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7. BUILDING AND CONSTRUCTION LAW

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

Christopher **CHUAH**
LLB (Hons), DipSurv; FCIArb; FSIArb; FCIOB;
Senior Accredited Specialist (Building and Construction Law);
Senior Adjudicator; Advocate and Solicitor (Singapore).

Mohan **PILLAY**
LLB (Hons), LLM; FCIArb; FSIArb;
Senior Accredited Specialist (Building and Construction Law);
Chartered Arbitrator; Senior Adjudicator;
Advocate and Solicitor (Singapore).

I. Terms of a contract

A. Letter of award and incorporation of terms

7.1 Frequently, a construction contract is awarded by way of a letter of award. It is trite that the letter of award may incorporate by way of reference the terms set out in another document. The question arises as to whether these incorporated terms bind a party who has not been issued with a copy of the document in which the terms are found.

7.2 In *Bintai Kidenko Pte Ltd v Samsung C&T Corp*[1] ("*Bintai Kidenko*") the subcontractor argued that it was not bound by a clause which excluded the subcontractor from relying on the ground of unconscionability to restrain a call on an on-demand performance bond ("the exclusion clause"). This clause was found in the particular conditions of the subcontract ("SC Particular Conditions"). The subcontractor argued that incorporation was ineffective because it had not been furnished with a copy of the SC Particular Conditions at the time of contracting.

1 [2019] 2 SLR 295.

7.3 The Court of Appeal dismissed this argument. In his judgment, Tay Yong Kwang JA held that:[2]

> … if a term in a signed contract incorporated some or all the terms of a separate document by making reference to those terms, the parties to the contract would be bound by those separate terms even if they did not have any knowledge of what those terms were at the time of contracting.

7.4 On the specific objection by the subcontractor that it had not been given a copy of the SC Particular Conditions, Tay JA said:[3]

> Accordingly, the Appellant could not claim that it was not bound by the SC Particular Conditions (or MC Particular Conditions) on the basis that it was not given a copy of those terms at the time of contracting. All that the Appellant needed to do was to request a copy of those Particular Conditions from the First Respondent or to ask what terms were being incorporated by reference. If it signed the contract without doing so, then it had to bear the risks and the consequences of its omission.

B. Consultant's liability for fitness for purpose

7.5 In the previous issue, the authors noted the decision in *Millenia Pte Ltd v Dragage Singapore Pte Ltd*[4] ("*Millenia*"), where the High Court considered the circumstances under which liability for fitness for purpose may attach to a contractor. In 2019, this issue was raised before the High Court in relation to a design consultant.

7.6 In *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd*[5] ("*Global Switch*") the owner of a data centre facility claimed a sum of $23.8m against a mechanical and electrical ("M&E") consultant for damages arising from extension works to an existing data centre facility. It was the owner's case that its contract of engagement with the M&E consultant included an implied term of fitness for purpose for the M&E consultant's design work.

7.7 Quentin Loh J, who coincidentally also presided in *Millenia*, noted that it was unclear whether a term for fitness for purpose should

2 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [60], referring to *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712.

3 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [62].

4 [2019] 4 SLR 1075, commented in (2018) 19 SAL Ann Rev 113.

5 [2019] SGHC 122.

be implied as a matter of law, or as a matter of fact.[6] In the event, Loh J rejected such an implied duty in either situation.

7.8 He declined to make any finding as to an implied fitness for purpose term in law because the threshold for implying such a term was a high one and neither party had addressed the court sufficiently on this point for the court to come to a concluded view. The learned judge noted that the authorities, while focusing on such an implied obligation on contractors, were reluctant to extend such an implied obligation to professionals generally.[7] He concluded that the only available avenue open to the owner in this case is to show that a fitness for purpose warranty should be implied into the contract in fact.[8]

7.9 On the issue of an implied duty in fact, Loh J considered the approach to take for this inquiry in the following passage of his judgment:[9]

> When approaching this issue two questions arise: Fit for what purpose? And, 'fit' to what standard? In the context of designing a data centre, the latter question is susceptible to numerous levels of quality and standards, such as the degree of redundancy …

7.10 The court accepted that the owner addressed the first question by identifying the purpose as the use of the facility as a data centre. However, the court found that the owner was unable to deal with the second question, not least because this question was susceptible to numerous levels of quality and standards. While parties had set down certain matters in the fee proposal and claimed that those were to be agreed, the terms were vague as to the tier of data centre that the extension works should attain. In the circumstances, it was held that the owner failed to particularise the applicable standard adequately and the owner's case for an implied term of fitness for purpose in fact was too vague and ambiguous to succeed.[10]

7.11 The learned judge also considered whether the owner's case for the warranty to be implied would have succeeded on the three-stage test for implied terms laid down by the Singapore Court of Appeal in

6 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [122].

7 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [122]–[123].

8 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [125].

9 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [126].

10 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [127]–[128].

Sembcorp Marine Ltd v PPLH Holdings Pte Ltd.[11] The *Sembcorp* test requires the court to consider (a) whether the gap arose because the parties did not contemplate the gap; (b) whether it is necessary in the business or commercial sense to imply a term to give the contract efficacy; and (c) whether the specific term to be implied is one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.[12]

7.12 While Loh J accepted that the parties did not contemplate the question of such a term as to fitness for purpose, he found that such an implied term would not have been necessary for business efficacy, because the consultant was already under a duty to use reasonable care and skill in performing its obligations. It was also clear from his analysis that the officious bystander test would not have been met. Given its modest fee and the fact that the design consultant was to develop the design in close consultation with the owner, the consultant would not have agreed to guarantee more than the use of reasonable care and skill. The court therefore rejected the owner's submission that the fitness for purpose term could be implied on the facts of the case.[13]

II. Delay

7.13 An important case during the year embraced all the typical issues where a contract did not contain an extension of time clause and delay set the time for completion at large.

7.14 In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*,[14] the employer employed a contractor to construct a business park and construction proceeded on the basis of a four-page letter of intent ("LOI"). The LOI was issued on 30 June 2008 and Temporary Occupation Permit was achieved on 22 December 2010. Crucially, the LOI was silent as to extension of time but contained a liquidated damages clause. The works were certified complete on 12 January 2011. It was not in dispute that regardless of which of these two dates was taken as the date of completion, the contractor had exceeded the stipulated period of 18 months allowed for the completion of the project. The contractor's case was that it was not responsible for any of the delays because of the employer's acts of

11 [2013] 4 SLR 193 at [101].
12 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [129].
13 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [130].
14 [2019] SGHC 4.

prevention and argued that, in the absence of an extension of time clause, the completion period had been set at large.

