**(2017) 18 SAL Ann Rev 131**
**(Published on e-First 17 May 2018)**

# 7. BUILDING AND CONSTRUCTION LAW

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## Interim certificates

7.1 During the year under review, the High Court was invited to reconsider the principle relating to the effect of an earlier interim certificate on the certifier's valuation in a subsequent interim certificate.

7.2 In *Mansource Interior Pte Ltd v CSG Group Pte Ltd*,[1] this issue was framed on a submission that the certifier had waived any objection to the correctness of the approach taken in an earlier valuation and is therefore bound to take that approach in a subsequent valuation. The respondent in this case was a lead subcontractor for interior fitting out works while the claimant was the respondent's sub-subcontractor. The respondent awarded the claimant a subcontract for wall finishes and a subcontract for joinery work. Both subcontracts were expressed to be re-measurement contracts. One of the issues in the action concerned the payment under the wall finishes subcontract. The respondent's case was that under the terms of the subcontract, all openings in the walls must be excluded in calculating the amount due to the claimant. The claimant's case was that at the time when parties entered into the subcontract, the respondent had agreed that it would measure all openings and pay of them at the contract rate. The claimant relied, *inter alia*, on the fact that the respondent was bound by its previous interim certificates which showed that the openings were included. It argued that in certifying the claimant's interim claims on the basis that the

1 [2017] 5 SLR 203.

openings are included, there was an estoppel by convention which prevents the respondent from asserting now that the openings should be excluded.

7.3 The High Court rejected the claimant's submission. Vinodh Coomaraswamy J affirmed the principles relating to estoppel by convention as laid down in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd*,[2] which laid down three requirements for finding the existence of an estoppel by convention: (a) there must be a course of dealing between the parties; (b) the course of dealing must be such that parties proceeded on the basis of an agreed interpretation of the contract; and (c) it must be unjust to allow a party to go back on the agreed interpretation.[3] The court decided that the parties' course of dealing did not suggest the understanding that the interim certificates would be final measurements. The judge cited with approval the statement on the subject in a textbook on the subject that these "certifications are never intended to be a precise determination of the value of the works".[4]

## Time obligations

### *Proceeding with due diligence*

7.4 All the major standard forms of construction contract contain provisions which require the contractor to proceed with due diligence and expedition. Due diligence has been described as an obligation on the part of a contractor to carry out construction work "industriously, assiduously, efficiently and expeditiously".[5] An issue posed before the courts during the year under review was whether, in the absence of an express obligation to proceed regularly and diligently, such a term may be implied.

7.5 In *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd*[6] ("*CAA Technologies*"), the facts concerned a subcontract for the design and production of precast concrete elements for a medical facility awarded on the basis of a three-page letter of intent ("LOI"). The terms contained in the LOI were supposed to be elaborated upon in a subsequent letter of acceptance ("LOA") but the LOA was never signed

2 [2005] 1 SLR(R) 379.
3 *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [57].
4 *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [59], citing from Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) at p 338.
5 *Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] Bus LR D81 at [19].
6 [2017] 2 SLR 940.

by the subcontractor. During the course of the works, the subcontractor repeatedly failed to meet rescheduled deadlines and fell substantially behind schedule. The contractor sought to justify its termination of the subcontract on the ground that the LOI contained an implied term that time was of the essence and that the subcontractor was expected to proceed with its works with due diligence.

7.6 The Court of Appeal had accepted the trial judge's finding of fact and his decision that the main contractor was entitled to terminate the subcontract because the subcontractor's breaches had substantially deprived the main contractor of the whole benefit of the subcontract. The views expressed by the Court of Appeal on the subject of due diligence are thus strictly *obiter* but they are instructive on a subject which, as the court noted, is not without controversy.[7] In essence, the Court of Appeal decided that there was no clear authority for the implication of a term of due diligence and expedition[8] and the court was reluctant to imply such a term. Steven Chong JA, in delivering the judgment of the court, cited two reasons for the court's reluctance to imply such a term. *First*, due diligence clauses are commonly found in standard form construction contracts in Singapore. Given that parties to construction contracts have recourse to standard form contracts, the fact that they ultimately agreed on a contract without an express term for due diligence may well mean that they elected not to include such clauses.[9] Terms cannot be implied in fact in order to give a party a specific remedy which parties did not expressly provide for.[10] *Second*, Chong JA considered that it would usually be unnecessary to imply a term of due diligence in construction contracts that stipulate a completion date of the main contractual obligation.[11] This appears to be consistent with the ruling in *Leander Construction Ltd v Mulalley and Co Ltd*.[12]

### *Time of the essence*

7.7 Although the focus of the court in *CAA Technologies* regarding implied terms was on the term relating to due diligence and expedition in construction contracts, the court also briefly commented on the implication of a term as to time being of the essence. The court cited, with approval, the view expressed in the tenth edition of *Keating on*

7 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [67].
8 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [66] and [68].
9 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [71].
10 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [81].
11 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [78]–[79].
12 [2011] EWHC 3449 (TCC).

*Construction Contracts*[13] that "the normal rule is that time is not of the essence in construction contracts, unless it is expressly so provided".[14] The court also concluded, for the same reasons that led it to dismiss the implication of the term as to due diligence, that time of the essence was not a term that should be implied on the facts of the case.[15]

### *Practical completion*

7.8 An interesting case during the year under review provided the courts with an opportunity to consider the basis on which practical completion may be determined. The decision validates the principle that in the absence of any other definition of completion in a contract, substantial or practical completion is normally considered to have been achieved when the works are in a state which is reasonably ready to be used by the employer. In *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd*,[16] the dispute arose from a contract for the interior design and fitting out of a dental clinic. One of the issues before the court was whether there was delay to the works and this turned on the date of completion. On this issue, Chan Seng Onn J considered that the respondent had commenced operations at the clinic on 1 November 2013 and found, on this basis, that the clinic would have been handed over to the respondent by 31 October 2013. The court therefore held that the date of practical completion was 31 October 2013[17] notwithstanding that, on that date, there was still a list of some 36 incomplete and outstanding items of works.[18]

### *Liquidated damages*

7.9 The Court of Appeal in *CAA Technologies* disagreed with the finding of the court below that the subcontractor was liable for liquidated damages paid by the main contractor to the employer, JTC, on account that the project had been delayed by the subcontractor. The Court of Appeal held that in order to sustain its claim, the main contractor had to prove that the liquidated damages incurred under the main contract arose solely from the breaches by the subcontractor. The evidence before the court showed that the main contractor did pay the employer a sum in liquidated damages but there was no evidence to

13 *Keating on Construction Contracts* (Stephen Furst QC & Vivian Ramsey eds) (Sweet & Maxwell, 10th Ed, 2016) at para 8-008.
14 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [44].
15 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [82].
16 [2017] SGHC 246.
17 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2017] SGHC 246 at [15].
18 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2017] SGHC 246 at [31].

show the cause of the delay or that the subcontractor was the sole cause of the delay for which liquidated damages was paid to the employer.[19] Chong JA, in the course of his Honour's judgment, said:[20]

> In essence, Newcon [that is, the main contractor] is inviting the court to infer that the 22 days of delay must have been caused by CAA's [that is, the subcontractor's] breaches of cl 2 of the LOI … In this regard, we should add that CAA has no burden to prove that the delay was caused by some other sub-contractors, and therefore the mere fact that CAA was not able to establish that the delay was caused by other sub-contractors did not *per se* prove that CAA was solely responsible for Newcon's payment of the liquidated damages to JTC. That burden rests with Newcon.

