CMC Ravenna Singapore Branch
v
CGW Construction & Engineering (S) Pte Ltd

[2017] SGHC 263

High Court — Originating Summons No 466 of 2017 (Summons No 2219 of 2017)
Chan Seng Onn J
29 June 2017

Building and Construction Law — Statutes and regulations —Building and Construction Industry Security of Payment Act
Building and Construction Law — Dispute resolution — Adjudication — Adjudication review determination — Setting aside

23 October 2017 Judgment reserved.

Chan Seng Onn J:

Introduction

1 Summons No 2219 of 2017 is an application taken out by CGW Construction & Engineering (S) Pte Ltd ("CGW"), the respondent in Originating Summons No 466 of 2017 ("OS 466"), to set aside ("the Setting Aside Application"):

(a) the adjudication review determination dated 12 April 2017 ("the Review Determination") in Adjudication Review Application No 1 of 2017 ("the Review Application"); and

(b) the order of court dated 28 April 2017 ("the Order of Court") obtained by CMC Ravenna Singapore Branch ("CMC Ravenna"), the applicant in OS 466, granting CMC Ravenna leave to enforce the Review Determination.

2 The application raises certain issues concerning the extent of review that a court should undertake when invited to set aside an adjudication review determination pursuant to s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA").

Background

3 The present dispute arose out of a contract involving the construction of the Tampines West Station and tunnels for Stage Three of the Mass Rapid Transit Downtown Line project ("the Project"). CMC Ravenna was engaged by the Land Transport Authority ("LTA"), the employer, to be the main contractor of the Project, while CGW was engaged by CMC Ravenna as the sub-contractor.[1]

4 Specifically, CMC Ravenna had initially engaged CGW pursuant to a letter of award dated 15 May 2015 ("the Letter of Award") to, *inter alia*, supply skilled and general workers, equipment and minor tools for the fixing and installation of the rebar to the skin wall abutting the D-wall at the site.[2] Under the Letter of Award, the works were valued at S$1,008,666.30.[3]

5 Subsequently, CMC Ravenna and CGW entered into an Addendum to

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1 Cao Yongliu's Affidavit dated 16 May 2017 ("Cao's 1st Affidavit"), paras 8 and 10.

2 Cao's 1st Affidavit, exh CYL-3, pp 3240–3241.

3 Cao's 1st Affidavit, exh CYL-3, p 3243.

the Letter of Award dated 2 October 2015 ("the Addendum"), which increased CGW's scope of works from that originally specified under the Letter of Award to include the provision of skilled workers for, *inter alia*, rebar installation, formwork installation and the placing of concrete for Entrance B of the site, as well as rebar installation for the service slab at the site.[4] The working period was expressly specified to be for "2 months",[5] and the works were valued at S$944,404.80.[6] The payment terms were stated as follows:[7]

> 2. Payments:
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> Payment will be made for completed works on a monthly progress basis. A 5% Retention shall be retained on all progress payments. The retention shall be released upon practical completion of the subcontract works to the satisfaction of CMC [Ravenna] and LTA upon finalization of the subcontract accounts.
>
> *The Subcontractor [CGW] shall submit the progress claim at the end of each month. The Contractor [CMC Ravenna] shall issue a progress payment certificate within 21 days from the date of [the Subcontractor CGW's] submission of the progress claim*, and the Contractor [CMC Ravenna] shall release payment within 21 days from the date of the payment certificate and the receipt of original tax invoice from the Subcontractor [CGW].
>
> Failure to complete the subcontract work within the stipulated working period will [be] liable to imposition of Liquidated damages at S$2,500 per day.
>
> [emphasis added]

According to CGW, it only signed the Addendum on 8 January 2017.[8]

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4 Cao's 1st Affidavit, exh CYL-4, pp 3250–3251.

5 Cao's 1st Affidavit, exh CYL-4, p 3250.

6 Cao's 1st Affidavit, exh CYL-4, p 3255.

7 Cao's 1st Affidavit, exh CYL-4, p 3252.

8 Cao's 1st Affidavit, para 11.

6 On 31 October 2016, pursuant to the payment terms set out under the Addendum, CGW served Progress Claim 16 for "Works Done Up To And Including 31st October 2016" ("PC 16") on CMC Ravenna for the sum of S$410,325.16 (inclusive of GST).[9] This meant that CMC Ravenna was supposed to pay CGW S$410,325.16 (inclusive of GST).

7 On 7 November 2016, CMC Ravenna served its Interim Payment Certificate (Payment Response) No 16 ("PR 16") on CGW, which confirmed CMC Ravenna's receipt of PC 16. PR 16 indicated that the "DUE AMOUNT (GST Excluded)" was "(735,378.93)".[10] This meant that the response amount was (S$735,378.93) (excluding GST), or a negative S$735,378.93 (excluding GST). In essence, CMC Ravenna was responding that CGW was instead owing it a sum of S$735,378.93 (excluding GST) and therefore, there was nothing for CMC Ravenna to pay CGW under PC 16.

Procedural history

8 On 5 December 2016, CGW commenced Adjudication Application No 469 of 2016 by first serving a notice of intention to apply for adjudication on CMC Ravenna,[11] and thereafter lodging an adjudication application ("the Adjudication Application") with the Singapore Mediation Centre ("SMC"), which is an authorised nominating body ("ANB") under the SOPA.[12] The payment claim was revised from S$410,325.16 (inclusive of GST) to

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9 Cao's 1st Affidavit, exh CYL-2, Annex E, Tab 2, p 295.

10 Cao's 1st Affidavit, exh CYL-2, Annex E, Tab 5, p 328.

11 Cao's 1st Affidavit, exh CYL-2, Annex E, Tab 6, pp 346-353.

12 Cao's 1st Affidavit, exh CYL-2, Annex E.

S$381,705.78 (inclusive of GST).[13]

9 On 9 December 2016, the SMC informed the parties that Ms Khoo Jing Ling was appointed as the adjudicator for the dispute ("the Adjudicator").[14]

10 On 13 December 2016, CMC Ravenna lodged its adjudication response ("the Adjudication Response") with the SMC.[15] In the Adjudication Response, CMC Ravenna justified its response amount of "(S$735,378.93)" by disputing CGW's claimed amount of S$381,705.78 (inclusive of GST) and proposing deductions in the sum of S$1,076,815.22. In particular, the bulk of the deductions in the Adjudication Response comprised the liquidated damages in the sum of S$547,500.00 that CMC Ravenna had allegedly suffered due to CGW's alleged delay in completing the Addendum works ("the Liquidated Damages Claim").[16]

11 On 7 March 2017, the Adjudicator issued her adjudication determination. A revised version of the adjudication determination was issued on 16 March 2017 to account for some calculation errors made by the Adjudicator ("the revised Adjudication Determination"). In the revised Adjudication Determination, the Adjudicator found in favour of CGW and determined that CMC Ravenna was to pay the sum of S$340,515.61 (plus GST) to CGW ("the Adjudicated Amount").[17]

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13 Cao's 1st Affidavit, para 20.