A. Time set at large and liquidated damages

7.15 Tan Siong Thye J in his judgment affirmed the general principle that where there is no extension of time clause, and the employer commits an act of prevention, the contractor is no longer bound by the original contractual completion date, and the time for the completion of the project will be set at large. Any liquidated damages clauses entered into between the parties are rendered inoperative. Nonetheless, the contractor is under an obligation to complete the project within reasonable time and failure to complete the project within reasonable time will render the defendant liable for general damages.[15] The court held that since the employer's acts of prevention accounted for 173 days of delay, the contractor was not bound to complete the works within the period of 18 months as stipulated in the LOI and, consequently, the employer had lost its right to claim liquidated damages under the LOI.[16]

B. Determining reasonable time for completion

7.16 The court then proceeded to determine whether the contractor had completed the works within a reasonable time. From his review of the authorities, in particular the High Court decision in *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd*,[17] Tan J stated the applicable principles on this issue as follows:[18]

> (a) What constitutes a reasonable time is a *question of fact*;
>
> (b) When determining reasonable time, the court must strike an appropriate balance between not allowing the employer to take advantage of its own fault and not giving the contractor any other additional time other than that caused by the employer's delay; and

15 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [353], citing *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 at [24]–[25]; *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 at [18]; and Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) at para 9.084.

16 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [354].

17 [2011] SGHC 82.

18 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [357], citing *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 at [25].

> (c) The *Fongsoon* method of determining reasonable time by simply adding the employer's delay to the contractual completion time is merely a guide on calculating reasonable time which meets the above two considerations.
>
> [emphasis in original]

7.17 Tan J further referred to the English decision in *Astea (UK) Ltd v Time Group*[19] on the relevant facts to be taken into account in determining the period of reasonable time. He said:[20]

> [The] determination of what constitutes reasonable time for the Project's completion is a holistic approach that includes taking into account the actual conduct of the parties that caused the delay. This would require this court to consider all the facts, including whether the parties' initial agreed time frame to complete the Project was reasonable, the experts' opinions of the parties on the timelines in the light of the actual scope of work involved in the Project, and the actual delay caused by the plaintiff.

7.18 Arising from his analysis, the learned judge concluded that, in the absence of acts of prevention from the employer, the reasonable time for the works to be completed would have been 18 months and 25 days. If the acts of prevention were taken into account, then applying the *Fongsoon* method, the reasonable period for the project to complete would be 18 months plus 25 days and 173 days (or 18 months plus 198 days of delay).[21]

7.19 Both the decision of the High Court and the careful reasoning of the learned judge were upheld by the Court of Appeal.[22] The only issue in respect of which the appeal was allowed was in respect of an agreed calculation error on account of the capping beams work.[23]

III. Damages for breach

A. Claim for loss of opportunity

7.20 Another issue raised before the court in *Global Switch*[24] related to a claim for damages in respect of loss of opportunity. The High Court in that case distinguished between the claim premise for "loss of

19 [2003] All ER (D) 212 at [144].
20 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [357], citing *Astea (UK) Ltd v Time Group* [2003] All ER (D) 212 and *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 at [25].
21 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [373].
22 *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd* [2019] SGCA 63 at [12].
23 *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd* [2019] SGCA 63 at [13].
24 See para 7.6 above.

profits" and that for "loss of chance". On a claim for *loss of profits*, the court affirmed the "but for" principle that, to sustain a claim for loss of profits, a claimant has to show, on a balance of probabilities, that, but for the other party's breach, it would have made the profits alleged.[25] This same test applies regardless as to whether the claim is grounded in tort or contract. In the case of a claim for *loss of chance*, the claimant's task is to establish, on a balance of probabilities, that the other party's breach had caused the claimant to lose the chance of securing the benefit in question. Having established causation for the loss of that chance, the claimant must further show that the lost chance was "real or substantial" and not merely speculative.[26]

7.21 In *Global Switch*, the owner had originally pleaded its claim as a claim for loss of profits it would have made if the spare capacity of the existing data centre was not used for remedying the shortfall caused by the consultant's faulty design. However, during the trial, it transpired that the owner's claim was actually a claim for lost opportunity. On the facts, the court found that the owner could not prove that it was unable to present a competitive offer to a customer because of the consultant's breaches. The owner was therefore unable to show causation. In addition, the court did not consider there was a chance that, in the absence of the alleged breach, there was a real and substantial chance of the customer accepting the owner's offer. The court therefore dismissed the owner's claim.

IV. Nuisance and the rule in *Rylands v Fletcher*

A. Role of foreseeability in nuisance

7.22 During the year, the Court of Appeal made a number of important observations on the tort of nuisance and the rule in *Rylands v Fletcher*[27] which will be of interest to readers in the construction industry.

7.23 In *PEX International Pte Ltd v Lim Seng Chye*[28] ("*PEX International*"), a property owner claimed that his property was damaged

25 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [390], citing *Super Continental Pte Ltd v Essential Engineering & Construction Pte Ltd* [2010] SGHC 365 at [142]; *AKM v AKN* [2014] 4 SLR 245 at [184]–[185]; *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475.

26 *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122 at [391], citing *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661 at [132]–[135] and [137].

27 (1868) LR 3 HL 330.

28 [2020] 1 SLR 373.

by a fire caused by sparks from the hot works in the adjoining property. The owner of the adjoining property employed a firm ("Formcraft") as the contractor to carry out construction works on its property, including the hot works. It was not in dispute that the fire was caused by the sparks from the hot works and that Formcraft had been negligent in its carrying out of the construction works.

7.24 In its judgment, the court distinguished between the concept of foreseeability as applied to negligence and the concept of foreseeability as applied to nuisance. The modern test for the existence of a duty of care in the tort of negligence continues to be strongly anchored to the concept of reasonable foreseeability and this concept expresses itself through the tests of factual foreseeability and proximity.[29]

7.25 In contrast, the relevance of foreseeability in the tort of private nuisance has been the subject of conflicting interpretations and applications.[30] There are two competing approaches to explain the proper role of foreseeability in the tort of private nuisance. The first approach is that foreseeability of the risk of harm is generally relevant in determining whether liability in nuisance is established[31]. The second approach is that foreseeability of the risk of harm is not generally relevant in establishing liability. Instead, the relevant control mechanism is the principle that the use of land must be reasonable. Foreseeability of the type of harm, however, is relevant in determining whether a type of loss is too remote to be claimed.[32] In delivering the judgment of the court, Steven Chong JA explained as follows:[33]

> What is common to both these approaches is that foreseeability of the risk of harm is relevant where the nuisance was created by a third party that was not authorised by the owner or occupier of the land. In the first approach, this is merely an application of the general principle that foreseeability of the risk of harm is relevant in establishing nuisance. In the second approach, this exception is justified on the basis that nuisance will only be established if there is an unreasonable use of land, and if the owner or occupier had no knowledge of a nuisance created by an unauthorised third party, it would follow that such a situation cannot be characterised as 'use' …

7.26 The Court of Appeal preferred the second approach for three reasons. First, this approach preserves the historical distinction between the tort of negligence and the tort of private nuisance. The latter focused on the plaintiff's interest and rights over land, whereas negligence is

29 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [31].
30 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [32].
31 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1.
32 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.
33 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [54].

focused on the conduct of the defendant. Secondly, the approach is also more consistent with the original scope of nuisance set out in earlier authorities. Finally, the principle in the second approach that one should use one's property in such a manner as not to injure the property of another is particularly important in land-scarce Singapore.[34]

