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NO ROSE WITHOUT A THORN

Claims for damage, loss or expense under the new adjudication regime

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I. Introduction

1 The Building and Construction Industry Security of Payment (Amendment) Act 2018[1] ("Amendment Act") and the Building and Construction Industry Security of Payment (Amendment) Regulations 2019[2] ("Amendment Regulations") came into effect on 15 December 2019. While the Amendment Act and the Amendment Regulations seek to codify existing case law and remove ambiguities associated with the interpretation of the Building and Construction Industry Security of Payment Act[3] ("SOP Act"), there are still lingering questions concerning the interpretation of several key provisions. The purpose of this article is to examine some of the potential practical problems arising out of the new s 17(2A) of the SOP Act and to offer a perspective on these issues.

1 Act 47 of 2018.
2 S 780/2019.
3 Cap 30B, 2006 Rev Ed.

II. What is the scope of the Building and Construction Industry Security of Payment Act for damage, loss or expense?

A. Purpose, effect and controversies surrounding the new section 17(2A)

2 The new s 17(2A) of the SOP Act provides:

> (2A) In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to *damage, loss or expense* that is not supported by —
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> > (*a*) *any document showing agreement* between the claimant and the respondent *on the quantum* of that part of the payment claim or the payment response; or
> >
> > (*b*) *any certificate or other document that is required to be issued under the contract*.
>
> [emphasis added]

3 The effect of this provision is to reduce the ambit of claims relating to damage, loss, and expense that may be dealt with in adjudication unless the claim falls within the exception of (a) having a document showing agreement between parties as to the quantum or (b) there is a certificate or other document required to be issued under the contract.

4 The purpose of this amendment is to address the lengthening of the adjudication process due to the introduction of complex claims by claimants and respondents on damages, losses or expenses in adjudication.[4] It was reported that one adjudication case took 129 days to complete as the adjudicator required time to review the claims for prolongation costs which accounted for 70% of the total claimed amount when the usual time for an adjudication to complete would be about 21 to 28 days from application to payment.[5] The intention behind

4 *Parliamentary Debates, Official Report* (2 October 2018), vol 94 (Zaqy Mohamad, Minister of State for Manpower and National Development).

5 *Parliamentary Debates, Official Report* (2 October 2018), vol 94 (Zaqy Mohamad, Minister of State for Manpower and National Development).

the amendment is therefore to encourage parties to mediate, litigate or arbitrate complex disputes which are more appropriate mediums for resolving such disputes.

5 Some have welcomed the change as in practice, some claimants do abuse the adjudication regime by introducing complex claims such as disruption, prolongation and acceleration claims while respondents would likewise introduce complex defects and liquidated damages claims. This may lead to an adjudicator having to contend within a short period of time challenging issues of, for instance, whether a delay is a concurrent and/or a critical delay which in turn would require expert evidence. The exception in the new s 17(2A)(*a*) appears to limit damage, loss or expense claims in adjudication to instances where a party has reneged on an agreement on the quantum for damage, loss or expense, for example by not making timely payment or not making payment of the correct amount. As for s 17(2A)(*b*) of the SOP Act, it appears to limit damage, loss or expense claims in adjudication to claims with supporting documents (whether certificates or otherwise) which are required to be issued by a neutral third party in the contract. Examples of such documents include payment certificates, certificates of substantial completion, *etc*, which are usually issued by a neutral third party to a contract.[6] A broad exception to include any documents required to be issued by either a contractor or an employer under a contract would undermine the intention behind the SOP Act amendments to limit complex claims.

6 Critics of the amendments view the new s 17(2A) as detracting from the intention of the SOP Act to deliver cash flow and roughshod justice. The effect of s 17(2A) now shifts the burden of proving damage, loss and expense claims back to the parties themselves or to the certifier when the SOP Act was originally conceived to deal with the inadequacies of the

6 Building and Construction Authority, "Security of Payment (Amendment) Act/Regulations" (2019) at slide 10 <https://www1.bca.gov.sg/docs/default-source/docs-corp-regulatory/slides.pdf?sfvrsn=2d9b002b_2> (accessed 20 July 2021).

certifier.[7] There have been no reports from adjudicators indicating they had problems dealing with claims on damage, loss and expense in past adjudication cases.[8] The filtering out of many construction cases from adjudication through s 17(2A) except for cases involving work done may lead to a reduction in SOP Act cases and a corresponding increase in mediation, litigation and/or arbitration cases.

