IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 37

Civil Appeal No 204 of 2019

Between

Shimizu Corporation

… *Appellant*

And

Stargood Construction Pte Ltd

… *Respondent*

In the matter of Originating Summons No 1099 of 2019

Between

Stargood Construction Pte Ltd

… *Applicant*

And

Shimizu Corporation

… *Respondent*

JUDGMENT

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]
[Building and Construction Law] — [Termination] — [Consequences]

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Shimizu Corporation
v
Stargood Construction Pte Ltd

[2020] SGCA 37

Court of Appeal — Civil Appeal No 204 of 2019
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
2 March 2020

21 April 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 Can a payment claim be served after termination of the contract? The intuitive response would be – it depends on the terms of the contract. After all, in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*Far East Square*") at [31], this court emphasised that "in order to determine a contractor's entitlement to submit payment claims under the [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA")], the court must necessarily have regard to the provisions of *the underlying construction contract*" [emphasis added].

2 The dispute which led to this appeal concerned the submission of payment claims by the respondent, Stargood Construction Pte Ltd ("Stargood") following the termination of a subcontract by the appellant, Shimizu

Corporation ("Shimizu"). In determining the validity of the payment claims, the first port of call must necessarily be the terms of the contract, in particular the terms which governed the parties' rights in the event of termination. Unfortunately, both parties did not pay sufficient attention to the terms of the subcontract dealing specifically with the consequences of a termination on account of a default by the subcontractor, Stargood. Reliance was instead placed on the recent amendment to s 2 of the SOPA in defining a contract to include "a construction contract … that has been terminated". In the course of the hearing, the parties were directed to address this court on the effect of the termination provisions in relation to the right to submit payment claims post termination and how such provisions should operate in light of the recent SOPA amendment.

3 It was suggested that the SOPA was designed to provide a "dual railroad track system" such that the party seeking payment has the option to elect between the statutory and contractual entitlement to payment. Accordingly, a subcontractor can validly submit a payment claim under the SOPA notwithstanding the fact that such a payment claim would be contrary to the terms of the contract. In other words, the SOPA can override the express terms of the contract. However, in *Far East Square*, we held that the SOPA "was not meant to alter the substantive rights of the parties under the contract, neither was it intended to give rise to a payment regime independent of the contract". This judgment will thus examine the interaction between the SOPA and the terms of any governing contract in order to put to rest the "dual railroad track system" argument as such an interpretation is at odds with this court's decision in *Far East Square*.

4 The other intuitive response following the termination of a contract is that the person tasked with the certifying function might be rendered *functus officio*. Indeed, the parties' principal arguments here and below were focused

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on the question whether the project director who was contractually tasked with the duty to certify payment claims had become *functus officio* following the termination of the subcontract and if so, what were the ensuing consequences. The adjudicator found the project director to be *functus officio* while the Judge below took the opposite view. While we recognise that some aspects of the *functus officio* point might not have been fully explored in *Far East Square*, for the purposes of the present appeal, we were ultimately able to dispose of it solely with reference to the termination provisions of the subcontract.

5 Given this background, there are two issues which we shall address in this Judgment:

(a) First, whether the SOPA provides an independent right to continue serving payment claims for works completed regardless of the provisions of the underlying contract ("Issue 1").

(b) Second, if the first issue is answered in the negative, whether under the terms of the contract in question, Stargood was entitled to serve payment claims on the Project Director following its termination ("Issue 2").

6 We begin by examining the facts of the case and the Judge's reasoning.

Facts

7 Shimizu was engaged as the main contractor for a project located at 79 Robinson Road, Singapore. Stargood was engaged as one of Shimizu's subcontractors for the project pursuant to a letter of acceptance dated 8 February 2018, which incorporated with amendments the Real Estate Developers'

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Association of Singapore Design and Build Conditions of Contract (3rd Ed, 2013) ("the Subcontract").