7.27 In his judgment, Chong JA decided that the judge in the first instance had erred in taking into account the fact that the adjoining owner could have foreseen the risk of harm occurring. This is because the works that created the nuisance were authorised by the adjoining owner. Thus, foreseeability of the risk of harm was strictly irrelevant.[35] Nevertheless, on the facts, the Court of Appeal agreed with the trial judge there was an unreasonable use of land. The hot works were done in the presence of strong winds and without any proper supervision of the workers. The court therefore upheld the finding by the court below that the adjoining owner was liable in nuisance.[36]

B. *Rule in* Rylands v Fletcher

7.28 The Court of Appeal noted that English authorities are united in the view that the rule in *Rylands v Fletcher*[37] is a subspecies of the tort of nuisance. These authorities are in agreement that foreseeability of the risk of harm is not relevant in establishing liability under the rule.[38] As originally conceived, the rule in *Rylands v Fletcher* merely extended the law of nuisance to cases of isolated escape. It was not developed as a new basis to hold persons strictly liable for ultra-hazardous operations.[39] In *Transco plc v Stockport Metropolitan Borough Council*,[40] the continued existence of the rule in *Rylands v Fletcher* was justified on the basis that it was an exception to the general rule that foreseeability of the risk of harm is relevant in establishing liability for nuisance.

7.29 Chong JA accepted that the effect of the Court of Appeal's decision in *PEX International*[41] calls into question whether it remains necessary to preserve the distinction between nuisance and the rule in *Rylands v Fletcher*.[42] Nevertheless, he considered that, on a "preliminary basis", abolishing the rule would be too radical a step to take given that it

34 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [58].
35 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [61].
36 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [63]–[64].
37 See para 7.22 above.
38 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [66].
39 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 304–305.
40 [2004] 2 AC 1.
41 See para 7.23 above.
42 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [68].

had been part of English law for around 150 years and the court did not see any good reason to depart from the English authorities. Nevertheless, it is clear from these authorities that the risk of harm is not relevant to determine liability under the rule and the trial judge had therefore erred in holding otherwise.[43]

7.30 However, on the facts in *PEX International* the court dismissed the appeal on the rule because the Court of Appeal agreed with the trial judge that there was non-natural use of the land and there was an escape of a dangerous object onto the plaintiff's property. The Court of Appeal also agreed that the loss was not too remote as the type of harm was foreseeable.[44]

V. Construction defects

7.31 In *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556*[45] ("*Orion-One*"), the management corporation ("MCST") of a strata-titled commercial building brought a claim against the developer of the building and the main contractor for defects.

A. Locus Standi *of the Management Corporation*

7.32 One of the issues before the Court of Appeal was the *locus standi* of the MCST in this action. It was common ground that the MCST did not itself have the *locus standi* to sue under the sale and purchase agreements. The issue revolved around the letters of authorisation ("LOAs") signed by the various subsidiary proprietors to provide the requisite authorisation to the MCST. The MCST relied on these letters of authorisation as the basis of its *locus standi*. On the point as to whether these LOAs had to be supported by direct evidence or affidavits of the subsidiary proprietors, the Court of Appeal expressed the view that there was no need to do so. The LOAs indicated, on their face, the name of the subsidiary proprietors, their unit numbers and their signatures together with the statement of authorisation. The court held that the subsidiary proprietors had properly authorised the MCST to act on their behalf given that the authenticity of the LOAs was not disputed, and that there was no need for fresh evidence on this point.[46]

43 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [69].
44 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [70].
45 [2019] 2 SLR 793.
46 *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556* [2019] 2 SLR 793 at [15].

B. Standard of "good and workmanlike manner"

7.33 Another issue in *Orion-One* concerned the applicable standard of workmanship in the construction of the building. Clause 10.1 of the sale and purchase agreement required the building to be built "in a good and workmanlike manner" according to the specifications and plans approved by the authorities. The developer submitted that the standard imposed by cl 10.1 did not require the common property to be constructed with proper care and skill, but only to the specifications identified in the sale and purchase agreement.

7.34 The Court of Appeal rejected this submission, holding that cl 10.1 did not draw any distinction between "defective workmanship" on the one hand and constructing "according to the Specifications" on the other. The developer was obliged to build the common property in good and workmanlike manner according to the specifications and plans approved by the Commissioner of Building Control and other authorities. It would not make sense for a developer to escape liability for poor workmanship just because it might technically have met the specifications.[47]

7.35 The Court of Appeal also rejected the developer's argument that Parliament intended a lower standard to apply to the construction of commercial properties in contrast to residential properties. The court considered that such a distinction was unlikely and noted that the developer was unable to offer any possible reason for such a distinction.[48]

C. Omission of design features

7.36 In the course of its judgment, the Court of Appeal also addressed the MCST's allegation of faulty design, in that it did not provide for certain features and whether this affected the developer's obligation to construct the building in a "good and workmanlike manner". The Court of Appeal held that the mere omission of features in the specifications and approved plans could not be said to fall under the developer's duty to construct in "a good and workmanlike manner".[49] Andrew Phang Boon Leong JA in delivering the judgment of the court noted:[50]

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47 *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556* [2019] 2 SLR 793 at [31].

48 *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556* [2019] 2 SLR 793 at [32].

49 *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556* [2019] 2 SLR 793 at [37]; *MCST Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 distinguished.

50 *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556* [2019] 2 SLR 793 at [38].

> It is not the MCST's case that the Building was not constructed in accordance with the Specifications or the approved plans. Rather, counsel for the MCST … submitted at the oral hearing that, as a result of the defective designs, Orion-One did not construct the Building 'in a good and workmanlike manner'. However, as we pointed out to [counsel] the design defects relate to Orion-One's omission to install certain features … We do not think that an omission to construct because the feature was not included in the Specifications or the approved plans (i.e., a pure omission) can be fairly said to fall under Orion-One's duty to construct in a good and workmanlike manner.

D. Proof of poor workmanship

7.37 In *Orion-One*, the MCST pointed to defects arising from the debonding of the plasterwork, plaster and paintwork such as water ponding and defective floor slabs. The Court of Appeal held that the mere existence of these defects did not by itself establish poor workmanship. Phang JA considered that the issue was not whether the defects existed, but whether the defects were caused by poor workmanship.[51] In the result, the Court of Appeal found that the developer was not liable for the "design omissions".

VI. Security of payment

A. The Amendment Act

7.38 Readers will recall that in 2018, Parliament enacted the Building and Construction Industry Security of Payment (Amendment) Act 2018[52] ("the Amendment Act") and provided for the Act to come into operation on a date to be notified by the Minister. On 26 November 2019, the Minister notified that the Amendment Act came into operation on 15 December 2019[53] and further issued the Building and Construction Industry Security of Payment (Amendment) Regulations 2019[54] ("Amendment Regulations").

7.39 It is important to note the transitional provisions listed under s 25 of the Amendment Act. Section 25(2) of the Amendment Act provides that s 10 of the principal Act as in force immediately before

51 *Orion-One Development Pte Ltd v Management Corporation Strata Title Plan No 3556* [2019] 2 SLR 793 at [48].
52 Act 47 of 2018.
53 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Commencement) Notification 2019 issued by the Minister on 26 November 2019 at 5.00pm.
54 S 780/2019.

the commencement date of the Amendment Act continues to apply to the service of a payment claim in relation to a contract that was entered into before that date. Thus, arising from the Amendment Act, s 10 of the principal Act (as amended) applies to contracts entered into after 15 December 2019.