7 Whichever camp one may be in, some questions in relation to claims on damage, loss and expense remain:

(a) What constitutes "damage, loss or expense" under s 17(2A)?

(b) What would qualify as a "document showing agreement between the claimant and the respondent on the quantum" under s 17(2A)(*a*)?

(c) What would qualify as a "certificate or other document that is required to be issued under the contract" under s 17(2A)(*b*)?

B. Definition of "damage, loss or expense" under section 17(2A)

8 In relation to the first issue (a), the new s 17(2A) is silent on the definition of "damage, loss or expense". It therefore allows an ordinary interpretation of the words as is commonly understood in the construction industry.

9 The word "damage" stems from a breach of contract and aims to restore the parties to a position where there is no breach.[9] Damages would extend to instances of acceleration costs[10] and

7 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ss 17(2A)(*a*) and 17(2A)(*b*). See also Chow Kok Fong *et al*, *Amendments to the SOP Act: a Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet and Maxwell, 2019) at para 2.004.

8 Chow Kok Fong *et al*, *Amendments to the SOP Act: a Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet and Maxwell, 2019) at para 2.006.

9 Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 4.112.

10 Acceleration costs refer to costs arising from additional capital and manpower resources which are deployed to increase the pace of activities on site: see

(cont'd on the next page)

liquidated damages.[11] The word "loss" has been defined to mean "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way".[12] As for the meaning of "expense", it has been described as "[a]n expenditure of money, time, labour, or resources to accomplish a result".[13] "Loss and expense", which refers to loss suffered by a contractor as a result of the disruption or prolongation of the construction period,[14] has been considered to fall within the definition of "loss or expense" under s 17(2A).[15] They include claims such as disruption costs[16] and prolongation costs.[17]

10 Two recent Singapore cases provide further guidance on the meaning of "damage, loss or expense" under s 17(2A).

11 In *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd*[18] ("*Orion-One*"), the Court of Appeal had occasion to comment on the meaning of "damage, loss or expense" in s 17(2A) in considering an appeal on a setting aside of an adjudication

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Halsbury's Laws of Singapore: Building and Construction vol 2 (LexisNexis, 2021) at para 30.204. See also *AOB Pte Ltd v AOC Pte Ltd* [2013] SCAdjR 66 which decided at [49] that where an acceleration claim is not made pursuant to the terms of a contract, it would accordingly be a claim for "damages" and cannot be a claim under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

11 Liquidated damages are calculated at a specified daily or weekly rate over the period by which the completion has been delayed without the employer having to prove actual damage: see *Halsbury's Laws of Singapore: Building and Construction* vol 2 (LexisNexis, 2021) at para 30.192.

12 *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014).

13 *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014).

14 Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 10.001.

15 Chow Kok Fong *et al*, *Amendments to the SOP Act: a Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) at paras 1.012, 2.002 and 2.004.

16 Disruption costs refer to additional costs and losses during the extended periods of activities usually without any effect on the date of the completion of the works: see *Keating on Construction Contracts* (Stephen Furst *et al* eds) (Sweet & Maxwell, 10th Ed, 2016) at para 9-046.

17 Prolongation costs refer to costs and losses incurred as a result of delays to the activity in question or the works as a whole which have led to critical delay to the contract completion date, and such claims are often seen as the financial side of a delay claim: *see Keating on Construction Contracts* (Stephen Furst *et al* eds) (Sweet & Maxwell, 10th Ed, 2016) at para 9-046.

18 [2021] 1 SLR 791.

determination. The case dealt with a payment claim served on 5 August 2019 before s 17(2A) came into effect on 15 December 2019. The Court of Appeal opined that the amendments were to give effect to the original intention behind the SOP Act, that is, to exclude "complex claims" involving "complicated prolongation costs, damages, losses or expenses".[19] The Court of Appeal also held that "the [SOP Act] was never intended to deal with damages claims"[20] and found that the adjudicator would in any event not have been able to consider damages suffered by the employer (which under cl 30.3.1 of the contract in question included liquidated damages[21]) as a result of the termination of the contractor's employment. There was no mechanism in the contract which provided for certification or any other document to support the damages claimed by the employer. While the Court of Appeal's observations are *obiter dicta*, they confirm that the SOP Act is aimed at straightforward claims, whether they are contractor or employer claims.

