Newcon Builders Pte Ltd *v* Sino New Steel Pte Ltd
[2015] SGHC 226

Case Number	: Originating Summons No 228 of 2015 (Registrar's Appeal No 179 of 2015)
Decision Date	: 21 September 2015
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Lok Vi Ming SC, Lee Sien Liang, Joseph, Tang Jin Sheng (Rodyk & Davidson LLP) for the plaintiff; Twang Kern Zern and Wee Qianliang (Central Chambers Law Corporation) for the defendant
Parties	: Newcon Builders Pte Ltd — Sino New Steel Pte Ltd

Building and Construction Law – Statutes and Regulations

21 September 2015 Judgment reserved.

Quentin Loh J:

1 This Registrar's Appeal arises from an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). It raises two issues:

(a) first, whether an adjudication application can be made before the expiry of the dispute settlement period, and if not, whether that adjudication determination is liable to be set aside by the court ("the Jurisdiction Issue"); and

(b) secondly, whether the terms of the main contract were incorporated into the sub-contract thereby rendering the adjudication application premature as it was made before the expiry of the dispute settlement period ("the Construction Issue").

2 I reserved judgment after hearing the parties on 24 July 2015 and I now give my decision and reasons therefor.

Background

3 The plaintiff, Newcon Builders Pte Ltd ("the Plaintiff"), was engaged under a contract with the employer ("the Main Contract") as main contractor for demolition works and then construction of a "2 Storey Detached Dwelling House with an Attic and a Swimming Pool on Lot 99188K MK15 at 14 Cassia Drive" ("the Project"). [note: 1] The Plaintiff entered into a sub-contract ("the Sub-contract") with the defendant, Sino New Steel Pte Ltd ("the Defendant") for some structural and architectural steel works for the Project.

4 Clause 3.0 of the Sub-contract detailed the scope of works which the Defendant was engaged to carry out and provide:

> **SCOPE OF WORKS**
>
> The scope of the Sub-Contract Works shall include … the design, supply, installation and testing

of structural steel, roof purlins, steel cladding & steel windows, including any other Works & Accessories deemed necessary for the proper execution of this Sub-Contract *in accordance with the Conditions of Contract, Specifications, Contract Drawings of the Main Contract and the Main Contractor's Program including any revision thereof*. [emphasis added]

The clause made clear that the Sub-contract works were to be executed in accordance with the terms and conditions and drawings and specifications of the Main Contract. Further, cl 6.0 required all works carried out to comply with the specification and drawings unless otherwise agreed by the architect.

5 The Sub-contract works were carried out and substantially completed sometime around 20 December 2010. [note: 2] On 31 December 2014, the Defendant served Payment Claim No 14 ("the Payment Claim") on the Plaintiff for work done during the period 15 April 2009 to 20 December 2010. The amount claimed was $208,783.96 (inclusive of GST). [note: 3] In response, the Plaintiff sought clarification of the Payment Claim and asked for certain documents for their assessment. [note: 4] The Defendant, however, did not reply to the Plaintiff's request. Instead, on 20 January 2015, the Defendant served on the Plaintiff a notice of the Defendant's intention to apply for adjudication. [note: 5] Following this, on the same day, the Plaintiff submitted a document headed "Statement of Final Account", which it claims to be its payment response to the Payment Claim ("the Statement of Final Account"). [note: 6]

6 The Defendant filed an adjudication application with the Singapore Mediation Centre on 21 January 2015 ("the Adjudication Application"). [note: 7] The Adjudication Application was served on the Plaintiff on 22 January 2015. On that same day, Mr Ong Ser Huan was appointed as the adjudicator ("the Adjudicator"). [note: 8] The Plaintiff filed its adjudication response on 29 January 2015. [note: 9]

7 This was followed by an adjudication conference which was held over the course of three days (*ie*, 2, 3 and 5 February 2015). The Adjudicator also conducted a site inspection on 6 February 2015. [note: 10]

8 Shortly after this, the Adjudicator issued his adjudication determination on 13 February 2015 ("the Adjudication Determination") with the following determination: [note: 11]

(a) the Plaintiff shall pay to the Defendant a sum of $86,9681.88 (including GST);

(b) this amount is to be paid within 7 days after the determination is served on the Plaintiff;

(c) the rate of interest payable shall be at 5.33% per annum compounded on an annual basis from 21 February 2015 up to the date of payment; and

(d) the costs of the adjudication shall be borne 70% by the Plaintiff and 30% by the Defendant.

9 The Plaintiff, being dissatisfied with this decision, commenced Originating Summons No 228 of 2015 ("OS 228/2015") to set aside the Adjudication Determination. This summons was heard before an assistant registrar ("the AR") on 14 May 2015 and 4 June 2015. The Plaintiff put forward two reasons for setting aside the Adjudication Determination:

(a) the Adjudication Application filed on 21 January 2015 was submitted too early; and

(b) the Adjudicator had acted beyond his remit in applying a lower rate to the payment for works relating to corten steel cladding and steel windows and doors.

10 The AR delivered his written decision on 11 June 2015 dismissing the Plaintiff's application to set aside the Adjudication Determination ("the AR's Decision"). He concluded that the grounds relied upon by the Plaintiff did not justify the exercise of the court's supervisory jurisdiction (see [52] of the AR's Decision). The AR concluded that:

(a) the issue of whether an adjudication application was filed prematurely was not one that fell to be considered by the High Court in a setting aside application; and

(b) the issue of whether the Adjudicator was entitled to allow the Defendant to lower one of its claims during the Adjudication cannot be considered by the High Court as it entails a review on the merits of the Adjudication Determination.

It is against this backdrop that the Plaintiffs commenced Registrar's Appeal No 179 of 2015 ("RA 179/2015").

The parties' arguments

The Plaintiff's case

11 From the Plaintiff's written and oral submissions, it would appear that it is no longer challenging the Adjudication Determination on the basis that the Adjudicator was not entitled to lower one of the Defendant's claims during the Adjudication. The Plaintiff's main submission is that the Adjudication Application had been filed prematurely and therefore this court is entitled to set aside the Adjudication Determination on that basis. [note: 12]

12 The Plaintiff argues first, that the supervisory jurisdiction of the court in a setting aside application includes the jurisdiction to examine whether an adjudication application had been filed prematurely. [note: 13] To support this position, the Plaintiff relies on *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*") where the Court of Appeal noted (at [66]) that while the court should not review the merits of an adjudicator's decision, the court does have the power to decide whether the adjudicator was validly appointed. Further, the court may also set aside an adjudication determination on the ground of non-compliance with one or more provisions under the Act which is so important that it is the legislative purpose that an act done in breach of the provision should result in the adjudication determination being invalid (see [67] of *Chua Say Eng*). According to the Plaintiff, the premature filing of the Adjudication Application, which is in breach of 13(3)(*a*) of the Act, is one such breach which should render the Adjudication Determination invalid.

13 The Plaintiff further relies on the decision of *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156 ("*Taisei Corp*") where the assistant registrar held (at [81]) that a premature adjudication application was ground for setting aside an adjudication determination.

14 Secondly, the Plaintiff contends that the terms of the Sub-contract allowed the Plaintiff to submit a payment response within a period of 14 days from service of a payment claim. [note: 14] This is significant because in the absence of such a term, s 11(1)(*b*) of the Act only gives the Plaintiff a

seven-day period to submit its payment response. If the Plaintiff only had seven days to submit its payment response, then the Adjudication Application would not have been premature. Therefore, the Plaintiff's submission that the Adjudication Application was filed prematurely hinges on a finding that it did have 14 days, after the Payment Claim was served, to submit the Payment Response.