7.40 All the cases considered below relate therefore to the situation before the Amendment Act came into force.

B. Existence of a written contract

7.41 It is trite that the recourse to the Building and Construction Industry Security of Payment Act[55] ("the SOP Act") is conditional on the existence of a contract between the parties. In *Sito Construction Pte Ltd v PBT Engineering Pte Ltd*[56] ("*Sito Construction*"), a contractor ("PBT") employed a subcontractor ("Afone") for the purpose of carrying out construction works for a project that formed part of the Changi East development. At that time, a Loke Swee Wan was the sole proprietor of Afone. Shortly after PBT entered into the contract with Afone, Loke sold the business of Afone to Sito. Notwithstanding this change in ownership, from July 2016 till August 2017, Afone continued to work with PBT and received payments from PBT totalling $4.811m. On 14 June 2018, Afone served on PBT payment claim 25 for a sum of $2.047m. PBT did not serve any payment response.

7.42 In its application to set aside the adjudication determination, PBT argued that there was no contract between the new sole proprietor, Sito and PBT. The contract was only binding between Loke and PBT. In reply, Sito argued that the conduct of the parties indicated that the contract between PBT and Loke of Afone continued to bind the parties. Sito filed an adjudication application and was successful in the adjudication.

7.43 The High Court allowed the enforcement application and dismissed the application to set aside the adjudication determination. In doing so, the court found that there was indeed a contract between Afone and PBT. In his judgment, Tan Siong Thye J noted that it was well established that a sole proprietorship or a firm did not have a distinct and separate legal personality from its sole proprietor. Therefore, when the sole proprietorship entered into a contract, at law, it was the sole proprietor himself who entered into the contract.[57] However, the learned judge considered that the result also turned on the intention of

55 Cap 30B, 2006 Rev Ed.
56 [2019] 4 SLR 804.
57 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [36].

the parties to a contract. From the evidence, PBT's true intention was to contract with Afone, as a business, to carry out the works under the contract. The fact that Afone was a sole proprietorship and that Loke was the sole proprietor when the contract was executed was merely a legal technicality which the parties never considered.[58] Tan J said:[59]

> … Afone International, indeed, honoured its part of the Contract by providing the necessary contractual services to the respondent who failed to make the necessary payment for the services rendered. Notwithstanding the change of ownership in Afone International in the early part of the Contract, the parties had held themselves to be bound by the Contract … The sale of Afone International was an internal matter of Afone International which had nothing to do with the respondent.

7.44 The important point arising from the decision in *Sito Construction* is that a change in the sole proprietorship of a business does not necessarily dismantle a contractual relationship between parties. The parties' true intentions would always form the basis for the court's inquiry as to the existence of a contractual relationship.

C. Application of the Building and Construction Industry Security of Payment Act to off-site work

7.45 In *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd*,[60] a subcontractor lodged an adjudication application after the main contractor had terminated the subcontract. The adjudicator determined that $165,683.91 (inclusive of Goods and Services Tax ("GST")) was payable by the main contractor to the subcontractor. Of the sum of $165,683.91, $75,651.00 was included for the value of materials, which, while fabricated by the subcontractor for the project, had not been delivered or installed. One of the issues before the High Court was whether the amount of $75,651.00, being the value of the uninstalled materials, should be allowed in the adjudication determination.

7.46 The court noted that s 7(2)(*c*) of the SOP Act provides for the adjudicator to allow in his valuation materials "that are to form part of any building, structure or works arising from the construction work". These consist of materials that (a) had become the property of the party for whom the construction work was being carried out ("the first limb");

58 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [37].
59 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [39].
60 [2019] 4 SLR 901.

and (b) on payment, would become the property of the party for whom the construction work was being carried out ("the second limb").[61]

7.47 The contention before the court was between two interpretations of s 7(2)(*c*). The main contractor argued that only materials that had been incorporated or affixed to a building ought to be valued under s 7(2)(*c*) of the SOP Act ("Situation A"). In contrast, the subcontractor's case was that materials could be subject to the valuation exercise even if they had neither been delivered nor affixed to the building, as long as they were fabricated for the construction contract ("Situation B"). Chan Seng Onn J decided that the fabrication test was to be preferred. He considered that the adoption of the affixation text would be inconsistent with the legislative intent behind the SOP Act to mitigate the cash flow problems of downstream players in the construction industry.[62] In dismissing the main contractor's application to set aside the adjudication determination, the learned judge said in the course of his judgment:[63]

> As a result, I prefer the respondent's interpretation of s 7(2)(*c*) of the SOPA. Under their interpretation, Situation B unequivocally allows the subcontractor or supplier to be able to receive payment for materials fabricated for the construction contract, thereby facilitating cash flow and enabling the construction project to move along. Alternatively, in cases such as the present whereby the construction contract has been terminated, Situation B ensures that the subcontractor or supplier may nonetheless be paid for fabricated materials which it produced for the project, and which can be costly and would be of little use to them outside the project. This mitigates the significant cash flow issues that may flow from non-payment of such fabricated materials simply due to a (possibly wrongful) termination.

D. Payment for work done

7.48 During the year under review, the High Court had an opportunity to reiterate that, for the purposes of the SOP Act, the scope of a payment claim is limited only to payment for construction work carried out, or goods and services supplied under a contract. A claim for damages for breach of contract does not fall within the province of the SOP Act.

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61 *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [14].

62 *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [32].

63 *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 at [33].

7.49 In *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd*,[64] a subcontractor lodged an adjudication application of its Payment Claim 35 ("PC 35"). In his adjudication determination dated 13 December 2018 ("1 AD"), the adjudicator awarded a subcontractor the sum of $692,051.21. The subcontractor had, at the inception of the subcontract, furnished the main contractor with a performance bond as a security for the subcontractor's performance of the subcontract works. Shortly after 1 AD was issued, on 20 December 2018, the main contractor called on an on-demand performance bond for the sum of $281,441.95. Following the call on the performance bond, the subcontractor served payment claim 36 ("PC 36"), claiming the sum received by the main contractor from its call on the bond plus GST. PC 36 was referred to adjudication. The subcontractor was also successful in the second adjudication determination ("2 AD") and was awarded the claimed amount. The main contractor applied to set aside 2 AD.

7.50 In resisting the main contractor's application, the subcontractor relied on the decision in *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd*[65] ("*SH Design*"). In that case, pursuant to the requirements of a subcontract, a subcontractor procured an on-demand performance bond for the sum of $1,293,600 in favour of the main contractor. The main contractor later assigned all of its rights under the subcontract, including the performance bond, to the owner. The owner subsequently called on the bond in full. The subcontractor's payment claim in that case consisted of a sum of $4,250,683.08 for work done for the claimed period. In the adjudication determination issued in that case, the adjudicator determined that the subcontractor was entitled to a sum of $1,127,088.40 after taking into account the bond proceeds of $1,293,600 which had been received by the owner. The court had in *SH Design* dismissed the main contractor's application to set aside the adjudication determination.

