

# Can Payment Claims Be Made Under the SOP Act After the Termination of the Contract?

27 April 2020

1. The Court of Appeal has recently held that the Building and Construction Industry Security of Payment Act (Cap 30B) (the “SOP Act”) does not provide an independent right to serve payment claims regardless of the provisions of the underlying contract: *Shimizu Corporation v Stargood Construction Pte Ltd* [2020] SGCA 37.
2. This means that if a party has been terminated from the contract and there are no provisions for the terminated party to continue serving payment claims, the terminated party will have no right to do so under the SOP Act.
3. The case is particularly relevant to situations where a party wishes to serve payment claims after being terminated for purposes of seeking adjudication under the SOP Act.

## Key Takeaways

4. Key takeaways include the following:
  - 4.1. The SOP Act does not provide for an independent entitlement to serve payment claims after a contract has been terminated.
  - 4.2. An entitlement to serve a payment claim under the SOP Act must be established under the contract.
  - 4.3. Parties who have been terminated from contracts will likely be unable to subsequently submit payment claims for purposes of adjudication under the SOP Act.

## Background

5. The appellant, Shimizu Corporation (“**Shimizu**”) was the main contractor for a project located at 79 Robinson Road, Singapore. The respondent, Stargood Construction Pte Ltd (“**Stargood**”) was engaged as one of Shimizu’s Sub-Contractors for the project.
6. The Sub-Contract incorporated the REDAS Conditions of Contract (the “**Sub-Contract**”), which stipulated that Shimizu would appoint a Project Director to act on its behalf for the certification of progress payments (amongst other responsibilities). Payment claims were to be submitted by Stargood to the Project Director, who would in turn issue a payment response containing the amount which was due from Shimizu to Stargood.
7. On 4 March 2019, Shimizu issued a notice of default and subsequently exercised its right of termination against Stargood following certain alleged breaches of the Sub-Contract.
8. After the Sub-Contract had been terminated, Stargood served Payment Claim No. 12 (“**PC 12**”) for payment for works done up till April 2019. Shimizu did not serve a payment response to PC 12. Stargood then proceeded to lodge the first adjudication application (“**AA 203**”). In its adjudication response, Shimizu claimed that: (a) PC 12 had not been properly served; and (b) PC 12 was outside the purview of the SOP Act.
9. Before AA 203 commenced, Stargood served Payment Claim No. 13 (“**PC 13**”) which was identical to PC 12 except that the claim was for works done up till May 2019. Shimizu’s payment response to PC 13 stated the response amount as “nil”.
10. AA 203 was dismissed by the adjudicator on two grounds.
  - 10.1. First, that PC 12 had not been properly served on Shimizu.

- 10.2. Second, PC 12 was served after Shimizu had terminated the Sub-Contract, which effectively brought the Project Director's certifying functions under the Sub-Contract to an end, or in other words, rendered the Project Director *functus officio* as regards his certifying function under the Sub-Contract. Further, since no post-termination payment certification regime existed under the Sub-Contract, Stargood could no longer serve a payment claim as the Project Director did not have power under the Sub-Contract to certify the same.
11. Thereafter, Stargood lodged its second adjudication application ("**AA 245**") for PC 13. This was dismissed by the adjudicator as he found that Stargood was bound by the determination in AA 203.
12. Following this, Stargood filed its application to set aside the adjudication determinations in AA 203 and AA 245, and also sought a declaration that it was entitled to serve a further payment claim against Shimizu.

### **The High Court's Decision**

13. Ruling in favour of Stargood, the High Court Judge set aside the adjudication determinations and granted the declaration.
14. The High Court Judge found that Shimizu had only terminated Stargood's employment, rather than the entire Sub-Contract. Therefore, Stargood could continue to avail itself of the payment certification process.
15. The Judge also found that the SOP Act provided Stargood with an independent right to progress payments, even if the entire Sub-Contract had been terminated. The Judge reasoned that an interpretation holding that the SOP Act did not apply to works done before the termination of the Sub-Contract would place Sub-Contractors and suppliers at the mercy of main contractors or employers, who could resist or delay payment by termination the underlying contract on tenuous grounds.
16. The Judge also thought that it was significant that the Building and Construction Industry Security of Payment (Amendment) Bill (No 38 of 2018) (the "**2018 Amendments**") had amended the definition of a "contract" under the SOP Act to include a "construction contract or a supply contract that has been terminated".
17. Shimizu appealed against the High Court's decision.

