Tienrui Design & Construction Pte Ltd *v* G & Y Trading and Manufacturing Pte Ltd [2015] SGHC 243

Case Number	: Originating Summons No 1005 of 2014
Decision Date	: 16 September 2015
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Monica Neo Kim Cheng (Chan Neo LLP) for the plaintiff; Tan Yiting Gina (Legal Solutions LLC) for the defendant.
Parties	: Tienrui Design & Construction Pte Ltd — G & Y Trading and Manufacturing Pte Ltd

Building and Construction Law – Statutes and Regulations

16 September 2015

Lee Seiu Kin J:

Introduction

1 This was an application by Tienrui Design & Construction Pte Ltd ("the plaintiff") to set aside an adjudication determination ("the AD") made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act"). G & Y Trading & Manufacturing Pte Ltd was the defendant ("the defendant").

2 After hearing arguments, I dismissed the application and awarded costs fixed at $5,000 (inclusive of disbursements) to the defendant. I now set out the grounds of my decision.

The facts

3 The background facts are as follows.

4 The parties were at the material time involved in a building project to convert an existing office building into a hotel at 33 Jalan Afifi (Geylang Planning Area) ("the Project"). The plaintiff was the main contractor for the Project. By a contract in writing dated 19 December 2012 ("the Contract"), the plaintiff engaged the defendantas its sub-contractor to supply and install timber doors ("the Works"). The contract was for the sum of $399,280.00.

5 In the course of the Project, the defendant's performance was allegedly sub-par. The plaintiff complained that the defendant performed parts of the works poorly, failed to rectify the defects in its works and failed to complete other parts of the works. The defendant attributed its poor performance to its poor financial situation. In view of this, the plaintiff agreed to increase the frequency of payments ("the Variation Agreement"). This was evidenced in the plaintiff's email dated 6 April 2013 where the plaintiff stated:

> Therefore, in order to help your financial issues; [*sic*] we have decided to omit the down payment as stipulated in your contract and converted to verify based on work done on site, *every 2 weeks* with necessary documentations supported together with your submission of progress claim.

[emphasis added]

6 Under the original payment terms of the Contract, the defendant was required to submit its payment claim to the plaintiff before the 30th of each month and the plaintiff was supposed to issue an "interim certificate" with respect to the defendant's payment claim by the 25th of the subsequent month. The relevant clauses are as follows:

> **14**. **PAYMENT**
>
> (1) The Sub-Contractor shall submit to the Contractor before the 30th of each month (Month M) a request for payment in the form to be agreed with the Contractor showing the estimated value of the Sub-Contract Works executed up to the end of that month unless in the opinion of the Sub-Contractor such values and amounts together will not justify the issue of an Interim Certificate.
>
> (2) The Contractor will issue an interim certificate with respect to the above claim by 25 [*sic*] of the subsequent month (Month M+1).
>
> (3) The Contractor's Interim Certificate to the Sub-Contractor will show the amounts which have been accepted for payment by the Contractor taking into account the real progress achieved during the month less a deduction of retention money at the rate of ten percent (10%) of the value of the Interim Payment up to a maximum retention of five percent (5%) of the Sub-Contract Price and less any back charges due by the Sub-Contractor to the Contractor.

7 Despite the increase in payment frequency, the defendant's performance remained sub-par. That led to the termination of the Contract on 28 August 2014.

8 Prior to the termination of the Contract, on 19 August 2014, the defendant served payment claim no 1 ("the Payment Claim") for work done between March 2013 and July 2014. The total amount claimed was $85,580.05. On 27 August 2014, the plaintiff responded by way of payment response no 1 ("the Payment Response") which stated that the plaintiff did not owe any amount to the defendant and that the defendant was actually indebted to the plaintiff in the amount of $186,774.96 by reason of defective works and overpayment.

9 On 8 September 2014, the defendant notified the plaintiff of its intention to apply for adjudication. On 9 September 2014, the defendant lodged an adjudication application in respect of the Payment Claim with the Singapore Mediation Centre ("the SMC"). An adjudicator ("the Adjudicator") was appointed by SMC on 11 September 2014. On 8 October 2014, the AD was rendered in favour of the defendant. Dissatisfied, the plaintiff filed the present application to set aside the AD on the ground that the adjudication application had been filed prematurely.