7.51 In this case, the High Court allowed the application. Chan J noted that, under s 10(1) of the SOP Act, a payment claim has to relate to construction work carried out, or goods and services supplied under a contract. This delineates the boundaries of a payment claim. A payment claim must be dismissed entirely if it relates to matters beyond the scope allowed under s 10(1).[66] Here, PC 36 was a claim for performance bond proceeds. While the performance bond related to the construction works,

64 *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422.

65 [2018] SGHC 133.

66 *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [22]–[23].

a call on the performance bond by the main contractor usually arises from some allegation of breach by the subcontractor.

7.52 Chan J said in the course of his judgment:[67]

> [The] subcontractor's argument that it is entitled to make a payment claim for performance bond proceeds flies in the face of clear statutory wording, which stipulates that entitlement to progress payment (from which a payment claim results) is premised on work done or goods or services being supplied. While the performance bond relates to the construction works, a call on the performance bond resulting in the main contractor receiving the bond proceeds cannot be considered as works done by the subcontractor, which is a fundamental requirement under s 5 SOPA. On the contrary, the performance bond is usually called as a result of some alleged breach of the contract and it includes an alleged failure by the subcontractor to carry out construction works, or supply goods or services, in accordance with the terms of the construction contract …

7.53 In the course of his judgment, Chan J distinguished *SH Design*:[68]

> In *SH Design*, there was no doubt that the payment claim related to progress payment for construction works that had been carried out by the defendant. Indeed, in arriving at the adjudicated sum, the adjudicator had considered that $1,050,344.52 was owed to the defendant for work done …

7.54 Crucially, Chan J further pointed out that the bond proceeds in *SH Design* were raised only in the payment response, and only featured in the accounting stage when the adjudicator was determining the final adjudicated amount.[69] In contrast, the learned judge noted that, in the case before him, PC 36:[70]

> … relates entirely to the performance bond proceeds, and it is not disputed that it is not a claim for any construction work done by the subcontractor which remains unpaid.

E. Progress claim within the ambit of the SOP Act

7.55 During the year under review, the Court of Appeal in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd*[71] ("*Far East Square*") revisited its earlier holding on the operation of s 15(3) and also

67 *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [42].
68 *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [36].
69 *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [36].
70 *China Railway No 5 Engineering Group Co Ltd v Zhao Yang Geotechnic Pte Ltd* [2019] 5 SLR 422 at [37].
71 [2019] 2 SLR 189.

considered whether a contractor is entitled to serve a payment claim submitted after the issuance of a final certificate.

7.56 Given the extensive areas covered by the Court of Appeal's decision in *Far East Square*, it is necessary to set out the facts at some length. The subject contract in that case incorporated the Singapore Institute of Architects Conditions of Building Contract (Measurement Contract)[72] ("SIA Conditions"). The works were completed on 6 May 2014 and the maintenance period lasted from 6 May 2014 to 5 August 2015. Clause 31(11) of the SIA Conditions provided for the contractor to submit its final claim to the architect of the project before the end of the maintenance period. On 4 August 2017, the architect issued the maintenance certificate.

7.57 On 23 August 2017, that is, after the issuance of the maintenance certificate, the contractor submitted payment claim 73 ("PC 73"). On 5 September 2017, the architect issued the final certificate certifying the final balance to the contractor in the sum of $1.546m. On 12 September 2017, the employer issued a payment response to PC 73 described as "Payment Response Reference Number 73 (Final)". On 24 October 2017, the contractor submitted payment claim 74 ("PC 74"). The architect wrote to the contractor that the final payment claim had to be submitted before the end of the maintenance period and, since the contractor failed to do so, he had proceeded to issue the final certificate in accordance with cl 31(12)(a) of the SIA Conditions. Notwithstanding the architect's letter, on 24 November 2017, the contractor proceeded to submit payment claim 75 ("PC 75"). PC 75 was exactly the same as PC 74. PC 75 was also the same as PC 73 except for certain deductions.

7.58 The contractor lodged an adjudication application in respect of PC 75 and in the ensuing adjudication determination, the adjudicator awarded the contractor the sum of $2.276m. The adjudicator examined the employer's objection that PC 75 was submitted after the issuance of the final payment claim and the final certificate but agreed with the contractor that as the employer had not raised this objection in a payment response, s 15(3) of the SOP Act applied to prohibit the adjudicator from considering the objection.

7.59 The Court of Appeal set aside the adjudication determination. Steven Chong JA in his judgment observed that the Act "was not meant to alter the substantive rights of the parties under the contract, neither was it

72 7th Ed, April 2005.

intended to give rise to a payment regime independent of the contract".[73] It was necessary, therefore, for a claimant to first establish that he was entitled to be paid under the contract.[74] Under the SIA Conditions, the architect plays a fundamental role in the entire construction process since the architect's certificate serves as the basis for both the contractor's claim for payment of moneys and also the employer's right to make deductions against the claims.[75] In the absence of a person duly appointed to perform the duties of the architect under the contract, the process leading to payments, approvals and instructions will grind to a halt[76] since the right to be paid derives not from the actual execution of the works but from the issue of the payment certificate in respect of the work.[77] For this reason, the court considered that the payment certification process, and indeed the works under the contract itself, came to an end once the architect issued the final certificate:[78]

> The final certificate shows the architect's final measurement and valuation of the works in accordance with the terms of the contract and states the final balance between the contractor and the employer. This 'finalisation of accounts' typically signifies the end of the project works …

7.60 The consequence of the issuance of the final certificate is that the architect's duties under the contract are concluded and he becomes *functus officio*. It is therefore axiomatic that once an architect becomes *functus officio*, the entire certification process under the contract comes to an end. Chong JA continued:[79]

> Once the role of the architect under the contract has come to an end, there is simply no basis to submit further payment claims. As it is undeniable that the architect's certificate is a 'condition precedent' to the contractor's right to receive payment, the contractor would no longer be able to receive progress payments once the architect loses his capacity to issue such certificates. Hence,

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

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

75 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [32], citing *Chin lvan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 at [13].

76 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [33], citing Chow Kok Fong, *The Singapore SIA Form of Building Contract* (Sweet & Maxwell, 2013) at paras 2.13 and 2.l5.

77 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [35], citing *Chin lvan v H P construction & Engineering Pte Ltd* [2015] 3 SLR 124 at [20].

78 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [36].

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

> any payment claim that is issued after the architect is *functus officio* would be incapable of being certified by the architect so as to entitle the contractor to progress claims under the SOPA. [emphasis in original omitted]

7.61 The Court of Appeal clarified that s 10(4) of the SOP Act did not have the effect of allowing a contractor to submit payment claims indefinitely.[80] Section 10(4) was subject to the condition that the regime for submitting fresh payment claims would continue to apply. This was not the case given that the architect had lost his ability to issue any further payment certificates after the final certificate had been issued.

