

Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd
[2009] SGHC 269

Case Number : OS 976/2009, SUM 5184/2009
Decision Date : 26 November 2009
Tribunal/Court : High Court
Coram : Ho May Kim AR
Counsel Name(s) : Melvin Chan and Jonathan Yang (TSMP Law Corporation) for the applicant; Soh Lip San, Sim Chee Siong and Paul Lie (Rajah & Tann LLP) for the respondent
Parties : Chip Hup Hup Kee Construction Pte Ltd — Ssangyong Engineering & Construction Co Ltd

Building and Construction Law – Dispute resolution – Alternative dispute resolution procedures

26 November 2009

Judgment reserved.

Ho May Kim AR:

Introduction

1 This summons raises two questions in the context of an application to set aside an adjudication determination pursuant to s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act"), namely, (i) whether an 18-day delay by the Singapore Mediation Centre ("SMC") in the service of an adjudication determination on the parties to an adjudication determination affects the validity of the adjudication determination; and (ii) whether an adjudication determination must be signed by the adjudicator in order for it to be valid.

2 The respondent, Ssangyong Engineering & Construction Co Ltd ("Respondent"), is the Main Contractor in the proposed Marina Bay Sands Integrated Resort Project ("the Project"). By a letter of acceptance dated 3 September 2007, the Respondent engaged the claimant, Chip Hup Hup Kee Construction Pte Ltd ("Claimant") as the RC Structural Works Sub-Contractor for Tower 1 of the Project. Progress Claim No.7 gave rise to a payment dispute between the Claimant and Respondent (collectively "the Parties"). On 11 September 2008, the Claimant invoked the adjudication process under the SOP Act by issuing a Notice of Intention to Apply for Adjudication and by lodging an adjudication application for Progress Claim No.7, Adjudication Application No. SOP/AA48 of 2008, with the SMC on the same day.

3 On 18 September 2008, the SMC notified the Parties that Ms Lim Ee Ping had been appointed the adjudicator ("Adjudicator"). On the same day, the Respondent submitted its adjudication response. The Parties attended an adjudication conference with the Adjudicator on 25 September 2008. On 29 September 2008, the Parties submitted their written submissions to the Adjudicator in accordance with the timeline stipulated by the SOP Act.

4 Pursuant to s 17(1)(b) of the SOP Act, the Adjudicator was required to determine the adjudication by 4 October 2008. On 30 September 2008, the Adjudicator requested the Parties to extend the deadline for her to determine the adjudication. On 1 Oct 2008, the Parties acceded to her request and extended the deadline to 8 October 2008.

5 The SMC received from the Adjudicator an adjudication determination on 4 October 2008. I

shall refer to it as the Unsigned Adjudication Determination ("Unsigned Adjudication Determination") as it was not signed. The SMC did not serve the Unsigned Adjudication Determination on the Parties until 22 October 2008, some 18 days after it was received by the SMC, for reasons unknown to the parties.

6 On the 4 October 2008, after the Adjudicator sent the Unsigned Adjudication Determination to the SMC, she sent an email to the Parties on 6 October 2008 seeking their agreement on whether they would like the cost of the room for the adjudication conference to be paid and apportioned upfront or to be apportioned and determined by her. The Claimant's solicitors replied the Adjudicator by email on 7 October 2008 stating that the Claimant "would like the costs of the room for the conference to be determined by the [A]djudicator as part of the adjudication costs" whereas the Respondent's solicitors replied on 9 October 2008 stating that "the costs should not form part of [the Adjudicator's] determination and should be paid and apportioned upfront".

7 This led to another determination which I shall refer to as the Signed Adjudication Determination ("Signed Adjudication Determination"). This determination, unlike the Unsigned Adjudication Determination, was signed. Although the Signed Adjudication Determination is dated 4 October 2008, it came into existence presumably between 9 October 2008 (date of the Respondent's solicitors' reply email to the Adjudicator) and 13 October 2008 (date the Adjudicator sent the Signed Adjudication Determination to the SMC). The SMC served the Signed Adjudication Determination on the Parties the very next day on 14 October 2008.

8 On 15 October 2008, the Respondent's solicitors wrote to the SMC enquiring when the Signed Adjudication Determination was received by the SMC. It was through a series of correspondence between the Respondent's solicitors and the SMC that the Parties came to know of the existence of the Unsigned Adjudication Determination which the SMC served on the Parties on 22 October 2008. It also became apparent on 22 October 2008 that there were differences in the substance of the Signed and Unsigned Adjudication Determinations.

