Mataban Development Pte Ltd
v
Black Knight Warrior Pte Ltd

[2017] SGHCR 12

High Court — Originating Summons No 448 of 2017 (Summons No 2236 of 2017)
Colin Seow AR
11 July 2017

Building and construction law – Dispute resolution – Alternative dispute resolution procedures – Setting aside of adjudication determination

23 August 2017 Judgment Reserved.

Colin Seow AR:

Introduction

1 Summons No 2236 of 2017 ("the Application") is an application taken out by Black Knight Warrior Pte Ltd ("the Defendant") seeking the following orders:

(a) that the Order of Court dated 26 April 2017 *vide* HC/ORC 2675/2017 be set aside;

(b) that the Adjudication Determination dated 21 March 2017 ("the Adjudication Determination") *vide* Adjudication Application No SOP/AA 051 of 2017 ("the Adjudication Application") be set aside; and

(c) Costs of the Application to be paid by Mataban Development Pte Ltd ("the Plaintiff") to the Defendant.

2 The Application was taken out pursuant to section 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA"). The procedure for the taking out of such an application is provided for under Order 95 rule 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC").

3 The Application came up for hearing before me on 11 July 2017, at the end of which I reserved judgment. At the invitation of this court, further written submissions were tendered by the parties' respective counsel on 2 August 2017. I now render my decision on the Application with my grounds attached.

Procedural history

4 Before I delve into the merits of the Application, it is apposite to outline very briefly how the Application came to be heard by me.

5 On 24 April 2017, the Plaintiff took out an *ex parte* application in Originating Summons No 448 of 2017 ("the OS") pursuant to section 27 of the SOPA seeking leave to enforce the Adjudication Determination against the Defendant. The Adjudication Determination was earlier issued in the Plaintiff's favour on 21 March 2017 pursuant to the Plaintiff's Adjudication Application against the Defendant in respect of a construction dispute that had arisen between the parties. Leave to enforce the Adjudication Determination was granted by an Assistant Registrar on 26 April 2017.

6 On 27 April 2017, the Assistant Registrar's order was extracted by the Plaintiff *vide* HC/ORC 2675/2017 (see [1(a)] above).

7 On 16 May 2017, the Defendant filed the Application in court. The hearing for the Application was initially scheduled to take place on 2 June 2017. The hearing was later re-scheduled twice before it was fixed on 13 June 2017 before a High Court Judge. The 13 June 2017 hearing was subsequently vacated, and the parties appeared before a Senior Assistant Registrar for a pre-trial conference ("PTC") on 14 June 2017. At the PTC, directions were given for the Application to be heard by a High Court Judge on 11 July 2017.

8 On 27 June 2017, the Plaintiff's counsel wrote in to the Registry requesting that the hearing of the Application be re-fixed before any Assistant Registrar for reasons which I shall reproduce herewith for reference:

> […] The provisions of the [SOPA] and the [ROC] do not appear to require that applications made under section 27 of SOPA be heard before a Judge.
>
> […] In this regard, there are several reported cases in which applications under section 27 of SOPA were heard before an [Assistant Registrar] at first instance. For instance, *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHCR 13 […] and *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd* [2013] SGHCR 16 […]
>
> […] As the sum in dispute in this case is less than S$250,000.00, we do not wish to trouble the [High Court Judge] to hear this matter.
>
> […]
>
> […] The Defendant has indicated that it has no objections to our client's proposal to write to the Registry to request for [the Application] to be heard before an [Assistant Registrar].

9 The Registry accordingly re-fixed the Application to be heard by any Assistant Registrar on 11 July 2017. The Application was eventually assigned to my list for hearing.

