IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 34

Civil Appeal No 91 of 2020

Between

Range Construction Pte Ltd

… *Appellant*

And

Goldbell Engineering Pte Ltd

… *Respondent*

In the matter of Originating Summons No 382 of 2020

In the matter of Order 95, Rule 3 of the Rules of Court (Cap 322, Rule 5, 2014 Rev Ed)

And

In the matter of the Amended Adjudication Determination of SOP/AA 008 of 2020

And

In the matter of Section 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

Between

Range Construction Pte Ltd

… *Applicant*

And

Goldbell Engineering Pte Ltd

… *Respondent*

JUDGMENT

[Building and Construction Law] — [Damages] — [Liquidated damages]
[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]
[Building and Construction Law] — [Set-off]

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v
Goldbell Engineering Pte Ltd

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Court of Appeal — Civil Appeal No 91 of 2020
Tay Yong Kwang JCA, Steven Chong JCA and Quentin Loh JAD
22 January 2021

9 April 2021 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 The Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA") was enacted in 2004 to facilitate cash flow by establishing a fast and low cost adjudication system to resolve payment disputes in the construction industry (see *Singapore Parliamentary Debates*, *Official Report* (16 November 2004), vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development)). Since then, it has served the industry well by allowing payment disputes to be resolved effectively and efficiently. From time to time, however, disputes over the scope of the SOPA surface. The present appeal concerns such a dispute. The central question in this appeal is whether the SOPA regime, prior to the 2019 amendments, permits set-offs by an employer for liquidated damages. The appellant, Range Construction Pte Ltd ("Range"), argues that it does not.

2 The backdrop to this appeal is that Range, the contractor for a construction project, had lodged an adjudication application ("AA8") against its employer, Goldbell Engineering Pte Ltd ("Goldbell"). An adjudication determination ("AD") was subsequently issued, and Range applied to set aside part of the AD in the proceedings below. Amongst other things, Range alleged that the adjudicator ("the Adjudicator") had acted in excess of his jurisdiction and in breach of natural justice in finding that Goldbell was entitled to set off liquidated damages against the sums due to Range under Range's payment claim. The High Court judge ("the Judge") heard and dismissed Range's application in *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2020] SGHC 191 ("the Judgment").

3 In this appeal, Range maintains that the Adjudicator had no jurisdiction to determine Goldbell's claim to set off liquidated damages against Range's payment claim. According to Range, the SOPA only confers upon an adjudicator the jurisdiction to value construction work done; liquidated damages, on the other hand, are damages for breach of contract and thus fall outside an adjudicator's jurisdiction. Range also alleges that the Adjudicator breached the rules of natural justice in arriving at certain conclusions in the AD.

4 This appears to be the first case since the SOPA's enactment in which an employer's right to set off its claim for liquidated damages against a contractor's payment claim has been disputed. Needless to say, this court's decision on whether the Adjudicator had properly acted within his jurisdiction in determining Goldbell's entitlement to liquidated damages will be of importance to employers across the construction industry, who not infrequently have to grapple with delays in completion. We first set out the factual background to this appeal as well as the Judge's decision below.

Background facts

5 Pursuant to a letter of award dated 19 April 2017 ("the Contract"), Range was appointed as Goldbell's contractor for the design and erection of a six-storey single-user workshop with an ancillary office ("the Project"). The Contract incorporated the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, July 2013) ("the Conditions"). Clause 19 of the Conditions provided for the payment of liquidated damages in the event that the Contractor (*ie*, Range) failed to complete the Project on time. In particular, cl 19.1 (read with Appendix 1) set out the rate at which liquidated damages would be payable while cl 19.2 stipulated that the Employer (*ie*, Goldbell) could deduct the amount of liquidated damages payable from any moneys due, or to become due, to the Contractor (*ie*, Range) under the Contract.

6 The contractual completion date was originally 31 August 2018 but was subsequently extended to 7 September 2018. The Temporary Occupation Permit ("TOP") was granted on 2 October 2018.

7 On 2 December 2019, Range served a payment claim ("PC 28") on Goldbell. Goldbell submitted its payment response ("PR 1") on 20 December 2019. Thereafter, Range lodged AA8 and submitted claims totalling $2,445,225.58. The Adjudicator issued the AD and awarded Range $205,647.43, which sum was arrived at after deducting $852,000 in liquidated damages that he found to be payable by Range to Goldbell.

8 Per cl 19.1 of the Conditions, if Range failed to complete the Project by the extended contractual date of completion (*ie*, 7 September 2018), liquidated damages of $12,000 per day would be payable by Range to Goldbell for each

day that elapsed between the extended contractual date of completion and the date of issuance of the Handing Over Certificate ("HOC"). The HOC was therefore critical in determining the amount of liquidated damages payable by Range to Goldbell. Goldbell had not issued the HOC at the time of the adjudication proceedings and has still not issued the HOC to date.

9 The Adjudicator found that Goldbell ought to have issued the HOC by the time of the adjudication proceedings. However, as it was common ground between the parties that he was not required to find the exact date of completion of the Project or the exact date when the Project could be considered as having been handed over, he made no finding as to *when* the HOC ought to have been issued. The Adjudicator also found that, since the issuance of the HOC was not a pre-condition for awarding liquidated damages, Goldbell was entitled to liquidated damages notwithstanding its failure to issue the HOC.

10 The Adjudicator then had to quantify the liquidated damages payable by Range to Goldbell. He relied on an e-mail dated 17 November 2018 ("the 17 November e-mail") in which Range's managing director had stated that "L3, L5 and Roof are ongoing and will be completed next week". The Adjudicator understood this e-mail to mean that, as of 17 November 2018, Range had not completed the Project and thus remained liable for liquidated damages. He therefore found Range to be liable for liquidated damages for the period from 8 September 2018 (*ie*, the day after the extended contractual completion date) to 17 November 2018. While the Adjudicator also made various findings on Range's claim for variation works, it is unnecessary for us to address those findings for the purposes of this appeal.

