IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 175

Originating Application No 160 of 2023

In the matter of Order 36, Rule 3 of the Rules of Court 2021

And

In the matter of Section 27 of the Building and Construction Industry Security of Payment Act 2004

And

In the matter of Section 27(6) of the Building and Construction Industry Security of Payment Act 2004

And

In the matter of the Adjudication Application No 226 of 2022 between A I Associates Pte Ltd as Claimant and Asia Grand Pte Ltd as Respondent

And

In the matter of the Adjudication Determination dated 15 February 2023 in respect of Adjudication Application No 226 of 2022

Between

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Asia Grand Pte Ltd

… *Claimant*

And

A I Associates Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law — Statutes and regulations — Date of service of payment claim — Sections 10(2)(*a*)(ii) and 10(3)(*b*) of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Regulations 5(1) and 5(3) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)]
[Building and Construction Law — Statutes and regulations — Application of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Whether ambit of application is based on frequency and method for quantification of payment claims]
[Building and Construction Law — Jurisdictional objection — Whether lack of performance bond a ground for setting aside adjudication determination]

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Asia Grand Pte Ltd
v
A I Associates Pte Ltd

[2023] SGHC 175

General Division of the High Court — Originating Application No 160 of 2023
Teh Hwee Hwee JC
13, 26 April 2023

22 June 2023 Judgment reserved.

Teh Hwee Hwee JC:

1 The Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") was enacted to introduce a regime for interim payments and a procedure to resolve payment disputes that facilitate cash flow in the construction industry. The legislative purpose is achieved by creating a statutory scheme for payment for work done or materials supplied that is effected "through an expeditious process that requires strict adherence to timelines": see the High Court decision of *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481 ("*Libra*") at [84], referring to the Court of Appeal decision of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482 at [27]–[30], in which the importance of strict compliance with the timelines under the SOPA for responses, notices, and adjudication applications and responses was underscored. The present case

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raises the issue of how the various timelines in this process are to be determined and concerns the interpretation of the relevant provisions under the SOPA.

Facts

2 The claimant in this application is Asia Grand Pte Ltd ("AGPL"). The defendant is A I Associates Pte Ltd ("AI"). Both companies are incorporated in Singapore.

3 AGPL was the employer in a project known as the "Remodelling of Chinese Restaurant at #03-22 Fairmont Hotel, 80 Bras Basah Road, Singapore 189560" (the "Project").[1] Through a letter of award dated 13 July 2022 sent by AGPL's interior design consultant, AGPL awarded AI a contract (the "Contract") to carry out works for the Project.[2]

4 The Contract did not contain a provision specifying the date on which payment claims under the Contract were to be served.[3] Neither did the Contract specify the date on which payment responses under the Contract were to be served.[4] However, the Contract provided for "weekly progress claims" under cl 14, which was titled "Terms of Payment & Retention".[5]

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1 Affidavit of Andrew Cheng Lloyd dated 21 March 2023 ("ACL") at para 6.

2 Affidavit of Chau Pak Heen dated 22 February 2023 ("CPH") at p 692; ACL at para 7.

3 AGPL's Written Submissions dated 5 April 2023 ("CWS") at paras 14 and 15.

4 ACL at para 10; AI's Written Submissions dated 3 April 2023 ("DWS") at para 9.

5 CPH at para 38 and p 357.

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5 On 16 November 2022, AI served its payment claim bearing reference number SQ1396-22 (the "PC") on AGPL.[6] The PC was for a sum of $133,529.08, inclusive of Goods and Services Tax ("GST").[7]

6 On 13 December 2022, AI served a Notice of Intention to Apply for Adjudication in respect of the PC that was served on AGPL.[8] On the same day, AI lodged an adjudication application with the authorised nominating body, the Singapore Mediation Centre, claiming the sum of $133,529.08 as stated in the PC, inclusive of GST.[9] This was adjudication application SOP/AA 226 of 2022 ("SOP/AA 226 of 2022").

7 On 14 December 2022, one day after the adjudication application was filed, AGPL served a payment response in respect of the PC.[10] In the cover letter for the payment response, AGPL asserted that its payment response was served in compliance with the timelines provided under the SOPA and the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOPR") and that AI's 13 December 2022 notice was defective.[11]

Decision of the learned Adjudicator in SOP/AA 226 of 2022

8 The learned Adjudicator appointed to adjudicate SOP/AA 226 of 2022 held an adjudication conference on 19 January 2023 and heard the oral

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6 CPH at pp 530–563; ACL at para 8.

7 CPH at p 531; ACL at para 8.

8 CPH at para 35 and pp 613–617; ACL at para 15.

9 Adjudication Determination dated 15 February 2023 ("AD") at paras 9 and 107.

10 CPH at pp 98–143.

11 CPH at p 98, paras 2–4.

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submissions of the parties.[12] The written adjudication determination (the "Adjudication Determination") was released on 15 February 2023. The Adjudication Determination comprised separate sections, with one section assessing the jurisdictional issues raised in SOP/AA 226 of 2022, and another section dealing with the merits. Only the jurisdictional issues are relevant in the present application.

9 The first jurisdictional issue that the learned Adjudicator had to decide was whether the adjudication application in SOP/AA 226 of 2022 was premature. This issue turned on the time at which the PC was served by AI, which had a direct bearing on when the payment response from AGPL was due. This consequently affected the question of when AI's entitlement to make an adjudication application under s 12(2) of the SOPA first arose.[13] The main dispute revolved around the question of whether the PC should be regarded as having been served on 16 November 2022, which is the date on which it was actually served, or on 30 November 2022, being the last day of the month, which AGPL argued is the deemed date of service under ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA.

10 The learned Adjudicator determined that the date of service of the PC was 16 November 2022. In his view, the PC was not deemed to have been served on 30 November 2022 because that date was not the "prescribed date" within the meaning of ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA.[14] The learned Adjudicator expressed the opinion that reg 5(1) of the SOPR, which governs contracts that do not contain any provision specifying the time at which a

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12 AD at paras 26–27.

