

A REVIEW OF 2019 COURT CASES ON ADJUDICATION

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I. Introduction

1 Last year saw a number of important court cases dealing with issues arising from the Building and Construction Industry Security of Payment Act² (“SOP Act”). They cover a variety of topics, including the validity of claims after the issuance of a final certificate under the Singapore Institute of Architects’ Articles and Conditions of Building Contract (“SIA Form of Contract”), claims in terminated contracts, claims for performance bond proceeds, waiver, patent errors, valuation of materials, time for submitting a payment claim, and the nature of adjudication determinations. This article summarises³ the cases on the SOP Act in 2019 and seeks to provide practical takeaways from the courts’ discussion on the issues arising under the SOP Act. As there have been key developments since the end of 2019, this article also considers the 2019 cases in the light of the recent Court of Appeal decision in *Shimizu Corp v Stargood Construction Pte Ltd*⁴ (“*Shimizu Corp*”).

1 The author would like to thank Mr Edwin Lee, founding partner at Eldan Law LLP, for his invaluable comments on an earlier draft of this article.

2 Cap 30B, 2006 Rev Ed.

3 As the focus of this article is on the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and related implications and issues discussed in the court cases in 2019, the summaries provided herein are not intended to be exhaustive summaries of all the facts and issues raised in the cases.

4 [2020] SGCA 37.

II. Jurisdictional objections, waiver and patent errors

A. *Sito Construction Pte Ltd v PBT Engineering Pte Ltd*

2 The respondent in *Sito Construction Pte Ltd v PBT Engineering Pte Ltd*⁵ (“*Sito Construction*”), PBT Engineering Pte Ltd, entered into a contract for the supply and installation of building and drainage works with a sole proprietorship, Afone International (“Afone”), owned by a Mr Loke. A month after entering into the contract, Mr Loke sold Afone to the applicant, *Sito Construction Pte Ltd*, and became an employee of Afone.

3 Afone served a payment claim on the respondent but the respondent did not serve any payment response.

4 The applicant commenced adjudication against the respondent and obtained an adjudication determination in its favour. The respondent applied to set aside the adjudication determination on grounds that (a) the applicant had no cause of action and *locus standi* against the respondent because it was not a party to the contract; and (b) there was a patent error in the adjudicator’s findings as the adjudicator was wrong to find that there was no settlement agreement between the parties.

5 The High Court found that, based on the evidence, the respondent’s intention was to contract with Afone, as a business. If the respondent intended to contract with Mr Loke as a sole proprietor only, the contract would have clearly indicated so.⁶ The contract did not. The High Court held that the contract bound the applicant and respondent despite the change of ownership of Afone and the adjudication determination was thus valid.⁷

6 Further, the High Court held that the respondent had waived its right to raise the jurisdictional objection that there was no contract between the parties. The High Court disagreed with the respondent’s argument that the principles in *Audi Construction*

5 [2019] 4 SLR 804.

6 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [37].

7 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [42].

*Pte Ltd v Kian Hiap Construction Pte Ltd*⁸ (“*Audi Construction*”) were intended to be “limited to the broad meaning of jurisdictional objections pertaining questions of irregularity of procedure or contingent jurisdiction or non-compliance with the statutory condition precedents to the validity of a step in the litigation”.⁹

7 The High Court held that the respondent could have raised the objection in its adjudication response as the respondent had, by then, learnt of the change in ownership.¹⁰ The respondent also did not raise this challenge during the adjudication proceedings and had, on the contrary, admitted that there was a contract between the applicant and respondent and relied on the change in ownership.¹¹

8 The High Court held that there was no patent error as parties had amply ventilated the issue of whether there was a settlement agreement before the adjudicator and the adjudicator had independently considered the parties’ submissions and deliberated on all the evidence before him before deciding that there was no settlement agreement between parties.¹² The court observed that the respondent’s argument on the issue was tantamount to asking the court to review the merits of the adjudicator’s decision and this was something that the court could not do.¹³

B. Comments on case

9 *Sito Construction* echoes the principle laid down in *Audi Construction* that all objections, including jurisdictional objections, must be raised at the earliest possible stage of the adjudication process.

10 However, it is important to note that the High Court’s application of *Audi Construction* in *Sito Construction* was subsequently doubted in *Far East Square Pte Ltd v Yau Lee Construction (Singapore)*

8 [2018] 1 SLR 317.