14 Cao's 1st Affidavit, exh CYL-5.

15 Cao's 1st Affidavit, exh CYL-2, Annex G.

16 Cao's 1st Affidavit, exh CYL-2, Annex G, Tab G2.

17 Cao's 1st Affidavit, exh CYL-2, Annex C.

12 Dissatisfied with the revised Adjudication Determination, CMC Ravenna commenced the Review Application by paying the Adjudicated Amount to CGW on 17 March 2017[18] and lodging the Review Application with the SMC on 21 March 2017.[19] In the Review Application, CMC Ravenna stated the response amount as "NIL [-S$735,378.93 (excluding GST)]".[20] On 28 March 2017, the SMC informed the parties that Mr Chia Chor Leong was appointed as the review adjudicator for the Review Application ("the Review Adjudicator").[21]

13 On 29 March 2017, the Review Adjudicator convened a preliminary conference, during which CGW challenged the jurisdiction of the Review Adjudicator to hear and determine the Review Application on the basis that pursuant to s 18(5)(*b*) of the SOPA read with reg 10(3) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the SOPR"), a panel of three review adjudicators should have been convened instead.[22] The Review Adjudicator made certain observations about CGW's jurisdictional challenge, but ultimately declined to make a ruling and ordered the parties to proceed with the Review Application.[23]

14 On 12 April 2017, the Review Adjudicator issued the Review Determination. The Review Adjudicator found in favour of CMC Ravenna, determining that there is no amount payable by CGW to CMC Ravenna under

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18 Cao's 1st Affidavit, exh CYL-2, Annex A.

19 Cao's 1st Affidavit, exh CYL-2, p 142.

20 Cao's 1st Affidavit, exh CYL-2, p 140.

21 Cao's 1st Affidavit, exh CYL-7.

22 Cao's 1st Affidavit, para 36.

23 Cao's 1st Affidavit, exh CYL-1, paras 44 and 58.

the Adjudication Application and that the Adjudicated Amount of S$340,515.61 (plus GST) as determined by the Adjudicator should be substituted with the Adjudicated Amount of "Nil".[24]

15 On 27 April 2017, CMC Ravenna commenced OS 466, which is an *ex parte* application for leave to enforce the Review Determination in the same manner as a judgment or order of court. CMC Ravenna obtained the Order of Court on 28 April 2017. On 2 May 2017, the Order of Court was served on CGW.

16 Subsequently, on 16 May 2017, CGW filed the Setting Aside Application.

Issues to be determined

17 Based on the arguments canvassed by the parties, the two main issues that have arisen for my determination in this application are:

(a) whether the Review Determination should be set aside because a panel of three review adjudicators instead of a sole review adjudicator should have been appointed to hear and determine the Review Application ("the Appointment Issue"); and

(b) whether the Review Determination should be set aside because the Review Adjudicator had misdirected himself on a point of law ("the Misdirection Issue").

18 Succeeding on either issue will be sufficient for CGW to succeed in the Setting Aside Application.

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[24] Cao's 1st Affidavit, exh CYL-1, para 170.

The applicable legal principles

19 At the outset, I note that there is limited guidance for the setting aside of adjudication review determinations from the existing corpus of SOPA case law. Applications to set aside adjudication review determinations have rarely arisen for our courts' consideration: to the best of my knowledge, the only two decisions involving the setting aside of an adjudication review determination that have been issued in the High Court are the recent decisions of *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 ("*Ang Cheng Guan*") and *Mataban Development Pte Ltd v Black Knight Warrior Pte Ltd* [2017] SGHCR 12 ("*Mataban Development*"). Also, the adjudication review procedure provided for under the SOPA has no statutory analogue in any of the other jurisdictions that have introduced similar regimes to expedite payments in the construction industry, *ie*, the United Kingdom, Australia and New Zealand: *Ang Cheng Guan* at [11], citing *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [24].

20 Having said that, the paucity of case law in this regard is not in itself a major concern because the grounds for setting aside adjudication review determinations are broadly similar to those for setting aside adjudication determinations, which have been the subject of numerous High Court and Court of Appeal decisions since the SOPA's inception (see [36] below). Rather, what causes some difficulty is the identification of the precise grounds on which adjudication determinations may be set aside. I shall first turn to consider the law as it currently stands on the setting aside of *adjudication determinations*, before setting out the applicable legal principles in respect of the setting aside of *adjudication review determinations*.

Setting aside adjudication determinations

No review on the merits

21 The fundamental rule underlying the court's role in hearing and determining an application to set aside an adjudication determination is that the court should not review the merits of the adjudicator's decision: *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*") at [66], citing *SEF Construction* ([19] *supra*). This starting position follows from the fact that a court's role in dealing with an application to set aside an adjudication determination is limited to exercising a *supervisory* function: see *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*") at [41].

22 This rule also comports with the policy objective underlying the SOPA, which is to facilitate cash flow in the building and construction industry by establishing "a fast and low cost adjudication system to resolve payment disputes": *Chua Say Eng* ([21] *supra*) at [2], citing *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112 (Cedric Foo Chee Keng, Minister of State for National Development) ("the second reading speech"). Any potential unfairness that might result from the quick resolution of payment claim disputes is meant to be tempered by the temporary finality that underpins the adjudication process, whereby any injustice in the adjudication outcomes may yet be redressed at a more thorough and deliberate forum like arbitration or litigation: see *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890 at [31], citing *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [22]. It is thus consistent with the purpose of the SOPA for a court hearing a setting-aside application to refrain from looking into the merits of an adjudicator's

decision to determine if the adjudicator had arrived at the correct decision: see *Citiwall* ([21] *supra*) at [48].

Permissible grounds of review

23 However, the critical question is what a court is entitled to review when hearing an application to set aside an adjudication determination. In this regard, the Court of Appeal in *Citiwall* ([21] *supra*) has held that a setting-aside application is only "concerned with the propriety of the [adjudication determination] itself (that is to say, with issues relating to the jurisdiction of the adjudicator, including non-compliance with the SOPA, and procedural propriety in the adjudication, including whether there was a breach of natural justice)" (at [49]). Although this accords with the general notion that a court must not review the merits of the adjudicator's decision, the matters that a court is permitted to consider when hearing a setting-aside application remain unclear. I thus endeavour to set out, in the light of various Court of Appeal decisions that have been issued in this regard, the grounds on which a court may set aside an adjudication determination.

(1) Breach of natural justice

24 First, a court has the power to set aside an adjudication determination for breach of natural justice. This ground is uncontroversial and stems from the statutory obligation imposed on an adjudicator under s 16(3) of the SOPA to "act independently, impartially and in a timely manner" (s 16(3)(*a*)), as well as to "comply with the principles of natural justice" (s 16(3)(*c*)): see *Citiwall* ([21] *supra*) at [47], citing *SEF Construction* ([19] *supra*) at [45]. The principles of natural justice oblige the court to consider first whether the parties to the adjudication have been accorded a fair hearing and secondly whether the adjudicator has been independent and impartial in deciding the dispute: *UES*

Holdings Pte Ltd v KH Foges Pte Ltd [2017] SGHC 114 ("*Foges*") at [28], quoting *Metropole Pte Ltd v Designshop Pte Ltd* [2017] SGHC 45 at [46].