13 AD at para 41.

14 AD at para 42.

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payment claim must be served, requires a claimant to serve the payment claim *by*, and not *on*, the last day of the month. A payment claim could therefore be served on any day in a month as reg 5(1) of the SOPR provides for a period of time for the service of a payment claim, as opposed to any specific or prescribed date.[15] Further, AGPL's interpretation would require reg 5(1) to be read to require a payment claim to be served on the last day of the month, which is not what the regulation provides for.[16]

11 The learned Adjudicator observed that Parliament had introduced the deeming provisions in s 10(3) of the SOPA to save payment claims served earlier than the contractually provided dates from being defeated, by deeming those claims to be validly served in accordance with the contractually provided timelines.[17] Before the SOPA was amended in 2018, there were instances where the validity of payment claims was challenged because the payment claims were served on the "wrong date" (see *Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Mr Zaqy Mohamad, Minister of State for National Development) ("*2018 Debate*")). That led to payment delays. In the learned Adjudicator's view, s 10(3)(*b*) of the SOPA has no application in any reg 5(1) situation where the contract is silent on service timelines for payment claims, as there is nothing to be saved since the payment claim may be served on any day in a month. Section 10(3) therefore does not come into play.[18] In addition, the learned Adjudicator noted that the words "or *last day* mentioned in subsection 2(*a*)(i) …" [emphasis added], which are present in s 10(3)(*a*) of the SOPA, are absent in s 10(3)(*b*) of the SOPA. He relied on that to provide

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15 AD at para 43.

16 AD at para 43.

17 AD at paras 49–50.

18 AD at para 50.

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support for the view that the prescribed date mentioned in s 10(3)(*b*) of the SOPA cannot be the *last day* of the month.[19]

12 In light of the foregoing, the learned Adjudicator decided that the time for AGPL to serve the payment response had started running from 17 November 2022.[20] On this basis, the payment response was due on 30 November 2022[21] and the entitlement to lodge an adjudication application would then subsist from 8 to 14 December 2022.[22] The learned Adjudicator, therefore, found the adjudication application lodged by AI on 13 December 2022 in SOP/AA 226 of 2022 to be in compliance with the statutory timeline.[23] Relatedly, the learned Adjudicator found that AGPL's payment response served on 14 December 2022 was served late and was not valid.[24]

13 The second jurisdictional issue that the learned Adjudicator had to determine was whether the PC fell outside the ambit of the SOPA because the Contract provided for *weekly* (as opposed to *monthly*) progress claims.[25]

14 The learned Adjudicator determined that the word "weekly" in cl 14 would be rendered void under s 36(2)(*a*) of the SOPA as a contractual term purporting to modify the operation of reg 5(1A) of the SOPR.[26] In his view, if the word "weekly" is rendered void, or if the entire provision in cl 14 is rendered

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19 AD at para 52.

20 AD at para 53.

21 AD at para 84.

22 AD at paras 58–59.

23 AD at paras 59–60.

24 AD at paras 84–86.

25 AD at para 61.

26 AD at para 73.

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void, then the Contract would be silent on the frequency of payment claims and/or whether AI was entitled to submit payment claims for work done, which allows the SOPA to operate as a "gap-filler" to prescribe for *monthly* payment claims.[27] The learned Adjudicator rejected AGPL's argument that since the Contract provides for weekly and not monthly payment claims, this breaches the maximum frequency of one claim per month allowable under the SOPA and therefore any payment claims served would fall outside the ambit of the SOPA. In this regard, the learned Adjudicator observed that to allow contracts to fall outside the ambit of the SOPA through a contractual term providing for a frequency of claims exceeding one payment claim per month would allow parties to easily contract out of the provisions of the SOPA, which is inimical to the legislative purpose of the SOPA.[28]

15 Finally, the learned Adjudicator examined AGPL's contention that the PC encompassed multiple claims and was therefore impermissible under the SOPA.[29] The learned Adjudicator found that this contention took the form of a vague statement in AGPL's written submissions at the adjudication stating that "it is *possible* that there are multiple claims with respect to the 'Progress Claim' of 16 November 2022" [emphasis added].[30] Crucially, the learned Adjudicator noted that no other details of the "multiple claims" were provided by AGPL.[31] I note that AGPL did not attempt to revive this contention as a basis for setting aside the Adjudication Determination.

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27 AD at paras 74–76.

28 AD at para 77.

29 AD at para 79.

30 AD at para 79.

31 AD at para 80.

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16 In summary, the learned Adjudicator determined that he had jurisdiction to adjudicate SOP/AA 226 of 2022. Upon an evaluation of the merits of the claim, he determined that AGPL was to pay AI the adjudicated amount of $94,097.21 (inclusive of GST) plus 100% of the costs of the adjudication.[32]

The parties' cases in this application

AGPL's case as the claimant

17 In the present application, AGPL is applying, *inter alia*, to set aside the Adjudication Determination.[33]

18 AGPL first argues that the adjudication application for SOP/AA 226 of 2022 was prematurely, and therefore invalidly, lodged, rendering the learned Adjudicator devoid of jurisdiction.[34] AGPL contends that since the Contract does not specify a date for service of payment claims thereunder, ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA, read with regs 5(1) and 5(3) of the SOPR, operate to deem the date of service of the PC to be the last day of the month in which it was served (*ie,* 30 November 2022).[35] Accordingly, it argues that the time for service of the payment response only started running after this deemed service date.[36] AGPL submits that it had until 14 December 2022 to file its payment response in relation to the PC, and, even after 14 December 2022, it could still have elected to file the payment response by the end of the Dispute Settlement

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32 AD at paras 3(a), 174 and 183.

33 HC/OA 160/2023 filed on 24 February 2023 at prayer 1.

34 CWS at paras 7–8 and 52–53.

35 CWS at paras 27–29 and 35–37.

36 CWS at para 39.

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Period on 21 December 2022.[37] Therefore, AI's lodgement of its adjudication application on 13 December 2022 was premature, and the Adjudication Determination ought to be set aside for want of jurisdiction.

