IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 120

Originating Application No 738 of 2022

In the matter of Section 27 of the Building and Construction Industry Security of Payment Act 2004

And

In the matter of Order 36, Rule 3 of the Rules of Court 2021

And

In the matter of the Adjudication Determination dated 27 October 2022 made in Adjudication Application 164 of 2022

Between

Builders Hub Pte Ltd

… *Claimant*

And

JP Nelson Equipment Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law — Jurisdictional objection]
[Building and Construction Law — Standard form contracts]
[Building and Construction Law — Termination — Repudiation of contract]
[Building and Construction Law — Termination — Termination under terms of contract]

TABLE OF CONTENTS

Builders Hub Pte Ltd
v
JP Nelson Equipment Pte Ltd

[2023] SGHC 120

General Division of the High Court — Originating Application No 738 of 2022
Teh Hwee Hwee JC
5, 20 January 2023

3 May 2023 Judgment reserved.

Teh Hwee Hwee JC:

Introduction

1 It is trite that the legislative framework laid down in the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") is intended to expedite the process by which a contractor may receive payment through the payment certification and adjudication process *in lieu* of commencing arbitral or legal proceedings: see the Court of Appeal decision of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*Yau Lee*") at [30]. This legislative objective balances the desire to ensure that contractors are paid their dues in a timely fashion against the need to respect the parties' bargain as reflected in their agreed contractual terms. Hence, in the speech of the then Minister of State for National Development, Mr Zaqy Mohamad, at the Second Reading of the Building and Construction

Industry Security of Payment (Amendment) Bill on 2 October 2018, the minister stated that it is common industry practice for a contract to provide for the suspension of payment until a later date if the contract is terminated upon a contractor's default. Where there is such a provision, a contractor that has defaulted will have to abide by the terms of the contract and will only be able to submit a payment claim under the SOPA after the conditions in the contract have been met (see *Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 ("*Second Reading Speech*")). The present case is one where these competing considerations are engaged.

Facts

2 The claimant is Builders Hub Pte Ltd ("BH"). The defendant is JP Nelson Equipment Pte Ltd ("JP"). Both companies are incorporated in Singapore.

3 On or around 8 June 2018, BH was awarded a contract ("Contract") by JP for the construction of a building in a project ("Project").[1] The Contract incorporated the REDAS Design and Build Conditions of Contract (3rd Ed, October 2010) (the "REDAS Conditions").[2]

4 On 2 August 2022, the Employer's Representative nominated by JP, Infield Projects Pte Ltd ("Infield"), served on BH a notice entitled "Notice under Clause 30.2.1 of the REDAS Conditions (3rd Edition) and Imposition of Liquidated Damages".[3] The notice states that the revised contract completion

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1 Affidavit of Lawrence Lee dated 4 November 2022 ("LL") at para 5; Affidavit of Seh Yin Yoke dated 28 November 2022 ("SYY") at para 6.

2 LL at para 6; SYY at para 6.

3 SYY at pp 15–16.

date was 19 December 2021, after including all applicable extensions of time. According to BH, this was a unilateral backward revision of the previously-granted extensions of time, which revised the contract completion date from 19 December 2021 to 19 May 2022.[4] In addition, the notice states that BH was liable to JP for liquidated damages amounting to the sum of $678,000 for the 226 days' delay in the completion of the Project.[5] The notice further specifies that it was issued under cl 30.2.1 of the REDAS Conditions, which empowered the Employer's Representative to give written notice to the contractor requiring him to recommence the design or the construction of the works, or to proceed with due diligence and expedition in the works. According to the notice, BH was required to complete the Project by no later than 30 September 2022, failing which JP would be entitled to terminate the Contract for default.[6]

5 On 18 August 2022, BH served Payment Claim 40 ("PC 40") on JP for the sum of $2,471,258.29.[7] A few days later, on 22 August 2022, BH sent a letter to JP setting out various alleged repudiatory breaches of the Contract by JP.[8] The allegations made by BH included claims that JP had failed to make full payment to BH for work done,[9] obstructed BH's access to the work site,[10] unreasonably refused to recognise BH's entitlement to extensions of time for the Project,[11] and wrongfully claimed to be entitled to be paid liquidated

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4 LL at para 31(c).

5 SYY at p 15, paras 3–4.

6 SYY at p 15, para 7.

7 LL at para 7; SYY at para 8.2.

8 LL at para 24 and pp 761–764.

9 LL at para 25 and p 761, paras 3–4 and pp 763–764, para 8C.

10 LL at p 762, paras 5–6 and p 764, para 8D.

11 LL at pp 762–763, para 8A.

damages by BH.[12] BH thus demanded that JP retract its allegedly wrongful imposition of liquidated damages on BH and make payment of all sums due to BH within two days of the 22 August 2022 letter.[13]

6 On 25 August 2022, JP sent a letter to BH rebutting the allegations contained in BH's 22 August 2022 letter.[14] JP refused to pay BH the sums that BH had demanded in the said letter.[15] Instead, JP accused BH of committing several acts of repudiation in relation to the Contract, including the failure to provide an updated schedule for completion, attempted wrongful removal of equipment from the Project site, and demand for undue payments.[16] JP asserted that the sums demanded by BH were not due[17] and insisted that the completion date of the Project was 19 December 2021, which BH had allegedly missed by over 226 days.[18] JP also insisted that it had promptly paid all sums due to BH.[19] JP demanded that BH retract its 22 August 2022 notice and confirm that it would immediately perform the Contract with due expedition, failing which JP would "consider all options, including to accept [BH's] repudiatory breach of the [C]ontract".[20]

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12 LL at p 763, para 8B.

13 LL at p 764, paras 10–11.

14 SYY at pp 21–23.

15 SYY at p 21, para 2 and p 22, paras 7–8.

16 SYY at p 21, para 1 and pp 22–23, paras 9–10.

17 SYY at p 23, para 9(c).

18 SYY at p 21, para 4.

19 SYY at p 22, paras 6–8.

20 SYY at p 23, para 11.

7 On 26 August 2022, BH replied to JP stating that JP had indicated by its conduct that it would continue with its alleged repudiatory conduct and breaches of contract.[21] As a result, BH stated that it was accepting the alleged repudiatory breach of contract by JP.[22] In that regard, it is important to note that BH's evidence in this present application is that the reference to "repudiatory breach" meant that it was terminating the Contract at "common law".[23] According to BH, this legal basis was to be contrasted with JP's response letter on the same day,[24] in which JP purported to terminate BH's *employment* for the Project under cl 30.2.2 of the REDAS Conditions by issuing a notice of termination under that clause.[25] JP's cited justifications for its notice of termination were: (a) BH's alleged failure to comply with Infield's 2 August 2022 notice under cl 30.2 within 28 days from the date of its receipt; and/or (b) BH's alleged abandonment of the works for the Project.[26] In response to JP's purported termination of BH's employment, BH sent a further letter on the same day stating that JP's purported termination was "too late" as JP "cannot terminate a contract in the afternoon that has already come to an end in the morning" and "cannot rely on clauses in a contract that has already been repudiated".[27] In this judgment, I will refer to 26 August 2022, which is the date on which the Contract was purportedly terminated by BH, as well as the date on which the employment of BH was purportedly terminated by JP, as the "Date of Termination".

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21 LL at p 765.

