Aik Heng Contracts and Services Pte Ltd *v* Deshin Engineering & Construction Pte Ltd [2015] SGHC 293

Case Number	: Originating Summons No 432 of 2015 (Registrar's Appeal No 195 of 2015)
Decision Date	: 09 November 2015
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Ashok Kumar Rai (Chan Neo LLP) for the applicant; Tan Joo Seng (Chong Chia & Lim LLC) for the respondent.
Parties	: Aik Heng Contracts and Services Pte Ltd — Deshin Engineering & Construction Pte Ltd

Building and Construction Law – statutes and regulations

9 November 2015

Lee Seiu Kin J:

Introduction

1 This is one of the many applications that come before the court seeking to set aside an adjudication determination made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") for the adjudicator's purported breach of natural justice. This case nonetheless involves a somewhat novel application of well-established principles of judicial review in the sphere of adjudication determinations – to what extent can the refusal of an adjudicator to hear a respondent on matters which should have been addressed in a payment response (but were not) constitute a breach of natural justice?

Background

2 The respondent was the main contractor for a project titled "Proposed Erection of Condominium Development Comprising a Block of 5 Storey Residential Building with Attics (Total: 131 Units), Basement Carparks & Recreational Facilities on Lots 01732V 704778X MK 03 at West Coast Road (Clementi Planning Area)" ("the Project"). By a letter of award dated 12 February 2014 ("the Letter of Award"), the respondent appointed the applicant as a subcontractor for the "installation of aluminium, steel & glazing works" relating to the Project. The Letter of Award was signed and accepted by the applicant on 10 October 2014.

3 On 11 March 2015, the applicant served on the respondent a payment claim for the amount of $85,974.19, being the value of work done for which it had yet to be paid. However, no payment response was filed by the respondent, which was not legally represented at that stage. As a consequence, the applicant lodged Adjudication Application No 124 of 2015 on 1 April 2015. The adjudicator determined in favour of the applicant, stating at para 37 of the adjudication determination ("the Determination"):

> Based on the evidence before me, I find no reason to reject the Claimant's Adjudication Application and Payment Claim for the purpose of the Act. *In the absence of a payment response, I am bound not to consider any of the matters raised in the Adjudication Response*

[filed by the respondent] pursuant to s 15(3)(a) of the Act. [emphasis added]

4 The applicant then applied for leave to enforce the Determination pursuant to s 27 of the Act and O 95 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), which was granted by way of an order of court dated 14 May 2015 ("the Order"). In response, the respondent filed summons no 2720 of 2015 ("SUM 2720/2015"), seeking an order to set aside the Determination and in the alternative, that the enforcement of the Order be stayed pending the outcome of a concurrent claim by the respondent against the applicant in the District Court. The respondent's application in SUM 2720/2015 was dismissed by the assistant registrar ("the AR"), and it appealed against his decision on the following grounds:

(a) The AR had erred by not finding that the notice of intention ("NOI") was invalid and irregular, which would have meant that the adjudicator had no jurisdiction to adjudicate the claim.

(b) The AR had erred by not finding that the adjudicator had breached the principles of natural justice.

5 The respondent also applied before me, as it had done in SUM 2720/2015, for the enforcement of the Order to be stayed pending the resolution of its claim against the applicant in the State Courts. I dismissed the appeal and the respondent's application to stay the enforcement of the Order. These are the grounds of my decision.