(2) Invalid appointment of adjudicator and non-compliance with important statutory requirements

25 A court also has the power to set aside an adjudication determination on the ground that an adjudicator was invalidly appointed, or when the claimant did not comply with important statutory requirements when making his adjudication application. This was the conclusion of the Court of Appeal in *Chua Say Eng* ([21] *supra*), where it was held (at [66]–[67]) that:

> 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.
>
> 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.
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> [emphasis in original in italics; emphasis added in bold]

These two discrete grounds on which a court may set aside an adjudication determination have been characterised by the Court of Appeal in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 ("*Grouteam*") at [49] as errors that go towards an adjudicator's jurisdiction (see [32] below). For this reason, I shall refer to these two grounds as "jurisdictional errors" in this judgment.

26 To facilitate a more nuanced understanding of the limits of these two jurisdictional errors, I now turn to examine the two distinct approaches undertaken in the Singapore courts at that time, which the Court of Appeal in *Chua Say Eng* ([21] *supra*) had to reconcile. The first was the approach taken by Judith Prakash J (as she then was) in three decisions she authored in quick succession, *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 ("*Chip Hup Hup Kee*"), *SEF Construction* ([19] *supra*) and *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*"). The second approach was that taken by Lee Seiu Kin J in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo*").

27 Out of the three decisions issued by Prakash J, most of the key principles expounded on by her were set out in *SEF Construction* ([19] *supra*). In *SEF Construction*, Prakash J held (at [45]–[46]):

> … an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:
>
> > (a) the existence of a contract between the claimant and the respondent, to which the [SOPA] applies (s 4);
> >
> > (b) the service by the claimant on the respondent of a payment claim (s 10);
> >
> > (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
> >
> > (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
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> > (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 (ss 17(1) and (2));

> (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
>
> (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

The basic requirements set out above were adapted by Prakash J from the decision of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Another* [2004] NSWCA 394 ("*Brodyn*"). *Brodyn* was a decision of the New South Wales Court of Appeal that concerned the setting aside of a judgment entered for the purpose of enforcing an adjudication determination under the New South Wales Building and Construction Security of Payment Act 1999 (Act 46 of 1999) (NSW) ("the NSW SOPA"), in which Hodgson JA classified conditions under the NSW SOPA as "essential" or "non-essential" and decided that judgments could only be set aside if essential conditions were not complied with ("the essential conditions approach") (at [53]). However, while Prakash J intended for the "basic requirements" to be exhaustive grounds under which a court is allowed to set aside an adjudication determination, Hodgson JA stated that the "basic and essential requirements" listed in his judgment (at [53]) were not meant to be exhaustive (at [55]).

28 In *Sungdo* ([26] *supra*), Lee J held (at [34]), in the context of setting aside an adjudication determination, that where a document does not purport to be a payment claim, the court would be entitled to set aside the adjudication determination. However, where a document purports to be a payment claim, the court would be entitled to review an adjudicator's decision that the document indeed satisfies all the requirements of a payment claim only if the adjudicator's findings are unreasonable in the sense as described in *Associated Provincial*

Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223 ("*Wednesbury*"), *ie*, *Wednesbury* unreasonable.

29 The Court of Appeal in *Chua Say Eng* ([21] *supra*) reconciled the two approaches in *SEF Construction* ([19] *supra*) and in *Sungdo* ([26] *supra*) by finding that they were addressing "different legal questions" (at [37]). According to the Court of Appeal (at [39] and [51]), Lee J in *Sungdo* was addressing situations where the payment claim was either non-existent or had not been served at all. Hence, Lee J was dealing with the "threshold issue of competence" (at [37]) that went to the "validity of the appointment of the adjudicator" (at [31]). In so ruling, the Court of Appeal affirmed the holding in *Sungdo* that the court may set aside an adjudication determination where the payments claim is either non-existent or has not been served.

30 On the other hand, the Court of Appeal in *Chua Say Eng* ([21] *supra*) considered that Prakash J was addressing situations where the payment claim existed and had been served, but did not comply with all the requirements of the SOPA (at [39]). Hence, Prakash J was dealing with the "substantive issue of legality" (at [37]) that went to the "validity of the adjudication determination" (at [31]). However, in respect of situations of mere non-compliance with the SOPA, the Court of Appeal refrained from affirming Prakash J's more restrictive interpretation of the essential conditions approach as laid down in *Brodyn* ([27] *supra*). Instead, it went on to affirm the approach laid down by the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd and Others v Hamo Industries Pty Ltd and Another* [2010] NSWCA 190 ("*Chase Oyster*") at [37]–[38] *per* Spigelman CJ ("the legislative purpose test"), which provides that the court may set aside an adjudication determination, even if there was a payment claim and that payment claim was served, where a claimant fails to comply with a SOPA provision which is so important that it is the legislative

purpose that an act done in breach of the provision should be invalid: see *Chua Say Eng* at [67]. Under the legislative purpose test, in order to determine the legislative purpose of any SOPA provision in question, the court must consider the language of the SOPA provision, and the scope and object of the whole SOPA: see *Chua Say Eng* at [40] and [52]–[53], citing *Chase Oyster* at [37]–[38].

31 The upshot of the *Chua Say Eng* ([21] *supra*) decision is that in relation to situations where the payment claim is in existence and has been served, the Court of Appeal preferred the legislative purpose test to the essential conditions approach. This is clear given that the court in *Chase Oyster* ([30] *supra*) had rejected the essential conditions approach laid down in *Brodyn* ([27] *supra*). However, the "basic requirements" listed by Prakash J in *SEF Construction* ([19] *supra*) at [45] remain relevant as *examples* of provisions that fulfil the legislative purpose test. In other words, the "basic requirements" listed in *SEF Construction* at [45] are examples of provisions that are so important that it is the legislative purpose that an act done in breach of those provisions should be invalid. This interpretation finds support in the Court of Appeal's observation in *Chua Say Eng* (at [61]) that:

> … it seems to us in the context of the different provisions and structure of the [SOPA] (as compared with the NSW [SOPA]) that the characterisation of an essential condition in *Brodyn* … as a condition the breach of which would invalidate an adjudication is substantially the same as the characterisation of a mandatory condition in *Chase Oyster* the breach of which would lead to the same result.

32 To conclude, where a payment claim does not exist or is not served at all, the appointment of the adjudicator would be invalid because there would be no basis at all for the adjudicator to be appointed in the first place. The adjudicator would thus lack *jurisdiction at the threshold*. Conversely, even

where a payment claim exists or has been served, if the claimant fails to comply with a provision of the SOPA that is so important that it is the legislative purpose that an act done in breach of the provision should be invalid, the adjudication determination would be found to be invalid as a substantive matter because there would be no basis for the adjudicator to act or come to any determination binding on the parties concerned. The adjudicator would thus lack *substantive jurisdiction*. Examples of such important SOPA provisions include the "basic requirements" listed in *SEF Construction* ([19] *supra*) at [45]. An adjudicator determination may be set aside on the ground of either of these jurisdictional errors: see *Grouteam* ([25] *supra*) at [49].