F. Payment claims made following termination

7.62 In *Stargood Construction Pte Ltd v Shimizu Corp*[81] ("*Stargood*"), the issue before the High Court was whether a subcontractor was entitled to submit a further payment claim under the Act following the termination of the subcontract. In that case, following the termination of its subcontract, the subcontractor served on the main contractor its payment claim 12 ("PC 12") and subsequently lodged an adjudication application ("AA 203"). The adjudicator dismissed AA 203 on the ground that the PC 12 was improperly served on the main contractor. The adjudicator also decided, in the alternative and applying *Far East Square*,[82] that the subcontractor was not entitled to lodge PC 12 because the subcontract had been terminated since the project director was *functus officio* as regards his certifying functions. Before the determination in AA 203 was issued, the subcontractor proceeded to file payment claim 13 ("PC 13"). This was also the subject of another adjudication application ("AA 245"). The adjudicator in AA 245 also dismissed the adjudication application but he did so on the ground that the subcontractor was bound by the determination in AD 203. The subcontractor applied to set aside both AA 203 and AA 245.

7.63 Vincent Hoong JC distinguished this case from *Far East Square*, pointing out that the issue in the latter case related to a situation where the works had been completed and the architect had issued the final certificate of the project after the expiry of the maintenance period. In *Stargood*, there was no allegation that the final certificate had been issued such that the project director was *functus officio* with respect to his certifying function.[83] The learned judge also adopted the distinction

80 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [49].
81 [2019] SGHC 261.
82 See para 7.55 above.
83 *Stargood Construction Pte Ltd v Shimizu Corp* [2019] SGHC 261 at [12]–[13].

between the determination of a subcontractor's employment under the subcontract and the termination of the entire subcontract as laid down in *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd*,[84] and distinguished *Engineering Construction Pte Ltd v Attorney General*,[85] where it was the contract and not the contractor's employment that had been terminated.[86] The court considered that the authorities "speak with one voice in showing that a contractor who has performed works under a construction contract can continue to claim for such works even after its employment under the contract has been terminated".[87] In the circumstances, the court held that the subcontractor was entitled to serve both PC 12 and PC 13 and that the adjudicator in both adjudication determinations were wrong in so far as they decided that a payment claim that was served after the termination of the subcontract was invalid.

G. Duty to speak

7.64 In *Far East Square*,[88] the Court of Appeal also revisited the principle that a party has a "duty to speak" if it has any objections against a payment claim arising from the operation of s 15(3) of the SOP Act. The court had in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*[89] ("*Audi Construction*") held that a respondent had a duty to speak if it had any jurisdictional objections to a payment claim, and these objections should be raised in a timely manner in a payment response. If the respondent failed to do so by the date which the payment response should have been filed, the respondent might be taken to have waived its rights and/or be estopped from raising such objections.[90]

7.65 The Court of Appeal in *Far East Square* clarified that this duty to speak does not apply to a situation where the payment claim fell outside the SOP Act from the outset.[91] The "duty to speak" laid down in *Audi Construction* arose from a payment claim which had been served validly

84 [2011] SGHC 163 at [51]–[53].
85 [1994] 1 SLR(R) 125.
86 *Stargood Construction Pte Ltd v Shimizu Corp* [2019] SGHC 261 at [14].
87 *Stargood Construction Pte Ltd v Shimizu Corp* [2019] SGHC 261 at [19], citing *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [21]–[22] and *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364 at [17]–[18].
88 See para 7.55 above.
89 [2018] 1 SLR 317.
90 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [71].
91 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [55].

in accordance with a subsisting contract under s 10(2)(*a*) of the SOP Act. As Chong JA in *Far East Square* stated in his judgment:[92]

> In this regard, we should clarify that our holding in *Audi Construction* in relation to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell outside the purview of the SOPA from the outset … If the purported payment claim was one which did not entitle the contractor to commence adjudication under the SOPA in the first place, there would be no corresponding duty to speak.

7.66 On the facts in *Far East Square*, the payment claim (PC 75) could not be said to be "made" under s 10 of the SOP Act. The contractor lost its ability or right to make progress claims once the architect became *functus officio* and hence could no longer issue certificates, which were "conditions precedent" to payment. The principle in *Audi Construction* was premised on the rationale that a claimant would have a chance to rectify any invalidity by submitting a new payment claim. In this case, there was no such possibility of the contractor submitting a fresh payment claim to replace or rectify PC 75 given that the payment certification regime had come to an end.[93]

7.67 The *Audi Construction* "duty to speak" was also raised in *Sito Construction*[94] but in relation to the stage of proceedings subsequent to the payment response. Briefly, PBT (the respondent) had argued that the payment claim and the subsequent adjudication application were invalid in that case. An issue before the court was whether, by not raising these arguments during the adjudication, PBT had effectively waived its rights to raise this jurisdictional objection. The court noted the ruling of the Court of Appeal in *Audi Construction* that a respondent had a duty to speak if it wished to raise any objections of this nature.[95] In *Sito Construction*, the "duty to speak" related to the objection that there was no contract between the parties.

7.68 Tan J held that PBT ought to have raised the objection in its adjudication response as the respondent had by then learnt of the change in ownership of Afone on 19 July 2018 and it had filed its adjudication response on 26 July 2018.[96] The respondent also did not raise this objection in its reply to the claimant's further submissions and during the adjudicator's summary of the respondent's arguments at the adjudication

92 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [56].
93 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [59].
94 See para 7.41 above.
95 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [71].
96 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [54].

conference.[97] The court further noted that the respondent admitted that there was a contract between the applicant and the respondent.[98] Tan J said:[99]

> The principles in *Audi Construction* are trite as they preserve the *raison d'ĕtre* of SOPA which is to facilitate the speedy and efficient resolution of disputes in the building and construction industry. Therefore, it is imperative on the parties to raise all jurisdictional objections when they can at the earliest possible stage of the adjudication process under SOPA. In light of the admissions made, i.e., that there was a valid contract between the parties, and the arguments made by the respondent at the adjudication proceedings, the respondent's jurisdictional arguments raised at the setting-aside application were afterthoughts. They were made in the hope of having a second bite at the cherry. Allowing such objections would defeat the regime.

H. Anti-avoidance provisions

7.69 The SOP Act contains important provisions to preclude the operation of contractual terms which attempt to circumvent the Act. The relevant statutory provisions include the prohibition of the "pay when paid" clause, but a broader set of anti-avoidance provisions are found in s 36 of the Act. Section 36(2)(*a*) of the Act voids any provision under which the operation of the Act "is, or is purported to be, excluded, modified, restricted or in any way prejudiced". Section 36(2)(*b*) voids any provision "that may reasonably be construed as an attempt to deter a person from taking action under this Act".

