IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 19

Civil Appeal No 163 of 2017

Between

Comfort Management Pte Ltd

… *Appellant*

And

OGSP Engineering Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and construction law] — [Dispute resolution] — [Adjudication]
[Statutory interpretation] — [Construction of statute]

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Comfort Management Pte Ltd
v
OGSP Engineering Pte Ltd

[2018] SGCA 19

Court of Appeal — Civil Appeal No 163 of 2017
Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
9 February 2018

13 April 2018

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 The proper remit of an adjudicator's task in adjudicating a payment claim dispute under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") is governed by a handful of provisions in the Act which have in recent years been the subject of close judicial scrutiny: see, for example, *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") and *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"). Built into those provisions, and consequently latent in the jurisprudence thereon, is a tension between facilitating the efficient resolution of payment claim disputes by placing responsibility on respondents to furnish as early as possible their reasons for withholding payment on the one hand, and ensuring that adjudicators observe a minimum standard of procedural fairness and judicial rigour in their

adjudicative task on the other, especially when no such reasons have been duly provided.

2 To ease that tension, the Act itself incentivises parties to payment claim disputes to participate in the adjudication process, so that their claims and objections are properly heard and fairly disposed of. However, it is not uncommon for respondents to choose to remain silent in the face of being served with payment claims. In such circumstances, the adjudicator may not consider, and the respondent cannot rely on, reasons for withholding payment which are not stated in a duly filed payment response. This applies to both objections to the adjudicator's jurisdiction and objections on the merits of the claim. Recently, this Court in *Audi Construction* reiterated the necessity for active participation in the adjudication process under the Act by holding that a respondent who is served with a payment claim has a duty to speak by filing a payment response, and if he fails to do so, he may be found to have waived his right to raise objections before the adjudicator. What then is the position of a respondent who fails or omits to file a payment response? Does it mean that such a respondent is precluded from raising any ground whatsoever before the adjudicator to challenge the payment claim? Does it follow that the adjudicator will automatically determine the adjudication in favour of the claimant in default of a payment response? And what is the standard of review that a court should apply in assessing whether an adjudication determination made in such circumstances should be set aside?

3 The concerns behind these questions contribute significantly to the tension we have alluded to. This appeal provided an opportunity to address that tension by way of two issues of law on which no definitive answer has as yet been supplied in the cases. First, does s 17(3) of the Act *restrict* the matters to

which an adjudicator is entitled to have regard, or does it also *prescribe* the matters which he must consider? Second, what amounts to a patent error in a payment claim, and on what basis does an adjudicator's failure to recognise such an error render the adjudication determination liable to be set aside by a court? After hearing the parties, we dismissed the appellant's appeal against the High Court's decision to uphold the adjudication determination made in favour of the respondent, indicating our intention in due course to explain our decision, particularly our thinking on those two issues. This we do now.

4 The essence of our conclusions is as follows. We hold that s 17(3) of the Act is both restrictive and prescriptive as to the matters that an adjudicator is required to have regard to in his determination. This duty to have regard to the list of prescribed matters that is set out in that provision is in turn part of an adjudicator's general and independent duty to adjudicate the payment claim dispute. That duty requires him, regardless of whether a payment or adjudication response has been duly filed, to be satisfied that the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and, if so, what its value is. Notwithstanding this independent duty on the adjudicator, a respondent who has failed to file a payment response, and who wishes to challenge the payment claim, is entitled to highlight to the adjudicator only patent errors in the material properly before the adjudicator. A patent error is simply an error that is obvious, manifest or otherwise easily recognisable, and the category of patent errors is an extremely narrow and limited one. In addition, s 17(3) is a mandatory provision, and an adjudicator's breach of it renders his determination liable to be set aside. To establish before a court that an adjudication determination should be set aside because the adjudicator has breached s 17(3), a respondent must show that there are patent errors which the adjudicator failed to recognise. In this appeal, the

appellant, who was the respondent to the payment claim, failed to identify any patent errors in the material properly before the adjudicator, and we therefore found no merit in the appeal.

5 We turn now to elaborate, beginning with the background.

Background

6 Comfort Management Pte Ltd ("Comfort") and OGSP Engineering Pte Ltd ("OGSP") are Singapore incorporated companies which are in the business of general construction and building works. In October 2013, Comfort engaged OGSP as a sub-contractor to supply and install a ventilation and ducting system for a warehouse in Joo Koon Circle for a fixed sum of $1.25m, excluding GST.[1]

7 On 16 March 2017, OGSP issued a payment claim[2] in the sum of $890,262.23 (including GST) to Comfort for work done between October 2013 and October 2014. In reply, Comfort's lawyers on 30 March 2017 sent an e-mail to OGSP to say that the invoices in the payment claim had already been paid, and asked for additional supporting documents.[3] But Comfort did not file a payment response.

8 On 4 April 2017, OGSP served on Comfort a Notice of Intention to Apply for Adjudication.[4] On 6 April 2017, OGSP filed an adjudication application with the Singapore Mediation Centre ("SMC"), together with its submissions for the adjudication application.[5] The SMC served a copy of the

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1 Agreed Bundle Vol 2 at p 30 and p 41ff.

2 Agreed Bundle Vol 2 at pp 274–275.

3 Agreed Bundle Vol 2 at p 142.

4 Agreed Bundle Vol 2 at p 7.

adjudication application on Comfort on 7 April 2017. Comfort filed its adjudication response and its submissions with the SMC on 17 April 2017; it is common ground that these were filed out of time.

9 On 21 April 2017, the adjudicator issued his adjudication determination[6] and awarded $890,262.23 to OGSP, requiring Comfort to pay within seven days. Comfort did not do so, and OGSP applied on 3 May 2017 to the High Court to enforce the adjudication determination as a judgment debt. Comfort then applied to set it aside on the ground that (a) the adjudicator had failed to consider patent errors in OGSP's claim; and (b) OGSP had engaged in a conspiracy with its associates to defraud Comfort through inflated invoices.

Decision below

10 The Judge allowed OGSP's application and dismissed Comfort's application. His grounds of decision are reported at *OGSP Engineering Pte Ltd v Comfort Management Pte Ltd* [2017] SGHC 247[7] ("the GD"). The Judge held that the adjudicator did not fail to consider the issue of patent errors in OGSP's claim. The Judge examined the adjudicator's reasoning and noted that the adjudicator professed to be aware that he had to scrutinise OGSP's claim for patent errors: GD at [25]. The Judge observed that the adjudicator had proceeded to examine the documents properly before him, and the Judge opined that this was "*not* a case where the adjudicator did not know that he had the duty to consider patent errors and hence failed to do so" [emphasis in original]: GD at [25].

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5 Agreed Bundle Vol 2 at p 7.

6 For the adjudication determination, see Agreed Bundle Vol 1 at p 38ff.

7 Agreed Bundle Vol 1 at pp 5–32.

11 The Judge also rejected Comfort's submission that the adjudicator was obliged under s 17(3) of the Act to consider the provisions of the parties' contract in his determination. The Judge held that s 17(3) did not prescribe what the adjudicator "must consider" but simply set the "outer limits" of what the adjudicator could consider: GD at [28]. But even if s 17(3) so prescribed, and the adjudicator was required to consider the contract, the Judge held that the adjudicator had not failed to recognise any patent error in OGSP's claim: GD at [29]. To the extent that the contract required OGSP to provide "relevant supporting documents" to establish its claim, the adjudicator did consider those documents; and to the extent that Comfort was arguing that OGSP's documents were insufficient to support the claims, Comfort was mounting an impermissible attack on the merits of the adjudicator's decision: GD at [29].

12 The Judge also rejected Comfort's argument that it had been defrauded under a conspiracy in which OGSP was a participant: GD at [45]. Comfort did not pursue this argument on appeal,[8] and therefore there is no need to comment on the Judge's decision in relation to this issue.

13 Comfort appealed against the Judge's decision.

Parties' cases

14 Comfort's central argument on appeal proceeded in two steps. First, s 17(3) of the Act imposes an obligation on the adjudicator to consider *all* matters listed in that provision, including the terms of the contract between the parties (see s 17(3)(*b*)), and the Judge was wrong to conclude otherwise. Second, the adjudicator must have breached that obligation because if he had considered the parties' contract, it would have been "readily apparent" to him

[8] Appellant's Written Submissions at para 2.

that OGSP's claim should be rejected for containing patent errors.[9] The substance of those errors is that the evidence that OGSP adduced did not show that it had complied with the terms of the contract with respect to the claim. The adjudicator's failure to identify these errors also demonstrates that he failed to apply his mind independently and impartially to determine the claim,[10] contrary to s 16(3)(*a*) of the Act. Accordingly, the adjudication determination should be set aside.

