

CONSTRUCTION ADJUDICATION

The Basis for Setting Aside Adjudication Determinations

The Singapore Building and Construction Industry Security of Payment Act (“SOP Act”) was passed by Parliament on 16 November 2004 and came into force on 1 April 2005. It has as its main aim the facilitation of payment and cash-flow in the construction industry. This article examines the extent to which the courts will set aside adjudication determinations in light of latest case law developments, and how these decisions are in accordance with the legislative intent behind the enactment of the SOP Act.

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I. Introduction

1 Over the past 18 months, there has been an increasing number of applications to the courts to set aside adjudication determinations under the Building and Construction Industry Security of Payment Act¹ (“SOP Act”).² Typically, such challenges have been advanced on jurisdictional grounds. However, because the SOP Act is largely silent on

1 Cap 30B, 2006 Rev Ed.

2 Since the original draft of this article, another decision on the subject has been delivered by the High Court. In *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] SGHC 105, a payment claim was made in the form of a one-page letter accompanied by 164 pages of supporting documents. The one-page letter requested early payment and was signed off with “greetings of the season”. It was held that the letter could not amount to a payment claim under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). Justice Lee Seiu Kin took the view that a payment claim should not be thought as valid merely because it “satisfies all the requirements under the Act”: to be a valid payment claim it must also be *intended* as a payment claim ([2010] SGHC 105 at [20]). This ruling suggests that in certain situations the courts would be prepared to go beyond these “basic and essential conditions” for a valid determination as laid down in *Brodyn v Davenport* [2004] NSWCA 394 and inquire whether the adjudication process was properly founded.

the grounds for setting aside an adjudication determination, a jurisdictional challenge of an adjudication determination could be constructed on two grounds. First, on a more narrow footing, it could be alleged that the dispute in issue falls outside the ambit of the adjudicator's power or competence. Secondly, and more commonly, determinations can be attacked on the basis that the process or conduct of the adjudication was defective or irregular or that these do not comply with the requirements of the SOP Act. The problems posed by challenges of the latter nature will be immediately clear. They will require the court hearing the application to revisit the merits of factual or legal matters canvassed before the adjudicator, matters which the Legislature had intended should be disposed of swiftly through adjudication on a temporary but binding basis.

2 In an important development, the High Court has now clarified the basis on which applications may be made to set aside adjudication determinations under the SOP Act.³ At the heart of this development are three considered judgments by Judith Prakash J,⁴ which entailed a careful review of the authorities, in particular an examination of the extent to which certain principles of administrative law may apply to the subject.

II. Adjudication process and avenues for review

3 The facts of *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*⁵ (“*Skoy*”) may be briefly stated. The plaintiff, SEF Construction Pte Ltd entered into a subcontract agreement with the defendant subcontractor, Skoy Connected Pte Ltd. SEF was the main contractor and it employed Skoy to carry out the supply and installation of aluminum and glass works for the construction of 19 three-storey houses. Skoy sent SEF its payment claim for work done and commenced adjudication subsequently. 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.

4 SEF argued that it had attempted to render a payment certificate to Skoy but it was refused. It also alleged that the adjudication application was invalid on four grounds: first, the adjudication application was filed prematurely. Secondly, the reference period of the

3 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

4 The cases are *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23; *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733; *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260.

5 [2010] 1 SLR 733.

claimed amount was not within the jurisdiction of the SOP Act.⁶ Thirdly, the adjudication application failed to attach relevant documents which were essential and required under the SOP Act. Lastly, the claimed amount in the adjudication application was inconsistent with, and exceeded the amount stated in, the payment claim.

5 In the determination, the adjudicator first dealt with SEF's argument that its payment certificate constituted a payment response. During a meeting between the parties, SEF's representatives attempted to hand over the payment certificate to Skoy's representatives but they refused to accept it and the document was left on the table. The adjudicator stated that SEF ought to have served the payment response on Skoy in accordance with the requirements under the SOP Act.⁷ He decided that because SEF failed to do so, he did not consider any payment response to have been served on Skoy at all.

