Sungdo Engineering & Construction (S) Pte Ltd *v* Italcor Pte Ltd [2010] SGHC 105

Case Number : Originating Summons No 231 of 2009

Decision Date : 07 April 2010

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : S Magintharan and James Liew (S Magin & Co) for the plaintiff; Timothy Kho Thong Teck (One Legal LLC) for the defendant.

Parties : Sungdo Engineering & Construction (S) Pte Ltd — Italcor Pte Ltd

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

7 April 2010

Lee Seiu Kin J:

Introduction

1 In this originating summons, the plaintiff applied to set aside an adjudication order ("the Adjudication Order") dated 12 February 2009 made by Mr Koh Lee Meng James ("the Adjudicator") in SOP Application No SOP/AA08 of 2009. The Adjudication Order was made pursuant to an application by the defendant under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). On 9 October 2009, I allowed the plaintiff's application and set aside the Adjudication Order on the ground that the defendant had not served a payment claim under s 10 of the Act ("Payment Claim"), and therefore, the Adjudication Order was null and void. I ordered the defendant to pay the plaintiff costs fixed at $10,000. The defendant had since filed a notice of appeal and I now give the grounds for my decision.

Background

2 There was some dispute as to the circumstances of the commencement of the matter and I shall deal with this later, at para 6. What was not in dispute is the following. The plaintiff was a subcontractor engaged by M+W Zander – Samsung JV, the main contractor in the construction of a wafer plant at Tampines Industrial Avenue ("the Project"). In March 2007 the plaintiff entered into a subcontract with the defendant ("the Contract") to provide services for the chilled water piping of the Project, which included testing and commissioning, and supply of management and other staff ("the Contract Works"). The contract sum was $1.5m ("the Contract Sum"). The terms of payment in the Contract states: "No down payment. Progress claim 30 Days Nett". This meant that the defendant was to submit progress claims which the plaintiff would pay within 30 days of submission. The Contract commenced on 1 March 2007 and from April to July 2007, the defendant submitted five "progress claims" in the form of invoices. The first invoice, dated 13 April 2007, was for $78,750; the second dated 18 May 2007, was for $594.30; the third dated 23 May 2007, was for $315,000; the fourth dated 20 June 2007, was for $472,500 and the fifth dated 27 July 2007, was for $401,250. For each of these five invoices, the plaintiff made payments within the 30 day period stipulated in the Contract.

3 Around September 2007 a dispute arose between the parties. The defendant claimed that it

had carried out variation works ("the Variation Works") under the Contract pursuant to instructions from the plaintiff. However the plaintiff alleged that it was the defendant who had breached the Contract; the defendant had delayed carrying out the works due to financial difficulties and the plaintiff had to advance monies to the defendant's subcontractors to enable the works to be completed. The plaintiff accordingly informed the defendant that it would not pay on its claims. The defendant took this as a repudiatory breach, accepted it and terminated the Contract. The defendant left the work site at the end of September 2007. Thereafter the defendant submitted four further invoices. The first of these, which was the sixth invoice submitted, was dated 5 October 2007, for the sum of $256,919.84 for part of the Variation Works carried out. The seventh invoice, dated 26 October 2007, was for $321,000 being the balance works under the Contract that the defendant claimed had been completed by that date. The eighth invoice dated 1 December 2007 was for $97,750.00 and the ninth invoice, also dated 1 December 2007, was for $448,603.92. These last two invoices were for the remainder of the Variation Works. Not unexpectedly the plaintiff did not make any payment on these last four invoices. The plaintiff's position was that it was not liable under the Contract to pay the seventh invoice as the defendant had not completed all its works under the Contract and had in fact been paid in excess of its entitlements under the Contract. As for the three invoices relating to Variation Works, the plaintiff's position was that it had not authorised those works. The defendant's position was that the plaintiff had given written instructions in respect of the "additional/variation works" and these had been carried out.

