IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 191

Originating Summons No 382 of 2020

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

And

In the matter of Order 95, Rule 3 of the Rules of Court (Cap 322, Rule 5)

And

In the matter of Adjudication Application No SOP/AA 008 of 2020

Between

Range Construction Pte Ltd

… *Applicant*

And

Goldbell Engineering Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] – [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)] – [Setting aside adjudication determination]

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Introduction

1 This was Range Construction Pte Ltd's application ("Range") to set aside part of an adjudication determination dated 10 March 2020 (the "AD"). Range took issue with (a) the adjudicator's award of $852,000 in liquidated damages to the defendant, Goldbell Engineering Pte Ltd ("Goldbell"), and (b) his decision to value the nett variation claim at $38,455.54. I dismissed the application and now furnish my grounds of decision.[1]

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[1] Plaintiff's Written Submissions dated 5 June 2020 ("PWS") at [4].

The adjudication

2 Range was appointed as Goldbell's contractor for a project, pursuant to a letter of award dated 19 April 2017 ("the Contract"). Following Goldbell's payment response to a payment claim dated 2 December 2019 ("Payment Claim No 28"), Range filed Adjudication Application No SOP/AA/008/2020 ("AA 008"). There, Range submitted claims totalling $2,445,225.58[2] and was ultimately awarded an adjudicated amount of $205,647.43:[3]

S/N	Summary of Work Claimed	Amount (including GST)
1	Half the Retention Sum	$950,000.00 + GST $66,500
2	Less: Liquidated Damages	($852,000.00)
3	Nett Variation Claim	$38,455.54 + GST $2,691.89
		Amount after 7% GST: $205,647.43

Retention sums and liquidated damages

3 The bulk of the AD focused on Goldbell's failure to issue a Handing-Over Certificate ("the HO Certificate"). The HO Certificate was significant for two reasons. First, it determined whether and how much of the retention sum was to be released back to Range. The first half of the retention sum was due upon issue of the HO Certificate (Clause 23.1 of the Contract[4]) while the second was due upon issue of the Maintenance Certificate. The issue of the Maintenance Certificate, in turn, depended on when the HO Certificate was

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2 Loo Ching Choo's 1st Affidavit dated 3 April 2020 ("LCC1") – AA 008, at p 1338.

3 LCC1 – Adjudication Determination for AA 008, at p 1703.

4 LCC1 – Conditions of Contract, p 495.

issued (Clauses 20.6 and 20.1 of the Contract).[5] As such, the issuance of the HO Certificate was critical in establishing Range's entitlement to the retention sums.

4 Second, the HO Certificate determined how much liquidated damages Range owed to Goldbell. Liquidated damages were awarded for every day which elapsed between the contractual completion date (here, 7 September 2018[6]) and the date that the HO Certificate was issued (Clause 19.1 of the Contract).[7] The longer it took for the HO Certificate to be issued, the more liquidated damages Range was liable to pay.

5 Accordingly, two questions arose in relation to the HO Certificate. First, whether an HO Certificate *ought* to have been issued and second, *when* it ought to have been issued. As to the first, the adjudicator found that an HO Certificate ought to have been issued[8]. As to the second, "it was common ground between the parties that [the adjudicator] was not required to find the exact date of completion of the works or when exactly was the date when the works may be considered as having been handed over".[9] The adjudicator accordingly made no finding as to when the HO Certificate ought to have been issued.

6 Since an HO Certificate was never issued and since the adjudicator did not make a finding as to *when* it ought to have been issued, there were some difficulties in calculating the amount of liquidated damages payable. The clock would have started running on 8 September 2018 (since 7 September 2018 was

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5 LCC1 – Conditions of Contract, p 490 & 491.

6 LCC1 – Adjudication Determination for AA 008, at p 1691 at [43(a)].

7 LCC1 – Conditions of Contract, p 490.

8 LCC1 – Adjudication Determination for AA 008, at p 1693 at [44].

9 LCC1 – Adjudication Determination for AA 008, at p 1691 at [42].

the contractual completion date) but it was uncertain when Range's exposure to liquidated damages would have ended. In fact, it was uncertain if Goldbell could have claimed liquidated damages at all since the HO Certificate had not been issued. As such the adjudicator invited further submissions[10] on the applicability of Clauses 19.1 and 19.2 (the clauses of the Contract dealing with liquidated damages) given that no HO Certificate was issued. Following these submissions, the adjudicator determined that an HO Certificate was not a pre-condition for awarding liquidated damages and determined that Goldbell was entitled to liquidated damages.[11]

