Lee Wee Lick Terence (alias Li Weili Terence) *v* Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal
[2012] SGCA 63

Case Number	: Civil Appeals Nos 44 and 46 of 2011
Decision Date	: 02 November 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Wong Soon Peng Adrian, Nelson Goh Kian Thong and Liew Mei Chun (Rajah & Tann LLP) and Koh Kok Kwang (CTLC Law Corporation) for the appellant in Civil Appeal No 44 of 2011 and the respondent in Civil Appeal No 46 of 2011; Edwin Lee Peng Khoon and Poonaam Bai d/o Ramakrishnan Gnanasekaran (Eldan Law LLP) for the respondent in Civil Appeal No 44 of 2011 and the appellant in Civil Appeal No 46 of 2011.
Parties	: Lee Wee Lick Terence (alias Li Weili Terence) — Chua Say Eng (formerly trading as Weng Fatt Construction Engineering)

Building and Construction Law – Statutes and regulations

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 109.]

2 November 2012 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 Civil Appeal No 44 of 2011 ("CA 44 of 2011") is an appeal by Lee Wee Lick Terence ("TL") and Civil Appeal No 46 of 2011 ("CA 46 of 2011") is a cross-appeal by Chua Say Eng ("CSE") against the decision of a High Court Judge ("the Judge") to set aside an adjudication determination made in favour of CSE under s 17 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") (see *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence (alias Li Weili Terence)* [2011] SGHC 109 ("the GD")).

The background of the Act

2 Before addressing the facts of this case, we ought to briefly set out the policy behind and the purpose of the Act and the scheme of adjudication that it provides for. According to the second reading speech for the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) ("the Bill"), the Bill was passed to solve a common problem in the construction industry of contractors (especially sub-contractors) going unpaid for work done or materials supplied. To help facilitate the cash-flow of contractors, the Act sought to establish "a fast and low cost adjudication system to resolve payment disputes" (see *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112 (Cedric Foo Chee Keng, Minister of State for National Development) ("the second reading speech")).

3 Generally, the scheme prescribed by the Act has the following features. To paraphrase the Explanatory Statement attached to the Bill, the Act provides that any person who has carried out

construction work or supplied goods or services under a construction contract or supply contract has a statutory entitlement to payment. The Act also establishes an adjudication procedure by which such a person may claim payment as well as provides for remedies when the adjudicated amount is not paid. A contractor obtains the right to seek adjudication after serving a payment claim in the prescribed form on the customer (ss 10 and 12 of the Act), to which the customer has to serve a payment response or else be barred from contesting the amount claimed before the adjudicator (ss 11 and 15(3)(*a*) of the Act). The adjudicator's decision as to the payable amount is binding in an interim manner (s 21(1) of the Act).

4 This whole process is characterised by strict time-lines. After adjudication, the adjudicated sum is payable within a short time (s 22(1) of the Act) and enforceable through various means (ss 23–27 of the Act), thus facilitating the contractor's cash-flow. However, the adjudication outcome can be disputed (and any errors as to the amount payable accounted for) at a later arbitration or litigation that finally determines the parties' contractual rights (ss 21(3) and 34(4) of the Act). Some of the provisions of the Act form the subject of this appeal and will be discussed below in greater detail.

5 Concerning the origin of the scheme under the Act, the then Minister of State for National Development stated the following in the second reading speech:

> This Bill is modelled after similar legislation in other countries such as Australia, UK and New Zealand. For more than a year, the Building and Construction Authority (BCA) has consulted extensively with various stakeholders in the industry. These include the developers, professionals, main contractors, subcontractors, suppliers, and Government procurement agencies. The features of this Bill have been adapted to suit local conditions and have taken the stakeholders' suggestions and views into account.

In the debate that followed the second reading speech, frequent comparison was made between the Bill and the Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (NSW) ("the NSW Act"). This piece of New South Wales legislation has a similar structure and purpose to the Act and seems to have informed the work of the Act's drafters, although there are important differences between them.

Facts

6 The material facts are as follows. On 16 August 2008, TL engaged CSE, a contractor, to convert his two-storey house at 1 Pasir Ris Heights into a three-storey house. Disputes arose, and this resulted in TL terminating the contract on 21 April 2010. In the letter of termination, TL required CSE to vacate the construction site by 12.00pm on 26 April 2010, which CSE did.

7 The Act applied to the contract between TL and CSE ("the Contract") because it was a written contract for the carrying out of construction work on a residential property which required the approval of the Commissioner of Building Control under the Building Control Act (Cap 29, 1999 Rev Ed) (see ss 4(1) and 4(2)(*a*) of the Act). [note: 1]

8 On 2 June 2010, CSE served a document described as "PAYMENT CLAIM NO. 6" ("PC6") on TL by leaving it at TL's last known address as stated in the Contract. PC6 was a claim for $140,450.40 for work done from June 2009 to 26 April 2010. There was no reference in PC6 that it was made or served under the Act. The contents of PC6 are as follows:

> **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).

We note that the details provided in the attachments to PC6 did not show when the works described were completed.

9 TL did not serve on CSE a payment response within seven days as required by s 11(1)(*b*) of the Act. On 18 June 2010, CSE served a notice of intention to apply for adjudication under s 13(2) of the Act on TL at the same address. On 22 June 2010, CSE filed an adjudication application with the Singapore Mediation Centre ("SMC"), an authorised nominating body ("ANB") for adjudicators under the Act. The SMC served the adjudication application on TL on the same day at the same address. TL did not file an adjudication response with the SMC under s 15(1) of the Act. An adjudicator (the "Adjudicator") was then appointed under s 14 of the Act. The Adjudicator communicated with the parties and held a conference on 2 July 2010 to hear them on their respective positions.

10 Ultimately, the Adjudicator identified the following issues to be determined by him:

(a) whether CSE had effected valid and proper service of PC6 on TL on 2 June 2010;

(b) whether PC6 was served out of time;

(c) whether PC6 was invalid for failure to state that it was issued for the purposes of the Act; and

(d) the extent to which an adjudicator may assess the amount claimed in a payment claim as being properly due to a claimant where there is no payment response and adjudication response.

11 At the conference, TL indicated that issues (a), (b) and (c) (see [10] above) were in the nature of jurisdictional challenges based on the decision of the High Court in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo*"), *ie*, they related to the jurisdiction of the Adjudicator to make a determination on PC6. The Adjudicator rejected a submission by CSE that TL should not be allowed to raise jurisdictional and/or procedural issues at the adjudication if these arguments had not been stated in a payment response on the ground that they constituted "reasons for withholding payment" under s 15(3) of the Act. He accordingly proceeded

with his adjudication and, in his adjudication determination dated 7 July 2010 ("the AD"), awarded CSE the sum of $125,450.40. In relation to issues (a) to (d) (see [10] above), he held as follows: (a) PC6 was properly and validly served; (b) PC6 was not served out of time; (c) PC6 was not invalid for not stating that it was issued for the purposes of the Act; and (d) he was bound to conduct his own independent assessment as to the amount due to CSE even where there was no payment response or adjudication response by TL.

12 Upon TL's failure to pay the amount awarded to CSE under the AD, CSE made an *ex parte* application to the Registrar under O 95 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for leave to enforce the AD under s 27(1) of the Act as a judgment of the court. Leave was granted and the order of court was served on TL. In response, TL applied under s 27(5) of the Act to set aside the order granting leave as well as the AD on the following grounds:

(a) PC6 was not a valid payment claim under the Act;

(b) PC6 was not served on him in accordance with the Act; and

(c) PC6 was served out of time.

