IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 132

Originating Summons No 204 of 2016

In the matter of Section 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B)

And

In the matter of Order 95, Rule 2 of the Rules of Court (Cap 322, r 5)

And

In the matter of the Adjudication Determination dated 23 February 2016 made in Adjudication Application No SOP/AA030 of 2016 between International Elements Pte Ltd and Hyundai Engineering & Construction Co Ltd

Between

Hyundai Engineering & Construction Co Ltd

… *Plaintiff*

And

International Elements Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Building and Construction Law]—[Statutes and regulations]

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8 July 2016

Kannan Ramesh JC

Introduction

1 Modelled after similar legislation in other Commonwealth jurisdictions, the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") came into effect in 2005 with the primary purpose of maintaining liquidity in the construction industry, facilitated by a "fast and low cost adjudication system to resolve payment disputes" (see *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113). While the Act has gone some way towards achieving its goal, it has also spurred ingenuity in the legal profession in the formulation of means to set aside an adjudication determination. The present application, Originating Summons No 204 of 2016 ("OS 204"), involving the interpretation of s 15(3)(*b*) of the Act ("s 15(3)(*b*)) in the context of a "cumulative" payment claim (in essence, a claim that includes unpaid amounts

that were the subject of previous payment claims served in relation to the same contract, under s 10(4) of the Act), was one such example. The principal question that the application framed for decision was: as regards a supply contract, did s 15(3)(*b*) require that the reasons for non-payment be given after the issuance of and *in relation to* a payment claim. It would appear that this is the first time this issue has arisen for consideration by our courts.

Background

2 The plaintiff, a Singapore-registered foreign company in the business of building construction, was engaged as the main contractor for a project known as "Proposed Conservation & Additions and Alterations to Existing Blocks 1, 9, 14 and NCO Club, and New Erection of 2 Tower Blocks of 34 & 45 Storey, 4 Podium Blocks and 3 Basement Levels, Comprising of Hotels, Offices, Retail Units and Residential Dwelling Units (Total 190 Units) on Lot 858K TS11 at Beach Road (Downtown Core Planning Area)" ("the Project").

3 The defendant was a Singapore-incorporated company in the business of the manufacture, production and fabrication of building materials. By a Letter of Award dated 7 August 2013 ("the Letter of Award") and a Letter of Acceptance dated 11 October 2013 ("the Letter of Acceptance"), the defendant was engaged by the plaintiff as a subcontractor for the "supply, delivery and unloading of stone" to the Project. It was common ground that the agreement evidenced by the Letter of Award and the Letter of Acceptance ("the Subcontract") fell within the definition of a "supply contract" in s 2 of the Act.

4 Clause 18 of the terms and conditions in the Letter of Acceptance ("Clause 18") established a mechanism for the making of periodic payments to the defendant under the Subcontract. It read:

> **18. Payment Terms**
>
> 18.1 The Supplier shall submit your monthly interim payment claim by the 20th of each calendar month to ensure prompt payment. Any payment claim submitted later than the 20th of each calendar month shall be treated as a payment claim for the following month, without exception or waiver. Refer to Appendix K.
>
> 18.2 Within 21 days from receipt of the application for interim payment from the Supplier, the Main Contractor shall evaluate and certify an amount due to the Supplier fairly representing the value of the Sub-Contract Works plus any authorized variations properly executed.
>
> 18.3 The Main Contractor shall pay the Supplier such amount as certified in the Payment Certificate, less all proper and lawful deductions which may arise under the terms of this Agreement against any and all sums which may be due to the Supplier, on or before the expiry of 35 days from the date the tax invoice has been submitted to the Main Contractor.

Similar terms for payment were also set out in cl 5 of the General Conditions in the Letter of Award. The collective effect of these clauses was that the plaintiff would evaluate and certify the amount due to the defendant within 21 days from the receipt of the payment claim, which had to be submitted by the defendant by the 20th of each calendar month. Upon certification by the plaintiff of the amount due, the defendant would submit a tax invoice to the plaintiff, based on the amount certified, for payment by the plaintiff within 35 days from submission of the tax invoice.

5 The payment claim that was the subject of the dispute was Progress Claim No 24 ("PC24"), which was served by the defendant on the plaintiff on

20 November 2015. The sum of $1,188,087.59 was claimed under PC24, and it was said to be the cumulative value of the unpaid amounts under the preceding 23 payment claims ("PC1 to 23") served pursuant to the Subcontract. No new claims were thus made in PC24.

