

INVALIDATING SUSPENSION OF PAYMENT CLAUSES WHICH CIRCUMVENT SECTION 17(3) OF THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2004

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I. Introduction

1 The termination of a construction contract can be a dramatic event that disrupts the delicate balance of a project and causes significant financial, legal and reputational consequences for the parties involved. It is common for subcontracts, in which the main contractor–subcontractor relationship is often lopsided, to provide that after the subcontract is terminated, the main contractor’s liability to pay any further sum owing to its subcontractor is contingent or conditional on the occurrence of specified events (referred to as a “Suspension of Payment Clause”).

2 Section 4(2)(c) of the Building and Construction Industry Security of Payment Act 2004¹ (“SOP Act”) enables the operation of Suspension of Payment Clauses by rendering the SOP Act inapplicable to terminated contracts containing Suspension of Payment Clauses until the occurrence of the specified events.

1 2020 Rev Ed.

3 Nonetheless, such freedom to contract is not unfettered. In *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd*² (“*Frontbuild Engineering*”), the High Court upheld the legislative intent of the SOP Act of facilitating cash flow in the construction industry and struck down the Suspension of Payment Clause in question for being a “pay when paid” provision prohibited by s 9 of the SOP Act, thereby providing a glimmer of hope to subcontractors whose cash flow is often at the mercy of errant main contractors.

4 Could the High Court’s ruling in *Frontbuild Engineering* be expanded to support a proposition that any Suspension of Payment Clause is similarly unenforceable and of no effect if it excludes, modifies, restricts or otherwise prejudices the operation of other provisions of the SOP Act?

5 This glimmer of hope was brightened in *Emergent Engineering Pte Ltd v China Construction Realty Co Pte Ltd*³ (“*Emergent Engineering*”) when the High Court suggested that the Suspension of Payment Clause in question may be void for its potential to be abused by the main contractor to effectively withhold progress payment by offsetting damages against the value of work done without agreement or certification as required by s 17(3) of the SOP Act.

II. Suspension of Payment Clause as a tool for abuse by belligerent main contractors

6 Given that the definition of “contract” in the SOP Act includes a construction contract or a supply contract that has been terminated,⁴ a claimant continues to be entitled to progress payments and the SOP Act continues to apply even after the termination of the contract. The High Court in *Frontbuild Engineering* similarly held that the finding of a valid termination

2 [2021] 4 SLR 862.

3 [2022] SGHC 276.

4 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) s 2.

of a contract by the respondent does not *ipso facto* mean that the claimant is not entitled to progress payments thereafter.⁵

7 The only exception to the general rule is – and the SOP Act does not apply – when:

- (a) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and
- (b) that date has not passed or that event has not occurred.⁶

8 Indeed, it is well settled that a claimant’s entitlement to progress payments after a contract has been terminated “depends, first and foremost, on the terms of the contract which govern the parties’ rights; thus, the contract and its terms retain primacy ... the overarching role of the [SOP] Act is only a ‘gap-filling’ one. The contract and its terms remain the primary focus of the parties’ rights and obligations in so far as submission of progress payment claims are concerned; this remains true also for the submission of payment claims post-contract termination”.⁷

9 Given the primacy of contract terms in determining entitlement to progress payments, it is not difficult to envision belligerent main contractors abusing the freedom of contract with, in the words of S Mohan JC, “ingenious drafting” to circumvent the SOP Act provisions and withhold progress payments to subcontractors against the spirit of the SOP Act.

5 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [34].

6 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) s 4(2)(c).

7 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [34], re-emphasising the Court of Appeal’s proposition in *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [36] and *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [48].

