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7. BUILDING AND CONSTRUCTION LAW

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I. Contract formation

A. Scope of works and price as essential terms of a contract

7.1 Contract formation issues are frequently encountered in the industry when parties are prepared to proceed before all the terms are settled. An instructive analysis of the contract formation process is found in the judgment of the High Court in *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd*.[1] In that case, a subcontractor ("Ramo") employed a structural steel fabricator ("DLE") to supply and fabricate the structural steel for the project ("steel supply contract"). Ramo had issued a letter of award ("LOA") on 20 January 2016. This was signed by DLE but DLE submitted that, at the point of signing the LOA, parties were still negotiating the contract price and that the LOA was therefore not part of the contract between the parties. DLE explained that the purpose of the LOA was to convince the upstream parties that Ramo had formally engaged a steel supplier for the project.

7.2 The preamble of the LOA stated that "[this] letter shall constitute a binding agreement" between the parties. Clause 1 described the scope of the works. Clause 14 stipulated the liquidated damages rate at RM 10,750 per day and cl 16 provided for retention money to be held against the

1 [2020] SGHC 4.

gross value of each invoice. The schedule of works annexed to the LOA stated that the quantity of work to be supplied was 1,295mt but the rate and the price were not stated. Ramo was said to have orally assured DLE that the LOA was "only temporary pending finalisation of the actual written agreement between the parties". By an e-mail of 4 February 2016, DLE offered to supply the steel at the price of US$1,100/mt, but sometime before 14 February 2016 parties orally agreed to the rate of US$960/mt and another US$60 for delivery to the site ("Oral Price Agreement").

7.3 Chan Seng Onn J approved the statements of principle on contract formation in construction contracts. An agreement as to the parties, price, time and description of works (or scope of works) is normally the minimum necessary to make the contract commercially workable. However, the absence of any of these terms – essential as they are – does not mean that no agreement has been concluded.[2] He described the typical contract formation process in these terms:[3]

> In the ordinary course of business, it is often the case that the scope of works/services are first discussed, such as the specifications and quality of the steel structural materials in the present case, before the unit price can be agreed upon because the price depends substantially on (a) how extensive the scope of works/services is; (b) how stringent the specifications are; and (c) how onerous the contractual obligations are. As Mr Chow Kok Fong rightly notes in *Law and Practice of Construction Contracts* at para 1.057: 'the description of the works, or what is normally referred to as the scope of works, is critically important. … The terms relating to price and time can only be understood in relation to the scope of works.' Logic dictates that parties would usually negotiate over the price only *after* they have agreed upon the scope of works/services.

7.4 On these principles, Chan J held that the contract before him could not have crystallised at the time when the parties signed the LOA since the parties had not yet reached agreement on the price, which was clearly an essential term. However, when parties made the Oral Price Agreement, this was sufficient for the formation of the contract. Taking into account the factual chronology of events, the learned judge found that the contract crystallised when the Oral Price Agreement was made some time before 14 February 2016.[4]

7.5 However, he did not accept DLE's submission that the LOA was a mere formality. Both the preamble of the LOA stating that "[this] letter

2 *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4 at [68]; citing with approval Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed 2018) at paras 1.051, 1.052 and 1.059.

3 *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4 at [68].

4 *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4 at [69].

shall constitute a binding agreement"[5] and the fact that DLE signed and stamped on each page of the LOA suggested that, while the LOA was an incomplete agreement, the terms on the scope of works were agreed upon, subject to the finalisation of the price. The brevity of the purchase order ("PO") and the letters of credit provided weight to the finding that the LOA was part of the contract. He noted that neither PO nor the letters of credit made any reference to any drawings for the fabrication of the steel structures or the quality of the steel. The learned judge concluded that the contract before him was constituted by the LOA, the Oral Price Agreement and the PO, with the letters of credit being undisputed to be a further part of the agreement.

B. Incorporation of document to be prepared

7.6 In *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd*[6] ("*GA Engineering*"), a subcontract for the design, supply and installation of various furnishings included a glass curtain wall system, aluminium and glazing works. After the works had been completed and handed over, the main contractor brought an action to recover for defective works.

7.7 One of the subcontractor's defences was that the "glass specifications" were not incorporated into the subcontract. The subcontractor made three arguments on this point. First, the subcontractor alleged that the main contractor's reliance was an afterthought. Second, the subcontractor argued that it was never given a copy of the main contract. Finally, the subcontractor pointed out that the glass specifications came into existence only after the subcontract.

7.8 Vinodh Coomaraswamy J decided that the first and second arguments were not relevant to the issue of incorporation. On the third argument, the learned judge observed that there is no principle of law that a document which comes into existence only after a contract is formed cannot be incorporated by reference into that contract:[7]

> It all depends on the parties' intention, objectively ascertained from the terms of their contract. Indeed, 'it is not uncommon for parties to first agree on a set of essential terms which the parties may be bound by as a matter of law and on the basis of which they may act, even while there may be ongoing discussions on the incorporation of other usually detailed terms …"

5 *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4 at [21].
6 [2020] SGHC 167.
7 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [44], citing *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [52].

7.9 The following principles emerged from the learned judge's review of the authorities on the subject:

> (a) The law "adopts an objective approach towards questions of contractual formation and the incorporation of terms".[8]
>
> (b) Whether a set of terms has been incorporated turns on ascertaining the parties' objective intentions from their correspondence and conduct assessed in light of the relevant background. This includes the particular industry in which the parties operate, the character of the document which contains the terms in question as well as the course of dealings between the parties.[9]
>
> (c) In the absence of fraud or misrepresentation, a party is bound by all the terms of a contract that it signs, even if that party did not read or understand those terms.[10]
>
> (d) It is established that parties may first agree to be bound by a set of essential terms and act on that basis, even while there may be ongoing discussions on the incorporation of other usually detailed terms.[11]

7.10 In the present case, the learned judge concluded that it was the parties' objective intention to incorporate into the subcontract the specifications relating to the works which were contained in the main contract, whenever that might come into existence:[12]

> The plaintiff subcontracted the Works to the defendant as glazing specialists. The clear reference to 'all provisions of the main contract … applicable to the Sub-contract works' and 'all main contract … specifications in cll 8.1 and 24.1(b) of the Subcontract respectively puts it beyond doubt that the parties did intend for certain specifications further to govern the specialised nature of the Works, namely, the design, supply and installation of the glass curtain wall.

8 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [34], citing *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [51].

9 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [35], citing *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [51].

10 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [40], citing *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [58].

11 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [44], citing *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [52].

12 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [47].

C. Where a term is void for uncertainty

7.11 One of the subcontractor's arguments in *GA Engineering Pte Ltd* related to cl 2.6 of the subcontract. Clause 2.6 reads:[13]

> Submission of design, shop drawings, as-built drawings, installation details, samples, colour chart and method statement to the Architect/us for approval as and when required by us.

7.12 The subcontractor submitted that a literal reading of the phrase "as and when required" suggests that the main contractor was entitled to ask for as-built drawings at any time, even when goods and materials had yet to be installed or even before any works were carried out. The learned judge considered that this argument does not mean that the clause is uncertain:[14]

> The most that can be said is that cl 2.6 is capable of operating unreasonably or uncommercially. Even then, a contextual interpretation of cl 2.6, bolstered by industry practice, suffices to alleviate any unreasonable or uncommercial consequences which may arise from a literal interpretation.

