

Singapore Contractors Association Limited Seminar
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HOW SECURED IS THE SOP ACT IN ASSISTING CONTRACTORS TO GET PAYMENT?

presented by

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- **Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Revised Edition) (SOP Act)**
- **Came into operation on 1 April 2005**
- **Supplemented by the Building and Construction Industry Security of Payment Regulations (2006 Revised Edition)**

Objectives of the SOP Act

- To facilitate cash flow
- To resolve payment disputes in the construction industry

Minister of State for National Development, Mr. Cedric Foo, during the Second Reading of the SOP Bill on 16 November 2004

The Act “will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes....”

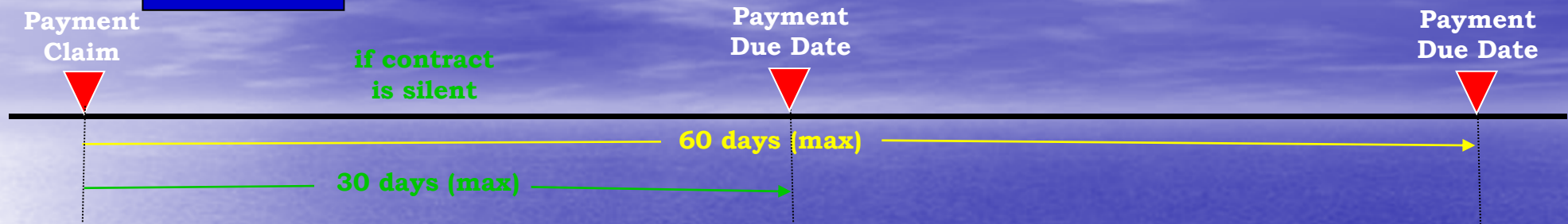
“By upholding the rights of any party in the industry to seek payment for work done or goods supplied, [the Act] will help to deter and weed out the practice of delaying or withholding payment without valid reasons. The speedy and low cost adjudication process will expedite the resolution of genuine payment disputes so that cash flow will not be disrupted. It will identify contractors who are facing financial difficulties early, before they cause more problems downstream.”

So, how does the SOP Act achieve its objectives?

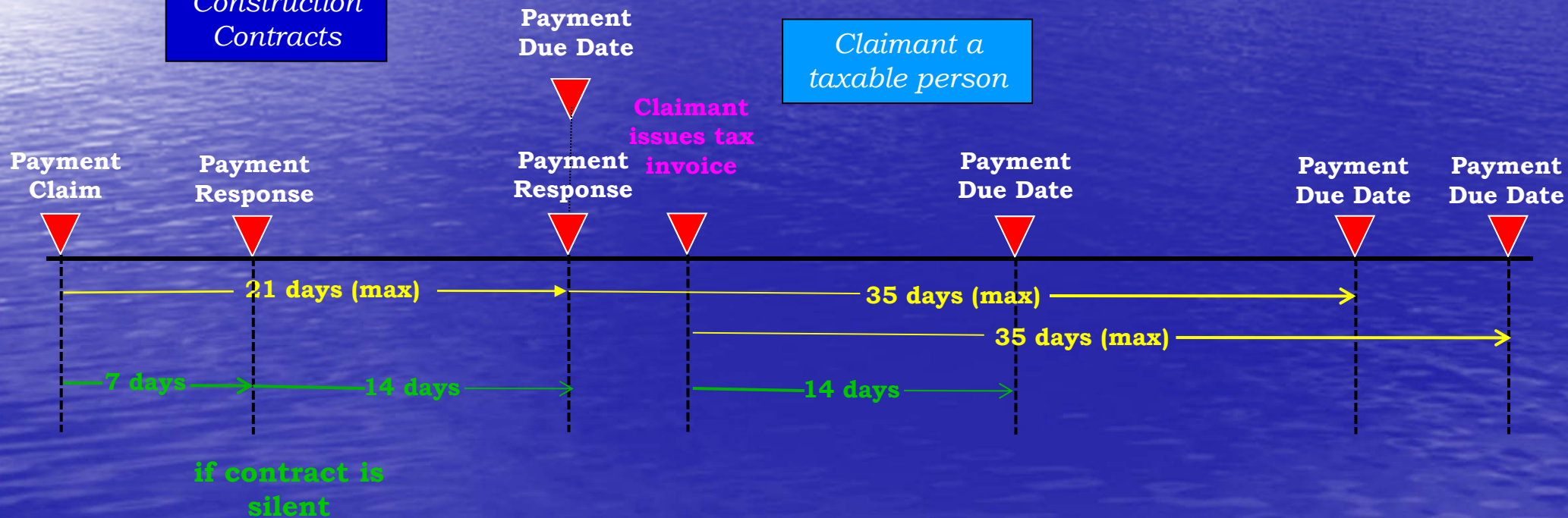
Key features of the SOP Act

- Restricts the period for the submission of response to a payment claim and for the making of payment under the contract

