W Y Steel Construction Pte Ltd *v* Osko Pte Ltd
[2013] SGCA 32

Case Number : Civil Appeal No 108 of 2012

Decision Date : 30 April 2013

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; V K Rajah JA; Quentin Loh J

Counsel Name(s) : Lee Eng Beng SC and Kelvin Poon (Rajah & Tann LLP), Henry Heng, Corinne Taylor and Gina Tan (Legal Solutions LLC) for the appellant; Chelliah Ravindran and Alison Jayaram (Chelliah & Kiang) for the respondent.

Parties : W Y Steel Construction Pte Ltd — Osko Pte Ltd

Building and Construction Law – Dispute Resolution – Adjudication – Natural Justice

Building and Construction Law – Dispute Resolution – Adjudication – Stay of enforcement of adjudication determination

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 194.]

30 April 2013

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal from the decision of the High Court judge ("the Judge") in Originating Summons No 484 of 2012 ("OS 484/2012"). The Judge refused to set aside an adjudication determination dated 7 May 2012 ("the Adjudication Determination") made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") ordering the appellant, W Y Steel Construction Pte Ltd ("W Y Steel"), to pay the sum of $1,767,069.80 ("the Adjudicated Sum") to the respondent, Osko Pte Ltd ("Osko"): see *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2012] SGHC 194 ("the GD"). W Y Steel had earlier paid the whole of the Adjudicated Sum into court pending the hearing of OS 484/2012, and it submitted that if we were minded to dismiss its appeal, we should nonetheless stay the enforcement of the Adjudication Determination and direct, instead, that the Adjudicated Sum be retained in court pending the disposal of separate proceedings that it had brought against Osko to recover the amount that it (W Y Steel) contended was properly due to it.

2 At the close of the hearing, we dismissed the appeal and ordered that a portion of the Adjudicated Sum was to be released to Osko to enable it to settle some of its outstanding financial obligations. We also ordered that the remainder of the Adjudicated Sum ("the Remaining Sum") should continue to be held in court until our further order as we did not think the evidence before us at that time was sufficient to enable us to dispose of W Y Steel's aforesaid stay application ("W Y Steel's stay application"). At the same time, we gave leave to W Y Steel to produce affidavit evidence as to why the Remaining Sum should continue to be held in court and not paid out to Osko. We now give our grounds for dismissing the appeal. We hereby also give our decision on W Y Steel's stay application.

The facts

3 W Y Steel is a registered contractor and licensed builder. By a contract dated 12 April 2011, it was appointed as the main contractor by Singapore Turf Club for alteration works at the club's grandstand. That contract ("the Singapore Turf Club Contract") was valued at $6,153,600. Subsequently, W Y Steel entered into a sub-contract ("the Sub-Contract") with Osko for a sum of $3,752,436.15. Osko is also a licensed builder, but not a registered contractor. Osko was to perform a substantial part of the work under the Singapore Turf Club Contract, save for certain specialist steel works and electrical works.

4 By a letter dated 12 March 2012, W Y Steel purported to terminate the Sub-Contract. Osko claimed that notwithstanding this, it continued working under the Sub-Contract until 31 March 2012, that being the stipulated completion date for the work set out in the Sub-Contract. On 31 March 2012, Osko served on W Y Steel, in respect of work done under the Sub-Contract, a payment claim under the Act for a sum which later turned out to be the same as the Adjudicated Sum. Crucially for the purposes of this appeal, contrary to s 11(1)(*b*) of the Act, W Y Steel failed to file a payment response within seven days after Osko's payment claim was served on it (*viz*, by 8 April 2012).

5 On 20 April 2012, Osko, having received no payment response, filed Adjudication Application No SOP/AA036 of 2012 ("the Adjudication Application") against W Y Steel for adjudication of its payment claim. Again, W Y Steel did not file an adjudication response, which, in the circumstances, was due by 27 April 2012 (see s 15(1) of the Act). The duly appointed adjudicator ("the Adjudicator") called the parties for an adjudication conference, which was held on 2 May 2012, in the course of which each party made submissions upon the Adjudicator's invitation.

6 Before the Adjudicator, W Y Steel claimed that it was ignorant of the timelines mandated by the Act, but urged the Adjudicator nonetheless to consider the submissions which it wished to present in relation to Osko's payment claim. In essence, W Y Steel contended that after taking into account certain deductions and contra charges, it was Osko that owed W Y Steel a sum of $158,301. The computation of this sum was purportedly based on the assessment of Singapore Turf Club's quantity surveyor. W Y Steel claimed that it had e-mailed a response to Osko's notification that it (Osko) had filed the Adjudication Application, and that this response, which was sent by e-mail on 23 April 2012, included the said assessment. It was further said that this e-mail should be considered W Y Steel's payment response under the Act or, alternatively, its adjudication response.

7 We pause here to observe that in our view, the e-mail of 23 April 2012 was not in fact a payment response or, for that matter, a response to the Adjudication Application. Rather, it was W Y Steel's recommended payment certificate showing an amount due to it from Osko, and not the other way around. The e-mail certainly did not comply with the requirements of s 11(3) of the Act. Nor did W Y Steel's counsel, Mr Lee Eng Beng SC ("Mr Lee"), seriously urge us to conclude that the e-mail was a payment response or an adjudication response for the purposes of the Act.

8 It should also be noted that under s 11(1)(*b*) of the Act, W Y Steel's payment response was due on 8 April 2012 (see [4] above). The "dispute settlement period", as defined in s 12(5) of the Act, ran until 15 April 2012, but even by that date, no payment response had been received from W Y Steel. Quite apart from the fact that W Y Steel's e-mail of 23 April 2012 was not in substance or even in form a payment response, it was not sent within the time permitted under the Act for a payment response to be submitted. Osko accordingly took the point that W Y Steel, having neglected to file a payment response, was prevented by s 15(3) of the Act from bringing to the notice of the Adjudicator new matters, including cross-claims, counterclaims and set-offs, that had not yet been

raised in a timely payment response. Osko also submitted that in any event, under s 15(3), the Adjudicator was not even permitted to consider such material in the circumstances.

