

## Singapore Court of Appeal Clarifies that Parties' Underlying Contract Remains First Port of Call for Contractor's Entitlement to Payment under SOPA

The Court of Appeal has, in the context of the Building and Construction Industry Security of Payment Act ("**SOPA**"), held that a contractor's entitlement to submit a payment claim depends on the terms of the underlying contract: *Shimizu Corporation v Stargood Construction Pte Ltd* [2020] SGCA 37 ("**Shimizu Corporation**").

### Our Comments

This case is significant as it clarifies that the SOPA does not recognise a "dual railroad track system" which was previously understood to provide contractors an independent statutory right to payment. In this regard, the Court of Appeal also reiterated its previous holding in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("**Far East Square**") that the SOPA "*was not meant to alter the substantive rights of the parties under the contract, neither was it meant to give rise to a payment regime independent of the contract*". Our earlier update on *Far East Square*, in which our firm acted for the successful appellant, is available [here](#).

*Shimizu Corporation* provides important and valuable guidance on a contractor's right to submit a payment claim for the purposes of claims under the SOPA. It is now established law that primacy would be given to the terms of the underlying contract. Following *Shimizu Corporation*, contractors should be mindful of their rights to serve payment claims under the terms of the contract, even if these rights are accrued from works performed prior to termination.

It is foreseeable that respondents will, in future adjudication proceedings and setting-aside cases in court, increasingly seek to argue that payment claims are not validly served pursuant to the

terms of the contract. This potentially gives rise to tension between the need to uphold the terms of the underlying contract and the need to give effect to the legislative purpose of the SOPA, which is to facilitate cash flow to the downstream contractors.

While recent amendments to the SOPA make it clear that the SOPA applies to contracts that have been terminated, the Court of Appeal in *Shimizu Corporation* clarified that the new amendments affect only contracts which are silent as to the payment certification process, and that primacy will be given to the terms of the contract. As such, upstream contractors or employers may attempt to use unduly onerous provisions to stifle their downstream counterparts' entitlement to serve payment claims upon the contract's termination. To this end, parties should carefully consider whether such provisions have the effect of prejudicing the operation of the SOPA which may result in those provisions being rendered void under Section 36 of the SOPA.

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

### Background Facts

Stargood Construction Pte Ltd ("**Stargood**") was engaged as a subcontractor for Shimizu Corporation ("**Shimizu**") in connection with a project at 79 Robinson Road, Singapore. The parties' contract incorporated, with amendments, the Real Estate Developers' Association of Singapore Design and Build Conditions of Contract (3<sup>rd</sup> Ed, 2013) ("**Sub-contract**").

Clause 28 of the Sub-contract provided for Stargood's payment claims to be submitted to the Project Director appointed by Shimizu. Following

certain alleged breaches of the Sub-contract on the part of Stargood, Shimizu issued a notice of default on 4 March 2019, and proceeded to terminate the Sub-contract.

On 30 April 2019, Stargood served Payment Claim No. 12 (“**PC 12**”) on Shimizu for the sum of \$2,599,359.44 as payment for works done up till April 2019. Shimizu did not serve a payment response to PC 12. Stargood then proceeded to lodge Adjudication Determination No. SOP/AA 203/2019 (“**AA 203**”) on 4 June 2019. Stargood, who appeared to be alive to the possibility that PC 12 had been improperly served, then elected to serve Payment Claim No. 13 (“**PC 13**”) on 31 May 2019 prior to the commencement of AA 203. Shimizu’s payment response to PC 13 served on 21 June 2019 stated the response amount as “nil”.

### The Adjudication Determinations

On 2 June 2019, AA 203 was dismissed by the adjudicator on two distinct grounds:

- (a) First, PC 12 had not been properly served on Shimizu; and
- (b) Second, PC 12 was served after Shimizu had already terminated the Sub-contract. The termination of the Sub-contract rendered the Project Director *functus officio* as regards to his certifying function under the Sub-contract. Since no post-termination payment certification regime existed under the Sub-contract, Stargood could no longer serve a payment claim as the Project Director did not have power under the Sub-contract to certify it.

Stargood subsequently lodged Adjudication Application No. SOP/AA245/2019 (“**AA 245**”) on 5 July 2019 in relation to PC 13. This was dismissed by the adjudicator on 6 August 2019 as he found that Stargood was bound by the determination in AA 203.

Stargood then filed OS 1099 of 2019 to set aside the adjudication determinations in AA 203 and AA 245. It also sought a declaration that it was entitled to serve a further payment claim on Shimizu.

### The High Court’s Decision

The High Court Judge (“**Judge**”) found that Shimizu had only terminated Stargood’s employment, and not the entire Sub-contract. He then found that the effect of the termination of Stargood’s employment meant that it could continue to avail itself of the payment certification process.