6 The defendant received no payment or any response providing reasons for non-payment from the plaintiff as regards PC24. As a result, on 22 January 2016, 63 days after the service of PC24, the defendant served a Notice of Intention to Apply for Adjudication of PC24 on the plaintiff and thereafter lodged Adjudication Application No 30 of 2015 ("AA30") with the Singapore Mediation Centre on the same day. The plaintiff filed its adjudication response on 1 February 2016 relying on reasons that had allegedly been given in the past in relation to PC1 to 23.

7 The adjudicator found in the defendant's favour, determining that the defendant was entitled to its revised claim of $974,823.95 and the costs of the adjudication ("the Determination"). The plaintiff, dissatisfied with the Determination, filed OS 204, seeking that it be set aside. There were two grounds which formed the basis for OS 204. The first was that the Determination was made in breach of natural justice as a result of the adjudicator's refusal to consider reasons for withholding payment that had been provided by the plaintiff *prior to the issuance of* but not *in relation to* PC24. The second was that AA30 had been filed out of time or that there was no entitlement to lodge the same. It was therefore argued that AA30 was improperly filed.

8 I dismissed OS 204, and the plaintiff has appealed my decision. I set out the grounds of my decision below.

There was no breach of natural justice

9 Section 16(3)(*c*) of the Act provides that an adjudicator shall comply with the principles of natural justice, and it is well established that a breach of s 16(3)(*c*) is a ground for setting aside an adjudication determination: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [47]. The purported breach in OS 204 was the adjudicator's refusal to have regard to the reasons given by the plaintiff in respect of PC1 to 23 in the adjudication of PC24. If this alleged breach was sustained, it would afford a basis for setting aside the Determination, The adjudicator took the view that he was not permitted to do so by reason of s 15(3)(*b*) of the Act. Section 15(3) 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 —
>
> > (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.

The adjudicator held that as reasons had not been given in *relation to PC24*, the plaintiff was not entitled to include in its adjudication response reasons for resisting AA30. The adjudicator took this view notwithstanding that reasons had allegedly been proffered in the past *in relation to* PC1 to 23, which cumulatively made up PC24.

10 What constitutes a "relevant due date" in s 15(3)(*b*) is discussed in respect of the second issue but the parties' respective positions on that issue had no bearing on the purported breach of natural justice. It was nevertheless

accepted that for the purpose of the issues before me, the "relevant due date" was that for PC24. On the assumption that PC24 was an amalgamation of PC1 to 23 and the plaintiff had in fact offered reasons in the past for not making payment of PC1 to 23, it would be factually accurate to say that reasons had been provided by the plaintiff before the "relevant due date" for PC24 as regards PC 1 to 23 thereby complying with s 15(3)(*b*). However, accepting this argument would gloss over the fact that those reasons were provided *in relation to PC 1 to 23* and not PC24. While PC24 did not comprise any new claims, it nonetheless was a fresh payment claim with a new "relevant due date" that resuscitated the claims in PC1 to 23 by amalgamating them through the avenue of s 10(4) of the Act. Therefore, the pertinent question before me was whether, for the purpose of s 15(3)(*b*), the reasons which the plaintiff sought to rely on to challenge AA30 had to be given before the "relevant due date" *in relation to* PC24. In other words, could the reasons for non-payment of PC24 have preceded its issuance? I should point out that this issue only arises in respect of cumulative payment claims. It is only in that limited context would one see a situation where reasons given in relation to past payment claims might be resuscitated for a future payment claim that subsumes them. This is an important point to bear in mind when examining Parliament's intention in enacting s 15(3)(*b*).

11 The plaintiff adopted a literal approach to the interpretation of s 15(3)(*b*), pointing to the fact that there was no express stipulation therein that the reasons had to be provided *in relation to* a payment claim; all that was required was for the reasons to be provided before the "relevant due date" for the payment claim. The plaintiff juxtaposed the difference in statutory language between supply contracts and construction contracts to augment its

argument. It was pointed out that unlike construction contracts, there was no requirement that a payment response be provided in respect of supply contracts. For construction contracts, s 15(3)(*a*) of the Act prescribed that any reason in a respondent's adjudication response must have been stated in a relevant payment response. On the other hand, for supply contracts, s 15(3)(*b*) merely stated that a reason must have been provided before the "relevant due date". The argument was that this difference in language between construction and supply contracts – "relevant payment response" and "relevant due date" respectively – was deliberate to reflect the lesser degree of formality that was required for the latter. It was argued that this reduced emphasis on formality did not require reasons to be given in writing *in relation to* a payment claim provided that they were given before the "relevant due date". It sufficed that those reasons had been given in the past as regards aspects of the claim that were being challenged. Taking the plaintiff's argument at its highest, to require such reasons be provided in relation to a payment response would in effect read into s 15(3)(*b*) a requirement akin to the filing of a payment response in relation to construction contracts when Parliament had by deliberately utilising different language signalled its intention that none was required.