The proceedings below

11 By way of HC/OS 382/2020, Range applied to set aside the parts of the AD pertaining to: (a) the award of $852,000 in liquidated damages to Goldbell; and (b) the valuation of the net variation claim. This appeal only concerns the award of liquidated damages to Goldbell. As Range's arguments in the present appeal are substantially similar to those that were raised in the proceedings below, we set them out in some detail below.

12 Range made four main arguments in support of its setting-aside application. First, Range contended that the Adjudicator had acted in excess of his jurisdiction as he had no jurisdiction to award or to take into account liquidated damages. According to Range, the SOPA only allows claims for loss and expense where they relate to the value of construction work done. Liquidated damages, however, are damages for breach of contract, rather than payments for construction work done. Range further argued that the Adjudicator had exceeded his jurisdiction in designating 17 November 2018 as the completion date, since the parties had expressly agreed that he was not required to make any findings on the completion date.

13 Second, Range submitted that the Adjudicator had breached the fair hearing rule. By awarding Goldbell liquidated damages up till 17 November 2018, the Adjudicator had effectively identified 17 November 2018 as the completion date, despite the parties' explicit instructions to the contrary and without affording them the opportunity to address that issue.

14 Third, Range argued that the Adjudicator had breached the rules of natural justice by failing to consider its submission that the date on which TOP was issued (*ie*, 2 October 2018) was the date by which Goldbell ought to have

issued the HOC. In other words, the issuance of TOP was said to be determinative of completion, Range's entitlement to the HOC and, accordingly, Goldbell's entitlement to liquidated damages.

15 Finally, Range submitted that the Adjudicator had erroneously interpreted the 17 November e-mail as he had failed to consider several important pieces of evidence. According to Range, documents such as an e-mail dated 2 November 2018 and a presentation dated 8 November 2018, which had been placed before the Adjudicator, showed that the outstanding works referred to in the 17 November e-mail were simply minor outstanding works that could not have justified Goldbell's withholding of the HOC.

The decision below

16 The Judge dismissed Range's setting-aside application. First, the Judge held (at [13]–[15] of the Judgment) that the Adjudicator had not acted in excess of his jurisdiction by considering Goldbell's claim for liquidated damages. Although payment claims could only be made in respect of construction work done (and not for compensatory damages for contractual breaches), this was beside the point since liquidated damages were never meant to be part of a contractor's payment claim. Instead, liquidated damages were claimed by *employers* in their *payment responses*. Under s 17(3)(*d*) of the SOPA, the Adjudicator's jurisdiction to consider liquidated damages was derived from the fact that such damages were listed in PR 1.

17 The Judge highlighted that cl 19 of the Contract expressly provided for liquidated damages. He also referred to the New South Wales ("NSW") case of *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and others* [2005] NSWCA 228, which held (at [40]) that "any requirement … that

the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect". In addition, s 6(*a*) of the SOPA (which is *in pari materia* with s 9(a) of the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the NSW Act")) provided that progress payments were to be "calculated in accordance with the terms of the contract". Emphasising that cl 19 of the Contract clearly provided for liquidated damages, the Judge held (at [17]–[19] of the Judgment) that Goldbell was entitled to set off its claim for liquidated damages against Range's payment claim.

18 Second, the Judge rejected Range's argument that the Adjudicator had exceeded his jurisdiction by identifying a completion date despite the parties' agreement that he was not required to do so. The Judge was of the view that the Adjudicator did not in fact identify a completion date; in any event, the Adjudicator's jurisdiction was rooted in s 17 of the SOPA and was not limited by the parties' wishes. Furthermore, ss 17(3)(*c*) and 17(3)(*d*) of the SOPA required the Adjudicator to have regard to PC 28 and PR 1. Since Range's claim in PC 28 for the first half of the retention sum and Goldbell's cross-claim in PR 1 for liquidated damages "inadvertently" called on the Adjudicator to identify a completion date, he had acted well within the jurisdiction conferred upon him by s 17 of the SOPA (see [22]–[26] of the Judgment).

19 The Judge also found that the Adjudicator had not breached the fair hearing rule. The Adjudicator had not designated 17 November 2018 as the completion date; he had merely found that Range would have been liable for liquidated damages from 8 September 2018 to 17 November 2018 *at the minimum*. Accordingly, the very premise for Range's allegation that the Adjudicator had breached the fair hearing rule was wholly erroneous to begin with (see [29] of the Judgment).

20 Finally, the Judge held that the Adjudicator did not breach the rules of natural justice by failing to consider relevant matters. No "clear and virtually inescapable inference" could be drawn that the Adjudicator had failed to consider Range's pleading as to the significance of the issuance of the TOP or evidence which Range asserted would have lent context to the 17 November e-mail (see [42]–[45] and [47] of the Judgment).

The parties' cases

21 Range appeals against the Judge's decision in relation to Goldbell's set-off for liquidated damages, and reiterates the following arguments on appeal:

(a) First, the Adjudicator had no jurisdiction to determine Goldbell's claim for liquidated damages. Under the SOPA, an adjudicator only has jurisdiction to adjudicate claims for construction work done (or for goods and services supplied) but not claims for damages arising from contractual breaches, such as liquidated damages.

(b) Second, in awarding Goldbell liquidated damages up till 17 November 2018, the Adjudicator in effect designated 17 November 2018 as the completion date, despite the parties' agreement that he was not required to determine the exact completion date. The Adjudicator had thereby acted in excess of his jurisdiction and breached the fair hearing rule.

(c) Third, the Adjudicator failed to consider Range's submission that the grant of TOP was determinative of Range's entitlement to the HOC, which would have been dispositive of Goldbell's entitlement to liquidated damages.