(3) Patent error on the face of the record

33 Finally, a court also has the power to set aside an adjudication determination on the ground that a patent error on the face of the record has been committed. This ground, by allowing a court to look into the substance of the adjudicator's decision, might appear to contravene the cardinal rule that a court is not to engage in a review of the merits of the adjudicator's decision. However, this danger is regulated by the highly circumscribed manner in which a "patent error" has been defined by the courts: an adjudicator would be considered to have committed a patent error only if he commits errors that are plain and evident on the face of the material that has been properly placed before the adjudicator and which he is permitted and, indeed, obliged to consider: see *W Y Steel* ([22] *supra*) at [51] and [54]. Put in another way, for an error committed by the adjudicator to be considered a "patent" error, it must be "easily recognisable" or "obvious", such that it would have been incumbent on the adjudicator to avoid such an error had he considered the material properly placed before him: see *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd and another matter* [2017] SGHC 174 ("*Kingsford*") at [35], quoted

with approval in *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2017] SGHC 247 ("*OGSP*") at [23].

(4) Conclusion

34 I note in passing that another possible ground on which courts have previously held that it is possible to set aside an adjudication determination is where the adjudication determination has been obtained by fraud: *OGSP* ([33] *supra*) at [37]; see also *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264 at [31] and *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2012] SGHC 194 at [7]. However, the Court of Appeal has thus far neither affirmed nor rejected fraud as a valid setting-aside ground: see *OGSP* at [34]–[35]. Given that this ground was not raised in this matter, I refrain from expressing a view on whether fraud should indeed be a valid setting-aside ground and leave this to be dealt with by another court with the benefit of comprehensive submissions in this regard.

35 The role of a court in hearing and determining an application to set aside an adjudication determination may thus be conveniently restated as follows:

(a) When considering an application to set aside an adjudication determination, the court should not review the merits of the adjudicator's decision (see [21]–[22] above).

(b) However, the court has the power to set aside the adjudication determination if:

(i) The adjudicator has acted in breach of the principles of natural justice (see [24] above);

(ii) The adjudicator was not validly appointed because the payment claim does not exist or was not served at all, which causes the adjudicator to lack jurisdiction at the threshold (see [32] above);

(iii) Even if the adjudicator was validly appointed, 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, which causes the adjudicator to lack substantive jurisdiction (see [32] above); or

(iv) The adjudicator commits a patent error on the face of the record (see [33] above).

(c) Examples of the provisions under the SOPA that are considered so important that it is the legislative purpose that an act done in breach of the provision should be invalid include (see [27] and [31] above):

(i) the existence of a contract between the claimant and the respondent, to which the SOPA applies (s 4);

(ii) the fulfilment of the formal requirements by the claimant when effecting service of a payment claim on the respondent (s 10);

(iii) the making of an adjudication application by the claimant to an authorised nominating body (s 13);

(iv) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14); and

(v) 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 (ss 17(1) and (2)).

Setting aside adjudication review determinations

36 In my view, the principles set out above regarding the setting aside of adjudication determinations should apply with equal force, albeit with suitable modifications, to the setting aside of adjudication review determinations for the following reasons:

(a) First, applications to set aside adjudication review determinations are brought under the exact same provision as applications to set aside adjudication determinations, *ie*, s 27(5) of the SOPA. Section 27(5) only expressly refers to a "party to an adjudication [commencing] proceedings to set aside the adjudication determination or the judgment obtained", and an "adjudication determination" is defined under s 2 to, "in relation to an adjudication, [mean] the determination of the adjudicator". However, s 2 defines an "adjudication" to include "an adjudication review", and also defines an "adjudicator" to include "a review adjudicator or a panel of review adjudicators appointed under s 18(5)(*b*)". Accordingly, the setting aside of an "adjudication determination" referred to in s 27(5) should also include the setting aside of a determination of a review adjudicator or a panel of review adjudicators.

(b) Second, review adjudicators are empowered under s 19(5) of the SOPA to determine almost precisely the same matters as adjudicators are empowered to determine under s 17(2), such that review adjudicators are effectively entitled to "reconsider the findings of facts as well as the application of legal principles to those findings of fact": *SEF Construction* ([19] *supra*) at [23].

(c) Third, adjudication review determinations have the same temporarily binding quality of adjudication determinations. This is evident from s 21 of the SOPA, which provides that an adjudication determination shall be binding on parties to the adjudication unless or until leave of the court to enforce the adjudication determination is refused, the dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding, or the dispute is settled by agreement of the parties (s 21(1)), and that an adjudication review determination "shall have effect as if it were an adjudication determination for the purposes of [the SOPA]" (s 21(2)).

(d) Finally, Prakash J in *SEF Construction* ([19] *supra*) has also implicitly recognised (at [45(g)]) that an adjudication review determination "may be treated by the court in a similar manner as if it were an adjudication determination": *Mataban Development* ([19] *supra*) at [29].

37 It thus stands to reason that the principles set out above (at [34]) could be suitably modified for the purposes of delineating the court's role in setting aside adjudication review determinations. I restate them in the following manner:

(a) When considering an application to set aside an adjudication review determination, the court should not review the merits of the review adjudicator's decision.

(b) However, the court has the power to set aside the adjudication review determination if:

(i) The review adjudicator has acted in breach of the principles of natural justice;

(ii) The review adjudicator was not validly appointed, which causes the review adjudicator to lack jurisdiction at the threshold;

(iii) Even if the review adjudicator was validly appointed, the respondent in the adjudication, in the course of making an adjudication review 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, which causes the review adjudicator to lack substantive jurisdiction; or

(iv) The review adjudicator commits a patent error on the face of the record.

38 I now proceed to deal with each of the identified issues in turn.

My decision

39 Having carefully considered the parties' submissions and the authorities cited in support thereof, I find against CGW on both issues. In the result, I dismiss the Setting Aside Application.

The Appointment Issue

40 CGW's first contention for the setting aside of the Review Determination is that the Review Adjudicator lacks the jurisdiction to hear and determine the Review Application because a panel of three review adjudicators, instead of a single review adjudicator, should have been appointed pursuant to s 18(5)(*b*) of the SOPA read with reg 10(3) of the SOPR. Two questions arise from this contention:

(a) Whether the SMC's appointment of the wrong number of review adjudicators is a jurisdictional error; and

(b) Whether the SMC should have appointed three review adjudicators to hear and determine the Review Application.

41 I find that the Review Adjudicator had the jurisdiction to hear and determine the Review Application. In my judgment, although the ANB's appointment of the wrong number of review adjudicators is a jurisdictional error, the SMC had rightly appointed a single review adjudicator to hear and determine the Review Application in this case. Hence, the Review Determination should not be set aside on this ground.

Whether the ANB's appointment of the wrong number of review adjudicators is a jurisdictional error

42 At the outset, I note that it was common ground between both CGW and CMC Ravenna that if CGW managed to show that the SMC had appointed the wrong number of review adjudicators, the Review Determination would be liable to be set aside (*ie*, the SMC's appointment of the wrong number of review adjudicators is a jurisdictional error). CMC Ravenna did not seriously contest this point of law, while CGW expressly asserted in its submissions that if it

managed to show that the SMC should have appointed a panel of three review adjudicators instead of a sole review adjudicator under reg 10(3) of the SOPR, then the Review Adjudicator would clearly "not have jurisdiction" to hear and determine the Review Application.[25] Therefore, it is strictly unnecessary for me to determine which *type* of jurisdictional error the appointment of the wrong number of review adjudicators would fall under (see [35(b)(ii)] and [35(b)(iii)] above). Nevertheless, for the purposes of clarity, I shall proceed to consider whether the ANB's appointment of the wrong number of review adjudicators would cause the review adjudicator to lack jurisdiction at the threshold or lack substantive jurisdiction.