6 The adjudicator then went on to decide on SEF's allegation regarding whether the adjudication application was premature. He concluded that it was not filed prematurely and therefore he had lawful jurisdiction over the adjudication application. He also addressed the second issue raised by SEF but dismissed it on the ground that Skoy made a typographical error in stating the reference period. However, the adjudicator did not address the last two issues raised by SEF, and awarded 90% of the amount claimed to Skoy. This failure to address the two issues formed the main basis for SEF's challenge of the adjudication determination.

7 SEF applied to set aside the adjudication application. It appeared before the District Judge and argued that the adjudicator breached his duties under the SOP Act⁸ because of two primary reasons. First, the adjudicator breached the rules of natural justice by failing to consider SEF's submissions on two out of the four jurisdictional issues. Secondly, the adjudicator failed to engage in a *bona fide* exercise of power. The District Judge rejected SEF's arguments and SEF appealed to the High Court.

III. Purposive construction of the SOP Act

8 The appeal was dismissed by the High Court. In the course of a detailed judgment, Judith Prakash J discussed the objective of the

6 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

7 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

8 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

SOP Act⁹ to “facilitate payments for construction work done or for related goods and services supplied in the building and construction industry”.¹⁰ An adjudication determination is designed 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 SOP Act. The respondent is also entitled under s 27(5) of the SOP 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 SOP Act is silent on the grounds on which an application for setting aside under s 27(5) may be based. Prakash J considered that the court should therefore 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”.¹¹

IV. Court’s power limited to setting aside

9 In her judgment, Prakash J affirmed the position that an application to set aside an adjudication determination 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:¹²

One thing, however, is plain and that is that an application under s 27(5) is not an appeal. I say this because there is no inherent right of appeal to the court from the decision of an administrative or inferior tribunal. A right of appeal has to be expressly provided for by legislation which will also determine whether the appeal is limited to questions of law or encompasses questions of fact as well. A right of appeal also must be available to both parties and the right granted under s 27(5) is given to the respondent to the adjudication alone. Therefore the court faced with an application under s 27(5), not being an appellate court, would not be in a position to look into the merits of the dispute and adjust the adjudication amount whether upwards or downwards. The court’s power is limited to deciding whether the adjudication determination should be set aside or not.

10 Thus, if an aggrieved respondent considers that the merits of the case should be revisited, the only recourse provided under the

9 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

10 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [15].

11 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [27].

12 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [27].

SOP Act¹³ is for him to lodge an adjudication review application under s 18 of the SOP Act. The learned judge earlier affirmed the view expressed in a textbook that a review adjudicator is empowered to reconsider the findings of fact as well as the application of legal principles to those findings of fact.¹⁴

V. No requirement for *bona fide* exercise of an adjudicator's powers

11 On the adjudicator's failure with two of the four issues, SEF had relied on a number of Australian authorities, including *Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*¹⁵ ("*Timwin Construction*"). In *Timwin Construction*, McDougall J in the Supreme Court of New South Wales accepted as a principle¹⁶ that a basic requirement of a valid adjudication determination would be "a *bona fide* attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation".¹⁷ This requirement of good faith amounts to an effort to understand and deal with the issues in the discharge of the statutory function and was consonant with s 22(2) of the New South Wales SOP Act which required an adjudicator to "consider" certain matters. SEF argued that this wording in the New South Wales SOP Act parallels the wording of s 17(3) of the Singapore SOP Act¹⁸ which states that an adjudicator "shall only have regard to", *inter alia*, "the submissions and responses of the parties". Hence, SEF submitted, s 17(3) of the SOP Act imposes a similar duty on an adjudicator to exercise his powers in good faith as is imposed on an adjudicator under the New South Wales SOP Act.

12 Judith Prakash J rejected this submission. She accepted Skoy's case that the New South Wales SOP Act is not *in pari materia* with the Singapore SOP Act.¹⁹ This is because the New South Wales Act does not provide for an adjudication review process nor does it provide for the right to set aside the adjudication determination. It is only the judgment

13 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

14 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [23], citing the statement in Chow Kok Fong, *Security of Payment and Construction Adjudication* (Lexis Nexis, 2005) at p 473.

