Admin Construction Pte Ltd *v* Vivaldi (S) Pte Ltd
[2013] SGHC 95

Case Number : Originating Summons No 165 of 2012/L

Decision Date : 03 May 2013

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : S Magintharan and Liew Boon Kwee James (Essex LLC), Raymond Ng Yong Ern (Tan Lay Keng & Co) for the plaintiff; Xhuanelado Owen (Kalco Law LLC) for the defendant.

Parties : Admin Construction Pte Ltd — Vivaldi (S) Pte Ltd

Building and Construction Law – Dispute Resolution – Adjudication – Settlement Agreements

3 May 2013 Judgment reserved.

Quentin Loh J:

The Facts

1 The plaintiff, Admin Construction Pte Ltd ("Admin Construction"), was the main contractor for the construction of a 21-storey, 102 unit block of residential flats at Akyab Road ("the Project"). [note: 1] The defendant, Vivaldi (S) Pte Ltd ("Vivaldi"), was Admin Construction's subcontractor for the aluminium glazing and associated metal works for the Project.

2 In these proceedings, Admin Construction seeks to set aside an adjudication determination for a sum of $326,614.29, interest and costs, in favour of Vivaldi under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act").

3 The parties entered into a written sub-contract dated 24 July 2009 ("the sub-contract"), for Vivaldi to undertake the design, supply and installation of aluminium, glazing and metal works for the Project, with a 15-month maintenance period and a warranty of its works for 10 years for a lump sum of $1,600,000. Clause 12 of the sub-contract provided that the sub-contract works were to commence on 24 July 2009 and were to be completed by 25 September 2010. Clause 14(1) provided that Vivaldi should submit their payment claim for the relevant period "before the 26th day of each month". Clause 14(3) provided that a payment response was to be served within 21 days of the service of the payment claim. [note: 2]

4 Admin Construction alleges that Vivaldi breached the sub-contract by installing aluminium instead of mild steel glazing as required by the contract specifications. Admin Construction says that despite demands and reminders, Vivaldi refused to rectify the breach, causing Admin Construction to incur a sum of $235,000 in rectification costs. [note: 3]

5 Admin Construction also says that on 31 January 2011, the parties arrived at a settlement agreement ("the Settlement Agreement") whereby Vivaldi agreed that its liability for the rectification costs was to be set-off against its entitlement to payment. This resulted in a full and final settlement sum of $176,840.83 (including Goods and Services Tax ("GST")) due to Vivaldi for all works done

under the sub-contract. [note: 4] The Settlement Agreement was evidenced by a letter of acceptance from Vivaldi to Admin Construction dated 31 January 2011, irrevocably and unconditionally accepting the sums of $165,271.80 (which is equivalent to $176,840.83 less the applicable GST) and $34,125 (the amount of retention monies held by Admin Construction less GST) as full and final settlement for all the works under the sub-contract. [note: 5]

6 Admin Construction paid this sum to Vivaldi's director, Madam Gan Kim Hong ("Madam Gan"). Vivaldi does not deny that Madam Gan signed the letter of 31 January 2011 and received a cheque for the sum of $176,840.83. However, Vivaldi claimed, [note: 6] and the adjudicator ("the Adjudicator") apparently accepted, that Madam Gan was "misled" by Admin Construction into signing the letter as she was "Chinese-educated and did not understand English" (see [30] of the Adjudicator's determination ("the determination")).

7 Admin Construction alleges that subsequently, Vivaldi unilaterally reneged on the Settlement Agreement by making further payment claims dated 15 February 2011 ("the First PC"), 12 October 2011 ("the Second PC") and 24 November 2011 ("the Third PC") in relation to work done under the sub-contract. [note: 7] It should be noted that all three payment claims bore the same number, No 2744.

8 As for the First PC dated 15 February 2011, Admin Construction contended, [note: 8] and the Adjudicator accepted, that there was no evidence of this being sent to Admin Construction (see [58]–[59] of the determination). Admin Construction alleges that Vivaldi has belatedly conceded that the First PC was never intended to be a payment claim within the meaning of the Act (see [23] of the determination).

9 As for the Second PC dated 12 October 2011, Admin Construction accepts that it received the Second PC on 4 November 2011 but asserts that it is not a payment claim made under the Act as there was no indication on the claim that it was a claim under the Act and also because the Settlement Agreement had extinguished all claims between the parties so that Vivaldi was no longer entitled to make a payment claim. Admin Construction also says that the existence of the Second PC was not brought to the attention of the Adjudicator because it was not legally represented during the adjudication and was therefore unaware of the significance of the Second PC. [note: 9]

10 Finally, as for the Third PC dated 24 November 2011 and served on the same day, entitled "the Final Progress Claim No 2744", Admin Construction says that this payment claim is exactly the same as the Second PC: the claimed amount ($326,624.29), particulars of claim (claims for work done and completed as early as January 2011) and enclosures are identical with that of the Second PC. [note: 10] The Third PC is therefore invalid as a repeat claim. Admin Construction also asserts that the Third PC is not a payment claim made under the Act as there was no indication on the claim that it was a claim under the Act and also because the Settlement Agreement had extinguished all claims between the parties.