7 In calculating the quantum of these liquidated damages, the adjudicator found 17 November 2018 to be a date which he could reasonably conclude that the project was still experiencing delays, *ie,* a date that still left Range liable for liquidated damages. He based this finding on an email dated 17 November 2018 ("the 17 November Email") from Range's managing director. The email admitted that "the 3rd, 5th and roof level would only be completed 1 week later",[12] effectively confirming that work was still incomplete as of 17 November 2018. The adjudicator accordingly took the difference between the contractual completion date (7 September 2018[13]) and 17 November 2018 in calculating the liquidated damages payable.[14]

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10 LCC1 – Range's Supplementary Submissions dated 14 February 2020, p 1553; LCC1 – Goldbell's Supplementary Submissions dated 14 February 2020, p 1612.

11 LCC1 – Adjudication Determination for AA 008, p 1695 at [54].

12 LCC1 – Adjudication Determination for AA 008, at p 1696 at [57].

13 LCC1 – Adjudication Determination for AA 008, p 1691 at [43(a)].

14 LCC1 – Adjudication Determination for AA 008, p 1697 at [59].

Variation works

8 Besides this, the adjudication determination also addressed Range's claims for variation works.[15] To this, Goldbell contended that it had already paid $156,387.34 earlier and that any claim for variation works should be set off against the sums earlier paid. Range, without substantially disputing whether Goldbell had indeed previously paid $156,387.34, argued that Goldbell should have raised this contention earlier in its payment response. Having failed to do so, Goldbell was not allowed to now rely on such a contention. Ultimately, the adjudicator found in favor of Goldbell, and determined that $156,387.34 had been paid earlier. Accordingly, any sums due for variation works were set off against the $156,387.34.

Miscellaneous matters

9 I should, for the sake of completeness, add that the adjudicator also considered overtime pay fraudulently claimed by the resident engineer,[16] and whether Range's requests for extensions of time had been properly assessed.[17] However, given that these parts of the AD were not in dispute, it is not necessary to elaborate further on them.

Issues to be determined

10 Range took issue with many parts of the AD. These complaints can be broadly categorized as follows:

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15 LCC1 – Claimant's Submissions for AA 008 dated 8 January 2020 ("CS1"), p 1348 at [11] onwards.

16 LCC1 – Adjudication Determination for AA 008, p 1697 at [60].

17 LCC1 – Adjudication Determination for AA 008, pp 1696 – 1697 at [58].

(a) the adjudicator allegedly acting in excess of his jurisdiction;

(b) alleged breaches of the fair hearing rule; and

(c) the adjudicator's alleged failure to consider assorted matters.

11 I now take them in turn.

Issue 1: Adjudicator acting in excess of his jurisdiction

12 According to Range, the adjudicator had acted in excess of his jurisdiction in two main regards. First, he had considered liquidated damages in his determination even though he had no jurisdiction to do so and second, he had allegedly identified a completion date in excess of his jurisdiction. I rejected both arguments.

No jurisdiction to take into account liquidated damages

13 Range's first and boldest argument was that an adjudicator under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act") regime had no jurisdiction to award or take into account liquidated damages.[18] The SOP Act, it was submitted, only allowed for loss and expense claims to be claimed where they related to the value of construction works done. Liquidated damages, being more in the nature of compensatory damages for breach of contract, were not strictly payment claims *for construction work done*. As such, they were not claimable under the SOP Act.

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18 PWS at [22].

14 This argument was fundamentally misconceived. Liquidated damages were never meant to be part of any contractor's payment claim. Liquidated damages are claimed by *employers* who would be expected to articulate their entitlement in a payment response. The adjudicator's jurisdiction to consider liquidated damages therefore flows from the fact that these were listed in an employer's payment response: s 17(3)(*d)* of the SOP Act. Here, the liquidated damages were clearly described in Goldbell's payment response.[19] The adjudicator had therefore, been well within his jurisdiction to take the liquidated damages into account.

