7. BUILDING AND CONSTRUCTION LAW

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Design liability of a contractor

Generally

7.1 Frequently, having secured a contract on the basis of the design as prepared by the owner's design consultant, the contractor may, for various reasons, offer an alternative design to the works. An interesting case came before the High Court which examined the design responsibility of a contractor in such a situation and dealt with a number of issues which pertain to this subject, in particular the subject of fitness of purpose and whether this is affected by the issue of a certificate of substantial completion.

Facts

7.2 In *Jurong Town Corp v Sembcorp Engineers and Constructors Pte Ltd* [2009] SGHC 93, the plaintiff, JTC, employed the defendant, Sembcorp Engineers and Constructors ("SEC"), to construct a development known as Woodlands Spectrum I which consisted of 17 blocks of nine-storey stack-up factories. The contract originally provided for the use of reinforced concrete lintels and stiffeners for the brick walls in the project. After being awarded the contract, JTC accepted a proposal by SEC to substitute the reinforced concrete lintels and stiffeners with steel lintels and stiffeners. In the design, the stiffeners were used to strengthen and support the walls – and could be placed horizontally or vertically – while the lintels were essentially horizontal beams built into the wall at the top of openings. Following JTC's acceptance of their proposal, SEC employed a subcontractor to design and construct the steel stiffeners. However, as between JTC and SEC, the design of the steel stiffeners was SEC's responsibility. Shortly after the completion of the project, defects appeared at certain brick wall locations.

7.3 JTC's case was that these defects were caused by the design and construction of the steel stiffeners. In its defence, SEC contended that the steel stiffeners and lintels were fit for their intended purpose, which was only to support the weight of the brick walls. The brick walls, not being structural components, were not expected to take additional loads from either the structure or to carry the extra forces induced by the effects of creep, shrinkage and expansion of the brick walls. SEC submitted that since the calculations and laboratory test results showed that the horizontal steel lintels, in the as-built condition, could carry as much as ten times the weight of the brick wall above, the steel lintels had fulfilled their intended purpose.

The law

7.4 On the issue as to SEC's obligation to ensure fitness of purpose of the design which was contained in its proposal to JTC, Chan Seng Onn J (*Jurong Town Corp v Sembcorp Engineers and Constructors Pte Ltd* [2009] SGHC 93 at [7]) cited with approval the following statement of principle from *Hudson's Building and Engineering Contracts* (Canada: Thomson Professional Publishing, 11th Ed, 1994) at para 4.066:

> A contractor undertaking to do work and supply materials impliedly undertakes … that both the workmanship and materials will be *reasonably fit for the purpose* for which they are required, unless the circumstances of the contract are such as to exclude any such obligation. [emphasis added]

Effect of approval of contractor's design by the owner

7.5 An issue posed to the court was whether the existence of such an obligation was affected by the fact that the shop drawings of the steel stiffeners had to be accepted by JTC before SEC could proceed with the works. Chan J held that on a plain reading of the provisions of the standard preliminaries and cl 6.2 of the Public Sector Standard Conditions of Contract ("PSSCOC") the obligation exists because the consequence of the acceptance of the shop drawings is not to relieve the contractor of any responsibilities for compliance with all the requirements of the contract (*Jurong Town Corp v Sembcorp Engineers and Constructors Pte Ltd* [2009] SGHC 93 at [19]). Furthermore, the learned judge noted (at [20]) that cl 2.1(2) of the PSSCOC provides that, at any rate, the superintending officer of the contract has no authority to relieve the contractor of any of his obligations under the contract.

Fitness of purpose

7.6 Following his review of the facts, Chan J found that the horizontal steel stiffeners failed primarily because the vertical web elements supporting the flanges of the horizontal steel stiffeners, as designed by SEC, were too slender. There was also insufficient internal cross-sectional bulkhead stiffening of the box structure of the steel stiffeners to prevent parallel movement of the flanges relative to each other when subjected to the expected wind and other loads acting on the wall panels and the compressive vertical and non-uniform lateral forces on the webs and flanges. In addition, there was no provision for stresses induced by creep and shrinkage of the structural framework and expansion of the brick wall over time. These defects were caused by the inadequately designed and constructed steel stiffeners which SEC proposed to JTC as a substitution for the reinforced concrete stiffeners.

