SINGAPORE CONSTRUCTION ADJUDICATION REVIEW

[2024] SCAdjR

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Commentary and reports on adjudication determinations made with respect to adjudication applications lodged with the Singapore Mediation Centre between 1 January 2024 and 31 December 2024

General editors

EDWIN LEE PENG KHOON
LLB (Hons), MSc (RE), FSIArb
Advocate and Solicitor, Supreme Court of Singapore
Senior Accredited Specialist (Building and Construction Law), Singapore Academy of Law

TAI CHEAN MING
LLB (Hons), BSc (Civil Engineering) (Hons)
Corporate Member, Institution of Engineers, Malaysia
Advocate and Solicitor, Supreme Court of Singapore

CHRISTOPHER CHONG
LLB (Hons), FSIArb
Advocate and Solicitor, Supreme Court of Singapore
Senior Accredited Specialist (Building and Construction Law), Singapore Academy of Law

Singapore Mediation Centre

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Managing Editor, SCAdjR
Singapore Academy of Law
1 Coleman Street
#08-06 The Adelphi
Singapore 179803
Tel No: (+65) 6332 4388 Fax No: (+65) 6333 9747
E-mail: academypublishing@sal.org.sg

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GENERAL EDITORS

EDWIN LEE PENG KHOON is a Senior Director at Allyed Gateway LLC. He is recognised by the Singapore Academy of Law as a Senior Specialist in Construction Law and as a distinguished practitioner in AsiaLaw; and Chambers & Partners has ranked him in Band 1 for Construction. Edwin is the Chairman of the Construction Adjudicator Accreditation Committee, which oversees the selection and assessment of adjudicators. He has conducted hundreds of adjudication cases, as counsel, adjudicator and review adjudicator. He has also argued many of the landmark court cases on construction law and on adjudication. Edwin is also an accredited adjudicator in Malaysia. Apart from his active legal practice in arbitration and in court, Edwin is an Adjunct Associate Professor with the Singapore University of Technology and Design, and a trainer for the Building and Construction Authority on Construction Law. Edwin is the co-author of the books *Confidentiality in Arbitration* (Academy Publishing, 2007) and *Amendments to the SOP Act* (Sweet & Maxwell, 2019). Currently, he is the Construction Law editor for the Singapore Academy of Law's online journal, the *SAL Practitioner*. His book, *Building Contract Law in Singapore* (LexisNexis, 2024), is now into its fourth edition.

TAI CHEAN MING is an advocate and solicitor of the Supreme Court of Singapore and is a director of Chong Chia & Lim LLC. He has an active practice in building and construction law since 1995, both as counsel and as an arbitrator. He is also an accredited senior adjudicator with the Singapore Mediation Centre. He had successfully argued several important cases, including the landmark Court of Appeal case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*. His early training was in civil and structural engineering, having obtained a bachelor degree (with Honours) in Civil Engineering from what was then known as Queen Mary College, University of London. He had practised as a consulting engineer in Malaysia and is a corporate member of the Institution of Engineers, Malaysia.

CHRISTOPHER CHONG is an equity director in Drew & Napier LLC and heads the firm's Construction and Engineering practice. He is an experienced lead counsel who has successfully argued cases at all levels of the Singapore courts, in both domestic and international arbitrations and in adjudications. He specialises in high value construction disputes. Christopher is a Senior Accredited Specialist in Building and Construction Law under the Singapore Academy of Law's Specialist Accreditation Scheme. He is ranked by a number of global legal publications as one of the leading construction lawyers in Singapore. Christopher represents some of the largest international and domestic players in the construction sector, and works on a diverse range of private and public sector projects in Singapore and in the rest of Asia. Christopher is also an accredited adjudicator with the Singapore Mediation Centre and a member of their Adjudication Training Faculty Committee.

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COMMENTARY

COMMENTARY

[2024] SCAdjR

1. CONSTRUCTION CONTRACT

1.1 In *SOP AA068 (2024)*, some interesting jurisdictional issues were raised by the respondent, namely, whether the work carried out was "construction work" within the meaning of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") and whether the contract was sufficiently made in writing to satisfy the requirements under s 4 of the SOP Act. The contract works involved the provision of equipment and labour by the claimant subcontractor for the loading of incinerated waste onto barges at Tuas Marine Transfer Station, and for transporting, unloading and landfilling them at the Semakau Landfill. The respondent was the main contractor.

1.2 On the issue of whether the contract was for "construction work" to bring it within the scope of the SOP Act, the claimant had argued that such works were "land reclamation" as provided in s 3(1)(*d*)(i) and which were defined as "construction works". On the other hand, the respondent argued that the works were in effect merely waste disposal, as no structures were to be erected thereon in the future. It also submitted that the soil that was used to cover the waste which was then levelled were for environmental reasons and not to prepare the land for constructing structures thereon.

1.3 The adjudicator rejected the respondent's objection. He took the view that landfilling was a "subset" of land reclamation. Land reclamation could be carried out by using sand or incinerated waste. Further, even in land reclamation work, loadbearing structures would not be constructed for a long time. In this respect, he opined that it would be artificial to distinguish land reclamation and landfilling by looking at land uses, current or in the future.

1.4 On the respondent's objection that the contract was purely an oral contract and was not therefore within the scope of the SOP Act by virtue of s 4(1), this was rejected by the adjudicator. He accepted the claimant's submission that, while the contract was not wholly made in writing, the

disputes between the parties were in writing, so as to bring it within the scope of the SOP Act under s 4(5).

1.5 The decision of the adjudicator has been subsequently affirmed by the General Division of the High Court ("General Division") in *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2025] 3 SLR 39 ("*CGS*"). The case has provided a fuller elaboration of the factual background and the applicable legal principles. This determination is more profitably read together with this General Division precedent.

1.6 In particular, it is noteworthy that the court in *CGS* has adopted a wide interpretation of s 4(5) when deciding whether a contract is treated to be in writing for the purpose of the SOP Act where it is not wholly made in writing. Kwek Mean Luck J opined at [28] that in interpreting the words "matter in dispute between the parties thereto is in writing" in s 4(5), the following principles should apply. First, it is not enough if there is merely written correspondence setting out the disputed position of the parties. Where certain oral terms are in dispute, the dispute relating to these terms must be captured in such correspondence. Secondly, if the parties do not rely on contractual terms but on facts, these facts should be in writing. Finally, a broad approach should be taken in making such assessment, taking into account the commercial context.

1.7 It is fortuitous that the court found that the disputes in question were all in writing and therefore the contract in question fell within the purview of the SOP Act. It is quite common for local building contracts to comprise both oral and written terms which are not wholly in writing. It appears from *CGS* that disputes, both on the contract terms that are not in writing and matters that are related to such terms, have to be captured to some degree in writing to bring such disputes within the purview of the SOP Act.

1.8 It is therefore important, where a contract is not wholly made in writing, to ensure that the disputes that are expected to be germane in an adjudication application but are not captured in the written contract are sufficiently ventilated in prior correspondence before the application is made. If this is not done, the effect may not merely be evidential but may result in a finding that such disputes fall outside the scope of the SOP Act altogether.

1.9 In *SOP AA045 (2024)*, the adjudicator had to determine whether there was a contract made between the parties at all. The claimant's case was that its company director (one "Mr [A]") had agreed on its behalf to provide project management services and tendering services to the respondent. It said that project management service was to be provided by Mr [A] and tendering service by one of its staff. The adjudication application was in respect of these services that were provided.

1.10 The respondent objected to the application on the ground that there was in fact no contract in writing made between it and the claimant. The claimant countered by submitting that the respondent was estopped from making this objection as this was not set out in its payment response.

1.11 The adjudicator found as a fact that this objection was in fact set out in the respondent's payment response. In any case, he was of the view that the "duty to speak" discussed in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 did not arise even if the respondent's objection had indeed been made out, as the payment claim would then have fallen outside the purview of the SOP Act. In addition, he opined that it was his duty to be satisfied that there was a construction contract in writing under s 4 of the SOP Act irrespective of whether an objection in that regard had been made in a payment response.

1.12 The adjudicator, however, noted that an antecedent question, quite apart from whether the contract was in writing, was whether there was a contract made between the claimant and the respondent at all in the first place. The respondent had argued that the contract in question was in fact an employment contract made by it with Mr [A] in his personal capacity. It maintained that there was no contract made between the claimant and the respondent at all.

1.13 The adjudicator had to examine the evidence. After doing so, he opined that, taken as a whole, it was more consistent with the respondent's position that the contract was made between the respondent and Mr [A] personally. In any case, his view was that the claimant and the respondent were not *ad idem* on the essential term as to whom the parties to the agreement were. The evidence, as the adjudicator found, was that Mr [A] believed that he was contracting on behalf of the claimant while the respondent thought that Mr [A] was contracting in his personal capacity. They were not *ad idem* and there was therefore no contract at all made between the claimant and the respondent.

1.14 Next, in *SOP AA332 (2024)*, one of the issues was whether the subcontract was a contract for maintenance works that did not qualify as construction works under the SOP Act. The scope of works in question was in two parts: one, for maintenance services such as the maintenance of mechanical electrical equipment and systems; and two, for "soft services" such as cleaning services, horticulture, pest control and waste disposal. The respondent also argued that the subcontract was not for maintenance works relating to any one building or facility, but was for the provision of maintenance to various buildings.

1.15 The adjudicator dealt with the jurisdictional objection by considering each of the two sets of scope of works and the interpretation of ss 3(1)(*a*) and 3(1)(*c*) of the SOP Act. The adjudicator followed the holding in the

English case of *Nottingham Community Housing Assoc v Powerminster Ltd* [2000] Adj LR 06/30. In that case, the Housing Association employed Powerminster Ltd to carry out annual servicing of gas appliances and also to provide a responsive repair and breakdown service. The issue was whether the services constituted "construction operations" within the meaning of s 105 of the Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ("HGRA"). Dyson J held that the maintenance of systems fell within the definition of "construction operations" under s 105 of the HGRA.

1.16 The adjudicator went on to consider that works done in relation to "soft services" did not qualify as construction work in so far as they were not cleaning works performed in the course of maintaining the mechanical and electrical systems, and therefore did not allow the claim for such works.

Precast: supply or construction contract?

1.17 The amendments to the SOP Act that came into effect on 15 December 2019 under the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) made clear that the scope of the SOP Act was expanded to include the overseas production of prefabricated components supplied for construction work to be carried out in Singapore as well as prefabricated components in Singapore intended for overseas projects where the contracting parties are Singapore entities.

1.18 In *SOP AA203 (2024)*, the dispute between the parties was whether a precast concrete subcontract was a supply contract or a construction contract under the SOP Act. The claimant took the position that it was a construction contract, whereas the respondent argued that it was a supply contract. The outcome was relevant because of the different applicable timelines and hence whether the adjudication application was lodged prematurely or within time.

1.19 The respondent argued that a contract for the prefabrication of components under s 3(1)(*d*)(v) must be carried out inside Singapore to be a "construction contract" under the SOP Act. As the prefabrication works were carried out outside Singapore in Malaysia, the definition of "construction works" under s 2 of the SOP Act, which provides that prefabrication works may include works or prefabrication carried out offsite, did not apply.

1.20 This argument was correctly rejected by the adjudicator, who determined that s 4(3)(*a*) of the SOP Act provided that the Act "applies to a contract that deals with the prefabrication (whether in or outside Singapore) of components that will form part of any building, structure or works, where the contract is for the supply of these prefabricated components for construction work to be carried out on a construction site in

Singapore", and that it is clear from an ordinary reading of s 3(1)(*d*)(v) of the SOP Act that prefabrication works "to form part of any building, structure or works whether carried out at or on the construction site or elsewhere" are statutorily deemed to be construction contracts.

2. PAYMENT CLAIM

2.1 In *SOP AA233 (2024)*, the respondent argued that the payment claim was invalid as it was a contractual payment claim instead of a payment claim made under the SOP Act. The contract contained two distinct clauses: one for the submission of payment claims under the SOP Act ("cl 31"), and another entitled "Alternative Progress Payments" ("cl 32") for the submission of progress claims if the contractor did not intend to submit its claim under cl 31. Under cl 32, the contractor had to refer to the clause in its payment claim if the claim was made under the clause.

2.2 The claimant not only did not refer to cl 32 in its payment claim, but it had expressly referred to the claim having been made under the SOP Act. The adjudicator therefore had no difficulty in concluding that the claim was made under the SOP Act. Further, the adjudicator applied the Court of Appeal's holding in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 that if a payment claim complied with the requirements of the SOP Act and regulations, it should be treated as a payment claim under the SOP Act.

3. PAYMENT RESPONSE

Time for service of payment response

3.1 *SOP AA228 (2024)* is one of the earliest adjudications impacted by the case of *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 ("*Hiap Seng*"). In *Hiap Seng*, the General Division held that a payment response that was served before the date of deemed service of a payment claim under the SOP Act was invalid. For further discussion on the case, see Edwin Lee, "It Is About Time: Navigating Timelines for Adjudication, Payment Claims and Payment Responses" [2024] SAL Prac 19.

3.2 In *SOP AA228 (2024)*, the claimant submitted its payment claim on 10 July 2024. Since the contract between the parties was silent as to the time for submission of payment claims, s 10(2)(*a*)(ii) of the SOP Act read with reg 5 of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations") deemed the payment claim to be served on 31 July 2024. The respondent issued its payment response on 29 July 2024. Applying *Hiap Seng*, the adjudicator found the payment response to be invalid. He did not accept the respondent's argument that a payment response that was served before a payment claim was submitted

to be deemed to have been served after the payment claim. He considered it untenable to allow the payment response to be valid regardless of the date of submission of payment claims.

3.3 We observe that while there is a deeming provision for the issuance of a premature payment claim under s 10(2) of the SOP Act so that the payment claim would be saved from being invalid, there is no corresponding deeming provision for any early service of a payment response. This is something that may need to be looked into in any future revisions to the SOP Act.

3.4 In *SOP AA146 (2024)*, the relevant contract incorporated the Singapore Institute of Architects' SIA Building Contract (Without Quantities) 2016 ("SIA Conditions"). Clause 40(2) of the SIA Conditions provides that "[t]he Employer shall be entitled to serve a payment response as defined in Section 11 of the SOP Act within 21 calendar days of receipt of the aforesaid payment claim from the Contractor." The relevant contract, however, contained a "Tender Appendix" which provided that the "Period of Issuing Interim Certificates" under "Clause 31(3)" to be "14 days".

3.5 The claimant relied on cl 40(2) of the SIA Conditions and argued that the respondent had 21 days to serve its payment response. The adjudicator disagreed and determined that the respondent had 14 days to serve its payment response because he took the view that the aforesaid 14-day period referred to in the Tender Appendix applies to the time period for the service of the payment response.

3.6 With respect, this conclusion appears to us to be erroneous. It appears to us that the SIA Conditions contemplate that the interim certificate issued by the architect and the payment response served by the employer are different things. Hence, cl 40(1) of the SIA Conditions makes it clear that cl 40 "shall set out the agreement of the parties as to the timelines permitted by the SOP Act …". In the context of the relevant contract in the adjudication, cl 2.3.9 of the letter of award makes this even clearer, because it contains a deeming provision which deems the payment certificate issued to be the employer's payment response where the employer does not issue a payment response.

4. ADJUDICATION APPLICATION

Timelines

4.1 *SOP AA040 (2024)* concerned a supply contract. The adjudicator had to decide whether the adjudication application was made in accordance with the timeline requirements set out in s 13(3)(*a*) of the SOP Act.

4.2 For a "supply contract", the SOP Act does not require a respondent to serve a payment response as is required for a "construction contract". Section 11(2) of the SOP Act, however, requires a respondent who does not agree to pay to raise objections in writing by the due date of payment. This due date dictates the start date of the period within which the application has to be submitted, as provided under s 12(4). The adjudicator noted that s 8(3) of the SOP Act provided that the due date for payment of a payment claim for a supply contract was the earlier of two dates: (a) under s 8(3)(*a*), the date as specified in or determined by the contract; and (b) under s 8(3)(*b*), the date immediately upon the expiry of 60 days after the service of the payment claim.

4.3 The adjudicator noted that the 60-day period under s 8(3)(*b*) did not apply, as the contract had provided for a due date which was earlier than the due date provided under s 8(3)(*b*). His focus was therefore on s 8(3)(*a*), that is, what was the due date for payment provided under the contract.

4.4 It was not in dispute that the due date of the claimed amount provided under the contract was 45 days after receipt of the payment claim. There were four public holidays within this 45-day period. The dispute was whether these public holidays should be excluded. The respondent contended that they should not be excluded in the computation of the 45-day period which would then result in the adjudication application having been lodged late and liable to be dismissed. Not unexpectedly, the claimant took the opposite position.

4.5 To this end, the adjudicator reviewed the contract for a number of terms therein relating to the word "day". He concluded that the 45 days agreed in the contract were calendar days and therefore included public holidays. In particular, he placed weight on the fact that the claimant had specifically requested for the deadline of the provision of certain documents "… within three (03) days of such written request" to be amended to "14 business day", which would suggest that the parties had understood the word "day" in the contract to refer to calendar days.

Two adjudication applications

4.6 In *SOP AA054 (2024)*, the adjudicator had to decide whether the claimant was precluded from making the adjudication application in view of an earlier application that was lodged. After the earlier application was lodged with the Singapore Mediation Centre ("SMC"), the claimant appeared to have realised that it was lodged prematurely. It then withdrew this earlier application and submitted another adjudication application within the validity period for an adjudication application by relying on the same payment claim.

4.7 The respondent objected to the later application on the following grounds: (a) that the claimant had no entitlement to lodge a second application with respect to the same payment claim; and (b) it was prejudiced by the second application as it had already spent expenses in submitting an adjudication response to deal with the earlier application.

4.8 The adjudicator found that the earlier application was prematurely lodged but he held that this did not preclude the claimant from lodging the second application. He was of the view that whilst s 13 of the SOP Act may be seen as only allowing one adjudication application to be lodged, it operated only after the entitlement to apply had arisen under s 12. In this case, there was only one application lodged within the entitlement period. The adjudicator also rejected the respondent's submission that it had suffered prejudice, as: (a) there was no compelling reason to read the requirement of prejudice to decide whether the claimant was precluded from filing the second application into the SOP Act; and (b) the expenses incurred in the first application was irrelevant as they could not have been recovered by the respondent in any event.

4.9 In coming to his view, the adjudicator appeared to place emphasis on the fact that the claimant's entitlement to lodge its first application had not arisen and that a premature application did not count as an application under s 13. If that is the correct reading of his decision, it will seem to us that the adjudicator would not have been concerned whether a premature application was withdrawn, as it would have been irrelevant to the validity of the second application.

4.10 This decision does not cover the situation where two applications are lodged within the entitlement period, with the first being withdrawn before the second is lodged. Even in such a situation, it appears to us that there is nothing in s 13 to render the second application invalid.

4.11 We should add that the adjudicator also noted that an adjudicator had no power to deal with conduct amounting to abuse of process (assuming that there was abuse in submitting a repeated application), as there was nothing in the SOP Act expressly allowing him to do so.

Electronic submission

4.12 In *SOP AA036 (2024)*, the payment claim and the payment response contained in the adjudication application forwarded by the SMC to the adjudicator as soft copies via a Google Drive link were corrupted or damaged, and could not be opened by the adjudicator. On 5 February 2024 (at 6.59am), the adjudicator sent an e-mail to the claimant to request for further copies of the affected documents. Very shortly, at 9.09am on the same day, the claimant attached these documents in an e-mail to the adjudicator with copies to the respondent and the SMC.

4.13 The adjudicator was of the view that there was a failure to properly submit the relevant payment claim and payment response in compliance with s 13(3)(*c*) of the SOP Act read with reg 7(2)(*e*) of the SOP Regulations. The adjudicator requested for submissions from parties as to whether this failure could amount to a patent error leading to the dismissal of the application.

4.14 The claimant explained that the documents appeared to be in good order and accessible at the time they were uploaded to the Google Drive platform but could have been corrupted during the time of transmission to the SMC.

4.15 The adjudicator considered the case of *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481, where Kannan Ramesh JC opined that "non-compliance with s 13(3)(*c*) read with reg 7(2)(*e*) would not result in invalidity of the application, in light of the legislative purpose of the Act." The adjudicator also found that the respondent did not suffer any prejudice. Therefore, relying on s 16(4), she accepted the application.

4.16 We note that many adjudication applications are submitted to the SMC electronically through the internet. The SMC had made rules governing electronic lodgment in the Supplementary Rules for Electronic Adjudication Lodgment (2nd Ed, 2020). Under r 2.4, it is the sole responsibility of the party lodging the documents to ensure, *inter alia*, the completeness and integrity of the documents. In this instance, the adjudicator was much influenced by the fact that the respondent suffered little prejudice. If prejudice was indeed suffered, the outcome might have been different. It would be prudent for any party submitting documents electronically to the SMC or to the counter party to take additional steps to check that these documents are complete, not damaged and can be retrieved after they have been uploaded to the Google Drive platform.

New documents in adjudication application

4.17 In *SOP AA337 (2024)*, the respondent objected to the fact that the claimant did not provide all relevant supporting documents with its payment claim, but had only sought to provide them in the adjudication application. This, the respondent argued, was in breach of cl 22.1.1 of the REDAS Design and Build Conditions of Main Contract (3rd Ed) ("REDAS Contract"). As a result, the claimant should not be able to rely on the new documents in its adjudication application. The respondent relied on para 22.8 of Chow Kok Fong, *The Singapore Developers Design and Build Contract: Commentary on the REDAS Design and Build Conditions of Contract* (Lexis Nexis, 3rd Ed, 2014) and an adjudication determination in Adjudication Application No SOP/AA 156 of 2017 ("SOP/AA 156 of

2017"). The respondent further asserted that the claimant should not be allowed to rely on the SOP Act to circumvent compliance with the contractual certification mechanism.

4.18 The REDAS Contract cl 22.1.1 provides as follows:

> 22.1.1.The Contractor shall serve on the Employer with a copy to the Employer's Representative a Payment Claim on the last day of each month following the month in which the Contract is made (or otherwise by such time or on such day as stated in Appendix 1) showing the amount which the Contractor considers himself to be entitled for that month together with the relevant supporting documents …

4.19 The adjudicator determined that cl 22.1.1. of the REDAS Contract did not preclude a claimant from supplementing or providing additional supporting documents in its adjudication application. The clause was not intended to and cannot limit or curtail the power of the adjudicator to consider such documents accompanying the adjudication application under s 17(3) of the SOP Act. The submission of relevant supporting documents with the progress claim was not a condition precedent to the claimant's entitlement to be paid for work done. It also would not limit the claimant's entitlement to payment to only the amount valued by the employer's representative in the interim payment certificate or payment response based on the documents submitted with the progress payment claim in an adjudication. In this regard, the adjudicator did not follow the determination in SOP/AA 156 of 2017, which did not consider the effect of ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act.

4.20 The adjudicator also noted that under s 13(3)(*e*) of the SOP Act, an adjudication application "may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondence and submissions) as the claimant may consider to be relevant to the application". This provision allowed the claimant to submit further and new supporting documents in an adjudication application. If a claimant failed to do so in the adjudication, the claimant was at risk of having its claim rejected for not discharging its burden of proof on a *prima facie* basis. The adjudicator did not agree with the respondent's argument that having regard to ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act will result in the claimant circumventing the contractual mechanism on progress payment. The adjudicator opined that the parties' substantive rights under the subcontract were not altered. The respondent's argument had conflated two different procedures: the claimant's obligation to submit supporting documents to the employer's representative and the claimant's duty to discharge its burden of persuasion before an adjudicator in an adjudication under the SOP Act.

4.21 Finally, the adjudicator also determined that if indeed cl 22.1.1 of the REDAS Contract had the effect advanced by the respondent, it would be an attempt to circumvent ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act.

Claim based on more than one contract

4.22 It is well established that a payment claim can only be based on not more than one contract: *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584. In *SOP AA221 (2024)*, the responded argued that the payment claim was based on several quotations, and hence based on several contracts.

4.23 The adjudicator examined the quotations and found that the title of each of the quotations supported the claimant's position that the quotations were meant to be variations to the subcontract. They were described as being quotations for additional works. Further, the claimant had, over the course of the works, always submitted only one payment claim.

4.24 The respondent argued that the quotations contained a clause stating "[i]n case of discrepancy, this quotation shall take precedence" and that such a clause would be unworkable if they were all part of one contract, as no quotation would then be able to override the other since each of them was supposed to take precedence. The adjudicator did not accept this argument. He opined that the clauses were just standard *c*lauses in the quotation, and it could not be inferred just by such a clause that the parties had therefore intended to enter into separate contracts.

4.25 Additionally, the adjudicator also decided that because there was no payment response issued by the respondent, and the objection to the payment claim being based on several contracts was not a patent error, the respondent was precluded by s 15(3) of the SOP Act from raising such objections.

Scope of adjudication application

4.26 *SOP AA002 (2024)* concerned a case where the adjudicated amount was higher than the amount claimed in the payment claim. The sum claimed in the payment claim was $90,677.93, which was derived by deducting the cumulative sum "previously certified" from the cumulative price of work done. The sum claimed in the adjudication application, however, was for a much higher sum of $301,950.57. The increase was due to the claimant's inclusion of sums within the "previously certified" sum but which had not been paid in full.

4.27 The adjudicator took the view that as the "previously certified" sum was not fully paid, he had to replace this sum with the "amount previously

paid". In the end, he determined that the adjudicated amount was $265,242.65.

4.28 In doing so, we note that the adjudicator had not only adjudicated on the $90,677.93 claimed in the payment claim, but had also widened the scope of the adjudication by including other sums. Understandably, the payment response submitted did not appear to have dealt with those additional claims at all that were subsequently made in the application. The High Court had stated in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [101] that the payment claim fixed the parameters of the substantive content of an adjudication application subject to any additional issues introduced by a duly served payment response. It therefore appeared to us that the adjudicator had gone further than what was permissible and, to that extent, we find that his approach, while convenient, was wrong.

4.29 In *SOP AA037 (2024)*, the respondent raised a preliminary objection to the application on the ground that the payment claim ("PC57") contained two items which had already been claimed in a previous claim ("PC56"). The respondent had issued a payment response ("PR56") to PC56, with a response amount lower than the amount claimed. This was accepted in writing by the claimant. As payment was not received by the payment due date, the claimant commenced adjudication proceedings ("SOP 36") and obtained a determination for the accepted response amount. The respondent argued that s 17(7) of the SOP Act prohibited the claim for these two items as they were repeat claims which had already been adjudicated upon.

4.30 After comparing PC56 and PR56, the adjudicator concluded that the two items were not in fact part of PR56 which was accepted by the claimant. They therefore could not have been before the adjudicator in SOP 36. Citing *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061, the adjudicator found that the claimant was entitled to roll up these two items in a later payment claim which would still be amenable to adjudication.

4.31 Further, the adjudicator noted at [63] that the application in SOP 36 was based on an accepted but unpaid payment response under s 12(1) of the SOP Act. She opined that it was significant that this was not an application under s 12(2)(*a*), which concerned a disputed payment response, which "… invariably involves a holistic assessment of the competition between the sums claimed and responded". It is not entirely clear, but it appears that the adjudicator also took the view that even if these two items had been before the adjudicator in SOP 36 and had been adjudicated upon, the fact that the application was made under s 12(1) meant that there was no assessment on the merits and that they would still be capable of submission for adjudication again. If this was the case, it is unclear whether this aspect of

the decision was correct; the issue will have to be revisited in a later case with fuller arguments.

4.32 The respondent also objected to the claim for goods and services tax ("GST") in the adjudication, as this was not expressly claimed for in the payment claim. The adjudicator rejected this objection. She opined that the claim amount which was described as "Total amount for this claim (Before GST)" must have meant that GST would eventually be applied as the claimant is a taxable entity under the Goods and Services Tax Act 1993 (2020 Rev Ed). She also took into consideration the past conduct of parties where the respondent would pay the prevailing GST even though the claimant did not include it in its payment claim.

5. DETERMINATION

Burden of proof

5.1 In *SOP AA116 (2024)*, the claimant claimed a sum of $250,481.28 for work performed but the adjudicator concluded, after reviewing the materials provided by the claimant, that the claimant only provided two photographs of 20 pieces of steel delivered to the site and a steel plate cover for grating protection at site as evidence of work performed. When asked by the adjudicator to provide evidence that they performed the work claimed by them, the claimant took the position that it was the respondent who had to prove that third parties had done the work claimed by the claimant, rather than the claimant having to prove that they had performed the work claimed by them on a *prima facie* basis.

5.2 The adjudicator correctly determined that this position was wrong and contrary to the Court of Appeal's decision in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979, where it was held at [26] that an adjudicator "must satisfy himself as to whether the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and, if so, what the value of that work is", and that "an adjudicator should not simply rubber-stamp any payment claim". The court also held at [65] that "the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim."

5.3 In the adjudicator's view, to establish evidence of work done on a *prima facie* basis, he would expect the claimant to provide photographs, site reports or assessments by quantity surveyors of their work done. As the claimant only provided the two said photographs, the adjudicator determined that the claimant has failed on a *prima facie* basis to provide evidence of work done and dismissed the adjudication application.

5.4 In *SOP AA193 (2024)*, the adjudicator considered what was meant by "[a] claimant has to establish a *prima facie* case" and found guidance from the recent decision of the General Division in *Mak-Levrion Kah Kay Natasha v R Shiamala* [2024] 4 SLR 616 ("*Mak-Levrion Kah Kay Natasha*") in the context of summary judgment proceedings under the Rules of Court 2021:

> 16 Accordingly, to obtain summary judgment, a claimant must discharge his burden of showing that he has a *prima facie* case for his claims. If he fails to do that, his application ought to be dismissed. In this regard, Mr Kho suggested before me that the expression '*prima facie*' suggests a lower threshold to cross compared to the usual civil standard of balance of probabilities before the claimant is deemed to have a viable case. I respectfully disagree for four reasons. First, '*prima facie*' is defined to mean 'at first sight' or 'on first appearance but subject to further evidence or information' (see Bryan Garner, *Black's Law Dictionary* (Thomson Reuters, 11th Ed, 2019) ('*Black's Law Dictionary*') at p 1441). Similarly, a '*prima facie* case' is defined to mean 'a party's production of *enough evidence* to allow the fact-trier to infer the fact at issue and rule in the party's favour' (see *Black's Law Dictionary* at p 1441) [emphasis added]. This does not connote a lower standard. Second, it is unclear to me how this 'lower threshold' can be different from the normal civil standard of proof. Mr Kho did not substantiate this suggestion with any authority. Third, the premise of the summary judgment procedure is that the claimant is entitled to such a judgment because he has such a clear case, *and* the defendant has no viable defence against that clear case. Thus, if the claimant does not have a clear case, then it must follow that the court need not even consider the defendant's defence. Fourth, and more substantively, the label '*prima facie*' is used in this context only because the claimant's case is considered on its own, *without* considering the defendant's defences. Thus, the claimant's case is '*prima facie*' viable only because his case is considered on its face, without considering any counterarguments. While this has not been expressly set out in any decision, this is clear from the courts' approach to summary judgment applications, where the courts first assess the claimant's case on its own. Only after the claimant has established *a prima facie* case, do the courts proceed to evaluate the defendant's case.
>
> 17 Once the claimant shows that he has a *prima facie* case, the tactical burden then shifts to the defendant who, in order to obtain permission to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence (see the High Court decision of *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ('*M2B World*') at [17], citing the High Court decision of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [43]–[47]). The tactical burden which shifts to the defendant is the burden to provide further evidence to rebut an inference that would otherwise be drawn from the evidence provided by the claimant. The court will not grant permission to

> defend if the defendant only provides a mere assertion, contained in an affidavit, of a given situation which forms the basis of his defence (see *M2B World* at [19], citing the High Court decision of *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd* [1998] 1 SLR(R) 53 at [14]). If the defendant cannot satisfy this tactical burden, the claimant would be entitled to summary judgment.
>
> [General Division's emphasis in *Mak-Levrion Kah Kay Natasha*]

5.5 We note that *Mak-Levrion Kah Kay Natasha* held that the *prima facie* test in the context of a summary judgment applications did not connote a lower standard from the balance of probabilities test. If this definition is applied to adjudications, this appears to contradict the Court of Appeal's decision in *Comfort Management* where it was expressly held at [63] that "there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities".

Assessment of quantum

5.6 A frequent issue encountered by adjudicators in considering the substantive merits of an adjudication application is whether an adjudicator can allow a claim where it is not satisfied that the evidence provided by a claimant is sufficient to support the quantum the claimant is claiming. There have been several instances in the past where despite inadequate evidence or unsatisfactory evidence on the quantum of the claim, adjudicators have nonetheless assessed a discounted amount to be payable, on the basis that work had clearly been carried out and the value cannot be nil.

5.7 In *SOP AA159 (2024)*, the adjudicator addressed this difficulty by relying on the principle of pragmatic estimation applied by the High Court in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min*") which both the claimant and respondent agreed may be applicable in an adjudication in an appropriate situation.

5.8 In *Jia Min*, the High Court was not persuaded that an assessment of the quantum of a claim was completely reliable. V K Rajah JC considered that he could either "steeply discount" the assessment of the claim before him or he could, with the available evidence, "attempt to mathematically arrive at the exact estimate of the quantum". He concluded that neither of these approaches were "entirely satisfactory" and decided, instead, to make a "pragmatic estimation" of the amount to be awarded (*Jia Min* at [77] and [78]).

5.9 In this adjudication, the claimant claimed for 95% for an item of work but the adjudicator was of the view that, on the balance of the supporting documents, it cannot be said that it was readily evident that 95% of that

item of work was completed. The adjudicator applied the principle of pragmatic estimation and determined that 85% of that item of work was completed.

5.10 In *SOP AA226 (2024)*, the adjudicator relied on *BAP Pte Ltd v BAQ Pte Ltd* [2019] SCAdjR 225, *BCB Pte Ltd v BCC* [2019] SCAdjR 735 and the High Court case of *Jia Min* at [77]–[78] to also determine that a "pragmatic estimation" may be made, based on available material.

5.11 In that case, the adjudicator was unable to accept that all of the claimed work had been completed as there was insufficient evidence of it. However, he was also not satisfied that there should therefore be no payment to the claimant at all, since work had clearly already been carried out. He then took a pragmatic estimation of the work done and applied a 20% deduction to the claimant's claim to "take into account the gaps" in the claimant's evidence.

5.12 We consider such an approach to be consistent with the interim nature of an adjudication determination. It provides a deserving claimant with some payment for work done as long as the adjudicator is satisfied that work has indeed been carried out, even though the full extent of it cannot be proven. After all, the reverse – not to award any amount at all for work done in the face of some evidence that work had indeed been carried out – would be a less appealing outcome given the SOP Act's objective to facilitate cashflow for those who have carried out construction work.

Variation claims

5.13 In *SOP AA159 (2024)*, the adjudicator considered that the requirements for a claimant to successfully establish that there was a variation to the works had been satisfied. The adjudicator applied the Appellate Division of the High Court's decision in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] 2 SLR 468, which affirmed the general position that in order for a claim to be made for variation work under a construction contract, it was necessary to establish that:

(a) the work was an "extra";

(b) there was an express or implied promise to pay for the work;

(c) the work was instructed by a person with authority to vary the contract; and

(d) any condition precedent to payment had been fulfilled.

5.14 The adjudicator then correctly considered if each requirement was satisfied for the various variation claims made by the claimant and made his determinations accordingly.

Section 17(3)

5.15 In *SOP ARA06 (2024)*, the review adjudicator considered whether a backcharge by a respondent for the costs of deploying resources such as manpower and machinery to carry out the subcontract works on behalf of the claimant, due to the claimant's alleged failure to procure sufficient resources for the project, was a claim for "damages, loss or expense".

5.16 The review adjudicator concluded that it was. He agreed with the adjudicator below that the key wording in s 17(3) of the SOP Act was "related to damage, loss or expense" and gave three reasons for his determination.

5.17 Firstly, in general, these alleged costs incurred arose from purported breaches of contract by the claimant under the subcontract. Secondly, the alleged costs incurred were intended to remedy the respondent's losses. Thirdly, the alleged costs were incurred to mitigate delays. It was apparent to him that the alleged costs incurred by the respondent constituted complex claims of "damage, loss or expense" which was what s 17(3) of the SOP Act was directed at.

Termination of contract

5.18 The definition of "contract" under the SOP Act includes terminated contracts. However, where terminated contracts contain provisions that permit the respondent to suspend payments to the claimant until a date or occurrence of a specified event, the SOP Act will give effect to such provisions.

5.19 In *SOP AA195 (2024)*, the respondent sought to rely on the ground that, as it had already terminated the contract pursuant to cll 30.2.2.3(b) and 30.2.2.4 of the REDAS Design and Build Conditions of Main Contract (4th Ed, 2022) ("REDAS Conditions"), it was no longer liable to make any payment to the claimant by virtue of cl 30.3.1 of the REDAS Conditions. Under cl 30.3 of the REDAS Conditions, under "Effects of Termination for Default", it was stipulated, *inter alia*, as follows:

> In the event of the termination of the employment of the Contractor under clause 30.2:
>
> 30.3.1.the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained …

5.20 The respondent contended that in light of cl 30.3.1, the SOP Act would not apply to the present case or the adjudication application by virtue of s 4(2)(*c*) of the SOP Act, which provides that:

> (2) This Act does not apply to—
>
> …
>
> (*c*) any terminated contract to the extent that—
>
> (i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and
>
> (ii) that date has not passed or that event has not occurred.

5.21 In determining whether the respondent was entitled to rely on cl 30.3.1 and s 4(2)(*c*) of the SOP Act, the adjudicator had to first decide whether the termination by the respondent was proper pursuant to cll 30.2.2.3(b) and 30.2.2.4 of the REDAS Conditions and, therefore, whether cl 30.3.1 was engaged. As the adjudicator correctly pointed out, this was the approach adopted by the General Division in *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 ("*Builders Hub*"). After an involved consideration of the facts, the adjudicator concluded that the respondent was not entitled to rely on cll 30.2.2.3(b) and 30.2.2.4 of the REDAS Conditions, and cl 30.3.1 was therefore not engaged.

5.22 We observe that an analysis as to whether s 4(2)(*c*) of the SOP Act can be relied on by a respondent is a factually intensive exercise and, often, a complicated exercise as well. This appears to be inconsistent with one of the objectives of the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018), which is to remove complex claims from the ambit of the SOP Act.

5.23 In another case, *SOP AA005 (2024)*, the adjudicator articulated and took a pragmatic "high-level" approach. One of the matters that the adjudicator had to determine was whether the claimant was entitled to lodge the adjudication application, given that the contract was terminated prior to the submission of the payment claim to the respondent. The respondent argued that it had terminated the contract on the ground of delay pursuant to cl 12(a) thereof. Clause 12(b) also provided that the respondent was not liable to pay under the contract until the occurrence of certain events, including the ascertainment of damages and expenses incurred as a result of the termination.

5.24 The adjudicator accepted the respondent's case that the contract was terminated pursuant to cl 12(a) of the contract. However, he disagreed with the respondent's submission that after deciding that the said clause was

"engaged", the adjudicator would not be required to decide whether the termination was valid. He opined that *Builders Hub* relied on by the respondent did not support its case but in fact suggested the opposite, *ie,* that he should delve deeper to consider if the termination was valid. However, given the summary nature of adjudication proceedings, he also opined that he would only need to conduct a "high-level" examination of the facts to decide the validity of the termination. He equated the burden of persuasion to that of a *prima facie* case and that this burden rested on the respondent.

5.25 In our view, although s 4(2)(*c*) of the SOP Act is silent as to whether an adjudicator has to decide if a termination is valid, the adjudicator's approach is arguably supported by the General Division decision in *Builders Hub*. Further, if an investigation into the termination is required – even if only at a "high-level" – this will introduce some degree of safeguard to a subcontractor's cashflow being affected by a respondent who may try to terminate a contract vexatiously for the sole reason of delaying payment. A "high-level" approach may be equated to the adjudicator being persuaded on a *prima facie* basis. This will also be consistent with the expeditious nature of these proceedings.

Late payment interest

5.26 *SOP AA277 (2024)* serves as a salient reminder that late payment interest is claimable in an adjudication application. The adjudicator highlighted that s 2 of the SOP Act defined "claimed amount" as "the whole or part of any progress payment claimed by a claimant in a payment claim and includes any interest payable under section 8(5)". That meant that claims for any late payment interest payable under s 8(5) of the SOP Act that was included in a payment claim may be considered by an adjudicator in adjudicating the merits of any claimed amount in a payment claim.

5.27 In the adjudication, the claimant had claimed for a sum that was contractually due and payable upon the project achieving practical completion. The claimant also issued a tax invoice to the respondent. Under s 8(1) of the SOP Act, the amount would hence be due 35 days from the date of the invoice. The adjudicator awarded late payment interest from the due date accordingly.

Conflict of interest

5.28 In *SOP AA149 (2024)*, the claimant made a rare request for the appointed adjudicator to reconsider his appointment. This request was premised on the fact that the adjudicator was acting against the claimant's counsel in a separate dispute, and that due to the nature of certain correspondence from the claimant's counsel to the adjudicator in that

separate dispute, there may be "a risk of perceived conflicts of interest" on the part of the adjudicator.

5.29 The adjudicator disagreed with the claimant. The claimant sent a request to the SMC pursuant to r 6 of the SMC Adjudication Rules (10th Ed, 2024). Following consultation with the Construction Adjudicator Accreditation Committee, the SMC took the position that the adjudicator may remain appointed as adjudicator for that adjudication.

5.30 We highlight that regs 11(2) and 11(3) of the SOP Regulations set out the applicable circumstances where a person is ineligible to be appointed as an adjudicator. The SMC's Code of Conduct for Adjudicators (7th Ed, 2025) sets out various conflict of interest rules in r 3. In addition, the SMC has also published the Practice Direction to Adjudicators 2022, which specifically deals with, amongst other things, conflict of interest in appointment.

5.31 In our view, the SMC was correct to conclude that there were no grounds for the adjudicator to be replaced based on the claimant's counsel's complaint, which does not relate to any conflict of interest *vis-à-vis* either the claimant or respondent.

6. ADJUDICATION REVIEW

Scope of review

6.1 In *SOP ARA15 (2024)*, the issue arose as to whether the review adjudicator had the jurisdiction to also review the adjudication costs ordered by the adjudicator below.

6.2 In *BFK Pte Ltd v BFL Co Ltd* [2021] SCAdjR 656, the review adjudicators had taken the view that the review adjudicators had no jurisdiction to substitute the adjudicator's decision in respect of the costs of the adjudication below. This arose from the review adjudicators' reading of ss 19(7) and 19(8) of the SOP Act; they took the view that as the review process was a creature of the Act, the review adjudicators would only have such jurisdiction as was expressly and specifically conferred on them. They considered the fact that s 19(8) of the SOP Act expressly referred to the review adjudicators having to determine the "costs of the adjudication review" but made no mention of the costs of the adjudication below was indicative of legislative intent that the review adjudicators should not interfere with the costs of the adjudication below.

6.3 The review adjudicator in *SOP ARA15 (2024)*, however, took a different view. He considered that s 19(7) of the SOP Act conferred on a review adjudicator the overarching powers to substitute the adjudication determination with the review determination. Costs orders formed a part of

the adjudication determination below. As such, the review adjudicator considered that he had the jurisdiction to reassess the costs of the adjudication below; s 19(8) of the SOP Act did not limit the jurisdiction as it did not provide that the matters in s 19(8) were the only matters on which the review adjudicator had to render his determination.

6.4 Between the two review determinations, the decision in *SOP ARA15 (2024)* appears to be preferred. As was stated by the review adjudicator in his determination, an award of costs in an adjudication application or a review application was generally guided by the outcome of the application. It would indeed seem incongruous if a review adjudicator's powers extend to overturning the adjudicator's determination but not his assessment of costs.

ADJUDICATION DETERMINATIONS

BHS Pte Ltd
v
BHT Pte Ltd

[2024] SGSOP 1

Singapore Mediation Centre — SOP AA 002 of 2024
Teoh Wooi Sin
26 January 2024

Adjudication Application — *Validity* — *Respondent contending that claimant's adjudication application ought to be dismissed as it lacked details* — *Whether documentary evidence submitted by claimant sufficient*

Adjudicator — *Duties* — *Respondent contending that documents submitted by claimant could not prove sums claimed* — *Whether adjudicator allowed to simply take claimant's assertions without addressing merits of claim*

Payment Claim — *Release of retention sums* — *Claimant seeking release of retention moneys as claimant unable to continue work due to respondent's failure to make payment for work done* — *Whether requirements of subcontract for release of retention sum fulfilled*

Payment Response — *Back charges* — *Assessment* — *Respondent claiming back charges for damaged formwork materials* — *Whether damaged formwork materials fell within definition of defective works or outstanding works* — *Whether case falling within purview of s 17(3) Building and Construction Industry Security of Payment Act (2020 Rev Ed)* — *Section 17(3) Building and Construction Industry Security of Payment Act (2020 Rev Ed)*

Payment Response — *Liquidated damages* — *Respondent contending claimant liable for liquidated damages arising from claimant's act of stopping work* — *Whether requirements stipulated under ss 17(3)(*a*) and 17(3)(*b*) Building and Construction Industry Security of Payment Act (2020 Rev Ed) satisfied* — *Sections 17(3)(*a*) and 17(3)(*b*) Building and Construction Industry Security of Payment Act (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 10(2)(*a*), 10(2)(*a*)(i), 10(3), 11(1)(*a*), 12(2), 12(5), 13, 13(3), 13(3)(*a*), 13(3)(*b*), 13(3)(*c*), 15(1), 16(2)(*a*), 16(3)(*a*), 16(4), 17(1), 17(3), 17(3)(*a*), 17(3)(*b*)

Claimant in person;
Respondent in person.

[Commentary: see para 4.26]

26 January 2024

Teoh Wooi Sin:

1 This is a determination made on 26 January 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("Act") in respect of Adjudication Application No SOP/AA 002 of 2024. This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the Act.

2 The claimant in this matter is [BHS] Pte Ltd ("Claimant') and the respondent is [BHT] Pte Ltd ("Respondent") (collectively, "Parties").

3 For the reasons as enunciated hereinafter, I determine as follows:

(a) The Respondent shall pay to the Claimant the sum of $286,462.06 (inclusive of goods and services tax ("GST")). This is hereby recorded as the adjudicated amount of this determination ("Adjudicated Amount").

(b) The date on which the Adjudicated Amount becomes due would be seven days after this determination is served on the Respondent. This is hereby recorded as the due date for payment of the Adjudicated Amount ("Due Date").

(c) The rate of interest shall be 5.33% per annum on an annual basis from the expiry of the Due Date up to the date of full payment.

4 After considering the extent to which each party succeeded in its case, the costs of the adjudication, being the adjudication application fee of $654 (inclusive of GST) and the adjudicator's fee of $10,464 (inclusive of GST) shall be apportioned between the parties as follows:

(a) the Claimant shall bear 20% of the said cost; and

(b) the Respondent shall bear 80% of the said cost.

Record

Preamble

5 This adjudication application ("AA") is in respect of a subcontract for the "Supply of Labour Including Small Tools and Accessories for Concreting, Formwork and Reinforcement Works" ("Subcontract") entered

into between the Claimant and the Respondent and evidenced by the letter of award dated 1 March 2023 ("LOA") for the proposed erection of one block of eight-storey residential flats (total 34 units) with carparks at the first and second storeys and a swimming pool at the third storey on [xxx] ("Project").

6 The Subcontract is for a provisional sum price of $1,052,028.46 (excluding GST) based on a fixed-price basis with no allowance for any price fluctuation ("Subcontract Sum"). The Subcontract Sum is subjected to remeasurement of the subcontract work done ("Subcontract Work").

7 It is noted that the commencement date and completion date of the main contract ("Main Contract") are 2 May 2022 and 5 June 2024, respectively.

8 The Claimant submitted Payment Claim No 8 ("PC8") on 28 November 2023 for the sum of $90,677.93 (excluding GST) as shown in the payment claim submitted with the AA. It is noted that the claimed amount ("Claimed Amount") as stated in the AA is for a sum of $301,950.57 (excluding GST) which includes not only the claimed amount in PC8 but also those certified amounts in Payment Claims Nos 6 and 7 which have not been paid in full by the Respondent to the Claimant.

9 The Respondent issued Payment Response No 8 ("PR8") on 21 December 2023 certifying a negative amount of $(14,719.09) (excluding GST) ("Response Amount") payable by the Claimant to the Respondent.

10 The Claimant filed a Notice of Intention to Apply for Adjudication on 2 January 2024 and lodged its AA on the next day on 3 January 2024 with the SMC.

11 The SMC had since assigned this AA the reference number SOP Application No AA002 of 2024.

Appointment of adjudicator

12 On 3 January 2024, the SMC offered to appoint me as the adjudicator for this case. I promptly e-mailed the SMC to accept the appointment on the same day. The SMC wrote officially to appoint me as the adjudicator for this case on 4 January 2024.

13 A copy of the AA was served by the SMC on the Respondent on 4 January 2024 through e-mail.

14 In accordance with s 15(1) of the Act, the Respondent had to lodge its adjudication response ("AR") by 11 January 2024.

15 Section 15(1) of the Act provides as follows:

> A Respondent shall, within 7 days after receipt of a copy of an adjudication application under section 13(4)(*a*), lodge with the authorised nominating body a response to the adjudication application".

16 The Respondent filed its AR by the due date of 11 January 2024 in compliance with s 15(1) of the Act.

17 With regard to the rendering of the determination, s 17(1) of the Act provides as follows:

> An adjudicator shall determine an adjudication application —
>
> (*a*) within 7 days after the commencement of the adjudication under section 16(1) or (2) (as the case may be) or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent, if the adjudication relates to a construction contract and the respondent:
>
> (i) has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication; or
>
> (ii) has failed to pay the responded amount, which has been accepted by the claimant, by the due date; or
>
> (*b*) in any other case, within 14 days after the commencement of the adjudication under section 16(1) or (2) (as the case may be) or within such longer period as may have been requested by the adjudicator and agreed by the claimant and the respondent.

18 As the AR was due on 11 January 2024, the commencement date of this adjudication would be 12 January 2024.

19 The due date for my rendering of the adjudication determination would therefore be 26 January 2024, being 14 days after the adjudication commencement date which excludes the day on which the adjudication commenced pursuant to *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298 ("*HP Construction*") since the Respondent had provided its PR8 and filed its AR in compliance with the Act.

20 The Parties agreed to my request dated 14 January 2024 to extend the due date for rendering my adjudication determination from 26 January 2024 to 6 February 2024.

21 However, since I am able to complete the adjudication determination earlier than expected, I wrote to inform the Parties on 23 January 2024 through e-mail that I shall issue my adjudication determination as per the original due date of 26 January 2024 through the SMC.

Adjudicator's role

22 In *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*"), the Court of Appeal (at [64]) decided as follows:

> [T]he only functions of an adjudicator are to: (a) decide whether the adjudication application in question is made in accordance with s 13(3)(*a*), (*b*) and (*c*) of the Act (see s 16(2)(*a*)); and (b) to determine the adjudication (see s 17(2)). If the adjudication application complies with s 13(*a*), (*b*) and (*c*), the adjudicator should proceed with the adjudication. He is not competent to decide whether he was validly appointed to adjudicate the matter …

23 Section 16(2)(*a*) of the Act referred to in *Chua Say Eng* above is the predecessor to s 16(3)(*a*) of the current Act in force and is identical in wording with the exception that it is now subject to s 16(4), as shown below:

> Subject to subsection (4), an adjudicator must reject —
>
> (*a*) any adjudication application that is not made in accordance with sections 13(3)(*a*), (*b*) or (*c*); …

24 Section 16(4) of the Act provides:

> Despite subsection (3), an adjudicator may accept any adjudication application that is not made in accordance with section 13(3)(*c*) if the adjudicator is satisfied that the non-compliance does not materially prejudice the respondent.

25 Section 13(3) of the Act reads as follows:

> An adjudication application -
>
> (*a*) shall be made within 7 days after the entitlement of the claimant to make an application first arises under section 12;
>
> (*b*) shall be made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator;
>
> (*c*) shall contain such information or be accompanied by such documents as may be prescribed; …

26 It is noted that cl 9.6 of the LOA provides:

> The Subcontractor shall serve on the Main Contractor, a payment claim at monthly interval on the last day of each calendar month (the 'reference month') for the value of all works carried out including reasonable projection up to the end of the reference month.

27 Since there is a provision in the Subcontract on the date of serving of a payment claim, s 10(2)(*a*)(i) of the Act shall apply with regards to the time

when a payment claim shall be served on the Respondent. Section 10(2)(*a*) of the Act states:

> A payment claim must be served —
>
> (*a*) not later than:
>
> (i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or
>
> (ii) the date prescribed for the purpose of this subsection if the contract does not contain such terms; …

28 The Claimant served PC8 to the Respondent on 28 November 2023 thus in compliance with the Act.

29 As for payment response, cl 9.9 of the LOA provides:

> Within 21 days (excludes public holiday(s)) after the payment claim is served on the Main Contractor by the Subcontractor, the Main Contractor shall respond to the payment claim by providing a payment response to the Subcontractor.

30 Section 11(1)(*a*) of the Act provides as follows:

> A respondent named in payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (*b*) where the construction contract does not contain such provision, within 14 days after the payment claim is served under section 10.

31 Since there is a provision in the Subcontract on the date of serving of a payment response, s 11(1)(*a*) of the Act shall apply with regards to the time when a payment response shall be served on the Claimant.

32 By virtue of s 10(3) of the Act, which states that a payment claim that is served before the prescribed date mentioned in s 10(2)(*a*)(i) is deemed to have been served on that date, PC8 which was served on the Respondent on 28 November 2023 shall be deemed to have been served on 30 November 2023 which is the prescribed date for serving of payment claim pursuant to the terms of the Subcontract. Correspondingly, PR8, which was issued by the Respondent on 21 December 2023, was issued within time in compliance with the Act.

33 In consequence of the payment response being due on 21 December 2023, the dispute settlement period ("DSP") thereafter will expire on 29 December 2023 after taking into consideration the public holiday on 25 December 2023, in accordance with s 12(5) of the Act, which reads as follows:

> (5) In this section, 'dispute settlement period', in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided …

34 Pursuant to s 12(2) of the Act, the Claimant is entitled to make an adjudication application under s 13 in relation to the relevant payment claim if, by the end of the DSP, the dispute is not settled.

35 The fact that the DSP would expire on 29 December 2023 would mean that pursuant to s 13(3)(*a*) as mentioned above and assuming the Claimant is entitled to make an adjudication application, such an adjudication application must be lodged by 7 January 2024, which is a period of seven days after the expiry of the DSP (excluding the day after the expiry of the DSP, namely, 30 December 2023 pursuant to *HP Construction* ([19] *supra*)), taking into consideration the public holiday on 1 January 2024.

36 In this instance, the Claimant filed a Notice of Intention to Apply for Adjudication on 2 January 2024 and submitted this AA on the next day on 3 January 2024, which was within the timeline in compliance with the Act.

37 Having perused the documents and as explained above, I am of the view that this AA submitted by the Claimant has, *prima facie*, complied with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the Act and that I may therefore proceed to hold an adjudication conference and make a determination on this adjudication.

Adjudication conference

38 I wrote to the parties on 14 January 2024 to schedule an adjudication conference ("Adjudication Conference") to be held at 9.00am on Saturday, 20 January 2024 via video conference. I set a limit of four representatives from each party to attend the Adjudication Conference.

39 At the Adjudication Conference, the Claimant was represented by:

(a) Mr [A] – the Claimant's manager;

(b) Mr [B] – the Claimant's manager; and

(c) Mr [C] – the Claimant's supervisor.

40 The Respondent was represented by:

(a) Mr [D] – the Respondent's director; and

(b) Ms [E] – the Respondent's contracts manager.

Adjudication application

41 The Claimant's claimed amount of $301,950.57 (exclusive of GST) under the AA is different from the claimed amount of $90,677.93 (exclusive of GST) as stated in its PC8.

42 Besides claiming the claimed amount of $90,677.93 in PC8, the Claimant is claiming in its AA the unpaid amount of the claimed amounts for its Payment Claims Nos 6 and 7 ("PC6" and "PC7" respectively) as detailed in the table below. This was verified with and confirmed by the Claimant during the Adjudication Conference.

Description	**AA ($)**	**PC8 ($)**
Value of Works done (remeasured)	658,652.43	658,652.43
Variation No 1 – Work Done	6,708.39	6,708.39
Sub-total:	665,360.82	665,360.82
Less: 10% Retention (Max 5%)	(65,865.24)	(65,865.24)
Less: Previously Certified	(508,817.65)	(508,817.65)
Claimed Amount for PC8:	90,677.93	**90,677.93**
Add: Claimed Amount for PC6	150,024.40	NA
Add: Claimed Amount for PC7	111,248.24	NA
Less: Partial Amount Paid for PC6 & PC7	(50,000.00)	NA
Claimed Amount for AA:	**301,950.57**	NA

43 The Claimant submitted the following documents as attachments to its AA submission:

(a) Notice of Intention to Apply for Adjudication / Singapore Post / e-mail / photos;

(b) Adjudication Application Form;

(c) LOA;

(d) Progress Payment Claims Nos 1 to 5;

(e) Progress Payment Claims Nos 6 to 8; and

(f) related e-mail correspondences.

44 The Claimant submits that it was paid for the amounts certified in Progress Payment Claims Nos 1 to 5 by the Respondent. However, the Respondent only partially paid a sum of $50,000 for the amounts certified

in Progress Payment Claims Nos 6 and 7. The Claimant adds that despite numerous reminders for payment of balance amounts due under Progress Payment Claims Nos 6 and 7, the Respondent has failed to make any further payment to the Claimant.

45 The Claimant contends that a sum of $52,601.42, being 5% of the Subcontract Sum of $1,052,028.46, which was deducted as a retention sum in PR8 ought to be returned to the Claimant.

46 In conclusion, the Claimant is claiming from the Respondent for a sum of $301,950.57 plus the release of the retention sum in full in its AA.

Adjudication response

47 The Respondent submits in its AR that the AA ought to be dismissed with the Claimant bearing all the costs of the adjudication as the Claimant has failed to provide reasons for its disputes while the payment response (PR8) has provided sufficient justifications.

48 The Respondent submitted the following documents as attachments to its AR:

(a) AR submissions;

(b) *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380;

(c) *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13;

(d) *Asian Pacific Building Corp Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300;

(e) PR8 dated 21 December 2023;

(f) the Subcontract;

(g) the Respondent's e-mail dated 29 May 2023 on the Return of Formwork Materials; and

(h) the Respondent's e-mail dated 23 November 2023 on delay.

49 In its PR8, the Respondent provided a negative Response Amount of ($14,719.09), the details of which are as shown in the table below. For ease of comparison, I have included the Claimant's Claimed Amount in its AA in the table below as well.

Description	**AA ($)**	**PR8 ($)**
Value of Works done (remeasured)	658,652.43	644,478.77
Variation No 1 – Work Done	6,708.39	6,708.39
Sub-total:	665,360.82	651,187.16

Less: 10% Retention (Max 5%)	(65,865.24)	(52,601.42)
Less: Previously Certified	(508,817.65)	(513,496.90)
Claimed Amount for PC8:	90,677.93	85,088.84
Add: Claimed Amount for PC6	150,024.40	NA
Add: Claimed Amount for PC7	111,248.24	NA
Less: Partial Amount Paid for PC6 & PC7	(50,000.00)	NA
Less: Previous Cumulative Contra Charges of $1,100.00 (for safety infringement) deducted from the amount due in PR4.	NA	0
Less: Contra Charges	NA	(7,307.93)
Less: Liquidated Damages	NA	(92,500.00)
Claimed Amount for AA:	**301,950.57**	**(14,719.09)**

50 The Respondent submits that an adjudicator is not allowed to simply take the Claimant's words or assertions on the amount payable and award the claims. The Claimant must prove the amount due and the adjudicator must be satisfied that the claims are well supported and borne out by the evidence submitted. The Respondent cites *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [52] to support its position:

> In our judgment, an adjudicator is bound to consider the payment claim before him and cannot make his determination as if the fact that the respondent has not filed a response obviates the need for him to consider the material properly before him. The adjudication does not become a mere formality. The adjudicator is obliged to adjudicate, and in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner: see s 16(3)(*a*) … In this regard, the views of Brereton J in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 ('*Pacific General Securities*') at [82] are to the point:
>
>> … [T]he adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the [NSW] Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.

51 The Respondent adds that a determination on a payment claim without properly addressing the merits of the claim, namely, whether the work identified in the payment claim has been carried out and what is its value, will be void and set aside as shown in the case of *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 ("*Pacific General Securities*") at [86]:

> I have endeavoured to explain above the minimum content of any adjudication: the absence of relevant material from a respondent does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value … by allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak a misconception of what is required of an adjudicator … In short, there would not have been an adjudication, within the meaning of the Act … Accordingly, I respectfully agree with Hodgson JA's tentative view that for an adjudicator to determine a progress payment at the amount claimed simply because he or she rejects the relevance of the respondent's materials is such a failure to address the task set by the Act as to render the determination void.

52 The Respondent further submits that the above position is affirmed in the case of *Asian Pacific Building Corp Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300 ("*Asian Pacific Building*") at [21]–[23]:

> *Is an Adjudicator's Determination Void for Failure to Discharge the Adjudicator's Function?*
>
> 21 A failure to conduct an adjudication of a payment claim, which requires as a minimum a determination as to whether the construction work the subject of the claim has been performed and its value (or whether the goods and services have been supplied and their value) is a failure to comply with a basic and essential requirement of the Act.
>
> 22 The absence of relevant material from the respondent, or presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim without addressing its merits, namely, as a minimum, determining whether the construction work identified in the payment claim has been carried out and what is its value.
>
> 23 Accordingly, there will not be a valid adjudication of payment claim, within the meaning of the Act, if all the adjudicator does is reject the respondent's contentions. As Brereton J said in *Pacific General*: …

53 The Respondent contends that the documents submitted by the Claimant in this AA cannot prove that any of the sums claimed are due and

accordingly the claim must be rejected because the Claimant would have failed to discharge its burden of proof on a balance of probabilities.

54 The Respondent submits that as there was no detail submitted by the Claimant in its AA, it shall respond based on Annex A of the AA Form. The Respondent adduces from Annex A to the AA Form that the Claimant is disputing PR8 and submits that the Claimant has failed to provide its reasons for the dispute.

55 The Respondent avers that it had provided PR8 on 21 December 2023, complete with its justifications and calculations for each item. In addition, the Respondent submits that a list of back charges as listed below was also provided in PR8:

(a) damaged system formwork materials;

(b) fines for safety infringement; and

(c) liquidated damages for delay of 37 days.

Damaged system formwork materials

56 The Respondent submits that it rented the formwork materials from a third-party formwork supplier for the sole use of the Claimant's Subcontarct Work. However, some of the formwork materials were damaged by the Claimant and their return was not accepted by the third-party formwork supplier who invoiced the Respondent for the damaged formwork materials. As a result, the Respondent avers that it is entitled to recover the amount from the Claimant as a back charge pursuant to cl 9.13 of the Subcontract.

57 The Respondent adds that it had informed the Claimant prior to the delivery of the formwork materials on 29 May 2023 via e-mail with regard to the return of the formwork materials in a similar condition as when received, which stated: "You will be receiving the items once delivered, so please make sure that the materials are received in condition as per attached. When return, any materials that are not accepted by the supplier will be charged to you …"

Fines for safety infringement

58 The Respondent submits that the Claimant committed safety infringements during the course of the Subcontract and pursuant to the Subcontract at Appendix B1(J), the Claimant is liable to pay administrative charges for these infringements. The Respondent submits that the details of these infringements are provided in PR8.

Liquidated damages for delay of 37 days

59 The Respondent submits that the Claimant had been in delay for 37 days for its works under the Subcontract, and as a result is liable to pay liquidated damages amounting to $92,500 (37 days at $2,500 per day) as per the Respondent's e-mail dated 23 November 2023 to the Claimant. The Respondent avers that it is entitled to set off the liquidated damages against any moneys due to the Claimant pursuant to cl 9.13 of the Subcontract.

Findings

60 I agree with the Respondent that an adjudicator has to determine a payment claim independently by addressing the merits of the claim, namely, whether the construction work identified in the payment claim has been carried out and what is its value as enshrined in the cases of *W Y Steel* ([50] *supra*), *Pacific General Securities* and *Asian Pacific Building* ([52] *supra*).

61 However, I am unable to agree with the Respondent's contention that the documents submitted by the Claimant in this AA cannot prove that any sums claimed are due hence the AA ought to be dismissed. My reasons are given in the ensuing paragraphs.

62 Firstly, the Claimant has stated clearly in the AA that it is claiming an amount of $301,950.57 from the Respondent for works carried out as contained in PC8 as well as for unpaid amounts for works done contained in PC6 and PC7.

63 Secondly, the Claimant has submitted sufficient documentary evidence to show that the Respondent had entered into a contract with the Claimant on 1 March 2023 for the latter to carry out the supply of labour including small tools and accessories for concreting, formwork and reinforcement works for the Project.

64 Thirdly, from the payment claims and payment responses (Payment Claims Nos 1 to 8 and Payment Responses Nos 1 to 8), and the related e-mail correspondences submitted by the Claimant, there is sufficient documentary evidence including calculations, marked drawings and photos to show that there were works carried out by the Claimant for the Project. In fact, the Respondent had itself certified that some works had been carried out in its Payment Responses Nos 1 to 8.

65 In view of the above, I disagree with the Respondent that the AA ought to be dismissed as it lacks details and the Claimant has failed to prove that any of the sums claimed are due. Nevertheless, I will address the merits of the Claimant's payment claim when I deal with the substantive claim in the subsequent section of my determination.

Substantive claim

66 Based on the AA, AR, PC8 and PR8, it occurs to me that the amount previously paid is not equal to the amount previously certified. This is because the amounts certified for two of the past progress payment claims, namely, PC6 and PC7, have not been paid in full. As such, the amount previously certified would have to be replaced with the amount previously paid to take into consideration the balance amounts certified in the previous payment claims but have not been paid by the Respondent.

67 In addition, I am also unable to agree with the Claimant's approach in advancing its claim in the AA by adding the unpaid claimed amounts for PC6 and PC7 to the claimed amount of PC8. In my mind, the unpaid amount for PC6 and PC7 should rightly be computed based on the certified amounts as reflected in PR6 and PR7, respectively. Alternatively, the claimant should adopt a cumulative claim approach so as to avoid any double counting and/or repeated items of claim.

68 It is pertinent to note that both the Claimant and the Respondent agreed with me that the certified amounts as reflected in PR6 and PR7 should be used to compute the balance amount not paid by the Respondent for PC6 and PC7.

69 It is also relevant to note that the previously certified amount of $(508,817.65) as shown in PC8 is incorrect. The correct amount is $(513,496.90) as pointed out to the Claimant and confirmed by the Claimant during the Adjudication Conference.

70 During the Adjudication Conference, both the Claimant and the Respondent agreed and confirmed that the amount previously paid is $329,543.09 as detailed in the table below:

PC/PR No	PC Amount ($)	PR Amount ($)	Paid Amount ($)	Cumm. Paid Amount ($)
1	12,307.21	6,903.62	6,903.62	6,903.62
2	37,755.50	35,911.54	35,911.54	42,815.16
3	65,240.26	48,984.14	48,984.14	91,799.30
4	107,086.41	67,963.73	67,963.73	159,763.03
5	136,156.01	119,780.06	119,780.06	279,543.09
6	150,024.40	137,409.67	0.00	279,543.09
7	111,248.24	95,444.14	50,000.00	329,543.09
8	90,677.93	-14,719.09	-	329,543.09

71 With the cumulative amount previously paid established, the PC8 and PR8 and their differences are presented in the table below:

Description	**PC8 ($)**	**PR8 ($)**	**Difference ($) (PC8 – PR8)**
Value of Works done (remeasured)	658,652.43	644,478.77	14,173.66
Variation No 1 – Work Done	6,708.39	6,708.39	-
Sub-total:	665,360.82	651,187.16	
Less: 10% Retention (Max 5%)	(65,865.24)	(52,601.42)	(13,263.82)
Less: Previously Paid Amount	(329,543.09)	(329,543.09)	
Less: Back Charges (Safety Infringement) previously deducted in PR4	0	(1,100.00)	1,100.00
Less: Back Charges (Safety Infringement)	0	(2,700.00)	2,700.00
Less: Back Charges (Damaged Formwork)	0	(4,607.93)	4,607.93
Less: Liquidated Damages	0	(92,500.00)	92,500.00
Claimed Amount for AA:	**269,952.49**	**168,134.72**	**101,817.77**

72 Essentially, there are six items which the parties are disputing, as listed below:

(a) value of Subcontract Work done;

(b) retention sum amount and the release of retention sum;

(c) back charges for safety infringements deducted in PR4;

(d) back charges for safety infringements;

(e) back charges for damaged formworks; and

(f) liquidated damages.

Value of Subcontract Work done

73 The Claimant submitted a claimed amount of $658,652.43 for the value of Subcontract Work done in its PC8, while the Respondent certified a response amount of $644,478.77.

74 During the Adjudication Conference, both the Claimant and the Respondent were asked to explain how they carried out the computation of the claimed amount and response amount for the Subcontract Work done. Both the Claimant and the Respondent explained that the value of the Subcontract Work done was computed based on remeasured quantities of

works done for concrete, formwork and reinforcement bars, and the respective rates for these work items in the Subcontract. The quantities for the concrete and formwork were remeasured based on the drawings of the completed elements of building while the reinforcement bars quantities were remeasured based on bar bending schedules.

75 Both the Claimant and the Respondent explained during the Adjudication Conference that the difference in the value of work done amounting to $14,173.66 was due to the differences in the remeasured quantities for the concrete, formwork and reinforced bars.

76 The Claimant confirmed during the Adjudication Conference that as the amount of the difference is not high, it is prepared to accept the response amount of $644,478.77 certified by the Respondent in PR8 for the purpose of this adjudication.

77 After examining the documents contained in the AA, AR, PC8 and PR8, I am convinced that the Claimant has submitted sufficient documentary evidence in the form of computations, marked drawings and photographs to demonstrate, on a *prima facie* basis, that the Subcontract Work identified in its PC8 has been carried out to the tune of $644,478.77 as certified by the Respondent in its PR8. It is pertinent to note that the Subcontract Work has reached level six of the eight-storey Project. The Respondent cannot possibly deny and reject that this amount of Subcontract Work has been carried out by the Claimant as the amount of $644,478.77 was certified by itself in its PR8.

78 In view of the above, I will allow $644,478.77 as the value of Subcontract Work done in my determination.

Retention sum amount

79 During the Adjudication Conference, the Claimant was unable to explain how it derived a figure of $(65,865.24) for the retention sum in its PC8.

80 On the other hand, the Respondent explained during the Adjudication Conference that the retention sum amount of $(52,601.42) in its PR8 was computed based on 5% of the Subcontract Sum of $1,052,028.46 pursuant to cl 9.1 of the Subcontract which states:

> Progress Payment shall be made monthly based on the actual value of work properly executed on site less ten percent (10%) retention. However, the total cumulative amount retained shall not exceed five percent (5%) of the Subcontract Sum or any adjusted Subcontract Sum (taking into account any variation(s)), whichever is higher.

81 When queried during the Adjudication Conference why the value of Variation No 1 ("VO1") was not added to the Subcontract Sum in deriving the retention sum, the Respondent explained that the anticipated remeasured final Subcontract Sum would be lower than the Subcontract Sum of $1,052,028.46 even after taking into account the value of VO1 which is not significant.

82 When prompted during the Adjudication Conference, the Claimant confirmed that it accepts the retention sum to be $(52,601.42) in accordance with cl 9.1 of the Subcontract. However, the Claimant averred that it is claiming the release of the retention sum as stated in its AA.

83 I will deal with the release of the retention sum in the next section of my determination. For now, I will take the retention sum amount to be $(52,601.42) in my determination.

Release of retention sum

84 The Claimant averred during the Adjudication Conference that it is entitled to the release of the full retention sum because it is prevented from continuing with the Subcontract Work. The Claimant argued that since the Respondent had failed to make payment for the work done, it was unable to continue with the Subcontract Work. The Claimant added that it was also prevented from entering the site as the site was locked by the Respondent.

85 In response, the Respondent submitted during the Adjudication Conference that the Claimant is not entitled to the release of the retention sum as the Claimed Amount of $301,950.49 did not include the release of the retention sum. Furthermore, the Respondent added that the conditions for the release of the retention sum as stipulated in cl 9.2 of the Subcontract have not been met by the Claimant.

86 Clause 9.2 of the Subcontract states that: "Release of retention sum shall be as set out in Appendix D to the Conditions of Subcontract". Appendix D to the Subcontract states:

(1) First 2.5% of the retention sum will only be released to the Subcontractor upon Main Contractor's receipt of the Completion Certificate (or Certificate of Substantial Completion, or the Handing Over Certificate, as the case may be) for the Main Contract works and the satisfactory completion of the Subcontract and compliance with the following pre-requisites:

(a) Submission of all jointly executed deeds of indemnities and warranties stipulated in the Subcontract;

(b) Submission of approval of the requisite number of sets of certified 'as-constructed' or 'as-built' drawings;

(c) Submission and approval of all maintenance operating manuals …

(f) The balance will be released upon the Main Contractor's receipt of the Completion Certificate from the Employer/Architect.

87 I agree with the Respondent that the Claimant is not entitled to the release of the retention sum. The Claimant has not submitted any documentary evidence to support that it has completed the Subcontract Work and has fulfilled the requirements and prerequisites of the Subcontract for the release of the retention sum. The Respondent's failure to make payment for work done which resulted in the Claimant's inability to continue with the Subcontract Work does not entitle the Claimant to the release of the retention sum.

88 As such, I will disallow the Claimant's claim for the release of the retention sum.

Back charges for safety infringements

89 From the "List of Back-charges" in PR8, it is noted that there were the following back charges imposed on the Claimant due to the latter's infringements of safety rules during the progress of the Subcontract Work:

S/N	PR No	Safety Infringements Admin Charge	Amount ($)
1	PR4	Admin Charge dated 1 March 2023 (AC/01)	300.00
2	PR4	Safety Offence dated 26 July 2023 (AC/02)	800.00
3	PR5	Safety Offence dated 7 September 2023 (AC/04)	Waived
4	PR8	Safety Offence dated 25 September 2023 (AC/05)	900.00
5	PR8	Safety Offence dated 28 September 2023 (AC/06)	800.00
6	PR8	Safety Offence dated 19 October 2023 (AC/07)	1,000.00
		Total:	**3,800.00**

90 It is noted that the administrative charges for the first two safety infringements amounting to $1,100 were back charged by the Respondent in its Payment Response No 4. The administrative charge for the third safety infringement was waived and those for the last three safety infringements amounting to $2,700 were back charged by the Respondent in its PR8. It is pertinent to note that the last three safety infringements, namely, AC/05, AC/06 and AC/07 are listed in PR8 complete with the notices of safety infringements and photographs showing the safety infringements.

91 In response to my query during the Adjudication Conference, the Claimant narrated that it has an agreement with the Respondent that it accepts all the certified and paid amounts for Progress Payments Nos 1 to 5 and it will not raise any dispute about them. When queried further, the Claimant confirmed that it accepts the deduction of $1,100 for administrative charges due to its safety infringements in PR4.

92 The Claimant further confirmed its acceptance of the deduction of $2,700 for administrative charges due to its safety infringements in PR8 when queried during the Adjudication Conference on whether it had committed the safety infringements as listed by the Respondent in its PR8.

93 In view of the above, I will allow the agreed and undisputed back charges of $3,800 for administrative charges due to safety infringements committed by the Claimant.

Back charges for damaged formwork

94 It is noted from the "List of Back-charges" in PR8 that a total amount of $4,607.93 was deducted by the Respondent in its PR8 for back charges due to damaged formwork materials as detailed in the 13 invoices of the third-party formwork supplier enclosed in PR8.

95 During the Adjudication Conference, the Claimant rejected the deduction of these back charges for damaged formwork materials in PR8. The Claimant denied the Respondent's accusation that the said formwork materials were damaged by the Claimant. The Claimant asserted that the said formwork materials were already in bad condition when they were first delivered to the site.

96 Damaged formwork materials do not, in my opinion, fall within the definition of defective works or outstanding works. As such, the principle as enshrined in the recent Court of Appeal case of *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91, *ie*, the cost of rectification of defects or the value of the outstanding works do not fall within the purview of s 17(3) of the Act, does not apply to the back charges for damaged formwork materials.

97 In other words, the deduction of $4,607.93 for the said damaged formwork materials falls within the meaning of "related to damage, loss and expense" in s 17(3) of the Act which states:

> In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss and 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.

98 When queried during the Adjudication Conference, the Respondent confirmed that there is no provision in the Subcontract for any certificate or other document to be issued for the deduction of back charges for the damaged formwork materials. However, the Respondent mentioned that it had sent an e-mail dated 29 May 2023 to forewarn the Claimant that "any materials that are not accepted by the supplier will be charged to you".

99 In my view, the e-mail cited by the Respondent in the preceding paragraph cannot be taken as a document which satisfy the requirements of ss 17(3)(*a*) or 17(3)(*b*). As such, s 17(3) applies notwithstanding that cl 9.13 of the Subcontract allows set off as shown below:

> The Main Contractor shall have the right to set-off against monies due to the Subcontractor under the Subcontract such losses or damages suffered or incurred by the Main Contractor as a result of the failure of the Subcontractor to carry out the Subcontract Work with due diligence or due expedition or to complete the subcontract Work by the Date of Completion.

100 In view of the above, I must disregard and thus disallow the deduction of back charges for the damaged formwork materials in PR8 since the back charge falls within the purview of s 17(3) of the Act and the requirements in either s 17(3)(*a*) or 17(3)(*b*) are not met.

Liquidated damages

101 With regard to the deduction of liquidated damages ("LD"), there is no doubt that it falls within the meaning of "related to damage, loss or expense" referred to in s 17(3) of the Act. As such, the Respondent is not entitled to deduct the LD in PR8 unless the requirements in either s 17(3)(*a*) or s 17(3)(*b*) are satisfied.

102 During the Adjudication Conference, the Respondent related that it had been paying the Claimant promptly. However, the Claimant had failed to mobilise sufficient workers since July 2023 and as a result caused a delay

to the Subcontract Work. In view of the slowdown in work progress and the delay to the Subcontract Work, the Respondent was unable to receive sufficient payment from the developer to pay the Claimant. The Respondent added that notwithstanding that, it had tried its best to pay a partial amount of $50,000 to the Claimant in the middle of November 2023 and urged the Claimant to continue its Subcontract Work. However, the Claimant chose to stop its work totally in late November 2023 resulting in the subsequent termination of the Main Contract by the developer. The Respondent contended that as a result of the Claimant's unfair act of unilaterally stopping its work without giving any notice, it had suffered tremendous losses and was facing significant back charges and LD from the developer. The Respondent asserted that it would be unfair for the Claimant to be paid considering it had caused great losses to the Respondent.

103 The Claimant, on the other hand, responded during the Adjudication Conference that it needed to be paid promptly for the work that had been carried out. Without prompt payment from the Respondent, the Claimant explained that it could not pay its workers and thus was unable to continue with the work at the site. The Claimant related that since November 2023, it had not been paid for the Progress Payment Nos 6 and 7 except the partial payment of $50,000 received in the middle of November 2023. The Claimant added that while the Respondent had promised to pay the balance amount for Progress Payment Nos 6 and 7 by the end of November 2023, no payment was received from the Respondent and the Respondent could not be contacted thereafter. The Claimant affirmed that the "pay when paid" clause is not valid under the Act and prompt payment is expected from the Respondent.

104 With regard to the LD, the Claimant denied during the Adjudication Conference that it had caused any delay to the Subcontract Work. The Claimant stated that the delay, if any, was caused by the Respondent who did not make prompt payments for work done and certified. The Claimant added that the Subcontract period was until June 2024 and if prompt payments were received from the Respondent, it could still complete the Subcontract Work on time.

105 During the Adjudication Conference, I explained to both the Claimant and the Respondent that the LD deduction falls within the purview of s 17(3) of the Act and unless the requirements as stipulated under ss 17(3)(*a*) and 17(3)(*b*) are satisfied, I will have to disregard and disallow it in my determination. I conveyed my sympathy to both the Claimant and Respondent over the termination of the Main Contract and explained to them that I am unable to deal with the issues brought up by them pertaining to the delay in the work progress, the stop work action, and the termination of the Main Contract as all these issues are beyond the purview of the Act and my role as the adjudicator for this AA.

106 In response to my further query during the Adjudication Conference, the Respondent confirmed that it had nothing to show that the requirements as stipulated in s17(3)(*a*) or 17(3)(*b*) could be satisfied for me to deal with the deduction of the LD. The Respondent added that the only documents it could produce were the e-mail correspondences between the parties from 31 July 2023 to 23 September 2023 on the issues of work progress and delay.

107 After examining the e-mail correspondences in Annex D of the AR, I am of the view that these e-mails do not satisfy the requirements of s17(3)(*a*) or 17(3)(*b*).

108 In view of the above, I will disregard and disallow the LD amount of $92,500 in my determination.

Summary

109 The summary of my assessment is as shown below.

Description	**Adjudicated Amount ($)**
Value of Works Done (Remeasured)	644,478.77
Variation No 1 – Work Done	6,708.39
Sub-total:	651,187.16
Less: 10% Retention (Max 5%)	(52,601.42)
Less: Previously Paid Amount	(329,543.09)
Less: Agreed Back Charges (Safety Infringements)	(3,800.00)
Adjudicated Amount (excluding GST):	265,242.65
Add: 8% GST	21,219.41
Adjudicated Amount (including GST @ 8%):	**286,462.06**

Determination

110 In conclusion, and for the reasons as set out above, I determine the Adjudicated Amount to be $286,462.06 (inclusive of GST) to be paid by the Respondent to the Claimant.

Costs of the adjudication

111 In determining the apportionment of the costs of adjudication, I have taken into account the extent to which each party succeeds in its case. In this respect, I determine that the costs of the adjudication, being the Adjudication Application Fee of $654 (inclusive of GST), and the Adjudicator Fee of $10,464 (inclusive of GST) shall be apportioned between the parties as follows:

(a) the Claimant shall bear 20% of the said cost; and

(b) the Respondent shall bear 80% of the said cost.

BHU Pte Ltd
v
BHV Pte Ltd

[2024] SGSOP 2

Singapore Mediation Centre — SOP AA 005 of 2024
Soh Lip San
30 January 2024

Contract *— Termination — Whether Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) entitled claimant to lodge adjudication application where subcontract had been terminated prior to submission of payment claim — Whether claimant's employment under subcontract terminated and what the basis of purported termination was — Whether adjudicator required to determine whether termination was valid — Section 4(2)(c) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Jurisdiction *— Jurisdictional objections — Whether respondent was under duty to speak to raise jurisdictional objection in its payment response*

Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ss 2, 4(2)(*c*), 4(2)(*c*)(i), 11, 11(1)(*a*), 12(4), 12(5), 12(6), 15(1), 15(3), 16(1), 16(4), 17(1)(*b*)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)

Holidays Act 1998 (2020 Rev Ed)

Esmond Yue and Wee Qianliang (Covenant Chambers LLC) for the claimant; Lawrence Tan and Jennifer Fong (Eldan Law LLP) for the respondent.

[Commentary: see para 5.23]

30 January 2024

Soh Lip San:

1 This is an adjudication determination made on 30 January 2024 ("Adjudication Determination") under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (being the

version in force on 15 December 2019) ("SOP Act") in respect of Adjudication Application Number SOP/AA 005 of 2024 ("Adjudication Application"). This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 Unless otherwise stated or the context requires otherwise, all references herein to "sections" refer to sections under the SOP Act and all references to "regulations" refer to regulations under the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) (being the version in force on 15 December 2019) ("SOP Regulations").

3 The claimant in this matter is [BHU] Pte Ltd ("Claimant"), and the respondent is [BHV] Pte Ltd ("Respondent") (collectively, "Parties").

4 For the reasons set out herein in this Adjudication Determination, I determine that:

(a) the Adjudication Application is dismissed in its entirety; and

(b) taking into account that the Claimant's Adjudication Application is dismissed, in the exercise of my discretion on costs of the adjudication proceedings, the costs of the adjudication proceedings being the adjudication application fee of $654 (inclusive of goods and services tax ("GST")) and the adjudicator fee of $20,066.90 (inclusive of 9% GST), shall be borne solely by the Claimant.

Record

Background

5 Pursuant to a letter of award dated 20 April 2022 ("Subcontract"), the Respondent appointed the Claimant as its subcontractor for the supply and installation of civil and structural works, wet trade works, and mechanical and electrical works ("Subcontract Works") for the proposed new erection of a two-storey envelope control detached dwelling house with basement and attic on Lot [xxx] at [xxx] ("Project"). The Subcontract is a lump sum contract for the sum of $2,370,000 (excluding GST) and this is derived from Appendix A of the Subcontract.

6 On 30 November 2023, the Claimant served its Payment Claim No 12 on the Respondent purporting to claim a sum $208,871.60 (including GST) ("Claim Amount") from the Respondent ("Payment Claim"). For completeness, I do not accept the Respondent's position that the sum claimed by the Claimant in the Payment Claim is excluding GST. This is not borne out by the copy of the Payment Claim adduced for my determination. The Claimant's Payment Claim pertains to work done for

the period from 18 May 2022 to 30 November 2023. A summary of the Claim Amount in the Payment Claim is set out in the table below:

Description	Amount (S$)
Original contract sum	2,370,000.00
Original contract works	1,088,650.00
Value for variation works	86,716.26
Subtotal	**1,175,366.26**
Less retention (10%)	(117,536.63)
Less previous certified amounts	(864,430.00)
Claimed Amount (excl GST)	**193,399.63**
GST 7%	15,471.97
Total Claimed Amount	208,871.60

7 In relation to the service of the Payment Claim, the Claimant has adduced evidence to demonstrate that the Payment Claim was served on the Respondent by way of e-mail on 30 November 2023. The Claimant referred me to an e-mail of 30 November 2023 (timestamped 9.46pm) from the Claimant's Mr [A] (the Claimant's project manager) to the Respondent's Mr [B] (the Respondent's director) and Mr [C] (the Respondent's quantity surveyor) which attached a soft copy of the Payment Claim (for completeness, and pursuant to my query to the Parties at the Adjudication Conference, I record that this was confirmed by the Parties). On 16 January 2024 (and this is elaborated further in this Adjudication Determination below), I directed the Respondent to address me on various issues, including the Respondent's position on whether "the payment claim no 12 ('PC 12') submitted on 30 November 2023 [was] served on a date in accordance with the Sub-Contract and/or the SOP Act". The Respondent answered the same in the affirmative by way of its e-mail of 17 January 2024 (timestamped 3.24pm) ("Respondent's 17 January Response"). Consequently, I am satisfied and determine that the Payment Claim is a valid payment claim pursuant to the SOP Act and SOP Regulations.

8 Section 11(1)(*a*) of the SOP Act provides that a payment response must be served "by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier". Pursuant to cl 18 of the Subcontract (read with s 11(1)(*a*) of the SOP Act), the Respondent's payment response (if any) would have been due to be served by 21 December 2023.

9 In addition, I note that s 12(4) of the SOP Act provides that "the respondent may provide the claimant with a payment response where he has failed to do so under section 11(1), or vary the payment response provided under that section" by the expiry of the dispute settlement period ("DSP").

Pursuant to s 12(5) of the SOP Act, the DSP expired on *29 December 2023* (this takes into account that 25 December 2023 is a gazetted public holiday pursuant to ss 2 and 12(6) of the SOP Act read with the Holidays Act 1998 (2020 Rev Ed)). On 20 December 2023, the Respondent submitted its Payment Certificate No 12 certifying a negative sum of $(88,776) ("Payment Response"). The Respondent referred me to an e-mail of 30 November 2023 (timestamped 4.36pm) from the Respondent's Mr [C] (the Respondent's quantity surveyor) to the Claimant's Mr [A] (the Claimant's project manager) which attached a soft copy of the Payment Response (for completeness, and pursuant to my query to the Parties at the adjudication conference, I record that this was confirmed by the Parties). I find that the Payment Response was served within the time period stipulated by the SOP Act (as read with the Subcontract). Consequently, I determine that the Payment Response complies with the SOP Act and SOP Regulations.

10 In summary, the Respondent's contention in the Payment Response was that it was entitled to set off the following sums from the Claimant's Claim Amount in the Payment Claim:

(a) $37,027.46 as back charges; and

(b) $115,800.00 as liquidated damages.

For completeness, I also record that the Claimant contends, at para 18.2 of the Adjudication Application submissions ("AA Submissions"), that "[t]he Respondents had previously claimed the sum of $33,600.00 as [previous] liquidated damages and are claiming for the further sum of $82,200.00 as liquidated damages in its Payment Response". I also observe that the Respondent's cover e-mail of 20 December 2023 (timestamped 4.36pm) which attached the Payment Response refers to the termination of the Subcontract. The significance of this is discussed at para 68(c) of this Adjudication Determination below in the context of whether the Respondent possesses a "duty to speak" to raise the jurisdictional objection in its Payment Response, and consequently, whether the Respondent is estopped and/or has waived its right to raise this jurisdictional objection in its adjudication response.

Notice of intention to apply for adjudication and adjudication application

11 On 4 January 2024, the Claimant served on the Respondent by e-mail and fax its notice of intention to apply for adjudication, giving notice of the Claimant's intention to apply for adjudication.

12 On 4 January 2024, the Claimant lodged its Adjudication Application with the SMC. For the record, the Adjudication Application was lodged with the following (including a CD-ROM):

(a) Adjudication Application Form AA-1 dated 24 January 2024;

(b) Claimant's AA Submissions;

(c) documents appended to the end of the AA Submissions under the cover of Tabs 1 to 17;

(d) Scott Schedule dated 24 January 2024; and

(e) Letter to SMC dated 24 January 2024.

Adjudication response

13 On 5 January 2024, the SMC invited me, Soh Lip San, to be the adjudicator for this Adjudication Application. I accepted the appointment as adjudicator on 8 January 2024 and furnished the SMC with the statement of acceptance and declaration of impartiality and independence on the same day.

14 I am informed by the SMC that the Adjudication Application, together with the enclosed supporting documents and authorities, was successfully served on the Respondent on 5 January 2024.

15 Section 15(1) of the SOP Act requires the Respondent to file its adjudication response (if any) no later than seven days after receipt of the Adjudication Application. Given that the Adjudication Application was served on the Respondent on 5 January 2024, the last day for the Respondent to lodge its adjudication response (if any) was 12 January 2024.

16 On 12 January 2024, the SMC informed me that the Respondent had lodged an adjudication response on 12 January 2024 at 4.11pm ("Adjudication Response"). For the record, the Adjudication Response was lodged with the following:

(a) Adjudication Response Form AR-1 dated 12 January 2024;

(b) the Respondent's Adjudication Response submissions ("AR Submissions");

(c) the Respondent's AR Submissions (Annexure A);

(d) the Respondent's bundle of documents ("RBOD");

(e) the Respondent's bundle of authorities ("RBOA"); and

(f) letter of authorisation dated 10 January 2024.

Commencement of adjudication

17 Pursuant to s 16(1) of the SOP Act, the adjudication commences immediately on the expiry of the period mentioned in s 15(1) of the SOP Act within which the respondent may lodge an adjudication response. The present adjudication proceedings, therefore, commenced on 13 January 2024.

Due date for determination

18 Given the above, pursuant to s 17(1)(*b*) of the SOP Act, I have to determine the Claimant's Adjudication Application by 27 January 2024. This has been extended with the Parties' consent to *30 January 2024* as recorded in the Adjudication Determination below.

Adjudication conference and further submissions

19 On 15 January 2024, and in view of the matters and issues raised by the Parties in their respective written submissions, under the powers conferred on me by virtue of s 16(4) of the SOP Act, I wrote to the Parties directing the following (my "Directions No 1"):

> (a) a procedural conference (only to be attended by counsel) be held on 16 January 2024 at 10.30am, by way of a Zoom video conference, to discuss with counsel the need for reply submissions, and if so the timelines, and to fix date or dates for the adjudication merits conference, together with any other consequential directions to be considered; and
>
> (b) the Claimant and Respondent both provide me with a soft copy (in Microsoft Word format) of their written submissions accompanying the Adjudication Application/Adjudication Response by 6.00pm on 15 January 2024.

20 On the same day both counsel for the Claimant (by way of e-mails timestamped 4.55pm and 6.40pm) and the Respondent (by way of an e-mail timestamped 3.47pm) informed me that both Parties' counsel are available to attend the procedural conference at my proposed date and time. The Parties also provided me with a soft copy (in Microsoft Word format) of their written submissions accompanying the Adjudication Application/Adjudication Response.

21 On 15 January 2024 (at 8.43pm), I formally directed the Parties that a procedural conference be held on 16 January 2024 at 10.30am, by way of a Zoom video conference ("Procedural Conference") (my "Directions No 2").

22 On 16 January 2024, the Parties' counsel attended the Procedural Conference. The Procedural Conference was attended by the following representatives:

(a) On behalf of the Claimant: Mr Wee Qianliang ("Mr Wee"), counsel for the Claimant.

(b) On behalf of the Respondent:

(i) Ms Jennifer Fong, counsel for the Respondent; and

(ii) Ms [F], the Respondent's paralegal.

23 Both Parties' introductory remarks at the Procedural Conference helped to crystallise the key dispute and differences between the Parties' respective positions in the Adjudication Application/Adjudication Response. In particular, in response to my query to the Parties, I record that the Parties are in agreement that the Respondent has raised a jurisdictional objection which goes towards the Claimant's entitlement to lodge the Adjudication Application pursuant to the SOP Act (at Section IV of the AR Submissions). In brief:

(a) It is the Respondent's contention that the Subcontract prohibits any Adjudication Application given that the Subcontract has been terminated.

(b) This is an issue that goes towards whether the SOP Act confers me jurisdiction to determine this Adjudication Application as the adjudicator which I am obliged to deal with as a threshold issue.

(c) In view of this, and considering that the Claimant has only made a bare reference to the termination of the Subcontract in its AA Submissions, and has yet to have an opportunity to respond to the jurisdictional objection raised by the Respondent (which only featured for the first time in the AR Submissions), I took the view that I would be assisted by further written submissions from the Parties on this issue.

24 With the above in mind, and bearing in mind Mr Wee's scheduling difficulties, I proposed to the Parties the following directions:

(a) the Claimant is to file a right of reply to the AR Submissions by 5.00pm, Friday, 19 January 2024;

(b) the Respondent is at liberty to file a reply by 12.00pm, Tuesday, 23 January 2024; and

(c) a half-day adjudication merits conference be held from 1.30 to 5.30pm, on 24 January 2024.

25 I informed the Parties that I would allow the Claimant the right to file a right of reply to the AR Submissions in any event. However, in view of the proposed timelines, I sought the Parties' agreement for an extension of time for me to determine the Claimant's Adjudication Application by 14 February 2024. If the Parties were unable to agree to the extension, I would direct more compressed timelines so that I would be able to render the adjudication determination by 27 January 2024:

(a) The Claimant *was agreeable* to my request.

(b) However, counsel for the Respondent informed me that she had *no instructions* from the Respondent to agree to any extension of time for me to render my adjudication determination.

26 In view of this, I directed that the Parties stand down for counsel for the Respondent to take instructions from the Respondent. The Procedural Conference was stood down for 20 minutes (from 11.00am to 11.20am) without any conclusion on the Respondent's position.

27 I informed the Parties' counsel that, in the alternative, I would consider more compressed timelines as follows:

(a) the Claimant is to file a right of reply to the AR Submissions by 10.00am, Friday, 18 January 2024;

(b) the adjudication merits conference to be held on 3.00pm, 19 January 2024; and

(c) the Respondent is at liberty to address me on the Claimant's reply orally at the adjudication merits conference.

28 I then adjourned the Procedural Conference for the Parties' counsel to be given a further opportunity to take the Parties' full instructions on the same. Subsequent to the Procedural Conference, I, therefore, made the following provisional directions (my "Directions No 3"):

(a) the Claimant is to file a right of reply to the AR Submissions by 5.00pm, Friday, 19 January 2024;

(b) the Respondent is at liberty to file a reply by 12.00pm, Tuesday, 23 January 2024; and

(c) a half-day adjudication merits conference be held from 1.30 to 5.30pm, on 24 January 2024.

29 In my Directions No 3, I also informed the Parties of the following:

(a) The abovementioned timelines are provisional and would necessitate an extension of time for me to render my adjudication determination. To this end, I requested for the Parties' consent for an extension until 14 February 2024 for me to render my adjudication

determination. The Parties are directed to state their position on my request by 5.00pm, 16 January 2024.

(b) In the event that the time for me to render my adjudication determination is not extended by agreement, I sought the assistance of the Parties to be ready to attend the adjudication merits conference on 3.00pm, 19 January 2024.

30 On the same day (16 January 2024):

(a) Counsel for the Claimant informed me (by way of an e-mail timestamped 1.19pm) that the Claimant *was agreeable* to my request and timelines set out in Directions No 3.

(b) Counsel for the Respondent informed me (by way of an e-mail timestamped 4.30pm) that the Respondent *was not agreeable* to my request and timelines set out in Directions No 3 "at this point in time" and "is prepared to have the adjudication merits conference on 19 January 2024 at 3pm".

31 Consequently, and as discussed with the Parties' counsel at the Procedural Conference, I wrote to the Parties on 16 January 2024 directing and confirming the following (my "Directions No 4"):

(a) The Claimant is to file a right of reply to the AR Submissions by 10.00am, Friday, 18 January 2024.

(b) A soft copy (in Microsoft Word format) of the Claimant's reply is to be provided to me by 10.00am, Thursday, 18 January 2024.

(c) In the event that the Respondent considers that the Claimant's reply has raised new material, or is otherwise objectionable, the Respondent shall state this in writing to me, with brief reasons, on or before 2.00pm, Friday, 19 January 2024. Should there be any such concerns raised by the Respondent, this could be elaborated upon and addressed by the Respondent during oral submissions at the adjudication merits conference.

(d) The adjudication merits conference is to be held at 3.00pm, 19 January 2024, by way of a Zoom video conference ("Adjudication Conference"). In an effort to encourage both Parties to make the best use of the time, I also directed that the Parties are to be prepared to make oral submissions on a chess clock basis.

(e) Each party is limited to not more than three representatives for the Adjudication Conference. Each party is to provide me with the name(s)/designation of the attendees for the Adjudication Conference on or before 10.00am, Thursday, 18 January 2024.

(f) On or before 10.00am, Thursday, 18 January 2024, the Respondent is directed to respond to the following queries (leaving aside the significance of the termination of the Subcontract on 6 December 2023 as asserted by the Respondent) (my "Queries"):

(i) Was the Payment Claim submitted on 30 November 2023 served on a date in accordance with the Subcontract and/or the SOP Act?

(ii) By reason of the date of service of the Payment Claim, when was the Claimant entitled to lodge an adjudication application?

(iii) What is the commencement date of these adjudication proceedings?

(iv) What is the due date for me to render my adjudication determination?

32 On 17 January 2024 (by way of an e-mail timestamped 3.24pm), the Respondent:

(a) confirmed its attendance for the Adjudication Conference;

(b) provided me with the names and designations of four representatives that would be attending the Adjudication Conference (instead of the cap of three representatives as directed in my Directions No 4); and

(c) provided its response to my Queries (the Respondent's 17 January Response).

33 On 17 January 2024 (by way of an e-mail timestamped 3.24pm), I wrote to the Parties as follows:

(a) I recorded that the Respondent has provided for four representatives instead of limiting itself to three representatives as directed in my Directions No 4. To this end, I reminded the Parties to seek leave if they intend to depart from my express directions;

(b) as a matter of fairness, I directed that the Claimant is also allowed to be represented by four representatives; and

(c) the Claimant is directed to state its position on the Respondent's 17 January Response on or before 5.00pm, 18 January 2024.

34 On 17 January 2024 (by way of an e-mail timestamped 10.39pm), the Claimant:

(a) confirmed its attendance for the Adjudication Conference;

(b) provided me with the names and designations of the four representatives that would be attending the Adjudication Conference; and

(c) provided its response to the Respondent's 17 January Response ("Claimant's 17 January Response").

35 On 18 January 2024 (by way of e-mails timestamped 9.55am and 10.11am), the Claimant submitted the Claimant's reply submissions ("CR Submissions") with the following:

(a) further documents appended to the end of the CR Submissions under the cover of Tabs 18 to 22 ("CSBOD"); and

(b) the Claimant's Bundle of Authorities ("CRBOA").

36 On 19 January 2024 (by way of an e-mail timestamped 2.01pm), the Respondent submitted the Respondent's reply submissions ("RR Submissions") with the following:

(a) Annex A to the Respondent's RR Submissions; and

(b) further documents as contained in the Respondent's supplementary bundle of documents ("RSBOD").

37 The RR Submissions span across 33 pages and, apart from pp 1 to 4 which set out the Respondent's reasons as to why the Respondent contends that the CR Submissions are objectionable or that the Claimant has raised new material, the rest of the RR Submissions (*ie*, a total of 29 pages) are more accurately characterised as responsive written submissions to the arguments raised by the Claimant in the CR Submissions which I have not given the Respondent the liberty to file further written submissions on. Be that as it may, I am of the view that I would be assisted by the Parties' further written submissions (in particular those pertaining to the Respondent's jurisdictional objection) and I exercise my discretion as adjudicator to admit and consider the RR Submissions in full in arriving at this Adjudication Determination.

38 On 19 January 2024, the Claimant and the Respondent attended the Adjudication Conference. The Adjudication Conference was attended by the following representatives:

(a) On behalf of the Claimant:

(i) Mr [D] – Claimant's Director;

(ii) Mr [A] – the Claimant's project manager;

(iii) Mr Esmond Yue ("Mr Yue") – instructed counsel for the Claimant; and

(iv) Mr [E] – the Claimant's paralegal.

(b) On behalf of the Respondent:

(i) Mr [B] – the Respondent's director;

(ii) Mr [C] – the Respondent's quantity surveyor;

(iii) Ms Jennifer Fong ("Ms Fong") – counsel for the Respondent; and

(iv) Ms [F] – the Respondent's paralegal.

39 At the conclusion of the Adjudication Conference, the Claimant's position was that the other party's reply submissions (*ie*, the RR Submissions) and the accompanying bundles were objectionable or raised new material(s)/document(s) which ought to be disallowed/disregarded by me in arriving at my determination. I observe that, in part, this debate could have been avoided had the Respondent provided "brief reasons" instead of departing from my express directions in Directions No 4.

40 After hearing the Parties, I took into account the fact that the RR Submissions were only provided an hour before the Adjudication Conference, and that counsel for the Claimant may not have had the benefit of a detailed review and full instructions from the Claimant, and proposed to the Parties the following:

(a) That the Claimant is to file a right of reply to the RR Submissions to identify the documents (if any) contained in the RR Submissions filed on 19 January 2024 which it finds objectionable by 10.00am, Monday, 22 January 2024.

(b) Thereafter, the Respondent is likewise entitled to a right of reply by 10.00am, Tuesday, 23 January 2024.

(c) To accommodate the above, I sought the Parties' agreement for an extension of time for me to determine the Claimant's Adjudication Application by 2 February 2024.

41 For the record, and in addition to the exchanges detailed above, oral submissions were then made at the Adjudication Conference to discuss this:

(a) Mr Yue informed me that the Claimant *was agreeable* to my request.

(b) However, Ms Fong informed me that the Respondent *was not agreeable* to my request for the reason that "[the Respondent] is concerned that the extension of time is linked to the fact that more time has been given to people to adduce further submissions" and that the Respondent "is not okay with the time disparity. What [the Respondent] wants to convey that the time for [me] to write [the Respondent] is okay. But [the Respondent] is afraid that the time

disparity is different. If [I] want more time, it is for [me] to make that request".

(c) In response, I urged to Ms Fong to prevail on the Respondent that my request for an extension of time to properly consider the Parties' respective cases ought to be delinked from whether any party is granted a right of reply, and that the discussion should not take the form of a "barter trade". I further emphasised that if the Respondent is not agreeable to my request, I would proceed to issue the appropriate and necessary directions to ensure that I am able to determine the Adjudication Application fairly and render my determination as required under the SOP Act.

(d) Despite this, Ms Fong informed me that the Respondent is only agreeable to my extension of time request until 30 January 2023 on the condition that the Respondent has until Tuesday, 24 January 2024 to file its right of reply.

42 In conclusion, I stressed to both Parties that the extension of time request was not viewed as any precondition to the matter. That said, given the Respondent's sentiments on having more time, and noting the Respondent's position that it was prepared to consent to an extension of time for my determination in any case, I issued the following directions orally (my "Directions No 5") and confirmed them in writing via e-mail on 20 January 2024:

(a) The Claimant is to identify the documents (if any) contained in the RR Submissions filed on 19 January 2024 which it finds objectionable, along with reasons, in tabular form:

(i) In doing so, the Claimant should not be revisiting the merits of the case and/or providing any further document(s).

(ii) A soft copy of the table is to be provided to both me and the Respondent by 10.00am, Monday, 22 January 2024.

(iii) In the event that no document is received from the Claimant by 10.00am, Monday, 22 January 2024, I will proceed on the basis that the record is closed, and I will make my determination accordingly.

(b) In the event that the Claimant raises any objection(s), the Respondent is entitled to respond. The response is to be contained in the document sent by the Claimant by way of an additional column:

(i) In doing so, the Respondent should not revisit the merits of the case.

(ii) A soft copy of the table is to be provided to both me and the Claimant by 10.00am, Wednesday, 24 January 2024.

(iii) In the event that no document is received from the Respondent by 10.00am, Wednesday, 24 January 2024, I will proceed on the basis that the record is closed, and I will make my determination accordingly.

(c) That the deadline for me to issue my determination has been extended with the Parties' consent to 30 January 2024.

43 On 22 January 2024 (by way of an e-mail timestamped 6.55am), the Claimant submitted the Claimant's objections to the Respondent's additional documents ("Claimant's Document Objections").

44 On 24 January 2024 (by way of an e-mail timestamped 9.10am), the Respondent submitted the Respondent's response to the Claimant's Document Objections ("Respondent's Response to Claimant's Document Objections").

Adjudication determination

45 I shall record at the outset that with a view to save time and avoid incurring unnecessary costs, I have not recorded each and every fact, argument and authority which had been submitted by the Parties in support of their contentions in this Adjudication Application, but which I have considered carefully in arriving at my Adjudication Determination. It should not be assumed that any evidence, argument, authority or issue which has not been specifically recorded herein had not been taken into account in arriving at this Adjudication Determination.

Issues to be determined

46 Having considered all the facts and submissions by the Parties, I am of the view that the issues to be determined in this adjudication are as follows:

(a) ***Issue A***: Whether the SOP Act entitles the Claimant to lodge this Adjudication Application given that the Subcontract has been terminated.

(b) ***Issue B***: Whether there are further and/or additional documents produced in the CR Submissions (and the accompanying bundles) and the RR Submissions (and the accompanying bundles) that ought to be disregarded by me in arriving at my determination. In doing so, I would have to consider the Parties' positions contained in, *inter alia*, (i) pp 1 to 4 of the RR Submissions; (ii) the Claimant's document objections; and (iii) the Respondent's response to the Claimant's document objections.

(c) ***Issue C***: Whether the Claimant is entitled to the sums claimed in the Payment Claim (for instance, Item V.1 "Preliminaries & General

Matters", Item V.2 "Structural Works", Item V.3 "M&E Works", Variation Order 1, and Variation Order 2).

(d) ***Issue D***: Whether the Respondent is entitled to impose back charges and liquidated damages set out in the Payment Response (for instance, Item V4.1 "Back charge relating to insurance, including contractor's all risk insurance and employer's liability insurance", Item V4.2 "Back charge relating to pre-construction photo survey report, cable detection report, professional fee for telco NCE meeting, rebar supply and water bill", Item V4.3 "Fines, Demerit Points by NEA and MOM", and Item V4.4 "Liquidated damages").

I will elaborate on my decision on these issues in this Adjudication Determination.

Issue A: whether SOP Act entitles Claimant to make this Adjudication Application given that Subcontract has been terminated

47 The Respondent's jurisdictional objection in the Adjudication Response is that the Claimant was not entitled to lodge this Adjudication Application as: (a) the Subcontract has been terminated; and (b) cl 12(b) of the Subcontract provides that the Respondent shall not be liable to pay to the Claimant any sum in respect of the Subcontract until the cost of completion, maintenance, damages for delay in completion and all other expenses incurred by the Respondent has been ascertained. Consequently, the Respondent contends that I had no jurisdiction under the SOP Act to hear this Adjudication Application, and that this Adjudication Application ought to be dismissed.

48 The Claimant disagrees and contends that the Respondent's position is "misconceived", and argues that I possess jurisdiction under the SOP Act to hear this Adjudication Application.

49 With the above in mind, I am of the view that there are three distinct sub-issues to be determined in relation to the Respondent's jurisdictional objection:

(a) *Issue A1*: whether the Claimant's employment under the Subcontract was terminated, and if so, the basis of the purported termination by the Respondent. On this point, there is an important anterior question which both Parties appear to have glossed over in their written submissions and to which I have directed the Parties to address me orally at the Adjudication Conference:

(i) It is trite that each party who advances a proposition to the adjudicator bears the burden of persuading the adjudicator to accept that proposition in and for the purposes of the adjudication.

(ii) Flowing from this, what is the burden of persuasion on the Respondent who is seeking to persuade me in these adjudication proceedings that the Claimant's employment under the Subcontract was terminated?

(b) *Issue A2*: whether the Claimant is entitled to lodge this Adjudication Application/whether I possess jurisdiction under the SOP Act to determine the merits of the Adjudication Application.

(c) *Issue A3*: whether the Respondent was under a "duty to speak" to raise the jurisdictional objection in its Payment Response, and consequently, whether the Respondent is estopped and/or has waived its right to raise this jurisdictional objection in its Adjudication Response.

(1) Issue A1: termination of Claimant's employment under Subcontract and requisite standard of persuasion

50 It is common ground that the Subcontract was terminated on 6 December 2023 (prior to the Adjudication Application). The Respondent contends that this termination was made pursuant to cl 12 of the Subcontract, when it sent the Claimant a notice of termination ("Notice of Termination") stating the following:

> 1. We refer to our client's Third Notice of Delay to you dated 27 November 2023, to which you have not only failed to respond.
>
> 2. This situation is untenable and in the circumstances, *pursuant to Clause 12(a)(i) and 12(a)(v) of the Letter of Award*, as well as Clause 12(a) of Appendix C-Terms and Conditions of Subcontract, we are instructed to give you *Notice of Termination of the said Subcontract, with immediate effect*. [emphasis added]

(A) The basis of termination and requisite standard of persuasion

51 At the Adjudication Conference, I invited the Parties to address me on the basis of the purported termination by the Respondent:

(a) On the one hand, Ms Fong contends that termination of the Subcontract was a termination based on an express term of the Subcontract (*ie*, a *Situation 1* termination as characterised by the Singapore Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC Concrete*"). To support this contention, Ms Fong directed my attention to the Notice of Termination which expressly refers to cll 12(a)(i) and 12(a)(v) of the Subcontract. Clauses 12(a)(i) and 12(a)(v) of the Subcontract state as follows:

> 12. TERMINATION
>
> (a) If the Subcontractor:
>
> Fails to proceed with the Sub Contract works with due diligence within 7 days of issue by the Contractor of written notice directing the work; or
>
> …
>
> Does or omits to do any other act or thing which would or might occasion (directly or indirectly) a forfeiture of the Contract.
>
> The Contractor, without prejudice to any other rights and remedies available to him, may give a notice in writing to the Subcontractor of the termination of the employment of the Subcontractor and expel the Subcontractor from the site without releasing the Subcontractor from any liabilities or obligations under the Subcontract.

(b) On the other hand, Mr Yue contends that termination of the Subcontract *was not* a contractual termination. Mr Yue contends that the Claimant's position is that the Subcontract was wrongfully terminated by the Respondent. Mr Yue argued that the Respondent did not have any basis to terminate the Subcontract as the purported delay on the part of the Claimant was attributable to the Respondent's own persistent delay in furnishing the Claimant with the drawings.

52 On the burden of persuasion on the Respondent who is seeking to persuade me in these adjudication proceedings that the Claimant's employment under the Subcontract was terminated, the Parties' raised these arguments:

(a) On the one hand, Ms Fong directed my attention to [29] and [32] of the Singapore High Court decision of *Builders Hub v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 ("*Builders Hub*") (I will discuss the case of *Builders Hub* in greater detail in the succeeding portions of my determination when I deal with whether there is any applicable provision in the Subcontract that negates or suspends the Claimant's entitlement to be paid based on the validly served Payment Claim):

(i) In relation to [29] of *Builders Hub*, Ms Fong relied on the sentence that reads as follows: "JP had *invoked* cl 30.2 of the REDAS Conditions to terminate BH's employment under the Contract, BH would no longer have a contractual right to be paid any progress payment by virtue of cl 30.3 of the REDAS Conditions, and BH would consequently lose its entitlement to the adjudication of PC 40" [emphasis added].

(ii) In relation to [32] of *Builders Hub*, Ms Fong directed my attention to the following: "The 'default position' does not

consider the critical point of whether the employment termination clause is engaged in the first place. In my view, the mere existence of an employment termination clause in the Contract should not and does not affect a contractor's entitlement under the contract if it is not *engaged* on the facts … Where the clause is *not engaged*, the question should be whether there are other contractual terms that preclude, negate or suspend the contractor's right to be paid based on a payment claim that is served prior to termination, rather than whether there are contractual terms that provide for entitlement to post-termination progress payments" [emphases added].

(iii) Ms Fong therefore contends that the terms "invoke" and "engage" lends credence to her argument that I would only need to be satisfied that the Respondent has, in its Notice of Termination, "invoke[d]" and "engage[d]" (*ie*, referred to) cll 12(a)(i) and 12(a)(v) of the Subcontract. Consequently, and according to Ms Fong, I would not need "to go into whether it is truly right or wrong as long as [the Respondent has] properly engaged the termination clause".

(b) On the other hand, Mr Yue contends that I would need to go further than what was suggested by Ms Fong:

(i) Mr Yue brought my attention to [58] of *Builders Hub* which states that "in order to decide whether cl 30.2 was engaged, it was necessary, as an antecedent inquiry, to decide whether BH had validly terminated the Contract pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches before JP issued the notice of termination under cl 30.2.2 later on the same day".

(ii) In response to my query on how the Claimant's position sits with the adjudication process which has often been referred to as "rough justice" because it is typically a "documents only" process (without the benefit of witness testimony and cross-examination) with a highly truncated timeline, Mr Yue asserted that the Respondent's position "goes against SOPA … [which is] to ensure contractors get paid … it cannot be that the contractors cannot be paid whenever it is terminated".

53 Having carefully considered the Parties' respective arguments, my determination on Issue A1 is as follows:

(a) I agree with the Respondent that the termination of the Subcontract was a termination *based on an express term of the Subcontract* (in particular, cl 12 of the Subcontract). It cannot be disputed that the Notice of Termination clearly makes reference to

cll 12(a)(i) and 12(a)(v) of the Subcontract. On this point, I find that Mr Yue's contention (as set out at [51(b)] above) has missed the point and this stems from a conflation of two distinct concepts: (i) on the one hand, whether the termination of the Subcontract was a termination *based on an express term of the Subcontract*; and (ii) on the other hand, whether the termination based on an express term of the Subcontract was *wrongful or not*. In my view, and contrary to Mr Yue's contention, whether the termination was wrongful or not goes towards whether the contractual termination was valid and does not and cannot alter the character of the termination as a contractual termination.

(b) However, I disagree with the Respondent's position that I would not need "to go into whether [the termination was] truly right or wrong as long as [the Respondent has] properly engaged the termination clause". In my view, a proper reading of *Builders Hub* does not support the Respondent's position. On this, I find that the following passages from *Builders Hub* are instructive:

> 57 *As is evident from the chapeau of cl 30.3, cl 30.3 of the REDAS Conditions would only apply to suspend further payments if BH's employment was terminated by JP due to the occurrence of any of the events of default listed under cl 30.2.* If cl 30.2 was not engaged, then cl 30.3 would similarly not be engaged, in which case there appears to be no other provision in the Contract that would disentitle BH to the adjudication of, or the receipt of payment under, PC 40.
>
> 58 Therefore, *in order to decide whether cl 30.2 was engaged, it was necessary, as an antecedent inquiry, to decide whether BH had validly terminated the Contract pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches before JP issued the notice of termination under cl 30.2.2 later on the same day …*
>
> …
>
> 62 There are two points to be made here. First, whether BH had exercised its general contractual right to terminate the Contract for JP's alleged repudiatory breaches before JP purported to terminate BH's employment under cl 30.2.2 of the REDAS Conditions is a necessary antecedent issue that has to be addressed before any conclusion may be made about whether the learned Adjudicator has jurisdiction to adjudicate SOP/AA 164 of 2022 on its merits. I caveat that as this is an issue that goes into the merits of the dispute that the learned Adjudicator has yet to consider, I express no view on its substantive merits.
>
> [emphases added].

(c) I find that the factual matrix in *Builders Hub* is unique and does not fall neatly within the facts presented to me in these adjudication proceedings. In *Builders Hub*:

(i) *Both* parties purported to terminate the contract in question. BH terminated the contract pursuant to its general contractual right to terminate the contract for JP's alleged repudiatory breaches before JP issued the notice of termination under cl 30.2.2 of the REDAS Conditions later on the same day.

(ii) Therefore, if it was found that BH's termination of the contract pursuant to its general contractual right to terminate was legally justified and its allegations concerning JP's alleged repudiatory breaches of the contract fell within one or more of the situations set out in *RDC Concrete*, then there was no basis for JP's purported invocation of cl 30.2.2 of the REDAS Conditions to terminate BH's employment under the contract subsequently, given that the contract had already been terminated by the time of issuance of the notice of termination.

(iii) Conversely, if it was found on the facts that BH's purported termination of the Contract for JP's alleged repudiatory breaches was unjustified, BH would itself be in breach of the contract. In such a situation, JP would have validly terminated BH's employment under the contract under cl 30.2.2 of the REDAS Conditions.

(d) With the above context in mind, and noting that Teh Hwee Hwee JC exercised her powers to remit the inquiry back to the learned adjudicator to consider "whether cl 30.3 of the REDAS Conditions, which suspends further payments to BH, has any application in this case", this suggests to me that I am bound to delve deeper to consider whether the Respondent's Notice of Termination which "invoke[d]" and "engage[d]" cll 12(a)(i) and 12(a)(v) of the Subcontract was valid. However, I find that the authorities referred to me by both Parties in these adjudication proceedings do not assist me with the standard of persuasion required of this inquiry by an adjudicator.

(e) On balance, I find that it is neither reasonable nor appropriate to expect these adjudication proceedings to arrive at a definitive determination on this issue. A full inquiry has to be left to a proper dispute resolution process which allows for, amongst others, pleadings, full discovery, witness statements (whether of fact or of expert opinion) as well as cross-examination of witnesses. I consider that the summary nature of these adjudication proceedings (including the time limits imposed for any determination) permits only a high-level examination

of the facts and issues and would not be capable of inquiring definitively into whether the termination was indeed valid.

(f) Hence, on the papers before me, I have taken reference from the Singapore Court of Appeal's pronouncement in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979, where the Court of Appeal confirms that claimants in adjudication only need to establish a *prima facie* case, and applying this standard of persuasion, I sought to determine whether there exists any reasonable basis for the Respondent to terminate the Subcontract in accordance with the terms thereof.

(g) At the Adjudication Conference, I requested the Parties' counsel to address me, based on the materials properly placed before me, on whether or not the Respondent's evidence sufficed to raise a *prima facie* case to support the Respondent's contention that the Subcontract had been terminated in accordance with the Subcontract.

(B) *PRIMA FACIE* CASE OF VALID CONTRACTUAL TERMINATION

54 At the Adjudication Conference, Ms Fong directed my attention to three notices of delay sent to the Claimant by the Respondent. In the overall, Ms Fong argues that the Claimant did not carry out the Subcontract works with due diligence. Ms Fong emphasised that the notices of delay recorded that "almost 17.5 months of delay" was caused in part by "drawings that are not given" by the Claimant, "poor sanitary work", and the Claimant's submission of "revised programs which were not accepted" by the Respondent as the revised programmes unilaterally asserted by the Claimant indicate a completion date which the Respondent did not/was not prepared to accept.

(a) The Respondent sent the first notice of delay to the Claimant on 6 March 2023. The letter, headlined "Notice of Delay", states as follows:

> … Based on the Master Program submitted on 22nd May 2022, the superstructure work shall be completed by 28th Feb 2023. The progress is very much delayed and behind schedule.
>
> … We would like to highlight that this is not acceptable to us and the Owner. You are hereby instructed to resubmit the Catch-Up Program to catch up on the delay.
>
> As per your promise in the WhatsApp group chat conversation, the structural basement slab and rainwater tank shall be completed on 12th Mar 2023, followed by 1st storey structural slab to be cast within 3 to 4 weeks afterward. To catch up on the delay, the balance of the

> storey slab must be cast within 3 weeks one after another. You should add more manpower on site to expedite the progress immediately …

(b) The Respondent sent the second notice of delay to the Claimant on 19 May 2023. The letter, headlined "Notice of Delay – To Submit Catch-Up Program and All M&E Shop Drawings (Full Set)", states as follows:

> Since our last letter … dated 6th Mar 2023, we are yet to receive your Catch-Up Program to catch up on the construction progress. You are hereby instructed to submit the Catch-Up Program by 25th May 2023.
>
> Your Catch-Up Program must clearly show all structural slab casting schedules, and all these schedules must be met and built on site to avoid any further delay. Any new completion date in your revised schedule is not agreed to us, but subject to our further discussion and evaluation.
>
> Referring to our meeting discussion on 8th May 2023 at our office, you and your subcontractors promised to submit full set of M&E shop drawings by the end of the week which is 12th May 2023. Until to date, not full set of M&E drawings submitted yet. Please submit to us by 25th May 2023.

(c) The Respondent sent the third and final notice of delay to the Claimant on 27 November 2023. The letter, headlined "3rd Notice of Delay – Final Remind", states as follows:

> … We are very disappointed with your performance as your work has affected the master schedule and the whole progress. We observe you will not be able to complete the work on time with the numbers of workers on site and your sub-contractor.
>
> … Please immediately rectification for the above-mentioned matters and complete before the stated date. And please properly organize your work programmers and wisely arrange a better site management. Otherwise, you shall bear the risk to reimburse for all monies, cost, or expenses arises due to your delay.

(d) Ms Fong also directed my attention to an e-mail, sent after the Respondent's Notice of Termination on 6 December 2023, by Mr [A] (the Claimant's project manager) to Mr [B] (the Respondent's director) on 16 December 2023 (timestamped 2.18am). Ms Fong highlighted to me that while the Claimant did not expressly accept the Respondent's termination in the correspondence, it was telling that it failed to express any disagreement with the Respondent's termination. According to Ms Fong, it was an "observed fact" that the Claimant was terminated on short notice. Ms Fong also points out that, in the said e-mail, the Claimant had accepted that it would leave the

planning area once it received full and final payment. Ms Fong relies on the following:

> … [the Respondent] terminated [the Claimant] with a short notice period and within a short span of time [the Respondent] immediately bring another subcontractor to site to carry out works without settling the outstanding and full final payment to [the Claimant], for [the Claimant] in order to leave the [project], we need the actual payment certification including the variation order, retention sum either by independent QS or any third party to justify the amount and [the Respondent] have to pay [the Claimant] before engaging other contractor to take over the project, we will move our excavator, containers, equipments and other items from the site on the day when your full and final payment cheque is cleared …

(e) Finally, Ms Fong emphasised to me that the Claimant had "stopped work since 31 October 2023 until the date of the termination of the Contract on 6 December 2023".

55 In response, Mr Yue acknowledged that the papers presented by the Claimant only referred generally to drawings being delayed and made general comments as to wrongful termination. Mr Yue made these submissions:

(a) First, Mr Yue further argued that "up until September, there was a 4 or 5 months delay before [the Claimant] got the BCA approved drawings". In support of this argument, Mr Yue drew my attention to a chain of e-mail correspondence between the Parties which included the Claimant's requests for the Respondent to send over certain drawings.

(b) Second, Mr Yue also highlighted to me that "at no point did the Claimant stop working" even after the Respondent sent the Notice of Termination. Mr Yue further submitted that the Claimant "continued working and tried to rectify the defects" which were "minor". To support this assertion, Mr Yue directed my attention to a chain of e-mail correspondence between the Parties. However, at the Adjudication Conference, I directed Mr Yue to address me on why these e-mails, in particular an e-mail dated 16 December 2023 (timestamped 2.18am), discussed a joint site inspection, the appointment of an independent quantity surveyor and a handover which would flow naturally from the Respondent's termination of the Subcontract. I questioned Mr Yue as to whether these e-mails were sufficient *prima facie* evidence that the Claimant had accepted the Respondent's termination, and that the Claimant was preparing to vacate from the site. Mr Yue disagreed and insisted that the Claimant wanted to continue working on site.

(c) Third, Mr Yue argued that "consistent delays from [the Respondent] culminated in wrongful termination". Mr Yue asserted that the Respondent contributed to the delays as "some drawings that were insisted by the Respondent were not part of [the Claimant's] scope of work". However, this assertion has not been supported by any meaningful details and/or particulars.

(d) Mr Yue also contended that "[t]he household shelter was delayed for 6 months. Without the approved drawings, [the Claimant] could not done the works". Leaving aside the fact that this argument only transpired from Mr Yue's oral submissions at the Adjudication Conference, this assertion is also not supported by any meaningful details and/or particulars. I am also inclined to agree with Ms Fong's submissions that the household shelter is indeed included in the drawing provided to the Claimant sometime in March 2022.

56 After carefully considering the Parties' arguments on whether there has been a valid contractual termination, I placed little weight on Mr Yue's third and fourth submissions. I therefore agree with the Respondent's position and determine that the Respondent has demonstrated a *prima facie* case that there has been a valid contractual termination pursuant to cl 12 of the Subcontract.

57 In arriving at my determination, I placed emphasis on the chain of e-mail correspondence that the Claimant relies on to assert that it "continued working and tried to rectify the defects". I find that the chain of e-mail correspondence suggests to me that the Claimant had accepted that the contractual termination was valid. Specifically, the e-mails show that the Claimant was in the midst of arranging the incoming handover process, a joint site inspection, and its eventual leaving of the planning area. All of this can reasonably demonstrate that the activities had been predicated on a valid contractual termination of the Claimant's employment under the Subcontract. For completeness, I reproduce relevant portions of the e-mail correspondence below:

(a) On 15 December 2023, the Parties conducted a joint inspection of the site. In the e-mail sent on the same day by the Respondent's Mr [B] to the Claimant's Mr [A] on 15 December 2023 (timestamped 3.36pm), Mr [B] stated as follows:

> 1. Refer my site inspection on 17 November and today 12.30pm, Mr [D] sent the completion photo on today 12.48pm at our Whatsapp group. I no acceptable. I have highlight many time doe all the uneven concrete surface, hole, nail & *etc* must make good to handover, today check onsite is NO DONE. I give you another few days until 8 December 23, if you unable to complete. I will check to my lawyer the next step for [the Respondent] to repair.

> 2. Ditto, All the material, equipment, site container, excavator, loose concrete and all your thing to be remove by 18 December 23 …

(b) On 16 December 2023, the Claimant's Mr [A] sent an e-mail (timestamped 2.18am) to Mr [B] in response. While Mr [A] offered to rectify any "minor defects", it appears to me that, barring settlement of moneys payable to the Claimant, the Claimant had accepted that the Claimant's employment under the Subcontract had been terminated, and that the Claimant would remove its equipment from the premises upon full and final payment being made. The relevant portions of the e-mail are as follows:

> … Today 15/1/2023, from [the Respondent], you only one person came to site to inspect and also you highlighted some new defects …
>
> … those defects you mentioned are not structural defects, *those are very minor and we will rectify* Asap …
>
> … *[the Respondent] terminated [the Claimant] with a short notice period and within a short span of time [the Respondent] immediately bring another subcontractor to site to carry out works without settling the outstanding and full & final payment to [the Claimant], for [the Claimant] in order to leave the [project]*, we *need the actual payment certification including the variation order, retention sum either by independent QS or any third party to justify the amount and [the Respondent] have to pay [the Claimant]* before engaging other contractor to take over the project, we will move our excavator, containers, equipments and other items from the site on the day when your full and final payment cheque is cleared.

[emphasis added]

58 As to the Claimant's assertion that the Claimant's delays were partially caused by the Respondent's late submission of the Building and Construction Authority ("BCA") approved drawings, I am inclined to accept, for the purposes of the inquiry in these adjudication proceedings, the Respondent's position that the BCA drawings *were not* the cause of the delays for which the Respondent terminated the Claimant's employment pursuant to cl 12 of the Subcontract:

(a) It was apparent to me after hearing Mr Yue's submissions at the Adjudication Conference that the Claimant's primary argument is that the BCA drawings were only sent to them in September 2022. However, I find that the said delay (even if proven by the Claimant) does not assist the Claimant's case:

(i) First, the Claimant was unable to explain to me how the said BCA drawings were necessary for work to be done at that current phase of the Project.

(ii) Second, and on a related point, Mr Yue conceded at the Adjudication Conference that, based on the papers properly placed before me in these adjudication proceedings, there has been no delay analysis carried out in respect of the said delay.

(b) By way of contrast, Ms Fong's reference to the WhatsApp message in a group chat which included the Parties, sent on 12 August 2022 at 10.11am, shows that the Claimant's Mr [A] had admitted that the piling works had been delayed. Thus, even before September 2022, *prima facie*, the Claimant had already begun works and the works had already started to be delayed.

59 Flowing from the above, I determine that the Respondent has demonstrated a *prima facie* case that there has been a valid contractual termination pursuant to cl 12 of the Subcontract.

(2) Issue A2: whether Claimant entitled to lodge Adjudication Application and whether I possess jurisdiction under SOP Act to determine merits of Adjudication Application

60 The Respondent's position is that the Claimant is not entitled to lodge this Adjudication Application as the Subcontract has been terminated and cl 12(b) of the Subcontract provides that the Respondent shall not be liable to pay to the Claimant any sum in respect of the Subcontract until the cost of completion, maintenance, damages for delay in completion and all other expenses incurred by the Respondent has been ascertained.

61 First, the Respondent brought my attention to s 4(2)(*c*)(i) of the SOP Act which states that the SOP Act does not apply to any terminated contract if the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract. Section 4(2)(*c*)(i) of the SOP Act as follows:

> This Act *does not apply to* —
>
> …
>
> (c) *any terminated contract* to the extent that —
>
> (i) *the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract*; and …
>
> [emphasis added].

62 Second, the Respondent specifically brought my attention to two court decisions:

(a) First, the Singapore High Court decision of *Builders Hub* ([52] *supra*) where the High Court expressly considered the operation of s 4(2)(*c*)(i) of the SOP Act and held that cl 30.3 of the *REDAS Design and Build Condition of Contract* (3rd Ed, October 2010) ("*REDAS Conditions*") prohibits a claimant's entitlement to bring a progress claim. The High Court held (at [28]) as follows:

> … The foremost consideration would be the terms of the Contract (*Orion-One* at [23], citing *Yau Lee* at [31] and *Shimizu* at [2], [21] and [28]). In this case, the question is whether, upon the contractual termination event, there *is any applicable provision in the Contract that negates or suspends BH's entitlement* to be paid based on a validly served payment claim. If there is such a provision, BH would *lose its right to apply for adjudication of the claim in PC 40 even though PC 40 was validly served prior to the termination.* If no such contractual provision was engaged, BH's entitlement to apply for adjudication of the claim in PC 40 would remain unaffected notwithstanding the termination. [emphasis added by the Respondent]

(b) At [35], the High Court also held as follows:

> In my view, s 4(2)(*c*) of the SOPA only applies to exclude the application of the SOPA to a terminated contract if there are *terms in that contract 'relating to termination that permit the respondent to suspend progress payments*" that have been engaged. This conclusion may be gleaned from the Second Reading Speech:
>
> > …we understand that *it is common industry practice for contract terms to suspend payment until a later date if a contractor has defaulted*, leading to the termination of the contract. When this happens, the SOP Act will pay heed to terms pre-agreed by parties. As such, *clause 3 will require adjudicators to respect the contract clauses on suspension of payment for terminated contracts.* This means that claimants that have defaulted on the contract will need to abide by contract terms, and *they will be able to submit a payment claim under the SOP Act only after the conditions in the contract have been met.*
>
> [emphasis added by the Respondent]

(c) Second, the Singapore Court of Appeal decision of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 1 SLR 189 ("*Yau Lee*"), where the Court of Appeal held (at [31]) that a contractor must first establish an entitlement to payment in the underlying contract before a claim for progress payments under the SOP Act can be made. The Court of Appeal went on to find that in order to determine a contractor's entitlement to submit payment

claims under the SOP Act, it would necessarily have regard to the provisions of the underlying contract. At [31]:

> … In order to claim for progress payments under the SOPA, it is imperative for the contractor to first establish that he is entitled to such payment under the contract. It follows that in order to determine a contractor's entitlement to submit payment claims under the SOPA, the court *must necessarily have regard to the provisions of the underlying construction contract.* [emphasis added by the Respondent]

(d) Next, the Respondent directed my attention to cl 12 of the Subcontract. The Respondent makes two arguments in respect of cl 12 of the Subcontract:

(i) First, the Respondent contends that termination of the Subcontract pursuant to cl 12(a) of the Subcontract would have triggered the application of cl 12(b) of the Subcontract. Clause 12(b) of the Subcontract "imposes a condition that must be complied with before the Claimant can bring an SOP claim, the condition being that the Contractor's Costs needs to be first ascertained". Given that the "condition" was not fulfilled by the Claimant, cl 12(b) of the Subcontract falls within the ambit of s 4(2)(*c*)(i) of the SOP Act and, consequently, the SOP Act would pause to apply to the Subcontract. The Claimant has to comply with the "condition" before it can lodge an adjudication proceeding. Clause 12(b) of the Subcontract states as follows:

> *In the event of termination of the employment* of the Subcontractor under this Clause, *no sum shall be certified as due to the Subcontractor nor shall the Contractor be liable to pay to the Subcontractor any sum* in respect of the Subcontract until the cost the completion and maintenance, damages for delay in completion (if any) all other expenses incurred by the Contractor ('the Contractor's Cost') has been ascertained. If the Contractor's Cost exceeds the sum which would have been payable to the Subcontractor shall upon demand, pay to the Contractor such excess shall be deemed a debt due by the Subcontractor to the Contractor and be recoverable accordingly. [emphasis added]

(ii) Second, the Respondent contends that cl 12(b) of the Subcontract is similar to cl 30.3 of the REDAS Conditions which has been expressly considered by the High Court in *Builders Hub*, for which such clauses were held by the High Court to prohibit a claimant's entitlement to bring a progress claim. To recapitulate, *Builders Hub* involved a payment claim which was validly served prior to termination of the underlying contract based on the REDAS Conditions. According to the

High Court (at [61]), the effect of cl 30.3.1 of the REDAS Conditions was such that a contractor would be precluded from claiming any payments (including progress payments) until the project is completed and the relevant costs ascertained and deducted upon the termination of the contractor's employment. The court thus held (at [28] and [86]) that if cl 30.3 of the REDAS Conditions applied upon termination of the contract, a payment claim would fall outside the ambit of the SOP Act even if it was validly served prior to termination, and any adjudicator would have no jurisdiction to hear the adjudication application.

(iii) As per cl 30.3 of the REDAS Conditions in *Builders Hub*, the Respondent argued that cl 12 of the Subcontract similarly extinguished the Claimant's right to adjudicate a payment claim even if the Payment Claim was validly served prior to termination. For ease of reference, a table comparing the two sets of clauses is set out below:

Clause 12 of the Sub-Contract	**Clause 30.3 of the REDAS Conditions**
"In the event of termination of the employment of the Subcontractor under this Clause, no sum shall be certified as due to the Subcontractor nor shall the Contractor be liable to pay to the *Sub contractor* any sum in respect of the Subcontract until the cost the completion and maintenance, damages for delay in completion (if any) all other expenses incurred by the Contractor ('the Contractor's *Costs*') has been ascertained. If the Contractor's Cost exceeds the sum which would have been payable to the Subcontractor shall upon demand, pay to the Contractor such excess shall be deemed a debt due by the Subcontractor to the Contractor and be recoverable accordingly." [emphasis added]	"30.3 Effects of Termination for Default In the event of the termination of the employment of the Contractor under clause 30.2, 30.3.1. the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained. … 30.3.7 the Employer shall be entitled to recover from the Contractor the following

	30.3.7.1 the extra costs (if any) incurred in the design and completion of the incomplete Works, 30.3.7.2 the costs of rectification of defects (if any) 30.3.7.3 liquidated damages payable for delay in completion and, 30.3.7.4 any other loss or expense incurred arising from the termination of the Contractor's employment From any sum due to the Contractor under clause 30.3.6 or as a debt. If there are no such extra costs, the Employer shall pay any balance to the Contractor."

63 The Claimant disagreed with the Respondent's interpretation of s 4(2)(*c*) of the SOP Act and the case law raised. Mr Yue made the following arguments:

(a) First, the Claimant argued that "the Respondents' reliance on Section 4(2)(c) of the SOP Act is misplaced". The Claimant contends that s 4(2)(*c*) of the SOP Act neither prohibits the Claimant from lodging an adjudication application on a payment claim issued prior to termination of the contract, nor does it render a payment claim issued prior to termination as an invalid payment claim.

(b) The Claimant contends that "the reference to 'progress payment' in the SOP Act must refer to prospective payment claims issued post-termination and not prior to termination". To support this argument, the Claimant directed my attention to *Builders Hub* (at [35]), where the Singapore High Court made reference to the speech of the then Minister of State for National Development, Mr Zaqy Mohamad, at the Second Reading of the Building and Construction Industry Security of Payment (Amendment) Bill on 2 October 2018, as follows:

> … we understand that it is common industry practice for contract terms to suspend payment until a later date if a contractor has defaulted, leading to the termination of the contract. When this happens, the SOP Act will pay heed to terms pre-agreed by parties. As such, clause 3 will require adjudicators to respect the contract clauses on suspension of payment for terminated contracts. This means that claimants that have defaulted on the contract will need to abide by contract terms, *and they will be able to submit a payment claim under the*

SOP Act only after the conditions in the contract have been met. [emphasis added by the Claimant]

(c) Second, the Claimant referred me to the Singapore Court of Appeal's decision in *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 ("*Shimizu*") and argued that the case stood for the proposition that only payment claims served after termination, and not before, were incapable of supporting adjudication applications under the SOP Act.

(d) Third, on the Respondent's reliance on the High Court decision in *Builders Hub*, the Claimant stated that it disagreed with the decision. No reasons elaborating on this were provided by the Claimant in the written submissions. However, I record that Mr Yue has asserted at the Adjudication Conference that "if we take the Respondent's point to the extreme, then Respondents can delay indefinitely". For completeness, I also record that Mr Yue seems to have also taken an opposite position at the Adjudication Conference. One of Mr Yue's submissions was that "[i]f [the Subcontract] was terminated contractually, then technically and arguably following from [*Builders Hub*], it is no longer the Adjudicators jurisdiction".

64 Having carefully considered the Parties' respective arguments, I accept the Respondent's position for the following reasons:

(a) In my view, the existing legal authorities that I am bound to apply are clear on this point. I am bound and agree with Teh Hwee Hwee JC's decision in *Builders Hub*. The valid service of the Claimant's Payment Claim prior to the termination of the Subcontract and/or the employment of the Claimant did not, *ipso facto*, give the Claimant an unqualified entitlement to adjudication after termination. Neither did the occurrence of the contractual termination event *per se* disentitle the Claimant to an adjudication of a payment claim that was validly served prior to the termination. The question is whether, upon the contractual termination event, there is any applicable provision in the Subcontract that negates or suspends the Claimant's entitlement to be paid based on the validly served Payment Claim:

(i) If such a provision exists, the Claimant would lose its right to apply for adjudication of the claim in the Payment Claim even though the Payment Claim was validly served prior to the termination of the Subcontract.

(ii) If no such provision exists, the Claimant's entitlement to apply for adjudication of the claim in the Payment Claim would remain unaffected notwithstanding the termination of the Subcontract.

(b) I do not accept the Claimant's contention for the following reasons:

(i) I am unable to agree with the Claimant that the Court of Appeal case of *Shimizu* stood for the proposition that *only* payment claims served after termination, and not before, were incapable of supporting adjudication applications under the SOP Act. It is true that the Court of Appeal in *Shimizu* found that a payment claim served after termination could not support the relevant adjudication application. However, this finding was made on the basis of the underlying contract (at [38]–[39] and [42]–[49] of *Shimizu*). *Shimizu* simply does not stand for the sweeping proposition that only a payment claim served after termination would render a payment claim unable to support an adjudication application.

(ii) Further, while the Claimant disagrees with *Builders Hub*, apart from sweeping assertions that the outcome would lead to the Claimant not being paid for work done, the Claimant was unable to assist me with any *substantive* reasons as to why I ought to depart from the High Court's findings in *Builders Hub*.

65 In the premises, I determine that the Claimant is not entitled to lodge this Adjudication Application as the Subcontract has been terminated and cl 12(b) of the Subcontract provides that the Respondent shall not be liable to pay to the Claimant any sum in respect of the Subcontract until the cost of completion, maintenance, damages for delay in completion and all other expenses incurred by the Respondent has been ascertained.

(3) Issue A3: whether Respondent was under "duty to speak" to raise jurisdictional objection in its Payment Response and consequently whether Respondent is estopped and/or has waived its right to raise this jurisdictional objection in its Adjudication Response

66 Even if I find that the Claimant is not entitled to lodge this Adjudication Application, the Claimant contends that the Respondent "had waived an available objection to the learned Adjudicator's jurisdiction" as it possessed a "duty to speak" to raise this jurisdictional objection in the Payment Response. Consequently, the Claimant contends that I cannot consider and/or accept the Respondent's jurisdictional objection. This effectively means that if I determine Issue A3 in the Claimant's favour, nothing turns on my determination of Issue A2 in the Respondent's favour.

67 The Claimant specifically brought my attention to these authorities:

(a) First, the Singapore Court of Appeal decision of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018]

1 SLR 317 ("*Audi Construction*") for the proposition that "if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response". The Claimant cited *Audi Construction* (at [67]):

> … *a failure to object would amount to an unequivocal representation of a decision to forgo one's right to raise that objection only when such a failure subsists at the time a claimant would reasonably expect the respondent to air his objection. For the reasons stated at [66] above, that time is the time by which the respondent is to file his payment response.* This is consistent with our view in *Grouteam* at [68] that:
>
> … the appropriate time for the respondent to raise such an objection [*ie*, an objection to the time of service of a payment claim] would generally be the time at which it receives that payment claim or, *at the latest, by the deadline for it to submit its payment response* …
>
> [emphasis added by the Claimant]

(b) Second, the Court of Appeal decision of *BWG v BWF* [2020] 1 SLR 1296 ("*BWG v BWF*") for the proposition that the doctrine of approbation and reprobation, which precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he had exercised, applies to the Respondent's jurisdictional objection. The Court of Appeal stated (at [102]):

> … We endorse Belinda Ang Saw Ean J's description of the doctrine in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, Intervener)* [2006] 1 SLR(R) 358 ('*Treasure Valley*') at [31]:
>
> > The doctrine of approbation and reprobation precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised. It entails, for instance, that a person 'having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit': see *Evans v Bartlam* [1937] AC 473 at 483 and *Halsbury's Laws of Australia* vol 12 (Butterworths, 1995) at para 190–35 where the doctrine of approbation and reprobation is conveniently summarised as follows:
> >
> > > *A person may not 'approbate and reprobate', meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course.*

[emphasis added by the Claimant]

(c) At the Adjudication Conference, and in response to Ms Fong's contention (elaborated at [68(c)] of this Adjudication Determination below):

(i) Mr Yue took issue with the fact that the objection was only stated in the cover e-mail to the Payment Response. Conversely, Mr Yue contends that the Respondent was required to include its objection in the Payment Response itself.

(ii) Mr Yue also directed my attention to the Payment Response. Mr Yue submitted that, given the detailed nature of the Payment Response (and the Respondent's objections to the Claimant's claim therein), I ought to only refer to and/or consider the contents of the Payment Response and *not* the cover e-mail when deciding whether the Respondent had waived its right to raise the jurisdictional objection.

68 The Respondent disagrees with the Claimant's reliance on *Audi Construction* for the following reasons:

(a) First, the Respondent contends that *Audi Construction* would not apply to this Adjudication Application:

(i) The Respondent submitted that *Audi Construction* could be differentiated from the present case. *Audi Construction* concerned a respondent's right to object to an *invalidly served payment claim*. Whether a payment claim was validly served was an issue that a respondent *would have known at the time of their payment response*. This is in contrast to an objection to a claimant's right to bring an adjudication application. *Whether an adjudication application would be filed by a claimant would not be known to a respondent at the time of their payment response*.

(ii) At the Adjudication Conference, Ms Fong also directed my attention to the High Court decision of *Builders Hub* ([52] *supra* at [84]) where the court, consistent with the Court of Appeal's findings in *Audi Construction*, held that whether the waiver and estoppel argument applied hinged on *whether the payment claim fell within the SOP Act*. Ms Fong contends that the jurisdictional objection raised by the Respondent goes towards my jurisdiction to hear this Adjudication Application (and not the validity of the Payment Claim). Therefore, the waiver and estoppel argument would not apply to this jurisdictional objection. It is stated at [84] of *Builders Hub* as follows:

Taking guidance from the legal principle expressed in *Yau Lee*, BH could not rely on the doctrines of waiver and estoppel, or

> s 15(3) of the SOPA, to prevent JP from raising or relying on s 4(2)(*c*) of the SOPA. Indeed, when s 4(2)(*c*) is engaged, it has the effect of placing any payment claims outside the purview of the SOPA. Section 4(2)(*c*) of the SOPA was inserted by way of amendments to the SOPA in 2018 to add to the list of contracts enumerated in s 4 to which the SOPA does not apply. Section 4(2)(*c*) applies to certain types of terminated contracts and has the same effect as the other provisions in s 4(2) of the SOPA in placing any payment claims made under such contracts outside the purview of the SOPA. Understood in the context of the present case, s 4(2)(*c*) would be engaged if cl 30.3 of the REDAS Conditions is engaged on the facts. As such, the question of whether cl 30.3 is applicable is, in substance, a question of whether the payment claims fell outside the purview of the SOPA. In other words, it is a jurisdictional objection to which the doctrines of waiver and estoppel cannot operate. Support for this conclusion is best expressed in the Court of Appeal's statement in *Yau Lee*: that 'the duty to speak does not extend to payment claims which are *outside* the ambit of the SOPA' [emphasis in original] (at [70]); instead, the duty to speak applies to jurisdictional objections 'in respect of payment claims that were otherwise within the purview of the SOPA' (at [56]). The doctrines such as estoppel and waiver therefore cannot apply to extend the learned Adjudicator's jurisdiction to claims which the SOPA was never intended to regulate.

(iii) Further, the Respondent also noted that the court in *Audi Construction* held that only a "voluntary or relinquishment of a known right, claim or privilege" would amount to a waiver. At the Adjudication Conference, Ms Fong highlighted to me that the doctrines of waiver and estoppel considered in *Audi Construction* are derived from the general principles on waiver and estoppel. On this point, Ms Fong directed my attention to [54] of *Audi Construction* which states as follows:

> As Lord Goff of Chieveley observed *in Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The 'Kanchenjunga')* [1990] 1 Lloyd's Rep 391 ('*The Kanchenjunga*') at 397 col 2, 'the expression "waiver" is one which may, in law, bear different meanings' and '[i]n particular, it may refer to a forbearance from exercising a right or to an abandonment of a right'. In the true sense of the word, however, waiver means a voluntary or intentional relinquishment of a known right, claim or privilege: Sean Wilken QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ('*Wilken and Ghaly*') at

> para 3.14. On this definition, the only form of waiver that befits that label is waiver by election. This doctrine concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [33].

The Respondent argued that since it was not aware that it had any right to object to the Claimant's filing of this Adjudication Application at the time of the Payment Response, no "known right" was and/or can be relinquished.

(iv) In addition, the Respondent also argued that the court in *Audi Construction* held that "a failure to object would amount to an unequivocal representation of a decision to forego one's right to raise that objection only when such a failure subsists at the time a claimant would reasonably expect the respondent to air his objection". On this, the Respondent submitted that the Claimant could not have reasonably expected the Respondent to air its objection before an adjudication application had been brought. The Respondent also highlighted to me that there were 11 prior progress claims which resulted in no adjudication application.

(b) Second, the Respondent contends that, in any case, the Court of Appeal's findings on waiver and estoppel in *Audi Construction* were strictly *obiter dicta* as the court had already found that the payment claim was validly served, rendering the objection irrelevant.

(c) Finally, the Respondent points out that it *did not* communicate any election not to object to any future adjudication in the Payment Response. Practically, the Respondent could not anticipate whether the Claimant would bring an adjudication application. This is especially after the Respondent had provided its certification and verification of the Claimant's progress claim. At the Adjudication Conference, Ms Fong emphasised to me that the Respondent *did not*, as a matter of fact, waive its right to raise a jurisdictional objection. Ms Fong directed my attention to the cover e-mail to the Payment Response, where Ms Fong contends that the Respondent had already

notified the Claimant of the objection. The cover e-mail, dated 20 December 2023 (timestamped 4.36pm), states as follows:

> From: Mr [C]
>
> Sent: Wednesday, 20 December 2023 4:36pm
>
> To: Mr [A]
>
> Cc: [xxx], Mr [D], Mr [B], …
>
> Subject: RE: [Project]-Progress Claim No.12
>
> Attachments: PC12_Payment Response.pdf
>
> Dear Mr [A],
>
> Payment response no.12 correspondence to your progress claim no.12 attached for your attention. LD is calculated based on our new target Completion Date which is on 31 July 2024, due to your failure to execute and complete the subcontract works.
>
> *In view of we had already issued termination letter to your company on 6 December 2023, no sum shall be certified in respect of the Subcontract until the cost of the completion and maintenance, damages for delay in completion (if any) all other expenses incurred to us has been ascertained [pursuant to Clause 12(b) of Appendix C – Terms and Conditions of Subcontract].*
>
> We would like to bring to your attention that the structural defects are not rectified completely by you, we will engage third party subcon to rectify after past the deadline given to you. All these costs and expenses thereof shall be solely borne by you and we are entitled to deduct all such costs and expenses from any monies due or to become due to you.
>
> [emphasis added]

(d) In response to Mr Yue's contention (at [67(c)) of this Adjudication Determination above) that the Respondent was required to include its objection in the Payment Response itself, Ms Fong disagrees and contends that:

(i) the SOP Act and the SOP Regulations do not prescribe/mandate a format that a payment response ought to take;

(ii) s 11 of the SOP Act allows a respondent to supplement its payment response; and

(iii) the above must mean that an objection which is set out in the cover e-mail to the Payment Response is sufficient.

69 Having carefully considered the Parties' arguments, I agree with the Respondent's position. My reasons are as follows:

(a) The interaction between (i) the law on waiver and estoppel in the context of s 15(3) of the SOP Act; and (ii) a jurisdictional objection that the payment claim fell outside the ambit of the SOP Act, has been helpfully clarified by the Court of Appeal in *Yau Lee* ([62(c)] *supra*), and more recently, affirmed and applied by the High Court in *Builders Hub*.

(b) The Court of Appeal in *Yau Lee* (at [56]) had clarified that the "duty to speak" principle as espoused in its previous decision in *Audi Construction* did not apply to situations where the payment claim *falls outside the ambit of the SOP Act*:

> In this regard, we should clarify that our holding in *Audi Construction in relation to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell outside the purview of the SOPA from the outset.* Indeed, our entire discussion on waiver and estoppel was predicated on the basis that '[t]he contract and the [SOPA] define the rights the parties have in relation to each other' (at [62]). If the purported payment claim was one which did not entitle the contractor to commence adjudication under the SOPA in the first place, there would be no corresponding duty to speak. In other words, it is clear from the context of our decision in *Audi Construction* that 'any' jurisdictional objection refers to objections in respect of payment claims that were otherwise within the purview of the SOPA. [emphasis added]

(c) At [70], the Court of Appeal in *Yau Lee* held in unequivocal terms that "the duty to speak *does not extend to payment claims which are outside the ambit of the SOPA*" [emphasis added].

(d) The Court of Appeal's decisions in *Audi Construction* and *Yau Lee* were affirmed and applied by the High Court in *Builders Hub*, where the High Court (at [83]) held as follows:

> In this regard, the law on waiver and estoppel (in relation to the SOPA regime) and s 15(3) of the SOPA was examined in detail by the Court of Appeal in *Audi Construction Pte Ltd* [2018] 1 SLR 317 ('*Audi Construction*'), where it held that 'if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response' (at [66]). However, the Court of Appeal later clarified in *Yau Lee* that the holding in *Audi Construction* 'in relation to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell *outside the purview of the SOPA from the outset*' [emphasis in original] (at [56]). For this reason, the court found that the doctrines of waiver and estoppel could not bar the raising of a jurisdictional objection where the objection was

that the payment claim fell outside the ambit of the SOPA (*Yau Lee* at [65]).

(e) In my view, the existing legal authorities, that I am bound to apply, are therefore clear on this point. The waiver and estoppel argument does not assist the Claimant if the Respondent's jurisdictional objection was that the payment claim fell outside the ambit of the SOP Act. In the present case, the Respondent's jurisdictional objection is precisely one which argues that the Payment Claim fell outside the ambit of the SOP Act, premised on cl 12 of the Subcontract and s 4(2)(*c*) of the SOP Act.

(f) I, therefore, find that the Respondent did not possess a "duty to speak" to raise its jurisdictional objection in the Payment Response. The Respondent, therefore, has not waived its right to object to my jurisdiction just because the objection was first raised in the Adjudication Response.

(g) In any event, I also find that the Respondent has made no unequivocal representation that it would waive its right to raise a jurisdictional objection in the Adjudication Application. At the Adjudication Conference, Mr Yue was unable to direct my attention to any evidence of such an election on the Respondent's part. I, therefore, find that the Respondent did not make an election not to raise an objection to my jurisdiction.

(h) In any case, following my determination that the Respondent had no "duty to speak" and raise its jurisdictional objection in the Payment Response, I reject the Claimant's argument that the waiver and estoppel principle in *Audi Construction* prohibits the Respondent's jurisdictional objection.

70 For the reasons mentioned above, I determine that cl 12 of the Subcontract, which suspends further payments to the Claimant, applied to this Adjudication Application. Consequently, the Payment Claim would fall outside the ambit of the SOP Act and this Adjudication Application is dismissed on the basis that I have no jurisdiction to determine the same.

71 Following my determination in relation to Issue A that I am not seized of any jurisdiction to determine the merits of the Adjudication Application, the ancillary question is whether I would need to determine Issues B, C and D. At the Adjudication Conference, I have directed the Parties to address me on this:

(a) Ms Fong contends that I *will not* need to decide on any further issues if I find that I have no jurisdiction to determine the merits of the Adjudication Application.

(b) Mr Yue disagrees and contends that "for [me] to come to [a conclusion on] the jurisdiction question, [I] have to look at the other stuff like the back charges, because that will determine whether the contract has been validly terminated". His further contention is that "because [the Claimant] [was] prevented from continuing the contract due to the other issues, [I] have to look at the other facts".

72 Having carefully considered the Parties' argument, I accept the Respondent's position. I am of the view that Mr Yue's contention seems to have missed the point – whether I consider whether the Subcontract has been validly terminated (which I have determined in the Respondent's favour on *prima facie* evidence) and whether I have jurisdiction to further consider the substantive merits of the Claimant's claim as set out in the Payment Claim are two separate and distinct matters. Given that I have determined that I am not seized of any jurisdiction to determine the merits of the Adjudication Application, I find that it is unnecessary (and in fact, inappropriate) for me to determine Issues B, C and D.

Conclusion

73 For the reasons mentioned above, I determine that the Adjudication Application is dismissed in its entirety given the jurisdictional issues surrounding it.

74 Taking into account that the Claimant's Adjudication Application is dismissed, in the exercise of my discretion on costs of the adjudication proceedings, the costs of the adjudication proceedings, being the adjudication application fee of $654 (inclusive of 9% GST) and the adjudicator fee of $20,066.90 (inclusive of 9% GST), shall be borne solely by the Claimant.

BHW Pte Ltd
v
BHX Pte Ltd

[2024] SGSOP 3

Singapore Mediation Centre — SOP AA 036 of 2024
Kee Bee Kheng
19 February 2024

Adjudication Application — *Documents* — *Adjudication application sent to adjudicator via Google Drive link containing damaged or corrupted files that could not be opened* — *Claimant providing replacement documents on adjudicator's request via e-mail* — *Whether adjudication application should be dismissed for failure to attach mandatory documents* — *Whether failure to properly submit relevant payment claim and payment response amounted to patent error* — *Section 13(3)*(c) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Adjudication Application — *Requirements* — *Claimant's acceptance of response amount* — *Whether claimant's tax invoice constituted valid written acceptance of response amount* — *Section 12(1) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Adjudication Application — *Time for lodgment* — *Whether lodgment of adjudication application was in accordance with statutory timelines* — *Section 16(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 10, 10(1), 10(2), 10(2)(*b*), 10(3)(*a*), 10(3)(*b*), 10(4)

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 3(1), 4(4), 5, 8(1), 8(1)(*a*), 8(1)(*b*)(i), 8(5), 8(5)(*b*), 10, 11(1), 11(1)(*a*), 11(3), 12, 12(1), 12(3), 12(5)(*b*), 13(2), 13(3), 13(3)(*a*), 13(3)(*b*), 13(3)(*c*), 15(1), 15(3)(*a*), 15(4), 16(3), 16(4), 16(5)(*c*), 17(1)(*a*)(ii), 17(4), 17(4)(*b*), 17(4)(*g*), 17(6), 22(1)(*a*), 22(1)(*b*), 36, 36(2), 37(1)(*d*)

Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ss 11(1)(*b*), 25(3), 25(4), 25(6), 25(7), 25(8)

Building and Construction Industry Security of Payment Regulations 2005 regs 5, 5(1), 5(2)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 7(1), 7(2), 7(2)(*e*), 7(2A)

Holidays Act 1998 (2020 Rev Ed)

Interpretation Act (Cap 1, 2002 Rev Ed)

Divyesh Menon and Tessa Teo (Rajah & Tann Singapore LLP) for the claimant; Respondent in person.

[Commentary: see para 4.12]

19 February 2024

Kee Bee Kheng:

1 This is a determination made on 19 February 2024 under the prevailing Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of adjudication application number SOP/AA 036 of 2024 ("Adjudication Application" or "AA"). This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant is [BHW] Pte Ltd ("Claimant"), UEN number: [xxx] and the respondent is [BHX] Pte Ltd ("Respondent"), UEN number: [xxx].

3 For the reasons set out in the pages which follow, I determine that:

(a) The Respondent shall pay to the Claimant the sum of $104,866.81, which includes a sum of $7,767.91 for 8% goods and services tax ("GST") ("Adjudicated Amount").

(b) This Adjudicated Amount is due and payable by the Respondent to the Claimant within seven days after this determination is served on the Respondent. This is hereby recorded as the due date ("Due Date") for payment of the Adjudicated Amount. The Respondent must pay this Adjudicated Amount by the Due Date.

(c) The rate of interest payable shall be at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid on the Due Date until the full payment of the same is paid.

(d) The Claimant shall bear 30% and the Respondent the remaining 70% of the costs of adjudication, being the Adjudication Application fee of $654 (inclusive of 9% GST) and adjudicator's fee of $9,705.36 (inclusive of 9% GST). There is no cost involved in using the Zoom video conferencing platform in this Adjudication Application.

4 The Claimant's Adjudication Application together with the following attachments were filed at the SMC on 1 February 2024. For convenience,

the referencing to the attachments adopts primarily the same format: "AA: CBOD Tab [number]" and "AA: CBOA Tab [number]" shown in the Claimant's Adjudication Application submissions dated 1 February 2024 ("CS-1"):

Reference		
CBOD		
(a)	AA-1 Form	
(b)	Notice of Intention to Apply for Adjudication dated1 February 2024	
(c)	Letter of Authorisation dated 1 February 2024	
(d)	Proof of payment of lodgment fees	
(e)	CS-1	
(f)	Subcontract documents, comprising: Annex A – The Letter of Award ("LOA"); Annex B – The Schedule of Unit Rates; Annex C – The Compliance List; Annex D – The Tender Documents; and Annex E – The Tender Drawings.	Tab 1
(g)	Adjudication Determination SOP/AA 188 of 2022	Tab 2
(h)	Adjudication Determination SOP/AA 087 of 2023	Tab 3
(i)	Adjudication Determination SOP/AA 198 of 2023	Tab 4
(j)	Adjudication Determination SOP/AA 257 of 2023	Tab 5
(k)	Payment Claim No 56Tab 6	Tab 6
(l)	Payment Certificate No 56	Tab 7
(m)	Invoice for Certified Sum dated 28 December 2023	Tab 8
(n)	Finalised price	Tab 9
(o)	Delivery orders for PC56 reference period	Tab 10
(p)	Copies of Payment Claims Nos 1–55	Tab 11
(q)	Quotation 089r0	Tab 12
(r)	Quotation 090r1	Tab 13
(s)	Addendum 22	Tab 14
CBOA		
(a)	SOP Act	Tab 1
(b)	Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)	Tab 2

(c) Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) Tab 3

(d) Building and Construction Industry Security of Payment Act(Cap 30B, 2006 Rev Ed) Tab 4

(e) Holidays Act 1998 (2020 Rev Ed) Tab 5

(f) Interpretation Act (Cap 1, 2002 Rev Ed) Tab 6

(g) *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 Tab 7

(h) *AGP v AGQ* [2011] SCAdjR 192 Tab 8

(i) *AKT Pte Ltd v AKU* [2012] SCAdjR 55 Tab 9

(j) *ASO v ASP* [2015] SCAdjR 251 Tab 10

(k) *AXT v AWU* [2017] SCAdjR 881 Tab 11

(l) *BAX Pte Ltd v BAY Pte Ltd* [2019] SCAdjR 331 Tab 12

(m) *BCN Pte Ltd v BCO Pte Ltd* [2020] SCAdjR 175 Tab 13

(n) *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 Tab 14

(o) *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 Tab 15

(p) *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 Tab 16

(q) *TD Pte Ltd v TE Pte Ltd* [2010] SCAdjR 811 Tab 17

(r) *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 Tab 18

(s) Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) Tab 19

5 The Claimant submitted its answers to the adjudicator's directions ("CS-2") on 15 February 2024 at 9.54am on time as directed. The following documents are attached:

(a) *ATA Pte Ltd v ATB Pte Ltd* [2015] SCAdjR 406;

(b) *AWS Pte Ltd v AWT Pte Ltd* [2017] SCAdjR 312;

(c) Chow Kok Fong, Security of Payments and Construction (LexisNexis, 3rd Ed, 2022) Ch 15: "Section 12 – Regulation 7(2A)"; and

(d) *Trustee of the estate of Tay Choon Huat v Soon Kiat Construction & Maintenance Pte Ltd* [2021] 3 SLR 1005.

6 The Respondent submitted its answers to the adjudicator's directions ("RS-1") on 15 February 2024 at 9.32am on time as directed. There is no attachment with the RS-1.

Record

Preamble: the Contract

7 The Claimant is a subcontractor of the Respondent and the Respondent itself is the subcontractor of the main contractor, [A] of [xxx] ("Principal"), for the project known as "The development of 6 Blocks of 7-Storey [xxx] and 4 basement levels with 2 Levels for carparking on [xxx]" ("Project").

8 This AA is in connection with the "Letter of Award for Security System @ [xxx]" dated 15 February 2019 ("LOA") in relation to the "supply, testing and commissioning of the Security System at [xxx]", contract reference number [xxx] ("Subcontract") between the Respondent and the Claimant, whereby the Claimant was contracted to carry out the scope of works specified therein ("Subcontract Works") for the lump sum price of $4,200,000 ("Contract Price").

