Case Note

THE FINAL PAYMENT IN A CONSTRUCTION CONTRACT: PRESSURES ON ACCOUNT FINALISATION

Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd [2007] 4 SLR 364

The security of payment regime introduced by the Building and Construction Industry Security of Payment Act confers on contractors, consultants and suppliers a right to progress payment. Since its enactment, there has been uncertainty as to whether the ambit of the regime is confined to progress payments made during the period within which works are carried out in a construction contract or whether it extends to the final payment of a contract. Recently, the High Court addressed this issue in a decision which is expected to change the pace at which accounts are finalised for construction contracts.

CHOW Kok Fong
LLB (Hons), BSc(Bldg) (Hons), MBA,
FRICS, FCIArb, FCIS, FSIArb;
Chartered Arbitrator, Chartered Quantity Surveyor.

1 The Building and Construction Industry Security of Payment Act 2004 ("the Singapore BCISP Act")[1] was enacted to redress some of the difficulties arising from progress payment delays in construction contracts which had, for many years, affected the financial state of contractors, subcontractors, sub-subcontractors and suppliers. The general framework and central features of the regime have been discussed elsewhere[2] but this may be briefly summarised for the purpose of the present note.

2 Section 5 of the Act confers a right to progress payment on a party who undertakes construction work or supplies goods and services in relation to construction work. It thus ensures that the right of a contractor, consultant, subcontractor or supplier ("the claimant") to be paid progressively could no longer be arbitrarily dismissed by the party who has to pay for the works, supplies or services ("the respondent").

1 Act 57 of 2004, which came into operation on 1 April 2005.

2 See, *eg*, Chow Kok Fong, "Reforming Payment Behaviour in the Construction Industry" *Inter Se* (Singapore Academy of Law, May–June 2005) at p 4.

Once a claim for payment has been served, the new regime expects the sum claimed to be paid in full. In the absence of full payment, the respondent has to furnish a payment response within a prescribed period setting out the reasons why he is only paying part of this amount or nothing at all.[3] A claimant who is not satisfied with either the amount paid on the claim or with the respondent's position as stated in the payment response may refer the difference to be settled by adjudication under the Singapore BCISP Act. This is intended to provide a temporary but binding resolution of a dispute pending arbitration or trial. It is carefully prescribed under the regime so that the determination can be delivered speedily. An adjudicator has basically between seven and 14 days to determine a dispute referred to him in accordance with the provisions of the Singapore BCISP Act.

3 The Singapore BCISP Act borrowed to a large extent the model found in the New South Wales Building and Construction Industry Security of Payment Act 1999 ("the NSW Act"). Both the NSW Act and the Singapore BCISP Act emphasised prompt progress payments – that is, the payments made by a building owner to a contractor during the execution of the works. Under most construction contracts, progress payments are typically made on estimates of the value of the works carried out within a designated period. In industry parlance, a progress payment made during the course of a project is normally distinguished from the final progress payment made at the end of the contract. The latter is typically described simply as the "final payment". It is determined after a careful valuation of the work done and after the valuation has been adjusted against the contract price for variations, the payments made previously up to that date and other incidents encountered in the carrying out of the works. The final payment has been aptly described as "the final balancing of account between the contracting parties".[4] Unfortunately, both Acts are silent as to whether the respective security of payment regime extends to the final payment of a construction contract.

4 It is arguable that the policy considerations which apply to progress payments do not apply to a final payment of a construction contract. Firstly, the certification of the final payment is expected towards the end of the contract when the risks associated with non-payment are generally less likely to threaten the delivery and completion of the works. Secondly, it might be thought that since the final payment is an incident encountered at the end of the contract, parties should be able to submit disputes relating to the final payment for final resolution by the courts or arbitration. Thirdly, quantity surveyors generally consider the final payment to constitute a definitive statement of the final financial position between the parties in respect of the subject contract and, accordingly, the

3 Section 11 of the Singapore BCISP Act.
4 *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395 ("*Jemzone*") at [37].