19 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [45].

20 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [45].

21 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 ("*Orion-One*") at [33]:

> It is apparent from cl 30.3 of the REDAS Conditions that any payment payable by the employer thereunder is conditioned upon the ascertainment of all costs incurred by the employer as a result of the termination. This is evident from the language of cl 30.3.1 which is couched in negative terms, providing that:
>
> > [T]he employer *shall* not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and *all other costs incurred by the Employer as a result of the termination* has been ascertained. [emphasis added]

See also *Orion-One* at [34]:

> Based on the language of cl 30.3.1, the costs referred to therein ('the Termination Costs') do not only refer to the costs that have actually been expended by the employer post-termination (*eg*, the costs of engaging another contractor to complete the works). It also includes any *damages* that are due to the employer as a result of the termination of the contractor's employment. In other words, the Termination Costs encompass not only the costs required to bring the project to completion but also any sums that the contractor is legally liable to pay to the employer as a result of its breach of contract. [emphasis in original]

12 The Court of Appeal has clarified in *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd*[22] that the pre-amendment SOP Act is different from the post-amendment SOP Act and that the position in the post-amendment SOP Act in s 17(2A) was not merely declaratory. The Court of Appeal arrived at this view on the following bases. First, the contractor's reliance on the Ministerial statement[23] was misguided as it did not have the force of law and the passage was in the context of payment claims and not payment responses. Second, if s 17(2A) was merely declaratory, then s 15(3) of the pre-amendment SOP Act which allowed for "set off" would be devoid of any substantive content. Third, the exceptions in s 17(2A) were not to be found in the express language of s 15(3) of the pre-amendment SOP Act. Fourth, the new s 15(3) omitted the reference to "set off" the same time it introduced the exceptions in s 17(2A). Fifth, the above interpretation was consistent with New South Wales cases which interpreted similar provisions. Finally, allowing liquidated damages under the pre-amendment SOP Act was consistent with the overriding aim of the SOP Act as it sought to "balance the contractor's entitlement to progress payments and the employer's need for some interim resolution in respect of delays for which it is not culpable".[24]

13 A contractor may ask whether variation claims fall within "damage, loss or expense". A variation claim, which is a claim

22 [2021] 2 SLR 91.

23 *Parliamentary Debates, Official Report* (2 October 2018), vol 94 (Zaqy Mohamad, Minister of State for National Development):

> Another issue that this Bill will address is the lengthening of the adjudication process due to submission of complex claims. We have observed that some claimants have started to include complicated prolongation costs, damages, losses or expenses when applying for adjudication.
>
> This goes beyond the original scope of the SOP Act, which is intended to cover claims for work done or goods and services supplied. …
>
> So, clauses 11 and 14 will make clear that adjudicators are to consider claims on damages, losses, and expenses only when the claim is supported by documents showing the parties' agreement on the quantum of the claim, or a certificate or document that is required to be issued under the contract. Parties that wish to dispute on complex claims should consider other avenues, such as arbitration or litigation.

24 *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 at [54].

for the price of extra work derived from the terms of the contract, would likely not qualify as a "damage, loss or expense".[25]

14 An employer may then ask whether a back charge would fall within "damage, loss or expense". This is likely to depend on the nature of the back charge. Where the back charge is a result of damage to works at the construction site, this would likely be "damage" within the meaning of s 17(2A). Where the back charge is in the nature of a loss or expense incurred by the employer, including expenditure in connection with some task which should have been carried out by the contractor but was in fact executed by the employer,[26] the back charge would likely be a "loss" or an "expense" within the meaning of s 17(2A). However, it may be possible to reformulate such back charges as "work done", that is, work done by the employer on behalf of the contractor which the contractor should have done in the first place to avoid the application of s 17(2A) altogether.

15 Alternatively, if there is a provision in the contract which lends itself to an interpretation falling within the second exception of s 17(2A)(*b*), *ie*, "document that is required to be issued under the contract", this might be another route to squeeze in a back charge for adjudication. Examples of documents required to be issued under the contract may be the (a) Architect's Direction and (b) Schedule of Defects referred to in cll 27(2) and 27(3) of the SIA Building Contract (Without Quantities) 2016 (the "SIA Contract"). These provisions allow the architect to issue an Architect's Direction for a defect not to be remedied and for moneys to be recovered by the employer from the contractor on the basis of breach of contract for failing to rectify defects from the issuance of the Schedule of Defects.