7.7 The learned judge considered that SEC was effectively seeking to sustain the unreal position that the steel stiffeners were fit for their purpose as long as they worked in theory to support a free standing wall isolated from the building within which they were found (as if the weight of the brick wall was the only possible load on the steel stiffeners), even if in fact such steel stiffeners, when installed on site, would unacceptably deform and cause damage to the wall finishes when subjected to the actual lateral and vertical loads. He proceeded to rule on this as follows (*Jurong Town Corp v Sembcorp Engineers and Constructors Pte Ltd* [2009] SGHC 93 at [61]):

> In my view, the stiffener system would not be fit for its purpose if it only satisfied one design aspect but not other relevant design aspects. All design aspects relevant to a stiffener system should be satisfied before it could be said that the stiffener system was fit for its intended purpose. It was clearly insufficient merely to show that the steel stiffeners could *per se* carry the weight of the brick wall above, if the steel stiffener system would not work if other normal anticipated conditions, factors or loads were taken into account. It must be borne in mind that SEC's obligation was to design and construct a working practical stiffener system that met the relevant building code requirements and satisfied all other contractual requirements as might have been stipulated by JTC.

Effect of the certificates of completion

7.8 Chan J also considered the effect of a certificate of substantial completion and the certificate of final completion on this issue. The learned judge held that on a construction of cll 17 and 18 of the Public Sector Standard Conditions of Contract, "*substantial completion*" did not mean that the contractor had completed the entire works or that what the contractor had done was free of defects. In his view, neither

would the issue of the final completion certificate preclude JTC from bringing this claim. He pointed out that cl 33.2 specifically provides:

> No certificate of the Superintending Officer shall of itself be conclusive evidence that the Works have been completed or that any Plant, materials, goods or work to which it relates are in accordance with the Contract.

7.9 Chan J proceeded to hold that SEC was in the circumstances liable for the defects and ordered damages to be assessed by the Registrar (*Jurong Town Corp v Sembcorp Engineers and Constructors Pte Ltd* [2009] SGHC 93 at [587]).

Repudiation and termination of contract

7.10 A particularly important decision delivered during the year under review concerns a situation where both parties are in breach of contract and one party seeks to terminate the contract.

Facts

7.11 In *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602, by a contract evidenced in a letter, Comfort (the respondent) agreed to supply sand to Alliance's (the appellant) ready-mixed concrete plants. Under the terms of the contract, Comfort was to deliver to these plants an aggregate total of 40,000 +/- 25% metric ton each month and Alliance was entitled to adjust the quantity ordered "as it deems fit to suit the production requirements/demand". Following repeated payment delays by Alliance, Comfort stopped deliveries of sand to Alliance on 20 July 2006. In their action against Alliance, Comfort alleged that Alliance had repeatedly failed to order the requisite contracted quantities each month and that Alliance had failed to pay them for the May to July 2006 deliveries. They argued that this evinced an intention on the part of Alliance to be no longer bound by the terms of the contract. On the same day, Alliance commenced an action alleging that Comfort had repeatedly breached the contract by failing to supply the contracted quantities of sand to Alliance and subsequently terminating the supply altogether and that further Comfort had repudiated the contract through a series of letters.

Breach not necessarily an impediment

7.12 In *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602, Andrew Phang JA, in delivering the judgment of the Court of Appeal, took the position that the fact that a party who has elected to terminate performance of a contract was, at the relevant time, in breach of contract does not necessarily operate to impede the

effectiveness of the election (at [45]–[46]). He followed another decision of the Court of Appeal in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 which approved the following observations by Kerr LJ in the English Court of Appeal decision of *State Trading Corp of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286:

> The fact that in the present case both parties had committed breaches before one of them elected to treat the contract as repudiated appears to me to make no difference whatever; nor the fact that (assumedly) both had been breaches of condition. If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature. A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract *and* if the effect of A's subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words, B would have to show that A, being in breach of an obligation *in* the nature of a condition precedent, was therefore not entitled to rely on B's breach as a repudiation. [emphasis in original]

Prerequisites in cases of mutual breach

7.13 On the principle laid down by Kerr LJ in *State Trading Corp of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286, there are therefore two prerequisites before a mutual breach could be said to disentitle a party from accepting the other party's repudiation and terminating the contract: (a) whether the breach by the other party is a *continuing* one; and (b) whether the other party is in breach of an obligation in the nature of a *condition precedent*.