4 On 6 December 2007, the defendant's solicitors, M/s Tan Lim & Wong ("TLW") wrote a letter to the plaintiff demanding payment under the sixth and seventh invoices within seven days, failing which the defendant would institute legal proceedings. On 13 December 2007, the plaintiff replied to TLW, denying liability to pay the invoices on the ground that the defendant had failed to complete the works under the Contract. On 19 December 2007, the plaintiff wrote to the defendant requesting an explanation for the delay and giving notice that the plaintiff would take over the outstanding works if the defendant did not revert by 23 December 2007. The plaintiff claimed that it thereafter engaged other subcontractors to complete the Contract Works.

5 On 30 July 2008 the defendant filed the writ in Suit No 529 of 2008 ("the Suit") in the High Court, claiming for payment under the sixth to ninth invoices. The plaintiff entered appearance in the Suit on 7 August 2008 and filed its Defence and Counterclaim on 25 August 2008. On 8 October 2008, the plaintiff filed further and better particulars of its Defence and Counterclaim in response to the defendant's request by its letter of 5 September 2008. On 11 November 2008, the plaintiff filed an amended Defence and Counterclaim and on 25 November 2008 the defendant filed the Reply. Then on 9 December 2008 the defendant filed a notice of change of solicitors as well as an amended Statement of Claim. The discovery process was commenced on 19 December 2008 with the filing of an affidavit and list of documents by the defendant, followed by the filing of the corresponding affidavit and list of documents by the plaintiff on 22 December 2008. On 23 December 2008, the defendant filed further and better particulars of its amended Statement of Claim pursuant to the plaintiff's request in its letter of 17 December 2008.

6 This was the status of the matter before the defendant fired the first salvo. I say "allegedly" because, as I had alluded in para 2, there was a dispute between the parties on this point. The defendant's position was that on 26 December 2008, it served on the plaintiff a Payment Claim. This was in the form of a letter dated 23 December 2008 together with accompanying documents (collectively, "the 2008 Letter"). The defendant's engineer, Ngo King Hwa ("Ngo") deposed on affidavit that on 26 December 2008, he personally handed the 2008 Letter to the plaintiff's agent, Kim Jin Yong ("Kim"). However Kim, in his affidavits, strenuously denied that this was done. Both sides drew attention to various factors supporting its position: the plaintiff said, *inter alia*, that by that time the parties were already embroiled in a suit in the High Court over the same subject matter and

were represented by solicitors who would have undertaken the task of serving any Payment Claim; the defendant said, *inter alia*, that the plaintiff had not raised the issue of non-service to the Adjudicator. The ferocity of the allegations that the other side is lying would certainly call for cross-examination of the deponents to determine the truth in this respect.

7 Whatever the dispute between the parties concerning the service of the 2008 Letter, the parties agreed that there did not exist a written response of any kind to it by the plaintiff. The following facts were also agreed upon. On 16 January 2009, the defendant lodged an adjudication application ("the Adjudication Application") under s 13 of the Act at the Singapore Mediation Centre ("SMC"). The SMC is an authorised nominating body ("ANB") under the Act. On the same day, the defendant served on the plaintiff a notice of intention to apply for adjudication under the Act. In the Adjudication Application the defendant asserted that a Payment Claim had been served on the plaintiff on 26 December 2008 in the sum of $1,124,192.29 and that no payment response had been given by the plaintiff. The Adjudicator was appointed on 22 January 2009 and the plaintiff filed the adjudication response on 23 January 2009. After considering the submissions of the parties the Adjudicator made his determination on 12 February 2009. He found that the plaintiff was not liable in respect of the seventh invoice for $321,000 which was for the balance works under the Contract and the ninth invoice for $448,603.92 which was for part of the Variation Works. The Adjudicator found the plaintiff liable in respect of the sixth and eighth invoices totalling $354,588.37. On 25 February 2009 the plaintiff filed this originating summons.