10 In relation to the parties' request for the hearing to be re-fixed before any Assistant Registrar, I thought it appropriate to highlight certain comments made by the High Court in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 at [65] ("*Admin Construction Pte Ltd*"), as follows (per Quentin Loh J):

> 65 […] I offer some questions for the consideration of the relevant authorities and stakeholders. *Perhaps some thought should be given to whether challenges to adjudication determinations should in the first instance be heard before assistant registrars as that would add one more layer of appeal.* This would cause undue delay, especially if there has been a stay of payment out to the claimant. […] [emphasis added]

11 It is appreciated that the High Court's comments in *Admin Construction Pte Ltd* are strictly speaking *obiter*. Nevertheless, I consider these comments to be of useful guidance to parties embroiled in a challenge against an adjudication determination under the SOPA regime. More so, it is my respectful view that it is sensible for legal practitioners in the field of construction disputes to be mindful of these comments of the High Court when advising their clients as to the manner in which a setting aside application such as the present one should take its course at first instance.

12 At the hearing before me, counsel for the Plaintiff quite candidly admitted that he was not aware of the High Court's comments in *Admin Construction Pte Ltd* when the request to re-fix the hearing before any Assistant Registrar was made earlier. To his credit, however, counsel for the Plaintiff explained (as he did before (see [8] above)) that the request was made having regard to the following considerations:

(a) the principal sum involved in the Adjudication Determination was around $92,000; and

(b) he thought it best not to trouble a High Court Judge to hear the Application at first instance given the relatively low amount at stake.

13 In the end, I considered it proper to proceed with the hearing on 11 July 2017 rather than deferring the hearing to a High Court Judge, in order to avoid any further postponement of the hearing quite literally at the eleventh hour. This was also on account of the fact that counsel for both sides who attended the hearing on 11 July 2017 had indicated their readiness to proceed with their arguments on the same day.

14 Be that as it may, I should think that moving forward, litigants and litigators alike should stay guided by the High Court's comments in *Admin Construction Pte Ltd* (see [10] above), if anything at all as a reminder for consideration in the event that a similar request for the re-fixing of a hearing is contemplated in a future case. With that, I turn now to deal with the Application proper.

Parties' respective cases in the Application

15 The dispute in the Application may be summarised as follows. The Defendant is seeking the setting aside of HC/ORC 2675/2017 and the Adjudication Determination on grounds of breach of the rules of natural justice and/or "jurisdictional error" committed by the adjudicator in question. In the Adjudication Determination, the adjudicator had determined that the Defendant shall pay the Plaintiff a sum of $91,955.46 (exclusive of costs) representing unpaid work done by the Plaintiff at the Defendant's "hotpot" restaurant premises in Marina Bay Sands.

16 A major point of contention pursued by the Defendant in the Application revolves around the validity of the Defendant's purported payment response

("the Payment Response") in the SOPA adjudication proceedings. The material content of the Payment Response, which was served via email by the Defendant on the Plaintiff four days after the latter had served its payment claim ("the Payment Claim"), is reproduced herewith in its original wording for reference:

> Hi Kai,
>
> Apologies for the late reply as we are preparing for the opening of restaurant.
>
> With regards to your claim, please take note that we have expressed our dissatisfaction on your job. I believe when Ms Kao when through the project with you on 27 December 2016, you have also agreed the job was not completed, most of the items did not even completed up to 50%.
>
> Also we have to highlight that due to the all the delays from Mataban on the renovation, Black Knight Warrior has incurred more than $200,000 for uncompleted renovation as well as paying rental for fit out period. We reserve the right to claim all the losses against Mataban Development Pte Ltd.

17 Against this backdrop, the Defendant's case in the Application may be summarised as follows:

(a) The adjudicator had erred in disregarding the Defendant's adjudication response ("the Adjudication Response") in the SOPA adjudication proceedings on the ground that the Payment Response was non-compliant with and therefore invalid under section 11(3) of the SOPA and regulation 6(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the SOPR").

(b) The adjudicator's misdirection as to the validity of the Payment Response resulted in a denial of the Defendant's right to be heard in the SOPA adjudication proceedings. This constituted a material breach of

the rules of natural justice and should render the Adjudication Determination void.

(c) Alternatively, in the light of the adjudicator's misdirection as to the validity of the Payment Response, the Adjudication Determination was based on a "jurisdictional error" and should therefore be set aside on that basis.