22 Goldbell defends the Judge's decision on each of these grounds.

The issues before this court

23 There are three issues that arise for our determination in this appeal:

(a) whether it was within the Adjudicator's jurisdiction to allow Goldbell to set off liquidated damages against the sums claimed by Range;

(b) whether the Adjudicator exceeded his jurisdiction and/or breached the fair hearing rule by identifying 17 November 2018 as the completion date; and

(c) whether the Adjudicator breached the rules of natural justice by failing to consider if the grant of TOP was determinative of Range's entitlement to the HOC.

24 At the hearing before us, the parties focused on whether (a) the Adjudicator had jurisdiction to take into account Goldbell's set-off for liquidated damages in PR 1; and (b) the Adjudicator had breached the fair hearing rule. This judgment is therefore primarily concerned with these two issues.

25 We also highlight that although certain amendments to the SOPA came into effect on 15 December 2019, Range served PC 28 on Goldbell on 2 December 2019. Accordingly, the pre-amendment SOPA governs AA8 and the present appeal. As will be seen, however, the parties made extensive submissions on whether and how the amendments to the SOPA were relevant to the interpretation of the pre-amendment SOPA. With that in mind, we turn to address the central issues in this appeal.

Whether the Adjudicator had jurisdiction under the SOPA to determine Goldbell's set-off for liquidated damages

26 We first consider if the Adjudicator acted within his jurisdiction in adjudicating Goldbell's claim for a set-off for liquidated damages. We agree with the Judge that the Adjudicator had the jurisdiction to do so, and that this jurisdiction stems from the SOPA itself.

The pre-amendment SOPA

27 The starting point of our analysis is s 15(3)(*a*) of the pre-amendment SOPA, which states that where an adjudication relates to a construction contract, the respondent may include in the adjudication response, and the adjudicator may consider, "*any reason for withholding any amount*, including but not limited to any cross-claim, counterclaim and ***set-off***" [emphasis added in italics and bold italics], as long as that reason was included in the relevant payment response. Section 17(3)(*d*) of the pre-amendment SOPA in turn provides that an adjudicator shall have regard to the payment response. It is undisputed that Goldbell's set-off for liquidated damages was included in PR 1. Section 17(3)(*b*) of the pre-amendment SOPA also requires that an adjudicator have regard to the provisions of the contract to which the adjudication application relates; as mentioned, cl 19.2 of the Conditions expressly permitted Goldbell to deduct liquidated damages from any moneys due, or to become due, to Range under the Contract. It was therefore abundantly clear to us that the Adjudicator was entitled to consider Goldbell's set-off for liquidated damages, and that his jurisdiction to do so was based on ss 15(3)(*a*) and 17(3) of the pre-amendment SOPA.

28 We add that, had Parliament intended to exclude liquidated damages as a valid form of set-off, one would have expected this exclusion to be expressly

reflected in the SOPA. For example, s 26(2) of the pre-amendment SOPA explicitly clarifies when loss and expense claims should be denied – namely, where a claimant is not paid the adjudicated amount and he exercises his right to suspend the carrying out of construction work or the supply of goods or services (see Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) ("*Security of Payments and Construction Adjudication*") at para 5.77). In the absence of such an express exclusion, there is no room for this court to interpret s 15(3) of the pre-amendment SOPA to exclude liquidated damages as a valid form of set-off.

29 At the hearing, we pointed out to counsel for Range, Mr Tan Chee Meng SC ("Mr Tan"), that ss 15(3)(*a*) and 17(3) of the pre-amendment SOPA conferred upon the Adjudicator the jurisdiction to determine Goldbell's entitlement to a set-off for liquidated damages. In response, Mr Tan argued that an adjudicator's jurisdiction under s 15(3) was in fact much more limited, and that this was evident from the parliamentary debates that preceded the enactment of s 17(2A) of the current SOPA. As the parties' oral submissions converged on the significance and effect of the enactment of s 17(2A), we now turn to consider that provision.

The enactment of s 17(2A) and the effect thereof

30 Section 17(2A) provides as follows:

> (2A) In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by —
>
> > (*a*) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or
> >
> > (*b*) any certificate or other document that is required to be issued under the contract.

31 Section 17(2A) thus prohibits claims relating to damage, loss or expense, whether such claims are made in payment claims or in payment responses, save for certain stipulated exceptions. Section 17(2A) does not apply to AA8 as it only came into effect after Range had filed PC 28. Mr Tan, however, submitted that Parliament had made it clear that the position codified in s 17(2A) was merely declaratory and not new law. In this regard, he referred to the following passage on the enactment of s 17(2A) in the Ministerial Statement at the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) (*Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Zaqy Mohamad, Minister of State for National Development) ("the Ministerial Statement"):

> Another issue that this Bill will address is the lengthening of the adjudication process due to submission of complex claims. *We have observed that some claimants have started to include complicated prolongation costs, damages, losses or expenses when applying for adjudication.*
>
> ***This goes beyond the original scope of the [SOPA], which is intended to cover claims for work done or goods and services supplied***. …
>
> So, *clauses 11 and 14 will* ***make clear*** *that adjudicators are to consider claims on damages, losses, and expenses only when the claim is supported by documents showing the parties' agreement on the quantum of the claim, or a certificate or document that is required to be issued under the contract.* Parties that wish to dispute on complex claims should consider other avenues, such as arbitration or litigation.
>
> [emphasis added in italics and bold italics]

32 According to Mr Tan, s 17(2A) simply clarified but did not change the legal position under the pre-amendment SOPA. In other words, claims for damage, loss or expense were prohibited even under the pre-amendment SOPA, regardless of whether such claims were made in payment claims or in payment responses.

33 We first examine Mr Tan's basis for asserting that s 17(2A) was of merely declaratory effect. The premise of Mr Tan's argument was the passage from the Ministerial Statement reproduced at [31] above. In our view, his reliance on that passage in asserting that s 17(2A) did not change the legal position is misplaced for two reasons.