First issue: whether the 2008 Letter served

8 The first question to be determined was an issue of fact: Whether Ngo had served the 2008 Letter on Kim. If the plaintiff's version is true, then the defendant did not serve a Payment Claim and this would invalidate the Adjudication Order which was made pursuant to a Payment Claim purported to be served on 26 December 2008. This was a substantial dispute of fact that would require cross-examination of the principal witnesses of fact, Kim and Ngo, as well as the defendant's director, Moon Chang Gook. However I was of the view that I could dispose of this application on the basis of my finding on the next question: whether the 2008 Letter amounted to a Payment Claim.

Second issue: whether the 2008 Letter a Payment Claim

9 The second issue was therefore this: assuming that the 2008 Letter was served on the plaintiff on 26 December 2008 as the defendant claimed, did it constitute a Payment Claim? To throw light on this question it is necessary to consider the relevant provisions of and background to the Act.

Scheme of the Act

10 The long title to the Act states that it is "[a]n Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith". In moving the second reading of the Bill in Parliament on 16 November 2004, the Minister of State for National Development set out the background to and scheme of the Act in the following manner *(Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1112–1120 (Cedric Foo Chee Keng, Minster of State for National Development)):

> … the construction industry is going through a difficult time. … while the construction pie has shrunk by more than half, the number of contractors has increased by 8.5%. … With too many firms chasing too few projects, the result is severe price competition, with firms prepared to accept marginal profits or even losses in order to remain in business. …

The financial problems affecting some construction firms have in turn affected sub-contractors and suppliers further downstream along the construction value chain. They face delays or non-payments for work done or materials supplied.

… whilst the Security of Payment (SOP) Bill will not resolve the structural problem of overcapacity in the construction industry, it will address payment problems. The SOP Bill will create a more conducive operating environment and a level playing field for all parties in the industry. …

Progress payments are made periodically throughout the project's duration. Parties lower down the value chain usually fund their work in advance and collect payments thereafter. *These downstream players will therefore be adversely affected if those upstream fail to make prompt payment for work done or materials supplied*. Contractual terms also tend to favour those higher up the chain. For example, parties downstream are subject to the "pay when paid" clause, whereby they get paid only when those upstream have been paid. *The parties who have not been paid for work done are also not permitted to suspend work*. In some instances, they are also required to pay liquidated damages if they suspend work.

The SOP Bill … facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes. *Affected parties will have the right to suspend work or withhold the supply of goods and services, if the adjudicated amount is not paid* in full or not paid at all. …

Under the Bill, a claimant, ie, the party who is entitled to progress payment for work done or goods supplied, serves the progress payment claims for work done to the respondent. The respondent must then respond by stating the amount he will pay. If the respondent does not wish to pay the full amount claimed, he must give reasons in his response. This is similar to the current practice of issuing the Architect's Certificate to main contractors for private sector projects, or the issuing of the Superintending Officer's Certificate for public sector projects. The Bill requires the respondent to issue the payment response within 21 days of receiving the payment claim. If the response period is not specified in a contract, a default period of seven days has been prescribed in the Bill. This will ensure timely response to the claims. …

The claimant will have a valid reason to make an adjudication application under the following situations:

(a) Payment response has not been received from the respondent within the specified period; or

(b) Amount in a payment response is disputed; or

(c) Payment is not received by the due date.

Adjudication does not require the consent of both parties to proceed. The entire process will be completed within three weeks after application unless the parties agree to a longer period. The adjudicator will determine the amount to be paid by the respondent to the claimant, the pay-by date and the adjudication fees payable by both parties. The adjudicator's decision on the particular progress payment in dispute is binding. The respondent could apply for the decision to be reviewed only if the adjudicated sum differs by more than $100,000 from the amount that he is willing to pay in his response to the claimant.

However, the adjudicated sum must be paid up first prior to the review so that payment to the claimant will not be delayed further. Although the adjudicator's decision is binding, it is not final.