final statement should not be subject to the same pressures of timelines as those encountered with the processing of progress payments. In 2002, the New South Wales Supreme Court held that the term "progress payment" as originally defined under the NSW Act could not be construed to include a final payment which is payable following completion. Austin J in *Jemzone*[5] considered the definition of "progress payment" in that Act and decided that the ambit of the NSW Act does not extend to the amount demanded in the Final Account of a project "regardless of any genuine dispute or offsetting claim".[6]

5 At one level, it may be contended that the position taken by the NSW Supreme Court in *Jemzone* is sustainable if a narrow view is taken of the policy objectives of security of payment legislation which is to ensure that the cash flow of a contractor or service provider is not disrupted during the course of the project. At the broader level, it may be suggested that if the statutory provision is construed in this manner, it does not go all the way to support the policy objective of ensuring prompt payment for construction work or services.[7] Here, the premise is that even the protracted withholding of a final payment arising from the existing dispute resolution routes will exact too high a premium from the contractor or service provider because by blocking payment on one project, this will affect the financial resources of the contractor or service provider for other projects.[8] There is also the consideration that the position taken in *Jemzone* may not be easily reconciled with the fact that the ambit of the Act expressly extends to a contract under which the contractor is to be paid a single, one-off payment. That the New South Wales legislature recognised some of the policy difficulties presented by the *Jemzone* decision was demonstrated when the New South Wales Act was promptly amended so that the Act subsequently expressly provides for the definition of "progress payment" to include "the final payment for construction work carried out (or for related goods and services supplied) under a construction contract".[9]

6 The High Court in Singapore recently considered the subject in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd*[10] and provided what will be welcomed within the industry as a timely

5 *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395.
6 [2002] NSWSC 395 at [39].
7 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis Singapore, 2005) at p 73.
8 Adjudication determination of Philip Jeyaretnam SC in *AU v AV* [2006] SGSOP 9 at [13].
9 See definition of "progress payment" under s 4 of the NSW Act as amended by the NSW Building and Construction Industry Security of Payment Amendments Act 2002.
10 [2007] 4 SLR 364.

"determinative pronouncement".[11] The case involves the payment of a "Final Claim" arising from an earthworks subcontract. The Final Claim was for an amount of $481,156 in respect of which the main contractor paid a sum of $210,554 leaving unpaid the remainder of $270,602. When further payment was not forthcoming, the subcontractor sought adjudication under the Singapore BCISP Act. Before the adjudicator, the main contractor argued that the payment claim had been issued after the Final Claim and that, accordingly, it could not be relied upon to found a claim under the Act. The adjudicator determined that the subcontractor was entitled to receive a further sum of $169,950 plus 5% GST (goods and services tax) and further determined that the main contractor should pay 60% of the costs of adjudication. The total sum awarded in favour of the subcontractor amounted to $182,542. The main contractors took out an originating summons to set aside the adjudication on the grounds that the Act does not extend to "final claims" and that accordingly the adjudicator had no jurisdiction to make the determination in respect of the subject adjudication application.

7 In her judgment, Lai Siu Chiu J reviewed the background of the legislation, noting that the Singapore BCISP Act was modelled on statutes on this subject in other jurisdictions, such as Australia, the UK and New Zealand, and discussed the judgment of the NSW Supreme Court in *Jemzone* in relation to the definition of "progress payments" under the NSW Act as well as the subsequent amendments to that definition. She ruled that on a proper interpretation of the Singapore BCISP Act, the definition "progress payments" should include "final payments". In ruling as she did, the learned judge considered that "final payments" can only be excluded from the ambit of the Act by express wording to that effect:[12]

> It would not suffice to infer a legislative intention to exclude simply on the basis that "final payments" were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. If the legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad ranging definition in the main limb must be determinative.

8 The learned judge was of the view that a plain reading of "a payment that is based on an event or a date" or a "single or one-off payment" clearly encompasses final payments. She observed:[13]

> Such a conclusion is vindicated by the fact that the Act at no time makes any distinction between "final claims" and "non-final claims". Implying such a distinction from the supplementary limb would severely impair

11 [2007] 4 SLR 364 at [22].
12 [2007] 4 SLR 364 at [27].
13 [2007] 4 SLR 364 at [28].

