

IN THE MATTER OF THE BUILDING AND CONSTRUCTION INDUSTRY
SECURITY OF PAYMENT ACT 2004

AND

IN THE MATTER OF AN ADJUDICATION
(ADJUDICATION APPLICATION NO. SOP/AA03 OF 2006)

BETWEEN

AH PTE LTD
Claimants

And

**AI and
AJ PTE LTD**
Respondents

ADJUDICATION DETERMINATION

Before

Mohan R Pillay
Adjudicator

For The Claimants
Ms G, Director
AH Pte Ltd

For the Respondents
Mr H / Mr I
M/s H A & Chung Partnership

19th May 2006

DETERMINATION

1. This determination is made on 19th May 2006 under the Building and Construction Industry Security of Payment Act 2004 ("the SOP Act").
2. The Claimant in this matter is *AH* Pte Ltd (hereinafter "the Claimants") and the 2 Respondents are *AI* and *AJ* Pte Ltd (hereinafter "the Respondents").
3. The Claimants are represented in their proceedings by their Director, Ms *G*. The Respondents have appointed Messrs H A & Chung Partnership as their solicitors for this Adjudication.
4. For the reasons set out below, I determine that :
 - 4.1 The Adjudication Application of the Claimants falls outside the jurisdiction of the SOP Act; and
 - 4.2 The proportion of the costs of the adjudication payable by each party shall be as follows:

Claimants :	60%
Respondents:	40%

RECORD

5. These proceedings began on 4th May 2006 when the Claimants submitted an Adjudication Application to the Singapore Mediation Centre ("SMC") pursuant to the provisions of the SOP Act. The Claimants seek payment of the sum of S\$45,000 for the provision of concept design services in relation to the construction of a retail mall and hotel at *YYY*, Indonesia.
6. The SMC served the Adjudication Application on the Respondents the following day, 5th May 2006.
7. On 8th May 2006 the SMC referred the Adjudication Application to me and I accepted the reference the same day. The parties were informed of my appointment as Adjudicator on 9th May 2006.
8. The Respondents were required by Section 15(1) of the SOP Act to lodge their Response to the Adjudication Application within 7 days after its receipt. This therefore fell due on Saturday, 13th May 2006 as Friday, 12th May 2006 was the Vesak Day public holiday.
9. The Respondents did not file their Response to the Adjudication Application by that date, which under Section 16(1), constitutes the commencement of this Adjudication. The reasons for this can be found in two letters from Messrs H A & Chung Partnership, the Respondents' solicitors dated 8th and 15th May 2006 where they raise issues of jurisdiction under the SOP Act.

10. As these letters had not been extended to the Claimants, I wrote to the parties on 16th May 2006 forwarding copies of these two letters and invited the Claimants to let me have their response to these letters in writing by 12 noon, Thursday, 18th May 2006 and thereafter, convened a conference of the parties at 5 pm that day. The Claimants provided their response to these letters by their letter of 17th May.
11. The Conference on Thursday, 18th May 2006 was attended by:
 - 11.1 Ms *G*, a director of the Claimants as their representative; and
 - 11.2 Mr *H* and Mr *I* of Messrs H A & Chung Partnership, for the Respondents.
12. I sought clarification from the Respondents on a document dated 25th April 2006 from *AJ* Pte Ltd ("*AJ*") which the Claimants had included in their Adjudication Application as the Respondents' payment response. This was a document that was marked "WITHOUT PREJUDICE, PRIVATE & CONFIDENTIAL". The Respondents took the position that they were claiming privilege over this document and that it should be excluded from my consideration given its notation as a "WITHOUT PREJUDICE" document.
13. This meant that there was no payment response properly on the record before me. As stated earlier, the Respondents had also not lodged an Adjudication Response by the commencement of the Adjudication. No Adjudication Response had been lodged up to the date of this determination.
14. Section 17(1)(a) of the SOP Act provides that I shall determine an Adjudication Application within 7 days of the commencement of the Adjudication, if the Adjudication relates to a construction contract and the Respondents have failed to make a payment response and to lodge an Adjudication Response by the commencement of the Adjudication.
15. The Claimants seek payment for the supply of concept design services. This falls within the definition of "services" under the SOP Act. The supply of services in turn falls under the definition of "construction contract" of the SOP Act.
16. Given the absence of both the payment response and an Adjudication Response, I am therefore obliged by Section 17(1)(a) of the SOP Act to determine this Adjudication Application within 7 days after the commencement of the Adjudication ie. by Saturday, 20th May 2006.
17. Some amount of time at the conference was taken up by the Respondents' contentions about reserving their rights in connection with the merits of the claim, and the timelines for filing the Adjudication Response under the SOP Act. I deal with this in further detail below.