9 On 2 May 2012, W Y Steel attempted to file its submissions, which it claimed to be its adjudication response, with the Singapore Mediation Centre ("the SMC"), the "authorised nominating body" for the purposes of Part IV of the Act, but these submissions were rejected by the SMC as being out of time. We note in passing and in agreement with the Judge below that it was not open to the SMC, as opposed to the Adjudicator, to reject any purported adjudication response: see the GD at [8]. However, nothing turned on this as W Y Steel e-mailed its submissions directly to the Adjudicator on the evening of 2 May 2012 and again through its legal counsel on 4 May 2012, urging the Adjudicator to consider those submissions (collectively, W Y Steel's "late submissions").

10 On 7 May 2012, the Adjudicator issued the Adjudication Determination ordering W Y Steel to pay Osko the Adjudicated Sum plus costs and fees. The Adjudicator (at [23.3] of the Adjudication Determination) agreed with Osko that he was: [note: 1]

> … precluded by section 15(3) [of the Act] from considering the reasons and matters submitted by [W Y Steel] … as they were not included in any valid payment response. …

11 On 16 May 2012, Osko applied under s 27 of the Act for leave to enforce the Adjudication Determination in the same manner as a judgment or court order. On 21 May 2012, W Y Steel filed OS 484/2012 to set aside the Adjudication Determination and also paid the Adjudicated Sum into court. In the meantime, W Y Steel commenced Suit No 474 of 2012 ("Suit 474/2012") against Osko in relation to the disputes arising out of the Sub-Contract. We have already alluded to this earlier (see [1] above).

The decision below

12 OS 484/2012 was heard by the Judge on 8 August 2012. W Y Steel argued that the Adjudication Determination should be set aside because the Adjudicator had no jurisdiction to adjudicate Osko's payment claim, had contravened the rules of natural justice and had erred in fact as well as in law.

13 The Judge found that the Adjudicator did have jurisdiction to adjudicate Osko's payment claim and, therefore, to determine the relevant issues of fact and law. The Adjudication Determination was therefore imbued with temporary finality under s 21 of the Act. The Judge also held that there had been no breach of the rules of natural justice. W Y Steel's failure to file a payment response was fatal to its case as the Adjudicator was precluded by s 15(3) of the Act from taking into account its late submissions. However, since the Adjudication Determination only enjoyed temporary finality, any error could yet be corrected upon the final determination of the parties' disputes either: (a) by a court or tribunal or some other dispute resolution body; or (b) by way of a settlement agreement between the parties. This was in keeping with the purpose of the Act, which was to provide a fast and low-cost adjudication process to ensure that a contractor's cash flow was not disrupted by disputes arising from or relating to construction contracts ("building and construction disputes"). The Judge therefore dismissed OS 484/2012, but ordered that pursuant to s 27(5) of the Act, the Adjudicated Sum was to be paid into court to be held pending the determination of this appeal.

The primary issue before this court

14 The primary issue before us was the true interpretation of s 15(3) of the Act, which reads:

Adjudication responses

15. …

(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* —

(*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

(*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.

…

[emphasis added]

The parties' principal contentions on s 15(3) of the Act

15 In its submissions before us, counsel for W Y Steel, Mr Lee, accepted that if the true interpretation of s 15(3) of the Act was to preclude the Adjudicator from considering W Y Steel's late submissions, then there would have been no breach of natural justice. However, Mr Lee suggested that the proper interpretation of s 15(3) was a narrow one which confined its applicability to situations where a valid payment response had in fact been filed, but had omitted certain reasons for withholding payment that otherwise might have been relevant. In such circumstances, Mr Lee accepted, an adjudicator would not be able to consider matters not raised in the payment response. But, according to Mr Lee, s 15(3) did not exclude or affect an adjudicator's discretion to accept submissions from a respondent who had failed to file a payment response at all. Mr Lee referred us to a number of provisions of the Act under which, he contended, the Adjudicator could and should have considered W Y Steel's late submissions. It was submitted that the Adjudicator's failure to do so meant that he had merely accepted Osko's payment claim without applying his mind to whether it was valid, and in doing so, he had breached the basic rule of natural justice that the parties to a hearing must be given a chance to be heard and their submissions must be considered.

16 If this argument failed, W Y Steel's alternative position was that enforcement of the Adjudication Determination should nonetheless be stayed because there was a real risk that any amount paid out to Osko in respect of the Adjudicated Sum might be irrecoverable by the time the dispute over the Sub-Contract was finally determined in Suit 474/2012. Mr Lee said that there was evidence that Osko was in financial distress and therefore might not be able to return any sums which might be due to W Y Steel upon final judgment being rendered in Suit 474/2012. Temporary finality might, as a matter of circumstance, become absolute finality as far as W Y Steel was concerned.

17 Osko disputed W Y Steel's reading of s 15(3) on the grounds that it was contrary to legislative intention as well as the interpretation placed upon the provision in a number of High Court decisions. Osko opposed any stay of enforcement of the Adjudication Determination on the grounds that there was insufficient evidence to justify the conclusion that it was in financial distress as alleged by W Y Steel, and that in any case, whatever financial distress it was enduring had been caused by W Y Steel's failure to pay the Adjudicated Sum pursuant to the Adjudication Determination.

Our decision

The purpose of the Act

18 In ascertaining the true interpretation of s 15(3) of the Act, we begin by considering the Act as a whole. Any construction that we place upon its provisions must take into account its purpose and its guiding philosophy (see s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed)). It has often been said that cash flow is the life blood of those in the building and construction industry. If contractors and sub-contractors are not paid timeously for work done or materials supplied, the progress of construction work will almost inevitably be disrupted. Moreover, there is a not insignificant risk of financial distress and insolvency arising as a result. In the years before the immediate predecessor of the Act (*viz*, the Building and Construction Industry Security of Payment Act 2004 (Act 57 of 2004) ("Act 57/2004")) was enacted in 2005, there had been several such cases. It was with the specific aim of minimising such disruptions that Act 57/2004 (now superseded by the Act) was passed. The Act achieves its stated purpose of facilitating cash flow in the building and construction industry in two principal ways. First, it establishes that parties who have done work or supplied goods are entitled to payment as of right: see s 5 of the Act. Second, it creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved: see s 21 of the Act. This is what is referred to as temporary finality.

19 As stated by Mr Cedric Foo Chee Keng ("the Minister of State"), the then Minister of State for National Development, in his speech at the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) ("the SOP Bill"), which was later enacted as Act 57/2004 (see *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112 ("*Singapore Parliamentary Debates* vol 78, col 1112")):

> The SOP Bill will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes. Affected parties will have the right to suspend work or withhold the supply of goods and services, if the adjudicated amount is not paid in full or not paid at all.

