ASC Pte Ltd
v
ASD Pte Ltd

[2015] SGSOP 2

Singapore Mediation Centre — SOP AA027 of 2015
Naresh Mahtani
26 March 2015

Adjudication application *— Validity — Adjudication application including items not found in payment claim and items in payment claim not retained in adjudication application — Whether alleged discrepancies invalidating adjudication application — Whether alleged discrepancies prejudicing respondent*

Adjudication application *— Validity — Contractual clause purportedly operating to delay payment owing to contractor until issue of certificate by architect — Whether contractual clause of such effect void under s 36 of the Act for excluding, modifying, restricting or prejudicing operation of the Act*

Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ss 2, 5, 8, 8(1)(*b*), 10(2), 10(2)(*a*), 10(3)(*a*), 11(1)(*a*), 12(2), 12(2)(*a*), 12(5), 13(3)(*a*), 13(3)(*b*), 13(3)(*c*), 16(2), 16(2)(*a*), 16(3)(*a*), 17(3), 22, 22(1)(*a*), 36, 36(1), 36(2), 36(2)(*a*)

Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) regs 5, 5(1), 5(2)(*c*), 7(2)(*a*), 7(2)(*c*)(iii), 7(2)(*d*), 7(2)(*e*)

Winston Quek Seng Soon (Winston Quek & Co) for the claimant;
Christopher Chuah, Kua Lay Theng, Lydia Yahaya, Candy Agnes Sutedja and Amanda Lim (WongPartnership LLP) for the respondent.

[Commentary: see paras 4.4–4.6, 6.1]

26 March 2015

Naresh Mahtani:

Determination

1 This is a determination issued on 26 March 2015 under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev

Ed) (the "SOP Act" or the "Act") in respect of adjudication application SOP AA027 of 2015 (the "Adjudication").

2 The claimant in the Adjudication is [ASC] Pte Ltd, ACRA Registration No [xxx] (the "Claimant") and the Respondent is [ASD] Pte Ltd, ACRA Registration No [xxx] (the "Respondent").

3 For the reasons which are set out below, I determine that:

(a) The Respondent shall pay the Claimant the sum of $6,152,260.34 (excluding goods and services tax ("GST")) (the "Adjudicated Amount").

(b) The rate of interest shall be 5.33% per annum payable on the Adjudicated Amount or any amount thereof that remains unpaid from the due date (as prescribed in s 22(1)(*a*) of the SOP Act) to the date of full payment of the Adjudicated Amount.

(c) The costs of the Adjudication, being the adjudication application fee of $642.00 (inclusive of GST) and the adjudicator's fee of $46,620.00 (plus GST thereon at 7% of $3,263.40 (*ie*, a total of $49,883.40) and disbursements of $82.21 (inclusive of GST)), shall be borne and paid by the parties in the following proportions:

(i) The Respondent shall bear 75%.

(ii) The Claimant shall bear 25%.

Background and commencement of adjudication

Respondent's award of main contract to Claimant

4 The Respondent is the owner of the proposed erection of a "Condominium Housing Development Comprising [xxx] Blocks of [xxx]-Storey Residential Flats (Total [xxx] Units) with a Basement Carpark, Swimming Pool and Communal Facilities on [xxx] at [xxx]" (the "Project").

5 By a letter of award (the "LOA") dated 15 January 2013, the Respondent appointed the Claimant as the main contractor for the Project for the contract sum of $88,063,838 (excluding GST) by a contract (the "Contract"), which incorporated the Singapore Institute of Architects ("SIA") *Articles and Conditions of Building Contract (Lump Sum Contract)* (9th Ed, August 2011 Reprint) (the "SIA Conditions") and *Supplemental Articles and Conditions of Contract* (the "Supplemental Conditions"). Collectively, with the LOA, they make up the Contract. The Claimant and the Respondent do not dispute that the Contract was made on 15 January 2013.

6 The Project commenced on the scheduled commencement date of 21 January 2013, and was scheduled to be completed within 24 months by 20 January 2015.

Termination of Contract by Respondent

7 Following the issue of two "Termination Certificates" by the project architect (the "Architect") on 23 October 2014, the Respondent issued a "Notice of Termination" on 24 October 2014 pursuant to cl 32(2) of the SIA Conditions to terminate the Claimant's employment under the Contract. The Respondent's position is that, further and in the alternative, they were entitled to terminate the Contract with the Claimant under common law by accepting the Claimant's alleged repudiatory breaches.

8 The Claimant alleges that the termination was wrongful, and challenges the Architect's Termination Certificates and the Respondent's Notice of Termination. They have referred their claim for wrongful termination (including claims for damages) to arbitration under their "Request for Arbitration" of 10 November 2014.

Joint site inspection following termination

9 After termination, a joint site inspection was conducted from 31 October to 14 November 2014, attended by the Claimant, and the Respondent's quantity surveyor, Architect, structural engineer, service engineer and M&E consultant to assess the work carried out up to termination.

Employment by Respondent of replacement contractor

10 Following a tender exercise, the Respondent appointed a replacement contractor, [B] ("[B]" or "Replacement Contractor") on 3 November 2014 under a "Completion Contract" to complete the works in the Project at the contract sum of $59,941,539.26 (the "Completion Contract").

Respondent's call on performance bond

11 On 3 November 2014, after the termination of the Contract, the Respondent made a demand on a performance bond (the "Performance Bond") provided by the Claimant under the Contract. The Claimant applied to the High Court for an injunction restraining payment under the Performance Bond. The pending proceedings in the Supreme Court do not affect the issues in this Adjudication, as the laws and practice of the courts as regards issues relating to performance bonds and injunctions are a separate

matter from those relating to payment claims and adjudication applications under the SOP Act.

Claimant's payment claim

12 On 22 December 2014, the Claimant served a payment claim (the "Payment Claim") on the Respondent for a total claim amount of $28,881,775.78 consisting of the following heads of claim:

(a) "Works Done under the Contract for the Reference Period of 21 January 2013 – 24 October 2014";

(b) "Materials On Site";

(c) "Materials/Tools/Equipment Withheld On Site after Termination";

(d) "Rental Charges for Equipment";

(e) "Materials Off Site"; and

(f) "Loss of Profits for the Balance Work due to the alleged Wrongful Termination".

Respondent's payment response

13 On 12 January 2015, the Respondent submitted its payment response (the "Payment Response"), under cover of its letter of even date in which it stated "Please find enclosed our Payment Response No. 21". The Payment Response contained various reasons disagreeing with the Payment Claim and contained comments and valuations by the Respondent's consultants. After making several substantial deductions in respect of set-offs and counterclaims, the response amount in its Payment Response was a negative sum of $7,697,687.51 allegedly owed by the Claimant to the Respondent.

14 In its letter of 19 January 2015 entitled "Dispute to Payment Response", the Claimant recorded briefly the reasons it disputed the Payment Response.

15 On 22 January 2015, the Claimant issued a "Notice of Intention to apply for Adjudication" in which it said, amongst other things: "Despite our efforts in pointing out the errors, mistakes and lack of substantiations in your Payment Response, you have refused to revise the valuation/assessment or provide further explanations or substantiations within the Dispute Settlement Period." It gave notice that it intended to apply for adjudication under the SOP Act and also enclosed brief particulars of its claim.

Commencement of Adjudication under the SOP Act

16 On 23 January 2015, the Claimant commenced this Adjudication Application (the "Adjudication Application" or "AA").

17 On 26 January 2015, the Singapore Mediation Centre ("SMC") appointed me as adjudicator.

18 On 2 February 2015, the Respondent submitted its adjudication response (the "Adjudication Response" or "AR").

19 Pursuant to my directions, the parties submitted written submissions in support of their respective cases and attended an adjudication conference (the "Conference") with me on 6 March 2015 from 10.00am to 6.00pm, at which the parties expanded on their respective submissions and provided clarifications to my enquiries as regards their respective arguments and the documents submitted with the Adjudication Application and the Adjudication Response. The Claimant's representatives at the Conference were their counsel Mr Winston Quek (assisted by Mr Derrick Soh), together with seven representatives from the Claimant, namely [C] (Managing Director), [D] (Executive Director), [E] (Technical Director), [F] (Group General Manager), [G] (General Manager), [H] (Contract Manager) and [J] (M&E Coordinator). The Respondent's representatives who attended the Conference were their counsel Mr Christopher Chuah (assisted by Ms Lydia Yahaya and Ms Candy Sutedja), together with six representatives from the Respondent, namely [K] (CEO of [L], the holding company of the Respondent); [M] (Legal Counsel), [N] (Project Manager), [P] and [Q] (both from [R], the Project's quantity surveyor) and [S] (from [T], the Project's ME Consultant).

20 At the Conference, the Claimant stated that it had decided not to pursue in this adjudication its claim for loss of profits for the balance work amounting to $5,184,995.70, as it said this sum is to be properly adjudicated at arbitration where it was claiming for damages in connection with wrongful termination. Therefore, the total claim amount was reduced to $23,696,780.08.

21 At the Conference, at my request, the parties agreed to an extension of time up to 23 March 2015 for the issuance of this determination. Subsequently, on 19 March 2015, at my request, the parties agreed to an extension of time until 26 March 2015.

22 I should record at the outset that with the view to save time and avoid incurring unnecessary costs, I have not recorded each and every fact, argument and authority (including past adjudication determinations, which the parties submitted have persuasive value) presented by the parties in support of their contentions on the various issues raised in this adjudication, but which I have considered carefully in arriving at my 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 my determination.

Preliminary and jurisdictional issues

Whether Claimant's Payment Claim was "Final Payment Claim" submitted under clause 31(11)(c) of SIA Conditions and/or was invalid for non-compliance with clause 31(11)(c)

23 The Respondent submitted that the Claimant's Payment Claim of 22 December 2014 was named as and issued as a "Final Payment Claim" under cl 31(11)(c) of the SIA Conditions; and that it was invalid for not complying with the contractual requirements in cl 31(11)(c) for the issuance of a final payment claim.

24 The Respondent's arguments on this point can be summarised as follows:

(a) That the Claimant's document of 22 December 2014 was intended as a "Final Payment Claim" under cl 31(11) is shown by the following facts: (i) the document was entitled "Statement of Final Payment Claim" (ii) was served under cover of a letter of even date entitled "Final Payment Claim" and (iii) included a claim for the release of retention moneys.

(b) Clause 31(11)(c) states:

> The Contractor shall serve his final payment claim to the Employer (with a copy to the Architect and Quantity Surveyor) within 14 days after the occurrence of either of the following events whichever is the later:
>
> (i) The issue of the Maintenance Certificate; or
>
> (ii) The receipt by the Contractor of the Statement of the Final Account under paragraph (b) hereof.

If the Contractor serves his final payment claim to the Employer earlier than the issue of the Maintenance Certificate or his receipt of the Statement of Final Account (whichever is the later) as provided under paragraph (b) hereof, the Architect shall not be required to issue his Final Certificate or the Employer to serve his Payment Response to that final payment claim earlier than would have been the case had the Contractor served his final payment claim in accordance with this clause.

(c) As neither the "Maintenance Certificate" nor the "Statement of Final Account" have been issued, the Claimant's "Final Payment Claim" was premature and invalid as a payment claim at this adjudication, since s 10(2)(*a*) of the SOP Act requires a payment claim to be served at such time as specified or determined in accordance with the terms of the contract.

(d) The Claimant's entitlement to this Adjudication has not arisen as the Final Payment Claim did not comply with s 10(2)(*a*) read with s 13(3)(*a*) of the SOP Act, and that I should accordingly dismiss the AA under s 16(2)(*a*) of the SOP Act.

25 The Claimant's submissions on this issue can be summarised as follows:

(a) Clause 31(11)(c) applies to the kind of "Final Payment Claim" by a contractor who had carried out construction works to completion in a *non-termination* situation.

(b) The Payment Claim of 22 December 2014 was not really a "Final Payment Claim" submitted under cl 31(11)(c), even though the Claimant had called it a "Final Payment Claim". It was actually *Interim Payment Claim or Progress Claim No 21* (following Interim Payment/Progress Claim No 20) after the termination of its employment on 24 October 2014 and the said joint site inspection from 31 October to 14 November 2014.

(c) This was evidenced, *inter alia*, by the fact that the Respondent's Payment Response of 12 January 2015 had referred to itself as "*Payment Response No. 21*" and recognised the Claimant's Payment Claim of 22 December 2014 as "*Payment Claim No. 21*". It was not lost on the Respondent that the subject Payment Claim was not really submitted as a "Final Payment Claim" under cl 31(11)(c), and it was therefore wrong of the Respondent to assert that it was invalid for not complying with that clause.

My decision on this issue

26 After considering all the submissions from the parties and evidence on this point, I am of the view that cl 31(11)(c) does not apply to the subject payment claim, even though it bore the title "Final Payment Claim".

27 An analysis of the contractual framework under the SIA Conditions shows that cl 31 contemplates final payment to the "Contractor" upon completion, following the steps in the sub-clauses preceding cl 31(11)(c). Clauses 31(11)(a) and 31(11)(b) provide for the contractor intending to make a Final Payment Claim to first submit its "Final Account Documents" to the architect and quantity surveyor. The architect would then prepare a

"Statement of Final Account" which would show the architect's final measurement and valuation of all works carried out together with any permitted deductions by the employer under the terms of the contract. Clause 31(11)(c) effectively relates to the kind of Final Payment Claim issued after or in connection with the issuance of a "Maintenance Certificate" and Statement of Final Account.