22 LL at p 765.

23 LL at paras 20 and 43.

24 LL at p 766, para 1.

25 LL at para 9 and p 766, para 5; SYY at paras 8.6 and 28.

26 LL at p 766, para 4.

27 LL at p 768.

8 On 15 September 2022, JP served Payment Response 40 ("PR 40") in response to BH's PC 40. In PR 40, JP instead asserted that BH owed JP a sum of $416,503.30.[28] In a letter from JP enclosing PR 40, JP stated that it would "be deducting a sum of $765,000 in liquidated damages from the amount certified to [BH] in [JP's] Payment Response No. 40".[29] The $765,000 sum for liquidated damages was stated to be calculated based on alleged delay in the Project amounting to 226 days between 20 December 2021 and 31 August 2022.[30]

9 On 22 September 2022, BH made an adjudication application ("SOP/AA 164 of 2022") in respect of PC 40 under s 13(1) of the SOPA, claiming for the sum of $940,246.97, inclusive of Goods and Services Tax.[31] On 30 September 2022, JP lodged its adjudication response for SOP/AA 164 of 2022.[32] As JP had raised jurisdictional objections in its submissions, an adjudication conference was held on 13 October 2022 to determine the jurisdictional issues prior to any consideration of the merits.[33]

10 On 27 October 2022, the learned Adjudicator released his written adjudication determination (the "Adjudication Determination") dismissing SOP/AA 164 of 2022 on the basis that PC 40 fell outside the purview of the SOPA and that consequently he had no jurisdiction to adjudicate the proceedings that were commenced on the basis of PC 40.[34]

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28 LL at para 10; SYY at para 6.

29 LL at p 613, para 4.

30 LL at p 613, para 6.

31 LL at para 12; SYY at para 6.

32 LL at para 14; SYY at para 6.

33 LL at para 15; SYY at para 6.

34 Adjudication Determination dated 27 October 2022 ("AD") at paras 3 and 89.

Decision of the learned Adjudicator in SOP/AA 164 of 2022

11 The learned Adjudicator identified and framed four issues for determination in SOP/AA 164 of 2022. Only two are relevant for the purposes of the present application. As I understand it, they were namely: (a) whether BH was entitled to lodge the adjudication application on the basis of PC 40 even though "[BH's] employment under the Contract [had] been terminated as at the date of lodgement" of the adjudication application; and (b) whether BH was entitled to proceed with the adjudication even though the designated payment certifier under the Contract had become *functus officio* upon either JP's alleged termination of BH's employment under the Contract or BH's alleged termination of the Contract.[35]

12 While the learned Adjudicator noted that BH and JP had disagreed on which party had validly issued a termination notice for the Contract, he took the position that he could "use the phrases termination of the Contract and termination of employment under the Contract interchangeably … as nothing turn[ed] on any particular difference between both phrases".[36] Accordingly, he rendered his determination on the basis that "it [was] *not* disputed between the parties that the Claimant's employment under the Contract had been terminated as of *26 August 2022*" [emphasis in original omitted; emphasis added in italics].[37]

13 In relation to issue (a), the learned Adjudicator opined that his review of the Court of Appeal authorities in *Yau Lee*, *Shimizu Corp v Stargood*

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35 AD at paras 27.3 and 27.4.

36 AD at para 47.

37 AD at para 10.

Construction Pte Ltd [2020] 1 SLR 1338 ("*Shimizu*") and *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal* [2021] 1 SLR 791 ("*Orion-One*") led him to the view that a claimant making a claim for progress payment under the SOPA must show that there was an entitlement to be paid under the contract. The entitlement to be paid was key in determining whether a payment claim could form the basis for adjudication under the SOPA.[38] The learned Adjudicator found, at paragraph 79 of the Adjudication Determination, that in considering whether a claimant was entitled to be paid under the contract, the correct approach is as follows:

> … the "default" position is that unless the material contract expressly provided that a contractor is entitled to submit further payment claims post-termination or that it is entitled to be paid progress payments post-termination, then no such entitlement can arise under the said contract. I find this to be the correct position, with the qualification that this is the case only where there is an express termination clause providing for the termination of the employment of the contractor and the consequences of such termination, as in the present case. …

14 Applying this "default position", the learned Adjudicator found that there was no *express* provision in the Contract providing that BH would be entitled to have its payment claims that were submitted prior to termination evaluated and paid after termination.[39] In making this finding, he observed that upon the termination of BH's employment, BH lost its entitlement to be paid notwithstanding that PC 40 might have been served prior to the Date of Termination, as cl 30.3 of the REDAS Conditions contemplated that no further payments shall be paid pending the determination of all costs incurred as a result

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38 AD at para 76.

39 AD at para 77.

of the said termination ("Termination Costs").[40] Further or in the alternative, BH lost its entitlement to be paid as the general payment term in cl 22 of the REDAS Conditions would no longer be applicable in the event of termination.[41]

15 As BH no longer had any entitlement to be paid progress payments under PC 40 prior to the lodgement of the adjudication application, the learned Adjudicator found that BH's claim fell outside the purview of the SOPA and that as a result he had no jurisdiction to adjudicate SOP/AA 164 of 2022.[42] In this regard, he decided that the questions of who had terminated the Contract and on what basis were immaterial, because the fact remained that BH no longer had any contractual right to be paid progress payments upon the said termination.[43] Accordingly, the learned Adjudicator dismissed SOP/AA 164 of 2022.

16 In relation to issue (b), the learned Adjudicator took the position that it was not necessary for him to decide whether the designated payment certifier under the Contract (which was Infield, the Employer's Representative nominated by JP) had become *functus officio* upon the termination of the Contract, and the consequences of the designated payment certifier becoming so. He opined, however, that the designated payment certifier's duties under cl 22.2 of the REDAS Conditions would appear to end in the event of any termination of the employment of BH under cl 30.2 of the REDAS Conditions. This was because cl 30.3 of the REDAS Conditions provided that upon such

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40 AD at paras 78, 81, 82 and 84.

41 AD at para 82.

42 AD at para 89.

43 AD at para 88.

termination, no further payment shall be made to BH until the determination of the Termination Costs.[44] The learned Adjudicator, while declining to make a conclusive finding,[45] also went on to note that if the designated payment certifier had become *functus officio* at the Date of Termination, he would no longer be empowered under the Contract to certify PC 40 *after* the Date of Termination.[46] If that were the case, by the time the adjudication application was filed after the Date of Termination, BH would no longer be entitled to be paid any progress payments under PC 40 as it had not been certified before the Date of Termination. In turn, this meant that there would be nothing to adjudicate under the SOPA and no jurisdiction for the learned Adjudicator to do so.[47]

The parties' cases in this application

BH's case as the claimant

17 In the present application to this court, BH is applying, *inter alia*, to set aside the Adjudication Determination and to remit SOP/AA 164 of 2022 to the learned Adjudicator for the determination of its merits.[48]

18 BH argues that the learned Adjudicator was wrong to dismiss SOP/AA 164 of 2022 on the basis of a lack of jurisdiction.[49] BH asserts that the right to trigger the adjudication process under the SOPA is founded on the valid service

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44 AD at para 92.

45 AD at para 92.

46 AD at para 93.

47 AD at para 93.

48 Originating Application filed on 4 November 2022 at para 2.

49 BH's Written Submissions dated 23 December 2022 ("CWS") at para 25.

of a payment claim under the SOPA[50] and, so long as that is done, any subsequent termination of the contract does not affect a contractor's right to apply for adjudication of that payment claim.[51] In the present case, BH contends that since it is undisputed that PC 40 was validly served on 18 August 2022, which was prior to the Date of Termination,[52] BH's entitlement to payment had crystallised at that time, and it did not lose the right to trigger the SOPA adjudication process pursuant to PC 40 simply because the Contract was subsequently terminated.[53]

19 BH further argues that it had terminated the Contract at common law in the morning of 26 August 2022 and therefore JP could not have and did not terminate the Contract under cl 30.2.2 of the REDAS Conditions by issuing its notice of termination later on that day.[54] In support of this, BH reasons that (a) JP represented in the cover letter to PR 40 that JP had not terminated the Contract under cl 30.2.2;[55] (b) JP did not raise any objections in PR 40 on the ground that it had terminated the Contract under cl 30.2.2;[56] and (c) as BH had filed its adjudication application in reliance on JP's response in PR 40, JP was estopped from contending that it had terminated the Contract under cl 30.2.2.[57]

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50 CWS at paras 14–16.