Supply Contracts



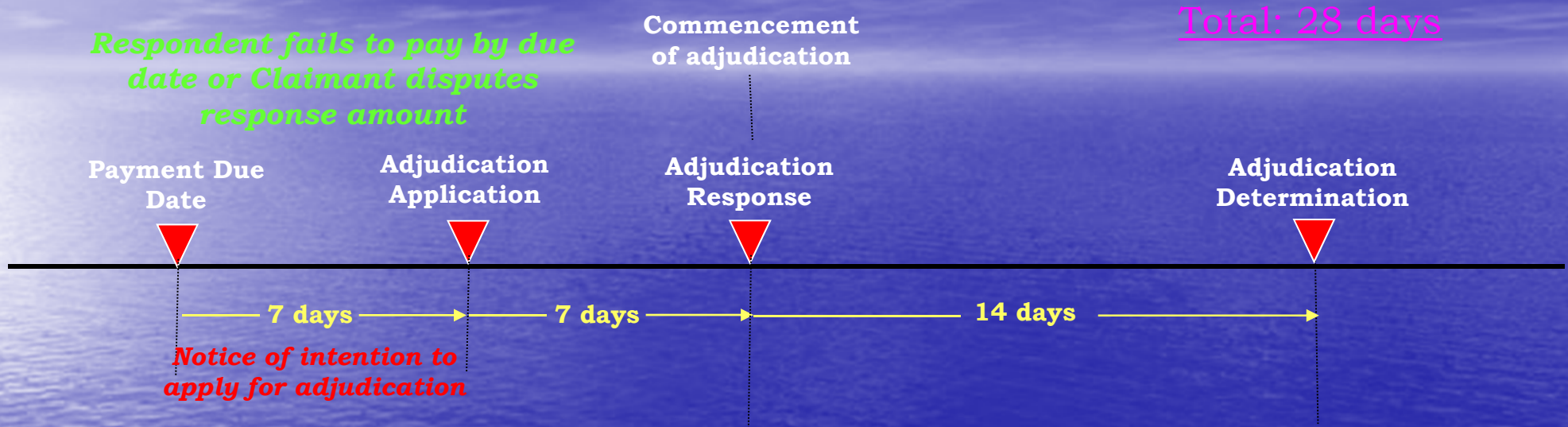
Construction Contracts



Key features of the SOP Act

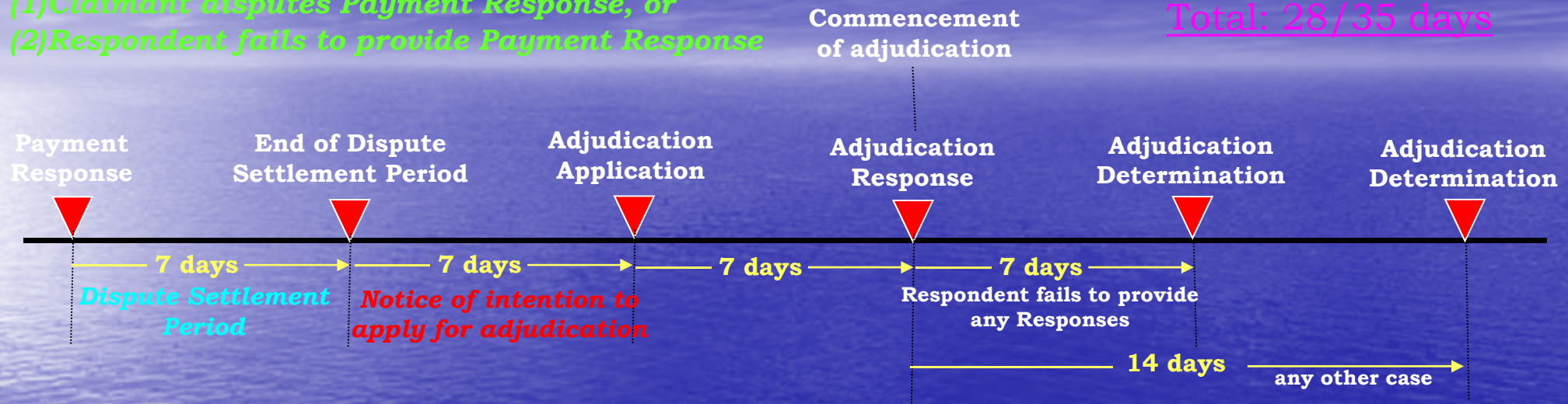
- Provides for interim settlement of payment disputes through the adjudication process
- Process is simpler, faster and less expensive than arbitration or litigation

