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7. BUILDING AND CONSTRUCTION LAW

CHOW Kok Fong
LLB (Hons), BSc (Bldg) (Hons), MBA;
FRICS; FCIArb; FCIS; FSIArb; Chartered Arbitrator, Chartered Quantity Surveyor; Senior Adjudicator.

Christopher **CHUAH**
LLB (Hons), DipSurv; FCIArb; FSIArb; FCIOB; Senior Accredited Specialist (Building and Construction Law); Senior Adjudicator; Advocate and Solicitor (Singapore).

Mohan **PILLAY**
LLB (Hons), LLM; FCIArb; FSIArb; Senior Accredited Specialist (Building and Construction Law); Chartered Arbitrator; Senior Adjudicator; Advocate and Solicitor (Singapore).

I. Disputes over time and delay

7.1 During the year under review, the courts made a number of practical observations relating to the factual inquiry of assessing completion time and delays.

A. Applicable baseline programme

7.2 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd*[1] ("*ICOP*") concerned a subcontract for carrying out micro-tunnelling works. The decision is instructive in illustrating a logical approach to determining the criticality of a delay event. The first step involves identifying the applicable baseline programme. The trial judge found this to be the subcontractor's 8 January 2018 programme. This was issued shortly after the main contractor issued the "Notice to Proceed" on 28 December 2017. The Appellate Division of the High Court ("Appellate Division") agreed with this finding, reasoning that the earlier programmes were drafted more than a year before the main contractor's issuance of the Notice to Proceed.[2] On the basis of the 8 January 2018 programme, the Appellate Division agreed with the trial judge that the critical delay

1 [2024] SGHC(A) 1.
2 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [97].

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was the task of obtaining the authorities' approval, because this was a precondition to the subcontractor commencing pipe-jacking works.[3]

B. Claim for standby and idling costs

7.3 In *ICOP*, the Appellate Division also demonstrated the treatment of standby and idling damages. The trial judge had disallowed these damages in respect of the micro-tunnelling boring machine ("MTBM") on the premise that standby costs are on an expectation basis and the capital costs would be incurred in any event.[4] The Appellate Division disagreed with the learned trial judge. In his judgment delivered on behalf of the court, Quentin Loh SJ stated the premise for the award of these damages:[5]

> The legal basis of delay damages claimed by contractors or subcontractors for standby or idling costs is well established as a head of damage in building and construction law … This is a claim that is usually founded on a breach of an express contractual provision (an express loss and expense clause providing that the contractor is entitled to monetary compensation for loss incurred on account of the relevant delay or other claim event) or at common law for a breach of contract by an employer or main contractor who causes the delay or standby or idling time (see *Chow Kok Fong* at para 10-003[6]). In a claim under an express contractual provision, 'the scope of entitlement as formulated in the contract is important' (see *Chow Kok Fong* at para 10-003[7]). [references added]

7.4 He further considered that the claim for the MTBM is "a classic case of delay damages" and "no different from the other standby costs"[8] such as head office overheads, personnel and manpower. Since the main contractor caused the MTBM to be on standby and idling due to its delay in obtaining the authorities' approvals, the main contractor cannot deny liability for the loss and damage thereby caused to the subcontractor.[9]

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3 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [101].
4 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [112].
5 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [116].
6 Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell Asia, 5th Ed, 2018) at para 10-003.
7 Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell Asia, 5th Ed, 2018) at para 10-003.
8 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [117].
9 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [117].

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C. *Absence of time extension clause*

7.5 The subcontract did not contain any provision for time to be extended in the event of an act of prevention by the main contractor. The trial judge determined that the subcontractor was responsible for 123.997 days of delay arising from delay events relating to a headwall, non-compliance with noise restriction issues, slow price jacking, slow demobilisation and imposed liquidated damages. On this finding, the learned judge awarded a total of $212,034.87 in liquidated damages in respect of these delays.[10] The Appellate Division held that the learned judge erred in awarding liquidated damages for the subcontractor's delays because the subcontract did not contain an extension of time clause:[11]

> Therefore, if TSCE prevented or delayed ICOP from carrying out its work such that the latter failed to meet the completion date or dates, and there was no power under the Subcontract to extend time for that act or those acts of prevention, it is settled law that the liquidated damages clause is unenforceable or inoperative and time is also set at large …

D. *Reasonable time for completion*

7.6 Another important issue raised before the Appellate Division was the assessment of a reasonable time to complete the works given that time has been set "at large". Approving the approach taken in *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd*[12] and *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*,[13] Loh SJ noted that the trial judge had determined the respective liabilities of the main contractor and subcontractor for each individual delay event.[14] The next step is to add up each party's liabilities for the individual delay events and set them off against each other.[15] The net result is added to the duration allowed for

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10 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [127].

11 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [128], citing Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell Asia, 5th Ed, 2018) at para 9.156; *Hudson's Building and Engineering Contracts* (Nicholas Dennys QC & Robert Clay gen eds) (Sweet & Maxwell, 14th Ed, 2022) at para 16-025; and *Keating on Construction Contracts* (Stephen Furst & Sir Vivian Ramsey gen eds) (Sweet & Maxwell, 11th Ed, 2021) at para 8-014. See also *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [353], affirmed in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [34].

12 [2011] SGHC 82.

13 [2019] SGHC 4.

14 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [238].

15 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2024] SGHC(A) 1 at [242].

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a critical activity identified as "Drive 2", to arrive at the reasonable time for the completion of that activity.

E. Determining completion

7.7 An important step of the inquiry in any dispute over delays is the determination of the date when the construction works could be said to be complete. In the major standard forms used in the industry, there is no insistence that the works and the defects are rectified to a very fine detail but, rather, that the works are in a state which can be handed over to the employer to be adequately used for the purpose for which the works were commissioned. The typical expressions used in construction contracts for this purpose include "practical completion" or "substantial completion",[16] distinguishing the state of the works at the time of handover from that at final completion. The period between substantial completion (also referred to as "practical completion") and final completion allows for the rectification of minor outstanding or defective works.