## **The Court of Appeal's Decision**

18. The Court of Appeal allowed Shimizu's appeal, and held that:
  - 18.1. There is no independent right created by the SOP Act which allows Stargood to continue serving payment claims after the termination of the Sub-Contract.
  - 18.2. Therefore, the first point of reference in determining Stargood's entitlement to serve a payment claim post-termination would be the terms of the Sub-Contract, in particular, any provisions therein relating to the service of payment claims following termination.
  - 18.3. As the Sub-Contract terms preclude the service of payment claims following termination, this meant that both PC 12 and PC 13 were not valid payment claims under the SOP Act and were incapable of supporting adjudication applications.

## **Why The SOP Act Does Not Provide An Independent Right to Serve Payment Claims**

### *A. No "Dual Railroad Track System" Exists Under the SOP Act*

19. The Court rejected Stargood's argument that there was a line of authorities that stood for the proposition that a "dual railroad track system" exists under the SOP Act, where a party possesses a statutory entitlement to a progress payment which is separate and distinct from a party's contractual entitlement.
20. Instead, the Court observed that the SOP Act plainly points to a preference for the provisions of the contract between the parties in determining rights to payment and expressly provides for specific situations where the SOP Act applies to modify these rights.
21. Further, there is no question of election under the SOP Act. The statutory right to make progress payments will only be invoked when the statutory conditions under the SOP Act have been satisfied, for example, one such statutory condition is when the contract does not contain the relevant provision.

*B. Provisions of the SOP Act Do Not Contain A Separate Statutory Entitlement From the Contract*

22. In explaining why the SOP Act does not provide a separate statutory entitlement to progress payment, the Court took a holistic consideration of the following provisions of the SOP Act:
- 22.1. In relation to s 5 of the SOP Act, which purportedly creates a statutory entitlement to a progress payment, the Court stated that the words “under a contract” in s 5 serves to premise the right to progress payment on the performance of a contract. Thus, where a contract provides no basis to bring a claim for progress payment, there is simply nothing to be adjudicated under the SOP Act.
- 22.2. The wording of ss 6 and 7 of the SOP Act applies only as a “gap-filler” in a situation where a contract is silent as to the amount of a progress payment which a party is entitled to, or does not provide any mechanism for the valuation of construction work carried out or goods or services supplied.
- 22.3. In situations where the SOP Act limits the parties’ freedom to contract as they see fit (such as in s 8 which limits the ability of parties to set a payment date further than a certain specified point, and s 9 which prohibits “pay when paid clauses” in contracts) the extent of such limitation has been expressly set out in the statutory provisions.
- 22.4. Such an entitlement is also not contained within s 10 of the SOP Act as it is abundantly clear from the wording in s 10(2) that the terms of the contract which provides for the service of payments claims will govern. Thus, in a situation where under the terms of the contract the payment certification mechanism can no longer operate, a party is no longer entitled to serve a payment claim.
23. As for the 2018 Amendments, the Court found that it only affected contracts which were silent on the payment certification process. While the Court acknowledged that the 2018 Amendments sought to achieve that the SOP Act could in principle apply to progress payment claims after termination, it does not and was not intended to override the terms of the contract which provide the contrary.

24. The Court further added that having two payment regimes existing side-by-side would create intolerable uncertainties.
25. In any event, even in a situation where a party is no longer entitled to serve a payment claim under the contract, the party still has a right to have full and final settlement of its disputes via arbitration or legal proceedings in accordance with the dispute resolution provisions of the contract.