Decisions of the Assistant Registrar and the Judge

13 The Assistant Registrar ("AR") found in favour of CSE on all three of the grounds at [12] above (see *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence @ Lee Weili Terence* [2010] SGHC 333). TL appealed against the AR's decision on the first and third grounds. The Judge decided the appeal on the first ground against TL, but the appeal on the third ground in TL's favour. Accordingly, the Judge allowed TL's appeal.

14 Before addressing the merits of the appeal, the Judge first considered the preliminary question of whether he could review the Adjudicator's decision on the two issues raised by TL, *viz*, whether PC6 was a valid payment claim and whether PC6 was served out of time. In this regard, he compared two distinct approaches taken in the Singapore courts. The first approach was developed in the cases of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 ("*Chip Hup Hup Kee*"), *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") and *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*"), all decided by Judith Prakash J. In *Chip Hup Hup Kee*, Prakash J held that the formal validity and service of a payment claim were not jurisdictional issues. In *SEF Construction* and *AM Associates*, Prakash J held that the court's role extended only to reviewing a closed list of "basic requirements" for the validity of an adjudication determination (see *SEF Construction* at [45]; *AM Associates* at [19]). The two issues raised by TL would not fall into the category of reviewable issues formulated by Prakash J. This was contrasted with the second approach, set out in the case of *Sungdo* by Lee Seiu Kin J. On Lee J's reasoning, a court may review an adjudicator's decision on whether a document properly constitutes a payment claim under the Act or whether a payment claim was properly served.

15 After reviewing the two lines of authorities, the Judge accepted the approach in *Sungdo* and reviewed the findings of the Adjudicator on the two issues. In this regard, he stated at [28]–[29] of the GD as follows:

> 28 ... I answer the preliminary question in the positive. First, I agree with Lee J's statements at [32] of *Sungdo* ... that in principle, the court may review an adjudicator's decision in respect of whether a document properly constitutes a payment claim under the [Act] and that where a

document purports to be a payment claim under the [Act], the court should only review an adjudicator's decision that it was indeed a valid payment claim under the [Act] on the basis of *Wednesbury* unreasonableness ...

29 Second, I note that in *Sungdo* ..., Lee J took the view (also at [32]) that the service of a payment claim should be reviewable by a court … 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 Bar v Hamo Industries* [2010] NSWCA 190], [Spigelman CJ] 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 in original]

16 After examining the contents of PC6, the Judge concluded that it was a valid payment claim under the Act notwithstanding that it did not state that it was made under the Act (see [31]–[32] of the GD). On the issue of whether PC6 was served out of time, the Judge held that it was, having regard to reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the SOPR") read with s 10(2)(*b*) of the Act. He accordingly allowed TL's appeal.

17 In view of the divergent judicial approaches, the Judge then invited, and gave leave to, the parties to appeal against his decision. Hence the present appeals, *viz*, CA 44 of 2011, which is TL's appeal against the Judge's decision that PC6 was a valid payment claim, and CA 46 of 2011, which is CSE's appeal against the Judge's decision that PC6 was served out of time.

18 At the conclusion of the appeal before us, we reserved judgment. On 11 November 2011, counsel informed this court that the parties had settled their dispute (which was pending in Suit No 82 of 2011). Consequently, our decision on the issues raised on appeal will have no bearing on the position of the parties, except possibly on the issue of costs. We have also been given to understand by counsel for both parties that the two judicial approaches have created difficulties among adjudicators on the proper approach to adopt, and for this reason it is desirable for this court to express its views on the state of the law.

19 In this judgment, we shall first discuss the two judicial approaches and outline the respective roles of the ANB, the adjudicator and the court in the scheme of the Act. We will then examine the specific issues in these appeals to consider whether the Judge's holdings on the two issues are correct in law.

The two judicial approaches

Chip Hup Hup Kee

20 In *Chip Hup Hup Kee*, Prakash J held that the jurisdiction (in the sense of competence) of an adjudicator to hear and determine an adjudication application stemmed from his appointment by an ANB and his acceptance of such appointment. The formal validity and service of a payment claim did not affect the adjudicator's jurisdiction. However, the adjudicator would be entitled to reject the payment claim if it was not in proper order. At [54] of *Chip Hup Hup Kee*, she said:

> 54 I was unable to accept the respondent's argument that the jurisdiction of the [a]djudicator was determined according to whether the claimant had followed the requirements of the [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 [a]djudicator'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 [a]djudicator's jurisdiction arose from his appointment by an [ANB] under s 14(1) of the [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 [a]djudicator's jurisdiction, though of course if it was not in order, the [a]djudicator would be able to throw out the claim on that basis. Once an appointment had been made and confirmed to the parties by the [ANB] under s 14(3), jurisdiction would have been conferred on the [a]djudicator in relation to that particular adjudication application.

SEF Construction

21 Subsequently, Prakash J elaborated on her views in another decision, *viz*, *SEF Construction*, where she held that, given that the legislative intention of the Act is to establish a speedy and economical procedure and the fact that there is provision for adjudication orders to be reviewed by a panel of review adjudicators, the court hearing a setting-aside action should not review the merits of an adjudicator's decision.

22 Prakash J also endorsed the decision of the New South Wales Court of Appeal ("the NSW Court of Appeal") in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 ("*Brodyn*"), which held that the NSW Act laid down certain conditions that were essential for the existence of an adjudicator's determination. She accordingly held, following *Brodyn*, that in an application to the court under s 27(5) of the Act to set aside an adjudication determination, the court's role was limited to determining the existence of the following basic requirements (or essential conditions) for the validity of an adjudication determination (at [45] of *SEF Construction*):

> (a) the existence of a contract between the claimant and the respondent, to which the [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 [ANB] (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 17(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.

23 By implication, therefore, the existence of all other non-essential requirements was for the adjudicator to decide. Prakash J accordingly held at [46] of *SEF Construction* as follows:

> ... [A]lthough the [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* (... 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]

AM Associates

24 In the next case, *viz*, *AM Associates* , the respondent in the adjudication proceedings applied to set aside the adjudication determination on the ground that the payment claim ("Payment Claim 1") was not a valid payment claim under the Act. Prakash J, reiterating her views in *SEF Construction*, said (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 [a]djudicator 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 [the claimant] and *whether it was actually a "payment claim" within the meaning of that term under the [Act], was a mixed question of law and fact for the [a]djudicator*, who would be privy to the facts, *to decide*.
>
> [emphasis added]

Sungdo

25 Shortly after the decision in *AM Associates*, a similar issue arose in *Sungdo.* In that case, the claimant sent to the respondent some documents with a one-page covering letter (collectively the "Letter Claim") which ended with these words (see *Sungdo* at [14]):

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

26 The respondent in the adjudication proceedings applied to set aside the adjudication order on the grounds that (a) the Letter Claim was not a payment claim under the Act; and (b) the Letter Claim was not served. On the preliminary question of whether the court could review the adjudicator's decision on the two issues, Lee J disagreed with Prakash J's statements at [54] of *Chip Hup Hup Kee* (see [20] above), stating (at [32] of *Sungdo*) that:

> ... While I agree that the jurisdiction of the adjudicator is not vested until his appointment by an ANB, *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 regards Prakash J's view at [46] of *SEF Construction* (see [23] above) that whether or not a purported payment claim is actually a payment claim under the Act is an issue for the adjudicator and not the court, Lee J went on to observe at [34] of *Sungdo* 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.

In Lee J's view, *if* the validity of a payment claim and the service thereof on the respondent were issues that affected the jurisdiction of the adjudicator, they were subject to judicial review by the court.

