7. BUILDING AND CONSTRUCTION LAW

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Battle of forms

7.1 Construction contracts are voluminous, a large part of which may consist of standard documents or provisions incorporated from other contracts and documents. The documentation process is often a hurried undertaking and the standard provisions and incorporated terms may not always be consistent with each other. More crucially, these terms may conflict with documents which are drafted specifically for the particular contractual situation. In 2016, the issue of how to resolve these conflicts surfaced before the Court of Appeal on two occasions.

7.2 In *Ser Kim Koi v GTMS Construction Pte Ltd*[1] ("*Ser Kim Koi*"), it took the form of a provision in Item 72 of the Preliminaries, which stipulated that a completion certificate would not be issued until all parts of the works were, in the Architect's opinion, ready for occupation and for use. The Court of Appeal, in the course of its judgment, held that this term should take precedence over the printed conditions:[2]

> Item 72 being a specially drafted term should, therefore, take precedence over the printed conditions. This can be compared to some other standard form contracts which contain a provision stating that … nothing contained in the contract bills or bills of quantities shall override, modify, or affect in any way whatsoever the application or interpretation of the conditions …

1 [2016] 3 SLR 51.
2 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [65].

7.3 In *Grouteam Pte Ltd v UES Holdings Pte Ltd*[3] ("*Grouteam*"), the dispute which related to whether a subcontractor had served its payment claim on time, turned on provisions found in four documents:

(a) the Sub-Contract Agreement;

(b) the Summary of Contract Negotiations ("SOCN") annexed to the Sub-Contract Agreement;

(c) the General Conditions and Preliminaries ("Preliminaries"); and

(d) the Purchase Order dated on the same day as the Sub-Contract.

7.4 The main contractor's case was that item E of the Preliminaries (*viz*, Preliminaries E) governed the timeline for the service of the payment claim. This requires the subcontractor to serve its payment claim within seven days from the end of each month. The subcontractor maintained that the applicable term was cl E of the SOCN ("SOCN-E") and this provided that payment claims were to be served no later than the 20th day of each month. The Court of Appeal held that SOCN-E governed the submission of the payment claim. In arriving at this decision, the court considered, *inter alia*, that:[4]

(a) The SOCN was signed two days before the subcontract was executed and it seemed implausible, therefore, that the parties would have intended to supersede the SOCN.

(b) The Purchase Order had reproduced the payment schedule found in the SOCN.

(c) The SOCN was drafted specifically to govern the relationship between the parties to the subcontract, whereas the Preliminaries were taken from the main contractor's tender documents for the Main Contract to which the subcontractor was not a party.

Arising from the court's finding that SOCN-E governed the service of the payment claim, it followed that the payment claim, the adjudication notice, and the adjudication application were all served in good time.[5]

3 [2016] 5 SLR 1011.
4 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [41].
5 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [44].

Design-and-build contracts

7.5 In a "design-and-build" contract, the contractor is responsible for carrying out both the design and construction of a project. It is distinct from the traditional "build-only" model where the contractor's obligation is to construct a project on the basis of design provided by design consultants employed by the owner or employer.

7.6 The principal features of design-and-build contracts were examined in *Goh Eng Lee Andy v Yeo Jin Kow*.[6] Kannan Ramesh JC accepted that a design-and-build contract necessarily operates as a lump-sum contract in that the contractor "has to do all that is necessary to achieve the contractual scope of works without an adjustment in price".[7] Consequently, a design-and-build contractor has "no recourse to the owner for additional payments unless it can be shown that the works undertaken were substantially different from the original design or that the additional expense came about as a result of the owner's breach".[8]

7.7 Ultimately, whether a construction contract is a "design-and-build" contract is a matter of interpretation. In this case, the court held that the incorporation of the term "design and build" was *prima facie* evidence that the parties intended to and did enter into a "design-and-build" contract[9] and this intention was borne out by the conduct of the parties. The learned judicial commissioner pointed, *inter alia*, to the fact that the owner had refrained from accepting the final quotation until he was satisfied with the architectural and construction drawings[10] and the contractor's entering into arrangements with the design professionals in preparing the design and paying the fees for these services.[11] Arising from this finding, the court dismissed the contractor's counterclaims for "variation works", as these relate to items which were not extraneous to the scope of the contract.[12]

Implied term to proceed with due diligence

7.8 While most construction contracts provide for the contractor to proceed with the works with due diligence, in the absence of such an express term, the issue arises as to whether such a term may be implied.

6 [2016] 4 SLR 292.
7 *Goh Eng Lee Andy v Yeo Jin Kow* [2016] 4 SLR 292 at [29].
8 *Goh Eng Lee Andy v Yeo Jin Kow* [2016] 4 SLR 292 at [28].
9 *Goh Eng Lee Andy v Yeo Jin Kow* [2016] 4 SLR 292 at [33].
10 *Goh Eng Lee Andy v Yeo Jin Kow* [2016] 4 SLR 292 at [34].
11 *Goh Eng Lee Andy v Yeo Jin Kow* [2016] 4 SLR 292 at [36].
12 *Goh Eng Lee Andy v Yeo Jin Kow* [2016] 4 SLR 292 at [41].

In *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd*,[13] a subcontractor undertook to design, produce, and deliver precast concrete elements for a substantial building project. The contractor considered that it had awarded the subcontract to the subcontractor by way of a three-page letter of intent ("LOI") containing eight numbered clauses. It was common ground that the LOI had contractual force and was not merely an agreement to agree. Subsequently, the contractor followed up with the LOI with a lengthy letter of acceptance ("LOA") which expanded on the terms contained in the LOI including provisions requiring the subcontractor to proceed with due diligence.

7.9 The subcontractor repeatedly failed to meet rescheduled deadlines and, when the elements were delivered, they were out of sequence and behind schedule. Certain terms governing due diligence and delivery schedule were set out in an LOA but this letter was never accepted by the subcontractor. The court, therefore, held that the subcontractor's obligation was to follow the contractor's progress on-site and to produce and deliver the slabs in accordance with the delivery schedule as envisaged by the LOI.