7.8 In *Tid Plus Design Pte Ltd v Kwek Seng Wee John*[17] ("*Tid Plus Design*") the dispute arose from a contract to renovate a residential property. During the course of the works, the owner complained of workmanship concerning, in particular, the floor and carpentry. The works were delayed and when the owner eventually moved into the property, there were defects including cracked tiles and water leakage.

7.9 In deciding that the contractor had not achieved completion, the District Court adopted the definition of completion as a state when the "works are ready for use or occupation with the exception of minor defects or outstanding work" that "do not detract from the enjoyment or utility of the facility".[18] It was considered further that this definition comports with the doctrine of substantial performance allowing for a party to sue for payment, in that the word "completion" connotes the need for the works to have been "substantially performed". In this case, the defects were major and the District Court held that there was no substantial completion.

16 The expression "practical completion" is found in cl 2.30 of the Joint Contracts Tribunal Contract 2016 and the expression "substantial completion" is found in cl 17.1 of the Public Sector Standard Conditions of Contract (8th Ed, 2020).

17 [2024] SGHC 187.

18 *Tid Plus Design Pte Ltd v Kwek Seng Wee John* [2024] SGMC 22 at [43], citing Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell, 2nd Ed, 2014) at p 84.

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7.10 The High Court agreed with this test, highlighting that since this concerned a renovation contract, the assessment of completion was limited only to the works scoped under the renovation contract and not that of the whole property.[19]

F. Role of experts

7.11 In *Tid Plus Design*, the court also commented on the role of experts in construction matters. The parties had appointed a single joint expert who was instructed to find whether the works could be considered completed notwithstanding the presence of defects. The expert's answer in the affirmative was understood to be an opinion as to whether the works were factually undertaken.[20] In his judgment, Mohamed Faizal JC affirmed the general position that expert evidence should be regarded as opinions on factual issues and not issues as to liability:[21]

> For completeness, even if the appointed expert had opined on the matter of whether payment ought to be due as a matter of law, I fully agree with the District Judge that the word 'completion' entails considerations of both fact and law. While an expert would be technically competent to advise on technical issues (*eg*, the nature of the defect, how serious it was), the court is the ultimate arbiter of whether the words were, legally and contractually speaking, completed …

II. Variations

7.12 Regular readers of this commentary will be familiar with the variation of works in construction contracts. During the year under review, the concept was revisited in *Keppel DC Singapore 1 Ltd v DXC Technology Services Singapore Pte Ltd*[22] and applied to a contract for data centre services. It is an instructive decision because the High Court, in applying the concept, explained several aspects of the concept. In that case, the facts concerned a "Standard Services Agreement" executed in 2010 ("SSA"), under which Keppel undertook to provide data centre space and services to DXC for a five-year term with an option for renewal. The SSA was described as covering four modules (A to D). It was renewed twice, as a result of which the term was extended to 31 March 2025. In May 2021, DXC issued a purchase order and change order to omit Modules C and D, citing excess capacity. Keppel challenged the validity of the change and continued to invoice for all four modules while DXC only paid for Modules A and B.

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19 *Tid Plus Design Pte Ltd v Kwek Seng Wee John* [2024] SGHC 187 at [24]–[25].
20 *Tid Plus Design Pte Ltd v Kwek Seng Wee John* [2024] SGHC 187 at [31].
21 *Tid Plus Design Pte Ltd v Kwek Seng Wee John* [2024] SGHC 187 at [32].
22 [2024] SGHC 7.

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7.13 The issue centred on whether the terms of the SSA permitted DXC to unilaterally revise the scope of services provided by Keppel such that DXC could return Modules C and D to Keppel and continue with the agreement only with respect to Modules A and B. Clause 2.3 of the SSA provided for DXC to issue a "Change Order" to authorise "an addition, deletion or revision in the Services or an adjustment to the Maximum Cost or the time of performance of the Services". Clause 7.1 provided for changes to be documented in a Change Order before the change was executed and that arising from the change, Keppel may request for additional compensation.

7.14 In his judgment, Hri Kumar Nair J held that, on a proper construction of the SSA, the agreement was meant to be a renewable fixed-term contract for a period of five years. Under the agreement, Keppel was to provide a *fixed* amount of space and specified services in consideration for the payment of a monthly recurring charge ("MRC") and other accompanying charges. In the event of premature termination there was guaranteed payment of the MRC, calculated for the entire *fixed* space.[23]

7.15 The High Court held that on a proper construction of its terms, these provisions in the SSA did not expressly allow DXC to unilaterally change the services it had contracted for.[24] The "Change Order Form" specifically provided for both DXC and Keppel to sign their acceptance of the proposed modifications to the SSA. Furthermore, DXC's interpretation would produce the absurd result whereby DXC could, at will, increase or decrease the space it desired at any point during the term of the SAA while Keppel was required to keep the entire agreed space available for DXC's use.[25]

7.16 Drawing an analogy from construction contracts, Nair J pointed out that it is an established principle that a contractor cannot reject a reasonable variation to the works, but it is entitled to object to an omission if that would amount to a change in the scope of the contract, such that the works as varied would become fundamentally different

23 *Keppel DC Singapore 1 Ltd v DXC Technology Services Singapore Pte Ltd* [2024] SGHC 7 at [20].

24 *Keppel DC Singapore 1 Ltd v DXC Technology Services Singapore Pte Ltd* [2024] SGHC 7 at [32], applying *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

25 *Keppel DC Singapore 1 Ltd v DXC Technology Services Singapore Pte Ltd* [2024] SGHC 7 at [53].

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from that contemplated by the parties at the time of contracting.[26] The change order issued by DXC was therefore invalid and DXC's subsequent refusal to pay for Modules C and D amounted to a breach of contract.[27]

III. Performance bonds

A. Conflicting dispute resolution provisions

7.17 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd*[28] ("*Star Engineering*") provided the Court of Appeal an opportunity to examine the interplay between a performance bond ("PB") which required disputes to be referred to the Singapore courts,[29] and the underlying construction contract which obliged disputes, including those under the PB, to be resolved by arbitration.[30] The Court of Appeal's decision is helpful in explaining how to reconcile these two apparently conflicting dispute resolution provisions.