9 The Signed and Unsigned Adjudication Determinations are identical except in respect of the cost of sharing of the conference room (para [3(d)] and [75] of the Adjudication Determinations) and the extension of time for the Adjudicator to render an adjudication determination (para [17] of the Adjudication Determinations).

10 The Signed Adjudication Determination includes the Adjudicator's determination that the room fees for both Parties would be deducted from the Claimant's deposit and that the Respondent would pay the Claimant accordingly, whereas the Unsigned Adjudication Determination is silent on this issue. The other difference between the two Adjudication Determinations is that the Unsigned Adjudication Determination contains the statement (at para [17]), "As it turned out, I did not require the extension of time for making this determination" whereas this sentence is not present in the Signed Adjudication Determination, presumably because it had been deleted by the Adjudicator.

11 The Claimant seeks to rely solely on the Unsigned Adjudication Determination. There is, therefore, no need for me to determine the validity of the Signed Adjudication Determination.

12 On 9 September 2009, the Claimant was granted leave of Court to enforce the Unsigned Adjudication Determination. On 2 October 2009, the Respondent filed this summons, seeking to set aside:

- a) the Unsigned Adjudication Determination; and

b) the Order of Court dated 9 September 2009 granting leave to the Claimant to enforce the Unsigned Adjudication Determination.

13 The Respondent sought to set aside the Unsigned Adjudication Determination on the following grounds:

b) the Unsigned Adjudication Determination is merely a draft and is not a proper adjudication determination and further the Signed Adjudication Determination is out of time for the purposes of the SOP Act ("First Ground");

c) the Adjudicator has no jurisdiction to adjudicate on the Adjudication application as:

a. the Claimant has failed to serve a valid payment claim under the SOP Act on the Respondent ("Second Ground"); and

b. the Claimant has claimed for items which fall outside the scope of the SOP Act thereby rendering the Payment Claim No. 7 dated 20 June 2008 invalid ("Third Ground").

d) The Adjudicator had breached the rules of natural justice ("Fourth Ground").

14 At the request of the Respondent and with the Claimant's consent, I agreed to hear the Parties submissions on the First Ground alone and to determine this ground without prejudice to the other three grounds of the Respondent. As such, the First Ground raises two issues, namely whether the Unsigned Adjudication Determination should be set aside on the ground that:

(1) it is a draft and is unsigned; and

(2) it was not served on the Parties until 18 days after it was received by the SMC.

Setting aside of an adjudication determination under the SOP Act

15 The court's powers in relation to an adjudication determination is set out at s 27(5) of the SOP Act which provides:

Enforcement of adjudication determination as judgment debt, etc.

27. — (5) 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.

16 In the recent case of *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 ("*SEF Construction*") concerning an application by SEF to set aside an adjudication determination on the grounds that the adjudicator had breached the rules of natural justice and had failed to engage in a *bona fide* exercise of his powers, Judith Prakash J in *SEF Construction* at [27] noted that s 27(5) of the SOP Act had nothing to say on the grounds on which an application for setting aside may be based or on the approach that the court should take to such an application. In her view, the court was guided in its approach mainly by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) which called for a purposive reading of statutory wording. In considering applications to set aside an adjudication determination, she was of the opinion that the court must view adjudication determinations and the

SOP Act itself in the light of the legislative intention.

17 In determining the grounds on which an adjudication determination may be set aside, Prakash J considered and applied with suitable modifications, the approach of Hodgson JA in *Brodyn v Davenport* [2004] NSWCA 394 ("*Brodyn*"). In *Brodyn*, Hodgson JA was of the view (at [52]) that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the New South Wales Building and Construction Industry Security of Payment Act 1999 ("1999 NSW Act"), it must satisfy whatever were the conditions laid down by 1999 NSW Act as essential for there to be such a determination, otherwise it would be void, not merely voidable. He then proceeded to set out a non-exhaustive list of the basic and essential requirements for the existence of an adjudicator's determination (at para [53]).

18 Similarly, in *Transgrid v Siemens Ltd & Anor* [2004] NSWCA 395 ("*TransGrid*"), Hodgson JA at [29] said that "review is available only where the determination is not a determination within the meaning of the [1999 NSW Act], because of non-satisfaction of some pre-condition which the [1999 NSW Act] makes essential for the existence of such a determination". In *Coordinated Construction Co v J M Hargreaves and Ors* [2005] NSWSC 77, McDougall J at [45] was of the view that the language in both *Brodyn* and *TransGrid* suggested strongly that the factors to be considered in determining whether a determination was reviewable were anterior rather than interior: matters that must exist before there can be an adjudication at all.