9 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [50]–[52].

10 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [54].

11 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [55]–[57].

12 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [62]–[63].

13 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [65].

*Pte Ltd*¹⁴ (“FES”). In *FES*, the Court of Appeal clarified that *Audi Construction* does not stand for the proposition that objections in respect of payment claims that fall outside the ambit of the SOP Act can be waived.¹⁵ In particular, with respect to *Sito Construction*, the Court of Appeal opined that where the jurisdictional objection is that there is no contract between the parties, the respondent cannot possibly be estopped from raising this objection at the setting-aside stage notwithstanding its failure to raise it earlier since if there was indeed no contract, the payment claim will be outside the ambit of the SOP Act.¹⁶

11 The respondent’s subsequent appeal to the Court of Appeal was dismissed. The Court of Appeal agreed with the High Court that there was a contract between the applicant and the respondent. No written grounds of decision were issued and only brief oral grounds were rendered. It would have been interesting to see how the Court of Appeal dealt with the separation of entities (sole proprietorship *versus* company) point – especially when there was no novation. After all, at the inception of the contract, it was clearly the sole proprietorship that had entered into the contract.

III. Terminated contract

A. CHL Construction Pte Ltd v Yangguang Group Pte Ltd

12 The issue in *CHL Construction Pte Ltd v Yangguang Group Pte Ltd*¹⁷ (“*CHL Construction*”) was whether a subcontractor’s payment claim submitted after termination of the contract was served prematurely and in contravention of s 10(2) of the SOP Act. The High Court had to consider if cl 37 of the subcontract which stipulated that the subcontractor had to withhold its penultimate payment claim “until *three months after the Certificate of Substantial Completion* has been received by”¹⁸ [emphasis in original] the main

14 [2019] 2 SLR 189.

15 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [56].

16 See *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [65].

17 [2019] 4 SLR 1382.

18 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [14].

contractor remained applicable in stipulating the timeline for the service of the payment claim.

13 The High Court held that the timeline for service of the payment claim is determined at the point the statutory entitlement to payment arises. Termination of the contract subsequent to the point of time the statutory entitlement to a payment had arisen and accrued does not alter the timeline for service of an SOP Act payment claim.¹⁹

14 Further, the High Court also considered that parties' agreement to have the penultimate payment claim submitted at least three months after receipt of the Certificate of Substantial Completion did not contravene s 36(2) of the SOP Act. This is because the scope of cl 37 was limited and the reasons for the deferment of the payment of the penultimate claim, including allowing the main contractor sufficient time to access the total value of the subcontractor's works upon completion, were justified.²⁰

B. Comments on case

15 It would appear from this case that a contractor wishing to engage the adjudication regime under the SOP Act to claim for works done prior to termination may do so even after termination but must adhere to the timelines for payment claims in the contract. This position, however, would have to be revisited in the light of the subsequent Court of Appeal decision in *FES* and the recent Court of Appeal decision in *Shimizu Corp*. In *FES*, the Court of Appeal held that a certifier is *functus* after the issuance of the final certificate and is therefore incapable of issuing a payment response. As a result, no valid payment claim can be issued after the issuance of the final certificate. More importantly, in *Shimizu Corp*, the Court of Appeal had the opportunity to pronounce on the application of the "dual railroad track system" applied in *CHL Construction* and held that the SOP Act does not give rise to a statutory entitlement that is separate and distinct from a party's

19 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [19]–[21].

20 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [38]–[41].

contractual entitlement to progress payment.²¹ Following *Shimizu Corp*, the key question in terminated contracts is thus whether the contract provides for the contractor's entitlement to serve a payment claim following termination.

16 On a related note, *CHL Construction* also shows that while parties' agreement with respect to payment claim timelines are generally respected, the ability of parties to agree on deferring timelines for making claims will be circumscribed by the SOP Act's purpose to facilitate cash flow. Parties cannot agree to indiscriminately defer all progress claims. *CHL Construction* nonetheless suggests that parties can contractually agree to defer claims made after the completion of works so as to give the respondent more time to verify and value all the works done by the contractor. Such contractual agreements are enforceable under the SOP Act and will be upheld.