43 In my view, if the ANB appoints the wrong number of review adjudicators, the review adjudicator would lack jurisdiction *at the threshold* to hear and determine the adjudication review application because the appointment of the review adjudicator would be invalid.

44 I first set out the provisions relevant to the appointment of review adjudicators by the ANB. Section 18 of the SOPA states as follows:

> **Adjudication review applications**
>
> **18.—**(1) This section shall apply to a respondent who is a party to an adjudication if the adjudicated amount exceeds the relevant response amount by the prescribed amount or more.
>
> (2) Subject to subsection (3), where a respondent to whom this section applies is aggrieved by the determination of the adjudicator, the respondent may, within 7 days after being served the adjudication determination, lodge an application for the review of the determination with the authorised nominating body with which the application for the adjudication had been lodged under section 13.
>
> (3) Where the respondent is required in consequence of the adjudication determination to pay an adjudicated amount to

[25] Respondent's Written Submissions, dated 28 June 2017, para 36.

> the claimant, the respondent shall not lodge any application for the review of the determination unless he has paid the adjudicated amount to the claimant.
>
> (4) An adjudication review application —
>
> > (*a*) shall be made in writing addressed to the authorised nominating body requesting it to appoint one or more review adjudicators to determine the application;
> >
> > (*b*) shall contain such information or be accompanied by such documents as may be prescribed; and
> >
> > (*c*) shall be accompanied by such application fee as may be determined by the authorised nominating body.
>
> (5) *The authorised nominating body shall*, upon receipt of an adjudication review application —
>
> > (*a*) serve —
> >
> > > (i) a copy thereof on the claimant; and
> > >
> > > (ii) a notice in writing that the application has been made on the principal (if known) and the owner concerned; and
> >
> > (*b*) subject to subsection (7) and in accordance with the prescribed criteria, *appoint a review adjudicator or a panel of 3 review adjudicators.*
>
> (6) The authorised nominating body shall, within 7 days after receipt of the adjudication review application, serve a notice in writing confirming the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, on the parties to the adjudication review, the principal (if known) and the owner concerned.
>
> (7) For the purpose of subsection (5)(*b*) —
>
> > (*a*) section 14(1) and (2) shall apply with the necessary modifications; and
> >
> > (*b*) the authorised nominating body shall not appoint an adjudicator whose determination is the subject of the adjudication review.
>
> [emphasis added]

Regulation 10 of the SOPR states as follows:

> **Adjudication review applications**
>
> **10.—**(1) A respondent who is a party to an adjudication shall be entitled to lodge an application for the review of the determination of the adjudicator under section 18 of the Act if the adjudicated amount exceeds the relevant response amount by $100,000 or more.
>
> (2) Every adjudication review application shall —
>
> (*a*) contain proof of payment of the adjudicated amount to the claimant pursuant to section 18(3) of the Act; and
>
> (*b*) be accompanied by a copy of the adjudication determination that is the subject of the application.
>
> (3) *An authorised nominating body shall*, upon receipt of an adjudication review application —
>
> (*a*) *appoint one review adjudicator if the adjudicated amount exceeds the relevant response amount by $100,000 or more but less than $1 million;* or
>
> (*b*) *appoint a panel of 3 review adjudicators if the adjudicated amount exceeds the relevant response amount by $1 million or more.*
>
> [emphasis added]

45 In my view, the foregoing provisions show that for there to be a valid appointment of a review adjudicator, the ANB must: (a) receive an adjudication review application, and (b) appoint the review adjudicator or a panel of three review adjudicators according to the "prescribed criteria" under reg 10(3) of the SOPR. If either requirement is not met, then the review adjudicator appointed would lack jurisdiction *at the threshold*; in such circumstances, even if the review adjudicator accepts the nomination by the ANB, "[a]n acceptance of an invalid nomination would not clothe the acceptor with the office of [review] adjudicator": see *Chua Say Eng* ([21] *supra*) at [30].

46 It might be contended that the ANB's appointment of the review adjudicator according to the "prescribed criteria" under reg 10(3) of the SOPR should not in fact affect a review adjudicator's jurisdiction at the threshold. The

Court of Appeal in *Chua Say Eng* ([21] *supra*) has previously made the following observations about the role of the ANB in the appointment of an adjudicator (at [63]):

> ***The role of the ANB***
>
> 63 In our view, the functions of the ANB are set out in s 13(4) of the [SOPA], which provides that the ANB shall, upon receipt of an adjudication application, serve a copy on the respondent, and s 14(3) of the [SOPA], which provides that the ANB shall, within seven days after receipt of the adjudication application, serve a notice in writing confirming the appointment of an adjudicator on the claimant, the respondent, the principal (if known) and the owner concerned. *Given the mandatory words of obligation, and the short timelines for carrying out its duties, it seems to us that the ANB's function is largely administrative in nature when appointing an adjudicator.* The ANB has no obligation to consider the *bona fides* of the claimant's request by looking into or questioning whether the payment claim is intended to be a payment claim, whether it has been served or properly served on the respondent, or whether it complies with all the requirements of the [SOPA].
>
> [original emphasis removed; emphasis added]

Those remarks might suggest that the role of the ANB, being "largely administrative in nature when appointing an adjudicator", should necessarily also be largely administrative in nature when appointing a review adjudicator. Accordingly, as the argument might go, the appointment by the ANB of the wrong number of review adjudicators should not be an error that causes the review adjudicator to lack jurisdiction at the threshold.

47 I do not think that just because the ANB plays a *predominantly* administrative role in the appointment process, it would *ipso facto* mean that *all* errors made by the ANB do not go to jurisdiction. On the contrary, there are still facets of the ANB's role in the appointment process that are pivotal to the validity of the appointment of an adjudicator or review adjudicator. This is evident from s 14(1) of the SOPA, which states as follows:

> **Appointment of adjudicator**
>
> **14.—**(1) The authorised nominating body *shall*, upon receipt of an adjudication application, *refer the adjudication application to a person who is on the register of adjudicators established under section 28(4)(*a*)* and whom the authorised nominating body considers to be appropriate for appointment as the adjudicator to determine the adjudication application.
>
> [emphasis added]

Section 28(4)(*a*), which is referred to in s 14(1), in turn states as follows:

> **Authorised nominating bodies**
>
> **28.—** …
>
> (4) An authorised nominating body shall, in relation to its authorisation under subsection (1) —
>
> (*a*) establish and maintain a register of adjudicators;
>
> …

From the use of the modal verb "shall", instead of "may", under s 14(1), it is evident that when the ANB refers an adjudication application to an adjudicator who is *not* on the register of adjudicators established by the ANB, the appointment of the adjudicator must necessarily be considered invalid. This should then cause the adjudicator to lack jurisdiction at the threshold. More importantly for our purposes, s 18(5)(*b*) read with s 18(7)(*a*) both incorporate these mandatory requirements under s 14(1) for the purposes of the appointment of review adjudicators. This ensures that the ANB plays a similarly fundamental role in the appointment of a review adjudicator in this specific manner, *ie*, the reference by the ANB of a review application to a review adjudicator who is *not* on the register of adjudicators would also invalidate the appointment of the review adjudicator. It would thus be incorrect to suggest that, just because the ANB usually plays a largely administrative role, an error made by the ANB in the appointment of a review adjudicator can never go to the jurisdiction of the review adjudicator.