The adjudication proceedings

10 In order to make sense of the issues raised by the parties, I first set out the statutory timeline for the adjudication process. Sections 11 and 12 of the SOP Act state:

> **Payment responses, etc.**
>
> 11.—(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —

(*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or

(*b*) where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.

…

Entitlement to make adjudication applications

12. —(1) Subject to subsection (2), a claimant who, in relation to a construction contract, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.

(2) Where, in relation to a construction contract —

(*a*) the claimant disputes a payment response provided by the respondent; or

(*b*) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11(1),

the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.

…

(5) In this section, "dispute settlement period", in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1).

Adjudication applications

13. — (1) A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body.

…

(3) An adjudication application —

(*a*) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;

…

11 The key feature of the provisions set out above is that the recipient of a payment claim is to provide a payment response within the period stipulated in the contract, except that if this is more than 21 days, the time is limited to 21 days (s 11(1)(*a*)). In the absence of such a stipulation in the contract, the payment response must be provided within seven days of the service of payment claim

(s 11(1)(*b*)). Thereafter, regardless whether a payment response has been provided, the claimant has to wait out a mandatory seven-day dispute settlement period which commences after the "date on which or the period within which" the payment response is required to be provided (s 12(5)). The entitlement to lodge an adjudication application only begins after the expiry of the dispute settlement period (s 12(2)) and *lasts for seven days* (s 13(3)(*a*)).

The plaintiff's position

12 The plaintiff had originally objected to the adjudication application on two grounds. *First*, the plaintiff argued that the adjudication application was premature as it was made before the expiry of the dispute settlement period. *Secondly*, the plaintiff claimed that the defendant did not include a complete set of the payment response in the adjudication application. However at the hearing before me, the plaintiff abandoned the second ground and proceeded only with the first. I shall therefore only address the first ground.

13 I have summarised the statutory timelines at [11] above. The plaintiff argued that, should the Variation Agreement be found to be effective, the Payment Response was due two weeks after the submission of the Payment Claim. Accordingly, as the Payment Claim was submitted on 19 August 2014, the Payment Response was only due on 2 September 2014. This would mean that the 7-day dispute settlement period ran from 3 September 2014 to 9 September 2014, and the defendant's entitlement to lodge an adjudication application only arose on 10 September 2014. Since the adjudication application was lodged before that, on 9 September 2014, it was premature.

14 The plaintiff contended that, even if the Variation Agreement was found to be invalid and therefore not applicable, the adjudication application was also premature. This was because the Payment Response was due 21 days after the submission of the Payment Claim *ie*, by 9 September 2014. The dispute settlement period would run from 10 September 2014 to 16 September 2014, and the defendant's entitlement to lodge an adjudication application arose on 17 September 2014, eight days after the date on which the adjudication application was actually lodged on 9 September 2014.

15 In essence, the plaintiff took the position that the earliest date on which the defendant's entitlement to lodge an adjudication application was 10 September 2014. Since the defendant lodged the adjudication application with the SMC on 9 September 2014 (the day before its entitlement arose), the plaintiff submitted that the adjudication application was brought prematurely and that consequently, the resulting AD was null and void.

The defendant's position

16 The defendant's position was that the adjudication application was lodged within the statutory timeframe. This was based on two grounds. The first was that the terms of both the Variation Agreement and the Contract (collectively termed "the Agreements") did not specify or determine the timelines for payment claims and responses. This was because they did not expressly refer to payment claims and responses. Therefore, in the absence of any contractual provision, the default period of seven days applied. Accordingly, the plaintiff was required to furnish its Payment Response by 26 August 2014 and the dispute settlement period ran from 27 August 2014 to 2 September 2014. The defendant's entitlement to lodge an adjudication application thus arose on 3 September 2014 and continued till 9 September 2014, the day on which the adjudication application was actually lodged.

17 The defendant's second ground was that the dispute settlement period began after the date on which the Payment Response was actually provided and not the date on which it was due. Therefore,

although the Payment Response was only due on 2 September 2014, the Payment Response was actually issued earlier, on 27 August 2014. Accordingly, the dispute settlement period begun on 28 August 2014 and ended on 4 September 2014. Accordingly, the defendant's entitlement to lodge the adjudication application arose on 5 September 2014.