> Parties may still pursue their right under the contract to challenge the adjudication determination in any court proceedings or arbitration. …
>
> … to expedite cashflow, the respondent has up to seven days after the adjudicator's decision to pay the claimant the adjudicated amount. Otherwise, the claimant can suspend work or stop supply. A supplier may also exercise a lien on unfixed goods supplied under the contract, if the goods have not been paid. In addition, the claimant can file the adjudicated amount as a judgement debt in court. …
>
> … The speedy and low cost adjudication process will expedite the resolution of genuine payment disputes so that cashflow will not be disrupted. It will identify contractors who are facing financial difficulties early, before they cause more problems downstream.
>
> [emphasis added]

11 The provisions of the Act are in accord with the stated objectives of fast and low cost adjudication. The process is commenced by service of a Payment Claim under s 10 of the Act, which provides that a claimant may serve a payment claim on any person liable to make a progress payment under a construction contract. The Payment Claim must state the claimed amount and be in the form and contain the information prescribed in the regulations. Within seven days (or up to 21 days if so provided in the contract) of such service, the respondent is required by s 11 of the Act to provide a payment response to the claimant. The payment response may be in the form of payment of the claimed amount or the response amount which is any lesser sum that the respondent is prepared to pay. If the payment response is not by way of payment of the claimed amount, it must be in the form and manner prescribed and must state, *inter alia*, the response amount and the reason for the difference with the claimed amount. If the claimant disputes a payment response provided by the respondent, or the respondent fails to provide a payment response within the seven to 21 day period, s 12 of the Act provides that the claimant may, within seven days of such failure, make an adjudication application under s 13 to an ANB. Under s 14(3) of the Act, within seven days of receipt of the adjudication application, the ANB is required to serve a copy of it on the respondent and appoint an adjudicator. The respondent is required by s 15(1) of the Act to lodge a response ("adjudication response") to the adjudication application within seven days. The adjudication response cannot include, as a reason for refusing payment, anything that was not stated in the payment response (see para 13 below). The adjudicator is required under s 16(3) of the Act to act, apart from the usual attributes of impartiality and natural justice, in a timely manner and to avoid incurring unnecessary expense. He is certainly required by s 17(1)(a) of the Act to make a decision within seven to 14 days after the commencement of the adjudication. There is provision in s 18 of the Act for review of the adjudicator's decision by a single adjudicator or a panel of adjudicators and this process is also required by s 19 of the Act to adhere to strict timelines.

12 It may be seen, from the second reading speech in Parliament and the provisions of the Act set out above, that the objective of the Act is to ensure that the cash flow of the claimants are not disrupted by disputes concerning liability and quantum so that construction works can proceed smoothly. The Act seeks to achieve this primarily by putting in place a fast, cheap and, hopefully, effective process whereby a neutral party would adjudicate on the disputed Payment Claim and impose a temporary finality on his determination. Timelines for the various steps are kept short and both claimant and respondent are required to state their positions at the outset and are prohibited from deviating from it in order for the adjudication to proceed with expedition. This, no doubt, goes a long way in ensuring that the process does not become bogged down by amendments to the claim or to the response midway in the adjudication.

Section 15(3) of the Act

Section 15(3) of the Act

13 It bears emphasising that s 15(3) of the Act provides a very important constraint on the contents of the adjudication response. It provides as follows:

> The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —
>
> (a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or
>
> (b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

This subsection prohibits the respondent from including in the adjudication response any reason for non-payment unless such reason has been stated in the payment response. To ensure its effectiveness, it further provides that even if such reason is included, the adjudicator is prohibited from considering it. It is therefore very important for a respondent who disputes a Payment Claim or any part thereof to provide a payment response because if he does not do so, then he will have no ground to resist payment before the adjudicator. An omission on the part of the respondent to provide a payment response to a Payment Claim within the time allowed would tantamount to conceding to an adjudication order on the Payment Claim. The next point to note is that the respondent has as little as seven days to provide a payment response (and up to 21 days if the contract provides for it). So while the claimant has as much time as he wishes to prepare the Payment Claim, and there is no obligation on his part to inform the respondent in advance, once he has served the Payment Claim on the respondent, the latter has to not only find out the nature of the claim and consider it, but also, in the event that he disputes it, to decide on the grounds for rejection and to ensure that all the grounds are stated in the payment response because he will not be able to rely on any additional ground before the adjudicator. This part of the adjudication process has such great consequences that any interpretation of the provisions of the Act must take this into consideration.