27 Further, Lee J distinguished *SEF Construction* on the ground that, in any event, the Letter Claim did not purport to be a payment claim under the Act as nothing therein stated that it was so. Lee J went on to state that in practice, where a document did purport to be a payment claim under the Act, the court should only review an adjudicator's decision that it was indeed a valid payment claim under the Act on the basis of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223). In this regard, he cited as support a passage from the judgment of Hodgson JA in *Brodyn* (*Sungdo* at [34]):

> ... 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 [f]act 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]

28 As will be explained in greater detail below, the above passage shows that Lee J has conflated two different issues. The first issue concerned whether there is in existence a payment claim which the adjudicator is able to adjudicate upon (and on which his competence to adjudicate is in question because the issue goes to the validity of his appointment as adjudicator). The second issue

concerned whether a payment claim complies with the requirements of the Act. Prakash J's holding in *SEF Construction* (with which Lee J disagreed in *Sungdo*) and Hodgson JA's holding in *Brodyn* (with which Lee J seems to agree) were concerned with the second issue. Lee J agreed with Hodgson JA that the second issue is for the adjudicator to decide, but that the court may review his decision if it is *Wednesbury* unreasonable.

Our views

29 We first consider the issue of whether an adjudicator has been validly appointed under s 14(1) of the Act. At [32] of *Sungdo*, Lee J explained that:

> 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.

30 We would agree with the above passage. If there is no payment claim or if a payment claim is not served on the respondent, then the power of the ANB to nominate an adjudicator would not have arisen, and an appointment made in such circumstances would not be valid. The power of nomination under s 14(1) of the Act is predicated on the existence of a payment claim and the service thereof on the respondent. An acceptance of an invalid nomination would not clothe the acceptor with the office of adjudicator. It is in this sense that an adjudicator appointed in such circumstances is said to have no jurisdiction in the matter because he has not been validly appointed under the Act. Any issue arising in relation to the validity of the appointment of the adjudicator is a jurisdictional issue which must be reviewable by the court. This was the kind of issue that Lee J was concerned with in *Sungdo.*

31 However, we do not think that this was the same kind of jurisdictional issue that Prakash J had in mind when she held in *Chip Hup Hup Kee* that whether the payment claim was in proper order or not would not have an impact on the adjudicator's jurisdiction, as she also held that the court's power of review should be restricted to supervising the appointment of adjudicators, *ie*, the validity or otherwise of an appointment was subject to review by the court. What she had in mind was the case of a payment claim that was intended as a payment claim but which did not comply with all the requirements of the Act: it would still be a payment claim, but the adjudicator could "throw [it] out" for non-compliance (see [20] above). The distinction between Lee J's proposition in *Sungdo* and that of Prakash J in *Chip Hup Hup Kee* is that the former proposition was made in relation to a payment claim which was in form a payment claim but not intended to be such, and therefore did not have the effect of a payment claim, and the latter proposition was made in relation to a payment claim which was in form a payment claim and was intended to be such, but which did not satisfy all the requirements of the Act. In the first situation, a payment claim has not come into operation as a payment claim. In the second situation, a payment claim operates as a payment claim but it is defective for non-compliance with the requirements of the Act. The first situation goes to the validity of the appointment of the adjudicator. The second situation goes to the validity of the adjudication determination.

32 The same reasoning can be applied to the service or non-service of a payment claim that complies with the requirements of the Act. If a payment claim is not served on the respondent, the claimant will not receive payment or a response from the respondent, and such an omission cannot be the basis of a valid request by the claimant for the appointment of an adjudicator. Any appointment of the adjudicator made on that basis would be invalid. However, if the payment claim is served on

the respondent by a mode of service which reaches the respondent, but which does not comply with the agreed or applicable mode of service, it should not affect the validity of the appointment of the adjudicator. An adjudicator may still be appointed, but he may reject a payment claim which has not been properly served on the respondent, especially when the respondent has been prejudiced.

33 In *Sungdo*, Lee J rejected counsel's argument that a payment claim that complies with the requirements of the Act is a payment claim on the ground that if the payment claim contains an express statement "This is not a payment claim under the Act" (see *Sungdo* at [20]), it would be absurd for the court to accept it as a payment claim under the Act. In our view, the reasoning of Lee J was based on semantics. Where a payment claim complies with all the requirements of the Act but is expressly stated not to be a payment claim under the Act, this simply means that the payment claim is not intended to operate as a payment claim. It therefore cannot be treated as a payment claim for the purpose of invoking the power of the ANB to nominate an adjudicator. But, as a matter of form, it is still a payment claim because it complies with the requirements of the Act for a payment claim. Another way of resolving the problem is to hold that a payment claim of the type envisaged by Lee J is a payment claim as prescribed by the Act, but that the claimant is estopped in asserting it as a payment claim for the purpose of invoking the power of the ANB to nominate the adjudicator since he has expressly said that it was not a payment claim. We see no absurdity in either of these conclusions.

34 Lee J held in *Sungdo* that a payment claim has to satisfy two elements: (a) it must be intended to be a payment claim under the Act; and (b) the intention must be communicated to the recipient (the "*Sungdo* test"). The problem with the *Sungdo* test in the context of the appointment of the adjudicator is that it creates other obstacles to the smooth working of the legislative scheme. If the *Sungdo* proposition is correct, it may require the ANB to examine the validity of an adjudication application before making a nomination. This issue was raised, but not answered, in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 ("*Chase Oyster"*) (discussed below). At [98], Basten JA noted:

> 98 The structure of the [NSW] Act might suggest that it would be inappropriate to refer an invalid adjudication application to an adjudicator; there would then be an implied obligation on the authorised nominating authority to consider the validity of the application made to it. Arguably the duty to refer an application to an adjudicator (see s 17(6)) is limited to a valid adjudication application. However, as no party before this Court argued for that construction, it may be put to one side.

In *Sungdo*, this question did not arise and Lee J did not consider it as he was only concerned with whether the court had the power to review a jurisdictional issue arising from such facts. But, in any event, how would the ANB go about finding out whether a purported payment claim is in substance a payment claim under the Act or whether it has been validly served on or (under the *Sungdo* test) communicated to the respondent? These are factual issues which would be beyond the knowledge of the ANB unless it holds an inquiry to determine such questions, and to hold it would delay the nomination of the adjudicator.

35 These evidentiary and procedural problems suggest that the ANB's obligation under the Act is to nominate an adjudicator on the basis of documents submitted to it by the claimant, having regard to the prescribed period it has to make the nomination. Section 13(4) of the Act provides that an ANB *shall*, *upon receipt* of an adjudication application, serve a copy on the respondent, and s 14(3) of the Act provides that it *shall, within 7 days* after receipt of the adjudication application, serve a notice in writing confirming the appointment of an adjudicator on the claimant, the respondent, the principal (if known) and the owner concerned. These short timelines evince a legislative intention that the ANB's functions are largely administrative and that it should proceed to make a nomination so long as the

adjudication application facially complies with the requirements of the Act. There is no time for the ANB to check whether the claimant intends his payment claim to be an operative payment claim or whether the payment claim has been served on the respondent. This interpretation would be consistent with the policy of the scheme to expedite the adjudication process. Any issue of alleged invalidity for non-compliance can be taken up in separate court proceedings, or subsequently in proceedings under s 27 of the Act relating to the enforcement of the adjudication award. In *Sungdo*, the respondent commenced separate court proceedings.

36 In our view, if the respondent's objection to the jurisdiction or power of the adjudicator to conduct the adjudication is based on an invalid appointment, such a jurisdictional issue should be raised immediately with the court and not before the adjudicator. The reason is that since the objection is against the adjudicator's jurisdiction as an adjudicator, he has no power to decide if he has jurisdiction or not. He cannot decide his own competency to act as an adjudicator when such competency is being challenged by the respondent. An adjudicator who decides the issue may face one or other of the following consequences. If he accepts the respondent's objection and dismisses the payment claim, the claimant may commence court proceedings against him to compel him to adjudicate the payment claim. If he dismisses the respondent's objection and makes an award, the respondent could still raise the same objection in enforcement proceedings with respect to his award. Accordingly, the adjudicator should proceed with the adjudication and leave the issue to the court to decide.