15 The Plaintiff submits that cl 5.0 of the Sub-contract incorporates the terms of the Main Contract; cl 5.0 provides: [note: 15]

> **CONDITIONS OF SUB-CONTRACT**
>
> The Conditions of this Sub-Contract shall comply fully with all the terms and conditions as set out in the Main Contract, a copy of which is available for your inspection upon request. …

Under cl 2.2 of the Main Contract, after the claimant serves his payment claim, the respondent has 14 days to issue an interim certificate. [note: 16] According to the Plaintiff, the term "interim certificate" was a reference to a payment response and that because this clause was incorporated into the Sub-contract through cl 5.0, the Sub-contract similarly allowed the Plaintiff 14 days to issue a payment response.

16 Therefore, according to the Plaintiff, the relevant timelines would be as follows:

Event	Stipulated Date
Service of payment claim	On (or before) the last day of each calendar month (submitted on 31 December 2014 – not in dispute)
Service of payment response	Within 14 days after 31 December 2014 (*i.e.*, 1 January 2015 to 14 January 2105)
Dispute settlement period	The period of seven days after 14 January 2015 (*i.e.*, 15 January 2015 to 21 January 2015)
Submission of adjudication application	Within seven days after 21 January 2015 (*i.e.*, 22 January 2015 to 28 January 2015)

By filing the Adjudication Application on 21 January 2015, the Defendant had done so within the dispute resolution period and therefore prematurely.

The Defendant's case

17 The Defendant argues that the court is not allowed to set aside the Adjudication Determination on the ground put forth by the Plaintiff because doing so would amount to a review of the merits of the case. [note: 17] According to the Defendant, the Adjudicator decided that the Adjudication Application was filed within time because he concluded that the terms of the Main Contract were not incorporated into the Sub-contract. The Defendant contends that because the conclusion that the Adjudication Application was filed within time was based on a legal merit, the court is not entitled to review this point.

18 The Defendant further argues that even if the Adjudication Application was filed one day early, the actual service of the application on the Plaintiff only came a day later. Therefore, the Plaintiff had suffered no prejudice from the Adjudication Application being filed a day early. Such non-compliance

with the Act cannot be considered a breach which is in contravention of the legislative purpose of the Act. [note: 18]

19 The Defendant also argues that even if cl 2.2 of the Main Contract could be read into the Sub-contract, cl 2.2 does not in fact provide that the Plaintiff has 14 days to file its *payment response*. This is because the phrase used in cl 2.2 of the Main Contract was that of an "interim certificate" and not a "payment response". [note: 19] According to the Defendant, this means that the Sub-contract was silent as to how many days the Plaintiff should have to file its payment response — in the face of such silence, s 11(1)(*b*) of the Act applied and the Plaintiff only had seven days to file its payment response, *ie*, by 7 January 2015. On this basis, the dispute resolution period expired on 14 January 2015. Accordingly, the Defendant's Adjudication Application made on 21 January 2015 was not filed prematurely.

Issues

20 The two issues that arise have been set out at [1] above. The Jurisdictional Issue can be broken down into two sub-questions. First, whether an adjudication application can be made within the dispute resolution period under s 12 read with ss 13(3)(*a*) and 16(2)(*a*) of the Act. Secondly, if an adjudication application is made within the dispute resolution period, can the Court set it aside pursuant to its supervisory jurisdiction or is it purely within the purview of the adjudicator to make that decision.

21 The Construction Issue can also be broken down to two sub-questions. First, whether the terms of the Main Contract in relation to the interim certificate was incorporated into the Sub-contract. Secondly, if so, whether these terms allowed the Plaintiff 14 days to submit its payment response.

My decision

22 It would be apposite to set out the timelines for the adjudication process with respect to construction contracts as provided for under the Act:

(a) A payment claim is to be served at such time as specified in the contract or determined in accordance with the terms of the contract, or where the contract does not contain such provision, by the last day of each month following the month in which the contract is made: see s 10(2) of the Act read with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations).

(b) A payment response shall be provided to the claimant by the date as specified in or determined in accordance with the terms of the contract, or within 21 days after the payment claim is served, whichever is the earlier, or where the construction contract does not contain such provision, within 7 days after the payment claim is served: see s 11(1) of the Act.

(c) The claimant is entitled to make an adjudication application in relation to the payment claim if, by the end of the dispute settlement period (*ie*, the period of 7 days after the date on which or the period within which the payment response is required to be provided), the dispute is not settled or the respondent does not provide the payment response: see s 12(2) read with s 12(5) of the Act.

(d) An adjudication application shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises: see s 13(3)(*a*) of the Act.

The Jurisdictional Issue

23 In *Chua Say Eng* (at [66]–[67]), the Court of Appeal authoritatively laid down the ambit of a court's supervisory jurisdiction in a setting-aside action.

> ***The role of the court in a setting-aside action***
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> 66 Turning now to the court's role in a setting-aside action, we agree with the holding in *SEF Construction* ([14] supra) that the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.
>
> 67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid. [emphasis in original]

24 The Court of Appeal has therefore made clear that where there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid and this in turn would lead to an adjudication determination being null and void. The Court of Appeal, however, chose not to exhaustively list the other instances in which an adjudication determination may be set aside. Instead, the applicable test is whether any non-compliance with the Act is so important that it is the legislative purpose that such a breach would result in the adjudication determination being set aside (see also *JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd* [2015] 3 SLR 575 at [39]).

25 In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797, the Court of Appeal affirmed the position in *Chua Say Eng* and observed (at [48]) that:

> Put simply, in hearing an application to set aside an [adjudication determination] and/or a s 27 judgment, the court does not review the merits of the adjudicator's decision, and any setting aside must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the SOPA. …

26 Since the decision in *Chua Say Eng*, there have been several instances where the High Court has set aside an adjudication determination on the basis that a mandatory condition of the Act had not been complied with (see *eg*, *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] 2 SLR 70; and *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 ("*YTL Construction*")). In *YTL Construction*, Tan Siong Thye J set aside the adjudication determination on the basis that the adjudication application had been lodged out of time. It should be noted, however, that in that case, the adjudication application *was lodged late*, and not allegedly prematurely as in the present case.

27 The question that arises then is whether a different conclusion should be reached when dealing with a premature adjudication application as compared to an adjudication application which had been lodged late. This question was previously addressed in the case of *Taisei Corp* where the assistant registrar held that a premature adjudication application was a ground for setting aside an adjudication

determination.

28 In *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 ("*LH Aluminium*"), the defendant similarly sought to set aside an adjudication determination on the basis that the adjudication application was lodged prematurely. Lee Seiu Kin J, however, did not specifically address the question as to whether this was a valid ground for setting aside as he concluded that on the facts of that case, the adjudication application had not been filed prematurely.

2 9 *Taisei Corp* is the only case which has decided that a premature adjudication application is a ground for setting aside an adjudication determination. In the hearing below, the AR addressed the authority of *Taisei Corp* and disagreed with its holding. In the AR's Decision, he reasoned that there is a distinction between a premature adjudication application and an application which is filed late. The material parts of his decision are as follows:

> 36 I did not agree with the position taken by the plaintiff. It is well-known that the *raison d'etre* of the regime provided under the Act is to provide for "a fast and low cost adjudication system to resolve payment disputes": see *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112 (Cedric Foo Chee Keng, Minister of State for National Development). Stipulating a mandatory deadline by which an adjudication application must be submitted is integral to the achievement of this aim. Were it otherwise, any adjudication system provided for may not be as quick as desired. However, providing for a timeline before which an adjudication application ought not be submitted does not further that ultimate objective. In fact, it almost detracts from it. That such a timeline is provided under the Act is, of course, a nod to a secondary objective. As was stated in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 (at [57]), the Act "recognises that the fastest and most efficient means of disposing of the dispute is through settlement". The latter timeline therefore endeavours to balance between allowing enough time for settlement and moving the adjudication process along. The former deadline, however, was designed solely to secure a quick adjudication. Given the different impetuses for the two, they ought to be examined independently.
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> 37 This leads me to the next point. In my opinion, counsel for the plaintiff, as well as the AR in *Taisei*, was wrong to assume that the provision breached where there was a premature adjudication application was section 13(3)(a) of the Act. Section 13(3)(a) provides that an adjudication application shall be made within seven days after the entitlement to make it first arises. This sets the *latest* date by which an adjudication application must be made. It says nothing of the time before which an adjudication application ought not be made. Instead, the provision not complied with when there is a premature adjudication application is section 12(2) …
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> …
>
> 38 This is significant for the purpose of ascertaining the legislative intent behind the provision of the time before which an adjudication application ought not be lodged. [*YTL] Construction* and *Shin Khai* made reference to the mandatory language of the Act. This is accurate but only insofar as section 13(3) is concerned. The use of "shall" is found in section 13(3)(a) but not in section 12(2). Section 12(2) uses the phrase "is entitled" which is more permissory than mandatory. Further, section 16(2) only requires the rejection of any adjudication application not made in accordance with section 13(3)(a), (b) or (c); it does not require the rejection of any application made in breach of section 12(2). Hence, one of the key reasons for determining that a late adjudication application would fall within the purview of the court's supervisory jurisdiction is not present in the case of a premature adjudication application – the Act does not use mandatory

language in respect of the latter. In my view, the court in *Taisei* was wrong to assume that a premature adjudication application resulted in the breach of a mandatory time limit.

30 With respect, I cannot agree with the learned AR's reasons. First, the AR reasoned that when an adjudication application is made prematurely, the provision which is not complied with is s 12(2) and not s 13(3)(*a*) of the Act. In my view, this is an incorrect reading of and gives the wrong emphasis to the provisions. Section 13(3)(*a*) of the Act makes clear that an adjudication application:

> shall be made within 7 days *after the entitlement* of the claimant *to make an adjudication application* first arises under section 12 [emphasis added].

Although s 13(3)(*a*) prescribes, in mandatory terms, a time limit beyond which the right to make an adjudication application is lost, when the time starts to run is an equally important milestone; that is governed by the phrase "*after the entitlement … first arises*" [emphasis added]. The "entitlement" must first have arisen. One must then turn to s 12, which prescribes when there is an "entitlement" to make an adjudication application. Section 12(1) unambiguously provides that, *subject to* s 12(2), a claimant who has made a payment claim under s 10 is entitled to make an adjudication application under s 13 if he fails to receive payment by the due date. Section 12(2), the important and relevant provision here, governs when a party is entitled to make an adjudication application. It provides that where (a) the claimant disputes a payment response by the respondent, or (b) the respondent fails to provide a payment response by the date or within the period referred to in s 11(1), then the claimant "… is *entitled* to make an adjudication application under s 13 … if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response …" [emphasis added]. Just as an adjudication application which has not been made within the seven days after the entitlement of the claimant to make an adjudication application first arises is not a valid adjudication application, an adjudication application made before the entitlement to do so arises is similarly not a valid adjudication application. Section 12 governs when the entitlement first arises. In my judgment, both premature and late adjudication applications are not valid as they do not comply with both ss 12 and 13.

31 Secondly, I cannot agree with the learned AR's interpretation of the phrase "is entitled" under s 12(2) of the Act as permissory in nature and therefore s 12(2) is not a mandatory condition. First, the word "entitled" means the giving or conferring or having a right to something or a claim to receive something or to do something. The word does not connote any permissory element. Secondly, the words "is entitled" cannot be viewed in isolation and must be interpreted in the entire context of s 12, the scheme of the Act and the adjudication process and steps provided for. Part III of the Act, (*ie*, ss 10, 11 and 12), lays down fairly detailed provisions providing for the making of payment claims, furnishing the payment responses, what happens if no payment response is forthcoming and when the entitlement to make an adjudication claim arises. The dispute settlement period is an important step and part of this scheme under the Act. It allows either party to seek clarification from the other *and* more importantly, allows the respondent to first provide a payment response where he has failed to do so under s 11(1) or secondly vary his payment response under s 11(4) if he has done so. Allowing the lodgement of an adjudication application during the dispute settlement takes away these statutorily-provided rights of the respondent, *viz*, to settle the matter, to ask for clarification *and/or* to provide or vary a payment response. Therefore, when the dispute settlement period has not run its course, the claimant simply does not have the right to or is not entitled to make an adjudication application. This is, in my view, phrased in as mandatory terms as a provision which states that the claimant "shall not make an adjudication application" until the *entitlement* arises.

32 The learned AR's reasons also do not take into account (and I make no criticism because neither counsel raised this in their submissions to him) that the 7-day dispute settlement period is

unique to and was specially written into our adjudication scheme. It does not exist in the adjudication schemes in the United Kingdom or Australia. The significance of this measure being built into our scheme was undoubtedly the concerns generated by cases like *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266. There, the main contractor, under a A$26.6 million construction of a residential development in New South Wales, served a payment claim of some A$14.9 million shortly before Christmas. Many Australian companies are closed over Christmas and well into the New Year, but the clock still ticks away under the adjudication regime. The net result, as no payment schedule (the equivalent of our payment response) was issued, was a judgment for about A$14 million (after deducting a sum for payment outside the stipulated timeframe), despite the payment claim including some dubious and highly contentious claims of A$3.14 million for an "EOT Consolidated Claim", A$1.86 million for "Special measures claim" and a sum of A$3 million for "Further Entitlements claim". An English example can be found in *CIB Properties Ltd v Birse Construction Ltd* [2004] EWHC 2365 where it was alleged that while the claimant appeared to negotiate, it was secretly preparing its adjudication claim. The payment claim of £16,609,154.98 was accompanied by an expert's report. The demand letter and the expert report referred to 52 files of supporting documents, which were made available for inspection, but this became bogged down in a wrangle over photocopying. That letter also enclosed 15 lever arch files which filled 22 files in the trial bundle. In the English context, this claim being launched at the end of July was just before the holiday season of August. A further 55 files were served during the course of the adjudication. Judge John Toulmin QC was satisfied that the claimant prepared these claim documents because of a previous adjudication which the respondent sprung on them, over whether the contract termination was lawful. In the course of his judgment, Judge Toulmin also acknowledged:

> 9 There is no doubt that the procedure is being used in disputes which are to be resolved long after the contract which is the subject matter of the dispute has come to an end. It has come to be used, as in this case, as a form of intense confrontational litigation which can be very costly.
> …
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> 10 The procedure, as in this case, can often encourage the parties to engage in tactical manoeuvring of a type that is these days deprecated in litigation before these courts. This manoeuvring continued up to and throughout the adjudication.
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> …
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> 80 In my view both sides were jockeying for tactical advantage in a way which is apparently permitted in adjudication but is not permitted in current litigation practice.

33 These and similar cases where claimants serve payment claims with voluminous documentation on the eve of public holidays or during the holiday season, have led to many articles debating the use of the adjudication process to "ambush" a respondent; (it appears that this still occurred in 2009, see *eg*, *The Dorchester Hotel Limited v Vivid Interiors Limited* [2009] EWHC 70 (TCC), which involved a 92-page payment claim with 37 lever arch files served on 19 December 2008). Everyone acknowledges that the timeline for adjudications "is very tight …": see Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 (at [14]) but it seems that such tactics have become grist for the mill. Having had the benefit of this untoward experience in countries which enacted similar legislation before we did, our provision of a dispute settlement period ameliorates this possible exploitation by affording a little more time to the respondent, who can put in a payment response if he has failed to do so within the time provided for under s 11(1) of the Act or amend his payment response if his hastily-put-up payment response did not set out all the reasons for resisting the payment claim. By this time the respondent knows it is facing an adjudication claim and is given a final opportunity to put his payment response in order.

34 Thirdly, I cannot agree with the learned AR's conclusion that the timeline *before* which an adjudication application shall not be made and the timeline *after* which an adjudication application shall not be made achieve different legislative objectives. While the AR is right in that the *raison d'etre* of the regime is to provide for a fast and low cost adjudication system to resolve payment disputes, he is incorrect in relegating the regime's desire to encourage settlement to a mere secondary objective. The time within which a payment response has to be provided under s 11(1) has been carefully calibrated under the scheme provided for by the Act.