The adjudicator's decision

18 The Adjudicator determined that the adjudication application was validly lodged within the statutory timeframe. He concluded that the timelines provided by the Agreements applied to payment claims and responses within the meaning of the SOP Act. However, he found that the dispute settlement period started to run from the date of actual service of the Payment Response as opposed to the date by which it was required to be served. This meant that the defendant's application on 9 September 2014 was not premature since its statutory entitlement to lodge an adjudication application began as early as 5 September 2014 and only ended on 11 September 2014.

Issues

19 The only point of contention in this application was whether the adjudication application had been lodged prematurely. This turned on two issues. *First*, whether the timelines stipulated in the Agreements applied to payment claims and responses under the SOP Act. *Second*, whether the dispute settlement period started to run from the date the payment response was actually served or the date the payment response was required to be served.

Decision

20 The parties in the present application proceeded on the basis that a premature adjudication application would necessarily lead to the invalidation of the resulting AD. Nonetheless, I would like to make the following observations on the consequences of filing an adjudication application outside the timeframe prescribed by s 13(3)(*a*) of the SOP Act.

21 In *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*") at [61], the Court of Appeal left open the question of whether s 13(3)(*a*) of SOP Act operated as a mandatory condition so that an adjudication application filed out of time is necessarily invalid. However, subsequent decisions have answered the question in the affirmative.

22 In *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 4 ("*Shin Khai Construction*"), the assistant registrar ("AR") held that s 13(3)(*a*) of SOP Act constituted a mandatory condition under the Act and that consequently, an adjudication determination may be set aside if there has been a breach of s 13(3)(*a*), however slight the breach. The AR stated (at [27]):

> … 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*.

[emphasis added]

23 The decision in *Shin Khai Construction* was endorsed by Tan Siong Thye J in *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 ("*YTL Construction*") at [47] and [48]. Tan J said:

> 47 The timelines under the SOP Act are therefore very tight so as to facilitate "cash flow by establishing a fast and low cost adjudication system": *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [25]. The importance of observing such tight timelines was elaborate [*sic*] by McDougall J in the Australian decision of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 ("*Chase Oyster*") at [208]–[209]:
>
> > 208 Further, the *Security of Payment Act* operates in a way that has been described as "rough and ready" or, less kindly, as "Draconian". It imposes a mandatory regime regardless of the parties' contract: s 34. It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents (see, for example, my decision in *Laing O'Rourke Australia Construction v H&M Engineering and Construction* [2010] NSWSC 818 at [8]).
> >
> > 209 The *Security of Payment Act* gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the *Security of Payment Act* lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.
>
> 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*** . …
>
> [emphasis in italics in original, emphasis in bold italics added]

24 In my view, the reasoning in *Shin Khai Construction* and *YTL Construction* applied with equal force to the situation where an adjudication application was filed prematurely.

25 Furthermore, I should add that the dispute settlement period was designed so as to provide parties with a final opportunity to settle the dispute before triggering the adjudication process (*Security of Payments and Construction Adjudication* (Chow Kok Fong, 2nd Ed, LexisNexis, 2013) ("SOPCA") at para 8.4). To help crystallise the issues in dispute and encourage settlement between the parties, both parties are allowed to seek additional information or clarification of the payment dispute (s 12(4)(*a*) of the SOP Act). Additionally, the respondent is given the right to furnish a payment response where he has failed to do so or vary the payment response that he had furnished earlier (s 12(4)(*b*) of the SOP Act). The legislative intent of encouraging settlement would be undermined if parties were allowed to "jump the gun" during the dispute settlement period. Therefore, I was satisfied that a premature adjudication application went towards the jurisdiction of the adjudicator, and nullified any resulting adjudication determination.

