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

[2022] SGHC 276

Originating Application No 667 of 2022
(Summons No 2788 of 2022)

Between

Emergent Engineering Pte Ltd

And

China Construction Realty Co Pte Ltd

EX TEMPORE JUDGMENT

[Building And Construction Law — Statutes and regulations — Contractor applying for adjudication of payment claim]
[Building And Construction Law — Subcontracts — Claims by subcontractor]
[Building And Construction Law — Termination — Termination under terms of contract]

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Emergent Engineering Pte Ltd
v
China Construction Realty Co Pte Ltd

[2022] SGHC 276

General Division of the High Court — Originating Application No 667 of 2022 (Summons No 2788 of 2022)
Tan Siong Thye J
2 November 2022

2 November 2022

Tan Siong Thye J:

Introduction

1 China Construction Realty Co Pte Ltd (the "Respondent") brings the present application to set aside both the Adjudication Determination dated 29 July 2022 (the "Adjudication Determination") and the Order of Court dated 17 August 2022 obtained by Emergent Engineering Pte Ltd (the "Applicant") under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") which enforced the Adjudication Determination in the same manner as a Judgment or an Order of the Court (the "Order of Court"). The Adjudication Determination was rendered following the Adjudicator's determination of Adjudication Application No. SOP/AA 093 of 2022 ("AA 93"), which was filed by the Applicant on 10 June 2022.

2 Having considered the parties' written and oral submissions, I dismiss the Respondent's application to set aside the Adjudication Determination and the Order of Court. In my view, the Respondent has not made out any of the grounds for setting aside the Adjudication Determination and the Order of Court. I now give the reasons for my decision.

The facts

The background leading to AA 93

3 The subject matter of the present proceedings involves a residential project (the "Project"). The Respondent is the main contractor of the Project.[1]

4 In December 2019, the Respondent engaged the Applicant as a sub-contractor for the Project. The terms of the engagement were detailed in a Letter of Acceptance dated 14 December 2019 (the "LOA").[2] Subsequently, the scope of the Applicant's sub-contract work was varied under Variation Order No 1 ("VO 1") dated 14 August 2020 and there was a further Supplemental Agreement dated 31 March 2021 (the "Supplemental Agreement"). The LOA, VO 1 and the Supplemental Agreement collectively define the relationship between the parties and make up the scope of the Applicant's contractual obligations under its sub-contract (the "Sub-Contract").[3]

5 On 22 April 2022, the Respondent issued a Notice of Termination seeking to terminate the Sub-Contract. The Respondent purportedly relied on, amongst others, clause 5.10.1 of the LOA ("Clause 5.10.1") as the basis for

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[1] First Affidavit of He Daoning dated 16 August 2022 ("HDN 1st Affidavit") at para 5.

[2] HDN 1st Affidavit at para 5.

[3] HDN 1st Affidavit at para 6 and Exhibit HD-1.

terminating the Sub-Contract.[4] The relevant portion of Clause 5.10.1, which I shall term as the "Termination Provision", reads as follows:[5]

> **5.10.1 Termination For Default**
>
> If, in the opinion of [the Respondent], [the Applicant]:
>
> (a) has abandoned the Sub-Contract or suspended the Sub-Contract works; or
>
> (b) has failed to proceed with the Sub-Contract works with due diligence and expedition 7 days after issuance of a Notice of Delay under Clause 5.10 above or 7 days after issuance of notice to expedite the Sub-Contract works ; or
>
> (c) has failed to comply with the laws and regulations laid out under Clause 7.0; or
>
> (d) has failed to execute the Sub-Contract works or to perform or comply with its other obligations or duties under and in accordance with the Sub-Contract after 7 days' notice in writing to do so has been given by [the Respondent],
>
> then [the Respondent] shall without prejudice to any other rights and remedies available to him in law or under the Sub-Contract, be entitled to terminate the employment of [the Applicant] under the Sub-Contract by written notice with immediate effect.

6 On 30 April 2022, the Applicant responded with its notice stating that the Respondent had wrongfully terminated the Sub-Contract and was therefore in repudiatory breach.[6]

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4 1st Affidavit of Mak Khye Wing dated 30 August 2022 ("MKW 1st Affidavit") at pp 420–422.

5 MKW 1st Affidavit at p 37.

6 MKW 1st Affidavit at pp 423–424.

AA 93

7 On 6 May 2022, the Applicant served on the Respondent Payment Claim No 25 ("PC 25") pursuant to s 10 of the SOPA. On 27 May 2022, the Respondent served Payment Response No 25 ("PR 25") on the Applicant under s 11 of the SOPA.[7]

8 On 10 June 2022, the Applicant lodged AA 93 pursuant to s 13(1) of the SOPA.[8] Two adjudication conferences were held: the first was on 24 June 2022 (the "First Adjudication Conference") and the second was on 8 July 2022 (the "Second Adjudication Conference").[9]

9 On 29 July 2022, the Adjudicator rendered the Adjudication Determination.[10] The Adjudicator found that the Applicant was entitled to the sum of $175,099.23 from the Respondent (the "Adjudicated Amount").

10 Despite the due date for payment of the Adjudicated Amount falling on 5 August 2022, the Respondent expressed its unwillingness to make payment of the Adjudicated Amount to the Applicant.[11]

Enforcement of the Adjudication Determination

11 In DC/OA 64/2022 ("OA 64"), the Applicant sought the District Court's permission to enforce the Adjudication Determination in the same manner as a

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7 HDN 1st Affidavit at paras 9–10.