35 We should not lose sight of the fact that building and construction contracts, especially institutional conditions of contract, run along a fairly uniform set course of steps, stages and procedures. Because of abuses within the industry of financially squeezing those down the contractual line, the adjudication scheme was grafted onto these steps, stages and procedures to enable contractors, subcontractors and suppliers to avail themselves of a special procedure to get payment relatively quickly thus redressing the abuse to a large measure. That payment was ascertained through a not unduly complex procedure under tight timelines which was therefore incapable of being ascertained with exactitude and correctness; see *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [22]. Whilst payment under this scheme of 'rough and ready' justice was subject to possible eventual revision in arbitration or court proceedings after the contract comes to an end, an adjudication determination nonetheless results, usually, in a payment to the claimant which he gets to keep unless and until such an arbitration or court proceedings considers all the issues and claims between the parties and ascertains the final balance between the parties.

36 Consequently, if a party wishes to avail itself of this scheme to obtain speedy payment, then it has to ensure that its conditions and timelines are complied with. The steps, their required content and timelines are key features of this scheme and *must* be complied with. This is aptly illustrated in the very recent case of *Citywall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SGCA 42 ("*Citiwall v Mansource*") where the Court of Appeal upheld an adjudicator's disregard of an adjudication response which was filed two minutes out of time. The Court of Appeal rejected the argument that the *de minimis* rule could apply to excuse non-compliance with these timelines. It noted (at [30]) that:

> While the way we had applied r 2.2 might seem harsh in light of the fact that the Respondent's filing of the Adjudication Response was merely two minutes late, we were of the view that having regard to the principle of *temporary finality* undergirding the SOPA, the strict application of the rule did not seem that draconian. Proceedings under the SOPA are meant to proceed at a good pace, and sums due under adjudication determinations are to be honoured and paid promptly. That was the whole object of the scheme. There might be a case for applying the *de minimis* rule if the substantive rights of the parties had been impinged, but here clearly the parties will have another chance to obtain redress by filing a substantive suit on the merits or have the matter submitted to arbitration. Accordingly, we held that there was no place for the *de minimis* rule to apply in this case.

37 The right conferred upon a respondent to furnish a payment response or to amend its payment response during the dispute settlement period must also be viewed against the very strict provision of s 15(3) which prevents the adjudicator from considering any reasons for withholding payments, including cross-claims, counterclaims and set-offs, not included in the "relevant payment response" provided by the respondent to the claimant. The contents of the payment response are accordingly critical to defending a payment claim. Hence whilst the scheme has provided a short time line for the payment response to be made under ss 11(1)(*a*) and 11(1)(*b*), it has also provided, if for any reason the opportunity to do so has passed, a further opportunity for the respondent to provide or to amend its payment response. That right is expressly provided for in ss 11(4), 12(2) and 12(4), 13(3)(*a*) and

16(2)(*a*) and cannot be taken away by perceived "policy" reasoning.

38 Further the balance between allowing enough time for settlement and moving the adjudication process along has to be struck. This balance is not subordinate to, but is inextricably linked to the objective of providing for a fast and low cost adjudication system. As had been previously noted in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 (at [57]), the Act "recognises that the fastest and most efficient means of disposing of the dispute is through settlement". The right to do so within a statutorily provided period cannot be taken away.

39 Another point raised by the AR was that the prejudice suffered by a respondent from an adjudication application being filed early (*ie*, losing an opportunity to settle) could be remedied by costs. The AR also noted that although an early adjudication application could deprive a respondent of the opportunity to file a payment response during the dispute settlement period, this is an overstated concern. In his view, it is the respondent's duty to respond to a payment claim within the time stipulated under s 11 of the Act and if it fails to do so, it runs the risk of losing the chance to put in a payment response in a situation when an adjudication application is filed prematurely.

40 For the reasons I have mentioned above, with respect, that reasoning cannot be right. The respondent's duty to provide a timely payment response under s 11 of the Act must be considered together with the additional time to do so or the opportunity to amend its payment response conferred upon it by s 12.

41 At this juncture, I also address a point made by the Defendant in its oral submissions — that in the present case, while the Adjudication Application was lodged a day early, it was only served on the Plaintiff a day later. According to the Defendant, by that time, the Plaintiff still had not made any offers to settle the dispute and therefore it did not suffer any prejudice from the Adjudication Application being lodged a day early. This, however, should not affect the enquiry as to whether there had been a breach of a mandatory condition of the Act. The Defendant has adopted an effects-centric approach to ascertaining whether its breach should be construed as a breach of a mandatory condition. With respect, I cannot agree with such an approach. The question asked should not be what is the exact prejudice suffered by the Plaintiff from the Defendant's breach of the Act. Rather, the question is whether Parliament intended for the provision that was breached to be strictly observed. In *YTL Construction*, Tan J held that s 13(3)(*a*) is such a provision which is meant to be strictly observed:

> 46 I agree with the above two decisions in relation to s 16(2)(a) of the SOP Act which makes it mandatory for an adjudicator to reject an adjudication application that does not comply with ss 13(3)(a), (b) or (c). This is especially the case for s 13(3)(a) of the SOP Act which deals with timelines, an essential factor in ensuring a fast and fluid cash flow within the building and construction industry. As stated by Mr Cedric Foo Chee Keng, then Minister of State for National Development, during the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) ("the SOP Bill"), which was later enacted as Act 57/2004, *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112:
>
> > The SOP Bill will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes. Affected parties will have the right to suspend work or withhold the supply of goods and services, if the adjudicated amount is not paid in full or not paid at all.

…

48 Hence, *the legislative intent was for the 7-day timeline in s 13(3)(a) to be observed strictly such that the adjudicator must, without any room for discretion, reject an adjudication application lodged out of time.* This would also mean that there is no room for waiver of the formal requirements by the parties to the adjudication.

[emphasis added]

42 Therefore, the adjudicator should not have to ask itself what is the exact prejudice suffered from a particular non-compliance with the Act. This dovetails with the decision and reasoning of *Citiwall v Mansource* which I have already referred to above.

43 I also find the views expressed in *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 4 ("*Shin Khai*") (at [27]) apposite:

Furthermore, s 16(2) is directed at the adjudicator. If s 13(3)(*a*) was directory and not mandatory, an intolerable uncertainty which would considerably compromise the regime under the Act would be introduced. The adjudicator would be called upon to decide when an application is late but forgivable so as to accept the adjudication application, and late and unforgivable so as to reject it. In the continuum of time, apart from the extreme cases, there would be little predictability and considerable uncertainty as to where such a distinction will lie. In contrast, if s 13(3)(*a*) was mandatory, the certainty introduced by the bright line test in s 13(3)(*a*) which excludes any adjudication application outside of the seven day window period leaves no room for doubt and is more consistent with and emblematic of the regime.

44 While indeed the assistant registrar in *Shin Khai* was referring to adjudication applications which had been lodged late, the need for certainty and an unambiguous test under s 13(3)(*a*) of the Act should apply equally to premature adjudication applications.

45 I therefore find and hold first, that there is no entitlement to make an adjudication application during the dispute settlement period and any such application is an invalid adjudication application. Secondly, I find that in such an event, the court is entitled, as part of its supervisory jurisdiction, to set aside an adjudication determination which has been rendered pursuant to a premature adjudication application in breach of ss 12(2) and 13(3)(*a*) of the Act.

The Construction Issue

46 The Construction Issue arises because whether or not the Adjudication Application was lodged prematurely turns on whether the Sub-contract provides that the Plaintiff has 14 days to issue a payment response.