19 AGPL further argues that the Contract fell outside the ambit of the SOPA because the Contract provided for *weekly* payment claims, and that the PC, which was served for work done under the Contract, was therefore not amenable to adjudication under the SOPA regime.[38] In AGPL's submission, the SOPA only applies to *monthly* valuated payment claims.[39] Furthermore, according to AGPL, s 36 of the SOPA has no application in the present case to void the *weekly* payment term in the Contract.[40] The SOPA also cannot operate to substitute an existing term in the present Contract for another term.[41]

20 In addition, AGPL points to AI's failure to provide a performance bond in accordance with the Contract,[42] and argues that the SOPA is not intended to allow claims by contractors like AI who do not meet basic contractual requirements to the prejudice of employers.[43] AGPL further asserts that the failure to provide the performance bond should have been, but was not, factored into the learned Adjudicator's assessment, resulting in errors in the adjudicated amount in SOP/AA 226 of 2022.[44]

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37 CWS at para 55.

38 CWS at paras 56 and 61–63.

39 CWS at paras 70–71 and 80.

40 CWS at paras 81–84.

41 CWS at paras 89 and 108–111.

42 CWS at paras 100–103.

43 CWS at para 106.

44 CWS at paras 112–117; Minute sheet in HC/OA 160/2023 dated 13 April 2023.

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AI's case as the defendant

21 In response, AI argues that AGPL's application to set aside the Adjudication Determination should be dismissed.[45]

22 AI first argues that the learned Adjudicator's determination of the statutory timelines, as summarised at [12] above, is correct.[46] Therefore, AI had filed its adjudication application within the prescribed time.[47] AI contends that, statutorily, there is no prescribed date for the submission of the PC under ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA because a payment claim may be served on any day in a month pursuant to reg 5(1) of the SOPR, and it is not stated anywhere in the SOPA or the SOPR that "the last day of the month" is the "prescribed date" stated in s 10(3)(*b*) of the SOPA.[48] In the alternative, AI contends that any day can be a "prescribed date" since a payment claim can be served anytime.[49] AI also reasons that s 10(3) of the SOPA has no application in the present case since the purpose of the deeming provision is to save payment claims that were served on an incorrect date.[50] AI further makes the point that AGPL's reading of the deeming provision serves to retard rather than speed up the payment process – on AGPL's reading, a payment claim served earlier in the month is *deemed to have been served* only on the last day of the month – and this is contrary to Parliament's intent.[51]

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45 DWS at para 78.

46 DWS at paras 17–19.

47 DWS at para 19.

48 DWS at paras 21–29.

49 DWS at para 30.

50 DWS at paras 32–34.

51 DWS at paras 35–36.

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23 In responding to AGPL's contentions about the *weekly* frequency of progress claims under cl 14 of the Contract, AI argues that reg 5(1A) of the SOPR does not preclude a contractor from serving *any* payment claim just because the relevant payment clause in the contract provides for the submission of claims more often than once per month.[52] Instead, all reg 5(1A) does is to regulate the frequency of payment claims.[53] AI argues that only the *frequency* portion of cl 14 of the Contract is nullified by reg 5(1A) of the SOPR, and AI is still entitled to serve payment claims under that clause, albeit on a monthly basis.[54] AI's alternative argument on this point is that if the *entirety* of cl 14 of the Contract on the submission of weekly progress claims is nullified, then the SOPA functions as a "gap-filler" to entitle AI to serve monthly payment claims.[55]

24 In relation to AGPL's arguments about the alleged failure by AI to provide a performance bond, AI submits that this point was not raised in the affidavit submitted by AGPL to this court.[56] AI further submits that AGPL's arguments on the performance bond touch on the merits of the learned Adjudicator's determination, and that the court, in hearing a setting aside application, should not review the merits of the learned Adjudicator's determination.[57]

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52 DWS at para 40.

53 DWS at para 40.

54 DWS at para 42.

55 DWS at paras 43 and 47.

56 Minute sheet in HC/OA 160/2023 dated 26 April 2023.

57 Minute sheet in HC/OA 160/2023 dated 26 April 2023; DWS at para 61.

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Issues

25 The following issues arise for my decision in this application:

(a) whether, for the purposes of ascertaining the due date for the provision of a payment response under s 11(1) of the SOPA and the time frame within which an adjudication application must be filed under s 13(3)(*a*) read with s 12 of the SOPA, the date the PC was "served under section 10" is 16 November 2022, which is the actual date on which the PC was served, or 30 November 2022, which AGPL contends is the date the PC is "deemed to have been served" under s 10(3)(*b*) of the SOPA;

(b) whether a provision in the Contract for "weekly progress claims" takes the Contract outside the ambit of the SOPA; and

(c) whether AI's alleged failure to provide a performance bond disentitles AI from making a progress payment claim and is a ground for setting aside the Adjudication Determination, and, relatedly, whether there are errors in the adjudicated amount that would warrant the setting aside of the Adjudication Determination.

The relevant statutory timelines

26 I turn first to consider the statutory timelines for the service of a payment claim and payment response, where the contract, such as the Contract in this case, does not stipulate the relevant dates.