7.10 In the circumstances, to justify its termination of the subcontract, it was necessary for the contractor to argue that the LOI contained two implied terms. The first of these is that time is of the essence. The second is that the subcontractor is expected to proceed with its works with due diligence. The court addressed the issue of implied terms on the basis of the three-step process in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.[14]

7.11 The first step identifies the gaps in the parties' contract and determines whether those gaps had arisen because the parties failed to contemplate them (in which case, the inquiry proceeds to the second step) or whether those gaps arose for some other reason (in which case, the inquiry ends).[15] The learned judge found that "despite accurate and timely production and delivery being the commercial purpose of the parties' contract", the LOI was silent on this point and concluded that the gaps arose "because the parties failed to contemplate them".[16]

7.12 The second step considers whether "it is necessary in the business or commercial sense to imply [each] term in order to give the

13 [2016] SGHC 246.
14 [2013] 4 SLR 193.
15 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [137].
16 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [139] and [140].

contract efficacy."[17] The learned judge was satisfied that the subcontractor knew that the structural components it supplied were essential for the main contractor to perform its time-critical obligations to the employer[18] and they had to be delivered in a particular sequence.[19] Thus, he concluded that given its commercial purpose, the subcontract would lack business efficacy without an implied term relating to timeliness in producing and delivering slabs and without an implied term relating to termination for breach of that term.[20]

7.13 The third step is to determine the actual content of the implied terms. The term requires the subcontractor to proceed with its works with due diligence and expedition and is qualified only by a requirement of reasonableness. The learned judge stated:[21]

> … One effect of this implied term is to require CAA to meet the delivery dates which Newcon would make known to CAA from time to time. Another … is to oblige CAA to arrange its work processes between the delivery dates so that it makes reasonable progress on production and is therefore able to deliver slabs on time, in sequence and in full on the appointed dates.
>
> I accept also that it is necessary that time be of the essence, but only with respect to this implied term of due diligence and expedition. The effect of time being of the essence in relation to this term is to give Newcon the right to terminate the contract if CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract. This second implied term is deliberately drawn in narrow terms. It does not entitle Newcon to terminate the contract for any breach of any time provision under the contract. It is confined to a breach of the implied term as to due diligence and expedition. Even then, it does not give Newcon the right to terminate the contract for any breach of the implied term as to due diligence and expedition. It gives Newcon that right only if the breach, taken together with other breaches, goes to the root of the parties' bargain.

7.14 On this analysis, the court found that the subcontractor was in breach of the obligation to proceed with due diligence and thereby committed a repudiatory breach of these implied terms.

17 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [144].
18 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [148].
19 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [149].
20 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [152].
21 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 at [153]–[154].

Security of payment

7.15 The year 2016 saw a continued increase in the number of decisions arising from adjudication determinations made under the Building and Construction Industry Security of Payment Act[22] ("SOP Act").

Whether "construction work" includes fixtures

7.16 An interesting issue considered by the High Court in 2016 was whether the common law on fixtures is imported into the definition of "construction work" for the purpose of s 3(1) of the SOP Act. Section 3(1)(*c*) of the SOP Act provides that the term "construction work" includes "the installation in any building … fittings that form, or are to form, part of the land".

7.17 In *JFC Builders Pte Ltd v Permasteelisa Pacific Holdings Ltd*,[23] Lee Seiu Kin J considered the decision of *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd*[24] ("*Gibson Lea*"), which had held that the phrase "forming part of the land" imported the common law on fixtures. However, Lee J preferred the position taken in *Savoye v Spicers Ltd*[25] ("*Savoye*") and *J & D Rigging Pty Ltd v Agripower Australia Ltd*[26] ("*Agripower*"), which had opined that the words "forming part of the land" did not incorporate the law relating to fixtures, and concluded that the common law on fixtures is not imported into the definition. The learned judge cited two reasons:[27]

> (a) First, the phrase "fittings that form, or are to form, part of the land" in the limb does not unambiguously import the common law on fixtures. As noted in *Savoye*, the Parliament did not use the word "fixtures" even though it could have done so.
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> (b) Second, neither does the purpose of the SOP Act suggest that the common law on fixtures should be imported. As Applegarth J observed in *Agripower*, the common law on fixtures has to do with ownership of property.[28] Thus, whether something is a fixture in law is an inquiry that is, with respect to Judge Seymour QC in *Gibson Lea*, quite beside the point.

22 Cap 30B, 2006 Rev Ed.
23 [2016] SGHC 247.
24 [2001] BLR 407.
25 [2015] Bus LR 242.
26 [2013] QCA 406.
27 *JFC Builders Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2016] SGHC 247 at [31].
28 *JFC Builders Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2016] SGHC 247 at [21].

Jurisdictional challenges

Existence of a payment claim

7.18 In the course of its decision in *Grouteam*, the Court of Appeal addressed the jurisdictional issues in connection with the validity of a payment claim. There have been two seemingly contradictory lines of decisions addressing whether the validity of a payment claim went to the jurisdiction of an adjudicator. In *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd*;[29] *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd*;[30] and *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*[31] ("*SEF Construction*"), the High Court had reasoned that the jurisdiction of an adjudicator stemmed from his appointment by an authorised nominating body, and that the substantive validity and service of a payment claim did not affect the issue.[32] On the other hand, in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd*[33] ("*Sungdo*"), the High Court held that if a payment claim was invalid, this would go to jurisdiction and the court would be in a position to review the validity of an adjudicator's appointment. This part of the decision in *Sungdo* was upheld by the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng*[34] ("*Chua Say Eng*"), but the Court of Appeal had in that case shown that the two judicial approaches were not inconsistent.[35] In *Grouteam*, Sundaresh Menon CJ took the opportunity to clarify whether the validity of a payment claim was an issue as to the jurisdiction of an adjudicator:[36]

> … In our judgment, the position is clear because we are concerned with two slightly different situations. In *Sungdo*, Lee J held that an adjudicator would not have been validly appointed if there was in fact no payment claim or no service of a payment claim. In such a case, there would be no basis at all to appoint an adjudicator, and any such appointment would be void and without effect in law. This is a consideration of the adjudicator's jurisdiction at the *threshold* because without a payment claim or service of such a claim, there is no basis at all for an adjudicator to be appointed in the first place. In *Chip Hup Hup Kee, AM Associates and SEF Construction*, Prakash J was faced with a situation where there was what appeared on its face to be a

29 [2010] 1 SLR 658.
30 [2009] SGHC 260.
31 [2010] 1 SLR 733.
32 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [54].
33 [2010] 3 SLR 459.
34 [2013] 1 SLR 401.
35 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [30] and [31].
36 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [49]; see also *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [35].