9 The Subcontract documents, comprise the following:

(a) the LOA;

(b) the schedule of unit rates;

(c) the compliance list;

(d) the tender documents; and

(e) the tender drawings.

10 The owner/employer of the Project is [B] Pte Ltd of [xxx] ("Owner").

11 The Project is a construction contract within the meaning of s 3(1) of the SOP Act. The Subcontract is made in writing in compliance with s 4(4) of the SOP Act. Hence, I am satisfied that this Subcontract falls under the SOP Act.

12 The Claimant is a GST-registered person and holds GST registration number [xxx] and, therefore, the Claimant is entitled to claim for 8% GST.

13 Both the Claimant and the Respondent are collectively, hereinafter, referred to as the "Parties".

14 The Claimant is legally represented by M/s Rajah & Tann Singapore LLP and the Respondent is not legally represented.

15 According to the Claimant, this AA arises from the Respondent's failure to make payment of the sum of $104,866.81 (including 8% GST) ("Certified Sum") certified by the Respondent in Payment Certificate 56 ("Payment Certificate 56") for the Claimant's Payment Claim No 56 ("PC 56") for work done under the Subcontract for the period from

15 February 2019 to 15 December 2023. PC 56 and Payment Certificate 56 are the subject matter of this AA.

16 The Claimant accepted the full Certified Sum by way of a tax invoice dated and issued on 28 December 2023 day ("Invoice") and transmitted to the Respondent on the same.

17 The Claimant submitted that the Respondent failed to make payment of the accepted Certified Sum by 27 January 2024 ("Payment Due Date") and it remains outstanding at the time of the lodgment of this AA.

18 It is noted that prior to the lodgment of this AA with the SMC, the Claimant had lodged a total of five adjudications against the Respondent in respect of the LOA but in relation to different payment claims. Except one which was withdrawn, all the learned adjudicators found in favour of the Claimant and determined that the Respondent was liable to pay the following respective adjudicated amounts.

(a) SOP/AA 188 of 2022 – adjudicated amount $1,076,955.83;

(b) SOP/AA 087 of 2023 – adjudicated amount $469,317.68;

(c) SOP/AA 198 of 2023 – adjudicated amount $323,183.50; and

(d) SOP/AA 257 of 2023 – adjudicated amount $607,545.16.

19 The Parties agreed that, to date, the costs determined in SOP/AA 087 of 2023, SOP/AA 198 of 2023 and SOP/AA 257 of 2023 have not been paid.

20 The nature of dispute recorded on Form AA-1 is: "Accepted response amount not fully paid".

Adjudication proceedings

21 On 1 February 2024, the Claimant lodged the AA with the SMC pursuant to the provisions of the SOP Act. On the next day, 2 February 2024, the SMC served the AA on the Respondent.

22 Of even date at 9.56am, the SMC referred the AA to me and I accepted the appointment as adjudicator of this matter on the same day at 10.35am. In the afternoon at 2.28pm, the SMC notified the Parties, the Principal and the Owner of my appointment as the adjudicator of this matter.

23 At 2.48pm, I received from the SMC the AA on Google Drive and the AA-1 Form bound together with accompanying documents in, among other things, PDF, Excel, Words and Outlook formats, including the notice of intention to apply for adjudication ("NOI").

24 Upon a closer review of the NOI and AA-1 Form, I am satisfied that their contents generally comply with the respective regs 7(1) and 7(2) of the prevailing Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations").

25 The AA was made in writing on the AA-1 Form addressed to the authorised nominating body (*ie*, the SMC) requesting it to appoint an adjudicator. I accept that the Claimant had made this AA in conformity with s 13(3)(*b*) of the SOP Act.

26 Under s 15(1) of the SOP Act, the Respondent was required to lodge an adjudication response with the SMC by 4.30pm on 9 February 2024, the due date for the adjudication response.

27 On the 13 February 2024 at 9.21am, the SMC wrote to me that the adjudication response ("Adjudication Response" or "AR") was not lodged by the Respondent as of 9.00am on 13 February 2024. This Adjudication Application commences on 10 February 2024.

28 As this Adjudication Application falls within s 17(1)(*a*)(ii) of the SOP Act, I will have seven days by the due date of 19 February 2024 (including two days public holidays for Chinese New Year and the day next following the public holiday which falls on Sunday) to give my determination.

Background

Payment claim

(1) Validity of payment claim

29 The Claimant had provided the works under a construction contract and hence is entitled to progress payments as provided under s 5 of the SOP Act.

30 A copy of the 42-page PC 56 is attached at AA: CBOD Tab 6 Annex A.

31 As the Subcontract was entered into on 15 February 2019, prior to the commencement of the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ("Amendment Act"), *ie*, 15 December 2019 ("Commencement Date"), s 10 of the pre-amendment Act (Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)) ("Previous SOP Act") applies to the service of payment claims pursuant to s 25(2) of the Amendment Act.

32 It is noted that the Amendment Act is silent on the applicability of the pre-amendment Building and Construction Industry Security of Payment Regulations 2005 ("Previous SOP Regulations"), I find it is logical for me to assume that the Previous SOP Act should be read in conjunction with the Previous SOP Regulations and not with the prevailing SOP Regulations (*ie*, the 15 December 2019 version). I find the Claimant's application is consistent with mine.

33 PC 56 is made in writing and has identified the Subcontract the claim is being made pursuant to. Upon a closer review of the form and manner in which PC 56 is made, I accept on a *prima facie* basis that the general descriptions and level of detail fulfil the prescriptive requirements as stated in ss 10(3)(*a*) and 10(3)(*b*) of the Previous SOP Act and reg 5(2) of the Previous SOP Regulations (as explained above). Based on the judgment of the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*") at [78] as stated below, I hold that PC 56 is a valid payment claim.

> … the correct test for determining the validity of a payment claim is whether a purported payment claim satisfies all the formal requirements in s 10(3)(*a*) of the Act and reg 5(2) of the SOPR. If it does, it is a valid payment claim.

34 For the reasons given above, I determine that PC 56 is a valid payment claim.

(2) Service of payment claim

35 Under the Subcontract, it is silent on the date or time for the service of payment claims. Therefore, the following relevant statutory provisions under the Previous SOP Act and the Previous SOP Regulations apply to this AA, as submitted by the Claimant, and accepted by me.

(a) Section 10(2)(*b*) of the Previous SOP Act:

> (2) A payment claim shall be served ——
>
> …
>
> (*b*) where the contract does not contain such provision, at such time as may be prescribed.

(b) Regulation 5(1) of the Previous SOP Regulations:

> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, then a payment claim made under the contract shall be served *by the last day of each month following the month in which the contract is made*.
>
> [emphasis added]

36 At para 32 of its AA: CS-1, the Claimant referred me to the case of *Chua Say Eng* where the Court of Appeal at [93] clarified that the expression "month" referred to in reg 5(1) of the Previous SOP Regulations refers to a calendar month, and at [94] held that the "last day of each month following the month in which the contract is made" ought to be calculated from the date on which the contract was made.

37 In that case, the Claimant added that the relevant contract was made on 16 August 2008, but a supplementary contract was subsequently entered into on 3 December 2008. This was the critical date for the purposes of reckoning time under reg 5(1) of the Previous SOP Regulations, and thereby found that "the last day of the calendar month following the calendar month in which the contract was made, would be the third day of each calendar month".

38 Accordingly, the Claimant served via e-mail to the Respondent its PC 56 on 14 December 2023 (timestamped 4.08pm), being by the last day of the month (*ie*, by 15 December 2023) following the month in which the Subcontract was entered into on 15 February 2019, in compliance with the Previous SOP Act.

39 I note the service of PC 56 is not in dispute.

40 The Claimant pointed out that PC 56 is validly served within the relevant timeline, *ie*, by the 15th of that calendar month (December) and in accordance with s 37(1)(*d*) of the SOP Act. Moreover, the Claimant said PC 56 expressly stated on the face of the document that "[i]n accordance with that Act and Contract, this payment claim is *deemed to be served on 15 December 2023*" (emphasis added by the Claimant).

41 According to the Claimant at para 12 of its AA: CS-1, the Claimant's construction works for the reference period in PC 56 (till 15 July 2023) were last delivered to the Respondent on 24 November 2023. I am satisfied that this is within the six-year period prescribed in s 10(4) of the Previous SOP Act.

42 Accordingly, I concur with the Claimant that PC 56 is validly served and is valid in compliance with ss 10(1), 10(2) and 10(4) of the Previous SOP Act.

Payment response

(1) Payment response under SOP Act

43 I refer to ss 25(3), 25(4), 25(6), 25(7) and 25(8) of the Amendment Act, which provide that the relevant provisions in the Previous SOP Act would apply where the relevant payment claim is served before the

Commencement Date. However, since PC 56 was served after the Commencement Date and on 14 December 2023, the applicable provisions for payment responses, entitlement to apply for adjudication applications and adjudication proceedings lie in the prevailing SOP Act.

44 Section 11(1)(*a*) of the SOP Act provides that the Respondent is to respond to the payment claim by way of a payment response "as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the *earlier*" [emphasis added].

45 Clause 7(b) of the LOA states as follows:

> 7. PROGRESS CLAIMS & PAYMENT TERMS
>
> Payment of the Contract Price shall be made in accordance with the following progressive payment terms:
>
> …
>
> (b) 95% progressive claim with certification from the Contractor *within 15 days* and 30 days terms upon tax invoice.
>
> [emphasis added]

46 Clearly, cl 7(b) of the LOA provides that the Respondent must provide certification of a payment claim within 15 days. This is earlier than the 21 days after the payment claim is served under s 10. Hence, the Subcontract timeline of within 15 days applies in this AA. It is noted that the Subcontract timeline is silent on when the certification period will start, just plainly "within 15 days". In the corollary, the due date for the payment response (in this case the Payment Certificate 56) will start counting from the last day of the calendar month, *ie*, from 15 December 2023.

(2) Issuance of payment certificate for PC 56

47 In its AA submissions at CS-1, the Claimant provided extensively its position on the Respondent's payment certification and purported payment response at paras 37 to 59 leading to the Claimant's acceptance of the Certified Sum in the Payment Certificate 56 dated 28 December 2023, issued by the Respondent to the Claimant on 28 December 2023.

48 The Claimant conceded at para 41 of its submissions that under the SOP Act, the Respondent is required to serve its payment response "within 15 days (excluding any public holiday)" by 31 December 2023. I disagree with the Claimant on this due date for payment response for this case.

49 Notwithstanding the word "day" is defined in the SOP Act as "any day other than a public holiday within the meaning of the Holidays Act (Cap 126)", this is contrasted with the plain and ordinary meaning of "day"

in most construction contracts, in which public holidays are included in the calculation. I find that the latter is consistent with cl 13 of the LOA on delay and liquidated damages in which it had defined day as "per calendar day", meaning "includes any public holidays".

50 With respect, I refer to [37] in the case of *Trustee of the estate of Tay Choon Huat v Soon Kiat Construction & Maintenance Pte Ltd* [2021] 3 SLR 1005 ("*Tay Choon Huat*"). Based on the High Court's decision of *Tay Choon Huat*, Andre Maniam JC simply and succinctly stated "ultimately, the particular contract in each case stands to be construed". In other words, to comply with the contract. In this circumstance, I consider that the "within 15 days" should be by 30 December 2023 (including any public holiday).

51 In response to the adjudicator's directions, the Claimant cited that *Tay Choon Huat* is inapplicable to this application as there was no exclusion of the SOP Act's definition of "day" present in the Subcontract. While this has its attractions, I am unable to agree with the Claimant.

52 Be that as it may, the Subcontract did not interpret "day" as in the SOP Act, and thus, in my view, it would be apposite to give such word its ordinary meaning. Accordingly, the "within 15 days" should be by 30 December 2023 (including any public holiday).

53 In this present AA, given that the Respondent has submitted its Payment Certificate 56 on 28 December 2023 and the Claimant submitted its Invoice on the same day, ahead of both 30 and 31 December 2023, I do accept the Claimant's argument that the one-day difference has no impact on the present proceedings.

54 On 26 December 2023 (timestamped 9.55am), the Respondent issued a purported payment response for PC 56. The Claimant pointed out that this included the Respondent's response amount for PC 56, which exactly matches the Certified Sum in the eventual Payment Certificate 56, issued two days later on 28 December 2023 by the Respondent.

55 While the Subcontract did not explicitly state that such payment certification will be the equivalent of a payment response under the SOP Act, the Claimant submitted that Payment Certificate 56 issued in response to PC 56 constituted a valid payment response. The Claimant referred me to the High Court's holding in the case of *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 at [58] and [63] that in the absence of any definition in the contract on payment response and payment certification, the reference to "payment certification" was also intended by parties to refer to the "payment response" under the SOP Act.

56 Upon closer reading of the Subcontract in this present case, I find there is no definition of "payment response." The Respondent could have loosely used the term "payment response" in communicating with the Claimant, possibility to mean "draft payment certificate".

57 This is evident from the way the purported payment response was being prepared – simply by tabulating the Respondent's assessment on the Claimant's payment claim spreadsheet for PC 56. Upon receipt of the purported "payment response," the Claimant would then respond by acknowledging the purported payment response in its reply of 26 December 2023. In its reply, it expressly stated that it was "looking forward to receiving your Payment Certificate 56".

58 In answer to my query at the adjudication conference, the Parties are not in dispute that the Respondent's usual practice throughout the Subcontract has been to issue a draft assessment of the payment claim in a purported payment response to the Claimant, then followed by the payment certificate.

59 In the premise, I agree with the Claimant's submission at para 54 of its AA: CS-1 that since the Subcontract at cl 7(b) states that the Respondent *must provide certification* of a payment claim, it is averred that the Respondent's Payment Certificate 56 constitutes a valid payment response under ss 11(1), 11(3) and 12(5)(*b*) of the SOP Act (emphasis added). This is particularly considering the express intention of the Respondent in the Subcontract as highlighted by the Claimant at paras 44–53 of its AA: CS-1.

Claimant's justification of valuation and computation in PC 56

60 For easy reference, I append below print screens of respective summaries of PC 56 and the Payment Certificate 56 from Appendix A of AA: CS-1.

Table 1 – Summary of the Claimant's claim in PC 56

Row No.	Brief Description	Amount (SGD)
A	Total claims in relation to Subcontract Works to date	3,922,698.66
B	Claim for variations	1,226,206.00
C	Total claims for work to date (A+B)	5,148,904.66
D1	Retention Sum	(257,445.23)
D2	One-off Advance Payment	(5,000.00)
D3	Amount Previously Certified (before GST) (inclusive of previous Adjudicated Amounts from past adjudications)	(4,659,616.62)
E	Claim for work in this PC 56 (before GST) (C-D1-D2-D3)	226,842.81
F	Claim for prolongation costs under the Simplified Claim Process for Prolongation Costs in Public Sector Construction Contracts due to COVID-19 Events	32,800.33
G	Overdue amount from unpaid invoice NBR 53	118,032.00
	Total PC 56 Amount (E+F+G) (Before 8% GST)	**377,675.14**

Note: Amount in Item A is 93.40% of the original Subcontract sum. The total claim of $377,675.14 includes a sum of $32,800.00 for prolongation claim due to COVID-19 events and an unpaid invoice in the sum of $118,032.00 for payment claim 53.

Table 2 – Summary of the Respondent's certified amount in Payment Certificate 56

Brief Description	Amount (SGD)
Value of accumulative work done to date	5,007,068.97
Retention Fund @ 5%	(250,353.45)
Previous Payments	(4,654,616.62)
Previous Advance Payment	(5,000.00)
Total Amount Certified (Before GST)	97,098.90
GST (8%)	7,767.91
Total Certified Amount	**104,866.81**

Note: Certified value of accumulative work done includes 92.02% of the Original Subcontract Sum in the sum of $3,864,938.37 and 93.14% of the variation claim in the sum of $1,142,130.60.

61 The Claimant submitted in great detail at paras 5–45 of its submissions in AA: CS-1 on its justification of valuation and computation to claim an amount of $377,675.14 (excluding GST) (including variation claims) in PC 56. The Claimant pointed out that pursuant to cl 7(b) of the LOA, the Claimant is entitled to 95% of the lump sum contract price. The Claimant claimed that it has completed and claimed for 93.4% of the

original Subcontract sum in PC 56, of which the Respondent has certified 92.02% and for variation claims at 93.14%.

62 In support of its PC 56 for works carried out up to the period ending 15 December 2023, the Claimant submitted voluminous supporting documents, including the Subcontract, drawings, PC 56 and Payment Certificate 56 and extensive list of delivery orders and delivery tracking spreadsheets enclosed in AA: CBOD Tab 11 to be read in conjunction with the respective payment claims 1 to 56.

63 With respect to variation claims for Quotations 089r0 and 090r1 in PC 56, the Claimant at paras 23–44 cited the variation items were supported by quotations and the following steps taken constitute the normal course of dealing between the Parties:

(a) first, the Respondent will request a quotation from the Claimant for the variation works;

(b) second, the Claimant will submit the quotations, comprising the quantities and rates to the Respondent for approval;

(c) third, the Claimant will carry out the variations works after instruction given by the Respondent to proceed on a signed copy of the quotation; and

(d) lastly, the Respondent will incorporate the variation works into an "Addendum 22" and send it to the Claimant for review and agreement. Upon agreement, the signed "Addendum 22" would form part of the Subcontract.

64 I accept that the above steps taken by the Claimant satisfied the relevant provisions of the LOA in compliance with s 17(4)(*b*) of the SOP Act. In answer to my query, the Respondent affirmed that the above with respect to variation claims is the usual practice that has been used throughout the Subcontract.

65 Be that as it may and for completeness, I refer to the case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [34] and [64] on the meaning of "burden of proof" or more accurately the "standard of persuasion".

66 In *Comfort Management*, the Court of Appeal held that regardless of whether any payment response has been filed, I have an independent duty to address my mind to and consider the true merits of a payment claim, and, to allow it, I must be satisfied that the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and that the value of that work is as stated in the payment claim.

67 Overall, I am contented with the detailed overview on the valuation and calculation methodology of the claims presented by the Claimant in its AA: CS-1. Going by the supporting documents as mentioned at [62] above and being properly adduced before me in these adjudication proceedings, I am satisfied that that the Claimant has proven its claim on a *prima facie case* that the construction work was carried out and the sum certified in the Payment Certificate 56.

68 In any case, the details of the works which have been carried out by the Claimant are included in the Annex of AA: CS-1, I do not intend to be loquacious to repeat them here given that the Respondent has already certified the sum of $104,866.81 (including 8% GST) in the Payment Certificate 56 for payment and that the Claimant has accepted the full Certified Sum of $104,866.81 (including 8% GST), in writing.

69 For completeness, I refer to the emphasis given by the Claimant in its submissions that its valuation methodology was accepted as reasonable by the adjudicator in SOP/AA 188 of 2022 and was similarly not disputed by the learned adjudicator in SOP/AA 087 of 2023, SOP/AA 198 of 2023 and SOP/AA 257 of 2023, respectively.

70 Overall, I am of the view that PC 56, including the relevant information, *ie*, working valuations and computations attached to it, was made in compliance to the prescriptive requirements as stated in the Previous SOP Act.

My findings and determination

71 I wish to state that with due regards to time and unnecessary expense, I have not provided all the facts and arguments presented and considered by me in arriving at my determination. It should not be assumed that any submissions which had been specially provided by the Parties had not been duly considered in making this determination.

72 By virtue of s 17(4) of the SOP Act, this adjudication is based on the provisions of the SOP Act and SOP Regulations; the provisions of the Subcontract dated 15 February 2019 to which the AA related; PC 56, the Payment Certificate 56 (*ie*, the payment response under the SOP Act), the AA and their accompanying documents and the Parties' answers to the adjudicator's directions.

Adjudication conference

73 Pursuant to the powers conferred on me under s 16(4) of the SOP Act, I directed both the Claimant and the Respondent to attend a video adjudication conference ("Conference") scheduled for 2.00pm on Wednesday, 14 February 2024.

74 The following persons participated in the Conference:

(a) For the Claimant:

(i) Ms [C], representative, legal counsel ([BHW] Pte Ltd);

(ii) Mr Divyesh Menon, Counsel (M/s Rajah & Tann Singapore LLP); and

(iii) Ms Tessa Teo, Counsel, Associate (M/s Rajah & Tann Singapore LLP).

(b) For the Respondent:

(i) Mr [D] (chief operating officer) ([BHX] Pte Ltd); and

(ii) Mr [E] (project director) ([BHX] Pte Ltd).

75 Counsel for the Claimant introduced a lady recorder in the Conference whose name was not submitted earlier before the meeting. The Respondent's representatives had no objection to it.

76 At the Conference, I directed that I wished to seek answers from the Parties on the AA and, at the same time, to allow Parties to air their concerns if they had any. I then went through a list of items posed for answers in an adjudicator's direction form ("Adjudicator's Directions") which I had prepared before the Conference to save time in the hearing. After I completed reading the list of questions, the Parties gave a brief introduction of their positions.

77 At the end of the Conference, I invited the Parties to give written replies to my Adjudicator's Directions, to be e-mailed to the other party and me by 10.00am of 15 February 2024 (Thursday).

78 To meet the due date for the determination, the Parties were directed not to include any new grounds, issues or documents, unless the information was requested for by me in the Adjudicator's Directions.

79 I am much obliged to both the Claimant and the Respondent for acting on my request to use the Zoom Conferencing Platform for the Conference and forward softcopies of their replies via e-mail by the due date. This had helped to considerably expedite the adjudication proceedings.

80 To keep within the tight timelines, I disallowed any party from serving further submissions after 10.00am on 15 February 2024.

Errors discovered

81 Having examined the AA and save for the damaged/corrupted documents, I discovered the following typographical/unintentional errors contained in the documents, enclosed in the AA.

(a) At AA: CS-1, the amount of $1,076,955.38 in para 20.1 should be $1,076,955.83.

(b) Documents in AA: CBOA Tab 2 and Tab 4 are repeated. The document enclosed in Tab 4 should be "SOP Act (Previous version – 2006 Rev Ed)" and not "SOP Regulations version in force from 15/12/2019".

(c) The folder for PC 55 is empty.

82 The Claimant replied that these are unintentional errors.

83 Concerning item (c) at [81] above, the Claimant added that in any case PC 55 is not the subject of the present case and does not contain documents that require me to review. Nothing in the present adjudication depends on the PC 55 documents. The Claimant offered to provide the PC 55 documents if I need to review them. I find that there is no necessity for me to ask for the documents.

84 I am aware that the Respondent had not raised any objections regarding the errors nor had said that its position is being prejudiced due to the errors. I am satisfied and do find that the errors are unintentional and in the interest of costs, I allow amendments to correct the errors pursuant to reg 7(2A) of the SOP Regulations.

Issues for determination

Whether the AA is to be dismissed due to damaged orcorrupted PC 56 and Payment Certificate 56 being filed in AA, not in compliance with section 13(3)(c) of SOP Act read with regulation 7(2)(e) of SOP Regulations

85 For the AA, the Claimant submitted voluminous supporting documents to me via the SMC from the Google Drive Link for my considerations. After downloading and attempting to open the attached documents, I found PC 56 and Payment Certificate 56, including, *inter alia*, accompanying cover e-mail, e-mail correspondences, delivery schedules and tax invoice for Certified Sum were all defective/corrupted and could not be opened. I attempted to download the files from a separate computer system and the same error messages "File size '0'" was prompted.

86 Under s 12 of the SOP Act, the right to invoke the statutory adjudication regime is invariably linked to a payment claim and/or a payment response. In the premise, on 5 February 2024 (timestamped 6.59am), I wrote to the Claimant, with copies to the Respondent and the SMC, requesting the Claimant to resend the affected documents pursuant to s 17(4)(*g*) of the SOP Act. In response to my request of, the Claimant

provided, by way of an e-mail, the replacement documents, promptly to me with copies to the Respondent and the SMC on the same day at 9.09am.

87 After the Claimant sent copies of the replacement documents, there was no dispute raised from the Respondent.

88 In consideration that the damaged/corrupted evidence contain "zero" information, I find it is necessary for me to consider this matter as "failure to attach with the AA" mandatory documents required under s 13(3)(*c*) of the SOP Act read with reg 7(2)(*e*) of the SOP Regulations. This could be constituted a patent error on the face of the material.

89 In the interest of the principles of natural justice pursuant to s 16(5)(*c*) of the SOP Act, I posed this matter for discussions during the Conference. In the Conference, the Respondent said it was not familiar with the legal requirements in the SOP Act and doubtful whether it was being prejudiced from the received damaged/corrupted documents. In answers to my Adjudicator's Directions, the Respondent did not submit in writing any objection to the issue, but cited that it would leave the matter to me to act as an independent party to decide fairly.

90 The above issue highlighted was after I have taken into consideration that I am bound by [51] and [52] of the Court of Appeal's decision in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 as stated below which imposed on me to make an independent and impartial assessment to ascertain first if there are any patent errors on the face of the materials properly before me to contend that the AA must be rejected or otherwise:

> 51 … under s 17(3) [s 17(3) has been amended to s 17(4) in the prevailing SOP Act] of the Act, even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material which is properly before him and which he is permitted and, indeed obliged to consider. …
>
> 52 … The adjudication does not become a mere formality. …

91 Therefore, I must have regard to the matters under s 17(4) of the SOP Act, which is clearly a mandatory provision and breaching it would result in my determination being invalid.

92 Section 13(3)(*c*) of the SOP Act and reg 7(2)(*e*) of the SOP Regulations provide:

> **Adjudication applications**
>
> **13.—**
>
> (3) An adjudication application —
>
> …

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

Adjudication applications

7.—(1) …

(2) Every adjudication application *shall* —

…

(*e*) be accompanied by … a copy of the relevant payment claim and a copy of the payment response (if any) thereto.

[emphasis added]

93 In this AA, as the documentary evidence submitted by the Claimant is damaged/corrupted with "zero messages", I take the view that this matter is plainly a case of failure to attach a copy of the relevant payment claim and a copy of the payment response. In this regard, the AA is not in compliance with s 13(3)(*c*) of the SOP Act read with reg 7(2)(*e*) of the SOP Regulations.

94 Turning now to the question of whether the AA should be dismissed for non-compliance with the above mandatory provision of the SOP Act, the Claimant at AA: CS-2 argued the following, in gist:

(a) The documents appeared in good order and accessible at the time they were loaded on to the Google Drive platform. The file could have been corrupted during the time of transmission to the SMC on 1 February 2023.

(b) This was a technical, clerical or administrative error, which does not affect the validity of the AA. The learned adjudicator has the power under reg 7(2A) of the SOP Regulations to allow amendments to the clerical mistakes in the AA.

(c) The Respondent did not file any AR and did not raise any objections regarding the validity of the AA or other objections regarding the corrupted files. The Respondent has failed to raise these objections in an AR, the Respondent is now precluded under s 17(6) of the SOP Act from raising any such objections to the learned adjudicator at this stage.

95 I am aware of the High Court's decision in *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481 ("*Libra*"), when it dealt with the issue of whether the adjudication in that case was invalidated as a result of a failure of the claimant to accompany its adjudication application with an "exact copy" of its payment claim – a breach of s 13(3)(*c*) of the SOP Act read with reg 7(2)(*e*) of the SOP Regulations. At [93] of *Libra*, the High Court held that "non-compliance with s 13(3)(*c*)

read with reg 7(2)(*e*) would not result in invalidity of the application, in light of the legislative purpose of the Act".

96 Furthermore, Kannan Ramesh JC at [99] of *Libra* added that:

> … the mandatory language of s 13(3)(*c*) read with reg 7(2)(*e*) ought not to be read as requiring an exact copy of the payment claim. To conclude otherwise would be to allow technical quibbles of non-compliance to prevail over the object of the Act. The test ought to be whether there has been compliance with the statutory requirements as assessed through an objective lens applying a not overly demanding and technical standard (*Australian Timber* [44] *supra*) at [61] and [63]).

97 Pertinently, at [105] of Libra, Kannan Ramesh JC added that

> … even if there was non-compliance with reg 7(2)(*e*), that would not render the Application null and void. It is important to examine whether s 13(3)(*c*) read with reg 7(2)(*e*) was so important a provision that non-compliance would defeat the legislative purpose of the Act. This was the test laid down in *Chua Say Eng* (([26] *supra*) … I am of the view s 13(3)(*c*) did not carry such importance. … I am therefore of the view that even if there was non-compliance with reg 7(2)(e), the Application was not null and void.

98 I now turn to s 16(4) of the SOP Act, which expressly states that an adjudicator may accept any adjudication application that is not made in accordance with s 13(3)(*c*) if the adjudicator is satisfied that the non-compliance does not materially prejudice the respondent.

99 Corollary, in consideration of whether the Respondent will be materially prejudiced by the corrupted files in the AA, I am persuaded by the Claimant's justification below in its reply in the AA: CS-2. In gist:

> (a) The e-mail correspondence between the Parties shows that PC 56 and the Payment Certificate 56 were in the Respondent's possession and the Respondent had access to and could reference the relevant documents.
>
> (b) The AA also included numerous screenshots of the documents within the text of the written submissions itself. Even without the documents being accessible from the Google Drive link, the Respondent would have been readily able to identify what documents were being referenced.
>
> (c) Well before the due date for the Respondent to file its AR, the corrupted files were replaced. The Respondent did not file any AR nor raised any objections regarding the validity of the AA or the corrupted files. The Respondent is now precluded under s 17(6) from raising any such objections to the learned adjudicator at this stage.

100 I am in cognisance that the Respondent is fully aware of the content/basis of PC 56 and Payment Certificate 56, since the Respondent is one of the contracting parties in relation to the Subcontract, and as the Claimant has submitted, the Respondent has gone through a series of correspondences relating to the documents.

101 I am satisfied that the issue of prejudice to the Respondent is irrelevant in this case as it can be seen from the earlier paragraphs that the Respondent did not assert that it has suffered any prejudice from the Claimant on the matter.

102 With respect to the Respondent's answer to the Adjudicator's Directions that it has not appointed a legal representative, I am guided by the Court of Appeal's decision in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [65] ("*Grouteam*") which dictates that "it ought not to be an answer that the [respondent] did not have legal advice at the relevant time".

103 In the premises, the Respondent has waived its right to object to the adjudicator's lack of jurisdiction pursuant to s 17(6) of the SOP Act, since it was not the case that the circumstance had arisen or was known only after the AR was lodged (see the Court of Appeal's decision in *Grouteam* at [63] and [64]).

104 Relying on the foregoing legal principles, I am therefore bound by them such that the Claimant's having filed the damaged/corrupted PC 56 and Payment Certificate 56 should not warrant a dismissal of the AA.

105 Accordingly, pursuant to s 16(4) of the SOP Act, I would not dismiss the AA in this case, despite it having not been made in accordance with s 13(3)(*c*) of the SOP Act read with reg 7(2)(*e*) of the SOP Regulations.

Whether lodgment of AA in accordance with statutory timelines

106 The timelines for the service of an adjudication application are triggered by the date of service, in the first instance, of a payment claim, and in the second in this AA, by the due date for payment of the Certified Sum in the payment response under the SOP Act (in this AA, the Payment Certificate 56) accepted by notice in writing to the Respondent under s 13(3) of the SOP Act (that is, there is no dispute settlement period ("DSP") in this case).

107 Having considered the Claimant's submissions on the lodgment timelines relating to this AA at para 25 of its AA: CS-1, I append a table below of the key dates:

Summary of the Applicable Timelines

Activity	Reference to SOP Act	Actual Lodgment	SOP Act default timelines
Service of PC 56 (LOA silent about the date, therefore, by the last day of the calendar month.)	s 10(2)(*b*) and r 5(1) of Previous SOP Act and Regulations	14 December 2023	By 15 December 2023
Last date for service of Payment Certificate 56 (contractual date within 15 days)	s 11(1)(*b*) read with s 25(3) of the Amendment Act	28 December 2023	30 December 2023 (the Claimant in its AA submitted the date as 31 December 2023. The date should be 30 December 2023. See [48]–[52] above.)
Due date for payment (within 30 days upon tax invoice) (tax invoice, accepted the Certified Sum in writing, issued on 28 December 2023)	s 12(1) and s 12(3)	No payment	27 January 2024
Entitlement to make an adjudication application (no DSP)	s 12(1) & s 13(3)(*a*)	No payment	28 January 2024
Period for serving of NOI on the Respondent (within seven SOP days after entitlement)	s 12(1), s 13(2) and s 13(3)(*a*)	1 February 2024	28 January 2024 to 3 February 2024 (both dates inclusive)
Period for filing Adjudication Application (within seven SOP days after entitlement and after NOI served)	s 12(1) and s 13(3)(*a*)	1 February 2024	28 January 2024 to 3 February 2024 (both dates inclusive)

108 As can be seen in the table above, according to the SOP default timelines, the Claimant was entitled to file an adjudication application only between 28 January 2024 and 3 February 2024 (both dates inclusive). As the AA was filed on 1 February 2024, I find and determine that it was

lodged within seven SOP days after the entitlement of the Claimant to make an adjudication application first arises under s 12.

109 I am therefore agreed with the Claimant that the AA complies with ss 12(1) and 13(3)(*a*) of the SOP Act and, therefore, pursuant to s 16(3) of the SOP Act, the AA is accepted.

Whether Claimant entitled to payment of accepted Certified Sum of $104,866.81 (including 8% GST)

Claimant's tax invoice constitutes valid written acceptance of response amount

110 The Claimant pointed out that s 12(1) of the SOP Act entitles a claimant (in relation to a construction contract) to make an adjudication application under s 13 of the SOP Act where the claimant "fails to receive payment by the due date of the response amount which the claimant has accepted in writing".

111 The Claimant referred me to a passage from Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) where the learned author notes that "the claimant's acceptance of the response amount has to be made in writing … [A]n acceptance for this purpose may be made by an e-mail or letter and served by one of the modes of service as prescribed in section 37".

112 The Claimant contended that its acceptance of the Certified Sum (*ie*, the response amount) by way of the Invoice via e-mail constitutes the acceptance of the Payment Certificate 56 – in other words, the acceptance of the payment response under the SOP Act for PC 56. The acceptance is in writing and objectively certain, without any qualification or reservation of rights.

(a) It was clearly and expressly communicated to the Respondent that the Claimant's issuance and transmission by e-mail to the Respondent of the Invoice on 28 December 2023 constituted an acceptance in writing of the Certified Sum. This Invoice was a tax invoice and clearly identified to be in relation to PC 56.

(b) The cover e-mail of 28 December 2023 (timestamped 11.41am) from the Claimant transmitting the invoice to the Respondent expressly stated that "this e-mail and the attached invoice constitute acceptance in writing of the response amount of $97,098.90, excluding GST".

(c) The transmitting e-mail also attached the Respondent's Payment Certificate 56 and the Invoice, both reflecting the payment certified

amounts in the sum of $97,098.90 (before GST) and $104,866.81 (including GST).

(d) The payment certified amounts (both before and after GST) in the two attached documents must be read as a whole and have been applied, and this is not disputed by the Parties.

113 A copy of the e-mail transmitting the Invoice and three attachments are attached at AA: CBOD Tab 8 Annex B.

114 The Claimant reiterated that the Invoice and accompanying cover e-mail constitute a valid written acceptance of the Respondent's response amount in the Payment Certificate 56 in accordance with ss 12(1) and 37(1)(*d*) of the SOP Act.

115 Upon closer reading of the plain language in the Claimant's cover e-mail of 28 December 2023 ("Cover E-mail 28Dec2023"), attached at AA: CBOD Tab 8 Annex B, I agree with the Claimant that the Cover E-mail 28Dec2023 accompanying the Invoice and Payment Certificate 56 is, *prima facie*, an acceptance of the payment response of $104,866.81 (including GST) within the meaning of s 12(3) of the SOP Act and is valid.

116 This is despite the Respondent having, in its covering letter to the Payment Certificate 56, stated that:

> … progress payment certificate is provided without prejudice to above-stated objections to PC56, and our right to object to PC56 including as to the validity of PC56 and/or any adjudication application brought by you in respect of the claim in PC56 are strictly reserved without waiver or modification.

117 In this regard, the Claimant argued that the Respondent is precluded from excluding the application of the SOP Act by way of its cover to the Payment Certificate 56. I find myself in agreement with this contention pursuant to s 36 of the SOP Act, which strictly prevents the Parties from circumventing the SOP Act. Section 36(2) of the SOP Act provides that any provisions in any agreement which seek to exclude, modify, restrict or in any way prejudice the operation of the SOP Act are void.

118 There was also an argument by the Claimant that the issue concerning its entitlement to payment of the Certified Sum/the response amount to this AA, does not fall under s 15(4) of the SOP Act. The circumstances of this objection did not arise nor known only after the Payment Certificate 56, that is, the payment response under the SOP Act, was served on the Claimant. Pursuant to s 15(3)(*a*) of the SOP Act, the Respondent is precluded from raising objections to the AA that had not been raised in its payment response (see *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [70]).

119 In further justifying its position, the Claimant asserted that in SOP/AA 087 of 2023, SOP/AA 198 of 2023 and SOP/AA 257 of 2023, the learned adjudicators, in dealing with very similar issues, accepted the respective payment certificate sums which in essence were like this present case.

120 For completeness, the Claimant also referred me to the adjudication determination in *ASO Pte Ltd v ASP Pte Ltd* [2015] SCAdjR 251 at [46] to support its argument that since the Respondent has accepted the Certified Sum is due to the Claimant in its Payment Certificate 56, therefore the Claimant is entitled to the Certified Sum without the need to substantiate its claims comprising the Certified Sum, as there is no dispute between the parties as to the merits of the Claimant's claim for the Certified Sum.

121 I am aware that unlike a court decision, the determinations made by adjudicators in other cases are not binding on me but I do share much of the views they expressed in the above cases. The Payment Certificate 56 reflected the Certified Sums of $97,098.90 (excluding 8% GST) and $104,866.81 (including 8% GST) and clearly stated "PAYMENT DUE", without qualification.

122 In answer to my query in the Adjudicator's Directions, the Claimant confirmed that the Certified Sum in the Payment Certificate 56 has *not* been the subject of a previous adjudication application.

123 At the Adjudication Conference, the Respondent also confirmed that it has agreed to the Certified Sum, which is due and payable to the Claimant and, again, agreed in the reply to the Adjudicator's Directions that the Certified Sum of $104,866.81 in the Payment Certificate 56 (*ie*, the payment response under the SOP Act) included the following amounts:

(a) value of accumulative work done, including variations: $5,007,068.97;

(b) retention sum: $250,353.45;

(c) previous payment including previous one-time advanced payment: $4,659,616.62; and

(d) GST 8% in sum of $7,767.91.

124 For the reasons given above, I consider that the Claimant is entitled to payment of the accepted Certified Sum of $104,866.81 (including $7,767.91 for 8% GST).

Determination

Adjudicated amount

125 Following my review of the materials and documents before me and my analysis of the issues, I determine that the Respondent shall pay the Adjudicated Amount of $104,866.81 (including a sum of $7,767.91 for 8% GST). The Claimant's GST registration number is [xxx].

Due date for payment

126 Section 8(1) states as follows:

> **Due date for payment**
>
> **8.** —(1) Where a construction contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the *earlier* of the following dates:
>
> (*a*) the date as specified in or determined in accordance with the terms of the contract; or
>
> (*b*) the date immediately upon the expiry of 35 days after —
>
> (i) if the claimant is a taxable person under the Goods and Services Tax Act 1993 who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or
>
> (ii) in any other case, the date on which or the period within which the payment response is required to be provided under section 11(1) (whether or not a payment response is provided).
>
> [emphasis added]

127 The due date for honouring payment as specified in cl 7(b) of the Subcontract was a 30-day term upon submission of a tax invoice. This is earlier than the 35 days after submission of a tax invoice under s 8(1)(*b*)(i) of the SOP Act.

128 In this premise, s 8(1)(*a*) of the SOP Act shall apply for this case.

129 Therefore, the Adjudicated Amount becomes due and payable on 27 January 2024.

130 Sections 22(1)(*a*) and 22(1)(*b*) of the SOP Act provide as follows:

> **Payment of adjudicated amount**
>
> **22.**—(1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent must pay an adjudicated amount to the claimant, then except as provided in subsection (2) and section 18(3), the respondent must pay that amount —
>
> (*a*) within 7 days after the adjudicator's determination is served on the respondent; or
>
> (*b*) by the date on which the adjudicated amount is determined by the adjudicator to be payable,
>
> whichever is the *later*.
>
> [emphasis added]

131 Therefore, I determine that the Adjudicated Amount shall be paid by the Respondent to the Claimant within seven days after this adjudication determination is served on the Respondent. This is hereby recorded as the due date for payment of the Adjudicated Amount.

Payment of interest

132 Section 8(5) of the SOP Act provides as follows:

> (5) The interest payable on the unpaid amount of a progress payment that has become due and payable is at the higher of the following rates —
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract; or
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969.

133 The Subcontract is silent on the rate of interest. Accordingly, I determine that the interest shall run from the Due Date at the rate of 5.33% per annum on any part of the Adjudication Amount which remains unpaid until the same is paid pursuant to s 8(5)(*b*) of the SOP Act.

Costs of the adjudication

134 The costs of the adjudication are in the amount of $10,359.36 ("Costs of Adjudication"). This includes the adjudication application fee of $654 (inclusive of 9% GST) payable to SMC and the adjudicator's fee of $9,705.36 (inclusive of 9% GST).

135 Considering that the Claimant has submitted voluminous documents in this AA, I determine that the Claimant shall bear 30% of the Costs of Adjudication and the Respondent, the remaining 70%.

136 There is no cost involved in using the Zoom video conferencing platform in this Adjudication Application.

BHW Pte Ltd
v
BHX Pte Ltd

[2024] SGSOP 4

Singapore Mediation Centre — SOP AA 037 of 2024
Margaret Yeow
15 March 2024

Payment Claim *— Assessment — Goods and services tax — Whether claimant entitled to goods and services tax if not expressly included in payment claim*

Payment Claim *— Assessment — Whether testing and commissioning separate components of contract price*

Payment Claim *— Repeat claims — Respondent setting out preliminary objections on grounds that claimant had raised multiple identical claims which had been claimed in previous adjudication — Claimant claiming it was entitled to bring repeat claims against respondent as long as it had not been paid in full or without any adjudication — Claimant arguing case was not adjudicated on its merits in previous adjudication as it involved procedural non-compliance and claims were unpaid — Section 17(7) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim *— Variation works — Assessment — Whether claimant only entitled to full sum for each variation order after completion of testing and commissioning*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 8, 10(1), 10(5), 10(6), 12(1), 12(2)(*a*), 15(1), 15(3), 16(1), 16(4), 17(1)(*b*), 17(7)

Goods and Services Tax Act 1993 (2020 Rev Ed)

Divyesh Menon and Tessa Teo (Rajah & Tann Singapore LLP) for the claimant; Grace Lu (CMS Holborn Asia) for the respondent.

[Commentary: see para 4.29]

15 March 2024

Margaret Yeow:

Determination

1 This is a determination made on 15 March 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("Act") in respect to Adjudication Application No SOP/AA 037 of 2024 ("AA"). This is the reference assigned to this case by the Singapore Medication Centre ("SMC") acting as the authorised nominating body under the Act.

2 The claimant in this matter is [BHW] Pte Ltd ("Claimant") and the respondent is [BHX] Pte Ltd ("Respondent") (collectively, "Parties").

3 The Claimant is the subcontractor of the Respondent, having been engaged by way of a signed "Letter of Award for Security System @ [xxx]" dated 15 February 2019 ("LOA") for the supply, testing and commissioning of security system for a sum of $4,200,000.

4 This AA arises from the Claimant's dispute over the payment response provided by the Respondent in respect of Payment Claim No 57 ("PC 57"). For the purpose of this AA, the Claimant is pursuing $347,248.86 (including goods and services tax ("GST")).

5 For the reasons set out in the pages that follow, I determine that:

(a) the Respondent shall pay to the Claimant the adjudicated amount of $376,611.84 ("Adjudicated Amount") consisting of the determined amount of $376,611.85 ("Determined Amount") which is inclusive of the prevailing GST on the Determined Amount of $347,248.86;

(b) the Respondent shall pay the Adjudicated Amount on or before the due date ("Due Date") which shall fall on the expiry of seven days from the date of service of this adjudication determination ("Adjudication Determination" or "AD");

(c) interest shall be paid by the Respondents at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid as at the Due Date until the same is paid; and

(d) the costs of the adjudication amount to $13,597.75 (inclusive of 9% GST). This consists of the adjudication application fee of $654 (inclusive of 9% GST) and the adjudicator fee of $12,943.75 (inclusive of 9% GST on the sum of $11,875.00). The costs shall be paid by the Respondent.

Record

6 With a view to save time and to avoid incurring unnecessary expenses, I have not recorded each and every fact and argument presented and considered by me in arriving at my determination. Nevertheless, the present record is sufficient, in my view, to reflect (a) the substance of the respective cases as canvassed by the Parties; and (b) the principal issues on which I consider the result of the Adjudication Determination turns. It should not be assumed that any evidence or argument which had not been specifically recorded herein had not been taken into account in arriving at my determination.

Factual background

7 The Respondent is a contractor of [A] by virtue of Contract No [xxx] dated 26 September 2018. For completeness, [A] is not a party to the present proceedings.

8 By way of the signed LOA dated 15 February 2019 and the documents annexed thereto (collectively, "Subcontract"), the Respondent engaged the Claimant as its subcontractor for the supply, testing and commissioning of a security system for a sum of $4,200,000 (before GST).

Payment Claim No 57

9 On 15 January 2024, the Claimant served its PC 57 on the Respondent by e-mail to claim for a total sum of $380,049.20 (exclusive of GST) for subcontract works, variation works, prolongation claim and overdue amounts from Payment Certificates No 53 and No 55 to the Respondent.

10 The particulars of PC 57 are extracted and set out, *inter alia*, in Table 1 as follows:

Table 1: Extract of PC 57

Total main contract claim to date	$3,948,084.59
Total variation order claim to date	$1,230,886.00
Less Retention Sum	- $258,948.53
Less one-off advance payment	- $5,000.00
Less amount certified (before GST) (inclusive of adjudicated amounts)	- $4,756,715.52
Prolongation Claim due to Covid-19 events	$32,800.33
Overdue Amount (NBR-53) (before GST)	$118,032.00
Overdue Amount (NBR-55) (before GST)	$70,910.33
Total amount for this claim (before GST)	$380,049.20

Payment Response No 57

11 The Respondent served its Payment Response No 57 on 23 January 2024 ("PR 57") for the sum of $37,219.45.

12 The particulars of PR 57 are extracted and set out, *inter alia*, in Table 2 as follows:

Table 2: Extract of PR 57

Contract Works	$3,899,436.74
Variation	$1,146,810.60
Less Retention Sum (Contract Works)	- $252,312.37
Less one-off advance payment	- $5,000.00
Less certified paid (before GST)	- $3,745,214.74
Less paid (excluding GST)	- $ 1,006,500.78
Response Amount (excluding GST)	$37,219.45

13 The Respondent subsequently prepared and served Payment Certificate No 57 dated 30 January 2024. This essentially follows the Respondent's position in PR 57, which certified the payable sum to be paid as $37,219.45 (before GST) or $40,569.20 (after 9% GST).

Adjudication proceedings

14 On 15 February 2024, the Claimant lodged the AA with the SMC pursuant to the provisions of the Act. The Claimant claimed a sum of $347,248.86 (exclusive of GST).

15 In support of its AA, the Claimant has submitted its documents which shall be referred to as "CBD". The Claimant's submissions dated 15 February 2024 in support of the Claimant's AA and the Claimant's reply submissions dated 4 March 2024 shall be referred to as "CWS-1" and "CWS-2" respectively.

16 On 16 February 2024, the SMC served the AA on the Respondent.

17 On 16 February 2024, the SMC offered to appoint me as adjudicator in respect of the adjudication application. Having satisfied myself that I am not in conflict in this matter, I accepted the offer on the same day.

18 On 16 February 2024, the SMC notified the Parties of my appointment as adjudicator of this matter.

19 In accordance with s 15(1) of the Act, the Respondent is required to file an adjudication response no later than seven days after the receipt of the AA. The Respondent therefore had up to 23 February 2024 to file the adjudication response. Further, by virtue of s 16(1) of the Act, the adjudication commenced on 24 February 2024.

20 The Respondent lodged its adjudication response on 23 February 2024 at 4.06pm. The Respondent's submission and bundle of documents shall be referred to as "RWS" and "RBD" respectively. This conforms with the timeline as provided by s 15(1) of the Act and r 34 of the SMC Adjudication Rules (9th Ed, 1 June 2023).

21 Section 17(1)(*b*) of the Act provides that the time for the making of the AD is 14 days from the date of the lodgment of the adjudication response or within such longer period as may have been requested by the adjudicator and agreed to by the Claimant and the Respondent. The due date for the determination, by default, was 9 March 2024.

22 Pursuant to s 17(1)(*b*) of the Act, I requested for the Parties' agreement to extend the deadline of the AD to 15 March 2024. This was agreed by the Respondent through an e-mail dated 29 February 2024, and by the Claimant through an e-mail dated 1 March 2024. Accordingly, the due date for this determination is 15 March 2024.

Parties' position

23 At this juncture, it should be highlighted that the Claimant is not pursuing the prolongation claim in our present adjudication. This is set out in para 15 of the CWS-1, an extract of which is reproduced in Table 3 below:

Table 3: Claimant's Claim in SOP/AA 037 of 2024

Component of Claim	**Claim in this AA**
Delivery for 15 February 2019 to 15 January 2024	$158,306.53
Prolongation Claim	Not pursued in this AA
Overdue amounts rolled over from PC 53	$118,032.00
Overdue amounts rolled over from PC 55	$70,910.33
TOTAL	**$347,248.86**

24 The total amount of the claim pursued by the Claimant in this adjudication is therefore $347,248.86 (excluding GST).

25 The Claimant's present claim is built on the value of accumulative work done and delivered up to 15 January 2019. Thereafter, the claim will deduct the previously certified sums, retention sum and advance payment. Based on this formula, the value of the works claimed in PC 57 is $380,049.20 (before GST).

26 The Claimant commenced this AA as it disputes the following issues:

(a) the Respondent's valuation of the accumulative work done by the Claimant; and,

(b) the Respondent's exclusion of previously unpaid invoices which were certified in the Respondent's Payment Certificates Nos 53 and 55.

27 In support of the Claimant's AA, the Claimant had submitted its bundle of documents (CBD) which comprised 37 Tabs with each containing the various documents as well as five other prior adjudication determinations pertaining to this project with the Respondent.

28 At this juncture, I pause to note that there are certain documents which are indicated but not found in the CBD. For example, at CBD Tab 1, the Claimant has prepared a folder "Additional Documents" but no documents or materials are contained therein. Similarly, in respect to Payment Certificate 54, no documents or materials are found for Annex A and Annex B of CBD Tab 11.

29 Be that as it may, I have proceeded and considered all the documents which are submitted and filed in the CBD by the Claimant. I also refer to *AWS Pte Ltd v AWT Pte Ltd* [2017] SCAdjR 312 at [36]–[38], in which it was determined that the failure to include documents that include relevant terms and conditions is not fatal to a party's case.

30 In its response to PC 57, the Respondent took the position that the Claimant is not entitled to the aforesaid claimed sum in Payment Claim No 57. The nub of the Respondent's dispute in this AA can be summarised in two aspects:

(a) that in respect of the subcontract works and items delivered, the Claimant did not furnish any proof of having carried out the requisite testing and commissioning ("T&C") as well as handover of systems; and,

(b) that in respect of the variation works, the Claimant similarly did not furnish any proof of having carried out the requisite T&C as well as handover of systems.

Adjudication conference

31 Pursuant to the powers conferred on me under s 16(4) of the Act, on 19 February 2024, I had invited the Parties to confirm by 1 March 2024 by 5.00pm if the parties were able to attend an adjudication conference on 4 March 2024 ("AC") to be conducted by way of Microsoft Teams conference at 9.30am.

32 In that regard, during the discourse of the Parties' communications, it was agreed that the AC would be held via Microsoft Teams on 4 March 2024 from 9:30am and the Claimant's counsel's further written submissions

be e-mailed to all parties by 8.00am on 4 March 2024 so that the AD would be delivered as scheduled on 15 March 2024.

33 Accordingly, on 4 March 2024 at 7.42am, the Claimant submitted its reply written submissions, which are referred to as "CWS-2".

34 The AC was convened on the 4 March 2024 by way of Microsoft Teams Conferencing from 9.30am to 11.50am. The Parties were represented by the following persons at the AC:

(a) The Claimant:

(i) Mr Divyesh Menon of Rajah & Tan Singapore LLP (the Claimant's solicitor);

(ii) Ms Tessa Teo of Rajah & Tan Singapore LLP (the Claimant's solicitor);

(iii) Ms [B] (the Claimant's legal counsel); and,

(iv) Mr [C] (the Claimant's project director).

(b) The Respondent

(i) Ms Grace Lu of CMS Holborn Asia (the Respondent's solicitor);

(ii) Mr [D] (the Respondent's chief operating officer); and

(iii) Mr [E] (the Respondent's project director).

35 At the AC, the Claimant's counsel made the following submissions:

(a) the Claimant is entitled to the sum of $158,306.53 (excluding GST) as it has delivered the subcontract works and variation works, and which were acknowledged by the Respondent;

(b) the Claimant is not prohibited from claiming the certified sums of $118,032.00 (excluding GST) for PC 53 and $70,910.33 (excluding GST) for PC 55; and,

(c) the Claimant, as a GST-registered company, is entitled to charge GST on the sum payable to it.

36 In her oral submissions during the AC, the Respondent's counsel raised two preliminary objections to this AA. This is on the grounds that the Claimant had made repeat claims in PC 57, and in any case, the events had been overtaken by an earlier adjudication determination in SOP/AA 036 of 2024 (*ie, BHW Pte Ltd v BHX Pte Ltd* [2024] SGSOP 3) ("AD 36").

37 Accordingly, based on the Respondent's calculation set out in para 58 of its RWS, the Respondent submitted at the AC hearing that the total sum of –$4,260,585.50 meant that no sum (*ie*, $0) is due to the Claimant.

Preliminary objections

38 In its RWS, the Respondent set out preliminary objections to this AA on the grounds that the Claimant had raised multiple identical claims which have been claimed in Payment Response No 56 ("PR 56") and adjudicated in AD 36.

39 It is therefore apposite to briefly set out the proceedings and determination in AD 36.

AD 36

40 The Claimant had commenced AD 36 against the Respondent for the certified sum of $104,886.81 (including 8% GST) in Payment Certificate 56. This was a lower sum than what the Claimant had initially claimed in Payment Claim No 56 ("PC 56"), but which was nonetheless accepted by the Claimant in its subsequent invoice to the Respondent.

41 The learned adjudicator in AD 36 held that the Claimant must establish "a *prima facie* case that the construction work which is the subject of the payment claim has been completed and that the value of the works is as stated in the payment claim". On the facts presented in AD 36, the learned adjudicator determined that Claimant had "proven its claim on a *prima facie* case that the construction work was carried out and the sum certified in the Payment Certificate 56".

42 Accordingly, the learned adjudicated in AD 36 determined that the Respondent was to pay the adjudicated amount of $104,866.81 (including 8% GST) to the Claimant.

43 For completeness, a copy each of PC 56, PR 56 and Payment Certificate No 56 are found at Tab 11 of the CBD.

Respondent's preliminary objection

44 The Respondent objected to this AA and cited s 17(7) of the Act as the statutory basis against repeat claims with the same value and that were previously determined. Their objections pertain to the claims for Payment Certificates No 53 and No 55, as the Respondent submitted that both were subsumed in Payment Certificate No 56 and therefore these amounts had been taken into account in the adjudication application in SOP 36 of 2024 and consequently in AD 36.

45 In view of the Respondent's assertion of prohibited repeat claims, I have extracted the parties' assessment on the subcontract works in Payment Claim No 56, Payment Response No 56, Payment Claim No 57 and Payment Response No 57 and set out in Appendix A of this AD.

46 At the AC, the Respondent's counsel submitted that the Claimant is seeking a second bite of the cherry as there are multiple identical claims in PC 57 and which are prohibited repeat claims as they were determined as part of AD 36.

47 Citing *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061 ("*Asplenium Land*"), the Respondent's counsel submitted that the multiple claims in PC 57 were adjudicated on its merits in an earlier adjudication. This is on the basis that the Claimant had accepted the Respondent's certified amount to PC 56, which was adjudicated and determined in AD 36.

48 As a result of the preliminary objections, the Respondent's position in this AA is set out in para 58 of the RWS and is reproduced in full below:

Table 4: Respondent's position in SOP/AA 037 of 2024

S/N	Description	PC 57 Claimant	AR Respondent
[A] Contract Works – SECURITY SYSTEMS			
1	ISMS and Card Access System	$1,162,239.00	$0.00 (repeat claim)
2	Network Video Surveillance Management System	$2,262,070.00	$0.00 (repeat claim)
3	Security Network Equipment	$97,021.80	$0.00 (repeat claim)
4	Security Control Console & Equipment Rack	$32,550.00	$0.00 (repeat claim)
5	Guard Tour System	$35,268.60	$0.00 (repeat claim)
6	Duress Alarm System	$127,311.00	$122,218.56
7	Key Management System	$143,040.00	$0.00 (repeat claim)
8	Testing & Commissioning	$135,000.00	$120,000.00 (subject to adjudicator)
9	Provisional Quantity Sum	$318,312.00	$0.00 (repeat claim)
Total Amount [A] (before Agreed Discount)		$4,312,812.40	$242,218.56
Agreed Discount as %: ($388,000 / $4,588,000)		- 8.4568439%	- 8.4568439%
FACTOR: Agreed Discount % to Total Amount		$364,727.81	- $20,484.05
Total Amount: [A] (after Agreed Discount)		**$3,948,084.59**	**$221,734.51**

[B] Variations			
	- 'PC 56 VOs'	$1,226,206.00	$0.00 (repeat claim)
	- 130Fire-Bracket (A22)	$4,680.00	$4,680.00
	Total Amount: [B]	**$1,230,866.00**	**$4,680.00**
	Total Value: [A] + [B]	$5,178,970.59	$226,414.51
	LESS: 5% retention	-$258,948.53	-$11,320.73
	LESS: Previous Payment	-$4,567,773.19	-$4,470,674.29
	LESS: Advance payment	-$5,000.00	-$5,000.00
	Total due: (excluding GST)	$347,248.66	- $4,260,580.50

49 The second objection that the Respondent had raised was that the Claimant was not entitled to GST as the claimed sum in its AA Form was stated as "SGD 347,248.86 (exclusive of GST)".

Claimant's position on preliminary objections

50 The Claimant disagreed with the Respondent's preliminary objections. On the first objection, the Claimant cited two grounds.

51 The first ground is that there was no adjudication on the merits of the claim in AD 36. The Claimant's counsel pointed to the fact that AD 36 was a case of unpaid certified sum, and argued that the case was not adjudicated on its merits as it involved procedural non-compliance such as breaching of the mandatory time limit for payment.

52 Counsel for the Claimant relied on the persuasive authority of Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 9.35 and further argued that there is no adjudication on the merits for unpaid certified sums since the adjudicated amount and the response amounts will be the same.

53 Furthermore, the Claimant's counsel argued that the Respondent had excluded certification of Payment Certificates No 53 and 55 in PC 56 and the Claimant had accepted the sums certified by the Respondent in Payment Certificate 56.

54 In relation to Payment Certificates Nos 53 and 55, the Claimant's counsel argued that s 10(5) read with s 10(6) of the Act does not prohibit the Claimant from serving an unpaid claim against the respondent.

55 The Claimant further relied on the Court of Appeal's decision in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Terence Lee*") at [92] to illustrate that a claimant is entitled to bring a repeat claim against the respondent as long as it has not been paid in full or without any adjudication.

56 Equally significant is the Claimant's citation of the Court of Appeal's subsequent decision in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [57]. The Court of Appeal held that the Act does not prohibit a payment claim which merely repeats an earlier claim, and affirmed the approach in *Terence Lee*.

Applicable legal principles

57 The Court of Appeal's decision in *Terence Lee* is instructive on which types of repeat claims are prohibited. In the same case, the apex court also observed at [92] that s 10(1) of the Act does not bar all repeat claims.

58 While the Parties have not referred me to this case, I note that in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 at [44], the High Court observed that: "*Terence Lee* has been understood to stand for the proposition that the Act only prohibits a repeat claim that has been adjudicated and dismissed on its merits".

59 Applying to our present case, I am inclined to agree with the Claimant that the claims for subcontract works and variation orders in PC 57 have not been adjudicated on their merits. This is in view that the learned adjudicator in AD 36 had limited the adjudication to the certified amount to PC 56.

60 The learned adjudicator in AD 36 was cognisant of the differences between the Claimant's claim in PC 56 and the Respondent's certified sum in Payment Certificate No 56. Specifically, the learned adjudicator noted that the Claimant had "claimed for 93.04% of the original Subcontract sum in PC 56, of which the Respondent had certified 92.02% and for variation claims at 93.14%".

61 That said, it bears emphasis that the learned adjudicator in AD 36 was satisfied that the Claimant had proved its claim that "the construction work was carried out and the *sum certified in Payment Certificate 56*" [emphasis added]. As the Claimant had "accepted the full Certified Sum of $104,866.81 (including 8% GST), in writing" in Payment Certificate 56 as certified by the Respondent, the amount in PC 56 was not pertinent for the purpose of determination in AD 36. It was only relevant to the learned adjudicator in AD 36 that the Respondent had certified the sum of $104,866.81 (including 8% GST) and that the Claimant had accepted this sum.

62 The Court of Appeal also held in *Terence Lee* at [92] that an unpaid claim and which has not been adjudicated upon can be the subject of a later payment claim and adjudication. As an illustration, the Claimant has elected not to pursue their prolongation claim for $32,800.33 in PC 57 even though this head of claim was initially set out in their present AA. For avoidance of doubt, this would mean that AD 37 will not operate as a bar to

preclude the Claimant from pursuing the prolongation claim in future payment claims and subsequent adjudication applications.

63 In this connection, we note that the Respondent had excluded Payment Certificate No 53 and did not account for Payment Certificate No 55 in its response to PC 56 as there had already been invoices issued in relation to these two payment certificates. This indicates that the learned adjudicator in AD 36 did not need to and had not adjudicated on the merits or included Payment Certificates Nos 53 and 55.

64 The learned adjudicator in AD 36 had compared PC 56 and Payment Certificate 56, and was therefore cognisant that the Claimant in PC 56 had claimed $118,032 for "[o]verdue amount from unpaid invoice NBR 53" and which was excluded in the certified amount in Payment Certificate No 56.

65 For completeness, it should be mentioned that the Claimant had drawn to the Respondent's notice in PC 56 that the sum of $76,583.16 (including GST) remains unpaid for invoice NBR-55. This, however, did not form part of the total claimed sum in PC 56 or the total certified sum in Payment Certificate No 56.

66 I am therefore satisfied that since the Respondent had not made any Payment Response to invoices NBR-53 and NBR-55 (*ie*, invoices for Payment Certificates Nos 53 and 55), these amounts were excluded from PR 56 and Payment Certificate No 56. It follows that Payment Certificates No 53 and No 55 were not adjudicated in AD 36, as both certificates were not taken into account in the subject of adjudication (*ie*, Payment Certificate No 56). Both invoices are therefore unpaid claims that can be the subject of a later claim and adjudication.

67 It is also significant to reiterate that AD 36 concerned an application for an accepted unpaid response amount made under s 12(1) of the Act. This is unlike disputes over payment response under s 12(2)(*a*) of the Act, which invariably involves a holistic assessment of the competition between the sums claimed and responded. On this ground, I am of the view that AD 36 did not make any assessment in relation to Payment Certificates Nos 53 and 55.

68 On the authority of *Asplenium Land* ([47] *supra*) at [14], the Claimant is entitled to "roll-up any payment claim which was not paid or paid in full" unless it had been adjudicated on the merits. I am therefore inclined to agree that the preliminary objection will also not succeed in respect to the certified amounts in Payment Certificates Nos 53 and 55.

Finding on preliminary objections

69 It is trite that the s 15(3) of the Act prohibits the Respondent from raising in their adjudication response any objection that has not been previously included in their payment response to PC 57.

70 In interpreting s 15(3) of the Act, the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [70] emphasised that a respondent had "a duty to speak by way of fully spelling out his reasons for withholding payment so that the claimant is not caught by surprise at the adjudication".

71 Applying this to our present context, it is clear that the Respondent's preliminary objections were not raised in PR 57 and in fact had significantly departed from the response provided therein. On this ground alone, I find that the Respondent will not succeed on its preliminary objections.

72 Even if the law permits otherwise, it is difficult to sustain the Respondent's argument that the Claimant is making prohibited repeat claims for the subcontract and variation works in PC 57 *vis-à-vis* PC 56 and AD 36.

73 Given the accumulative nature of the payment claims in this project, it does not necessarily follow that the identical sums in PC 57 *vis-à-vis* PC 56 are repeated claims. What the sums reflect is the value of works done to date, and identical sums for each item between different payment certificates would mean that there is no progress and therefore no additional payment is warranted.

74 Taking variation order SOI-006 as an example, it is observed that the Claimant accepted the sum of $12,600 in Payment Claims Nos 53–57. The Respondent had correspondingly accepted the said sum in Payment Responses Nos 53–57. If the Respondent's argument in this AA is allowed, it would mean that the Respondent had curiously allowed the claim of $12,600 to be repeated over four responses. I am inclined to agree with the Claimant that the payment claims are accumulative, and by extension this will include the amounts ascribed to each variation order in the payment claim.

75 It is also observed that PC 57 had also deducted previous certified claims, which eliminates double counting and repeat claims. As such, the sum payable for subcontract works completed for the relevant period in PC 57 excludes previous amounts unless it is explicitly included.

76 In any case, it is inaccurate to use PC 56 and claim that PC 57 had made repeated claims. This is in view that AD 36 had determined the payable sum is that of Payment Certificate No 56, which in turn is based on the response amount in PR 56. PC 56, which was not pursued by the Claimant in AD 36, was for all intents and purposes irrelevant.

77 If the Respondent's argument is allowed, it would give rise to an illogical result where AD 36 would extinguish the Claimant's right to be paid on a progressive basis for further works done for the subcontract and variation works.

78 Taking variation order SOI-007 as an example, it is observed that the parties agreed that the cost shall be $174,870 in Addendum 3 dated 24 June 2022 and that "this shall be valid as part of the original contract". To date, the sum certified by the Respondent in Payment Certificates Nos 56 and 57 is $130,023. By the Respondent's logic of repeated claim, it will mean that AD 36 will extinguish the Claimant's right to the contracted sum of $174,870 in respect of SOI-007.

79 Accordingly, I determine that the preliminary objections are not made out and it is necessary to examine the substantive issues in dispute.

Substantive issues in dispute

80 The Parties differed on the methodology and quantification of the works claimed in PC 57 and responded in PR 57.

81 The following components in PC 57 are referred for determination in this adjudication:

(a) whether the Claimant's claim for subcontract works should be allowed;

(b) whether the Claimant's claim for variation works should be allowed;

(c) whether the Claimant's claim for Payment Certificates Nos 53 and 55 should be allowed; and,

(d) whether GST should be applied to the sum claimed and/or determined in this AA.

82 As a starting point, it is observed that the Claimant had lodged four earlier adjudications (not including AD 36) against the Respondent in relation to different payment claims and in which all were found in favour of the Claimant. In respect to the valuation methodology adopted by the Claimant, the learned adjudicator in AD 36 made the following observations:

> 69 For completeness, I refer to the emphasis given by the Claimant in its submissions that its valuation methodology was accepted as reasonable by the adjudicator in *SOPA/AA 188 of 2022*, and was similarly not disputed by the learned adjudicators in *SOP/AA 087 of 2023, SOP/AA 198 of 2023 and SOP/AA 253 of 2023*, respectively.

> 70 *Overall, I am of the view that PC 56, including the relevant information, ie, working valuations and computations attached to it*, was made in compliance with the prescriptive requirements as stated in the Previous SOP Act.
>
> [emphasis added]

83 While I am not bound by the determinations and views in earlier adjudications, I am similarly inclined to agree that the Claimant's valuation methodology in PC 57 is reasonable. This has not been disputed by the Respondent as set out in PR 57, and accordingly, *Audi Construction* ([70] *supra*) (at [66], [67] and [69]) sets out the principles that such arguments raised in the adjudication response would not be taken into account and the Respondent was estopped from doing so.

84 I have also considered the Respondent's responses to the various components of PC 57 which it disputes, but given the lack of explanation by the Respondent to justify its alternative valuation in PR 57, I am unable to accept the figures proposed in PR 57.

Subcontract works

85 It is undisputed that the Subcontract is a lump-sum contract, with progressive claims allowed up to 95% of the agreed sum of $4,200,000. It therefore follows that the payment sum in each progressive claim is subject to the completion progress at the material time. The final accumulated sum will eventually be on par with the contracted sum in the LOA, which is $420,000.

86 To reiterate, the Claimant's basis for its valuation of contracted works done is that it has delivered the works and items which were acknowledged by the Respondent. The Respondent, however, disagreed with the sum assessed in PR 57 on the basis that the Claimant did not perform the requisite testing and commissioning as well as handover for the subcontract works.

87 In respect to the subcontract works, I have extracted the Parties' assessment in Payment Claim No 57, Payment Response No 57 and the Respondent's position as reflected in para 58 of its RWS and set them out in Appendix B of this AD.

88 The Claimant's position in Payment Claim No 57 is that there is progress for the contracted works, and these were evinced by the delivery schedule and delivery orders which were acknowledged by the Respondent. The Respondent did not dispute the delivery of these works and items.

89 The Respondent, however, disagreed with the claimed sum in PC 57 and submitted an alternative valuation in PR 57. This is on the basis that the

Claimant had only delivered the works and items, without any proof of the requisite T&C and handover of systems.

90 In view of the Parties' differing positions, it is necessary to examine the LOA and the quotation (Ref No: [xxx]) dated 5 December 2018, which detailed the breakdown for the contract price ("Final Offer") in determining whether the Claimant's claim should succeed. The relevant paragraphs in the LOA are para 4 which governs the scope of works and para 7 which governs progress claims and payment terms.

91 Based on the LOA, it is observed that:

(a) para 4(c) of the LOA sets out that the scope of works includes the supply, testing and commissioning of security devices;

(b) para 4(d) of the LOA mandates that the Claimant and the Respondent are "jointly responsible for the integration and commissioning of security system";

(c) the final quotation contemplated and listed "Testing and Commission" for a sum of $300,000 as a separate item from the provision of security devices; and

(d) para 7(b) of the LOA allows the Claimant to make progressive claims capped at 95% of the contract price.

92 Returning to PC 57 and PR 57, it is clear that the Claimant had included "Testing & Commissioning" as a separate item from the security devices under the subcontract works and items.

93 It therefore follows that the value of work done for each security device under the subcontract component in PC 57 excludes testing and commissioning works. To say otherwise would result in double counting of the costs for testing and commissioning works.

94 During the AC, Mr [E] (project director of the Respondent) stated that the Respondent had written via e-mails on 17 February 2023 to express its position that testing and commissioning costs should be excluded from the quotations as it is already included in the contract price.

95 The basis for the Respondent's position in the aforesaid e-mails is premised on the following clauses in the "Schedule of Rates" as attached in the e-mail dated 23 February 2023:

> 2 The rates quoted in this Schedule shall include supply, delivery, installation, commissioning, profit, establishment, overhead charges, T&C, drawing changes and other associated items necessary for the erection of the equipment to comply with the Specification requirements.

> 3 These rates shall be used or the assessment of variations to the Contract for a period up to when the Contract Works are completed and where the Architect has issued a practical completion certificate.

96 At this juncture, I wish to highlight that neither party has furnished the full set of Schedule of Rates which is purportedly part of the contract. Be that as it may, I will review the e-mail correspondences as exhibited in RBD at Tab 7 as invited by the Respondent's counsel during the AC.

97 For completeness, it is important to highlight the Claimant's position in relation to the Respondent's e-mails. This can be summarised by the Claimant's e-mail dated 22 February 2024, which stated that testing and commissioning formed part of their final offer to the Respondent.

98 Having reviewed the LOA and Final Offer dated 5 December 2018, it is clear that both parties have agreed to cap the subcontract works at $4,200,000. I find force in the Claimant's position that the Parties had entered into the contract based on the Final Offer, which quoted a final sum of $4,200,000 including a separate component of "Testing and Commissioning" for $300,000.

99 On the other hand, the e-mail correspondences in RBD at Tab 7 are insufficient in explaining why the Respondent adopts a different view or methodology four years later in February 2023. If the Respondent's concern is centred on the contract price, it is clear that the Claimant's methodology of including a separate component of "Testing and Commissioning" does not raise the contract price beyond the agreed $4,200,000.

100 In view of the foregoing, I am inclined to agree with the Claimant's arguments and determine that the Claimant has established a *prima facie* case in relation to its claim for the subcontract works.

Variation works

101 In respect to variation works, the Claimant asserted that it is entitled to the accumulated sum of $1,230,866 claimed in PC 57 as the Respondent had accepted that these works were delivered.

102 The Respondent, however, reached a different assessment in PR 57. While it did not dispute that the variation works were delivered, it opined that the Claimant was not entitled to the claimed sum as there is no evidence of testing and commissioning as well as handover.

103 As such, I have similarly extracted the Parties' assessment on variation works in PC 56, PR 56, PC 57 and PR 57 and set out in Appendix C of this AD.

104 For ease of reference on the Parties' position in our present adjudication, I have also extracted the Parties' assessment on variation works

in PC 57, PR 57 and the Respondent's position in Annex A of its RWS. This is set out in the table in Appendix D of this AD.

105 I am unable to agree with the Respondent's submission that the Claimant is not entitled to the claimed sum in respect of variation works in PC 57 as the latter has not completed the testing and commissioning works. Nothing in the various quotations and addendums of contract specify that the Claimant is only entitled to the full sum for each variation order after the completion of testing and commissioning.

106 On the contrary, the various quotations produced in this AA by the Claimant clearly specify that the variation orders are to supply devices. Similarly, the addendums unequivocally state that the Claimant is to "supply Additional materials/equipment at [xxx]".

107 This dovetails with the Claimant's position that it has delivered the variation works and which were accepted by the Respondent in the various delivery orders, with the claimed sum calculated based on the quantity of material or equipment delivered up to 15 January 2024.

108 I am inclined to agree with the Claimant's argument, though I pause to make some observations relating to "SOI-926" and "SOI-927" (or alternatively referred to as "SAA-926" and "SAA-927" in Annex B in the RWS).

(a) In respect to "SOI-926", the sum in quotation [xxx] dated 28 August 2023 was $3,785. However, though the same quotation was referred to in Addendum 21, the sum contracted and agreed by the Parties for SOI-926 was $1,590. That said, the Parties by their conduct have acquiesced that the true value of the sum cannot be $1,590. This is in the light of the Claimant's claim of $3,785 in PC 57 and the Respondent having certified the payable sum to be $3,656.40 in Payment Certificates Nos 56 and 57.

(b) In respect to "SOI-927", the sum in quotation [xxx] dated 28 August 2023 was $5,071. However, though the same quotation was referred to in Addendum 21, the sum contracted and agreed by the Parties for SOI-927 was $2,876. That said, the Parties by their conduct have acquiesced that the true value of the sum cannot be $2,876. This is in the light of the Claimant's claim of $5,071 in PC 57, and the Respondent having certified the payable sum to be $4,860 in Payment Certificates Nos 56 and 57.

109 Furthermore, I note that there is no dispute that the Claimant is entitled to the sum of $4,680 for the variation order "130Fire-Bracket". As such, it is not necessary to make any finding in relation to this variation order.

110 Overall, having regard to the Parties' conduct and the circumstances, I am inclined to agree with the Claimant that it has established a *prima facie* case in relation to its claim for the variation works and that it is entitled to the sums claimed for the variation works as set out in PC 57.

Payment Certificates Nos 53 and 55

111 The Claimant is seeking payment of $118,032 (excluding GST) for Payment Certificate No 53, and $70,910.33 (excluding GST) for Payment Certificate No 55.

112 However, the Respondent had raised a preliminary objection that both payment certificates are prohibited repeat claims subsumed in AD 36 and the Claimant is thereby prohibited from making such repeat claims. I have determined in the earlier part of this determination that the preliminary objection will not succeed.

113 Nonetheless, it remains necessary to consider whether the Claimant's claim for Payment Certificates Nos 53 and 55 should succeed. Owing to the relevance of Payment Certificates Nos 53–57, I have extracted certain particulars of these payment certificates and reproduced them in Appendix E of this AD.

114 As a starting point, it is observed that each payment certificate *excludes* the previous amount that is certified. This is clearly indicated in the component "Previous Payment" in each payment certificate prepared by the Respondent, which is part of the deductions made against the "Value of accumulative work done to date". It is therefore abundantly clear that previous certified sums are excluded and not subsumed in the sum payable in later payment certificates.

115 This is buttressed by the fact that the difference in "Previous Payment" between *current* (*eg*, Payment Certificate No 57) and the preceding (*eg*, Payment Certificate 56) payment certificates will reflect the amount certified and payable in the preceding payment certificate. This is illustrated through the comparative analysis in Table 5, based on figures extracted from the payment certificates prepared by the Respondents:

Table 5: Comparison across Payment Certificates Nos 53 to 57

	'*Previous Payment*' in current payment certificate	**'*Previous Payment*' in preceding payment certificate**	**Difference in '*Previous Payment*' between current and preceding**	**Total amount certified and payable in preceding payment certificate**
No 57	$4,751,715.52	$4,654,616.62	$97,098.90	$97,098.90 (No 56)

No 56	$4,654,616.62	$4,583,706.29	$70,910.33	$70,910.33 (No 55)
No 55	$4,583,706.29	$4,274,290.31	$309,415.98	$309,415.98 (No 54)
No 54	$4,274,290.31	$4,156,258.31	$118,032.00	$118,032.00 (No 53)

116 In view of the foregoing, the certified sum of $97,098.90 (excluding GST) or $104,866.81 (including 8% GST) in Payment Certificate No 56 plainly excludes the sums payable in Payment Certificate Nos 53 and 55. Accordingly, it cannot be said that Payment Certificate Nos 53 and 55 were adjudicated on their merits in AD 36.

117 In any case, it is difficult to see how the combined sum of $188,942.33 (excluding GST) for both Payment Certificates Nos 53 and 55 can be subsumed in the lesser sum of $97,098.90 (excluding GST) or $104,866.81 (including 8% GST) in the later Payment Certificate No 56.

118 It is not disputed that the Claimant did include a sum of $118,032 (excluding GST) for "Overdue amount NBR: 53" after deducting previous certified amounts in PC 56, as well as a notice for the unpaid sum of $76,583.16 (including 8% GST, or $70,910.33 if excluding GST) for NBR55 in the same payment claim.

119 However, as the Claimant rightly observed in CWS-2, the Respondent had removed references to NBR: 53 and NBR: 55 in its PR 56. For the avoidance of doubt, the response sum in PR 56 is identical with the certified sum in Payment Certificate No 56. This further underscores the fact that Payment Certificate No 56 excludes Payment Certificates Nos 53 and 55.

120 Returning to PC 57, it is also clear that the Claimant had included "Overdue amount – NBR: 53" and "Overdue amount – NBR: 55" therein. The claims for the overdue amounts were inserted after deductions were made for previous amounts certified, thereby removing the risk of double counting.

121 In view of the foregoing, I do not agree that Payment Certificates Nos 53 and 55 were subsumed in Payment Certificate No 56. I am inclined to agree with the Claimant that the sums of $118,032 (excluding GST) for Payment Certificate No 53, and $70,910.33 (excluding GST) for Payment Certificate No 55, remain unpaid to date.

Issue pertaining to GST

122 The Claimant seeks for the prevailing GST rate (*ie*, 9%) to be applied to the sum claimed and determined in this AA. However, the Respondent submitted that GST should not be applied as it was not expressly provided by the Claimant in PC 57.

123 In response, the Claimant submitted that it is entitled to GST by virtue of the fact that it is a GST-registered company. Furthermore, the Claimant referred to the Parties' past conduct and explained that GST will only be applied in tax invoices after the Parties agree on the sum payable.

124 I am not persuaded by the Respondent's position. It is clear in PC 57 that it is subject to GST charges, as indicated in the term: "Total amount for this claim (Before GST)". While one can argue that it is a matter of semantics, "Before GST" undoubtedly means that GST will eventually be applied.

125 Having reviewed the past conduct between the Parties, it is established that the Respondent will apply the prevailing GST rate to the certified sum in the payment certificate. This is even though the Claimant did not include the sum including GST in payment claims.

126 The Respondent is therefore acutely aware that GST is chargeable and, in fact, took steps to apply GST charges to the certified sum in its payment certificates to the Claimant. In other words, the mere fact that GST charges are not applied in PC 57 should not detract from the Parties' established practice and understanding.

127 In any event, if the Claimant is a taxable entity under the Goods and Services Tax Act 1993 (2020 Rev Ed), GST is payable. This is also set out at s 8 of the Act.

128 Accordingly, GST should be included in the sum payable to the Respondent in respect to the works performed in PC 57.

Findings

129 In the light of the foregoing reasons, I therefore find that the Claimant is entitled to the following claimed amount under Payment Claim No 57:

S/N	Component of Claim	Sums to be paid (before GST)	Sums to be paid (after GST)
(a)	Delivery of subcontract and variation works from 15 February 2019 to 15 January 2024	$158,306.53	$172,554.12 (9% GST)
(b)	Overdue amounts rolled over from Payment Certificate No 53	$118,032.00	$127,474.56 (8% GST)
(c)	Overdue amounts rolled over from Payment Certificate No 56	$70,910.33	$76,583.16 (8% GST)
	TOTAL SUM:	**$347,248.86**	**$376,611.84**

130 Pursuant to s 22(1) of the Act, I determine that the due date for payment for the purpose of this adjudication shall be on the expiry of

a period of seven days from the date of service of this Adjudication Determination.

Costs of adjudication

131 In view of the rather voluminous documents submitted albeit online, it is a necessary exercise to distill and dissect the relevant documents at hand. The costs of the adjudication amount to $13,597.75 (inclusive of 9% GST). This consists of the adjudication application fee of $654 (inclusive of 9% GST) and the adjudicator fee of $12,943.75 (inclusive of 9% GST on the sum of $11,875).

132 The Respondent shall bear 100% of the costs since the Claimant has been successful for its entire action and the Respondent has failed to pay the certified sums in Payment Certificates Nos 53 and 54.

Appendix A: Overview of PC 56, PR 56, PC 57 and PR 57

		Contract Sum	PC 56	PR 56	PC57	PR57
	Description	Amount	Amount	Amount	Amount	Amount
A	TOTAL MAIN CONTRACT CLAIMED	$4,200,000.00	$3,922,698.66	$3,864,938.37	$3,948,084.59	$3,899,436.74
	ISMS and Card Access System	$1,162,239.00	$1,162,239.00	$1,147,129.89	$1,162,239.00	$1,159,914.52
	Network Video Surveillance Management System	$2,262,070.00	$2,262,070.00	$2,257,545.86	$2,262,070.00	$2,259,807.93
	Security Network Equipment	$119,780.00	$97,021.80	$72,790.31	$97,021.80	$72,790.31
	Security Control Console & Equipment Pack	$32,550.00	$32,550.00	$28,318.50	$32,550.00	$28,318.50
	Guard Tour System	$41,010.00	$35,268.60	$35,268.60	$35,268.60	$35,268.60
	Duress Alarm System	$127,311.00	$114,579.90	$114,579.90	$127,311.00	$122,218.56
	Key Management System	$143,040.00	$143,040.00	$143,040.00	$143,040.00	$143,040.00
	Testing & Commission	$300,000.00	$120,000.00	$105,000.00	$135,000.00	$120,000.00
	Provisional Quantity Sum	$400,000.00	$318,312.00	$318,312.00	$318,312.00	$318,312.00
	(Less) Lumpsum Project Discount	-$382,000.00	-$362,382.64	-$357,046.69	-$364,727.81	-$360,233.68
	(Less) Further Discount	-$6,000.00				
B	VARIATION		$1,226,206.00	$1,142,130.60	$1,230,886.00	$1,146,810.60
C	TOTAL CLAIM AMOUNT OF WORK [A + B]		$5,148,904.66	$5,007,068.97	$5,178,970.59	$5,046,247.34
D1	LESS RETENTION SUM		-$257,445.23	-$250,353.45	-$258,948.53	-$252,312.37
D2	LESS ONE-OFF ADVANCE PAYMENT		-$5,000.00	-$5,000.00	-$5,000.00	-$5,000.00
D3	LESS AMOUNT CERTIFIED		-$4,659,616.62	-$3,648,115.84	-$4,756,715.52	-$3,745,214.74
E	THIS CLAIM [C – D1 – D2 – D3]		$226,842.81	$1,103,599.68	$158,306.53	$1,043,720.23
F	Prolongation Claim		$32,800.33	$0.00	$32,800.33	$0.00
G1	Overdue Amount (NBR-53)		$118,032.00	(Not included)	$118,032.00	N.A.
G2	Overdue Amount (NBR-55)		(Not included)	(Not included)	$70,910.33	N.A.
G3	Less Paid (SOP/AA188 of 2022)		(Not included)	-$1,006,500.78	N.A.	-$1,006,500.78
H	TOTAL AMOUNT FOR THIS CLAIM (E + F + G)		$377,675.14	$97,098.90	$380,049.20	$37,219.45
	(including prevailing GST)		$407,889.15	$104,866.81	$414,253.63	$40,569.20

Appendix B: Parties' position on Subcontract in this AA

		Contract Sum	PC 57	PR 57	AR Position in RWS at [58]	
	Description	Final Amount	Amount	Amount	Amount	Note
A	TOTAL MAIN CONTRACT CLAIMED	$4,200,000.00	$3,948,084.59	$3,899,436.74	Amount	Remarks
	ISMS and Card Access System	$1,162,239.00	$1,162,239.00	$1,159,914.52	$0	Repeat claim
	Network Video Surveillance Management System	$2,262,070.00	$2,262,070.00	$2,259,807.93	$0	Repeat claim
	Security Network Equipment	$119,780.00	$97,021.80	$72,790.31	$0	Repeat claim
	Security Control Console & Equipment Pack	$32,550.00	$32,550.00	$28,318.50	$0	Repeat claim
	Guard Tour System	$41,010.00	$35,268.60	$35,268.60	$0	Repeat claim
	Duress Alarm System	$127,311.00	$127,311.00	$122,218.56	$122,218.56	RWS at [40]-[42]
	Key Management System	$143,040.00	$143,040.00	$143,040.00	$0	Repeat claim
	Testing & Commission	$300,000.00	$135,000.00	$120,000.00	$120,000.00	RWS at [43]-[44]
	Provisional Quantity Sum	$400,000.00	$318,812.40	$318,812.40	$0	Repeat claim

Appendix C: Parties' assessment on variation works in PC 56, PR 56, PC 57 and PR 57

		PC 56	PR 56	PC57	PR57
	Description	Amount	Amount	Amount	Amount
B	VARIATION	$1,226,206.00	$1,142,130.60	$1,230,886.00	$1,146,810.60
	SOI-008(A01)	$362,395.00	$326,155.50	$362,395.00	$326,155.50
	SOI-013(A02)	$16,541.00	$15,802.00	$16,541.00	$15,802.00
	SOI-007(A03)	$144,470.00	$130,023.00	$144,470.00	$130,023.00
	SOI-006(A04)	$12,600.00	$12,600.00	$12,600.00	$12,600.00
	SOI-018(A05)	$175,504.00	$175,504.00	$175,504.00	$175,504.00
	SOI-020(A06)	$11,760.00	$11,760.00	$11,760.00	$11,760.00
	SOI-024(A07)	$840.00	$840.00	$840.00	$840.00
	SOI-026(A08)	$22,198.00	$22,198.00	$22,198.00	$22,198.00
	SOI-002(A09)	$23,023.00	$20,990.20	$23,023.00	$20,990.20
	SOI-011(A10)	$1,809.00	$1,809.00	$1,809.00	$1,809.00
	SOI-015(A11)	$4,120.00	$3,708.00	$4,120.00	$3,708.00
	SOI-017(A12)	$1,088.00	$1,088.00	$1,088.00	$1,088.00
	SAA-483(A13)	$719.00	$677.80	$719.00	$677.80
	SAA-507(A14)	$971.00	$929.80	$971.00	$929.80
	SOI-005(A15)	$13,783.00	$12,321.00	$13,783.00	$12,321.00
	SOI-012(A16)	$256,200.00	$230,580.00	$256,200.00	$230,580.00
	SOI-019(A17)	$28,366.00	$27,378.40	$28,366.00	$27,378.40
	SOI-021(A18)	$2,914.00	$2,826.60	$2,914.00	$2,826.60
	SOI-022A(A19)	$3,564.00	$3,564.00	$3,564.00	$3,564.00
	SOI-022B(A20)	$777.00	$777.00	$777.00	$777.00
	SAA-683(A21)	$2,914.00	$2,653.30	$2,914.00	$2,653.30
	SOI-009(A21)	$10,305.00	$10,072.00	$10,305.00	$10,072.00
	SAA-442(A21)	$971.00	$929.80	$971.00	$929.80
	SAA-592(A21)	$3,244.00	$3,079.20	$3,244.00	$3,079.20
	SAA-626(A21)	$971.00	$929.80	$971.00	$929.80
	SAA-684(A21)	$3,564.00	$3,564.00	$3,564.00	$3,564.00
	SAA-727(A21)	$2,887.00	$2,804.60	$2,887.00	$2,804.60
	SAA-766(A21)	$719.00	$677.80	$719.00	$677.80
	SAA-767(A21)	$8,755.00	$8,374.20	$8,755.00	$8,374.20
	SAA-857(A21)	$1,459.00	$1,376.60	$1,459.00	$1,376.60
	SAA-870(A21)	$4,137.00	$4,008.40	$4,137.00	$4,008.40
	SAA-926(A21)	$3,785.00	$3,656.40	$3,785.00	$3,656.40
	SAA-927(A21)	$5,071.00	$4,860.00	$5,071.00	$4,860.00
	SAA-1012(A21)	$4,352.00	$4,182.20	$4,352.00	$4,182.20
	80Fire-Bracket (A22)	$2,880.00	$2,880.00	$2,880.00	$2,880.00
	CRC (A22)	$73,150.00	$73,150.00	$73,150.00	$73,150.00
	re-download (A22)	$13,200.00	$13,200.00	$13,200.00	$13,200.00
	CUS23–002	$200.00	$200.00	$200.00	$200.00
	130Fire-Bracket (A22)	N.A.	N.A.	$4,680.00	$4,680.00

Appendix D: Parties' assessment on variation works in PC 57, PR 57 and Annex A of RWS

		PC57	PR57	AR Position in RWS at [58]	
	Description	Amount	Amount	Amount	Note
B	VARIATION	$1,230,886.00	$1,146,810.60	Amount	Remarks
	SOI-008(A01)	$362,395.00	$326,155.50	$0	Repeat claim
	SOI-013(A02)	$16,541.00	$15,802.00	$0	Repeat claim
	SOI-007(A03)	$144,470.00	$130,023.00	$0	Repeat claim
	SOI-006(A04)	$12,600.00	$12,600.00	$0	Repeat claim
	SOI-018(A05)	$175,504.00	$175,504.00	$0	Repeat claim
	SOI-020(A06)	$11,760.00	$11,760.00	$0	Repeat claim
	SOI-024(A07)	$840.00	$840.00	$0	Repeat claim
	SOI-026(A08)	$22,198.00	$22,198.00	$0	Repeat claim
	SOI-002(A09)	$23,023.00	$20,990.20	$0	Repeat claim
	SOI-011(A10)	$1,809.00	$1,809.00	$0	Repeat claim
	SOI-015(A11)	$4,120.00	$3,708.00	$0	Repeat claim
	SOI-017(A12)	$1,088.00	$1,088.00	$0	Repeat claim
	SAA-483(A13)	$719.00	$677.80	$0	Repeat claim
	SAA-507(A14)	$971.00	$929.80	$0	Repeat claim
	SOI-005(A15)	$13,783.00	$12,321.00	$0	Repeat claim
	SOI-012(A16)	$256,200.00	$230,580.00	$0	Repeat claim
	SOI-019(A17)	$28,366.00	$27,378.40	$0	Repeat claim
	SOI-021(A18)	$2,914.00	$2,826.60	$0	Repeat claim
	SOI-022A(A19)	$3,564.00	$3,564.00	$0	Repeat claim
	SOI-022B(A20)	$777.00	$777.00	$0	Repeat claim
	SAA-683(A21)	$2,914.00	$2,653.30	$0	Repeat claim
	SOI-009(A21)	$10,305.00	$10,072.00	$0	Repeat claim
	SAA-442(A21)	$971.00	$929.80	$0	Repeat claim
	SAA-592(A21)	$3,244.00	$3,079.20	$0	Repeat claim
	SAA-626(A21)	$971.00	$929.80	$0	Repeat claim
	SAA-684(A21)	$3,564.00	$3,564.00	$0	Repeat claim
	SAA-727(A21)	$2,887.00	$2,804.60	$0	Repeat claim
	SAA-766(A21)	$719.00	$677.80	$0	Repeat claim
	SAA-767(A21)	$8,755.00	$8,374.20	$0	Repeat claim
	SAA-857(A21)	$1,459.00	$1,376.60	$0	Repeat claim
	SAA-870(A21)	$4,137.00	$4,008.40	$0	Repeat claim
	SAA-926(A21)	$3,785.00	$3,656.40	$0	Repeat claim
	SAA-927(A21)	$5,071.00	$4,860.00	$0	Repeat claim
	SAA-1012(A21)	$4,352.00	$4,182.20	$0	Repeat claim
	80Fire-Bracket (A22)	$2,880.00	$2,880.00	$0	Repeat claim
	CRC (A22)	$73,150.00	$73,150.00	$0	Repeat claim
	re-download (A22)	$13,200.00	$13,200.00	$0	Repeat claim
	CUS23–002	$200.00	$200.00	$0	Repeat claim
	130Fire-Bracket (A22)	$4,680.00	$4,680.00	$4,680.00	Undisputed.

Appendix E: Extract of particulars in Payment Certificates Nos 53–57

		Contract Sum	Pay Cert 53	Pay Cert 54	Pay Cert 55	Pay Cert 56	Pay Cert 57
S/N	Description	Amount	Amount	Amount	Amount	Amount	Amount
A	CONTRACT SUM	**$4,200,000.00**	$4,200,000.00	$4,200,000.00	$4,200,000.00	$4,200,000.00	$4,200,000.00
B	VARIATION		$537,265.00	$1,370,242.00	$1,370,242.00	$1,370,242.00	$1,171,576.00
C	TOTAL VALUE OF WORK [A + B]		**$4,737,265.00**	**$5,570,242.00**	**$5,570,242.00**	**$5,570,242.00**	**$5,371,576.00**
D	Value of Accumulative Work Done to Date		*95.09%*	*86.71%*	*88.05%*	*89.89%*	*93.94%*
			$4,504,516.12	**$4,830,217.15**	**$4,904,859.60**	**$5,007,068.97**	**$5,046,247.34**
E	TOTAL Deduction		**-$4,386,484.12**	**-$4,520,801.17**	**-$4,833,949.27**	**-$4,909,970.07**	**-$5,009,027.89**
	Less Retention at 5%		-$225,225.81	-$241,510.86	-$245,242.98	-$250,353.45	-$252,312.37
	Less Previous Payment		-$4,156,258.31	-$4,274,290.31	-$4,583,706.29	-$4,654,616.62	-$4,751,715.52
	Less Others (Previous Advance Payment)		-$5,000.00	-$5,000.00	-$5,000.00	-$5,000.00	-$5,000.00
H	TOTAL AMOUNT FOR THIS CLAIM		**$118,032.00**	**$309,415.98**	**$70,910.33**	**$97,098.90**	**$37,219.45**
	(incl. prevailing GST)		$127,474.56	$334,169.26	$76,583.16	$104,866.81	$40,569.20

BHY Pte Ltd
v
BHZ Pte Ltd

[2024] SGSOP 5

Singapore Mediation Centre — SOP AA 040 of 2024
Christopher Chong Chi Chuin
15 March 2024

Adjudication Application — *Time for lodgment — Supply contract — Respondent arguing adjudication application lodged late in breach of s 13(3)(*a*) read with s 12(4) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Whether four days of public holidays should be excluded from computation of due date for payment — Definition of "day" in supply agreement — Sections 13(3)(*a*) and 12(4) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 4, 4(2), 8(3), 8(3)(*a*), 8(3)(*b*), 11(2), 12(4), 13(2), 13(3)(*a*), 13(3)(*b*), 13(3)(*c*), 15(1), 16(1), 16(3)(*a*), 17(1)(*b*)

Holidays Act 1998 (2020 Rev Ed) s 4(2)

Claimant in person;
Tan Tian Luh, Tan Xian Ying and Shee Zihui (Chancery Law Corporation) for the respondent.

[Commentary: see para 4.1]

15 March 2024

Christopher Chong Chi Chuin:

Determination

1 This is a determination made on 15 March 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Application Number SOP/AA 040 of 2024 ("AA"). This is the reference number assigned to this adjudication application by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant is [BHY] Pte Ltd ("Claimant') and the respondent is [BHZ] Pte Ltd ("Respondent") (collectively, "Parties").

3 For the reasons set out below, I determine that:

(a) The AA is rejected as it was not made in accordance with s 13(3)(*a*) of the SOP Act.

(b) The costs of the adjudication, being the adjudication application fee of $654 (inclusive of 9% goods and services tax ("GST")) and the adjudicator fee of $10,164.25 (inclusive of 9% GST), shall be entirely borne by the Claimant.

Record

Contract

4 The Respondent is the main contractor engaged by [A] for the [xxx] Phase 2 Project ("Project"). The Project is located in Singapore.

5 The Claimant is the supplier for the supply of odour control system for the Project, appointed by the Respondent under the supply agreement dated 6 August 2018 ("Supply Agreement").

6 The Supply Agreement was for the contract sum of $4,500,000, and was signed by representatives from both Parties.

7 The Supply Agreement between the Parties was "in writing" as defined in s 4 of the SOP Act.

8 The Claimant and Respondent are agreed that the Supply Agreement is a "supply contract" as defined in the SOP Act. I also agree, and note that the Supply Agreement does not fall within the types of contracts described in s 4(2) of the SOP Act.

Payment claim

9 Although the Supply Agreement has specified that a payment claim shall be submitted by the seller "on a monthly basis upon the delivery" (see cl 14.1), it does not specify the day on which the Claimant has to serve a payment claim on the Respondent.

10 It is not disputed that the Claimant served Payment Claim No 29 (which is the subject of this AA) ("PC29") on the Respondent on 29 December 2023. The claimed amount in PC29 was $770,996.39 (inclusive of 8% GST).

11 The Respondent accepts in para 31 of the adjudication response submissions that PC29 was validly served on 29 December 2023.

Payment response

12 The SOP Act does not require a respondent named in a payment claim for a "supply contract" to serve a payment response as is required for a "construction contract". Section 11(2) of the SOP Act does, however, require a respondent who does not agree to pay to raise objections in writing by the due date of payment.

13 The Respondent raised its objections in writing in its payment response to PC29 on 9 January 2024, and its revised payment response to PC29 on 24 January 2024.

Notice of intention to apply for adjudication

14 Section 13(2) of the SOP Act provides that "[a]n adjudication application must not be made unless the claimant has, by written notice containing the prescribed particulars, notified the respondent of the claimant's intention to apply for adjudication of the payment claim dispute" ("NOI").

15 It is not disputed that the Claimant served its NOI on the Respondent on 22 February 2024.

Adjudication application

16 The Claimant lodged the AA with the SMC on 22 February 2024, and the AA was served on the Respondent by the SMC on 23 February 2024.

17 The claimed amount in the AA was $770,996.39 (inclusive of 8% GST).

18 The AA comprises the Adjudication Application Form AA-1 with attached documents including a set of written submissions dated 22 February 2024, and I am satisfied that s 13(3)(*c*) of the SOP Act has been complied with.

19 The AA satisfies s 13(3)(*b*) of the SOP Act as it was "made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator".

Appointment of adjudicator

20 On 23 February 2024, the SMC invited me to be the adjudicator of this AA. I accepted the appointment as adjudicator and informed the SMC accordingly on the same day.

Adjudication response

21 Section 15(1) of the SOP Act requires the Respondent to "within 7 days after receiving a copy of an adjudication application under section 13(4)(*a*), lodge with the authorised nominating body a response to the adjudication application".

22 As the AA was served on the Respondent on 23 February 2024, the Respondent had up to 1 March 2024 to lodge its adjudication response (to the AA) with the SMC. The Respondent lodged their adjudication response on 1 March 2024 ("AR"). The AR comprises the Adjudication Response Form AR-1 with attached documents including a set of written submissions dated 1 March 2024 ("AR Submissions").

Due date of this determination

23 Under s 16(1) of the SOP Act, this adjudication "commences immediately upon the expiry of the period … within which the respondent may lodge an adjudication response", *ie*, on 2 March 2024.

24 Pursuant to s 17(1)(*b*) of the SOP Act, I am required to determine the AA by 16 March 2024.

Directions, subsequent events and adjudication conference

25 On 4 March 2024, I directed that the adjudication conference be held via Zoom on 8 March 2024 at 10.00am and the Parties were to be represented by no more than six representatives per party, including counsel.

26 The adjudication conference took place on 8 March 2024 at 10.00am via Zoom. The Claimant and the Respondent attended the conference with the following representatives:

(a) the Claimant's representatives were:

(i) Mr [B] (deputy chairman);

(ii) Mr [C] (chief financial officer);

(iii) Mr [D] (general manager);

(iv) Mr [E] (contracts manager);

(v) Mr [F] (senior project manager); and

(vi) Ms [G] (quantity surveyor).

(b) the Respondent's representatives were:

(i) Mr [H] (executive director);

(ii) Mr [I] (Respondent's Head of [xxx]);

(iii) Ms [J] (head of contract and procurement);

(iv) Mr Tan Tian Luh (counsel);

(v) Mr Tan Xian Ying (counsel); and

(vi) Mr Shee Zihui (counsel).

Grounds of determination

27 The Respondent challenged the AA on both jurisdictional and substantive grounds:

(a) the Respondent argues that the AA should be dismissed as it was lodged late in breach of s 13(3)(*a*) read with s 12(4) of the SOP Act; and

(b) the Respondent argues that the Claimant was not entitled to the sums as claimed in the AA that are in excess of the response amount.

28 In the interest of saving time and to avoid incurring unnecessary costs, I have not recorded each and every fact and argument presented by the Parties and considered by me in arriving at my adjudication determination ("Adjudication Determination"). Nevertheless, the present record is sufficient, in my view, to reflect: (a) the substance of the respective cases as canvassed by the parties; and (b) the principal issues on which I consider the result of the Adjudication Determination turns. It should not be assumed that any evidence or argument which has not been specifically recorded herein was not duly considered in this Adjudication Determination.

Whether AA made in accordance with section 13(3)(a) of SOP Act

29 It is now settled law, following the Court of Appeal's decision in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401, that an adjudicator has to decide whether the adjudication application in question is made in accordance with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the SOP Act.

30 Sections 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) provide that:

(3) An adjudication application —

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

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

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

…

31 As I have stated above at [18] and [19], I am satisfied that the Claimant has complied with ss 13(3)(*b*) and 13(3)(*c*) of the SOP Act. However, I agree with the Respondent that the AA was lodged late in breach of s 13(3)(*a*) of the SOP Act.

32 Under s 12(4) of the SOP Act:

> (4) 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.

33 It is not in dispute between the Parties that the due date is 45 days after receipt of PC29 on 29 December 2023.

34 There is, however, a dispute between the parties as to whether the four days of public holidays falling within the 45 calendar days after 29 December 2023 (New Year's day on 1 January 2024 and Chinese New Year on 10, 11 and 12 February 2024) should be excluded from the computation of the 45 days.

35 The Claimant takes the position that the four days of public holidays ought to be excluded in the computation of 45 days. If the Claimant is correct, then its AA was lodged on time in compliance with s 13(3)(*a*) of the SOP Act.

36 The Respondent takes the position that the four days of public holidays should not be excluded in the computation of 45 days. If the Respondent is correct, then the AA was lodged late and does not comply with s 13(3)(*a*) of the SOP Act.

37 A summary of the Claimant's and Respondent's position is set out below:

Event	**Claimant's position**	**Respondent's position**
Service date of PC29	29 December 2023	
Due date for payment	16 February 2024	12 February 2024
Entitlement to lodge AA	17 February 2024	13 February 2024
AA40 Window	17 February 2024 to 23 February 2024	14 February 2024 to 20 February 2024
AA40 Lodgment date	22 February 2024	

38 The Claimant does not explain in the AA why the four days of public holidays ought to be excluded. However, it is apparent from paras 38 to 47

of the AR Submissions that the Respondent understood the Claimant's argument as one premised on the SOP Act's definition of "day" in s 2 of the SOP Act, as did I.

39 In my determination, the SOP's Act definition of "day" does not assist the Claimant.

40 Section 2 of the SOP Act makes clear that the definitions contained in that provision apply where a specific word or specific words are used in the SOP Act. In the case of the word "day", s 2 provides that where this word is used in the Act, it "means any day other than a public holiday within the meaning of the Holidays Act 1998".

41 The relevant provision in the SOP Act for determining the due date for payment of PC29 is s 8(3) which provides that:

> (3) Where a supply contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the earlier of the following dates:
>
> (*a*) the date as specified in or determined in accordance with the terms of the contract;
>
> (*b*) the date immediately upon the expiry of 60 days after the relevant payment claim is served under section 10.

42 It is apparent from s 8(3) that the word "day" in plural form is used only in s 8(3)(*b*). In other words, if s 8(3)(*b*) of the SOP Act is engaged, the computation of 60 days will exclude public holidays by virtue of s 2 of the SOP Act.

43 It is also apparent from s 8(3) that the function of s 8(3)(*b*) is to provide all supply contracts with a long stop date for payment. Section 8(3)(*a*) makes clear that parties are free to contractually agree to any due date for payment, but s 8(3)(*b*) limits this to a maximum of 60 days excluding public holidays.

44 There are two ways s 8(3)(*b*) can be engaged:

> (a) First, if parties do not provide for a due date for payment in the contract.
>
> (b) Second, if parties provided for a due date for payment in the contract exceeding 60 days (excluding public holidays).

45 In the present case, s 8(3)(*b*) is *not* engaged because parties had agreed a due date of 45 days after the service of a payment claim which cannot exceed the long stop date in s 8(3)(*b*).

46 It is s 8(3)(*a*) that is engaged and s 8(3)(*a*) expressly provides that the due date is "the date as specified in or determined in accordance with the terms of the contract".

47 In our present case, it is not in dispute that the Supply Agreement does not contain any provision which excludes public holidays from the computation of "day". It is also not in dispute that the Supply Agreement does not contain any provision that incorporates the SOP Act's definition of "day" into the Supply Agreement.

48 The Respondent has helpfully extracted a number of provisions in the Supply Agreement with reference to time periods in day(s), month(s) and year(s) at paras 48 to 59 of the AR Submissions. It is apparent from these provisions that references to day(s), month(s) and year(s) are on a calendar day(s), month(s) and year(s) basis and do not exclude public holidays.

49 It also appears that the Claimant was aware that the word "days" referred to in the Supply Agreement is a reference to calendar days.

(a) As the Respondent has pointed out at para 49 of the AR Submissions at S/No 2, cl 11 of the Supply Agreement originally provided that:

> When requested by the Buyer during the term of the Supply Agreement, the Seller shall furnish the Buyer with such documents as may be required by the Buyer in order to verify the progress of the Seller under the Supply Agreement, within three (03) days of such written request.

(b) The Claimant requested that the "three (03) days" be changed to "14 business day".

(c) It is apparent from this that the Claimant understands the use of "days" in the Supply Agreement to refer to calendar days.

50 Under the above circumstances, I am unable to agree with the Claimant's argument that the 45 days agreed in the Supply Agreement excludes public holidays.

51 I should add that support for my determination can be found in the High Court decision of *Trustee of the estate of Tay Choon Huat, deceased v Soon Kiat Construction & Maintenance Pte Ltd* [2021] 3 SLR 1005 ("*Tay Choon Huat*").

52 In *Tay Choon Huat*, the claimant (who sought to defend an application to set aside an adjudication determination) argued that the contractual period of 21 days for the service of a payment response excludes public holidays. While the relevant contract in *Tay Choon Huat* is a construction contract rather than a supply contract, the argument made by the claimant in that case that the SOP Act's s 2 definition of "day" ought to

apply to the contractual period of 21 days, is similar to the Claimant's argument in this AA. This argument was rejected by the High Court on the basis that: (a) the contract did not incorporate the SOP Act's definition of "day" (as was the case in the Supply Agreement); and (b) the other provisions in the contract suggests that the reference to day(s) and month(s) refer to calendar day(s) and month(s) (as was the case in the Supply Agreement).

53 For completeness, I should also address the Claimant's reliance, at the adjudication conference, on the following extract from "Building and Construction Industry Security of Payment Act: Common Questions Relating to Adjudication" available on the SMC's website:

> 2. Sundays are included in the counting of 'days', but not public holidays. What if the public holiday falls on a Sunday?
>
> Should a public holiday fall on a Sunday, the next day is also considered a public holiday. Therefore, 2 days will be excluded from the counting of 'days' – *ie* the Sunday which is a public holiday, and the Monday thereafter which is also considered a public holiday.

54 In my determination, this extract does not assist the Claimant because it is not dealing with the application of s 8(3)(*a*) of the SOP Act. The extract is meant to explain what happens when the s 2 definition of "day" applies and a public holiday falls on a Sunday. In fact, the extract is no more than an application of s 4(2) of the Holidays Act 1998 (2020 Rev Ed) which provides that "[s]ubject to the provisions of this Act, if any day specified in the Schedule falls on a Sunday, the day next following not being itself a public holiday is declared a public holiday in Singapore".

55 As the due date for payment is 12 February 2024, pursuant to s 12(4) of the SOP Act, the Claimant's entitlement to lodge an adjudication application first arose on 13 February 2024. Section 13(3)(*a*) of the SOP Act mandates that the AA be lodged between 14 February 2024 to 20 February 2024.

56 As the AA was only lodged on 22 February 2024, it was lodged in breach of s 13(3)(*a*) of the SOP Act.

57 As s 16(3)(*a*) of the SOP Act obliges me to reject any adjudication application that was not made in accordance with s 13(3)(*a*) of the SOP Act, I have to reject the AA.

58 Given that the AA has been rejected, there is no necessity for me to determine the substantive disputes between the Parties. I also do not deem it appropriate or sensible for me to determine the substantive disputes between the Parties as it is possible that the disputes in this AA may be referred to adjudication in the future before a different adjudicator.

Adjudicated amount

59 In view of the above, the AA is rejected for failure to comply with s 13(3)(*a*) of the SOP Act and there is no adjudicated amount.

Costs of adjudication

60 I order that the costs of the adjudication being the adjudication application fee of $654 (inclusive of 9% GST) and the adjudicator fee of $10,164.25 (inclusive of 9% GST), shall be entirely borne by the Claimant.

BIA Pte Ltd
v
BIB Pte Ltd

[2024] SGSOP 6

Singapore Mediation Centre — SOP AA 045 of 2024
Chia Swee Chye Kelvin
25 March 2024

Adjudication Application — *Validity — Patent errors — Whether adjudication application based on claims under multiple contracts — Section 16(3)(*a*) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Jurisdiction — *Jurisdictional objections — Claimant's director ("Mr A") believing he was contracting on behalf of claimant to provide project management services and tendering services to respondent — Respondent believing Mr A was contracting in his personal capacity — Respondent contending there was no contract in writing between itself and claimant under s 4 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Whether there was contract between parties at all — Sections 4 and 16(3)(*a*) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim — *Validity — Whether payment claim based on claims under multiple contracts — Section 16(3)(*a*) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 4, 4(4)(*d*), 4(5), 10(2)(*a*)(ii), 11(1), 12, 13(3)(*a*), 13(3)(*b*), 13(3)(*c*), 15(1), 16(3)(*a*), 16(5)(*b*), 16(6), 17(1)(*b*), 21(1)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) reg 5(3)

Chong Kuan Keong, Bernadette Loh and Tay Yan Xia (Chong Chia & Lim LLC) for the claimant;
Respondent in person.

[Commentary: see para 1.9]

25 March 2024

Chia Swee Chye Kelvin:

Determination

1 This adjudication determination ("Adjudication Determination") is made on 25 March 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act").

2 The claimant in this adjudication application ("Adjudication Application") is [BIA] Pte Ltd ("Claimant") and the respondent is [BIB] Pte Ltd ("Respondent") (collectively, "Parties").

3 For the reasons set out in the pages which follow, I determine that the Adjudication Application is rejected pursuant to s 16(3)(*a*) of the SOP Act.

4 The cost of the adjudication is $6,022.25, consisting of the adjudication application fee of $654 (inclusive of goods and services tax ("GST")) and the adjudicator's fee of $5,368.25 (inclusive of GST). The costs shall be wholly borne by the Claimant.

Record

5 On 29 February 2024, the Claimant lodged the Adjudication Application with the Singapore Mediation Centre ("SMC") under the provisions of the SOP Act. The Claimant sought payment of the sum of $66,490 (inclusive of GST). The SMC served the Adjudication Application on the Respondent on 29 February 2024.

6 On 29 February 2024, the SMC referred the Adjudication Application to me and I accepted the appointment as adjudicator of the matter on the same day. On 29 February 2024, the SMC notified the Parties of my appointment as adjudicator of the matter.

7 Pursuant to s 15(1) of the SOP Act, the Respondent was required to lodge an adjudication response ("Adjudication Response") with the SMC "within 7 days after receiving a copy of an adjudication application under section 13(4)(*a*)". Therefore, the Respondent was required to lodge the Adjudication Response by 7 March 2024 (being seven days from 29 February 2024). Since the Adjudication Response was filed on 7 March 2024, I determine and hold that it was filed in time.

8 Following from the above, the time for making the Adjudication Determination was 14 days from the date by which the Adjudication Response may be lodged, as provided in s 17(1)(*b*) of the SOP Act. The last

day for making the Adjudication Determination was, therefore, 21 March 2024.

9 On 7 March 2024, I wrote to the Parties' solicitors and representatives with various directions for the further conduct of the proceedings. In particular, I directed the Claimant to file submissions in response to the Respondent's submissions filed with the Adjudication Response ("AR Submissions") by 14 March 2024.

10 In its reply e-mail dated 8 March 2024, the Respondent requested "that only written submissions and authorities may be tendered [by the Claimant] without any new document [*sic*]". However, I declined to impose such a restriction as the Claimant might have needed to adduce new documents in response to some of the allegations in the AR Submissions. To be fair to the Respondent, I gave leave to the Respondent to raise objections to any new documents adduced by the Claimant.

11 The Claimant's submissions in reply to the AR Submissions ("Claimant's Reply Submissions") were filed on 14 March 2024, 7.40pm, via e-mail. The said submissions were accompanied by a bundle of authorities and a bundle of documents. No objections were raised by the Respondent to the new documents adduced by the Claimant.

12 In view of the fact that I could only convene a conference in the week commencing 18 March 2024 (at the earliest), I requested for and obtained the Parties' agreement to extend the time for me to render the Adjudication Determination to seven days from the adjudication conference.

13 Pursuant to the powers conferred on me by s 16(6) of the SOP Act, I convened a conference of the Parties. The conference was held on 18 March 2024, 9.30am, via the Zoom platform ("Adjudication Conference"). Following therefrom, the extended deadline for the issuance of the Adjudication Determination is 25 March 2024.

14 The Parties were represented at the Adjudication Conference as follows:

(a) The Claimant was represented by Mr Chong Kuan Keong (counsel), Ms Bernadette Loh (counsel), Ms Tay Yan Xia (counsel), Mr [A] (director), Mr [B] (witness), Mr [C] (trainee) and Mr [D] (trainee).

(b) The Respondent was represented by Mr [E] (consultant) and Ms [F] (administrative manager). I was informed by Mr [E] that Mr [G] (director) could not attend the Adjudication Conference as he was participating in a tender exercise.

15 During the Adjudication Conference, the Parties' solicitors and representatives submitted extensively on the various issues framed by the

Adjudication Application and the Adjudication Response. I will go into greater detail on the positions and arguments advanced by the Parties in subsequent sections of the Adjudication Determination.

Reasons for determination

16 With the view of saving time and avoiding unnecessary expense, I have not recorded each and every fact and argument presented to and considered by me in arriving at my determination. Nevertheless, I am of the view that the present record is sufficient to reflect:

(a) the substance of the case as canvassed by the Claimant and the Respondent; and

(b) the principal issues on which the result of the determination turns.

It should not be assumed that any evidence or argument which has not been specifically recorded herein had not been taken into account in arriving at my determination.

Background facts

17 According to para 6 of the Claimant's submissions filed in support of the Adjudication Application ("AA Submissions"), the Claimant's claim was made under the auspices of a "Sub-Contract" ("Alleged Subcontract") pursuant to which the Claimant had allegedly agreed to carry out the following works or services:

(a) to deploy the Claimant's director, Mr [A], to carry out project management services for the Respondent; and

(b) to deploy the Claimant's employee, Mr [H], to carry out tendering services for the Respondent.

18 In para 3 of the AR Submissions, however, the Respondent argued "that there is no contract made in writing, therefore the payment claim falls out the ambit of the SOP Act".

19 As the above issue ("Threshold Issue") is fundamental to the validity of the Adjudication Application, I will deal with it at greater length at [33]–[74] below. The rest of the discussion in this section of the Adjudication Determination assumes that the Threshold Issue is decided in favour of the Claimant and that the Alleged Subcontract is a construction contract in writing for the purposes of s 4 of the SOP Act.

20 On 31 January 2024, the Claimant served its Payment Claim No 1 for the sum of $66,490 (inclusive of GST) ("PC1") on the Respondent by hand. I note that the Respondent acknowledged receipt of PC1 on the

Claimant's transmittal form on 31 January 2024, 11.12am. The Claimant's claim is subject to para 46 of the Claimant's Reply Submissions, wherein the Claimant confirmed that it was "withdraw[ing] the claim for the Tender Services carried out in April 2023". This is a reduction of $3,500 (exclusive of GST) from the claimed amount in PC1.

21 In para 25 of the AA Submissions, the Claimant averred that "[t]he Sub-Contract does not specify the date or period for a payment claim to be served". In this regard, s 10(2)(*a*)(ii) of the SOP Act provides that such "[a] payment claim must be served … not later than … the date prescribed for the purpose of this subsection".

22 In the case of *Asia Grand Pte Ltd v A I Associates Pte Ltd* [2023] SGHC 175 at [45], the General Division of the High Court held "that the Prescribed Date for the purposes of ss 10(2)(*a*)(ii) and 10(3)(*b*) of the SOPA is 'the last day of the month', with 'month' referring to a calendar month". To elaborate, reg 5(3) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) defines "month" to mean "a period of time beginning on the first day of each of the 12 calendar months into which a year is divided, and ending on the last day of each of these months".

23 Therefore, the "prescribed date" for PC1 was 31 January 2024.

24 It follows from the above that, if the Threshold Issue is decided in favour of the Claimant, PC1 was validly served on the Respondent on 31 January 2024.

25 Section 11(1) of the SOP Act provides that:

> **11.**—(1) A respondent named in a payment claim served in relation to a construction contract must respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (*b*) *where the construction contract does* ***not*** *contain such provision, within 14 days after the payment claim is served under section 10.*
>
> [emphasis added in italics and bold italics]

26 In para 38 of the AA Submissions, the Claimant averred that "[t]he Sub-Contract does not specify a date or period for the provision of a payment response". In the premises, the Respondent was entitled to the default period of 14 days (from service of PC1) to serve the payment response. It follows that the Respondent had until 17 February 2024 (being 14 days from 31 January 2024, after excluding the three Lunar New Year public holidays on 10–12 February 2024) to serve the payment response.

27 After adding another seven days for the dispute settlement period under s 12 of the SOP Act ("Dispute Settlement Period"), the final cut-off date for the Respondent to serve the payment response was 24 February 2024.

28 According to para 41 of the AA Submissions, the payment response to PC1 ("PR1") was served by the Respondent on 21 February 2024. The Respondent declined to make any payment to the Claimant in PR1.

29 The Claimant stated – in para 49 of the AA Submissions – that it had served the notice of intention to apply for adjudication ("Notice of Intention") on the Respondent on 28 February 2024. I am satisfied from the evidence adduced by the Claimant that the Notice of Intention was duly served on the Respondent. There is also no objection by the Respondent on the service of the Notice of Intention.

30 Pursuant to s 13(3)(*a*) of the SOP Act, the Adjudication Application "must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12" ("Entitlement Period"). Following therefrom, the Adjudication Application should have been filed by 3 March 2024 (being eight days from the expiry of the Dispute Settlement Period on 24 February 2024, see *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [29]–[35]).

31 As I said at [5] above, the Claimant lodged the Adjudication Application on 29 February 2024. This falls within the Entitlement Period.

32 Having perused the Adjudication Application and the documents attached thereto, I hold that the Adjudication Application was filed in accordance with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the SOP Act *if* the Threshold Issue is determined in the Claimant's favour.

Jurisdictional objections

33 As stated at [19] above, the Respondent had raised the jurisdictional objection that there is (allegedly) no contract in writing between the Parties. I described this objection as "the Threshold Issue" because the SOP regime is not even triggered if there is no such contract for the purposes of s 4 of the SOP Act.

34 In this regard, the High Court made the following observation in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [15]: "The SOP Act is a relatively new piece of legislation, applying *only* to contracts in the building and construction industry made in writing on or after 1 April 2005" [emphasis added].

35 The learned adjudicator, Mr Chow Kok Fong, in the case of *JL Pte Ltd v JM Pte Ltd* [2009] SCAdjR 75 at [57], held that "the present

adjudication application could not be said to have arisen from a contract made in writing for the purpose of section 4 of the Act … [and] that the said application does not fall within the province of the Act". He concluded (at [73]) that "the fact that the Claimant's case was not founded on a contract made in writing for the purpose of the Act was fatal to this adjudication application".

36 Therefore, the Adjudication Application must be rejected if I agree with the Respondent's contention that there is no contract in writing under s 4 of the SOP Act.

37 In para 17 of the AA Submissions, the Claimant made the argument "that the Respondents are estopped from, among others, taking the position that the Sub-Contract is not a contract made in writing under the SOP Act". This is incorrect for two reasons.

38 Firstly, the Respondent had made the objection in PR1 as shown below:

Derivation of response amount

Work carried out by Contractor	$57,964.43
Unfixed goods & materials	-
Nominated sub-contractor, suppliers or designated PC work	-
Unfixed goods & materials of nominated sub-contractor, suppliers	-
Total	$57,964.43
Deduction for retention	-
Less defective works deduction	-
Less amounts previously paid	$57,964.43
RESPONSE AMOUNT	**NIL**
Note: There is no written contract.	

39 The Court of Appeal's holding (in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*")) on a respondent being estopped from raising objections *not* stated in a payment response is, therefore, inapplicable.

40 Secondly, the Court of Appeal had clarified – in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*Far East v Yau Lee*") at [56] – that the "duty to speak" discussed in *Audi Construction* did *not* arise for claims which fall outside the SOP Act:

> In this regard, we should clarify that our holding in *Audi Construction* in relation to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell *outside the purview of the SOPA from the outset*. [emphasis in original]

41 One of the examples of payment claims which "fell outside the purview of the SOPA from the outset" are "payment claims made pursuant to oral contracts (s 4(1) of the SOPA)" (*Far East v Yau Lee* at [60(a)]). *A fortiori*, a claim which is not founded on a contract between the parties

would also fall outside the ambit of the SOP Act. Such objections need not be raised in a payment response.

42 In addition to the above, I consider that it is part of my duty as the adjudicator to be satisfied that there is a construction contract in writing under s 4 of the SOP Act.

43 The Parties have devoted a substantial part of their submissions on whether the Alleged Subcontract was "made in writing" for the purposes of s 4 of the SOP Act. In this regard, extensive references were made to, *inter alia*, the cases of *Qingjian International (South Pacific) Group Development Co Pte Ltd v Capstone Engineering Pte Ltd* [2014] SGHCR 5 and *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277. I agree that the foregoing is an important issue but the anterior question is whether there was a contract at all between the Parties.

44 Contrary to the Claimant's position, the Respondent avers that the contract was between the Respondent and Mr [A] (in his personal capacity) and that the contract was in the nature of an employment contract ("Alleged Employment Contract").

45 To decide the Threshold Issue, it is necessary for me to determine if and how the Alleged Subcontract was formed (or not formed).

46 During the Adjudication Conference, the Claimant's counsel confirmed that the Alleged Subcontract was an oral contract concluded on or about 1 June 2022 and that the Claimant was relying on ss 4(4)(*d*) and/or 4(5) of the SOP Act as the applicable provisions elevating the (alleged) oral contract to a contract "made in writing".

47 The circumstances leading to the formation of the Alleged Subcontract were set out in para 8 of Mr [A]'s witness statement:

> 8 Sometime before June 2022, Mr [G], as [the Respondent]'s Managing Director, and I, as [the Claimant]'s Director, agreed on the rate of S$8,000.00 plus GST per month for PM Services carried out.
>
> 8.1 I met with Mr [G] in person to discuss, among others, the rate to be applied for the PM Services to be carried out by [the Claimant]; and
>
> 8.2 I proposed the rate of S$8,000.00 plus GST per month, which Mr [G] accepted.

48 Not surprisingly, the above account was denied by the Respondent, who provided its version of the discussions between Mr [A] and Mr [G] in paras 21(1)–21(3) of the AR Submissions. As I mentioned at [44] above, the Respondent's position is that it had entered into an employment contract with Mr [A] and that there was no construction contract between the Parties.

49 Without the benefit of testing the credibility of the Parties' witnesses (*ie*, Mr [A]and Mr [G]) via cross-examination, I am compelled to determine the Threshold Issue primarily on the basis of the objective documentary evidence before me. I find support for such an approach in the following extract from the High Court case of *ARS v ART* [2015] SGHC 78 at [53], *per* Quentin Loh J (as he then was):

> I distil the following guiding principles on the proper approach for determining the existence of an oral agreement as set out in the cases cited above:
>
> (a) in ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time;
>
> (b) where possible, the court should look first at the relevant documentary evidence;
>
> (c) the availability of relevant documentary evidence reduces the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists;
>
> (d) oral testimony may be less reliable as it is based on the witness' recollection and it may be affected by subsequent events (such as the dispute between the parties);
>
> (e) credible oral testimony may clarify the existing documentary evidence;
>
> (f) where the witness is not legally trained, the court should not place undue emphasis on the choice of words; and
>
> (g) if there is little or no documentary evidence, the court will nevertheless examine the precise factual matrix to ascertain if there is an oral agreement concluded between the parties.

50 The Parties adduced evidence showing that Mr [A] was deployed to the Respondent as an executive director and that Mr [A] enjoyed various benefits in that capacity (*eg*, season parking, printed name cards, usage of the company petrol card). I do not find such evidence to be helpful as they are equally referable to the Alleged Subcontract *or* the Alleged Employment Contract. As the Singapore International Commercial Court held in *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [21]: "It was not enough for the conduct to be consistent with the alleged contract. For a court to imply a contract it had to be necessary to do so because the conduct was not explicable on any other basis."

51 However, I did find two pieces of evidence to be particularly relevant to the determination of the Threshold Issue.

52 The first piece of evidence is an e-mail sent by the Respondent to GrantSG dated 31 May 2022, wherein the Respondent described Mr [A] as "a new hire" with a salary of $6,500.

RE: Career Conversion Programme

Ms [F]
To 'GRANTSG', Mr [G] 2022-05-31 14:59 Hide Detail

From: Ms [F]
To: 'GRANTSG'<govgrantsg@gmail.com>
Cc: Mr [G]
Time: 31 May 2022 (Tue) 14:59
Size: 172 KB

NRIC.pdf (97 KB)

Hi Sherie,

We will have a new hire as below:

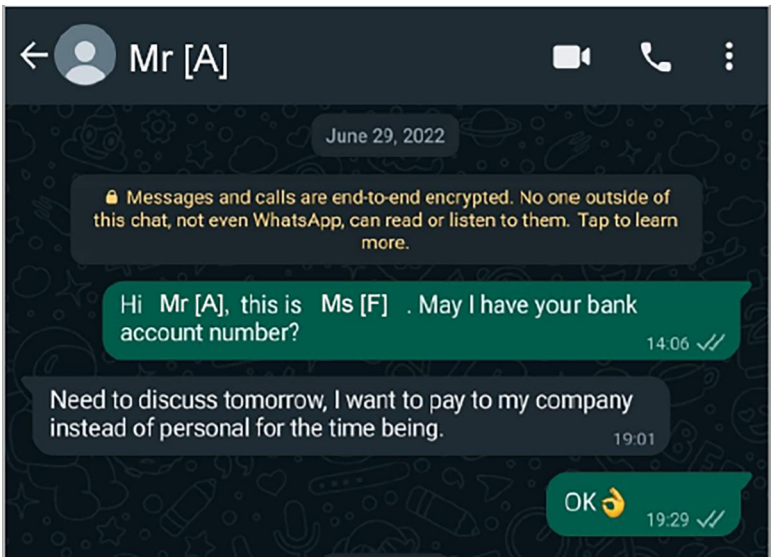
Mr [A]
Job Description: Executive Director
Salary: $6,500.00

Thank you.

Best Regards,
Ms [F]

53 The Claimant objected – in para 33.2 of the Claimant's Reply Submissions – that the above e-mail to GrantSG "was sent without the Claimants' and/or [A]'s knowledge". I accept that the e-mail was seemingly not copied to Mr [A]. However, this does not detract from the Respondent's belief that Mr [A]'s services were carried out under an employment contract (rather than a construction contract with the Claimant).

54 The second relevant piece of evidence is a WhatsApp exchange between the Respondent and Mr [A] on 29 June 2022, wherein the Respondent had requested for Mr [A]'s personal bank details:



55 Reading the above exchange objectively, it appears that the Respondent was supposed to pay Mr [A] *personally* but that the latter wanted the payment to be made to his company (presumably the Claimant) as a temporary arrangement, *ie*, "for the time being". In this regard, I agree that the Respondent's explanation in para 21(3)(v) of the AR Submissions coheres more with the objective evidence.

56 If there really was a subcontract between the Parties (as the Claimant is alleging), I would have expected Mr [A] to say something like this: "No, please don't pay me at all. The contract is with [the Claimant] so the payment should be made to [the Claimant]."

57 On the flip side, the Claimant has not pointed to any documentary evidence which is referable to the Alleged Subcontract. The e-mail and WhatsApp evidence only shows that Mr [A] had carried out project management services for the Respondent.

58 Taking the evidence as a whole, I am of the view that it is more consistent with the existence of the Alleged Employment Contract rather than the Alleged Subcontract.

59 To be clear, I am *not* making a definitive finding that there *was* an employment contract between the Respondent and Mr [A]. As the Claimant pointed out in the Claimant's Reply Submissions and during the Adjudication Conference, there are some evidential gaps in the Respondent's case as well, *eg*, the lack of a written employment contract, the non-production of Mr [A]'s IR8A form and inconsistent Central Provident Fund ("CPF") contributions.

60 However, as the General Division of the High Court explained in the recent case of *Manoj Dharmadas Kalwani v Bharat Dharmadas Kalwani* [2024] SGHC 70, *per* Wong Li Kok Alex JC, a claimant may lose its case *even if* the defendant does not succeed on its positive defence:

> 65 It is trite that the substantive requirements of an oral agreement are no different from those in relation to a written contract – there needs to be (a) offer and acceptance; (b) intention to create legal relations; (c) certainty of terms; and (d) consideration: *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 ('*Chan Tam Hoi*') at [64]–[65], citing *Tan Swee Wan and another v Johnny Lian Tian Yong* [2018] SGHC 169 at [222]. *The court in* Chan Tam Hoi *further highlighted at [38] that the burden of proof always remains on the plaintiff to prove its positive case. The court also observed that being clear about which party bears the burden of proof 'is especially important in cases involving oral agreements, where there will be gaps in the evidence precisely because there is no direct evidence that points to a written agreement'.* ***Crucially, the court noted that 'it is important not to confer an unintended advantage to the plaintiff where the defendant's defence is unsustainable'.***
>
> 66 The court's remarks in *Chan Tam Hoi* is an instantiation of the broader principle explained by the Court of Appeal in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 ('*Loo Chay Sit*') at [16]–[23] that the law of evidence allows for three possibilities in so far as the concept of proof is concerned – a fact can be said to be 'proved', 'disproved' or 'not proved'. As explained by the Court of Appeal at [21] of *Loo Chay Sit*, after a party seeking to prove the existence of a particular fact has adduced evidence in support of it, the opposing party may be able to adduce some evidence as to the non-existence of that fact. Such evidence may not be sufficient on its own for the court to conclude that, on a balance of probabilities, the fact does not exist so as to be 'disproved'. Such evidence may, nevertheless, sufficiently undermine the case of the party asserting the fact so as to cause doubt as to its existence with the result that the party is unable to discharge his burden of proving the fact. *As I will go on to explain later, while I do not completely accept Mr Mike's defence in relation to the S$2.8m transfer, I nonetheless find that Mr Manoj has not proven his affirmative case on the alleged loan agreement.*
>
> [emphasis added in italics and bold italics]

61 Therefore, while I acknowledge some evidential difficulties with regard to the existence of the Alleged Employment Contract, it suffices – for the purposes of this determination – to note that the Respondent seemed to have operated on the notion that Mr [A] would be carrying out his services as an employee of the Respondent (rather than as the Claimant's personnel seconded to the Respondent).

62 It is trite law "that for there to be a binding contract, there has to be a 'final and unqualified expression of assent' to contract" (*per* Chao Hick Tin JA, as he then was, in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR(R) 316 at [36]). In other words, there must be a *consensus ad idem* (or a meeting of minds) on all essential terms of the contract. If Mr [A] thought that he was offering his services *on behalf of the Claimant* while the Respondent thought that Mr [A] was doing so *in his personal capacity*, there is *no* "meeting of minds" and, therefore, no contract.

63 It is possible, of course, that, notwithstanding the *subjective* views of the Respondent, the oral discussions between Mr [A] and Mr [G] – when construed *objectively* – do give rise to the Alleged Subcontract. If that is the Claimant's position, then I am afraid that this issue must be ventilated and tried in court as there is simply no evidence before me (*eg*, an audio recording or a transcript of the actual discussion) for me to make a finding that the Alleged Subcontract was formed between the Parties.

64 There is another issue which I am concerned about. According to the Claimant, the Alleged Subcontract stipulated that Mr [A] would provide project management services *and* that Mr [H] would provide tendering services for the Respondent (see [17] above).

65 The Claimant's evidence is that the discussions and alleged agreement on Mr [A]'s services took place "[s]ometime [*sic*] before June 2022" (para 8 of Mr [A]'s witness statement) while the discussions and alleged agreement on Mr [G]'s services took place "[s]ometime [*sic*] before September 2022" (para 15 of Mr [A]'s witness statement).

66 As the High Court held in *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd* [2021] SGHC 197 at [47], "[i]n order for a binding agreement to be formed, there must be a *single* point in time when the necessary consensus *ad idem* is reached" [emphasis added]. Following therefrom, it is incumbent on the Claimant "to pinpoint a precise point in time that a free-standing agreement materialised from these negotiations". In our case, however, the Claimant referred to two dates for the conclusion of the alleged agreement(s) with regard to Mr [A]'s services and Mr [H]'s services.

67 During the Adjudication Conference, the Claimant clarified that there were no discussions on Mr [H]'s tendering services during the first discussion between Mr [A] and Mr [G] before June 2022. In that case, it would appear that, even if the Alleged Subcontract did exist, Mr [H]'s services were carried out under the auspices of a *separate* contract formed in or around September 2022.

68 The Claimant argued that Mr [H]'s services could be claimed as a variation work under the Alleged Subcontract. I do not accept this argument because there is nothing in Mr [A]'s witness statement that there

was an agreed provision for variations in the discussions before June 2022. Based on Mr [A]'s own evidence, it appears that the alleged contract (for Mr [H]'s services) arose separately and independently from the Alleged Subcontract.

69 This poses a problem for the Claimant because the SOP Act does *not* permit a claimant to combine claims from various contracts into one adjudication application.

70 The authority on point is the case of *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [47], wherein the High Court affirmed the principle that "an adjudication [must] be founded on a single contract". This principle was affirmed by the Court of Appeal in the case of *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 ("*Civil Tech*").

71 The Court of Appeal started its analysis with its observation (in *Civil Tech* at [40]) that a central feature in the SOP scheme is "that each contract has its own payment framework". The court then went on to hold (at [55]) that an adjudicator may only refer to *the* contract (singular) on which the payment claim is based:

> The singular article 'the' indicates that the adjudicator may only consider *one* contract. This would be the Payment Claim Contract, which founds the payment claim that is disputed and referred to adjudication. Section 17(3)(*b*) does not entitle an adjudicator to consider other contracts … [emphasis in original]

72 Following from the above, the Court of Appeal held (in *Civil Tech* at [57]):

> First, an adjudicator is appointed to determine a single payment dispute arising out of the Payment Claim Contract. In our judgment, appointment for this limited purpose is not consistent with the adjudicator having to review potentially extensive documentary material on claims arising under other contracts.

73 Therefore, it is clear that an adjudication application which is based on claims under multiple contracts is fundamentally irregular and should be rejected. Although this objection was not raised by the Respondent (until the Adjudication Conference), I am entitled to consider it as a patent error on the face of the materials properly before me.

74 By virtue of the foregoing, I determine the Threshold Issue in favour of the Respondent. I find that the Alleged Subcontract was not concluded between the Parties and that there was, therefore, no "contract that is made in writing" for the purposes of s 4 of the SOP Act. Alternatively, I determine that PC1 and the Adjudication Application are irregular as they are premised on claims under multiple contracts. I wish to emphasise that my findings are

interim in nature and that they are subject to final determination of the court (or other appropriate tribunal) under s 21(1) of the SOP Act.

75 Following from the above, I reject the Adjudication Application under s 16(3)(*a*) of the SOP Act.

76 There are many other issues raised by the Parties in the Adjudication Application and the Adjudication Response but there is no need for me to deal with them in view of the above findings and the consequent dismissal of the Adjudication Application. This is in accordance with my duty, under s 16(5)(*b*) of the SOP Act, to "avoid incurring unnecessary expense".

Decision

77 As stated above, I determine that the Adjudication Application is rejected pursuant to s 16(3)(*a*) of the SOP Act.

Cost of adjudication

78 The cost of the adjudication amounts to $6,022.25. This consists of the adjudication application fee of $654 (inclusive of GST) and the adjudicator fee of $5,368.25 (inclusive of GST). I determine that the cost of adjudication shall be wholly borne by the Claimant.

BIC Pte Ltd
v
BID (Pte) Ltd

[2024] SGSOP 7

Singapore Mediation Centre — SOP AA 054 of 2024
Liow Wang Wu Joseph
28 March 2024

Adjudication Response — *Reasons for withholding payments* — *Respondent not including reasons for non-payment in payment response* — *Whether respondent permitted to subsequently include such reasons in adjudication response*

Jurisdiction — *Jurisdictional objections* — *Claimant realising its adjudication application was lodged prematurely, withdrawing this earlier application and submitting another adjudication application within validity period for adjudication application by relying on same payment claim* — *Respondent contending it suffered prejudice in respect of time and costs unnecessarily expended because of claimant's withdrawal of earlier adjudication application* — *Whether claimant precluded from lodging adjudication application in view of earlier lodged but withdrawn adjudication application based on same payment claim* — *Section 13 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim — *Assessment* — *Whether works were integral part of claimant's work* — *Whether respondent's response in payment response was in nature of assertion that works were not completed or that works were completed but defective or inadequate* — *Whether respondent's claim constituted claim for damages, loss and expenses* — *Whether adjudicator allowed to regard claim relating to damages, loss or expenses*

Payment Claim — *Repeat claims* — *Whether claimant entitled to make repeat claim in payment claim for matters included in prior payment claims* — *Whether claimant allowed to file repeat adjudication application if earlier adjudication application was not adjudicated upon*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 3(1)(*b*), 4(2), 8(5), 10(2)(*a*)(ii), 10, 10(3)(*b*), 10(5), 11(1)(*a*), 12, 12(5), 13, 15(3)(*a*), 17(3)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 5(1)

Holidays Act 1998 (2020 Rev Ed)

Supreme Court of Judicature Act 1969 (2020 Rev Ed)

Claimant in person;
Ashok Kumar Rai (Cairnhill Law LLC) for the respondent.

[Commentary: see para 4.6]

28 March 2024

Liow Wang Wu Joseph:

Parties and construction project

1 The claimant ("Claimant") was engaged as subcontractor for the respondent ("Respondent") to carry out pipe jacking works in relation to the construction of proposed sewers in [xxx] ("Project"). The ultimate employer or principal was [Z].

Construction contract

2 The agreement to carry out works is evidenced in writing. By a construction work order dated 7 March 2023 ("Construction Work Order"), the Respondent instructed the Claimant to carry out pipe jacking works at four locations. Such works were to include mobilisation or demobilisation as well as pipe jacking project management. The Construction Work Order referred to and incorporated a document that was referred to as a "Signed Quotation". It is common ground between the parties that the said Signed Quotation was a quotation dated 3 February 2023 issued by the Claimant which included an appendix known as "Appendix A – Responsibility Matrix". On the second page of the quotation, the Respondent's representative appears to have confirmed and accepted the Claimant's quotation of 27 February 2023. For convenience, I will herein refer to the agreement between parties as the "Subcontract".

3 It is common ground as well that the price of the Subcontract works was subject to final measurement (see term 1 of the Construction Work Order forming part of the Subcontract).

Applicability of Building and Construction Industry Security of Payment Act 2004

4 It was common ground between the parties that the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("Act" or "SOP Act") was applicable to the Subcontract.

5 The Subcontract did not fall within any of the excluded classes of contracts as provided for in s 4(2) of the Act. In addition, s 3(1)(*b*) of the Act provides that the construction of any works that form part of the land, including the construction of sewers, fall within the definition of "construction work". As such, I independently find that the Subcontract is a construction contract as defined by the Act and, accordingly, the Act is applicable to the Subcontract.

Record

Adjudication application

6 It is common ground that the Claimant lodged its adjudication application ("AA") with the Singapore Mediation Centre ("SMC") on 5 March 2024 after it served its notice of intention to apply for adjudication on the Respondent on the same day. The claimed amount in the AA was stated to be $573,709.50 inclusive of goods and services tax ("GST").

7 The AA identified the relevant payment as Payment Claim No 6 ("PC 6") served on 3 January 2024. The period of the works claimed for was specified as the period between 7 March 2023 to 27 December 2023.

8 The documents that accompanied the AA lodged with SMC were as follows:

(a) the Claimant's notice of intention to apply for adjudication dated 5 March 2024;

(b) copies of the documents that formed the Subcontract as described above;

(c) copies of PC 6 with a summary page of how the claimed sum of $573,709.50 was derived, together with its pipe jacking reports reflecting its works done;

(d) the Respondent's payment response dated 29 February 2024 ("Payment Response"); and

(e) other supporting documents consisting of prior payment claims numbered one to five, related tax invoices issued by the Claimant and proof of prior payment made by the Respondent.

9 The nature of the dispute as indicated in the AA was that this was a disputed payment claim.

10 At the time of lodging its AA, the Claimant did not file any submissions.

Service of AA on Respondent

11 Based on information from the SMC, the AA was served on the Respondent via e-mail on 6 March 2023 at 9.03am and at 9.04am.

Appointment as adjudicator

12 I was appointed by the SMC as the adjudicator for this AA on 7 March 2024.

Adjudication response lodged with SMC

13 The Respondent lodged its adjudication response ("AR") with the SMC on 13 March 2024.The AR was accompanied by the Respondent's written submissions which in turn included two other documents marked as Tab-1 and Tab-2. In Tab-1, the Respondent exhibited an earlier adjudication application filed by the Claimant which was designated as AA 38 of 2024 ("AA 38"). Tab-2 exhibited documents purportedly supporting the Respondent's contention that the "tunnel being excavated by the Claimant was rendered useless by the failure of the Claimant's tunnel boring machine" resulting in a need for a new tunnel to be excavated. Tab-2 appeared to be a print-out of a PowerPoint presentation containing photographs of the relevant tunnel, its supports, and the location of the affected works.

14 In the written submissions enclosed with its AR, the Respondent contended that: (a) the AA should be "dismissed" as PC 6 "had already been submitted to adjudication in [AA 38]"; and (b) that "there was a failure of consideration as the tunnel excavated by the Claimant cannot be used in its entirety".

Commencement of adjudication and due date for determination

15 On 14 March 2023, in an e-mail to the representatives of the parties, I informed the parties that it was my view that the adjudication of this AA commenced on that day and that I was required to determine this matter within 14 days from the commencement of this adjudication. I informed the parties that my adjudication determination would be due on Thursday 28 March 2024. I should record that in the e-mail referred to herein, I had erroneously indicated that the due date for my determination was 28 April 2024. The error was highlighted to me by the representative for the Claimant and I subsequently issued a correction to clarify that the due date for the determination was Thursday 28 March 2024.

16 Returning to my aforesaid e-mail to the parties, I gave certain preliminary directions to the parties. I requested the parties to: (a) consider

setting out a list of agreed issues; (b) to limit their number of representatives attending the adjudication conference to three representatives; (c) to indicate if the parties would be minded to hold the adjudication conference by remote means as it would provide flexibility in terms of the timing to hold the adjudication conference; and (d) that if the parties were not inclined to conduct the adjudication conference by remote means, that the physical venue of the adjudication conference would be fixed at a later date and at the same time indicating the costs of the physical meeting venue.

17 Various correspondence was exchanged between the parties and it suffices for me to state, as part of this record, that the parties agreed that an adjudication conference was required and that it would be held remotely with each party being limited to three representatives at the said conference. The parties were able to agree to a list of issues which, after some consideration, I reframed as set out in the next section below.

18 In my e-mail to the parties dated 15 March 2024, I gave the following directions to the parties:

(a) The adjudication conference would be held on Tuesday 19 March 2024 at 10.00am via remote means.

(b) The parties were to ensure confidentiality of the proceedings and specifically directed to ensure that no other persons apart from the following representatives (whose names were provided by each party) were present. The representatives were:

(i) For the Claimant:

(A) Mr [A], in-house counsel;

(B) Mr [B], project director; and

(C) Mr [C], quantity surveyor.

(ii) For the Respondent:

(A) Mr Ashok Kumar Rai, counsel;

(B) Mr [D], contract manager; and

(C) Ms [E], senior quantity surveyor.

(c) Each party was also directed, should they choose to do so, to submit written submissions (not exceeding ten pages) addressing the issues in the manner as reframed by me. The submissions were to be exchanged by no later than 4.30pm on Monday 18 March 2024.

Issues in contention

19 Based on the AA and AR, these were the issues in contention:

(a) Jurisdictional issues:

(i) whether the Claimant was precluded under the Act from lodging this AA by reason of the fact that an earlier adjudication application (AA 38) was based on the same PC 6;

(ii) whether the Claimant is entitled to make a repeat claim in PC 6 for matters included in prior payment claims, specifically in Payment Claims Nos 3, 4 and 5;

(iii) whether, in respect of the purported total failure of consideration, the Respondent is entitled to raise this as a reason to challenge the jurisdiction for this matter to be adjudicated when such reasons were not set out in the Respondent's Payment Response; and

(iv) if the purported total failure of consideration is to be considered in this adjudication, and how (if it were made out), does presence of total failure of consideration preclude this matter from being adjudicated.

(b) Merit issues:

(i) Whether the "annular grouting" was an integral part of the Claimant's works. A related issue was whether the nature of the Respondent's Payment Response with respect to the issue of annular grouting was in the nature of an assertion that the works were not completed, or an assertion that the works were completed but were defective/inadequate and the Respondent was seeking to deduct a portion of the value of work completed as damages, losses and/or expenses.

(c) Ancillary matters:

(i) What is the appropriate rate for GST tax?

(ii) What is the appropriate interest rate to be imposed, if any, for late payment due for any sum found due and payable?

Adjudication conference

20 The parties filed their respective submissions on the issues as directed. I set out the parties' submissions, as made in their written submissions and the oral arguments made during the adjudication conference, on the issues as presented. The headings of the issues are abbreviated in the paragraphs that follow.

Analysis on issues and findings

Issue (a): Is Claimant precluded from making this AA in view of earlier lodged but withdrawn AA 38?

21 In its written submissions, the Claimant submitted that it should not be precluded from filing the present AA since AA 38 was withdrawn before the adjudication of AA 38 commenced. It contended that AA 38 was withdrawn before the same was adjudicated on its merits, and since repeat claims are permitted, by analogy, there should be no reason why a second adjudication application cannot be filed in respect of the same PC 6. The Claimant relied on the authority of the Court of Appeal's decision in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*") at [92], contending that the same stood for the proposition that a repeat claim is allowed, as long as it was not adjudicated on its merits.

22 The Respondent's key argument was that there was nothing in the Act which entitles the Claimant to lodge a second adjudication application with respect to the same payment claim. The Respondent alluded to the prejudice that it had suffered in that it had incurred time and expended fees to prepare and file an adjudication response in dealing with the earlier AA 38 and thus it would be unfair to allow the Claimant to proceed with this AA.

23 In response, the Claimant contended that there was also nothing in the Act which precluded it from filing a second adjudication application and, in any event, suggested that there was no prejudice since AA 38 was not adjudicated upon.

24 It is common ground that despite the Claimant's submissions at its para 4, that the adjudication in AA 38 had commenced. It is also common ground that the Respondent had filed an adjudication response in the earlier AA 38, and the adjudication application was withdrawn on or around 27 February 2024. Whilst the Claimant was not initially prepared to explain why it had withdrawn AA 38, it became apparent that AA 38 was withdrawn as it was prematurely lodged. PC 6 was served by the Claimant on 3 January 2024. It is common ground that the Subcontract *did not* contain any provision specifying when a payment claim may be served. Thus, s 10(2)(*a*)(ii) of the Act applies which required the Claimant to serve a payment claim no later than "the date prescribed for the purposes of this [s 10(2)(*a*)(ii)]". By virtue of reg 5(1) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("Regulations"), that date is the *last day* of a month.

> **Payment claims**
>
> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim must be served or by which such time may be

determined, then a payment claim made under the contract must be served by the last day of —

(*a*) the month following the month in which the contract is made; or

(*b*) any subsequent month.

(1A) For the purposes of paragraph (1), only one payment claim made under a contract may be served in each month.

25 Notwithstanding that PC 6 was served on 3 January 2024, it appeared that the Claimant had overlooked the provisions in s 10(3)(*b*), which states that "a payment claim that is served before the prescribed date mentioned in sub-s (2)(*a*)(ii) is deemed to have been served on that date". In other words, although PC 6 was served on 3 January 2024, it was deemed to have been served only on 31 January 2024.

26 The Subcontract provides at term 2 of the Construction Work Order that the Respondent "shall issue progress payment certification within 30 days (Sunday & Public Holidays excluded) upon submission of the (Claimant's) claim". Pursuant to s 11(1)(*a*) of the Act, the permitted time by which the Respondent was entitled to file its payment response to PC 6 would have been *the earlier of*, either, a date determined in accordance with the Subcontract, or within 21 days after the payment claim was served under s 10. The earlier date would have been the period of 21 days, and taking into account the definition of "days" under s 2 of the Act which excludes any public holiday within the meaning of the Holidays Act 1998 (2020 Rev Ed), the Respondent's payment response to PC 6 would have been 23 February 2024 which took into account two public holidays (*ie*, Chinese New Year which fell on 10 and 11 February 2024). Although the Respondent did not serve any payment response then, it was permitted by virtue of s 12(5) of the Act to do so during the dispute settlement period which was between 24 February 2024 to 1 March 2024. As mentioned earlier, the Payment Response was served by the Respondent on the Claimant on 29 February 2024.

27 For completeness, in relation to PC 6, the Claimant's entitlement to apply for adjudication arose on 2 March 2024 and the Claimant had up to 9 March 2024 to file this AA.

28 The aforesaid paragraph demonstrates that AA 38 was lodged by the Claimant before its entitlement to do so arose. It is common ground that, but for the issue of the premature application in AA 38, that this AA was otherwise lodged in a regular time and form.

29 It was also common ground that there was no decision by our courts that provides any guidance on this specific factual matrix. I highlighted to the parties that the wording of s 13 of the Act suggests that when a claimant's entitlement to make an adjudication application arises,

a claimant may only file one adjudication application, and invited parties to make submissions on the same. The parties were, however, unable to assist, and reverted to their original arguments.

Finding on Issue (a)

30 I find that the premature application made through AA 38 does not preclude the Claimant from lodging this AA. Whilst the provisions of s 13 of the Act may be seen as only allowing one adjudication application to be lodged, s 13 operates only after the entitlement to apply arises under s 12.

31 Had AA 38 not been withdrawn when it was, the adjudicator required to determine the matter would have surely found that AA 38 was lodged prematurely with the consequence that jurisdiction would not have been engaged. In most cases, once a claimant realises its error, it will be too late to lodge a fresh adjudication application.

32 In this case, however, the error was discovered much earlier, *ie*, before the dispute settlement period ended. The Respondent in fact was able to file its payment response two days after AA 38 was withdrawn as the parties were still within the relevant dispute settlement period.

33 The Respondent further contended that because of the Claimant's withdrawal of AA 38, it had suffered prejudice in respect of time and costs unnecessarily expended. However, it must be remembered that the adjudication regime, no matter the outcome, does not allow either party to recover the value of time or professional fees expended. The only costs that may be determined relate to the costs of the adjudication, where a successful Claimant may obtain a determination to have the Respondent pay all, or depending on how an adjudicator exercises his discretion, part of the adjudication costs. Thus, the Respondent, even if it was able to successfully oppose AA 38, would have never recovered the value of time or professional fees expended; in fact, had AA 38 been proceeded with, it would have irrecoverably expended more time and legal costs. As such, I do not accept the Respondent's argument that the Claimant should be precluded from filing this AA on the grounds of prejudice occasioned by the earlier, and prematurely lodged, AA 38. In my view, there is no compelling reason to read into the provisions of the Act that prejudice suffered would preclude the Claimant from filing this AA.

34 Returning to the Claimant's arguments as to why it should not be precluded from lodging this AA notwithstanding that it had lodged and withdrawn AA 38 based on the same PC 6, I am unable to follow the argument as to how the Court of Appeal's decision in *Chua Say Eng* ([21] *supra*) assisted the Claimant's position. The analogy which the Claimant sought to draw was not appropriate. The rights to include in a payment claim, unpaid progress claims in prior claims that were not

adjudicated upon is statutorily provided for; there is no provision covering the present circumstances.

35 In my view, the correct approach to deal with this issue is to look to the provisions of the Act. The fact remains that the Claimant only lodged one adjudication application *after* its entitlement to file an adjudication application arose. There is nothing in the Act that deals with the present specific situation; there is nothing in the Act itself that states that the conduct of the applicant bars it from filing the present AA. Whilst such conduct may in practice be an abuse of process, that is, filing multiple adjudication applications without regard to whether it was entitled to do so (and for avoidance of doubt, I am not in any way suggesting that the Claimant's conduct was in fact an abuse of process), it is worth highlighting that the powers of an adjudicator are derived from by the Act. Adjudicators do not have inherent jurisdiction. Thus, unless expressly provided for in the Act, adjudicators do not have powers to deal with instances which may be categorised as abuse of process. When faced with an adjudication application which is regularly lodged when an entitlement arises to a claimant, an adjudicator is required by the Act to determine the same *in accordance with the provisions of the Act.* Absent any provision that requires me not to hear this AA, the burden being on the Respondent to establish the legal premise requiring me to reject the AA, and finding no such legal premise, I find that I am required to hear and determine this AA.

Issue (b): repeat claims

36 The Claimant sought to argue by analogy that because repeat claims are allowed in payment claims, it should be allowed to file a repeat adjudication application if the earlier AA 38 was not adjudicated upon.

37 I reject this argument as a general proposition. As mentioned above at [34], I found it difficult to understand the analogy sought to be drawn. Repeat claims are expressly provided for in s 10(5) of the Act. Even in respect of payment claims, one cannot insist that one is entitled to serve two payment claims within the same claim period.

38 As alluded to above, my view is that s 13 of the Act, read in its entirety, contemplates that only one adjudication application may be lodged *after the entitlement arises* under s 12. Clearly one cannot lodge two adjudication applications *after* your entitlement arise. That said, I, however, do not see anything in the Act which prohibits a claimant, as the one in this present case, who after realising its earlier adjudication application was prematurely lodged, from correcting its error by withdrawing the same and then lodging a subsequent adjudication application on the same payment claim within time and when it had the right to do so.

Issues (c) and (d): total failure of consideration

39 With respect to this issue, the Respondent's written submissions at para 4 expressed the view that it is entitled to raise the issue of total failure of consideration "as it goes towards the evidentiary burden that the Claimant has to discharge" and that "(s)ince the Claimant is seeking payment, it has the burden to establish that it has carried out the work, which necessarily means that it must establish that the tunnel excavated by the Claimant can be used".

40 During the adjudication conference, the Respondent clarified and confirmed my understanding of its submission on this issue as not one going to my jurisdiction to hear the matter but as an issue as to the proof required for the Claimant's claim for work done. This submission differed from its submissions filed with the Adjudication Response; the argument also has the advantage of being framed as a question of evidence, thereby enabling the Respondent to skirt around the fact that the circumstances purportedly being related to the tunnel being unusable were not set out in the Payment Response as a reason for non-payment.

41 It is well established by now that where a respondent has a duty to speak, *ie*, that it must state its reasons for non-payment in its payment response and, failing to do so, its rights to raise such grounds for non-payment during an adjudication will be not considered by an adjudicator. It is further well established that absent any reason for non-payment, the burden is on a claimant to prove its claim. However, the authorities are also clear that absent grounds for non-payment, the standard of proof is a *prima facie* one. On the other hand, where there are reasons for non-payment clearly stated, the Respondent would be entitled to support those reasons and speak of them during the adjudication process; in such circumstances, the standard of proof on the Claimant would be higher, *ie*, on a balance of probabilities.

42 As this jurisdictional argument was abandoned by the Respondent, I will say no more about it.

Issue (e): merits of payment claim

43 In PC 6, the Claimant asserted that it had completed works up to a value of $855,010. It claimed that the GST thereon, at the rate of 8%, amounted to $68,400.80. These two values added up amounted to $923,410.80. The Claimant asserted that it had been paid only $349,701.30 out of the sum of $923,410.80; the amount paid to the Claimant was not contested by the Respondent.

44 PC 6 also reflects the fact that there was an arrangement between the parties where the Respondent had advanced a sum of $174,675.00 to the

Claimant. This advance payment was to be set off against the value of work carried out by the Claimant (and GST thereon) during the course of the Subcontract. By the time that PC 6 was served, the sums advanced had been fully set off and was thus reflected in PC 6 as such. In the manner that PC 6 was presented, it appears that the sums advanced formed part of the sums that were paid to the Claimant amounting to $349,701.30.

45 In the Payment Response to PC 6 served on 29 February 2024, the Respondent asserted that the total value of work carried out by the Claimant was not $855,010 as claimed, but that it was only $703,200.80.

46 The difference between the two positions taken by the parties boiled down to only one item of work, *ie*, item 4.4 of PC 6 (which corresponds with item A sub-item 7.0 in the Payment Response). That item was described as "Pipe Jacking from MHA4 to MHA5 (curved line)". The difference amounted to $151,809.20.

47 The reason provided by the Respondent for not paying the sum claimed by the Claimant was expressed as:

> Jacking WD: 1/12/2023–37/2023. Claimed Pipes is 84 nos with IJS, Normal Pipe length (81 pipes) = 81 X 2.999m = 242.19m. IJS installed (3 nos) = 3x
>
> 4.5 = 13.5m; Total 242.19 + 135m = 255.69 m. Please see attached Engineer Verification. To certify 80% of work done and balance 20% will be certified upon completion of the annular grouting.

48 Reading the Respondent's Payment Response, two matters become evident. Firstly, the Respondent calculated the specific pipe length installed to be only 255.69m and did not accept the Claimant's computation of 256.90m. Secondly, the Respondent took issue with the Claimant not completing the annular grouting.

49 It was necessary for me to understand the nature of the work referred to as annular grouting and with the parties' assistance I was informed that annular grouting was part of the Claimant's works; it was not work required by defective work. It was explained to me that annular grouting is the process of filling the area between a pipe and the surrounding soil by injecting cement grout. Upon clarification, the parties informed me that the annular grout stabilises the surrounding soil to prevent ground subsidence. It is common ground between the parties that annular grouting was an integral part of the Claimant's works, although the Claimant characterised such works as "minor outstanding works".

50 It is also common ground that annular grouting was not carried out by the Claimant who asserted that it intended to carry out the annular grouting later once all its pipe jacking works were completed.

51 In its submissions, the Claimant at para 32 expressed its acceptance of the quantity of the relevant pipes installed as 255.69m; thus accepting that the total work done for the item in dispute should be at the slightly lower value of $741,501.

52 However, it contends that the Respondent's deduction which was 20% of the value of its work done for this item of work was without any contractual basis.

53 I have noted that the cost of annular grouting was not specifically provided for in item A sub-item 7.0. Therefore, the cost of such uncompleted annular grouting was part of the built-up rate of $235.90 for the pipe jacking works. Absent any breakdown, the Claimant provided, in its submissions at paras 34.11 and 34.12, a computation of the value of the non-completed annular grouting. It came up with a value of $12,753.82 based on a computation which it set out in para 34.12 of its submissions.

54 The Respondent was invited to comment on the Claimant's computation of the price of the uncompleted annular grouting. The Respondent's contract manager expressed his view that the labour rates appeared to be too low to which the Claimant's response was that this was because it was using its own manpower. Upon my request for clarification, the Claimant confirmed my understanding that its computation did not consist of any profit element.

55 Upon my further query to both parties, the parties appear to agree that the profit margin for the Subcontract works would have been around 5%. The Respondent's contract manager pointed out that the Project was secured during the Covid-19 pandemic and jobs were hard to come by and thus it was necessary to be competitive with pricing. The Respondent's contract manager asserted that the Respondent's own profit margin would have been around 4–5%.

56 Taking all such submissions and materials into consideration, I *find* that the Claimant has discharged its burden on a balance of probability that, for the item in dispute, the Claimant would have been entitled to the sum of $$741,501 *but for* the uncompleted annular grouting works.

57 As to the value that should be omitted on account of the uncompleted annular grouting works, the only evidence before me was the values as provided by the Claimant. However, since the Claimant should not be entitled to its profit for the entire item of work when it had only carried out part (although significant amount of) work, a proportionate reduction to take into account unearned profit is appropriate. Thus, I find that a sum of $13,391.51 (*$12,753.82 + applying a 5% profit margin thereon = $13,391.51*) should be disallowed in respect of the accepted sum of $741,501 for this item of work. As such, I further *find* that for item 4.4 of

its PC 6 (corresponding with item A sub-item 7.0 of the Respondent's Payment Response), the Claimant is entitled to only $728,109.49.

58 I should mention that I have not considered the allegation of the Respondent pertaining to the suitability of the Claimant's works (or rather, the lack thereof) which it earlier characterised as a "total failure of consideration". Such reasons may have been reasons for non-payment but as they were not stated in the Payment Response, the Respondent is not permitted to include the same in its AR; see s 15(3)(*a*). It thus follows that if the Respondent cannot include reasons which it did not identify in its Payment Response in its AR, I cannot have regard to such reasons.

59 In addition, if indeed the Claimant's works were not properly carried out, the Respondent's remedy would have been a claim for damages, loss and expenses. Section 17(3) of the Act requires me to disregard any part of a payment response related to damages, loss or expenses that is not supported by any document showing agreement between the parties on the quantum of that part of the payment response or certificate or other document required under the contract. None of the documents produced to me show that this requirement was met so as to allow me to have regard to a claim relating to damages, loss or expenses.

Issues (f) and (g): GST applicable and interest on late payment

60 The Claimant clarified that although the present GST rate is 9%, the sums claimed in PC 6 had been earlier invoiced and therefore the appropriate tax rate is 8%. Copies of the tax invoices formed part of the documents submitted with the AA. The Respondent accepted this contention as well; and accordingly, I find that the correct GST rate applicable is 8%.