48 Taking the above conclusion one step further, it is thus also open to me to ascribe mandatory effect to s 18(5)(*b*) of the SOPA read with reg 10(3) of the SOPR, and find that s 18(5)(*b*) of the SOPA introduces the mandatory requirement that the ANB must nominate review adjudicators for a particular adjudication review application only in accordance with the criteria prescribed under reg 10(3) of the SOPR. Therefore, the failure of the ANB to appoint the correct number of review adjudicators in accordance with the magnitude of the difference between the adjudicated amount and the relevant response amount should be an error that causes the appointed review adjudicator to lack jurisdiction at the threshold.

49 This construction of s 18(5)(*b*) of the SOPA read with reg 10(3) of the SOPR finds support in the authoritative treatise of Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013), which states the following (at para 17.30):

> … The steps which the ANB is *obliged to* take upon receipt of an adjudication review application are as follows:
>
> (a) First, the ANB has to determine whether a review application should go before a single review adjudicator or a panel of three review adjudicators.
>
> (b) After determining the appropriate size of the tribunal, the ANB then has to appoint the review adjudicator or panel of review adjudicators.
>
> These *obligations* are reinforced in regulation 10(3) of the [SOPR]. …
>
> [emphasis added]

To my mind, the learned author's treatment of the reg 10(3) requirements as an *obligation* of the ANB in the appointment process provides considerable support for treating reg 10(3) of the SOPR as a mandatory requirement.

50 I thus conclude that the ANB's appointment of the wrong number of review adjudicators to hear and determine an adjudication review application is an error that causes the review adjudicator to lack jurisdiction *at the threshold*.

Whether the SMC should have appointed a panel of three review adjudicators

51 I now direct my attention to the heart of the dispute regarding the Appointment Issue, which essentially turns on the correct interpretation of "relevant response amount" under reg 10(3) of the SOPR. In my view, the SMC was correct in deciding that the difference between the adjudicated amount and the relevant response amount was less than S$1m. The SMC had thus rightfully appointed a single review adjudicator to hear and determine the Review Application pursuant to reg 10(3).

52 It was common ground between both parties that the adjudicated amount is S$340,515.61. What remains in dispute is the exact quantum of the "relevant response amount" in this case for the purposes of reg 10(3) of the SOPR. Regulation 10(3) is once again set out as follows:

> **Adjudication review applications**
>
> **10.—** …
>
> (3) An authorised nominating body shall, upon receipt of an adjudication review application —
>
> > (*a*) appoint one review adjudicator if the adjudicated amount exceeds the *relevant response amount* by $100,000 or more but less than $1 million; or
> >
> > (*b*) appoint a panel of 3 review adjudicators if the adjudicated amount exceeds the *relevant response amount* by $1 million or more.
>
> [emphasis added]

53 CGW argued that the "relevant response amount" should properly be regarded as "(S$735,378.93)", such that the difference between the adjudicated

amount and the response amount would be S$1,075,894.54, which exceeds S$1m. This, pursuant to reg 10(3)(*b*) of the SOPR, would require a panel of three review adjudicators to be appointed. In support of this, CGW made the following submissions:

> (a) First, the "relevant response amount" must refer to the response amount provided in the original payment response. In this case, the payment response in question is PR 16, which in turn expressly states that the response amount is "(S$735,378.93)" (see [7] above).[26]
>
> (b) Second, the provisions in the SOPA and the SOPR that pertain to payment responses and adjudication responses expressly recognise the possibility of sums being withheld by respondents. This in turn shows that the adjudication process clearly contemplates the prospect of the response amount being a negative figure.[27]
>
> (c) Third, it is in fact an accepted practice for the response amount to include negative sums, given that there exists an array of reported cases that involve the payment response being reflected as a negative amount.[28]

54 In response, CMC Ravenna argued that the "relevant response amount" was rightly considered by the SMC to be "Nil", such that the difference between the adjudicated amount and the response amount would be S$340,515.61, which is less than S$1m. This, pursuant to reg 10(3)(*a*) of the SOPR, would require a single review adjudicator to be appointed. In aid of this reading of "relevant

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[26] Respondent's Written Submissions, paras 43–52.

[27] Respondent's Written Submissions, paras 61–74.

[28] Respondent's Written Submissions, paras 69–70.

response amount", CMC Ravenna relied on the definition of "response amount" under s 2 of the SOPA to argue that the "relevant response amount" under reg 10(3) of the SOPR cannot carry a negative value because CGW cannot possibly propose to pay a negative value.[29]

55 I accept CMC Ravenna's contention that the "relevant response amount" under reg 10(3) of the SOPR cannot carry a negative value. This is first evident from the plain and literal reading of the definition of "response amount" under s 2 of the SOPA, which defines a "response amount" as "the amount that a respondent *proposes to pay* to a claimant in a payment response" [emphasis added]. Interpreting "relevant response amount" under reg 10(3) of the SOPR to include negative values would do violence to the express wording of the definition of "response amount" under s 2 of the SOPA because, as submitted by CMC Ravenna, it is not logically possible for a respondent to *propose to pay* a negative amount to a claimant. In other words, the definition of "response amount" under s 2 of the SOPA clearly envisages a "relevant response amount" under reg 10(3) of the SOPR to carry only positive values or a nil value but not a negative value.

56 Next, it is trite that statutory provisions ought to, as much as possible, be construed as a harmonious whole with the other provisions in the same statute or related subsidiary legislation. I thus find it telling that the interpretation of "relevant response amount" advanced by CMC Ravenna also makes eminent sense when read alongside reg 6(1)(*c*) of the SOPR, which provides that every "payment response provided in relation to a construction contract shall … state 'nil' where the respondent does not *propose to pay* any part of the claimed amount and the reasons therefor" [emphasis added]. Put in another way, reg

[29] Applicant's Written Submissions, paras 9–17.

6(1)(*c*) categorically states that where a respondent does not propose to pay any part of the amount claimed by a claimant whatsoever, he or she is supposed to state "nil", as opposed to any possible negative amount. In my view, there is thus much force in the argument that the "relevant response amount" under reg 10(3) of the SOPR is not intended to carry negative values.

57 The final nail in the coffin of the assertion that the "relevant response amount" under reg 10(3) of the SOPR can carry negative values comes from the clear parliamentary intention in respect of the provisions providing for adjudication review. In his speech for the second reading of the Building and Construction Industry Security of Payment Bill 2004 (No 54 of 2004), the Minister of State for National Development made the following observations about the adjudication process (the second reading speech at col 1117):

> Adjudication does not require the consent of both parties to proceed. The entire process will be completed within three weeks after application unless the parties agree to a longer period. The adjudicator will determine the amount to be paid by the respondent to the claimant, the pay-by date and the adjudication fees payable by both parties. The adjudicator's decision on the particular progress payment in dispute is binding. *The respondent could apply for the decision to be reviewed only if the adjudicated sum differs by more than $100,000 from the amount that he is* ***willing to pay*** *in his response to the claimant.*
>
> [emphasis added in italics and in bold italics]

To my mind, the Minister of State's express recognition that the response amount for the purposes of an adjudication review application is the amount that the respondent is *willing to pay* in his response to the claimant confirms that the "relevant response amount" under reg 10(3) of the SOPR must be a positive figure or a nil figure when he is not willing to pay anything.