15 Range pressed the point. It cited *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 at [42] ("*Coordinated Construction*"). This case stood for the proposition that a payment claim must relate to the carrying out of construction work. Therefore, a payment claim could not include sums which were "of their nature damages for breach".[20] On application of this rule, liquidated damages were not the proper subject of a payment claim and therefore should not have been considered by the adjudicator. But again, my previous difficulty with Range's arguments persisted. Liquidated damages were never part of payment claims in the first place. And so the rule in *Coordinated Construction* (which determined what could or could not be validly claimed under a *payment claim*) was simply not applicable to liquidated damages at all.

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19 LCC1 – Payment Response to Payment Claim No 28, pp 786 and 788.

20 PWS at [24].

16 Even if I accepted that the rule in *Coordinated Construction* was applicable, I found Range's argument unpersuasive. Indeed, *Coordinated Construction* served to damage rather than bolster Range's arguments.

17 There, the subcontractor claimed "delay damages" for delays owing to the contractor's acts (*eg, "*architectural design changes which impacted on contract programme": *Coordinated Construction* at [8]). The adjudicator held in favour of the subcontractor, and the contractor sought to set aside the award. The contractor argued that delay damages should not have been part of the payment claim since they were not sums claimed for carrying out construction work. Accordingly, the adjudicator should not have considered these delay damages in his adjudication.

18 The learned judge accepted that there was a distinction between payments claims for construction work (which would be part of the adjudicator's jurisdiction) and claims for damages for breach (which would not): *Coordinated Construction* at [41]. But he went on to find that delay damages were "not of their nature damages for breach but rather [were] additional amounts which may become due and payable under the contract" (*Coordinated Construction* at [42]). Indeed, the learned judge was of the view that "any requirement … that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect", given that the contract expressly contemplated delay damages being included in the progress payments: *Coordinated Construction* at [40]. To that end, his reasoning was fortified by s 9(a) of New South Wales' equivalent of the SOP Act ("NSW SOP Act"), which stated that the progress payment was "to be … calculated in accordance with the terms of the contract": *Coordinated Construction* at [29] and [40]. Accordingly, the adjudicator's determination was upheld.

19 Singapore's SOP Act too, provides that progress payments are to be "calculated in accordance with the terms of the contract": s 6(*a*) of the SOP Act. The present case too, involved claims for something (liquidated damages) clearly provided for in the contract (Clauses 19.1 and 19.2 of the Contract[21]). Much as how the subcontractor in *Coordinated Construction* was entitled to claim for delay damages in its payment claim, Goldbell too was entitled to set off the payment claim against its claim for liquidated damages. I therefore found that the adjudicator was within his jurisdiction to consider liquidated damages in assessing the adjudged sum.

20 Range had another arrow in its quiver. It referred to the recent 2018 SOP Act amendments. Quoting parliamentary debates, Range argued that the pre-amendment regime saw many "complex claims … [involving] complicated prolongation costs, damages, losses or expenses when applying for adjudication".[22] Parliament had expressly acknowledged that these "[went] beyond the original scope of the SOP Act"[23] and had enacted the new amendments to reflect this position (see s 17(2A) of the SOP Act currently in force). These amendments, in Range's view, clarified that the original scope of the SOP Act had been to cover claims *for work done* or *goods and services supplied*.[24] On that reading, liquidated damages were not intended to be claimable and the adjudicator had exceeded his jurisdiction in considering matters that were not the proper subject of a payment claim.

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21 LCC1 – Conditions of Contract, p 490.

22 PWS at [28].

23 PWS at [28].

24 PWS at [28].

21 Range's case was again, misguided. The "complicated prolongation costs, damages, losses or expenses" mentioned in the parliamentary debates did not refer to liquidated damages. Instead, they referred to the *contractor*'s damage claims for the *employer*'s actions. An employer may for example, have failed to acquire the appropriate permits to allow the contractor to begin work. Alternatively, the employer may have made a fundamental change in architectural design (as what happened in *Coordinated Construction*). These may cause the contractor to incur further costs. The contractor's claims for these sorts of losses – sometimes referred to as "loss and expense claims" – were the true targets of the recently introduced s 17(2A) in the SOP Act (see also *Atkin's Court Forms Singapore – Construction Contracts* vol 59 (LexisNexis, 2007) at para 103) As such, I did not consider the introduction of s 17(2A) of the SOP Act to be any signal of parliamentary disapproval of adjudicators considering liquidated damage claims under the SOP regime. Accordingly, I dismissed this argument as well.