Whether the timelines in the Agreements applied to payment claims and responses under the SOP Act

The parties' positions

26 The plaintiff submitted that the timelines stipulated in the Agreements applied to payment responses under the SOP Act ("statutory payment responses"). To that end, the plaintiff relied primarily on s 2 of the SOP Act which reads as follows:

> "payment claim" means a claim made by a claimant for a progress payment under section 10;
>
> "payment response" , in relation to a construction contract, means a response to a payment claim made by a respondent under section 11(1) or 12(4); …

27 According to the plaintiff, the "request for payment" in cl 14(1) of the Contract constituted a claim for a progress payment within the statutory meaning of a payment claim. Since the "interim certificate" in cl 14 was a response to such a claim, it fell within the statutory meaning of a "payment response". Although the period provided in cl 14 is, in effect, 25 days, and this exceeds the limit of 21 days in s 11(1)(*a*) of SOP Act, this merely operated to bring to effect the statutory limit of 21 days in that provision. Therefore the period for providing the Payment Response in the Contract would be 21 days.

28 On the other hand, the defendant argued that the Agreements did not cover statutory payment responses and consequently, the default statutory timeline of seven days applied. First, the defendant contended that the language used in the Agreements ("request for payment" and "interim certificate") was distinct from the language used in the SOP Act ("payment claim" and "payment response") and that for reasons of certainty, such clauses ought not to be construed as prescribing the timelines for statutory payment responses.

29 In the alternative, the defendant argued that, as a matter of construction, that cl 14 did not refer to a statutory payment response. *First*, the defendant contended that cl 14 provided the plaintiff with up to 25 days to issue an interim certificate, which is more than the maximum 21 days allowed under the SOP Act. *Secondly*, the defendant claimed that the progress claims and interim certificates that were issued during the Project did not comply with the provisions of the SOP Act because, for example, the interim certificates did not set out the reasons for the certified amounts even though such reasons are required to be included in a statutory payment response. *Lastly*, the defendant highlighted the fact that the numbering of the payment claims and responses which were the subject of the adjudication began from one and did not follow the numbering of the progress claims and interim certificates that were previously issued.

The applicable law

30 The SOP Act establishes a speedy and low cost dispute resolution mechanism to facilitate the cash flow of contractors operating in the building industry. Under the SOP Act, a party who carries out any construction work or supplies any goods or services under a construction contract is entitled to progress payments (s 5). While that statutory entitlement to payment is founded on the underlying contract, it is separate and distinct from a party's contractual entitlement to be paid. The result is a "dual railroad track system" consisting of the statutory regime under the [SOP Act] which operates concurrently with, but is quite distinct from, the contractual regime (*TransGrid v Siemens and anor* [2004] NSWSC 87 at [56]).

31 In practical terms, the dual track regime allows a claimant to make separate claims under the contract and the SOP Act, or, make a claim that has both contractual and statutory force. Likewise, a respondent may provide separate responses under the contract and the SOP Act, or, issue a

response that has both contractual and statutory force. At paras 9.30, 9.32 and 9.33 in SOPCA, the learned author observed that each of the two major standard forms – the Singapore Institute of Architects ("SIA") Standard Form and the Public Sector Standard Conditions of Contract ("PSSCOC") – had taken different approaches:

> … [T]he arrangement under the SIA Standard Form consists of firstly a provision under clause 31(3) for the architect to issue an interim certificate within 14 days of the receipt of the payment claim, and secondly, a separate provision under clause 31(15(a) for the employer to issue a payment response within 21 days of the receipt of the payment claim. *The separation between an interim certificate for progress payment issued by the architect and a payment response issued by the employer is maintained throughout the entire process and there is no intersection in terms of their operation*. Consequently, a respondent cannot answer an adjudication application under section 12(2)(b) on the basis that his architect has issued an interim payment certificate if he has not also issued a payment response.
>
> …
>
> The position in the SIA Standard Form may be contrasted with the approach taken in the PSSCOC. … In essence, the superintending officer has to issue a payment certificate within 14 days from the receipt of the contractor's payment claim showing the response amount which is the sum computed after taking into account set-offs or counterclaims. *Up to this point, the payment certificate has only contractual force*. Specifically it does not constitute a payment response for the purpose of the Act notwithstanding the stipulation in the clause that it shall comply fully with the requirements for a payment response under the Act.
>
> The transformation of the payment certificate into a payment response is provided under clause 32.2(2). … The payment certificate as issued by the superintending officer is turned into a payment response for the purpose of the Act only if the employer fails to or elects not to provide any response within the 14-day period. The payment certificate is then deemed to be the payment response. *At this point, the same document has both contractual and statutory force*.
>
> [emphasis added]

32 The SIA Standard Form made a clear distinction between an interim certificate and a statutory payment response, and stipulated timelines that applied to each. The interim certificate and statutory payment response were respectively due 14 days and 21 days after the submission of a payment claim.