The validity of the NOI

6 The respondent submitted that the adjudicator had no jurisdiction to adjudicate the dispute as there had been no valid service of an NOI, as required under s 13(2) of the Act. Section 13(2) states:

An adjudication application shall not be made unless the claimant has, *by notice in writing containing the prescribed particulars*, notified the respondent of his intention to apply for adjudication of the payment claim dispute. [emphasis added]

7 The "prescribed particulars" are set out at reg 7(1) of the Building and Construction Industry Security of Payment Regulations 2005 (Cap 30B, Reg 1, 2006 Rev Ed) ("the Regulations"), which is as follows:

7.—(1) Every notice of intention to apply for adjudication shall contain the following particulars:

(*a*) *the names and service addresses of the claimant and the respondent*;

(*b*) the date of the notice;

(*c*) the particulars of the relevant contract, comprising —

(i) the project title or reference, or a brief description of the project;

(ii) the contract number or a brief description of the contract; and

(iii) *the date the contract was made*;

(*d*) the claimed amount;

(*e*) the response amount (if any); and

(*f*) a brief description of the payment claim dispute.

[emphasis added]

8 The respondent argued that the NOI served by the applicant on it did not comply with regs 7(1)(*a*) and 7(1)(*c*)(iii), and there had therefore been no valid notification under s 13(2) of the Act. This, it argued, was because the NOI did not set out the date on which the subcontract was made or the service address of the respondent. The respondent, rightfully in my opinion, did not pursue the latter point in its written submissions beyond a passing mention, nor did it actively argue the point during oral submissions. As the applicant had pointed out, the address of the respondent was clearly set out above the subject heading in the NOI. There is nothing in the Regulations that requires that an address for correspondence must be explicitly stated to be a "service address".

9 As for the purported failure to set out the date on which the subcontract was made, the applicant disputed that there had been any breach of reg 7(1)(*a*). It emphasised that that while the NOI did not state the date the contract was made, that date being the date on which the Letter of Award was accepted, the NOI did state the date of the Letter of Award. In any case, it submitted that regs 7(1)(*a*) and 7(1)(*c*)(iii) are not "so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*" (emphasis in original): see *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*") at [67].

10 The respondent did not dispute that *Chua Say Eng* applied, merely contending that regs 7(1)(*a*) and 7(1)(*c*)(iii) were sufficiently important to warrant the setting aside of an adjudication determination whenever they were breached. It pointed to four reasons in support of its submission:

(a) Regulation 7(1) of the Regulations is prefaced with the word "shall", suggesting that the legislative intention must have been that all the requirements prescribed therein are essential requirements.

(b) The NOI is expressed in the Act to be a pre-requisite to an applicant's entitlement to submit an adjudication application.

(c) It had been determined in previous adjudication proceedings that a failure to comply with reg 7(1) will render an NOI invalid.

(d) The "date of the contract" is one of the prescribed particulars that must be included in an adjudication application, further underlining the importance with which it was viewed by the legislature.

11 In this regard, the applicant submitted that even if reg 7(1)(*a*) had been breached, no prejudice was caused to the respondent and it could not have been the legislative purpose to invalidate the NOI on this basis. It directed my attention to the decision of *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 ("*Australian Timber*"), in which Woo Bih Li J held that a payment claim found wanting in detail with respect to regs 5(2)(*c*)(iii) and 5(2)(*c*)(iv) of the Regulations was nonetheless valid. He stated at [78] and [80]:

78 Progress Claim No 9 was found wanting in detail with respect to regs 5(2)(*c*)(iii)–5(2)(*c*)(iv) of the [Regulations]. But this claim did fulfil the requirements in s 10(3)(*a*) of the Act and regs

5(2)(*a*), 5(2)(*b*) and 5(2)(*c*)(i)–5(2)(*c*)(ii) of the [Regulations]. Ordinarily, a respondent receiving a payment claim with some, but not all, of the details required under reg 5(2)(*c*) of the [Regulations] will have enough information at his disposal to decide on his next course of action. In this case, APCD could have issued a payment response denying that the Variation Works were done and/or stating that there was insufficient information relating to the Variation Works. *Put in another way, the lack of detail here did not in itself prejudice APCD in that it did not preclude a response from APCD.* It was under these circumstances that I did not think that it was the legislative purpose to invalidate Progress Claim No 9 for failing to comply with regs 5(2)(*c*)(iii)–5(2)(*c*)(iv) of the [Regulations].