27 Where the contract does not contain terms that specify, or provide for the determination of, a date or period for the service of a payment claim, s 10(2)(*a*)(ii) of the SOPA applies to require that the payment claim be served not later than the date prescribed for the purpose of s 10(2)(*a*)(ii) of the SOPA ("the

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Prescribed Date"). In cases where s 10(2)(*a*)(ii) applies and a payment claim is served before the Prescribed Date, s 10(3)(*b*) of the SOPA deems it to have been served on the Prescribed Date. After the payment claim is served on the respondent, the respondent is required to provide the claimant with a payment response. In this regard, s 11(1)(*b*) of the SOPA requires, in situations where the contract does not contain terms that specify, or provide for the determination of, a date by which the payment response is to be provided, the payment response to be provided within 14 days after the payment claim is "served under section 10". If a respondent fails to provide a payment response under s 11(1)(*b*) of the SOPA, s 12(5)(*b*) of the SOPA provides that the respondent may still do so during the Dispute Settlement Period, which is the period of seven days after the period within which the payment response is required to be provided under s 11(1) of the SOPA: see s 12(6) of the SOPA. If, by the end of the Dispute Settlement Period, the dispute is not settled or the respondent does not provide the payment response, the claimant is, pursuant to s 12(2) of the SOPA, entitled to make an adjudication application in relation to the payment claim. Under s 13(3)(*a*) of the SOPA, the adjudication application must be made within seven days after the entitlement to make the adjudication application first arises under s 12 of the SOPA. The preceding statutory timelines and the parties' positions[58] may be summarised as follows:

	Relevant statutory provisions	**AGPL's position**	**AI's position**
Service of payment claim	If the contract does not contain any terms that	While the actual date of service was 16	The actual date of service was 16 November 2022.

[58] DWS at para 18.

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	specify, or provide for the determination of, a date or period for the service of a payment claim, s 10(2)(*a*)(ii) provides that the payment claim must be served not later than the Prescribed Date. If a payment claim is served before the Prescribed Date, s 10(3)(*b*) provides that the payment claim is deemed to have been served on the Prescribed Date.	November 2022, the PC was deemed to have been served on 30 November 2022, being the last day of the month.	The deemed date of service has no application.
Service of payment response	If the contract does not contain any terms that	The due date was 14 December 2022.	The due date was 30 November 2022.

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	specify, or provide for the determination of, a date by which the payment response is to be provided, the payment response must be provided within 14 days after the payment claim is served (s 11(1)(*b*)). Alternatively, the payment response may be provided within the Dispute Settlement Period (s 12(5)(*b*)), which is seven days after the period within which the payment	Alternatively, it was the end of the Dispute Settlement Period on 21 December 2022. AGPL provided the payment response on 14 December 2022.	Alternatively, it was the end of the Dispute Settlement Period on 7 December 2022.

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	response is required to be provided (s 12(6)).		
Date on which entitlement to make adjudication application first arose	The claimant is entitled to make an adjudication application if, by the end of the Dispute Settlement Period, the dispute is not settled, or no payment response is provided (s 12(2)).	First arose on 22 December 2022.	First arose on 8 December 2022.
Period within which the adjudication application is to be filed	The adjudication application must be made within seven days after the entitlement of the claimant to make an	Within seven days after 22 December 2022.	Between 8 and 14 December 2022 (both dates inclusive).[59] AI filed the adjudication

[59] DWS at para 19.

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	adjudication application first arises (s 13(3)(*a*)).		application on 13 December 2022.

28 As the High Court observed in *Libra* at [32], a payment claim that is served in compliance with s 10(1) of the SOPA is the bedrock upon which the adjudication process rests, and it is the trigger for the adjudication process. As may be seen from the procedure set out at [27] above, the process is "triggered" with the service of the payment claim, and the due dates for the subsequent steps in the process hinge on the date the payment claim is "served under section 10" (see s 11(1) of the SOPA). In this case, the date on which the payment claim is "served under section 10" is therefore core to the inquiries of whether the payment response was served out of time, and whether the adjudication application was premature. If the date the PC was "served under section 10" was the actual date of service on 16 November 2022 as AI contends, the payment response provided by AGPL would have been out of time, and the adjudication application filed by AI on 13 December 2022 would have been filed in accordance with the statutory timelines and valid. If, however, the date on which the PC was "served under section 10" was deemed (under s 10(3)(*b*) of the SOPA) to be 30 November 2022 as AGPL contends, then the payment response filed by AGPL would have been filed within time, and the adjudication application filed by AI would have been premature and invalid.

29 The determination of the date of service of the PC turns on the question of what the Prescribed Date is. The answer to the latter question lies in how ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA are to be read with regs 5(1) and 5(3) of the SOPR. To begin with, ss 10(2)(*a*) and 10(3) of the SOPA provide as follows:

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> **Payment claims**
>
> …
>
> (2) A payment claim must be served —
>
> (*a*) not later than —
>
> (i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or
>
> (ii) the date prescribed for the purpose of this subsection if the contract does not contain such terms; and
>
> …
>
> (3) In subsection (2) —
>
> (*a*) a payment claim that is served before the date or last day mentioned in subsection (2)(*a*)(i) is deemed to have been served on that date or day, as the case may be; and
>
> (*b*) a payment claim that is served before the prescribed date mentioned in subsection (2)(*a*)(ii) is deemed to have been served on that date.

30 Regulation 5 of the SOPR, which deals with payment claims, states at regs 5(1) and 5(3) as follows:

> **Payment claims**
>
> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim must be served or by which such time may be determined, then a payment claim made under the contract must be served by the last day of —
>
> (*a*) the month following the month in which the contract is made; or

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> (*b*) any subsequent month.
>
> …
>
> (3) In this regulation, "month" means a period of time beginning on the first day of each of the 12 calendar months into which a year is divided, and ending on the last day of each of these months.

31 The provisions above address two different questions. First, s 10(2)(*a*) of the SOPA, read with regs 5(1) and 5(3) of the SOPR, deals with the question of the date by which a payment claim must be served, *ie*, the service period. Under s 10(2)(*a*)(i), where the contract specifies, or provides for the determination of, a date or period, for the service of a payment claim, then the payment claim must be served not later than the contractual date or the last day of the contractual period. Under s 10(2)(*a*)(ii), if the contract does not contain terms that specify, or provide for the determination of, a service date or service period, then the payment claim must be served *not later than the Prescribed Date*. It is pertinent to note that s 2(1) of the Interpretation Act 1965 (2020 Rev Ed) defines "prescribed" as "prescribed by the Act in which the word occurs or by any subsidiary legislation made thereunder". The relevant provisions of the subsidiary legislation are regs 5(1) and 5(3) of the SOPR. Regulation 5(1) specifies the day by which a payment claim must be served in a case where the contract does not contain any provision that specifies, or provides for the determination of, the time at which a payment claim must be served. So, where s 10(2)(*a*)(ii) applies, reg 5(1) of the SOPR also applies to provide that a payment claim must be served *by* the last day of the month following the month in which the contract is made or any subsequent month. In this regard, reg 5(3) clarifies that "month" means a calendar month. Reading these provisions together, it follows that the Prescribed Date contemplated in s 10(2)(*a*)(ii) must be the last day of the relevant calendar month. Put simply, where s 10(2)(*a*)(ii)

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applies, the payment claim must be served not later than the last day of the relevant calendar month.