### **Observations on the High Court's Concern**

26. The Court of Appeal made two observations on the High Court's findings that to hold that the SOP Act did not apply to progress payment claims would prejudice Sub-Contractors and suppliers as main contractors and employers could abuse their termination rights to "resist or delay payment":
  - 26.1. Firstly, any termination exercised under the contract must necessarily be supported by facts; and
  - 26.2. Secondly, while it is not impossible for a contractor to act irrationally or unreasonably in terminating a contract, it would be an overstatement to say that contractors, who are economic actors in their own right, would exercise a right to terminate capriciously in order to "resist or delay payment".

### **Whether An Entitlement To Serve Payment Claims Arises After the Sub-Contract Has Been Terminated**

#### *A. Terms of the Sub-Contract*

27. Upon close scrutiny of the Sub-Contract terms, the Court found that:
  - 27.1. Clause 33.4 of the Sub-Contract which governed the effects of a termination did not provide for Stargood to make any payment claim in such a situation.
  - 27.2. Clause 33.5 provided that if the Sub-Contract is terminated due to the termination of the Main Contract for some reason unconnected to any default of Stargood, it will be paid for work done prior to termination.

28. Pursuant to the terms of the Sub-Contract, Stargood had no contractually provided right to serve a payment claim for work done prior to termination if the Sub-Contract was terminated for its default.
29. In the circumstances, the Sub-Contract was not silent as to whether Stargood was entitled to submit a payment claim for work done prior to termination, but had provided the contrary that Stargood cannot serve a payment claim for work done prior to termination unless the termination was in turn caused by the termination of the Main Contract for which it was not responsible.
30. Given the clear terms of the Sub-Contract, the Court was of the view that the arguments raised by parties on the distinction between a termination of employment or a termination of sub-contract was irrelevant for the purposes of the appeal. In any event, the Court found that it was clear from the notice of termination that the entire Sub-Contract had been terminated.

### **Observations On Whether A Payment Certifier Became Functus Officio In Relation To His Payment Certification Functions Following the Termination of the Contract**

31. Although it was not necessary for the Court to decide on whether the Project Director's certification functions had ceased upon the termination of the Sub-Contract, i.e. became functus officio in relation to his certification functions, and the consequences of his becoming so, the Court made the following preliminary observations:
  - 31.1. First, a distinction cannot be drawn between a case where the payment certifier becomes functus officio as a result of the completion of the contract or the termination of a contract. In either case, the payment certifier no longer has the ability to certify payments under the contract in question unless it expressly provides so.
  - 31.2. Second, in relation to the effect of the payment certifier becoming functus officio on a certificate functioning as a condition precedent to a party's right to serve a payment claim, the Court was of the view that that an adjudicator and/or arbitrator is entitled to re-open any certificates which have been issued and such certificates were not intended to be final and binding on parties.

## **Conclusion**

32. In light of the above and taking into account the Court of Appeal's preliminary observations as summarised in paragraph 31, it would be unwise for a terminated contractor to serve a payment claim under purposes of seeking an adjudication under the SOP Act.
33. Contractors seeking reliefs for unpaid claims should therefore endeavour to do so well before being terminated from a construction contract.

## **For further information contact:**

### **Tan Chau Yee**

Partner

[chauyeetan@eversheds-harryelias.com](mailto:chauyeetan@eversheds-harryelias.com)

+65 6361 9850



### **Justin Tan**

Senior Associate

[justintan@eversheds-harryelias.com](mailto:justintan@eversheds-harryelias.com)

+65 6361 9877



### **Wong Sze Qi**

Practice Trainee

[szeqiwong@eversheds-harryelias.com](mailto:szeqiwong@eversheds-harryelias.com)



**Note:**

Eversheds Harry Elias LLP is a limited liability partnership registered in Singapore under the Limited Liability Partnerships Act (Cap 163A), UEN T10LL0175E and with our registered place of business at 4 Shenton Way #17-01 SGX Centre 2 Singapore 068807 Singapore. We are regulated by the Law Society of Singapore and the Legal Services Regulatory Authority.

The information in this e-Briefing is only intended to be a general guide to the subject matter and is not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific requirements.

Please seek legal advice for your situation and contact the lawyer you normally deal with in Eversheds Harry Elias LLP.