7.18 In *Star Engineering* the PB furnished by Great Eastern, on behalf of Star Engineering, to Pollisum Engineering, contractually limited the grounds to restrain any demand on the PB to only fraud (having specifically excluded unconscionability).[31] There was no dispute that the PB was an unconditional bond payable on demand.[32]

7.19 The Court of Appeal held that[33] the correct interpretation of the dispute resolution provisions taken together is that:

(a) interference with a demand for payment under the PB was only permitted on the ground of fraud and any such interference should be sought *from the court* pursuant to the dispute resolution clause in the PB;

(b) however, as between the parties to the underlying contract, any disputes as to the amounts to which the beneficiary

26 *Keppel DC Singapore 1 Ltd v DXC Technology Services Singapore Pte Ltd* [2024] SGHC 7 at [37], citing with approval, Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) at paras 5.145–5.146.

27 *Keppel DC Singapore 1 Ltd v DXC Technology Services Singapore Pte Ltd* [2024] SGHC 7 at [55].

28 [2024] 1 SLR 1099.

29 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [7(a)].

30 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [7(b)] which required "[a]ny dispute which the Contractor has in relation to such call, demand, receipt, payment" to be referred to arbitration.

31 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [10(d)].

32 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [10(a)].

33 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [10(e)].

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was entitled, having regard to the differences between the parties in relation to the underlying contract, would be resolved *by arbitration*; and

(c) if it should subsequently be determined that there was any over-payment, then there would be repayment of that amount to Star Engineering. In short, "*any dispute*" in relation to the call, demand, receipt, payment or utilisation of the cash proceeds would be resolved by an arbitrator (under the arbitration clause of the underlying contract), who would determine whether Pollisum Engineering had received cash proceeds from Great Eastern greater than the amount of loss or damage actually incurred by it *after* it had received the cash proceeds.

7.20 When Pollisum Engineering called on the PB, Star Engineering obtained a temporary injunction[34] to restrain its call. In response, Pollisum Engineering sought a stay of the court action in favour of arbitration to determine the precise issue as to whether it was entitled to call on the PB, instead of contending that there was no basis to restrain its call and applying to set aside the temporary injunction.[35]

7.21 By doing so, the Court of Appeal found that Pollisum Engineering had in effect converted its position from that of a party holding an unconditional on-demand bond into something akin to that of a party holding a conditional bond payable only upon proof of its entitlement to receive payment thereunder.[36]

B. Approach to application of unconscionability ground

7.22 The High Court decision in *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa*[37] provides practical guidance concerning the application of the well-settled ground of unconscionability, relying on the principles of law summarised by the Court of Appeal in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd*[38] ("*BS Mount Sophia*").

7.23 In finding that the applicant had failed to establish the required strong *prima facie* case of unconscionability, the High Court made the following observations:

34 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [38].
35 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [2] and [39].
36 *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd* [2024] 1 SLR 1099 at [39].
37 [2024] SGHC 5.
38 [2012] 3 SLR 352. See *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [35].

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(a) As regards the applicant's case of unconscionable conduct connected with the employer's reliance on the architect's imposition of allegedly erroneous liquidated damages[39] ("LDs"), the court noted that the parties' contract[40] provided for the architect to act independently in the certification of LDs.[41] Therefore, any alleged errors in such certification were not attributable to the employer. The architect's conduct in issuing his certificates was irrelevant in determining whether the employer had acted unconscionably, subject to the caveat that if the employer was put on notice about something improper about the architect's certification process and proceeded to call on the bond regardless, there might be an argument that the employer had acted unconscionably.[42] That was not the case here, and the employer should not be put in a position of having to second-guess the decisions of an independent architect in the absence of knowledge of a clear error.[43]

(b) The applicant's claim of unconscionability concerning whether and to what extent two disputed parts of the work (the tarmac and the dome) were within the claimant's work scope were clearly issues in dispute to be addressed by the tribunal taking charge of the substantive dispute. For the purposes of the interlocutory application to restrain a call on the PB, the court was not engaged to delve deeply into those disputes and to determine the merits.[44] On the facts before it, the court was not satisfied that the strong *prima facie* case standard was met[45] – in short, a *bona fide* dispute will not suffice.[46]

39 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [42].

40 The contract incorporated the Articles and Conditions of Contract for Minor Works 2012 (1st Ed, December 2012) published by the Singapore Institute of Architects: see *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [4].

41 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [43].

42 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [43].

43 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [43].

44 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [47].

45 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [47].

46 *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 at [55].

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IV. Latent defects

*A. Limitation period under section 24A(3)(*b*) Limitation Act 1959*

7.24 In *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd*,[47] the Appellate Division considered an appeal against the decision of the lower court striking out the MCST's claims against KTP as time-barred under s 24A(3) of the Limitation Act 1959.[48]

7.25 The MCST's claim arose in connection with allegedly defective cladding, which it considered KTP and three other defendants were liable for.[49]

7.26 In noting that KTP applied to strike out the claim after the close of pleadings (before discovery and the filing of any factual or expert evidence), the Appellate Division cautioned that the court must accordingly proceed on the basis that the claimant will prove all the facts that he pleads and determine whether, on those facts, the claimant will not be entitled to his remedy against that defendant.[50] In eventually arriving at its decision to allow the appeal and set aside the striking out of KTP as a party, the Appellate Division placed considerable weight on a number of key points regarding the MCST's knowledge that would be dependent on the evidence at trial and were not clear and obvious at this early stage.[51]

7.27 The Appellate Division considered s 24A(3)(*b*) of the Limitation Act 1959, which postpones the limitation period for latent damage,[52] as central to the appeal, and in particular the requirement of the "knowledge required for bringing an action for damages in respect of the relevant damage".[53] In analysing this provision, the Appellate Division provided

47 [2024] 1 SLR 1226.
48 2020 Rev Ed.
49 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [1].
50 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [56].
51 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [72]–[76].
52 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [40].
53 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [41].