8 Under cl 6 of the Subcontract, Shimizu appointed a project director ("the Project Director") to act on its behalf in respect of matters relating to the Subcontract, including the certification of progress payments. Clause 28 of the Subcontract provided for payment claims to be submitted by Stargood to the Project Director, who would in turn be responsible for issuing a payment response. The amount reflected in the payment response would be what was due from Shimizu to Stargood.

9 Following certain alleged breaches of the Subcontract on the part of Stargood, Shimizu issued a notice of default on 4 March 2019. This was followed on 22 March 2019 by an exercise of its termination rights under cl 33.2 of the Subcontract, which reads:

> At any time after the Project Director is satisfied that the Sub-Contractor has defaulted in respect of any of the grounds set out under Clause 33.1, the Project Director shall issue a Notice of Default to the Sub-Contractor specifying the default, and stating the Contractor's intention to terminate the Sub-Contract unless the default is rectified within 7 days from the date of the said notice. If the Sub-Contractor fails to rectify the specified default within 7 days from the receipt of the Notice of Default, the Contractor shall be entitled, without any further notice to the Sub-Contractor, to terminate the employment of the Sub-Contractor by issuing to the Sub-Contractor a Notice of Termination of [the] Sub-Contract.

10 On 30 April 2019, after termination of the Subcontract, Stargood served Payment Claim No 12 ("PC 12") on Shimizu for the sum of $2,599,359.44 as payment for works done up till April 2019. Shimizu did not serve a payment response to PC 12. Stargood then proceeded to lodge Adjudication Determination No SOP/AA203/2019 ("AA 203") on 4 June 2019. In its

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adjudication response, Shimizu claimed that: (a) PC 12 had not been properly served; and (b) PC 12 was outside the purview of the SOPA.

11 It appears that Stargood was alive to the possibility that PC 12 had been improperly served on Shimizu. It then elected to serve Payment Claim No 13 ("PC 13") on 31 May 2019 prior to the commencement of AA 203, which was for all intents and purposes identical to PC 12, save that the claimed sum of $2,599,359.44 was stated to be for works done up till May 2019. Shimizu's payment response to PC 13 served on 21 June 2019 stated the response amount as "nil".

12 AA 203 was dismissed by the adjudicator on 27 June 2019 on two distinct grounds:

(a) first, PC 12 had not been properly served on Shimizu; and

(b) second, PC 12 was served after Shimizu had already terminated the Subcontract. This rendered the Project Director *functus officio* as regards his certifying function under the Subcontract. Since no post-termination payment certification regime existed under the Subcontract, Stargood could no longer serve a payment claim as the Project Director did not have power under the Subcontract to certify the same.

13 Stargood subsequently lodged Adjudication Determination No SOP/AA245/2019 ("AA 245") on 5 July 2019 for the adjudication of PC 13. This was dismissed by the adjudicator on 6 August 2019 as he found that Stargood was bound by the determination in AA 203.

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14 Following this, Stargood filed OS 1099 of 2019 ("OS 1099") to set aside the adjudication determinations in AA 203 and AA 245. It also sought a declaration that it was entitled to serve a further payment claim on Shimizu.

Decision below

15 The Judge framed two issues for determination (see *Stargood Construction Pte Ltd v Shimizu Corporation* [2019] SGHC 261 ("the Judgment") at [11]):

(a) Whether the Project Director was *functus officio* when Stargood served PC 12 on Shimizu; and

(b) Whether Stargood was entitled to serve PC 12 and PC 13 on Shimizu for works done prior to the termination of the Subcontract.

16 The Judge found that Shimizu had only terminated Stargood's employment, rather than the entire Subcontract. He then found that the effect of the termination of Stargood's employment meant that it could continue to avail itself of the payment certification process (Judgment at [13]–[16]). The Judge also found that the SOPA provided Stargood with an independent right to progress payments, even if the entire Subcontract had been terminated (Judgment at [18]–[21]). In doing so, the Judge reasoned that an interpretation holding that the SOPA did not apply to works done before termination of the Subcontract would place subcontractors and suppliers at the mercy of main contractors or employers, who could resist or delay payment by terminating the underlying contract on tenuous grounds. The Judge also thought it significant that the Building and Construction Industry Security of Payment (Amendment) Bill (No 38 of 2018) ("the 2018 Amendments") amended the definition of a "contract" under the SOPA to include a "construction contract or a supply

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contract that has been terminated" (Judgment at [21]–[24]). The Judge thus set aside both adjudications and granted a declaration that Stargood was entitled to serve further payment claims on Shimizu for work done prior to termination of the subcontract (Judgment at [33]).