20 Singapore's statutory adjudication process for building and construction disputes is modelled after systems already established in the United Kingdom, Australia and New Zealand, with some adaptations to suit our own conditions. All these systems share a common philosophical basis, which is the aforesaid feature of temporary finality. In essence, it entails the idea that the parties to a construction contract should "pay now, argue later": *per* Ward LJ in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] 1 WLR 2344 at [1]. The appeal of this philosophy is apparent: payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of lengthy and expensive proceedings that have to be undertaken in order to disentangle the knot of disputed claims and cross-claims. In *Dawnays Ltd v F G Minter Ltd and Trollope and Colls Ltd* [1971] 1 WLR 1205, Lord Denning MR articulated the rationale for temporary finality in the context of interim certificates of payment issued under a Royal Institute of British Architects (RIBA) standard form contract as follows (at 1209G–1210A):

> … Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the sub-contractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad – except so far as the contract

specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims. …

21 This was later qualified in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, where the House of Lords held that the parties to a construction contract could contractually restrict their common law right to set off cross-claims against any money due under an interim certificate. Nonetheless, Lord Denning's articulation of the importance of preserving a contractor's cash flow remains valid in principle.

22 Statutory adjudication of building and construction disputes takes the concept one step further. Interim payment claims *per se* are not granted temporary finality under the adjudication scheme. Instead, the parties enter into an expedited and, indeed, an abbreviated process of dispute resolution in which payment claims and payment responses must be made within the stipulated deadlines to an adjudicator, who is himself constrained to render a quick decision. As a species of justice, it is admittedly somewhat roughshod, but it is fast; and any shortcomings in the process are offset by the fact that the resultant decision only has temporary finality. The party found to be in default has to pay the amount which the adjudicator holds to be due (referred to in the Act as the "adjudicated amount"), but the dispute can be reopened at a later time and ventilated in another more thorough and deliberate forum.

23 In *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739, the first case dealing with the statutory adjudication process under the United Kingdom's Housing Grants, Construction and Regeneration Act 1996 (c 53) ("the UK Act"), Dyson J noted (at [14]):

> The timetable for adjudications is very tight (see s. 108 of the [UK] Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. … It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. *But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.* Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved. [emphasis added]

Interpretation of s 15(3) of the Act

24 Against this background, we turn to the specific provisions of the Act which are relevant for the purposes of the present appeal. The rapid-fire nature of the statutory adjudication process is readily apparent from the various provisions prescribing time limits under the Act. Section 11(1) requires that a payment response be filed either (depending on the applicable circumstances): (a) by the date specified or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served, whichever is earlier (see s 11(1)(*a*)); or (b) where the construction contract does not stipulate a deadline or a means of determining the deadline for filing a payment response, within seven days after the payment claim is served (see s 11(1)(*b*)). Section 11(4)(*b*) provides for a limited period of time within which a payment response may be varied. Under s 11(3)(*c*), a respondent must explain in his payment response the difference between the response amount (*ie*, the amount which he proposes to pay in respect of the payment claim) and the amount claimed, and why this difference in amount is not being paid. If no payment response is filed by the deadline stipulated in s 11(1), and if such response is still not filed by the end of the dispute settlement period (as defined in s 12(5)), the claimant is entitled, under s 12(2)(*b*), to make an adjudication application. Under s 13(3)(*a*), an adjudication application must be made "within 7 days

after the entitlement of the claimant to make an adjudication application first arises under section 12". Within seven days of receiving the adjudication application, the respondent must lodge an adjudication response: see s 15(1). Pursuant to s 17(1), the adjudicator must render his decision on the adjudication application either: (a) (in cases where no payment response and no adjudication response is filed, or where the respondent fails to pay by the due date the response amount, which has been accepted as correct by the claimant) within seven days after the commencement of the adjudication (see s 17(1)(*a*)); or (b) (in other cases) within 14 days after the commencement of the adjudication or such other longer period as may have been requested by the adjudicator and agreed to by the parties (see s 17(1)(*b*)). Under s 18(2), an aggrieved respondent who wants to have an adjudication determination reviewed must apply for a review within seven days after the adjudication determination is served on him; under s 18(6), a review adjudicator or panel of review adjudicators ("review panel") must be appointed by the SMC (the authorised nominating body for the purposes of Part IV of the Act) within seven days after it receives an adjudication review application; and under s 19(3), the decision of the review adjudicator or review panel (as the case may be) must be rendered either within 14 days after the adjudication review begins or within such longer period as may have been requested by the review adjudicator/review panel and agreed to by the parties.

25 These timelines are self-evidently very tight, and in most cases, only the Minister (as defined in s 2(1) of the Interpretation Act) may vary them pursuant to s 39. This is entirely consistent with the purpose of the Act as enunciated in the Minister of State's speech at the second reading of the SOP Bill ("the second reading speech"): to facilitate "cash flow by establishing a fast and low cost adjudication system to resolve payment disputes" (see the extract from *Singapore Parliamentary Debates* vol 78, col 1112 quoted at [19] above).

26 We turn to s 15(3) of the Act against this background. Local jurisprudence has spoken with one voice on its construction: that it applies even in cases where a respondent has not filed a payment response or an adjudication response.

27 In *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 ("*Chip Hup Hup Kee (AR)*"), the learned assistant registrar ("the Assistant Registrar") dealt at some length with many of the same issues before this court and concluded (at [84]) that "the dis-application of s 15(3) of the [Act] to cases where no payment response was submitted … would frustrate the apparent purpose of the legislation". The reasoning of the Assistant Registrar proceeded in this way:

(a) First, the second reading speech showed that Parliament intended to create an efficient adjudication process for building and construction disputes so that cash flow would be assured even in the event of such disputes. This intention must influence how the rules of natural justice were applied in the context of the statutory adjudication scheme set out in the Act.

(b) Second, provisions laying down tight deadlines and jurisdictional restrictions such as s 15(3) served this objective and should therefore be construed strictly. Moreover, this was in keeping with how statutory adjudication of building and construction disputes had been approached and applied by the courts in Australia and the United Kingdom. If s 15(3) applied only to respondents who had tendered a payment response, this would mean that such respondents would be in a worse position than respondents who had failed to tender any payment response. This could *not* have been the intention of Parliament.

(c) Third, the other provisions of the Act, including s 16(7), did not have the effect of allowing an adjudicator to ignore the effect of s 15(3).