7.14 In applying these principles to the case before the court, Phang JA found that in respect of the breach centring on the *non-payments* by Alliance, the *first* prerequisite had been satisfied inasmuch as the breach by Comfort *was* a *continuing* one as it had not furnished any sand to Alliance since 20 July 2006. However, *the* second prerequisite had not been satisfied. Although there were, indeed, mutual breaches by both parties, they did not appear to be related such that it could be stated that Comfort was "in breach of an obligation in the nature of a condition precedent" (*Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [48]). As to the breach centring on the alleged under-ordering by Alliance, again the first prerequisite had been satisfied but the second prerequisite had not been satisfied since any breach by Alliance with respect to under-ordering could not have lasted beyond 20 July 2006. This is because when Comfort refused to supply sand from 20 July 2006, any order for sand placed by Alliance would, *ex hypothesi*, have been an exercise in futility. In the circumstances, any breach by Alliance with respect to under-

ordering would have occurred prior to Comfort's breach (which consisted in a failure to supply sand from 20 July 2006 onwards) (at [49]). Put simply, there was no relationship between the two breaches and, hence, the second prerequisite was not satisfied. The conclusion, therefore, was that the mutual breaches in this case would not operate to disentitle Comfort from accepting Alliance's alleged repudiation.

Acts amounting to repudiation of contract

7.15 On the general law relating to repudiation, Phang JA affirmed (*Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [31]) the categorisation of situations which entitle an innocent party to elect to treat a contract as discharged as a result of the other party's breach as laid down in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413:

> (a) The *first* is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract ([2007] 4 SLR(R) 413 at [91]).
>
> (b) The *second* is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (at [93]).
>
> (c) The *third* is where the term breached is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty) (at [97]). The focus here is not so much on the consequences of the breach, but, rather, on the *nature of the term* breached.
>
> (d) The *fourth* is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (at [99]). This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. The focus here, unlike that in the previous situation, is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

7.16 The court then considered whether the breaches by Alliance amounted to repudiation of the contract. The first of these was the breach of payment obligations by Alliance. Phang JA noted that when Comfort terminated the contract, only two months of outstanding

payments were still owing to them by Alliance (*Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [38]). He also accepted Alliance's submission that there had been no renunciation of the contract by Comfort and cl 8 of the contract (which related to the obligation of payment) was not a "condition" and, hence, a breach of it did not entitle Comfort to terminate the contract (at [51]–[53]). At any rate, it is clear that the failure by Alliance to pay the arrears due pursuant to the May and June 2006 deliveries by Comfort did *not* deprive the latter of substantially the whole benefit of the contract that it was intended that it should obtain (at [57]). Accordingly, it was held that Comfort was *not* justified in terminating the contract on account of the breach by Alliance of its payment obligations.

7.17 The court next considered whether the alleged under-ordering of sand by Alliance entitled Comfort to terminate the contract. The court was persuaded that Alliance would have ordered the requisite amount of sand if it had been given the opportunity to do so. There had been an upward trend in spot prices of sand at the material time and, consequently, there was, in the circumstances, no incentive for Alliance to under-order from Comfort in the face of this rising market *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [72]).

7.18 Accordingly, the court held that Comfort was not entitled to terminate the contract based on the non-payments by Alliance pursuant to Alliance's breach of the payment terms of the contract. It was also not entitled to terminate the contract based on the under-ordering of sand by Alliance notwithstanding that this was a breach of the contractual provision stipulating the minimum order quantities. However, the court emphasised that the innocent party is always entitled to damages for breach of contract by the other party (*Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [84]). Thus, while Alliance was entitled to damages for Comfort's wrongful termination, Comfort was entitled to damages for Alliance's under-ordering of sand.