The 2008 Letter

14 The 2008 Letter that the defendant claimed it had delivered to the plaintiff on 26 December 2008 comprised a one-page covering letter and accompanying documents numbering some 164 pages. These accompanying documents included a copy of the Contract documents, and the four invoices described in para 3 above along with purchase orders, quotations, letters, site instructions, work orders and other documents in support of the defendant's claim for payment under those invoices. It is important to set out the entirety of the one-page covering letter which is on the defendant's letterhead. This reads as follows:

> **Letter from Italcor to Sungdo**
>
> **Re: SSWP FAB300-3 PROJECT**
>
> We refer to the above project, the contract of which (comprising the commercial contract, our quotation and your purchase order) is attached at Tab A.
>
> With regard to your questioning of whether we have done the work, we wish to assure you that the work in respect of the following invoices have been done and we claim for payment for such

work as follows:

S/no	Invoice No	Date	Amount	Tab
1.	Inv-IPL-2007-10-0061	26/10/07	$321,000.00	B
2.	Inv-IPL-2007-10-0062	05/10/07	$256,919.84	C
3.	Inv-IPL-2007-12-0079	01/12/07	$ 97,668.53	D
4.	Inv-IPL-2007-12-0080	01/12/07	$448,603.92	E

You have paid us for the following first 5 invoices for 80% of the work. Copies of these invoices may be seen [at] Tab F.

(a)	Inv-IPL-2007-04-0031	13/04/07	$ 78,750.00
(b)	Inv-IPL-2007-05-0039	18/05/07	$ 594.30
(c)	Inv-IPL-2007-05-0040	23/05/07	$315,000.00
(d)	Inv-IPL-2007-06-0042	20/06/07	$472,500.00
(e)	Inv-IPL-2007-07-0046	27/07/07	$401,250.00

We have substantially completed the works under the original agreement (for which invoice (1) has been issued). We have also completed the works under the variation orders in respect of invoices (2) to (4). Therefore the invoices specified at (1) to (4) above are due and payable.

With regard to the invoices at (2) to (4) above, your approval for the variation works and the breakdown of the works and prices are attached to the respective invoices at Tabs C to E above.

Please therefore let us have your payment.

Finally, we wish you greetings of the season!

[Unintelligible signature] 23/12/08

The 2008 Letter does not state it is Payment Claim

15 The plaintiff contended that the 2008 Letter did not amount to a Payment Claim within the meaning of s 10 of the Act as there was no indication that this was a payment claim under the Act. The defendant's position was that the 2008 Letter amounted to a Payment Claim because it complied with all the requirements in s 10(3) of the Act which provides:

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.

16 With respect to sub-para (a), the defendant contended that the 2008 Letter had stated the claimed amounts and the attached invoices showed the period to which they relate. As for sub-para (b), the defendant contended that it complied with all the requirements prescribed in R 5(2) of the Building and Construction Industry Security of Payment Regulations (RG1, 2006 Rev Ed) ("the Regulations") which provides:

> Every payment claim shall —
>
> (a) be in writing;
>
> (b) identify the contract to which the progress payment that is the subject of the payment claim relates; and
>
> (c) contain details of the claimed amount, including —
>
> (i) a breakdown of the items constituting the claimed amount;
>
> (ii) a description of these items;
>
> (iii) the quantity or quantum of each item; and
>
> (iv) the calculations which show how the claimed amount is derived.

