Published on e-First 9 May 2019

7. BUILDING AND CONSTRUCTION LAW

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Entire agreement clause

7.1 The negotiations between parties leading to a contract typically entail an exchange of draft documents and statements. An "entire agreement" clause is frequently inserted in a contract to ensure that the terms of the contract are confined to those stated expressly set out in the agreement.

7.2 During the year under review, the High Court was invited to consider the operation of an entire agreement clause in determining whether a particular tender document should be construed as part of the contract between the parties. In *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd*[1] ("*Sunray Woodcraft*"), a main contractor and subcontractor had, in the course of negotiating the terms of a draft letter of award dated 22 June 2015 ("LOA"), recorded certain matters in a document referred to as the "Tender Bid Evaluation" ("TBE"). The TBE set out a long list of items for which the subcontractor's answers were sought, including the percentage of the retention. It was returned by the subcontractor to the main contractor on 7 July 2015, following which the main contractor told the subcontractor that the main contractor was preparing the LOA. The LOA did not mention the TBE, but it contained an entire agreement clause, cl 2.4 of the LOA, and this stated:

1 [2019] 3 SLR 285.

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> Except as provided above in the list of correspondences and documents forming the Sub-Contract, all other correspondences with the Employer and/or Consultants and/or us shall be excluded from this Sub-Contract. Similarly, all representations, statements and/or prior negotiations are specifically excluded.

7.3 Ang Cheng Hock JC ruled that an entire agreement clause does not prevent a court from adopting a contextual approach in contract interpretation.[2] The question to be determined is whether the agreement in its final form constituted the entire agreement, thereby superseding and replacing all representations that might have transpired in the course of reaching the agreement in the first place, but which were never actually incorporated in the written agreement.[3] The court held that, in this case, the TBE could not be characterised as "representation, statements and/or prior negotiations" for the purpose of cl 2.4 of the LOA but was a document that recorded parties' agreement on certain terms arising from the negotiations.[4] The court further considered that this finding was fortified by another clause in the LOA which incorporated the subcontractor's responses to "various questionnaires, clarifications and addenda" and held that the TBE was precisely such a document.[5] In the course of his judgment, Ang JC distinguished the case from *Encus International Pte Ltd v Tenacious Investment Pte Ltd*,[6] emphasising that, here, the TBE was discussed and agreed after cl 2.4 had already been drafted in the LOA.[7]

Validity of architect's certificates

7.4 The court had an opportunity during the year under review to consider the basis for challenging an architect's certificate following two recent decisions of the Court of Appeal on this subject, *Chin Ivan v H P Construction & Engineering Pte Ltd*[8] and *Ser Kim Koi v GTMS Construction Pte Ltd*.[9]

7.5 In *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd*[10] ("*Yau Lee (HCR)*") – the first of the two cases between the same parties which came before the courts during the year[11] – the

2 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [41].
3 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [45].
4 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [46].
5 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [49].
6 [2016] 2 SLR 1178.
7 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [50].
8 [2015] 3 SLR 124.
9 [2016] 3 SLR 51.
10 [2018] SGHCR 11.
11 The other case considered below is *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHC 261.

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subject contract in that case incorporated the Singapore Institute of Architects Standard Form of Building Contract ("SIA Conditions"). Clause 31(3) of the SIA Conditions provided for certificates issued by the architect to be given full effect by way of summary judgment or interim award or otherwise in the absence of fraud, improper pressure or interference by either party. The completion of the works was delayed. The developer commenced proceedings in court to claim liquidated damages in reliance on the architect's delay certificate and further delay certificate. The central issue before the court was whether there existed a dispute which could properly be referred to arbitration[12] and this is discussed below. However, in the course of reaching its decision the court had to inquire, albeit in a limited way, into the validity of the architect's certificates.

7.6 After reviewing the procedure by which the delay certificate is to be issued under the SIA Conditions,[13] the learned assistant registrar distilled the disagreement between the parties in relation to cl 24(1) to essentially the "relevant date" on which to determine whether there are matters which entitle the contractor to an extension of time.[14] The developer's position was that the relevant date was the latest extended date while the contractor argued that this was the date on which the delay certificate was issued.[15] Elton Tan AR observed that, from the language and structure of cl 24(1), there is a clear distinction between the determination of the "latest Date for Completion" and the determination of whether "at the said date there are no other matters entitling the Contractor to an extension of time".[16] He concluded that the latest date for completion determined in accordance with cl 22(1) should be the reference point for the architect's consideration of whether there are matters entitling the contractor to extensions of time.[17]

7.7 In respect of the termination of delay certificate, the debate was reduced to whether the architect can consider any instructions (that is, the delay events) that occurred before the date of the delay certificate in granting an extension of time through a termination of delay certificate.

12 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [27].

13 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [88].

14 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [90].

15 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [90] and [91].

16 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [94].

17 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [98].

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It was held that on the language of cl 24(3), the architect can only consider instructions or matters entitling the defendant to an extension of time that occur "while the Contractor is continuing work subsequent to the issue of a Delay Certificate".[18]

7.8 On the contention that the architect should wait out the expiry of the 28-day notice period before issuing a delay certificate, Tan AR considered that there was nothing in the language of cl 24(1) to support this construction. The purpose of the notification, as stated in cl 23(2), is that it served as a condition precedent to an extension of time by the architect.[19] It is clear that not every architect's instruction causes a delay and there should not be any presumption to such effect.[20]

7.9 The learned assistant registrar concluded that given the 94 instructions were given after the latest date for completion of 30 September 2013 (as certified by the architect), in issuing the delay certificate as he did, the architect had plainly failed to consider these instructions before finding the contractor culpable for delay. The developer's claim could not be considered to be undisputed or indisputable or "so unanswerable that there is nothing to arbitrate". The contractor had therefore established a "*prima facie* case of disputes".[21] Tan AR also considered that, on the terms of cl 24(3)(c), the validity of the further delay certificate is premised on the validity of the termination of delay certificate. If the termination of delay certificate is invalid, there is no proper grant of extension of time under it and accordingly no grounds to issue a further delay certificate.[22]

Performance bond

7.10 The doctrine of unconscionability featured in an instructive decision of the High Court during the year under review. In *Milan International Pte Ltd v Cluny Development Pte Ltd*,[23] a developer terminated the employment of a contractor on account of several incidents of breach of contract. Three months following the termination, the developer called on the contractor's on-demand

18 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [103].
19 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [109].
20 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [111].
21 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [118].
22 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [123].
23 [2018] SGHC 33.

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performance bond. In applying for an injunction to restrain the developer's call on the bond, the contractor contended that it had been prevented from commencing work because the employer's consultants had not provided the necessary documents to enable the contractor to secure the necessary statutory permits for this purpose. It also argued that the developer had shown through its actions that it did not want to be bound by the contract and was in repudiatory breach. The contractor further alleged that the termination was unlawful in that the developer had not issued the notice as required by cl 32(3)(d) of the SIA Conditions. Finally, the contractor claimed that the developer had not suffered any damages arising from the alleged breaches.

7.11 The High Court dismissed the contractor's application. The court held that the contractor failed to establish a strong *prima facie* case of fraud or unconscionability on the part of the developer in making the call on the bond. Hoo Sheau Peng J stated in her decision that since unconscionability and fraud were separate and independent grounds for restraining a call on a performance bond, the contractor's case turned on showing strong *prima facie* proof of unconscionability.[24] The learned judge noted that unconscionability has been described as involving abuse, unfairness or dishonesty or "conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party".[25] The existence of genuine disputes and mere breaches of contract do not amount to unconscionable conduct,[26] but:[27]

> … where it can be said that the beneficiary under the performance bond did not honestly believe that the obligor whose performance is guaranteed by the bond has failed or refused to perform his obligations, the court may find that a demand was made dishonestly and in bad faith.