15 [2005] NSWSC 548, the other cases cited were *Lanskey v Noxequin* [2005] NSWSC 963, *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 and *Reiby Street Apartments v Winterton Constructions* [2006] NSSC 375.

16 Following the judgment of Hodgson JA in *Brodyn v Davenport* [2004] NSWCA 394.

17 [2005] NSWSC 548 at [19].

18 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

19 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

entered for the purpose of enforcing an adjudication determination which may be set aside and such judgment may be set aside by the court if it was given “irregularly, illegally or against good faith” as specified by r 36.15 of the New South Wales Civil Procedure Rules 2005. As such, challenges to the adjudication determination itself which have been taken out under the New South Wales Act have often been on the basis of judicial review, though the availability of such relief has been doubted in cases such as *Brodyn v Davenport*.²⁰ In any case, the Australian courts have imported principles from the realm of administrative law into their consideration of the New South Wales SOP Act. Thus, the New South Wales Act, unlike the Singapore Act, does not expressly require an adjudicator to observe the rules of natural justice. This requirement was imported into that regime by the application of administrative law principles and it is the same principles which led to the establishment of the need for the adjudicator to engage in a *bona fide* exercise of his powers.

13 The learned judge was quite clear that the situation in Singapore is different from that in New South Wales. She pointed out that 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 procedure. She said in her judgment:²¹

[It] must have recognised that the adjudication procedure provided a somewhat rough and ready type of justice. This was because compliance with the timelines imposed on the process might lead to a lack of depth in the submissions and matters considered. This inbuilt limitation on the procedure had been commented on in relation to earlier regimes imposed in other jurisdictions. As Chow in *Security of Payments and Construction Adjudication* puts it (at p 503):

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

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

20 [2004] NSWCA 394.

21 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [38].

14 Prakash J proceeded to observe that in the English regime where there is no adjudication review procedure, the courts still recognise that they should not inquire too deeply into the merits of the determination.²² She agreed with the views expressed by Lord Reid in *Ballast plc v The Burrell Co (Construction Management) Ltd*²³ 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”.²⁴ 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 SOP Act²⁵ 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.²⁶ 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”.²⁷ She concludes on this issue:²⁸

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

VI. Basic and essential requirements of a determination

15 Notwithstanding that there is no requirement under the Singapore SOP Act²⁹ that the adjudicator has to engage in a *bona fide* exercise of his powers, Prakash J agreed with Hodgson JA in *Brodyn v*

22 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [39].

23 [2001] BLR 529.

24 [2001] BLR 529 at 538.

25 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

26 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [40].

27 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [40].

28 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [42].

29 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

*Davenport*³⁰ on the basic and essential conditions to be satisfied for the existence of a valid determination.³¹ She proceeded to rule 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:³²

- (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
- (b) the service by the claimant on the respondent of a payment claim (s 10);
- (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
- (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
- (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (s 17(1) and (2));
- (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
- (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

16 In confining the court's role to the determination of the existence of these requirements, the scope for setting aside an adjudication determination can only be advanced on either a breach of natural justice or a defect which goes to the formal validity of the determination as opposed to the substance of the determination. It follows that, on this premise, even an adjudicator's finding as to whether a contract falls within the ambit of the SOP Act³³ would not be a matter on which the resulting determination could be set aside so long as the basic and essential conditions set out herein are satisfied. Thus, in the course of her judgment, Prakash J pointed out that while s 16(3)(b) requires the adjudicator to avoid incurring unnecessary expense, she does not consider that a failure to comply with that requirement should result in the setting aside of the adjudication determination "since, even

30 [2004] NSWCA 394.

31 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [43].

32 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [45].

33 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

if unnecessary expense is incurred in connection with the adjudication, that is unlikely to affect the correctness of the determination as long as the adjudicator was independent and impartial and afforded the parties natural justice”³⁴.