37 We are of the opinion that the divergent judicial approaches discussed above have arisen because they were concerned with different legal questions. *Sungdo* addressed the question of whether an adjudicator has been validly appointed to the office of adjudicator, and therefore clothed with all the powers of an adjudicator under the Act. *Chip Hup Hup Kee* was concerned with whether the adjudicator had exercised his powers correctly. One is a threshold issue of competence and the other is a substantive issue of legality. They can lead to the same outcome, *ie*, the setting aside of an adjudication award, but it would be for entirely different reasons (*cf Sungdo* and *Chase Oyster*).

38 We note that the distinction between the issue of validity of an adjudicator's appointment and the issue of compliance with the requirements of the Act is also partially obscured by another issue relating to the kinds of issues an adjudicator and the court may decide under the Act. In *SEF Construction*, Prakash J held that the court's role is restricted to reviewing compliance with certain basic requirements, and that the question of whether a purported payment claim is a payment claim under the Act is a question for the adjudicator and not the court to decide. In *Sungdo*, Lee J held that such an issue was subject to review on the basis of *Wednesbury* unreasonableness as it went to the competence of the adjudicator to adjudicate what might not be a payment claim at all (which he found on the facts to be the case).

39 In the light of our views set out above, we would agree with Lee J's holding in *Sungdo* that *if* the validity of a payment claim or the service of a payment claim goes to the competence of an adjudicator to hear and determine an adjudication, such issues must be subject to review by the court. The critical word in Lee J's ruling is "if", and it gives rise to the question: "Does the non-compliance with the requirements of the Act go to the competence of an adjudicator?" Hence, the critical question is whether an invalid payment claim or an invalid service of a valid payment claim, as distinguished from a non-existent or inoperative payment claim or a payment claim which has not been served on the respondent at all, goes to the validity of an adjudicator's appointment and his competence to adjudicate a payment claim. The decision in *Sungdo* did not and cannot answer this question because, there, Lee J held that there was *no* payment claim. Lee J equated a non-existent or inoperative payment claim with an invalid payment claim. The *ratio* in *Sungdo* should therefore be confined to cases of that type, *ie*, cases relating to non-existent or inoperative payment claims. In

Chip Hup Hup Kee, Prakash J proceeded on the basis that an invalid payment claim was merely a claim that did not comply with the requirements of the Act, and that, according to *Brodyn*, this was an issue to be decided by the adjudicator and not the court.

40 This brings us to the decision in *Chase Oyster*. In that case, the NSW Court of Appeal was concerned with the service of a payment claim that did not comply with a mandatory requirement of the NSW Act as to the period within which it was required to be served, and the court held that as a consequence, the adjudicator's award was also invalid. The court there did not consider (at least it was not argued) the issue of whether the non-compliance also resulted in the invalid appointment of the adjudicator. The court held that the adjudicator who decided that the payment claim was served within the mandatory prescribed period made an error of fact (which the court characterised as a "jurisdictional error"), and that *certiorari* was available to quash or set aside the adjudicator's determination. The court rejected the decision in *Brodyn* that the court should be restricted to reviewing whether the basic requirements (essential conditions) set out at [53] of *Brodyn* (reproduced at [43] below) had been complied with. Instead, Spigelman CJ referred (at [37]–[38]) to the traditional distinction between mandatory and directory conditions, which had been replaced in Australia by the current test of whether "it is the purpose of the legislation that an act done in breach of a provision should be invalid" (see *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 ("*Project Blue Sky*") at [93] (reproduced at [52] below). The legislative purpose can be discerned from the language of the provision itself and of the associated provisions.

41 We will now discuss the decisions in *Brodyn* and *Chase Oyster* to determine their relevance to similar issues under the Act.

The decision in Brodyn

42 In *Brodyn*, a subcontractor ("D") served a payment claim on the second respondent ("B") after the subcontract between D and B had been terminated. B contended that the payment claim was invalid, because it was not served "in respect of" a reference date within the meaning of s 13(5) of the NSW Act. By s 8(2) of the NSW Act, the "reference date" was either the date fixed by the contract for the making of progress claims or the last day of each month from the date when construction work was first carried out (see summary of *Brodyn* at [128] of *Chase Oyster*). The NSW Court of Appeal made, *inter alia*, the following rulings:

(a) that the Supreme Court of New South Wales ("SCNSW") was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the NSW Act ("ruling (a)");

(b) that an order in the nature of *certiorari* was not available to quash or set aside a decision of an adjudicator under the NSW Act, but declaratory or injunctive relief could be given; and

(c) that the NSW Act expressly or impliedly limited the SCNSW's power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the NSW Act ("ruling (c)").

43 In respect of ruling (a), the NSW Court of Appeal (per Hodgson JA) held at [53]–[55]:

[53] What then are the conditions laid down for the existence of an adjudicator's determination? 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 [NSW] 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 (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

[54] ... A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable 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.

[55] ... [T]he legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 at 390–391. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive)...

In respect of ruling (c), the relevant parts of s 25 of the NSW Act state the following:

25 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

…

(4) *If the respondent commences proceedings to have the judgment set aside, the respondent:*

(a) *is not, in those proceedings, entitled:*

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) *to challenge the adjudicator's determination*, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

[emphasis added]

It is pertinent to note that s 25(4)(a)(iii) of the NSW Act is not found in s 27 of the Act.

The decision in Chase Oyster

44 In *Chase Oyster*, the NSW Court of Appeal had to determine the effect of non-compliance with s 17(2)(a) of the NSW Act. The relevant parts of s 17 of the NSW Act provide:

> **17 Adjudication applications**
>
> (1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:
>
> ...
>
> (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
>
> (2) An adjudication application to which subsection (1)(b) applies cannot be made unless:
>
> (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
>
> (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

45 In *Chase Oyster*, Spigelman CJ, Basten JA and MacDougall J delivered separate judgments in rejecting the decision in *Brodyn* as set out at [42] above. The NSW Court of Appeal held that in the light of the decision of the High Court of Australia in *Kirk v Industrial Relations Commission* [2010] HCA 1 ("*Kirk*"):

> (a) the decision in *Brodyn* was incorrectly decided in so far as it held that the SCNSW was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the NSW Act;
>
> (b) an order in the nature of *certiorari* was available to quash or set aside a decision of an adjudicator under the Act; and
>
> (c) the NSW Act did not expressly or impliedly limit the power of the SCNSW to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the NSW Act.

The decision in Kirk

46 In *Kirk*, the High Court of Australia was concerned with the effect of a breach of s 15(1) of the Occupational Health and Safety Act 1983 (NSW) which required every employer to ensure the health, safety and welfare of their employees at work. A breach of s 15(1) is an offence that can be prosecuted in the Industrial Court. The High Court of Australia held that the erroneous construction of s 15(1) and the failure to comply with the rules of evidence were jurisdictional errors, and errors of law on the face of the record within the meaning of s 69 of the Supreme Court Act 1970 (NSW),

requiring the grant of relief in the nature of *certiorari* to quash the convictions and sentences.

47 The High Court of Australia held that an erroneous construction of s 15(1) was a jurisdictional error as it led the Industrial Court to misapprehend the limits of its functions and powers, and to make orders beyond its power. The Industrial Court had no power to convict and sentence the defendants because no particular act or omission was identified as constituting the offences.