25 Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 4.112.

26 Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 8.081(d)].

C. Meaning of "document showing agreement between the claimant and the respondent on the quantum" under section 17(2A)(a)

(1) What if there is no "quantum" agreed?

16 As for the meaning of the phrase "document showing agreement between the claimant and respondent on the quantum" in s 17(2A), a clear case which would not fall within the phrase would involve a contractual provision which allows for loss and expense to be claimable but which does not provide for agreement on the quantum. An example would be cl 22 of the Public Sector Standard Conditions of Contract for Construction Works 2020 ("PSSCOC") which provides that a contractor would be entitled to claim for loss and expense:

> Reasons for Loss and Expense
>
> The Contractor shall be entitled to recover as Loss and Expense sustained or incurred by him and for which he would not be reimbursed by any other provision of the Contract, all loss, expense, costs or damages of whatsoever nature and howsoever arising as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by:
>
> (a) the issue of an instruction for a variation;
>
> …
>
> (e) the Contractor not having received from the Superintending Officer within a reasonable time necessary Drawings, instructions or other information in regard to the Works for which notice in writing had been given by the Contractor in accordance with Clause 3.4;
>
> …
>
> (g) unforeseeable adverse physical conditions of which notice in writing has been given pursuant to Clause 5.2; …
>
> (h) acts or omissions of other contractors engaged by the Employer in executing work not forming part of this Contract; …

(2) What if only a portion of the "quantum" is agreed?

17 What is less clear though is where the ***rate*** is agreed between the parties in the contract but the overall *quantum* is not agreed. Take, for example, cl 16.1 of the PSSCOC which provides that:

> (1) If the Works shall not have been substantially completed within the Time for Completion or any extended time made pursuant to Clause 14, the *Contractor shall pay or allow to the Employer liquidated damages calculated at the rate or rates stated in the Appendix hereto for the period during which the Works shall so remain incomplete* and the Employer may recover the amount of such liquidated damages from the Contractor. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works or from any other of his obligations and liabilities under the Contract. [emphasis added]

18 It has been suggested[27] on a possible broad interpretation that as long as there is agreement on the daily *rate* of liquidated damages without necessarily agreeing on the number of days of liquidated damages, that would be sufficient to fall within a "document showing agreement between claimant and respondent on the quantum". A more conservative view on the matter would be that the agreement on quantum should not only go towards the *rate* but also as to the *rate* and *number of days* of liquidated damages. A better view may be to take a more conservative view of the matter in the light of Parliament's intention to weed out complex claims from the adjudication process.

(3) What if there is only some inference that the "quantum" is agreed?

19 The other issue that could arise would be where the contract does not give the independent certifier the right to issue a certificate for liquidated damages but instead provides for the independent certifier the right to only grant extension of time. Take, for example, cl 16.4 of the PSSCOC which provides that:

27 Chow Kok Fong *et al*, *Amendments to the SOP Act: a Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet and Maxwell, 2019) at para 2.007.

Extension of Time During Delay Period

> For the avoidance of doubt, if the Contractor shall have failed to complete the Works or any phase or part of the Works by the Time for Completion and the execution of the Works thereafter is delayed by any of the events set out in Clause 14.2(g) to (q) inclusive, the Employer's right to liquidated damages shall not be affected thereby but, subject to compliance by the Contractor with Clause 14, the Superintending Officer *shall grant an extension of time pursuant to Clause 14*. Such extension of time shall be added to the Time for Completion of the Works (or of the relevant phase or part). [emphasis added]

20 This is to be contrasted with cl 24(2) of the SIA Contract which specifically provides for liquidated damages to be provided for in a delay certificate:

> 24(2)(a) The Employer *shall be entitled to recover liquidated damages from the Contractor upon receipt of a Delay Certificate*.
>
> (b) *Liquidated damages shall be calculated at the rate stated in the Appendix* from the date of default certified by the Architect for the period during which the Works shall remain incomplete.
>
> (c) The Employer shall be entitled to deduct such liquidated damages in part or in whole from any monies due under the Contract at any time.
>
> [emphasis added]