17 In *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd*³⁵ (“Laguna”), the respondent, Laguna, employed the claimant, AMA, to undertake certain project management work in relation to a construction project. On 15 January 2009, AMA served its Payment Claim No 1 on Laguna in respect of the work period from July 2008 to 2 December 2008. The total amount claimed was \$1,027,000. Under the terms of the SOP Act,³⁶ Laguna should have issued a payment response to relation to Payment Claim No 1 by 22 January 2009. No such payment response was made. The adjudicator convened an adjudication conference on 23 February 2009. This was attended by representatives of both parties and their respective counsel. Following the adjudication conference, the parties were directed to file their submissions no later than 5.00pm on 24 February 2009. The next day, both parties filed supporting documents and comments. The adjudicator issued his adjudication determination on 2 March 2009. He determined, *inter alia*, that Laguna was to pay AMA the sum of \$1,027,000. Laguna was not satisfied with the adjudication determination but it did not make an application for an adjudication review nor did it pay the adjudicated amount. On 12 March 2009, AMA filed the originating summons herein for leave to enforce the adjudication determination against Laguna and for judgment to be entered in its favour for the adjudicated amount with interest and costs. On 16 March 2009, AMA obtained an order in terms of its summons. Laguna applied to set aside the adjudication determination and the judgment. The assistant registrar of the High Court dismissed Laguna’s application and Laguna appealed. Prakash J dismissed the appeal and reiterated her views in *Skoy*³⁷ that the Australian requirement relating to the *bona fide* exercise of the adjudicator’s powers did not apply in Singapore.³⁸

34 *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [46].

35 [2009] SGHC 260.

36 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

37 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733.

38 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 at [19].

VII. Practical issues with *bona fide* requirement

18 The decisions in *Skoy*³⁹ and *Laguna*⁴⁰ are to be lauded for clarifying the premise on which applications may be made to set aside adjudication determinations. In refusing to import the requirement that an adjudicator has to engage in a *bona fide* exercise of his powers under the SOP Act⁴¹ (“the *bona fide* requirement”), the court has affirmed that adjudication is a fast track process delivering a result which is intended to be temporarily binding and that accordingly the burden imposed on the adjudicator should not be unduly onerous. It recognised the inevitability that an adjudicator, operating within the tight timelines demanded under the SOP Act, may not be able to fully identify or deal with each and every single issue before him. Any anxieties over excesses of injustice or inaccuracies expressed on account of the absence of the *bona fide* requirement will be ameliorated by the fact that an aggrieved respondent may apply for an adjudication determination to be reviewed. The review adjudicator is entitled to revisit the merits of the original adjudicator’s decision and correct any mistakes or rectify inadequacies of the determination. Furthermore, while only the respondent is entitled to review the adjudication determination, the claimant is not prevented from taking the dispute before an arbitrator or the court for a final determinative result to be issued.

19 It will also be appreciated that the imposition of the *bona fide* requirement will give rise to another serious difficulty which may operate to effectively thwart the legislative intentions behind the SOP Act.⁴² As noted, this requirement is a creature of Australian administrative law. It is unclear how an adjudicator in the Singapore context can demonstrate that he has expended sufficient effort to understand and deal with the issues in the discharge of the statutory function. If the respondent’s grievance is one where an adjudicator clearly ignored the evidence before him, the recourse available to him would be to lodge an adjudication review application or to have the dispute decided in arbitration or trial. As Judith Prakash J so aptly stated in her judgment in *Skoy*, the consequence of the imposition of this requirement would amount to giving “the court a backdoor way”⁴³ to do exactly what the Legislature had not intended.

39 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733.

40 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260.

41 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

42 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

43 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [40].