28 This reasoning was approved on appeal to Judith Prakash J in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658. Prakash J summarised the Assistant Registrar's judgment and concluded (at [23]):

> I have dealt with the [Assistant Registrar's] reasons for his rejection of the respondent's submissions and his refusal to set aside the Determination at some length since there has not been much judicial consideration to date of the provisions of the [Act] and therefore the [Assistant Registrar's] reasoning is useful for parties in the construction industry. Further, having studied the same, I could find no fault with his conclusions on the correct interpretation of the relevant statutory provisions.

We agree with Prakash J and the Assistant Registrar with some qualifications, to which we will come in due course.

29 In *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo*"), which was likewise heard by the Judge, the Judge set out the scheme of the Act and noted that its provisions were consistent with its stated objectives of providing for a fast and low-cost process of adjudication. At [13], he noted:

> 13 It bears emphasising that s 15(3) of the Act provides a very important constraint on the contents of the adjudication response. … This subsection prohibits the respondent from including in the adjudication response any reason for non-payment unless such reason has been stated in the payment response. To ensure its effectiveness, it further provides that even if such reason is included, the adjudicator is prohibited from considering it. It is therefore very important for a respondent who disputes a Payment Claim or any part thereof to provide a payment response *because if he does not do so, then he will have no ground to resist payment before the adjudicator.* An omission on the part of the respondent to provide a payment response to a Payment Claim within the time allowed would [be] tantamount to conceding to an adjudication order on the Payment Claim. … [emphasis added]

30 The italicised portion above indicates that the Judge applied his mind to the situation where no payment response had been filed and concluded that s 15(3) applied even in such a case.

31 Unsurprisingly, in deciding OS 484/2012 in the court below, the Judge affirmed his previous interpretation of s 15(3) (see the GD at [9]):

> 9 … [T]he [A]djudicator refused to take into account the points made in the adjudication response that [W Y Steel] had attempted to file on 2 May 2012. However [W Y Steel] had not suffered any prejudice because it had not filed any payment response, which it [was] supposed to do under s 11 of the Act. As I have pointed out in *Sungdo* (at [13] and [21]), this is potentially fatal to [W Y Steel] as s 15(3) [of the Act] precludes [it] from including in the adjudication response any reason for opposing the claim that was not in [its] payment response. *Not only that, the adjudicator is prevented by the same provision from considering any reason not included in the payment response.* … [emphasis added]

32 Finally, in the recently decided case of *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] SGHC 56, Woo Bih Li J said at [26]:

> 26 Indeed, a closer examination of the scheme of the Act lends support to the point that [the respondent's] arguments here were not properly for my consideration. Pursuant to s 11(3)(*c*) of the Act, any allegation by the respondent which would affect the determination of the

adjudication amount (*eg*, that the claimant was double-claiming, that the contract price was unilaterally increased by the claimant, or that the work done was not something for which payment could be claimed under the contract) should be contained in a payment response. This appears to be so central a pillar of the Act's adjudication mechanism that the adjudicator cannot consider such allegations at *all* unless they are included in a payment response (s 15(3)(*a*) of the Act). Given this statutory impetus on a respondent to raise his objections to the adjudication amount in a particular fashion and the serious consequences visited on the respondent for failing to do so, I did not see why the court should now intervene to consider [the respondent's] protestations, whether presented as outright attacks on the validity of Progress Claim No 9 or more subtly disguised as objections to jurisdiction. [emphasis in original]

33 It is for good reason that not a single authority has taken the position that was urged upon us by W Y Steel. In our judgment, s 15(3) is jurisdictional in the sense that it curtails the power of an adjudicator to allow a respondent to raise new grounds for withholding payment that were not included in his payment response and, for that matter, an adjudicator's power even to consider such grounds at all. This is literally what the provision provides and we should, in our view, give proper effect to it. In view of the scheme of the Act, it is clear that W Y Steel's argument – *viz*, that s 15(3) applies to exclude consideration of matters not contained in a payment response only where a payment response, albeit an incomplete one, has been filed and not otherwise – cannot be right. This reading would, as the Assistant Registrar in *Chip Hup Hup Kee (AR)* astutely pointed out, perversely favour a respondent who did not file a payment response at all over one who did and, thus, would incentivise conduct that defeats the very purposes of the Act.

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. As the Minister of State said in the second reading speech (see *Singapore Parliamentary Debates* vol 78, col 1112):

> Under the [SOP] Bill, a claimant, ie, the party who is entitled to progress payment for work done or goods supplied, serves the progress payment claims for work done to the respondent. The respondent must then respond by stating the amount he will pay. *If the respondent does not wish to pay the full amount claimed, he must give reasons in his response.* This is similar to the current practice of issuing the Architect's Certificate to main contractors for private sector projects, or the issuing of the Superintending Officer's Certificate for public sector projects. The [SOP] Bill requires the respondent to issue the payment response within 21 days of receiving the payment claim. If the response period is not specified in a contract, a default period of seven days has been prescribed in the [SOP] Bill. This will ensure timely response to the claims. [emphasis added]

35 W Y Steel also attempted to persuade us that a distinction should be drawn between reasons that went towards showing that a respondent was not liable on a payment claim and those that went towards showing that a respondent, although liable in principle, was entitled to withhold payment by reason of set-offs or counterclaims. On this basis, it was argued that the injunction in s 15(3) applied only to the latter class of reasons. This distinction, W Y Steel argued, was recognised in s 11(3)(*c*) of the Act, which required a payment response to state "where the response amount is less than the claimed amount, the reason for the difference and the reason for *any amount withheld*" [emphasis added].