> payment claim, but that payment claim was said to be defective by reason of some non-compliance with the Act. In such a case, the appointment of the adjudicator would nonetheless be valid because the SMC plays only an administrative role in appointing an adjudicator once it receives what appears to be and is intended to be a payment claim. It is *not* for the SMC to assess or adjudicate on the validity of a payment claim, nor whether it has been properly served on the respondent … [emphasis in original]

7.19 An "adjudicator's jurisdiction at the threshold", thus, derives from the existence and service of a payment claim. On the basis of *Grouteam*, the inquiry at the threshold does not extend to determining whether the payment claim complies substantially with the SOP Act. As Menon CJ made plain in the same passage, the issue as to whether a payment claim is defective for non-compliance only arises after this threshold is crossed, when the matter goes to the adjudicator's substantive jurisdiction. Although the two situations are different, both may lead to the setting aside of an adjudication determination, albeit for different reasons.[37]

Waiver of jurisdictional challenges and time for raising objections

7.20 In *Grouteam*, the Court of Appeal affirmed that it is mandatory for parties in adjudication to comply with the mandatory provisions of the SOP Act such as the timelines prescribed in s 10(2).[38] However, the court considered that it accords with the legislative purpose of the Act to hold that the non-defaulting party may waive the other party's breach of a mandatory provision of the Act. In this case, the court noted that, notwithstanding its position that the claimant breached these provisions, the respondent had even issued a payment response and did not take any action to object to the time of service of the payment claim.[39] Menon CJ said:[40]

> [I]t is in line with the legislative purpose of the Act that a party who is not in breach may waive the other party's breach of a mandatory provision of the Act, and that parties may also waive the right to object to an adjudicator's lack of jurisdiction. Allowing parties to waive the right to make such objections only serves to facilitate the speedy and efficient resolution of disputes in the building and construction industry so as to allow progress payments to be made promptly. Furthermore, all this may be countenanced because of the underlying principle of *temporary* finality. [emphasis in original]

37 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [49] and [50].
38 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [55].
39 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [61].
40 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [63].

7.21 Furthermore, the court also considered that it is also consistent with the same legislative purpose that parties should not be permitted to argue that an adjudicator lacks jurisdiction or that a breach of a mandatory provision of the Act has occurred if such objections are not raised at the earliest possible opportunity:[41]

> … Parties should not be allowed to keep silent at the time a mandatory provision is breached, only to throw up all forms of technical objections at the adjudication. To hold otherwise would, in our judgment, offend the salutary purposes of the Act.
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> It seems to us, therefore, that any objection of the type mentioned above should be made before the party who is entitled to raise the objection takes any further step which would be inconsistent with the objection being maintained …

Proceeding with a jurisdictional challenge

7.22 Previously, in *Chua Say Eng*, the Court of Appeal had stated that when a challenge is mounted against the jurisdiction of an adjudicator, the adjudicator should not rule on the challenge but he should simply proceed with the adjudication because an adjudicator has no power to decide whether or not he has the requisite jurisdiction.[42]

7.23 This issue was considered in two cases before the High Court in 2016. In *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd*[43] ("*Asplenium Land*"), Foo Chee Hock JC read the conclusion on this issue reached by the Court of Appeal in *Chua Say Eng* to mean that "the adjudication should proceed on the non-jurisdictional issues only, leaving the jurisdictional issues to be raised 'immediately with the court and not before the adjudicator'".[44] In *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania*[45] ("*Hauslab*"), the High Court proceeded on the basis of this ruling in *Chua Say Eng*. Vinodh Coomaraswamy J held that it follows that a respondent should not raise the issue of jurisdiction before an adjudicator, except perhaps to preserve the point for a future setting-aside application to court.[46]

7.24 The judgment in *Hauslab* was delivered two weeks before the decision of the Court of Appeal in *Grouteam*, where the issue was

41 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [64]–[65].
42 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [36], [48] and [64].
43 [2016] 3 SLR 1061.
44 *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061 at [24].
45 [2017] 3 SLR 103.
46 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [44].

discussed in some detail. In the course of his judgment, Menon CJ said:[47]

> … In our judgment, and in the light of our observation that objections to jurisdiction and claims that a mandatory provision of the Act has been breached in the run-up to the adjudication should be raised expeditiously, even before the adjudicator, there is no objection as a matter of principle to adjudicators considering and then ruling on whether they have jurisdiction and/or whether breaches of mandatory provisions have occurred. However, their determination of such issues will not be final and conclusive because adjudicators do not have the power to *finally and conclusively* decide these matters. Any decision that they make in this regard will remain open to review by the court, which alone has the power to decide these matters in a final and conclusive manner. Thus, time spent and costs incurred in focusing on such issues in the course of an adjudication might well be wasted. As a practical matter, it may therefore speed up the adjudication process and reduce costs if adjudicators confine themselves to the issues which they are required to deal with, namely, whether payment is due and if so, how much. Challenges to jurisdiction and objections to breaches of mandatory provisions of the Act which have been timeously raised can then be pursued in court. [emphasis in original]

7.25 The present position following *Grouteam* is that, while an adjudicator's determination of jurisdictional issues is not final and conclusive, an adjudicator may have to rule on these issues in order to proceed with the adjudication. However, the adjudicator should focus his time and effort to determine the substantive issues of the dispute, namely, whether the claimant is entitled to be paid and, if so, the quantum of such payment.

Repeat claims

7.26 Previously, the position was that on a construction of s 10(1) of the SOP Act, a claimant was entitled to make only one payment claim in respect of a particular quantity of work done and, hence, if a claimant made a second payment claim in respect of the same work, that second payment claim or "repeat claim" could not be the subject of an adjudication application.[48]

7.27 In *Chua Say Eng*, the Court of Appeal expressed *obiter* the view that, on policy considerations, there is no reason to preclude a claimant from making a repeat claim and applying for an adjudication of that claim so long as the earlier payment claim had not been previously

47 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [67].
48 See *Doo Ree Engineering v Taisei Corp* [2009] SGHC 218.

adjudicated on its merits.[49] This view was cited with approval by Quentin Loh J in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd*[50] ("*Vivaldi*") and followed by the assistant registrar in *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd*.[51] Subsequently, in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd*,[52] Lee J, while noting that the policy considerations are finely balanced, affirmed the views as expressed *obiter* in *Chua Say Eng* and *Vivaldi*.

7.28 In *Grouteam*, the Court of Appeal returned to this issue and settled the position in its judgment:[53]

> [T]he High Court in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 (at [68]) held that a payment claim which merely repeated an earlier claim (also referred to hereafter as a 'repeat claim' where appropriate to the context) would be prohibited under the Act … We consider this to be incorrect. For one thing, it is contrary to our decision in *Chua Say Eng* … Further, we do not think the concerns expressed are valid. First, we cannot see why it would be an abuse of process to allow a repeat claim for work done or goods supplied where a previous payment claim for the same work or goods was not in fact adjudicated on the merits. The fact of the matter is that in such a case, work has been done or goods supplied for which payment has yet to be made and in respect of which no adjudication on the merits has taken place. Secondly, the recipient of a payment claim served out of time only has a legitimate complaint in so far as the payment claim was served at a time when he was not obliged to accept it. But, where a fresh payment claim for the same scope of work or goods is subsequently served in good time, we cannot see any legitimate ground for objecting.