7.13 He observed that as-built drawings reflect the completed state of works in a building and are required for submission to the relevant authorities to obtain statutory approvals. It is consistent with the commercial purpose that as-built drawings can and will ordinarily be asked for and prepared only after construction works are completed.[15] Accordingly, the learned judge considered that, applying the contextual approach, the phrase "as and when required" should be interpreted:[16]

> … to refer to any time after the construction works are completed, save for circumstances which are commonly accepted in the industry as exceptional. There is therefore no basis for the argument that clause 2.6 is uncertain and unenforceable.

II. Delay

A. Liability for delay

7.14 In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [17] ("*Comfort (No 2)*"), under what was essentially a sub-subcontract, OGSP

13 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [129].
14 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [130].
15 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [131].
16 *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 at [132] and [133].
17 [2020] SGHC 165.

was employed to carry out air-conditioning and mechanical ventilation works which formed part of the works of an upstream subcontract between Comfort and the main contractor. It was common ground that the sub-subcontract was priced as a lump sum contract and was expressed to be "back-to-back" with the upstream subcontract.

7.15 The dispute arose as to culpability for delay and the imposition of a liquidated damages clause. There were four variation orders, the cumulative value of which amounted to almost 50% of the contract sum of the sub-subcontract. On this basis, it was argued that these were "substantial variations which inevitably would have contributed to a delay in the [sub-subcontractor] completing the Works".[18] The learned judge considered that "only a supervening activity or an event which lies on the critical path will suffice to relieve a contractor of liability for delay".[19] Since it was the sub-subcontractor who asserts that the delay arose as a result of variations, the burden is on the sub-subcontractor to prove the variations are on the critical path and hence were causally connected to the delay. However, it provided no delay analysis to establish this.[20]

B. Liquidated damages

7.16 A follow-up issue in *Comfort (No 2)* was the operation of the liquidated damages clause in the sub-subcontract. It was argued that the rate of liquidated damages represented a genuine "pre-estimate of loss". The court accepted the employer's evidence that at 0.04% of the total contract price, this rate could not be considered "extravagant nor unconscionable" and is therefore not a penalty.[21]

7.17 Next, it was contended that since the sub-subcontract was "back-to-back" with the upstream subcontract, and the main contractor did not impose liquidated damages on the subcontractor, it had suffered no loss even if delay to the sub-subcontract was proven. Vinodh Coomaraswamy J rejected this argument on two grounds. Firstly, he considered that:[22]

> … [t]he term 'back-to-back' is 'not a term of art' … It is essentially a pragmatic term of incorporation, allowing a subcontract to … incorporate the terms of the head contract. Despite these words of incorporation, the subcontract and

18 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [68].
19 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [70], citing with approval the statement of principle in Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell 5th Ed 2018) at para 9.272.
20 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [71].
21 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [59]–[60].
22 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [62].

> the head contract remain distinct contracts. The two contracts have distinct sets of parties and create two distinct sets of contractual rights and obligations.

7.18 Secondly, the learned judge pointed out that an enforceable liquidated damages clause does not cease to yield damages simply because the party seeking to rely upon the clause has, in fact, suffered no loss:[23]

> The plaintiff's right to recover liquidated damages in accordance with the clause accrues when the contract is made and does not depend on proof of loss when the contract is breached. Therefore, whether [the main contractor] in fact imposed liquidated damages on the plaintiff is a *legally* irrelevant consideration and does not affect the plaintiff's right to recover liquidated damages from the first defendant under the [sub-subcontract]. [emphasis in original]

7.19 The learned judge noted that there could be, in any case, many conceivable reasons for the main contractor not levying liquidated damages on the subcontractor. He cited the example that the main contractor might waive its right to liquidated damages "as a calculated commercial decision in the light of potential future dealings".[24]

III. Variations

7.20 In *Comfort (No 2)*. the High Court also approved a two-stage approach to establishing a variation claim:[25]

> First, a claimant has to show that a valid instruction has been issued for the variation. The instruction has to be issued by a person who has been specifically authorised by the contract for this purpose and, where it entails work in respect of which additional payment is sought, it has to be issued on terms which carry an express or implied promise that the claimant would be paid for the varied work. Second, it has to be established that the work ordered falls within the definition of 'variation' as intended by the contract. In most cases, this means that the claimant has to demonstrate that the item of work either changes the scope of work to which the original contract sum relates or, alternatively, it is work which is of a different character or has to be executed under different conditions from that originally envisaged.

7.21 The fact that the main contractor in the upstream subcontract paid the subcontractor for the variation did not discharge the sub-subcontractor's burden to make out its right to recover its claim for this work as a variation under the sub-subcontract. This necessarily

23 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [63].
24 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [63].
25 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [100], citing with approval, the statement of principle in Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 5.008.

arose from the fact that both the subcontract and the sub-subcontract are distinct contracts with distinct rights and distinct obligations.[26] Since the sub-subcontractor failed to adduce any evidence to show that the subcontractor instructed the sub-subcontractor to carry out the variation work, the claim failed.[27]

7.22 The learned judge also had to determine whether the employer had waived the need for a written instruction for a variation. Waiver by election requires a contracting party to make a clear and unequivocal choice between two inconsistent rights.[28] In this case, while the parties dealt with variations with a high degree of informality, in respect of the specific variation order, the employer had not waived the condition precedent of a written instruction.[29]

IV. Performance bonds

A. Unconscionability

7.23 During the year under review, the High Court held that it was unconscionable for an employer to call on an on-demand bond in order to penalise a contractor for refusing to carry out works in circumstances where the construction work could not be legally carried out. In *CEX v CEY*,[30] a project for the construction of six strata detached houses faced numerous delays. The delays were due in part to the hospitalisation, and eventually, the passing away of the architect who was the qualified person for the project. On the date when the architect took ill, the statutory permits for the works to be carried out had lapsed. It would have been illegal for the contractor to proceed and continue with the works. The court concluded that it was unconscionable to allow the employer to call on the performance bond in the circumstances.

7.24 In his judgment, Lee Seiu Kin J summarised the following policy objectives which have guided the courts in deciding the grant of a restraint of a call on a performance bond:[31]

26 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [101] and [102].
27 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [107].
28 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [120].
29 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [126].
30 [2021] 3 SLR 571.
31 *CEX v CEY* [2021] 3 SLR 571 at [10]; *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [11].

(a) respecting the intention of the parties;[32]

(b) upholding the commercially valuable autonomy principle;[33] and

(c) preventing abusive and oppressive calls on performance bonds, particularly in the construction industry.[34]

B. Analytical framework

7.25 Although the facts of this case are not unduly complex, it is considered that the judgment will serve as a valuable reference on this subject for two reasons. Firstly, from his analysis of the authorities, the learned judge laid down a framework for evaluating whether an injunction restraining a performance bond should be granted on the ground of unconscionability. This involves three steps:[35]

(a) Identify the nature of the performance bond.[36]

(b) Ascertain whether the call falls within the terms of the bond.[37]

(c) Evaluate whether the "overall tenor and entire context of the conduct of the parties support a strong *prima facie* case of unconscionability".[38]

7.26 Secondly, Lee J observed that against the broad description of unconscionability as involving "unfairness and conduct lacking in good faith",[39] certain elements "have most commonly manifested":[40]

(a) calls for excessive sums;

(b) calls based on contractual breaches that the beneficiary of the call itself is responsible for;

(c) calls tainted by unclean hands;

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32 *CEX v CEY* [2021] 3 SLR 571 at [11], referring to principles enumerated in *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 at [34]–[42].