## Termination for convenience

7.10 Standard forms of contract frequently contain provisions entitling a party to terminate a contract without proof of default. These provisions are useful where for some reason, it is not possible for the owner to continue with the project, typically because of adverse changes in the business environment or unexpected change in the owner's financial resources to enable the completion of the project. During the year under review, a case involving the exercise of such a termination provision in one of the major standard forms – the Public Sector Standard Conditions of Contract for Construction Works ("PSSCOC")[21] – came before the High Court. The court's approach in determining the basis for compensating the contractor in this situation is instructive.

7.11 In *TT International Ltd v Ho Lee Construction Pte Ltd*[22] ("*TT International*"), the dispute arose from a construction contract for the construction of an eight-storey warehouse and retail complex which incorporated the PSSCOC 2006.[23] A few months after the Contractor commenced the building works, the Employer began to experience financial difficulties arising from the 2008 global financial crisis. The superintending office issued instructions to suspend the Contractor from the carrying out of the works. Subsequently, the Employer sent a

19 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [84].

20 *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [85].

21 These provisions are not unique to the Public Sector Standard Conditions of Contract for Construction Works. Similar provisions in cl 32(1) of the SIA Building Contract 2016 (Without Quantities) (Lump Sum) and cl 30.1 of the *REDAS Design and Build Conditions of Contract* (Real Estate Developers' Association of Singapore, 3rd Ed, 2010).

22 [2017] SGHC 62.

23 The version of the PSSCOC referred to in this case is the 5th Edition published in 2006.

notice of termination under cl 31.4 of the PSSCOC 2006. Clause 31.4(1) was a termination for convenience clause and provided that the "Employer may at any time, give the Contractor a written Notice of Termination … which shall have the effect of immediately terminating the employment of the Contractor under the Contract". The central issue before the court was whether the Contractor was entitled to recover for loss of profit on uncompleted work flowing from this termination.

7.12 The contention of the parties turned on the operation of cl 31.4(2) in the PSSCOC 2006, which provided in this situation for the superintending officer to certify payment to the Contractor for all work executed prior to the termination and "loss and expense" suffered by the Contractor as a consequence of the termination.

7.13 Quentin Loh J considered that cl 31.4(2) exhaustively provided for the sums which the Contractor was entitled to recover upon a proper termination under cl 31.4(1).[24] His Honour considered that this provision expressly conferred on the Contractor a right to payment and thus dismissed the Contractor's submission that cl 31.4(2) merely provided for the superintending officer's duties.[25] The learned judge also disagreed with the Contractor that upon termination under cl 31.4(1), the Contractor obtained without more a right at common law to recover for loss of profits which cl 31.4(2) failed to oust. Loh J said in the course of his Honour's judgment:[26]

> This submission is without basis. In terminating the Contractor's employment under cl 31.4(1), the Employer is exercising a contractual right. The mere exercise of a contractual right cannot constitute a breach of contract, let alone a repudiation of the contract. Thus, the Contractor does not acquire a right at common law to recover for loss of profits upon termination under cl 31.4(1). Moreover, in my judgment, even if such a right arises at common law, cl 31.4(1) is in sufficiently clear words to oust this right.

7.14 The court also decided that there was no basis for the Contractor's contention that the Employer had concurrently repudiated the main contract.[27] Loh J accepted the general principle that if a contract was terminated pursuant to a contractual termination clause, the innocent party may recover such loss of bargain damages if there was a concurrent repudiation of the contract. However, this principle

24 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [37] and [41].
25 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [38].
26 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [39].
27 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [42].

had no application on the facts of the case.[28] In any case, at a more fundamental level, this principle was limited to cases where one party has a right to terminate a contract on two grounds, *viz*, under an express contractual provision and under the common law for repudiatory breach, and where both grounds are triggered by the same event as exemplified by the English decision in *Lombard North Central plc v Butterworth*[29] ("*Lombard*"). However, the learned judge noted that in the case before him, unlike the situation in *Lombard*, the contractor's argument suggested that there are two parties with the right to terminate (not one) and, further, the alleged rights to terminate derived from two different events.[30]

7.15 Turning to the "scope" of the compensation, the court considered the definition of "loss and expense" as defined in cl 1.1(q) of the PSSCOC 2006. This included 15% of the costs in respect of the matters as specified in the clause and stated that the 15% to be "*inclusive of and in lieu of any profits* head office or other administrative overheads, financing charges (including foreign exchange losses) and any other costs, loss or expense of whatsoever nature and howsoever arising" [emphasis added by the High Court in *TT International*].[31] The court thus concluded that if the definition of "loss and expense" was governed by cl 1.1(q), the Contractor was not entitled to directly recover for loss of profits under cl 31.4(2) but instead may recover a sum in lieu of, *inter alia*, loss of profits.[32]

## Performance bonds

7.16 During the year under the review, the High Court reaffirmed the high standard of proof expected of a party seeking to resist a call on an on-demand performance bond. In *Tactic Engineering Pte Ltd v Sato Kogyo (S) Pte Ltd*[33] ("*Tactic Engineering*"), a subcontractor experienced difficulties in completing its works and the main contractor agreed to release the retention sum of the subcontract in exchange for an on-demand bond for a sum of $1.22m. Despite this release of the retention, the subcontractor failed to complete the subcontract works and the main contractor had to make arrangements to complete the works. The main contractor claimed a sum of $1.35m from the subcontractor for back charges, administrative charges and moneys owed under a separate agreement. The main contractor's demands for

28 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [43].
29 [1987] QB 257.
30 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [45].
31 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [28].
32 *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62 at [48].
33 [2017] SGHC 103.

payment went unheeded and, as a consequence, the main contractor called on the bond. The subcontractor managed to obtain an injunction preventing the main contractor from calling on the bond and the main contractor applied to have the injunction set aside.