8 HDN 1st Affidavit at para 12.

9 MKW 1st Affidavit at paras 12–15.

10 HDN 1st Affidavit at pp 88–181.

11 HDN 1st Affidavit at p 197.

judgment or an order of the court, under s 27 of the SOPA. The Applicant's application was subsequently granted via the Order of Court.

12 In DC/SUM 2788/2022 ("SUM 2788"), the Respondent applied to the District Court to set aside the Adjudication Determination and the Order of Court (the "Setting-Aside Application"). By the parties' consent, the proceedings in OA 64 and SUM 2788 were transferred to be heard in the General Division of the High Court, *ie*, the present application.

The Respondent's claims

13 The Respondent raises the following allegations in support of its application to set aside the Adjudication Determination:

(a) The Adjudicator failed to comply with the principles of natural justice set out in s 16(5)(*c*) of the SOPA.

(b) PC 25 was not served in accordance with s 10 of the SOPA.

(c) PC 25 involves a claim for the final settlement of accounts and is therefore not a progress payment within the ambit of the SOPA.

14 I shall deal with each of the above allegations, starting with the Respondent's claim that there was a breach of natural justice.

My decision

15 It is axiomatic, and in any case undisputed between the parties, that the court cannot review the findings of the adjudicator. This is because the court is exercising its supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination, or a judgment procured under s 27(1)

of the SOPA to enforce the adjudication determination in the same manner as a judgment or an order of the court. The Court of Appeal explained as follows in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*") at [48]–[49]:

> 48 *Put simply, in hearing an application to set aside an [adjudication determination or "AD"] 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 ADs 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 AD 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].
>
> 49 The view that the court is exercising its supervisory jurisdiction when it hears an application to set aside an AD and/or a s 27 judgment is strengthened further when one considers that the court, in hearing such an application, is not solely concerned with the procedural propriety of the process by which the creditor obtained its s 27 leave order, such as whether the creditor made full and frank disclosure in its *ex parte* application for the s 27 leave order. This is because focusing only on the procedural propriety of the process by which the creditor obtained its s 27 leave order would not address the real concern of the debtor, which is to set aside the underlying AD and/or the s 27 judgment entered pursuant to that AD. Instead, *the court, in hearing such a setting-aside application, is concerned with the propriety of the AD 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).* These go beyond the usual

> concerns which the court takes into account in deciding whether an order obtained pursuant to an *ex parte* application should be set aside for non-disclosure.
>
> [emphasis in original omitted; emphasis added in italics]

16 The Court of Appeal in *Citiwall* further observed that there are limited instances in which the court can intervene. These instances are prescribed statutorily under s 27(5) read with s 27(6) of the SOPA, such as a breach of the rules of natural justice or where the adjudication determination was induced or affected by fraud or corruption.

Breach of natural justice

The applicable law

17 Section 16(5)(*c*) of the SOPA prescribes the duty of an adjudicator to act in accordance with the principles of natural justice. Further, s 27(6)(*g*) of the SOPA provides that a party may apply to set aside an adjudication determination on the ground that a breach of the rules of natural justice has occurred in connection with the making of the adjudication determination.

18 A party seeking to set aside an adjudication determination on the ground of a breach of natural justice must show, on a balance of probabilities, that: (a) there has been a material breach of natural justice, (b) which has caused it to suffer prejudice (*Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers*") at [34]–[35]).

19 The principles of natural justice are well-established. One of the twin pillars of the rules of natural justice requires that each party must be given an adequate opportunity to be heard and to respond to the case raised by the other party (the "fair hearing rule") (see *Bintai Kindenko Pte Ltd v Samsung C&T*

Corp [2018] 2 SLR 532 ("*Bintai Kindenko*") at [34]). One aspect of the fair hearing rule is the requirement that the adjudicator must receive both parties' submissions and address important issues which are determinative of the outcome of a dispute (see *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277 at [57]; *Bintai Kindenko* at [40]–[43]).

20 Accordingly, an adjudicator will be found to have acted in breach of natural justice for failing to consider an important issue in a dispute before him if: (a) the issue was essential to the resolution of the dispute; and (b) a clear and virtually inescapable inference may be drawn that the adjudicator did not apply his mind to the said issue (see *Bintai Kindenko* at [46]). Element (a) is simple and clear. As for element (b), it is useful to explain that where the adjudicator fails to consider an important pleaded issue, the court can draw an inference that the adjudicator failed to address that issue, if the facts and circumstances clearly warrant it.

21 The threshold for finding a breach of natural justice on this ground is a high one; the court should only infer that the adjudicator has failed to consider an important pleaded issue if such an inference was "clear and virtually inescapable" (see *Glaziers*, citing *AKN v ALC* [2015] 3 SLR 488 ("*AKN*") at [46]). The Court of Appeal in *Glaziers* observed at [36]:

> 36 … where the allegation is that the decision-maker has wholly failed to consider an important pleaded issue, the court must be especially careful. *It is often being invited to conclude, not from any "explicit indication" … but rather from the decision-maker's silence on a submission that he has failed to even address his mind to that submission. Yet such silence may be equally consistent with the decision-maker considering the submission, but then choosing to disregard or reject it without explaining himself. The difficulty in drawing such an inference is that the decision-maker's silence is inherently ambiguous.* … Given the ambiguities inherent in the decision-maker's silence,