…

8 0 *To hold Progress Claim No 9 invalid for breaching regs 5(2)*(c)*(iii)–5(2)*(c)*(iv) of the [Regulations] would not appear to be consonant with the ideals and purpose of the Act. It would be all too easy to invalidate a payment claim for a lack of detail.* In my view, the requirement to provide details in a payment claim is to facilitate the implementation of the adjudication scheme in the Act, but not to trip up claimants. It seems to me that the requirements to state the quantity of each item claimed and the calculations showing how the claimed amount is derived are only a guide for the claimant, since there are conceivably other important details to be submitted in a payment claim which are not expressly stated in reg 5(2)(*c*) of the [Regulations]. One example would be the location of the work done. It is pertinent to note here that reg 5(2)(*c*) of the [Regulations] states that details "including" … the ones stipulated therein should be set out in a payment claim. The details to be provided are therefore in no way exhaustively set out in reg 5(2)(*c*) of the [Regulations]. In view of this, it would seem incongruous that an omission to state, say, the quantity of the items claimed is fatal to the validity of a payment claim, whereas an omission to state the location where the work was done would not be fatal. It might be argued in response that the details expressly stipulated in reg 5(2)(*c*) of the [Regulations] have been legislatively determined to be more important and therefore warrant a difference in treatment. While I agree that the four limbs of that provision may arguably be said to have set out the more important details, I was not convinced, having regard to the important fact that the Legislature made the list set out in that provision only an inclusive list, that a failure to state the details in regs 5(2)(*c*)(iii)–5(2)(*c*)(iv) of the [Regulations] would invalidate a payment claim. …

[original emphasis omitted; emphasis added in italics]

12 I considered *Australian Timber* in *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689 ("*Progressive Builders*"), in which I held at [58] that a payment claim would only be invalidated for failure to comply with s 10(3)(*a*) of the Act where that failure impeded the adjudication process. While *Australian Timber* and *Progressive Builders* related to the validity of a payment claim and not a notice of intention under s 13(2) of the Act, in my view, that reasoning was equally applicable. It is one thing to suggest that a failure to notify a respondent under s 13(2) of the Act deprives an adjudicator of any jurisdiction to adjudicate the matter; it is another thing altogether to say that any deficiency whatsoever in that notice would render it invalid. There is no doubt that the service of a notice of intention under s 13(2) of the Act is a jurisdictional requirement. What founds the jurisdictional nature of the requirement under s 13(2), in the sense that the condition is essential to the existence of an adjudicator's determination, is that a respondent must know of the case he has to meet and be allowed to prepare his response. As pointed out in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 8.16:

The notice is clearly intended to alert the respondent that the adjudication application has been made to the authorised nominating body in order to enable the respondent to commence the

preparation of his case. It is important that this requirement is scrupulously complied with, given the demanding timeline of the ensuing adjudication. …

13 Analogous to what Woo J had held in respect of reg 5(2)(*c*) of the Regulations and what I had held in respect of s 10(3)(*a*) of the Act, I was of the view that the breach of reg 7(1)(*a*) *in the present case* (*ie*, stating the date of the Letter of Award and not the date of the acceptance) was a technical breach which was insufficient to invalidate the notification. The formal requirements in reg 7(1) were clearly intended to ensure that a respondent has sufficient notice under s 13(2) of the Act. As I had stated in *Progressive Builders* at [58], the Act, characterised by speed and informality, should not be countenanced by an excessively technical approach.

14 In the present case, counsel for the respondent conceded that the respondent was able to identify the subcontract in dispute, despite the fact that the date of the Letter of Award (and not the date the subcontract was made) was stated in the NOI. There was no doubt that it had, by way of the NOI, been notified of the applicant's intention to apply for adjudication of the payment claim dispute, and that it was able to prepare its substantive response accordingly. This reinforced my finding that breaches of this nature do not render a notice of intention invalid. I therefore rejected the respondent's submission on this ground.