36 This semantic distinction leaves no impression on us. In the New South Wales Supreme Court case of *Multiplex Constructions Pty Limited v Jan Luikens and Lahey Detailed Joinery Pty Ltd* [2003] NSWSC 1140, Palmer J had to construe certain sections of New South Wales' Building and

Construction Industry Security of Payment Act 1999 ("the NSW Act"). Section 20(2B) of that Act reads:

> (2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

37 This provision is similar to our s 15(3) (the "payment schedule" under the NSW Act corresponds, in broad terms, to what we refer to as the "payment response" under the Act) and has much the same effect. In that case, Palmer J said (at [67]–[68]):

> 67 … The evident purpose of s 13(1) and (2), s 14(1), (2) and (3), and s 20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s 22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the [NSW] Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s 14(3) and s 20(2B) are designed to prevent this from happening.
>
> 68 Section 14(3) requires that if the respondent to a payment claim has "*any* reason" for "withholding payment", it must indicate that reason in the payment schedule. ***To construe the phrase "withholding payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim".*** If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s 14(3) requires that that reason be indicated in the payment schedule and s 20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s 22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s 14(3).
>
> [emphasis in original in italics; emphasis added in bold italics]

38 We agree with this approach and with the reasoning of Palmer J. The words "any reason for withholding any amount" in s 15(3) of the Act are wide enough in themselves to cover any type of situation where a respondent does not meet a payment claim. Moreover, these words are immediately followed by the words "including but not limited to", which are self-evidently expansive rather than restrictive in intent. Consistent with this, reg 6(1)(*d*) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) states that a respondent must, in his payment response, give in full his reasons for withholding payment of any amount specified in the payment claim and his calculations in support of those reasons; and reg 8(1)(*d*) states that if a respondent wishes, in his adjudication response, to supplement the reasons for withholding payment which he earlier set out in his payment response, his adjudication response must contain "the additional computations and justifications". In our judgment, the purpose of these provisions generally

and of s 15(3) of the Act in particular is to prevent a respondent from ambushing a claimant by raising any grounds for withholding payment which have not already been set out in his payment response, whether or not these amount to reasons entitling him to withhold payment by way of a cross-claim, set-off or counterclaim. Litigation by ambush is almost always likely to delay the resolution of any dispute as the ambushed party would be forced to review the new material, regroup and, only then, possibly regain its momentum. To permit this would fly in the face of what the scheme of statutory adjudication sets out to achieve. In our judgment, the distinction proffered by W Y Steel at [35] above is illogical, and neither the Act nor the Parliamentary debates on the SOP Bill support its legitimate existence.

39 Next, W Y Steel cited a raft of provisions of the Act under which, it argued, the Adjudicator was allowed – even obliged – to take into consideration its late submissions. These provisions were s 16(3)(*c*), s 16(4), s 16(7) and s 17(3). We deal with this argument for completeness even though it follows that since we have already held that W Y Steel's reading of s 15(3) is incorrect, this argument must fail.

40 In our view, none of these provisions either individually or collectively permit an adjudicator to ignore s 15(3). Section 16 sets out generally the rules relating to the commencement of an adjudication and the adjudication process. Under s 16(3)(*c*), an adjudicator must comply with the principles of natural justice; these must include the duty to give the parties adequate notice and an opportunity to be heard. However, these rules are always contextual. We have already discussed the centrality of the concept of temporary finality to the adjudication scheme under the Act. A respondent is given a chance to respond to a payment claim by producing, first, a payment response and then (if the claimant proceeds to apply for adjudication of his payment claim) an adjudication response. If he fails to provide a payment response and if, as a result, the adjudicator is mandated not to consider material that he seeks to introduce later, he has not been denied his right and opportunity to be heard. Rather, he has simply chosen not to exercise it and the rules of natural justice cannot then be called in aid. Simply put, in such a scenario, the respondent has had his opportunity, for the purposes of the hearing that culminates in the provisional ruling that has temporary finality, to make his case and he has failed to take that opportunity.

41 In *Brodyn Pty Limited t/as Time Cost and Quality v Philip Davenport and Dasein Constructions Pty Limited* [2004] NSWCA 394 ("*Brodyn*"), the respondent ("Brodyn") appealed to the New South Wales Court of Appeal against a primary judge's refusal to grant it an order quashing an adjudication determination made under the NSW Act. Brodyn's grounds of appeal were that the claimant's payment claim was invalid and that there had been a denial of natural justice. At [57] of *Brodyn*, the New South Wales Court of Appeal (*per* Hodgson JA) said:

> The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that *natural justice is to be afforded to the extent contemplated by these provisions* … [emphasis added]

42 In our judgment, this is correct. Where the Act itself states that certain material is not to be considered in certain circumstances, this must, as a matter of logic, have the effect of qualifying some other provision that imposes a general requirement that the principles of natural justice must be applied. In this context, there is no reason to construe s 16(3)(*c*) as foreclosing an adjudicator's power (indeed, his obligation) to act exactly as the Act contemplates in s 15(3). We should not strain the natural construction of the Act to accommodate cases such as the present, where a respondent has failed through his own lack of diligence to file a payment response. Everyone in the building and construction industry must be aware, or at least taken to be aware, of the rigorous application of the timelines in the Act, and if they ignore them, they do so at their own peril.

43 Turning to s 16(4) of the Act, this sets out various powers of an adjudicator, but this only spells out what an adjudicator is *permitted* to do as a general matter; it cannot change (and we do not construe it as changing) what, under some other provision of the Act, he is not permitted to do. Thus, for instance, it is true that under s 16(4)(*b*), an adjudicator may require submissions or documents from any party to the adjudication, but it would be perverse and, for that reason, wrong to hold that under this provision, an adjudicator may require submissions on matters that he is expressly proscribed from considering under s 15(3).

44 As for s 16(7) of the Act, W Y Steel's reliance on this provision was wholly misconceived: this subsection merely empowers an adjudicator to proceed to determine an adjudication application undeterred by the failure of the respondent to file his payment response or his adjudication response, and by the failure of either party to comply with his (the adjudicator's) instructions. In no way does this lend support or assistance to W Y Steel's case.

45 Finally, we turn to s 17(3) of the Act, which provides as follows:

> (3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:
>
> (*a*) the provisions of this Act;
>
> (*b*) the provisions of the contract to which the adjudication application relates;
>
> (*c*) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
>
> (*d*) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
>
> (*e*) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates;
>
> (*f*) the report of any expert appointed to inquire on specific issues;
>
> (*g*) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and
>
> (*h*) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.

46 This subsection sets out what an adjudicator is permitted to consider and expressly provides that he "shall *only* have regard to [those] matters" [emphasis added]. In this context, an adjudicator should consider the Act, the contract to which the adjudication application before him relates, the payment claim to which that adjudication application relates and the adjudication application itself: see ss 17(3)(*a*)–17(3)(*c*). He must also consider the respondent's payment response and adjudication response, if any: see s 17(3)(*d*). In the present case, the Adjudicator could not consider W Y Steel's responses to, respectively, Osko's payment claim and the Adjudication Application because there were none filed in accordance with the Act. As there was no inspection by the Adjudicator (see s 17(3)(*e*)), there was no inspection report to consider. Further, there was no expert appointed and, thus, no expert report to take into account (see s 17(3)(*f*)); the Adjudicator also did not request any

documents or other information from the parties (see s 17(3)(*g*)). The Adjudicator had to consider the submissions of the parties, but given what we have said on the effect of s 15(3), there was not much that W Y Steel, who had failed to file either a payment response or an adjudication response, could properly say.