In the course of its judgment, the Court of Appeal also considered that in many cases, a repeat may be "prudent, expedient and cost-effective" in a situation where parties dispute whether an earlier payment claim was served within the applicable timeframe.[54]

7.29 The validity of an adjudication application based on a repeat claim, therefore, turns on whether the payment claim has been adjudicated on its merits. The question then arises as to what constitutes a "determination on the merits". In *Asplenium Land*, the adjudication application was made in respect of Payment Claim No 22. Several items of that payment claim were identical to that in the preceding Payment Claim No 21 and had been dismissed for want of evidence in a previous

49 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [92].
50 [2013] 3 SLR 609.
51 [2013] SGHCR 16.
52 [2015] 1 SLR 648.
53 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [57].
54 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [58].

adjudication. Foo JC cited with approval the Queensland decision of *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd*[55] and held that "a dismissal of a claim for insufficiency or want of evidence must be an adjudication on the merits" and that there was no reason to distinguish between "a dismissal of a claim based on absence of legal or factual basis[; a dismissal based on] acceptance or rejection of evidence[; and a dismissal based on] insufficiency or lack of evidence".[56]

Effect of earlier determinations

7.30 Section 17(5) of the SOP Act provides that where an adjudicator has determined the value of any construction work, this determination must be necessarily followed by a subsequent adjudicator in respect of that same work unless it is shown that "the value thereof has changed since the previous determination." In determining whether "the value thereof has changed since the previous determination", Foo JC approved the following statement of principle:[57]

> … The learned author of *Security of Payments* opined (at para 16.62) that the exception applied only "where the facts surrounding the premise of the valuation have changed". This could conceivably apply (in my view) to situations where there were variations in or additions to the construction work, or the goods or services supplied. The exception must be "specifically raised" and required "compelling evidence" (see para 16.62 of *Security of Payments*) of the change in facts. I considered that the author's views were sensible having regard to the obvious policy and purpose that the section served.

Post-termination claims

7.31 The High Court in *Asplenium Land* had to consider whether payment claims made following the termination of a contract falls within the province of the SOP Act. The issue turns on s 5 of the SOP Act, which stipulates the basis for the claimant's entitlement to progress payment under the Act:

> Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.

7.32 Foo JC cited with approval the Queensland decision of *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd*[58] and held that since the contract was terminated, the contractor's

55 [2010] QSC 135.
56 *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061 at [17].
57 *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061 at [41].
58 [2013] QSC 269.

claim could no longer come under s 5 of the SOP Act for the carrying out of construction work. Read together with s 10(1), which provides that "a claimant may serve one payment claim in respect of a progress payment", it follows that post-termination claims could not be the subject of a payment claim. Accordingly, the adjudicator has no jurisdiction to determine these claims.[59]

Reasons for withholding payment in a supply contract

7.33 During 2016, the courts were presented with an opportunity to consider the operation of s 15(3) of the SOP Act in relation to a supply contract. Section 15(3)(*b*) provides that in an adjudication arising from a supply contract, the respondent shall not include in the adjudication response, and the adjudicator shall not consider any reason for withholding any amount unless the reason was provided to the claimant on or before the relevant date.

7.34 In *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd*[60] ("*Hyundai Engineering*"), the dispute arose from a subcontract between a contractor and supplier for the "supply, delivery and unloading of stone". It was common ground that the subcontract was a supply contract for the purposes of the SOP Act. The main contractor did not respond to a payment claim for a sum of S$1,188,087.59, which was expressed to be "the cumulative value of the unpaid amounts under the preceding 23 payment claims". In the ensuing adjudication, the adjudicator found for the supplier having earlier rejected the main contractor's arguments on account of s 15(3)(*b*). Before the High Court, the contractor argued, *inter alia*, that the relevant reasons had been provided in respect of the preceding payment claim, which was also a cumulative claim and that cumulative payment claims for supply contracts should be isolated and treated differently from a non-cumulative payment claim. The High Court held that "the reasons for withholding payment to a payment claim had to be given *in relation to* that payment claim and therefore only *after* it had been issued" [emphasis added].[61] Ramesh JC cited three reasons for reaching this finding:

> (a) First, it would be strange that s 15(3)(*b*) contemplates a different or customised treatment for cumulative payment

59 *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061 at [47]–[48].

60 [2016] 4 SLR 626.

61 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [13].

claims.[62] On the terms of s 10(4), a claimant is entitled to bundle past unpaid payment claims into a cumulative payment claim (provided that the past claims relate to work carried out within six years prior to the subject payment claim). The cumulative payment claim effectively sets a new payment due date for all the unpaid past payment claims that it subsumes. The cumulative payment claim, therefore, resets the "relevant due date" for payment and the reasons relevant for the purpose of s 15(3)(*b*) would be those offered in relation to that cumulative payment claim.[63]

(b) Second, this construction is consistent with the structure of the adjudication process in the SOP Act. A payment claim in respect of a supply has to be met by reasons (not necessarily in the form of payment response) or, pursuant to s 11(2), by way of payment. Failure to make payment by the "relevant due date" entitles the claimant under a supply contract to file an adjudication application.[64] When the adjudicator examines the adjudication response for compliance with s 15(3) of the Act, the assessment is based on reasons that were given *in response to* the payment claim which initiated the claims process.[65]

(c) Third, such an approach is more consistent with the underlying purpose of the Act, which is to facilitate and simplify the recovery of payment particularly as regards supply contracts. This underlying purpose is given effect by adopting an interpretation that favours certainty where an ambiguity arises in the Act. To accept that reasons need not be given *in relation to* a payment claim under a supply contract, particularly a cumulative payment claim, would expand the ambit of s 15(3)(*b*) too broadly and introduce uncertainty into the adjudication process.[66]

7.35 In the course of his judgment, the learned judicial commissioner agreed with the suggestion in *Security of Payments and*

62 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [14].

63 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [15].

64 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [16].

65 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [17].

66 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [21].

Construction Adjudication[67] that as a matter of *practice*, the respondent in the context of a supply contract should issue a statement akin to a payment response *in relation to* the payment claim but without the cloak of formality that accompanies the payment response. As he said, "[t]hat would be a prudent step to take to avoid issues arising as to whether s 15(3)(*b*) had been complied with in any given case".[68]

Setting aside

7.36 A successful party in an adjudication may apply to enforce an adjudication determination in the same manner as a judgment or order of the court.[69]

Grounds for setting aside

7.37 In *Hauslab*, the High Court affirmed the principle that in a setting-aside application, the court does not review the merits of the adjudication determination. This follows from the premise that the power of the court to set aside an adjudication determination arises at common law as an instance of the court's supervisory jurisdiction. Consequently, the court's role in exercising this supervisory jurisdiction is restricted and, as explained by the Court of Appeal in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd*,[70] any setting aside "must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the [Act]".

7.38 In *Hauslab*, the High Court pointed out that because the power to set aside arises at common law, the SOP Act does not expressly provide for this power nor does the Act spell out the grounds for setting aside. Instead, the Act assumes that such a power exists outside the Act. Section 27(5), therefore, does no more than require the dissatisfied party to pay the unpaid portion of the adjudicated amount into court before applying to the court to invoke that power.[71]

67 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013).

