

CASE UPDATE

7 November 2019

CONTRACTORS CAN SERVE PAYMENT CLAIMS FOR WORK DONE PRIOR TO TERMINATION OF CONSTRUCTION CONTRACT

Stargood Construction Pte Ltd v Shimizu Corporation [2019] SGHC 261

SUMMARY

In the recent decision of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189, the Court of Appeal held that the contractor was not entitled to serve further payment claims under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“**SOP Act**”) after the final certificate has been issued because the architect’s duties under the Singapore Institute of Architect’s Articles and Conditions of Building Contract (Measurement Contract) (7th Ed, April 2005) (“**SIA Form of Contract**”) were concluded and he became *functus officio* following the issuance of the final certificate. An earlier update on *Far East Square* may be accessed [here](#).

This has resulted in some uncertainty in the building and construction industry as to whether the *functus officio* holding in *Far East Square* could be extended to other situations, such as when the construction contract was terminated before the completion of the works.

In *Stargood*, the High Court clarified that the application of the Court of Appeal’s holding in *Far East Square* on the architect being *functus officio*

is limited to a situation where the construction works under the contract had been completed and the architect had already issued the final certificate for the project. The High Court held that a contractor who has performed works under a construction contract prior to termination can serve payment claims under the SOP Act for such works as the contractor has an accrued statutory entitlement to payment which survives termination, and allowed a setting aside application by Stargood Construction Pte Ltd (“**Stargood**”) in relation to two adjudication determinations by two different adjudicators.

Drew & Napier Director Christopher Chong and **Associate Chen Zihui** successfully represented Stargood in this case.

BACKGROUND

Shimizu Corporation (“**Shimizu**”) was the main contractor of a construction project at 79 Robinson Road and Stargood was one of Shimizu’s sub-contractors for the Project.

After about a year into the Project, Shimizu terminated the employment of Stargood under the sub-contract by way of a notice of termination.

After the termination of the sub-contract, Stargood served payment claim 12 to claim for work that it had done prior to the termination. Shimizu did not serve a payment response to the payment claim. Stargood proceeded to lodge adjudication application SOP/AA 203 of 2019 in respect of payment claim 12 (“**AA 203**”).

The adjudicator dismissed AA 203 as he found that payment claim 12 was improperly served on Shimizu and that Stargood was not entitled to serve payment claim 12 after the termination of the sub-contract as the project director was *functus officio* under the sub-contract.

Before the release of the adjudication determination in AA 203, Stargood served payment claim 13, which was essentially a claim for the same sum as payment claim 12. This time round, Shimizu served a payment response with a “nil” response amount. As the adjudicator in AA 203 dismissed the application on purely jurisdictional grounds, Stargood proceeded to lodge a 2nd adjudication application SOP/AA 245 of 2019 in relation to payment claim 13 (“**AA 245**”).

The 2nd adjudicator dismissed AA 245 as he determined that he was bound by the adjudicator's determination in AA 203 that Stargood was not entitled to submit any further payment claim under the sub-contract under the SOP Act.

Stargood applied to the High Court to set aside the adjudication determinations in AA 203 and AA 245, and for a declaration that it is entitled to serve further payment claims on Shimizu for construction work done under the sub-contract.

THE HIGH COURT'S DECISION

The High Court clarified that the Court of Appeal's holding in *Far East Square* holding on the *functus officio* point was applicable to a situation where the construction works under the contract had been completed and the architect had already issued the final certificate for the project. This holding was plainly inapplicable to the facts in *Stargood* which concerns a termination scenario and a different issue.

In *Stargood*, the High Court identified the key issue to be whether Stargood can serve a payment claim for work done prior to termination of its employment under the sub-contract and have its claim adjudicated under the SOP Act.

In this regard, the High Court cited the decisions in *inter alia Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210, *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364, and *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382, and agreed that a contractor who has performed works under a construction contract can continue to submit payment claims for such works even after the contract has been terminated as the contractor has an accrued statutory entitlement to payment which survives termination of the contract. The Court also held that this accords with the legislative intent expressed by the Minister of State for National Development, Mr. Zaqy Mohamad, during his ministerial statement at the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (no 38 of 2018).

The High Court went on to find that the adjudicator in AA 203 had erred on the issue of whether Stargood was entitled to serve payment claims for works done prior to the termination of its

employment under the sub-contract, which went to the jurisdiction of both adjudicators in AA 203 and AA 245, and that there were just grounds to set aside both adjudication determinations.

As the adjudicator's primary ground for dismissing AA 203 was the improper service of payment claim 12, which was not contested by Stargood at the hearing, the Court exercised its power to sever and set aside only the part of the adjudication determination in AA 203 that dealt with whether Stargood can issue further payment claims after termination of the sub-contract.

COMMENTS

The High Court decision in *Stargood* serves as a timely reminder that the legislative intent of the SOP Act is to facilitate cash flow in the building and construction industry, and that the decision in *Far East Square* should not and cannot be relied on to deprive a contractor of its statutory entitlement to submit progress claim for work done prior to termination and have its claim adjudicated under the SOP Act. As the Court rightly pointed out, this cannot be right because such an interpretation would place downstream contractors at the mercy of their employers who can resist or delay payment for works done or goods supplied by terminating the underlying contract on tenuous grounds.

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