III. The glimmer of hope in *Frontbuild Engineering*

10 In *Frontbuild Engineering*, the Suspension of Payment Clause in question provided that:⁸

No further payment shall be made to the Sub-Contractor until the whole of the Main Contract Works has been completed and the Sub-Contractor shall indemnify the Main Contractor for the additional cost necessary to complete the remaining Sub-Contract Works and any loss or damage suffered as a result of the termination. [emphasis added]

11 Adopting a purposive interpretation of the context of the SOP Act as a whole, the High Court struck down the Suspension of Payment Clause and held that any Suspension of Payment Clause which amounts to a prohibited “pay when paid” provision under s 9 is to be disregarded as unenforceable and of no effect.⁹

12 The crux of the High Court’s decision is that:¹⁰

42 ... At the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) (*Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Zaqy Mohamad, Minister of State for National Development)), when Parliament sought to introduce the current s 4(2)(c) of the Act, the then Minister of State for National Development Mr Zaqy Mohamad clearly stated that the preservation of rights to payment for construction companies ‘remains the principle that underpins the amendments’.

43 ... s 4(2)(c) of the Act should be construed in context, having regard to the entire piece of legislation and not in isolation. In doing so, the court should strive to achieve a harmonious construction of provisions within the same statute, particularly where that construction would promote the purpose of the legislation and thereby, give effect to the intention of Parliament. As such, s 4(2)(c) of the Act should be construed in light of the other provisions of the Act such as s 9.

8 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [9].

9 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [47] and [48].

10 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [42]–[43].

13 The High Court’s decision in striking down the offending Suspension of Payment Clause emphasises the sanctity of the overarching purpose of the SOP Act of facilitating cash flow.

IV. Brightening of the glimmer of hope in *Emergent Engineering*

14 The relevant extract of the Suspension of Payment Clause in *Emergent Engineering* read as follows:¹¹

... Where termination of the employment of the Sub-Contractor under the Sub-Contract is made pursuant to this Sub-Contract for default and/or repudiatory breach under general law, no sum shall be due and payable to the Sub-Contractor until this Project has been completed and handed over to the Employer *nor shall the Main Contractor be liable to pay the Sub-Contractor any sum in respect of the Sub-Contract until the total cost to the Main Contractor of completing and remedying any defects, damages for delay and/or other loss or expense incurred by the Main Contractor as a result of the termination (whether directly or indirectly) ('Main Contractor's Costs') have been ascertained ...* [emphasis added]

Only the section in emphasis is relevant for the purpose of this article.

A. The High Court’s suggestion

15 Although the High Court’s ultimate decision in *Emergent Engineering* did not hinge on the validity of the Suspension of Payment Clause, the High Court suggested, in *obiter*, the possibility of invalidating the Suspension of Payment Clause on the basis that it offends s 17(3) of the SOP Act:¹²

35 At this juncture, I note that the Applicant has argued comprehensively and extensively that even if the Payment Suspension Provision was operative, it would have been invalid and unenforceable for being in violation of the SOPA, particularly ss 9, 17(3) and 36(2) of the SOPA. In brief, the Applicant’s case is that the Payment Suspension Provision permits the Respondent

11 *Emergent Engineering Pte Ltd v China Construction Realty Co Pte Ltd* [2022] SGHC 276 at [32].

12 *Emergent Engineering Pte Ltd v China Construction Realty Co Pte Ltd* [2022] SGHC 276 at [35].

to withhold certification and payment of any progress payment claims filed by the Applicant, following the Respondent's termination of the Sub-Contract. This is on the basis that the Respondent has not yet ascertained the costs of completing and remedying any defects, damages for delay and other loss or expense incurred, as the plain language of the Payment Suspension Provision alludes to. This, the Applicant submits, allows the Respondent to effectively evade the requirements under s 17(3) of the SOPA, namely that any damage, loss or expense indicated in a payment claim or payment response must be supported by documentation, failing which the adjudicator is entitled to disregard that claim. The Applicant thus argues that such a circumvention of the requirements under s 17(3) of the SOPA should be rendered void under s 36(2) of the SOPA.

36 It does appear that the Payment Suspension Provision could potentially be abused by the Respondent to delay the Applicant's progress payment claim and offset it without any proper supporting documentation.