18. At the conference, the Respondents asked to put in written submissions on their challenge to jurisdiction. Given the constraints of time imposed on me by Section 17(1)(a), I directed that such written submissions be filed by 10 am on Friday, 19th May 2006 and were not to exceed 4 pages in length.
19. I also made consequential directions for the Claimants to respond to these submissions, if they so wished, by 1 pm the same day with the same limitation that the submissions should not exceed 4 pages.
20. Both parties filed their respective submissions in accordance with my directions.

REASONS

21. It is evident that I should in the first instance consider the challenge mounted by the Respondents to jurisdiction under the SOP Act.
22. The Respondents, in their letters of 8th May and 15th May 2006, took the position that there was no jurisdiction under the SOP Act on two principal grounds:
 - 22.1 the project, in respect of which the Claimants provided the concept design services, was in *YYY*, Indonesia ie. it is outside Singapore; and
 - 22.2 there is no contract in writing as required under Section 4 of the SOP Act
23. There was also some suggestion in these letters that *AJ* was only incorporated after the alleged services were rendered by the Claimants and that, in any event, any fees that were payable were only due on a contingent basis.
24. The Respondents also submitted that neither of the Respondents were employees, servants or agents of the developer of the project, *AK*. The suggestion here and, this was developed and confirmed in the Respondents' written submissions of 19th May, is that the proper party, if any, to the claim should be *AK* and not the Respondents.
25. The matters set out in paragraphs 23 and 24 above, of course, arise for consideration only if there is in fact jurisdiction to consider the Claimants' Adjudication Application under the SOP Act.
26. At the conference on 18th May 2006, the Respondents submitted that the issue of jurisdiction should be treated as a preliminary point, in that any timelines for the filing of the Adjudication Response should become operative only after I had determined the question of jurisdiction.

27. In their written submissions, the Respondents highlighted a concern foreshadowed in their letter of 15th May. They submitted that they had not filed their Adjudication Response as they did not wish to submit, or be taken to have submitted by conduct, to jurisdiction under the SOP Act. They were apprehensive that the act of filing an Adjudication Response could constitute a step in the proceedings and be taken to amount to a submission to jurisdiction.
28. The Respondents also stated in their written submissions, without elaboration, that they "*reserve their rights to seek a stay of the proceedings on the basis of forum non conveniens*". It is unclear how this is material to the matters before me.
29. The Respondents made these submissions as part of the overall caveat reserving their right to appeal or seek determination of these issues "*in a court of law or the appropriate or proper forum*". The grounds relied upon included, amongst others, the somewhat curious ground that the Respondents had "*no sight of the Adjudication Application*" and that they have been unable to locate this set of papers. For the reasons set out in the paragraph immediately following, it will be evident that this contention is without merit.
30. The SMC responded to this part of the Respondents' written submissions by their letter of 19th May. They pointed out that *AJ* acknowledged in writing service of the Adjudication Application which SMC forwarded by courier on 5th May 2006. The acknowledgement shows that the Adjudication Application was received by *AJ* the same day. The SMC also recorded that the Respondents' solicitors contacted the SMC on the morning of 19th May seeking a copy of the Adjudication Application "*as their client had misplaced it*".
31. Prior to dealing in detail with the submissions on jurisdiction, it might be helpful to briefly consider the Respondents' position that the timelines for the filing the Adjudication Response should only be operative after I determine the question of jurisdiction. The Claimants in their written submissions, object to the Respondents filing any Adjudication or payment response outside the timelines under the SOP Act.
32. Section 16(2)(b) of the SOP Act obliges the Adjudicator to reject any Adjudication Response not lodged within the period referred to in Section 15(1). Section 15(1) requires the Respondents to lodge the Adjudication Response 7 days after receipt of the Adjudication Application.
33. The language of Section 16(2) is clear. It does not provide for any discretionary power on the part of the Adjudicator to consider any Adjudication Response filed after this 7 day period. This is consistent with the absence in Section 16(4), which deals with the broad powers of the Adjudicator, of any discretionary power to extend the timelines provided for in the SOP Act. Where such power exists, it is expressly provided for, eg. Section 17(1)(b) provides that the Adjudicator can request for a longer period within which to determine the Adjudication if this is agreed to by the Claimant and the Respondent (where the Adjudication Application falls within the ambit of this proviso).