33 In contrast, the PSSCOC envisaged a possible intersection between a payment certificate and a statutory payment response. Under the PSSCOC, a payment certificate was due 14 days after the submission of a payment claim. Thereafter, the same payment certificate would be deemed a statutory payment response where the employer failed to or elected not to provide a further response within the same 14-day period. Thus, a statutory payment response would be provided (or come into existence) within 14 days after the submission of a payment claim.

34 Although these standard forms have managed the dual track characteristics of the payment regime differently, what is common between them is that the relationship between the contract and the statutory regime is clearly spelt out. The difficulty in the present case arose due to the failure in the Contract to spell out the relationship between the contractual and statutory tracks. The Contract referred to a "request for payment" and an "interim certificate", omitting any reference to the statutory language. The pertinent question was *whether the parties had intended the timeline*

provided in cl 14 of the contract to supplant the default timeline in the SOP Act.

35 A similar issue was examined in *Shin Khai Construction* at [30]. The disputed clause read as follows:

> The Sub-contractor shall submit interim progress claim base on work done upto [*sic*] the date of claiming on every **25th of the month**. The Contractor shall within 10 days after receipt of the Sub-Contractor's claim, evaluate and issue a Sub-Contractor's Payment Certificate certifying the amount of work done, such sums as may be properly due and payable, less the **retention money of 10%** upto [*sic*] a maximum of 5% of the contract sum. ...
>
> [emphasis in original]

36 The AR held that the dispute turned on a construction of the contractual terms to determine whether the parties had intended for the payment certificate to function as a statutory payment response. Following that, he found that the disputed clause had envisaged a payment certificate which was also to function as a payment response. Instead of providing for certification by an architect or engineer as is usually the case, payment certification was done by the contractor. Furthermore, in certifying the sums "as may be properly due and payable", the clause contemplated the inclusion of, *inter alia*, set-offs and cross-claims. For the above reasons, it was held that the contractual timeline had supplanted the default statutory timeline in s 11(*b*) of the SOP Act.

37 In the present case, however, for the reasons that follow, I found that the parties had envisaged the contractual and statutory tracks to operate separately, *ie*, that the contractual timeline did not apply to supplant the default statutory timeline.

38 *First*, there were notable linguistic variations between cl 14 of the Contract and the SOP Act. The former used the terms "request for payment" and "interim certificate" whereas the latter used the terms "payment claim" and "payment response".

39 It is a cardinal rule of contractual interpretation that the court must give effect to the intention of the parties as expressed, that is, the meaning of the words actually used (*The Commissioners of Inland Revenue v Raphael and others* [1935] AC 96 at 142 ("*Raphael*")). Otherwise, all certainty would be taken from the words in which the parties have recorded their agreement (*Raphael* at 143). Nevertheless, as observed by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 775, the exercise is not limited to the meaning of the words as they appear in the dictionary, but also extends to the relevant background against which the words were used.

40 In the present case, it was unlikely that the reference to an "interim certificate" imported with it a reference to a statutory payment response. In the context of the building industry, a payment certificate (or interim certificate) is often understood to have a complexion slightly different from that of a statutory payment response. Interim certificates are usually independent valuations of work done that are issued by architects or engineers; persons separate from the owner or the principal (SOPCA at para 6.32). On the other hand, a statutory payment response serves to state the respondent's position in relation to a statutory payment claim and has to satisfy the requirements of the SOP Act (see s 11(3)). This distinction was alluded to in the following passage from SOPCA at para 6.43:

> Indeed, in the consultative documents on the Bill circulated by the Singapore Building and Construction Authority for comments by the industry, the terms 'payment certificate' and 'payment response' were used interchangeably. However, the draftsman chose to use the term 'payment response' as a specific description of a response to a payment claim and this appears to

stem from the consideration that the position taken in the payment certificate may not always be synonymous with that which the owner would adopt in the payment response. …

4 1 *Second*, beyond the linguistic variations, the Contract did not appear to pay heed to the statutory requirements of payment claims and responses. To illustrate, cl 14(1) required the "request for payment" to:

> … [Show] the estimated value of the Sub-Contract Works executed up to the end of that month unless in the opinion of the Sub-Contractor such values and amounts together will not justify the issue of an Interim Certificate.