18 The Plaintiff's case in resisting the Application may be summarised as follows:

(a) It is not the court's role, when hearing an application to set aside an adjudication determination, to review the merits of the adjudicator's decision to determine whether the adjudicator had made an error in his decision.

(b) In any case, the adjudicator had correctly found that the Payment Response was not valid. In particular, the Payment Response failed to comply with section 11(3) of the SOPA and regulation 6(1) of the SOPR in that it did not (i) expressly identify the payment claim to which it related, (ii) state the response amount, and/or (iii) address or respond to any of the items claimed in the payment claim with reasons.

(c) Even if the adjudicator had incorrectly found that the Payment Response was not valid, the adjudicator had not breached the rules of natural justice because he had in fact considered the parties' submissions on the validity of the Payment Response before deciding not to consider the Defendant's reasons for withholding payment in accordance with section 15(3) of the SOPA. This was in contrast with a situation where an adjudicator finds that there was a valid payment response, and yet

fails to take into account the reasons for withholding payment in arriving at his adjudication determination.

(d) In any event, even if the adjudicator had incorrectly found that the Payment Response was not valid, there was no "jurisdictional error" committed by the adjudicator that would justify a setting aside of the Adjudication Determination.

19 For ease of reference, the relevant provisions of the SOPA and the SOPR referred to above are set out below:

Section 11(3) of the SOPA:

(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.

Section 15(3) of the SOPA:

(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or

(b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

Regulation 6(1) of the SOPR:

> **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 withdrawn is derived.

The issues in dispute

20 Having regard to the parties' respective cases in the Application, this court considers the following to be the relevant issues for determination:

(a) Does the court have a role, under section 27(5) of the SOPA, to review the merits of the adjudicator's finding that the Payment Response was invalid? ("the First Issue")

(b) If the answer to the First Issue is "yes", did the adjudicator incorrectly find that the Payment Response was invalid? ("the Second Issue")

(c) If the answer to the Second Issue is "yes", did the adjudicator commit any breach of the rules of natural justice or "jurisdictional error" in disregarding the Adjudication Response in the Adjudication

Determination, such that the Adjudication Determination should be set aside? ("the Third Issue")

21 I will address these issues in sequence.

The First Issue

The key authorities for consideration

22 In respect of the First Issue, the Plaintiff relies principally on the High Court's decision in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction Pte Ltd*") for the proposition that the court, in hearing a setting aside application under section 27(5) of the SOPA, has no role to play in reviewing the merits of an adjudicator's findings in his adjudication determination. Section 27 of the SOPA provides as follows:

> **Enforcement of adjudication determination as judgment debt, etc.**
>
> **27.**—(1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.
>
> (2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.
>
> (3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.
>
> (4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the judgment shall be for the unpaid part of the adjudicated amount.
>
> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

23 In *SEF Construction Pte Ltd*, the key issue before the High Court was whether an adjudication determination should be set aside on grounds that the adjudicator had failed to engage in a *bona fide* exercise of his powers, and breached the rules of natural justice, by issuing an adjudication determination containing written grounds only in respect of two out of four issues argued in the course of the adjudication proceedings. In declining to order the setting aside of the adjudication determination, Judith Prakash J (as she then was) outlined the role of the court as follows (at [41]-[42]):

> 41 In my judgment, bearing in mind the purpose of the [SOPA], the court's role when asked to set aside an adjudication determination or a judgment arising from the same, cannot be to look into the parties' arguments before the adjudicator and determine whether the adjudicator arrived at the correct decision. In this connection, I emphasise the intention that the procedure be speedy and economical. […] One can very easily envisage a situation (in fact such situations have already occurred) where the dissatisfied respondent first applies to the court for the adjudication determination to be set aside on the ground that, for example, the adjudication response should not have been rejected, and then when that application is rejected by the assistant registrar, appeals to the judge in chambers and finally when the appeal is unsuccessful, appeals again to the Court of Appeal. Bearing in mind that the adjudication process could have been a two-step process involving a review, that would mean five steps in all before the dispute regarding the claimant's payment claim is finally disposed of. The more steps there are, the longer the process will take and the more expensive it will be. Such an outcome would be contrary to the intention of Parliament that the adjudication process should afford speedy *interim* relief.
>
> 42 Accordingly, instead of reviewing the merits (in any direct or indirect fashion), it is my view that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper. After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the