IV. Valuation of materials

A. Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd

17 Prior to the High Court's decision in *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd*²² ("*Chuang Long*"), the interpretation of s 7(2)(c) of the SOP Act had not been raised before the courts.

18 The High Court dismissed the plaintiff's application to set aside the adjudication determination and agreed with the adjudicator's interpretation that s 7(2)(c) of the SOP Act would allow a claim for materials under two scenarios:

- (a) first, where the materials or components have become the property of the party for whom the construction work is carried out (Scenario A); or
- (b) second, where the materials or components have yet to become the property of the party for whom the

21 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [25]–[32].

22 [2019] 4 SLR 901.

construction work is carried out but will become so once payment is made (Scenario B).

19 The High Court held that Scenario A incorporated the common law position that property in the materials and fittings once incorporated into or affixed to a building will become the property of the main contractor for whom the construction work is carried out.²³ Scenario B, on the other hand, goes beyond the common law affixation test. Materials could be subject to valuation under s 7(2)(c) of the SOP Act even if they have neither been delivered nor affixed to the building, as long as they were fabricated for the construction contract.²⁴

B. Comments on case

20 It bears emphasising that the valuation mechanism set out in s 7(2) of the SOP Act only applies where the contract does not provide how the works, good or services supplied are to be valued. In *Chuang Long*, it was agreed that the contract was silent on how the works were to be valued and hence s 7(2) of the SOP Act applied.²⁵

21 However, in the absence of such an agreement as in *Chuang Long*, the issue of whether the contract does provide for the valuation of the specific work, goods or services supplied may be controversial. In the case where the contract only provides for valuation of the finished or constructed product and not the yet-to-be installed components of the product, it may be argued that the contract does not contain a provision for valuation of the components. To avoid potential payment disputes in contracts where the contractor is engaged to supply and install, there should be clear provisions in the contract setting out the proportion of valuation for fabricated but undelivered materials, and delivered but uninstalled materials on site.

23 *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [21] and [24].

24 *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [22] and [24].

25 *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [13].

22 Even in cases of termination, as in the case of *Chuang Long*, the High Court’s interpretation of s 7(2)(c) ensures that the subcontractor is nonetheless paid for the materials it supplies and mitigates the risk of non-payment simply due to a (possibly wrongful) termination.

V. Validity of payment claim after final certificate, SIA Form of Contract and waiver

A. Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd

23 This case involved the Court of Appeal’s determination of how the terms of the SIA Form of Contract interact with the provisions of the SOP Act. In particular, the Court of Appeal held that any payment claim submitted after the architect has issued the final certificate is outside the ambit of the SOP Act.²⁶ In the SIA Form of Contract, the architect becomes *functus officio* after the final certificate and the entire certification process under the contract comes to an end.

24 Fundamentally, the Court of Appeal highlighted that the right of a contractor to be paid ultimately stems from the construction contract. The SOP Act is a legislative framework to “expedite the process by which a contractor may receive payment” and “it does not, in and of itself, grant the contractor a *right to be paid*” [emphasis in original].²⁷

25 As the architect’s certificate is a “condition precedent” to the contractor’s right to receive payment under the SIA Form of Contract, the contractor would no longer be able to receive progress payments once the architect loses his capacity to issue such certificates. Hence, any payment claim that is issued after the architect is *functus officio* would be incapable of being certified

26 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [28].

27 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30]–[31].

by the architect so as to entitle the contractor to progress claims under the SOP Act.²⁸

26 Further, objections in respect of payment claims that fall outside the ambit of the SOP Act cannot be waived and the Court of Appeal clarified that its holding in *Audi Construction* in relation to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell outside the purview of the SOP Act from the outset.²⁹

B. Comments on case

27 *FES* makes clear that a claimant must first address the issue of whether it is contractually entitled to payment in order to establish its entitlement to submit a claim under the SOP Act. It decided that the SOP Act does not create an independent right to be paid. Thus, the commonly referred concept of the “dual track” mechanism for payment – contractual and statutory – was rejected by the Court of Appeal. This rejection of the “dual track” mechanism has also been confirmed most recently in the Court of Appeal's decision in *Shimizu Corp.*³⁰

28 Contractors who use the SIA Form of Contract and wish to engage the adjudication process under the SOP Act should do so prior to the architect's issuance of the final certificate as *FES* makes clear that any claims submitted after the final certificate cannot be adjudicated upon under the SOP Act. Employers should also ensure that the architect timeously issues the final certificate so that any adjudication long after works are completed can be avoided.

