SEF Construction Pte Ltd v Skoy Connected Pte Ltd
[2009] SGHC 257

Case Number : OS 20/2009, RA 29/2009

Decision Date : 17 November 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Edwin Lee and Deborah Ho (Rajah & Tann LLP) for the plaintiff; Christopher Chuah and Emily Su (WongPartnership LLP) for the defendant

Parties : SEF Construction Pte Ltd — Skoy Connected Pte Ltd

Building and Construction Law

17 November 2009

Judith Prakash J:

Introduction

1 This registrar's appeal poses the interesting question of what exactly the court's powers are under s 27 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act"). Under s 27(5) of the SOP Act, a party to an adjudication may commence proceedings to set aside the adjudication determination or the judgment entered in terms of the adjudication determination, provided that that party pays into court the unpaid portion of the adjudicated amount that he is required to pay. In this judgment, I will set out my views on how the court should approach applications of this nature.

2 This matter comes before me as an appeal against a decision of a district judge. The plaintiff, SEF Construction Pte Ltd ("SEF"), was the respondent in adjudication application, SOP/AA 74 of 2008 ("Adjudication 74"), in which the defendant, Skoy Connected Pte Ltd ("Skoy"), was the claimant. The adjudicator issued an adjudication determination dated 19 December 2008 ("the Adjudication Determination") whereby he determined that SEF must pay Skoy an amount of $185,167.58 ("the Adjudicated Amount"). SEF was not satisfied with this result and on 16 January 2009, it applied by way of an originating summons in the District Court for the Adjudication Determination to be set aside. SEF's present appeal to the High Court arises from the failure of that application.

The Adjudication

3 The parties were at the material time involved in a building project comprising the construction of 19 three-storey houses at Pasir Panjang Road ("the project"). SEF was the main contractor for the project and it engaged Skoy as its subcontractor to carry out the supply and installation of aluminium and glass works for the project. During the course of the project, disputes arose between the parties in relation to payment.

4 On 5 November 2008, Skoy sent SEF its Payment Claim No 4 dated 31 October 2008 for the sum of $250,344.45 ("the Payment Claim"). On 20 November 2008, Skoy served a Notice of Intention to Apply for Adjudication on SEF. On 26 November 2008, it lodged an adjudication application with the Singapore Mediation Centre ("SMC") pursuant to s 13 of the SOP Act. In the adjudication application, the amount claimed was $214,382.20. At 5pm on 5 December 2008, SEF lodged its Adjudication Response with the SMC.

5 The SMC appointed Mr Latiff Ibrahim ("the Adjudicator") as the adjudicator in respect of Adjudication 74. The Adjudicator directed the parties to submit their written submissions on 15 December 2008 and their reply submissions on 16 December 2008. There was no oral hearing thereafter. Instead, he issued the Adjudication Determination and it was served on the parties on 22 December 2008.

6 In the Adjudication Determination, the Adjudicator, as required by the SOP Act, gave reasons for his decision. He noted that the parties' positions were as follows:

(a) Skoy's claim was that it had carried out work to the value of $214,382.20 (including GST) for the period from November 2007 to October 2008 for which it had not been paid by SEF. It rejected SEF's Payment Certificate dated 13 November 2008 as not constituting a Payment Response and further alleged that the Adjudication Response was lodged late and should be rejected by the Adjudicator;

(b) SEF alleged that its Payment Certificate was a valid Payment Response which it had attempted to hand over to Skoy on 14 November 2008 but the same had been refused by Skoy. As to the lodging of the Adjudication Response, SEF's position was that nothing turned on the alleged lateness of the filing;

(c) SEF contended that the Adjudication Application was invalid on four grounds namely:

(1) it was filed prematurely;

(2) the reference period of the claimed amount stated in the Adjudication Application was not within the jurisdiction of the SOP Act;

(3) the Adjudication Application failed to attach relevant documents which were essential and required under s 15 [the reference to s 15 was an error in the Adjudication Determination as the correct section is actually s 13] of the SOP Act; and

(4) the claimed amount in the Adjudication Application was inconsistent with and exceeded the amount stated in the Payment Claim.

7 The Adjudicator then went on to consider various points raised by the parties. The first point related to the Payment Response. The Adjudicator found that even if SEF's Payment Certificate dated 13 November 2008 were to constitute a valid Payment Response (as to which he made no determination), the manner in which SEF had attempted to serve it on Skoy was not proper and not in accordance with the requirements of the SOP Act and therefore he determined that no Payment Response was served on Skoy at all.

8 Next, dealing with the Adjudication Response, the Adjudicator found that although SEF purported to lodge the document on 5 December 2008, it had not complied with Rule 2.2 of the SMC Adjudication Procedure Rules which provided that documents to be lodged with the SMC had to be lodged "during the opening hours of 9.00am to 4.30pm from Monday to Friday". The Adjudication Response had been lodged at 5pm on 5 December 2008 and therefore was not lodged by the deadline of 5 December 2008. The Adjudicator determined that the Adjudication Response was not lodged in compliance with s 15(1) of the SOP Act and he was therefore required by s 16(2)(b) of the SOP Act to reject it.