15 In response, OGSP defended the Judge's construction of s 17(3) of the Act on the basis that it is more consistent with the purposes of the Act. In particular, OGSP asserted that the Judge's construction meets the concern that it is not for the adjudicator to identify issues for the parties that have not been raised.[11] OGSP also argued that Comfort's submission on the manner in which the adjudicator dealt with the alleged patent errors in OGSP's claim is in substance an attempt to review the merits of the adjudicator's decision.[12]

Issues for determination

16 The central premise of Comfort's appeal was that the adjudicator was obliged under s 17(3) of the Act to consider the provisions of the parties' contract. On the basis of this obligation, Comfort mounted the argument that the adjudicator must have failed to consider certain provisions in the parties' contract and thus breached s 17(3) because, if he had considered those provisions, he would have recognised patent errors which allegedly existed in

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9 Appellant's Written Submissions at para 1.

10 Appellant's Written Submissions at paras 37 and 41.

11 Respondent's Written Submissions at paras 30–33.

12 Respondent's Written Submissions at para 44.

OGSP's payment claim. His failure to identify those errors, Comfort contended, was the basis for setting aside his decision.

Two main issues

17 The first main issue to be determined, therefore, was whether Comfort's construction of s 17(3) of the Act was correct. At one level, this may be regarded as a narrow issue of statutory interpretation. On another level, it is an issue which concerns the heart of the adjudication scheme established by the Act. After all, the issue concerns the proper role of an adjudicator in determining the merits of a payment claim, *ie*, what the adjudicator *must* consider in arriving at his determination. The answer to this question is particularly crucial in cases like the present case where the respondent is, under s 15(3)(*a*) of the Act, precluded by his failure to file a payment response from raising submissions before the adjudicator which he might otherwise have included in the payment response. Examining the position in such a scenario is of analytical value to the law because it sheds light on the irreducible core of an adjudicator's duty to adjudicate and, as it will be seen, s 17(3) is a vital component of that core.

18 The second main issue to be determined was whether the adjudicator's alleged failure to recognise patent errors in OGSP's claim was a basis for setting aside the adjudicator's determination. For Comfort, this issue rode on the back of a determination in its favour of the first issue in that the adjudicator's failure to recognise patent errors must first be found to have been a breach of his obligation under s 17(3) which vitiated his determination. OGSP, on the other hand, needed simply to succeed on this second issue because even if Comfort were right about the construction of s 17(3), the determination would still stand if we found no patent error that the adjudicator had failed to identify.

19 Each of these two main issues raise subsidiary issues, which we will examine below. But before we begin the main analysis, there are two preliminary points which need to be addressed at the outset.

Two preliminary points

20 First, we consider it important to highlight that our analysis of the first main issue, defined at [17] above, is confined to what s 17(3) of the Act requires of an *adjudicator during the adjudication*. That analysis is found at [26]–[69] below. The separate but related question of what is required of a *court when reviewing an adjudication determination* for the purpose of deciding whether to set it aside for breach of s 17(3) is dealt with only in our analysis of the second main issue, defined at [18] above. That analysis is found at [70]–[102] below. This distinction – between (a) the standard to be applied by an adjudicator in discharging his duty to adjudicate and (b) the standard to be applied by a court in assessing whether that duty was breached – is critical because it reflects the design of the Act for the adjudicator and the court to perform different functions in relation to payment claim disputes. It is therefore important to bear this distinction in mind as we develop the analysis below.

21 Second, we consider it necessary to set out a working definition of a patent error as the concept is relevant to both the first and the second issue. Furthermore, the true difficulty with the concept of patent error lies not with its definition but with its proper role (or, as it will be seen, roles) in the scheme of adjudication and review that is established by the Act.

22 In essence, a patent error is an error that is obvious, manifest or otherwise easily recognisable. It refers to an error that is in the *material* that is properly before an adjudicator for the purpose of his adjudication. It is therefore

strictly not an error that is *committed* by an adjudicator. That type of error would be an error in his decision-making. But the expression "patent error" is not used in this context to refer to an error of that sort. It instead refers to an *error in the material* before an adjudicator when he is making his decision.

23 An example of a patent error might be where the contract adduced by the claimant in support of the payment claim is not even the contract between the parties. Another example, illustrated by Tan Siong Thye J in *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [35], is where "the documentary evidence submitted by the claimant plainly contradict[s] the claimed amount". Yet another example might be where no supporting material or explanation whatsoever is adduced to support the payment claim. While in principle these are not exhaustive examples of patent error, it is difficult to conceive of other forms of error that may properly be regarded as patent. Ultimately, whether an error is properly characterised as patent will depend on the facts. But the point to be made here is that patent errors constitute by definition an exceptional and extremely narrow category of errors.

24 In addition, a patent error must be manifest from "the material that was properly before the [a]djudicator": *W Y Steel* at [54]. Although it was not stated expressly in *W Y Steel* what counted as material properly before the adjudicator, it was implicit in this Court's reasoning in that case that this simply means material that has been duly filed and is permitted to be placed before the adjudicator. That is why s 17(3)(*d*) refers to documents such as the payment response, with the qualifier, "if any". Thus, in *W Y Steel*, given that there was no payment response, no inspection report and no expert report, this Court observed that the appellant (who was the respondent in the adjudication) did not have much it could properly submit before the adjudicator (at [46]).

25 Bearing these preliminary points in mind, we turn now to consider the two main issues defined at [17] and [18] above.

Issue 1: Section 17(3) and the duty to adjudicate

26 In brief, we accept Comfort's submission that s 17(3) of the Act imposes an obligation on the adjudicator to consider *all* matters listed in that provision. In other words, s 17(3) prescribes the matters an adjudicator *must* consider in arriving at his determination. This construction of s 17(3) is clearly supported by the text of the provision. This obligation under s 17(3) to have regard to matters prescribed in that provision, and the obligation under s 17(2) to determine (among other things) the adjudicated amount, constitute an adjudicator's general and independent duty to adjudicate the payment claim dispute before him. To discharge this duty, he must satisfy himself as to whether the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and, if so, what the value of that work is. This is a duty that he must discharge even if, under s 15(3), he is precluded from considering, and the respondent is precluded from relying on, reasons for withholding payment which were not included in a duly filed payment response. Where a respondent is so precluded under s 15(3) because he has failed to file a payment response, he is entitled nevertheless to highlight to the adjudicator patent errors in the material properly before the adjudicator.

The meaning of "shall only have regard to" in s 17(3)

27 Section 17(3) of the Act reads:

> (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.

28 The operative phrase which expresses what the adjudicator is required to do with all these matters is "shall only have regard to". We recognise that if the phrase were instead "shall have regard to these matters and these matters only", there would be no answer to Comfort's construction of s 17(3). However, the absence of such phrasing is not decisive. The Judge's and OGSP's construction, that s 17(3) simply sets the outer limits of the matters to be considered by the adjudicator, also does not follow necessarily from the actual wording used. That construction would be more persuasive if the operative phrase were "may only have regard to", as the word "may" would indicate that s 17(3) is only permissive and restrictive but not prescriptive. It seems to us that on a natural reading, "shall only have regard to" is at least ambiguous, being capable of these two interpretations. At best, it leans in favour of Comfort's prescriptive interpretation because of the use of the word "shall".

29 In our view, however, Comfort's construction is supported by the very nature of the matters listed in s 17(3) itself. The first of those matters is "the provisions of this Act": s 17(3)(*a*). It cannot reasonably be suggested that s 17(3) was intended to allow an adjudicator to decide whether or not to have regard to the provisions of the Act. Comfort was correct to highlight this point.[13] Parliament cannot have intended to allow the adjudicator simply to ignore the Act, given that the Act is the governing legislation of the adjudication regime. Since there is no other provision in the Act which states that an adjudicator must consider the provisions of the Act in an adjudication determination, his obligation to consider those provisions must ensue from s 17(3).

30 The question then is whether as a matter of statutory interpretation there is any reason to treat the other matters listed in s 17(3) differently. In our view, there is none. Leaving aside the scenario where a matter is not physically before the adjudicator (*eg*, a payment response, because the respondent failed to file one), nothing in the wording of s 17(3) suggests that some matters under s 17(3) must be considered by the adjudicator while others may but need not be. The effect of the Judge's and OGSP's construction of s 17(3) is effectively to suggest that such a distinction exists, but we can find no support for it. We therefore hold that s 17(3) both *prescribes* the matters that an adjudicator must consider in adjudicating a payment claim dispute and *restricts* his consideration for that purpose to only those matters set out in that provision.