29 The application of *FES* may even extend to every situation where the person who is due to issue a payment response is

28 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [39].

29 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [56].

30 The Court of Appeal rejected the “dual track” proposition that may have been suggested in the following cases: *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852; *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210; and *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382.

considered to be *functus*, whereupon it may seem that, applying the analysis in *FES*, no valid payment claim under the SOP Act may thereafter be issued. In fact, the Court of Appeal in *Shimizu Corp* expressed its provisional observation that there is no distinction between a case where the payment certifier becomes *functus officio* as a result of the completion of the contract, or the termination of a contract.³¹ This has implications for contracts which are terminated, and where there are no saving provisions to allow the claim and response mechanism under the contract to survive the termination.

30 Further, it also remains to be seen if the Court of Appeal's clarification of *Audi Construction* that objections in respect of payment claims that fall outside the ambit of the SOP Act cannot be waived continues to be the position in law and is upheld as a further exception to the present s 27(7) of the SOP Act. Section 27(7), which only came into force after *FES*, provides that a respondent may not commence setting-aside proceedings on the ground which objection was not included in the adjudication response unless (a) the circumstances of the objection to support the ground only arose after the lodgement of the adjudication response; or (b) the respondent could not reasonably have known of the circumstances.

VI. Payment claim and performance bond proceeds

A. China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd

31 The High Court in *China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd*³² (“*China Railway*”) was concerned with the issue of whether a payment claim entirely for performance bond proceeds is a valid payment claim within the parameters of s 10(1) of the SOP Act. The High Court found that a payment claim for performance bond proceeds flies in the face of clear statutory wording since a claim for bond proceeds cannot be considered as a claim for works done by the

31 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [51].

32 [2019] 5 SLR 422.

subcontractor as required under s 5 of the SOP Act.³³ The court also held that the performance bond functions as a deposit or security as a result of a bargain struck between the parties and allowing the payment claim would thus defeat the bargain struck between the parties.³⁴

32 In holding that the claim for performance bond proceeds is in breach of s 10(1) of the SOP Act which is a mandatory provision,³⁵ the court distinguished the case of *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd*³⁶ (“*SH Design*”) as the bond proceeds in *SH Design* only featured at the accounting stage after a valid payment claim had been filed;³⁷ in *SH Design* the payment claim was for work done and it was the respondent who had raised the bond proceeds in its payment response.

B. Comments on case

33 As the court was dealing with a payment claim that was exclusively for performance bond proceeds without any other claims for construction work, it is arguable that if a payment claim included other claims for works done apart from a claim for performance bond proceeds, the payment claim would not be invalid in its entirety. The adjudicator would be permitted and obligated to still consider the claims for construction work that properly fall within the SOP Act.

34 There are situations where a claim for bond proceeds may also be disguised. Instead of making a positive and express claim for bond proceeds, a claimant may present its claim by reducing the amount previously paid by the respondent by the bond moneys. It cannot be that the principles laid down in *China Railway* can be so

33 *China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [39]–[42].

34 *China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [43]–[45] and [47].

35 *China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [25].

36 [2018] SGHC 133.

37 *China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [36].

easily circumvented by concealing the claim for bond proceeds in the presentation of the claim.

35 Ultimately, accounting of the bond proceeds can still be made at the final accounts stage or be separately pursued in arbitration or in court.

VII. Timeline for lodging adjudication application

A. *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd*

36 The sole issue before the High Court in *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd*³⁸ (“*Lendlease*”) was whether the adjudication application lodged by the defendant was out of time, in breach of s 13(3)(a) of the SOP Act. This turned on whether the time for lodging the adjudication application ran from the date of physical service of the payment claim, or the date stated in the payment claim.

37 The defendant had served payment claim No 29 (“PC 29”) on the plaintiff on Friday, 18 January 2019 but PC 29 was dated 20 January 2019, which was a Sunday.

38 Clause 7.1(c)(i) read with Annexure Part A of the contract provided for payment claims to be made on the 20th day of each calendar month. It was also expressly provided at cl 1.2 of the contract that the payment claim is to be given on the preceding business day if the 20th day was a non-business day.