Crucially, the learned judge made the point that the court was not required to decide on the substantive entitlements of the parties or to engage in a protracted consideration of the merits of the substantive disputes between the parties.[28]

7.12 A similar finding was reached by the High Court in *AES Façade Pte Ltd v Wyse Pte Ltd*.[29] In that case, a façade subcontractor was successful in its adjudication application lodged against the contractor

24 *Milan International Pte Ltd v Cluny Development Pte Ltd* [2018] SGHC 33 at [29].
25 *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5].
26 *Milan International Pte Ltd v Cluny Development Pte Ltd* [2018] SGHC 33 at [29].
27 *Milan International Pte Ltd v Cluny Development Pte Ltd* [2018] SGHC 33 at [30].
28 *Milan International Pte Ltd v Cluny Development Pte Ltd* [2018] SGHC 33 at [31].
29 [2018] SGHC 163.

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under the Building and Construction Industry Security of Payment Act[30] ("SOP Act"). It was awarded a sum of $1,077,151.37. The contractor commenced arbitration proceedings bringing a counterclaim for $1.55m in liquidated damages and also called on the performance bond for the full guaranteed sum of $496,500.00. The subcontractor applied to restrain the call on the ground that it was unconscionable, alleging that the contractor's call on the bond was an unfair attempt to "claw back" the moneys paid out following the adjudication determination. It relied on the abruptness of the contractor's call on the bond some 19 months after the subcontract completion date. Lee Seiu Kin J reviewed the principles as settled by the leading authorities and summarised these as follows:[31]

> (a) First, while the boundaries of unconscionability cannot and should not be precisely delineated, it is generally uncontroversial that the concept covers acts involving abuse, unfairness and dishonesty.[32]
>
> (b) Second, the essence of unconscionable conduct is "conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party".[33]
>
> (c) Unconscionability extends to facts not amounting to a finding of fraud, and as such is broader than the notion of fraud.[34]
>
> (d) Whilst unfairness is an important consideration in determining unconscionability, not every instance of unfairness would amount to unconscionability.[35]
>
> (e) Further, the existence of genuine disputes between the parties is not sufficient *per se* to constitute unconscionability.[36]
>
> (f) The threshold for establishing unconscionability is a high one, the burden being on the applicant to demonstrate a strong *prima facie* case.[37]

30 Cap 30B, 2006 Rev Ed.
31 *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [17].
32 *BS Mount Sophia Pte Ltd v Join-Am Pte Ltd* [2012] 3 SLR 352 at [35]–[38].
33 *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5].
34 *BS Mount Sophia Pte Ltd v Join-Am Pte Ltd* [2012] 3 SLR 352 at [23].
35 *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [30].
36 *BS Mount Sophia Pte Ltd v Join-Am Pte Ltd* [2012] 3 SLR 352 at [42]; *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [32]; *LQS Construction Pte Ltd v Mencast Marine Pte Ltd* [2018] 3 SLR 404 at [32].
37 *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] 5 SLR 640 at [18].

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7.13 Applying these principles, the court held that the subcontractor had not proven a strong *prima facie* case of unconscionability on the contractor's part.[38] He considered it relevant that the contractor had been consistent in asserting its right to liquidated damages under the subcontract.[39] On the argument that the call on the bond was an attempt by the contractor to claw back the adjudicated amount paid to the subcontractor, the learned judge was satisfied that the totality of the evidence before him was insufficient to support this depiction.[40] Finally, on the timing of the call on the bond, Lee J considered that it was not for the court to assess whether this was a prudent or reasonable legal strategy.[41] In the circumstances, the court concluded that the subcontractor failed to advance a strong *prima facie* case that the main contractor had made the call on the performance bond unconscionably and dismissed the subcontractor's application.[42]

Arbitration – Stay application

7.14 In *Yau Lee (HCR)*,[43] the High Court considered the extent to which the arbitrability of a matter has to be established to support an application of a stay. This decision was considered earlier in relation to the validity of architect's certificates. In that case, the employer commenced proceedings to claim liquidated damages relying on the architect's delay certificate and further delay certificate. the contractor applied for a stay of proceedings. The court had to consider whether there existed a dispute which could properly be referred to arbitration[44] and this turned on the test to be applied to determine this issue. The learned assistant registrar, Elton Tan AR, dismissed the employer's submission that, in these cases, the applicant has to satisfy the court of the existence of such a dispute by establishing a "*prima facie* defence" and not merely the existence of a "*prima facie* dispute":[45]

> [T]he Plaintiff's argument ultimately confuses a question of jurisdiction with a question of merits and ignores the fact that an employer's entitlement to enforce architect's certificates by way of summary judgment ultimately arises out of an agreement between the parties of which an arbitration clause is also part.

38 *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [24].
39 *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [25].
40 *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [26].
41 *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [27].
42 *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [30].
43 See para 7.5 above.
44 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [27].
45 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [32].

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7.15 The applicable approach to determining the existence of a dispute to be referred to arbitration depends on whether one is considering a stay application under the Arbitration Act[46] ("AA") or the International Arbitration Act.[47] ("IAA"). In the context of the IAA, the Court of Appeal had held that it is "sufficient for a defendant to simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration".[48] In a situation to which the AA applies, the consideration is whether the claim is "undisputed or indisputable".[49] In the context of the case before him, Tan AR thus considered that the operative question is whether the employer's claim can be said to be undisputed or indisputable.[50]

7.16 The applicant of the stay bears the burden of establishing the existence of a "*prima facie* case of disputes". This cannot be demonstrated on the basis of "mere allegations" but has to be backed up by "credible evidence".[51] Once the applicant sets up this *prima facie* case of a dispute, the burden shifts to the other party to satisfy the court that there is "*sufficient reason*" why the matter should not be referred in accordance with the arbitration agreement. The learned assistant registrar accepted that an examination of whether a claim is "indisputable" necessarily involves some inquiry into the merits of the claim.[52] He referred to *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd*,[53] where the inquiry entailed the examination and interpretation of the subcontract, which led the court to reject the defence in relation to one set-off notice and to *Chin Ivan v H P Construction & Engineering Pte Ltd*,[54] where the court considered whether the disputed architect's certificates had been issued in accordance with the SIA Conditions. The quality of the parties' cases was therefore "inarguably and inescapably put in issue" in determining whether the claim was "indisputable". However, with respect to the manner in which the merits review is carried out, namely, the degree to which the court will examine the quality of the claim, the court will not "embark on an examination of the

46 Cap 10, 2002 Rev Ed.
47 Cap 143A, 2002 Rev Ed.
48 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [33] and [34], citing *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [49].
49 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [38], citing *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595 at [15].
50 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [53].
51 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [54].
52 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [57].
53 [2005] 2 SLR(R) 530.
54 [2015] 3 SLR 124.

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validity of the dispute as though it were an application for summary judgment" and will instead adopt a "holistic and common sense approach to see if there is a dispute".[55]

Fitness for purpose

7.17 Issues with "fitness for purpose" are increasingly encountered within the construction industry in the light of an increasing proportion of construction works which are placed on a design and build basis. In *Millenia Pte Ltd v Dragages Singapore Pte Ltd*[56] ("*Millenia*") the High Court stated the principles of liability, which are as follows:[57]

> A warranty of fitness for purpose is readily implied where three conditions are fulfilled …[58]
>
> (a) 'the employer makes known to the contractor the particular purpose for which the work is to be done';
>
> (b) 'the work is of a kind which the contractor holds itself out as performing'; and
>
> (c) 'the circumstances show that the employer relied on the contractor's skill and judgment in the matter'.

7.18 The court considered that in this case all three conditions were met for liability for fitness for purpose to attach to the contractor. First, the contractor knew that the building was to be an office building since this was clearly stated in the first recital to the subject contract. Secondly, the contractor held itself out as a party who designs and builds office buildings. Thirdly, the court found that the developer plainly relied on the contractor's exercise of care and skill in designing and constructing the building.

7.19 Relevantly, Quentin Loh J held that the warranties for fitness in this case extended to ensuring that the building would be able to withstand foreseeable vibrations generated by construction activity, in particular, the construction of the Mass Rapid Transit works. This activity should have been accounted for in the design and construction of the building.[59]

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55 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHCR 11 at [58].

56 [2018] SGHC 193.

57 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [409].