34. In the circumstances, it appears to me that I have no power to extend the time for the filing of any Adjudication Response. Nor is it open for me to consider [in fact I am obliged to reject this possibility under Section 16(2)(b)] the contents of any Adjudication Response that is not lodged within the seven days period provided for under Section 15(1).
35. It follows from this that if I should determine that the Adjudication Application properly falls within the regime under the SOP Act, then I should proceed to consider the merits of the claim on the basis of the documents that are properly before me. There is no further right for the Respondents to file an Adjudication Response out of time. This, of course, only arises if I should reject the Respondents' contentions on the question of jurisdiction.
36. In their written submissions, the Respondents submit that they make no admission that I have the power to determine issues of jurisdiction under the Act. They submit that the SOP Act does not expressly provide for the Adjudicator to rule on his own jurisdiction. They contend that such powers need to be expressly provided for, as found for example in Section 21 of the Arbitration Act (Cap. 10) and Rule 19 of the SIAC Domestic Arbitration Rules.
37. The constraints of time do not permit an elaborate investigation of this issue. However, the overall scheme of the SOP Act in seeking to facilitate payments for construction work and related supply of goods and services, would be severely undermined if every jurisdictional challenge fell outside the scope of the Adjudicator. It is unclear from the Respondents' submissions exactly which alternative tribunal should hear such a challenge.
38. The overall scheme of the SOP Act suggests that Adjudication Application received by the authorised nominating body should, under Section 14(1), be referred to the Adjudicator. The Adjudicator is required, by Section 17(2), to determine the amount, if any, to be paid by the Respondent to the Claimant.
39. In addition, the Adjudicator is obliged by Section 16(2) to reject any Adjudication Application not made in accordance with Section 13(3)(a), (b) or (c). It is not unreasonable, given the overall objectives and scheme of the SOP Act, to assume that any Adjudication Application made in accordance with Section 13(3)(a), (b) or (c) would obviously have to be one arising from a contract governed by the SOP Act.
40. If it does not in fact arise from such a contract, then there can be no entitlement to file an Adjudication Application under the SOP Act. It would follow from this that such an Adjudication Application should be rejected and that the Adjudicator would have powers to do so.

Jurisdiction

41. I now turn to consider the Respondents' challenge to jurisdiction under Section 4 of the SOP Act.
42. This challenge is mounted on 2 grounds. First, that in breach of Section 4(2)(b)(ii), the Claimants rely on a contract dealing with services supplied in relation to construction work outside Singapore. Secondly, the Respondents contend that any contract relied upon by the Claimants fails to satisfy the requirement in Section 4(1) that the SOP Act shall only apply to a contract made in writing.
43. I deal first with the challenge under Section 4(2)(b)(ii) of the SOP Act which reads:
- "(2) *This Act shall not apply to -*
- (a) ...
- (b) *any contract to the extent that -*
- (ii) *it deals with ... services supplied in relation to construction work carried out outside Singapore"*
44. The Respondents contend that the concept design work was in relation to construction work to be carried out for a retail mall and hotel in YYY, Indonesia.
45. The Claimants' Adjudication Application concerns fees for a concept design prepared by the Claimants in Singapore. In their Adjudication Application, the Claimants state that the Respondents requested the Claimants to provide the concept design proposal for the YYY Shopping Centre and hotel in Indonesia on 7th February 2006. This was followed by a meeting two days later on 9th February where the Claimants received their design brief and some drawings. The Claimants then proceeded to complete this work including the overall design studies which was then presented to the Respondents on 1st March 2006 at their offices in Singapore. The Respondents are then said to have requested some further work which was then subsequently presented to them on 6th March 2006. The Respondents say that their work was commissioned, completed and finally delivered to the Respondents in Singapore.
46. In their written submissions of 19th May, the Claimants submit that their work was done independently and there are no issues relating to the subsequent construction work as their concept design work comes well before any construction work. This may well be correct in terms of the manner in which the Claimants went about their work. However, the Claimants accept that the concept design services were supplied in relation to the construction of a retail and hotel in YYY, Indonesia.