32 Second, s 10(3) of the SOPA deals with the separate question of when a payment claim is *deemed to have been served* for the purposes of the running of the statutory timelines, *ie*, the service date. In other words, the *actual date* of service of the payment claim, and the *deemed date* of service of the payment claim, may differ. Under s 10(3)(*a*), where the contract specifies, or provides for the determination of, a date or period for the service of a payment claim, a payment claim that is served before the contractual date or the last day of the contractual period is deemed to have been served on that contractual date or on that last day of that contractual period, as the case may be. Under s 10(3)(*b*), if the contract does not contain terms that specify, or provide for the determination of, a date or period for the service of a payment claim, then a payment claim that is served before the Prescribed Date is deemed to have been served on the Prescribed Date. This deemed service date is important because it determines the subsequent timelines for the provision of a payment response and the filing of an adjudication application (if any).

33 From the above, it is clear that both ss 10(2)(*a*)(ii) and 10(3)(*b*) apply to scenarios where the contract does not contain terms that specify, or provide for the determination of, a contractual service date or contractual service period. Specifically, s 10(2)(*a*)(ii) provides for a service period and s 10(3)(*b*) provides for a deemed service date. What, then, is the cumulative effect of these two provisions when applied together?

34 In answering this question, AI submits that, where ss 10(2)(*a*)(ii) and 10(3)(*b*) apply, there is a prescribed service period but there is no Prescribed Date on which a payment claim must be deemed to have been served, relying

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heavily on the Court of Appeal decision 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*").[60] AI argues that since *Chua Say Eng* held at [93]–[94] that reg 5(1) of the SOPR provides that a payment claim shall be served "by the last day of each month following the month in which the contract is made", and that "it would not matter on what day [of the month] the claim is made", this means that a payment claim may be served on any day in a month. There is, therefore, no "prescribed date" as such, and no requirement to serve a payment claim at the end of the month.[61] AI further argues that it is not stated in reg 5(1) of the SOPR that the last day of the month is the Prescribed Date.

35 I am unable to agree with that submission. In my view, the fact that reg 5(1) allows for a period in which a payment claim must be actually served does not detract from its separate effect of also *deeming* a service date for the purpose of s 10(3)(*b*). It bears emphasis that the Prescribed Date in s 10(2)(*a*)(ii), read with reg 5(1), is the *same* "prescribed date" referred to in s 10(3)(*b*). This is because s 10(3)(*b*) refers to the "prescribed date mentioned in subsection (2)(*a*)(ii)" of s 10. This means that the Prescribed Date in s 10(2)(*a*)(ii), that sets out the last day on which a payment claim may be served, is also the deemed date of service under s 10(3)(*b*). In light of my finding in [31] that the Prescribed Date is the last day of the relevant calendar month, the deemed date of service under s 10(3)(*b*) is therefore also the last day in the relevant calendar month. Accordingly, the effect of ss 10(2)(*a*)(ii) and 10(3)(*b*) is that if the contract does not contain terms that specify, or provide for the determination of, a service date or service period, then any payment claim will

60 DWS at para 24.

61 DWS at paras 24–28.

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be deemed to have been served on the last day of the calendar month in which it was served, regardless of when it was actually served.

36 There is a further reason why I do not accept AI's argument. It disregards the fact that the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ("SOPA Amendment Act") amended s 10 of the SOPA by *introducing* the deeming provision in s 10(3) of the SOPA via s 5(*a*) of the SOPA Amendment Act. Indeed, the Explanatory Statement to the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) ("SOPA Amendment Bill") (pursuant to which the SOPA Amendment Act was enacted) explains that the new s 10(3) was inserted "to specify the deemed date of service for a payment claim that is served before the applicable due date in section 10(2)". Further, when Parliament enacted s 10(3)(*b*) of the SOPA, it decided, for the purpose of defining the Prescribed Date, to adopt the same date as that mentioned in s 10(2)(*a*)(ii). Accordingly, AI's argument that there is no Prescribed Date is flawed as it turns a blind eye to the deeming provision in s 10(3)(*b*) of the SOPA and the scheme adopted by Parliament for determining the statutory timelines under the SOPA.

37 It is apposite at this juncture to deal with a point made by the learned Adjudicator, that the words "or *last day* mentioned in subsection 2(*a*)(i) …" [emphasis added] which are present in s 10(3)(*a*) of the SOPA, are absent in s 10(3)(*b*) of the SOPA. In the learned Adjudicator's view, this point supports the position that the Prescribed Date mentioned in s 10(3)(*b*) of the SOPA cannot possibly be the last day of the month, which is AGPL's interpretation of the statute.[62] I am unable to agree with the learned Adjudicator. In my judgment,

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62 AD at para 52.

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there is no reference to the "last day" in s 10(3)(*b*) of the SOPA simply because s 10(2)(*a*)(ii) makes no reference to the last day of a period. As s 10(2)(*a*)(ii) refers only to the Prescribed Date, s 10(3)(*b*) likewise makes reference to a *single date*. This *single date* is the Prescribed Date, which, as explained at [31] and [35] above, is the last day of the month. In contrast, s 10(3)(*a*) refers to "the date or last day mentioned in subsection (2)(*a*)(i)" as s 10(2)(*a*)(i) refers to both a "date" and also "a period". The reference to "last day" in s 10(3)(*a*) of the SOPA is necessary to accommodate the reference in s 10(2)(*a*)(i) to "a period", which, logically, has a "last day". Therefore, the fact that the words "last day" appear in s 10(3)(*a*) but are absent from s 10(3)(*b*) says nothing about whether the Prescribed Date can or cannot be the last day of the month.