11 Admin Construction further alleges that its contracts manager replied to the Third PC by way of a letter faxed on the same day to Vivaldi ("the alleged PR"), to the effect that the accounts had been settled pursuant to the Settlement Agreement. [note: 11] This is disputed by Vivaldi which claims that it had not received the alleged PR from Admin Construction or any other payment response under the Act. [note: 12]

12 On 23 December 2011, Vivaldi filed its notice of intention to apply for adjudication on the

ground that it had not received a payment response from Admin Construction. On 4 January 2012, Admin Construction filed its required adjudication response disputing Vivaldi's payment claim on the grounds, *inter alia*, that the Settlement Agreement had extinguished all claims between the parties. [note: 13] An adjudication conference was subsequently held on 12 January 2012. [note: 14]

The Adjudicator's decision

13 First, the Adjudicator found that the First PC was not a payment claim within the meaning of the Act because it was never intended to be a payment claim even though Vivaldi admitted to serving this progress claim on Admin Construction (see [56]–[57] of the determination). Consequently, the Adjudicator concluded that he did not need to consider if the Third PC was a repeat claim of the First PC (as noted above, the existence of the Second PC was not raised before the Adjudicator, see [58]–[59] of the determination).

14 Second, the Adjudicator found that Admin Construction's alleged PR was sent to Vivaldi only on 23 December 2011, more than 21 days after the Third PC was served on Admin Construction (see [67]–[74] of the determination), and was therefore not a valid payment response under the Act. Consequently, the Adjudicator ruled that he was not permitted under s 15(3)(*a*) of the Act to consider the Settlement Agreement as a defence against Vivaldi's payment claims (see [75]–[76] of the determination). The Adjudicator accordingly ruled in favour of Vivaldi and awarded it the sum of $326,614.29 (including GST) under the Third PC as well as costs and interest from 18 January 2012.

Admin Construction's Case

15 Admin Construction raises the following grounds for setting aside the determination. First, Admin Construction says that the Adjudicator acted in excess of his jurisdiction and *ultra vires* the Act in: [note: 15]

(a) Failing to consider that the Act was not applicable because the parties had compromised and settled all the outstanding payments in the Settlement Agreement;

(b) Failing to consider that there was no valid payment claim under the Act for the following reasons:

(i) There were no construction works carried out by Vivaldi since January 2011 and therefore no basis for Vivaldi to make the Third PC ten months after, or even to make any progress claim under the Act;

(ii) The Third PC was made out of time in contravention of reg 5(1) of the Building And Construction Industry Security Of Payment Regulations (Cap 30B, RG1, 2006 Rev Ed) ("the SOPR") and was invalid since it was issued more than ten months after the last progress works were carried out;

(iii) Vivaldi was precluded from making the Third PC by reason of the Settlement Agreement;

(iv) The Third PC was invalid under s 10(1) of the Act as it was a repeat claim; and

(v) The Third PC was invalid as it was ambiguous, had no indication whatsoever that it was a payment claim under the Act and had ambushed Admin Construction in contravention of certain principles laid down in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte*

Ltd [2010] 3 SLR 459 ("*Sungdo Engineering*");

(c) Failing to accept that the alleged PR was a valid payment response;

(d) Rejecting the whole of Admin Construction's defence on the "mere technical ground" that Admin Construction had failed to submit a payment response despite the same being before the Adjudicator and contained in the alleged PR; and

(e) Having fettered his discretion under s 16(7) of the Act in refusing to take into account Admin Construction's defences even though they were contained in the alleged PR.

Admin Construction also says that the Adjudicator had breached the rules of natural justice and had failed to provide Admin Construction a fair hearing when he totally disregarded its defences. [note: 16]

Vivaldi's Case

16 In response, Vivaldi says that:

(a) The director from Vivaldi who signed the Settlement Agreement was "Chinese-educated and did not understand English" and was "misled" by Admin Construction into signing the Settlement Agreement;

(b) Reg 5(1) of the SOPR does not apply in the present case as the sub-contract contained a provision regarding the time at which a payment claim shall be served in relation to work done pursuant to the sub-contract *viz*, Clause 14(1). Further, the Third PC was not served out of time pursuant to Clause 14(1) as works were still being carried out until November 2011; and

(c) The Third PC is not a repeat claim of the Second PC as Vivaldi had no intention to adjudicate upon the Second PC which was merely a draft not intended to be sent out and in any case was mistakenly sent out. Vivaldi also says that Admin Construction is estopped from raising the issue of the Third PC being a repeat claim as it had ample opportunity to do so at the adjudication conference called by the Adjudicator but had failed to do so.

Issues before this Court

17 The first issue before me is whether the Act is inapplicable because the parties had compromised and settled all the outstanding payments in the Settlement Agreement. It is only if the Act is applicable, that the following issues raised by the parties on the adjudication determination arise:

(a) Whether the Third PC was intended to be a payment claim under the Act and if not, whether this makes the Third PC invalid;

(b) Whether the Third PC was served out of time and if so, whether this makes the Third PC invalid;

(c) Whether the Third PC was a repeat claim and if so, whether this makes the Third PC invalid; and

(d) Whether the Third PC is otherwise invalid for being ambiguous or having ambushed Admin Construction in contravention of the test laid down in *Sungdo Engineering*.

18 At the time of oral submissions, the Court of Appeal decision in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Terence Lee*") was pending. Counsel sensibly agreed I should await that judgment before deciding this case.