33 Referring to Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) at pp 325–326.

34 Referring to *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [24]; and *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [11].

35 *CEX v CEY* [2021] 3 SLR 571 at [11]

36 Referring to principles enumerated in *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 at [34]–[42].

37 Referring to *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 at [39]–[42]; *BWN v BWO* [2019] 5 SLR 215 at [22].

38 Referring to *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [40].

39 *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5].

40 *CEX v CEY* [2021] 3 SLR 571 at [22].

(d) calls made for ulterior motives; and

(e) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

C. Call on bond by unsuccessful party in adjudication

7.27 In *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd*[41] ("*Samsung C&T Corp*") the Court of Appeal held that it would be unconscionable for a party in adjudication to call on a performance bond issued in circumstances where the effect of doing so was to negate an adjudication determination ("AD") prior to any final determination of the dispute between the parties.[42] The facts in that case concerned a subcontractor employed by a main contractor in relation to the construction of a Land Transport Authority project. The subcontractor was successful in its adjudication application against the main contractor and was awarded a sum of $2m by the adjudicator. Following the issuance of the AD, the main contractor called on the bond on the basis that the adjudicator erred in failing to consider the relevant terms of the underlying contract. The subcontractor succeeded before the High Court in its application for an injunction restraining the main contractor from receiving the amount called under the performance bond.

7.28 The subcontractor had argued before the Court of Appeal that the main contractor's call in the circumstances was an attempt to circumvent the AD and the scheme under the Building and Construction Industry Security of Payment Act[43] ("SOP Act"). On its part, the main contractor contended that the SOP Act does not impede its right to call on the bond, referring to a number of Australian cases, including *Patterson Building Group Pty Ltd v Holroyd City Council*[44] ("*Patterson*") and *Duro Felguera Australia Pty Ltd v Samsung C&T Corp*[45] ("*Duro*").

7.29 In delivering the judgment of the Court of Appeal, Woo Bih Li J noted that the subcontractor did not rely merely on the AD but that "[the main contractor's] reasons for making the demand had already been considered and rejected by the adjudicator".[46] The decision of the

41 [2020] 2 SLR 955.
42 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [22].
43 Cap 30B, 2006 Rev Ed.
44 [2013] NSWSC 1484.
45 [2016] WASC 119.
46 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [22].

New South Wales ("NSW") Supreme Court in *Patterson* was therefore distinguishable because the employer in that case (who called on the bond) claimed for unrectified defects which was not the subject of the AD.[47] In *Duro*, the underlying contract provided for the main contractor to convert into money any security if the main contractor considered that it was entitled to recover the relevant amount.[48] The Western Australian ("WA") Supreme Court considered that cl 5.2 of the contract required the subcontractor to establish a strong case and not merely an arguable case that the main contractor was not acting *bona fide* in claiming that it was entitled to recover the relevant sum from the subcontractor. The subcontractor had to further establish that the balance of convenience favoured the grant of the injunction.[49]

7.30 The court in *Duro* referred, *inter alia*, to the Queensland decision in *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd*[50] where the application for an injunction was dismissed because one of the claims was in respect of liquidated damages and had not been raised before the adjudicator.

7.31 In the present case, the subcontract did not have a provision similar to cl 5.2(b) in *Duro*. Woo J considered, however, that even if it had one, such a provision would not assist the main contractor because it would have been an attempt to contract out of the SOP Act.[51]

7.32 In any case, Woo J noted that the NSW,[52] WA[53] and Queensland Acts[54] do not contain a provision that is the equivalent of s 21 of the Singapore SOP Act. This provides that an AD is binding on the parties to the adjudication until, *inter alia*, the dispute is finally settled by a court or a tribunal or at some other dispute resolution proceeding. Thus, while the main contractor was entitled to disagree with and challenge the views of the adjudicator, it was entitled to do so only in final dispute resolution

47 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [35].
48 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [51].
49 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [52].
50 [2015] FCA 1371.
51 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [57].
52 Building and Construction Industry Security of Payment Act 1999 (NSW).
53 Construction Contracts Act 2004 (WA).
54 Building and Construction Industry Payments Act 2004 (Qld).

proceedings between the parties, whether before a court or tribunal, or otherwise. In an important passage of his judgment, Woo J stated:[55]

> The contractual rights of parties are circumscribed by SOPA and the scheme under SOPA and not the other way around. Otherwise, the 'no contracting out' provision in s 36 SOPA would be meaningless.

D. Call made when beneficiary is undergoing re-structuring

7.33 An interesting question addressed by the High Court during the year under review was whether the fact that a party calling on a bond was undergoing restructuring was a sufficient reason to support an injunction to restrain the call from being made. In *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd*[56] ("*Sulzer Pumps*"), the applicant for an injunction to restrain a call on a bond entered into a contract under which it was to carry out the supply and installation of pumps. The pumps repeatedly failed and there was a dispute as to whether this failure was attributable to design flaws. The respondent made a call on the bond. On the facts, the respondent was in a dire financial predicament which meant that the applicant would have little recourse against the respondent even if it ultimately succeeded at trial on the substantive dispute.

7.34 The High Court, in arriving at its decision, affirmed the general principle that, to maintain an injunction on grounds of unconscionability, an applicant needed to show a strong *prima facie* case of unconscionability.[57] Unfairness was not a separate standalone ground for this purpose. It was only one factor in determining whether unconscionability was made out.[58] The mere existence of a genuine dispute could not *ipso facto* support an injunction on grounds of unconscionability. In this case, the applicant failed to show a strong *prima facie* case of unconscionability. Aedit Abdullah J held that the mere fact that the respondent was in the midst of restructuring was not reason enough to grant an injunction if the applicant was unable to establish unconscionability, and this position would hold even if the party calling on the bond was hypothetically on

55 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [58].
56 [2020] SGHC 122.
57 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [31].
58 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [41]–[43].

the verge of insolvency.[59] Abdullah J explained the rationale in these terms:[60]

> [A] performance bond is a security that has been bargained for, and the court should not disrupt the status quo unless the applicant meets the threshold of proving either unconscionability or fraud. Parties calling on bonds are not to be treated differently merely because they are in the midst of a restructuring. The fact that the obligor may be exposed to the financial constraints of the beneficiary is not good enough reason to bar the call if no other reason exists. This is part and parcel of the contractual arrangement that they have made between themselves in arranging for the performance bond.

E. Delay in making the call

7.35 A factor considered by the High Court in *Sulzer Pumps* in deciding for the respondent was that there was no delay which rendered the respondent's conduct unconscionable.[61] The applicant had argued that the call was made only two years after the pump failures began and about six months after the pumps were fixed. Abdullah J accepted the respondent's explanation that it needed some time to verify if the pumps were fully fixed. This was reasonable considering the repeated failures of the pumps despite repeated attempts at remedying the pumps. On this point, the learned judge elaborated:[62]

> There is no bright line that will distinguish an unconscionable delay from the usual lapse of time that may arise in commercial matters; this must be determined on the circumstances of each case. A short dispute which was quickly resolved, followed by just a few months' or possibly even a few weeks' passage of time, may be enough to show lack of *bona fides* and that the beneficiary did not genuinely believe that he had a right to call on the bond. However, a long-drawn dispute may require longer time for the beneficiary to monitor the situation and decide whether to call on the bond. The nature of the dispute and the depth of disagreement may also be material.