28 Under the scheme of the Conditions of Contract applicable in this case, cll 31(9) to 31(12) provide for the *final accounting exercise between the employer and contractor in a non-termination* situation; whereas cll *32(8) to 32(12) and 33(4) provide for the final* accounting in termination situations. As the Contract was terminated under cl 32(2) in this case, the applicable and relevant provisions for final accounting between the parties would be cll 32(8) to 32(12), and not cll 31(11) and 31(12).

29 It is clear to me that the subject Payment Claim was not meant to be the kind of "Final Payment Claim" envisaged under cl 31(11)(c) (even though it purported and attempted to include a claim for the return of retention sums, which subject I will deal with further in this determination). From the submissions and evidence before me, it appears to me that the Claimant had mistakenly called it a "Final Payment Claim" following the termination of its employment and the joint site inspection. Importantly, neither the Respondent, nor the Architect and quantity surveyor, were misled into treating it as a "Final Payment Claim" under cl 31(11)(c). Amongst other things, taken together:

(a) The payment claim further clearly and specifically asked the Respondent "to issue a Payment Response within 21 days as stipulated under section 11 of the SOP Act".

(b) The Respondent's payment response of 12 January 2015 specifically referred to itself as "Payment Response No. 21" and contained a "response amount".

(c) The Claimant's letter of 19 January 2015 is titled "Dispute to Payment Response".

(d) Some other documents in the Respondent's Payment Response and Adjudication Response (including the affidavits of the Respondent's witnesses included in the Adjudication Response documents) acknowledged the subject Payment Claim as "Payment Claim No. 21" and the Respondent's response as "Payment Response No. 21".

30 I find that the subject Payment Claim in this AA is not a "Final Payment Claim" attracting the pre-requisites of cl 31(11)(c), and neither should its validity be tested under that clause.

31 For completeness, I should add, though, that it is clear to me, after considering the submissions and arguments by the parties, that even if the subject Payment Claim was intended to be and/or is regarded in this adjudication as a "Final Payment Claim", it was still valid as a payment claim for progress payments for construction work carried out, under ss 2 and 5 of the SOP Act, in spite of the objections to its timing in relation to the conditions in cl 31(11)(c).

32 This is because:

(a) The final accounting exercises under both cll 31 and 32 are separate from and do not affect the contractors' ability to continue making progress payment claims (in both termination and non-termination situations) under cl 31(2), for which the timelines for making payments on progress payments under the "saving" provisions in [cl] 31(16) [of the SIA Conditions] and s 8 of the SOP Act will apply. These "saving' provisions are elaborated further below at [119] to [125] in relation to cl 32(8)(a) of the SIA Conditions.

(b) The *Guidance Notes on Articles and Conditions of Building Contract (Incorporating 9th Edition Main Contract and 4th Edition Subcontract Conditions)* (3rd Ed, March 2011) state at p 20:

> It is important to note that the Contract Conditions do not in any way prevent the Contractor from serving a payment claim for works carried out (including variations ordered) as an interim payment claim at any time before he submits his final payment claim under Clause 31(11)(c) and to refer such payment claim for adjudication under the SOP Act to secure payment.
>
> As such, the *final payment procedure under Clause 31(11) does not affect the Contractor's right to seek immediate payment under the SOP Act for all works carried out* including variations *by the submission of an interim payment claim* to the Employer.
>
> [emphasis added]

(c) As indicated by the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2012] SCAdjR 771; [2012] SGCA 63 ("*Chua Say Eng*") at [74], and noted in Chow Kok Fong, *The Singapore SIA Form of Building Contract* (Sweet & Maxwell, 2013) at para 31.42, "a claimant's subjective intention is irrelevant to determining whether a document is a payment claim. So long as a payment claim complies with the 'legislated formal requirements for payment claims', it should be treated as a payment claim."

33 Further, as stated by the learned adjudicator in SOP AA135 of 2013 [*AOZ Pte Ltd v APA Pte Ltd* [2013] SCAdjR 299 ("*SOP AA135 of 2013*") at [121]–[125], which I brought to the attention of the parties at the

Conference for their comments, the conditions imposed by cl 31(11)(c) (namely the prior issue of a Maintenance Certificate and the Statement of Final Account) should not be allowed to have the effect of excluding, modifying, restricting or prejudicing the operation of the SOP Act in relation to a contractor's entitlement to pursue a payment claim for progress payments for work done, as to have that effect would be contrary to the provision of "No contracting out" in ss 36(1) and 36(2)(*a*) of the SOP Act. As stated in s 36(1), the "provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement".

34 In *The Singapore SIA Form of Building Contract*, Mr Chow Kok Fong considered at para 31.46 whether the imposition of conditions under cl 31(11)(c) contravenes s 36 of the SOP Act or whether it should be regarded as the "event" entitling the Contractor to make a claim for payment under s 2 of the SOP Act. Mr Chow commented on the consequence of applying the latter, given that "the issue of both [the Maintenance Certificate and the Statement of Final Accounts] is critically dependent on the Architect's diligence and judgment" such that the service of the Final Payment Claim "falls within the class of situations which could be exposed to dilatoriness on the part of the certifier, the very kind of mischief which the Act was enacted to address".

Whether, if Payment Claim was interim payment claim, service was within time under clause 31(2)(a) read with Appendix

35 The Respondent submitted that even if the Payment Claim of 22 December 2014 was not a "Final Payment Claim" but an interim payment claim, it was "out of time" under the applicable provisions of the Contract, *ie*, by cl 31(2)(a) read with the Appendix to the Contract.

36 The applicable provisions of the SOP Act are as follows:

(a) Section 10(2) provides: "A payment claim shall be served — (a) at such time as specified in or determined in accordance with the terms of the contract".

(b) Section 11(1)(*a*) states: "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 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*."

(c) Section 12(2) states: "Where, in relation to a construction contract — (a) the claimant disputes a payment response provided by

the respondent … 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 dispute settlement period, the dispute is not settled …"

(d) Section 12(5) states: "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).*"

(e) Section 13(3)(*a*) states: "An adjudication application shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12."

37 The first inquiry thus in determining whether the Adjudication Application was made within time is to ask whether the Claimant's payment claim of 22 December 2014 was within time in accordance with the terms of the Contract. The reason for this has been set out by the learned adjudicator in SOP AA194 of 2014 [*AQY Pte Ltd v AQZ Pte Ltd* [2014] SCAdjR 310] at [67], which was cited to me by the Respondent:

> 67 It is immediately obvious that the issue of whether a claim is served 'out of time' relates directly to the question of whether that claim complies with s 10(2) of the Act. If the claim is not served in accordance with s 10(2), it is served 'out of time'. If the claim does not comply with s 10(2), it is not made 'under Section 10'. That claim is therefore not a 'payment claim' in relation to which the claimant is entitled under s 12 to make an adjudication application, and *no* entitlement would arise under s 12 to make an adjudication application in relation to that claim. If that were the case, any adjudication application made in relation to that claim would *not* be an application which is made 'within 7 days after the entitlement of the claimant to make an adjudication application first arises under Section 12'. That adjudication application would therefore *not* be in accordance with s 13(3)(*a*) of the Act, and the adjudicator must reject it under s 16(2)(*a*). [emphasis in original]

38 The relevant provisions of the Contract in relation to these issues are as follows:

Document	**Provision**	**Terms Agreed to Between Parties**
SIA Conditions of Contract	Clause 31(2)(a)	"… the Contractor shall submit the 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 specified in the Appendix)"

Appendix to SIA Articles and Conditions of Building Contract (Lump Sum Contract, 9th Ed, August 2011 Reprint) ("Appendix to the Conditions of Contract")	Dates and Periods for Making Interim Payment Claims (*If none stated*, on the last day of each month following the month in which the contract is made, except in the case of stage payment under Article 2 and Clause 31.(5) of these Conditions)	"*Monthly and not later than 7 days from the end of each calendar month*"

39 For ease of reference and as a convenient summary of the parties' submissions on the issue of timelines under Contract and the SOP Act, I set out in the table below the timelines applied by the Claimant and by the Respondent in support of their respective positions on this subject in this adjudication:

Description	**Timeline Applied by Claimant**	**Respondent's Timeline 1 (on argument that the PC was invalid as being out of time)**	**Respondent's Timeline 2 (by operation of s 31(2)(*c*) (on argument that the AA was premature)**
Due date for Payment Claim	22 December 2014	7 December 2014	7 January 2015
Date of Payment Claim	22 December 2014	Claimant's 22 December 2014 Payment Claim therefore out of time	22 December 2014
Date of Payment Response	12 January 2015	12 January 2015	12 January 2015
Due date for Payment Response	12 January 2015 (*ie*, 21 days from date of payment claim (22 December 2014))	28 December 2014 (*ie*, 21 days from due date for payment claim (7 December 2014))	28 January 2015 (*ie*, 21 days from due date for payment claim (7 January 2015))
Dispute Settlement Period	13 January 2015 to 19 January 2015	29 December 2014 to 5 January 2015	29 January 2015 to 5 February 2015
Period to lodge Adjudication Application	20 January 2015 to 26 January 2015	6 January 2015 to 12 January 2015	6 February 2015 to 12 February 2015

Date of lodging Adjudication Application by Claimant	23 January 2015	Claimant's 23 January 2015 Adjudication Application out of time as it should have been lodged between 6 January 2015 to 12 January 2015	Claimant's 23 January 2015 Adjudication Application premature as it should have been lodged between 6 February 2015 to 12 February 2015

40 In support of its position that the Payment Claim of 22 December 2014 was served within the time prescribed in the Contract, the Claimant submitted as follows:

> (a) The phrase "calendar month" in the Appendix has to be read in the context set out in cl 31(2)(a)(i), *ie*, "the last day of each month following the month in which the contract is made".
>
> (b) That phrase (*ie*, "the last day of each month following the month in which the contract is made") is the same phrase which appears in reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) (the "SOP Regulations"), which was judicially interpreted by the Court of Appeal in *Chua Say Eng* ([32(c)] *supra*) at [93]–[94] to mean the same day of each calendar month following the month the contract is made. For example, in *Chua Say Eng*, the phrase refers to the third day of every month following the third day of December 2008, which was the day the contract was made in that case.
>
> (c) As the Contract in this case was made on 15 January 2013, the "end of each calendar month" for the purposes of the Appendix to the Conditions of Contract would be the 15th day of each calendar month; and therefore the end result of "*Monthly and not later than 7 days from the end of each calendar month*" (as stated in the Appendix) should mean "monthly and not later than seven days from the 15th day of each calendar month", *ie*, by the "22nd day of each calendar month".
>
> (d) Therefore, its Payment Claim of 22 December 2014 was within the time prescribed by cl 31(2)(a)(i) read with the Appendix to the Contract.

41 The Respondent disagreed with the Claimant's construction of cl 31(2)(a)(i) and the Appendix. The Appendix provided: "*If none stated*, on the last day of each month following the month in which the contract is made". Since the Appendix *did state* a specific other time period, the interpretation in *Chua Say Eng* of the meaning of "the last day of each

month following the month in which the contract is made" is *inapplicable* to the present case.

42 The Respondent submitted that the correct timeline to accord with the agreed term "Monthly and not later than 7 days from the end of each calendar month" stated in the Appendix is that set out under "*Respondent's Timeline 1*" as shown in the table at [39] above: that the Payment Claim should be submitted by or "not later than" the seventh of the month, and therefore should have been submitted on 7 November 2014 or 7 December 2014, and therefore the service of the payment claim on 22 December 2014 was clearly out of time.

My decision on this issue

43 I agree with the Respondent that the interpretation in *Chua Say Eng* of the phrase "the last day of each month following the month in which the contract is made" *is* inapplicable in this case (although other parts of the decision of the Court of Appeal may provide guidance on other aspects of this case, such as I have mentioned in [47] below). Those words, which appear in reg 5(1) and in cl 31(2)(a)(i) are only applicable if there were "none stated" otherwise in the Appendix. In this Contract, however, the parties agreed in the Appendix that the "the Dates and Periods for Making Interim Payment Claims" was to be "*Monthly and not later than 7 days from the end of each calendar month*". This differs from the default phrasing in cl 31(2)(a)(i) and in reg 5.

44 Therefore, I do not agree with the Claimant that the interpretation of the date and time for making interim payment claims in this case should follow the formula in *Chua Say Eng* such that the "calendar month" referred to in the Appendix's provision should commence on the 15th of each month (in view of the Contract being made on 15 January 2013), and such that seven days from the end of each calendar month should therefore be the 22nd of each month.

45 It is clear to me that the "the Dates and Periods for Making Interim Payment Claims" in the present Contract, *ie*, "Monthly and not later than 7 days from the end of each calendar month" means exactly what it says. The "end of each *calendar* month" would mean the end of each month (*eg*, 30 November, 31 December, and so forth) and *not* the 15th of every month just because the Contract was made on 15 January 2013. It would follow that "*not later than 7 days from the end of each calendar month*" means not later than the seventh day of each ensuing calendar month.

46 However, I also do not agree with the Respondent's interpretation that "monthly and not later than 7 days from the end of each calendar month" [means] that if the Claimant wished to claim for work done up to October 2014 (as it did in this case), that the payment claim would have to be

submitted not later than 7 November 2014 and at the latest by 7 December 2014.