Supply contracts

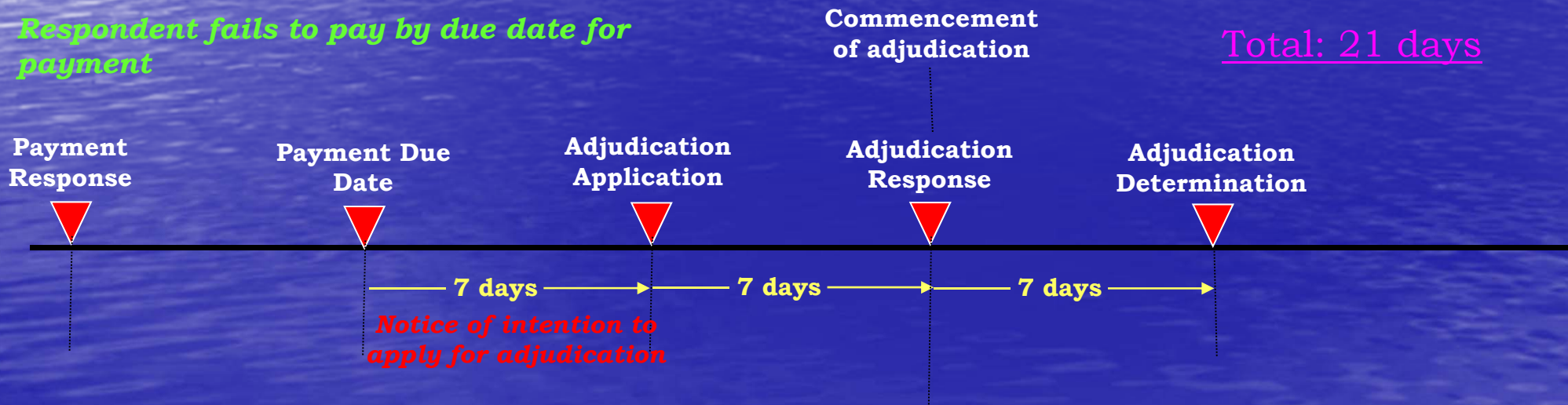


Construction contracts

(1) Claimant disputes Payment Response, or
(2) Respondent fails to provide Payment Response



Respondent fails to pay by due date for payment



Key features of the SOP Act

- Parties may apply for adjudication even if dispute is the subject of a court proceeding or any other dispute resolution procedure
- Application to court or other dispute resolution procedure does not affect or bring an end to the adjudication

Key features of the SOP Act

- Act does not limit one's contractual right to other dispute resolution - parties can still pursue their contractual rights in court or arbitration
- Adjudication determination is enforceable just like any judgment or arbitral award

Key features of the SOP Act

- Adjudication determination is binding on the parties, unless:
 - dispute is determined by a court or tribunal or is settled, or
 - enforcement has been refused by the Court

So, does the SOP Act achieve
its objectives?

Limitation in scope of application

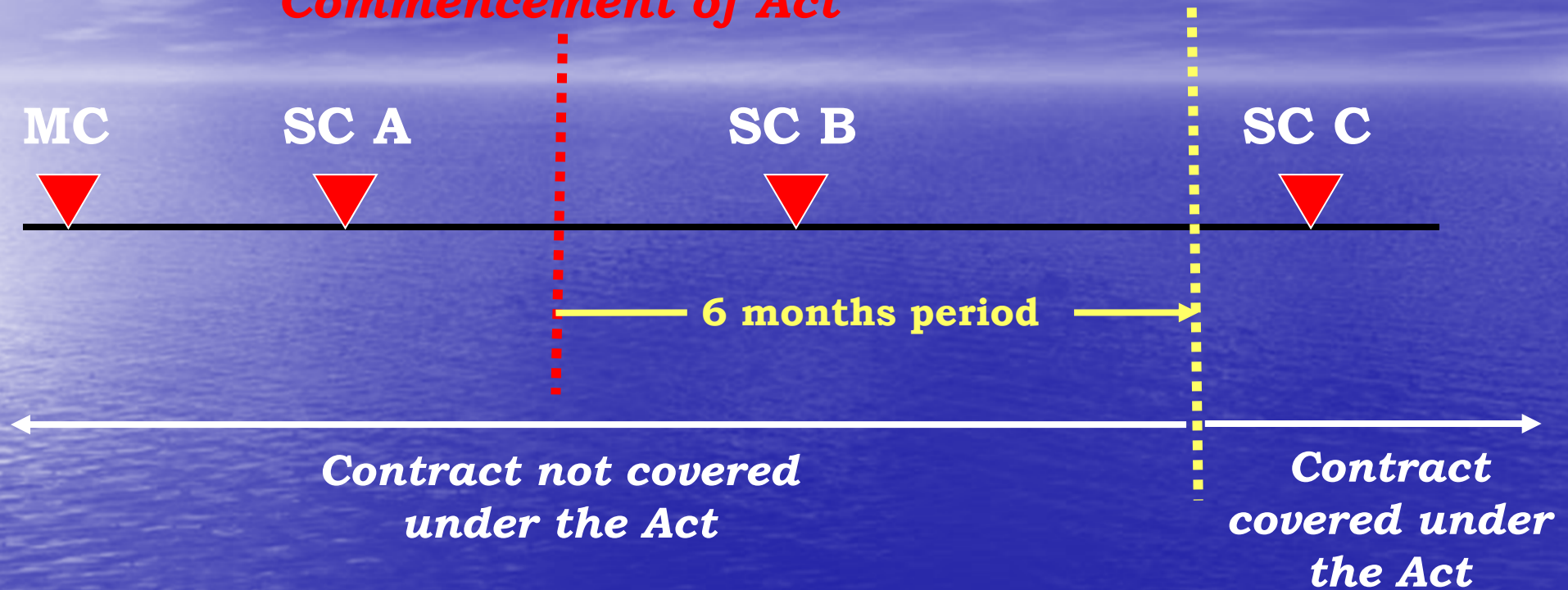
- Applicable to written contracts only [s 4]
- Applicable only to contracts made on or after 1 April 2005 [s 4]
- For supply contracts to be within the Act, they must specify or identify the construction site or project in relation to which the goods are to be supplied [reg 3]

Limitation in scope of application

Does not apply to :

- Residential properties that do not require BP approval [s 4(2)(a)]
- Overseas construction works [s 4(2)(b)]
- Employment contracts [s 4(2)(b)]
- Sub-contracts made within 6 months from 1 April 2005 and the main contract is made before 1 April 2005 [reg 4]

1 April 2005
Commencement of Act



Adjudication Review

- s 18 & 19, SOP Act
- Application for review must be made within 7 days after being served the adjudication determination
- Only the respondent can apply for review

Adjudication Review

- Respondent must first pay the adjudicated amount to the claimant
- The adjudicated amount must exceed the relevant response amount by \$100,000 or more
- Entire review process takes 28 days

Setting Aside Determination

- No specific provision for the setting aside of adjudication determination – right to do so obliquely provided in s 27

Enforcement of adjudication determination as judgment debt, etc.