48 The majority of the High Court of Australia pointed out at [71] that "[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error". However, by reference to the decision in *Craig v South Australia* [1995] HCA 58 ("*Craig*") at 177–180, the majority identified two categories of jurisdictional error (*Kirk* at [72]):

> (a) the mistaken denial or assertion of jurisdiction, or (in a case where jurisdiction does exist), misapprehension or disregard of the nature of or limits on the inferior court's functions and powers; and
>
> (b) entertaining a matter or making a decision of a kind that lies, wholly or partly, outside the limits on the inferior court's functions and powers, as identified from the relevant statutory context.

49 The majority further gave three examples of an inferior court entertaining a matter outside the limits of its functions or powers as follows:

> (a) proceeding in the absence of a jurisdictional fact;
>
> (b) disregarding something that the relevant statute requires to be considered as a condition of jurisdiction, or considering something required to be ignored; and
>
> (c) misconstruction of the statute leading to misconception of the nature of the inferior court's functions.

Of this last example, it was said in *Craig* (at 178) that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern." The majority also emphasised (at [73] of *Kirk*) "that the reasoning in *Craig* ... is not to be seen as providing a rigid taxonomy of jurisdictional error", and "not to be taken as marking the boundaries of the relevant field".

50 Applying the decision in *Kirk*, the NSW Court of Appeal in *Chase Oyster* rejected the categorisation of conditions in the NSW Act as "essential" or "non-essential" conditions. Spigelman CJ, after referring to Hodgson JA's judgment in *Brodyn* at [54]–[55], held the following (at [24]–[33]):

> 24 There are three aspects of this reasoning which are of significance for present purposes.
>
> 25 First, insofar as his Honour referred to the specific requirements of s 17, relevantly for present purposes s 17(2)(a), his remarks were obiter. The section did not arise in that case.
>
> 26 Secondly, his Honour's statement that the Parliament "did not intend that exact compliance with *all* the more detailed requirements was essential" (emphasis added) may not mean that none of the detailed requirements are "essential". It may leave open the possibility that *some* of these "detailed requirements" *could* be found to be "essential". His Honour made it clear that he was

not purporting to set out all of the "essential requirements" by using the word "include", before identifying the list at [53], and by stating expressly that that list "may not be exhaustive" at [55].

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".

...

29 The centrality of the distinction between jurisdictional and non-jurisdictional error had been identified by the High Court in *Craig ...* 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.

...

31 In *Kirk*, after identifying the constitutional foundation of the supervisory jurisdiction of the Supreme Courts of the states, the High Court concluded:

> "[100] ... [T]he observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context."

32 This new dimension of the distinction between jurisdictional and non-jurisdictional error undermines the proposition in *Brodyn*, if that is the correct interpretation of the passage set out at [22] above, which suggests that, as a matter of statutory interpretation, a provision can constitute "jurisdictional error" but not constitute "an essential pre-condition".

...

33 There is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined …

51 The decision in *Chase Oyster* that, on the basis of the decision in *Kirk*, an order of *certiorari* was available to quash or set aside an adjudicator's award made on a jurisdictional error is not relevant to the scope of the Act as it concerned a constitutional issue which does not arise in Singapore under the Act. As we explained earlier (at [43] above), s 27 of the Act is not *in pari materia* with s 25(4)(a)(iii) of the NSW Act. What is of relevance to the courts in Singapore is whether they should follow *Brodyn* or *Chase Oyster* in dealing with a breach of the requirements of the Act (*Sungdo* is not relevant to this issue as it concerned the narrow question of the non-existence of a payment claim).

52 In this respect, Spigelman CJ held at [36] of *Chase Oyster*:

> 36 The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

Spigelman CJ then went on to hold (*Chase Oyster* at [37]) that s 17(2) of the NSW Act was a procedural requirement of the kind to which the High Court of Australia in *Project Blue Sky* referred in the following way:

> [91] An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
>
> [92] Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory.
>
> [93] ... *A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid*. ... In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'. (*Tasker v Fullwood* at 24.)
>
> [emphasis added]

53 The question therefore was whether it was the purpose of 17(2) of the NSW Act that an act done in breach thereof should be invalid, having regard to its language and the scope and object of the NSW Act. Applying this test, Spigelman CJ held that the words "cannot be made unless" in s 17(2) of the NSW Act had mandatory effect. With respect to the structure of the legislative scheme, Spigelman CJ held that, first, the element of essentiality occurs at the application stage of the decision-making process, and not during the course of the decision-making process itself. It was an element which is an "essential preliminary to the decision-making process" rather than "a fact to be adjudicated upon in the course of inquiry" (see *Chase Oyster* at [43] citing *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 443). Second, the legislation provides for a precise sequence of a series of time stipulations which is (*Chase Oyster* at [47]):

... 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.

54 For these reasons, Spigelman CJ held: (a) that the court had the power to determine whether s 17(2) of the NSW Act had been complied with; (b) that s 17(2)(a) of the NSW Act (which requires a 20-business-days notice) was a jurisdictional fact, satisfaction of which was essential to the validity of an adjudication application and to the existence of the power to adjudicate; and (c) that s 17(2) of the NSW Act had not been complied with and therefore the adjudicator's decision should be quashed or set aside by way of *certiorari*.

55 In a concurring judgment, Basten JA held (*Chase Oyster* at [96] and [101]):

[96] For the reasons given by the Chief Justice at [31]-[53] and by McDougall J, I agree that compliance with the time limit specified in s 17(2)(a) is an essential condition for a valid adjudication application. The language of the provision ("cannot be made unless") is intractable; neither the structure nor the purpose of the Act suggests a different conclusion.

...

[101] For these reasons, the proper construction of the [NSW Act] is that it does not permit the adjudicator to determine the validity of the adjudication application. The challenge in the present case must therefore be determined on the basis of facts found by the Court.

56 McDougall JA, in his concurring judgment, also held that the adjudicator's determination in this case was vitiated by jurisdictional error. In relation to whether s 17(2)(a) of the NSW Act was an essential condition or a jurisdictional fact, His Honour held (*Chase Oyster* at [149], [178], [199], [211], [212], [218]):

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.

...

178 The fundamental issue on this point is whether s 17(2)(a) embodies, as a criterion of jurisdiction, a "jurisdictional fact" in the sense explained in [*Gedeon v Commissioner of the NSW Crime Commission* [2008] HCA 43 at [43]] (see at [57] above). If there is such a criterion and it is not satisfied then, as the Court pointed out in the sentence immediately following that from which I quoted, "the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision maker".

...

199 The question which most divided the parties and the interveners in this case was whether s 17(2)(a) of the [NSW Act] stated a jurisdictional fact, satisfaction of which was essential to the validity of an adjudication application and to the existence of the power to adjudicate.

...

211 The language of s 17(2) is clear. Where there has been no payment schedule and no payment, an adjudication application "cannot be made unless" the requisite notice is given within the specified time. The words "cannot be made" suggest strongly that, in the absence of notice, there is no right to make an application. On the submissions for [the first defendant], that statutory prohibition may be disregarded: "an adjudication application... cannot be made... but, if made, can be considered and dealt with". That is an unusual construction, particularly taking into account the mandatory provisions of s 17(6), to which I refer in the next paragraph.

212 What is made is an application for adjudication of a payment claim (s 17(1)). As s 4 points out, it is that application that is an "adjudication application". It is an adjudication application, so defined, that is made to an authorised nominating authority (s 17(3)(b)) and referred by that authority to an adjudicator (s 17(6)). The authorised nominating authority has no discretion about referring the application to an adjudicator, even if (for example) it is plain on the face of the application that the claimant has not complied with s 17(2)(a). On the contrary, "[i]t is the duty of the authorised nominating authority" to do so "as soon as practicable". If that referral is accepted by the adjudicator (s 19(1)), "the adjudicator is taken to have been appointed to determine the application" (s 19(2)). Thereafter, the adjudicator is required to "determine" that application, by determining the matters set out in s 22(1)).