34 First, although ministerial statements may be useful in shedding light on the parliamentary intent underlying a statutory provision, they do not have the force of law (*Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [181]) and should not be analysed as one would in the case of a judgment or a statutory provision. As the court cautioned in *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 (at [87]), one ought to refrain from "construing speeches in Parliament as if they were statutory … provisions with fine distinctions and deliberate nuances in the choice of words and phraseology. They are not always amenable to such dissection under the microscope." This is particularly so where the ministerial statement in question pronounces on the *legal effect* of a statutory provision, which is a matter that lies squarely within the province of the court. In other words, even if the Minister of State had suggested that s 17(2A) was declaratory of the pre-existing law, that suggestion might not have been accurate and is certainly not conclusive (*Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [103]). It remains for the court to determine if the Minister of State was correct in his assessment of the legal effect of s 17(2A).

35 Second, the Ministerial Statement does not unequivocally suggest that Parliament regarded s 17(2A) as merely a declaratory provision that did not alter the law. In support of his position, Mr Tan emphasised the following statements in the Ministerial Statement: (a) that claims for damage, loss or expense "[went] beyond the original scope of the [SOPA], which is intended to cover claims for

work done or goods and services supplied"; and (b) that the amended ss 17 and 19 of the SOPA will "make clear" that adjudicators should generally not consider claims for damages, losses, and expenses. However, those statements do not incontrovertibly indicate that claims for loss and expense in *payment responses* were impermissible even under the pre-amendment SOPA. As we repeatedly highlighted to Mr Tan and as he agreed, the passage of the Ministerial Statement that he referred us to was made in the context of *payment claims* by contractors. It therefore appears to us that the true import of the Ministerial Statement was that the "original scope" of the SOPA was intended to cover claims *by claimants* for work done or goods and services supplied. Furthermore, it seems to us that ss 17 and 19 of the amended SOPA were intended to "make clear" that claims for damage, loss or expense were not permitted because such claims were *not* clearly precluded under the pre-amendment SOPA. This is in fact the position adopted by the learned author of Chow Kok Fong *et al*, *The SOP Amendment Act – A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) ("*The SOP Amendment Act*"), who noted (at para 2.001) that prior to the 2019 amendments, the SOPA *allowed* for loss and expense claims if it could be demonstrated that payment for such items were contemplated under the terms of the contract in question. Section 17(2A) therefore ushered a change in the pre-existing law (see also *The SOP Amendment Act* at paras 2.001, 2.002 and 2.006). In other words, the passage from the Ministerial Statement that Mr Tan premised his argument on was equally consistent with s 17(2A) having *modified* rather than merely clarifying the law.

36 Moreover, if s 17(2A) were merely declaratory of the pre-existing legal position, s 15(3) of the pre-amendment SOPA would have been devoid of any

substantive content. As mentioned, s 15(3) of the pre-amendment SOPA provides that the respondent may include in the adjudication response, and the adjudicator may consider, "*any reason for withholding any amount*, including but not limited to any cross-claim, counterclaim and ***set-off***" [emphasis added in italics and bold italics]. If the position enshrined in s 17(2A) was applicable even under the pre-amendment SOPA, as Mr Tan argued, then claims for damage, loss or expense would generally be barred and could not have been brought by way of cross-claims, counterclaims and set-offs under s 15(3) of the pre-amendment SOPA. We therefore struggled to see what "reason[s] for withholding any amount" *could* have been raised under s 15(3) of the pre-amendment SOPA, as Mr Tan's argument would have effectively rendered s 15(3) superfluous.

37 Mr Tan submitted that s 15(3) was in fact circumscribed by s 17(2A). He contended that although an employer could assert a set-off in a payment response and adjudication response, the set-off had to be for a claim expressly permitted under the SOPA and could not relate to damage, loss or expense. When pressed on examples of set-offs that could possibly be brought on such a limited reading of s 15(3), the only example that Mr Tan could offer was a set-off for defective works. In this regard, he referred us to s 7(2)(*b*) of the SOPA. However, s 7(2)(*b*) provides that when valuing construction work carried out or goods or services supplied under a contract, if any part of the construction work, goods or services is defective, regard should be had to the estimated cost of rectifying the defect. Under s 7(2)(*b*), the costs of rectifying defects are taken into account *not* by way of a set-off but by way of *valuing the payment claim*. Hence, if claims for damage, loss or expense were categorically prohibited under the pre-amendment SOPA, it would be simply impossible for an employer to withhold any amount *by way of set-off* under s 15(3) and s 15(3) would have

been legislated in vain. In essence, Mr Tan's submission would entail the court having to reconcile s 15(3) with s 17(2A) in a rather complicated fashion and limiting the words "counterclaim and set-off" in s 15(3) to only claims identified in s 7(2)(*b*).

38 In our judgment, the Ministerial Statement could not be relied upon to interpret s 15(3) in the narrow manner that Mr Tan contended for. Mr Tan asserted that, in enacting s 17(2A), the Minister had made clear in the parliamentary debates that claims for damage, loss or expense could not be brought under both the current SOPA and the pre-amendment SOPA, save for the two exceptions provided for in ss 17(2A)(*a*) and 17(2A)(*b*). Our fundamental difficulty with Mr Tan's argument is that the two exceptions stipulated in s 17(2A) are nowhere to be found in the express language of s 15(3) of the pre-amendment SOPA. Instead, s 15(3) states as follows:

> (3) 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.

39 It is trite that in ascertaining the meaning and legislative purpose of a statutory provision, primacy should be accorded to the *text* of that provision and its statutory context over any extraneous material (*Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [43]). As emphasised in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [53] (citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518): "*The words of a Minister*

must not be substituted for the text of the law. … The function of the Court is to give effect to the will of Parliament as expressed in the law." [emphasis in original]. However, Mr Tan's argument would require us to use the Ministerial Statement to impute to s 15(3) a meaning that its language cannot bear (*Tan Cheng Bock* at [50]). It would be highly improper for us to do so, particularly in light of this court's explicit caution in *Tan Cheng Bock* (at [52(b)]) that "[t]he court should guard against the danger of finding itself construing and interpreting the statements made in Parliament rather than the legislative provision that Parliament has enacted". Since Mr Tan relied *solely* on the Ministerial Statement for reading s 15(3) as being circumscribed by s 17(2A), we are unpersuaded that s 15(3) should be interpreted in such a narrow manner.

