

# **4<sup>th</sup> National Conference on Construction Adjudication**

## **Session 3 - Latest Developments in Adjudication and their implications**

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**Topic:**

**Section 17(3) of the SOP Act & its exceptions**

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# Section 17(3) of SOPA and exceptions



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## Section 17(3) of SOPA and exceptions

- Section 17(3) In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by —
  - (a) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or
  - (b) any certificate or other document that is required to be issued under the contract.

## Section 17(3) of SOPA and exceptions

- The difficult issues which remain unresolved are :
  - (a) Meaning of “ damage, loss or expense”
  - (b) What qualifies as a document showing agreement between the claimant and respondent on the quantum ;
  - (c) What qualifies as a “ certificate or other document that is required to be issued under the contract”

## Section 17(3) of SOPA and exceptions

- Meaning of “damage, loss or expense”.
- There is no statutory definition of “damage, loss or expense” in SOPA.
- Adjudicators are often divided on this topic. Some take the view that if the damage, loss or expense is occasioned by a breach of contract, it would be caught by the section. However, damages for rectification of defects may be excluded or can be considered under section 7(2)(b) if applicable as section 7(2)(b) provides :
  - (b) if any part of the construction work, goods or services is defective — having regard to the estimated cost of rectifying the defect; and
- By and large, most adjudicators would agree that certain claims are taken to fall outside this category . For example, payment in advance or materials purchased at the request of the other party.

## Section 17(3) of SOPA and exceptions

- What document would constitute an agreement on quantum
- It is pertinent to note that agreement on liability alone would not suffice. The quantum must be agreed.
- This can be evidenced by letters or even payment responses or payment claims where the claim for damage, loss or expense is accepted.

## Section 17(3) of SOPA and exceptions

- What certificate or document would be required to be issued under the contract to support the claim?
- There is as yet no judicial authority on this subject.
- One view is that the payment response by itself would not be sufficient as a payment response is in any case required to be issued under the Act. It would also render the exception otiose if a payment response can support itself.
- The general view adopted by adjudicators is that a delay certificate , for example, issued by the Architect under the SIA Form of Contract would suffice for this purpose.
- What about certificates issued by the Respondent itself to support backcharges?

# THANK YOU



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