27. —(1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.

(2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.

(3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.

(4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the judgment shall be for the unpaid part of the adjudicated amount.

(5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

Setting Aside Determination

- Respondent is required to pay the adjudicated amount into court as security
- However, the Act does not set out the circumstances under which an adjudication determination can be set aside – therefore one will have to look at the caselaws for guidance

Case 1 - *Tiong Seng Contractors (Pte) v Chuan Lim Construction Pte Ltd* [2007] SGHC 142 (31 Aug 2007)

- Plaintiff (TS) – main contractor for a construction project at Sentosa
- Defendant (CL) – earthworks sub-contractor
- Claimed amount - \$270,602.09
- Adjudicated amount - \$169,949.94

Background

- Defendant sought payment of S\$481,155.77 under its Final Claim dated 25 January 2007.
- In response to this claim, plaintiff made a preliminary payment of S\$210,553.68, based on a preliminary evaluation of the work done at that time, leaving S\$270,602.09 unpaid.
- Defendant responded by raising Progress Claim No. 10 for the unpaid balance of S\$270,602.09.

Background

- When further payment was not forthcoming from plaintiff, defendant sought an adjudication under the Act based on Progress Claim No. 10.
- At the Adjudication Conference, plaintiff argued, *inter alia*, that Progress Claim No. 10 had been issued after the Final Claim, and could not be relied upon to found a claim under the Act.

Background

- Adjudicator rejected plaintiff's argument.
- Plaintiff applied to court to have the determination set aside.

Issue before the court

- Does a final progress claim come under the purview of the SOP Act for purposes of adjudication?

Held (Lai Siu Chiu J.) :

- The ambit of adjudication under the Act should extend to both “final” and “non-final” payments.
- Accordingly, adjudicator’s decision was upheld.
- However, the court did not lay down any principles governing the setting aside of an adjudication determination.

Case 2 – Chip Hup Hup Kee Construction Pte Ltd v
Ssangyong Engineering & Construction Pte Ltd [2008]
SGHC 159 (24 Sep 2009)

- Respondent (Ssangyong) – main contractor for construction works in relation to the hotel portion of Marina Bay Sands Integrated Resort project
- Claimant (CHHK) – sub-contractor for reinforced concrete structural works
- Claimed & adjudicated amount - \$1,103,101.49

Background

- Claimant served progress claim no. 5 on Respondent.
- Respondent did not provide any payment response to the claim within the prescribed timeline.
- Claimant applied for adjudication.

Background

- In the adjudication proceeding, Respondent submitted its adjudication response within the timeline.
- In the meanwhile, the sub-contract was terminated.

Issues before the Adjudicator

- Whether the adjudicator had jurisdiction to deal with the adjudication application when the sub-contract between the parties had been terminated.
- Whether s 15(3) of the SOP Act precluded the adjudicator from considering payment certificate no. 5 and the reasons given by the respondent for withholding amounts due to the claimant found in the adjudication response and the annexed documents.

Adjudication responses

15. (3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

- (a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or
- (b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

Adjudicator held:

- He had the jurisdiction to deal with the adjudication application notwithstanding that the sub-contract had been terminated.
- s 15(3) of the SOP Act precluded him from considering payment certificate no. 5 and the respondent's reasons for withholding amounts due to the claimant.
- Accordingly, he determined the adjudication application in the claimant's favour.

Application before the court

- Respondent applied to set aside the order granting the claimant leave to enforce the determination.

Respondent's arguments before the court

- Adjudicator was wrong to interpret s 15(3) of the SOP Act to completely exclude all aspects of the Respondent's case.
- Such an interpretation denied the respondent of the right to be heard and constituted a breach of the adjudicator to abide by the rules of natural justice as required under s 16(3) of the SOP Act .

Commencement of adjudication and adjudication procedures

16. (3) An adjudicator shall —

- (a) act independently, impartially and in a timely manner;
- (b) avoid incurring unnecessary expense; and
- (c) comply with the principles of natural justice.

Held (Lim Jian Yi AR) :

- Not a disputed fact that respondent's payment certificate no. 5 was not submitted within the timeline under the SOP Act for the submission of a payment response.
- Thus, it could not be considered as "the relevant payment response" under s 15(3) of the SOP Act.
- In effect, by a literal reading of the provision, there is no such thing as a "late" payment response.

Held (Lim Jian Yi AR)

- Any purported response tendered out of time is not a payment response at all.
- Following this logic, the respondent had failed to provide any payment response.
- A plain reading of s 15(3) of the SOP Act would thus support the adjudicator's decision not to consider any of the respondent's reasons why it withheld payment at all.

Held (Lim Jian Yi AR)

- Adjudicator not in breach of natural justice to have disregarded the reasons for withholding payment put forth by the respondent in its payment certificate no. 5 and its adjudication response.
- The adjudication process under the SOP Act chooses a quicker, but somewhat less thorough, means of achieving justice. This is a general theme which pervades the SOP Act and in itself is not a ground for saying that natural justice has been denied.