61 Both parties took the position that it would leave the issue of interest for my determination. As s 8(5) of the Act specifies that the interest payable on the unpaid amount of a progress payment that has become due and payable is at a higher rate of either: (a) the contractually provided rate; or (b) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969 (2020 Rev Ed) and because there is no contractual provision in the present case specifying the rate of interest, I *find* that the rate of 5.33% per annum is the appropriate rate of interest.

62 As the parties choose not to submit on the issue of when interest would start to accrue, I find and determine that the adjudicated amount was already due and payable. As such, I find and determine that the adjudicated amount determined below is due and payable immediately. For the computation of interest, I find and determine that interest shall accrue from the date of this determination.

Adjudicated amount

63 Based on the above findings, I find and determine the adjudicated amount to be $555,456.95.

Breakdown of adjudicated amount

Total Claimed for Work Done under PC 6 (without GST)	$855,010.00
Less: Adjustment based on measurement as reflected in item A sub-item 7.0 of Respondent's Payment Response [$745,010 – (255.69m X $2,900)]	*-$3,509.00*
Less: Uncompleted annular grouting	*-$13,391.51*
Total completed Sub-Contract Works	$838,109.49
Add: GST Tax 8%	$67,048.76
Less: Previous Payments	*-$349,701.30*
Adjudicated Amount	**$555,456.95**

Conclusion

64 In view of my findings above, I accordingly find and determine as follows:

(a) The adjudicated amount payable by the Respondent to the Claimant is $555,456.95 (inclusive of GST at 8%).

(b) The adjudicated amount is due and payable immediately from the date that this adjudication determination is served on the Respondent.

(c) In the event of non-payment, the Respondent shall pay the Claimant interest at the rate of 5.33% per annum on the adjudicated amount or unpaid balance thereof.

(d) The Claimant having substantially succeeded in this AA, the Respondent shall pay to the Claimant the adjudication fee of $654 (inclusive 9% GST) and the adjudicator's fee of $8,131.40 (consisting of $7,460 plus 9% GST of $671.40).

BIE Pte Ltd
v
BIF Pte Ltd

[2024] SGSOP 8

Singapore Mediation Centre — SOP AA 068 of 2024
Low Tien Sio
23 April 2024

Contract — *Contracts in writing* — *Whether oral contract deemed "contract in writing" within meaning of s 4(5) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)* — *Section 4(5) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Jurisdiction — *Jurisdictional objections* — *Respondent contending there was no construction contract as required by Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA")* — *Definition of "construction work"* — *Whether landfilling works come under ambit of s 3(1) SOPA* — *Sections 3(1) and 3(1)*(b) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim — *Requirements* — *Respondent submitting that claimant's claim for payment was not proper payment claim under provisions of Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)* — *Whether letter constituted payment claim* — *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)* — *Regulation 5(2) Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)*

Payment Response — *Deductions* — *Respondent making deduction for retention sum* — *No conditions of contract provided* — *Whether any basis existed for amount to be retained by respondent*

Payment Response — *Deductions* — *Whether contract was lump sum contract or contract that required adjustments and remeasurement of variable component* — *Whether adjustments based on variable elements in main contract flowed through subcontract on back-to-back arrangement* — *Whether full adjustment to be borne by claimant*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 3(1), 3(1)(*b*), 4(5), 8(5)(*b*), 9, 10, 10(2)(*a*)(ii), 11(1), 11(1)(*b*), 12(5)(*b*), 17(1)(*b*), 22(1)(*a*)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 5(1), 5(1)(*a*), 5(3), 7(2)(*d*)

Land Titles Act 1993 (2020 Rev Ed) s 4

Supreme Court of Judicature Act 1969 (2020 Rev Ed)

Edwin Lee, Amanda Koh and Smrithi Sadasivam (Eldan Law LLP) for the claimant; Christopher Chuah, Michael Leong and Terrence Ng (Christopher Chuah Law Chambers LLC) for the respondent.

[Commentary: see para 1.1]

23 April 2024

Low Tien Sio:

Introduction

1 This adjudication is in connection with a project owned by [Z] Agency ("[Z]") for the operation and maintenance of landfill equipment, vehicles and floating platform at [xxx] including the handling and disposal of waste, the provision of ferry services and the management, operation and maintenance of a fleet of equipment and vehicles for the project ("Project").

2 The complete landfill operation comprises loading of incinerated waste onto the barges at [xxx] Transfer Station, marine transportation of these waste, and the unloading and landfilling of the waste at [xxx].

3 The respondent ("Respondent") was employed to provide "Services" for waste handling and management and shall be responsible for transferring the waste from the barges onto dump trucks, transporting the waste to disposal sites and landfilling the waste including the provision of manpower and all other necessary materials for the smooth, safe and efficient operation of all the landfill equipment and vehicles.

4 The claimant [BIE] Pte Ltd was employed by the Respondent [BIF] Pte Ltd to provide these Services as a subcontractor under an oral contract and a number of fundamental issues arise as to whether:

(a) the contract is deemed to be a "contract in writing" within the meaning of s 4(5) of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)("SOPA");

(b) a proper payment claim had been lodged in accordance with the provisions of the SOPA; and

(c) the services provided by the Claimant could be considered to be construction work within the ambit of the SOPA.

5 Having subcontracted the whole of the Services, does the Respondent pay the Claimant the quoted price of $12,488,000 less 8% (this 8% is not disputed) and less other deductions that the Respondent is entitled to deduct? Alternatively, and as averred by the Claimant, the Respondent is required to pay to the Claimant the total amount paid by [Z] under the main contract to the Respondent less only 8%.

6 The Services referred to in this adjudication relates to the part or phase of the [Z] Project known as "[xx3]". The parties had previously worked together on [xx2] and the final account for this aspect of the [Z]Project is already settled.

7 In reference to a letter from the Claimant dated 31 January 2024 (it should be noted that the said letter was not submitted by the Claimant together with its adjudication application), the Respondent stated that the:

> … subcontract amount, after negotiation, is 8% deduction from [the Claimant]'s quotation to [the Respondent] based on the tender document. It was never based on[the Respondent]'s tender price to [Z]. Whatever price tender by [the Respondent] to [Z]was never [the Claimant]'s concern. As such, your assumption, without any documental proof that [the Claimant]'s quote is based on 8% discount of [the Respondent]'s tender price is grossly misleading and wrong.

8 In view of this fundamental difference, the Claimant has in its written submission for the adjudication application ("AA") stated that:

> For the purposes of this Adjudication only, and without prejudice to [the Claimant]'s position on the agreed terms and its rights to pursue its full claims at the appropriate forum … [the Claimant] is prepared to accept [the Respondent]'s position on the lump sum subcontract price of $12,488,000 and the application of 8% discount. [The Claimant] however does not agree with the other deductions made by[the Respondent].

Payment claim

9 Section 10(2)(*a*)(ii) requires that a payment claim must be served not later than the date prescribed under the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations") if the contract does not specifically define the period or time for submission of payment claims. Pursuant to reg 5(1), read together with reg 5(3) of the SOP Regulations, the payment claim ("Payment Claim") was served by the last day of the calendar month and this was on 29 February 2024.

10 The Claimant's Payment Claim dated 29 February 2024 reflected a total amount claimed of $1,949,475.90 derived as follows:

Description	Amount
Lump sum amount for [xx3] works	$12,488,000.00
Less 8%	$999,040.00
Less Previous Payment	$9,700,450.00
Amount Payable (before GST)	$1,788,510.00
Total Amount Claimed (with 9% GST)	**$1,949,475.90**

Payment response

11 Pursuant to s 11(1)(*b*) of the SOPA, the payment response was to be served by the Respondent within 14 days, *ie*, on 14 March 2024 but this did not materialise. However, in accordance with s 12(5)(*b*), the Respondent may provide the Claimant with a payment response during the dispute settlement period where the Respondent had failed to do so under s 11(1). This it did on 20 March 2024 but the payment response ("Payment Response") was only sent to the Claimant by the deadline of 21 March 2024; given that the dispute settlement period would have ended on 21 March 2024.

12 The Payment Response dated 20 March 2024 was in the form of a final account for an amount of $935,614.32 reflected as follows:

S/N	Description	Amount ($)
1	Contract Sum	12,488,000.00
2	Variation Omission	(295,372.03)
3	Variation Addition	69,449.40
4	Revised Contract Sum	12,262,077.37
5	8% Discount	980,966.19
6	Deductions	(158,206.38)
7	Final Contract Sum	11,122,904.80
8	Less Retention 5%	(556,145.24)
9	Less Previous Payment	9,700,450.00
10	Net Amount	866,309.56
11	Add 8% (*sic*) GST	69,304.76
12	Total Amount Payable	**$935,614.32**

Adjudication application

13 The Claimant served a claim for payment on 29 February 2024 relying on s 10(2)(*a*)(ii) of the SOPA and reg 5(1)(*a*) of the SOP Regulations, and importantly, the Claimant also relied on the statement of final account

provided by the Respondent except that the Claimant did not agree with the deductions made by the Respondent other than the 8% discount or administrative charge for the value of work done and also previous payments made by the Respondent.

14 The Respondent did not provide a payment response by 14 March 2024 but subsequently submitted the Payment Response dated 20 March 2024 and served this on the Claimant on 21 March 2024.

15 With the dispute settlement period ending on 21 March 2024 and in view of the Payment Response dated 20 March 2024 for an amount of $935,614.32 against the claimed amount of $1,949,475.90, the Claimant gave notice of its intention to apply for adjudication on 28 March 2024 within the deadline of 30 March 2024. The AA was subsequently lodged on 28 March 2024 and was served on the Respondent on 1 April 2024.

Adjudication response

16 The Respondent submitted its adjudication response ("AR") on 8 April 2024 within the timeline set down in the SOPA as required and raised a number of jurisdictional challenges to the AA, and amongst these was the contention that there was no construction contract that was envisaged and defined in the SOPA that would allow the Claimant to claim relief under the SOPA for payment. The Respondent cited the following legal principles that are applicable in determining whether there was a contract in writing as required under the SOPA between the Claimant and the Respondent in regard to the [xx3] works. These were:

> (a) As regards sections 4(4)(a) and 4(4)(b) of the SOP Act, the evidence must reflect an agreement on the essential terms of a contract …
>
> (b) As regards section 4(4)(b) of the SOP Act, where the essential terms cannot be adduced from the exchange in communications, there is no contract in writing; and
>
> (c) As regards section 4(5) of the SOP Act, it is insufficient for the written communications to set out the dispute between the parties. Rather, the dispute must also arise from a contract to which written communications coherently reflect an agreement of terms between the parties. Without an agreement on essential terms of the contract, there would be no contract in writing.

17 The Respondent further clarified that:

> … for the avoidance of doubt, the Respondent is not suggesting that there was no contract between the parties for the [xx3] Works. Instead, the Respondent's position is that the [xx3] Works were not subject to a written

> contract, but purely an oral contract that was effected by conduct of the parties. In this regard, parties engaged in verbal discussions and eventually agreed in or around 1 March 2018 to enter into a subcontract for the Claimant to carry out the [xx3] Works with an 8% discount of its quoted price. The terms were discussed and agreed orally.

There was no disagreement that the works were eventually carried out and completed by end of February 2023.

18 However, the Respondent also contends that:

> Claimant has not produced or identified the quote [for the lump sum price of $12,488,000.00] in their AA Submissions and the Respondent submits that this is a fatal omission. Section 13(3)(c) of the SOP Act requires the Adjudication Application to contain, inter alia, relevant extracts of the contract read with the SOP Regulations. Insofar as the Claimant is suggesting that the quote is or forms part of the sub-contract, the quote has been omitted from the AA. Therefore, by virtue of Section 16(3)(a) of the SOP Act, the learned Adjudicator has to reject the AA.

19 Interestingly, in their letter dated 13 December 2023 in reply to the Claimant's letter of 29 November 2023, the Respondent stated that "[the Claimant] has the tender document [this is the [Z] document being referred to] and has submitted the quotation to [the Respondent] as per the tender requirement". The Respondent itself could have furnished this quotation but it did not and this would suggest that the quotation was only made orally and not evidenced in writing.

20 The Respondent also averred that there is no payment claim that meets the requirements of the SOPA. In the AR, the Respondent stated that:

> The Claimant has asserted that the 29 February Letter (see RBOD Tab 10) constitutes a payment claim, and that its AA was filed in respect of the 29 February Letter. The Respondent's position is that the 29 February Letter is not a payment claim that would fall within the ambit of the SOP Act. This is for the following alternative reasons:
>
> (a) the 29 February Letter is fundamentally different from the nature of a payment claim within the ambit of the SOP Act;
>
> (b) the 29 February Letter is not made pursuant to a contract in writing; and/or
>
> (c) the 29 February Letter is not made pursuant to a construction contract, or a contract for the supply of goods and services, within the meaning of section 3 of the SOP Act.

21 In the alternative, the Respondent also sets down the rationale that "the letter of 20 March 2024 bears the hallmarks of a payment response issued in accordance with the SOP Act … by refer[ring] to [the Claimant's]

letter dated 29th February 2024, the Respondent had clearly identified the payment claim to which it relates" and was the appropriate response. Presumably, this was the Respondent's position in the event that I should decide that the Claimant had submitted a proper payment claim under s 10 of the SOPA.

Appointment

22 I was invited by the authorised nominating body, the Singapore Mediation Centre, to be the adjudicator and I accepted the appointment on 2 April 2024. As the AR was lodged on 8 April 2024, the adjudication period commenced on 9 April 2024 and I have to provide my determination by 23 April 2024 in accordance with s 17(1)(*b*) of the SOPA. Prior to this, I gave direction that the Claimant should provide its written submission to address the jurisdictional challenge raised by the Respondent by the close of business on Friday 13 April 2024. The Claimant responded to this challenge by the Respondent in its further submission on 13 April 2024 and extended a copy to the Respondent.

23 Specifically, I requested that the written submission should address the following challenges put forth in the AR. These were:

(a) there is no contract in writing between the parties within the ambit of the SOPA;

(b) the Claimant did not serve a payment claim within the ambit of the SOPA; and

(c) The [xx3] works are not "construction work" for the purposes of the SOPA.

Conference

24 I called for a conference with the parties on Tuesday, 16 April 2024 ("Conference") to deal with the jurisdictional issue as well as the substantive issue if appropriate. At the Conference:

(a) The Claimant was represented by:

(i) Mr Edwin Lee: lead counsel (Eldan Law LLP);

(ii) Ms Amanda Koh: counsel;

(iii) Ms Smrithi Sadasivam: counsel;

(iv) Mr [A]: managing director; and

(v) Mr [B]: project manager.

(b) The Respondent was represented by:

(i) Mr Christopher Chuah: lead counsel (Christopher Chuah Law Chambers);

(ii) Mr Michael Leong: counsel;

(iii) Mr Terrence Ng: counsel;

(iv) Mr [C]:managing director;

(v) Mr [D]:general manager;

(vi) Mr [E]:director;

(vii) Mr [F]:assistant contract manager; and

(viii) Mr [G]: administration manager.

25 The Conference was held virtually via Zoom link and commenced at 2.30pm and ended at 4.30pm. During the meeting, the Respondent provided a power point presentation deck to address its rationale for the jurisdictional challenge and also to refute the further submissions of the Claimant. At the end of the Conference, I directed that the Claimant need not make any additional submissions as it had appropriately dealt with the presentation and the issues raised by the Respondent in discussion at the Conference.

26 Essentially, the contentious issues that I have to determine are:

(a) Whether there is a construction contract in writing within the meaning of the SOPA for construction work as defined or set out in the SOPA.

(b) If there is no such construction contract in writing, then I cannot proceed to deal with the merits of the payment claim as I cannot proceed beyond this jurisdictional threshold and any determination arising from it will then be null and void.

(c) However, if I should find that the payment claim is properly lodged in accordance with the provisions of the SOPA, then I may go on to deal with the substantive issues on merit even if the determination maybe subsequently challenged.

Determination

27 At the outset, I should record that I find that the statutory timelines were strictly observed by the Claimant so the claim for payment was properly submitted and due process followed by the Claimant when it lodged its AA.

There is no contract in writing between parties within ambit of SOPA

28 The Claimant dispelled the Respondent's submission that the claim for payment was not one that could be considered to be within the ambit of SOPA by relying on s 4(5) of the SOPA that provides that "where a contract is not wholly made in writing, the contract is treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties to the contract is in writing".

29 The Claimant directed my attention to the High Court case of *Qingjian International (South Pacific) Group Development Co Pte Ltd v Capstone Engineering Pte Ltd* [2014] SGHCR 5 ("*Qingjian*"):

> Importantly, in *Qingjian*, the Court made clear that Section 4(5) (formerly Section 4(4) at the time of *Qingjian*) was broadly drafted to give a wide interpretation of a 'contract in writing' and that it is consistent with policy and purpose of the SOP Act that a commercially sensible approach is to be adopted in finding the existence of a 'contract made in writing'.

30 The Claimant also stated:

> The Court ruled that Section 4(4) of the Act (now renumbered Section 4(5)) was satisfied on the basis that 'the matter in dispute' … can be found in an exchange of communications in writing … and that the documents sufficiently showed agreement as to the matters in dispute.
>
> Based on the High Court judgment in *Qingjian*, the 'matter in dispute' refers to the Claimant's works at the … Project. The Claimant is claiming based on the Respondent's own certified amount in the Statement of Final Account but is disputing the Respondent's deductions for *(a)* an alleged variation omission, *(b)* deductions amounting to $158,206.38; and *(c)* retention (collectively, the '3 Deductions').

31 Specifically, the Claimant submitted that:

(a) The [Z] tender documents set out the Project in which the dispute relates and detail the scope of works which the Respondent had subcontracted to the Claimant.

(b) Respondent's own final account sets out the certified amounts which the Claimant is claiming for. In particular, the lump sum amount of $12,488,000 was certified by the Respondent, before its own unilateral deductions. It also records the 8% 'discount' retained by the Respondent.

(c) The 23 February payment claim not only sets out the Claimant's claim but also records the dispute on the 3 Deductions.

(d) The Respondent's payment response dated 21 March 2024.

(e) The written exchange of letters between the parties prior to that, on 13 December 2023, 31 January 2024 and 8 February 2024 also reinforce how the Claimant had carried out the works for the Project.

…

It bears highlighting that the Respondent itself has made clear that it 'is not suggesting that there was no contract between the parties for the [xx3] Works'. This is significant as it clearly shows the Respondent already admits to there being a binding contract entered into between the parties. Thus, even if there is any disagreement on the price, … this does not mean that there is no contract between the parties.

32 The Respondent does not accept this and instead contends that:

As regards section 4(5) of the SOP Act, it is insufficient for the written communications to set out the dispute between the parties. Rather, the dispute must also arise from a contract to which written communications coherently reflect an agreement of terms between the parties. Without an agreement on essential terms of the contract, there would be no contract in writing.

And yet, the Respondent's case is that "any contract if at all was purely verbal albeit concluded by conduct" (para 20 of the AR).

33 The Respondent further stated at para 25 of the AR:

For the avoidance of doubt, the Respondent is not suggesting that there was no contract between the parties for the [xx3] Works. Instead, the Respondent's position is that the [xx3] Works were not subject to a written contract, but purely an oral contract that was effected by conduct of the parties.

34 In accordance with the SOP Regulations at reg 7(2)(*d*), "every adjudication application shall contain an extract of the terms or conditions of the contract that are relevant to the payment claim dispute". Clearly, the dispute between the parties is on the statement of final account and this is captured in the exchange of correspondence; particularly the claim for payment dated 29 February 2024 and the Respondent's response dated 20 March 2024. The claim for payment and the response to the claim arose from the Claimant's letter of 31 January 2024 and the Respondent's reply on 8 February.

35 In the letter of 31 January 2024, the Claimant stated that for "[xx3], we do not agree with the revised final account to your letter [this was the letter of 13 December 2023]. Please find enclosed our claim setting out the correct amount of payment that is due to us. We do not agree with the deductions that [the Respondent] is trying to impose on us".

36 The letter from the Respondent dated 8 February 2024 stated, *inter alia*, that:

> We do not agree with your claims as enclosed with your letter. We stand by our Final Account given to you in our previous letter. The deduction made in our Final Account, all of which, has documental proof and is not something that we try to imposed [*sic*] on [the Claimant] as again alleged by you in your letter.

37 In my determination, there is objectively speaking a basis for the Respondent to formulate its own case based on the documents cited. In the case of *UES Holdings Pte Ltd v Grouteam Pte Ltd* [2016] 1 SLR 312 at [56], Quentin Loh J commented "that adjudicators have generally considered objections under reg 7(2)(*d*) to be unduly technical, particularly when it is considered that, notwithstanding the omission of certain terms from the extracts, the respondent has not been prejudiced". In reference to the publication on Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013), "… it has been suggested that the test is whether, on the extracts of the documents as furnished, the respondent understands the case it has to meet and is afforded a basis to formulate its case. I think, with respect, that must be right".

38 Loh J also held (at [57]) that:

> This … is an eminently sensible test to adopt especially when one considers the statutory scheme for the submission of adjudication applications and responses under the Act. Pursuant to s 15(2)(*d*), when a respondent submits its adjudication response, it is entitled to attach such documents which it considers to be relevant to the adjudication response. The respondent therefore has the opportunity to furnish documents which were not attached to the adjudication application, but which the respondent deems to be relevant to its case. The statutory scheme places the onus on each party to place before the adjudicator, documents which they respectively consider to be relevant for the purposes of resolving the dispute. In a situation such as the present, where the Defendant had provided the terms and extracts of the contract which it considers relevant to support its claim and this gave the Plaintiff a basis to formulate its own case, it cannot be said that s 13(3)(*c*) of the Act read with reg 7(2)(*d*) had been breached. I clarify at this juncture that this is not a subjective test whereby so long as a party attaches extracts of the contract which it subjectively considers to be relevant, that would suffice for the purposes of meeting the requirement under reg 7(2)(*d*) of the Regulations. Rather, the test is an objective one – do the extracts attached, objectively speaking, give the respondent a basis to formulate its own case? In my view, this requirement was satisfied in the present case.

39 The Claimant further submits that:

> In our present case, the dispute can be clearly gleaned from the Respondent's final account and the payment claim. Based on the payment claim, it is clear that the certification in the Respondent's final account is disputed and the Claimant has also provided its position on the amounts it is entitled to. There is also clearly a dispute on the Deductions in writing as the Claimant has not accepted the 3 Deductions in the payment claim.

Claimant did not serve payment claim within ambit of SOPA

40 As to the Respondent's submission that the claim for payment was not a proper payment claim under the provisions of the SOPA, the Claimant relied on the finding of the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 that "there is no particular format for a payment claim – as long as a claim satisfies all the formal requirements under the SOP Act, then it is a payment claim".

41 Regulation 5(2) of the SOP Regulations provides that:

> (2) Every payment claim shall —
>
> (*a*) be in writing;
>
> (*b*) identify the contract to which the progress payment that is the subject of the payment claim relates; and
>
> (*c*) contain details of the claimed amount, including —
>
> (i) a breakdown of the items constituting the claimed amount;
>
> (ii) a description of these items;
>
> (iii) the quantity or quantum of each item; and
>
> (iv) the calculations which show how the claimed amount is derived.

42 Further, the Claimant submitted that:

> The reference to the Respondent's own final account enclosed in the Respondent's letter dated 13 December 2023 clearly shows the claim was for the entire reference period of the works up till the final account in December 2023 prepared by the Respondent itself. There is no need to be pedantic or overly technical to require a period to be expressly stated. The amount and period of the claim is clear.
>
> Taking into account the parties' correspondence(s) that was referred to in the payment claim, the Respondent was clearly aware of the amounts being claimed given that the claim was based on the Respondent's own final

> accounts. Insofar as the claim has differed from the Respondent's final account, the Claimant has explained why it was disagreeable with the variation omission, deduction of $158,206.38 and retention.

The [xx3] works are not "construction work" for purposes of SOPA

43 As for the submission that the various activities carried out by the Claimant for that part of the Project known as [xx3], the Claimant cited many aspects of the construction work carried out (at paras 49 to 75 of their further submission) to dispel the perception that there was no construction work as envisaged by the SOPA that would allow the Claimant to submit a claim for payment for work done. At the Conference, the Respondent dealt with these aspects to rebut the Claimant's specific claims that "construction work" as defined in the SOPA, was prevalent in the manner of waste handling and disposal at [xxx].

44 The Respondent submitted that landfill is also not land reclamation and reinforced this at the Conference:

> The [xx3] Works, which pertain to landfilling, are not a precursor to future building works to be built upon. It is also not intended to be integrated as part of final building works or an operational component as part of the process of constructing certain works. Therefore, it would not fall within the meaning of section 3(1)(*d*) of the SOP Act, let alone section 3(1)(*d*)(i) of the SOP Act.

45 According to the Respondent:

> … landfilling is a waste disposal process that involves heavily mechanised equipment and labour. While at a superficial view, landfilling could be mistaken as a construction activity, it is clear at a closer view that it is not actually a construction activity. The heavy machinery and equipment are only used to move waste to its final tipping point. No new buildings or structures are to be erected. Earth is used to cover the waste after they have been levelled for environmental reasons, and not to prepare the land for a construction purpose.

46 Furthermore, and as averred by the Respondent:

> By definition, landfilling is distinct from 'land reclamation'. Landfilling refers to 'the disposal of waste material by burying it, especially as a method of filling in and reclaiming excavated pits'. This is different from land reclamation, which is 'the activity of making land that is under water or is in poor condition suitable for farming or building on'. In other words, landfilling is a process to dispose waste by burying it underground, without the land being used for any future purpose to construct buildings or structures meant for human use. Land reclamation, on the other hand, involves the

> preparation or making of land for the future construction of buildings or structures.

47 In my determination, landfilling is just a subset of land reclamation. The reclamation process requires a protective barrier in the form of a concrete bund or similar to demarcate and protect the extent of the reclamation from natural erosion. Thereafter, the area so formed is then filled with sand or similar material and it can also be treated waste as well for that matter. Hence the process of land reclamation requires land filling. If instead of treated waste, sand was used to fill up the reclaimed area, this would naturally be considered as land reclamation. So, if the waste was treated or in this instance incinerated for hygiene and suitability to be used as fill, it would not detract from the fact that the fill was indeed part of the process of land reclamation.

48 Even when the land reclamation is completed there will be an extensive period of time before any load bearing structure is constructed on the site of the reclaimed land. This is to allow for natural consolidation of the material that was used for landfill and reclamation and the process does take a long time. In the meantime, the land can be put to a usage that is considered suitable so it is rather artificial to draw a distinction between current and future use of the land.

49 Basically, in my determination, the Respondent had contracted with the Claimant (based presumably on their long association and business relationship) for "Services" and "Manpower" to be provided in relation to construction work and labour to carry out construction work (s 3(1) of the SOPA).

50 "Construction work" as defined in that provision is very wide. At s 3(1)(*b*) of the SOPA, "construction work is defined broadly as construction of any works … that form part of the land" and land as defined under s 4 of the Land Titles Act 1993 (2020 Rev Ed) means:

> **4.**—(1) … 'land' means:
>
> (*a*) the surface of any defined parcel of the earth, so much of the subterranean space below and so much of the column of airspace above the surface whether or not held apart from the surface as is reasonably necessary for the proprietor's use and enjoyment, and includes any estate or interest therein and all vegetation growing thereon and structures affixed thereto; …

51 Thus, the Claimant succeeds in its proposition that the services provided by the Claimant for the landfilling works at [xx3] comes under the ambit of s 3(1) of the SOPA and it should be able to seek redress for payment of its claim for work done.

52 Having considered the various grounds of challenge mounted by the Respondent I have reached the conclusion that:

(a) there is a contract made in writing for the purpose of s 4(5) of the SOPA;

(b) the Claimant submitted a payment claim that complies with the relevant provisions of the SOPA; and

(c) the services rendered by the Claimant amounted to construction work within the ambit of the SOPA.

53 As a result, I hold that I have jurisdiction to consider the merits of individual items of claims for payment submitted by the Claimant. I shall now deal with each of these claims and deductions.

Three deductions

54 The Respondent advocated that it is entitled to deduct $225,922.63 (being $295,372.03 – $69,449.40 for net variation) in the event that I shall determine that a valid payment claim had been submitted in accordance with the relevant provisions of the SOPA.

55 The Claimant objected to this deduction on the basis that "[i]t appears that the Respondent is simply transferring the loss of profit to the Claimant by deducting from the Claimant, the same amount that [Z] deducted from the Respondent. The Respondent cannot apply such a downward adjustment". There is no evidence to suggest that this is the case even though the Claimant was able to deduce this aspect from the final account but it is clear that "[a] pay when paid provision … is unenforceable and has no effect in relation to any payment for construction work carried out … or services supplied … under the contract" (s 9 of the SOPA). Clearly, the contract that the Respondent has with [Z]was based on the combined features of fixed and variable components. So, naturally, the Respondent referred to the listing of fixed and variable components over the duration of the works that were regarded as completed by February 2023 to demonstrate that there is a proper and justifiable basis for the deduction to be made.

56 The question arises as to the intent of the contract or agreement between the parties. Was this a lump sum contract or was this a contract that required adjustments and remeasurement of the variable component for the costs of diesel and other expenses in operating the landfill equipment for the transportation of waste?

57 In the [Z] tender document, "Variable Component" was defined as:

> The quantities for tonnage of waste handled as provided in the price schedule under the variable component are only indicative. Payment of the variable component shall be made monthly based on the actual tonnage of waste

> handled. The amount of waste handled shall be based on the figures recorded at the weighbridge of [xxx] Transfer Station.

58 Clearly, the contract that the Respondent had with [Z] was one that required the variable element to be adjusted based on the quantity of land fill since this will vary over time. The final account clearly demonstrated this and, by extension of logic, the same adjustment would flow through the subcontract with the Claimant on a back-to-back arrangement. I raised this aspect at the Conference and the Claimant objected to the full adjustment to be borne by the Claimant and this is reasonable.

59 Hence, the sum for net variation amounting to $225,922.63 ought to be prorated downwards by multiplying this figure by 12,488,000/14,343,800 to yield a net deduction of $196,692.77 for adjustment of the variable component; (the sum of $14,343,800 being the price quoted by the Respondent to [Z]).

60 As for the retention amount of $556,145.24, I can only be guided by the conditions of contract but alas this was not provided as there was none; because of the nature of the transaction and contractual arrangement. There is therefore no basis for this amount to be retained by the Respondent and no evidence was produced to show that machinery and equipment repair would expose the Respondent to additional cost or expense for which it is entitled to claim from the Claimant. Other than a bare statement as to fire damage to the excavator supplied by [Z]and inadequate or poor repair and maintenance of the rest of the machinery and equipment in its letter of 8 February 2024, no supporting documents were provided to verify this statement. It should also be noted that under the contract that the Respondent has with [Z], the cost of any equipment or parts in excess of $1,000 would be reimbursed by [Z]to the Respondent. So, the additional expense that the Respondent has to incur will be the effort taken to repair or replace the parts that require maintenance but this is not evident in the Payment Response or the AR.

> Each party who advances a proposition to the adjudicator bears the burden of persuading the adjudicator to accept that proposition in and for the purposes of the adjudication.. [*WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28 at [33]]

61 Finally, the Claimant has, on its own accord, decided that it is no longer pursuing the position that the Respondent was not entitled to deduct the sum of $109,227.94 in this AA based on the documents submitted by the Respondent to justify the deductions. This amount for various expenses was deducted to cover insurances, bonds, factory registration and licences and is now admitted (without prejudice and only for the purpose of this adjudication) by the Claimant to reimburse the Respondent.

62 However, the Claimant maintains that the Respondent is not entitled to deduct the sum of $48,978.44 for the other alleged expenses involving repairs to various machinery and equipment. No information or supporting documents had been provided to verify the justification of these claims by the Respondent and I am not persuaded that the Respondent had provided a proper basis to deduct this amount.

Amount owing to Claimant

63 Taking into consideration and having regard to the exchanges and correspondences and in particular the final account for [xx3]; notwithstanding that this was a contract made orally without the usual documentation, I have arrived at the amount to be paid to the Claimant of $1,498,324.71 (excluding GST) by the Respondent as shown below:

S/N	Description	Amount Claimed ($)	Amount in Response ($)	Determination ($)
1.	Contract Sum	12,488,000.00	12,488,000.00	12,488,000.00
2.	Variation Omission	NIL	(295,372.03)	(196,692.77)
3.	Variation Addition	NIL	69,449.40	Included-item(2)
4.	Revsd Contract Sum	_	12,262,077.37	12,291,307.23
5.	Less 8% Discount	(999,040.00)	(980,966.19)	(983,304.58)
6.	Less Deductions	(109,227.94)	(158,206.38)	(109,227.94)
7.	Final Contract Sum	11,379,732.06	11,122,904.80	11,198,774.71
8.	Less Retention	NIL	(556,145.24)	NIL
9.	Previous Payment	(9,700,450.00)	(9,700,450.00)	(9,700,450.00)
10.	Net Amount Due to the Claimant	**1,679,282.06**	**866,309.56**	**1,498,324.71**
11.	Amount inclusive of GST (9%)	1,830,417.45	944,277.42	1,633,173.93

64 This amount of $1,633,173.93 (inclusive of GST) shall be paid to the Claimant within seven days after this determination is served on the Respondent in accordance with s 22(1)(*a*) of the SOPA; failing which interest shall be levied on the amount outstanding at 5.33% per annum; this being the rate prescribed for judgment debts under the Supreme Court of Judicature Act 1969 (2020 Rev Ed) and in accordance with s 8(5)(*b*) of the SOPA.

65 In view of my determination, the costs for this adjudication, being the adjudication application fee of $654 (inclusive of GST) and the adjudicator fee of $10,464.00 (inclusive of GST), shall be borne by the Respondent and the Claimant in the respective amount of 90% and 10%; after having

considered all matters dealt with in this adjudication and the outcome of each of these in my determination.

BIG Pte Ltd
v
BIH Pte Ltd

[2024] SGSOP 9

Singapore Mediation Centre — SOP AA 116 of 2024
Nicholas Lazarus
4 June 2024

Adjudication Application *— Evidential burden of proof — Claimant only adducing two photographs as evidence of work performed — Claimant submitting it was respondent who had to prove that third parties had done the work claimed by claimant, rather than claimant having to prove that they had performed the work on* prima facie *basis — Whether claimant adduced* prima facie *evidence of work done in adjudication application*

Contract *— Nature — Whether subcontract was lump sum contract or measurement contract*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 12(5), 13, 15(1), 17(1)(*b*), 30(2), 31(1)

Claimant in person;
Sarbjit Singh, Luis Duhart and Dupinderjeet Kaur (Selvam LLC) for the respondent.

[Commentary: see para 5.1]

4 June 2024

Nicholas Lazarus:

Determination

1 This is a determination made on 4 June 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("Act") in respect of Adjudication Application No SOP/AA 116 of 2024 ("AA"). This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the Act.

2 The claimant is [BIG] Pte Ltd ("Claimant") and the respondent is [BIH] Pte Ltd ("Respondent") (collectively, "Parties").

3 For the reasons which are set out in my determination below, I determine the following:

(a) the Claimant's AA herein is dismissed; and

(b) the costs of the adjudication, namely, the application fee of $654 (inclusive of 9% goods and services tax ("GST")) payable to the SMC and the adjudicator fee of $8,175 (inclusive of 9% GST) shall be borne entirely by the Claimant.

Record

4 With the view to save time and to avoid incurring unnecessary expense, I have not recorded each and every fact and argument presented and considered by me in arriving at my determination. Nevertheless, the present record is sufficient, in my view, to reflect (a) the substance of the respective cases as canvassed by the Parties; and (b) the principal issues on which I consider the result of the adjudication determination turns. It should not be assumed that any evidence or argument which had not been specifically recorded herein had not been taken into account in arriving at my determination.

Factual background

5 The Respondent is the main contractor for the construction of the proposed [xxx] Centre at [xxx] ("Project").

6 The Claimant was initially engaged as a subcontractor for the Project by way of a letter of acceptance dated 21 December 2021.

7 Subsequently, the Claimant was engaged as a subcontractor by way of a second letter of acceptance dated 7 April 2022.

8 This second letter of acceptance dated 7 April 2022 with document reference: [xxx] can be found in Annex F of the AA and comprised the Claimant's quotation, measurement form and drawings ("Subcontract"). There was a dispute between the Parties as to whether the Subcontract was for a lump sum or based on measurement. I shall deal with this issue later.

Payment claim

9 On 15 April 2024, the Claimant served its payment claim ("PC5") on the Respondent for the sum of $250,481.28 (inclusive of 9% GST). The claim in this AA arises from PC5.

10 The service of PC5 is not disputed by the Respondent.

11 A breakdown of the Claimant's claim in PC5 is as follows:

Value of Work Done up to: 21 December 2021 to 31 August 2023:	$ 285,604.46
Variation Orders: Addition:	$ 873,242.00
Sub-Total for work done	$ 1,158,846.46
Less Previous Payments	$ 929,047.12
Amount due and payable (excluding GST)	S$ 229,799.34
Add: GST @ 9%	S$ 20,681.94
Amount due and payable (including GST)	**S$ 250,481.28**

Payment response

12 The Respondent's payment response ("Payment Response") was served on the Claimant on 16 April 2024 certifying that –$64,302.11 (including 8% GST) was payable. The breakdown of the Payment Response is as follows:

Subcontract works:	$1,115,956.13
Less Previous Payments	$1,175,495.12
Amount due and payable (excluding GST)	- $ 59,538.99
Add: GST @ 9%	- $ 4,763.12
Amount due and payable (including GST)	**- $ 64,302.11**

13 The service of the Payment Response is not disputed by the Claimant.

14 The dispute settlement period under s 12(5) of the Act was from 30 April 2024 to 7 May 2024, both dates inclusive taking into account the public holiday on 1 May 2024.

15 Pursuant to s 13 of the Act, the Claimant was entitled to file this AA within seven days after 7 May 2024, the last day being 14 May 2024.

16 Accordingly, on 9 May 2024, the Claimant served its notice of intention to apply for adjudication of even date on the Respondent. This is not disputed by the Respondent.

Adjudication application

17 On 10 May 2024, the Claimant lodged its AA with the SMC, claiming for a sum of $250,481.28 (inclusive of 9% GST).

18 On 13 May 2024, the SMC served the AA on the Respondent.

Appointment of adjudicator

19 On 13 May 2024, the SMC invited me, Nicholas Lazarus, to be the adjudicator for the AA.

20 On the same day (*ie*, 13 May 2024), I accepted the appointment as adjudicator and informed the SMC accordingly. The SMC served on the Parties a copy of my notice of acceptance of appointment as adjudicator on 14 May 2024.

Adjudication response

21 In accordance with s 15(1) of the Act, the Respondent is required within seven days after receipt of a copy of an AA to lodge with the SMC a response to the AA. The Respondent had up to 20 May 2024 to lodge its adjudication response ("AR") with the SMC.

22 By an e-mail dated 20 May 2024 (time-stamped 4.20pm), I was informed by the SMC that the AR was filed on 20 May 2024 and received at 3.43pm.

23 By an e-mail dated 21 May 2024, I received the PDF versions of the AR dated 20 May 2024 from the SMC.

24 As a Payment Response had been issued by the Respondent in respect of the subject payment claim to which the AA relates and also that the Respondent had provided an AR, it follows that the time for the making of the adjudication determination is 14 days from the date of lodgment of the AR as provided under s 17(1)(*b*) of the Act.

25 The due date for the adjudication determination is 4 June 2024 taking into account a public holiday on 22 May 2024 that was subsequently extended by consent of all parties to 7 June 2024.

Parties' documents and written submissions

26 The Claimant's AA is accompanied by the following:

(a) Adjudication Application Form AA-1;

(b) notice of intention to apply for adjudication;

(c) PC5 and Payment Response;

(d) Subcontract Tab C – Claimant's submission and a letter of acceptance dated 21 December 2021;

(e) bundle of quotations for variation works;

(f) past payment claims, payment responses and tax invoices;

(g) correspondence between the Parties; and

(h) documents relating to SOP/AA 043/2024.

27 The Respondent's AR is accompanied by the following:

(a) Respondent's AR submissions;

(b) Adjudication Response Form AR-1;

(c) letter of authority;

(d) Tab 1: Payment Response;

(e) Tab 2: explanation of rates; and

(f) Tab 3:– correspondence.

28 I had called for an adjudication conference ("Adjudication Conference") fixed on 24 May 2024. The Respondent applied to refix the Adjudication Conference to later date that I accommodated. The Adjudication Conference was fixed for 28 May 2024 at 10.00am.

Adjudication Conference

29 The representatives of the Parties at the Adjudication Conference held on 28 May 2024 at 10.00am were as follows:

(a) The Claimant:

(i) Mr [A]: director; and

(ii) Mr [B]: practitioner.

(b) The Respondent:

(i) Mr Luis Duhart: lead counsel;

(ii) Ms Dupinderjeet Kaur: counsel;

(iii) Mr [C]: managing director;

(iv) Mr [D]: project manager;

(v) Ms [E]: senior quantity surveyor; and

(vi) Mr [F]: manager.

30 At the Adjudication Conference, both the Claimant and the Respondent made submissions and were given the opportunity to address questions that I had, with a view to clarifying specific issues which were raised in their respective submissions.

31 I shall elaborate on the clarifications and submissions made by the Parties at a later stage of this adjudication determination. There were no

jurisdictional issues raised by the Respondent in its Payment Response, AR or at the Adjudication Conference.

32 I have considered all the submissions, both oral and written, tendered by the respective Parties in these adjudication proceedings and all of the authorities cited or referred to or produced before me, as well as all of the other materials properly placed before me, so far as I am obliged or permitted to do so under the Act.

33 I now set out the reasons for my adjudication determination.

Grounds for determination

Issues

34 Having considered all the facts and the submissions of the Parties before me, it then appears that the issues to be determined by me in this adjudication are as follows:

(a) whether the Claimant has adduced any *prima facie* evidence of work done for PC5; and

(b) whether the Subcontract was a lump sum contract or a measurement contract.

Whether Claimant has adduced any prima facie evidence of work done for PC5

35 It is trite law that the Claimant must provide *prima facie* evidence of work done in the AA.

36 This was held by the Singapore Court of Appeal in the landmark case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [26], [56] and [57] that an adjudicator "must satisfy himself as to whether the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and, if so, what the value of that work is", and that "an adjudicator should not simply rubber-stamp any payment claim".

37 In the AA, the Claimant has not provided any evidence of work done save for two photographs at Tab 13 Annex G – G13 of 20 pieces of steel delivered to the site and a steel plate cover for grating protection at the site. This cannot be regarded as *prima facie* evidence of the Claimant's works.

38 At the Adjudication Conference, I repeatedly asked the Claimant to point out the evidence of work done in its AA.

39 The Claimant took the position that it was the Respondent to prove the AR that third parties had done the Claimant's works in PC5 rather than for the Claimant to prove the Claimant's works in PC5 on a *prima facie* basis.

40 The Claimant explained that only the Claimant could have done the works claimed in PC5 as it was on a lump sum basis and it was for the Respondent to prove otherwise.

41 Now that the Respondent had set out in its AR the Respondent's evidence of work done (on a measurement basis), the Claimant presented a 76-page PowerPoint presentation at the Adjudication Conference to counter the Respondent. The Claimant went through about 21 pages of this PowerPoint presentation that were more of criticisms of the Respondent's evidence and measurement of work done.

42 So as to save time, I directed that the Claimant submit their 76-page PowerPoint presentation as a PDF version, which the Claimant did. I have since perused the Claimant's 76-page PDF presentation which is entirely a criticism of the Respondent's evidence and measurement of work done rather than evidence of the work done by the Claimant. These criticisms are by way of submissions and by annotations on drawings. There are some photographs produced at the following pages:

(a) Pages 33 to 36, Items 7 and 8: B1, L1 and L3 and L5 ("Chequer Plates Cover & Grating"), dealing with the erroneous omission where the 14 photographs show what is allegedly within the Claimant's scope and what is not. I do not regard this as *prima facie* evidence of the Claimant's work done under PC5 because the Claimant has simply taken the same photographs first produced by the Respondent in its AR Tab 2 "Explanation of Rate" at pp 14 to 20 and annotated their assertions on it.

(b) Page 54, Item 12: "Steel Gates", where it is alleged that all 13 gates were installed but the one photograph only shows two (not 13) gates.

(c) Page 57, Item 13: "Steel Plates". All the 20 pieces of steel plates were delivered and installed with one photograph of steel plates on a trolley. Taken at its highest, this may evidence that such plates may have been delivered but this was not evidence on installation at the site.

(d) Pages 66 to 69: WhatsApp conversation with photographs that deal with complaints of defective works and rectification. Parts of the conversation are in Korean and there is no translation provided.

43 For the above reasons, the Claimant's 76-page PDF presentation is not evidence of the work done by the Claimant.

44 I have perused the AA and find it comprising of submissions, references to legal authority, quotations, e-mail exchanges, correspondence, past payment claims and payment responses. In my view, this was not evidence of work done of PC5 by the Claimant.

45 There is one diagram found at H1 termed "Detailed work o [*sic*] demarcation drawing schedule of [xxx] and variation works". This is simply a drawing of what appears to be the Project site with annotations in red ink. These are simply assertions and cannot be regarded as evidence of work done of PC5 by the Claimant.

46 To establish evidence of work done on a *prima facie* basis, I would expect the Claimant to present in the AA site photographs, site reports or assessments by quantity surveyors of its works done.

47 Save for two photographs at Tab 13 Annex G – G13 of 20 pieces of steel delivered, none of this was provided.

48 Evidence provides the facts while submissions analyse evidence and make arguments about how the law should be applied to those facts. The Claimant cannot introduce evidence through submissions. In any event, the Claimant's submissions whether in the AA or its 76-page presentation are not evidence of work done of PC5 by the Claimant.

49 Just because the Claimant took the position that the Subcontract was on a lump sum basis did not mean that I could assume that it was so. I also do not agree that it was for the Respondent to prove the AR rather than for the Claimant to prove the Claimant's works on a *prima facie* basis. This would go against the ruling by the Singapore Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [26], [56] and [57] which is trite law for all adjudicators.

50 In any event, I shall determine the issue of whether the Subcontract was on a lump sum basis in this determination.

51 Accordingly, I find that the Claimant has failed on a *prima facie* basis to provide evidence of work done. On this basis, the AA is dismissed.

Whether Subcontract was lump sum contract or measurement contract

52 For completeness, and since the Claimant's case rests on the Subcontract being a lump sum contract, I shall deal with this issue.

53 The Respondent's position relied on cl 1(a) of the Claimant's quotation at F4 of the AA that formed part of the Subcontract. It reads: "All quantities are subject to final measurements, unless the price is 'Lump sum' basis and the final construction drawings do not deviate from the Tender drawings."

54 The Claimant submitted that although such clause existed, it was understood by the Parties that the contract was a lump sum contract and the Parties conducted themselves on that basis. It was also submitted that both Parties' command of English was poor and that it was thus unjust to focus on the wording of such clause. Further, the industry practice was that such contract was on a lump sum basis.

55 I had difficulty accepting any of the Claimant's arguments in relation to cl 1(a) as it was clear from the plain and obvious reading that the Subcontract was to be on a measurement basis, save for specific items that were lump sum and that too if the lump sum items did not have a difference in the tender and final drawings.

56 At the Adjudication Conference, I also asked the Claimant why PC5 was structured on a measurement basis. This was because Annex A to PC5 had columns for "Unit Rate" and "Bill of Quantity" that are typically found in measurement contracts. The Claimant conceded that such claims were structured as a measurement contract but stated that this was how the Parties conducted themselves. There was also a concern that the Respondent would reject a payment claim if not structured according to the format.

57 I could not accept the Claimant's arguments. By presenting PC5 on a measurement basis, it was clear that the Claimant was treating the Subcontract as a measurement contract in compliance with cl 1(a). If the Claimant indeed treated the Subcontract as a lump sum contract, there would have been no need for columns for "Unit Rate" and "Bill of Quantity".

58 I also note that the measurement form found at F5 of the Subcontract functions as the bill of quantities. It provides various units, quantities and rates for the works to be carried out. It is only one item under 5.1 for "site management and safety provision" that has "LS" as its unit of measurement. This would mean "lump sum" within the meaning of cl 1(a). The rest of the items are to be measured based on "m-run" and "trip" that are on a measurement basis.

59 As for the variation works, the Claimant produced 12 quotations from G1 to G12 in the AA. Two quotations were signed by the Respondent at G1 and G2. The rest were not signed by the Respondent.

60 More importantly, from a perusal of these quotations, only [xx3] found at G5 was on a lump sum basis.

61 There was another quotation, [xx1], found at G1 that had one item that was on a lump sum basis.

62 Apart from this, all other variations were clearly on a measurement basis.

63 Thus, the manner in which the Claimant presented its PC5 as an entirely lump sum claim was also incorrect. The Claimant should have claimed on a measurement basis for the majority of the items that were on a measurement basis. The Claimant should have provided its measurements in support of these items instead of: (a) claiming as a lump sum; and (b) taking the position that all its works were done when there was no *prima facie* evidence of such works.

Costs

64 The costs of the adjudication would be the application fee of $654 (inclusive of 9% GST) payable to the SMC and the adjudicator fee of $8,175.00 (inclusive of 9% GST).

65 The Claimant failed to provide *prima facie* evidence of work done and thus fails in this AA. The Claimant was also wrong to characterise the Subcontract as an entirely lump sum contract.

66 Even though I have not accepted all of the Respondent's arguments, it is just and equitable that the Claimant bear the costs of the adjudication. Pursuant to ss 30(2) and 31(1) of the Act, I order that the costs of the adjudication shall be borne by the Claimant.

Conclusion

67 In the circumstances, based on the material and authorities submitted to me and having considered the Parties' arguments contained in their written submissions, it is my determination that:

(a) the Claimant's AA herein is dismissed; and

(b) the costs of the adjudication, namely, the application fee of $654 (inclusive of 9% GST) payable to the SMC and the adjudicator fee of $8,175 (inclusive of 9% GST), shall be borne entirely by the Claimant.

BII Pte Ltd
v
BIJ

[2024] SGSOP 10

Singapore Mediation Centre — SOP AA 146 of 2024
Patrick Ong Kok Seng
18 June 2024

Adjudication Application *— Time for lodgment — Whether adjudication application lodged prematurely and non-compliant with s 13(3)(*a*) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") — Whether premature adjudication application invalid and should be rejected under s 16(3)(*a*) SOPA — Sections 13(3)(*a*) and 16(3)(*a*) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Response *— Due date for filing — No payment response filed by respondent — Parties' contract incorporating Singapore Institute of Architects' SIA Building Contract (Without Quantities) 2016 ("SIA Conditions") — Claimant relying on cl 40(2) SIA Conditions to argue that respondent had 21 days to serve its payment response — Parties' contract containing Tender Appendix providing "Period of Issuing Interim Certificates" to be 14 days — Whether respondent had 14 or 21 days to serve its payment response*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 10(2)(*a*)(i), 10(3)(*a*), 11(1)(*a*), 12, 12(2), 12(5), 13(3)(*a*), 15(1), 16(1), 16(3)(*a*), 16(5)(*b*), 17(1)(*a*)(i)

Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)

Monica Neo and Lee Yun Long (Chan Neo LLP) for the claimant;
Respondent in person.

[Commentary: see para 3.4]

18 June 2024

Patrick Ong Kok Seng:

Determination

1 This is a determination ("Determination") made on 18 June 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") and as amended by the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ("Amendment Act") and the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOPR") in respect of Adjudication Application No SOP/AA 146 of 2024 ("AA"). This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nomination body under the SOPA.

2 The claimant is [BII] Pte Ltd (UEN No [xxx]) ("Claimant") and the respondent is BIJ (NRIC No [xxx]).

3 For the reasons set out in the pages which follow, I hereby determine that:

(a) The AA is dismissed.

(b) There is no amount payable by the Respondent to the Claimant under this AA.

(c) The costs of the adjudication, including the adjudication application fee of $654 (inclusive of 9% goods and services tax ("GST")) and the adjudicator fee of $7,684.50 (inclusive of 9% GST), shall be borne 100% by the Claimant.

Record

4 By way of a letter of acceptance (Ref No [xxx]) dated 27 July 2021 ("LOA"), [A] Pte Ltd was engaged by the Respondent for the works to the project ("Project") known as the "Proposed New Erection of 2-storey Envelope Control Semi-Detached Dwelling House with an Attic on Lot [xxx] at [xxx]" ("Contract"), for the lump sum of $2,178,000 (excluding GST) ("Contract Sum").

5 The Respondent, [BIJ], is the owner of [xxx] and the employer for the Project ("Owner").

6 At cl 2.1 of the LOA, it is stated that the Contract between [A] Pte Ltd and the Respondent is a lump sum contract and the prices in "Preliminaries", "Main Building Works" and "M & E Works" are fixed, not subject to fluctuations in the prices of materials, goods or any other

constituent part of the works ("Works"), or to measurement or recalculation should the actual quantities of work and/or materials (unless otherwise provided) differ from any estimates available to or submitted by the contractor at the time of contracting, except in regard to variations which may be ordered by the architect, which shall be valued in accordance with the terms of the Contract.

7 Clause 2.2 of the LOA states that the form of contract is the Singapore Institute of Architects SIA Building Contract (Without Quantities) 2016 ("SIA Conditions").

8 Subsequently, by way of a novation agreement dated 27 June 2023 ("Novation Agreement") between the Owner, [A] Pte Ltd and the Claimant, it was agreed between the parties that the Claimant shall be "substituted in place of [[A] Pte Ltd] as if the Claimant was the original party to the Contract with the Owner instead of [[A] Pte Ltd]".

9 At cl 2.1 of the Novation Agreement, the Claimant confirmed "receipt of copies of the Contract Documents and hereby undertakes to assume, observe and perform all of the obligations, conditions, duties and liabilities as set out in the Contract Documents in all respect as if the [Claimant] had been a party to the Contract Documents in place of the Original Contractor".

10 I am satisfied that the Contract (read together with the Novation Agreement) is a construction contract within the meaning of the SOPA.

Payment claim

11 On 26 April 2024, the Claimant served its Progress Claim No 31 ("PC 31") on the Respondent by e-mail for the claimed amount of $419,794.89 (inclusive of GST).

Payment response

12 Based on the information in the Adjudication Application Form AA-1, no payment response was served by the Respondent.

Adjudication proceedings

13 On 31 May 2024, the Claimant served its notice of intention to apply for adjudication ("NOI") on the Respondent. On the same day, the Claimant lodged this AA. The AA was accompanied by a set of the Claimant's written submissions ("AA Submissions") and other supporting documents.

14 On 3 June 2024, a copy of the AA was served on the Respondent by the SMC.

15 Under s 15(1) of the SOPA, a respondent shall lodge its adjudication response within seven days after receipt of a copy of an adjudication application (*ie*, by 10 June 2024). Therefore, the period for the Respondent to lodge its adjudication response was from 4 June 2024 to 10 June 2024.

16 I was informed by the SMC that no adjudication response had been lodged with the SMC as at 10 June 2024.

Appointment of adjudicator

17 On 4 June 2024, the SMC formally referred this AA to me. I accepted the appointment of adjudicator on the same day.

18 On 4 June 2024, the parties were notified by the SMC of my appointment as adjudicator.

Commencement of adjudication

19 Section 16(1) read with s 15(1) of the SOPA provides that the adjudication commences immediately upon the expiry of the period within which the Respondent may lodge its adjudication response. As such, this adjudication commenced on 11 June 2024.

Record of proceedings and due date for determination

20 On 11 June 2024, I wrote to both parties, the relevant extracts of which are reproduced below:

> … Pursuant to Section 16(1) of the Act, the adjudication would commence on 11 June 2024. Under Section 17(1)(*b*) of the Act, my determination would be due on 18 June 2024 or such longer period as requested by the Adjudicator and agreed by parties. If parties have a different understanding of the timelines, [either] party may address me on the same.
>
> Notwithstanding that no AR has been served by the Respondent, I would like to convene an adjudication conference to allow parties to be heard and in relation to some queries I have *on 17 June 2024 at 9.30am* (via Zoom link), provided parties are agreeable to my request to extend time for the Determination to be rendered *by 26 June 2024*. In this regard, I would appreciate if parties could let me know *by no later than 10am of 12 June 2024 tomorrow* if parties are available for the conference on 17 June 2024 and if parties agree to the extension of time for the Determination to be rendered by 26 June 2024.

> If parties cannot agree to extend the due date for the Determination as aforesaid, I will proceed to issue fresh directions.
>
> [emphasis in original]

21 As I did not receive any response from any of the parties by 10.00am of 12 June 2024, I wrote to both parties again on 12 June 2024 (timestamped 11.33am), the relevant extracts of which are reproduced below:

> … To-date, I have yet to receive any response from parties. Please let me hear from parties *by no later than 3 pm of today, 12 June 2024*. If I do not receive a positive confirmation from both parties on the issues raised in my email of 11 June 2024, I will proceed to issue fresh directions for the conduct of this adjudication by today.
>
> Separately and on the issue of timelines, the Determination should be due on *19 June 2024* (and not 18 June 2024) or such longer period as requested by the Adjudicator and agreed by parties as I had not taken into consideration, the gazetted Public Holiday on 17 June 2024. Again and if parties have a different understanding of the timelines, ether party may address me on the same.
>
> [emphasis in original]

22 For completeness and under the provisions of s 17(1)(*a*)(i) of the SOPA, the Determination would be due within seven days after the commencement of adjudication as the Respondent had failed to make a payment response and to lodge an adjudication response by the commencement of adjudication unless an extension of time for the rendering of the Determination had been requested by the adjudicator and agreed to by *both* the Claimant and the Respondent. In the absence of any agreement for extension of time for the Determination to be rendered, my Determination would be due on 19 June 2024.

23 By 3.00pm of 12 June 2024, I received a response from the Claimant's solicitors, stating as follows:

> … We note that the Adjudication Conference has been fixed on 17 June 2024. However, we note that 17 June 2024 is a public holiday. Accordingly, we would like to request for the Adjudication Conference to be held on another day. Please note that for next week, we are unavailable on 20 June 2024 and 21 June 2024.

24 However, no reply was received from the Respondent by 3.00pm of 12 June 2024. Accordingly, I wrote to the parties on 12 June 2024 (timestamped 4.21pm), the relevant extracts of which are as follows:

> … I thank the Claimant's counsel for their email of today's date.

> As no response has been forthcoming from the Respondent to-date and due to the constraints of time in having to issue the Determination by 19 June 2024, I shall proceed to adjudicate the matter based on the materials before me and no adjudication conference will be held.

25 In accordance with my directions of 12 June 2024, I proceeded to adjudicate the matter based only on the materials before me, with a view to issuing the Determination on or before 19 June 2024.

26 In the light of the foregoing and pursuant to s 17(1)(*a*)(i) of the SOPA as aforesaid, my Determination would be due on 19 June 2024. In the circumstances, I also did not consider it necessary or practicable to convene an adjudication conference due to time constraints and the Respondent's unresponsiveness/reticence in the adjudication proceedings or to agree to an extension of time for the Determination to be issued to accommodate any proposed conference. Further, the Respondent had also not served any payment response or lodged any adjudication response to state its case against the Claimant's claim in PC 31.

27 On that basis, I proceeded to adjudicate the matter based on the materials properly before me.

Preface

28 In arriving at this Determination, I have considered all the materials, documents and submissions placed before me and in so far as I am obliged or permitted to do so under the SOPA. For completeness, these include the following:

(a) the AA and the AA Submissions;

(b) all supporting documents submitted by the Claimant in the AA; and

(c) all legal authorities submitted by the Claimant in the AA.

29 With a view to avoid incurring unnecessary costs and to save time, I have only recorded the facts and law relevant to arriving at my Determination. It should not be assumed that where a fact or argument that was canvassed but not recorded herein, it was not given due consideration and taken into account in arriving at my Determination.

My Determination

Relevant timelines for lodgment of adjudication application

30 Notwithstanding the absence of any jurisdictional objections raised by the Respondent, I have an incumbent duty to decide if the adjudication

application is made in accordance with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the SOPA. The Court of Appeal stated in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [64]:

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

31 Section 13(3)(*a*) of the SOPA provides that "[a]n adjudication application must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12". The entitlement to make an adjudication application under s 12 of the SOPA would, in turn, be set out at s 12(2) of the SOPA, which provides as follows:

> (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 mentioned 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.

Time for making payment claims

32 Section 10(2)(*a*)(i) of the SOPA provides that "[a] payment claim must be served not later than the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection".

33 It is expressly provided at cl 2.4.1 of the LOA that the contract documents shall comprise, *inter alia*, the following:

(a) the LOA;

(b) final tender offer submitted via e-mail on 27 July 2021;

(c) the priced tender documents and all terms and conditions stated in the documents and all corrigendum and addendum from all consultants issued;

(d) all e-mails, correspondences, clarifications and replies from all consultants and contractors during pre- and post-tender stage, including the tender drawings (architectural, C&S, BQ) issued by [B] Pte Ltd on 10 June 2021, which includes Tender Addendums No 01 and post Tender Addendums Nos 01– 05; and

(e) confirmation regarding [xxx] aluminium works which was included in the final tender pricing issued by [B] Pte Ltd via e-mail on 27 July 2021;

34 As stated at [7] above, cl 2.2 of the LOA states that the form of contract shall be the SIA Conditions.

35 On the date for making payment claims, cl 40(2) of the SIA Conditions provides:

> The Contractor shall be entitled to serve a payment claim as defined in Section 10 of the SOP Act within and inclusive of the 25th to 28th calendar day of each calendar month.

36 Based on a literal interpretation of cl 40(2) of the SIA Conditions, it would appear that a payment claim may be served "within and inclusive of the 25th – 28th calendar day of each calendar month". In other words and under cl 40(2) of the SIA Conditions, a payment claim may be served between the 25th–28th day of each calendar month.

37 On the other hand, S/N 10.1 of the Appendix of the tender document ("Tender Appendix") provides that the "Dates For Making Payments Claims" is the "Last Date of Month". At the top of the Appendix, it is further stated:

> TO BE READ IN CONJUNCTION WITH:
>
> ARTICLES AND CONDITIONS OF BUILDING CONTRACT SIA 2016
>
> (Updated July 2017)
>
> (APPLICABLE TO MAIN CONTRACTOR AND NOMINATED SUB CONTRACTOR)
>
> (Note: In times of discrepancies between the rest of the section of Tender Document with the following terms in this page, the terms in this page shall take precedence)

38 For completeness, Art 10(1) of the SIA Conditions also provides that in respect of the contract documents:

(a) they shall be read and construed as a whole;

(b) no special priority other than that accorded by law shall apply to any one document or group of documents; and

(c) the contra proferentem rule shall not apply either to these Articles or to the Conditions of the SIA Building Contract 2016.

39 As may be seen from the foregoing paragraphs, there appears to be an apparent conflict on the time for submission of payment claim under the Contract; namely, between the 25th–28th day of each calendar month (pursuant to cl 40(2) of the SIA Conditions) and the last day of the month (pursuant to S/No 10.1 of the Tender Appendix). The date for the making of payment claims under the Contract is an issue which arises for my determination as this is relevant to the ultimate question of the relevant timelines for the lodgment of the adjudication application under s 13(3)(*a*) of the SOPA.

40 Based on the Claimant's own stated case in its AA Submissions, the Claimant submitted that using the maxim of contractual interpretation of *generalia specialibus non derogant*, *ie*, where there is a conflict between general and specific provisions, the specific provisions prevail and the date for making a payment claim should be the last date of the month, *ie*, 30 April 2024 as this is a specific term drafted by the Respondent.

41 I agree with the Claimant's submissions. There can be no dispute that the Tender Appendix forms an integral part of the contract between the parties and this is also recorded in the LOA at cl 2.4(c); namely, the "priced tender documents and all terms and conditions stated in the documents and all corrigendum and addendum from all consultants issued". In this respect, S/No 10.1 of the said Tender Appendix specifically states the "Date for Making Payment Claims" to be the "Last Date of Month".

42 As is typical of the SIA standard form contracts, it is also noteworthy that the same Tender Appendix also contains other specific terms relating to the Contract between the parties, *eg*, rate of liquidated damages per day, retention percentages, maintenance period, contract period, *etc*. From my perusal of the LOA, these other specific terms in the Tender Appendix are also contained in and set out in the LOA.

43 There are also no "precedence" clauses in any of the documents forming part of the Contract. In this respect, the closest equivalent of a "precedence" clause may be found in the said Art 10 of the SIA Conditions which provides in Art 10(1)(b) that no special priority shall be accorded to any document/group of documents unless accorded by law.

44 Accordingly and in such circumstances, I agree with and accept the Claimant's submissions that the principle of *generalia specialibus non derogant* would apply. Although this is strictly speaking a maxim of statutory

construction, the High Court of Singapore has endorsed the basic principle of contract law that "where there are inconsistencies in the terms contained in related contracts, specific terms override general terms, and supersede or vary them to the extent of their inconsistencies, unless there is an express hierarchy of precedence that provides otherwise" (see *Sintalow Hardware Pte Ltd v OSK Engineering* [2017] 2 SLR 372 at [119(b)]).

45 As there is no precedence clause that provides otherwise, the specific term in the Tender Appendix governing the date for service of payment claims would prevail; namely, on the last day of the month. As such, I find and determine that the date for service of the payment claim for the purpose of s 10(2)(*a*)(i) of the SOPA to be the last day of the month, being the time specified in the Contract between the parties.

46 In this case, PC 31 was served on the Respondent by e-mail on 26 April 2024. However, s 10(3)(*a*) of the SOPA also provides as follows:

> (3) In subsection (2) —
>
> (*a*) a payment claim that is served before the date or last day mentioned in subsection (2)(*a*)(i) is deemed to have been served on that date or day, as the case may be; …

47 As the last day of the month of April 2024 would be 30 April 2024, I agree with the Claimant that pursuant to s 10(3)(*a*) of the SOPA, PC 31 would be deemed served on 30 April 2024 and I so determine.

Time for providing payment response

48 In relation to the time for making a payment response, s 11(1)(*a*) of the SOPA provides:

> **Payment responses, etc.**
>
> **11.**—(1) A respondent named in a payment claim served in relation to a construction contract must respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the *date as specified in or determined in accordance with the terms of the construction contract*, or within 21 days after the payment claim is served under section 10, whichever is the earlier; …
>
> [emphasis added]

49 According to the Claimant, the Respondent had 21 days to provide a payment response or up until 21 May 2024 to provide a payment response. This is because cl 40(3) of the SIA Conditions provides:

> The Employer shall be entitled to serve a payment response as defined in the Section 11 of the SOP Act within 21 *calendar* days of receipt of the aforesaid payment claim from the Contractor. [emphasis added]

50 As such, the Claimant's case is that pursuant to s 12(5) of the SOPA, the dispute settlement period would run from 22 May 2024 to 29 May 2024 (taking into account one public holiday on 22 May 2024) and the Claimant would be entitled to file the adjudication application from 30 May 2024 to 6 June 2024.

51 Having considered the Claimant's AA Submissions and the documents before me, I do not agree that the Respondent had 21 days to serve its payment response within the meaning of s 11(1)(*a*) of the SOPA. In my view, the Respondent had 14 days to serve its payment response in relation to PC 31 (which was deemed served on 30 April 2024). I now set out my reasons below.

52 Firstly, I find that the same Tender Appendix does contain a specific term for the service of a payment response which is set out in S/No 11.1 of the Tender Appendix as follows:

S/No.11.1	Period for Issuing Interim Certificates	31(3)	14 days

53 Based on the Claimant's own stated case in reliance on the maxim of *generalia specialibus non derogant* to determine the date for service of payment claims under the Contract, the specific provisions in the contract (S/No 11.1 of Tender Appendix) would override the general provisions of the contract (cl 40(3) of the SIA Conditions). In this respect, the Claimant cannot approbate and reprobate its case on the interpretation of the Contract documents to suit its own needs nor has any explanation been given by the Claimant in its AA Submissions as to why the maxim of *generalia specialibus non derogant* would not apply when determining the date for service of a payment response under the Contract. In the same light, I am also unable to accept the proposition that the Tender Appendix provides for the date of service of payment claims but not for the date of service of payment responses, which must be construed separately from cl 40(3) of the SIA Conditions. In my view, this would lead to an incongruent and inconsistent interpretation of the terms of the Contract. Indeed, even S/No 10.1 of the Tender Appendix itself (titled "Dates for Making Payment Claims") expressly refers to cl 31(2) of the SIA Conditions which is itself titled "Payment of Contractor and Interim Certification". Since it is the Claimant's own case that the date for service of payment claims is to be derived from the Tender Appendix (*ie*, the last day of the month), this shows that the Claimant itself accepted that a payment claim is, for all intents and purposes, the same as an interim progress claim (see

cl 31(1)(b)(ii)), for which interim valuation shall be carried out by the architect under cl 31(2)(a) of the SIA Conditions.

54 Secondly, and in so far as it may be contended that S/No 11.1 of the Tender Appendix is inapplicable as it applies only to *interim certificates* and not to payment responses (which are expressly covered under cl 40 of the SIA Conditions ("Statutory Adjudication Under SOP Act"), I do not accept the same. I should also add for context that cl 31 of the SIA Conditions (which is referred to in S/No 11 of the Tender Appendix) is under the heading of "Payment of Contractor and Interim Certification". Specifically, cl 31(1)(a) of the SIA Conditions provides as follows:

> Clause 31 contains only the contractual provisions for payment and not provisions relating to the Building and Construction Industry Security of Payment Act ('SOP Act') on timelines for the issuance of payment claims and payment responses which shall be set out in Clause 40 below.

55 In so far as it is suggested that cl 31 and cl 40 of the SIA Conditions create a "dual railroad track system" for progress payments; *ie*, a contractual entitlement to payment which is separate and distinct from a statutory entitlement to payment under the SOPA, this has since been decisively rejected by the Singapore Court of Appeal in *Shimizu Corp v Stargood Construction Pte Ltd* [2021] 1 SLR 1338 ("*Shimizu Corp*"). As stated by the Court of Appeal at [31] of *Shimizu Corp*, having two payment regimes existing side by side would create intolerable uncertainties and there is no question of election under the SOPA. Moreover, the SIA Conditions in question were published in 2016 (updated July 2017), which was well before the decision by the Court of Appeal in *Shimizu Corp*.

56 Further, it is also clear from the LOA itself that a *payment certificate* may also operate as a payment response. In this respect, cl 2.3.9 of the LOA provides that:

> The payment certificate issued in response to the Contractor's payment claim in Clause 31 of the Form of Contract shall be deemed the Employer's payment response where no further payment response is issued by the Employer following issue of payment certificate.

57 That said, I would only observe/comment that I am unable to see how cl 2.3.9 of the LOA would operate for the purposes of this Contract as the applicable standard form SIA Conditions herein is the Singapore Institute of Architects SIA Building Contract (Without Quantities) 2016, which only appears to contain provisions for certification by the architect (with no separate certification obligations by the employer). This is unlike other editions of the SIA standard form contracts, *eg*, the SIA Articles and Conditions of Main Contract (Lump Sum Contract) (9th Ed, 2010), where there is interim certification by architect within 14 days (cl 31(3) and

certification by employer of the payment response within 21 days (cl 31(15)).

58 Moreover and as stated above, I find the valuation and certification mechanism for interim certificates/payment certificates by the architect under cl 31 of the SIA Conditions to be the same, for all intents and purposes, as a payment response under the SOPA. Apart from cl 31, there is no separate valuation and certification mechanism of payment claims for the purposes of the SOPA in the SIA Conditions. I find this to be reinforced by the Claimant's own reliance on the Respondent's previous responses in Interim Certificate No 28 ("IC 28") and Recommendation for Interim Certificate No 29 ("RIC 29") in support of the claimed amounts in this adjudication. Indeed, IC 28 is stated by the architect to be issued pursuant to cl 31(3) of the SIA Conditions.

59 In summary, I find and determine that the reference to "Period for Issuing Interim Certificates – 14 days" at S/No 11.1 of the Tender Appendix to refer to the specific contractual requirement to issue a payment response within 14 days of being served with a payment claim.

60 I note that 1 May 2024 is a gazetted public holiday in Singapore. However, there is no definition of "day" in the Contract or in the SIA Conditions and whether the 14 days in the Tender Appendix includes or excludes public holidays. However, I am aware that the High Court had, in *Trustee of the estate of Tay Choon Huat, deceased v Soon Kiat Construction & Maintenance Pte Ltd* [2021] 3 SLR 1005 ("*Tay Choon Huat*"), decided that the word "day" in cl 31(15) of the SIA Lump Sum Contract (9th Ed) *included* public holidays and that "the drafters of the SIA Conditions made a deliberate decision not to incorporate the definition of 'day' in the SIA Conditions".

61 I respectfully agree with the High Court's decision in *Tay Choon Huat* and I find that the period for the Respondent to serve its payment response ran from 1 May 2024 to 14 May 2024, including the public holiday on 1 May 2024.

Time for lodgment of adjudication application

62 As I have determined that pursuant to the terms of the Contract (and s 11(1)(*a*) of the SOPA) that the Respondent would have 14 days after the service of a payment claim to submit a payment response, I find the applicable timelines for this adjudication to be as follows:

Event	Applicable SOPA provision	Date / Period
Service of PC 31	s 10(2)(*a*)/10(3)(*a*)	30 April 2024 (deemed service)

Timeline to serve payment response	s 11(1)(*a*)	1 May 2024 – 14 May 2024
Dispute settlement period	s 12(5)	15 May 2024 to 21 May 2024
Day on which the Claimant's entitlement to make the AA first arose (see *HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298)	s 13(3)(*a*)	23 May 2024 (excluding public holiday on 22 May 2024)
Period during which the Claimant is entitled to lodge an adjudication application	s 12(2) read with s 13(3)(*a*)	24 May 2024 to 30 May 2024
Lodgment of AA		31 May 2024

63 As the AA was lodged on 31 May 2024, the AA was premature (by one day) and non-compliant with s 13(3)(*a*) of the SOP Act. As was made clear by the High Court in *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226 at [44] and [45], a premature adjudication application is invalid and an adjudication determination made pursuant to a premature adjudication application would be set aside by the courts:

> 44 While indeed the assistant registrar in *Shin Khai* was referring to adjudication applications which had been lodged late, the need for certainty and an unambiguous test under s 13(3)(*a*) of the Act should apply equally to premature adjudication applications.
>
> 45 I therefore find and hold first, that there is no entitlement to make an adjudication application during the dispute settlement period and any such application is an invalid adjudication application. Secondly, I find that in such an event, the court is entitled, as part of its supervisory jurisdiction, to set aside an adjudication determination which has been rendered pursuant to a premature adjudication application in breach of ss 12(2) and 13(3)(a) of the Act.
>
> [emphasis added]

64 In the circumstances, I am compelled and bound by s 16(3)(*a*) of the SOPA which makes it mandatory for an adjudicator to reject any adjudication application that is not made in accordance with s 13(3)(*a*) of the SOP Act. This was further explained in *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 4 ("*Shin Khai*") at [26]–[28]:

> 26 But, be that as it may, whether s 13(3)(*a*) should be read to be directory or mandatory ultimately turns, as the Court of Appeal in *Chua Say Eng* …emphasises, on the legislative intent. *In this regard, s 16(2) in stating that the adjudicator 'shall reject' the adjudication application if there has been*

> *a breach of s 13(3)(a) uses clear language which demonstrates that the legislative intent is for s 13(3)(a) to be treated a[s] mandatory.*
>
> 27 Furthermore, s 16(2) is directed at the adjudicator. If s 13(3)(a) was directory and not mandatory, an intolerable uncertainty which would considerably compromise the regime under the Act would be introduced. The adjudicator would be called upon to decide when an application is late but forgivable so as to accept the adjudication application, and late and unforgivable so as to reject it. In the continuum of time, apart from the extreme cases, there would be little predictability and considerable uncertainty as to where such a distinction will lie. In contrast, if s 13(3)(a) was mandatory, the certainty introduced by the bright line test in s 13(3)(a) which excludes any adjudication application outside of the seven-day window period leaves no room for doubt and is more consistent with and emblematic of the regime.
>
> 28 For these reasons, I conclude that an adjudication determination may be set aside if there has been a breach of s 13(3)(*a*), however slight the breach.
>
> [emphasis added]

65 I should also mention that the case of *Shin Khai* has since been cited with approval in various subsequent High Court cases, including *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 and *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852.

66 As such, I dismiss the AA entirely on the jurisdictional ground that it was prematurely lodged and in breach of the mandatory requirements of s 13(3)(*a*) of the SOPA.

Merits of the claim

67 I am guided by s 16(5)(*b*) of the SOPA that an adjudicator shall avoid incurring unnecessary expense. As I have already dismissed the AA on a point of jurisdiction, I will not go further to consider the merits of PC 31 in the interests of saving time and costs for parties.

68 As this AA has been dismissed on jurisdictional grounds and has not been adjudicated on its merits, the Claimant is at liberty to commence fresh adjudication proceedings or other forms of dispute resolution proceedings if the disputes on payment cannot be resolved between the parties.

Adjudicated amount

69 As I have dismissed this AA on jurisdictional grounds, it follows that no amount is payable by the Respondent to the Claimant.

Costs of the adjudication

70 In view of the dismissal of the AA, I determine that the costs of the adjudication, being the adjudication application fee of $654 and the adjudicator fee of $7,684.50 (each inclusive of 9% GST) be borne 100% by the Claimant.

BIK Pte Ltd
v
BIL

[2024] SGSOP 11

Singapore Mediation Centre — SOP AA 149 of 2024
Kishan Pillay
17 July 2024

Adjudication Application — *Documents* — *Claimant failing to include copy of Singapore Institute of Architects' Articles and Conditions of Contract for Minor Works 2012 in adjudication application* — *Whether adjudication application should be accepted notwithstanding non-compliance with s 13(3)*(c) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)* — *Sections 13(3)*(c) *and 16(4) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Adjudicator — *Challenge against adjudicator* — *Conflict of interests* — *Claimant's counsel requesting replacement adjudicator based on fact that adjudicator was acting against him in separate dispute* — *Whether risk of perceived conflicts of interest existed*

Jurisdiction — *Jurisdictional objections* — *Whether contract in relation to residential property falling within Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)* — *Section 4(2)*(a) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim — *Assessment* — *Respondent submitting that various defects not satisfactorily rectified by claimant* — *Dispute as to level of completion of works* — *Whether works considered completed* — *Amount claimant entitled to be paid for items of work*

Payment Claim — *Release of retention sums* — *Retention moneys payable at expiry of defects liability period* — *Respondent submitting works not substantially completed and thus defects liability period had not commenced and retention moneys not due* — *Whether retention moneys should be released on basis that contract had been terminated*

Payment Claim — *Validity* — *Payment claim served after contract terminated* — *Whether payment claim invalid* — *Whether s 4(2)*(c) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) applicable* — *Whether cll 23 and 25 Singapore Institute of Architects' Articles and Conditions of Contract for Minor Works 2012 applied to disentitle claimant from serving payment claim post-termination* — *Section 4(2)*(c) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 4(1), 4(2)(*a*), 4(2)(*c*), 8(5), 12(6), 13(2), 15(3), 16(1), 17(4)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) reg 7(2)(*d*)

Building Control Act 1989 (2020 Rev Ed)

Charles Lim and Nilesh Khetan (Shook Lin & Bok LLP) for the claimant;
Josh Samuel Tan Wensu (Cecil Law LLC) for the respondent.

[Commentary: see para 5.28]

17 July 2024

Kishan Pillay:

1 This is an adjudication determination ("Adjudication Determination") made on 17 July 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act"), in respect of Adjudication Application No SOP/AA 149 of 2024 ("Adjudication Application"). SOP/AA 149 of 2024 is the reference number assigned by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant in this matter is [BIK] Pte Ltd ("Claimant" or "[BIK]"). The respondent in this matter is [BIL] ("Respondent").

3 For the reasons set out below, I determine that:

(a) The Respondent shall pay to the Claimant the sum of $36,898.14 (including 9% goods and services tax ("GST")), which is hereby recorded as the adjudicated amount ("Adjudicated Amount").

(b) The date on which the Adjudicated Amount is due is seven days from the date that the Adjudication Determination is served on the Respondent ("Due Date").

(c) Interest shall be paid by the Respondent at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid as at the Due Date until the said is paid.

(d) The Claimant and the Respondent shall each bear 50% of the costs of the adjudication, such costs comprising the adjudication application fee of $654 (including 9% GST) and the adjudicator fee of $6,234.80 (including 9% GST).

Background

4 Pursuant to a quotation dated 5 September 2022 ("Quotation"), the Respondent engaged the Claimant to design, supply and install a stainless steel pool at his residence at [xxx] ("Works").

5 The Quotation provides that the Claimant shall be paid the total sum of $468,420 (excluding GST) for the Works ("Contract Sum"), in the following manner:

> Payment Terms:
> 20% Upon appointment
> 10% Upon competion of excavation works
> 10% Upon completion of ground slab
> 30% Upon completion of pool structure
> 10% Upon completion of cladding works
> 10% Upon completion of tiling works
> 5% Upon completion of M&E works
> 5% At the end of Defects Liability Period (12 months from pool testing and commissioning)

6 The Quotation further states that "Parties have agreed that the terms and conditions of this project shall be in accordanec [*sic*] to SIA minor works contract 2012". On this note, the parties have both adopted the position that this provision serves to incorporate in the contract between the parties ("Contract") the Singapore Institute of Architects' Articles and Conditions of Contract for Minor Works 2012 ("SIA Minor Works COC").

7 For completeness, I am satisfied, and I also understand that there is no dispute by either party, that the letter of acceptance ("LOA") is a construction contract made in writing within the meaning of ss 2 and 4(1) of the SOP Act.

Procedural history

8 On 3 May 2024, the Claimant served on the Respondent a payment claim for the sum of $71,911.12 (including 9% GST) ("Payment Claim").

9 In accordance with cl 25(1)(b) of the SIA Minor Works COC, and as confirmed by the Respondent in the adjudication response submissions, the Respondent was required to serve a payment response within 21 days, *ie*, by 24 May 2024. On 24 May 2024, the Respondent served on the Claimant its payment response with a "nil" response amount.

10 The dispute settlement period under s 12(6) of the SOP Act expired on 31 May 2024.

11 On 6 June 2024, the Claimant sent to the Respondent a notice of intention to apply for adjudication pursuant to s 13(2) of the SOP Act.

12 On 7 June 2024, the Claimant lodged with SMC its Adjudication Application in respect of the Payment Claim, claiming the sum of $68,561.12 (including 9% GST). The Adjudication Application includes the Claimant's written submissions and a bundle of documents.

13 By an e-mail dated 10 June 2024, the SMC invited me to be appointed as the adjudicator ("Adjudicator") for this adjudication. On the same day: (a) I accepted the appointment as Adjudicator and sent to the SMC my signed statement of acceptance and declaration of impartiality and independence; and (b) the SMC notified both parties of my appointment.

14 I am informed by the SMC that the Adjudication Application was served on the Respondent on 10 June 2024. In accordance with s 15(1) of the SOP Act, the Respondent was required to lodge with the SMC its response to the Adjudication Application within seven days after receipt of the Adjudication Application, *ie*, by 18 July 2024 (taking into account the Hari Raya Haji public holiday on 17 June 2024).

15 On 18 July 2024, the Respondent lodged with the SMC its response to the Adjudication Application ("Adjudication Response"). The Adjudication Response includes the Respondent's written submissions ("AR Submissions") and various supporting documents.

16 Pursuant to s 16(1) of the SOP Act, the present adjudication commenced immediately upon the expiry of the period within which the Respondent was able to lodge an adjudication response. The adjudication therefore commenced on 19 June 2024. Accordingly, subject to any extension agreed by the parties, the Adjudication Determination would be due on 3 July 2024.

Claimant's request for replacement of adjudicator

17 I pause here to outline a peripheral matter.

18 After the parties were informed of my appointment as Adjudicator on 10 June 2024, in the evening on the same day, the Claimant's counsel sent an e-mail (addressed to me and copying the Respondent and the SMC) to request that I reconsider my appointment. As stated in this e-mail, the Claimant's counsel's request was based on the fact that I am acting across from him in a separate dispute ("Other Matter"), and that due to the nature of certain correspondence from him to me in the Other Matter, there may therefore be "a risk of perceived conflicts of interest" on my part as Adjudicator in the present adjudication.

19 On 11 June 2024, I informed the Claimant's counsel by e-mail that I have carefully considered the request, and that it is not apparent to me how a reasonable apprehension of bias (perceived or otherwise) arises in these circumstances. I further stated in this e-mail that I am prepared to further

consider my appointment should he wish to further articulate his client's doubts or concerns, and I am in any event happy to allow the SMC to make a determination on this issue in accordance with r 6 of the SMC Adjudication Rules (10th Ed, 2024) ("SMC Adjudication Rules").

20 Thereafter, the Claimant (through its counsel) sent a letter to the SMC dated 12 June 2024 with a request that a replacement adjudicator be appointed in accordance with r 6 of the SMC Adjudication Rules ("Claimant's Replacement Request"). In this letter, the Claimant further articulated that the correspondence from its counsel to me in the Other Matter "may engender ill-feeling or bias [on my part] against its counsel, whether such feeling may be conscious or unconscious". The Claimant also cited rr 2.1, 3.2 and 8.1 of the Code of Conduct for Adjudicators as being relevant. It should be noted that in the Claimant's Replacement Request, the Claimant emphasised that it was in no way casting aspersions on me or contending that I will be driven by actual bias in discharging my obligations in this adjudication.

21 The Claimant's Replacement Request was forwarded to me by the SMC on 13 June 2024.

22 On 14 June 2024, I sent to the SMC my response to the Claimant's Replacement Request in accordance with r 6.2 of the SMC Adjudication Rules. In my response, I addressed the points raised in the Claimant's Replacement Request, and stated my position that: (a) none of the matters raised by the Claimant could reasonably lead to a conclusion that I may be biased in discharging my obligations as an adjudicator in the present adjudication; and (b) I am happy to abide by the SMC's determination as to whether the matters raised in the Claimant's Replacement Request amount to a valid disqualifying matter under r 6 of the SMC Adjudication Rules.

23 Also on 14 June 2024, the Respondent's counsel wrote to the SMC to state that the Respondent will leave this issue to the SMC for the SMC's determination.

24 On 20 June 2024, the SMC informed the parties and me that it had conferred with the Construction Adjudicator Accreditation Committee ("CAAC"), and that based on the remarks by the CAAC, the SMC takes the position that I will remain appointed as Adjudicator in this matter.

25 For completeness, neither party has further raised or addressed this issue following the SMC's communication of its decision.

Adjudication proceedings

26 By an e-mail dated 21 June 2024, I wrote to the parties to inform them of my decision to convene an adjudication conference over the Zoom platform, and sought the parties' agreement to extend the due date for the

Adjudication Determination to 10 July 2024. In this e-mail, I also granted leave to the Claimant to tender reply submissions by 5.00pm on 24 June 2024 and invited the Claimant to address the following:

(a) "The Claimant's position is that the Contract 'provides that the terms and conditions of the Project shall be in accordance with the SIA Minor Works Contract 2012'. The Adjudication Application does not seem to contain a copy of the SIA Minor Works Contract 2012, albeit a copy of the SIA Minor Works Contract 2012 is included in the Adjudication Response. In such a situation, how would regulation 7(2) of the Building and Construction Industry Security of Payment Regulations apply?"

(b) "The contract relates to construction works in relation to a residential property. As the Claimant's Written Submissions do not state or suggest that the works require the approval of the Commissioner of Building Control under the Building Control Act 1989, does section 4(2)(*a*) of the SOP Act apply?"

27 Due to conflicting schedules, the adjudication conference was eventually fixed on 3 July 2024 over the Zoom platform, with each party allowed up to four representatives (including counsel) at the adjudication conference. In this regard, both parties agreed to extend the due date for the Adjudication Determination to 17 July 2024.

28 On 26 June 2024, the Claimant tendered its reply submissions. The Claimant also requested leave to produce a video and screenshots, in response to statements made by the Respondent in the AR Submissions that he did not attend a supposed joint inspection that took place on 29 August 2023. I allowed this request and directed the Claimant to submit the video and screenshots by 4.00pm on 28 June 2024. I further granted permission to the Respondent to submit a written response, limited to the abovementioned video and screenshots, by 12.00pm on 2 July 2024. Further to this, the Respondent tendered its further submissions on 2 July 2024.

29 The adjudication conference was held on 3 July 2024 over the Zoom platform. Both parties were represented as follows:

(a) For the Claimant:

(i) Mr Charles Lim (counsel);

(ii) Mr Nilesh Khetan (counsel);

(iii) Mr [A] (director of the Claimant); and

(iv) Ms [B] (director of the Claimant).

(b) For the Respondent:

(i) Mr Josh Samuel Tan Wensu (counsel); and

(ii) [BIL] (Respondent).

30 At the adjudication conference, the parties made their respective submissions with reference to documents that had already been submitted.

Grounds of determination

31 In arriving at my determination, I have considered all the documents tendered by the parties, including their respective written submissions and authorities. I also considered the oral submissions made by the parties at the adjudication conference. In the interest of saving time and costs, I have not recorded in this Adjudication Determination each and every fact, argument, item of evidence or submission considered by me in arriving at my determination. I have set out below what I have considered to be the most salient of the points relevant to my determination.

Burden of proof in adjudication

32 I am aware that the burden of proof in an adjudication is the standard of persuasion of a *prima facie* case, as held by the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979:

> 57 What standard of satisfaction must be applied by the adjudicator? To be clear, this is a standard which applies regardless of whether a payment or adjudication response has been filed, because it is part of his core duty to adjudicate. There are at least three possibilities for this standard: (a) absence of patent errors in the payment claim and its supporting materials; (b) proof on a balance of probabilities that facts supporting the payment claim are made out; and (c) a *prima facie* case that the payment claim is supported by the facts. For the reasons below, we hold that the *prima facie* standard is the correct standard to be applied by the adjudicator.
>
> …
>
> 60 … an adjudicator looking only for patent errors may not proactively inquire whether the claim amount has been inflated. Yet, the adjudicator must determine whether the work for which payment is claimed has in fact been completed and is worth the amount claimed, nothing more and nothing less. To do so, he must address the material before him and be satisfied that it is sufficient to support the claim amount.
>
> …

62 … we consider that absence of patent error does not adequately or accurately capture the standard to which an adjudicator must be satisfied of the completion and the value of the work claimed. He must have a positive basis for that determination. On this note, we turn to explain why that basis needs only to be demonstrated on a *prima facie* standard, and not proved on a balance of probabilities.

63 In our view, there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities. Nothing in the existing authorities has ever suggested that to be the position, certainly not *W Y Steel*, which is the first local authority that attempts to examine what an adjudicator must substantively consider in adjudicating a payment claim dispute. More importantly, the adjudication process is intentionally 'somewhat roughshod' (*W Y Steel* at [22]) given that the resultant decision is intended to have only temporary finality, the path being open for the parties to resolve their dispute fully and finally through arbitration or litigation: see s 21(1)(*b*) of the Act. This is especially true where no payment or adjudication response has been filed, in which case the adjudicator must render his decision in just seven days instead of the usual 14: see s 17(1)(*a*) of the Act. That is why the Act, as Vinodh Coomaraswamy J recently observed in *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28, does not require the adjudicator to find, nor does it require the claimant to 'prove', the facts supporting the claim to be objectively true on a certain standard of 'proof', that exercise being 'within the exclusive province of the dispute-resolution tribunal which will resolve the parties' dispute with full finality' (at [32]). Coomaraswamy J employed the term 'standard of persuasion' to reflect more accurately the nature of the standard to which the adjudicator must be satisfied before he allows a claim (at [34]). We respectfully adopt this term for our analysis below.

64 Therefore, it is evident – considering that the adjudicator is not simply to look for patent errors but to identify a positive basis for the claim, and that he also does not have to assess proof on a balance of probabilities – that the scheme of the Act requires the adjudicator to be satisfied that the claimant has established at least a *prima facie* case for his claim …

65 In particular, the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim. Indeed, that is the essence of his duty under s 17(2)(*a*) of the Act to 'determine the adjudicated amount (if any) to be paid by the respondent to the claimant'. Therefore, to ensure that he discharges that duty, it is only sensible for the Act to require him to consider all the matters stated in s 17(3) in so far as those matters are properly before him. Accordingly, the content of the adjudicator's duty to adjudicate the claim is normatively rooted

in and given substance by s 17(3) which both prescribes and restricts the substantive matters he is to consider.

33 In arriving at my determination, I was also guided by the principles set out by the Court of Appeal in *Far East Square v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [69], which may be summarised as follows:

(a) An adjudicator is duty bound under s 17(4) of the SOP Act to consider the matters in the material properly before him, and this is separate and distinct from the respondent's obligation under s 15(3) of the SOP Act to raise all reasons for withholding payment in its payment response or be estopped from doing so.

(b) An adjudicator has an *independent* duty to consider the true merits of the payment claim, and must satisfy himself as to whether the claimant has established a *prima facie* case in respect of its claims.

Preliminary issues

34 Before I deal with the merits of the Claimant's claims, I address the following preliminary issues that were raised before me.

Claimant's failure to include copy of SIA Minor Works COC in Adjudication Application

35 From my initial review of the Adjudication Application and Adjudication Response, I noted that both parties referred to the SIA Minor Works COC and appeared to be in agreement that this document was incorporated in the Contract.

36 However, as the Adjudication Application did not include a copy of the SIA Minor Works COC, I invited the Claimant to address me on this omission.

37 The Claimant accepts that a copy of the SIA Minor Works COC ought to have been included in the Adjudication Application, by reason of s 13(3)(*c*) of the SOP Act read with reg 7(2)(*d*) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed). However, the Claimant submitted that since its omission was inadvertent and caused no prejudice to the Respondent, I should accept the Adjudication Application by reason of s 16(4) of the SOP Act which states:

(4) Despite subsection (3), an adjudicator may accept any adjudication application that is not made in accordance with section 13(3)(c) if the adjudicator is satisfied that the non-compliance does not materially prejudice the respondent.

38 According to the Claimant, the Respondent had itself included a copy of the SIA Minor Works COC in the Adjudication Response and was "able to answer the Claimant's claims". Moreover, the Respondent did not assert that it had been prejudiced in this regard. The Respondent also confirmed during the adjudication conference that it would not be asserting any objection in relation to the omission of the SIA Minor Works COC in the Adjudication Application.

39 Based on the above, I am satisfied that the Claimant's failure to include a copy of the SIA Minor Works COC in the Adjudication Application did not materially prejudice the Respondent, and I therefore exercise my right under s 16(4) to accept the Adjudication Application notwithstanding the non-compliance with s 13(3)(*c*).

Whether Contract falls within ambit of SOP Act

40 I invited the Claimant to address me on this issue, as the Works are in relation to a residential property, and s 4(2)(*a*) of the SOP Act states that the SOP Act does not apply to a contract for such works unless they require the approval of the Commissioner of Building Control under the Building Control Act 1989 (2020 Rev Ed).

41 The Claimant submitted that the exclusion in s 4(2)(*a*) of the SOP Act does not apply in this case, and pointed out to me various documents in the Adjudication Application which refer to the submission of structural drawings to the Building and Construction Authority ("BCA"), application to BCA for a temporary occupation permit ("TOP") and the submission of a builder's certificate of completion to the Commissioner of Building Control.

42 The Respondent did not make any submissions or otherwise challenge the Claimant's position, in its written and oral submissions.

43 Based on the above, I am satisfied that the exclusion in s 4(2)(*a*) of the SOP Act does not apply in this case, and accordingly the Contract falls within the ambit of the SOP Act.

Whether Payment Claim valid as it was served after Contract was terminated

44 The Respondent's objection to the validity of the Payment Claim, as set out in the Adjudication Response, may be summarised as follows:

(a) Section 4(2)(*c*) of the SOP Act states that the SOP Act does not apply to any terminated contract to the extent that:

(i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress

payments to the claimant until a date or the occurrence of an event specified in the contract; and

(ii) that date has not passed or that event has not occurred; …

(b) On 24 April 2024, the Respondent issued to the Claimant a notice of termination ("Notice of Termination") pursuant to cl 23(3)(b) of the SIA Minor Works COC. The Respondent contends that it was entitled to issue a Notice of Termination because the Claimant had failed to comply with requests for it to "remedy the outstanding incomplete works", and that this constitutes a repudiation of the Contract.

(c) The effect of cll 23(5)(e) and 25(1)(a)(iii) of the SIA Minor Works COC is that following termination of the Contract, the Claimant may only serve a payment claim after the architect ("Architect") issues a cost of termination certificate. In this case, no cost of termination certificate has been issued, and the Claimant was therefore not entitled to serve the Payment Claim on 3 May 2024.

(d) To address the Claimant's contention that the termination of the Contract was actually pursuant to cl 23(1)(a) of the SIA Minor Works COC (*ie*, termination without default), the Respondent submitted that the Claimant is likewise barred from serving a payment claim as cll 23(1)(c) and 25(1)(a)(ii) require the Claimant to first submit a statement of work done addressed to the Architect, which the Architect shall evaluate within 28 days. In this case, no statement of work done was submitted by the Claimant.

45 The Claimant's primary argument in its written submissions is that the Respondent's Notice of Termination is only effective as a termination without default under cl 23(1)(a) of the SIA Minor Works COC, as there was no default on the Claimant's part.

46 The parties further elaborated on their arguments over this issue at the adjudication conference. A key fact that emerged in the course of these arguments is that [D] Studio ("[D]") was engaged by the Respondent to provide consultancy services and fulfil the role of qualified person for the project, but was not appointed as the Architect to administer the Contract in accordance with the SIA Minor Works COC. In this regard, I noted the following:

(a) The parties did not actually execute the SIA Minor Works COC, and the version of the SIA Minor Works COC exhibited in the Adjudication Response is just a template. Notably, if it had been executed, the parties would have agreed on the identity of the Architect in Art 3 as follows:

3. ARCHITECT

(a) The Architect in this Contract shall mean _____

of the firm _____

whose Address is _____

_____

The Architect shall administer the Contract as agent of the Employer, except where the Contract requires him to act independently between the Employer and the Contractor in exercising discretion and professional judgement, he shall be impartial under the Architects Act, Architects Rules, The Schedule (Code of Professional Conduct and Ethics), Part I, Rule 3.-(1), particularly in regard, but not limited, to the following:

(b) [D] did not undertake any of the usual certification roles in the SIA Minor Works COC, such as the issuance of interim certificates for payment. Instead, such matters were handled by the Respondent personally. In fact, in an e-mail on 11 May 2022 to both the Claimant and Respondent, [D] stated: "Please note =hat [*sic*] *we are not the contractor [sic] administrator for the project* because this proje=t [*sic*] is pretty straight forward, there is only 2 consultants company and 1 ma=n [*sic*] builder, so exchange of information can be easily done." [emphasis added]

(c) The Respondent cited cl 23(3)(b) of the SIA Minor Works COC in the Notice of Termination dated 24 May 2024. However, prior to this and apart from the Quotation itself, the parties did not apply the SIA Minor Works COC or make reference to the SIA Minor Works COC in any of the documents exchanged between themselves.

47 In the light of the foregoing, and especially the Respondent's own confirmation that there was no Architect ever appointed to administer the Contract in accordance with the SIA Minor Works COC, I am unable to accept the Respondent's argument that the mechanisms in cll 23 and 25 of the SIA Minor Works COC should apply to disentitle the Claimant from serving a payment claim post termination. Accordingly, I find that s 4(2)(*c*) of the SOP Act is not applicable in this case, and the Claimant was therefore entitled to serve the Payment Claim.

48 For completeness, given my finding on this matter, there is no need for me to consider the parties' related arguments, such as whether the Claimant was in default of its obligations and whether the Respondent was entitled to terminate the Contract for cause.

Merits of Claimant's claims

49 I now move to consider the substantive issues to be determined by me in this Adjudication Application.

50 As mentioned above, the Quotation provides that the Contract Sum of $468,420 (excluding GST) shall be paid in the following manner:

> Payment Terms:
> 20% Upon appointment
> 10% Upon competion of excavation works
> 10% Upon completion of ground slab
> 30% Upon completion of pool structure
> 10% Upon completion of cladding works
> 10% Upon completion of tiling works
> 5% Upon completion of M&E works
> 5% At the end of Defects Liability Period (12 months from pool testing and commissioning)

51 Based on my review of the documents, I set out an overview of the parties' respective positions, with the disputed items in bold:

Item	Claim (S$)	Response (S$)
20% upon appointment	93,684.00	93,684.00
10% upon completion of excavation works	46,842.00	46,842.00
10% upon completion of ground slab	46,842.00	46,842.00
30% upon completion of pool structure	**140,526.00**	**Nil**
10% upon completion of cladding works	46,842.00	46,842.00
10% upon completion of tiling works	46,842.00	46,842.00
5% upon completion of M&E works	**23,421.00**	**Nil**
5% at the end of the 12-month Defects Liability Period	**23,421.00**	**Nil**
Variations (aggregate of additions and omissions)	3,200.00	3,200.00
Less: Amount previously paid	(405,646.50)	(405,646.50)
Sub-total:	65,973.50	(121,394.50)
Sub-total (with 9% GST):	71,911.12	Nil
Less: Reduction on account of estimated rectification costs [see [54(e)] and [60(a)] below)	(3,350.00)	NA
Total (with 9% GST):	68,561.12	Nil

52 I now examine each of the issues in turn.

Item 1: 30% upon completion of pool structure

53 On a preliminary note, it appears to me, and the parties are in agreement, that the Quotation provides for milestone, as opposed to progress payments. Accordingly, the Claimant would be entitled to be paid for a particular milestone, only upon completion of all of the works relevant

to that milestone. In this regard, the Claimant submitted that the parties did not strictly adhere to a payment regime based on milestones, as the Respondent had previously made partial payment for milestones that had not been fully completed. This is also consistent with the Respondent's position for this item, as the Respondent had submitted (in the alternative) that the Claimant should only be paid 90% for this item based on the assessment of the Respondent's quantity surveyor. I am therefore satisfied that it is appropriate for me to determine that the Claimant is entitled to payment to the extent of its completion of each milestone.

54 The Claimant's submissions for this item may be summarised as follows:

(a) The Claimant had completed the construction of the pool structure and is therefore entitled to payment of the full sum of $140,526 for these works.

(b) The completion of the pool structure is evidenced by the fact that a handover took place on 29 August 2023. At this handover, testing and commissioning ("T&C") of the pool took place in the presence of the Respondent.

(c) Subsequently, on or around 6 September 2023, the Claimant sent an e-mail to [D] to update [D] that the T&C of the pool had taken place on 29 August 2023. In this e-mail, the Claimant attached its inspection and handover forms.

(d) On 11 September 2023, [D] sent to the Claimant two forms for the Claimant's endorsement, which are typically provided only after completion of the pool.

(e) The Claimant acknowledges that there are some defects that have not been rectified. However, the Claimant was prevented from carrying out the rectification works due to the Respondent's failure to allow access, and [D]'s unreasonable rejection of the Claimant's proposed method statement. Nevertheless, the Claimant accepts that since the rectification works are not completed, it is agreeable to reducing its overall claim in this adjudication by $3,350 being the value of such rectification works.

55 The Respondent's submissions may be summarised as follows:

(a) There are various defects that the Claimant has not satisfactorily rectified, and the Claimant itself has acknowledged that the rectification works are extensive.

(b) The TOP for the project has not been obtained, and can only be obtained upon completion of these remaining works. Until TOP is

obtained, the pool cannot be used and it cannot be said that the Claimant has completed the Works.

(c) The Respondent did not unreasonably prevent the Claimant from carrying out the rectification works. [D] had legitimate concerns about the adequacy of the Claimant's proposed method statement and the Claimant failed to address these concerns.

(d) The Claimant is not entitled to any payment as it has not completed this item of work. Alternatively, the Claimant is entitled to only 90% for this item, based on an assessment carried out by [E] Pte Ltd, a quantity surveyor engaged by the Respondent ("QS Assessment").

56 At the conference, the parties made detailed submissions on the outstanding defects, which are set out in a list prepared by [D] on or about 14 December 2023 ("List of Outstanding Defects"). It transpired from these submissions that:

(a) All of the defects are located within or around the pool pump room, and relate to matters concerning the mechanical and electrical engineering ("M&E") aspect of the Works. In other words, [D] did not raise any issue with the pool structure.

(b) The QS Assessment states that the construction of the pool structure is only 90% complete, with the remark "Incomplete/Improper Works". However, the QS Assessment does not state or describe the remaining 10% of the pool structure works that are incomplete or improper. In the absence of any meaningful details, I am unable to place reliance on the QS Assessment for this item.

57 In my view, as there is no real dispute that the pool structure has been completed, I find that the Claimant is entitled to be paid the full sum of $140,526 for this item.

Item 2: 5% upon completion of M&E works

58 As with Item 1 (completion of pool structure), similar arguments were raised by both parties in relation to the level of completion of the M&E works. However, a significant difference for this item is that the outstanding defects appear to be directly related to the M&E works.

59 To recap, there is no dispute by the Claimant that it has not completed these rectification works, and the Claimant's main contention is that it had been unreasonably prevented by the Respondent and [D] from doing so. But these are disputes that I do not need to contend with, as what needs to

be determined is the value of the works that the Claimant had completed for this item.

60 The difference between the parties' positions on the issue of quantum may be summarised as follows:

(a) The Claimant accepts that for the purposes of this adjudication, it will reduce its claim by $3,350 (including 9% GST) being the estimated cost of rectifying the defects relating to the M&E works. Put another way, the Claimant is now claiming approximately 85.7% of the value of the M&E works.

(b) According to the QS Assessment relied on by the Respondent, the Claimant had only completed 40% of the M&E works. I take this to mean that the amount to be withheld for this item due to outstanding defects is 60% which amounts to $14,052.60.

61 Based on the List of Outstanding Defects and [D]'s comments on the Claimant's proposed method statement, some of the defects appear to be relatively significant and serious in nature, such as water leakages at areas with exposed electrical equipment. Moreover, there are a total of 11 defects identified and the Claimant had estimated that the rectification works would take around 23 days based on a schedule included with its method statement.

62 I find that there are issues in the values put forward by both parties. On one hand, the Claimant's estimated rectification costs are based on amounts that it has put forward for each item, without any breakdown or underlying substantiation. For instance, for the replacement of the pump room hatch cover, the Claimant's estimate is $300 with no explanation as to how this figure is derived. On the other hand, the Respondent relies on the QS Assessment which states that the M&E works are only 40% complete, with the remark "Incomplete/Improper Works" and no further elaboration.

63 From the foregoing analysis, it appears to me that neither party's valuation is particularly reliable. In such circumstances, I am of the view that an appropriate assessment is the midway point between the parties' respective positions. Accordingly, I determine that the Claimant is entitled to be paid the sum of $14,720 for this item.

Item 3: 5% at the end of 12-month defects liability period

64 This item essentially relates to the 5% retention moneys payable at the expiry of the defects liability period ("DLP") of a project.

65 The Claimant submits that the Works were handed over to the Respondent on 29 August 2023, when T&C was performed during a joint inspection attended by the Respondent. According to the Claimant, this

means that the Works were substantially completed on 29 August 2023. Based on this, the 12-month DLP commenced on 29 August 2023. However, the Claimant's case is that the DLP is no longer operative given the Respondent's termination of the Contract, which means that the retention moneys should be payable now.

66 The Respondent's position is that the Claimant has not completed all of the Works as evidenced by the List of Outstanding Defects, or alternatively, that T&C of the pool has not been properly done and the Works are hence not substantially completed. Accordingly, the DLP has not even commenced and the retention moneys are therefore not due.

67 As earlier mentioned, the Claimant tendered a video taken on 29 August 2023 which shows the Respondent in attendance. The 45-second long video does show some kind of testing being undertaken, with the Respondent present together with the Claimant's workers. At the conference, the Respondent explained that he was present on that day because that is his residence, but he was not informed by the Claimant that this was for the purpose of a handover or T&C of the pool.

68 I am not satisfied that a handover or T&C of the pool took place on 29 August 2023 or at all, for the following reasons:

(a) There is no evidence that the Claimant informed the Respondent or [D] *prior* to 29 August 2023, that it intended to carry out T&C and handover of the pool on that day.

(b) If the parties had indeed intended for T&C and handover to take place on 29 August 2023, it is odd that the Respondent would turn up alone. Instead, it would have been expected that [D], as the primary consultant for the project, would also be in attendance to witness the T&C and handover.

(c) The inspection and handover forms sent by the Claimant to [D] were completely blank and unsigned, as reproduced below:

ENDORSEMENT

The inspection was jointly performed and completed by the Client Representative and [BIK] *Personnel.*

Inspected and acknowledged by Client Repesentative	Confirmed by [BIK] Personnel
Signature: _____	Signature: _____
Name: _____	Name: _____
Designation: _____	Designation: _____

PROJECT ACCEPTANCE & HANDOVER

PROJECT:	STAINLESS STEEL POOL AND BUILDERS WORK AT [redacted]
ISSUED BY:	[BIK] PTE LTD
PERSON-IN-CHARGE:	[redacted]
DATE:	29TH AUGUST 2023

The endorsement of this document shall constitute the acceptance from the authorised client representative and denotes the satisfactory performance of all project deliverables, as stated in the project's Inspection. This client acknowledges the completion of all project deliverables and the handover of the project site back to the client.

Unless otherwise stated as follows, the project is considered closed out.

ADDITIONAL COMMENTS TO BE APPENDED TO CLIENT'S ACCEPTANCE:

ACKNOWLEDGEMENT & ENDORSEMENT

CLIENT REPRESENTATIVE SIGNATURE / NAME / COMPANY	[BIK] **SIGNATURE / NAME**

69 Additionally, it is noted that TOP for the Works has not been obtained and the pool therefore cannot be used by the Respondent. According to the Respondent, the outstanding defects must first be rectified before TOP can be obtained, and this has not been disputed by the Claimant. In other words, these are not minor defects that are ordinarily addressed during the DLP. Instead, these are defects which must be rectified before it can be said that the Works are substantially completed.

70 I therefore find that the Works have not been completed (substantially or otherwise). Nevertheless, the issue that remains is whether the retention moneys should be released, on the basis that the Contract has been terminated.

71 The Quotation provides that the sum of $23,421.00 is payable "[a]t the end of Defects Liability Period (12 months from pool testing and commissioning)". As earlier mentioned, the parties agree that payments are

based on milestones in this Contract, and it is an objective fact that this particular milestone has not been achieved. The Claimant has also not canvassed any argument or cited any authority to support its contention that it should be paid for a milestone that is not achieved, because of the termination of the Contract.

72 For the above reasons, I am unable to agree with the Claimant that it should be paid for this item. Accordingly, I determine that no payment is due to the Claimant for this item.

Conclusion

Adjudicated Amount

73 In conclusion, based on the foregoing reasons, I determine that the Claimant is entitled to the following amounts:

Item	Amount payable (S$)
20% upon appointment	93,684.00
10% upon completion of excavation works	46,842.00
10% upon completion of ground slab	46,842.00
30% upon completion of pool structure	140,526.00
10% upon completion of cladding works	46,842.00
10% upon completion of tiling works	46,842.00
5% upon completion of M&E works	14,720.00
5% at the end of the 12-month Defects Liability Period	0
Variations (aggregate of additions and omissions)	3,200.00
Less: Amount previously paid	(405,646.50)
Total:	33,851.50
Total (with 9% GST):	36,898.14

74 I therefore determine that the Respondent shall pay to the Claimant the total sum of $36,898.14 (including 9% GST), which is hereby recorded as the Adjudicated Amount.

Due Date for payment

75 I determine that the Adjudicated Amount shall be paid by the Respondent to the Claimant within seven days after the Adjudication Determination is served on the Respondent. This is hereby recorded as the Due Date.

Interest

76 Section 8(5) of the SOP Act provides that:

> (5) The interest payable on the unpaid amount of a progress payment that has become due and payable is at the higher of the following rates:
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract;
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969.

77 In this case, the Contract is silent as to the applicable interest rate for late payments.

78 Accordingly, I determine that the rate of interest shall be 5.33% per annum on any part of the Adjudicated Amount which remains unpaid as at the Due Date until the said is paid.

Costs of adjudication

79 As the Claimant has only partially succeeded on its substantive claims, I order that the Claimant and the Respondent shall each bear 50% of the costs of the adjudication, such costs comprising the adjudication application fee of $654 (including 9% GST) and the adjudicator fee of $6,234.80 (including 9% GST). On this note, I should clarify that the adjudicator fee does not include the time that I spent in connection with the Claimant's request for replacement of adjudicator outlined above.

BIM Pte Ltd
v
BIN Pte Ltd

[2024] SGSOP 12

Singapore Mediation Centre — SOP AA 159 of 2024
Chow Kok Fong
24 July 2024

Payment Claim — *Assessment* — *Claimant claiming for item of work at percentage completion of 95%* — *Not readily evident from claimant's supporting documents that 95% of said item of work was indeed completed* — *Determining amount claimant was entitled to*

Payment Claim — *Variation works* — *Proving variations* — *Claimant making various variation claims* — *Whether claimant satisfied requirements in* Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd *[2023] 2 SLR 468 to make successful claim for variation works*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 8(1), 8(1)(*a*), 8(1)(*b*), 8(1)(*b*)(ii), 8(5), 8(5)(*b*), 10, 10(2), 10(3), 11, 11(3), 11(3)(*a*), 12(1), 12(5)(*b*), 12(6), 13(2), 13(3)(*a*), 15(1), 15(3), 15(4), 15(4)(*a*), 16(1), 16(3)(*b*), 16(4)(*e*), 17(1)(*b*), 17(2)(*b*), 17(6)

Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 25

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)

Supreme Court of Judicature Act 1969 (2020 Rev Ed)

Katie Lee (Lumiere Law LLP) for the claimant;
Kishnan Pillay, Sim Qian Hui and Darren Tan (Invictus Law Corporation) for the respondent.

[Commentary: see paras 5.7 and 5.13]

24 July 2024

Chow Kok Fong:

Determination

1 This is a determination made pursuant to the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act" or the "Act" as the context requires) and the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations").

2 The claimant in this matter is M/s BIM Pte Ltd (hereinafter "BIM" or "Claimant").

3 The Respondent is M/s BIN Pte Ltd (hereinafter "BIN" or "Respondent").

4 For the reasons set out in the pages which follow, the tribunal ("Tribunal") determines as follows:

(a) the Respondent shall pay to the Claimant the sum of **$1,149,041.57** inclusive of goods and services tax ("GST") ("Adjudicated Amount");

(b) the Adjudicated Amount shall be paid by the Respondent to the Claimant on or before **Wednesday 31 July 2024** ("Adjudicated Payment Date"); and

(c) interest shall be paid by the Respondent at the rate of **5.33%** per annum on any part of the Adjudicated Amount which remains unpaid as at the Adjudicated Payment Date until the same is paid.

5 The costs of the adjudication consist of the adjudicator's fee of $24,525.00 (before GST) and the adjudication application fee of $654.00, amounting to a total of **$27,386.25** inclusive of GST.

6 The Tribunal determines that the costs of the adjudication shall be apportioned as follows:

(a) the Claimant shall bear 40% of the costs of adjudication; and

(b) the Respondent shall bear the other 60%.

Record

Adjudication Application

7 On 26 June 2024, the Claimant lodged an adjudication application (hereinafter "Adjudication Application") with the authorised nominating body appointed by the Minister pursuant to s 28(1) of the SOP Act, the Singapore Mediation Centre (hereinafter "SMC").

8 The Adjudication Application relates to matters contained in Payment Claim No 15 (hereinafter the "Payment Claim" or "PC15" as the context requires) served by the Claimant on the Respondent on 20 May 2024 for a sum of $1,716,862.10 (excluding GST).

9 To the Adjudication Application is annexed a set of written submissions (hereinafter "Claimant's AA Submissions") as well as copies of supporting documents and authorities.

10 The SMC served on the Respondent a copy of the Adjudication Application on 27 June 2024.

Appointment of adjudicator

11 On 28 June 2024, the SMC appointed Mr Chow Kok Fong as adjudicator of the Adjudication Application.

Filing of Adjudication Response

12 Section 15(1) of the SOP Act provides for the Respondent to file an adjudication response within seven days *after* the receipt of the adjudication application. In this case, the Adjudication Application was served on the Respondent on 27 June 2024. Pursuant to s 15(1), the last day for the filing of the adjudication response is 4 July 2024.

13 The Respondent duly filed the adjudication response on 4 July 2024 (hereinafter the "Adjudication Response"). To the Adjudication Response is annexed a set of written submissions (hereinafter "Respondent's AR Submissions") as well as copies of supporting documents and authorities.

14 Section 16(1) of the SOP Act reads:

> **16.**—(1) An adjudication commences immediately upon the expiry of the period referred to in section 15(1) within which the respondent may lodge an adjudication response.

15 Pursuant to s 16(1), this adjudication therefore commenced on 4 July 2024.

16 On 5 July 2024, the Claimant was invited to reply to new points raised in the Respondent's AR Submissions. The Claimant duly field its reply submissions on 8 July 2024 ("Claimant's Reply Submissions").

Adjudication Conference

17 Pursuant to s 16(4)(*e*) of the SOP Act, the Tribunal invited parties to attend an adjudication conference fixed originally for Tuesday, 9 July 2024.

18 Parties agreed for the adjudication conference ("Adjudication Conference") to be conducted by way of a video conference. Parties were represented at the conference as follows:

(a) For the Claimant:

(i)	Ms Katie Lee Shi Ying	Counsel;
(ii)	Mr [A]	Claimant's Project Director;
(iii)	Ms [B]	Claimant's Quantity Surveyor; and
(iv)	Mr [C]	Claimant's Site Representative.

(b) For the Respondent:

(i)	Mr Kishnan Pillai	Counsel;
(ii)	Mr Sim Qian Hui	Counsel;
(iii)	Mr [D]	Respondent's Director;
(iv)	Mr [E]	Respondent's Director; and
(v)	Mr [F]	Respondent's Project Engineer.

19 Following the close of the Adjudication Conference, the Tribunal invited the Claimant to organise, in the form of a schedule, specific information relating to the variation claims in this adjudication ("Claimant's Further Schedule"). The Claimant's Further Schedule was received by the Tribunal on 11 July 2024 and copied to the Respondent. The Respondent was invited to provide, by 12 July 2024, its comments (if any) on the clarifications in the Claimant's Further Schedule. The Respondent did not file any further comments on the Claimant's clarifications.

Form of adjudication determination

20 This adjudication determination ("Adjudication Determination") is delivered to the SMC in PDF format pursuant to r 5.1 of the Supplementary Rules for Electronic Adjudication Lodgment (2nd Ed, 2020).

Date for making Adjudication Determination

21 As noted earlier, the Respondent filed its Adjudication Response on 4 July 2024. Pursuant to s 16(1) of the SOP Act, the adjudication commenced immediately on this date.

22 The timeline for rendering the Adjudication Determination falls to be regulated by s 17(1)(*b*) of the SOP Act. Section 17(1)(*b*) provides that the adjudicator must determine an adjudication application within 14 days "*after* the commencement of the adjudication … or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent" [emphasis added].

23 At the request of the adjudicator, parties agreed to extend the date for making the Adjudication Determination to **Friday 26 July 2024**.

Reasons for Determination

24 With the view to save time and avoid incurring unnecessary expense in accordance with s 16(3)(*b*) of the SOP Act, not every fact and argument presented and considered by the Tribunal is recorded in this determination except those on which the result of the adjudication turns. The matters recorded are considered sufficient, in the Tribunal's view, to reflect: (a) the substance of the respective cases as canvassed by the parties; and (b) the principal issues on which the result of the determination turns. It should not be assumed that any issue, evidence or argument raised by the parties which has not been recorded herein had not been considered by the Tribunal in arriving at its determination.

Background

The Project

25 The project to which the adjudication application relates is described as the "Proposed Mixed Development at [xxx]. Subcontract for ACMV Works" ("Project"). The employer of the Project is [Z] Ltd.

The Main Contract and Subcontract

26 The main contractor of the Project is [Y] Pte Ltd ("Main Contractor"). The Main Contractor employed, as its mechanical and electrical engineering subcontractor, [X] Pte Ltd ("[X]"). [X], in turn, employed the Respondent as the sub-subcontractor for the air-conditioning and mechanical ventilation works ("ACMV Works"). For convenience, the sub-subcontract between [X] and the Respondent shall be referred to in this determination as "ACMV Contract".

27 By a letter of award dated 13 January 2023 ("Letter of Award" or "LOA" as the context requires), the Respondent employed the Claimant to supply labour, material and tools for a part of the ACMV Works ("Subcontract").

28 Essentially, within the contractual chain, the Claimant is a sub-sub-subcontractor. The structure of the contractual chain within which the parties are located are as shown in Figure 1 below:

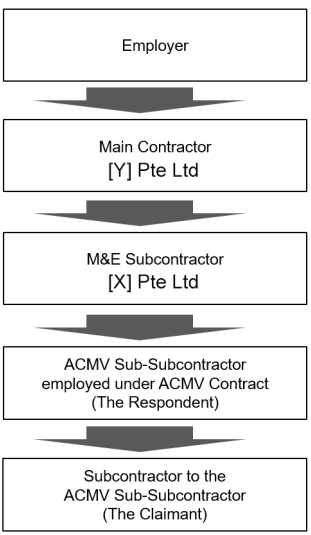


Figure 1:
Positions of the parties in the contractual chain

Documents forming Subcontract

29 The Respondent states that the documents comprising the Subcontract include "the Letter of Award and the Articles and Conditions of Building Contract (Lump Sum Contract) (9th Edition) published by the Singapore Institute of Architects".

Key aspects of Subcontract

30 Pursuant to the terms of the Subcontract of 13 January 2023, the Subcontract sum is stated as $5,200,000.00 (exclusive of GST) ("Subcontract Sum").

31 In its submissions, the Respondent drew the attention of the Tribunal to cl 2.3 of the LOA:

> You are to comply with all terms and conditions as stated in the subcontract documents signed between [X] Pte Ltd and [Y] Pte Ltd. An unpriced copy of this document has been made available to you and you are deemed to have read and fully understood its contents. All contractual obligations as stated in this contract where applicable to [X] shall be applicable to you with [X] assuming the rights as our Client.

Applicability of the Act

Applicable version of SOP Act

32 The Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ("Amendment Act") amends the previous version of the SOP Act ("Pre-Amended Version"). The SOP Act, as amended ("Current Version"), came into force on 15 December 2019 (15 December 2019 is referred to as "the date" in the Amendment Act). The operation of the amendments is subject to the "*saving and transitional provisions*" [emphasis added] in s 25 of the Amendment Act.

33 In determining which of the two versions of the Act applies in this adjudication, it is pertinent to note that

(a) the contract was made on 13 January 2023; and

(b) the subject payment claim, PC15, was issued by the Claimant on 20 June 2024.

34 The Tribunal is satisfied that the procedural matters in this adjudication, including the timelines, are governed by the Current Version of the SOP Act. These include the timelines relating to the following matters in the present adjudication:

(a) the Claimant's entitlement to make an adjudication application;

(b) the lodgment of the adjudication application; and

(c) the making of the determination of the adjudication application.

"Construction contract" for purposes of the Act

35 The Claimant submits that the Subcontract is a "construction contract" as defined under the SOP Act. This point is not contested by the Respondent. The Tribunal is satisfied from a plain reading of the definition of a "construction contract" in s 2 of the SOP Act that this submission is correct and the Respondent's admission is rightly made.

The Payment Claim

Timeline for Payment Claim

36 Section 10(2) of the Current Version provides for the service of a payment claim as follows:

> (2) A payment claim must be served —
>
> (*a*) not later than –
>
> (i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or
>
> (ii) the date prescribed for the purpose of this subsection if the contract does not contain such terms …

37 For the purpose of s 10(2), the deeming provisions in s 10(3) apply:

> (3) In subsection (2) —
>
> (*a*) a payment claim that is served before the date or last day mentioned in subsection (2)(*a*)(i) is deemed to have been served on that date or day, as the case may be; and
>
> (*b*) a payment claim that is served before the prescribed date mentioned in subsection (2)(*a*)(ii) is deemed to have been served on that date.

38 In this case, the LOA contains an express term governing the service of a payment claim. Clause 2.16 of the LOA states:

> PROGRESS CLAIMS AND PAYMENT
>
> Progress payment shall be made based on monthly interim valuation by the Consultants in accordance with the Conditions of Main Contract. You are required to present your monthly valuation of works completed to us, in time for checking and inclusion in our overall monthly valuation of works completed and, in any event, not later than 20th day of each calendar month.

39 In this adjudication, PC15 was served on 20 May 2024. There can be no issue that this complies with the letter of cl 2.16 of the LOA. Accordingly, the Tribunal is satisfied that PC15 has been properly served for the purposes of ss 10(2) and 10(3) of the SOP Act.

Contents of Payment Claim

40 The Payment Claim in this adjudication consist of three parts.

41 The first of these is one page of entries on a form issued by the Respondent ("Claim Form"). This shows the claimed amount of $1,716,862.10. The relevant part of the Claim Form is extracted as shown in Figure 2 below:

BIN PTE LTD

PROGRESS CLAIM APPLICATION / CERTIFICATION

TRADE :	**ACMV - Ductwork installation**		
Progress Claim No:	15	Date :	20/5/2024
Name Of Sub-Contractor:	BIM PTE LTD		
Period Of Work Done:	May 2024 Month (Contract works) 01/03/2023 ~ 05/04/2024 (VO works)		
Contract:	Proposed Mixed Development Works at [redacted] SubContract for ACMV Works dated 13 January 2023	Purchase Order:	P2575
Limit Of Retention Sum:	$ 4,255,000.00	Retention:	10%

	BY CONTRACTOR S$	*Do not write* (For BIN Use Only) BY BIN S$	
Contract Amount :	**$ 4,255,000.00**	**$ 4,255,000.00**	
Downpayment received (Agreed as per Contract)	$ 500,000.00		
Claim for Work done	$ 4,235,197.50		
Less :10 % to the Max of 5%	$ 212,750.00		
Less : Recovery of downpayment (5 of 5)	$ 500,000.00		
Less: Previously certified	$ 3,116,750.00		
This Claim- Progress Claim-15	$ 405,697.50		(w/o GST)
Add: Wrongful back charges imposed and deducted from progress claims 11 & 12	$ 223,892.50		
Add: VO Amount to be claimed	$ 1,087,272.10		
Total Claim Amount (Before 9% GST)	**$ 1,716,862.10**		
NET AMOUNT APPROVED			
Add 9% GST			
NET AMOUNT PAYMENT (INCL. GST)			

Figure 2:
Key entries in PC15

42 The second part is a two-page schedule providing a breakdown of the claimed amount ("Breakdown Schedule"). In the Breakdown Schedule, the claim items are set out under two sections. The first section, entitled "Duct Installation", reflects the work done under the original scope of the works (which, as noted below, the Claimant noted has been reduced by an omission). The claimed amount for the work under Duct Installation is $4,235,197.50. The second section consists of claims for variations ("Variations"). The claimed amount for the work under Variations is $1,08,272.10.

43 The final part of the Payment Claim is a PowerPoint document consisting of 47 pages of drawings. This is again divided into two sections: "ACMV System (AC Works" and "ACMV System (MV Works)". In this part of the Payment Claim, the completed works are shown by colour highlights.

Summary of claim components

44 The Claimant furnishes a summary of the claimed amount in its submissions. The relevant calculations of the claimed amount as extracted from the entries on the Claim Form appear to be as follows:

1	Contract Works Done	$4,235,197.50	
2	Less Retention	-$212,750.00	
3	Less Recovery of downpayment	-$500,000.00	
4	Less Previous Payments	-$3,116,750.00	$405,697.50
5	**Variations**	**$1,087,272.10**	
6	'Wrongful' Back charges in PCs 11, 12	$223,892.50	$1,311,164.60
	Claimed Amount before GST		$1,716,862.10
	Add GST at 9%		$154,517.59
	Claimed Amount with GST		$1,871,379.69

The payment response

Two versions of payment response

45 One of the unnumbered paragraphs of cl 2.16 of the LOA specifies the payment claim handling procedure:

> Within 21 days after the receipt of your claim or on which you are required to submit your claim, whichever is the later, you will be notified of the amounts to which you are entitled in respect of the claim amount less the retention money of 10% of the amount payable up to a limit of 5%. Payment will generally be made within 35 days after the receipt of your Tax Invoice, provided the works is executed to the full satisfaction and approval of the Employer and/or his representative(s) but subject to variations clauses and deductions.

46 The "notification" mentioned in cl 2.16 takes the form of a "Sub-Contractor's Payment Certificate" (or "Payment Certificate"). It is common ground that the Payment Certificate has been accepted by parties as the payment response to each payment claim. To avoid any confusion, the Respondent also refers to payment certificates occasionally as progress payments.

47 In this adjudication, the Claimant asserts that the Respondent failed to issue a payment certificate in response to PC15 within the time it was required to do so under cl 2.16 of the LOA. The Claimant submits:

> 13. On 21 May 2024, the Respondent emailed Payment Certificate No. 13 dated 15 May 2024 ('**1st Payment Cert. 13**'). A copy each of the said email and Payment Cert. 15 are exhibited in **Tab E**.
>
> 14. It is submitted that the 1st Payment Cert. 13 is not a payment certificate in response to PC15.
>
> 15. Although 1st Payment Cert. 13 was served on the Claimant on 21 May 2024 which was one day after PC15 was sent, it is critical to note that the 1st Payment Cert. 13 was signed and dated 15 May 2024.
>
> 16. Hence, the 1st Payment Cert. 13 cannot be in response to PC15.
>
> 17. On 11 June 2024, the Respondent emailed another Payment Certificate No. 13 purportedly dated 10 June 2024 ('**2nd Payment Cert. 13**'). A copy each of the said email and Payment Cert. 15 are exhibited in **Tab E**.
>
> 18. In the 2nd Payment Cert. 13, the Respondent did not raise any objections to the validity of PC 15.
>
> 19. Accordingly, the Respondent has made an 'unequivocal representation' that it intends to forgo its objections, if any, to the validity of PC 15.

48 For the purposes on this determination, it is considered clearer to refer to the first Payment Certificate 13 as "Certificate 13A" instead of the Claimant's reference of "1st Payment Cert. 13". Certificate 13A was issued on 15 May 2024, before PC15 was received by the Respondent. It could not possibly be a response to PC15. Indeed, the Respondent made no attempt to rely on Certificate 13A in its submissions. The Tribunal is satisfied that both parties are on common ground here.

49 The Respondent relies on the second payment certificate which was also referred to as "Payment Certificate 13". This second Payment Certificate 13 was issued on 11 June 2024. It is convenient to refer to this second Payment Certificate 13 as "Certificate 13B". The Respondent explained that there was an unfortunate error in describing Certificate 13B as "Progress Payment No 13" but it was intended as a payment response to PC15. The Respondent states that it should have been referred to as "Progress Payment No 14" (*ie*, "Certificate 14").

50 The Tribunal has examined the circumstances of Certificate 13B. Three observations are pertinent to the determination of this issue:

> (a) Firstly, Certificate 13B was issued some 21 days after the receipt of PC15 by the Respondent. Both the interval corresponds with the

21-day period for issuing a payment certificate as laid down in cl 2.16 of the LOA.

(b) Secondly, the contents of Certificate 13B include entries for various signatures by the Respondent's personnel and these are dated 10 June 2024. Again, these dates are consistent with a payment certificate that is intended to comply with cl 2.16.

(c) Thirdly, Certificate 13B shows a cumulative amount of $3,646,750.00, which was an increase over the previous cumulative amount of $3,616,750.00 as recorded in Certificate 13A.

51 The mistaken labelling of Certificate 13B as Progress Payment No 13 instead of Progress Payment No 14 is without doubt an error of transcription. It certainly did not mislead the Claimant as to the true position of the Respondent. From the contents of the Adjudication Application and the Claimant's submissions, this error does not appear to have inflicted any prejudice on the Claimant. Certificate 13B issued on 11 June 2024 was therefore intended by the Respondent as its payment response to PC15 (hereinafter "Payment Response" or "Certificate 13B" as appropriate).

Further objections as to validity

52 Nevertheless, the Claimant persisted with its contention that Certificate 13B is not a valid payment response under the SOP Act. This contention rests on two grounds:

(a) First, it argues that Certificate 13B was served only on 11 June 2024 which "falls outside the due date to provide the payment response, *ie* 10 June 2024".

(b) Secondly, the Claimant contends that the payment response did not provide sufficient particulars to allow the Claimant "to understand the nature of the respondent's case which it will have to meet if it decides to pursue the claim in an adjudication".

53 The first of these objections has to be considered in relation to the provisions governing the dispute settlement period. The Tribunal notes the following:

(a) Section 12(5)(*b*) of the SOP Act provides for the Respondent to serve a payment response during the dispute settlement period ("DSP").

(b) Section 12(6) provides that the DSP runs from the date after the date by which the payment response is required to be provided under s 11. Under cl 2.16 of the LOA, this date is 10 June 2024. Consequently, the DSP in this case ends on 18 June 2014.

(c) It is not in dispute that Certificate 13A was served on 11 June 2024. This falls squarely within the DSP.

The Claimant's first objection on the validity of the payment response thus fails.

54 In relation to its second objection, the Claimant refers to s 11(3) of the SOP Act. Section 11(3) reads:

> (3) A payment response provided in relation to a construction contract –
>
> (*a*) must identify the payment claim to which it relates;
>
> (*b*) must state the response amount, if any;
>
> (*c*) must state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and
>
> (*d*) must be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

55 The Claimant asserts that Certificate 13B did not comply with "the mandatory statutory requirements" laid down in s 11(3) for these reasons:

> It is abundantly clear that the one-page 2nd Payment Cert.13 does not comply with the foregoing mandatory statutory requirements as:
>
> (a) It does not identify PC 15;
>
> (b) It does not state the response amount or 'nil';
>
> (c) It does not provide any information or documents to support its purported position that the value of work done is '90.71%'.

56 The Claimant's allegation that Certificate 13B "does not identify PC15" invites a consideration of the terms of s 11(3)(*a*). While the terms of s 11(3)(*a*) require a payment response to "identify the payment claim to which it relates", it prescribes no form or particular language for this purpose. More specifically, there is no explicit requirement that a payment claim has to be identified by a payment claim number. It is evident that the purpose behind s 11(3)(*a*) is that the claim to which the payment response relates should not be mistaken with that of another payment claim. So long as this purpose is achieved, the purpose of s 11(3)(*a*) is fulfilled. In this case, it is clear from the service date of the Certificate 13B and the amounts reflected therein as the cumulative certified amount, that it was clearly intended to address PC15. The Claimant has not suggested or demonstrated that the Claimant had been misled or even inconvenienced by any ambiguity here. The manner by which the Claimant addressed the issues in Certificate 13B in this adjudication is evident that the Claimant did not

think that Certificate 13B was intended for any purpose other than as a payment response to PC15. Accordingly, the Tribunal finds no merit in this ground of the Claimant's objection.

57 The Claimant's second ground of objection is that Certificate 13B did not state the response amount or "nil". This ground of objection is also unfounded. The dash (denoted by "-") inserted against the entry "Amount Due" in Certificate 13B is accepted nomenclature for stating that no amount is due. There is no basis for asserting this point as a ground of objection.

58 The final ground of the objection is that the Respondent did not "provide any information or documents to support its purported position that the value of work done is '90.71%'". It is not clear why this is advanced as a ground of objection. The Claimant itself claims for work done on a percentage basis. If, indeed, there are no supporting information for the value of work done, then this goes to the evidence relating to the merits of the Respondent's case. It does not invalidate the payment response. This is not a ground for mounting a procedural objection.

59 For these reasons, the Tribunal dismiss the Claimant's objections as to the validity of Certificate 13B as the payment response in respect of PC15.

Contents of Payment Response (Certificate 13B)

60 While the Tribunal has accepted the Respondent's argument that Certificate 13B constitutes a valid payment response, it is relevant for this determination to note the brevity of the Payment Response.

61 Firstly, the Payment Response (in the form of Certificate 13B) is essentially a one-page document. Secondly, this one-page document advanced as the Payment Response contains only the following entries in response to PC15:

Provisional Sub-contract Sum		$4,255,000.00
Value of work done	**90.71%**	$3,859,500.00
(Refer to the attached)		
Sub-total		3,859,500.00
V.O. :Addition		
:Omission		
Gross value		$3,859,500.00
Less Retention (10%)		$(212,750.00)
Sub-total		$3,646,750.00
Recovery of downpayment – (Full)		$ –
Less: Previous payment made		$(3,646,750.00)
TOTAL		$ –

Add: 9% GST	$ –
Sub-total	$ –
Less: Deduction	
Amount due	$ –

62 Thirdly, there are no supporting documents or further supporting calculations. Accordingly, to the extent that the Payment Response is relied on to answer the Payment Claim in this adjudication, the contents are confined to the entries recorded on this one-page document.

Other procedural issues

Timeline for making Adjudication Application

63 It has been noted earlier that the DSP in respect of this adjudication expires on 18 June 2014. By reason of s 12(1), the Claimant is entitled to make its adjudication application within the following seven-day period as stated in s 13(3)(*a*) of the SOP Act. The Claimant's entitlement to make an adjudication application thus commences on 19 June 2024 and ends on 26 June 2024. The Adjudication Application in this case was made on 26 June 2024. It therefore falls within the timeline prescribed in s 13(3)(*a*).

Notice of intention to apply for adjudication

64 Aside from complying with the timeline, the Claimant is required, pursuant to s 13(2) of the SOP Act, to notify the Respondent of its intention to apply for adjudication application before proceeding to make the adjudication application. On 24 June 2024, the Claimant's solicitors wrote to the Respondent attaching a copy of the notice of the intention to apply for adjudication. There is no issue that this notice has been served before the Adjudication Application was lodged.

Respondent's position

65 In its Adjudication Response, the Respondent did not raise any issues against the validity of the Payment Claim or with any of the stages in the process leading up to the Adjudication Application.

Tribunal's determination of procedural validity

66 The Tribunal is satisfied, on the records, that the Payment Claim (PC15) has been properly issued and that the Adjudication Application has been properly lodged in accordance with the SOP Act.

Legal principles

67 Both parties in their submissions directed the Tribunal to a number of authorities on the issues raised in this adjudication. It is necessary to briefly review these authorities and the propositions for which they stand.

Establishing prima facie case

68 The Tribunal accepts the Claimant's submission that in adjudication, a claimant is only required to establish a *prima facie* case before the adjudicator in order for its claims to succeed. In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [63], the Court of Appeal settled this principle when it endorsed the proposition first laid down in *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28 ("*Glaziers Engineering*"). In *Glaziers Engineering* at [32], the High Court expressed the view that a party in an adjudication does not, strictly speaking, "prove" its case to an adjudicator "in the sense of demonstrating to the adjudicator that its case is objectively true". Instead, it is more accurate to speak of a party discharging its "burden of persuasion" (at [33]).

69 It will not be controversial that the task of persuading the adjudicator on the merits of a claim falls on the party advancing the claim. In *Comfort Management*, Steven Chong JA alluded to this point in the course of his judgment at [65]:

> In particular, the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim. Indeed, that is the essence of his duty under s 17(2)(*a*) of the Act to 'determine the adjudicated amount (if any) to be paid by the respondent to the claimant' …

70 Thus, while the Claimant is correct to submit that there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities, it is clear from the judgment in *Comfort Management* that the Claimant's burden of persuading the adjudicator is not discharged by mere assertions in the Payment Claim. Instead, the Claimant must demonstrate to the Tribunal that it has a *prima facie* case for its claim on the materials and documents properly lodged in this adjudication.

Operation of section 15(3)

71 While the Tribunal has ruled that Certificate 13B is a valid payment response, the Respondent is obliged to state any objection against any part of the Claimant's claimed amount in the Payment Response (Certificate 13B).

In absence of such statement in the Payment Response, s 15(3) of the SOP Act applies and, as a consequence, the Respondent would not be entitled to raise in its adjudication response any objection against the relevant part of the PC15 which has not been set out in the Payment Response.

72 Section 15(3) reads:

> (3) Subject to subsection (4), 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
>
> …

73 Section 15(3)(*a*) has to be read in conjunction with s 15(4). Section 15(4)(*a*) reads:

> (4) Despite subsection (3), the respondent may include in the adjudication response an objection mentioned in subsection (3) if —
>
> (*a*) in the case of an adjudication that relates to a construction contract—
>
> (i) the circumstances of that objection only arose after the respondent provided the relevant payment response to the claimant; or
>
> (ii) the respondent could not reasonably have known of the circumstances when providing the relevant payment response to the claimant …

74 Arising from the Amendment Act, it is also necessary to read s 15(3) in relation to s 17(6). Section 17(6) reads:

> (6) The adjudicator must not consider an objection from the respondent of any nature that was not included in the adjudication response, unless —
>
> (*a*) the circumstances of that objection only arose after the respondent lodged the adjudication response with the authorised nominating body;
>
> (*b*) the respondent could not reasonably have known of those circumstances when lodging the adjudication response with the authorised nominating body; or
>
> (*c*) the objection relates to a patent error.

75 Sections 15(3) and 17(6) therefore set off a chain of consequences arising from a failure to raise an objection in a payment response. An

objection which has not been raised in a payment response cannot be raised in an adjudication response and an objection which has not been raised in an adjudication response cannot be considered by an adjudicator in making his/her determination.

76 For completeness, two further points should be briefly noted. Firstly, prior to the Amendment Act, the effect of the previous s 15(3) is similar to the cumulative effect of the amended ss 15(3) and 17(6). Secondly, in the amended ss 15(3) and 17(6), the term "objection" was used in place of the previous term "reason" in pre-amended s 15(3). The term "reason" is used in many of the judgments published by the courts prior to 2018. However, there can be no issue that both terms – "reason" and "objection" – essentially refer to grounds on which a respondent may rely to deny or withhold payment of the whole of or any part of the claimed amount stated in a payment claim.

77 The operation of s 15(3) was considered at some length by the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*"). Sundaresh Menon CJ, in delivering the judgment of the court in that case, explained the operation of s 15(3) in these terms (at [33]):

> In our judgment, s 15(3) is jurisdictional in the sense that it curtails the power of an adjudicator to allow a respondent to raise new grounds for withholding payment that were not included in his payment response and, for that matter, an adjudicator's power even to consider such grounds at all. This is literally what the provision provides and we should, in our view, give proper effect to it.

78 The opportunity to respond to a payment claim has also been characterised as "a duty to speak on the part of the Respondent". This was discussed by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"), where the court explained that this duty to speak entails, *inter alia*, stating in a payment response any objection that a respondent wished to rely on before an adjudicator (at [58] and [66]). Chong JA in delivering the judgment of the Court of Appeal in *Audi Construction* said (at [67]): "a failure to object would amount to an unequivocal representation of a decision to forgo one's right to raise that objection" and such a representation is taken to subsist "at the time a claimant would reasonably expect the respondent to air his objection".

79 Essentially, the thrust of the language of s 15(3) of the SOP Act construed on the basis of these authorities is that an adjudicator has no mandate to consider any objection which had not been first stated in a valid payment response. Section 15(3) goes, therefore, to the jurisdiction of an

adjudicator and hence the validity of an adjudicator's determination (see *W Y Steel* at [33]).

Patent errors

80 In this adjudication, as shall be seen below, the Respondent raises issues with the claim for the "Reduced Scope of Works" as well as its claim in respect of variations. The Respondent submits that even if the Tribunal finds that the Respondent has not objected to these claims expressly in the Payment Response, the Tribunal should not accept the claims in PC15 without reservation. The Respondent contends that it is entitled to raise patent errors in the Payment Claim. This entitlement is enshrined again in the leading authorities on the subject.

81 In *W Y Steel*, Menon CJ stated the position in these terms at [51]:

> … In such circumstances, there is nothing to stop a respondent who has failed to file any payment response or adjudication response from raising patent errors on the face of the material *properly* before the adjudicator to contend that the payment claim should not be allowed in part or at all. We reiterate that such errors must be plain and evident on the face of the material that is *properly* before the adjudicator. [emphasis in original]

82 The issue was also before the Court of Appeal in *Comfort Management* ([68] *supra*). Chong JA, in delivering the judgment of the court in that case, states at [4]:

> Notwithstanding this independent duty on the adjudicator, a respondent who has failed to file a payment response, and who wishes to challenge the payment claim, is entitled to highlight to the adjudicator only *patent errors* in the material properly before the adjudicator. [emphasis added]

83 In a further passage of his judgment in the same case, Chong JA expounds on the nature of a patent error as understood in the context of the SOP Act at [22] and [23]:

> 22 In essence, a patent error is an error that is obvious, manifest or otherwise easily recognisable. It refers to an error that is in the material that is properly before an adjudicator for the purpose of his adjudication. It is therefore strictly not an error that is committed by an adjudicator. That type of error would be an error in his decision-making. But the expression 'patent error' is not used in this context to refer to an error of that sort. It instead refers to an error in the material before an adjudicator when he is making his decision.
>
> 23 An example of a patent error might be where the contract adduced by the claimant in support of the payment claim is not even the contract between the parties. Another example … is where 'the documentary evidence

> submitted by the claimant plainly contradict[s] the claimed amount'. Yet another example might be where no supporting material or explanation whatsoever is adduced to support the payment claim. While in principle these are not exhaustive examples of patent error, it is difficult to conceive of other forms of error that may properly be regarded as patent …

84 This definition of the term "patent error" is now enshrined in s 2 of the Current Version of the Act:

> **2.** … 'patent error', in relation to a payment claim, means an error that is obvious, manifest or otherwise easily recognisable on the face of the claim …

85 Thus, notwithstanding that the Respondent failed to respond to the merits of any part of the claim in Certificate 13B, this Tribunal is obliged to examine whether there are patent errors in that part of the claim in PC15. The authorities accept that the inquiry in these circumstances cannot be expected to resemble that which an adjudicator might be expected to undertake had a response been issued by the respondent. Furthermore, the matters which may be raised as patent errors are limited necessarily by the definition of the term. As noted in *Comfort Management* at [4], "the category of patent errors is an extremely narrow and limited one".

86 Furthermore, it is clear that it is not sufficient for the Tribunal to merely look for patent errors. As noted in *Comfort Management*, an adjudicator "must have at least some *positive basis* for his determination, and not simply lack a reason not to allow the claim" [emphasis in original] (at [56]). However, the court also made clear than an inquiry into a positive basis in support of a claim is not inconsistent with the principle that a claimant in adjudication is not required to establish "his claim on a balance of probabilities" (at [63]):

> In our view, there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities. Nothing in the existing authorities has ever suggested that to be the position, certainly not *W Y Steel*, which is the first local authority that attempts to examine what an adjudicator must substantively consider in adjudicating a payment claim dispute. More importantly, the adjudication process is intentionally 'somewhat roughshod' (*W Y Steel* at [22]) given that the resultant decision is intended to have only temporary finality, the path being open for the parties to resolve their dispute fully and finally through arbitration or litigation: see s 21(1)(*b*) of the Act …

87 These principles from the authorities are clear and are not in dispute. They are recorded at length in this determination because they apply directly to the analysis of the merits of the Payment Claim in this adjudication.

Original scope of Subcontract works

Omission of works

88 As recorded earlier in this determination, the Subcontract Sum is stated in the LOA as $5,200,000.00 (exclusive of GST) The Claimant's position is that following the award of the Subcontract, parties subsequently agreed to omit the works at Level 2 of the building amounting to $945,000.00. In its submissions, the Claimant relates the chronology of exchanges between the parties beginning 21 February 2023:

> (a) In a Whatsapp dated 21 February 2023 from the Respondent's Project Manager, Mr [G], to the Claimant's Project Director, Mr [A], the Respondent asked '*[Project] level 2 can help to omit 965k?*' The Claimant replied '*$945k the lowest*'.
>
> (b) Thereafter, parties engaged in discussion on omitting level 2 works from the Sub-Contract,
>
> (c) In an email dated 31 May 2023, the Claimant informed the Respondent that '*as per the final discussion, please refer below breakdown and Omit cost ($945K) from the total contract sum of [BIM]*'.
>
> (d) In the said email, the Claimant also attached the Respondent's Purchase Order No. P2575 and struck out all works relating to level 2.
>
> (e) Thereafter, in subsequent progress claims starting from Progress Claim No.3 dated 23 June 2023, the Claimant indicated the contract amount as '*$4,255,000.00*' (S$5,200,000.00 less S$945,000.00).
>
> (f) Similarly, in subsequent payment certificates starting from Payment Certificate No.5 dated 10 August 2023 (in response to Progress Claim No.3 dated 23 June 2023), the Sub-Contract sum is stated as '*$4,255,000.00*'.
>
> [emphasis in original]

Respondent's arguments

89 In its submissions annexed to the Adjudication Response, the Respondent disputes that the works for the Level 2 works had been omitted from the Subcontract. It states:

> In this regard, the Parties did not agree to omit the entire scope of the Level 2 works, as would be evident by examining the Claimant's Quotation for the Sub-Contract Works (the "Quotation"), which the Claimant had sent to the Respondent for the preparation of the Letter of Award.

90 This submission is relied on by the Respondent to assert its entitlement to withhold a sum of $223,829.50 against the claimed amount. The submission is a challenge of the claimed amount on its merits and invites the Tribunal to consider the contents of pre-contract documents that is supposed to be the basis for the agreed Subcontract price. It would also require an examination of the legal basis to justify an inquiry into parties' subjective intentions leading to the Subcontract.

91 This is, unmistakably, a challenge against the merits of the Payment Claim. As noted earlier, the Payment Response in the form of Certificate 13B is essentially a one-page document. The assertions in this particular submission of the Respondent cannot be found anywhere in the Payment Response.

92 The authorities are incontrovertibly consistent that, pursuant to s 15(3) of the Act, the Respondent is expected to raise objections of this nature in the payment response. Sections 15(3) and 17(6) set out a chain of consequences arising from the Respondent's failure to raise these objections in the Payment Response. The Respondent is not entitled to raise them in its Adjudication Response. In turn, an objection which has not been raised in an adjudication response cannot be considered by this Tribunal in these proceedings. Essentially, the Respondent has failed to discharge its "duty to speak" and this amounts to "an unequivocal representation of a decision to forgo one's right to raise that objection" (*Audi Construction* ([78] *supra*) at [58] and [67]).

93 Similarly, the Respondent also pointed to an aspect of the "Reduced Scope of Works" which it alleged had not been completed. This item is described by the Respondent as "testing and commissioning" works. This cannot fall within the definition of a "patent error" under s 2 of the SOP Act. It is plainly an objection which again goes to the merits of the claim and should have been properly raised by the Respondent in the Payment Response. As it is, there is nothing in the materials before the Tribunal to show why testing and commissioning could not be carried out on the works as completed. This objection must be dismissed.

94 The Respondent further alleged a number of inconsistent calculations in respect of the sum claimed for the item described as "AC System" at "Basement 2 (F&B Area)". The Respondent's complaint is that in the previous payment claim, "PC14", the Claimant had claimed a higher percentage completion of 98%. However, in PC15, the Claimant has only claimed for this item at a percentage completion of 95%. Once again, even if there is merit in this complaint, this is clearly a point which should have been raised as an objection in Certificate 13B. Nevertheless, it is difficult to think why a claimant should not be entitled to *reduce* the quantum of its claimed amount in a subsequent payment claim. It has not been shown why this prejudices the Respondent. Thus, even if the Respondent is not

prevented by s 15(3) to advance this objection, the objection would be plainly unsustainable. This objection is hereby dismissed.

95 The Tribunal is satisfied that, on the records, it is clear that parties had agreed to omit the Level 2 works and that, as a result of the agreed omission, the original scope of works was reduced to $4,255,000.00 ("Reduced Scope of Works") on 31 May 2023.

Valuation

96 In PC15, the Claimant concedes that it had not completed the item described as "Staircase/FFL/SSL (B2 to L1M)" under "MV System". This item is found in the schedule attached to PC15 under "MV System Item c". For convenience, it shall be hereinafter referred to as "Item MVS-C". The Claimant did not therefore claim the full amount of $4,255,000.00 (as it would if the whole of the Reduced Scope of Works is completed) but the sum of $4,235,197.50.

97 The Claimant explained that it had completed 95% of this item. It states that it did not carry out the remaining 5% of the works for Item MVS-C because this could only be done after the Main Contractor completed the "coring works" and provided a new drawing for the staircase.

98 The basis for the claim of a 95% percentage completion is calculated as follows:

(a) In PC14, the cumulative percentage completion for this item of work was 46% and the claim was $174,507.50.

(b) In PC15, the Claimant claimed a further 49% of this item for a claimed amount of $186,690.00.

(c) As a result, the cumulative percentage completion is now 95%, giving a valuation of $361,950.00.

99 These calculation metrics may be presented as follows:

Contract Value	Previous Claim PC14		Current PC15		Cumulative	
	% Work Done	Claimed Amount	% Work Done	Claimed Amount	% Work Done	Claimed Amount
$381,000.00	46%	$174,507.50	49%	$186,690.00	95%	$361,197.50

100 The Tribunal noted that nine sketch drawings were furnished with PC15 in support of the claim that the percentage completion for Item MVS-C is 95%. In these sketch drawings, the work components completed were denoted by a colour code designating the "1st Fix" and "Final Fix". There is a third colour code – green – referenced as "Final Fix FRB". At the Adjudication Conference, it was clarified that the abbreviation "FRB" relates

to fire rated boards. These account for around one third of the value of the work.

101 From the Tribunal's examination of the sketch drawings, it is clear that compared to the state at PC14, there is a significant amount of work done in respect of Item MVS-C. However, on the balance of the supporting documents, it cannot be said that it is readily evident that a further percentage completion of 49% was achieved during the interval between PC14 and PC15 (giving a cumulative percentage completion of 95%).

102 Prior to the Adjudication Conference, the Tribunal invited parties to consider the High Court decision in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288. In that case, the High Court was not persuaded that an assessment of the quantum of a claim was completely reliable. V K Rajah JC (as he then was) considered that he could either "steeply discount" the assessment of the claim before him or he could with the available evidence "attempt to mathematically arrive at the exact estimate of the quantum". He concluded that neither of these approaches was "entirely satisfactory" and decided, instead, to make a "pragmatic estimation" of the amount to be awarded. At the Adjudication Conference, both parties agreed that, in an appropriate situation, this approach may be applied in this adjudication.

103 The parties took the Tribunal through the drawings showing the areas of the works which can only be completed after the Main Contractor had carried out the coring works. The true percentage as assessed from this joint visual inspection of the drawings places the percentage completion for Item MVS-C at between 80% and 90%. As a pragmatic estimate, it seems to the Tribunal that a reasonable assessment is 85%.

104 Accordingly, the Tribunal determines the cumulative percentage completion at 85%. Applying 85% to the contract value of $381,000.00 for Item MVS-C, the value for this item is determined in the sum of **$323,850.00**. This is $37,346.50 lower than the claimed amount of $361,197.50 claimed for Item MVS-C in PC15.

105 The value of "Claim for Work Done" as at the date of PC15 is therefore determined as follows:

Original Claim for Work Done		$4,235,197.50
Original Claim for Item MVS-C	$361,197.50	
Determined Amount for Item MVS-C	$323,850.00	-$37,347.50
Determined Amount for Work Done		$4,197,850.00

106 For the purpose of calculating the Adjudicated Amount, the Tribunal thus determines the Claim for Work Done in the sum of **$4,197,850.00**.

Variations

107 The Claimant presented several claims for variations in PC15.

Applicable principles

108 The Appellate Division of the High Court in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] 2 SLR 468 ("*Vim Engineering*") affirmed the general position that in order for a claim to be made for variation work under a construction contract, it is necessary to establish that:

(a) the work is an "extra";

(b) there is an express or implied promise to pay for the work;

(c) the work was instructed by a person with authority to vary the contract; and

(d) any condition precedent to payment has been fulfilled (*Vim Engineering* at [7]).

109 The four requirements articulated in this passage from the judgment in *Vim Engineering* shall be considered in turn. Each of these requirements shall be referred to respectively as "Requirement (a)", "Requirement (b)", "Requirement (c)" and "Requirement (d)".

110 As to **Requirement (a)**, it is for the Claimant to bear the burden to persuade the Tribunal that the varied work is, in each case, an "extra".

111 The Tribunal now turns to **Requirement (b)**. Where a contract provides expressly for variations to the contract, it must be taken that there is an express or implied promise to pay for the work. In the present case, cl 2.17 of the LOA applies to variation claims under the Contract. In respect of the variations claimed in this adjudication, Requirement (b) is therefore satisfied.

112 The consideration of **Requirement (c)** turns on cl 2.17. Clause 2.17 consists of two unnumbered paragraphs and reads:

> You are to supply all necessary materials and labour required for the completion of the whole awarded works to the approvals from [BIN]/[X]/Main Contractor/Consultants/Owner. No variation claims for additional materials or labour supplied will be accepted unless these are approved as variation works for [BIN] [the Respondent].

> The amount of variations due to you will be based on the amount of approved in writing by Main Contractor not less than 6% as profit for [BIN]. All lump sum omission cost and value engineering cost as provided in the tender document shall be agreed upon finalization with the client/consultants. No claim for any loss of profit or any other consequential losses resulting from any variation, addition or omission shall be granted. All cost savings shall be subject to percentage sharing agreed upon on case-by-case basis.

113 The first of the objections raised by the Respondent concerns the requirement for variations to be authorised or approved by [X]. The Respondent states:

> In a similar vein, Clause 2.17 of the Letter of Award makes it clear that no variation claims shall be accepted unless [X] had approved the same as variation works under the [X] Sub-Contract. Further, on a plain reading of Clause 2.17, the Respondent does not reserve any residual discretion as to the approval of the Claimant's variation claims, unlike the case in *Vim Engineering*.

114 [X] is the mechanical and electrical subcontractor in relation to whom the Respondent itself is a subcontractor. [X] is two levels higher than the Claimant in the contractual chain. While the Respondent refers to cl 2.17 for this proposition, cl 2.17 says nothing of that sort. The first paragraph of cl 2.17 states only that approvals for works may be issued by several entities – identified as "[BIN] / [X] /Main Contractor / Consultants / Owner". It is significant that this approval only pertains to the "whole awarded works". In fact, on a plain reading of the sentence, this sentence appears to be concerned only with the "materials and labour" used for the works. It makes no mention of variations at all and offers no basis to suggest that any of these entities (other than the Respondent) is entitled to approve variations.

115 Instead, there is a separate sentence in the same paragraph stipulating that no variation claims "will be accepted unless these are approved as variation works for [BIN]". Thus, unlike the other entities mentioned in the first sentence of this paragraph, the authority to approve variations is only reserved for [BIN] (the Respondent). The clause could not be more explicit. If [X] is intended to be included as the approving authority for varied work, it would have been a simple matter to insert [X] alongside the Respondent. The unmistakable reading of this sentence is that the authority to instruct the Claimant as to variation works is reserved only for the Respondent. For the avoidance of doubt, neither does the clause subject the Respondent's approval of a variation to consent by or agreement with [X]. The Respondent's submission that the acceptance of variation claims is conditional on [X]'s approval is a complete misreading of cl 2.17.

116 As a consequence, the fact that [X] had not approved any of the variations claimed is immaterial. So long as the Claimant can demonstrate that each item of variation work has been authorised by the Respondent, **Requirement (c)** is satisfied.

117 As for **Requirement (d)**, it is for the Claimant to show to the Tribunal that the relevant condition precedent has been complied with in the case of each variation claim.

118 One related observation of cl 2.17 should be recorded. There is no prescribed form for approval of variation works by the Respondent. For example, it does not state that any instruction to vary the works has to be in writing. With respect to several of the variations, the records show that the Respondent was present together with [X] when the relevant instruction was issued. This would be sufficient, in the Tribunal's view, for the requirement stated in [102(d)].

119 Since the requirement in [102(b)] is settled for all variations ordered under this contract, the inquiry for each variation claim has to only address Requirements (a), (c) and (d).

Variation Order 1

120 The claim for Variation Order 1 ("VO1") is as follows:

VO No. & Description	Amount
VO1 – B1- Carpark EAD & FAD Duct	$35,435.00

121 VO1 arose from an extension of the area which is required to be covered by mechanical ventilation. This extension, in turn, required changes to the design and quantities of the ducts.

122 The documentation provided in support of the claim for VO1 included a series of recorded exchanges between the parties. By an e-mail dated 20 January 2023, the Claimant wrote to the Respondent referring to this variation as VO1. Later that same day, the Respondent requested for a "soft copy for my input".

123 On 3 March 2023, the Claimant sent to the Respondent a detailed quotation for this work. The quotation may be summarised as follows:

Work	Rate	Unit	Quantity	Amount
Zone D				
Supply, install NEW carpark fresh air G.I				
ductwork c/w painting, support & brackets				
(New) 2300 X 800mm – 13 m	$95.00	m²	81	$7,695.00

(New) 1650 X 1200mm – 13 m	$95.00	m²	74	$7,030.00
Zone E				
Supply, install NEW carpark exhaust air G.I				
ductwork c/w painting, support & brackets				
(New) 2300 X 800mm – 33 m	$95.00	m²	218	$20,710.00
Total (excluding GST)				$35,435.00

124 Among the supporting documents were drawings which contained annotations entered by [X]'s representative in the presence of the representatives from both the Claimant and Respondent. The annotations were framed in the language expected of instructions to the Claimant to proceed with the varied work.

125 The Tribunal is satisfied that the instructions consist of clearly documented acknowledgments by the Respondent that this item of work was a variation. The supporting documents further included photographs showing that the works had been carried out. On the records, the particulars with respect to this claim was with the Respondent since 3 March 2023. The Respondent had more than 15 months to satisfy itself as to the circumstances of this variation. There is no record of the Respondent raising any issue with the claim for this work until the Adjudication Response. The records support irresistibly the Claimant's case that it has made out a *prima facie* case as to its entitlement to be paid for this work as a variation.

126 At the Adjudication Conference, the Claimant's quantity surveyor stated that the quantities were measured on site and that these measurements were also referenced to as-built drawings. In the Tribunal's view, there is a reliable basis for the quantities. The rates are confirmed to be rates from the "Schedule of Rates". On the face of the materials before the Tribunal, no issues can be taken with the rates applied by the Claimant.

127 The calculations support the Claimant's valuation of the work in the sum of $35,435.00. However, pursuant to cl 2.17, the Claimant has to allow the Respondent a sum equivalent to 6% of this amount for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing 6% as profit for the Respondent is $33,308.90.

128 The Tribunal thus determines that the Claimant is entitled to be paid for this variation in the sum of **$33,308.00**.

Variation Order 3A

129 A description of Variation Order 3A ("VO3A") is as follows:

VO No. & Description	Amount
VO3A – B2-L1M Labour cost for AC Linear Plenum Box	$49,920.00

130 The Claimant relies on an e-mail from the Respondent's Mr [G] to the Respondent's Mr [H] dated 2 May 2023 as the instruction of VO3A. In that e-mail, the Claimant states: "Kindly find the attached VO3 or additional labour cost for plenum box installation due to the change of aircon slot diffuser type."

131 In the Claimant's Further Schedule, there was a reference to an e-mail exchange dated 3 April 2024 which refers to variation orders ("VOs") in general terms and complained that the Respondent did not address the VO claims. In the same document, the Claimant confirms that the genesis of this claim relates to "verbal instructions" from the Respondent's Mr [H].

132 None of the records produced before the Tribunal can be said to amount to a written record of an instruction from the Respondent to vary the works claimed as VO3A. The Claimant's e-mail of 2 May 2023 is an assertion by the Claimant that it is claiming for this work. However, this e-mail is completely silent as to the circumstances of the "verbal instructions" which the Claimant now states is the basis for carrying out VO3A. In the case of the earlier variation, VO1 – which is for a smaller amount of $35,435.00 – there is a consistent course of exchanges pointing unmistakably to the Respondent's acknowledgment of an agreement for the varied work. In VO3A, the claim is for a larger quantum of $49,920.00. It is inexplicable that the Claimant is unable to point to a more persuasive corroborative record supporting the variation.

133 The Tribunal is unable to find that there was an instruction to vary the works. The claim for VO3A is hence dismissed.