> respondent and intended to resolve all contractual disputes that have arisen.
>
> [emphasis in underline added]

24 Prakash J further took the view that the role of the court "must be limited to" determining the existence of the following "basic requirements" (at [45]):

> (a) the existence of a contract between the claimant and the respondent, to which the SOPA applies;
>
> (b) the service by the claimant on the respondent of a payment claim;
>
> (c) the making of an adjudication application by the claimant to an authorised nominating body;
>
> (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application;
>
> (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant, the date on which the adjudicated amount is payable, the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication;
>
> (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice; and
>
> (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutatis mutandis*, as under (a) to (f) above.

25 It also bears mentioning that Prakash J, in referring to a New South Wales case authority in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 ("*Brodyn Pty Ltd*"), also opined that "although the [SOPA] requires a payment claim to be served, whether or not the document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court" (see *SEF Construction Pte Ltd* at [46]). The material passage in *Brodyn Pty Ltd* referred to by Prakash J reads as follows (per Hodgson JA):

> […] If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of act and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

26 The Defendant, on the other hand, raises a fairly recent High Court decision in *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 ("*Ang Cheng Guan Construction Pte Ltd*") which, at first blush, appears to be at some variance in approach with that advocated in *SEF Construction Pte Ltd*.

27 In *Ang Cheng Guan Construction Pte Ltd*, an application was taken out to set aside an adjudication review determination on the basis that the review adjudicator had declined to take into consideration issues raised by the claimant in an adjudication review initiated by the respondent. The two main grounds advanced by the claimant in seeking the setting aside order were:

(a) the review adjudicator had committed a breach of the rules of natural justice by erroneously arriving at a narrow interpretation of the scope of the adjudication review; and

(b) the error committed by the review adjudicator amounted to a "jurisdictional error" that warranted the setting aside of the adjudication review determination.

28 In granting the setting aside application, Lee Seiu Kin J embarked on a fairly detailed analysis of the merits of the review adjudicator's decision in the adjudication review, *viz.* whether the review adjudicator had in fact committed an error in taking a narrow view towards the scope of the adjudication review (see *Ang Cheng Guan Construction Pte Ltd* at [11]-[30]). In the course of his analysis, Lee J held, *inter alia*, that orders of an adjudicator and a review adjudicator "are susceptible to judicial review" and, upon his review of the review adjudicator's orders, found that the review adjudicator "had misdirected himself in a point of law" and had therefore wrongly failed to take into account issues raised by the claimant in the adjudication review (see *Ang Cheng Guan Construction Pte Ltd* at [35] and [44]). The adjudication review determination was thus set aside on that basis.

This court's reading of the authorities

29 In my reading of the two High Court cases mentioned above, it is first and foremost noted that *Ang Cheng Guan Construction Pte Ltd* was a case involving the setting aside of an adjudication review determination, whereas *SEF Construction Pte Ltd* was concerned with the setting aside of an adjudication determination. However, it is not obvious if such a difference would *per se* amount to a material point of distinction between the two cases, given that section 21(2) of the SOPA expressly recognises that "[a]n

adjudication review determination […] shall have effect as if it were an adjudication determination for the purposes of this Act". Furthermore, it appears that in *SEF Construction Pte Ltd*, Prakash J did somehow recognise that a setting aside application in respect of an adjudication review determination may be treated by the court in a similar manner as if it were an adjudication determination (see [24(g)] above).