31 It remains to be said here that we do not rest our construction on the word "and" which appears immediately after the penultimate matter in the list in s 17(3): see s 17(3)(*g*). Comfort relied on that word to support the argument that the matters in the list are therefore "cumulative, not disjunctive".[14] But we

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[13] Appellant's Reply Submissions at para 17.

do not see how this feature of s 17(3) supports Comfort's and our reading of s 17(3). Whether or not the list of matters is conjunctive tells us nothing about whether the words "shall only have regard to" in s 17(3) contain an obligation to have regard to those matters. Indeed, a conjunctive reading of the list of matters is equally consistent with OGSP's and Comfort's construction of those words.

An adjudicator's duty to adjudicate

32 Having established that s 17(3), read in the context of its sub-provisions, requires an adjudicator to consider the matters stated in those sub-provisions, we turn now to analyse the effect of this requirement within the context of his general duty to adjudicate payment claims disputes.

33 Section 17(3) governs an adjudicator's duty to consider certain prescribed matters while s 15(3) requires him not to consider reasons a respondent has for withholding payment unless those reasons have been included in a duly filed payment response. What then is the position with respect to reasons which the respondent did not duly raise but which the adjudicator is nonetheless obliged under s 17(3) to consider? Is the adjudicator still obliged to consider them? These questions illustrate a conceptual tension between ss 17(3) and 15(3), and it is a tension that arises squarely in the present case: although Comfort failed to file a payment response, it relied on the provisions of the parties' contract to challenge the payment claim. Before this Court, Comfort argued that if the adjudicator had fulfilled his obligation under s 17(3) to consider the parties' contract, he would not have allowed OGSP's claim. Having accepted Comfort's construction of s 17(3), we agree that this argument can, in

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[14] Appellant's Submissions at para 16(b).

principle, be legitimately raised by Comfort. But the question then arises as to what it means for the adjudicator to fulfil his obligation under s 17(3). Should he have considered Comfort's objections based on the provisions of the parties' contract even though no payment response was filed?

34 Our view is that notwithstanding s 15(3), and regardless of whether any payment response has been filed, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be satisfied that the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and that the value of that work is as stated in the payment claim. Articulated in the terms of the Act, this duty comprises the obligations set out in ss 17(2) and 17(3), and requires an adjudicator, in particular, to have regard to all the matters stated in the latter provision. However, an adjudicator's duty to adjudicate is conceptually distinct from a respondent's entitlement to make submissions before him. Therefore, notwithstanding the existence of such a duty, if a respondent has failed to file a payment response, he is permitted to challenge the payment claim before the adjudicator by highlighting *only* patent errors in the material properly before the adjudicator.

35 The concept of the duty to adjudicate has been analysed by a number of foreign, principally Australian, authorities. We will review them below with reference to the relevant local decisions before explaining the applicable law.

Australian authorities

36 A number of leading common law jurisdictions, including Australia, England and New Zealand, have established security of payment regimes to promote efficient cash flow in the construction industry. The only jurisdiction

whose authorities are relevant to the discussion here, however, is Australia. This is because it is only in the security of payment regimes of the Australian states that there is a conceptual tension of the kind that exists between ss 15(3) and 17(3) of the Act. Like the Act, the security of payment regimes of those states contain (a) some limitation on a respondent's entitlement to rely on reasons for withholding payment before an adjudicator in the absence of a payment response (or "payment schedule", as it is called in Australia), as well as (b) some prescription on the matters which an adjudicator must consider in any event. Although there are some differences between these regimes, which we shall highlight along the way, in the main, they all consider that an adjudicator has an independent duty to determine whether the construction work which forms the subject of the claim has been carried out and, if so, what the value of that work is, even if no payment schedule has been duly filed. In addition, this duty both includes and is established upon the adjudicator's duty to consider matters that are prescribed by statute for him to consider, in the vein of s 17(3) of the Act.

37 We will focus on the position in New South Wales, which was the first state in Australia to adopt security of payment legislation, in 1999. The position in other Australian states with equivalent legislation is essentially the same, with minor differences in their legislation which are not material to this discussion. Section 20(2B) of the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the NSW Act"), like s 15(3) of our Act, precludes a respondent from including in his adjudication response any reason for withholding payment that was not included in a duly filed payment schedule. Section 22(2) of the NSW Act, which is *in pari materia* with s 17(3) of our Act, states that the adjudicator "is to consider the following matters only", those matters being set out in s 22(2). Thus, like s 17(3), there is possibly some

ambiguity as to whether the words are intended merely to restrict the adjudicator's consideration to certain matters or also to oblige him to consider all of those matters.

38 The New South Wales courts first had the occasion to discuss the combined effect of ss 20(2B) and s 22(2) of the NSW Act in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and Ors* [2005] NSWCA 228 ("*Hargreaves*"), a decision of the New South Wales Court of Appeal. In that case, the question was whether a claim for damages for delay in carrying out work was a claim for construction work, and therefore a claim that might be included in a payment claim. In answering this question in the affirmative, the judge at first instance, McDougall J, appeared to suggest as an alternative ground for his decision that the respondent's failure to take a contrary position in its payment schedule meant that the adjudicator was entitled automatically to determine the issue and (consequently) the claim in favour of the claimant. That view was the subject of divided albeit *obiter* remarks in the Court of Appeal. Hodgson JA disagreed with it and took the view that the adjudicator had to address the merits of the payment claim even if no relevant submission or material had been duly put forward by the respondent. Thus he said at [52]:

> *The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable.* Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see *The Minister for Commerce v*

> *Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [33]–[36]. *The 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 Act and the true merits of the claim.* The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits. [emphasis added]

39 Basten JA observed that Hodgson JA had advanced his view on the basis of a prescriptive reading of s 22(2) of the NSW Act. Basten JA accepted the force of this view, opining that s 22(2) "has a dual function" (at [65]). It prescribes matters to which the adjudicator is required to have regard as well as identifies those matters as the "only" matters to which the adjudicator is to have regard. We pause here to note that this is also true of s 17(3) of our Act, as we have held at [30] above. Basten JA then took the more tentative position of postulating two issues arising in this context for future consideration. The first was whether, in the light of s 20(2B), the respondent not having filed a payment schedule may give any reason for withholding payment at all; and the second was whether it is intended, in such a case, that the adjudicator must allow the claim in full (at [67]).

40 The first issue, as far as we know, has not since been the subject of judicial comment in New South Wales, and we address it in our context at [66]–[68] below. But the second issue was central in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2006] NSWSC 13 ("*Pacific General*"), a decision of the New South Wales Supreme Court. This was a case cited with approval in *W Y Steel* at [52], and we will discuss it in that context at [47] below. In *Pacific General*, the adjudicator considered that the respondent's submissions in its adjudication response either could not be considered, because they were not matters included in the payment schedule, or did not relate to the

contents of the payment schedule. The adjudicator therefore held that "in the absence of any valid submission from the respondent which refutes the claim of [the claimant], [the claimant] is entitled to payment of the [claimed sum]": *Pacific General* at [26]. The respondent successfully applied to set aside that determination. Brereton J set it aside on the basis that "there [is] a compelling case that the adjudicator simply allowed the claim in full in default of any valid submission against it" (at [88]). That, in Brereton J's view, was "not an adjudication, within the meaning of the Act, of the payment claim" (at [88]). Brereton J arrived at this conclusion by aligning himself with, and applying, Hodgson JA's *obiter* view in *Hargreaves*.

41 Brereton J considered that view to be supported by two salient features of the regime established by the NSW Act in addition to s 22(2) of that Act. First, s 4 defines a "progress payment", for which a payment claim may be made, as payment for construction work that has been "carried out". Therefore, adjudication of a payment claim dispute must involve at least a determination of whether the construction work has been carried out (at [80]). This reasoning is equally persuasive under our Act because s 2 defines "progress payment" in a similar way. Second, under the NSW Act, failure to serve a payment schedule which challenges any part of a payment claim entitles a claimant to two alternative remedies, namely, recovery of the claimed amount as a judgment debt under s 15(2)(a)(i) or adjudication under s 17(1)(b). If the claimant chooses the latter option, the respondent must, under s 17(2)(b), be given a *further* opportunity to submit a payment schedule after receiving the claimant's notice for adjudication. If he avails himself of that opportunity, he will by s 20(2A) be allowed to lodge a corresponding adjudication response. This suggested to Brereton J that the design of the NSW Act was to require adjudicators as far as possible to make substantive determinations. An equivalent set of alternative

remedies is also provided for in the security of payment regimes of Victoria and Queensland. However, these alternative remedies, including the second chance to submit a payment schedule in the event of adjudication, have no equivalent in our Act. So it could be said that the Australian equivalents of the Act are less stringent in that they permit a respondent additional avenues to advance reasons for withholding payment even in the absence of a payment schedule.