9 Next, the Adjudicator considered SEF's submission that the Adjudication Application was filed

prematurely. This was a procedural argument that he was entitled to consider by virtue of s 16(7) and 17(3)(h) of the SOP Act notwithstanding his rejection of the Adjudication Response. This issue turned on whether the subcontract provided for a time period for SEF to provide a payment response. Skoy's contention was that it did not and therefore by virtue of s 11(1)(b) of the SOP Act, the relevant period was seven days from 5 November 2008. SEF contended that the time period should be 21 days because the provisions of the main contract were incorporated into its subcontract with Skoy. The Adjudicator decided that the provisions of the main contract were not incorporated into the subcontract. He therefore determined that the Payment Response was due on 12 November 2008 and consequently the time to commence adjudication proceedings began on 19 November 2008. Thus, the Adjudication Application was not premature.

10 In relation to SEF's objection that there was an absence of a reference period in the Payment Claim as required by the SOP Act, the Adjudicator overruled the same. He then considered the substantive merits of Skoy's claim. He found that the evidence of the photographs showed fairly substantive work had been done by Skoy. Whilst the evidence did not tell him precisely whether the valuation should be $214,382.20 as claimed by Skoy, he was required to value the works as best as he could. The Adjudicator then decided that, after taking into account all the relevant materials, Skoy's claim should be discounted by ten percent on the basis that Skoy had included some items of work which it could not carry out due to acts of prevention by SEF. He therefore determined that Skoy was entitled to payment in the sum of $185,167.58.

SEF's application to set aside the Adjudication Determination

11 It would be noted that although the Adjudicator had mentioned in para 20 of the Adjudication Determination (see [6(c)] above) the four grounds on which SEF had contended that the Adjudication Application was invalid, he had only dealt with the first and second issues in giving his reasons for the Adjudication Determination. He did not make any comment or determination in respect of the argument that the Adjudication Application failed to attach relevant documents which were required under s 13(3)(c) of the SOP Act or the argument that the amount in the Adjudication Application was inconsistent with and exceeded the amount stated in the Progress Claim. The Adjudicator's failure to deal with these issues (which SEF termed "jurisdictional issues") formed the main basis for SEF's challenge of the Adjudication Determination.

12 On 16 January 2009, SEF applied to set aside the Adjudication Application. It considered that the adjudication process and the Adjudication Determination were flawed in that in the discharge of his duties under the SOP Act, the Adjudicator had breached such duties because:

(a) the Adjudicator had breached the rules of natural justice by failing to consider SEF's submissions on two out of the four jurisdictional issues; and

(b) the Adjudicator failed to engage in a *bona fide* exercise of his powers.

I should also mention that SEF had a subsidiary ground of challenge and that was that in valuing Skoy's claim, the Adjudicator had acted arbitrarily and had not followed the valuation method set out in s 7 of the SOP Act.

13 Before the District Judge, SEF contended that a finding in its favour on any one of the four jurisdictional challenges it had made would have resulted in a dismissal of the Adjudication Application. This was supported by previous adjudication determinations where adjudication applications had been dismissed on similar grounds. Further, despite acknowledging the obvious supporting evidence, the Adjudicator arbitrarily found for Skoy after a deduction of ten percent from the claimed amount. This

represented a failure to apply s 7(2) of the SOP Act.

14 The above arguments were rejected by the District Judge. On appeal, SEF has reiterated the same. Before I go on to discuss SEF's arguments and Skoy's rebuttals in detail, it may be useful for me to give a short description of the adjudication procedure as provided for by the SOP Act.

The SOP Act

15 The SOP Act is a relatively new piece of legislation, applying only to contracts in the building and construction industry made in writing on or after 1 April 2005. The SOP Act aims to facilitate payments for construction work done or for related goods and services supplied in the building and construction industry. It sets up a scheme whereunder a claimant, for example, a subcontractor, can claim progress payments from a respondent, for example, the main contractor, for work done, via an adjudication process. The SOP Act also provides safeguards to ensure that the claimant's claims are properly considered. To ensure that the adjudication process is conducted fairly, the SOP Act entrenches certain standards that the adjudicator has to adhere to. It is also significant that the adjudication determination made by an adjudicator is designed to be only an interim result. Whilst the adjudicated amount must be paid by the respondent to the claimant, the determination and the payment do not prevent the respondent from contending in subsequent arbitration or court proceedings that the adjudicated amount was not due or was in excess of the amount actually payable and the arbitral tribunal or court, as the case may be, has an unfettered power to decide on the actual amount outstanding without regard to the adjudicated amount.

16 The adjudication process under the SOP Act is triggered by a claimant who has served a payment claim on the respondent in accordance with s 10 thereof. Thereafter, the respondent has to respond to the payment claim by providing a payment response to the claimant in accordance with the time prescribed under s 11(1), which states:

> **Payment responses, etc**.
>
> **11**. – (1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant –
>
> > (a) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
> >
> > (b) where the construction contract does not contain such a provision, within 7 days after the payment claim is served under section 10.

17 If the claimant fails to receive payment by the due date of the response amount or if no payment response is furnished by the respondent within the prescribed time, the claimant's entitlement to make an adjudication application accrues at the end of the dispute settlement period (*ie* seven days after the date on which or the period within which the payment response is required to be provided).

