

Singapore Court of Appeal Clarifies that Employers Have No Duty to Speak in respect of Payment Claims Falling Outside Ambit of SOPA

The Court of Appeal has, in the context of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“**SOPA**”), clarified that the employer’s duty to speak by way of a payment response does not extend to payment claims submitted after the issuance of the final certificate by the architect in a construction project governed by the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract) (7th Edition, April 2005) (“**SIA Form of Contract**”) as they fall outside the ambit of the SOPA: *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] SGCA 36.

Our Comments

Far East Square v Yau Lee Construction is a significant decision as it clarifies the precise scope and correct application of an employer’s duty to speak by way of a payment response by making it clear that the duty to speak does not apply to a payment claim falling outside the ambit of the SOPA.

In an earlier decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“**Audi Construction**”), the Court of Appeal held that the SOPA imposes a duty on the employer to fully spell out its objections, jurisdictional or otherwise, in its payment response or be estopped from doing so at the adjudication proceedings or the setting-aside stage. The Court of Appeal in *Far East Square v Yau Lee Construction* clarified that its holding in *Audi Construction* was never intended to apply to a situation where a payment claim fell outside the purview of the SOPA from the outset. Rather, the

discussion on waiver and estoppel in *Audi Construction* was predicated on the basis that the contract and the SOPA define the rights the parties have in relation to each other.

Our Christopher Chuah and Lee Hwai Bin acted for the successful appellant in the appeal.

This update takes a look at the Court of Appeal’s decision.

Background

The key facts relevant to the issues discussed in this update are summarised below.

The appellant in this appeal was Far East Square Pte Ltd (“**Far East**”), a property developer. The respondent was Yau Lee Construction (Singapore) Pte Ltd (“**Yau Lee**”), the main contractor engaged by Far East to carry out works for an integrated commercial and residential project (“**Project**”).

Yau Lee’s engagement was documented in a letter of award which incorporated (with amendments) the SIA Form of Contract.

The final phase of the works for the Project was completed on 6 May 2014. The maintenance period for the works then took place from 6 May 2014 to 5 August 2016.

On 4 August 2017, the architect of the Project (“**Architect**”) issued the certificate certifying that all defects had been notified to Yau Lee and that all outstanding works had either been made good

or taken into account by way of a letter of undertaking (“**Maintenance Certificate**”).

On 5 September 2017, the Architect issued a letter certifying the final balance payable from Far East to Yau Lee (“**Final Certificate**”) in the sum of \$1,545,776.20. This was in accordance with clause 31(12)(a) of the SIA Form of Contract, which provided that the Architect was to issue the Final Certificate within three months from the issuance of the Maintenance Certificate.

Under clause 31(11) of the SIA Form of Contract, Yau Lee was to have submitted its final claim to the Architect before the end of the maintenance period.

Despite the issuance of the Final Certificate, Yau Lee continued to submit further payment claims. One of them was payment claim number 75 (“**PC 75**”), which was submitted on 24 November 2017. In response to PC 75, the Architect informed Yau Lee in writing that there would be no further progress payments after the issuance of the Final Certificate. However, Far East did not issue a payment response to PC 75.

On 27 December 2017, Yau Lee lodged an adjudication application in relation to PC 75. The adjudicator found that Far East liable to pay Yau Lee substantially the sums in PC 75 plus certain of Yau Lee’s claims for additional preliminaries arising out of prolongations to the works. The adjudicator noted Far East’s objection that PC 75 was submitted after the issuance of the final payment claim and/or the Final Certificate and was therefore invalid for failing to comply with the SIA Form of Contract and section 10(2)(a) of the SOPA. However, the adjudicator agreed with Yau Lee and held that because Far East had not raised this objection in a payment response, the adjudicator was “prohibited” from considering the objection pursuant to section 15(3) of the SOPA.

Yau Lee then commenced proceedings in the High Court to enforce the adjudication determination while Far East applied to have the adjudication determination set aside.

The High Court’s Decision

Before the High Court, Far East argued that PC 75 was invalid as the SIA Form of Contract did not permit Yau Lee to submit further payment claims after the final payment claim and/or after the Final Certificate had been issued by the Architect. It therefore submitted that the adjudicator lacked jurisdiction as PC 75 did not fall within the purview of the SOPA and the adjudication determination had to be set aside.

The High Court Judge rejected Far East’s arguments. He found PC 75 to be a valid payment claim. In addition, relying on the Court of Appeal’s decision in *Audi Construction*, he found, among other things, that Far East was estopped from challenging the validity of PC 75 as it had not objected to it in a payment response. He also rejected Far East’s argument that a respondent is not obliged to file a payment response if the payment claim is invalid because it falls outside the SOPA from the outset, based on his understanding that the Court of Appeal had, in *Audi Construction*, stated that the duty to speak arises in relation to any jurisdictional objection to a payment claim.

Far East appealed to the Court of Appeal against the High Court Judge’s decision.

The Court of Appeal’s Decision

Allowing the appeal, the Court of Appeal found that Far East’s duty to speak by way of a payment response did not extend to payment claims which were submitted *after* the issuance of the Final Certificate by the Architect, given that the Project was governed by the SIA Form of Contract.

