Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) *v* Lee Wee Lick Terence (alias Li Weili Terence)
[2011] SGHC 109

Case Number	: Originating Summons No 783 of 2010 (Registrar's Appeal No 454 of 2010) (Summonses 387 of 2011 and 402 of 2011)
Decision Date	: 29 April 2011
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Edwin Lee and Joni Tan (Eldan Law LLP) for the plaintiff; Adrian Wong and Nelson Goh (Rajah & Tann LLP) (briefed) and Koh Kok Kwang (CTLC Law Corporation) for the defendant
Parties	: Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) — Lee Wee Lick Terence (alias Li Weili Terence)

Building and Construction Law – Statutes and regulations

[LawNet Editorial Note: The appeal in Civil Appeal No 44 of 2011 was dismissed and the appeal in Civil Appeal No 46 of 2011 was allowed by the Court of Appeal on 2 November 2012. See [2012] SGCA 63.]

29 April 2011

Tay Yong Kwang J:

Introduction

1 This was an appeal against the decision of an Assistant Registrar ("the AR") dismissing the defendant's application to set aside an adjudication determination dated 7 July 2010 ("the Adjudication Determination") made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA"). The defendant's application was made in response to the plaintiff's application (by way of Originating Summons No 783 of 2010) to enforce the Adjudication Determination as a judgment under section 27 of the SOPA.

2 The defendant raised three issues before the AR, who decided all three of them against him. Before me, the defendant only appealed against the AR's findings on two of the three issues. After hearing the arguments from both parties, I agreed with the AR on one issue but disagreed with him on the other. In the result, I allowed the defendant's appeal and his application.

3 As the Adjudication Determination was for the sum of only $125,450.40, the parties required leave under section 34(2)(a) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) if they wished to appeal to the Court of Appeal. The defendant applied for leave to appeal against my decision on the issue on which I agreed with the AR and ruled against him. The defendant's application was however contingent on the plaintiff also seeking leave to appeal to the Court of Appeal. One day after the defendant filed his application, the plaintiff did apply for such leave.

4 The SOPA has been the subject of several High Court decisions. In my opinion, a decision of the Court of Appeal would help clarify the law on payment claims under the SOPA for the construction industry. I therefore gave both parties leave to appeal despite the fact that they had already

proceeded to litigate their dispute in court. Both the plaintiff and the defendant have filed their appeals accordingly (Civil Appeal No 46 of 2011 and Civil Appeal No 44 of 2011 respectively) and I now set out the grounds of my decision.

Brief factual background

5 The AR has set out the facts in detail at [3] to [9] of his decision (see *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence @ Li Weili Terence* [2010] SGHC 333) ("the AR's decision"). I will limit my account here to the salient facts.

6 The plaintiff is in the business of building and renovation works. The defendant is a private individual who engaged the plaintiff in August 2008 as the main contractor for the conversion of his two-storey house at 1 Pasir Ris Heights into a three-storey house. Relations soured and the defendant purported to terminate his contract with the plaintiff by way of a letter dated 21 April 2010. In the same letter, the plaintiff was instructed to vacate the construction site by 12 noon on 26 April 2010. On 2 June 2010, the plaintiff served "Payment Claim No 6" on the defendant. The defendant did not serve a payment response.

7 On 18 June 2010, the plaintiff served the defendant with a "Notice of Intention to Apply for Adjudication" in compliance with section 13(2) of the SOPA. On 22 June 2010, the plaintiff filed an adjudication application ("the Adjudication Application") with the Singapore Mediation Centre ("the SMC"). The SMC served the Adjudication Application on the defendant that same day. The defendant did not lodge an adjudication response with the SMC.

8 On 7 July 2010, the Adjudication Determination was made, awarding the plaintiff $125,450.40. As stated above, the plaintiff applied to enforce this and hence the defendant's application to set it aside.

The issues

9 The AR identified the three issues which arose before him as follows (see [10] of the AR's decision):

(a) Whether Payment Claim No 6 was a valid payment claim under the SOPA;

(b) Whether Payment Claim No 6 was served in accordance with the SOPA;

(c) Whether Payment Claim No 6, if it had been served in accordance with the SOPA, was nevertheless served out of time.

The AR decided all three issues against the defendant and dismissed his application to set aside the Adjudication Determination. Before me, on the defendant's appeal against the AR's dismissal of his application, the defendant only contested the AR's findings on the first and the third issues.

Preliminary issue: what should the court review?

10 The preliminary question which these two issues raised was whether the court ought to even

review the Adjudicator's decision on the said issues.