Analysis

Role of the courts in reviewing adjudication determinations under the Act

19 The Court of Appeal in *Terence Lee* at [66]–[67] stated the role of the courts in reviewing adjudication determinations as follows:

> 66 … the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.
>
> 67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.
>
> [emphasis in original]

20 If, as Admin Construction claims, there is a valid and binding Settlement Agreement, then it is an issue arising in relation to the validity of the appointment of the adjudicator and this is a jurisdictional issue which can and must be reviewable by a court: see *Terence Lee* at [30]. An adjudicator cannot, when his jurisdiction is challenged, decide his own competency to act as an adjudicator: see *Terence Lee* at [36].

21 Secondly, this Court can review the validity and service of a payment claim pursuant to which an adjudicator was appointed and for which the adjudicator rendered an adjudication determination. This is because the validity of such a payment claim and its service on a respondent forms the basis of the adjudicator's appointment under the Act, a matter which is reviewable by the courts (*Terence Lee* at [30]) as this also goes to the jurisdiction of the adjudicator.

22 I note that Admin Construction raised this as a defence in the adjudication conference before the adjudicator. This was, quite correctly, not accepted by the Adjudicator as he had found that it was not included in a valid payment response to the Third PC and he was precluded from considering it pursuant to s 15(3)(a) of the Act. Nonetheless, for the reasons set out above, (*Terence Lee* at [30]) this is more properly an issue for the courts as such a defence goes to the jurisdiction and validity of the appointment of the adjudicator.

The effect of the Settlement Agreement

23 I now turn to the Settlement Agreement. Admin Construction contends, [note: 17] and Vivaldi does not dispute, that on 31 January 2011 a director of Vivaldi, Madam Gan, signed what on the face of the document is a settlement agreement. [note: 18] It is also not in dispute that Madam Gan received a cheque for the sum stated in the Settlement Agreement. The heading or subject matter of

the Settlement Agreement contained the words: "STATEMENT OF FINAL ACCOUNT FOR SUB-CONTRACT.." and the operative clause of the Settlement Agreement reads:

> We, Vivaldi (S) Pte Ltd, do hereby irrevocably and unconditionally agree with and accept the sum of S$165,271.80… and a further S$34,125.00… being retention as shown herein being the *full and final settlement for all the Works under the Sub-Contract*.
>
> We further confirm that we have no further claims whatsoever arising out of any matters whether covered by this Sub-Contract or otherwise and *all Final Account [sic] issued earlier if any, shall be superseded by this Statement of Final Account*.
>
> [emphasis added]

24 Vivaldi objects strongly to the validity of the Settlement Agreement. It alleges that Madam Gan was misled into signing the Settlement Agreement as she was told that the payment under the Settlement Agreement was only a part payment and that the balance sum would be settled some time later. Vivaldi says that Madam Gan did not converse in English, was a housewife and was instructed simply to sign on the Settlement Agreement and to collect a cheque. While not expressly framed as such, it appears that Vivaldi's claim is that the Settlement Agreement should not bind them due to a misrepresentation that had operated on Mdm Gan's mind when she executed the Settlement Agreement on behalf of Vivaldi

25 If Vivaldi is correct, then it is entitled to set aside the Settlement Agreement on the basis that it was induced to enter into the same as a result of a misrepresentation by Admin Construction. However, even then, the Settlement Agreement is only a voidable contract and remains in force until it is set aside: see *Bristol and West Building Society v Mothew* [1998] Ch 1 at 22. It is not void *ab initio*. Vivaldi has not taken any steps to set aside the Settlement Agreement.

26 Admin Construction cited *Shepherd Construction Ltd v Mecright Ltd* [2000] BLR 489 ("*Shepherd Construction*") for the proposition that the Settlement Agreement superseded the sub-contract and had the effect of cancelling (or more correctly extinguishing) all claims under the sub-contract. Its argument is that there is therefore no construction sub-contract in existence as at 31 January 2011 under which Vivaldi was entitled to commence any adjudication application under the Act. [note: 19]

27 In *Shepherd Construction*, the plaintiff, Shepherd Construction, applied for a declaration that an adjudicator, who had begun to investigate a dispute referred to him by the defendant, Mecright, had no jurisdiction to do so. Shepherd Construction was the main contractor for the construction project while Mecright was the specialist steelwork subcontractor engaged by Shepherd Construction in October 1998. Following the award of the contract, the work had to be changed and Mecright found that it had to incur considerable extra expenditure. However, it was common ground that the parties had subsequently arrived at a settlement agreement on 15 March 2000 with regard to the change in works and increase in expenditure. The operative settlement term read:

> We, Mecright Ltd, accept the sum of £366,600 in respect of manufacture, supply, delivery and installation of steel trees, steel posts assembly, hand rails and sundry metal work carried out by us in full and final settlement of all our claims under the above contract but without prejudice to our outstanding obligations.

Despite the settlement agreement, on 3 July 2000, Mecright launched a request for adjudication. Shepherd replied to the request for adjudication on 11 July pointing to the settlement agreement into which the parties had entered. In reply, Mecright claimed for the first time that the agreement

reached had been made under duress.

28 The court gave the declaratory relief sought by Shepherd Construction. Three crucial holdings can be elicited from the court's judgment.

(a) First, the court found that the settlement agreement was an agreement which, but for the plea of economic duress, would have the effect of extinguishing all the disputes that then existed on 15 March so that there could be no dispute capable of being referred to adjudication thereafter in relation to valuation (at [12]). Therefore, there was no dispute about the subject matter of the settlement agreement which was capable of being referred to adjudication. The court thus found that Mecright had no right to apply for adjudication and the adjudicator had no authority or jurisdiction to deal with the notice of 3 July (at [13]).