20 Furthermore, the duty under s 16(3) of the SOP Act⁴⁴ to afford parties natural justice overlaps with the duty to exercise his powers in good faith. If an adjudicator refuses to consider evidence placed by a party before him for no good reason, it may be argued that he had failed to act impartially in not considering the evidence of that party but considering the evidence of another. This would fall under s 16(3)(c) of the SOP Act as a breach of natural justice and this would not call for an application to be made on the basis of the *bona fide* requirement. In *Skoy*, Prakash J in discussing whether there had been a breach of natural justice stated that what was held by the Australian courts in relation to the *bona fide* requirement can be applied to the requirement under the Singapore SOP Act that an adjudicator has to comply with the principles of natural justice.⁴⁵

VIII. Breach of natural justice

21 The principles of natural justice in relation to the adjudication process were considered at some length in a case also decided by Prakash J earlier in the year. In *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd*⁴⁶ (“*Chip Hup Hup Kee*”), the claimant subcontractor started work and from time to time issued and served progress claims in respect of the work it had done. The claimant served Progress Claim No 5 on the respondent main contractor. The respondent did not pay the amount claimed nor did it issue a payment response. The respondent only provided its payment response after the matter had been referred for adjudication by the claimant. The adjudicator had to consider whether s 15(3) of the SOP Act⁴⁷ 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. The adjudicator decided that since there was no payment response from the respondents, s 15(3) of the SOP Act precluded him from considering any reason which was not included in a valid payment response.

22 Before the assistant registrar, the respondent argued that the adjudication determination should be set aside on the ground that the

44 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

45 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [58].

46 [2009] SGHC 23.

47 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

adjudicator was wrong to have construed s 15(3) of the SOP Act⁴⁸ to mean that he had to completely exclude all aspects of the respondent's case. It submitted that this constituted a breach of natural justice. The assistant registrar recognised that the intention behind the SOP Act was to provide a speedy and low cost adjudication process and the interpretation which the adjudicator had accorded to s 15(3) of the SOP Act was appropriate. Natural justice only requires the respondent to be given a fair opportunity to be heard. The respondent chose not to avail itself of the opportunity to be heard on its reasons for withholding payment and there is no requirement that a party has to be actually heard. It is perfectly legitimate for a party to forfeit his right to be heard through some procedural default. On appeal, Prakash J concurred with the assistant registrar's decision on the point of natural justice.

23 An adjudicator must comply with the rules of natural justice under s 16(3) of the SOP Act.⁴⁹ In *Skoy*,⁵⁰ SEF argued on the alternative basis that by failing to deal with two of the issues submitted, the adjudicator was in breach of his duty to comply with the rules of natural justice. Skoy, on the other hand, advanced the same argument it raised in relation to the *bona fide* requirement in relation to the adjudicator's exercise of his powers, that because an adjudicator only has a short time frame to render his determination, it would place an unduly onerous duty on him if he is expected to formulate detailed reasons for his decision on each and every one of the submissions before him.

24 The court agreed with Skoy's submission and 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 SEF had the opportunity to present its case before it. Prakash J cited with approval the statement of principle in the Australian case of *Brookhollow Pty Ltd v R&R Consultants Pty Ltd*⁵¹ 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

48 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

49 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

50 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733.

51 [2006] NSWSC 1.

relation to the third and fourth issues put forth by SEF. Prakash J further ruled that there cannot be a breach of natural justice just because parties were not given responses on all submissions made. The principle only requires that parties should be heard. The judge also pointed out that SEF could have raised all its points before a review adjudicator instead of bringing the dispute to court.⁵²

25 The case of *Laguna*⁵³ also involves the subject of natural justice. The respondent there raised the usual argument of a breach of natural justice in the hope of setting aside an earlier adjudication determination. 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:⁵⁴

[It] can be gathered ... that 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.

26 If the parties have been given a fair hearing, a party who is dissatisfied with the decision cannot use the principles of natural justice to have the decision set aside. An aggrieved respondent is entitled to seek a reconsideration of the merits of his case by lodging an adjudication review application under the SOP Act.⁵⁵

52 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60].

53 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260.

54 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 at [25].