Held (Lim Jian Yi AR)

- While natural justice requires that a respondent be given a fair opportunity to be heard, there is no requirement that in every case a party is actually heard and it is entirely possible for a party to forfeit his right to be heard through some procedural default.

Held (Lim Jian Yi AR)

- In the instant case, it is clear that the SOP Act does afford a respondent the opportunity to be heard on the condition that the reasons for withholding payment is being provided in the payment response tendered within certain timelines.
- What has really happened in this case was that the respondent chose not to avail itself of the opportunity to be heard on its reasons for withholding payment.

Held (Lim Jian Yi AR)

- In any event, the respondent would not be denied of any sort of hearing at all as the adjudicator is still obliged to exercise his discretion in a number of matters which a respondent is fully entitled to raise.
- For instance, a respondent can raise procedural arguments based on facts which had arisen only after the due date for a payment response has passed.

Held (Lim Jian Yi AR)

- Conclusion: The court refused to set aside the adjudication determination.
- Court also considered as a preliminary issue the general principles governing the setting aside of an adjudication determination.

General principles laid down by the AR in *Chip Hup Hup Kee* case

- The setting aside application is not an appeal.
- A court considering a setting aside application should not be concerned with substantive issues.
- However, it may set aside an adjudication determination, not just on jurisdictional errors of law, but also some non-jurisdictional errors of law.

General principles laid down by the AR in *Chip Hup Hup Kee* case

- In deciding that judicial review of an adjudicator's determination was available to certain instances of non-jurisdictional errors of law, the court basically adopted and followed the principles set out in the New South Wales Court of Appeal decision in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, where it was stated that beyond jurisdictional errors, an adjudication determination also had to comply with the "basic and essential requirements" of the existence of a determination. Natural justice forms one of these basic and essential requirements.

per Hodgson JA in Brodyn Pty Ltd v Davenport
[2004] NSWCA 394

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

- 1 The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
- 2 The service by the claimant on the respondent of a payment claim (s.13).
- 3 The making of an adjudication application by the claimant to an authorised nominating authority (s.17).

per Hodgson JA in Brodyn Pty Ltd v Davenport
[2004] NSWCA 394

- 4 The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
- 5 The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

per Hodgson JA in Brodyn Pty Ltd v Davenport
[2004] NSWCA 394

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

per Hodgson JA in Brodyn Pty Ltd v Davenport
[2004] NSWCA 394

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination ... What was intended to be essential was compliance with the basic, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power ..., and no substantial denial of the measure of natural justice that the Act requires to be given. ... If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

Appeal from AR's decision

- *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 237 (22 Oct 2009)

Respondent's arguments on appeal

- New grounds – Adjudicator had no jurisdiction to adjudicate on the application because (a) claimant had failed to serve a valid payment claim under the SOP Act, and (b) claimant had claimed items which fell outside the scope of the SOP Act and this had rendered the purported payment claim invalid.

Held (Judith Prakash J):

- The jurisdiction of the adjudicator was not determined according to whether the claimant had followed the requirements of the SOP Act in connection with the form and content of the payment claim and the time at which it had to be served.

Held (Judith Prakash J):

- The adjudicator's jurisdiction arose from his appointment by an authorised nominating body under s 14(1) of the SOP Act and from his acceptance of such appointment.
- Ssangyong had by its conduct waived its right to challenge the validity of progress claim 5.
- Appeal was accordingly dismissed.

Case 3 - *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156 (03 Jul 2009)

- Plaintiff (Taisei) – main contractor of LTA for construction of the Thomson, Botanic Gardens and Farrer Road Station project
- Defendant (Doo Ree) – sub-contractor for reinforced concrete works to the Botanic Gardens MRT station
- Claimed amount - \$1,194,593.29

Background

- On 4 Oct 2008, Taisei terminated Doo Ree's appointment as the sub-contractor
- On 29 Nov 2008, Doo Ree submitted its 25th payment claim.
- On 16 Dec 2009, Doo Ree gave notice of intention to apply for adjudication.

Background

- Thereafter on 19 Dec 2009, Doo Ree lodged an adjudication application on the basis that Taisei did not provide any payment response within the default period of 7 days given that the sub-contract was silent on the timeline for submission of a payment response.
- On 20 Dec 2009, Taisei submitted its payment response, i.e. after the 7 days period.

Background

- It is Taisei's case that Doo Ree's adjudication was premature as clause 16.3 of sub-contract conditions (which formed part of the sub-contract) provided for the submission of payment response within 21 days.
- Main issue before adjudicator was whether the sub-contract conditions formed part of the sub-contract, which the adjudicator determined in Doo Ree's favour.

Background

- Accordingly, Taisei's payment response submitted on 20 Dec 2009 was late in that it was made outside the default period of 7 days, and had to be disregarded.
- The adjudicator then proceeded to consider Doo Ree's claim and determined a sum of \$444,503.18 in Doo Ree's favour.
- Taisei, being dissatisfied with the adjudicator's determination, applied to the court to have the determination set aside.

Preliminary issue before the Court

- Parties agreed that it was not open to a court hearing such an application to review the substantive merits of the adjudication determination.
- Parties agreed that the court could only consider issues pertaining to the adjudicator's jurisdiction or natural justice.