> *the court must be wary that a disaffected party may wrongly characterise what is, in truth, the decision-maker's misunderstanding of or disagreement with a certain submission as a failure to consider that submission entirely.*
>
> [emphasis in original omitted; emphasis added in italics]

22 The holding of the Court of Appeal in *Glaziers* is apposite. Where the adjudicator is alleged to have breached the fair hearing rule by failing to *expressly* consider a pleaded issue in the adjudication determination, the court must be wary of drawing an inference from the adjudicator's "silence" that he or she has failed to consider the pleaded issue. The Court of Appeal in *AKN* held as follows at [46], albeit in the context of setting aside an arbitral award (but equally applicable to the context of setting aside an adjudication determination):

> … If the facts are also consistent with the [adjudicator] simply *having misunderstood the aggrieved party's case*, or having been *mistaken as to the law*, or having *chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary* (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the [adjudicator] did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.
>
> [emphasis in original omitted; emphasis added in italics]

23 However, where the adjudicator's failure to expressly consider a pleaded issue in the adjudication determination is based on the adjudicator's misunderstanding of the complainant's case, disagreement with the complainant's submission, or an error of law, an inference should not be drawn that the adjudicator has failed to afford the complainant natural justice by not expressly considering the pleaded issue (*AKN* at [47]; see also *Bintai Kindenko* at [47]). Natural justice only requires that the parties be heard; it does not require that the parties be given responses on all submissions made (see *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 ("*Range*

Construction") at [75], citing *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [60]). Accordingly, the fact that an adjudicator did not explicitly state his conclusions in relation to a given issue does not mean that he had not considered the parties' submissions on that issue (see *Range Construction* at [75]).

The Respondent has not established that the Adjudication Determination was rendered in breach of natural justice

24 The Respondent submits that the Adjudicator had breached the rules of natural justice in connection with the making of the Adjudication Determination under s 16(5)(*c*) read with s 27(6)(*g*) of the SOPA. The Respondent makes the following arguments:

(a) The Respondent pleaded that the termination of the Sub-Contract was based on two distinct and separate grounds, namely (i) the Termination Provision under Clause 5.10.1, *ie*, the Respondent's contractual right to terminate the Sub-Contract; and (ii) the Applicant's wrongful repudiation of the Sub-Contract under common law.[12] Both grounds were canvassed by the Respondent in PR 25 and its submissions to the Adjudicator.[13]

(b) From a reading of the Adjudication Determination, the Adjudicator only determined the issue of wrongful repudiation under common law.[14] That was distinct from the Respondent's contractual right to terminate the Sub-Contract under the Termination Provision

12 Respondent's Written Submissions dated 27 October 2022 ("RWS") at para 30.

13 RWS at para 31.

14 RWS at para 33.

following the Applicant's breach of the terms of the Sub-Contract.[15] Accordingly, it is "patently clear and obvious" that the Adjudicator had failed to consider and determine the same.[16]

(c) Had the Adjudicator applied his mind to the Termination Provision, he would invariably have determined that the Respondent had validly terminated the Sub-Contract. This was because in the Adjudication Determination it was stated that there were "other outstanding and defective works" by the Applicant and thus the Applicant had breached the term(s) of the Sub-Contract.[17]

25 In my view, the Respondent's submission that the Adjudicator had breached the principles of natural justice is baseless.

26 First, the Adjudicator had, in the First Adjudication Conference, asked the parties to address the Adjudicator on the jurisdictional issue of whether PC 25 was invalid given the Respondent's termination of the Sub-Contract on 22 April 2022.[18] The Adjudicator also allowed both parties to make further written submissions specifically concerning, amongst others, the Respondent's termination of the Sub-Contract under the Termination Provision and the validity of PC 25.[19] The Respondent was thus allowed to raise all the arguments that it wanted to in the submissions without any restriction.

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15 RWS at para 32.

16 RWS at para 34.

17 RWS at paras 33 and 35.

18 MKW 1st Affidavit at para 12.

19 MKW 1st Affidavit at pp 226–240 and 242–257, Claimant's Further Submissions dated 29 June 2022 and Respondent's Written Submissions No. 2 dated 4 July 2022.

27 Second, it is obvious that the Adjudicator read the parties' submissions. A perusal of the Adjudication Determination shows the Adjudicator's awareness of the two alternative grounds of termination that the Respondent relied upon, in particular under the Termination Provision. Indeed, as the Applicant points out,[20] there are numerous references throughout the Adjudication Determination to Clause 5.10.1 and the Termination Provision. This is entirely consistent with the view that the Adjudicator was aware of the parties' submissions on this issue. If it were otherwise, the Adjudicator would not have been able to summarise in the Adjudication Determination the Respondent's factual arguments on its entitlement to terminate the Sub-Contract, whether under common law or the Termination Provision.[21]

28 It is also important to note paragraphs 75 and 76 of the Adjudication Determination:[22]

> 75. In reaching my Determination, I have considered the parties' Written Submissions …
>
> 76. In order to save time and cost, although I have taken all the parties' contentions into consideration, I have not recorded every one of them but only those which are crucial in arriving at my determination.

This shows that the Adjudicator had applied his mind and considered the issue of the Respondent's termination of the Sub-Contract under Clause 5.10.1. It cannot be argued that the Adjudicator had failed to decide on a pleaded issue.

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20 Applicant's Written Submissions dated 27 October 2022 ("AWS") at para 39.