F. Nature of injunction to restrain call on bond

7.36 In the course of his judgment in *Sulzer Pumps*, Abdullah J took the opportunity to point out that an injunction to restrain a call on performance bonds is best characterised as "a freestanding prohibitory

59 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [53].
60 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [53].
61 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [69].
62 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [70].

injunction" as it prohibits a party from calling on the bond. It is not an interlocutory injunction since "the sole and entire purpose of the originating process is to obtain the injunction". Once that application had been determined, the entire subject matter of that proceeding would have been spent.[63]

7.37 In addition, the purpose of an injunction to restrain a call on a bond is not to preserve the rights of parties pending any substantive proceedings but solely to prevent the injustice of the beneficiary calling on the bond without *bona fides*.[64] An example would be where a beneficiary calls on a bond issued by the obligor, although neither party had breached their contractual obligations to each other. If the injunction were interlocutory in nature, the court would not be able to grant the injunction even though the call was clearly unconscionable because the obligor has no cause of action against the beneficiary.[65] The court here has the power to grant a freestanding injunction to prevent injustice, in the exercise of its equitable jurisdiction and this power is confirmed by O 92 r 4(1) of the Rules of Court.[66]

G. Requirements for call on indemnity bond

7.38 In contrast with an on-demand bond, the right of a party to call on an indemnity bond is predicated on the existence of a breach. This is because an on-demand bond is conditioned on documents while a conditional bond is conditioned on extant facts entitling the call to be made.

7.39 In *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd*,[67] the High Court reviewed the principles of the propositions relating to indemnity bonds as laid down in a number of earlier local authorities and how a party calling on such a bond ought to prove its loss. The case concerned a performance bond issued pursuant to the terms of a subcontract. Disputes arose regarding the main contractor's certification of one of the payment claims of the subcontractor. In the ensuing adjudication, the adjudicator decided in favour of the subcontractor.

63 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [75] and [76], referring to *Maldives Airport Co Ltd v GMR Male International Airport Pte Ltd* [2013] 2 SLR 449.

64 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [78].

65 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* 2020] SGHC 122 at [79] and [80].

66 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 at [91].

67 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234.

When the main contractor proceeded to call on the bond in 2018 ("the First Call"), the subcontractor was successful in obtaining an injunction to prevent the insurance company from paying and the main contractor from receiving any payments under the bond. In granting the injunction, the High Court had decided that the bond was *in pari materia* to the bond before the Court of Appeal in *JBE Properties Pte Ltd v Gammon Pte Ltd*[68] ("*JBE*"). It was thus an indemnity bond rather than an on-demand bond and the main contractor had failed to provide substantive evidence of actual loss.[69] The subcontractor was wound up in 2019. In 2020, the main contractor wrote to the insurance company, making a second call on the bond ("the Second Call"), attaching a notice of its claim.

7.40 Lee Seiu Kin J agreed with Andrew Ang J's observation in *York International Pte Ltd v Voltas Ltd*[70] ("*York*") that an on-demand bond is "conditioned on documents" while a conditional bond is "conditioned on extant facts" and that a similar point was made in *JBE*.[71] Arising from both *JBE* and *York*, Lee J held that a beneficiary under an indemnity bond must prove that it had suffered actual losses as a matter of fact and this could only be definitively done after an independent determination, arbitral award or admission from a relevant party. The provision of documents, regardless of the volume and specificity, was insufficient to conclusively prove the matter.[72]

7.41 However, an independent determination could be made in this case by the court hearing the injunction application. [73] In this case, the main contractor had claimed sums with respect to, *inter alia*, the fire alarm system, defective plastering work connected to the electrical work, air conditioning system, maintenance costs and other defect rectification costs. Lee J considered that the main contractor had shown sufficient evidence of loss and decided that such amount would justify the call on the bond and that the Second Call on the bond was thus valid.

68 [2011] 2 SLR 47.
69 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [6].
70 [2013] 3 SLR 1142.
71 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [18] and [19], referring to *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 at [24] and *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10].
72 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [19].
73 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [21]–[22]. The learned judge noted that, unlike the situation in *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142, in this case, neither party had commenced arbitration proceedings: *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [24].

V. Security of payment

A. Meaning of "day"

7.42 In *Trustee of Tay Choon Huat v Soon Kiat Construction*,[74] ("*Tay Choon Huat*") the sole issue before the court was whether the contractor's adjudication application was lodged one day late. The contract between the parties incorporated the SIA Articles and Conditions of Building Contract.[75] Clause 31(15)(a) required the employer to respond to an interim payment claim by the contractor by providing a payment response within 21 days after the interim payment claim is served on the employer. The payment claim was served on 20 April 2020 and the payment response was issued on 15 May 2020. The adjudication application was lodged on 28 May 2020. The definition of "day" for the purpose of cl 31(15)(a) expressly included public holidays but s 2 of the SOP Act defines "day" to mean "any day other than a public holiday within the meaning of the Holidays Act".[76]

7.43 Andre Maniam JC decided that, in *Tay Choon Huat*, the contractual definition of "day" applied and the term "day" therefore included public holidays. He noted that:[77]

> (a) … the drafters of the SIA Conditions chose not to incorporate the SOPA definition.
>
> (b) … the parties [had] agreed on a contract period of six calendar months that expressly included public holidays.
>
> (c) … it was common ground that 'day' in relation to liquidated damages included public holidays.

He considered that the preference must be for a "consistent treatment" of all the time provisions to avoid confusion and ambiguity.[78] This construction is consistent with the SOP Act since s 11(1)(*a*) expressly allows the parties "to contractually agree on a more stringent deadline for the provision of a payment response than the long stop period under the SOPA".[79]

74 [2020] SGHC 212.
75 9th Ed, 2016.
76 Cap 126, 1999 Rev Ed.
77 *Trustee of Tay Choon Huat v Soon Kiat Construction* [2020] SGHC 212 at [38] and [39].
78 *Trustee of Tay Choon Huat v Soon Kiat Construction* [2020] SGHC 212 at [39].
79 *Trustee of Tay Choon Huat v Soon Kiat Construction* [2020] SGHC 212 at [43].

B. Building and Construction Industry Security of Payment (Amendment) Act 2018

7.44 One of the important amendments introduced by the Building and Construction Industry Security of Payment (Amendment) Act 2018[80] ("Amendment Act") is a new s 17(2A) which reads:

> 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 —
>
> (*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.

7.45 In Parliament, the Minister has explained that the original scope of the SOP Act was never intended to cover claims for "complicated prolongation costs, damages, losses or expenses" and that the intention of the amendment is to allow these claims only when they are "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".[81]

7.46 In *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd*,[82] a contractor served a payment claim which included an amount representing the release of the first half of the retention sum following the handing-over of the project. In its payment response, the employer sought to set off a sum of liquidated damages against the claimed amount. The adjudicator allowed this set-off and the claimant applied to set aside the determination. The High Court held that the adjudicator was entitled to consider this set-off.

7.47 In his judgment, Lee Seiu Kin J expressed his views on the thrust of the new s 17(2A) as follows:[83]

> The 'complicated prolongation costs, damages, losses or expenses' mentioned in the parliamentary debates did not refer to liquidated damages. Instead, they referred to the *contractor*'s damage claims for the *employer*'s actions. An employer may for example, have failed to acquire the appropriate permits

80 Act 47 of 2018.

81 *Parliamentary Debates, Official Report* (2 October 2018), vol 94 "Second Reading of the Building and Construction Industry Security of Payment (Amendment) Bill" (Zaqy Mohamad, Minister of State for National Development).