Preliminary issue before the Court

- However, parties were divided on the specific issue of whether the court could examine and set aside the adjudication determination even if the adjudicator had erred in finding that clause 16.3 did not bind the parties and that the adjudication application had been made within the time prescribed under the SOP Act.

Held (Francis Ng Yong Kiat AR) :

- The timelines for making an adjudication determination was essential to the existence of the adjudication determination.
- The court would therefore have the jurisdiction to examine and determine if there was compliance with these timelines and set aside the adjudication determination as being void in the event of non-compliance.

Held (Francis Ng Yong Kiat AR) :

- Having found that it had the jurisdiction to deal with the application, the court then proceeded to determine whether the adjudicator was right in holding that the sub-contract conditions formed part of the sub-contract.
- It then concluded that the adjudicator was wrong, and hence Doo Ree's adjudication application was premature and the adjudicator ought to have rejected the adjudication application pursuant to s 16(2)(a) of the SOP Act.

Held (Francis Ng Yong Kiat AR) :

- Accordingly, the adjudication determination was set aside.

Commencement of adjudication and adjudication procedures

16. (2) An adjudicator shall reject —

- (a) any adjudication application that is not made in accordance with section 13 (3) (a), (b) or (c); and
- (b) any adjudication response that is not lodged within the period referred to in section 15 (1).

Case 4 - *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 (25 Sep 2009)

- Defendant (Taisei) – main contractor of LTA for several MRT (i.e. train) stations, including the Botanic Garden station and the Bukit Brown station.
- Plaintiff (Doo Ree) – sub-contractor for reinforced concrete works to the Bukit Brown station
- Claimed amount - \$202,349.41

Background

- On 4 Oct 2008, Taisei terminated the Doo Ree's appointment as the sub-contractor
- On 29 Nov 2008, Doo Ree submitted its payment claim for \$254,257.41 ("Nov claim")
- On 19 Dec 2009, Doo Ree submitted the claim to adjudication in SOP AA/87 of 2008.

Background

- One of the preliminary issues that arose for consideration before the adjudicator was whether the adjudication application had been prematurely lodged, and, therefore, had to be rejected by virtue of s 16(2)(a) of the SOP Act.
- In an adjudication determination dated 15 January 2009, the adjudicator concerned determined that the adjudication application was, indeed, premature, and, on this basis, the application was dismissed without any determination of the substantive issues.

Background

- On 30 January 2009, Doo Ree submitted a fresh payment claim for \$202,349.41 (“Jan 2009 claim”).
- On 6 February 2009, Doo Ree submitted its payment response, in which the Jan 2009 claim was refuted on, *inter alia*, the basis that it was a repeat claim *vis-à-vis* the Nov 2008 claim, which had already been adjudicated upon.
- Doo Ree did not lodge any adjudication application.

Background

- On 31 March 2009, Doo Ree submitted another payment claim, which was also for the sum of \$202,349.41 (“Mar 2009 claim”).
- No payment response was provided by Taisei.
- Subsequently, on 7 May 2009, Doo Ree submitted the Mar 2009 claim for adjudication in SOP AA/56 of 2009.

Background

- On 14 May 2009, Taisei provided its adjudication response.
- In the adjudication response, Taisei contended that the application for adjudication should be dismissed, for, *inter alia*, the reason that the Mar 2009 claim was a repeat claim of the Jan 2009 and Nov 2008 claim.

Background

- In the adjudication determination, the adjudicator determined that the Mar 2009 claim was a repeat claim, and dismissed Doo Ree's adjudication application on the basis that the SOP Act precludes the submission of an identical repeat claim.
- Doo Ree applied to the court to have the adjudication determination set aside.

Issue before the Court

- Whether the SOP Act permits the service of repeat claims.

Held (Nathaniel Khng AR) :

- The issue of whether the SOP Act permits the service of repeat claims clearly was jurisdictional in nature.
- It was a jurisdictional issue of law, which the Adjudicator had decided in favour of Taisei, and, accordingly, if he had erred, a jurisdictional error of law would have been committed.

Held (Nathaniel Khng AR) :

- The service of repeat claims is *not permitted* under the SOP Act.
- As expressly stated in s 10(1), a claimant can serve “one” payment claim for a particular progress payment.

Held (Nathaniel Khng AR) :

- Turning to s 10(4), which allows an amount that was the subject of a previous payment claim to be included in a subsequent payment claim, this provision does not, on its face, allow for the service of repeat claims, as the word “include” would indicate that the amount that was the subject of a previous payment claim, should form *part*, and *not the whole*, of the subsequent payment claim.
- Accordingly, Doo Ree’s application to set aside the determination was dismissed.

Payment claims

10. —(1) A claimant may serve one payment claim in respect of a progress payment on —

- (a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or**
 - (b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.**
- (4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.**

Case 5 - *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 (17 Nov 2009)

- Plaintiff (SEF) – main contractor for a building project comprising the construction of 19 three-storey houses at Pasir Panjang Road
- Defendant (Skoy) – sub-contractor for the supply and installation of aluminium and glass works for the project
- Claimed amount - \$214,382.20
- Adjudicated amount - \$185,167.58

Background

- On 5 November 2008, Skoy sent SEF its Payment Claim No 4 for \$250,344.45.
- On 20 November 2008, Skoy served a Notice of Intention to Apply for Adjudication on SEF.
- On 26 November 2008, it lodged an adjudication application with the SMC. In the adjudication application, the amount claimed was \$214,382.20.