38 AI's alternative submission is that *Chua Say Eng*'s holding supports its view that "any day" can be the Prescribed Date.[63] I do not think that *Chua Say Eng* assists AI's case. First, *Chua Say Eng* was not concerned with the interpretation of the SOPA or SOPR to ascertain the date of the service of the payment claim, as is the case here. Second, AI's reliance on *Chua Say Eng* is problematic in that it attempts to apply an authority that was decided before the SOPA was amended in 2018. The deeming provision in s 10(3) of the SOPA, with which we are concerned, was only introduced in the 2018 amendments. As for reg 5(3), it was inserted by the Building and Construction Industry Security of Payment (Amendment) Regulations 2019. As such, the Court of Appeal's statements in *Chua Say Eng* did not directly concern the interpretation of these specific provisions and should not be taken out of their proper context.

39 Critically, on AI's argument that the Prescribed Date can be "any day", ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA would read absurdly. It will result in

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63 DWS at paras 28 and 30.

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s 10(2)(*a*)(ii) providing that "[a] payment claim must be served … not later than … [any day]". As for s 10(3)(*b*), I will use the present Contract for illustration. If the Prescribed Date is taken to be "any day", it would result in s 10(3)(*b*) of the SOPA providing, in the present context, that "a payment claim that is served *before* [16 November 2022 (being the actual date of service)] is deemed to have been served on [16 November 2022]". This interpretation gives no indication as to the deemed date of service for a payment claim that was actually served *on* 16 November 2022. Further, if the deemed date of service is taken to be 16 November 2022, then this interpretation renders the provision otiose as it begs the question of why a payment claim that is actually served on 16 November 2022 must be specifically deemed to be served on that date.

40 In contrast, AGPL's submission that the Prescribed Date refers to the "last date of the month"[64] coheres better with parliamentary intent for the 2018 SOPA amendments, as expressed in the speech of the then Minister of State for National Development, Mr Zaqy Mohamad, at the Second Reading of the SOPA Amendment Bill on 2 October 2018. The Minister stated (see *2018 Debate*):

> Currently, the Act requires claimants to serve payment claims according to the contract terms. Typically, a contract will stipulate a specific date or fixed period for payment claims to be served so that employers can better manage payment claims from multiple sub-contractors. However, there have been past cases where claimants unintentionally serve their claims on the wrong date.
>
> This technically invalidates the payment claim during adjudication. Such issues have also been raised before the Courts, leading to payment delays. To address this, clause 5 will provide that the payment claim will be valid even if it is served before the date or the period specified in the contract.
>
> In such cases, *the payment claim will be deemed as served on the contract specified date or on the last day of the fixed period.*

64 CWS at para 35.

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> *To illustrate, if a contract specifies that the payment claim must be made on the 29th of the month, the payment claim will still be valid if the claimant serves it before the 29th of the month. However, the respondent's deadline for payment response will only start running from the 29th of the month.* If the claimant serves a payment claim on the 30th of the month instead of 29th, his claim will be treated as being served in the next month.
>
> [emphasis added]

41 I am fully cognisant that the Minister, in the extract above, was mainly discussing the effect of s 10(3)(*a*) of the SOPA, which is the sister provision of s 10(3)(*b*). The difference between the two provisions is that s 10(3)(*a*) of the SOPA applies to contracts where the service date or service period for payment claims is specified in the contract or can be determined in accordance with contractual terms, whereas s 10(3)(*b*) of the SOPA applies to contracts where the service date or service period is not specified and cannot be so determined using the contractual terms. Based on the Minister's explanation, under s 10(3)(*a*) of the SOPA, if a payment claim is served before the date stipulated in the contract for service of a payment claim, the payment claim will still be valid, but the respondent's deadline for the payment response will only start running from the date stipulated in the contract for service of payment claims or from the last day of the service period (in the event the contract stipulates a period for service). However, I note that both ss 10(3)(*a*) and 10(3)(*b*) are worded similarly, and there is no reason why the Minister's comments on the effect of s 10(3)(*a*) of the SOPA should not also apply in parallel to s 10(3)(*b*), such that the respondent's deadline for payment response will only start running from the Prescribed Date.

42 Next, as against AGPL's proposed reading of s 10(3)(*b*), *ie*, that the Prescribed Date refers to the "last date of the month", AI submits that AGPL's

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interpretation would retard rather than speed up the payment process.[65] This argument does not advance AI's case. In the context of a contract like the present one, wherein the parties do not stipulate timelines for the service of payment claims or payment responses, it is reasonable for the respondent's deadline for payment response to be fixed to run only from the last day of the calendar month. This provides certainty for the respondent and helps to facilitate the timely service of payment responses. A payment process that keeps to regular timelines that run from a consistent day in each month keeps the SOPA mechanism running smoothly, prevents the missing of deadlines due to inadvertence, and minimises disputes. As a corollary, this also relieves a respondent from the need to constantly keep track of payment claims that are not served according to any stipulated contractual timelines. Indeed, the practical value of having a consistent and fixed date for the calculation of payment claim and payment response timelines was observed by the Minister at the Second Reading of the SOPA Amendment Bill when he stated that "[t]ypically, a contract will stipulate a specific date or fixed period for payment claims to be served so that employers can better manage payment claims from multiple sub-contractors" (see *2018 Debate*).

43 Finally, AI makes the broad argument that the deeming provision in s 10(3) of the SOPA does not operate in situations such as the present, where reg 5(1) of the SOPR allows a payment claim to be served on any day of the month.[66] According to AI, the rationale of s 10(3) of the SOPA is to save prematurely served payment claims from invalidation (see *2018 Debate*), and a payment claim served in a contract such as the present one, where there is no

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65 DWS at para 36.