51 CWS at paras 36–44.

52 CWS at paras 23–24.

53 CWS at paras 34–46.

54 CWS at paras 69–70.

55 CWS at paras 71–72.

56 CWS at para 73.

57 CWS at paras 74–75.

Furthermore, BH contends that the learned Adjudicator could not have had regard to an objection that was not included in the payment response.[58]

20 In relation to the issue of whether the designated payment certifier under the Contract was *functus officio*, BH asserts that this is irrelevant, because it is the employer himself who was to provide the payment response which takes precedence over any certification by the designated payment certifier.[59] Furthermore, BH adds that JP's failure to raise the *functus officio* argument in its payment response precluded it from raising this issue as an objection at the adjudication stage.[60] BH argues that, in any event, PC 40 was submitted prior to the termination of the Contract, during which the designated payment certifier was in office and could not be said to have been *functus officio*.[61]

21 BH further submits that the learned Adjudicator breached the rules of natural justice. This is because his decision to dismiss SOP/AA 164 of 2022 turned on (a) there being no express contractual provision entitling BH to be paid after termination, and (b) that PC 40 fell outside the purview of the SOPA at the time of the adjudication application. However, BH says that these arguments were not part of JP's submissions and the parties were not given a chance to submit on these issues.[62] BH submits that it was deprived of the opportunity of making submissions that "could reasonably have made a difference" to the outcome and, in this regard, s 27(6)(*g*) of the SOPA provides

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58 CWS at para 75.

59 CWS at para 94.

60 CWS at para 96.

61 CWS at para 91.

62 CWS at paras 54–55.

that an adjudication determination may be set aside for such breaches of the rules of natural justice.[63]

JP's case as the defendant

22 In response, JP argues that BH's application to set aside the Adjudication Determination should be dismissed.[64]

23 JP first argues that the learned Adjudicator correctly recognised that a claimant must be contractually entitled to payment before it is entitled to adjudication under the SOPA.[65] In this regard, JP asserts that BH was not entitled to adjudication of PC 40 under the SOPA "once the Contract was terminated (either under the common law or under Clause 30.2 of the REDAS Conditions), as there [was] no contractual right to progress payments after termination" [emphasis omitted].[66] Further, under cl 30.3 of the REDAS Conditions, it was not liable to pay BH until the Termination Costs had been ascertained.[67] Therefore, JP contends that once the Contract was terminated, BH lost its entitlement to progress payments and adjudication, notwithstanding that PC 40 was served before termination.[68]

24 JP also contends that BH was not entitled to seek adjudication because s 4(2)(*c*) of the SOPA provides that the SOPA does not apply to any terminated

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63 CWS at paras 64–65.

64 JP's Written Submissions dated 23 December 2022 ("DWS") at para 72.

65 DWS at para 21.

66 DWS at para 37.

67 DWS at para 30.

68 DWS at paras 33–34.

contract to the extent that the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of a contractual event, and that date has not passed or that event has not occurred.[69] In the present case, JP argues that it had terminated BH's employment pursuant to cl 30.2.2 of the REDAS Conditions. As such, under cl 30.3.1 of the REDAS Conditions, JP was permitted to suspend progress payments until the Termination Costs had been ascertained.[70] Since the Termination Costs were not yet ascertained at the time SOP/AA 164 of 2022 was filed, JP asserts that s 4(2)(*c*) of the SOPA would prevent BH from seeking adjudication.[71]

25 JP further submits that SOP/AA 164 of 2022 was rightly dismissed because BH would not be entitled to seek adjudication once the designated payment certifier had become *functus officio*.[72] Here, the designated payment certifier became *functus officio* on 26 August 2022 when the Contract was terminated as there were no contractual provisions for the designated payment certifier to certify progress payments to BH, except under cl 30.3.1 of the REDAS Conditions.[73] JP adds that it was not estopped from raising a jurisdictional objection about the designated payment certifier being *functus officio* because no estoppel can arise for claims falling outside the purview of the SOPA.[74]

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69 DWS at paras 50–51.

70 DWS at paras 52–53.

71 DWS at para 60.

72 DWS at para 38.

73 DWS at para 39.

74 Presentation slides used by JP at the hearing on 20 January 2023 ("Slides") at 41–42.

26 In relation to the issue of natural justice, JP disputes BH's assertion that the learned Adjudicator relied on different grounds from the parties' submissions in reaching his decision.[75] JP asserts that the learned Adjudicator's determination as to whether there was a contractual provision entitling BH to be paid after termination was canvassed by JP in its submissions before the learned Adjudicator.[76] Moreover, JP asserts that BH had also made submissions on the same issue.[77] In any event, even if BH failed to directly address the issue in its submissions, it had identified the issue and had the opportunity to submit on it, which made plain that there was no breach of natural justice.[78]

Issues

27 The following issues arise for my decision in this application:

(a) whether BH was precluded from applying for adjudication of PC 40 by virtue of a contractual termination event occurring before the relevant adjudication application was filed, even though PC 40 itself was validly served prior to the termination event;

(b) whether BH was precluded from applying for adjudication of PC 40 on the basis that the designated payment certifier was *functus officio*; and

(c) whether the learned Adjudicator acted in breach of the rules of natural justice.

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75 DWS at para 62.

76 DWS at paras 63–64.

77 DWS at paras 65–68.

78 DWS at paras 69–71

BH's entitlement to apply for adjudication based on PC 40

28 In my judgment, the valid service of PC 40 prior to the termination of the Contract or the employment of BH did not, in and of itself, give BH an unqualified entitlement to adjudication after termination. Neither did the occurrence of the contractual termination event *per se* disentitle BH to an adjudication of a payment claim that was validly served prior to the termination. The foremost consideration would be the terms of the Contract (*Orion-One* at [23], citing *Yau Lee* at [31] and *Shimizu* at [2], [21] and [28]). In this case, the question is whether, upon the contractual termination event, there is any *applicable* provision in the Contract that negates or suspends BH's entitlement to be paid based on a validly served payment claim. If there is such a provision, BH would lose its right to apply for adjudication of the claim in PC 40 even though PC 40 was validly served prior to the termination. If no such contractual provision was engaged, BH's entitlement to apply for adjudication of the claim in PC 40 would remain unaffected notwithstanding the termination.

29 For reasons which I will explain below, I conclude that if JP had invoked cl 30.2 of the REDAS Conditions to terminate BH's employment under the Contract, BH would no longer have a contractual right to be paid any progress payment by virtue of cl 30.3 of the REDAS Conditions, and BH would consequently lose its entitlement to the adjudication of PC 40. If, however, the Contract was terminated by BH pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches, or if the provisions for the termination of BH's employment in cl 30.2 and the consequences of such termination in cl 30.3 were not otherwise engaged, BH's entitlement to apply for adjudication would remain intact in the absence of any other terms in the Contract providing to the contrary.

30 In explaining my conclusion, I will consider: (a) the learned Adjudicator's analysis of BH's entitlement to progress payments which undergirded his determination that he had no jurisdiction to determine SOP/AA 164 of 2022; (b) the relevant provisions in the SOPA; and (c) the case authorities referred to by the learned Adjudicator and the parties. Thereafter, I will turn to the facts and examine how the application of the relevant provisions in the Contract will affect BH's entitlement to apply for an adjudication on the basis of PC 40.