68 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [19].

69 See Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 27(1).

70 [2015] 1 SLR 797.

71 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [52] and [53].

7.39 Coomaraswamy J, in his judgment, referred to *Chua Say Eng*, which laid down two fundamental grounds on which the power to set aside may be exercised:[72]

> (a) whether the adjudicator was validly appointed; and
>
> (b) whether the claimant complied with a provision of the Act which is so important that the legislative purpose of the Act is that a breach of that provision should render the application invalid.

7.40 The learned judge considered that the seven grounds for setting aside cited by Judith Prakash J in *SEF Construction*[73] might be understood as a "convenient expansion on *Chua Say Eng*'s two fundamental grounds".[74]

Burden and standard of proof

7.41 In *Hauslab*, the parties were on common ground that the burden of proof in a setting-aside application rests on the respondent, who has "to advance a positive case in order to satisfy the court that he ought to succeed".[75]

7.42 The High Court then considered the standard of proof to be applied. There are two possible standards of proof – on the balance of probabilities or the standard which applies on a summary judgment application. The latter standard means that the burden is discharged on the establishment of "a reasonable or fair probability that the adjudication determination ought to be set aside".[76] The learned judge considered that, on this point, the authorities in England and New South Wales offer no assistance because in the former, the adjudication regime is founded on contract rather than statute and in the case of the latter, the authorities turned on the general law of civil procedure rather than a specific standard under the New South Wales adjudication regime.[77]

72 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [55].
73 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [45].
74 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [56].
75 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [61].
76 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [63].
77 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [65].

7.43 As a result, the court proceeded to hold that in a setting-aside application, the respondent must establish its case on a balance of probabilities.[78] The High Court considered that the ordinary civil burden of the balance of probabilities was entirely consistent with the underlying purpose of the SOP Act, to yield a determination carrying temporary finality so long as certain prerequisites were satisfied. That goal would be undermined if the applicant was allowed to displace such temporary finality by a standard other than the balance of probabilities.[79]

Principles of natural justice

7.44 The High Court took the opportunity in *Hauslab* to clarify the operation of the rules of natural justice in the context of an adjudication under the SOP Act. Section 16(3)(*c*) of the SOP Act expressly requires an adjudicator to comply with the principles of natural justice. However, the court held that it is not sufficient in a setting-aside application for a respondent to show merely that the adjudicator has breached his duty under s 16(3)(*c*). To succeed, it has to be established that some material prejudice has been caused by the breach. The adjudicator's statutory duty under s 16(3)(*c*) of the SOP Act has to be construed against the legislative objective to provide an "expedited and … abbreviated" process by design and the fact that an adjudicator does not have the luxury of time to indulge in the "grinding detail of the traditional approach to resolution of construction disputes".[80] Coomaraswamy J said in his judgment:[81]

> [I]t is my view that the defendant must show in addition that it is the legislative purpose of the Act that a breach of s 16(3)(*c*) should render the determination invalid. I cannot find in the Act any hint of a legislative purpose to invalidate every adjudication determination in which there has been a breach of the principles of natural justice, no matter how trivial or serious and regardless of whether that breach has caused the respondent prejudice. I therefore consider that for the defendant to succeed in his setting-aside application, it is necessary for him to establish that he suffered prejudice by reason of the breach of the principles of natural justice on which he relies.

78 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [66].

79 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [109].

80 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [146].

81 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [176].

7.45 The learned judge accepted that in determining an adjudicator's compliance with the principles of natural justice, it is legitimate to consider the adjudicator's duties under ss 16(3)(*a*) and 16(3)(*b*) of the SOP Act to act in a timely manner, and avoid incurring unnecessary expense.[82] Given that the matter before him was not unduly complex, it was proper for the adjudicator to take the view that it did not warrant lengthy and detailed primary submissions and to require parties to "focus on the key points of dispute, keep it brief and adhere strictly to [the] deadline".[83]

7.46 Nevertheless, the learned judge considered that "even if the adjudicator did breach his duty to comply with the principles of natural justice in his procedural decisions between 18 March 2015 and 20 March 2015, that breach caused the defendant *no* prejudice" [emphasis added].[84]

Release of security under s 27(5)

7.47 Section 27(5) of the SOP Act provides that a party applying to set aside an adjudication determination is required to pay into court as security the unpaid portion of the adjudicated amount pending the "final determination of those proceedings". One of the questions answered during 2016 was whether this security should be released pending appeal by the unsuccessful party in the setting aside. In *Hyundai Engineering*, the court held that the expression "final determination of those proceedings" in s 27(5) referred to the final decision of the court of first instance and that, accordingly, the amount paid into court should be released pending determination of the appeal.[85] In the course of his judgment, Ramesh JC referred to the overarching purpose of the SOP Act to facilitate liquidity in the construction industry through the expeditious resolution of payment disputes. Thus, the courts should be wary of construing any provision in a manner that would defer payment to successful claimants. It could not have been intended by the Parliament that such considerations could be circumvented easily by the filing of an appeal, which would effectively

82 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [161].

83 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [162].

84 *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [177].

85 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [37].

operate as a statutorily prescribed stay of execution pending appeal even in the absence of any such intent.[86]

Statutory demand on the basis of an adjudication determination

7.48 One of the issues considered during 2016 was whether a statutory demand can be premised on an adjudication determination. In *Lim Poh Yeoh v TS Ong Construction Pte Ltd*,[87] a contractor obtained an adjudication determination for the sum of S$138,660.16 but was largely unsuccessful in enforcing payment of the adjudicated amount. After the completion of the works, the owner sued the contractor for a sum of approximately S$400,000 in damages ("Suit"). The contractor issued a statutory demand on the owner for the outstanding amount owed under the judgment debt. The owner applied to set aside the statutory demand on the ground that she had a valid cross-demand in her claims under the Suit.