(b) Secondly, the court found that the settlement agreement was not inherently unenforceable and invalid. While the settlement agreement could be avoided at the option of a party (in this case Mecright) if it was able to establish that it was entered into under economic duress, the settlement agreement stood unless and until a court or arbitrator (as the case may be) holds that the agreement is void; it could not be deprived of its effect simply because one party elected, without more, to avoid it. In any case no election was made by Mecright until 12 July. Therefore, as at 3 July 2000, the date the adjudication was applied for, the settlement agreement of 15 March 2000 governed the relationship of the parties, and the purported reference to an adjudicator relating to a failure to value and pay the works done prior to 15 March 2000 was invalid or of no effect since there was no dispute capable of being referred to an adjudicator about any such matter (at [16]).

(c) Thirdly, in any event, the court was of the view that a dispute about a *settlement agreement* of this kind could not be a dispute *under the parties' sub-contract*. This was crucial because under the terms of the subcontract, which incorporated the terms of the Standard Form of Sub-Contract for Domestic Subcontractors ("DOM/1"), or under the relevant statute governing statutory adjudication in this case, parties could only refer a dispute arising *under* the construction subcontract to adjudication (see clause 38A.1 of DOM/1 and s 108(1) of the Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ("the UK Housing Act")). Here the court found that there could be no dispute under the sub-contract as the settlement agreement had the effect of replacing Shepherd Construction's obligations to value and to pay Mecright under the sub-contract the value of the work (at [14]).

29 I note that there is no equivalent of clause 38A.1 of DOM/1 and s 108(1) of the UK Housing Act in either the sub-contract or the Act. Under the Act, the entitlement to refer a dispute to adjudication stems from s 12 which reads:

Entitlement to make adjudication applications

12.—(1) Subject to subsection (2), a claimant who, *in relation to* a construction contract, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.

(2) Where, in relation to a construction contract —

(a) the claimant disputes a payment response provided by the respondent; or

(b) the respondent fails to provide a payment response to the claimant by the date or

within the period referred to in section 11 (1),

the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.

(3) A claimant who has served a payment claim *in relation to* a supply contract is entitled to make an adjudication application under section 13 in relation to the payment claim if —

(a) the claimant fails to receive payment by the due date of the claimed amount; or

(b) the claimant disputes the response amount, where the response amount is less than the claimed amount.

[emphasis added]

30 Under the Act, the right to invoke adjudication is not restricted to disputes *under* the sub-contract but includes also disputes *in relation to* the subcontract. Whilst the latter may appear wider than the former, a closer reading of s 12 of the Act shows that the right to invoke the statutory adjudication regime is invariably linked to a payment claim and/or a payment response, which are premised on progress payments themselves which are in turn premised on the existence of a construction or supply contract (see s 10(1) read with s 5 of the Act). This means that the position in Singapore appears narrower than that in England. Thus, despite the difference in language between the operative clause in *Shepherd Construction* and s 12 of the Act, *Shepherd Construction* is good authority and I adopt its ruling.

31 As noted above, the Settlement Agreement is *ex facie*, valid and binding on parties and since Vivaldi has not taken any steps to set it aside, accordingly, as at 28 December 2011, the date of Vivaldi's adjudication application, all disputes that existed between the parties on or before 31 January 2011 were extinguished. There was therefore no dispute as at 28 December 2011 *in relation to the Third PC* capable of being referred to adjudication and Vivaldi had no right to apply for adjudication in relation to the Third PC.

32 It follows that the Adjudicator had no authority or jurisdiction to deal with the adjudication application of 28 December 2011. Consequently, I find that the Adjudicator had no jurisdiction to hear the dispute, and the determination rendered by the Adjudicator must be set aside.

33 Although that disposes of the matter, I shall, for completeness, deal with the alleged irregularities of the Third PC.

Whether the Third PC is invalid by reason of the Sungdo Engineering test

34 Admin Construction relies on this Court's decision in *Sungdo Engineering* and contends that the Third PC is invalid because it was not intended to be a payment claim under the Act. In *Sungdo Engineering*, the Court held that a payment claim must satisfy two elements: (a) it must be intended to be a payment claim under the Act; and (b) the intention must be communicated to the recipient (the "*Sungdo Engineering* test"). However, the Court of Appeal in *Terence Lee* recently restricted the applicability of the *Sungdo Engineering* test to alleged payment claims which are non-existent or inoperative (*Terence Lee* at [39]), which is not the case advanced by Admin Construction *vis-à-vis* the Third PC.

35 The Court of Appeal also made it clear that the Act does not require a payment claim to state that it is made under the Act. The emphasis is not on the claimant's intention but on the respondent being given notice of certain information about the claim: *Terence Lee* at [73] and [74]. Since the Act does not require a payment claim to state that it is made under the Act, the absence of such a statement cannot make it any less a payment claim if it otherwise satisfies all the formal requirements in s 10(3)(*a*) of the Act and reg 5(2) of the SOPR: *Terence Lee* at [73] and [78]. Accordingly, Admin Construction's argument that the Third PC is invalid because it was not stated to be a payment claim under the Act or its argument that the Third PC was otherwise invalid under the *Sungdo Engineering* test must fail.

Whether the Third PC is invalid for being served out of time

36 I now turn to the next alleged irregularity of the Third PC. Admin Construction claims that the Third PC was served out of time, relying on the High Court's decision in *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence (alias Li Weili Terence)* [2011] SGHC 109 ("*Chua Say Eng*"). In *Chua Say Eng* at [48], the High Court held that the Act contained a "default position of requiring payment claims to be made at monthly intervals" and that if payment for work done in a certain month was not claimed under the Act by the last day of the subsequent month, then a claim in respect thereof was time-barred by reg 5(1) and could not be made under the Act anymore.