The "default position" adopted by the learned Adjudicator

31 As I have summarised above (see [13]–[14]), the learned Adjudicator found that where a contract bears an express termination clause providing for the termination of a contractor's employment and the consequences of such termination (the "employment termination clause"), the "default position" is that the contractor has no right to submit further payment claims, or to be paid progress payments, even if the relevant payment claim was served prior to such termination unless the contract expressly provides otherwise.[79] The reason for this "default position" is that there is no need for the SOPA to perform a "gap-filling" function in such cases, since the express terms of the contract ought to apply instead.[80] In this regard, the learned Adjudicator noted that this was the case here, given that there was an express general payment term in cl 22 and an express termination term in cl 30 (*ie*, the employment termination clause) of the REDAS Conditions.[81]

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79 AD at para 79.

80 AD at paras 75, 77 and 79.

81 AD at para 77.

32 With respect, I do not agree with this "default position". The "default position" does not consider the critical point of whether the employment termination clause is engaged in the first place. In my view, the mere existence of an employment termination clause in the Contract should not and does not affect a contractor's entitlement under the contract if it is not engaged on the facts. It is only if the contract was in fact terminated pursuant to that employment termination clause that the contents and effect of that clause and its constituent parts become engaged. Where the clause is not engaged, the question should be whether there are other contractual terms that preclude, negate or suspend the contractor's right to be paid based on a payment claim that is served prior to termination, rather than whether there are contractual terms that provide for entitlement to post-termination progress payments.

Section 4(2)(c) of the SOPA does not exclude the application of the SOPA where no suspension of payment term is applicable on the facts

33 I begin my analysis with reference to the relevant provisions in the SOPA. In this regard, there is no legislative support for any requirement that the contract must expressly preserve a contractor's entitlement to progress payments in respect of payment claims that had been validly served prior to termination, in order for that claim to be amenable to adjudication under the SOPA. The entitlement to progress payments is provided in s 5 of the SOPA, which states that "[a]ny person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment". There is no reference here to the general defeasibility or suspension of the entitlement to progress payments upon the occurrence of any event.

34 So far as contractual termination is concerned, s 4(2)(*c*) of the SOPA provides only for a limited situation where the SOPA does not apply to a terminated contract. Section 4(2)(*c*) reads as follows:

> **Application of Act**
>
> **4.**— …
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> …
>
> (2) This Act does not apply to —
>
> (*c*) any terminated contract to the extent that —
>
> (i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and
>
> (ii) that date has not passed or that event has not occurred;

35 In my view, s 4(2)(*c*) of the SOPA only applies to exclude the application of the SOPA to a terminated contract if there are terms in that contract "relating to termination that permit the respondent to suspend progress payments" that have been engaged. This conclusion may be gleaned from the *Second Reading Speech*:

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

36 From the extract above, it is telling that the purpose of s 4(2)(*c*) is simply to require parties to "respect the contract clauses on suspension of payment for terminated contracts" by not allowing claimants to rely on the progress payment mechanism in the SOPA if the conditions for payment under the contract have not been met. By parity of reasoning, where there is no suspension of payment clause that is engaged, there is no indication of parliamentary intent to exclude the application of the SOPA to the terminated contract as there will be no contractual bargain that needs to be upheld. As such, in my view, the contractual terms relating to termination *must be engaged on the facts* before the SOPA is disapplied pursuant to s 4(2)(*c*) of the SOPA. This is clear from the plain reading of s 4(2)(*c*), which envisages the invocation or engagement of the clause that permits the suspension of progress payments until a specified date or event. Where the suspensory provision in the contract is not invoked or engaged on the facts, s 4(2)(*c*) does not operate to disentitle a contractor to progress payments.

37 On the facts, s 5 of the SOPA undeniably applies – there is no dispute that PC 40 relates to construction work under the Contract. There is also no question that BH was entitled to serve PC 40, when it was served, and that PC 40 was validly served. The question is whether BH "lost" its entitlement to be paid based on PC 40 upon the termination of the Contract or its employment. In this regard, under the REDAS Conditions that have been incorporated into the Contract, unless a contractor's employment is terminated under cl 30.2 due to a contractor's default and cl 30.3 applies to suspend progress payments until a specified date or event, s 4(2)(*c*) of the SOPA simply does not come into play. Any contention that cll 30.2 and 30.3 of the REDAS Conditions should be construed as satisfying the conditions in s 4(2)(*c*) of the SOPA, even when those clauses are not invoked on the facts, is misconceived.

The case authorities do not support the "default position"

38 Moreover, I am of the view that case authorities that were referred to by the learned Adjudicator and cited by JP do not support the proposition that a payment claim validly served prior to termination is not amenable to adjudication, if the adjudication application is not filed before the termination event, unless the contract expressly provides otherwise. Indeed, as I will elaborate, the case authorities support the *converse* proposition – that an entitlement to be paid based on a payment claim that is validly served before the termination event remains unaffected provided that there are no contractual provisions to the contrary.

39 The first decision to be considered is the Court of Appeal's judgment in *Yau Lee*. One of the main questions, in that case, was whether payment claims could be submitted after a final certificate had been issued by the designated architect under the contract. The Court of Appeal answered the question in the negative, explaining that once the designated architect has issued a final certificate that was *prima facie* valid, he is rendered *functus officio* and his role under the contract comes to an end, such that there is "simply no *basis* to submit further payment claims" [emphasis in original] (at [39]).

40 I should note from the outset that *Yau Lee* concerned a contract that incorporated, with amendments, the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract) (7th Ed, April 2005) ("SIA Conditions"), in contrast to the REDAS Conditions that are applicable in the present case. The certification regime under the SIA Conditions has been observed to be "categorically different" from that under the REDAS Conditions, in that, unlike an architect under the SIA Conditions, the

designated payment certifier under the REDAS Conditions is an agent of the employer and is thus neither independent nor objective. His certificates are thus "no more than steps in a payment procedure, and hardly carry the same weight as a certificate issued by an architect … [under the SIA Conditions]" (see *CEQ v CER* [2020] SGHC 70 ("*CEQ"*) at [25]–[28]). In this regard, I note that the appeal from the decision in *CEQ* was allowed by the Court of Appeal in *Orion-One*. The Court of Appeal, however, did not comment on the learned Judge's observations about the differences between the REDAS Conditions and the SIA Conditions, and disposed of the appeal based on a different point. Furthermore, in *Yau Lee*, the payment claim that was being challenged was served *after* the material event in question – which was the issuance of the final certificate – whereas in the present case, there is no dispute that PC 40 was issued *prior to* the Date of Termination. I therefore consider *Yau Lee* to be distinguishable from the present case.

41 I turn then to consider the two Court of Appeal decisions of *Shimizu* and *Orion-One* which were canvassed by the parties. I begin with *Shimizu*, where the material issue before the Court of Appeal was whether the terms of the contract entitled the contractor to serve payment claims on the employer following the termination of the contract pursuant to a term of that contract. The court held that on a proper construction of the contract, there was "no contractually provided right to serve a payment claim for work done prior to termination *if the [contract was] terminated for [the contractor's] default*" [emphasis added] (at [47]), and that s 10 of the SOPA did not apply to perform any "gap-filling" role to change this status since the contract was not silent as to the entitlement to submit post-termination payment claims in the first place (*Shimizu* at [48]). On the facts of that case, the employer had exercised its rights under a termination clause in the contract on the basis of the contractor's alleged

default. The Court of Appeal held that since there were provisions in the contract that precluded the service of payment claims following contractual termination, this meant that the payment claims served by the contractor following the termination of the contractor's employment were invalid *(*at [38]).