12 As the adjudicator noted, there was a strong intuitive appeal to the plaintiff's argument. As s 10(4) of the Act expressly allows for unpaid amounts that were the subject of a previous payment claim to be included in subsequent payment claims, a respondent could conceivably be aware of the reasons for withholding payment for a cumulative claim which was comprised in part or solely of past payment claims in relation to which reasons had previously been given. If that were the case, there would be no prejudice to a

claimant even if no reasons were given *in relation to* that cumulative payment claim as regards the past payment claims that it subsumed. Such a reading would also satisfy the requirement in s 15(3)*(b)* that reasons be given on or before the "relevant due date" as the reasons for withholding payment on the cumulative payment claim would have been furnished within time. Notwithstanding its intrinsic appeal, this argument clearly did not apply as regards payment responses for construction contracts given the language that has been used for such contracts in the Act. The question was whether Parliament intended a different approach for supply contracts by deploying different statutory language. I was of the view that Parliament did not intend a difference in approach between the two types of contracts on the specific issue of whether reasons had to be given in relation to a payment claim.

13 The defendant disputed that reasons for withholding payment for PC24 had been provided. It was the plaintiff's position that those reasons had been given in its payment certificate issued in response to Progress Claim No 23, which was also a cumulative claim including amounts outstanding under previous payment claims. However, the plaintiff did not appear to dispute that it otherwise only provided reasons in relation to PC24 in the adjudication response in AA30 and not before that. Further, it also seemed that reasons had not been provided in respect of some of the claims. Regardless, I shared the view of the adjudicator that the reasons for withholding payment to a payment claim had to be given *in relation to* that payment claim and therefore only *after* it had been issued. There were at least three reasons, in my view, why this ought to be the case.

14 First, I found it strange that in enacting s 15(3)(*b*), Parliament would have had in mind a customised treatment for cumulative payment claims. As noted earlier, the issue before me would only arise in relation to a cumulative payment claim under s 10(4) of the Act. Therefore, s 15(3)(*b*) would ordinarily operate in the context of a "single" payment claim (*ie*, a claim for amounts that were not the subject of any prior payment claims). In that scenario, it is axiomatic that the respondent would have to give reasons *in relation to* that payment claim before the "relevant due date" as that was the only payment claim it would have faced. It would be impossible to come to any other factual landing. In my judgment, the manner in which the section ought to be applied should be the same regardless of whether the claim was single or cumulative. It was difficult to fathom any basis for concluding that Parliament intended a bifurcated approach depending on the type of claim under consideration, an approach that would attenuate the link between each payment claim and their respective "relevant due date", especially considering the similarity of treatment between supply contracts and construction contracts (see below at [16]).

15 Section 10(4) of the Act allows a claimant to bundle past unpaid payment claims into a cumulative payment claim provided the past claims were in relation to works which were carried out not later than 6 years before the date of the cumulative payment claim. By issuing the cumulative payment claim, the claimant effectively sets a new payment due date – the "relevant due date" for the cumulative payment claim – for all the unpaid past payment claim that it subsumes. What is therefore at play in the claims process is not the past unpaid payment claims but the cumulative payment claim, the former being subsumed into and treated as being part of the latter, thereby resetting

the "relevant due date" for payment. Accordingly, the reasons relevant for the purpose of s 15(3)(*b*) would be those offered *in relation to* the cumulative payment claim, establishing and reinforcing the clear link in s 15(3)(*b*) between the provision of reasons and "the relevant due date" for the payment claim under consideration. Seen in this way, reasons given in relation to past unpaid payment claims are no longer relevant. What is of relevance is whether reasons were given *in relation to* the cumulative payment claim on or before its *"relevant due date*.

16 Second, the structure of the adjudication process outlined in the Act is consistent with this interpretation. It is important to recognise that the regime for making payment claims under the Act, in respect of both supply and construction contracts, is broadly the same. The claimant serves a payment claim which has to be met by reasons – a payment response in the case of a construction contract, or reasons not necessarily in the form of payment response in the case of a supply contract. In the case of a supply contract, the respondent responds to the claim by either making payment in full or in part (s 11(2) of the Act), or giving reasons for not making payment if a contest is intended (s 15(3)(*b*)). Section 11(2) of the Act makes it clear that the response by way of payment is to be made *in relation to* the payment claim. I could see no conceivable basis for why the reasons for non-payment under s 15(3)(*b*) should not also be *in relation to* the payment claim.