18 Upon notifying the respondent, in writing, of his intention to apply for adjudication, the claimant may lodge an adjudication application with the SMC. Rule 7(2) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, R1, 2006 Rev Ed) ("the Regulations") prescribes the contents of each adjudication application and by sub-rule (d), one of the requirements is that the

adjudication application "contain an extract of the terms or conditions of the contract that are relevant to the payment claim dispute".

19 After the respondent receives a copy of the adjudication application, he has to lodge a written adjudication response with the SMC within seven days thereof. Further, s 15(3) of the SOP Act states:

> **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 an 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 …

20 The procedure for the appointment of an adjudicator is set out in s 14. By this section, the authorised nominating body, in this case the SMC, has to refer the adjudication application to a person who is on the register of adjudicators established under the SOP Act and whom the body considers to be appropriate for appointment as the adjudicator. The person, to whom the application has been referred, then decides whether to accept or decline the appointment and, if he accepts, the body will serve a notice in writing confirming the appointment of the adjudicator on the claimant, the respondent and other relevant parties.

21 The SOP Act contains a number of provisions regarding the conduct of the adjudication and the duties of the adjudicator. In the conduct of the adjudication, s 16 states:

> **Commencement of adjudication and adjudication procedures**
>
> **16**. - …
>
> (2) An adjudicator shall reject –
>
> (a) any adjudication application that is not made in accordance with section 13(3)(a), (b) or (c); and
>
> (b) any adjudication response that is not lodged within the period referred to in section 15(1).
>
> (3) An adjudicator shall –
>
> (a) act independently, impartially and in a timely manner;
>
> (b) avoid incurring unnecessary expense; and
>
> (c) comply with the principles of natural justice.

Section 16(4) emphasises that the adjudicator may conduct the adjudication in such manner as he thinks fit and sets out some of his powers in relation to the adjudication, for example he has power to require the parties to provide submissions or documents and to inspect the construction work if he deems fit.

22 Section 17 sets out the strict timeframe within which the adjudicator has to determine the adjudication application and s 17(2) prescribes exactly what it is that he must determine, *viz*:

> **Determination of adjudicator**
>
> **17**. …
>
> (2) An adjudicator shall, in relation to an adjudication application, determine –
>
> (a) the adjudicated amount (if any) to be paid by the respondent to the claimant;
>
> (b) the date on which the adjudicated amount is payable;
>
> (c) the interest payable on the adjudicated amount; and
>
> (d) the proportion of the costs of the adjudication payable by each party to the adjudication,
>
> and shall include, in the determination, the reasons therefor.

The next subsection, s 17(3), lists the matters to which the adjudicator may have regard when determining an adjudication application. Among these are the submissions and responses of the parties to the adjudication.

23 Where the respondent is aggrieved by the determination of the adjudicator, the respondent may lodge an adjudication review application if the requirements under s 18 of the SOP Act read with rule 10 of the Regulations are met. Section 18 states:

> **Adjudication review applications**
>
> **Section 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.

Rule 10 of the Regulations states:

> **Adjudication review application**
>
> **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.

That the review adjudicator is empowered to reconsider the findings of facts as well as the application of legal principles to those findings of fact seems clear since s 19(5) empowers the review adjudicator or panel (as the case may be) to determine almost precisely the same things as the

adjudicator has to determine under s 17(2). This in fact is the view taken by a textbook on the SOP Act, *Security of Payments and Construction Adjudication* (LexisNexis, 2005) by Chow Kok Fong. He states at (p 473):

> The review adjudicator or panel of review adjudicators may be invited to reconsider the findings of fact surrounding the dispute as well as the legal principles applied to the findings of fact. For example, it might be suggested that the previous adjudicator omitted to consider certain facts which have been advanced or wrongly interpreted some provision of the Act or term of the underlying contract.

24 It should be noted that there is no equivalent of the adjudication review procedure in the equivalent regimes in place in the United Kingdom, Australia and New Zealand. The adjudication review is unique to the Singapore regime and was created as a possible way of remedying injustice to any of the parties inflicted by the rather hasty process of adjudication. It would be appreciated though that this remedy is only available if the difference between the adjudicated amount and the amount which the respondent considered payable is of a certain quantum (at the moment that quantum is $100,000) and therefore the drafters of the SOP Act must have considered that it would not be convenient or economical to provide a review process for a dispute that did not have sufficient substance in economic terms. In those cases, the respondent's arguments on principle or facts would have to be taken up subsequently in court or in arbitration proceedings.

25 The SOP Act also expressly preserves the right of either party to challenge an adjudication determination or an adjudication review determination in subsequent dispute resolution proceedings. This position is reflected in s 21(3) which reads:

> **Effect of adjudication determinations and adjudication review determinations**
>
> **21**. – (3) This section shall not affect the right of any party to challenge an adjudication determination or an adjudication review determination in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

Plainly, the right that the section is preserving is the right of the parties to argue that the adjudication determination was wrong as part of their contentions in relation to disputes over the contract and the works which are being dealt with in arbitral or court proceedings. This section deals with the interim and provisional nature of an adjudication determination and is not a section providing a claimant with the right to ask for an adjudication amount to be immediately increased or providing the respondent with the right to have the adjudication amount reduced or the adjudication determination set aside completely.

26 As mentioned in [1] above, the only section of the SOP Act that deals with the court's powers in relation to an adjudication determination is s 27(5) which provides:

> **Enforcement of adjudication determination as a judgment debt, etc**
>
> **27**. – (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 332, R5), pending the final determination of those proceedings.