...

218 To my mind, the weight of those factors favours the conclusion that the requirement of s 17(2)(a) are jurisdictional, in the sense that the giving of notice within the requisite period is a condition that must be satisfied for a valid application to be made pursuant to s 17(1)…

Section 17(2) of the NSW Act contrasted with ss 13(2) and 13(3) of the Act

57 Section 17(2)(a) of the NSW Act provides that an adjudication application cannot be made unless: (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice. In contrast, ss 13(2) and 13(3) of the Act (which correspond to s 17(2) of the NSW Act) are structured differently. These sections provide as follows:

(2) An adjudication application *shall not be made unless* the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.

(3) An adjudication application —

(*a*) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;

(*b*) shall be made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator;

(*c*) shall contain such information or be accompanied by such documents as may be prescribed;

(*d*) shall be accompanied by such application fee as may be determined by the authorised nominating body; and

(*e*) may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the claimant may consider to be relevant to the application

[emphasis added]

58 Like s 17(2) of the NSW Act, s 13(2) of the Act is also directed at the claimant and not the ANB, the adjudicator or the court. The words "shall not be made" in s 13(2) of the Act are words of prohibition. They have stronger force than the words "cannot be made" which are merely words of disablement. Hence, applying the reasoning in *Chase Oyster*, it should follow that if s 13(2) of the Act is breached, no valid adjudication application can be made. However, with respect to the time period within which an adjudication application may be made, s 13(3)(*a*) of the Act provides that it "shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under [s] 12". Suppose the claimant makes an adjudication application on the eighth day after his entitlement arises, does not the word "shall" connote a mandatory requirement? One may reasonably contend that it should be treated as a directory requirement because, far from prejudicing the respondent, it actually benefits him in so far as the delay in making the application results in a corresponding delay in his having to pay a progress payment claim.

59 By way of rebuttal, it may be argued that even if the mandatory force of the words "shall be made within 7 days" prevents an application from being made outside the prescribed period, no harm will be caused to the claimant because the claimant can still include the undetermined payment claim in a fresh payment claim where the application for the appointment of an adjudicator complies with s 13(2) of the Act. The same reasoning would also apply to an invalid adjudication determination that has been set aside by the court as such payment claims would not have been rejected by the adjudicator on the merits. In other words, a breach of a mandatory provision of the Act will not bar the claimant from serving fresh payment claims, but only delay their adjudication in accordance with the provisions of the Act.

60 In this connection, attention may be drawn to the observations of McDougall JA in *Chase Oyster* at [233], with reference to the NSW Act, that:

... the question of compliance with s 17(2)(a) is both relatively simple in a factual sense and something peculiarly within the knowledge of the claimant. It is unlikely that the trap will be sprung by some esoteric piece of factual or legal analysis which has the result that a determination is found to be void.

61 As no issue has arisen in this appeal that requires this court to determine the nature of the requirement under s 13(3)(*a*) of the Act, we shall leave it for further consideration in an appropriate case in the future. However, it seems to us in the context of the different provisions and structure of the Act (as compared with the NSW Act) that the characterisation of an essential condition in *Brodyn* as a condition the breach of which would invalidate an adjudication is substantially the same as the characterisation of a mandatory condition in *Chase Oyster* the breach of which would lead to the same result.

Outline of the respective roles of the ANB, the adjudicator and the court

62 We now set out our view on the respective roles of the ANB, the adjudicator and the court in

the scheme of the Act.

The role of the ANB

63 In our view, the functions of the ANB are set out in s 13(4) of the Act, which provides that the ANB shall, *upon receipt* of an adjudication application, serve a copy on the respondent, and s 14(3) of the Act, which provides that the ANB shall, *within seven days* after receipt of the adjudication application, serve a notice in writing confirming the appointment of an adjudicator on the claimant, the respondent, the principal (if known) and the owner concerned. Given the mandatory words of obligation, and the short timelines for carrying out its duties, it seems to us that the ANB's function is largely administrative in nature when appointing an adjudicator. The ANB has no obligation to consider the *bona fides* of the claimant's request by looking into or questioning whether the payment claim is intended to be a payment claim, whether it has been served or properly served on the respondent, or whether it complies with all the requirements of the Act.

The role of the adjudicator

64 We are of the opinion that the only functions of an adjudicator are to: (a) decide whether the adjudication application in question is made in accordance with ss 13(3)(*a*), (*b*) and (*c*) of the Act (see section 16(2)*(a)*); and (b) to determine the adjudication application (see s 17(2)). If the adjudication application complies with ss 13(3)(*a*), (*b*) and (*c*), the adjudicator should proceed with the adjudication. He is not competent to decide whether he was validly appointed to adjudicate the matter (see [36] above). Thus, in this case, the Adjudicator need not and should not have decided issues (a) to (d) (at [10] above).

65 If the respondent wishes to argue that the adjudicator was not validly appointed or that the adjudicator has not exercised his power to determine the adjudication application properly (for example, because the adjudicator has not complied with s 16(3) of the Act), such argument should be made to the court. The respondent may apply to court to set aside the adjudication determination on this basis. If the respondent's objection is that there is no valid payment claim, this should be raised as soon as possible in the payment response so as not to delay the adjudication process.

The role of the court in a setting-aside action

66 Turning now to the court's role in a setting-aside action, we agree with the holding in *SEF Construction* that the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.

67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.

68 Having stated how the statutory framework should be interpreted, we now turn to the specific issues raised in this appeal.

Our decision

CA 44 of 2011 – Whether PC6 is a valid payment claim

69 TL appealed against the Judge's finding that PC6 is a valid payment claim under s 10 of the Act. Section 10(3)(*a*) of the Act requires that a payment claim state the claimed amount calculated by reference to the period to which it relates, while s 10(3)(*b*) mandates that a payment claim be made in a prescribed form and manner. The relevant formal requirements are contained in reg 5(2) of the SOPR. At the hearing before the Judge, TL's counsel conceded that PC6 satisfied all these statutory formal requirements. Both before the Judge and at this appeal, TL's argument rested entirely on an additional non-statutory formal requirement proposed in *Sungdo*.

70 At [18] of *Sungdo*, Lee J recognised that whereas s 13(2)(c) of the NSW Act expressly requires that payment claims must state that they are made under the NSW Act, the Act contains no such requirement. He then stated the following at [20]–[21]:

> 20 … [S]ince it is not a requirement under the [Act], the absence of a statement that a document is a Payment Claim does not of itself preclude that document from being one. But the defendant's contention that any document that satisfies all the requirements under the [Act] and the [SOPR] as to how it is made and what it must contain would amount to a Payment Claim is quite another manner. This would mean that a document containing all such information but also containing the statement "This is not a payment claim under the [Act]" would be a payment claim under the [Act], which would be contrary to commonsense. To the argument that in such a situation the claimant is estopped from relying on it as a Payment Claim, there are two responses. The first is that this argument will not address the situation where the respondent, out of an abundance of caution, submits a payment response and therefore has not been prejudiced. The second is a matter of principle: surely intention must be a necessary element and such a document cannot be a Payment Claim even if it contains all the prescribed requirements for one, simply because it was not intended to be one by the maker of the document. In my view, for a document to amount to a payment claim under the [SOPR], the party submitted it must intend it to be such, and I so hold.
>
> 21 Further, as the respondent is given a limited period under the Act to make a payment response failing which he would effectively be precluded from any defence he might have to the claim (see [13] above), subjective intention alone is not sufficient. As a matter of policy, such intention must be communicated to the respondent. Otherwise, the Act could be used as an instrument of oppression against potential respondents …

71 At this point Lee J described a number of onerous difficulties claimants might impose on potential respondents, such as the need to check possibly voluminous correspondence and to make possibly unnecessary payment responses out of an overabundance of caution. He concluded by laying down the *Sungdo* test at [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. … 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.