Parties' cases

Appellant's case

17 Shimizu argued that this court's decision in *Far East Square* stands for the proposition that once a certifier (*ie*, the Project Director in this case) is unable to certify further payment claims, any payment claims made would fall outside the ambit of the SOPA and be incapable of supporting an adjudication. In so far as the Judge found that s 5 of the SOPA would have entitled Stargood to progress payments even if the entire Subcontract had been terminated, *Far East Square* makes it clear that any entitlement to submit a payment claim under the SOPA stems from the underlying contract; there is no separate and independent statutory entitlement to payment. Under the terms of the Subcontract, the Project Director was *functus officio* once Shimizu served notice of termination under cl 33.2 of the Subcontract. It was thus strictly irrelevant *how* the Project Director became *functus officio*. This had the effect of terminating the *entire* Subcontract, rather than just Stargood's employment under the Subcontract. Given that the Subcontract did not provide for the role of the Project Director in certifying payment claims to extend past the termination of the contract, any payment claim issued following termination was incapable of being certified so as to allow Stargood to submit progress claims under the SOPA.

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Respondent's case

18 Stargood argued that *Far East Square* was concerned with an entirely different situation as the underlying contract had been completely performed. The decision does not stand for a blanket proposition that a claimant cannot serve a payment claim under the SOPA if the payment certifier is *functus officio*. On the contrary, there is existing authority which supports the position that a claimant has an independent right under the SOPA to serve a payment claim after termination of the underlying contract, even in the absence of express language to that effect in the contract. Such a reading is also supported by the 2018 Amendments which, *inter alia*, extended its application to contracts which have been terminated (see [2] above).

19 In the alternative, Stargood took the position that by invoking cl 33.2 of the Subcontract, Shimizu only terminated its employment under the Subcontract, rather than the entire Subcontract. The corollary of this was that the Project Director had not become *functus officio* at the time Stargood served PC 12 and PC 13.

Issue 1: Whether the SOPA provides an independent right to continue serving payment claims for works completed regardless of the provisions of the underlying contract

20 In our judgment, subject to the qualifications which we set out below, there is no independent right created by the SOPA which would allow Stargood to continue serving payment claims after the termination of the Subcontract. Before we explain how we arrived at this finding, it is first necessary to examine our decision in *Far East Square*.

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The decision in Far East Square

21 In *Far East Square*, we found that the SOPA is merely a legislative framework to expedite the process by which a contractor may receive payment through the payment certification and adjudication process in lieu of commencing arbitral or legal proceedings. It does not, in and of itself, grant the contractor a right to be paid. Before a contractor can make a claim for progress payments under the SOPA, it is imperative that he can establish that he is entitled to such payment under the contract (at [30]–[31]).

22 Before us, Stargood cited a number of High Court authorities which it claimed supported its position that a contractor which has performed works under a construction contract has a statutory entitlement to make a claim for progress payments under SOPA independent of the underlying contract.

23 The first of these was a line of cases going back to the decision in *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 ("*Tienrui Design*") and most recently applied in *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 ("*CHL Construction*"). In *CHL Construction*, the subcontractor was engaged to complete certain works for the main contractor. After the subcontractor had completed the work and a certificate of substantial completion had been issued, the contract was terminated for reasons irrelevant to the proceedings. Following this, the subcontractor served a payment claim on the main contractor. Chan Seng Onn J held that a contractor had both a contractual and statutory entitlement to be paid under s 5 of the SOPA (at [17]–[18], citing *Tienrui Design*). Chan J also found that the timeline for service of payment claims under s 10(2) of the SOPA applied to this statutory entitlement notwithstanding the termination of the underlying subcontract (at [19]–[25]).