82 [2020] SGHC 191.

83 *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2020] SGHC 191 at [21].

> to allow the contractor to begin work. Alternatively, the employer may have made a fundamental change in architectural design (as what happened in *Coordinated Construction*). These may cause the contractor to incur further costs. The contractor's claims for these sorts of losses – sometimes referred to as "loss and expense claims" – were the true targets of the recently introduced s 17(2A) in the SOP Act … [emphasis in original]

7.48 The learned judge held that the court:[84]

> … did not consider the introduction of s 17(2A) of the SOP Act to be any signal of parliamentary disapproval of adjudicators considering liquidated damage claims under the SOP regime.

Nevertheless, it will be further noted that, on its terms, s 17(2A) is intended to apply to both claimants and respondents. This appears from the explicit reference to a "payment response" in the text of the subsection.

C. Supplementary agreements

7.49 It is not uncommon for parties to vary the terms of a construction contract during the course of the works by way of a supplementary agreement executed for this purpose. A supplementary agreement may contain terms which have the effect of altering a claimant's entitlement to serve a payment. In *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd*,[85] ("*Orion-One*") a contractor took over the construction of a residential project by way of a novation agreement dated 1 February 2016. The construction contract incorporated the terms found in the Real Estate Developers' Association of Singapore ("REDAS") Design and Build Conditions of Contract[86] ("REDAS Conditions"). On 29 August 2016, the contractor and the employer entered into an agreement to vary the terms of the contract ("the Supplementary Agreement").

7.50 On 2 March 2017, the employer terminated the contractor's employment. Some two years after the termination, the contractor began to serve payment claims on a regular monthly basis on the employer, beginning with payment claim 20 and launched three separate adjudication applications. In payment claim 25, the contractor served a payment claim for $3,262,740.23. The dispute arising from that claim was referred for adjudication and the contractor was awarded a sum of $1,981,159.50. The High Court refused the employer's application to set aside the AD.

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84 *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2020] SGHC 191 at [21].
85 [2020] SGCA 121.
86 3rd Ed, July 2013.

7.51 Before the Court of Appeal, the employer relied on a new argument that the contractor's employment was terminated pursuant to cl 2.5 of the Supplementary Agreement and that, accordingly, cl 30.3 of the REDAS Conditions (relied upon by the contractor as the basis for serving its post-termination payment claim) did not apply. The Court of Appeal held that, on its terms, cl 30.3 only applies in the event of "the termination of the employment of the Contractor under clause 30.2".[87] In this case, the notice of termination referred specifically to cl 2.5 of the Supplementary Agreement. Since cl 2.5 was the basis of the termination, the Court of Appeal held that cll 30.2 and 30.3 of the REDAS Conditions "did not come into play at all" and that the contractor's reliance on cl 30.3 as the basis of its entitlement to serve payment claim 25 was entirely misplaced.[88]

D. Operation of cl 30.3 of REDAS Conditions

7.52 The Court of Appeal in *Orion-One* took the opportunity to consider the operation of cl 30.3 of the REDAS Conditions. This was notwithstanding that it had found that the contractor's employment in that case was terminated pursuant to cl 2.5 in the supplementary agreement. Steven Chong JA in delivering the judgment of the Court of Appeal noted that cl 30.3.1 expressly provides that, following the termination of a contractor's employment, the employer shall not be liable to make any further payments to the contractor until such time when "all costs incurred by the employer as a result of the termination has been ascertained." The costs referred to therein ("Termination Costs") refers to any damages that are due to the employer arising from the termination, including the costs to bring the project to completion and also sums which the contractor is liable to pay to the employer as a result of the contractor's breach of contract.[89]

7.53 In this case, the Court of Appeal decided that the Termination Costs have not been ascertained notwithstanding that the handing-over certificate has been issued. [90] Chong JA arrived at this conclusion on the basis that there were ongoing arbitration proceedings between the parties in which the employer had counterclaimed against the contractor for

87 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [28].

88 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [31].

89 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [33] and [34].

90 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [36].

liquidated damages.[91] In any case, Chong JA pointed out in the course of his judgment that payment under cl 30.3 "was not a progress payment" but concerned "the final settlement of accounts between the parties in the event that the contractor is terminated by the employer for breach of contract".[92] Such payments did not fall within the ambit of the SOP Act. In reaching this conclusion, Chong JA observed that whilst s 4(2)(*c*) of the SOP Act can, in principle, apply to progress post-termination payment claims as well as payment claims made after lifting of contractual suspension of payment, this is subject to any terms of the contract to the contrary.

E. Cost-benefit analysis of recourse to adjudication

7.54 In *Orion-One*, the Court of Appeal doubted the wisdom of commencing an adjudication application following the termination of a contract when arbitration proceedings had already commenced. In that case, the contractor launched three adjudication applications in the midst of ongoing arbitration proceedings. The Court of Appeal remarked on "the futility of applying for adjudication of a payment more than two years following the termination of a contract".[93] Chong JA remarked that since an AD has only "temporary finality", regardless of the outcome of the adjudication, "the merits of the case would still be subsequently reopened by a competent court or tribunal".[94] He would therefore "encourage parties to bear this in mind and conduct a proper cost-benefit analysis before deciding to pursue adjudication under the SOPA regime".[95]

F. Difference between SIA Conditions and REDAS Conditions

7.55 *Orion-One* is an appeal from the High Court decision in *CEQ v CER*[96] which distinguishes between the role of an architect under the Singapore Institute of Architects ("SIA") Form and the employer's representative under the REDAS Form. An architect under the SIA Form "plays an integral role in the payment certification process" and has been

91 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [35] and [36].
92 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [38].
93 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [4].
94 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [52] and [53].
95 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121 at [53].
96 *CEQ v CER* [2020] SGHC 70.

described as a "quasi-adjudicator".[97] The employer's representative in the REDAS Form is neither an independent certifier nor a referee but "an agent of the employer". His certifications are not an "objective assessment of works done and monies due" but, instead, "mere signals of the employer's assent to the payment claim as submitted by the contractor.[98] Although in *Orion-One*, the Court of Appeal reversed the decision of the High Court, this part of the judgment in *CEQ v CER* was left undisturbed.

G. Fraud and Building and Construction Industry Security of Payment Act

7.56 During the year under review, the issue of fraud was raised in relation to adjudication applications. The case in question came before the High Court in *CFA v CFB*[99] and was heard by the Court of Appeal in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd*.[100]

7.57 A main contractor employed a subcontractor for the fabrication and installation of 864 window panels, who in turn employed a Chinese supplier to fabricate the window panels. The subcontractor commenced adjudication at a time when some 489 out of the 864 window panels remained undelivered. Nevertheless, the subcontractor maintained throughout the proceedings that it had control over all the undelivered panels.

7.58 After the adjudication was determined, the main contractor asked the subcontractor to confirm delivery of the undelivered panels in exchange for the adjudicated amount. The subcontractor did not respond but submitted two additional claims for the storage of the materials. A few days later, the Chinese supplier introduced itself to the main contractor and informed the main contractor that it had withheld 169 panels in the light of ongoing disputes with the subcontractor. Following its contact with the supplier, the main contractor visited the supplier's factory in China and confirmed that the supplier had the undelivered panels.