47 However, this is not to say that s 15(3) would bar a respondent who has failed to file a payment response from making any kind of submission whatsoever before an adjudicator. We deal with this below.

48 The crux of W Y Steel's argument in relation to s 17(3) was that it obliged the Adjudicator to consider *all* the submissions made before him. He was not to apply an unthinking mind to Osko's payment claim just because no payment response had been filed. There are two separate points here, and it is incorrect to conflate them as W Y Steel appeared to do. As will be apparent, we agree that the Adjudicator could not blindly endorse Osko's payment claim. He had to apply his mind to it. But, we do not think this helps W Y Steel's case because there was a limit to what material the Adjudicator could properly have considered. We note that during the adjudication conference convened by the Adjudicator on 2 May 2012, W Y Steel made the following claims:

(a) there was some suggestion that the SMC (the authorised nominating body for the purposes of Part IV of the Act) had served the Adjudication Application on W Y Steel not on 20 April 2012 (the date on which that application was filed), but five days later ("Claim (a)");

(b) W Y Steel was unaware of the timelines prescribed in the Act ("Claim (b)");

(c) W Y Steel had filed what it considered to be its payment response, *viz*, the e-mail of 23 April 2012 mentioned at [6] above ("Claim (c)"); and

(d) for various reasons, Osko was not entitled to the sum which it claimed ("Claim (d)").

49 Claim (a) was considered and disposed of by the Adjudicator in Osko's favour. Simply put, there was no evidence to suggest that the Adjudication Application had in fact been served on W Y Steel only on 25 April 2012, rather than on 20 April 2012. Claim (b) was legally irrelevant. Claim (c) was considered by the Adjudicator, who was entitled to and did reject it. Claim (d) went to the merits and was correctly held by the Adjudicator to be inadmissible under s 15(3). There was no other argument advanced to show that the Adjudicator had no jurisdiction to proceed to determine the Adjudication Application. In particular, there was no attempt to argue that there was some patent or manifest error on the face of the record, or that Osko's payment claim was internally inconsistent, or that having regard to the material that was *properly* before the Adjudicator, it would have been evident that there was a patent error in that payment claim.

50 Notwithstanding this, we consider the question of whether it would even have been open to W Y Steel, who had not filed a payment response, to make a submission that Osko's payment claim was patently in error or, for some reason, fell outside the Adjudicator's jurisdiction, assuming (for the sake of this analysis) that the facts had borne this out. In this regard, in *Chip Hup Hup Kee (AR)*, the Assistant Registrar said (at [93]–[94]):

> 93 … My own view is that *where there are no reasons provided in any valid payment response, the adjudicator cannot examine whether the claimant's claim is supported by the documents. Save for the permissible procedural or jurisdictional objections identified earlier, the adjudicator must accept the claim at its face value*.

> 94 One might think this harsh – what if the payment claim states an obviously incorrect amount, either through innocent mistake or deliberate overcharging, completely unsupported by the documents or the facts? One answer to this is that the more obvious the error, the more reason why the respondent could have simply pointed this out in a valid payment response. Furthermore, this approach avoids the problem of the adjudicator having to decide whether he is merely making sure that the claimed amount is supported by the documents or whether he is impermissibly addressing the respondent's reasons why he withheld payment. In my mind, making such distinctions will be a futile hair-splitting exercise because it is evident that one generally applicable reason why the respondent would have withheld payment is because the claimed amount is not supported by any documentary evidence. As I have stated in relation to s 15(3) of the [Act], I am of the view that a strict interpretation is more consonant with the overall purpose and structure of the [Act].
>
> [emphasis added]

51 With respect, we do not think this is correct. 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.

52 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). In this regard, the views of Brereton J in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2006] NSWSC 13 ("*Pacific General Securities*") at [82] are to the point:

> … [T]he adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the [NSW] Act and the true merits of the claim, and *while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits*, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value. [emphasis added]

53 Brereton J had to consider whether the aforesaid duty should be imported under the rubric of "good faith" or as "a basic and essential element, namely adjudication of a payment claim (which requires as a minimum determination of whether construction work [that is] the subject of the claim has been performed, and of its value)" (see *Pacific General Securities* at [86]). We have no need to engage in a similar exercise because the NSW Act does not have the equivalent of our s 16(3). 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.

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]", [note: 2] 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.

55 For these reasons, we dismissed the appeal and affirmed the Judge's decision not to set aside the Adjudication Determination. We turn now to W Y Steel's stay application

W Y Steel's stay application

56 Ordinarily, if an application to set aside an adjudication determination is refused, the adjudication determination will be enforced and the adjudicated amount earlier paid into court pending the determination of the setting-aside application (see s 27(5) of the Act) will be paid out to the successful claimant. In the present case, W Y Steel urged us to grant a stay of enforcement of the Adjudication Determination pending the disposal of Suit 474/2012 on the grounds that there was evidence that Osko was in financial difficulty and therefore might not be able to repay the Adjudicated Sum if it subsequently failed to successfully defend the claim that W Y Steel had brought against it in that suit. As mentioned earlier (see [1] and [11] above), W Y Steel had earlier paid the whole of the Adjudicated Sum into court pending the hearing of OS 484/2012. At the close of the hearing of this appeal, we ordered as an interim measure that part of the Adjudicated Sum was to be released to Osko to enable it to settle six lawsuits in which it was the defendant, together with the related legal costs. As mentioned at [2] above, we did not think there was sufficient evidence before us at that time to enable us to dispose of W Y Steel's stay application. We accordingly directed W Y Steel to file an affidavit within seven days explaining why a stay of enforcement should be granted in respect of the remainder of the Adjudicated Sum (*viz*, the Remaining Sum referred to at [2] above) and also gave Osko seven days thereafter to file a reply affidavit.