42 In *Orion-One*, the Court of Appeal considered the validity of a payment claim served more than two years following the termination of the contractor's employment. In its decision, the court stressed that "the starting point of the analysis must always be the terms of the contract" (*Orion-One* at [23]), and held that on proper construction, none of the clauses relied upon by the contractor served as a valid basis to entitle it to submit payment claims after the termination of its employment.

43 I accept that *Shimizu* and *Orion-One* are more pertinent to the present case, in the sense that the material event being considered was a contractual termination event and how that affected the contractor's entitlement to submit or serve payment claims. However, it must be borne in mind that unlike the present case, in both cases the relevant payment claims were served *after* the respective dates of termination in those cases. Therefore, while the Court of Appeal's guidance as to the general approach that should be taken in evaluating the basis for a payment claim is salient and helpful, the specific manner in which certain provisions have been construed and applied to the facts may not be directly applicable. Critically, like *Yau Lee*, neither of these cases support a finding that an entitlement arising from a validly served *pre-termination* payment claim will be "lost", negated or suspended upon the termination of the contract or the contractor's employment, if the contract does not *expressly* provide for the contractor to be paid post-termination.

44 On the contrary, the Court of Appeal clarified in *Shimizu* that the applicability of the SOPA to progress payments after termination "does not and was not intended to override the *terms of the contract which provide the contrary*" [emphasis added] (at [36]). Again, the Court of Appeal held in *Orion-One* at [48] that the "SOPA can *in principle* apply to progress payment claims served post-termination … subject always to ***any terms of the contract which provide to the contrary***" [emphasis in original in italics; emphasis added in bold italics]. These observations support the view that as far as a validly served pre-termination payment claim is concerned, the question is not whether there are provisions in the contract that *permit* the contractor to pursue its adjudication post-termination, but whether the contract *precludes* the contractor from doing so, which is the *converse* position of the "default position".

45 Indeed, there is some authority for the proposition that subsequent termination does not negate, suspend or otherwise affect a contractor's right to apply for adjudication under the SOPA on the basis of a payment claim that has been validly served *before* that termination.

46 In the High Court decision of *Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 ("*Choi Peng Kum*"), the contractor issued a payment claim seeking a progress payment under a contract that incorporated the SIA Conditions. In response, the employer terminated the contract and did not serve any payment response. When the contractor lodged an adjudication application under the SOPA, the adjudicator found in favour of the contractor and ordered that the employer make certain progress payments. The employer applied to set aside that adjudication determination on, among others, the ground that the adjudicator had no jurisdiction to consider the payment claim as the contract had been terminated. The High Court disagreed

and held that the contractor was not precluded from lodging the adjudication application and that the adjudicator was not deprived of jurisdiction to hear the payment claim simply because the contract had been subsequently terminated after issuance of the payment claim.

47 The High Court arrived at this conclusion despite the fact, acknowledged at [9], [10] and [18] of the decision, that the respondent to the payment claim (the employer in that case) did not provide a payment response, and had terminated the contract before the adjudication application was lodged. In this regard, I highlight [35] of the judgment:

> The question therefore was whether cl 32(8)(a) precluded the [contractor] from engaging the adjudication process under SOPA and precluded the Adjudicator from making an AD under SOPA …

48 It should be noted that the learned Judge framed the issue as whether a term of the contract *precluded* the SOPA adjudication process, rather than whether a term of the contract *permitted* the adjudication process. Therefore, so far as a payment claim that had been validly served prior to termination is concerned, the inquiry focuses on whether the relevant contract *extinguishes* the right to adjudicate that payment claim. In the absence of such a provision, the law does not consider the entitlement under the payment claim extinguished, "lost" (in the learned Adjudicator's words), or otherwise affected simply by the fact of a subsequent termination.

49 At this juncture, it is apposite to note that *Choi Peng Kum* pre-dated the 2018 amendments to the SOPA, where s 4(2)(*c*) was inserted to clarify that the SOPA does not apply to certain terminated contracts.[82] However, its

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82 Slides at 28.

consideration of the effect of a subsequent contractual termination on a contractor's right to apply for adjudication based on a payment claim that had been validly served was referred to with approval by the Court of Appeal in *Shimizu*, which post-dated the 2018 amendments. In *Shimizu,* the Court of Appeal placed significance on the fact that the payment claim in *Choi Peng Kum* had been served *prior to termination*, and observed at [25] that *Choi Peng Kum* "was decided on the basis that the [contractor] had validly served the payment claim in question in accordance with the terms of the contract *before* the termination" [emphasis in original]. Thereafter at [34], the Court of Appeal held that *Choi Peng Kum* is "entirely consistent with our interpretation of the SOPA" and went on to explain:

> … In *Choi Peng Kum*, *the payment claim in question had been validly served prior to the termination of the contract*. It was on this basis that the adjudication application was found to have been validly made pursuant to s 12(2)(*b*) of the SOPA, notwithstanding the fact that no payment response was provided to the defendant by the quantity surveyor.
>
> [emphasis added]

50 While it is true that the courts have repeatedly stressed that primacy must be accorded to the terms of the contract in determining the parties' rights even within the context of the SOPA, it does not follow that where an adjudication application relating to a validly served payment claim is filed after a contractual termination event, the payment claim is amenable to adjudication only if the contract expressly provides for it.

51 Indeed, I consider it a point of principle that, ordinarily, the termination of a contract does not affect rights which have accrued before that termination (see the High Court decision of *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 at [15]). In the context of construction

contracts, the High Court in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364 also quoted with approval the following passage by Philip Jeyaretnam SC (as he then was) who was the adjudicator in that case (at [17]):

> … Nonetheless, I am of the view that the Act does apply even after a contract is terminated. First, the intention to protect cash flow would not be achieved if the interpretation put forward by the Respondent is adopted. If cash flow is blocked on one project, that will affect a contractor or service provider's financial resources for other projects. Secondly, *although one always speaks of termination of a contract when it is really the right and obligation to do work and be paid for it which is terminated for the future, the contract continues to govern the relationship between the parties in relation to the work already done.*
>
> [emphasis added]

52 In the present case, there is no dispute that PC 40 relates to construction work under the Contract. There is also no dispute that BH was entitled to serve PC 40 under cl 22 of the REDAS Conditions, when it was served, and that PC 40 was validly served. The application of the foregoing principle means that the rights of BH which accrued from the valid service of PC 40 prior to the termination event will give rise to an entitlement to a progress payment that remains amenable to adjudication, unless the contract provides otherwise. In other words, if there are no express provisions that negate or suspend the entitlement that has accrued before termination, the entitlement continues to exist. Thus, the court's inquiry should turn to whether the contract has provided for the negation or suspension of that subsisting right in the event of termination. This, in my view, better accords with principle and coheres with the court's desire to give effect to the contractual bargain of the parties.

Application to the facts

53 Given the foregoing analysis, it is necessary to turn to examine whether the Contract provides for the negation or suspension of BH's entitlement to the progress payment under PC 40 upon the occurrence of a termination event under the Contract. As I will elaborate, this issue is in turn dependent on the basis upon which the Contract was terminated.

54 At the outset, I set out the Court of Appeal's guidance in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 ("*Alliance Concrete*") at [31]–[32]:

> 31 … [The] actual termination of a contract is always *legally* "dangerous". This is due, in part, to the fact that if a party terminates the contract *without legal justification*, it will *itself* be in *breach* of contract …
>
> 32 Whether or not the innocent party is legally justified in terminating the contract depends on whether one of the situations set out in [*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* ("*RDC Concrete*") [2007] 4 SLR(R) 413] has been satisfied. These situations were, in fact, summarised by this court in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"), as follows (at [153]–[158]):
>
> > 153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party … to elect to treat the contract as discharged as a result of the other party's … breach.
> >
> > 154 The *first* ('Situation 1') is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).
> >
> > 155 The *second* ('Situation 2') is where the party in breach of contract ('the guilty party'), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).