58 Citing from Stephen Furst & Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2016) at para 3-078.

59 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [415].

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Security of payment

7.20 In 2018, the number of adjudication applications made pursuant to the SOP Act rose by 20% to 481 cases. The year also saw the passage of the Building and Construction Industry Security of Payment (Amendment) Act 2018.[60] The minister has yet to announce the date when the amendments introduced are to take effect.

Service of a payment claim on a specified day

7.21 During the year under review, several matters arising from the decisions of the High Court on setting-aside applications were the subject of appeal.

7.22 The decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*[61] ("*Audi*") had been considered in the 2017 volume of the Ann Rev,[62] but it may be useful to briefly recall that the decision relates to the operation of terms in a contract prescribing the date of service of a payment claim. More specifically, it was held in that case that where the contract provides for the service of a payment claim on a specified date, in the absence of any "good reason" for serving the claim before that date, a premature service would invalidate the payment claim.[63] In that case, the Court of Appeal decided that the payment claim served two days before the specified day was valid because the claimant had a good reason for effecting service as it did and there was no confusion as to the operative date of the payment claim.[64]

7.23 The "good reason" test, as propounded by the Court of Appeal in *Audi* on the construction of provisions for the service of payment claims, was applied by the High Court in *Benlen Pte Ltd v Authentic Builder Pte Ltd*[65] ("*Benlen*"). In this case, the relevant term provides for payment claims to be served on the "25th day" of every month. The subject payment claim was served by the subcontractor, Benlen, on 23 June 2017. Benlen argued that it had decided to serve the payment claim on 23 June 2017 because 25 June 2017 was a Sunday as well as a public holiday. Furthermore, it was not feasible for the payment claim to be served on 25 June 2017 as the main contractor's office premises were closed on that day. Chan Seng Onn J held that the payment claim had

60 Act 47 of 2018.
61 [2018] 1 SLR 317.
62 (2017) 18 SAL Ann Rev 131.
63 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [23].
64 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [26].
65 [2018] SGHC 61.

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been invalidly served. In the course of his judgment, Chan J stated the proposition in *Audi* in the following terms:[66]

> [A] payment claim that was not served on a date stipulated in the parties' contract could be considered to have been validly served, even though it was served early, if: (a) the claimant had good reason for serving the payment claim early; and (b) the early service of the payment claim did not cause any confusion as to the payment claim's operative date.

7.24 In this case the learned judge accepted that Benlen had good reason to serve its payment claim two days ahead of the prescribed date.[67] However, he pointed out that in *Audi*, the claimant had dated its payment claim on 20 November 2016 even though it physically served the claim on 18 November 2016 and this:

> … made it clear and obvious to the respondent there that the applicant had intended for the payment claim to be treated as being served and operative only on 20 November 2016.

This was not the case with Benlen's payment claim. This payment claim was dated 23 June 2017 even though it was contractually required to be served on the 25th of every month. There was no evidence that Benlen had intended its payment claim to be operative from 25 June 2017.

7.25 The authors would add that the judgment in *Audi* also considered, *obiter*, the operation of waiver and estoppel in statutory adjudication. First, the Court of Appeal in *Audi* affirmed its earlier decision in *Grouteam Pte Ltd v UES Holdings Pte Ltd*[68] that a party may waive his right to object to a breach of a mandatory provision which would have gone towards the substantive jurisdiction of the adjudicator.[69] Crucially, the Court of Appeal in *Audi* agreed that it should depart from one of its earlier rulings in *Lee Wee Lick Terence v Chua Say Eng*[70] that an adjudicator cannot deal with jurisdictional challenges. On the previous reasoning for this ruling, the Court of Appeal in *Audi* said:[71]

> The reason is essentially that regardless of the adjudicator's decision on the jurisdictional challenge in question, either party may end up referring the issue to court for determination. Therefore, he should leave the issue to the court (*Chua Say Eng* at [36]). We note that the

66 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [36].
67 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [37].
68 [2016] 5 SLR 1011.
69 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [42] and [43].
70 [2013] 1 SLR 401.
71 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [50].

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> immediate context in which this was said concerned the jurisdiction an adjudicator has by virtue of being properly appointed, but it would seem that the reasoning applies equally in the context of an adjudicator's substantive jurisdiction. In any event, we respectfully depart from this reasoning. If the concern is that parties will end up in court anyway, it is surely important to ensure that they do not do so unnecessarily. Allowing the adjudicator to decide matters on his jurisdiction achieves that aim because it compels parties to ventilate their jurisdictional disputes at an early stage, which will give them an opportunity to resolve those issues and hopefully avoid the need to come to court.

Whether payment certificate was intended to serve as payment response

7.26 In *Sunray Woodcraft*,[72] a document in the subcontract referred to as "the TBE" provided for the main contractor to serve a payment certificate within 21 days from the receipt of a payment claim but made no mention of a payment response. Ang JC stated that there is no rule that a payment certificate could not be a payment response under the SOP Act:[73]

> It was clear to me that parties could agree that the payment response under the Act shall take the form of a payment certificate (see Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 6.32). The Act allows for a dual track regime whereby a claimant can make separate claims under the contract between the parties and under the Act, or make a claim that has both contractual and statutory force. In the same way, the respondent may provide separate responses pursuant to the contract and under the Act, or issue a response that has both contractual and statutory force (see *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 ('*Tienrui*') at [31]) …

7.27 The learned judge held that in this case parties must have intended the payment certificate to operate as a payment response under the SOP Act. First, he noted that the contract was not one which provided for a process of certification of payment by an architect or an engineer. Instead, the parties appeared to envisage that the payment certificate was to be issued by the main contractor.[74] Secondly, he noted the conduct of the parties, specifically that in respect of all the payment claims before the subject payment claim, the main contractor had always

72 See para 7.2 above.

73 *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 at [55].

74 *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 at [58].

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responded by issuing payment certificates and never by way of a payment certificate followed by a payment response. Each of these payment responses was issued on an average of 24.5 days and satisfied the statutory requirements of a payment response as set out in s 11(3) of the SOP Act:[75]

> Each 'payment certificate' clearly identified the payment claim to which it related and stated the response amount in a table form. The format of the 'payment certificate' also made clear, in my view, that the difference between the response amount and that claimed was due to a difference in valuation. The Act and its regulations do not require any more than that. I also noted that the 'payment certificates' were almost always titled 'payment response sheet'.

Waiver and estoppel

7.28 An important aspect of the decision of the Court of Appeal in *Audi*[76] concerns the operation of waiver and estoppel in relation to a respondent's jurisdictional and procedural objections. Steven Chong JA had stated in his judgment that the contract and the SOP Act define the rights of the parties in adjudication in relation to each other[77] and the doctrine of waiver and estoppel applies to these rights:[78]

> The respondent, upon realising that the payment claim is invalid, acquires the power to change his rights in relation to the claimant by objecting to the validity of the payment claim. If the respondent exercises that power by raising that objection in a payment response, he establishes for himself the right to raise that objection before a tribunal or a court as a ground for not having to make payment to the claimant. If, however, the respondent elects not to exercise that power by failing 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; indeed, he will have lost the opportunity to establish that right by the time the payment response should have been filed, 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.

7.29 The result of *Audi* is that if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response. This construction of s 15(3)(*a*),

75 *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 at [61].

76 See para 7.22 above.

77 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [62].

78 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [63].

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namely, that a respondent has a duty to raise jurisdictional objections in his payment response, is entirely in line with the purpose of the Act.[79]

7.30 In *Benlen*,[80] applying the decision in *Audi*,[81] the High Court considered that the main contractor in that case was obliged under s 15(3)(*a*) to point out the defect in the date of service of payment claim in its payment response, but it failed to do so. Accordingly, the main contractor had waived its right to object to Benlen's invalid service of the payment claim.[82] The High Court held that while the payment claim in that case had been invalidly served, the main contractor had waived its right to object to the validity of the service of the payment claim. The main contractor is thus estopped from raising this objection before the court and its setting-aside application was therefore dismissed.