No jurisdiction to designate a completion date

22 Range then argued that the adjudicator had acted in excess of his jurisdiction when designating a completion date. Here, "completion date" referred to the date when the HO Certificate ought to have been issued. Range argued that determining a completion date was a "complex inquiry with many moving parts" – an endeavour that the adjudicator should never have adopted.[25] In the alternative, it argued that the adjudicator's jurisdiction was limited by the parties' wishes. The parties had expressly clarified and agreed that the adjudicator was not required to identify a completion date. The adjudicator

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25 PWS at [83].

should accordingly have restrained from doing so.[26] I rejected these arguments for three reasons.

23 First, the adjudicator's actions were fully in keeping with the jurisdictional parameters set out by the SOP Act. An adjudicator's jurisdiction under the SOP Act regime is found in s 17 of the SOP Act. Nowhere does it suggest that an adjudicator's jurisdiction is limited by the complexity of the inquiry or shackled to the wishes of the parties.

24 Second, the payment claims and payment responses inadvertently called on the adjudicator to identify a completion date. Range's payment claim made reference to the first half of the retention sum. As discussed earlier (see [3]), determining Range's entitlement to this may well have required the identification of a completion date. Similarly, Goldbell's payment response cross-claimed for liquidated damages. That too involved identifying a completion date. Being envisaged in the payment claim and the payment response, the identification of a completion date would naturally have been within the adjudicator's jurisdiction. Indeed, ss 17(3)(*c*) and 17(3)(*d*) of the SOP Act explicitly provide that the adjudicator shall have regard to the payment claim and the payment response.

25 Third, even if the adjudicator was bound by what the parties had agreed to, I find that Range had mischaracterized the adjudicator's statements. The adjudicator never "acknowledged this constraint on his jurisdiction".[27] The

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26 PWS at [85].

27 PWS at [85].

paragraphs that Range referred to in support of this proposition[28] do not make reference to the adjudicator's jurisdiction at all. Instead, they are simple statements from the adjudicator stating that the parties had told him he was not *required* to identify a completion date. The question of jurisdiction did not cross the adjudicator's mind, much less a conscious decision to limit the same.

26 Lastly, I would add that the adjudicator did not identify a completion date at all. I elaborate further below.

Issue 2: Breaches of the fair hearing rule

27 Range alleged that there had been three breaches of the fair hearing rule. First, the adjudicator had allegedly identified 17 November 2018 as the completion date, notwithstanding the parties' instructions to the contrary. This had apparently caught Range by surprise since it had never gotten a chance to address the adjudicator on this matter.[29] Second, the adjudicator had allegedly awarded liquidated damages on the basis of arguments that the parties had not had a chance to make submissions on.[30] Third, the adjudicator had allegedly relied on Goldbell's arguments, even though they were outside the assigned parameters of further submissions requested by the adjudicator.[31] I found that all these allegations were founded on a severe mischaracterization of the adjudicator's reasoning and/or decision. Accordingly, they were dismissed.

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28 LCC1- Adjudication Determination for AA 008, at pp 1691, 1693 and 1696 at paragraphs [42], [45] and [56] respectively.

29 PWS at [88] – [93].

30 PWS at [70] – [77].

31 PWS at [62] – [69].

Choosing 17 November 2018

28 Range argued that both parties had agreed the adjudicator was not required to identify a completion date for the project. The completion date, it will be remembered, is significant because liquidated damages are calculated based on the difference between the contractual completion date (8 September 2018[32]) and the actual completion date. Range argued that in selecting 17 November 2018 and awarding liquidated damages up till that date, the adjudicator had effectively designated an actual completion date, notwithstanding the parties' instructions to the contrary. This had caught Range by surprise and supposedly occasioned a breach of the fair hearing rule.

29 I disagreed. The adjudicator did not choose a completion date at all. 17 November 2018 was merely a date for which he could reasonably conclude that the project was still incomplete *ie,* a date that still left Range liable for liquidated damages. The actual completion date itself could have been much later than 17 November 2018 (in which case Range could be liable for even *more* liquidated damages). If anything, the adjudicator recognized that the completion date and the yardstick to calculate liquidated damages could be separate things. He simply found that *at the minimum*, Range would have been liable for liquidated damages from 8 September 2018 till 17 November 2018. Having rejected the fundamental premise on which this complaint was based – that the adjudicator had selected a completion date at all – I accordingly rejected this contention.

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32 LCC1 – Adjudication Determination of AA 008, p 1691 para 43(a).