37 However, on appeal to the Court of Appeal, the Court disagreed with the Judge's interpretation that reg 5(1) of the SOPR read with s 10(2) of the Act created a limitation period for making payment claims and held that there was nothing in the language of reg 5(1) of the SOPR to compel a claimant to make monthly payment claims for work done in the previous month: *Terence Lee* at [88] and [90]. In the Court of Appeal's view, the mandatory language of reg 5(1) of the SOPR in relation to service of the payment claim should be read with s 10(1) of the Act, with the effect of imposing a maximum frequency of one payment claim per month: *Terence Lee* at [90]. Further, the Court of Appeal was of the view that a payment claim which has not been paid or which was only partially paid before or without any adjudication under the Act was an unpaid claim under s 10(4) of the Act: *Terence Lee* at [92].

38 With this clarification from the Court of Appeal in *Terence Lee*, Admin Construction's argument that the Third PC is invalid for being served out of time in contravention of s 10(2) of the Act, read with reg 5(1) SOPR, must fail.

39 As to whether the Third PC was served out of time pursuant to Clause 14(1), I note that this issue was not addressed by the Adjudicator in the determination. Since the parties take conflicting positions on when the work under the sub-contract had stopped, and I am without the assistance of the Adjudicator's findings on this point, I make no finding as to whether the Third PC was served out of time pursuant to Clause 14(1).

40 The issues raised by Admin Construction in argument at [15(b)(i)] and [15(b)(ii)] above do not strictly speaking arise for my decision. However, I voice my doubts *obiter*, as to whether it should be permissible to issue a payment claim long after works have been completed and the contract or sub-contract is at an end. Admin Construction alleges that all works had ceased by January 2011. The sub-contract completion date was stated to be 25 September 2010. The Second PC was dated 15 February 2011 and the claim documents in support of the claim show all works, including variations, completed. Therefore, even on Vivaldi's documents, everything was complete as at that date. On these facts, (and putting to one side the apparently valid Settlement Agreement), is it permissible for Vivaldi to begin the adjudication process in November 2011, some nine to ten months after works

have ceased?

41 The aims of the Act are now well known and set out in various judgments, including *Terence Lee*, *viz*, to ensure that contractors, subcontractors and suppliers are paid timeously for work done and for materials supplied. The mischief sought to be avoided was that prevalent in the construction industry prior to the passage of the Act where contractors, subcontractors and suppliers were kept out of their money and this ran a significant number into financial distress and insolvency. The Act established the principle that such parties were entitled to progress payments as of right and to this end made pernicious but then prevalent pay-when-paid clauses void. The Act also created a process of statutory adjudication which enabled such parties to make payment claims in respect of progress payments to which they were entitled. Such claims were then expeditiously adjudicated: there were strict timelines and procedures set in place for disputing progress claims and if they were not complied with, employers and upstream parties were precluded from raising them in the adjudication. Once the adjudication determination was made, it had to be paid. The adjudication determination was final and binding on the parties for the time being but the parties were free to dispute or 'open up' the same by later raising any defences to such claims or to ask for reassessment of the same or to claim set-offs or counterclaims through the usual arbitration or court proceedings where all issues could be ultimately and conclusively determined at the end of the contract.

42 The Court of Appeal ruled in *Terence Lee* that the Act also applies to final progress claims. What I question is whether, notwithstanding s 10(4) of the Act, a party should be permitted to apply for adjudication under the Act long after contract works have been completed instead of making its claim in court or to an arbitrator. Should it be permitted to gain an upper hand by using what is a temporary but speedy rough-and-ready mechanism of justice to resolve an entire building and construction dispute, with its myriad of interlinked issues? Do the considerations which led to the passing of the Act apply to such factual situations? In my view, the adjudication process is not a suitable procedure, with its time pressures, especially on the adjudicator, to decide such complex and detailed disputes which are notorious for their involved and detailed documentation and evidence. It might even be said that an application for adjudication, which is filed long after the contract has ended, which involves the determination of complicated issues of fact and law and which is plainly an attempt to overwhelm the respondent (and indeed the adjudicator) with voluminous submissions and extensive documentation, is an abuse of process.

43 It should also be noted that statutory adjudication was introduced as part of a scheme to preserve a claimant's right to progress payments under a building contract until the final determination of the parties' rights through arbitration or in court after the contract works have come to an end. Just as progress payment certificates are meant to have temporary finality so too are adjudication determinations. However, if the parties are still locked in dispute after the end of the contract, for instance, over the valuation of progress payment certificates and the enforcement of adjudication determinations if any, all such issues and disputes can be raised at the final dispute resolution process of an arbitration or court proceedings. At this stage all certificates and determinations can be 'opened up' and they are not binding on the arbitrator or the court: see *eg*, para 6, page vi, Foreword by Chan Sek Keong, former Chief Justice, to Chow Kok Fong, *Security of Payments and Construction Adjudication*, (Lexis-Nexis, 2nd Ed, 2013).