7.59 Before the High Court, the subcontractor admitted that it did not disclose to the adjudicator its dispute with the supplier over the 169 panels but claimed that it was in negotiations with the supplier for the delivery of the 169 panels but had been unable to reach an agreement. The High

97 *CEQ v CER* [2020] SGHC 70 at [25], citing *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [32] and *Chin Ivan v HP Construction & Engineering* [2015] 3 SLR 124 at [13].
98 *CEQ v CER* [2020] SGHC 70 at [25].
99 [2020] SGHC 101.
100 [2020] 2 SLR 1125.

Court set aside the AD on the ground of fraud. Lee Seiu Kin J approved the test laid down by the NSW Supreme Court in *QC Communications NSW Pty Ltd v CivComm Pty Ltd*[101] which involved the establishment of two requirements.

7.60 The first is the "Material Fact Requirement" which was satisfied by three facts: (a) the 169 panels were not in Singapore; (b) the serious dispute between the subcontractor and the supplier which led to the termination of the fabrication contract; and (c) the subcontractor's difficulties in negotiating for the delivery of the panels. The second requirement was the "Opposite Verdict Requirement". Lee J held that the subcontractor was not entitled to be paid if there was a serious dispute which rendered the claimant unable to effect delivery if called upon to do so. The subcontractor's fraud was in abusing the adjudication process when it knew that it was in no position to deliver the panels.

7.61 The Court of Appeal agreed with the High Court that fraud is an accepted ground for setting aside an AD under common law. Steven Chong JA referred to *Brodyn Pty Ltd v Davenport*[102] where the NSW Court of Appeal held that if a determination was induced by fraud, it was liable to be set aside. Chong JA laid down a two-step test in setting aside an AD on the ground of fraud:

> (a) The AD must be based on facts which the party seeking the claim knew or ought reasonably to have known were untrue. "This objective test of knowledge would encompass constructive knowledge and would apply to every stage of the adjudication proceedings."[103] "Where it is established that an AD is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence."[104]
>
> …
>
> (b) "Second, the innocent party has to establish that the facts in question were material to the issuance of the AD."[105] "Materiality is established if there is a real prospect that had the adjudicator known the truth, the outcome of the determination *might* have been different. [For this purpose], it matters not what the claimant did or did not think was material at the relevant time." [emphasis in original][106]

101 [2016] NSWSC 1095.
102 [2004] NSWCA 394 at [60].
103 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [29].
104 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [33].
105 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [34].
106 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [35].

7.62 Chong JA expressed preference for the materiality requirement because the opposite verdict requirement test would place "an unnecessarily high burden on the supervisory court in circumstances where there is no particular interest in upholding orders that were impacted by fraud".[107] He affirmed in the same passage the position laid down in *Lee Wee Lick Terence v Chua Say Eng* [108] that:[109]

> … in an action to set aside an AD, the court *does not* review the merits of the adjudicator's determination That is not within the supervisory jurisdiction of the court. Rather, the setting aside must be premised on issues relating to jurisdiction, breach of natural justice, noncompliance with the provisions of the Act (including those as stated under s 27(6) of the Act) or in this case, fraud. [emphasis in original]

7.63 With respect to the first step, the Court of Appeal found that the subcontractor had fraudulently represented that it had control over all the undelivered panels and deliberately withheld the fact that the 169 panels were not within its possession or control throughout the adjudication proceedings.[110] In relation to the second step, the subcontractor's misrepresentation was held to be an *operative cause* of the AD as the adjudicator had allowed the claim on the assumption that it was able to deliver all the undelivered panels. It was therefore material to the AD.[111]

7.64 The court affirmed that it has the power under common law to sever an AD in part and this is recognised under the newly enacted s 27(8)(*a*) of the SOP Act. The power to sever may be exercised, for example, where the consequence of a jurisdictional error may be quantified so as not to deprive the claimant the benefit of the entirety of the adjudicator's decision.[112] However, where an AD is obtained by fraud, the court has to take into account the policy consideration of upholding public confidence in the administration of justice. "[F]raud unravels all and the starting point is that an AD that was corrupted by fraudulent conduct would be tainted in its entirety, and the whole must fail."[113] In this case, the Court of Appeal refused to sever the AD, noting, *inter alia*, that (a) the misrepresentation was deliberately maintained throughout the adjudication proceedings; and (b) the 169 panels comprised approximately 20% of the claimed amount and the quantum could hardly be said to be *de minimis*.[114]

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107 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [36].
108 [2013] 1 SLR 401 at [66].
109 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [36].
110 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [39].
111 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [56].
112 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [60].
113 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [61].
114 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [64].

H. Dismantling of dual-track framework

7.65 In a decision delivered during the year under review, the Court of Appeal decided that the SOP Act does not confer on a claimant an independent statutory right to be paid under a "dual-track" framework. This is a very important development as it sets the Singapore position on statutory adjudication apart from that as understood in several other common law jurisdictions.

7.66 In *Shimizu Corp v Stargood Construction Pte Ltd*,[115] ("*Shimizu*") the disputants were parties to a subcontract based on the REDAS Conditions ("REDAS Subcontract"). Under cl 6 of the REDAS Subcontract, the main contractor appointed a project director whose functions included the certification of progress payments. Arising from certain breaches of the subcontract, the main contractor served a notice of default and terminated a subcontract on 22 March 2019. On 30 April 2019, the subcontractor served its payment claim 12 for a sum of $2.6 million. The main contractor did not issue a payment response and the subcontractor commenced adjudication proceedings[116] ("*AA 203*"). In the midst of the adjudication proceedings in *AA 203*, the subcontractor served payment claim 13 which was identical to payment claim 12. In its payment response, the main contractor entered "nil" as the response amount. The subcontractor lodged another adjudication,[117] ("*AA 245*"). The adjudicator in *AA 203* dismissed the subcontractor's adjudication application holding, *inter alia*, that payment claim 12 had not been properly served and that, in any case, relying on earlier authorities, the payment claim could not be served after the termination of the subcontract when the project director was *functus*. Subsequently, the adjudicator in *AA 245* also dismissed that application, finding that he was bound by the determination in *AA 203*. The subcontractor applied to set aside both ADs.

7.67 The matter was distilled into two issues for the decision of the Court of Appeal. Issue 1 was whether the SOP Act provides an independent right to allow payment claims to be served regardless of the terms of the underlying contract. Issue 2 would arise if Issue 1 is answered in the negative, namely, whether a party is entitled to serve a payment claim after the termination of the underlying contract.

7.68 The Court of Appeal in *Shimizu* elaborated on the principles it had previously laid down in *Far East Square Pte Ltd v Yau Lee*

115 [2020] 1 SLR 1338.
116 *Adjudication Determination No SOP/AA203/2019*.
117 *Adjudication Determination No SOP/AA245/2019*.