Awarding liquidated damages on the basis of arguments which neither party had submitted on

30 Range took issue with the adjudicator's reliance on the following argument when awarding liquidated damages:[33]

> In a situation where a contractor may be in extensive delay, it cannot be that the employer has to stand idly by and await completion and the issuance of the Handing Over Certificate before being able to claim liquidated damages for delay. It cannot be that in the meantime the employer has to continue to pay whatever may be due to the contractor for the limited progress, but for his own damages for delay, not be able to claim any compensation.

31 Range's complaint was that this argument – a policy argument of sorts – was neither submitted by the parties nor canvassed at the adjudication conference. Range had accordingly been deprived of the opportunity to respond to this argument. This, it was submitted, amounted to a breach of the fair hearing rule.

32 The law on the fair hearing rule was clarified in *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers*"). The test is whether the parties have been deprived of a *fair opportunity* to be heard: *Glaziers* at [55]. To that end, the Court of Appeal discussed three situations to illustrate how this test might be applied (at [56]–[61]):

> 56 … First, the outcome of a dispute may be surprising to the parties because although they each have addressed the particular question which the decision-maker has posed as a decisive issue, the decision-maker has ultimately answered that question in a way that is so far removed from any position which the parties have adopted that neither of them could have contemplated the result. …

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33 LCC1 – Adjudication Determination of AA 008, p 1695 para 54.

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> 58 Alternatively, the outcome of a dispute may be surprising to the parties by reason of the fact that they have not even addressed the very question which the decision-maker has posed as being a decisive issue, because they (a) did not know; *and* (b) could not reasonably have expected that it would be in issue at all. …
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> …
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> 60 The final type of situation is where the outcome of a dispute is surprising to the parties because they have omitted to address a particular issue *even though* they could reasonably have foreseen that the issue would form part of the court's decision. The parties may have chosen not to address the issue because they failed to apply their minds to it, or failed to appreciate its significance, or because they each assumed that the decision-maker would adopt their position on that issue. …
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> 61 One type of case which comes within this category are those where the decision-maker has decided the dispute on a premise which, though not directly raised by the parties, is reasonably connected to an argument which the parties have raised …
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> [emphasis in original]

33 The first two types of situations evinced breaches of the fair hearing rule while the third did not: *Glaziers* at [56]–[60]. From this exposition, it can be deduced that the court has regard to, among other things, the following matters when deciding whether there has been a breach of the fair hearing rule:

(a) Whether the answer given by the decision-maker was so far removed from any position which the parties had adopted that neither of them could have contemplated the result

(b) Whether the question that the decision-maker posed as the decisive issue was known or could have been reasonably expected by the parties.

34 Here, there was no breach of the fair hearing rule. First, the policy argument relied on by the adjudicator (see [30] above) was in fact alluded to in Range's own submissions. The adjudicator's concern about the "employer [having] to stand idly by", incurring costs without any immediate relief,[34] spoke to a greater concern that animated the SOP Act regime – the recognition that "cash flow is the life blood of those in the building and construction industry": *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [18] ("*W Y Steel"*). This was the exact policy concern raised and invoked by Range in its submissions.[35] It therefore lay foul in Range's mouth to contend that parties had not contemplated such a policy concern in this matter.

35 Secondly, the primary basis for the adjudicator's decision was the contractual interpretation of Clauses 19.1 and 19.2.[36] The adjudicator invited and accepted submissions on this issue.[37] Even if I accept that his ultimate reasoning included elements not found in the parties' submissions,[38] the pith and marrow of his determination directly responded to and took into account the parties' submissions on Clauses 19.1 and 19.2.[39] In that light, I cannot accept that the adjudicator's ultimate reasoning deviated so radically from the parties' original positions that neither could have contemplated the result. It goes without saying that the parties were also sufficiently appraised of what the decisive issue was – the proper interpretation of Clause 19.1 in light of the fact

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34 LCC1 – Adjudication Determination of AA 008, p 1695 para 54.

35 LCC1 – Range's Further Submissions on Clauses 19.1 & 19.2, p 1553 at [4].

36 LCC1 – Adjudication Determination of AA 008, pp 1695 – 1696 at [53] – [55].

37 LCC1 – Goldbell's Further Submissions on Clauses 19.1 & 19.2 at p 1612; LCC1 – Range's Further Submissions on Clauses 19.1 & 19.2 at p 1553.