55 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

IX. Adjudicator's jurisdiction to hear a dispute

27 The case of *Chip Hup Hup Kee*⁵⁶ also dealt with the basis for the jurisdiction of an adjudicator under the SOP Act.⁵⁷ In that case, this was one of the first issues raised before the adjudicator and the adjudicator had rejected the respondent's case that the parties' rights under the SOP Act were premised on the continued subsistence of the construction contract between the parties. He held that under the SOP Act, he had jurisdiction to deal with an adjudication application although the contract between the parties had been terminated because a valid contract had previously existed.⁵⁸ This point was not pursued further when the hearing went before the assistant registrar and the High Court.

28 When the case proceeded before Prakash J in the High Court, the respondent argued that it was entitled to raise the following new issues on appeal, namely, that: (a) the claimant had failed to serve on the respondent a valid payment claim under the SOP Act;⁵⁹ and (b) the claimant had claimed items which fell outside the scope of the SOP Act and this had rendered the purported payment claim invalid. The thrust of the respondent's case was that because of these irregularities, the adjudicator had no jurisdiction to adjudicate on the application in the first instance.⁶⁰ In response, the claimant argued, *inter alia*, that on the facts the respondent had waived its right to challenge the adjudicator's jurisdiction and that they were entitled to waive such rights according to the law. The respondent countered that a statutory jurisdiction could not be varied by consent of the parties and that a party's ability to challenge jurisdiction could not be affected by waiver or estoppel.

29 In her judgment, Prakash J considered that the answer is found in the definition of the word "jurisdiction".⁶¹ "Jurisdiction" could be used in two distinct ways. First, it could be read strictly as referring to a court's competence to hear. Secondly, it could be read broadly to refer to the manner in which the court's power was exercised. In the former, any party to a dispute may assert the lack of jurisdiction at any stage and can

56 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23.

57 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

58 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23 at [7], [11].

59 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

60 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23 at [26].

61 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23 at [43]–[51].

never be taken to have waived or be estopped from its right of protest. In the latter, when it is a question of irregularity or procedure or contingent jurisdiction or non-compliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the consequence of waiver would not be to confer any jurisdiction which did not exist. Prakash J rejected the respondent's submissions that the jurisdiction of the adjudicator was determined according to whether the claimant had followed the requirements of the SOP Act⁶² in connection with the form and content of the payment claim and the time at which it had to be served. In her judgment, an adjudicator's jurisdiction arises from his appointment by an authorised nominating body under s 14(1) of the SOP Act and from his acceptance of such appointment. The powers and functions of the adjudicator come from s 16 of the SOP Act and not from any action on the part of the claimant. The learned judge found that the adjudicator in this case had been duly appointed by the designated authorised nominating body and held that in the circumstances he had jurisdiction to hear and determine the adjudication application.⁶³ She cited with approval the following passage from the judgment in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd*⁶⁴ where Nicholas J said:⁶⁵

Although it may be said that, by service of a payment claim under section 13 on the person who under the contract is liable to make the payment, the claimant has set in train the procedure for recovery of payment established under Pt 3 of the Act, it is not correct to say that the payment claim is the foundation of the jurisdiction of the Adjudicator. By section 19(2), upon acceptance of a claimant's adjudication application under section 17, the Adjudicator is taken to have been appointed to determine the application. The Adjudicator's powers and functions in respect of the adjudication procedures and determination are prescribed in section 21 and section 22. These provisions of the Act are the source of jurisdiction. In my opinion the Plaintiff's submissions on this issue were misconceived.

30 In *Laguna*,⁶⁶ the adjudicator in that case dealt with four jurisdictional grounds on which the respondent had challenged the adjudication application. The respondent had alleged that: (a) the adjudication application had been served on the wrong party; (b) the subject Payment Claim No 1 was not a payment claim for a progress

62 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

63 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23 at [54].

64 [2003] NSWSC 365.

65 [2003] NSWSC 365 at [31].