Construction (Singapore) Pte Ltd[118] ("*Far East Square*"), a decision the authors considered in the preceding year's volume of this Ann Rev. In *Far East Square*, it was held that the SOP Act provides only a legislative framework to expedite the process by which a contractor may receive payment through "the payment certification/adjudication process" of the underlying contract and that "it does not, in and of itself, grant the contractor a right to be paid".[119]

7.69 In *Shimizu*, the Court of Appeal acknowledged that there are situations where the SOP Act limits the parties' freedom to contract as they see fit as in ss 8 and 9. However, it affirmed its holding in *Far East Square* that the SOP Act operates essentially as a "gap-filler" in situations where parties have omitted to contractually stipulate for progress payments.[120] The court concluded that "there is no separate statutory entitlement to a progress payment where a contract already makes provisions for such payments" and expressly disagreed with decisions which have found otherwise.[121]

7.70 While it might be suggested that the analysis of the Court of Appeal in *Shimizu* and its proposition that the SOP Act discharges essentially a "gap-filling" role has the effect of according primacy to the contract, the court did point out that such a role operates in a "limited sense".[122] This appears consistent with the observation of a differently constituted Court of Appeal in the later case of *Samsung C&T Corp*,[123] where Woo J (delivering the judgment of the court) stated:[124]

> The contractual rights of parties are circumscribed by SOPA and the scheme under SOPA and not the other way around. Otherwise, the 'no contracting out' provision in s 36 SOPA would be meaningless.

7.71 The Court of Appeal in *Shimizu* also addressed specifically the 2018 Amendments to the SOP Act where the term "contract" as amended now means "a construction contract or a supply contract, and includes a construction contract or a supply contract that has been terminated". The Court of Appeal examined both the parliamentary speech of the Minister in introducing the Amendment Act and the amended provision and concluded that the amendment does not go so far "as to allow a person

118 [2019] 2 SLR 189.
119 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30].
120 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [29] and [30].
121 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [31].
122 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [29].
123 See para 7.27 above.
124 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [58].

responsible for certifying payments under a contract to continue to do so, even where he can no longer do so under terms of the contract".[125] It is pertinent that in its judgment, the Court of Appeal stated that the premise of this holding is that the termination must necessarily be *prima facie* valid:[126]

> In other words, there must be some facts to support the valid contractual exercise to terminate the contract.

7.72 On Issue 2, the Court of Appeal considered that although the subcontract was not based on the SIA Form as was the case in *Far East Square*,[127] the payment mechanism thereunder was still broadly similar. Clause 28 of the subcontract called for payment claims to be submitted to the project director. The project director was then obligated to issue a payment response stating the amount he believed was due to the subcontractor. The project director thus played an important role in this process as its payment response served as a condition precedent to the subcontractor's right to receive progress payments.[128]

7.73 The court turned next to cl 33.4 of the REDAS Subcontract. This provided that, upon the termination of the subcontract for default, the main contractor would be entitled to damages on the same basis as if the subcontractor had repudiated the subcontract. No provision had been made for the subcontractor to make any payment claim in such a situation.[129] This contrasted with the provision governing a non-default termination situation where cl 33.5 expressly provided for the subcontractor to be paid for work done prior to the termination.[130] The court thus concluded that the subcontractor had no contractual right to serve a payment claim for work done prior to the termination.[131] Since the subcontract in this case was not silent as to the subcontractor's entitlement to submit a payment claim for work done prior to cl 33.2, "there [was] no question of any gap-filling by s 10 of the SOPA". The subcontractor was therefore not entitled to serve payment claims 12 and 13 under the terms of the subcontract.[132]

7.74 It appears from the judgment in *Shimizu* that the Court of Appeal was not invited to consider jurisprudential developments elsewhere on the subject. These developments may be usefully noted for future

125 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [36].
126 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [37].
127 See para 7.68 above.
128 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [43].
129 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [45].
130 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [46].
131 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [47].
132 *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [48].

reference to assist with an assessment of the applicability of authorities to cases relating to the regime of statutory adjudication in this country.

7.75 In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[133] ("*Probuild*"), the Australian High Court comprising Kiefel CJ, Bell, Keane, Nettle and Gordon JJ in ruling on the operation of the New South Wales equivalent of the Singapore SOP Act, stated that under the NSW SOP Act,[134] the statutory language is intended to grant "a statutory entitlement" to payment "regardless of whether the relevant construction contract makes provision for progress payments".[135] The High Court of Australia addressed the tension between explicit provisions providing that parties may not contract out of the Act and the acknowledgment and preservation of the rights, duties and remedies arising under a construction contract as follows:[136]

> … the operation of the statutory scheme, including its preservation of parties' contractual entitlements, affirmatively supports the conclusion that review for non-jurisdictional error of law on the face of the record is excluded. *The clear legislative intention is to ensure that the statutory entitlement can be determined and enforced with minimal delay.* The Security of Payment Act defers the final determination of contractual rights to a different forum, in which the consequences of any erroneous determination can and must be taken into account. [emphasis added]

7.76 It should be noted that under the NSW SOP Act, s 3(2) lays down specifically that the objective of the NSW legislation is to grant a person entitled to receive a progress payment "a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments". In Singapore, the Building and Construction Industry Security of Payment Bill 2004[137] introduced in Parliament contained an explanatory statement which states:

> … The Bill provides that any person who has carried out construction work or supplied goods or services under a construction contract or supply contract … has a statutory entitlement to payment.

7.77 Unlike the NSW SOP Act, this declaration of the objective of the legislation was not reproduced as a specific provision in the Singapore SOP Act. If Parliament had intended this objective to have the force of law, it may be reasonable to query why the draftsman of the Singapore SOP Act did not follow the NSW SOP Act approach in expressly stating this

133 [2018] HCA 4.
134 See para 7.32 above; also n 52.
135 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [5].
136 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [47].
137 Bill 54 of 2004.

objective in the enacted legislation. At the same time, in the speeches in Parliament during both the reading of the original Bill and, subsequently, the Bill for the Amendment Act, the ministers in each case referred to the legislation as "preserv[ing] the rights to payment for work done".[138] It is arguable that these differences may offer a basis for distinguishing the position in NSW and hence *probuild* (even if it is raised) from that in Singapore.

7.78 Courts in the UK take a strict approach in endorsing the statutory adjudication process. In *Bresco Electrical Services Ltd v Lonsdale (Electrical) Ltd*,[139] the UK Supreme Court affirmed a statutory right to adjudication and appeared to contemplate a more expansive role for adjudication in the dispute landscape in that jurisdiction. In that case, Lord Briggs, with whom Lords Reid, Kitchin, Hamblen and Legatt agreed, said:[140]

> But solving the cash flow problem should not be regarded as the sole objective of adjudication. It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing *de facto* final resolution of most of the disputes which are referred to an adjudicator. Furthermore, the availability of adjudication as of right has meant that many disputes are speedily settled between the parties without even the need to invoke the adjudication process.

7.79 The approach taken in the UK in resolving the tension between the statutory right to relief and a party's contractual rights is best represented by the decision of the English Court of Appeal in *Ferson Contractors Ltd v Levolux AT Ltd*[141] where Mantell LJ (with whom the other members of the court agreed) famously stated that:[142]

> The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down.

7.80 The views expressed by these foreign authorities must be considered against the security of payment models and the legislative context of each jurisdiction. In introducing the Amendment Act in Parliament in Singapore, the Minister explained that the overriding objective was to remove "complex" disputes from the province of the statutory adjudication regime. The "gap-filling" role assigned to the

138 *Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development).
139 [2020] UKSC 25.
140 *Bresco Electrical Services Ltd v Lonsdale (Electrical) Ltd* [2020] UKSC 25 at [13].
141 [2003] EWCA Civ 11.
142 *Ferson Contractors Ltd v Levolux AT Ltd* [2003] EWCA Civ 11 at [30].

legislation by the Court of Appeal in the *Shimizu* line of cases may be more consistent with a change in the legislative objective as suggested in his speech in 2018.[143] This need not be controversial as the industry here is generally perceived to be less litigious than its counterparts in both the UK and Australia. Furthermore, there is clear policy recognition that a payment claim served long after a project has been completed or the termination of a contract was probably not intended as the mischief for which the original legislation was enacted. The Amendment Act has addressed this by reducing the limitation period to 30 months. It is arguable whether this limitation period is still too long, but it might be justified on the ground that statutory adjudication, as compared with arbitration, the other usual route of dispute resolution in the industry, is fast and largely more affordable.