30 At the same time, it is also noted that the High Court in *SEF Construction Pte Ltd* was faced with a rather specific situation where a party was seeking to set aside an adjudication determination on the basis that two issues raised in argument were not addressed by the adjudicator in his adjudication determination. In particular, the complaint in *SEF Construction Pte Ltd* was that the adjudicator had failed to address issues that *were properly canvassed before him*, not – as in the present case – that the adjudicator *had wrongly assumed or wrongly decided* that he was not empowered to consider those issues in his determination at all. By contrast, *Ang Cheng Guan Construction Pte Ltd* was a case where – similar to the present case – the contention was that the review adjudicator had taken an unduly restrictive view towards the scope of matters that should be considered in the adjudication review determination.

31 Nevertheless, in my respectful view, I consider *SEF Construction Pte Ltd* to be the more instructive authority which ought to be applied in the present case. This is because the holdings in *SEF Construction Pte Ltd* relating to the role of the court in a setting aside application had been endorsed by the Court of Appeal 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 ("*Lee Wee Lick Terence*").

32 In *Lee Wee Lick Terence*, the Court of Appeal (per Chan Sek Keong CJ (as he then was), Andrew Phang JA and VK Rajah JA (as he then was)) addressed – albeit arguably in *obiter* given that the parties had actually settled their dispute shortly after the Court of Appeal reserved its judgment – two lines of local case authorities constituting what was perceived to be "two judicial approaches" vis-à-vis the role of the court "in the scheme of the [SOPA]" (see *Lee Wee Lick Terence* at [19]). The first approach advocated (as did Prakash J in *SEF Construction Pte Ltd*) a fairly circumscribed role of the court in revisiting issues determined by an adjudicator, while the second approach appeared to embrace a more expansive role of the court (as characterised by the High Court's decision in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 (per Lee J) ("*Sungdo Engineering & Construction (S) Pte Ltd*")). The Court of Appeal endorsed the approach in *SEF Construction Pte Ltd* and distinguished *Sungdo Engineering & Construction (S) Pte Ltd*. Pertinently, the Court of Appeal held (at [66]):

> ***The role of the court in a setting-aside action***
>
> 66 Turning now to the court's role in a setting-aside action, we agree with the holding in *SEF Construction* […] that the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void. [emphasis in underline added]

33 At [67], the Court of Appeal further observed as follows:

> 67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the [SOPA] which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of

> such a provision would result in the adjudication determination being invalid. [emphasis in underline added]

34 In a later decision in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [46]) ("*Citiwall Safety Glass Pte Ltd*"), the Court of Appeal (per Sundaresh Menon CJ, Chao Hick Tin JA and Steven Chong J (as he then was)) reaffirmed its earlier holdings in *Lee Wee Lick Terence*. In particular, the Court of Appeal in *Citiwall Safety Glass Pte Ltd* summarised its holdings in this regard as follows (at [48]):

> 48 Put simply, in hearing an application to set aside an [adjudication determination] and/or a s 27 judgment, the court does not review the merits of the adjudicator's decision, and any setting aside must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the SOPA. Applications to set aside [adjudication determinations] and/or s 27 judgments are thus *akin* to judicial review proceedings, and are not appeals on the merits of the adjudicator's decision. In our judgment, it is consistent with the purpose of the SOPA, which is to facilitate cash flow in the building and construction industry, that the court, in hearing such applications, does not review the merits of the [adjudication determination] in question. It may be noted that in keeping with its statutory purpose, the SOPA establishes that parties who have done work or supplied goods are entitled to payment as of right; it also sets out an intervening process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined. In other words, the adjudication regime under the SOPA seeks to achieve temporary finality: see *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [18]. [emphasis in underline added]

35 Thus, having regard to the authorities surveyed above, this court considers that the following conclusions may be drawn:

(a) the case authorities demonstrate that a prevalent view is held in the Court of Appeal that a court should play only a limited role in a setting aside application under section 27(5) of the SOPA; and

(b) the limited role that a court should play in this regard is that which was advocated by Prakash J in *SEF Construction Pte Ltd* (see also [24] above).