7.17 The High Court allowed the main contractor's application to set aside the injunction. In the course of arriving at this decision, Foo Chee Hock JC reviewed the decisions in *Eltraco International Pte Ltd v CGH Development Pte Ltd*[34] and *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd*[35] and stated the principles on unconscionability as follows:[36]

> (a) First, parties were expected to 'abide by the deal they have struck'[37]. Hence, courts 'should be *slow* to upset the status quo and disrupt the allocation of risk which the parties had decided upon for themselves'. [emphasis added in bold italics by the High Court in *Tactic Engineering*[38]]
>
> (b) Second, an applicant had to establish a *strong prima facie* case of unconscionability, and the 'threshold is a high one'. A finding of unconscionability must be supported by '*the whole context* of the case' [emphasis in original] and a '*prima facie* strong piece of evidence does not make a strong *prima facie* case'[39].
>
> (c) Third, the concept of unconscionability imported notions of *unfairness* and *bad faith*[40]. Where there was a *genuine dispute*, it could not be said that there was unconscionability because a party was 'entitled to protect [its] own interest'[41]. [emphasis in original]
>
> (d) Fourth, it was not necessary for the court to carry out a detailed examination of the minutiae and 'engage in a protracted consideration of the merits of the case'. In such proceedings, the focus was on 'breadth rather than depth' and the court's role was simply to '*be alive to the lack of* bona fides'. [emphasis in original[42]]

7.18 The subcontractor had argued that the main contractor had unconscionably inflated the values of various claims. The subcontractor disputed the main contractor's inclusion of moneys from a separate contract but Foo JC pointed out that the parties had agreed to set off these sums against the retention and, further, even if these moneys were

34 [2000] 3 SLR(R) 198.
35 [2012] 3 SLR 352.
36 *Tactic Engineering Pte Ltd v Sato Kogyo (S) Pte Ltd* [2017] SGHC 103 at [9].
37 *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198.
38 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [25].
39 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [20] and [39]–[40].
40 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [36]–[37].
41 *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [32].
42 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [40], [45] and [52].

not considered, the remainder of the main contractor's claim was in excess of the bond amount.[43] On the issue of the administrative charges, the court considered that the subcontract expressly allowed the main contractor to set off these charges and these were incurred because the subcontractor failed to carry out its works with diligence and due expedition.[44] In respect of the alleged inflation of the back charges, the court was not impressed by the subcontractor's reliance only on a statement of account dated 30 November 2014. The court noted that the total back charges already amounted to $600,000 as at 30 November 2014 and there was every likelihood that the amount would rise as the works were completed. In any case, Foo JC considered that the court should not engage in a minute examination of both parties' cases – it is sufficient that the court is satisfied that the back charges claimed by the main contractor "were not so excessive or abusive as to establish that it was unconscionably bloating the numbers to justify the call on the Bond".[45]

## Security of payment

7.19 In 2017, the number of adjudication applications made pursuant to the Building and Construction Industry Security of Payment Act[46] ("SOP Act") fell for the first time in five years. The number of cases filed with the authorised nominating body for the year was 412, representing a 20% reduction from that registered in the preceding year.

### *Payment claim*

*Effect of breach of contract term on validity of payment claim*

7.20 During the year, issues relating to the payment claim continues to be raised before the courts. One of these issues concerned the effect of breach of a contract term on the validity of a payment claim.

7.21 In *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd*[47] ("*Kingsford*"), a subcontractor was appointed to carry out the wet trades under two subcontracts by the same main contractor. The completion date for both subcontracts was 30 April 2016. On 8 December 2016,

43 *Tactic Engineering Pte Ltd v Sato Kogyo (S) Pte Ltd* [2017] SGHC 103 at [10] and [11].
44 *Tactic Engineering Pte Ltd v Sato Kogyo (S) Pte Ltd* [2017] SGHC 103 at [12].
45 *Tactic Engineering Pte Ltd v Sato Kogyo (S) Pte Ltd* [2017] SGHC 103 at [14].
46 Cap 30B, 2006 Rev Ed.
47 [2017] SGHC 174.

some seven months after completion, the subcontractor issued two payment claims ("Payment Claims No 14") which were labelled as "final" claims. On 20 January 2017, it served its Payment Claim No 15 for each of the subcontracts. The main contractor did not issue its payment response to either of these payment claims. The subcontractor lodged two adjudication applications with respect to the two Payment Claims No 15 and were successful in both adjudications. Before the High Court, one of the main contractor's challenges was that the two Payment Claims No 15 were invalid as Payment Claims No 14 for each subcontract was identified by the subcontractor as the "final" payment claims. Therefore, the subcontractor should not have made further payment claims after each of the Payment Claims No 14. The High Court dismissed this submission holding that the two Payment Claims No 15 were valid notwithstanding the labelling of Payment Claims No 14 as final claims.

7.22 The respondent had cited *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd*[48] ("*Lau Fook Hoong*") to support its argument that the two Payment Claims No 15 were invalid as the two Payment Claims No 14 were labelled as the final payments. However, both the adjudicators and the High Court found that *Lau Fook Hoong* was distinguishable. Tan Siong Thye J pointed out that in *Lau Fook Hoong*, the breach related to a provision in the Singapore Institute of Architects ("SIA") Conditions[49] regulating the submission of final payment claims. The breach of that provision could potentially be a breach of a mandatory provision, namely, s 10(2)(*a*) of the SOP Act, which provides that a payment claim shall be served "at such time as specified in or determined in accordance with the terms of the contract". The learned judge considered that "for a breach of a contractual provision to invalidate a payment claim, the SOPA [that is, SOP Act] provisions must make reference to the contractual provisions such that a breach of the latter can be said to be a breach of the former".[50] In this case, it was not in dispute that the SIA Conditions did not apply to the subcontracts. Instead, the respondent relied on the fact that the two Payment Claims No 14 were labelled as final payment claims by the subcontractor to found its claim that the two Payment Claims No 15 were invalid. However, on the facts, nothing in the subcontracts provided for final payment claims. Tan J noted in the course of his Honour's judgment:[51]

48 [2015] 4 SLR 615.

49 *Articles and Conditions of Building Contract: Lump Sum Contract* (Singapore Institute of Architects, 7th Ed, 2005).

50 *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [29].

51 *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [31].

> Indeed, cll 5.1 to 5.4 of each subcontract prescribes the procedure for making payment claims between the parties. But they did not provide for any mechanism for determining which payment claims were 'final', and the effect of deeming such payment claims 'final'. As the two Payment Claims No 15 did not contravene these contractual terms, Kingsford's argument could not stand. The contractual terms in this case were entirely unlike the SIA Conditions in *Lau Fook Hoong*, which specifically provided for the provision of a 'Final Certificate'.

*Payment claim defines scope of claimant's reference*

7.23 A particularly important issue which has been settled concerns the extent to which the claimant's case in an adjudication is scoped by the matters advanced in the payment claim. Consequently, an adjudicator has no mandate to deal with a claim that does not fall within the ambit of the payment claim. In *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd*[52] ("*Rong Shun*"), a subcontractor made a payment claim for electrical and fire alarm works. The respondent did not issue a payment response. In its adjudication application, the subcontractor invited the adjudicator to adjudicate its claim for the release of the retention sum even though this had not been advanced in progress claim 24. The adjudicator awarded the claimed amount in entirety together with the retention sum.