The earlier cases

11 Following Judith Prakash J's ("Prakash J's") decision in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 ("*Chip Hup*"), it would appear that the two issues do not pertain to whether an adjudicator has properly assumed jurisdiction and thus should not be considered by the court. Prakash J held the following at [54]:

> 54 *I was unable to accept the respondent's argument that the jurisdiction of the Adjudicator was determined according to whether the claimant had followed the requirements of the SOP Act in connection with the form and content of the payment claim and the time at which it had to be served, or not*. I took the view that the Adjudicator's jurisdiction, in the sense of his power to hear and determine the adjudication, could not depend on such adventitious elements. *It appeared to me that, as the claimant submitted, the Adjudicator's jurisdiction arose from his appointment by an authorised nominating body under s 14(1) of the SOP Act and from his acceptance of such appointment. Whether the payment claim was in proper order or not would not have an impact on the Adjudicator's jurisdiction*, though of course if it was not in order, the Adjudicator would be able to throw out the claim on that basis. *Once an appointment had been made and confirmed to the parties by the authorised nominating body under s 14(3), jurisdiction would have been conferred on the Adjudicator in relation to that particular adjudication application*.
>
> [emphasis added]

At [55], the judge made reference to two New South Wales Supreme Court decisions and went on to hold at [56]:

> 56 *Similarly, under our legislation, the jurisdiction of an adjudicator stems from his appointment. It does not stem from a properly completed and served payment claim. The powers and functions of the adjudicator come from s 16 of the SOP Act and not from any action on the part of the claimant*. The respondent's argument in respect of the Adjudicator's jurisdiction was analogous to an argument that the High Court's jurisdiction to hear any particular dispute depends on whether the writ of summons or other originating process is in proper form when in fact the court's jurisdiction comes from the provisions of the SCJA or other relevant legislation, depending on the nature of the proceedings.
>
> [emphasis added]

12 Therefore, according to Prakash J, an adjudicator obtains jurisdiction to hear and determine an adjudication application as soon as he accepts the appointment made by the SMC. Applying that to the case before me, it appears that as an adjudicator's jurisdiction does not stem from a "properly completed and served payment claim", this court should not be reviewing the Adjudicator's decision on the two issues raised in this appeal.

13 About two months after her decision in *Chip Hup*, Prakash J set out her views in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") on the court's role when asked to set aside an adjudication determination or a judgment arising from the same. She said at [42]:

> 42 Accordingly, instead of reviewing the merits (in any direct or indirect fashion), *it is my view*

that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper. After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.

[emphasis added]

14 To further elucidate the limits of the court's role, Prakash J had regard to the New South Wales Court of Appeal ("NSW CA") case of *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 ("*Brodyn*"). In *Brodyn*, Hodgson JA first stated (at [51]) that the scheme of the equivalent New South Wales Act ("the NSW Act") "appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law." The judge went on (at [53]) to consider what the conditions for the existence of an adjudicator's determination were:

The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).

2. *The service by the claimant on the respondent of a payment claim (s 13)*.

3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).

4. The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19).

5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss 22(1)) and the issue of a determination in writing (ss 22(3)(a))."

[emphasis added]

As for more detailed statutory requirements of the NSW Act such as "section 13(2) as to the content of payment claims; section 17 as to the time when an adjudication application can be made and as to its contents", Hodgson JA disapproved of the approach which asked "whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error" as he thought that approach "tended to cast the net too widely". He preferred to ask "whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination." (see *Brodyn* at [54])

15 At [44] and [45] of *SEF Construction*, Prakash J adopted Hodgson JA's discussion on the basic and essential requirements:

44 ... *However, the discussion on the essential conditions to be satisfied for the existence of a valid adjudication determination* (and by this I am referring to formal validity without regard to whether the court agrees with the substance of the determination or not) *can be applied to the SOP Act with suitable modifications to reflect the duties of the adjudicator as expressly stated in*

the statute.

45 Thus I consider that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:

(a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);

(*b*) *the service by the claimant on the respondent of a payment claim (s 10);*

(c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);

(d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);

(e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));

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

(g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

[emphasis added]

16 Although sub-paragraph (b) of [45] in *SEF Construction* (which followed from sub-point 2 of [53] in *Brodyn*) included the service by the claimant on the respondent of a payment claim, Prakash J made clear at [46] of *SEF Construction* that whether a purported payment claim was actually a payment claim under the SOPA was an issue for the adjudicator:

... Similarly, although the SOP Act requires a payment claim to be served, *whether or not the document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court*. In this respect, I agree entirely with Hodgson JA's reasoning in *Brodyn* (([32] *supra*) at [66]):

> ... If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

[emphasis added]

17 Prakash J next decided the case of *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*"), in which she applied her holdings in *SEF*

Construction. The respondent in the adjudication proceedings there applied to set aside the adjudication determination on the basis that the payment claim it was served with ("Payment Claim 1") was not a valid payment claim under the SOPA. Prakash J held (at [20]):

> ... It was not my place to determine whether Payment Claim 1 was a valid payment claim or not. This was an enquiry that fell squarely within the jurisdiction of the Adjudicator and it is one that he recognised and dealt with. *What the court would be concerned with is whether prior to making an adjudication application the claimant had served a purported payment claim*. In this case, Payment Claim 1 had been served by AMA and *whether it was actually a "payment claim" within the meaning of that term under the SOP Act, was a mixed question of law and fact for the Adjudicator*, who would be privy to the facts, *to decide*.
>
> [emphasis added]

Sungdo Engineering

18 Shortly after the *AM Associates* decision, Lee Seiu Kin J ("Lee J") decided the case of *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo Engineering*"). An appeal was filed against Lee J's decision but was subsequently withdrawn. There, the respondent in the adjudication proceedings applied to set aside the adjudication order on the basis that the letter which the claimant purported to be a payment claim ("the 2008 Letter") did not in fact constitute a payment claim under the SOPA. Lee J found notable the conclusion of the 2008 Letter (see *Sungdo Engineering* at [27]):

> Please therefore let us have your payment.
>
> Finally, we wish you greetings of the season!