Whilst the section refers to "any party", it is obvious from the condition precedent imposed that in fact the only party who has a right under the section to apply for a setting aside of the adjudication application is the respondent since the respondent is the party who would have to pay into court the unpaid portion of the adjudicated amount at the time of commencing the application. The claimant has to live with the quantum of the adjudicated amount determined by the adjudicator and has no recourse either before the review adjudicator or the court to claim an increase of the same.

27 Further, as also mentioned above, s 27(5) has nothing to say on the grounds on which an application for setting aside may be based or on the approach that the court should take to such an application. The court is guided in its approach mainly by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) which calls for a purposive reading of statutory wording and therefore in considering such applications, the court must view adjudication determinations and the SOP Act itself in the light of the legislative intention. One thing, however, is plain and that is that an application under s 27(5) is not an appeal. I say this because there is no inherent right of appeal to the court from the decision of an administrative or inferior tribunal. A right of appeal has to be expressly provided for by legislation which will also determine whether the appeal is limited to questions of law or encompasses questions of fact as well. A right of appeal also must be available to both parties and the right granted under s 27(5) is given to the respondent to the adjudication alone. Therefore the court faced with an application under s 27(5), not being an appellate court, would not be in a position to look into the merits of the dispute and adjust the adjudication amount whether upwards or downwards. The court's power is limited to deciding whether the adjudication determination should be set aside or not.

Arguments and analysis

SEF's Position

28 The first argument made by SEF is that the Adjudication Determination should be set aside due to the Adjudicator's failure to address two of the four jurisdictional issues that SEF had raised. Under s 17(3) of the SOP Act, the Adjudicator had a duty to consider the submissions and responses made to him by SEF and Skoy on the said issues but he failed to do so. Had these issues been considered by the Adjudicator, the outcome of the Adjudication Determination may have been different. Similar jurisdictional issues had been raised in previous adjudication applications and the adjudicators in those cases had decided that those adjudication applications were invalid on account of the jurisdictional issues.

29 With respect to the first of the unconsidered issues, the assertion by SEF that Skoy had omitted to provide a relevant page of the subcontract in the Adjudication Application and had thus failed to comply with r 7(2)(d) of the Regulations, SEF cites the adjudication determination of SOP/AA 65 of 2008. The adjudicator in that case dealt with the respondent's objection to the adjudication application that it failed to contain relevant contractual terms and conditions. The adjudicator found that the SIA conditions 6th Edition should have been included in the adjudication application because "without Conditions 1 and 12, it would not be possible to consider the Claimant's entitlement to payment for variations". The adjudicator upheld the objection and dismissed the adjudication application in accordance with s 13(3)(c) of the SOP Act and r 7(2)(d) of the Regulations.

30 With respect to the second unconsidered issue, the discrepancy between the amount claimed in the Adjudication Application and that claimed in the Payment Claim, SEF refers to *Company BQ v Company BR* [2006] SGSOP 13 where the adjudicator had held that where the amounts differ between that stated in the adjudication application and that stated in the payment claim to which it relates, the claimant should explain the discrepancy in the adjudication application and if it did not do so, the defect could not be cured by an amendment and the adjudication application would be defective in

form and substance.

31 SEF also contends that the Adjudicator's failure to deal with the two issues was a breach of his duty under s 16(3)(c) to comply with the principles of natural justice. In this respect, SEF considers that the court should obtain guidance from the case law on the New South Wales Building and Construction Security of Payment Act ("NSW SOP Act"). In SEF's view, the Australian case law supports the proposition that a failure to consider duly made submissions is a failure to exercise the powers under the SOP Act in good faith and constitutes a breach of natural justice. The cases cited by SEF are *Timwin Construction Pty Limited v Façade Innovations Pty Limited* [2005] NSWSC 548 ("*Timwin*"), *Lanskey v Noxequin* [2005] NSWSC 963 ("*Lanskey*"), *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 ("*Trysams*") and *Reiby Street Apartments v Winterton Constructions* [2006] NSSC 375.

32 In *Timwin*, the respondent had raised three issues in its submissions to the adjudicator. In his adjudication determination, however, the adjudicator decided that he would not consider the issues as they had not been raised previously in the respondent's payment response. McDougall J sitting at first instance in the Supreme Court of New South Wales applied the judgment of Hodgson JA in *Brodyn v Davenport* [2004] NSWCA 394 ("*Brodyn*") and accepted that the basic requirement of a valid adjudication determination would be "a *bona fide* attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation" (see *Brodyn* in [55]). McDougall J held that the requirement of good faith laid down in *Brodyn* required an effort to understand and deal with the issues in the discharge of the statutory function and was consonant with s 22(2) of the NSW SOP Act which required an adjudicator to "consider" certain matters. In the present case, the adjudicator had not considered the submissions for the parties because he had not given weight to the arguments or taken them into account as focal points by reference to which the relevant decision was to be made. McDougall J made the following observation at [42]:

> It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.

McDougall J then concluded that the adjudicator did not attempt in good faith to exercise the power given to him by the NSW SOP Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was. The adjudication determination was set aside.