7.24 The High Court held that in this case the adjudicator adjudicated upon the retention sum claim when he was not clothed with statutory authority to do so. As a consequence, the result is that the adjudication determination on the retention sum claim was null and void.[53]

*Service of payment claim on prescribed date*

7.25 Until the year under review, the general view was that where a provision required a payment claim to be served by a specified date, it would be permissible for the payment claim to be served before that date since it would be considered that the respondent suffered no prejudice on account of the earlier service. In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*[54] ("*Audi (HC)*"), the High Court held that this view is misplaced. The case in *Audi (HC)* concerned a subcontract for the carrying out of reinforced concrete work. Clause 59 of the subcontract provided for the subcontractor "to serve a payment claim as defined in section 10 of the Act *on the date* for

52 [2017] 4 SLR 359.
53 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [106].
54 [2017] SGHC 165.

submission as set out in Appendix 1" [emphasis added by the High Court in *Audi (HC)*]. Appendix 1 stated, "[times] for submitting progress claims … 20th day of each calendar month". The claimant subcontractor served the payment claim which was the subject of the adjudication on 18 November 2016. The High Court held that the payment claim was invalid because it was not served on 20 November 2016 as the "ordinary and natural meaning of these words is that the event concerned is to take place on that day and not on any other day, neither sooner nor later".[55]

7.26 The decision was overturned on appeal but not on the construction placed by the High Court on the operation of the contractually stipulated timeline. In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*[56] ("*Audi (CA)*"), the Court of Appeal was persuaded by two facts to arrive at a different result. Firstly, the Court of Appeal was persuaded that the claimant had a good reason for effecting service of the payment claim before 20 November 2016. That day was a Sunday, and there was no dispute that the respondent's office was closed on Sundays. Secondly, the Court of Appeal noted that there could not have been any confusion as to the payment claim's operative date.[57]

7.27 The court in *Audi (CA)* also appeared to consider it pertinent that while the payment claim was physically two days before the specified date, the claimant had post-dated the payment claim to 20 November 2016. In the court's view, this "would have left absolutely no doubt in the respondent's mind as to when service of the payment claim was intended to take effect".[58] In delivering the grounds of the decision of the court, Chong JA said:[59]

> The fact is that the appellant in serving the payment claim on 18 November 2016 but dating it 20 November 2016 simply adopted a practical and sensible way of complying with the parties' contract. By doing so, the appellant in our view did comply with cl 59 read with Appendix 1 of the parties' contract and did correspondingly also comply with s 10(2)(*a*) of the Act …

7.28 It is important to bear in mind that the date of service of the payment claim may be varied by agreement or conduct, and that parties may be found to have waived their right to rely on the original date of submission or be estopped from doing so. In *Linkforce Pte Ltd v Kajima*

55 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [9].
56 [2018] SGCA 4.
57 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [26].
58 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [27].
59 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [28].

*Overseas Asia Pte Ltd*,[60] the issue of whether the subcontractor's adjudication application was lodged prematurely turned on whether the date of service of payment claim had been varied by reason of an e-mail from the last day of each month to the fifth of each month. The High Court was prepared to accept that parties could by "estoppel by representation or waiver by estoppel" change the date of service of the payment claim. However, where the issue was advanced on the basis of an estoppel or waiver arising from a representation, the representation had to be clear and unambiguous. In this case, the representation in the e-mail was incapable of this effect. Foo JC said:[61]

> But in my view, the language in the E-mail was haphazard and ambiguous. It could well be referring only to the 'next' progress claim in October 2014. One must read the E-mail in its entirety. It could be seriously argued that the E-mail was concerned only with 'supporting documentation' such as floor plans and equipment tables that had to be attached to the 'progress claim' … The point was that the E-mail was plainly ambiguous; any decision maker would be hard-pressed to make a firm finding based on the E-mail standing on its own without other explanatory evidence …

Accordingly, the court ruled that the payment claim was served prematurely which in turn led to a premature adjudication application. The adjudication determination was set aside.

### *Payment response*

#### *Determination in absence of payment response*

7.29 In *Kingsford*, the main contractor had also alleged, *inter alia*, that there was a breach of natural justice, specifically that the adjudicators of the two adjudications did not consider patent errors which included back charges in respect of each of the payment claims. On this point, the main contractor relied on the decision the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd*[62] ("*W Y Steel*"). In a familiar passage of the judgment in that case, the Court of Appeal had held that under s 17(3) of the SOP Act, an adjudicator must make a determination even when no payment response has been filed and that "there is nothing to stop a respondent who has failed to file any payment response or adjudication response from raising patent errors on the face of the material properly before the adjudicator". In a further passage, the

60 [2017] SGHC 46 at [17].
61 *Linkforce Pte Ltd v Kajima Overseas Asia Pte Ltd* [2017] SGHC 46 at [21].
62 [2013] 3 SLR 380.

Court of Appeal had emphasised that the adjudication does not in these circumstances become a mere formality.[63]

7.30 In *Kingsford*, Tan J held that the main contractor had misunderstood the ruling in *W Y Steel*. While the Court of Appeal had decided that an adjudicator should not merely rubber stamp a payment claim in a situation where no payment response had been filed, the court did not require the adjudicator to go beyond "[spotting] obvious and clear cut errors" in a payment claim. Tan J stated in his Honour's judgment:[64]

> [The] adjudicator was entitled to look only at the materials properly before him and make his determination based on such materials. This excludes the payment response, since it had not been filed by the respondent and therefore was not *properly* before the adjudicator. However, the respondent was still entitled to make arguments based on the materials which were before the adjudicator and point out 'patent errors' on the face of the materials. For instance, if the documentary evidence submitted by the claimant plainly contradicted its claimed amount, the respondent would be entitled to point that out to the adjudicator … [emphasis in original]

7.31 Relevantly, the learned judge continued to point out that while the adjudicators could consider "patent errors", they could go no further lest they contravened s 15(3)(*a*) of the SOP Act.[65] In respect of the two adjudication determinations which form the subject of the respondent's challenge in *Kingsford*, no issue as to breach of natural justice arose as both adjudicators had discharged these obligations in arriving at their determinations. The adjudicators had considered the respondent's claims relating to the back charges and set-off and "rightfully precluded these claims as these were not in the payment responses" in accordance with s 15(3)(*a*) of the SOP Act.[66]

*Meaning of "day" in respect of security of payment timelines*

7.32 In *UES Holdings Pte Ltd v KH Foges Pte Ltd*,[67] the main contractor challenged the validity of the adjudication application on the ground that it was lodged out of time. The subcontract, which was varied by parties by way of a letter dated 28 July 2015, provided that all payment claims must be submitted "on or before 25th of each month"

63 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [51] and [52].
64 *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [35].
65 *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [36].
66 *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [37].
67 [2017] SGHC 114 at [32] and [33].

and that the payment response had to be submitted within 21 days from the submission cut-off date. Thereafter, the main contractor sent a second letter to the subcontractor on 20 June 2016, reminding the subcontractor "to submit your Progress Claim every 25th of the month or on the subsequent working day if 25th falls on a Sunday/Holiday".