21 MKW 1st Affidavit at pp 272–280 and 283–285, Adjudication Determination at paras 42–65 and 72–78.

22 MKW 1st Affidavit at p 284, Adjudication Determination at paras 75 and 76.

29 Third, it is important to note that the Respondent relied on two distinct legal grounds for terminating the Sub-Contract, *ie*, under common law and the Termination Provision. However, the Respondent relied on substantially the same facts to argue that it was entitled to terminate the Sub-Contract. This was clear from the Respondent's written submissions filed in AA 93,[23] and the Adjudicator's summary of the same.[24] In brief, the Respondent's case was that the Applicant had, by its conduct, committed a repudiatory breach of the Sub-Contract under common law and this also resulted in a breach of the terms of the Sub-Contract.

30 The Adjudicator found that the Respondent "had not provided sufficient justification to terminate the Sub-Contract".[25] Thus, the Adjudicator was also not satisfied that the Applicant had, by its conduct, committed a repudiatory breach of the Sub-Contract under common law, or a breach of the terms of the Sub-Contract. It follows that the Adjudicator was of the view that there was no basis to terminate the Sub-Contract, whether under common law or contract, *ie*, Clause 5.10.1. That was why the Adjudicator stated in the Adjudication Determination in paragraph 101 that he had "determined the termination not to be valid".[26]

31 Thus, the Adjudicator found that there was insufficient basis for the Respondent to allege a repudiatory breach or a breach of the terms of the Sub-

[23] MKW 1st Affidavit at pp 185–190 and 246–247, Respondent's Written Submissions No. 1 dated 20 June 2022 at paras 10–16 and 22 and Respondent's Written Submissions No. 2 dated 4 July 2022 at paras 13–14.

[24] MKW 1st Affidavit at pp 284–290, Adjudication Determination at paras 77–98.

[25] MKW 1st Affidavit at p 290, Adjudication Determination at para 100.

[26] MKW 1st Affidavit at p 290, Adjudication Determination at para 101.

Contract. Hence, the Respondent cannot argue that the Adjudicator failed to apply his mind to consider the merits of the Respondent's case for terminating the Sub-Contract under the Termination Provision.

32 I further note that the Adjudicator had, in the Adjudication Determination, found PC 25 to be a valid payment claim under the SOPA and concluded that he had the jurisdiction to adjudicate AA 93.[27] According to the Adjudicator, the following portion of Clause 5.10.1, which I shall term as the "Payment Suspension Provision", was not invoked on the facts to invalidate the Applicant's payment claim:[28]

> **5.10.1 TERMINATION FOR DEFAULT**
>
> …
>
> Where termination of the employment of [the Applicant] under the Sub-Contract is made pursuant to this Sub-Contract for default and/or repudiatory breach under general law, no sum shall be due and payable to [the Applicant] until this Project has been completed and handed over to the Employer nor shall [the Respondent] be liable to pay [the Applicant] any sum in respect of the Sub-Contract until the total cost to [the Respondent] of completing and remedying any defects, damages for delay and/or other loss or expense incurred by [the Respondent] as a result of the termination (whether directly or indirectly) ("Main Contractor's Costs") have been ascertained. [The Applicant] shall thereafter only be entitled to receive such sum for work carried out less the Main Contractor's Costs, which sum shall be set off against what would otherwise be payable to [the Applicant] in light of the parties' mutual debts and dealings.
>
> …
>
> Upon the termination of [the Applicant's] employment under this Clause, [the Respondent] is not obliged to certify any further payment under the [SOPA]. Further, [the Respondent]

27 MKW 1st Affidavit at pp 290–291, Adjudication Determination at paras 100 and 101.

28 HDN 1st Affidavit at p 29.

> is entitled to retain any payment which would otherwise be due and owing to [the Applicant] under the [SOPA].

33 It is necessary, at this juncture, to also consider s 4(2)(*c*) of the SOPA, which states as follows:

> **Application of Act**
>
> 4.—…
>
> (2) This Act does not apply to —
>
> …
>
> (c) any terminated contract to the extent that —
>
> (i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and
>
> (ii) that date has not passed or that event has not occurred;
>
> …

34 If the Payment Suspension Provision was invoked, the effect would be to suspend the Applicant's entitlement to issue the Respondent a payment claim. This would have rendered the Applicant's service of PC 25 invalid under s 4(2)(*c*) of the SOPA. The invocation of the Payment Suspension Provision is dependent on the Respondent's termination of the Sub-Contract "for default and/or repudiatory breach under general law". In other words, from the moment the Respondent terminates the Sub-Contract under either the Termination Provision "for default" or under common law for "repudiatory breach", the Applicant would not be entitled to serve any payment claim on the Respondent.

35 At this juncture, I note that the Applicant has argued comprehensively and extensively that even if the Payment Suspension Provision was operative,

it would have been invalid and unenforceable for being in violation of the SOPA, particularly ss 9, 17(3) and 36(2) of the SOPA. In brief, the Applicant's case is that the Payment Suspension Provision permits the Respondent to withhold certification and payment of any progress payment claims filed by the Applicant, following the Respondent's termination of the Sub-Contract. This is on the basis that the Respondent has not yet ascertained the costs of completing and remedying any defects, damages for delay and other loss or expense incurred, as the plain language of the Payment Suspension Provision alludes to. This, the Applicant submits, allows the Respondent to effectively evade the requirements under s 17(3) of the SOPA, namely that any damage, loss or expense indicated in a payment claim or payment response must be supported by documentation, failing which the adjudicator is entitled to disregard that claim. The Applicant thus argues that such a circumvention of the requirements under s 17(3) of the SOPA should be rendered void under s 36(2) of the SOPA.[29]

36 It does appear that the Payment Suspension Provision could potentially be abused by the Respondent to delay the Applicant's progress payment claim and offset it without any proper supporting documentation.