The reason was that, upon the issuance of the final certificate under the terms of the SIA Form of Contract, the architect becomes *functus officio* and any payment claims submitted thereafter would not be progress claims within the meaning or ambit of the SOPA. Because the SOPA does not apply to such purported payment claims, even if the contractor does not file a payment response, any adjudication proceedings in respect of such payment claims would effectively be void and the employer would neither be estopped from objecting to the adjudicator's jurisdiction nor from challenging an adjudication determination made in respect of such payment claims.

In this connection, the Court of Appeal explained that:

- Under the SIA Form of Contract, both the payment certification process and the works under the contract come to an end once the architect issues the final certificate. The final certificate shows the architect's final measurement and valuation of the works in accordance with the terms of the contract, and documents the final balance between the contractor and the employer. The final certificate is generally released after the maintenance certificate is issued, and by this time the works under the contract would be completed.
- With the issuance of the final certificate, the architect's duties under the contract are concluded and he becomes *functus officio* and the entire certification process under the contract comes to an end. There is therefore no basis for the contractor to submit further payment claims. As the architect's certificate is a "condition precedent" to the contractor's right to receive payment, the contractor loses its ability or right to make progress claims or to receive progress payments once the architect loses his capacity to issue such certificates.
- In the circumstances, any payment claim that is issued after the architect is *functus officio* cannot be certified by the architect so as to entitle the contractor to progress claims under the SOPA, subject to two caveats:
 - The architect must not have improperly withheld a payment certificate. If he has improperly withheld a payment certificate (as opposed to the situation where he is unable to issue a further certificate because of his *functus officio* status), then the contractor may bring a claim to adjudication under the SOPA; and
 - For the final certificate to render the architect *functus officio* and bring the works under the contract to an end, the final certificate must *prima facie* comply with the requirements in the SIA Form of Contract.
- Further, and importantly, to claim for progress payments under the SOPA, the contractor must first establish that he is entitled to such payment *under the construction contract* and the court, in determining a contractor's entitlement to submit payment claims under the SOPA, must take into account the provisions of the construction contract. The right of a contractor to be paid stems from the construction contract under which construction works are carried out. The SOPA does not grant the contractor the right to be paid; nor does it alter the substantive rights of the parties under the construction contract or create a payment regime independent of the construction contract. The SOPA is simply a legislative framework to expedite the process by which a contractor may receive payment through the payment certification/adjudication process in place of commencing arbitral or legal proceedings.

- Where, as here, the construction contract incorporates the SIA Form of Contract, any progress claim submitted after the architect has issued the final certificate is outside the ambit of the SOPA. That being the case, the progress claim cannot be said to be “made” under or be considered a “payment claim” within the meaning of the SOPA or entitle the contractor to commence adjudication under the SOPA. Simply put, the SOPA machinery would not be engaged.
- The employer’s duty to speak would therefore not arise. The employer would not be obliged to issue any payment response to that progress claim and no estoppel can arise from its alleged failure to speak in respect of a payment claim which is outside the ambit of the SOPA.

The Court of Appeal also highlighted other examples of payment claims that would fall outside the ambit of the SOPA from the outset. These include the following:

- Payment claims made pursuant to oral contracts;
- Payment claims made pursuant to contracts for the carrying out of construction works, or the supply of good and services in relation to any residential properties;
- Payment claims made pursuant to contracts which contains provisions under which a party undertakes to carry out construction works or supply goods and services, as an employee of the party for whom the construction work is to be carried out, or the goods and services supplied;
- Payment claims made in respect of construction projects outside Singapore;

- Payment claims made pursuant to non-construction contracts, or contracts for the supply of goods and services, within the meaning of section 3 of the SOPA; and
- Payment claims submitted beyond the six-year limitation period as set out in section 10(4) of the SOPA.

The Court of Appeal further observed that an adjudication commenced in relation to a payment claim falling outside the ambit of the SOPA would in effect be the same as commencing an adjudication in the absence of a payment claim. In such a case, the adjudicator would be deprived of jurisdiction at the threshold and can set aside a purported payment claim independent of any payment response as part of his independent duty to consider the true merits of the payment claim. Indeed, the Court of Appeal noted that the adjudicator should, as a fundamental issue going to the heart of the adjudication, always consider whether the payment claim is within the ambit of the SOPA to begin with.

In this case, the Court of Appeal found that PC 75 was outside the ambit of the SOPA from the outset and therefore incapable of supporting Yau Lee’s adjudication application.

It also held that PC 75 in any event constituted a patent error that entitled Far East to have the adjudication determination set aside notwithstanding its lack of a payment response. The Court of Appeal took the view that it would have been clear to the adjudicator based on the construction contract, the Final Certificate and PC 75 itself that, by the time PC 75 was submitted, the Architect had become *functus officio* and any payment claims submitted after that would be outside the ambit of the SOPA.

In the circumstances, the Court of Appeal allowed Far East's appeal and set aside both the

adjudication determination and the High Court's decision.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the partner at WongPartnership that you normally work with or any of the following partners:



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