7.33 Loh J considered that the result turns on the definition of the term "day" in relation to the timelines in the SOP Act. In determining the meaning of this term, the learned judge considered the context of the legal and regulatory backdrop of the contract:[68]

> When parties contract with the provisions of a statute in mind, and when the terms of those statutory provisions are defined by that statute, then generally, if the contract uses the same terms, the terms should be interpreted in accordance with the statutory definitions, unless the context yields a different interpretation. This is simply an application of the principle of contextual interpretation.

7.34 The learned judge noted that there was nothing in the contract which would accord a different interpretation of the term from that as defined in the statute. Accordingly, it was held that, consistent with the statutory definition, public holidays should be excluded from the reckoning of days for the purpose of the timelines under the SOP Act. This decision may be compared with *Fujitec Singapore Corp Ltd v GS Engineering & Construction Corp*,[69] where, on the facts, the High Court found that parties had used the expression "calendar days" instead of "days" in describing the relevant timelines and this in turn affected the determination of the timelines for the purpose of the SOP Act.

*Waiver and estoppel*

7.35 The court in *Audi (CA)* also visited the operation of waiver and estoppel in relation to a situation where a respondent failed to raise jurisdictional objections in a payment response. The court noted that it is well-established that mere silence or inaction will not normally amount to an unequivocal representation by one party that he will not insist upon his legal rights against the other party.[70] However, in certain circumstances, particularly where there is a duty to speak, mere silence may amount to such a representation.

68 *UES Holdings Pte Ltd v KH Foges Pte Ltd* [2017] SGHC 114 at [99] and [100].
69 [2016] 1 SLR 1307 at [10].
70 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [57]–[58], citing *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 1 SLR(R) 385 at [36] and [37].

7.36 In the context of an adjudication under the SOP Act, both the contract and the Act define the rights the parties have in relation to each other and "these are rights which are in principle capable of being elected and whose exercise is capable of being forborne".[71] On this premise, when a claimant serves a payment claim, a respondent is entitled to raise an objection to that claim through a payment response. If the respondent communicates his election not to raise an objection to the payment claim's validity, he may in principle be said to have waived his right to make that objection before the adjudicator. Thus, if the respondent fails to file a payment response containing the objection, then he will not have any right to rely on that objection before a tribunal or court and "will therefore have to be content with the default obligation to pay under the payment claim in so far as no other form of objection has been raised".[72]

7.37 In the course of his Honour's judgment, Chong JA in *Audi (CA)* pointed out that in the earlier case of *Grouteam Pte Ltd v UES Holdings Pte Ltd*[73] ("*Grouteam*"), the court had stated that a respondent should raise such objections at the "earliest possible opportunity". However, while this would be ideal, Chong JA acknowledged that silence at literally the earliest possible opportunity may not be sufficiently unequivocal for the purpose of waiver by election or equitable estoppel. Accordingly, a failure to object would amount to an unequivocal representation of a decision to forgo one's right to raise that objection only when such a failure subsists at the time a claimant would reasonably expect the respondent to air his objection.[74]

### *Adjudicator's determination of his jurisdiction*

7.38 A particularly important aspect of the Court of Appeal's decision in *Audi (CA)* is its affirmation of its decision in *Grouteam* that there is no objection as a matter of principle to adjudicators considering and then ruling on whether they have jurisdiction or on whether breaches of mandatory provisions have occurred.[75] This relates to a reconsideration of the court's *obiter* remarks to the contrary in *Lee Wee Lick Terence v Chua Say Eng*.[76] In *Audi (CA)*, the Court of Appeal elaborated on the reasons why it had decided in *Grouteam* to depart from the views expressed in *Chua Say Eng*. Chong JA, in delivering the grounds of the court points, considered that s 17(3)(*c*) of the SOP Act gives a "clear indication" that an adjudicator has the power to decide

71 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [62].
72 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [63].
73 [2016] 5 SLR 1011.
74 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [67].
75 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [63] and [67].
76 [2013] 1 SLR 401.

matters which go towards his jurisdiction. This includes both challenges to his substantive jurisdiction as well as challenges to jurisdiction based on appointment, specifically the validity and the validity of service of a payment claim.[77]

### *Enforcement*

#### *Setting aside for fraud*

7.39 During the year under review, the High Court held that an adjudication determination procured by fraud may be set aside notwithstanding that the SOP Act is silent as to whether an adjudication determination may be set aside on this ground. In *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd*,[78] the main contractor failed to furnish a payment response to a payment claim made by a subcontractor. The main contractor also failed to lodge its adjudication response within the time prescribed for this purpose. The adjudicator decided in favour of the subcontractor. In its application to set aside the adjudication determination, the main contractor alleged, *inter alia*, that there was a conspiracy between the subcontractor, the consultants and the main contractor's own project manager. The alleged conspiracy was that the subcontractor would present inflated invoices for work done when no such work had in fact been done by that time.

7.40 Tan J stated in his Honour's judgment that it was not entirely clear whether the SOP Act provides for an adjudication determination to be challenged on the ground of fraud.[79] However, he noted that there were several decided cases which have expressed the view that fraud should be a ground for setting aside an adjudication determination. His Honour referred to *QC Communications NSW Pty Ltd v CivComm Pty Ltd*,[80] where the New South Wales ("NSW") Supreme Court had concluded on a construction of the NSW SOP Act[81] that an adjudication determination obtained by fraud in which the adjudicator was not involved may be set aside by the court.[82] The learned judge considered that the NSW SOP Act is *in para materia* with the Singapore SOP Act and agreed with the NSW authorities that where an adjudication

77 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 at [45].
78 [2017] SGHC 247.
79 *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2017] SGHC 247 at [34].
80 [2016] NSWSC 1095.
81 Building and Construction Industry Security of Payment Act (Act 46 of 1999) (NSW).
82 *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2017] SGHC 247 at [36], citing the judgment in *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095 at [31]–[32].

determination was obtained by fraud that did not pertain to the adjudicator, it may be set aside under the SOP Act. His Honour stated:[83]

> Although no provision within the SOPA expressly provides that an adjudication determination obtained by fraud can be set aside by the court, it is trite that the court will not allow its processes to be used to facilitate fraud. An adjudication determination is enforced by applying to the court for an order to enforce it as a judgment debt. Hence, the court will not assist in this process where the adjudication determination had been obtained by fraud on the part of one party. Furthermore, in this case, both parties accepted that fraud was a ground to set aside the [adjudication determination].

7.41 On the facts, Tan J found that there was no evidence to support the allegation that there had been a conspiracy to defraud the main contractor and dismissed the main contractor's application to set aside the adjudication determination on this ground.