21 In a scenario where a party with a contract based on the PSSCOC seeks to claim liquidated damages, the party may be unable to invoke s 17(2A)(*b*) since there is no certificate or document to be issued for liquidated damages. This then begs the question of whether the party may still invoke s 17(2A)(*a*) to argue that there is at least some agreement on quantum. The strict view is that there is no agreement on the quantum stated in the contract based on the PSSCOC since an agreement could only come about if it was clearly provided for in the contract or if the agreement was arrived at after a specific disagreement between parties on liquidated damages has arisen.[28] The broad view,

28 Chow Kok Fong *et al*, *Amendments to the SOP Act: a commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet and Maxwell, 2019) at para 2.007.

however, quite apart from the issue of rate mentioned above,[29] is that since there is some reference to extension of time in cl 16.4 of the PSSCOC, by inference, it is implicit in the clause itself that there must be an agreement between parties for deduction of liquidated damages. The broader view does not lend itself to be easily accommodated within the plain language of s 17(2A)(*a*) and does not accord with Parliament's intention to rid the SOP Act of complex claims.

*D. Meaning of "certificate or other document that is required to be issued under the contract" under section 17(2A)(*b*)*

(1) Whose contractually required "certificate" or "document"?

22 As for the phrase "any certificate or other document that is required to be issued under the contract", this was likely drafted in contemplation of the classic scenario where an independent contract administrator would certify or issue a document as to whether a claimant or respondent is entitled to its claim.

23 However, this phrase becomes less clear when considered in the context of a construction contract that does not contemplate an independent certifier to assess and certify these claims. In such a situation, the contract works would involve a party, typically an employer (instead of an independent certifier), providing a payment response to the contractor's payment claim. As part of this process, it is not uncommon to have an interim payment certificate act as a payment response unless there is a separate payment response that is issued. The question then becomes whether a payment certificate issued by a respondent itself would qualify as a "certificate" or "document" under s 17(2A). In this scenario, it might seem tempting and logical to an employer seeking to introduce liquidated damages or back charges to rely on its own interim payment certificate as "any certificate or other document that is required to be issued under the contract". After all, the SOP Act, other than requiring the certificate or document to be one which is to be issued under

29 See para 17 above.

the contract, does not define or impose restrictions on what a "certificate" or "document" means.

24 While such an interpretation may seem textually congruent, the better view may be that it would be incongruent with the intention of Parliament to weed out complex claims from the adjudication process. The other problem with this textually attractive argument, at least from the respondent's perspective, is that it gives a respondent an unfair advantage as the claimant would not be able to put forth complex claims of this nature while a respondent who acts both as certifier and payor would be able to deduct damages claims against payment claims. This cannot have been the intention of Parliament.

(2) Must the required certificate or document cross a prima facie *threshold of no fraud, improper pressure and/or interference and issued in strict compliance with the contract?*

25 The other unclear aspect with "any certificate or other document that is required to be issued under the contract" is whether the certificate or other document must first be issued properly, that is, to borrow the language of cll 31(11)(b) and 31(11)(c) of the SIA Contract, in accordance with the terms of the contract,[30] without fraud, improper pressure and/or interference.

26 A possible view is that as long as there is a document which is *prima facie* "a certificate or document that is required to be issued under the contract", this threshold question in s 17(2A) will be crossed and it matters not that the certificate or document was not issued in accordance with the terms of the contract, issued fraudulently or subject to improper pressure and/or interference. It is then up to the adjudicator in the later assessment of liability and quantum stages to decide how much to award the claimant in the light of any improperly issued certificate, as under s 17(4) the

30 Chow Kok Fong *et al*, *Amendments to the SOP Act: a commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet and Maxwell, 2019) at para 2.008, where it was stated that "[a]n adjudicator's mandate to consider a claim for damages and loss and expense will turn on whether these issues have been determined by the certifier and whether a certificate has been properly issued to deal with these issues".

adjudicator is not bound by any prior assessment which purports to be final or binding on parties. The other and perhaps better view may be that the certificate or document purporting to allow loss, expense or liquidated damages must first, as a preliminary issue, be one that is issued in accordance with the contract, without fraud, improper pressure and/or interference. This is more in tandem with Parliament's intention to weed out complex claims of damages, loss or expense from the adjudication regime.

III. Conclusion

27 As seen above, even with the recent amendments, the SOP Act is far from demystified. Parties working on projects under the new adjudication regime can only await how adjudicators and judges will continue to interpret these provisions and address the above issues.