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a number of helpful staging posts including: the legislative history,[54] overall structure[55] of s 24A and in particular, s 24A(3).[56]

7.28 The primary focus was on s 24A(3)(*b*), in respect of which the Appellate Division explained that the element of "knowledge" under that subsection:

> (a) requires the limbs of the definition in s 24A(4) to be read conjunctively (with the exception of limbs (*b*) and (*c*) which operate as alternatives), such that the claimant would not have the requisite knowledge unless and until they possess the knowledge described in limbs (*a*), (*d*) *and* (*b*) *or* (*c*)[57] – with a detailed analysis of the requirements in limbs (*a*),[58] (*b*) and (*c*)[59] and (*d*);[60]
>
> (b) as is the case for "knowledge" for the purposes of s 24A as a whole, this includes not only actual but also *constructive* knowledge as defined by s 24A(6) (which includes facts ascertainable by him with the help of appropriate expert advice which is reasonable for him to seek);[61]
>
> (c) means knowledge of the damage is necessary for time to run under s 24A(3)(*b*), but that is not enough – the question is whether the MCST also knew (or ought reasonably to have known) that the damage was attributable to KTP's alleged breaches of duty;[62] and
>
> (d) must consider aspects of context when dealing with expert reports:

54 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [32] *ff*.
55 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [36] *ff*.
56 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [38] *ff*.
57 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [42].
58 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [44].
59 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [51].
60 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [51].
61 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [43].
62 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [75].

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(i) Expert reports must be read as the work of an expert seeking to communicate his concerns and recommendations to individuals who are not trained in his expert discipline. It is not a contract still less a statute. Those more formal legal documents are drafted within the context of conventions familiar to lawyers. Such conventions would not be relevant here.[63]

(ii) The nature of the inspection done, *eg*, in this case it was purely visual.[64]

(iii) The specific discipline or specialism of the expert involved, *eg*, in this case a firm of building surveyors rather than structural engineers.[65]

V. Security of payment

7.29 In 2024, a total of 337 adjudication applications and 15 applications for adjudication review were lodged under the Building and Construction Industry Security of Payment Act 2004[66] ("SOP Act"). This corresponds to 60% of the number of applications received prior to the enactment of the Building and Construction Industry Security of Payment (Amendment) Act 2018[67] and a series of Court of Appeal decisions in 2019, both of which had reduced significantly the scope of claims that may be made under the SOP Act. Notwithstanding the low volume of adjudication applications, the cases that came before the courts in the year addressed several important aspects of the legislative regime.

A. Contract in writing

7.30 In *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd*,[68] ("*CGS Construction*"), the respondent ("Q&Q") was the main contractor for a project described as "Operation and Maintenance of Landfill Equipment, Vehicles and Floating Platform at Semakau Landfill". After it was awarded the project, Q&Q subcontracted the entire works to the claimant ("CGS"). The works were completed on or

63 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [65].
64 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [67].
65 *Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] 1 SLR 1226 at [67].
66 2020 Rev Ed.
67 Act 47 of 2018.
68 [2025] 3 SLR 39.

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around 28 February 2023. A payment dispute arose between the parties, leading CGS to file an adjudication application. The adjudicator awarded CGS a sum of $1.633m. Q&Q applied to set aside the adjudication determination. The application was dismissed. Although the result is not surprising, the judgment in this case is an important contribution to the law on the subject and deserves to be studied.

7.31 One of the grounds relied on by Q&Q was that the contract was made orally and hence there was no "contract in writing" for the purpose of s 4(5) of the SOP Act. Section 4(5) provides that where the contract is "not wholly made in writing" it shall be treated as being in writing for the purposes of s 4 of the SOP Act, if "the matter in dispute between the partes … is in writing".

7.32 The High Court found that since Q&Q subcontracted the entire works to CGS, the work scope was found in the tender documents of Q&Q's contract with the employer. It followed that at least part of the contractual terms of the subcontract were in writing.[69] In determining this issue, Kwek Mean Luck J reviewed the legislative purpose for this requirement, including the legislative history of the equivalent legislation in New South Wales and the UK, and the parliamentary debates in Singapore behind the SOP Act.[70] He held that the legislative intent of this requirement was the lack of certainty of purely oral contracts which might render a matter "less susceptible for expeditious resolution by summary procedure under [the SOP Act]".[71]

7.33 Next, the learned judge noted that s 4(5) provides that where a contract is "not wholly made in writing", it shall be treated as being made in writing if "the matter in dispute between the parties is in writing". He agreed with the views expressed in Chow Kok Fong's *Security of Payments and Construction Adjudication*[72] that for this purpose, the parties may rely on certain exchanges that are made in the context of an existing contractual relationship. Thus, a chain of documents could be relied on if they provided a sufficient sense of certainty as to the relevant terms

69 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [20].
70 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [14]–[17].
71 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [22].
72 LexisNexis, 3rd Ed, 2022.

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of a contract.[73] Kwek J consolidated the principles from the authorities as follows:[74]

> (a) It would not suffice if there is only written correspondence setting out the positions of dispute between the parties, where contractual terms or agreement may be relevant to the dispute. In such a situation, the contractual term or agreement relied on by a party, that is relevant to the dispute before the adjudicator, should be in writing, notwithstanding that the evidence or construction of a particular term or agreement may be disputed.
>
> (b) Where a party does not rely on a contractual term or agreement for its claim, but on an alleged fact, the alleged fact that a party relies on should be in writing, notwithstanding that the evidence of that particular fact may be disputed. This may occur, for example, where a party seeks to exercise the right to a non-contractual set-off.
>
> (c) Bearing in mind the policy rationale for SOPA, set out in *Lee Terence* ([15] *supra*) at [2]–[5], a broad approach should be taken in making this assessment, taking into account the commercial context.

7.34 Applying these principles, the learned judge found that the requirement for a contract in writing was satisfied. First, he pointed to the project price of $12,488,000 stated in the Final Account issued by Q&Q.[75] Secondly, he observed that the parties' arguments over various deductions for variations, expenses and retention were predicated on whether the deductions could be supported on the basis of some term in writing.[76] Finally, the learned judge noted that the adjudicator did not appear to be hampered by the complete absence of written documents in assessing the dispute.[77]

B. Validity of payment claim

7.35 Q&Q also argued in *CGS Construction* that the payment claim was not a payment claim for the purposes of s 10 of the SOP Act. It relied on the grounds recognised in *Sungdo Engineering & Construction (S) Pte*

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73 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [25], citing Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at paras 3.32–3.37.