7.31 The same issue arose before the court in *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd*[83] ("*Yau Lee (HC)*"), the second of the two cases involving these same parties heard during the year. At the heart of this case was a payment claim referred to as PC 75. This was served on 24 November 2017, after the issuance of the final certificate on 5 September 2017. In response, the architect issued a letter dated 24 November 2017 reiterating that no further progress payments shall be issued following the issuance of the final certificate ("the Architect's Letter"). The developer failed to file a payment response. In the ensuing adjudication proceedings, the adjudicator found for the contractor. Before the High Court, the employer argued, *inter alia*, that PC 75 did not fall within the purview of the SOP Act. The developer sought to distinguish its case from that in *Audi* on the basis that in *Audi*, the payment claim was invalid by virtue of non-compliance with the mandatory provisions of the Act, but here the payment claim was alleged to be invalid as it fell outside of the Act.

7.32 Lee Seiu Kin J dismissed the developer's submission. He considered that the Court of Appeal in *Audi* had clearly stated that the duty to speak arises in relation to any jurisdictional objection to a payment claim. The developer's objection to PC 75, however classified, would fall within this broad scope where there is a duty to speak. This is because s 15(3)(*a*) of the SOP Act restricts the issues which can be raised before an adjudicator to issues stated in the payment response.[84]

79 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [66].
80 See para 7.23 above.
81 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317.
82 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [66].
83 [2018] SGHC 261.
84 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHC 261 at [36]–[37].

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7.33 Furthermore, the learned judge held that the developer's duty to speak was not discharged by the Architect's Letter. He noted:[85]

> The architect's letter did not state that the response amount was 'nil' and did not provide the reason for this. Although the letter alluded to a 'Final Certificate' and 'no further progress payment' after that, it is necessary for a respondent in a payment response to state its contractual position clearly in this kind of situation. In the circumstances, the architect's letter of 24 November 2017 could not constitute a payment response under the SOPA.
>
> I also rejected the developer's alternative submission that it need not object to PC 75 through a payment response, but may object through correspondence. Section 15(3)(*a*) of the SOPA (see [37] above) restricts the issues which can be raised before an adjudicator to those stated in the payment response and thereby renders it necessary for the respondent to include its jurisdictional objection in its payment response in order to raise it before the adjudicator. It was thus insufficient for the developer to raise objections through correspondence between the parties.

Operation of s 17(3) of the SOP Act

7.34 During the year under review, the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*[86] ("*Comfort Management*") clarified the operation of s 17(3) of the SOP Act, the concept of "patent errors" and the standard of persuasion which applies to statutory adjudication in Singapore.

7.35 It has been settled that, on the terms of s 17(3) of the SOP Act, an adjudication determination shall be set aside if it is shown that there has been a breach of a mandatory provision under the SOP Act. A mandatory provision is described as a provision that is so important that it is the legislative purpose that an act done in breach of that provision should be invalid.[87] In *Comfort Management*, the facts concern a subcontractor's payment claim which set out four heads of claim: (a) variation work; (b) cost of materials delivered and used; (c) payment of the balance contract sum; and (d) release of the retention sum. The main contractor did not file a payment response and the subcontractor made an adjudication application under the SOP Act, following which

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85 *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHC 261 at [43]–[44]. The developer's appeal against the High Court decision was heard and allowed by the Court of Appeal on 26 March 2019. The Court of Appeal has indicated that it will be releasing its grounds of decision to clarify the scope of the duty to speak in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*.

86 [2018] 1 SLR 979.

87 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [45].

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the adjudicator awarded the subcontractor the amount claimed. The main contractor applied to set aside the adjudication determination on the ground that the adjudicator had breached s 17(3) of the Act in failing to consider terms in the subcontract requiring that variation orders be made in writing. The main contractor alleged that the subcontractor failed to produce evidence of written variation orders and argued that this constituted a patent error in the payment claim. The High Court dismissed the application to set aside the adjudication determination and this decision was upheld on appeal.

7.36 The Court of Appeal accepted the proposition that an adjudicator has to ensure that an adjudication application is determined in accordance with the requirements of s 17(3) of the SOP Act. Section 17(3) prescribes the matters that an adjudicator must consider in determining an adjudication and restricts his consideration for that purpose to those matters only. The court considered that the matters listed in s 17(3) are matters that Parliament could not have intended that an adjudicator is entitled to ignore. Steven Chong JA said:[88]

> Leaving aside the scenario where a matter is not physically before the adjudicator (*e.g.*, a payment response, because the respondent failed to file one), nothing in the wording of s 17(3) suggests that some matters under s 17(3) must be considered by the adjudicator while others may but need not be … We therefore hold that s 17(3) both prescribes the matters that an adjudicator must consider in adjudicating a payment claim dispute and *restricts* his consideration for that purpose to only those matters set out in that provision. [emphasis in original]

7.37 Nevertheless, the court recognised that there is a conceptual tension between an adjudicator's duty to consider the prescribed matters under s 17(3) and his duty under s 15(3) not to consider reasons a respondent has for withholding payment unless those reasons have been included in a duly filed payment response. The court referred to its earlier decision in *W Y Steel Construction Pte Ltd v Osko Pte Ltd*[89] ("*W Y Steel*"), which had approved the analysis taken by the New South Wales Supreme Court in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd*[90] and considered that the adjudicator has a duty to adjudicate and this duty to adjudicate cannot depend on whether a payment response is filed or not. The court proceeded to explain that this means that the adjudicator must address his mind to the true merits of the claim, and must at a minimum determine whether the construction work in the payment claim has been carried out and, if so, what its value is.[91] Furthermore, on a proper construction of s 16(3)(*a*) when read with

88 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [30].
89 [2013] 3 SLR 380.
90 [2006] NSWSC 13.
91 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [54].

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s 16(3)(*b*), it is clear from the scheme of the Act that an adjudicator must have at least some positive basis for his determination and not simply lack a reason not to allow the claim.[92]

7.38 Section 17(3) is therefore clearly a mandatory provision in that it prescribes as well as restricts the matters which an adjudicator must consider. Compliance with s 17(3) is thus integral to an adjudicator's duty to adjudicate.[93] Chong JA considered that the absence of writing did not automatically disentitle a party from being paid for work done under a variation order even if the contract requires a variation to be ordered in writing. Therefore, even where the subject contract contains such a requirement and even where the subcontractor in this case did not produce evidence of such writing, this does not mean that the adjudicator failed to have regard to the parties' contract.[94]

Patent errors

7.39 In *Comfort Management*, the court agreed that the concept of a patent error in the context of adjudication under the Act appears to be a unique development in Singapore, which was first employed in their decision in *W Y Steel*.[95]

7.40 In delivering the grounds of decision of the Court of Appeal, Steven Chong JA considered that a patent error is an obvious or manifest error in the material before an adjudicator and not an error committed by an adjudicator:[96]

> In essence, a patent error is an error that is obvious, manifest or otherwise easily recognisable. It refers to an error that is in the material that is properly before an adjudicator for the purpose of his adjudication. It is therefore strictly not an error that is committed by an adjudicator. That type of error would be an error in his decision-making. But the expression 'patent error' is not used in this context to refer to an error of that sort. It instead refers to an error in the material before an adjudicator when he is making his decision.

7.41 Examples of patent errors are where the wrong contract was adduced in support of the payment claim, documentary evidence that plainly contradicted the claimed amount and the absence of any

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92 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [56].
93 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [77].
94 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [89] and [91], citing with approval Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 4th Ed, 2012) at para 5.25.
95 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [79].
96 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [22].

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material or explanation to support the payment claim. Patent errors are therefore an exceptional and extremely narrow category of errors.[97]

7.42 However, the perspective of looking for patent errors is the wrong perspective for an adjudicator to start from because his central task is to ascertain whether the claim before him is justified, and not simply whether it is unsustainable.[98] Chong JA states four points on the proper role of the concept of patent error in the context of a court's review of an adjudication determination. First, the question of whether there are patent errors is the decisive test for whether the adjudicator has breached his duty under s 17(3). The learned judge explains that:[99]

> … [t]he theory behind this test is a simple process of inference. When a court looks at a payment claim that has been allowed, and sees that the payment claim or its supporting materials contain patent errors, the court will draw the inexorable inference that the adjudicator failed to recognise those errors. In failing to do so, he must therefore have failed to have regard to the matters under s 17(3), in contravention of his duty under that provision. In other words, if he had fulfilled that duty, he would have recognised the patent errors in question, and in the light of those errors, he would not have been satisfied that the claimant had established a *prima facie* case for the completion or value of the construction work which is the subject of the payment claim. He would therefore not have allowed the claim if he had applied his mind to it.