33 SEF submits that while s 22(2) of the NSW SOP Act provided that "in determining an adjudication application, the adjudicator *is to consider the following matters only*" [emphasis mine] that wording was parallel to the wording of s 17(3) of the SOP Act which states that an adjudicator "shall only have regard to" *inter alia* "the submissions and responses of the parties" because the judge in *Timwin* stated that the requirement to "consider" matters was equivalent to the requirement to have "regard to something". Hence, SEF submits, s 17(3) of the SOP Act imposes a similar duty on an adjudicator to exercise his powers in good faith as is imposed on an adjudicator in New South Wales under the NSW SOP Act. In *Timwin*, the adjudicator had stated his reasons for dismissing the respondent's submissions but the court found that he could not reasonably had done so had he considered the same in good faith. In contrast, in the present case, the Adjudicator had not addressed SEF's submissions at all and it was entirely inadequate for the Adjudicator to merely reproduce the heading of the objection without going on to consider it.

34 *Lanskey* was another first instance decision of the Supreme Court of New South Wales. It was submitted there that the adjudicator had failed to engage in a *bona fide* exercise of power and failed to accord the respondent in the adjudication natural justice. The judge considered that there had been no *bona fide* exercise of power by the adjudicator because he had considered that 69 items being charged by the respondent to the claimant were claims relating to set off when according to the judge "[p]lainly on the face of the documents before the Adjudicator this was not the case" (at [12]). This was an indication that the adjudicator had not dealt with the detailed documents and submissions of the plaintiff and the adjudication determination was held to be void and set aside. In arriving at his decision, Associate Justice Macready said at [15]:

> Plainly on the face of the documents there was a real question about incomplete work that the Adjudicator has not considered because of the way in which he dealt with the claims as set offs. It is clear therefore that he has not considered the plaintiff submissions in this respect and this is apparent on the face of his reasons. Having regard to his obligations to consider of the submissions under section 22 of the Act this failure means that the plaintiff has not been accorded natural justice.

SEF submits that this case shows first, that an adjudicator must at least consider all issues that had been duly raised and, second, the adjudicator's reasons or lack thereof will go towards showing whether he has in fact considered the relevant issues. SEF also pointed to *Trysams* which had followed the principles enunciated in *Timwin* and *Lanskey* and in which the adjudication determination was set aside both on the basis that the adjudicator's power had not been exercised in a *bona fide* manner and on the basis that natural justice had not been accorded to the plaintiff.

Does the "bona fide exercise of power" requirement apply in Singapore?

35 In my consideration of SEF's arguments, I must separate the two strands which the Australian cases deal with: that of *bona fide* exercise of power and that of affording the parties natural justice. An adjudicator appointed under the SOP Act is under a statutory duty to apply the principles of natural justice when conducting an adjudication. What those principles consist of and how they should be applied is something that I will discuss later in this judgment. For the time being, I want to concentrate on the requirement, if any, for the adjudicator's powers to be exercised *bona fide* and what such requirement means.

36 Skoy submits that in deciding whether to adopt the approach taken by the Australian authorities, the court should note that the NSW SOP Act is not in *pari materia* with the SOP Act. This is because the NSW SOP Act does not provide for an adjudication review process nor does it provide for the right to set aside the adjudication determination. Only the judgment entered for purpose of enforcing an adjudication determination may be set aside and such judgment may be set aside by the court if it was given "irregularly, illegality or against good faith" as specified by rule 36.15 of the New South Wale Civil Procedure Rules 2005. As such, challenges to the adjudication determination itself which have been taken out under the NSW SOP Act have often been on the basis of judicial review though the availability of such relief has been doubted in cases such as *Brodyn*. In any case, the Australian courts have imported principles from the realm of administrative law into their consideration of the NSW SOP Act. Also, the NSW SOP Act does not contain a provision expressly requiring the adjudicator to comply with the rules of natural justice. It is the administrative law principles that led to the establishment of the need for the adjudicator to engage in a *bona fide* exercise of his powers.

37 I consider that Skoy's submissions on the basis of the Australian decisions are well supported by the Australian legislation and case law. That administrative law principles have been important in the

Australian jurisprudence on this issue is clear from judicial pronouncements. In *Timwin*, for example, McDougall J stated at [38]:

> There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in *Brodyn*. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Summer in *Roberts v Hopwood* [1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer".

38 The situation in Singapore is different. Whilst our legislature, like those abroad, was concerned to provide a framework in which disputed payment claims could be handled speedily and with interim "finality" so that work could continue without interruption and without imposing too much hardship on the parties involved, it must have recognised that the adjudication procedure provided a somewhat rough and ready type of justice. This was because compliance with the timelines imposed on the process might lead to a lack of depth in the submissions and matters considered. This inbuilt limitation on the procedure had been commented on in relation to earlier regimes imposed in other jurisdictions. As Chow in *Security of Payments and Construction Adjudication* puts it (at p 503):

> In particular, consideration will be accorded to the time frame within which an adjudicator is required to arrive at his determination and the consequence that the adjudicator cannot possibly provide the level of analysis of the facts and law relating to the dispute which is frequently expected upon a full curial hearing.

This must have been why the legislature decided in our case to introduce the adjudication review procedure. The adjudication review procedure provides the parties with an opportunity to re-argue their respective cases with regard both to the facts and the law. The review adjudicator is able to go into the substantive merits of the original adjudicator's decision. The adjudication review procedure is therefore a species of appeal albeit limited to cases in which a particular monetary qualification is reached.