74 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [28].

75 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [30].

76 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [31]–[32] and [42].

77 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [43].

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Ltd v Italcor Pte Ltd[78] ("*Sungdo*"), where the payment claim was impugned because it was not clear that it was intended as a payment claim.

7.36 In his judgment, Kwek J accepted the principle that the particulars of a payment claim suffice "if they can apprise the parties of the real issues in the dispute".[79] Kwek J followed the holding of the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng*[80] that "the correct test for determining the validity of a payment claim is whether a purported payment claim satisfies all the formal requirements in Section 10(3)(*a*) [now Section 10(4)(*a*)]".[81] He also cited with approval the decision in *Progressive Builders Pte Ltd v Long Rise Pte Ltd*,[82] where it was held that on the authorities, the standard of compliance required by s 10(3)(*a*) of the SOP Act (now s 10(4)) is not an onerous one and that "an excessive technical approach should not be countenanced under the Act which is characterised by speed and informality".[83]

7.37 The learned judge noted that Q&Q did not argue that it was unable to understand the basis of the payment claim or that it was somehow prejudiced by the non-compliance with s 10(3)(*a*) of the SOP Act. On the contrary, Q&Q "knew exactly what the defendant was claiming for".[84] He further noted that the principle laid down in *Sungdo* had been rejected by the Court of Appeal. He considered that the emphasis was not on the claimant's intention but on the respondent having been given certain information about the claim.[85]

7.38 In this case, he found that the claim document had stated the claimed amount and referred this to Q&Q's Final Account, and had indicated the reference period of the claim.[86] The claim document had identified the contract and had set out the details of the claim in five pages of annexures with a full breakdown.[87] The learned judge proceeded

78 [2010] 3 SLR 459.
79 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [51], citing Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 5.244(4).
80 [2013] 1 SLR 401.
81 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [78].
82 [2015] 5 SLR 689.
83 *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689 at [50].
84 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [56].
85 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [59].
86 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [61].
87 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [63(a)]–[63(b)].

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on this basis to hold that the claim was a valid purpose claim for the purposes of the SOP Act.

C. Meaning of "construction work"

7.39 The third and final ground advanced by Q&Q for its setting-aside application was that the works of the contract did not fall within the definition of "construction work" under the SOP Act, given that the contract concerned the provision of labour and equipment services for the transportation of waste for disposal by way of landfill. This could not constitute a construction activity as no new buildings or structures were erected.[88] Q&Q also relied on the fact that the Ministry of Manpower ("MOM") had earlier rejected its application for foreign manpower man-year entitlements ("MYE") on the ground that the subject works were not regarded as construction projects.[89]

7.40 On its part, CGS submitted that the works were "construction work" within the meaning of SOP Act. It pointed out that the scope of work entailed the carrying out of the: (a) construction, repair and maintenance of drains; (b) construction of earth bunds; (c) construction of bunds and embankments; (d) maintenance of monitoring wells and drainage system; (e) maintenance and repair of storage tanks; (f) maintenance and repair of access slabs; and (g) construction of drainage and access roads for vehicular access.[90]

7.41 The court noted that Q&Q was barred from raising the MYE argument under s 27(7) of the SOP Act since this point had not been raised in adjudication. At any rate, Kwek J noted that MOM's determination could not be conclusive as to whether the work amounted to construction work, since the determination was for the qualification of MYE and not for the purposes of the SOP Act.[91]

7.42 On the facts, there were at least some ancillary construction works. Although Q&Q described the extent of these works as *de minimis*, there is nothing in s 3(1)(*b*) of the SOP Act to state that the construction

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88 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [67].

89 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [68].

90 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [71].

91 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [75].

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work cannot be ancillary and *de minimis*.[92] In fact, it is not in dispute that the construction relating to the bunds were integral to the landfill operation and not merely ancillary. The contract also involved works to construct temporary earth drains to prevent flooding and this could not be said to be *de minimis*.[93] The learned judge considered that there is evidence that the works fall under s 3(1)(*d*) as "land reclamation" works since land filling is required in land reclamation.[94] Accordingly, he concluded that the works fell within the definition of "construction works" for the purposes of the SOP Act.

D. Timing of lodgment of adjudication application

7.43 The important question of when the timelines for the lodgment of an adjudication application start to run was reopened before the Appellate Division in *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd*[95] ("*H P Construction*").

7.44 This case was an appeal against the decision of the General Division of the High Court ("General Division") in *H P* Construction *& Engineering Pte Ltd v Mega Team Engineering Pte Ltd*,[96] which was also discussed in the 2023 issue of this chapter.[97]

7.45 In the present appeal, the Appellate Division had to consider the correct interpretation of the lodgment deadline provided under s 13(3)(*a*) of the SOP Act.[98]

7.46 The appellant ("HP") had engaged the respondent ("MT") to supply labour under a subcontract in relation to a building and construction project. In the relevant adjudication proceedings, MT was the applicant and HP was the respondent.[99]

92 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [78].
93 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [80].
94 *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 at [83].
95 [2024] 1 SLR 220.
96 [2023] SGHC 298.
97 Chow Kok Fong, Christopher Chuah & Mohan Pillay, "Building and Construction Law" (2023) 24 SAL Ann Rev 169.
98 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [1].
99 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [4].