The alleged breaches of natural justice

15 The respondent alleged two instances where natural justice was breached. First, it argued that the adjudicator had failed to properly adjudicate the claim by blindly endorsing the applicant's variation claims despite the absence of evidence of instructions from itself, and despite obvious errors in the supporting documents. These supporting documents referred to were copies of "timecards" signed by the respondent's representatives, the validity and authenticity of which were disputed by the respondent. Second, it submitted that it had not been given "the opportunity to raise its contentions" as the adjudicator had declined to hear from it during the adjudication conference.

The adjudicator's alleged blind endorsement of the applicant's claims

16 I first deal with the respondent's allegation that the adjudicator had "not made a fair and genuine consideration of the evidence presented by [the applicant]". The respondent highlighted some major problems with some of the "timecards" which it said were apparent on the face of it but did not appear to have been considered:

(a) The "timecards" did not reflect the number of hours worked at the site by each worker, but merely contained a description of the variation works carried out and the total number of man-hours required to carry out the work.

(b) The dates on the "timecards" were either inconsistent or erroneous. For example, some of the dates stated on these "timecards" were either after the date on which the applicant claimed to have completed the work contracted for, or before the date of the subcontract in dispute.

17 The respondent's submission in this regard appeared to have been premised on a breach of s 16(3)(*a*) of the Act and not a breach of natural justice under s 16(3)(*c*). There is no difference as far as the consequences are concerned; a breach of s 16(3), be it s 16(3)(*a*) or s 16(3)(*c*), is sufficient basis for the setting aside of an adjudication determination: see *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [45]. Section 16(3) of the Act reads:

An adjudicator shall —

(*a*) act independently, impartially and in a timely manner;

(*b*) avoid incurring unnecessary expense; and

(*c*) comply with the principles of natural justice.

18 The respondent referred me to *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*"), in which the Court of Appeal held at [52]–[54]:

> 5 2 *In our judgment, an adjudicator is bound to consider the payment claim before him and cannot make his determination as if the fact that the respondent has not filed a response obviates the need for him to consider the material properly before him. The adjudication does not become a mere formality.* The adjudicator is obliged to adjudicate, and in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner: see s 16(3)(*a*). He has seven days to do so where no payment response and no adjudication response have been lodged: see s 17(1)(*a*)(i) …
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> 53 … Under s 16(3)(*a*) of the Act, an adjudicator, having regard only to the matters which he can properly consider and not those which he cannot, must, in a timely manner, *come to his own independent and impartial view of the payment claim before him*.
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> 54 In the event, this was not an issue in the case at hand. W Y Steel was not seeking to rely on errors manifest from the material that was properly before the Adjudicator. Rather, it was seeking to remedy the irremediable consequences of its failure to file a payment response. Significantly, the Adjudication Determination expressly stated (at [23]) that the Adjudicator did consider "the parties' submissions and the matters an adjudicator can consider … pursuant to the provisions of section 17(3) of the [Act]", and there is nothing to indicate that he did not in fact do so. Certainly, there was nothing in the arguments presented before us that went to making good W Y Steel's suggestion that the Adjudicator had applied a *blank or unthinking mind* to the issues before him. Accordingly, this argument also fails.
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> [emphasis added]

19 The applicant contended that the respondent had given instructions for the work done and that the errors in the "timecards" were not patent errors on the face of the material. In any case, it submitted that this amounted to an application to review the merits of the Determination which the court had no power to grant: see *Chua Say Eng* at [66]. That may have well been the respondent's motives, but its submissions did not go so far. As I understood it, the respondent was inviting the court to infer that the adjudicator had merely rubber-stamped the applicant's claim based on the fact that he would have detected the errors highlighted above and come to a different conclusion had he considered the material properly.