Application of the authorities

36 Bearing these conclusions in mind, this court finds it inappropriate, in this Application, to act against the weight of the authorities by embarking on a review of the adjudicator's decision relating to the validity of the Payment Response. This is for the following reasons.

37 First, the question regarding the validity of a payment response is not one which will affect the validity of the appointment of (and, correspondingly, the taking of jurisdiction over adjudication proceedings by) an adjudicator under the SOPA adjudication regime (*cf Lee Wee Lick Terence* at [66], which is reproduced in [32] above). Section 14(1) of the SOPA stipulates the steps by which an adjudicator is to be appointed by the authorised nominating body "upon the receipt of an adjudication application". Relevant to the present context, a claimant's entitlement to make an adjudication application is provided for in section 12(2) of the SOPA, which states that:

> (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.

38 In either of the scenarios contemplated under sections 12(2)(a) and 12(2)(b) of the SOPA, and indeed regardless of whether the Defendant in the present case had in fact furnished a valid payment response by serving the Payment Response, the Plaintiff would have been entitled to make (as it did pursuant to section 12(2) of the SOPA) its Adjudication Application. In other words, no issues relating to the adjudicator's appointment are engaged by virtue of the issue raised with regard to the validity of the Payment Response. I should also mention that there have been no issues raised by the Defendant regarding whether the Adjudication Application had properly complied with the formal requirements set out in section 13(3) of the SOPA (*cf Lee Wee Lick Terence* at [67], which is reproduced in [33] above).

39 Second, the question whether a payment response is valid is not a question of jurisdictional fact. At a fundamental level, section 16(7) of the SOPA clearly provides that "[a]n adjudicator's power to determine an adjudication application is not affected by the failure of […] the respondent to provide a payment response […]". *A fortiori*, the same should also be true where the respondent has provided a payment response which is invalid.

40 For completeness, I shall also consider section 15(3)(a) of the SOPA (reproduced in [19] above) which provides that an adjudicator "shall not consider" any reason for withholding any amount sought in a payment claim unless "the reason was included in the relevant payment response provided by the respondent to the claimant". On one reading of section 15(3) of the SOPA, one might perhaps argue that the provision concerns an adjudicator's "jurisdiction" in the sense of his competence to adjudicate on *certain* issues raised (or purported to be raised) in an adjudication proceedings (*cf*, *eg*, *Hua*

Rong Engineering Pte Ltd v Civil Tech Pte Ltd [2017] SGHC 179 at [7] (per Tan Siong Thye J)).

41 With respect, I am doubtful that introducing into the analysis such additional layer of understanding "jurisdiction" would not substantially muddy (and effectively so much as to alienate) the test that the Court of Appeal in *Lee Wee Lick Terence* at [52]-[56] (referring to *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190) considered to be more pertinent, namely to focus the inquiry on the distinction between "acts done [by a claimant] in breach of an *essential preliminary to* the [adjudicator's] exercise of a statutory power or authority" and "acts done [by a claimant] in breach of a *procedural condition for* the [adjudicator's] exercise of a statutory power or authority" [emphases added]. Indeed, if one were to extrapolate this test further, a broad distinction could, *mutatis mutandis*, in theory similarly also be drawn in respect of decisions made by *an adjudicator* to determine whether an alleged error in the adjudicator's decision-making is correspondingly in the nature of a "jurisdictional error" or a "mere error in the exercise of jurisdiction" (see *Lee Wee Lick Terence* at [49], referring to *Craig v South Australia* [1995] HCA 58).