He decided (at [23]) that the 2008 Letter was not a payment claim under the SOPA, even though it arguably contained the information prescribed in the SOPA and the regulations made thereunder, for the following five reasons.

(a) The defendant did not communicate its intention to the plaintiff that it was a payment claim under the Act.

(b) The plaintiff did not treat it as a Payment Claim.

(c) Events prior to the service of the 2008 Letter suggested that this was not a Payment Claim.

(d) The contents of the covering letter did not suggest it was Payment Claim.

(e) Public policy.

19 Lee J's elaboration of reason (e) (at [28]) provides some background to the case and I set it out in full here:

> 28 This leads to reason (e). If the defendant's position as to what constitutes a Payment Claim is correct, it had made four prior demands for payment of the four invoices after which it did not proceed to apply for adjudication. It then attempted to claim payment through its solicitors, which was also not followed up with an adjudication application. The defendant even commenced a suit to pursue in the High Court the payment it was unable to persuade the plaintiff

to pay by way of its four invoices and its solicitors' letter of demand. And well into the pleadings stage, between two public holidays - Christmas and New Year - the defendant delivered the 2008 Letter which did not, on its face, state that it is a payment claim under the Act. That letter was written in an informal manner without the sense of urgency that a Payment Claim demands of a respondent. *To hold that a document such as the 2008 Letter amounts to a Payment Claim under these circumstances would leave ample scope for potential claimants to ambush respondents by submitting document after document and applying for adjudication the minute the respondent fails to provide a payment response. It cannot be the intention of Parliament for the Act to operate in this manner*.

[emphasis added]

20 Significantly, Lee J disagreed with Prakash J's statements at [56] of *Chip Hup* (see [11] above), stating (at [32]) that:

... While I agree that the jurisdiction of the adjudicator is not vested until his appointment by an ANB ("authorised nominating body"), *I am, with respect, unable to agree that jurisdiction is not affected by an invalid Payment Claim or service thereof*. The power of the ANB to appoint an adjudicator arises from the receipt of an adjudication application from a claimant, and that is predicated by a whole chain of events initiated by the service of a Payment Claim by the claimant on the respondent under s 10 of the Act. It must follow that if the claimant had failed to serve a Payment Claim, or to serve something that constitutes a Payment Claim, the power to appoint an adjudicator for that particular claim has not arisen.

[emphasis added]

As for Prakash J's view at [46] of *SEF Construction* (see [16] above) that whether or not a purported payment claim is actually a payment claim under the SOPA is an issue for the adjudicator and not the court, Lee J went on to say at [34] that

... In principle, if the validity of a Payment Claim goes to jurisdiction, I do not see how a court is precluded from examining this issue on judicial review and I would, with respect, disagree with this.

21 Lee J then distinguished *SEF Construction* on the basis that in any event, the 2008 Letter did not *purport* to be a payment claim under the SOPA as nothing therein stated that it was so. Finally, notwithstanding Lee J's disagreement in principle with Prakash J, he stated that in practice, where a document did purport to be a payment claim under the SOPA, the court should only review an adjudicator's decision that it was indeed a valid payment claim under the SOPA on the basis of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223). In support, Lee J cited the same passage from *Brodyn* which was cited at [46] of *SEF Construction*, highlighting Hodgson JA's qualification:

... If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, question as to whether the document complies in all respects with the requirements of the Act *are generally, in my opinion, for the adjudicator to decide*. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

[emphasis in original]

Chase Oyster

22 Since then, a different NSW CA from that which decided *Brodyn* has decided the case of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 ("*Chase Oyster*"). Section 17(2) of the NSW Act provides that a claimant cannot make an adjudication application unless the respondent is notified, within 20 business days after payment is due, of the claimant's intention to apply for adjudication. In *Chase Oyster*, the claimant gave notice to the respondent outside the 20 business day limit. The adjudicator quite irrationally (see [242]-[243] of *Chase Oyster*) concluded that notice had been given to the respondent within the 20 business day period. In the course of answering the specific questions removed into the Court of Appeal, McDougall J (sitting in the NSW CA) stated (at [286]) that his conclusions suggested that an order should be made to quash the adjudicator's determination, unless there was some discretionary reason to the contrary.