66 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260.

payment under s 10 of the SOP Act;⁶⁷ (c) the adjudication application had been made out of time; and (d) the claim relating to project management services in the manner that was defined in the contract between the parties did not fall within the purview of the SOP Act. In relation to the first issue, the adjudicator determined that, based on the construction of the SOP Act and the conduct of the parties, the claimant was entitled to deal with the respondent instead of Laguna Golf Resort Holding Pte Ltd for the purpose of the project. On the second issue, the adjudicator determined that Payment Claim No 1 could not be said to be a mere repetition of the earlier claims and this was not a situation where the claimant reissued the claim because it had failed before a prior adjudicator. As to the third issue, after examining the time lines, the adjudicator found that the adjudication application had not been served out of time by the claimants. On the final issue, the adjudicator considered that the scope of the services did not fall outside the purview of the SOP Act. At the hearing before the assistant registrar, the court agreed with the determination of the adjudicator as he found no fatal flaw in the reasoning.

31 Prakash J agreed with the claimant's submission based on the assistant registrar's decision in *Chip Hup Hup Kee*⁶⁸ that a court considering a setting aside application should not be concerned with substantive issues since the SOP Act⁶⁹ provides a limited right of review of the substantive correctness of an adjudication determination through the adjudication review procedure. She further decided that whether or not the payment claim was a valid payment claim did not fall within the purview of the court but was a matter for the decision of the adjudicator.⁷⁰

32 In light of an increasing number of challenges mounted on lack of jurisdiction, on account of defective payment claims, Prakash J suggested that it would be helpful if the SOP Act⁷¹ or regulations made contained a provision that payment claims made for the purposes of the SOP Act should be identified by an endorsement to the effect that the document is a payment claim for the purposes of a claim under the

67 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

68 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23.

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

70 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 at [20].

71 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

SOP Act.⁷² She noted that it is unfortunate that such a requirement in the New South Wales SOP Act was not incorporated into the Singapore SOP Act.

X. Summary of principles

33 The principles arising from the three judgments delivered by Prakash J may be briefly summarised.

34 First, in determining an application for setting aside an adjudication determination under s 27(5) of the SOP Act,⁷³ the court will be guided by 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.⁷⁴

35 Secondly, an application to set aside an adjudication determination is not an appeal and the court's power does not extend to re-examining the merits of the dispute.⁷⁵

36 Thirdly, under the Singapore SOP Act,⁷⁶ there is no requirement that an adjudicator has to engage in a *bona fide* exercise of his powers. The court's role in considering an application to set aside an adjudication determination must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper.⁷⁷ The proper course of inquiry for the court must be to determine the existence of the following basic requirements:⁷⁸

- (a) the existence of a contract between the parties to which the Act applies (s 4);
- (b) the service by the claimant on the respondent of a payment claim (s 10);
- (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);

72 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 at [22].

73 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

74 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [27]; Interpretation Act (Cap 1, 2002 Rev Ed) s 9A.

75 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [27].

76 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

77 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [42].

78 *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [45].

- (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 (s 17(1) and (2));
- (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
- (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

37 Fourthly, to sustain a challenge as to 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. The *audi alteram partem* rule requires the adjudicator to receive both parties' submissions and consider them; it does not require him to decide the dispute in accordance with one party's submissions.⁷⁹

38 Finally, an adjudicator's jurisdiction arises from his appointment by an authorised nominating body under s 14(1) of the SOP Act⁸⁰ and from his acceptance of such appointment. The powers and functions of the adjudicator are derived from s 16 of the SOP Act and not from any action on the part of the claimant: *Chip Hup Hup Kee*.⁸¹

XI. Conclusion

39 The opportunity to clarify the premise for mounting a jurisdictional challenge under the SOP Act⁸² has been well taken by the court. Prakash J's statement of the position in these cases ensures that the adjudication regime instituted by Parliament to "facilitate" payments for construction work is not defeated by applications to set aside adjudication determinations for technical or procedural irregularities.

79 *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 at [25].

80 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

81 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23.

82 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

More importantly, these judgments have set out a coherent set of principles regulating challenges to determinations, and to confine such challenges within a narrow ambit, a move which is consistent with the overall objectives of the adjudication regime.