42 To illustrate, an example of an adjudicator committing a "jurisdictional error" might be where an adjudicator decides to proceed with an adjudication where no payment claim existed at all. In such a situation, it might stand to reason that the court in a setting aside application may review the correctness of the adjudicator's decision to proceed with the adjudication, so as to arrive at a judicial finding as to whether the adjudicator's appointment in the adjudication proceedings was tainted at all (see, *eg*, *Sungdo Engineering & Construction (S) Pte Ltd* at [32], and as clarified in *Lee Wee Lick Terence* at [39]). Where, instead, for example an adjudicator makes an adjudication determination in favour of a claimant taking into account a formally defective payment claim (as

distinguished from a non-existent payment claim or a payment claim which has not been served on the respondent at all), any error in the adjudicator's finding on the validity of such payment claim would most likely be considered a "mere error in the exercise of jurisdiction" (see, *eg*, *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 (per Prakash J) as clarified in *Lee Wee Lick Terence* at [39]). As there is no question engaged with regard to the propriety of the adjudicator's appointment, a review of the merits of the adjudicator's decision would not be justified in a setting aside application under section 27(5) of the SOPA. This would indeed be consistent with Prakash J's holding in *SEF Construction Pte Ltd* that whether or not a document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court (see [25] above); in similar vein, the same could also be said in respect of an adjudicator's decision as to whether or not a document purporting to be a *payment response* is a valid payment response under the relevant provisions of the SOPA.

43 In this last regard, it is noted that the Defendant has sought to rely on a New South Wales decision in *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 ("*Multiplex Constructions Pty Ltd*"), which was cited with approval by the High Court in *Ang Cheng Guan Construction Pte Ltd* at [46]. In *Multiplex Constructions Pty Ltd*, issues were raised as to whether an adjudication determination should be quashed on the basis of an "error of law that appears on the face of the record of the proceedings" under section 69(3) of the Supreme Court Act 1970 (NSW). There, the New South Wales Supreme Court dealt with, *inter alia*, an issue as to whether the adjudicator had committed an error of law in disregarding the respondent's submissions and evidence in the adjudication response, where reasons for withholding payment had not been

stated in the respondent's payment schedule (*ie*, the equivalent of a payment response under the SOPA regime) (see *Multiplex Constructions Pty Ltd* at [60]-[71]). The New South Wales Supreme Court in its judgment appeared to recognise that any error of such nature would amount to a "jurisdictional error" justifying a quashing of the adjudication determination.

44 With respect, however, I find that the proposition in *Multiplex Constructions Pty Ltd* could potentially and so fundamentally unsettle the prevalent view held in the Court of Appeal on the limited role of the court in a setting aside application (see [35] above) that it should, as a matter of principle, not be open to a court of this present level to simply follow *Multiplex Constructions Pty Ltd*. This court therefore respectfully declines to apply *Multiplex Constructions Pty Ltd* in the present case.

45 With that, I now move on to the third reason as to why I consider that this court should not embark on a review of adjudicator's decision relating to the validity of the Payment Response. The Defendant has not, in the Application, put forth any argument to the satisfaction of this court that an adjudicator's decision on the validity of a payment response is one in respect of which an error would, in any case as a matter of "legislative purpose", render the resulting adjudication determination null and void (*cf Lee Wee Lick Terence* at [67], which is reproduced in [33] above albeit in respect of "acts done" by a *claimant* in the course of making an adjudication application). There has been no parliamentary material adduced by the Defendant to assist this court in this specific regard. Instead, the Defendant's submissions appear to focus solely on the contention that the adjudicator's decision on the validity of the Payment Response was either a "jurisdictional error" or had resulted in a breach of the rules of natural justice.

46 Finally, the Defendant's allegation of a breach of the rules of natural justice is a misconceived one. In *Ang Cheng Guan Construction Pte Ltd*, a similar challenge was raised by the claimant as a ground for setting aside an adjudication review determination. In rejecting this particular ground, Lee J held (at [32]-[34]):