40 There is yet another difficulty with Mr Tan's argument. His argument essentially assumes that s 15(3) of the pre-amendment SOPA and s 17(2A) were to be read harmoniously. Indeed, he claimed at the hearing that s 15(3) remained unamended even after the enactment of s 17(2A), which applies to both payment claims and payment responses. Fatal to his argument is the fact that *s 15(3) was amended in 2019 to omit any reference to set-offs*. Section 15(3) now reads as follows:

> (3) Subject to subsection (3A), the respondent must not include in the adjudication response an objection of any nature, unless —
>
> > (*a*) where the adjudication relates to a construction contract, that objection was included in the relevant payment response provided by the respondent to the claimant; or
> >
> > (*b*) where the adjudication relates to a supply contract, that objection was raised by the respondent to the claimant in writing on or before the relevant due date.

41 Evidently, s 17(2A), which generally bars claims related to damage, loss or expense, was at odds with the old s 15(3), which permitted set-offs as long as they were reflected in the relevant payment response, thereby necessitating amendments to s 15(3). The very fact that s 15(3) was amended *at the same time* that s 17(2A) was enacted to omit all references to set-offs militates against Mr Tan's strained interpretation of s 15(3). In our view, the amendments to s 15(3) further demonstrated that s 17(2A) changed the law and was not merely declaratory. Far from illustrating that set-offs for liquidated damages could not be brought under the pre-amendment SOPA, the 2019 amendments to the SOPA in fact suggested the very opposite.

42 For the reasons above, we are satisfied that the Adjudicator acted within his jurisdiction in adjudicating Goldbell's entitlement to liquidated damages, and that his jurisdiction arose from ss 15(3) and 17(3) of the pre-amendment SOPA. We note that the position has changed under s 17(2A) of the current SOPA, which requires an adjudicator to disregard any part of a payment claim or a payment response relating to damage, loss or expense, save in select circumstances that have been expressly provided for in s 17(2A). However, s 17(2A) altered the legal position under the pre-amendment SOPA, and there was no equivalent provision in the pre-amendment SOPA that precluded the Adjudicator from determining Goldbell's set-off for liquidated damages.

The case law

43 Our conclusion at [42] above is also consistent with the relevant case law. As mentioned earlier in this judgment, there is no local authority that directly addresses the issue of whether an adjudicator has jurisdiction to determine a set-off for liquidated damages under the SOPA. However, Mr Tan submitted that this court's *dictum* in the recent decision of *Orion-One*

Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal [2020] SGCA 121 ("*Orion-One*") suggests that the pre-amendment SOPA did not permit counterclaims or set-offs by employers for liquidated damages. He referred us to [45] of *Orion-One*, where this court made the following observations:

> This finding was further reinforced by the fact that the SOPA was never intended to deal with damages claims. Under s 17(2A) of the SOPA, an adjudicator is expressly precluded from considering 'damage, loss or expense' that is not supported by (a) a document showing agreement between the parties on the quantum; or (b) any certificate or other document that is required to be issued under the contract. Although s 17(2A) only came into force on 15 December 2019, *after* PC 25 was served, the purpose of s 17(2A) was to give effect to what had always been intended under the SOPA. As the Minister of State for National Development … explained at the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) (*Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 …, s 17(2A) was intended to exclude 'complex claims" involving "complicated prolongation costs, damages, losses or expenses'. Such claims unduly lengthened the adjudication process and '[went] beyond the original scope of the [SOPA], which [was] intended to cover claims for work done or goods and services supplied'.
>
> [emphasis in original]

44 Mr Tan argued that the above *dictum*, as well as the Ministerial Statement cited therein, showed that the SOPA only contemplated claims for construction work done and not counterclaims for prolongation or damages. Stressing that "the purpose of s 17(2A) was to give effect to what had always been intended under the SOPA", he argued that since adjudicators were precluded from considering claims for damage, loss or expense in both payment claims and payment responses under s 17(2A), it followed that it had always been intended under the SOPA that adjudicators could not consider claims for damage, loss or expense in payment responses.

45 With respect, it seemed to us that Mr Tan had taken this court's *dictum* in *Orion-One* out of context. The central issue in *Orion-One* was whether a payment claim could be validly served after the contract between a contractor and an employer had been terminated. The employer's counterclaim for liquidated damages was not in issue in *Orion-One* as that counterclaim was the subject of ongoing arbitration proceedings (*Orion-One* at [36]). Moreover, both this court's *dictum* as well as the Ministerial Statement were made in the context of *payment claims* by *contractors* and not *payment responses* by *employers*. We also pointed out to Mr Tan that ss 15(3) and 17(3) of the pre-amendment SOPA were not in issue in *Orion-One*. *Orion-One* was therefore of no assistance to Range's case.

46 Although there is no local authority on the issue at hand, the Australian courts have affirmed, albeit indirectly, that an adjudicator has the jurisdiction to take set-offs for liquidated damages into account under the NSW Act, which the SOPA was based on. This reinforces our conclusion that an adjudicator can properly adjudicate set-offs for liquidated damages under the pre-amendment SOPA.

47 The case of *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 is instructive in this regard. In that case, the contractor made a payment claim. The employer then served its payment schedule in which it asserted that the contractor owed it a net amount because liquidated damages (among other things) were payable by the contractor. The contractor made an adjudication application and the adjudicator found that the employer was liable to pay the contractor a sum of roughly $393,000. The adjudicator did not allow the claim for liquidated damages on the basis that the employer had provided insufficient information for the assessment of liquidated damages. The

employer then filed an application seeking a declaration that the adjudication determination was void.