23 Notable in the *Chase Oyster* decision were the comments which the NSW CA made regarding the decision in *Brodyn*. The background to some of those comments included the High Court of Australia's decision in *Kirk v Industrial Relations Commission* [2010] HCA 1. The implications of that decision were neatly summarised by Spigelman CJ at [29] in *Chase Oyster*:

> 29 The centrality of the distinction between jurisdictional and non-jurisdictional error had been identified by the High Court in *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163. The significance of *Kirk* is that it has given this distinction a constitutional dimension in State law, to the same general effect as had earlier been established for Commonwealth law. That has placed this distinction at the centre of Australian administrative law jurisprudence, *in a manner which is not consistent with the reasoning in Brodyn, on one view of that reasoning*.
>
> [emphasis added]

24 The said inconsistency was Hodgson JA's seeming preference for the higher review threshold of the failure to meet "basic and essential pre-conditions" over the lower threshold of "jurisdictional error". "Basic and essential pre-conditions" appeared to be a subset of "jurisdictional errors." This understanding of Hodgson JA's decision in *Brodyn* was explained by Spigelman CJ at [27] of *Chase Oyster*:

> 27 The third consideration is of particular significance. *The impact of the judgment in Kirk on his Honour's reasons arises from his rejection at* [54] *of the applicability of the distinction between "jurisdictional" and "non-jurisdictional" error, on the basis that it "cast the net too widely"*. His Honour went on to apply a test as to what statutory requirements constituted "an essential pre-condition". That statement could be understood as the equivalent of "jurisdictional error", but it appears from the passage quoted at [22] above, that that may not be what his Honour had in mind. *The concept of "an essential precondition" may have been intended to be encompassed within, but narrower than, the scope of "jurisdictional error"*.
>
> [emphasis added]

25 Additionally, as the AR pointed out at [13] of his decision, McDougall J made the following related critique at [149]:

> 149 The decision in *Brodyn* appears to assume that there is a distinction between a basic and essential requirement for the existence of an adjudicator's determination and a jurisdictional

condition, or jurisdictional fact. *However, the decision does not analyse the relevant requirements of the Act in terms of jurisdiction; the framework of analysis was restricted by the search for basic and essential conditions of validity*.

[emphasis added]

26 As for what then constitutes jurisdictional error, Spigelman CJ had this to say (at [33]):

33 There is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined. (See M Aronson et al *Judicial Review of Administrative* Action, 4th ed (2009) Lawbook Co esp at [1.80]-[1.90], [4.185]-[4.200]. See also M Aronson "Jurisdictional Error Without Tears" in M Groves and H P Lee (ed) *Australian Administrative Law* (2007) Cambridge University Press; P Craig *Administrative* Law, 6th ed (2008) Sweet & Maxwell, Ch 14.) ...

The court can review the issues raised in this appeal

27 To what extent should the court interfere with an adjudicator's determinations? A liberal approach would invite more setting aside applications and undermine the statutory purpose of creating a speedy and low cost adjudication process (see *Sungdo Engineering* at [10]) while turning away from putting right erroneous adjudication determinations could create the impression that the court countenances injustice.

28 Returning to the case at hand, I answer the preliminary question in the positive. First, I agree with Lee J's statements at [32] of *Sungdo Engineering* (see [20] above) that in principle, the court may review an adjudicator's decision in respect of whether a document properly constitutes a payment claim under the SOPA and that where a document purports to be a payment claim under the SOPA, the court should only review an adjudicator's decision that it was indeed a valid payment claim under the SOPA on the basis of *Wednesbury* unreasonableness (see [21] above).

29 Second, I note that in *Sungdo Engineering*, Lee J took the view (also at [32]) that the service of a payment claim should be reviewable by a court:

... While I agree that the jurisdiction of the adjudicator is not vested until his appointment by an ("authorised nominating body"), *I am, with respect, unable to agree that jurisdiction is not affected by an invalid Payment Claim* ***or service*** *thereof. ...*

[emphasis added]

I also agree with this. The review of the adjudicator's decision as to whether a payment claim was properly served includes reviewing his decision as to whether a payment claim was served within the prescribed time. In so holding, I have regard to Spigelman CJ's views on the importance of time limits in the NSW Act. Having gone through a long list of time provisions in the previous paragraph of his judgment in *Chase Oyster*, the judge held at [47]:

47 This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. *The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value*.

[emphasis added]

In line with those views, I think it would be helpful for the court to clarify issues regarding time limits so as to provide certainty for parties proceeding under the SOPA.

Whether Payment Claim No 6 was a valid payment claim under the SOPA

Payment Claim No 6 is a valid payment claim under the SOPA

30 The covering letter of Payment Claim No 6 reads:

[Plaintiff's Letterhead]

Date: 2nd June 2010

To:

[Defendant at his residential address]

[Defendant at his construction address]

Dear Sir

PAYMENT CLAIM NO. 6

CONSTRUCTION WORKS TO NO. 1 PASIR RIS HEIGHT SINGAPORE

QUOTATION REF: WFCE/1022/08 ACCEPTED ON 16 AUGUST 2008

ADDITIONAL WORKS FOR 2ND FLOOR

QUOTATION DATED 5 NOV 2008 ACCEPTED ON 3 DECEMBER 2008

We submit our payment claim number 6 for work done from June 2009 to 26 April 2010:

Amount claimed:	$350,450.40
Less payment:	$210,000.00
Amount due/claimed:	$140,450.40

Details of the amount claimed are attached (2 pages).

Yours Sincerely

WENG FATT CONSTRUCTION ENGINEERING

[including mandarin translation]

[Plaintiff's signature]

[Plaintiff's name]

As stated in the covering letter, two pages of itemised cost breakdown of the work which the plaintiff claimed had been done were attached.