VI. Responsibility of accredited checkers

7.81 In *Leong Sow Hon v Public Prosecutor*,[144] the High Court heard an appeal against the six-month imprisonment sentence imposed on an engineer who had pleaded guilty to an offence under s 18(1) of the Building Control Act[145] for failing to evaluate, analyse and review the structural design in respect of a number of key structural elements of a viaduct. The offence arose from the collapse of the precast girders and formwork used to support the casting of the concrete deck slab of the viaduct. Aedit Abdullah J reviewed the nature and scope of the duty imposed on the accredited checker by the Building Control Act read with the Building Control (Accredited Checkers and Accredited Checking Organisations) Regulations[146] ("Accredited Checkers Regulations").

7.82 From his review of the applicable statutory and regulatory provisions, Abdullah J found as follows: First, he held that the duty of the accredited checker extended beyond evaluating, analysing and reviewing the structural design of building works to performing "original calculations with a view to determining the adequacy of the key structural elements".[147] Secondly, in his view, the specific duties imposed on the accredited checker are separate and distinct from those imposed on the qualified person. In particular, he considered that the duties imposed on the accredited checker are of a personal and non-negotiable nature.

143 *Parliamentary Debates, Official Report* (2 October 2018) vol 94 "Second Reading Bills: Building and Construction Industry Security of Payment (Amendment) Bill" (Zaqy Mohamad, Minister of State for National Development).

144 [2020] SGHC 228.

145 Cap 29, 1999 Rev Ed.

146 Cap 29, Rg 2, 2002 Rev Ed.

147 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [25(a)].

This appears from the requirement in s 18(1) of the Building Control Act that the accredited checker "shall" check the detailed structural plans and design calculations in accordance with the building regulations.[148] It is reinforced by the Minister's speeches in Parliament for the Building Control Bill[149] that "all" structural plans and calculations are subjected to a series of "independent" checks.[150]

7.83 The learned judge agreed that deterrence ought to be given effect as the primary sentencing consideration, utilising the full range of sentences prescribed, particularly after the 2008 amendments to the Building Control Act.[151] Furthermore, it is Parliament's intent that offences under the Building Control Act should attract custodial sentences where appropriate.[152]

7.84 However, Abdullah J iterated that:[153]

> … any deterrent element cannot be pitched so high that suitably qualified individuals decline to offer themselves up as accredited checkers for fear that any breach, no matter how small, would sound in a criminal offence and imprisonment.

Abdullah J accepted the proposition that "the sentencing framework for offences under the [Building Control] Act can, in principle, be developed by reference to that for the [Workplace Safety and Health Act]".[154] In this framework, the first stage is establishing the level of harm and level of culpability.[155] The second stage calls for an adjustment to offender-specific aggravating and mitigating factors.[156] Arising from these considerations, the learned judge laid down the following sentencing matrix:[157]

148 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [25(b)].
149 Bill 3 of 1988.
150 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [27] and [28].
151 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [42].
152 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [43].
153 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [44].
154 Cap 354A, 2009 Rev Ed. See *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [47].
155 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [51(a)].
156 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [51(b)].
157 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [52].

Culpability				
		Low	Medium	High
Harm	High	Six to 10 months' imprisonment.	10 to 15 months' imprisonment.	Above 15 months' imprisonment.
	Medium	Up to three months' imprisonment.	Three to six months' imprisonment.	Six to 10 months' imprisonment.
	Low	Fine of up to S$32,500.	Fine of S$32,500 to S$65,000.	Fine of S$65,000 to S$100,000.

7.85 The learned judge considered the various aggravating factors in this case, including the abandonment of the very duty imposed by the legislation and that the engineer had initially lied to the Building and Construction Authority when he stated that he had performed the original calculations but, as it turned out, he was unable subsequently to produce those calculations.[158] In consideration of these factors and mitigating factors, the learned judge held that the six-month custodial sentence imposed by the District Judge was not manifestly excessive and dismissed the appeal.

VII. Operation of defects liability clauses

7.86 *Sandy Island Pte Ltd v Thio Keng Thay*[159] concerned a claim for damages by a purchaser against a developer for defects in a waterfront villa sold under the terms of a standard sale and purchase agreement ("SPA"). Clause 10 of the SPA required the developer to build the property in a good and workmanlike manner. Clause 17 was the usual defects liability clause which required the developer to make good any defect that became apparent within a 12-month defects liability period. Soon after taking possession, the purchaser complained of numerous defects in the property. Despite the developer proposing various method statements for the rectification works, the purchaser refused to grant the developer permission to carry out the rectification works, arguing that the proposed rectification works were unsatisfactory and insufficient. Eventually the purchaser conducted two tender exercises and engaged a new contractor to carry out rectification works and sought damages for the rectification and associated costs.

158 *Leong Sow Hon v Public Prosecutor* [2020] SGHC 228 at [61] and [62].
159 [2020] 2 SLR 1089.

7.87 The Court of Appeal held that the wording of cl 17 did not support the developer's contention that it was a complete code that governed the parties' rights and obligations in relation to any defects arising out of the property. The clause, for example, "did not deal with defects that appeared after the defects liability period, or with latent defects".[160] Quentin Loh J, in delivering the judgment of the court, approved the statement of principle in a number of textbooks that, "in the absence of express provision, the remedies under maintenance clauses [or defects liability clauses] were in addition to, and not in substitution of, the common law rights".[161] The decision of the NSW Supreme Court in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd*[162] was distinguishable because the defects liability clause in that case contained "sufficiently clear words" to restrict the rights of the contracting party in pursuing a common law claim for damages.[163]

7.88 Furthermore, the relevant parliamentary material surrounding the standard form of SPA emphasised avenues of redress for rectification of defects during the defects liability period and allowed it for defects beyond the defects liability period. As such, homeowners could sue the developers for latent defects on grounds of negligence or breach of contract. There was no suggestion that homeowners' rights at common law would be replaced by a defects liability clause.[164]

7.89 The purchaser's act of disallowing the developer to conduct rectification works could not be said to be of such significance that it would displace the developer's legal responsibility for defective works. However, denying access to or preventing the developer from carrying out rectification works would be relevant to the quantum of damages recoverable from the developer pursuant to the purchaser's duty to mitigate his loss.[165]

160 *Sandy Island Pte Ltd v Thio Keng Thay* [2020] 2 SLR 1089 at [50] and [54]–[55].
161 *Sandy Island Pte Ltd v Thio Keng Thay* [2020] 2 SLR 1089 at [69] and [70]; *Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 on the effect of defects liability clauses affirmed.
162 [2009] NSWSC 1302.
163 *Sandy Island Pte Ltd v Thio Keng Thay* [2020] 2 SLR 1089 at [76].
164 *Sandy Island Pte Ltd v Thio Keng Thay* [2020] 2 SLR 1089 at [89].
165 *Sandy Island Pte Ltd v Thio Keng Thay* [2020] 2 SLR 1089 at [100].