47. The key issue here is whether the concept design services were in fact "***supplied in relation to construction work carried outside Singapore***" within the meaning of Section 4(2)(b)(ii) of the SOP Act. If it does, then such a contract will fall outside the ambit of the SOP Act. Consequently, the adjudication regime available under the Act cannot apply to claims arising from any such contract. In that event, I will not be able to consider the merits of the Adjudication Application.
48. The Claimants have put their position forward plainly and candidly. They rely on meetings in Singapore as the basis of the commission to provide the concept design services. They say that these services were carried out and finally delivered to the Respondents in Singapore. They also plainly accept the fact that these concept design services relate to a retail mall and hotel to be constructed in YYY, Indonesia.
49. It appears to me that Section 4(2)(b)(ii) does not require an investigation of whether the services were, commissioned, carried out or delivered in Singapore itself. The key question is whether such services were supplied "***in relation to construction work carried outside Singapore***". In this particular case, it is clear that the construction work in relation to which the concept design services were supplied, involved a project outside Singapore, in YYY, Indonesia.
50. I have noted that Section 4(2)(b)(ii) confines itself to "***services supplied in relation to construction work carried out outside Singapore***" (emphasis added). It may possibly be argued that, where the construction work has not yet been carried out, Section 4(2)(b)(ii) has no application.
51. Such an approach would, in my opinion, be an overly technical reading which does not fit comfortably with the overall intention of Section 4. The definition of "services" in the SOP Act includes activities, such as feasibility studies, planning services, architectural, design, surveying and quantity surveying services in relation to construction work. Much of this type of work will necessarily be done before the commencement of construction work itself. It is therefore entirely conceivable that a claim for such services under the SOP Act could well be made before construction work is carried out.
52. Section 4(2)(b) does not seek to draw a distinction as to whether the construction work has been carried out or not. Its key focus is to exclude contracts dealing with construction work carried outside Singapore and with any claims arising from goods and services supplied in relation to such contracts.
53. The Claimants' claim for concept design services in relation to the construction of a retail mall and hotel in YYY, Indonesia therefore falls within the excluded ambit of Section 4(2)(b)(ii). It follows that Claimant cannot seek to invoke the provisions of the SOP Act since the Act expressly excludes such contracts.

54. I should however make clear that this does not mean that the Claimants have no remedy in law. It simply means that they cannot invoke the statutory adjudication regime provided for by the SOP Act. It is, of course, open to them therefore to consider other remedies such as commencement of proceedings in the Singapore Courts if they should so wish.
55. Given the clear terms of Section 4(2)(b)(ii) and the undisputed facts, I do not have to proceed further to consider the second ground on which the Respondents have mounted their jurisdictional objections ie. there is no contract in writing.
56. For the sake of completeness, I should point out that the Respondents' written submissions include the contention that the Claimants do not come with "*clean hands*". This is a notion of relevance to equitable remedies. I cannot immediately fathom its bearing when dealing with the statutory adjudication regime under the SOP Act.

Adjudication Cost

57. In considering the appropriate order for costs, I have taken into account the fact that the Respondents have put forward contentions and reservations of rights which are, in my view, out of place. This has resulted in costs which I do not consider appropriate to lay completely before the Claimants.
58. Given the circumstances, I determine that the proportion of the cost of this adjudication payable by each party shall be as follows:

Claimants: 60%
Respondents 40%

Mohan R Pillay
Adjudicator

19th May 2006