44 I recognise that drawing a line as to when the entitlement to make an adjudication application should cease (if at all) will be difficult. If the measure to be adopted is that of a "reasonable time", what amounts to a reasonable time to bring an adjudication claim will vary with the facts of each case and two people could honestly arrive at different conclusions. Quite often, final accounts and claims take time to be finalised. At times there will be employers or upstream parties who string along their downstream counterparts with endless meetings and negotiations. They may, and do, call for

multiple rounds of substantiating documentation. A downstream party who enters into such negotiations in good faith should not be penalised by being disentitled from bringing his claims to adjudication. He has by then been out of pocket for perhaps large sums of money for work already done and for material already supplied and installed. He should be entitled to avail himself of the adjudication process. However, there may be as I have said instances where the rapid fire timelines of the adjudication process are abused to one party's detriment. In my view, this should be addressed by legislation; the courts should not be left to develop some doctrine of "reasonable time" within which a claimant is entitled to apply for adjudication. I note that the equivalent processes of statutory adjudication in New South Wales and Queensland limit the service of a payment claim, at the latest, to a 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: see s 17(4)(b) of the Building and Construction Industry Payments Act 2004 (No 6 of 2004) (Qld) and s 13(4)(b) of the Building and Construction Industry Security of Payment Act 1999 (No 46 of 1999) (NSW).

45 It seems that the authoritative construction placed on s 10(1), s 10(4) and Regulation 5(1) by the Court of Appeal in *Terence Lee* has the effect of allowing a claimant to make a payment claim, sit on it until some two years or so after all construction work in relation thereto has ended, and only then spring an adjudication application. It may well be counter-argued that this is only a theoretical possibility as no contractor or subcontractor would wait for so long to be out of pocket. Yet, experience in the construction industry tells a different story.

46 I say no more as there is insufficient evidence before me and this issue does not arise for decision. If the view I have expressed above is wrong because of the implications of s 10(4) of the Act, *viz*, there is an entitlement to payment for work done or material supplied and this entitlement continues to exist until it is extinguished by payment or by operation of the Limitation Act (Cap 163, 1996 Rev Ed), then I suggest this issue should be looked at again to see if it is consistent with the overall scheme of building contracts and their dispute resolution processes.

Whether the Third PC is invalid for being a repeat claim

47 The final irregularity alleged of the Third PC is that it is invalid for being a repeat claim. As mentioned above at [10], the claim number, the claimed amount, particulars of claim and enclosures of the Second PC and Third PC are identical.

48 Recently, Woo Bih Li J in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*") addressed the issue of whether s 10(1) of the Act prohibits the making of a repeat claim, which he defined as "one which merely repeats an earlier claim without any additional item of claim, whether for additional or repair work or otherwise although of course it may and should give credit for any payment received since the earlier claim was made": *JFC Builders* at [47]. Woo J found at [67]–[68] and [76] that:

> 67 …s 10(1) [of the Act] does impliedly preclude a claimant from making a repeat claim. Otherwise there would be no purpose in having s 10(1). Furthermore, it is because s 10(1) contains this implied prohibition that s 10(4) starts off by stating "Nothing in subsection (1) shall prevent ...". If there is no prohibition in s 10(1) in the first place, then the starting words in s 10(4) are unnecessary. …
>
> 68 It also seemed to me that it is an abuse to allow a claimant to make repeat claims which he will do if, for example, he has missed the deadline under SOPA to serve his earlier payment claim. Indeed, the deadline to do so would also be rendered largely nugatory if he can resurrect a new

deadline by merely issuing and serving a repeat claim.

…

76 In the circumstances, I was of the view that a claimant is precluded from making a repeat claim. Section 10(1) is an important part of the scheme under SOPA and it is the legislative purpose that a breach of s 10(1) renders the payment claim invalid.

49 Woo J also considered the Court of Appeal's observations in *Terence Lee* regarding payment claims which have not been paid or which were only partially paid and which were not yet adjudicated upon under the Act. In *Terence Lee* at [92], the Court of Appeal said:

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

[emphasis added]

50 Faced with the italicised text above, Woo J's response was that it was not clear whether the Court of Appeal was referring to a repeat claim as defined by him (see [48] above) or not. Moreover, Woo J noted that the Court of Appeal gave no reasons for its view in this regard: *JFC Builders* at [78].

51 Whilst I may instinctively empathise with the view of Woo J, given the possibility of abuse which was alluded to and the proffered construction of s 10(1), I think the Court of Appeal's decision in *Terence Lee* has put the matter beyond doubt. The preliminary observation that must be made is that the Act does not use the expression "repeat claim". Accordingly the first thing to clarify is what exactly is meant by a "repeat claim". That phrase is used by practitioners (including lawyers, quantity surveyors, architects, engineers and claims consultants) in the construction industry and has therefore passed into the lexicon of the courts. The concept may have been introduced from the Australian cases but there are differences between the Australian legislation and our Act. In New South Wales for example, s 13(5) of the Building and Construction Industry Security of Payment Act 1999 (No 46 of 1999) (NSW) (as amended in 2002) provides that a claimant "... *cannot* serve more than one payment claim in respect of each reference date" (emphasis added). Unless we are clear as to what is meant by a "repeat claim", we may well be debating at cross-purposes.

52 *Terence Lee* made clear the following in relation to "repeat claims":

(a) First, a subsequent payment claim can include a sum which has been previously claimed (and therefore in one sense a "repeat" claim), but has not been paid. S 10(4) of the Act specifically deals with this. *A fortiori*, I would imagine that if a piece of work was done within the relevant month but not included for any reason in the relevant payment claim, there cannot be a bar against it being included in a later payment claim.