42 This may be contrasted with the statutory requirements of a payment claim which are set out in s 10(3) of the SOP Act, and further particularised in reg 5(2) of the Building and Construction Industry Security of Payment Regulations 2005 ("the SOP Regulations"). Section 10(3) of the SOP Act reads:

> **Payment claims**
>
> …
>
> (3) A payment claim —
>
> (*a*) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and
>
> (*b*) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

43 Regulation 5(2) reads:

> **Payment claims**
>
> …
>
> (2) Every payment claim shall —
>
> (*a*) be in writing;
>
> (*b*) identify the contract to which the progress payment that is the subject of the payment claim relates; and
>
> (*c*) contain details of the claimed amount, including —
>
> (i) a breakdown of the items constituting the claimed amount;
>
> (ii) a description of these items;
>
> (iii) the quantity or quantum of each item; and
>
> (iv) the calculations which show how the claimed amount is derived.

44 It was evident that the requirements of a "request for payment" were far less comprehensive

than the statutory requirements of a payment claim. In the same vein, it was also apparent that requirements of an "interim certificate" was similarly lacking in view of the statutory requirements of payment responses. Under cl 14(3), an "interim certificate" was required to:

> … [S]how the amounts which have been accepted for payment by the Contractor taking into account the real progress achieved during the month less a deduction of retention money at the rate of ten percent (10%) of the value of the Interim Payment up to a maximum retention of five percent (5%) of the Sub-Contract Price and less any back charges due by the Sub-Contractor to the Contractor.

45 As a starting point, s 11(3) of the SOP Act provides:

> **Payment responses, etc.**
>
> …
>
> (3) A payment response provided in relation to a construction contract —
>
> (*a*) shall identify the payment claim to which it relates;
>
> (*b*) shall state the response amount (if any);
>
> (*c*) shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and
>
> (*d*) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

46 Further requirements are prescribed by reg 6(1) of the SOP Regulations:

> **Payment responses in relation to construction contracts**
>
> 6. —(1) Every payment response provided in relation to a construction contract shall —
>
> (*a*) be in writing;
>
> (*b*) be addressed to the claimant;
>
> (*c*) state "nil" where the respondent does not propose to pay any part of the claimed amount and the reasons therefor; and
>
> (*d*) where the response amount is less than the claimed amount —
>
> (i) contain the amount that the respondent proposes to pay for each item constituting the claimed amount, the reasons for the difference in any of the items and the calculations which show how the amount that the respondent proposes to pay is derived; and
>
> (ii) contain any amount that is being withheld, the reason for doing so and the calculations which show how the amount being withheld is derived.

47 The Adjudicator took the view that the contractual timeline applied to both interim certificates

and statutory payment responses because "[f]rom contract clause 14-(3) and s11-(3), there is similarity in characteristic of the content to be taken within the meaning of the Act s11-(1)". [note: 1] I did not agree. It was obvious from a perusal of the statutory requirements that a "request for payment" and an "interim certificate" that complies with the Contract would not pass muster under the SOP Act. For instance, s 11(3)(*c*) of SOP Act requires the respondent to state its reason for withholding payment in its payment response. This is one of the most critical elements of the statutory payment response, but the Contract did not require it. I also noted that the interim certificates that were issued pursuant to the Contract did not include reasons for withholding payment, [note: 2] but the statutory payment response did. [note: 3]

48 Payment claims and responses that fail to comply with the statutory requirements risk invalidation and the serious consequences that follow such invalidation. If the parties had intended to rely on the "request for payment" and "interim certificate" to trigger the adjudication process, the relevant terms in the Contract would have presumably incorporated the salient elements of statutory payment claims and responses. Those elements being absent in the Contract, it would appear that the parties did not intend the "interim certificate" to be coterminous with a statutory payment response.

49 Finally, the parties' subsequent conduct made it abundantly clear that the parties intended to maintain a distinction between the contractual and statutory certification machinery. Although I was mindful of the legal difficulties with the use of subsequent conduct to aid the construction of a contract, I took the view that this was an appropriate case in which recourse may be made to such conduct.