> 156 The *third* ('Situation 3(a)') is where the term breached … is a *condition* of the contract. Under what has been termed the 'condition-warranty approach', the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.
>
> 157 The *fourth* ('Situation 3(b)') is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the '*Hongkong Fir* approach' after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.
>
> 158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):
>
> > If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach). [emphasis in original]
>
> [emphasis in original]

55 In the present case, as I have summarised above (see [19] and [24]), BH submits that it had terminated the Contract in the morning of 26 August 2022 at common law, whereas JP appears to prefer the position that it terminated BH's employment under the Contract under cl 30.2.2 of the REDAS Conditions by

issuing the notice of termination later on that same day.[83] In any event, JP's primary submission before me is that the basis of the termination is "a distinction without a difference".[84] This submission reflects substantively the same position as that adopted by the learned Adjudicator in his determination (see [12] above). With respect, I disagree and consider the basis of the termination to be material.

56 I begin the analysis by reproducing the salient portions of cl 30 of the REDAS Conditions, which is titled "Termination by Employer":

> 30. TERMINATION BY EMPLOYER
>
> …
>
> 30.2. Termination For Default
>
> 30.2.1. In the event that the Contractor
>
> 30.2.1.1. has wholly suspended the carrying out of the design or construction of the Works without justification, or
>
> 30.2.1.2. has failed to proceed with due diligence and expedition in the Works,
>
> the Employer's Representative may give Written notice to the Contractor requiring him to recommence the design or the construction of the Works or to proceed with due diligence and expedition in the Works.
>
> 30.2.2. If the Contractor commits any of the following:
>
> 30.2.2.1. fails to comply with the Employer's Representative's Written Notice under clause 30.2 within 28 days from the date of receipt of the same, or

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83 CWS at paras 69–70.

84 DWS at para 35.

> 30.2.2.2. abandons the Works, or
>
> …
>
> then, the Employer, may without prejudice to any other rights and remedies under the Contract (including the right to treat the Contract as repudiated under general law), give a Notice of Termination of the employment of the Contractor. Upon receipt of such Notice, the Contractor's employment shall immediately terminate.
>
> …
>
> 30.3. Effects of Termination for Default
>
> In the event of the termination of the employment of the Contractor under clause 30.2,
>
> 30.3.1. the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained.

57 As is evident from the chapeau of cl 30.3, cl 30.3 of the REDAS Conditions would *only* apply to suspend further payments if BH's employment was terminated by JP due to the occurrence of any of the events of default listed under cl 30.2. If cl 30.2 was not engaged, then cl 30.3 would similarly not be engaged, in which case there appears to be no other provision in the Contract that would disentitle BH to the adjudication of, or the receipt of payment under, PC 40.

58 Therefore, in order to decide whether cl 30.2 was engaged, it was necessary, as an antecedent inquiry, to decide whether BH had validly

terminated the Contract pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches before JP issued the notice of termination under cl 30.2.2 later on the same day.

59 If it is found that BH's termination of the Contract was legally justified and its allegations concerning JP's alleged repudiatory breaches of the Contract fell within one or more of the situations set out in *RDC Concrete*, then there was no basis for JP's purported invocation of cl 30.2.2 of the REDAS Conditions to terminate BH's employment under the Contract subsequently, given that the Contract had already been terminated by the time of issuance of the notice of termination. In such a case, cl 30.3 of the REDAS Conditions, which suspends a contractor's entitlement to a progress payment upon the termination of the employment of the contractor under the Contract, would simply not be engaged and the entitlement to progress payments pursuant to PC 40 would have continued to subsist.

60 For completeness, I refer to my observation earlier at [36] that the contractual terms relating to termination *must be engaged on the facts* before the SOPA is disapplied pursuant to s 4(2)(*c*) of the SOPA. Accordingly, if cl 30.3 of the REDAS Conditions was not invoked and operative on the facts of this case, then s 4(2)(*c*) does not come into play to affect BH's entitlement to post-termination progress payments.

61 On the other hand, if it is found on the facts that BH's purported termination of the Contract for JP's alleged repudiatory breaches was unjustified, then, as noted at [31] of *Alliance Concrete*, it is likely that BH would itself be in breach of the Contract. In such a situation, if JP had validly terminated BH's *employment* under the Contract under cl 30.2.2 of the REDAS

Conditions, then cl 30.3.1 of the REDAS Conditions would operate to disentitle BH from making an adjudication application, which would therefore place SOP/AA 164 of 2022 outside the purview of the SOPA. Under cl 30.3.1 of the REDAS Conditions, if the employment of the contractor was terminated under cl 30.2, the employer shall not be liable to make any further payments to the contractor until the Termination Costs have been ascertained. The effect of cl 30.3.1 was explained by the Court of Appeal in *Orion-One* at [44]:

> … cl 30.3.1 goes one step further to *preclude* the contractor from claiming any payments (including progress payments) until the project is completed and the relevant costs ascertained and deducted. In other words, **by virtue of cl 30.3.1, the progress payment regime set out in cl 22 no longer applies once the contractor's employment is terminated for breach**. …
>
> [emphasis added]

62 There are two points to be made here. First, whether BH had exercised its general contractual right to terminate the Contract for JP's alleged repudiatory breaches *before* JP purported to terminate BH's employment under cl 30.2.2 of the REDAS Conditions is a necessary antecedent issue that has to be addressed before any conclusion may be made about whether the learned Adjudicator has jurisdiction to adjudicate SOP/AA 164 of 2022 on its merits. I caveat that as this is an issue that goes into the merits of the dispute that the learned Adjudicator has yet to consider, I express no view on its substantive merits.

63 Second, the Court of Appeal's analysis at [44] in *Orion-One* on the effect of cl 30.3.1 of the REDAS Conditions is instructive. The Court of Appeal noted that "the progress payment regime set out in cl 22 no longer applies" by virtue of the operation of another term (cl 30.3.1), which, by implication, means

that an express provision is required to negate the operation of cl 22. This supports the view I expressed earlier (at [48] and [52]) that if there are no provisions that negate or suspend a subsisting right to payment in the event of termination, the entitlement continues to exist. There is no need for an express provision to preserve a subsisting entitlement in that case.

64 For the foregoing reasons, before a finding is made as to whether cl 30.2.2 was in fact invoked on the facts, there is no basis for JP's contention that, by virtue of cl 30.3 of the REDAS Conditions, JP was not liable to pay BH until the Termination Costs have been ascertained,[85] or that once the Contract was terminated, BH lost its entitlement to progress payments and adjudication, notwithstanding that PC 40 was served before termination.[86] Before the finding is made, I am also unable to agree with JP's contention that BH was not entitled to seek adjudication since s 4(2)(*c*) of the SOPA provides that the SOPA does not apply to any terminated contract as long as the terminated contract contains provisions permitting the respondent to suspend progress payments,[87] and that JP was permitted to suspend progress payments under cl 30.3 of the REDAS Conditions until the Termination Costs have been ascertained.[88]

Relevance of the status of the designated payment certifier

65 In my view, whether the Employer's Representative, as the designated payment certifier, was *functus officio* or not in the present case is immaterial to BH's right to file the adjudication application in SOP/AA 164 of 2022. This is

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85 DWS at para 30.