Security of payment

Generally

7.19 The dispute resolution landscape in the construction industry has been changed considerably as a result of the continuing acceptance of the adjudication regime under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). It will be recalled from the previous volumes the *Singapore Academy of Law*

Annual Review of Cases that the Act provides for a scheme of "adjudication" by which parties in a construction contract can obtain a quick, interim decision by an adjudicator on a payment dispute for construction work done or materials supplied in relation to a construction project located in Singapore. The decision of the adjudicator, referred to in the Act as a "determination", binds both parties until such time that the matter is decided by an arbitrator or the courts.

Increase in the number of adjudication applications

7.20 The intensity of the reception accorded to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) is vividly demonstrated by the fact that the year under review saw no less than 168 adjudication applications. This number was 82% more than that received for the preceding year and, more tellingly, exceeds the aggregate number of applications between 2005 and 2008. Not surprisingly, consistent with the experience elsewhere, the number of cases involving adjudication which came before the High Court also saw a corresponding increase. A number of these decisions deserve careful study because they clarified important principles relating to the jurisdiction and the basis for challenging an adjudicator's determination.

Timeline as a jurisdiction issue

7.21 The significance of an adjudication application's compliance with the timeline prescribed in the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) was raised before the High Court in *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156. In that case, the plaintiff, Taisei, applied to set aside the adjudication determination in SOP AA88 (2008). The substantive issue was whether the adjudication application by Doo Ree was premature such that the adjudicator had no jurisdiction to make an adjudication determination. In turn, this raised the question of whether the timelines for making an adjudication application should be essential to the existence of an adjudication determination. The court determined that it was, with the result that it was open to the court to review the adjudication determination to ascertain whether there had been compliance with the timelines prescribed in the Act, and to set aside the adjudication determination as being void in the event of non-compliance. On the facts, as the adjudication application in SOP AA88 (2008) had been made before the dispute settlement period, it was held to be premature and thus not made in accordance with s 13(3)(*a*) of the Act. The court ruled that the adjudicator should have rejected the adjudication application pursuant to s 16(2)(*a*) of the Act and that, consequently, he had no jurisdiction to make the adjudication

determination that he did. Taisei's application was allowed and the adjudication determination was ordered to be set aside

Validity of repeat claims

7.22 *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 concerns an application for adjudication of a payment claim which the applicant, Doo Ree, conceded was substantially the same as a previous claim. The same items of work were the subject of both claims, and the work had been carried out over the same period of time. The previous claim had been adjudicated upon and dismissed as the adjudicator determined that the application for adjudication was premature. In a subsequent adjudication, the adjudicator held that service of a repeat claim that was a duplicate of a payment claim that had been previously adjudicated upon would fall outside the province of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The High Court agreed with the adjudicator. The court pointed out that under s 10(1), a claimant could serve "one" payment claim for a particular progress payment. Section 10(4), which allowed an amount that was the subject of a previous payment claim to be included in a subsequent payment claim, did not *prima facie* allow the service of repeat claims as the word "include" would indicate that the amount that was the subject of a previous payment claim should form part, and not the whole, of the subsequent payment claim. The court noted the danger of abuse by a claimant if the service of repeat claims were to be allowed as a general principle and dismissed Doo Ree's application.

Setting aside adjudication determinations

7.23 Probably the most important of the cases decided during the year under review were a trilogy of cases, heard by Judith Prakash J. The first of these cases was *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733. The plaintiff, SEF Construction Pte Ltd, entered into a subcontract agreement with the subcontractor, Skoy Connected. SEF was the main contractor in a contract to build 19 three-storey houses, and employed Skoy to carry out the supply and installation of aluminum and glass works. Skoy lodged an adjudication application in respect of one of its payment claims. An adjudicator was appointed by the Singapore Mediation Centre and he directed parties to submit written submissions as well as reply submissions. There was no oral hearing.