42 Having had regard to these statutory features, and also to s 22(2) of the NSW Act, Brereton J adopted Hodgson JA's view in *Hargreaves* in the following terms (*Pacific General* at [81]–[82] and [86]):

> 81 … These provisions, taken together, indicate that *even where no payment schedule has been lodged, if the matter proceeds to adjudication, the adjudicator is still required to proceed in accordance with ss 21 and 22, and in particular to have regard to the matters specified in s 22(2)* – save that in an adjudication under s 17(1)(b) there will [or, more accurately, may] not be an adjudication response – and is not bound to allow the claim in full. If that be so in the absence of any payment schedule at all, then the same must pertain where a payment schedule has been lodged, even if it does not state sound or sufficient reasons for withholding payment.
>
> 82 I therefore respectfully agree with the view tentatively expressed by Hodgson JA in *Hargreaves*: the 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 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.*
>
> …
>
> 86 I have endeavoured to explain above the *minimum content of an adjudication* … Adoption of the other approach by an adjudicator – by allowing a claim in full just because a

> respondent's submissions are rejected, without determining whether the construction work [that is] the subject of the claim has been performed and without valuing it – would be bespeak *a misconception of what is required of an adjudicator*. …
>
> [emphasis added]

43 Brereton J's statement of principle continues to be applied in New South Wales: see, *eg*, *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No. 2)* [2016] NSWSC 1229 at [19]–[20] *per* McDougall J. It is also followed in Victoria and Queensland: see, *eg*, *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors* [2010] VSC 300 at [21]–[24] *per* Vickery J and *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2013] QSC 293 at [8]–[9] *per* Mullins J.

44 We turn now to the local authorities.

Singapore authorities

45 The proper construction of s 17(3) of the Act, and its relationship with an adjudicator's duty to adjudicate, has not been fully examined by this Court, although observations in connection with this topic have from time to time been made. In *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*"), this Court took the view that the "only functions of an adjudicator" were to decide whether the adjudication application was made in accordance with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the Act, and pursuant to s 17(2) to determine the adjudication application (at [64]). We departed from that view in our recent decision in *Audi Construction* ([1] *supra*), but only for the purpose of demonstrating that the Act does not forbid, but in fact permits, an adjudicator to consider and decide matters going towards his jurisdiction: see *Audi Construction* at [45]–[52]. In both decisions, nothing was

said specifically about the precise ambit of an adjudicator's duty to adjudicate, although *Audi Construction* has strengthened the restriction on permissible submissions before an adjudicator by confirming the applicability of the doctrines of waiver and estoppel in that context: see *Audi Construction* at [53]–[71]. That is an important aspect of the conceptual tension between ss 15(3) and 17(3), but before that is discussed, it is appropriate to examine our decision in *W Y Steel* ([1] *supra*), which expressly considered the issue at hand, albeit in *obiter dicta*.

46 In *W Y Steel*, the respondent failed to file a payment response, and the adjudicator, applying s 15(3)(*a*), accordingly disregarded the respondent's submissions and found for the claimant. The respondent then applied to set aside the determination, arguing that s 15(3) did not apply to a respondent who had failed to file a payment response, and that by disregarding its submissions, the adjudicator had breached the rules of natural justice. We examined the scheme of the Act, rejected those submissions and, on that basis, dismissed the appeal. But we went on to explain at [51] that "there [was] 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" [emphasis in original].

47 Significantly, we went on to say at [52] that an adjudicator was "obliged to adjudicate" and that "in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner". We then registered our approval of Brereton J's view of an adjudicator's duty to adjudicate in *Pacific General*, although we did not examine, as we have done here, the legislative nuances

behind that pronouncement or its reception in other Australian states. Thus we said at [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 v Soliman & Sons Pty Ltd* [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 in original]

48 However, even though we affirmed the duty of an adjudicator independently to examine the merits of the claim regardless of the existence of a payment or adjudication response, we did not specify the standard to which that examination should be conducted. As a result, *W Y Steel* has been read (or, more accurately, misunderstood) by some adjudicators to mean that where a payment or adjudication response has not been filed, all that the adjudicator needs to do to discharge his duty to adjudicate is to look for patent errors in the payment claim and in the material properly before him. But in our view, this is

not what was meant in *W Y Steel*. The Law Reform Committee in 2015 specifically noted the same point. It considered that simply looking for patent errors was too permissive an adjudicative standard, and proposed that the standard should instead be the identification of a *prima facie* case, which is a lower standard than proof on a balance of probabilities. The Committee made the following remark (Law Reform Committee, Singapore Academy of Law, *Proposals for Amending the Building and Construction Industry Security of Payment Act* (September 2015) at paras 47–50 (Chairman: Philip Chan) ("the SAL Report")):

> 47 In [*W Y Steel*], the Court of Appeal held that in a situation where a respondent fails to issue a payment response in accordance with the SOP Act, an adjudicator has to still "adjudicate the claim". The adjudicator has to determine the amount of work done and the value of those works. Thus while a respondent in a section 15(3) situation is reduced to pointing out patent errors arising from the payment claim, the adjudicator is not permitted to simply "rubber-stamp" the payment claim as suggested in an earlier decision.
>
> 48 It seems to us that adjudicators will appreciate clarification on the expression "adjudicate the claim" and the standard of proof which the adjudicator should hold the claimant to in a situation to which section 15(3) applies. *In the absence of a payment response, some adjudicators considered that the ruling in* WY Steel *requires that they should confine themselves to determining whether there are any patent errors in the claimant's claim. In the absence of these errors, the full claimed amount is awarded.* There are a few adjudicators who read the ruling in *WY Steel* to mean that the claimant is required to prove its case on the standard of proof of a balance of probabilities. This is to be established on the basis of the documents and other materials which are properly before the adjudicator.
>
> 49 In our view, an appropriate standard of proof in a section 15(3) situation lies somewhere between the "patent error" basis and proof on a "balance of probabilities". ***The former is arguably too permissive and may unduly prejudice a respondent because an adjudicator would not on this premise inquire into whether the quantum of the claim had been unduly inflated.*** On the other hand, proof on

> a balance of probabilities may impose an inordinate weight of the onus on the claimant in this situation. Since no payment response was filed by the respondent when a respondent is generally expected to do so, the tribunal should not be required to inquire into the claimant's case as would a respondent who had complied with the statutory provision.
>
> 50 Furthermore, given that the adjudicator has only the short period of between 7 to 14 days to make his determination, it is impractical and may be too onerous to require that he should be satisfied on a balance of probabilities on each and every item of the claim. ***In our view, the standard should be whether* prima facie *the claimant's claim has been made*** [out]. An adjudicator should satisfy himself that there is *at least* a *prima facie* basis in law and in fact for the claim and the amount claimed. The test to be applied by the adjudicator may be prescribed in section 17 of the Act.
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> [original emphasis in italics; emphasis added in bold italics]

49 A final point to be made about *W Y Steel* is that in opining that an adjudicator has a duty to adjudicate the claim, we appeared to ground that duty at least in part on s 17(3) of the Act, the provision under consideration here. We said at [51] that "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" [emphasis in original]. In our view, it is implicit in this statement that in *W Y Steel* we considered s 17(3) to have prescriptive effect. Otherwise, we would not have said that by that provision it was "incumbent" on the adjudicator to consider the material properly before him.

50 For completeness, we note that s 17(3) was discussed in two recent decisions of this Court. But those discussions do not deal specifically with the issue at hand. In *Audi Construction*, we read s 17(3)(*c*) as a provision which permits an adjudicator to consider jurisdictional challenges related to payment claims (at [48]–[49]). That reading neither addresses nor rules out the possibility

that s 17(3) requires the adjudicator to consider *all* the matters listed in that provision. The same may be said about our treatment of s 17(3) in our recent decision in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] SGCA 12, where we held that that provision does not permit an adjudicator to have regard to a respondent's cross-claim against the claimant arising from another construction contract (at [54]).

The proper relationship between s 17(3) of the Act and the duty to adjudicate

51 Having considered the relevant authorities, we turn now to set out the position in law regarding the proper construction of s 17(3) of the Act and the content of an adjudicator's duty to adjudicate.