38 LCC1 – Adjudication Determination of AA 008, p 1695 para 54.

39 LCC1 – Adjudication Determination of AA 008, pp 1695 – 1696 at [53] – [55].

that an HO Certificate had not been issued.[40] In these circumstances, I find that Range had not been deprived of a fair opportunity to be heard. There was no breach of the fair hearing rule.

Relying on arguments outside the parameters of the given assignment

36 Range's last argument about the fair hearing rule related to the further submissions that the adjudicator had requested from the parties. According to Range, the adjudicator had "specifically directed parties to address the much narrower issue of the effect of how Clause 19.2 was intended to operate *vis-à-vis* Clause 19.1 of the REDAS Conditions".[41] Notwithstanding the "strict instructions as to the scope of these further submissions",[42] Goldbell had discussed other clauses in the Contract, in an effort to interpret Clause 19.2. The adjudicator's reliance on these arguments from Goldbell, being arguments outside the instructed scope, was objectively unforeseeable. Range did not have an opportunity to reply to these arguments. The adjudicator's reliance on this "impermissible chain of reasoning"[43] had therefore severely prejudiced Range. I rejected this argument as well.

37 First, it was not clear that the adjudicator had strictly delineated the scope of the submissions at all. If anything, the evidence suggested that the adjudicator had worded his request fairly broadly. Range's own submissions suggested that the adjudicator's request was for "parties [to] address the

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40 LCC1 – Adjudication Determination for AA 008, p 1695 at [53].

41 PWS at [62].

42 PWS at [64].

43 PWS at [68].

question of how Cl. 19.2 [was] intended to operate".[44] The adjudicator, in his determination, stated that he had "invited both parties to submit on the applicability of Clause 19.1 if there is no Handing Over Certificate issued".[45] These suggested that there had never been such strict instructions for the parties to limit their submissions in the first place.

38 Second, even if the instructions had strictly directed parties to address "how Clause 19.2 was intended to operate *vis-à-vis* Clause 19.1 of the REDAS Conditions",[46] Goldbell was perfectly entitled to bring up other clauses in the Contract if they were relevant. It is entirely normal for contractual clauses to be interpreted with reference to other neighboring provisions. As Goldbell points out, "one of the canons of contractual interpretation is … the whole contract or a holistic approach".[47] In that regard, Goldbell had acted well within the parameters of the given assignment. The adjudicator's reliance on Goldbell's arguments, therefore, was hardly cause for surprise, much less a breach of the fair hearing rule.

39 Finally, I had serious doubts as to whether there truly were mismatched expectations between the parameters of the assignment and what credit was actually given for. Indeed I found that all the alleged breaches of the fair hearing rule – all the allegations that Range had been caught by surprise – were based on mischaracterizations of the adjudication or the adjudicator's decision. This

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44 LCC1 - Range's Further Submissions on Clauses 19.1 & 19.2, p 1553 at [2].

45 LCC1 – Adjudicator's Determination for AA 008, p 1695 at [53].

46 PWS at [62].

47 DWS at [27].

litany of laments was in truth, disagreement with the determination itself; Range was disgruntled, not surprised.

Issue 3: Adjudicator's failure to consider relevant matters

40 Range's final grievance was the adjudicator's alleged failure to consider certain relevant matters. These were (a) the alleged failure to consider Range's pleadings that the HO Certificate must have, at least, been issued by the time the Temporary Occupation Permit ("TOP") was granted; (b) the alleged failure to consider other evidence in finding that Range had failed to complete works by 17 November 2018; and (c) the alleged failure to consider Range's jurisdictional objections concerning Goldbell's arguments *vis* the variation orders. I dismissed all of these as well.

Alleged failure to consider Range's pleadings about the TOP

41 Range's pleadings stated that the HO Certificate ought to have been issued by the time the TOP was granted. Range complained that this pleading was not taken into account by the adjudicator.[48]

42 This was untrue. The TOP date (2 October 2018) was expressly considered by the adjudicator. It was one of the ten relevant facts which he set out and relied on in determining whether the HO Certificate ought to have been issued.[49] Indeed, Range acknowledged this as well.[50] But Range's grievance was

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48 PWS at [37].

49 LCC1 – Adjudicator's Determination at AA 008, p 1692 at [43].

50 PWS at [41].

that the TOP date was taken into account "without any consideration of its significance as expressly contended by Range".[51] I rejected this entirely too.