31 Payment Claim No 6 falls within the meaning of a payment claim under the SOPA. Unlike the 2008 Letter in *Sungdo Engineering*, Payment Claim No 6 here specified clearly on its face that it was a payment claim. It was a business-like document. From its contents, there could have been no doubt that it was claiming that a sum of money was due. As the contract had been terminated by the defendant, the inclusion of the date 26 April 2010 also made it clear that it was the final bill for the works done as the plaintiff had been directed to clear out of the site by that date (see [6] above).

Payment claims do not need to expressly refer to the SOPA to be valid

32 The obvious objection to this proposition is that if Payment Claim No 6 made no reference to the SOPA, how could it have purported to be a valid payment claim *under the SOPA*? However, as Lee J also noted at [17] of *Sungdo Engineering*, there is no requirement for a payment claim to expressly state that it is made under the SOPA for it to be a valid payment claim under the said Act. At [18], Lee J went on to observe that our SOPA departed from the NSW Act which specifically provides under its section 13(2)(c) that a valid payment claim must state that it is made under the NSW Act. The judge also noted a comment by Mr Chow Kok Fong ("Mr Chow"):

> ... However there is an interesting comment in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2005) at p 134. After noting that there is no requirement in our legislation, unlike the NSW Act, to declare that the claim is made under the Act, the learned author said:
>
> > It is understood that, during consultations leading to the drafting of the [Building Construction Industry Security of Payment] Bill, the Building and Construction Authority accepted the suggestion from the subcontractors and suppliers lobby that such a requirement may conceivably result in creating a contentious atmosphere in the relationships between a main contractor and subcontractors straight away. It is difficult to follow this line of argument. It will be appreciated that, in the normal course of a business, various letters, claims, quotations, negotiation proposals and exchanges will be encountered between the parties. A claimant may submit a proposal for a payment arrangement or furnish a draft progress payment claim as a template for working through the computations and prices with the quantity surveyor on a project. In the absence of a definitive statement of intention, it is conceivable that a payment claim may be mistaken by the respondent for any one of these exchanges.

33 The defendant did not seek to argue that the adjudicator's finding that Payment Claim No 6 was valid under the SOPA was unreasonable in the Wednesbury sense. As stated above, I am of the opinion that Payment Claim No 6 was a valid payment claim under the SOPA. To this extent, I agreed with the AR on the first issue determined by him (see [9] above).

The requirement that a claimant must communicate his intention that a claim is a payment claim

The requirement that a claimant must communicate his intention that a claim is a payment claim under the SOPA

34 Finally, I ought to address the defendant's arguments on this issue which were essentially premised on Lee J's statements at [22] of *Sungdo Engineering*:

> 22 I would therefore hold that for any document to amount to a Payment Claim, not only must it comply with the prescribed requirements for a Payment Claim, it must be intended to be such by the party submitting it and, importantly, such intention must be communicated to the recipient. Whether or not this communication has taken place in each case would be a question of fact to be determined according to the circumstances of that case. Evidence of such communication may come from covering letters, e-mail exchange referring to the document in question or even oral communication. Evidence could well come from the manner in which the respondent had dealt with the document, *eg*, he gives a payment response. It would not be possible to set out all the circumstances under which a court would hold that such intention has been communicated and each case would have to be determined on the basis of its unique facts. But certainly a statement in the document that it is a payment claim under the Act would be the most effective manner of communicating this intention.

The defendant emphasized that as a private individual, it was all the more important that the plaintiff's intention (for the payment claim to be one made under the SOPA) be communicated to him. At [34] of his skeletal submissions, the defendant argued that:

> ... Unlike members of the construction industry, it would be surprising for an individual to be unaware [*sic*] of the intricacies of the SOPA. It is therefore crucial that a party who wishes to serve a payment claim for the purposes of the SOPA make it absolutely clear to that layperson.

35 However, the SOPA does not distinguish between laypersons and members of the construction industry. An opponent to this view might point out that under section 4(2)(a) of the SOPA, contracts relating to residential property are excluded from the application of the SOPA:

> **Application of Act**
>
> **4**.—(2) This Act shall not apply to —
>
> (a) any contract for the carrying out of construction work at or on, or the supply of goods or services in relation to, any residential property (within the meaning of the Residential Property Act (Cap. 274)), which do not require the approval of the Commissioner of Building Control under the Building Control Act (Cap. 29);
>
> ...

In this regard, I note that in response to a Member of Parliament's query during the second reading of the SOPA Bill in Parliament, the Minister of State for National Development, Mr Cedric Foo Chee Keng stated the following (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1135:

> Sir, Mr Ang Mong Seng suggested that renovation works in private residential and commercial buildings be included in the Bill. Currently, the Bill applies to all construction works including renovation works in commercial buildings. So I would like to make this clarification. Only renovation works in residential buildings engaged by private homeowners - be it interior decoration, re-tiling of floors, replacing a set of windows - *will not be included in the Bill as they*

are normally of small contract value and may not be worth the while for homeowners to take their case to an adjudicator. Such disputes, however, can be resolved through mediation or the Small Claims Tribunal, which will be the proper body to do so. This is also the practice with other SOP legislation in Australia and the UK.