Variation Order 4a

134 The claim for Variation Order 4a ("VO4a") is as follows:

VO No. & Description	Amount
VO4a – B1 – Kitchen KEAD & KMAD Duct	$206,585.00

135 This variation arises from a change in the fan size capacity of 800–900mm to 1,200mm at Basement 1. As a consequence, the attending ductwork had to be extensively rerouted. When the variation was instructed, the Claimant had completed to a significant extent the works based on the original design. As a result of the variation, the Claimant claims for the costs of dismantling the work already carried out.

136 The documentation provided in support of the claim for VO4a consisted of a series of annotated drawings fronted by a quotation from the

Claimant to the Respondent dated 31 May 2023. On 21 July 2023, the Respondent's Mr [H] stated in a WhatsApp message to the Claimant that "[X] signed instructions for duct VO work proceed".

137 At the Adjudication Conference, it was clarified that that the annotations were entries made by Mr [I], [X]'s representative, in the presence of the parties. As seen from the extract from one of these drawings below, one of the annotations clearly referred to the work as "VO4a" and stated "KMAD Duct Size change". These are unequivocally instructions to change the dimensions of the original work.

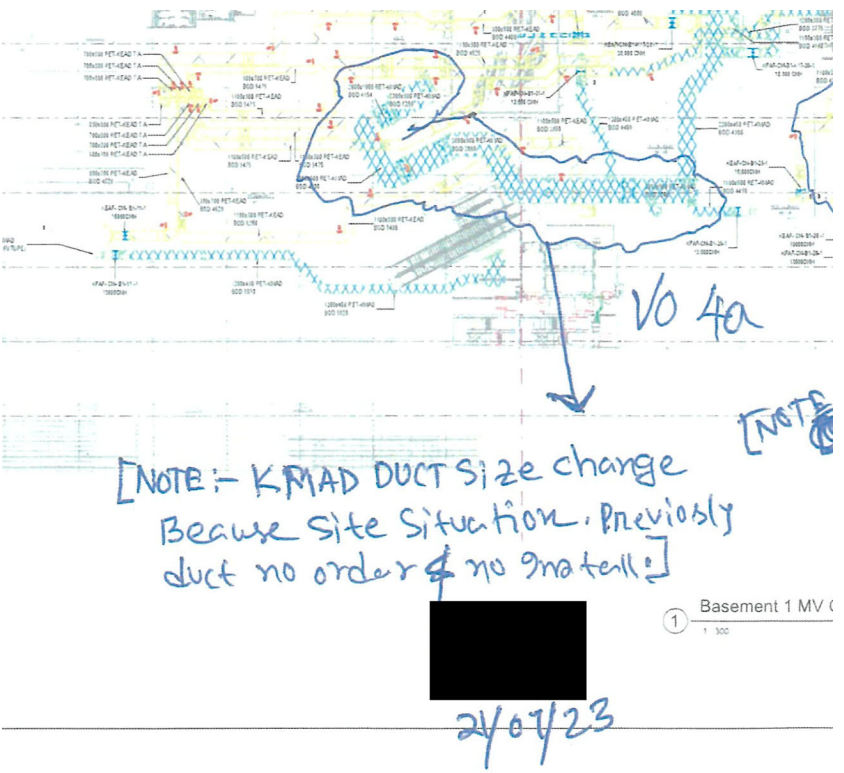


Figure 3:
Extract showing annotations for VO4a

138 In addition, the drawings carefully showed the omitted works (highlighted in yellow) from the original design and the additional works carried out under VO4a (highlighted in red). The variation thus involves the omission of parts of the original works of the Contract and extra works and the claimed amount is for the additional costs incurred for the changes.

139 The Tribunal is satisfied that the annotations on the drawings constituted instructions by the Respondent for this variation. There is no

record disputing the intent of these annotations. The documents submitted with the Adjudication Application also included photographs showing that the works had been carried out.

140 The Tribunal notes that this claim was submitted to the Respondent on 31 May 2023. The Respondent had 14 months to satisfy itself as to the circumstances of the claim. There is no record of the Respondent disputing the claim for this work until the Adjudication Response. The Tribunal is thus satisfied that the Claimant has made out a *prima facie* case as to its entitlement to be paid for this work as a variation.

141 For all these reasons, the Tribunal finds that the Claimant is entitled to be paid for this work as a variation.

142 The Claimant's quantity surveyor stated during the Adjudication Conference that the quantities were measured on site and referenced to as-built drawings. No reason has been advanced in the Payment Response to challenge the reliability of the quantities. The rates are confirmed to be rates from the Schedule of Rates except for the "labour" items. The latter items are priced as star rates.

143 During the Adjudication Conference, the Claimant addresses the possibility that the issue of omissions may not have been adequately accounted for in the Claimant's calculations. However, having reviewed the calculations, the Tribunal is satisfied that this concern stems from the way the calculations are presented. It would have been preferable if the presentation took on more mould, wherein the original works are first reflected as omissions and the new works are presented as additions so that the claimed amount is represented by the difference between the two.

144 Nevertheless, the Tribunal is satisfied that there are sufficient particulars and records to support a *prima facie* valuation of the claim in the sum of $206,585.00. However, an adjustment has to be applied to this valuation for the purpose of cl 2.17. Under cl 2.17, the Claimant has to allow the Respondent a margin 6% of this amount for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing 6% as profit for the Respondent is $194,189.90.

145 Accordingly, the Tribunal determines that the Claimant is entitled to be paid for this variation in the sum of **$194,189.90**.

Variation Order 5

146 The claim for Variation Order 5 ("VO5") is as follows:

VO No. & Description	Amount
VO5 – B1 – MV FAD Duct	$7,290.00

147 VO5 relates to the installation of ducts for four air-conditioning units in the transformer room at Basement 1.

148 The Claimant once claimed that this ductwork was instructed by way of annotations made by Mr [I] ([X]'s representative) on shop drawings in the presence of parties' representatives. The following annotations were made at two locations on the drawings: "Site coordination. Extend duct".

149 These annotations cannot be read as instructions to vary the works. They do not even acknowledge that the works were additional works. Instead, they appear only to require the Claimant to attend to site coordination matters and to construct the ducts accordingly. It is insufficient to read an intent to vary the works on the language of these annotations. At any rate, the change in quantities does not appear to be material, certainly not sufficiently material to constitute a variation for the purposes of a lump sum contract.

150 The Claimant is not entitled to claim for this work as a variation and the Tribunal would dismiss this claim.

Variation Order 6

151 The claim for Variation Order 6 ("VO6") is as follows:

VO No. & Description	Amount
VO6 – B2 – Kitchen KEAD D Duct	$29,920.00

152 On 3 May 2023, instructions were issued for this work. The instructions took the form of the following annotations on the drawings signed by representatives from [X] and the Respondent:

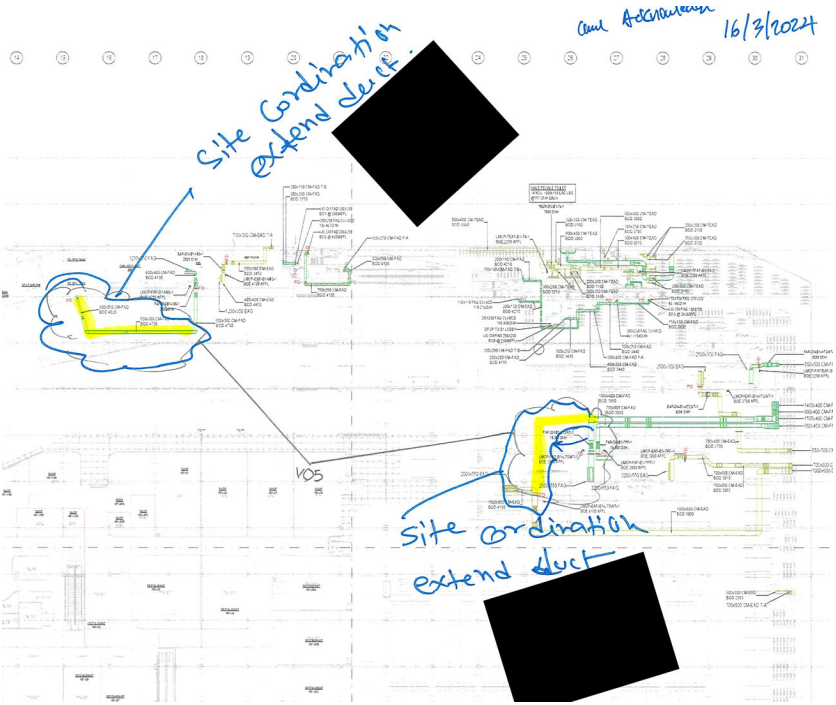


Figure 4:
Extract showing annotations for VO6

153 As with VO5, both sets of annotations only directed the Claimant to address site coordination matters and to construct the ducts accordingly. These annotations do not refer to the works as additional works and cannot be accepted, on their own, as instructions to vary the works. The Claimant states that the work arose from changes made to the F&B kiosk locations. Although the changes relied on were highlighted in the drawings, they tell very little about the nature of the changes and why, within the context of a lump-sum contract, they should be considered additional works.

154 As with the case in VO5, the Claimant is not entitled to claim for the work in VO6 as a variation and the Tribunal would dismiss this claim.

Variation Order 7b

155 The claim for Variation Order 7b ("VO7b") is as follows:

VO No. & Description	Amount
VO7b – B1–New FCU @ Consumer LT Switch Room & Transformer Room	$53,214.00

156 On 2 May 2023, the Claimant notified the Respondent that the ductwork for the air-conditioning fan coil unit ("FCU") in the consumer switch room and transformer room at B1 constitutes a variation. The work consists of the addition of three FCUs in the switch room and another four FCUs in the transformer room. On 20 June 2023, the Claimant followed up with an e-mail to the Respondent attaching the claim for VO7b.

157 The Claimant ascribes as instructions the following annotations made by [X]'s representative on a shop drawing dated 7 August 2023:

> … Proceed installation work. Base [*sic*] on site coordination
>
> Mr [I] 7/8/23

158 On a plain reading, as with VOs 5 and 6, these annotations merely suggest that the Claimant should coordinate this item work with other activities on site. It cannot be read as an instruction to vary the works. The words are more plausible to direct the Claimant on the approach for carrying out work which is part of the Reduced Scope of Works. Furthermore, this claim is for a significant amount. It is reasonable to expect that, if the work was intended as a variation, there would have been some other corroborating records of the Respondent affirming that this is varied work.

159 The Tribunal concludes that the work is not a variation and the Claimant is not entitled to claim for this work as a variation. This claim would be dismissed.

Variation Order 8

160 The claim for Variation Order 8 ("VO8") is as follows:

VO No. & Description	Amount
VO8 – B1 – Zone F – Kitchen KEAD & KMAD – Dismantle and Reinstall	$8,369.00

161 This work relates to the dismantling and installation work in respect of additional smoke curtains in the kitchen area located in Zone F of Basement B1. On the record, the additional work was necessitated by a "clash" of services based on the original design. The Claimant's case is that it was instructed to carry out this work on 21 July 2023 by [X]'s representative in the presence of the Respondent. The instruction was recorded by way of the following annotations on "signed drawings".

162 A relevant extract of the annotations and the drawings is reproduced in Figure 5 below:

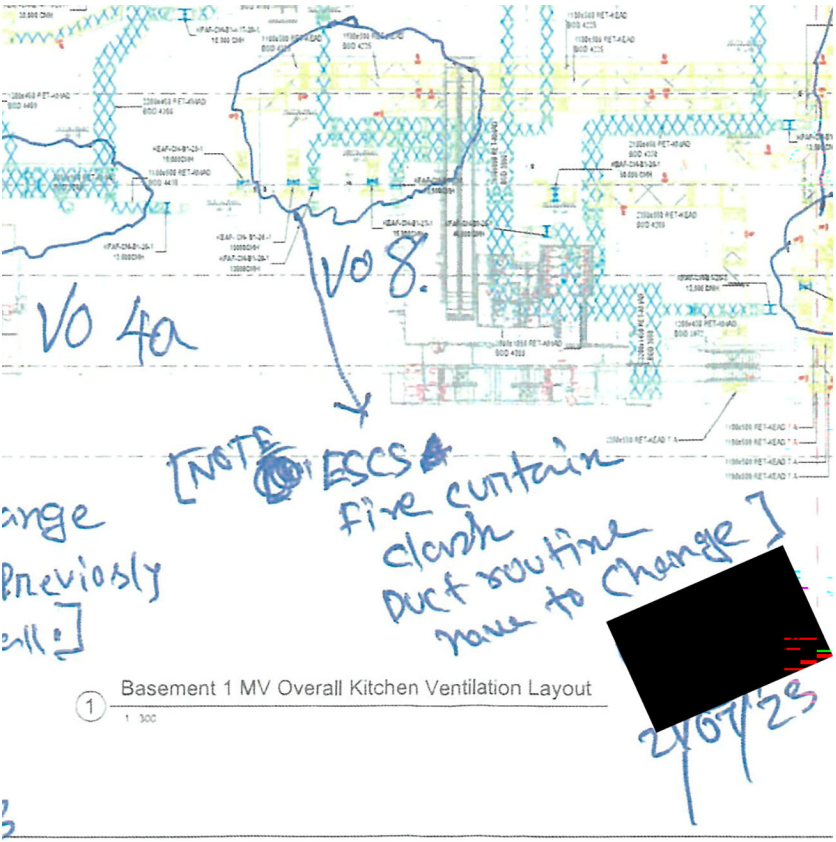


Figure 5:
Extract showing annotations for VO8

163 The Tribunal notes that the location of the work was demarcated by a "cloud" and stated clearly as "VO8".

164 By an e-mail dated 24 July 2023, the Claimant wrote to the Respondent to record this instruction, together with the quotation for the variation. The site photographs taken on 20 August 2023 recorded the completion of the works.

165 The Tribunal considers that these records are sufficient to show that the work had been duly instructed by the Respondent and that the work had been carried out. The Respondent had more than 12 months to consider the details of the Claimant's records on the e-mail of 24 July 2023. Until the Adjudication Response, there was no record of any protest on the part of the Respondent against the matters stated in that e-mail. The Tribunal is thus satisfied that the Claimant has made out a *prima facie* case as to its entitlement to be paid for this work as a variation.

166 The Claimant stated that the quantities were measured on site and referenced to as-built drawings. The Tribunal is thus satisfied that the quantities are reasonably reliable. The rates are stated to be rates from the Schedule of Rates with the exception of the star rate for labour. There is nothing to suggest that the star rate for labour was unreasonable. No issue arises therefore in respect of the calculations on the quantum of the claim.

167 The Claimant has provided sufficient particulars to support a *prima facie* valuation of this variation in the sum of $8,369.00. As with VO1 and VO4a before, it is necessary to apply an adjustment for the purpose of cl 2.17. The Claimant has to allow the Respondent a margin 6% of this valuation for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing for the Respondent's profit is $7,866.86.

168 The Tribunal therefore allows the Claimant the sum of **$7,866.86** for VO8.

Variation Order 11

169 The claim for Variation Order 11 ("VO11") may be described as follows:

VO No. & Description	Amount
VO11 – B2 – Zone A – Dismantle cost for TEAD/P.I.D ductwork)	$10,800.00

170 This work arose from the requirement for a new ESCS duct. As a consequence, the Claimant stated that it was required to dismantle and reinstall certain exhaust duct in the toilet and the PID duct.

171 The Claimant alleged that the instructions for this work were issued verbally by the Respondent's representative. There were no corroborative records for these instructions before the Tribunal. Even if it is true that the instructions were issued verbally, it is reasonable to expect some reference to the instruction in some minutes of meetings or on the drawings. Furthermore, there were also no contemporaneous records to show that this work was additional work. The absence of written records suggests that there is no *prima facie* evidence that this work was instructed as a variation. The Claimant may have carried out the work, but as this has not been shown to be a variation, it is not entitled to be paid.

172 The Tribunal would therefore <u>dismiss</u> the claim for VO11.

Variation Order 12

173 A description of the claim for Variation Order 12 ("VO12") is as follows:

VO No. & Description	Amount
VO12 – B2 Dismantle and additional ductwork for KED system	$26,305.00

174 This claim relates to abortive work arising allegedly from changes in the design and quantities of ductwork. The Claimant stated that it had completed the installation of the kitchen exhaust ductwork for the supermarket at B2. The tenant indicated that it required bigger fans and this necessitated changes in the duct sizes and capacity.

175 As with the preceding VO claim, the Claimant alleged that the relevant instructions for this work were issued verbally by the Respondent's representative. The Tribunal was not provided with any records to support the instruction of this work as additional work. The claim is for a substantial amount. It would be expected that even if the instructions were given verbally, the Claimant would take the earliest opportunity to require some sign-off or written record of the variation. On the records, there is no *prima facie* evidence that this work was instructed as a variation. The Claimant may have carried out the work but as this has not been shown to be a variation, the Claimant is not entitled to be paid for the work.

176 The Tribunal would therefore dismiss the claim for VO12.

Variation Order 15

177 The claim for Variation Order 15 ("VO15") is as follows:

VO No. & Description	Amount
VO15 – B2, Zone A – Dismantle cost for KMAD Ductwork	$7,710.00

178 The Claimant alleged that this variation arose from damage to completed ductwork caused by the Main Contractor. The Claimant stated that it was instructed by [X] and the Respondent to proceed to dismantle and replace the damaged ductwork.

179 The Claimant furnished photographs showing the state of the ductwork before it proceeded with the dismantling and replacement work. On the drawings, the annotations state: "Abortive work removed done. Water leak."

180 In the Tribunal's view, this is a clear variation instruction. The Claimant's letter dated 4 July 2023 confirmed that the work arose from damage caused by the Main Contractor. If there is no basis for this claim, it

would be reasonable to expect the Respondent to rebut this claim after having received this letter more than 11 months ago. As it turned out, there was no protest from the Respondent until the Adjudication Response. At the Adjudication Conference, it was suggested by the Respondent that the damage could have resulted from the Claimant's work. Aside from the fact that such an objection should have been properly raised in the Payment Response, this argument is not consistent with the records. If the damage was in fact caused by the Claimant, it would be reasonable to expect the Respondent's annotations on this item of work to record somehow that the Claimant was culpable.

181 On a *prima facie* basis, the Tribunal finds that there was an instruction to dismantle and replace the damaged ductwork and the Claimant is entitled to be paid for this work as a variation.

182 There is no dispute that the quantities were measured on site and referenced to as-built drawings. The Tribunal finds this to be a sufficient basis to accept the quantities. The rates applied for the variation were taken from the Schedule of Rates with the exception of the star rate for labour. There is nothing to suggest that the star rate is unreasonable. The calculations on the quantum of the claim appear to be in order.

183 On this basis, the *prima facie* valuation of this variation is $7,710.00. Once again, for the purpose of cl 2.17 it is necessary to apply an adjustment of 6% for the Respondent's profit. Applying this adjustment, the Tribunal determines VO15 in the sum of **$7,247.40**.

Variation Order 16

184 The claim for this Variation Order 16 ("VO16") is as follows:

VO No. & Description	Amount
VO16 – B2, Zone F – Additional New Extension PAD ductwork	$14,110.00

185 This work was carried out in connection with [X]'s decision to increase the primary air handling unit ("PAHU") capacity as a consequence of additional FCUs. This required the Claimant to provide additional pre-cooling ductwork and reroute the fresh air ductwork. On the drawings, representatives from [X] and the Respondent had annotated as follows: "Modification of ductworks. Please proceed to install …"

186 The extent of the modification works was highlighted in yellow in the drawing details and clearly designated as "VO16". This appears to be a clear variation instruction. On 7 August 2023, the Claimant wrote to the Respondent setting out the quotation for the variation, together with

supporting drawings and clearly demarcated areas of work. There were also photographs recording the completed work.

187 The Tribunal is satisfied that, on a *prima facie* basis, there was an instruction to carry out this varied work and the work had been completed. The Claimant is entitled to be paid for this work as a variation.

188 As with the other claims, the Claimant confirmed that the quantities were measured on site and referenced to the as-built drawings. The Tribunal is satisfied that there is a reliable basis for the quantities. All the items were valued on rates from the Schedule of Rates. No issue arises therefore in respect of the calculations on the quantum of the claim.

189 The Claimant has provided sufficient particulars to support a *prima facie* valuation of this variation in the sum of $14,110.00. For the purpose of cl 2.17 it is necessary to apply an adjustment of 6% for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing for the Respondent's profit is $13,263.40.

190 The Tribunal thus determines VO16 for the Claimant in the sum of is **$13,263.40**.

Variation Order 17

191 The claim for Variation Order 17 ("VO17") is described as follows:

VO No. & Description	Amount
VO17 – B1 Zone C Additional Carpark EAD Ductwork	$6,475.00

192 The Claimant alleged that certain ductwork in the carpark had been damaged by another subcontractor and that it was instructed by the Respondent to dismantle and replace the damaged ductwork.

193 The Claimant stated that the instructions were issued verbally by the Respondent's representative. However, no records are before the Tribunal to support the Claimant's case that it was instructed to carry out this work as additional work. It would be expected that even if the instructions were given verbally, there would be some corroborative records of the relevant instruction. The photographs furnished provide no indication as to whether the work constitutes additional work. Consequently, it could not be determined on a *prima facie* basis that this work constitutes a variation. The Claimant may have carried out the work, but as this has not been shown to be a variation, it is not entitled to be paid.

194 The Tribunal would therefore <u>dismiss</u> the claim for VO17.

Variation Order 21

195 A description of the claim for Variation Order 21 ("VO21") is as follows:

VO No. & Description	Amount
VO21 – B1 Zone F Additional Labour cost For NRD and VCD @ Kiosk Area	$8,100.00

196 The Claimant states that this claim relates to the installation of additional duct accessories arising from design changes. The variation was allegedly instructed by representatives of [X] and the Respondent on site "based on signed drawings". From an examination of the drawings, the Tribunal notes that the annotations merely describe the works as "NRD & VCD installation". There were no statements attesting that the work constitutes additional work.

197 On the materials furnished with the Payment Claim, it is not evident that there was an instruction for this work and that the work constitutes a variation. The Tribunal only has the Claimant's assertion for the proposition that a variation instruction had been given verbally. In the Tribunal's determination, the Claimant had not made out a *prima facie* case for this variation claim.

198 The Tribunal would therefore <u>dismiss</u> the claim for VO21.

Variation Order 22a

199 Variation Order 22a ("VO22a") may be described as follows:

VO No. & Description	Amount
VO22a – B1 Zone F / Kiosk – Dismantle & Additional Ductwork for KEAD/KMA	$77,938.30

200 This variation claim arises from an adjustment of the ceiling height at the kiosk area in Zone F. This required a change in the size of the fan equipment and the dimensions of the air cleaner system. The Claimant states that at that point of time, it had already completed a part of the work based on the original design. The work which had been completed had to be dismantled before re-constructing this item of work. The Respondent's Mr [H] had annotated on the drawings to confirm the instruction to make the changes: "Modification of kitchen duct work & fresh air duct of kiosk area / tenant area (included fire rated board to do rectification)".

201 The location of the works forming this variation was demarcated by several "clouds" in the relevant drawings. An annotation against one these demarcations referred clearly to "VO22":

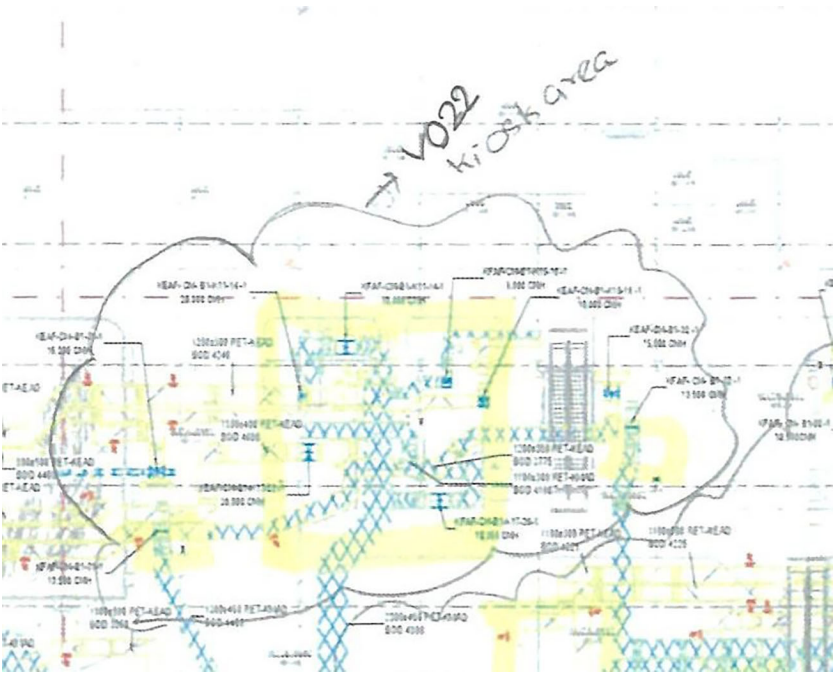


Figure 6:
Extract showing annotations for VO22

202 In an e-mail to the Respondent dated 5 July 2023, the Claimant recorded the changes and set out the costing of the varied work. The work was completed sometime later in that month as evidenced by the photographs of the completed work provided in the Adjudication Application.

203 The Tribunal is satisfied, on these records, that the Respondent had instructed the Claimant to proceed with this variation. The Respondent did not reply to the Claimant's e-mail of 5 July 2023. Until the Adjudication Response, the Respondent did not dispute that the variation had been instructed or that the works were carried out. The Payment Response only disputes the entitlement to claim but did not contest the quantum of the variation work. The photographs of the completed work submitted with the Adjudication Application are sufficient to show that, on a *prima facie* basis, the works had been carried out. The Tribunal is thus satisfied that the Claimant has made out a *prima facie* case as to its entitlement to be paid for this work as a variation.

204 As with the other claims, the Claimant stated that its quantity surveyor measured the quantities on site, which quantities were also referenced to the as-built drawings. There are no materials to suggest that the quantities are

not in order. The rates applied in valuing the varied works are confirmed to be rates from the Schedule of Rates except for the "labour" items. These are priced at star rates. There is no indication in the Payment Response that the star rates were exorbitant or unreasonable.

205 The Tribunal is satisfied that there are sufficient particulars and records to support a *prima facie* valuation of the claim in the sum of $77,938.30. However, as with the other variations found in favour of the Claimant, an adjustment has to be made for the purpose of cl 2.17. Under cl 2.17, the Claimant has to allow a sum equivalent to 6% of this amount for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing the 6% margin is $73,262.00.

206 Arising from this analysis, the Tribunal finds that the Claimant is entitled to be paid for VO22a in the sum of **$73,262.00**.

Variation Order 27

207 The claim for Variation Order 27 ("VO27") may be described as follows:

VO No. & Description	Amount
VO27 – B1 Zones A & B – Additional Carpark EAD/FAD c/w fan & silencer install	$19,490.00

208 The Claimant states that this work relates to the installation of two additional fans in the carpark area in Zones A and B at Basement B1. On 3 August 2023, the Claimant wrote to the Respondent setting out the particulars and costing of the additional work involved. The annotations on the drawings affirmed the installation of the additional fans. The two additional fans were delivered only in early 2024 and this meant that this work could only be completed sometime in March 2024. The Tribunal is satisfied from the materials filed in this adjudication that this work had been instructed as a variation.

209 The completed work for this variation was recorded in photographs provided with the Adjudication Application. These photographs demonstrate that the work had been carried out.

210 As with the other claims, the Claimant's quantity surveyor calculated the claimed amount on the basis of measurements taken on site and referenced to as-built drawings. In the Tribunal's view, there is a reliable basis for the quantities. The rates are confirmed to be rates from the Schedule of Rates except for the "labour" items. These are priced at star rates. The Tribunal finds nothing in the Payment Response to show that the star rates were exorbitant or unreasonable.

211 The Tribunal is satisfied that there is a sufficient basis for the valuation of $19,490.00 for this variation. For the purpose of cl 2.17 it is necessary to apply an adjustment of 6% for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing for the Respondent's profit is $18,320.00.

212 Accordingly, the Tribunal would allow the Claimant its claim for this variation in the sum of is **$18,320.00**.

Variation Order 28

213 The claim for Variation Order 28 ("VO28") is described as follows:

VO No. & Description	Amount
VO28 – L1 Zones A&B – Additional Length KEAD/KMAD	$263,146.50

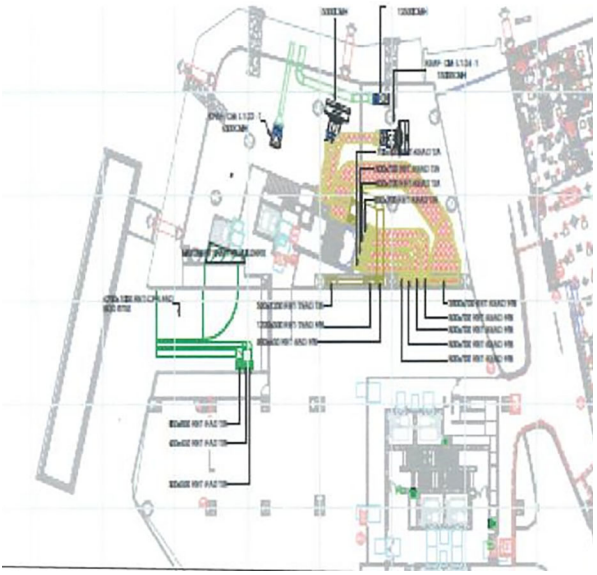
214 One of the tenants required the fan size for its premises to be increased. This necessitated the supply and installation of additional exhaust and other ductwork. At the request of the Respondent, the Claimant in its e-mail of 14 November 2023 (at 3.18pm) indicated to the Respondent the extent of the additional work required.

215 Later that month, the work was confirmed on site by a series of annotations on the drawings which were countersigned by Mr [I], [X]'s representative, in the presence of Mr [H], the Respondent's representative. The instructions from both [X] and the Respondent were explicit: the Claimant was to follow the "latest drawings".

216 The instruction was further confirmed by a WhatsApp message of 24 November 2023 (at 10.14am) from the Respondent's Mr [H] to the Claimant's Mr [A] ("First Instruction"), which states as follows: "… this VO drawings is [*sic*] confirmed. Additional ducts and upsize in ducts due to new fan design and upgrades. As per site boon confirmation".

217 In response to the First Instruction, the Claimant's Mr [A] queried at 10.16am on the same day whether Mr [H] would want to first discuss the cost of the VO with his superior. The response from the Respondent's director, Mr [E], was as follows ("Second Instruction"): "If [X] confirm VO please proceed the work."

218 As [X]'s representative had earlier authorised the change, the extent of the varied works was highlighted in the drawings in substantial detail. The following extracts are examples of the highlighted work:



New Hood - 1 set
Mandatory length additional - 20mL
new EAF - 1set
New KBAF - 2sets
New WAFE - 2sets
MATCHLINE : REFER TO PSR_C_DTS_ADRV_SO_CM_L1_0301
1st Storey - MV Kitchen Layout - ZONE B

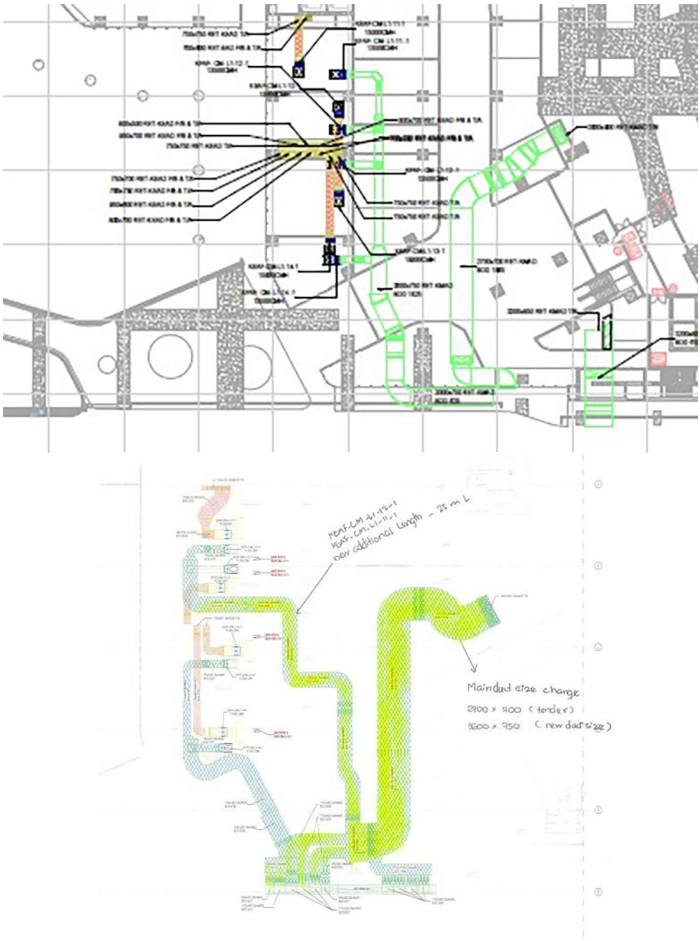


Figure 7:
Extracts of drawings relating to VO28

219 Although there was no further trail of records, it is evident that the variation had earlier been confirmed by [X]'s Mr [I]. The letter containing the costings of the variation had already been sent to the Respondent on 17 November 2023. There was no record of the Respondent disagreeing with the contents of that letter. There is persuasive evidence of the Respondent's instruction to vary the works and to proceed with the varied works.

220 The Tribunal is satisfied from these records that the Claimant has made out a *prima facie* case on its entitlement to be paid for this work as a variation.

221 To calculate the quantities for this variation, the Claimant's quantity surveyor carried out site measurements and referenced these measurements to as-built drawings. The rates used in valuing the variation are rates from the Schedule of Rates. The Tribunal is satisfied that there are sufficient particulars and records to support a *prima facie* valuation of the claim in the sum of $263,146.50.

222 For the purpose of cl 2.17 it is necessary to apply an adjustment of 6% for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing for the Respondent's profit is $247,357.71.

223 The Tribunal thus determines VO28 for the Claimant in the sum of **$247,357.71**.

Variation Order 30

224 The claim for Variation Order 30 ("VO30") is as follows:

VO No. & Description	Amount
VO30 – Carpark & MV Fans Additional Ductwork	$11,856.00

225 This claim apparently arises from issues raised by the registered inspector. On 18 January 2024 (11.56pm), the Respondent's Mr [H] wrote to the Respondent's Mr [E] as follows:

> Please see email below from [X] on masonry shaft changes to ducted riser for all MV Carpark system. Kindly check and let us know if have any cost, bcoz [*sic*] this duct is related RI Item.

226 The work therefore is attributed to "masonry shaft changes" and is extensive, as it applies to "all MV Carpark system". Noticeably, anxieties were expressed by the Claimant in these exchanges over the delay in the confirmation of revised details for this work. This is because of an impending inspection by the registered inspector ("RI"). Notwithstanding the urgency of the work, it is clear from these e-mails, in particular Mr [H]'s e-mail of 18 January 2024 to Mr [E], that this work was envisaged as a variation. On 5 February 2024, the varied work was unequivocally acknowledged on the drawings.

227 The Tribunal is satisfied that the Claimant was instructed to carry out this variation. There can be little dispute with the quantities given that these were duly measured in m². The valuation rate of $95.00/m² was taken from the Schedule of Rates. There are sufficient particulars and records to support a *prima facie* valuation of the claim in the sum of $11,856.00.

228 Once again, for the purpose of cl 2.17, an adjustment of 6% is to be applied to the sum of $11,856.00 for the Respondent's profit. The result is that the Claimant is entitled to be paid the sum of $11,144.64.

229 The Tribunal thus determines VO30 for the Claimant in the sum of **$11,144.64**.

Variation Order 32a

230 The claim for this Variation Order 32a ("VO32a") is as follows:

VO No. & Description	Amount
VO32A Staircase – Additional FAD ductwork	$45,823.50

231 The Claimant states that this claim arises from changes to a louvre outlet. The work as claimed seemed different from the descriptive title of the claim. In particular, it is not understood why there is a reference to the staircase. The Claimant's position is that the instructions for the variation were stated on the drawings. These refer to the following hand-written notations in the drawings:

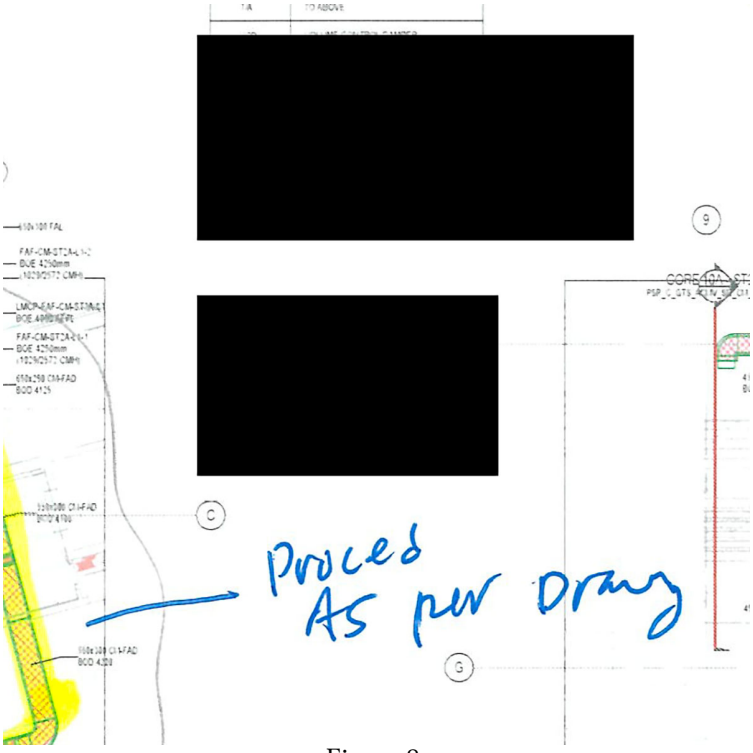


Figure 8:
Extracts of drawings showing annotations relating to VO32a

232 All that these annotations appear to say is that the Claimant is to proceed with the works shown in accordance with the drawings. There is nothing in the annotations to suggest that the work is varied work nor can any of the inscriptions be construed as instructions to vary the works. The Tribunal has also noted parts of the drawings which were highlighted. The highlighted work can equally be work which the Respondent requires the Claimant's attention. If the highlighted work is indeed varied work, it is reasonable to expect some annotation to that effect. There are no such annotations on the drawings.

233 On the whole, the Tribunal finds nothing from the way this claim is presented to suggest that it constitutes a variation. The Tribunal would dismiss the claim for this variation.

Variation Order 34

234 The claim for this Variation Order 34 ("VO34") is as follows:

VO No. & Description	Amount
VO34 Roof Area – KEAD extension from Doghouse	$116,660.00

235 The background to this claim is that the Claimant was not given the L3 drawings at the time of tender. The notations on the drawings for this work confirmed this. An entry by the Respondent's Mr [H] reads: "As per New Drawings Confirmation".

236 This appears to be a confirmation that the work described in the new drawings is not a replacement of existing work but work which was had not been particularised at the time of tender. However, it is not in dispute that this is a lump sum contract. The fact that not all the drawings are provided at the time of tender does not absolve the Claimant from allowing for this work in the tender. Mr [H]'s entry on the drawings did not state that these are additional works.

237 In their supplementary submissions, the Claimant asserted that its scope of works did not extend to Level 3. Unfortunately, this limitation of the scope of work is not apparent from the contract documents before the Tribunal. It cannot be assumed, without some evidence, that the Claimant has not allowed for this work in its tender price.

238 On settled principle, this is insufficient for the Claimant's case. In *Comfort Management* ([62] *supra*), the Court of Appeal stated that an adjudicator "must have at least some positive basis for his determination, and not simply lack a reason not to allow the claim"(at [56]). On the materials before the Tribunal, despite the Claimant's forceful assertions, the Tribunal is unable to find any "positive basis" for this variation claim.

239 To conclude, the Claimant has not demonstrated that the work to which the new drawings relate fall outside the scope of the contract. The Tribunal is not satisfied that the work claimed under this item constitutes a variation. This claim is dismissed.

Variation Order 35

240 The claim for this Variation Order 35 ("VO35") is as follows:

VO No. & Description	Amount
VO35 L1 Carpark MV Shaft Area – Duct Extension to Louvre	$70,670.50

241 The Claimant attributes the need for this work to the Respondent's error in the design details. As designed, the new smoke duct system "clashed" with the duct in the carpark. As a result, the outlet of the duct has to be relocated. The problems with the design were raised in the exchange between the parties in an e-mail of 29 January 2024. There was a WhatsApp exchange in which the Respondent's Mr [E] and Mr [H] confirmed the circumstances and acknowledged that this item of work constituted a variation.

242 As a result of the error, the Respondent was unable to "produce the proper exact drawings" for the RI inspection.

243 On 23 February 2024 (at 4.20pm), an e-mail from the Claimant to the Respondent's Mr [E] and Mr [H] confirmed that the Claimant was urgently instructed to proceed with these works:

> … confirmed already. Under commercial duct. Label wrongly. Carpark MV System. From B1 and B2.
>
> New routing. New design …
>
> I'm doing the VO costing now.

244 The Respondent's Mr [H] appeared to acknowledge the context as reflected in the Claimant's preceding message when he emphasised the urgency of the task:

> Do first, this serve carpark mv.

245 On 24 February 2024, representatives from both [X] and the Respondent noted on the drawings for the varied work to proceed.

246 On 22 February 2024, the Claimant issued a letter setting out the costing for the variation. The drawings highlighted clearly the areas of the duct work in substantial detail. Until the Adjudication Response, there was no written objection to the claim for the variation. The completion of the varied work was recorded by photographs furnished with the Adjudication

Application. In the Tribunal's view, the Claimant has demonstrated a *prima facie* case for its entitlement to be paid for this work as a variation.

247 The Payment Response did not raise any issues with the calculations on the claimed amount for this variation. Once again, the Claimant's quantity surveyor's evidence is that it has measured the quantities on site and referenced these measurements to as-built drawings. The Tribunal accepts the Claimant's measured quantities. There should be no issues with the applied rates for the valuation of this work since these rates are found in the Schedule of Rates.

248 Accordingly, the Tribunal finds that there is a basis for the Claimant's valuation of this variation in the sum of $70,670.50. However, for the purpose of cl 2.17 it is necessary to apply an adjustment of 6% for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing for the Respondent's profit is **$66,430.27**.

Variation Order 36

249 The claim for this Variation Order 36 ("VO36") is as follows:

VO No. & Description	Amount
VO36 L1 Zone A, KMAD abortive works affected by ceiling	$14,281.80

250 As with VO35, the claim in VO36 appears to have arisen from an error in the design details. During the course of the works, it was found that a structural beam was in the way of ductwork in Level 1 at Zone A. Consequently, four lengths of 3,600mm x 750mm ductwork had to be replaced with 3,600mm x 550mm elbows, S-bends and additional joints. The problem was recorded in an e-mail dated 16 January 2024 from [X]'s Mr [J] to: (a) the Main Contractor's Mr [K] and Mr [L]; and (b) the Respondent's Mr [H]. In that e-mail, [X] insisted that the Respondent proceed with the variation.

251 On the same day, the Respondent's Mr [H] wrote to the Claimant's Mr [A] as follows: "As per instruction from [X] to proceed abortive work for level 1 duct installation. Kindly submit the cost for [X] to proceed the work."

252 This e-mail chain constitutes a clear instruction from the Respondent to the Claimant to proceed with this additional work. The Tribunal is satisfied that the work is a variation and that the Claimant has been properly instructed to carry out this work.

253 On 22 February 2024, the Claimant issued a letter setting out the costing for the variation. Until the Adjudication Response, there was no

written objection to the claim for the variation. On the records, the Tribunal is satisfied that the Claimant has demonstrated a *prima facie* case for its entitlement to be paid for this work as a variation.

254 The Payment Response did not challenge the calculations on the claimed amount for this variation. As with the previous variations, it is not disputed that the quantities were measured on site and no issues were raised with the measurements. In the absence of a more persuasive set of measurements, the Tribunal accepts the Claimant's measured quantities. All the rates applied to the valuation of this work are found in the Schedule of Rates.

255 On these records, the Tribunal is satisfied that the Claimant succeeds in demonstrating a *prima facie* case for this variation to be valued in the sum of $14,281.80. However, for the purpose of cl 2.17, it is necessary to apply an adjustment of 6% for the Respondent's profit. The amount which the Claimant is entitled to in respect of this variation after allowing for the Respondent's profit is **$13,424.89**.

Variation Order 39

256 The particulars of the claim for Variation Order 39 ("VO39") are as follows:

VO No. & Description	Amount
VO39 Zone E Carpark FAD	$3,172.50

257 The Claimant alleges that certain of its air-conditioning ducts in the Zone E Carpark were damaged by one of the subcontractors involved in the carrying out of the works for the travelator. It states that the Respondent's Mr [H] gave "verbal instructions" for the work to be repaired. However, there were no written records that the Respondent agreed that the ducts had to be replaced and that they had to be replaced because of damage by another subcontractor.

258 There are very few particulars of the circumstances of this variation. The materials did not point to the precise location of the damaged ductwork. The Claimant did not identify the subcontractor who allegedly caused the damage or the date and time when the damage was discovered. Until very late in the day, there was no record of the issue being taken up by the Claimant with the Respondent.

259 The Claimant has not made a *prima facie* case that this work was a variation and that there was an instruction to carry out the varied work. The Tribunal would <u>dismiss</u> this claim.

Summary of determination on variations

260 The Tribunal summarises below its determination on the claim for variations:

Description	Amount
VO1 – B1 Carpark EAD & FAD Duct	$33,308.90
VO3a – L1M Labour for AC (Linear Plenum Box)	Dismissed
VO4a – B1 Kitchen KEAD & KMAD Duct	$194,189.90
VO5 – B1 MV FAD Duct	Dismissed
VO6 – B2 Kitchen KEAD Duct	Dismissed
VO7b – B1 FCU @ LT Switch & Transformer Rooms	Dismissed
VO8 – B1 Zone F Kitchen KEAD & KMAD reinstall	$7,866.86
VO11 – b2 Zone A – Dismantle TEAD/PID ductwork	Dismissed
VO12 – Dismantle & additional ductwork KED system	Dismissed
VO15 – B2 Zone A – Dismantle KMAD ductwork	$7,247.40
VO16 – B2 Zone F – Additional PAD ductwork	$13,263.40
V17 – B1 Zone C – Additional Carpark EAD Ductwork	Dismissed
VO21 – B1 Zone F – Labour NRD & VCD ar kiosk	Dismissed
VO22a – B1 Zone F Kiosk – Ductwork KEAD & KMAD	$73,262.00
VO27 – B1 Zone A&B – Carpark EAD/FAD fan & silencer	$18,320.60
VO28 – L1 Zone A&B – Additional KEAD/KMAD	$247,357.71
VO30 – Carpark MV Fans ductwork extension	$11,144.64
VO32a – Staircase – Additional FAD ductwork	Dismissed
VO34 – B1 Zone F Kiosk – Ductwork KEAD & KMAD	Dismissed
VO35 -L1 Carpark MV Shaft Area – Duct Extension	$66,430.27
VO36 – L1 Zone A, KMAD Abortive Works – Ceilings	$13,424.89
VO39 – L1 Zone E Carpark FAD Damage – Travellator	Dismissed
Total	$685,816.57

Recovery of back charges

261 The Claimant also seeks to recover back charges imposed by the Respondent in respect of Progress Claims Nos 11 and 12 ("PC11" and "PC12" respectively). The Claimant submits that the back charges amount to "a loss suffered by the Claimant" and that they were included in the Respondent's previous payment certificates. In PC15 itself, this item is described as "*Wrongful* back charges imposed and deducted from progress claims 11 & 12" [emphasis added]. This expression suggests an allegation of breach of contract.

262 Given the Claimant's characterisation of the back charges as "loss suffered by the Claimant" or as loss recovered arising from a breach of

contract, the first issue is whether these claims fall within s 17(3) of the Act. Section 17(3) reads:

> (3) 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.

263 In both the Payment Response and the Adjudication Response, the Respondent states nothing about these back charges, let alone acknowledging that the Claimant is entitled to recover them under PC15. In the absence of any document or certificate before the Tribunal stating that the Claimant is entitled to recover these back charges, it follows that the Tribunal has no statutory mandate by reason of s 17(3) of the SOP Act to consider these back charges in this adjudication.

264 For completeness, it is necessary to point to another statutory impediment for the Claimant's recovery of these back charges. The Claimant has acknowledged that these are sums deducted by the Respondent in respect of PC11 and PC12. They relate to matters claimed in previous payment claims and payment certificates. An adjudication application can only be lodged in respect of a dispute from a payment claim which has been processed in accordance with s 10 of the SOP Act. Only PC15 complied with the timelines and other requirements leading up to the Adjudication Application. Thus, the present Adjudication Application can only be lodged in respect of PC15. The matters which would have to be inquired to consider this claim pertaining to PC11 and PC12 would fall outside the ambit of PC15.

265 At any rate, in order for the Tribunal to determine amounts withheld in PC11 and PC12, the full context of the back charges in PC11 and PC12 has to be examined. The materials before this Tribunal are insufficient for the purpose of such an inquiry.

266 The Claimant's claim for the recovery of back charges in respect of PC11 and PC12 is thus <u>dismissed</u>.

Remaining calculations of PC15

267 For completeness, it is necessary to record that there is no dispute with respect to the following items in PC15 which are intended to be set off against the value of work carried out by the Claimant:

	$
Recovery of Downpayment	-500,000.00
Retention	-212,750.00
Previous Payments	-3,116,750.00

Adjudicated amount

268 Arising from the Tribunal's determination of the Claim for Work Done and the Variations, the adjudicated amount is determined as follows:

Item		Amount
Value of Claim for Work Done		$4,197,850.00
Less		
Recovery of Downpayment	-$500,000.00	
Retention	-$212,750.00	
Previous Payments	-$3,116,750.00	-$3,829,500.00
		$368,350.00
Item		Amount
	c/f	$368,350.00
Variations		$685,816.57
Aggregate Total of Groups A and B		$1,054,166.57
9% GST		$94,874.99
Claimed Amount including GST		$1,149,041.57

269 The adjudicated amount is thus determined in the sum of **$1,149,041.57** inclusive of GST (*ie*, the Adjudicated Amount).

Date for payment of Adjudicated Amount

270 The relevant provision governing the due date for payment is s 8(1) of the SOP Act. Section 8(1) reads:

> **8.**—(1) Where a construction contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the earlier of the following dates:
>
> (*a*) the date as specified in or determined in accordance with the terms of the contract;
>
> (*b*) the date immediately upon the expiry of 35 days after —
>
> (i) if the claimant is a taxable person under the Goods and Services Tax Act 1993 who has submitted to the

respondent a tax invoice for the progress payment — the date the tax invoice is submitted to the respondent; or

(ii) in any other case — the date on which or the period within which the payment response is required to be provided under section 11(1) (whether or not a payment response is provided).

271 For the purpose of s 8(1)(*a*), the contract date for payment is found in cl 2.16 of the LOA, which reads: "Payment will generally be made within 35 days after the receipt of your Tax Invoice …"

272 The Payment Response (Certificate 13B) was served on 11 June 2024. The tax invoice may be expected to be served on 12 June 2024. The period of 35 days from 12 June 2024 would have expired on 17 July 2024.

273 For the purpose of s 8(1)(*b*), the relevant provision is sub-s (*b*)(ii). The timeline under s 8(1)(*b*)(ii) would give the same expiry date for the 35-day period as that determined in respect of s 8(1)(*a*), that is to say, 17 July 2024.

274 However, in determining the date for payment of the adjudicated amount, the Tribunal considered that it is reasonable to allow for the expected date on which the determination is expected to be released by the SMC. Allowing for this consideration together with the due date, the Tribunal hereby orders the Respondent to pay the Adjudicated Amount on or before **Wednesday 31 July 2024**. This is hereby fixed as the date on which the Adjudicated Amount is payable for the purpose of s 17(2)(*b*) of the Act (*ie*, the Adjudicated Payment Date).

Interest

275 The rate of interest on any payment determined in these proceedings is governed by s 8(5) of the SOP Act. Section 8(5) reads:

> (5) The interest payable on the unpaid amount of a progress payment that has become due and payable *is at the higher of the following rates* —
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract;
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act (Cap. 322).
>
> [emphasis added]

276 In this case, the Subcontract does not stipulate a rate of interest which may be applied to unpaid amounts of a progress payment that has become due and payable. The prescribed rate of interest in respect of judgments debts under the Supreme Court of Judicature Act 1969 (2020 Rev Ed) is 5.33% per annum. Accordingly, pursuant to s 8(5)(*b*) of the SOP Act,

interest in respect of the Adjudicated Amount shall apply at the rate of **5.33%** per annum and the Tribunal so determines. This rate of interest shall apply to any part of the Adjudicated Amount which remains unpaid after the Adjudicated Payment Date.

Costs of adjudication

277 The costs of the adjudication, including the adjudicator's fee of $24,535.00 (before GST), amount to $27,386.25, calculated as follows:

Adjudication Application Fee (including GST)		$654.00
Adjudicator's Fee	$24,525.00	
GST at 9%	$2,207.25	$26,732.25
Total		$27,386.25

278 Parties have submitted extensively on the authorities and the documents relating to each of the claims. This has necessarily led to a fairly lengthy post-conference submissions and clarifications.

279 In apportioning the costs, it is clear that the Claimant is successful in the majority of its claims. The Tribunal considers that the Claimant shall bear 40% of the said costs and the Respondent shall bear 60% of the said costs.

BIO Pte Ltd
v
BIP and another

[2024] SGSOP 13

Singapore Mediation Centre — SOP AA 193 of 2024
Wong Chin Sing
30 August 2024

Adjudication Determination — *Previous adjudication determinations — Effects — Claimant having filed prior adjudication application with respect to one payment claim resulting in prior determination — Respondent having not paid adjudicated amount from prior determination to claimant — To what extent prior determination binding on present adjudication pursuant to s 21 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Section 21 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim — *Additional works — Claimant claiming several items of works which it considered additional works — Additional works not submitted in previous payment claims and claimant not submitting any cost estimate or quotation to respondent for agreement — Respondent only being informed verbally of additional works carried out — Respondent alleging there were no agreement to pay for additional works — Whether claimant succeeded in establishing* prima facie *case for additional works*

Payment Claim — *Deductions — Omission — Claimant omitting several items of works scope from contract — Claimant's and respondent's calculation for said variation omissions differing in quantum and method of measurement — Determining which party's method to be preferred — Whether claimant entitled to omit items of works and then reintroducing all omitted works based on higher unit rates*

Payment Response — *Back charges — Respondent imposing back charges against claimant's payment claim — Whether back charges falling under "damage, loss or expense" prohibited under s 17(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Section 17(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Response — *Liquidated damages — Respondent claiming liquidated damages against claimant for delay — Neither party having submitted delay analysis to pinpoint exactly which activities had been delayed and parties' respective culpability for said delay — Parties' contract containing no extension-of-time clause — Whether respondent entitled to liquidated damages*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 10, 11(2), 11(2)(*b*), 15(1), 15(3), 16(1), 17(1)(*a*), 17(1)(*b*), 17(2), 17(2)(*a*), 17(2A), 17(3), 17(3)(*a*), 17(3)(*b*), 17(6), 21, 21(1), 21(1)(*b*)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed)

Ho Yong Kin (Chan Neo LLP) for the claimant;
Respondents unrepresented.

[Commentary: see para 5.4]

30 August 2024

Wong Chin Sing:

Determination

1 This is the determination made on 30 August 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Application No SOP AA 193 of 2024. This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant in the matter is M/s [BIO] Pte Ltd ("Claimant") and the respondents are Mr [A] and Mr [B] (collectively, "Respondent").

3 I determine that:

(a) There shall be <u>no</u> adjudicated amount payable by the Respondent to the Claimant.

(b) The adjudication application fee of $654.00 (inclusive 9% goods and services tax ("GST")) and the adjudicator fee of $14,061.00 (inclusive GST) shall be fully borne by the Claimant.

The parties

4 The Respondents were the house owners of the residential development for the "Proposed Budgetary for Works to [xxx]" (hereinafter, "Project").

5 The Claimant was the main contractor with an ACRA Registration No [xxx]. The Claimant was appointed by the Respondent as the main

contractor for the construction of the residential development works for the Project.

The Contract

6 Through a Respondent's letter of award ("LOA") Ref No LOA/ [xxx] dated 9 September 2021, the Respondent accepted and appointed the Claimant as the "Contractor" for the construction of the residential development based on URA approved drawings dated 27 August 2021 at [xxx] for the Project for a total contract sum of $836,954.00 (GST included) ("Contract Sum"). The LOA is attached with a Claimant's Quotation Ref No QWI/2020/12/103[xxx]/Q06A which was duly accepted and endorsed by the Respondents.

7 The said LOA consisted of terms and conditions clauses pertaining to the subject matters, amongst others, as follows:

(a) contract period;

(b) payment terms;

(c) contract drawings ("Contract Drawings"); and

(d) liquidated damages.

8 The Respondent's LOA was formally endorsed and accepted by the Claimant on 10 September 2021 ("Contract"). Thus, I determined that a legal and binding Contract was made between the parties.

Chronology of events

9 On 30 June 2024, the Claimant served the payment claim Ref No QWI/2020/12/103[xxx]/Q06A dated 30 June 2024 (hereinafter "PC"), on the Respondent by hand and e-mail, for an amount of $162,919.63 (inclusive of GST) for the work done under the contract for the period up to 30 June 2024.

10 In accordance with s 11(2) of the SOP Act, the Respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the Claimant: (a) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under s 10 of the SOP Act, whichever is the earlier; or (b) where the construction contract does not contain such provision, within 14 days after the payment claim is served under s 10.

11 In the present case, the Contract does not provide any provision relating to the service of a payment claim as well as the service of a payment response. Therefore, pursuant to s 11(2)(*b*) of the SOP Act, the due date for

the Respondent to respond to the Claimant's PC falls on the 14 July 2024 after having received the PC on 30 June 2024.

12 The Respondent provided a payment response ("Payment Response") to the Claimant on 9 July 2024 and a "Revised Payment Response" dated 12 July 2024 on 13 July 2024, which was within the due date allowed under the SOP Act for the Respondent to respond. In the Revised Payment Response dated 12 July 2024, the Respondent deduced that the amount payable to the Claimant for the PC was "NIL". In other words, the Respondent alleged that in fact there was no payment amount payable to the Claimant based on their payment evaluations taking into consideration: (a) the alleged omission works amount of $85,022.96; (b) alleged amount of $276,282.00 for undone work and delay; (c) retention sum of $40,641.27; and (d) previous payment amount of $734,880.77.

13 On 25 July 2024, the Claimant served on the Respondent of their intention to apply for adjudication in respect of the payment disputes pertaining to the PC.

14 On 26 July 2024, the Claimant lodged an Adjudication Application with the SMC, the authorised nominating body under the SOP Act.

15 On 29 July 2024, the SMC served the Claimant's adjudication application ("Adjudication Application") on the Respondent.

16 On 30 July 2024, the SMC invited me, Wong Chin Sing, to serve as the adjudicator ("Adjudicator") and on the same day I accepted and conveyed my acceptance for the appointment as the Adjudicator to the SMC accordingly.

17 On 31 July 2024, the SMC informed the parties of my appointment as the Adjudicator for the payment disputes.

18 Pursuant to s 15(1) of the SOP Act, the due date for the Respondent to lodge an adjudication response falls on 5 August 2024, which is seven days after receipt of a copy of the Adjudication Application on 29 July 2024. I was informed by the SMC that the Respondent had duly lodged an Adjudication Response with the SMC on 5 August 2024.

19 On 5 August 2024, I directed both parties to attend a virtual preliminary meeting ("Preliminary Meeting") to be held on 7 August 2024 via an e-mail sent to the parties. In the virtual Preliminary Meeting, the Claimant was represented by Mr Ho Yong Kin from M/s Chan Neo LLP, Ms [C] and Ms [D], while the Respondent was represented by Mr [B] and Mr [E].

20 During the Preliminary Meeting on 7 August 2024, the parties agreed to: (a) attend an adjudication conference in my office scheduled on

15 August 2024 at 2.00pm; and (b) extend the due date of my determination to 30 August 2024 upon my request.

21 During the Preliminary Meeting on 7 August 2024, I also invited the parties to make further written submissions to address me of a related issue as follows: Pursuant to s 21 of the SOP Act, to what extent is the determination made by the learned adjudicator in SOP AA 101 of 2024 binding on the present Adjudication Application?

22 I directed the parties to submit the further submission to me by 5.00pm on 8 August 2024 for my determination. On 8 August 2024, I received the parties' submissions as directed to be considered in my determination.

23 The adjudication conference was convened on 15 August 2024 as scheduled. The Claimant was represented in the adjudication conference by Mr Ho Yong Kin from M/s Chan Neo LLP, Ms [C] and Ms [D]; while the Respondent was represented by Mr [B], Ms [F], Mr [E] and Mr [G].

24 Pursuant to s 16(1) of the SOP Act, the adjudication proceedings commence upon expiry of the period within which the Respondent may lodge an adjudication response. the due date for the respondent to lodge an adjudication response falls on 5 August 2024, therefore in accordance with s 17(1)(*b*), I am required to determine the said adjudication application on or before 20 August 2024, taking into consideration that 9 August 2024 was a public holiday. However, at my request, the parties agreed to extend the due date of the determination to 30 August 2024.

The submissions

25 The submission made by the Claimant consisted of the Adjudication Application Form AA-1 annexed with written submissions and bundles of document and authorities as follows:

> (a) The Claimant's brief written submissions described the background of the payment disputes. Generally, in the submissions, the Claimant explained that since the Contract does not provide any provision relating to the service of a payment claim and a payment response based on the SOP Act and the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations"), the payment claim must be served on the last day of each month. Therefore, the Claimant submitted that the PC served on the Respondent on 30 June 2024 and the Adjudication Application lodged on 26 July 2024 was submitted in accordance with the SOP Act. In their submissions, the Claimant disputed the Respondent's payment response pertaining to all the back charges imposed by the Respondent. The Claimant submitted that the

adjudicator must disregard the back charges as the Respondent fails to satisfy the provisions of s 17(3) of the SOP Act. In conclusion, the Claimant submitted that the claimed amount of $162,919.93 (GST included) should be determined in the Claimant's favour and that the Respondent is to bear the full costs of the adjudication proceedings.

(b) Bundle of documents:

(i) Tab 1: a copy of the Claimant's notice of intention to apply for adjudication dated 25 July 2024 served on the Respondent.

(ii) Tab 2: a copy of the Contract which consisted of the Claimant's Quotation Ref No QWI/2020/12/103[xxx]/Q06A dated 9 September 2021 ("Quotation") accepted and duly endorsed by the Respondent. The Contract Sum was $836,954.00 (GST included) and the said Quotation was attached with several terms and conditions which the Contract is subjected to.

(iii) Tab 3: a copy of the Claimant's Payment Claim Ref No QWI/2020/12/103[xxx]/Q06A dated 30 June 2024 for $162,919.93 (including GST) for work done up to 30 June 2024 under the contract for the project. It is to note that the PC was supported with a bill of quantities and calculations of work done and variation works claimed under the PC.

(iv) Tab 4: a copy of the Respondent's Payment Response dated 30 June 2024 for the Claimant's PC. The Payment Response was attached with details of the back charges claimed by the Respondent. It is to note that in the Respondent's Payment Response, the Respondent stated the amount payable as "Nil", which means that the Respondent deduced that there was no amount payable to the Claimant with respect to the PC.

(v) Tab 5: a copy of the Respondent's Revised Payment Response dated 12 July 2024 for the Claimant's PC. The Payment Response was attached with details of the back charges claimed by the Respondent. It is to note that in the Respondent's Revised Payment Response, the Respondent stated the amount payable as "Nil", which means that the Respondent deduced that there was no amount payable to the Claimant with respect to the PC.

(vi) Tab 6: a copy of the Claimant's Scott Schedule for "Variation Omissions". The Claimant deduced that the total omission of works amounted to $152,667.18 against the

Respondent's valuations of $85,022.96. The Claimant stated its position against each of the items contained in the said Scott Schedule for Variation Omissions.

(vii) Tab 7: a copy of the Claimant's Scott Schedule for "Variation Additions". The Claimant deduced that the total additions of works amounted to $274,098.39 against the Respondent's valuations of $6,318.40. The Claimant stated its position against the Respondent's in each of the items contained in the said Scott Schedule for Variation Additions.

(viii) Tab 8: a copy of the Claimant's Scott Schedule for undone work and penalty for related delay. The Scott Schedule for undone work and penalty for related delay showed that the total amount imposed by the Respondent was $276,282.00. The Claimant stated its position against each of the items contained in the said Scott Schedule for undone work and penalty for related delay.

(ix) Tab 9: a series of photographs, contract drawings, as-built drawings and WhatsApp messages as supporting documents for the variation works.

(x) Tab 10: a copy of the Claimant's extension of time application dated 28 March 2023. The summary of the extension of time recorded by the Claimant amounted to 832 days required to extend the completion date of the project. The Claimant attached a series of project photographs and WhatsApp messages as supporting documents.

(xi) Tab 11: a copy of the Temporary Occupation Permit Ref No TOP [xxx] dated 5 February 2024 for the project issued by the Building and Construction Authority.

(xii) Tab 12: a copy of the Site Inspection Report/ Checklist Ref No A2161–00110–2021. The site inspection report which is not dated contained a series of photographs taken to verify the conditions of the completed work done for the project.

(xiii) Tab 13: a full copy of the adjudicator's determination issued on 12 June 2024 for SOP AA101 (2024) ("Determination") lodged by the claimant against the respondent for Payment Claim No 23 for an amount of $41,488.72 served on the respondent on 30 March 2024. It is significant to note that in the Determination, the adjudicator had determined that an adjudicated amount of $40,451.79, which was 97.50% of the Payment Claim No 23, shall be payable to the claimant by the respondent.

(xiv) Tab 14: a full copy of the SOP Act and a full copy of the SOP Regulations.

(xv) Tab 15: a copy of an extract from a publication entitled "Amendment to the SOP Act" dated 29 July 2022 on the subject matters of "Scope of Claim for Prolongation Costs" and "Implications of the Amendment" as a supporting document.

(xvi) Tab16: a full copy of the adjudicator's determination issued on 29 July 2020 for SOP AA174 (2020) as a supporting document.

(xvii) Tab 17: a copy of the Court of Appeal judgment from the Singapore Law Reports for the case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") as supporting document.

(xviii)Tab 18: a copy of the Court of Appeal judgment from the Singapore Law Reports for the case of *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2018] 1 SLR 317 as supporting document.

(xix) Tab 19: a copy of the Court of Appeal judgment from the Singapore Law Reports for the case of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 as supporting document.

(xx) Tab 20: a copy of the Court of Appeal judgment from the Singapore Law Reports for the case of *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 as supporting document.

(xxi) Tab 21: a copy of the Court of Appeal judgment for the case of *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 as supporting document.

26 The submissions made by the Respondent consisted of the Adjudication Response Form AR-1 attached with a bundle of documents and authorities as follows:

(a) Written submissions where the Respondent briefly described the background of the payment disputes. In the written submissions, the Respondent alleged that: (i) the Claimant has not discharged the burden of proof to establish a *prima facie* case and there are patent errors in the PC; (ii) the Respondent should not pay for variation works that they did not consent to; (iii) even if the Respondent approved such variation works, the Claimant reaffirmed that it would not charge for them; (iv) even if the Claimant's additional claims are valid, they are over-inflated and do not reflect the true market value; and (v) the Respondent's claims for liquidated damages plainly satisfy

s 17(3) of the SOP Act as the quantum of these liquidated damages is supported by the plain words within the LOA, which is literally the document showing agreement between the parties on the quantum according to s 17(3)(*a*) of the SOP Act. The Respondent submitted that the adjudicated amount of $40,451.79 payable under the previous adjudication proceeding of SOP AA 101 of 2024 has been paid to the Claimant on 30 July 2024. In the written submissions, the Respondent also highlighted several disputed items of works with regard to price and quantities of the work done, gross floor area ("GFA") reduction and quality of work done among others. In conclusion, the Respondent submitted that there is no amount due to the Claimant under the PC and wish to clarify and address the payment disputes in an adjudication conference.

(b) Bundle of documents:

(i) Tab 1: a copy of the Letter of Award Ref No LOA/QWI/2020/12/103[xxx]/Q06 dated 9 September 2021.The LOA was attached with a bills of quantities describing the various scopes of works with the corresponding amounts that added up to the total Contract Sum of $836, 954.00 (GST included).

(ii) Tab 2: a copy of the Payment Response Ref No QWI/2020/12/103[xxx]/Q06A dated 12 July 2024 sent to the Claimant by hand and e-mail on 13 July 2024. In the Payment Response, the Respondent stated the payment amount payable as "Nil". It is to note that the Respondent indicated the reasons and amount to pay or not to pay against every item of works stated in the PC.

(iii) Tab 3: a series of supporting documents against the PC consisting of drawings, calculations, project photographs, quotation and WhatsApp messages among others.

(iv) Tab 4: a copy of a banking transaction from [xxx] Bank to show that an amount of $40,451.79 had been transferred to the Claimant's bank account on 30 July 2024.

(v) Tab 5: a list of authorities as follows:

(A) a copy of the Court of Appeal judgment for the case of *Comfort Management* as supporting document;

(B) a copy of the Court of Appeal judgment from the Singapore Law Reports for the case of *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 as supporting document;

(C) a copy of the High Court judgment for the case of *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 ("*Crescendas*") as supporting document; and

(D) a copy of the High Court judgment for the case of *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 as supporting document.

(vi) Tab 6: a copy of the article entitled "Response to Response by Adjudicator Regarding the Unfair Adjudication Outcome for SOP 101". It is to note that in the article, the Respondent made various responses against the learned adjudicator's determinations under SOP AA 101 of 2024. Generally, in the article, the Respondent submitted its unhappiness and dissatisfaction over the outcome of the adjudication application lodged by the Claimant on 29 April 2024 against the Respondent.

(vii) Tab 7: a copy of a police report made by the Respondent related to an incidence of alleged trespass by the Claimant's employees to the Respondent's dwellings on 24 May 2024.

Reasons

Respondents' Payment Response and Adjudication Response

27 In response to the Claimant's PC dated 30 June 2024, the Respondents provided a Payment Response dated 12 July 2024. The Respondent evaluated that the total response amount due to the Claimants was "Nil". In other words, the Respondent alleged that there is no amount payable for the Claimant's PC. In the Payment Response, the Respondent evaluated that the work done under the contract consisted of: (a) a sum of $812,879.00 for work done as claimed; (b) an omission of $80,022.96; (c) a claim of $276,282.00 for undone works and penalty for delayed work; (d) an addition of $6,318.40 for variation works; (e) less $40,641.27 for 5% retention sum; and (f) less the total previous payment of $734,880.77.

28 In their adjudication response ("Adjudication Response") submission, the Respondent submitted that:

(a) The Claimant has not discharged the burden of proof to establish a *prima facie* case and there are *patent errors* under the Claimant's PC and therefore the Respondent objected to the merits of the Claimant's claim.

(b) The Claimant has intentionally removed certain items from the original contract and added new ones to make repeated claims for work done already covered in the original contract.

(c) The Respondent has included every item from the original contract, totaling $812,879.00. The Respondent submitted that $93,004.40 should be deducted from the contract amount of $812,879.00 as variation omissions, hence the actual work done is $719,814.10 only.

(d) The Claimant removed all the zero-value items from the Respondent's submissions, which are repeated claims. The Respondent has addressed these invalid additional work claims, as they mainly consisted of items already included in the original contract. Among the $274,098.39 additional works claimed by the Claimant, there is a repeated claim of $225,224.05 which is already included with detailed calculation and fully paid in "Contract Q06A"; and there is an invalid claim amount of $42,402.54 that is not agreed by the Respondent and the Respondent only agreed an additional work amount of $6,471.80.

(e) The Claimant's project delays make it liable to the Respondent for liquidated damages totaling $239,500.00 (excluding GST and interest) and/or a general damage of $36,162.00.

(f) Clause 5.1 of the LOA clearly states that the Claimant must inform the Respondent immediately of any discrepancy and divergences from the drawings and quotations while the works are carried out. The Claimant has not shown evidence of such and proceeded to unilaterally charge for these works. Therefore, the Respondent should not pay for addition works that were not approved or grossly inflated above market rate.

(g) The Claimant even clarified with the Respondent about the interpretation of cl 5.1 in the LOA through WhatsApp messages, insisting that the Respondent did not need to pay and if there are any changes from the drawings to the actual site, the Claimant has to inform the Respondent immediately and the Respondent does not have to pay. The Respondent only has to pay for variations in quantity according to the agreed rate per cl 5.1 of the LOA.

(h) The Claimant rightly concedes that the LOA does not have provisions for valuing variation works. Thus, the adjudicator should have regard to s 7(2) of the SOP Act in valuing the variation works.

(i) The Respondent has submitted a detailed supporting document for the back charges.

29 However, in the Adjudication Application submissions, the Claimant's positions in its submissions are as follows:

(a) The Claimant submitted that it is well established that a claimant in an adjudication application must make out a *prima facie* case that the work which is the subject of the payment claim has been completed and that the value of that work is as stated in the payment claim.

(b) The Claimant submitted that it has completed the works in the Project ("Works"). Following the completion of the Works, the Claimant has attended to the rectification of all defects as and when they were identified and raised by the Respondent until June 2024.

(c) The Claimant submitted that the items remaining in dispute in this adjudication are:

(i) Item B: variation works – omission;

(ii) Item C: variation works – addition;

(iii) Item D: undone work and penalty for delayed work; and

(iv) Item G: previous payment received.

(d) In the PC, the Claimant allowed a total deduction of $152,667.18 as Variation Omissions against the Respondent's omissions of $85,022.96.

(e) The Claimant submitted that in the PC, the Claimant claimed a total of $274,098.39 as Variation Additions. The Claimant avers that the Contract does not contain provisions on the valuation of variation works. Nonetheless, the Claimant will either adopt the rate in the Contract (with adjustment) that are similar to the work done or build up the rate using the supplier price plus profit and attendance.

(f) The Claimant disputes all the back charges amounting to $276,282.40 imposed by the Respondent. The Claimant submitted that the disputed back charges fall under "damage, loss or expense" such that the Respondent is not entitled to deduct the same in "PR31R" from the claimed amount unless either s 17(3)(*a*) or 17(3)(*b*) of the SOP Act is satisfied. In this regard, it is clear that the Respondent is unable to satisfy either s 17(3)(*a*) or 17(3)(*b*) of the SOP Act. Therefore, the Clamant does not agree to the Respondent's entitlement to the back charges, and there are no documents showing agreement between the parties on the quantum of the disputed back charges.

(g) In the Payment Response, the Respondent stated "Less: Previous Payment received" amount of $734,880.77. However, the Claimant has to-date only received a total payment of $730,695.51.

30 In the written submissions submitted for the adjudication proceeding, both parties cited the Court of Appeal case of *Comfort Management* to highlight the duty of an adjudicator under the SOP Act for the present case. The relevant paragraphs of the judgment in *Comfort Management* are reproduced here for easy reference:

> 34 Our view is that notwithstanding s 15(3), and the regardless of whether any payment response has been filed, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be satisfied that the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and that the value of that work is as stated in the payment claim. Articulated in the terms of the Act, his duty comprises the obligations set out in ss 17(2) and 17(3), and requires an adjudicator, in particular, to have regard to all the matters stated in the latter provision. However, an adjudicator's duty to adjudicate is conceptually distinct from a respondent's entitlement to make submissions before him. Therefore, notwithstanding the existence of such duty, if a respondent has failed to file a payment response, he is permitted to challenge a payment claim before the adjudicator by highlighting *only* patent errors in the material properly before the adjudicator.
>
> …
>
> 63 In our view, there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities. Nothing in the existing authorities has ever suggested that to be the position, certainly not in *W Y Steel*, which is the first local authority that attempts to examine what must substantively consider in adjudicating a payment claim dispute. More importantly, the adjudication process is intentionally 'somewhat roughshod' (*W Y Steel* at [22]) given that the resultant decision is intended to have only temporary finality, the path being open for the parties to resolve their dispute fully and finally through arbitration or litigation: see s 21(1)(*b*) of the Act. This is especially true where no payment or adjudication response has been filed, in which case the adjudicator must render his decision in just seven days instead of the usual 14: see 17(1)(*a*) of the Act. That is why the Act, as Vinodh Coomaraswamy J recently observed in *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28, does not require the adjudicator to find, nor does it require the claimant to 'prove', the facts supporting the claim to be objectively true on a certain standard of 'proof', that exercise being 'within the exclusive province of the dispute-resolution tribunal which will resolve the parties' dispute with full finality' (at [32]). **Coomaraswamy J employed a term 'standard persuasion' to reflect more accurately the nature of the standard to which an adjudicator must be**

satisfied before he allows a claim (at [34]). We respectfully adopt this term for our analysis below.

64 Therefore, it is evident – considering that the adjudicator is not simply looking for patent errors but to identify a positive basis for the claim, and that he also does not have to assess proof on a balance of probabilities – that the scheme of the Act requires the adjudicator to be satisfied that the claimant has established at least a *prima facie* case for his claim. We agree with the view of the of the Law Reform Committee in this regard (see [48] above), because the *prima facie* standard is already implicitly established in the Act. The content of this standard is by no means unfamiliar as the standard is employed in various adjudicative contexts, including the obtaining of summary judgement: see *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772 at [9] per Lai Siu Chiu J.

65 In particular, the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim. Indeed, that is the essence of his duty under s 17(2)(*a*) of the Act to 'determine the adjudicated amount (if any) to be paid by the respondent to the claimant'. Therefore, to ensure that he discharges that duty, it is only sensible for the Act to require him to consider all the matters stated in s 17(3) in so far as those matters are properly before him. Accordingly, the content of the adjudicator's duty to adjudicate the claim is normatively rooted in and given substance by s 17(3) which both describes and restricts the substantive matters he is to consider.

[emphasis added in bold]

31 In view of the decision by the Court of Appeal in *Comfort Management*, therefore, I have an independent duty to address my mind to and consider the true merits of the alleged work done and variation works claimed in the PC and the Adjudication Application, and the Respondent's valuations and deductions in its Payment Response to the PC. This duty comprises the obligations set out in ss 17(2)–17(6) of the SOP Act and I am required, before allowing a claim from either party, to be persuaded that it has established a *prima facie* case before me.

32 As to what is meant by "a claimant has to establish a *prima facie* case", I find the judgment at [15]–[18] of the General Division of the High Court case of *Mak-Levrion Kah Kay Natasha v R Shiamala* [2024] 4 SLR 616 ("*Mak-Levrion*"), where the court allowed the defendant's appeal against the grant of summary judgment, very instructive:

15 In this regard, it is well established that the purpose of the summary judgment procedure is to enable a claimant to obtain judgment without trial, if they can prove their claim '*clearly*' … and if the defendant is unable to set up a *bona fide* defence (see *Singapore Civil Procedure 2021* vol 1 (Cavinder

Bull gen ed) (Sweet & Maxwell, 2021) ('*Singapore Civil Procedure 2021*') at para 14/4/2). Accordingly, if the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived (or, if arguable, can be shown shortly to be plainly unsustainable), then the claimant is entitled to summary judgment (see *Singapore Civil Procedure 2021* at para 14/1/2). However, this is predicated on the *claimant* having established a *prima facie* case in the first place. This is an important point because while most of the cases have turned on whether the defendant has raised a *bona fide* defence, that must necessarily be *after* the claimant has shown a *prima facie* case. Put differently, before the court may examine if the defendant has raised a *bona fide* defence, the anterior question to be analysed is whether the claimant has established a *prima facie* case. The claimant bears the burden of establishing such a *prima facie* case.

16 Accordingly, to obtain summary judgment, a claimant must discharge his burden of showing that he has a *prima facie* case for his claims. If he fails to do that, his application ought to be dismissed. In this regard, Mr Kho suggested before me that the expression '*prima facie*' suggests a lower threshold to cross compared to the usual civil standard of balance of probabilities before the claimant is deemed to have a viable case. I respectfully disagree for four reasons. First, '*prima facie*' is defined to mean 'at first sight' or 'on first appearance but subject to further evidence or information' (see Bryan Garner, *Black's Law Dictionary* (Thomson Reuters, 11th Ed, 2019) ('*Black's Law Dictionary*') at p 1441). **Similarly, a '*prima facie* case' is defined to mean 'a party's production of *enough evidence* to allow the fact-trier to infer the fact at issue and rule in the party's favour'** (see *Black's Law Dictionary* at p 1441) … This does not connote a lower standard. Second, it is unclear to me how this 'lower threshold' can be different from the normal civil standard of proof. Mr Kho did not substantiate this suggestion with any authority. Third, the premise of the summary judgment procedure is that the claimant is entitled to such a judgment because he has such a clear case, *and* the defendant has no viable defence against that clear case. Thus, if the claimant does not have a clear case, then it must follow that the court need not even consider the defendant's defence. Fourth, and more substantively, the label '*prima facie*' is used in this context only because the claimant's case is considered on its own, *without* considering the defendant's defences. Thus, the claimant's case is '*prima facie*' viable only because his case is considered on its face, without considering any counterarguments. While this has not been expressly set out in any decision, this is clear from the courts' approach to summary judgment applications, where the courts first assess the claimant's case on its own. Only after the claimant has established *a prima facie* case, do the courts proceed to evaluate the defendant's case.

17 Once the claimant shows that he has a *prima facie* case, the tactical burden then shifts to the defendant who, in order to obtain permission to defend, must establish that there is a fair or reasonable probability that he has

a real or *bona fide* defence (see the High Court decision of *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ('*M2B World*') at [17], citing the High Court decision of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [43]–[47]). The tactical burden which shifts to the defendant is the burden to provide further evidence to rebut an inference that would otherwise be drawn from the evidence provided by the claimant. The court will not grant permission to defend if the defendant only provides a mere assertion, contained in an affidavit, of a given situation which forms the basis of his defence (see *M2B World* at [19], citing the High Court decision of *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd* [1998] 1 SLR(R) 53 at [14]). If the defendant cannot satisfy this tactical burden, the claimant would be entitled to summary judgment.

18 With the applicable law in mind, I turn to explain why I find that the claimant has not established a *prima facie* case simply by reading her pleadings and affidavits filed in SUM 1706. To my mind, in the absence of any binding authority, a *prima facie* case must, at the very least, mean a case that is: (a) supported by the claimant's *own* evidence; (b) internally consistent; and (c) not inherently unbelievable without good explanation. As I will now explain, the claimant's case does not satisfy these requirements of a *prima facie* case.

[emphasis in original in italics; emphasis added in bold]

33 Although *Mak-Levrion* is a case where the court had to decide whether to grant a summary judgment sought by the plaintiff, I find that the decision is very applicable for cases under the SOP regime like the present case, where similarly, an adjudicator has to be satisfied whether the claimant has made out all its claims on a *prima facie* basis in the adjudication proceeding.

The adjudication issues for determination

34 From the submissions of the parties to the adjudication proceedings, I find that the subject matter of the payment disputes between the parties are as follows:

(a) To what extent is the determination made on 12 June 2024 by the learned adjudicator in SOP AA 101 of 2024 binding on the present Adjudication Application pursuant to s 21 of the SOP Act?

(b) The amount of variation omissions claims in the PC.

(c) The amount of variation additions claims in the PC.

(d) Whether the back charges of $276,282.40 imposed by the Respondent in the Payment Response is valid.

(e) The adjudicated amounted payable under the Claimant's PC.

35 Before I commence to determine the foregoing disputed matters, I will briefly record the matters which the parties have agreed in their written submissions. The Respondents submitted at para 18 of its Adjudication Response submissions that the Respondent agreed to withdraw the additional payment of $4,185.26 for water bills from the Payment Response.

36 During the adjudication conference, the Claimant confirmed that a payment amount of $40,451.79 from the Respondent has been received on 30 July 2024. Therefore, the total amount of payment received to-date from the Respondent for the Project amounted to $730,695.51 + $40,451.79 = $771,147.30.

Issue 1: To what extent determination made on 12 June 2024 by learned adjudicator in SOP AA 101 of 2024 binding on present Adjudication Application pursuant to section 21 of SOP Act

37 I begin with the fact that the payment disputes between the parties have gone a long way after the Project had been completed and achieved temporary occupation permit ("TOP") status on 5 February 2024. Since then, the Respondents have also taken possession of the dwelling house constructed by the Claimant under the contract.

38 Due to some disagreements over Payment Claim No 23 ("PC23") submitted by the Claimant on 30 March 2024, the Respondent did not make any payment under PC23. Subsequently, the Claimant lodged an adjudication application against the Respondent in SOP AA 101 of 2024 with respect to PC23.

39 On 12 June 2024, the learned adjudicator determined an adjudicated amount of $44,915.34 in favour of the Claimant.

40 However, the adjudicated amount of $44,915.34 was not paid to the Claimant under the timelines stated in the determination.

41 On 30 June 2024, the Claimant submitted the PC dated 30 June 2024 to the Respondent under the Contract. On 1 July 2024, the Claimant served a notice to suspend the works under the Contract after non-payment of the adjudicated amount of $44,915.34 by the Respondent.

42 The present Adjudication Application, SOP AA 193 of 2024, was lodged by the Claimant on 26 July 2024.

43 As there was a previous adjudication proceeding on a payment dispute under the same construction contract after the completion of the project, the determination made by the learned adjudicator in the previous adjudication proceedings may have some binding effects on the present adjudication determination as the parties and the works involved under the construction contract are similar for the project. Therefore, first and foremost, I need to consider to what extent the determination made in SOP AA 101 of 2024 may bind me in the making of the determination for the present Adjudication Application.

44 Section 21(1) of the SOP Act provides as follows:

> **21.**—(1) An adjudication determination made under this Act is binding on the parties to the adjudication and on any person claiming through or under them, unless or until —
>
> (*a*) permission of the court to enforce the adjudication determination is refused under section 27;
>
> (*b*) the dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding; or
>
> (*c*) the dispute is settled by agreement of the parties.

45 It is not disputed that none of the requirements under s 21 of the SOP Act has been met. Therefore, it appeared that the determination made in SOP AA 101 of 2024 by the learned adjudicator on 12 June 2024 is binding on the parties in the present adjudication proceedings.

46 In the Preliminary Meeting, I invited the parties to address me as to what extent the previous determination is binding on the parties for the present adjudication proceedings.

47 The parties duly submitted their views on the question posed by me. To this end, both parties submitted that the determination made in the previous adjudication proceeding for SOP AA 101 of 2024 should not be binding on the present adjudication application. However, the reasons and views provided by the parties are quite different.

48 The Claimant's submitted that the Claimant's claims in the present Adjudication Application are in respect of "variation works" which falls outside the scope of the previous SOP AA 101 of 2024, therefore the determination made in the previous adjudication proceeding should not be binding on me to make the determination on the present case.

49 On the other hand, the Respondent submitted that the determination made in SOP AA 101 of 2024 should be set aside under s 17(3) of the SOP Act for patent errors and should not apply to the present Adjudication Application. In their submissions, the Respondents alleged that the learned adjudicator in SOP AA 101 of 2024 failed to recognise the patent errors in

the Claimant's payment claim and based his determination on the premise that the Respondent did not submit a valid payment response, thus rejecting all of the Respondent's objections for the omission works claimed by the Claimant.

50 To answer this question, I find the views of the learned author in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at paras 16.111–16.112, very instructive:

> [16.111] An interesting issue arises as to whether the findings of an adjudicator on an issue other than the quantum of the adjudicated amount bind the parties in subsequent adjudication proceedings. In *ADT Pte Ltd v ADU Pte Ltd*, the respondent submitted that, pursuant to s 21(1), parties are bound only by an earlier tribunal's finding as to quantum of the adjudicated amount and that they are not bound by the findings of the tribunal on the other issues relating to the dispute. On this basis, it was contended that the tribunal's rulings on the other issues may be reopened in a subsequent adjudication. The adjudicator in this case rejected this submission. He pointed out that section 21(1) states quite explicitly that an adjudication determination made under the Act shall be binding. There is nothing in section 21(1) to suggest that the binding effect of an earlier adjudication is only confined to the determination of the adjudicated amount. He said in his determination:
>
>> Indeed, the legislative intent appears to be that parties are to treat an adjudication determination as binding in its totality. Thus, where the adjudication determination includes a finding of fact or construction of the contract, this must be accepted for the time being. It is open to the Respondents, of course, to initiate full curial proceedings to settle any grievance with a finding reached in an adjudication determination which they consider to be in error in law or in fact. However, until and unless they do this, the operation of s 21(1) is clear. A party cannot ignore nor seek to undermine the effect of earlier adjudication determinations, nor can a party selectively ignore findings which under pin the result of these determinations…
>
> [16.112] This view is reinforced when it is considered that the adjudicated amount is determined frequently on the basis of the findings on the issues which lead to the calculation of the adjudicated amount. **So long as a finding on an issue affects the quantum, whether by a deduction or set-off, it is clearly germane to the determination of the quantum. To require a subsequent adjudicator to re-visit these premises, given that both parties have had opportunities to express their views and debate on the merits of their cases and that the determination is provisional in nature, must inevitably require both the tribunal and the parties to incur additional time and expense and this is anathema to the legislative intent of the Act.**

[emphasis added in bold]

51 Therefore, in my view, I agreed with the parties that the determination made by the learned adjudicator in the previous adjudication proceeding does not bind me on matters not placed properly to the learned adjudicator in the previous adjudication proceedings, such as the "variation works" as submitted by the Claimant and the alleged omissions and back charges imposed by the Respondents in their Payment Response for the present Adjudication Application. However, I find that the learned adjudicator in SOP AA 101 of 2024 has made his determination on two findings which go into his determination on the quantum of the adjudicated amount. The two findings were: (a) the work done for Item F.14: planter box; and (b) the work done for Item G.6: railings to 2nd floor, which was reflected in his summary table of the adjudicated amount for the determination made on 12 June 2024.

52 In my view, the findings of the learned adjudicator in the previous adjudication proceeding that goes toward the previous adjudicated amount is binding on me pursuant to s 21 of the SOP Act.

53 Therefore, for the purposes of the present adjudication proceedings, I determine that the findings made by learned adjudicator in SOP AA 101 of 2024 on Item F.14: planter box and Item G.6: railings to 2nd floor shall be adopted in this determination.

54 Having resolved the matter under s 21 of the SOP Act, I proceed further to determine the other matters that were not put forward by the parties in the previous adjudication proceedings of SOP AA 101 of 2024. The matters which remain in disputes are the amount of valid variation works and the amount of payment the Claimant is entitled to under the PC.

Issue 2: amount of Variation Omissions claims in the PC

55 From the material before me, I find that the Claimant had omitted fully several items of the works scope under the Contract's bills of quantities ("Bills of Quantities") and summarised them as a total omission from the Contract. The total works omissions calculated by the Claimant amounted to $152,667.18 which consisted of the re-measurable scope of works under the Contract from: (a) Item F: "Masonry Works"; and (b) Item G: "Metal Works".

56 However, on the other hand, the Respondent stated that the variation omissions amounted to $86,920.00 in its Adjudication Response submissions. Apparently, the Respondent applied a different approach to evaluate the omissions under the Contract.

57 Clause 5.2 of the LOA provides as follows:

> Any variation in quantity for addition or omission will be counted based on **agreed** unit rate for both addition and omission respectively.
>
> [emphasis added in underlined bold]

58 From my reading of cl 5.2 of the LOA, it shows that the intention of the party is to treat the contract as a "re-measurement" contract where the quantity inserted in the Bills of Quantities for the respective scope of works is provisional only for the purpose to derive the total contract sum of the project inclusive of other lump sum items of works which are not subjected to re-measurement.

59 Normally, in a "re-measurement" contract, the quantity of each item of works will be measured according to the dimensions of the as-built structures or work done and payment will be made by multiplying the unit rate of the respective scope of works stated in the original bills of quantities unless otherwise provided.

60 For the present adjudication proceedings, the disputes turned on the difference in opinions of how the measurement of the scope of works is to be done, especially on the areas of the wall where the Respondent's view is to deduct the opening for windows and doors from the overall area of the wall. However, the Claimant's view is completely opposite and claimed that there should not be any deduction for the openings to calculate the area of the wall to be paid under the contract.

61 From my reading of the Bills of Quantities and the LOA, there is no preamble or any statement to dictate whether in the final measurement of quantity, the parties have to consider the openings in the walls as omission to the area measured. Moreover, there is also no provision in the LOA to dictate on the mechanism of how to resolve contradicting or ambiguous documents and circumstances when it arises in the execution of the contract.

62 In my view, since the parties' intention is to re-measure the quantity after the works is carried out, then it is only right to measure the actual work done in accordance with the description of the work scope in the original Bills of Quantities. Therefore, I find that the Respondent's method of measurement is more reasonable against the Claimant's because, simply, if there is no work done carried out for wall openings, rightfully the Claimant is not entitled to claim for it. Therefore, the same principle should also be applied in another area of dispute where the partial existing walls that were retained and incorporated to form a part of the new walls should be deducted from the calculations of work done carried out by the Claimant.

63 Apparently, the omissions of works were considered differently between the parties also. On one hand, the Claimant considered that all re-measurable items of works under the Contract are to be omitted from the original Contract. On the other hand, the Respondent did a quantity re-

measurement for all the re-measurable items of works under the Contract and applied them against the respective unit rates stated in the Contract to derive the amount of omission from the original Contract.

64 During the adjudication conference, I seek the Claimant's explanations on the rationale of working out the omissions wholly from the Contract and reconsidered the same items of works as additions to the Contract with an additional wastage rate of 20% built into the unit rate for the respective scope of works under the Contract.

65 The Claimant submitted that, firstly, the Respondent requested the Claimant to re-measure all the work done under the Contract; secondly, the Respondent requested to change the material from sand-cement plaster to pre-mix sand-cement plaster material; thirdly, the Respondent requested to change the design of the Metal Works under the Contract; and lastly, the 20% wastage is a build-up to the unit rate on the supplier prices.

66 However, the Respondent submitted there is no difference in the material of sand-cement plaster and pre-mix sand-cement plaster which is basically made up of sand-cement materials. The Respondent further submitted that wastages should already be included in the original unit rate stated in the Contract. During the adjudication conference, the Respondent also submitted that under cl 2.2 of the LOA, the payment for the scope of works under the Contract should be based on the actual measurement of the work done carried out by the Claimant in accordance with the unit rate stated in the Contract which the Respondent never agreed to be changed.

67 The Respondent submitted that the change in the design of Metal Works was communicated to the Claimant and agreed by the Claimant without any additional cost to the Respondent.

68 During the adjudication conference, the Claimant admitted that all the communication between the parties were done verbally and not in writing. In my view, in a normal construction contract, especially for a re-measurement contract, quantities are measured for the work done carried out and valued in accordance with the rates stated in the original Bills of Quantities under the Contract, unless there is an agreement between the parties which stated otherwise. It is a normal practice in the construction industry for a contractor to submit a proposal whenever there is an intention to claim for variation works that arises in the project and to negotiate and obtain an agreement from the employer on its proposal on the cost of the varied works, if the unit rate stated under the Contract is not applicable.

69 From the submissions of the parties, I agree with the Respondent that the Claimant does not have a valid basis under the Contract to be allowed to do a re-costing of the re-measurable items of the scope of works such as the items of works under the Masonry Works and Metal Works.

70 From the foregoing facts and reasoning, I find that the Claimant does not have a valid basis under the Contract to omit all the re-measurable items of works and then reintroducing all the omitted works based on higher unit rates for all the items of works. Moreover, there is no agreement given by the Respondent to allow the Claimant to do so. Therefore, I determined that the Claimant has not make out a *prima facie* case for the omissions of $152,667.18 and the variations additions of $274,098.39 as claimed in the PC.

71 During the adjudication conference, I went through the quantities of each item of works stated in the Scott Schedules for Variation Additions submitted by the Claimant which show the parties' position on all the disputed items of works under the Contract to determine the actual amount of work done carried out by the Claimant. Apparently, both parties have done a quantity re-measurement exercise on all the items of works, but independently and without consultation or agreement from each other. Therefore, understandably, there are very few quantities of works which can achieve a common agreement among the many quantities of work done measured. For the remaining measured quantities in disputes, I have to determine carefully which of the differing quantities are acceptable to adopt in my determination based on the explanations submitted by the parties during the adjudication conference with reference to the evidence, Contract's drawings and documents.

72 From the Scott Schedules for Variation Additions, basically the disputes turned on the measured quantities of work done and the unit rate for plastering. The Respondent submitted the unit rate for plastering should be $30.00 per m^2, as a wall has two sides to be plastered. During the adjudication conference, the Respondent accepted that the unit rate for plastering is $60.00 per m^2 as stated clearly in the Contract.

73 The other area of disagreement turned on the method of measurement adopted by both parties on the actual work done carried out by the Claimant. For instance, in the calculation with respect to the area of plastering works, the Claimant considered the full wall area without deduction of openings for windows or doors. On the other hand, the Respondent only took into consideration the actual area of plastering carried out by the Claimant without including the areas for windows and doors opening.

74 As the cost of the works are based on actual quantities of the works carried out by the Claimant and there is no provision in the Contract to state otherwise, I agree to the method of measurement provided by the Respondent to determine the amount of work done for the re-measurable items of works under the Contract.

75 After going through the explanations from both parties and going through all the evidence placed before me during the adjudication conference and the information provided in the adjudication submissions, I determined that the total amount of work done, excluding valid additional works, under the Contract amounting to $739,910.85 (excluding GST), consisted as follows:

Item	Description	Qty		Unit Rate ($)	Amount ($)	Remarks
A	Demolition/ dismantling	1	L.S		12,500.00	No dispute
B	General earthworks excavation	1	L.S		45,000.00	Accept Claimant qty.
C	Shoring works (ERSS)	1	L.S		85,000.00	Accept Claimant qty.
D	Structure Works	1	L.S		397,500.00	Accept Claimant qty.
E	**Roofing Works**					
1	Supply and install roofing	98.6	m²	370.00	36,482.00	Accept Respondent qty.
2	Metal roof capping flashing	1	L.S	6,000.00	6,000.00	No dispute
3	RC roof waterproof system	1	L.S	5,000.00	5,000.00	Accept Claimant qty.
F	**Masonry Works**					
1	Internal/Perimeter wall	35.39	m²	100.00	3,539.00	Accept Respondent qty.
2	Plastering of concrete cast wall	129.8	m²	60.00	7,788.00	Accept Respondent qty.
3	Boundary Wall (ht. 0.6m)	18.53	m²	100.00	1,853.00	Accept Claimant qty.
4	Boundary Wall (ht.1.8m)	16.74	m²	100.00	1,674.00	Accept Claimant qty.
5	Internal/perimeter wall (ht.2.65m)	136.0	m²	125.00	17,000.00	Accept Respondent qty.

6	Party to party wall (ht.2.65m)	8.28	m²	125.00	1,035.00	Accept Respondent qty.
7	Plastering of concrete cast wall between garden and car porch	10.26	m²	60.00	615.60	Accept Claimant qty.
8	Plastering works indoors	43.50	m²	60.00	2,610.00	Accept Claimant qty.
9	Inter/ perimeter walls (ht. 2.55m)	105.6	m²	100.00	10,560.00	Accept Respondent qty.
10	Paty to party walls (ht.2.55m)	28.25	m²	125.00	3,531.25	Accept Respondent qty.
11	Plastering works indoor	19.1	m²	60.00	1,146.00	Accept Respondent qty.
	2nd Storey					
13	Internal/perimeter wall (ht. 2.59)	161.5	m²	100.00	16,150.00	Accept Respondent qty.
14	Party to party wall (ht. 2.5m)	41.0	m²	125.00	5,125.00	Accept Respondent qty.
15	Plastering works indoors	19.1	m²	60.00	1,146.00	Accept Respondent qty.
	Attic					
16	Internal/perimeter wall (ht.3.3)	198	m²	100	19,800.00	Accept Claimant qty.
17	Party to party wall (ht. 3.3m)	32.44	m²	125.00	4,055.00	Accept Respondent qty.
18	Plastering works indoors	19.1	m²	60.00	1,146.00	Accept Respondent qty.
	Parapet Wall					
19	Boundary Wall (ht. 0.6m)	11.70	m²	100.00	1,170.00	No Dispute
20	Boundary Wall (ht. 1.8m)	8.10	m²	100.00	810.00	No dispute

	General Area					
21	Screeding of all ledges, roof and anti-drip line	272.0	m²	65.00	17,680.00	Accept Claimant qty.
22	Screeding of all planter box and facade	1	L.S	2,500.00	1,250.00	Adopt SOP AA 101 of 2024
G	**Metal Works**					
1	Screen on 2nd floor	1	L.S	2,500.00	2,500.00	No dispute
2	Handrails to stairs- labour only	1	L.S	5,000.00	5,000.00	No dispute
3	1st storey	28.15	m	300.00	8,445.00	Accept Respondent qty.
4	Mezzanine	18.0	m	300.00	5,400.00	Accept respondent qty.
5	Attic	23.6	m	300.00	7,080.00	Accept respondent qty.
6	2nd Floor (after TOP)	14.4	m	300.00	4,320.00	Adopt SOP AA 101 of 2024
	Total Work Done				**$739,910.85**	

76 It was not disputed that the Contract Sum for all the scope of works under the Contract amounted to $812,879.00 (excluding GST). However, from the re-measured quantities provided by both parties for the adjudication proceeding, the total work done under the original scope of works carried out by the Claimant is determined to be $739,910.85 excluding any valid additional works carried out by the Claimant.

77 From the foregoing calculations and findings, I determined that the total omission from the original scope of works under the Contract amounted to ($812,879.00 – $739,910.85) = $72,968.15 (excluding GST).

Issue 3: amount of Variation Additions works claims in the PC

78 In the PC, the Claimant claimed several items of works which the Claimant considered as additional works to the Contract as follows:

a. Pre-Mix Cement cost of $10,650.14.

b. Low wall to WC (size 900mm x 900mm) + concrete slab top cover (size 250mm x 900mm) + materials cost of $4,200.00

c. Repair and plastering of front/ rear retaining walls of $5,445.00

d. Conceal PVC TV Pipes for TV cabinets cost of $2,424.00.

e. Niche in wall in bathrooms cost of $1,500.00

f. Basement Window walls cost of $2,073.60

g. Replastering of walls due to owner request to hack cost of 17,616.00

h. To plaster lift shaft instructed by the owner cost of $2,040.00

i. Owner request for additional waterproofing at basement cost of $7,056.00

79 During the adjudication conference, the Claimant confirmed that the additional variation works were not submitted in the previous payment claims and the Claimant did not submit any cost estimate or quotation to the Respondent for agreement. The Claimant also confirmed that the Respondent was only informed verbally of the additional works carried out.

80 However, the Respondent denied that the additional works claimed were valid additional works claims as there were no agreement to pay for the additional works except for the repair and plastering of the front/rear retaining walls and to install concealed PVC TV pipes for the TV cabinets. The Respondent further submitted that the costs of the alleged additional works are not reasonable.

81 Clause 5.1 of the LOA provides as follows:

> The contract Drawings and Quotation shall be read and constructed as a whole. Should any discrepancy or divergence occur in or between the drawings or quotation as to the precise and extent or nature of any part of the Works carried out, [BIO] Pte Ltd/ [BIO-A] Pte Ltd is required to notify the Employer immediately. No claim or whatsoever against the Employer in the event either the Contract Drawings or Quotation has indicated the item(s) to be constructed/ delivered. For the avoidance of doubt, Contract Drawings refer to URA approved drawings dated 27th August 2021 ([xxx]), and structural drawings that correspond to the URA approved drawings dated 27th August 2021 and a set of contract drawings including after TOP works dated 6th September 2021 as per attachment. [BIO] Pte Ltd/ [BIO-A] Pte Ltd is obliged to construct/ deliver all items listed in the mentioned documents.
>
> [emphasis added]

82 During the adjudication conference, the Claimant submitted that cl 5.1 of the LOA is silent on the mode of notification with respect to the discrepancy or divergence from the Contract Drawings and the Quotation. The Claimant cited the cases of SOP AA 144 of 2024 and *BEW Pte Ltd v BEX Pte Ltd* [2021] SCAdjR 342 to support their arguments that a written

variation order was not necessarily a condition precedent to a variation claim.

83 Respectfully, I find that the past determinations do not bind me for the present adjudication determination as the facts and circumstances of the case in hand are different from the past cases cited by the Claimant.

84 I do agree with the claimant that cl 5.1 does not expressly state that any variation order must be in writing but, in my view, from the plain reading of the words "required to notify the employer immediately" it means that any variation arising from the project must be notified within a reasonable time if not immediately to the employer. From the Claimant's submissions, I did not find any evidence to show that the Claimant had submitted any cost estimate or quotation for acceptance by the employer for any of the alleged additional works. Moreover, there were no claims submitted for any of these alleged additional works until the present Adjudication Application was lodged. There is no provision in the Contract that variation works are to be evaluated after the completion of the project nor is there any agreement between the parties to consider the variation works only at the end of the Contract. Therefore, it leads one to believe that there was no intention to claim for the additional costs under the Contract for these additional works or there were agreements earlier that these alleged additional works are not claimable under the Contract. I rejected the Claimant's explanations as a valid reason that the additional works were not claimed previously because the parties were busy finalising the Contract cost which caused the delay to claim for the additional costs to the Project.

85 From the foregoing facts and reasoning, I determine that the Claimant has failed to make out a *prima facie* case of the claims for the alleged additional works cost. Therefore, I determine that all the Claimant's additional cost claims are not valid and shall be dismissed except for the cost to install the concealed PVC pipes for the TV cabinets and the cost for repair/ plastering of the front/rear retaining walls, which the Respondent agreed as valid additional works.

86 The Claimant claimed for the additional cost of $2,424.00 to install the concealed PVC pipes for the TV cabinets instructed by the Respondent. During the adjudication conference, the Claimant explained the cost estimate which I find to be reasonable from the evidence shown to me during the adjudication conference, except the mark up of $404 which was not agreed by the parties before. Therefore, I determine that the Claimant is entitled to the variation additions claim of $2,020.00 for this item of claim.

87 For the additional cost for plastering of the front/rear retaining walls of 30.76m², the Claimant applied a unit rate of $125.00 per m² but the Respondent submitted that the unit rate stated in the Contract is $60.00 per m² only. During the adjudication conference, I accepted the Claimant's

explanations that the unit rate for indoor and outdoor plastering works are different as stated in the Contract. Therefore, from the submissions of both parties during the adjudication conference, I determine that the reasonable additional cost for the repair/plastering of the front/rear retaining walls that the Claimant is entitled to claim amounted to $3,845.00 for the plastering works of the front/rear retaining walls.

88 Therefore, from the foregoing findings and reasoning, I determine that the Claimant is entitled for a total sum of $5,865.00 as a variation addition to the Contract.

Issue 4: whether back charges of $276,282.00 imposed by Respondent in Payment Response valid

89 In the Respondent's Payment Response dated 12 July 2024, I find that the Respondent had imposed a total back charge of $276,282.00 against the PC. The back charges imposed by the Respondent consisted of: (a) liquidated damages amount of $239,500.00; (b) deduction for metal railings for cost and materials of $5,972.00; (c) paint defects of $7,560.00; (d) rebuilding cost for retaining wall of $2,350.00; (e) cost deduction for not using pre-mix cement of $1,360.00; (f) design error for toilet bowls of $7,000.00; (g) defects on the slabs and walls of $5,000.00; (h) reduction of GFA of $550.00; (i) deduction for waterproofing for the basement of $3,990.00; and (j) storage fees for rejected metal railing materials of $3,000.00.

90 In the Adjudication Application submissions, the Claimant submitted that the Respondent's total back charges of $276,282.00 in the Payment Response fall under "damage, loss or expense" such that the Respondent is not entitled to deduct the same in PR13R from the claimed amount unless either s 17(3)(*a*) or 17(3)(*b*) of the SOP is satisfied. The Claimant submitted that in this regard, it is clear that the Respondent is unable to satisfy either s 17(3)(*a*) or 17(3)(*b*) of the SOP Act. The Claimant cited several authorities from case law as well as the past determination in SOP AA 174 of 2020 to support its arguments. Therefore, the Claimant submitted that as the adjudicator for the present case, I must disregard the disputed back charges such that the Respondent is not entitled to deduct the same from the claimed amount given the mandatory provision in s 17(3) of the SOP Act.

91 In the Adjudication Response submissions, the Respondent submitted that the quantum of the liquidated damages are supported by the plain words within the LOA, which is literally the document showing agreement between the parties on the quantum according to s 17(3)(*a*) of the SOP Act and, alternatively, the LOA itself can qualify as a document that is required to be issued under the Contract under s 17(3)(*b*) of the SOP Act.

92 The Respondent submitted that the parties had unequivocally agreed that the Claimant must pay the Respondent $500.00 in liquidated damages per calendar day for work delays, inclusive of Sundays and public holidays under cl 2.4 of the LOA. The Respondent submitted that the Claimant is liable for 419 days of delay for the completion of the project and 60 days to complete the remaining work after the TOP is issued. Therefore, the Respondent imposed a total of $239,500.00 as liquidated damages under the Contract for 479 days of delay on the completion of the project liable to be paid by the Claimant.

93 Apparently, from the materials before, it appeared that the completion date of the project under the Contract had been delayed as the TOP of the project was only achieved on 5 February 2024.

94 Clause 2.2 of the LOA stated that the contract shall be 12 calendar months including Sundays and public holidays to obtain TOP and two more to complete works that are to be carried out after TOP. It was not disputed that the TOP for the project was achieved on 5 February 2024 and the works commenced on or about 10 December 2021 from which the Respondent deduced that there is a delay of 479 days (including 60 days to complete the works after TOP) attributable to the Claimant to complete the project under the Contract.

95 Clause 2.4 of the LOA provides as follows:

> In the event of work delay (reference to contract period 2.2), the liquidated damages shall be $500.00 per calendar day inclusive of Sundays and Public Holidays.

96 From cl 2.4 of the LOA, although it expressly provided that the Respondent has the contractual entitlement to impose the liquidated damages, from the materials before me, I find that there are at least three main factors which show that it may not be proper for the Respondent to impose the liquidated damages against the Claimant in the present case. Firstly, I did not find any evidence from both parties to show that a delay analysis has been done to pinpoint exactly what were the activities that have been delayed and the culpability of the parties or events that caused the delay. The Claimant claimed the delays were caused by the Respondent but there is no delay analysis done by the Claimant to show that the activities that were delayed were on the critical path of an agreed construction programme to which any delay on the critical activities will contribute to the delay of the overall completion date of the project. From the Claimant's submissions, it shows that there are several incidences of interference during the execution of the contract by the Respondent causing the delays to the completion of the project. Therefore, in my view, the period of delay attributable to the Claimant or the Respondent cannot be affirmed simply by calculating the difference between the commencement date and the date

of the TOP of the project as submitted by the Respondent in the present case. Therefore, I am unable to determine the exact quantum of the liquidated damages liable to be paid by the Claimant.

97 Secondly, from the LOA, significantly, I find that there is no extension-of-time clause being provided in the LOA. It is clear from case law that under common law, extension-of-time provisions is regarded as being inserted to protect the employer as its existence operates to support the liquidated damages provisions stated in a contract in the event of delay caused by the employer's acts of prevention. The extension-of-time provisions allowed the extension of time to be granted to the contractor accordingly. The courts have ruled that in the absence of an extension-of-time provision in a contract, the consequence will be interpreted *contra proferentum* against the employer. It is well established that if there is delay arising from some breach committed by the employer and if this breach is not a cause for which an extension of time could be granted under the contract, the court will hold the liquidated damages clause to be inoperative and the contractor will not be bound by any previously determined completion dates but will instead be obliged to complete the works within a reasonable time as decided in the High Court case of *Crescendas* ([26(b)(v)] *supra*) at [353] of the judgment.

98 Thirdly, from the Respondent's submissions for the adjudication proceedings, I did not find any evidence to show that the Respondent has the intention to impose the liquidated damages against the Claimant for the alleged delay caused by the Claimant. I did not find any evidence to show that the Respondent has given notice or request for additional efforts from the Claimant to expedite and catch up with the delay that had occurred for which the Respondent intends to exercise its entitlement under the Contract to impose liquidated damages against the Claimant. From the materials before me, it appeared unusual to me that there were no record of communication, meeting or discussion ever being held between the parties with respect to the alleged excessive delays from both parties, to evince the Respondent's intention to impose liquidated damages if the project was not completed in accordance with the Contract. Therefore, it leads one to believe that both parties do not treat the completion date under the Contract as an essence to the project and it has become acceptable to both parties that any delay to the agreed completion date will not lead to any consequences under the Contract.

99 Therefore, from the foregoing findings and reasoning, I determine that the Respondent's claim of $239,500.00 for liquidated damages against the Claimant shall be rejected and dismissed in its entirety.

100 During the adjudication conference, the Claimant also submitted that the Claimant wishes to claim for economic losses or general damages and damages for physical harassment caused by the Claimant. The Respondent

submitted that I am allowed to determine these damages for the Respondent in the proceedings. Respectfully, I disagree with the Respondent's submissions as these damages or losses are matters that I am unable to determine in the present adjudication proceeding. In my view, the Respondent should submit these claims in another appropriate forum if they wish to pursue such claims further.

101 For the remaining of the items of back charges of $36,782.00 which consisted of defect rectification cost, reduction in GFA and storage fees for materials among other claimed under the Payment Response, the Claimant submitted that there is no agreement between the parties within the meaning of s 17(3)(*a*) of the SOP Act nor are these back charges supported by any certificate or other document that is required to be issued under the contract as provided under s 17(3)(*b*) of the SOP Act.

102 The Claimant further submitted that as the Respondent's back-charges claim does not fall within the exceptions in either s 17(3)(*a*) or 17(3)(*b*) of the SOP Act, therefore, the adjudicator is mandated by statute to disregard such claims.

103 Section 17(3) of the SOP Act provides as follows:

> (3) 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.
>
> [emphasis added in bold italics]

104 From the Claimant's submissions, I find that the views of the learned authors in Chow Kok Fong *et al*, *Amendments to the SOP Act: A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet and Maxwell, 2019) are very relevant to the instant case. In particular, the learned authors' views at para 2.006 are very instructive and applicable to the facts of this matter:

> Section 17(2A) applies to both payments claims and payment responses. Thus, while a contractor is precluded from pursuing a claim for prolongation costs (unless it has been duly certified or has been agreed with the respondent), *the respondent is similarly precluded from setting off against a claimed amount for loss or damages unless the amount of loss or damages have been certified or agreed between the parties. Examples of these set-offs include the cost of rectification of defective work and liquidated damages arising from delay to*

> *the works caused by the contractor*. In the same vein, *a respondent may not be able to set-off the costs incurred in employing third party contractors* or labour suppliers to expedite the works in order to mitigate the effects of the contractor's delay. [emphasis added]

105 It is to note that s 17(2A) of the SOP Act mentioned by the learned authors above is one of the amendments included in the recent amendment exercise made to the SOP Act which came into effect on 15 December 2019 as s 17(3) of the amended SOP Act. It applies when there are claims for "damage, loss and expense" in a payment claim or a payment response.

106 In my view, I agree with the Claimant that s 17(3) of the SOP Act precludes all claims for losses and damages in an adjudication proceeding unless either of the two exceptions in s 17(3) of the SOP Act is satisfied. The first exception is set out in s 17(3)(*a*) when there is an agreement on the *quantum* of losses and damages. The second exception is set out in s 17(3)(*b*) where it requires the claim for loss and damages to be supported by a "certificate" or "document" that is required to be issued under the contract. In my view, a payment response issued by a respondent is not a "certificate or document issued under the contract" within the meaning of s 17(3)(*b*) of the SOP Act, as a payment response which is usually issued to a claimant without discussion and agreement is not considered an impartial and independent evaluation on the set-off or back charge imposed in a payment response.

107 From the Respondent's submissions in the adjudication, and from the materials before me, clearly the first requirement is lacking, as there is no agreement to be found between the parties on the *quantum* of the alleged back charges imposed by the Respondent.

108 As regards the second requirement, although in the Payment Response, the Respondent had included these back charges but, in my view, the Payment Response is not a certificate or document within the meaning of s 17(3)(*b*) of the SOP Act to support that there is an agreement on the *quantum* of the alleged back charges imposed in the Payment Response.

109 From the foregoing findings and reasoning, I determine that the Respondent's remaining back charges amount of $36,282.00 is invalid and shall also be rejected for the adjudication proceeding. Therefore, I determine that the Respondent is not allowed to deduct $276,282.00 for back charges in its Payment Response dated 12 July 2024 with respect to the PC.

Issue 5: adjudicated amount payable under Claimant's PC

(1) Adjudicated amount

110 During the adjudication conference, the Claimant confirmed that a sum of $40,451.79 has been received from the Respondent on 30 July 2024, after the present Adjudication Application was lodged. Therefore, the total payment received by the Claimant to-date amounted to $771,147.30.

111 From the assessment of the submissions provided by both parties to the adjudication proceedings and the reasons as provided above at [25]–[109] of this determination, I determine that there is **no** adjudicated amount payable by the Respondent to the Claimant. The summary of the adjudicated amount is as follows:

Item	Description	Claimed Amount ($)	Adjudicated Amount ($)
1.	Contract Sum	812,879.00	812,879.00
2.	Less: Variation Omissions Works	(152,667.18)	(72,968.15)
3.	Add: Variation Additions Works	274,098.39	5,865.00
4.	Sub-total:	934,310.21	745,775.85
5.	Less: 5% retention sum	(40,641.27)	(37,288.79)
6.	Less: Adjustment of $53.50 discount	(53.50)	(0.0)
7.	Less: Previous payment received	(730,695.51)	(771,147.30)
8.	**Claimed Amount (excluding GST)**	**162,919.93**	**(62,660.24)**

(2) Adjudication fee

112 Since the Claimant has failed in its claim in the Adjudication Application, I determine that the costs of the adjudication application fee of $654.00 (including 9% GST) and the adjudicator fee of $14,061.00 (inclusive of 9% GST) shall be fully borne by the Claimant.

BIQ Pte Ltd
v
BIR Pte Ltd

[2024] SGSOP 14

Singapore Mediation Centre — SOP AA 195 of 2024
Por Hock Sing Michael
13 August 2024

Contract — *Termination* — *Respondent terminating contract pursuant to cll 30.2.2.3(b) and 30.2.2.4 REDAS Design and Build Conditions of Main Contract (4th Ed, 2022)* — *Whether respondent entitled to terminate contract*

Jurisdiction — *Jurisdictional objections* — *Respondent terminating contract pursuant to cll 30.2.2.3(b) and 30.2.2.4 REDAS Design and Build Conditions of Main Contract (4th Ed, 2022) ("REDAS Conditions")* — *Respondent contending Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) not applying to present case* — *Whether respondent not liable to make any payment to claimant until determination of its termination costs and any liquidated damages by virtue of cl 30.3.1 of REDAS Conditions* — *Section 4(2)(c) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Response — *Response amounts* — *Parties agreeing to revised payment certificate and claimant duly issuing its tax invoice ("Original Tax Invoice")* — *Respondent subsequently requesting claimant to make minor amendments to its tax invoice* — *Claimant acceding to respondent's request and sending its "Revised Tax Invoice" but respondent still failing to make payment without providing reasons* — *Whether timeline for payment based on date of submission of Original Tax Invoice or Revised Tax Invoice* — *When was due date for payment of response amount*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 3, 4(1), 4(2)(*c*), 8(1), 8(1)(*a*), 8(1)(*b*)(i), 8(5)(*b*), 12(1), 12(2)(*b*), 13(3)(*a*), 13(2), 15(1), 16(1), 17(1)(*a*)(ii), 17(3), 22(1)(*a*)

Supreme Court of Judicature Act 1969 (2020 Rev Ed)

Claimant unrepresented;
CTLC Law Corporation for the respondent.

[Commentary: see para 5.19]

13 August 2024

Por Hock Sing Michael:

Determination

1 This is an adjudication determination made on 13 August 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act"). It is made in respect of Adjudication Application No SOP AA 195 of 2024 ("AA"), the case number having been assigned by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant ("Claimant") is [BIQ] Pte Ltd ("Claimant"), who is not represented by counsel, while the respondent is [BIR] Pte Ltd ("Respondent"), who is represented by CTLC Law Corp in the present proceedings.

3 For the reasons set out below, I determine that:

(a) The Respondent shall pay the Claimant the sum of **S$955,749.19** (inclusive of goods and services tax ("GST") at the prevailing rate of 9%). This is hereby recorded as the "Adjudicated Amount" of this adjudication determination ("Adjudication Determination").

(b) The Adjudicated Amount shall be paid by the Respondent to the Claimant **within seven days** after this Adjudication Determination is served on the Respondent. This is hereby recorded as the "Due Date for Payment" of the Adjudicated Amount.

(c) The Respondent shall pay the Claimant interest on the Adjudicated Amount at the rate of **5.33% per annum** calculated from the date immediately after the Due Date for Payment of the Adjudicated Amount up to the date of full payment of the same.

(d) The Respondent shall bear the costs of the adjudication, such costs comprising the adjudication fee of **S$654** (inclusive of GST at 9% thereof) and the adjudicator fee of **S$13,679.50** (comprising the aggregate of the adjudicator fee of S$12,450 and disbursements of S$100, together with GST at 9% thereof).

Record

Background

4 The material facts of the case are as follows.

5 By a novation contract evidenced by, *inter alia*, a letter of acceptance dated 6 March 2024 which was executed by both parties on 28 March 2024 ("LOA"), the Respondent had engaged the Claimant as its main contractor to undertake design and construction works ("Works") in a project entitled the "Design And Build For Proposed Addition And Alteration Of Converting Existing Single Storey Warehouse And 2-Storey Office Block To Single Storey Factory And 3-Storey Office Block On Lot [xxx] at [xxx] ('[X] Planning Area')" (the "Project") for the aggregate contract sum of S$5,700,000, excluding GST ("Contract Sum"). The Project was originally awarded to one [Y] Pte Ltd ("Original Contractor") as evidenced by a letter of acceptance dated 18 August 2023 which the parties thereat had executed on 19 September 2023 ("Previous LOA"). For reasons which are not material to the present proceedings, the Respondent had eventually novated the contract for the Project and/or the Works entirely to the Claimant with the Original Contractor's agreement ("Contract").

6 The Contract incorporated, *inter alia*, the terms under both the Previous LOA as well as the LOA, and the REDAS Design and Build Conditions of Main Contract (4th Ed, 2022) form of contract ("REDAS Conditions") pursuant to cl 4 of the Previous LOA. [Z] Pte Ltd ("[Z]") was the Respondent's appointed project manager as well as quantity surveyor for the Project and was also the designated employer's representative ("ER") for the Project under cl 5.1 read with Appendix 1 of the REDAS Conditions.

7 Under cl 3(3) of the LOA, it was stipulated that the Project was to be completed and the temporary occupation permit for the same was to be obtained by 19 December 2024 ("Contract Completion Date"), although under cl 5 of the Previous LOA, it was originally prescribed, *inter alia*, that "the Commencement Date shall be the same date as the grant of Permit to Carry Out Structural Works by Building and Construction Authority", while "the Contract Period shall be **twelve (12) calendar months** from the Commencement Date. The Maintenance Period shall be **twelve (12) calendar months** from the date of Handing Over Certificate" [emphasis in original]. Pursuant to the aforesaid, it was also stipulated that liquidated damages ("LD") at the rate of S$1,200 per calendar day ("LD Rate") would be imposed on the Claimant for any delay to the completion of the Works beyond the Contract Completion Date as may be certified under a delay certificate which may be issued by the ER. Clause 19.1 of the REDAS Conditions also reiterated, *inter alia*, the Respondent's entitlement to impose LD at the LD Rate in the event of any

delay to completion caused by the Claimant based on the period of delay as may be certified by the ER under a delay certificate.

8 Clause 1.3 of the Previous LOA contained the applicable payment term *vis-à-vis* payment to the Claimant under the Contract for the Works undertaken by the Claimant. This was essentially similar to the terms of payment prescribed under cl 22 of the REDAS Conditions referred to below. In addition, it was expressly stipulated thereof that "there shall be no Retention Sum under this Contract". Notwithstanding the novation of the Contract to the Claimant by the Original Contractor and the Respondent as evidenced by the LOA, the aforementioned term under the Previous LOA would continue to apply to the Claimant. In the present case, the material terms under the REDAS Conditions (in addition to what have been referred to above) are set out below.

(a) Clause 7.2 of the REDAS Conditions, under "Removal or Rectification of Defective Work or Reduction of Contract Sum", provides, *inter alia*, as follows:

> The Employer's Representative may during the course of the Works by Written Notice order the removal from the Site or the rectification of any work, Materials or goods whether fixed or not which are not in accordance with the Contract or are in any way defective. Where the Contractor fails to comply with such Written Notice within 14 days from the date of such Written Notice, the Employer may engage other contractors to rectify the same and recover the costs from the Contractor by deducting or withholding any sum due to the Contractor under the Contract. Alternatively, the Employer may choose to accept any defective work unremedied or Materials supplied which are not in accordance with the Contract, in which event the Contract Sum shall be reduced to reflect the loss of value of the Works to the Employer.

(b) Clause 14 of the REDAS Conditions, under "DUE DILIGENCE AND EXPEDITION BY CONTRACTOR", stipulates that "Following the commencement of work … the Contractor shall proceed with the design and the construction of the Works diligently and with due expedition at all times until completion."

(c) Clause 19 of the REDAS Conditions, under "LIQUIDATED DAMAGES", provides, *inter alia*, as follows:

> 19.1.1In the event that the Contractor fails to complete the Works by the Date of Completion or the extended Date of Completion, as the case may be, the Employer's Representative may at any time up to the issue of the Handing Over Certificate issue a Delay Certificate setting out the total period of extension of time determined (if any), the

extended Date of Completion (if any) and the latest Date of Completion of the Works and certifying that the Contractor is in default in failing to complete the Works by the latest Date of Completion.

19.1.2The Contractor shall pay to the Employer the relevant sum calculated at the rate stated in Appendix 1 as liquidated damages for every day of default during the period which the Works remain incomplete pursuant to the Delay Certificate.

19.2 The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due, or to become due, to the Contractor under the Contract including but not limited to any sums due in the Interim Payment Certificates issued under clause 22.

(d) Clause 20 of the REDAS Conditions, under "MAINTENANCE PERIOD", provides, *inter alia*, as follows:

20.2 During the Maintenance Period, the Contractor shall complete the minor outstanding works (if any) as set out in the Schedule to the Handing Over Certificate.

20.3 The Employer's Representative may at any time during the Maintenance Period instruct the Contractor to remedy any defects (including omissions and defaults) that appear in the Works.

20.4 If the Contractor fails to remedy any defect within 14 days or such other time as instructed in Writing by the Employer's Representative, the Employer's Representative may give Written notice to the Contractor to remedy the defect within 7 days from the date of such notice. If the Contractor fails to remedy the defect within the 7 days period as set out in the Written notice, the Employer may carry out the remedial works himself or employ other contractors to do so. The costs of such remedial works shall be recoverable by the Employer against the Contractor including the deduction or withholding of any sum due to the Contractor under the Contract.

(e) Clause 22 of the REDAS Conditions, under "PROGRESS PAYMENTS", contains the general payment provisions under the Contract. In particular, under cl 22.1 of the REDAS Conditions, under "Contractor to Submit Application for Progress Payment Claim", it is stipulated, *inter alia*, as follows:

22.1.1The Contractor shall serve on the Employer with a copy to the Employer's Representative a Payment Claim on the last day of each month following the month on which the Contract is made (or otherwise by such time or on such day as stated in Appendix 1) showing the amount which the Contractor considers himself to be

> entitled for that month together with the relevant supporting documents … The Contractor's Payment Claim under this clause shall have the same meaning as in the Building and Construction Industry Security of Payment Act 2004 ('the SOP Act').
>
> 22.1.4In the event that the Contractor serves the Payment Claim earlier than the time period as provided under clause 22.1.1 above, the Employer's Representative shall not be required to issue the Interim Payment Certificate or the Employer to issue the Payment Response earlier than the case if the Contractor had served his Payment Claim in accordance with clause 22.1.1.

(f) Under cl 22.2.1 of the REDAS Conditions, under "Interim Payment Certificates", it is stipulated, *inter alia*, as follows:

> The Employer's Representative shall within 14 days of receipt of the Payment Claim and supporting documents submitted under clause 22.1 issue an Interim Payment Certificate to the Employer (with a copy to the Contractor) setting out the amount which the Employer's Representative considers to be due to the Contractor. The Interim Payment Certificate may include deductions for sums which have been or may become due and payable to the Employer by the Contractor …

(g) Under cl 22.4 of the REDAS Conditions, under "Interim Payment Certificate and Final Payment Certificate (Deemed Payment Response)", it is stipulated as follows:

> The Interim Payment Certificate issued under clause 22.1 or the Final Payment Certificate issued under clause 24.4 shall be deemed the Payment Response from the Employer to the Contractor under the SOP Act in the event that the Employer fails to provide any Payment Response to the Contractor within 21 days after the Payment Claim is served on the Employer by the Contractor. Where the Employer provides a Payment Response within 21 days after the date the Payment Claim is served in compliance with the SOP Act, the Employer's Payment Response shall take precedence over the Interim Payment Certificate issued under clause 22.2.1 or the Final Payment Certificate issued under clause 24.4 and shall constitute the Payment Response to the Contractor.

(h) Under cl 22.5 of the REDAS Conditions, under "Payment to Contractor", it is stipulated, *inter alia*, as follows:

> Where the Contractor is a taxable person under the Goods and Services Tax Act, the Contractor shall prepare his tax invoice based on the response amount as stated in the Payment Response provided under clause 22.4, The Contractor shall be paid the amount stated in the tax invoice on or before the expiry of 35 days (or otherwise by such time or

on such day specified in Appendix 1) after the date of submission of the tax invoice to the Employer in compliance with the SOP Act.

(i) Under cl 30.2 of the REDAS Conditions, under "Termination For Default", it is stipulated, *inter alia*, as follows:

30.2.1.In the event that the Contractor:

30.2.1.2.has failed to proceed with due diligence and expedition in the Works,

the Employer's Representative may give Written notice to the Contractor requiring him to recommence the design or the construction of the Works or to proceed with due diligence and expedition in the Works.

30.2.2.If the Contractor commits any of the following:

30.2.2.1.fails to comply with the Employer's Representative's Written Notice under clause 30.2.1 within 28 days from the date of receipt of the same, or …

30.2.2.3.without any justification fails:

(b) to show that he has employed sufficient design capability in the design of the Works to achieve completion within the Date of Completion or any extended Date of Completion; or …

30.2.2.4fails to comply with any Written instruction which the Employer's Representative may give within 28 days after the date of receipt of the same; or …

30.2.2.7has failed to provide the cash deposit or the Performance Bond under clause 2.1,

then, the Employer's Representative may without prejudice to any other rights and remedies under the Contract (including the right to treat the Contract as repudiated under general law), give a Notice of Termination of the employment of the Contractor. Upon receipt of such Notice, the Contractor's employment shall immediately terminate.

(j) Under cl 30.3 of the REDAS Conditions, under "Effects of Termination for Default", it is stipulated, *inter alia*, as follows:

In the event of the termination of the employment of the Contractor under clause 30.2:

30.3.1.the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs

> for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained …
>
> 30.3.5.the Employer may recover from the Contractor liquidated damages for delay in completion arising from the termination under this clause …
>
> 30.3.6.the Employer's Representative shall as soon as practicable after termination of the Contractor's employment, determine the value of the Works completed at the time of termination.
>
> 30.3.7.the Employer shall be entitled to recover from the Contractor the following:
>
> > 30.3.7.1.the extra costs (if any) incurred in the design and completion of the incomplete Works;
> >
> > 30.3.7.2.the costs of rectification of defects (if any);
> >
> > 30.3.7.3.liquidated damages payable for delay in completion; and
> >
> > 30.3.7.4.any other loss or expense incurred arising from the termination of the Contractor's employment,
>
> from any sum due to the Contractor under clause 30.3.6 or as a debt. If there are no such extra costs, the Employer shall pay any balance to the Contractor.

9 *Prima facie*, subject to the Respondent's jurisdictional objection raised herein and my findings thereof, it will appear ostensibly that the Works would fall within the definition of "construction work" under s 3 of the SOP Act. Similarly, it will appear that the parties had entered into a "contract that is made in writing" for the undertaking of the Works as evidenced by the Contract, the same thereby appearing to constitute a "construction contract" as defined under s 2 of the SOP Act. Thus, s 4(1) of the SOP Act would appear to have been satisfied and the SOP Act would thus apply in such a case. However, as will be apparent below, that is not the end of the matter as I will have to decide in these proceedings if, notwithstanding the aforesaid, the Claimant is entitled to lodge the AA and proceed under the SOP Act based on the ground which it is relying on at present herein. I will say more about this later.

10 The Respondent had paid the Original Contractor an advance payment in the sum of **S$570,000** (excluding GST), equivalent to 10% of the Contract Sum, ("Advance Payment") prior to the commencement of the Works. This was eventually transferred to the Claimant in its entirety upon the novation of the Contract to it.

11 The Claimant had on **30 April 2024** submitted its Progress Claim No 1 for the work done up to the end of April 2024 in the sum of **S$1,487,511.90** (excluding GST) ("PC No 1"), without providing for any retention sum in accordance with cl 1.3 of the Previous LOA.

12 On **10 May 2024**, [Z] had on behalf of the Respondent issued its assessment of PC No 1 in the sum of **S$680,234.08** (excluding GST) only, which, after allowing for the Advance Payment in full, resulted in the Claimant being assessed to be entitled to a mere sum of **S$110,234.08** only. This was not accepted by the Claimant.

13 On **13 May 2024**, pursuant to a meeting between the parties, [Z] had reassessed the claim under PC No 1 to include, *inter alia*, allowances for materials on site as well as higher assessments for some of the Works claimed for. This resulted in a revised assessment of PC No 1 in the sum of **S$839,519.82** (excluding GST). In addition, [Z] had also acknowledged and agreed that the Advance Payment need not be accounted for entirely under PC No 1 but may be accounted for via *ten equal instalments* of **S$57,000** each ("Advance Payment Instalments"), to be set off against each progress payment which may be submitted by the Claimant, commencing with PC No 1. However, notwithstanding the aforesaid, [Z] had then proceeded to deduct **90%** of the Advance Payment from the reassessed sum payable to the Claimant *vis-à-vis* PC No 1, resulting in the Claimant being reassessed to be entitled to be paid the sum of **S$326,519.82** only. The Claimant did not accept the aforesaid.

14 On **27 May 2024**, after further discussions, the Claimant had resubmitted a Revised Progress Claim No 1 in the sum of **S$1,530,555.90** (excluding GST) ("Rev PC No 1"). This increased claim appeared to be due to the Claimant's claim for materials purchased.

15 On **6 June 2024**, [Z] had issued its Interim Payment Certificate No 1 in the sum of **S$777,750.71** (excluding GST) with regard to Rev PC No 1. This was not accepted by the Claimant as it included a deduction for **10%** retention sum as well as a deduction for **two** of the Advance Payment Instalments.

16 Subsequently, it appears that the Respondent had sought to persuade the Claimant to accept the aforementioned certification of Rev PC No 1 by [Z] with the removal of the deduction of the retention sum in the sum of **S$99,083.41** since that was obviously without any basis. Hence, the adjusted certified sum would amount to **S$990, 834.12** (excluding GST) and the certified sum payable would be **S$876,834.12** (excluding GST), after taking into account the deductions for **two** of the Advance Payment Instalments. On **12 June 2024**, the Respondent had informed the Claimant that if the final amount could be agreed by [Z] and the Claimant as proposed, payment could be disbursed by the bank to the Claimant "very

quickly". The Claimant had already provided the Respondent with its bank details to facilitate due payment by then.

17 The Claimant appeared to have acceded to the abovementioned request by the Respondent eventually. Consequently, on **14 June 2024**, [Z] had issued its Revised Interim Payment Certificate No 1 ("Rev IPC No 1") based on the aforementioned agreement with the Respondent and [Z]. Taking into account the **two** Advance Payment Instalments to be deducted, the sum certified to be payable to the Claimant was **S$876,834.12** (excluding GST) as agreed. This represents the sum claimed in the present proceedings under this AA ("Claim Sum").

18 On **18 June 2024**, pursuant to the Claimant's agreement to accept the certification of its Rev PC No 1 under Rev IPC No 1, the Claimant had duly issued to the Respondent its Tax Invoice No TPL2406–02 dated **14 June 2024** in the aggregate sum of **S$876,834.12** (excluding GST) or **S$955,749.19** (inclusive of GST) based on the aforesaid ("Original Tax Invoice"). The date of the Original Tax Invoice was based on the date of Rev IPC No 1. The Claimant also provided its bank details to the Respondent again to facilitate payment. The Original Tax Invoice was issued without any qualification whatsoever, reflecting the Claimant's acceptance of the certification under Rev IPC No 1.

19 On **19 June 2024**, the Respondent had confirmed that it was "processing" the Claimant's claim for payment of the Claim Sum under the Original Tax Invoice and "preparing the drawdown request". Subsequently, it had written to the Claimant to request the Claimant to provide the name of the authorised signatory of the Original Tax Invoice as well as to affix the company stamp on the same. This was duly done by the Claimant.

20 On **20 June 2024**, the Claimant had duly submitted the amended tax invoice to the Respondent ("Revised Tax Invoice"). This was duly acknowledged by the Respondent on the same day. Save for the abovementioned amendments to the Original Tax Invoice, the Revised Tax Invoice was exactly the same as the Original Tax Invoice.

21 Thereafter, the Claimant had continued to press the Respondent for payment of the agreed sum under the Revised Tax Invoice until early **July 2024**. Throughout this period, the Respondent did not deny or challenge the Claimant's entitlement to be paid the sum under the Revised Tax Invoice, giving the impression that it was preparing the said payment to the Claimant. Indeed, on **10 July 2024**, [Z] had written to the Claimant to state that: "Your revised claim submission is dated 27 May 2024 and we certified on 14 June 2024. Under the Contract, the client has up to 35 days to pay the invoice. Therefore, the client has up to 19 July 2024 to make payment." The aforesaid deadline for payment as stated by [Z] appears to be derived from the date of certification under Rev IPC No 1, that is, **14 June 2024**,

and not the date of submission of either the Original Tax Invoice (**18 June 2024**) or the Revised Tax Invoice (**20 June 2024**).

22 In any event, the self-admitted final deadline for payment of **19 July 2024** appears to be significant as the Respondent had purported to terminate the Contract the very next day, on **20 July 2024** ("Termination Date"). It was also evident from this e-mail from [Z] that just **ten days** prior to the termination of the Contract, there was still no intimation from the Respondent or [Z] that the Respondent was actually contemplating terminating the Contract on account of any breaches of the same and, instead, it had merely sought to ask the Claimant to wait out the expiry of the stipulated payment period under the Contract (**35 days**) as asserted by [Z] to receive due payment.

23 However, on **17 July 2024**, this being **two days** before the due date stipulated by [Z] and just **a day** before the Termination Date, the Respondent had written to the Claimant to inform the latter for apparently the first time that it was rejecting the Revised Tax Invoice as it did not reflect the actual date of submission of the same. Hence, it had informed the Claimant to amend the date of the Revised Tax Invoice to the actual date of submission (**20 June 2024**) as well as to correct a minor typographical error in the title of the Project set out thereof (*ie*, correct "[X] Avenu2" to "[X] Avenue 2"). Again, there was no intimation that the Respondent was considering the termination of the Contract shortly, or that the Claimant would not be entitled to payment under the Original Tax Invoice or the Revised Tax Invoice. The Claimant did not appear to have acceded to the Respondent's aforementioned requests.

24 In any event, notwithstanding what [Z] had previously stated in its e-mail of **10 July 2024** referred to above, no payment was received by the Claimant by **19 July 2024**. Subsequently, a mere day later, on **20 July 2024** (the Termination Date), the Claimant had received a notice of termination from the Respondent ("Termination Notice"). In the Termination Notice, the Respondent had notified the Claimant that it was issuing the same to terminate the Contract forthwith pursuant to "clause 30.2 of the Conditions … for reasons under clauses 30.2.1.2, 30.2.2.3(b), 30.2.2.4 and 30.2.2.7" thereof. In addition, the Respondent also alleged that the Claimant had "submitted fraudulent documents for Progress Payment Claims and failed to comply with statutory requirements, by-laws and regulations". As such, the Respondent sought to exercise its rights under cl 30.3 of the REDAS Conditions accordingly, contending that no payment was due to the Claimant.

25 I note that the above chronology of events in the present case does not appear to be disputed by the Respondent, certainly not in the adjudication response served by the Respondent in the present case on **5 August 2024**

("AR"). Indeed, the same appears to be supported by the documentary evidence properly before me.

26 Further, notwithstanding the various grounds for termination stated in the Termination Notice, for present purposes, as evidenced by the submissions filed with the AR, the Respondent only seeks to rely on cl 30.2.2 of the REDAS Conditions and, in particular, cll 30.2.2.3(b) as well as 30.2.2.4 thereof, to justify its basis for the purported termination of the Contract. No submissions or evidence to support a case for termination under cll 30.2.1.2 and 30.2.2.7 of the REDAS Conditions or with regard to the purported additional ground for termination (which was also raised in the Termination Notice) were provided by the Respondent at all, whether in the AR or otherwise. As such, I shall confine my decision in the main to the grounds of termination raised by the Respondent in the AR only. I will address these purported grounds of termination, and the material facts raised by the Respondent in support of its contentions thereof, below.

27 I also note that it had taken the parties about **six weeks** (until **14 June 2024**) since the submission of PC No 1 on **30 April 2024** to come to an agreement for the sum to be certified and paid to the Claimant *vis-à-vis* the Works undertaken as of **end April 2024**. This was already **twice** as long as the period typically contemplated under the SOP Act. In addition, I note that this agreement was in relation to the **first** progress payment for the Claimant under the Contract, although I do recognise that the Claimant would have already received the benefit of the Advance Payment at the outset. Be that as it may, based on the eventual sum agreed to be paid to the Claimant under Rev IPC No 1, this represented a very substantial sum that was due to be paid to the Claimant as duly certified. As such, I can well appreciate the possible adverse impact on its project cashflow of any delay in paying the Claimant the said sum, as also acknowledged by the Respondent and/or [Z] in [Z]'s e-mail of **13 May 2024** to the Claimant, when it had agreed to reassess and increase its prior assessment of the Claimant's PC No 1 on **10 May 2024**.

Payment claim

28 As stated above, the Claimant had originally served its PC No 1 on the Respondent on **30 April 2024**, but this was subsequently revised after negotiations between the parties. The Claimant had then served its Rev PC No 1 on the Respondent on **27 May 2024** via e-mail as acknowledged by the Respondent in [Z]'s e-mail of **10 July 2024**. This was for the sum of **S$1,530,555.90** (excluding GST) for work done during the reference period up to **end April 2024**. The Respondent and/or [Z] regarded this payment claim as the relevant payment claim to be assessed, certified and/or responded to for purposes of the Contract and/or the material provisions of the SOP Act as prescribed. The parties had then embarked on a further

course of negotiations to determine the eventual sum to be certified and paid to the Claimant.

Payment response

29 The Respondent had through [Z] first issued its Interim Payment Certificate No 1 for the Claimant in response to Rev PC No 1 on **6 June 2024**. This was subsequently superseded by Rev IPC No 1 issued on **14 June 2024** based on the parties' agreement on the sum payable to the Claimant in respect of Rev PC No 1 (the "Response Amount"). This was the Claim Sum in the present case. In the circumstances, there was **no** formal separate payment response served by the Respondent in response to Rev PC No 1 in accordance with the provisions of the SOP Act. Hence, in light of cl 22.4 of the REDAS Conditions referred to above, Rev IPC No 1 shall be deemed to be the payment response to be served by the Respondent in response to Rev PC No 1 as prescribed under the SOP Act. The certified sum thereunder shall thus be deemed to be the Response Amount. As stated, the Response Amount is the Claim Sum. Consequently, the Respondent is deemed to have duly served a valid payment response on the Claimant for purposes of the SOP Act.

Adjudication proceedings

30 As explained above, the Claimant had eventually agreed to and accepted the sum certified by [Z] under Rev IPC No 1 in response to Rev PC No 1, which constituted the payment response prescribed by the SOP Act for purposes of the Contract, notwithstanding that Rev PC No 1 might well have been for a significantly higher sum. Such agreement is evidenced by, *inter alia*, the issuance of the Original Tax Invoice via the Claimant's e-mail of **18 June 2024** sent to the Respondent, providing its banking details to facilitate payment for the same. This was after the parties' exchanges on WhatsApp. Thereafter, as evident above from the chronology of events, the Claimant had continued to press the Respondent for payment of the Response Amount under the Revised Tax Invoice eventually, without disputing [Z]'s assessment of the Claimant's Rev PC No 1 as reflected in Rev IPC No 1. Quite clearly, the Claimant has accepted the Response Amount as set out under the payment response represented by Rev IPC No 1. There was no qualification of its claim for the Response Amount whatsoever, whether under the Original Tax Invoice or under the Revised Tax Invoice.

31 Section 8(1)(*a*) of the SOP Act provides, *inter alia*, that "where a construction contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on … the date as specified in or determined in accordance with the terms of

the contract", this being the earlier of the prescribed dates under the said provision. In this regard, I note that cl 22.5 of the REDAS Conditions stipulated, *inter alia*, that "[t]he Contractor shall be paid the amount stated in the tax invoice on or before the expiry of 35 days … after the date of submission of the tax invoice to the Employer in compliance with the SOP Act". This contractually stipulated due date for payment is similar to s 8(1)(*b*)(i) of the SOP Act, the Claimant being a "taxable person". Consequently, depending on the deemed date for submission of the material tax invoice for the Response Amount, the due date for payment of the Response Amount in the present case ("Due Date") could be **23 July 2024** (based on the Original Tax Invoice submission date of **18 June 2024**) or **25 July 2024** (based on the Revised Tax Invoice submission date of **20 June 2024**).

32 In this regard, as I have noted above, [Z] had actually deemed the due date for payment to be **19 July 2024**, based on the date of issue of Rev IPC No 1 on **14 June 2024**. This may well be wholly misconceived in light of the clear terms of cl 22.5 of the REDAS Conditions as well as s 8(1) of the SOP Act, which both require the due date to be derived from the date of submission of the material tax invoice, the Claimant being a "taxable person" as described under both these provisions.

33 Notwithstanding the Respondent's certification of the Response Amount in favour of the Claimant as stated above, which the Claimant had accepted, ultimately the Respondent did not pay the Claimant the Response Amount by the Due Date (as the case may be) or to date. This is because the Respondent had proceeded to terminate the Contract on the Termination Date and relied on cl 30.3.1 of the REDAS Conditions to contend that in such circumstances, it need not pay the Claimant at all pending the determination of the costs of termination and LD (if any) as set out in the aforesaid provision and under cl 30.3.7 of the REDAS Conditions (collectively, "Termination Costs"). Clearly, and it has not been disputed, the Termination Costs have yet to be determined currently.

34 Section 12(1) of the SOP Act provides, *inter alia*, that:

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

35 Section 13(3)(*a*) of the SOP Act provides that: "An adjudication application must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12."

36 With regard to the abovementioned provisions, I am cognisant of the General Division of the High Court's decision in *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298

("*HP Construction*"), which has been upheld by the Appellate Division of the High Court ("Appellate Division") on appeal (see *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220), where it was held that the entitlement to make an adjudication application referred to under s 13(3)(*a*) of the SOP Act would arise "on the day following the end of the dispute settlement period", while "the seven-day period after the entitlement arises will commence on the day after" (at [14]). As such, applying the aforesaid ruling to the present facts, the entitlement period for the lodgment of the AA would actually commence on **24 July 2024** or **26 July 2024** (depending on the determination of the Due Date as explained above at [31]) but end on **31 July 2024** or **1 August 2024** respectively, as the case may be. As held by the Appellate Division at [2], "in effect … an adjudication applicant has eight days in total to lodge an adjudication application".

37 In the present case, as the Respondent did not pay the Claimant the Response Amount by the Due Date (as the case may be), the Claimant had served a notice of intention to apply for adjudication ("Notice of Intention") on the Respondent (as prescribed in accordance with s 13(2) of the SOP Act) and lodged the AA with the SMC on **26 July 2024**. In light of the aforementioned prescribed timeline for the lodgement of the AA under the SOP Act, regardless of when the Due Date is, this AA would have been lodged in time.

38 Meanwhile, the SMC had served the AA on the Respondent on **29 July 2024**. The Respondent thus had until **5 August 2024** to file its AR under s 15(1) of the SOP Act. As seen above, the Respondent had duly lodged the AR on the aforesaid date.

39 Meanwhile, on **31 July 2024**, the SMC, as the authorised nominating body under the SOP Act, had appointed me as the adjudicator for this matter.

40 Pursuant to s 16(1) of the SOP Act, the adjudication is deemed to have commenced on **6 August 2024**. By virtue of s 17(1)(*a*)(ii) of the SOP Act, I am required to determine the AA within **seven** (7) **days** after the commencement of the adjudication if the Respondent "has failed to pay the response amount, which has been accepted by the claimant, by the due date". While I had written to the parties on **31 July 2024** for an extension of time to deliver my Adjudication Determination ("AD") in the present case, neither party has consented to such a request. As such, I shall have to deliver my AD by **14 August 2024** (taking into account the National Day public holiday and applying the same construction as was adopted in *HP Construction vis-à-vis* s 13(3)(*a*) of the SOP Act). Due to the tight timelines and the time constraints imposed on me under the SOP Act, I was unable to convene an adjudication conference where the parties may be heard on their respective case and had proceeded to determine the merits of

the AA based only on the evidence and/or documents properly before me. I note that there was no request from either party for me to convene an adjudication conference in any case, while the Claimant had actually sought to impress upon me the urgency of this matter where it was concerned in view of the dire financial straits it appeared to have found itself in currently.

41 For clarity, notwithstanding the aforesaid, I should point out that I had on **31 July 2024** and **6 August 2024** respectively sought from the Claimant copies of the material tax invoices referred to herein as well as the Termination Notice, and required certain clarifications to be made via further written submissions from the same on the following issues (collectively, the "Queries"):

(a) whether the Claimant was proceeding under s 12(1) of the SOP Act instead of s 12(2)(*b*) of the SOP Act in respect of the AA, in light of the abovementioned facts, notwithstanding that it had appeared to indicate in the AA form that the AA involved a "Failure to provide payment response" instead of "Accepted response amount not fully paid"; and

(b) the Claimant's position with regard to the "Jurisdiction Objection" (as defined below) raised by the Respondent in the AR as addressed below.

42 In the circumstances, the Claimant had duly provided the further written submissions to the Queries on **1 and 7 August 2024** respectively. In particular, the Claimant has confirmed that it was proceeding under s 12(1) of the SOP Act in the AA, on the basis that the Respondent has failed to pay the Response Amount which it had accepted, and **not** on the basis of any failure to serve a payment response. The Claimant also sought to respond to the Jurisdiction Objection raised by the Respondent in the AR. The Respondent did not raise any objection to the Claimant's aforementioned clarification of the basis for the AA in the AR even though this was provided to it prior to its filing of the AR and the Respondent would have been allowed to address the same. Indeed, the Claimant's position was clearly borne out by the substance of its submissions filed with the AA, where there was obviously a valid payment response served by virtue of the issuance of Rev IPC No 1, and this position was also duly reflected in the Notice of Intention. Hence, I have accepted the Claimant's position in this regard, applying the relevant provisions as well as timelines under the SOP Act relating to a failure to pay the response amount which has been accepted by a claimant accordingly, as evident above.

Matters considered

43 In arriving at my decision in this AD, I have considered all the submissions validly made and all the documents presented in this

adjudication in so far as I am entitled to under the SOP Act. The fact that any particular submission or document which is properly before me is not expressly set out or referred to in this AD does not mean that I have not duly considered it, as, in order to save time and not to incur unnecessary expense, I may not have set out or referred to every submission or document made or submitted in this AD, notwithstanding that I would have taken into account all such matters in arriving at my decision herein in so far as I may be able to under the SOP Act.

Preliminary issue: When was Due Date for Payment of Response Amount?

44 As I have stated above, in the present case, the AA has been duly lodged within the prescribed timeline under the SOP Act as referred to above regardless of when the Due Date was. Nonetheless, I will determine when the Due Date for payment of the Response Amount was as this has an impact as to when the entitlement to lodge an adjudication application under the SOP Act will arise. This will depend on whether I ought to calculate the timeline for payment based on the date of submission of the Original Tax Invoice or the Revised Tax Invoice.

45 As I have noted above, the sole difference between the Original Tax Invoice and the Revised Tax Invoice is the inclusion of the name of the authorised signatory of the said tax invoices as well as the affixing of the company stamp in the latter. There are no changes to the substance or nature of the same, which were both issued pursuant to the receipt of Rev IPC No 1. The basis as well as the amount of the sum claimed under both the said tax invoices remained the same, and both were duly dated 14 June 2024, this being the date of issue of Rev IPC No 1. In fact, from the evidence disclosed, it appears to me that Rev IPC No 1 was only issued pursuant to the parties' agreement on the sum to be certified payable to the Claimant with regard to the Claimant's Rev PC No 1. The Respondent had sought and obtained the Claimant's agreement to such sum before procuring [Z] to issue Rev IPC No 1 based on the same. The Original Tax Invoice was issued pursuant to the receipt of Rev IPC No 1 accordingly.

46 In the circumstances, I find that the Due Date ought to be derived from the date of submission of the Original Tax Invoice, notwithstanding the amendments to the same subsequently by the Claimant as requested by the Respondent, resulting in the issue of the Revised Tax Invoice. I have not been provided with any evidence whatsoever by the Respondent that the Original Tax Invoice is not a valid tax invoice for purposes of securing payment under the Contract and, indeed, there does not appear to be any express terms under the same which required the requested amendments to be made to the Original Tax Invoice before it can constitute a valid tax invoice for purposes of payment under the Contract. As I have stated, by the

time the Original Tax Invoice was issued, the parties had already agreed that the Claimant ought to be entitled to be paid the Response Amount, and the Original Tax Invoice was duly issued pursuant to the same in order to facilitate due payment.

47 My view on the reasonableness of my above finding is reinforced when it can be seen from [Z]'s own e-mail of **10 July 2024** that it had actually expressly considered that the sum certified to be payable to the Claimant under Rev IPC No 1 is due to be paid even earlier, on **19 July 2024**, based on the date of Rev IPC No 1. As such, my said finding will cause no prejudice whatsoever to the Respondent.

48 Further, if the Respondent is allowed to defer the commencement of the credit term for payment until all its requested amendments have been accommodated, this could conceivably mean that even the Revised Tax Invoice cannot be used to derive the Due Date as the Respondent had purported to seek even more amendments to the Revised Tax Invoice belatedly by its e-mail of **17 July 2024**, about **one month** after it had first received the Original Tax Invoice, and merely **three days** before it had purported to terminate the Contract. That would be grossly unfair to the Claimant, which cannot be held liable for the Respondent's delay in notifying it of any issue over the form of the tax invoice issued by the Claimant. If so, since the Claimant has yet to accede to the latest request for amendments to the Revised Tax Invoice, it would have meant that the 35-day stipulated credit term for payment would not have even commenced notwithstanding that [Z] had already certified that the Response Amount was payable since **14 June 2024**. Surely, that cannot be the case since it would mean that the Claimant's entitlement to commence adjudication under the SOP Act would not have arisen yet. As I have stated, there is nothing on the face of the Original Tax Invoice and there is nothing in the Contract which prevent the Original Tax Invoice from being accepted as a valid tax invoice for purposes of payment under the Contract.

49 In the premises, I find that the Due Date ought to be based on the date of submission of the Original Tax Invoice and, as such, the Claimant ought to be entitled to lodge the AA from **24 July 2024** pursuant to s 12(1) read with s 13(3)(*a*) of the SOP Act. In view of the aforesaid, as the AA was lodged on **26 July 2024**, it was duly lodged within the prescribed timelines under the SOP Act. To hold otherwise could conceivably mean that the Due Date for payment would not have even arisen yet in view of the Respondent's belated attempt to request for further amendments to the Revised Tax Invoice, which the Claimant has not acceded to. Without the ascertainment of the Due Date for payment of the Response Amount, it will not be possible to determine when the Claimant's entitlement to lodge an adjudication application under the SOP Act will arise in such a case.

Jurisdiction Objection

50 The Respondent has raised a jurisdictional objection to the AA in the AR ("Jurisdiction Objection"). This was its **sole** ground of objection as it does not appear to dispute that based on Rev IPC No 1, [Z] has already certified that the Response Amount is payable to the Claimant *vis-à-vis* the latter's Rev PC No 1. It thus appears that its position as set out under the AR seems to be that the Response Amount would have been payable to the Claimant if not for the purported termination of the Contract on the grounds raised in the AR.

51 With regard to the Jurisdiction Objection, the Respondent sought to rely on the ground that as it has already terminated the Contract pursuant to cll 30.2.2.3(b) and 30.2.2.4 of the REDAS Conditions, it is no longer liable to make any payment to the Claimant by virtue of the effect of cl 30.3.1 of the REDAS Conditions. As such, it contended that in light of the presence of this latter clause, the SOP Act would not apply to the present case or this AA by virtue of s 4(2)(*c*) of the SOP Act. This provision provided that:

> (2) This Act does not apply to—
>
> (*c*) any terminated contract to the extent that—
>
> (i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and (ii) that date has not passed or that event has not occurred.

52 The Respondent contends that cl 30.3.1 is such a provision as described under the aforesaid s 4(2)(*c*) of the SOP Act and thus, since this provision applied in the present case, there is no basis for the Claimant to lodge the AA to seek to adjudicate its claim under the prescribed regime under the SOP Act for the Response Amount payable to it by virtue of the issue of Rev IPC No 1 in response to its Rev PC No 1 and the Original Tax Invoice. The SOP Act is not applicable in the present case since there is no longer any contractual obligation for the Respondent to pay the Claimant the Response Amount in light of the termination of the Contract and the effect of cl 30.3.1 of the REDAS Conditions in such event. This is the Jurisdiction Objection.

53 In support of the Jurisdiction Objection, the Respondent cited the case of *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 ("*Builders Hub*"). I shall set out the key findings of *Builders Hub* as is applicable for the present purposes below. Prior to that, I note that the Court of Appeal has in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 ("*Orion-One*") acknowledged that cl 30.3.1 of the REDAS Conditions, if it applies upon a termination of the

material contract that is subject to the REDAS Conditions, would disentitle a claimant to any further payment until the determination of the Termination Costs. As such, *prima facie*, the operation of s 4(2)(*c*) of the SOP Act would apply to exclude any payment claim from the ambit of the SOP Act should cl 30.3.1 of the REDAS Conditions apply to a termination of the Contract as contended by the Respondent currently. This could then exclude the subject matter of the AA from the ambit of the SOP Act in light of the purported termination of the Contract by the Respondent currently. In this regard, I also note the Court of Appeal's view in *Orion-One* that payment of the Termination Costs to be determined pursuant to cl 30.3.7 of the REDAS Conditions would also not fall within the ambit of the regime under the SOP Act should these relate to damages by virtue of s 17(3) of the SOP Act. Further, I should also note that in the present case, as in *Orion-One*, there was no need to distinguish between the termination of the Claimant's employment and the termination of the Contract, as nothing turned on such a distinction. As such, I have proceeded on the basis that the present case involved the termination of the Contract.

54 *Builders Hub* involved a construction contract which had incorporated the REDAS Conditions, albeit the third edition, although for present purposes, the material provisions are for all intents and purposes the same. In that case, the claimant ("BH") had submitted a valid payment claim on 18 August 2022 ("PC 40"). On 26 August 2022, BH had purported to terminate the material contract at common law. Thereafter, on the same day, the respondent ("JP") had also purported to terminate the material contract pursuant to cl 30.2.2 of the REDAS Conditions. BH had then lodged an adjudication application in respect of PC 40 on 22 September 2022. As will be noted, PC 40 was submitted prior to the purported termination of the material contract. The learned adjudicator had dismissed the application for lack of jurisdiction. Dissatisfied with the decision, the claimant had then applied to set aside the determination in the High Court. Teh Hwee Hwee JC (as she then was) ("Judge") had decided as follows.

55 The material issue decided by the Judge for present purposes was (at [27(a)]): "whether BH was precluded from applying for adjudication of PC 40 by virtue of a contractual termination event occurring before the relevant adjudication application was filed, even though PC 40 itself was served prior to the termination event". The Judge took the view that the determination of this issue will depend on (at [28]):

> … whether, upon the contractual termination event, there is any applicable provision in the Contract that negates or suspends BH's entitlement to be paid based on a validly served payment claim. If there is such a provision, BH would lose its right to apply for adjudication of the claim in PC 40 even though PC 40 was validly served prior to the termination. If no such contractual provision was engaged, BH's entitlement to apply for

adjudication of the claim in PC 40 would remain unaffected notwithstanding the termination.

56 In *Builders Hub*, the Judge had concluded (at [29]):

> … that if JP had invoked cl 30.2 of the REDAS Conditions to terminate BH's employment under the Contract, BH would no longer have a contractual right to be paid any progress payment by virtue of cl 30.3 of the REDAS Conditions, and BH would consequently lose its entitlement to the adjudication of PC 40. If, however, the Contract was terminated by BH pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches, or if the provisions for the termination of BH's employment in cl 30.2 and the consequences of such termination in cl 30.3 were not otherwise engaged, BH's entitlement to apply for adjudication would remain intact in the absence of any other terms in the Contract providing to the contrary.

57 In arriving at her decision, the Judge had held that (at [32]):

> … the mere existence of an employment termination clause in the Contract should not and does not affect a contractor's entitlement under the contract if it is not engaged on the facts. It is only if the contract was in fact terminated pursuant to that employment termination clause that the contents and effect of that clause and its constituent parts become engaged. Where the clause is not engaged, the question should be whether there are other contractual terms that preclude, negate or suspend the contractor's right to be paid based on a payment claim that is served prior to termination, rather than whether there are contractual terms that provide for entitlement to post-termination progress payments.

58 In this regard, the Judge had construed s 4(2)(*c*) of the SOP Act to apply (at [36]):

> … simply to require parties to 'respect the contract clauses on suspension of payment for terminated contracts' by not allowing claimants to rely on the progress payment mechanism in the SOPA if the conditions for payment under the contract have not been met … As such, in my view, the contractual terms relating to termination must be engaged on the facts before the SOPA is disapplied pursuant to s 4(2)(c) of the SOPA … Where the suspensory provision in the contract is not invoked or engaged on the facts, s 4(2)(*c*) does not operate to disentitle a contractor to progress payment.

59 Applying the aforesaid construction, the Judge was of the view that unless cl 30.3 of the REDAS Conditions is engaged on the facts of that case in view of the termination of the material contract by JP pursuant to cl 30.2 of the REDAS Conditions, s 4(2)(*c*) of the SOP Act "simply does not come into play".

60 The Judge had also gone on to hold that it is a "point of principle that, ordinarily, the termination of a contract does not affect rights which have accrued before that termination" (at [51]). Applying the aforesaid principle, the Judge had then held that this meant that (at [52]):

> … the rights of BH which accrued from the valid service of PC 40 prior to the termination event will give rise to an entitlement to a progress payment that remains amenable to adjudication, unless the contract provides otherwise. In other words, if there are no express provisions that negate or suspend the entitlement that has accrued before termination, the entitlement continues to exist. Thus, the court's inquiry should turn to whether the contract has provided for the negation or suspension of that subsisting right in the event of termination. This, in my view, better accords with principle and coheres with the court's desire to give effect to the contractual bargain of the parties.

61 In light of the above decision and applying the same, in the present case it will then be necessary for me to consider the basis upon which the Contract was terminated by the Respondent, since this will determine whether cl 30.3 of the REDAS Conditions has been engaged such as to negate or suspend the Claimant's entitlement to the Response Amount certified under Rev IPC No 1. In this regard, applying the abovementioned approach to the facts of *Builders Hub*, I note that the Judge had held as follows in that case:

(a) At [57]:

> … cl 30.3 of the REDAS Conditions would only apply to suspend further payments if BH's employment was terminated by JP due to the occurrence of any of the events of default listed under cl 30.2. If cl 30.2 was not engaged, then cl 30.3 would similarly not be engaged, in which case there appears to be no other provision in the Contract that would disentitle BH to the adjudication of, or the receipt of payment under, PC 40.

