

DEMISE OF THE DUAL-TRACK REGIME UNDER THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

[2020] SAL Prac 17

It was generally understood in the context of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”) that there was a dual-track system for progress payments under a construction contract. However, the recent decisions by the Court of Appeal in *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 and *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 now make clear that this system does not exist and that the underlying contract governs a contractor’s entitlement to payment under the SOP Act. In doing so, the Court of Appeal abolished the notion that there could be a separate, statutory entitlement to payment under the SOP Act. This article attempts to unpack the concept of the “dual-track” system and explore the implications of both decisions by the Court of Appeal.

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I. Introduction

1 When can a contractor serve a payment claim under a construction contract? The Court of Appeal in two recent decisions, *Shimizu Corp v Stargood Construction Pte Ltd*¹ (“*Shimizu v Stargood*”) and *Far East Square Pte Ltd v Yau Lee Construction*

¹ [2020] 1 SLR 1338.

(*Singapore*) Pte Ltd² (“*Far East v Yau Lee*”), has emphatically held that this depends on the terms of the contract. In both decisions, the Court of Appeal dealt with important issues surrounding the scheme of the Building and Construction Industry Security of Payment Act³ (“SOP Act”) and whether there is any separate statutory entitlement to a progress payment (under the SOP Act) where a contract already makes provisions for such payments.

2 This article examines both decisions and tracks how the court’s position has evolved in relation to the payment regime under the SOP Act. It further explores the extent to which the courts will uphold contractual provisions which appear to offend the objective of the SOP Act following the rejection of the dual-track regime to payment claims.

II. Dual-track regime to payment claims

3 Section 5 of the SOP Act provides 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”. In *CHL Construction Pte Ltd v Yangguang Group Pte Ltd*⁴ (“*CHL*”), the High Court held that s 5 of the SOP Act conferred upon a contractor a statutory right to progress payments for construction works which co-existed with a contractor’s contractual right to the same.⁵ This meant that the SOP Act provided claimants with a statutory entitlement to payment founded on the underlying contract, which was separate and distinct from a party’s contractual right to be paid.⁶ This is otherwise known as the “dual-track regime” and will be referred to as such in this article.

4 In *Shimizu v Stargood*, it was suggested that the practical effect of the dual-track regime means that “a subcontractor can validly submit a payment claim under the SOPA notwithstanding

2 [2019] 2 SLR 189.

3 Cap 30B, 2006 Rev Ed.

4 [2019] 4 SLR 1382.

5 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [17]–[18].

6 See *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 at [31].

the fact that such a payment claim would be contrary to the terms of the contract. In other words, the SOPA can override the express terms of the contract”.⁷ Accordingly, even if the claimant has not met the contractual requirements to be entitled to payment, the entitlement to progress payment arises as long as (a) the claimant has carried out the construction work and (b) the work arose out of a contract as defined under the SOP Act.

5 For example, under the dual-track regime, even though the construction contract entitled the employer to delay payment owing to the contractor until the issuance of the Cost of Termination Certificate (the “CTC”), the adjudicator in *ASC Pte Ltd v ASD Pte Ltd*⁸ found that the claimant contractor was entitled to rely on the event of carrying out construction work in its claim for progress payment, without having to wait for the CTC.⁹ The adjudicator reasoned that such a finding was “consistent with construction contracts and the SOP regime in Singapore now operating under a dual track system”.¹⁰

6 The dual-track regime finds its genesis from the Building and Construction Industry Security of Payment Act 1999 (NSW) enacted by the state of New South Wales in Australia (the “NSW SOP Act”) which was later amended by the Building and Construction Industry Security of Payment Amendments Act 2002 and relevant authorities from the New South Wales. It arose from concerns regarding the ease with which main contractors could introduce condition precedents to the rights of payment of subcontractors into construction contracts.

7 This issue was addressed by the *New South Wales Supreme Court* in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*.¹¹ In that case, the claimant had served a payment claim on 20 December 2002. The superintendent (the equivalent of the architect or project director in the case of *Stargood v Shimizu*) only provided a payment schedule (the equivalent of a statutory payment response in

7 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [3].

8 [2015] SCAdjR 70.

9 *ASC Pte Ltd v ASD Pte Ltd* [2015] SCAdjR 70 at [93] and [113]–[115].

10 *ASC Pte Ltd v ASD Pte Ltd* [2015] SCAdjR 70 at [115]

11 [2003] NSWSC 266.