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24 There was also the decision in *Choi Kum Peng and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 ("*Choi Kum Peng*"). In *Choi Kum Peng*, the plaintiffs entered into a contract to appoint the defendant as contractor for reconstruction works to their home. The contract was subject to the Singapore Institute of Architects, Articles and Conditions of Building Contract (9th Ed, Lump Sum Contract) ("the SIA Conditions"). Under the terms of the contract, progress payment claims were to be valued by the quantity surveyor, who would certify the amount of payment to be made to the defendant. The defendant issued a progress claim directly to the plaintiffs which was not supported by any valuation from the quantity surveyor (at [24]–[25]). Some days later, the plaintiffs terminated the contract with the defendant. The plaintiffs argued that the defendant was not entitled to submit a progress payment under the SIA Conditions without the quantity surveyor's valuation (*ie*, that the condition precedent for payment was not met). Woo Bih Li J rejected the plaintiffs' arguments, finding that the SOPA did not preclude the lodgement of an adjudication without the payment certificate. Woo J found that the defendant was permitted under the contract to serve a payment claim under s 10(1) of the SOPA. In this case, the valuation by the quantity surveyor fulfilled the role of a payment response to be given to the defendant under s 11 of the SOPA. As no such valuation was given to the defendant, it was entitled to lodge an adjudication application pursuant to s 12(2)(*b*) of the SOPA (at [25]–[26]).

25 While Stargood cited these cases for the singular proposition that a "dual railroad track system" exists under the SOPA, it appears to us that there are nuanced differences between them. In *CHL Construction*, the High Court found that s 5 of the SOPA conferred a statutory right to a progress payment which co-existed with any contractual right to the same, and that the statutory timeline set out in s 10(2) of the SOPA would not be altered by the termination of the

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underlying contract (see [23] above). This puts it on a different footing from the decision in *Choi Kum Peng*, which, notwithstanding references to the existence of "dual tracks" for a contractor to claim payment, was decided on the basis that the defendant had validly served the payment claim in question in accordance with the terms of the contract *before* the termination of the contract (see [24] above). In our view, *CHL Construction* is the only case which could be said to have applied the "dual railroad track system" on the merits. We first address whether s 5 of the SOPA creates a separate statutory entitlement to progress payments. We also examine Stargood's further argument that s 10 of the SOPA (as it then stood) separately creates a statutory right to serve a payment claim. Finally, we deal with the effects of the 2018 amendments to the SOPA.

Whether there is a separate statutory entitlement to progress payments under s 5 of the SOPA

26 In so far as the cases suggest that the SOPA creates a "dual railroad track system" where a party possesses a statutory entitlement to a progress payment which is separate and distinct from a party's contractual entitlement, such an interpretation would be inconsistent with our decision in *Far East Square.* More importantly, we do not think that this is borne out by a construction of the SOPA, bearing in mind its structure.

27 The provisions of the SOPA dealing with a party's entitlement to progress payments are found in Part II, which is titled "Rights to Progress Payments". The key observation to be made in this regard is that the SOPA 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 SOPA applies to modify those rights.

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28 Section 5 of the SOPA is the provision that purportedly creates a statutory entitlement to a progress payment and reads:

> **Entitlement to progress payments**
>
> **5.** Any person who has carried out any construction work, or supplied any goods or services, *under a contract* is entitled to a progress payment. [emphasis added]

While this might be construed to suggest that a statutory right to a progress payment co-exists alongside any contractual rights to progress payments, this analysis does not withstand close scrutiny. As we observed in *Far East Square* at [30], the phrase "under a contract" in section 5 of the SOPA "serves to premise the right to be paid on the performance of a contract so that if there is a breach of performance, the right to be paid does not crystallise". Ultimately, the contractor making a claim for progress payments under the SOPA must show that there is a basis for claiming such payment under the terms of the contract in question. Where the contract provides no basis to bring such a claim, and there is no question of any gap in the contract being filled by the provisions of the SOPA in the manner set out at [29] below, there is simply nothing to be adjudicated under the SOPA.