19 Prakash J in *SEF Construction* at [45] considered that an application to the court under s 27(5) of the SOP Act must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:

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

Whether the Unsigned Adjudication Determination may be set aside on the grounds that it is in draft, unsigned and there was a delay in its service on the Parties

20 This brings me to the question of whether the Unsigned Adjudication Determination may be set aside on the grounds that it is in draft, unsigned and it was not served on the Parties until 18 days after the SMC had received it.

21 The Respondent's submission that the Unsigned Adjudication Determination is in draft and unsigned goes to the question of the existence of a determination by the Adjudicator within the specified period, a valid ground to set aside an adjudication determination applying *SEF Construction* (at para [45(e)]).

22 However, the Respondent's submission that the Unsigned Adjudication Determination should be set aside on the ground that there was a delay in the service of the said determination does not fall squarely within the basic requirements set out in *SEF Construction* (at para [45]). This brings me to the issue of whether the SMC's 18-day delay in the service of the Unsigned Adjudication Determination on the Parties is a breach of a basic and fundamental requirement for the existence of a valid adjudication determination, thereby rendering the Unsigned Adjudication Determination a nullity. I pause to note at this juncture that although the question of whether or not prompt service of an adjudication determination by the SMC was a basic requirement in the adjudication process was not raised and consequently not considered in *SEF Construction*, Prakash J's list of basic requirements (at para [45]) seems to be exhaustive.

23 On the one hand, the Respondent submitted that the mere existence of a determination is not sufficient to achieve the purposes of the SOP Act because the service of an adjudication determination is an essential part of the mechanism for the resolution of disputes under the SOP Act. Further, the Respondent submitted that an adjudication determination can only take effect upon its service on the parties. On the other hand, the Claimant submitted that s 17(8) of the SOP Act does not expressly impose a timeline on the SMC to complete the service of the adjudication determinations on the Parties, therefore an 18-day delay by the SMC does not warrant the setting aside of the Unsigned Adjudication Determination.

24 Section 17(8) of the SOP Act imposes on the SMC the obligation to serve the adjudication determination on the parties in the following terms:

Determination of adjudicator

17. — (8) The authorised nominating body —

(a) shall serve a copy of the adjudication determination, and any amended adjudication determination, on the claimant and the respondent; and

(b) shall serve on the principal (if known) and the owner concerned a notice in writing that the adjudication determination has been made or amended, as the case may be.

25 The Minister of State for National Development, Mr Cedric Foo Chee Keng, touched on the role of the SMC very briefly during the Second Reading of the Building and Construction Industry Security of Payment Bill ("the SOP Bill") on 16 November 2004 (Singapore Parliamentary Debates, Official Report (16 November 2004) vol 78 at col 1112) where he stated:

For a start, the Singapore Mediation Centre (SMC) will be appointed as the ANB. SMC is familiar with payment disputes and issues in the construction industry. More ANBs may be considered in future, as and when necessary. Besides administering the adjudication process, the ANB will train, certify and maintain a register of adjudicators, including establishing their fees. The fees will be

capped so that adjudication will remain affordable....

26 The Victoria Building and Construction Industry Security of Payment Act 2002 ("2002 Victoria Act") is the only other statute which places on the authorised nominating body the obligation to serve the adjudicator's determination on the parties. The Victoria Building and Construction Industry Security of Payment (Amendment) Act 2006, passed in July 2006, inserted s 23A into the 2002 Victoria Act. Section 23A of the 2002 Victoria Act provides:

23A Adjudication determination to be given to parties and Building Commission

23A — The authorised nominating authority to whom the adjudication application was made must give a copy of the adjudication determination –

- (a) to the claimant and the respondent, as soon as practicable after it is made; and
- (b) to the Building Commission within 5 business days after it is made.