47 Here, I refer to guidance provided by the Court of Appeal in *Chua Say Eng* at [94]:

> 94 … reg 5(1) of the SOPR *does not refer to the work done up to the last day of the month*. However, where the payment claim, when made, *does not breach the frequency of a maximum of one claim per calendar month*, *eg*, *where the payment claim is made after an interval of two calendar months, then it would not matter on what day the claim is made*. For example, using the building contract in the present case, if PC6 had been served on 5 June 2010, the day on which the claim is served would not have mattered because 5 June 2010 is still within the period of one month expiring on 3 July 2010. [emphasis added]

48 Likewise, in our case, the Appendix to the Conditions of Contract does not refer to work done up to the last day of the month. I am of the view that the Claimant's "Payment Claim No. 21" served on 22 December 2014 *was* within the "Period for Making Interim Payment Claims", *ie*, it *was* "monthly" (in the sense that there was not more than one payment claim per month) and it *was* "not later than 7 days from the end of each calendar month" (following my construction of this phrase as explained at [45] above). In my view, 22 December 2014 was indeed chronologically before or "not later than" 7 January 2015, so the submission of the payment claim on that date *was* in compliance with the agreed term in the Appendix.

49 Even if this seems a "permissive" interpretation, *this* is what the parties agreed to in the Appendix to the Contract, and it is not for the adjudicator to re-write the bargain between the parties to make it more restrictive than what they agreed. In this, I am fortified in my view by the abovementioned comments in the decision of the Court of Appeal in *Chua Say Eng* at [94], which recognised this same point (see [47] above).

50 The Respondent contended at the Conference that such a construction fails to give effect to the words "not later than" in the Appendix in the context of the contract by practically allowing payment claims to be served *on any* day of the month. I consider that there is no injustice in such a construction as it simply means that should any claim for any particular calendar month be not made by the seventh day of the following month, the Claimant would either have to combine its claim for that month with its claim for the following month (and thereby submit the combined claim by the seventh day of the *next* following month) or, should it choose to submit its claim late, forgo its ability to make a claim for the following month until after the seventh day of the next following month.

51 Seen in this context, it makes sense that the 22 December 2014 Payment Claim was valid as a "monthly" claim, as there was no other

payment claim submitted by the Claimant to the Respondent in the month prior to it.

52 I should add that I also do not agree with the Respondent that the parties had agreed by the phrase "monthly and not later than 7 days from the end of each calendar month", to mean that that payment claims must be submitted "within" seven days from the end of each calendar month, as that is not what the provision states. Neither does the operative provision prescribe that payment claims should be submitted "not earlier than" any particular date or the period spanning the first to the seventh days of any month. I do not accept these additional and alternative interpretations as they fall outside the plain reading of the agreed terms.

53 For completeness, I also now deal with an additional submission by the Respondent. The Respondent referred to dates of submission of previous payment claims in the Project. Out of the 20 previous payment claims Nos 1 to 20, only three payment claims (progress claims Nos 11, 18 and 20) had been submitted beyond the seventh day of the relevant months, with the other 17 all being submitted by the seventh of the month. The Respondent contended that there were good reasons for the three exceptions: progress claim No 11 submitted on 16 December 2013 was a projected claim incorporating a reference period which covered the then upcoming December Christmas season; progress claim No 18 of 11 August 2014 was on the Monday following 9 August 2014 which was a National Day holiday week; and progress claim No 20 served on 8 October 2014 could be explained by reference to 5 October 2014 being a Hari Raya Haji holiday.

54 Following from such course of conduct between the parties, the Respondent contended that the Claimant should be estopped from contending that its 22 December 2014 Payment Claim was within time.

55 The Claimant disagreed with this submission from the Respondent, including the speculative reasons given for the Respondent in respect of the three payment claims submitted after the seventh day of the calendar months. The Claimant also submitted that because the Respondent had accepted with no objection progress claims Nos 11, 18 and 20, there was a waiver of strict compliance with the Respondent's interpretation of the Contract's stipulation for payment claim timelines.

56 After due consideration of the parties' submissions on this, I would like to record that nothing ultimately turns on this point, as (a) I consider that the 22 December 2014 Payment Claim was made within time for the reasons set out above; and (b) there was in any case insufficient evidence before me concerning a clear prior course of dealings or conduct which would allow me to decide any clear case of estoppel (as contended by the Respondent) or waiver (as contended by the Claimant).

Whether AA was premature under section 13(3)(a) of the SOP Act even if Payment Claim was valid

57 The Respondent's next submission, which it made at the Conference, was that even if the payment claim was not out of time, the Adjudication Application was premature by the operation of a "deeming" provision in cl 31(2)(c) of the Conditions, which provides:

> Provided that if the Contractor submits a payment claim before the time stipulated herein for the making of that claim, *such early submission shall not require the Architect to issue the Interim Certificate or the Employer his payment response in respect of that payment claim earlier* than would have been the case had the Contractor submitted his payment claim in accordance with the Contract.

58 The Respondent submitted that the Payment Claim of 22 December 2014 would have been an "early submission" under cl 31(2)(c), as it was not served on 7 January 2015 but earlier than that; and as such the Respondent was not required to serve a payment response "earlier than would have been the case" if the Payment Claim was not so "early". The Respondent submitted that cl 31(2)(c) in effect operated as a "deeming" provision which "deemed" the 22 December 2014 Payment Claim as being submitted on 7 January 2015 and therefore the Respondent had 21 days after 7 January 2015, *ie*, up to 28 January 2015 to submit a payment response. The 21-day period prescribed under cl 31(15) for making a payment response after 7 January 2015 ended on 28 January 2015. The dispute settlement period would then be from 29 January to 5 February 2015 (pursuant to s 12(5) of the SOP Act) and the period for the Claimant to lodge its Adjudication Application would be from 6 to 12 February 2015 (pursuant to ss 12(2)(*a*) and 13(3)(*a*) of the SOP Act). Applying this timeline (see "Respondent's Timeline 2" at the table at [39] above), the Claimant's Adjudication Application lodged on 23 January 2015 was premature.

My decision on this issue

59 I consider that the Respondent's argument does not take into account s 11(1)(*a*) of the SOP Act, which provides that payment responses shall be provided:

> … 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]

60 It is not disputed that the Claimant's Payment Claim was served on 22 December 2014. In compliance with s 11(1)(*a*), the Respondent *did* serve its Payment Response within 21 days thereafter, *ie*, on 12 January 2015. The words "whichever is the earlier" in s 11(1)(*a*) require the payment

response to be provided "within 21 days after the payment claim is served under section 10" (*ie*, 21 days after 22 December 2014).

61 This conclusion is supported by the judgment of Lee Seiu Kin J in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648; [2014] SGHC 254 ("*LH Aluminium*") at [23]:

> 23 … 'the date determined in accordance with the terms of the construction contract' for the service of the Final Payment Response (*ie*, first limb of s 11(1)(*a*) of the Act ([20(a)] above)) is 12 January 2014, being the later of the two dates. However, the date determined under the second limb of s 11(1)(*a*) of the Act ([20(b)] above), *ie*, '*within 21 days after the payment claim is served under section 10*', is 23 December 2013. This is the earlier date as between the two limbs under s 11(1) of the Act ([20] above). Therefore, in answer to the question posed in [7] above, the date on which the Final Payment Response is required to be provided under s 11(1) of the Act is 23 December 2013. [emphasis added]

62 The Respondent's argument that cl 31(2)(c) should operate to "deem" an early payment claim as having been served on the last day permissible under the contract was moreover dealt with and rejected by Eunice Chua AR in *LH Aluminium Industries Pte Ltd v Newcon Builders* [2014] SGHCR 10 ("*LH Aluminium (Chua AR)*"), which considered the effect of an equivalent provision at cl 14.4(c) in the *Singapore Institute of Architects Conditions of Subcontract* (3rd Ed, 2005) ("the SIA Subcontract"), which is *in pari materia* with cl 31(2)(c), and which states:

> 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 Architect to issue the interim certificate or the Contractor 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 Contract.

63 The defendant in *LH Aluminium (Chua AR)* had argued that cl 14.4(c) of the SIA Subcontract meant that early submission of a payment claim would not immediately engage s 11(1)(*a*) of the SOP Act (such that a payment response would be due 21 days from the final day permissible under the contract for the service of a payment claim as opposed to 21 days from the actual date of service), as the payment claim would be "deemed" to have been served on the last day permissible under the contract. According to this submission, the dispute settlement period provided for under s 12(5) of the SOP Act and the period for filing an adjudication application would be pushed back accordingly.

64 Chua AR rejected this argument, and I reproduce the analysis from [12]–[15] of the grounds of decision in full:

12 The crux of the defendant's case is that cl 14.4(c) of the SIA Sub-Contract should be read to mean that although early submission of a payment claim is not precluded, such an early submission will not set the 21 day period for a payment response in motion. According to the defendant, the Payment Response should only be required 21 days after the date on which the Payment Claim should have been made and not the date on which the Payment Claim was, in fact, actually made.

13 In other words, although the Payment Claim was served on 2 December 2013, it ought to have been deemed to have been served on either 21 December 2013 (pursuant to cl 14.4 of the SIA Sub-Contract) or 22 December 2013 (pursuant to cl 10.2 of the letter of acceptance). The Payment Response would then only be due 21 days later (pursuant to cl 10.3 of the letter of acceptance read with cl 14.5 of the SIA Sub-Contract) on 15 January 2014 (taking into account the intervening public holidays). Accordingly, the defendant submitted, the 'dispute settlement period' would mean the 7 days after 15 January 2014, i.e. 16 January 2014 to 22 January 2014, and since the Adjudication Application was filed on 3 January 2014, it was premature.

14 *In my judgment, the defendant's arguments are not supported by a proper construction of cl 14.4(c) of the SIA Sub-Contract. That provision merely provided that where a payment claim had been filed earlier than was required, a payment response need not be submitted until the time contemplated by the contract. However, it did not go so far as to prevent a payment response from being served earlier if that was desired.* In fact, the defendant had served the Payment Response on 20 December 2013 although it could have done so, according to its calculations, as late as 15 January 2014. Where a payment response is in fact served at an earlier date, *there is nothing in cl 14.4(c) or 14.5 of the SIA Sub-Contract or cl 10.3 of the Contract that suggests that the 'dispute settlement period' should only run from the date at which the payment response was contractually due*.

15 *This would also be commercially sensible as otherwise any adjudication, if required, would be delayed without good reason. As both parties have already made clear their positions to each other via a payment claim and payment response, there is no prejudice to the parties if the 'dispute settlement period' commences from the actual making of a payment response.* Such a reading would further be consistent with the purpose of the Act to provide a speedy and effective dispute resolution process for the building and construction industry. [emphasis added]

65 I consider this analysis to be sound and thus reject the Respondent's submission that the dispute settlement period should only commence running from 28 January 2015.

66 In any case, again for completeness, I do not agree that the Payment Claim of 22 December 2014 was an "early submission" made "before the time stipulated". What is stipulated in the agreed term in the Appendix is "not later than 7 days from the end of each calendar month". If the term said "on" the seventh, a payment claim served before that (such as on 22 December, as in this case) would be "early" thus kicking in the applicability of cl 31(2)(c). However, in our present case, the subject payment claim complied with and was "not later than" the time provisions of "the Periods for Making Interim Payment Claims" in the Appendix. It was not really an "early submission", so cl 31(2)(c) is inapplicable.

67 In consequence, I do not accept "Respondent's Timeline 2" (set out in the table at [39] above) and find that the 23 January 2015 Adjudication Application was in compliance with s 13(3)(*a*) of the SOP Act, as per the timeline applied by the Claimant in the table at [39] above.

Whether AA should be rejected under section 16(2) on basis of non-compliance with section 13(3)(c) of the SOP Act read with regulations 7(2)(a), 7(2)(c)(iii) and 7(2)(e) of the SOP Regulations

68 Besides timeline objections, the Respondent had also submitted that the AA should be dismissed on the basis of:

(a) alleged omissions in the AA form submitted by the Claimant; and

(b) discrepancies between the Payment Claim served on 22 December 2014 and the copy of the Payment Claim enclosed with the AA.

Alleged omissions in Adjudication Application form

69 The Respondent submitted that the Claimant's Adjudication Application was invalid as the Claimant had, in its Adjudication Application form ("AA Form") lodged with SMC:

(a) left "Section C" (concerning details of the "Principal and Owner") blank; and

(b) indicated "*nil*" for "Date Contract Made" under "Section D".

70 With regard to the "Principal" and "Owner" details, the Respondent submitted that it was mandatory for these details to be included in the Adjudication Application under reg 7(2)(*a*) of the SOP Regulations and that non-compliance rendered the Adjudication Application invalid. Amongst other things, they cited SOP AA008 of 2011 and SOP AA024 of 2012, in which the adjudicators agreed that the omission of "Owner" details invalidated the adjudication applications in those adjudications.

71 With regard to the "Date Contract Made" section under Section D, the Respondent likewise submitted that as this was a requirement for adjudication applications pursuant to s 13(3)(*c*) of the SOP Act and reg 7(2)(*c*)(iii) of the SOP Regulations, the Claimant's entry of "nil" amounted to non-compliance and meant that its AA was invalid.

72 In its submissions in response, the Claimant submitted that although it did not provide principal and owner details in Section C and the "Date Contract Made" in Section D of the AA Form, this surely would not be fatal to the AA.

73 With regard to principal and owner details, the Claimant pointed out that the Respondent in this case was the owner of the Project, so there is no concern in this Adjudication that the owner would not be notified of the dispute. In any event, as the details of the Respondent *were* provided in Section B of the AA Form, it had in effect complied with s 13(3)(c) of the SOP Act read with reg 7(2)(*a*) of the SOP Regulations.

74 With regard to the "nil" entry for the "Date Contract Made" segment under Section D, the Claimant submitted that the relevant date for this is the same as the main contract date, *ie*, 15 January 2013, which *was* stated in the same Section D. As the Claimant, importantly, was the main contractor for the Project, and the Respondent the owner, it was obvious that the "Main Contract Date" was the same as the "Date Contract Made". The Claimant therefore considered that it had complied with s 13(3)(*c*) of the SOP Act read with reg 7(2)(*c*)(iii).