7.70 During the year under review, the scope of operation of these anti-avoidance provisions were considered for the first time before the High Court. In *CHL Construction Pte Ltd v Yangguang Group Pte Ltd*,[100] a subcontractor had completed the works on 9 July 2018, in respect of which a certificate of substantial completion ("CSC") was received the next day. On 20 July 2018, the subcontract was terminated. On 30 August 2018, the subcontractor served payment claim 10 ("PC 10"), claiming for works done until 30 August 2018 and for the release of half of the retention moneys. The main contractor disputed the claim, and the matter was submitted to adjudication. The adjudicator determined that the subcontractor was entitled to be paid a sum of $95,704.37. In applying to set aside the adjudication determination, the main contractor argued that PC 10, which was a penultimate payment claim, was lodged too early, in breach of s 10(2)(*a*) of the SOP Act. The main contractor relied

97 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [55].
98 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [56].
99 *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] 4 SLR 804 at [58].
100 [2019] 4 SLR 1382.

on cl 37 of the subcontract, which provided that the subcontractor had to withhold its penultimate payment claim until three months after the CSC had been received by the main contractor. A central issue before the High Court was whether this clause offended s 36(2) of the SOP Act.

7.71 The subcontractor referred the High Court to *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd*[101] ("*John Holland*"), which concerned a term in the contract providing that if a payment claim did not comply with certain conditions, the payment claim was void and the payment claim would be deferred to the same day of the following month. The Queensland Court of Appeal held that this clause was void under the equivalent of s 36(2) in the Queensland Building and Construction Industry Payments Act 2004 as it deferred the subcontractor's statutory entitlement to progress payment.[102]

7.72 Chan Seng Onn J found that in the case before him, cl 37 of the subject subcontract did not offend s 36(2) of the SOP Act. In his judgment, he considered that a balance between competing considerations had to be struck in determining whether a contractual clause offended s 36(2).[103] These competing considerations are, on the one hand, the protection of the entitlement of those who perform construction work, or supply related goods or services, to receive progress payments and, on the other, the freedom of parties to contract as they wish.[104] In this case, Chan J appeared to ground his decision on the reasonableness of the requirements of the clause. He noted:[105]

> [T]he penultimate payment claim was to be submitted at least three months after the receipt of the CSC. This was so as to give the Main Contractor sufficient time to assess the total value of the Subcontractor's works upon completion. Being a re-measurement contract, a final measurement of the work done and certified was necessary for valuing all the works completed by the Subcontractor.

7.73 Furthermore, as the penultimate payment claim included a claim for half of the retention moneys, more time would also be needed by the main contractor to investigate if there were any uncompleted works or defects to be highlighted to the subcontractor, all of which would have to be subsequently made good by the subcontractor. The three-month window following the issuance of the CSC would therefore be helpful

101 [2012] QCA 150.

102 *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150 at [21].

103 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [32].

104 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [32], citing with approval *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707 at [78].

105 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [38]–[39].

in allowing sufficient time for completing any uncompleted works or making good any defects.

7.74 The learned judge distinguished the case before him from *John Holland*,[106] pointing out that in the latter case the offending term:[107]

> … applied indiscriminately to defer all progress payment claims so long as they did not conform with the contractual conditions for the submission of payment claims; the contractual conditions included providing the payment claim in the appropriate format and to deliver them to the main contractor's project manager.

7.75 Nevertheless, it is relevant to consider whether the court in this case would have arrived at the same decision if the clause had required the claim to be held back for a period much longer than three months, say in the order of two years.

I. Stay of enforcement

(1) Stay of superseded adjudication determination

7.76 An interesting issue considered by the courts during the year concerns a stay of enforcement application in respect of a prior adjudication determination which had been effectively superseded by a subsequent adjudication determination. While this is a novel case, it is particularly relevant to situations where successive adjudication applications are made in respect of the same project.

7.77 In *United Integrated Services Pte Ltd v Civil Tech Pte Ltd*[108] ("*United Integrated*"), the facts related to a subcontract for addition and alteration works to a semi-conductor factory. On 23 October 2018, the subcontractor was successful in an adjudication relating to payment claim 6 and was awarded a sum of $1.37m ("1 AD"). On 19 November 2018, the subcontractor was granted leave to enforce 1 AD. Shortly thereafter on 23 November 2018, in relation to a second adjudication application on payment claim 7 ("2 AD"), the adjudicator determined that no amount was payable by the main contractor to the subcontractor as the adjudicator had determined a negative adjudicated sum of $1.18m. In arriving at his valuation, the adjudicator of 2 AD had adopted the valuation of all work items and variation works considered in 1 AD and

106 See para 7.73 above.
107 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [40].
108 [2019] 3 SLR 1426.

he had also considered the main contractor's claim for liquidated damages and back charges which were not before the adjudicator in 1 AD.

7.78 In granting the main contractor its application for stay of enforcement of 1 AD, Chan Seng Onn J noted that the SOP Act is silent on this point. The learned judge explained that if the subcontractor was permitted to enforce 1 AD, the subcontractor would "gain a windfall which was likely unintended by the drafters of the SOPA".[109] He approved the view expressed in a textbook that rulings in an adjudication determination "will normally be relied on by the parties in the conduct and regulation of their relationship with one another for the remainder of the project".[110] As a consequence, the learned judge stated that while adjudication determinations enjoy temporary finality, they "are essentially cumulative".[111] A subsequent adjudication determination must therefore supersede a prior adjudication determination where the subsequent adjudication determination had properly taken on board the valuation and result of the prior adjudication determination. Chan J illustrated the obvious injustice if the court was to hold otherwise:[112]

> To illustrate, consider the following scenario, in which a subcontractor completes the first tranche of work pursuant to a construction contract, and accordingly issues its Payment Claim for $2,000,000 ('PC1'). Thereafter, the main contractor disputes PC1, and the matter is submitted to adjudication. The adjudicator publishes an AD in favour of the subcontractor in the sum of $2,000,000. However, the subcontractor does not enforce the AD. Instead, it submits a further Payment Claim for $2,000,000 ('PC2') in the next month for the same works it had previously completed, and which remains unpaid. PC2 is then subject to adjudication, and the adjudicator, after considering the prior AD, adopts the prior adjudicator's decision and therefore issues an AD in the subcontractor's favour for $2,000,000 (assuming no liquidated damages or back-charges have arisen yet). This process is repeated *ad infinitum*, and the subcontractor obtains multiple ADs each in the value of $2,000,000 in its favour.

(2) Stay on account of claimant's insolvency

7.79 The main contractor in *United Integrated*[113] raised further arguments for a stay enforcement to be granted on account of the subcontractor's insolvency. The court referred to *W Y Steel Construction*

109 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [14] and [18].

110 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [15], citing Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 16.61.

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

112 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [19].

113 See para 7.78 above.

Pte Ltd v Osko Pte Ltd,[114] where the Court of Appeal had expressed the view that a stay of enforcement may be justified where (a) there is clear and objective evidence of the successful claimant's actual present insolvency; *or* (b) the court is satisfied on a balance of probabilities that if a stay is not granted, the money paid to the claimant may not be ultimately recovered if the respondent succeeds when the dispute is decided by a court or some other tribunal.[115] In this case, the court noted the subcontractor's problems in paying its own subcontractors[116] and that there were multiple applications to wind up the subcontractor on account of its inability to pay its debts.[117] On these facts, Chan J granted the main contractor its application for an unconditional stay of enforcement of 1 AD.