37 Further, the Applicant also contends that the Payment Suspension Provision is in contravention of the "pay when paid provisions" in s 9 of the SOPA. I also agree with the Applicant's argument on this issue. For the purpose of this *ex-tempore judgment,* and given my findings above, it may not be necessary to discuss in detail the validity of the Payment Suspension Provision of the Sub-Contract. However, I shall supplement this *ex-tempore* judgment, if necessary.

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[29] AWS at paras 67.2 and 80–91.

38 Returning to my main analysis, the Adjudicator found that the Respondent had wrongly terminated the Sub-Contract, the Payment Suspension Provision did not apply and PC 25 was a valid payment claim under the SOPA. It can be inferred that the Adjudicator would have considered and rejected the Respondent's purported termination of the Sub-Contract under the Termination Provision.[30] For the Adjudicator to conclude that the Payment Suspension Provision did not apply, he must have considered that the conditions for invoking that provision were not met, *ie*, that the Respondent had not validly terminated the Sub-Contract, amongst others, under the Termination Provision. It, therefore, follows that the Adjudicator would have applied his mind to consider the Respondent's arguments on the issue relating to the Respondent's entitlement to terminate the Sub-Contract under the Termination Provision.

39 Therefore, the Adjudicator has not wholly ignored and failed to consider the Respondent's reliance on Clause 5.10.1 as an alternative ground for terminating the Sub-Contract. Indeed, the Adjudicator's analysis in the Adjudication Determination suggests that he was aware of the Respondent's argument on the termination of the Applicant's employment under the Sub-Contract.

40 The true substance of the Respondent's complaint lies in its grievance that the Adjudicator had found that the Respondent had wrongfully terminated the Sub-Contract under common law and the Termination Provision. The Respondent's basis for alleging a breach of natural justice is, fundamentally, its disagreement with the Adjudicator's decision on the merits.

[30] AWS at para 40.

41 Whether the Adjudicator was correct in his analysis on this point is beside the point. As I have held at [23] above, even an error of law committed by the Adjudicator is not a ground for finding a breach of natural justice. It is not the prerogative of the Court to review the merits of an adjudicator's decision when hearing an application to set aside an adjudication determination. As Judith Prakash J (as she then was) emphasised in *SEF Construction* at [41], the court's role in deciding a setting-aside application cannot be "to look into the parties' arguments before the adjudicator and determine whether the adjudicator arrived at the correct decision". A complete review of the adjudication determination would unduly prolong the process before a dispute relating to a payment claim is finally disposed of. This will prolong the payment disputes and will be expensive. Further, the review of the adjudication determination is inconsistent with the purpose of the SOPA which is to facilitate cash flow, a vital feed in the building and construction industry, by according speedy interim relief. Any party who is dissatisfied with the adjudicator's decision, can always avail itself to the full suite of the court procedure if it so decides.

42 I accept the Applicant's submission that the proper recourse for the Respondent is to apply for an adjudication review under s 18 of the SOPA,[31] and not to disguise its grievances on the merits of the Adjudicator's decision as an argument founded on a breach of natural justice. Unfortunately, the Respondent did not avail itself to this procedure.

43 I shall now consider the Respondent's submission for setting aside the Adjudication Determination on the ground that PC 25 was not served in accordance with s 10 of the SOPA.

[31] AWS at para 44.

Whether PC 25 was validly served on the Respondent

The applicable principles

44 Section 27(6)(*a*) of the SOPA provides that a party to an adjudication may commence proceedings to set aside an adjudication determination on the ground that the payment claim was not served in accordance with s 10 of the SOPA.

45 Section 10 of the SOPA prescribes the following relevant requirements for service of payment claims:

(a) the payment claim must be served on a person liable to make the payment or specified in accordance with the contract (see s 10(1)(*a*) and (*b*) of the SOPA);

(b) the payment claim cannot be served out of time as determined in accordance with the contract (see s 10(2)(*a*) of the SOPA);

(c) the payment claim is in respect of which the full payment has not been received and for which an adjudication application has not been brought (see s 10(5) read with s 10(6) of the SOPA); and

(d) the payment must state the claimed amount, be made in such form and manner, and contain information or be accompanied by documents as prescribed (see s 10(4) of the SOPA).

46 Where there has not been valid and proper service of a payment claim under s 10 of the SOPA, the time for making a payment response under s 11(1) of the SOPA would not begin to run, and a claimant would not be entitled to make an adjudication application under s 13 of the SOPA. It also follows that the appointment of an adjudicator under s 14(1) of the SOPA in such an

adjudication application would be invalid. As the Court of Appeal observed 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 at [66]:

> … If there is no … [valid] service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.

47 The Respondent's submission on this ground is that, given the alleged improper service of PC 25, the Applicant would not be entitled to apply for an adjudication of its claims under PC 25. It also follows that there is no basis at all for an adjudicator to be appointed in the first place, and the adjudicator would not have had the jurisdiction to adjudicate on the parties' dispute.