52 We consider that Comfort's interpretation of s 17(3) is correct, and we reject that of OGSP which was accepted by the Judge. In our judgment, s 17(3) both *prescribes* the matters that an adjudicator must consider in determining an adjudication and *restricts* his consideration for that purpose to those matters only. This construction is supported by s 17(3)'s immediate context, namely, its sub-provisions, which concern matters that Parliament could not have intended the adjudicator to have the option of ignoring, such as the provisions of the Act and the parties' contract.

53 Bearing in mind s 17(3)'s proper construction, this provision raises two questions in relation to the proper conduct of an adjudication in a case where no payment response has been filed. First, in the absence of a payment response, may a respondent in the light of s 15(3)(*a*) give any reason at all for withholding payment? Second, in such a situation, must the adjudicator invariably allow the claim? These correspond to the two questions that Basten JA identified in *Hargreaves*: see [39] above.

54 Addressing the second question first, we reiterate our acceptance of Brereton J's statement of the core content of an adjudicator's duty to adjudicate, which is that the adjudicator must address his mind to the true merits of the claim, and must at a minimum determine whether the construction work in the payment claim has been carried out and, if so, what its value is. As we have alluded to at [26] and [34] above, ss 17(2) and 17(3) of the Act constitute the basis and substance of this duty, and set out the central issues that an adjudicator is to determine and the matters he must consider in making that determination.

55 Although Brereton J's statement of principle was originally advanced on the footing of a statutory scheme which contained relatively less robust restrictions on a respondent's right to rely on reasons not stated in a duly filed payment response (*ie*, New South Wales), and was endorsed in regimes where those restrictions are also not as robust as those under our Act (*ie*, Victoria and Queensland), this does not, in our view, warrant a different approach as regards the core duty of an adjudicator to adjudicate.

56 It is clear that under our Act, an adjudicator should not simply rubber-stamp any payment claim that is unchallenged. Section 16(3)(*a*) of the Act requires him to act "independently". Inherent in the concept of independence, in our view, is the idea that the content of the adjudicator's duty to adjudicate cannot depend on whether a payment response has been filed or not. When s 16(3)(*a*) is read with s 16(4)(*b*), which entitles the adjudicator to call for additional submissions or material if he thinks necessary, it seems clear from the scheme of the Act that he must have at least some *positive* basis for his determination, and not simply lack a reason not to allow the claim. Moreover, as we alluded to at [41] above, the Act by s 2 defines a payment claim as a claim for a "progress payment", which is in turn defined as "a payment to which a

person is *entitled for the carrying out of construction work …*" [emphasis added]. That implies that the adjudicator must be satisfied on some basis that the work has in fact been carried out.

57 What standard of satisfaction must be applied by the adjudicator? To be clear, this is a standard which applies regardless of whether a payment or adjudication response has been filed, because it is part of his core duty to adjudicate. There are at least three possibilities for this standard: (a) the absence of patent errors in the payment claim and its supporting materials; (b) proof on a balance of probabilities that facts supporting the payment claim are made out; and (c) a *prima facie* case that the payment claim is supported by the facts. For the reasons below, we hold that the *prima facie* standard is the correct standard to be applied by the adjudicator.

58 The difficulty with absence of patent errors as the applicable standard is that conceptually, the absence of error, in and of itself, is not a *positive* basis for evaluating the completion and value of the construction work that is the subject of the payment claim. Absence of patent errors as the standard effectively places the burden on the respondent to show why the claim should not be allowed, rather than on the claimant to show why the claim should be allowed. On this analysis, if the respondent and the adjudicator cannot identify any patent error, then the adjudicator must allow the claim. But that puts the cart before the horse. The true position is that the burden lies on the claimant first to demonstrate to the adjudicator why he should allow the payment claim. The claimant having made his case, the adjudicator (with or without the respondent's help) may nevertheless disallow the claim if he sees patent errors in the material properly before him.

59 Having drawn the conceptual distinction between absence of error and existence of a positive basis, we nevertheless recognise that in many cases, there may well be no real difference in the result if either approach is taken. Specifically, there may not be a difference in the outcome of an adjudication if the adjudicator applies the absence of error standard and not the *prima facie* standard which we explain and endorse at [64]–[65] below. Given the definition of patent error that we have set out at [21]–[24] above, an adjudicator who has genuinely applied his mind to identify patent errors in the material properly before him will, in all likelihood, also have assessed the true merits of the claim and come to an independent conclusion on why the claim should be allowed, at least on a *prima facie* basis. Nevertheless, the point remains that conceptually, the perspective of looking for patent errors is the wrong perspective for an adjudicator to *start from* because his central task is to ascertain whether the claim before him is justified, and not simply whether it is unsustainable.

60 In so far as there could in some cases be a difference in the outcome, that is a further reason against absence of patent error as the proper standard. As it is observed in the SAL Report at para 49 (see [48] above), an adjudicator looking only for patent errors may not proactively inquire whether the claim amount has been inflated. Yet, the adjudicator must determine whether the work for which payment is claimed has in fact been completed and is worth the amount claimed, nothing more and nothing less. To do so, he must address the material before him and be satisfied that it is sufficient to support the claim amount.

61 Further, the absence of patent error is also not the standard for adjudication that we may properly be regarded to have laid down in *W Y Steel*, given our express observation that the adjudicator must "consider the material

properly before him", and our approval of Brereton J's statement of principle in *Pacific General* (at [82]) to the effect that the adjudicator must consider the "true merits" of the claim and as a "minimum" determine whether the construction work identified in the payment claim was done (at [52]).

62 For all these reasons, we consider that absence of patent error does not adequately or accurately capture the standard to which an adjudicator must be satisfied of the completion and the value of the work claimed. He must have a positive basis for that determination. On this note, we turn to explain why that basis needs only to be demonstrated on a *prima facie* standard, and not proved on a balance of probabilities.

63 In our view, there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities. Nothing in the existing authorities has ever suggested that to be the position, certainly not *W Y Steel*, which is the first local authority that attempts to examine what an adjudicator must substantively consider in adjudicating a payment claim dispute. More importantly, the adjudication process is intentionally "somewhat roughshod" (*W Y Steel* at [22]) given that the resultant decision is intended to have only temporary finality, the path being open for the parties to resolve their dispute fully and finally through arbitration or litigation: see s 21(1)(*b*) of the Act. This is especially true where no payment or adjudication response has been filed, in which case the adjudicator must render his decision in just seven days instead of the usual 14: see s 17(1)(*a*) of the Act. That is why the Act, as Vinodh Coomaraswamy J recently observed in *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28, does not require the adjudicator to find, nor does it require the claimant to "prove", the facts supporting the claim to be objectively true on a certain standard of "proof", that

exercise being "within the exclusive province of the dispute-resolution tribunal which will resolve the parties' dispute with full finality" (at [32]). Coomaraswamy J employed the term "standard of persuasion" to reflect more accurately the nature of the standard to which the adjudicator must be satisfied before he allows a claim (at [34]). We respectfully adopt this term for our analysis below.

64 Therefore, it is evident – considering that the adjudicator is not simply to look for patent errors but to identify a positive basis for the claim, and that he also does not have to assess proof on a balance of probabilities – that the scheme of the Act requires the adjudicator to be satisfied that the claimant has established at least a *prima facie* case for his claim. We agree with the view of the Law Reform Committee in this regard (see [48] above), because the *prima facie* standard is already implicitly established in the Act. The content of this standard is by no means unfamiliar as the standard is employed in various adjudicative contexts, including the obtaining of summary judgment: see *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772 at [9] *per* Lai Siu Chiu J.

65 In particular, the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim. Indeed, that is the essence of his duty under s 17(2)(*a*) of the Act to "determine the adjudicated amount (if any) to be paid by the respondent to the claimant". Therefore, to ensure that he discharges that duty, it is only sensible for the Act to require him to consider all the matters stated in s 17(3) in so far as those matters are properly before him. Accordingly, the content of the adjudicator's duty to adjudicate the claim is normatively rooted in and given

substance by s 17(3) which both prescribes and restricts the substantive matters he is to consider.

66 We turn then to the first question posed by Basten JA in *Hargreaves*: in the absence of a payment claim, can a respondent make any submission before the adjudicator? The answer, as we suggested in *W Y Steel* at [51], is "Yes", if and only if that submission relates to a patent error in the material properly before the adjudicator. Before explaining why this is so, we pause to note that it would be a *non sequitur* to conclude from this answer that an adjudicator has only to look for patent errors where no payment or adjudication response has been filed: *cf* [58] above. That is because an adjudicator's duty to adjudicate and a respondent's entitlement to rely on a reason to withhold payment are conceptually distinct. An adjudicator's duty to adjudicate is in the nature of a duty to decide a dispute, and is rooted in ss 17(2) and 17(3) of the Act. By contrast, a respondent's right to rely on a reason to withhold payment is in the nature of a right to make submissions before the adjudicator, and is rooted in other provisions of the Act, including but not restricted to s 15(3). Therefore, these two legal incidents – the adjudicator's duty to adjudicate and the respondent's right to make submissions – are distinct concepts and are governed by different provisions of the Act.