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7.47 The undisputed facts were as follows. On 30 May 2023, MT submitted a payment claim to HP and pursuant to the parties' subcontract read with s 11(1)(*a*) of the SOP Act, HP was to provide a payment response by 20 June 2023, but HP failed to do so. HP also failed to provide a payment response by 27 June 2023, which was the last day of the dispute settlement period under s 12(6) of the SOP Act.[100]

7.48 As no payment response was issued by HP, MT lodged an adjudication application[101] on 6 July 2023 under s 13 of the SOP Act and the adjudication determination was rendered on 21 August 2023.[102]

7.49 After the adjudication determination was rendered, HP sought to set it aside on two grounds, the relevant one being that the adjudication application should have been lodged by 5 July 2023, and the actual lodgment date of 6 July 2023 was one day late.[103]

7.50 In the court below, the judge held that the adjudication application was made within time and that under s 13(3)(*a*) of the SOP Act, the entitlement to make an adjudication application arises on the day following the end of the dispute settlement period and the seven-day period after the entitlement arises will commence on the day after.[104]

7.51 HP then appealed the judge's decision.

7.52 HP's overarching position in support of its contention was that the seven-day period for making an adjudication application under s 13(3)(*a*) of the SOP Act after the entitlement to apply for adjudication arises *includes* the day on which such entitlement first arises (*ie*, 28 June 2023). Therefore, excluding a public holiday, the seven-day period ended on 5 July 2023.[105]

7.53 In contrast, MT's position was that the entitlement to lodge an adjudication application arose on 28 June 2023 (*ie*, the last day after the dispute settlement period) and that the adjudication application should

100 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [5].
101 Adjudication Application No SOP/AA 150 of 2023.
102 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [6].
103 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [6].
104 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [7]–[8].
105 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [9].

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be filed within seven days after 28 June 2023.[106] In other words, it was argued that the seven-day period for making an adjudication application ought to exclude the day on which such entitlement arose. Therefore, excluding a public holiday, the seven-day period ended on 6 July 2023.

7.54 Pertinently, MT relied on s 50(*a*) of the Interpretation Act 1965[107] ("Interpretation Act") to interpret s 13(3)(*a*) of the SOP Act, which stated that the computation of a period of days is to be calculated from the happening of an event, excluding the day on which the event happened.[108]

7.55 Therefore, the issue before the Appellate Division was of great significance, as it concerned the calculation of timelines for the lodging of an adjudication application, *ie*, whether under s 13(3)(*a*) of the SOP Act, the day the entitlement of the payment claimant to make an adjudication application first arises is included or excluded in calculating the seven-day longstop deadline.[109]

7.56 After considering the parties' arguments and submissions, the court ultimately held that the appeal turned on the plain application of s 50(*a*) of the Interpretation Act to s 13(3)(*a*) of the SOP Act.[110]

7.57 In doing so, the court dismissed HP's appeal. It was held that the adjudication application was made within time as the entitlement to lodge an adjudication application first arose on 28 June 2023 (*ie*, the day after the last day of the dispute settlement period) and the adjudication application should have been filed within seven days after 28 June 2023 (*ie*, by 6 July 2023 (excluding the public holiday on 29 June 2023)).[111]

7.58 Therefore, *H P Construction* is of notable importance as it established greater certainty as to how the time periods when making an adjudication application should be counted.

106 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [11]–[12].
107 2020 Rev Ed.
108 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [12].
109 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [13].
110 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [40].
111 *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [41].

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E. Severance of adjudication determination

7.59 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd*[112] is a significant decision as it concerns timelines for payment claims and payment responses stipulated by the SOP Act, and severance of an adjudication determination.

7.60 In this case, Hiap Seng sought to set aside the adjudication determination on the grounds that: (a) the payment response was not a valid one within the meaning of the SOP Act; and (b) the adjudicator had acted *ultra vires* in awarding the adjudication amount which was greater than what was claimed by Hock Heng Seng in the payment response.

7.61 The relevant payment claim and payment response were Payment Claim No 15 served on 5 July 2023 ("Payment Claim") and Progress Payment certificate No 02 served on 27 July 2023 ("Payment Response") respectively. The value of works claimed for in the Payment Response was $15,758.51 (excluding goods and services tax ("GST")) and $16,861.60 (including GST). On the basis of the Payment Response, Hock Heng Seng issued a tax invoice dated 1 August 2023 for the sum of $16,861.61 (including GST) to Hiap Seng ("Tax Invoice").[113]

7.62 Hock Heng Seng then commenced adjudication proceedings after Hiap Seng failed to make payment of the Tax Invoice, which was the sum certified in the Payment Response.[114]

7.63 In the adjudication determination ("Determination"), the Adjudicator ruled in favour of Hock Heng Seng and awarded Hock Heng Seng the sum of $17,019.19 (including GST) which consisted of the determined amount of $15,758.51 and $1,260.68 representing 8% GST on the determined amount.

7.64 Hiap Seng then applied to set aside the Determination on the grounds that the Payment Response was not valid under the SOP Act and that the adjudicator had acted *ultra vires* in awarding the adjudicated amount which was greater than that claimed by Hock Heng Seng in the adjudication.[115]

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112 [2024] 4 SLR 940.

113 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [4].

114 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [5].

115 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [7].

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7.65 The issues which the court ultimately had to decide on were as follows:

(a) whether the Payment Response was valid ("Issue 1");

(b) whether Hiap Seng was estopped from challenging the adjudication determination based on the invalidity of the Payment Response ("Issue 2"); and

(c) whether the adjudicator had acted *ultra vires* in awarding the Adjudicated Amount ("Issue 3").

(1) Issue 1

7.66 Given that the subcontract did not prescribe the date of the service of the Payment Claim, s 10(2)(*a*)(ii) of the SOP Act read with regs 5(1) and 5(3) of the Building and Construction Industry Security of Payment Regulations[116] ("SOP Regulations") would apply to provide that a payment claim under the subcontract must be served not later than the last day of the calendar month.[117]

7.67 Further, by operation of s 10(3)(*b*) of the SOP Act, "a payment claim that is served before the prescribed date mentioned in subsection 2(*a*)(ii) is deemed to have been served on that date". In other words, the Payment Claim which was served on 5 July 2023 was deemed to have been served on 31 July 2023.[118]

7.68 Likewise for the Payment Response, the subcontract did not provide any provision for the timeline for the service of the Payment Response. Accordingly, the default timeline under s 11(1)(*b*) of the SOP Act applied to stipulate that a payment response *must* be served starting from the date after the payment claim is served under s 10, and before the end of 14 days from that deemed service date of a payment claim.