48 It bears highlighting that s 22(2)(a)–s 22(2)(e) of the NSW Act then in force ("the 2003 NSW Act") were *in pari materia* with ss 17(3)(*a*)–17(3)(*e*) of the SOPA. Although the 2003 NSW Act did not contain any equivalent of s 15(3) of the pre-amendment SOPA, neither did it contain any equivalent of s 17(2) of the current SOPA. Furthermore, s 25(4)(a)(i) of the 2003 NSW Act clearly indicated that cross-claims were contemplated under that Act, and there were no express prohibitions on what could be brought in such cross-claims.

49 The Supreme Court of NSW held (at [75] and [83]) that the adjudicator *had* been presented with sufficient information to assess the liquidated damages payable but "simply did not proceed to adjudicate the [employer's] claim for liquidated damages *as the Act required him to do*" [emphasis added]. By necessary implication, the adjudicator would have acted well within his jurisdiction in adjudicating the employer's claim for liquidated damages. Indeed, the Supreme Court of NSW held that it was *incumbent* upon the adjudicator to do so.

50 We further note that *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd and another* (2018) 351 ALR 225 and *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107 were cases in which employers had claimed set-offs for amounts due as liquidated damages for delay. While the issue of whether the NSW Act permitted such set-offs was not considered in those cases, there was no suggestion by either the court or the contractors in those cases that such set-offs were impermissible under the NSW Act.

51 The Australian case law thus fortifies our conclusion that, prior to parliamentary intervention by way of the enactment of s 17(2A) and the amendment of s 15(3), an adjudicator could properly adjudicate set-offs by an employer for liquidated damages under the SOPA.

The policy objectives of the SOPA

52 In the course of the hearing, Mr Tan referred to the Ministerial Statement and argued that the SOPA regime was not intended to apply to complex claims. We agreed with him in so far as his argument was confined to claims brought by *contractors* as claimants. The Minister of State explicitly noted in the Ministerial Statement that "some *claimants* have started to include complicated prolongation costs, damages, losses or expenses when applying for adjudication …" [emphasis added]. In addition, the Minister of State observed that the original scope of the SOPA was "intended to cover claims for work done or goods and services supplied". Claims for work done or goods and services supplied are made in *contractors' payment claims*; it is not apparent from the face of the Ministerial Statement that Parliament's concerns about the submission of complex claims extended to *employers'* claims (for, *eg*, liquidated damages) in *payment responses*. Indeed, for all of Mr Tan's reliance on the Ministerial Statement, it is curious that there was nothing in that statement itself to suggest that increasingly complex claims were being made not merely in payment claims but also in *payment responses*, thereby warranting legislative intervention.

53 Mr Tan, however, contended that the rationale for excluding complicated prolongation costs, damages, losses or expenses from payment claims necessarily applied to payment responses too. We do not think that this conclusion is as foregone as Mr Tan made it out to be. It is eminently sensible

and logical that payment claims are limited to claims for work done or for goods and services supplied. Such a limitation ensures that only construction work, goods and services that can be readily valued fall within the ambit of the SOPA, thereby preserving the SOPA as an efficient and low-cost mechanism for the resolution of payment disputes. In the same vein, liquidated damages (unlike unliquidated damages) are typically capable of straightforward computation in most cases. In the present case, for example, the calculation of the liquidated damages payable to Goldbell simply entailed multiplying the number of days for which liquidated damages were payable and the daily rate of liquidated damages payable. The learned author of *Security of Payments and Construction Adjudication* similarly observed (at para 7.6) that "[a] set-off is only available where both the claim and cross-claim are made in respect of liquidated debts or can otherwise lend themselves to be quantified without undue difficulty … claims in liquidated damages qualify as sums which may be tendered as set-offs." Contrary to Mr Tan's argument, there is nothing incompatible or contradictory about limiting payment claims to claims for construction work done or for goods and services supplied on the one hand, and permitting set-offs by employers for liquidated damages on the other.

54 That adjudicators have the jurisdiction to determine entitlements to set-offs for liquidated damages is also aligned with the overriding aim of the SOPA. If the SOPA regime is intended to address claims that are normally the subject of progress payment claims, then given the frequency with which claims for liquidated damages arise, it would be "too limiting a charter to exclude financial claims associated with contract prolongation" (*Security of Payments and Construction Adjudication* at para 5.73). Allowing set-offs for liquidated damages would balance the contractor's entitlement to progress payments and the employer's need for some interim resolution in respect of delays for which

it is not culpable. The contractor can subsequently dispute the employer's entitlement to liquidated damages in an arbitration or in legal proceedings (as Range did), but in the meantime, the employer is afforded a means of recovering some of the loss occasioned by the delay (*Security of Payments and Construction Adjudication* at para 5.75).

55 In summary, the Adjudicator had the jurisdiction to consider Goldbell's set-off for liquidated damages in PR 1. We therefore dismiss Range's argument that the Adjudicator had no jurisdiction to consider liquidated damages in assessing the adjudged sum.

The Adjudicator's finding that the Project remained incomplete as at 17 November 2018

Whether the Adjudicator breached the fair hearing rule

56 We next address Range's allegation that the Adjudicator breached the fair hearing rule. Apart from the issue of whether the Adjudicator had jurisdiction to determine Goldbell's entitlement to liquidated damages, this was the other issue that the parties focused on in oral submissions.

57 By way of background, Goldbell had claimed liquidated damages of $5.388m (*ie*, from 8 September 2018 to 30 November 2019) in PR 1. However, the Adjudicator only awarded Goldbell liquidated damages of $852,000 (*ie*, from 8 September 2018 to 17 November 2018).