Background

- At 5pm on 5 December 2008, SEF lodged its adjudication response with the SMC.
- The adjudicator directed the parties to submit their submissions and reply submissions within certain timelines.
- There was no oral hearing thereafter.

Skoy's arguments -

1. SEF's payment certificate does not constitute a payment response
2. The adjudication response was lodged late and should be rejected

SEF's arguments - adjudication application invalid :

1. It was filed prematurely
2. The reference period of the claimed amount stated in the application was not within the jurisdiction of the SOP Act
3. The application failed to attach the relevant documents which were essential and required under s 15 of the SOP Act
4. The claimed amount in the application was inconsistent with and exceeded the amount stated in the payment claim.

Adjudicator's determination

- No payment response was served on Skoy at all as the manner in which SEF had attempted to serve it on Skoy was not proper and not in accordance with the requirements of the SOP Act

Adjudicator's determinations

- Although SEF purported to lodge the document on 5 Dec 2008, it had not complied with Rule 2.2 of the SMC Adjudication Procedure Rules
- Rule 2.2 provided that documents had to be lodged “during the opening hours of 9.00am to 4.30pm from Monday to Friday”.
- The adjudication response had been lodged at 5pm on 5 Dec 2008 and therefore was not lodged by the deadline of 5 Dec 2008.
- Adjudication response was therefore not lodged in compliance with s 15(1) of the SOP Act and had to be rejected.

Adjudicator's determinations

- The provisions of the main contract were not incorporated into the subcontract.
- Accordingly, the default period of 7 days applied, and the payment response was due on 12 Nov 2008 and the time to commence adjudication proceedings began on 19 Nov 2008.
- The adjudication application was therefore not premature.

Adjudicator's determinations

- In relation to SEF's objection that there was an absence of a reference period in the payment claim as required by the SOP Act, the adjudicator overruled the same.
- The adjudicator did not deal with the other issues in his determinations.

Application to the Court

- SEF applied to the court to set aside the adjudication determination on the grounds that (1) the adjudicator had breached the rules of natural justice by failing to consider SEF's submissions on 2 out of the 4 jurisdictional issues, and (2) the adjudicator had failed to engage in a bona fide exercise of his powers.
- Application was dismissed by the district judge.
- SEF therefore appeal against the dismissal to a High Court judge.

Held (Judith Prakash J):

- An application under s 27(5) of the SOP Act is not an appeal. Therefore, the court faced with an application under s 27(5), not being an appellate court, would not be in a position to look into the merits of the dispute and adjust the adjudication determination amount whether upwards or downwards.
- The court's power is limited to deciding whether the adjudication determination should be set aside or not.
- Bearing in mind the purpose of the legislation, the court's role when asked to set aside an adjudication determination or a judgment arising from the same, cannot be to look into the parties' arguments before the adjudicator and determine whether the adjudicator arrived at the correct decision.

Held (Judith Prakash J):

- In this regard, the court emphasised the intention that the procedure be speedy and economical.
- Accordingly, instead of reviewing the merits (in any direct or indirect fashion), the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper.

Held (Judith Prakash J):

- After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.

Held (Judith Prakash J):

- Thus, an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:
 - ✓ (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
 - ✓ (b) the service by the claimant on the respondent of a payment claim (s 10);
 - ✓ (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);

Held (Judith Prakash J):

- ✓ (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
- ✓ (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));

Held (Judith Prakash J):

- ✓ (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
- ✓ (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.
- If the court finds that the answer to any of those questions is in the negative, then the adjudication determination and any judgment arising therefrom must be set aside.

Held (Judith Prakash J):

- Whilst s 16(2) directs an adjudicator to reject any adjudication application that is not made in accordance with s 13(3)(a), (b) or (c) and also to reject any adjudication response that is not lodged within the time limit prescribed in s 15(1), it must be for the adjudicator to decide whether the adjudication application or adjudication response before him meets those requirements. It would not be for the court to overturn the adjudication determination later on the basis that the adjudicator should have rejected either of those documents because if the court took that course, it would have delved into the merits of the dispute.

Held (Judith Prakash J):

- Similarly, although the SOP Act requires a payment claim to be served, whether or not the document purporting to be a payment claim which has been served by a claimant is actually a payment claim is an issue for the adjudicator and not the court.
- Conclusion: SEF is not entitled to argue that because the Adjudicator did not deal in substance with two of the four issues it raised, he did not exercise his powers in a *bona fide* manner. Accordingly, the Adjudication Determination cannot be set aside on that basis.

Held (Judith Prakash J):

- Adjudicator's failure to discuss the submissions in his adjudication determination was not a breach of natural justice, taking into account that he is required to determine an adjudication application "as expeditiously as possible" and, in any event, within 10 business days after his or her notification of acceptance of the application (or any longer period the parties agree).
- There is thus a statutory intention that an adjudicator should work quickly. That may militate against the standards of thoroughness and detail that are to be expected where no externally imposed time pressure applies. It cannot be intended that an adjudicator working to the tight statutory timetable will be as painstaking as a judge who has reserved judgment in a case involving the same claims under the same construction contract.