17 Failure to make payment by the "relevant due date" entitles the claimant under a supply contract to file an adjudication application. The adjudication processes in respect of supply and construction contracts are also largely parallel. Section 12 of the Act makes it clear that the entitlement to file

an adjudication application arises with regard to the payment claim that initiated the claims process. Therefore when the adjudicator examines the adjudication response for compliance with s 15(3) of the Act, the assessment is based on reasons that were given *in response to* the payment claim which initiated the claims process. Seen in this light, the reference in s 15(3)(*b*) to "the reason [that] was provided by the respondent to the claimant" is in fact a reference to the reasons that were provided *in relation* to the payment claim that initiated the claims process. Accordingly, requiring reasons for withholding payment for supply contracts to be furnished *in relation to* a payment claim would make the recovery process for both construction and supply contracts broadly consonant as regards registering the reasons for not making payments. It would also make the approach to providing responses to single and cumulative payment claims for supply contracts the same.

18 As I alluded to above, the plaintiff stressed that it was precisely because the Subcontract was a supply contract for which no payment response was needed that there was no temporal limit to the provision of reasons. This argument, however, missed the woods for the trees. The argument elided the fact that it played itself out in the limited arena of a cumulative payment claim under a supply contract. In all other types of claims, the issue would not rear its head. The plaintiff effectively argued for cumulative payment claims for supply contracts to be isolated and treated differently, hanging the argument solely on the peg of a difference in statutory language. However, there was nothing that indicated that Parliament intended this outcome based on the difference in language that it chose. I could also see no logical reason why Parliament would have intended a different approach. As observed in *Eng Seng Precast Pte Ltd v SLF Construction Pte Ltd* [2015] 5 SLR 948 ("*Eng*

Seng Precast") at [24], the Building and Construction Industry Security of Payment Act 1999 No 46 (NSW) ("the NSW Act"), on which the Act was based, draws no distinction between supply and construction contracts. The Parliamentary debates are silent as to the reason for the dichotomy under the Act, but Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis 2nd Ed, 2013) ("*Security of Payments*") proffers a reason for the dispensation of a payment response with regard to supply contracts at para 6.24:

> … The dispensation with the requirement to furnish a payment response is a practical one. The disputes surrounding supply contracts centre on a few principal issues: whether delivery was made, the quantity delivered, the condition of the material supplied and the agreed price or rate to be applied in the payment. The contract documentation is likely to be considerably simpler and hence the issues are unlikely to be as complex as those encountered in construction contracts. Very few supply contracts proceed to adjudication and the figures from the Singapore Mediation Centre show that they account for less than 3% of the matters filed with the authorised nominating body.

19 In substance, the dichotomy appears to be down to a perception that supply contracts, being of a simpler and less sophisticated variety to constructions contracts, do not require the reasons for a refusal to pay to be cloaked with the same degree of formality as those in relation to construction contracts. Hence, the requirement for greater formality in relation to a payment response. However, eschewing formality for providing reasons is not the same as saying that reasons need not to be given *in relation to* each payment claim. The rationale for requiring reasons to be given in relation to each payment claim remains the same regardless of the manner in which the reasons are to be given or for that matter, whether the claims are made under construction or supply contracts. There is good reason for this. The reasons

crystallise the dispute between the parties enabling: (a) the claimant to make an assessment of the merits of the resistance that it faces; and (b) the issues in dispute to be properly framed before the adjudicator. Consequently, there would be clarity as to the areas of the discord between the parties and the focus of the inquiry before the adjudicator. I therefore did not see why the lesser degree of formality in providing reasons for payment claims under supply contracts justified the conclusion that the disputes arising thereunder were less complex and warranted a deviation from the general approach that reasons be given *in relation* to a payment claim. Under my construction of s 15(3)(*b*), sufficient concession is given to disputes arising out of a supply contract. Reasons given for withholding payment under a supply contract need not comply with the requirements for a payment response under s 11 of the Act read with reg 6 of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Reg 1, 2006 Rev Ed), and can be provided at any time before the "relevant due date". Additionally, s 12(5) of the Act provides that a claimant in respect of a supply contract need not be subject to the expiry of a dispute settlement period in order to file its adjudication application, as opposed to one claiming in respect of a construction contract. I also noted that the Minister of State for National Development, in running through the key features of the Act during the Second Reading of the Building and Construction Industry Security of Payment Bill (*Singapore Parliamentary Debates*, Official Report, vol 78, cols 1112-1120), also made no distinction between construction contracts and supply contracts as far as the general adjudication process was concerned. What this leads to, as *Security of Payments* notes at para 6.30, is that as a matter of *practice*, the respondent should issue a statement akin to a payment response *in relation to* the payment claim but without the cloak of formality that accompanies the payment

response. That would be a prudent step to take to avoid issues arising as to whether s 15(3)(*b*) had been complied with in any given case.