7.24 SEF argued that the adjudication application was invalid on four grounds: first, the adjudication application was filed prematurely. Secondly, the reference period of the claimed amount was not within

the jurisdiction of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). Thirdly, the adjudication application failed to attach relevant documents which were essential and required under the Act. Lastly, the claimed amount in the adjudication application was inconsistent with, and exceeded the amount stated in, the payment claim. In his determination, although the adjudicator recorded the four jurisdictional issues, he only dealt with two of them. SEF applied to set aside the determination on this ground and on the ground that the adjudicator failed to engage in a *bona fide* exercise of his powers under the Act. The District Judge rejected SEF's arguments and SEF appealed to the High Court.

7.25 The appeal was dismissed by the High Court. In the course of a detailed judgment, Judith Prakash J observed that an adjudication determination is intended to be only an interim result so that if a respondent is directed to pay the adjudicated amount to the claimant, he is not prevented from recovering the sum paid in a subsequent arbitration or trial. She noted the recourse available to an aggrieved respondent to lodge an adjudication review application under s 18 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The respondent is also entitled under s 27(5) of the Act to challenge an adjudication determination but this is subject to the respondent paying into court, as security, the unpaid portion of the adjudicated amount. However, the Act is silent on the grounds on which an application for setting aside under s 27(5) may be based. On this point, Prakash J held that the court should be "guided in its approach mainly by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) which calls for a purposive reading of statutory wording and therefore in considering such applications, the court must view adjudication determinations and the SOP Act itself in the light of the legislative intention" (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [27]).

Court's power limited to setting aside

7.26 In her judgment, Prakash J affirmed that an application to set aside an adjudication determination under s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) is not an appeal and the court's power does not extend to re-examining the merits of the dispute. On this point, the learned judge said (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [27]):

> A right of appeal has to be expressly provided for by legislation which will also determine whether the appeal is limited to questions of law or encompasses questions of fact as well. A right of appeal also must be available to both parties and the right granted under s 27(5) is given to the respondent to the adjudication alone. Therefore the court faced with an application under s 27(5), not being an appellate court, would

> not be in a position to look into the merits of the dispute and adjust the adjudication amount whether upwards or downwards. The court's power is limited to deciding whether the adjudication determination should be set aside or not.

7.27 If an aggrieved respondent considers that the merits of the case should be revisited, the only recourse provided under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) is for him to lodge an adjudication review application under s 18. Prakash J also affirmed the view expressed in a textbook that a review adjudicator is empowered to reconsider the findings of facts as well as the application of legal principles to those findings of fact (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [23], citing the statement in Chow Kok Fong, *Security of Payment and Construction Adjudication* (LexisNexis, 2005) at p 473).

Exercise of an adjudicator's powers

7.28 SEF had relied on a number of Australian authorities to argue that the Singapore Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), like its counterpart in New South Wales, imposes a duty on an adjudicator to exercise his powers in good faith. Prakash J rejected this submission holding that the New South Wales Act is not *in pari materia* with the Singapore Act. Challenges to adjudication determinations under the New South Wales Act have been formulated on the basis of judicial review (*Brodyn v Davenport* [2004] NSWCA 394) and, as a consequence, the Australian courts have imported principles from the realm of administrative law into their consideration of the New South Wales Act. The Singapore situation is different from that in New South Wales because in Singapore the Legislature here has, in providing for adjudication review, recognised that the adjudication procedure provided a somewhat rough and ready type of justice and has addressed this aspect of the regime by the provision of the adjudication review procedure. Prakash J said in her judgment (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [38]):

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

7.29 Prakash J also accepted the consideration that the courts should not inquire too deeply into the merits of the determination (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [39]).

She agreed with the views expressed by Lord Reid in *Ballast plc v The Burrell Company (Construction Management) Ltd* [2001] BLR 529 at 538 that it "cannot be appropriate for the courts to undertake an investigation into the merits of the dispute in order to ascertain whether the adjudicator has reached the same decision as a court would have done". In the Singapore context, she considered it particularly otiose to add an additional requirement that the adjudicator must exercise his powers in a *bona fide* manner when the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) is very clear in s 16(3) as to the way in which the adjudicator must conduct the arbitration. It mandates that he must act independently, impartially and in a timely manner, avoid incurring unnecessary expense and comply with the principles of natural justice (at [40]). In the circumstances, the consequence of requiring an adjudicator to engage in a bona fide exercise of his powers "is to give the court a backdoor way to do exactly what Lord Reid considers it should not" (at [40]).