7.49 The court considered that adjudication determinations, although provisional in nature, were binding on the parties in the adjudication until their differences were ultimately and conclusively resolved. This was the principle of temporary finality. Thus, debtors were precluded from attempting to set aside statutory demands by challenging the validity of the judgment debts on which they were based.[88] However, the policy objective behind the SOP Act did not displace the usual rules of insolvency.[89] The result is that while a successful claimant was fully entitled to seek leave to enforce an adjudication determination as a judgment and thereafter to pursue the recovery of the adjudicated amount in insolvency proceedings, he had to abide by the rules governing the insolvency process.[90]

7.50 The court ruled that this case should be decided on the same basis as would apply to any other application to set aside a statutory demand. On the facts, the owner's cross-claim in the Suit raised triable issues and was broader in scope than the adjudication (in particular the claim for defects).[91] Admittedly, some of these claims could have been brought up during the adjudication. This was but one factor, albeit a weighty one, that had to be considered in the overall balance. Another important consideration is that a declaration of bankruptcy could potentially render the owner's statutory right to seek a final

86 *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626 at [42].
87 [2016] 5 SLR 272.
88 *Lim Poh Yeoh v TS Ong Construction Pte Ltd* [2016] 5 SLR 272 at [51] and [52].
89 *Lim Poh Yeoh v TS Ong Construction Pte Ltd* [2016] 5 SLR 272 at [71].
90 *Lim Poh Yeoh v TS Ong Construction Pte Ltd* [2016] 5 SLR 272 at [73].
91 *Lim Poh Yeoh v TS Ong Construction Pte Ltd* [2016] 5 SLR 272 at [76].

determination of the dispute in a court of law nugatory. On the basis of these considerations, the court held that the statutory demand should be set aside.[92]

Certification

Fraud

7.51 In *Ser Kim Koi*, the Court of Appeal held that temporary finality can be denied to certificates issued by the architect under the articles and conditions of the Singapore Institute of Architect Standard Form ("SIA Conditions"), "which are, to the knowledge of the architect false, or issued by the architect without any belief in its truth, or recklessly". The facts concern a contract to build three bungalows. The contract incorporated the SIA Conditions. The contract sum was S$13.13m and the works were to be completed within 20 months, effectively by 21 February 2013. On 15 May 2013, the architect certified completion as at 17 April 2013, granting full extension of time up to that date. This was notwithstanding that the buildings failed their inspection for the temporary occupation permit ("TOP") two weeks earlier. It was not disputed that a TOP was not obtained until 16 September 2013. On 3 September 2013, Interim Certificate No 25 was issued for a sum of S$390,951 and on 6 November 2013, Interim Certificate No 26 was issued for S$189,250. The contractor sued for payment but the employer launched counterclaims against both the contractor and architect for alleged defects, delays, and conspiracy.

7.52 The Court of Appeal accepted the classic exposition of fraud in Lord Herschell's speech in *Derry v Peek*[93] that fraud is proved when it is shown that a false representation has been made "(a) knowingly or (b) without belief in its truth or (c) recklessly, careless as to whether it be true or false". Recklessness in certification can, therefore, amount to fraud under cl 31(13) of the SIA Conditions.[94]

Effect on temporary finality under the SIA conditions

7.53 The Court of Appeal in *Ser Kim Koi* held that the Architect had issued the Completion Certificate at least without belief in its truth and/or recklessly without caring whether it was true or false. It arrived at this decision in consideration of the Architect's inability to explain the issuance of the Completion Certificate in relation to the requirements of

92 *Lim Poh Yeoh v TS Ong Construction Pte Ltd* [2016] 5 SLR 272 at [77].
93 *Derry v Peek* (1889) LR 14 App Cas 337 at 374.
94 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [38].

cl 24(4) of the SIA Conditions and Item 72 of the Preliminaries, against the context that the buildings had failed two TOP inspections and the failures detected in the first TOP inspection had not been rectified for the second TOP inspection.[95] Furthermore, the fact that the works were still being valued for Interim Certificates Nos 25 and 26 well after the purported completion date of 17 April 2013 suggested that the works could not have been "complete" under cl 24(4) of the SIA Conditions and Item 72 of the Preliminaries.[96]

7.54 The Court of Appeal also noted other anomalies surrounding the interim certificates. First, since the certified completion date was 17 April 2013, the Architect might be expected to impose liquidated damages on the contractor from 18 April 2013 but the Architect failed to do so.[97] Secondly, if a TOP was obtained only on 16 September 2013, the contractor must have carried out additional works after the two failed attempts to secure TOP clearance. For this purpose, there should have been an instruction from the Architect with the attendant extension of time and payment for variation work.

7.55 The court concluded from this analysis that, like the Completion Certificate, Interim Certificates Nos 25 and 26 had also not been issued in accordance with the terms of the contract and that when he issued these certificates, the Architect could not have had any belief in their truth or he did so recklessly without caring whether they were true or false. Both certificates, therefore, lost the temporary finality that would otherwise have been conferred by the SIA Conditions.[98]

Insolvency of a claimant

7.56 In *W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd*,[99] an adjudicator had determined in favour of a subcontractor whereupon the main contractor applied for the determination to be set aside. Separately, the main contractor commenced Suit 112 in the High Court against the subcontractor on the latter's purported repudiation of the subcontract. Shortly thereafter, the subcontractor was placed under creditors' voluntary liquidation. The main contractor filed a proof of debt, which substantially overlapped with its claims in Suit 112. The issue in this case was whether leave should be granted to the main contractor to proceed with Suit 112.

95 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [49].
96 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [74].
97 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [95].
98 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [98].
99 [2016] SGHC 80.

7.57 The court refused the main contractor's application. The issue turns essentially on s 299(2) of the Companies Act,[100] which provides that after the commencement of winding up, no action or proceeding shall be commenced against a company except by leave of court. Lee J noted that the purpose behind s 299(2) is to prevent a company in winding up from "being further burdened by expenses incurred in defending unnecessary litigation". In this case, Lee J noted that the subcontractor's resources in this case "were already threadbare and considerable costs would be incurred" if the subcontractor was required to defend Suit 112.[101] In any case, the court further observed that the plaintiff was not totally without recourse since it had already filed a proof of debt with the liquidators and this can be dealt with in the ordinary course of the liquidation.[102]

Independent contractor defence

7.58 During 2016, the courts heard an important case relating to the extension of the "independent contractor" defence to other members of the construction team, specifically main contractors and architects. The decision in the High Court is reported as *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd*[103] ("*Mer Vue Developments*"). Following that decision, an appeal was lodged against the architect and the contractor and the Court of Appeal decision is reported as *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd*[104] ("*Tiong Aik*").

Mer Vue Developments

Non-delegable duties

7.59 In *Mer Vue Developments*, the subsidiary proprietors of a condominium sued the developer, the main contractor, the architect, and the mechanical and electrical engineer for defects. The subject of interest in this discussion concerns the action which was founded in tort. The High Court affirmed the general principle, previously settled in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd*[105] ("*Seasons Park*"), that an employer is not vicariously liable for the

100 Cap 50, 2006 Rev Ed.
101 *W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd* [2016] SGHC 80 at [32].
102 *W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd* [2016] SGHC 80 at [33].
103 [2016] 2 SLR 793.
104 [2016] 4 SLR 521.
105 [2005] 2 SLR(R) 613.

negligence of an independent contractor, his workmen, or agents in the execution of his contract.