43 An adjudicator cannot be expected to pamper every pleading submitted by the parties. The SOP Act regime calls for fast and low cost adjudication: *W Y Steel* ([34] *supra*) at [18]. The nature of such a regime necessarily results in a more "roughshod but quick species of justice" (*Glaziers* ([32] *supra*) at [48]) and any ancillary unfairness is tempered by the temporary finality of adjudications, *ie,* the dispute may later be reopened and ventilated in another more thorough and deliberate forum (*W Y Steel* at [22]). In view of this, the Court of Appeal's exhortation in *Glaziers* is particularly apposite:

> 36 … Given the ambiguities inherent in the decision-maker's silence, the court must be wary that a disaffected party may wrongly characterise what is, in truth, the decision-maker's misunderstanding of or disagreement with a certain submission as a failure to consider that submission entirely.
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> 37 It was in view of these specific concerns that this court stated in *AKN v ALC* that we would only infer that the decision-maker had wholly failed to consider an issue if the inference was clear and virtually inescapable. …

44 Here, I did not think that such a "clear and virtually inescapable" inference was made out. For one, the adjudicator had considered Range's pleadings. He acknowledged Range's position that the HO Certificate ought to have been issued by end September 2018.[52] Inherent in that argument were multiple references to and heavy reliance on the TOP's issuance on 2 October

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51 PWS at [41].

52 LCC1 – Adjudication Determination of AA 008, p 1694 at [52].

2018.[53] The adjudicator had therefore considered Range's pleadings when he acknowledged its position.

45 More importantly, I found that there were multiple possible explanations for the absence of any explicit reference to Range's arguments. None of these explanations were particularly more compelling than the rest, much less capable of raising a "clear and virtually inescapable" inference. To illustrate, Range contended that its arguments about the TOP were a "key plank" in its case. The failure to reference such an important part of its pleadings in the AD raised an inference that the adjudicator had failed to consider it at all.[54] But this may well be explained by the fact that the adjudicator simply did not share Range's views on the importance of the TOP. Whether such a view is erroneous or not, is not the subject of this application. But it certainly provides an alternative explanation for the failure to make reference to Range's "key" arguments – the adjudicator did not find them to be very "key" at all. This was not mere speculation. It was fairly apparent that the adjudicator placed emphasis on other matters instead (the 17 November Email for example,[55] and the requests for extensions of time[56]). In these circumstances, there was no "clear and virtually inescapable inference" that the adjudicator had wholly failed to consider Range's pleadings regarding the significance of the TOP.

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53 LCC1 – Range's Adjudication Submissions dated 8 January 2020, pp 1368 – 1369 at [54].

54 PWS at [43].

55 LCC1 – Adjudication Determination of AA 008, p 1696 at [57].

56 LCC1 – Adjudication Determination of AA 008, pp 1696 – 1697 at [58].

Alleged failure to consider evidence other than the 17 November Email

46 As stated above, the adjudicator found 17 November 2018 to be a date which he could reasonably conclude that the project was still experiencing delays, *ie,* a date that still left Range liable for liquidated damages. He based this conclusion (that the project was still incomplete as of 17 November 2018) on the 17 November Email.[57] The email suggested that works were still incomplete. Range's complaint was that the adjudicator should have relied on more than just this email. Other pieces of evidence would have provided context and possibly led to a different finding.

47 Here, the entirety of Range's arguments is founded on the adjudicator's silence. The (simplistic) suggestion was that the adjudicator's failure to mention other pieces of evidence evinced a certain myopia, a reliance on one piece of evidence "to the exclusion of all the other evidence placed before [the adjudicator]".[58] This was precisely the sort of reasoning that the court in *Glaziers* ([32] *supra*) cautioned against (see *Glaziers* at [36]). I had been invited to conclude, not from any explicit indication, but rather from the decision-maker's silence that he had failed to address his mind to that submission. Absent any additional reasoning, this was not an inference I was prepared to make.

48 If anything, Range had ample opportunity to state its case. Its case was that the 17 November Email merely showed that there were "minor outstanding works including variation works which could not have justified the withholding

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57 LCC1 – Adjudication Determination of AA 008 p 1696 at [57].