39 In the English regime where there is no adjudication review procedure, the courts still recognise that they should not inquire too deeply into the merits of the determination. The same paragraph of *Security of Payments and Construction Adjudication* quoted above goes on to say that because this procedure cannot encompass the level of analysis expected at a court hearing:

It is expected, therefore, that the courts will not inquire into the merits of the dispute. In *Ballast plc v The Burrell Company (Construction Management) Ltd* (2001), Lord Reid, in the course of delivering his speech in the House of Lords *(sic)*, considered the position as follows:

> These aspects of adjudication – the short timetable, the scope of inquisitorial procedure, and the provisional nature of the decision – fit together as elements in a coherent scheme … [It] cannot be appropriate for the courts to undertaken an investigation into the merits of the dispute in order to ascertain whether the adjudicator has reached the same decision as a court would have done: were the courts to do so, section 108 and the Scheme would be rendered pointless. *To some extent, therefore, the adjudicator's decision must be binding, temporarily, notwithstanding that a court would not agree with it; and to the extent that the adjudicator's decision is binding, it might be said that there is, in effect, a temporary ouster of the court's jurisdiction to determine the matters in dispute*. [Emphasis added]

40 I entirely agree with Lord Reid's observations. He was dealing with the Scottish regime established under The Scheme for Construction Contracts (Scotland) Regulations 1998, but his comments apply *a fortiori* in relation to the SOP Act because of the availability (even though limited) of the adjudication review procedure. I do not think that the Australian position is applicable or should be followed. There is no need in the Singapore context to import a duty to act *bona fide* from administrative law because the SOP Act is very clear in s 16(3) as to the way in which the adjudicator must conduct the arbitration. It mandates that he must act independently, impartially and in a timely manner; avoid incurring unnecessary expense and comply with the principles of natural justice. The legislature having so prescribed the manner in which the adjudicator must behave, it is entirely otiose to add an additional requirement that he must exercise his powers in a *bona fide* manner. As the Australian cases themselves illustrate, the consequence of imposing this requirement is to give the court a backdoor way to do exactly what Lord Reid considers it should not, *ie* undertake an investigation into the merits of the dispute to ascertain whether the adjudicator has reached the same decision that the court would have. *Lanskey* is a prime example of this. The court there plainly considered the adjudicator's decision to be so wrong that it would never have reached the same conclusion and therefore set aside the determination even though the ostensible reason for the setting aside was a perceived failure on the part of the adjudicator to have regard to the submissions of the respondent.

41 In my judgment, bearing in mind the purpose of the legislation, the court's role when asked to set aside an adjudication determination or a judgment arising from the same, cannot be to look into the parties' arguments before the adjudicator and determine whether the adjudicator arrived at the correct decision. In this connection, I emphasise the intention that the procedure be speedy and economical. It would be recalled that one of the adjudicator's duties is to avoid incurring unnecessary expense. If the court were to be allowed to look into questions of substance or quantum including questions like whether a proper payment claim had been served by the claimant, the procedure is likely to be expensive and prolonged. One can very easily envisage a situation (in fact such situations have already occurred) where the dissatisfied respondent first applies to the court for the adjudication determination to be set aside on the ground that, for example, the adjudication response should not have been rejected, and then when that application is rejected by the assistant registrar, appeals to the judge in chambers and finally when the appeal is unsuccessful, appeals again to the Court of Appeal. Bearing in mind that the adjudication process could have been a two-step process

involving a review, that would mean five steps in all before the dispute regarding the claimant's payment claim is finally disposed of. The more steps there are, the longer the process will take and the more expensive it will be. Such an outcome would be contrary to the intention of Parliament that the adjudication procedure should afford speedy *interim* relief.

42 Accordingly, instead of reviewing the merits (in any direct or indirect fashion), it is my view that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper. After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.

43 The Australian courts have considered this issue of the role of the court in the adjudication process and their discussion on the same is worth taking into account. I find particularly helpful the following discussion by Hodgson JA in *Brodyn* in connection with whether the court's supervision of the adjudication process should be exercised on the basis of the judicial review principles which are usually applied when a court has to supervise the actions of an inferior or administrative tribunal. He says (at [51] to [53]):

51 … the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. *The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay*. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss.3(4), 32. *The procedure contemplates a minimum of opportunity for court involvement*: ss.3(3), 25(4). The remedy provided by s.27 [**which is the right of the claimant to suspend work and is similar to the remedy given to claimants under s 26 of the SOP Act**] can only work if a claimant can be confident of the protection given by s.27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s.27 would be prohibitive, and s.27 could operate as a trap.

52 However, it is plain in my opinion that *for a document purporting to [be] an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination*. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8)

2. The service by the claimant on the respondent of a payment claim (s.13).

3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).

4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).

5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

[Emphasis added in italics and bold]

44 The references in the above passage to relief being granted by way of declaration or injunction may be disregarded since our courts have been endowed with the power to set aside adjudication determinations by s 27(5). However, the discussion on the essential conditions to be satisfied for the existence of a valid adjudication determination (and by this I am referring to formal validity without regard to whether the court agrees with the substance of the determination or not) can be applied to the SOP Act with suitable modifications to reflect the duties of the adjudicator as expressly stated in the statute.