7.43 Second, the question of whether there are patent errors is the central analytical tool for ascertaining whether the adjudicator has breached his duty under s 17(2), which is principally to determine the adjudicated amount. The situation envisaged is where it is clear that an adjudicator could not have arrived at the adjudicated amount if he had recognised alleged patent errors in the material properly before him.[100]

7.44 Third, it follows from the two preceding points that the existence of patent errors will lead to the conclusion that the adjudicator has breached his duty to adjudicate, that is, his duty to be satisfied on a *prima facie* basis of the completion and proper value of the construction work which forms the subject of the payment claim. This is because that duty essentially comprises an adjudicator's obligations under ss 17(2) and 17(3). Apart from cases in which the adjudicator is clearly shown to have simply rubber stamped the payment claim, a court will not readily draw the conclusion that he abdicated his duty to adjudicate in the absence of patent errors in the material properly before him.[101]

97 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [23].
98 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [59].
99 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [81].
100 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [82].
101 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [83].

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7.45 Fourth, the question of whether there are patent errors may serve as an analytical tool for ascertaining whether other mandatory provisions relating to the adjudicator's conduct have been breached. An adjudicator's failure to recognise a patent error might, for example, together with other circumstances, support the inference that the adjudicator, in allowing the claim nonetheless, had failed to act in an impartial way, thus contravening s 16(3). However, when and whether such an inference will be made will, of course, depend on the specific facts of the case.[102]

Standard of persuasion

7.46 The Court of Appeal in *Comfort Management* agreed with the proposition that for the purposes of the SOP Act it is more accurate to employ the term "standard of persuasion" to reflect the nature of the standard which the adjudicator has to be satisfied before he allows a claim.[103] Considering that an adjudicator is not simply to look for patent errors but to identify a positive basis for the claim, and that he also does not have to assess proof on a balance of probabilities, the court agreed with the Law Reform Committee that the scheme of the Act requires the adjudicator to be satisfied that the claimant has established at least a *prima facie* case for his claim.

7.47 A crucial issue in *Comfort Management* was whether the adjudicator had applied the wrong standard of persuasion. The court held that the adjudicator had not. Adjudicators will find this part of the court's analysis to be invaluable. Chong JA noted that the adjudicator had prefaced his analysis by stating that notwithstanding the absence of a payment response or an adjudication response, he would not "merely rubber stamp a claim".[104] The court considered that that was a brief but correct statement of the adjudicator's duty to adjudicate.

7.48 On this basis, the Court of Appeal considered that the adjudicator did not fail to recognise patent errors in any of the four heads of claim in the payment claim. The court found that he had considered all the material which had been adduced in support of each head, and had a positive basis for accepting all of them.[105] On the claim relating to the variation order, it was held that the absence of writing did not automatically disentitle a party from being paid for work done under a variation order even if the variation was required by the relevant

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102 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [84].
103 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [63].
104 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [86].
105 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [87], [91], [99], [101] and [102].

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contract to be made in writing. Therefore, even though the parties' contract did contain such a requirement, and even though the respondent did not produce evidence of such writing, that did not mean that the adjudicator had failed to have regard to the parties' contract or that he would have recognised a patent error had he done so.[106]

7.49 On the claim for cost of materials delivered and used, the court noted that the subcontractor had stated in the payment claim: "Materials ordered at your instructions and delivered to site which have been used by your …" The court considered this to be a "specific factual assertion" by the subcontractor. The main contractor, having failed to file a payment response, was precluded from denying this statement. Chong JA considered that, in this situation, it could not be said that there was a patent error in respect of the claim for cost of materials which the adjudicator failed to consider.[107]

7.50 On the claim for the balance contract sum and the retention sum, the court was satisfied from the record in the adjudication determination that the adjudicator did consider the evidence for these two claims. The court further considered that even if the adjudicator had erred as to the relevance and sufficiency of the evidence, "that is at most an error of substance which the court will not review".[108]

Cross-contract set-offs

7.51 In *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd*,[109] a subcontractor was employed to supply labour by the same main contractor for two separate construction projects, referred to as "T211" and "C933". The respondent did not dispute a payment claim submitted by the subcontractor in respect of T211. However, the main contractor sought to set off this claim on the basis that the subcontractor had made false and fraudulent payment claims in respect of C933. The payment claim in respect of T211 was referred to an adjudicator who held that the respondent could not set off a counterclaim based on another contract between the parties. The High Court dismissed the application of the respondent to set aside the adjudication.

7.52 The Court of Appeal upheld the decision of the High Court. The Court of Appeal considered that s 17(3)(*b*) provides for the adjudicator to consider only one contract, the "Payment Claim

106 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [88]–[90].
107 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [97].
108 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [102].
109 [2018] 1 SLR 584.

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Contract".[110] Sundaresh Menon CJ in delivering the grounds of decision of the court explained:[111]

> If Cross Construction Contract Claims were valid withholding reasons, an adjudicator would have to consider inspection results and expert reports pertaining to those claims; for example, in relation to claims for defective work. We did not accept this for two reasons. First, an adjudicator is appointed to determine a single payment dispute arising out of the Payment Claim Contract. In our judgment, appointment for this limited purpose is not consistent with the adjudicator having to review potentially extensive documentary material on claims arising under other contracts. Second, if an adjudicator were required to consider such material, this would add to the length of adjudication proceedings, and hamper the operation of the adjudication regime as a swift procedure for resolving payment disputes.

7.53 Menon CJ further considered that this finding is borne out by the definition of s 2 of the SOP Act, and the provisions for the claimant in s 10(1) of the Act, and reg 5(2) of the Building and Construction Industry Security of Payment Regulations.[112] He concluded:[113]

> These provisions concern progress payments and payment claims. They are significant because they indicate that for the purposes of a progress payment and a payment claim, only one contract is material: the Payment Claim Contract. Pertinently, a progress payment is the subject of a payment claim (see s 10(1) of the Act), which is in turn the subject of an adjudication under the Act (see s 12(1) of the Act). In this light, in our judgment, given that a progress payment and a payment claim centre on one contract, the Payment Claim Contract, the aforementioned provisions indicate that a SOPA adjudication also centres on that one contract. They thus suggest that the inquiry in a SOPA adjudication relates to the claimant's entitlement under the Payment Claim Contract, and not to its entitlement taking into account separate Cross-Contract Claims.

Scope of adjudication reference

7.54 In *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd*[114] the High Court had to consider whether in determining an adjudication application, an adjudicator is entitled to consider a sum received by the respondent arising from a call made on a performance bond. The adjudication arose from a subcontract for the supply of overhead cranes.

110 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [56(a)].
111 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [57].
112 Cap 30B, Rg 1, 2006 Rev Ed.
113 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [68].
114 [2018] SGHC 133.

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Pursuant to the terms of the subcontract, the subcontractor was required to furnish a demand bond in favour of the main contractor. Pursuant to a deed of assignment executed between the owner and the main contractor, the main contractor assigned to the owner all of its rights, title, interest and benefit under the subcontract, including the performance bond. Subsequent to the assignment, the owner terminated the subcontractor's employment and made a call on the bond. The subcontractor's application for an injunction to call on the bond was dismissed by the High Court and the bond proceeds were duly paid to the owner.

7.55 The subcontractor served a payment claim for the sum of $4,250,683.08. The main contractor answered the claim with a payment response for a negative sum of $15,63,770.47 which response amount included the bond proceeds received by the main contractor. In the ensuing adjudication, the adjudicator determined an adjudicated amount which included the bond proceeds. The main contractor applied for the adjudication determination to be set aside, alleging that the adjudicator had acted in excess of his jurisdiction by taking into account the bond proceeds in assessing the adjudicated amount because in so doing it amounted to the adjudicator allowing a cross-contract set-off.