My decision on this issue

75 I consider that the Claimant's AA cannot be invalidated on these technical grounds submitted by the Respondent.

76 With regard to principal and owner details, I considered both SOP AA008 of 2011 and SOP AA024 of 2012 to be of limited assistance. In those cases, the owners concerned were not parties in the respective adjudications. In SOP AA008 of 2011, the learned adjudicator suggested that the purpose of requiring owner details in adjudication applications was so that the authorised nominating body could notify the owner about the adjudication, stating:

> S13(4)(b) SOP Act explicitly requires that the Authorised Nominating Body serve on the owner in writing a notice of the Adjudication Application. In this instant case, *where the name and address of the owner is not provided in the Adjudication Application, it would not enable the authorised nominating body to notify the owner of the adjudication application and it meant that the Authorised Nominating Body is unable to fulfil its statutory duty required in S.13(4)(b) and S. 13(5) SOP Act*.

> In the circumstance, the owner of the project would not be notified of a dispute in adjudication between the main building contractor and sub-contractor both of whom have carried out works on the proposal and the outcome/consequence/determination of the adjudication thereafter. In lesser words, it tantamount [*sic*] to denying the 'owner' the right to be informed of an existing dispute in adjudication as provided for in S.13(4)(b) SOP Act. In which case the transparency provided for in the SOP Act is as good as having a veil drawn over it.
>
> [emphasis added]

77 Whereas, in the present case, as mentioned above, the Respondent was itself the owner of the Project and its details had been duly included in Section B of the AA Form. It was duly notified about the adjudication and had itself fully participated in the adjudication process. Therefore, the Claimant had already technically complied with reg 7(2)(*a*) that "[e]very adjudication application shall contain the names and service addresses of the claimant, the respondent, the principal (if known) and the owner concerned".

78 Likewise, with regard to the "nil" entry under the "Date Contract Made" section under Section D of the AA Form, I agree with the Claimant that as the relevant contract date had already been provided in the very same section under the section named "Date Main Contract Made" (*ie*, 15 January 2013), the Claimant had complied with reg 7(2)(*c*)(iii) of the SOP Regulations. Further, in the Payment Response, it is acknowledged that "Date Main Contract Made" and "Date Contract Made" are the same, *ie*, 15 January 2013.

79 There is no mandatory technical requirement in SOP Act nor the SOP Regulations nor any evidence of any legislative intent that the name and service address of the owner or the contract date have to be submitted in a particular location or format in an adjudication application. I consider that so long as this information is clearly stated in the AA Form in a manner capable of readily appraising all parties and the adjudicator to it, it could not have been the legislative purpose that a failure of the Claimant to repeat this information in a particular box or section of the AA Form (which is prescribed not in the Act or Regulations, but rather by SMC) to be a matter so important that it was the legislative purpose that such failure should be render the Adjudication Application invalid.

80 Therefore, I do not accept that I should reject the Adjudication Application under s 16(2) on these grounds.

Whether AA was invalid due to discrepancies between Payment Claim served on Respondent and copy of Payment Claim enclosed with Adjudication Application

81 The Respondent also submitted that due to discrepancies between the Payment Claim provided with the Adjudication Application and the served Payment Claim on 22 December 2014 ("PC 21") upon which the AA was based, the AA ought to be invalidated on the basis that it failed to enclose a "copy of the relevant payment claim" as required under reg 7(2)(*e*).

82 In support of this, the Respondent relied on the definition of the word "copy" in Black's Law Dictionary as meaning "an imitation or reproduction of the original" to submit that the Claimant cannot be said to have complied with reg 7(2)(*e*) if it did not include in its AA a complete reproduction of the entire original Payment Claim which was served on the Respondent.

83 The Respondent contended that the Claimant did not comply with reg 7(2)(*e*) in that the Claimant had included the following additional items in the Adjudication Application which were not in PC 21:

(a) "Unit Progress Reports" for 14 units in the Project.

(b) A drawing of a unit in the Project.

(c) Photographs of three units in the Project.

(d) The fifth storey plan of Blk [xxx] of the Project.

84 The Respondent also contended that the Claimant did not comply with reg 7(2)(*e*) in that the Claimant had included the following items in PC 21 which were missing in the AA:

(a) A tax invoice, and a delivery order in relation to "ACCORD 'M' Series Tops & Bottom Concealed Pivot Hinges" from [U] to the Claimant.

(b) A statement of account from [U] to the Claimant.

(c) Four e-mails from a [V] to [W] in relation to confirmation of ironmongery for apartment units.

85 The Claimant submitted, however, that the payment claim accompanying the AA *was* the exact copy of the one served on the Respondent on 22 December 2014. At the Conference, the Claimant also suggested that it was possible that some pages of the payment claims could have been lost in transit. The Claimant submitted also that even if there were some discrepancies between the two versions as alleged in annexes A and B of the AR, the AA should not be rendered invalid for non-compliance with reg 7(2)(*e*) of the SOP Regulations.

86 In support of its submissions, the Claimant relied on *Chua Say Eng* ([32(c)] *supra*) and *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] SCAdjR 831; [2013] SGHC 56 ("*Australian Timber*") as authority that only acts done in breach of a legislatively important provision would be rendered invalid. As the missing documents in the payment claim attached to the AA were not crucial documents that would hinder and/or prejudice the Respondent's ability to effectively respond to the AA, the Claimant submitted that the adjudication application should not be invalidated on such grounds.

87 In its reply submissions, the Respondent submitted that:

(a) It was not for the Claimant to unilaterally decide that the documents were not "crucial".

(b) The discrepancies were substantial and did not amount to just a few pages.

(c) The presence or absence of prejudice to a party was irrelevant as an adjudicator is statutorily bound to reject an adjudication application that does not comply with s 13(3)(*c*) of the SOP Act.

88 The Respondent cited SOP AA096 of 2011, in which the learned adjudicator had, amongst other reasons, dismissed the adjudication application because the Claimant had failed to include a complete set of the payment claim in the adjudication application. The Respondent also cited SOP AA049 of 2011 [*AIQ Pte Ltd v AIS Pte Ltd* [2011] SCAdjR 555], in which the learned adjudicator stated the reasons for strict compliance of requirements under the SOP Act and SOP Regulations, such as:

> Given the extremely tight time frames that are imposed on a respondent under the Act to respond to a payment claim and an adjudication application, a respondent is entitled to expect and insist that a claimant strictly complies with the relevant provisions of the Act and provide the requisite information and documents prescribed by the Act and the Regulations. A failure on the part of a claimant to do so could well hinder and prejudice a respondent's ability to effectively respond to an adjudication application within the short time frames prescribed by the Act.

and:

> The requirements of Regulations 7 are not, in my view, merely technical or procedural matters. Given the express language of Section 13(2) of the Act and Regulation 7 of the Regulations, they are important requirements which go to the very right of a claimant to make an adjudication application.

My decision on this issue

89 I consider both SOP AA096 of 2011 and SOP AA049 of 2011 to be of limited assistance as (a) those determinations were made on the basis of the omissions and failures to meet technical requirements in the context of those adjudications, (ii) although they could be of persuasive use, those adjudication determinations are not binding on me in the current adjudication, and (iii) those adjudications were prior to *Australian Timber* and did not consider the judicial guidance in *Australian Timber* (which I am bound by) of inquiring whether a provision that is not complied with is so legislatively important that an act done in breach of the provision should be invalid. As stated by Woo Bih Li J in *Australian Timber* at [75]:

> These considerations would include the overarching purpose of the Act, the degree of difficulty in ascertaining compliance with that provision, the fact that curial intervention is permitted in the Act's adjudication mechanism, and the practical realities of the construction industry and its operation. I hasten to add that this is not an exhaustive list.

90 Given that the overarching purpose of the SOP Act is to establish a fast and low-cost adjudication system to resolve payment disputes in order to facilitate the smooth and prompt cash flow of contractors in the construction industry (see *Australian Timber* at [76]), I consider that reg 7(2)(*e*) must be viewed with this purpose in mind.

91 Parallel commentary on reg 7(2)(*d*) suggests that the factor of prejudice *is* relevant in determining whether a technically non-compliant adjudication application should be invalidated. In Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013), the learned author stated at para 9.68:

> There have been several instances where the validity of an adjudication application has been challenged on the ground that the application fails to include all the relevant terms and conditions of the underlying contract as required by regulation 7(2)(*d*). Adjudicators have generally considered such an objection to be unduly technical, particularly where it is considered that, notwithstanding the omission of certain terms from the extracts, the respondent has not been prejudiced. *It has been suggested that the test is whether, on the extracts of the documents as furnished, the respondent understands the case he has to meet and is afforded a basis to formulate his case.* [emphasis added]

92 Having considered all the submissions and the evidence in this adjudication, I do not consider that the additional pages or missing pages impeded the Respondent's ability to understand or respond to the AA and the payment claim. Neither party found it necessary, desirable or crucial to refer to any of the additional or missing additional pages when considering the substantive issues and hence there was no prejudice to the Respondent.

The importance of these pages to the adjudication turned out to be miniscule or nil, and there was no necessity for any party or myself to refer to any of the additional pages.

93 Therefore, I do not accept that I should reject the Adjudication Application under s 16(2) on these grounds.

Effect of clause 32(8)(a) of the SIA Conditions

94 The Respondent submitted that, even if there was a valid Payment Claim and AA, no amount is due to the Claimant at this time in view of cl 32(8)(a) of the SIA Conditions, which provides that in the event of termination of the employment of the Contractor under sub-cl 32(2) (as occurred in this case), "*no further sum shall be certified as due to the Contractor* until the issue by the Architect of the Cost of Termination Certificate" (which is provided in cl 32(8)(e)), "*nor shall the Employer be bound to pay any sums previously certified if not already paid*".

95 To put it in a nutshell, cll 32(8)(a), 32(8)(e) and 32(8)(f) operate in tandem to delay payment owing to the contractor until the issue by the architect and quantity surveyor of the "Cost of Termination Certificate" (the "CTC"), which must be issued not later than three months after the completion of the works by a replacement contractor, and which certificate shall state the final account taking into consideration all set-offs between the employer and terminated contractor.

96 The Respondent pointed out that particularly in a case like this, not only have the sums in the Claimant's Payment Claim not fallen due and payable pursuant to cl 32(8)(a), but also that in any case they are to be set-off immediately against the substantial backcharges and counterclaims by the Respondent, which it submits will leave a negative balance to be paid by the Claimant to the Respondent.

97 The Respondent submitted that this contractual structure in cl 32(8) is consistent with the statutory payment regime under the SOP Act, because entitlement to progress payments is defined and recognised in s 2 of the SOP Act as payments that are "based on an event or a date"; and, in this instance, the entitling "event" is the issuance of the CTC. Hence, cl 32(8)(a) works hand in glove with the SOP Act and therefore should not be considered as an instance of "contracting out" contrary to s 36 of the SOP Act.

98 The Respondent sought to draw a distinction between, on the one hand, the Claimant's statutory entitlement to progress payments and to make a payment claim under the SOP Act and, on the other hand, the contractual liability of the Respondent to make payment. The Respondent cited, amongst other things, the decision of the learned assistant registrar in

Choi Peng Kum v Tan Poh Eng Construction Pte Ltd [2013] SGHCR 19 ("*Choi (AR)*") (at [24]):

> 24 Under s 5 read with s 2 of the SOP Act, the entitlement to a progress payment arises as long as any person has carried out any construction work or supplied any goods or services under a construction contract or a supply contract. Once there is an entitlement to a progress payment, pursuant to s 10(1) of the SOP Act, a claimant may then serve 'one payment claim in respect of a progress payment' on a person 'who, under the contract concerned, is or may be liable to make the payment', or such other person 'as specified in or identified in accordance with the terms of the contract for this purpose'. *These provisions make clear that the entitlement to a progress payment and to make a payment claim under the SOP Act is a separate matter from the liability to make payment under the construction contract. The former depends on satisfying the conditions specified in the SOP Act, whereas the latter depends on satisfying the conditions specified in the construction contract.* [emphasis added by Respondent]

99 In reliance on this distinction, the Respondent submitted that cl 32(8)(a) relates to the employer's contractual liability to make payment to the Claimant, and that the Respondent is not seeking to rely on cl 32(8)(a) to extinguish the Claimant's entitlement to apply for adjudication under the SOP Act, and so was not contrary to the "no contracting out" provisions in s 36 of the Act.

100 Therefore, the Respondent submitted that the High Court decision of *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2013] SCAdjR 919; [2013] SGHC 272 ("*Choi (HC)*") can be distinguished from this case. The issue before the High Court in that case was, as set out at [35] of the decision, whether cl 32(8)(a) was void *to the extent* that it precluded the defendant from engaging the adjudication process under the SOP Act and whether the adjudicator was prevented from making an adjudication determination under the SOP Act. The High Court went on to hold at [39] and [40]:

> 39 … that cl 32(8)(a) *applies only to preclude certificates from being issued under the Contract* and not to the adjudication process under SOPA.
>
> 40 *If cl 32(8)(a) had the effect contended by the Plaintiffs it would in any event be rendered void by ss 36(1), 36(2)(a) and 36(2)(b) SOPA.*
>
> [emphasis added]

101 The Respondent thus emphasised that it is in this adjudication not disputing the Claimant's *entitlement* to make a payment claim nor the adjudicator's jurisdiction to *entertain* the AA. The issue here was whether the Claimant is *contractually entitled* to receive payment pursuant to the

agreed contractual terms in cl 32(8)(a), being the relevant "event" entitling payment under s 2 of the SOP Act.