50 In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(d)], the Court of Appeal left unresolved the admissibility of subsequent conduct in ascertaining contractual intention:

> … [T]he principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, … *there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128]-[129] above*. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.)
>
> [emphasis added]

51 V K Rajah JA argued persuasively that all relevant material, including evidence of subsequent conduct, which assists in revealing the parties' objective intentions should be considered. Writing extra-curially in "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 SAcLJ 513 at paras 48 and 53, he observed:

> … The admissibility of subsequent conduct has not received as much recent judicial attention. The last major English decision was in 1973, where the House of Lords firmly closed the door on this category of evidence in *L Schuler AG v Wickman Machine Tool Sales Ltd* ("*Schuler*"). How much of *Schuler* can continue to co-exist with the more liberal attitude evinced in the *ICS* restatement remains to be seen. In any case, the arguments for and against admitting extrinsic evidence generally are equally applicable to subsequent conduct, and only a few things need be

said with regard to this category of evidence. *Legally*, the meaning of the contract is, of course, fully and finally established at the time of the contract, and not subsequently. *Evidentially*, however, the considerations which drove the parties to enter into a contract do not evaporate when the contract is concluded, and so long as the parties remain animated by those considerations, their conduct can be valuable evidence of what they meant when they concluded the contract, and, once again there is no reason in principle why the court should be prevented from considering probative evidence in its search for the true agreement between the parties.

…

… The courts ought to embrace a consistently commonsensical approach in relation to the admissibility of evidence in contractual disputes. All relevant material which assists in revealing the parties objective intentions should be considered. It can be forcefully said that it is the legal entitlement of the parties to have their objective intentions and the "gold of a genuine consensus". …

[emphasis in original]

52 The above position was adopted in *Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] 2 SLR 603 at [91] where Tan Siong Thye J held that the subsequent conduct of parties could be considered to determine their common intentions if such conduct was evidentially probative. Thus, I was satisfied that in appropriate cases, evidence of subsequent conduct could be admitted to discern the objective intention of the parties.

53 It was clear from the parties' conduct that they intended to treat the "interim certificate" as a creature distinct from the statutory payment response. Notably, the parties had restarted the numbering for the payment claim and response that were the subject of the adjudication proceedings. The payment claim and payment response that were the subject of the adjudication proceedings were titled Payment Claim No 1 and Payment Response No 1 respectively, although numerous requests for payment and interim certificates had been issued previously. Therefore, I held that the reference to "Interim Certificate" in cl 14 of the Contract did not extend to statutory payment responses and as such, the timelines prescribed therein did not apply to statutory payment responses. Accordingly, the default statutory timeline of seven days applied.

54 I should add that while one does not need to go to the extent of expressly stating an intention to supplant the default statutory timeline for such an intention to be effective, that intention would be made unassailable if there was an express provision to that effect. Thus, it would be good practice and prudent for parties who wish to supplant the SOP Act timelines to expressly spell out their intention for "[p]arties that do not take care to properly incorporate their intentions in their contracts have to accept the vagaries of litigation" (*Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [31]). It is particularly important in the regime under the SOP Act, in which timelines are not only tight, but also attract drastic consequences. Hence it is essential that contracts clearly express any intention to stipulate the relevant timelines in the SOP Act. Indeed, the courts would not hesitate, in the appropriate case, to interpret *contra proferentem*, any ambiguity in the drafting, as this would promote the desired behaviour among participants in the industry players.

Whether the dispute settlement period started to run from the date of actual service or the date by which the payment response was required to be served

The parties' position

55 The crux of the defendant's case was that the dispute settlement period started to run from the date on which the payment response was served. The defendant cited observations to this effect by the assistant registrar ("AR") in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2014] SGHCR 10 ("*LH Aluminium*") which stated, at [14] – [15]:

> … *Where a payment response is in fact served at an earlier date, there is nothing in cl 14.4(c) or 14.5 of the SIA Sub-Contract or cl 10.3 of the Contract that suggests that the "dispute settlement period" should only run from the date at which the payment response was contractually due.*
>
> This would also be commercially sensible as otherwise any adjudication, if required, would be delayed without good reason. As both parties have already made clear their positions to each other via a payment claim and payment response, *there is no prejudice to the parties if the "dispute settlement period" commences from the actual making of a payment response*. Such a reading would further be consistent with the purpose of the [SOP Act] to provide a speedy and effective dispute resolution process for the building and construction industry.
>
> [emphasis added]

56 Relying on the above observations, the defendant submitted that the dispute settlement period began from the service of the Payment Response which was 27 August 2014 and ended after a period of seven days, on 3 September 2014. Thus, the claimant was entitled to make its adjudication application between 4 and 10 September 2014. Accordingly, the adjudication application, which had been filed on 8 September 2014, was not premature.