(b) At [58]:

> Therefore, in order to decide whether cl 30.2 was engaged, it was necessary, as an antecedent inquiry, to decide whether BH had validly terminated the Contract pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches before JP issued the notice of termination under cl 30.2.2 later on the same day.

(c) At [59]:

> If it is found that BH's termination of the Contract was legally justified and its allegations concerning JP's alleged repudiatory breaches of the Contract fell within one or more of the situations set out in

RDC Concrete, then there was no basis for JP's purported invocation of cl 30.2.2 of the REDAS Conditions to terminate BH's employment under the Contract subsequently, given that the Contract had already been terminated by the time of issuance of the notice of termination. In such a case, cl 30.3 of the REDAS Conditions, which suspends a contractor's entitlement to a progress payment upon the termination of the employment of the contractor under the Contract, would simply not be engaged and the entitlement to progress payments pursuant to PC 40 would have continued to subsist.

(d) At [61]:

… if it is found on the facts that BH's purported termination of the Contract for JP's alleged repudiatory breaches was unjustified, then, as noted at [31] of Alliance Concrete, it is likely that BH would itself be in breach of the Contract. In such a situation, if JP had validly terminated BH's employment under the Contract under cl 30.2.2 of the REDAS Conditions, then cl 30.3.1 of the REDAS Conditions would operate to disentitle BH from making an adjudication application, which would therefore place SOP/AA 164 of 2022 outside the purview of the SOPA. Under cl 30.3.1 of the REDAS Conditions, if the employment of the contractor was terminated under cl 30.2, the employer shall not be liable to make any further payments to the contractor until the Termination Costs have been ascertained …

(e) At [62]:

… whether BH had exercised its general contractual right to terminate the Contract for JP's alleged repudiatory breaches before JP purported to terminate BH's employment under cl 30.2.2 of the REDAS Conditions is a necessary antecedent issue that has to be addressed before any conclusion may be made about whether the learned Adjudicator has jurisdiction to adjudicate SOP/AA 164 of 2022 on its merits. I caveat that as this is an issue that goes into the merits of the dispute that the learned Adjudicator has yet to consider, I express no view on its substantive merits.

(f) At [64]:

… before a finding is made as to whether cl 30.2.2 was in fact invoked on the facts, there is no basis for JP's contention that, by virtue of cl 30.3 of the REDAS Conditions, JP was not liable to pay BH until the Termination Costs have been ascertained, or that once the Contract was terminated, BH lost its entitlement to progress payments and adjudication, notwithstanding that PC 40 was served before termination. Before the finding is made, I am also unable to agree with JP's contention that BH was not entitled to seek adjudication since s 4(2)(*c*) of the SOPA provides that the SOPA does not apply to any

terminated contract as long as the terminated contract contains provisions permitting the respondent to suspend progress payments, and that JP was permitted to suspend progress payments under cl 30.3 of the REDAS Conditions until the Termination Costs have been ascertained.

62 In the premises, I have to apply the same approach adopted in *Builders Hub* and determine if the Respondent has, on a *prima facie* basis, validly terminated the Contract pursuant to cl 30.2.2 of the REDAS Conditions, such as to engage cl 30.3.1 of the REDAS Conditions, which term is only applicable in the event of a termination of the Contract under cl 30.2 of the REDAS Conditions. It is only in such a case that s 4(2)(*c*) of the SOP Act will apply such as to disentitle the Claimant from filing the AA under the regime prescribed in the SOP Act. The AA would then fall outside the purview of the SOP Act. To this issue I now turn.

Purported termination by Respondent

63 As I have stated above, under the AR, the Respondent has merely raised **two** grounds for its termination of the Contract, notwithstanding the other grounds cited in the Termination Notice as referred to above. As such, my decision herein is limited to these two grounds. These said grounds are with regard to cll 30.2.2.3(b) and 30.2.2.4 of the REDAS Conditions. I shall consider both the said grounds in turn accordingly.

Clause 30.2.2.3(b): alleged insufficient design capability

64 Essentially, the Respondent alleged that the Claimant has been in delay in procuring due approvals for its drawings and/or plans from the relevant authorities. It alleged that this was due to slow design work and poor design work which had led to the necessity for amendments or revisions. Hence, based on the "Master Program" submitted under the Contract, the Claimant was often late in procuring the said approvals.

(a) The Claimant was allegedly 39 days late in procuring the notice of approval for the "Phase 1" demolition works.

(b) The Claimant was allegedly 46 days late in procuring the notice of approval for the "Phase 2" demolition works.

(c) The Claimant was allegedly more than two months late in obtaining the notice of approval for all structural plans, which included the piling drawings, and had only managed to do so one month after the piling works were supposed to be completed under the Master Program.

(d) The Claimant was allegedly late in producing the structural plans for the superstructure for approval, and these had remained outstanding as of the Termination Date, representing a delay of some 120 days.

(e) The Claimant was allegedly late in submitting the building plans, which were only submitted on 17 July 2024, some 117 days in delay based on the Master Program.

65 The Respondent alleged that the abovementioned delay is evidence of the Claimant's serious inability to perform its design obligations under the Contract. As such, this constituted a breach of the Contract, which entitled the Respondent to terminate the Contract pursuant to cl 30.2.2.3(b) of the REDAS Conditions.

66 The Claimant denies it was responsible for any of the abovementioned delay. In particular, it claimed, *inter alia*, that it had diligently resolved all issues relating to the design of the Works and/or the need to produce the necessary drawings or plans which would comply with the requirements of the relevant authorities for submission purposes. Such issues included, *inter alia*, resolving site issues arising from discrepancies with the design intent of the Respondent's own appointed design consultant, issues in relation to the cladding structures for the superstructure, change in the design of the piling works and change in the sequence of work. The Claimant alleged that its resolution of the aforementioned issues, while ostensibly appearing to cause delay to the progress of the Works, would eventually minimise a lot of issues during construction and save a lot of time as well as costs for the Respondent, allowing for all elements of the Works to be properly planned in advance and properly coordinated, thereby minimising mistakes. In any case, the Claimant contended that as of the Termination Date, it had applied a lot of resources to the design and submission work which had progressed and was already at an advanced stage. Approvals and/or clearances have been progressively obtained. As such, in light of the aforesaid, the Claimant challenged the Respondent's purported basis for terminating the Contract in this regard.

Finding: valid ground for termination?

67 I note that as of the Termination Date, the Contract Completion Date has yet to be reached, the same being about **five months** away, without taking into account any extension of time which the Claimant may be entitled to. While the Claimant has disclosed in the AA the project milestones which I presume is consistent with the Master Program, the Respondent has merely disclosed in the AR some of the notices of approval referred to above as obtained by the Claimant. Such evidence is grossly inadequate for me to make any determination as to whether there has been

any critical delay to completion which has been caused by the Claimant as alleged. In fact, currently, based on the evidence produced thus far by the parties, it is not evident to me at all whether there will eventually be any delay caused to the Contract Completion Date (which has yet to occur) and, even if so, whether the Claimant ought to be held to be solely liable for such critical delay, bearing in mind that the Claimant could well be entitled to extensions of time as allowed under the REDAS Conditions, or it could well seek to accelerate the Works such as to mitigate any delay which may be occasioned to the Works currently. At best, as of the Termination Date, it may only be said that there appears to be some delay to the progress of the Works. No evidence or delay analysis has been presented to me to show that such delay could result in critical delay being caused to the Contract Completion Date eventually, and the Claimant would be solely responsible for the same. As it is, no delay certificate as prescribed under cl 19.1 of the REDAS Conditions has been issued by the ER yet evidencing the causing of critical delay to completion as caused by the Claimant, thereby justifying the Respondent's imposition of LD at the LD Rate on the Claimant.

68 More importantly, from the documents disclosed and relied on by the Respondent in these proceedings, nowhere can it be seen that the Respondent has notified the Claimant that it had caused critical delay to the completion of the Project and if the Claimant did not rectify the situation and/or expedite the design work promptly, the Respondent would seek to terminate the Contract pursuant to cl 30.2.2.3(b) of the REDAS Conditions. In fact, no evidence has been offered by the Respondent that it had even objected to any such alleged delay on the part of the Claimant.

69 I note that cl 14 of the REDAS Conditions required the Claimant to carry out the Works with due diligence and expedition. Clause 30.2.1.2 of the REDAS Conditions allowed the Respondent to notify the Claimant in writing should it fail to do so. Clause 30.2.2.1 of the REDAS Conditions provided that the Respondent shall be entitled to terminate the Contract should the Claimant fail to comply with the aforesaid notification within 28 days. While the Respondent had listed the aforesaid as a ground for termination under the Termination Notice, it has not proceeded on that basis in the AR. In any case, from the evidence before me, the Respondent also did not disclose any notice as prescribed under cl 30.2.1.2 of the REDAS Conditions, much less showed me that the Claimant has failed to comply with any such notice within the prescribed period under cl 30.2.2.1 of the REDAS Conditions.

70 Further, from the evidence, and in particular, from the fact that the various notices of approval have since been duly obtained as disclosed by the Respondent, this would seem to put paid to the Respondent's suggestion that the Claimant did not employ sufficient design capability in the design of the Works as required under cl 30.2.2.3(b) of the REDAS Conditions.

The Claimant has contended that it had applied a lot of resources to do so, and the facts before me showed that it had succeeded in obtaining the requisite notices of approval eventually as contended by it. As such, I am unable to see that the Claimant has breached its design obligations under the Contract in the manner alleged by the Respondent such as would entitle the Respondent to terminate the Contract pursuant to cl 30.2.2.3(b) of the REDAS Conditions, and this I so find. Consequently, I find that there is no basis for the Respondent to terminate the Contract pursuant to the aforementioned provision. The Respondent has failed to make out a *prima facie* case of its purported entitlement to terminate the Contract pursuant to the same.

Clause 30.2.2.4: alleged failure to comply with written instructions

71 The Respondent also alleged that the Claimant had failed to carry out rectification works for the defects as well as outstanding works which it had listed in various lists that it had provided to the Claimant. These are as follows:

(a) On 13 May 2024, [Z], as the ER, had furnished the Claimant with a list of work items dated 9 May 2024 comprising, *inter alia*, the outstanding works to be completed by the Claimant as well as the defect rectification works to be undertaken by the same ("1st Defect List").

(b) On 20 May 2024, the ER had provided the Claimant with an updated list, reflecting the same items under the 1st Defect List as well as additional items which the Claimant was required to undertake ("2nd Defect List").

(c) On 1 July 2024, the ER had provided the Claimant with a further list which was substantially similar to the 2nd Defect List ("3rd Defect List").

(d) By 11 July 2024, the Claimant had merely rectified and/or carried out some of the works set out under the 1st to the 3rd Defect Lists. Further, the ER had also written to the Claimant then that it would be appointing a third-party contractor to undertake certain sanitary works in light of the Claimant's failure to do so. This was objected to by the Claimant on 12 July 2024, which had claimed that it had actually used the same third-party contractor to undertake the material sanitary works but it had failed to do so properly. Thus, it was in the process of engaging an alternative contractor to do so.

72 The Respondent contended that the issuance of the 1st and 2nd Defect Lists to the Claimant constituted written instructions from the ER which the Claimant had to comply with. As of the Termination Date,

more than **28 days** had passed since the 1st and 2nd Defect Lists were issued (but not the 3rd Defect List) while the bulk of the material works set out thereof had remained outstanding. As such, the Respondent seeks to rely on cl 30.2.2.4 of the REDAS Conditions to terminate the Contract. It contended that it was entitled to do so.

73 The Claimant maintained that the Respondent has no basis to terminate the Contract on the abovementioned ground. In particular, it contended that it was only contractually required to undertake any rectification works as well as complete the outstanding works during the stipulated "Maintenance Period" under cl 20 of the REDAS Conditions. As it is, the Maintenance Period has yet to commence since the Contract Completion Date has not even occurred yet, while the "Handing Over Certificate" has not been issued by the ER. Thus, it alleged that it is not required to carry out all the works listed under the various Defect Lists yet, although it has clearly undertaken some of the same by the Termination Date.

Finding: valid ground for termination?

74 I note that under cl 7.2 of the REDAS Conditions, the Respondent is in fact entitled to notify the Claimant of the need to undertake defect rectification and/or outstanding works during the course of the Works. It need not wait until the commencement of the Maintenance Period to do so as contended by the Claimant. The Claimant clearly has an obligation to comply with such notice within 14 days, failing which the Respondent is entitled to, *inter alia*, engage another contractor to undertake the aforementioned works instead and claim for the cost of doing so from the Claimant. This provision did not expressly allow the Respondent to terminate the Contract should the Claimant fail to comply with the aforementioned written notice.

75 In my view, the various Defect Lists were duly issued pursuant to cl 7.2 of the REDAS Conditions. In fact, the ER's letter dated **11 July 2024** issued to the Claimant relating to the engagement of a third-party contractor to undertake certain sanitary works was expressly stated to be pursuant to the aforesaid provision. Further, in the ER's or [Z]'s e-mail of **13 May 2024** enclosing the 1st Defect List, the ER had expressly stated that it had not taken into account the value of the items of work listed under the 1st Defect List in its assessment of the Claimant's PC No 1. However, should the Claimant fail to comply with the notice for it to carry out the works listed, the ER had threatened that it would take the said value into account from the next progress payment claim submitted by the Claimant.

76 Significantly, it was not intimated to the Claimant at all that any failure to comply within 28 days of receipt of the said notices would

constitute a breach which could entitle the Respondent to terminate the Contract pursuant to cl 30.2.2.4 of the REDAS Conditions. In fact, at all material times, as discerned from the evidence before me, the Respondent did not inform the Claimant at all that should it fail to comply with the said Defect Lists within 28 days of receipt of the same, the Respondent would be entitled to terminate the Contract pursuant to cl 30.2.2.4 of the REDAS Conditions and would exercise such rights should they arise. There was simply no indication whatsoever that it intended to terminate the Contract in such circumstances. Instead, the Respondent's position as expressly stated was merely that it would either engage a third-party contractor to undertake the material works in place of the Claimant or account for the value of such work by omitting the same from the next progress payment certification, should the Claimant fail to comply. As such, the stipulated 28-day period for compliance under cl 30.2.2.4 of the REDAS Conditions would not even have commenced running yet. The Respondent would accordingly not be entitled to rely on the said provision to terminate the Contract.

77 In any event, as evident from the updated defect list of **20 July 2024**, when the Respondent had terminated the Contract, the Respondent had admitted that the Claimant had in fact carried out some of the works under the said Defect Lists by then, albeit not fully or properly in some instances. This meant that the Claimant would have sought to comply with the Respondent's said notices, albeit not fully or properly as alleged by the Respondent. If so, then clearly cl 30.2.2.4 of the REDAS Conditions cannot apply in the present case.

78 In the premises, in view of the above, I find that the Respondent is not entitled to rely on cl 30.2.2.4 of the REDAS Conditions as a ground to terminate the Contract. The Respondent has failed to make out a *prima facie* case of its purported entitlement to terminate the Contract pursuant to the aforementioned provision.

No basis for termination of Contract: applicability of clause 30.3 of REDAS Conditions?

79 In light of the above, since I have found that the Respondent was not entitled to terminate the Contract pursuant to cl 30.2.2.3(b) or 30.2.2.24 of the REDAS Conditions as it had contended, then clearly cl 30.3 of the REDAS Conditions does not apply in the present case. As held in *Orion-One* and *Builders Hub* ([53] *supra*), cl 30.3 of the REDAS Conditions is only engaged and/or applied in the event that the Contract has been terminated pursuant to cl 30.2 of the REDAS Conditions. This is clear from the express language of cl 30.3 of the REDAS Conditions. Thus, in view of the scant evidence presently before me, it will appear to me that the Respondent has no basis to terminate the Contract, and its attempt to do so is without any merits. In this regard, I will also note that the timing of the

Respondent's purported termination of the Contract appears to coincide closely with its liability to pay the Claimant the Response Amount by the Due Date.

Conclusion

80 In view of my findings above and, in particular, my finding that the Respondent has failed to make out a *prima facie* case for terminating the Contract on any of the grounds set out under cl 30.2 of the REDAS Conditions, applying the approach in *Builders Hub*, if cl 30.3.1 of the REDAS Conditions is consequently not engaged such as to disentitle the Claimant to further payments pending the determination of the Termination Costs, then s 4(2)(*c*) of the SOP Act "does not even come into play". The AA is not excluded from, nor does it fall outside the purview of the SOP Act. In such event, cl 22 of the REDAS Conditions, being the general payment provision under the Contract, will continue to apply, and the Claimant is therefore entitled to receive payment from the Respondent accordingly as prescribed thereof. The Claimant is thus entitled to avail itself of the adjudication regime under the SOP Act in the event that the Respondent fails to pay the Claimant as required under the Contract. In filing the AA for the aforesaid purpose currently, the AA falls within the ambit of the SOP Act, and I clearly have jurisdiction to adjudicate the same. This I so find. Hence, the Jurisdiction Objection fails, and I can proceed to determine the merits of the AA accordingly.

81 Before I leave this issue, I shall note that the Claimant had sought to cite **three cases** before me, purportedly in support of its case in response to the Jurisdiction Objection. However, copies of the said authorities were not furnished to me. Nonetheless, when I had sought to search for the said cases based on the case names and citations provided, I am unable to locate the same. No such cases were found. In fact, the citations provided led me to other cases involving matters that are totally irrelevant to the present case. In one instance, it even involved a criminal case. As such, I am unable to consider the said cases cited eventually. Be that as it may, based on the Claimant's purported "case summary" in each case, it appears to me that such cases, even if they existed, would not really assist the Claimant in the present case. I do not know how the Claimant had obtained the citations for these cases, although it had said these were from a friend, but being given such misinformation has resulted in unnecessary time and effort being expended in trying to chase down these cases. This ought to be avoided in future.

Merits

82 The Respondent had certified that the Claimant is entitled to be paid the Response Amount as set out under Rev IPC No 1 and was in the process of making payment of the said sum to the Claimant until the Contract was terminated without basis, as I have found. The Respondent had agreed to pay the Claimant the Response Amount before it had sought to terminate the Contract. The Claimant has already issued its tax invoice to the Respondent to facilitate due payment. The Due Date for payment of the Response Amount has already passed as I have also found, without the Respondent paying the Claimant. As such, the Claimant is entitled to lodge the present AA, as I have also found.

83 In the premises, I find that the Respondent is liable to pay the Claimant the Response Amount, which is the Claim Sum herein, as it had agreed to do previously prior to seeking to terminate the Contract. The quantum of the Response Amount is the sum certified by [Z] under Rev IPC No 1 and agreed to by the parties as evidenced by, *inter alia*, the due issuance of the Original Tax Invoice. As such, I hereby allow the Claimant's claim for the Claim Sum in this AA in full with costs.

Adjudicated Amount

84 Consequently, it is my determination that the Respondent is liable to pay the Claimant the sum of **S$955,749.19**, including GST at the rate of 9%, this being the Response Amount which the Claimant had accepted, and the same is hereby recorded as the Adjudicated Amount.

Due Date for Payment

85 Pursuant to s 22(1)(*a*) of the SOP Act, I determine that the Adjudicated Amount shall be paid by the Respondent to the Claimant **within seven days** after this Adjudication Determination is served on the Respondent. This is hereby recorded as the Due Date for Payment of the Adjudicated Amount.

Interest

86 The Contract is silent on the applicable rate of interest in the event of late payment. In the circumstances, s 8(5)(*b*) of the SOP Act shall apply, and the applicable rate of interest shall be **5.33% per annum**, this being the rate prescribed under the Supreme Court of Judicature Act 1969 (2020 Rev Ed) in respect of judgment debts.

87 Therefore, I do hereby determine that interest at the aforementioned rate of 5.33% per annum shall run from the date immediately following the

Due Date for Payment of the Adjudicated Amount as determined above up to the date of full payment of the same.

Costs of adjudication

88 As the Claimant has succeeded in its entire claim for the Claimed Sum herein, the usual order that "costs follow the event" shall apply in the present case. Thus, I hereby order that the Respondent shall bear the total costs of the adjudication, such costs comprising the adjudication fee of **S$654** (inclusive of GST at 9% thereat) and the adjudicator fee of **S$13,679.50** (comprising the aggregate of the adjudicator fee of S$12,450 and disbursements of S$100, together with GST at 9% thereof).

BIS Pte Ltd
v
BIT Co Pte Ltd

[2024] SGSOP 15

Singapore Mediation Centre — SOP AA 203 of 2024
Raymond Chan
11 September 2024

Contract *— Nature — Parties entering into subcontract for supply and delivery of precast concrete by claimant — Respondent arguing claimant's adjudication application was lodged prematurely on basis that parties' subcontract was supply contract — Whether parties' subcontract was supply contract or construction contract — Meaning of "construction works" under s 2 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Section 2 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ss 3(1)(*d*)(v), 4(2)(*b*)(ii)

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 3(1)(*d*)(v), 4(3)(*a*), 8(5), 8(5)(*b*), 11(1)(*a*), 11(1)(*b*), 15(1), 15(3), 16(1), 16(4)(*e*), 17(1)(*a*), 17(1)(*b*), 17(2)–17(6), 17(3), 22(1)(*a*), 22(1)(*b*)

Goods and Services Tax Act 1993 (2020 Rev Ed)

Ng Kim Beng, Divyesh Menon and Tessa Teo (Rajah & Tann Singapore LLP) for the claimant;
Chong Kuan Keong and Bernadette Loh (Chong Chia & Lim LLC) for the respondent.

[Commentary: see para 1.18]

11 September 2024

Raymond Chan:

Determination

1 This is a determination ("Determination") made on 11 September 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication

Application No SOP AA 203 of 2024 ("AA"). This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant in these adjudication proceedings is [BIS] Pte Ltd ("[BIS]" or "Claimant"). The respondent is [BIT] Co Pte Ltd ("[BIT]" or "Respondent") (collectively, "Parties").

3 For the reasons which are set out in my Determination below, I determine the following:

(a) The Respondent shall pay to the Claimant the sum of S$1,360,172.04 (excluding goods and services tax ("GST")). This is hereby recorded as the "Adjudicated Amount" of this Determination.

(b) The Respondent shall pay this Adjudicated Amount within seven days after this Determination is served on the Respondent.

(c) Interest shall be payable at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid, from the due date for payment of the Adjudicated Amount up to the date of full payment of the Adjudicated Amount.

(d) The cost of the adjudication is in the amount of S$32,046.00 ("Costs of Adjudication"). This includes the adjudication application fee of S$654.00 (including 9% GST) payable to SMC and the adjudicator fee of S$31,392.00 (including 9% GST). As the Claimant has succeeded in most of its claims in the AA, the Costs of the Adjudication shall be borne by the Respondent entirely.

The record

4 With the view to saving time and to avoid incurring unnecessary expense, I have not recorded each and every fact and argument presented to and considered by me in arriving at my Determination. Nevertheless, the present record is sufficient, in my view, to reflect: (a) the substance of the respective cases as canvassed by the Parties; and (b) the principal issues on which I consider the result of the adjudication determination turns. It should not be assumed that any information, evidence or argument which is not specifically recorded herein has not been taken into account in arriving at my Determination.

The Subcontract

5 The Respondent is the main contractor for the project, described in the documents provided, as "Building Works at [xxx] Contract 3 (Total: [xxx] Dwelling Units)" ("Project").

6 The employer for the Project is the [xxx].

7 On 10 October 2017, the Respondent issued a letter of intent dated 10 October 2017 (Ref No [xxx]-R2) ("LOI"), to accept the Claimant's quotation for the supply and delivery of precast concrete ("Subcontract Works") for the Project, based on a unit rate provisional sum of S$20,884,130.00.

8 The LOI was signed and accepted by the Claimant on 12 October 2017.

9 By way of a Letter of Acceptance dated 14 December 2017 (Ref No [xxx]-R1) ("LOA"), the Claimant was engaged by the Respondent as the subcontractor for the Subcontract Works, for a unit rate provisional sum of S$20,884,130.00 ("Subcontract").

10 The following folio of documents form part of the Subcontract documents:

(a) The letter of acceptance dated 14 December 2017;

(b) Appendix 1: provisional bill of quantities;

(c) Appendices 2 and 2A: scope of work;

(d) Appendix 3: in-house environment, health, safety and security ("EHSS") administrative levy;

(e) Appendix 4: contract documents and drawings; and

(f) Appendix 5: particular conditions of purchase agreement.

Payment Claim No 48

11 By an e-mail dated 25 June 2024 (time-stamped 9.50pm), the Claimant served its Payment Claim No 48 ("PC48") for the sum of S$1,567,933.57 (excluding GST) on the Respondent, claiming for works done up till 25 June 2024.

12 PC48 is the subject matter of the present AA.

13 The brief particulars of PC48 are set out in the table below:

Item	Description	Amount (S$)
A	Credit om final quantity agreed	(42,669.91)
B	Late payment fee	27,052.17
C	Subcontract works done to date	21,193,564.92
D	Variation works	702,027.23
E	Steel Fluctuation	781,864.84
	Sub-Total:	22,661,839.25

F	Less: Retention Sums	-
G	Less: Payment till date	(21,223,418.49)
H	Less: Agreed deduction	(4,628.82)
I	Add: Amount deducted not agreed	134,141.63
	Claimed Amount:	S$1,567,933.57

14 The Respondent did not provide a payment response to PC48.

Notice of intention to apply for adjudication and adjudication application

15 By an e-mail dated 31 July 2024 (time-stamped 11.03am), the Claimant's solicitors served a notice of intention to apply for adjudication ("Notice") on the Respondent, notifying the Respondent of its intention to apply for adjudication in respect of PC48.

16 On 31 July 2024 at 3.38pm, the Claimant lodged its AA with the SMC, claiming for the sum of S$1,536,734.60 (excluding GST) (and subsequently reduced to S$1,489,834.22 by the "Amended AA Submissions") ("Claimed Amount").

17 On 1 August 2024, the SMC served the AA on the Respondent.

Appointment of adjudicator

18 On 1 August 2024, the SMC invited me, Raymond Chan, to be the adjudicator for the AA.

19 On the same day, *ie*, 1 August 2024, I accepted the appointment as adjudicator and informed the SMC accordingly. The SMC served on the Parties a copy of my statement of acceptance and declaration of impartiality and independence on 1 August 2024.

Adjudication response

20 In accordance with s 15(1) of the SOP Act, the Respondent is required within seven days after receipt of a copy of an AA to lodge with the SMC an adjudication response ("AR"). Given that the AA was served on the Respondent on 1 August 2024, the Respondent had up to 8 August 2024 (*ie*, 1 August 2024 plus seven days) to lodge its AR with the SMC.

21 The AR was lodged by the Respondent with the SMC on 8 August 2023 at 4.23pm.

22 On 12 August 2024, I received a copy of the AR from the SMC via e-mail.

Commencement of adjudication

23 By virtue of s 16(1) of the SOP Act and given that the period within which the Respondent may lodge an AR expired on 8 August 2024, the present adjudication commenced on 9 August 2024. This is so regardless of whether an AR was lodged at all or when it was actually lodged.

Due date for adjudication determination

24 As the Respondent has provided an AR by the commencement of the adjudication, and this is not a case where the Respondent had failed to pay a response amount which had been accepted by the Claimant, s 17(1)(*a*) of the SOP Act is not applicable. Accordingly, the time for the making of the Determination is 14 days from the date of commencement of the adjudication or within such longer period as the Parties may have agreed to extend as provided under s 17(1)(*b*) of the SOP Act.

25 Given that the adjudication commenced on 9 August 2024, the last day for making the Determination would be 23 August 2024, *ie*, 8 August 2024 plus 14 days (excludes public holiday on 9 August 2024).

The Preliminary Conference

26 Pursuant to the powers conferred on me under s 16(4)(*e*) of the SOP Act, I had, by an e-mail dated 8 August 2024 (time-stamped 5.34pm) addressed to the Parties, called for a conference of the Parties to be held on 13 August 2024 by way of a video conference on Zoom (https://zoom.us/) for the purpose of giving directions ("Preliminary Conference").

27 The Preliminary Conference was duly held on 13 August 2024 at 2.30pm via the Zoom platform.

28 At the Preliminary Conference, I made the following directions (which were recorded in my e-mail dated 13 August 2024 (time-stamped 3.23pm) to the parties:

> (a) The Claimant shall file and serve their reply submissions to the respondent's AR submissions by 12.00pm, 19 August 2024.
>
> (b) The Claimant's reply submissions shall be confined to the matters raised in the Respondent's AR submissions and no new documents shall be allowed to be adduced by the Claimant.
>
> (c) The merits conference ("Merits Conference") shall be held on 22 August 2024 commencing at 10.00am.
>
> (d) Each Party shall be allowed a maximum of ten persons (including counsel) to attend the Merits Conference. Each Party shall submit the names of their attendees by 20 August 2024.

(e) The Merits Conference will be conducted by way of video conferencing on the Zoom platform.

29 With the consent of the Parties and by virtue of s 17(1)(*b*) of the SOP Act, the due date for the issue of my Determination was extended to 12 September 2024.

30 Pursuant to my directions given at the Preliminary Conference, the Claimant's counsel by way of an e-mail dated 19 August 2024 (time-stamped 11.57am) served on me the Claimant's reply submissions dated 19 August 2024, with authorities.

The Merits Conference

31 The Merits Conference was duly held on 22 August 2024 commencing at 10.00am via Zoom platform. The representatives of the Parties present at the Conference were as follows:

(a) For the Claimant:

(i) Mr Ng Kim Beng, Mr Divyesh Menon and Ms Tessa Teo of Rajah & Tann Singapore LLP, as counsel for the Claimant;

(ii) Mr [A], Executive Director;

(iii) Ms [B], Senior Manager;

(iv) Mr [C], Quantity Surveyor;

(v) Mr [D], Assistant General manager;

(vi) Mr [E], Senior Supervisor-QC; and

(vii) Ms Kieran Wee, Rajah & Tann Singapore LLP (intern).

(b) For the Respondent:

(i) Mr Chong Kuan Keong and Ms Bernadette Loh of Chong Chia & Lim LLC, as counsel for the Respondent;

(ii) Mr Ben Ong, counsel team (trainee pending call);

(iii) Mr [F], Director;

(iv) Ms [G], Chief Corporate Officer;

(v) Ms [H], Contracts Manager;

(vi) Mr [I], Senior Contract Quantity Surveyor;

(vii) Mr [J], Project Manager;

(viii) Ms Tay Yan Xia and Mr Wang Song Xin, counsel team; and

(ix) Mr Chong Ang Chern, counsel team (intern).

32 At the Merits Conference, I heard oral arguments from counsel for the Claimant and counsel for the Respondent on disputed issues raised in the AA, AR and the subsequent written submissions filed by the Parties as directed by me.

33 Pursuant to my directions made during the Merits Conference, the Claimant's counsel by an e-mail dated 23 August 2024 (time-stamped 11.52am) submitted its Amended AA Submissions dated 23 August 2024. The amendments made by the Claimant are summarised below:

(a) At para 9.1 of the AA submissions, the Claimant's claim for S$569,531.58 "which has been certified by [BIT] but which has not been paid to [BIS]" has been amended to S$522,631.20. According to the Claimant, this is the value of the retention sum that has not been released by the Respondent to the Claimant, as reflected in Appendix 1 of PC48 (CBOD, Tab 2 Annex C), in the bottom row of the column headed "Retention sum Not Released to [BIS]".

(b) Related amendments are at paras 5, 9 and 94–96 of the AA submissions. The Claimant's claim in this AA is revised down from S$1,536,734.60 to S$1,489,834.22 (see paras 5 and 9).

Documents and written submissions tendered

34 The Claimant had tendered the following documents and submissions in this adjudication:

(a) the AA;

(b) Claimant's AA submissions dated 31 July 2024;

(c) Claimant's Amended AA Submissions dated 23 August 2024 ("ACS-1");

(d) Claimant's written reply submissions dated 19 August 2024 ("CS-2") and authorities; and

(e) The Subcontract documents, PC48, Notice, the Respondent's final account statement dated 25 January 2024 ("FAS"), supporting delivery orders for Subcontract Works and variation works, documents regarding steel fluctuation, other supporting documents and authorities.

35 The Respondent had tendered the following documents and submissions in this adjudication:

(a) the AR;

(b) Respondent's submissions for the AR dated 8 August 2024 ("RS"); and

(c) the Subcontract documents, documents regarding steel fluctuation, record of payments and other supporting documents and authorities.

36 I have considered all of the submissions, both oral and written, tendered by the respective Parties in the adjudication proceedings and all of the authorities cited or referred to or produced before me, as well as all of the other materials properly placed before me, so far as I am obliged or permitted to do so under the SOP Act. The fact that any particular submission or authority or material (which is properly before me and which I am obliged to consider) is not expressly set out or referred to in this Determination does not mean that I have not duly considered it.

37 I now set out the reasons for my Determination.

Grounds for determination

Respondent's preliminary objections

Introduction

38 The Respondent has in the present AA submitted that the tribunal ("Tribunal") has no jurisdiction to decide on the AA and that the AA ought to be dismissed in its entirety on the following grounds:

(a) The AA has been lodged prematurely, alternatively out of time, both in breach of mandatory provisions of the SOP Act, and/or falls outside the ambit of the SOP Act, on the basis that:

(i) the Subcontract is a supply contract under the SOP Act;

(ii) pursuant to the relevant provisions in the SOP Act pertaining to timelines in relation to supply contracts, the AA has been lodged prematurely; and

(iii) further and/or in the alternative, even if the Tribunal considered the Subcontract to be a construction contract, the timelines under s 11(1)(*b*) SOP Act for payment response apply.

(b) In the alternative, in the event that the Tribunal finds that it is within its jurisdiction to determine the AA, the Respondent submits

that the Claimant is not entitled to the claim amount in the AA on the basis that no *prima facie* case has been made out by the Claimant, and/or PC48 and/or the AA contains patent errors in respect of the claims for: (i) the Subcontract Works; (ii) variation works ("Variation Works"); (iii) steel fluctuation; and (d) amount deducted not agreed.

(c) Further, in the event that the Tribunal finds that it is within its jurisdiction to determine the AA, the Respondent submits that the:

(i) back charges amounting to S$129,692.00 constitute a partial settlement between the Claimant and the Respondent that ought not be determined by the Tribunal; and

(ii) the Tribunal is invited to record a settled amount of the back charges amounting to S$129,692.00.

39 The following issues are to be determined by me:

(a) whether the Subcontract is a supply contract or construction contract under the SOP Act;

(b) if it is a construction contract, whether, under the applicable timelines, the AA has been lodged prematurely;

(c) what is the payment response period if this was a construction contract;

(d) whether the Claimant is entitled to the claim amount in the AA on the basis that a *prima facie* case has been made out by the Claimant; and

(e) whether PC48 and/or AA contained patent errors in respect of the claims for:

(i) Subcontract Works;

(ii) Variation Works;

(iii) steel fluctuation;

(iv) amount deducted not agreed; and

(v) Back charges amounting to S$129,692.00 constituting a partial settlement between the parties.

Whether Subcontract is a supply or construction contract

(1) Introduction

40 It is the Claimant's position that the Subcontract is a construction contract as defined under the SOP Act. In support of its position, the

Claimant has relied on the High Court's decision in *Eng Seng Precast Pte Ltd v SLF Construction Pte Ltd* [2015] 5 SLR 948 ("*Eng Seng Precast*"). The Respondent disagrees.

41 It is the Respondent's position that the Subcontract is a supply contract under the SOP Act.

(2) Parties' submissions

42 The Respondent submits that a contract for the prefabrication of components as in s 3(1)(*d*)(v) must be carried out inside Singapore to be a "construction contract" under the SOP Act.

43 Further, the Respondent submits that as the prefabrication works were carried out outside Singapore in Johore Bahru, Malaysia, the definition of "construction works" under s 2 of the SOP Act, which provides that prefabrication works may include works or prefabrication carried offsite, does not apply.

44 In the AA, the Claimant has relied on the High Court case of *Eng Seng Precast* to support its case that a contract for the fabrication and supply of precast concrete components would fall under s 3(1)(*d*)(v) of the SOP Act and is therefore a construction contract. The Respondent disagrees.

45 The Respondent argued that *Eng Seng Precast* does not stand as authority that all contracts involving the fabrication and supply of precast concrete components, regardless of whether such fabrication works were carried out inside or outside of Singapore, are construction contracts as defined under the SOP Act.

46 The Respondent, at [29] to [35] of the RS, argued that:

(a) The fabrication works in the present Subcontract were carried out by the Claimant outside Singapore.

(b) *Eng Seng Precast* was decided by the High Court in 2015. *Eng Seng Precast* must therefore have been decided with reference to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("2006 SOP Act"), *ie*, the edition prior to the 2019 amendment.

(c) Under the 2006 SOP Act, it was provided under s 4(2)(*b*)(ii) that the 2006 SOP Act shall not apply to any contract to the extent that the contract "deals with construction carried out outside Singapore, or goods or services supplied in relation to construction work carried out outside Singapore" and s 3(1)(*d*)(v), "construction work" includes "the prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere".

(d) The Respondent argued that in *Eng Seng Precast*, the court when considering whether an "offsite production" of prefabricated components fell within the definition of "construction work" under the 2006 SOP Act, must have been contemplating only such "offsite" works that are carried out inside Singapore but not at the project construction site.

(e) The court could not have been dealing with works that were carried out outside Singapore, since contracts for such works carried out outside Singapore were excluded from the application of the 2006 SOP Act *per* s 4(2)(*b*)(ii) of the 2006 SOP Act.

47 Put simply, it is the Respondent's case that it is not apparent in the judgment of *Eng Seng Precast* that the subject fabrication works were carried out inside or outside Singapore, or that the court was concerned at all with works that were carried out outside Singapore.

48 In response, the Claimant in its CS-2 contends that the SOP Act expressly provides that prefabrication works carried out overseas fall within the territorial scope of s 4(3)(*a*) of the SOP Act.

49 The Claimant submits that by s 3(1)(*d*)(v) of the SOP Act, such contracts for prefabrication works "whether carried out at or on the construction site or elsewhere" are statutorily deemed to be construction contracts. The Subcontract is not for overseas prefabrication works only.

50 The Claimant further submits that the prefabrication works were carried out in Singapore, along with other "services" and other "construction work", each of which satisfies the requirements of a "construction contract" under the SOP Act.

51 The Claimant refers me to s 3(1)(*d*)(v) of the SOP Act, which defines "construction work" as:

> (*d*) any operation which forms an integral part of, is preparatory to, or is for rendering complete, works of the kind mentioned in paragraph (*a*), (*b*) or (*c*), including —
>
> …
>
> (v) the prefabrication of components to form part of any building, structure or works, **<u>whether carried out at or on the construction site or elsewhere</u>**"
>
> [emphasis added in underlined bold]

52 The Claimant, at para 33 of CS-2, submitted that s 2 read with s 3(1)(*d*)(v) of the SOP Act does not contain any limitation of prefabrication works to that carried out in Singapore only or, conversely, any exclusion of prefabrication works carried out outside Singapore.

53 In response to the Respondent's attempt seeking to distinguish or limit *Eng Seng Precast* by suggesting that that decision was limited to prefabrication works, the Claimant, at para 39 of CS-2, submitted that nowhere in the judgment is the location of the prefabrication works identified at all.

54 The Claimant further submitted that the Respondent's attempt to draw a parallel to the supply of tiles is flawed because it elides the distinction between prefabricated components and the supply of raw materials under s 2 of the SOP Act.

55 Even if the Respondent's interpretation of s 3(1)(*d*)(v) of the SOP Act is accepted, the Claimant submitted that the present Subcontract will still be a "construction contract" because the performance of the prefabrication for the works were carried out locally.

(3) My findings

56 On the Respondent's interpretation of *Eng Seng Precast* that it does not apply to the situation where the fabrication of the component is done outside Singapore, the facts of the case do not show where the prefabrication works were actually carried out. Hence, it is not correct for the Respondent to contend that the case does not apply to the facts in the present case since this fact on the location of the fabrication of the components is not clear from this case.

57 It would be difficult to ascertain whether a contract is a supply contract on the basis that the prefabrication works are carried out outside Singapore as this fact may not be certain or clear at the time when the contract was made. Hence, the better view for the purpose of certainty is to hold that prefabrication works carried out offsite, even if it outside Singapore, are construction works. In any case, this consideration may be irrelevant having regard to the statutory definition of construction works to include contract for the supply of prefabrication components even if the prefabrication works were carried out outside Singapore.

58 This is clear from an ordinary reading of s 3(1)(*d*)(v) of the SOP Act, that prefabrication works "to form part of any building, structure or works *whether carried out at or on the construction site or elsewhere*" [emphasis added] are statutorily deemed to be construction contracts.

59 Further, s 4(3)(*a*) of the SOP Act provides that:

> (3) [The Act] —
>
> (*a*) applies to a contract that deals with the **prefabrication (whether in or outside Singapore) of components that will form part of any building, structure or works**, where the contract is for the

> supply of these prefabricated components for construction work to be carried out on a construction site in Singapore …

[emphasis added in underlined bold]

60 It is clear from the above provisions that the Subcontract in question is a construction contract and not a supply contract.

61 The Respondent's use of the example of the supply of tiles which is regarded as a supply contract is inappropriate. Tiles are not manufactured according to the contract drawings and specifications of the project, unlike the prefabrication components which are made specifically for the particular project.

62 I accept the Claimant's submission that it had carried out work in Singapore, including the provision of labour on site for site supervision, coordination and repairs, among others. This will also show that the Subcontract is not a supply contract under the SOP Act.

63 Hence, for the above reasons, it is my determination that the Subcontract is a construction contract.

Whether AA was validly filed within time provided by Subcontract and SOP Act

(1) Introduction

64 The Respondent's next jurisdictional objection is that the Subcontract does not prescribe the timelines for the service of a payment claim and payment response; and on that basis, that timelines based on the default statutory timelines under the SOP Act or the oPublic Sector Standard Conditions of Contract for Construction Works (8th Ed, 2020) ("PSSCOC") ought to apply.

(2) Parties' submissions

65 The Respondent submits that cl 5 of the LOI does not provide for the date for the service of a payment response. Clause 5.1, in particular, merely provides for the period in which the Respondent is to evaluate the Claimant's progress payment, and does not allow the Parties to determine the terms relating to the service of a payment response under s 11(1)(*a*) of the SOP Act.

66 Thus, it is the Respondent's position that s 11(1)(*b*) of the SOP Act applies and the payment response period should be only 14 days as provided under s 11(1)(*b*) of the SOP Act or, alternatively, under cl 32.2(2) of the PSSCOC. Hence, the period for the Respondent to provide a payment

response would have commenced on 26 June 2024 and expired on 9 July 2024 (*ie*, 14 days from the date of service of PC48). Taking into account the dispute settlement period which would have commenced on 10 July 2024 and expired on 10 July 2024, the Claimant's entitlement to lodge an adjudication application on PC48 would have arisen on 17 July 2024 and expired on 24 July 2024.

67 The filing of the AA on 31 July 2024 was therefore out of time.

68 The Respondent further argued that the LOI was not incorporated by reference in the Subcontract nor was it part of the LOA. The LOI is hence not part of the Subcontract between the Claimant and the Respondent and, in any case, it has been superseded by the LOA. Hence, cl 5 of the LOI that indirectly provides for 21 days' payment response period as relied on by the Claimant does not apply.

69 The Claimant in its reply submissions contends that the Parties intended for cl 5 of the LOI to govern progress payments in relation to the Subcontract works as shown by the consistent course of dealings between the parties during the Subcontract's term. The Claimant consistently submitted its payment claims before the 25th of each calendar month (specifically, between the 20th to 25th of each month), for all of its 48 payment claims.

70 Clause 5 of the LOI was impliedly incorporated by the Parties into the LOA and/or Parties agreed to adopt cl 5 of the LOI in relation to the progress claims process for the Subcontract. In support of this position, the Claimant referred to Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) (at para 06.012) and the legal authorities in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 (at [51]), *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 (at [31]) and *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [131]).

71 The Claimant contends that the Respondent is estopped by its own conduct (*ie*, estoppel by convention) from seeking to deny the application and effect of cl 5 of the LOI in respect of progress claims under the Subcontract.

72 In any case, cl 5 of the LOA – at minimum – prescribes the relevant timeline for the service by the Respondent of a payment response, *ie*, 21 days. This is aligned with the position under cl 5 of the LOI, and further reinforces the Claimant's position that the parties operated on a common understanding and intention that the timelines in cl 5 of the LOI would govern their progress claims even after the issue of the LOA.

(3) My findings

73 On the issue of the relevant payment response period, I agree with the Claimant that in order to give meaning to cl 5 of the LOI which deals with progress payments and the period for payment, the LOI was part of the Subcontract. The matters covered under this cl 5 does not appear in the other contract documents, and hence it does not make sense to exclude the LOI as being part of the Subcontract.

74 Further, from the conduct of the Parties, the Respondent seems to have agreed that the relevant provisions under the LOI applies. In any case, s 11(1)(*b*) of the SOP Act and cl 32 of the PSSCOC providing for 14 days for payment response period does not apply because the Subcontract in this case is a specific agreement.

75 I agree with the Claimant's submissions that there is nothing in the Subcontract that suggests that cl 3.1 or 32.6 of the PSSCOC had been incorporated as terms of the Subcontract. This is especially so given that the PSSCOC is a standard form contract for main contract works intended to govern the relationship between a government or statutory body and its main contractor. Such standard clauses ought not to supersede the specifically negotiated Subcontract terms made between the main contractor (the Respondent) and the subcontractor (the Claimant).

76 I also agree with the Claimant that If the payment claim was served on 25 June 2024 or deemed to be served on 30 June 2024, with the application of the 21 days' payment response period, the latest date for the filing of the AA would be either 30 July 2024 or 5 August 2024. Hence the filing of the AA on 30 July 2024 was not out of time.

77 It is evident from the Parties' dealings that cl 5 of the LOI governs the progress claims and payment process under the Subcontract.

78 I have perused the Respondent's previous responses and observed that the Respondent has included a deduction of "retention 5% of revised subcontract sum". As rightly pointed out by the Claimant, nowhere in the LOA, or the PSSCOC, is this provided for. This deduction of the retention sum is expressly provided for in cl 5.3 of the LOI. This supports the intention of the Parties that cl 5 of the LOI governs the progress and payment process under the Subcontract, and hence the Respondent is estopped by its own conduct from disputing the application and effect of cl 5 of the LOI.

79 As regards cl 32 of the PSSCOC, I find that it does not apply to the present Subcontract. Clause 32 simply does not apply to the procedures for a progress payment claim and response as between the Claimant and the Respondent. Clause 32.1 applies to a payment claim to be submitted by the "Contractor" to the "Employer". Clause 32.2(2) deals with a "deemed …

Payment Response from the Employer", a government or statutory body. The Subcontract does not require a payment response from any government or statutory body and this clause has no relevance to the procedure for progress payment claims between the Claimant and Respondent.

80 Hence, I accept and find that the payment response period is 21 days as provided under cl 5 of the LOI. With this, I determine that the AA was not filed prematurely or out of time.

The applicable legal principles

Section 15(3) of SOP Act

81 The first legal principle applicable to the present AA is that s 15(3) of the SOP Act prohibits the Respondent from raising in its AR any objection that has not been previously included in its payment response to PC48.

82 In the present case, the Respondent conceded that it did not provide a payment response to PC48.

83 In interpreting s 15(3) of the SOP Act, the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [70] emphasised that s 15(3) of the SOP Act imposes on a respondent with "a duty to speak by way of fully spelling out his reasons for withholding payment so that the claimant is not caught by surprise at the adjudication".

84 The Court of Appeal in *Audi Construction* was clear in stating that where the respondent fails to file a payment response, it constitutes "an unequivocal representation that he would not raise any objection to the payment claim, whether as to jurisdiction or as to the merits".

85 That being said, the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [34] held that a respondent who failed to make payment response "is permitted to challenge the payment claim before the adjudicator by highlighting only patent errors in the material properly before the adjudicator".

86 In defining what may constitute a patent error, the Court of Appeal in *Comfort Management* at [23]–[24] referred to the statutory definition at s 2 of the SOP Act and the examples cited in *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGCH 174 at [35]. In summary, a patent error may be:

(a) any error that is obvious, manifest or otherwise easily recognisable;

(b) where the documentary evidence submitted by the claimant plainly contradicts the claimed amount; and

(c) where no supporting material or explanation whatsoever is adduced to support the payment claim.

87 The operation of s 15(3) of the SOP Act nevertheless requires that I hear the Respondent on any patent errors that the Respondent may wish to highlight in respect of PC48.

88 I agree with the Claimant's submissions that in considering whether there has been a patent error in the material properly before the adjudicator, his allowance of the Respondent's "patent errors" must be limited to "an exceptional and extremely narrow category of errors".

Standard of proof

89 The next legal principle is the standard of proof, where the Court of Appeal in *Comfort Management* held at [34] that regardless of whether any payment response has been provided, an adjudicator is to determine whether a claimant has established a *prima facie* case that it has completed the work being claimed for, and that the value of that work is as stated in the payment claim:

> Our view is that notwithstanding s15(3), and regardless of whether any payment response has been filed, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be **satisfied that the claimant has established a prima facie case that the construction work that is the subject of his claim has been completed and that the value of that work is as stated in the payment claim**. [emphasis added in underlined bold]

90 The Court of Appeal in *Comfort Management* at [57]–[59] and [63]–[65] opined that:

> 57 What standard of satisfaction must be applied by the adjudicator? To be clear, this is a standard which applies regardless of whether a payment or adjudication response has been filed, because it is part of his core duty to adjudicate. There are at least three possibilities for this standard: (a) the absence of patent errors in the payment claim and its supporting materials; (b) proof on a balance of probabilities that facts supporting the payment claim are made out; and (c) a prima facie case that the payment claim is supported by the facts. For the reasons below, **we hold that the prima facie standard is the correct standard to be applied by the adjudicator**.
>
> 58 The difficulty with absence of patent errors as the applicable standard is that conceptually, the absence of error, in and of itself, is not a positive basis for evaluating the completion and value of the construction work that is the

subject of the payment claim. Absence of patent errors as the standard effectively places the burden on the respondent to show why the claim should not be allowed, rather than on the claimant to show why the claim should be allowed. On this analysis, if the respondent and the adjudicator cannot identify any patent error, then the adjudicator must allow the claim. But that puts the cart before the horse. **The true position is that the burden lies on the claimant first to demonstrate to the adjudicator why he should allow the payment claim**. The claimant having made his case, the adjudicator (with or without the respondent's help) may nevertheless disallow the claim if he sees patent errors in the material properly before him.

59 Having drawn the conceptual distinction between absence of error and existence of a positive basis, we nevertheless recognise that in many cases, there may well be no real difference in the result if either approach is taken. Specifically, there may not be a difference in the outcome of an adjudication if the adjudicator applies the absence of error standard and not the prima facie standard which we explain and endorse at [64]–[65] below. Given the definition of patent error that we have set out at [21]–[24] above, an adjudicator who has genuinely applied his mind to identify patent errors in the material properly before him will, in all likelihood, also **have assessed the true merits of the claim and come to an independent conclusion on why the claim should be allowed, at least on a prima facie basis. Nevertheless, the point remains that conceptually, the perspective of looking for patent errors is the wrong perspective for an adjudicator to start from because his central task is to ascertain whether the claim before him is justified, and not simply whether it is unsustainable**.

…

63 In our view, there is **no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities**. Nothing in the existing authorities has ever suggested that to be the position, certainly not *W Y Steel*, which is the first local authority that attempts to examine what an adjudicator must substantively consider in adjudicating a payment claim dispute. More importantly, the adjudication process is intentionally "somewhat roughshod" (*W Y Steel* at [22]) given that the resultant decision is intended to have only temporary finality, the path being open for the parties to resolve their dispute fully and finally through arbitration or litigation: see s 21(1)(b) of the Act. This is especially true where no payment or adjudication response has been filed, in which case the adjudicator must render his decision in just seven days instead of the usual 14: see s 17(1)(a) of the Act. That is why the Act, as Vinodh Coomaraswamy J recently observed in *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28, does not require the adjudicator to find, nor does it require the claimant to 'prove', the facts supporting the claim to be objectively true on a certain standard of 'proof', that exercise being 'within the exclusive

> province of the dispute-resolution tribunal which will resolve the parties' dispute with full finality' (at [32]). **Coomaraswamy J employed the term 'standard of persuasion' to reflect more accurately the nature of the standard to which the adjudicator must be satisfied before he allows a claim (at [34]). We respectfully adopt this term for our analysis below**.
>
> 64 Therefore, it is evident – considering that the adjudicator is not simply to look for patent errors but to identify a positive basis for the claim, and that he also does not have to assess proof on a balance of probabilities – that the scheme of the Act requires the adjudicator to be satisfied that the claimant has established at least a prima facie case for his claim. We agree with the view of the Law Reform Committee in this regard (see [48] above), because the prima facie standard is already implicitly established in the Act. The content of this standard is by no means unfamiliar as the standard is employed in various adjudicative contexts, including the obtaining of summary judgment: see *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772 at [9] *per* Lai Siu Chiu J.
>
> 65 In particular, the adjudicator must be satisfied that the claimant has established a prima facie case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim. Indeed, that is the essence of his duty under s 17(2)(*a*) of the Act to 'determine the adjudicated amount (if any) to be paid by the respondent to the claimant'. Therefore, to ensure that he discharges that duty, it is only sensible for the Act to require him to consider all the matters stated in s 17(3) in so far as those matters are properly before him. Accordingly, the content of the adjudicator's duty to adjudicate the claim is normatively rooted in and given substance by s 17(3) which both prescribes and restricts the substantive matters he is to consider.
>
> [emphasis added in underlined bold]

91 In the present case, notwithstanding the absence of a payment response, I have a duty to independently address my mind and to consider the true merits of the work done as claimed in the AA. This duty includes the obligations set out in ss 17(2)–17(6) of the SOP Act and I am required, before allowing a claim, to be persuaded that a *prima facie* case has been made.

92 With the aforesaid legal principles in mind, I will proceed to examine each item of the Claimant's claims which are in dispute in this AA.

Claimant's entitlement to claimed amount

Introduction

93 In this AA, The Claimant is only claiming for the following:

(a) Subcontract Works;

(b) Variation Works;

(c) steel fluctuation; and

(d) amount deducted not agreed.

94 It is worth mentioning that the Claimant has relied on the Respondent's FAS to advance its claims for both the Subcontract Works and Variation Works. According to the Claimant, it has carried out the Subcontract Works and Variation Works amounting to a total sum of S$21,852,922.24 (*ie*, S$21,193,564.92 + S$702,027.23 – S$42,669.91). As evident from the FAS, the Respondent has derived the "Final Contract Sum" at S$21,792,950.07. The difference between: (a) the amount being claimed by the Claimant for Subcontract Works plus Variation Works done up to S$21,852,922.24; and (b) the Respondent's valuations contained in its FAS of S$21,792,950.07 is S$59,972.17 ("Uncertified Claim").

95 According to the Claimant, there is no dispute as to the base position that Subcontract Works plus Variation Works carried out by the Claimant were up to a total amount of S$21,792,950.07. Therefore, the Tribunal is only required to determine the uncertified outstanding amount of S$59,972.17 (*ie*, S$21,852,922.24 <u>less</u> S$21,792,950.07).

Standard of proof

96 The Court of Appeal in *Comfort Management* held at [34] that regardless of whether any payment response has been provided, an adjudicator is to determine whether a claimant has established a *prima facie* case that it has completed the work being claimed for, and that the value of that work is as stated in the payment claim:

> Our view is that notwithstanding s 15(3), and regardless of whether any payment response has been filed, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be **<u>satisfied that the claimant has established a prima facie case that the construction work that is the subject of his claim has been completed and that the value of that work is as stated in the payment claim</u>**.
>
> [emphasis added in underlined bold]

97 It is trite law and clear from *Comfort Management* that a claimant has the burden of proving its claim to satisfy the adjudicator. Mere assertions would not be sufficient. It is on this basis that I proceed to determine the Claimant's entitlement to the Claimed Amount in this AA.

Items A to D: Subcontract Works and Variation Works

(1) Introduction

98 In PC48, the Claimant claims for the Subcontract Works and Variation Works amounting to a total sum of S$21,852,922.24 (*ie*, Subcontract Works done S$21,193,564.92 + Variation Works S$702,027.23 – Credit on agreed final quantity S$42,669.91): see [13] above, Items A, C and D.

99 In support of its claim for the completion of the Subcontract Works and Variation Works claimed of S$21,852,922.24, the Claimant has produced the delivery orders ("DOs") found at CBOD, Tab 5 and Tab 6.

(2) Parties' submissions

100 The Respondent, at [86]–[90] of RS, argued that the the Claimant is not entitled to payment of S$21,150,895.01 for the Subcontract Works because there is a patent error.

101 According to the Respondent, at para 87 of the RS, the uncertified amount of S$1,108,163.19 now claimed by the Claimant in PC48 is unsupported as there is no evidence to prove the materials and the quantity claimed have been ordered or requested; the Claimant has not shown the actual quantities received by the Respondent; and the Claimant has not shown the correct rate has been applied.

102 The Claimant, at para 114 of CS-2, clarified that it is not making a claim for an uncertified amount of S$1,108,163.19. The Claimant further clarified that its total claim for all work done (including both Subcontract Works and Variation Works) is S$21,852,922.24 (*ie*, S$21,150,895.01 + S$702,027.00).

103 The Claimant, at paras 58 to 59 of ACS-1, relies on the FAS submitted by the Respondent to the Claimant on 25 January 2024 to argue that there is an admission by the Respondent that the Final Contract Sum as assessed by the Respondent is S$21,792,950.07. This is derived by adding the "Original Contract Amount" of S$20,042,731.82 with the "Variation Order (Omission) / Addition" of S$1,750,218.25. A copy of the FAS is exhibited at CBOD, Tab 3. The Claimant further contends that

"with regard to the FAS, a base level of SGD 21,792,950.07 for the value of Subcontract works carried out by [BIS] has been agreed on between parties".

(3) My findings

104 Having examined the documents and considered the Parties' respective submissions, I agree with the Claimant's submission that the Respondent had agreed or admitted in the FAS that the Final Contract Sum which comprises the original contract amount and the variations is for the sum of S$21,792,950.07. The question about patent errors in PC48 hence does not arise. I am hence satisfied that the Claimant has shown on a *prima facie* basis that the Subcontract Works and the variations have been carried out to the value of S$21,792,950.07.

105 Accordingly, I shall adopt the figure of S$21,792,950.07 as admitted by the Respondent in its FAS for the Final Contract Sum, and I will include this sum in arriving at the Adjudicated Amount.

Uncertified claim of S$59,972.18

(1) Introduction

106 The uncertified claim of S$59,972.17 relates to a single item: the variation works for a "Lift Wall" of 1,411.11m³. The DO of this item is found at CBOD, Tab 6.

(2) Parties' submissions

107 The Respondent takes issue with the the documents supporting the Claimant's unit rate at CBOD, Tab 6. The Respondent submits that the documents tendered were not signed by the Parties.

108 In response, the Claimant argued at para 118 of CS-2 that the claim of S$59,972.17 relates to the Lift Wall work of 1,411.11m³. It is therefore not open for the Respondent to say that this work had not been ordered or requested, or that quantities received by the Respondent have not been shown, when every DO has been signed and accepted by the Respondent.

(3) My findings

109 Having examined the documents and considered the Parties' respective submissions, I am not satisfied that the Claimant has shown on a *prima facie* basis that the uncertified variation claim of S$59,972.17 has been made out.

110 The Claimant must show and relate the specific DOs in Tab 6 of the CBOD to the variation works instructed and carried out for the Lift Wall.

No such evidence was produced by the Claimant in these adjudication proceedings, except for the DOs. The inclusion of the DOs and the summary in the AR, Tabs 5 and 6 of CBOD is not sufficient to satisfy this claim on a *prima facie* basis.

111 Unless the work in the DOs is shown to be related to the instructions for this item of variation works, I am not convinced on a *prima facie* basis that this particular uncertified variation claim has been made out and I shall not allow the same. Hence this item of the claim is dismissed.

112 The Respondent, at para 85 of RS, argued that the Claimant's claim for S$21,150,895.01 for contract works, being greater than the entirety of the "Subcontract Sum" of S$20,884,130.00, is a patent error. I disagree with the Respondent on this as the final quantity of works done under the Subcontract is subject to re-measurement. In a re-measurement contract, it is common for one to expect the final value of works done exceeding the original Subcontract Sum.

113 Accordingly, and for the reasons mentioned above, I find that the Claimant's claim for the uncertified variation claim of S$59,972.17 has not been made out on a *prima facie* level.

Item E: steel fluctuation

(1) Introduction

114 In PC48, the Claimant claims a sum of S$781,864.84 for "Steel Fluctuation".

115 The Respondent in the AR submits that the Claimant is not entitled to payment for Steel Fluctuation on the basis that there are patent errors in the PC48 and/or the AA.

(2) Parties' submissions

116 The Respondent submits that Item 22 of Appendix 2A does not entitle the Claimant to payment for Steel Fluctuation under the Subcontract. According to the Respondent, the list of contract documents and drawings do not include this appendix.

117 The Respondent further submits that the operative and applicable term for determining the issue of "the basis of the agreed contract price – whether subject to fluctuation in material cost" is cl 1 of the letter of acceptance. It contends that the contract sum is not subject to any increase in the price of steel. For ease of reference, I have reproduced cl 1 below:

> 1. Unless otherwise provided elsewhere in the Purchase Agreement, prices are: (i) stated in **Singapore Dollar**; (ii) not subject to increase (due to fluctuation of material prices) for the duration of the Purchase Agreement; and (iii) Delivered to Port (CIF Singapore)-Job site. No extra charges of any kind will be allowed unless specifically agreed by us in writing. Please refer **Appendix 4** for Particular Conditions of Purchase Agreement.

118 In the event that the Tribunal finds that the Claimant is entitled to payment for Steel Fluctuation, the Respondent submits that the Claimant has not proven to a *prima facie* standard that there was an agreement as to the following:

(a) formula to be applied for Steel Fluctuation;

(b) unit cost of steel reinforcement;

(c) the base index to be applied; and

(d) the duration of applying Steel Fluctuation.

119 In response, the Claimant submits that the Respondent has essentially attempted to submit contractual interpretation arguments under the guise of a "patent error". As the Respondent did not provide a payment response, the Claimant submits that the Respondent is not entitled to now belatedly raise any such reasons or objections which it had not disclosed in its payment response. Accordingly, the learned Adjudicator should disregard paras 98 to 115 of the AR submissions.

120 The Claimant further submits that its claim for the fluctuations in the price of steel reinforcement (*ie*, the Steel Fluctuation) stems from Appendix 2A of the Subcontract. Pursuant to cl 3 of the LOA, it is undeniable that the Appendix 2A is one of the "documents forming part of the Subcontract".

121 The Claimant further submits that Appendix B1 is the "Work scope checklist", and provides a detailed description of the scope of works for the Subcontract specific to the Project, and indicates who the scope of works is to be performed by for each item listed.

122 The Claimant also highlighted that Item 22 of Appendix B1 expressly provides that "the rebar and mesh is subject to price fluctuation. The quantities (CSQ: 6,128 tons) will be based on the evaluation of price fluctuation amount will be subject to BCA's latest available index". Both parties had initialed on each page of the Subcontract, including on Appendix 2A, hence according to the Claimant, it is clear that both parties would have been aware of Item 22 of Appendix 2A regarding the Steel Fluctuation.

123 While cl 1 of the LOA provides that the Subcontract sum is "not subject to increase (due to fluctuation of material prices) for the duration of

the Purchase Agreement", the Claimant submits that Item 22 of Appendix 2A would continue to be applicable and take precedence over cl 1 in so far as the two contractual provisions are inconsistent with each other. In support of its position, the Claimant has referred me the Court of Appeal's decision in *Zurich Insurance* ([70] *supra*) (at [131]).

(3) My findings

124 As a start, I wish to state that *contra proferentem* rule applies in case of a conflict between various provisions in the contract documents, and hence any ambiguity should be read against the Respondent who prepared the contract documents.

125 There were company stamps, initials and signatures made by the Parties against cl 22 in Appendix 2A of the LOA (which is reproduced below). This would signify that the Parties had put their attention and minds to the inclusion and application of this clause to allow for the fluctuation of the steel price and an adjustment of the final contract sum during the contract period.

Scope of works

Item	Description	Scope by		Remarks
		[BIT]	Subcon	
21	For all the raw material used in precast concrete components supplied by Supplier under this sub-contract which is being described in Appendix 1 shall be fully obtained (only applicable for local production). In the event of the supplier failing to obtain in full, main contractor shall reserve the right to impose shortfall recovery from supplier. Supplier not required to consume part of the main contract raw material if their production was produecd in oversea.		√	
22	The rebar and mesh is subject to price fluctuation. The quantities (CSQ: 6,128 tons) will be based on ~~actual delivered and~~ the evaluation of price fluctuation amount will be subject to BCA's latest available index. ~~This fluctuation is not applicable for oversea production.~~	[redacted]	√	[redacted]
23	All clothes drying racks, cast-in window frames, blast door frame, ventilation sleeve, accessories or parts, such as stainless steel base plates or supports		√	

126 In my view, there is actually no conflict in the various provisions in the contract documents, as cl 22 in Appendix 2A of the LOA is a specially negotiated terms as submitted by the Claimant and that it should take precedence over the general cl 1 of the Subcontract.

127 In my view, a fluctuation clause can work both ways. It can be used against the interest of the Claimant if the steel price falls. In such an event the final contract sum will be adjusted downwards against the Claimant to reflect this change. If this was indeed the case, I doubt that the Respondent would have taken the same position that it now adopts to contend that the final contract price cannot be adjusted even if the price of steel falls during the contract period.

128 It is not uncommon for contracts in the construction industry to provide that the contract price shall remain fixed subject to adjustment of

the final contract price if the steel price fluctuates, as this was a risk that neither party was prepared to assume. Hence, in my view there is no inconsistency between the provisions in a contract providing for a fixed lump sum price with a steel price fluctuation clause.

129 It is also worth mentioning that there is evidence of the Respondent's acknowledgment of a claim by the Claimant for price fluctuation due to an increase in the price of steel. This is seen and set out in its own FAS, which indicates that the Respondent accepted the application of cl 22. There is no reason for the Respondent to include such a claim for steel fluctuation in the FAS if it was not an agreed term in the contract.

130 There was no payment response provided by the Respondent to PC48. Hence, it is too late now for the Respondent to explain why the fluctuation claim is wrongly calculated in terms of the dates used and the rates relied upon by the Claimant.

131 Although no payment response was provided by the Respondent, as part of my independent duty to adjudicate independently, I have considered the Claimant's claim for fluctuation including the methodology and calculations, which is found at CBOD, Tab 9, and I am satisfied on a *prima facie* basis that the claim has been made out.

132 For the above reasons, I am inclined to allow the Claimant's claim of S$781,864.83 (excluding GST) for the fluctuation in the price of steel.

Item F: retention sums

133 In PC48, no deduction for retention sums is allowed by the Claimant.

134 As indicated in the FAS (see extract below), the Respondent took the position that no retention sum was applicable.

FINAL ACCOUNT STATEMENT

BUILDING WORKS AT [redacted] 2 CONTRACT 3 (TOTAL: 1,179 DWELLING UNITS) - SUPPLY AND DELIVERY OF PRECAST CONCRETE

This Final Statement of Account has been computed in accordance with the terms of the Contract / Letter of Award for your agreement and confirmation.

1.	Original Contract Amount	$	20,042,731.82
2.	Deduct steel fluctuation	$	-
3.	Variation Order (Omission) / Addition	$	1,750,218.25
4.	**Final Contract Sum**	**$**	**21,792,950.07**
	Less		
5.	Total Backcharge Amount	$	(938,181.90)
6.	Total Previous Payment	$	(20,663,144.57)
7.	Sub-Contractor retention	$	-
	Less Discount	$	-
8.	**Final Outstanding Payment**	**$**	**191,623.60**

135 Given the above, I find that there will be no deduction for retention sums.

Item G: payment till date

136 In PC48, the Claimant included a sum of S$21,223,418.49 (excluding GST) for "payment till date".

137 However, at para 95 of ACS-1, the Claimant stated that although the Respondent had in the FAS certified up to S$21,792,950.07 (excluding GST) of the Claimant's overall claim (before any deductions are made), the Claimant has only received a total payment of S$21,089,276.87 (excluding GST) (and not S$21,223,418.49 as stated under PC48).

138 The difference of S$134,141.63 (*ie*, S$21,223,418.49 less S$21,089,276.87) is for the deduction for the disputed backcharges, *ie*, Item I, "Amount deducted not agreed", included in PC48.

139 The particulars (*ie*, dates of payments, cheque numbers and amount paid) and breakdown of the total payment of S$21,089,276.87 is found at CBOD, Tab 2, Annex C. The Respondent did not challenge these particulars and breakdown.

140 Having considered the Parties' respective submissions and the evidence presented before me, and for the reasons mentioned above, I am inclined to adopt the sum of S$21,089,276.87 (excluding GST) as total payment made by the Respondent to the Claimant till date, in arriving at the adjudicated amount.

Items H and I: agreed deduction and amount deducted not agreed

(1) Introduction

141 The Claimant, in PC48, disputes the Respondent's deduction of S$129,512.81 (*ie*, S$134,141.63 less S$4,628.82). However, in the AA, the Claimant has revised downward the disputed back charges to the sum of S$125,366.00.

(2) Parties' submissions

142 As a starting point, the Claimant submitted, at para 76 of ACS-1, that the Respondent has failed to submit a payment response within the SOP Act's statutory timeline. Thus, the Respondent is not entitled to put forward its position regarding the deduction of back charges in this application.

143 In any case, the Claimant has relied on s 17(3) of the SOP Act to dispute the Respondent's entitlement to deduct the back charges. It is the Claimant's position that the deductions for "back charges" are in essence deductions for expenses and/or for losses which the Respondent has attempted to disguise as a "back charge". Accordingly, s 17(3) of the SOP Act will be applicable to the back charges deducted by the Respondent.

144 The Claimant, at paras 85 to 90 of ACS-1, submitted that there is no agreement between the Parties with regard to the amount of back charges to be imposed. There is also no certification mechanism under the Subcontract for back charges. In order for there to be an agreement between parties under s 17(3) of the SOP Act, there must be an agreement between parties with regard to the rate of back charges, issue of culpable delay and the amount of back charges to be imposed. In support of its case, the Claimant referred me to the adjudication cases in *BDM Pte Ltd v BDN Pte Ltd* [2020] SCAdjR 480 at [368] and *BDY Pte Ltd v BDZ (Pte) Ltd* [2020] SCAdjR 863 at [64] and [65].

145 The Respondent, at para 117 of the RS, argued that the Claimant's claim for S$125,366.00, being the back charges, would result in the Claimant making a double claim. The Claimant's claim for the "Disagreed Backcharges" would constitute a patent error, which should be dismissed by the Tribunal. During the merits conference, the Respondent, however, conceded that there was in fact no double claim made by the Claimant.

146 The Respondent, at paras 126 to 130 of the RS, further argued that the Claimant had expressly accepted the Respondent's claim for back charges, by accepting payment of the certified amounts, and hence there is no more dispute on this claim that can be referred to the Tribunal for determination. In support of its case, the Respondent has relied on the cases of *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332, *Shepherd Construction Ltd v Mecright Ltd* [2000] BLR 489 and *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609.

(3) My findings

147 As a start, I should deal with the Claimant's reliance on s 17(3) of the SOP Act to counter the Respondent's back charges.

148 I agree with the Claimant's submissions that the Respondent's penalty, cancellation charge and costs for defects rectification are essentially a claim for damages that fall within the ambit of "damage, loss or expense" under s 17(3) of the SOP Act. In my view, these costs are the additional costs that one party has incurred arising from a breach of the contract by the other party.

149 Having considered the Parties' submissions and the documents, it is clear that the two exceptions stipulated in s 17(3) of the SOP Act for the right to raise back charges are not satisfied.

150 The fact that the Claimant had, throughout the course of the Project failed to object to the contents of the various payment vouchers from the Respondent, which included the back charges to be deducted, and that the Claimant received payment from the Respondent based on these payment vouchers, does not mean that the Claimant agreed to the back charges within the meaning of s 17(3) of the SOP Act. Mere silence by the Claimant did not mean that they had agreed to the back charges deducted by the Respondent.

151 Accordingly, for the reasons set out above, I will disallow the deduction of the backcharges as it runs afoul of s 17(3) of the SOP Act.

Goods and services tax

152 The Claimant, at paras 110 to 111 of ACS-1, submitted that the price for the Subcontract Works excludes GST and since it is registered for GST and the Subcontract Works are liable for GST under the Goods and Services Tax Act 1993 (2020 Rev Ed), the Claimant is entitled to claim 9% GST in this adjudication.

153 The Claimant is bound by its claims in PC48 and AA. I note that the Claimant did not claim for GST in PC48 and the AA. I therefore have no jurisdiction to consider and include 9% GST in computing the adjudicated amount for the purpose of this adjudication.

Adjudicated Amount

154 The amounts determined in respect of each item claimed are aggregated as follows:

Item	Description	Amount (S$)	Reference to Determination
A to D	FAS (Subcontract Works + Variation Works)	21,792,950.07	See [105] above.
D1	Uncertified Claim	Nil	See [113] above.
E	Steel Fluctuation	781,864.84	See [132] above.
	Sub-Total:		
F	Less: Retention Sums	-	See [135] above.
G	Less: Payment till date	(21,089,276.87)	See [140] above.

H	Less: Agreed deduction }	
I	Add: Amount deducted not agreed }	(125,366.00) See [151] above.
	Amount (excluding GST):	S$1,360,172.04

155 I therefore determine that the Respondent shall pay to the Claimant the sum of **S$1,360,172.04** (excluding GST), which is hereby recorded as the Adjudicated Amount.

Due Date for Payment of Adjudicated Amount

156 Sections 22(1)(*a*) and 22(1)(*b*) of the SOP Act provide as follows:

> **22.**—(1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant, then except as provided in subsection (2) and section 18(3), the respondent must pay that amount —
>
> (*a*) within 7 days after the adjudicator's determination is served on the respondent; or
>
> (*b*) by the date on which the adjudicated amount is determined by the adjudicator to be payable,
>
> whichever is the later.

157 Therefore, I order that the Respondent pays the Adjudicated Amount to the Claimant within seven days after this Determination is served on the Respondent, to be hereby recorded as the "Due Date for Payment of the Adjudicated Amount".

Payment of interest

158 Section 8(5) of the SOP Act provides as follows:

> (5) The interest payable on the unpaid amount of a progress payment that has become due and payable is at the higher of the following rates:
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract;
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969.

159 The Claimant in its AA Form AA-1, under Section E, stated that the Subcontract does not specify the interest rate for late payment. This was not challenged by the Respondent in the adjudication proceedings.

160 In the circumstances, s 8(5)(*b*) of the SOP Act requires me to fix the interest on the basis of the "rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969". I therefore determine that interest shall run at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid, from the Due Date for Payment of the Adjudicated Amount up to the date of full payment of the Adjudicated Amount.

Costs of Adjudication

161 The costs of the adjudication are in the amount of S$32,046.00 ("Costs of Adjudication"). This includes the adjudication application fee of S$654.00 (including 9% GST) payable to the SMC and the adjudicator fee of S$31,392.00 (including 9% GST).

162 As the Claimant has succeeded in most of its claims in the AA, the Costs of the Adjudication shall be borne by the Respondent entirely.

BIU Pte Ltd
v
BIV Pte Ltd

[2024] SGSOP 16

Singapore Mediation Centre — SOP AA 221 of 2024
Asfian Mohaimi
27 September 2024

Jurisdiction *— Jurisdictional objections — Respondent submitting in adjudication response that claimant's payment claim was based on several quotations and hence based on several contracts in breach of one-contract rule — Claimant submitting that respondent precluded from raising objection at this stage of proceedings in accordance with s 15(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) — Whether objections raised by respondent related to patent error — Section 15(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim *— Assessment — Whether claimant had proven its claims for works on* prima facie *basis*

Payment Claim *— Relevant contracts — Whether payment claim premised on more than one contract in breach of one-contract rule — Claimant submitting that works claimed for pursuant to other quotations were variations to works under subcontract — Whether separate contract entered into by parties each time claimant submitted quotation for works*

Payment Claim *— Variation works — Assessment — Claimant claiming for various variation works — Assessing claimant's entitlement for variation works*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 8(5), 15(1), 15(3), 22(1)

Supreme Court of Judicature Act 1969 (2020 Rev Ed)

Kelvin Kek, Sophia Yew and Lokkesh Thangavelu (Allen & Gledhill LLP) for the claimant;
John Lim and Ng Kai Ling (LIMN Law Corporation) for the respondent.

[Commentary: see para 4.22]

27 September 2024

Asfian Mohaimi:

Determination

1 This is a determination made under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act"). It is made in respect of Adjudication Application No SOP/AA 221 of 2024, the case number having been assigned by the Singapore Mediation Centre ("SMC") as the authorised nominating body under the SOP Act.

2 The claimant is [BIU] Pte Ltd ("Claimant") and the Respondent is [BIV] Pte Ltd ("Respondent").

3 For the reasons which are set out below, I determine that:

(a) The Respondent shall pay to the Claimant the sum of $69,562.78 (inclusive of 9% goods and services tax ("GST")). This is hereby recorded as the adjudicated amount ("Adjudicated Amount") of this adjudication determination ("Adjudication Determination" or "Determination").

(b) The Respondent shall pay the Adjudicated Amount to the Claimant within seven days after the date of service of this Adjudication Determination on the Respondent. The last day of this seven-day period shall be the due date for payment ("Due Date for Payment").

(c) In the event that the Adjudicated Amount or any part thereof is not paid by the Respondent to the Claimant by the Due Date for Payment, the Respondent shall pay interest on such amount unpaid. The rate of interest payable shall be 5.33% per annum from the Due Date for Payment up to the date of full payment of the Adjudicated Amount.

(d) The costs of the adjudication being the adjudication application fee of $654 (inclusive of 9% GST) and adjudicator fee of $6,894.25 shall be borne 90% by the Respondent and 10% by the Claimant.

Record

Background

4 The present adjudication application ("Adjudication Application") arises out of works in connection to a project known as the "Proposed New

Erection Of A 2-Storey Envelope Control Detached Dwelling House With An Attic On Lot [xxx] at [xxx]" ("Project").

5 By way of the Claimant's quotation dated 6 July 2023 (Ref: [xxx]) ("Original Quotation"), the Respondent engaged the Claimant as its subcontractor for the supply, delivery and installation of aluminium works for the sum of $165,000 ("Subcontract"). The Respondent is the main contractor for the Project.

6 The Subcontract is silent on when each payment claim is to be submitted. The Subcontract is also silent on when the payment response is to be provided. As such, the default timelines under the SOP Act would apply.

7 On 25 July 2024, the Claimant served a copy of its Payment Claim No 8 ("PC 8") by e-mail to the Respondent. PC 8 was for the sum of $70,979.77, including GST. Under the SOP Act, PC 8 shall be deemed to have been served on the last day of the month, 31 July 2024.

8 Applying the default timeline under the SOP Act, the payment response would be due on 15 August 2024, taking into account the public holiday on 9 August 2024. The dispute settlement period thus commenced on 16 August 2024, and ended on 22 August 2024.

9 No payment response was submitted by the Respondent.

10 On 29 August 2024, the Claimant issued a notice of intention to apply for adjudication.

11 Later on the same day, on 29 August 2024, the Claimant lodged the present Adjudication Application with the SMC. Based on the timelines set out above, the Adjudication Application was lodged within the timeframe provided under the SOP Act.

12 A copy of the Adjudication Application was served on the Respondent by the SMC on 30 August 2024.

13 Under s 15(1) of the Act, the Respondent had seven days from the service of the Adjudication Application to issue its adjudication response ("Adjudication Response").

14 The Respondent issued its Adjudication Response on 6 September 2024. It was issued within the prescribed time under the SOP Act.

15 On 2 September 2024, the SMC appointed me as the adjudicator.

Adjudication conference

16 On 8 September 2024, I wrote to both parties to convene an adjudication conference. Both parties confirmed that they would attend the conference and provided the dates of their availability.

17 The adjudication conference was held on 18 September 2024. Both parties were represented as follows:

(a) For the Claimant:

(i) Mr [A]– director

(ii) Mr [B]– manager

(iii) Ms [C]– quantity surveyor

(iv) Mr Kelvin Kek – counsel

(v) Ms Sophia Yew – counsel

(vi) Mr Lokkesh Thangavelu – counsel

(b) For the Respondent:

(i) Mr [D]– director

(ii) Ms [E]– quantity surveyor

(iii) Mr John Lim – counsel

(iv) Ms Ng Kai Ling – counsel

18 Both parties made submissions at the adjudication conference, with reference to documents that had already been submitted.

19 At the conclusion of the conference, at my request and with the agreement of both parties, the date for the issuance of the Adjudication Determination was extended to 27 September 2024.

20 On 18 September 2024, after the conclusion of the conference, the Respondent sent me its revised calculations to correct an error in Annex A of its Adjudication Response submissions. This was in response to the Claimant's pointing out of a calculation error during the conference.

Issues in this adjudication

21 The issues in this adjudication may broadly be set out as follows:

(a) whether PC 8 is premised on more than one contract; and

(b) whether the Claimant has proven its claim for the works on a *prima facie* basis.

Determination

22 In arriving at my Determination, I have carefully considered all the documentary evidence tendered by the parties in this adjudication, including the relevant oral and written submissions, in so far as I am entitled to consider these under the SOP Act. I have also considered the respective parties' submissions at the adjudication conference. With a view to avoid incurring unnecessary expense, I have sought to be brief in setting out the gist of the submissions and only what I have considered to be the most salient of the points made by the parties. I have not recorded in this Determination each and every fact, argument, relevant evidence and submission considered by me in arriving at my Determination. Accordingly, the parties should not consider that any fact, argument, evidence or submission not recorded herein had not been taken into account in arriving at my Determination.

Whether PC 8 is premised on more than one contract

23 The Respondent submitted that "PC 8, upon which the AA is founded, arose from more than one contract, in breach of the one contract rule under the … SOP Act". Several arguments were relied on by the Respondent in support of its position, as stated at para 12 of the Respondent's Adjudication Response submissions. Amongst others, the Respondent highlighted that "[o]ut of the six (6) quotations upon which PC8 is premised, four (4) of them (*ie*, the Signed Quotations) each have their own set of terms and conditions". Meanwhile, only two of the quotations made reference to the "Quotation Ref. No. [xxx] dated 6 July 2023" but were unsigned ("Unsigned Quotations").

24 Relying on the adjudication determination in *AYR Pte Ltd v AYS Pte Ltd* [2018] SGSOP 5, the Respondent submitted that the present adjudication application should be dismissed as PC 8 is premised on more than one contract, which renders it incapable of supporting an adjudication application under the SOP Act.

25 In response, the Claimant submitted that the works claimed for pursuant to the other quotations were variations to the works under the Subcontract. The Claimant also highlighted that over the course of the works, the Claimant has always submitted only one payment claim in respect of all the other quotations relating to the aluminium trellis. Therefore, the Claimant submitted that there is only one contract between the parties in relation to the aluminium trellis.

26 Further, the Claimant submitted that the Respondent is precluded from raising its objections at this stage of the proceedings in accordance with s 15(3) of the SOP Act. According to the Claimant, the objections raised by the Respondent do not relate to patent errors.

27 Thus, the issue before me is whether a separate contract was entered into by the parties each time the Claimant submitted a quotation for the aluminium works. If separate contracts were entered into, then PC 8 would be an invalid payment claim which is not capable of supporting the present application.

28 I shall first analyse the Unsigned Quotations. Based on the Respondent's submissions at para 12(d) of its written submissions, the Respondent appears to accept that "the Unsigned Quotations are meant to be variations of the quotation dated 6 July 2023". In this regard, I note that under the terms and conditions of both the Unsigned Quotations, express references were made to the Original Quotation dated 6 July 2023. Therefore, I find that the Unsigned Quotations were not separate contracts between the parties but were claims for variations to the original scope of works under the Original Quotation.

29 Next, I shall turn to the "Signed Quotations". The three Signed Quotations all contain identical terms and conditions. In support of its position, the Respondent highlighted that each of the Signed Quotations contains a clause stating: "In case of discrepancy, this quotation shall take precedence." The Respondent submitted that such clause "would be unworkable if the Signed Quotations collectively form one (1) single contract between the parties, since no one quotation can override the other if each of them is supposed to take precedence".

30 With respect, I find this argument unpersuasive. In my view, the mere unworkability of a common clause in those quotations is insufficient to show that the parties had intended for separate contracts to be entered into. Further, I find that those clauses appear to be *pro forma* clauses in the Signed Quotations, which might also explain why they are identical. Therefore, I find it difficult to ascribe any objective intent to the Claimant as to whether it intended to enter into separate contracts with the Respondent simply by virtue of the inclusion of the said clause.

31 Further, I am of the view that an analysis to ascertain the parties' intention in respect of each of the Signed Quotations would require an extensive review of all the facts and circumstances giving rise to these quotations. The need for such an extensive review would mean that the objections raised by the Respondent would not amount to patent errors in the materials properly before me. In this regard, the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [4] defined patent error as "an error that is obvious, manifest or otherwise easily recognisable". Based on a review of the materials adduced before me, I find that there is nothing obvious or manifest which shows that the parties intended for the Signed Quotations to form separate contracts between them. Therefore, I accept the Claimant's submission that the Respondent is precluded by s 15(3) of the SOP Act

from raising such objections. Having failed to provide a payment response, it is not open for the Respondent to now submit these reasons in its Adjudication Response.

32 On the other hand, a mere cursory look at the title of each of the Signed Quotations appears to support the Claimant's position that these quotations were meant to be variations to the Subcontract. In this regard, the titles on the Signed Quotations for VO 3, VO 4 and VO 5 are "Additional Works", "Additional Screen Insert for Main Gate and Side Gate – A1" and "Additional Aluminum Panel Insert for Rear Gate", respectively. In each of the Signed Quotations, these titles appear immediately after the Project title. In my view, these titles are consistent with the nature of claims for variations. Thus, even if the Respondent is not precluded by s 15(3) in raising its objections, I would still find it difficult to ascribe any objective intent to the parties that these quotations were not meant to be claims for variations by the Claimant.

33 Having considered both parties' submissions and the evidence before me, I accept the Claimant's submission that PC 8 arose from one contract, which renders it valid for the purpose of supporting an adjudication application under the SOP Act.

Whether Claimant has proven its claims for works on prima facie basis

34 Even though the Respondent did not submit any payment response, in assessing the amount claimed, I accept the Respondent's submissions that I am still duty bound to adjudicate the claim and be satisfied that the Claimant has established a *prima facie* case for each of its claims, as pronounced in *Comfort Management*.

35 In assessing the claim, I am also mindful that the law requires that there must be a "positive reason" to award the amount, and that I must be satisfied that the claim has been sufficiently substantiated.

Payment claim

36 The Claimant's claims in this adjudication are as follows:

S/N	Description	Amount Claimed
1	Original Subcontract Works done as *per* the Subcontract	S$165,000.00
2	Variation Works done as *per* the Claimant's Quotation Reference No [xxx] dated 8 January 2024 ("VO 1")	S$1,896.00

3	Variation Works done as per the Claimant's Quotation Reference No [xxx] dated 9 January 2024 ("VO 2")	S$1,300.00
4	Variation Works done as per the Claimant's Quotation Reference No [xxx] dated 8 September 2023 ("VO 3")	S$3,610.00
5	Variation Works done as per the Claimant's Quotation Reference No [xxx] dated 6 February 2024 ("VO 4")	S$5,301.00
6	Variation Works done as per the Claimant's Quotation Reference No [xxx] dated 22 February 2024 ("VO 5")	S$1,105.00
	Total Revised / Adjusted Amount	S$178,212,00
	Less Payments Received	S$(113,092.94)
	Total Amount Claimed (Before GST)	S$65,119.06
	Add 9% GST	S$5,860.71
	Total Claimed Amount	**S$70,979.77**

37 The Claimant submitted that the Subcontract is a lump sum contract for the price of $165,000. It is of the position that it is entitled to be paid the Subcontract sum in full as it has completed all the works within the original subcontract works ("Original Subcontract Works") prior to July 2024. Further, the Claimant relies on the completion certificate from the architect to contend that it has proven, on a *prima facie* basis, that it has completed all the works required of the Claimant. Site photographs were also relied on by the Claimant to show that it has completed the Original Subcontract Works.

38 In response, the Respondent submitted that the Subcontract is a remeasurement contract, as provided in cl 2 of the terms and conditions. Clause 2 provides that: "Above amount and quantities quoted are based on the information/drawing provided by you at the time of preparing the quotation and subjected to remeasurement, if deviated from the original design intent (without specification)."

39 Based on the express wording of cl 2, I accept the Respondent's position that the Subcontract is a remeasurement contract. However, due to s 15(3) of the SOP Act, I am not able to accept the Respondent's as-built measurements giving rise to the Subcontract sum of $179,733.64 (before discount), and $154,969.93 (after discount). Accordingly, I accept the Claimant's position that the Subcontract sum is in the amount of $165,000.

40 Having considered both parties' submissions and the evidence before me, I accept the Claimant's position that the architect's completion certificate provides sufficient evidence, on a *prima facie* basis, that the

Claimant had carried out the Original Subcontract Works which it is claiming for in the present application. Accordingly, I find that the amount of $165,000 is the value of the Original Subcontract works carried out by the Claimant.

41 Apart from the Original Subcontract Works, the Claimant is also claiming for variation works for five items. I shall address each of these variation claims in turn.

VO 1

42 I note that the Respondent, at para 30 of its Adjudication Response submissions, "does not dispute the Claimant's final claimed amount for the supply, delivery and installation of pivot swing aluminium screen door, which is $1,896". Therefore, I allow the Claimant's claim for VO 1 in full for the sum of $1,896.

VO 2

43 This item of claim is in relation to an "aluminium box-up for existing drainpipe using WOODGRAIN finished aluminium cladding" for the sum of $1,300. The Claimant submitted that this work was done pursuant to a verbal instruction by the Respondent. However, the Respondent contended that this claim is patently erroneous as there is no evidence of any variation instruction or agreement to vary.

44 In support of its claim, the Claimant tendered a photograph and a screenshot of a WhatsApp conversation in Tab D-4 of the Claimant's Adjudication Application submissions. In the WhatsApp conversation, it is noted that the Claimant "still haven't get the confirmation from [the Respondent] regarding this scope". This appears to be consistent with the Respondent's position that there was no agreement between the parties for this particular item of claim. Tellingly, the quotation for VO 2 was also unsigned by the Respondent.

45 Having considered both parties' submissions and the evidence before me, I accept the Respondent's submission of patent error for this item of claim as it is obvious that there was no agreement between the parties for this variation item. Thus, I disallow the Claimant's claim for VO 2 in its entirety.

VO 3

46 This item of claim is in relation to the "supply, delivery and installation of aluminium framed 2.33mm thick Z shape single bank louvre vent in a non-metallic/textures FLUOROCARBON COATED finish

including insect screen to drawing described but aluminium fabricator details" for the sum of $3,610. These works were accepted and confirmed by the Respondent on 8 September 2023, as exhibited at Tab E-7 of the Claimant's Adjudication Application submissions. The Claimant submitted that VO 3 has previously been certified in the Respondent's payment response dated 25 March 2004 as 100% complete. I note that the evidence adduced by the Claimant for this item fully substantiates its claim. As such, I allow the Claimant's claim for VO 3 in its entirety.

VO 4

47 This item of claim is for the "supply, delivery and installation of fixed aluminium screen insert using 100x30mm aluminium RHS with +-12mm hollow separator in WOODGRAIN finish laid vertically @ +-112mm c/c spacing onto GMS structure to design intent but to installer details (GMS structure by others)" for the sum of $5,301. The quotation for these works was accepted and confirmed by the Respondent on 13 February 2024, as exhibited at Tab E-46 of the Claimant's Adjudication Application submissions. The Claimant submitted that it has completed 100% of the variation works for VO 4. In support of its claim, the Claimant has adduced site photographs of the completed works for this item. Based on the evidence before me, I accept that the Claimant has, on a *prima facie* basis, proven its entitlement to this claim. Thus, I allow the Claimant's claim for VO 4 in full.

VO 5

48 This item of claim is for the "supply, delivery and installation of fixed aluminium panel insert using 3mm thk aluminium bended sheet (2-sides) in fluorocarbon finish onto mild steel gate to design intent but to installer details (GMS Gate by others)" for the sum of $1,105. The quotation for these variation works was accepted and confirmed by the Respondent on 23 February 2024, as exhibited at Tab E-53 of the Claimant's Adjudication Application submissions. The Claimant submitted that it has completed 100% of the variation works for VO 5. In support of its claim, the Claimant has adduced site photographs of the completed works for this item. Based on the evidence before me, I accept that the Claimant has, on a *prima facie* basis, proven its entitlement to this claim. Thus, I allow the Claimant's claim for VO 5 in full.

Adjudicated Amount

49 I note that the amount previously paid is not in dispute between the parties. In the premises, a breakdown of the figures leading up to the Adjudicated Amount is as follows:

S/N	Description	Adjudicated Amount
1	Original Subcontract Works done as per the Subcontract	S$165,000.00
2	Variation Works done as per the Claimant's quotation reference no [xxx] dated 8 January 2024 (VO 1)	S$1,896.00
3	Variation Works done as per the Claimant's quotation reference no [xxx] dated 9 January 2024 (VO 2)	NIL
4	Variation Works done as per the Claimant's quotation reference no [xxx] dated 8 September 2023 (VO 3)	S$3,610.00
5	Variation Works done as per the Claimant's quotation reference no [xxx] dated 6 February 2024 (VO 4)	S$5,301.00
6	Variation Works done as per the Claimant's quotation reference no [xxx] dated 22 February 2024 (VO 5)	S$1,105.00
	Total Revised / Adjusted Amount	S$176,912.00
	Less Payments Received	S$(113,092.94)
	Sub-Total	S$63,819.06
	Add 9% GST	S$5,743.72
	Adjudicated Amount	**S$69,562.78**

50 For the reasons cited above, I therefore determine that the sum of S$69,562.78 (inclusive of 9% GST), being the Adjudicated Amount, is payable by the Respondent to the Claimant in respect of the items in the payment claim that are the subject of this adjudication.

Due Date for Payment

51 Section 22(1) of the SOP Act provides that the Respondent shall pay the Adjudicated Amount within seven days after the date of service of this Adjudication Determination on the Respondent or by the date the adjudicated amount is determined to be payable by the adjudicator, whichever is the later.

52 As the later date for payment under s 22(1) would apply, I determine that this shall be the period within seven days after this Adjudication Determination is served on the Respondent. The last day of this seven-day period is hereby recorded as the Due Date for Payment.

Interest

53 There is no provision in the Contract providing for the payment of interest.

54 Under s 8(5) of the SOP Act, the interest payable would be at the higher of the rate under the contract, or the rate of 5.33% per annum as prescribed under the Supreme Court of Judicature Act 1969 (2020 Rev Ed).

55 Accordingly, I determine that the interest rate shall be 5.33% per annum. It shall run on the Adjudicated Amount from the Due Date for Payment until full payment.

Costs of adjudication

56 Given that the Claimant's claim has been largely successful, I order that the costs of the adjudication being the adjudication application fee of $654 (inclusive of 9% GST) and the adjudicator fee of $6,894.25 be borne 90% by the Respondent and 10% by the Claimant.

BIW Pte Ltd
v
BIX Pte Ltd

[2024] SGSOP 17

Singapore Mediation Centre — SOP AA 226 of 2024
Kishan Pillay
9 October 2024

Adjudication Application *— Evidential burden of proof — Adjudication response not including any submissions, supporting documents or reference to payment response — Whether claimant still bore burden of persuasion*

Payment Claim *— Assessment — Whether claimant had proven its claims for works on* prima facie *basis — Whether "pragmatic estimation" approach applicable*

Payment Claim *— Variation works — Assessment — Claimant claiming for various variation works — Assessing claimant's entitlement for variation works*

Payment Response *— Validity — Adjudication response not including any submissions, supporting documents or reference to payment response — Whether respondent could rely on payment response — Whether respondent could raise objections not included in payment response — Section 17(6) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 4(1), 8(5), 10(2), 11(1)(*b*), 12(6), 13(2), 15(1), 15(3), 16(1), 16(7), 17(4), 17(4)(*d*), 17(6), 17(6)(*a*), 17(6)(*b*), 17(6)(*c*)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) reg 5(1)(*a*)

Daniel Tay (Chan Neo LLP) for the claimant;
Harpal Singh Bajaj and Louis Lim (Louis Lim & Partners) for the respondent.

[Commentary: see para 5.10]

9 October 2024

Kishan Pillay:

1 This is an adjudication determination ("Adjudication Determination") made on 9 October 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act"), in respect of Adjudication Application No SOP/AA 226 of 2024 ("Adjudication Application"). SOP/AA 226 of 2024 is the reference number assigned by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant in this matter is [BIW] Pte Ltd ("Claimant"). The respondent in this matter is [BIX] Pte Ltd ("Respondent").

3 For the reasons set out below, I determine that:

(a) The Respondent shall pay to the Claimant the sum of $52,491.21 (including 9% goods and services tax ("GST")), which is hereby recorded as the adjudicated amount ("Adjudicated Amount").

(b) The date on which the Adjudicated Amount is due is seven days from the date that the Adjudication Determination is served on the Respondent ("Due Date").

(c) Interest shall be paid by the Respondent at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid as at the Due Date until the said is paid.

(d) The Claimant and the Respondent shall each bear 50% of the costs of the adjudication, such costs comprising the adjudication application fee of $654 (including 9% GST) and the adjudicator fee of $5,629.85 (including 9% GST).

Background

4 Pursuant to a quotation dated 24 November 2023 ("Quotation"), the Respondent engaged the Claimant to, *inter alia*, install aluminium frames and glass doors ("Subcontract Works") for the project described as "[xxx]".

5 The Quotation provides that the Claimant shall be paid the total sum of $552,193.50 (excluding GST) for the Subcontract Works ("Subcontract Sum"), which is calculated based on fixed unit rates for the various aspects of the Subcontract Works.

6 The Quotation, which was signed by both parties, contains a breakdown of the Subcontract Sum and a set of terms and conditions.

This comprises the entirety of the subcontract ("Subcontract") between the parties.

7 For completeness, I am satisfied, and I also understand that there is no dispute by either party, that the Subcontract is a construction contract made in writing within the meaning of ss 2 and 4(1) of the SOP Act.

Procedural history

8 The Subcontract does not provide for the date of service of a payment claim or payment response.

9 On 31 July 2024, the Claimant served on the Respondent its Payment Claim No 7 for the sum of $273,796.38 (excluding GST) ("PC 7"). The date of service of PC 7 was in accordance with s 10(2) of the SOP Act read with reg 5(1)(*a*) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations").

10 Pursuant to s 11(1)(*b*) of the SOP Act, the Respondent was required to serve a payment response to PC 7 by 15 August 2024 (taking into account the National Day public holiday on 9 August 2024).

11 On 6 August 2024, the Respondent sent to the Claimant its response to PC 7, in the form of a breakdown of the amounts that it considered to be payable to the Claimant ("PR 7"). In this document, the Respondent assessed an aggregate sum of $56,531.60 (excluding GST) as being payable to the Claimant.

12 The dispute settlement period under s 12(6) of the SOP Act expired on 22 August 2024.

13 On 29 August 2024, the Claimant sent to the Respondent a notice of intention to apply for adjudication pursuant to s 13(2) of the SOP Act.

14 On 29 August 2024, the Claimant lodged with SMC its Adjudication Application in respect of PC 7, claiming the sum of $99,437.29 (including 9% GST). The Adjudication Application includes the Claimant's written submissions and various supporting documents.

15 By an e-mail dated 30 August 2024, SMC invited me to be appointed as the adjudicator for this adjudication. On the same day, I accepted the appointment as adjudicator and sent to the SMC my signed statement of acceptance and declaration of impartiality and independence.

16 I am informed by the SMC that the Adjudication Application was served on the Respondent on 30 August 2024. In accordance with s 15(1) of the SOP Act, the Respondent was required to lodge with the SMC its response to the Adjudication Application within seven days after receipt of the Adjudication Application, *ie*, by 6 September 2024.

17 On 5 September 2024, the Respondent lodged with the SMC its response to the Adjudication Application ("Adjudication Response"). As the time of lodgment was after 4.30pm, the Adjudication Response was considered by the SMC to be lodged on 6 September 2024. The Adjudication Response comprises only the completed Adjudication Response Form AR-1, with no submissions or other supporting documents.

18 Pursuant to s 16(1) of the SOP Act, the present adjudication commenced immediately upon the expiry of the period within which the Respondent was required to lodge an adjudication response. The adjudication therefore commenced on 7 September 2024. Accordingly, subject to any extension agreed by the parties, the Adjudication Determination would be due on 21 September 2024.

Adjudication proceedings

19 By an e-mail dated 8 September 2024, I wrote to the parties to inform them of my decision to convene an adjudication conference over the Zoom platform on either 17 or 18 September 2024, and sought the parties' agreement to extend the due date for the Adjudication Determination to 27 September 2024.

20 Both parties replied to state their preference for the adjudication conference to be fixed on 18 September 2024, and further confirmed their agreement to extend the due date for the Adjudication Determination to 27 September 2024.

21 Accordingly, the adjudication conference was held on 18 September 2024 over the Zoom platform. Pursuant to s 16(7) of the SOP Act, I granted leave for both parties to be represented by additional representatives as follows:

(a) For the Claimant:

(i) Mr Daniel Tay (counsel);

(ii) Mr [A] (managing director); and

(iii) Ms [B] (quantity surveyor).

(b) For the Respondent:

(i) Mr Harpal Singh Bajaj (counsel);

(ii) Mr Louis Lim (counsel);

(iii) Ms [C] (trainee);

(iv) Mr [D] (intern); and

(v) Mr [E] (general manager).

22 At the end of the adjudication conference, I directed the Respondent to tender, by 4.00pm on 19 September 2024, the following documents that were referred to during the adjudication conference, but are not contained in either the Adjudication Application or Adjudication Response:

(a) e-mail chain concerning "VO 1", which includes the e-mail from the Respondent dated 25 March 2024;

(b) e-mail chain concerning "VO 2", which includes the e-mails from the Claimant and the Respondent dated 23 July 2024 and 31 July 2024 respectively; and

(c) spreadsheet containing the Respondent's response to the file "Grouting Qty.pdf" found in Tab 9 of the Adjudication Application.

23 The above direction was pursuant to both parties agreeing during the adjudication conference that I should consider the documents described at [22(a)] and [22(b)], as they are relevant to the dispute. As for the document described at [22(c)], this was a document prepared by the Respondent which the Claimant objected to. Nevertheless, I made it clear to the parties that I will duly consider the relevance of all of these new documents, and will take the same into account in my determination, insofar as no prejudice is caused to any party.

24 At the end of the adjudication conference, I also directed the parties to submit further written submissions by 4.00pm on 25 September 2024, limited to addressing the following:

(a) In the event that I am not persuaded that the Claimant has established a *prima facie* case in relation to the full amount of $183,949 claimed for the Subcontract Works (before taking into account payments already made), whether it is appropriate for me to apply the approach of "pragmatic estimation" as set out in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min Building Construction*") at [77] and [78].

(b) If the answer to the above is "yes", what is the appropriate quantum to be paid to the Claimant for the Subcontract Works based on the application of "pragmatic estimation"?

25 In view of the foregoing, the parties both confirmed their agreement for the due date for the Adjudication Determination to be extended to 9 October 2024.

Grounds of determination

26 In arriving at my determination, I have considered all the documents tendered by the parties. I also considered the oral submissions made by the parties at the adjudication conference. In the interest of saving time and

costs, I have not recorded in this Adjudication Determination each and every fact, argument, item of evidence or submission considered by me in arriving at my determination. I have set out below what I have considered to be the most salient of the points relevant to my determination.

Burden of proof in adjudication

27 I am aware that the burden of proof in an adjudication is the standard of persuasion of a *prima facie* case, as held by the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979:

> 57 What standard of satisfaction must be applied by the adjudicator? To be clear, this is a standard which applies regardless of whether a payment or adjudication response has been filed, because it is part of his core duty to adjudicate. There are at least three possibilities for this standard: (a) absence of patent errors in the payment claim and its supporting materials; (b) proof on a balance of probabilities that facts supporting the payment claim are made out; and (c) a *prima facie* case that the payment claim is supported by the facts. For the reasons below, we hold that the *prima facie* standard is the correct standard to be applied by the adjudicator.
>
> …
>
> 60 … an adjudicator looking only for patent errors may not proactively inquire whether the claim amount has been inflated. Yet, the adjudicator must determine whether the work for which payment is claimed has in fact been completed and is worth the amount claimed, nothing more and nothing less. To do so, he must address the material before him and be satisfied that it is sufficient to support the claim amount.
>
> …
>
> 62 … we consider that absence of patent error does not adequately or accurately capture the standard to which an adjudicator must be satisfied of the completion and the value of the work claimed. He must have a positive basis for that determination. On this note, we turn to explain why that basis needs only to be demonstrated on a *prima facie* standard, and not proved on a balance of probabilities.
>
> 63 In our view, there is no requirement for an adjudicator to be satisfied that the claimant has proved his claim on a balance of probabilities. Nothing in the existing authorities has ever suggested that to be the position, certainly not *W Y Steel*, which is the first local authority that attempts to examine what an adjudicator must substantively consider in adjudicating a payment claim dispute. More importantly, the adjudication process is intentionally 'somewhat roughshod' (*W Y Steel* at [22]) given that the resultant decision is intended to have only temporary finality, the path being open for the parties to resolve their dispute fully and finally through arbitration or litigation: see

> s 21(1)(*b*) of the Act. This is especially true where no payment or adjudication response has been filed, in which case the adjudicator must render his decision in just seven days instead of the usual 14: see s 17(1)(*a*) of the Act. That is why the Act, as Vinodh Coomaraswamy J recently observed in *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28, does not require the adjudicator to find, nor does it require the claimant to 'prove', the facts supporting the claim to be objectively true on a certain standard of 'proof', that exercise being 'within the exclusive province of the dispute-resolution tribunal which will resolve the parties' dispute with full finality' (at [32]). Coomaraswamy J employed the term 'standard of persuasion' to reflect more accurately the nature of the standard to which the adjudicator must be satisfied before he allows a claim (at [34]). We respectfully adopt this term for our analysis below.
>
> 64 Therefore, it is evident – considering that the adjudicator is not simply to look for patent errors but to identify a positive basis for the claim, and that he also does not have to assess proof on a balance of probabilities – that the scheme of the Act requires the adjudicator to be satisfied that the claimant has established at least a *prima facie* case for his claim …
>
> 65 In particular, the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of that work is as stated in the payment claim. Indeed, that is the essence of his duty under s 17(2)(*a*) of the Act to 'determine the adjudicated amount (if any) to be paid by the respondent to the claimant'. Therefore, to ensure that he discharges that duty, it is only sensible for the Act to require him to consider all the matters stated in s 17(3) in so far as those matters are properly before him. Accordingly, the content of the adjudicator's duty to adjudicate the claim is normatively rooted in and given substance by s 17(3) which both prescribes and restricts the substantive matters he is to consider.

28 In arriving at my determination, I was also guided by the principles set out by the Court of Appeal in *Far East Square v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [69], which may be summarised as follows:

> (a) An adjudicator is duty bound under s 17(4) of the SOP Act to consider the matters in the material properly before him, and this is separate and distinct from the respondent's obligation under s 15(3) of the SOP Act to raise all reasons for withholding payment in its payment response or be estopped from doing so.
>
> (b) An adjudicator has an *independent* duty to consider the true merits of the payment claim, and must satisfy himself as to whether the claimant has established a *prima facie* case in respect of its claims.

Preliminary issue

29 At the adjudication conference, a preliminary issue arose as to whether PR 7 constitutes a valid payment response. In this regard, the Claimant's counsel confirmed that PR 7 was "technically" a payment response, but argued that the Respondent's ability to rely on PR 7 is subject to what is contained in the Adjudication Response. As mentioned above, the Adjudication Response did not include any submissions or supporting documents.

30 I agree with the Claimant. Section 17(4)(*d*) of the SOP Act expressly states that an adjudicator may have regard to "the payment response to which the adjudication application relates". However, s 17(6) of the SOP Act also makes it clear that an adjudicator "must not consider an objection from the respondent of any nature that was not included in the adjudication response", save for the limited circumstances described in ss 17(6)(*a*) to 17(6)(*c*). Given that the Adjudication Response did not include any submissions, supporting documents or reference to PR 7, the Respondent's ability to rely on PR 7 is accordingly curtailed. Nevertheless, the Claimant still bears the burden of persuasion, and I ought to take into account any patent errors in determining the Claimant's claims.

Merits of the Claimant's claims

31 Turning to the merits of the Claimant's claims, I first set out below a breakdown of the Claimant's position:

Description	**(S$)**
Subcontract Works	183,949.00
Additional Works – Grouting (VO 1)	59,966.97
Additional Works – Installation of door accessories (VO 2)	6,280.00
Sub-total:	250,195.97
Less: Amount previously paid	(158,969.10)
Sub-total:	91,226.87
Add: 9% GST	8,210.42
Total	**99,437.29**

32 In PR 7:

(a) The Respondent assessed an amount of $192,985.75 (excluding GST) for the Subcontract Works. I note that this amount is higher than what the Claimant has presently claimed for the Subcontract Works.

(b) The Respondent provided no assessment (or any response whatsoever) in relation to the "Additional Works".

(c) The Respondent stated $136,454.15 as the amount previously paid to the Claimant. This, however, does not take into account a further payment of $22,514.95, and I understand that there is no dispute between the parties that the total amount previously paid to the Respondent is $158,969.10.

Subcontract Works

33 The Claimant accepts that it has not completed all of the Subcontract Works. The Claimant's claim of $183,949 (excluding GST) is instead based on the items of work that it had completed, as of 31 July 2024 being the date of PC 7.

34 The Claimant included in the Adjudication Application, a breakdown listing the villas for which it had performed installations, as well as photographs showing the completed works.

35 It was, however, noted that the photographs purportedly showing final completion were taken on 19 August 2024. There were also other photographs taken between 1 July and 25 July 2024 which showed that the installation works were still ongoing.

36 In my view, the photographs taken on 19 August 2024 do not assist the Claimant, as they do not represent the state of the Subcontract Works as of 31 July 2024 being the date of PC 7. On the other hand, the Respondent accepts that the Claimant had completed some of the Subcontract Works. In fact, as mentioned above, the amount assessed by the Respondent in PR 7 for the Subcontract Works is even higher than what the Claimant has claimed.

37 In their respective further submissions:

(a) The Claimant argued that in relation to the photographs taken before 31 July 2024, "the presence of such workers on site carrying out installation work would necessarily mean that the photographed works would have and were completed within 1 to 3 days of such photographs being taken as a matter of work flow". The Claimant also submitted that the approach of "pragmatic estimation" in *Jia Min Building Construction* ([24(a)] *supra*) is not applicable, as it is "logical" to conclude that all of the claimed works would have been completed as of the date of PC 7 on 31 July 2024.

(b) The Respondent submitted that based on the Claimant's photographs, significant portions of work were still pending as of 25 July 2024. The Respondent sought to distinguish *Jia Min Building*

Construction on the basis that there was at least some evidence before the court in that case, whereas the Claimant's present claim lacks sufficient evidence for "pragmatic estimation" to be applied.

38 In *Jia Min Building Construction*, V K Rajah JC (as he then was) held (at [78]) that there are situations where the court is satisfied that a real and substantial loss has occurred, but there are difficulties in arriving at the precise quantum of loss due to the reliability of conflicting evidence. In such a case, the court may adopt an approach of "pragmatic estimation" based on the available material.

39 This approach in *Jia Min Building Construction* has been applied in prior adjudications, including in *BAP Pte Ltd v BAQ Pte Ltd* [2019] SCAdjR 225 and *BCB Pte Ltd v BCC* [2019] SCAdjR 735.

40 Based on the available evidence, the Claimant has established that it is entitled to payment for some of the Subcontract Works. However, I reject the Claimant's suggestion for me to imply or infer that all of the claimed works were completed by 31 July 2024, as there is simply insufficient evidence for me to do so.

41 I also do not agree with the Respondent that no payment at all should be due to the Claimant. Moreover, the Respondent had itself assessed in PR 7 an amount for the Subcontract Works that was even higher than what the Claimant presently claims.

42 In the circumstances, I am of the view that it is reasonable for me to apply the approach of "pragmatic estimation" in relation to the Subcontract Works. In this regard, I consider that a 20% deduction should be applied to the Claimant's claim to take into account the gaps in the Claimant's evidence. As a result, I find that the Claimant is entitled to the sum of $147,159.20 (excluding GST) for the Subcontract Works.

Additional Works

43 The Additional Works comprise two claims for grouting (VO 1) and installation of door accessories (VO 2).

(1) VO 1 (grouting)

44 The Claimant claims the sum of $59,966.97 (excluding GST) under VO 1, for grouting works that it performed.

45 The Claimant's position is that grouting is not part of its scope of works, as indicated in section D of the Quotation:

Hacking/ ~~Grouting~~ & Making Good		1	Item		Excluded

The Claimant, however, explained at the adjudication conference that based on industry practice, it would perform grouting up to a width of 20mm, with any grouting above 20mm to be payable as a variation. This is consistent with an e-mail from the Claimant to the Respondent dated 25 March 2024 stating: "For grouting work, with the gap of 10mm, we will do the grouting. If the gap is more than 20mm, grouting work shall be by others."

46 The Respondent made the following arguments at the adjudication conference and in its further submissions:

(a) The Claimant is claiming for some of the grouting works that were actually performed by the Respondent.

(b) The rate of $70 per metre run claimed by the Claimant is exorbitant, as the materials were provided by the Respondent and "the manpower required to perform grouting can easily complete a metre in a matter of a few minutes".

47 I am unable to accept the Respondent's arguments, as they were not contained in PR 7 or in the Adjudication Response. In any case, I make the following observations:

(a) The Claimant sent to the Respondent a document dated 31 May 2024, which was a quotation for grouting works at the rate of $70 per metre run. Notwithstanding that this document was not signed and returned by the Respondent, it shows that the Respondent was given notice of the intended claim and there is no evidence of any dispute by the Respondent to the same.

(b) There are photographs showing grouting done at height for large glass panels, meaning that the grouting works were not as simple or straightforward as suggested by the Respondent.

(c) After the adjudication conference, the Respondent circulated a spreadsheet showing its calculated quantities for the grouting works performed by the Claimant. I am, however, unable to accept this document as it should have been included in the Adjudication Response, and it would be highly prejudicial to the Claimant if the Respondent is allowed to submit and rely on this new document at such a late stage of the proceedings.

48 In the circumstances, I find that the Claimant has established a *prima facie* case with respect to VO 1. The quantities claimed by the Claimant are supported by contemporaneous evidence and calculations. Accordingly, I determine that the Claimant is entitled to the sum of $59,966.97 (excluding GST) for this item.

(2) VO 2 (installation of door accessories)

49 The Claimant claims the sum of $6,280 (excluding GST) under VO 2, for the installation of door accessories.

50 There is no dispute between the parties that the installation of door accessories is not part of the Claimant's scope of works.

51 The Respondent's contention is that the door accessories were actually installed by the Respondent itself, and not by the Claimant. Hence, the Claimant is not entitled to be paid for these works. In this regard, the Respondent referred me to an e-mail that it sent to the Claimant on 31 July 2024 in response to this claim, stating that: "The swing door handle and sliding door lockset is installed by [the Respondent]."

52 For the same reason as for VO 1, I am unable to accept the Respondent's argument. The Respondent should have raised this objection in PR 7 and included supporting evidence in the Adjudication Response.

53 That said, I find that the Claimant has not discharged its burden of persuasion. In the Adjudication Application, the only supporting evidence for this claim is a handwritten table which purportedly shows the number of handles and locksets installed by the Claimant. However, the quantities set out in this table seem to be far lesser than what the Claimant has claimed. There is also no other evidence to support the claim, such as photographs of the Claimant's workers actually performing the works.

54 In the circumstances, I determine that the Claimant has not established a *prima facie* entitlement to the amount claimed, and there is accordingly no payment due to the Claimant for this item.

Conclusion

Adjudicated Amount

55 In conclusion, based on the foregoing reasons, I determine that the Claimant is entitled to the following amounts:

Description	(S$)
Subcontract Works	147,159.20
Additional Works – Grouting (VO 1)	59,966.97
Additional Works – Installation of door accessories (VO 2)	0
Sub-total:	207,126.17
Less: Amount previously paid	(158,969.10)
Sub-total:	48,157.07

Add: 9% GST	4,334.14
Total	**52,491.21**

56 I therefore determine that the Respondent shall pay to the Claimant the total sum of $52,491.21 (including 9% GST), which is hereby recorded as the Adjudicated Amount.

Due date for payment

57 I determine that the Adjudicated Amount shall be paid by the Respondent to the Claimant within seven days after the Adjudication Determination is served on the Respondent. This is hereby recorded as the Due Date.

Interest

58 Section 8(5) of the SOP Act provides that:

> (5) The interest payable on the unpaid amount of a progress payment that has become due and payable is at the higher of the following rates:
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract;
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969.

59 In this case, the Subcontract is silent as to the applicable interest rate for late payments.

60 Accordingly, I determine that the rate of interest shall be 5.33% per annum on any part of the Adjudicated Amount which remains unpaid as at the Due Date until the said is paid.

Costs of adjudication

61 As the Claimant has only partially succeeded on its substantive claims, I order that the Claimant and the Respondent shall each bear 50% of the costs of the adjudication, such costs comprising the adjudication application fee of $654. (including 9% GST) and the adjudicator fee of $5,629.85 (including 9% GST).

BIY Pte Ltd
v
BIZ Pte Ltd

[2024] SGSOP 18

Singapore Mediation Centre — SOP AA 228 of 2024
Eugene Seah
2 October 2024

Payment Claim *— Assessment — Whether claimant had proven its claims for works on* prima facie *basis — Method of valuation of demolition work — Whether work completed and worth value claimed*

Payment Claim *— Variation works — Assessment — Claimant claiming for various variation works — Assessing claimant's entitlement for variation works — Issue as to amount of markup*

Payment Response *— Due date for filing — Claimant submitting payment claim on 10 July 2024 — Parties' contract silent as to time for submission of payment claims — Whether payment claim deemed served on 31 July 2024 — Respondent's payment response served on 29 July 2024 — Whether payment response valid regardless of date of submission of payment claim — Section 10(2)(*a*)(ii) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Response *— No response given — Whether respondent precluded by s 15(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) from raising objections as it did not issue valid payment response — Whether respondent could point out patent errors in payment claim — Section 15(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 10(2)(*a*)(ii), 11(1), 11(1)(*b*), 12(4), 12(5), 15(1), 15(3), 16(1), 17(1), 17(1)(*b*), 17(3), 17(4)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) reg 5(1)

Cha Ming Hao and Nicole Lee (Harry Elias Partnership) for the claimant;
Respondent in person.

[Commentary: see paras 3.1 and 3.2]

2 October 2024

Eugene Seah:

1 This is a determination made on 2 October 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Application No 228 of 2024. This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the Act.

2 The claimant in this matter is [BIY] Pte Ltd (UEN No [xxx]), ("Claimant" or "[BIY]") and the respondent is [BIZ] Pte Ltd (UEN No [xxx]), ("Respondent").

3 For the reasons as enunciated hereinafter, I determine as follows:

(a) The Respondent shall pay to the Claimant the sum of $191,221.31 (*excluding* goods and services tax ("GST")). This is hereby recorded as the adjudicated amount of this determination ("Adjudicated Amount").

(b) The date on which the Adjudicated Amount becomes due would be seven days after this determination is served on the Respondent. This is hereby recorded as the due date for payment of the Adjudicated Amount ("Due Date for Payment").

(c) The rate of interest payable shall be 5.33% per annum on an annual basis from the expiry of the Due Date for Payment up to the date of full payment.

4 The costs of the adjudication being the adjudication application fee of $654 (inclusive of GST) shall be borne by the Claimant alone; and the adjudicator fee of $24,198 (inclusive of GST) shall be borne by the Claimant in the sum of $12,099 and by the Respondent in the sum of $12,099.

Record

Preamble

5 By a purchase order dated 28 March 2023 ("LOA") and issued by the Respondent, the Claimant was appointed by the Respondent to carry out the following contract, [xxx] ("Project").

6 The LOA was in response to the Claimant's quotation dated 24 March 2023 ("Quotation") which contained a breakdown of the costs of items of

work to be carried out by the Claimant for the Project with terms of payment as follows:

> 10% downpayment upon confirmation
>
> Balance by monthly progressive payment claim
>
> 5% retention up to defects liability period of 12 months from date of Issuance of certificate of substantial completion of the works

7 The contract sum as stated in the LOA was $2,069,050.

8 The Claimant on 10 July 2024 submitted Progress Claim No 12 ("PC 12") for a claim amount of $728,694.01 (excluding GST).

9 The LOA and the Quotation are silent with regard to the timeline for submission of payment claims. In this regard, pursuant to s 10(2)(a)(ii) of the SOP Act read with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations"), a payment claim shall be submitted at the end of the month following the month in which a contract was entered into.

10 Section 10(2)(a)(ii) of the SOP Act and reg 5(1) of the SOP Regulations respectively provide as follows:

> (2) A payment claim must be served —
>
> (*a*) not later than —
>
> (i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or
>
> (ii) *the date prescribed for the purpose of this subsection if the contract does not contain such terms*; and …
>
> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim must be served or by which such time may be determined, then a payment claim made under the contract must be *served by the last day of* —
>
> (*a*) *the month following the month in which the contract is made*; or
>
> (*b*) any subsequent month.
>
> [emphasis added]

11 From the above statutory provisions, it follows that given the absence of express provisions in the contract, PC 12 would be deemed to have been served on the last day of the month following the month in which the contract was made, namely, 31 July 2024.

12 Subsequent to its receipt of PC 12, the Respondent had on 29 July 2023 issued its Payment Response No 12 ("PR 12") which included a statement asserting that PC 12 was deemed to be served on 31 July 2024.

13 The Claimant in its e-mail dated 2 August 2024 responded with: "We note [the Respondent]'s position". In this regard, it is noted that the parties have divergent positions on whether PR 12 had been validly served by the Respondent. Pending my determination with regard to this issue hereinafter in this determination, I shall for the interim base the timeline on 31 July 2024 in respect of the payment response to PC 12.

14 Given the absence of express provisions in the contract, the timeline in respect of a payment response would be governed by s 11(1)(b) of the SOP Act which reads as follows:

> **11.**—(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (*b*) where the construction contract does not contain such provision, *within 14 days* after the payment claim is served under section 10.
>
> [emphasis added]

15 The due date for the payment response would accordingly be 14 days from 31 July 2024, namely, *15 August 2024*, taking into account a public holiday on 9 August 2024.

16 Following the payment response period would be the "dispute settlement period" ("DSP") provided under ss 12(5) and 12(6) of the SOP Act which read as follows:

> (5) During the dispute settlement period, in addition to any other action that the claimant or the respondent may take to settle the dispute —
>
> (*a*) the claimant or the respondent may seek clarification from the other party on any matter relating to the relevant payment claim; and
>
> (*b*) *the respondent may provide the claimant with a payment response where he had failed to do so under section 11(1)*, or vary the payment response provided under that section.

> (6) In this section, 'dispute settlement period', in relation to a payment claim dispute, means the period of 7 days after the date or the period within which the payment response is required to be provided under section 11(1).
>
> [emphasis added]

17 Based on the expiry date of 15 August 2024 for the payment response, the DSP would expire on *22 August 2024* being seven days from 15 August 2024.

18 The Claimant has contended that given that PC 12 was deemed to be served on 31 July 2024, the Respondent had failed to serve a valid payment response thereto as PR 12 that was issued by the Respondent on 29 uly 2024 was *before* 31 July 2024, the accepted and deemed date of submission of PC 12. It asserted that the Respondent had failed to provide a payment response by 15 August 2024 and by the end of the DSP on 22 August 2024.

19 Subsequent to the expiry of the DSP, would be the period of seven days within which the Claimant would be entitled to lodge an adjudication application. This entitlement period would end on *30 August 2024* in accordance with the clarification provided in *HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 wherein it was held that the day the entitlement to lodge an adjudication application first arises is excluded from the computation of the seven-day period, meaning that effectively there is a period of eight days from the DSP's expiry date of 22 August 2024.

20 The Claimant filed a notice of intention to apply for adjudication on 29 August 2024 and thereafter lodged this adjudication application ("AA") on the same day. On the basis that the timeline for the adjudication proceedings is premised on PC 12 being served on 31 July 2024, the AA has been lodged timeously within the statutory deadline of 30 August 2024.

21 SMC has since assigned this AA the reference number SOP/AA 228 of 2024.

Appointment of adjudicator

22 On 30 August 2024, SMC offered to appoint me as adjudicator for this case. I formally accepted the appointment on the same day.

23 The AA was served on the Respondent by SMC on 30 August 2024.

24 The timeline in respect of the filing of the adjudication response ("AR") by the Respondent is stipulated in s 15(1) of the Act which reads as follows:

> **15.**—(1) A Respondent shall, within 7 days after receipt of a copy of an adjudication application under section 13(4)(*a*), lodge with the authorised nominating body a response to the adjudication application.

25 Accordingly, the Respondent had to file its AR by 6 September 2024. It was duly lodged by the Respondent with SMC on *6 September 2024*.

26 With regard to the rendering of the determination, s 17(1) of the SOP Act provides as follows:

> **17.**—(1) An adjudicator must determine an adjudication application —
>
> (*a*) within 7 days after the commencement of the adjudication under section 16(1) or (2) (as the case may be) or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent, if the adjudication relates to a construction contract and the respondent —
>
> (i) has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication; or
>
> (ii) has failed to pay the response amount, which has been accepted by the Claimant, by the due date; or
>
> (*b*) in any other case, *within 14 days after the commencement of the adjudication under section 16(1) or (2) (as the case may be) or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent*.
>
> [emphasis added]

27 The commencement of adjudication proceedings is provided in s 16(1) of the SOP Act which reads as follows:

> **16.**—(1) An adjudication commences immediately upon the expiry of the period referred to in section 15(1) within which the respondent may lodge an adjudication response.

28 The adjudication proceedings would therefore commence on *7 September 2024* as the expiry date for the filing of the AR was 6 September 2024. Pursuant to s 17(1)(*b*) mentioned above, the due date for my determination would therefore be 20 September 2024 being 14 days from the commencement of the adjudication proceedings. However, given the filing of further submissions as directed by me the date of rendering of the determination has been extended by consent to *2 October 2024*.

Adjudication conference

29 The adjudication conference was convened on Monday 16 September 2024 at 2.30pm. The Claimant was represented by the following:

(a) Mr Chua Ming Hao: counsel;

(b) Ms Nicole Lee: counsel;

(c) Mr [A]: director;

(d) Ms [B]: director; and

(e) Mr [C]: structural engineer.

30 The Respondent was represented by the following:

(a) Mr [D]: director;

(b) Mr [E]: project director;

(c) Mr [F]: advisor;

(d) Ms [G]: structural engineer; and

(e) Ms [H]: quantity surveyor.

Claimant's case

31 The Claimant in this AA is claiming for a sum of $392,609.13 (excluding GST) instead of the sum of $728,694.01 claimed under its PC 12. The claimed amount covers the following two disputed items:

(a) value of work done; and

(b) variations.

32 The Claimant has asserted that the Respondent had failed to serve a payment response on the basis that PR 12 which was served by the Respondent on 29 July 2024 was invalid given that PC 12 was deemed to be served on 31 July 2024.

33 The Claimant submitted that the back charges imposed by the Respondent are invalid as the Respondent had not issued a valid payment response to PC 12 and hence not entitled to make a claim for these back charges in the present adjudication proceedings. It asserted that these are objections which ought to be set out in a payment response but which the Respondent failed to do. It further submitted that the Respondent is precluded by reason of s 17(3) of the SOP Act from considering the back charges; and that the Respondent has failed to provide justification and/or substantiation for the back charges.

34 The Claimant contended that the threshold standard for payment claims is a *prima facie* case that a claimant is entitled to payment in respect of the construction work carried out on the Project, and that an adjudicator's duty under the SOP Act is to be satisfied that the construction work under the claimed amount has been carried out and the value of that work is worth the amount claimed.

Respondent's case

35 The Respondent has contended that the Claimant had not accepted the Respondent's position that PC 12 was deemed to be served on 31 July 2024 and hence the timeline for its PR 12 was indeterminate and therefore had been validly served; and submitted that the date of 29 July 2024 for PR 12 was operative in that it could be considered as being served after the deemed date of submission of PC 12.

36 The Respondent mounted the alternative argument that given that PC 12 was submitted on 10 July 2024, the date of lodgment of the AA on 29 August 2024 would mean it had been lodged out of time.

37 The Respondent has also disputed the Claimant's claimed amounts for work done and values of the variations, and asserted that the back charges it is imposing on the Claimant are justified.

Findings and determination

38 In view of the limited time frame allowed for the rendering of an adjudication determination pursuant to the SOP Act, I have not recorded each and every fact and argument presented by the parties and duly considered by me in arriving at my determination. Nonetheless, the present record represents a succinct but sufficient reflection of the substance of the respective cases as contended by the parties and the principal issues for my determination. It must not be assumed nor does it follow that any evidence or argument which has not been specifically recorded herein has not been duly considered by me in arriving at my determination.

Preliminary issues

39 The Claimant has taken the position that the Respondent has failed to serve a valid payment response. The law that relates to this commonly encountered issue in adjudication proceedings is somewhat banal.

Absence of payment response

40 It is trite that the failure of a respondent to issue a payment response would mean that it would be precluded from including reasons in an

adjudication response for withholding or not paying the claimed amount unless the reasons had earlier been provided in the relevant payment response. The statutory provisions in respect of a failure to provide a payment response are contained in the much-cited s 15(3) of the SOP Act, which reads as follows:

> (3) Subject to subsection (4), 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 This is an area that has been ardently argued and the principles well explicated in adjudication proceedings. While submissions would abound in respect of the need to disregard any objection that had not been raised earlier in the relevant payment response, I would like to mention a few pertinent points and in this regard would like to quote [51] and [52] of the judgment provided in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") which read as follows:

> 51 With respect we do not think this is correct. In our judgement, under s 17(3) of the Act, *even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material that is properly before him and which he is permitted, and indeed, obliged to consider*. In such circumstances, there is nothing to stop a respondent who has failed to file any payment response or adjudication response from raising *patent errors* on the face of the *material properly before the adjudicator* to contend that the payment claim should not be allowed in part or at all. We reiterate that such errors must be plain and evident on the face of the material that is properly before the adjudicator.
>
> 52 In our judgment, an adjudicator is bound to consider the payment claim before him and *cannot make his determination as if the fact that the respondent has not filed a response obviates the need for him to consider the material properly before him*. The adjudication does not become a mere formality. *The adjudicator is obliged to adjudicate, and in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner …*
>
> [emphasis added]

42 An adjudicator should not merely "rubber stamp" a claimed amount and he must not make his determination as if the fact that the respondent's failure to provide a payment response obviates the need for him to duly

consider the *material which is properly before him* and to *make an independent and impartial determination*.

43 Undeniably, the failure of a respondent to provide a payment response does not automatically entitle a claimant to whatever amount it is claiming; and that an adjudicator must consider all submissions that are properly presented before him. In this regard, the judgment in *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [35] is instructive. At [35], it was held as follows:

> With due respect, Kingsford's counsel had misunderstood *W Y Steel*. It is true that the Court of Appeal directed that the adjudicator should not approve the claimant's payment claim as a mere formality or rubber stamp the claim in situations where there is no payment response. However, in doing so, the Court of Appeal did not say that the adjudicator had to act as though the payment response was present. Rather, the *adjudicator was entitled to look only at the materials properly before him and make his determination based on such materials.* This excludes the payment response, since it had not been filed by the respondent and therefore was not properly before the adjudicator. However, *the respondent was still entitled to make arguments based on the materials which were before the adjudicator and point out 'patent errors' on the face of the materials*. For instance, if the documentary evidence submitted by the claimant plainly contradicted its claimed amount, the respondent would be entitled to point that out to the adjudicator. Indeed, this accords with the plain and simple meaning of 'patent' under the *Oxford Dictionary* which refers to something that is 'easily recognisable' or 'obvious'. Hence, the adjudicators in this case had to spot *obvious and clear-cut errors* in the payment claims. [emphasis added]

44 While a respondent will invariably mount the argument that the absence of a payment response does not mean rubber stamping a payment claim, it also does not mean that an adjudicator must act as if a payment response is present. The only recourse a respondent has is to point out patent errors.

45 Furthermore, with regard to jurisdictional objections, we must also take guidance from the Court of Appeal's holding in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi*") at [66] which reads as follows:

> Both questions, in our judgment, may be answered by reference to the legal context of the issue, in particular, to s 15(3)(*a*) of the Act. By that provision, the *Act restricts the issues which can be raised before an adjudicator to the issues stated in the payment response* provided by the respondent to the claimant. *It follows that if a respondent wants to raise a jurisdictional objection before the adjudicator*, ***he must include that objection in the payment response***. [emphasis added]

46 The Court of Appeal further held at [71] of *Audi* as follows:

> In the present case, the respondent failed to file a payment response. Applying the principles above, this *constituted an unequivocal representation that he would not raise any objection to the payment claim, whether as to jurisdiction or as to the merits*. The appellant relied on that representation by omitting to re-file a payment claim. When the matter came before the adjudicator, the respondent objected to the validity of the service of the payment claim. *In our judgment, it was by that time estopped from raising that objection, just as it was estopped from raising it in the High Court and before us*. [emphasis added]

47 It is pertinent at this juncture to make mention of s 17(4) of the SOP Act, which reads as follows:

> (4) Subject to subsection (5), in determining an adjudication application, an adjudicator may only have regard to the following matters:
>
> (*a*) the provisions of this Act;
>
> (*b*) the provisions of the contract to which the adjudication application relates;
>
> (*c*) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
>
> (*d*) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
>
> (*e*) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates;
>
> (*f*) the report of any expert appointed to inquire on specific issues;
>
> (*g*) *the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication;*
>
> (*h*) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.
>
> [emphasis added]

48 Pursuant to s 17(4) of the SOP Act an adjudicator shall have regard to various matters provided under the said section; and this must include the submission and responses of the parties to the adjudication. However, this must not include any objections or responses to the payment claim whether as to jurisdiction or as to the merit, unless these had been raised earlier in the relevant payment response. Section 17(4) mandates the various matters that

must be considered by an adjudicator; it does not diminish but rather complements the effect of s 15(3) of the SOP Act.

Patent errors

49 It would be pertinent at this juncture for me to address the point on *patent errors*. The genesis of the term *patent error* came from *W Y Steel* ([41] *supra*) when it was first mentioned and expounded in *W Y Steel* at [51]. The presence of patent errors if any does not alter the principle that a respondent cannot raise reasons in an adjudication response that were not provided earlier in the relevant payment response. Patent errors are not meant to entitle a respondent to raise reasons to reject a payment claim or to withhold payments to a claimant but to ensure that an adjudicator does not "rubber stamp" any claimed amount under a payment claim by considering the patent errors as part of the material that is properly before him.

50 Patent errors are intended to be applied in situations where there was no payment response, and arguments on "patent errors" that are canvassed by a party must therefore be considered in this context.

51 Patent errors are defined in s 2 of the SOP Act as "in relation to a payment claim, means an error that is obvious, manifest or otherwise easily recognisable on the face of the claim", and succinctly stated in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [23] as follows:

> An example of a patent error might be where *the contract adduced by the claimant in support of the payment claim is not even the contract between the parties*. Another example, illustrated by Tan Siong Thye J in *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 at [35], is where 'the documentary evidence submitted by the claimant plainly contradict[s] the claimed amount'. Yet another example might be where no supporting material or explanation whatsoever is adduced to support the payment claim. While in principle these are not exhaustive examples of patent error, it is difficult to conceive of other forms of error that may properly be regarded as patent. Ultimately, whether an error is properly characterised as patent will depend on the facts. But the point to be made here is that *patent errors constitute by definition an exceptional and extremely narrow category of errors*. [emphasis added]

52 Patent errors are meant solely to ensure that there is no unfettered adoption of a claimant's claimed amount and that they do not diminish the fact that reasons for the withholding of money or non-payment would not be considered by an adjudicator unless the reasons had been provided earlier in the relevant payment response.

53 It is apt for me to point out that disputes in claims such as incorrect methods of valuation of work done or the adoption of a different method of valuation of variations do not fall within the definition of patent errors as propounded in *W Y Steel*. It is a common phenomenon in construction contracts that a claimant would base his claim on his own method of assessment and if a respondent thinks otherwise or proposes a different methodology, there cannot be any accusation of patent errors being committed by the claimant. It remains only for the respondent either to reject the claim or to value the work with the best or appropriate method and make payment accordingly. Differences in assessment do not constitute a patent error and any incorrect inclusion of certain work is never a patent error in payment claims. Such differences occur routinely if not inevitably in payment claims and if these are considered patent errors then the whole system of payments in construction contract would fall asunder.

54 Therefore the raising of patent errors would apply only to those as defined in s 2 of the SOP Act and in accordance with holdings in *Comfort Management*.

Whether Respondent by way of its PR 12 dated 29 July 2024 has served valid payment response

55 The Claimant has argued that PR 12 was defective and therefore there was no valid payment response from the Respondent. In support of this contention, it cited *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd* [2024] 4 SLR 940 ("*Hiap Seng*") at [23] in which the court held that the payment response of 29 July *2023* predated the payment claim's deemed service date of 31 July *2023* and hence was defective.

56 Conversely, the Respondent has canvassed the argument that the Claimant had not explicitly accepted the Respondent's point contained in its e-mail of 29 July 2024 that PC 12 should be deemed served on 31 July 2024 and is therefore barred from challenging the validity of PR 12.

57 The Respondent citing holdings from *Hiap Seng* has contended that the Claimant had a duty to speak on the effective date of submission of PC 12 after it had received the Respondent's e-mail of 29 July 2023 containing the point on deemed service date for PC 12.

58 The Respondent submits that given the failure of the Claimant to communicate unequivocally its agreement on the effective date of the submission of PC 12, it was no longer open to the Claimant to commence adjudication on the basis that PC 12 is deemed to be served on 31 July 2024 and that the service of PR 12 on 29 July 2024 as a result was invalid. The Respondent contends that the Claimant's failure to raise any objection to PR 12 but instead allowed the deadline of 22 August 2024 by which the

Respondent had to properly submit a payment response to lapse is prejudicial and injurious to the Respondent; and that therefore the Claimant should not be allowed to subsequently raise objection to the validity of PR 12 purely on technical grounds.

59 The Claimant has countered with the argument that the Respondent has wrongly characterised its position as one challenging its own PR 12; and takes the position that PR 12 is invalid given that it was not submitted within the time frame provided under the statutory provisions of the SOP Act and SOP Regulations, and that the issue of any defective payment response would go towards an adjudicator's substantive jurisdiction (power to review PR 12) but with his threshold jurisdiction (power to hear the adjudication application) remaining intact.

60 The Claimant further submitted that parts of the holdings in *Hiap Seng* cited by the Respondent had no bearing on the present case given that the Claimant is not challenging the validity of its own PC 12 but rather relying on it to show that the PR 12 had been defective, and that hence the duty to speak is inconsequential.

Finding

61 Having considered parties' arguments, I am not inclined to accept the Respondent's position.

62 The first point of contention is the Claimant's response of "[w]e note [the Respondent]'s position" in its e-mail dated 2 August 2024 against which the Respondent has taken the position that the Claimant had not accepted that the service date of PC 12 was deemed to be 31 July 2024.

63 While I do not dispute that the word "note" does not signify acceptance or agreement, I must point out that the Respondent had clearly asserted in its e-mail of 29 July 2024 that PC 12 was deemed to be served on 31 July 2024 without any qualification or conditions. There is no ambivalence whatsoever in its assertion that "Your PC 12 is deemed to be served on us on 31 July 2024", followed by the sentence that states that the WhatsApp message of 12 September 2023 (in which Respondent had instructed that payment claims were to be submitted on the 10th of each month) did not form part of the contract and instructing the Claimant to refrain from relying on it. It is incontrovertibly clear that the Respondent had treated PC 12 as having been submitted on 31 July 2024. While the Claimant could be viewed as not having accepted the deemed date of 31 July 2024, the fact that the Respondent had itself rescinded the date of 10th of every month for payment claims and adopting 31 July 2024 can only mean that the date of 31 July 2024 has prevailed and assumed legal effect.

64 It is therefore disingenuous of the Respondent to now canvass the argument that the Claimant had a duty to speak against the invalid PR 12 and the effective date for the service of PC 12, and that the Claimant had to decide whether the base date should be 10 July 2024 or 31 July 2024.

65 The Claimant has already taken the position that based on the submission date on 31 July 2024, PR 12 that was issued on 29 July 2024 had pre-dated PC 12 and was therefore invalid, and the outcome is that there was no payment response from the Respondent.

66 In my view, the Respondent, following its receipt of the Claimant's e-mail of 2 August 2024, should have responded with a revised PR 12 to take into account that PC 12 was "submitted" on 31 July 2024. It did not do so and is therefore not entitled to now claim that the Claimant had failed to speak against it. The failure by the Respondent to clarify its position with the Claimant or to pre-empt any wrongful date of submission of PR 12 can only mean that the date of 31 July 2024 had been accepted by both parties.

67 The timeline is clear and I do not see the relevance of the Respondent's point that the Claimant had not accepted the deemed date of 31 July 2024 for the submission of PC 12. Even if the submission date of PC 12 were to be based on 10 July 2024, PR 12 was still out of time as it was not issued by the 14-day deadline of 24 July 2024 but on 29 July 2024 instead. In both cases, PR 12 was out of time and even if the Claimant is obligated to speak against the dates, it would not alter the fact that PR 12 had not been validly served by the Respondent.

68 It is apt to point out that in *Hiap Seng* ([55] *supra*) the applicant (main contractor/respondent in the adjudication proceedings) was applying to set aside the adjudication determination by arguing that its very own payment response was defective and invalid. The present case could be distinguished from *Hiap Seng* in that the Claimant is submitting that the Respondent has failed to issue a valid payment response and not challenging its own PC 12. While the court found that the payment response in *Hiap Seng* was defective, it also held that the applicant was barred from challenging the adjudication determination in question with the argument that its own payment response was invalid.

69 The holding in *Hiap Seng* at [31] as shown below is pertinent:

> Similarly, the Payment Response which did not satisfy s 11(1)(*b*) of the SOPA would amount to an invalid payment response, but one which still fell within the scope of the SOPA. This procedural defect would only go towards the Adjudicator's substantive jurisdiction, with his threshold jurisdiction still intact. That being the case, even though I disagreed with the Adjudicator's reasoning on the validity of the Payment Response, *the estoppel doctrine could still operate to prevent the applicant from making submissions on the defects of the Payment Response.* [emphasis added]

70 The issue before me is not on the Respondent challenging and arguing that its own payment response is defective but on whether the date of submission of PC 12 has been unequivocally established, and it turns not on whether the Claimant has accepted the date of 31 July 2024 but rather on whether the timeline adopted will render PR 12 invalid, and for both dates (10 July 2024 and 31 July 2024) it is clearly demonstrated that PR 12 was issued out of time and this amounted to a failure by the Respondent to issue a valid payment response.

71 In any event, even if the Claimant has not accepted the base date of 31 July 2024 or that the Respondent had not raised the point on the deemed submission date in its e-mail of 29 July 2024, the statutory provisions of the SOP Act and SOP Regulations would nonetheless dictate that this deemed date would prevail for the purpose of working out the timeline for payment response and adjudication applications. The relevant provisions are as provided in reg 5(1) of the SOP Regulations reproduced as follows:

> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim must be served or by which such time may be determined, then a payment claim made under the contract must be served by the *last day of* —
>
> (*a*) *the month following the month in which the contract is made*; or
>
> (*b*) any subsequent month.
>
> [emphasis added]

72 Hence the date of 31 July 2024 will take precedence regardless of whether it has been noted or accepted by the Claimant. The question of whether the Claimant has to speak against the date of submission of PC 12 and the validity of PR 12 has no relevance whatsoever as the date of 31 July 2024 is intrinsic in the timeline. Further, the Claimant is not challenging the validity of its own PC 12, but simply taking the position that PR 12 has been lodged out of time (pre-dated) based on the date of 31 July 2024. Even if the parties had agreed on the base date of 10 July 2024, it would have been nullified by the provisions of the SOP Act and SOP Regulations and any timeline for payment response based on this date of 10 July 2024 would be bereft of legal force.

73 I am also unable to accept the Respondent's argument that the issuance of its PR 12 on 29 July 2024 was meant to be operative and to be treated as being served after 31 July 2024. No evidence has been adduced by the Respondent in terms of statutory provisions or legal authorities to support its contention that PR 12 could be construed as having been served *before* the date of submission of a payment claim. The timeline in respect of payment claims and payment responses is enshrined in the SOP Act and

SOP Regulations. To allow the timeline for a payment response to shift according to a *subsequently established* date of payment claim would give rise to an untenable situation where regardless of the date of submission of payment claims, a payment response would remain as being validly served. The Respondent's argument to have a payment response that was served *before* a payment claim was submitted deemed to have been served *after* the date of payment claim is clearly unsustainable.

74 For the reasons enunciated above, I hold that the date of submission of PC 12 is 31 July 2024 and that PR 12 had been invalidly served.

75 I therefore dismiss the Respondent's challenge on the validity of PR 12.

Whether AA was lodged out of time

76 The Respondent has latched on to the issue regarding the date of submission of PC 12 and asserted that the AA had been lodged out of time by the Claimant.

77 The Respondent submits that the Claimant itself had relied on an e-mail from the Respondent's former quantity surveyor who directed the Claimant to submit payment claims on the 10th of every month and to allow 14 days for the valuation and certification; and argued that based on the date of 10 July 2024 (the date PC 12 was submitted), the last day for the Claimant to lodge an adjudication application would be 8 August 2024.

78 The Respondent contends that given the abovementioned deadline and that the AA was lodged on 29 August 2024, the AA was out of time.

Finding

79 I am unable to agree with the Respondent's proposition that the AA has been lodged out of time by the Claimant.

80 After arguing fervently that the Claimant provided an indecisive "[w]e note [the Respondent]'s position" rejoinder and that it had a duty to speak on the dates for submission of PC 12 and PR 12, the Respondent has now disingenuously canvassed the position that the AA had been lodged out of time. It has already taken the position that the date of submission of PC 12 was indeterminate by virtue of the Claimant's *noting* only and not accepting the deemed date of 31 July 2024 and that therefore the validity of PR 12 could not be scrutinised further. Having taken the position that the date of submission for PC 12 has not been established, there is no basis whatsoever for the Respondent to adopt the date of 10 July 2024.

81 I have found hereinabove in my determination that the date of 31 July 2024 must prevail and this is on two counts – the Respondent's own

admission in its e-mail of 29 July 2024 and the statutory provisions of the SOP Act and SOP Regulations. The date of 10 July 2024 inescapably is incapable of consideration.

82 Hence, on the basis of 31 July 2024, the lodgment of the AA by the Claimant on 29 August 2024 was within the statutory timeline provided under the SOP Act.

83 I therefore dismiss any notion that the AA was lodged out of time.

Merits of payment claim

84 It would be apposite for me to state that it is settled law that a claimant is entitled to payment of its claimed amount as long as a *prima facie* case is established. In the absence of a valid payment response and where no patent errors had been established, an adjudicator is to determine whether a claimant has established a *prima facie* case based on the evidence and material that is properly before him.

85 In *Comfort Management* ([51] *supra*) at [34], the Court of Appeal held as follows:

> Our view is that notwithstanding s 15(3), and *regardless of whether any payment response has been filed*, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be satisfied that the claimant has established a *prima facie* case that *the construction work that is the subject of his claim has been* ***completed*** *and that the* ***value*** *of that work is as stated in the payment claim*. [emphasis added]

86 In *Comfort Management* at [60] it was held that:

> Yet, the adjudicator must determine whether the work for which payment is claimed has in fact been *completed* and is *worth the amount claimed*, nothing more and nothing less. To do so, he must address the material before him and be satisfied that it is sufficient to support the claimed amount. [emphasis added]

87 The above point was reiterated at [65], which reads as follows:

> In particular, the adjudicator must be satisfied that the claimant has established a *prima facie* case that the construction work that is the subject of his claim has been carried out and, if so, the value of the work is as stated in the payment claim. Indeed that is the essence of his duty under s 17(2)(*a*) of the Act to 'determine the adjudicated amount (if any) to be paid by the respondent to the claimant'. Therefore to ensure that he discharges that duty, it is only sensible for the Act to require him to consider all the matters stated in s 17(3) [now s 17(4)] in so far as those matters are properly before him. Accordingly the content of the adjudicator's duty to adjudicate the claim is

normatively rooted in and given substance by s 17(3) (now s 17(4)) which both prescribes and restricts the substantive matters he is to consider.

88 An adjudicator must be satisfied that the sums claimed in a payment claim have been properly accounted for and justified based on the material that is properly before him pursuant to s 17(4) of the SOP Act, and in turn that work had been completed and worth the value claimed.

89 It is pertinent for me to point out that it is not the duty of an adjudicator to delve into the veracity or correctness of each claimed amount. Neither is he bound to provide an independent valuation of the claimed amounts or to determine an accurate rate to be applied. It suffices for him to provide an opinion as to whether the amounts claimed are a fair and reasonable representation of the work that had been completed.

90 It is well recognised that a determination by an adjudicator is accorded only interim finality and the cardinal rule is for him to provide the necessary resolution based on a fast and low-cost judicial process. The adjudicated sums as determined by me are therefore not final and conclusive and should eventually be adjusted by the parties if necessary in the finalisation of accounts on completion

91 The Claimant is claiming for a sum of $390,947.93 (excluding GST) which is made up of two items of dispute as shown in the tabulation below:

S/N	Description	Amount claimed	Amount paid to date	Amount claimed in AA
1	Value of work done	$1,267,849.83	$1,108,936.88	$158,912.95
2	Variation	$867,190.77	$635,155.79	$232,034.98
			Total	$390,947.91

92 The Claimant has in addition disputed the Respondent's imposition of back charges amounting to $75,956.

Value of work done

93 The dispute centres on two items of work, namely, demolition and concrete work.

94 I must at the outset reiterate the point that the Respondent had failed to issue a valid payment response and pursuant to s 15(3) of the SOP Act I am precluded from considering any submissions lodged by the Respondent in its AR and in the proceedings before me. Nonetheless it is incumbent upon me to consider the material that is properly before me as set out in s 17(4) of the SOP Act, in particular the following provision:

(*g*) submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; …

95 My determinations and findings provided hereinafter shall therefore be reliant mainly on submissions and evidence presented by the Claimant and materials that are properly before me.

Demolition

96 The claim by the Claimant comprises demolition work to the following areas:

(a) [xxx] Executive Lounge covering demolition of waterproofing, mesh reinforcement, floor finishes, existing partitions, joinery works, ceilings and other works;

(b) [xxB]: removal of existing catwalk and steelwork at existing kitchen; and

(c) [xxA]: demolition of kitchen platform, reinforced concrete ("RC") beam at lift and catwalk at kitchen platform.

97 The claimed amount is $150,592.93 which represents the difference between the sum claimed by the Claimant and the sum assessed by the Respondent.

98 The Respondent has submitted that the claim for demolition work was inaccurate on the basis that the claimed amounts were excessive due to double claims and that no work was carried out by the Claimant for certain parts of the work.

99 The dispute turns on the method of valuation with the Claimant relying on manpower deployment and time records, and the Respondent on areas based on markup drawings.

100 In my view, both methods are equally appropriate and applicable. Valuation of demolition work is never a straightforward process in construction contracts, and in the absence of detailed pricing for each and every item of demolition work as would be the case for a full bill of quantities any method that can represent work that has been carried out would suffice. These are progress claims which are merely approximate payments that go towards providing a contractor the requisite cash flow during the construction stage, with ultimately the full lump sum priced for the demolition work being paid when all demolition work is completed. Hence, as long as the method of assessment can provide a form of interim payment to a contractor, parties should not be unduly concerned about it. In the present case, the Claimant has asserted it is claiming less than 100%

of the demolition work which would mean that there would be no unwarranted overpayment of the sum for demolition to the Claimant.

101 While I take cognisance of the Respondent's contention that there were double claims and that some work was not carried out, I must reiterate that I am bound by s 15(3) of the SOP Act and would have to ignore the Respondent's submissions.

102 Nevertheless, while I am inclined to allow the claim, I would impute a discount of 5% to the claimed amount to take into account any errors or discrepancies in the quantities or any incorrect inclusion of work done.

103 In construction contracts, it is well recognised that there is a mechanism for finalisation of accounts and this would resolve any discrepancies in the measurement of quantities for work done.

104 The sum payable to the Claimant would therefore be $150,592.93 x 95% = $143,063.28.

105 Accordingly, I determine the sum for demolition work at $143,063.28.

Concrete work: supply and installation lightweight concrete topping

106 The Respondent has since accepted the Claimant's claim for the sum of $8,320.

107 In view of this, I shall delve no further into this item of claim and my determination thereof will be $8,320.

108 The total for "Value of Work Done" will therefore be $143,063.28 + $8,320.00 = $151,383.28.

Whether work is completed and worth the value claimed

109 On the evidence before me, work can be treated as being completed as the dispute is on method of valuation.

110 As for the value, I have duly provided my determinations in respect of the disputed amount and coupled with the accepted amount they would both represent the worth for the work in question.

111 I am therefore satisfied that a *prima facie* case has been established in terms of completion of the works and worth of the claim as promulgated under *Comfort Management* ([51] *supra*).

112 Accordingly, I determine the sum for "Value of Work Done" at $151,383.28.

Variations

Mark up on variations

113 Several variation claims turn on the issue of the markup – whether it should be 10% or 15%.

114 It is undisputed that the contract is silent in respect of this issue. While the Claimant had on certain variations accepted 10% this does not diminish the fact the contract does not provide expressly for a specific figure; and as the Respondent itself had asserted that the 15% it had allowed earlier is not binding, the figure of 10% would by the same token be not binding on the Claimant.

115 Significantly, given that the Respondent had failed to issue a payment response I have no alternative but to disregards its submission in this respect. While it had alluded to its objections in previous correspondence or payment response, this would not assist the Respondent's case as the law is clear that a payment response must be in response to a relevant payment claim as provided in s 11(1) of the SOP Act which reads as follows:

> **11.**—(1) A respondent named in a payment claim served in relation to a construction contract *must respond to* ***the*** *payment claim* by providing, or causing to be provided, a payment response to the claimant … [emphasis added in italics and bold italics]

116 The payment response must be in response to *the* payment claim, namely, PC 12, and hence any response or rejections provided in earlier payment responses would not count as a proper payment response.

117 In this case, I have held hereinabove in this determination that the Respondent has not provided a payment response to PC 12 and hence I have to disregard the reasons now put forth by the Respondent.

118 While I note that there were occasions in which 10% was adopted and accepted, in my opinion the figure of 15% is not unreasonable or exorbitant given that it has been routinely accepted and adopted in construction contracts, and is supported by the fact that the Public Sector Standard Conditions of Contract for Construction Works 2020 incorporate a similar figure in the contract form, which in my view provides an authoritative reference.

119 Accordingly, I will allow 15% for the markup as claimed by the Claimant.

120 I shall confine my determinations hereinbelow to variations that are in dispute in terms of entitlement or quantum. Claims that have been accepted by the Respondent and those related to the question of markup will not be addressed but will be summarised hereinafter in this determination.

VO 1B

(1) Items 4.4.1–4.4.3

121 This is a claim for additional structural steelwork for which the Claimant has applied a star rate of $9 per kg. The Respondent has contended that the nature of the variation work is no different from the original work and that the contract rates should be adopted.

122 Having looked at the evidence in particular "Lift 16 Photos" it does appear that the additional structural steelwork entailed a more difficult method of carrying out the work. However, no evidence has been adduced by the Claimant to demonstrate that the contract rates of $8.50 per kg for solid sections and $8 per kg for others apply only to the normal method of construction of structural steelwork and that these contract rates do not apply for work that is seemingly carried out under different conditions. The following is an extract from the Claimant's Quotation for structural steelwork.

S/N	DESCRIPTION
1	Supply and install structural steel members for columns and beams, including all necessary connections, plates, welding, surface treatment and the like

123 From the above, I would construe that the rate would apply to all structural steelwork regardless of the working conditions. No qualification or differentiation has been stated that a different rate would apply when work is carried out under more difficult conditions. Admittedly contracts between main contractors and subcontractors routinely lack clarity and definitive terms and unfortunately this is how the industry works, but in the absence of express provisions, there is no justification for me to disregard the contract rate and apply a different rate.

124 By the same token, it would also mean that if the work is less difficult than envisaged, a lower rate would apply. Hence, the contract provisions must be clear with regard to the use of contract rates and terms thereof clearly stated in the preambles to the rates; but is not so in the present case. This being a lump sum contract and in the absence of definitive terms, I am unable to accept the Claimant's adoption of a star rate.

125 The relevant items claimed by the Claimant are as shown below:

4.4.1	Solid Section	kg	1,536.00	1,267.68	$ 9.00	star rate	$ 13,824.00
4.4.2	Hot-rolled hollow section	kg	987.41	853.34	$ 9.00	star rate	$ 8,886.66
4.4.3	Mild steel flats, angles, plates, bolts	kg	2,391.42	1,725.30	$ 9.00	star rate	$ 21,522.78

126 Based on the quantities above (which are not in dispute) and using the original contract rates, I derive the following sums:

	Description				Claimant's Claim	Amount Paid
4.4.1	Solid Section	kg	1,536.00	$8.50	$13,056.00	$6,912.00
4.4.2	Hot rolled hollow section	kg	987.41	$8.00	$7,899.28	$4,441.50
4.4.3	Mild steel flats, angles, *etc*	kg	2,391.42	$8.00	$19,131,36	$10,759.50
				Total	$40,086.64	$22,113.00

127 The sum due to the Claimant will be $40,086.64 less $22,113.00 = $17,973.64.

128 I therefore determine the sum at $17,973.64.

(2) Item 5.2

129 This is a claim in respect of professional engineer ("PE") design for splicing details.

130 The claim is not disputed by the Respondent except that it had assessed the sum at $1,000 against the Claimant's claim amount $1,380 (without 15% markup). Having looked at the evidence of the invoice at AA Tab 2.21 p 56, I am satisfied that the Claimant is entitled to this claim.

131 I therefore determine the sum at $380.

VO 4

(1) Items B.4, C.4 and E.4: removal of existing vermiculite and reinstate

132 Having considered the evidence, I am of the view that the Claimant is not entitled to this claim.

133 This was work carried out *on and around* existing structures and involved demolition, concreter work, masonry work and structural steelwork. The scope of work must surely include working on the existing vermiculite that affects the installation of the structural steelwork. It is all part of the entire addition and alterations work. I am unable to accept the Claimant's argument that there is no provision regarding vermiculite. If the Claimant's argument is accepted, this would mean the Respondent engaging another contractor to remove the vermiculite and working in congested conditions alongside the Claimant's workers who would then wait for this other contractor to remove the vermiculite before working on the structural steelwork. This surely cannot be. The nature of such work is that work that

is required to be carried out before the actual work could be carried out falls within the scope of work for a contractor even if it is not expressly stated in the contract. The fact that the Respondent has made additional payment for another location is immaterial and does not diminish the fact that the work on the vermiculite remains within the Claimant's scope of work.

134 I therefore reject this claim.

(2) Item H: PE design, calculation and submission

135 This is a claim by the Claimant for fees incurred for PE endorsement in relation to a variation to the catwalk.

136 The Respondent has acknowledged that there were changes made to the catwalk which resulted in re-designing and endorsement; and also admitted that it paid the amendment submission fee to the Building and Construction Authority.

137 I am satisfied with the evidence contained in AA Tab 4.4 and that the Claimant did incur the sum of $3,000 for "Catwalk Framing Design". As the Respondent has assessed and made payment of $1,500, the balance sum of $1,500 is due and payable to the Claimant.

138 Accordingly, I determine the sum at $1,500.

VO 5

(1) Item 2.2: casting of new top up beam

139 This is a claim for the casting of a new top up beam and the Claimant has asserted that in the absence of a contract rate it is applying a star rate which was extrapolated from a rate for RC kerbs.

140 It is undisputed that work had been carried out and the dispute is on the valuation of the work.

141 Having considered the evidence, the top up beam of 550mm x 235mm high at $500.00 per metre run versus the RC kerb of 100mmx 100mm high at $300 per metre run, I can accept the star rate of $500 per metre run.

142 Accordingly, the Claimant is entitled to its claim of $1,500.

143 I therefore determine the sum at $1,500.

VO 10

(1) Item 1: supply of materials and fabrication of hangar column

144 The Claimant has since revised its markup rate from 20% to 15% and in this respect the figure of 15% will be allowed as determined hereinabove in my determination.

145 The dispute lies in the Respondent's assertion that the Claimant has failed to produce the relevant invoice showing the promised discount from its subcontractor, [Z], for the additional 2428mm x2438mm x 50mm thick metal plate.

146 On the evidence presented by the Claimant, I am satisfied that the additional supply had been procured and it is entitled to its claim. While I take cognisance of the Respondent's point in its submissions that the Claimant had yet to furnish the invoice showing the discount, I have to disregard this contention given that there was no payment response from the Respondent in the first place.

147 Accordingly, the Claimant is entitled to its claim of $4,727.05.

148 I therefore determine the sum at $4,727.05.

VO 16

(1) Items 4a and 4b: installation of new bridging plate and modification of fabricated column

149 The dispute is only in respect of the rate to be applied for this additional work for which the Claimant has applied the star rate of $9 per kg.

150 Extracts from the Claimant's claim for these two items are as shown below:

4	Installation and modification work at the site (by **[BIY]**):					
	a) Installation of new bridging plate at the site (connection to existing beam by full penetration butt weld	kg	526.67	9.00		4,740.03
	b) Modify the fabricated column and make shorted to new length due to new bridging plate. Connection by full penetration butt weld	kg	267.90	9.00		2,411.10

151 As determined hereinbefore in this determination, the contract rate of $8 per kg should be applied instead of star rates.

152 Accordingly, the claimed amounts should be as follows,

	Description				Claimant's Claim	Amount Paid
4a	New Bridging Plate	kg	526.67	$8.00	$4,213.36	$2,106.68
4b	Modification of Fabricated Column	kg	267.90	$8.00	$2,143.20	$1,071.60
				Total	$6,356.56	3,178.28
	Claim Amount				$3,178.28	

153 I therefore determine the sum at $3,178.28.

VO 19

(1) Item 2: modification/shortening of intermediate beams

154 This being modification work and not general supply and installation of structural steelwork, I am inclined to allow the Claimant to adopt the star rate of $9 per kg.

155 However, from the following tabulation which is extracted from AA Tab 2.39, it appears that the claimed amount of $4,132.80 (in "Scott Schedule B Variations") does not correspond with the figure of $3,117.40 shown in the tabulation below.

[BIY] RESPONSE 22 MAR 2024					
[BIY] VO-19rev2					Remarks
Unit	Qty	Rate (S$)	Rate Ref.	Amount (S$)	
LS	1.00	900.00	Star Rate	900.00	We agree to the assessment.
LS	1.00	1,900.00	Star Rate	1,900.00	We added cost for machine, consumables, tools, etc.
LS	1.00	317.40	Star rate	317.40	based on [redacted] invoice + 15% Structura P&A We kindly request the P&A to be minimum 15%. Same as previously approved VOs like VO-11, 12 & 13.
				3,117.40	
				3,117.00	If agreeable, we can round off to $3,100.00

156 In view of the above, I shall adopt the figure of $3,100 which is rounded off as suggested by the Claimant.

157 Accordingly, the sum due and payable to the Claimant would be $3,100 less the amount paid of $1,665.00 = $1,435.00.

158 I therefore determine the sum at $1,435.00.

VO 22: site modification of fin plates at [xxM]

159 The dispute for this claim is on entitlement. While the Claimant has contended that it was a variation based on an instruction for a change in design from the Respondent, the latter has asserted that the work was required due to the Claimant's mis-coordination and failure to verify the existing site conditions during setting out and hence was remedial work.