102 The Claimant rejected this distinction drawn by the Respondent, and argued that the abovementioned reasoning in the High Court decision of *Choi Peng Kum* should apply equally in this case. The Claimant submitted that if cl 32(8)(a) had the effect contended by the Respondent, *ie*, allowing the Respondent to withhold payment for work previously done until the issuance of the CTC, it should be rendered void under s 36 of the SOP Act since it effectively precludes the Claimant from receiving payment even if the AA was successful on the merits.

My decision in relation to clause 32(8)(a)

103 The issue before me is whether cl 32(8)(a) can validly postpone all the Claimant's claims for payment under the SOP Act until after the CTC is issued. If so, then the "due date" for payment arises only after the issuance of the CTC. If the clause is overridden by the statutory provisions in the SOP Act, then the Claimant can be paid assuming I am satisfied on the substantive merits of the claim.

104 I note and appreciate the distinctions sought to be drawn by the Respondent between the *Choi Peng Kum* High Court case and the present case, *ie*, that in that case, the High Court decided that cl 32(8)(a) could not preclude a claimant from engaging the adjudication process or the adjudicator from making an adjudication determination under SOP Act; and if that was the effect of cl 32(8)(a), it would be void as being contrary to the "no contracting out" provisions of s 36. Whereas, in this case the Respondent's argument is that the Claimant is not yet entitled to receive any payment since the "event" under s 2 giving any entitlement to payment has not taken place and therefore no "progress payment" is due.

105 After considering the parties' submissions and the authorities cited by them, my views are as follows.

(1) Uncertified amounts in Claimant's Payment Claim

106 Clause 32(8)(a) provides that (a) no further sum shall be certified until the [issuance] of the CTC, and (b) the employer shall not be bound to pay any sums previously certified if not already paid.

107 Firstly, it is clear from a plain and literal reading that cl 32(8)(a) somehow does not affect the payment of *uncertified* sums claimed under the SOP Act.

108 This plain point, for avoidance of doubt, is recognised by Mr Chow Kok Fong in *The Singapore SIA Form of Building Contract* where at

paras 32.47, 32.58 and 32.59, he noted that there are two limbs within cl 32(8)(a). The first limb precludes further certification of payments by the architect after termination of the contract by the employer. The second limb provides that the employer is no longer obliged to make payments on previously certified sums after termination.

109 Read with cll 32(8)(e) and 32(8)(f), only the payment of *certified* sums is suspended until the issuance of the CTC and after set-off against the employer's cost of completion, such that only the net sum (if any) is payable. There is nothing in cl 32(8)(a) that affects *post-termination payment of uncertified sums to the Contractor* for work previously done.

110 As stated by Mr Chow in *Security of Payments and Construction Adjudication* at para 5.5, the enactment of the SOP Act has created a "dual railroad track system" consisting of "the statutory regime under the Act which operates concurrently with, but is quite distinct from, the contractual regime". In particular, the statutory basis of a Claimant's entitlement is set out in s 5 of the SOP Act which reads: "Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment." Mr Chow goes on to state in the same paragraph that a contractor's s 5 statutory entitlement to payment for work done is distinct and separate from its entitlement to be paid under the contract.

111 Further at para 6.114, the learned author affirms the position that certification is no longer a condition precedent for payment for work done:

> **Certificate as Condition Precedent**
>
> As a result of the Singapore SOP Act, the *absence of a payment certificate under Clause 31(3) no longer presents an impediment against a Contractor's recovery of payment for work done provided that a payment claim has been issued in accordance with Section 10(1) of the [SOP] Act*. This effectively circumvents the operation of any term in the contract which provides for the issue of an interim certificate as a condition precedent for payment …
>
> [emphasis added]

112 I agree with the learned author's view in that the SOP payment regime allows contractors to claim and be paid for *uncertified* sums for work done. It is thus clear to me that cl 32(8)(a) is immaterial to and does *not* operate in relation to any claims for uncertified progress payments.

(2) Certified amounts in Claimant's Payment Claim

113 As regards the part of [cl] 32(8)(a) which disallows payment of certified sums until the issue of the CTC, the issue is whether this is an "event" entitling progress payment under s 2 of the SOP Act, as contended

by the Respondents, or whether it is void under s 36(2) of the SOP Act for its effect of postponing the due date of payment till after the issuance of the CTC. A similar issue was considered by Mr Chow in *The Singapore SIA Form of Building Contract* at para 31.46 in the context of cl 31(11)(c), the equivalent final accounting provision in a non-termination situation. This was in connection with the question of whether cl 31(11)(c), which provides for the issuance of a Statement of Final Account, should be voided under s 36(2) of the SOP Act for excluding, modifying, restricting or prejudicing the operation of the Act, or whether it should be regarded as the "event" entitling the contractor to make a claim for payment under s 2 of the SOP Act. This has been considered at [34] above, but since it is also relevant to the context of cl 32(8)(a), I refer to this point again. Mr Chow commented on the consequence of adopting the latter approach, that "the issue of both [the Maintenance Certificate and the Statement of Final Account] is critically dependent on the Architect's diligence and judgment" such that the service of the Final Payment Claim "falls within the class of situations which could be exposed to dilatoriness on the part of the certifier, the very kind of mischief which the Act was enacted to address".

114 In my view, the issuance of the CTC under cl 32(8)(e) might similarly be affected by delays on the part of the architect and quantity surveyor, and could be the kind of provision contrary to the legislative intention of the SOP Act of allowing progress payment claims to facilitate cash flow for contractors.

115 Further, other than the "event" relied [upon] by the Respondent entitling the Claimant to its claims (*ie*, the CTC), I am of the view that the Claimant is also entitled to rely on the "*event*" of carrying out construction work in its claim for progress payment, and the confirmation in prior certificates that the work has been carried out, without having to await the CTC. These latter occasions are no less an "event" under ss 2 and 5 of the Act to enable claims for progress payments for work carried out. This is consistent with construction contracts and the SOP regime in Singapore now operating under a dual track system, *ie*, with the right to be paid deriving from the underlying contract and the right to be paid progressively given statutory force by the SOP Act.

116 I set out s 36 for convenient reference:

> **36.**—(1) The provisions of this Act shall have effect *notwithstanding any provision to the contrary in any contract or agreement*.
>
> (2) The following provisions in any contract or agreement (whether in writing or not) shall be void:
>
> (a) *A provision under which the operation of this Act* or any part thereof is, or is purported to be, *excluded, modified, restricted or in any*

> *way prejudiced, or has the effect of excluding, restricting, or prejudicing the operation of this Act or any part thereof*;
>
> (b) A provision that *may reasonably be construed as an attempt to deter a person from taking action* under this Act.
>
> [emphasis added]

117 In my view, the barring of payments of certified sums to the contractor in cl 32(8)(a) (and for that matter, any provisions which bar or delay payments of uncertified sums which are due beyond the timelines in the SOP regime as well) appear to be contrary to s 36.

118 Therefore, my decision is that I am not prevented from adjudicating the substantive merits of the Payment Claim submitted to this adjudication, in respect of both the claim for certified sums and the claims for yet uncertified sums.

(3) Clause 31(16) of Conditions of Contract and section 8 of the SOP Act

119 The above section disposes of the issues raised regarding cl 32(8)(a). However, I should add that I am fortified in my decision above by a consideration of s 8 of the Act, read with cl 31(16) of the Conditions of Contract, which states:

> **Payment of Contractor**
>
> *The Contractor will be paid the interim or final payment (as the case may be) on the date immediately upon the expiry of 35 days after* (or otherwise by such time or on such date stated in the Appendix), if the Contractor is a taxable person under the Goods and Services Ta Act who has submitted to the Employer a tax invoice for the interim or the final payment, in accordance to and in compliance with Section 8 of the SOP Act, the date the tax invoice is submitted to the Employer, or in any other case, *the date on which or the period within which the payment response is required to be provided under Sub-Clause (15)(a) or (15)(b) hereof (or otherwise by such time or on such day as stated in the appendix)*.
>
> [emphasis added]

120 The Appendix to the Conditions of Contract states the period for interim and final payments to be "35 days as per the Conditions of Building Contract".

121 In The *Singapore SIA Form of Building Contract*, Mr Chow states at para 31.61 that cl 31(16) "import[ed] the full period of 35 days allowed under S 8(1)(b)(i) of the Act". This means that in an SOP situation, the contract itself contemplates that payments are due based on a 35-day

maximum timeline (from the date of the tax invoice or the date of the payment response, as the case may be).

122 Clause 31(16) mirrors the statutory timeline in s 8(1)(*b*) of the SOP Act, which provides as follows:

> **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 (Cap. 117A) 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]

123 It appears clear that the scope of cl 32(8)(a) governs a non-SOP situation and establishes the parties' contractual rights. Clause 31(16), on the other hand, contemplates an SOP situation and prescribes the contractual equivalent of s 8(1)(*b*) of the SOP Act. The due date indicated in the Appendix similarly adopts the 35-day statutory cap on the allowable payment period (after the tax invoice or Payment Response is served, as the case may be).

124 In *Security of Payments and Construction Adjudication*, Mr Chow confirms this interpretation at para 5.102 that if a contractual term provides for a due date which is later than 35 days from the dates in s 8(1)(*b*) of the SOP Act, the stipulated date will be inoperative and, in default, the due date will be the date as stipulated in the Act. He also noted at para 5.101 that this statutory cap was considered at the Second Reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004), where Parliament noted that "a cap on the maximum payment periods is needed to override unreasonable contractual payment terms". It was further pointed out that these prescriptions were intended to reduce an imbalance in negotiating power since "experiences in other countries have shown that parties with greater bargaining power are likely to impose longer payment periods on the other parties so as to circumvent the rights to payment in the Act".

125 It was not submitted to me that the Claimant is relying on any tax invoice for payment under s 8(1)(*b*)(i), but rather on its Payment Claim, the payment response for which was due 21 days thereafter. The due date for the progress payment would be 35 days after the payment response was "required to be provided" under cl 31(15). Under the SIA Conditions, the payment response was "required to be provided" within 21 days after the payment claim was served on 22 December 2014. The due date for payment would be 35 days thereafter. Under the scheme of both s 8 of the SOP Act and cl 31(16) of the Conditions of Contract, the Respondent is not entitled to withhold any payment due beyond that period.

Substantive merits of Claimant's Payment Claim

126 I have determined above:

(a) The Adjudication Application is based on a valid Payment Claim under the Contract and the SOP Act.

(b) The Adjudication Application was made in accordance with ss 13(3)(*a*), 13(3)(*b*) and 13(3)(*c*) of the SOP Act.

(c) The Claimant is not precluded from pursuing in this adjudication its payment claim for progress payment for work done (notwithstanding the provisions of cl 32(8)(a) of the Conditions of Contract).

127 I will now proceed to consider the contents and merits of the substantive claims in this Adjudication Application.

128 In the Payment Claim of 22 December 2014 and in the AA, the Claimant claimed a total amount of $28,881,775.77. The components of this amount include:

(a) Works done under the Contract for the reference period of 21 January 2013 to 24 October 2014 (including unpaid sums previously certified in Payment Certificates 19 and 20).

(b) Materials on site.

(c) Materials/tools/equipment withheld on site after termination.

(d) Rental charges for equipment.

(e) Materials off site.

(f) Loss of profits on the balance of the works following the termination (which the Claimant alleges to be wrongful termination).

129 At the Conference on 6 March 2015, the Claimant stated that it would withdraw from this adjudication the claim for $5,184,995.70 for loss of profits, but would instead pursue this claim as part of its claim for general

damages at the pending arbitration. The withdrawal of this claim item meant that the Claimant's total claim in the AA was reduced to $23,696,780.08.

130 In the Respondent's Payment Response of 12 January 2015 and its Adjudication Response, almost every item of the Claimant's Payment Claim and Adjudication Application was challenged, although it did accept some items and/or responded with different valuations on some items. As a result of these differences, the Respondent submitted that the correct valuation for the claimed items was $4,765,299.64 but this was subject to a set-off against the Respondent's counterclaims, leaving a *negative sum* of $7,697,687.51 owed by the Claimant to the Respondent.

131 In the sections below, I will first deal with the Respondent's counterclaims, before I address each of the Claimant's claims.

Respondent's counterclaims

132 The Respondent submitted that it had counterclaims against the Claimant in the total sum of $64,261,875.36, made up of several backcharges as well as costs, expenses and damages arising from the termination and employment of a replacement contractor to complete the Project.

133 These counterclaims comprised:

(a) "Design and other Consulting Fees in respect of the Completion Contract": $1,506,100.00.

(b) "Additional Site Staff In Order to Supervise the Remaining Works": $500,000.00.

(c) "Other Expenses: such as Site Security, Storage Costs, Protection": $55,000.00.

(d) "Rectification Costs for Retaining Walls": $31,350.00.

(e) "Contract Price for the Completion Contract": $59,941,539.26.

(f) "Post Termination Liquidated Damages at S$9,000/- per day from 20 January 2015 to 13 August 2015 (subject to Termination Delay Certificate)": $1,845.000.00.

134 The Respondent submitted that its counterclaims should be allowed and set off against the Claimant's claims because:

(a) The Respondent's right to impose the backcharges has accrued.

(b) The counterclaims were identified in the Payment Response.

(c) The counterclaims comprise acceptable principal components of a claim following termination.

(d) The counterclaims represent a reasonable and *bona fide* assessment of the losses, damages and/or costs incurred and/or likely to be incurred following the termination.