B. *Invalidating Suspension of Payment Clauses circumventing section 17(3)*

16 Section 17(3) of the SOP Act provides that any part of a payment claim or a payment response related to damage, loss or expense does not fall within the ambit of the SOP Act and an adjudicator must disregard any damage, loss or expense that is not supported by:¹³

(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.

17 It is trite that s 17(3) was enacted to address the lengthening of the adjudication process due to parties' submission of complex claims that go beyond the original scope of the SOP Act, which is intended to cover claims for work done or goods and services

13 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) s 17(3).

supplied, in the spirit of furthering the legislative purpose of the SOP Act.¹⁴

18 Such complex claims include claims for liquidated damages,¹⁵ the cost of rectification of defective work and costs incurred in employing third-party contractors or labour suppliers to expedite the works.¹⁶

19 In the case of *Emergent Engineering*, by entitling the main contractor to suspend progress payment until it has ascertained the total costs of completing and remedying defective works, damages for delay and other loss or expense resulting from its termination of the subcontract, the Suspension of Payment Clause arguably has the effect of allowing the main contractor – and may potentially be abused by the main contractor – to withhold payment for work done by the subcontractor merely because it has not yet ascertained the costs of completing and remedying defects, damages for delay and/or other loss or expense incurred.

20 In other words, if the Suspension of Payment Clause is valid and enforceable, the main contractor could delay ascertaining, or even never ascertain, such damages, loss or expense after terminating the subcontract. As a corollary, it could prevent the subcontractor from seeking payment through adjudication, forcing the subcontractor to resort to the more expensive (and often unaffordable) and lengthier court or arbitral proceedings, depriving the subcontractor of the benefit of expeditious and cost-efficient adjudication proceedings and the incidental statutory protection.

21 In the meantime, the fact that the main contractor is able to withhold payment to the subcontractor for work done has in effect enabled the main contractor to make a “claim”

14 See the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) in *Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Zaqy Mohamad, Minister of State for National Development).

15 See *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91.

16 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 para 2.006.

or “deduction” for any damage, loss or expense without even having to fulfil any of the requirements under s 17(3).

22 A belligerent main contractor, knowing that it cannot offset liquidated damages and/or backcharges for rectification works against the subcontractor’s payment claims it cannot fulfil the requirements under s 17(3), may simply (validly or invalidly) terminate the subcontract and trigger the operation of the Suspension of Payment Clause in the subcontract. The implication is that post-termination, the main contractor is effectively allowed to blatantly disregard s 17(3) and parties can easily circumvent the requirements under s 17(3) by contract drafting, both of which run against the grain of the SOP Act and render s 17(3) otiose.

23 Section 36 of the SOP Act prohibits any attempt to contract out of the SOP Act by providing that:

(1) *The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.*

(2) The following provisions in any contract or agreement (whether in writing or not) are void:

(a) a provision under which *the operation of this Act or any part of this Act is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part of this Act;*

(b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

[emphasis added]

24 It is not difficult to see that the Suspension of Payment Clause in *Emergent Engineering* is a disguised attempt to, or has such effect as to, exclude, modify, restrict or in any way prejudice the operation of s 17(3), and therefore should be void pursuant to s 36(2).

25 In the light of the High Court’s emphasis on a harmonious construction of contract terms with the legislative intent and whole context of the SOP Act in *Frontbuild Engineering*, the case

that Suspension of Payment Clauses should be disregarded as unenforceable and of no effect if they enable circumvention of the requirements under s 17(3) should be a foregone conclusion.

V. In sum

26 The High Court's suggestion in *Emergent Engineering* represents a much-welcomed development for subcontractors whose cash flow is often at the mercy of belligerent main contractors. It is encouraging to subcontractors that the Singapore courts do uphold the declared policy objective of the SOP Act of improving the payment behaviour of parties in the construction industry. It remains to be seen if the case for invalidating Suspension of Payment Clauses which prejudice the operation of s 17(3) will be accepted and crystallised as case law in a future case.¹⁷

17 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 3.4.