7.56 The High Court dismissed the main contractor's application to set aside. Tan Siong Thye J held that the accounting for the bond proceeds in assessing the adjudicated amount is not akin to a cross-contract set-off. Tan J pointed out that both the payment claim and the adjudication application were made on the basis of matters that had arisen out of the subcontract. The performance bond was meant to operate as a form of security to guarantee the subcontractor's due performance of the subcontract and the main contractor's entitlement to retain the bond proceeds was a matter specifically regulated by the subcontract.[115] Notwithstanding that the performance bond was captured in a separate contract document, it was an integral part of the subcontract and not a separate contract between the parties.[116]

7.57 The main contractor also argued that the bond proceeds were received by the owner; therefore, it was the owner that should be liable to account for them. Tan J dismissed this argument. He stated:[117]

> Although it was the Owner that had called on the Performance Bond and received the Bond Proceeds, in substance it was the Plaintiff that had benefitted from the Performance Bond. As the Plaintiff and the Owner are two unrelated and separate entities involved in the

115 *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 at [42].
116 *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 at [43].
117 *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 at [44].

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> Development, it can be inferred that the deed of assignment must have been done for some consideration. This is especially so since the Owner called on the Performance Bond on the same day as the deed of assignment. The Plaintiff's counsel, upon query from the court, confirmed that the deed of assignment was not gratuitous but was for the Plaintiff to square-off some of the Plaintiff's outstanding liabilities with the Owner. Therefore, notwithstanding that it was the Owner that had ultimately received the Bond Proceeds, I am of the view that this does not absolve the Plaintiff of its liability to account for them. After all, the Owner would not have been able to call on the Performance Bond without the Plaintiff's deed of assignment.

7.58 In any case, the main contractor had accounted for the bond proceeds in its payment response. The adjudicator not only had the jurisdiction to account for the bond proceeds but was also statutorily obliged to account for them.[118]

Breach of natural justice

Application of wrong standard of persuasion

7.59 As the industry becomes more familiar with procedural issues relating to the statutory, applications for the setting aside of adjudication determinations are frequently made on allegations of breach of natural justice. In *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd*,[119] the main contractor of a residential development employed a subcontractor to carry out aluminium and glazing works, which included the shower screens of the bathrooms. Shortly after the completion of the works in October 2016, the sliding doors in the shower screens of at least eight residential units shattered. The developer's architect considered that the shattering was caused by (a) the absence of a 30mm buffer between the edge of the screen; and (b) the fact that the rollers in the aluminium tracks allowed the screens to slide without any restraint.

7.60 In response to the subcontractor's payment claim, the main contractor served its payment response in which it back-charged for medical expenses arising from the shattering and the costs of remedial works carried out. In its adjudication application, the claimant accepted some of these back-charges but disputed the back-charge for costs arising from the shattered shower screens. One of the arguments raised by the subcontractor was that the main contractor had "produced insufficient evidence" to show that the subcontractor was responsible for

118 *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 at [50].
119 [2018] 2 SLR 1311.

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the shattered screens.[120] The subcontractor submitted that the main contractor had failed to meet its "burden of proof" and that in any case this set-off required a "fact-intensive investigation and expert evidence on the issues", and such an exercise was unsuitable to be undertaken in proceedings under the SOP Act.[121] However, neither party proffered a test or standard against which the sufficiency of the evidence ought to be assessed (standard of persuasion).

7.61 The adjudicator found for the subcontractor. The main contractor applied successfully to the High Court to set aside the adjudication determination. A key ground of the application was that the adjudicator breached his obligation under s 16(3)(*c*) of the Act to comply with the principles of natural justice by failing to give the respondent an opportunity to address him on the applicable standard of persuasion.

7.62 In allowing the appeal, the Court of Appeal considered that any error which the adjudicator made regarding the applicable standard of persuasion did not amount to a breach of natural justice on the facts.[122] In the course of the judgment delivered on behalf of the court, Steven Chong JA affirmed the general proposition that it is a breach of natural justice for a decision-maker to determine a dispute on a point that the parties never had an opportunity to address.[123] However, Chong JA held that an omission to invite submissions on the applicable standard of persuasion or proof is not a breach of the fair hearing rule in this case because this is a situation where parties could reasonably have foreseen that the issue would arise but chose not to address the issue:[124]

> Indeed, it is a gross understatement to say that the parties could 'reasonably foresee' that the issue of the standard of persuasion would arise, or that the issue was 'reasonably connected' to arguments raised by the parties. Rather, the standard of persuasion was so integral and crucial to the adjudicator's very task of determining the dispute that there was no way he could have decided the dispute without coming to a position on the standard to be applied. In an adversarial decision-making process, it is inherently the remit of the decision-maker to

120 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [14], citing *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28 at [24].

121 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [17], citing *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28 at [31].

122 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [44].

123 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [52].

124 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [63].

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> assess the evidence against some standard of proof or persuasion. Therefore, the parties may well have been surprised by the view that the adjudicator formed as to the applicable standard, but they could not have been surprised that he had to form a view on this very point. [emphasis in original omitted]

7.63 Furthermore, the court also noted that, on the facts, the parties did engage each other as to the sufficiency of the evidence. Having regard to the submissions which were filed in connection with the adjudication, it should have been obvious to the parties that they had diametrically opposing positions regarding the sufficiency of the evidence, and that the standard of persuasion to be met was thus an issue of decisive importance.[125] In light of these facts the court considered that the parties must have realised, or ought to have realised, that the adjudicator would need to choose which of their submissions he would accept with regard to the keenly disputed issue of the back charge. This process would necessarily involve him applying some standard of persuasion. The court held that parties could not in the circumstances complain that the adjudicator applied the incorrect standard. The application of the incorrect standard may amount to an error of law but would not constitute a breach of natural justice.[126]

Failure to consider an issue raised by the parties

7.64 In *Bintai Kidenko Pte Ltd v Samsung C&T Corp*[127] the dispute arose from a subcontract for mechanical, electrical and plumbing works. The subcontractor had submitted a claim for the release of the first half of retention money of $2,146,250.00, against which the main contractor issued a negative response amount of $2,190,963.62. The subcontractor raised three issues in dispute: (a) the retention moneys; (b) the back-charges for scaffolding carried out during the project; and (c) the variation works that had been certified and paid in earlier payment responses but had been recalculated in the payment response. In the adjudication response, the main contractor addressed the same three issues, as well as an additional preliminary objection to the validity of the adjudication application. The adjudicator found in favour of the subcontractor. However, in his determination, the adjudicator only addressed the preliminary issue raised by the main contractor as well as the claim for the release of the first half of the retention moneys. He did not consider the back-charges and the variation works.

125 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [64].
126 *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [67].
127 [2018] 2 SLR 532.

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7.65 The Court of Appeal agreed with the High Court that the adjudication determination should be set aside on account of the adjudicator's breach of the rules of natural justice pursuant to s 16(3)(*c*) of the SOP Act. In delivering the grounds of decision of the court, Sundaresh Menon CJ laid down an important test to determine whether an adjudicator in failing to consider an issue in the dispute before him had acted in breach of natural justice:[128]

> In our judgment, the upshot of the foregoing survey of the relevant authorities is that an adjudicator will be found to have acted in breach of natural justice for having failed to consider an issue in the dispute before him only if:
>
> > (a) the issue was essential to the resolution of the dispute; and
> >
> > (b) a clear and virtually inescapable inference may be drawn that the adjudicator did not apply his mind at all to the said issue.

7.66 He further explained:[129]

> If the facts show that the issue was not essential to the resolution of the dispute at all, or that the adjudicator had considered the issue but had wrongly rejected the aggrieved party's submissions in respect of that issue, such an inference should not be drawn. This is especially so in the context of adjudications under the Act, where adjudicators do not have the luxury of time to craft immaculately reasoned adjudication determinations.