66 DWS at para 34.

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stipulated date for service, does not require saving.[67] Parenthetically, I note that this argument was looked upon favourably by the learned Adjudicator.[68]

44 I am, however, not able to agree with this line of argument. As observed above at [32], s 10(3)(*b*) is the deeming provision that applies where the contract does *not* contain terms that stipulate, or provide for the determination of, a date or period for the service of a payment claim. The issue of payment claims being prematurely served before the contractually stipulated date or service period therefore does not arise in such situations. Yet, in such situations, Parliament saw it fit to introduce s 10(3)(*b*) as a deeming provision that would apply to payment claims. It is therefore patently obvious that s 10(3) of the SOPA applies even when payment claims do not require saving. In my view, s 10(3)(*b*) provides certainty for the timelines for the filing of payment responses and adjudication applications, and it achieves this by altering, for the purposes of s 11(1) of the SOPA, the date on which a payment claim is regarded as "served under section 10" from the actual date of service to the deemed date of service. It is therefore not open to AI to argue that s 10(3)(*b*) should not be given effect at all on the basis that the payment claims in such situations do not need saving.

45 In view of the foregoing, I find that the Prescribed Date for the purposes of ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA is "the last day of the month", with "month" referring to a calendar month. I set out below illustrations of how the date on which a payment claim is "served under section 10" of the SOPA should be ascertained based on this reading of the legislation:

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67 DWS at paras 32–34.

68 AD at paras 49–51.

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Scenarios	**Contractual date for service of payment claim**	**Applicable statutory provision**	**Actual date of service of payment claim**	**Date on which payment claim is served under s 10**
Scenario A: Where the contract contains terms that stipulate a payment claim service date.	Assuming that the contract provides for the 15th of the month.	Sections 10(2)(*a*)(i) and 10(3)(*a*) of the SOPA	Assuming that it is on 10 July	15 July
Scenario B: Where the contract contains terms that stipulate a payment claim service period.	Assuming that the contract provides for the 15th–18th of the month.	Sections 10(2)(*a*)(i) and 10(3)(*a*) of the SOPA	Assuming that it is on 10 July	18 July
Scenario C: Where the contract is silent on *when* a payment claim must be served.	No date is stated.	Sections 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA, read with regs 5(1) and 5(3) of the SOPR	Assuming that it is on 10 July	31 July

46 With the applicable principles in mind, I turn now to the facts of this case. I begin with the question of the date on which the PC was served under s 10 of the SOPA. In this regard, since the PC was actually served on

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16 November 2022 and the Contract does not stipulate the date for service, the PC is *deemed* to have been served on 30 November 2022, being the last day of November 2022. Turning then to ascertain the date by which the payment response must have been provided, given that the Contract does not prescribe a timeline for the provision of the payment response, s 11(1)(*b*) of the SOPA states that the payment response must be provided by AGPL "within 14 days after the payment claim is served under section 10". Therefore, the payment response should have been provided by 14 December 2022, which was 14 days after the deemed date of service of the PC.

47 I now consider the date on which AI was entitled to make an adjudication application. Taking into account the Dispute Settlement Period as provided for by ss 12(2) read with 12(6), which is a period of seven days after the date by which the payment response is required to be provided (*ie*, 14 December 2022), I find that AI's entitlement to make an adjudication application first arose after 21 December 2022, on 22 December 2022.

48 After this entitlement first arose on 22 December 2022, s 13(3)(*a*) provides that AI was entitled to make the adjudication application within seven days thereafter. Accordingly, the earliest date for the making of a valid adjudication application in respect of the PC was 22 December 2022. The present adjudication application in SOP/AA 226 of 2022, which was lodged on 13 December 2022, was therefore lodged prematurely. As the right to make an adjudication application had not arisen at the time it was filed, the adjudication application is invalid, and the learned Adjudicator had no power to adjudicate. Thus, the learned Adjudicator was without jurisdiction to render a determination in SOP/AA 226 of 2022 and the Adjudication Determination should be set aside. This is sufficient to dispose of this application brought by AGPL, but I will deal briefly with the other two issues raised by AGPL for completeness.

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The provision for "weekly progress claims"

49 I turn now to consider AGPL's contention that no payment claims for work done under the Contract may be made under the SOPA,[69] as cl 14 of the Contract, which provides for "weekly progress claims", takes the Contract outside the ambit of the SOPA. In this regard, AGPL asserts that the SOPA only applies to monthly valuated payment claims.

50 I begin my analysis of this issue with reference to s 4 of the SOPA, which deals with the "Application of [the] Act". Section 4(1) of the SOPA provides that "[s]ubject to subsection (2), this Act applies to *any contract* that is made in writing on or after 1 April 2005, whether or not the contract is expressed to be governed by the law of Singapore" [emphasis added]. Section 4(1) of the SOPA must be read with s 2, which defines a "contract" under the SOPA to mean "a construction contract or a supply contract". It is undeniable that the Contract is a construction contract, being a contract for the remodelling of premises.

51 I turn next to s 4(2) of the SOPA, which excludes certain contracts from the ambit of the SOPA. None of the exclusions are relevant in the present case. Specifically, a contract providing for quantified weekly payment is not excluded.

52 I therefore find AGPL's contention that the Contract is outside the ambit of the SOPA to be without basis or merit.

53 As for AGPL's reliance on reg 5(1A) of the SOPR in support of their contention that payment claims made under the SOPA are restricted only to

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69 CWS at paras 56, and 61–63.