> the protection afforded by the Act, as it would create a *carte blanche* for contractors to renege on the final stages of payment, which would have an equally deleterious effect on cash flow affecting other ongoing construction projects.

9 Lai J considered that the policy objective of the Singapore BCISP Act is to safeguard "the continued viability of contractors who are victims of payment delays or disputes made in bad faith perpetuated by upstream contracting parties" and that, from this perspective, "it makes no sense to draw an artificial distinction between allegedly 'final' and 'non-final' payments, as the withholding of either would create the exact same downstream ripple effect intended to be 'deterred and weeded out' by the Act".[14] Finally, in ruling that the Act should extend to final payments, she said at [35]:

> My interpretation is reinforced by Chow Kok Fong in *Security of Payment and Construction Adjudication* ... who expressed (at p 73) a similar opinion which merits reproduction in full:
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>> [I]f the objective is to encourage good payment behaviour on the part of the various parties down the contractual chain, there is little reason why the payment discipline intended by the BCISP Act should not be allowed to visit final payments as well. The definition of "progress payment" in the Act expressly includes "a payment that is based on an event or a date". Furthermore, the same considerations which justify the coverage of the Act to include contracts which provide for a single, one-off payment would apply to the security of the final payment as well. It is considered that where the final payment is expressed to be triggered by reference to an event such as the issue of a Final Completion Certificate, one view is that the claim for a final payment in such a situation would fall within the description of "a payment that is based on an event or a date" as stipulated in paragraph (b) of the definition of "progress payment" in the Act. On this construction, the definition of "progress payment" under the Act would extend to include a final payment claim made pursuant to the Final Certificate issue under clause 31(10) of the SIA Conditions of Building Contract and a payment claim following the Final Account Certificate issued under clause 32.5(7) of the Public Sector Standard Conditions of Contract.

10 It has been two and a half years since the Singapore BCISP Act came into force. On the whole, the results have been positive and well received within the industry. There is little doubt that the decision in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* settles for the time being what has been one of the few uncertain aspects of the Act. One immediate result of the decision, therefore, is that there is no

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14 [2007] 4 SLR 364 at [33].

urgency to amend the definition of "progress payment" to expressly include a final payment through an amending legislation as was done in New South Wales.

11 An important implication for owners and consultants in the industry, however, will be the impact of the decision on the time taken to process final accounts, the basis of which is used to determine the final payment to the contractor or service provider. The fact that claimants are prepared to invoke the Act to demand timely settlement of final payment claims means that consultants, particularly quantity surveyors, no longer have the luxury to allow themselves anything from three to nine months to process and evaluate final payment claims – together with claims for variations and other adjustments to the contract sum. Although adjudication under the Act is not a final determination of the amounts due to a contractor or supplier, it must be borne in mind that the regime ultimately involves a transfer of the risk of insolvency. Consequently the decision in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* is likely to raise the stakes for the owner if, as a result of the new pressures of time, final accounts are not satisfactorily resolved between the parties. The good news is that these issues have been addressed satisfactorily elsewhere. Following the 2002 amendment Act, the construction industry in New South Wales has come to accept this reality and final payment negotiations and documentation have been substantially simplified and shortened.

12 Given that the Singapore BCISP Act now extends unequivocally to final payments, contractors and service providers may be more prepared to leave matters to be decided by adjudication under the Act. The conventional dispute settlement process in the industry is arbitration but it has been shown to be relatively more protracted and more expensive when compared with adjudication. Unless the losing party in adjudication considers himself seriously aggrieved, he is likely to leave things as decided by the adjudicator. This reinforces the case for each party to ensure that the final accounts of a project and the valuation of the final payment should be undertaken with a sufficient degree of effort and detail. The tendency to relegate these tasks to the end of the project will be clearly untenable: this is a regime which will not be forgiving of a consultant with a huge backlog of work.