

Security of payment: claiming a sum that “may” be due?

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A recent decision by Singapore’s highest court has held that a contractor must first establish that it is entitled to payment under the contract in order to claim progress payments under the Security of Payment Act, raising concern over past court decisions and future challenges against payment claims.

Decision: *Far East Square Pte Ltd v. Yau Lee Construction (Singapore) Pte Ltd* [2019] SGCA 36

Background

For an overview of Singapore’s Building and Construction Industry Security of Payment Act (**‘SOP Act’**) and its claims process, please see our earlier [Client Alert](#) on the High Court’s decision in a previous case.

Facts

The parties were involved in the development of an integrated commercial and residential project. The developer was Far East Square Pte Ltd (**‘Far East’**) and Yau Lee Construction (Singapore) Pte Ltd (**‘Yau Lee’**) was engaged as the main contractor.

The parties’ contract incorporated the SIA Form of Contract. Yau Lee continued to submit payment claims even after the architect had issued a final certificate determining the final balance payable from Far East to Yau Lee. Far East did not issue payment responses to these payment claims, and the architect stated that no further progress payments would be made.

Yau Lee brought an adjudication in respect of one payment claim, for which no payment response had been given. Far East argued that the payment claim was invalid since it was submitted after the final certificate had been issued. The adjudicator ruled in favor of Yau Lee, and held that it was prohibited from considering Far East’s argument because Far East had failed to object to the payment claim in a payment response. Far East challenged the adjudicator’s determination in the High Court, but was unsuccessful. The High Court expressly rejected Far East’s argument that a respondent is not obliged to file a payment response if the payment claim is invalid, since it falls outside the SOP Act from the outset. Far East appealed to the Court of Appeal.

Issue

The key questions before the court were whether (1) a payment claim could be submitted under the SOP Act after a valid final certificate was issued under the SIA Form of Contract; and (2) an employer is estopped from raising such an objection if it was not raised in the form of a payment response.

Decision

The Court of Appeal allowed Far East's appeal and set aside the adjudication determination and High Court's decision.

In reaching its conclusion, the Court analyzed the interplay between the SOP Act and SIA Form of Contract, and also clarified its holding in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317.

- **The contractor must be entitled to payment under a contract to make a valid payment claim under the SOP Act**

The Court found that to claim for progress payments under the SOP Act, 'it is imperative for the contractor to first establish that he is entitled to such payment *under the contract*' (at [31]). In a construction contract that incorporates the SIA Form of Contract, the Court deemed the role of the architect to be completed upon the issuance of the final certificate. Therefore, any payment claim that is submitted *after* the architect has issued a valid final certificate is 'outside the ambit of the SOP Act' [28]. The Court found support for its analysis in the phrasing of section 2 of the SOP Act, which defines 'progress payment' as '*a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract*' (emphasis added).

- **The employer is not estopped from objecting for failure to submit a payment response, if the payment is outside the purview of the SOP Act**

The Court also held that an employer does not waive, and will not be estopped from raising, an objection to the adjudicator's jurisdiction on the basis that the SOP Act does not apply to the purported payment claim.

In *Audi Construction*, the Court of Appeal held that the SOP Act imposes a duty on an employer to fully spell out its objections, including 'any' jurisdictional objection, by way of a payment response. However, the Court clarified in the current case that its holding in *Audi Construction* was never intended to apply to a situation where a payment claim fell outside the purview of the SOP Act from the outset. Rather, the discussion on waiver and estoppel in *Audi Construction* was 'predicated on the basis that the contract and the SOP Act define the rights the parties have in relation to each other.' (at [62]). Therefore, if the purported payment claim did not entitle the contractor to commence an adjudication under the SOP Act in the first place, the employer would have no corresponding duty to speak.

Comment

The Court of Appeal's decision raises some concern, particularly because in relation to section 10(1)(a) of the SOP Act, which provides that:

- 10.—(1)** A claimant may serve one payment claim in respect of a progress payment on –
- (a) One or more other persons who, under the contract concerned, is or *may be liable* to make the payment (emphasis added)

This wording indicates that a person may be entitled *under the legislation* to make a payment claim, even if he is not entitled *under the relevant construction contract* to make the payment claim (emphasis added).¹

For instance, this might arise when a construction contract has been terminated and the contract provides that in the event of termination no further payments are required to be made to the contractor. In that case, the contractor may nonetheless have an accrued statutory right to make an enforceable payment claim, even though its contractual right to payment may have ended. This was the case in *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2013] SGHCR 19, in which the High Court determined that the entitlement to a progress payment and to receive payment under the SOP Act is a separate matter from the liability to make payment under the construction contract. The Singapore Court of Appeal in *Far East* was apparently not referred to *Choi Peng Kum*.

¹ Julian Bailey, *Construction Law* (2nd ed. 2016) at §6.188, discussing *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2013] SGHCR 19 at [24].

In its analysis, the *Choi Peng Kum* Court read section 2 of the SOP Act together with section 5, which states:

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 (emphasis added).

The Court determined that, read together, these sections provided that ‘the entitlement to a progress payment arises as long as any person has *carried out any construction work or supplied any goods or services under a construction contract* or a supply contract’ (emphasis added) (at [24]). This appears to be a more inclusive interpretation of the SOP Act compared to the *Far East* Court’s reading of section 2 as a stand-alone provision, in which the Court construed the term ‘under a contract’ to refer to the entitlement to payment, rather than the ‘carrying out of construction work’ or ‘the supply of goods or services.’

The High Court applied the same analysis in *China Railway No. 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd* [2019] SGHC 130, stating that ‘[b]y weeding out invalid payment claims which are not premised on work done or goods or services supplied under a contract (see s 5 SOP Act), s 10(1) SOP Act ensures that the SOP Act adjudication framework will not be abused to resolve construction disputes outside the ambit of SOP Act.’ (at [24]). This phrasing reinforces the notion that for a valid SOP Act payment claim, it is not the claimant’s entitlement to payment that must be found in the contract, but rather the scope and performance of the works, goods, or services provided.²

While *Far East* is an important decision that clarifies the Court’s previous holding in *Audi Construction*, it is likely to bring about challenges against SOP Act payment claims and corresponding adjudications based on jurisdictional objections. Parties may attempt to use the decision to argue that a payment claim is invalid due to the lack of entitlement to payment under the contract, while ignoring any statutory right the contractor may otherwise, have under section 10(1)(a), to make a payment claim.

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² Incidentally, a similar approach has been applied under cognate Australian legislation, including most recently in *Canberra Drilling Rigs Pty Ltd v Hades Pty Ltd* [2019] ACTCA 15.