47 At this juncture, I first address a preliminary objection raised by the Defendant that the court is not entitled to consider this issue as it would entail a review into the merits of the case. In support, the Defendant relies on the authority of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507 ("*Bouygues*") where Buxton LJ affirmed the principle (at [12]) that:

If [the adjudicator] has answered the right question in the wrong way, his decision will be binding. If [the adjudicator] has answered the wrong question, his decision will be a nullity.

48 With respect, I cannot accept this objection as the Defendant's reliance on *Bouygues* is

misplaced. *Bouygues* is a decision concerning adjudication under the Housing Grants and Reconstruction Act 1996 (c 53) (UK). There, the court found that the adjudicator had rendered an award without taking into account the fact that the 5% of the contract sum that represented the retention monies was not yet due for payment. Buxton LJ therefore cited the above passage to support his conclusion that while the adjudication determination rendered was incorrect, it did not provide a ground on which enforcement can be resisted. He noted (at [14]) that while the adjudicator had made an error, this error was made when he was acting within his jurisdiction. Therefore the adjudication determination could not be set aside. This approach is aptly captured by the rubric 'the adjudicator is entitled to get it wrong'.

49 That case is therefore distinguishable from the present one. The Defendant appears to have conflated a review into the merits of a decision made by an adjudicator acting within his jurisdiction with the court having to make certain findings to answer whether the adjudicator had jurisdiction in the first place. To answer the question of whether an adjudication application is filed within or out of time, a court invariably has to construe the underlying contract. This is not the same as a review into the merits of the decision. This was no doubt the very reason that counsel for the Plaintiff did not, very correctly in my view, proceed with the argument that the adjudicator was wrong to lower the Defendant's claims in his Adjudication Determination.

50 I now turn to whether the Sub-contract allowed the Plaintiff 14 days to issue its payment response. The disputed clause in question is cl 5.0 of the Sub-contract which provides that the "… Conditions of this Sub-contract shall comply fully with all the terms and conditions as set out in the Main Contract …". The Plaintiff relies on this clause to incorporate cl 2.2 of the Main Contract into the Sub-contract. Clause 2.2 of the Main Contract provides that:

> Within 14 days after receipt of the payment claim or the day on which Newcon (the Contractor) serves his payment claim, whichever is later, the architect and client shall issue an interim certificate to the Contractor, the Interim Certificate shall state the amount due to the Contractor ("the Certified Amonut") (*sic*) in respect of the matters forming the subject of the said payment claim.

51 Two points arise for consideration from the above argument:

(a) Was cl 2.2 of the Main Contract incorporated into the Sub-contract via cl 5.0 of the Sub-contract?

(b) Did the parties intend for an interim certificate to function as a payment response?

Incorporation of cl 2.2 into the Sub-Contract

52 The Plaintiff submits that cl 5.0 of the Sub-contract (see [15] above) sufficiently incorporates the timelines under the Main Contract and that in the event of conflict between the terms, the Sub-contract is subservient to the Main Contract. [note: 20]

53 The Defendant, on the other hand, argues because there are inconsistencies in timelines between the Main Contract and the Sub-contract, cl 5.0 of the Sub-contract should at best be interpreted to incorporate only terms and conditions of the Main Contract where there is no express term on the same point in the Sub-contract. [note: 21]

54 As was noted in *The Law of Contract in Singapore* (Andrew Phang Boon Leong, gen ed) (Academy Publishing, 2012) at para 06.018, when ascertaining if a document has been incorporated

into a contract, what is crucial is the intention of both of the parties to the contract (see also *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 ("*ABB Holdings*") at [24]). In *ABB Holdings*, it was held (at [24]) that where a document is expressly incorporated by general words, it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of a document is apt to be a term of the contract. In *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, the Court of Appeal cited *ABB Holdings* with approval and held (at [51]) that:

> First, the law adopts an objective approach towards questions of contractual formation and the incorporation of terms. Put another way, the question of when the Second Supply Contract came into being and whether the terms of the second Contract Note had been incorporated into the Second Supply Contract turned on ascertaining the parties' objective intentions gleaned from their correspondence and conduct in light of the relevant background as disclosed by the evidence. The relevant background includes the industry in which the parties are in, the character of the document which contains the terms in question as well as the course of dealings between the parties …

55 The relevant background includes the context, *viz*, the building and construction industry, in which this Sub-contract was entered into. It was a sub-contract for the design, fabrication, supply and installation and testing of certain structural and architectural steel components in the construction, by the Plaintiff main contractor, of a 2-storey detached house with an attic and swimming pool. It need hardly be said that this discrete part of the Plaintiff main contractor's works under the Main Contract was carved out and sub-contracted to the Defendant. It is undeniable that these steel components therefore had to comply with the relevant specifications, drawings, program and timing of supply at site and installation and terms and conditions of the Main Contract. Indeed as noted at [4] above, this was expressly provided for in cll 3.0 and 6.0 of the Sub-contract. This Sub-contract cannot be looked at as a stand-alone contract with stand-alone works.

56 As one would expect, the Plaintiff's Letter of Acceptance, which formed the Sub-contract (together with a Schedule of Rates), contained numerous references to the Main Contract between the Plaintiff and the owner of the Project and the latter's consultants, including, *eg*, no claims for preliminaries if there was an extension of time granted to the main contractor (Clause 2.0), scope of works (Clause 3.0), conditions of sub-contract (Clause 5.0), terms of payment (Clause 5.1), period for honouring certificates (Clause 5.3), defects liability period (Clause 5.6), release of retention (Clause 5.7), programme work (Clause 5.9), liquidated damages (Clause 5.12), insurance (Clause 5.14), design, shop drawings, samples and method statements (Clause 5.16), site meetings and safety meetings (Clause 5.18), compliance with specification, drawings and contract requirement (*sic*) (Clause 6.0) and arbitration (Clause 13.2(2)) which significantly entitled the Plaintiff to call upon the Defendant as subcontractor to join in any arbitration which the Plaintiff had with the owner of the Project, no doubt in relation to the Sub-contract works.

57 In *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 ("*GIB Automation*"), also a building and construction case, it was held (at [49]) that a back-to-back provision had to be construed in the light of the factual matrix known to the parties at the time of contracting. It was also noted that the object of a party who occupies an intermediate position between two parties with each of whom he has separate contractual relations is to avoid an exposure under either contract which cannot be passed on (at [35]). It was further held (at [48]) that the weight to be attached to the fact that a party has not seen the main contract must be considered in the light of the factual matrix as a whole, but that this would not be decisive if the circumstances are such that the terms said to be affected by the back-to-back provision are matters that would fall within the general appreciation and knowledge of the parties to the sub-contract. Additionally,

consideration should be given to the sub-contractor's ability to ask for a copy of the main contract.

58 It is worth noting that in *GIB Automation*, the letter of award between main contractor and subcontractor for a fire protection system, as reproduced at [6] of the judgment, stated:

> Your scope of work shall include but not [*sic*] limited to the design, supply, testing and commissioning, warranty and maintenance (12 monthly servicing with effect from issuance of Practical Completion Certificate by the Architect – together with Deluge maintenance team) of the above addressable fire alarm system. …
>
> *Any variation works, omission or addition, shall be back to back* [sic] *basis. Such variation claim shall be base* [sic]*on your unit price break down* [sic]*as per your quotation to us in appendix A*.
>
> [emphasis in original]

Sundaresh Menon JC, as he then was, said, at [7]:

> There is no dispute that the letter of award is to be construed as a whole. There is also no dispute that the plaintiff was a sub-contractor. The words "back to back basis", though not the most felicitous, are adequate, in my view, to convey the sense that any variations would be valued and taken into account if and to the extent a like adjustment was made in the defendant's own contract. More importantly, the express terms of the latter paragraph quoted above make it clear that additions and omissions were liable to be valued and that this would be on the basis of the unit prices supplied by the plaintiff.