27 The impetus for the Victoria Building and Construction Industry Security of Payment (Amendment) Act 2006 came in 2004, when the Minister for Planning asked the Victoria Building Commission to review the operation of the 2002 Victoria Act. The Victoria Building Commission consulted key industry associations to develop an Options Discussion Paper. In the Options Discussion Paper by the Building Commission of Victoria entitled: *Review of Victorian Security of Payment Act 2002 Options Discussion Paper* dated June 2004, one of the issues raised was the appointment of adjudicators. In this context, the Building Commission explored the role of the authorised nominating authorities in the following manner at pg 53:

If ANAs are given a central, coordination role in the appointment of adjudicators, it may be expedient to also delegate to ANAs responsibility for service of documents between the claimant, the respondent and the adjudicator. The Building Commission is frequently asked for advice on the meaning of 'service' of documents, when documents must be received and the implications of failing to serve or receive documents within the exact time frames stipulated. The uncertainty regarding service of documents is a potential weakness of the Victorian Act as it may cause applications for adjudication to be invalidated in grounds that documents were not served or received within the required time.

It would be logical extension of the ANAs role to give them responsibility for service of documentation relating to adjudications. ...

After an adjudicator has made a determination, the ANA could also be responsible for serving copies of the determination on the parties. Service of copy documents upon relevant parties within strict time frames is a burden on the claimant and the legislative requirements are confusing for parties who are not accustomed to legal process. It would therefore ease the burden on the claimant if that responsibility is delegated to an ANA who is better equipped and capable of managing the task.

[emphasis added]

28 A working group, chaired by Tony Robinson MP, considered the responses to the *Review of Victorian Security of Payment Act 2002 Options Discussion Paper* and proposed amendments to the 2002 Victoria Act which led to the insertion of s 23A into the 2002 Victoria Act.

29 In light of the speech of the Minister of State during the second reading of the SOP Bill (at [25] above) and the views in the *Review of Victorian Security of Payment Act 2002 Options Discussion Paper* dated June 2004 by the Building Commission of Victoria (at [27] above), the rationale for s 17(8) of the SOP Act is likely to be to give the SMC a central coordination role in the administration of the process of adjudication as well as to reduce the uncertainty regarding the service of documents, so that applications for adjudication would not be invalidated on the ground that documents were not served within the required time.

30 Despite the purpose of the SOP Act (to facilitate cash flow by establishing a fast and low cost adjudication system to resolve payment disputes), the SOP Act does not impose a timeline for the SMC to serve the adjudication determination on the parties. All the SOP Act provides in s 28 (4) of the SOP Act is:

Authorised nominating bodies

28. —(4) An authorised nominating body shall, in relation to its authorisation under subsection (1)

—

...

(b) establish and administer codes of conduct or practice;

...

(e) facilitate the conduct of adjudications under this Act, including the establishing of rules therefor not inconsistent with this Act or any other written law, and provide general administrative support therefor; ...

31 I note that the mere fact that the SOP Act is silent on the timeline for the service of an adjudication determination does not conclusively indicate that there is no contemporaneous duty on the SMC to communicate the decision to the parties. Lord Wheatley in the Scottish case of *St. Andrews Bay Development Ltd v HBG Management Ltd* [2003] SLT 740 ("*St. Andrews Bay Development*") was of the view that even though the Housing Grants Construction and Regeneration Act 1996 (c.53) ("1996 UK Act") was silent on the communication of the decision to the parties, there was a contemporaneous duty to communicate that decision to the interested parties. He held at [15] and [16]:

[15] ...It is true that the statutory provisions only require the adjudicator to reach a decision. This is all that is said in terms of s 108(2)(c). However, para 39A.6.3 also requires that the adjudicator reach a decision within 28 days and further provides that he shall "forthwith send that decision in writing to the parties".

[16] There are therefore two sets of provisions which apply to the present situation. Dealing first with the statutory provision, it is clear that the only obligation upon the adjudicator in this matter described in the Act is that a decision should be reached within 28 days. *The Act is totally silent on the question of intimation or communication of that decision. In these circumstances it must therefore follow that the obligation to reach a decision must include a contemporaneous duty to communicate that decision to the interested parties. Not to require such an interpretation of the obligation to reach a decision would render the whole purpose of the legislation meaningless. It would suggest that there is no obligation on the adjudicator, having once arrived at that decision, to communicate it at all to anyone else. Alternatively, it would mean that the decision*

once reached did not have to be communicated within any time limit to the parties interested in receiving it, thus frustrating the purpose of a speedy resolution of building contract disputes envisaged in terms of the legislation. I therefore can only conclude that the requirement to reach a decision in terms of the statutory provisions includes a duty to intimate or communicate that decision to interested parties. An alternative interpretation of the statute is that the duty on the adjudicator is to intimate or communicate the decision reached within the time limits immediately or forthwith. On either view, it is clear that the adjudicator cannot be said to have satisfied either definition of her duties. ...