58 Mr Tan's initial argument appeared to be that the Adjudicator was constrained to determining the "binary question" of whether Goldbell was entitled to liquidated damages up till 30 November 2019 or not at all. With respect, we found Mr Tan's argument to be plainly untenable. In deciding that

the evidence before him supported a finding that liquidated damages were payable to Goldbell only up till 17 November 2018, the adjudicator was doing no more than engaging in the process of *adjudication*. We found it somewhat surprising for Mr Tan to suggest that the Adjudicator could only decide if liquidated damages were payable to Goldbell up till 30 November 2019 or not at all, even though the evidence supported a position somewhere in the middle. Both parties agreed that Goldbell's entitlement to liquidated damages was always a live issue; as such, the Adjudicator was perfectly entitled to make the finding he did as to the *extent* of Goldbell's entitlement to liquidated damages, based on the available evidence. Mr Tan's argument that the Adjudicator had breached the fair hearing rule might only have gained traction had the issue of liquidated damages not been a live one in AA8. That was plainly not the case.

59 In response, Mr Tan contended that the Adjudicator was limited to deciding only whether Goldbell was entitled to liquidated damages up till 30 November 2019 or not at all, because the parties had agreed that the Adjudicator was not required to identify the exact completion date. However, it did not follow *ipso facto* from the fact that the Adjudicator was not required to identify the exact date of completion that he was precluded from awarding liquidated damages up till 17 November 2018. The fact that he was able to determine that Goldbell was entitled to liquidated damages only up till 17 November 2018 *without* identifying a completion date (as we explain at [68]–[70] below) suffices to illustrate the flaw in Mr Tan's argument.

60 Mr Tan next submitted that, given the Adjudicator had decided the extent of Goldbell's entitlement to liquidated damages on the basis of the 17 November e-mail, it was incumbent upon him to invite submissions on the context of that e-mail. We disagree. The 17 November e-mail was self-explanatory: Range's managing director had stated therein that "L1 and L2 are

substantially completed. L3, L5 and Roof are ongoing and will be completed next week". The 17 November e-mail could only mean that the works on the third level, the fifth level and the roof were incomplete, and that they were *substantially* incomplete, unlike the works on the first and second levels. It is not the duty of an adjudicator to invite submissions on each and every issue that might arise in adjudication proceedings (see *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311).

61 Before us, Mr Tan claimed that the delay in the completion of the Project was occasioned by the late engagement of another of Goldbell's contractors. He thus contended that, had the parties known that the 17 November e-mail would be used as the basis for computing the liquidated damages payable to Goldbell, it would have been open to Range to show that the delay in completion was attributable to a delay on Goldbell's part rather than Range's.

62 We were unable to accept Mr Tan's submission for two reasons. First, Range could and did make submissions on how the 17 November e-mail ought to be interpreted. As highlighted by counsel for Goldbell, Mr Christopher Chong, Goldbell had specifically relied on the 17 November e-mail in its Adjudication Response and written submissions of 16 January 2020 to contend that Range had failed to complete the Project on time. In response, Range stated as follows in its reply submissions of 29 January 2020:

> Range further submits that Goldbell's reliance on a 17 November email from Dave Soh is misplaced. Range's Dave Soh was not admitting that the works were not completed by then and/or that Goldbell was right in not issuing a Handing Over Certificate. Instead, Range's Dave Soh was only referring to the works which Goldbell insisted had to be completed before handover. This is consistent with Range's position that these works ought to have been regarded as minor outstanding works or defects which could and should have been rectified during the Maintenance Period.

63 There is therefore no question that Range had every opportunity to be heard, and was in fact heard, on whether the state of completion of the Project as at 17 November 2018 entitled Goldbell to liquidated damages.

64 Second, until the hearing before us, Range never once asserted that the delay in completion was due to Goldbell's delay in engaging another of its contractors. Instead, Range had objected to Goldbell's reliance on the 17 November e-mail on the basis that the outstanding works were minor works that could and should have been rectified during the Maintenance Period (see [62] above). It was thus not open to Range to assert that the Adjudicator had breached the fair hearing rule on the basis of an argument which it had neither raised in AA8 nor raised in the proceedings below.

65 As a last resort, Mr Tan retreated to the claim that an adjudication determination under the SOPA is a summary process. With respect, we do not see how that in any way bolsters Range's argument that the Adjudicator had breached the fair hearing rule. While an adjudication determination is a summary process, it is also of temporal finality (*Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [1] and [35]); it remains open to the parties to challenge the adjudication determination, as Range has done. More importantly, the nature of adjudication determinations did not change and could not have changed the fact that the Adjudicator did not breach the fair hearing rule in finding that Range was liable for liquidated damages up till 17 November 2018.

66 We therefore agree with the Judge that the Adjudicator did not breach the fair hearing rule. Accordingly, this ground for setting aside the AD fails.

Whether the Adjudicator exceeded his jurisdiction

67 We next consider Range's submission that the Adjudicator exceeded his jurisdiction in finding that the Project remained incomplete as at 17 November 2018. Range's submissions on this issue are slightly different from its submissions in the proceedings below. Before the Judge, Range simply asserted that the Adjudicator had identified 17 November 2018 as the completion date. In this appeal, Range additionally contended that even if the Adjudicator had merely found 17 November 2018 to be a date on which the Project remained incomplete, he had nonetheless acted in excess of his jurisdiction. We will first address if the Adjudicator had in fact identified 17 November 2018 as the completion date before considering if the Adjudicator had, in any event, acted beyond his jurisdiction.

68 Turning to the first sub-issue, we agree entirely with the Judge that the Adjudicator did *not* designate 17 November 2018 as the completion date. All that the Adjudicator did was to find that the Project remained incomplete *at least* as at 17 November 2018. The actual completion date could have been later than 17 November 2018 such that Range would have been liable for an even greater sum of liquidated damages. The Adjudicator simply found that, at the minimum, the Project was still incomplete as at 17 November 2018.