> 32 [The claimant] said that the [review adjudicator] had refused to hear its argument relating to [the claimant's] Issues and by so doing had breached the rules of natural justice. It submitted that the Adjudication Review Determination should be set aside on this basis. Specifically, [the claimant] relied on s 16(3)(c) of the [SOPA] and submitted that an "established example" of conduct amounting to a breach of natural justice is where the adjudicator takes an erroneously restrictive view of his own jurisdiction, with the result that he decides not to consider an important element of the dispute that has been referred to him. A number of foreign authorities were cited in support of this proposition.
>
> […]
>
> 34 Notwithstanding the cases cited by [the claimant], I do not agree with [the claimant's] suggestion that the Adjudication Review Determination should be set aside on the basis that there was a breach of natural justice. The cry for natural justice has an attractive ring to it. But all too often it is used mistakenly, perhaps because of its innate appeal to emotion. In the present case, the [review adjudicator] had formed the view that an adjudication review was limited to the issues raised by the respondent, *ie*, he was persuaded that the Narrow Interpretation applied. Critically, this view was formed "[a]fter very careful consideration of [the claimant's] submissions and a re-examination of the authorities cited to [the review adjudicator] on this subject". Having formed this view, there was no point in the [review adjudicator] hearing arguments concerning [the claimant's] Issues because even if he agreed with those arguments, it would not have made a difference to his decision. Therefore, once the [review adjudicator] had decided that it was not open to [the claimant] to challenge the parts of the adjudication determination that [the respondent] did not seek to review, it was absolutely correct for him to refuse to permit [the claimant] to make submissions on those points. Indeed, it was incumbent upon the [review adjudicator] to refuse to do so in order to avoid a waste of time and costs. It is wrong to characterise this as a breach of natural justice because [the claimant] was heard on the preliminary question concerning the scope of an adjudication review. The [review

> adjudicator] then determined that what [the claimant] wanted to submit was outside the scope of an adjudication review and it was pointless to go beyond that. There was clearly and emphatically no breach of natural justice in this case. To the extent that the foreign authorities relied on by [the claimant] appear to suggest otherwise, I respectfully disagree with them for this reason.
>
> [emphasis in underline added]

47 Coming back to the present case, the adjudicator had heard the parties on the issue relating to the validity of the Payment Response. At [42]-[48] of the Adjudication Determination, the adjudicator set out the context of the arguments raised by the respective parties on the validity of the Payment Response. This was followed by [49]-[53] of the Adjudication Determination where the adjudicator gave reasoned grounds as to why he found the Payment Response to be invalid under section 11(3) of the SOPA and regulation 6(1) of the SOPR, and accordingly why, pursuant to section 15(3) of the SOPA, he "shall not consider any reason the Respondent may raise for the withholding of any payment". Clearly, the adjudicator had applied his mind to the arguments raised with regard to the validity of the Payment Response and had made a considered determination on that issue. Applying the holding in *Ang Cheng Guan Construction Pte Ltd* as quoted above, I therefore find that there is no basis upon which the Defendant could launch a challenge framed as a breach of the rules of natural justice.

Summary of the decision in respect of the First Issue

48 In sum, this court considers that the prevailing judicial approach in a setting aside application taken out pursuant to section 27(5) of the SOPA is such that the court should play a limited role as envisaged by Prakash J in *SEF Construction Pte Ltd* and endorsed by the Court of Appeal in *Lee Wee Lick Terence* (and also *Citiwall Safety Glass Pte Ltd*). Flowing from that, this court

has found no valid reason to embark on a review of the adjudicator's decision relating to the validity of the Payment Response.

The Second Issue and the Third Issue

49 In the light of this court's decision in relation to the First Issue, this court will make no specific finding in relation to the Second Issue and the Third Issue (see [20(b)]-[20(c)] above). Nevertheless, for completeness particularly with regard to the Third Issue, this court will repeat its views expressed earlier that there is no basis upon which the Defendant could launch a challenge premised either on a "jurisdictional error" (see [39]-[44] above) or a breach of the rules of natural justice (see [46]-[47] above) committed by the adjudicator in question.

Conclusion

50 For the reasons stated above, the Application is dismissed. I will hear the parties on the issue of costs.

Colin Seow
Assistant Registrar

Liow Wang Wu Joseph and Charlene Cheam (M/s Straits Law Practice LLC) for the Plaintiff;
Chong Yew Meng Luke and Ng Ser Chiang (M/s Elitaire Law LLP) for the Defendant.