[emphasis added]

32 Moreover, Judge Humphrey Lloyd QC in *Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd* [2003] EWHC 3100 ("*Barnes & Elliot*") at [27] was of the opinion that to take the view, that a decision once reached did not have to be communicated within any time limit to the parties interested in receiving it, would deprive the parties not just of knowing where they stand in the eyes of the adjudicator but also of having a timely and enforceable decision upon which they may be to rebuild their relationship.

33 However, s 17(8) of the SOP Act must be looked in light of the other provisions of the SOP Act. The lack of an express obligation on the SMC to act promptly under s 17(8) of the SOP Act is to be contrasted with the other sections of the SOP Act which specify the time for the SMC to undertake its obligations. For example, section 13(1) of the SOP Act requires that a claimant who is entitled to make an adjudication application under s 12 may, subject to s 13, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body. Under s 13(4) of the SOP Act, the authorised nominating body shall, *upon receipt of an adjudication application* serve a copy thereof on the respondent; and serve on the principal (if known) and the owner concerned a notice in writing that the application has been made. Under s 14(1) of the SOP Act, the authorised nominating body shall, *upon receipt of an adjudication application*, refer the adjudication application to a person who is on the register of adjudicators established under s 28 (4) (a) and whom the authorised nominating body considers to be appropriate for appointment as the adjudicator to determine the adjudication application. In this context, s. 14(3) of the SOP Act provides a more specific timeline because it provides that the authorised nominating body shall, *within 7 days after receipt of the adjudication application*, serve a notice in writing confirming the appointment of an adjudicator on the claimant, the respondent, the principal (if known) and the owner concerned. Other sections of the SOP Act also impose specific timelines for the SMC to undertake its obligations to serve documents on the parties (see s 15(4), 18(5) and 18(6) of the SOP Act).

34 The fact that Parliament has specified the time for the SMC to undertake its obligations for all other aspects of the adjudication process except in relation to the service of an adjudication determination under s 17(8) of the SOP Act, is an indication that Parliament did not view the time period for the service of the adjudication determination as fundamental to the adjudication process. Furthermore, the fact that statutes on which the SOP Bill was modelled after (Scheme for Construction Contracts (England and Wales) Regulations 1998 ("1998 UK Scheme"), s 46 of the New Zealand Construction Contracts Act 2002 and in particular, the 2002 Victoria Act) contain language for the service of the adjudication determination "as soon as possible" or "as soon as practicable" once the determination is made, but similar language is absent from s 17(8) of the SOP Act, suggests that Parliament did not intend to impose any specific timeline on the SMC to serve the adjudication determination on the parties.

35 Furthermore, an examination of the English authorities reveals that the English courts have

drawn a distinction between reaching a decision and service of the decision on the parties. As to the relative importance of reaching a determination and service of the determination, Judge Humphrey Lloyd QC in *Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd, George Wimpey Southern Limited* [2003] EWHC 3100 (TCC) ("*Barnes & Elliot*") was of the view at [24] that:

24. As a matter of competing priorities the completion of the decision, as such, comes first. Its notification to the party should follow as night follows day, but the first and primary objective is that the decision should be there within the time limit.

36 The practical effect of the English and Scottish courts' position is that a determination reached outside the stipulated or agreed period would be void, but the English and Scottish courts have been willing to uphold a determination which has been served one or two days after the deadline for the adjudicator to determine the application (one day delay in *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC) and *Barnes & Elliot* at [26]; and two days delay in the Scottish case of *St. Andrews Bay Development* at [24]).

37 The reason for the court's tolerance of a delay of up to two days in the service of an adjudication determination is that the English and Scottish courts do not view such a delay as a sufficiently fundamental error to vitiate an adjudication determination. Lord Wheatley in *St. Andrews Bay Development*, in the context of a contract governed by the 1996 UK Act explained at [21]:

[21] ... While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity. *The production of a decision two days outwith the time limit provided is not such a fundamental error or impropriety that it should vitiate the entire decision.* Such a failure is a technical matter, and it is of significance in the present case that no challenge is offered to the merits of the adjudicator's decision. ... While this view of the statutory and contractual provisions may be thought in some respects to be unsatisfactory, and in particular offers no sanctions against an adjudicator who fails to produce a decision within the time limits, that is not something which alters my opinion. No doubt any adjudicator who fails to comply with time limits is unlikely to find favour with those who are seeking suitable persons to adjudicate on their disputes. However, this is not relevant to my conclusions...