*Whether set-off is mode of payment under Building and Construction Industry Security of Payment Act*

7.42 In *AES Façade Pte Ltd v WYSE Pte Ltd*,[84] the adjudication arose from a subcontract for façade works which incorporated the terms of the SIA subcontract form. Clauses 11.4 and 11.5 provided for the main contractor to set off any loss it suffers by reason of subcontractor's delay in carrying out the subcontract works. As a result of delays, the employer claimed liquidated damages of $2.05m against the main contractor. The main contractor attributed $1.47m of this sum to the subcontractor. As a result, when the subcontractor served Payment Claim No 20 for $1.28m, the main contractor asserted in its payment response its right of set-off for withholding the claimed amount. In the ensuing adjudication, the adjudicator held that the payment response was served out of time and awarded the subcontractor the sum of $1.07m.

7.43 In the ensuing enforcement proceedings, the main contractor did not dispute the validity of the adjudication determination. However, it maintained that it was entitled to set off the sum of $1.47m of liquidated damages against the adjudicated amount. It argued that s 27 of the SOP Act did not expressly prohibit set-off under the contract or general law unlike, say, s 25 of the NSW SOP Act, which included an express prohibition. It further contends that set-off was in any case a form of payment and, therefore, there was no "unpaid part of the adjudicated amount". The High Court rejected this argument. Tan J held

83 *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2017] SGHC 247 at [37].

84 [2017] SGHC 171.

that s 27 of the SOP Act implicitly prohibits a disputed and an unadjudicated set-off from being raised against an adjudicated amount.[85] On the appellant's comparison of s 27 of the SOP Act with s 25 of the NSW SOP Act, Tan J said:[86]

> Drafting is not an exact science, and material which one set of drafters might decide to include for the avoidance of doubt may be material which a different set of drafters might, equally reasonably, consider to be sufficiently and so clearly implied as to go without saying. One could just as easily flip the matter around, and ask: if Parliament had actively considered the question and decided that there *should be* such a right, why would it not have said so in the statute? Such speculation, in general, leads nowhere … [emphasis in original]

7.44 Tan J also ruled that s 27 of the SOP Act contemplates an actual payment. His Honour noted the use of the words "pay", "paid" and "unpaid" several times, in particular, the phrase in s 27(5): "the unpaid portion of the amount that [a party] is required to pay". In contrast, s 15(3) of the SOP Act refers to "any reason for withholding including … any cross-claim, counterclaim and set-off". The SOP Act thus treats a set-off as a reason for withholding payment rather than a mode of payment.[87] Section 27 is an enforcement provision. It does not expressly or impliedly indicate that the main contractor could set off against the adjudicated amount. It requires the claimant to file an affidavit to state that the amount had not been paid. In contrast, the section did not require the respondent to file any affidavit.[88]

7.45 Tan J further considered a number of reasons why the appellant's contention is unsustainable. Firstly, it would mean that the appellant would be given a second bite of the cherry.[89] Secondly, the pains taken by the adjudicator and the parties in participating in the process would be wasted.[90] Thirdly, it would bring the process into ill repute. The defaulting party would be able to frustrate a valid and final adjudication determination.[91] Fourthly, the adjudication process was meant to be a simple and quick process. The additional delay occasioned by a set-off would be an added prejudice.[92] Fifthly, allowing set-off would be incongruous with the overall object and purpose of the SOP Act. Section 15(3) of the SOP Act would lose the sting.[93]

85 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [34].
86 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [38].
87 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [41].
88 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [42].
89 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [53].
90 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [54].
91 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [55].
92 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [56].
93 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 at [57].

*Severance of adjudication determination*

7.46 The follow-up issue in *Rong Shun* is that, having found that the adjudicator's determination on the retention sum claim is null and void, whether this finding necessarily renders the entire determination a nullity. In a careful analysis of the authorities and the provisions of the SOP Act, Coomaraswamy J considered that the court may set aside a severable part of an adjudication determination for jurisdictional error without undermining the enforceability of the remainder of the determination.

7.47 In the course of his Honour's judgment in that case, Coomaraswamy J pointed out relevantly that the error relating to the adjudicator's determination of the retention sum claim is a jurisdictional error, not an error with jurisdiction. His Honour explained:[94]

> While it is certainly true that the adjudicator failed to comply with s 17(3) of the Act that is not the gravamen of his error. His breach of s 17(3) did not come in the course of determining a claim which was properly before him. The gravamen of his error is that he purported to determine a claim which was never in law before him. His failure to comply with s 17(3) came in the course of committing the far more fundamental jurisdictional error and is wholly subsumed within it …

7.48 The power to set aside an adjudication determination does not derive from the SOP Act since s 27 of the Act deals only with the right of the successful claimant to enforce the determination as a judgment of the court. As held by the Court of Appeal in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd*,[95] the power to set aside an adjudication determination is thus a common law power.[96] However, case law says nothing about the content of this power. The learned judge thus arrived at the view that the court is not obliged to set aside a determination in entirety:[97]

> There is nothing in the Act or the case law which requires a court to exercise its power to set aside a determination by setting aside the entire determination. Equally, there is nothing in the Act or the case law which prohibits a court from setting aside a part of a determination which it finds to be severable. That is not surprising. As I have already mentioned, the Act makes no attempt to describe, prescribe or circumscribe in any respect the content of the court's

94 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [114].

95 [2015] 1 SLR 797.

96 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [119] and [120].

97 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [140].

power to set aside an adjudication determination. And the question of severability has not been considered in any case law under the Act to date.

7.49 Coomaraswamy J concluded that the SOP Act has left setting aside to the common law, and given that case law does not exclude the operation of the common law doctrine of severance in exercising the power to set aside, it is entirely appropriate that that power should be exercisable against a severable part of an adjudication determination. His Honour considered that the doctrine of severance is based on the principle of *ut res magis valeat quam pereat* and applying that principle to an adjudication determination "permits the court to give the maximum effect permitted by law to an adjudication determination, and thereby to advance the purposes of the Act".[98] The learned judge, however, emphasised that before the court attempts a severance of an adjudication determination, the invalid part of the determination must be both texturally severable and substantially severable.[99]

7.50 The principles arising from the court's analysis of the authorities may be briefly summarised as follows:

(a) The court may set aside a severable part of an adjudication determination for jurisdictional error without undermining the interim finality and enforceability of the remainder of the adjudication determination.

(b) A part of a determination is severable for jurisdictional error only if it is both textually severable and substantially severable from the remainder of the determination.

(c) A part is textually severable if the textual elements may be disregarded, with what remains of the adjudicator's reasons still being grammatical and coherent.

(d) A part is substantially severable if the remainder of the determination may be identified in terms of liability and quantum, without adjustment or contribution to the content of the valid part by the court.

(e) The court may modify the text of the adjudication determination if this does not change the substantial effect of the adjudication determination.

98 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [141].

99 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [155].