17 The defendant contended that there was no requirement for the 2008 Letter to contain a statement that it was a payment claim under the Act for it to amount to one. I agreed that there was no such requirement. This is because one of the models of the Act, the New South Wales Building & Construction Industry Security of Payment Act 1999 ("the NSW Act"), contains such a requirement. This is found in s 13 of the NSW Act, which provides as follows:

> **13 Payment claims**
>
> (1) A person … who claims to be entitled to a progress payment (the "claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
>
> (2) A payment claim:
>
> (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
>
> (b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and
>
> (c) must state that it is made under this Act.
>
> (3) The claimed amount may include any amount:
>
> (a) that the respondent is liable to pay the claimant under section 27 (2A), or
>
> (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

18 It can be seen that s 13(2)(c) of the NSW Act specifically provides that the payment claim must state that it is made under the NSW Act. As there is no similar provision in the Act, the absence of such a statement in the 2008 Letter does not, of itself, preclude it from being a payment claim under the Act. This departure from the NSW Act is not explained anywhere in the Bill nor the Parliamentary debates. However there is an interesting comment in Chow Kok Fong: *Security of Payments and Construction Adjudication* (LexisNexis 2005) at p 134. After noting that there is no requirement in our legislation, unlike the NSW Act, to declare that the claim is made under the Act, the learned author said:

> It is understood that, during consultations leading to the drafting of the [Building Construction Industry Security of Payment] Bill, the Building and Construction Authority accepted the suggestion from the subcontractors and suppliers lobby that such a requirement may conceivably result in creating a contentious atmosphere in the relationships between a main contractor and subcontractors straight away. It is difficult to follow this line of argument. It will be appreciated that, in the normal course of a business, various letters, claims, quotations, negotiation proposals and exchanges will be encountered between the parties. A claimant may submit a proposal for a payment arrangement or furnish a draft progress payment claim as a template for working through the computations and prices with the quantity surveyor on a project. In the absence of a definitive statement of intention, it is conceivable that a payment claim may be mistaken by the respondent for any one of these exchanges.

19 I agreed fully with the comment at the second half of that passage that much confusion will arise from this omission in the Act. Given the short timelines under the Act for a respondent to come out with a payment response once a Payment Claim is served, the suggestion by the subcontractors and suppliers lobby does not bear scrutiny. I cannot see how the omission of a requirement to state that the document is a payment claim under the Act furthers the aim of promoting a non-contentious atmosphere when that would force a potential respondent to scrutinise every document submitted to him by a potential claimant to determine whether it falls within the definition of payment claim under s 10 of the Act. Such an exercise would have to be carried out in the manner that the defendant has submitted in paras 15 to 16 above for every document that is potentially a Payment Claim, a most impractical situation for a potential respondent.

Intention and communication necessary to be Payment Claim

20 Be that as it may, since 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 Regulations 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 Act, 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 para 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, who would then have to scrutinise any document that can possibly amount to a payment claim under the Act and decide if it amounts to one. Any document, no matter how voluminous (as is the case with the 2008 Letter), would have to be carefully studied, page by page, to determine if it contains all the prescribed requirements in the Act for a Payment Claim. And upon determining that it does constitute one, the respondent would then have to check on the claim and produce a payment response. All this would have to be done within as little as seven days. And even if the respondent does not think it amounts to a Payment Claim, so long as he is uncertain about it, he would be well advised to make a payment response given the dire circumstances of being caught out without one. At the end of every such exercise, all would have been in vain if it turns out that the party submitting the documents had not intended it to be a Payment Claim in the first place. I cannot see how Parliament could have intended such a chaotic situation to be the result of an Act enacted to promote cash flow in the construction industry.

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

Was the 2008 Letter a Payment Claim?

23 On the facts of the present case, I did not consider that the 2008 Letter was a Payment Claim even though, arguably, it contained the information prescribed in the Act and Regulations. The reasons are as follows:

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

claim under the Act.

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

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

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

(e) Public policy.

24 On reason (a), there was clearly no communication from the defendant, whether written or oral, that the 2008 Letter was a payment claim under the Act. Firstly, there was no mention in the covering letter of it being a payment claim under the Act. Secondly, Ngo, the defendant's engineer who handed the 2008 Letter to the plaintiff's representative on 26 December 2008, deposed that he merely handed the documents over. There was no prior or subsequent communication from the defendant to the plaintiff as to the nature of this document.