(b) Secondly, where a payment claim has been made, but has not been adjudicated upon, *eg*, because no adjudication application was made, it still remains an "unpaid" claim and could be the subject matter of a later payment claim and adjudication; see *Terence Lee* at [92]. For example, a claimant may choose not to lodge an adjudication application as he is too tied up trying to carry out his works or the requirements in s 12 of the Act were not or not yet satisfied; therefore the subsequent payment claim may include ("repeat") items in common and they nonetheless remain unpaid claims for the purposes of s 10(4) of the Act.

(c) Thirdly, a payment claim that has been dismissed by an adjudicator for being served prematurely or as an untimely claim under reg 5(1) or a premature adjudication application may be the valid subject of a subsequent adjudication provided it was not adjudicated upon and dismissed on its merits; it does not provide any ground for an estoppel.

(d) Fourthly, a payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication.

53 I accept that the Court of Appeal in *Terence Lee* did not expressly say that claimants could incorporate an unpaid payment claim into a subsequent payment claim which is *empty* in content (*ie*, with no claim for new work done). However, I think it follows from the foregoing that there is no prohibition against a "repeat" claim unless it falls within [52(d)]: see also the extra judicial comments by Chan Sek Keong, former Chief Justice who delivered the judgment in *Terence Lee*, in the Foreword to Chow Kok Fong, *Security of Payments and Construction Adjudication*, (Lexis-Nexis, 2nd Ed, 2013). In principle this must be correct, *viz*, that any payment claim or claims, even if "repeated" in more than one payment claim, can only be the subject, on the merits, of one adjudication.

54 That leaves open the question of the case where a claimant brings, say 10 items of claim, but the adjudicator makes awards on six items, dismisses three and says nothing about the last item. I say no more as this situation does not arise in the case before me.

55 In the present case, it is clear to me on the evidence that the Third PC, which formed the basis of the adjudication below, is a repeat claim in that it is identical to the Second PC. [note: 20] However, for the reasons set out above, Admin Construction's contentions that the adjudication determination is invalid as it is based on a "repeat" claim must fail.

56 Vivaldi raises two arguments in relation to the Second PC. It first says that it had no intention to adjudicate upon the Second PC as the document was merely a draft not intended to be sent out and in any case was mistakenly sent out. [note: 21] However, as I noted at [35], the emphasis is not on the claimant's intention since a payment claim is not invalid if it otherwise satisfies all the formal requirements in s 10(3)(*a*) of the Act and reg 5(2) of the SOPR. In this case, I find that the Second PC satisfies these requirements. However, as *Terence Lee* makes clear, Vivaldi was entitled to choose not to proceed to adjudication at that juncture.

57 Vivaldi next argues that Admin Construction is estopped from raising the issue of the Third PC being a repeat claim as it had ample opportunity to do so at the adjudication conference below but failed to do so. [note: 22] For convenience I repeat the relevant facts, *viz*., that Admin Construction had not filed a valid payment response and had not raised the issue of the Third PC being a repeat claim; its main defence (raised only in a belatedly and therefore invalidly filed adjudication response) was the Settlement Agreement which the adjudicator found that he could not consider due to s 15(3) of the Act.

58 An estoppel of this kind was discussed first in *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848 ("*TPX Builders*"). Andrew Ang J held that because RN & Associates (the respondent in the adjudication) had raised no objection to the claimant TPX Builder's payment claim, it was estopped from arguing at the setting aside stage that the payment claim was invalid: *TPX Builders* at [35]. Ang J reasoned that to allow the respondent to dispute the validity of the payment claim before the court where it had not done so before the adjudicator was to allow open-ended adjudication of the validity of the payment claim, which was the very thing that the Act sought to avoid. The learned Judge found support for his position in the New South Wales case of *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1.

59 A contrary position was taken by Woo J in *JFC Builders*. In discussing *TPX Builders* he said that a payment claim made in breach of the Act would undermine the jurisdiction of the adjudicator and therefore the validity of his rendered determination: at [35]. Accordingly neither s 15(3) of the Act nor estoppel should preclude a respondent from challenging the validity of the payment claim in an action for setting aside. Woo J pointed to *Terence Lee* at [64]–[65] for the proposition that a dispute over the validity of the payment claim was an issue to be determined by the court and not the adjudicator and repeated this reasoning in the recent case of *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] SGHC 56 at [36]:

> The formal validity of a payment claim under s 10(3) of the Act is therefore not a matter on which an adjudicator is entitled to decide; and in this regard, it would be superfluous to raise for the adjudicator's consideration any objection to validity stemming from the lack of detail in a purported payment claim. No question of any estoppel can arise, given that the adjudicator cannot decide on the point even if it is brought up for his consideration.

60 I agree that in *Terence Lee*, the Court of Appeal definitively clarified that a challenge to the validity of a payment claim amounts to a challenge to the validity of the appointment of the adjudicator, *ie* a challenge to the adjudicator's jurisdiction rather than the exercise of such jurisdiction (see [21] above) and that challenges as to an adjudicator's jurisdiction were not matters for the adjudicator himself to decide but rather were matters for the court to decide. Hence, Admin Construction cannot be said to be estopped from raising an argument it could not have raised in the adjudication conference. Therefore, for the reasons already set out, this argument must fail.