Basic and essential requirements of a determination

7.30 Notwithstanding that there is no requirement under the Singapore Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) that the adjudicator has to engage in a *bona fide* exercise of his powers, Prakash J agreed with Hodgson JA in *Brodyn v Davenport* [2004] NSWCA 394 on the basic and essential conditions to be satisfied for the existence of a valid determination (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [43]). She proceeded to rule (at [45]) that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:

> (a) the existence of a contract between the claimant and the respondent, to which the Building and Construction Industry Security of Payment Act applies (s 4);
>
> (b) the service by the claimant on the respondent of a payment claim (s 10);
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> (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
>
> (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
>
> (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion

of the costs payable by each party to the adjudication (ss 17(1) and 17(2));

(f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and

(g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

7.31 In *AMA Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260, the claimant was employed by the respondent to undertake certain project management work in relation to a construction project. The claimant made a payment claim but the respondent failed to issue a payment response within the period prescribed under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The adjudicator convened an adjudication conference which was attended by representatives of both parties and their counsel. Following the conference, directions were issued for the submission of closing submissions, and following this submission, the adjudicator issued his adjudication determination. He determined, *inter alia*, that the respondent was to pay the claimant the claimed amount in full. The respondent was not satisfied with the determination but did not apply for an adjudication review nor pay the adjudicated amount. The claimant filed an originating summons to enforce the adjudication determination against the respondent and successfully obtained judgment in its favour for the adjudicated amount with interest and costs. The respondent applied to set aside the adjudication determination and the judgment. The assistant registrar of the High Court dismissed the respondent's application and the respondent appealed. Prakash J dismissed the appeal and reiterated her views in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 that the Australian requirement relating to the *bona fide* exercise of the adjudicator's powers does not apply to the Singapore Building and Construction Industry Security of Payment Act (*AMA Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 at [19]).

Natural justice in adjudication

7.32 The third of the trilogy of decisions by Prakash J concerns the operation of the principles of natural justice in relation to the adjudication process. In *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658, the claimant subcontractor served a progress claim No 5 on the respondent main contractor. The respondent did not pay the amount claimed nor did it issue a payment response. In fact, the payment response was only

furnished after the adjudication application had been lodged by the claimant. The adjudicator considered that since the respondent failed to issue a payment response, s 15(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) applied and that this precluded the adjudicator from considering the respondent's payment response to progress claim No 5 and the reasons given by the respondent for withholding the amounts due to the claimant which were contained in the respondent's adjudication response and the documents served with it. Before the assistant registrar, the respondent argued that the adjudicator was wrong to have construed s 15(3) of the Act to mean that he had to completely exclude all aspects of the respondent's case. The respondent submitted that this constituted a breach of natural justice. The assistant registrar rejected this argument. On appeal, Prakash J concurred with the assistant registrar's decision on the point of natural justice.

7.33 An adjudicator must comply with the rules of natural justice under s 16(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The respondent in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 had similarly contended that by failing to deal with two of the four issues submitted, the adjudicator was in breach of his duty to comply with the rules of natural justice. Prakash J had in that case held that there was no breach of natural justice. In arriving at this decision, the learned judge noted that the adjudicator called for submissions from both parties and that the respondent had the opportunity to present its case. Prakash J cited with approval the statement of principle in the Australian case of *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1 that to sustain a challenge on the validity of the determination on a breach of natural justice, the adjudicator's oversight must be one which results from a failure overall to address in good faith, the issues raised by the parties. Therefore, where the adjudicator has dealt with most of the issues, an omission to deal with one issue because he does not believe it to be determinative of the result, is unlikely to be considered a breach of natural justice. As the adjudicator had regard to the submissions of the parties and all the material placed before him, there was no breach of natural justice just because he failed to address his conclusions in relation to the third and fourth issues put forth by the respondent (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60]).