7.60 Chan Seng Onn J said in his judgment that the issue did not turn necessarily on the extent of the control exercised by the employer over the servant ("Control Test") but, instead, the inquiry should be premised on whether the contractor was performing services as a person of business on his own account ("Independent Business Test" or "personal investment in enterprise" test).[106] Aside from establishing the independence of the contractor on these tests, the employer had to show that it has exercised proper care in appointing the independent contractor.[107] Chan J considered that the background and context had to be kept in mind in the independent contractor inquiry: the complexities of modern buildings required specialists of different disciplines interacting and communicating with one another.[108]

7.61 As noted in *Seasons Park*, there are certain non-delegable duties such as duties relating to the safety of employees, the carrying out of extra-hazardous acts, withdrawal of support for neighbouring land, and non-delegable duties as prescribed by statute. However, these are not true exceptions to the general principle of the independent contractor as they arise from a "primary and personal non-delegable duty owed by the employer to the claimant". Non-delegable duties are exceptional, and their categories should not be readily or easily expanded.[109] In the case of architects and contractors, the extent of non-delegable duties under the Building Control Act[110] ("BCA") was their responsibility to ensure building safety and construction in accordance with the relevant approved plans and regulatory requirements. The learned judge noted that the standard of statutory duties imposed on an architect (in his capacity as a qualified person or "QP") and on a main contractor is different[111] but the core responsibility to be borne by both QPs and main contractors is to ensure that all building works are designed and carried out in accordance with the BCA, the building regulations, approved

106 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [12].
107 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [15].
108 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [35].
109 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [26].
110 Cap 29, 1999 Rev Ed.
111 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [44].

plans, and any terms and conditions imposed by the Commissioner of Building Control.[112]

Delegation by architects

7.62 On the delegation of duties by architects, the learned judge accepted the submission that some of the early English authorities on the subject of the demands of modern construction are too simplistic against the context of the industry today. Chan J said:[113]

> … The complexities of developments may necessitate architects to assemble a team of specialist subcontractors with each performing a specific scope of design work that would be beyond the expertise of the general architect. The expectation that a single architect will have all the expertise to undertake the responsibility for the whole design of an entire modern building complex may not be realistic.

7.63 The learned judge cited with approval the English case of *Cooperative Group Ltd v John Allen Associates Ltd*[114] where Ramsey J suggested the following framework for determining whether a construction professional acted reasonably in seeking the assistance of specialists:[115]

> (a) whether the assistance was obtained from an appropriate specialist;
>
> (b) whether it was reasonable to seek assistance from other professionals, research or other associations or other sources;
>
> (c) whether there was information which should have led the professional to give a warning;
>
> (d) whether and if so to what extent the client might have a remedy in respect of the advice from the other specialist; and
>
> (e) whether the construction professional should have advised the client to seek advice elsewhere or should have himself taken professional advice under a separate retainer.

7.64 Following this framework, the starting point is to examine the professional's contract and, thereafter, to consider other relevant facts and circumstances. The learned judge found that the architect had not

112 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [45].

113 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [49].

114 *Cooperative Group Ltd v John Allen Associates Ltd* [2010] EWHC 2300 (TCC) at [159]–[181].

115 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [51].

in this case unreasonably delegated any of its professional design duties: express approval was granted by Mer Vue contractually; Architect Planners & Engineers (Pte) Ltd ("RSP")'s subcontractors specialised in areas RSP might not have expertise in; and the track records of RSP's subcontractors were satisfactory.[116]

Whether subcontractors were independent contractors

7.65 The Control Test focused on the right to control how the work was done.[117] On this test, the main contractor's nine nominated subcontractors and 12 domestic subcontractors were independent contractors of the contractor. The main contractor did not control the manner they carried out their work: the nature of work subcontracted out to them was largely specialist and dependent on the subcontractor's proprietary system. Supervisory control by main contractors on-site to co-ordinate among subcontractors did not establish the necessary control under the Control Test.[118] On the same basis, Chan J held that both the mechanical and electrical engineer and the landscape consultant were independent contractors of the architect because the firms were separate businesses and there was no requisite control exercised by the architect over these firms.[119]

Whether the developer exercised proper care

7.66 As to the position of the developer, the learned judge was satisfied that the developer had exercised proper care in the appointments of the various independent contractors. The developer had engaged in a formal tender exercise to appoint the main contractor; both the main contractor and the architect were established firms and the main contractor's subcontractors were appointed either on the basis of having worked with the main contractor in the past or on their track record.[120]

116 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [53]–[56].

117 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [63].

118 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [83] and [84].

119 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [90] and [91].

120 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [93]–[98].

Tiong Aik*: Vicarious liability and non-delegable duties*

7.67 When the matter came before the Court of Appeal in *Tiong Aik*, the issues centred on the non-delegable duties of the main contractor and the architect and whether in respect of these duties, both parties could rely on the independent contractor defence.

7.68 The case mounted by the management corporation was that the architect and the main contractor owed it non-delegable duties to ensure that the Condominium's common property were designed and built with reasonable care ("Proposed Non-Delegable Duty"). The Court of Appeal dismissed the appeal and found that the non-delegable duty advanced by the management corporation did not exist under statute or common law.

Fault-based principle in tort

7.69 Chao Hick Tin JA in delivering the grounds of the decision of the court started with the "fundamental fault-based principle in the law of torts" that tortious liability lies with the party that has engaged in the tortious act. Citing with approval the passage of the judgment of Lord Sumption in *Woodland v Swimming Teachers Association*[121] ("*Woodland*"), Chao JA said:[122]

> [I]n the context of the tort of negligence, a person is generally only held liable for his *own* carelessness, and not for the carelessness of *others*. The reason for this is that the nature of the duty imposed by common law is merely to *do what you are required to do with reasonable care*. One implication of this is that if the performance of a particular task is delegated to another party, the party who was originally responsible for the performance of that task (under, for example, contract) would, ordinarily, not be subject to *any* tortious liability for the negligent performance of that task (since he did not personally perform the task). [emphasis in original]

Distinction between vicarious liability and non-delegable duties

7.70 Vicarious liability stands, in a sense, as a "true exception" to this fault-based principle. It permits the imputation of secondary tortious liability on an employer on the basis of its employee's primary tortious liability. The employer is liable not because of its *own* negligence, but because of its *employee's* negligence. The principles of vicarious liability,

121 *Woodland v Swimming Teachers Association* [2014] AC 537 at [5].