Held (Judith Prakash J):

- As regards SEF's challenge on the ground that the adjudicator had, in quantifying the adjudication amount, acted arbitrarily and failed to follow the method for valuation set out in s 7 of the SOP Act, it is a point relating to the merits of the adjudication determination and therefore the proper course for SEF to take when it was not satisfied with what the adjudicator had done was to have asked for a review adjudication.
- This is not a matter that should have been brought before the court as a ground for setting aside the adjudication determination as it does not involve any of the listed questions.
- It does not, therefore, provide a basis on which the court can set aside the adjudication determination.

Case 6 - *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260
(23 Nov 2009)

- Defendant (Laguna) – employer
- Plaintiff (AMA) – project consultant
- Claimed and adjudicated amount -
\$1,027,000

Background

- AMA served its payment claim no. 1.
- Laguna did not provide any payment response. It only provided its adjudication response when AMA submitted the claim to adjudication.
- Adjudicator decided in AMA's favour.
- Laguna applied to the court to set aside the determination. Application was dismissed by the AR.
- Laguna appealed against the dismissal to a High Court judge.

Laguna's objections in the adjudication

- In its adjudication response, Laguna raised the following jurisdictional objections to the application:
 - ✓ The Adjudication Application had been served on the wrong party.
 - ✓ Payment Claim 1 was not a payment claim for a progress payment under s 10 of the SOP Act as it was in respect of progress payments for stages 1, 2 and 3 of the consulting work and this was identical to the three earlier payments claims which AMA had made.
 - ✓ The Adjudication Application had been made out of time.
 - ✓ The claim did not fall within the purview of the SOP Act.

Adjudicator's determination:

- On the basis of both the construction of the SOP Act and the conduct of the parties, AMA was entitled to deal with Laguna for the purpose of the project.
- Payment Claim 1 could not be said to be a mere repetition of the earlier claims and it was not a situation where the claimant reissued the claim because it had failed before a prior adjudicator. Laguna's challenge on this ground therefore failed.

Adjudicator's determination:

- Given the validity of Payment Claim 1 had been upheld, the adjudication application was not made out of time.
- Claim fall within the purview of the SOP Act.
- Laguna was not entitled to advance any reason for withholding payment in the adjudication response given that it had not provided a payment response.

Laguna's arguments on appeal:

- AR's decision was wrong on the grounds that:
 - ✓ The Adjudicator had had no jurisdiction to adjudicate the Adjudication Application because the same had been made in relation to an invalid payment claim.
 - ✓ The Adjudicator had failed to comply with the rules of natural justice.
- The arguments that Laguna was not the party liable under the contract and that the Adjudicator had not had the jurisdiction to determine questions of law were not raised on the appeal.

Held (Judith Prakash J):

- It was not a place for the court to determine whether Payment Claim 1 was a valid payment claim or not. This was an enquiry that fell squarely within the jurisdiction of the Adjudicator and it is one that he recognised and dealt with.
- What the court would be concerned with is whether prior to making an adjudication application the claimant had served a purported payment claim. In this case, Payment Claim 1 had been served by AMA and whether it was actually a “payment claim” within the meaning of that term under the SOP Act, was a mixed question of law and fact for the Adjudicator, who would be privy to the facts, to decide.

Held (Judith Prakash J):

- Accordingly, Laguna's objections to the validity of the payment failed.
- There had been no breach of natural justice.
- What Laguna was complaining about was not really a failure on the part of the Adjudicator to hear both sides of the dispute but a failure on his part to decide the dispute as Laguna considered it should be decided.

Held (Judith Prakash J):

- The *audi alteram partem* rule required the Adjudicator to receive both parties' submissions and consider them; it did not require him to decide the dispute in accordance with Laguna's submissions.
- However dissatisfied Laguna may be with those decisions, it cannot ask for the Adjudication Determination to be set aside because it considers the decisions to be against the weight of the evidence.

Held (Judith Prakash J):

- The principles of natural justice are concerned with the provision of a fair hearing to contending parties. They do not mandate any particular result.
- As long as the parties have been given a fair hearing, the decision cannot be set aside for failure to comply with natural justice. A party who is dissatisfied with the decision on its merits cannot use the principles of natural justice to have the decision set aside.
- The court cannot be asked under cover of an allegation of breach of natural justice to review the merits of the adjudicator's decision.

Case 7 - Chip Hup Hup Kee Construction Pte Ltd v
Ssangyong Engineering & Construction Co Ltd [2009]
SGHC 269 (26 Nov 2009)

- Ssangyong's objections :
 - ✓ The adjudication determination was a draft and was not unsigned
 - ✓ The adjudication determination was invalid as it was served 18 days late by SMC on the parties

Conclusion

- Given that the adjudicator's determination is subject to challenge in court, delay is inevitable.
- However, if court adopts the stringent approach as it did in SEF case, it will at least minimise delay in the adjudication process, which is something that parliament hopes to avoid.
- Problem of standards of adjudicator

SCAL Seminar on How Secured is the Building and Construction Industry Security of Payment Act in assisting the Contractors to get Payment?
(18 December 2009) *presented by* MONICA K. C. NEO, Advocate & Solicitor, Commissioner for Oaths

THE END

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"The Singapore Standard Form of Building Contract – An Annotation"
"Construction Defects: Your Rights and Remedies" title of the Sweet & Maxwell's Law for Layman Series
Singapore Civil Procedure 2003 (White Book)
Real Estate Developers' Association of Singapore's (REDAS) Design and Build Standard form contract
Chapter on "Construction Contracts" in Law Relating to Specific Contracts in Singapore (2008)