67 The reason why a respondent, not having filed a payment response or an adjudication response, is nevertheless entitled to highlight patent errors (and *only* patent errors) to the adjudicator, is that this position represents the proper balance between two competing sets of principles which govern such a situation. *First*, the respondent is by virtue of s 15(3)(*a*) disentitled from relying on any reason for withholding payment he could have included in a payment response but did not. Under the waiver or promissory estoppel analysis in *Audi*

Construction, he may have even forgone his right to make a jurisdictional objection before the adjudicator, for example, to the effect that the payment claim was invalidly served. Both of these restrictions are restrictions the claimant has the right to enforce, given that they are grounded in either the governing statutory regime or the contractual relationship between the parties. If either restriction applies, the respondent is effectively and rightfully deprived of any ability to attack the merits of the claim in question. *Second*, however, there is also no doubt that a respondent has a right to the proper conduct of the adjudication proceedings. That right is correlative to the adjudicator's duty to adjudicate and to observe the rules of natural justice: see ss 16(3)(*a*), 16(3)(*c*), 17(2) and 17(3). No objection based on that right could possibly have been included in a payment response since the adjudication would not have started yet. Nor could that right be forgone by way of waiver or estoppel, as we indicated in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [66]:

> To this [*ie*, the principle that a party may waive a jurisdictional objection], we think there is at least one exception. It seems to us that it may not be feasible to apply the same analysis to breaches of provisions which occur *during the adjudication* and which are not predicated purely on the acts of the parties (for instance, breach of s 16(3)(*c*) of the Act, which provides that an adjudicator shall comply with the rules of natural justice). Where the potential objections are premised not on the acts or omissions of either party, but rather, on the acts or omissions of the adjudicator, it seems to us that there may be practical difficulties with applying the same principle.

68 The only meaningful middle path between these two sets of principles, each of which is well-founded in the Act, therefore, is to allow the respondent to make submissions before the adjudicator to ensure that the adjudicator complies with his overriding duty to adjudicate, but no more than that, so that the teeth of the restriction in s 15(3)(*a*) or of any waiver or estoppel arising

under the *Audi Construction* analysis are not significantly blunted. Such submissions, in our judgment, must be in and only in the nature of highlighting patent errors in the material properly before the adjudicator. That is because if the adjudicator ignores such errors and makes a determination in favour of the claimant, then that is as clear an indication as any that he has abdicated his independent duty to adjudicate. The respondent is entitled at the very least to ensure that the adjudicator does not do so, even if the respondent has not filed a payment response. So understood, a respondent's right to highlight patent errors is a function of his right to ensure that the adjudication process is properly conducted. As we will go on to explain below, that is also why the existence of patent error in the payment claim and its supporting materials is the test which the court should apply in deciding whether the adjudicator has breached s 17(3).

Conclusion on the first issue

69 For the reasons stated above, Comfort succeeded on the first issue. It therefore became necessary to consider the second issue *ie*, whether the adjudicator in the present case breached s 17(3) of the Act by failing to recognise patent errors in the material properly before him.

Issue 2: Patent error as a reason for setting aside an adjudication determination

70 The second principal issue is whether the adjudicator's determination ought to be set aside on the ground that he failed to recognise patent errors in the claimant's payment claim. As we have mentioned at [20], it is in this context that we analyse the proper standard of review that a *court* should apply in deciding whether an adjudication determination should be set aside on account of a breach of s 17(3) of the Act.

71 In summary, the proper view on this issue is built on two basic premises. First, the task of a court in considering whether an adjudication determination should be set aside is to assess whether any mandatory provision under the Act has been breached. In the present context, that provision would be s 17(3). Second, in making this assessment, the court cannot consider the merits of the adjudication determination. In these premises, the existence of a patent error serves as the *test* for the court to determine whether s 17(3) has been breached. The theory behind this test is a process of inference. An adjudication determination that was made in favour of the claimant despite the existence of a patent error in the payment claim and its supporting material leads inexorably to the inference that the adjudicator had failed to recognise that patent error, and in so failing, he must also have failed to discharge his duty under s 17(3), thereby breaching his duty to adjudicate. Importantly, in determining whether s 17(3) was breached, the court must go no deeper than identifying patent errors in its scrutiny of the adjudication determination; otherwise, it will be reviewing the adjudication determination on its merits, which is contrary to the scheme of the Act.

72 Applying these principles to the facts of the case, we found that none of the errors that Comfort identified were patent errors. Therefore, it could not be said that the adjudicator had breached his duty to adjudicate or that he had acted without independence or impartiality.

Applicable principles

Role of the court reviewing an adjudicator's determination

73 It is well-established that the role of a court in reviewing an adjudicator's determination is not to review the merits of the determination, and that any

setting aside must be premised on the adjudicator's acting in excess of his jurisdiction or in breach of the rules of natural justice. As we explained in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [48]:

> Put simply, in hearing an application to set aside an AD and/or a s 27 judgment, the court does not review the merits of the adjudicator's decision, and any setting aside must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the SOPA. Applications to set aside ADs and/or s 27 judgments are thus *akin* to judicial review proceedings, and are not appeals on the merits of the adjudicator's decision. In our judgment, it is consistent with the purpose of the SOPA, which is to facilitate cash flow in the building and construction industry, that the court, in hearing such applications, does not review the merits of the AD in question. … [emphasis in original]

74 It has been observed, correctly, that the Act does not expressly spell out the grounds on which an applicant can succeed in either type of setting-aside application: *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [27] *per* Judith Prakash J (as she then was); *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 ("*Hauslab Design*") at [53] *per* Vinodh Coomaraswamy J. The grounds for setting aside are therefore to be found outside the Act and in the common law: *Hauslab Design* at [53]. An articulation of those grounds into a *numerus clausus* of seven heads was attempted by Prakash J in *SEF Construction* at [45]:

> (a) whether a contract exists between the claimant and the respondent within the meaning of s 4 of the Act;
>
> (b) whether, in accordance with s 10 of the Act, the claimant has served on the respondent a payment claim;

(c) whether, in accordance with s 13 of the Act, the claimant has made an adjudication application to an authorised nominating body;

(d) whether, in accordance with s 14 of the Act, the application has been referred to an eligible adjudicator who agrees to determine the adjudication application;

(e) whether, in accordance with ss 17(1) and 17(2) of the Act, the adjudicator has determined the application within the specified period; and has determined the matters stated in s 17(2);

(f) whether, in accordance with s 16(3) of the Act, the adjudicator has (i) acted independently and impartially and in a timely manner; and (ii) has complied with the principles of natural justice; and

(g) whether, in a case where a review adjudicator or panel of adjudicators has been appointed under s 18 of the Act, conditions (a) to (f) are satisfied, *mutatis mutandis*.

75 In *Chua Say Eng* ([45] *supra*), we explained that the unifying and fundamental basis for these grounds was whether there has been a breach of a provision under the Act which is so important that it is the legislative purpose that an act done in breach of that provision should be invalid (at [67]). We labelled such a provision a mandatory condition, and we considered that breaching it would result in the adjudication determination being invalid. For this reason, breach of a mandatory provision is sometimes referred to as a breach which invalidates the jurisdiction of the adjudicator, that absence of jurisdiction being the basis for setting aside the adjudication determination. Much ink has been spilt over the meaning of the word "jurisdiction" in this context. Some

authorities draw the distinction between an adjudicator's personal and substantive jurisdiction (*eg*, *Chua Say Eng* at [30]–[31] *per* Chan Sek Keong CJ), and others the distinction between his competence to hear and the way in which he exercises his power (*eg*, *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [43]–[44] *per* Prakash J (as she then was)). We have no doubt that these distinctions have analytical value even though they overlap with each other and seek somewhat ambitiously to encompass, for the purpose of rationalising the grounds of review under Act, rules of procedural fairness (such as the rules of natural justice) which are not traditionally described as "jurisdictional" in nature. But the key inquiry in any setting aside is whether a mandatory provision has been breached, and if it has been, then the adjudication determination should be set aside. This approach keeps the focus on the Act, as it should be.