160 The Claimant has asserted that the instruction "[p]lease proceed" came from the Respondent's staff, Ms [G]. An excerpt of the WhatsApp messages is as shown below:

Mr [C]:	@Ms [G] … As per discussed for Existing bondek problem. We will cut out fin plate and weld back lower 30mm. Pls confirm. Thanks
Ms [G]:	Yes proceed. Pls make sure 30mm is sufficient to avoid the slab deflection
Mr [C]:	Noted with thanks

161 However, I am unable to construe this as a design change; and neither does it expressly signify an instruction that will entail additional payment to the Claimant.

162 It bears mentioning that in a construction contract, such correspondence, in particular words like "please proceed", abounds. They do not inevitably denote an instruction for additional work. Therefore, it would not be fair to consider a text message in isolation; and unless evidence is provided to demonstrate that the message "please proceed" is in consequence to an earlier message depicting variation or additional payment, I would hesitate to accept the contents of the above messages as a rationale for my determination.

163 Further there was mention of an existing "bondek problem". In this regard, no evidence has been adduced by the Claimant to show that the existing bondek was not made known during the tender stage and which necessitated the cutting of the fin plates. I must also say that its assertion of approved shop drawings will not assist its case as the said drawings merely show I-section beams without any reference to the existing bondek.

164 There was no submissions with regard to item 2 – testing, and I take the view that the testing was part of the modification work to the fin plates.

As I have found that the Claimant is not entitled to the claim under item 1, it follows that it is similarly not entitled to the claim for item 2.

165 For the reasons enunciated above, I reject this claim.

VO 24: additional structural steelwork for all member sizes

166 This is a claim for additional supply and installation of structural steelwork, and the issue is whether the Claimant is entitled to its variation claim of $96,089.68.

167 The Claimant submits that it had carried out an additional 10,849.01kg of structural steelwork over and above the quantity of 70,000kg, and that the additional quantities arose from design changes.

168 Conversely, the Respondent contends that the 70,000kg stated in the purchase order ("Purchase Order") was based on the Claimant's own quantity stated in its Quotation and that this was not a remeasurement contract; that the Claimant had in its Quotation stated expressly that the quantities provided therein do not form part of the contract and that there shall be no adjustment for any errors thereof made by the Claimant; and that the design changes claimed by the Claimant was a result of its own deficient design calculations.

169 The issue turns on whether the quantity of 70,000kg is subject to adjustment or re-calculation and on the assertion by the Claimant that there were two design changes: one on strengthening plates and the other on connections and splicing details.

170 Having considered the evidence, I am inclined to hold that the Claimant is *not* entitled to this claim.

171 Item E8(a) of Appendix I of the Purchase Order is as shown in the extract below:

E)	**Structural Steel**			
8	Supply and install			
	a) Structural steel members for columns and beams, including all necessary connections, plates, welding, surface treatment and the like	70,000 kg	l.s.	620,000.00

172 However, I must point out that there is no indication whatsoever that the quantity of 70,000kg is provisional or that it is subject to re-calculation.

173 In lump sum contracts the breakdown costs and quantities that are routinely included in quotations or letters of award merely signify the sums allocated by a contractor in the derivation of its tender price and subsequently the formalisation of the contract sum. They represent the *breakdown* costs that make up the lump sum price and do not constitute contractual costs or quantities that are subject to adjustments. It is a well-recognised and accepted contract practice that individual breakdown sums

are used by a contract administrator or quantity surveyor for the purpose of making progress payments to a contractor and for budgeting purposes; and in the case of a contractor for the ordering of materials and manpower sourcing.

174 Unless the quantities are stated as being provisional or that the contract is one based on remeasurement, then any quantities provided by a contractor in the breakdown costs are non-contractual and any additional quantity needed would be at his own risk.

175 I am unable to accept the Claimant's argument that if the intention was for the Claimant to bear the risk regardless of quantities then the quantities should not have been stated by the Respondent. I must reiterate that the inclusion of quantities in a lump sum contract does not amount to it being subject to remeasurement unless the contract so provides. In the absence of express provisions with regard to management of quantities, there will be no adjustment whatsoever to the contract sum.

176 The Claimant has submitted that the additional quantities were due to two design changes: strengthening plates being included subsequent to tender and design changes to connections and splicing details.

177 Having perused the evidence cited by the Claimant (at pp 15–22 of AA Tab 2.44) I am not convinced that strengthening plates were included *after* the tender and that therefore additional payment is due. The Claimant has indicated on p 16 that "location of strengthening plates not shown", and on p 18 that "locations not shown on the framing plan". Obviously, the Claimant has incorrectly looked at the two drawings in isolation. However, if one were to read the two drawings conjunctively, it would be manifestly clear that the two drawings had set out the scope of the work required of the Claimant, namely, that strengthening plates formed part of the structural steelwork.

178 With regard to connections and splicing details, I reproduce below an extract from p 14 of AA Tab 2.44:

	Strengthening Built up	2.00	10.00	0.10	0.55	26.00	306.15	6,123.00
	Plate and connections							2,000.00
								61,850.04
		Allow Weight for Connections (15% of total tonnage)						9,277.51
								71,127.54

179 It would not be denied that the Claimant had allowed 15% for connections. In this regard I must point out that a pricing allowance such as the one shown above means that a contractor had made due allowance for that particular item of work in his tender price and he bears the risk thereof. He will gain financially if the final cost is lower but would suffer a loss if the final cost is higher. That is the fundamental nature of an allowance in the

pricing of a tender. An allowance is a pricing risk and a contractor bears the consequences of the risk.

180 It bears pointing out that if the claim for additional quantities of structural steelwork is allowed in the absence of express provisions in the contract, then the Claimant is correspondingly bound to identify all final quantities of work for concrete, masonry and demolition work that are *lesser* than the respective quantities stated in the Quotation or the LOA/Purchase Order and to have deductions made from the Contract Sum. The Claimant has not done so. It would not be correct to consider only additional quantities and not the reduced quantities.

181 I therefore dismiss this claim for additional quantities of structural steelwork.

VO 29: deployment of two additional engineers

182 This is a claim for the deployment of two additional engineers on site and the dispute again turns on the question of entitlement.

183 According to the Claimant, he was instructed by the Respondent to deploy two additional engineers such that there would be a minimum of three engineers on site. The Claimant has submitted a claim of $64,000 based on two engineers for eight months and a rate of $4,000 per month.

184 The Claimant has since amended this variation claim from $64,000 to $54,445 based on additional site supervisors.

185 The Claimant has stated in its variation order claim dated 10 June 2024 that it was only required to provide one full-time supervisor on site, and that it had only allowed a sum of $25,000 for site management as provided in the Respondent's [xx4] Purchase Order.

186 Having considered the respective submissions, I am unable to accept the Claimant's position.

187 First and foremost, the Claimant in its variation order dated 10 June 2024 is claiming for two additional *site engineers for structural work*. In its submissions, the Claimant asserted that the contract provided for one full-time *supervisor*. It would not be denied that these are two entirely different categories of staffing in a construction contract. On this score alone, the claim by the Claimant has not been made out.

188 Further there are no details or breakdown costs provided in respect of the line item for "Site Management Cost". It bears mentioning that site management is not confined to provision of site engineers or site supervisors, and would include other staff involved in the Project such as the project director, workplace health and safety personnel, QC controllers and the site

quantity surveyor. Any notion to equate the sum of $25,000 entirely to just site engineers or site supervisors is clearly without merit.

189 More importantly, no evidence has been adduced as to whether any organisation chart was submitted by the Claimant at the beginning of the project to show the *original* deployment of site engineer or site supervisors or whatever staff required for the Project. It is trite that any claim for additional resources must be premised on the original resources assigned for the Project. This must be inherently so or else a contractor would be free to state whatever original number he wants and then claim for additional number of staff just because he was instructed to provide additional staff. Without the original organisation chart, any claim for additional resources would not be capable of evaluation.

190 For the reasons stated above, I reject this claim.

VO 30: as-built drawings

191 This relates to the provision of as-built drawings. The Claimant has contended that the contract did not provide for it and as it had prepared and submitted the said drawings it is claiming for the costs of doing so.

192 The issue turns on the question of whether the contract expressly provides that the Claimant shall be obligated to produce the as-built drawings.

193 The Claimant has asserted that neither its Quotation nor the Respondent's LOA expressly stipulates that the obligation rests with the Claimant; and that the Respondent was responsible for producing the as-built drawings.

194 I am not inclined to agree with the Claimant.

195 First, I must reject the Claimant's point that the parties did not intend for the incorporation of the terms contained in the Quotation. I find this assertion to be without merit for the simple reason that the terms in respect of shop drawings are clearly set out in the Purchase Order as shown in the extract below:

5	Structural steelwork S1 certificate	1	lot	l.s.	80,000.00
6	Shopdrwing, MOS and RA	1	lot		included

196 There is no denying that the production *shop drawings* is by the Claimant. However, it does not follow that the production of *as-built drawings* are excluded as the Claimant did not qualify its tender that as-built drawings are excluded from the tender price. Shop drawings and as-built drawings are inextricably linked to each other and any argument to delink the two would not be sustainable. The subcontractor who produces the shop drawings must follow up with the as-built drawings.

197 It is the accepted practice in construction contracts that the subcontractor or specialist contractor who carries out the work will produce the as-built drawings. The main contractor will collate all the respective as-built drawings and submit them to the consultants. If the Claimant's position that it is not responsible for producing the as-built drawings holds true, then we would have a somewhat untenable situation in which a subcontractor produces only the shop drawings and no more and leaving the main contractor to source for another party to produce the as-built drawings. If the Claimant had intended not to produce the as-built drawings or that its tender pricings do not include the production of as-built drawings, then this must be conveyed at the outset to the Respondent. If it has not done so, then it is deemed that the responsibility for producing the as-built drawings rests with the Claimant.

198 Further, no evidence has been adduced by the Claimant to demonstrate that its portion of as-built drawings has been incorporated in the Respondent's overall as-built drawings that were submitted to the consultants.

199 I therefore reject this claim.

VO 31: additional demolition work

200 This is a claim by the Claimant for additional demolition work which it claimed was not included in the contract.

201 Conversely, the Respondent argued that it was part of the Claimant's scope of work and shown on the tender drawings.

202 Having considered the evidence, I am not inclined to allow this claim.

203 The Claimant submits the following points in support of its claim, namely:

(a) instruction for the additional work given by the Respondent;

(b) additional work not shown in the tender drawings;

(c) work that was completed and not disputed by the Respondent;

(d) proof of work evidenced by photographs; and

(e) derivation of costs provided.

204 First and foremost, the photographs presented by the Claimant are insufficient proof that the works depicted in the photographs are additional work. They are just photographs that simply show work being carried out, no more no less. Other than "Description of Work" which is somewhat self-explanatory, it is nigh impossible for me to discern whether the work that is

described falls under the original scope of work or whether it is not part of the contract and is thus additional work as asserted by the Claimant.

205 With regard to the so-called derivation of costs, I could see no details of any cost breakdown in AA Tab 2.50 pp 2–3.

206 As for instruction, no evidence has been adduced that the Respondent had issued the instruction in consequence of earlier correspondence indicating that the work was a variation to the contract and that the Claimant would be paid accordingly. As explicated previously, an instruction by itself does not denote a variation as it could be issued for a variety of reasons and not just for variation.

207 Overall, I am not persuaded that this claim has been made out by the Claimant.

208 I therefore dismiss this claim for additional demolition work.

Summary of determination for variations

209 VO 1B:

Item	Description	Determined Sum ($)	Rationale
	Phase 1A		
1.2	Labour Cost for removal	300.00	Accepted by [Respondent]
3.1	Supply of hoisting hook	30.70	15% mark-up
3.3	Labour Cost	84.00	Accepted by [Respondent]
3.4	Testing	46.40	15% mark-up
4.1	Supply and fabricate structural steelwork	1,023.43	15% mark-up
4.4	Blast and Prime fabricated steel	65.27	15% mark-up
4.4.1 4.4.2 4.4.3	Installation of Structural Steel – Solid Section Ditto – Hollow section Ditto – Flats, angles, angles, plates	17,973.64	Determined Sum
4.15	Testing	756.20	15% mark-up
5.2	PE design calculation and endorsement	380.00	Determined Sum
	Phase 1B		
1.2	Labour Cost for removal	300.00	Accepted by [Respondent]
3.1	Supply of Hoisting Hook	30.70	15% mark-up

	Total for VO 1B	**21,451.44**	

210 VO 4:

Item	Description	Determined Sum ($)	Rationale
A4	Supply and install 1000mm G I Railing	1,600.00	Accepted by [Respondent]
B3	Ditto	1,300.00	Ditto
B4	Removal of existing vermiculite	0.00	Determined Sum
C3	Supply and install 1000mm G I Railing	1,100.00	Accepted by [Respondent]
C4	Removal of existing vermiculite	0.00	Determined Sum
D3	Supply and install 1000mm G I Railing	360.00	Accepted by [Respondent]
E3	Ditto	350.00	Ditto
E4	Removal of existing vermiculite	0.00	Determined Sum
H	PE design calculation and endorsement	1,500.00	Ditto
	Total for VO 4	**6,210.00**	

211 VO 5:

Item	Description	Determined Sum ($)	Rationale
1.1	Cutting plate with bevelling	122.50	15% mark-up
1.4	Testing	183.60	Ditto
2.1	Supply and install new unequal angle for support of bondek	565.00	Ditto
2.2	Cast new top up beam	1,500.00	Determined Sum
3.1	Supply and fabrication by [Z]	42.50	15% mark-up
	Total for VO 5	**2,413.60**	

212 VO 10:

Item	Description	Determined Sum ($)	Rationale
1	Supply of materials and fabrication of hanger column	4,727.05	Determined Sum
4	Installation of new HC	175.80	Accepted by [Respondent]
5	Testing by Sub-con	30.60	15% mark-up
	Total for VO 10	**4,933.45**	

213 VO 16:

Item	Description	Determined Sum ($)	Rationale
1	Supply of material and fabrication of new bridging plate	197.50	15% mark-up
3	Blast and Prime by Sub-con	4.96	Ditto
4a 4b	Installation of new bridging plate Modification of fabricated column	3,178.28	Determined Sum
	Total for VO 16	**3,380.74**	

214 VO 19:

Item	Description	Determined Sum ($)	Rationale
2	Modification / shortening of intermediate beams	1,435.00	Determined Sum
3	Testing MPI only	13.80	15% mark-up
	Total for VO 19	**1,448.80**	

215 VO 22:

Item	Description	Determined Sum ($)	Rationale
1	Site modification of fin plates due to bondek soffit level	0.00	Determined Sum
2	Testing	0.00	Ditto
	Total for VO 22	**0.00**	

216 VO 24:

Item	Description	Determined Sum ($)	Rationale
1	Additional supply fabrication and installation of structural steelwork	0.00	Determined Sum
	Total for VO 24	**0.00**	

217 VO 29:

Item	Description	Determined Sum ($)	Rationale
1	Additional 2 nos site engineers	0.00	Determined Sum
	Total for VO 29	**0.00**	

218 VO 30:

Item	Description	Determined Sum ($)	Rationale
1	Production of as-built drawings	0.00	Determined Sum
	Total for VO 30	**0.00**	

219 VO 31:

Item	Description	Determined Sum ($)	Rationale
1	Additional demolition work	0.00	Determined Sum
	Total for VO 31	**0.00**	

Determined sum for variations

220 The determined sum for variations is $39,838.03:

Item	Description	Determined Sum ($)
1	VO 1B	21,451.44
2	VO 4	6,210.00
3	VO 5	2,413.60
4	VO 10	4,933.45
5	VO 16	3,380.74
6	VO 19	1,448.80
7	VO 22	0.00
8	VO 24	0.00
9	VO 29	0.00
10	VO 30	0.00
11	VO31	0.00
	Total for Variations	**39,838.03**

Back charges

221 The main point of contention made by the Claimant is that that the back charges had not been raised earlier in the relevant payment response and, alternatively, they were invalid by virtue of s 17(3) of the SOP Act.

222 On the basis that the Respondent had failed to serve a valid payment response, the Claimant has taken the position that the Respondent is not entitled to impose the back charges.

223 Section 17(3) of the SOP Act reads as follows:

> (3) 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.

224 I am in agreement on both counts.

225 I have earlier found that the Respondent had failed to issue a proper payment response and hence I am precluded from considering the back charges by virtue of s 15(3) of the SOP Act.

226 Further, pursuant to s 17(3) of the SOP Act, the imposition of back charges would fail given the absence of an agreement or a certificate certifying the sums to be back charged.

227 While I take cognisance of the arguments presented by the Respondent in its AR submissions and during the adjudication conference, s 15(3) of the SOP Act must prevail and would bar me from considering them and providing findings thereof.

228 Accordingly, I dismiss this claim for back charges.

Interim finality of adjudication determinations

229 For completeness, I would like to add that the SOP Act was enacted to enable payment disputes to be resolved in a fast and low-cost manner. Adjudication determinations are accorded only interim finality and, given the nature of the SOP regime and the timeline afforded for the proceedings, it is sometimes inevitable that the approach and analysis adopted might not be the best. However, it is well recognised that given the evanescent nature of adjudication determinations, parties should engage in arriving at a mutual agreement and settlement of the final accounts, but certainly are at liberty to ventilate their claims subsequently in litigation or arbitral proceedings.

Determination

230 In conclusion, my determination is that the Respondent shall pay the Claimant the sum of $191,221.31 (including GST) derived as set out below. This sum is hereby recorded as the Adjudicated Amount for the purpose of the SOP Act.

Item	Description	Determined Sum
1	Value of Work Done	$151,383.28
2	Variations	$39,838.03
3	Back charges	$0.00
5	**Amount (excluding GST)**	**$191,221.31**

Costs of adjudication

231 The usual order is for costs to follow the event and the unsuccessful party to bear the costs of the adjudication. I am inclined to take the view that in this present adjudication, given that the Claimant had not been entirely successful in its claim, the adjudication fee should be borne equally by the Claimant and the Respondent.

232 I therefore order that the costs of the adjudication being the adjudication application fee of $654 (inclusive of GST) be borne by the Claimant; while the adjudicator fee of $24,198 (inclusive of GST) be borne by the Claimant in the amount of $12,099 and by the Respondent in the amount of $12,099.

BJA Pte Ltd
v
BJB Pte Ltd

[2024] SGSOP 19

Singapore Mediation Centre — SOP AA 233 of 2024
Chuah Chee Kian Christopher
30 October 2024

Adjudication Application *— Time for lodgment — Dispute as to date of service of payment claim — Whether adjudication application filed prematurely*

Payment Claim *— Due date — Dispute as to date of service of payment claim — Interpretation of clause in standard conditions of contract*

Payment Claim *— Validity — Respondent contending that payment claim was only contractual claim and not payment claim under Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") — Parties' contract containing two distinct clauses for submission of payment claims under SOPA and for submission of progress claims respectively — Whether payment claim was valid payment claim under SOPA — Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Response *— Due date for filing — Dispute as to due date for service of payment response — Interpretation of clause in standard conditions of contract*

Payment Response *— No response given — Whether respondent precluded by s 15(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) from raising objections as it did not issue valid payment response — Whether respondent could point out patent errors in payment claim — Section 15(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 8(5), 10, 10(2)(*a*)(ii), 10(3)(*b*), 11(1)(*b*), 12(2)(*b*), 12(5)(*b*), 12(6), 13(2), 13(3)(*a*), 14(3), 15(1), 15(3), 16(1), 17(1)(*b*), 22(1), 36

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) reg 5(1)

Samuel Chacko, Ang Minghao, Justin Yeo and Eugene Koh (Legis Point LLC) for the claimant;
Sim Chee Siong and Jackie Tay Jack Kee (Rajah & Tann Singapore LLP) for the respondent.

[Commentary: see para 2.1]

30 October 2024

Chuah Chee Kian Christopher:

1 This is an adjudication determination made on 30 October 2024 ("Adjudication Determination") under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Application No SOP/AA 233 of 2024 ("AA"). This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant in this matter is [BJA] Pte Ltd (UEN No [xxx]) ("Claimant") and the respondent is [BJB] Pte Ltd (UEN No [xxx]) ("Respondent") (collectively, "Parties").

3 For the reasons which are set out in the pages which follow, I determine that:

(a) the Respondent shall pay to the Claimant the sum of S$4,997,755.54 (inclusive of goods and services tax ("GST")) ("Adjudicated Amount");

(b) the Respondent shall pay the Adjudicated Amount to the Claimant within seven days after this Adjudication Determination is served on the Respondent ("Due Date for Payment");

(c) in the event that the Respondent fails to pay the Adjudicated Amount by the Due Date for Payment, the Respondent shall pay the Claimant simple interest thereon at a rate of 5.33% per annum, calculated from the Due Date for Payment until the date of full payment; and

(d) the costs of the adjudication, comprising of the adjudication application fee of $654 (inclusive of GST) and adjudicator's fee and disbursements amounting to $24,688.50 (inclusive of GST), in total S$25,342.50 (collectively known as the "Costs"). The Costs shall be borne 10% by the Claimant and 90% by the Respondent.

Record

Background

Entitlement to make adjudication application

4 The Respondent is the subcontractor engaged by the main contractor, [A] (Pte) Ltd ("Main Contractor") for a project known as "Proposed Mixed Use Development Comprising 2 Basement Retail/Restaurant, Carpark and Underground Linkway, [xxx] Retail/ Restaurant, Carpark, Landscape Deck and A Flat Development Comprising [xxx] Residential Apartment Units (Total [x] Units) With Ancillary Facilities Lots [xxx] At [xxx]" ("Project").

5 By a letter of acceptance in writing dated 28 January 2022 ("Subcontract"), the Claimant was engaged by the Respondent as its subcontractor to carry out the design, supply, installation, testing and commissioning and service and maintenance for electrical work including "Extra Low Voltage (ELV) & Security System" at the Project ("Subcontract Works").

6 The Subcontract is a fixed lump sum contract for the sum of $31,065,000.

7 There is no dispute that the Project is a construction contract to which the SOP Act applies.

Chronology of events

(1) Payment claim

8 On 5 August 2024, the Claimant served Payment Claim No 29 ("PC 29") on the Respondent by hand and served the same by e-mail on the same day, claiming a total sum of $5,345,741.60 (inclusive of GST). It is noted that the Claimant, in its submission, asserted that the claims for work done were up to 9 July 2024, despite the cover letter for PC 29 stating it as a claim "for work done to date".

9 It is the Claimant's case that the Subcontract prescribes the timeline for submitting a payment claim, as set forth in cl 14.2. The Respondent, however, disputes this interpretation, asserting that the Subcontract does not specify when a payment claim must be served. In the absence of such a contractual provision, the Respondent argues that s 10(2)(*a*)(ii) of the SOP Act, read together with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations"), governs the situation. Therefore, the Claimant is required to submit its payment claim by the last day of the month

(*ie*, 31 August 2024). As PC 29 was submitted before the deadline, it is deemed to have been served on 31 August 2024, pursuant to s 10(3)(*b*) of the SOP Act.

(2) Payment response

10 The Claimant's position is that the Subcontract is silent regarding the deadline for submitting a payment response. Consequently, s 11(1)(*b*) of the SOP Act applies, requiring the Respondent to provide its payment response within 14 days after the payment claim is served, as stipulated under s 10 of the SOP Act, which would be by 20 August 2024 (excluding the public holiday on 9 August 2024). Furthermore, even if the Respondent missed the initial deadline, it was still permitted to submit a payment response within the sevenday dispute settlement period ("DSP") from 21 August 2024 to 27 August 2024, in accordance with ss 12(5)(*b*) and 12(6). However, the Respondent failed to provide any payment response, even by the extended deadline.

11 The Respondent disputes the Claimant's assertion, stating that cl 31.5 of the "Standard Conditions of Subcontract" ("Standard Conditions"), referenced in cl 14.1 of the Subcontract, clearly requires the Respondent to submit its payment response within 21 days. Since PC 29 is deemed to have been served on 31 August 2024, the deadline for the Respondent to submit its payment response was 21 September 2024. Additionally, with the seven-day DSP commencing on 22 September 2024, the Respondent had until 28 September 2024 to submit its payment response.

(3) Adjudication application

12 On 4 September 2024, the Claimant lodged its AA with the SMC. In the AA, the Claimant reduced its claim amount to $5,323,237.74 (inclusive of GST).

13 In the light of the differing positions of the parties whether the Subcontract stipulates the timing for the service of PC 29 and the period within which a payment response must be submitted, a dispute has emerged concerning whether this AA was submitted in accordance with the prescribed timelines under the SOP Act. The Respondent contends that this AA was submitted prematurely, asserting that the adjudicator therefore lacks jurisdiction to render a determination in this adjudication. I will address this assertion in greater detail later in this Adjudication Determination under the heading "Jurisdictional objections".

(4) Appointment of adjudicator

14 On 5 September 2024, the SMC referred the AA to me and invited me to accept appointment as the adjudicator to determine the AA. I accepted the appointment shortly thereafter on the same day.

15 In accordance with s 14(3) of the SOP Act, the SMC served a written notice on the Claimant and the Respondent on the same day, confirming my appointment as the adjudicator to determine this AA.

(5) Adjudication response

16 By virtue of s 15(1) of the SOP Act, the Respondent was to lodge an adjudication response with SMC within seven days after receipt of a copy of the AA. As the AA was served on the Respondent on 5 September 2023, the AR was due to be lodged by 12 September 2024.

17 On 12 September 2024, the Respondent lodged an adjudication response with the SMC ("AR").

(6) Commencement of adjudication

18 By virtue of s 16(1) of the SOP Act, following the expiry of the period within which the Respondent may lodge an adjudication response, the adjudication commenced on 13 September 2024.

(7) Due date of adjudication determination

19 By virtue of s 17(1)(*b*) of the SOP Act, the timeline to determine the AA was within 14 days after the commencement of the adjudication, or within such longer period as may have been requested by me and agreed to by the Claimant and the Respondent.

20 Given that the adjudication commenced on 13 September 2024, I was thus required to render the Adjudication Determination by 27 September 2024 subject to any extensions agreed by parties.

(8) Preliminary Conference

21 On 6 September 2024, I issued directions, by way of e-mail, for parties to attend a preliminary conference via Zoom video conference on 13 September 2024 at 10.00am ("Preliminary Conference") to enable me to issue further directions for the conduct of this adjudication.

22 The Preliminary Conference was held via Zoom video conference on 13 September 2024:

(a) The Claimant was represented by Mr Samuel Chacko, Mr Ang Minghao and Mr Justin Yeo of Legis Point LLC as counsel for the Claimant, along with Mr [B] (director), Mr [C] (director) and Mr [D] (general manager) as representatives of the Claimant.

(b) The Respondent was represented by Mr Jackie Tay Jack Kee of Rajah & Tann Singapore LLP as counsel for the Respondent.

23 During the Preliminary Conference, I handed down directions for the parties to exchange submissions and to attend a conference on the merits of the adjudication:

(a) The Claimant was to file a copy of its reply to the AR submissions ("CRS") by way of e-mail on the adjudicator and the Respondent on Friday, 20 September 2024.

(b) The Respondent was to serve its response to the CRS ("RRS") by way of e-mail on the adjudicator and the Claimant by Friday, 27 September 2024.

(c) The merits conference ("Merits Conference") was scheduled to proceed via Zoom on 10 October 2024, and if necessary, continue on 11 October 2024 at 10.00am.

24 In view of the timelines above, I requested an extension of the due date (*ie*, 30 October 2024) of the Adjudication Determination after the date of Merits Conference. Both parties agreed and consented to the extension.

Merits Conference

25 The Merits Conference was held as fixed on 10 October 2024, 10.00am via virtual meeting. At the Merits Conference, the parties were represented as follows:

(a) For the Claimant:

(i) Mr Samuel Chacko (counsel for the Claimant);

(ii) Mr Ang Minghao (counsel for the Claimant);

(iii) Mr Gregory Campos (counsel for the Claimant);

(iv) Mr [B](the Claimant's director);

(v) Mr [C](the Claimant's director); and

(vi) Mr [D](the Claimant's general manager);

(b) For the Respondent:

(i) Mr Sim Chee Siong (counsel for the Respondent);

(ii) Mr Jackie Tay Jack Kee (counsel for the Respondent);

(iii) [E] (the Respondent's chief executive officer);

(iv) [F] (the Respondent's director and legal counsel);

(v) [G] (the Respondent's head of division);

(vi) [H] (the Respondent's financial controller);

(vii) [I] (the Respondent's senior contracts executive);

(viii) [J] (the Respondent's senior contracts executive); and

(ix) [K] (the Respondent's assistant project manager).

26 Counsel for both parties were given an opportunity to present their respective oral arguments at the Merits Conference and responded to queries from me.

Jurisdictional objections

27 Having considered all the facts and the submissions of the parties, the issues to be determined in this AA were as follows:

(a) Was PC 29 a valid payment claim under the SOP Act?

(b) If answer to (a) is yes, what is the prescribed date for service of PC 29?

(c) Was the adjudication application lodged prematurely or within time?

28 At this juncture, I should state that I have considered all of the submissions, both oral and written, tendered by the respective parties in this adjudication and all of the authorities cited or referred to or produced before me, as well as all of the other material properly placed before me, so far as I am obliged or permitted to do so under the SOP Act. The fact that any submission or authority or material (which is properly before me and which I am obliged to consider) is not expressly set out or referred to in this Adjudication Determination does not mean that I have not duly considered it.

Whether PC 29 was valid payment claim under SOP Act

Respondent's submissions

29 The Respondent contends that PC 29 was a contractual payment claim submitted pursuant to cl 14.2 of the Subcontract and, therefore, is an invalid payment claim under the SOP Act. This is a threshold jurisdictional issue which I would need to consider. If the claim is not a valid payment

claim under the SOP Act, then it would have to be rejected and there is no further need to inquire as to whether the AA was lodged prematurely.

30 The thrust of the Respondent's case is that prior to PC 29, the Claimant had submitted a draft progress claim and, consequently, the progress claim which was submitted thereafter on 5 August 2024 could only be a contractual claim and not a payment claim under the SOP Act. Alternatively, PC 29 was intended to be a contractual payment claim as opposed to a payment claim under the SOP Act.

31 The Respondent had placed heavy reliance on another adjudication determination in *AXZ Corp Ltd v AYA Joint Venture* [2017] SCAdjR 951 ("*AXZ*") dealing with the distinction between contractual payment claims ("Contractual PC") and payment claims pursuant to the SOP Act ("SOP PC").

32 The claimant and respondent in that case had adopted divergent views on the scope of a Contractual PC as compared to the SOP PC. The adjudicator's determination of this issue in dispute is central to his decision given that the respondent in that case had raised a jurisdictional challenge that the claimant had submitted "PC26 and PC28 … within the same payment claim period", which is not permitted under the SOP Act (see [26(g)]–[26(j)] of *AXZ*).

33 In particular, with respect to PC26, the respondent in that case highlighted that the parties had agreed to an arrangement for the claimant to issue "draft" payment claims before submitting its "official" payment claim, and in this regard, the respondent's position was that the "draft" payment claim was a Contractual PC whereas the "official" payment claim was an SOP PC (see [28(b)] to [28(c)] of *AXZ*). As PC26 was an "official PC26", the respondent argued that it was an SOP PC falling within the SOP Act (see [26(e)]–[26(f)] of *AXZ*).

34 On the other hand, the claimant in that case argued that its "official" payment claim submitted in that case was not an SOP PC, and instead was a Contractual PC, such that it did not fall foul of the SOP Act as it did not issue more than one SOP PC within the same reference period (see [31] of *AXZ*).

35 The adjudicator agreed with the claimant's position in holding that notwithstanding that the word "official" was used in "PC26 dated 29 July 2017", both the "draft" and "official" PC26 were not SOP PCs, but were instead Contractual PCs (see [31] of *AXZ*).

36 The adjudicator's reason for this conclusion is set out in [34]–[37] of *AXZ*, and a key principle undergirding his decision (which was and remains good law) is the need to *distinguish between a Contractual PC and a SOP PC*. The salient paragraphs of his decision are reproduced below:

> 34 Section 2's definition of 'claimant' shows that the right to serve a payment claim was unfettered. All that a claimant needed to do was to claim to be entitled to the claim. *The SOP Act did not require the Claimant to obtain the Respondent's prior agreement to its claim*. Section 10 read with s 2 of the SOP Act gave the Claimant the right to value its claim *unfettered* by any interference from the Respondent. *It would be a mockery of the whole adjudication procedure if the Claimant could only proceed for adjudication at the response amount dictated by the Respondent*. Such a procedure, even if agreed by both Parties would be an attempt to exclude, modify and restrict the operation of the SOP Act and void under s 36(2)(*a*) of the SOP Act.
>
> 35 As shown at [33] above, the SOP Act gave a maximum of 21 days for the Respondent to respond to a claim. From the Respondent's previous conduct from February 2016 to 31 August 2017, the Respondent typically responded to the Claimant's 'draft' claims by the last week of the next month following the 'draft' claims, thereby consistently exceeding the maximum 21 days allowed by the SOP Act. *The Respondent was able to do this because they were 'draft' claims and not payment claims made under the SOP Act*. This excluded and modified the strict timelines set in place by the SOP Act to preserve and protect the cash flow of contractors such as the Claimant. *Hence, both the 'draft' claims and the 'official' claims in this Informal Procedure were not payment claims under the SOP Act.*
>
> 36 *Since the 'official' PC26 was not a payment claim under the SOP Act*, PC28 did not breach the statutory limit of one payment claim in any claim month or reference period.
>
> 37 I agree with the Claimant that PC28 remained a valid payment claim. It was served on 7 August 2017, which was the 7th day of the reference month under cl 14(4)(a)(i) of the Subcontract. *PC28 did not contain the words 'draft' or 'official' on it*. The claimed amount in PC28 was also not dictated by or pegged to the Respondent's responses. Contrary to the Respondent's submissions, the fact that PC28 claimed for work done up to 30 August 2017 alone did not invalidate the Payment Claim. Rather, it merely meant that the Claimant might not be entitled to the full amount claimed.
>
> [emphasis added]

37 The Respondent's position is that cll 31 and 32 of the Standard Conditions deal with payment claims to be submitted under the SOP Act and contractual claims respectively.

38 For ease of reference, cl 31 is reproduced below:

31 PROGRESS PAYMENTS IN ACCORDANCE WITH THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT (CAP. 30B)

31.1 The Sub-Contractor shall be entitled to progress payments for the works carried out and/or materials supplied and not prematurely delivered under this Sub-Contract by way of periodic valuation of the works carried out and the materials supplied and not prematurely delivered by the Sub-Contractor.

31.2 The Sub-Contractor shall be entitled to serve on the Main Contractor a payment claim (both in printed copy and electronic format) in respect of work done and materials supplied to site and not prematurely delivered in the preceding calendar month, at the time set out in Appendix 1 and in the form as prescribed at Appendix 10. The payment claim under this clause shall have the same meaning ascribed in the Building and Construction Industry Security of Payment Act (Cap. 30B) (the "SOP Act"). The payment claim shall be made in compliance with the SOP Act and shall show the amounts to which the Sub-Contractor considers himself to be entitled up to the last day of the monthly interval in question in respect of:

31.2.1 the value of the Sub-Contract works properly carried out and materials supplied and not prematurely delivered; and

31.2.2 the value of variations ordered under Clause 15 above,

less Retention Monies at the rate and subject to the limit referred to at Appendix 1.

31.3 If the time for submission of any payment claim under the preceding sub-paragraph falls due on a day which is Saturday, Sunday, Statutory or Public Holiday the Sub-Contractor shall submit the payment claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

31.4 Provided that if the Sub-Contractor submits a payment claim before the time stipulated herein for the making of that claim, such early submission shall not require the Main Contractor to issue his payment response in respect of that payment claim earlier than would have been the case had the Sub-Contractor submitted the payment claim in accordance with the Sub-Contract.

31.5 Within 21 days after the payment claim is served on the Main Contractor by the Sub-Contractor, the Main Contractor shall respond to the payment claim by providing, or causing to be provided, a payment response to the Sub-Contractor who shall be entitled to payment of any sum stated therein as due to the Sub-Contractor on the date or within the period provided under Clause 31.6 hereof.

31.6 The Sub-Contractor will be paid progress payment on the date immediately upon the expiry of 35 days after,

31.6.1 if the Sub-Contractor is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the Main Contractor a tax invoice for the progress payment, in accordance to and in compliance with section 8 of the SOP Act, the date the tax invoice is submitted to the Main Contractor, or

31.6.2 in any other case, the date on which or the period within which the payment response is required to be provided under Clause 31.5 hereof.

31.7 Where the word "day" is used in connection with or in relation to the SOP Act or any matter addressed therein, it shall have the meaning as ascribed in the SOP Act.

39 Clause 32 is reproduced below:

32 ALTERNATIVE PROGRESS PAYMENTS

32.1 The Sub-Contractor shall be entitled (but not obliged) to avail himself of the progress payment arrangement under Clause 32, instead of the progress payment regime under Clause 31 herein. In the event that the Sub-Contractor wishes to avail himself to Clause 32, he shall expressly indicate in his progress claim that he is making a claim pursuant to Clause 32 of the Sub-Contract.

32.2 The Sub-Contractor shall submit progress claims in respect of work done and materials supplied to site and not prematurely delivered in the preceding calendar month, at the time set out in Appendix 1. Progress claims shall include variations ordered under Clause 15 above. Progress claims are to be in writing and addressed to the Main Contractor and shall include all information, documentation and calculations necessary to substantiate the claims.

32.3 The Main Contractor shall issue an interim payment certificate certifying the value of each progress claim based on the value of work done and materials supplied to site and not prematurely delivered within 21 days of submission of the progress claim by the Sub-Contractor.

32.4 The Sub-Contractor shall be paid the certified value of its progress claim, less Retention Monies deducted at the percentage or amount set out in Appendix 1, within 35 days after receipt of a tax invoice from the Sub-Contractor setting out the amount stated in the interim payment certificate under Clause 32.3. The aggregate Retention Monies deducted from payments to the Sub-Contractor under this clause shall not exceed the percentage of the Sub-Contract Sum or amount stipulated in Appendix 1.

32.5 In the event that the Sub-Contractor fails to pay his sub-contractors, employees or workers for work done and/or goods supplied to the Sub-Contractor for the Sub-Contract Works, then, without prejudice to the Main Contractor's other rights and remedies, the Main Contractor may but not obliged to make payment direct to the Sub-Contractor's sub-contractors, employees or workers. In such event, the Sub-Contractor confirms that such direct payments to these sub-contractors, employees or workers and any such payments made by the Main Contractor shall be deemed to be payments made to the Sub-Contractor and amount to a valid and effective discharge of the Main Contractor's payment obligations to the Sub-Contractor insofar as the said payments are concerned.

32.6 Clause 32 shall in no way derogate from any rights the Sub-Contractor shall have under Clause 31 and the provisions of the SOP Act.

40 It is clear from a reading of cl 32 that for a contractual progress claim, the Claimant has to indicate expressly on the payment claim that it is a payment claim made pursuant to cl 32 of the Contract.

41 PC 29 had made it clear on its face that it was a payment claim for the purpose of the SOP Act and the Respondent had not taken issue with the validity of the payment claim.

Claimant's submissions

42 In so far as the case of *AXZ* is concerned, the Claimant had sought to distinguish the same.

43 The Claimant had submitted that the Respondent had in fact misconstrued the decision of the tribunal in *AXZ*.

44 The Respondent refers to [31], [34] to [37] of *AXZ*, and contends that the key principle undergirding the learned adjudicator's decision is the need to distinguish between a "Contractual PC" and an "SOP PC".

45 The Claimant submits that this completely misconstrues the decision of the learned adjudicator in *AXZ*. The learned adjudicator had in fact given

effect to the relevant clause found in the contract between the parties which prescribed the date for submission of payment claims (*AXZ* at [31]):

> I agree with the Claimant that the 'official' PC26 dated 29 July 2017 was not a valid payment claim. *It was not served pursuant to the timeline and procedure as set out in cl 14(4)(a)(i) of the Subcontract. Clause 14(4)(a)(i) of the Subcontract provided*:
>
> (i) Where pursuant to Sub-Clause 14.1(a), the interim payment is to be based on periodic valuation, *the Sub-Contractor shall submit the payment claim at monthly intervals on the 7th day of each calendar month* ("the reference month") for the value of all the work carried out under the Sub-Contract up to the end of the reference month …
>
> [emphasis added]

46 The relevant clause cited above prescribed that the payment claim was to be submitted on the seventh day of each calendar month. Notwithstanding the contractual provision, the parties in *AXZ* had agreed to an informal procedure as summarised at [32] of *AXZ*:

> Instead, Parties had agreed on a different procedure (the 'Informal Procedure') whereby the Claimant was to submit a draft payment claim to the Respondent. The Respondent would respond to this draft payment claim, possibly with a revised amount. Thereafter the Claimant would submit an 'official' claim consistent or compliant with the amount stated in the Respondent's earlier response. The Respondent did not need to respond to this 'official' claim given that the amount claimed in the 'official' claim would tally with the Respondent's revised amount.

47 The learned adjudicator went on to determine that this "Informal Procedure" would have been in contravention of the SOP Act, as the claimant was in effect forced to agree to the respondent's revised amount, and submit its "official" claim based on this revised amount (*AXZ* at [33]):

> This issue does not merely affect the 'draft' PC26. The 'official' PC26 was also not served pursuant to the SOP Act. There was no agreed date for the Respondent to respond with its revised amount. This might not be a problem if the Claimant could proceed to adjudication based on the 'draft' PC26. However, the Claimant was not able to proceed to adjudication because its 'draft"' PC26 dated 15 June 2017 was a 'draft'. *The Claimant was also forced to agree to the Respondent's revised amount when the Claimant was required to serve the 'official' PC26 at that revised amount.* Such restrictions on the "official" PC26 meant that it was not a payment claim under the SOP Act. Sections 2, 10, 11(1)(*a*), 11(1)(*b*) and 36 of the SOP Act stated that: … [emphasis added]

48 Accordingly, the learned adjudicator held that the Informal Procedure was unenforceable pursuant to s 36 of the SOP Act, and instead gave effect to PC28 which was submitted in accordance with cl 14(4)(a)(i) of the relevant contract.

49 Unlike the factual circumstances in *AXZ*, the parties in this case did not adopt an informal procedure for submission of payment claims. Instead, the date for submission of payment claims is prescribed in cl 14.2 of the letter of acceptance between the Respondent and the Main Contractor ("Respondent-Main Contractor LOA"). There is also no assertion by the Respondent that cl 14.2 is unenforceable under the SOP Act, but it has instead sought to draw a contrived distinction between a "Contractual PC" and an "SOP PC", which is not supported whether in fact or in law as explained above.

50 Further, not only does *AXZ* not stand for the proposition that there is a need to distinguish between a "Contractual PC" and an "SOP PC", the Court of Appeal in *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 ("*Shimizu*") has clarified that the SOP Act does not create a "dual railroad track system" where a party possesses a statutory entitlement to progress payment which is separate and distinct from a party's contractual entitlement. As such, the relevant terms of the contract providing for the service of payment claims will apply, and the SOP Act plays a "gap-filling" role in the event that the contract is silent on the date for service of a payment claim. *Shimizu* at [26] and [32] is reproduced below:

> 26 In so far as the cases suggest that the SOPA creates a 'dual railroad track system' where a party possesses a statutory entitlement to a progress payment which is separate and distinct from a party's contractual entitlement, such an interpretation would be inconsistent with our decision in Far East Square ([1] supra). More importantly, we do not think that this is borne out by a construction of the SOPA, bearing in mind its structure.
>
> …
>
> 32 We similarly conclude that there is no separate statutory entitlement to serve a payment claim under s 10 of the SOPA (as it then stood) where the underlying contract itself provides a mechanism for the service of payment claims. Sections 10(1) and 10(2) of the SOPA are the relevant provisions and they read as follows:
>
> …
>
> Since no separate statutory right to progress payments exists under s 5 of the SOPA where the contract itself provides for progress payments (see [26]–[31] above), there can be no question of a corresponding separate statutory entitlement to serve a payment claim under s 10 of the SOPA arising in such situations. *This is made abundantly clear by s 10(2) the SOPA, which stipulates*

> *that the terms of a contract which provides for the service of payment claims will govern.* Thus, in a situation where under the terms of the contract the payment certification mechanism can no longer operate, a party is no longer entitled to serve a payment claim. In this regard, we would note that the SOPA fulfills a similar 'gap-filling' role here as it does in relation to the amount and valuation of progress payments under ss 6 and 7 of the SOPA (see [29] above).
>
> [emphasis added]

My findings

51 After considering the extensive submissions by both parties on this issue, I am satisfied that PC 29 is a valid payment claim for the purpose of the SOP Act. It satisfies the requirements of a payment claim under the SOP Act and there is no ambiguity that it was intended to be a payment claim under the SOP Act given the express designation by the Claimant as such. In the course of the adjudication hearing, I had also drawn both parties' attention to the Court of Appeal decision in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [78], where the Court of Appeal opined that if a payment claim complies with the requirements of the SOP Act and Regulations, it should be treated as a payment claim under the SOP Act.

52 I accept the Claimant's argument that cl 14.2 is generic in nature. On a proper interpretation of cl 14.2, it is applicable in both situations where a payment claim is submitted under cll 31 or 32 of the Standard Conditions. The Respondent merely reserves the right to request for a draft payment claim to be submitted for consideration prior to submission of an official payment claim. Whilst cl 14.2 makes it clear that the draft payment claim does not constitute a payment claim under the SOP Act, it does not follow that the official payment claim submitted thereafter cannot constitute a valid payment claim under the SOP Act. In my view, it is still open to the Claimant thereafter to either couch the official payment claim as one under cl 32 of the Standard Conditions or as a payment claim pursuant to the SOP Act.

Prescribed date for payment claim to be served and date for lodgment of AA

Respondent's submissions

53 The main thrust of the Respondent's case is that the AA was filed prematurely based on the following assertions:

(a) Clause 14.1 of the Respondent-Main Contractor LOA provides that the timelines for submission of payment claims and payment responses are set out at cll 31 and 32 of the Standard Conditions.

(b) Clause 31.2 of the Standard Conditions in turn provides that the timelines for submission of payment claims are set out in Appendix 1 of the Standard Conditions.

(c) Appendix 1 of the Standard Conditions in turn provides that the time for submission of payment claims is set out in the Respondent-Main Contractor LOA.

(d) Clause 14.2 of the Respondent-Main Contractor LOA does not prescribe the date for the submission of payment claims, and instead, it prescribes the date by which the Respondent is to advise the Claimant in relation to the Claimant's draft payment claim.

(e) Since the Respondent-Main Contractor LOA does not prescribe when payment claims are to be submitted, the prescribed date under the SOP Act and SOP Regulations would apply, *ie*, by the last day of each calendar month.

(f) Based on the above, the Respondent contends that PC 29 is deemed to be served on 31 August 2024, and the payment response is only due on 21 September 2024, and accordingly, the AA was lodged prematurely.

Claimant's submissions

54 The Claimant had lodged the AA on 5 September 2024 at 3.47pm. The AA was lodged on time and is a valid AA. In this regard, the Claimant submitted that:

(a) Clause 14.2 of the Respondent-Main Contractor LOA provides that if the Respondent requests for a draft payment claim before the payment claim is to be submitted, the Claimant has to submit a draft payment claim on the 25th day of the month, or on such time as agreed between the parties.

(b) Clause 14.2 of the Respondent-Main Contractor LOA read with cl D.1 of the LOA requires the Claimant's payment claims to be submitted on the fifth day of the following month.

(c) For the month of July 2024, the Respondent had requested by way of its e-mail dated 2 July 2024 that the Claimant submit its draft progress payment claim on 9 July 2024. The Claimant had duly submitted its draft Progress Claim No 29 on 9 July 2024 for work done up to 9 July 2024.

(d) Pursuant to the timelines set out in the LOA, the Claimant served its PC 29 on the Respondent on 5 August 2024.

(e) Given that both the LOA and the Respondent-Main Contractor LOA are silent on the date by which the Respondent is required to submit its payment response to PC 29, the Respondent is required, pursuant to s 11(1)(*b*) of the SOP Act to submit its payment response by 20 August 2024, *ie*, excluding National Day on 9 August 2024, 14 days after the PC 29 is served.

(f) The Respondent had failed to serve a payment response on the Claimant by 20 August 2024. The Respondent had also failed to serve any payment response during the seven-day DSP, *ie*, from 21 August 2024 to 27 August 2024.

(g) Accordingly, the Claimant is entitled to lodge an adjudication application from 28 August 2024 to 4 September 2024, pursuant to s 12(2)(*b*) read with s 13(3)(*a*) of the SOP Act.

(h) At around 9.20am on 4 September 2024, prior to the lodgment of the AA, the Claimant had served on the Respondent its notice of intention to apply for adjudication pursuant to s 13(2) of the SOP Act.

(i) The Claimant had lodged the AA with the SMC on 4 September 2024, at 3.47pm.

(j) Accordingly, the AA was lodged on time and is a valid adjudication application.

(k) For ease of reference, the relevant timeline in respect of this AA is set out in the table below:

S/N	Event	Relevant dates
1.	Submission of PC 29	Submitted on **5 August 2024**.
2.	Payment Response to PC 29	Due on **20 August 2024** (excluding the National Day public holiday on **9 August 2024**). However, the Respondent did not provide a payment response.
3.	Dispute Settlement Period	Between **21 to 27 August 2024**.
4.	Entitlement to commence AA	Entitlement to commence adjudication arises on **28 August 2024**. The AA may be lodged from **28 August to 4 September 2024**.
5.	AA	The AA was lodged with the SMC on **4 September 2024**.

55 Alternatively, the Claimant submits that should I find that the purported "Standard Conditions" forms part of the LOA and prescribes the period within which a payment response is to be submitted by the Respondent, the AA would nonetheless have been lodged in time. In this regard:

(a) Clause 31.5 of the purported "Standard Conditions" stipulates that the payment response is to be submitted within 21 days after the payment claim is served.

(b) As such, the timelines set out in the timetable above at S/Ns 2 to 5 would be pushed back by seven days. The timetable in such event would be as follows (with changes set out in bold italics):

S/N	Event	Relevant dates
1.	Submission of PC 29	Submitted on **5 August 2024**.
2.	Payment Response to PC 29	Due on ***27 August* 2024** (excluding the National Day public holiday on **9 August 2024**). However, the Respondent ***still*** did not provide a payment response.
3.	Dispute Settlement Period	Between ***28 August* 2024 to *3 September* 2024**.
4.	Entitlement to commence AA	Entitlement to commence adjudication arises on ***4 September* 2024**. The AA may be lodged from ***4 September* to *11 September* 2024**.
5.	AA	The AA was lodged with the SMC on **4 September 2024**.

My findings

56 The central issue in this case turns on the interpretation of cl 14.2.

57 Clause 14.2 of the Respondent-Main Contractor LOA provides that payment claims are to be submitted on the fifth day of every month following the submission of the corresponding draft progress payment claim in the preceding month.

58 In this regard, cl 14.2 provides as follows:

> Notwithstanding Clause 14.1, you may be required as shall be informed by us to submit draft progress payment claims promptly on every 25th day or other agreed date of the month for work done forecast up to the end of the same month. The draft progress payment claims submitted by you ARE NOT meant to be actual payment claims whatsoever pursuant to the claim procedure specified in the Building and Construction Industry Security

> of Payment Act. We would advise you the amount for your official submission of progress payment claims on the 5th day of the following month.

59 The crux of the present dispute centres on the interpretation of the third sentence of cl 14.2. The Claimant asserts that cl 14.2 expressly provides that payment claims are to be submitted on the fifth day of the month. The Respondent, however, contends that cl 14.2 does not stipulate that a payment claim is to be submitted by the fifth day of the month. Instead, it contends that it is the Respondent's advice to the Claimant as to the amount that the Claimant should seek in its payment claim that the Respondent is to submit on the fifth day of each month.

60 The first sentence of cl 14.2 provides a mechanism for draft progress payment claims to be submitted to the Respondent. The Claimant submits that the purpose of this mechanism is for the Respondent to have sight of the amounts which the Claimant intends to claim, so that it, in turn, could rely on the same for its own claim to the Main Contractor.

61 The third sentence of cl 14.2 provides that the Respondent would advise the amount for the Claimant's payment claims. It should be noted that the Claimant is not contractually compelled to submit its payment claim in accordance with such advice. In other words, this mechanism of providing "advise" allows the Respondent to raise matters which it considers are deficiencies in the draft progress payment claim submitted by the Claimant, for the Claimant's consideration.

62 Such mechanism is intended to facilitate the Respondent's submission of its own progress claim to the Main Contractor, and to reduce any disputes which could arise out of any potential differences between the payment claims submitted by the Claimant (to the Respondent) and by the Respondent (to the Main Contractor).

63 The provision of such advice, however, is not mandatory, in the light of the use of the word "would", which suggests that the Respondent may provide such advice if it wishes to do so. Such an interpretation also accords with commercial and business sense, in that the Claimant's entitlement to submit a payment claim is not contingent on any such advice being provided.

64 Since the Respondent's advice is not mandatory, it would be unnecessary to stipulate a timeline for the provision of the same. Construing cl 14.2 in context and as a whole, what it really provides for is that the Claimant is required to submit its payment claim for the purposes of the SOP Act on the fifth day of the month, regardless of whether any advice has been provided by the Respondent.

65 The Respondent's interpretation of the third sentence of cl 14.2, on the other hand, is unworkable. If it is as the Respondent contends, *ie*, the timeline for the Respondent's advice is the fifth day of the month and there is no contractual timeline for the submission of payment claims for the purposes of the SOP Act, the Claimant is, pursuant to the SOP Act, entitled to submit its payment claim by the last day of the same month on which it submitted its corresponding draft progress payment claim, in spite of the fact that the Respondent's advice is only due on the fifth day of the next month.

66 I agree with the Claimant's submission that such an interpretation renders the third sentence of cl 14.2 otiose in that there is no point in stipulating a timeline for the provision of advice if the Claimant's payment claim for the purposes of the SOP Act may be submitted prior to its receipt of any advice. The Respondent's interpretation defeats the purpose of the mechanism provided in the third sentence of cl 14.2 – no advice provided by the Respondent would be considered by the Claimant unless it is provided before the last day of the month (*ie*, before the Claimant submits its payment claim for the purposes of the SOP Act).

67 As pointed out by the Respondent, as a matter of contractual interpretation, there is a presumption against redundant words or surplusage. It follows that the Respondent's interpretation ought to be rejected, given that its interpretation renders the third sentence of cl 14.2 otiose. A plain reading of cl 14.2 clearly indicates that the phrase "5th day of the following month" is the date by which the Claimant is to submit its payment claim under the SOP Act.

68 In the circumstances, I find that the prescribed date for service of the payment claim is the fifth day of every month and regardless of whether the time for service of the payment response is 14 or 21 days, the AA was properly lodged on the 4 September 2024.

Parties' agreement on due date for submission of payment claims

69 In any event, the Respondent itself had in writing confirmed that the Claimant's interpretation of cl 14.2 is the correct interpretation. In this regard, on 19 June 2023, Mr [L] (the Respondent's project manager at that time) of the Respondent wrote to the Claimant by e-mail as follows:

> Hi, [M] *Pls be noted that the email sent last month which indeed mentioned the official progress claim submission date should be on 5ht-Monthly as according to the contract indication. Therefore, the official claim submission will be assumed from 5th-Jun.* The latest payment response is still within the due date. [emphasis added]

70 The earlier e-mail referred to in this e-mail is an e-mail from Mr [L] to the Claimant dated 23 May 2023, which states: "Pls be noted that as requested by [Main Contractor] that our official progress claim should be submitted on 5th Monthly".

71 It is clear from the Respondent's own e-mail set out above, that as early as May 2023, the Respondent's position on record was that the Claimant was to submit its payment claims on the fifth of each month as provided for in the contract between the parties.

72 In reply to Mr [L]'s e-mail, the Claimant responded as follows:

> Dear Mr [G]/Mr [E]/ Mr [L],
>
> We refer to your emails dated 23 May 2023 and 19 June 2023, wherein you have stated that the date of submission of progress claims under the contract is on the 5th day of the month.
>
> This is despite a previous discussion at [the Main Contractor]'s office on 20 April 2022, during which it was discussed that the date of submission of progress claims would be on the 25th day of the month. The discussion was subsequently recorded in your email to us dated 21 June 2022 (see attached).
>
> Given that you have now taken the position that the relevant date for submission of progress claims set out in the contract will apply, we will proceed on the footing that this is the agreed date moving forward. Accordingly, the following dates will apply:
>
> 1. We will submit a draft progress claim *on the 25th day of the month*, if required; and
> 2. Thereafter, we will submit the progress claim *on the 5th day of the next month*.

73 As can be gleaned from the aforesaid e-mail exchanges between the Claimant and the Respondent, there was no dispute and, in fact, there was consensus between the Claimant and the Respondent that:

(a) the Claimant was to submit its payment claims on the fifth of each month;

(b) the contract between the Claimant and the Respondent required the Claimant to submit its payment claim on the fifth of each month; and

(c) at no time did either the Claimant or the Respondent assert that the contract was silent as to the date when the Claimant was to submit its payment claims.

74 Following the aforesaid e-mail exchange, both the Claimant and the Respondent proceeded on the basis that the Claimant was required under

the contract to submit its payment claims on the fifth of each month. This is seen from the payment claims that were submitted by the Claimant from August 2023 as tabulated below:

Payment Claim No.	Date of Submission of Draft Progress Payment Claim	Date of Payment Claim
17	25/7/2023	5/8/2023
18	10/8/2023	5/9/2023
19	8/9/2023	5/10/2023
20	11/10/2023	3/11/2023
21	8/11/2023	5/12/2023
22	4/12/2023	5/1/2024
23	10/1/2024	5/2/2024
24	7/2/2024	5/3/2024
25	7/3/2024	5/4/2024
26	5/4/2024	5/5/2024
27	7/5/2024	5/6/2024
28	7/6/2024	5/7/2024
29	9/7/2024	5/8/2024
30	13/8/2024	5/9/2024

75 There was no doubt or dispute between the parties as to when the Claimant was to submit its payment claims, *ie*, the fifth of every month. The current assertion by the Respondent that payment claims are to be submitted by the end of each month appears to be an afterthought that has been contrived in an attempt to avoid its liabilities under PC 29.

76 I accept the Claimant's submissions. In the circumstances, I find and accept the Claimant's contention that there was an express agreement for the Claimant to submit its payment claim on the fifth of every month. Alternatively, the Respondent would be estopped by conduct from contending otherwise.

Respondents' reliance on clause 40.2.2

77 The Respondent had contended that any amendment or variation to the contract has to be in writing and signed by both parties. Given my findings above on the date for submission of a payment claim under the SOP Act, cl 40.2.2 is not engaged in this case. There is no variation or amendment to speak of. In any case, I find that this provision would not be applicable if there is a clarification on interpretation of an existing provision in the contract or its payment terms. Alternatively, given the Respondent's confirmation in writing that progress claims are to be submitted on the fifth

of each month, they would be estopped from contending otherwise since the Claimant had relied on the same in the submission of its progress claims.

Patent errors

78 The Respondent had sought to raise various patent errors in its submissions and at the adjudication hearing.

79 The law on patent errors is well established and adequately set out in the submission of the Respondent. It is also well established that regardless of whether a payment response has been provided, an adjudicator must still satisfy himself that the claimant in an adjudication is entitled to the amount claimed. As the Court of Appeal stated in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [34]:

> Our view is that notwithstanding s 15(3), and regardless of whether any payment response has been filed, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be satisfied that the claimant has established a *prima facie* case that the construction work which is the subject of the payment claim has been completed and that the value of that work is as stated in the payment claim. Articulated in the terms of the Act, this duty comprises the obligations set out in ss 17(2) and 17(3), and requires an adjudicator, in particular, to have regard to all the matters stated in the latter provision.

80 The Respondent had also relied on the Court of Appeal decision in *Shimizu* ([50] *supra*). In *Shimizu*, the Court of Appeal held at [28] that:

> As we observed in *Far East Square* at [30], the phrase 'under a contract' in s 5 of the SOPA 'serves to premise the right to be paid on the performance of a contract so that if there is a breach of performance, the right to be paid does not crystallise'.

81 However, the Respondent had relied on the above passage in *Shimizu* to contend that the Claimant has allegedly failed to comply with its contractual obligations, and therefore is not contractually entitled to bring its claims.

82 In their reply, the Claimant contends that the Respondent should not be allowed to raise these objections in the adjudication as it had failed to provide a payment response.

83 The Respondent relies on the following in support of its contention:

(a) that the Claimant had allegedly failed to provide the large panel system;

(b) that the Claimant had allegedly supplied and installed defective distribution boards;

(c) that the Claimant had installed PVC pipes instead of GI pipes;

(d) that the Claimant had allegedly trespassed into areas which the Claimant was not authorised to access; and

(e) that the Claimant had allegedly exaggerated and inflated its claims.

84 The Claimant's contention is that in the light of the Respondent's failure to provide a payment response, pursuant to s 15(3) of the SOP Act, the Respondent has waived the right to raise any substantive and/or jurisdictional objections in these adjudication proceedings which ought properly to have been raised in a payment response, and the learned adjudicator has no jurisdiction to consider the same. The Respondent is at most only entitled to raise patent errors in relation to these claims based on the material properly before the adjudicator. Such patent errors must be obvious, manifest or otherwise easily recognisable, and are an extremely narrow category of errors, such as the wrong contract adduced in support of the payment claim, documentary evidence that plainly contradicted the claimed amount, and the absence of any material or explanation to support the payment claim (see [21]–[24] of *Comfort Management*).

85 In this regard, the alleged failure to comply with contractual obligations raised by the Respondent are not patent errors, but substantive objections which the Respondent is clearly not entitled to raise.

My findings

86 In my view, the passage cited by the Respondent in *Shimizu* at [28] appears to be taken out of context and does not have the far-reaching effect contended for by the Respondent. It is correct to say that the Claimant has to establish a *prima face* case that it has done the work in accordance with the contract and, hence, its entitlement to be paid. However, this must also be considered in the light of s 15(3) of the SOP Act which requires the Respondent to raise any matters entitling it to withhold money or set off in its payment response. Otherwise, it would render s 15(3) of the SOP Act otiose.

87 In this regard, in pointing out patent errors, the Respondent, in the absence of a payment response, would be limited to pointing out errors which appear on the face or absence of documents before the adjudicator.

88 The Claimant had objected to the introduction of new documents by the Respondent in its RSBOD filed with its reply submissions submitted on 27 September 2024 relating to these contractual breaches.

89 During the adjudication conference, I had reserved my position on the issue of admissibility and allowed the submissions by the Respondent based on these documents to ascertain whether they relate to matters which occurred after the due date on which the payment response had to be filed or matters that took place after the Adjudication Response. Having heard the Respondent, I accept the Claimant's submission that these objections relate to matters which were in the knowledge of the Respondent before the due date for filing of the payment response and could have been raised in the payment response. As such, I will disregard these documents and submissions on these contractual breaches for the purpose of this adjudication and confine myself to the documents already before me in the AA and AR.

90 I have gone through the documents and submissions made and made my findings on the items claimed in the attached Scott Schedule with brief reasons for my findings.

Conclusion

Adjudicated Amount

91 In the light of the foregoing, I determined that the Respondent shall pay the Claimant the sum of $4,997,755.54 (inclusive of GST) (the Adjudicated Amount). The breakdown of the Adjudicated Amount is as follows:

S/no.	Brief Description	Adjudication Amount (S$)
1	Subcontract Works	24,247,882.67
2	Variation Works	484,921.80
3	**Sub-total (1+2)**	**24,732,804.47**
4	Less: Retention sum	(1,553,250.00)
5	**Sub-total (3+4)**	**23,179,554.47**
6	Less: Previous payments	(18,594,457.64)
7	**Sub-total (5+6)**	**4,585,096.83**
8	Add: 9% GST	412,658.71
9	**Total (7+8)**	**4,997,755.54**

Due Date for Payment

92 Pursuant to s 22(1) of the SOP Act, I determine that the Respondent shall pay the Adjudicated Amount to the Claimant within seven days after

this Adjudication Determination is served on the Respondent (the Due Date for Payment).

Interest

93 Pursuant to s 8(5) of the SOP Act and in the absence of any stipulation in the Subcontract of a default interest rate, in the event that the Respondent fails to pay the Adjudicated Amount by the Due Date for Payment, the Respondent shall pay the Claimant simple interest thereon at a rate of 5.33% per annum, calculated from the Due Date for Payment until the date of full payment.

Costs of adjudication

94 The costs of the adjudication comprise the adjudication application fee of $654 (inclusive of GST) and adjudicator's fee and disbursements amounting to $24,688.50 (inclusive of GST), in total $25,342.50 (the Costs).

95 As the Claimant has succeeded in most, but not all, of its claims in this AA, I determine that the Costs of this AA amounting to $25,342.50 (inclusive of GST), shall be borne and paid by both parties in the following proportions:

(a) the Claimant shall bear and pay 10% of the said costs; and

(b) the Respondent shall bear and pay 90% of the said costs.

BJC Pte Ltd
v
BJD Pte Ltd

[2024] SGSOP 20

Singapore Mediation Centre — SOP AA 277 of 2024
Patrick Ong Kok Seng
22 November 2024

Jurisdiction — *Jurisdictional objections* — *Payment claim and adjudication application being served via e-mail to respondent's former employee who no longer worked with them and whose inbox was unattended* — *Whether there was effective service of payment claim on respondent* — *Whether there was effective service of adjudication application on respondent*

Payment Claim — *Claims for interest* — *Late payment interest* — *Whether late payment interest claimable in adjudication application* — *Sections 2 and 8(5) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 5, 8(1), 8(1)(*a*), 8(5), 10(2)(*a*)(i), 10(2)(*a*)(ii), 11(1), 11(1)(*b*), 11(3), 12, 12(2), 12(2)(*b*), 12(6), 13(3)(*a*), 13(3)(*b*), 13(3)(*c*), 15(1), 15(3), 15(3)(*a*), 16(1), 17(1)(*a*)(i), 17(3), 17(3)(*a*), 17(3)(*b*), 17(6), 17(6)(*a*)–17(6)(*c*), 18(1), 22(2), 37(1)(*d*), 37, 37(3), 37(3)(*a*), 37(3)(*b*)

Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 5(1), 5(3), 10(1)

Civil Law Act 1909 (2020 Rev Ed)

Companies Act 1967 (2020 Rev Ed) ss 215D, 215G(*c*), 215G(*d*)

Supreme Court of Judicature Act 1969 (2020 Rev Ed)

Yvonne Foo, Chua Minghao and Shee Zihui (Harry Elias Partnership LLP) for the claimant;
Murali Pany and Jolene Tan (Joseph Tan Jude Benny LLP) for the respondent.

[Commentary: see para 5.26]

22 November 2024

Patrick Ong Kok Seng:

1 This is a determination ("Determination") made on 22 November 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act"), as amended by the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ("Amendment Act"), and the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations") in respect of Adjudication Application No SOP/AA 277 of 2024. This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nomination body under the SOP Act.

2 The claimant is BJC Pte Ltd (UEN No [xxx]) ("Claimant") and the respondent is BJD Pte Ltd (UEN No [xxx]) ("Respondent").

3 For the reasons set out in the pages which follow, I hereby determine that:

(a) the Respondent shall pay to the Claimant the adjudicated amount of $337,883.06 (inclusive of goods and services tax ("GST"));

(b) the due date for payment of the adjudicated amount shall be on or before the expiry of seven days from the date of service of the adjudication determination on the Respondent ("Due Date"); and

(c) the Respondent shall pay to the Claimant interest at the rate of 5.33% per annum from the day after the Due Date of payment on the principal sum of $332,500.00 which remains unpaid until the same is paid.

Record

4 By a contract titled "Agreement for Interior Fit-Out Works [xxx] '[BJD]' Store at [xxx]" made on 31 October 2023 between the Respondent and [Z] Pte Ltd ("[Z]"), [Z] was engaged by the Respondent to carry out interior fit-out works for the project described as "Interior Fit-Out Works ('Renovation') at [xxx]" for the contract sum of $950,000.00 (the "Contract").

5 It is not disputed that on or about 17 April 2024, [Z] and the Claimant underwent the process of amalgamation under s 215D Companies Act 1967 (2020 Rev Ed). In this regard, the extraordinary general meeting ("EGM") to approve the resolution for the amalgamation of [Z] and the Claimant was passed on 17 April 2024. Pursuant to the passed resolution, [Z] ceased to exist as a separate entity as of 22 April 2024 and would exist as

the amalgamated company; namely, the Claimant. This was affirmed by the notice of amalgamation issued by the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") on 23 April 2024, stating that "… with effect from 22 April 2024, the Claimant and [Z] had amalgamated to become the Claimant".

6 Pursuant to ss 215G(*c*) and 215G(*d*) of the Companies Act 1967, all "property, rights and privileges" and "all liabilities and obligations" of [Z] will be transferred to and vest in the Claimant, being the amalgamated company.

7 For this reason, I agree with the Claimant that all of [Z]'s rights under the Contract including its right to be paid for work done under the Contract are vested in the Claimant and the Claimant is entitled to serve a payment claim on the Respondent for works done.

8 For the above reasons, I am satisfied that the Contract between the Respondent and [Z] (now amalgamated with the Claimant) is a construction contract within the meaning of the SOP Act.

The payment claim

9 The Claimant's case is that on 30 September 2024, the Claimant served its Payment Claim No 2 ("PC 2") on the Respondent by e-mail for the claimed amount of **$351,104.24** (inclusive of GST). Specifically, the cover page of PC 2 itself was stated to be by e-mail to only the Respondent's Mr[A]@[BJD].com.sg, although the e-mail service of PC 2 on 30 September 2024 was from the Claimant's Mr [B] to several of the Respondent's representatives, including the aforesaid e-mail at Mr[A]@[BJD].com.sg.

The payment response

10 Based on the information in the Adjudication Application Form AA-1, no payment response was served by the Respondent.

The adjudication proceedings

11 On 23 October 2024, the Claimant served its notice of intention to apply for adjudication ("NOI") on the Respondent.

12 On 29 October 2024, the Respondent lodged this adjudication application ("AA"). The AA was accompanied by a set of the Claimant's written submissions ("AA Submissions") and other supporting documents.

13 On 30 October 2024, a copy of the AA was served on the Respondent by the SMC.

14 Under s 15(1) of the SOP Act, a respondent shall lodge its adjudication response within seven days after receipt of a copy of an adjudication application (*ie*, by 7 November 2024). Therefore, the period for the Respondent to lodge its adjudication response was from 1 November 2024 to 7 November 2024.

15 I was informed by the SMC that as at 4.32pm of 7 November 2024, no adjudication response had been lodged with the SMC by the Respondent.

Appointment of adjudicator

16 On 30 October 2024, the SMC formally referred this adjudication application to me. I accepted the appointment of adjudicator on the same day.

17 On 30 October 2024, parties were notified by the SMC of my appointment as adjudicator.

Commencement of adjudication

18 Section 16(1) read with s 15(1) of the SOP Act provides that the adjudication commences immediately upon the expiry of the period within which the Respondent may lodge its adjudication response. As such, this adjudication commenced on 8 November 2024.

Record of proceedings and due date for determination

19 On 7 November 2024, I wrote to both parties, the relevant extracts of which are reproduced below:

> I refer to the Adjudication Application lodged on 29 October 2024 by the Claimant (the 'AA') and served on the Respondent on 30 October 2024. The Adjudication Response ('AR') would have been due by 7 November 2024.
>
> I have since been informed by SMC that as of 4.32 pm today, no AR has been served by the Respondent.
>
> Pursuant to Section 16(1) of the Act, the adjudication would commence on 8 November 2024. Under Section 17(1)(a) of the Act and as it appears that the Respondent has not made any payment response nor lodged any adjudication response, my determination would be due within 7 days after the commencement of adjudication; *ie*, on or before 15 November 2024 or such longer period as requested by the Adjudicator and agreed by parties. If parties have a different understanding of the timelines, ether party may address me on the same.

> Notwithstanding that no AR has been served by the Respondent, I am prepared to allow the Respondent an opportunity to be heard and to convene a short adjudication conference **on 11 November 2024 at 10 am (via Zoom link)**, provided parties are agreeable to my request to extend time for the Determination to be rendered **by 22 November 2024**.
>
> In this regard, I would appreciate if parties could let me know by 2 pm of 8 November 2024 tomorrow if:-
>
> (a) parties are available for the proposed conference on 11 November 2024; and
>
> (b) if parties agree to the extension of time for the Determination to be rendered by 22 November 2024.
>
> If I do not hear from parties or if I do not receive positive confirmation as aforesaid by 2 pm of 8 November 2024, I will proceed to issue fresh directions.
>
> [emphasis in original]

20 For completeness and under the provisions of s 17(1)(*a*)(i) of SOP Act, the Determination would be due within seven days after the commencement of adjudication, as the Respondent had failed to make a payment response and to lodge an adjudication response by the commencement of adjudication, unless an extension of time for the rendering of the Determination had been requested by the adjudicator and agreed to by the claimant and the respondent. In the absence of any agreement for extension of time for the Determination to be rendered, my Determination would be due on 15 November 2024.

21 By 3.22pm of 8 November 2024, I had only received an e-mail from the Claimant's solicitors, stating that they were taking instructions on the contents of my e-mail of 7 November 2024. Accordingly, I wrote to parties on 8 November 2024 at 3.22pm as follows:

> … I refer to my email of 7 November 2024 (time-stamped: 6.10 pm) and thank the Claimant's counsel for their response today (time-stamped: 2 pm).
>
> Given that I have not received any response from the Respondent nor received positive confirmation from both parties on the proposed conference and extension of time for the Determination to be rendered and due to the statutory constraints of time, I shall proceed to adjudicate the matter based on the materials before me and render the Determination on or before 15 November 2024. No conference will be necessary unless requested by either party and subject to my determination whether to convene a conference or otherwise.

22 On 8 November 2024 (at 3.45pm), I received a response from the Respondent's Group Finance Director, Ms [C], the relevant extracts of which are as follows:

> I refer to your email below, as Mr [A] is no longer with working with us, your email has been unattended and fall into the cracks. Taking over Mr [A]'s role is Mr [D] and he is assisted by Ms [E] copied in this email.
>
> Unfortunately none of our colleagues have received any emails relating to this matter, hence I would like to seek for 2 weeks extension to get back on the below matter if possible please.
>
> Separately, to speed things up, would be good if you can forward us all the past correspondences to all of my colleagues copied in this email.
>
> Your kind extension will be very much appreciated. Many thanks

23 On the same day (8 November 2024) at 5.18pm, I responded to the Respondent's e-mail as follows:

> I refer to your email of today's date (time-stamped: 3.45 pm).
>
> As set out in my email of 7 November 2024 to parties (time-stamped: 6.10 pm), I am the Adjudicator appointed by the Singapore Mediation Centre ('SMC') to determine the payment claim dispute in SOP/AA277 of 2024 between BJC Pte Ltd (Claimant) and BJD Pte Ltd (Respondent).
>
> I have been informed by SMC that the adjudication application in SOP/AA 277 of 2024 had been served on the Respondent, BJD Pte Ltd by email on 30 October 2024 at Mr[A]@[BJD].com.sg.
>
> As for my correspondences with parties and in case you did not receive the same, I also attach my last email sent to parties today (time-stamped: 3.22 pm). Beyond that, you already have my other correspondences with parties (as seen in your email thread).
>
> **As per my attached email of today's date, I will proceed to issue the Determination <u>on or before 15 November 2024</u> (unless I receive both parties' confirmation to an extension of time for the Determination to be rendered by no later than 1 pm of 11 November 2024).**
>
> In view of the above, you may wish to seek urgent legal advice if you are unsure of your rights.

24 On 8 November 2024 at 5.29pm, I received the following response from the Claimant's solicitors, the relevant extracts of which are as follows:

> The Claimant notes the Respondent's update that Mr [A] is no longer with the Respondent. The Respondent has not previously informed the Claimant on this issue. The Claimant is only made aware of this today.

> The Claimant wishes however to point out that the Respondent has access to and can retrieve emails from Mr [A]'s email inbox. The fact that the Respondent could respond to the present email thread is proof of this.
>
> On the basis of the above, and given the Respondent's confirmation (by conduct) that the Respondent has access to Mr [A]'s email inbox, the Claimant cannot agree to any extension of time, much less a '2 weeks extension to get back on the below matter'. Neither is such a request appropriate in the context of fast-paced adjudication proceedings.
>
> Be that as it may, the Claimant agrees with the Adjudicator's initial direction to give the Respondent an opportunity to be heard at the adjudication conference on 11 November 2024 at 10 am (via Zoom). The Claimant confirms its availability for the adjudication conference.
>
> For completeness, the Claimant also agrees to an extension of time to 22 November 2024, for the Adjudicator to render his determination.

25 Upon receiving the aforesaid response from the Claimant's solicitors, I wrote to both parties on the same day; *ie*, 8 November 2024 at 6.09pm, as follows:

> I refer to the email from the Claimant's counsel (time-stamped 5.29 pm).
>
> I have noted that the Claimant is agreeable to an extension of time to 22 November 2024 for the Determination to be rendered.
>
> As I have allowed the Respondent *until 1 pm of 11 November 2024* to revert on the extension of time for the Determination to be *rendered and subject to the Respondent's confirmation that they are agreeable for the Determination to be rendered by 22 November 2024*, I propose to re-fix the conference (via Zoom) to either of the following dates:-
>
> (a) 2.30 pm of 12 November 2024; or
>
> (b) 10.30 am of 14 November 2024
>
> Otherwise, my directions of 8 November 2024 (time-stamped: 3.22 pm) shall remain and I shall proceed to render the Determination on or before 15 November 2024.
>
> [emphasis added]

26 On 11 November 2024 at 10.30am, I received a response from the Respondent (addressed to both myself and the Claimant's solicitors), the relevant extracts of which are as follows:

> With reference to your email dd 8 November at 5.29pm, on your para 2 and 3 remarks, I disagree to your statement and would like to state that there was an out of office email by Mr [A] stating that he is no longer with the

> Company and therefore anyone corresponded to that email would have been notified of his absence and forward the email to the next in charged.
>
> The checking of Mr [A] email was a random check we do on our part and therefore shouldn't be deemed that we have access his emails regularly.
>
> Your proposed timing for 12 or 14 November does not give us enough time to seek legal representation on our side and would like to ask for 2 weeks extension of time please.
>
> Appreciate your indulgence on this timing please, Thank you

27 Pertinently, the Respondent's aforesaid email of 11 November 2024 (time stamped: 10.30am) did not indicate if they were agreeable to an extension of time for the Determination to be rendered by 22 November 2024. On the same day, I wrote to parties at 11.39am, as follows:

> I refer to the email from the Respondent's Ms [C] today (time-stamped: 10.30 am),
>
> Ms [C], under the statutory provisions of the SOP Act, an adjudicator is obliged to issue the Determination within the timelines set out in Section 17(1) of the SOP Act **or** under any extended timelines requested by the Adjudicator and agreed to by both parties. In my email of 8 November 2024, I have sought your confirmation if the Respondent is agreeable to the Determination to be issued by the later date of 22 November 2024 (which the Claimant has already agreed to) so as to accommodate any conference to allow both parties an opportunity to be heard. The dates of the conference are proposed dates only and may be subject to any further directions / other dates to be issued. As such, I am now awaiting the Respondent's confirmation that it is agreeable for the Determination to be issued by 22 November 2024 so that I may proceed to issue the necessary directions to accommodate any conference to be held..
>
> Ms [C], I would also reiterate my point in my email of 8 November 2024 (time-stamped: 5.18 pm) that given the gravity of the matter, the Respondent is strongly advised to seek urgent legal advice if you are unsure of your rights / issues raised herein. As the appointed Adjudicator, we cannot provide legal advice to either party.
>
> As per my email of 8 November 2024 (time-stamped: 6.09 pm), I look forward to receiving the Respondent's confirmation **by 1 pm today**.
>
> [emphasis in original]

28 I also sent a second e-mail to parties on the morning of 11 November 2024 (at 11.49am), requesting for a copy of the "out of office" email alluded

to in the Respondent's earlier email of 11 November 2024 (time stamped 10.30am) as follows:

> I refer to the email from the Respondent's Ms [C] today (time-stamped: 10.30 am),
>
> Further to my email of today's date (time stamp: 11.39 am), I would further direct that the Respondent provide to me, a copy of the out of office email from Mr [A] that he is no longer working with the Respondent (with a copy to be extended to the Claimant's solicitors) **by 5 pm today**.

29 On 11 November 2024 (at 6.39pm) and as *per* my request, I received the screenshot copy of the out-of-office e-mail from the Respondent's e-mail at Mr[A]@[BJD].com.sg ("Out-of-Office E-mail"). For completeness, the relevant extracts of the screenshot of the Out-of-Office E-mail are reproduced below as follows:

> From : Mr [A] 8 October
>
> To : You
>
> Dear Business Partners and Suppliers,
>
> I have left the organization and my apolgies [*sic*] if I have missed out on connecting you with the go forward teams. Kindly take note on the below effective immediately: …

30 Despite the Respondent's provision of the Out-of-Office E-mail to me on 11 November 2024 as aforesaid, I still had not received any response from the Respondent to my earlier e-mail of 11 November 2024 (time stamped 11.39am) on whether it was agreeable to an extension of time for the Determination to be rendered by 22 November 2024. On 11 November 2024 (time stamped 7.52pm), I wrote to both parties to grant one final opportunity for the Respondent to do so:

> I refer to the email from the Respondent's Ms [C] today (time-stamped: 6.43 pm).
>
> To-date and despite my emails, I have yet to receive any positive confirmation from the Respondent that that it is agreeable for an extension of time for the Determination to be issued by 22 November 2024.
>
> Given that the Respondent remains unrepresented (although I have advised that the Respondent seek urgent legal advice / representation), I hereby grant the Respondent, one final opportunity to confirm its agreement for an extension of time for the Determination to be issued by 22 November 2024, failing which I shall proceed to adjudicate the matter based on the materials before me. <u>In this respect, the Respondent is to respond by 10 am of 12 November 2024 whether it agrees to an extension of time for the Determination to be rendered by 22 November 2024.</u>

> Do take notice that if I do not receive the Respondent's confirmation by 10 am of 12 November 2024, I will issue the Determination on or before 15 November 2024. In such event, no conference will be convened due to statutory constraints of time.
>
> Separately, I would appreciate if the Claimant could confirm if they have a copy of the Notice of Amalgamation issued pursuant to Section 215F Companies Act (and referred to in Section 215G Companies Act) and if so, to provide me with a copy of the same (and copied to the Respondent too) by 2 pm of 12 November 2024.

31 On 12 November 2024 (time stamped 10.39am), the Respondent confirmed by e-mail that it was agreeable to an extension of time for the Determination to be rendered by 22 November 2024.

32 Accordingly, I sent an e-mail to parties on 12 November 2024 (time stamped:11.34am) to record the consent of parties for an extension of time for the due date of the Determination to be rendered by 22 November 2024 and to convene an adjudication conference at short notice.

33 On 12 November 2024, the Claimant's solicitors also provided me with a copy of the notice of amalgamation from ACRA (as requested in my aforesaid email of 11 November 2024 at 7.52pm to parties) ("Notice of Amalgamation").

Adjudication conference

34 Through further subsequent email correspondences, both parties confirmed their availability to attend an adjudication conference on 14 November 2024.

35 The virtual adjudication conference ("Conference") (by Zoom) took place on 14 November 2024 and was attended by the following representatives:

(a) Claimant's representatives:

(i) Ms [F] (Claimant's Senior Vice-President);

(ii) Mr [B] (Claimant's Vice-President);

(iii) Mr Chua MingHao (counsel); and

(iv) Ms Shee Zihui (counsel).

(b) Respondent's representatives:

(i) Ms [G] (Respondent's founder and Chief Executive Officer);

(ii) Ms [C] (Respondent's Group Finance Director);

(iii) Mr Murali Pany ("Mr Pany") (counsel); and

(iv) Ms Jolene Tan (counsel).

36 During the conference, I was informed by the Respondent's counsel, Mr Pany, that he had only just been appointed on the same day by the Respondent. Notwithstanding, Mr Pany confirmed that his firm was acting for and represented the Respondent in the present adjudication proceedings.

37 During the conference, parties made their respective oral submissions and arguments, the relevant parts of which I shall summarise below.

38 Due to the arguments and submissions raised during the Conference by parties, I had issued directions at the conclusion of the Conference and which were recorded in my e-mail of 14 November 2024 to parties (time stamped 6.17pm):

> I refer to the conference which was held earlier this afternoon.
>
> For the record, I have obtained confirmation during the conference that Mr Murali Pany from the firm of JTJB now act for the Respondent in these adjudication proceedings.
>
> During the conference, I had directed that parties are at liberty to exchange written submissions on the following issues raised:-
>
> (*i*) whether there is effective service of the payment claim / adjudication application in SOP/AA 277 of 2024 on the Respondent. In this regard, parties may also wish to refer to the principles set out in the case of *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2023] 3 SLR 292;
>
> (*ii*) whether the Claimant's claim for the gondola storage charges are caught by s.17(3) SOP Act;
>
> (*iii*) the merits of the Claimant's claim for interest of $10,224.74 and whether it can be said that the sum of $332,500 was a progress payment that was due and payable on the basis of the Claimant's tax invoice of 11 January 2024;
>
> (*iv*) whether there are any patent errors in the adjudication application;
>
> As discussed, the Claimant may also wish to procure written confirmation from SMC that no 'out of office' email was received for the service of the adjudication application.
>
> Due to time constraints to issue the Adjudication Determination on or before 22 November 2024, I direct that parties are to file and exchange the said written submissions **by no later than 10 am of 18 November 2024**. In this

> regard, I would be grateful if both the PDF and MS word copies of the submissions be extended to me.
>
> Thank you.

39 On 18 November 2023 and as directed, I received the Claimant's written submissions ("Claimant's Further Submissions"), together with some additional documents and authorities.

40 Contrary to the Respondent's indications at the conference that they wished to tender written submissions on the issues raised, I was informed by the Respondent's solicitors on 18 November 2024 that the Respondent would not be filing any submissions. Indeed, the e-mail from the Respondent's solicitors of 18 November 2024 (time stamped 7.41am) states as follows:

> 1. We refer to the Adjudicator's email dated 14 November 2024 below and thank the Adjudicator for his directions.
>
> 2. We are instructed that the Respondent will not be filing submissions in SOP/AA277 of 2024.
>
> 3. The Respondent reserves its rights in full.
>
> 4. Thank you.

41 Be that as it may, I proceeded to adjudicate the matter based on the materials before me, with a view to issuing the Determination on or before 22 November 2024.

Preface

42 In arriving at this Determination, I have considered all the materials, documents and submissions placed before me and in so far as I am obliged or permitted to do so under the SOP Act. For completeness, these include the following:

(a) the AA and the AA Submissions;

(b) the Claimant's Further Submissions;

(c) the Out-of-Office E-mail;

(d) the Notice of Amalgamation;

(e) the documents tendered together with the Claimant's Further Submissions and specifically referred to in this Determination;

(f) all oral submissions and arguments raised during the conference; and

(g) all legal authorities submitted by the Claimant in the AA and the Claimant's Further Submissions.

43 With a view to avoid incurring unnecessary costs and to save time, I have only recorded the facts and law relevant to arriving at my Determination. It should not be assumed that where a fact or argument was canvassed but not recorded herein, it was not given due consideration and taken into account in arriving at my Determination.

My determination

Jurisdictional issues

44 Although the Respondent had not served any payment response nor filed any adjudication response, the Respondent had, in their e-mails of 8 November 2024 (time stamped 3.45pm) and 11 November 2024 (time stamped 10.30am) (see [22] and [26] above), alluded that the Respondent had not received any e-mails on the matter as their former employee, Mr [A], was no longer working with them and that e-mails sent to Mr [A] were unattended and "fell into the cracks". However, it was unclear to me if the Respondent's complaint of "not having received any emails on the matter" meant that they had not been served with the payment claim in PC 2, or that the payment claim in PC 2 was not properly served as it was also served on Mr [A]'s e-mail box, and/or that the Respondent had not been served with the adjudication application by the SMC (which had been served by e-mail to Mr [A]'s e-mail inbox only).

45 During the conference, I sought clarification from the Respondent if they were taking the position that service of the payment claim in PC 2 had not been effected on the Respondent. The Respondent's counsel affirmed their position that PC 2 had not been properly served on the Respondent as the Claimant had effected service to an e-mail address of a former employee of the Respondent, Mr [A]. The Respondent's counsel further submitted that it was fortuitous that the service e-mail of 30 September 2024 came to light after the Respondent conducted a random check on Mr [A]'s e-mail. By the time the Respondent was aware of the payment claim, the Respondent had no chance to file their payment response and that any determination rendered under such circumstances would be faced with a question of jurisdiction.

46 During the conference, the Respondent did not, however, address me on any issues relating to the service of the adjudication application which had been served by the SMC on the Respondent on 30 October 2024. This was because unlike the issue of service of PC 2, the adjudication application was served by the SMC on Mr [A]'s e-mail address at Mr[A]@[BJD].com.sg only, as this was the sole e-mail service address provided by the Claimant in

the AA Form AA-1. However, taking into account that the Respondent's counsel had only just been appointed, I was inclined to allow the Respondent to make written submissions on this issue, if they wished to do so.

47 As I had been informed by the Respondent's counsel, Mr Pany, at the conference that he had just been appointed and to allow both parties an opportunity to fully ventilate their case, I had directed that parties be at liberty to file and serve written submissions on or before 10.00am of 18 November 2024 on the following jurisdictional issues:

(a) whether there was effective service of PC 2 on the Respondent; and

(b) whether there was effective service of the adjudication application on the Respondent;

48 As set out hereinabove, the Claimant had duly served the Claimant's Further Submissions on 18 November 2024 but the Respondent had elected not to do so.

First jurisdictional issue: whether there was effective service of payment claim on Respondent

49 The Respondent's position and submissions on this issue during the conference have been set out in the narrative above.

50 On the other hand, the Claimant's submissions on this issue (as set out in the Claimant's Further Submissions) may be summarised as follows:

(a) The Respondent's case is not that the payment claim was not served on them. Rather, the only argument raised by the Respondent (as canvassed at the conference) was that the payment claim was not properly served on the Respondent as it was served to Mr [A]'s e-mail inbox.

(b) The Respondent had waived its right to object that the payment claim was not effectively served, as it had failed to do so in any valid payment response. The Claimant cited the principles of waiver in the context of adjudication as set out by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*").

(c) That in any event, the Respondent cannot argue that PC 2 was not served on the Respondent on 30 September 2024, as PC 2 was also served on many of the Respondent's other personnel, including Ms [C], Ms [H] and Ms [I].

(d) The payment claim in PC 2 was properly served by e-mail, which is expressly permitted under s 37(1)(*d*) of the SOP Act and is likely to be effective in bringing the claim to the attention of the addressee in a reasonably prompt manner. This is because the Respondent had consented to being served via the e-mail address at Mr[A]@[BJD].com.sg. Further, the Respondent had previously issued and served payment claims to Mr [A]'s e-mail address at Mr[A]@[BJD].com.sg.

(e) Further, Mr [A] was, at all material times, the Respondent's Operation Director and had been actively liaising and/or corresponding with the Claimant through his e-mail address during the construction works. The Respondent had therefore also impliedly consent to the service of the payment claim via Mr [A]'s e-mail address, since the Respondent had behaved in a manner which gives the Claimant grounds to believe that Mr [A] regularly uses and checks that e-mail account.

(f) Even as at 15 November 2024, Mr [A] was still listed on the Respondent's website as the Respondent's Operation Director.

(g) In so far as the Respondent alludes that it was not immediately apparent from the service e-mail of 30 September 2024 that it contains a payment claim (as PC 2 was found in the enclosed document link), this lack of "apparentness" does not impugn the validity and/or service of the payment claim. This is because PC 2 complies with all the statutory requirements of a valid payment claim. The question, therefore, is whether the Respondent has received the payment claim and not whether the Respondent understands that it was served a payment claim, and it is clear that the Respondent has received the payment claim.

(h) It is more likely than not that the Respondent had opened and read the payment claim in PC 2, as the Respondent had made payment of the monthly late payment interest of $1,476.52 on 15 October 2024, for which the computation or breakdown is found at Annex C of PC 2.

My determination on first jurisdictional issue: whether there was effective service of payment claim on Respondent

51 At the outset, I wish to state that it is trite that there is a distinction between the situations where: (a) a payment claim is in fact served but did not comply with all the requirements of the SOP Act; and (b) a payment claim is not served. In the former situation, the validity of the appointment of an adjudicator by the authorised nominating body is not affected. However, in the latter situation where a payment claim is not served on the

respondent or where there is no payment claim, then the power of the authorised nominating body to appoint the adjudicator would not have arisen and any appointment of an adjudicator would be invalid: *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Lee Wee Lick Terence*") at [30]–[32].

52 In *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2023] 3 SLR 792 ("*LJH Construction*"), the General Division of the High Court ("General Division") had summarised the following principles at [38]:

> The following propositions may be gleaned from the authorities:
>
> (a) Where a payment claim is either: (i) not intended as a payment claim; or (ii) not served on the respondent, the appointment of an adjudicator on the basis of that payment claim would be invalid.
>
> (b) However, where a payment claim is intended as a payment claim and in fact reaches the respondent through service, but the mode of service does not comply with the agreed or applicable mode of service, it does not affect the validity of the adjudicator's appointment.

53 As such, and in so far as the Respondent's objection may be perceived as meaning that the payment claim in PC 2 was not in fact served on the Respondent, the Respondent would not be estopped from raising such objection or be held to have waived its right to do so as any appointment of an adjudicator on that basis would be void. It also follows to reason that if no payment claim had in fact been served on the Respondent in the first place, the Claimant would obviously not receive any payment response from the Respondent and no issue of waiver or estoppel can possibly arise.

54 Based on the Respondent's oral submissions at the Conference, I also did not understand the Respondent's case to be that the payment claim in PC 2 was not received by the Respondent. Rather, the real nub of the Respondent's objection was that the payment claim in PC 2 was served to an e-mail address of Mr [A], who had since left the employment of the Respondent. In other words, the Respondent was objecting to the invalid service of the payment claim (and not that the payment claim was not received by the Respondent).

55 Having considered the evidence and submissions before me, I find that there was effective and valid service of the payment claim in PC 2 on the Respondent on 30 September 2024.

56 As a starting point, I do not think it is controversial that PC 2 was in fact received by the Respondent on 30 September 2024 as the service e-mail was also addressed to several other representatives of the Respondent, including Mr [A]. These other Respondent's representatives included Ms [C], Ms [H] and Ms [I]. Even if Mr [A] had already left the employment

of the Respondent by then, it does not detract from the fact that PC 2 was received by the Respondent. The Respondent has not to-date alleged that the other Respondent's representatives had not received the service e-mail of 30 September 2024.

57 It is not controversial that service of payment claims by e-mail is permitted by s 37(1)(*d*) of the SOP Act, which provides as follows:

> **37.**—(1) Where this Act authorises or requires a document to be served on a person, whether the expression 'serve', 'lodge', 'provide' or 'submit' or any other expression is used, the document must be served on the person —
>
> (*a*) by delivering it to the person personally;
>
> (*b*) by leaving it during normal business hours at the person's usual place of business;
>
> (*c*) by sending it by post or fax to the person's usual or last known place of business;
>
> (*d*) *by sending it by email to the person's email address*; or
>
> (*e*) by sending it by any other electronic method authorised by regulations made under section 41(1) for the service of documents of that kind if the person consents to service of a document of that kind in that way.
>
> [emphasis added]

58 In turn, an e-mail address is defined under s 37(3) SOP Act to mean the "last email address given by the addressee concerned to the person serving the document as the email address for the service of documents" (see s 37(3)(*a*)) or the "the last email address of the addressee concerned known to the person serving the document" (see s 37(3)(*b*)).

59 In *LJH Construction* ([52] *supra*), the General Division expounded further on the requirements for valid service of payment claims by e-mail under s 37 of the SOP Act:

> 47 *Accordingly, in my judgment, service of a payment claim by e-mail would only be valid if it is likely to be effective in bringing the claim to the attention of the addressee in a reasonably prompt manner, and the sender has the onus of proving this*. To that end, where a sender wishes to serve a payment claim on a recipient via the last e-mail address of the addressee known to the sender under s 37(3)(*b*) of the SOPA, the sender must have some basis, which is objectively ascertainable, to believe that the last known e-mail address is one which the addressee currently uses, or at least checks, regularly. It is insufficient that the sender has some subjective belief, without any proper basis, that the last known e-mail address would be one that the addressee would check regularly. While I do not propose to exhaustively define what

> would amount to such an objectively ascertainable basis, an example would be where the sender has, in the recent past, sent e-mails to the addressee via a particular e-mail address, and the addressee has replied using that e-mail address.
>
> 48 This requirement is consistent with a contextual reading of s 37 of the SOPA. Section 37(1)(*e*) of the SOPA provides that a sender may serve documents on an addressee via any electronic method authorised by regulations made under s 41(1) of the SOPA only if the recipient consents to service via that method. *In the same vein, where a sender wishes to serve payment claims on an addressee through a particular e-mail address, it is reasonable to expect that the addressee has in some way consented to being served via that e-mail address. An addressee may expressly consent to the service of documents via a particular e-mail address by giving the sender that e-mail address for the service of documents (s 37(3)(a) of the SOPA). In that situation, it is reasonable to expect that the addressee would check his e-mail regularly for documents being served on him. Alternatively, an addressee may impliedly consent to the service of documents via the last e-mail address known to the sender by behaving in a manner which gives the sender grounds to believe that the addressee regularly uses and checks that e-mail account* (s 37(3)(*b*) of the SOPA). In that latter situation, it would be reasonable to expect that documents served via that e-mail address would be likely to be brought to the addressee's attention in a reasonably prompt manner. In both cases, the service of documents by e-mail would be regarded as effective in bringing the addressee's attention to the payment claim.
>
> [emphasis added]

60 Even discounting the fact that PC 2 was also served on other representatives of the Respondent as aforesaid, I agree with the Claimant that service by e-mail to Mr [A]'s e-mail box would be effective in bringing the payment claim to the attention of the Respondent. This is so for several reasons.

61 Mr [A] was, at all material times, the Respondent's Operation Director who had been actively liaising and/or corresponding with the Claimant through his email address during the course of the Contract works. Further, the Claimant's previous payment claim dated 31 August 2024 was also addressed to Mr [A] and sent to Mr [A]'s e-mail address (as well as to other representatives of the Respondent).

62 During the conference, I was informed by the Respondent's counsel that Mr [A] had left the employment of the Respondent on 25 September 2024. However, the Respondent did not provide any evidence of the same nor any evidence that the Respondent had notified the Claimant of Mr [A]'s departure on 25 September 2024. Indeed, the Out-of-Office E-mail (which the Claimant did not receive) also does not assist the Respondent's case as it appears to be dated 8 October (presumably 8 October 2024), which would

be ***after*** the date when the payment claim in PC 2 was served on the Respondent on 30 September 2024. This buttresses the Claimant's case that the Claimant was unaware that as at 30 September 2024, Mr [A] had left the employment of the Respondent. That being the case, I find that the Claimant's belief that service of the payment claim on 30 September 2024 by e-mail to Mr [A]'s e-mail "would be effective in bringing the claim to the attention of the Respondent in a reasonably prompt manner" to be justified and well founded.

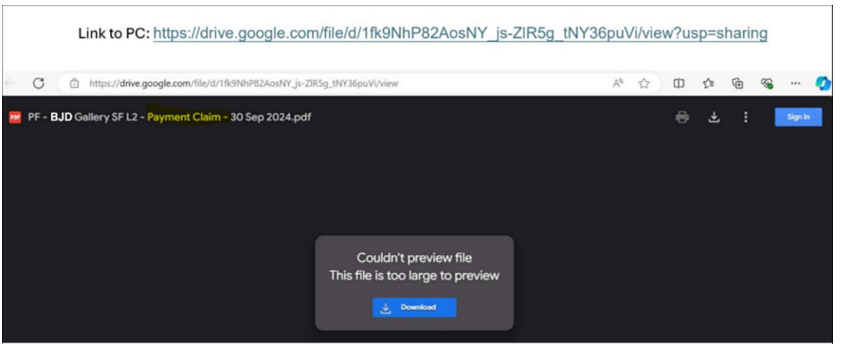
63 In the Claimant's Further Submissions, the Claimant also adduced a screenshot of the Respondent's management team at the Respondent's website. As at 15 November 2024, Mr [A] was still listed on the Respondent's website as the Respondent's Operation Director. This merely adds to the confusion of Mr [A]'s status with the Respondent, which the Respondent has failed to satisfactorily address.

64 I will now deal briefly with another point that was alluded by the Respondent's counsel during the conference; namely, that it was not immediately apparent from the service e-mail of 30 September 2024 that the e-mail contains a payment claim.

65 The service e-mail of 30 September 2024 from the Claimant to the Respondent is reproduced below:

> **From:** Mr [B]
>
> **Sent:** Monday, September 30, 2024 11:39 PM
>
> **To:** Mr [A]; Ms [C]; Ms [H]; Ms [I]; Mr [J]; Ms [F]; Mr [K]; Mr [L]; Mr [M]; Mr [N]; Mr [O]; Ms [P]
>
> **Subject:** RE: BJD Level 2 – RESUMPTION OF WORKS
>
> Hi Mr [A] and Ms [C]
>
> We have yet to receive any payment from BJD. This is a reminder to settle the outstanding amount. Details below.
>
> [Google Drive link]
>
> Best,
>
> Mr [B]

66 The document link, when clicked, shows the title of the document, which expressly states "PF – BJD Gallery SF L2 – *Payment Claim* – 30 September 2024.pdf" [emphasis added]:



67 The document (as uploaded in the document link) expressly states "PAYMENT CLAIM":

PAYMENT CLAIM

Payment claim reference number: 24/SMS/BJD/PC-02 **Payment claim date: 30/09/24**

To: BJD PTE LTD	
Service address: [redacted]	Tel: [redacted] Fax: [redacted] Email: Mr[A]@[BJD].com.sg
Person-in-charge: **Mr [A]**	
From: [Z] Pte Ltd/ BJC Pte Ltd	
Service address: [redacted]	Tel: [redacted] Fax: [redacted] Email: Mr[B]@[xxx].com.sg
Person-in-charge: **Mr [B]**	

68 At the outset, I wish to state I have some empathy for this submission as the textual context of the e-mail states that the subject matter is a reminder for outstanding payment (and not for service of a payment claim). Further, it would not be unfair to say that the payment claim in PC 2 appears to be somewhat "embedded" within the document link itself and is only apparent when the document link is clicked upon.

69 Notwithstanding, I agree with the Claimant's submissions that the lack of "apparentness" of a payment claim does not detract from the fundamental requirements of validity and service of the payment claim. A valid payment claim is a claim that satisfies the statutory requirements for a payment claim under the SOP Act and which is also required to be validly served in accordance with the statutory requirements of the SOP Act. Notwithstanding the contents of the cover e-mail of 30 September 2024, it would be apparent from clicking the document link in the same e-mail that PC 2 was being served on the Respondent by e-mail, which the Respondent would reasonably have been expected to click on the enclosed document link. As such, I have no difficulties in finding that there was effective service of PC 2 on the Respondent on 30 September 2024, although I would urge

the Claimant to state their purpose in less ambiguous terms in their e-mails in future when effecting service of payment claims.

70 The Respondent has also not advanced any arguments or submissions before me that the e-mail of 30 September 2024 was not intended to be a payment claim.

71 Lastly, and in so far as the Respondent's objections relate to the invalid service of the payment claim in PC 2 for being served on Mr [A]'s e-mail inbox, I agree with the Claimant's submissions that such an objection ought to have been included in a payment response, failing which the Respondent would have waived its right to do so. This was explained by the Court of Appeal in *Audi Construction* ([50(b)] *supra*):

> 63 We illustrate this using the example of an invalid payment claim, although this analysis would apply to a case involving an **invalidly-served payment claim** as well. When a claimant serves a payment claim, a respondent is entitled to raise an objection to that claim through a payment response. **If the respondent communicates his election not to raise an objection to the payment claim's validity, he may in principle be said to have waived his right to make that objection before the adjudicator**. In this respect, Handley's analysis of waiver by election (see [55] above) elucidates the waiver's precise mechanism. The respondent, upon realising that the payment claim is invalid, acquires the power to change his rights in relation to the claimant by objecting to the validity of the payment claim. If the respondent exercises that power by raising that objection in a payment response, he establishes for himself the right to raise that objection before a tribunal or a court as a ground for not having to make payment to the claimant. **If, however, the respondent elects not to exercise that power by failing to file a payment response containing the objection, then he will not have any right to rely on that objection before a tribunal or court; indeed, he will have lost the opportunity to establish that right by the time the payment response should have been filed, and will therefore have to be content with the default obligation to pay under the payment claim in so far as no other form of objection has been raised**.
>
> …
>
> 66 … By that provision, the Act restricts the issues which can be raised before an adjudicator to the issues stated in the payment response provided by the respondent to the claimant. **It follows that if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response. Reading s 15(3)(*a*) as requiring a respondent to raise any jurisdictional objection it has in its payment response is, again, entirely in line with the purpose of the Act**, which need not be repeated (see [1], [49] and [52] above). Section 15(3)(*a*) and the general regime of expeditious dispute resolution being the relevant legal

context of this case, **we have no hesitation in holding that a respondent has a duty to raise jurisdictional objections in his payment response.**

67 In this connection, we note that in Grouteam, we considered (at [64]) that a respondent should raise such objections at the 'earliest possible opportunity'. While this would be ideal, we acknowledge that silence at literally the earliest possible opportunity (*eg*, the day on which the payment claim is received) may not be sufficiently unequivocal for the purpose of waiver by election or equitable estoppel. **Accordingly, we are of the view that a failure to object would amount to an unequivocal representation of a decision to forgo one's right to raise that objection only when such a failure subsists at the time a claimant would reasonably expect the respondent to air his objection. For the reasons stated at [66] above, that time is the time by which the respondent is to file his payment response**. This is consistent with our view in *Grouteam* at [68] that:

… the appropriate time for the respondent to raise such an objection [*ie*, an objection to the time of service of a payment claim] would generally be the time at which it receives that payment claim or, at the latest, by the deadline for it to submit its payment response. …

[emphasis added in bold]

72 By not filing a payment response and thereby not including any objection as to the service of the payment claim or on any issue concerning the payment claim, the Respondent had elected not to raise such an objection and would have accordingly lost that right to rely on said objection in the present adjudication proceedings.

My determination on second jurisdictional issue: whether there was effective service of adjudication application on Respondent

73 Although the Respondent has not specifically addressed me on any issues relating to the service of the adjudication application by the SMC, I will deal with this issue briefly as the Claimant had made some written submissions on this issue pursuant to my directions.

74 Based on the evidence and material before me, I find that the Respondent had received the adjudication application which had been served by the SMC on the Respondent on 30 October 2024 at Mr[A]@[BJD].com.sg for the reasons that follow.

75 Firstly, I am satisfied that the Respondent retains access to Mr [A]'s e-mail inbox at all times. This is evidenced by the fact that the Respondent's Ms [C] was able to respond to my initial directions e-mail of 7 November 2024 which was only sent to Mr [A]'s e-mail inbox (on behalf of the Respondent, as this was the only stated e-mail address of the Respondent stated in the AA-Form 1) via her reply e-mail of 8 November 2024 (time

stamped 3.45pm). Otherwise, it would not been possible for the Respondent's Ms [C] to reply by e-mail if the Respondent did not have access to Mr [A]'s e-mail inbox.

76 Further, the Respondent had also admitted in their e-mail of 8 November 2024 that it had access to Mr [A]'s e-mail "which had been unattended and fallen through the cracks". The Respondent also admitted in their e-mail of 11 November 2024 (time stamped 10.30am) that they conduct "random checking of Mr [A]'s email and therefore shouldn't be deemed that we have access his emails regularly".

77 It is therefore apparent from the above that Mr [A]'s e-mail remains "live" and "operational" and is accessible by the Respondent.

78 Pertinently, the SMC has also since provided written confirmation by e-mail on 15 November 2024 that it did not receive an Out-of-Office E-mail from Mr [A]'s e-mail inbox when the adjudication application was served on Mr [A]'s e-mail address by the SMC on 30 October 2024. The SMC's aforesaid e-mail of 15 November 2024 was made in response to an e-mail request for confirmation by the Claimant's solicitors and was copied to all parties, including myself and the Respondent.

79 The Claimant has also stated in evidence in the Claimant's Further Submissions and in the Claimant's solicitors' e-mail of 12 November 2024 (time stamped 10.27am) that they have never received the Out-of-Office E-mail from the Respondent.

80 Aside from the SMC's e-mail service of the adjudication application on the Respondent, the SMC had also served a written notice by post to Ms [G], who is the Respondent's founder and chief executive officer, notifying her that an adjudication application has been lodged by the Claimant against the Respondent. The said Ms [G] was also present as one of the Respondent's representatives at the adjudication conference.

81 For the above reasons, I agree with the Claimant that it is inconceivable for the Respondent to claim that it was not aware of the adjudication application lodged against it by the Claimant.

82 I find that the adjudication application had been validly served by the SMC on the Respondent on 30 October 2024.

Relevant timelines for lodgment of adjudication application

83 Notwithstanding the above, I also have an incumbent duty to decide whether the adjudication application was made in accordance with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the SOP Act (*Lee Wee Lick Terence* ([51] *supra*) at [64]):

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

84 Section 13(3)(*a*) of the SOP Act provides that "An adjudication application must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12". The entitlement to make an adjudication application under s 12 of the SOP Act would in turn be set out at s 12(2) of the SOP Act, which provides as follows:

> **12.**—(1) …
>
> (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 mentioned 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.

85 Section 10(2)(*a*)(i) of SOP Act provides that "A payment claim must be served not later than the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection".

86 In this regard, the Contract is silent as to the date by which the Claimant is required to serve its payment claim.

87 In the absence of contractual stipulation of the time at which a payment claim must be submitted or by which such time may be determined, s 10(2)(*a*)(ii) of the SOP Act, read with reg 5(1) of the SOP Regulations, provides that "a payment claim made under the contract must be served by the last day of (a) the month following the month in which the contract is made; or (b) any subsequent month".

88 In this regard, reg 5(3) of the SOP Regulations provides that "month" means "a period of time beginning on the first day of each of the 12 calendar

months into which a year is divided, and ending on the last day of each of these months".

89 Accordingly, the Claimant is required to submit its payment claim by the last day of the month, *ie*, by 30 September 2024.

90 In this regard, I have already found that PC 2 was effectively served on the Respondent on 30 September 2024, being the last day of the month.

91 As the Contract is also silent as to the date by which the Respondent is required to issue its payment response, s 11(1)(*b*) of the SOP Act requires the Respondent to respond to the relevant payment claim "within 14 days after the payment claim is served under section 10".

92 As such, the Respondent is required under s 11(1)(*b*) of the SOP Act to issue a payment response within 14 days after PC 2 was served, *ie*, by 14 October 2024.

93 The dispute settlement period under s 12(6) of the SOP Act is seven days after the date on which the payment response is required to be provided under s 11(1) of the SOP Act:

> **12.**—(1) …
>
> (6) In this section, 'dispute settlement period', in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1).

94 In this regard, the dispute settlement period in relation to PC 2 was the period of seven days after 14 October 2024, *ie*, from 15 to 21 October 2024.

95 As set out above and under s 12(2)(*b*) of the SOP Act, the Claimant is entitled to apply for adjudication if by the end of the dispute settlement period, the dispute is not settled or if the Respondent does not provide a payment response.

96 Section 13(3)(*a*) of SOP Act provides that an adjudication application must be made within seven days after the entitlement to make an adjudication application first arises under s 12. This excludes the actual day on which the entitlement to make the application arises and the seven days period *after* the entitlement arises will commence on the day after: *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298.

97 Prior to the lodgement of the adjudication application with the SMC, the Claimant had, on 23 October 2024, served on the Respondent the NOI.

98 Accordingly, I find the relevant timelines to be as follows:

Description	Period
Date of service of PC 2	30 September 2024
Due date for payment response	14 October 2024
Dispute settlement period (pursuant to s 12(6) of the SOP Act)	15 October 2024 to 21 October 2024
Entitlement to lodge adjudication application first arises (pursuant to s 12(2) of the SOP Act)	22 October 2024
Entitlement to lodge adjudication application (pursuant to s 13(3)(*a*) of the SOP Act)	23 October 2024–29 October 2024

99 As the AA was lodged on 29 October 2024, I find and determine that it was made within the period of the Claimant's entitlement to lodge an adjudication application and within the meaning of s 13(3)(*a*) of the SOP Act.

Substantive merits of the claims and set-offs in this adjudication

100 I now move to consider the substantive merits of the claims raised in this adjudication. However, before I do so, it would be useful to outline the relevant applicable legal principles which I will be required to have regard to in deciding on the substantive merits.

101 It is not controversial that the statutory requirement for including reasons in a valid payment response for withholding payment of claimed sums are set out in s 11(3) of SOP Act. For completeness, s 11(3) of SOP Act provides as follows:

> (3) A payment response provided in relation to a construction contract —
>
> (*a*) must identify the payment claim to which it relates;
>
> (*b*) must state the response amount, if any;
>
> (*c*) must state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and
>
> (*d*) must be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

102 In the absence of any payment response or the absence of reasons stated in any payment response filed by the Respondent, the Respondent is precluded by s 15(3) of the SOP Act from including any reason for withholding any amount from the sum claimed in the adjudication response

and the adjudicator shall also be bound by s 17(6) of the SOP Act not to consider any objection from the Respondent of any nature that was not included in the adjudication response, subject to the narrow exceptions set out in ss 17(6)(*a*)–17(6)(*c*) of SOP Act, including patent errors. *A fortiori*, if a respondent is precluded by s 15(3) of SOP Act from including any reason not stated in a valid payment response in an adjudication response, then such reason must also not be considered by the adjudicator as it ought not to be included in an adjudication response in the first place. The said s 15(3) and ss 17(6)(*a*)–17(6)(*c*) of the SOP Act are set out below:

> **15.**—(1) …
>
> (3) Subject to subsection (4), 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 <u>relevant payment response</u> 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.
>
> **17.**—(1) …
>
> (6) The adjudicator must not consider an objection from the respondent of any nature that was not included in the adjudication response, unless —
>
> (*a*) the circumstances of that objection only arose after the respondent lodged the adjudication response with the authorised nominating body;
>
> (*b*) the respondent could not reasonably have known of those circumstances when lodging the adjudication response with the authorised nominating body; or
>
> (*c*) the objection relates to a patent error.

103 Further, the term "relevant payment response" in s 15(3)(*a*) of SOP Act has been clarified by the High Court in *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689 to refer to a "payment response to a payment claim which is the subject matter of an adjudication application".

104 Regardless of whether any payment response had been filed, an adjudicator has an independent duty to consider the true merits of the payment claim, *and to allow it, the adjudicator must be satisfied that the claimant has established a* prima facie *case that the construction work which is the subject of the payment claim has been completed and that the value of that work is as claimed in the payment claim.* These independent duties of an adjudicator are trite and have been comprehensively set out by the Court of

Appeal at [34] and [65] in the seminal case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*").

105 Finally, it is an integral role of an adjudicator to consider patent errors and that a respondent who had not filed any payment response is entitled to point to patent errors on the face of the materials properly before an adjudicator. The Court of Appeal had also clarified in *Comfort Management* that patent errors were, however, an exceptional and extremely narrow category of errors and was an error in the material properly before an adjudicator that was obvious, manifest or otherwise easily recognisable. The Court of Appeal at [23] of *Comfort Management* also gave some examples of what might amount to patent errors.

Claims by the Claimant in this adjudication

106 The breakdown of the Claimant's claim in PC 2 for the revised claim amount of $347,202.56 is as follows:

S/N	Description	Quantum (S$)
1.	Contract works (milestone payment)	332,500.00
2.	Third party gondola charges	8,550.00
3.	9% GST (for items 1 & 2)	30,694.00
4.	Interest	10,224.74
	Sub-total	381,969.24
5.	Deduction	(865.00)
6.	Less amounts previously paid (including the sums of $2,425.16 and $1,476.52 received on 15 October 2024 and after service of PC 2)	(33,901.68)
	Revised claim amount in SOP/AA 277 of 2024	347,202.56

107 To clarify and as set out hereinabove in this Determination, the claim amount in PC 2 which was served on the Respondent was for the original claimed sum of $351,104.25 (inclusive of GST). However, after accounting for the sums of $2,425.16 and $1,476.52 received by the Claimant on 15 October 2024, the Claimant has revised their claim amount to $347,202.56 in this adjudication proceedings.

Item 1: contract works (milestone payment)

108 Clauses C and D of the Contract provide for the contract sum of S$950,000.00 (exclusive of GST) to be paid out in the following tranches:

> (c) 40% valued at $380,000 shall be paid as a downpayment "upon Award and/or signing of Agreement" (cl D (2.0);

(d) 20% valued at $190,000 shall be paid when "60% work performed of the main contract (excluding variation and additional orders)" is achieved (cl D (3.1 & 3.2));

(e) 35% valued at $332,500 shall be paid "Upon achieving Practical Completion", *ie*, when "100% work performed of the main contract (excluding variation and additional orders)" is achieved (cl D (4.1); and

(f) 5% valued at $47,500, being the retention sum, shall be paid at the end of the 12 months' defects liability period (cll C and D (1.0)).

109 In PC 2, the Claimant has claimed the sum of $332,500.00 as the milestone payment for achieving practical completion.

110 Practical completion is defined in cl D (5.0) of the Contract to mean:

5.1 the Client [*ie* the Respondent] taking over of the Premise to commence operations, or;

5.2 Certified complete by an independent party (*ie* qualified professional, such as a Registered Architect).

111 The Claimant's case as set out in their AA Submissions is that both definitions of practical completion are satisfied, in that:

(a) The premises have been taken over by the Respondent as of 11 January 2024. The correspondence between the Respondent's "[Q]" and the Claimant's "Mr [O]" shows that the premises have been handed over to the Respondent, with the Respondent acknowledging receipt of the keys from the Claimant. Further, the Respondent has also commenced operations at the premises, with the soft launch of its operation on 22 January 2024.

(b) A certificate of practical completion ("Certificate of Practical Completion") has also been issued by [Y], the project manager appointed by the Respondent for the project, certifying that practical completion of the "interior fit-out works and supply of [xxx] "[BJD]" Store at [xxx]" was achieved on 11 January 2024.

112 Further, the Claimant also highlighted that 100% of the Contract works had been completed, in that:

(a) As of 11 January 2024, when the Certificate of Practical Completion had been issued, all that remained were defects. The defects were not part of the 100%, as the defects were to be rectified post-completion during the defects liability period. In support of the same, the Claimant had included the as-built drawings, approved product submissions and construction drawings in the AA.

(b) In any event, as of 1 March 2024, all of the defects had been rectified.

113 Based on my perusal of the supporting documents as aforesaid, I am satisfied that the Claimant has established a more than *prima facie* case that the Contract work item claimed as aforesaid has been carried out; namely, that practical completion had been achieved. There is evidence before me that both limbs of practical completion as contemplated by cl 5.1 (client taking over premises to commence business) and cl 5.2 (certified complete by an independent party, *ie*, "qualified professional, such as a Registered Architect)" have been achieved. Pertinently, the Certificate of Practical Completion issued by [Y] is *prima facie* proof that 100% of the Contract works have been completed as of 11 January 2024.

114 Accordingly, I allow the claim by the Claimant for the sum of $332,500.00, being the milestone payment for achieving practical completion.

Item 2: claim for third-party gondola storage charges

115 In PC 2, the Claimant had claimed for third-party gondola storage charges, amounting to $8,550.00.

116 As explained by the Claimant in the AA Submissions and as part of the Contract works, the Claimant was required to purchase gondolas from the Respondent's designated supplier, [X] Pte Ltd ("[X]"), and deliver them to the project site for the Respondent. As these gondolas are shipped to Singapore from overseas, once the gondolas arrived in Singapore, if the Respondent does not accept the gondolas, the gondolas will have to be stored offsite which would incur storage fees.

117 On 15 April 2024, the Respondent instructed the Claimant to withhold delivery of the gondolas and to store them offsite. The Respondent's Ms [C] wrote in the e-mail: "… Separately I would like to request that the Gondolas that you have ordered from [X] to be withheld until we receive delivery of goods …"

118 The Claimant complied with the instructions from the Respondent received on 15 April 2024 and when the gondolas arrived in Singapore, they were stored in a warehouse. They were stored in warehouses starting from 20 May 2024 and are still in storage as of the date of PC 2.

119 The Claimant's claim in PC 2 is for 19 weeks of storage charges at $450 per week for the period from 20 May 2024–30 September 2024, amounting to $8,550.00.

120 During the conference, I had asked the Claimant's counsel to address me on the issue of whether the claim for gondola storage charges is caught

by s 17(3) of the SOP Act as being a claim relating to loss and expense. As set out earlier, I had also issued directions after the conference to allow parties to file written submissions on this issue too.

121 For completeness, s 17(3) of the SOP Act provides as follows:

> (3) 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.

122 In the Claimant's Further Submissions, the Claimant had made the following arguments, which I summarise below:

> (a) The claim for gondola storage charges is a variation work item as it was incurred pursuant to instructions from the Respondent. Further, the storage of gondola is variation work as it satisfies the legal requirements for variation works as set out by the Court of Appeal in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] 2 SLR 468 ("*Vim Engineering*").
>
> (b) Even if the claim for gondola storage charge falls within the ambit of s 17(3), the statutory exception applies as there is a document showing agreement between the parties on the quantum of that part of the payment claim and within the meaning of s 17(3)(*a*) of the SOP Act.

123 I will now deal with the Claimant's first point. In my view, the claim for third-party gondola storage charges cannot be considered as variation works, as they are not "variation" works but rather for storage services provided by other third party or warehouse operator. This is not unlike delay-related costs and expenses incurred in any construction project, but which will not ordinarily be regarded as variation works. I also do not think that *Vim Engineering* assists the Claimant's case as I do not consider the storage of gondolas to be construction work(s) or works, much less variation works.

124 The reality is that in substance, the claim for the gondola storage charges is in the nature of a loss or expense claim as the Claimant's obligation is to pay the relevant third party or warehouse operator for storage charges for the gondolas pending further notification from the Respondent. As such, the Claimant's claim for the third-party gondola charges would be caught by the prohibitions in s 17(3) of the SOP Act as

being a claim related to loss or expense unless it falls within one of the statutory exceptions in s 17(3)(*a*) or 17(3)(*b*).

125 This brings me to the Claimant's alternative argument that there is a document showing agreement between the Claimant and the Respondent on the quantum of the claim and which qualify as an exception under s 17(3)(*a*) of the SOP Act such that an adjudicator may consider the storage claim. In this regard, I was referred to an e-mail dated 10 May 2024 wherein the Claimant had notified the Respondent on the third-party storage charge of $450 plus 9% GST per week. By instructing the Claimant to proceed with the storage, the Claimant submits that it is evident that there was an agreement between the parties on the quantum, *ie*, that the Respondent is to bear the cost of the gondola storage charges at the stated rate of $450 plus 9% GST.

126 I am unable to agree with this proposition. The only agreement between parties was on the *rate* of storage charge *ie*, at $450 per week plus 9% GST. However, this is different from saying that there was an agreement on the *quantum* of that part of the payment claim within the meaning of s 17(3)(*a*) SOP Act, which required documentary evidence to show that the Respondent had agreed to pay the claimed third-party gondola charges of $8,550.00 (being the quantum of storage charge claimed in PC 2).

127 However, no such documentary evidence was produced by the Claimant that the Respondent had agreed to pay the claimed storage charge of $8,550.00.

128 For the reasons above, I do not allow and dismiss the claim for the gondola storage charges.

Item 3: claim for late payment interest

129 In PC 2, the Claimant had claimed for late payment interest amounting to $10,224.74.

130 In the AA Submissions, the Claimant had detailed their claim as follows:

> 60. Pursuant to Section 8(1) of the SOP Act, the progress payment becomes due and payable from the respondent to the claimant on the date as specified in accordance with the terms of the contract, or on the date immediately upon the expiry of 35 days the claimant submits a tax invoice, whichever is earlier.
>
> 61. Clause D(4.4) provides that the payment is due within 2 months from the date of the invoice.

62. Therefore, pursuant to Section 8(1), the progress payment becomes due and payable from the Respondent to the Claimant immediately upon expiry of 35 days after the date the tax invoice is submitted to the Respondent.

63. The tax invoice for the milestone payment of $332,500 was issued on 11 January 2024;

64. Section 8(5) of the SOP Act provides as follows:-

> 'The interest payable on the unpaid amount of a progress payment that has become due and payable is at the higher of the following rates:
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract;
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969.'

65. As the Contract does not specify the rate of interest payable on the unpaid amount of a progress payment that has become due and payable, an interest of 5.33% should accrue 35 days from 11 January 2024.

66. Notwithstanding Section 8(1) of the SOP Act, for the purposes of PC 2, the Claimant had calculated interest based on the terms of the contract, *ie* 11 March 2024, being 2 months from the date of the invoice according to Clause D(4.4).

67. The breakdown of the Claimant's calculations for the claim for late payment interest is as follows:

S/No.	*Date*	*Principal amount*	*Interest*
1.	*11 March 2024 to 31 June 2024 (being 3.6 months)*	*$362,425 (being $332,500 plus 9% GST)*	*$362,425 x 5.33% x 3.6/12 months = $5,795.18*
2.	*1 July 2024 to 31 July 2024 (1 month)*	*$332,425 (being $362,425 (see S/No. 1 above, less $30,000 paid by the Respondent. Even though $30,000 was paid over 3 days on 4, 5 and 16 July 2024 [Tab 7.2], for the purposes of interest calculation, the Claimant has, out of goodwill to the Respondent, assumed that $30,000 had been paid on 31 June 2024)*	*$332,425 x 5.33% x 1/12 months = $1,476.52*

3.	*1 August 2024 to 31 August 2024 (1 month)*	*$332,425 (see S/No. 2 above)*	*$332,425 x 5.33% x 1/12 months = $1,476.52*
4.	*1 September 2024 to 30 September 2024, ie date of PC 2 (1 month)*	*$332,425 (see S/No. 2 above)*	*$332,425 x 5.33% x 1/12 months = $1,476.52*
Total:			*$10,224.74 (amount claimed in PC2)*

131 During the conference, I sought clarification from the Claimant on the merits of the claim for late payment interest and whether it could be said that the sum of $332,500.00 (milestone payment for practical completion) was a progress payment that was due and payable on the basis of the Claimant's tax invoice of 11 January 2024.

132 I summarise the Claimant's response in the Claimant's Further Submissions on this issue:

(a) The sum of $332,500.00 is a progress payment which is due to the Claimant. Section 2 of the SOP Act defines "progress payment" as a "payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes … a payment that is based on an event or a date (including a final payment)". In this respect, cl D of the Contract (which provides for payment of the Contract sum in tranches) provides for payment of the sum of $332,500.00 to be paid "upon achieving practical completion".

(b) Clause D of the Contract provides that the Claimant has a right to be paid the progress payment of $332,500.00 once practical completion is achieved. As practical completion was achieved on 11 January 2024, the Claimant's right to be paid the progress payment of $332,500.00 had accordingly accrued on 11 January 2024 under the terms of the contract. The Claimant duly issued its tax invoice to the Respondent on 11 January 2024.

(c) Pursuant to s 8(1)(*a*) SOP Act, this progress payment became due and payable "on the date as specified in or determined in accordance with the terms of the contract" or on the date immediately upon the expiry of 35 days the claimant submits a tax invoice, whichever is earlier. On the other hand, cl D4.4 of the Contract provides that payment is due within two months from the date of the invoice.

(d) Therefore, pursuant to s 8(1) of the SOP Act, the progress payment becomes due and payable from the Respondent to the Claimant immediately upon expiry of 35 days after the date the

11 January 2024 tax invoice was submitted to the Respondent. The Claimant is therefore entitled to interest 35 days after 11 January 2025.

(e) Notwithstanding the due date for payment as calculated pursuant to s 8(1) of the SOP Act, for the purposes of the payment claim, the Claimant is only claiming interest from 11 March 2024 onwards (based on cl D4.4 of the Contract).

(f) Section 2 of the SOP Act defines "claimed amount" as "the whole or part of any progress payment claimed by a claimant in a payment claim *and includes any interest payable under section 8(5)*" [emphasis added]. As such, late payment interest payable under s 8(5) of the SOP Act could therefore be part of the claim in an adjudication and may be considered by the adjudicator.

133 I agree with the Claimant's submissions on this issue and for the same reasons as articulated by the Claimant in their written submissions. It cannot be controversial that the sum of $332,500.00 represented a progress payment (within the meaning of ss 2 and 5 of the SOP Act) which had become contractually due and payable to the Claimant upon the project achieving practical completion on 11 January 2024. Accordingly, the Claimant had also issued its tax invoice to the Respondent on the same day (11 January 2024). The due date for payment of a progress payment is in turn provided by s 8 of the SOP Act (which provides for the due date as provided by the contract or 35 days after the date of the tax invoice). As cl 4.4 of the Contract provides for payment to be due two months from the date of the tax invoice, *ie*, from 11 March 2024 onwards, I find that the Claimant is entitled to claim for late payment interest from 11 March 2024 onwards and as provided for in s 8(5) of the SOP Act.

134 I also find it significant that s 2 of the SOP Act defines "claimed amount" as "the whole or part of any progress payment claimed by a claimant in a payment claim *and includes any interest payable under section 8(5)*" [emphasis added]. In my view, this means that claims for any late payment interest payable under s 8(5) of the SOP Act included in a payment claim may be considered by an adjudicator in adjudicating the merits of any claimed amount in a payment claim and appears not to fall within the prohibited categories of claims in the nature of "damage, loss and expense", which an adjudicator is mandated to disregard by virtue of s 17(3) of SOP Act.

135 For all of the above reasons, I allow the Claimant's claim for late payment interest amounting to $10,224.74.

Summary of my determination

Summary of findings and adjudicated amount

136 A summary of my findings on the merits are set out herein:

S/N	Description	Amount claimed	My Determination
1.	Contract works (milestone payment)	$332,500.00	332,500.00
2.	Third-party gondola charges	8,550.00	Not allowed
3.	9% GST (for items 1 & 2)	30,694.00	29,925.00
4.	Interest	10,224.74	$10,224.74
	Sub-total	381,969.24	372,649.74
5.	Deduction	(865.00)	(865.00)
6.	Less amounts previously paid (including the sums of $2,425.16 and $1,476.52 received on 15 October 2024 and after service of PC 2)	(33,901.68)	(33,901.68)
	Revised claim amount in SOP/AA 277 of 2024	347,202.56	337,883.06

137 The sum of **$337,883.06** (inclusive of GST) is hereby adjudicated and recorded as the adjudicated amount ("Adjudicated Amount").

Due date for payment

138 Section 22(1) of the SOP Act provides as follows:

> **22.**—(1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant, then except as provided in subsection (2) and section 18(3), the respondent shall pay that amount —
>
> (*a*) within 7 days after the adjudicator's determination is served on the respondent; or
>
> (*b*) by the date on which the adjudicated amount is determined by the adjudicator to be payable,
>
> whichever is the later.

139 However, the Amendment Act had also introduced new provisions for the time of payment of the adjudicated amount, depending on whether the Claimant is entitled to apply for an adjudication review. Section 22(2) of the SOP Act provides:

> (2) Where a respondent is required in consequence of the adjudication determination to pay an adjudicated amount to the claimant, and the claimant is entitled under section 18(2) to lodge an application for the review of the adjudication determination, the respondent must pay that amount —
>
> (*a*) not earlier than 7 days but within 10 days after the respondent is served the adjudicator's determination;
>
> (*b*) within 7 days after the respondent is served the adjudication review determination of an adjudication review brought by the claimant; or
>
> (*c*) on or before the date (if any) determined by the review adjudicator or the panel of review adjudicators under section 19(5)(b) as the date that the amount is payable,
>
> whichever is the later.

140 Pursuant to s 18(1) of the SOP Act, read with reg 10(1) of the SOP Regulations, the Claimant is not entitled to lodge an adjudication review application as the difference between the claimed amount and the Adjudicated Amount is less than the prescribed limit.

141 As such, the due date for payment of the Adjudicated Amount would be provided by s 22(1) of the SOP Act.

142 I therefore determine that the Adjudicated Amount will become due and payable by the Respondent to the Claimant on or before the expiry of seven days from the date of service of the Adjudication Determination on the Respondent. This is hereby recorded as the Due Date for payment of the Adjudicated Amount.

Interest

143 Section 8(5) of the SOP Act provides:

> (5) The interest payable on the unpaid amount of a progress payment that has become due and payable is at the higher of the following rates:
>
> (*a*) the rate specified in or determined in accordance with the terms of the contract;
>
> (*b*) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969.

144 However, the Claimant has already claimed for late payment interest of $10,224.74 for the period from 1 March 2024 to 30 September 2024 which I have allowed and which forms part of the Adjudicated Amount.

145 As such, the Claimant is not entitled to interest upon the whole of the Adjudicated Amount as that would be tantamount to awarding interest

upon interest, which is prohibited under the statutory provisions of the Civil Law Act 1909 (2020 Rev Ed).

146 As such, I determine that the Respondent shall pay, to the Claimant, interest at the rate of 5.33% per annum, being the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act 1969 (2020 Rev Ed) from the day after the Due Date of payment on any part of the principal amount of $332,500.00 which remains unpaid until the same is paid.

Costs of adjudication

147 The Claimant has succeeded substantially in this adjudication. As such, I order that the costs of the adjudication, being the adjudication application fee of $654.00 (inclusive of 9% GST) and the adjudicator fee of $14,715.00 (inclusive of 9% GST) is to be borne 100% by the Respondent.

BJE Pte Ltd
v
BJF (Pte) Ltd

[2024] SGSOP 21

Singapore Mediation Centre — SOP AA 332 of 2024
Ho Chien Mien
6 February 2025

Adjudication Application — *Time for lodgment — Whether claimant's adjudication application lodged prematurely*

Jurisdiction — *Jurisdictional objections — Claimant's scope of works under subcontract including provision of maintenance services on mechanical and electrical ("M&E") systems — Claimant's scope of works under subcontract including "soft services" such as cleaning, horticulture, pest control and waste disposal — Whether claimant's maintenance services on M&E systems and soft services qualified as "construction works" under Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") — Meaning of "construction contract" and "construction works" under SOP Act — Sections 2, 3(1)(*a*) and 3(1)(*c*) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Response — *Validity — Respondent issuing e-mail to claimant in response to having received claimant's payment claim — Whether respondent's e-mail constituted valid payment response*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 3(1), 3(1)(*a*), 3(1)(*c*), 3(1)(*d*), 3(1)(*e*), 8(5), 9, 10(2)(*a*)(i), 10(2)(*a*)(ii), 10(2)(*b*), 10(3), 10(3)(*b*), 11(1)–11(3), 13(2), 15(1), 15(3), 16(1), 16(6), 17(1)(*b*), 17(2)(*d*), 17(6), 22(1), 30(2)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 5(1), 6(1)

Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ss 105, 105(1)(a), 105(1)(c), 105(2)(d)

Daniel Li and Kelly Tan (Ramdas & Wong) for the claimant;
Melvin Chan, Benjamin Bala and Isaac Tay (TSMP Law Corporation) for the respondent.

[Commentary: see para 1.14]

6 February 2025

Ho Chien Mien:

Introduction

1 This is an adjudication determination made on 6 February 2025 ("Adjudication Determination") under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Application No SOP/AA 332 of 2024 ("AA 332").

2 The claimant in this matter is BJE Pte Ltd ("Claimant") and the respondent is BJF (Pte) Ltd ("Respondent") (collectively, the "Parties").

3 For the reasons set out below, I determine that:

(a) the Respondent shall pay to the Claimant the sum of **S$591,327.77** (inclusive of goods and services tax ("GST")) (the "Adjudicated Amount");

(b) the Respondent shall pay the Adjudicated Amount to the Claimant within seven days after this Adjudication Determination is served on the Respondent ("Due Date for Payment");

(c) in the event that the Respondent does not make payment of the Adjudicated Amount by the Due Date for Payment, the Respondent shall pay to the Claimant simple interest thereon at the rate of 5.33% per annum from the Due Date of Payment up to the date of full payment being made; and

(d) the costs of the adjudication, comprising of the adjudication application fee of S$654.00 (inclusive of GST) and the adjudicator fee of S$40,106.99 (inclusive of GST and comprising the adjudicator's fee of S$39,828.60 and disbursements of S$278.39) shall be borne 30% by the Claimant and 70% by the Respondent.

Contract details

4 The Respondent is the main contractor for the project known as "Provision of Integrated Building Maintenance Services and Addition & Alteration Works at [xxx] – Bundles 2 and 3" ("Project").

5 By a letter of appointment dated 9 July 2021 (Ref: [xxx]) ("LOA"), the Respondent engaged the Claimant as its subcontractor.

6 Parties subsequently contracted for the Project by way of a subcontract agreement dated 1 April 2021 ("Subcontract"). The Subcontract expressly states that the Subcontract "shall supersede the LOA in its entirety". The

scope of works under the Subcontract is reproduced as follows ("Subcontract Works"):

> 1. Scope of Works
>
> The scope of works ('Works') shall broadly be classified into (i) '**maintenance services**' such as maintenance of mechanical and electrical equipment and systems, and (ii) '**soft services**' such as cleaning services, horticulture, pet control (sic), building and waste disposal, subject to and based on Clause 4.7 of the Agreement (referencing the Main Contract) and which requirements and specifications the Subcontractor is deemed to have studied and is fully aware in all aspects thereto.
>
> [emphasis in original]

7 The Subcontract was for the sum of S$97,053,675.08 (excluding GST) ("Subcontract Sum").

8 The Subcontract comprises the following documents:

(a) the main body of the agreement forming the Subcontract;

(b) Appendix A: specific terms for subcontract arrangements ("Appendix A"); and

(c) Appendix B: the main contract ("Main Contract"), consisting of:

(i) Tender Document No [xxx] dated 8 November 2019 ("Tender Document"), which includes the conditions of contract, requirement specifications, form of tender, corrigenda and tender clarifications published by [Z]; and

(ii) [Z]191/9/7/184 Corrigendum 1 to 7.

Record of proceedings

Payment claim

9 On 29 November 2024, the Claimant served Payment Claim No 1 dated 29 November 2024 ("PC 1") on the Respondent. PC 1 states, as the claimed amount, the sum of S$5,617,092.43 (it is not stated if this amount is inclusive or exclusive of GST).

Payment response

10 On 9 December 2024 (time-stamped 3.43pm), the Respondent issued an e-mail response to the Claimant in response to having received PC 1 ("9 December E-mail"). Whether the 9 December E-mail constitutes a valid payment response is an issue in dispute. I find that the 9 December E-mail

does not constitute a valid payment response for the purposes of the SOP Act. My reasons for this are set out at [109]–[117] of this Adjudication Determination ("AD").

Notice of intention to apply for adjudication

11 On 27 December 2024, the Claimant served the Respondent with a notice of intention to apply for adjudication in compliance with s 13(2) of the SOP Act.

Adjudication application

12 On 27 December 2024, the Claimant lodged its adjudication application of the same date ("AA") with the Singapore Mediation Centre ("SMC").

13 To the AA is annexed a set of written submissions ("Claimant's Submissions"), as well as copies of the Subcontract, PC 1 and other supporting documents and authorities.

14 As abovementioned at [9], in PC 1, the Claimant claimed for the total sum of S$5,617,092.43 (without a clear indicator as to whether it is inclusive or exclusive of GST). However, in the AA, the Claimant reduced its claim to the total sum of S$5,154,156.76 (again, without a clear indicator as to whether it is inclusive or exclusive of GST) ("Claimed Amount"). This reduction in the claim is attributable to the following claim item that the Claimant has reduced its claim for the purposes of AA 332:

> Item 7 for '*JAN-SEP Y2024 [X], [W], [V] – Preventive Maintenance*' was reduced from S$1,457,823.89 to S$994,888.22.

15 The SMC served the AA on the Respondent on 30 December 2024. The Claimant's Submissions were only served on the Respondent on 8 January 2025. I have verified that the late service of the Claimant's Submissions was an administrative error on the part of the SMC.

Appointment of adjudicator

16 On 30 December 2024, by an e-mail time-stamped 10.26am, the SMC nominated me to act as the adjudicator in AA 332.

17 By e-mails dated 30 December 2024 (time-stamped 6.41pm) and 31 December 2024 (time-stamped 10.31am), I formally accepted the appointment by (among other things) returning a duly signed and completed "Statement of Acceptance and Declaration of Impartiality and Independence" dated 31 December 2024 to the SMC.

18 Subsequently, by a letter dated 31 December 2024, the SMC notified the Parties of my appointment as the adjudicator for AA 332.

Adjudication response

19 Pursuant to s 15(1) of the SOP Act, a respondent has seven days from its receipt of an adjudication application within which it may lodge an adjudication response.

20 In this case, since the AA was served on the Respondent on 30 December 2024, the Respondent had until 7 January 2025 to lodge its adjudication response (after allowing for the public holiday on 1 January 2025, being New Year's Day).

21 The Respondent lodged its adjudication response ("AR") with the SMC on 7 January 2025 in accordance with the prescribed period under s 15(1) of the SOP Act. The AR sets out the jurisdictional issues and denies the Claimant's entitlement to its claims.

22 To the AR is annexed a set of written submissions ("Respondent's Submissions") as well as various supporting documents and authorities.

Procedural timeline

23 The Claimant's procedural timeline leading up to the adjudication application is as follows:

Date	Event
29 November 2024	PC 1 is served on the Respondent.
30 November 2024	PC 1 is deemed to have been served on the Respondent by virtue of s 10(3)(*b*) of the SOP Act.
14 December 2024	Last day for the Respondent to issue its payment response.
27 December 2024	AA is lodged within the period specified in the SOP Act.

24 The Claimant therefore asserted that the AA was correctly lodged within the period specified by the SOP Act, on 27 December 2024. However, the procedural timeline set out in the table at [23] above is disputed by the Respondent.

25 The Respondent's procedural timeline leading up to the adjudication application is as follows:

Date	Event
29 November 2024	PC 1 is served on the Respondent.

7 December 2024	PC1 is deemed to have been served by virtue of cl 9(a) of the Subcontract.
29 December 2024	Last day for the Respondent to issue its payment response (after allowing for the public holiday on 25 December 2024, being Christmas Day)
30 December 2024	Commencement of the dispute settlement period.
6 January 2025	Expiry of the dispute settlement period (after allowing for the public holiday on 1 January 2025, being New Year's Day)
7 January 2025	Commencement of period for lodgment of adjudication application.
13 January 2024	Last day for the Claimant to lodge its adjudication application.

26 The Respondent therefore contended that the AA was lodged prematurely on 27 December 2024, as it was filed before the purported commencement of the period for lodgment of the Adjudication Application and should accordingly be dismissed in its entirety. I find that the AA was not lodged prematurely. My reasons for the same are set out at [52]–[80] of this AD.

Commencement of the adjudication

27 Pursuant to s 16(1) of the SOP Act, following the expiry of the period within which the Respondent may lodge an adjudication response, the adjudication ("Adjudication") commenced on 8 January 2025 (after allowing for the public holiday on 1 January 2025, being New Year's Day).

Prescribed due date for determination

28 Pursuant to s 17(1)(*b*) of the SOP Act, I was to determine AA 332 within fourteen days after commencement of the Adjudication, *ie*, by 22 January 2025.

Direction No 1

29 On 7 January 2024, by way of e-mail (time-stamped 8.59pm), I: (a) sought the Parties' consent to an extension of time for me to issue the AD until 27 January 2025; and (b) informed Parties that I intended to organise a conference early the following week. The Claimant confirmed that it was agreeable to the extension of time by its solicitor's e-mail dated 8 January 2025 (time-stamped 10.39am). The Respondent confirmed the same by its solicitor's e-mail dated 8 January 2025 (time-stamped 12.28pm) and further added that the Respondent's counsel would not be available that

week for the conference. The Respondent also requested time to review and address the Claimant's submissions which were only served on the Respondent by the SMC on 8 January 2025.

30 On 10 January 2025, I wrote to the Parties by way of an e-mail (time-stamped 12.08pm) ("Direction No 1").

31 Pursuant to the powers vested in me under s 16(6) of the SOP Act, I made the following directions in Direction No 1:

> 2. I issue herewith the following directions for both parties' compliance:
>
> (1) The Respondent shall serve a reply submission to the Claimant's Adjudication Submissions dated 27 December 2024, by **15 January 2024, 12.00pm** (the '**Respondent's Reply Submissions**');
>
> (2) The Claimant shall serve a response submission to the Respondent's Reply Submissions by **17 January 2025, 4.00pm.** In this regard, the Claimant shall only deal with new issues raised in the Respondent's Reply Submissions; and
>
> (3) A full-day hearing for Adjudication SOP/AA 332 of 2024 will be fixed for **20 January 2025**, between 9.30am to 12.30pm and 2.00pm to 5.00pm. At the end of the hearing, I will consider if more time is required to render the Adjudication Determination and seek parties' agreement for a further extension of time, if so required.
>
> 3. Parties are to let me know the following, by no later than **6.00pm today, *ie* 10 January 2025** (if necessary):
>
> (1) if they are unable to attend the full-day hearing at the above hearing date fixed for 20 January 2025;
>
> (2) if parties feel the need for a preliminary case conference to determine any other administrative issues; and
>
> (3) any other pressing issue.
>
> [emphasis in original]

32 By way of the following communications, the Parties agreed to the fixing of the hearing on 20 January 2025 at 9.30am:

> (a) the e-mail from the Claimant's counsel, dated 10 January 2025 (time-stamped 5.55pm); and
>
> (b) the e-mail from the Respondent's counsel, dated 10 January 2025 (time-stamped 5.45pm).

33 Pursuant to Direction No 1, the Respondent filed the Respondent's reply submissions by e-mail from the Respondent's counsel, dated 15 January 2025 (time-stamped 12.35pm).

34 The Claimant did not file a response submission to the Respondent's reply. The Claimant's counsel confirmed at the hearing that a response was not filed as my directions on the same was for the Claimant to deal with new issues only.

Direction No 2

35 On 15 January 2025, I wrote to the parties by way of an e-mail (time-stamped 3.24pm) ("Direction No 2").

36 Pursuant to the powers vested in me under s 16(6) of the SOP Act, I made the following directions in Direction No 2:

> 2. The full-day hearing for Adjudication SOP/AA 332 of 2024 on **20 January 2025**, between 9.30am to 12.30pm and 2.00pm to 5.00pm, will be held virtually on Zoom.
>
> emphasis in original]

37 I note that Parties did not object to Direction No 2.

Adjudication hearing

38 On 20 January 2025, I held a virtual adjudication hearing with the Parties ("Hearing").

39 At the Hearing, the Claimant was represented by:

Name	Role
Daniel Li	Ramdas & Wong, Claimant's counsel
Kelly Tan	Ramdas & Wong, Claimant's counsel
[A]	Claimant's representative
[B]	Claimant's representative
[C]	Claimant's representative

40 The Respondent was represented by:

Name	Role
Melvin Chan	TSMP Law Corporation, Respondent's counsel
Isaac Tay	TSMP Law Corporation, Respondent's counsel
Benjamin Bala	TSMP Law Corporation, Respondent's counsel
[D]	Respondent's representative
[E]	Respondent's representative

[F]	Respondent's representative
[G]	Respondent's representative
[H]	Respondent's representative

Direction No 3

41 At the end of the Hearing, in consideration of the complexity of issues discussed, I requested an additional one week and one day to render the AD. Parties verbally agreed to the same.

42 On 21 January 2025, I wrote to the Parties by way of an e-mail (time-stamped 1.33pm) ("Direction No 3").

43 Pursuant to the powers vested in me under s 16(6) of the SOP Act, I made the following directions in Direction No 3:

> 2. Further, and as discussed and agreed by the parties at the hearing, I hereby record that the time for me to issue the Adjudication Determination in AA 332 is extended until Tuesday, **4 February 2025**.
>
> [emphasis in original]

Direction No 4

44 On 27 January 2025, I wrote to the Parties by way of an e-mail (time-stamped 12.04pm) ("Direction No 4").

45 Pursuant to the powers vested in me under s 16(6) of the SOP Act, I made the following directions in Direction No 4:

> 2. I would like to invite parties' views on certain issues to aid me in my determination ('**Supplementary Submissions**'). I issue herewith the following directions for both parties' compliance:
>
> > (4) Parties are to submit their positions on the applicable principles to the interpretation of inconsistent clauses in a contract. Parties' submissions should include the following:
> >
> > > (*i*) consideration of the applicable principles to the inconsistency of clauses which are likely irreconcilable; and
> > >
> > > (*ii*) consideration of authoritative commentary on the matter, including Justice Goh Yihan's Interpretation of Contracts in Singapore, 2018 and/or his citation of cases therein, specifically in relation to irreconcilable clauses;
> >
> > (5) Parties are to submit their positions on the legal authorities for the applicability of the Building and Construction Industry Security of

Payment Act 2004 ('**SOP Act**') to contracts for the maintenance of M&E systems. Parties' submissions should include the following:

(*i*) consideration of the 2nd Reading of the Building and Construction Industry Security of Payment Bill dated 16 November 2004 by the then Minister of State for National Development (Mr. Cedric Foo Chee Keng), at Column 1114, particularly in relation to the scope of the SOP Act;

(*ii*) consideration of the UK case of **Nottingham Community Housing Assoc v Powerminster Ltd** [2000] Adj.L.R. 06/30 or any other applicable cases from Singapore, Australia, UK or New Zealand

3. If parties are agreeable to an extension of time for the date of my Adjudication Determination, **till 6 February 2025**, parties are to provide me with the above Supplementary Submissions by **31 January 2025, 12pm.**

4. If parties are not agreeable to an extension of time for the date of my Adjudication Determination, parties are then to provide me with the above Supplementary Submissions by **28 January 2025, 6pm**.

5. I look forward to hearing from parties on paragraphs [3] and [4] above.

[emphasis in original]

46 By way of the following communications, the Parties agreed to filing the supplementary submissions by 31 January 2025, 12.00pm, and for an extension of time for the Adjudication Determination to **6 February 2025**:

(a) the e-mail from the Claimant's counsel, dated 27 January 2025 (time-stamped 7.35pm); and

(b) the e-mail from the Respondent's counsel, dated 27 January 2025 (time-stamped 5.36pm).

Direction No 5

47 On 27 January 2025, I wrote to the Parties by way of an e-mail (time-stamped 7.41pm) ("Direction No 5").

48 Pursuant to the powers vested in me under s 16(6) of the SOP Act, I made the following directions in Direction No 5:

In view of parties' agreement to extend time for me to render my Adjudication Determination and in view of the Chinese New Year holidays, I hereby direct that the Supplementary Submissions be filed by 5.00 pm (instead of 12 pm) on Friday, 31 January 2025.

49 Pursuant to Direction No 4 and Direction No 5, the Claimant filed the Claimant's supplementary submissions dated 31 January 2025 ("Claimant's Supplementary Submissions") by an e-mail from the Claimant's counsel, dated 31 January 2025 (time-stamped 5.02pm).

50 Pursuant to Direction No 4 and Direction No 5, the Respondent filed the Respondent's supplementary submissions dated 31 January 2025 ("Respondent's Supplementary Submissions") by an e-mail from the Respondent's counsel, dated 31 January 2025 (time-stamped 4.55pm).

Issues for determination

51 Broadly, I summarise the issues raised in AA 332 as follows:

(a) whether the AA was filed prematurely and is therefore invalid and must be dismissed ("First Jurisdictional Objection");

(b) whether the Subcontract is a contract for maintenance that does not fall within the scope of the SOP Act, and therefore whether I lack the jurisdiction to make any determination in respect of the AA ("Second Jurisdictional Objection");

(c) whether the 9 December E-mail constituted a valid payment response for the purposes of the SOP Act; and

(d) whether the Claimant is entitled to its alleged claims in the AA.

Preliminary issues

First Jurisdictional Objection

52 The first jurisdictional issue to be considered is whether the Claimant lodged the AA in a timely manner. This would involve an analysis of the applicable timelines for payment procedures and the subsequent procedural timelines.

Applicable Subcontract provisions

53 I first address the issue of when PC 1 is deemed to be served. The analysis must begin with what Parties agreed as to the provisions governing the payment procedures and timelines as contained in the Subcontract. Having reviewed the Subcontract, I am in agreement with Parties that a relevant clause as to payment procedures is cl 9 of the Subcontract, the relevant sections of which I reproduce as follows:

> 9. Payment
>
> In consideration for the performance of its obligations under this Agreement, the Contractor shall pay the Subcontractor the sums set out in Section 2 of Appendix A and subject to Section 10 of the Appendix A, in the following manner:
>
> For fees payable on a monthly basis
>
> (*b*) The Subcontractor shall submit an invoice to the Contractor for any progress payments due to it for the preceding month *during the 1st week of each month*.
>
> …
>
> Provided always for the purposes of this Clause 9 that any relevant milestones specified as part of the Works have been duly performed/accomplished by the Subcontractor and have been accepted by the Client, and the Contractor to its satisfaction, *and all invoices to be paid by the Contractor can be paid subject to Appendix A*, and less other deductions which the Contractor is entitled to make under this Agreement.
>
> [emphasis added]

54 The Respondent submitted that "[w]here a contract does not contemplate a 'payment claim' and an 'invoice' as clearly or distinctly separate or different documents, or that a payment claim is to be submitted separately from an invoice, then an invoice can operate or 'double up' as a payment claim". While there may be an issue as to whether cl 9(a) of the Subcontract ("Cl 9(a)") can "double up" as an operative mechanism for the submission of invoices as payment claims, I find that I do not have to deliberate on this issue, due to my decision on a more overarching issue as to the inconsistency of contract terms. I elaborate as follows.

55 The Respondent submitted that by virtue of Cl 9(a) and s 10(2)(*a*)(i) of the SOP Act, the Claimant ought to have submitted the payment claim no later than the last day of the period specified in the Subcontract, being the first week of each month. Section 10(3)(*a*) of the SOP Act states that "[i]n subsection (2) … a payment claim that is served before the date or last day mentioned in subsection (2)(*a*)(i) is deemed to have been served on that day or day, as the case may be". Therefore, the Respondent submitted that PC 1 is deemed to have been submitted on the last day of the period mentioned in Cl 9(a), being 7 December 2024.

56 The Claimant, however, submitted that another provision dealing with payment procedures is set out in Section 3 of Appendix A of the Subcontract ("Section 3"), which I reproduce as follows:

Payment Event S/No.	Description of Payment Event	Payment Quantum
1.	Preventive Maintenance, Comprehensive Maintenance and On-site Manpower Support.	Equal pro-rated monthly payment shall be made 30 days upon presentation of BJE invoice and after BJF has successfully retrieved payment from [Z]
2.	Addition & Alteration, Repair and Redecoration and Ad-hoc Works, Contingency Works.	Full/Progressive payment shall be made 30 days 30 days upon presentation of BJE invoice and after BJF has successfully retrieved payment from [Z]
3.	Breakdown Maintenance	Consolidated payment shall be made 30 days upon presentation of BJE invoice and after BJF has successfully retrieved payment from [Z]

An invoice will be submitted on or before 14th of each prevailing month for outstanding claims. Submission of claims must be accompanied with the certificate of completions (COC) signed and approved by the Contractor or invoice from the Contractor to [Z]. All payments will be subject to the existence of a valid and duly maintained Security Deposit. All progress or ad-hoc payments to be paid to the Subcontractor will be paid subsequent to the receipt of the corresponding progress/ad-hoc payments to the Contractor by [Z] under the Main Contract.

[emphasis added]

57 At the outset, the Respondent's arguments at the Hearing that Cl 9(a) is the primary provision relating to the payment procedure is not convincing. As can be seen from the plain wording of Section 3, a payment procedure for the submission of an invoice or claim is also stipulated therein.

58 On the face of it, there appears to be two provisions in the Subcontract dealing with payment – and they differ when it comes to when payment claims ought to be submitted.

Unenforceable provision

59 The Claimant first submitted that the stipulation in Section 3 that payment shall be made to the Claimant "after BJF has successfully retrieved payment from [Z]" is an unenforceable pay-when-paid provision, falling within the meaning of s 9 of the SOP Act and, therefore, cl 9 and Section 3 are void.

60 The law on unenforceable pay-when-paid provisions is well established, and the Respondent does not disagree with Section 3's requirement that payment shall be made to the Claimant "after BJF has successfully retrieved payment from [Z]" is unenforceable against the Claimant. However, the Respondent submitted that Section 3 can be divorced from the Subcontract by operation of cl 23.6 of the Subcontract ("Cl 23.6"), leaving Cl 9(a) as the only operating payment provision. Cl 23.6 provides:

> If any provision of this Agreement or part thereof is rendered void, illegal or unenforceable by any legislation to which it is subject, it shall be rendered void, illegal or unenforceable to that extent and it shall in no way affect or prejudice the enforceability of the remainder of such provision or the other provisions of this Agreement.

61 The Respondent further submitted that the Claimant's position that cl 9 also contains pay-when-paid provisions is "clearly wrong" and cl 9 is "distinct" from Section 3. I respectfully disagree with the Respondent's position. I accept the Claimant's submissions that cl 9 contains various phrases incorporating Section 3 and the pay-when-paid provisions, such as, "… in accordance with the terms set out in Appendix A", "… subject to Appendix A", and "[p]rovided always for purposes of this Clause 9 that any relevant milestones specified as part of the Works have been duly performed/accomplished by the Subcontractor and have been accepted by the Client, and the Contractor to its satisfaction, and all invoices to be paid by the Contractor can be subject to Appendix A". It is clear from the wording of cl 9 that Parties likely intended, at the time of making the contract, for cl 9 to be followed conjunctively with Appendix A. Clause 9 also requires the acceptance of the Claimant's works to the satisfaction of [Z]. I therefore agree with the Claimant that cl 23.6 of the Subcontract may operate to divorce both cl 9 and Section 3 from the Subcontract.

62 Having found that both Cl 9(a) and Section 3 are void, I now turn to the other issue of the blatant inconsistency between the terms of Cl 9(a) and Section 3, as submitted by the Claimant in its alternative case.

Inconsistency between Cl 9(a) and Section 3

(1) Reconciliation of clauses

63 The inconsistency is clear from the wording of Cl 9(a) on one hand which stipulates that the Subcontractor shall submit an invoice "during the 1st week of each month", and Section 3 on the other, which states that an invoice will be submitted "on or before the 14th of each prevailing month". Although the Respondent had attempted to assert that there is no such inconsistency in its supplementary submissions, the Respondent originally

did not deny this inconsistency. The Claimant submitted that the language and the inconsistency of the provisions renders the payment scheme under the Subcontract unworkable.

64 The Claimant had cited Belinda Ang J in the High Court case of *Tan Poh Leng Stanley v UBS AG* [2016] 2 SLR 906 for Singapore's acceptance of the UK principles that the contract ought to be read as a whole; "and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by ordinary processes of construction" (at [191]). Further, Woo Bih Li J has stated in the High Court case of *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 that "if the inconsistency cannot be resolved by ordinary processes of construction, the court will attempt to discern the overall intentions of the parties from the remainder of the contract and determine which portion of the contract should be given effect to".

65 At this juncture, I note that the Subcontract is silent on inconsistent clauses. Reading the Subcontract as a whole does not offer any assistance to reconciling the clauses. Further, I agree with the Claimant that the express wordings of cl 9 and Section 3 provide for contrasting obligations and rights of Parties which cannot be reconciled. The Subcontract alone is thus not useful in discerning the Parties' intention in relation to payment obligations.

(2) Parties' intention

66 The Claimant cited the Court of Appeal case, *Hewlett-Packard Singapore (Sales) Pte Ltd v Corinna Chin Shu Hwa* [2016] 2 SLR 1083, for its approval of the UK proposition that for commercial contracts the courts have been willing to:

> … look at the whole agreement which the parties made, the words which they used and the circumstances in which they used, and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee.

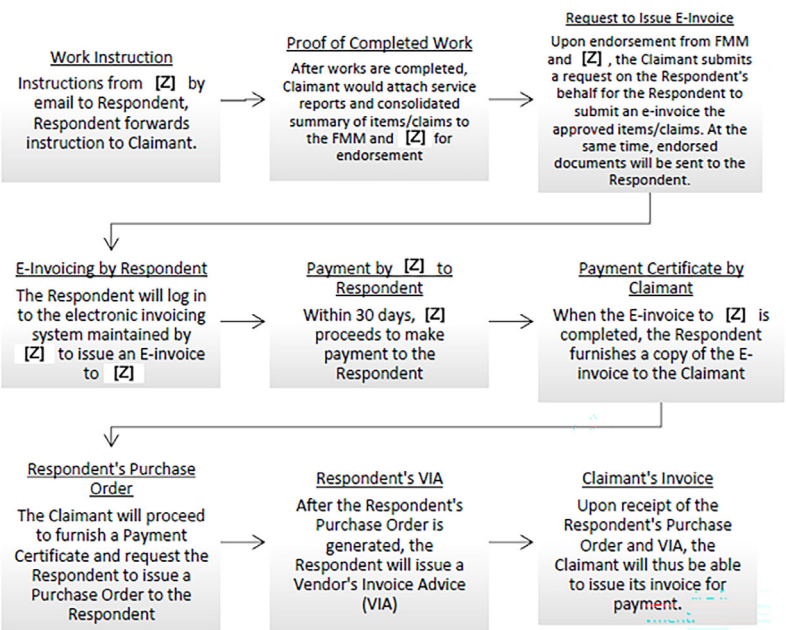
67 The Claimant cited an additional and/or alternate approach set out by the Court of Appeal case, *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2018] 1 SLR 180 ("*GPK Clinic*"), which set out the following principles when faced with two clauses which at first sight might appear to give rise to some ambiguity (at [34]):

> it is crucial to examine the underlying purpose of the Agreement … due consideration is given to the *commercial purpose of the transaction* or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction … *a construction which leads to very unreasonable*

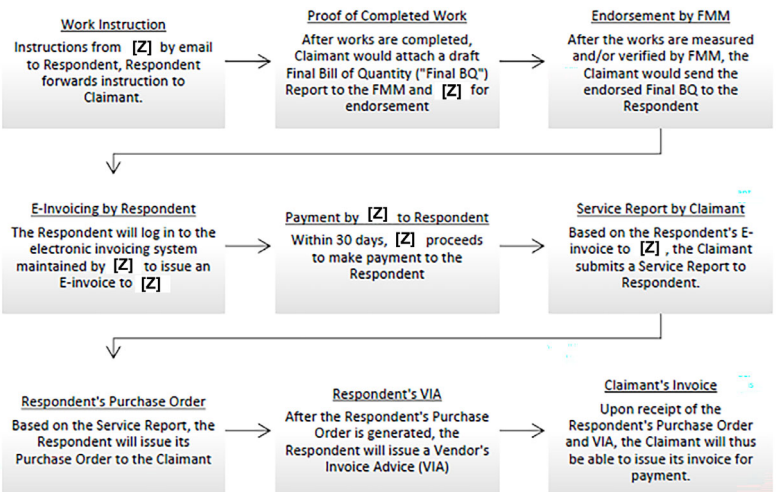
> *results is to be avoided* unless it is required by clear words and there is no other tenable construction. [emphasis added]

68 The law is therefore clear that Parties' commercial behaviour and the circumstances of their agreement play an integral role in determining what parties intended. While it is clear that Parties intended to follow some payment mechanism, the commercial reality was that Parties did not follow the mechanisms set out in either Cl 9(a) or Section 3. Instead, Parties appear to have abandoned the contradictory clauses and utilised an entirely different mechanism. The Claimant's flowchart in relation to the payment procedure followed by Parties is reproduced as follows:

For items relating to Preventive Maintenance, Comprehensive Maintenance and On-site Manpower Support



For items relating to Breakdown Maintenance



69 The Respondent, during its oral arguments, agreed that the above process was followed by the Parties but added that the final step requires the Claimant to issue an invoice as per Cl 9(a).