The Judge also ruled that the SOPA provided Stargood an independent right to progress payments, even if the entire Sub-contract had been terminated. In doing so, the Judge:

- (a) Reasoned that an interpretation that the SOPA did not apply to works done before termination of the Sub-contract would place sub-contractors and suppliers at the mercy of main contractors or employers, who could resist or delay payment by terminating the underlying contract on tenuous grounds; and
- (b) Placed emphasis on the fact that the Building and Construction Industry Security of Payment (Amendment) Bill (No 38 of 2018) (“**2018 Amendments**”) amended the definition of a “contract” under the SOPA to include a “*construction contract or a supply contract that has been terminated*”.

The Judge thus set aside the adjudication determinations in both AA 203 and AA 245 and granted a declaration that Stargood was entitled to serve further payment claims on Shimizu for work done prior to termination of the Subcontract.

Shimizu appealed to the Court of Appeal against the whole of the Judge’s decision.

## The Court of Appeal's Decision

The Court of Appeal allowed the appeal.

It framed two issues for determination:

- (a) First, whether the SOPA provides an independent right to continue serving payment claims for completed works regardless of the provisions of the underlying contract ("**Issue 1**"); and
- (b) Second, if the first issue is answered in the negative, whether Starwood was entitled under the Sub-contract to serve payment claims on the Project Director following its termination ("**Issue 2**").

*Issue 1: Whether the SOPA provides an independent right to continue serving payment claims for completed works regardless of the provisions of the underlying contract?*

The Court of Appeal held that there is no separate statutory entitlement to a progress payment under the SOPA where a contract already makes provisions for such payments. Having two payment regimes existing side-by-side would create intolerable uncertainties.

The Court of Appeal reasoned as follows:

- In its earlier decision in *Far East Square*, it held that the SOPA is merely a legislative framework to expedite the process by which a contractor may receive payment through the payment certification and adjudication processes, in lieu of commencing arbitral or legal proceedings. It does not, in and of itself, grant the contractor a right to be paid. Before a contractor can make a claim for progress payments under the SOPA, it must establish that it is entitled to such payment under the contract.
- Part II of the SOPA, which deals with a party's entitlement to progress payments, make it clear that there is no separate

statutory entitlement to a progress payment where a contract already makes provisions for such payments (assuming, of course, that the contractual provisions themselves do not contravene the SOPA). In this connection, the Court of Appeal highlighted that:

- Section 5 of the SOPA does not create a statutory right to progress payments which co-exists with any contractual rights to the same. Section 5 provides as follows:

### Entitlement to progress payments

5. Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.

As the Court of Appeal observed in *Far East Square*, Section 5 of the SOPA simply "*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*". Thus, a contractor making a claim for progress payments under the SOPA must show that there is a basis for claiming such payment under the terms of the contract in question.

- Sections 6 and 7 of the SOPA, which relate to the amount and valuation of progress payments, accord primacy to the contractual agreement between the parties. It is only where the contract does not contain provisions for the calculation of the progress payment amount or valuation of progress payments that the SOPA would act as "*gap filler*".
- Similarly, Sections 8 and 9 of the SOPA, which limit the ability of party to set a payment date further than a certain specified duration and prohibit "pay when paid provisions" respectively, are examples of situations where the SOPA limits the parties' freedom to contract as

they see fit. Otherwise, the provisions under the underlying contract remain the first port of call to examine a contractor's entitlement to payment under the SOPA.

- There is no separate statutory entitlement to serve a payment claim under Section 10 of the SOPA (as it then stood) where the underlying contract itself provides a mechanism for the service of the payment claim.

It is also pertinent to note that the 2018 Amendments were not intended to, and do not, change the position where the contract itself contains provisions relating to the amount and valuation of progress payments as well as payment certification. While the SOPA can, in principle, apply to progress payment claims after termination, this does not override the terms of the contract which provide to the contrary.

*Issue 2: Was Starwood entitled under the Sub-contract to serve payment claims on the Project Director following its termination?*

The Court of Appeal held that it was not.

The Sub-contract's payment mechanism was broadly similar to the mechanism in *Far East Square*. Clause 28 of the Sub-contract provided

for the sub-contractor's payment claims to be submitted to the Project Director. The Project Director was then obliged to issue a payment response to Stargood stating the amount that he believed was due to the latter. Following this, main contractor was obliged to pay the sub-contractor only the amount stated by the Project Director in the payment response.

Significantly, clause 33.4 of the Sub-contract, which governed the effects of termination, provided that upon termination of the Sub-contract, Shimizu would be entitled to damages on the same basis as if Stargood had wrongfully repudiated the Sub-contract. No provision was made for Stargood to submit a payment claim in that event.

Instead, clause 33.5 of the Sub-contract provided that if the Sub-contract was terminated due to the termination of the main contract for any reason unconnected to any default of Stargood, Stargood would be paid for work done prior to termination.

As the Sub-contract was *not silent* as to whether Stargood was entitled to submit a payment claim for work done prior to termination, the Court of Appeal found that Stargood was not entitled to serve PC 12 and PC 13 under the terms of the Sub-contract.

If you would like information on this or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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