20 In this regard, it is important to remember that respondents to an adjudication claim are precluded from including in their adjudication responses (and adjudicators are not to consider) any reason that has not been provided to the claimant as regards *that payment claim* – see s 15(3). If the Act mandates the same consequences for a failure to give reasons for both construction and supply contracts, it is difficult to see a compelling reason to conclude that a different approach was intended for the provision of reasons. It seems axiomatic that given the draconian consequences of s 15(3), there ought to be absolutely certainty as to whether it has been complied with irrespective of the type of contract under consideration. Requiring that reasons be given *in relation to* a payment claim would be a right and necessary step in that direction.

21 Third, such an approach is more consistent with the underlying purpose of the Act, which is to facilitate and simplify the recovery of payment particularly as regards supply contracts. This underlying purpose is given effect to by adopting an interpretation that favours certainty where an ambiguity arises in the Act: *Eng Seng Precast* at [15]. In this regard, I was of the view that to accept that reasons need not be given *in relation to* a payment claim under a supply contract, particularly a cumulative payment claim, would expand the ambit of s 15(3)(*b*) too broadly, thereby introducing uncertainty into the adjudication process. For instance, it would mean that reasons given in respect of a first payment claim could be relied on in a cumulative claim served months or perhaps years later aggregating amounts outstanding from

that first payment claim. Significant dispute could then arise as to whether reasons were indeed given in relation to the first payment claim, carrying with it the spectre of uncertainty as to the adjudicator's ability to consider them because of s 15(3). As noted earlier, the draconian consequence of s 15(3)(*b*) clearly dictates that there be certainty and clarity in the identification of the areas of disagreement between the parties.

22 Requiring reasons to be given in response to a payment claim (*ie*, after the payment claim has been served) would clearly demarcate the boundaries of the dispute. One may argue that reliance on prior reasons does not detract from the certainty of the adjudication process but even putting aside the possibility that such reasons may be forgotten, it may, as noted earlier, lead to disputes as to whether such reasons were in fact given. OS 204 is illustrative of this, where there was dissension between the plaintiff and the defendant as to whether reasons had in fact been given in the past. Section 17(1)(*b*) of the Act requires, in respect of a supply contract, that an adjudicator determines an adjudication application within 14 days of its commencement, unless a longer period is requested by the adjudicator and agreed to by the parties. It could not have been intended for heavy disputes of fact such as whether reasons set out in the adjudication response had in fact been given in the past to be canvassed in a process intended as a quick and low-cost means of claims resolution. To require factual disputes of such nature to be determined by an adjudicator as a preliminary issue would derail the adjudication process and make it extremely challenging if not next to impossible for the adjudicator to complete his task within the statutorily prescribed time limits. The adjudication process is not tailored for such investigations. Nor is the adjudicator equipped for such a task.

23 Further, in cumulative payment claims, because there is nothing to bind a disputant to reasons it had provided in respect of past payment claims, and given that such reasons could have been provided in reply to different claims, contradictory reasons may arise. This leaves the claimant in the unenviable position of having to discern if the disputant had in fact taken inconsistent positions and if so, what its existing position is. Taken together with the likelihood that there would be disputes as to whether reasons had been furnished at all, it would make it difficult for the claimant to assess what exactly are the issues that he is taking forward to the adjudication. The adjudicator would also be in very much the same boat. This would be antithetical to the "fast and low cost adjudication system to resolve payment disputes" that Parliament intended in enacting the Act.