7.69 In coming to his decision, Alex Wong JC held that s 11(1)(*b*) of the SOP Act contemplates both the start and end dates for the service of the payment response, and that s 11(1)(*b*) did not merely provide the deadline for the submission of the payment response.[119] This was also

116 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [16]–[17].
117 2006 Rev Ed.
118 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [18].
119 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [19]–[22].

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consistent with the purpose of the SOP Act to provide consistent and fixed timelines for the service of payment claims and payment responses.

7.70 Having considered the above, Wong JC held that the Payment Response, which was submitted on 27 July 2023, predated the deemed date of service of the Payment Claim and was hence defective within the meaning of s 11(1)(*b*) of the SOP Act.[120]

(2) Issue 2

7.71 Before addressing the issue of whether Hiap Seng was estopped from challenging the invalid Payment Response, the court dealt with the following pertinent preliminary issues of whether:

(a) the invalid Payment Response invalidated the entire Determination; and

(b) whether the adjudicator's flawed ruling on the validity of the Payment Response tainted the entire Determination.

7.72 Wong JC held that the invalid Payment Response *did not* taint the entire adjudication as the defect only impacted the adjudicator's substantive jurisdiction, but not his threshold jurisdiction, which would have otherwise rendered the Determination null and void from the outset.[121]

7.73 The judgment then elaborated that an adjudicator's threshold jurisdiction would be affected in situations where there was no payment claim or service of payment response, which would mean that such a situation fell outside of the SOP Act's purview at the outset.[122] However, where a payment claim has been served but is defective due to non-compliance with the SOP Act, it would only be the adjudicator's substantive jurisdiction, and not threshold jurisdiction, which would be compromised.[123]

7.74 In the present situation, the invalid Payment Response went to the substantive jurisdiction of the adjudicator and hence, although it did

120 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [23].
121 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [27]–[29].
122 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [29].
123 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [31].

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not satisfy s 11(1)(*b*) of the SOP Act, it was still one which fell within the scope of the SOP Act.

7.75 In relation to the second preliminary issue, it was found that the adjudicator's erroneous decision on the Payment Response's validity did not taint the Determination entirely and the tainted paragraphs could be severed and set aside. This is also borne out of s 27(8)(*a*) of the SOP Act, which states that an adjudication determination may be set aside "in whole or in part".

7.76 It was also held that Hiap Seng was estopped from using the invalid Payment Response to challenge the Determination.

7.77 In the context of estoppel under the SOP Act, the elements of estoppel are set out at [57] of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*[124] ("*Audi Construction*"), wherein "[i]t requires unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representator to go back upon his representation".[125]

7.78 Hiap Seng's position was that the submission of the Payment Response was not an unequivocal representation as to its position on the Payment Response as pursuant to s 11(4) of the SOP Act, a submitted payment response may be varied as long as it was submitted within the period set out at s 11(1) of the SOP Act or within the dispute settlement period under s 12(5) of the SOP Act. Further, Hiap Seng argued that under the process set out in the SOP Act, its duty to speak only arose when it had to provide its adjudication response and since it had raised its complaint on the defective Payment Response in its adjudication response, it had discharged its duty to speak.[126]

7.79 However, on the specific facts of the case, the court held that Hiap Seng's duty to speak arose earlier, *ie*, when the actual deadline for the service of the payment response was reached or when the Tax Invoice was issued to Hiap Seng. When Hiap Seng received the Tax Invoice, it did not raise any objection and did not issue a revised payment

124 [2018] 1 SLR 317.
125 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [34], citing *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [57].
126 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [36]–[37].

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response before the expiry of the time within which it had to submit the payment response.[127]

7.80 As such, Hiap Seng's silence and inaction amounted to an unequivocal representation that it would not insist on its legal right to serve its payment response later and hence, it could not thereafter try to invalidate the Determination on the ground that the Payment Response was invalid.[128]

7.81 In addition, Hock Heng Seng had already relied on Hiap Seng's representation to its detriment, which meant that it would be inequitable for Hiap Seng to renege on its representation. Due to Hiap Seng's representation, the only ground on which Hock Heng Seng could submit its adjudication application was that the accepted Payment Response was not fully paid. In doing so, it lost the opportunity and missed the deadline to file an adjudication application on the ground that Hiap Seng had failed to provide a payment response instead.[129]

7.82 In reaching his decision, Wong JC referred to [64] of *Audi Construction*, which illustrated that an estoppel could arise upon a party's failure to object to an invalid payment claim:[130]

> The respondent may also communicate his intention to forbear to exercise his right to object to the payment claim's validity. The claimant, in turn, may in reliance on that communication omit to re-file a payment claim which rectifies the filed payment claim's defect, if any. If the respondent later attempts to impugn the validity of the filed payment claim, the *claimant may by then, to his detriment, have missed the opportunity to re-file a rectified payment claim.* Indeed, the *claimant may have decided not to re-file because the respondent had acted consistently with the position that the payment claim was valid.* In such a case, *the respondent may in principle be estopped from raising that objection* … [emphasis added]

7.83 As such, parties should not be incentivised to act in a manner which defeats the SOP Act. The current situation was one to which the

127 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [38]–[39].
128 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [39].
129 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [40]–[41].
130 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [40], citing *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [64].

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parameters of *Audi Construction* directly applied concerning when Hiap Seng's duty to speak arose.[131]

7.84 Hiap Seng's early submission of its erroneous Payment Response was its own doing and it had many opportunities to ventilate its objections in a timely manner, but did not do so.[132] Consequently, Hiap Seng was not entitled to raise the invalidity of the Payment Response to invalidate the Determination.

(3) Issue 3

7.85 Lastly, the court also held that in awarding a higher amount than that stated in the Payment Response, the adjudicator had acted *ultra vires*.

7.86 In coming to his decision, Wong JC considered the following:[133]

(a) The Tax Invoice had stated the sum of $16,861.61 as the "Net Amount Due".

(b) The Notice of Intention to Apply for Adjudication stated that Hock Heng Seng had "accepted the response amount and issued a Tax Invoice for the sum of S$16,861.61" and that it "intends to apply for adjudication on the response amount of S$16,861.61 (inclusive of gst)" as no payment had been made for that amount.