39 The defendant disagreed with the plaintiff’s argument that the payment claim should be given on Friday, 18 January 2019, and took the position that the operative date was 20 January 2019, the date on which PC 29 was dated. In so arguing, the defendant heavily relied on the Court of Appeal’s decision in *Audi Construction*.

40 The High Court held that the adjudication application was lodged out of time and proceeded to set aside the adjudication

38 [2019] SGHC 139.

determination. Pursuant to cl 1.2, the day that the defendant was required to submit its payment claim was altered from Sunday to Friday, 18 January 2019.³⁹ The case of *Audi Construction* was distinguishable as there was no express contractual provision in that case for the situation where the date for serving a payment claim falls on a Sunday.⁴⁰

41 The High Court held that the plaintiff had served its payment claim on the operative date of 18 January 2019 and time would run from that date. The plaintiff's act of post-dating the payment claim did not have any effect on the operative date of the payment claim.⁴¹

B. Comments on case

42 To avoid the uncertainty that may arise from parties attempting to rely on arguments of “good reason” or the “practical and sensible way” of complying with the contract as reasoned in *Audi Construction*⁴² to justify the validity of the service of the payment claim, this case highlights that parties should ensure that there are express provisions in the contract that provide for situations where the date of the payment claim submission falls on a weekend or non-working day. This would also avoid having to post-date the payment claim since *Lendlease* suggests, notwithstanding *Audi Construction*, that the act of post-dating does not have any effect on the operative date of the payment claim.

39 *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd* [2019] SGHC 139 at [14].

40 *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd* [2019] SGHC 139 at [16]–[18].

41 *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd* [2019] SGHC 139 at [19].

42 *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd* [2019] SGHC 139 at [17].

VIII. Adjudication determination, waiver and patent error

A. **Tong Hai Yang Construction Pte Ltd v Little Swan Air-Conditioning & Engineering Pte Ltd**

43 The case of *Tong Hai Yang Construction Pte Ltd v Little Swan Air-Conditioning & Engineering Pte Ltd*⁴³ (“*Tong Hai*”) concerned the plaintiff’s application to set aside an adjudication determination on the sole ground that the adjudicator overlooked a material patent error when he accepted the variation orders (“VOs”) as part of the contract between parties. It was undisputed that the plaintiff had failed to file a payment response to the defendant’s payment claim.

44 The High Court held that the documents sent by the defendant to the plaintiff prior to the disputes in relation to the payment claim showed that the plaintiff was put on notice of the VOs completed by the defendant and thus waived its right to object to the VOs on the basis that they fell outside the contract.

45 Pursuant to a letter dated 12 July 2018 which the plaintiff had sent long before the adjudication, the plaintiff acknowledged receipt of a form setting out the quotations for 19 out of 21 of the VOs claimed at the adjudication. Further, the final account document submitted by the defendant had expressly claimed for the VOs, but the plaintiff did not raise any objections to the final account document. These, coupled with the plaintiff’s concession in its further letter of 26 April 2019 that only some, but not all, of the VOs were invalid caused the High Court to hold that that plaintiff had clearly waived its right to object to the VOs on the basis that they fell outside the contract.⁴⁴

46 Notwithstanding that the plaintiff had waived its right to object to the VOs on the basis that they fell outside the contract, the High Court highlighted that the adjudicator must still independently assess whether the defendant was entitled to the

43 [2019] SGHC 188.

44 *Tong Hai Yang Construction Pte Ltd v Little Swan Air-Conditioning & Engineering Pte Ltd* [2019] SGHC 188 at [16]–[23].

payment for the VOs, in so far as there were no patent errors in the payment claim and its supporting materials.⁴⁵

47 The High Court found that since the adjudicator had clearly considered the material before him in relation to the plaintiff's allegation that the VOs fell outside the contract, the plaintiff was not allowed to re-adjudicate the adjudicator's finding that the VOs formed part of the contract.⁴⁶ The plaintiff's application to set aside the adjudication determination was dismissed.

B. Comments on case

48 *Tong Hai* highlights the need for the employer or respondent to promptly raise its substantive objections to the contractor if it disagrees with the contractor's claims. It is to the detriment of the employer or respondent if it remains silent or acknowledges receipt of the contractor's documents, without raising an objection to the claims which the employer or respondent does not agree to since waiver may be inferred from such non-objection.