72 Relying on the *Sungdo* test, TL submitted that CSE did not communicate her intention to make a payment claim because PC6 did not state that it was made under the Act and therefore PC6 did not

qualify as a payment claim under the Act. The Judge rejected this argument, holding that the Act and the SOPR had specified certain formal requirements for the validity of payment claims and these did not include any proof of the claimant's intention or of communication of such intention. He further held that in any event, both elements of the test had been satisfied. This is reflected in [31] and [38] of the GD:

> 31 [PC6] falls within the meaning of a payment claim under the [Act]. Unlike the 2008 Letter in *Sungdo…*, [PC6] 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 ...
>
> ...
>
> 38 Coming back to Lee J's decision that for a document to amount to a valid payment claim under the [Act], 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 [Act] 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, [PC6] was clearly intended by the plaintiff to be a payment claim under the [Act] on its face and if the defendant did not realise that, then it was probably a case of him not being aware of the [Act] or its implications.

73 We agree with the Judge's statements in these passages. Since the Act does not require a payment claim to state that it is made under the Act, the absence of such a statement cannot make it any less a payment claim if it otherwise satisfies all the requirements of a payment claim. We reiterate that we do not agree with Lee J's analysis that a payment claim which satisfies all the statutory requirements is not a payment claim if it is expressly stated not to be a payment claim, and that it would be absurd for the court to accept it as a payment claim (see [33] above). In our view, the claimant in such a case is merely saying that the payment claim is not operative as a payment claim. It is no different from saying to the respondent: "You do not need to pay this claim until I give you further notice". Another example would be the claimant saying to the respondent that: "You need only pay this claim by [a stated date]", and that date has not passed. A claimant who has made such a representation is estopped from asserting in court that his payment claim is operative as a payment claim until the referenced event occurs. If a respondent in such a case is wary enough to prevent prejudice to himself by submitting a payment response, he may be taken to have waived any objections to the payment claim being treated as an operative payment claim. We find nothing in the scheme of the Act that forbids the adjudication from proceeding in such circumstances, but this is an issue which we do not need to decide as it does not arise in this case.

74 In addition, we do not agree with the decision in *Sungdo* if it means that, in the absence of express words to the contrary, the claimant's subjective intention is relevant to determining whether the claim he has served on the respondent is a payment claim. It seems to us that the legislated formal requirements for payment claims are designed to ensure that specified items of information are made available to the respondent before the claimant's rights under the Act are engaged. The emphasis is therefore not on the claimant's intention but on the respondent being given notice of certain information about the claim (such as the amount claimed, the contract under which the claim is made and a breakdown of the items constituting the claim). As for the mode of giving notice,

Parliament has stopped short of requiring the information to be personally communicated to the respondent. This can be seen from the service requirements in s 37(1) of the Act: that provision states that documents "may be served" by personal delivery (s 37(1)(*a*)), by leaving the document at the respondent's usual or last known place of business (s 37(1)(*b*)), or by posting or faxing it to that place (s 37(1)(*c*)). Other modes of service may also be possible. There is no requirement that the respondent actually needs to understand or even read the payment claim for the service requirement to be met, although the general law of service (preserved by s 37(3)) does require that the document at least be legible (see *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575 at 1579).

75 We accept the possibility that some documents meeting the formal validity requirements may be extremely voluminous or may contain confusing elements such as an informal or un-businesslike tone (as was the case in *Sungdo*). We recognise that these factors may impose a certain amount of inconvenience and even hardship on potential respondents who are considering what action to take to protect their interests in the context of the Act. For better or worse, Parliament has set the balance between the rights of claimants and respondents such that these situations may arise. In appropriate cases these factors *ma*y influence the adjudicator's decision on costs. In extreme cases, it may be found that a payment claim has been deliberately drafted in such a way as to induce the respondent into not taking steps to protect his rights, for example, by providing a payment response. Where estoppel is not available, it may be appropriate for an adjudicator to treat a claimant's reliance on such a payment claim as an abuse of the process of adjudication, which may well be taken into account by the adjudicator under the catch-all provision that is s 17(3)(*h*) of the Act. This, however, will be confined to those rare cases where sufficient evidence of abuse is available.

76 We recognise that, from a potential respondent's perspective, these safeguards do not offer the same protection as a legislative requirement that payment claims state that they are made under the Act. However, since Parliament has deliberately omitted this requirement, a respondent should treat every claim submitted by a claimant that satisfies the requirements of the Act as a payment claim and respond accordingly.

77 To conclude our discussion on this issue, it is necessary to emphasise that in balancing the rights of contractors and employers under building contracts, courts should bear in mind that the Act is intended to ease the cash flow problems of contractors by providing a framework to speed up the processing of their claims for progress payments without having to go to court or go before an arbitral tribunal. The pivotal element of the statutory progress payment scheme is "a fast and low cost adjudication system to resolve payment disputes" (see [2] above). On the other hand, the rights of employers have to be taken into account in case any precipitate enforcement of an adjudication determination puts the employers at risk of non-performance, *eg*, if, due to a sub-contractor's enforcement of payment claims against a contractor, a contractor becomes insolvent before completing the building works or fails to complete the building works. Apart from the Act, employers are free to take preventive steps by seeking the aid of the courts to correct what they perceive to be prejudicial breaches of the requirements of the Act by unscrupulous contractors who take advantage of the legislative scheme.

78 For the reasons stated above, we are of the view that the decision in *Sungdo* is applicable to its own peculiar facts, and the correct test for determining the validity of a payment claim is whether a purported payment claim satisfies all the formal requirements in s 10(3)(*a*) of the Act and reg 5(2) of the SOPR. If it does, it is a valid payment claim. We accordingly agree with the Judge that PC6 is a valid payment claim under the Act.

CA 46 of 2011 – Whether PC6 was served out of time

79 In deciding that PC6 was not served out of time, the Adjudicator rejected TL's argument that s 10(2) of the Act read with reg 5(1) of the SOPR creates a "limitation period" for the service of payment claims. The Adjudicator rejected the academic writings supporting the view that if a claimant intended to claim for works done as at April 2010, then the payment claim had to be served by 30 April 2010 and not at any later time as it would then be time-barred. In the Adjudicator's view, s 10(2) of the Act read with reg 5(1) of the SOPR merely stipulated *when* payment claims are to be served, and did not bar claims which for one reason or another were not made during that period. The AR upheld the Adjudicator's ruling on this issue.

80 However, the Judge held that s 10(2) of the Act read with reg 5(1) of the SOPR did create a limitation period and that PC6 was not served within that period. He accordingly allowed TL's appeal on that ground. We now examine the Judge's reasoning on this issue.

81 Section 10 of the Act states:

> **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.
>
> (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.
>
> (3) A payment claim —
>
> (*a*) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and
>
> (*b*) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.
>
> (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.

82 Regulation 5(1) of the SOPR (which applies to the present case) prescribes the service period as follows:

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]

83 The Judge held at [48] of the GD that the Act contained a "default position of requiring payment claims to be made at monthly intervals" (which he described as "sensible"). At [49], he held that:

> ... if payment for work done in a certain month is not claimed under the [Act] by the last day of the subsequent month, then a claim in respect thereof cannot be made under the [Act] anymore *ie* any later claim would fail under the [Act] for being outside the limitation period prescribed in reg 5(1).

84 In rejecting the views of the Adjudicator and of the AR, the Judge further held at [50]:

> ... In my view, the [Act] 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 ...*) 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.