70 I am of the view that the steps of the flowchart, involving various preconditions and procedures to the issuance of a claim, cannot reasonably be expected to then ultimately fall in line with the prescribed timelines of the Subcontract, be it Cl 9(a) or Section 3. This is clear from the various tax invoices submitted by the Claimant, pursuant to the vendor's invoice advice (the "VIAs"), being dated at differing dates such as the 15th of the month or the 30th of the month.

71 Further, in relation to the flowchart process culminating in the issuance of the invoice by the contractual mechanism of Cl 9(a), I agree with the Claimant that this does not help the Respondent, as the Respondent would effectively be attempting to incorporate unenforceable pay-when-paid provisions as preconditions to its payment procedure.

72 Having considered the above reality of the payment process, I accept the Claimant's submission that Parties could not have intended to follow the process set out in either Cl 9(a) or Section 3. Cl 9(a) and Section 3 are inconsistent and cannot be reconciled. Parties only intended to follow the payment procedure as set out in the flowchart at [68] above. I also agree with the Claimant that to prefer Cl 9(a) over Section 3, despite the above,

would yield "very unreasonable results" which is to be avoided (as *per GPK Clinic*).

73 Therefore, the failure of the Subcontract to specify a valid payment procedure would require deference to the SOP Act. The Claimant's various authorities in this regard strongly support this finding.

(3) Specific versus general terms

74 An additional argument advanced by the Respondent is that in accordance with the canons of construction applicable in the interpretation of contracts, as set out in the Court of Appeal case of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029: (a) "a specifically agreed provision should override an inconsistent standard provision which has not been individually negotiated" and (b) "a more precise or detailed provision should override an inconsistent general or widely expressed provision". Parties agree on applying these principles to the interpretation of the inconsistent clauses.

75 The Respondent asserted that cl 9 is the specific provision under the Subcontract that governs the payment of fees payable on a "monthly basis" and is directly applicable to the Claimant's claim which is premised on a statutory entitlement to monthly progress payments. I do not find this argument to be persuasive, as it does not show how Cl 9(a) is a specifically agreed provision nor how it is more detailed or precise as compared to Section 3.

76 Further, the Respondent had attempted to argue in its supplementary submissions that cl 9 sets out the agreed mechanism for the submission of a payment claim while Section 3 only sets out the time frame for the Respondent to make payments. As stated above at [63], the Respondent relied on an argument that there is no inconsistency, which goes against their earlier argument that the clauses are inconsistent. In any event, I do not see how these arguments show that Cl 9(a) is the more specific term which should prevail. I also do not find it convincing that there is no inconsistency between the terms, when the inconsistency as to when the Subcontractor is to submit an invoice is clear on the face of the wording of the Subcontract.

77 I find the Claimant's arguments that: (a) Appendix A providing the "particular terms of the Agreement", as stated therein; and (b) the legal position set out in Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011), being that the use of the words "subject to" mean that the first provision is "to be subject to, yield to, the second when the conflict occurs", would point towards Appendix A being the more specific clause as compared to cl 9. Thus, even if I were to find that Section 3 ought to prevail, s 9 of the SOP Act would prevent its operation and the valid payment procedure would again defer to the SOP Act. I find

that I do not have to deliberate on this point any further considering that in any event, I find both clauses to be inapplicable to Parties.

Applicable procedural timeline

78 Section 10(2)(*a*)(ii) of the SOP Act and reg 5(1) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOPR") state that the date prescribed for the service of a payment claim is the last day of the month following the month in which the contract is made or any subsequent month, where the contract does not contain such terms. Section 10(3)(*b*) of the SOP Act adds that a payment claim that is served before that prescribed date is deemed to have been served on that date. Therefore, I accept the Claimant's submission that PC 1 is deemed to be served on 30 November 2024.

79 Having found that Parties are to defer to the provisions of the SOP Act, I set out the procedural timeline that would have been applicable as follows:

Date	Event
29 November 2024	PC 1 is served on the Respondent.
30 November 2024	PC 1 is deemed to have been served on the Respondent by virtue of s 10(3)(*b*) SOP Act.
14 December 2024	Last day for the Respondent to issue its payment response.
15 December 2024	Commencement of the dispute settlement period.
21 December 2024	Expiry of the dispute settlement period.
22 December 2024	Commencement of period for lodgment of Adjudication Application.
29 December 2024	Last day for the Claimant to lodge its adjudication application (after allowing for the public holiday on 25 December 2024, being Christmas Day).

80 The Claimant's lodgment of the AA on 27 December 2024 is thus within the time period prescribed for the same, *ie*, 22 December 2024 to 29 December 2024 and the AA is not lodged prematurely.

Second Jurisdictional Objection

81 I now turn to consider whether the Subcontract is a "construction contract" within the definition of the SOP Act and therefore whether the Subcontract Works can come under the purview of this adjudication.

82 I have set out the scope of works of the Subcontract at [6] above. The Claimant submitted that the SOP Act applies to the Subcontract as the

scope of works comes within the definition of "construction work" as set out in s 3(1) of the SOP Act and the Subcontract is a construction contract within the meaning in s 2 of the SOP Act.

83 The meaning of "construction contract" as defined by s 2 of the SOP Act is reproduced as follows:

> 2. …
>
> 'construction contract' means an agreement under which —
>
> (*a*) one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or
>
> (*b*) one party undertakes to supply services to one or more other parties;

84 I will consider this jurisdictional objection in two parts: (a) Subcontract Works related to the maintenance of mechanical and electrical ("M&E") systems; and (b) Subcontract Works related to the "Soft Services", as there are two distinct parts of the services to be provided by the Claimant.

Subcontract Works related to maintenance of M&E systems

85 Section 3(1) of the SOP Act is reproduced as follows:

> **Definitions of 'construction work', 'goods' and 'services'**
>
> **3.**—(1) In this Act, unless the context otherwise requires and subject to subsection (2) —
>
> 'construction work' means —
>
> (*a*) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures (whether permanent or not) that form, or are to form, part of the land;
>
> (*b*) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works that form, or are to form, part of the land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purpose of land drainage, coast protection or defence;
>
> (*c*) the installation in any building, structure or works of fittings that form, or are to form, part of the land, including systems of

heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, and security or communications systems;

(*d*) any operation which forms an integral part of, is preparatory to, or is for rendering complete, works of the kind mentioned in paragraph (*a*), (*b*) or (*c*), including —

(i) land reclamation;

(ii) site clearance, earth moving, excavation, tunnelling and boring;

(iii) the laying of foundations;

(iv) the erection, maintenance or dismantling of scaffolding;

(v) the prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere; and

(vi) site restoration, landscaping and the provision of roadways and other access works;

(*e*) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension; or

(*f*) the painting or decorating of the external or internal surfaces of any building, structure or works;

86 The Respondent's assertion that the Subcontract Works do not fall within the definition of "services" under the SOP Act is not disputed. Parties' contention lies within the scope of s 3(1)(*a*) of the SOP Act ("s 3(1)(*a*)") and s 3(1)(*c*) of the SOP Act ("s 3(1)(*c*)").

87 Broadly, the Respondent submitted the following arguments (which are disputed by the Claimant):

(a) With respect to s 3(1)(*a*), if the maintenance works in question are not in respect of buildings or structures that "form or are to form, part of the land", then they do not fall within the ambit of the SOP Act.

(b) The inclusion of "maintenance" in s 3(1)(*a*) can be sharply contrasted with the absence (and express exclusion) of any mention of "maintenance" from s 3(1)(*c*). Section 3(1)(*c*) therefore concerns the installation of fittings or systems, including M&E systems, but not the maintenance of such systems.

(c) Clause 4.6 of the Subcontract states that the Claimant "… undertakes that it shall comply with all obligations to which the

[Respondent] is subject pursuant to the terms of the Main Contract documents …". In turn, cl 1.1(i) of the conditions of contract (to the Main Contract) states that "Construction Works shall not include Maintenance Works".

(d) The Subcontract is not for the maintenance works relating to any one building or facility but contemplates the provision of maintenance to various branches of [Z], which can be contrasted with typical building construction projects to which the SOP Act applies.

(e) The payments under the Subcontract Works represent actual payments for maintenance works performed and are not subject to re-adjustment or reconciliation in a subsequent "final accounting". Therefore, such payments do not "promote cashflow" in the same way as progress payments under construction contracts.

88 I first dismiss the argument that the Subcontract's incorporation of the Main Contract's definition of construction works has any relevance to the issue at hand. Whether the Subcontract is a construction contract which can come under the ambit of the SOP Act is a matter relating to the statutory definition of "construction contract" and "construction work", and not the parties' agreement. I also do not find the Respondent's arguments on the Subcontract Works failing to promote cashflow or that the SOP Act envisions construction contracts to be related to any one specific building, to be particularly persuasive. The Respondent's further arguments in its supplementary submissions, *inter alia*, that maintenance works do not have the same consequences of delays in payments adversely affecting "downstream players", are bare assertions that are, with respect, equally unconvincing.

89 I find that the more pertinent analysis of the issue would be the interpretation of ss 3(1)(*a*) and 3(1)(*c*) the SOP Act and the corresponding application of the same to the maintenance of M&E systems. The courts' views would be useful in this regard. However, I note that Parties were unable to provide local case law on this point.

90 To aid in this determination, I therefore invited Parties' views, by way of Direction No 4 and Direction No 5, on the hansard of parliamentary debates and on foreign case law, given that the SOP Act is modelled after similar legislation in other jurisdictions, including Australia, UK and New Zealand. In particular, I requested Parties to provide their respective positions on the UK case of *Nottingham Community Housing Assoc v Powerminster Ltd* [2000] Adj L R 06/30 ("*Powerminster*") in relation to the issue at hand.

91 In *Powerminster*, a similar issue of whether the contract entered into between parties was a construction contract within the meaning of the Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK)

("HGCRA") had arisen (at [1]). Section 105 HGCRA is reproduced as follows (in so far as relevant):

> (6) In this Part 'construction operations' means, subject as follows, operations of any of the following descriptions –
>
> (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
>
> (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks …
>
> (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems.

92 Sections 105(1)(a) and 105(1)(c) of the HGCRA and ss 3(1)(*a*) and 3(1)(*c*) of the SOP Act are very similarly worded.

93 The contract in *Powerminster* was for the carrying out of annual service on each gas appliance in Nottingham's properties, and for supplying a responsive repair and breakdown service. The gas appliances to be serviced and maintained comprised gas central heating systems, gas fires and gas cookers (at [4]). In *Powerminster*, Nottingham contended that the contract is not a "construction contract" within the meaning of s 105 of the HGCRA (at [8]).

94 Dyson J said the following at [13]–[15]:

> [13] *I shall start by considering whether, if paragraph (c) were not present, the maintenance and repair of heating systems that have been installed in a building would be operations falling within paragraph (a). I have no doubt that they would*. It is common ground that paragraph (a) applies to operations in relation to part as well as the whole of a building. It applies as much to the subcontractor who constructs the roof joists, as it does to the main contractor builder who builds an entire house for his client.
>
> [14] In my judgment, still leaving paragraph (c) on one side, there is no warrant in paragraph (a) for distinguishing between different type of operations carried out in relation to a building or structure. Take the construction of a building. *Paragraph (a) applies as much to the installation of a demountable wall partition as it does to the installation of a central heating, air-conditioning, sanitation system or any other of the fittings mentioned in paragraph (c)*. There is no distinction in property law: once installed, they all

become part of the land. Nor is there any other basis, whether technical or founded on the ordinary use of words, for saying that the installation of a demountable wall partition is, but the installation of heating systems *etc*. is not, part of the construction of a building … *The same applies to the other operations mentioned in paragraph (a). There is no justification for distinguishing between the repair and maintenance of the roof or cladding panels of a building and the repair and maintenance of the various systems described in paragraph (c). They are all part of a building*. It is not a misuse of language to say that the maintenance of a building includes the maintenance of the various items mentioned in paragraph (c). It is worth emphasising the scope of those items. They include not only heating and air-conditioning systems, but also lighting, power supply, drainage, sanitation and water supply. These are all vital parts of a building, whose proper functioning is required if a building is to be fit for habitation.

[15] I conclude, therefore, that, on the basis of a consideration of paragraph (a) alone, the maintenance and repair of heating systems *etc*. which have been installed in a building are operations within paragraph (a). It would be surprising if it were otherwise. *On Mr Harding's argument, it is only the installation of heating systems etc. that are construction operations. If that is right, Parliament has excluded from the ambit of 'construction operations' not only the repair and maintenance of all paragraph (c) systems, but also the 'alteration, extension, demolition or dismantling' of them too* … In the light of the plain mischief at which the Act was aimed, it is very difficult to see on what rational basis Parliament could have intended to include the installation of such systems, but exclude their alteration or demolition. The work of altering or dismantling heating and other systems that have been installed in a building is every bit as much a 'construction' activity as the work of altering the walls or roof of a building. Why should Parliament have intended to exclude the former but include the latter. The same question arises in relation to the repair and maintenance of heating and other systems that have been installed in a building.

[emphasis added]

95 Based on the above, I find that the Respondent's arguments in this AA similarly fail, as they did in *Powerminster*. Dyson J clearly and unequivocally set out that within the ambit of s 105(1)(a) of the HGCRA alone, the maintenance of systems is included within construction works. It would be hard to imagine that the Singapore Parliament adopted near identical wording but intended a different effect. The Singapore Parliament similarly could not have intended to exclude "the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling" of the s 3(1)(*c*) systems.

96 The Claimant further cited then-Minister of State for National Development, Cedric Foo Chee Keng, at the second reading of the Building

and Construction Industry Security of Payment Bill (Bill No 54/2004) (Singapore Parl Debates; Vol 78; Col 1114 [16 November 2004]), that construction work includes "building and civil engineering work, mechanical and electrical work, and any of their related preparatory or follow-up works". I agree with the Claimant that such related follow-up M&E works would include maintenance. The Claimant had also submitted at the Hearing that the Claimant's maintenance of M&E systems included works such as dismantling, replacements and reconstructions. It would be hard to argue against such works being captured within the ambit of the SOP Act.

97 The Subcontract Works relating to the maintenance of M&E systems thus ought to be included within the ambit of s 3(1)(*a*). I also agree with the Claimant that the lack of the word "maintenance" in s 3(1)(*c*) cannot be a presumption made against the interpretation of wordings stated in s 3(1)(*a*). It is unlikely that Parliament had intended to exclude the maintenance of M&E systems when the ongoing maintenance forms the root cause of the Claimant's disrupted cashflow.

98 For completeness, Dyson J added that it was likely that para (c) was inserted into the HGCRA because "it was thought sensible to do so in view of s105(2)(d)" (*Powerminster* at [20]), the purpose of which is to "exclude from 'construction operations' the simple manufacture of components, except under a contract which also provides for their installation". Although there is no similar provision to s 105(2)(d) of the HGCRA in the SOP Act, it is my view that it is likely that the parliamentary intentions of s 3(1)(*a*) mentioned above still remain true.

99 The Respondent submitted some additional arguments in its supplementary submissions to deal with this issue. First, I accept the Respondent's assertions that one of the purposes of the SOP Act was to preserve cash flow in the construction industry so that construction projects are not disrupted or delayed, as supported by *JFC Builders Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2017] 3 SLR 344 ("*JFC Builders*") (at [26]) and *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (at [18]).

100 However, the Respondent's argument that the Claimant's maintenance works were performed on buildings which were completed several years ago, and therefore the Subcontract Works cannot fall within the scope of the SOP Act, is not an attractive one. I am of the view that there are many ways for the maintenance of M&E works to face cash flow issues and be delayed by reason of upstream contractors' non-payment. For example, if a main contractor refuses to pay a subcontractor to perform its monthly maintenance works, that subcontractor might be unable to pay its workers to perform the maintenance works on site and the maintenance is delayed and/or disrupted.

101 Second, the Respondent asserts that Dyson J's reliance on the principles of property law is flawed on two levels. The first being that the omission of the word "maintenance" from s 3(1)(*c*), given that it features in ss 3(1)(*a*), 3(1)(*d*) and 3(1)(*e*), must be given due and proper consideration in constructing the SOP Act pursuant to the purposive approach. I accept that the purposive approach is to be constrained by the literal text of the provision and one must not interpret a statutory provision that goes against the express literal wording of that provision, in accordance with *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (at [43]) and *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 (at [52]). However, the Respondent has not shown how an interpretation that the maintenance of M&E systems being included within the "maintenance … of buildings or structures (whether permanent or not) that form, or are to form part of the land" runs afoul of the express wording of s 3(1)(*a*).

102 I therefore do not agree with the Respondent that the omission of "maintenance" in s 3(1)(*c*) shows Parliament's intention to distinguish repair and maintenance of M&E systems from that of fixtures and buildings. The Respondent has not provided any authorities to support this proposition, while Dyson J has explained Parliament's likely intention to the contrary in *Powerminster* ([90] *supra*) (at [15]). The Respondent also attempted to distinguish the UK's HGCRA from the SOP Act – however, the similarities of the sections in discussion, being ss 105(1)(a) and 105(1)(c) of the HGCRA and ss 3(1)(*a*) and 3(1)(*c*) of the SOP Act, are plain to see.

103 Finally, the Respondent has asserted that Dyson J's importation of common law rules on fixtures into the UK's HGCRA has not been universally accepted by subsequent case law. The Respondent has cited various cases, including the Singapore case of *JFC Builders*, for the proposition that, *inter alia*, the common law rules of fixtures and property ownership were not imported into the definition of "construction work" in s 3(1) of the SOP Act. In relation to this point, I note that the Claimant cited various authorities, such as Chow Kok Fong, *Security of Payment and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) (at paras 3.74–3.76) for the proposition, *inter alia*, that "[t]he Singapore SOP Act is silent on what is meant by the expression 'form part of the land' but the court may be expected to determine this on the basis of the common law principles relating to fixtures".

104 With respect to both Parties, I find that Dyson J's brief reference to common law principles on fixtures is not critical to his decision in *Powerminster*. In my view, the crucial point that Dyson J is making is that there is no basis or justification to distinguish between the maintenance of construction works and the maintenance of M&E systems. A direct incorporation of the strict and complex principles of the common law

relating to fixtures is not required for Dyson J to come to the conclusion that the repair and maintenance of the roof of a building and the repair and maintenance of the systems described in s 105(1)(c) of the HGCRA are all part of a building and therefore part of construction works.

105 The Respondent's final argument in this regard relates to whether by allowing the maintenance of M&E systems to come within the ambit of the SOP Act, all agreements for the supply of goods for works involving the maintenance of M&E systems would also fall under the scope of the SOP Act, by extension of ss 2 and 3(1) of the SOP Act which cover the supply of goods in relation to construction works. With respect, this issue is not before me in this adjudication and would be better addressed if the situation were to arise in a future adjudication or in court.

Subcontract Works related to the Soft Services

106 In its oral arguments, the Claimant submitted that Soft Services are covered by the ambit of s 3(1)(*e*) of the SOP Act ("s 3(1)(*e*)"), while the Respondent submitted that the type of cleaning referred to in the SOP Act would be the cleaning of buildings and structures. The Respondent further submitted at the Hearing that the type of cleaning that would be included in s 3(1)(*e*) ought to be the incidental cleaning as a result of the construction described in s 3(1)(*a*).

107 Given that I have found that s 3(1)(*a*) covers the maintenance of M&E systems, it would naturally follow, by the Respondent's own admission, that s 3(1)(*e*) covers the external or internal cleaning of structures or works, so far as it is carried out in the course of maintaining the M&E systems.

108 It would also follow from my finding above that the works done for Soft Services relating to cleaning (unrelated to maintenance works), waste disposal, horticulture and pest control are not covered by the ambit of the SOP Act. Therefore, I am inclined to reject the works done for all Soft Services in so far as I am unable to ascertain if they are cleaning works performed in the course of maintaining the M&E systems or not.

Reasons for the determination

Payment response

109 Having found that I have the jurisdiction to decide on AA 332, I now turn to the first issue that arises in relation to the determination of the claims, being the validity of the 9 December E-mail as a payment response for the purposes of the SOP Act.

110 The Respondent had submitted that the 9 December E-mail constitutes a valid payment response. I first refer to the SOP Act and the SOPR.

111 Sections 11(1) to 11(3) of the SOP Act provides as follows:

Payment responses, *etc*.

11.—(1) A respondent named in a payment claim served in relation to a construction contract must respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —

(*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or

(*b*) where the construction contract does not contain such provision, within 14 days after the payment claim is served under section 10.

(2) A respondent named in a payment claim served in relation to a supply contract may respond to the payment claim by paying to the claimant the claimed amount, or such part of the claimed amount as the respondent agrees to pay, or by raising objections in writing, by the due date.

(3) A payment response provided in relation to a construction contract —

(*a*) must identify the payment claim to which it relates;

(*b*) must state the response amount, if any;

(*c*) must state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and

(*d*) must be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

112 Regulation 6(1) of the SOPR provides as follows:

Payment responses in relation to construction contracts

6.—(1) Every payment response provided in relation to a construction contract shall —

(*a*) be in writing;

(*b*) be addressed to the claimant;

(*c*) state 'nil' where the respondent does not propose to pay any part of the claimed amount and the reasons therefor; and

(*d*) where the response amount is less than the claimed amount —

(i) contain the amount that the respondent proposes to pay for each item constituting the claimed amount, the reasons for the difference in any of the items and the calculations which show how the amount that the respondent proposes to pay is derived; and

(ii) contain any amount that is being withheld, the reason for doing so and the calculations which show how the amount being withheld is derived.

113 The pertinent question is whether the 9 December E-mail meets the requirements of the statutory provisions set out above at [111] and [112].

114 In this regard, the Claimant submitted that the 9 December E-mail was merely a confirmation "that PC1 was duly served on the Respondent" and "[n]o payment response was served and/or received by the Claimant by [14 December 2024] as required by section 11 of the SOP Act". In the Claimant's oral arguments, the Claimant further added that the 9 December E-mail did not give reasons for nil responses, contained pay-when-paid responses which was not a valid response, and for the amounts that the Respondent was willing to pay, the 9 December E-mail did not set out the amounts being held back nor did it give any reason for the difference in calculations and how the numbers were arrived at. The Claimant's position is that these characteristics preclude the entire 9 December E-mail from being a valid payment response.

115 The Respondent submitted that the failure to use the word "nil" does not invalidate a payment response, so long as the substance of the payment response satisfies the requirements under the Regulations. This is accepted. However, I am not convinced that the remaining requirements are met.

116 Having analysed the 9 December E-mail, the following characteristics of the documents make it difficult to reconcile with the requirements of the SOP Act and the SOPR:

(a) The 9 December E-mail does not state the response amount.

(b) The 9 December E-mail also does not state any response amounts for each of the items claimed. For example, at item 1 the Respondent states "[o]ur [Z] team will verify this amount with you and settle this amount" and at item 6 the Respondent states "[a]s per contract, we will make payment to BJE upon receive payment from [Z]". I cannot accept the Respondent's argument that such positions amount to a "nil" response. Reading the plain language of the 9 December E-mail, it is unclear whether the Respondent accepts the items claimed by the Claimant.

(c) It is equally unclear, where verification or further action is required, whether the Respondent is willing to give a response amount less than the amounts claimed, what that amount would be and what the calculations were for the Respondent to derive such figures. The vague language of the 9 December E-mail clearly does not satisfy the requirements.

(d) It is further noted that items 5, 6 and 7 contain pay-when-paid responses which are not valid for the purposes of a payment response.

117 Having considered the 9 December E-mail and both parties' submissions before me, I accept that 9 December E-mail does not constitute a valid payment response and, consequently, the Respondent has not submitted a payment response for the purposes of the AA.

The law as to Claimant's standard of proof and Respondent's objections

118 In PC 1, the Claimant claimed for Subcontract Works in the sum of S$5,617,092.43. The Claimant has also provided various supporting documents to prove its entitlement to its claims for the works done in the AA.

119 Even though I have found that the Respondent did not submit a valid payment response, in assessing the Claimant's entitlement to its claims, I accept the Respondent's submissions that I am still duty bound to adjudicate the claim and be satisfied that the Claimant has established a *prima facie* case for each of its claims, as pronounced in the Court of Appeal decision in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*").

120 In assessing the claim, I am cognisant of the requirement for a "positive reason" to award the amount, and that I must be satisfied that the claim has been sufficiently substantiated.

121 The Respondent's failure to provide a valid payment response, however, constrained the Respondent from raising any objections to the Claimant's claim by virtue of s 15(3) of the SOP Act and the Court of Appeal decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [71].

122 Finally, I am mindful that the Court of Appeal stated in *Comfort Management* that "regardless of whether there is any payment response, an adjudicator has an independent duty to address his mind to and consider the true merits of the claim". This duty would entail the consideration of "patent errors" in the material properly before me.

123 A patent error is "obvious, manifest or otherwise easily recognisable" and refers to "an error that is in the material that is properly before an adjudicator for the purpose of the adjudication".

124 I therefore accept the Respondent's submission that it is not precluded from raising in these adjudication proceedings any such patent errors in the Claimant's claims. Therefore, pursuant to ss 15(3) and 17(6) of the SOP Act, the Respondent's objections ought to be confined to those on patent errors. While the Respondent was free to present its case at the Hearing, objections of any other nature will not be considered unless the Respondent did not reasonably know of those grounds of objections at the relevant time or such grounds arose only after the time for lodgment of the AR.

Payment claim

125 As stated above at [14], in the AA, the Claimed Amount is the total sum of S$5,154,156.76.

126 The Claimant claims the following in this AA:

S/N	Description	Claimed Amount (S$)
1.	Y2022 [Y] Preventive Maintenance	32,525.69
2.	Y2021-Y2023 [W]- Preventive Maintenance (with VIA)	208,867.66
3.	JAN-MAR Y2021 [X]/[Y]- Preventive Maintenance (HY/Y Frequency)	556,544.12
4.	APR – DEC Y2023 [X] [xxx] (TM1) – Amounts due for Security Door & Ironmongery	94,958.18
5.	Y2021-Y2023 [W]- Amounts due under Direct Invoicing for Preventive Maintenance and Breakdown Maintenance	393,401.85
6.	Y2022-Y2023 [X] Cluster B – Rooftop Low Tension Switchboard	60,104.35
7.	JAN-SEP Y2024 [X], [W], [V]-Preventive Maintenance	994,888.22
8.	Improvement Project Works/ Breakdown Maintenance Works	2,812,866.68
Total Amount Claimed		5,154,156.76

127 There are a total of eight items of works that are in dispute in AA 332 (the "Disputed Works"). I will proceed to determine each item.

Item 1

128 This item of claim is in relation to outstanding amounts due for "Preventive Maintenance works at [Y] under [Z]'s E-Purchase Orders ('e-PO') No. [xxx]190 and [xxx]192" for the sum of S$32,525.69 (excluding GST). The Claimant submitted that the said works have been completed and certified.

129 The Respondent submitted at the Hearing that this claim amount is incorrect and unsubstantiated due to an agreed sum for cost-sharing that was not properly accounted for.

130 In support of its claim, the Claimant tendered copies of e-invoices setting out works done in June 2022 issued to [Z] and a claim summary verified by the Facilities Maintenance Manager, [U] Pte Ltd ("[U]") and approved by [Z]. Having reviewed these documents, I am satisfied that the Claimant has established a *prima facie* case and the following claim items within Item 1 – "Mechanical & Electrical Services Maintenance" – are sufficiently substantiated, amounting to S$2,393.63.

131 I find that the Respondent's objection that the amount is incorrect or unsubstantiated based on Parties having agreed sums for cost-sharing is not "obvious, manifest or otherwise easily recognisable" on the face of the documents and is thus not a patent error.

132 The following claims are disallowed for the reasons set out at [108] of this AD:

(a) "Pest Control" amounting to S$950.97;

(b) "Horticulture" amounting to S$2,988.84; and

(c) "Cleaning & Waste Management" amounting to S$22,695.00.

133 I also find that the claim for "Preliminaries 5%" amounting to S$4,852.49 cannot be correlated to either the M&E works or the Soft Services works. The Claimant has not identified the basis for these preliminaries. Therefore, the claim for Preliminaries 5% is disallowed for Item 1.

134 I accept the Claimant's submission that it is claiming 96% of the total sums e-invoiced by the Respondent to [Z], pursuant to the Subcontract. It appears to me that the basis for this is in Section 2 of Appendix A, which states that, for both Bundle 2 and Bundle 3:

> Provision of Preventive Maintenance Works, Comprehensive Maintenance Works, On-site Manpower, and General Repairs and Redecorations at a total monthly fee based on 96% of [Z] invoiced amount ([Z] approved invoice amount after deduction of omissions and KPIs or after addings the incentive bonuses, if any), to be paid in monthly progress payments.

135 I thus allow the Claimant's claim (being 96%) of the item allowed above, being the total sum of **S$2,297.88** (excluding GST).

Item 2

136 This item of claim is in relation to outstanding amounts due for "Preventive Maintenance works completed in 2021–2023 at [xxx] ('[W]') properties" for the sum of S$208,867.66. The Claimant submitted that the Respondent has issued six VIAs acknowledging the Claimant's claims for payment.

137 In support of its claim, the Claimant tendered copies of the six VIAs issued by the Respondent and consolidated tax invoices issued to the Respondent. As *per* the Parties' payment procedure, the Claimant would proceed to furnish a payment certificate and the Respondent would then issue a purchase order and the VIA to the Claimant, allowing the Claimant to invoice for payment.

138 The Respondent submitted that some of the claims in respect of Item 2 relate to work allegedly done or invoices issued prior to April 2022 and which should be barred from being claimed in this adjudication by operation of s 10(2)(*b*) of the SOP Act ("s 10(2)(*b*)").

139 Section 10(2)(*b*) provides as follows:

> (2) A payment claim must be served —
>
> …
>
> (*b*) not later than 30 months after the following, whichever is applicable:
>
> (i) the date on which the goods and services to which the amount in the payment claim relates were last supplied;
>
> (ii) the latest of the following dates:
>
> (A) the date on which the construction work to which the amount in the payment claim relates was last carried out;
>
> (B) the issuance date of the last document, as at the time the payment claim is served, certifying the completion of the construction work under a contract;
>
> (C) the issuance date of the last temporary occupation permit as at the time the payment claim is served.

140 The Respondent submitted that in so far as the Claimant has included claims in its PC for work allegedly done more than 30 months ago, the

Claimant cannot establish a *prima facie* entitlement in respect of such claims.

141 The Claimant submitted at the Hearing that the effect of s 10(2)(*b*) is as follows: if there were no goods or services supplied or construction works performed in the last 30 months prior to the submission of the payment claim, then a payment claim cannot be submitted. In respect of those claims, so long as there are any construction works performed in relation to the Subcontract within the said 30 months, then a payment claim can be submitted for work done in relation to the Subcontract more than 30 months ago, for the purposes of the SOP Act. I do not find the Claimant's argument persuasive. On a plain reading of s 10(2)(*b*), a payment claim must not be served later than 30 months after the works to which the claim relates to were carried out. In other words, if the claim relates to works performed in 2021, which is more than 30 months prior to the submission of PC 1, a payment claim for those works performed should have been submitted within the 30 months following the completion of said works, if the Claimant was to be able to avail itself of its rights under the SOP Act.

142 The Claimant therefore cannot claim, in this AA, payment for works undertaken prior to 30 months before PC 1 was served, being 30 months before 29 November 2024, *ie*, **29 May 2022**. In this respect, I agree with the Respondent in so far as the Claimant's claims in PC 1, for the purposes of the adjudication under the SOP Act, are limited by a 30-month period from when the works undertaken for the claim was performed.

143 Further, I have found, as *per* my findings above at [95]–[108], that in principle, I will allow a claim for maintenance works of M&E systems and related or ancillary cleaning works. However, I need also address my mind to the true merits of the payment claim and be satisfied that the Claimant has established a *prima facie* case that the works have been completed and that the value of the works is as stated in PC 1, as pronounced in the Court of Appeal decision in *Comfort Management* ([119] *supra*).

144 The six VIAs submitted by the Claimant as supporting documents do not provide any breakdown as to the scope of the works performed for Item 2. Neither do they provide the date of which the construction work to which each of the amounts relate to was last carried out. Without the above information, I am unable to determine which claims within Item 2 can be allowed as claims for maintenance of M&E systems and/or ancillary cleaning which were performed within the 30-month period prior to the submission of the payment claim. I am unable to make a determination on the merits of the claim.

145 I therefore find that the Claimant has not proven a *prima facie* case in Item 2 in so far as it includes works done for the period of 2021 and lacks

the information for me to decide if I have the jurisdiction to determine the claim.

146 For the reasons set out above, I disallow the Claimant's claim for Item 2 in its entirety.

Item 3

147 This item of claim is in relation to "preventive maintenance works for the year 2021 at [X] and [Y] properties" for the sum of S$556,544.12. The Claimant submitted that the said works have been completed.

148 The Claimant's claims for Item 3, as supported by its supporting documents in Annex C Tabs 4 to 6, are for works performed in 2021.

149 By reason of my findings above at [142] in relation to claims for works done prior to 30 months from the submission of the payment claim, I find that the Claimant is not entitled to claim for Item 3 works in this adjudication.

150 I therefore disallow the Claimant's claim for Item 3 in its entirety.

Item 4

151 This item of claim is in relation to "Mechanical & Electrical Services Maintenance at the [xxx] (TM1) and [xxx] (TM2) properties of [X], specifically, for Security Door & Ironmongery", for the sum of S$94,958.18. The Claimant submitted that an amount of S$12,211.70 had been wrongfully deducted each month over a period of nine months as omission based on a mistaken listing of door sliders and a mistaken understanding of the number of doors on site.

152 The Respondent submitted at the Hearing that [U] had previously certified 30 units of sliding doors when there were only 20 units on site, and therefore there was an "overpayment" to the Claimant. Although the Respondent has not quantified this overpayment, the Respondent submitted that there is a patent error in the Claimant's claims as there is no basis for the Claimant to be claiming for omissions and therefore the Claimant is not entitled to claim for wrongful deductions for items not on site.

153 In support of its claim, the Claimant tendered copies of various documents setting out the claim breakdown, cost recovery and detailed cost breakdown of preventive maintenance claim(s). The document titled "13. Supporting from Y2024 claim" ("Cost Recovery Document") sets out the cost recovery details for the year 2024 and is endorsed by various parties, including multiple representatives from [U] and a representative of the Respondent itself.

154 The Cost Recovery Document supports the Claimant's position that the original contractual listing of: (a) 53 door sliders; (b) onsite quantity being 30 doors; and (c) that 23 door sliders are omitted for maintenance are mistaken positions. The Cost Recovery Document sets out a revised claim for a total contractual quantity of 20 doors with no doors omitted. Therefore, I accept the Claimant's position that 23 doors were wrongfully omitted for six of the nine months set out in the claim summary, for the months of April to December 2023. These six months are supported by the claim breakdowns for the months of April and August to December 2023, as endorsed by [U] and the Respondent, which show an omission of 23 doors for the item "Security Door & Ironmongery".

155 However, for the months of May to July, I do not see a similar listing for "Security Door & Ironmongery" with an omission of 23 doors, as endorsed by [U] and the Respondent. It would seem to make sense that the maintenance of the 23 doors would continue to be omitted for the months of May to July but, in this case, I find that the Claimant has not sufficiently substantiated that there was a wrongful omission of maintenance for 23 doors.

156 I find that on the face of these documents, there is no "obvious, manifest or otherwise easily recognisable" error in relation to the Claimant being overpaid and lacking basis for its entitlement, as suggested by the Respondent, at least for April and August to December 2023.

157 I therefore find that the Claimant has proven its claim to a *prima facie* standard for six of the months and there are no patent errors on the face of these documents, and allow part of the claim for Item 4, being **S$63,305.45** (excluding GST).

Item 5

158 This item of claim is in relation to completed "Preventive Maintenance and Breakdown Maintenance works, where [Z] has given instructions for direct invoicing to be done without the need to reference the E-Invoice to any e-PO" for the sum of S$393,401.85.

159 The Claimant has provided a claim summary for Item 5 and e-mails in relation to [Z] requesting direct invoicing. From these documents, there appear to be claims for works performed prior to 29 May 2022.

160 By reason of my findings above at [142] in relation to claims for works done prior to 30 months from the submission of the payment claim, I find that the Claimant is not entitled to its claims for these works in Item 4, in this adjudication.

161 Second, the Respondent had submitted that it was not provided with any proof of completion or invoice from the Claimant for work done and, in

this AA, the Claimant had still failed to provide adequate supporting documents to justify this claim amount. I have looked into the Claimant's supporting documents in the fulfilment of my duty to consider the merits of the Claimant's claim.

162 As stated above at [143], I am required to address my mind to the true merits of the payment claim and be satisfied that the Claimant has established a *prima facie* case that the works have been completed and that the value of the works is as stated in PC 1. In this regard, the Claimant has provided a summary but not any invoice, endorsed documents or any other proof of work done, to sufficiently substantiate the amounts claimed for Item 5 for work done from 29 May 2022. I should make it clear that for this claim, just like the claims in Item 2, I have not adjudicated on the merits of the claim. It is simply that I have not been provided with sufficient evidence to be able to say that the Claimant has sufficiently substantiated its claim on a *prima facie* basis.

163 I therefore find that the Claimant has not proven a *prima facie* case for Item 5 and I disallow the Claimant's claim for Item 5 in its entirety.

Item 6

164 This item of claim is in relation to works from 2022 to 2023 for "Mechanical & Electrical Services Maintenance works in respect of Low Tension Electrical Installation(s) Switchboards found at the rooftop of the [X] Cluster B which is unaccounted for under the Subcontract" for the sum of S$60,104.35. The Claimant is claiming for additional costs of the maintenance of five low tension electrical switchboards.

165 The Claimant has provided a claim summary for Item 6, an equipment list for [X] Bundle 2 Cluster B, and an e-mail from the Claimant requesting a revision to the equipment list to include the five additional units.

166 First, the supporting documents provided by the Claimant do not provide any details as to when the works were performed, although the title of the claim includes a period of time in 2022. As *per* my findings at [142], this is integral, as the Claimant cannot claim in PC 1 for works performed before 20 May 2022, being 30 months prior to the submission of PC 1, in this adjudication. If I am unable to ascertain the time period of the works, I am unable to find that the Claimant has proven a *prima facie* entitlement to its claim in this adjudication.

167 Second, as stated above at [143], I am required to address my mind to the true merits of the payment claim and be satisfied that the Claimant has established a *prima facie* case that the works have been completed and that the value of the works is as stated in PC 1. In this regard, the Claimant has

provided a claim summary but not any instructions for the maintenance of the additional units, any invoice, endorsed documents or any other proof of work done to sufficiently substantiate the amounts claimed for Item 6 for works done after 29 May 2022, if any.

168 I therefore find that the Claimant has not proven a *prima facie* case for Item 6 and I disallow the Claimant's claim for Item 6 in its entirety.

Item 7

169 This item of claim is in relation to outstanding sums for "unpaid Preventive Maintenance works completed in January to September 2024 at [X] and [W] properties" for the sum of S$994,888.22 (after the Respondent's payment of S$462,935.67 on 20 December 2024). The Claimant submitted that it had provided the Respondent with all the necessary supporting documents showing that works were completed and yet were not paid.

170 The Claimant has provided a claim summary for Item 7, endorsed tax invoices, service reports and [Z]-endorsed payment certificates for [W] properties, and endorsed tax invoices, service reports and [Z]-endorsed payment certificates for [X] properties.

171 As stated above at [143], I am required to address my mind to the true merits of the payment claim and be satisfied that the Claimant has established a *prima facie* case that the works have been completed and that the value of the works is as stated in the amount claimed. In this regard, I first note that the supporting documents contained at AA, Annex C, Tabs 17 and 18 contain a mix of invoices, payment certificates, summaries, [Z]'s invoicing instructions and other such documents relating to both the maintenance of M&E systems and provision of Soft Services (and preliminaries). Having found at [95]–[108] above that I only have the jurisdiction to accept the Claimant's claims for the maintenance of M&E systems and related cleaning works, I can only fulfil my duty to determine the claims which are within my jurisdiction if they are identifiable in the documents. However, I tried but was not able to identify the various documents provided to determine claims which the Claimant is entitled to. There are various PDF files with hundreds of pages, and each of these files appear to be a compilation of numerous documents to be reviewed. The Claimant has not provided the supporting documents in a way that allows me to determine the Claimant's entitlement for the applicable items as many of the compiled documents are not appropriately tabbed, identified, correlated or properly explained.

172 This is further exacerbated by some documents having both Soft Services and maintenance of M&E systems within the same cost breakdowns, which are collectively summarised in some of the summary

pages. An example would include the supporting documents in AA, Annex C, Tab 18, Item 7 [X] Properties, compilation document titled "TMP", where a "summary of Preventive Maintenance Claim at _TMP_ for the month of _AUGUST_2024" provides a final amount after cost recovery of S$133,859.26 (at p 128), as a summation of the previous pages of the document which includes "Pest Control Services", "Horticulture Services" and an unidentified "Preliminaries 5%" claim. This document is subsequently followed by a "Detailed Cost Breakdown of Preventive Maintenance Claim of _TMP_ for the Month of AUGUST 2024", also including sums for "provision of pest control services" and "provision of horticulture services", and providing a nett claimable amount of S$137,273.45 and current claim amount of S$134,399.39 (at p 134).

173 Even if I allowed the entirety of the claims, including the Soft Services, as can be seen from the documents above at [172], some of these claims also have various "final amounts" and I have no way to tell which of these amounts are applicable to the Claimant's claims.

174 Further, different types of documentation are also being used, such as tax invoices, payment certificates and [Z]'s instructions for some claims as compared to summary of claims, summary of monthly maintenance price schedules and/or cost breakdowns in others. Without any explanation or proper correlation of the documents to the claims, it is impossible in the context of an adjudication to identify the relevant documents and how the total sums of the Claimant's claims are derived (and especially so for the claims which are allowable under the SOP Act).

175 It may well be that the supporting documents for works done in relation to M&E systems and/or ancillary cleaning works have been provided to sufficiently substantiate the Claimant's claims in Item 7. However, the supporting documents for the Claimant's claim amounts in its summary at Annex C, Tab 16, are not distinctly identifiable and impossible to apportion as claims for maintenance of M&E systems and claims for Soft Services which do not fall within the ambit of the SOP Act. I am thus unable to make a determination on the merits of this claim.

176 As an observation, it would have been helpful if the Claimant had provided a detailed breakdown of Item 7, properly identified the specific corroborating documents for each item of Item 7 in its submissions, and properly tabbed and signposted the relevant documents themselves in the PDF files provided. Alternatively, for complex claims with numerous invoices and supporting documents, the Claimant could have engaged the services of an independent expert or auditor to review the documents supporting the claim and attest to the accuracy of the tabulations and the documents supporting the claims.

177 I further note that the Item 7 claims also claim for the preventive maintenance of "[V]", but no supporting documentation were provided for the same.

178 Additionally, the Claimant submitted that the Respondent had made a payment of S$462,935.67 to the Claimant in respect of Item 7, on 20 December 2024. However, the Claimant provided its claim summary at AA, Annex C, Tab 16, setting out an unrevised claim breakdown amounting to $1,457,823.89, without taking into account the Respondent's payments. Without any explanation or breakdown, there is no indication as to the specific items of claim to which the Respondent's payment relates. I therefore find again that the supporting documents relevant to the Claimant's actual claim in this AA 332 cannot be ascertained.

179 For completeness, I note that the Respondent had submitted, *inter alia*, that the total revenue and the total original equipment manufacturer ("OEM") expenses set out in the Claimant's claim are inaccurate. The Respondent has also submitted that there is a difference between the Parties' account of amounts paid to the Claimant prior to 20 December 2024. The Respondent's documents in support of these positions, however, are equally unhelpful in ascertaining the correct amounts due to the Claimant. I find that I do not have to determine on the Respondent's arguments as they do not show patent errors and the Claimant has failed in proving its *prima facie* case, in any event.

180 For the reasons given above, I find that the Claimant has not proven a *prima facie* case for Item 7 and I disallow the Claimant's claim for Item 7 in its entirety, in this adjudication. I reiterate that in respect of the claims for maintenance services which I find are allowable in principle under the SOP Act (as opposed to the Soft Services which are not allowed under the same), this is a determination based on my finding that the Claimant has not proven its entitlement to its claims on a *prima facie* basis. I have not determined the merits of the individual claims.

Item 8

181 This item of claim is in relation to "unpaid Project Works / Breakdown Maintenance Works at [X] and [W] properties" for the sum of S$2,812,866.68. The Claimant submitted that it had provided the Respondent with all the necessary supporting documents showing that works were completed and yet were not paid.

182 The Claimant provided a claim summary for Item 8, endorsed certificates of completion, endorsed quotations and other documents.

183 The Respondent submitted that the works are in respect of ad-hoc works which is contingent upon the completion of such works with the

submission of certificates of completion. The Respondent submitted at the Hearing that without the certificates of completion, the Claimant has no entitlement to payment based on the Subcontract. The Respondent further submitted that the Claimant has overstated its claims. I find that on the face of the supporting documents provided by the Claimant, there is no "obvious, manifest or otherwise easily recognisable" error in this regard. Nevertheless, I have considered the general arguments that the claim is not substantiated by sufficient documentation to show works done.

184 As stated above at [143], I am required to address my mind to the true merits of the payment claim and be satisfied that the Claimant has established a *prima facie* case that the works have been completed and that the value of the works is as stated in the amount claimed.

185 First, I accept the Respondent's submissions to the extent that the Claimant has failed to prove its claims in respect of: (a) the 100% completed works; and (b) the works which are works-in-progress, which have no certificates of completion. I have also not found any other supporting documents to show that works were completed for the amounts claimed and at the rate of completion asserted. Without seeing any supporting documents as to the Claimant's progress of works on site pursuant to the purchase orders, I am unable to determine that the Claimant has proven its claims on a *prima facie* basis.

186 Second, similar to my comments set out in relation to Item 7 above, I face similar difficulties in finding the correct supporting documents for the corresponding claims as set out in the Claimant's Item 8a claim summary set out at AA, Annex C, Tab 19, even for claims supported by completion certificates. As an example, for Section 8a, I wish to highlight the item "SPC03 – PJQ022723P-SPSC-0586R2-S2-Additional Works for Conversion of space into Purpose Built Rooms in S2 Locker Area (FBQ Date: 21 August 2024)", for a PO/FBQ value of $3,864.83, for which the Claimant is claiming 100% of works done ("SPC03 Works"). At the outset, there is no indication as to where I can find the documents relevant to the SPC03 Works. Again, there are various lengthy PDF files with each file compiling numerous documents to be reviewed. I can only make an educated guess to attempt to identify the relevant document. Even for the documents I might be able to identify, the descriptions, dates or amounts therein do not fully match and it remains uncertain if I am looking at the correct document.

187 I highlight an example of my attempt to identify the relevant documents for the SPC03 Works. First, at AA Annex C, Tab 24, p 43, the Claimant has provided a certificate of completion of works dated 6 May 2024, stating that the final cost of works ought to refer to the "FBQ Amount". A related supporting document that I have been able to identify is at AA, Annex C, Tab 24, at pp 53–54 for a quotation dated

2 March 2023 (revision date), with subject titled "PJQ022723P-SPSC-0586R2-S2-Additional Works for Conversion of space into Purpose Built Rooms in S2 Locker Area" for a total sum of $4,388.79. I have made the following observations in relation to this document:

(a) this quotation sets out a different amount to that claimed in the claim summary for SPC03 Works; and

(b) the quotation also does not state the "FBQ Date: 21 August 2024" or the PO number, as stated in the claim summary.

188 A second document I found in relation to this item is at pp 49–50 of the same Tab, of [Z]'s invoicing instruction dated 21 April 2023 with invoicing instruction number "[xxx]166/1". This instruction was given in relation to the 2 March 2023 quotation as highlighted above. Although this matches the PO number for SPC03 Works as set out in the claim summary, the amount instructed for invoicing is S$4,388.79.

189 A third document related to SPC03 is a document titled "Final BQ" with subject "PJQ022723P-SPSC-0586FBQ-S2-Additional Works for Conversion of space into Purpose Built Rooms in S2 Locker Area", dated 29 October 2024. Although both the subject and the "FBQ date" do not match that of the payment claim summary, the amount of $3,864.83 does. It is thus unclear which of these are the relevant supporting documents (of the documents which I have been able to find and identify that are related to SPC03).

190 Even if I accept that the third document is the only relevant "FBQ Amount" for which the Claimant is claiming, and assuming that I am able to ascertain the correct document for each item of claim, I have also found that the overall sum of this section does not equate to the amount claimed in PC 1. The Claimant claims $1,538,719.75 for section 8a of Item 8. The Claimant's claim summary as provided in PC 1 at pp 118–122 and at AA, Annex C, Tab 19, however, sets out that Section 8a of Item 8 amounts to $1,537,592.95. The reason for this discrepancy is not provided.

191 I repeat my observations at [176] above that it would have been helpful if the Claimant had properly identified the specific corroborating documents for each item of Item 8 in its submissions, and properly tabbed and signposted the relevant documents themselves in the PDF files provided. For complex claims with numerous invoices and supporting documents, as I have said previously, the Claimant could have engaged the services of an independent expert and/or auditor to assist in this task.

192 Nevertheless, I have attempted to identify the relevant supporting documents, if any, and award sums for claims with identifiable supporting documents listed in Annex C. I do this in furtherance of my duty to ascertain if any claims are verifiable on a *prima facie* basis and are sufficiently

substantiated. Where the amount listed in the claim summary for Item 8 is more than the amount provided for in the "Final BQ" or "FBQ" documents referred to in the completion certificates, I have taken the amounts indicated in the FBQ. Where the amount claimed in the claim summary is less, I have awarded the Claimant the amount claimed. On this basis, therefore, I am allowing the claims for the following items of Section 8a of Item 8:

S/N	S/N in Section 8a of Item 8	Amount allowed (S$) (excluding GST)
1	OSC01	248,902.56*
2	OSC03	30,050.87*
3	OSC04	5,325.48*
4	OSC05	4,316.14*
5	OSC06	2,718.75
6	OSC08	8,412.46*
7	OSC10	1,002.36*
8	OSC11	631.84*
9	OSC12	30.45
10	OSC13	288.84
11	CLB02	47,038.90
12	CLB06	669.84**
13	CLB07	1,487.85**
14	CLB08	795.47
15	CLB09	2,427.70
Total		354,099.51
Total awarded (being 96% of total amount)		**339,935.53**

*Amounts awarded are based on the amounts set out in the FBQ documents.

**Amounts awarded are based on the claimed amount which is less than the FBQ amount.

193 I have observed from the claim summary for Item 8 that the Claimant is only claiming for 96% of the certified amounts, for the adjudication. I presume that this is due to the same reasoning set out at [134] above. I accept the Claimant's position in this regard and award the Claimant accordingly for the claims allowed in Item 8.

194 In Section 8b of Item 8, I reiterate my finding above at [185] that the Claimant has not provided sufficient supporting documents for me to ascertain the rate of completion of the works in progress. I also find that there is an error in PC 1 labelling this section as "[W] (Works-in-progress)".

The second section of the claim summary also lists the "Work Progress Status" of all the items within the section as "In-progress" and yet claims 100% work progress for three of the items. My evaluation of these three items is as follows:

(a) For the two items titled "B3A-[xxx] NPC, Staircase 1, 2 & Side-Staircase, Anti-Slip Coating Work" and "B3A-Transcom, Public Transport Security Command, Extend Metal Roof Sheet and Adding Cover on Machine", I accept the Respondent's submissions that despite claiming 100% for these items, no certificate of completion was provided. Further, I add that I was unable to find any supporting documents for these items at all.

(b) For the third item titled "B3A-PLB, Supply and Install Signage", with PO amount of "$8,934.90", the certificate of completion dated 29 October 2024 at AA, Annex C, Tab 20, PDF titled "PJQ27069P-B3A-PLB Supply and Install Signage (COC FBQ)", states that the final costs of works are to be referred to the "Final BQ Amount" (at p 1). However, the supporting documents provided only lists a quotation dated 30 October 2024 for $6,759.90 (at p 2) and [Z]'s invoicing instruction for $8,934.90 dated 26 July 2024. Neither of these documents refer to a "Final BQ Amount".

195 An additional example of a difficulty in deducing the progress claims in Section 8b of Item 8 is at the item titled "B3A-PLB, Replacement of FM200 Panel and Hydrostatic & Refilling of FM Cylinder", with PO No [xxx]708, claiming the amount $58,337.88 for 60% of the work done. However, in the PDF titled "PJQ27539P-B3A-PLB Replacement of FM200 Panel and Hydrostatic Refilling of FM Cylinder (COC FBQ)", the Claimant has provided a certificate of completion for PO No [xxx]708, dated 6 November 2024, with the final costs of works referred to in the "Final BQ Amount" which states $101,281.05 (at p 2). I am therefore unable to ascertain how the Claimant has arrived at its assertion of only 60% of work being done with a claim of $58,337.88.

196 In Section 8c of Item 8 of PC 1, for "[W] (Final Bill Quantities)", I encounter some similar errors for some items. For example, at S/N 106, project titled "B3A-[xxx] HQ, Construction of New Pathway at Entrance", I have identified the supporting documents at AA, Annex C, Tab 20, document titled "0106-PJQ17470P-B3A-[xxx] HQ Construction of New Pathway at Entrance – 241024R". The Certificate of Completion dated 20 September 2024 states that the final costs of works are to be referred to the "Final BQ Amount" (at p 1). However, the document titled "Final BQ" (at pp 2–5) sets out an amount of $36,961.47. This amount differs from the final amount claimed in S/N 106 of $38,626.84, for which I am unable to find an explanation. Nevertheless, in line with my decision in Section 8a of Item 8, where the amount listed in the claim summary for Item 8 is more

than the amount provided for in the "Final BQ" or "FBQ" documents referred to in the completion certificates, I have taken the amounts provided in the FBQ. Where the amount listed in the claim summary is less, I have awarded the Claimant the amount claimed.

197 It may be that I have considered the wrong documents or overlooked the correct ones. However, in the context of the time constraints in an adjudication, and without the proper submission or explanation of the documents submitted, this is an extremely difficult and onerous task.

198 From a review of the Claimant's supporting documents at AA, Annex C, Tab 20, there are only some items with a clearly identifiable endorsed Certificate of Completion and a "Final BQ Amount" corresponding to the Claimant's claims. Amongst these items, some works include Soft Services which I have rejected as *per* my findings above. For example, S/N 1002 for $4,211.47 contains "Disposal Work" for a total of $420.00 for works done which I am unable to ascertain if they are cleaning works ancillary to maintenance of M&E systems or other construction works.

199 I am therefore only satisfied with the documents provided which substantiate the work done and corresponding quantum claimed for the following items of Section 8c of Item 8:

S/N	S/N of Section 8c of Item 8	Amount allowed (S$) (excluding GST)
1	106	36,961.47*
2	313	5,840.76
3	936	4,807.00
4	969	7,863.30**
5	1002	3,791.47 (excludes disposal work)
6	1003	1,868.02* (excludes disposal work)
7	1004	5,114.72**
8	1005	3,168.17 (excludes disposal work)
9	1112	10,766.39
10	1159	638.64
11	1338	3,135.00
12	1355	1,508.00
13	1372	1,859.92
14	1386	1,815.76
15	1391	12,765.47
16	1417	6,751.97
17	1450	1,278.75
18	1489	19,178.37

19	1551	2,213.23
20	1553	743.12
21	1565	1,093.30
22	1635	2,770.28
23	1648	6,737.39**
Total		142,670.50
Total Awarded (being 96% of total amount)		**136,963.68**

*Amounts awarded are based on the amounts set out in the FBQ documents.

**Amounts awarded are based on the claimed amounts in the claim summary which is less than the FBQ amount.

200 For the above reasons, I reject the Claimant's claims for the following sections of Item 8:

(a) part of the quantum claimed in Section 8a;

(b) the entirety of Section 8b; and

(c) part of the quantum claimed in Section 8c.

201 Therefore, I allow only part of the Claimant's claims for Item 8, being the total sum of **S$476,899.21** (excluding GST), in this adjudication.

Adjudicated Amount

202 Having considered the Parties' submissions and the documents and matters before me, I hereby set out a detailed breakdown of the Adjudicated Amount, as assessed by me:

S/N	Description of Item	Amount (S$)
1.	Sums allowed in Item 1	2,297.88
2.	Sums allowed in Item 2	NIL
3.	Sums allowed in Item 3	NIL
4.	Sums allowed in Item 4	63,305.45
5.	Sums allowed in Item 5	NIL
6.	Sums allowed in Item 6	NIL
7.	Sums allowed in Item 7	NIL
8.	Sums allowed in Item 8	476,899.21
	Sub-total:	542,502.54
3.	*Add*: 9% GST	48,825.23
	Adjudicated Amount:	591,327.77

203 Accordingly, I determine that the Respondent shall pay to the Claimant the sum of **S$591,327.77** (inclusive of GST).

Due Date for Payment

204 Section 22(1) of the SOP Act provides that a respondent must pay the adjudicated amount to the claimant within seven days after the adjudicator's determination is served on the respondent or by the date on which the adjudicated amount is determined by the adjudicator to be payable, whichever is the later.

205 Pursuant to s 22(1) of the SOP act, I direct that the Respondent shall pay the Adjudicated Amount to the Claimant within seven days after this Adjudication Determination is served on the Respondent.

Interest

206 If the Respondent does not make payment of the Adjudicated Amount by the Due Date for Payment, pursuant to s 8(5) of the SOP Act and in the absence of any stipulation in the Subcontract of a default interest rate, the Respondent shall pay to the Claimant simple interest on any unpaid amount of the Adjudicated Amount at the rate of 5.33% per annum from the Due Date of Payment up to the date of full payment being made.

Costs of adjudication

207 The general rule is that costs should follow the event. However, in this Adjudication, the Claimant has succeeded in recovering a small proportion of the Claimed Amount. Although it would appear to me that the Claimant may well have valid claims for a substantial proportion of its claims, the manner in which the claims have been presented and substantiated made it virtually impossible to award any sums other than that already awarded. This is further exacerbated by claims time-barred from being pursued in this adjudication and claims which are mixed with claims which cannot be pursued in an SOP Act adjudication.

208 In view of the foregoing, and pursuant to ss 17(2)(*d*) and 30(2) of the SOP Act, I determine that the costs of the adjudication, namely, the adjudication application fee of S$654.00 (inclusive of GST) and the adjudicator fee of S$40,106.99 (inclusive of GST and comprising the adjudicator's fee of S$39,828.60 and disbursements of S$278.39), shall be borne 30% by the Claimant and 70% by the Respondent.

BJG Pte Ltd
v
BJH Ltd

[2024] SGSOP 22

Singapore Mediation Centre — SOP AA 337 of 2024
Chia Peng Chuang Michael
20 February 2025

Adjudication Application — *Documents* — *Respondent objecting to claimant not providing all relevant supporting documents with its payment claim and only providing them in adjudication application* — *Respondent contending breach of cl 22.1.1 REDAS Design and Build Conditions of Main Contract (3rd Ed)* — *Whether claimant allowed to rely on additional or new documents in its adjudication application* — *Sections 13(3)*(e) *and 17(4)*(c) *Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Payment Claim — *Variation works* — *Claimant claiming for variation works* — *Respondent objecting on ground that there were no employer's representative written instructions ("ERI") to support such variation claims* — *Whether issuance of ERI condition precedent to claimant's entitlement to payment of variation works* — *Whether claimant entitled to payment for variation works*

Payment Response — *Liquidated damages* — *Respondent deducting alleged liquidated damages ("LD") in its payment response* — *Claimant arguing respondent not entitled to deduct alleged LD* — *Whether respondent's deduction for liquidated damages constituted claim for damage, loss or expense* — *Section 17(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 6, 6(*a*), 7(1)(*a*), 8(5)(*b*), 10, 10(2)(*a*), 11, 11(1)(*a*), 11(3)(*c*), 12, 12(2), 12(2)(*a*), 13, 13(2), 13(3), 13(3)(*b*)–13(3)(*e*), 15, 15(1), 15(2), 15(3), 15(3)(*a*), 15(4), 16(1), 16(6), 17, 17(1)(*b*), 17(2), 17(2)(*d*), 17(3)–17(6), 17(3), 17(3)(*b*), 17(4), 17(4)(*b*), 17(4)(*c*), 17(5), 17(6), 22(1)(*a*), 30(2), 36(2)(*a*)

Edwin Lee, Amanda Koh, Smrithi Sadasivam and Niyanta Chowdhury (Allyed Gateway LLC) for the claimant;
Sathiaseelan Jagateesan, Margaret Joan Ling, Chamelia C Sugianto and Nadine Quah (Allen & Gledhill LLP) for the respondent.

[Commentary: see para 4.17]

20 February 2025

Chia Peng Chuang Michael:

Determination

1 This is an adjudication determination made on 20 February 2025 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Application No SOP/AA337 of 2024. This is the reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The claimant in this matter is BJG Pte Ltd ("Claimant" or "BJG") and the respondent is BJH Ltd (as trustee of [Y]) ("Respondent" or "BJH"), collectively, the "Parties".

3 For the reasons which are set out in the pages which follow, I determine that:

(a) The Respondent shall pay the Claimant the sum of **S$3,452,786.06** (inclusive of 9% goods and services tax ("GST")). This is hereby recorded as the adjudicated amount ("Adjudicated Amount").

(b) The Adjudicated Amount shall be paid within seven days of service of this determination on the Respondent ("Due Date for Payment").

(c) Interest at the rate of 5.33% per annum shall be payable by the Respondent to the Claimant from the Due Date for Payment of the Adjudicated Amount on any part of the Adjudicated Amount which remains unpaid until the same is paid.

(d) The costs of this adjudication, consisting of the adjudication application fee of S$654.00 (inclusive of 9% GST) and the adjudicator's fee and disbursements of S$40,711.50 (inclusive of 9% GST), shall be borne by the Claimant and Respondent in the proportions of 30% and 70%, respectively.

Record

Preamble

4 The Respondent is the owner of an existing single user-factory building located at No 16 [xxx], Singapore ("Building").

5 As evidenced by and/or contained in a letter of acceptance dated 17 October 2020 issued by [Z] Ltd ("LOA"), the Claimant was engaged as the main contractor for a "Design and Build Contract for Proposed Additions & Alterations including Conversion from existing Single-User Factory Building to a Single-Owner Multi-Users Factory Building on [xxx] (the 'Works')" (*ie*, "Contract") at the "Contract Sum" of S$27,558,000.00 (excluding GST, see Tab 1 of the AA (defined below at [12]).

6 Under cl 3.0 of the LOA read with cl 5.1 of the REDAS Design and Build Conditions of Main Contract (3rd Ed) published by the Real Estate Developers' Association of Singapore in July 2013 ("REDAS COC"), the employer ("Employer") nominated Mr [F] of [X] Pte Ltd as the "Employer's Representative".

7 On 25 November 2024, the Claimant submitted its Progress Claim No 24 to the Respondent to claim the sum of **$6,784,675.16** (including GST) for the value of work carried out under the Contract up to 25 November 2024 (see Tab 2 of the AA).

8 The Claimant asserted in its adjudication application (in Form AA-1) that the progress claim is a payment claim served on the Respondent on 25 November 2024 under the SOP Act (hereinafter referred to as "PC 24").

9 The Claimant stated in its adjudication application (in Form AA-1) that the "due date for Payment Response to be Served" by the Respondent is 16 December 2024.

10 The Claimant stated in Form AA-1 that the Respondent had served a payment response dated 16 December 2024 which provided a sum of **$1,881,840.76** (excluding GST) as the response amount. In this regard, the Claimant has included in its adjudication application a copy of the Respondent's payment response dated 16 December 2024 (see Tab 3 of the AA, hereinafter referred to as "PR 24").

11 The Claimant's adjudication application attached, *inter alia*, a copy of notice of intention to apply for adjudication ("NOI"). The NOI was sent to the Respondent by way of the Claimant's previous solicitors' letter dated 31 December 2024 (see Tab 7 of the AA). The NOI alluded to, *inter alia*, the Contract, PC 24, PR 24 and included the following statements:

> 5. **The Claimant disputes the Respondent's certification of the claims in PC 24.** The Disputes Resolution Period from 17 December 2024 to 23 December 2024 has since lapsed.
>
> 6. The Claimant hereby intends to apply for adjudication on PC 24 under the SOP Act for the sum of S$6,361,159.91 (including GST).
>
> [emphasis added in bold]

Adjudication application

12 On 31 December 2024, the Claimant lodged an application for adjudication with the SMC by way of an e-mail pursuant to the SMC's Supplementary Rules for Electronic Adjudication Lodgment (2nd Ed, 2020) ("SMC's E-Rules"). The Claimant's adjudication application (in Form AA-1) enclosed the following supporting documents (collectively referred to as the "AA"):

(a) Tab 1: contract documents ("Contract Documents");

(b) Tab 2: PC 24 submissions;

(c) Tab 3: payment response;

(d) Tab 4: supporting documents for contract works;

(e) Tab 5: supporting documents for variation works;

(f) Tab 6: other supporting documents;

(g) Tab 7: notice of intention, letter of authorisation, Form AA-1;

(h) Tab 8: authorities; and

(i) Tab 9: adjudication application submissions ("AAS").

13 On 2 January 2025, the SMC served on the Respondent a copy of the AA via e-mail pursuant to the SMC's E-Rules. Under s 15(1) of the SOP Act, the Respondent must lodge an adjudication response with the SMC within seven days after receipt of the AA, which is by Thursday, 9 January 2025.

14 Under s 16(1) of the SOP Act, the adjudication commenced after 9 January 2025.

Appointment of adjudicator

15 On 2 January 2025, the SMC offered to appoint me, Chia Peng Chuang Michael, as the adjudicator for this case. I formally accepted the appointment on the same day. By a letter dated 2 January 2025, the SMC notified the Claimant and the Respondent of my appointment as the sole adjudicator for this matter.

Adjudication response

16 On 9 January 2025, the Respondent lodged its adjudication response via e-mail with the SMC pursuant to the SMC's E-Rules. I received a copy of the adjudication response on 10 January 2025.

17 The Respondent's adjudication response (in Adjudication Response Form AR-1) enclosed the Respondent's written submissions ("RWS"), letter of authorisation and the following supporting documents (collectively referred to as the "AR"):

(a) Tab 1: general;

(b) Tab 2: authorities;

(c) Tab 3–1: original contract works (façade construction);

(d) Tab 3–2: materials on site;

(e) Tab 4–1: variations works (general documents);

(f) Tabs 4–2 to 4–11: documents for VO1, VO2, VO3, VO6, VO12, VO17, VO18b, VO25, VO32 and VO47 respectively; and

(g) Tab 5: documents related to extension of time.

Due date of adjudication determination

18 As the AA was made on the basis of "Disputed payment response", I am required under s 17(1)(*b*) of the SOP Act to determine the adjudication application within 14 days after the commencement of the adjudication or within such longer period as may have been requested by me and agreed by the Parties.

19 Given that the adjudication commenced after 9 January 2025, and unless the Parties agreed to extend time, I have to render my adjudication determination by 23 January 2024. Upon my request during the preliminary conference on 13 January 2025, the Parties agreed to extend the time to 21 February 2025.

Adjudication conferences and my directions

20 By an e-mail of 9 January 2025, I directed the Parties to attend an adjudication preliminary conference via Zoom at 2.00pm on Monday, 13 January 2025 for the purpose of giving directions for the further conduct of this adjudication ("Preliminary Conference").

21 At the Preliminary Conference, the Claimant was represented by its legal counsel, Ms Amanda Koh and Ms Niyanta Chowdhury; and the Respondent was represented by its legal counsel, Mr Sathiaseelan Jagateesan and Ms Nadine Quah, together with the Respondent's Assistant Vice President for Projects, Mr [A].

22 By an e-mail of 13 January 2025 and pursuant to s 16(6) of the SOP Act, I confirmed the directions consented by the Parties' counsel and directed by me during the Preliminary Conference as follows:

(a) The Claimant is to lodge and serve its reply written submissions to the RWS dated 9 January 2025 by 12.00pm, Monday, 20 January 2025, with a copy to the Respondent via e-mail.

(b) The Respondent is to lodge and serve its reply written submissions to the Claimant's reply submissions by 12.00pm, Tuesday, 28 January 2025, with a copy to the Claimant via e-mail.

(c) The adjudication merits conference is scheduled for Wednesday, 5 February 2025 at 9.30am at Allen & Gledhill LLP's meeting room or other venue to be confirmed by the parties' counsel.

(d) Each party is allowed seven representatives (including legal counsel) to attend the adjudication merits conference. In this regard, counsel were to revert via e-mail at least two working days before the adjudication merits conference to confirm the names and designations of the parties' representatives attending.

23 By the same e-mail of 13 January 2025, I also confirmed the Parties' agreement to extend the due date for me to render the Adjudication Determination to 21 February 2025.

24 The Claimant duly filed and served its reply written submissions to the RWS on Monday, 20 January 2015 ("CRS").

25 The Respondent duly filed and served its rebuttal submissions to the CRS on Tuesday, 28 January 2015 ("RRS").

26 The adjudication merits conference was held at Maxwell Chambers on Wednesday, 5 February 2025 from 9.30am to about 5.00pm ("Merits Conference") and was attended by the Parties' following representatives:

(a) Mr Edwin Lee ("Mr Lee"), Ms Amanda Koh ("Ms Koh") and Ms Smrithi Sadasivam from Allyed Gateway LLC together with Mr [B] (Managing Director), Ms [C] (Assistant Contracts Manager) and Ms [D] (Quantity Surveyor) for the Claimant.

(b) Mr Sathiaseelan Jagateesan ("Mr Sathia"), Ms Margaret Joan Ling ("Ms Ling (A&G)") and Ms Nadine Quah from Allen & Gledhill LLP, together with Ms [E] (BJH's Asset Manager), Mr [F] (BJH's General Manager), Mr [A] (BJH's Assistant Vice President for Projects), Ms [G] (Principal of [UU], the Employer's quantity surveyor) and Ms [H] (Executive Quantity Surveyor of [UU]) for the Respondent.

27 During the Merits Conference, counsel for the Claimant referred to its written submissions and the supporting documents accompanying the AA and made supplementary oral arguments and submissions in support of the AA and to reply to the Respondent's arguments and submissions. In reply, the Respondent's counsel also referred to the Respondent's written

submissions and supporting documents accompanying the AR and made oral arguments and submissions. During the conference, the Parties' lay representatives were also given many opportunities and time to clarify and/or state their positions on some of the areas in dispute and the queries raised by me.

28 After the Merits Conference, by e-mail of 6 February 2025, I confirmed my request made during the Merits Conference for the Claimant to provide its revised breakdowns for curtain wall feature and aluminium perforated panels (with 75%:25% costs apportionment as asserted by the Claimant, and 65%:35% costs apportionment for frame and glazing or panel as suggested by me for my consideration). Thereafter, the Respondent would reply with its comments to the revised breakdowns. I also took the opportunity to confirm the Parties' agreement to further extend the timeline for me to render the adjudication determination to 28 February 2025.

Reasons for my determination

29 am grateful to the Parties and their counsel for the detailed written submissions and extensive oral arguments and submission during the Merits Conference. To avoid incurring unnecessary adjudication costs for the Parties, I will not record each of every fact, issue, argument and submission of the Parties in this determination. In my view, the salient facts, the respective party's case and the analysis and reasons recorded herein should suffice for the Parties under s 17 of the SOP Act.

30 Since the AA was lodged under s 12(2)(*a*) of the SOP Act, I must determine, *inter alia*, whether the Claimant has complied with the provisions of the SOP Act read with the terms of the Contract, in particular the terms of payment as stated in cl 7.0 of the LOA read with ss 10, 12(2) and 13 of the SOP Act, and whether the Respondent has complied with ss 11 and 15 of the SOP Act.

Construction contract

31 The Contract incorporated, *inter alia*, the REDAS COC and the "Particular Conditions".

32 Having perused the Contract Documents and the LOA, I am satisfied and hold that the Contract is a construction contract under the SOP Act.

Compliance with sections 10, 11, 12, 13 and 15 of the SOP Act

33 Under cl 7.0 of the LOA read with cl 22.1 of the REDAS COC and s 10(2)(*a*) of the SOP Act, the Claimant has to serve a payment claim on the Respondent "on the 25th day of each month".

34 Under cl 7.0 of the LOA read with cl 22.2 of the REDAS COC, the Employer's Representative shall, within 14 days of receiving the payment claim, issue an "Interim Payment Certificate", "which shall comply fully with the requirements for payment responses under Section 11 of [the SOP Act]". The same provisions read with s 11(1)(*a*) of the SOP Act also provide for the Employer to issue a "Payment response" within 21 days of receiving the payment claim. If the Employer does not issue a payment response, then "the Interim Payment Certificate shall be deemed to be the Payment Response issued by the Employer to the Contractor".

35 As stated above, the Claimant has served on the Respondent a payment claim, PC 24, on 25 November 2024.

36 By an e-mail of 9 December 2024 to the Claimant, Mr [A], Assistant Vice President of [W] Pte Ltd, sent a letter dated 16 December 2024 from the Employer's Representative. The letter to the Claimant referred to and attached "[UU]'s valuation certificate dated 16 December 2024" (which was addressed to Mr [A] of [W] Pte Ltd) and the 24th Progress Payment Certificate No BJG-16TSS-24R1 dated 16 December 2024. The letter to the Claimant and the payment certificate were signed by Mr [F] of [Y] Management (S) Ltd "*[for] and on behalf of BJH Limited in its capacity as Trustee of [Y]*" [emphasis added].

37 It is not in dispute that the Employer's Representative's Interim Payment Certificate dated 16 December 2024 was based on a payment valuation and recommendation by the Employer's quantity surveyor, M/s [UU] ("[UU]" or the "QS").

38 By an e-mail of 16 December 2024 to the Claimant from Mr [A], Assistant Vice President of [W] Pte Ltd, the Respondent issued a letter dated 16 December 2024 entitled "EMPLOYER'S PAYMENT RESPONSE TO PROGRESS CLAIM NO. 24 (THE 'CLAIM')" to the Claimant. The letter referred to and attached the Employer's Representative's Interim Payment Certificate dated 16 December 2024, the QS's payment valuation and recommendation and "Annex A – Liquidated damages computation", and stated that these documents constituted the Employer's "payment response to PC 24 for the purposes of Section 11 of the SOP Act read with Regulation 6 of the SOP Regulations". Mr [M] of [Y] Management (S) Ltd signed the letter "*[for] and on behalf of BJH Limited in its capacity as Trustee of [Y]*" [emphasis added].

39 Having considered the terms of the Contract read with ss 10 and 11 of the SOP Act, I am satisfied that PC 24 is a valid payment claim submitted under s 10 of the SOP Act and PR 24 is a valid payment response provided under s 11 of the SOP Act. In fact, neither the Claimant nor the Respondent raised any dispute in relation to the validity of PR 24 and PC 24, respectively.

Entitlement to make adjudication application and validity of AA

40 I now proceed to consider whether the Claimant was entitled to lodge the AA on 31 December 2024 in relation to PC 24 under s 12(2)(*a*) of the SOP Act and, if so, whether the AA is valid.

41 Under s 12(2)(*a*) of the SOP Act, the following conditions must be satisfied:

(a) there must have been a payment response to PC 24;

(b) the Claimant must have disputed the payment response; and

(c) the dispute settlement period ("DSP") has expired.

42 If these conditions are satisfied, then the Claimant's entitlement to lodge the AA would arise on the date immediately following the expiry date of the DSP. Under ss 13(2) and 13(3) of the SOP Act, the Claimant must lodge an adjudication application after it has notified the Respondent of its intention to apply for adjudication and within seven days after the entitlement of the Claimant to make an adjudication application first arises under s 12 of the SOP Act.

43 At para 8 of AAS, the Claimant has helpfully provided a chronology of the relevant adjudication timelines and events. The Respondent does not dispute this. I accept that the last day of the DSP is 23 December 2024. Thus, under s 12(2)(*a*) of the SOP Act, the Claimant's entitlement to apply for adjudication commenced on 24 December 2024. Accordingly, an application for adjudication should be made by the Claimant by 2 January 2025, excluding the public holidays on 25 December 2024 and 1 January 2025.

44 By an e-mail of 18 December 2024 (see Tab 6 of the AA), the Claimant disputed "the certification and assessment in the Payment Response and maintain the clams in our PC 24". The Claimant issued a tax invoice dated 18 December 2025 for the sum of **$2,051,206.43** (inclusive of GST) in respect of PR 24 ("Tax Invoice"). In my view, on the facts, the Claimant has issued a qualified Tax Invoice and has disputed the response amount and PR 24.

45 In the NOI, as explained above, the Claimant has also disputed PR 24 and notified the Respondent of the Claimant's intention to apply for adjudication in respect of PC 24.

46 Incidentally, during the Merits Conference, Ms [C] confirmed that the Respondent has made payment of the response amount of $2,051,206.43 (inclusive of GST) to the Claimant.

47 The Claimant has also shown proof of payment of the adjudication fee and deposit to the SMC by telegraphic transfer (see Tab 7 of the AA).

48 As stated above, the AA was lodged with the SMC on 31 December 2024. The AA was therefore made within the period of seven days after the entitlement of the Claimant to make an adjudication application first arose under s 12(2)(*a*) of the SOP Act and was therefore made in accordance with s 13(3)(*a*) of the SOP Act.

49 Having perused the AA and the accompanying documents in the Claimant's adjudication application, I am also satisfied that the AA contains such information and is accompanied by such documents as prescribed. I also find that the AA was therefore made in accordance with ss 13(3)(*b*)–13(3)(*e*) of the SOP Act.

50 As stated above, the AR was lodged with the SMC on 9 January 2025. Having perused the AR and the accompanying documents in the Respondent's adjudication response, I am also satisfied that the AR contains such information and is accompanied by such documents as prescribed. I also find that the AR was therefore made in accordance with ss 15(1) and 15(2) of the SOP Act.

Main substantive issues

51 I now come to the substantive issues in dispute between the Parties.

Scope of payment claim disputes

52 At paras 7 and 13 of AAS, the Claimant stated that in this adjudication, it only pursued selected items in dispute between the Parties and claimed a lower claimed amount of **$6,361,159.91** (including 9% GST), as compared with the claimed amount stated in PC 24.

53 The Claimant stated that "[it] is prepared to accept the Respondent's certification and pursue its further claims in respect of the following items only":

Description	**Claimed amount in PC 24 or difference between the claimed amount in PC 24 and response amount in PR 24 ($)**
Certified sum (or response amount) in PR 24	1,881,840.76
Disputed amounts	
Façade Construction*	530,381.99
Materials on Site*	118,377.25
Variation works*	
VO 1: additional drywall and doors (02–01 [ZZ])	24,966.48
VO 2: installation of fresh air ducting ("FAD") (01–01 & 01–02 [Q])	42,741.10
VO 3: relocation of condensing units ("CU") (02–02 [YY])	37,661.04
VO 4: additional fan coil unit ("FCU") and ducting (02–02 [YY])	72,150.75
VO 6: additional finishes coat to [Q]'s kitchen exhaust duct HD panel ("KED HD Panel")	8,827.50
VO 9: secondary drain pan to all FCUs	42,000.00
VO 12: diversion of sanitary waste pipe	13,102.00
VO 13: jet fan	10,476.00
VO 15: CUs translation ducting	13,500.00
VO 17: temporary measure for sump pump	70,030.00
VO 18b: fire protection works at L1 [Q] unit	5,940.00
VO 23: relocation of CUs at level 2A carpark	90,948.00
VO 25: additional temporary works requested by tenant	449,019.90
VO 32: supply and install DB-ACMV	90,211.00
VO 47: spray painting to ceiling soffit & services at L1 drop off & FLL1	38,752.75
Subtotal	**3,540,926.52**
Recovery of alleged liquidated damages in PR 24	2,295,000
Subtotal	5,835,926.52
Plus 9% GST	525,233.39
Total amount claimed in the AA (including GST)	**6,361,159.91**

* According to the Claimant, these claimed amounts are calculated by taking the amounts in PC 24 less the certified sums in PR 24 for each item (since the latter are included under "Certified Sum" in PR 24). The Claimant's reduced claims for "Materials on Site", VO 6, VO 12 and VO 25 have also been considered in the above tabulation.

54 At para 189 of the CRS, the Claimant provided an updated list of disputed claims as follows:

Disputed items	**Claimant's claim in the AA ($)**	**Respondent's position in the AR ($)**
Façade Construction	2,822,700.00	2,317,818.01
Materials on Site	360,360.80	218,564.55
Variation works:		
VO 1: additional drywall and doors (02–01 [ZZ])	46,371.53	35,675.09
VO 2: installation of FAD (01–01 & 01–02 [Q])	101,131.00	58,469.90
VO 3: relocation of CU (02–02 [YY])	82,561.50	49,524.00
VO 6: additional finishes coat to [Q]'s KED HD Panel	12,637.50	3,810.00
VO 12: diversion of sanitary waste pipe	34,276.00	25,630.35
VO 13: jet fan	10,476.00	0.00
VO 15: CUs translation ducting	13,500.00	0.00
VO 17: temporary measure for sump pump	70,030.00	0.00
VO 18b: fire protection works at L1 [Q] unit	5,940.00	3,640.00
VO 23: Relocation of CUs at level 2A carpark	90,948.00	0.00
VO 25: additional temporary works requested by tenant	449,019.90	0.00
VO 32: supply and install DB-ACMV	90,211.00	15,290.00
VO 47: spray painting to ceiling soffit & services at L1 drop off and FLL1	38,752.75	6,652.75
Less retention sum (5% of Contract Sum)	(1,377,900)	(1,377,900)
Less alleged liquidated damages	0.00	(2,295,000)

Less previously certified/paid amount (before GST)	(16,221,497.79)	(16,221,497.79)
Balance amount (before GST)	**5,832,345.54**	**2,050,004.19**
Add 9% GST	**524,911.10**	**184,500.38**
Balance amount (including GST)	**6,357,256.64**	**2,234,504.27**

55 The difference between the Parties' positions is **$4,122,752.37**.

56 During the Merits Conference, in light of para 139 of the RRS wherein the Respondent said it "does dispute the amount claimed in V018b" of $5,940.00, Mr Sathia for the Respondent confirmed that VO18b is longer in dispute. In respect of VO12, after the Parties' counsel conferred with each other and taken their respective client's instruction, the Parties also agreed VO12 for $25,630.35, as stated at para 104 of RWS. Since the Respondent's response amount and the Employer's Representative's 24th interim payment certificate did not include any amount for VO18b and have included $21,174.00 for VO12, I allow the sum of **$5,940.00** for VO18b and the sum of **$4,456.35** (*ie*, $25,630.35 – $21,174.00) for VO 12 as part of the Adjudicated Amount.

57 Having considered PC 24, PR 24, the AA, the AR, all the written submissions and oral arguments and submissions, in my view, the main substantive issues are as follows:

(a) In respect of the Claimant's claims for payment of the "Original Contract Works", what is the value of "Façade Construction" payable to the Claimant?

(b) What is the amount of "Materials on Site" payable to the Claimant?

(c) Whether the Claimant is entitled to be paid for the disputed variation works, namely, "VO 1", "VO 2", "VO 3", "VO 4", "VO 6", "VO 9", "VO 13", "VO 15", "VO 17", "VO 23", "VO 25", "VO 32" and "VO 47" and, if so, what is the value of the variation works.

(d) Whether the Respondent is entitled to recovery of the alleged liquidated damages deducted in PR 24 of $2,295,000.00.

(e) What is the adjudicated amount to be paid by the Respondent to the Claimant in respect of PC 24 and the AA under the SOP Act?

58 It is axiomatic that in determining the disputes and the adjudicated amount under s 17(2) of the SOP Act, I must have regard to, *inter alia*, the terms of the Contract (see s 17(4) (*b*)) read with ss 6(*a*) and 7(1)(*a*) of the SOP Act).

59 Section 6 of the SOP Act provides:

> **6.** The amount of a progress payment to which a person is entitled under a contract is —
>
> (a) ***the amount calculated in accordance with the terms of the contract;*** *or*
>
> (*b*) *if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or the goods or services supplied, by the person under the contract.*
>
> [emphasis added in italics and bold italics]

60 Section 7(1)(*a*) of the SOP Act provides that the construction works carried out under the Contract are to be valued "*in accordance with the terms of the contract*" [emphasis added]. In this regard, I note that at paras 12–29 of the RWS, paras 40–55 of the RRS and during the Merits Conference, Mr Sathia for the Respondent argued, *inter alia*, that many of the Claimant's claims did not comply with cl 22.1.1 of the REDAS COC in that "numerous additional new documents in support of the claims" which accompanied the AA did not form part of PC 24. I will deal with this argument later.

61 I am also cognisant of the legal principles as decided in oft-cited authorities of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380, *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") and *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*"), and provisions in, *inter alia*, ss 15(3), 15(4) and 17(3)–17(6) of the SOP Act.

62 Following the decision by the Court of Appeal in *Comfort Management* at [34], [54], [57] and [62]–[65], in this case, I have an independent duty to address my mind to and consider the true merits of the alleged work done and variation works claimed in PC 24 and the AA, and the Respondent's evaluation and deductions in PR 24 and the AR. This duty comprises the obligations set out in ss 17(2)–17(6) of the SOP Act and I am required, before allowing a claim from either party, to be persuaded that it has established *a prima facie* case.

Can Claimant include additional or new documents in its AA?

63 I now deal with the Respondent's arguments in paras 13–29 of the RWS that the Claimant did not provide all "the relevant supporting documents" with PC 24 and that "the numerous new documents in support of its claims in the AA" were not given to the QS and the Respondent earlier, in breach of cl 22.1 of the REDAS COC (see also [60] above). The Respondent relied on the author's opinion at para 22.8 of Chow Kok Fong, *The Singapore Developers Design and Build Contract: Commentary on the REDAS Design and Build Conditions of Contract* (LexisNexis, 3rd Ed, 2014)

and an adjudication determination in SOP/AA 156 of 2017 ("AA156"). The Respondent argued, *inter alia*, that the Claimant could not rely on the new documents in the AA as "evidence proving its claims in the adjudication"; the Claimant's entitlement is limited to the Respondent's response amounts as stated in the PR 24; and that the Claimant cannot rely on the SOP Act to circumvent compliance with the contractual certification mechanism.

64 In reply to the Respondent's arguments, the Claimant's contentions in the CRS, in summary, are as follows:

(a) The learned author in Chow Kok Fong, *The Singapore Developers Design and Build Contract: Commentary on the REDAS Design and Build Conditions of Contract* (LexisNexis, 3rd Ed, 2014) at para 22.8 (see Item 1 of AR, Tab 2) was "merely elaborating on what documents may be included as supporting documents under REDAS Clause 22.1.1".

(b) The adjudication determination in AA156 was based on the SOP Act in force before the 2019 amendments; the adjudicator there has "failed to consider pertinent provisions in the SOP Act"; "it has not been followed in any other determination or case"; and AA156 is therefore "unhelpful and of no persuasive value".

(c) The provision for supporting documents in cl 22.1.1 of the REDAS COC is "administrative in nature" and it does not preclude the submission of additional documents in an adjudication.

(d) "There is no provision which says that the provision of supporting documents together with the payment claim is a condition precedent to entitlement to payment, and that non-compliance will forfeit the contractor's entitlement to payment". In this regard, the Claimant cited *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] 2 SLR 468 ("*Vim Engineering*") in support.

(e) Section 13(3)(*e*) of the SOP Act expressly provides that other supporting documents and information may be added in an adjudication application. In this regard, the Claimant cited Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at paras 9.85–9.86 in support.

(f) Under s 17(4)(*c*) of the SOP Act, an adjudicator is required to have regard to, *inter alia*, "the adjudication application, and the accompanying documents thereto". In this regard, the Claimant also argued that cl 22.1 of the REDAS COC cannot purport to modify the operation of s 17(4) of the SOP Act. Otherwise, it would be void under s 36(2)(*a*) of the SOP Act.

(g) Case law such as *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481 ("*Libra Construction*") at [97] and [101] and adjudication review determination in *BDW Pte Ltd v BDX Consortium* [2020] SCAdjR 810 at [65] support the Claimant's position.

65 The Respondent's arguments in the RRS may be summarised as follows:

(a) The Respondent is not disputing the Claimant's entitlement to rely on s 13(3)(*e*) of the SOP Act to provide "such other information or documents" in the AA and that the tribunal is entitled to have regard to "the accompanying documents thereto" in accordance with s 17(4)(*c*) of the SOP Act.

(b) However, the Claimant cannot rely on the SOP Act to circumvent compliance with the contractual certification mechanism, which remains valid. In this regard, the Respondent relied on *Audi Construction* at [62] and *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [31] to argue that the provisions of the underlying contract must be given primacy and strictly upheld, and they are independent of ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act that enable the Claimant to provide additional information and documents.

(c) The provision in cl 22.1 of the REDAS COC providing that the contractor ought to submit together with a payment claim "the relevant supporting documents" is not merely administrative in nature.

66 During the Merits Conference, Mr Lee for the Claimant reiterated his client's position and emphasised the following points:

(a) The Claimant is entitled to "annex documents in the AA" and this is supported by *Libra Construction*.

(b) Under s 17(4) of the SOP Act, the adjudicator is required to have regard to all documents accompanying the AA.

(c) With respect, the adjudicator in AA156 had not considered ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act as these provisions were not cited to him.

(d) In response to my request for counsel to comment on the effect of s 17(5) of the SOP Act, Mr Lee submitted that if an adjudicator is not bound by a lack of certification (for example, zero response amount), the adjudicator is not bound by the purport of cl 22.1.1 of the REDAS COC as argued by the Respondent.

(e) The Respondent cannot "contract out" of the SOP Act. If cl 22.1.1 of the REDAS COC has the effect as contended by the Respondent, it would be void under s 36(2)(*a*) of the SOP Act.

(f) With reference to the Respondent's argument in para 48 of RRS, in which the Respondent argued that the Claimant has "attempted to circumvent such requirement (in cl 22.1 of the REDAS COC) by introducing new substantiation and supporting documents in the AA and then relying on Sections 13(3)(*e*) and 17(4)(*c*) of the SOP Act as its basis for such tactics", Mr Lee for the Claimant argued that "the converse logic is true and that the clause is used to circumvent the Act".

(g) Clause 22.1.1 of the REDAS COC is intended for the Claimant to provide "administratively all the supporting documents" and it is an "administrative clause".

67 During the Merits Conference, Mr Sathia for the Respondent disagreed that cl 22.1.1 of the REDAS COC circumvents the powers of the adjudicator. Likewise, he reiterated his client's position and emphasised the following points:

(a) Clause 22.1.1 of the REDAS COC does not say it is "final and binding" but an "innocent request for documents".

(b) "When an adjudicator looks at a claim, the starting point is the contract, to the extent that it does not comply, ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act have to be construed in that context and could not be an excuse for the Claimant not to comply with the Contract" and that the adjudicator cannot consider the documents that did not comply with the Contract.

(c) Under s 17(4)(*c*) of the SOP Act, "the adjudicator could not consider the documents that did not comply with the Contract".

(d) The Respondent only has 28 days to respond to a payment claim and seven days to lodge an adjudication response. The effect of the Claimant's action is to deprive the Respondent of time to respond.

(e) While cl 22.1.1 of the REDAS COC is not a condition precedent barring a claim, the Claimant should submit a new payment claim with the new documents. The Claimant should not ambush the Respondent with new documents in the AA.

68 In response to my query, Mr Sathia for the Respondent clarified that there was no variation claim with "absolutely zero substantiation". He asserted that there are certain components of a claim that were without supporting documents with PC 24.

My determination on whether Claimant can include and rely on new documents in its AA

69 With respect, I am unable to accept the Respondent's objection to the Claimant providing new documents in support of its claims in the AA for the following reasons.

70 I agree with the Claimant that cl 22.1.1. of the REDAS COC does not preclude the Claimant from supplementing and/or providing additional supporting documents in the AA and that the clause is not intended and cannot limit or curtail the power of the adjudicator to consider such documents accompanying the AA.

71 Like in most standard forms of building contract, a payment term commonly stipulates the submission of supporting documents with a progress payment claim. In this case, cl 22.1 of the REDAS COC provides as follows:

> **22. PROGRESS PAYMENTS**
>
> **22.1. Contractor to Submit Application for Progress Payment Claim**
>
> 22.1.1.The Contractor shall serve on the Employer with a copy to the Employer's Representative a Payment Claim on the last day of each month following the month in which the Contract is made (or otherwise by such time or on such day as stated in Appendix 1) showing the amount which the Contractor considers himself to be entitled for that month <u>together with the relevant supporting documents …</u>

[Respondent's emphasis in the RWS]

72 To consider the issue in proper context, I should also refer to cl 22.2 of the REDAS COC, as it forms part of the progress payment mechanism, as follows:

> **22.2 Interim Payment Certificates**
>
> 22.2.1.The Employer's Representative shall within 14 days of receipt of the Payment Claim and supporting documents submitted under cl 22.1 issue an Interim Payment Certificate to the Employer (with a copy to the Contractor) setting out the amount which the Employer's Representative considers to be due to the Contractor. The Interim Payment Certificate may include deductions for sums which have been or may become due and payable to the Employer by the Contractor.
>
> *Where the amount in the Interim Payment Certificate is less than the amount claimed in the Payment Claim or where any payment due to the Contractor is withheld, the Employer's Representative shall provide written reasons for the same.*

> 22.2.2.In assessing the value of the Interim Payment Certificate, the Employer's Representative may but shall not be bound to refer to the detailed breakdown of the Contract Sum including quantities, unit rates and other pricing information as set out under the Contract Sum Analysis.
>
> [emphasis added]

73 In my interpretation of the above provisions, the submission of "the relevant supporting documents" with a progress payment claim is not a condition precedent to the Claimant's entitlement to be paid for the work done, nor will it limit the Claimant's entitlement to payment only to the amount valued by the Employer's Representative in the interim payment certificate or payment response based on the documents submitted with the progress payment claim in an adjudication. Further, this is consistent with the principle that the lack of supporting documents does not, by itself, render a payment claim invalid as long as it complies with the mandatory provisions of the SOP Act (see [21] of *Audi Construction* ([61] *supra*), quoting [53] of *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011).

74 As regards the Respondent's argument that the terms of the underlying contract must be given primacy, it is pertinent to note that at [31] of *Audi Construction*, the Court of Appeal was dealing with the issues of validity of a payment claim and a contractor's entitlement to submit a payment claim under the SOP Act. It was in this context that the Court of Appeal said, "the court must necessarily have regard to the provisions of the underlying construction contract".

75 In line with s 11(3)(*c*) of the SOP Act, cl 22.2.1 of the REDAS COC explicitly requires the Employer's Representative to state his reasons for the difference or the amount withheld. However, it does not go so far as to state that the Employer's Representative is not required to make his valuation or the contractor's entitlement is limited to the amount to be assessed by the Employer's Representative when the contractor fails to provide relevant supporting documents or the supporting document for any claim is inadequate. In my view, if the contractor claims an item of the works and/or a variation work that has been carried out, then the Employer's Representative should exercise his role as the certifier as best as he can based on the information and documents available, including his knowledge of the progress of the works on site, his expertise and experience. He should not adopt a passive approach, especially when he has a professional quantity surveyor or costs consultant specially trained to assist him in the valuation of claims. In this regard, I wish to emphasise that in my view, the Employer's Representative is not a mere "reviewer" or "verifier" of the claims, information and documents submitted by the contractor.

76 Further, in contrast, I note that under cl 29 "CLAIMS" of the REDAS COC, when the contractor fails to adequately substantiate its claims for additional payment under cl 29.1 of the REDAS COC, cl 29.3 "Payment of Claims" and cl 29.4 "Failure to Comply" provide certain consequences as follows:

> **29.3. Payment of Claims**
>
> Where the Contractor fails to provide sufficient substantiation for the whole of his claim, *he will be entitled to payment for such part of his claim which has been substantiated to the satisfaction of the Employer's Representative*.
>
> **29.4. Failure to Comply**
>
> Where the Contractor fails to comply with clauses 29.1.2 and 29.2 above, the Employer's Representative shall be entitled to make such assessment as shall be practicable on the basis of the information available. *In such an event*, ***the Contractor shall not be entitled to challenge*** *(whether before the arbitrator or in any other tribunal or otherwise)* ***the Employer's Representative's assessment*** *on the information which was not submitted to the Employer's Representative before he made his assessment*.
>
> [emphasis added in italics and bold italics]

77 Comparing cll 22.1 and 22.2 with cll 29.3 and 29.4 of the REDAS COC, one can see that the consequence of non-compliance is explicitly provided in cl 29 but not in cl 22.1 or 22.2.

78 Clause 29.4 of the REDAS COC brings to my mind s 17(5) of the SOP Act, which states:

> (5) *In determining an adjudication application,* ***an adjudicator is not bound*** *by any payment response, or* ***any assessment*** *in relation to the progress payment*, that is provided in the contract to be final or binding on the parties to the contract, ***whether subject to any term or condition or otherwise***.
>
> [emphasis added in italics and bold italics]

79 Since the tribunal is not bound by any payment response or any of the assessment in any payment response, the tribunal is not bound by the alleged limit of the Claimant's entitlement to payment as valued by the Employer's Representative in the 24th Progress Payment Certificate or PR 24. Indeed, the Respondent's argument is inconsistent with the intent of s 17(5) of the SOP Act.

80 It is trite principle that the amounts of progress payments are determined through a process of retrospective periodic valuation of the works or part thereof carried out by the contractor and that the certifier's decisions in interim payment certificate are susceptible to correction. This is recognised by cl 22.3 of the REDAS COC by empowering the Employer's

Representative to issue a certificate to correct any mistakes in his past interim payment certificates. Further, interim payments are not intended to be precise valuations or represent final statements of value.

81 As pointed out by the Claimant, under s 13(3)(*e*) of the SOP Act, an adjudication application "may contain or to be accompanied by such other information or documents (including expert reports, photographs, correspondence and submissions) as the claimant may consider to be relevant to the application". In my view, this provision allows the Claimant to submit further and new supporting documents in an adjudication application. If a claimant fails to do so in the adjudication, the claimant is at risk of having its claim rejected for not discharging its burden of proof on a *prima facie* basis. In this regard I do not agree with the Respondent that the tribunal, by having regard to ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act, will result in the Claimant circumventing the contractual mechanism on progress payment. The Parties' substantive rights under the Contract are not altered. The Respondent seems to conflate two different procedures, that is, the Claimant's obligation to submit supporting documents to the Employer's Representative and the Claimant's duty to discharge its burden of persuasion before an adjudicator in an adjudication under the SOP Act.

82 The foregoing provisions and reasons fortify my view against the interpretation and draconian consequence as argued by the Respondent as regards the requirement of providing "relevant supporting documents" with a progress payment claim under cl 22.1.1 of the REDAS COC. If cl 22.1.1 of the REDAS COC is to be strictly upheld "independent of the provisions of the SOP Act" as the Respondent has argued, despite the fact that the requirement of submitting "the relevant supporting documents" is not a condition precedent to the Contractor's entitlement to progress payment, such an argument is inconsistent with ss 13(3)(*e*) and 17(4)(*c*) of the SOP Act and arguably, as argued by the Claimant, an attempt to circumvent the SOP Act.

83 Logically, a contractor will substantiate its progress claims diligently and adequately as this will facilitate adequate and prompt progress payment without the need to resort to adjudication. However, I do recognise that there could be contractors who are careless and/or sloppy in documentation and paperwork. In my view, if any additional or new documents that accompanied the AA could have been submitted to the QS and/or the Respondent before the end of the DSP, so that the Employer's Representative could consider it in his certification and/or the Employer could revise its payment response, then I think this is a factor that I should take into consideration in determining the proportion of the costs of the adjudication payable by the Parties under s 17(2)(*d*) of the SOP Act.

Value of Façade Construction

84 I now deal with the Claimant's claim for "Façade Construction" for $2,822,700.00, against the Respondent's response amount of $2,317,818.01. The difference of **$504,881.99** is mainly due to the Parties' assessment of the percentage of completion, percentage of cost apportionment and the locations of work in progress or completed.

85 In Bill No 3 – Schedule of Works ("Bill No 3"), Item G "Façade Construction" at p B3/13 is priced as follows:

(a) "Proposed selected texture paint in-lieu of aluminium cladding" at a lump sum of $510,000.00;

(b) "Proposed selected texture paint in-lieu of aluminium strips to Elevation 2 & 3" at a lump sum of $440,000.00;

(c) "Proposed standard aluminium perforated panel in-lieu of laser cut aluminium perforated panel" at a lump sum of $420,000.00; and

(d) "Curtain wall feature" at a lump sum of $2,550,000.

86 The Claimant's claim in PC 24 and the QS's valuation for the foregoing first, third and fourth items of works are summarised as follows:

Brief description of work	**Claimant's percentage of completion claimed (%)**	**Claimant's amount claimed ($)**	**QS's recommended amount ($)**	**QS's remark**
Texture painting in-lieu of aluminium cladding	46	234,600.00	204,918.01	Refer to Weekly Progress Report No 118 pp 42–49 (based on the resident engineer-endorsed drawing dated 25 November 2024 for work done, calculation done by consultant)
Standard aluminium perforated panel in-lieu of laser cut aluminium perforated panel	88	369,600.00	302,400.00	As above
Curtain wall feature	88	2,244,000.00	1,810,500.00	As above
Total		2,848,200.00	2,317,818.01	

87 The Claimant's contentions may be summarised as follows:

(a) The percentage of work done claimed had been verified and signed off by the Resident Engineer, Mr [N] ("RE").

(b) "While the Respondent similarly relies on the RE's endorsement of the progress of work as at 25 November 2024, the Respondent conveniently ignores the RE's verification and endorsement of the Claimant's claim percentages".

(c) The Respondent did not provide a breakdown or basis for its certification and "arbitrary and baseless assessment" and is therefore

barred by s 15(3) of the SOP Act from raising any objections or reasons not included in PR 24.

(d) For the texture painting work, the Claimant asserted that the work comprises four stages, namely: (i) sealer; (ii) texture painting; (iii) first layer of finishing coat; and (iv) second and final layer of finishing coat, with each stage being apportioned 25% of the contract amount.

(e) For the aluminium perforated panel work and curtain wall feature work, "the contract amount was apportioned between the façade frame and the backpan/backpan and glazing and/or perforated panel in the proportion of 75% to 25% respectively", allegedly based on the payment terms in the subcontract between the Claimant and its façade subcontractor, which is "a reasonable allocation of costs". The Claimant disagreed with the Respondent's proposed breakdown at para 60 of the RWS allegedly based on Schedule of Rates ("SOR") rates, as "the rates used by the Respondent are inapplicable and do not properly reflect the kind of work actually carried out on site", the Building and Construction Authority ("BCA") SOR rate for "fixed panel window frame" does not "incorporate structural steel frame", and the Respondent's method of deriving SOR rates for glazing work is incorrect. The Claimant also produced a calculation in the CRS using SOR rates to come out with "the weightage for frame and glazing" of 72%:28%, which is close to the Claimant's apportionment of 75%:25%.

(f) In reply to the Respondent's argument which was allegedly not raised in PR 24, the Claimant asserted that it did not claim for payment of "curtain wall trellis works" for Elevations 2 and 3, as these works have not started. The Claimant also asserted that "trellis works do not form part of the Façade Construction work Bill item 3.13G described in the Bill of Quantities". Moreover, the QS also did not assess trellis as part of the three components of Façade Construction claimed in PC 24. In support of the contentions, the Claimant refers to Progress Report No 118.

(g) In reply to the Respondent's argument which was not raised in PR 24, the Claimant asserted that it did not claim for payment of glazing or glass at "level 6 sky terrace". However, the Claimant conceded that "the frame for the (level 6) balcony" was not done and therefore, in the CRS, the Claimant reduced its claim for "curtain wall feature" from 88% to 87% or reduced the amount claimed by $25,500.00. Consequently, the Claimant's revised claimed amount for curtain wall feature is $2,218,500.00.

88 The Respondent's contentions may be summarised as follows:

(a) As regards the percentage of allocation of costs for curtain wall feature, the Respondent disagreed with the Claimant's apportionment of weightage of 75% for frame and 25% for glazing as this "[breakdown] does not feature in the contract documents" nor was it agreed or "derived from the contract documents". In this regard, the Respondent asserted in the RWS that based on the SOR and BCA SOR, it asserted that the apportionment of the cost of curtain wall feature should be 45.44% for frame and 54.56% for glazing. The Respondent also disagreed with the Claimant's calculations in the CRS and pointed out that there were certain irregularities. For example, referring to an extract from a drawing showing the detail of Elevation 3, the Respondent said that the thickness of double glazing is 30.14mm and not the 12mm considered by the Claimant.

(b) The Respondent disagreed with the "sign-off by the RE" and his endorsed drawing, as the RE's role was not to perform a valuation of work done. This was the role of the QS and/or the Employer's Representative.

(c) The Claimant's "further marked-up drawings" are inaccurate and misleading as it has not even started work for "curtain wall trellis works for Elevation 2" and Elevation 3 and "the curtain wall frames and glass on level 6 sky terrace". In this regard, the Respondent produced Progress Report No 118 with annotation and highlights at Item 4 of AR Tab 3–1 to illustrate the points. Consequently, the Respondent argued that the Claimant has not completed 100% of the frame for curtain wall feature as claimed in PC 24.

(d) The QS has assessed the quantities of work done for the three components of Façade Construction based on the RE's endorsed drawings dated 25 November 2024.

(e) In PR 24, the QS has evaluated 40.18% of work done as compared with the 45.62% claimed by the Claimant for texture paint (see AR Item 2 of Tab 3–1). The Respondent asserted that the Claimant has accepted the Respondent's valuation of the quantity of work done for texture painting at 40.18% in Payment Claim No 25 ("PC 25").

(f) In PR 24, the QS has evaluated 72% of work done (frame and panel), as compared with the 88% claimed by the Claimant for aluminium perforated panel (see AR Item 2 of Tab 3–1).

(g) In PR 24, the QS has evaluated 71% of work done (frame and glazing), as compared with the 96% claimed by the Claimant for curtain wall feature (see AR Item 2 of Tab 3–1).

(h) In the RWS, the Respondent referred to "ERI 16" and asserted that "there are numerous errors, non-compliances and defects affecting this item of work" which the Respondent did not take into consideration in PR 24. This assertion was repeated by Mr Sathia during the Merits Conference to emphasise the point that the Respondent's certification has been very fair and reasonable.

(i) Referring to extracts from the Contract Documents and Bill No 3, Item 3.13G, the Respondent asserted at length that trellis (which is actually "aluminium strips") forms part of the Façade Construction and therefore it was claimed under Bill No 3, Item 3.13G by the Claimant in PC 24 when the work was not done.

89 During the Merits Conference, Mr Lee for the Claimant asserted that his client's claim of texture painting at 40.18% in PC 25 was a mistake, as the supporting documents show that the claim was for 46% of work done. He argued that the Claimant has made out its case on a *prima facie* basis to support the 46% (or $234,600.00) claimed, whereas there were no documents to support the QS's 40.1% valuation.

90 With reference to the table exhibited in the AR, Item 2 of Tab 3–1, for aluminium perforated panel and curtain wall feature, Mr Lee for the Claimant informed that his client would accept [UU]'s total area for work done. For example, for aluminium perforated panel, [UU]'s total area for work done was 274.48m² for panel and 625.81m² for frame. However, the Claimant would maintain its percentage of costs apportionment at 75% for frame and 25% for panel or glazing, and disagreed with [UU]'s 50%:50% apportionment for aluminium perforated panel and 45.44%: 54.56% for curtain wall feature.

91 Mr Lee also explained that his client's 75%:25% apportionment of costs for aluminium perforated panel and curtain wall feature is in line with the industry practice, as it was based on three quotations from subcontractors. With regard to the Respondent's 45.44%:54.56% apportionment, Mr Lee reiterated that the Respondent has not considered structural steel support for curtain wall in the computation. After referring to the Respondent's rebuttals in para 79 of the RRS, Mr Lee candidly conceded that the Claimant's calculations in Annex 2 of the CRS are "not absolutely right" as it has omitted to consider adequately the double-glazing and the gap between the two layers of the glass in deriving the thickness of double glazing. In this regard, with my permission, the Claimant has submitted a revised breakdown of claim for aluminium perforated panel work and curtain wall feature work. As regards the percentage of completion of texture paint, Mr Lee for the Claimant said that his instruction was that his client had mistakenly entered 40.18% in PC 25.

92 Mr Sathia for the Respondent emphasised that the Claimant's calculations based on three quotations used by the Claimant to justify its 75%: 25% apportionment is flawed, as all the subcontractors' quotations had incorporated advance payments.

93 During the Merits Conference, and after considering the oral arguments from the Parties' counsel, I requested the Claimant to provide another breakdown based on 65%:35% apportionment of the costs of frame and panel for aluminium perforated panel and 65%:35% apportionment of the costs of frame and glazing for curtain wall feature for my consideration. I told counsel that my preliminary view was that the percentage apportionment of the costs should be somewhere in between that asserted by the Parties, which I will explain below.

94 By an e-mail of 7 February 2025 from the Claimant's solicitors, the Claimant presented its revised calculations on the percentage of work done for two scenarios, "Scenario A" and "Scenario B".

95 For Scenario A, which is based on the Claimant's costs apportionment of 75% for frame and 25% for glazing or panel, and [UU]'s quantities, the Claimant claims **85%** of work done for curtain wall feature and **86%** of work done for aluminium perforated panel. In terms of value of work done, it is as follows:

Component of Façade Construction	**Contract amount ($)**	**Percentage of work done (%)**	**Amount claimed ($)**
Aluminium perforated panel	420,000.00	86	361,200.00
Curtain wall feature	2,550,000.00	85	2,167,500.00

96 For Scenario B, which is based on my suggested costs apportionment of 65% for frame and 35% for glazing or panel, and [UU]'s quantities, the Claimant's percentage of work done for curtain wall feature and aluminium perforated panel will be **81%** and **80%**, respectively. In terms of the value of work done, it is as follows:

Component of Façade Construction	**Contract amount ($)**	**Percentage of work done (%)**	**Amount claimed ($)**
Aluminium perforated panel	420,000.00	80	336,000.00
Curtain wall feature	2,550,000.00	81	2,065,500.00 (stated as $2,055,300.00 based on 80.60% in the Respondent's tabulations of 13 February 2025)

97 By an e-mail of 13 February 2025 from the Respondent's solicitors, the Respondent confirmed that it has "no objections to the quantities relating to Work done and Total Area set out in Scenarios A and Scenario B of the Claimant's Tabulation". This is not surprising, as these calculations came from [UU] which the Claimant accepted during the Merits Conference. In the Respondent's tabulations attached to the e-mail, the Respondent included a "Scenario C", which is based on a costs apportionment of 59.22% for frame and 40.78% for glazing for curtain wall feature, and costs apportionment of 50.00% for frame and 50.00% for panel for aluminium perforated panel, and [UU]'s quantities, the percentage of work done for curtain wall feature and aluminium perforated panel will be **78%** and **72%** respectively. In terms of the value of work done, it is as follows:

Component of Façade Construction	**Contract amount ($)**	**Percentage of work done (%)**	**Amount payable ($)**
Aluminium perforated panel	420,000.00	72	302,400.00
Curtain wall feature	2,500,000.00	78	1,990,448.40

98 The Respondent has recalculated its suggested percentage of costs apportionment for curtain wall feature in Scenario C after considering the cost of structural steel. By the Claimant's solicitors' e-mail of 19 February 2025, the Claimant argued that the Respondent's revised computation is flawed.

My determination on value of Façade Construction

99 On the face of PC 24, I note that the Claimant did not explain how the 46% of work done for texture painting and 88% of work done for aluminium perforated panel and curtain wall feature was derived. This was explained in paras 16 to 19 of the AAS. During the Merits Conference, though Ms [C] asserted that she had informed [UU]'s Ms [H] of the Claimant's basis of costs apportionment, the Parties' counsel confirmed that the percentage of costs apportionment were not agreed by the Parties from the start of the project. Though Ms [H] from [UU] asserted that [UU]'s valuation was done after a site walk, it seems to me that the dispute on the percentage of work done could be at least mitigated had there been a joint inspection of work done between the Parties' representatives and the RE before [UU]'s valuation was issued.

100 In [UU]'s valuation, it remarked, "Refer to Weekly Program Report No. 118 pg 42 to 49 (based on PE endorsed drawing dated 25 November 2024 for work done, *calculation done by consultant*)" [emphasis added]. The "calculation" was neither attached to the valuation nor exhibited in the AR. Despite the fact that the QS also relied on the RE's endorsed drawings on

the progress of work, there is still a significant difference between the claimed amount and the response amount. In this regard, though the Respondent provided its explanations for allocation of costs for curtain wall feature in the RWS, it is unclear how the QS's "Cumulative Recommended Amount" for the three components of Facade Construction were derived.

101 Having considered the Parties' supporting documents and submissions in writing and orally during the Merits Conference, and for the reasons below, I determine that the value of work done for Façade Construction is as follows:

Brief description of work (three components of Façade Construction)	**Adjudicated value of work done**
Texture painting in-lieu of aluminium cladding	$204,918.01
Standard aluminium perforated panel in-lieu of laser cut aluminium perforated panel (based on Scenario B as explained in [96] above)	$336,000.00
Curtain wall feature (based on Scenario B as explained in [96] above)	$2,065,500.00
Total	$2,606,418.01

102 For texture painting work, I do not have the benefit of perusing PC 25, Payment Response No 25 and the supporting documents to decide on the bare assertion of "clerical mistake" in claiming 40.18% in PC 25 by the Claimant. These documents were not provided in the AA or AR. Nevertheless, the Claimant did not dispute the fact that 40.18% of work done was claimed in PC 25. In the premises, I am unable to see why the percentage of work done for PC 24 should be higher than 40.18%. Thus, I accept the Respondent's response amount or [UU]'s recommended amount of $204,918.01.

103 As regards the other two components of Façade Construction, namely, aluminium perforated panel and curtain wall feature, I could not accept the Respondent's outright rejection of the RE's "sign-off" and endorsed drawings. The RE was based on site and it is not disputed that he would have a better knowledge of the progress of work on site. Though the RE was employed by the Claimant because this is a design-and-build contract, there is no suggestion that the RE was biased. In my view, the documents signed by him are at least *prima facie* and credible evidence of work done, barring any mistake by the RE. There is no evidence to show that the QS's valuation and the Employer's Representative's certification were based on a joint inspection of work done on site. In fact, from the remarks of the QS in his valuation, the QS also relied on the Weekly Progress Report No 118 and the RE's endorsed drawings.

104 Nevertheless, with the Claimant's acceptance of [UU]'s quantities (see [90] above and the Claimant's solicitors' e-mail of 7 February 2025), the main issue is what should be a fair and reasonable percentage of costs apportionment for aluminium perforated panels and curtain wall feature.

105 I am unable to accept the Claimant's and Respondent's calculations and rationale to derive its respective percentage of costs apportionment.

106 While the 75%:25% adopted by the Claimant was not specified in the Contract Documents, having considered the Claimant's explanations and the Respondent's calculations in the RWS, I consider the percentage of costs apportionment of the Claimant is a good starting point. In my view, the main shortcoming of the Claimant's percentage of costs apportionment is that it has included a significant amount of front loading of costs by the Claimant. Further, while I take the view that the costs of framing for curtain wall feature and aluminium perforated panel for this project should be higher than the costs of glazing and panel respectively, it should not be that high percentage of 75% as that adopted by the Claimant. As rightly pointed out by the Respondent, the three quotations used by the Claimant for comparison have an element of 25% advance payment. I do not think it is fair and reasonable for the Respondent to bear this totally, though I think about a fair 10%–15% for this element should be allowed, as in practice, the Claimant would have incurred a significant amount of costs in preparing shop drawings, cutting lists, procurements of materials and off-site fabrication.

107 With respect, I consider the 50%:50% for aluminium perforated panel and 45.44%:54.56% for curtain wall feature proposed by the Respondent in the RWS neither fair nor reasonable. I agree with the Claimant that the former percentage of costs apportionment in the RWS appears to be an arbitrary apportionment. The latter percentage of costs apportionment in the RWS proposed by the Respondent is not adequate, as it suggests that the cost of glazing is higher. The Respondent also has not explained adequately why glazing should be apportioned a higher apportionment of costs. With respect, an assertion that "[this] allocation is based on the contract documents" is not helpful.

108 As stated above, the Respondent has provided revised calculations on 13 February 2025. While I accept that the Respondent's revised calculations have certain basis, on balance, I am unable to adopt them for the following main reasons:

(a) Further to [80] above, in the context of progress payment, the percentage of costs apportionment is intended to pay the contractor's progress payment which is fair and reasonable and helps him in his cash flow, though this may not be completely adequate to ensure that the contractor is not "out of pocket" having regard to the pricing in

the tender and other relevant factors, such as the fact that the Claimant has to pay a substantial advance payment to its subcontractor in practice.

(b) I recognise that, in practice, it is inevitable that in estimation certain assumptions are made. Thus, the Respondent assumed and adopted the BCA SOR rate for power coated aluminium frame and assumed rates for structural steel and glazing and panel in its calculations. In this regard, given that the "Preamble Notes" in Bill No 3 (p B3/2) states that "[for] those tenderers which did not submit any rate, the BCA Schedule of Rates shall be applicable. BCA SOR dated 2020Q3" and there was in fact "Builder Schedule of Rates" and there is no detail for which the BCA SOR rate was based on for comparison, I tend to agree with the Claimant that such rate is inapplicable. In an attempt to address the Claimant's argument, the Respondent now factored in structural steel purportedly based on shop drawings at 10.50/m² whereas the Claimant used 30kg/m². However, as argued by the Claimant on 19 February 2025, there are still inadequacies in the revised calculation.

(c) The weighted percentage of work done of 81% for curtain wall feature and 80% for aluminum perforated panel which are based on 65%:35% costs apportionment is about the mid-point of the weighted percentage of work done suggested by the Claimant and the Respondent.

109 For the foregoing reasons, I am of the view that, taking a pragmatic approach to the issue, I determine that the weighted percentage of work done of 81% for curtain wall feature and 80% for aluminum perforated panel which are based on costs apportionment of 65% for frame and 35% for glazing or panel in determining the value of work done for progress payments, is fair and reasonable.

110 As the Employer's Representative had certified the amount of $2,317,818.01 in his 24th interim certificate, for the above reasons, I determine that the Claimant is entitled to be paid a further sum of **$288,600.00** (*ie*, $2,606,418.01 – $2,317,818.01) for Façade Construction as part of the Adjudicated Amount.

Value of Materials on Site

111 For this head of claim, the disputes are in respect of materials delivered to the site for: (a) lift installation; (b) sanitary wares and fittings; and (c) curtain wall feature.

112 The amount in dispute of $336,941.80 comprises the following:

	Lifts	**Sanitary wares**	**Curtain wall feature**
Claimant's claim	$10,115.00	$45,798.80	$281,028.00

113 For "Lifts", the Claimant asserted that the total amount claimed in PC 24 for materials on site were supported with delivery orders and tax invoices and that the RE had signed off the quantities of the materials delivered on site for lifts installation. The Claimant argued that "[given] that the Respondent (*sic*, should be RE) has signed off that 95% of the work has been completed and that there is a balance of 5% left on site, the Claimant has only claimed for the balance 5% that is on site". The Claimant also argued that as the Respondent has failed to respond in PR 24, s 15(3) of the SOP Act would apply.

114 For "Sanitary wares", the Claimant asserted that the total amount claimed in PC 24 for materials on site were supported with many delivery orders of various dates starting from 7 August 2023 and including a delivery order from [TT] dated 5 December 2024, "Request for Inspection" dated 19 November 2024 signed off by the RE which was attached with a list of sanitary wares with quantities (in number) under "Balance" column for 17 items therein, and two pages undated coloured photographs showing boxes printed with "[TT]" purportedly stored at stores at Levels 3 and 5 of the Building and [TT]'s quotation for sanitary wares submitted to [S] Pte Ltd.

115 Further, the Claimant asserted that "the Respondent has accepted the Claimant's position and has certified 15 out of the 16-line items claimed" and "[the] only line item that the Respondent has not addressed is that of "Auto Soap Dispenser, Deck Mounted – [TT] ASD203D". Thus, the Claimant argued that there was no dispute with regard to the 15 items and "[the] dispute between parties is therefore confined to only the sum of $7,700.00, for the said item (which is derived by 14 numbers multiplied by the unit price of $550/no.)". In respect of this item that the Respondent did not certify, the Claimant also argued that s 15(3) of the SOP Act would apply.

116 For "Curtain wall feature", the Claimant asserted that the total amount claimed in PC 24 for materials on site were supported with packing lists and tax invoices from [SS] Pte Ltd ("[SS]") and that the RE had endorsed "the materials delivered left on site". The Claimant argued that since the Claimant has carried out 88% of the façade works, it is only claiming 12% of the contract amount for curtain wall feature as "material left on site". In reply to the RWS, the Claimant argued that given that the Respondent has not proffered any alternative method of valuation, "payments based on the actual invoices is also sensible as the invoices represent the amounts incurred by the contractor".

117 The Respondent's main contention is that in order for the Claimant's claim for materials on site to be assessed and certified, the Claimant would have to:

(a) identify the specific item(s) forming the subject matter of this claim;

(b) identify the specific quantity of such item(s);

(c) produce the delivery order(s) specific to such item(s); and

(d) produce any invoice(s) specific to such item(s).

118 The Respondent then argued that:

> [The] items referred to in the collective production of delivery orders and invoices (as the Claimant has done) will not permit an assessment of whether these items relate to those that have already been incorporated in the permanent works, and certified and paid separately as work done or should fall within the ambit of material on-site.

119 Specifically for sanitary ware, the Respondent argued that the rate for "Auto Soap Dispenser Deck Mounted [TT] ASD203D" the Claimant had claimed in PC 24 of $550/no is inconsistent with the rate of $330/no for this item that was previously stated in the Claimant's "costing breakdown".

120 As regards the curtain wall feature, the Respondent argued, *inter alia*, that "the Claimant has not explained how it has computed value of the materials on-site based on the value allocated for this item of work in the contract documents" and "which of the delivery orders it has produced as part of its AA Submissions relate to the 12% of the materials on-site and distinguishing these from materials comprising the 88% of alleged work done that the Claimant is also claiming". In the RRS, the Respondent asserted that [UU]'s methodology is "more appropriate".

121 During the Merits Conference, Mr Lee for the Claimant reiterated his client's position. For the curtain wall feature, since the Claimant has revised its percentage of completion, the Claimant now claimed 12% as the cost of the materials. Mr Sathia for the Respondent argued that in respect of the documents relied by the Claimant, the documents signed off by the RE do not prove the quantities of materials.

My determination on value of Materials on Site

122 It is not in dispute that cll 22.1.1 and 22.1.3 of the REDAS COC provide for progress payment of "the value of materials delivered at the site for incorporation in the Permanent Works". As I have said during the Merits Conference, in my view, the correct way of evaluating materials on site should be based on the materials actually delivered and stored on site

at the time of submission of a payment claim which is supported with delivery orders, evidence of prices and confirmed by the resident engineer. In general, this is in line with the Respondent's and [UU]'s method of valuation.

123 In my view, the delivery orders dated 1 and 13 September 2023, 30 November 2023 and 5 December 2023 and [RR]'s tax invoices dated 20 September 2023 and 23 January 2024 exhibited by the Claimant in Tab 4, "Materials Left on Site", of the AA only go to show that the materials had been delivered by [RR] and certain amounts certified by the Claimant had been paid as progress payments to its subcontractor at the material times. They do not prove the materials left on site which have yet to be installed as of 24 November 2024. Further, just because there was 95% of "work done on site", it does not necessarily follow that 5% of the contract amount for lift installation should be the cost of the materials on site for lift installation. The 5% would necessarily include labour for installation on site, wastage, profit and attendance marked up by the Claimant. In the premises, I determine that the Claimant has failed to prove its claim on a *prima facie* basis.

124 I accept that the delivery orders and [TT]'s quotation and other documents would support the claim for "Auto Soap Dispenser, Deck Mounted – [TT] ASD203D" for $7,700.00. However, I do not think the Claimant has proved on a *prima facie* basis the costs of the materials on site for the other items amounting to $38,098.80 (*ie*, $45,798.80 – $7,700.00). As stated in para 29 of the AAS, the Employer's Representative has certified "15 out of the 16-line items claimed", and that "[in so far] as the other 15 items are concerned, there is no dispute between the parties". Further, the list of sanitary wares with quantities is without pricing to show the amount of materials claimed. On the other hand, [UU] has provided a listing with quantities and pricing of the sanitary wares (see Items 1–15 of [UU]'s "Breakdown of Materials on Site" dated 30 November 2024). In the circumstances, I see no compelling reason to revise the valuation of [UU] for the 15 items certified.

125 In my view, the documents exhibited by the Claimant do not support its claim for the costs of the materials on site for curtain wall feature. Just like the sanitary wares, the documents from [SS] only show the materials delivered at the material times and [SS]'s progress payment claims. I also find the undated table signed off by the RE unhelpful. Further, just because there was 88% (or 87% or 81%) of "workdone", it does not necessarily follow that 12% (or 13%) of the contract amount for curtain wall feature should be the cost of the materials on site as at 24 November 2024. The 12% (or 13%) would necessarily include labour for installation on site, wastage, profit and attendance marked up by the Claimant. What is clearly lacking is a list of materials (*ie*, frames and glazing) actually delivered and

stored on site which have yet to be installed at the time of submission of PC 24, which is supported by delivery orders, evidence of prices and confirmed by the resident engineer. On the other hand, having considered the Respondent's explanation in the RRS, I find [UU]'s valuation amounting to $180,465.75 (see Items 16 and 17 of [UU]'s "Breakdown of Materials on Site" dated 30 November 2024) is fair and reasonable.

126 Having considered the Parties' supporting documents and submissions in writing and orally during the Merits Conference, and for the above reasons, I determine that the Claimant is entitled to be paid a further sum of **$7,700.00** for materials on site as part of the Adjudicated Amount.

Value of variation works

127 Before I deal with the value of the variation works claimed in PC 24, I need to deal with the Respondent's arguments in paras 33–42 of the RWS that the Claimant is not entitled to claim VO 4, VO 9, VO 13, VO15, VO17, VO 23, VO 25, VO 32 and VO 47 (collectively, the "rejected VOs") because there were no Employer's Representative written instruction (or "ERI" in short") to support such claims. In this regard, the QS remarked in its valuation dated 16 December 2024 that these variation claims are "Not valid" because there were "No ERI". For VO 4, VO 13, VO 15, VO 17 and VO 23, the QS also stated that "BJG claim this is a valid vo, thus pending BJG to submit supporting doc to substantiate their claim validity". In [UU]'s "VO Tracking List", the QS remarked that these variation claims were "pending BJG to send supporting doc to substantiate" and "to be discussed".

128 The Respondent's arguments in the RWS may be summarised as follows:

(a) The Claimant is not entitled to alleged variations not instructed in "Writing" by the Employer's Representative or approved as a variation by the Employer's Representative in accordance with cl 26.1 of the REDAS COC.

(b) Related to the foregoing argument, the Respondent also argued that "[crucially], *an instruction to vary **must** be issued in writing by the Employer's Representative, and **not** by the Respondent*. The Claimant's argument that it is entitled to claims for additional works that 'were instructed by the Respondent' is fundamentally misconceived" [emphasis added in italics and bold italics].

(c) The alleged variations for which no ERIs have been issued do not constitute "Variations" as they do not constitute alterations and/or modifications to the Employer's requirements and/or were necessitated

by the Claimant's default or breach of contract; examples include VOs 13, 15, 23, 17 and 25.

(d) The works forming the subject matter of some of the disputed variation claims were not carried out to the extent claimed; see, for example, VO 47.

129 In support of the Respondent's contention that without an ERI the Claimant is not entitled to payment of the alleged variations, the Respondent cited Chow Kok Fong's books entitled *Law and Practice of Construction Contracts* (LexisNexis, 5th Ed, 2018) at paras 5.017, 5.008, 5.027 and 5.029 and *The Singapore Developers Design and Build Contract: Commentary on the REDAS Design and Build Conditions of Contract* (LexisNexis, 3rd Ed, 2014) at paras 26.7 and 26.8 (collectively, "CKF's books").

130 In reply to the Respondent's arguments, the Claimant's contentions in the CRS, in summary, are as follows:

(a) The Respondent's contentions are contrary to the decision of the Appellate Division of the High Court ("Appellate Division") in *Vim Engineering* ([64(d)] *supra*) at [12] and [32]–[34].

(b) Relying on *Vim Engineering*, the Claimant argued that "[as] long as the Respondent knew or was told that the works would cost extra, there is an implied promise to pay" and there "is no bar to claim for variations just because there is non-compliance with the requirement for an ERI".

131 The Respondent's arguments in the RRS may be summarised as follows:

(a) The Respondent agreed with the principles in *Vim Engineering*. However, the Respondent submitted that the Claimant has failed to properly apply the same to the Contract and the facts of this case.

(b) The Claimant has not discharged the burden of proof in relation to the four requirements as set out in [29] of *Vim Engineering* (see [139] below).

(c) At para 33 of the RRS, the Respondent presented its case in this manner:

> For the avoidance of doubt, ***the Respondent's case is not that the Claimant is barred from claiming for variations simply because there is, in the Claimant's words, 'non-compliance with the requirement for an ERI'. Put simply, the Respondent's contention is that the Claimant has not discharged its burden to establish its variation claims in accordance with the four requirements*** as set out at paragraph 8 above [summarised in paragraph 139(b) of this determination]. ***In particular, the***

> ***Respondent contends in this Reply that the Claimant has not discharged its burden of proof in respect of the fourth requirement, namely, establishing that <u>any condition precedent to payment has been fulfilled</u>***. It is telling that the Claimant has not done so, and in ***the absence of any proof from the Claimant of its compliance with the condition precedent to payment in Clause 29.1.1 of the REDAS Conditions***, the Respondent observes that the Claimant has, for the majority of its variation claims in this adjudication, not complied with the same. The variation claims should, therefore, be dismissed on this basis. [emphasis added in bold italics and underline]

(d) The Respondent argued that an "implied promise to pay" for variation is found in cl 29.1.1 of the REDAS COC which must be read with cl 26 of the REDAS COC. Clause 29.1.1 requires the Contractor to give a "Written notice of his intention to make any claims for additional payment" and "*the giving of such a notice shall be a condition precedent to any entitlement that the Contractor may have*" [emphasis added]. The Respondent added that "[any] implied promise to pay is therefore contingent on such condition precedent being fulfilled, and not the Respondent's knowledge that the works could cost extra".

(e) Because cl 29.1.1 of the REDAS COC contains a condition precedent, the Respondent argued that the present case is distinguishable from the case before the court in *Vim Engineering*.

(f) The Claimant has not argued any waiver of compliance with the condition precedent by the Respondent and/or estoppel.

132 During the Merits Conference, Mr Lee for the Claimant argued, *inter alia*, as follows:

(a) Following *Vim Engineering*, strict language is not found in cl 26.1.1 of the REDAS COC and "evidently, the Respondent accepted that cl 26 does not have a condition precedent".

(b) In the RRS, the Respondent has changed its position by relying on cl 29 of the REDAS COC. As the Respondent's PR 24 only stated "no ERI", pursuant to s 15(3) of the SOP Act, the Respondent could not raise this new objection.

(c) In any event, cl 29 of the REDAS COC does not have the effect as contended by the Respondent. In this regard, the Respondent also did not raise this objection in any of the variation claims.

133 Mr Sathia for the Respondent replied, *inter alia*, as follows:

(a) *Vim Engineering* was decided based on different facts.

(b) The Respondent was entitled to elaborate its reasons in PR 24. In this regard, the Respondent did not raise its objection based on cl 29 of the REDAS COC for the first time.

My determination on ERI requirement issue

134 With respect, I am unable to accept the Respondent's argument that without an ERI, the Claimant has no entitlement to payment of a variation claimed. My main reasons are as follows.

135 First, in light of the Respondent's representation of its case and change in position in the RRS, I should make clear that based on the reasons given for rejection of the variation claims in PR 24 and the submissions in the AAS and RWS, the issue for my adjudication is whether the absence of an ERI under cl 26.1.1 of the REDAS COC barred the Claimant to payment of a variation claim, and not whether the Claimant has complied with the condition precedent of giving a prior notice within time under cl 29.1.1 of the REDAS COC. This is because the Respondent has not stated non-compliance with "any condition precedent to payment" or the condition precedent of giving prior notice within time under cl 29.1.1 of the REDAS COC (belatedly included in the RRS) as a reason for rejecting the rejected VOs in PR 24. Consequently, pursuant to s 15(3)(*a*) read with s 17(6) of the SOP Act, I am unable to have regard to this belated objection of non-compliance with condition precedent or cl 29.1.1 of the REDAS COC in the RRS. Moreover, by not stating this new objection in PR 24, the Respondent has waived its right to object. In this regard, see [66], [67] and [69] of *Audi Construction* ([61] *supra*).

136 So far as relevant to this issue, I first refer to the salient clauses of the Contract which the Parties' counsel has referred to in written and oral submissions:

(a) Clause 1.1.33 of the REDAS COC defines "Variations" as "any alteration and/or modification to the Employer's Requirements, which is instructed by the Employer's Representative or approved as a variation by the Employer's Representative in accordance with cl 26.1".

(b) Clause 1.1.35 of the REDAS COC defines "Writing" or "Written" as "any hand-written, typewritten, or printed communication, including telex and facsimile transmission".

(c) Clause 26.1 "Right to Vary" (so far as relevant to this issue) states as follows:

> 26.1.1 The *Employer's Representative may at any time during the Contract Period instruct the Contractor* <u>*in Writing*</u> *to carry out Variations to the Works save that the Contractor shall be entitled to refuse to carry out any*

> *variations which would result in contravention of any legislation, bye laws or conditions made by the relevant authorities or which would undermine or adversely affect the structural integrity of the Contractor's design and/or the Works.* ***The Contractor shall not carry out any variations without the Written instructions of the Employer's Representative.***
>
> [emphasis in original in italics and bold; emphasis added in underline]

137 In principle, I agree with the Claimant's interpretation of cl 26.1.1 of the REDAS COC that the issue of an ERI is not a condition precedent to the Claimant's entitlement to payment of a valid variation.

138 It is pertinent to note that the Respondent has not initially referred to *Vim Engineering* and cl 29.1.1 of the REDAS COC in the RWS. Though the Respondent attempted to distinguish *Vim Engineering* on the facts in the RRS and during the Merits Conference, in my view, the discussions and decisions in *Vim Engineering* are instructive in dealing with this technical objection raised by the Respondent in PR 24 and the RWS.

139 In *Vim Engineering*, at [29], the Appellate Division in dealing with the issue of whether the plaintiff had complied with notice requirements in cl 16 of the subcontract, said as follows:

> 29 In general, to claim for work as a variation under a contract, it is necessary to establish that (a) the work is an 'extra'; (b) there is an express or implied promise to pay for the work; (c) the work was instructed by a person with authority to vary the contract; and (d) ***any condition precedent to payment has been fulfilled***. As set out in Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2021) ('*Keating*') at para 4–043:
>
> > … A contractor frequently carries out, or is asked to carry out, work for which it considers it is entitled to payment in excess of the original contract sum. To recover such payment, it must be shown that:
> >
> > (1) it is extra work not included in the work for which the contract sum is payable;
> >
> > (2) there is an express or implied promise to pay for the work;
> >
> > (3) any agent who ordered the work was authorised to do so; and
> >
> > (4) any condition precedent to payment imposed by the contract has been fulfilled.
>
> [emphasis added in bold italics]

140 At [37], the Appellate Division in *Vim Engineering* refers to the Court of Appeal's statements in *Comfort Management* ([61] *supra*) at [89] and [90] that "it is *not* invariably the case that the absence of writing, or more generally, the failure to follow the prescribed procedure, will disentitle the

party who has performed the variation works from claiming payment for those works" [emphasis added] and at [90], after referring to a passage from Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 4th Ed, 2012) at para 5.25, the Court of Appeal explained that:

> ***[This] passage suggests that the absence of documents that demonstrate formal compliance with the contractually prescribed procedure for variation works is not necessarily fatal to a claim for variation works.*** That gives the impression that such absence does not inexorably translate into a patent error in the payment claim. ***All it means is that the contractor bears the risk of proving that the variation was ordered by the employer in the absence of a written variation order.*** This observation finds support in the position in English law on this issue, which is that a term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation; instead, the effect of such a term is at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation: Sean Wilken QC & Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) at p 26 fn 131, citing the English Court of Appeal's decision in *I-Way Ltd v World Online Telecom UK Ltd* [2002] EWCA Civ 413 (see [11]–[12] *per* Sedley LJ and [17] *per* Schiemann LJ) … [emphasis added in bold italics]

141 At [32], the Appellate Division in *Vim Engineering*, after holding that cl 16 in the subcontract of that case was not drafted in a stringent manner requiring strict compliance failing which a variation claim will fail, the court illustrated that:

> [A] clause may expressly state that a written authorisation of work done or written confirmation of an oral order ***is a condition precedent for any right to additional payment*** or it may specify a time within which the contractor is to inform the architect or owner in writing that it considers the instruction or direction or request to do certain work, as a variation with time and cost consequences: see Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th Ed, 2015) ('*Hudson's*') at paras 5–040 and 5–044 … [emphasis added in bold italics].

142 Similar to cl 16 in *Vim Engineering*, in our present case, cl 26.1.1 of the REDAS COC does not expressly state that prior "Written instruction" of the Employer's Representative or issue of an ERI is a condition precedent to any entitlement to payment. To paraphrase the words of the Appellate Division in *Vim Engineering* at [32] and [33], cl 26.1.1 of the REDAS COC is **not** "drafted in a stringent manner requiring strict compliance failing which a variation claim will fail" and does not state "no extras will be paid unless so ordered by the Employer's Representative in Writing". Clause 26.1.1 of the REDAS COC also does not state that if there is no written instruction from the Employer's Representative or ERI, the contractor shall have no right to any additional or extra payment or is

otherwise barred from claiming payment for work that is considered a variation.

143 As regards the opinions of the learned author in CKF's books, it is apparent that the author has not considered the decisions in *Vim Engineering* (as the case was decided after the publication of CKF's books). As regards the passage from CKF's books at para 5.029 quoted at para 37 of the RWS, it is pertinent to note that the learned author was commenting on the contractual provisions in the Singapore Institute of Architects' SIA Building Contract 2016 ("SIA COC"). For a full extract of the learned author's comments, see [38] of *Vim Engineering*.

144 I also disagree with the Respondent's argument that only written instruction requiring variation by the Employer's Representative and not by the Respondent, would entitle the Claimant to payment of a variation. As defined in cl 1.1.35 of the REDAS COC, the Employer's Representative's "Written instruction" need not be in any prescribed formal format such as "ERI 7" (see Tab 5 "Supporting Documents for VO" in the AA issued for VO1). The question is whether the employer's representative such as Mr [A] has the authority to issue instruction to carry out a variation. In this regard, I note that the Respondent has not disputed Mr [A]'s authority.

145 In my view, the words "any hand-written, typewritten, or printed communication" in cl 1.1.35 of the REDAS COC includes letter, e-mail and/or drawing issued by the Employer's Representative or his authorised assistant. In this regard, from my perusal of the Parties' supporting documents, I note that a common mode of communication between the contractor's representative, the Employer's Representative and his authorised representative (such as Mr [A]), the consultants and the Employer's tenants, is by e-mails. Some of this correspondence could possibly be construed as an instruction in writing to carry out a variation or giving rise to an implied promise to pay. I shall consider the purport of the correspondence including the e-mails and the Respondent's other arguments summarised in [131(c)], [131(d)] and [133] above when dealing with the merits of each variation claim later.

146 In conclusion, for the above reasons, I am of the view that based on a proper construction of the Contract, the issue of an ERI is not a condition precedent to the Claimant's entitlement to payment of a valid variation. Further, I also do not think the statement "The Contractor shall not carry out any variations without the Written instructions of the Employer's Representative" will change the character and intent of the clause as explained above.

147 I now consider the merits of the disputed variation claims.

VO 1: additional drywall and doors

148 For VO1, for the claimed amount of $46,371.53 as against the certified amount of $21,405,05, the dispute in quantum is essentially in respect of the Claimant's claims for "preliminaries relating to safety and supervision", scissor lift and "DOC for tenant's SCDF submissions (submission by others)".

149 The Claimant's main contentions may be summarised as follows:

(a) Though [UU] remarked in its valuation that "Pending BJG to support supporting doc to substantiate, [UU] commented on 19 September 2024. (See the attached email correspondence)", there was no such 19 September 2024 e-mail enclosed in PR 24 and there was no breakdown provided of the sum of $21,405.05 certified.

(b) The Claimant's rates are based on the contract rates and are further supported by third-party quotations.

(c) As part of the AA (however, this was not attached to PC 24), the Claimant exhibited its timesheet to substantiate its rates.

(d) The Claimant has claimed $3,255 (and not $7,175) for manpower for safety and supervision which has not included the SOR rates applied in the other items claimed and that the variation was carried out *before* the contract period. Hence, the Claimant argued that "the preliminaries being claimed for under this VO cannot be said to be part of the preliminaries of the Contract, and would not have been priced into the Contract".

(e) As regards the claim of $2,500.00 for "Declaration of Compliance" ("DOC"), the SCDF submission itself was to be carried out by the tenant, and accordingly the Claimant has not made any claim for "the SCDF Submission". The sum is supported with invoices. Further, a copy of the "*redacted* version of the DOC certificate had been submitted, as this was to inform that the DOC Certificate was available and ready, and once payment was made, the Claimant would promptly forward the certificate" [emphasis added].

(f) The Respondent has conceded at least $35,675.09 at para 79 of the RWS.

(g) The Claimant has fully substantiated its claim on a *prima facie* basis and is entitled to its claim of $46,371.53 for the works.

150 The Respondent's main contentions may be summarised as follows:

(a) At para 74(2) of the RWS, "[UU] has certified the sum of S$35,675.09 in the VO Tracking List for the reason: 'Pending BJG to

submit supporting doc to substantiate, [UU] commented on 19 September 2024. BJG target to submit ~~by 04 Oct 2024. 09 Oct 2024.~~ 01 November 2024'".

(b) In [UU]'s "VO1 Draft Assessment", [UU] has taken the view that "only S$35,675.09 is payable", "[certain] preliminaries relating to safety and supervision (against [UU]'s remarks that they are 'not applicable') are not payable as they have been accounted for as part of the SOR Rates applied in valuing the other items forming part of the variation claim", "[tax] invoice for SCDF submission has not been submitted – accordingly, the sum of S$2,500.00 is not payable" and "[timesheets] for Scissor Lift with operator based on work done on site has not been submitted – accordingly, the sum of S$3,520.00 is not payable".

(c) The Respondent relied on certain provisions in Bill No 1, "Preliminaries", which I will elaborate later.

(d) "The tax invoice for SCDF Submission and time sheets which are referred to in paragraphs 43 and 46 of the AA Submissions (which has been enclosed as part of the AA in Tab 5 (VO Supporting Documents) were provided for the first time in the AA".

(e) The Respondent submitted that "the claim should be evaluated based on the documents available as at submission of PC 24 and accordingly, [UU]'s valuation in the VO Tracking List should stand".

151 During the Merits Conference, Mr Lee for the Claimant reiterated that since the variation was carried out before the Contract was signed, the clauses relating to provision of "Preliminaries" do not apply. He also clarified that the tax invoices from [QQ] Construction were exhibited in the AA because the Claimant had engaged M/s [PP] Contractor ("[PP]") to carry out the drywall and [PP] in turn engaged [QQ] Construction as a subcontractor. As regards submission of a redacted DOC certificate, Mr Lee said that his client had informed "the Respondent that [the Claimant] could show the DOC certificate once the costing is finalised" and "the bottom line is DOC certificate can be provided" after payment.

152 Mr Sathia argued that the "Preamble" in Bill No 1 was "drafted very specific" and is "all-inclusive". He asserted that as the QS, [UU] has "accountability" and hence, they had insisted that the Claimant should submit supporting documents such as the DOC certificate and timesheets together with a payment claim. He added that since these documents were not submitted with PC 24, as "Contract takes primacy", "adjudication is not a proper forum for such claim".

My determination for VO 1

153 I agree with the Respondent that the Claimant has not proven on a *prima facie* basis that it is entitled to claim the alleged preliminaries, namely, "Safety & Supervision" and "Scissor Lift" for this variation. It is clear from the terms of the Contract that the Claimant had priced these items and included them in the Contract Sum for "preliminaries" such as provision of safety and supervision to carry out the works. In this regard, "Bill No. 1–Preliminaries", Item A (p B1/9) states that "[this] LUMP SUM CONTRACT shall include", *inter alia*, "[preliminaries]" and "Schedule of unit rates and Daywork rates". Further, Bill No. 1–Preliminaries, Item A (p B1/3) states that "the Schedule of Rates shall include, but not limited to, all costs for", *inter alia*, "labour", "[use] of ordinary plant, tools, equipment ad machinery and existing scaffolding", "[trade] supervision" and "[overhead] and profit".

154 With respect, I am unable to agree with the Claimant's argument that the clauses relating to provision of "Preliminaries" in the Contract Documents do not apply. It bears noting that the variation was claimed pursuant to cl 22.1.1 read with cl 26.1 of the REDAS COC under the Contract, and not as a separate contract. Upon acceptance of the LOA on 20 October 2022, the terms of the Contract would apply to this variation.

155 As regards the alleged provision of scissor lift, it is pertinent to note that in Bill No. 1–Preliminaries, Item E "LABOUR, PLANT AND TOOLS", the Claimant had priced a sum of $616,900.00 for providing "all necessary plants, scaffolding, hoists, cranes, *etc*. for the duration of the Contract …".

156 Considering the supporting documents for these items and notwithstanding the Respondent's objection for the reason as explained above, I am of the view that they do not prove that the Claimant had provided the staff for "safety & supervision" and "scissor lift" over and above that were required under the Contract specifically for this variation. In this regard, I also note that the Contract contemplates supply and installation of drywall partitions (see Specification, NQPS, A5–10 Dry Wall Partitions). This means that it was within contemplation of the Parties that the contractor has to provide safety supervisor, site supervisor, plant, machinery, tools and access to carry out drywall partition work.

157 As for the submission of the DOC certificate, the onus is on the Claimant to submit a proper and complete document to discharge its performance and to prove that it was justified to be paid the amount claimed. A redated document is inadequate and insufficient.

158 I have considered the valuation by [UU]. In respect of the other items of works claimed and accepted by [UU], I note that the rates in the SOR were applied. These rates would have included the provision of,

amongst other things, safety, supervision, platform for access and plant and tools.

159 For the above reasons, I find that the Claimant is entitled to be paid $35,675.09 for this variation. Since the Respondent's response amount has included the sum of $21,405.05 as certified in the 24th interim payment certificate, I allow a further sum of **$14,270.04** (*ie*, $35,675.09 – $21,405.05) for this variation as part of the Adjudicated Amount.

VO 2: installation of FAD

160 For VO2, for the claimed amount of $101,131,00 as against the certified amount of $58,469.90, the dispute in quantum is essentially in respect of the Claimant's claims for "safety and supervision", fire damper, non-return damper and volume control damper (collectively, "dampers"). See para 50 of the AAS.

161 As regards the Claimant's claims for "safety and supervision" for $2,000.00 as star rate and "working platform and hoisting / lifting machines for FAF & FAD and necessary components" for $2,500.00 as star rate, the Parties' contentions are similar to that for VO 1. Relying on the "Preliminaries" clauses, the Respondent argued that the total amount of $4,500.00 is not payable.

162 As regards the Claimant's claim for dampers, the Claimant argued, *inter alia*, that dampers were already part of the original scope of the Contract, "[UU] and the Respondent fail to have proper regard the full import of Clause 1" of the "Schedule of Unit Rates for Air-Conditioning & Mechanical Ventilation Installation"; and that "[cl 1] expressly requires that the dampers be provided '*as per Specification and Drawings*'" [emphasis in original] which according to the Claimant means that "only the dampers specified in the original contract drawings would fall under the scope. All other additional dampers which were not specified in the contract would constitute variation works".

163 The Respondent argued, *inter alia*, that "[UU] accepts that the installation of fresh air ducts and air fans constitutes a variation", however, "its position is that the Claimant is not entitled to make separate claims for supply and installation of [the dampers] as these are encompassed within the SOR Rates claimed for the supply and installation of fresh air duct".

164 During the Merits Conference, Mr Lee for the Claimant refers to para 64 of the CRS and emphasised that more rooms were erected and additional dampers supplied and installed. For the pricing of fresh air duct, he said that the Claimant has applied the rates in the SOR. In reply, Mr Sathia said that the Contract does contemplate insulation of fire rated

walls. Thus, he asserted that the rate in the Contract SOR does cover installation of all dampers.

My determination for VO 2

165 As regards the Claimant's claim for "safety and supervision" and "working platform and hoisting / lifting machines", for the reasons which I have given for VO1, and after considering the supporting documents for this item (notwithstanding the Respondent's objection for the reason as explained above), I am of the view that they do not prove that the Claimant had provided the staff for "safety & supervision" and "working platform and hoisting / lifting machines" over and above that were required under the Contract specifically for this variation. With respect, bare assertions that "additional working platform was required for VO2" is insufficient. I therefore reject the Claimant's claims for these two items of preliminaries. Moreover, as acknowledged by the Claimant, the Contract contemplates supply and installation of fresh air duct with dampers, which would require erection of platform and provision of scaffolding and/or scissor lift for access.

166 As for the Claimant's claim for dampers, the crux of the dispute is whether under cl 1 of the "Schedule of Unit Rates for Air-Conditioning & Mechanical Ventilation Installation" which provides unit rates for "supply, install, test and commission the following ductwork inclusive of all supports and hangers, provision of all dampers/vanes, *etc*. as per Specification and Drawings per square metre of surface", the dampers should be priced and paid separately from the prices of fresh air duct of various dimensions.

167 Having considered the documents and the Parties' arguments and submission, I agree with the Respondent that the supply and installation for dampers for this variation is not to be priced separately. With respect, it seems to me that the Claimant has not properly appreciated the meaning and intention of cl 1 and the words "as per Specification and Drawings" in the context of the said cl 1 and the variation.

168 The Form of Tender alludes to "Tender Documents" such as the "Specifications" and the "Drawings".

169 In practice, the Specifications for air-conditioning and mechanical ventilation ("ACMV") specifies the supply and installation of fresh air duct with dampers such as volume control dampers and non-return dampers in compliance with performance requirements and relevant standards such as the Singapore Fire Code 2018 (in Chapter 7) for ventilation system. For example, as Mr Lee for the Respondent has said during the Merits Conference, the "original Contract Drawings specified 1 fire damper and 5 return dampers".

170 Further, Bill No.1–Preliminaries (p B1/13) explains "Drawings", "Shop Drawings" and "As-Built Drawings". After the award of the Contract, the "Tender Drawings", being part of "the documents forming part of the Tender", would be considered "Contract Documents". In this sense, the Tender Drawings are commonly referred to as "Contract Drawings". However, in a design and build contract, such as the Contract, the Contract requires that before any work commences, the contractor is required to produce "full detailed shop drawings and co-ordination drawings" that comply with, *inter alia*, the "Design brief and Requirements", the Specifications and the Contract Drawings. Similarly, when the Claimant was instructed to carry out this variation by way of ERI 7, it is imperative that the Claimant has to prepare and submit "full detailed shop drawings and co-ordination drawings" to the Employer's Representative. These shop drawings would have to be prepared in compliance with, *inter alia*, ERI 7, the Specifications and the Singapore Fire Code 2018. Thus, when the additional fresh air ductwork with dampers are specified in the approved shop drawings and ultimately installed, it is indisputable that such works have to be paid extra.

171 When the variation work is valued, the valuation is governed by the terms of the Contract, such as cl 26.3 "Valuation Methods" of the REDAS COC and the said cl 1 of the "Schedule of Unit Rates for Air-Conditioning & Mechanical Ventilation Installation" which requires the Claimant to "supply, install, test and commission the following ductwork inclusive of all supports and hangers, provision of all dampers/vanes, *etc*. as per Specification and Drawings per square metre of surface". In this context, "all dampers/vanes, *etc*" required for this variation would be specified in the approved shop drawings. Thus, it is not in dispute that the additional dampers which were not specified in, to use the words of the Claimant's counsel "original Contract Drawings", would constitute variation works.

172 The issue then is how should such dampers be valued? In this regard, one has to apply the words "supply, install, test and commission the following **ductwork inclusive of all supports and hangers, provision of all dampers/vanes**, *etc*. as per Specification and Drawings **per square metre of surface**" [emphasis added in bold] and the unit rates listed thereunder. In my view, on a proper interpretation of the Contract Documents, the ductwork including all the dampers are to be measured based on the "square metre of surface" (*ie*, m^2) of the ductwork, and the dampers are not to be separately measured and priced. Thus, when the Claimant asserted in para 64 of the CRS that it had supplied and installed "3 additional non-return dampers, and 29 additional volume control dampers with diffuser", these items, similar to "all supports and hangers", in accordance with the said cl 1, are not to be separately measured and valued.

173 For the above reasons, I find that the Claimant is not entitled to be paid more than the sum certified in the 24th interim payment certificate and agree with [UU]'s valuation for this variation.

VO 3: relocation of CU #02–02

174 For VO3, for the claimed amount of $82,561.50 as against the certified amount of $44,900.46, the dispute in quantum is essentially in respect of the Claimant's claims for "Preliminaries", namely, "Protection to existing unit", "Safety and supervision" and "Working platform and hoisting / lifting machineries for CUs to Level 2A carpark" and material cost claimed as a star rate for relocation of CUs.

175 The Claimant's main contentions may be summarised as follows:

(a) The Claimant's claim is based on the SOR rates and its claim of $26,716.00 for Item b "ACMV", "Material Cost" for the CUs, piping and gas is reasonable and is supported with quotations from third party contractors.

(b) In response to the Respondent's contention in the RWS that the quotations were not acceptable, the Claimant asserted in the CRS that the objection is not found in [UU]'s e-mail of 12 November 2024. The Claimant also argued that "there is no contractual requirement for the Claimant to provide separate quotations for materials only nor any provision that renders the Claimant's entitlement to be paid premised on the submission of material only quotations". The Claimant added that comparing its claim with the third-party quotations, the Claimant argued that "taken as a whole, the amounts claimed by the Claimant are in line with market rates".

(c) [UU]'s comments in its 12 November 2024 e-mail are not valid reasons for withholding payment.

(d) In response to the Respondent's contention in the RWS that the timesheets were not submitted with PC 24 and hence, the claim should not be allowed, as explained above, the Claimant asserted in the CRS that "the SOP Act does expressly provide that other supporting documents and information may be added in the AA and the adjudicator may have regard these documents as well".

(e) The Claimant had carried out protection work and shown proof of photographs (which were provided in the AA) and Progress Reports Nos 9, 10 and 75 for the protection works for Level 2 tenant units twice. The protection work was required to cover and protect the tenant's existing facilities and assets before the installation of the FCU. The protection works thus had to be done twice, once in October 2022 and again in February 2024.

(f) The Claimant disagreed with the Respondent's contention in the RWS that the preliminaries relating to safety and supervision claimed under this VO are not payable because these were allegedly already accounted for under the SOR rates. The Claimant repeated its submission for VO 1 and VO 2 and argued in the CRS that:

> [There] is no reference to 'safety and supervision' in the preliminaries. In any case, it is unclear how the Respondent's general assertion is even applicable since the Claimant's claim is based on the built up labour rates and material costs for variation works. The safety and supervision is in relation to these variation works.

(g) The Claimant's claim of "cable on cable tray" based on star rate for electrical works is supported by the quotes from [WW] and [VV].

176 The Respondent's main contentions may be summarised as follows:

(a) The Respondent relied on [UU]'s e-mail of 12 November 2024 for the reasons why the claimed amount is not payable.

(b) The Claimant's quotation submitted on 19 February 2024 did not meet [UU]'s requirements. This is because the Claimant's variation claim was based on SOR rate for labour and star rate for material. Hence, [UU] required the Claimant to submit a quotation for material only.

(c) At para 106 of the RRS, the Respondent pointed out that the Claimant's overall claim amount of $43,278.00 is significantly higher than the three quotations provided in the AA ranging from S$21,000.00 to S$32,500.00. Based on [UU]'s assessment, a reasonable amount to be paid for this item should be $21,000 (based on the quotation from [OO] Pte Ltd) plus 15% (for Profit & Attendance) = $24,150.00.

(d) As regards the Claimant's claim of "cable on cable tray" based on the documents provided at para 76 of the CRS, at para 106(3) of the RRS, the Claimant submitted that a "fair market value" should be $12,103.35.

(e) The Claimant's timesheets were provided for the first time in the AA. As such, the claim for labour cost for $436.50 is not payable.

(f) There was no proof for double protection. At para 107(2) of the RRS, the Claimant argued that in any event, the Claimant has not proven the work was carried out and how this would constitute a variation. As such, the claim for $1,500.00 is not payable. Even if the claim is allowed, based on [UU]'s assessment, it should be $317.59.

(g) The claim for safety and supervision and working platform of $4,385.00 is not payable as the SOR rates applied in valuing the other items claimed.

(h) Based on the documents available with PC 24, the adjudicated amount should be $49,524.00 (see para 90 of the RWS).

177 During the Merits Conference, Mr Lee for the Claimant referred to para 106 of the RRS and submitted that the lowest quote from [OO] Pte Ltd of $21,000.00 is an "outlier" and therefore should not be used. He suggested that the median figure of $32,500.00 quoted by [XX] Pte Ltd plus 10% for profit and attendance (*ie*, $35,200.00) should be used. As regards the Respondent's assessment for double protection of $317.59, Mr Lee submitted that it is a "far cry" from the rates of $34.50/m² and 436.00/m²quoted by [WW] and [VV], respectively.

178 Mr Sathia for the Respondent argued that [UU]'s assessment is fair and reasonable. As regards to certain items of claim which the Claimant has only provided supporting documents in the AA, he submitted that these could be dealt with in the next progress payment claim.

My determination for VO 3

179 As explained above for VO 1, the Contract Sum includes the provision of safety and supervision and working platform for access and lifting machineries as described in Bill No.1–Preliminaries. Even though the Claimant has claimed the "Material Cost" using star rate, the Claimant cannot ignore the fact it has also used SOR Daywork rates for labour for relocation of the CUs and "Builder's Work". Just like VO 1 and VO 2, the problem for the Claimant is that it has not proven on a *prima facie* basis that it had provided the "safety cum supervisor" for "safety & supervision" and "working platform and hoisting / lifting machineries" over and above that required under the Contract specifically for this variation. In the circumstances and for the reasons as explained above, I reject the claim of $4,385.00.

180 As regards the claim for Item b "ACMV" of the Claimant's breakdown or computation, the Claimant used the rates in SOR Daywork for "Labour Cost" and star rates for "Material Cost". I note that the Respondent did not dispute the method of valuation. The complaint of the Respondent was that the timesheets signed by the RE were not submitted with PC 24 and that the quotations were not for material cost only.

181 In my view, the Claimant has not proven its claim of $26,716.00 for Item b "ACMV", "Material Cost" for the CUs, piping and gas based on star rates on a *prima facie* basis. Since the Claimant has claimed the "Labour cost" separately based on the manhours purportedly evidenced by the

timesheets signed by the RE (which were provided in the AA only) and SOR Daywork rates, in my view, the Claimant has to prove how it has derived the star rates for material costs. However, I note that the Claimant did not provide any tax invoice from its subcontractor to prove that the star rates were the actual costs (plus 10% profit and attendance pursuant to Appendix 1 and cl 26.3.1.4 of the REDAS COC) incurred by the Claimant.

182 The quotations from three contractors, presumably obtained to prove "a fair valuation based on market rates and prices" under cl 26.3.1.3 of the REDAS COC, are for supply and installation of ACMV and not just for material costs of the CUs, piping and gas. Thus, it is inappropriate for the Claimant to use these quotations to justify its star rates for material cost.

183 Further, as pointed out by the Respondent, the total amount of the Claimant's claims for "Labour Cost" and "Material Cost" for ACMV of $43,278.00 is very much higher than any of the three quotations. This shows that the Claimant's "Material Cost" based on five different star rates are not fair and reasonable, let alone being reflective of fair market rates. Another problem with the quotations is that they are not priced on the same scope of works. The quotation from [NN] Pte Ltd dated 28 September 2022 excludes CU isolator and cable. The quotation from [MM] Pte Ltd dated 6 October 2022 includes "one lot of electrical wiring from CU to isolator". It is not clear from [OO] Pte Ltd's quotation dated 30 September 2022 what are the "exclusion & qualification".

184 It is not in dispute that the Claimant has carried out the ACMV work. However, [UU] did not value the "Material Cost" in its valuation attached to PR 24. In the RRS, as explained above, from the Respondent's perspective, [UU] proposed to use the lowest of the three quotations from [OO] Pte Ltd to derive the amount of $24,150.00.

185 On the facts and having considered the documents and submissions, I am satisfied with the Claimant's proof of entitlement but has doubt on the quantum and the three quotations.

186 In the circumstances, taking a "pragmatic estimation" approach as suggested by V K Rajah JC (as he then was) in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [78]), which the Parties' counsel agreed during the Merits Conference that I am at liberty to do so, I determine that a fair and reasonable amount for ACMV is **$29,425.00.** This sum is derived based on the arithmetic average of the quotations from [NN] Pte Ltd and [OO] Pte Ltd (since they appear to be of the same scope of works for ACMV) plus 10% for profit and attendance.

187 For electrical work, it is not disputed that the work was carried out and the Claimant is entitled to be paid as a variation. However, I find that the Claimant has not proven on a *prima facie* basis the star rate of $90/m run for *16mm x 5c* PVC/PVC cable on *cable tray*. The Claimant did not provide

any tax invoice from its subcontractor to prove that the star rate was the actual cost incurred (plus 10% profit and attendance). I do not think the quotations from [WW] and [VV] (both for *5x6mm and 5x10mm* PVC cables c/w *trunking*) dated 30 December *2024*, which are much lower than the star rate, are reflective of fair market rates at the time the variation was completed in *October 2022* (emphasis added to show the different specifications and timing). As I mentioned during the Merits Conference, the prices of construction materials, such as copper wire in this case, are substantially higher in 2024 than in 2022.

188 Having considered the Claimant's supporting documents and arguments from the Parties, though the star rate of $90/m run for 16mm x 5c PVC/PVC cable on cable tray was not substantiated but the electrical work was carried out, I accept and allow the Claimant's claim for electrical work for the sum of **$20,576.50** (*ie*, $436.50 for relocation of isolator + $16,335.00 x 80% for the cable on cable tray + $7,072.00 for 2 core sensing cable).

189 As regards the claim for Item a(i) "Protection to existing unit", having considered the Claimant's supporting documents and arguments from the Parties, though the work was carried out, the star rate (which was priced as a "sum") was not substantiated. I am unable to accept the quotations from [WW] and [VV] dated 30 December 2024 as they do not specify the type of materials to be used for protection in the context of electrical work, which the Claimant used to support its claims for VO 25 and are not reflective of fair market rates at the time the variation was completed. In these circumstances, I accept and allow the Claimant's claim for double protection for the sum of **$1,200.00**, after a minor reduction.

190 It is not clear to me how [UU] has derived the amount of $44,900.46 (which is about 54.4% of the claimed amount) as it only remarked in its valuation that it was "based on work done on site" and "pending BJG to submit supporting [documents] to substantiate".

191 For the above reasons, I find that the Claimant is entitled to be paid $51,201.50 (*ie*, $29,425.00 + $20,576.50 + $1,200.00) for this variation. Since the Respondent's response amount has included the sum of $44,900.46 as certified in the 24th interim payment certificate, I allow a further sum of **$6,301.04** (*ie*, $51,201.50 – $44,900.46) for this variation as part of the Adjudicated Amount.

VO 4: additional FCU and ducting (02–02 [YY])

192 For VO 4, for the claimed amount of $72,150.75, the Employer's Representative did not certify any amount. [UU] remarked in its valuation for this claim as "Not valid" and "No ERI-BJG claim that is a valid vo, thus

pending BJG to submit supporting [documents] to substantiate their claim validity".

193 At para 162 of the RWS, the Respondent stated that [UU] has considered the new and additional documents in the AA and "the Respondent has not contested the Claimant's entitlement in this AR (*eg*, VO 4 and VO 9)".