57 In the affidavit which W Y Steel filed pursuant to our directions, it stated, in essence, that:

(a) Based on public records, a total of 11 lawsuits had been filed against Osko. Three of them involved W Y Steel as plaintiff, namely: Suit 474/2012, Suit No 507 of 2012 and Magistrate's Court Suit No 17611 of 2012. Suit 474/2012 involved the Singapore Turf Club Contract at issue in this appeal and the sum claimed by W Y Steel was $747,639.76. The latter two lawsuits involved a separate contract concerning work done at Senoko Way ("the Senoko Way Contract") and the combined sum claimed was $1,845,328.91. W Y Steel said that default judgment had been granted against Osko in two of the 11 lawsuits which had been brought against it, and that a garnishee application had been filed in one.

(b) W Y Steel cited photographs, an office visit and information from "various sources" [note: 3] in the building and construction industry as well as a report filed by a private investigator as evidence that Osko was no longer in business.

(c) W Y Steel also pointed to Osko's filed accounts from 1 December 2010 to 30 November 2011, in which Osko's auditor had disclaimed an opinion. Those accounts indicated that Osko had suffered a loss of $454,568 for that period and was in a net current liability position of $454,803.

(d) W Y Steel further pointed to the fact that Osko had, despite its financial difficulties, lent a sum of $70,000 to one of its directors.

58 Osko filed five reply affidavits, including one deposed by its auditor. In these affidavits:

(a) Osko stated, in respect of the 11 lawsuits mentioned at [57(a)] above, that out of the eight lawsuits which had been commenced by parties other than W Y Steel, three had been settled in full. In another (*viz*, District Court Suit No 1322 of 2012), the plaintiff had agreed to withhold enforcement of the judgment awarded in its favour pending this appeal. This was supported by an affidavit filed by that plaintiff.

(b) Osko denied that it had ceased operating business and produced evidence of leases and existing contracts. It admitted that its main director had started another company doing the same business, but explained that that was because a building and construction company in the midst of major litigation would find it hard to secure new contracts.

(c) Osko's auditor explained that he had disclaimed an opinion on the company's accounts for the period from 1 December 2010 to 30 November 2011 mainly because he had been unable to obtain sufficient evidence regarding continuing financial support from Osko's main contractor, which was W Y Steel. W Y Steel was therefore the main cause of whatever financial distress Osko was in.

(d) The same auditor went on to state that he had not meant to and in fact did not express the view that there were concerns over Osko's solvency. In fact, he thought that the records which he was shown suggested that Osko was solvent.

(e) Osko stated that the $70,000 loan mentioned at [57(d)] above had already been repaid in full by the director concerned.

(f) Osko also stated that while its paid-up capital was admittedly just $25,000, W Y Steel had known of this when it awarded the Sub-Contract to Osko.

(g) Finally, one of Osko's witnesses said that one of W Y Steel's principals had contacted him and threatened that W Y Steel would outspend and so outlast Osko in the litigation, and had offered to end the litigation by paying him a sum of $400,000 if he agreed to sign some unspecified documents.

59 We have said above that the purpose of the Act is to ensure (*inter alia*) that even though adjudication determinations are interim in nature, successful claimants are paid. To this end, under s 22(1), the respondent must pay the adjudicated amount either within seven days after being served with the adjudication determination (see s 22(1)(*a*)), or by the deadline stipulated by the adjudicator (see s 22(1)(*b*)). The claimant can suspend work (see s 26(1)(*d*)) or take a lien on goods supplied (see s 25(2)(*d*)) if the respondent fails to pay. If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s 18(3). If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s 27(5). This requirement is repeated in O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). These provisions all point to one thing: where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason.

60 Notwithstanding these provisions, it is clear that the court retains the power to stay the

enforcement of an adjudication determination. In our judgment, this follows from the provisional nature of an adjudication determination. Such a determination is not a final determination of the parties' rights. Rather, it establishes a position with finality for the *present*, and this position continues until the rights of the parties are eventually and finally determined or resolved. It follows from this that the court retains the discretion to order a stay of enforcement of an adjudication determination where it is necessary to do so in order to secure the ends of justice. There are no local cases on point on the exercise of this discretion, although we can take reference from foreign cases, bearing in mind the scheme of the Act and our Parliament's intention.

61 In *Brodyn*, the New South Wales Court of Appeal, after finding against Brodyn (the respondent to the payment claim in that case), noted that it was not left without recourse and identified the general principle of law on granting a stay of enforcement thus (at [85] *per* Hodgson JA):

> A court in which judgment for recovery of money has been given can stay execution of that judgment. A party against whom there was a substantial judgment could apply for a stay of execution on the grounds that it had a greater claim against the judgment creditor, for which it would shortly obtain judgment, and that, if the judgment money was paid, it would be irrecoverable; and the court could in its discretion grant a stay, on terms if it thought appropriate. I see no reason why a judgment under s 25 of the [NSW] Act could not be stayed on that kind of basis, although the policy of the [NSW] Act that progress payments be made would be a discretionary factor weighing against such relief.

62 Section 25(4)(b) of the NSW Act is, for present purposes, similar to our s 27(5), and as a general proposition, we agree with the principle stated in the above passage from *Brodyn* that enforcement of an adjudication determination *may* be stayed in appropriate circumstances. Undoubtedly, the claimant who successfully secures an adjudication determination in his favour has a right to be paid, but there is a competing residual right on the part of the respondent to have his claims ventilated in full in court or in some other dispute resolution proceeding.

63 Under s 21(1) of the Act, an adjudication determination is binding on the parties to the adjudication until: (a) leave of the court to enforce the adjudication determination is refused under s 27 (see s 21(1)(*a*)); (b) the dispute is finally determined by a court or tribunal or some other dispute resolution body (see s 21(1)(*b*)); or (c) the dispute is settled by agreement between the parties (see s 21(1)(*c*)). Section 34(1)(*a*) further states that nothing in the Act shall affect any party's right to submit a dispute relating to or arising from a construction contract to a court or tribunal or some other dispute resolution body, and s 34(3) provides that adjudication proceedings should be terminated if the dispute is first determined by a court or tribunal or some other dispute resolution body. All of these provisions underscore the idea of an unsuccessful respondent having the right to try to reverse (either in whole or in part) the temporarily final adjudication determination.

64 For this right not to be nugatory, a respondent who is initially unsuccessful must have an avenue open to him that will enable him finally to achieve effective justice. This avenue must extend to the right to recover whatever sums have been paid pursuant to an adjudication determination, but which are eventually and finally shown not to have been owed to the (initially successful) claimant. Where the adjudicated amount is paid to a claimant in serious financial distress, there is a chance that the money may not be recoverable by the time the rights of each of the parties are finally determined. How is this tension to be managed in a way that is compatible with the overall purposes of the Act?