59 How far the courts will go in the building and construction industry context can be seen in the case of *Modern Building Wales Ltd v Limmer & Trinidad Co Ltd* [1975] 1 WLR 1281 ("*Modern Building v Limmer*") where the main contractor's order to the sub-contractors required them to supply labour plant and machinery in full accordance "… with the appropriate form for nominated sub-contractors (R.I.B.A. 1965 edition)." This description was incorrect as there was no such RIBA Sub-contract form, but there was a F.A.S.S. 'Green Form' sub-contract published by another body for use with the RIBA conditions. Evidence was received to identify the latter form and the English Court of Appeal held that the words were sufficient to incorporate the arbitration clause in the F.A.S.S. 'Green Form' sub-contract. *Hudson's Building and Engineering Contracts*, (Sweet & Maxwell, 12th Ed, 2010) comment at paragraph 3-056 is that *Modern Building v Limmer* "reflects the approach which will be adopted where reference is made (even if briefly and inaccurately) to a document which both parties will be aware of and will recognise, and which both parties would normally expect to be included". See also *Brightside Kilpatrick Engineering Services Ltd v Mitchell Construction (1973) Ltd* [1975] 2 Lloyd's Rep 493.

60 Again, a not dissimilar case can be seen in *Schindler Lifts (Singapore) Pte Ltd v Paya Ubi Industrial Park Pte Ltd and Another* [2004] SGHC 34 ("*Schindler Lifts*"). There, the relevant clause read (at [23]):

> **4.0 CONDITIONS OF NOMINATED SUB-CONTRACT**
>
> You are to enter into a Sub-Contract with us under the SIA Conditions of Sub-Contract, First Edition, 1980 (Reprint April 1990). *In addition, you shall comply fully with all the terms and conditions as set out in the Main Contract*, in particular, Clause 28 and 29 which relate specifically to Nominated Sub-Contracts. Your attention is drawn to the following stipulations …
>
> [emphasis added]

The parties in *Schindler Lifts* did not dispute, and I would add rightly so, that the above clause acted as an incorporation clause.

61 Clause 5.0 of the Sub-contract reads as follows:

> **CONDITIONS OF SUB-CONTRACT**
>
> The *Conditions* of this Sub-Contract *shall comply fully with all the terms and conditions as set out in the Main Contract*, a copy of which is available for your inspection upon request. *Your attention is also drawn to the following stipulations*.
>
> [emphasis in italics and bold added]

Clause 5.0 draws the Sub-contractor's attention to the "following stipulations" and is followed by clauses like 5.1 (Terms of Payment), 5.2 (Period of Interim Certificate), 5.3 (Period of Honouring Certificate), 5.4 (Retention), 5.5 (Limit of Retention), 5.6 (Defects Liability Period), 5.7 (Release of Retention), 5.9 (Programme Work), 5.10 (Due Diligence by Sub-contractor), 5.11 (Termination as a Result of Delays of the Sub-contract Works), 5.12 (liquidated damages), 5.13 (Ordering Materials/Equipment), 5.14 (Insurance), 5.15 (Site Entry and Access), 5.16 (Design, Shop Drawings, Samples and Method Statements), 5.17 (Site Staff) and 5.18 (Site Meetings and Safety Meetings).

62 The words in clause 5.0: "[t]he Conditions of this Sub-Contract shall comply fully with all the terms and conditions as set out in the Main Contract", "though not the most felicitous", (to borrow the phrase used by Sundaresh Menon JC, as he then was in *GIB Automation*), nonetheless in context and content adequately incorporates the terms and conditions of the Main Contract where applicable. The Sub-contract only consisted of the Letter of Acceptance and a Schedule of Rates. There were no separate conditions of Sub-contract as such. The reference in Clause 5.0 to the "Conditions" of the Sub-contract when there are none and the words immediately following, that the Sub-contract conditions "…shall comply fully with all the terms and conditions set out in the Main Contract" evince a clear intention of the parties that the terms and conditions of the Main Contract also apply to the Sub-contract. There were obvious modifications to the sub-clauses following cl 5.0 (set out above), as one would expect, to modify their application to the Sub-contract, *eg*, 10% retention with a limit of 5% of sub-contract sum in the Sub-contract as opposed to 5% retention with a limit of 5% of the main contract sum in the Main Contract, differences in the liquidated damages per day and different caps thereon and a Defects Liability Period ("DLP") under the Sub-contract which was to run for 12 months from the date of issuance of the Completion Certificate by the Architect or the issuance of the Final Certificate by the Architect, whichever is the later, as compared to a 12-month DLP running from the issuance of the Temporary Occupation Permit in the Main Contract. There were other separate clauses, set out at [61] above, which tied the Sub-contract terms in the Letter of Award to the relevant Main Contract Provisions as they would apply to the Sub-contract. This included, *eg*, the time-lines set out in the Main Contract and the release of retention (cl 5.7: "To follow with the Main-contract terms & condition").

63 I cannot agree with the Defendant's argument that the inconsistencies between the timelines in the Main Contract and Sub-contract militate against a finding that cl 5.0 is an incorporation clause. Clauses 5.1 and 5.2 of the Sub-contract provide:

> **5.1 TERMS OF PAYMENT**
>
> Progress payment application based on the work done to submit monthly, subject to Main Contractor's certification.

5.2 Period of Interim Certificate

Monthly

Clause 5.1 does not state on which day of the month the progress payment must be made, it only stipulates that it is to be made monthly. It further refers to the Main Contractor's certification. Moreover, cl 5.1 falls within cl 5.0 which states that the conditions of the Sub-contract shall comply fully with all the terms and conditions of the Main Contract. Clause 2.1 of the Main Contract states that the main contractor "… shall submit progress claim on or before last day of each month". I fail to see any inconsistency. It is a very standard practice in the industry for the progress claims to be submitted by the end of each month. There is absolutely no difficulty in incorporating this "last day of each month" into cl 5.1 of the Sub-contract from cl 2.1 of the Main Contract and there can be no conflict whatsoever.

64 It should be noted that far from finding discrepancies in the clauses, where possible, the court should seek to construe the clauses in a contract in a manner which reconciles potentially conflicting clauses (see *eg*, *Petroleum Oil & Gas Corp of South Africa (Pty) Ltd v FR8 Singapore PTE Ltd (The Eternity)* [2009] 1 Lloyd's Rep 107; *Bayoil SA v Seawind Tankers Corporation (The Leonidas)* [2001] 1 Lloyd's Rep 533). It was also stated in Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) at para 6-004that:

> … It has been said that the inconsistency must be "clear and direct". It is not enough if one term "*qualifies or modifies*" the effect of another and the court should ask whether a "reasonable commercial construction of the whole [contract] can reconcile two provisions (whether typed or printed)." …
>
> [emphasis in original]

65 For the same reason, the terms in the Main Contract and Sub-contract, as to when an interim certificate must be issued, are not in conflict with each other. Clause 5.2 of the Sub-contract provides that the interim certificate is to be issued monthly. Clause 2.2 of the Main Contract allows 14 days for an interim certificate to be issued after the receipt of a payment claim which, similar to the Sub-contract, is to be submitted monthly as well. Clause 2.2 of the Main Contract can therefore be read together with cl 5.2 of the Sub-contract such that the former provision qualifies the latter.

66 Finally I would point out that cl 5.0 of the Sub-contract expressly drew the attention of the Defendant to cl 5.2, which was titled "PERIOD OF INTERIM CERTIFICATE".

67 It would not have been commercially sensible for the Plaintiff, who was in an intermediate position in the contractual chain, to put itself in a position where it could not pass on the claims from and exposure to the Sub-contractor under the Sub-contract works to the Employer under the Main Contract. I am therefore of the view that cll 2.1 and 2.2 of the Main Contract are, amongst others, incorporated into the Sub-contract via cl 5.0 of the Sub-contract.