The Applicant has validly served PC 25 on the Respondent

48 The Respondent does not allege that any of the requirements under s 10 of the SOPA set out above was breached in the Applicant's service of PC 25. Indeed, the parties do not dispute that PC 25 was, in fact, compliant with all the payment claim requirements under s 10 of the SOPA. Rather, the Respondent's main contention is that the Applicant was not entitled to serve PC 25 on the Respondent as the Respondent had terminated the Sub-Contract. The Respondent makes two arguments in support.

49 First, the Sub-Contract was validly terminated on 22 April 2022 following the Respondent's service of its Notice of Termination on the Applicant.[32] Under the Payment Suspension Provision, therefore, the Applicant was not entitled to serve PC 25 on the Respondent until either of the two events

[32] RWS at para 37.

prescribed under the Payment Suspension Provision had occurred, namely: (a) the completion and hand-over of the Project to the Employer; or (b) the ascertainment of the total costs for completing and remedying any defects, damages for delay and/or other loss or expense incurred by the Respondent as a result of the termination for breach.[33] Since neither of the prescribed events had occurred, the Applicant's right to be paid under Clause 5.10.1 had not crystallised.[34] Accordingly, the Applicant was not entitled to serve PC 25.

50 Second, the Respondent also relies on s 4(2)(*c*) of the SOPA, which provides that the SOPA shall not apply to any "terminated contract" to the extent that the contract "contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until … the occurrence of an event specified in the contract" and "that event has not occurred" (see [33] above). Accordingly, the Respondent says that since the Sub-Contract was validly terminated, s 4(2)(*c*) of the SOPA reinforces the Respondent's position that the Applicant was not entitled to issue PC 25.[35]

51 As I have canvassed above, the Applicant also argues that s 4(2)(*c*) of the SOPA does not apply as the Payment Suspension Provision contravenes other provisions of the SOPA (see [35]–[37] above). Be that as it may, I do not accept the Respondent's submission.

52 I emphasise that the court's supervisory jurisdiction in respect of an application to set aside an adjudication determination does not include an examination of the merits of the adjudication determination (see [15] above).

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33 RWS at para 42.

34 RWS at para 43.

35 RWS at paras 44–45.

As the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 observed at [73]:

> It is well established that the role of a court in reviewing an adjudicator's determination is not to review the merits of the determination, and that any setting aside must be premised on the adjudicator's acting in excess of his jurisdiction or in breach of the rules of natural justice.

53 Bearing this principle in mind, the Respondent's submissions above clearly amount to a backdoor attempt to review the merits of the underlying dispute; it sought to invite this Court to consider whether it would have reached the same decision as the Adjudicator on the issue regarding the validity of the Respondent's termination of the Sub-Contract.

54 As the Applicant points out, the Respondent's basis for alleging that the Applicant has improperly served PC 25 is premised fundamentally on its disagreement with the Adjudicator's decision that the Respondent had not validly terminated the Sub-Contract pursuant to the Termination Provision.[36] This was an issue that the Adjudication Determination had resolved in the Applicant's favour. I accept the Adjudicator's finding at face value that "the Respondent had **not** provided sufficient justification to terminate the Sub-Contract" [emphasis in original] and that the termination was not valid.[37] Having made this determination, the Adjudicator was entitled to conclude that PC 25 was a valid payment claim under the SOPA and that the Payment Suspension Provision was not triggered to invalidate PC 25.[38] Accordingly, I reject the

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[36] AWS at para 102.

[37] MKW 1st Affidavit at p 290, Adjudication Determination at paras 100–101.

[38] MKW 1st Affidavit at pp 290–291, Adjudication Determination at para 101; AWS at para 108.

Respondent's submission that PC 25 was not a valid payment claim in this regard.

Whether PC 25 was a claim for progress payment within the scope of the SOPA

55 Finally, I shall consider the Respondent's submission that PC 25 was not a progress payment claim, and thus falls outside the scope of the SOPA.

56 The Respondent submits that PC 25 was a claim for the final settlement of accounts between the Applicant and the Respondent following the termination of the Applicant's employment under the Sub-Contract. Such a claim, the Respondent alleges, was outside the scope of the SOPA. Accordingly, the Respondent alleges that the Adjudicator acted in excess of his jurisdiction and powers under the SOPA in making the Adjudication Determination in respect of PC 25 in AA 93.[39] In support, the Respondent seeks to analogise the present case with the Court of Appeal's observations in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal* [2021] 1 SLR 791 ("*Orion-One*").

57 In *Orion-One*, Orion-One Residential Pte Ltd ("Orion"), the developer of a condominium project, engaged Dong Cheng Construction Pte Ltd ("Dong Cheng") as the main contractor for the project. The main contract between Dong Cheng and Orion incorporated the *REDAS Design & Build Conditions of Main Contract* (Real Estate Developers' Association of Singapore, 3rd Ed, July 2013) ("REDAS Conditions") which contained clause 30.3, the effects of termination for default. I shall elaborate on clause 30.3 below. Orion eventually terminated

[39] RWS at para 46

Dong Cheng's employment as the main contractor of the project. Slightly more than two years later, Dong Cheng served a payment claim on Orion, which Orion disputed. Dong Cheng then lodged an adjudication application in respect of the payment claim. The adjudicator in that case found, amongst others, that Dong Cheng was entitled to serve the payment claim despite the payment claim being served after Dong Cheng's employment had been terminated. The High Court found that Dong Cheng's payment claim was valid, and thus dismissed Orion's application to set aside the adjudication determination.