[emphasis added]

38 Judge Humphrey Lloyd QC in *Barnes & Elliot* was of a similar view when he held at [26]:

26. I do not consider that to answer the last question in the affirmative would be the result of a sensible interpretation of the contract or of s.108 of the Act. *Clearly time remains very important, but an error which results in a day (or possibly, in the view of Lord Wheatley, of two days) seems to me to be excusable. It seems to me within the tolerance in commercial practice that one must afford to the Act and to the contract.* Whilst an adjudicator is not authorised to make mistakes, a decision arrived at in time is in principle authorised and valid, and in my judgment does not become unauthorised and invalid because by an error by the adjudicator in despatching the decision it does not reach the parties within the time limit. *However, I should emphasise that this tolerance does not extend to any longer period* (unless perhaps the parties had agreed to a very long duration), nor does it entitle an adjudicator not to complete the decision within the time allowed. ... [emphasis added]

39 In light of the English and Scottish authorities cited above at [37] and [38], SMC's obligation to serve the adjudication determination on the parties is less important than the Adjudicator's obligation

to reach a determination within the time stipulated in the SOP Act. The fact that the English and Scottish courts are only willing to tolerate a delay of two days in the service of the adjudication determination may be read in the light of the obligation under 19(1) of the 1998 UK Scheme which obligates the adjudicator to deliver the adjudication determination *as soon as possible* once the determination is made. This is to be contrasted with s 17(8) of the SOP Act which does not impose a specific timeline on the SMC to complete the service of the adjudication determination on the parties.

40 The fact that the SOP Act does not impose a specific timeline on the SMC to serve the adjudication determinations on the parties does not undermine the rationale underpinning the procedures laid down by the Act (i.e. to facilitate cash flow by establishing a fast and low cost adjudication system to resolve payment disputes so that cash flow would not be disrupted). The likelihood of the SMC taking such a long time to serve the adjudication determination on the parties to the extent that the entire purpose of the SOP Act is undermined, is very slim. Furthermore, the parties would not suffer significant prejudice where there is a delay in the service of the adjudication determination given that the time when the respondent shall pay the adjudicated amount to the claimant (s 22(1)(a) of the SOP Act); when the party required to make payment in consequence of the adjudication review determination shall make such payments (s 22(2)(a) of the SOP Act); and when the respondent may lodge an application for the review of the determination with the SMC (s 18(2) of the SOP Act) are all measured from the time of service of the adjudication determination, not the date of the adjudication determination.

41 That is not to say that the SMC has liberty to serve the adjudication determination on the parties as and when it feels like it, given that the SMC has to abide by The Code of Practice for Authorised Nominating Body ("Code of Practice"). Clause 1 (a) of the Code of Practice provides:

The ANB shall:-

a) efficiently and without discrimination perform the functions and duties of an ANB as specified in the [SOP Act] and the Building and Construction Industry Security of Payment Regulations 2005 ("the Regulations");...

Clause 6 of the Code of Practice further provides:

Process: Adjudication/Adjudication review

6. For managing and monitoring of the adjudication process, the ANB will:

a) *manage documents and notices in a timely manner;*

b) develop and maintain a process for recording time and date of document handled. This include:

(i) the receipt of documents (such as adjudication application, adjudication response and determination) from the relevant parties;

(ii) the serving of documents (such as a copy of application and notice of application, a copy of adjudication response and notice of adjudication response) to the relevant parties in a timely manner upon receipt of the relevant documents; and

(iii) *the serving of the determination and notice of the determination in a timely manner upon receipt of full payment of the adjudicator's fees.*

c) develop and maintain a complaint / feedback management process to address all complaints (written and verbal) of the ANB and adjudicator performances;

d) facilitate and provide conference venue (if needed);

[emphasis added]

42 For the above reasons, I am of the view that the delay of 18 days by the SMC in the service of the Unsigned Adjudication Determination on the Parties is not a breach of a basic and fundamental requirement for the existence of an adjudication determination under the SOP Act.