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monthly claims,[70] I find it to be misconceived. Regulations 5(1) and 5(1A) provide:

> **Payment claims**
>
> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim must be served or by which such time may be determined, then a payment claim made under the contract must be served by the last day of —
>
> (*a*) the month following the month in which the contract is made; or
>
> (*b*) any subsequent month.
>
> (1A) For the purposes of paragraph (1), only one payment claim made under a contract may be served in each month.
>
> …

54 It is clear from the statutory language that reg 5(1A) of the SOPR, which restricts the *service* of payment claims to one each month, is only "[for] the purposes of [reg 5(1)]". Where reg 5(1) applies, *ie*, where the contract does not contain any provision that specifies, or provides for the determination of, the time at which a payment claim must be served, reg 5(1A) is meant to regulate *the frequency of service of payment claims*. There is nothing in reg 5(1A) which limits the application of the SOPA or which excludes contracts from the ambit of the SOPA. Indeed, in *Libra*, the court considered the Court of Appeal's guidance in *Chua Say Eng* and arrived at the conclusion that "the time for and frequency of service of a payment claim is first and foremost a matter of contract" (at [42(c)]), and that reg 5(1) only operates to provide a "default setting" in situations "where the contract is silent" (at [42(d)]). I agree with the learned Adjudicator that the provision for weekly progress claims in the Contract does not disentitle AI from serving payment claims under the SOPA. To conclude otherwise would also defeat the protective regime of the SOPA

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[70] CWS at para 71.

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because the SOPA may be disapplied, whether intentionally or inadvertently, by employers and contractors simply through seemingly innocuous contractual terms varying the payment frequency in contracts that do not contain any provision specifying the time at which a payment claim must be served. Indeed, s 36(1) of the SOPA prevents this by providing that "[t]he provisions of [the SOPA] have effect despite any provision to the contrary in any contract or agreement". I therefore reject AGPL's contention that the term providing for "weekly progress claims" takes the Contract outside the ambit of the SOPA.

55 There is no need for me to go further and deal with the arguments on whether the "weekly progress claims" term is a contractual term that purports to modify the operation of reg 5(1A) of the SOPA and which is therefore "nullified" by s 36 of the SOPA, or whether the Contract may be supplemented by the provisions in the SOPA notwithstanding any gaps created by the nullification of the "weekly progress claims" term. AI advances these arguments in response to AGPL's contention that the SOPA has no application to the Contract. However, there is nothing that disentitles AI from serving the PC on AGPL as I have found at [52] and [54] that the SOPA applies to the Contract. In this regard, it is clear that AI's entitlement to progress payment, as provided for by the Contract, is consistent with s 5 of the SOPA which states that any "person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment". Pertinently, AI is not acting in contravention of reg 5(1A) of the SOPR when it combined its payment entitlements for work done under the Contract within a reference period that stretched from 19 July to 31 October 2022 when it submitted the PC for a "FINAL CLAIMED AMOUNT" on 16 November 2022.[71] In short, there

[71] CPH at p 68.

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is no issue of the "weekly progress claims" term being engaged in any way to thwart the operation of the SOPA or any part of the SOPA, or to contravene reg 5(1A).

56 Similarly, to the extent that AGPL's complaint about the Contract is that "the claims were based on instalment [*sic*] and not valuation",[72] I have not been referred to any legislative or case authority in support of AGPL's contention that the claims, which AGPL refers to as instalments, put the Contract outside the ambit of the SOPA. On the contrary, s 2 of the SOPA provides that a "progress payment" means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes a single or one-off payment (including a final payment) or a payment that is based on an event or a date (including a final payment). There is nothing in that provision that excludes a progress payment that is based on a pre-determined quantification that the contracting parties had agreed to or an aggregation of such quantifications. In fact, s 6(*a*) of the SOPA provides that the amount of a progress payment is the amount calculated in accordance with the contract. It is only if the contract does not contain such a provision that s 6(*b*) of the SOPA applies to provide that the amount of a progress payment is to be calculated on the basis of the value of the construction work carried out or of the goods or services supplied. In short, the parties in this case had agreed to progress payments to be paid under the Contract on a regular interval for pre-determined amounts, and there is nothing in the SOPA or the SOPR which precludes such an arrangement. In my view, therefore, AGPL's argument that the Contract is outside the ambit of the SOPA because it provides for instalment (as opposed to valuated) payments also cannot stand and should not be accepted.

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72 CWS at para 62.

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AI's alleged refusal to provide a performance bond

57 Finally, I turn to AGPL's contention that the SOPA is not intended to allow claims by contractors who do not meet basic contractual requirements to the prejudice of employers. In this regard, AGPL complains about AI's alleged refusal to provide a performance bond as required by cl 9 of the Contract and argues that the alleged failure of the learned Adjudicator to account for the performance bond sum created errors in the adjudicated amount.

58 This argument by AGPL may be promptly disposed of. It is not stated anywhere in the SOPA that a contractor's entitlement to a progress payment is contingent on the provision of a performance bond, even if there is a contractual stipulation for the provision of such a bond. Further, any issue with the adjudicated amount determined by the learned Adjudicator, including any alleged failure to account for the performance bond amount that AGPL contends AI is contractually bound to furnish, would go to the merits of the learned Adjudicator's evaluation of AI's claim, and is not a ground to set aside the Adjudication Determination in SOP/AA 226 of 2022. As noted by the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [73], the role of a court in reviewing an adjudicator's determination is not to review the merits of the determination, and any setting aside must be premised on the adjudicator's acting in excess of his jurisdiction or in breach of the rules of natural justice. This principle applies to the present case.

Concluding remarks

59 Given my finding at [48] that the Adjudication Application was lodged prematurely and that the learned Adjudicator was without jurisdiction to render a determination in SOP/AA 226 of 2022, I allow AGPL's application and set aside the Adjudication Determination pursuant to s 27(8)(*a*) of the SOPA. I also

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make the usual consequential orders for payment out of the security furnished by AGPL.

60 I will hear the parties on costs.

Teh Hwee Hwee
Judicial Commissioner

Lee Wei Yung and Harpal Singh (Tito Isaac & Co LLP) for the claimant
Chia Swee Chye Kelvin (Lumen Law Corporation) for the defendant.

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