Singapore) on 23 January 2003 – at a time which fell outside of the statutorily prescribed time for service of a payment schedule (ie, within ten business days after service of the payment claim). The respondent tried to argue that the claimant’s claim was not a valid payment claim within the meaning of the NSW SOP Act because the superintendent had not issued a payment certificate to the claimant as required under the construction contract. Given that the claimant had not established his entitlement to the amount claimed under the construction contract, he was not entitled to serve a payment claim under the NSW SOP Act.

8 The New South Wales Supreme Court rejected the respondent’s argument¹² and held that the NSW SOP Act gave rise to a statutory entitlement to a progress payment under a construction contract. Accordingly, the contractor was entitled to proceed even though it had not met a contractual condition precedent for the issuance of a payment claim.

9 However, this appears no longer to be the case. In *Far East v Yau Lee*, the Court of Appeal held that the SOP Act did not provide the contractor with any payment regime independent of the contract. In *Stargood v Shimizu*, the Court of Appeal went further to state emphatically that there is no separate statutory entitlement for a contractor to serve a payment claim under the SOP Act.¹³

III. The decisions in *Far East v Yau Lee* and *Shimizu v Stargood*

10 Before dealing with the implications of the Court of Appeal’s decisions in *Far East v Yau Lee* and *Shimizu v Stargood*, the authors shall summarise the facts of both cases. Both cases concerned contractors who submitted payment claims when their respective construction contracts appeared to disallow or did not contemplate submission of payment claims at that stage.

11 In *Far East v Yau Lee*, the appellant, a developer of an integrated commercial and residential development at Yio Chu Kang/Seletar Road (the “Project”), Far East Square Pte Ltd

12 *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [55].

13 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [31].

(“Far East”), engaged the respondent, Yau Lee Construction (Singapore) Pte Ltd (“Yau Lee”), as the main contractor of the Project. Yau Lee’s engagement was pursuant to a letter of award dated 29 November 2010, which incorporated a modified form of the SIA Conditions of Contract (the “SIA Conditions”). Under cl 31(11) of the SIA Conditions, Yau Lee was obliged to submit its final claim to the architect of the Project before the end of the maintenance period. The Project’s maintenance period ended on 5 August 2015. Despite exceeding the end of the maintenance period, Yau Lee submitted numerous payment claims and the architect issued interim certificates in respect of the aforesaid payment claims. Thereafter, the architect issued the final certificate under the contract. Yau Lee proceeded to submit two further progress payments (*ie*, PC 74 and PC 75) to which no payment responses were submitted. Instead, the architect responded with a letter stating that there would be no further progress payments after the issuance of the final certificate.

12 Consequently, Yau Lee lodged an adjudication application in relation to PC 75. After the adjudicator had issued an adjudication determination in favour of Yau Lee, Yau Lee filed an application to enforce the adjudication determination whereas Far East filed a cross-application to set the adjudication determination aside.

13 The Court of Appeal unreservedly held that PC 75, being a payment claim issued after the final certificate had been issued, fell outside the ambit of the SOP Act and was incapable of supporting the adjudication determination. It held that commencing an adjudication on such a payment claim would be equivalent in effect to commencing an adjudication in the absence of a payment claim.¹⁴ In so doing, the Court of Appeal observed,¹⁵ *inter alia*, that “the SOPA was not meant to alter the substantive rights of the parties under the contract, neither was it intended to give rise to a payment regime independent of the contract. In order to claim for progress payments under the SOPA, it is imperative

14 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [67].

15 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [31].

for the contractor to first establish that he is entitled to such payment under the contract. It follows that in order to determine a contractor's entitlement to submit payment claims under the SOPA, the court must necessarily have regard to the provisions of the underlying construction contract".

14 In *Shimizu v Stargood*, cl 28 of the subcontract provided for payment claims to be submitted by the subcontractor (Stargood) to a project director, who was contractually responsible for certifying the amount due to the subcontractor and providing a payment response. Following this, the main contractor (Shimizu) was only obligated to pay the subcontractor the amount stated by the project director in the payment response.

15 The subcontract was later terminated because of certain alleged breaches on the part of the subcontractor. After termination, the subcontractor served PC12 on the main contractor. The main contractor did not serve a payment response and the subcontractor commenced adjudication under the SOP Act ("AA 203"). The adjudicator dismissed AA 203 because, *inter alia*, PC12 was served after the main contractor had terminated the subcontract and therefore, there was no post-termination payment certification regime capable of supporting an adjudication determination.¹⁶ After a subsequent adjudication ("AA 245") during which the adjudicator held that he was bound by the adjudicator's findings in AA 203, the subcontractor initiated proceedings to set aside AA 203 and AA 245.