20 In this regard, I was not persuaded that the purported errors in the "timecards" came anywhere near to establishing that the adjudicator had applied "a blank or unthinking mind to the issues before him". *W Y Steel* at [54] appears to suggest that it is only patent errors which are obvious on the face of the material which *may* establish the absence of genuine consideration; as discussed below, I did not think that the errors highlighted were such errors. Significantly, as was also the case in *W Y Steel*, it was expressly stated in the Determination at [35] that the adjudicator had "reviewed and found that the [applicant had] substantiated all its claims under different heads with drawings,

documents and information available to [him]".

The adjudicator's alleged failure to hear the respondent's arguments

21 In respect of the respondent not being given "the opportunity to raise its contentions", the respondent's representative stated that he had been informed by the adjudicator at the adjudication conference that the adjudicator "did not need to hear from the [respondent] at all … in relation to the merits of the claim". This was because no valid payment response had been filed, and the adjudicator had felt that he could not consider any reason advanced by the respondent for withholding payment in view of s 15(3) of the Act, which reads:

> (3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —
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> (*a*) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or
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> (*b*) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

22 It was not disputed by the respondent that s 15(3) of the Act compels an adjudicator to reject any submissions made in the course of the proceedings which serve to rectify a party's failure to have made a payment response. Instead, counsel for the respondent appeared to advance two propositions. First, he said that s 15(3)(*a*) merely precluded an adjudicator from *considering* the respondent's substantive response, and not *hearing* the response. Therefore, the respondent should in any case have been allowed to put forward its case during the adjudication conference, regardless of whether the adjudicator would be allowed to take the respondent's arguments into consideration.

23 To the extent that the respondent was referring to reasons which it could, and indeed should, have raised in a payment response, I was unable to agree with this proposition. Although the ordinary literal construction of the phrase "shall not consider" says nothing as to the respondent's right to address the adjudicator, the respondent did not put forward any reason why an adjudicator would have to hear from a respondent on matters which he was expressly prohibited from considering. The Court of Appeal did not make this distinction in *W Y Steel*, holding at [34]:

> In our judgment, Parliament intended that a respondent should ventilate his reasons for withholding payment within the timelines prescribed by the Act or suffer the consequences, namely, *losing the opportunity to* ***ventilate those reasons*** *at all at the adjudication stage* … [emphasis added in italics and bold italics]

24 Even if I were wrong and the respondent's interpretation of s 15(3)(*a*) of the Act were to be adopted, I did not think that that would have been sufficient for the setting aside of the Determination. This was because the adjudicator could not have taken the respondent's arguments into account for the purpose of the Determination. That is, there had been no *material* breach of natural justice.

25 The requirement for breaches of natural justice in building and construction adjudication proceedings to be material finds support in decisions of the courts in the United Kingdom and New South Wales. In *Balfour Beatty Construction Limited v The Mayor and Burgesses of the London Borough of Lambeth* [2002] BLR 288 ("*Balfour*"), which was subsequently endorsed in *Cantillon Ltd v*

Urvasco Ltd [2008] BLR 250 (TCC), the court stated:

> 27. It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties. In *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 93 Dyson J made it clear that a mere procedural error should not invalidate an Adjudicator's decision. Adjudication under the HGCRA is necessarily crude in its resolution of disputes. Errors of fact and law do not vitiate the decision which has to be complied with, unless of course it was not authorised and thus made without jurisdiction …
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> …
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> 29. Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an Adjudicator has acted impartially, *it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant*. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. *The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision.* The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater. …
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> [emphasis added]

26 Similarly, it was held by the Supreme Court of New South Wales in the exercise of its appellate jurisdiction in *Brodyn Pty Ltd (trading as Time Cost and Quality) v Davenport and another* (2004) 61 NSWLR 421 (at 442) ("*Brodyn*"), which was endorsed in *SEF Construction*, that an adjudication determination would be void if there had been a "*substantial* denial of the measure of natural justice that the Act requires to be given" [emphasis added]. This was later expanded on in *Watpac Constructions v Austin Corp* [2010] NSWSC 168 ("*Watpac*") at [142]–[147]:

> 142 Any entitlement to natural justice must accommodate the scheme of the Act, including the extremely compressed timetable provided for the submission of payment schedules, adjudication applications, and adjudication responses; and the limited time (subject to the consent of the parties, which they may give or withhold at their will) for an adjudicator to determine an application. It must also accommodate the fact that, in many cases, claimants and respondents will prepare their documents themselves, and will not avail themselves of legal advice in doing so.
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> 143 In *Musico v Davenport* [2003] NSWSC 977, I said at [107]
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> > that where an adjudicator is minded to decide a dispute on a basis for which neither party has contended, then natural justice requires the adjudicator to notify the parties of that intention, so that they could put submissions on it.

144 However, as I pointed out in *John Goss* at 716 [42], "the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case." That meant, I said, that *the principles of natural justice "could not … require an adjudicator to give the parties an opportunity to put submissions on matters that were not germane to his or her decision"*.

145 I see no reason to depart from those views; and neither party submitted that I should. In particular, I think, my insistence on materiality is consistent with the reference by Hodgson JA in Brodyn to "substantial denial … of natural justice."

146 In this context, Gleeson CJ said in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 13–14 [37] that fairness is not abstract but practical. His Honour said that "[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". To like effect, Kirby J said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291 that the court should not undertake the task of "combing through the words of the decision-maker with a fine appellate tooth-comb [sic], against the prospect that a verbal slip will be found warranting" the intervention of the court.

147 I accept, however, that the court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that (in the present context) there was nothing that could have been put on the point in question. But it remains the case, I think, that *the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point*.

[emphasis added]

27 I agreed with both *Balfour* and *Watpac*. The provisional nature of adjudication determinations and the need for a speedy resolution mean that the consequences of a denial of natural justice must be assessed in that context. My finding was further reinforced by the decision of the Court of Appeal in *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998, which related not to adjudication proceedings under the Act but a purported breach of the hearing rule in the context of court proceedings. The Court of Appeal held at [59]:

As a matter of principle, a breach of the hearing rule *does not* entail that the tainted decision *must* be set aside. Instead, it merely requires that: (a) the aggrieved party be given, *in appropriate cases*, the opportunity to be heard on the issues on which he was not heard; and (b) the court thereafter considers whether its previous decision was correct and, if it finds that that decision was not correct, either sets aside or rectifies (depending on what the circumstances of the case require) that decision …. In other words, where the hearing rule is breached, the aggrieved party has a *prima facie* right to be heard on the matters on which he has not been heard, *but only on those matters and not on any other matters in respect of which no allegation of breach of the hearing rule has been made*. Natural justice does not require that the aggrieved party be over-compensated by being given more than what he claims he has been denied, *ie*, a fair hearing on the matters on which he was not heard. However, ***if a hearing on those matters will not change the ultimate outcome of the case (ie, if the aggrieved party will still lose the case even if he is given a hearing on the matters on which he was not heard), then the hearing would be in vain and an exercise in futility*** . In such a situation, the court would be entitled to exercise its discretion not to grant the aggrieved party a hearing on the matters on which he was not heard – as the Judge did in the court below on the ground that even if the 2008 CA's decision were wrong, it should still be *res judicata* as between the MC and Lee Tat.