(e) Following the termination, the Respondent had to incur substantial costs to complete the Project. They had to call for tenders and engage a replacement contractor, and incurred various other costs, expenses and damages. Such costs, they say, should be set off against the Claimant's claim.

(f) The SOP Act does not limit backcharges, cross-claims and set-offs to only those which have been certified.

(g) The Respondent has the right to rely on the defence of equitable set-off, so long as it can establish entitlement to such set-off and then quantify them using reasonable assessments made in good faith, citing cases such as *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681 and *Hiap Tian Soon Construction Pte Ltd v Hola Development Pte Ltd* [2003] 1 SLR(R) 667.

135 The Claimant submitted that the Respondent's counterclaims should be rejected because:

(a) Liability for the Respondent's abovementioned counterclaims for damages has not arisen, as the matter of the validity of the contract's termination is subject to the pending arbitration.

(b) The counterclaims are uncertified and the line of authorities (such as *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314; *Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd* [1994] 2 SLR(R) 805; *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 1 SLR(R) 591; *Kum Leng General Contractor v Hytech Builders Pte Ltd* [1996] 1 SLR(R) 310 and *All-Trade Construction Pte Ltd v Lo Geok Kwee* [2000] 2 SLR(R) 318 governing the employer's narrow right of set-off in relation to a contractor's entitlement to certified payments are instructive and relevant. Thus, while the Claimant's claim for actual work done at termination is considered "due and payable" under the SOP Act, the Respondent's counterclaims and set-offs are still speculative, premature and not yet "due and payable", pending certification by the Architect.

136 The Respondent asserted that it was entitled to terminate the employment of the Claimant due to the Claimant's unsatisfactory performance and conduct, including amongst other things, its unacceptable and defective works, insufficient manpower, failure to proceed diligently

and expeditiously and non-compliance with certain "Architect's Directions" ("ADs"). This led up to the Architect's four notices in September 2014 to the Claimant requiring compliance but which were not complied with, followed by the Architect's Termination Certificates of 23 October 2014 following which the Respondent terminated the Claimant's employment on 24 October 2014 in reliance on the Termination Certificates and further and alternatively by accepting the Claimant's repudiatory breaches of the Contract.

137 The Claimant submitted that the termination was wrongful, challenging the validity of the said ADs and Termination Certificate (on grounds such as that the Respondent had influenced the Architect's issue of Termination Certificates), and also that the ADs contained insufficient detail for compliance within the "Notice Periods" stated therein) and the Respondent's Notice of Termination.

138 There is also a dispute between the parties as to the quantifications of the counterclaims and set-offs. On the largest part of the counterclaims, the Respondent counterclaimed the cost of the replacement contractor in the "Completion Contract" in the sum of $59,941,539.26. However, the Claimant asserted that as the project was already about 50% complete, the cost of the remaining works in the Completion Contract ought to be only about $45m. In response, the Respondent contended that they appointed the lowest bidder, and the appointment was thus made in good faith and justified in the circumstances. The relatively higher cost (of $59.9m) was necessitated by the replacement contractor having to complete unfinished works, defects rectification and maintenance obligations involved in the transition from one contractor to another in an accelerated fashion.

My decision as regards Respondent's counterclaims and set-offs

139 As regards the Respondent's counterclaims and set-offs, having heard the parties' submissions and considered the items of claims concerned, my decision is that I am unable to allow any set-off by the counterclaims in this adjudication. The validity of the termination (*ie*, whether it was wrongful or not), the liability of the Claimant for all the heads of counterclaim and alleged breaches and defaults, as well as the correct quantifications, are matters which are being contested in the pending arbitration between the parties. Further, partly due to the time constraints of an SOP adjudication like this, there was insufficient evidence, information and documents adduced by the parties at this adjudication to enable me to make a proper determination on the counterclaims and set-offs. The end result is that the liability of the Claimant and the entitlement of the Respondent as regards these cross-claims (and quantifications thereof) are not yet established to the point where I can allow them at this forum to be set off (even as equitable set-offs) against the Claimant's progress payment claims in this adjudication.

Claimant's heads of claim

"Undisputed" sums

140 There are two categories of items I shall now deal with together:

(a) Previously certified sums (which have not been paid).

(b) Uncertified sums which are undisputed and remain unpaid by the Respondent.

141 In relation to category (a), it is not in dispute that there is a sum of $1,822,071.87 previously certified in payment certificates Nos 19 and 20 but which has not been paid to the Claimant. This is a "progress payment" for work carried out and which is due to the Claimant under the Contract. It is contrary to the SOP Act to deprive a contractor of sums certified for work done.

142 In relation to category (b), when one compares the "Response Amount" with the claimed amount, it is clear that in relation to the Payment Claim, the Respondent has accepted that $2,943,227.37 is its valuation of yet uncertified and unpaid amounts in respect of "Preliminaries", "Works Done" (including those under "Prime Cost and Provisional Sums" and "M&E services") and "Variations". In its Payment Response, the Respondent had either (a) accepted the full amount of the Claimant's valuation on its individual claims or (b) submitted that some lesser payment was due to the Claimant based on its differing measurements/valuations. Although the Respondent disputes the rest of the Claimant's claims for these items, there is no reason to withhold payment of this aforesaid valuation of already accepted by the Respondent.

143 I therefore award the amount of $4,765,299.24 ($1,822,071.87 + $2,943,227.37) to the Claimant for these two categories.

144 I shall now proceed to consider whether to award any further sums over and above the amount of $4,765,299.24 which I have determined above.

Preliminaries

145 The contract amount for Preliminaries for the Project was $7,572,157.00, which covers initial and recurring supporting costs (such as the insurances, performance bond, site safety and security, site offices, scaffolding, plant, tools and equipment).

146 The Claimant's valuation of Preliminaries is $6,580,975.63. The Respondent's valuation is $5,677,666.95, with the disputed sum thus being $903,308.68.

147 The Claimant's valuation was based on applying a 24-month base period, which corresponds with the contract schedule of 24 months running from January 2013 to January 2015. It submitted, as it did in its letter of 19 January 2015 disputing the Payment Response, that a 24-month period should be used to calculate the preliminaries instead of 29 months. This was because:

(a) A time-based method is the fair and reasonable way to assess preliminaries in a termination situation.

(b) Apart from "Interim Valuation No. 20" where a 29-month base period was used, the Respondent's quantity surveyor had used a 24-month base period to calculate the payment of preliminaries for progress claims Nos 1 to 19. The Claimant objected to using a 29-month period for "Payment Claim No. 21" as the contract has now been terminated and the extended timeline for completion (of 29 months) in the revised master schedule no longer applied.

(c) If a 29-month period was adopted, the resulting valuation would be lower than that for "Payment Claim No. 19" in August 2014 (which was in the sum of $6,113,499.66).

(d) The Architect's entitlement to adjust the preliminaries under cl 5.14.3 of the Main Contract, Volume 2 of 3, Part 1 of 2, does not apply where the contract has been terminated, but only where there was no termination and the contract continued.

148 The Respondent submitted that a 29-month base period should be applied to the calculation of preliminaries. This was because:

(a) Using a 24-month period was a deviation from an "agreed method" of computing preliminaries. In "Payment Claim No. 20", the Claimant claimed a sum of $5,482,961.36, (based on 29 months) and the Architect's valuation, as per the agreed method, was same as the claim amount. A 29-month period was used because the Claimant had by then indicated in its revised master programme that the total number of months in the Contract should be extended by five months to 29 months.

(b) The five-month delay was attributable to the Claimant. The Respondent had simply assessed the preliminaries for "Payment Claims No. 20" and "Payment Claims No. 21" based on the Claimant's own proposed timeline of 29 months in the revised master programme.

(c) The Claimant's comparison of the valuation in "Payment Claim No. 21" (using 29 months) with "Payment Claim No. 19" (which used 24 months) was wrong, and to be consistent they should have

compared it with "Payment Claim No. 20" (which had used 29 months).

(d) The Architect's entitlement to use a 29-month period pursuant to cl 5.14.3 had already accrued due to the Claimant's own revised master programme which reflected a five-month delay to the Project. Clause 5.14.3 states as follows:

> If in the opinion of the Architect, after reference to the Construction Programme and actual progress of the Works on site, *delay has occurred* in the Works, the Architect upon the recommendation of the Quantity Surveyor *may adjust the amounts* included in Interim Certificates and/or Payment Responses for the *Preliminaries* Items and for attendance in the Prime Cost and Provisional Sums Section. [emphasis added]

My determination (Preliminaries)

149 Having considered the documents and both parties' submissions, I am of the view that the Claimant has not at this adjudication established that its claim should prevail over the Respondent's method and valuation for this item, both as a matter of fact and contractual entitlement. Further, there remain some disputes of fact, law and contractual entitlement which could not be resolved at this adjudication, but perhaps might be in another forum.

150 Accordingly, I am unable to award any amount for this item in addition to any valuations already included in the sums at [143] above.

Measurement and valuation of construction works carried out up to date of termination

151 I will now deal with the Claimant's claims for valuations of work done (including items grouped under the headings "Schedule of Works Prime Costs and Provisional Sums", "M&E Works" and other miscellaneous items in its Payment Claim).

152 The Claimant's position was:

(a) The proper valuation method was to measure the actual quantities of work done against the total measured quantity of the entire project. This method was derived from the measurements allegedly set out in the joint inspection report prepared pursuant to the joint site inspection conducted after termination during the period of 31 October 2014 to 14 November 2014. This joint inspection report was forwarded to the Respondent's consultants on 4 December 2014 for them to check and surface any discrepancy with their own records. However, the consultants did not revert with any discrepancies.

(b) This method more accurately represented the amount of work done, as compared to the Respondent's method which was based on the number of fully completed residential units. The latter method was wrong and inaccurate because (i) not all the units in the Project are of similar size and/or layout, and the quantities of architectural works would increase proportionately with the increase in built up area and/or ceiling heights and (ii) it disregarded the work done for partially completed units. It was inappropriate for the Respondent to rely on the units-based method of valuation used in previous payment responses prior to termination.

(c) The Claimant's percentage amounts for works done were sufficiently particularised and substantiated to meet SOP requirements and/or the SIA Conditions. For example, the measurements for internal brick walls and aluminium doors and windows were derived from certain yellow markings on these drawings in the joint inspection report.

153 The Respondent submitted that its valuations should be preferred over the Claimant's valuations for the following reasons:

(a) The Claimant had failed to provide any take-off sheets or measurement sheets in support of its valuations.

(b) For structural works, the Respondent had relied on measurement sheets in relation in its Payment Response.

(c) For architectural works, the Respondent's quantity surveyor based its measurements and/or evaluated the claims against the number of residential units completed, as had been done in previous Payment Responses.

(d) The joint inspection report relied on by the Claimant did not document or record any joint measurements carried out or agreed to by the parties, but merely recorded the state of works at the time of termination.

(e) The Claimant had only provided a percentage amount without a sufficiently particularised breakdown as required by s 10(3)(*a*) of the SOP Act read with reg 5(2)(*c*) of the SOP Regulations. For example, the drawings produced by the Claimant in its AA did not contain any narrative explaining how the calculations/measurements for work done were derived from the yellow markings.

(f) The Respondent's quantity surveyor had difficulty assessing the Claimant's claimed items because of the inconsistent terms of references used in the Payment Claim and the joint inspection report. For example, the Claimant had three categories for aluminium doors in its Payment Claim – outer frame, inner frame and ledging – whereas

the legend in the joint inspection report did not provide for the term "outer frame".

(g) The Claimant had not provided adequate vouchers and information to substantiate its claim, contrary to cll 31(3) and 31(3)(4) of the SIA Conditions, which govern interim valuations.

(h) The Respondent had insufficient time after receiving the Claimant's correspondence in early December 2014 to review the Claimant's conclusions from the joint inspection report, and it has not accepted the Claimant's measurements, valuations and conclusions in that correspondence.

My determination (on valuation of works done)

154 As stated by the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SCAdjR 854; [2013] SGCA 32 at [40], [43], [44], [52] and [54], even if there was no payment response or no objections by the Respondent to the claims, ss 17(3) and 16(3)(*a*) of the SOP Act require an adjudicator to consider the material properly before him and make an independent and impartial determination on the claims in a timely manner.

155 Where the Respondent serves a payment response disputing/objecting to the claims, the onus lies on the Claimant to prove their entitlement to the claims advanced in this AA. The SOP Act holds the Claimant to a stringent standard of providing all necessary documentation to prove its claim and to enable the Respondent to effectively respond. In particular, reg 5(2)(*c*) of the SOP Regulations requires the Payment Claim to contain "*a breakdown of the items constituting the claimed amount, a description of these items, the quantity or quantum of each item and the calculations which show how the claimed amount is derived*" [emphasis added].

156 There are numerous contested items in the Payment Response relating to the measurements and valuations of the schedule of works. The parties in their submissions referred to certain specific disputed items, such as internal brick walls; aluminium doors and windows; cement and sand plastering; marble to walls and homogenous tiles. As mentioned above, the disputes centred mainly on the Claimant's method of comparing the amount of completed work against the projected total quantities in the contract; in contrast to the Respondent's method of comparing the number of units completed against the total number of units in the Project. As regards the M&E works, there were some disputes of fact as regards the supply and installation of fire protection services; and certain electrical works.

157 I have considered the Claimant's and Respondent's submissions and the examples they referred to in their respective submissions. In my view, the Claimant has not discharged its burden of proving its entitlement to its

claimed amount for this head of claim. On the evidence presented at this adjudication, there are missing links between the amounts claimed and the supporting documents. There remain disputes of facts and contentious issues between the Claimant and Respondent as to the method of measurements and valuations for the works, as well as in connection with the evidence in support of their respective valuation methods; and different versions and disputes of facts as regards some of the M&E works.