VII. Performance bond

A. Unconscionability

7.80 In Singapore, a court will only intervene to prevent a beneficiary from calling on an on-demand performance guarantee if it can be shown that the call was either fraudulent or unconscionable. In an appropriate situation, the timing of a call on a bond may be relevant in determining unconscionability.

7.81 In *BWN v BWO*,[118] a nominated subcontractor ("NSC") was employed by the main contractor under two separate subcontracts. As required by the subcontracts, the NSC procured its bankers to issue two performance bonds in favour of the main contractor. Disputes arose between the parties. On 25 April 2018, the NSC commenced arbitration proceedings. On 4 February 2019, the main contractor called on the full amount of the performance bonds. The High Court found that the main contractor's call on the performance bonds was not in accordance with cl 25.1 of the supplementary conditions to the subcontracts ("cl 25.1") and further that the main contractor's conduct was unfair and lacking in *bona fides*.

7.82 On the first of these grounds, the court found that cl 25.1 was not satisfied. That clause permitted the respondent to draw from the performance bonds where the respondent was entitled to deduct any moneys from sums due to the NSC pursuant to a condition of the

114 [2013] 3 SLR 380.
115 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [70].
116 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [27].
117 *United Integrated Services Pte Ltd v Civil Tech Pte Ltd* [2019] 3 SLR 1426 at [28].
118 [2019] 5 SLR 215.

subcontract. In the course of his judgment, Ang Cheng Hock JC noted that the main contractor did not indicate either in its call on the bonds or in any of the correspondence, the term of the subcontract on which it relied for its payment claim against the NSC.[119]

7.83 On the second ground, the learned judge considered that the timing of the call on the performance bonds calls into question the *bona fides* of the main contractor. He said:[120]

> There was no explanation in any of the correspondence placed before me as to the reason the respondent had decided only to call on the performance bonds almost ten months into the arbitration proceedings where it had already raised a substantial counterclaim against the applicant. Neither was there anything in the correspondence as to why the respondent was calling on the full guaranteed sum under the performance bonds, that is, $1,054,637.00. The circumstances were clearly such that some clear explanation of the respondent's conduct and substantiation of its claim was called for.

7.84 Accordingly, the court held that the NSC had shown a strong *prima facie* case that the main contractor's call on the performance bonds was unconscionable such that it should be restrained by way of an interim injunction. The court also considered that since the arbitral tribunal would be more familiar to deal with the details of the dispute between the parties and their respective claims, the interim injunction should subsist only until any further order by the arbitral tribunal to vary, discharge or affirm the injunction.[121]

B. Operation of clause restraining call on a bond

7.85 In recent years, arising from the decision in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd*,[122] exclusion provisions have been written into construction contracts to expressly exclude the right of a provider of the performance guarantee to rely on the unconscionability exception to restrain the beneficiary's call on the performance guarantee. A case in point came before the Court of Appeal during the year under review.

7.86 In *Bintai Kidenko*,[123] the facts concerned a subcontract for mechanical, electrical and plumbing works. Various phases of the subcontract works were in delay. The subcontractor applied to the main

119 *BWN v BWO* [2019] 5 SLR 215 at [22].
120 *BWN v BWO* [2019] 5 SLR 215 at [23].
121 *BWN v BWO* [2019] 5 SLR 215 at [28].
122 [2015] 3 SLR 1041.
123 See para 7.2 above.

contractor for extensions of time in respect of the delays. The main contractor rejected the subcontractor's application and alleged, instead, that the subcontractor was responsible for the delays and therefore liable for liquidated damages and claims for any additional costs incurred by the main contractor. When the subcontractor learnt that the main contractor had made a call on the banker's guarantee furnished by the subcontractor at the inception of the subcontract, the subcontractor applied and successfully obtained an interim injunction to restrain the main contractor from making the call and the bank from paying on the guarantee. Subsequently, on the application of the main contractor, the court discharged the interim injunction. The subcontractor appealed against the decision to discharge the interim injunction.

7.87 Before the High Court and the Court of Appeal, the main contractor relied on a clause in the subcontract that excluded the subcontractor from relying on the ground of unconscionability to restrain any call or demand on the performance bond. On its part, the subcontractor argued, *inter alia*, that it should not be precluded from relying on the unconscionability exception so long as there was a triable issue as to whether the subcontractor was bound by the exclusion clause on unconscionability. The subcontractor submitted that the attendant effect of an interlocutory finding could result in it being deprived of a possible defence at trial.

7.88 In dismissing the subcontractor's appeal, the Court of Appeal affirmed the position as laid down in the classic case of *Bocotra Construction Pte Ltd v The Attorney General*[124] where it was held that an applicant seeking an injunction to restrain a call on a performance guarantee only needed to show that the fraud or unconscionability were made out. The two exceptions of fraud and unconscionability were available to all applicants seeking to restrain a call on a performance guarantee.[125] The main contractor in this case bore the burden of showing that the subcontractor's right to rely on the unconscionability exception was contractually excluded.[126]

7.89 In rejecting the subcontractor's submission that it should not be precluded from relying on the unconscionability exception so long as there was a triable issue as to the operation of the exclusion clause, Tay JA pointed out that it is not unusual for a court to arrive at a "preliminary" conclusion on a party's case in determining interlocutory applications:[127]

124 [1995] 2 SLR(R) 262.
125 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [50].
126 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [49].
127 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [49].

> Contrary to the Appellant's suggestion, it would not be precluded from raising substantive claims or defences when the underlying dispute is eventually heard simply because the court arrived at a preliminary conclusion on the merits of the First Respondent's case in respect of the incorporation of the Exclusion Clauses. There is nothing unusual about courts making preliminary conclusions on the merits of a party's case for the purposes of determining the outcome of interlocutory applications … [Our] conclusions are only preliminary and would not bind any court or tribunal that is eventually tasked with adjudicating on the parties' substantive claims …

C. Restraint on the ground of fraud

7.90 In *Bintai Kidenko*, the Court of Appeal also took the opportunity to consider the standard of proof necessary for a party to invoke the fraud exception to restrain a call on a performance bond. The Court of Appeal followed the test laid down in *Arab Banking Corp (BSC) v Boustead Singapore Ltd*[128] and held that in order to avail itself of the fraud exception, that party had to establish a strong *prima facie* case that the other party called on the bond (a) with the knowledge that its demand was invalid; (b) without belief in the validity of its demand; or (c) with indifference to whether the demand was valid or not. The Court of Appeal considered that the focus of the inquiry was on the beneficiary's state of mind as to the validity of the demand.[129]

7.91 In this case, Tay JA considered that the main contractor's claims for liquidated damages "reflects very poorly on it" in that firstly, there was no evidence of the employer of the main contract making any claims against the main contractor for delay and secondly, there were errors in computing some of the periods of delay, suggesting that the main contractor "had simply made up its liquidated damages claims in haste". However, the Court of Appeal considered that these facts as found by the trial judge were not sufficient to establish a strong *prima facie* case of fraud for the purpose of restraining the call on the performance bond.[130]

128 [2016] 3 SLR 557 at [61]–[63].
129 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [74].
130 *Bintai Kidenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [77].