86 DWS at paras 33–34.

87 DWS at para 51.

88 DWS at paras 50, 52 and 53.

because, on an analysis of the scheme of the REDAS Conditions, read with the SOPA, all the necessary conditions for BH's entitlement under s 12(2) of the SOPA to make an adjudication application had arisen when SOP/AA 164 of 2022 was lodged. On the facts, BH's right to make its adjudication application was unaffected by the availability or otherwise of the designated payment certifier. I explain the reasons for my conclusion.

66 Section 12(2) of the SOPA specifies that any adjudication application made under s 13 would be "in relation to the relevant payment claim". The relevant payment claim in this case is PC 40, and its validity is therefore an essential foundation for the validity of the adjudication application in SOP/AA 164 of 2022. In the present case, the validity of PC 40 was an issue canvassed before the learned Adjudicator, who found that PC 40 was validly served.[89] In any event, JP did not make any submissions before me that PC 40 was not validly served.

67 Clause 22.2.1 of the REDAS Conditions provides that after a payment claim is served by the contractor, the Employer's Representative shall, within 14 days of the receipt of the payment claim and supporting documents, issue an Interim Payment Certificate to the employer with a copy to the contractor setting out the amount which the Employer's Representative considers to be due to the contractor. Under cl 22.4, the Interim Payment Certificate shall be deemed to be the payment response from the employer to the contractor under the SOPA in the event the employer fails to provide a payment response to the contractor within 21 days after the payment claim is served on the employer by the contractor. However, where the employer provides a payment response within

[89] AD at paras 38–46.

21 days, the employer's payment response shall take precedence over the Interim Payment Certificate. Section 11(1) of the SOPA similarly provides that a respondent named in a payment claim served in relation to a construction contract must respond to the payment claim by providing, or causing to be provided, a payment response to the claimant by the timelines stated in that provision.

68 The crux of this framework is that the Interim Payment Certificate issued by the Employer's Representative is subordinate to the payment response if one is issued by the employer. Where the employer issues a payment response within 21 days after the relevant payment claim is served, the employer's payment response takes precedence and "shall constitute the Payment Response to the Contractor" (see cl 22.4 of the REDAS Conditions).

69 I note that in the present case, there is in evidence a document titled "Interim Payment Certificate No. 40" dated 15 September 2022 that was issued by Infield, the designated payment certifier, who is the Employer's Representative nominated by JP.[90] However, the status of the Employer's Representative when it issued this certificate is immaterial because JP served PR 40 on BH on 15 September 2022 (see [8] above). In fact, at paragraph 5 of JP's letter dated 15 September 2022, which formed part of JP's PR 40, JP stated that "[o]ur Payment Response 40 [would] take precedence over the Interim Valuation No. 40 as certified by Infield Projects, and our Payment Response 40 [would] be the operative payment response under the SOP Act and clause 22.4 of the REDAS Conditions".[91] JP did not argue that PR 40 is invalid or should

90 LL at pp 615–681.

91 LL at p 613.

be disregarded for any reason. On the basis of cl 22.4 of the REDAS Conditions, the service of the payment response itself supersedes the need for an Interim Payment Certificate to be issued. This means that BH is entitled to rely on PR 40 in making its adjudication application under s 13(1) of the SOPA, regardless of whether a valid Interim Payment Certificate had been issued.

70 I next examine the *functus officio* point with particular attention paid to the terms of the SOPA and the contractual clauses in the present contract, and the application of these provisions to the specific facts of this case.

71 I set out portions of s 12 of the SOPA, which contains provisions on the entitlement to make adjudication applications. Sections 12(2) and 12(3) are of particular relevance:

> **Entitlement to make adjudication applications**
>
> 12.—
>
> …
>
> (2) Where, in relation to a construction contract —
>
> (*a*) the claimant disputes a payment response provided by the respondent; or
>
> (*b*) the respondent fails to provide a payment response to the claimant by the date or within the period mentioned in section 11(1),
>
> the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.
>
> (3) For the purpose of subsection (2)(*a*), a claimant is considered to dispute a payment response if the claimant does not in writing accept the payment response.

72 Leaving aside the issue of whether there were contractual terms that kick in after termination to negate or suspend BH's right to the progress payments, the conditions for BH's entitlement under s 12(2) of the SOPA to make an adjudication application appears to be satisfied regardless of the status of the designated payment certifier. This is because (a) BH had served PC 40 on JP on 18 August 2022 (see [5] above), (b) PC 40 was served prior to the Date of Termination (see [7] above), and (c) JP served PR 40 on BH on 15 September 2022 (see [8] above). Under s 12(2) of the SOPA, BH was entitled to make an adjudication application under s 13 of the SOPA in relation to PC 40 by the end of the dispute settlement period if BH disputed the payment response provided by JP. As BH did not accept PR 40 in writing, it was considered to have disputed PR 40 under s 12(3). BH availed itself of its entitlement by way of its adjudication application in SOP/AA 164 of 2022 under s 13(1) of the SOPA on 22 September 2022 (see [9] above). I note that it is not JP's case that SOP/AA 164 of 2022 is defective for failure to comply with any of the requirements imposed by s 13 of the SOPA. In summary, I find on the facts that whether the Employer's Representative was *functus officio* or not does not affect the adjudicator's jurisdiction to determine SOP/AA 164 of 2022.

The rules of natural justice

73 In my view, the learned Adjudicator did not breach the rules of natural justice in arriving at his decision.

74 The law on the breach of the fair hearing rule, which is one of the rules of natural justice, was considered by the Court of Appeal in *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers Engineering*") at [54]–[55]. In essence, a decision-maker may

be in breach of the fair hearing rule if he decides a dispute on a point on which the parties have not had a fair opportunity to address. A surprising or unforeseen outcome from the decision-maker may indicate that there has been a breach of the fair hearing rule, but this is not conclusive. The true question is whether the parties have been deprived of a fair opportunity to be heard, and fairness in this context is to be understood not in terms of equal treatment between the parties, but in terms of *reasonableness*.

75 In this regard, a fair and reasonable opportunity of being heard may or may not require a decision-maker to take the overt step of inviting submissions from the parties on a given issue. The Court of Appeal in *Glaziers Engineering* proceeded at [60]–[65] to elaborate on a situation where the outcome of a dispute may be surprising to one or more of the parties, but which does not breach the fair hearing rule. This is a situation "where the decision-maker has decided the dispute on a premise which, though not directly raised by the parties, is reasonably connected to an argument which the parties have raised" (*Glaziers Engineering* at [61], citing *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [63]).

76 As summarised in *Glaziers Engineering* at [61]–[62], in *TMM*, the main issue in dispute between a ship purchaser and a ship seller was whether the ship purchaser was entitled to terminate the contract on the basis of an alleged repudiatory breach on the ship seller's part. At the heart of this question was whether the term which the ship seller had breached ("cl 11") was a condition of the contract. The ship purchaser alleged that cl 11 was a *condition*, whereas the ship seller alleged that it was an *innominate term*. The parties referred the dispute to arbitration, where the arbitrator found that cl 11 was not a condition, but a collateral warranty. The ship purchaser applied to the High Court to have

the arbitrator's decision set aside. On the facts, Chan Seng Onn J (as he then was) found that it was in fact the seller's case before the arbitrator that cl 11 was a *collateral warranty* and therefore dismissed the application to have the decision set aside. He nevertheless went further to opine in *obiter* that the arbitrator could not be said to have deprived the purchaser of its right to be heard by deciding that the term was a *collateral warranty*. This was because the finding that cl 11 was a collateral warranty was not only reasonably connected to the arguments raised by the parties, but also a reasonable follow-through from the arbitrator's finding that cl 11 was not a condition.