7.67 In this case the adjudicator had acted in breach of the fair hearing rule by failing to consider the two issues regarding the back-charges and variation works. Those issues were clearly essential to the resolution of the adjudication application and it was clear that the adjudicator did not apply his mind at all to the issues of the back-charges and variation works, but had in fact shut his mind to those issues.[130] The adjudicator's failure to consider those two issues was sufficiently material as to prejudice the main contractor because had the adjudicator properly considered these issues in coming to his decision, he could reasonably have found that the main contractor's response was valid, such that even if the subcontractor's claim for the release of the first half of the retention moneys were valid, the main contractor would still not be liable to pay the subcontractor any sum of money.[131]

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128 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [46].
129 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [47].
130 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [55].
131 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [62].

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Suspension of work – Meaning of "loss or expenses"

7.68 Where a respondent fails to pay the adjudicated amount determined by an adjudicator, the claimant may elect to suspend the carrying out of construction work pursuant to s 26(1) of the SOP Act. Section 26(3) of the SOP Act separately provides that where the claimant has properly invoked its right to suspend work, it is entitled to recover "loss or expenses" arising from the removal by the defaulting respondent of part or all of the works that are the subject of the suspension. These provisions constitute an important instrument in the statutory regime to compel a defaulting respondent to pay the adjudicated amount. Despite this, the operation of provisions in s 26 has not been hitherto considered in any decided case.

7.69 The construction industry should welcome the consideration of these provisions in *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd*.[132] The plaintiff in this case was a subcontractor of a hospital project (hereinafter referred to for convenience as "the contractor") who in turn sub-subcontracted the mechanical and electrical works to the defendant ("the subcontractor"). The subcontractor was successful before the adjudicator who awarded the subcontractor a sum of nearly $2.5m. The contractor attempted unsuccessfully to set aside the adjudication determination and the subcontractor suspended its works pending the payment of the adjudicated amount. During the period of suspension, the contractor carried out various testing and commissioning works as well as the installation of certain fan coil units. The subcontractor's position was that these works formed part of its works and by carrying out these works, the contractor had taken them out from the scope of the subcontract. As a consequence, it claimed the "full contract sum" of the omitted works on the terms of s 26(3) of the Act.

7.70 The learned assistant registrar noted that in invoking the right to suspend works in this situation, s 26(2) exculpates a claimant subcontractor from claims by the main contractor, principal or owner that might otherwise be brought against it for its decision to suspend works, but opens the respondent main contractor to potential claims from the principal or owner.[133] He observed:[134]

> Parliament's intention in so wording the section was two-fold: first, to draw a clear distinction between the risk exposures of sub-contractors and main contractors upon the exercise of the right to suspend; and second, to issue a warning to the latter group that they would have

132 [2018] SGHCR 15.

133 *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [32].

134 *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [33].

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> little to gain and potentially much to lose from failing to pay adjudicated sums promptly.

Together with s 26(3), both these two provisions contain an intricate allocation of parallel rights, defences and liabilities that support the primary right in s 26(1).

7.71 On the terms of s 26(3), the learned assistant registrar considered that the right on the part of the subcontractor to recover loss and expenses under s 26(3) cannot mean that the subcontractor is entitled to recover the full contract sum of the works removed. If this is so, it would mean that the subcontractor would essentially be able to obtain payment for work that it had not done.[135] It is clear that, following New South Wales authorities, the claimed "loss or expenses" must flow from the removal of the works in question. The proper measure of damages is the subcontractor's expectation loss or its reliance loss as described in *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd*.[136] For this purpose, "*expectation loss*" refers to the "value of the benefit that the claimant would have obtained but for the breach of contract" while "*reliance loss*" refers to the "costs and expenses the claimant incurred in reliance on the defendant's contracted-for performance, but which were wasted because of the breach of contract".[137] "Claims for expectation losses and reliance losses are generally alternative claims" because "a claim for profit is made on the hypothesis that the expenditure had been incurred".[138] Allowing a claim for the "full contract sum" for the omitted works would put the subcontractor in a better position than it would have been in if the subcontract had been wholly performed. The subcontractor would effectively be able to recover not only the profit that it expected to gain from the agreement (that is, its expectation loss) but also any costs that it had expended thus far in relation to the omitted works in order to secure those expected profits (that is, its reliance loss).[139]

7.72 Finally, Elton Tan AR considered that a claim for the full contract value would be inconsistent with the statutory intention of the SOP Act. The intention of s 26(3) of the SOP Act was to preserve the subcontractor's position during the period of suspension so as to sustain both the attractiveness and efficacy of the primary right to suspend. There was no intention to enhance the subcontractor's position beyond that.[140]

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135 *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [44].
136 [2016] 2 SLR 1056 at [23]–[24].
137 *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [50].
138 *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [50].
139 *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [51].
140 I-*Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15 at [55].

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Defects in buildings

Right of support – Rule in Xpress Print

7.73 The rule in *Xpress Print Pte Ltd v Monocrafts Pte Ltd*[141] ("*Xpress Print*") provides that a landowner has a non-delegable duty to not cause damage to his neighbour's land by excavating or otherwise removing his land without first securing additional means of support.

7.74 In *Eng Yuen Yee v Grandfort Builders Pte Ltd*,[142] an estate relied on the rule in *Xpress Print* in its claim for damage to its property arising from the construction of a neighbouring house and by the tilt of this house towards the subject property. The court found that the damage had been caused by the imposition of additional lateral load on the deceased's property, arising from the reconstruction of the defendants' house. The learned assistant registrar thus distinguished this case from that in *Xpress Print* because it did not concern damage caused by excavation of land or the removal of support *per se*.[143] On the facts, the plaintiff's application for summary judgment was thus dismissed.

7.75 The plaintiff submitted that the court should recognise a broad non-delegable duty on the part of the landowner not to cause damage to his neighbour's property, regardless of whether that damage is the result of excavations or other construction activities. Relying on *Ng Huat Seng v Munib Mohammad Madni*[144] where the Court of Appeal had refused to recognise an absolute duty on adjoining landowners not to cause harm to each other's property through construction activities, the learned assistant registrar declined to extend the rule in *Xpress Print*. It was further held that, as the law currently stands in Singapore, a landowner only owes a non-delegable duty to his neighbour in so far as damage is caused by an independent contractor excavating or otherwise removing the land, without first securing alternative means of support. That duty does not extend to damage caused by the imposition of an additional lateral load. Such claims would be governed by the tort of negligence. On the facts, the plaintiff's application for summary judgment was thus dismissed.

141 [2000] 2 SLR(R) 614.
142 [2018] SGHCR 1.
143 *Eng Yuen Yee v Grandfort Builders Pte Ltd* [2018] SGHCR 1 at [26].
144 [2017] 2 SLR 1074.

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Basis for determining damages for defects

7.76 A common issue in defects cases concerns whether damages should be determined on the basis of repair of the damaged component or the replacement of the whole damaged component. In *Millenia*,[145] one of the issues before the High Court was whether the plaintiff in that case was entitled to claim only the cost of rectifying a section of the defective building façade or whether it should be entitled to claim the cost for the recladding of the entire façade. The court referred to *Ng Siok Poh v Sim Lian-Koru Bena JV Pte Ltd*[146] and affirmed that the "governing principle" to be applied is that of reasonableness.[147]

7.77 In advancing their respective cases, parties called a total of 16 expert witnesses on subjects such as façades, vibrations, geotechnical engineering, structural dynamics and quantum aspects. Quentin Loh J accepted that reliance on expert advice was relevant to the question of whether the claimant had acted reasonably in putting into effect a particular remedial scheme. He also approved the caveats on this point as stated in the English decision of *McGlinn v Waltham Contractors Ltd (No 3)*:[148] (a) such advice will not be sufficient in every case to establish reasonableness; and (b) it is not necessary to prove professional negligence by the expert in putting into issue the reasonableness of the decision.[149]

7.78 In this case, the learned judge considered it was relevant in this case that rectification had been attempted but substantially failed.[150] There is the likelihood that any remedial scheme could damage adjacent panels, which would in turn need to be assessed and rectified.[151] Loh J also had "serious reservations over whether any method of rectifying the defects short of a full reclad would have ensured the safety of the Façade":[152]

> The risk of one more panel falling off the Façade was simply not acceptable … If, as I have concluded, the risk of another panel falling off the Façade could not have been eliminated without a reclad, then a reclad, in my judgment, was not only reasonable but the only justifiable course.