[emphasis in original in italics; emphasis added in bold italics]

28 The second proposition, made by counsel for the respondent in his oral submissions, was that a respondent being prevented from bringing *patent* errors to an adjudicator's attention, notwithstanding its failure to have filed a payment response, is a breach of natural justice. The respondent sought to rely on *W Y Steel* at [51], in which the Court of Appeal held:

> … In our judgment, under s 17(3) of the Act, even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material which is properly before him and which he is permitted and, indeed, obliged to consider. *In such circumstances, there is nothing to stop a respondent who has failed to file any payment response or adjudication response from raising patent errors on the face of the material properly before the adjudicator to contend that the payment claim should not be allowed in part or at all.* We reiterate that such errors must be plain and evident on the face of the material that is properly before the adjudicator. [original emphasis omitted; emphasis added in italics]

29 What constitutes a patent or manifest error was considered in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 ("*Oriental Insurance*") at [90]:

> At [33], the court in *Veba Oi*l … considered what else could constitute "manifest errors":
>
> > … I would extend the 'definition' of manifest errors as follows: 'oversights and blunders so obvious *and obviously capable of affecting the determination as to admit of no difference of opinion'*. [emphasis added; emphasis in original omitted]
>
> Hence, manifest errors include errors which are "obviously capable of affecting the outcome of the determination" and "admit of no difference of opinion". Usual errors that qualify as manifest errors are mathematical miscalculations in the determination, *eg*, 2 + 2 = 5.

30 I was of the opinion that there was greater merit to the second proposition. Following *W Y Steel* at [51], a respondent has a right to be heard on patent errors in the applicant's claim even where no payment response was filed, and an adjudicator's refusal to hear the respondent on this matter was a material breach of natural justice. There is no dissonance with the Parliamentary intent underlying s 15(3)(*c*) of the Act; there is no expansion of issues in contention or the scope for ambush by the respondent. All that the respondent is allowed to do is comment on the veracity of the evidence adduced by the applicant *on the face of that material*. Further, unlike other material that should have been included in the payment response, patent errors are by definition necessarily capable of affecting the determination. I nonetheless found against the respondent on two grounds.

31 First, it was not affirmatively stated in any of the affidavits filed in support of the respondent's application to set aside the Determination that the respondent would have pointed out the patent errors had it had the chance. The only evidence addressing the respondent's failure to be given a chance to put forward its case was the affidavit of Mr Tan Soon Gee, the General Manager of the respondent, dated 26 May 2015. Paragraph 22 of the affidavit read:

> **iii) Respondent Was Not Allowed to Make Oral Representation on Merits**
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> 22. I attended the Adjudication Conference on 14 April 2015 on behalf of the Respondent. At the Adjudication Conference, I was also informed by the learned Adjudicator that he did not need to hear from the Respondent at all during the Adjudication Conference in relation to the merits of the claim. The Respondent is advised and verily [believes] that this is unfair to the Respondent

and may be a possible breach of the rules of natural justice. Even if the Respondent had failed to submit a valid payment response, it is incumbent on the Adjudicator to give the Respondent the opportunity to raise its contentions. Whether or not the Respondent succeeds is another issue altogether.

32 There was therefore nothing to suggest that the respondent wanted to and would have raised any alleged patent errors had it had the chance. Its complaint appeared to be that it was prevented from addressing the merits of its case as a whole, which I have already dismissed above. The onus lay on the respondent to prove that he was not given an opportunity to be heard on matters on which he has a right to be heard. While oral evidence could suffice, the respondent cannot rely on a mere allusion – he must make a positive assertion that this was the case. Documentary evidence, such as written submissions which a respondent had tendered to the adjudicator that the latter had refused to consider, would constitute strong evidence in the respondent's favour.

33 Second, I did not think that the errors alleged were patent errors as defined in *Oriental Insurance*. Counsel for the respondent did not articulate what these patent errors were. Taking the respondent's case at the highest, it seemed to me that of the errors pointed out at [16] above, only the errors in the dates of the "timecards" could possibly have qualified as patent errors. Even if I were able to look beyond the face of the award or decision to establish manifest error (see *Oriental Insurance* at [89]) and found that these errors were obvious, I did not think they were "*obviously capable of affecting the determination as to admit of no difference of opinion*". It was perfectly open to the adjudicator to have found, as the applicant contended, that the "timecards" accurately reflected the work done by the applicant notwithstanding the errors in the dates stamped, particularly since the respondent's employees had signed off on them. Indeed, as I have held above at [20], that seemed to be precisely what the adjudicator did. I therefore held that there had been no material breach of natural justice on this ground.