The meaning of "interim certificate"

68 I now turn to the final issue: whether the parties intended for an interim certificate to function as a payment response and consequently whether the time period for the submission of an "interim certificate" under cl 2.2 of the Main Contract could similarly be construed as stipulating the time period for the submission of a "payment response". It bears emphasis that under s 11(1) of the Act, if a contract is silent as to when a payment response has to be submitted, the default position would

be that the respondent has seven days after the payment claim is served to submit his payment response. Therefore, the question is whether cl 2.2 of the Main Contract, which has been incorporated into the Sub-contract, supplants this default timeline.

69 At this juncture, I highlight that in making submissions, it is neither helpful nor sufficient for counsel to simply state that because the term "interim certificate" is used in a contract, it cannot be a reference to a "payment response" as envisaged under the Act without more. No supporting authorities or reasons were given in support of that submission.

70 Interim certificates can and do function as payment responses in the building and construction industry. The common standard form contracts in use were amended to cater for the grafting of the adjudication regime under the Act onto their standard form conditions of contract. For example:

(a) the *Public Sector Standard Conditions of Contract for Construction Works* (Building and Construction Authority, 4th Ed, 2005) was amended to cater for the adjudication regime and the 7th Ed, 2014, clause 32.2 provides that the payment certificate issued by the superintending officer shall serve as the payment response for the purposes of the Act if the Employer does not provide a separate payment response within the prescribed period.

(b) The Singapore Institute of Architects standard form was amended (from the 7th edition onwards) for the same reason; however it provided for the issue of the interim certificate within 14 days from the service of a claim under cl 31(3)(*a*) and then for a payment response to be separately issued by the Employer within 21 days after the service of the claim under cl 31(15)(*a*). As noted by the well-known practitioner and author, Mr Chow Kok Fong, this created a potential problem because by separately providing for an interim certificate from the Architect and a payment response from the Employer, the interim certificate could not be treated as the payment response and if for any reason the Employer failed to issue the payment response, *eg*, thinking that his Architect's interim certificate has answered the payment claim, he would be in for a rude shock, especially in view of s 15(3) of the Act: see Chow Kok Fong, *The Singapore SIA Form of Building Contract* (Sweet & Maxwell, 2013) at paras 31.10–31.12. For this reason, quantity surveyors, who normally prepare the contract documentation, ensure that in dealing with the SIA Form of contract, they provide within the preliminaries that interim certificates (which are issued within 14 days of the payment claim) are deemed as a payment response under the Act if the Employer does not subsequently provide one within 21 days from the date of the payment claim, which is the maximum time limit allowed under s 11(1)(*a*) of the Act.

71 That this is fact and practice can also be seen in cases like *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] SGHC 223 (" *Progressive Builders* "), where in dealing with the setting aside of an adjudication claim, Lee Sieu Kin J recited the following facts without controversy at [4]:

> On 25 June 2014, the defendant issued its progress claim 12 ("PC12") for work done in the month of June 2014. *The plaintiff responded on 15 July 2014 by serving its payment certificate 10 on the defendant.* I should point out that payment certificate 10 was in response to PC12 because progress claims 1 and 2 were not certified.
>
> [emphasis added]

This was a case of a main contractor for a housing project at Punggol West engaging a domestic sub-contractor by a "letter of acceptance" (which formed the sub-contract), for the supply of labour and tools to carry out structural works for two blocks in the project.

72 It should be noted that in this case, the interim certificates are not issued by an architect, (although there were references to the Architect in relation to Completion and Final Certificates to be issued under cl 5.6 of the Sub-contract), but by the Plaintiff. The Plaintiff was also the upstream contracting party to the Defendant and as this was a domestic subcontract, there is no contractual relationship between the Defendant and the owner of the Project. Accordingly the distinction drawn between the Architect or Superintending Officer and the Employer insofar as interim payment certificates and payment responses are concerned in the standard form contracts referred to above are not applicable to the facts of the present case. Interim certificates can still be considered payment responses where the employer fails to issue the latter under these standard forms and an *a fortiori* case must apply to cases like the present, *ie*, between a main contractor and domestic sub-contractor, where the documentation is often less formal and one will find a paucity of correspondence and paperwork between the parties.

73 In principle and in practice therefore, there can be no impediment or objection to an interim certificate functioning as a payment response. Whether the interim certificate adequately gives reasons or grounds for resisting payment is another matter.

74 With this background in mind, it appears to me, and I emphasise that this is a case dealing with a domestic sub-contract for works relating to the construction of a single house, that the parties would not have intended for the interim certificate to be distinct from a payment response requiring the Plaintiff to submit two different documents. This appears to me to be a classic main contractor and domestic sub-contractor arrangement where, as I have stated above, the documentation is less than formal and where the paperwork and correspondence between the parties is Spartan. In my judgment, it is clear that the parties intended for the interim certificate to function as a payment response.

75 This interpretation is further buttressed by reference to the actual interim certificates which were issued in the present case. While I do not purport to make any conclusive finding as to the sufficiency of the certificates as payment responses under the Act, I do note that these interim certificates do provide fairly detailed responses to the amounts claimed for under the various payment claims.

76 From a perusal of both s 11 of the Act and reg 6(1) of the Regulations, it is clear that that no particular form is specified for payment responses and only the important or essential information is prescribed, leaving much of the details to the parties or their advisers to craft. However, the adjudication scheme calls for a proper payment claim setting out or identifying the sums claimed and a proper response as to why the these claimed items are not admitted at all or are only admitted in part, so that the issues in relation to each claim or the set-off or cross-claim are made clear. It is also self-evident that if a party chooses to give its reasons laconically by stating "rejected" or "not entitled" or "withheld" without explaining more, it will find itself unable to supplement that in the adjudication response. That merely states the result but not the reasons for arriving at that result. In *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 ("*Multiplex Constructions*"), Palmer J made that point and said, at [67]:

> … It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were to be able to reject a payment claim, serve a payment schedule [*ie*, response, in Singapore legislation] which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant

has had no prior opportunity of checking and disputing. …

I entirely agree. I also note that the New South Wales legislation on the requirements of the payment response are for all intents and purposes *in pari materia* with our provisions. I also agree with Palmer J when he said, at [70]:

> … Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.

77 Before I proceed to elaborate on how the responses to the payment claims in the present case did appear to have some particularity to enable the Defendant to understand broadly what the issue between it and the Plaintiff was in relation to individual items of claims, there is a need to clarify the way in which certain documents have been labelled by the Plaintiff. The Plaintiff replied to certain progress claims by issuing documents titled "payment certificate" and replied to other progress claims by issuing documents titled "statement of final account". [note: 22] Although these documents are not labelled as "interim certificates", which is what the timelines under s 5.2 of the Sub-contract and s 2.2 of the Main Contract pertain to, the parties do not appear to dispute that these payment certificates and the Statements of Final Account were in fact interim certificates. This illustrates the point I made at [74] above. For convenience, I will use the term "interim certificates" when referring to both types of documents collectively.

78 I should also mention, although I do not strictly have to consider this, that s 11(3)(*a*) of the Act states that a payment response, *inter alia*, '..shall identify the payment claim to which it relates." Although the Statement of Final Account did not expressly state the payment claim which it was responding to (*ie*, the Payment Claim), this does not amount to a breach of s 11(3)(*a*). In Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 6.71, the learned author provided suggestions as to how this requirement could be met, *eg*, by stating the name of the project, the date of the payment claim, as well as the particulars of the underlying contract such as the name of the parties. He goes on to note, generally, that "[i]n principle, the response should leave little room for ambiguity that the response is intended as a reply to the particular payment claim." This is fulfilled in the present case. There was no ambiguity that the Statement of Final Account was in response to the Payment Claim. The Payment Claim was served four years after the works had been completed and was for the final construction period of 15 April 2009 to 20 December 2010 (see above at [5]). Therefore, notwithstanding that the number and date of the Payment Claim were not stated in the Statement of Final Account, there was no ambiguity that the Statement of Final Account was a reply to this final payment claim. Indeed, the Defendant has not alleged that there was any such ambiguity. In *Progressive Builders* (at [53]), Lee J held that a degree of reasonableness must be read into the formal requirements of a payment claim. This is also true for the formal requirements of a payment response as well, a point which was endorsed by Palmer J in *Multiplex Constructions* (at [76]).