7.34 The subject of natural justice was also raised in *AMA Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260. The respondent submitted that the adjudicator had failed to comply with the rules of natural justice in that, in the adjudication determination, he had failed to fully consider the submission that there was a discrepancy in AMA's claim. Prakash J agreed with the assistant registrar in dismissing this submission, holding that the principles of

natural justice are concerned with the provision of a fair hearing to contending parties. She said in her judgment (at [25]):

> [What] Laguna was complaining about was not really a failure on the part of the Adjudicator to hear both sides of the dispute but a failure on his part to decide the dispute as Laguna considered it should be decided. The *audi alteram partem* rule required the Adjudicator to receive both parties' submissions and consider them; it did not require him to decide the dispute in accordance with Laguna's submissions. It was clear from the Adjudication Determination that the Adjudicator had conducted the adjudication in accordance with the principles of natural justice: he had called an adjudication conference at which both parties were able to make their submissions and he had then given them the opportunity to make further written submissions, an opportunity which Laguna had availed itself of. Thereafter, as the Adjudication Determination itself made plain, the Adjudicator gave consideration to all points raised and he then came to certain conclusions for which he gave his reasons.

Practice notes

Pleadings in construction cases

7.35 Two decisions delivered by the High Court during the year under review serve to emphasise the importance of precision in pleadings. In *Jaya Sarana Engineering Pte Ltd v GIB Automation Pte Ltd* [2009] SGHC 122, an assistant registrar had assessed damages to be paid to the plaintiff subcontractor on account of abortive work. This assessment was made pursuant to a decision of the trial judge who had held that the defendant had failed to provide the subcontractor with the necessary for the latter to carry out its works. In appealing against the assessment, the subcontractor had submitted that the ratio of the trial judge's decision was not confined only to damages in respect of work that was aborted because of the lack of proper drawings but that it had included costs for additional work which it mistakenly did because of the lack of proper drawings. Judith Prakash J, after reviewing the judgment, considered that the trial judge did not deal with the additional work which the subcontractor claimed to have done because this was not argued before the trial judge. She therefore agreed with the interpretation that the assistant registrar gave to the judgment in limiting the assessment to the cost to the subcontractor of redoing work which had to be redone or undone because the original drawings were inadequate (at [26]).

7.36 In *Econ Piling Pte Ltd v GTE Construction Pte Ltd* [2009] SGHC 213, in its defence to a claim for the release of the retention sum in a subcontract, the defendant had pleaded that the retention sum was to be retained as a performance bond to ensure the performance of the

plaintiff's obligations and that the retention sum was to be set off against the damages that the defendant had allegedly sustained by reason of the plaintiff's breach of contract. At the trial, the defendant sought to resist the claim on two grounds. The first was that the retention sum was not due to be released because the work area had not been handed over. Judith Prakash J held that this defence was not pleaded and that, accordingly, the defendant could not in the circumstances put forward a defence to the claim for the retention sum on this basis. The second ground was pleaded: this was the argument that the retention sum was to be retained as a performance bond to ensure the performance of the plaintiff's obligations. However, this point was omitted from the defendants' submissions and the learned judge held that this ground of defence must be taken to have been abandoned (at [10]).

Res judicata

7.37 The subject of res judicata was raised in *Teo Chin Lam v Lead Management Engineering & Construction Pte Ltd* [2009] SGHC 23. In that case, the plaintiff had several contracts with the defendant over several projects and was lumping several claims in one action. For one of the projects, there was included an invoice that was described as a "Final Claim". The defendant settled the action by making full payment of the sum claimed plus costs, statutory interests and solicitor's disbursements. Subsequently, the plaintiff started another action to recover further sums in the project beyond that which had been settled in the final claim. The defendant raised res judicata in defence. The court held that the defence was entitled to succeed. Lai Siu Chu J (at [25]) approved the following excerpt of the judgment of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257H:

> [*R*]*es judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

7.38 Lai J concluded (*Teo Chin Lam v Lead Management Engineering & Construction Pte Ltd* [2009] SGHC 23 at [30]):

> The plaintiff should not in effect be given a second bite of the cherry, when his previous conduct in presenting the Final Claim led the defendant to believe the balance of his entire claim for the MSD project was encapsulated in that last invoice and prompted the defendant to pay him $68,678.12 in the first action.