158 Perhaps, another forum such as arbitration may be a more appropriate forum for resolving disputes of fact such as those which arose in this adjudication but are yet unresolved due to incomplete evidence and documentation in this adjudication. Where there are disputes of fact or in relation to the documentation, the adjudicator does not have the benefit of hearing the examination and cross-examination of factual and expert witnesses (within the time constraints of such an adjudication) to assist in deciding between the Claimant's and Respondent's version of events and in construing the project documentation and correspondence presented by the parties.

159 Perhaps the evidence "is there" (both on the part of the Claimant and Respondent) but again perhaps due to the time constraints of an adjudication like this, not enough was presented to tie up the missing links and connect the dots to enable me to make any determination on the claims, especially in the face of the evidence and the documents for these claims being contested by the parties on matters of fact, including matters relating to the joint inspection. Further, it would not be just to award or reject claims merely on the basis of chosen examples and drawings, as references to examples would not prove that the Claimant's whole claim is substantiated or that its total valuation was to be preferred to the Respondent's valuations.

160 Hence, the Claimant did not establish a clear case at this adjudication for me to make any determination in its favour on this item at this adjudication.

161 Accordingly, I am unable to award any amount for this item in addition to any valuations already included in the sums at [143] above.

Variations

162 The Claimant's claim for variations is $596,356.41, whereas the Respondent's valuation in response was $281,745.51. The disputed sum was thus $314,610.90.

163 In its "Adjudication Response Submissions", the Respondent submitted that for its valuation of the variation works, the quantity surveyors had based their valuation on the method provided for in cl 12(4) of the Conditions of Contract. The Respondent relied, amongst other

things, on the witness statements of the quantity surveyors for the Project, who considered that the Claimant had not explained how the works allegedly undertaken constitute "variations" under cl 12(2) of the Conditions of Contract, and also that the Claimant had failed to provide adequate substantiation and/or justifications to explain the basis and/or method of valuation of their variation claim.

164 At the Conference, the Respondent criticised the Claimant's claims for not being supported by any narratives, contending that the Claimant's failure to explain its claims meant that its did not discharge its burden of proving its claims in this adjudication.

165 However, it is apparent from the Payment Response that the Respondent's position was not really that no sums were to be paid under this head of claim, but rather that the correct sum was $281,745.51, with the Respondent rejecting some items or granting lower valuations largely on the basis of the progress of the works concerned in the RE's site records.

166 For clarity, I will consider the contested variation claims in turn, as follows.

(a) VO-018: Additional RC roof slab above all spiral staircases including associated structural works

The Claimant claimed for $34,905.36 for this item, while the Respondent's interim valuation was only 50% of the claimed sum (*ie*, $17,452.68). At the Conference, the Claimant pointed out that the RE site records showed that the work had been completed for 42 of the 47 units concerned, challenging the Respondent's valuation made on the basis that only 50% of the work was done. The Respondent countered that several works were still pending so the Claimant was not entitled to 100% of the sum claimed for this item. On the basis of the *prima facie* information and evidence before me, I determine that payment for 42 out of 47 units (*ie*, 42/47 x $34,905.36) in the sum of $31,192.02 is due, *ie*, $13,739.34 above the valuations already included in the sums at [143] above.

(b) VO-020: Purchaser's request: Unit [xxx]

The Claimant claimed for $763.00 as a sum due for 13.88% of the works for this variation item, while the Respondent valued this at $0.00. In the RE records referred to by parties, there is no indication that any percentage of this work has been done. In the absence of any contrary submission or evidence by the Claimant to persuade me otherwise, I am not convinced that the work was done and therefore do not determine any sum for this item.

(c) VO-031: Safety acrylic panel between wading pool and main pool

The Claimant claimed for $18,400.00 as a sum due for 100% of the works for this variation item, while the Respondent's valuation indicated that $0.00 was due. I observe that the RE records indicate that 90% of work for this item was completed as at 24 October 2014, even though a handwritten note there states "not done". On the basis of the *prima facie* information and evidence in the RE records before me, I determine that 90% x $18,400.00 = $16,560.00 is due to the Claimant for this item.

(d) VO-033: Omit the toe of retaining wall (structural toe at edge of raft foundation)

The Claimant claimed a reduction of $12,671.69 for this omission on the basis of a 92% reduction of work done for this item, while the Respondent valued the reduction at $13,733.58 on the basis of a 100% reduction. In the RE records relied on by parties, the consultant had assessed this reduction at ($13,773.58). In the absence of any clear contrary evidence by the Claimant, I am not convinced that the Claimant's omission sum was to be preferred.

(e) VO-035: ID design changes (applicable to all apartment units)

The Claimant claimed for $4,758.60 for 2.88% of the works done for this item, while the Respondent's valuation indicated that $0.00 was due. Curiously, the RE records (on which the Respondent relies for its valuations) indicated that *30%* of this variation had been completed as at 24 October 2014, which arguably might provide a much higher valuation for this item. However, since the Claimant had claimed $4,758.60, I determine this sum to be due to the Claimant.

(f) VO-043: Lift jamb in black stainless steel finish

The Claimant claimed for $20,800.00 for 100% of the works for this item, while the Respondent's valuation indicated that $0.00 was due. I observe that the RE records indicate that 100% of work for this item was completed as at 24 October 2014, even though a handwritten note there states "not done". On the basis of the *prima facie* information and evidence in the RE records before me, I determine that $20,800.00 is due to the Claimant for this item.

(g) VO-044: Alteration of glass thickness for AD-type windows

The Claimant claimed for $29,206.75 for 18.25% of the works for this item, while the Respondent's valuation indicated that $0.00 was due. Curiously, the RE records (on which the Respondent relies for its valuations) indicated that *60%* of this variation had been completed as

at 24 October 2014, which arguably might provide a much higher valuation for this item. However, since the Claimant had claimed $29,206.75, I determine this sum to be due to the Claimant.

(h) VO-058: Rain water sump pump system

The Claimant claimed for $42,459.21 for 100% of the works for this item, while the Respondent's valuation indicated that $0.00 was due. However, in the RE records pointed to me by the Respondent, it was indicated that 60% of this variation had been completed as at 24 October 2014. This amounts to an assessed sum of $25,475.53. In the absence of any contrary submission or evidence by parties, I am *prima facie* satisfied and thereby determine that $25,475.53 is due to the Claimant for this item.

(i) VO-063: Change of parapet wall (1.15m high) material from brick to cast-in-situ and precast wall ("Joe Green Panel") along boundary at roof terrace

The Claimant claimed for $53,270.88 for 97.5% of the works for this item, while the Respondent's valuation indicated that $0.00 was due. The RE records indicate that 100% of this variation had been completed as at 24 October 2014, which might provide a higher valuation for this item. However, since the Claimant had claimed $53,270.88, I determine this sum to be due to the Claimant.

(j) Reconstruction of brick walls at 25 units

The Claimant claimed for $142,977.22 for 100% of the works for this item as a variation, while the Respondent's valuation indicated that $0.00 was due. The Respondent's basis for objecting to this item was that it was not a valid variation claim as it was the subject of ADs 42, 57, 60, 88, 106, 109, 152, 155, 156, 158, 168, 179 which were issued to the Claimant to rectify unacceptable brick walls. The Respondent submitted that the Claimant had not shown why these brick walls were additional works nor had they provided any documents to support such a contention.

During the course of the adjudication, the Claimant did not point me to any architect's instructions or to any other documentation in relation these brick walls to substantiate its assertion that it had the contractual entitlement to claim for work for these items as variations. In the absence of any such evidence (or submission to like effect), I am not satisfied on a *prima facie* basis that this item can be the basis of a valid variation claim, and therefore cannot determine any sum in the Claimant's favour for this item in this adjudication.

(k) Various other items like tree cutting, Additional support for pocket doors, *etc* referred to at p D-3 of the AA

The Claimant claimed for various other amounts as variations. According to the Respondent, no amount is payable for these items as these items were included in the contract sum and hence cannot be claimed as variations.

During the course of the adjudication, the Claimant did not point me to any architect's instructions or to any other documentation in relation to these remaining items to substantiate its assertion that it had the contractual entitlement to claim for work for these items as variations. In the absence of any such evidence (or submission to like effect), I was not satisfied on a *prima facie* basis that these items can be the basis of valid variation claims at this forum, and therefore cannot determine any sum in the Claimant's favour for these items in this adjudication. In any event, to award the Claimant any sum for these items should the items be already reflected within the contract sum would amount to double-counting.

Summary of my determination on Claimant's variations claims

167 Taking into account the sums determined above in [166], sub-paras (a), (c), (e), (f), (g), (h) and (i), I determine that a total sum of $163,811.10 is payable for variations over and above the sum of $281,745.51 included in the valuations already included in the sums at [143] above.

Materials on site

168 The Claimant's claim for materials on site is $1,002,396.00, whereas the Respondent's valuation in response was $0.00.

169 The Claimant submitted that it was entitled to $1,002,396.00 for the materials on site because:

(a) This figure was recorded following the joint inspections with the quantity surveyor, Architect, structural engineer and service engineer-cum-M&E consultant from 31 October to 14 November 2014, with a summary of the locations of each material on site.

(b) The materials had been properly protected against damage or deterioration in accordance with cl 31(4)(c) of the Conditions of Contract as most of the materials had been stored "either in the residential unit itself or at the basement".

(c) While the reinforcement bars and the [xxx] steel mesh at the [xxx] deck of the Project were exposed to the elements, the Claimant

should not be faulted for this as these materials are not normally protected and sheltered as they are hardy and are materials which are consumed normally within two weeks in the construction process.

(d) Reliance should not be had on [B]'s input on assessments of materials on site as they were appointed replacement contractor and were not present at the joint site inspection.

(e) The Respondent's position that the materials left on site were not in accordance with the contract was inconsistent with its refusal to let the Claimant remove the materials from the site.

(f) The Claimant should not be held responsible for any missing materials from the site as it had been forced out of the site.

(g) The Claimant should not be prejudiced by its earlier valuation of $347,205.30 submitted on 29 October 2014, since that was merely an estimate made just five days after the termination and the Claimant did not then have a chance to do a proper stocktake as the Respondent had prohibited entry into the site.

170 The Respondent disputed the Claimant's claim because:

(a) The claim of $1,002,396.00 was a threefold jump from the Claimant's alleged valuation of work done at $347,205.30 at termination on 24 October 2014 (which was submitted on 29 October 2014).

(b) The Claimant had not in its supporting documents provided any specific indications of the materials allegedly stored on site nor shown that there was any protection done.

(c) The Respondent's zero assessment of value of materials on site was based on the replacement contractor ([B])'s input of materials on site.

(d) The Respondent was not able to locate the materials allegedly supplied by the Claimant over and above [B]'s assessed amount.

(e) There were unexplained errors in the Claimant's "Summary Table of Materials on Site", as the document indicated positive total quantities of specific materials at the project site even when the same document indicated that there was none of such materials present at specific locations on site.

(f) There was no joint recording of materials on site during the joint inspections.

(g) The table of locations set out by the Claimant on each material on site was not specific enough as the site was a large one and the

quantity surveyor could not be expected to scour over the whole location.

(h) In the Respondent's account, the quantity surveyor did not find any materials at the [xxx] deck of the Project.

(i) The Claimant had contractual obligations to fulfil for proper protection of materials before it could be entitled to payment for materials on site; for instance, under cl 31(4)(c) of the Conditions of Contract; Preliminaries, cl 9.7.1, cl 16.30 (for metalwork), cl 9.22 (for stonework).

(j) Some of the materials appeared to have been taken back from the site by the Claimant.

(k) Police reports had been lodged in relation to loss of some of the materials on site.

(l) It was incumbent on the Claimant who was seeking payment to provide adequate documentation and/or other evidence to show that the materials had indeed been ordered, delivered and had remained on site and had been properly protected against damage and/or deterioration.

My decision (materials on site)

171 I note that the bulk of the supporting documents submitted by the Claimant were invoices or delivery orders for the Claimant's purchase of the items. The correlation of these documents to alleged materials and locations on site was not clearly explained in this adjudication. Other pieces of allegedly supporting evidence included photographs which were not correlated to the supply documents or alleged locations of the items, nor were there sufficient supporting documents to substantiate the rates claimed by the Claimant for these items.

172 Therefore, there were missing links in the evidence and documentation, such that in the ultimate analysis, there was not sufficient evidence to enable me to make a determination of the amount claimed by the Claimant nor any other amount. It is not for me to be making any discretionary estimates as an adjudicator without clear and cogent evidence.

173 I note that a sum of $278,936.29 was already certified in "Payment Certificate No. 20" of September 2014, and that this is included in the certified sum of $1,822,071.87 at [141] above.

174 Accordingly, I am unable to award any amount for this item in addition to any valuations already included in the sums at [143] above.

Materials off site

175 The Claimant claimed $1,708,519.47 for materials off site. It submitted:

(a) The materials were pre-ordered based on the Architect's approvals.

(b) It had paid the deposits so as to secure the production of these materials.

(c) At the time the Contract was terminated, these materials were in transit and/or ready for shipment.

176 The Respondent submitted that the amount due for materials off site was $0.00. This was because:

(a) The Claimant had no contractual entitlement to claim for materials off site, as under cl 31(4)(c) of the Conditions, the Claimant is only entitled to the value of unfixed goods and materials delivered (but not prematurely) to the site and properly protected against damage or deterioration.

(b) The very fact that the materials are stored off site meant that the materials had not been delivered to the Respondent.