25 On reason (b), the fact remained that the plaintiff did not provide a payment response at all. If the defendant had considered it to be a Payment Claim, it is inconceivable that the plaintiff would not have provided a payment response because such omission would tantamount to conceding to an adjudication order being made (see para 13 above). Therefore even if the plaintiff had received the 2008 Letter on 26 December 2008 as the defendant had alleged, the evidence was that the plaintiff did not consider it to be a Payment Claim.

26 With respect to reason (c), it is necessary to go further back in the development of the dispute. As suggested on the face of the 2008 Letter, 26 December 2008 was not the first time that the defendant had submitted a claim to the plaintiff on the four invoices. Indeed all four invoices were issued more than a year earlier; they were submitted by the defendant to the plaintiff between 5 October and 1 December 2007. If the defendant's position on the issue of what constitutes a Payment Claim is correct, then each invoice would have constituted a Payment Claim in respect of the invoiced sum. It would follow that the defendant would have been entitled to make an adjudication application in respect of each of those invoices. That the defendant did not do so was either because the defendant did not consider them to be Payment Claims, or decided not to do so for whatever reason. The evidence of the parties did not go into whether any payment response was given by the plaintiff, although there was certainly no payment response by way of payment of a response amount under s 11(3) of the Act. The fact of the matter is that the defendant had not proceeded to adjudication in respect of the first time it had submitted each of the four invoices to the plaintiff. The defendant's solicitors had written a letter of demand to the plaintiff claiming payment for the four invoices on 19 December 2007. Again, on the defendant's position, this would be a Payment Claim. And yet no adjudication application was made. The matter dragged on until 30 July 2008 when the writ in Suit No 529 of 2008 was filed. Parties filed pleadings over the next three months and it was after the defendant had filed an amended Statement of Claim on 9 December 2008 and just before the plaintiff filed the amended Defence and Counterclaim on 29 December 2008 that the defendant delivered the 2008 Letter on 26 December 2008. It can be seen that the defendant had submitted requests for payment of the four invoices individually and collectively more than a year prior to the delivery of the 2008 Letter. A suit in the High Court had been commenced and the parties were in the thick of settling the pleadings when the 2008 Letter was delivered. The events leading to the delivery of the 2008 Letter do not lead to the conclusion that it was a Payment Claim.

27 On reason (d), the 2008 Letter begins with a reference to the Project and attaches the relevant contract documents. After this, it goes on to "assure" the plaintiff that work in respect of the four unpaid invoices had been done and the defendant "claim for payment for such work …". The 2008 Letter goes on to set out the five earlier invoices and then reiterates that work for the last four invoices had been completed and these were therefore due and payable. Reference is then made to supporting invoices and approval for variation works, and it concludes with the following words:

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

There is a signature at the bottom of the letter which is unintelligible and the signatory is not identified in the text of the 2008 Letter. The only date that appears on it is handwritten after the signature. The overall appearance of the 2008 Letter is that it is of an informal nature. Although it is on the defendant's letterhead, the proper name of the plaintiff, which is "Sungdo Engineering & Construction (S) Pte Ltd", is not stated as the addressee. Indeed the only link to the plaintiff is the word "Sungdo" in the first line "Letter from Italcor to Sungdo". This informality is enhanced by the fact that the person signing it is not identified and the date is handwritten. The 2008 Letter concludes with a cheerful greeting for the Christmas and New Year season, the levity of which is enhanced by the exclamation mark. It should be noted that 26 December 2008 was a Friday, and presumably employees would have just returned to work from the Christmas public holiday the day before. The weekend was the following day, with another public holiday, 1 January 2009, six days after that. Further, this was a season where many employees would be on leave between Christmas and New Year. If there was an intention to give the plaintiff seven days to provide a payment response, it was certainly masked by the text of the 2008 Letter and the timing of its delivery.