58 On appeal, Dong Cheng submitted that its right to serve a payment claim post-termination was prescribed by cl 30.3.1 of the REDAS Conditions ("Clause 30.3.1"). Clause 30.3.1 states:

> **30.3. Effects of Termination for Default**
>
> In the event of the termination of the employment of the Contractor under clause 30.2,
>
> 30.3.1. the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained.

59 The Court of Appeal allowed the appeal and held that Clause 30.3.1 was only applicable if Dong Cheng's employment was terminated under clause 30.2. This was not the case; Dong Cheng's employment was instead terminated under clause 2.5 of the supplementary agreement between Dong Cheng and Orion. Thus, Clause 30.3.1 was not applicable, and Dong Cheng was not entitled to rely on Clause 30.3.1 to serve its payment claim (see *Orion-One* at [31]).

60 The Court of Appeal commented, *obiter*, that Clause 30.3.1 of the REDAS Conditions concerned the final settlement of accounts between the parties in the event that the contractor was terminated by the employer for breach of contract (see *Orion-One* at [33] and [34]):

> 33 It is apparent from [Clause 30.3.1] that any payment payable by the employer thereunder is conditioned upon the ascertainment of all costs incurred by the employer as a result of the termination. …
>
> 34 Based on the language of [Clause 30.3.1], the costs referred to therein ("the Termination Costs") do not only refer to the costs that have actually been expended by the employer post-termination (*eg*, the costs of engaging another contractor to complete the works). *It also includes any damages that are due to the employer as a result of the termination of the contractor's employment. In other words, the Termination Costs encompass not only the costs required to bring the project to completion but also any sums that the contractor is legally liable to pay to the employer as a result of its breach of contract.*
>
> [emphasis added]

Thus, Clause 30.3.1 was concerned with Orion's payment to Dong Cheng after ascertaining all the costs incurred by Orion as a result of its termination of Dong Cheng's employment *and* any damages that are due to Orion as a result of the termination of Dong Cheng's employment (the "Termination Costs"). Payments made pursuant to Clause 30.3.1, which factors into account the Termination Costs, could not be viewed as progress payments as they are not concerned solely with the value of the works done but also sums that the contractor is legally liable to pay to the employer as a result of its breach of contract (*Orion-One* at [34]). The Court of Appeal thus concluded that Dong Cheng's payment claim did not fall within the ambit of the SOPA. Any payment claimed under Clause 30.3.1 concerns the final settlement of accounts between the parties in the event that the contractor's employment is terminated by the employer for breach of contract (see *Orion-One* at [38] and [44]).

61 In the present case, the Respondent seeks to analogise Clause 30.3.1 in *Orion-One* with the Payment Suspension Provision. The Respondent submits that since PC 25 was served following the Applicant's termination of its employment under the Sub-Contract, it follows that PC 25 was served pursuant to the Payment Suspension Provision. That meant that PC 25 was a claim for the final settlement of accounts between the Applicant and the Respondent following the termination of the Applicant's employment under the Sub-Contract.[40]

62 The language of Clause 30.3.1 in *Orion-One* may appear similar to the Payment Suspension Provision in the present case. However, I cannot accept the Respondent's submissions. The Payment Suspension Provision applied only in the event of the termination of the Applicant's employment under the Sub-Contract (see [34] above). And as I have accepted above, the Adjudicator determined that the Respondent had wrongfully terminated the Sub-Contract (see [30] above). Thus, the Payment Suspension Provision was not operative. Therefore, the final settlement of accounts as prescribed by the Payment Suspension Provision could not have been initiated. Hence, PC 25 cannot possibly be a claim for the final settlement of accounts.

63 I accept the Applicant's submission that its right to serve PC 25 is founded on clause 5.1.1 of the LOA ("Clause 5.1.1"). This clause is an express mechanism for the service of progress payment claims under the SOPA. Clause 5.1.1 states: [41]

40 RWS at para 43.

41 HDN 1st Affidavit at p 23; MKW 1st Affidavit at p 32.

5.1 TERMS OF PAYMENT

5.1.1 PAYMENT CLAIMS

A progress payment claim shall:-

a) Be made as a payment claim ("Payment Claim"), within the meaning of, and strictly in compliance with the Building and Construction Industry Security of Payment Act and its regulations ("the SOP Act"), *based on periodic valuation of the Sub-Contract works or part thereof carried out by the Sub-Contractor*, and to be served on the 7th day of every month or such date as specified by the Main Contractor for the work carried out during the previous month, i.e. during the period from the first to the last day of the previous calendar month

b) *Include but shall not be limited to:*

   i. a breakdown of the value attributable to each item;

   ii. details of the percentage completed of each item;

   iii. calculations of the costs attributable to each item;

   iv. confirmation that the Sub-Contract works comply with all relevant approval and authorizations; and

   v. details of any variations carried out;

c) Show the amount to which the Sub-Contractor considers himself to be entitled up to the end of the relevant month, together with the relevant supporting documents, inclusive of documents which reflect the progress of Sub-Contract Works;

d) Be served in person on the Main Contractor's Project Director/Senior Project Manager/Project Manager of this Project to which this Sub-Contract relates, or any such other person as shall be named in these conditions or nominated in writing by the Main Contractor. In the event that the Project Director/Senior Project Manager/Project Manager or such other named or nominated person is unavailable, the