16 The Court of Appeal held that the subcontractor had no independent right created by the SOP Act which would allow it to continue serving payment claims on the main contractor after the subcontract had been terminated.¹⁷ In doing so, the Court of Appeal concluded that "there is no separate statutory entitlement to a progress payment where a contract already makes provisions for such payments (assuming, of course, that these provisions do not themselves otherwise violate the SOPA). This eminently makes sense as having two payment regimes existing side-by-side would

16 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [12].

17 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [20].

create intolerable uncertainties”.¹⁸ Therefore, in a situation where the contractual terms on payment certification can no longer operate, a party is no longer entitled to serve a payment claim.¹⁹ In doing so, the Court of Appeal observed that this was a natural conclusion of its decision made in *Far East v Yau Lee*²⁰ as any entitlement to submit a payment claim under the SOP Act stems from the underlying contract.²¹

17 In particular, the Court of Appeal examined Pt II of the SOP Act holistically and found that (at [28]–[32]):

(a) Section 5 of the SOP Act does not create a statutory entitlement to payment as the phrase “under a contract” in s 5 of the SOP Act “serves to premise the right to be paid on the performance of a contract so that if there is a breach of performance, the right to be paid does not crystallise”. Ultimately, the contractor making a claim for progress payments under the SOP Act must show that there is a basis for claiming payment under the terms of the contract in question (at [28]).

(b) Where the contract provides no basis to bring such a claim, and there is no question of any gap in the contract being filled by the provisions of the SOP Act, there is simply nothing to be adjudicated under the SOP Act (at [28]).

(c) Sections 6 and 7 of the SOP Act, which deal with the amount and valuation of progress payments, accord primacy to the contractual agreement between parties. Only if the contract contains no provision will ss 6 and 7 apply as a “gap-filler” to guide the valuation.

(d) The SOP Act limits the parties’ freedom to contract by expressly setting out such limitations in the statutory provisions. For example, s 9 of the SOP Act renders “pay when paid provisions” completely unenforceable.

18 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [31].

19 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [32].

20 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [26] and [28].

21 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [31].

18 On the facts, the court compared the provisions that governed the effect of termination of the subcontract due to wrongdoing by the subcontractor, and termination of the subcontract due to the termination of the main contract for some reason unconnected to any default of the subcontractor. The Court of Appeal found that under the subcontract, while the subcontractor was entitled to payment for work done where the termination was not caused by default of the subcontractor, the subcontractor has not contractually provided for a right to serve a payment claim for work done prior to termination if the subcontract is terminated for its default.²² Accordingly, as the subcontract was not silent as to whether the subcontractor was entitled to submit a payment claim, there is no need for s 10 of the SOP Act to act as a gap-filler.

IV. The significance of both decisions

19 The Court of Appeal's decisions in both *Far East v Yau Lee* and *Shimizu v Stargood* have provided conceptual clarity on the framework of the SOP Act and its relationship with the parties' underlying construction contract.

20 It is now clear that there is no "dual-track" regime under the SOP Act. Prior to the recent decisions in *Far East v Yau Lee* and *Shimizu v Stargood*, the prevailing view appeared to be that a contractor's right to payment under the SOP Act was placed on a premium, overriding any contrary provisions in the underlying construction contract. This may be gleaned from two adjudication determinations, *ALX Pte Ltd v ALY Pte Ltd*²³ ("ALX v ALY") and *AOZ Pte Ltd v APA Pte Ltd*²⁴ ("AOZ v APA"). Both determinations concerned the service of a final payment claim and whether it was made prematurely because of the contractors' alleged failure to comply with the terms of their respective contracts. In both cases, the claimants had served their final payment claims before issuance of the maintenance certificate and the statement of final accounts as required under the terms of their respective construction contracts. The respondents tried to argue that those claimants had no

22 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [45]–[47].

23 [2012] SCAdjR 474.

24 [2013] SCAdjR 299.

entitlement to serve their respective final payment claims because they failed to meet their contractual pre-conditions for payment.