7.51 In this case, although there was slight difficulty with textual severance, the court was able to substitute a figure after subtracting the retention sum from the adjudicated amount before adjusting for goods and services tax.[100] The adjudication determination was substantially severable because the payment claim and the retention sum claim involved separate considerations of fact and law. On this point, Coomaraswamy J explained:[101]

> With respect to the applicant's payment claim, the adjudicator considered whether the works carried out by the applicant justified the payment claim. With respect to the retention sum claim, the adjudicator considered whether the parties had contractually agreed that the respondent was to withhold a retention sum …

*Cross-claims from different contract*

7.52 Another interesting issue decided by the courts during year 2017 is whether a respondent in resisting payment of a claimed amount is entitled to raise cross-claims, counterclaims and set-offs which stem from matters external to the particular contract to which the payment claim relates. In *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd*[102] ("*Hua Rong*"), the parties were involved in two construction projects commissioned by the Land Transport Authority, referred to as "T211" and "C933" respectively. The claimant was employed by the respondent as a subcontractor in respect of each of these projects. The claimant's adjudication application was lodged in respect of a payment claim for a sum of $601,873.40 under T211. In its payment response, the respondent had certified a negative response amount of $1,468,276.32, relying on the allegation that the claimant had made fraudulent payment claims under C933.

7.53 The High Court's decision underscored the importance of reading the provisions of the SOP Act in the light of its legislative intent. In a careful analysis of the principles laid down by a train of authorities, Tan J noted that in the earlier decision of *Rong Shun*, the High Court had held that, on a proper construction of ss 2, 5, 10 and 12 of the SOP Act, a payment claim has to be necessarily predicated on the "one payment claim, one contract" rule.[103] The learned judge thus summarised:[104]

100 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [161].
101 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [162].
102 [2017] SGHC 179.
103 *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179 at [27].
104 *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179 at [28].

> Parliament's consistent use of the phrase 'a contract', and variations thereon similarly adopting the singular form, indicated that payment claims as well as adjudications under the SOP Act were both intended to be confined to a single contract. Each adjudication application is to relate to one payment claim, and each payment claim is to relate to one contract.

7.54 The learned judge accepted that in the case before him, the issue is not whether a *claimant* may base his claim on multiple contracts, but whether a *respondent* may rely on withholding reasons that arise in relation to multiple contracts. His Honour considered that the language in ss 15(3) and 17(3)(*b*) of the SOP Act indicates that Parliament intended that the same position which applies to payment claims applies as well to withholding reasons which can be considered in an adjudication under the SOP Act – namely, that they must arise out of a single contract only:[105]

> Logically, this must be so. The language used is functionally identical: just as the SOP Act refers to 'a' or 'the' contract in the provisions concerning progress payments, payment claims and adjudication applications, it also refers to 'a' or 'the' contract in the provisions concerning adjudication responses and withholding reasons …

7.55 Tan J also considered that, aside from the language used in the relevant statutory provisions, there is also "a convincing reason of policy" which militates toward adopting the single-contract interpretation. The learned judge helpfully hastened to add that this is not a freestanding interpretation of the law, but one that takes into account the object and purpose of the SOP Act as well as the motivations underlying Parliament's introduction of the SOP Act. His Honour cited with the reason as expressed by Coomaraswamy J in *Rong Shun* that "allowing claims and disputes which arise from several contracts – which may contain materially different terms, including materially different payment terms – to be confounded in one payment claim and thereafter in one adjudication application has the potential to cause unfairness to the respondent, to increase the decision-making burden on the adjudicator and thereby to increase costs and to increase delay in adjudication".[106] His Honour concluded that both the language of the SOP Act and the SOP Regulations,[107] and their underlying object and purpose, require the court to adopt the single-contract interpretation.[108]

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105 *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179 at [34].

106 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [27].

107 Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed).

108 *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179 at [40].

*Insolvency provisions of Companies Act*[109]

7.56 During the year under review, the High Court had also affirmed that where the result of the SOP Act conflicts with the statutory provisions governing insolvency, it is clear that the latter should prevail. The insolvency regime had far-reaching consequences, in particular that of preferring certain creditors over others due to their security over the company's assets. Parliament has accepted as a matter of public policy that allowing a claimant under the SOP Act to intrude into this regime would unnecessarily tilt the balance in favour of the construction industry over other creditors.

7.57 In *Strategic Construction Pte Ltd v JH Projects Pte Ltd*[110] ("*Strategic Construction*"), the issue arose from a payment claim made by a subcontractor against the main contractor involved in the construction of a military camp. When the main contractor failed to pay, the subcontractor lodged an adjudication application and was awarded an adjudicated amount of $156,979.24. When the main contractor also failed to pay the adjudicated amount, the subcontractor applied to the court to wind up the main contractor. A few days later, the main contractor commenced action for cross-claims against the subcontractor on the ground that the subcontractor failed to rectify defects in another subcontract between the parties. The main contractor also applied for a stay of the subcontractor's winding-up application pending the determination of its action on the cross-claims. The High Court allowed the main contractor's application and ordered the stay. The *coram* of the High Court in *Strategic Construction* was Tan J, who had earlier delivered the decision in *Hua Rong* that cross-claims under the SOP Act are limited to cross-claims within a single contract, and not to claims across contracts. However, Tan J highlighted that the winding-up application was not premised on the SOP Act, but was commenced pursuant to s 254(1)(*e*) of the Companies Act. Relevantly, s 254(1)(*e*) does not limit cross-claims to those originating from the main claim.[111] The policy of "quick and simple" justice also did not apply to the insolvency regime under the Companies Act. Thus, the main contractor was entitled to rely on a cross-claim arising out of a separate contract in support of its application for a stay on the winding-up application.[112] In arriving at his Honour's decision, Tan J considered it significant that Parliament recognised that a claim under the SOP Act may potentially conflict with a claim under the insolvency regime and clearly intended that the latter should prevail in such situations.[113]

109 Cap 50, 2006 Rev Ed.
110 [2017] SGHC 238.
111 *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2017] SGHC 238 at [32].
112 *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2017] SGHC 238 at [33].
113 *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2017] SGHC 238 at [57].

### *Adjudication review application*

*Scope of review*

7.58 There is no controversy that under s 18(2) of the SOP Act only an aggrieved respondent (and not the claimant) is entitled to lodge an adjudication review application. However, the question which arises is whether, upon the lodgement of an adjudication review application, the entire adjudication determination falls to be reviewed or should the adjudication review be limited to matters referred to by the aggrieved respondent.

7.59 In *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd*,[114] the respondent who was unsuccessful in an adjudication stated in its adjudication review application that the adjudicator was wrong to have found that the claimant contractor was entitled to an extension of time of 133 days. In the adjudication review proceedings, the claimant contractor took the opportunity to raise its own grievance, namely that the adjudicator should have found that it was entitled to a further extension of time and should have allowed the contractor's claim for all preliminaries, prolongation costs and idling costs. The contractor submitted that a review adjudicator was entitled to review the entire adjudication determination ("the broad interpretation"). In reply, the employer submitted that an adjudication review was restricted to only the issues raised by the respondent ("the narrow interpretation"). The review adjudicator agreed with the respondent and proceeded on the narrow interpretation, that is, his jurisdiction was limited to issues raised by the unsuccessful respondent in the adjudication review.