[emphasis added]

36 Further, Christopher Chuah *et al, Annotated Guide to the Building and Construction Industry Security of Payment Act 2004* (Sweet & Maxwell Asia, 2004) states at [4.6]:

First, the [SOPA] will not apply to the carrying out of construction works or supply of goods or services in relation to any residential property within the meaning of the Residential Property Act (Cap. 274), which do not require the approval of the Commission of Building Control under the Building Control Act. This exempted category deals with minor renovation works done by individual home owners. *The object of the Act is clearly addressed at larger scale projects where the encumbered cash involved is likely to be substantial*.

[emphasis added]

37 It appears therefore that section 4(2)(a) exempts renovation works done by home owners from the application of the SOPA because such contracts are generally of small value and not because the potential respondent under the SOPA is a private individual.

38 Coming back to Lee J's decision that for a document to amount to a valid payment claim under the SOPA, it must be intended to be such by the claimant and such intention must be communicated to the recipient, the Adjudicator viewed this (at [85] of his Determination) as a statement of best practice rather than a requirement of validity under the Act. Indeed, the SOPA does not impose such a requirement for validity. The only formal requirements are found in section 10(3) and reg 5(2) in that every payment claim shall be in writing, identify the relevant contract and contain details of the claimed amount. In any event, as I have found, Payment Claim No 6 was clearly intended by the plaintiff to be a payment claim under the SOPA on its face and if the defendant did not realise that, then it was probably a case of him not being aware of the SOPA or its implications.

Whether Payment Claim No 6 was served out of time

section 10(2) of the SOPA and reg 5(1) of the SOPR

39 The defendant contended that section 10(2) of the SOPA, read with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the SOPR"), establishes a limitation period for the service of payment claims under the SOPA. Section 10(2) of the SOPA states:

Payment claims

10. —(2) A payment claim shall be served —

(a) at such time as specified in or determined in accordance with the terms of the contract; or

(b) where the contract does not contain such provision, at such time as may be prescribed.

The time that is prescribed is found in reg 5(1) of the SOPR:

Payment claims

5. —(1) Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, *then a payment claim made under the contract shall be served by the last day of each month following the month in which the contract is made*.

[emphasis added]

Before the AR, counsel for the defendant took the position that the payment claim for work done in April 2010 had to be served by 30 April 2010 (see [24] of the AR's decision). However, before me, counsel for the defendant submitted that for work done in April 2010, the last day for serving a payment claim was 31 May 2010.

The AR's interpretation

40 After citing the NSW CA decision in *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd* [2002] NSWCA 238 ("*Fyntray*") at [26] of his decision, the AR opined as follows (at [27]):

> The express words of reg 5(1) do not clearly set out a limitation period, … In my view, the true import of reg 5(1) is two-fold. First, since reg 5(1) states that the payment claim must be served by the last day of the (*sic*) each month *following the month in which the contract is made*, this means that no payment claim can be served in the month in which the contract is made. This is a sensible position since a plaintiff should generally be expected to complete a certain amount of work before it can make a payment claim. By disallowing the making of a payment claim in the month in which the contract was made, reg 5(1) prevents plaintiffs from swiftly serving payment claims after the completion of merely trivial work. Second, a contract may provide that a payment claim must be served by, on or after a specified day of the month. … In my view, reg 5(1) clarifies that if the contract does not specify that a payment claim must be served by, on or after a specified day of the month, then the default position is that a payment claim must be served "by the last day of the month" (ie, the payment claim can be served on any day of the month).
>
> [emphasis in original]

41 With respect, I think the AR's interpretation of reg 5(1) is unjustified by the language used in the provision. The words "shall be served by the last day of each month following the month in which the contract is made" cannot be read as meaning that no payment claim can be served in the month in which the contract is made. The deadline set by reg 5(1) is the very last day for service but that does not prohibit a contractor from serving earlier if he has done the work in question and there is no contractual provision postponing entitlement to payment. For instance, let us assume there is a school directive for students to submit their assignments by the last day of each month following the month in which the assignment is given and an assignment is given in early January. The deadline for submission would therefore be the last day of February. Surely a diligent student who has completed his work in January is not thereby prevented from submitting his work in January. Asking someone to complete a task *by* a certain time is not telling him that he is not allowed to complete it earlier.

Local academic acceptance of a limitation period for payment claims

42 The defendant cited commentaries by two local authors in support of the interpretation he

contended for. The first was Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2005) ("*Security of Payments and Construction Adjudication*") at page 557:

> The *Building and Construction Industry Security of Payment Regulations 2005* (hereinafter the 'BCISP Regulations') prescribe that the default date is 'the last day of each month following the month in which the contract is made'. ***This effectively allows the claimant one month to prepare and submit the payment claim*** .
>
> [original emphasis in italics; emphasis added in bold italics]

43 The second commentary cited was Dr Philip Chan, *Statutory Adjudication in Singapore* (Sweet & Maxwell Asia, 2008) ("*Statutory Adjudication in Singapore*") at paragraphs 3.2.8 and 3.2.9:

> [Discussion of s 10(4) of the SOPA]
>
> 3.2.8 *Therefore, it would appear that if any claimed amount has not been properly included in a payment claim as prescribed by s 10(2), it is no longer possible to make a claim that is out of time. Thus, the time of service of the payment claim is also the limitation period for the purpose of claiming an amount in a payment claim*. According to s 10(2), this limitation period may be agreed by the parties under s 10(2)(a) or it may be prescribed under s 10(2)(b)...
>
> *3.2.9 By reg 5(1), the default limitation period for each claimed amount is marked 'by the last day of each month following the month in which the contract is made'*.
>
> [emphasis added]

44 In clarification of Dr Philip Chan's ("Dr Chan's") position, the defendant tendered a paper entitled "Statutory adjudication and the standard building contract in Singapore – Is the Final Payment referable to statutory adjudication?", which was submitted to COBRA 2008 (the construction and building research conference of the Royal Institution of Chartered Surveyors held in September 2008). That paper discussed the first case that went up to the High Court challenging the validity of an adjudicator's determination, *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364 ("*Tiong Seng Contractors*"). In the concluding section at page 11 of the paper, Dr Chan raised certain queries that he felt ought to have been raised in respect of that case, the first of which I set out here:

> *First, as each payment claim has a limitation period to serve*, is it possible to validly serve a payment claim based on Progress Claim 10 dated one month after the Final Claim and which represents the unpaid amount claimed in the Final Claim. *It is humbly submitted that without further scrutiny of other points, a payment claim based on* ***more than a month old*** *Final Claim would have been time barred*.
>
> [emphasis added]

Evidently, Dr Chan took the view that each payment claim must be served within a limitation period and it seems reasonable to conclude from the preceding excerpt that he understood the limitation period to be one month. I should also state that it does not appear from the judgment in *Tiong Seng Contractors* that the plaintiffs had contractually provided for a limitation period within which payment claims must be served.

45 Although the wording of reg 5(1) is admittedly not free from ambiguity, it seems to me that

Mr Chow's and Dr Chan's understanding of the said provision is pragmatic and sensible and I agree with them.

The SOPA envisaged payment claims to be made at monthly intervals by default

46 The "Building and Construction Industry Security of Payment Act 2004 Information Kit" ("the Info Kit") which was referred to in *Tiong Seng Contractors* at [18] was first published in 2005 by the Building & Construction Authority (see BCA website http://www.bca.gov.sg/SecurityPayment /others/SOP_infokit.pdf), which was also the main proponent of the SOPA. Section 2.3 of the Info Kit states as follows:

> **2.3 How to make a payment claim under the Act?**
>
> A claimant is entitled to serve a payment claim within the period (payment claim date) stated in the contract or mutually agreed in writing. If there is no period provided in the contract, *a payment claim must be made by the last day of each month* ***(monthly intervals)*** *following the month in which the contract is made*.
>
> [emphasis added]

47 The Info Kit understood the SOPA as envisaging payment claims to be made at *monthly intervals* if there is no period otherwise specified in the contract. A similar understanding appears in clause 32.1 of the Public Sector Standard Conditions of Contract for Construction Works 2008, which reads:

> 32.1 **Payment claims**
>
> (1) The Contractor shall submit to the Employer (with a copy to the Superintending Officer), at monthly intervals (on the day of each month specified by the Superintending Officer following the month in which the Contract is made), a claim for payment (hereafter referred to as the "Payment Claim") in such form as the Superintending Officer may from time to time prescribe. For the purposes of payment claims made under this Clause, *the Payment Claim shall have the same meaning ascribed in the Building and Construction Industry Security of Payment Act* (hereafter referred to as the "Act"). *The Payment Claim shall be made in compliance with the requirements of the Act and shall show the amounts* (hereafter referred to as the "Claimed Amount") *to which the Contractor considers himself to be entitled up to the last day of the* ***monthly interval*** *in question in respect of*:
>
> (a) the value of the Permanent Works executed;
>
> ...
>
> [emphasis added]

48 The default position of requiring payment claims to be made at monthly intervals is a sensible arrangement allowing a potential respondent under the Act to be regularly informed of sums due under a construction contract. With this background understanding of the default requirement of payment claims to be made at monthly intervals, the text in reg 5(1) requiring that a payment claim (under a contract which does not specify when a payment claim shall be served) must be served by the last day of each month makes sense. Therefore, reg 5(1) means that, following the month in which the contract is made, payment claims must be served at monthly intervals by the last day of each month.

49 On this understanding, it follows that payment claims for work done in a certain month must be served by the last day of the subsequent month. Thus, for example, for work done in April, payment must be claimed by 31 May. To require payment for work done in a certain month to be claimed by the last day of the same month, e.g. payment for work done on 29 or 30 April to be claimed by 30 April, may be much too onerous for the claimant. On the other hand, if payment for work done in a certain month is not claimed under the SOPA by the last day of the subsequent month, then a claim in respect thereof cannot be made under the SOPA anymore *ie* any later claim would fail under the SOPA for being outside the limitation period prescribed in reg 5(1).