57 The plaintiff argued otherwise, taking the position that *LH Aluminium* did not stand for the proposition canvassed by the defendant. In its view, the AR there was not concerned with the meaning and effect of s 12(5) of the SOP Act. Instead, the issue was whether the early submission of a payment claim set the 21-day period for a payment response in motion. The AR there held that where a payment claim had been filed earlier than was required, the payment response need not be submitted until the time contemplated by the contract. It was in this context that this observation was made, *ie*, that if the payment response was served earlier, there was nothing in the contract preventing the dispute settlement period from commencing after the payment response was served.

58 To support its proposition that the dispute settlement period only commenced after the date on which the payment response was due, the plaintiff also cited my judgment in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 in which the issue was addressed obliquely at [24]:

> The dispute settlement period is the period of seven days after the date which the payment response is required to be provided under s 11(1) of the Act. …

The applicable law

59 In my view, the dispute settlement period was only set in motion after the due date of the payment response. I was unable to agree with the AR's conclusion in *LH Aluminium* for two reasons.

60 *First*, I disagreed with the suggestion that the dispute settlement period could commence after the payment response was served because nothing in the contract prevented it. The dispute settlement period is a creature of statute and there is no provision for it to be modified by contract.

61 *Second*, I could not see how it is possible to read s 12(5) of the SOP Act as meaning anything else. The provision reads as follows:

> In this section, "dispute settlement period", in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1).

To facilitate understanding, I have reformatted the provision in the following manner:

> In this section, "dispute settlement period", in relation to a payment claim dispute, means the period of 7 days after:
>
> (a) the date on which; or
>
> (b) the period within which
>
> the payment response **is required to be provided** under section 11(1). [emphasis added]

62 The key words are emphasised above. Both limbs (a) and (b) relate to the date on which, or period within which, the payment response is required to be served, not the date on which the payment response was actually served. To have the meaning contended by the defendant, s 12(5) would have to be drafted along the following lines:

> In this section, "dispute settlement period", in relation to a payment claim dispute, means the period of 7 days after the date on which ***the payment response was served*** or the period within which the payment response is required to be provided under section 11(1), ***whichever is the earlier*** . [emphasis added]

63 I should add that this interpretation is supported by the following passage in SOPCA at para 8.3, where the learned author stated:

> Section 12(5) provides that the duration of the dispute settlement period is seven days. This runs from the last day on which the payment response is required to be served by the respondent. It will be noted that there is no requirement for the claimant to notify the respondent of the commencement of the dispute settlement period.

64 Although an argument may be made that the dispute settlement period should commence earlier (*ie*, after the service of a payment response) since the objective of the SOP Act was to provide a speedy and effective dispute resolution mechanism, this could introduce other problems. One of these would be that the date of service of the payment response may itself be in dispute and this would further delay the process. Therefore reducing the number of facts that may be in dispute would promote greater certainty and further the objective of the SOP Act of facilitating cash flow in the construction industry. The importance of such certainty was explained in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 in which Spigelman CJ said:

> 47 This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. *It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value*.

[emphasis added]

Conclusion

65 For the reasons set out above, I found that the Agreements did not apply to supplant the default statutory timeline in s 11(1) of the SOP Act and consequently, that the payment response was due by 26 August 2014. The dispute settlement period commenced on 27 August 2014 and ended on 2 September 2014. The claimant was thus entitled to file an adjudication application between 3 September 2014 and 9 September 2014. Since the application was in fact filed on 9 September 2014, it was not premature.

[note: 1] Adjudication Determination, para 29.

[note: 2] Defendant's Submissions, para 12.

[note: 3] Ling Wong King's Affidavit, LWK-6.

Copyright © Government of Singapore.