28 This leads to reason (e). If the defendant's position as to what constitutes a Payment Claim is correct, it had made four prior demands for payment of the four invoices after which it did not proceed to apply for adjudication. It then attempted to claim payment through its solicitors, which was also not followed up with an adjudication application. The defendant even commenced a suit to pursue in the High Court the payment it was unable to persuade the plaintiff to pay by way of its four invoices and its solicitors' letter of demand. And well into the pleadings stage, between two public holidays – Christmas and New Year – the defendant delivered the 2008 Letter which did not, on its face, state that it is a payment claim under the Act. That letter was written in an informal manner without the sense of urgency that a Payment Claim demands of a respondent. To hold that a document such as the 2008 Letter amounts to a Payment Claim under these circumstances would leave ample scope for potential claimants to ambush respondents by submitting document after document and applying for adjudication the minute the respondent fails to provide a payment response. It cannot be the intention of Parliament for the Act to operate in this manner.

Jurisdiction

29 There is no provision in the Act for any appeal; however the High Court has power of judicial review over statutory tribunals by virtue of s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 1 of the First Schedule relating to prerogative orders. Before me, the parties did not dispute that the court had such power. Indeed this position is envisaged in s 27(5) of the Act which provides as follows:

> Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner

as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

In *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394, the New South Wales Court of Appeal considered this issue in relation to the NSW Act which was one of the models for the Act. Section 25(4) of the NSW Act is similar to s 27(5) of the Act, and the former provides as follows:

> 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.

After stating that NSW Act appeared strongly against the availability of judicial review on the basis of non-jurisdictional error of law, the judgment went on to state as follows at [52]:

> However, it is plain in my opinion that for a document purporting to [be] an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

30 This court therefore has power to quash an Adjudication Order or declare it null and void on grounds of an error of law going to the jurisdiction of the statutory tribunal. In view of my finding that the 2008 Letter did not amount to a payment claim under Act, there was no Payment Claim served by the defendant. Accordingly the Adjudication Application and the Adjudication Order of 12 February 2009 were void as they were made on the basis of the 2008 Letter being a payment claim under the Act.

31 Subsequent to my decision on this originating summons on 9 October 2009, there have been three written decisions of the High Court relating to adjudications under the Act, namely *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*"). I turn to consider them.

32 In *Chip Hup Hup Kee*, the court held that the jurisdiction of an adjudicator stems from his appointment by an ANB and not from a properly completed and served Payment Claim. The court there stated at [56]:

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

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.

33 Indeed, this was the position in the next case: *SEF Construction*. There the court held that, given that the legislative intention of the Act was 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 would not review the merits of an Adjudication Order. Instead (at [42]):

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

The court then considered and endorsed the decision in *Brodyn* and held that an application to the court under s 27(5) of the Act must be limited to the determination of the following (at [45]):

> (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 (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).

(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.

34 The holding relevant to the present case is sub-para (b) in para 33 above, which is that the court may examine the validity of the service of a Payment Claim. However the court elaborated at [46] that:

> … although [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. [emphasis added]

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. Notwithstanding this, the 2008 Letter did not purport to be a payment claim under the Act as nothing therein states that it is so. Therefore *SEF Construction* does not stand in the way of my decision in the present case. However I should state that in practice, where a document purports to be a Payment Claim, then unless the adjudicator has made an unreasonable finding on the evidence (unreasonableness as in *Associated Provincial Picture Houses v Wednesday Corporation* [1948] 1 KB 223), his decision that it satisfies all the requirements of a Payment Claim may not be interfered with by the court when exercising its powers of judicial review. This appears to be the offset of the following passage in *Brodyn* (at [66]), which was cited in *SEF Construction* at [46]:

> … 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 added]

35 In *AM Associates*, the court followed *SEF Construction* on the issue of whether it could review the adjudicator's finding that the Payment Claim was valid.

Conclusion

36 In view of my finding that the 2008 Letter does not amount to a payment claim under the Act, it would follow that the appointment of the adjudicator and the determination that he made was null and void. This court, in exercise of its powers of judicial review over a tribunal established under the Act, has powers to make a determination on its jurisdiction and, having found that the Adjudication Order was null and void as the defendant had not served a valid payment claim under the Act, set it aside.

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