(c) In the Adjudication Application filed by Hock Heng Seng, the dispute was indicated as "Accepted response amount not fully paid" and the claimed amount was "SGD 16,861.61 (inclusive/exclusive of GST)".

(d) During the adjudication process, including in its written submissions, Hock Heng Seng did not seek to vary or correct its claimed amount.

7.87 Given the above, the amount awarded by the adjudicator was never sought by Hock Heng Seng and the amount of S$16,861.61 formed the basis of the adjudication application and the fair notice principle was applicable.

131 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [42].
132 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [42].
133 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [45].

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7.88 The principle of fair notice was highlighted in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd*[134] ("*Rong Shun*"), wherein it was held at [102] that:[135]

> A respondent must be able to ascertain from the payment claim with completeness and certainty – at the time it receives the payment claim – each claim which it will have to address in its payment response if it chooses not to satisfy that claim.

7.89 Therefore, by awarding a higher amount than what was claimed by Hock Heng Seng, the adjudicator had acted *ultra vires* and exceeded his jurisdiction.[136] However, this did not mean that the entire Determination had to be set aside, as the court had the power to sever the problematic parts of the Determination instead for jurisdictional errors.[137]

7.90 This was likewise decided in *Rong Shun,* where the court noted at [155(e)] that:[138]

> … the court may modify the text of the adjudicator's determination in order to achieve severance if the court is satisfied that it is effecting no change in the substantial effect of the adjudication determination after accounting for the jurisdictional error and its necessary editorial consequences.

7.91 As such, in the present case, the excess amount was severed without affecting the substantive content of the adjudication determination.[139]

F. Setting aside on ground of fraud

7.92 The issue of whether an adjudication determination was tainted by fraud and hence was liable to be set aside arose in *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd*[140] ("*Builders Hub No 3*") before the Appellate Division.

134 [2017] 4 SLR 359.

135 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [46], citing *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [102].

136 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [47].

137 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [48].

138 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [48], citing *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [155(e)].

139 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 at [49].

140 [2024] 1 SLR 1189.

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7.93 As readers may recall, *JP Nelson Equipment Pte Ltd v Builders Hub Pte Ltd*[141] ("*Builders Hub No 2*") was discussed in the 2023 issue of this chapter.[142] As discussed in the 2023 issue, on the facts of the case, Lee Seiu Kin J found that where fraud has been proved, a court will not allow a fraudulent party to retain the fruits of its fraud, and will register its disapprobation of the fraudulent conduct by going beyond the matters forming the basis of an adjudication determination and compel the fraudulent party to disgorge the fruits of the fraud.[143] This was despite the fact that JP Nelson ("JPN") had failed to engage s 27(6)(*h*) of the SOP Act to set aside the adjudication determination, as Lee J had decided that JPN had failed to satisfy the two-stage test set out in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd*[144] ("*Façade Solution*").

7.94 By way of brief background, in *Builders Hub No 2*, the employer, JPN, had made out its case that the contractor, Builders Hub Pte Ltd ("Builders Hub"), had defrauded JPN by submitting certain fake documents ("Five Cappitech Documents") to claim for alleged payments made to a third-party supplier.[145] In *Builders Hub No 3*, Builders Hub appealed against the decision in *Builders Hub No 2* wherein it was compelled to disgorge the fruits of its fraud.

7.95 The Appellate Division thus had to consider s 27(6)(*h*) of the SOP Act, which stipulates that an adjudication determination may only be set aside if "the making of the adjudication determination was induced or affected by fraud or corruption".[146]

7.96 In *Builders Hub No 3*, Builders Hub's position was that the adjudication determinations were not tainted by fraud as the fraud in relation to the Five Cappitech Documents arose in the past and in connection with earlier claims, and had nothing to do with the relevant payment claim and response which was the basis of the adjudication determination. Therefore, it could not be said that both the adjudicator and the review adjudicator had relied on the Five Cappitech Documents for their determinations.[147]

141 [2023] SGHC 186.
142 Chow Kok Fong, Christopher Chuah & Mohan Pillay, "Building and Construction Law" (2023) 24 SAL Ann Rev 169.
143 *JP Nelson Equipment Pte Ltd v Builders Hub Pte Ltd* [2023] SGHC 186 at [81]–[84].
144 [2020] 2 SLR 1125 at [30]–[38].
145 Chow Kok Fong, Christopher Chuah & Mohan Pillay, "Building and Construction Law" (2023) 24 SAL Ann Rev 169.
146 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [11].
147 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [13].

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7.97 In contrast, JPN contended that the determinations were tainted by the Five Cappitech Documents as a payment claim was cumulative, and hence the relevant payment claim and payment response which formed the basis of the adjudication determination included the amounts which were previously certified pursuant to the Five Cappitech Documents.[148]

7.98 In making its decision, the Appellate Division upheld the General Division's judgment that the adjudication determinations were not affected by fraud and that JPN did not satisfy the test in *Façade Solution*.[149] In doing so, the Appellate Division also reaffirmed that the test set out in *Façade Solution* had to be satisfied before an adjudication determination may be set aside.

7.99 However, despite disapproving Builders Hub's fraud, the Appellate Division overturned the General Division's decision to apply the principle of "fraud unravels all" to reduce the amount under the review adjudication.[150]

7.100 While the Appellate Division disapproved of Builders Hub's fraud and was cognisant of Lee J's sense of justice underpinning the decision in *Builders Hub No 2*, the Appellate Division made clear that under the SOP Act, there is no power for a judge to reduce the amount on the principle that "fraud unravels all". This is because that would render s 27(6)(*h*) of the SOP Act otiose given that there would be no need to show that the determination has been affected by fraud.[151]

7.101 For completeness, the Appellate Division also advised that in such a situation, the proper recourse would be for the defrauded party to make a claim for overpayment due to the fraud.[152]

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148 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [14].
149 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [17]–[19].
150 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [17] and [20].
151 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [20].
152 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] 1 SLR 1189 at [22]–[23].

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