58 In contrast, I find the arguments advanced by CGW in support of the "relevant response amount" being "(S$735,378.93)" to be unconvincing. First, CGW's main contention that the "relevant response amount" must be the exact amount stated in the original payment response in question is question-begging. CGW argued that the "relevant response amount" that the SMC ought to have considered when deciding on the number of review adjudicators to appoint should have been the response amount referred to in PR 16, *ie*, "(S$735,378.93)". In my view, although the definition of "response amount" under s 2 of the SOPA does indeed make an express reference to "the amount that a respondent proposes to pay to a claimant in a *payment response*" [emphasis added], it ultimately begs the question of whether a "relevant response amount" is indeed intended to be capable of carrying a negative value. While CGW's argument might demonstrate that the response amount should be consistent throughout the entire adjudication process, it leaves us none the wiser regarding what exactly the response amount in the original payment response ought to be in the first place.

59 I also do not accept CGW's second contention, which is that the adjudication process clearly contemplates the prospect of the "relevant response amount" being a negative figure because the provisions pertaining to payment responses and adjudication responses under the SOPA and the SOPR (*ie*, ss 11(3)(*c*) and 15(3)(*a*) of the SOPA and reg 6(1)(*d*) of the SOPR) expressly recognise the possibility of sums being withheld by respondents. In my view, this argument is a *non sequitur*. To illustrate the fallacy underlying this argument, I first set out the provisions referred to by CGW. Sections 11(3)(*c*) and 15(3)(*a*) of the SOPA read as follows:

> **Payment responses, etc.**
>
> **11.—** …

(3) A payment response provided in relation to a construction contract —

…

(*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*; …

Adjudication responses

15.— …

(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*; …

[emphasis added]

Regulation 6(1)(*d*) of the SOPR reads as follows:

Payment responses in relation to construction contracts

6.—(1) Every payment response provided in relation to a construction contract shall —

…

(*d*) where the response amount is less than the claimed amount—

(i) contain the amount that the respondent proposes to pay for each item constituting the claimed amount, the reasons for the difference in any of the items and the calculations which show how the amount that the respondent proposes to pay is derived; and

(ii) *contain any amount that is being withheld, the reason for doing so and the calculations which show how the amount being withheld is derived.*

[emphasis added]

It is true that all three provisions highlighted above suggest that the SOPA and the SOPR clearly contemplate that there will be amounts withheld in a payment response that are independent of the items in the payment claim, and which may take the form of cross-claims, counterclaims or set-offs. However, in my view, just because these provisions state that a payment response may be accompanied by the *reasons* for any withheld amount, it does not *ipso facto* follow that the response amount can carry a negative value. In particular, both s 11(3)(*c*) of the SOPA and reg 6(1)(*d*) of the SOPR merely provide for the content of the payment response in the specific event "where the response amount is less than the claimed amount". Nothing is said about whether the response amount can indeed take on a negative value. Therefore, in asserting that these provisions show that the adjudication process contemplates that the response amount can carry negative values, CGW is overstating their effect.

60 Finally, I also reject CGW's third contention. CGW argued that it is an accepted practice for the response amount in the payment response to be reflected as a negative value, as evinced by the following cases:

(a) In *Foges* ([24] *supra* at [4]), the payment response amount was negative S$91,371.23;

(b) In *W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd (in liquidation)* [2016] SGHC 80 (at [3]), the payment response amount was negative S$666,382.89;

(c) In *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] 2 SLR 70 (at [3]), the payment response amount was negative S$155,891.63;

(d) In *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 (at [8]), the payment response amount was negative S$186,774.96;

(e) In *JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd* [2015] 3 SLR 575 (at [5]), the payment response amount was negative S$220,009.37; and

(f) In *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226 (at [81]), the payment response amount was negative S$149,587.18.

To my mind, the cited cases are by no means indicative of whether the response amount can carry a negative value. None of the cases cited by CGW turned on whether the payment response amounts could take on negative values, and therefore no arguments were canvassed on this point. Accordingly, I do not think that any weight ought to be placed on the mere fact that the courts in those cases did not question whether the response amounts stated in the payment responses should not have shown negative values. In my judgment, the negative amounts that all the respondents had posted in the cases cited by CGW, just like CMC Ravenna had done in this case, were merely meant to provide the *reason* for the respective respondents' refusal to pay the *whole* of the amounts claimed by the respective claimants. At the end of the day, the respondents in those cases, including CMC Ravenna in this case, proposed to pay the claimants nothing. Hence, the response amount posted should be regarded as "Nil".

61 Therefore, I take the view that the SMC was correct to consider the "relevant response amount" to be "Nil" in this case. As the adjudicated amount of S$340,515.61 (plus GST) exceeds the effectively "Nil" relevant response amount by more than S$100,000 but less than S$1m, I thus find that the SMC

had rightfully appointed a single review adjudicator to hear and determine the Review Application under reg 10(3) of the SOPR. Accordingly, CGW's Setting Aside Application fails on this ground.

The Misdirection Issue

62 CGW's second ground of contention for setting aside the Review Determination is that even if the Review Adjudicator had jurisdiction to hear and determine the Review Application, he had misdirected himself on a point of law. Again, I reject CGW's submissions and find that the Review Determination should not be set aside on this ground. In my judgment, courts should be precluded from evaluating whether a review adjudicator had misdirected himself on a point of law, especially one that relates to the manner of his substantive determination of the quantum of the adjudicated amount. This is because reviewing an adjudication review determination for a misdirection on a point of law or fact (as the case may be) that affects the quantification or assessment of the adjudicated amount would amount to an impermissible intrusion of the court into a review of the merits of the review adjudicator's decision.

63 CGW submitted that an adjudication review determination may be set aside if the review adjudicator had misdirected himself on a point of law by taking into account irrelevant considerations and not taking into consideration relevant matters. In support of this contention, CGW relied heavily on the recent High Court decision of *Ang Cheng Guan* ([19] *supra*) (at [35]–[46]).[30] On the facts, CGW argued that the Review Adjudicator had misdirected himself on a point of law in respect of the Liquidated Damages Claim. According to CGW,

[30] Respondent's Written Submissions, paras 122–127.

the Review Adjudicator, in deciding that there was a clear contractual completion date on 24 December 2015 for the purposes of the Liquidated Damages Claim, had mistakenly failed to consider: (a) the context in which the word "months" was used in the Addendum; (b) the nature of CGW's subcontract works; and (c) the context in which the Addendum was signed. Accordingly, the Review Adjudicator had supposedly made a mistake in contractual interpretation, which is a mistake in law: *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455 at [49]–[50].[31] In response, CMC Ravenna simply submitted that the Review Determination may not be set aside just because the Review Adjudicator had misdirected himself on a point of law, given that doing so would involve reviewing the merits of the Review Determination.[32]

64 I find myself in agreement with CMC Ravenna's submissions. In my view, it should not be open to this court to set aside the Review Determination on the basis that the Review Adjudicator had misdirected himself on the point of law as set out by CGW. By evaluating whether the Review Adjudicator had failed to take into account relevant matters or had taken into account irrelevant matters in respect of the Liquidated Damages Claim, which thereby affected his determination of the quantum of the adjudicated sum, this court would effectively be reviewing the merits of the Review Adjudicator's decision. It cannot be gainsaid that this is clearly prohibited (see [21]–[22] and [37(a)] above).