21 The respective adjudicators in *ALX v ALY* and *AOZ v APA* held that such contractual pre-conditions contravened s 36 of the SOP Act (based on a purposive interpretation of the SOP Act). Section 36(1) of the SOP Act stipulates that “the provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement”. Section 36(2)(a) of the SOP Act reinforces this position by providing that any provision in the underlying contract which seeks to either “exclude, modify, restrict or prejudice the operation of this Act” is void. The apparent effect of both ss 5 and 36 of the SOP Act was therefore that the statutory right conferred under the Act was intended to override or negate any contractual restraint which seeks to either negate or diminish the right to progress payment.

22 The Court of Appeal’s comments in both *Far East v Yau Lee* and *Shimizu v Stargood* appear to be a retreat from this view. Accordingly, a well-crafted provision in a construction contract may be able to completely deprive the contractor of his entitlement to progress payments under the SOP Act subject to the operation of s 36 of the SOP Act.

23 Unfortunately, the Court of Appeal’s decision in *Shimizu v Stargood* does not offer any guidance on how s 36 of the SOP Act will be applied by future courts which are bound by its finding that the “SOPA plainly points to a preference for the provisions of the contract between the parties in determining rights to payment”.²⁵ Indeed, the judicial deference to parties’ contractual intentions in the recent court decisions may suggest that s 36 of the SOP Act may be increasingly less effective in protecting a contractor’s entitlement to be paid for work done. Ironically, such considerations were given voice in *CHL*, which *Shimizu v Stargood* overruled.

24 In *CHL*, the High Court gave effect to a clause which mandated that the subcontractor had to withhold its penultimate payment claim until three months after the certificate for statutory

25 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [27].

completion has been received by the main contractor. Such a clause was not voided by s 36(2) of the SOP Act.²⁶ In determining whether a contractual clause offended s 36(2), the court had to find a balance between two competing considerations.²⁷ On one hand, the deferment of the subcontractor's right to submit its penultimate payment claim by virtue of cl 37 appears to offend the object of the SOP Act, which entitles a contractor to payment upon completion of works (s 5 of the SOP Act). This is to facilitate cash flow for parties in the construction industry. On the other hand, the SOP Act accords primacy to the parties' agreement with respect to payment claim timelines.²⁸

25 In the light of the competing considerations, the court found that the clause in question was not voided by s 36(2) for it had a limited scope as it applied to the penultimate payment claim only. Furthermore, the deferment of the penultimate payment claim by three months was justified as it allowed for a final measurement of the work done and certified, and also allowed sufficient time for the subcontractor to complete any uncompleted works or to make good any defects.

26 In this regard, many in the construction industry would know of condition precedent clauses in a construction contract which require payment claims to be submitted with sufficient documentation and supporting evidence to enable the certifier to determine the value of works done under the construction contract or for such drafts to be submitted within a stipulated number of days before the due date for payment claims. There are also clauses in standard form contracts which impose contractual preconditions on service of the final payment claims.²⁹ Such clauses have long been the source of disputes in adjudications.³⁰ In the light of the courts according primacy to the contractual provisions in recent

26 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [41].

27 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [32].

28 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [37].

29 See, for example, cl 31(8) of the Singapore Institute of Architects Building Contract Without Quantities (International) (1st Ed, 2016) and cl 24.3 of the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, 2013).

30 See *ALX Pte Ltd v ALY Pte Ltd* [2012] SCAdjR 474 and *AOZ Pte Ltd v APA Pte Ltd* [2013] SCAdjR 299 above.

decisions, will such clauses be looked upon more favourably or would such conditions be deemed inconsistent with the SOP Act due to s 36 of the SOP Act?

V. Conclusion

27 Following the decision in *Shimizu v Stargood*, the Court of Appeal has rejected the dual-track regime by finding that there is no separate statutory entitlement to a progress payment where a contract already makes provisions for such payments. Moving forward, it appears that there will be more disputes concerning contractual preconditions to the submission of progress claims for the purposes of the SOP Act.

28 Furthermore, the effectiveness of s 36 of the SOP Act has been thrown into further doubt. It appears that s 36 will continue to play an important role in facilitating cash flow by voiding provisions which restrict the operation of the SOP Act. Given that the Court of Appeal has now emphasised that the SOP Act accords primacy to the parties' contractual intentions, how will this affect the primary object of the SOP Act which is to facilitate cash flow in the construction industry? In the meantime, the authors await another decision which will fully consider the operation of s 36 in an era where it appears that there is no longer a statutory entitlement to payment.