45 Thus, I consider that 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 SOP Act 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);

(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.

46 If the court finds that the answer to any of those questions is in the negative, then the adjudication determination and any judgment arising therefrom must be set aside. Whilst I note that s 16(3)(b) requires the adjudicator to avoid incurring unnecessary expense, I do not consider that a failure to comply with that requirement should result in the setting aside of the adjudication determination since, even if unnecessary expense is incurred in connection with the adjudication, that is unlikely to affect the correctness of the determination as long as the adjudicator was independent and impartial and afforded the parties natural justice. I should add that whilst s 16(2) directs an adjudicator to reject any adjudication application that is not made in accordance with s 13(3)(a), (b) or (c) and also to reject any adjudication response that is not lodged within the time limit prescribed in s 15(1), it must be for the adjudicator to decide whether the adjudication application or adjudication response before him meets those requirements. It would not be for the court to overturn the adjudication determination later on the basis that the adjudicator should have rejected either of those documents because if the court took that course, it would have delved into the merits of the dispute. Similarly, although the SOP Act requires a payment claim to be served, whether or not the document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court. In this respect, I agree entirely with Hodgson JA's reasoning in *Brodyn* (at [66]):

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

47 I therefore conclude that in the present case, SEF is not entitled to argue that because the Adjudicator did not deal in substance with two of the four issues it raised, he did not exercise his powers in a *bona fide* manner. Accordingly, the Adjudication Determination cannot be set aside on that basis.

Did the Adjudicator comply with the rules of natural justice?

48 The alternative basis is that by failing to deal with the two issues the Adjudicator was in breach of his duty to comply with the rules of natural justice as prescribed by s 16(3)(c). It would be recalled that in the *Lanskey* case, the court was of the view that the failure of the adjudicator to consider the respondent's submissions meant that the respondent had not been accorded natural justice. In *Timwin* too, the judge was of the opinion that the adjudicator had denied Timwin natural justice by disregarding its submissions for the reason that he gave.

49 The requirements of natural justice have been frequently restated in both texts and case authority. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Soh Beng Tee*"), the Court of Appeal cited a passage from an English judgment as stating the essential principles. At [43], the court said:

> In *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396, Marks J helpfully distilled the essence of the two pillars of natural justice in the following terms:
>
> > The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *nemo judex in causa sua*. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – *audi alteram partem. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done; (*Lord Hewart, C.J. in R. v Sussex Justices; ex parte McCarthy, [1924] 1 K.B. 256 at p 259; [1923] All E.R. Rep. 233*). Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties*. [emphasis added]

50 In this case, the argument of non-compliance with natural justice is based on an allegation that the *audi alteram partem* principle was not observed. This principle is further explained in *Halsbury's Laws of Singapore*, vol I (2005 Ed) at 10.059:

> It is a cardinal principle of justice that no man shall be condemned unless he has been given notice of the allegations against him and a fair opportunity to be heard, and in particular, to make oral or written representations to the body which will make a decision affecting him.

51 Skoy does not accept that SEF was not given a fair opportunity to be heard. It contends that in the circumstances of the adjudication procedure, basic adherence to the principles of natural justice are sufficient and, in this respect, it places reliance on the following observations at [14] of the judgment of Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739:

> … The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement … The timetable for adjudication is very tight … Many would say unreasonably tight and likely to result in injustice. Parliament must be taken to have been aware of this … It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.

It submits that having regard to the rationale of the SOP Act, the above passage applies equally to the regime in Singapore.

52 A similar view was taken by Assistant Registrar Lim Jian Yi ("the AR") who made the decision at first instance in the case of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159. The AR referred to the passage from Dyson J's judgment set out above and then stated at [50] of his own grounds:

> These special considerations influence how the established canons of natural justice would be applied in relation to the SOP Act. I have quoted Lord Reid's comment that "the so-called rules of natural justice are not engraved on tablets of stone": at [42] above. There are numerous other learned pronouncements to the same effect: Lord Denning MR in *R v Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417 at 439, saying that "it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter"; or Sachs LJ in *Re Pergamon Press Ltd* [1971] Ch 388 at 403, stating that "in the application of the concept of fair play there must be real flexibility." Justice, whether performed by a court, a tribunal or any quasi-judicial body, is a balancing exercise between thoroughness and timeliness. More formal settings, such as litigation through a court, would tend to emphasis the former. The adjudication process under the SOP Act instead chooses a quicker, but somewhat less thorough, means of achieving justice. This is a general theme which pervades the SOP Act and in itself is not a ground for saying that natural justice has been denied.

53 Similar views were expressed by Barrett J sitting in the Supreme Court of New South Wales when he decided *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152. At [15] of his judgment, Barrett J noted:

15 Another important indicator of the extent of "the measure of natural justice that the Act requires to be given" comes from s.21(3). That section requires an adjudicator to determine an adjudication application "as expeditiously as possible" and, in any event, within 10 business days after his or her notification of acceptance of the application (or any longer period the parties agree). There is thus a statutory intention that an adjudicator should work quickly. That may militate against the standards of thoroughness and detail that are to be expected where no externally imposed time pressure applies. It cannot be intended that an adjudicator working to the tight statutory timetable will be as painstaking as a judge who has reserved judgment in a case involving the same claims under the same construction contract.