24 For these very reasons, I was also inclined to dismiss the plaintiff's appeal on the basis that not all of the reasons that were allegedly given were in writing. The plaintiff's case was that some of the reasons were provided orally to the defendant and it submitted, citing Chow Kok Fong and Chow Wen Si, *Adjudication Case Law Principles* (LexisNexis, 2015) ("*Adjudication Principles*") at para 4.15 in support, that reasons for non-payment could be provided orally. While *Adjudication Principles* is correct to observe that there is nothing in the Act or the subsidiary legislation that *expressly* prevents the respondent from providing reasons for non-payment orally, I was of the view that to allow reasons to be provided in such a manner would similarly burden the adjudication process in a way that would not have been contemplated by Parliament. Nevertheless, it was unnecessary for me to come to a firm landing on this issue given that I had already found that reasons could not be given prior to the filing of a payment claim. However, I would strongly encourage

disputants to manifest their reasons for resisting payment claims under supply contracts in writing.

25 In the round, I was satisfied that the proper interpretation of s 15(3)(*b*) was that the reasons referred to therein must be furnished *in relation to* a payment claim before the "relevant due date" and as a logical consequence, must be furnished after the issuance of the payment claim.

AA30 was properly filed

26 The plaintiff's second ground for its application in OS 204, as I understood it, had two elements. It argued that the defendant was either not entitled to lodge AA30 and had thereby lodged it prematurely, or had lodged it out of time. As s 13(3)(*a*) of the Act requires an adjudication application be made within seven days after the entitlement first arises under s 12 of the Act, and the entitlement in relation to supply contracts only arises under s 12(3) when a claimant fails to receive the payment by the "relevant due date" or disputes the response amount, an adjudication application filed outside of this timeline would warrant the adjudication determination being set aside: *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 at [47]–[49].

AA30 was not lodged prematurely

27 I first deal with the argument that AA30 had been lodged prematurely. It was not disputed that such a breach was a ground for setting aside an adjudication determination; this is consistent with the decision in *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226, in which the court held at [45] that an adjudication application filed prematurely is invalid

and entitles the court to set aside an adjudication determination rendered pursuant to that application.

28 As noted at [4] above, service of a payment claim by the defendant under Clause 18.1 of the Letter of Acceptance triggers the running of time for the plaintiff to certify payment. Upon the certification being issued, the defendant is entitled to submit a tax invoice on the basis of the amount certified which has to be satisfied within 35 days from the date of submission of the tax invoice. It is therefore apparent that each step is sequential and contingent on the steps earlier in the sequence happening. As the plaintiff had refused to issue the certification under Clause 18.2, the tax invoice could not be submitted by the defendant, resulting in there being no "due date" for payment. As one of the bases for filing an adjudication application as regards a supply contract is when payment is not made by the "due date" for payment (see s 12(3)(*a*) of the Act), there being no "due date" in the present case, the plaintiff argued that the lodgement of AA30 under s 12(3)(*a*) was premature.

29 I did not think there was merit to this argument. "Due date" is defined in s 2 of the Act as the date on which the progress payment becomes due and payable under s 8. The "due date" of a supply contract is therefore determined in accordance with s 8(3) or s 8(4) of the Act. These sections read:

> (3) Where a supply contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the earlier of the following dates:
>
> (a) the date as specified in or determined in accordance with the terms of the contract; or
>
> (b) the date immediately upon the expiry of 60 days after the relevant payment claim is served under section 10.

> (4) Where a supply contract does not provide for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable immediately upon the expiry of 30 days after the relevant payment claim is served under section 10.

30 To interpret Clause 18 of the Letter of Acceptance as requiring the submission of the tax invoice as a precondition for the running of time would lead an absurd result on the present facts. It would mean that the plaintiff's refusal to certify payment which prevented the defendant from issuing the tax invoice effectively resulted in time for payment being at large. That would mean that the timelines under Clause 18 were more generous than the long-stop deadline under s 8(3) of the Act of 60 days from the date of service of the payment claim. In substance, the parties would have contracted out of s 8(3) of the Act. This is expressly prohibited by s 36 of the Act, the relevant parts of which read:

> **No contracting out**
>
> 36.—(1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.
>
> (2) The following provisions in any contract or agreement (whether in writing or not) shall be void:
>
> (a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof;
>
> (b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

31 Accordingly, I rejected the argument that AA30 was filed prematurely.

AA30 was not lodged out of time

32 As for the plaintiff's second argument that AA30 had been lodged out of time, counsel for the plaintiff sought to rely on s 8(4) of the Act, arguing that it applied because there was no date specified in the Subcontract for when a payment claim was due – the date on which a progress payment became due and payable was dependent on when a tax invoice was served, of which there was none because the defendant was unable to issue one by reason of the plaintiff's refusal to certify payment. Accordingly, as the argument ran, AA30 ought to have been filed within 37 days after the service of PC24. The defendant, on the other hand, argued that s 8(3)(*b*) of the Act applied. The key question was therefore what the "due date" for payment of PC24 was.