58 PWS at [96].

of a Handing Over Certificate".[59] This was precisely what it pleaded in its Reply Submissions dated 29 January 2020.[60] If there were extra documents that the adjudicator should have referred to, or important "context" to the 17 November Email, the onus was on Range to make mention of this *when it had the opportunity to do so*. It should have referred to "the 2 November 2018 email" and the "8 November 2018 presentation" which it now submitted were crucial in interpreting the 17 November Email.[61] Instead, its earlier submissions merely denied Goldbell's characterization of the 17 November Email and went no further than those bald assertions.[62] The adjudicator, in other words, "failed" to consider the "proper context" of the 17 November Email because Range never attempted to explain in the first place. Range could not now come before the court, seeking to rectify its earlier mistakes under the guise of alleged breaches of natural justice.

Alleged failure to consider jurisdictional objections

49 Finally, Range argued that it had raised a jurisdictional objection to the inclusion and recognition of one of Goldbell's partial payments. The jurisdictional objection was that Goldbell had not raised the partial payment in its payment response and neither was it brought up in response to anything that Range had raised. As such, Goldbell could not have relied on the partial payment in setting off the variation order claims, and neither could the adjudicator have taken heed of it. Crucially, Range was not contesting "the

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59 PWS at [97].

60 LCC1 – Range's Reply Submissions dated 29 January 2020, pp 1467 – 1468 at [84].

61 PWS at [97].

62 LCC1 – Range's Reply Submissions dated 29 January 2020, pp 1467 – 1468 at [84].

merits of Goldbell's arguments or the [a]djudicator's preference thereof".[63] Rather it took issue with the adjudicator's failure to consider Range's jurisdictional objection. This failure was supposedly evident from the fact that the AD had made no mention of the jurisdictional objection at all.

50 Again, Range's case was founded on the Adjudicator's silence and failure to refer to the jurisdictional objection explicitly. This was insufficient to establish a breach of natural justice and I adopt the same reasoning earlier stated at [47]. But Range's case here was slightly different from its earlier arguments. It referred to the adjudicator's "general practice throughout his Adjudication Determination".[64] This practice was to "first highlight both parties' arguments in respect of an issue before providing his analysis".[65] In that context, the failure to mention the jurisdictional objection – a deviation from the established structure of the AD – was supposedly evidence that he had overlooked it.

51 I disagreed. It was not at all clear that this was necessarily the prevailing manner in which the AD had been organized. For example, when determining the sub-issue of whether the HO Certificate ought to have been issued, the adjudicator simply listed ten "relevant facts" and stated his findings.[66] When determining whether the second half of the retention sum ought to have been released, his analysis weaved together references to Range's case, the primary materials (*ie,* the contractual provisions) and other evidence such as the "list of outstanding defects" that Goldbell produced.[67] These go to show that there was

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63 PWS at [107].

64 PWS at [109].

65 PWS at [109].

66 LCC1 – Adjudication Determination of AA 008, pp 1692 – 1692 at [43].

67 LCC1 – Adjudication Determination of AA 008, pp 1693 – 1694 at [48].

simply no *consistent* structure that organized the AD. Range's argument, which was founded on this fundamental premise, accordingly collapsed.

52 Even if I accepted that the adjudicator failed to consider the jurisdictional objection altogether, I found that there had been simply no prejudice occasioned. Indeed, it is not the duty of the court to comb an AD pedantically, trawling for procedural defects and setting aside determinations on inconsequential technical breaches of natural justice: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65]. Here, I found that the partial payment claimed by Goldbell was referred to in its payment response. Its payment response attached a report from "ES Tang Consultants interim payment no 21 dated 4 Dec 2019"[68] and there, the "Summary of Variations" listed $156,387.34[69] – the sum that Goldbell claimed had been an earlier partial payment for variation works. As such, I found that the jurisdictional objection had been inadvertently answered by the AD since the adjudicator had simply considered something that had been in the payment response all along.

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68 LCC1 – Goldbell's Payment Response dated 20 December 2019, pp 787 & 791.

69 LCC1 – Goldbell's Payment Response dated 20 December 2019, p 795.

Conclusion

53 For these reasons, I dismissed the application and awarded costs to Goldbell, fixed at $8,000 all-in.

Lee Seiu Kin
Judge

Choo Poh Hua Josephine and Chin Yan Xun (WongPartnership LLP) for the applicant;
Campos Conrad Melville, Chong Jia Hao and Michelle Lim Ann Nee (RHTLaw Asia LLP) for the respondent.