77 In the present case, BH takes issue with two particular findings of the learned Adjudicator: (a) that there was no express contractual provision entitling BH to be paid after termination; and (b) that PC 40 fell outside the purview of the SOPA at the time of the adjudication application.[92]

78 In relation to finding (a), I take the view that the learned Adjudicator had "decided the dispute on a premise which, though not directly raised by the parties, is reasonably connected to an argument which the parties have raised" (*Glaziers Engineering* at [61]). In JP's reply submissions filed in SOP/AA 164 of 2022 dated 11 October 2022, JP had argued that BH was "not entitled to seek adjudication under the SOP Act because there is no contractual entitlement to payment after termination either under the common law or under the contract".[93] In those written submissions, JP proceeded to elaborate on how, on JP's reading of the authorities, the Court of Appeal had decided that a claimant "must be contractually entitled to payment, before it is entitled to adjudication under the

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92 CWS at para 54.

93 JP's Reply Submissions dated 11 October 2022 ("JP's AA Reply Submissions") at para 7 (LL at p 738).

SOP Act".[94] JP then argued that a claimant's contractual entitlement to payment is assessed by whether the payment mechanism under the Contract is operational.[95] In my view, the Adjudicator's determination that there was no express contractual provision entitling BH to be paid after termination is a point that is "reasonably connected" to JP's argument that BH had no contractual entitlement to payment after termination either at common law or under the Contract. In particular, I note that a submission that there is no general contractual entitlement to post-termination payment logically implies that there is no *express* contractual provision giving rise to such an entitlement.

79 Turning to finding (b), I am unable to agree with BH that the learned Adjudicator breached the fair hearing rule by making a finding that PC 40 fell outside the purview of the SOPA at the time of the adjudication application. It is helpful here to reproduce a relevant section of the learned Adjudicator's determination:[96]

> … Where it is not entitled to receive any such progress payment under the terms of the material contract at the time of lodgement of the adjudication application then surely there is nothing to adjudicate under the SOP Act, and any purported payment claim relied upon for purposes of adjudication under the SOP Act *must be deemed to fall outside the purview of the SOP Act*. As such, the claimant would not be entitled to proceed with adjudication under the SOP Act based on any such aforementioned payment claim. This is the case presently.
>
> [emphasis added]

80 It will be seen that the learned Adjudicator's determination that PC 40 fell outside the purview of the SOPA at the time of the adjudication application

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94 JP's AA Reply Submissions at para 8 (LL at p 738).

95 JP's AA Reply Submissions at para 10 (LL at p 739).

96 AD at para 85.

was predicated on his finding that BH was not entitled to receive any relevant progress payment under the terms of the Contract at the time of the lodgement of the adjudication application. This brings us back to the issue canvassed earlier – *ie*, that JP had argued that BH was "not entitled to seek adjudication under the SOP Act because there is no contractual entitlement to payment after termination either under the common law or under the contract".[97] More broadly, I note that both BH and JP made submissions on the applicability and legal effect of s 4(2)(*c*) of the SOPA before the learned Adjudicator,[98] and this provision sets out situations where the SOPA does not apply to terminated contracts. In my view, a dispute concerning the applicability and legal effect of s 4(2)(*c*) of the SOPA may logically and reasonably give rise to a finding that PC 40 fell outside the purview of the SOPA at the time of the adjudication application.

81 For the foregoing reasons, the learned Adjudicator cannot be said to have reached the two impugned findings without giving the parties a fair and reasonable chance to be heard on those issues.

Other issues

82 For completeness, I deal with BH's arguments on the doctrines of waiver and estoppel, and the rule in s 15(3) of the SOPA which precludes a respondent from including in its adjudication response an objection unless the objection was included in the relevant payment response provided by the respondent to the claimant.

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97 JP's AA Reply Submissions at para 7 (LL at p 738).

98 JP's AA Reply Submissions at pp 11–21 (LL at pp 745–755); Claimant's Further Written Submissions (Preliminary Issues) dated 6 October 2022 ("BH's AA Further Written Submissions") paras 23–41 (LL at pp 725–729).

83 In this regard, the law on waiver and estoppel (in relation to the SOPA regime) and s 15(3) of the SOPA was examined in detail by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"), where it held that "if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response" (at [66]). However, the Court of Appeal later clarified in *Yau Lee* that the holding in *Audi Construction* "in relation to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell *outside the purview of the SOPA from the outset*" [emphasis in original] (at [56]). For this reason, the court found that the doctrines of waiver and estoppel could not bar the raising of a jurisdictional objection where the objection was that the payment claim fell outside the ambit of the SOPA (*Yau Lee* at [65]).

84 Taking guidance from the legal principle expressed in *Yau Lee*, BH could not rely on the doctrines of waiver and estoppel, or s 15(3) of the SOPA, to prevent JP from raising or relying on s 4(2)(*c*) of the SOPA. Indeed, when s 4(2)(*c*) is engaged, it has the effect of placing any payment claims outside the purview of the SOPA. Section 4(2)(*c*) of the SOPA was inserted by way of amendments to the SOPA in 2018 to add to the list of contracts enumerated in s 4 to which the SOPA does not apply. Section 4(2)(*c*) applies to certain types of terminated contracts and has the same effect as the other provisions in s 4(2) of the SOPA in placing any payment claims made under such contracts outside the purview of the SOPA. Understood in the context of the present case, s 4(2)(*c*) would be engaged if cl 30.3 of the REDAS Conditions is engaged on the facts. As such, the question of whether cl 30.3 is applicable is, in substance, a question of whether the payment claims fell outside the purview of the SOPA. In other words, it is a jurisdictional objection to which the doctrines of waiver

and estoppel cannot operate. Support for this conclusion is best expressed in the Court of Appeal's statement in *Yau Lee*: that "the duty to speak does not extend to payment claims which are *outside* the ambit of the SOPA" [emphasis in original] (at [70]); instead, the duty to speak applies to jurisdictional objections "in respect of payment claims that were otherwise within the purview of the SOPA" (at [56]). The doctrines such as estoppel and waiver therefore cannot apply to extend the learned Adjudicator's jurisdiction to claims which the SOPA was never intended to regulate.

85 Lastly, as for the issue of whether JP's failure to raise the *functus officio* argument in its payment response precluded it from raising it as an objection at the adjudication stage, it is now moot given my findings that the *functus officio* argument has, in any event, no bearing on the learned Adjudicator's jurisdiction to determine SOP/AA 164 of 2022.

Conclusion

86 For the above reasons, I exercise my powers under ss 27(8)(*a*) and 27(8)(*b*) of the SOPA to set aside the Adjudication Determination and to remit it to the learned Adjudicator for his determination on whether cl 30.3 of the REDAS Conditions, which suspends further payments to BH, has any application in this case. If cl 30.3 applies, PC 40 would fall outside the ambit of the SOPA and SOP/AA 164 of 2022 should be dismissed on the basis that the learned Adjudicator has no jurisdiction. If, however, cl 30.3 is not engaged because the Contract had already been terminated by BH pursuant to its general contractual right to terminate the Contract for JP's alleged repudiatory breaches, *before* JP futilely purported to terminate BH's employment under cl 30.2.2 of the Contract, then PC 40 should be assessed on the merits.

87 To conclude, I express my gratitude to the learned counsel for both parties for their comprehensive written and oral submissions, from which I derived substantial assistance in the rendering of this judgment.

88 I will hear the parties on costs.

Teh Hwee Hwee
Judicial Commissioner

Lee Peng Khoon Edwin and Amanda Koh Jia Yi (Eldan Law LLP) for the claimant;
Chuah Chee Kian Christopher, Tan Jia Wei Justin and Huang Zixian (WongPartnership LLP) for the defendant.