122 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [19].

however, do not extend to imposing liability on employers for the negligence of their *independent contractors*.[123]

7.71 Against this context, the learned appeal judge distinguished the legal basis for liability in respect of non-delegable duties and vicarious liability:[124]

> A *separate* legal basis for such a cause of action may, however, exist in the doctrine of *non-delegable duties*. The liability incurred upon a breach of a non-delegable duty is *not vicarious* … Non-delegable duties are *personal* duties, the delegation of which will not enable the duty-bearer to escape tortious liability because the legal responsibility for the proper performance of the duty resides, in law, in the duty-bearer … [emphasis in original]

7.72 Thus, where a party is subject to non-delegable duties, he will be held liable in tort if those duties are breached, *even if* he has non-negligently delegated the performance of those duties to an independent contractor. Non-delegable duties create an exception to the rule that an employer cannot be liable for the negligence of its independent contractors.[125] The result, therefore, is that there are two separate legal doctrines which permit "derogation" from the fault-based principle: the first is vicarious liability (where an employer is liable for the negligence of its employees); and the second is non-delegable duties (where a party is liable in tort even if the negligent party was its independent contractor).[126]

Statutory non-delegable duties

7.73 On the construction of ss 9(1)(*a*) and 11(1)(*a*) of the BCA, the Court of Appeal agreed with the first instance judge that the *only* relevant statutory non-delegable duties imposed under the Act concerned building safety, construction in accordance with the relevant approved plans, compliance with building regulations and provisions of the Act, and compliance with the terms and conditions imposed by the Commissioner of Building Control. The court held that nothing in the express words of the Act countenance the imputation of the Proposed

123 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [20].
124 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [21].
125 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [24].
126 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [25].

Non-Delegable Duty.[127] In the course of his judgment, Chao JA noted that in enacting the Act and the subsequent amendments to the Act, the Parliament focuses on the structural safety and soundness of buildings and not poor workmanship or aesthetics.[128] Thus, both the express statutory language and the relevant parliamentary debates provide no basis for the submission that the Act imposes a wide-ranging statutory duty, which extends beyond structural soundness, on the main contractor or the architect.[129]

Non-delegable duties under common law

7.74 Chao JA considered that in order to demonstrate that a non-delegable duty arises on a particular set of facts, a claimant must *minimally* be able to satisfy the court either that: the facts fall within one of the established categories of non-delegable duties; *or* the facts possess *all* the features described by Lord Sumption in *Woodland*.[130] In this case, it was not disputed that the Proposed Non-Delegable Duty fell under any existing established category of non-delegable duties.[131] In respect of the second category of non-delegable duties identified in *Woodland*, the court dismissed the argument that the management corporation should be regarded as a "vulnerable claimant". The management corporation was never under the guardianship of either the main contractor or the architect and neither of them exercised any control over the management corporation[132] and the management corporation could avail itself against the developer or under the warranties as against the main contractor. In fact, the Parliament had specifically placed the responsibility on homebuyers to be discerning consumers and to take adequate measures to protect themselves against poor workmanship.[133] There are also no policy reasons to justify the imposition of non-delegable duties on the main contractor and the architect, when the same nature of the duties can be attained by the contractual arrangements that parties are at liberty to enter into and in fact did so.[134]

127 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [33].
128 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [38] and [39].
129 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [41].
130 *Woodland v Swimming Teachers Association* [2014] AC 537 at [23].
131 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [65].
132 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [78].
133 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [80].
134 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [87]–[88].

7.75 As a result, the Court of Appeal concluded that there was no case for imposing the Proposed Non-Delegable Duty on the main contractor and the architect and observed:[135]

> [G]iven the increasing specialisation in the construction industry, which necessitates subcontracting, it would be excessively onerous to impose legal liability on the respondents for defective building works which they might not even be equipped or qualified to undertake and/or supervise.

Unlicensed builders

7.76 In *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd*,[136] a main contractor employed on a public works project held both a general builder's licence as well as a specialist builder's licence under the BCA. It subcontracted part of its works to an unlicensed subcontractor. The main contractor paid the sums stated in 10 of 11 invoices for the subcontract works but did not pay the amount owed under the 11th invoice. In resisting a claim by the subcontractor for the outstanding sum, the main contractor argued that the subcontract work relates to structural steelwork which was a type of specialist work within s 2(1) of the Act and which could only be carried out by a firm with a specialist builder's licence. Being unlicensed, the subcontractor was not entitled to be paid by virtue of s 29B(4) of the Act. Section 2(1)(*d*) defines "specialist building works" as follows:

> 'specialist building works' means the following types of building works:
>
> …
>
> (d) structural steelwork comprising —
>
> (i) fabrication of structural elements;
>
> (ii) erection work like site cutting, site welding and site bolting; and
>
> (iii) installation of steel supports for geotechnical building works …

7.77 The Court of Appeal held that while s 2(1)(*d*) could be construed either conjunctively or disjunctively, on a purposive consideration of the legislation, the disjunctive reading was preferred. This is because the object of the Act is to improve safety standards in all areas of the construction industry. A conjunctive interpretation would

135 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [90].

136 [2016] 4 SLR 604.

mean that builders who *only* install steel supports for geotechnical works would *not* be required to be licensed.[137]

7.78 However, the licensing regime is concerned only with the licensing of "builders". Section 29B(2) prohibits the "carrying on of the business of a builder" without a licence and s 29C provides for the licensing of one who wishes "to carry on the business of a builder". While the expression "builder" is not defined in the Act, it is clear that a subcontractor is not a builder. If it is not a builder, then the licensing regime should not apply to the subcontractor.[138]

7.79 As a result, the court held that while the subcontractor in this case had performed specialist building works within the meaning of s 2(1) of the Act, it did not need a licence to do so because it was a subcontractor.[139]

Limitation period

7.80 The issue in *Geocon Piling & Engineering Pte Ltd v Multistar Holdings Ltd*[140] concerned whether the claims of a sub-subcontractor were time-barred pursuant to s 6(1)(*a*) of the Limitation Act.[141] The sub-subcontractor, Geocon Piling & Engineering Pte Ltd ("Geocon"), had issued its final progress claim to the subcontractor, Multistar Holdings Limited ("Multistar"), sometime in December 2004. The subject action was commenced more than six years later, on 31 January 2011. Geocon contended that the cause of action only arose in 2009 because that was when the final accounts of the head contract between Multistar and the main contractor ("Sembcorp") were finalised.

7.81 The High Court held that Geocon's claims against Multistar were not time-barred as the parties had proceeded throughout on the basis that the sub-subcontract was back-to-back with, and subordinate to, the *head* subcontract. The High Court ruled that the final account of the sub-subcontract was, therefore, contingent on the final account between Sembcorp and Multistar under the head subcontract. It was only at that point that Multistar and Geocon could, as between themselves, come to a definite and final position on the amounts that

137 *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 at [24].
138 *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 at [41].
139 *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 at [60].
140 [2016] SGHC 240.
141 Cap 163, 1996 Rev Ed.

Multistar could determine amounts which could be back-charged against Geocon.[142] The parties only arrived at the final figure no earlier than 31 January 2006 and consequently, the result was that Geocon's claims were not time-barred.

142 *Geocon Piling & Engineering Pte Ltd v Multistar Holdings Ltd* [2016] SGHC 240 at [145].