65 In *Brodyn*, the New South Wales Court of Appeal declined to grant a stay of enforcement of the adjudication determination in question even though the successful claimant in that case had first

been in voluntary administration and then been the subject of a Deed of Company Arrangement. In *Grosvenor Constructions (NSW) Pty Limited (in administration) v Joseph Musico, Rosemary Musico, Luigi Genua and Rose Genua* [2004] NSWSC 344, where the successful claimant was placed in administration, Einstein J accepted (at [32]) that "where there is a certainty that the [unsuccessful respondent's] rights will be otherwise rendered nugatory, and that it will suffer irreparable prejudice, the proper and principled exercise of the Court['s] discretion is to grant a stay".

66 In the English case of *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] CLC 927, a payment claim was brought by a sub-contractor ("Dahl-Jensen") against the main contractor ("Bouygues"), and a counterclaim was also brought by Bouygues against Dahl-Jensen. The net effect of the adjudicator's determination of Dahl-Jensen's claim and Bouygues' counterclaim was that Bouygues was to pay the sum of £208,000 to Dahl-Jensen. Dahl-Jensen subsequently obtained summary judgment against Bouygues for this sum. The English Court of Appeal dismissed Bouygues' appeal against the summary judgment, but granted a stay of enforcement on the grounds that Dahl-Jensen was already in insolvent liquidation at the time of its application for summary judgment. Chadwick LJ said (at [35]):

> … In circumstances such as the present where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in liquidation, in which full account can be taken and a balance struck. …

67 In *Rainford House Limited v Cadogan Limited* [2001] BLR 416, the successful claimant was in administrative receivership at the time it applied for summary judgment of the adjudicated amount against the respondent. Richard Seymour QC ("HHJ Seymour QC"), sitting as a judge of the Technology and Construction Court of the Queen's Bench Division (UK) ("the TCC"), allowed the claimant's application for summary judgment, but at the same time, imposed a stay of enforcement on the basis that (at [12]):

> … [T]he evidence put before me on behalf of [the respondent] raises a strong prima facie case that [the claimant] is currently insolvent. That evidence has not been contradicted or explained. …

HHJ Seymour QC stated that the type of evidence which had to be shown by an unsuccessful respondent who was applying for a stay of enforcement of an adjudication determination was "credible material which, unless contradicted, demonstrates that the claimant is insolvent" (at [11]); "vague fears or unsubstantiated rumours of insolvency" (at [9]) would not suffice.

68 It is evident from these cases that where there is objective evidence that the successful claimant is in fact insolvent, a stay of enforcement would usually be appropriate. However, as is evident from *Brodyn*, evidence of financial difficulties which fall short of actual, objective insolvency – even if these difficulties are serious – will not usually suffice.

69 Consistent with this, although perhaps a somewhat extreme case, is *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] BLR 374 ("*Derek Vago*"). In that case, the evidence showed that the successful claimant was a "maximum risk company" (at [28]) according to a credit report, had a net liability position of £71,630 and had an unexplained short-term loan of £135,050 from a director. Yet, these factors were held to be insufficient to show that the claimant would be unable to repay the adjudicated amount if the respondent were to succeed in the arbitration proceedings which it had brought against the claimant following the adjudication determination. Peter Coulson QC ("HHJ Coulson QC"), sitting as a judge of the TCC, added two other relevant

considerations: first, the claimant's present financial position and its likely position when the arbitration was likely to end was the same or very similar to its financial position when the contract between the parties was made (at [39]); and second, the claimant's financial woes were due to the respondent's failure to pay the adjudicated amount determined by the adjudicator (at [40]).

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.

71 In the course of the arguments before us, it was suggested that the above approach would tilt the balance unduly in favour of the successful claimant and place the unsuccessful respondent unfairly at risk. It was also suggested that this would leave a successful claimant in an adjudication under the Act in a better position than a party who had succeeded at a trial but where an appeal was pending. Whether that is true or not, the comparison is not one that is apt. An adjudication determination is provisional in the sense that it may ultimately be reversed if it is challenged in a court or tribunal or some other dispute resolution body. However, as far as the rights of the parties to the adjudication are concerned, to the extent that the adjudication determination remains intact pending any such challenge, it has the effect of absolutely and conclusively determining the parties' rights until and unless it is eventually reversed in accordance with the provisions of the Act – see [13] and [18] above. Hence, while we are prepared to recognise the possibility of granting a stay of enforcement of an adjudication determination because of the possibility of a different outcome emerging eventually, a stay will not *readily* be granted having regard to the overall purpose of the Act, which is precisely to avoid and guard against pushing building and construction companies over the financial precipice.

72 Turning to the facts before us, it is evident that W Y Steel had not met the high threshold that was required to justify granting a stay of enforcement of the Adjudication Determination pending the disposal of Suit 474/2012. On W Y Steel's own evidence, it was clear that it was by far the biggest claimant against Osko. The Remaining Sum, if released to Osko, would, together with the amount which we had already ordered to be released at the close of the hearing before us, settle in full all the outstanding claims against Osko (incidentally, including W Y Steel's claim in Suit 474/2012), save for the claims related to the Senoko Way Contract. The evidence offered in support of W Y Steel's contention that Osko was no longer in business was, to put it mildly, weak. W Y Steel's reliance on the accounts of Osko and Osko's $70,000 loan to one of its directors was rebutted by the affidavits that were filed by Osko. Further, to the extent that the accounts of Osko demonstrated that it was in some financial distress, the accounts in question covered the period from 1 December 2010 to 30 November 2011, the very period in which Osko signed on as a sub-contractor to W Y Steel. In our judgment, the facts before us fall comfortably within the precedents that were cited to us where no stay of enforcement was granted. Having regard to the legal principles which we have just articulated, we accordingly dismiss W Y Steel's stay application.

Conclusion

73 In the circumstances, we dismissed the appeal and we hereby also dismiss W Y Steel's stay

application. The Remaining Sum, which is currently still being held in court, is to be released to Osko forthwith. There will be the usual consequential orders. Osko is to have its costs of the appeal fixed at $30,000 plus reasonable disbursements.

[note: 1] See Appellant's Core Bundle Vol II, p 140.

[note: 2] *Ibid*.

[note: 3] See para 12 of Lim Joo Suan's affidavit dated 4 March 2013.