76 In this context, the first question raised in this case regarding s 17(3) of the Act is whether that provision is a mandatory provision. Comfort's submission proceeded on the basis that it is: it argued that the adjudicator had breached it, among other provisions, and therefore his award should be set aside. The second question is how an adjudicator's failure to recognise patent errors in the payment claim or in its supporting material ought to be understood as a reason for setting aside an adjudication determination. These questions are related, and we address them in turn.

Section 17(3) as a mandatory provision

77 In our judgment, s 17(3) is clearly a mandatory provision given our conclusion at [52] above that it prescribes as well as restricts the matters which an adjudicator must consider. Therefore, the question whether the adjudicator has complied with his duty under s 17(3) should be added to sub-paragraph (e)

of [74] above as part of that head of review which relates to the adjudicator's conduct in determining the dispute. That duty, as we have held, is integral to his duty to adjudicate, and a proper discharge of his duty to adjudicate is no doubt critical to the scheme of adjudication established by the Act.

78 The question, then, is what standard of review the court should apply in assessing whether s 17(3) has been breached. In our view, the standard is to identify whether there are any patent errors in the material properly before the adjudicator. It follows that the essential task of a respondent who is asking a court to set aside an adjudication determination for breach of s 17(3), in circumstances where no payment response has been filed, is to show that there are patent errors in the material properly before the adjudicator which he had failed to recognise.

Patent error as the test for reviewing for breach of s 17(3)

79 The concept of a patent error (defined at [22]–[24] above) in the context of adjudication under the Act appears to be a unique development in Singapore which was first employed in our decision in *W Y Steel* ([1] *supra*) in the context of describing what a respondent who has failed to file a payment response is entitled to raise notwithstanding s 15(3)(*a*): see *W Y Steel* at [50]–[51]. There is some *dicta* (at [54]) to suggest that the existence of patent errors itself is a ground for the court's review, but anything said to that effect was at best tentative.

80 In our judgment, the proper role of the concept of patent error in the context of a court's review of an adjudication determination may be expressed in four points, which correspond respectively to s 17(3), s 17(2), the duty to

adjudicate, and other mandatory provisions relating to the adjudicator's conduct.

81 First, for the reviewing court, the question of whether there are patent errors is the decisive test for whether the adjudicator has breached his duty under s 17(3). The theory behind this test is a simple process of inference. When a court looks at a payment claim that has been allowed, and sees that the payment claim or its supporting materials contain patent errors, the court will draw the inexorable inference that the adjudicator failed to recognise those errors. In failing to do so, he must therefore have failed to have regard to the matters under s 17(3), in contravention of his duty under that provision. In other words, if he had fulfilled that duty, he would have recognised the patent errors in question, and in the light of those errors, he would not have been satisfied that the claimant had established a *prima facie* case for the completion or value of the construction work which is the subject of the payment claim. He would therefore not have allowed the claim if he had applied his mind to it. For example, if he allows a payment claim that has absolutely no supporting material and no explanation to justify the claim notwithstanding the absence of any supporting material, the court will not hesitate to draw the conclusion that he has breached s 17(3); and this would be a classic case of an adjudicator rubber-stamping a claim. This inferential analysis explains why we critiqued the submissions of the appellant in *W Y Steel* in the following terms (at [54]):

> … 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.* [emphasis added]

Accordingly, the central task of a respondent who seeks to set aside an adjudication determination for breach of s 17(3) is to show the court that there

are patent errors in the material properly before the adjudicator that the adjudicator failed to recognise.

82 Second, for the reviewing court, the question of whether there are patent errors is the central analytical tool for ascertaining whether the adjudicator has breached his duty under s 17(2), which is principally to determine the adjudicated amount. We do not say that it is the "test" for a breach of the duty under s 17(2) because it is obvious that *in theory*, an adjudicator can breach that duty in other ways. For example, if an adjudicator simply makes no attempt to determine the value of certain components of the payment claim, then clearly he would have failed to determine the adjudicated amount in accordance with s 17(2)(*a*): see, *eg*, *Ballast plc v The Burrell Company (Construction Management) Ltd* [2001] BLR 529, cited in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 12.29. However, it is equally obvious that the occurrence of this kind of failure will be highly exceptional. Much more common will be the argument that the adjudicator could not have arrived at the adjudicated amount if he had recognised alleged patent errors in the material properly before him. That is in principle a valid argument, and this is why we consider the existence of patent error to be the central analytical tool for determining whether s 17(2) has been breached.

83 Third, it follows from the two points made above that the existence of patent errors will lead to the conclusion that the adjudicator has breached his duty to adjudicate, that is, his duty to be satisfied on a *prima facie* basis of the completion and proper value of the construction work which forms the subject of the payment claim. This is because, as we have observed at [54] above, that duty essentially comprises an adjudicator's obligations under ss 17(2) and 17(3).

It also follows from the two points made above that the conclusion that the adjudicator has breached his duty to adjudicate need not only arise from the fact that he failed to recognise patent errors in the material properly before him. However, as we have said at [82] above, the circumstances apart from his failure to recognise patent errors which will lead to that conclusion must be highly exceptional. Apart from cases in which the adjudicator is clearly shown to have simply rubber-stamped the payment claim thereby failing to put a value to the work that is claimed to have been done, a court will not readily draw the conclusion that he abdicated his duty to adjudicate in the absence of patent errors in the material properly before him.

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

85 With these principles in mind, we turn now to review the adjudicator's decision.

Review of the adjudicator's decision

Standard of persuasion

86 We begin by noting that, in the light of our analysis of the duty to adjudicate, it might be said that the adjudicator applied the wrong standard of

persuasion, given that he appeared to have focused his analysis on the identification of patent errors, as the Judge observed: see [10]–[11] above. However, on a proper reading of the adjudication determination, we found this not to be the case. At para 65 of the adjudication determination, the adjudicator prefaced his analysis of the merits by stating that "even in the absence of a payment response or an adjudication response, I must not merely rubber stamp a claim. I must consider the material properly before me *and* consider if there are patent errors" [emphasis added].[15] He then proceeded to cite *W Y Steel* for that statement. In our judgment, that is a brief but correct statement of his duty to adjudicate. But even if he did indeed focus only on identifying patent errors, that by itself does not mean that he breached his duty to adjudicate, because as we have explained at [59] above, although looking for patent errors is conceptually the wrong starting point for the adjudicator, in substance that exercise generally entails an assessment of the true merits of the claim. For these reasons, it was not possible to infer that he had breached that duty in allowing the claim without being independently persuaded that there was a positive basis for it.

Alleged patent errors

87 It is not disputed that the payment claim comprises four separate claims: (a) a claim for payment for Variation Order No. 2 ("VO2") in the sum of $737,528.73; (b) a claim for payment for the cost of materials ordered on OGSP's instructions and delivered to the construction site and used by OGSP, in the sum of $30,178.78; (c) claim for payment of the balance contract sum; and (d) a claim for payment of the retention sum which has yet to be released.[16] We shall consider each of these in turn.

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15 Agreed Bundle Vol 1 at p 59.

(1) Variation Order No. 2

88 Comfort argued that the adjudicator in allowing OGSP's claim with regard to VO2 demonstrated that he had failed to apply his mind to the applicable provisions in the parties' contract.[17] Comfort submitted that cl 11 of the parties' contract "provides for a strict and detailed contractual mechanism for the approval and valuation of variations".[18] That mechanism requires, among other things, that Comfort first serve on OGSP a notice in writing for variation works to be undertaken, and that OGSP seek Comfort's approval in writing to carry out such works if they would involve a claim for additional payment.[19] Comfort therefore argued that if the adjudicator had considered cl 11, he would have realised that OGSP had produced no evidence that the variation works had been ordered by Comfort and no evidence that OGSP had performed the variation works.[20]

89 We did not accept this submission. We recognise that standard form construction contracts, which may be said to reflect industry practice, generally require variations in the contract to provide for a change in the scope of construction work contemplated to be effected in writing. However, it is not invariably the case that the absence of writing, or more generally, the failure to follow the prescribed procedure, will disentitle the party who has performed the variation works from claiming payment for those works. Thus it is said in Chow

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16 Appellant's Submissions at para 5; Respondent's Submissions at para 18.

17 Appellant's Submissions at paras 27–28. See Agreed Bundle Vol 2 at p 49 for the specific terms of the contract, *ie* cl 11.

18 Appellant's Submissions at para 27.

19 Appellant's Submissions at para 27.

20 Appellant's Submissions at para 32.

Kok Fong, *Law and Practice of Construction Contracts: Volume 1* (Sweet & Maxwell, 4th Ed, 2012) at para 5.25:

> The effect of contractual provisions such as those cited here is that, except for situations which have been specifically exempted, a written variation order serves as a condition precedent for payment of the variation work. If a contractor ignores the requirement for a written variation order, as a general principle, he cannot be found to complain subsequently if he is not paid for the varied work, nor can he contend that he should be paid a reasonable sum for the work merely on the premise that the employer had the benefit of the variation work. However, in a suitable situation, the employer may be estopped by his conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract.