34 The conclusion from the foregoing is that adjudicators do not need to hear a respondent in an adjudication application on any matter that the respondent ought to have put in a valid payment response but had failed to do so. Indeed, in view of s 16(3)(*b*) of the Act which requires an adjudicator to "avoid incurring unnecessary expense", an adjudicator should not condescend to hear the respondent at all on those matters as this would cause unnecessary expense to be incurred. What the adjudicator must hear a respondent on, apart from issues raised in a valid payment response, is any submission relating to patent errors on the documents or calculations or submissions of the claimant.

Stay of Execution

35 Finally, having found that there were no grounds for the setting aside of the Determination, I was urged by the respondent to order a stay of the enforcement of the Order pending the final determination of the respondent's claim against the applicant in the District Court. The principles governing the exercise of the court's discretion to do so are uncontroversial, and are set out in *W Y Steel* at [70]:

> In our judgment, a stay of enforcement of an adjudication determination may ordinarily be justified where there is *clear and objective evidence of the successful claimant's actual present insolvency*, or where *the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour* by a court or tribunal or some other dispute resolution body. Further, we agree with HHJ Coulson QC in *Derek Vago* that a court may properly consider whether the claimant's financial distress was, to a significant degree,

caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract. [emphasis added]

36 The respondent did not adduce evidence of the applicant's actual present insolvency, but sought to persuade me on the basis of the second limb. That is, that the respondent would not be able to recover the money paid to the applicant if the dispute were finally resolved in its favour. It highlighted the following in support of its submission:

(a) The applicant's workers had not received any salary in the three months prior to February 2015.

(b) The applicant was unable to provide sufficient manpower in fulfilling its obligations under the subcontract in dispute, which was indicative of the financial difficulty it was experiencing.

(c) The respondent had been told by the applicant at the time of the subcontract that it did not have any other jobs then.

(d) The applicant had failed and/or refused to carry out rectification works, which suggested that it was going to be wound up.

(e) The applicant's directors and shareholders had incorporated a new company ("YSR") on 29 April 2015, and it was suspected that they intended to channel or had already channelled all new projects and funds to this new company to allow the applicant to avoid its liabilities under the subcontract.

37 I noted that all the listed evidence was given by way of affidavit without supporting documents. In contrast, the applicant was able to provide the following documentary evidence:

(a) Payment vouchers evidencing that the applicant had continued to pay for its workers' meals and accommodation and part of their salary during the period referred to, and that it was now paying its employees their full salaries.

(b) A letter of award dated 25 May 2015 evidencing that the applicant had secured a new project with YSR for the sum of $550,708.10 ("the YSR Project").

38 Ultimately, I agreed with the applicant that an assessment of its financial standing under the second limb of *W Y Steel* should be conducted as at the time of the application. The financial difficulties experienced earlier in the year, as alleged at [36(a)]–[36(c)] above, were of little relevance to the applicant's state of solvency *at the time of the respondent's application*. In this regard, the evidence adduced by the applicant, which was not refuted by the respondent, showed that it was engaged in an ongoing project and was able to pay its employees in full. The respondent sought to characterise the YSR Project as further evidence of an intention to strip the applicant of its assets to avoid liability but there was little, beyond its bare assertion, to support this allegation. I therefore found that the respondent had failed to establish, on a balance of probabilities, that it would not be able to recover the money paid to the claimant if the dispute were finally resolved in its favour. I thus declined to order a stay of execution of the Order.

Conclusion

39 For the reasons given, I dismissed the respondent's appeal and its application for a stay of

execution, and ordered the respondent to pay the applicant costs fixed at $2,000, inclusive of disbursements.