85 On the basis of these rulings, the Judge held that: (a) in the case of PC6, the last date of the reference period for work done was 26 April 2010; (b) PC6 should have been served by 31 May 2010; and (c) since PC6 was served on 2 June 2010, it fell outside the "limitation period" and therefore could not be entertained by the Adjudicator.

86 In reaching these conclusions, the Judge relied on para 2.3 of the *Building and Construction Industry Security of Payment Act 2003 Information Kit* (Building and Construction Authority, 2005) (the "Info Kit") published by the Building and Construction Authority ("BCA"), which states that "… [i]f 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." He also relied (at [47] of the GD) on condition 32.1 of the *Public Sector Standard Conditions of Contract for Construction Works 2008* (Building and Construction Authority, 6th Ed, 2008) ("PSSCOC 2008"), also published by the BCA, which provides that a contractor shall submit payment claims under the Act at monthly intervals.

87 In our view, neither BCA publication supports the Judge's holding on the existence of a "default position" under the Act. Condition 32.1 of the PSSCOC 2008 imposes a monthly interval for payment claims as a standard contract term. This imposition is not based on any provision of the Act or the SOPR. While para 2.3 of the Info Kit appears to contain an interpretation of reg 5(1) of the SOPR, it is not necessarily correct. Furthermore, even if the Act did envisage that payment claims should be served monthly as a default position, that fact would not imply of itself that reg 5(1) of the SOPR

acts as a time-bar preventing payment claims from being served less frequently.

88 We disagree with the Judge's interpretation that reg 5(1) of the SOPR read with s 10(2) of the Act creates a limitation period in the sense of barring from adjudication a payment claim that falls outside the prescribed period for payment claims to be made. Section 10(2) of the Act has no effect on reg 5(1) of the SOPR other than to make reg 5(1) applicable to construction contracts. In our view, reg 5(1) of the SOPR should be read with s 10(1) of the Act, which provides that 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".

89 In the context of s 10(1) of the Act, or in its own context, reg 5(1) of the SOPR should not be interpreted so narrowly as to unduly restrict the rights of claimants under the Act. Regulation 5(1) does not say that a claimant must make a payment claim on a monthly basis for work done up to or in the previous month. It says that "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". The language of compulsion is not in relation to the making of the payment claim but in relation to its service. On a plain reading, the italicised words (at [82] above) mean that if a claimant makes a payment claim, he must serve the claim by the last day of the month following the month in which the contract is made. Furthermore, there is no reference in reg 5(1) of the SOPR to work done. Section 6 of the Act provides that the amount of a progress payment to which a person is entitled under a contract is: (a) "the amount calculated in accordance with the terms of the contract", or (b) "if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or the goods or services supplied, by the person under the contract". Section 10(3) of the Act provides that the amount claimed must be calculated by reference to the period to which the payment claim relates, but it leaves it to the claimant to determine the relevant period for the construction work done or the goods or services supplied.

90 Accordingly, there is nothing in the language of reg 5(1) of the SOPR to compel a claimant to make monthly payment claims for work done in the previous month, whether he wants to or not. The Act is intended to facilitate the payment of progress payments at monthly intervals. If a claimant chooses not to make a payment claim at monthly intervals, because, for example, he is not experiencing any cash flow problems or because it is not convenient for him to do so, there is no reason to compel him to do otherwise. If a claimant decides to serve payment claims at *longer than monthly intervals*, *eg*, *quarterly payment claims*, it would also benefit the respondent, who need not pay monthly claims. In our view, the mandatory language of reg 5(1) of the SOPR in relation to service of the payment claim, when read with s 10(1) of the Act, serves to impose a maximum frequency of one payment claim per month. It bars the claimant from making more than one monthly claim in respect of a progress payment. Imposing such a maximum frequency for making payment claims is fair and reasonable to both parties.

91 Both the Adjudicator and the AR referred to s 10(4) of the Act which provides for payment claims to include amounts that were the subject of earlier claims. Section 10(4) provides as follows:

> 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.

The AR was of the view that s 10(4) was meant to widen the scope of s 10(1) of the Act by providing an added option of including in a payment claim unpaid amounts made in earlier claims.

92 We agree with the observations of the AR. A payment claim which has not been paid or partially paid before or without any adjudication under the Act is an unpaid claim. We see no reason why an untimely payment claim under reg 5(1) of the SOPR (whether served prematurely or out of time) should not be treated as an unpaid claim under s 10(4) of the Act. In our view, reg 5(1) of the SOPR does not limit such claims. However, we qualify this conclusion to exclude amounts in previous claims which have been adjudicated upon on their merits for obvious reasons (see *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69, and *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117). In this connection, we should add that we do not approve the finding of the Assistant Registrar in *Doo Ree Engineering & Trading Pte Ltd v Taisei Corporation* [2009] SGHC 218 that s 10(1) of the Act prohibits all repeat claims (in that case, the repeat claim was a non-adjudicated premature claim).

93 Further, we would also disagree with the Judge that reg 5(1) of the SOPR required that PC6 must be served by 31 May 2010. Regulation 5(1) provides that a payment claim shall be served "by the last day of each month following the month in which the contract is made". The expression "month" in reg 5(1) is not defined in the Act or the SOPR, but it is defined in s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed) to mean a "calendar month". That expression has been judicially interpreted to mean a month which ended on the same day as it commenced on the previous month (see *Migotti v Colvill* (1879) 4 CPD 233 at 238 (per Brett LJ) and *General Ceramics Manufacturers Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Anor* [1988] 3 MLJ 474, at 477 (per Mohamed Azmi SCJ)). The Judge's interpretation of "month" is therefore contrary to the statutory meaning as judicially interpreted. There is nothing in the context of reg 5(1) of the SOPR to compel a different interpretation.

94 PC6 was a final claim for work done and included work done from June 2009 to 26 April 2010 under the building contract made on 16 August 2008. As this contract was supplemented by a second contract for additional works agreed on 3 December 2008, the later date would be the critical date for the purpose of calculating the monthly period under reg 5(1) of the SOPR. On this basis, the last day of the calendar month following the calendar month in which the contract was made, would be the third day of each calendar month. In the present case, PC6 was served on 2 June 2010, and therefore PC6 was served in compliance with reg 5(1) of the SOPR and not served out of time. As we have mentioned earlier, reg 5(1) of the SOPR does not refer to the work done up to the last day of the month. However, where the payment claim, when made, does not breach the frequency of a maximum of one claim per calendar month, *eg*, where the payment claim is made after an interval of two calendar months, then it would not matter on what day the claim is made. For example, using the building contract in the present case, if PC6 had been served on 5 June 2010, the day on which the claim is served would not have mattered because 5 June 2010 is still within the period of one month expiring on 3 July 2010.

95 The other point to note in this case is that PC6 was a final claim for payment and not a progress payment. The Act is expressed to apply to progress payments (s 5). The expression "progress payment" is defined in s 2 as follows:

> "progress payment" means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —
>
> (*a*) a single or one-off payment; or
>
> (*b*) a payment that is based on an event or a date ...

Even though no argument has been made to us on whether a final payment is a progress payment as defined, it seems to us that the definition is wide enough to include a final payment as it is a payment, albeit final, to which a person is entitled for the carrying out of construction works (see also *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 at [27]).

Conclusion

96 For the above reasons, we dismiss TL's appeal in CA 44 of 2011 and allow CSE's appeal in CA 46 of 2011. Each party is to bear their own costs in this appeal and in their applications for leave to appeal to this court.

[note: 1] Adjudication Determination in SOP/AA 87 of 2010 dated 7 July 2010, Appellant's Core Bundle Vol II in Civil Appeal No 46 of 2011 p 37 at para 42.