33 It seemed to me that the relevant provision was s 8(3) and not s 8(4) of the Act. In assessing whether s 8(3) or s 8(4) of the Act was to apply, Parliament would have assumed that the parties would observe the contractual terms for payment that had been agreed between the parties to determine the due date for payment of a payment claim. It surely could not be the case that the question of which sub-section would apply would be contingent on whether a party performed or breached the terms of the contract that regulated the process by which the due date for payment is ascertained. Parliament could not have intended such an absurd application of the Act.

34 In the present case, the Subcontract clearly contemplated a due date being set for payment if the terms were duly observed and performed by the parties – 35 days from the date on which the defendant submitted a tax invoice on the plaintiff. None was served, but only because the plaintiff had refused to certify the amount set out in PC24. In my judgment, the fact that no tax

invoice had been submitted did not mean that there was no specified date on which a progress payment became due under the Subcontract. All it meant was that the deadline set out in s 8(3)(*b*) of the Act, necessarily being the earlier of the two dates under s 8(3) of the Act, would apply. The plaintiff's refusal to certify payment of the payment claim meant that s 8(3)(*a*) of the Act did not apply simply because a date for payment could not be determined in accordance with the terms of the Subcontract. The service of PC24, however, triggered the running of time under s 8(3)(*b*) of the Act. Accordingly, PC24 became due and payable immediately upon the expiry of 60 days after it had been served. PC24 was served on 20 November 2015. It became due and payable immediately upon expiry of 60 days thereafter, *ie*, 19 January 2016. Therefore, the defendant was entitled to file AA30: (a) immediately upon expiry of the said 60 days, pursuant to s 12(3)(*a*) of the Act; and (b) within seven days thereafter, pursuant to s 13(3)(*a*) of the Act. AA30 was filed on 22 January 2016, 63 days after the service of the PC24, and was therefore filed within time.

Conclusion

35 I therefore dismissed OS 204 and ordered costs of the application, fixed at $6,000, and reasonable disbursements to the defendant.

Postscript: the release of the money paid into court as security

36 Upon giving my decision, the parties agreed to tender written submissions on whether the money paid into court as security under s 27(5) of the Act ("s 27(5)") ought to be released to the defendant. This was because the plaintiff had instructed its counsel to appeal my decision on the merits of OS 204, and argued that s 27(5) required that the security not be released to

the defendant until the determination of the appeal. The plaintiff submitted that this was clear from the wording of s 27(5), which read:

> Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), *pending the final determination of those proceedings*. [emphasis added]

37 The key to the determination of this issue lay in the interpretation of the phrase "final determination of those proceedings". The plaintiff submitted that the use of the word "final" must refer not only to the first instance determination of the setting aside application but would include resolution of all avenues of appeal; the defendant on the other hand submitted that the phrase simply referred to the final decision of the first instance court. Again, while the plaintiff's construction perhaps adhered better to a literal interpretation of the provision, taking the context of the Act as a whole, I ultimately found in favour of the defendant. I should point out that no appeal has been filed against this aspect of my decision.

38 The plaintiff raised a number of reasons why its construction should be preferred. It referred to the use of the word "proceedings" in s 27(5), which it said supported an interpretation that went beyond the first instance determination. This, it said, would be consistent with a purposive approach since it could not have been Parliament's intention for the plaintiff to have to seek the return of the adjudicated sum from the defendant if it succeeded on appeal. Further, it referred to the decision of *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] 2 SLR 429 ("*Global (HC)*"), in which Tay Yong Kwang J held at [44] that a matter was only "finally

determined" for the purposes of what is now O 67 r 10(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") only if all avenues of appeal had been exhausted. While it was not necessary for the Court of Appeal to decide whether this finding of Tay J was correct, it nonetheless observed that "the Judge's reasoning and conclusion on this issue … seem to [the court] to be quite persuasive": *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116 at [36].

39 I did not find *Global (HC)* to be of persuasive authority on the specific issue before me. Order 67 r 10 of the ROC, which adopts the language of s 4(5) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA"), was clearly directed toward a very different mischief, that being the circumstances in which execution on a foreign judgment may be issued. In particular, Tay J was persuaded by the fact that Parliament had deemed it necessary to clarify in s 3(3) of the REFJA that a judgment would be deemed final and conclusive notwithstanding that an appeal may be pending, but had not done so in respect of s 4(5). Significantly, as Tay J highlights at [39] of *Global (HC)*, s 3(3) of the REFJA reflects the common law position, where a foreign judgment is "final" so long as it is not interlocutory and "conclusive" in the sense that it can be defeated by a plea of *res judicata*.