> Payment Claim shall be served on the quantity surveyor in-charge on site; and
>
> Further to the above, to assist the Main Contractor in preparing its claims under the Main Contract, the Sub-Contractor shall provide to the Main Contractor's Project Director/Senior Project Manager/Project Manager on the 25th of each month, a statement for the work carried out during that month. This statement shall not constitute a payment claim under the SOP Act.
>
> [emphasis added]

64 I turn next to consider the statutory framework prescribing the process for making a progress payment claim. Section 2 of the SOPA defines "progress payment" as including "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes … a single or one-off payment (*including a final payment*)" [emphasis added]. Sections 5 and 6 of the SOPA further provide that:

> **Entitlement to progress payments**
>
> **5**. Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.
>
> **Amount of progress payment**
>
> **6**. The amount of a progress payment to which a person is entitled under a contract is —
>
> (a) the amount calculated in accordance with the terms of the contract; or
>
> (b) if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or of the goods or services supplied, by the person under the contract.

65 As the Court of Appeal in *Orion-One* observed at [40], the statutory framework defines a claim for progress payments as "payments predicated upon and directly linked to the carrying out of construction work or the supplying of

goods or services under a contract. The quantum of such payment depends on the terms of the contract, or the value of the work carried out or of the goods or services supplied."

66 It is clear that Clause 5.1.1 largely mirrors progress payments as defined in the SOPA. The amounts of such progress payments are determined through the process of periodic valuation of the works or part thereof carried out by the contractor.

67 In this case, PC 25 which was made pursuant to Clause 5.1.1 was concerned only with the Applicant's claim for work done in respect of the Project as prescribed under the Sub-Contract before the Respondent terminated the Sub-Contract.[42] Further, the Applicant submits that PC 25 did not include particulars of the loss and damage that the Applicant had incurred as a result of the Respondent's alleged repudiatory breach of the Sub-Contract.[43] Indeed, nothing on the facts showed that at the time PC 25 was served, the Respondent had ascertained all the costs which it had incurred under the Payment Suspension Provision. I am thus satisfied that PC 25 is merely a final claim for progress payment that falls within the SOPA regime, instead of a claim for the value of works less any costs and deductions prescribed under the Payment Suspension Provision. I, therefore, reject the Respondent's characterisation of PC 25 as a claim for the final settlement of accounts between the Applicant and the Respondent.

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[42] AWS at para 111.

[43] AWS at para 111.

Conclusion

68 In summary, I find that the Respondent has not made out any ground for its Setting-Aside Application:

(a) First, I am satisfied that the Adjudicator had not breached the rules of natural justice as the Respondent has not proven, on a balance of probabilities, that the Adjudicator had failed to consider the Respondent's alternative ground for terminating the Sub-Contract under Clause 5.10.1 of the LOA, *ie*, the Termination Provision. A thorough perusal of the Adjudication Determination shows that the Adjudicator was aware of the two alternative grounds of termination that the Respondent relied upon, *ie*, under the common law and under the Termination Provision. The factual basis for these two grounds is the same. The parties had comprehensively argued these grounds before the Adjudicator. The mere fact that the Adjudicator did not expressly mention that the Respondent was not entitled to terminate the Sub-Contract based on Clause 5.10.1 is insufficient to sustain the allegation that the Adjudicator had failed to consider an important pleaded issue. Therefore, the Adjudicator had not failed to apply his mind to consider the merits of the Respondent's case for terminating the Sub-Contract under Clause 5.10.1. The true grievance of the Respondent is that it disagreed with the Adjudicator's finding that the Respondent had wrongly terminated the Sub-Contract. This is not a valid basis for setting aside the Adjudication Determination. It is not the role of the Court to review the merits of an adjudicator's decision when hearing an application to set aside an adjudication determination.

(b) I also find that the Applicant has validly served PC 25 on the Respondent. Whether the Applicant was entitled to serve PC 25 turned on whether the Sub-Contract was validly terminated, such that the Payment Suspension Provision and s 4(2)(*c*) of the SOPA precluded the Applicant from serving any payment claim. The Adjudicator has found that PC 25 was validly served. This determination on the merits is one which the Court is not entitled to review. Accordingly, the Respondent's submission on this ground amounts to an impermissible backdoor attempt to review the merits of the underlying dispute, *ie*, whether the Respondent had validly terminated the Sub-Contract.

(c) Finally, I accept that PC 25 was not a claim for the final settlement of accounts, *ie*, a claim for the value of works done by the Applicant less any deductions or claims prescribed under the Payment Suspension Provision. The fact that the Applicant had served PC 25 following the Respondent's purported termination of the Sub-Contract does not automatically render PC 25 a claim for the final settlement of accounts. It is still necessary to examine the substance of PC 25. In this case, I am satisfied that PC 25 was merely a progress payment claim made under Clause 5.1.1. The Respondent's reliance on analogising the present case with the Court of Appeal's decision in *Orion-One* is flawed and based on a misreading of the Court of Appeal's observations therein.

69 I, therefore, dismiss the Respondent's application to set aside the Adjudication Determination and the Order of Court. I shall now hear the parties on the issue of costs.

Tan Siong Thye
Judge of the High Court

Koong Len Sheng and Lee Wan Ling (David Lim & Partners LLP) for the Applicant;
Tan Beng Swee (CTLC Law Corporation) for the Respondent.