7.60 The High Court noted that the SOP Act did not state that the review was limited to points raised by the respondent nor did it state that it was not limited to those issues. Lee Seiu Kin J observed in his Honour's judgment that s 19(6)(*a*) of the SOP Act states the matters which a review adjudicator should have regard to, one of which is the adjudication determination under review. This is a reference to the adjudication, not a part of it. As for the matters stated in ss 17(3)(*a*)–17(3)(*h*), these include the payment claim, the payment response and the submissions and responses of the parties to the adjudication. Again, these are not expressed in such a way that regard may only be had to part of these matters.[115] Furthermore, s 19(5) states that the review should determine the adjudicated amount. It did not restrict a review

114 [2017] 3 SLR 988.

115 *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 at [19].

adjudicator to simply maintaining and decreasing the adjudicated amount.[116]

7.61 While conceding that "the policy of the Act is ambivalent as to which interpretation is to be preferred", Lee J held in favour of the broad interpretation, ruling that once an application is made for adjudication review, the entire adjudication determination is liable to be reviewed by the review adjudicator.[117] However, the learned judge clarified that it is wrong to characterise the review adjudicator's decision as a breach of natural justice because the review adjudicator considered the claimant's arguments before arriving at his decision on the scope of the adjudication review. Nevertheless, it follows in this case that the review adjudicator had misdirected himself in a point of law in adopting the interpretation of the Act as he did and the adjudication review determination would be set aside for this reason.[118]

*Setting aside adjudication review determination*

7.62 Interestingly, a number of cases decided during the year under review relate to the setting aside of an adjudication review determination. An important decision on this issue is *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd*[119] ("*CMC Ravenna*"), where the court, following a comprehensive review of the authorities, provided a very helpful statement on the subject.

7.63 The dispute in *CMC Ravenna* arose out of a contract involving the construction of the Tampines West Station and tunnels for the Stage 3 of the Mass Rapid Transit Downtown Line project. The respondent was engaged by the Land Transport Authority, the employer, to be the main contractor of the Project. The claimant was employed by the respondent as a subcontractor to "supply skilled and general workers, equipment and minor tools for the fixing and installation of the rebar to the skin wall abutting the D-wall at the site". The claimant made a progress claim for a sum of $410,325.16. In response, the respondent stated in its payment response a response amount of negative $735,378.92. The claimant applied and obtained an adjudication determination in its favour for an amount of $340,515.61. The respondent lodged an adjudication application review. The review adjudicator found in favour of the respondent, holding that there is no

116 *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 at [20].
117 *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 at [30].
118 *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 at [44].
119 [2018] 3 SLR 503.

amount payable by the claimant to the respondent. In applying to set aside the adjudication review, the claimant raised two issues for the consideration of the court: (a) whether a panel of three review adjudicators should have been appointed instead of a sole review adjudicator; and (b) whether the review adjudicator had misdirected himself on a point of law.

7.64 Chan J, in the course of his Honour's judgment, was satisfied that "the grounds for setting aside adjudication review determinations are broadly similar to those for setting aside adjudication determinations" albeit with suitable modifications.[120] The starting point is that the court's role in dealing with an application to set aside an adjudication determination is limited to exercising a *supervisory* function.[121] The learned judge proceeded to summarise the principles applicable to a setting aside application for an adjudication review determination as follows:

> (a) First, applications to set aside adjudication review determinations are brought under the exact same provision as applications to set aside adjudication determinations, that is, s 27(5) of the SOP Act.[122]
>
> (b) Second, review adjudicators are empowered under s 19(5) of the SOP Act to determine almost precisely the same matters as adjudicators are empowered to determine under s 17(2), such that review adjudicators are effectively entitled to "reconsider the findings of facts as well as the application of legal principles to those findings of fact".[123]
>
> (c) Third, by virtue of s 21 of the SOP Act, adjudication review determinations have the same temporarily binding quality of adjudication determinations.[124]
>
> (d) Fourth, an adjudication review determination "may be treated by the court in a similar manner as if it were an adjudication determination".[125]

120 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [20] and [36].

121 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [21], referring to *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [49].

122 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [36(a)].

123 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [36(b)] citing *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [23].

124 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [36(c)].

7.65 Arising from these principles, the learned judge was prepared to list the situations under which an adjudication review determination may be set aside:[126]

> (i) the review adjudicator has acted in breach of the principles of natural justice;
>
> (ii) the review adjudicator was not validly appointed, which causes the review adjudicator to lack jurisdiction at the threshold;
>
> (iii) even if the review adjudicator was validly appointed, the respondent in the adjudication, in the course of making an adjudication review application, has not complied with one (or more) of the provisions under the SOPA which is so important that it is the legislative purpose that an act done in breach of the provision should be invalid, which causes the review adjudicator to lack substantive jurisdiction; or
>
> (iv) the review adjudicator commits a patent error on the face of the record.

7.66 Turning to the two issues before the court, Chan J held that a valid appointment of a review adjudicator is conditional on the authorised nominating body first receiving an adjudication review application and secondly appointing either a review adjudicator or a panel of three review adjudicators according to the prescribed criteria laid down in reg 10(3) of the SOP Regulations. If either requirement is not met, the review adjudicator appointed lacks jurisdiction at the threshold because an invalid nomination would not clothe the acceptor with the office. In this case, the adjudicated amount was $340,515.61. The respondent had argued that the relevant response amount should be the negative sum of $735,378.93 and therefore the difference between the adjudicated amount and the response amount would be $1,075,894.54, which exceeds the threshold for determination by a sole review adjudicator. The claimant on the other hand argued that the "relevant response amount" is "nil". The difference between the adjudicated amount and the response amount was therefore $340,515.61 and justified the appointment of a single review adjudicator. The court accepted the claimant's submission that under the definition of "response amount" in s 2 of the SOP Act, the expression "relevant response amount" cannot carry a negative value.[127]

125 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [36(d)].

126 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [37].

127 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [55].

7.67 On the second issue, Chan J rejected the respondent's submissions and decided that an adjudication determination should not be set aside on the ground that the review adjudicator had misdirected himself on a point of law. He said in the course of his Honour's judgment:[128]

> In my judgment, courts should be precluded from evaluating whether a review adjudicator had misdirected himself on a point of law, especially one that relates to the manner of his substantive determination of the quantum of the adjudicated amount. This is because reviewing an adjudication review determination for a misdirection on a point of law or fact (as the case may be) that affects the quantification or assessment of the adjudicated amount would amount to an impermissible intrusion of the court into a review of the merits of the review adjudicator's decision.

The result is that the court in this instance dismissed the setting aside application.

128 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [62].