(c) The Claimant had not provided any substantiation to prove that the materials have been properly protected against damage or deterioration.

My decision (materials off site)

177 The Claimant's supporting documents for this claim include various purchase orders, payment vouchers, delivery orders and some photographs. However, it was not explained clearly in any of the Claimant's submissions how these documents indicate where and how the materials were supposedly stored or protected and/or to what extent they have been shipped, delivered or paid for and/or whether or not the Claimant still has full possession over the materials or has since divested any of its interest in them (for value or otherwise). While some photographs were provided showing some materials in storage, it was not explained clearly either how these were sufficient to establish the amounts being claimed.

178 I find thus that the Claimant has not discharged the burden of proving entitlement to the claimed amount. There was insufficient basis for me to be satisfied that the claim was substantiated, and it is not for me to be making any discretionary estimates as an adjudicator without clear and cogent evidence. Accordingly, I am unable to award the Claimant any amount for this item in this adjudication.

"Materials / Tools / Equipment etc. Withheld at the Site"

179 The Claimant claimed payment of $1,604,068.25 for "materials/tools/equipment etc. withheld at the site".

180 The Respondent's response amount for this head of claim was $0.00. It submitted:

(a) The Claimant had no contractual entitlement to claim for materials/tools/equipment withheld at the site.

(b) For valuation of works up to 24 October 2014, only Preliminaries (which *inter alia* comprise plant and machinery in the Contract) were to be assessed, and this had been done in the item for Preliminaries, where there was a gross certification for plant, tools and vehicles in Preliminaries Item P/5N cl 7.14 up to the termination date of 24 October 2014.

(c) The Claimant was only entitled to a return of the balance materials, tools and equipment upon completion under cl 32(8)(h) of the Conditions of Contract, which states:

> … where on final completion there shall be any *temporary buildings, plant, tools, equipment, goods or unfixed materials on the Site*, the property in which would otherwise be the Contractor's or revest in him under Clause 16 of these Conditions, the Contractor shall be permitted to remove the same, provided that if pursuant to paragraphs (f) and (g) hereof, or under Sub-Clauses (9) and (10) of this Condition, there shall be final net sums or damages due to the Employer from the Contractor, *the Employer may retain the same until payment of such sums or damages by the Contractor*, and failing payment may sell the same, holding any excess of the proceeds of sale obtained by the Employer at the same price as that in any proposed sale to a third person by Employer, over the sums expenses, damages or costs (including legal and financing costs) properly due to the Employer, for the credit of the Contractor. Provided that the Contractor shall be entitled to purchase the same from the Employer at the same price as that in any prospective sale to a third person by the Employer within 7 days of receipt of the proposed sale. [emphasis added]

(d) Any materials retained under cl 32(8)(h) would be properly accounted for under the final accounting exercise under cl 32(8)(e) when that occurs.

181 The Claimant submitted that it had not received any credit notes or other similar documentation for the materials even though it has already been about four months since termination.

My decision ("Materials / Tools / Equipment etc. Withheld at the Site")

182 There was either insufficient or no evidence nor sufficient supporting documentation tendered by the Claimant in support of the items claimed under this head of claim, nor submissions to rebut the above matters raised by the Respondent.

183 I find thus that the Claimant has not discharged the burden of proving entitlement to its claimed amount. There was insufficient basis for me to be satisfied that the claim was substantiated, and it is not for me to be making any discretionary estimates as an adjudicator without clear and cogent evidence. Accordingly, I am unable to award the Claimant any amount for this item in this adjudication.

Rental charges of equipment

184 The Claimant claimed that it was entitled to $35,796.73 for rental charges for equipment.

185 The Respondent's response amount for this head of claim was $0.00. It submitted:

> (a) There are no contract provisions allowing for claims in respect of "Rental Charges of Equipment (Prior to retrieval from Site)".
>
> (b) For valuation of works up to 24 October 2014, only Preliminaries (which *inter alia* comprise plant and machinery in the Contract) were to be assessed, and this had been done in the item for Preliminaries, where there was a gross certification for plant, tools and vehicles in Preliminaries Item P/5N cl 7.14 up to the termination date of 24 October 2014.
>
> (c) Some equipment had been removed and signed off by the Claimant.

186 The Claimant had made no contrary submission to the above. No reasons were advanced by the Claimant in its submissions nor were there clear supporting documents indicating why this claim should be allowed

187 I find thus that the Claimant did not prove its entitlement to payment to its claimed amount. Accordingly, I am unable to award the Claimant any amount for this item in this adjudication.

Claim for retention sums

188 The Claimant submitted that the total retention sum of $8,806,383.30 should be released to it, since cll 31(9) and 31(10) of the Conditions, which provide for the first and second release of retention moneys upon the issue of the Completion Certificate and Architect's Final

Certificate respectively, did not apply in this case as the Contract has been terminated.

189 Clause 31(9) provides for the first release of one-half of the retention moneys:

> **First Release of Retention Monies**
>
> Subject to Clauses 25 and 26 of these Conditions in regard to Phased on Stage Completion or Partial Occupation, one-half of the Retention Monies not yet paid shall be certified as due to the Contractor on the issue of the Completion Certificate under Clause 24(4) of these Conditions, less only a reasonable sum to cover the cost of the outstanding work (if any) not yet completed pursuant to Clause 24(5) of these Conditions at the date of the said Certificate. Any sum so deducted shall be released to the Contractor upon a further certificate of the Architect given as soon as such outstanding work has been completed.

190 Clause 31(10) provides for the release of the remaining unpaid balance of the retention moneys:

> **Second Release of Retention Monies**
>
> Subject to Clauses 25 and 26 of these Conditions, and to any special deduction under Clause 27(4) of these Conditions, any remaining unpaid balance of the Retention Monies shall be certified and be paid to the Contractor under the Final Certificate issued by the Architect at the expiry of the Maintenance Period for the whole work or upon the issue of the Maintenance Certificate under Clause 27(5) of these Conditions, whichever is the later.

191 Therefore, the Claimant submitted that the Respondent is not contractually entitled to withhold the retention moneys post termination because the SIA Conditions, unlike the Joint Contracts Tribunal Contract (2005 Edition), does not contain any provision allowing the employer to continue withholding the retention sum where termination is triggered, notwithstanding that a certificate for its release has been issued.

192 However, the Respondent's position was that the absence of an express provision such as that in the Joint Contracts Tribunal Contract does not necessarily lead to the inference that the position in the SIA Conditions is to allow such an early release of retention moneys as suggested by the Claimant. The Respondent's position was that releasing the retention moneys at this juncture would place a terminated contractor in a more advantageous position of being entitled to the release earlier as compared to a contractor who completes the Project without being terminated.

193 The Respondent also referred me to SOP AA082 of 2014, in which the learned adjudicator agreed that, despite the Claimant having been

terminated, the Respondent was entitled to withhold the retention sum until the expiry of the 18-month "defects liability period" under the main contract (which had yet to occur) in accordance with the contractual condition for the release of the retention moneys.

My decision (retention sums)

194 The preliminary issue here is whether the Claimant was entitled to make a payment claim under the SOP Act for "retention monies".

195 It appears that this has been done in previous adjudications such as SOP AA082 of 2014, SOP AA248 of 2013, and SOP AA135 of 2013 [*AOZ Pte Ltd v APA Pte Ltd* [2013] SCAdjR 299]. In those cases, the Claimants had included in their payment claims a release of the retention moneys and the adjudicators have, after deciding that they were valid payment claims under the SOP Act, gone on to consider the substantive merits of their claim for retention moneys. Further, Mr Chow in *Security of Payments and Construction Adjudication* has stated at para 7.47:

> Where the contract provides for a sum to be deducted and accumulated as a retention sum, the Respondent is entitled to include this deduction in arriving at the sum stated as the response amount in the payment response. *The deduction of an amount representing the retention money is not a set-off since the amount is deducted on the basis of the payment terms of the contract and is not related to any breach of the claimant.* However, the deduction should be described clearly as such and, where possible, the contractual term permitting the deduction should be cited. [emphasis added]

196 The above reinforces the point that retention moneys can be part of a payment claim under the SOP Act. Further, it clarifies that a deduction in the payment response is not a set-off for backcharges or counterclaims, but is instead deducted as part of the payment terms of the contract.

197 Under the SIA Conditions, cl 31(9) provides for the first release of one-half of the retention moneys and cl 31(10) provides for the release of the remaining unpaid balance of the retention moneys. In contradistinction, cl 32 does not expressly provide for the release of retention moneys, nor is this provided for anywhere else in the SIA Conditions where termination is triggered before the release of the retention sum.

198 As the Claimant has rightly observed in its submissions, the Respondent was unable to point to any clause granting it the contractual entitlement to continue withholding the Claimant's retention moneys after termination.

199 However, I agree with the Respondent that this does not *ipso facto* mean that the Claimant would be entitled to the release of the retention moneys upon termination.

200 First, the Claimant must still show its contractual entitlement to the release of the retention sums, like the other heads of claim in its Payment Claim. In the absence of express provision on the release in a termination situation, I now turn to examine the rationale for staggering the release under cll 31(9) and 31(10) in a non-termination situation. As stated by Mr Chow in *Security of Payments and Construction Adjudication* at para 7.49, retention moneys serve the purpose of acting as:

> … a form of insurance to the client in the event that the contractor fails to complete the works properly. It affords recourse to an additional sum against which an employer can set off claims arising from defaults of the contractor such as defects and delay. In the event that the contractor fails to rectify defects or complete outstanding works, the retention may be used to pay another contractor to carry out the rectification or to complete the work.

201 In my view, the rationale behind cll 31(9) and 31(10) applies equally to a termination situation, despite there being no completion certificate or final certificate issued under the original contract and with a replacement contractor engaged to complete the remaining works. The original contractor who may have performed defective works should not get full payment by the immediate release of the retention moneys upon the termination of the contract; and that the retention moneys should only be released after the defects and insufficiencies of its work have been made good. I agree with the Respondent's submission that that the original terminated contractor cannot be put in a more advantageous position. Therefore, the original contractor should only be entitled to the upfront release of retention moneys upon termination if this was agreed or it is made sufficiently clear to the tribunal that there were no defects in the work done.

202 This was not so in the present case. In its Payment Response, the Respondent had alleged defects in the Claimant's work in relation to the brick walls, "Joe Panels" and retaining walls. There was insufficient evidence to convince me that the rectification of defects in this Project had reached such a stage that in this adjudication, I should determine the release of the whole retention sum being claimed for return by the Claimant. Nor was there sufficient evidence before me to enable me to return part of it to the Claimant.

Cost of rectification of "Joe Panels" and brick walls

203 I note that the Respondent's "Payment Response No. 21" had deducted $1,223,150.00 as rectification costs for Joe Panels and brick walls in arriving at the total "undisputed" sum of $4,765,299.24 (*ie*, $1,822,071.87 + $2,943,227.37) which I have mentioned in [143] above.

204 Having considered the parties' submissions and evidence as regards the alleged rectification costs of these two items, I am of the view that this sum should not be deducted from the "Response Amount", as was done in the Respondent's Payment Response. This is because:

(a) Based on the supporting documentation in the Payment Response and the Adjudication Response, coupled with the Claimant's disputes as to the amounts counterclaimed for these items, the Respondent has not established that the Claimant is liable for this sum. Hence, the Respondent did not establish a clear and cogent case at this adjudication for a deduction or withholding of this amount.

(b) Since the retention sum of $8,806,383.30 is still with the Respondent, it is unnecessary and perhaps a case of double-accounting for it to retain this further sum of $1,223,150.00 on account of rectification of defects.

205 Accordingly, I do not allow the deduction of $1,223,150.00 as rectification costs for Joe Panels and brick walls. Therefore, this amount should be added to the sum of $4,765,299.24 (*ie*, $1,822,071.87 + $2,943,227.37) in [143] above.

Determination and conclusion

206 Pursuant to the above decisions, I determine the following to be paid by the Respondent to the Claimant:

(a)	Under [143] above:	$ 4,765,299.24
(b)	Under [167] above:	$ 163,811.10
(c)	Under [205] above:	$ 1,223,150.00
	TOTAL:	$ 6,152,260.34

207 I direct that the Respondent is to pay the Adjudicated Amount of $6,152,260.34 (*note: this does not include GST*) within seven days after this determination is served on the Respondent, in accordance with s 22 of the SOP Act, failing which the Respondent is to pay simple interest thereon at the rate of 5.33% per annum from the due date to the date of payment (which rate I base on the prescribed rate in the relevant Practice Direction in the Supreme Court of Singapore and s 8(5)(*b*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)).

208 As regards the determination of costs of the Adjudication, I have considered the following:

(a) The Respondent did not succeed in its in-principle, jurisdictional and technical contentions against the validity of the Payment Claim and Adjudication Application (considered at

[23]–[125] above) which took up considerable time in this adjudication.

(b) The Respondent did not succeed in setting off its counterclaims against the Claimant's claims.

(c) The Claimant succeeded in having determined in its favour about one-fifth of the sum claimed in this adjudication (or one-quarter of the sum, if I take into account the withdrawal of the loss of profits claim of which I was informed in any case not before the adjudication conference).

(d) Bearing in mind the above factors, I consider it fair and reasonable that the Respondent bears 75% of the cost of this adjudication and the Claimant bears 25%.

209 I therefore determine that the costs of this Adjudication, comprising the Adjudication Application fee of $642.00 (inclusive of GST) and the adjudicator's fee of $46,620.00 (plus GST thereon at 7% of $3,263.40 (*ie*, a total of $49,883.40) and disbursements of $82.21 (inclusive of GST)), be borne 75% by the Respondent and 25% by the Claimant.