145 See para 7.17 above.
146 [2018] 2 SLR 417.
147 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [669].
148 [2007] EWHC 149 (TCC).
149 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [671].
150 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [677].
151 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [685(b)].
152 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [686].

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Liability in tort

Concurrent liability in contract and tort

7.79 The High Court in *Millenia* also affirmed that where parties have negotiated an obligation in contract to exercise care and skill in the exercise of his rights or duties, it is possible that an identical duty of care could exist in tort. The High Court in that case, following *Go Dante Yap v Bank Austria Creditanstalt AG*,[153] held that this was the situation with the contractor in respect of its liability for the damaged panels which were the subject of the dispute in that case.[154]

Scope of consultants' tortious duties

7.80 A decision delivered by the High Court during the year provides an instructive analysis of consultants' duties in tort in what is basically a design and build contract.

7.81 In *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd*,[155] a shophouse owner contracted with a design and build contractor ("the contractor") to carry out renovation works on a conserved shophouse in Chinatown. The contractor in turn employed the architect and engineer to prepare various designs and plans for submissions to the authorities. As it turned out, parts of the shophouse were constructed in a manner which deviated substantially from the guidelines issued by the Urban Redevelopment Authority ("URA"). The URA refused to waive the deviations and, as a consequence, the owner was required to rectify the works. In the course of doing so, the owner incurred substantial costs and suffered a delay of more than three years. The owner sought compensation from the contractor, the architect and the engineer. The owner's case was that (a) the architect had failed to ensure that the drawings used for the renovation were consistent with each other; and (b) the engineer had failed to ensure that his structural drawings were consistent with the other drawings. The owner's case against the contractor was more prosaic and separable from the present subject. In the interest of space, it is not visited in these comments.

7.82 The High Court held that the architect and engineer had breached both their duties with respect to the design and preparation of drawings ("drawings duty") and their duty to supervise the works ("supervision duty"). The architect had breached the drawings duty because he failed to ensure consistency between the written permission

153 [2011] 4 SLR 559.
154 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [426]–[433].
155 [2018] SGHC 182.

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drawings and the structural drawings. Similarly, the architect breached the supervision duty because he failed to detect the deviation and failed to insist that the contractor rectify it in a timely manner, even though the architect knew that they did not comply with his own drawings.[156] The engineer had breached his duty when he failed to ensure that his structural drawings conformed to the written permission drawings. The engineer breached his supervision duty in failing to detect deviations that might affect the building's structural integrity and safety.[157]

7.83 The court referred to the test set out in seminal case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[158] ("*Spandeck*"). The *Spandeck* test comprises a preliminary or threshold question coupled with a two-stage test. The threshold question asks whether it was factually foreseeable that the plaintiff would suffer loss from the defendant's actions. The two-stage test considers at the first stage whether there exists sufficient proximity between the parties. At the second stage, it considers whether policy considerations prevent a duty of care from arising.

7.84 Both the architect and the engineer did not contest the factual foreseeability submission that a failure to discharge its duty to submit plans for approval by the relevant authorities and ensure that these comply with the statutory and regulatory requirements (drawings duty) would result in the owner having to bear rectification costs and a delay in completion.[159] On the issue of proximity (that is, the first stage of the *Spandeck* test), the court held that despite the fact that the owner did not have a contractual relationship with the architect and the engineer, on the evidence, both had, by their conduct, assumed responsibility for both the preparation of drawings and supervision. Although not by itself determinative, this was reinforced by the assumption of their respective roles as Qualified Person (Architectural) and Qualified Person (Structural).[160] The focus in these analyses is not on the degrees of separation but on whether the owner relied on the skill of the architect and engineer and, if it did, was reasonable in so doing.

7.85 On the second stage of the *Spandeck* test, the focus is whether policy considerations negate or limit the duty that is found to exist in

156 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [237].
157 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [242] and [243].
158 [2007] 4 SLR(R) 100.
159 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [63] and [107].
160 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [82], [83] and [124].

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the proximity stage.[161] The court held that in this case the analysis performed with respect to the issue of proximity suggested that there were no policy considerations that militated against a duty of care.[162] It dismissed the architect's submission that the owner's contractual arrangements set out a complete framework for liability of all of the professionals involved in the owner's project, and thus there was no scope for the architect to be found to have assumed responsibility to the owner, nor for the owner reasonably to have relied on the architect. The court rejected this submission since it had earlier found that the architect had assumed the duty of care and the owner had reasonably relied on the architect.[163] The engineer's case was that its role was related only to structural safety. The court considered that the engineer's duties went beyond the confines of ensuring structural safety and integrity and that the statutory regime did not militate against the engineer owing a duty of care in tort to the owner.[164]

Settlement agreements

7.86 During the course of a construction contract, parties may confer and resolve various differences and disputes between them and, when these are resolved, reduce the agreed terms in writing in what are termed "settlement agreements". In *Millenia*,[165] the High Court examined the operation of the settlement agreement in that case, specifically whether it was sufficient to discharge the developer's causes of action against the contractor and the consultants. The parties to the settlement agreement were the developer, the contractor and the façade subcontractor.

7.87 In the course of his analysis, Quentin Loh J referred to *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*,[166] where the Court of Appeal accepted that a settlement agreement generally has the effect of "[superseding] the original cause of action altogether".[167] However, Loh J also noted that the Court of Appeal in that case allowed that there may be situations where the settlement agreement may permit recourse to the original claim in the event of a breach of its terms. In these cases, if a

161 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [100].
162 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [104].
163 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [103]–[104].
164 *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 at [152]–[154].
165 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193.
166 [2017] 2 SLR 12.
167 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [152(c)].

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breach is subsequently committed, the innocent party may then proceed with the original claim.[168]

7.88 Quentin Loh J thus considered the position to be as follows:[169]

(a) The general effect of a settlement agreement is that the parties' causes of action prior to the conclusion of the agreement are discharged, and may not be revived upon breach of the agreement.

(b) Yet in some cases, the discharge of a party's causes of action is conditioned upon the counterparty's performance of its duties under the settlement agreement. The causes of action are not discharged upon the execution of the agreement but suspended pending performance.

(c) It must be clear that the parties intended that they might have recourse to their original claims for the settlement agreement to be construed to have the effect noted in [(b)] above. A settlement agreement will generally not be construed to have that effect unless it expressly provides for the original claims to be revived upon breach.

7.89 In *Millenia*, the relevant terms of the settlement agreement stated:[170]

> 25. ***Subject to the Parties' obligations under this Agreement, each Party hereby unconditionally and absolutely*** *discharges and releases the other* from all and any debts, claims, demands, liabilities, obligations, disputes, actions, proceedings, judgments or issues whatsoever *that each Party may now, in the past* ***or in the future*** *have* ***arising from or in connection with the [1st Fall], [Suit 480] and [Arup's 2004 Reports]***.
>
> 26. Nothing herein shall prejudice [Millenia's] right to bring any claim against Dragages and/or Builders Shop *arising out of or in respect of present and future defects,* ***where such defects have not been the subject of this Agreement***, nor shall this Agreement affect any rights [Millenia] may have against Dragages and/or Builders Shop arising out of any other breaches of the Contract, ***where such breaches have not been the subject of this Agreement.***
>
> [emphasis in original]

7.90 The court held that these terms expressly indicated that the discharge of the developer's causes of action was to be unconditional, and not conditioned upon performance by the contractor and the façade subcontractor of their duties under the settlement agreement.[171] They did not provide for the developer's causes of action to be revived on

168 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [154].
169 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [444].
170 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [445].
171 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [446(a)].

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breach by the contractor and the façade subcontractor of their duties under the settlement agreement.[172]

172 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [446(b)].

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