61 However some thought should be given to how jurisdictional challenges should be dealt with. In my view the present arrangements are not entirely satisfactory. In *Terence Lee* at [36], the Court of Appeal opined that jurisdictional issues should be raised immediately with the court and not the adjudicator. But the timelines are already tight enough without having to add a layer of court proceedings on to adjudication proceedings. However fast that reference to the court may be, a definitive ruling is unlikely to come before the adjudication timelines are over. What then would be the status of the adjudication in law in the meanwhile?

Whether Admin Construction had served a valid payment response

62 Finally, as to the issue of whether Admin Construction had served a valid payment response, apart from the jurisdictional issues, the Adjudicator has made his finding on this point and the court should not review the merits of the Adjudicator's determination. Admin Construction is therefore precluded from raising this issue before the court.

Whether it is timely for a review of the Act

63 I am told there are many uncertainties in the minds of adjudicators and not all doubts as to the

operation of the Act have been removed by *Terence Lee*. There are valid doubts in the minds of adjudicators as to how they should deal with jurisdictional challenges. I am told there are many more applications before the court. It is timely for the Building and Construction Authority, the Singapore Mediation Centre (the authorised nominating body under the Act) and other stakeholders to discuss these issues and to see if the Act is fulfilling its functions and if not, to consider suitable amendments to the same.

64 In Chow Kok Fong, *Security of Payments and Construction Adjudication*, (Lexis-Nexis, 2013, 2nd Ed), former Chief Justice Chan Sek Keong, states in para 15 of his Foreword:

> Despite the considerable efforts which have gone into the setting up of the statutory regime to make the construction industry financially more efficient, it will be necessary to periodically review and refine various aspects of the Act to ensure that it is able to achieve the policy objectives behind the Act. In so doing, it has to be borne in mind that there will always be a tension between the interests of the contract for timely payment by the employer for work done and the interests of the employer in not being 'ambushed' by the contractor in making a humongous payment claim which could leave the employer with insufficient time to address the merits of the claim. The Act does not distinguish a claim for $100,000 and a claim for $100 million in prescribing time within which the adjudicator must make his adjudication. It is sensible, and also in the interest of the parties, that where the claim is large or complex, the adjudicator should be given more time to deal with the matter without having to seek the consent of the parties (as currently required). The Act also does not provide for the appointment of a new adjudicator in place of an adjudicator who is incapacitated or who discovers that he is in a position of conflict of unable to continue to act for any other reason.

65 In light of my comments above which, it bears repeating, are strictly speaking *obiter dicta*, I offer some questions for the consideration of the relevant authorities and stakeholders. Perhaps some thought should be given to whether challenges to adjudication determinations should in the first instance be heard before assistant registrars as that would add one more layer of appeal. This would cause undue delay, especially if there has been a stay of payment out to the claimant. Some thought should also be given as to whether, in principle, some limits should be imposed on jurisdictional challenges. For example, should there be a statutory estoppel to the effect that a respondent cannot raise a jurisdictional challenge to the court unless it is taken in its payment response (see [61] above)? Should there be a cut-off for adjudication applications (see [44] above) and should "final" claims also be included as "payment claims" without some time limit being put in place? It is timely that these and other issues are reviewed and refined.

Conclusion

66 For the reasons set out above, I allow Admin Construction's application to set aside the adjudication determination as the Settlement Agreement between the parties had extinguished all disputes in relation to the Third PC and there is thus no dispute in relation to the Third PC which was capable of reference to the Adjudicator as at the date of Vivaldi's adjudication application.

67 Costs must follow the event and I award costs to Admin Construction, to be taxed if not agreed.

[note: 1] Para 6 of Yap's affidavit (23 February 2012).

[note: 2] Para 7 of Yap's affidavit (23 February 2012).

[note: 3] Para 8 of Yap's affidavit (23 February 2012).

[note: 4] Para 9 of Yap's affidavit (23 February 2012).

[note: 5] Paras 13 to 14 and p41 of Yap's affidavit (23 February 2012).

[note: 6] Para 15 of Yap's affidavit (23 February 2012).

[note: 7] Paras 17, 23 and 31 of Yap's affidavit (23 February 2012).

[note: 8] Para 19 and p 64 of Yap's affidavit (23 February 2012).

[note: 9] Paras 23 to 28 and pp 76 to 77 of Yap's affidavit (23 February 2012).

[note: 10] Para 31 and pp 174 to 175 of Yap's affidavit (23 February 2012) and pp 55 to 151 and 155 to 340 of the Plaintiff's Bundle of Documents ("PBD").

[note: 11] Para 34 of Yap's affidavit (23 February 2012) and para 5 of Yap's affidavit (9 April 2012).

[note: 12] Para 36 and p 285 of Yap's affidavit (23 February 2012).

[note: 13] Para 37 and p 299 of Yap's affidavit (23 February 2012).

[note: 14] Para 19 of the determination.

[note: 15] Para 43 of Yap's affidavit (23 February 2012) and para 3 of the Plaintiff's written submissions (16 July 2012).

[note: 16] Para 44 of Yap's affidavit (23 February 2012).

[note: 17] Para 3(a) of the Plaintiff's written submissions (16 July 2012).

[note: 18] Para 13 of the Defendant's written submissions (13 July 2012).

[note: 19] Para 74(c) of the Plaintiff's written submissions (16 July 2012).

[note: 20] See pp 55 to 151 and 155 to 340 of the Plaintiff's Bundle of Documents.

[note: 21] Para 21 of the Defendant's written submissions (13 July 2012).

[note: 22] Para 22 of the Defendant's written submissions (13 July 2012).