69 The Adjudicator acknowledged repeatedly in the AD that it was common ground between the parties that he was not required to pinpoint the exact date of completion or handover. The following paragraph of the AD puts paid to any allegation that he had identified 17 November 2018 as the completion date:

> However, the exact date when the handing over might have occurred was less clear. While I am mindful of [Goldbell's] quantity surveyor stating it to be 14 February 2019, *I have also*

> *considered that there was an earlier email of 17 November 2018 from [Range's] managing director stating that the rest of the floors would be completed 1 week from 17 November 2018, i.e. 24 November 2018. There is insufficient evidence for me to find what exactly might have been the date of the handover;* indeed, both parties had indicated at the adjudication conference that this was not something I was required to do.
>
> [emphasis added]

70 Having referred to the 17 November e-mail, the Adjudicator concluded that he did not have enough evidence to determine the exact date of handover. In fact, even though Range's managing director had stated in the 17 November e-mail that the outstanding works would be completed by 24 November 2018, the Adjudicator chose *not* to designate 24 November 2018 as the completion date because he did not have sufficient evidence to justify *any* date as the completion date. In finding that the Project remained incomplete as of 17 November 2018, therefore, it is clear to us that the Adjudicator did *not* designate 17 November 2018 as the completion date.

71 Range submitted that even if the Adjudicator had found that the Project remained incomplete as at 17 November 2018, without designating that date as the completion date, he had nonetheless acted in excess of his jurisdiction. This was because the parties had only submitted "the binary question of whether the works were completed by 30 November 2019" for his determination.

72 In our view, this ground for setting aside the AD is wholly without merit. Unlike an arbitrator, an adjudicator's jurisdiction is conferred not by the parties' consent but by s 17(3) of the SOPA. Under s 17(3), the Adjudicator was bound to have regard to (among other things) the Contract, PC 28 and PR 1 (see ss 17(3)(*b*)–17(3)(*d*) of the SOPA). Goldbell had clearly asserted a claim to set off liquidated damages in PR 1, and cl 19 of the Conditions provided for the setting off of liquidated damages. The Adjudicator's finding that the Project was

still incomplete as of 17 November 2018 was but part of his determination of Goldbell's entitlement to liquidated damages, and it was well within his jurisdiction to make that determination (since Goldbell's claim for liquidated damages was reflected in PR 1).

73 An adjudicator's jurisdiction is statutorily conferred; there is no provision in the SOPA to support Range's claim that the Adjudicator was bound to determine only the binary question of whether the works were completed by 30 November 2019. We therefore find that the Adjudicator did not exceed his jurisdiction in finding that the Project remained incomplete as at 17 November 2018.

Whether the Adjudicator acted in breach of natural justice

74 Finally, we consider if the Adjudicator acted in breach of natural justice by failing to consider the significance of the grant of the TOP. The parties did not address this issue in their oral submissions. In our view, this issue can be disposed of swiftly.

75 An adjudicator will be found to have acted in breach of natural justice for failing to consider an issue in the dispute before him only if (a) the issue was essential to the resolution of the dispute; and (b) a clear and virtually inescapable inference may be drawn that the adjudicator did not apply his mind at all to the said issue (*Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 ("*Bintai*") at [46]). Natural justice requires that the parties be heard but not that the parties be given responses on all submissions made; the fact that an adjudicator did not explicitly state his conclusions in relation to a given issue does not inevitably lead to the conclusion that he did not have regard to the parties' submissions on that issue at all (*Bintai* at [44] and [45]; *SEF*

Construction Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733 ("*SEF Construction*") at [60]).

76 We agree with the Judge that no clear and virtually inescapable inference can be drawn that the Adjudicator did not apply his mind at all to the issue of whether the issuance of the TOP was determinative of Goldbell's entitlement to liquidated damages. In AA8, Range submitted that the Project was substantially completed and thus ready for handover in September 2018. It argued that it was entitled to a HOC by end-September 2018 and no later than 2 October 2018 (when the TOP was granted), as the issuance of the TOP amounted to a confirmation that the Project had been substantially completed. As is evident from its submissions in this appeal, Range's case was and remains that the grant of the TOP was/is determinative of its entitlement to *a HOC*. Seen in this light, it is obvious why the Adjudicator did not explicitly refer to this argument by Range in the AD: he had found that the issuance of a HOC was *not* a prerequisite for liability for liquidated damages to arise. Nor was Range's entitlement to a HOC relevant to the Adjudicator's quantification of the liquidated damages payable to Goldbell: instead, he found that the Project remained incomplete as at 17 November 2018 and that Range was accordingly liable to pay liquidated damages from 8 September 2018 to 17 November 2018. In light of his findings, the significance of the grant of the TOP was *not* essential to the resolution of the dispute (*Bintai* at [46]), and there was simply no need for the Adjudicator to explicitly address Range's submission thereon.

77 In any event, Range's argument was unmeritorious to begin with because the grant of the TOP was *not* determinative of its entitlement to a HOC. While no HOC could be granted unless the TOP had been issued (per cl 11.2.1.2 of the Conditions), cl 11.1 of the Conditions set out five requirements that had to be met before Range could apply for a HOC. Among those requirements were

that Range had to consider that "the whole of the [Project] (or the Section thereof required to be completed) [wa]s suitable for beneficial use and occupation" (see cl 11.1.1.1 of the Conditions). Given Range's admission in the 17 November e-mail that the third, fifth and roof levels remained incomplete as at 17 November 2018, it seems unlikely that Range would have been entitled to a HOC by the earlier date of 2 October 2018 when the TOP was issued.

78 In summary, Range had submitted that the grant of the TOP was determinative of its entitlement to a HOC. The Adjudicator found that Range's entitlement to a HOC was *not* dispositive of Goldbell's entitlement to liquidated damages. As such, the most plausible reason why he did not expressly address Range's submission on the significance of the grant of the TOP was that he found the submission so unconvincing that he thought it unnecessary to explicitly state his findings (*SEF Construction* at [60]). In the circumstances, no breach of natural justice occurred and this ground for setting aside the AD must also fail.

Conclusion

79 For the foregoing reasons, we dismiss the appeal with costs.

80 Having reviewed the parties' costs submissions, we fix the costs of the appeal at $26,000 inclusive of disbursements since both counsel had sought costs excluding disbursements in the *same* amount of $25,000. We note that the

costs submission was the only point where both counsel shared common ground. We also make the usual consequential orders.

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

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