49 Employers or respondents should also be more conscious of the legal implications that may arise from their day-to-day communications during the ordinary course of correspondence with the contractor. This is especially since correspondence between the parties, even communications that took place a long time ago, may be raised as concessions to the validity of the contractor's claims during subsequent adjudication proceedings.

45 *Tong Hai Yang Construction Pte Ltd v Little Swan Air-Conditioning & Engineering Pte Ltd* [2019] SGHC 188 at [26].

46 *Tong Hai Yang Construction Pte Ltd v Little Swan Air-Conditioning & Engineering Pte Ltd* [2019] SGHC 188 at [29]–[30].

IX. Jurisdiction and claims by subcontractor after termination of subcontract

A. Stargood Construction Pte Ltd v Shimizu Corp; Shimizu Corp v Stargood Construction Pte Ltd

50 The plaintiff subcontractor in *Stargood Construction Pte Ltd v Shimizu Corp*⁴⁷ applied to the High Court to set aside two adjudication determinations, namely Adjudication Determination No SOP/AA 203/2019 (“AD 203”) and Adjudication Determination No SOP/AA 245/2019 (“AD 245”). In AD 203, the adjudicator dismissed the plaintiff’s adjudication application as he found that the plaintiff’s payment claim No 12 was improperly served and that the plaintiff was not entitled to serve a payment claim after termination of the subcontract as the project director was *functus officio* as regards his certifying function under the subcontract.

51 The plaintiff took the position that the determination in AD 203 was only on jurisdictional grounds and not on the substantive merits of the claim and proceeded to serve its payment claim No 13 for the same sum claimed in payment claim No 12. The plaintiff commenced a further adjudication, SOP/AA 245/2019.

52 In AD 245, the adjudicator dismissed the adjudication application as he determined that pursuant to s 21(1) of the SOP Act, the plaintiff was bound by the determination of the issues determined in SOP/AA 203/2019. In particular, in respect of the fundamental issue that upon termination of the subcontract, the plaintiff was not entitled to submit any further payment claim under the SOP Act. The plaintiff had, in its application to the High Court, also sought a declaration that it was entitled to serve a further payment claim.

53 The High Court held that the Court of Appeal’s observations of the architect being *functus officio* in *FES* was inapplicable to the present case as the situation before the Court of Appeal in *FES* was in relation to completed works where the maintenance period had

47 [2019] SGHC 261.

expired and the architect had already issued a final certificate for the project.⁴⁸

54 In determining that the project director was not *functus officio* as regards his certifying function upon termination of the plaintiff's employment, the High Court found it material that (a) the defendant's notice of termination under cl 33.2 of the subcontract only terminated the plaintiff's employment and not the entire subcontract; and (b) there were also no provisions in the subcontract that prohibited the plaintiff from serving payment claims in a situation where the plaintiff's employment was terminated.⁴⁹

55 In reliance of the decisions in *CHL Construction, AU v AV*⁵⁰ and *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd*,⁵¹ the High Court held that a contractor who has performed works under the construction contract can continue to claim for such works even after its employment has been terminated as the contractor has an accrued statutory entitlement to payment that survives the termination.⁵² The High Court also considered that the Parliamentary debates on the recent amendments⁵³ supported this position.⁵⁴

56 The High Court went on to find that there were grounds to set aside both AD 203 and AD 245 as the adjudicator's error in finding that the plaintiff had no entitlement to serve a payment claim for works done prior to termination of its employment went to the jurisdiction of both adjudicators in SOP/AA 203/2019 and

48 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [12]–[13].

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

50 [2006] SGSOP 9.

51 [2007] 4 SLR(R) 364.

52 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [19].

53 Specifically, the amendment to expand the definition of “construction contract” in s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) to include “a construction contract or a supply contract that has been terminated”.

54 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [22]–[24].