65 I also do not think that the *Ang Cheng Guan* ([19] *supra*) decision cited by CGW is persuasive authority for conducting an evaluation of whether the

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31 Respondent's Written Submissions, paras 112–121, 128–162.

32 Applicant's Written Submissions, paras 41–53.

Review Adjudicator in this case had misdirected himself on a point of law. In *Ang Cheng Guan*, the respondent had engaged the claimant to carry out works. In the adjudication brought by the claimant, the adjudicator was to determine, *inter alia*, whether the claimant was entitled to an extension of time, whether liquidated damages were wrongfully imposed, and whether amounts were payable to the claimant for work done and prolongation claims. The adjudicator found in favour of the claimant. The respondent thus applied for an adjudication review, seeking a review of two of the adjudicator's determinations. Two issues were framed ("Respondent's Issues"). However, at the adjudication review, the claimant was also dissatisfied with the adjudicator's determinations, and submitted three issues for the review adjudicator's determination ("Claimant's Issues"). The review adjudicator took the view that his jurisdiction was limited to determining only the Respondent's Issues, and hence did not consider the Claimant's Issues that were not inextricably linked to the Respondent's Issues.

66 When the claimant applied to set aside the adjudication review, Lee Seiu Kin J held that the review adjudicator ought to have reviewed the entire adjudication determination, and not only the Respondent's Issues. In Lee J's view, the review adjudicator, in considering only the Respondent's Issues, had misdirected himself in a point of law and had as a result failed to take into consideration a very relevant matter, *ie*, the Claimant's Issues (at [38] and [44]). Accordingly, Lee J set aside the adjudication review determination on this basis.

67 In arriving at his conclusion that a court could set aside an adjudication review determination on the basis of a wrong direction as to law, Lee J first cited with approval the *Wednesbury* case ([28] *supra* at [39]), and proceeded to rely on various other UK and Singapore cases expounding on the principles of the illegality head of review under administrative law (at [40]–[43]). With respect, I disagree with the approach taken in *Ang Cheng Guan* ([19] *supra*). None of

these cases were decided pursuant to the setting aside provisions under the SOPA or its statutory equivalent in the UK. Accordingly, they clearly fail to account for the unique policy reasons underpinning the SOPA regime that justify the highly circumscribed scope of review currently permitted in setting-aside applications under the SOPA (see [21]–[22] above).

68 Lee J also referred to the New South Wales Supreme Court cases of *Musico and Others v Davenport and Another* [2003] NSWSC 977 ("*Musico*") and *Multiplex Constructions Pty Ltd v Luikens and Another* [2003] NSWSC 1140 ("*Multiplex*") in order to reinforce his conclusion in *Ang Cheng Guan* ([19] *supra*) that a court may consider whether a review adjudicator had misdirected himself on a point of law in an application for the setting aside of adjudication review determinations. Specifically, both decisions purported to stand for the proposition that a court may set aside a decision of an administrative tribunal if the administrative tribunal has fallen into an error of law by, *inter alia*, failing to take into account something that ought to have been considered or basing its decision on something that it ought not to have taken into account (*Ang Cheng Guan* at [45]–[46]).

69 However, I am of the view that these two cases are also of limited utility for two reasons. First, they were decided before the New South Wales Court of Appeal decision of *Brodyn* ([27] *supra*) was decided. *Brodyn* went on to overturn the positions in *Musico* ([68] *supra*) and *Multiplex* ([68] *supra*) by introducing the essential conditions approach (at [52]–[55] and [59]). Although, as I have earlier noted (see [30] above), the court in *Chase Oyster* ([30] *supra*) subsequently rejected the essential conditions approach laid down in *Brodyn*, this was on the specific ground that *Brodyn* purported to, for the purposes of the NSW SOPA, entirely replace the dichotomy between jurisdictional and non-jurisdictional errors with the essential conditions approach: see *Chase Oyster* at

[27]–[32] *per* Spigelman CJ. It was for this reason that Spigelman CJ rejected the essential conditions approach, and instead went on to define the test for determining what would constitute a jurisdictional error in the terms as set out in the legislative purpose test: see *Chase Oyster* at [37]–[38].

70 Second, it is crucial to note that in laying out the legislative purpose test in *Chase Oyster* ([30] *supra*), Spigelman CJ clearly refrained from importing wholesale all conceivable forms of errors of law that a court supervising an administrative tribunal would traditionally consider, which had been the approach adopted in both *Musico* ([68] *supra*) and *Multiplex* ([68] *supra*). In *Musico*, McDougall J affirmed (at [50] and [52]) the holding of the High Court of Australia in *Craig v The State of South Australia* (1995) 184 CLR 163 (at 179) that a court may set aside the decision of an administrative tribunal where it "falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion". In *Multiplex*, Palmer J cited with affirmation (at [34]) the holding of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 14 (at 171) that a tribunal's decision would be a nullity if, *inter alia*, it "refused to take into account something which it was required to take into account … [or] based its decision on some matter which, under the provisions setting it up, it had no right to take into account". Conversely, Spigelman CJ in *Chase Oyster* consciously set out a test that ensured a scrupulous fidelity to the language and purpose of the NSW SOPA. The legislative purpose test laid down in *Chase Oyster* has since become a permanent fixture in our local SOPA jurisprudence when it was accepted by the Court of Appeal in *Chua Say Eng* ([21] *supra*) at [67]. It thus stands to reason that the positions adopted by the courts in *Musico* and *Multiplex* have little jurisprudential value, if at all.

71 Ultimately, mere errors of law or fact that relate to the determination of the quantum of the adjudicated sum should not be considered errors that permit a setting aside by the court of the adjudication review determination under the SOPA as it would amount to a review of the merits of the adjudication review determination by the backdoor. Accordingly, I am of the view that courts may not consider whether a review adjudicator has misdirected himself on a point of law, especially one that affects the review adjudicator's substantive determination of the quantum of the adjudicated sum. I thus find against CGW on the Misdirection Issue.

Conclusion

72 For all of the reasons stated above, I dismiss the Setting Aside Application. In the result, I decline to set aside both the Review Determination and the Order of Court obtained by CMC Ravenna.

73 I shall hear the parties on costs within two weeks if parties are not able to agree on costs.

Chan Seng Onn
Judge

Lee Peng Khoon Edwin and Fong Lee Cheng Jennifer (Eldan Law LLP) for the applicant;
Chan Kah Keen Melvin and Yvonne Mak Hui-Lin (TSMP Law Corporation) for the respondent.