194 During the Merits Conference, Mr Sathia for the Respondent confirmed that the Respondent agreed to VO 4.

195 In the circumstances, I find that the Claimant is entitled to be paid $72,150.75 for this variation. Since the Respondent's response amount and the 24th interim payment certificate have not included any amount for this variation, I allow a sum of **$72,150.75** for this variation as part of the Adjudicated Amount.

VO 6: additional finishes to tenant's kitchen exhaust duct HD panel (KED HD Panel)

196 In PC 24, the Claimant claimed the sum of $17,400.00 for VO 6. However, for the purposes of this AA, the Claimant is only pursuing a claim for $12,637.50. The revision was due to a revised claim of only 25% for primer.

197 In PR 24, the response amount (as certified by the Employer's Representative) is $3,810.00. The dispute in quantum is essentially in respect of the Claimant's claims for painting and staging works.

198 The Claimant argued that as it has completed primer, it is entitled to 25% of the value of texture painting. In addition, the Claimant claimed 100% for the amount of $11,050.00 based on star rate for staging works for external painting. The Claimant also argued that the Respondent's objection with regard to the staging work was not raised in PR 24 and hence, s 15(3) of the SOP Act would apply.

199 The Respondent's case is that based on the photographs provided by the Claimant, "only normal painting has been applied, and [UU] has not been able to gain access to carry out a physical inspection". Thus, [UU] has assessed the claim based on normal external paint at $6.21/m² as opposed to the Claimant's rate for texture painting at $25/m². The Respondent also disputed the quantity of painting and the claim of staging work.

200 Having considered the Claimant's supporting documents and arguments from the Parties, I find that the Claimant is entitled to be paid for this variation.

201 As explained by the Claimant, it only claimed 25% of the texture painting work (which comprises four layers) on account of the fact that only

primer (that is the first coat) was done. The Respondent is not disputing the rate for texture painting *per se*. Since texture painting was required, the valuation should be based on the rate for texture painting inclusive of a primer coat.

202 However, I am unable to accept the Claimant's star rate (which was priced as a "sum") for staging works, as it is not substantiated with any tax invoice from its subcontractor to prove that the star rate was the actual cost incurred (plus 10% profit and attendance). Further, since the painting work was still in progress as at 24 November 2024, it is not justified for the claim to claim 100% as the Claimant has to maintain the staging/scaffolding (such as routine inspection by Ministry of Manpower-approved scaffold contractor) and that it has yet to be dismantled and demobilised. In the circumstances, I accept and allow the Claimant's claim for staging works for the sum of **$7,735.00**, after a 30% reduction.

203 For the above reasons, I find that the Claimant is entitled to be paid $9,322.50 (*ie*, $1,587.50 + $7,735.00) for this variation. Since the Respondent's response amount has included $3,810.00 for this variation, as certified in the 24th interim payment certificate, I allow a further sum of **$5,512.50** (*ie*, $9,322.50 – $3,810.00) for this variation as part of the Adjudicated Amount.

VO 9: secondary drain pans to all FCUs

204 For VO 9 for the claimed amount of $42,000.00, the Employer's Representative did not certify any amount as [UU] remarked in its valuation as "Not valid" and "No ERI".

205 At para 162 of the RWS, the Respondent stated that [UU] has considered the new and additional documents in the AA and "the Respondent has not contested the Claimant's entitlement in this AR (*eg*, VO 4 and VO 9)".

206 During the Merits Conference, Mr Sathia for the Respondent confirmed that the Respondent is "not contesting" the claim for VO 9.

207 In the circumstances, I find that the Claimant is entitled to be paid $42,000.00 for this variation. Since the Respondent's response amount and the 24th interim payment certificate have not included any amount for this variation, I allow a sum of **$42,000.00** for this variation as part of the Adjudicated Amount.

VOs 13, 15, 23: works relating to relocation of CUs at the Building

208 For VOs 13, 15 and 23, since the Parties' counsel dealt with them together in their respective written submissions and orally, during the Merits Conference, I will do likewise in this determination.

209 VOs 13, 15 and 23 allegedly relate to the Respondent's instructions in relation to the CUs at the Building. They are as follows:

(a) the supply and installation of two units of jet fan at the carpark (claimed as VO 13);

(b) the supply and installation of eight units of CU translation elbow ducting for the CUs at the carpark (claimed as VO 15); and

(c) the relocation six sets of CUs at Level 2M carpark (claimed as VO 23).

210 According to the Claimant, the tender drawings showed that the CUs were to be placed outside of the Building, at the first storey external area. Subsequently, during the discussions at the initial kick-out meetings with the Respondent's Mr [O] (who was the Vice President of the Respondent then), the Respondent instructed the Claimant to relocate the CUs into the Building as he considered it unsightly for the CUs to be placed outside. Later, as evidenced by Meeting Minutes No 2 held on 14 July 2022 (see Item 3.1.6 of the meeting minutes), the Claimant was instructed to relocate the CUs for Levels 1–3 at the Level 3 carpark while the CUs for Level 4 and above were to be placed at the Level 7 RC flat roof. Pursuant to the Respondent's instruction, the relocations to the carpark were incorporated into revised drawings issued by the architect on 22 July 2022.

211 However, it turned out that Level 7 RC flat roof where the Respondent had wanted the CUs to be relocated could not accommodate all the CUs for Levels 4–8 and therefore some of the CUs were to be relocated elsewhere.

212 At this juncture, I pause to note that the LOA dated 17 October 2022 was accepted and signed by the Claimant on 20 October 2022.

213 As regards the issue of liability, the Claimant asserted that during the execution of the works, the Respondent instructed the following further changes:

(a) As evidenced by the Respondents' Mr [A]'s e-mails of 21 July 2023 and 7 August 2023, in July and August 2023, the Respondent instructed the newly installed CUs at Level 2A, serving tenants, namely [Q], [ZZ] and [YY], to be relocated and/or shifted. The relocation works involving five units of CU serving [Q] (namely, CU 1–4, CU 1–9, CU 1–8, CU 1–6, CU 1–2) and one unit of CU serving [ZZ] (namely, CU 2–5) are the subject matter of VO 23.

(b) During the period while the CUs were being relocated, as evidenced by the Respondent's Mr [A]'s e-mail of 29 August 2023, the Respondent further instructed the Claimant to implement interim measures to reduce the temperature at the existing CU area at carpark Level 2A. These measures comprise: (i) installation of jet fans; and (ii) installing duct-out/c-channel to CUs along first row, which are the subject matter under VO 13 and VO 15, respectively.

214 As regards the issue of quantum, the Claimant asserted that it had completed the variation works and the claimed amounts are fully substantiated, in summary, as follows:

(a) For VO 13 (two units of jet fans) for $10,476.00, the Claimant has applied the SOR rates and where star rates are applied, they are reasonable and supported by quotations from third parties.

(b) For VO 15 (C-channel ducting to eight units of CUs) for $13,500.00, the Claimant has applied star rates which are supported by quotations from third parties.

(c) For VO 23 (relocations of CUs) for $90,948.00, the Claimant has applied the SOR rates and where star rates are applied, they are reasonable and supported by quotations from third parties.

215 The Respondent's case as contended in the RWS may be summarised as follows:

(a) The depiction of location of CUs in the tender drawing relied by the Claimant is inconsistent with the Employer's design brief as part of the Employer's requirements which indicated that the CUs were to be placed on the rooftop.

(b) Consequently, there were discussions during the "kick-out meetings" between the Parties to resolve the inconsistency and to consider various options to resolve "the appropriate placement of CUs".

(c) Pursuant to the provisions in the LOA, it was the duty of the Claimant to highlight any inconsistency or discrepancy between the Contract Documents and the Claimant has to comply with the decision of the Employer's Representative at its "own cost and expense", in other words, no variation.

(d) The Respondent agreed that "the level 7 RC flat roof where the Respondent had wanted to the CUs to be relocated could not accommodate all the CUs for levels 4 to 8", however, this was a design issue which ought to have been raised by the Claimant (but was not). Instead, the Respondent was informed by the Claimant's consultant, [V] Pte Ltd ("[V]") that M/s [U] ("[U]") had conducted a simulation

and found that the "ambient temperature at the car park was not ideal". As a result, it was recommended that the Level 4 CUs be relocated.

(e) As communicated by the Respondent to [V] in an e-mail dated 20 July 2023, [Q] (one of the tenants) had also highlighted to the Respondent that "their air con for certain areas [was] not cold".

(f) The Respondent argued that in the circumstances, "the Respondent had no choice but to request in an e-mail dated 21 July 2023 that the Claimant explore" the various options.

(g) The Respondent also alluded to an e-mail of 7 August 2023 to the Claimant regarding the relocation of the CUs due to the "heated air circulation at the CU area" affecting [Q].

(h) "Ultimately, the responsibility to ensure that the CUs are installed at suitable and appropriate locations rests with the Claimant."

(i) Thus, the Respondent argued that there is no basis for the variation claims.

216 In reply to the RWS, the Claimant argued that the Respondent has sought to raise several new objections in the AR which the adjudicator is bound to disregard pursuant to s 15(3) of the SOP Act. Without prejudice to this general position, the Claimant provided rebuttals in CRS, which are summarised as follows:

(a) The revised tender drawing was issued on 4 March 2022, and it had superseded the design brief dated 24 February 2021. The tender drawing formed part of the Claimant's tender submission.

(b) In any event, the statement for "all condenser unit along façade *to relocate to roof*…" [emphasis added] in the design brief was also subsequently overtaken by events and was not even applicable as many of the CUs along the façade were dismantled by the tenants who moved out of the Building before the Claimant started work. The Respondent also decided to have brand new CUs installed instead of relocating existing CUs.

(c) The instruction by the Respondent's Mr [O] to relocate CUs came after the Parties have entered the Contract.

(d) As regards the recommendations by [V], they were made in the context for "improving the ventilation/ 'heat exchange' at the carpark Level 2M CU area". The recommendations included the use of "jet fan(s) to thrust the high temperature air above the CU forward beyond carpark parapet wall". This shows that the relocation was suitable and "there was no necessity to carry out further shifting or relocation of the

installed CUs, specifically in respect of the 6 set of CUs that are the subject matter of VO 23".

(e) The Claimant argued that:

> [U]ltimately, *the relocation works claimed under VO 23, jet fans (VO 13) and c-channel ducting (VO15) to reduce the temperature at the CU carpark area constitute works that arise from the Respondent's requirement of having the CUs shifted into the building. These are works not contemplated within the original scope of works under the Employer's Requirements at the time of Contract*. [emphasis added]

(f) To support the variation claims, the Claimant also alluded to the Meeting Minutes No 39 dated 5 April 2023 at item 6.2.5 in which it was recorded that the Respondent "*agreed* [on 27 April 2023] *that the jet fans constitute VO*" [emphasis added].

217 In the RRS, the Respondent alluded to the VO Tracking List and argued that the Respondent was justified in advancing the arguments in the AR.

218 As regards VO 23, the Respondent asserted that it "relates to the relocation of 6 sets of CUs <u>within</u> Level 2M itself" and "was a direct result of the Claimant's inappropriate placement of these units at this level". Hence, VO 23 should be rejected.

219 Citing an extract from [V]'s e-mail of 13 July 2023, the Respondent asserted that "as a result of the inappropriate placement of the CUs, this resulted in ambient temperature of the areas surrounding the CUs being excessive". "Pending the relocation of the 6 CUs concerned, the jet fans and ducting were necessary to ensure that the ambient temperature was within the acceptable range."

220 The Respondent concluded that "[in] other words, the jet fans and ducting were intended to rectify the Respondent's inappropriate installation of the 6 CUs". The Respondent also cited cl 26.1.1 of the REDAS COC to buttress its allegations that all these alleged variation works were "***necessitated by, or is intended to cure any default of or breach of contract by the Contractor***" [emphasis in original].

221 During the Merits Conference, Mr Lee for the Claimant made the following main points:

(a) Section 15(3) of the SOP Act applies for these VOs as the "reasons" in the RWS and RRS were not given in PR 24.

(b) The placement of CUs at Level 2M is an Employer's requirement. In this regard, Mr Lee referred to the supporting documents in the AA, Tab 5, VOs 13, 15 and 23, namely, a covering e-mail dated 22 July 2022 from the architect, M/s [S] Pte Ltd to the

Respondent's Mr [A] attaching architectural (tender) drawings showing the location at which the CUs should be placed.

(c) As regards the screenshot of WhatsApp shown at para 125 of the RRS, Mr Lee said that the WhatsApp message was for VO 3 ([YY]) and not VO 23. He tendered photocopies of screenshot of WhatsApp messages, for ease of reference, marked as exhibit "C1" and the Claimant's letter dated 25 October 2023 for VO 3 to prove his point that "[the] Respondent's evidence of inappropriate placement is wrong".

(d) As regards the extract from [V]'s e-mail of 13 July 2023 alluded to in para 127 of the RRS, he argued that "the Claimant were asked to perform these measures" and "to relocate the CUs at Level 2M" and the variation works were not due to a breach of contract. Referring to the Minutes of Meeting No 39 annexed at p 124 of the CRS, he said that "[the] Respondent admitted that it was a VO" and that the installation of "jet fan is an interim measure pending relocation of the CUs at Level 2M".

(e) As regards the works claimed under VO 15, Mr Lee for the Claimant said that it was "also temporary measure" as explained in para 109(b) (ii) of the AAS.

222 During the Merits Conference, Ms Ling (A&G) for the Respondent reiterated that as there was no ERI, there should be "no variation". Citing cl 26.1.1 of the REDAS COC and cl 4.1.2 of the Particular Conditions, she argued that since the CUs were inappropriately located, the Employer should not be responsible for the Claimant's breach of contract or the design. She also referred to an e-mail of 17 July 2023 (1.47pm) exhibited in the AR and asserted that the recommendations came from [V], the design consultant engaged by the Claimant. Mr Sathia for the Respondent argued that it is clear in the REDAS COC that the contractor takes full responsibility for design and the fact is the design and recommendations came from [V].

My determination for VO 13, VO 15 and VO 23

223 As I have explained in [127] above, the Respondent's reasons for not paying the three variations are that "Not valid" and "No ERI- BJG claim this is a valid vo, thus pending BJG to submit supporting [documents] to substantiate their claim validity". Thus, the Respondent's position in PR 24 is simply that since no ERI was issued, the variation claims was rejected as "not valid". [UU] essentially put the onus on the Claimant to prove the claims.

224 I therefore agree with the Claimant that the new reasons and objections given in the RWS and RRS relating to merits of the claims are prohibited by s 15(3)(*a*) read with s 17(6) of the SOP Act. Moreover, by not stating these new objections in PR 24, the Respondent has waived its right to raise these new objections in the adjudication. In this regard, see [66], [67] and [69] of *Audi Construction* ([61] *supra*). The foregoing notwithstanding, following the authorities as cited and discussed in [58]–[62] above, I have to adjudicate the claims on the merits and to determine whether the works claimed are variations under the terms of the Contract and, if so, what will be the quantum.

225 In my view, given the voluminous correspondence and many drawings referred to in the AA and AR, and the convoluted and disputed facts, I start by referring to the claim under VO 13 for the supply and installation of two units of jet fans.

226 It is not in dispute that the jet fans were introduced as a measure to improve the ambient temperature and ventilation by inducing air flow. As referred to by the Claimant in the CRS, the Respondent had in fact agreed to pay for this work as a variation. This was recorded in the Minutes of Meeting No 39 at Item 6.2.5, which was not contradicted in writing by BJH, or orally during the Merits Conference by the Respondent. This makes the Respondent's case that all these alleged variations were necessitated by the Claimant's breach of contract and/or poor or inappropriate placement of the CUs questionable.

227 In fact, from my perusal of the correspondence and the minutes of meeting accompanying the AA and the AR, I am unable to find any assertion of any sort from the Respondent that could possibly come close to proving a breach of contract and/or poor or inappropriate placement of the CUs by the Claimant as the probable reason necessitating all the variation works claimed in VOs 13, 15 and 23.

228 It is true that under the REDAS COC, the contractor has design responsibility. However, during execution of the works, on the facts, I find that since there was a change in the Employer's requirements and/or design brief, and the contractor was instructed to carry out additional works to relocate CUs, to improve the ambient temperature and ventilation and to resolve the issues raised by the Respondent's tenants, in the circumstances, the works would give rise to a variation under the terms of the Contract. I shall explain below.

229 During the Merits Conference, the Respondent's Mr [A] confirmed that there were no baseline drawings agreed by the Parties. Thus, in order to resolve the issue whether there was any inconsistency between the design brief and the revised tender drawing as asserted by the Respondent, I refer to cl 3.0 of the LOA. This clause provides, *inter alia*, as follows:

> *In the event of any discrepancy between any or all of the* correspondence and *documents listed above, the succeeding* correspondence and *documents in terms of date shall override and take precedence over the preceding* correspondence and *documents*, provided always that they do not conflict and/or are not inconsistent with the terms and conditions of this Letter of Acceptance, which shall always prevail and take precedence over any such correspondence and/or documents. [emphasis added]

230 It is not in dispute that the design brief (second issue) dated 24 February 2021 relied by the Respondent and the revised tender drawings issued by the Employer's architect to tenderers on 4 March 2022 relied by the Claimant are Contract Documents. Applying the above rule of construction in cl 3.0 of the LOA, I agree with the Claimant that later and revised tender drawing or Contract Drawings specifying the location of the CUs clearly superseded the general statement of intent in the design brief. The effect is that the Contract Drawings set out the revised Employer's requirements as regards the locations of the CUs.

231 Consequently, the Respondent's allegations that the discussions during the "kick-out meetings" were to resolve the alleged inconsistency and that the Claimant has to bear "own cost and expense" in carrying out the alleged variation works are misconceived and have to be rejected.

232 Subsequently, during a meeting on 14 July 2022 attended by BJH's Mr [O], Mr [A] and Ms [P], it was recorded by Item 3.1.6 of the meeting minutes that "Level 1–3's CU to place on Level 3 carpark, while Level 4 and above to place on Level 7 RC flat roof".

233 I agree with the Claimant that pursuant to the Respondent's foregoing instruction, the relocations of the CUs were incorporated into revised architectural drawings issued by the architect, [S] Pte Ltd, by way of an e-mail dated 22 July 2022 (12.30pm) to BJH's Mr [A] and copied to BJH's Mr [O] and Ms [P] and others (see AA, Tab 5, "VOs 13, 15, 23 2022.07.22 (1230hrs) (Revised Archi Drawings)") which the Claimant's counsel referred to during the Merits Conference. I note that in the drawings above, at the title block on "Legend", the architect inserted a note to explain the addendum or amendment which reads as "COLOUR MAGENTA DENOTES NEW WORKS".

234 Incidentally, during a meeting on 4 August 2022 attended by BJH's Mr [O] and Mr [A] and others, it was recorded by item 3.1.41 of the meeting minutes that "[Q]'s air-cond and condensing unit (CU) will be located at Level 3". [Q] refers to BJH's tenant.

235 Thus, I agree with the Claimant that the Minutes of Meeting No 2 dated 14 July 2022 recorded the instruction of the Respondent with regard to the relocation of the CUs and that pursuant to the Respondent's instruction, the relocations of the CUs were incorporated into revised

architectural drawings issued by the architect. In my view, at the material time, it is likely that [S] Pte Ltd was still under the employment of BJH as the LOA has not been issued and the details in title block of the revised architectural drawings dated 22 July 2022 issued to BJH do not include the name of the Claimant as the contractor or "Builder".

236 It is pertinent to note that while the foregoing took place, as evidenced by Minutes of Meeting No 2 dated 14 July 2022 (Item 3.1.7), BJH has yet to issue the LOA. I also note that neither the Minutes of Meeting No 2 nor the revised architectural drawings issued on 22 July 2022 forms part of the Contract Documents as they are not listed in cl 3.0 of the LOA.

237 Unfortunately, the location of the CUs was still not settled by the revised architectural drawings issued by the architect on 22 July 2022. According to the Claimant, "the level 7 RC flat roof where the Respondent had wanted the CUs to be relocated could not accommodate all the CUs for levels 4 to 8 and therefore some of the CUs were relocated elsewhere". The Respondent did not dispute this fact.

238 To complicate the matter, it appears that to accommodate the requirements of BJH's tenants, more changes were made to the location of the CUs. The Respondent also hinged on a simulation study by [U] to undergird its allegation that the relocation of the CUs was the result of inappropriate placement of the CUs.

239 The context leading to a simulation study by [U] is not clear. Neither of the Parties said who instructed [U] to commission the study, nor was a copy of the report provided in the AA or AR.

240 As evidenced by an internal e-mail of 6 July 2023 (6.05pm), [U] had produced "CFD simulation results for 16 [xxx]". By an e-mail of 7 July 2023 (3.41pm) from Ms [K] of [U] to the Claimant's Mr [I] and [V]'s Mr [J], [U] sent the "simulation results" to them with the following comments:

> Hi Mr [I]/ Mr [J],
>
> Kindly find attached the results for the above.
>
> At this moment, we are simulating with 100% operation, *together with level 4 CUs in place as per dwgs given*
>
> We have also assumed there is no cladding or screening on all sides of the car park.
>
> *We have <u>also included 9 Jet Air Fans</u> in our simulation hoping to improve on the dire conditions.*
>
> The simulation is done based on 4 scenarios/wind conditions: No Wind / LEFT/ RIGHT / BACK / FRONT

> *Even with Jet Fans, the ambient temperature at the carpark is not ideal.* Averaging at ~ 42DegC. In certain wind conditions, the temperature is above the CU guaranteed temperature of 52DegC.
>
> *High ambient temperature* will cause significant de-ration (*sic*) in the cooling capacity, and stressing of the equipment. Which will result in a much shorter lifespan.
>
> *We <u>strongly recommend</u> for level 4 CUs to be re-located*, since level 1–3 have already been installed.
>
> [emphasis added in italics and underlined italics]

241 By [V]'s e-mail of 13 July 2023 (9.02pm) to BJH's Mr [A], [V] forwarded [U]'s "CFD simulation results for 16 [xxx]" and e-mail of 7 July 2023 to BJH with the following statement: "Please see attached and below email for your references. It is the input from [U] regarding to the heat rejection from VRF CUs at 2nd Mezz storey carpark".

242 The reply from BJH's Mr [A] via his e-mail of 19 July 2023 (1.47pm) is an important background fact leading to the carrying out of the variation works. The Respondent's counsel also referred to this e-mail during the Merits Conference. Mr [A] said:

> Hi Mr [J],
>
> Thanks for sharing the report from [U].
>
> *Would you be able to provide your* ***recommendation to <u>improve</u> the poor heat exchange issue at car park level 2M****.*
>
> [emphasis added in italics and bold italics]

243 Naturally, [V] replied with an e-mail of 19 July 2023 (4.06pm) to BJH only, which I reproduce below (excluding the graphic presentation and a photograph):

> Hi Mr [A],
>
> With references to the issue of warm air accumulation in the vicinity of the VRF outdoor unit at 2nd Mezz storey, please refer to following suggestions,
>
> 1. *Use jet fan(s) to thrust the high temperature air above CU forward beyond carpark parapet wall, the fast-moving air will draw the surrounding air along with it due to induction effect.*
>
> …
>
> 2. Installation of perforated panel on the 2nd mezz storey façade is not recommended, it is necessary to maximize the wall opening area for cross ventilation.

3. To reduce the number of rows of CUs by shifting the CUs installed at the back to the position closer to parapet wall.

…

4. *The space clearance around CUs shall be adhered to manufacturer requirement.*

…

5. *Placement of 4th storey tenant CUs shall be based on tender proposal, which was originally planned at 7th storey roof.* As discussed in the AEI meeting, those CUs serving office area can be installed at RC cantilever above bin center.

[emphasis added]

244 Thereafter, BJH's Mr [A] replied to [V] and instructed the Claimant via his e-mail of 19 July 2023 (1.47pm) as follows:

Hi Mr [J],

Thanks for the recommendation.

Hi Mr [I],

Reference to the below recommendation from [V] and further to our meeting on 17 July 2023, *please let us know when the newly installed CUs at level 2A can be relocated to achieve the space requirement by [U] as well as to comply to Architect's design*.

[Q] has been highlighting to us that their air con for certain areas is not cold, likely due to the *poor air circulation at the CU area*. The current situation, if allowed to persist, will not only increase energy costs but will also shorten the equipment lifespan.

Please let us have your proposed CU relocation schedule by coming Monday, 24 July 2023.

[emphasis added]

245 At this juncture, I wish to point out that I disagree with the Respondent's assertion that the "space clearance around CUs" brought out in [V]'s e-mail of 19 July 2023 evidenced the inappropriate placement of the CUs. As explained by the Claimant's counsel, this lack of space clearance between the two CUs installed could be rectified by shifting the concrete plinths and one or both of the CUs outwards to create a bigger space clearance. However, BJH's Mr [A] decided to instruct the Claimant otherwise, namely, "*the newly installed CUs at level 2A can be relocated to achieve the space requirement by [U] as well as to comply to Architect's design*".

246 More instructions from BJH's Mr [A] ensued. For example, Mr [A] instructed the Claimant via his e-mail of 21 July 2023 (2.00pm) as follows:

> Hi Mr [I],
>
> Further to our site discussion earlier today, please explore the following:
>
> 1. To accommodate the CUs for level 4 at the RC roof above bin centre
>
> 2. To relocate the CUs for level 3 to the external area outside fire lift lobby 2
>
> 3. ***To spread out the newly installed CUs for level 1 and 2 serving [Q], [ZZ] and [YY] at level 2A***
>
> 4. ***Get [U] to rerun the simulation report to see if the jet fans are necessary***
>
> ***Meanwhile, please make arrangement to improve the temporary measures at level 2A.***, i.e adjustment of industrial fans to blow out the hot air.
>
> [emphasis added in bold italics]

247 By BJH's Mr [A]'s e-mail of 7 August 2023 (9.08am) to the architect and the Claimant, the Respondent instructed as follows (so far as relevant for our consideration of these VOs and reproduced below without the graphic presentation):

> Hi all,
>
> Further to our discussion on last Friday, ***there is a need to urgently relocate [Q]'s condensing units, which are now located at car park level 2A***, *as the heated air circulation at the CU area is likely to be affecting the FCU performance in [Q]'s unit.*
>
> As discussed, can we explore the following options: …
>
> [emphasis added in italics and bold italics]

248 By BJH's Mr [A]'s e-mail of 16 August 2023 (1.57pm) to the Claimant, the Respondent instructed as follows (so far as relevant for our consideration of these VOs and reproduced below):

> Hi Mr [I],
>
> ***Further to our discussion in the meeting earlier this morning, it has been proposed to relocate 9 nos of [Q]'s CUs to the roof of new bin centre*** as both earlier option 1 and 2 are not feasible.
>
> Can you please advise on the timeline for the ST submission and construction of the new bin centre + proposed schedule of [Q]'s CU relocation for us to brief [Q].

> Please also let us have the analysis report of the temperature survey which was completed on last Friday.
>
> [emphasis added in bold italics]

249 By BJH's Mr [A]'s e-mail of 29 August 2023 (11.47am) to the Claimant, Mr [A] commented on the Claimant's schedule and instructed as follows (so far as relevant for our consideration of these VOs and reproduced below):

> ***During the period from now till CU relocation, we will need to implement the following interim measures to bring down the high temperature at existing CU area at carpark level 2A:***
>
> > ***1. Installation of duct-out / C-channel to CUs along first row***
> >
> > ***2. Installation of jet fans (3 nos)***
>
> Can you please let us know the proposed timeline for the abovementioned by tomorrow.
>
> Mr [J] – Can you please advise if it is possible for [Q] to add in another FCU based on the existing CU capacity if they wish to improve on the FCU performance after the CU relocation.
>
> [emphasis added in bold italics]

250 As evidenced by BJH's Mr [A]'s e-mail of 4 September 2023 (10:51am), after BJH's meeting with [Q], BJH asked the Claimant, [V] and the architect to explore 2 options on relocation of CUs.

251 By BJH's Mr [A]'s e-mail of 11 September 2023 (1:46pm) to the Claimant, Mr [A] instructed as follows (so far as relevant for our consideration of these VOs and reproduced below):

> Hi Mr [I],
>
> ***As confirmed by [Q] last Friday, they would like to proceed with Option 2;***
>
> > ***1. CU 1–4, 1–8 and 1–9 to be relocated to the area next to generator room***
> >
> > ***2. Remaining CU 1–2 and 1–6 to be relocated to roof top of new bin centre***
>
> Please try to bring forward the CU relocation for CU 1–4, 1–8 and 1–9 by end-Sept 2023 and CU 1–2 and 1–6 in early Oct 2023, where possible.
>
> [emphasis added in bold italics]

252 By BJH's Mr [A]'s e-mail of 19 September 2023 (5:07pm) to the Claimant, Mr [A] instructed as follows (so far as relevant for our consideration of these VOs and reproduced below):

> Hi Mr [I],
>
> ***We would like to proceed with the installation of 3 nos jet fans at carpark level 2A during the interim period before the relocation of CU 1–2 and 1–6.***
>
> @Mr [J] – Appreciate if you could advise on the exact location for the 3 nos of jet fans to be installed please.
>
> [emphasis added in bold italics]

253 By BJH's Mr [A]'s e-mail of 3 October 2023 (9.39am) to the Claimant, Mr [A] instructed as follows (so far as relevant for our consideration of these VOs and reproduced below):

> Hi Mr [I],
>
> As discussed yesterday, we noted that the installation of C-channel ducting was completed last week and the temperature at the CU area (carpark level 2A) has slightly improved, i.e 35 to 38 degrees Celsius as compared to previously 42 to 45 degree Celsius. However, it is still not within the ideal temperature range, i.e <35 degrees Celsius.
>
> ***In view of the above, please proceed with the installation of 2 nos jet fans to ease the heat issue at the CU area during the interim period before the full CU relocation works are completed.*** Please let us (*sic*) if the jet fans can be deployed by this week.
>
> [emphasis added in bold italics]

254 I was not referred to any performance requirements in the Employer's requirements or design brief with regard to ambient temperature or parameters relating to the environment which the Claimant has to comply. From the chronology of events, and as explained above, I note that the Respondent's Mr [A] asked [V] to recommend improvements. Consequently, this led to further instructions from the Respondent to the Claimant on relocation of the CUs and installation of jet fans.

255 As evidenced by Item 7.2.2 of the Meeting Minutes No 59 dated 2 October 2023, it seems that by 2 October 2023, the scope of the variation works was finalised and proceeded with. There is no dispute that the variation works were completed. This is supported by undated photographs. In this regard, the Claimant clarified at para 99 of the CRS that "Level 4 CUs were not eventually installed at the carpark and the Claimant is also not claiming for relocation of the level 4 CUs under VO 25".

256 In the circumstances, on the facts, I find it hard to accept that just because the Claimant engaged [V], the Claimant has to bear the costs of the additional works, and it was within the Contractor's design responsibility. Based on the correspondence and conduct of the Parties, I find that there

were implied promise by the Respondent to pay the variation works. The Respondent instructed that the works were to be carried out.

257 In fact, as evidenced by, *inter alia*, the following facts, and contrary to the Respondent's contentions at paras 113 and 114 of the RWS, the Respondent and [UU] knew that the Claimant was expected to be paid for the variation works:

(a) A footnote just below the record for item 4.0.3 on "Anticipated VOs to be Submitted" recorded in the minutes of meeting no. 39 which reads as follows:

> [27 April 2023] [UU] highlighted that there are potential VO works for CU installation at level 2M, serving 3rd and 4th sty which was planned to be installed at level 7 rooftop. Jet fan blowers are required to be installed at level 2M so as to prevent overheating of CUs.

(b) The Claimant's quotation dated 10 October 2023 for VO 13 submitted to the Respondent which was not objected.

258 As regards the quantum of the variation works, the Respondent did not dispute the amounts claimed in the RWS and RRS. However, having considered the Claimant's supporting documents and submissions, I am unable to accept the Claimant's star rates (which were priced as a "sum") for VO 13, VO 15 and VO 23 as they are not substantiated with any tax invoice from its subcontractors to prove that the star rates were the actual costs incurred (plus 10% profit and attendance). I was also unable to find that the third party quotations provided by the Claimant prove that the star rates are market rates and prices. For example, neither the quotation dated 16 June 2023 from [LL] Pte Ltd nor the quotation from [NN] Pte Ltd dated 27 March 2024 for VO 13 was accepted and signed by the Claimant. For VO 15, neither of the three quotations was accepted and signed by the Claimant. For VO 23, as pointed out above, the quotations from [WW] and [VV] are dated 30 December 2024, after the variation works were completed.

259 For VO 23, I note that the Claimant, like all other VO claims, have included star rates for "Preliminaries", namely, $1,500.00 for "Protection to existing CU units at L2A", $3,500.00 for "Safety and supervision" and $1,200.00 for "Working platform ad hoisting/ lifting machineries to relocate CUs". For the same reasons as explained for VO 1 and VO 3 above, I find that the Claimant has not proven on a *prima facie* basis that it had provided "protection", "safety and supervision" and "working platform and hoisting / lifting machineries" over and above that were required under the Contract specifically for this variation. In the circumstances and for the reasons as explained above, I reject the claims for "Item 1.0 Preliminaries" of the claim.

260 In the circumstances, taking a pragmatic estimation approach, I determine that a fair and reasonable amount for VO 13 is **$8,380.00**, VO 15 is **$10,800.00** and VO 23 is **$67,800.00** after a reduction of about 20%.

261 For the above reasons, I find that the Claimant is entitled to be paid **$8,380.00** for VO 13, **$10,800.00** for VO 15 and **$67,800.00** for VO 23. Since the Respondent's response amount and the Employer's Representative's 24th interim payment certificate have not included any amount for these variations, I allow these sums for these variations as part of the Adjudicated Amount.

VO 17: temporary measure for sump pump

262 It is not in dispute that this work arose from the Respondent's instruction to upgrade the ejector pump (which was claimed and certified under VO 14).

263 The Claimant's case is that since the Respondent accepted that it had instructed the upgrade in the ejector pump and those works constituted a variation to the Works, "it necessarily follows that the temporary measure works instructed that arose from the upgrading works also constitute a valid variation which entitles the Claimant to additional payment". The Claimant further alleged that "the temporary measure involving the installation of a temporary (sump) pump to discharge sewerage from IC 2 to IC 7 was instructed because using the existing IC was not feasible and the downtime of 15 days was unacceptable to the tenant ([Q])" and that "the temporary pump was thus installed because the Respondent instructed for there to be no downtime for the level 1 tenants".

264 It is not in dispute that prior to carrying out the works, the Claimant had submitted its method statement for the temporary measures to the Respondent for approval. The Claimant asserted that there was no objection from the Respondent.

265 The Respondent's case in the RWS is that the works claimed under VO 17 "would not have been necessary but for the Claimant's delays". In this regard, the Respondent referred to a chronology of events starting with a request for costing on 27 February 2023 for upgrading of the ejector pump, submission of a quotation by the Claimant on 27 April 2023, submission of supporting documents by the Claimant on 5 June 2023 and [UU]'s comments on 17 and 26 July and 13 August 2023.

266 The Respondent also asserted that as the new ejector pump was not installed before [Q] moved in, the existing ejector pump started to face overflow issues. After the Claimant was instructed to proceed with the ejector pump upgrading works, a downtime of 15 days was encountered,

which was not acceptable to [Q]. Hence, there was a need for the temporary sump pump. The Respondent asserted that the "foregoing issues could have been avoided had the Claimant responded promptly to the Respondent's request for information regarding costing of the new ejector pump at the initial stage".

267 In the CRS, the Claimant objected to the "new" reasons sated in the RWS which were not raised in PR 24 and submitted that the Respondent is precluded from raising these new reasons in the AR. The Claimant disputed the Respondent's allegations relating to delay.

268 The Claimant referred to the correspondence relating to [V]'s advice to upgrade the ejector pump, submission of technical information and review by the Respondent and submission of quotation by the Claimant for the upgrade of ejector pump and argued that the Respondent had only provided confirmation to proceed with the ejector pump replacement on 17 July 2023.

269 The Claimant asserted that the Respondent has not presented correctly the alleged "overflow issues" and "downtime" issue. According to the Claimant, it was not because of the overflow issues that the Respondent had instructed the Claimant to proceed with the pump upgrading works. The reasons for the instruction, which I reproduce in full, are as follows:

(a) [First], the existing sanitary infrastructure on the 1st storey was not originally designed to accommodate a central kitchen. It was only when [Q] became a tenant at 1st storey that the ejector pump system had to be upgraded to a higher capacity so as to be able to handle the increased volume of wastewater generated by [Q]'s operations (given that they had a central kitchen).

(b) Secondly, wastewater from the 2nd storey (and all storeys above) is discharged conventionally, by gravity flow. For the first storey, discharge pipes are positioned at a level *below* the inspection chambers pipeline that connect to the external sewerage manhole. As a result, ejector pumps are required to pump the wastewater from the first storey up to the inspection chambers so as to allow the discharge to the external sewerage manhole. However, the Respondent instructed that the sanitary pipes be diverted (under VO 12 which is not a disputed VO) such that the waste water from *both* level 1 and level 2 would now go to the ejector pit and therefore the ejector pump system had to be upgraded so that it could accommodate the pumping services required for both level 1 *and* level 2.

(c) Further, the alleged overflow problem arose not as a result of the ejector pump, but due to a 'construction choke' in the inspection chamber ('IC'). There were works being carried out at the unit, and it is likely that the IC line was choked by construction waste, leading to the

> overflow. The alleged overflow problems have nothing to do with the new ejector pump not being installed before [Q] moved in.

[emphasis in original]

270 In the RRS, the Respondent asserted that in light of [UU]'s statements in the VO Tracking List on "evaluation status" and pending submission of the supporting documents from the Claimant, "the Respondent is not precluded from making arguments" in the RWS and RRS. The Respondent also asserted that the Claimant was slow in responding to [V]'s request to check the on-site capacity of the existing sewerage ejector pump and in responding to advice by [V] for the Claimant to engage a licensed plumber to check. As regards the quotations submitted by the Claimant, the Respondent asserted that the Claimant was slow in providing supporting documents for [UU] to evaluate and that the costing was neither fair nor reasonable as, amongst other things, the Claimant should not have used a new sump pump but rented a sump pump at a much lower cost.

271 During the Merits Conference, Mr Lee for the Claimant reiterated that s 15(3) of the SOP Act applied as the "reasons" in the RWS and RRS were not given in PR 24. He also argued that the Respondent's arguments were inconsistent with "contemporary evidence". On quantum, Mr Lee argued that the assertion of renting a sump pump was from the Respondent's perspective. However, at the material time, there was "no end date in mind" and the "end date was unclear". He added that the amount claimed was reasonable as compared with the quotation from third party.

272 Ms Ling (A&G) asserted that it was "common sense" that "a new sump pump cost more". She also took issue with the late submission of time sheets and the RE's endorsement.

My determination for VO 17

273 Having perused the documents and the Parties' submissions, I find that the "new" reasons advanced by the Respondent are misconceived. First, as the Claimant has argued, they were not stated in PR 24. As stated above, [UU]'s (and hence the Respondent's) position in its valuation and PR 24 respectively was that, just like the other rejected VOs, "Not valid" as there was "No ERI". Secondly, the reliance on [UU]'s statement in the VO Tracking List is misconceived. [UU] essentially put the onus on the Claimant to send supporting documents to prove the claims. That, in my view, could not be an excuse for the Respondent's failure to discharge its "duty to speak" in a payment response.

274 I do not think I need to retrace the events as I accept the facts as put forward by the Claimant. The truth of the matter is that the Respondent took time to decide before finally instructing the Claimant to proceed with

the upgrade of the ejector pump. They wanted to be satisfied with the technical details and the cost. Indeed, in my view, once the technical details were accepted, the Employer's Representative could have issued an ERI with a valuation to be dealt with later by [UU] and the Claimant in accordance with cl 26.3 of the REDAS COC. In the event, it appears that ERI was issued for VO 14 and other variations on or about 15 July 2024. According to the Claimant's timesheets, the temporary measures were carried out in the first two weeks of January 2024.

275 I also agree with the Claimant that in any event, given the nature of the ejector pump upgrading works, downtime was expected and as the Claimant said, a temporary pump sum would have been required in any event. Moreover, the Respondent was forewarned in the Claimant's quotation dated 26 April 2023 for VO 14 that "Pumps and Control Panel lead time min 6 months from the date of confirmation".

276 In the circumstances, on the facts and based on the correspondence and conduct of the Parties, I find that there was implied promise by the Respondent to pay the variation works. The Respondent instructed that the works were to be carried out.

277 As regards the quantum of the variation work, I note that the Claimant, like all other VO claims, have included star rates and claimed "Preliminaries", namely, "Safety provision and supervision including traffic controller *etc*", "protection works (temporary barricade)" and "excavation and/or timber shoring", *etc*. Given the nature of the works and having perused the documents, I accept that these works were necessary and should be paid. However, having considered the Claimant's supporting documents and submissions, I am unable to accept the Claimant's star rates (which were priced as a "sum") as they are not substantiated with any tax invoice from its subcontractors to prove that the star rates were the actual costs incurred (plus 10% profit and attendance). A major component of the claim is a sum of $33,000.00 as a star rate for "supply and install over-pumping system" purportedly supported by [KK] Pte Ltd's invoice dated 9 January 2024 for $38,000.00 (excluding GST). If the Claimant had paid [KK] Pte Ltd, it begs the question why the Claimant claimed only $33,000.00. Since the new sump pump was installed as a temporary measure, in my view, there should be a rebate in the price claimed as the Claimant could reuse or sell the pump. I am also unable to find that the third-party quotations provided by the Claimant prove that the star rates are market rates and prices.

278 In the circumstances, taking a pragmatic estimation approach, I determine that a fair and reasonable amount for VO 17 is **$56,024.00** after a reduction of about 20%.

279 For the above reasons, I find that the Claimant is entitled to be paid **$56,024.00** for VO 17. Since the Respondent's response amount and the

Employer's Representative's 24th interim payment certificate has not included any amount for this variation, I allow this sum for this variation as part of the Adjudicated Amount.

VO 25: additional temporary works requested by tenant (Level 4)

280 This VO comprises many items, broadly as follows:

(a) Item 1, "Preliminary": the Claimant did not claim;

(b) Item 2, "Additional full height partition as requested by [T]";

(c) Item 3, "Builders Works (as requested by [T])";

(d) Item 4, "M&E works"; and

(e) Item 5, "Additional general cleaning works".

281 During the Merits Conference, Mr Lee for the Claimant informed that his client is not proceeding with its claims for Item 3, "Builders Works (as requested by [T])", Item 4.3 "To re-run new cabling and reuse existing switches in the tenanted units (inside hoarding); switches removed from common area outside hoarding", Item 4.7 "To dismantle and reinstall sprinkler head", Item 4.9 "Relocation of Pharmacy's CUs", and Item 5 "Additional general cleaning works". The result is that the total amount claimed is reduced from $449,019.90 to **$233,122.00** as shown by a revised breakdown tendered during the Merits Conference, for ease of reference, which was marked as exhibit "C2".

282 The Employer's Representative did not certify any amount in the 24th interim payment certificate. In [UU]'s valuation, the QS remarked that the claim is "Not valid" and the "Evaluation Status" is "No ERI".

283 The Claimant's case for all the items claimed under this VO is that the addition and alteration works that were to be undertaken by the Claimant under the original contract scope are entirely different from the works done under VO 25. The Claimant argued that the additional works under VO 25 were requested by the Respondent's tenant at the fourth storey, [T], after the Contract was entered into and the Respondent instructed the Claimant to accede to all those requests.

284 For Item 2, "Additional full height partition as requested by [T]", according to the Claimant's counsel, Mr Lee, the Contract requires installation of full height hoarding made of plywood. However, the Claimant was instructed to install full height drywall which is more costly. Thus, in their cost breakdown for this VO, they omitted the cost of full height plywood partition and added full height of drywall partition.

285 The Respondent's case is that all the purported works carried out formed part of the Claimant's contractual obligations and do not constitute variation works.

286 The Claimant's main contentions in the AAS may be summarised as follows:

(a) In the Contract, the Claimant had made provisions to install canvas, moveable barricade and plywood partition, which are typically used for temporary hoarding in the construction industry.

(b) However, during the course of the works, [T] wanted drywall partition to be erected up to the soffit of the floor slab, instead of up to the ceiling where the floor partition ends.

(c) [T] wanted its warehouse area to be completely "close/sealed" so that the temperature for their operations could be maintained and thus wanted a full height partition wall to be constructed. This was further confirmed by [T] on 14 February 2023 and the Respondent instructed the Claimant to provide the revised work schedule based on the additional work requested by the tenant.

(d) As regards the relocation of [T]'s pantry, the Claimant argued that it was relocated twice. As a result, the Claimant has to modify existing pantry hoarding and to carry out plumbing and sanitary works. The Claimant therefore is entitled to claim for the costs incurred during the second relocation.

(e) The Respondent was aware that the works requested by [T] were additional works that were not covered by the Contract. This is evidenced by: (i) the Respondent's WhatsApp messages on 1 November 2023 and February 2024 asking the Claimant to provide the estimated costs for such works; and (ii) the Claimant's e-mail dated 18 June 2024 to the Respondent submitting its cost for the additional works requested by [T].

287 The Respondent's main contentions in the RWS may be summarised as follows:

(a) Under the Contract, the Claimant has to remove the existing façade (which causes the premises in operation by the tenant to be exposed to the weather elements) and install a new façade (as specified in Bill No 3) as "Façade Construction". Further, the Claimant has to ensure that the hoarding, as part of the "Temporary Works", is adequate, suitable, durable and practical and fit for its intended purpose under cl 4.1 of the REDAS COC.

(b) When carrying out the removal and re-installation of the façade, the Claimant has to ensure that the tenants' premises are adequately

protected from external weather elements (such as rain) as well as dust and debris generated from the ongoing construction works. The Claimant was also obliged to minimise any disruption to the tenants' operations.

(c) [T]'s premises at Level 4, with ceiling height of about 7m, due to the nature of its business and operations, have to comply with the Health Sciences Authority's stringent requirements, such as those relating to temperature and humidity and clean environment.

(d) Unfortunately, the Claimant did not adequately carry out the works which resulted in several incidents of rain ingress and water leakage to the tenant's premises in operation during periods of heavy rainfall.

(e) Due to the Claimant's multiple incidents of disruptions to [T]'s operation, water seepage and ingress, lack of protective measures taken and its breach of contractual obligations which caused [T] loss and damage, [T] required full height drywall partition to be erected as hoarding. These works also come within the Claimant's scope of works and not payable as a variation.

(f) As regards the relocation of pantry, the Respondent argued that this was to facilitate the carrying out of the Claimant's works in the vicinity of the original location of [T]'s pantry. As such, the Claimant is not entitled to claim a variation for work carried out within its contractual obligations.

(g) As regards the e-mail and correspondence and the Claimant's cost proposal relied on by the Claimant, the Respondent argued that they must be viewed in context of the Claimant's contractual obligations and the disruptions, *etc*, caused to [T] and thus they did not give rise to an instruction to the Claimant to carry out variation works. This is supported by the fact that no ERI was issued.

288 In reply to the Respondent's contentions in the RWS, the Claimant's rebuttals may be summarised as follows:

(a) The Claimant has no dispute with the contractual obligations under the Contract. The Claimant, however, contended that the extent of the works requested by [T] and carried out under VO 25 were substantial, not specified in the Contract and they were not under its original scope of work under the Contract.

(b) "There is no evidence that the Claimant's design of its temporary works was not suitable or fit for the carrying out of the Claimant's works. Instead, it was due to the Respondent's tenant, [T]' own peculiar and additional requirements which were raised only subsequent to the Contract that resulted in the additional works."

(c) As regards the Respondent's reliance on specific requirements of [T] and the Health Sciences Authority's Guidance Notes, this was never raised nor formed part of the Contract.

(d) As regards the Respondent's "isolated instances" of disruptions to [T]'s operations and alleged incidents, they are "a red herring to the current claim".

(e) "There is no causal link between the alleged incidents of breach raised by the Respondent and the Claimant's entitlement to be paid for the additional works claimed under VO 25. The Respondent has no evidence as to how the Claimant's original provision of canvass and plywood partitions (both full height) as temporary hoarding was inadequate for the Claimant's works."

(f) As regards the Respondent's allegations that "the canvas sheets used by the Claimant was not adequate, durable, suitable or fit for purpose" and other allegations relating to the relocation of [T]'s pantry and M&E works, the Claimant argued that these objections were not raised in PR 24 and the Respondent is barred under s 15(3) of the SOP Act from raising them in these proceedings.

(g) The Claimant further argued that in any event, the Respondent's allegation is without merit as "the Claimant had already made provision for a plywood partition as well as heavy-duty canvas", "[there] is no evidence that such double layer hoarding was inadequate for the Claimant to carry out its works", "[there] is no evidence that these materials are inadequate or unable to provide dust protection or minimize disruption to the tenants' operations" and "[there] is no evidence that the alleged incidents of water seepage and ingress at [T]'s unit (which are denied) occurred due to the Claimant's hoarding being of inadequate or unsuitable material".

(h) As regards the relocation of [T]'s pantry, there is no provision in the Contract that obligates the Claimant to carry out relocation works for the fittings, fixtures and/or installations within the Respondent's tenants' premises.

(i) "In the absence of any specification [or drawing] or provision whatsoever on the need to carry out relocation works, it would not have been reasonably foreseeable that any relocation works would be required of the Claimant in order to carry out its works. This is consistent with the fact that based on the Additions and Alterations Guidelines which the Respondent had issued to its own tenants, the tenants are responsible to '*remove installations, machinery, partitions or any articles to permit the Landlord to execute the replacement or installation works*'." [emphasis in original]

(j) As regards the M&E works carried out, the Claimant argued that the "permanent and substantial works in the tenant's premises … could not be reasonably contemplated as part of the duty to minimise disruption to the tenant's operations" as "[the] Claimant's obligation is also merely to *minimise* disruption and not to carry out whatever works requested by the tenant nor to ensure no disruption to the tenants at all" [emphasis in original].

289 In the RRS, the Respondent provided an extensive, point-by-point rebuttal of the Claimant's contentions. I will summarise the Respondent's main rebuttals as follows:

(a) For matters relating to [T], the Claimant was given access to [T]'s premises at the time of tender and the Claimant had or ought to have full knowledge of the details of [T]'s premises and operations prior to the formation of the contract between the Parties. The Respondent therefore argued that the works, including the relocation of [T]'s pantry, were within the Claimant's risks and responsibilities specified in cl 2.7 of the REDAS COC and as a design-and-build contractor.

(b) Relying on cl 4.1 of the REDAS COC, the Respondent maintained that the hoarding provided by the Claimant was not suitable or fit for its purpose.

(c) The Respondent argued that "[the] numerous incidents of disruptions and damage complained of by [T] are certainly not a 'red herring' and gave rise to legitimate concerns being raised by [T] on the adequacy of the hoarding / protection measures undertaken and to be undertaken by the Claimant at the material time". In this regard, the Respondent exhibited many photographs and argued that the protection or hoarding by the canvas installed by the Claimant (and not plywood and partition) was inadequate and "there was a litany of complaints from [T] on the significant adverse impact on its premises and operations, due to water seepage and ingress in [T]'s unit and severe dust nuisance".

(d) The Respondent argued that it has not raised new objections in the AR and RWS but they are elaborations.

290 During the Merits Conference, referring to layout attached as Annex B of the RRS, e-mails and many photographs, Mr Lee for the Claimant argued that the location of drywall partition is far from the locations where [T] complained of dust and disruptions and that the alleged "sorry state of canvas sheet has nothing to do with the replacement of plywood to drywall". In reply to Mr Sathia's assertion that canvass was used above ceiling, Mr Lee asserted that this was "overtaken by event as in the present claim, [the Claimant] omitted the plywood for the full height".

291 As regards the M&E works, Mr Lee argued that the Claimant could have easily switched off the power supply from the distribution box ("DB") and protect the light fittings. Instead, the Claimant did more than what was required and carried out the works as claimed under items 4.1, 4.2, 4.4 and 4.5 of exhibit C2.

292 As regards the relocation of pantry, Mr Lee for the Claimant argued that the Claimant need not do it twice but for the requests of [T]. It was not due to the Claimant's schedule of works. He also referred to an email dated 28 February 2024 from [T], attaching layout showing the proposed location for the pantry to be relocated. He added that "[T] says to accommodate our works", that was for the first time. "Obviously, [the Claimant] was entitled to claim for one of the two moves … because it was to accommodate [T]'s workers". Ms [C] explained that "the pantry was attached to the wall. If we moved it, we constructed a beam to hold the pantry. When it was first moved, it was clearly temporary. The Claimant made another move".

293 During the Merits Conference, in relation to the statements by Ms [C], Mr [A] for the Respondent said that "it was not a structural beam but a propping beam". Referring to the layouts exhibited at paras 150 and 151 of the RWS, Mr [A] pointed to the locations of the first move and asserted that the reason for the second move was because of the propping beam work.

294 During the Merits Conference, Mr Sathia raised the following points:

(a) The Claimant's claims must be viewed in the context of contractual responsibility, a design-and-build contract and not a bill of quantities ("BQ") contract, cll 2.6 and 2.7 of the REDAS COC, "site risks to be borne by the Contractor" and that the Claimant had full access to know the facilities of [T].

(b) "In terms of what [the Claimant] has to do", such as hoarding, and referring to para 126 of the RWS, the Claimant is responsible for "adequacy, suitability, integrity and durability". Thus, Mr Sathia argued that the hoarding must be adequate and durable such that they do not result in water ingress, dust penetration and fit for purpose "so that it does not cause nuisance".

(c) While acknowledging that the Respondent's position in PR 24 was that an ERI was issued for the works, Mr Sathia reiterated that "all these [*ie*, the arguments in the RWS and RRS] are elaborations".

(d) In relation to the alleged problems faced by [T], referring to a layout used by Mr Lee for the Claimant (in Annex B of the RRS), Mr Sathia asserted that the Claimant initially erected partial hoarding (indicated by blue line) and because the existing facade has to be removed, [T] requested full height of drywall.

(e) Referring to para 157 of the RRS, Mr Sathia argued that the Claimant's initial work plan was to erect full height of hoarding. However, there was no hoarding above the ceiling. Instead, there was canvass, not plywood, above the ceiling. Thus, he argued that the Claimant's computation of omitting plywood and adding drywall was doubtful.

(f) As regards the M&E works, referring to paras 168 to 171 of the RRS, Mr Sathia asserted that "historically, there was water ingress issue that led to the request".

(g) As regards the relocation of pantry, referring to paras 150 to 163 of the RRS, Mr Sathia asserted that "the relocation (twice) was to accommodate [the Claimant's] own works". He added that "[there] was no instruction from [T] or the Respondent". "From the Respondent's point of view, fundamentally, there must be a ERI". As there was also no ERI, there was "no variation instruction from the Respondent".

My determination for VO25

295 As a preliminary point, further to [127] above, I wish to repeat that in PR 24, the Respondent's reason for not paying is simply that the claim is "Not valid" because there was "No ERI". The Respondent did not go on to state in PR 24 that the works claimed in VO 25 are in any event works within the Claimant's contractual obligations and risks borne by the Claimant under the Contract. Thus, with due respect, I am unable to agree with the Respondent that the arguments raised in the RWS and RRS are "elaborations". Consequently, I agree with the Claimant that by s 15(3)(*a*) of the SOP Act, the Respondent cannot be allowed to rely on the objections which were not raised in PR 24. By not stating the new objections in PR 24, the Respondent has also waived its right to rely on these objections in the adjudication. See [66], [67] and [69] of *Audi Construction* ([61] *supra*).

296 Given the convoluted and disputed facts, I shall analyse the claims by first discussing the Claimant's original scope of works under the Contract. Secondly, I shall discuss whether the requests by [T], predominantly via e-mails, exceeded the scope of works under the Contract and, if so, whether the Respondent had instructed the Claimant to carry out such works and/or whether there was a promise to pay and the quantum of work payable, if any.

297 I agree with the Respondent that, in general, the Contract and REDAS COC provide for Temporary Works for protection, coordination and liaison with the Respondent's tenants and the Respondent's site representatives and risks allocation and to ensure minimal or no disruption to the daily operation of the Respondent's tenants. In this regard, the

Claimant is not disputing such provisions in the Contract. The Claimant's case is that it had carried out the alleged variation works over and above the contractual requirements which were required by the Respondent's tenant, [T], and instructed by the Respondent's via e-mails.

298 It is also indisputable that there were various complaints from [T] about water seepage, dust and disruptions. In my view, the question is whether the drywall and the other works caried out by the Claimant were necessitated by the former as the Respondent has contended or, as the Claimant has argued, requested by [T] and instructed by the Respondent beyond the contractual requirements.

Item 2 of exhibit C2: drywall partition

299 I start by dealing with the claim for full *drywall partition*. In this regard, I will only refer to salient correspondence which I think will shed light on the reason for the request for the full drywall.

300 I accept that in practice, the Claimant could erect canvass and/or plywood or use other suitable material for temporary hoarding. In this regard, it is indisputable that before the existing façade was demolished and removed, the Claimant has to erect a suitable and adequate hoarding that was fit for its purpose. As for the material to be used for hoarding, I am of the view that a full-height plywood would suffice. Moreover, I note that the Contract does not specify that the Contractor has to install drywall.

301 There is no dispute that the Claimant had erected full-height drywall as indicated on the location of the layout referred to by the Parties' counsel during the Merits Conference.

302 To provide context of [T]'s requests, I need to refer to, *inter alia*, the following e-mails between the Respondent and [T], and between the Claimant and the Respondent.

303 By an e-mail dated 11 October 2022 (10.11am) from the Respondent's Mr [A] to [T], the Respondent sent to [T] "tenant briefing slides" and enquired from [T] on "*[T]'s requirement*, i.e downtime, temperature, RH, *etc* to MOH *in order for [the Respondent] to finetune the AEI works*" [emphasis added].

304 By an e-mail dated 11 October 2022 (10.45am) from the Respondent's Mr [A] to [T], the Respondent asked [T] on "*[T]'s requirement for MOH compliance*, i.e downtime, temperature, RH, the design parameters of the production /warehouse area *so that* ***we can take these into consideration for the proposed AEI works***" [emphasis added in italics and bold italics]. It is clear from these e-mails that the Respondent was willing to accommodate [T]'s requirements.

305 By an e-mail dated 30 November 2022 (4.35pm) from the Respondent's Mr [A] to [T], the Respondent, having been informed of [T]'s requirements, informed [T] that the Respondent would "review the queries with [the Claimant] and will get back to [[T]] in due course".

306 After the Respondent replied to [T], by an e-mail of 27 January 2023 (11.38am), [T] asked, *inter alia*, as follows:

> For the hoarding of the warehouse, ***what are the materials that would be used***, would the hoarding be 'sealed' (like a partition wall?). As previously spoken during the couple of visits, we had highlighted that *the warehouse must remain closed in order to maintain the temperature for our [xxx] wholesaling operations to continue*. [emphasis added in italics and bold italics]

307 By an e-mail of 14 February 2023 (11.18am), after the Respondent had visited [T] and reviewed the Claimant's work schedule, [T] said as follows:

> Thanks for coming down on the 2 February.
>
> After internal discussion, *we concluded that* ***we do need the boarding up to cover through for the works done on the façade at the warehouse area*** *for prevention of pests and temperature control reasons. As such* ***we have determined that we require partition to seal the warehouse during the works*** *at the 'outfacing' walls*.
>
> In addition, can we have the latest version of the renovation works please? Thank you.
>
> [emphasis added in italics and bold italics]

308 After the receipt of the foregoing requests from [T], by an e-mail of 14 February 2023 (11.26am), the Respondent forwarded [T]'s e-mail of 14 February 2023 (11.18am) and asked the Claimant for a "revised work schedule for level 4".

309 By an e-mail dated 17 August 2023 (2.54pm) from the Respondent's Mr [A] to [T], the Respondent informed [T] that "[the Claimant] are ***using drywall partition for the temporary hoarding***". [emphasis added in bold italics]

310 By an e-mail of 11 October 2023 (5.21pm) to the Respondent's Mr [A], the Claimant attached "the amended layout of the temp partition/hoarding at level 4 [T] areas a[s] requested by [Mr [L]]" and informed the Respondent that "[the Claimant] are in the midst of preparing cost for these additional works and shall submit in due course". There is no evidence of any objection from the Respondent.

311 At least by this time, implicitly, the Respondent must have known that the additional works requested by [T] and instructed by the Respondent has

to be paid for as a variation. This fact is supported by the WhatsApp message from "[R] Mr [BB]" dated 20 February 2024 wherein the Respondent stated, "Let us have the ***exact full height partition cost for [T] hoarding works*** asap". [emphasis added in bold italics]

312 By an e-mail of 31 October 2023 (7.00pm) to [T], the Claimant requested permission to commence work at Level 4. So far as relevant for this issue, I reproduce a part of the e-mail as follows:

> Dear Mr [L],
>
> This is related to the site discussion we had today evening regarding *the commencement of the preparation work (for demolition of walls & curtain wall erection*).
>
> *Herewith attached the* ***Layout*** *(submitted earlier by BJG)* ***of the temporary full height hoarding along (inside) of your separated office partitions to separate the office area to carry out the external demolition and curtain wall erection works*** *and the proposed changes/ scope to Level 4.*
>
> …
>
> Please confirm us [*sic*] whether we can start our work on 13.11.2023 (Monday) for the ***hoarding installation …***
>
> [emphasis added in italics and bold italics]

313 As can be seen from the e-mails above, [T]'s requests to have a drywall partition as a hoarding have nothing to do with the alleged complaints of water ingress, dust and disruptions which could only occurred after the Claimant had commenced work at Level 4. It is also pertinent to note from the content of the e-mail of 31 October 2023 (7.00pm) to [T] that, at that time, the Claimant has yet to commence work when the request for "temporary full height hoarding" was already acceded to by the Respondent and the Claimant was instructed to proceed with the works when work schedules were requested by the Respondent so that the Respondent could forward them to [T].

314 With regard to the construction details and location of the hoarding which the Parties' counsel deliberated during the Merits Conference, I refer to the Respondent's Mr [A]'s e-mail of 11 April 2024 (2.42pm) to the Claimant forwarding [T]'s e-mail of 11 April 2024 (2.36pm) from Mr [L] to Mr [A]. As the Respondent harped on [T]'s complaints of "dust nuisance" and inadequate quality canvass as the reasons for the hoarding, for proper context, I will set out what [T] said as follows:

> After reviewing the MOS, a full height partitioning is required for the works proposed in the office area. Firstly, there have been numerous incidents that have been devastating. Please see attached photos of the conditioned found using canvas. This was made known to BJH last year September. *Canvases are*

not durable and won't secure our premises. Please follow the existing hoarding done at cargo lift and pantry area.

Above the ceiling area is open & exposed. This will lead to dust entering to other parts of the premises such as server room, production & warehouse. The dust will create further issues to the aircons and air sampling. As you are aware, air sampling has been a major issue for us since the start of AEI.

The works are being done inside a stretch of rooms and *it would be ideal for the hoarding to be inside the room for BJG to carry out the works without any hassle*. The partition works can be continuing above the current ones. I do see the markings done below the service line. Installing a canvas or partition boards will require ceiling boards removed and the required works can be carried out.

We would appreciate that partition boards will be used to avoid any unwanted incident. Please see attached photos below.

[emphasis added]

315 I make the following points regarding the foregoing e-mails from [T] to the Respondent and the Respondent to the Claimant:

(a) As stated in the e-mail, [T]'s comments came about after their review of the Claimant's method statement.

(b) Before this review of the method statement, as explained above, the Respondent had already instructed the Claimant to carry out full-height drywall partition/hoarding as a variation.

(c) The Respondent asked the Claimant for "clarification and counter proposal soonest". Clearly, the Respondent was prepared to accommodate and accede to [T]'s further requests. The Respondent did not retract or change their decision on their prior instruction despite [T]'s feedback of "numerous incidents" and on the use of canvas.

316 The Claimant followed up by an e-mail of 17 April 2024 (5.38pm) to the Respondent's Mr [A], attaching an "amended MOS for the L4 hoarding works for [his] action". The Respondent reverted with Mr [A]'s e-mail of 19 April 2024 (2.47pm) informing the Claimant, amongst other things, that "[T] has insisted that partition can be done above false ceiling for both layers of hoarding, even with existing services above the ceiling".

317 For the above reasons, I find that the Respondent's allegations in paras 130, 135 to 144 of the RWS and reliance on cll 2.7 and 4.1 of the REDAS COC, in a belated attempt to resile from their instructions, misconceived and out of context.

318 I therefore find that the Claimant is entitled to be paid as a variation for the full-height drywall partition.

319 As regards issue of quantum, having considered the Claimant's explanations and supporting documents in the AAS and CRS and the Respondent's submissions and arguments, I find that the star rate for canvass claimed by the Claimant is not supported with tax invoice from its subcontractor to prove its actual cost incurred and that the third-party quotations are unhelpful. As stated above, the quotations from [WW] and [VV] dated 30 December 2024 are for electrical works and obtained after work was carried out. In the premises, by taking a pragmatic approach with a minor 10% reduction for the claim of "Second layer full height canvass", I find that the Claimant is entitled to payment of an amount of **$100,982.40** for erection of "Additional full height partition as requested by [T]".

Items 4.1, 4.2, 4.4 and 4.5 of Exhibit C2: M&E works

320 At para 152 of the AAS, the Claimant asserted that the Respondent's instructions relating to "dismantling of the lighting point, power/data points" were recorded in various e-mails. I shall examine them below.

321 By an e-mail of 30 March 2023 (13.02pm) to BJH's Mr [A], [T] raised various concerns, so for as relevant for this issue, as follows: "There are lights and switches during the hoarding up which needs to be isolated and removed *as the hoarded area is being used by* BJG. BJG to use their own run wiring for the lighting and switches in the hoarding area" [emphasis added].

322 As evident by Mr [A]'s interim reply e-mail of 30 March 2023 and e-mail of 13 April 2023 (2.43pm) to [T] and copied to the Claimant, after discussion "with the team", presumably that would include the Claimant, the Respondent replied as follows: "[R]: BJG *will co-ordinate with [T] on the lighting adjustment according*" [emphasis added].

323 In context, I agree with the Claimant's argument that as evidenced by this e-mail, the Respondent had instructed the dismantling of light, power and/or data points. Though coordination with the Respondent's tenant alluded to by the foregoing e-mails was part of the Claimant's obligations, the Respondent had committed and acceded to the tenant's request that the lights and switches needed to be isolated and removed and that the Claimant would carry out the works.

324 By Mr [A]'s e-mail of 30 May 2024 (8.20pm) to the Claimant, after meeting [T] on 21 May 2024, the Respondent conveyed [T]'s "comments/information" for the Claimant to "follow Up". This includes, in relation to "hoarding works", "[the] *electrical & IT cables need to be removed / isolated*" [emphasis added].

325 By an e-mail of 3 June 2024 (5.03pm) to the Respondent's Mr [A], [T] informed the Respondent, so for as relevant for this issue, as follows:

> Electrical works that were to be completed on the 1st June is still pending. It is also made known to BJG *to isolate or provide a new electrical line for the E-pharmacy as it is sharing with the common services on Saturday 1st June.* Unfortunately, this was not done. [T] do not know what works were done on Saturday by BJH's contractors. Kindly advise how is BJH going to resolve the outstanding works as we can't afford power trips/isolation during office hours. [emphasis added]

326 By the Respondent's Mr [A]'s e-mail of 3 June 2024 (6.12pm) to the Claimant, Mr [A] forwarded the foregoing e-mail from [T] to the Claimant with this instruction, "For your follow up and clarification please".

327 About two weeks later, in the same e-mail chain with the foregoing 3 June 2024 e-mail from the Respondent, the Claimant sent its "budgetary costing" to the Respondent for "review and approval" via e-mail on 18 June 2024 (1.45pm). I note the subject matter of the e-mail is stated as "16TSS: Request to Shift the Materials to Start Hoarding Works" and the PDF file attached is labelled as "Budgetary Costing for L4- Additional works". I note that the costing is similar to that exhibited in "Tab 5. Supporting Documents for VO>VO25>VO25_Revised Breakdown" save that the latter costing has included two columns on the right for "Claim".

328 On the face of the foregoing e-mail, it is implicit that the Claimant had expected additional payment for the works described in the attached breakdown. In general, silence does not necessarily imply an agreement or an admission; however, having considered the context in which the costing was sent to the Respondent, if the Respondent has no intention to pay, I expect a reply to say otherwise from the Respondent. There is no evidence of any reply from the Respondent to the foregoing budgetary costing.

329 By an e-mail of 11 June 2024 (11.13pm) to the Respondent's Mr [A], [T] informed the Respondent, so for as relevant for this issue, as follows:

> After meeting with BJG at our unit today, it was mentioned to the electrician that he must prepare and *show us the location and we will verify the electrical points that are terminated and isolated at the DB and the affected area near hoarding. Upon confirmation all in order, hoarding works can proceed*.
>
> Unfortunately, no one appeared at all after the meeting. This is not the first time it is happening, and [T] will not bear responsibility for the delay which is caused by BJG. Agreed works to have water points and discharge points are not done yet too.

> We will leave this in your good hands to manage BJG to complete *the agreed tasks* diligently.
>
> [emphasis added]

330 Following another e-mail from [T] dated 18 June 2024 (5.40pm) to the Respondent's Mr [A], Mr [A] forwarded [T]'s e-mail to the Claimant on 18 June 2024 (7.20pm) for their follow up and complete the work "as discussed".

331 By the Respondent's Mr [BB]'s e-mail of 20 June 2024 (4.33pm) to [T] and Mr [A], the Respondent recorded a "summary" of the discussion with [T], so for as relevant for this issue, as follows:

> [T] has agreed for BJG to start the hoarding works from 21/6/24 onwards. We understand there are a few items pending actions from the respective parties, which will be handled concurrently with the hoarding works in progress:
>
> …
>
> 7. **Fix and relocate the electrical points for these Exit signs** – [R] 20/6: BJG ***will reinstate the power to the exit signs by today. Additionally, the emergency lighting will be shifted into the office area once they start the hoarding works***. 20/06/24 –Completed. …
>
> [emphasis in original in bold; emphasis added in bold italics]

332 By the Respondent's Mr [A]'s WhatsApp message appended with a photograph marking out three light panels dated 11 July 2024, the Respondent instructed the Claimant as follows: "As instructed by [T], pls remove the 3 nos light panels and return to [T] …"

333 As evidenced by the Respondent's WhatsApp message dated 20 June 2024, the Respondent instructed the Claimant, *inter alia*, as follows:

> 6. Ensure electrical points have been relocated-[R] 20/6: BJG has terminated the existing electrical point as it is longer in use.
>
> 7. Fix and relocate the electrical points for these Exit signs- [R] 20/6: BJG will reinstate the power to the exit signs by today. Additionally, the emergency lighting will be shifted into the office area once they start hoarding works.

334 The foregoing WhatsApp message shows that the Respondent (*ie*, "[R]") had responded to [T]'s requests with an update on 20 June 2023 and after the termination of existing electrical points have been carried out by the Claimant.

335 As can be seen from the e-mails above, the M&E works which were requested by [T] and which the Respondent agreed to be carried out by the

Claimant have nothing to do with any alleged water ingress. From the content of the e-mails, at no time had the Respondent said to the Claimant that the works were not payable or were within the Claimant's original scope of works under the Contract. Thus, on the facts, I find that the Respondent's allegations in para 155 of the RWS and paras 182 and 183 of the RRS are misconceived and are out of context.

336 As regards the issue of quantum, having considered the Claimant's explanations and supporting documents in the AAS and CRS and the Respondent's submissions and arguments, I find that the star rates for Item 4.1 claimed by the Claimant are not supported with tax invoices from its subcontractors to prove its actual costs incurred and the third-party quotations are unhelpful. As stated above, the quotations from [WW] and [VV] dated 30 December 2024 for electrical works were obtained after the works have been carried out. In the premises, by taking a pragmatic approach with a 20% reduction for the claim of Item 4.1 only, I find that the Claimant is entitled to payment of a total amount of **$102,955.00** for M&E works under VO25.

Items 4.6 and 4.8 of Exhibit C2: relocation of pantry

337 By an e-mail of 30 March 2023 (13.02pm) to BJH's Mr [A], [T] raised various concerns, so far as relevant for this issue, as follows: "Pantry area will be hoarded up. We would need the basin and the cabinet relocated for usage by our staff. Kindy confirm if this is being done as BJG does not know and we had highlighted before."

338 As evident by Mr [A]'s interim reply e-mail of 30 March 2023 and e-mail of 13 April 2023 (2.43pm) to [T] and copied to the Claimant, after discussion "with the team", presumably that would include the Claimant, the Respondent replied as follows: "[R]: BJG will temporary relocate the basin and cabinet, wherever possible."

339 By an e-mail of 27 February 2024 (6.12pm) to BJH's Mr [A], [T] asked "when the pantry beam works will start as the pantry needs to be relocated to the office area. There are plumbing, electrical and carpentry works involved for the relocation".

340 In reply to the Claimant's e-mail of 28 February 2024 (11.44am) asking for "the new location of the pantry indicated in layout", by an e-mail of 28 February 2024 (4.41pm) to the Claimant and BJH's Mr [A], [T] provided a layout indicating the proposed location of the pantry to be relocated. It is common ground that this was the second relocation claimed by the Claimant. Moreover, the Claimant claimed that this email evidenced the second relocation.

341 On the face of the e-mails, I find that the second relocation is likely to be due to the Claimant's works as, understandably, [T] would not wish to have a pantry in the locality and midst of the Claimant's works. It is pertinent to note that when the Claimant received the enquiry from [T] on 27 February 2024, the Claimant did not reply that the relocation was unnecessary or notified the Respondent contemporaneously that the second relocation would give rise to a variation and asked for an ERI. Instead, it appears to me that the Claimant accommodated [T]'s request.

342 As regards the WhatsApp messages exhibited in the AA, I note that in a WhatsApp message dated 20 June 2024, the Respondent informed [T] that for the "Old Pantry Water Point … BJG will terminate the water point during the hoarding works". This, by itself, cannot be evidence of an instruction by the Respondent to carry out variation work. In my view, the Respondent was conveying the message and the planned work by the Claimant.

343 Like other items claimed for VO25, the Claimant has relied on its "budgetary costing" sent to the Respondent for "review and approval" via e-mail for 18 June 2024 (1.45pm). I note the subject matter of the e-mail is stated as "16TSS: Request to Shift the Materials to Start Hoarding Works" and the PDF file attached is labelled as "Budgetary Costing for L4-Additional works". On the face of the e-mail, it suggests that the Claimant was expecting additional payment for the works described in the attached breakdown. However, as silence does not necessarily imply an agreement or an admission, I find that on the facts, there was no instruction from the Respondent nor any promise to pay for the second relocation works as a variation.

344 For the above reasons, I find that the Claimant is not entitled to be paid for Items 4.6 and 4.8 relating to the relocation of pantry under VO 25.

345 In conclusion, for the above reasons, I find that the Claimant is entitled to be paid **$203,937.40** for VO 25 (*ie*, $100,982.40 + $102,955.00). Since the Respondent's response amount and the Employer's Representative's 24th interim payment certificate have not included any amount for this variation, I allow this sum for this variation as part of the Adjudicated Amount.

VO 32: additional sprinkler works at L1 [Q] Unit

346 For VO 32 for the claimed amount $90,211.00, being 85% of the total amount of $106,215.00 stated in the Claimant's VO claim breakdown, the Employer's Representative did not certify any amount as [UU] remarked in its valuation as "Not valid" and "No ERI". Though this VO is described as "additional sprinkler works" in the AAS, it was described as "Supply and install of DB-ACMV" in PC 24 and [UU]'s valuation.

347 The Claimant's main contentions in the AAS may be summarised as follows:

(a) Under the Contract, the Claimant has to to provide temporary DB-ACMVs, and not "permanent DB-ACMVs" [emphasis added]. According to the Claimant, this is clear from the revised M&E tender drawings provided by [UU] which only requires "DB-Temp" (ie, temporary DB boards).

(b) Referring to the project meeting on 7 November 2022 and the Respondent's e-mail of 10 November 2022, the Claimant argued that the Respondent instructed the Claimant to supply and install permanent DB-ACMVs.

(c) Referring to the meeting minutes dated 5 February 2024 under the heading "Anticipated VOs to be Submitted", item 6 "Permanent DB for AC", the Claimant argued that "[it] was understood and anticipated that the Claimant would be entitled to be paid for the additional works".

(d) The Claimant had installed 13 sets of permanent DB-ACMVs.

(e) The Claimant's star rates are supported by two third-party subcontractors' quotations.

348 At para 158 of the RWS, the Respondent asserted that based on its e-mail dated 10 November 2022, the Respondent only instructed the Claimant to install permanent DB-ACMVs at Units #01-01 and #01-02. Hence, the Respondent argued that the Claimant is entitled to be paid two units only.

349 In the CRS, the Claimant again relied on s 15(3) of the SOP Act. The Claimant also argued that the e-mail dated 10 November 2022 only related to the two units owned by [Q] and that at the project meeting on 7 November 2022, the Respondent's Mr [O] confirmed that the Respondent wanted all units to have permanent DB-ACMV. The work done is evidenced by photographs.

350 At paras 186 and 187 of the RRS, the Respondent reiterated that it only instructed the Claimant to instal two units and denied that the further documents referred to by the Claimant support the claim of 13 units.

351 During the Merits Conference, Mr Lee for the Claimant referred to para 187 of the RRS and e-mail and asked rhetorically: "Why would the Contractor install all the DBs for all units if they were not requested to?" Ms [C] added that there were a few rounds of discussions and that the Respondent's Mr [A] wanted "all DBs permanent". In this regard, Mr [A] replied that "he could not recall". Ms Ling (A & G) maintained that since there was no ERI, the claim is not payable as a variation.

My determination for VO 32

352 As a preliminary point, further to [127] above, I wish to repeat that in PR 24, the Respondent's reason for not paying is simply that the claim is "Not valid" because there was "No ERI". The Respondent did not go on to state in PR 24 that the works claimed in VO 32 is payable only for two units. Thus, with due respect, I am unable to agree with the Respondent that it is entitled to put forward objections on the merits in the AR. Consequently, I agree with the Claimant that by s 15(3)(*a*) of the SOP Act, the Respondent cannot be allowed to rely on the objections which were not raised in PR 24. By not stating the new objections in PR 24, the Respondent has also waived its right to rely on these objections in the adjudication. See [66], [67] and [69] of *Audi Construction* ([61] *supra*).

353 Given the fact that the Respondent has conceded liability for two units of permanent DB-ACMVs and has not disputed the fact that the Claimant had installed 13 units, the question is whether the Respondent had in fact instructed the Claimant to install 13 units.

354 Having perused the Claimant's supporting documents, I agree with the Claimant that the Respondent's e-mail of 10 November 2022 (10.26am) to Ms [C] and Mr [A] and [V] forwarding the e-mail of 8 November 2022 (8.34pm) from Mr [AA] of [Q], in context, is for the two units owned by [Q].

355 To better understand the e-mail dated 4 November 2022 (5.13pm) from [V] to the Respondent's Mr [O], so far as relevant for this issue, I reproduce the exchange between them as follows:

> Item 8, aircon supply tap from tenant DB, landlord will provide isolator for aircon system, tenant should connect the isolator to their own DB.
>
> Mr [O]: what happened if there is no tenant? Air-cond still can work?
>
> [V]: AC (within the unit) cannot work, as no electricity supply to the system.

356 The Respondent's Mr [O] then replied with an e-mail of 7 November 2022 (12.48pm) asking [V], "Can we discuss this in the meeting later".

357 This brings me to the next point, that is the discussion alluded to during the Merits Conference by Ms [C] and the project meeting on 7 November 2022 alluded to by the Claimant in para 166 of the AAS.

358 Having considered the documents and the Parties' submissions and what was said by the Claimant's Ms [C] and counsel, I find on a *prima facie* basis that there was such a meeting and discussion in which the Respondent had instructed the Claimant to supply and install permanent DB-ACMV to all the 13 units. This makes practical sense as a reasonable and sensible landlord would want to ensure electrical supply to all units for tenants. Though the meeting minutes dated 5 February 2024 recorded this work as

"anticipated VO", by that time, with the DBs about to be installed on site, the Respondent must have known that it has to pay for the works as a variation.

359 For the above reasons, I find that the Claimant is entitled to be paid for 13 permanent DB-ACMVs as a variation.

360 As regards the issue of quantum, having considered the Claimant's explanations and supporting documents in the AAS and CRS and the Respondent's submissions and arguments, I find that the star rates claimed by the Claimant are not supported with tax invoices from its subcontractor or supplier and licensed electrical worker to prove its actual costs incurred and the two third-party quotations are unhelpful.

361 Based on the Claimant's Progress Report No 24 attached with photographs endorsed by the RE, the permanent DB-ACMVs were supplied and installed in February 2023. However, the unsigned quotations from [JJ] Pte Ltd dated 24 January 2024 and from [II] Pte Ltd dated 30 December 2024 obtained after about a year after completion could not be reflective of the price of the DBs at the material time when the Claimant made a firm order from its DBs supplier.

362 For the above reasons, by taking a pragmatic approach with a 20% reduction for the claim, I find that the Claimant is entitled to payment of a total amount of **$72,168.80** for the works under VO32. Since the Respondent's response amount and the Employer's Representative's 24th interim payment certificate have not included any amount for this variation, I allow this sum for this variation as part of the Adjudicated Amount.

VO 47: spray painting to ceiling soffit and services

363 For VO 47 for the claimed amount $38,752.75, the Employer's Representative did not certify any amount as [UU] remarked in its valuation as "No ERI".

364 The Claimant's main contentions in the AAS may be summarised as follows:

(a) "These works arose because after the completion of the perforated ceiling, the Respondent wanted the ceiling soffit and visible wall above the suspended ceiling to be painted black, such that the original white wall (as could be seen through the perforated ceiling) would no longer be visible."

(b) The instruction is evidenced by, *inter alia*, four photographs showing the labels to perforated panels with written notes "all services above ceiling to be painted in black", a WhatsApp message dated

30 October 2024 from the Claimant to the Respondent's Mr [A] and the Claimant's e-mail dated 1 November 2024 to the Respondent.

(c) The work done is evidenced by photographs endorsed by the RE.

(d) The amount claimed is supported with two third-party quotations.

365 At paras 160 to 162 of the RWS, the Respondent referred to [UU]'s "VO tracking list" and conceded that painting work (in the sum of $6,652.75) should be paid, but disputed the "protection works" for the following reasons:

(a) The protection works was provided under "Preliminaries".

(b) The protection work was put up in the course of painting works to the ceiling.

366 The Respondent also complained of the new documents in the AA.

367 At para 169 of the CRS, the Claimant argued that "the circumstances of when [the Respondent] instructed the Claimant to paint the ceiling soffit and services" and "the *Respondent's* last-minute instructions" before "the perforated ceiling was closed" justified the need for additional protection work. The Claimant also argued that the "Preliminaries" in the Contract is for original contract work.

368 At para 189 of the RRS, the Respondent referred to, *inter alia*, photographs, the Respondent's e-mail dated 17 October 2024 complaining of "no protection" and progress reports to argue that it should not be liable for the cost of protection installed belatedly. The Respondent also argued that the amount of $32,100.00 claimed for protection works is unreasonable and excessive.

369 During the Merits Conference, Mr Lee for the Claimant asserted that his client did dispute the Respondent's e-mail dated 17 October 2024 and added that at the material time, due to concurrent "floor and wall works", there were times when protection was temporarily removed. Ms Ling (A & G) submitted that the amount claimed for protection works is not fair and reasonable. She referred to para 191 of the RRS in which the Respondent provided a fair valuation.

My determination for VO 47

370 In light of the Respondent's concession to pay the painting work, the issue is whether the Claimant has proven on a *prima facie* basis that it had carried out additional protection work for this variation work.

371 It is not in dispute that when painting work is carried out, protection is necessary. In this regard, it is also not in dispute that the "Preliminaries"

priced in the Contract Sum would have included protection work. See the preambles in Bill No. 1–Preliminaries discussed above.

372 Having considered the documents and the Parties' arguments and submissions, I am of the view that the Claimant has not proven that it had provided protection work over and above that required under the Contract specifically for this variation. With respect, bare oral assertion that the Respondent's e-mail of 17 October 2024 supported with photographs were disputed is insufficient. I also agree with the Respondent that the amount of $32,100.00 is grossly excessive for the alleged protection work, close to twice the cost of painting for an area of 650m².

373 For the above reasons, I allow the claim of painting work for **$6,652.75** only but reject the Claimant's claim for additional protection work. Since the Respondent's response amount and the Employer's Representative's 24th interim payment certificate have not included any amount for this variation, I allow this sum for this variation as part of the Adjudicated Amount.

Deduction of alleged liquidated damages by Respondent

374 In PR 24, the Respondent had deducted alleged liquidated damages ("LD") in the amount of **$2,295,000.00** (excluding GST).

375 The Claimant's position in the AAS is that the Respondent is not entitled to the alleged LD for the following main reasons:

(a) Pursuant to s 17(3) of the SOP Act, I am precluded from adjudicating the deduction and alleged LD in PR 24 and that none of the exceptions under s 17(3) of the SOP Act applies. In this regard, the Claimant cited *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 ("*Range Construction*") in support of the proposition that any purported deduction for liquidated damages would be regarded as a claim for damage, loss or expense covered under s 17(3) of the SOP Act.

(b) The Claimant is entitled to an extension of time and the original date for completion of 30 June 2024 relied on by the Respondent does not apply. In this regard, the Claimant has submitted many claims for extensions of time ("EOT") to complete the works. However, the Employer's Representative has wrongly rejected them. Consequently, the time for completion was set at large.

(c) That in any event, the alleged LD has not accrued as the Employer's Representative has yet to issue the "Handing Over Certificate" under cl 19.1 of the REDAS COC.

376 The Respondent disagreed that its deduction for LD should be rejected. The Respondent's contentions in RWS may be summarised as follows:

(a) The Claimant's EOT applications were validly rejected by the Employer's Representative. In this regard, the Respondent also asserted that the Claimant was not entitled to EOT due to various alleged grounds categorised under four broad headings of "L4 Tenant delay, "L4 works", "Facade amendment at E4" and "Inclement weather".

(b) The Respondent disagreed with the Claimant's interpretation of cl 19.1 of the REDAS COC. In particular, the Respondent contended that the Handing Over Certificate represents a cut-off date beyond which the LD cannot be imposed. The Handing Over Certificate, unlike the delay certificate required under the SIA COC, is not a condition precedent to imposition of LD.

(c) The adjudicator is entitled to have regard to the deduction of the LD in PR 24 as the claim falls under s 17(3)(*b*) of the SOP Act. In this regard, the Respondent disagrees with the Claimant's reading of *Range Construction*.

(d) At paras 174 and 175 of the RWS, the Respondent quoted the Court of Appeal's observations at [52] to [54] of *Range Construction* and excerpts from the statement of the then-Minister of State for National Development ("MOS") during the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018).

377 In reply to the Respondent's arguments in the RWS, the Claimant submitted in the CRS that the Respondent has not considered two recent High Court's decisions in *CEQ v CER* [2020] SGHC 70 ("*CEQ*") at [25] and *CKR Contract Services Pte Ltd v Tai Ping Yang Jian Gong Pte Ltd* HC/OA 419/2023 ("*CKR*").

378 Incidentally, as noted in the LawNet Editorial Note of *CEQ*, there were cross appeals to the Court of Appeal in *CEQ v CER* and the judgment was given in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121.

379 The Respondent's rebuttals in the RRS may be summarised as follows:

(a) The Respondent repeated its contention in the RWS that the Handing Over Certificate represents a cut-off date beyond which the LD cannot be imposed.

(b) The Respondent maintained that it had correctly rejected the Claimant's applications for EOT.

(c) The Respondent is entitled to set off its claim for the alleged LD against the Claimant's payment claim.

(d) The contract in the unreported decision of *CKR* does not appear to have incorporated the REDAS COC.

(e) The Respondent maintained that the Employer's Representative's Interim Payment Certificate dated 16 December 2024 satisfies the requirement at s 17(3)(*b*) of the SOP Act.

(f) The Court of Appeal's observations in *Range Construction* nonetheless support "the position that liquidated damages should be allowed in payment responses as they do not detract from the underlying policy of the SOP Act to create an efficient and low-cost mechanism for resolving disputes".

380 During the Merits Conference, Mr Lee for the Claimant submitted that the tribunal is bound to follow *CKR*. He also added that following the Respondent's counsel confirmation that the Employer's Representative was from the Respondent, the independence of the Employer's Representative was questionable. Mr Sathia for the Respondent relied on the Respondent's written submissions and did not make oral submissions.

My determination for alleged LD issue

381 In general, if one of the parties to a contract fails to perform as required, in this case, to complete by the date for completion, *prima facie*, this constitutes a breach of contract. A breach may entitle the innocent party to make a claim for "the common law remedy of damages to which the injured promisee is entitled as of right in compensation for any loss that the promisee may have suffered as a result of the breach of contract" and it is trite law that damages for breach of contract include liquidated damages. See Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 20.002 and 20.055.

382 Having considered the documents, arguments and submissions from the Parties, I find that s 17(3) applies to the alleged LD and that the Employer's Representative's 24th Progress Payment Certificate dated 16 December 2024 (see [35]–[38] above, which forms part of PR 24) in support of the alleged LD does not fall within the exception under cl 17(3)(*b*) of the SOP Act. My main reasons are as follows.

383 Section 17(3) SOP Act provides as follows:

> (3) 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 b; or

(*b*) *any certificate or other document* that is required to be issued under the contract.

[emphasis added in bold and bold italics]

384 On a plain reading of the statutory provision, the key words in s 17(3) of the SOP Act include the words "*related to damage, loss or expense*" [emphasis added]. In the context of this case, the question is whether the disputed LD is within the meaning of "related to damage, loss or expense", which are to be interpreted on a purposive approach. In this regard, I disagree with the Respondent's contention that s 17(3) of the SOP Act was enacted to "give effect to the legislative intent that was focused on contractors' claims for prolongation costs" or to cover "complex claims". Though these two types of claims were discussed by the MOS for illustration, they are not intended to be exhaustive. Further, in light of the authorities tendered by the Parties' counsel, I am of the view that that s 17(3) of the SOP Act was not intended only to exclude "complicated or complex claims" of "damages, loss or expense" from adjudications under the SOP Act.

385 In fact, by submitting that the alleged LD falls within s 17(3)(*b*) of the SOP Act (see para 172 of the RWS), the Respondent has conceded that the alleged LD falls within "damage, loss or expense" in s 17(3) of the SOP Act.

386 Though the Claimant has only provided notes of evidence of the unreported case of *CKR* and that *CKR* was not a case based on the REDAS COC, I am of the view that the decision and *ratio* in *CKR* are highly instructive and persuasive. In *CKR*, the crux of the key issues is whether a payment response with accompanying supporting documents from the main contractor in which backcharges were imposed could constitute "document[s] under s 17(3)(*b*) of the SOP Act". The learned Teh Hwee Hwee JC (as she then was) held that it would not.

387 Teh JC held that for a document to satisfy s 17(3)(*b*) of the SOP Act, it must answer affirmatively the following three questions (see [11] of *CKR*):

(a) Is there a provision under the contract that requires the issue of a certificate or other document that may provide support for a matter related to damage, loss or expense?

(b) If so, is the certificate or other document that is produced before the adjudicator issued pursuant to that provision?

(c) If so, does the certificate or other document provide a statement or position on any matter that has a bearing on, and supports, the

party's entitlement to damage, loss or expense, as well as the party's entitlement to the quantum of such damage, loss or expense?

388 Teh JC added that "[any] document produced by a party that is merely a presentation of that party's one-sided position on a disputed matter may therefore not meet the requirements under s 17(3)(*b*)" of the SOP Act.

389 In rejecting the main contractor/respondent's reliance on cl 8, "Interim Payments", as the contractual provision requiring issue of such a document under s 17(3)(*b*) of the SOP Act, Teh JC provided the following reasons (see [22]–[23] of *CKR*):

> 22. To the extent that there is any suggestion that a payment response, or any part thereof, can constitute a document under s 17(3)(b) simply because the payment response was issued under the contract, I am unable to agree. Such a view render otiose the general rule in s 17(3) that an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense, if any and all payment responses may each constitute a 'certificate or other document' under s17(3)(b), and any respondent can circumvent the requirements simply by creating a document and annexing it to their payment response. This plainly cannot be correct.
>
> 23. … First, cl 8 is concerned with interim payments, and provides for the submission of payment claims and payment responses. It has nothing to do with matters related to damage, loss or expense. There is naturally nothing there that requires the issue of a certificate or other document that may provide support for a matter related to damage, loss or expense. PR 20 and PR 20 Annexes serve only to present CKR's own version of the matter for adjudication. They do not provide any statement or position to lend weight to CKR's claim in principle or quantum. In my view, PR 20 and PR 20 Annexes do not constitute documents under s 17(3)(b).
>
> [emphasis added]

390 In rejecting the main contractor/respondent's reliance on cl 9 "Contractor's right of set-off" as the contractual provision allowing the main contractor/s respondent to exercise the right of set-off, to claims damage, loss and expense against its subcontractor and the argument that it is a document issued under s 17(3)(*b*) of the SOP Act, Teh JC provided the following reasons (see [25] of *CKR*):

> In my judgment, the documents purportedly issued under cl 9 would not satisfy the requirements under s 17(3)(*b*). This is because cl 9 only requires a contractor to issue a notice specifying the contractor's intention to set-off a specified amount, which must be quantified with reasonable accuracy, as well as the grounds on which the set-off is to be made, in order to exercise its right of set-off. *It does not require the issue of a certificate or other document that may provide support for a matter related to damage, loss or expense. Further, the*

> *documents purportedly issued pursuant to cl 9 do not provide a statement or position that lends weight to CKR's claim in principle or quantum.* In this case, the documents do no more than state CKR's case, including its claim in summary form, and its claim with the relevant breakdowns and particulars. [emphasis added]

391 For the reasons as explained in [381]–[385] above, I determine that the alleged LD is undoubtedly caught by s 17(3) of the SOP Act.

392 The issue then is whether any of the exceptions in s 17(3)(*b*) of the SOP Act applies.

393 Applying *CKR*, I am of the view that the Employer's Representative's 24th Progress Payment Certificate dated 16 December 2024 and the "Annex A: Liquidated damages computation" of the QS do not constitute a certificate or document under s 17(3)(*b*) of the SOP Act, as they do not satisfy all the requirements as set out in [11] of *CKR*. The 24th Progress Payment Certificate (forming part of PR 24), which was signed by Mr [F] for the Respondent and "Annex A: Liquidated damages computation" (see [35]–[38] above), merely state the Respondent's alleged and one-sided position as regards its alleged entitlement to deduct the amount of alleged LD for the period of July to November 2024 under cl 19.1 of the REDAS COC.

394 Further, though I agree with the Respondent that the issuance of the Handing Over Certificate under cl 19.1 of the REDAS COC is not a prerequisite for recovery of liquidated damages in this case, as long as the Employer proves that liquidated damages has accrued and it seeks only to deduct liquidated damages for the culpable delay period that has elapsed, I am of the view that cl 19.1 of the REDAS COC does not provide for the issuance of a certificate or document for the purposes of s 17(3)(*b*) of the SOP Act.

395 Indeed, as pointed out by the Claimant in para 184 of the CRS, the drafter of the REDAS COC seems to recognise this gap when it introduced amendment to cl 19.1 in its latest fourth edition of the REDAS Design and Build Conditions of Main Contract 2022. The revised cl 19.1 now requires the Employer's Representative to issue a "Delay Certificate setting out the total period of extension of time determined (if any), the extended Date of Completion (if any) and the latest Date of Completion for the Works and certifying that the Contractor is in default in failing to complete the Works by the latest Date of Completion".

396 Further, from my perusal of the correspondence, it is not clear, even on a *prima facie* basis, that the Claimant is not entitled to any EOT, as the Respondent has asserted. In fact, I find that that there was a serious dispute of facts over the Respondent's contentions that there were no grounds entitling the Claimant to an EOT.

397 For example, the Claimant had claimed an EOT of 16 days due to inclement weather (see the Claimant's letter dated 19 October 2024 exhibited in Tab 6 of the AA) pursuant to cl 16.1.4 of the REDAS COC read with Bill No.1–Preliminaries, Item B: Inclement Weather (p B1/8). The Employer's Representative rejected the EOT claim purportedly "because the conditions precedent set out in Clause 16.2 of the [REDAS COC] were not satisfied", namely, the Claimant submitted the average rainfall records of five meteorological stations in Singapore instead of that "nearest to the Site" and the Claimant did not comply with the condition precedent of applying for an EOT within 28 days "[after] the cause of any delay has arisen together full detailed particulars in justification of the period of [EOT] claimed in order that the claim may be investigated at the time" in accordance with cl 16.2 of the REDAS COC (see the Respondent's letters dated 22 August 2024, 10 October 2024 and 4 December 2024 as exhibited in Tab 5 of the AR). In the Respondent's letters dated 10 October 2024, the Respondent took the position that the Claimant may only be entitled to EOT if the Claimant was in fact delayed by inclement weather and disagreed with the Claimant's delay analysis by "Impacted As-Planned" modelling method.

398 As regards the Respondent's first ground of rejection, the Claimant asserted that the 16 days EOT was computed based on the formula specified in Bill No.1–Preliminaries, Item B "Inclement Weather" and rainfall records from Tai Seng Station. Despite the fact that the Project is situated in [xxx] Street, the Respondent insisted that the computation of "wet days" must be based on rainfall records of Paya Lebar Meteorological Station, which I find odd.

399 As regards the Respondent's second ground of rejection, I have a doubt with the Respondent's interpretation of cl 16 of the REDAS COC (as amended) read with Bill No.1–Preliminaries, Item B: Inclement Weather. Since the Claimant could only comply with the condition precedent in cl 16.2 of the REDAS COC after it obtained the rainfall records after the end of each calendar month as part of its full detailed particulars in justification of the period of EOT claimed, it is not at all clear that the Claimant had missed the 28-day period. Further, there seems to be tension between cl 16.1.2 inserted in the Particular Conditions and Bill No.1–Preliminaries, Item B: Inclement Weather. The former clause says, *inter alia*, that the Contractor is only entitled to an EOT "which but for the occurrence of such events or circumstances, the Contractor would have been ready and able to progress with the affected works". However, the latter provision provides for an EOT when the "wet days" for any calendar month based on "the rainfall records for the standard meteorological station nearest to the Site" exceeds the average figures of wet days in the clause. I also do not think the Respondent was justified in rejecting summarily the Claimant's

delay analysis without providing a counter delay analysis based on a critical path.

400 It is not in dispute that in law, if the Claimant is able to prove any act of prevention and/or breach of contract of the Respondent which has caused a delay in completion of the Works, unless an extension of time is granted to adjust the date for completion of the Works, time for completion is being set at large and the Claimant is required to complete within a reasonable time and the Respondent's right to claim general damages for delay in completion under the Contract attributable to the Claimant is only for the delay period in which the Claimant has exceeded the reasonable time. See *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [8] for the Appellate Division's summary of the decisions at the High Court and Court of Appeal.

401 In my view, on the facts, failing amicable settlement by the Parties, the appropriate forum for adjudication of these issues relating to EOT and damages for delay in completion ought to be in arbitration under cl 33.2 of the REDAS COC.

402 Therefore, for the reasons above, when adjudicating the Claimant's claim for payment of work done in this adjudication, I determine that I must disregard the Respondent's alleged LD in PR 24.

Adjudicated Amount

403 Based on the evidence and submissions before me and the reasons given above, I determine that the Claimant has succeeded in its Adjudication Application and the response amount of **S$3,452,786.06** (inclusive of GST). This is hereby recorded as the Adjudicated Amount. The details are as follows:

Description	**Adjudicated amount ($)**
Disputed claims as determined by the tribunal:	
Façade Construction (see [110] above)	288,600.00
Materials on Site (see [126] above)	7,700.00
<u>Add</u> variation works	
VO 1: additional drywall and doors (02-01 [ZZ]) (see [159] above)	14,270.04
VO 2: installation of FAD (01-01 and 01-02 [Q]) (see [173] above)	0.00
VO 3: relocation of CU (02-02 [YY]) (see [191] above)	6,301.04

VO 4: additional FCU and ducting (02-02 [YY]) (see [195] above)	72,150.75
VO 6: additional finishes coat to [Q]'s KED HD Panel (see [203] above)	5,512.50
VO 9: secondary drain pan to all FCUs (see [207] above)	42,000.00
VO 12: diversion of sanitary waste pipe (see [56] above)	4,456.35
VO 13: jet fan (see [261] above)	8,380.00
VO 15: CUs translation ducting (see [261] above above)	10,800.00
VO 17: temporary measure for sump pump (see [279] above)	56,024.00
VO 18b: fire protection works at Level 1 [Q] unit (see [56] above)	5,940.00
VO 23: relocation of CUs at Level 2A carpark (see [261] above)	67,800.00
VO 25: additional temporary works requested by tenant (see [345] above)	203,937.40
VO 32: supply and install of permanent DB-ACMV (see [362] above)	72,168.80
VO 47: spray painting to ceiling soffit and services at Level 1 drop off and FLL1 (see [373] above)	6,652.75
Sub-total	**872,693.63**
<u>Add</u> recovery of alleged liquidated damages deducted in PR 24 (see [402] above)	2,295,000.00
Sub-total	**3,167,693.63**
Plus 9% GST	285,092.43
Adjudicated amount (including GST)	**3,452,786.06**

Due Date for Payment

404 As stated above, the Contract provides for due date for payment.

405 As evidenced by the Tax Invoice issued by the Claimant, the Claimant is a GST-registered company. Section 22(1) of the SOP Act provides as follows:

> **22.**—(1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant, then except as provided in subs (2) and s 18(3), the respondent shall pay that amount —

(*a*) within 7 days after the adjudicator's determination is served on the respondent; or

(*b*) by the date on which the adjudicated amount is determined by the adjudicator to be payable,

whichever is the later.

[emphasis added in bold]

406 In this case, I am of the view that s 22(1)(*a*) of the SOP Act provides a later date, and the Respondent has therefore up to seven days after the adjudication determination is served on them to make payment (*ie*, the Due Date for Payment).

Payment of interest

407 The Claimant did not state any interest rate in Form AA-1. Clause 22.6 of the Particular Conditions provides for 1% per annum for any unpaid amount. Pursuant to s 8(5)(*b*) of the SOP Act, I determine that interest shall run from the Due Date for Payment at the rate of 5.33% per annum on any part of the Adjudicated Amount which remains unpaid until the same is paid.

Adjudication costs

408 For the above reasons, the Claimant succeeds in the adjudication application and the Adjudicated Amount is lower than the revised claimed amount in the AA. In apportioning the adjudication costs, I note that the Claimant is successful in the majority of its claims. In light of my observation at [83] above that the Claimant has in fact included new documents which I think should have been submitted with PC 24, I should take this into consideration.

409 In the circumstances, pursuant to s 30(2) of the SOP Act, I order that the costs of the adjudication, being the adjudication application fee of S$654.00 (inclusive of GST) and the adjudicator's fee and disbursements of **S$40,711.50** (inclusive of GST), shall be borne by the Claimant and the Respondent in the proportion of 30% and 70% respectively.

Conclusion

410 For the reasons stated above, I determine that:

(a) The adjudication application is allowed and an Adjudicated Amount of **S$3,452,786.06** is to be paid by the Respondent to the Claimant.

(b) The Adjudicated Amount shall be paid within **seven** days of service of this determination on the Respondent.

(c) Interest at the contractual rate of 5.33% per annum shall be payable by the Respondent to the Claimant from the due date for payment of the Adjudicated Amount or any part of the Adjudicated Amount which remains unpaid until the same is paid.

(d) Pursuant to s 30(2) of the SOP Act, I order that the costs of the adjudication, being the adjudication application fee of S$654.00 (inclusive of GST) and the adjudicator's fee and disbursements of **S$40,711.50** (inclusive of GST), shall be borne by the Claimant and Respondent in the proportions of 30% and 70% respectively.

ADJUDICATION REVIEW DETERMINATION

BJI Corp Ltd
v
BJJ Pte Ltd

[2024] SGSOP 23

Singapore Mediation Centre — SOP ARA 006 of 2024
Chuah Chee Kian Christopher
8 April 2024

Adjudicated Amount *— Back charges — Subcontractor allegedly failing to procure sufficient resources such as manpower and machinery for project — Main contractor deploying its own resources to carry out subcontract works on behalf of subcontractor and subsequently deducting back charges in its payment response — Adjudicator below disallowing main contractor's deduction of back charges — Main contractor lodging review application against adjudicator's determination — Whether main contractor's back charges constituted claim for damages, loss or expense — Section 17(3) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 7, 7(1), 10(4), 17(3), 18(2), 18(3), 18(4)(*a*), 18(5)(*b*), 18(6), 19(1), 19(6), 19(7)(*a*), 22(3)(*a*)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 5(2), 10(2)(*a*), 10(3)(*a*)

Kishan Pillay and Daniel Lee (Breakpoint LLP) for the applicant;
Daniel Tay and Lee Yun Long (Chan Neo LLP) for the respondent.

[Commentary: see para 5.15]

8 April 2024

Chuah Chee Kian Christopher:

Adjudication review determination

1 This is an adjudication review determination made on 8 April 2024 under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Review Application No SOP/ARA 006 of 2024 ("Review Application"). This is the

reference number assigned to this case by the Singapore Mediation Centre ("SMC") acting as the authorised nominating body under the SOP Act.

2 The Review Application relates to Adjudication Application No SOP/AA 290 of 2023 hereinafter referred to as the "Adjudication Application", and the adjudication hearing thereof being hereinafter referred to as the "Adjudication". The determination of the Adjudication Application was made on 14 February 2024 ("AA Determination").

3 The Adjudication Application was made by BJJ Pte Ltd (UEN No [xxx]) as the claimant ("Claimant").

4 The Adjudication Application was made against BJI Corp Ltd (Singapore Branch) (ACRA Registration No [xxx]) as the respondent ("Respondent").

5 The Adjudication Application and accordingly the AA Determination relate to Payment Claim No 33 which was served on 25 November 2023, claiming for a sum of S$2,593,519.20 (inclusive of 8% goods and services tax ("GST")) ("PC33" or "Payment Claim"). On 15 December 2023, the Respondent issued Payment Response No 33 certifying an amount of S$2,882.46 (inclusive of 8% GST) ("PR33" or "Payment Response").

6 The adjudicator appointed by the SMC to determine the Adjudication Application was Mr Michael Chia Peng Chuang ("Adjudicator"). In the AA Determination at [3], the Adjudicator determined as follows:

> (a) the Respondent shall pay to the Claimant the sum of **S$517,812.34** (inclusive of 8% GST) ("Adjudicated Amount") not earlier than seven days but within ten days after receipt of the AA Determination; and
>
> (b) the costs of the Adjudication Application, being the Adjudication Application fee of S$648.00 (inclusive of 8% GST) and Adjudicator's fee and disbursements amounting to S$34,226.00 (inclusive of 9% GST), are in total S$34,874.00 (collectively known as "Costs"). The Claimant and the Respondent shall bear the Costs equally, which amounts to S$17,437.00.

7 The Respondent, being aggrieved by the AA Determination, had lodged the Review Application for the review of the AA Determination.

8 For the reasons which are set out in the pages which follow, I determine that:

> (a) The Adjudicated Amount of S$517,812.34 (inclusive of 8% GST) as determined by the Adjudicator in the AA Determination is hereby substituted with the amount of **S$515,265.70** (inclusive of 8% GST). This amount is hereby recorded as the "Substituted

Adjudicated Amount" determined by me in this adjudication review ("Adjudication Review").

(b) As the Respondent had paid the Adjudicated Amount of S$517,812.34 (inclusive of 8% GST) to the SMC, the amount to be returned by the SMC to the Respondent is **S$2,546.64** (inclusive of 8% GST) ("Refund Amount").

(c) The due date for the payment of the Substituted Adjudicated Amount and the Refund Amount shall be on or before the expiry of seven days from the date of service of the adjudication review determination on the Claimant and the Respondent respectively. This is hereby recorded as the "Due Date for Payment".

(d) No interest shall be payable by the SMC to the Claimant and/or the Respondent or any party of the Substituted Adjudicated Amount and/or the Refund Amount which remains unpaid as at the Due Date of Payment; and

(e) The costs of this adjudication review are in the amount of S$12,753.00 (inclusive of 9% GST) ("Costs of this Adjudication Review"):

(i) the Claimant shall bear and pay 10% of the said costs; and

(ii) the Respondent shall bear and pay 90% of the said costs.

Record

Background

Entitlement to make Review Application

9 The Respondent is the main contractor for a project known as "Package C – Proposed design, execution and completion of [xxx] and ancillary facilities on Lot [xxx] at [xxx] Road" ("Project").

10 By a letter of acceptance in writing dated 11 January 2021 ("Subcontract"), the Claimant was engaged by the Respondent as its subcontractor to carry out excavation and earthwork works at the Project ("Subcontract Works").

11 The Subcontract is a fixed lump sum contract for the sum of S$3,910,500.90.

12 There is no dispute that the Project is a construction contract to which the SOP Act applies.

Chronology of events

(1) The Review Application

13 The AA Determination was served on the Respondent on 14 February 2024. This is not disputed by the Claimant.

14 Therefore, if the Claimant or Respondent wished to make an application for the review of the AA Determination, the Claimant or Respondent must, by virtue of s 18(2) of the SOP Act, do so within seven days after 14 February 2024, *ie*, by 21 February 2024.

15 On 21 February 2024, the Review Application was lodged with the SMC. It was therefore lodged within the time stipulated in s 18(2) of the SOP Act.

16 The Review Application was accompanied by, *inter alia*, evidence of payment made by the Respondent of the Adjudicated Amount to the SMC on 21 February 2024, in compliance with s 18(3) of the SOP Act read with reg 10(2)(*a*) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("Regulations").

17 The Review Application was made in writing addressed to the SMC as the authorised nominating body under the SOP Act, requesting the SMC to appoint the appropriate number of review adjudicators to determine the Review Application. The Review Application was therefore made in compliance with s 18(4)(*a*) of the SOP Act.

18 The Review Application was served by the SMC on the Claimant on 22 February 2024. The Claimant raised no objections regarding the procedural matters as recorded herein.

(2) Appointment of review adjudicator

19 As the Adjudicated Amount exceeds the relevant claimed amount by at least S$100,000 but less than S$1m, the SMC was obliged under s 18(5)(*b*) of the SOP Act, read with reg 10(3)(*a*) of the Regulations, to appoint one review adjudicator to determine the Review Application.

20 On 22 February 2024, the SMC referred the Review Application to me and invited me to accept appointment as the sole review adjudicator to determine the Review Application. Thereafter, on the same day, I proceeded to confirm and accept appointment to determine the Review Application.

21 On the same day, 22 February 2024, in accordance with s 18(6) of the SOP Act, the SMC served its notice on the Claimant and the Respondent, confirming my appointment as the review adjudicator to determine the Review Application.

(3) Commencement of Adjudication Review

22 By virtue of s 19(1) of the SOP Act and given that my appointment was confirmed by SMC on 22 February 2024, this Adjudication Review commenced on 23 February 2024.

Due date of adjudication review determination

23 By virtue of s 19(6) of the SOP Act, the timeline to determine the Adjudication Review was within 14 days after the commencement of the Adjudication Review, or within such longer period as may have been requested by me and agreed to by the Claimant and the Respondent.

24 Given that the Adjudication Review commenced on 23 February 2024, the period of 14 days after the commencement of the Adjudication Review expired on 8 March 2024. I was thus required to render the Adjudication Review determination by 8 March 2024 subject to any extensions agreed by the parties.

25 On 22 February 2024, I issued directions, by way of e-mail, for parties to attend a preliminary conference via Zoom video conference on 26 February 2024 at 3.00pm ("Preliminary Conference") to enable me to issue further directions as to the subsequent conduct of the Review Application.

Preliminary Conference

26 The Preliminary Conference was held via Zoom video conference on 26 February 2024:

(a) the Claimant was represented by Lee Yun Long of Chan Neo LLP as counsel for the Claimant; and

(b) the Respondent was represented by Kishan Pillay and Daniel Lee of Breakpoint LLP as counsel for the Respondent.

27 During the Preliminary Conference, I handed down directions for parties to exchange submissions and to attend a conference on the merits of the Review Application:

(a) The Respondent was to serve a copy of its adjudication review application submissions ("ARA Submissions") by way of e-mail on the review adjudicator and the Claimant on **Wednesday, 6 March 2024**.

(b) The Claimant was to serve its reply to the ARA Submissions ("CR Submissions") by way of e-mail on the review adjudicator and the Respondent by **Friday, 15 March 2024**.

(c) The merits conference ("Merits Conference") was to proceed for a Zoom hearing on either 22, 25 or 26 March 2024. The parties were to confirm their availability on the proposed dates by 15 March 2024.

28 In view of the timelines above, I requested an extension of the due date of the review determination by a period of two weeks after the date of the Merits Conference. Both parties agreed and consented to the extension. It was confirmed on 14 March 2024 that the Merits Conference would take place on 26 March 2024. Therefore, the due date for the adjudication review determination was extended by agreement to 11 April 2024, considering the public holidays on 29 March 2024 and 10 April 2024.

The Merits Conference

29 The Merits Conference was held as fixed on 26 March 2024, 10.00am. At the Merits Conference, the parties were represented as follows:

(a) For the Claimant:

(i)	Mr Daniel Tay:	counsel for the Claimant;
(ii)	Mr [A]:	Senior Construction Advisor;
(iii)	Mr [B]:	Claimant's Project Manager;
(iv)	Mr [C]:	Claimant's Project Engineer;
(v)	Mr [D]:	Claimant's Site Engineer; and
(vi)	Mr [E]:	Claimant's Consultant.

(b) For the Respondent:

(i)	Mr Kishan Pillay:	counsel for the Respondent;
(ii)	Mr Daniel Lee:	counsel for the Respondent;
(iii)	Mr [F]:	Respondent's Project Manager; and
(iv)	Mr [G]:	Respondent's Deputy Contracts Manager.

30 Counsel for both parties were given an opportunity to present their respective oral arguments at the Merits Conference and responded to queries from me. Counsel for the Respondent presented their case with the aid of PowerPoint slides and new legal authorities to support its arguments, copies of which were provided to me and the Claimant after the Merits Conference.

31 At this juncture, I should state that I have considered all of the submissions, both oral and written, tendered by the respective parties in this Adjudication Review and all of the authorities cited or referred to or produced before me, as well as all of the other material properly placed before me, so far as I am obliged or permitted to do so under the SOP Act.

The fact that any submission or authority or material (which is properly before me and which I am obliged to consider) is not expressly set out or referred to in this review determination does not mean that I have not duly considered it.

Scope of Review Application

32 The Respondent submits the following findings made by the Adjudicator in the Adjudication Application for review:

(a) the dismissal of entitlement to deduct the sum of back charges in PR33 that was not agreed between the parties, amounting to S$553,405.47 (should be S$542,705.47); and

(b) the determination of entitlement to payment for work not claimed in PC33 but certified in PR33, amounting to S$2,358.00 for disposal works for Item 7, [Z] Edge.

Dismissal of entitlement to deduct sum of back charges in PR33 that was not agreed between parties amounting to S$542,705.47

(1) The AA Determination

33 The Adjudicator determined that the Respondent was not entitled to any disputed back charges and only allowed the back charges that have been accepted by the Claimant in the Adjudication Application, which amounted to S$203,204.76. Further, the 15% administrative charge was disallowed by the Adjudicator.

34 At [241] of the AA Determination, the Adjudicator disagreed with the Respondent's contention and found that the back charges fell within the ambit of s 17(3) of the SOP Act. It was clear from the facts that the backchages were the Respondent's claim for damage, loss or expense due to the Claimant's failure to perform in accordance with the Subcontract.

(2) The Respondent's contentions

35 The Respondent maintained their position in the Adjudication Review, arguing that the nature of back charges does not fall within the ambit of s 17(3) of the SOP Act.

36 They elaborated further that the back charges represent the actual cost incurred by the Respondent to carry out the work originally within the Claimant's scope of works under cll 15.2.8 and 15.2.9 of the Subcontract. Conversely, if the Claimant had performed with due diligence on the

Subcontract Works, the Respondent would not have needed to perform work on behalf of the Claimant.

37 Thus, these costs should be deducted from the Claimant's account when assessing the overall value of the work entitled to the Claimant under s 7 of the SOP Act.

(3) The Claimant's contentions

38 The Claimant pointed out the AA Determination regarding the back charges was justified, as the Adjudicator thoroughly examined cl 15.2 of Subcontract and all the relevant material before him before determining that the Respondent could not invoke its right under cl 15.2 of Subcontract.

39 There is nothing in PR33 to substantiate the Respondent's arguments concerning the evaluation of the Claimant's work done in PC33 in that it must consider the cost of labour, equipment and materials incurred on behalf of the Claimant by the Respondent, in accordance with s 7(1) of the SOP Act.

40 The Claimant submits that the back charges fall within the ambit of s 17(3) of the SOP Act by scrutinising the methodology of the Respondent's computation (*ie*, estimated rental cost) and the nature of the back charges. Such methodology also suggests that the Respondent's argument that the deductions should be viewed as adjustments to the quantities of work performed by the Claimant cannot stand. The Respondent also failed to provide any supporting documentation to demonstrate that the Claimant has indeed been paid for the work or had been given the full credit for the work.

41 Lastly, the Claimant also contends that the amount of the back charges represents estimations rather than actual costs incurred by the Respondent, contradicting cll 15.2.8 and 15.2.9 of the Subcontract. This is evident from the wording of "Estimated Cost" shown on the issued "Backcharge Notice" ("BCN"). Therefore, the Respondent is not entitled to invoke cl 15.2 to deduct the back charges.

(4) My findings

42 In addressing back charges, it is crucial to recognise that the back charges typically arise from breaches of provisions in the Subcontract, which necessitates a thorough examination of the events leading to their imposition. Based on the evidence presented before me, it is indisputable that the Respondent deployed necessary resources, such as manpower and machinery, to carry out the Subcontract Works on behalf of the Claimant due to the Claimant's alleged failure to procure sufficient resources for the Project despite numerous reminders issued by the Respondent. This resulted

in additional costs incurred by the Respondent to mitigate the delay of the Project. Therefore, the Respondent invoked cl 15.2 of the Subcontract to exercise their right.

43 Clause 15.2 of the Subcontract specifies a list of default events. If the Claimant breaches any of the defaults outlined in cll 15.2.1 to 15.2.7, the Respondent is entitled to exercise their right under cll 15.2.8 and 15.2.9 as grounds for remedies. These remedies may include recovering the actual costs incurred, along with a 10% administrative charge, after providing a seven-day written notice to the Claimant. The Respondent has, in fact, issued numerous "Site Notification Memo" ("Memo") to inform the Claimant regarding insufficient machinery and manpower on site or failure to carry out works according to the given schedule, falling within the default events as outlined in cll 15.2.1 to 15.2.7. The Memo clearly indicates the entitlement to such remedies in accordance with cll 15.2.8 and 15.2.9 if the Claimant persisted in failing to rectify the issues, which aligns with the conditions of Subcontract. Subsequently and progressively, the Respondent issued numerous BCNs to recover the alleged costs incurred from payment claims.

44 The Respondent contended, firstly, that the back charges or deductions should not be disregarded as damage, loss and expense under s 17(3) of the SOP Act. Instead, they should be considered adjustments to the overall amount payable to the Claimant. As noted by the Adjudicator in [245] of the AA Determination, the key word in s 17(3) of the SOP Act is "related to damage, loss or expense". In general, these alleged costs incurred arise from purported breaches of contract by the Claimant under the Subcontract. Secondly, the alleged costs incurred were intended to remedy the Respondent's losses: see para 20.002 of Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012). Thirdly, the alleged costs were incurred to mitigate delays. It becomes apparent that the alleged costs incurred by the Respondent constitute complex claims of "damage, loss or expense" which is what s 17(3) of the SOP Act seeks to address.

45 Even if the alleged costs incurred do not strictly fall under the classification of damage, loss or expense, it is crucial to acknowledge that they still necessitate an evaluation of the Claimant's actual work done. This evaluation is particularly important regarding omissions related to machinery and manpower procured on behalf of the Claimant or work carried out by a third party. The complexity arises from the necessity to distinguish between work completed by the Claimant and that undertaken by others involved in the project. In PR33, there is no indication that the valuation of work done has been considered in assessing the omissions due to the back charges. During the Merits Conference, Mr Kishan Pillay responded to my observation that I could not determine the actual work

done by the Claimant by suggesting a 25% percentage to be applied to the total amount. In my view, this exercise is still arbitrary and not borne out by the documents before me. I raised this issue because I am not convinced that the documents presented before me could enable me to carry out a fair and reasonable valuation. Additionally, I agree with the Adjudicator's finding, as stated at [240] of the AA Determination, that it was crucial for the Respondent to establish a direct cause-and-effect relationship between each Memo and the relevant BCN, which the Respondent failed to do. Therefore, I am of the view that the Respondent has not discharged their burden of proof for the quantum and there are no supporting documents indicating an agreement between the parties on the quantum of the claim.

46 Based on the matters outlined above, I concur with the Adjudicator that the back charges are caught by s 17(3) of the SOP Act. Therefore, I reject the Respondent's claim for the disputed back charges and the Adjudicated Amount for the back charges shall ***remain***.

Determination of entitlement to payment for work not claimed in PC33 but certified in PR33

(1) The AA Determination

47 In the AA Determination, the Adjudicator referred to s 2 of the SOP Act to define the "response amount". The Respondent did not deny that the works have been carried out by the Claimant at [Z] Edge.

48 Based on the above, the Adjudicator concluded that since the Respondent has responded to PC33 with a response amount to be received by the Claimant for the work done carried out at [Z] Edge and accepted by the Claimant in the Adjudication Application, there is no dispute to Item 7, "[Z] Edge (for disposal)" in the amount of S$2,358.00.

49 As a result, the Claimant is deemed entitled to the payment.

(2) The Respondent's contentions

50 The Respondent contends at paras 49–59 of the ARA Submissions by repeating its position in the Adjudication Application that the Claimant is barred from precluding a claim and/or being entitled to payment. This is because it was not originally claimed in PC33 and the Claimant is estopped from claiming it in the Adjudication Application, irrespective of the Respondent's position in PR33.

51 The Adjudicator also failed to assess the Claimant's entitlement by considering the prescribed requirements outlined in s 10(4) of the SOP Act and reg 5(2) of the Regulations when arriving at his determination.

(3) The Claimant's contentions

52 The Claimant contends that the Respondent is obliged under the SOP Act to respond with their position regarding the payment claim.

53 Replying principally on the response amount in PR33, subsequently accepted by the Claimant in the Adjudication Application, the Claimant submits that the Respondent admitted to the substance of the claim and thus the Claimant is entitled to receive the certified amount.

54 However, at the hearing, the Claimant's counsel accepted that as a matter of law, there would be no basis for the Adjudicator to award more than what was claimed in the payment claim.

(4) My findings

55 Having considered the parties' submissions, I agree with the Respondent's arguments that the Claimant cannot introduce a claim that was not initially included in PC33.

56 In view of the above, the Adjudicated Amount of S$2,358.00 for Item 7, "[Z] Edge (for disposal)" shall be disallowed. Accordingly, I determine that the Adjudicated Amount for the contract works of S$3,048,551.25 (exclusive of GST) (see [171] of the AA Determination) shall be reduced by S$2,358.00 to the amount of **S$3,046,193.25** (exclusive of GST).

Conclusion

The Substituted Adjudicated Amount

57 Pursuant to s 19(7)(*a*) of the SOP Act, I substitute the Adjudicated Amount of **S$517,812.34** (inclusive of 8% GST) in the Adjudication Application with the adjudicated amount of S$515,265.70 (inclusive of 8% GST). This sum is hereby recorded as the Substituted Adjudicated Amount.

S/No	Brief description	Adjudication Amount (S$)	Substituted Adjudicated Amount (S$)
1	Subcontract Works	3,048,551.25	3,046,193.25
2	Variation works	90,326.72	90,326.72
3	**Sub-total (1+2)**	**3,138,877.97**	**3,136,519.97**
4	Less: retention sum	(195,525.05)	(195,525.05)
5	**Sub-total (3+4)**	**2,943,352.92**	**2,940,994.92**
6	Less: previous payments	(2,249,992.29)	(2,249,992.29)
7	Less: back charges	(203,204.76)	(203,204.76)

8	Less: safety fines	(10,700.00)	(10,700.00)
9	**Sub-total (5+6+7+8)**	**479,455.87**	**477,097.87**
10	Add: 8% GST	38,356.47	38,167.83
11	**Total (9+10)**	**517,812.34**	**515,265.70**

Amount to be returned by SMC

58 As the Respondent had paid the Adjudicated Amount of S$517,812.34 (inclusive of 8% GST) to the SMC, the amount to be returned by the SMC to the Respondent is **S$2,546.64** (inclusive of 8% GST) (*ie*, the Refund Amount).

Due Date for Payment

59 Pursuant to s 22(3)(*a*) of the SOP Act, I further determine that:

(a) the SMC shall pay the Substituted Adjudicated Amount to the Claimant within seven days from the date of service of the review determination on the Claimant; and

(b) the SMC shall pay the Refund Amount to the Respondent within seven days from the date of service of the review determination on the Respondent.

Interest

60 No interest shall be payable by the SMC to the Claimant and/or the Respondent or any party of the Substituted Adjudicated Amount and/or the Refund Amount which remains unpaid as at the Due Date for Payment.

Costs of Adjudication Review

61 The Costs of this Adjudication Review is S$12,753.00 (inclusive of 9% GST). This includes the adjudication review application fee of S$1,308.00 (inclusive of 9% GST) and the review adjudicator fees of S$11,445.00 (inclusive of 9% GST).

62 As the Respondent did not completely succeed in this Review Application, I determine that the Costs of this Adjudication Review amounting to S$12,753.00 (inclusive of 9% GST) shall be borne and paid by both parties in the following proportions:

(a) the Claimant shall bear and pay 10% of the said costs; and

(b) the Respondent shall bear and pay 90% of the said costs.

BJK Pte Ltd
v
BJL Pte Ltd

[2024] SGSOP 24

Singapore Mediation Centre — SOP ARA 015 of 2024
Tai Chean Ming
9 January 2025

Adjudication Review *— Powers of review adjudicator — Adjudicator below holding that costs of adjudication were to be fully borne by claimant — Whether review adjudicator had jurisdiction to also review adjudication costs ordered by adjudicator below — Sections 19(7) and 19(8) Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)*

Adjudication Review *— Substitution of judgment — Adjudicator below holding that claimant's payment claims suffered from patent errors due to various inconsistencies — Claimant lodging review application arguing adjudicator below had breached natural justice by coming to such conclusion without providing claimant fair and reasonable opportunity to be heard — Whether adjudicator below breached rules of natural justice — Whether patent errors established*

Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ss 2, 9, 15(1), 17(1), 17(4), 18(1), 18(2), 18(6), 19(6), 19(7), 19(7)(*a*), 19(8)

Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) regs 10(1)(*b*), 10(3)

Eric Yuen and David Zee (Malkin & Maxwell LLP) for the claimant;
Respondent unrepresented.

[Commentary: see paras 6.1, 6.3 and 6.4]

9 January 2025

Tai Chean Ming:

Adjudication Review Determination

1 This is an adjudication review determination ("Adjudication Review Determination") made on 9 January 2025 under the Building and

Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOP Act") in respect of Adjudication Review Application No SOP ARA 15 of 2024 ("Review Application").

2 The Review Application relates to adjudication application No SOP AA 297 of 2024 ("AA").

3 The claimant in the AA was BJK Pte Ltd ("Claimant") and the Respondent was BJL Pte Ltd ("Respondent").

4 The AA relates to the Claimant's Progress Claim No 16 dated 25 October 2024 claiming a sum of $165,135.00 (inclusive of 9% goods and services tax ("GST")) ("PC 16"). The appointed adjudicator in the AA was Mr Tan Kian Hoon ("Adjudicator").

5 The adjudication determination in the AA was issued by the Adjudicator on 13 December 2024 ("AA Determination"). In the AA Determination, the Adjudicator dismissed the AA with the consequence that no sum would be payable by the Respondent to the Claimant. The Adjudicator also held that the costs of the adjudication, $3,433.50 (comprising the adjudication application fee of $654.00 and the adjudicator fee of $2,779.50 (both inclusive of GST)), was to be fully borne by the Claimant.

6 The Claimant being aggrieved by the AA Determination, lodged the Review Application to seek a review of the AA Determination.

7 For the reasons set out in this Adjudication Review Determination, I hereby determine that:

(a) The Respondent shall pay the Claimant the sum of $165,135.00 (inclusive of GST). This sum shall be the "Adjudication Review Adjudicated Amount" for the Review Application and shall substitute the determination in the AA Determination where no amount is stated to be payable.

(b) The Adjudication Review Adjudicated Amount shall be paid within seven days of the service of this Adjudication Review Determination on the Respondent.

(c) Interest shall be payable by the Respondent at a rate of 5.33% per annum on any part of the Adjudication Review Adjudicated Amount which remains unpaid as at the due date of payment.

(d) The total cost of the Review Application of $13,979.25, comprising the adjudication review application fee of $1,308.00 (inclusive of 9% GST) and the fee of the review adjudicator of

$12,671.25 (inclusive of 9% GST), shall be borne and be paid by the Respondent solely.

(e) The Respondent shall also bear and reimburse the Claimant the sum of $3,433.50 (inclusive of GST), being the cost of the adjudication below.

The record

Background to the AA

8 On 25 October 2024, the Claimant served PC 16 on the Respondent for work done valued at $165,135.00 (including GST). The Respondent did not issue a payment response.

9 On 28 November 2024, the Claimant served the notice of intention to apply for adjudication on the Respondent for the claimed sum under PC 16. The AA was filed with the Singapore Mediation Centre ("SMC") on the same day and the SMC served the AA on the Respondent on 29 November 2024.

10 Under s 15(1) of the SOP Act, the adjudication response was due seven days thereafter – *ie*, on 6 December 2024, but the Respondent failed to lodge any adjudication response.

11 On 5 December 2024, the Claimant wrote to the Adjudicator, requesting for a determination without holding an adjudication conference, on the basis that: (a) there was no dispute over the work done for PC 16, and that the maintenance period had expired; and (b) the Claimant believed that the Respondent's personnel had been repatriated to China and would thus not lodge any adjudication response and/or attend the adjudication conference (if convened). The Claimant also notified the Adjudicator that attempts to contact the Respondent had been unsuccessful.

12 On 10 December 2024, the Adjudicator issued Direction No 1, calling for, *inter alia*, an adjudication conference to be held on 11 December 2024, and for an extension of time to 26 December 2024 for the publication of the AA Determination. The Adjudicator had also established the identity of the Respondent's company secretary, one Mr [A], and also requested for the e-mail addresses of the Respondent's company secretary, director and project staff.

13 The Claimant responded on the same day to indicate that their representative was unable to attend the conference on 11 December 2024 (and also proposed alternative dates on 12 or 13 December 2024) and that they had no objections to the request for an extension of time.

14 On 11 December 2024, the Respondent's company secretary informed the Adjudicator that he would not be attending the conference as he was not involved in the operations of the project. As the Adjudicator did not obtain both the Claimant's and Respondent's consent for the extension of time, he confirmed that he would render the AA Determination on 13 December 2024, in accordance with the timelines under s 17(1) of the SOP Act. The Adjudicator also cancelled the conference fixed on 11 December 2024.

15 On 12 December 2024, the Adjudicator issued Direction No 2, directing the Claimant to provide a full image of p 6 of the payment response issued for Payment Claim No 12 ("PC 12"), as the bottom of the said p 6 had been blanked out. The Claimant responded to clarify that they were unable to provide the full image as requested, as the Respondent had sent it to the Claimant with the page already blanked out.

16 The AA Determination was duly published on 13 December 2024, in which the AA was dismissed in full, and no sum was determined payable from the Respondent to the Claimant.

Entitlement to lodge review

17 Pursuant to s 18(1) of the SOP Act read with reg 10(1)(*b*) of the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("SOP Regulations"), a claimant is entitled to lodge an adjudication review application if the claimed amount exceeds the adjudicated amount by at least $100,000.00.

18 In this case, the requirement in s 18(1) of the SOP Act is satisfied. The claimed amount of $165,135.00 (inclusive of 9% GST) exceeds the adjudicated amount of "nil" by more than $100,000.00.

19 Accordingly, the Claimant is entitled to lodge an application for the review of the AA Determination.

Review application

20 Pursuant to s 18(2) of the SOP Act, a respondent must lodge its adjudication review application within seven days after being served with the adjudication determination.

21 The AA Determination was served by the SMC on the parties on 13 December 2024. The Review Application was lodged with the SMC on 19 December 2024 at 3.49pm, which is within the timelines stipulated in s 18(2) of the SOP Act.

22 The Review Application was served by the SMC on the Respondent on 20 December 2024.

Appointment of review adjudicator

23 As the claimed amount in this Review Application exceeds $100,000 but is less than $1m, reg 10(3) of the SOP Regulations provides that one review adjudicator will be appointed to determine this application.

24 On 23 December 2024, the SMC referred the Review Application to me and invited me to accept the appointment as the sole review adjudicator. I accepted the invitation on the same day.

25 On 23 December 2024, pursuant to s 18(6) of the SOP Act, the SMC served a notice on both parties as well as [Z] Pte Ltd, who was identified as the principal and owner in Form AA-1, to confirm and inform them of my appointment as the review adjudicator.

Commencement of adjudication review

26 Section 19(1) of the SOP Act provides that an adjudication review commences on the date immediately after the appointment of the review adjudicator is confirmed by the authorised nominating body.

27 Accordingly, this adjudication review commenced on 24 December 2024.

Due date for adjudication review determination

28 Section 19(6) of the SOP Act requires a review adjudicator to issue his review determination within 14 days after the commencement of the adjudication review, or within such longer period as may have been requested by the review adjudicator and agreed to by the claimant and the respondent.

29 Section 2 of the SOP Act provides that "day" means "any day other than a public holiday within the meaning of the Holidays Act 1998".

30 As 25 December 2024 and 1 January 2025 were Christmas Day and New Year's Day respectively, this Adjudication Review Determination was therefore due on **9 January 2025**. For completeness, during the adjudication conference convened on 27 December 2024, I had invited parties to submit which was the due date of the same. In the Claimant's further submissions dated 31 December 2024, the Claimant submitted that the Adjudication Review Determination would be due on 9 January 2025.

Merits conference

31 By an e-mail dated 24 December 2024, I directed that a substantive conference ("Conference") be held on 27 December 2024 starting at 5.00pm. It was an online conference conducted on the Zoom platform.

Only the Claimant responded to confirm their attendance at the Conference.

32 Representatives from the Claimant attended the said conference. No one from the Respondent attended. The following representatives of the Claimant were present at the Conference:

(a) Mr [B];

(b) Mr [C];

(c) Eric Ng Yuen (counsel);

(d) David Zee Keng Kok (counsel); and

(e) Amet You Cai Edouard (trainee).

33 Counsel for the Claimant presented their oral arguments at the Conference. In the course of its oral submissions, the Claimant also referred to a written set of submissions, a copy of which had been provided to me via the SMC earlier. I will refer to this set of submissions as "ARWS".

34 At the end of the Conference, I had directed the Claimant to submit further written submissions on the following by *12.00 noon, 31 December 2024 (Tuesday)*:

(a) whether I am entitled to order, under the SOP Act, the Respondent to reimburse the Claimant the costs of the adjudication below; and

(b) the due date for me to issue my adjudication review determination.

35 These directions were set out in my e-mail dated 27 December 2024. Although no representative from the Respondent was in attendance at the Conference, I nevertheless invited the Respondent to respond, if it so wishes, to the submissions directed to be made at [34] above by *12.00 noon, 2 January 2025 (Thursday).*

36 The Claimant submitted its written submissions as directed. No submissions were made by the Respondent.

Documents and written submissions tendered

37 The Claimant had lodged this Review Application, together with the following documents which were downloaded from a Google Drive link:

(a) a folder of documents (comprising eight sub-folders) which had been tendered for the AA, which included a set of written submissions together with legal authorities and supporting documents;

(b) the AA Determination dated 13 December 2024, which I will abbreviate to "AD"; and

(c) seven folders of documents (numbered 1 to 7) tendered for the Review Application, which included the ARWS together with legal authorities and supporting documents.

38 Pursuant to my directions at [34] above, the Claimant lodged a further set of written submissions by way of e-mail dated 31 December 2024 (time-stamped: 10.56am). There were no attachments and/or further documents tendered under that e-mail.

39 I have considered all the submissions, relevant documents and legal authorities tendered by the Claimant. I have set out the grounds for my determination in the paragraphs below. To avoid incurring unnecessary expense, I have not recorded all the facts and arguments presented and considered by me in arriving at this determination. Nevertheless, the record in this determination is sufficient to reflect the substance of the respective cases canvassed by the Claimant and the main issues on which I consider this determination is based. It should not be assumed that any evidence or argument which has not been specifically recorded herein has not been taken into account in arriving at this determination.

Scope of review application

The contract

40 The Claimant was engaged by the Respondent as a subcontractor for electrical installation works ("Subcontract Works") in relation to the proposed erection of a nine-storey [xxx] complex comprising [xxx] with car parks at [xxx] ("Project"), which included the carrying out of construction works and/or supply of services.

41 The employer of the Project is [Z] Pte Ltd ("Employer"). The Employer had engaged the Respondent as the main contractor for the Project under a main contract dated 21 December 2016.

42 By way of a letter of award dated 21 February 2022 (Ref No [xxx]) ("Subcontract"), the Claimant was engaged by the Respondent to carry out the Subcontract Works at the agreed lump sum of S$2,580,000.00 (excluding "Optional Item" and GST), based on the breakdown of the scope of work set out in the Tender Submission dated 12 November 2021 (Ref [xxx]072), First Tender Resubmission dated 3 December 2021 (Ref [xxx]072A) and Second Tender Resubmission dated 28 December 2021 (Ref [xxx]072B).

Payment claim and response

43 Since the start of the Project, the Claimant has submitted 16 payment claims from 23 March 2022 to 25 October 2024 in respect of the Subcontract Works: *ie*, PC 1 to PC 16. In turn, the Respondent has submitted 12 payment responses from 13 April 2022 to 18 March 2023. The last payment response submitted by the Respondent was "PR 12" dated 18 March 2023 for $1,000.00 and, since then, the Respondent has not served any payment response to the last four payment claims (*ie*, PCs 13 to 16).

44 The AA was made in respect of PC 16. On 25 October 2024, the Claimant served PC 16 on the Respondent for the outstanding sum of S$165,135.00 for work carried out under the Subcontract.

45 PC 16 was served in accordance with cl 31(1) read with cl 40(2) of the SIA Building Contract 2016 (Without Quantities), which provided that the "Contractor shall be entitled to serve a payment claim as defined in Section 10 of the SOP Act within and inclusive of the 25th to 28th calendar day of each month".

46 The Respondent did not serve a payment response to PC 16.

47 For reasons that will be explained below, even though the AA concerned only PC 16, the Adjudicator had also considered the amounts in PCs 12–15 relevant to his determination. As such, I will set out a tabulation of items and amounts extracted from PCs 12–16, as follows:

	PC 12 ($)	**PC 13 ($)**	**PC 14 ($)**	**PC 15 ($)**	**PC 16 ($)**
Payment claim date	21.02.2023	24.03.2023	22.02.2024	27.08.2024	25.10.2024
Value of original Subcontract Works	2,058,500.00	2,058,500.00	2,080,000.00	2,080,000.00	2,060,000.00
Optional Item for Phase 2	-	-	-	-	-
Add variation orders ("Variation Works")	290,856.00	290,856.00	290,856.00	-	-
Value of work done	2,349,356.00	2,349,356.00	2,370,856.00	2,080,000.00	2,060,000.00
Less amount previously paid	1,879,250.00	1,879,250.00	2,199,356.00	1,908,500.00	1,908,500.00

Add GST	37,608.48	37,608.48	15,435.00	15,435.00	13,635.00
Payment claim amount	507,714.48	507,714.48	186,935.00	186,935.00	165,135.00
Amount paid by Respondent	1,000.00	NIL	NIL	NIL	NIL
Adjudicator's determination	N/A	N/A	N/A	N/A	NIL

The Adjudicator's decision

48 In summary, the Adjudicator had dismissed the AA on the basis that the Claimant had made "*ad hoc* adjustments" to the sums claimed in PCs 14, 15 and 16, resulting in inconsistencies that "cast doubt on the accuracy and reliability of payment claims" (AD at [39]). In particular, the Adjudicator highlighted the following alleged inconsistencies:

(a) First, it was "unorthodox and illogical" for the sums claimed in PCs 12 and 13 to stagnate, before increasing to a peak in PC 14, and then downwards again in PC 15 and 16 (AD at [31]).

(b) The Adjudicator also observed that the Variation Works (amounting to $290,856.00) that was claimed in PC 14 was omitted in PC 15, resulting in a reduction in the value of work claimed from $2,370,856.00 to $2,080,000.00. At the same time, the "amount previously paid" was correspondingly lowered in PC 15 such that the payment claim amounts in PC 14 and 15 were identical (AD at [35]).

(c) As for PC 16 (in respect of which the AA was lodged), the Adjudicator noted that the Variation Works were likewise omitted, and that the value of the work had been lowered from PC 15 to PC 16 (AD at [37]).

49 In view of the aforementioned inconsistencies, the Adjudicator concluded that PCs 14, 15 and 16 suffered from "patent errors". He also concluded that the Claimant had made "misrepresentations" in compiling the payment claims (at [39]). For these reasons, the Adjudicator dismissed the AA.

Main issues

50 After reviewing the written and oral submissions from the Claimant, it appears to me that the Claimant is requesting me to review and or to decide the following issues:

(a) Issue 1: whether the Adjudicator had breached the rules of natural justice in arriving at his conclusions as summarised at [49] above.

(b) Issue 2: if the Adjudicator had breached the rules of natural justice and the AA Determination is liable to be set aside, how much is the Claimant entitled to under PC 16?

Issue 1: whether Adjudicator had breached rules of natural justice

Parties' contentions

51 The Claimant has raised the following points in support of its contention that the Adjudicator had breached the rules of natural justice, and the AA Determination should be set aside:

(a) The Adjudicator had failed to provide the Claimant a fair and reasonable opportunity to be heard. In particular, in arriving at his determination that the Claimant had made "*ad hoc* adjustments" to PC 14, PC 15 and PC 16 resulting in "patent errors", the Adjudicator had failed to allow parties (especially the Claimant) the opportunity to explain these adjustments in claimed amounts (including the omission of the Variation Works). This issue was also not brought to the Claimant's attention as being a live issue in the AA, and the Claimant had no opportunity to address it in the proceedings below before the Adjudicator made a decision adverse to the Claimant.

(b) The Adjudicator had ample time and opportunity to seek parties' submissions and clarifications on the aforementioned issues, but failed to do so. This caused material prejudice to the Claimant, as the Adjudicator may have reasonably reached a different conclusion if the Claimant had been given a chance to provide an explanation for the downward revision in amounts claimed.

52 For the record, the Respondent has not provided submissions on this issue, or in fact on any issues at all in this review proceedings.

The applicable law

53 The Claimant has referred me to the case of *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers Engineering*"), where the Court of Appeal laid out the following principles (at [54]–[55]):

> 54 It is well-established that a decision-maker may breach the fair hearing rule if **he decides a dispute on a point which the parties have not had a fair opportunity to address** (see *Pacific Recreation Pte Ltd v S Y Technology Inc*

> *and another appeal* [2008] 2 SLR(R) 491 ('*Pacific Recreation*') at [30] and *AKN v ALC* at [76]–[80]). In articulating the type of mischief or unfairness which this principle is designed to address, the courts often speak in terms which suggest that **a decision may be unfair by virtue of the fact that it catches the parties by *surprise*.** Thus, for instance, in *Soh Beng Tee* at [41], this court noted that where a breach of natural justice is alleged, '**[i]t is frequently a matter of degree as to how *unexpected* the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it**'.
>
> 55 In our judgment, a surprising or unforeseen outcome *may* usefully indicate that there has been a breach of the fair hearing rule, but this is hardly conclusive. The courts should be mindful that a surprising outcome may be the product of several distinct types of situations, some of which may not involve any breach of natural justice at all (see [56]–[63] below). **The true question is whether the parties have been deprived of a *fair opportunity* to be heard** (see *Soh Beng Tee* at [43] and *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [73] and [77]). **Here we speak of fairness not in terms of equal treatment between the parties, but in terms of reasonableness.** At the risk of stating the obvious, **a fair and reasonable opportunity of being heard *may or may not* require a decision-maker to take the overt step of inviting submissions from the parties on a given issue.**
>
> [Claimant's emphasis in bold]

54 The Court of Appeal went on to outline the three possible situations in which the parties could have been deprived of a fair and reasonable opportunity to be heard, resulting in a surprising outcome. In the Claimant's ARWS (at para 35), the Claimant argued that the present situation is analogous to the situation where the parties had been surprised by the outcome of a dispute as described at [58] and [59] of that decision:

> 58 Alternatively, the outcome of a dispute may be surprising to the parties by reason of the fact that **they have not even addressed the very question which the decision-maker has posed as being a decisive issue, because they (a) did not know; *and* (b) could not reasonably have expected that it would be in issue at all.** An example of this may be seen in the case of *The Vimeira* [1984] 2 Lloyd's Rep 66, where the issue in dispute was whether a particular port where a ship had docked to discharge was unsafe for the vessel. The parties argued the case on the basis that the decisive issue was whether there was sufficient water in the port for the ship to dock safely. The arbitrators, however, decided that the port was unsafe because the turning area was unduly restrictive for the vessel, notwithstanding that this issue had not been raised in the pleadings.

> 59 The English Court of Appeal held that this amounted to a breach of natural justice, **Robert Goff LJ stating that it was unfair for the arbitrators 'to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it' (at 75).** In our view, the court rightly found that the parties did not have a fair opportunity to be heard on the issue of the adequacy of the turning area for the vessel. Such a finding is necessarily fact sensitive and would be a function of the evidence before the arbitrator. **The parties did not have an opportunity to adduce evidence or address the arbitrator because they were subjectively unaware that the adequacy of the turning area was an issue at all. They did not have a *fair* opportunity because they objectively could not have reasonably foreseen that it was a live issue. In such situations, the arbitrator would be in breach of natural justice unless he has taken the step of inviting submissions on that issue.**
>
> [Claimant's emphasis in bold]

My decision

55 While *Glaziers Engineering* had concerned the court's powers to set aside an adjudication determination for breach of natural justice, I am of the view that the principles regarding breach of natural justice are of equal application to the present case. In particular, the thrust of the inquiry should be whether the parties had been deprived of a "fair opportunity to be heard" in respect of a decisive point in the adjudicator's decision. While the court noted that it is not necessary for the decision-maker to have taken the overt step of inviting submissions on a particular issue, in situations where the parties **did not know and/or could not have reasonably expected** that the issue would have been decisive, the decision-maker would be in breach of natural justice **unless** he had invited submissions on that issue.

56 It is clear that a decisive factor in the Adjudicator's decision to dismiss the AA was the seemingly illogical and/or *ad hoc* adjustments to the sums claimed in PCs 12–16. In my view, it was a breach of natural justice for the Adjudicator to have impugned the reliability and accuracy of the sums claimed, without first inviting the Claimant to provide an explanation for these alleged inconsistencies. As the Claimant later explained in its ARWS (which I will address in further detail below), there could be legitimate reasons for these fluctuations.

57 I also accept the Claimant's contention that it was unaware and/or could not have reasonably expected that the fluctuations between PCs 12–16 would have been a live issue, such that it was taken by surprise when the Adjudicator made an adverse finding against the Claimant. This is because the AA had been lodged in respect of PC 16, and the Claimant's ARWS before the Adjudicator had (understandably) revolved around its

entitlement to the moneys claimed under PC 16, without delving into the amounts under PCs 12–15. The Claimant could not have been expected to pre-empt the myriad evidential objections that the Adjudicator could have raised, especially when there could have been legitimate reasons for the fluctuations.

58 If the Adjudicator had regarded the fluctuations to have been a material issue, he ought to have brought it to the Claimant's attention and to invite submissions and/or explanations for the same, especially since this was not canvassed in the ARWS. It should be also noted that the AA Determination had been rendered without the benefit of an adjudication conference, which yet again deprived the Claimant an opportunity to address these issues. When issuing the Adjudicator's Direction No 2 to seek clarification on the blanked-out bottom of p 6 of the payment response to PC 12, the Adjudicator could have also taken the opportunity to bring his concerns to the Claimant's attention. As such, I accept that the Claimant was unaware and/or could not have reasonably foreseen that the fluctuations were a live issue that ultimately resulted in the dismissal of the AA.

59 In the High Court decision of *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28, the court noted (at [68]) that:

> The defendant's next submission is that the breach of natural justice was not material to the adjudicator's determination. It is certainly true that **not every breach of natural justice will result in an adjudication determination being set aside.** There are **two aspects of materiality**. The first is whether the breach of natural justice was **causally connected with the adjudicator's determination**. This requires considering the role played in his determination by his holding that the standard of persuasion which the plaintiff had to meet amounted to persuasion beyond reasonable doubt. I deal with that aspect of the submission in this section of the judgment. The **other aspect is whether the breach of natural justice caused the plaintiff prejudice**. [emphasis added in bold]

60 Accordingly, aside from establishing that there had been a breach of natural justice, it must also be shown that the breach had been "material" to the adjudicator's decision – *ie*, it had to be "causally connected" with the determination, and that the breach must have caused the claimant prejudice.

61 In this regard, the Claimant in its ARWS has argued that the breach had been material because the amounts claimed in PCs 14, 15 and 16 were ultimately consistent when understood with the benefit of context, and the Adjudicator would have reasonably arrived at a different conclusion had the Claimant been given the opportunity to address this earlier:

> (a) First, the Claimant has clarified that there had been a removal of unpaid items (*ie*, Item 10, being provisional sums for the supply and

installation of power points for security and CCTV equipment) (previously certified as "nil" in PR 12), which resulted in the $20,000 reduction in amounts claimed in PC 16 (paras 38 and 46 of the ARWS). The Claimant further explained the works for Item 10 were not ultimately performed and the "previous claims for Item 10 were wrong", and thus the Claimant had ultimately decided to remove Item 10 in PC 16.

(b) As for the payments due under Variation Works claimed under PCs 12, 13 and 14 amounting to $290,856.00, the Claimant explained that moneys had been paid as directed by the Employer to the Claimant. In this regard, the Claimant has adduced WhatsApp correspondence from March 2023 to April 2023 evidencing such payment arrangement. I have also sighted the Claimant's Oversea-Chinese Banking Corp ("OCBC") account statement details for May 2023, showing a transfer from the Employer in the sum of $314,383.03, which the Claimant has explained constitutes the sum of the Variation Works as well as other variation works.

(c) After removing the amounts paid directly by the Employer for the Variation Works, the Claimant has explained there has been no change to the outstanding claim in PC 16 (at para 45 of the ARWS). In particular, after accounting for the $20,000.00 omitted for Item 10, and the payment of $290,856.00 (for the Variation Works), the amount claimed (including GST) from PC 14 to PC 16 remained constant at $165,135.00.

62 It is evident from the AA Determination that the key reason for the Adjudicator's dismissal of the AA was the apparent "*ad hoc* adjustments" and "significant inconsistencies" to the sums claimed in PCs 12–16. Had the Claimant been given the chance to explain the context or reasons behind the adjustments as summarised above, I am of the view that the Adjudicator would have reasonably reached a different conclusion. As such, I accept that the breach of natural justice occasioned by the Adjudicator's failure to bring this issue to the Claimant's attention and to invite submissions on the same had resulted in material prejudice to the Claimant.

63 For completeness, I note that the Adjudicator has also reminded himself that there has been "patent errors" as a result of the apparent inconsistencies in PCs 14, 15 and 16. It is established law that an adjudicator has a duty to look out for patent errors, even if it has not been brought to the adjudicator's attention by the respondent. This is part of the adjudicator's general and independent duty to adjudicate the payment claim dispute before him, and not simply rubber stamp a claim in the absence of a payment response.

64 In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*"), the Court of Appeal held (at [22]) that "a patent error is an error that is obvious, manifest or otherwise easily recognisable. It refers to an error that is in the material that is properly before an adjudicator for the purpose of his adjudication". A patent error is also, by definition, "an exceptional and extremely narrow category of errors" (at [23]).

65 Section 2 of the SOP Act now ascribes a definition of "patent error" in relation to a payment claim as meaning "an error that is obvious, manifest or otherwise easily recognisable on the face of the claim".

66 I do not think that the alleged inconsistencies brought up by the Adjudicator amounted to patent errors. As rightly pointed out by the Claimant, there could be numerous plausible reasons why the value of work claimed could decrease over time – for instance, it could be reduced to account for omissions or mistakes in the previous payment claims. As demonstrated in the present case, it is also not always that such omissions will be recorded as separate line items in the progress claims, such that the numbers can be easily reconciled. In such situations, it would be necessary to invite explanations or further submissions from the parties, instead of summarily concluding that a "patent error" had been made.

67 For the reasons above, I agree that the Adjudicator had breached the rules of natural justice in arriving at his determination, and the AA Determination should accordingly be set aside and be substituted by what I consider to be appropriate upon a full review. This is set out in s 19(7)(*a*) of the SOP Act which gives me general powers to "substitute the adjudication determination that is the subject of the adjudication review for any other determination as is considered appropriate". I also consider the High Court's observations in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 instructive in relation to the role and powers of a review adjudicator. After considering the provisions in the SOP Act relating to the review adjudication process, Judith Prakash J (as she then was) concluded at [38] that:

> … The adjudication review procedure provides the parties with an opportunity to re-argue their respective cases with regard both to the facts and the law. The review adjudicator is able to go into the substantive merits of the original adjudicator's decision. The adjudication review procedure is therefore a species of appeal albeit limited to cases in which a particular monetary qualification is reached.

68 From the above, it is clear to me that I can freely review the Adjudicator's findings that there were patent errors in the documents properly before him, and to substitute his determination with what I consider to be appropriate on the facts as I find them, if necessary. Having

considered the submissions made by the Claimant in this review application and also following my review of all the documents before me, I do not share the Adjudicator's view that there were any patent errors of the types identified by the Adjudicator. I have also considered whether on the evidence before me, PC 16, the notice of intent and the AA were all valid, both in terms of the time that they were served and their form. I agree with the Adjudicator at [28] of the AD that they were all in compliance with the Subcontract and the SOP Act.

Issue 2: How much is Claimant entitled to under PC 16?

Claimant to establish prima facie case

69 In the case of *Comfort Management*, the Court of Appeal decided that an adjudicator must be satisfied that the Claimant has establish a *prima facie* case for its claim, regardless of whether any payment response has been filed (at [34]):

> Our view is that notwithstanding s 15(3), and regardless of whether any payment response has been filed, an adjudicator has an independent duty to address his mind to and consider the true merits of a payment claim, and, to allow it, he must be satisfied that the claimant has established a prima facie case that the construction work which is the subject of the payment claim has been completed and that the value of that work is as stated in the payment claim. Articulated in the terms of the Act, this duty comprises the obligations set out in ss 17(2) and 17(3), and requires an adjudicator, in particular, to have regard to all the matters stated in the latter provision …

70 The relevant provisions of s 17(4) of the SOP Act read as follows:

> (4) Subject to subsection (5), in determining an adjudication application, an adjudicator may only have regard to the following matters:
>
> (*a*) the provisions of this Act;
>
> (*b*) the provisions of the contract to which the adjudication application relates;
>
> (*c*) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
>
> (*d*) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
>
> …

(*g*) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication;

(*h*) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.

71 The claim in PC 16 is substantially a claim for work carried out under the Subcontract. The Claimant has explained that all Subcontract Works were completed as evidenced by the following:

(a) on or about 15 November 2022, SP Powergrid Ltd had approved the power turn on;

(b) the Commissioner of Building Control had issued the certificate of statutory completion and the temporary occupation permit on or around 3 March 2023;

(c) the Employer's project architect had apparently issued a completion certificate dated 15 March 2023 certifying that, save for minor outstanding works, the main contract building works had been completed. He also certified that the maintenance period started on 16 March 2023 and would end on 15 March 2024; and

(d) the Claimant also asserted there that all defects had been rectified.

72 In the absence of any payment response and adjudication response, I am persuaded, on a *prima facie* basis, that the Subcontract Works have been completed.

73 As for the price of the Subcontract Works, I accept the Claimant's figure of $2,060,000.00 claimed in PC 16 as *prima facie* correct. This is supported in the last payment response submitted by the Respondent, *ie*, PR 12 dated 29 February 2023. In this payment response, the Respondent certified the value of the Subcontract Works as $2,038,500.00 at that stage. The difference between this sum and the sum claimed in PC 16 came about because the Respondent had assessed four items of work as incomplete. If they were completed, the price of the Subcontract Works would have been the same as the sum claimed in PC 16 of $2,060,000.00. As I have found that the Subcontract was completed, I accept that the total Subcontract price is $2,060,000.00.

74 As regards the payment received by the Claimant, I accept that it amounted to $1,908,500.00 as evidenced from the Respondent's own certification in PR 12.

75 I note from the letter of award dated 21 February 2022 of the Subcontract that the last tranche of 2.5% as retention is agreed to be released only after the "maintenance certificate" is issued or after the "defect liability

period" has ended, whichever is the later. It is not entirely clear whether the "maintenance certificate" referred to in the said letter of award pertained to the "Subcontract Maintenance Certificate" mentioned in the SIA Subcontract 2016 which formed part of the Subcontract (and to be issued by the Respondent) *or* to the maintenance certificate to be issued under the main contract made between the Employer and the Respondent by the project architect. The Claimant has not exhibited any such certificates at all.

76 I do not think that the absence of such a certificate, whatever that may be, is relevant to the due date for the release of this sum, for the following reasons:

(a) If the "maintenance certificate" in the letter of award was referring to the main contract maintenance certificate, I accept the Claimant's submission made to me during the Conference that in that event, the clause in the said letter of award is unenforceable as a "pay when paid" provision under s 9 of the SOP Act.

(b) However, if it refers to the certificate in cl 11.2(a) of the SIA Subcontract 2016, my view is that if it had not been issued by the Respondent, it ought to have been issued as there is no evidence before me that there were any outstanding defects for the Claimant to rectify. It cannot be the case that the Respondent can defer its liability to pay simply by refusing or neglecting to issue such a certificate.

77 Accordingly, I will set out the account as I find it, as follows:

(a) Subcontract Works	$2,060,000.00
(b) Less previous payment made	($1,908,500.00)
Add 9% GST	$13,635.00
Payment due	**$165,135.00**

Costs of adjudication

78 In this review, the Claimant is also claiming for a review of the adjudication costs ordered by the Adjudicator below. The Adjudicator had determined that the costs of the AA below, being $3,433.50 (inclusive of GST), comprising the adjudication application fee of $654.00 (inclusive of GST) and adjudicator fees of $2,799.50 (inclusive of GST), be borne by the Claimant. Pursuant to my request, the Claimant has made submissions that, if I do decide this application in its favour, then I am entitled to determine that these costs be reimbursed to it by the Respondent. I will discuss these submissions below.

79 The Claimant's submissions in this regard may be briefly summarised as follows:

(a) the review adjudicator is permitted to review the costs of the AA, as s 19(7) of the SOP Act provides that the review adjudicator may "substitute the adjudication determination … as is considered appropriate". Given that the costs order forms part of the AA Determination, the review adjudicator may exercise his powers under s 19(7)(*a*) to substitute the same for an appropriate cost order.

(ii) The Claimant also submitted that the panel of review adjudicators in *BFK Pte Ltd v BFL Co Ltd* [2021] SCAdjR 656 ("*BFK*") had erroneously decided that review adjudicators had no jurisdiction to substitute the adjudicator's decision in respect of the costs of the adjudication below, and urged me to depart from that decision.

80 Although I had invited the Respondent to tender submissions on this issue, the Respondent did not do so.

81 Having carefully considered the Claimant's submissions, it is my view that I am entitled under the SOP Act to review the costs of the adjudication below as determined by the Adjudicator, and substitute it with what I consider appropriate. I now turn to explain my reasons.

82 At the outset, I accept that the scope of my jurisdiction or mandate as review adjudicator is defined under ss 19(7) and 19(8) of the SOP Act.

83 Section 19(7) of the SOP Act provides as follows:

(7) In relation to any adjudication review application, a review adjudicator or a panel of review adjudicators (as the case may be) may —

(*a*) substitute the adjudication determination that is the subject of the adjudication review for any other determination as is considered appropriate; or

(*b*) refuse the adjudication review application.

84 Section 19(8) provides as follows:

(8) A review adjudicator or a panel of review adjudicators (as the case may be) must determine under subsection (7)(*a*)—

(*a*) the adjudicated amount (if any) to be paid by the respondent to the claimant;

(*b*) the amount (if any) to be returned by the authorised nominating body to the respondent;

(*c*) where the adjudicated amount mentioned in paragraph (a) is different from the amount that the respondent has paid to the authorised nominating body under section 18(3), the date on which the difference in amount is payable;

(*d*) the interest payable on any such amount; and

(*e*) the proportion of the costs of the adjudication review payable by each party to the adjudication review, and must include, in the determination, the reasons therefore.

85 In *BFK*, the panel of review adjudicators ("Panel") held that since ss 19(7) and 19(8) of the SOP Act read together did not "expressly and specifically" confer on a review adjudicator the jurisdiction to review the costs of the adjudication below, he does not have any jurisdiction to do so (at [151]).

86 I note that I am not bound by the decision in *BFK* and am entitled to decide this issue independently. Having considered the Panel's reasoning in *BFK*, I respectfully decline to follow the decision reached in that case.

87 In my view, I am conferred the overarching powers to review and, if necessary, substitute the "adjudication determination" as I deem appropriate under s 19(7) of the SOP Act. Section 2 defines "adjudication determination" to be the determination of the adjudicator, and s 17(2)(*d*) states that this includes, *inter alia*, the "proportion of the costs of the adjudication payable by each party to the adjudication". It is therefore clear that the costs of the AA below forms part of the "adjudication determination" which I am entitled to review.

88 Notably, s 19(8) does not provide that I am entitled **only** to determine the matters specified therein; it merely sets out the matters on which I "must" render a decision, which is a subset of matters falling within my broader jurisdiction to review the adjudication determination under s 19(7). While I accept the Panel's proposition (at [147]) that the review adjudicator only has such jurisdiction that is conferred upon him under the SOP Act, I hold that such jurisdiction has already been expressly granted pursuant to s 19(7).

89 Further, given that the award of costs in an adjudication application is generally guided by the outcome of the application, it seems incongruous to me that my powers extend to overturning the adjudicator's determination, but not his assessment of costs.

90 For the above reasons, I hold that I am entitled to make a determination in relation to the costs of the adjudication below. Given that I have allowed the Claimant's claim for the amount due under PC 16 in full, I also determine that the costs of the adjudication below should be wholly borne by the Respondent.

Conclusion

Outcome of adjudication review

Adjudication Review Adjudicated Amount

91 Accordingly, I hereby determine the following:

(a) The Respondent shall pay the Claimant the sum of $165,135.00 (inclusive of GST). This sum shall be the Adjudication Review Adjudicated Amount for the Review Application and shall substitute the determination in the AA Determination where no amount is stated to be payable.

(b) The Adjudication Review Adjudicated Amount shall be paid within seven days of the service of this Adjudication Review Determination on the Respondent.

(c) As no interest rate has been agreed upon in the Subcontract for any late payment of money owing, the Respondent shall pay the Claimant interest at a rate of 5.33% per annum on any part of the Adjudication Review Adjudicated Amount which remains unpaid as at the due date of payment.

Costs of the AA/Review Application

92 The total cost of the Review Application is $13,979.25, which consists of the adjudication review application fee of $1,308.00 and the fee of the review adjudicator amounting to $12,671.25 (both inclusive of 9% GST).

93 As the Claimant is wholly successful in this application, I determine that the total cost of the Review Application of $13,979.25 shall be solely borne and paid by the Respondent.

94 For the reasons provided at [78]–[90] above, I also determine that the cost of the AA below, being $3,433.50 (inclusive of GST), comprising the adjudication application fee of $654.00 (inclusive of GST) and adjudicator fee of $2,799.50 (inclusive of GST), shall be borne by the Respondent and it shall reimburse the said sum to the Claimant.