SOP/AA 245/2019.⁵⁵ The High Court severed and set aside only part of AD 203 as the adjudicator’s dismissal of the adjudication application on the ground of improper service of payment claim was not challenged by the plaintiff.⁵⁶

B. Comments on cases

57 The High Court’s pronouncements must now be considered in the light of the defendant’s successful appeal in *Shimizu Corp*. The Court of Appeal found that the subcontract terms preclude the service of payment claims following termination under cl 33.2.⁵⁷ As the subcontract was not silent as to whether the plaintiff was entitled to submit a payment claim for work done prior termination under cl 33.2, there was no question of any gap-filling by s 10 of the SOP Act.⁵⁸

58 Departing from the High Court’s reliance of a statutory entitlement to serve a payment claim, the Court of Appeal in *Shimizu Corp* has made clear that there is no separate statutory entitlement to serve a payment claim under ss 5 and 10 of the SOP Act. While earlier cases⁵⁹ may have suggested that there is a “dual railroad track system”, the Court of Appeal has rejected such an interpretation of the SOP Act and has unequivocally held that there is no separate statutory entitlement to progress payment where the contract already makes provisions for such payments; the SOP Act has a “gap-filing” role and the statutory right to progress payment under the SOP Act is invoked only where there are no relevant contractual provisions.⁶⁰ In a situation where under the terms of the contract the payment certification mechanism can

55 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [25].

56 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [26]–[27].

57 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [38] and [44]–[48].

58 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [48].

59 *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852; *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210; *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382.

60 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [26]–[32].

no longer operate, a party is no longer entitled to serve a payment claim under the SOP Act.⁶¹

59 Significantly, the Court of Appeal's pronouncement indicates that unless the payment claim and certification provisions are preserved post-termination, the contractor cannot submit a valid payment claim under the SOP Act after termination. While the Court of Appeal's finding that there was no entitlement to serve a payment claim post-termination was premised on the *express* provision of the subcontract, the Court of Appeal's observations in *Shimizu Corp* suggest that even in the absence of express clauses preserving the payment claim and certification mechanism post-termination, the effect of termination is to render the certifier *functus officio* under the contract such that no valid payment claim can be served.⁶²

60 Moving forward, it will be interesting to see the extent to which the Court of Appeal's observation on the payment certifier becoming *functus officio* as a result of termination will be applied and how it will interplay with the new s 4(2)(c) of the SOP Act. Section 4(2)(c) contemplates that terminated contracts will, as a starting point, attract the application of the SOP Act unless there are express provisions permitting the suspension of progress payments. The Court of Appeal in *Shimizu Corp* recognised that the new amendments affirmed in principle the applicability of the SOP Act to terminated contracts, but held that this was nonetheless still subject to contractual provisions relating to termination of the contract.⁶³ If the effect of termination of the contract is to render the payment certifier *functus officio*, the starting point in terminated contracts would appear to be at odds with that contemplated under s 4(2)(c) – there can be no valid payment claim served under the SOP Act after termination unless expressly provided for. Further, as s 4(2)(c) may also have been drafted with consideration given to

61 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [32].

62 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [51]: the Court of Appeal did not think that a distinction can be drawn between a case where the payment certifier becomes *functus officio* as a result of completion of the contract (as in the case of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 (“FES”)), or the termination of a contract. Express doubt was cast on the High Court's finding that FES was inapplicable.

63 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] SGCA 37 at [36].

the “dual track” cases⁶⁴ that existed prior to its introduction,⁶⁵ but which have since been rejected by the Court of Appeal, clarity on how the concept of *functus officio* applies to terminated contracts under the SOP Act will be much welcomed.

X. Adjudication determinations

A. **United Integrated Services Pte Ltd v Civil Tech Pte Ltd; United Integrated Services Pte Ltd v Harmonious Coretrades Pte Ltd; Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd**

61 The subcontractor, Civil Tech Pte Ltd (“Civil Tech”) was engaged by the main contractor, United Integrated Services (“United”) to carry out additions & alterations works at a factory.

62 Civil Tech obtained an adjudication determination in its favour and sought leave to enforce the adjudication determination (“AD1”).

63 However, based on another adjudication application by Civil Tech on a subsequent payment claim, a second adjudication determination (“AD2”) determined that no amount was payable by United to Civil Tech. In AD2, the adjudicator took into account AD1 and considered other claims for work done, liquidated damages and backcharges which were not before the adjudicator in AD1.

64 Upon United’s application to stay the enforcement of AD1, the High Court in *United Integrated Services Pte Ltd v Civil Tech Pte Ltd*⁶⁶ (“*United (HC)*”) held that given that the ADs are “essentially cumulative” in nature, it would not have been intended by the drafters of the SOP Act for both adjudication determinations to be independently enforceable as this could lead to a windfall for

64 *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852; *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210; *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382.