40 Nevertheless, I was of the view that the term "final determination of those proceedings" had to be construed in the context of the Act. The defendant pointed me to *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 4 SLR 615 ("*Lau Fook Hong*") at [26], in which the court discussed the purpose of s 27(5):

> With regard to the requirement for the provision of security in a setting-aside application, I would only add that this requirement also protects the successful claimant's right to be paid by guarding that claimant against the risk of the respondent becoming insolvent and the risk of the respondent dissipating assets to avoid payment. *It also ensures that the claimant would be paid immediately upon the conclusion of the setting-aside application* (which may sometimes take a substantial amount of time to conclude) in the event that the application is dismissed. The claimant should not be put through the entire process of having to enforce the adjudication determination against the respondent when that process was delayed as a result of the setting-aside application itself. All in all, s 27(5) of [the Act] and O 95 r 3(3) of the Rules of Court provides successful claimants with a very important safeguard against non-payment of adjudicated amounts which, in the grand scheme of things, is aligned with the SOPA's overarching aim of ensuring timeous payments to contractors. [emphasis added]

41 Nevertheless, the need for a claimant to be given protection by payment into court does not speak to when the security should be released. In this regard, I was mindful of the observations of the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [18] in respect of the crucial role liquidity plays in the construction industry:

> … 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. …

42 In my judgment, the overarching purpose of ensuring the flow of liquidity in the construction industry through the provision of an expeditious means of resolving payment disputes means that the courts should be wary of construing any provision in a manner that would defer payment to successful claimants. This was the approach taken in *Choi Peng Kum and another v Tan*

Poh Eng Construction Pte Ltd [2013] SGHC 272 ("*Choi Peng Kum*") which interpreted s 27(5) in the same manner. It could not have been intended by Parliament that such considerations could be circumvented easily by the filing of an appeal, and I did not think it appropriate to imply what would in effect be a statutorily prescribed stay of execution pending appeal in the absence of any such intent.

43 It is also consistent with the Supreme Court of New South Wales decision of *Shell Refining (Australia) Pty Limited v A J Mayr Pty Limited* [2006] NSWSC 154, in which it was held that the court had the discretion to release the adjudicated amount paid into court notwithstanding that an appeal was pending. The court held that it should be slow to infer an intention by Parliament to circumscribe the courts discretion in relation to security paid into court under s 25(4)(b) of the NSW Act (which is *in pari materia* to s 27(5) of the Act), a view which I too shared:

> 18 It was submitted by Shell that s 25(4)(b) requires that the adjudicated amount be paid into Court and that it must remain in Court until the proceedings are finally determined. Thus it was submitted the order I made was without jurisdiction
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> 19 Firstly, I do not agree with that construction of s 25(4)(b) of the Act. I am of the view that the legislature would not have intended to fetter a judge's discretion generally in relation to security in the hands of the Court. It also seems to me, in particular, that the legislature would not have intended to fetter a judge's discretion to order that such part of the amount paid into Court that was not in issue could be paid out, if the dictates of justice required such order. If such was intended it would have to be by very clear provisions indeed. There are no such provisions.

44 I was further reinforced in my conclusion by the fact that there was no express provision in the Act governing the release of the money paid into

court under s 27(5) of the Act where an appeal was contemplated, as was the case here. If the plaintiff were correct, it would mean that money paid into court under s 27(5) cannot be released immediately after the final determination of the High Court, at least until the time for filing an appeal has expired. That has generally not been the way our courts have approached s 27(5). In this regard, the plaintiffs directed me to the decision of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2012] SGHC 194 at [13], in which the court ordered payment out of the sum paid into court *unless the plaintiff appealed within time*. While this suggests that the court had adopted the plaintiff's construction of s 27(5), it did not appear from the grounds of decision that this specific point had been argued before the court and in the absence of any reasons why that construction was preferred, I found it to be of limited persuasive value. In my judgment, the right to receive payment cannot be ambulatory pending the filing of the appeal, at least not where the Act is silent on this issue.

45 I therefore ordered that the money paid into court be released to the defendant, notwithstanding that the matter was still pending appeal.

Kannan Ramesh
Judicial Commissioner

Christopher Wong and Chew Wei Jie (cLegal LLC) for the plaintiff;
Raymond Chan (Chan Neo LLP) for the defendant.