50 Taking the AR's interpretation, there would be no limitation period under the SOPA or the SOPR within which payment claims must be served. The AR took the view (at [28] of the AR's decision) that his interpretation was to be preferred because the SOPA was purposed "to provide persons who have performed construction work with a statutory entitlement to a progress payment." In my view, the SOPA was meant to expedite payments to claimants so as to facilitate their cash flow and relieve their financial problems and to provide an expeditious adjudication process to resolve construction disputes in the interim (see [10] and [12] of *Sungdo Engineering*) and having a limitation period of almost two months is entirely consistent with that purpose. If a contractor is facing cash flow difficulties, I have no doubt that he would be diligent in making monthly payment claims well within that limitation period. In any event, even if he does not do so within the limitation period, that does not mean he will be left without any remedy. He can still pursue his claims by arbitration or by litigation (as the plaintiff has now done). I note that section 13(4) of the NSW Act contains a longer limitation period of 12 months for payment claims.

51 It is also important to remember that once a valid payment claim under the SOPA is served, a process with strict timelines applies to the respondent. As Mr Chow noted in *Security of Payments and Construction Adjudication* (at page 541):

> **Potential for Ambush**
>
> *Timing of claim*
>
> ...
>
> Once the claim is presented, the respondent has only the prescribed maximum of 21 days [see s 11(1)(a) of the SOPA; if not contractually provided for, the respondent has only seven days under s 11(1)(b) of the SOPA] to provide a payment response. This is only adequate if the claim is relatively straight forward. In complex cases, even allowing for the fact that a high degree of exactitude is not normally expected of progress payment valuations, the timeline will be extremely demanding.

The role of section 10(4) of the SOPA

52 Finally, I will address section 10(4) of the SOPA, which I set out below together with section 10(1):

> **Payment claims**
>
> **10**.—(1) A claimant may serve one payment claim in respect of a progress payment on —
>
> (a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or

(b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

...

(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

53 The effect of section 10(4) is that a claimant can only include in a payment claim amounts which were the subject of earlier payment claims. This is also in line with Dr Chan's view at paragraph 3.2.8 of *Statutory Adjudication in Singapore*:

[Discussion of s 10(4) of the SOPA]

3.2.8 *Therefore, it would appear that if any claimed amount has not been properly included in a payment claim as prescribed by s 10(2), it is no longer possible to make a claim that is out of time. Thus, the time of service of the payment claim is also the limitation period for the purpose of claiming an amount in a payment claim*. According to s 10(2), this limitation period may be agreed by the parties under s 10(2)(a) or it may be prescribed under s 10(2)(b). ***On the other hand, once a claimed amount is properly included in a payment claim that is properly served, it can be incorporated in future payment claim subject to the limitation set out in s 10(4)*** .

[emphasis added]

54 If a respondent does not pay a claimant or serve a payment response, the claimant could pursue the adjudication process and make an adjudication application but these are the early stages of the contract and chances are that he may not wish to antagonise the respondent. I say "antagonise" because while a valid payment claim may make no reference to the SOPA, the claimant's notice to the respondent of his intention to apply for adjudication (required by section 13(2) of the SOPA) would surely indicate that the parties are moving into contention mode. However, if the claimant does nothing, he will soon be out of time to make the adjudication application. This is because the claimant has a time limit of seven days within which to make the adjudication application once he is entitled to make it (see section 13(3)(a) of the SOPA).

55 This is the moment that section 10(4) assists the claimant. Section10(4) allows him to bundle the amount from the earlier payment claim (for which the claimant might have decided not to make an adjudication application) into a subsequent one (subject to the stipulated six year time limit) and then later submit an adjudication application for the total sum claimed. Thus, the claimant's right to adjudication under the SOPA is preserved even if he decides not to follow through with the adjudication process early on in the construction contract.

Payment Claim No 6 was served out of time

56 Applying the legal analysis set out earlier to the facts of this case, work was done by the plaintiff at the latest in April 2010. The last day for service of the payment claim for work done in April

2010 was 31 May 2010. Since Payment Claim No 6 was served only on 2 June 2010, it was served out of time, albeit by only a couple of days. However, the plaintiff retains her usual legal remedies as noted by McDougall J at [217] of *Chase Oyster*:

> ... even if the door to adjudication is closed, the door to judgment remains open; and the ability of the respondent to bar access through that door to judgment is limited.

Conclusion

57 Therefore, although I did not interfere with the Adjudicator's finding that Payment Claim No 6 was a valid payment claim under the SOPA with respect to its form and content, I set aside the Adjudication Determination on the basis that Payment Claim No 6 was served out of time.

58 I made the following orders pertaining to costs:

(a) The Adjudicator ordered the defendant to pay $7,971.50 costs and the adjudication fee of $535.00. The plaintiff conceded that she should now bear these costs. I ordered these amounts to be paid by the plaintiff.

(b) The AR ordered $3,000 costs against the defendant. As the defendant succeeded on one out of the three issues before the AR, I set aside the AR's order on costs and awarded $1,000 to be paid by the plaintiff to the defendant for the hearing before the AR.

(c) As for the costs of this appeal, since the defendant succeeded on only one out of the two points canvassed, I awarded $5,500 to be paid by the plaintiff to the defendant, together with reasonable disbursements.