90 This passage suggests that the absence of documents that demonstrate formal compliance with the contractually prescribed procedure for variation works is not necessarily fatal to a claim for variation works. That gives the impression that such absence does not inexorably translate into a patent error in the payment claim. All it means is that the contractor bears the risk of proving that the variation was ordered by the employer in the absence of a written variation order. This observation finds support in the position in English law on this issue, which is that a term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation; instead, the effect of such a term is at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation: Sean Wilken QC and Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) at p 26 fn 131, citing the English Court of Appeal's decision in *I-Way Ltd v World Online Telecom UK Ltd* [2002] EWCA 413 (see [11]–[12] *per* Sedley LJ and [17] *per* Schiemann LJ); see also the English Court of Appeal's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [34] *per* Kitchin LJ.

91 In addition, it is significant that the adjudicator evidently had a positive reason for accepting the claim relating to VO2. He addressed his mind to the supporting documents for that claim and was satisfied that they were sufficient. Thus he said at para 68.2 of his decision:[21]

> The PC has also included a table summarizing the details for VO 2. The location, quantities, prices are set out. I also note that there was a letter dated 25 October 2016 enclosing 2 appendices. Appendix A contained a breakdown of the items in VO 2 with reference to the relevant drawings. Appendix B contained a set of drawings referred to in Appendix A. These drawings are marked as "as built" drawings and contained hand written quantities and locations of work sketched in colour.

92 Furthermore, it cannot be said that the adjudicator did not have regard to the parties' contract. The adjudicator remarked explicitly at paras 68 and 69 that "I have examined the documents in this [adjudication application ("AA")]" and that he had "gone through this AA".[22] He further qualified at para 68 that he was going to highlight only "some" of the documents he had gone through. At para 65, he observed that although Comfort had failed to file a payment response, he "must not merely rubber stamp a claim".[23] Hence, the absence of any specific mention of the parties' contract in para 68 cannot lead to the conclusion that the adjudicator failed to have regard to the parties' contract contrary to s 17(3)(*b*) of the Act.

93 Comfort's alternative argument was that in so far as the variation works in VO2 were performed under an oral agreement, that oral agreement was a contract distinct from the contract under which OGSP had brought its claim, and therefore, the adjudicator had no jurisdiction to allow that part of the claim

21 Agreed Bundle of Documents Vol 1 at p 60.

22 Agreed Bundle of Documents Vol 1 at p 61.

23 Agreed Bundle of Documents Vol 1 at p 59.

relating to VO2. While we appreciated the creativity of this argument, we ultimately found it to be neither here nor there, and certainly not indicative of a patent error in OGSP's claim. To begin with, OGSP's case for the variation works was not premised on any oral contract. Furthermore, more than one conclusion may be drawn from the fact that the variation works were undertaken without a written variation order. It may well be that the claimant would be entitled to claim payment only on the footing of the existence of a separate oral contract *or* that the claimant would be entitled to make a *quantum meruit* claim, *or* that the claimant is in fact entitled to claim payment on the contract upon which he has brought his payment claim or that the claimant would not be entitled to claim payment altogether. Can it really be said that, having perused the materials before him, the adjudicator ignored a patent error in dereliction of his duty to adjudicate? Given the range of possible conclusions, and given that the adjudicator explicitly stated that he had considered all the documents properly before him, we did not think that such an inference was warranted.

94 In our view, the true substance of Comfort's argument was that OGSP produced *insufficient* documentation to support its claim on VO2, and that the adjudicator erred in nevertheless allowing the claim. This was the Judge's characterisation of Comfort's argument (GD at [29]), and we agreed with it. To invite the court to set aside the adjudicator's determination for that error is tantamount to asking the court to review his decision on the merits. This, the court cannot do. For this reason and the reasons above, we rejected Comfort's argument on VO2.

(2) Cost of materials

95 Next, Comfort criticised the adjudicator's decision to allow OGSP's claim for payment for the cost of materials essentially on the basis that he had

failed to consider that there was "no legal basis", "no factual basis to it", and that it was a "double claim" insofar as it overlapped with materials used to fulfil VO2.[24] Comfort suggested that this failure may be discerned from the fact that the adjudicator "did not provide *any* review or analysis (even at a high level)" [emphasis in original] of the claim.[25]

96 We had some sympathy for this submission. We note that as regards the claim for cost of materials, the adjudicator simply observed at para 68.3 of the determination that "There is a summary of the "Costs of Materials" item. In this summary, the type of goods supplied, the quantities are [*sic*] rates are set out." Although the adjudicator qualified this statement with an earlier statement to the effect that he was going to highlight only some of the documents which the claimant had adduced, we accept that the economy of his treatment of the cost of materials claim might give the impression that he did not properly consider the claim.

97 However, we were ultimately unable to identify any patent error which he may be said to have ignored in arriving at his conclusion on that claim. We note first that on the face of the payment claim, the following words are stated next to the line setting out the cost of materials claim: "Materials ordered at your instructions and delivered to site which have been used by you".[26] This is a specific factual assertion by OGSP. Comfort failed to file a payment response to deny that statement, and was precluded from making such a denial before the adjudicator. In those circumstances, we do not think it can be said that there was

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24 Appellant's Submissions at paras 34–35.

25 Appellant's Submissions at para 33.

26 Agreed Bundle Vol 2 at p 274.

a patent error in respect of the claim for cost of materials which the adjudicator failed to consider.

98 This analysis illustrates the general point alluded to at [24] above that the alleged patent error which a respondent seeks to raise with the court that the adjudicator had failed to recognise must be an error on the face of the material that is properly before the adjudicator. In the light of this point, it should not be surprising that the absence of any payment or adjudication response will make it that much harder for any respondent to identify patent errors which the adjudicator allegedly failed to identify. Certain errors which could have been patent in the face of material adduced by the respondent will naturally be latent where no such material is properly before the adjudicator. The lesson in this is simply that it is overwhelmingly in a respondent's interest to file a payment response, so that he is not confronted with the difficult task of demonstrating that the adjudicator has failed to identify a patent error.

99 Returning to the claim in question, we would observe also that the adjudicator's explicit reference to the claim shows that he at least considered it and, indeed, had regard to a document which summarised the items claimed. Finally, as we have mentioned, the adjudicator did say that he had examined the documents properly before him. Comfort was simply disagreeing with the adjudicator that the documents he had were sufficient to make good OGSP's claim. However, that substantive judgment by the adjudicator is not one that the court should review.

(3) Claim for balance contract sum and release of retention sums

100 The last two claims can be dealt with together. Comfort's common submission on these two claims was that OGSP produced no evidence to support

them. On the balance contract sum, Comfort argued that the documents adduced by OGSP related to works already certified to have been completed and not to the balance claimed.[27] On the retention sums, Comfort argued that OGSP did not adduce a certificate which the parties' contract required OGSP to issue before claiming the retention sum, and that since the adjudicator did not note the absence of the certificate, he must have failed to consider the parties' contract.[28]

101 We had no hesitation in rejecting these submissions. First, we note that the adjudicator did consider what he regarded to be the relevant evidence for these two claims. He found at para 68.1 of the adjudication determination:[29]

> The PC claimed the full lump sum contract price of $1,250,000.00 I noted an email dated 9 October 2014 from the Respondent to the Claimant which set out milestone dates for work to be done including items for TOP inspection by 15 October 2014. The Claimant has submitted that the warehouse has been in operation for some time and I have no reason to disbelieve this. There are no materials or information in this AA to suggest that the Works were not completed or that the Retention Money is not due for release.

102 Second, in so far as he might have erred as to the relevance and sufficiency of this evidence, that is at most an error of substance which the court will not review. Even if Comfort were right to say that the adjudicator allowed the two claims despite OGSP's not fulfilling the relevant conditions precedent in the parties' contract for making those claims, it is simply not possible to infer from this fact alone that the adjudicator ignored the parties' contract.

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27 Appellant's Submissions at para 36.

28 Appellant's Submissions at paras 42–43.

29 Agreed Bundle of Documents Vol 1 at p 60.

Conclusion

103 For these reasons, we dismissed the appeal with costs, which we fixed at $25,000 inclusive of disbursements.

Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Paul Wong, Andrea Gan and Francis Wu (Dentons Rodyk & Davidson LLP) for the appellant;
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