Whether the Unsigned Adjudication Determination should be set aside on the grounds that it is draft and unsigned

43 Allegations⁴As mentioned above at [\[21\]](#), the Respondent's submission that the Unsigned Adjudication Determination is in draft and unsigned goes to the question of the existence of a determination by the adjudicator of the application within the specified period.

44 In this regard, the Respondent's allegation that the Unsigned Adjudication Determination is in draft is not supported by evidence. The mere fact that the Adjudicator produced the Signed Adjudication Determination subsequent to the Unsigned Adjudication Determination does not prove on a balance of probabilities that the latter determination is a draft. Instead, the Adjudicator's statement at para [17] of the Unsigned Adjudication Determination that she requested for an extension of time but as it turned out she did not require it, suggests that the Unsigned Adjudication Determination was final but she changed her mind subsequent to the Unsigned Adjudication Determination leading to the Signed Adjudication Determination. The Respondent's other submission that the SMC's service of the Signed Adjudication Determination on the parties before the Unsigned Adjudication Determination indicates that the Unsigned Adjudication Determination is a draft, is mere speculation and the true reason for SMC's delay in the service of the Unsigned Adjudication Determination is not known to the parties.

45 This brings me to the issue of whether an adjudication determination has to be signed in order for it to be valid. The SOP Act, in particular s 17, is silent on the requirement of a signature for the determination to be valid.

46 In the English case of *Mott MacDonald Limited v London & Regional Properties Limited* [2007] EWHC 1055 (TCC) in the context of the 1996 UK Act and 1998 UK Scheme, one procedural challenge to the decision of the adjudicator at [80] was that the adjudicator could not have completed his decision until he had signed it. It was argued that although the adjudicator had reached a decision on 8 December 2006, because he did not sign the decision until 13 December 2006, the adjudicator did not deliver it as soon as possible as required by s 19(1) of the 1998 UK Scheme. Judge Thornton QC was of the view that the signature was not a necessary step that had to be taken for a decision to be reached. He held at [80]:

80 MM contended that the decision could not have been completed until he had signed it. However, the scheme provides for the decision to be reached and then sent off as soon as possible thereafter. There is no reason not to take the adjudicator at his word so that the decision was completed, or reached, on 8 December 2006 and it was a formality for him then to sign it. That step appears to have been postponed after the completion of the decision because the adjudicator was awaiting payment. However, *the signature was not a necessary step that had to be taken to allow the decision to be reached*. It follows that the decision was reached on

8 December 2006.

[emphasis added]

47 In another English case of *Treasure & Son Limited v Martin Dawes* [2007] EWHC 2420 (TCC), the claimant was engaged by the defendant to carry out extensive works of refurbishment and restoration at Dinmore Manor, Herefordshire pursuant to a contract which provided that the adjudicator shall within 28 days of his receipt of the referral and its accompanying documentation reach his decision and forthwith send that decision in writing to the parties. In dealing with the issue of whether the adjudicator must sign his decision, Mr Justice Akenhead was of the opinion (at [45] and [46]) that a signature was not required and not necessary on any commercial or practicable basis for the adjudicator to reach a determination because the contract did not expressly require the adjudicator to sign his decision; all that the contract called for was that the adjudicator "reaches his decision" and sends that decision to the parties; and further there was no issue that the decision document contained the adjudicator's (as opposed to anyone else's) decision on the matters referred to him. Mr Justice Akenhead further noted at [47]:

Whilst it is the case that a decision signed by the [a]djudicator will clearly demonstrate as a matter of evidence that it is his decision, the contract provisions in this regard are still operable if it can be demonstrated as a matter of evidence that a decision was the decision of the particular [a]djudicator.

48 Chow Kok Fong on *Security of Payments and Construction Adjudication* (2005, Lexis Nexis at pg 406) takes a similar view that it is good practice, but not a requirement that an adjudication determination be signed for it to be valid.

49 On the present facts, taking into account the fact that the SOP Act does not expressly require an adjudication determination to be signed, I find that such a requirement is not necessary for the operation of the SOP Act and given that the Parties did not contest the fact that the Unsigned Adjudication Determination was that of the Adjudicator, I am of the view that the validity of the Unsigned Adjudication Determination cannot be successfully challenged on the basis that it is unsigned.

Conclusion

50 For the above reasons, I dismiss the Respondent's application to set aside the Unsigned Adjudication Determination on the ground that the Unsigned Adjudication Determination is a draft, unsigned and the SMC took 18 days to serve it on the Parties. I will hear the parties on the issue of costs.

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