79 I now turn to examine some of the interim certificates which had been issued by the Plaintiff throughout its course of dealings with the Defendant. For example, payment certificate no 5, [note: 23] which was issued on 18 April 2010, was in response to progress claim no 8 [note: 24] which was dated 31 March 2010. From a perusal of these documents, it is evident where the areas of dispute are between the parties. With respect to both progress claim no 8 and payment certificate no 5, the

five categories of works done are consistent with each other, namely:

(a) structural steel works;

(b) steel cladding;

(c) steel windows and doors;

(d) bondeck installation; and

(e) GS railing.

Where the parties differed was in the amounts being claimed in each of these categories. Using the category of the steel windows and doors as an example, in progress claim no 8, the Defendant applied a rate of $550/m^2 for 250m^2 worth of works which it alleged had been fully completed. The Plaintiff on the other hand, stated in payment certificate no 5 that the rate was $350/m^2 and that the full 250m^2 of works had not yet been completed. This difference explained why the "to-date amount" for the steel windows works under progress claim no 8 was stated to be $137,500, whereas it was stated to be $76,359 under payment certificate no 5.

80 In progress claim no 14 (*ie*, the Payment Claim), [note: 25] it was stated to cover the contract period 4 November 2008 to 4 December 2009. It stated the original contract sum of $400,000.00, it claimed $469,193.75 for contractual works, it claimed Additional Works of $63,361.75, making a total of $532,555.50; it noted an Accumulative net payment of $337,430.30 thereby leaving a balance of $208,783.96 (with GST of $13,658.76). There followed two pages of tables setting out the items and sums claimed under the Sub-contract and the additional works. Supporting documents were also attached. According to the Affidavit of Ho Fei Yen filed on 30 March 2015, it comprised some 41 pages excluding the covering letter with the same date.

81 The Plaintiff's response, dated 17 January 2015, was issued after they received notice from the Defendant's solicitors that they were applying for adjudication and comprised some 40 pages as well. [note: 26] It stated the original contract works of $400,000, Variation Works of $44,309.71, making a total of $444,309.71, less previous payments of $337,430.30, followed by backcharges of $246,680.51 which left a negative balance, *ie*, a sum owing from the Defendant to the Plaintiff of $149,587.18. There follows summaries in tabular form on contract and additional works sums, details of payments made, backcharges for services or materials rendered by the Plaintiff and other current backcharges; followed by tables on Original Sub-contract works and the Variations and supporting documents.

82 In the tables, there are breakdown of components with columns with Unit, Rate, Quantity and Amounts under "Approved", columns for Approved Quantity and Amounts, Current Month's Quantity and Amounts, To-Date Quantity and Amounts, Remarks and Columns for the Defendant's Claims with sub-columns for Quantity, Rate and Amounts.

83 I take one example for illustration. There is a claim for additional works in the relevant Defendant's Payment Claim, S/No.8: "SS grating to drain opening 175W, Ref: Sino/NC.B_Cassia/Q.08". This claim is for 14.53 metres at $126.00/m making a total of $1,830.78. In the Statement of Final Account, there is a corresponding item with the same description. In going through the tables, it is clear that the Plaintiff's response to this variation (additional works) claim was as follows:

(a) the 'Approved Quantity' of this Stainless Steel Grating (175W) was 14.53m but at $90.00/m making a total of $1,307.70;

(b) under the 'This Month Column', only 8.25m had been completed; multiplied by the approved unit rate, $742.50 was due;

(c) under the 'To Date' column these figures at (b) were repeated;

(d) under the 'Sino Claim' columns, we see a claim for 14.53m completed, a rate of $126 and a claim for $1,830.78; and

(e) under the 'Remarks' column, it states "No layout drawing submitted, Different [*sic*] in valuation".

84 In going through the Payment Claim's supporting documents, there is a quotation dated 1 September 2010 with the same reference number. [note: 27] The Unit Rate is $126.00/m for 14.53m, for a total amount of $1,830.78. There are also the Defendant's drawing of this grating specifying the width of 175 mm and the type of flat and angle bars to be used. However the letter has a notation "Accepted by:" that is not signed. From examining the two sets of documents, the differences become clear. The Defendant claims a rate of $126.00/m and the Plaintiff says it is $90.00/m and the Defendant claims 14.53m were done but the Plaintiff says it was 8.25m. The Plaintiff's reasons, set out above, have been given. I do not have to decide who is right, or what are or whether the reasons given are valid or adequate, but it does appear to me that the Statement of Final Account did have sufficient particularity to enable the Defendant to understand broadly what the issues between the parties were.

85 Therefore, in my judgment, there is nothing on principle or in practice that prevents an interim certificate being a payment response provided it complies with the requirements of the Act and Regulations, and the parties clearly intended the interim certificates to function as payment responses. Under the Sub-contract, the Plaintiff had 14 days to issue its payment response as cl 2 of the Main Contract was incorporated into the Sub-contract to supplement, *mutatis mutandis*, cll 5.1 and 5.2. It is not correct that the Sub-contract did not provide a time within which a payment response was to be issued such that the 7 day default period under s 11(1)(*b*) was applicable.

Conclusion

86 In summary, for the reasons set out above, I find and hold that:

(a) an adjudication application cannot be made during the dispute settlement period, and any such application is an invalid adjudication application under the Act;

(b) the dispute settlement period in the present case ran from 15 January 2015 to 21 January 2015; and

(c) the Adjudication Application on 21 January 2015 filed by the Defendant was done prematurely and having been filed during the dispute settlement period, was invalid.

87 The appeal is allowed and I therefore set aside the Adjudication Determination. I also set aside the orders made below, including the order for costs, with the usual consequential orders. The parties have liberty to apply if any clarification is needed and if there are any other or further orders required.

88 I will hear the parties on costs here and below.

[note: 1] 1st affidavit of Xu Jing, 13 March 2015 (Xu's 1st affidavit), at para 5.

[note: 2] Affidavit of Ho Fei Yen, 30 March 2015 ("Ho's affidavit"), at para 10.

[note: 3] Ho's affidavit, at para 12.

[note: 4] Xu's 1st affidavit, at para 10.

[note: 5] Ho's affidavit, at para 16.

[note: 6] Xu's 1st affidavit, at para 13.

[note: 7] Xu's 1st affidavit, at para 14.

[note: 8] Xu's 1st affidavit, at para 15.

[note: 9] Xu's 1st affidavit, at para 16.

[note: 10] Xu's 1st affidavit, at para 17.

[note: 11] Xu's 1st affidavit, at paras 18–19.

[note: 12] Plaintiff's submissions, at para 2.

[note: 13] Plaintiff's submissions, at para 14.

[note: 14] Plaintiff's submissions, at para 82.

[note: 15] Xu's 1st affidavit, at p 33.

[note: 16] Xu's 1st affidavit, at p 45.

[note: 17] Defendant's written submissions, at para 9.

[note: 18] Minute Sheet of Quentin Loh J, 24 July 2015, at p 5.

[note: 19] Defendant's written submissions, at para 47.

[note: 20] Minute Sheet of Quentin Loh J, 24 July 2015, at p 3.

[note: 21] Defendant's submissions, at para 34.

[note: 22] See pp 8–57 of Xu's 2nd affidavit.

[note: 23] Xu's 2nd affidavit, at pp 23–24.

[note: 24] Xu's 2nd affidavit, at pp 34–37.

[note: 25] Affidavit of Ho Fei Yen at p36.

[note: 26] Xu's 1st affidavit, pp 169–210.

[note: 27] Plaintiff's bundle of affidavits Tab 2 at p139.

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