65 The Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) came into operation on 15 December 2019.

66 [2019] 3 SLR 1426.

subcontractors.⁶⁷ The High Court held that only the final AD, which accumulated the findings of all prior ADs and took into account all matters reasonably relevant to the adjudication, was enforceable. It thus ordered the stay of enforcement of AD1.⁶⁸

65 Separately, Harmonious Coretrade Pte Ltd (“Harmonious”) who was the subcontractor of Civil Tech had obtained a final garnishee order against United. In the High Court, United succeeded in its application to set aside the final garnishee order on the basis that AD2 superseded AD1 and the debt arising from AD1 had been extinguished.⁶⁹ Further, the final garnishee order would have the effect of unduly favouring Harmonious at the expense of United in Civil Tech’s insolvency.⁷⁰

66 On appeal, while the Court of Appeal in *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd*⁷¹ (“*Harmonious (CA)*”) agreed with the High Court’s finding that the court had the power to set aside a final garnishee order under its inherent power to prevent injustice, the Court of Appeal held that the present case did not warrant the exercise of that power.⁷²

67 Significantly, the Court of Appeal disagreed with the High Court’s finding in *United (HC)* that adjudication determinations supersede one another. The Court of Appeal held that adjudication determinations are each enforceable independently unless or until impugned on the grounds provided in s 21(1) of the SOP Act.⁷³ The Court of Appeal also rejected the notion that only the final adjudication determination is enforceable as such reasoning would

67 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [16]–[18].

68 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [23]–[24].

69 *United Integrated Services Pte Ltd v Harmonious Coretrades Pte Ltd* [2019] SGHC 126; the High Court took into consideration its decision in *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426.

70 *United Integrated Services Pte Ltd v Harmonious Coretrades Pte Ltd* [2019] SGHC 126 at [46]–[50].

71 [2020] 1 SLR 206.

72 *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [41]–[43].

73 *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [45]–[46].

run counter to the SOP Act’s underlying philosophy of “pay now, argue later”.⁷⁴ Further, AD2 did not have the effect of creating a debt owing from Civil Tech to United. Instead, all that was decided was that under AD2, United did not have to pay Civil Tech on that payment claim.⁷⁵ The net effect of both AD1 and AD2 is that the sums owing under AD1 still stood.⁷⁶

B. Comments on cases

68 The Court of Appeal’s holding that each adjudication determination is independently enforceable is significant. It highlights the importance of respondents ensuring that the payment response to each payment claim contains all their reasons and objections for withholding payment. A subsequent and more favourable adjudication determination obtained by the respondent does not alter or extinguish the sum that may be payable under an earlier adjudication.

69 It is interesting to note that while the Court of Appeal had accepted that the consequence of upholding the final garnishee order is that Harmonious would have its claim against Civil Tech satisfied in full whereas United would have to prove its claim in Civil Tech’s liquidation and possibly receive less than the full value of its claim, the Court of Appeal did not agree that it warranted the setting aside of the final garnishee order. The Court of Appeal nonetheless left open the possibility that the final garnishee order would constitute a preferential discharge of Harmonious’ claim.⁷⁷ Nonetheless, the Court of Appeal’s judgment in *Harmonious (CA)* highlights that once a claimant obtains an adjudication determination in its favour, a debt is created and subsequent supervening events or arguments do not alter or extinguish the

74 *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [52].

75 *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [53].

76 *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [55].

77 *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [62].

debt unless any of the events set out in ss 21(1)(a) to 21(1)(c) have occurred.

XI. Conclusion

70 Overall, 2019 saw significant decisions, spanning a wide range of topics, on the SOP Act. Welcomed clarifications on *Audi Construction* were made and the courts also took the opportunity to provide guidance on issues not previously before the courts; that is, the interpretation of s 7(2)(c) of the SOP Act and the implications of multiple adjudication determinations. In addition, the court's judgments on the issues of waiver, patent errors and the validity of claims made after the final certificate in the SIA Form of Contract as well as in terminated contracts have significant implications on and provide new insights into the existing body of law. They will no doubt be relied on by the various stakeholders in the construction industry.

71 Notwithstanding that there have been recent amendments to the SOP Act that came into force on 15 December 2019, the sections of the SOP Act discussed in the cases above have not been amended and the principles laid down in the cases will continue to be relevant.