54 Building on the above, Skoy submits that given that an adjudicator has only seven or 14 days within which he has to issue his determination, the result of an adjudication is necessarily "coarse". It would place an unduly onerous duty on the adjudicator if he is expected to formulate detailed reasons for accepting or rejecting each and every submission raised by the parties, however frivolous or irrelevant the submissions may be. Section 17(3) of the SOP Act only requires an adjudicator to "have regard … to submissions and responses of the parties to the adjudication". It does not prescribe the level of detail which has to be furnished in the adjudication determination. Hence, says Skoy, the fact that the issues raised by SEF were set out in paragraph 20 of the Adjudication Determination indicates that the Adjudicator had considered the issues. While he did not deal explicitly with them, that did not mean that he did not "have regard" to those submissions. Further, the Adjudicator's request that both parties provide submissions shows that both parties had been given the opportunity to be heard. Accordingly, Skoy argues that the Adjudicator had discharged his duty to comply with the principles of natural justice.

55 SEF's argument is based on s 17(3) of the SOP Act and the requirement that the Adjudicator should have regard to the submissions and responses of the parties. It says that he had a duty to consider the submissions made to him by SEF and Skoy on the jurisdictional issues. His failure to give regard to the submissions was a failure to adjudicate in accordance with the principles of natural justice. It submits that before an adjudicator can make any decision on the substantive merits of the case, he is required by s 16(2)(a) of the SOP Act to first satisfy himself that s 13(3)(c) has been complied with. It was, SEF says, therefore all the more shocking that the Adjudicator failed to address the issue of compliance with s 13(3)(c) when that issue was expressly raised before him. If indeed the Adjudicator had applied his mind to SEF's submissions, he would have at the minimum been able to cite the correct provisions of the SOP Act and would not have referred to s 15 in paragraph 20 of the Adjudication Determination when the correct section was s 13.

56 It has to be recognised that the Adjudicator, apart from setting out in para 20 of the Adjudication Determination the four jurisdictional objections made by SEF, took no further steps in that document to discuss the third and fourth objections. Looked at as a whole, however, it is clear that in making the Adjudication Determination, the Adjudicator was fully aware of the various provisions of the SOP Act that applied to the Adjudication Application. There are numerous references throughout the Adjudication Determination to specific sections of the SOP Act and although the Adjudicator did not mention s 13(3)(c) which is the section relevant to the third jurisdictional objection, he did deal with s 13(3)(a) so he could hardly have been ignorant of the contents of s 13(3)(c).

57 There can be no doubt that the letter of the *audi alteram partem* principle was observed in this case. The Adjudicator called for submissions from both parties so SEF had the opportunity to raise all

the arguments that it wanted to in the submissions without any restriction. Then, it is obvious that the Adjudicator read both sets of submissions as if he had not, he would not have been able to explain in paragraph 20 the four grounds on which SEF contended that the Adjudication Application was invalid. The question that faces me is whether, notwithstanding this, the Adjudicator still flouted the rule because he did not expressly deal with the third and fourth arguments and explain why he was rejecting them (as he obviously did since if he thought they were valid arguments he would not have made the determination that the Adjudicated Amount was due to Skoy).

58 Having given this question somewhat anxious consideration since affording natural justice is a fundamental requirement of the adjudication procedure, I have decided that the Adjudicator's failure to discuss the submissions in his Adjudication Determination was not a breach of natural justice. In coming to this conclusion I was fortified by the views of Dyson J and the AR quoted above (at [51]-[52]). I also found useful and practical guidance from the Australian cases, notwithstanding their references to good faith which is a concept that I have found not to be applicable in Singapore. What the Australians say in regard to good faith can be applied to the requirements of natural justice as well.

59 The following passage of the judgment of Palmer J in *Brookhollow Pty Ltd v. R&R Consultants Pty Ltd* [2006] NSWSC 1 was particularly useful:

> 57 Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). *Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties*.
>
> 58 In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. *If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result*. *Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination*. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation. (Emphasis added)

60 In the present case, having studied the Adjudication Determination, I am satisfied that the Adjudicator did have regard to the submissions of the parties and their responses and the other material placed before him. The fact that he did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all. It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator

took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice. Natural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made. I should also point out that SEF could have taken the opportunity to ask for a review adjudication once the Adjudication Determination had been issued and, if it had done so, SEF could have raised all the points before the review adjudicator that it had brought before the Adjudicator.

Did the Adjudicator act arbitrarily

61 Turning to the other ground on which the Adjudication Determination is challenged, *ie* that in quantifying the Adjudication Amount, the Adjudicator had acted arbitrarily and failed to follow the method for valuation set out in s 7 of the SOP Act, I can deal with this shortly. In my judgment, this is a point relating to the merits of the Adjudication Determination and therefore the proper course for SEF to take when it was not satisfied with what the Adjudicator had done was to have asked for a review adjudication. This is not a matter that should have been brought before the court as a ground for setting aside the Adjudication Determination as it does not involve any of the questions I have listed in [45] above. It does not, therefore, provide a basis on which I can set aside the Adjudication Determination.

Conclusion

62 For the reasons given above this appeal must be dismissed with costs.