29 The suggestion of a "dual railroad track system" would also be contrary to other provisions found in Part II of the SOPA. For instance, ss 6 and 7 of the SOPA, which deal with the amount and valuation of progress payments, accord primacy to the contractual agreement between the parties:

> **Amount of progress payment**
>
> **6.** The amount of progress payment to which a person is entitled under a contract shall be —
>
> (*a*) the amount calculated in accordance with the terms of the contract; or
>
> (*b*) *if the contract does not contain such provision*, the amount calculated on the basis of the value of the

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> construction work carried out, or the goods or services supplied, by the person under the contract.
>
> **Valuation of construction work, goods and services**
>
> **7.—**(1) Construction work carried out, or goods or services supplied, under a contract are to be valued —
>
> (*a*) in accordance with the terms of the contract; or
>
> (*b*) *if the contract does not contain such provision*, having regard to the matters specified in subsection (2).
>
> (2) For the purposes of subsection (1)(*b*), construction work carried out, or goods or services supplied, under a contract are to be valued —
>
> (*a*) having regard to —
>
> (i) the contract price for the construction work, goods or services;
>
> (ii) any other rate or price specified in the contract; and
>
> (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price specified in the contract, is to be adjusted by a specific amount,
>
> or in the absence of the matters referred to in sub-paragraphs (i), (ii) and (iii), then having regard to the rates or prices prevailing in the building and construction industry at the time the construction work was carried out, or the goods or services were supplied;
>
> (b) if any part of the construction work, goods or services is defective, having regard to the estimated cost of rectifying the defect; and
>
> (*c*) in the case of materials or components that are to form part of any building, structure or works arising from the construction work, having regard to the basis that the only materials or components to be included in the valuation are those that have become or, on payment, will become the property of the party for whom the construction work is carried out.
>
> [emphasis added]

It is evident from the text of the above provisions that ss 6 and 7 of the SOPA only apply in a situation where a contract is *silent* as to the amount of a progress

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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. In this limited sense, the SOPA can be said to operate as a "gap-filler" in situations where parties have omitted to contractually stipulate for progress payments.

30 In other situations where the SOPA limits the parties' freedom to contract as they see fit, the extent of such limitation is expressly set out in the statutory provisions. Section 8 of the SOPA, for example, limits the ability of the parties to set a payment date further than a certain specified point. At the extreme end are provisions such as s 9 of the SOPA, which entirely prohibit parties from including any "pay when paid provisions" in their contract by rendering them completely unenforceable.

31 A holistic consideration of the provisions of Part II of the SOPA leads to the conclusion that there is no separate statutory entitlement to a progress payment where a contract already makes provisions for such payments (assuming, of course, that these provisions do not themselves otherwise violate the SOPA). This eminently makes sense as having two payment regimes existing side-by-side would create intolerable uncertainties. Which regime applies or do they both apply? Must a contractor elect between them? Is the election irrevocable? We are of the view that there is no question of election under the SOPA. To the extent that decisions such as those in as *CHL Construction* and *Tienrui Design* found otherwise, we respectfully disagree. If the statutory conditions under the SOPA are satisfied, then the statutory right to make progress payments can be invoked but not otherwise. One such statutory condition is when the contract *does not* contain the relevant provision. We should add that this holding is, to all intents and purposes, no different from our decision in *Far East Square*. Unlike *Far East Square*, the "dual railroad track

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system" argument was specifically raised before us in the present appeal thereby providing the context for our pronouncement on this point.

Whether there is a separate statutory entitlement to serve a payment claim under s 10 of the SOPA

32 We similarly conclude that there is no separate statutory entitlement to serve a payment claim under s 10 of the SOPA (as it then stood) where the underlying contract itself provides a mechanism for the service of payment claims. Sections 10(1) and 10(2) of the SOPA are the relevant provisions and they read as follows:

> **Payment claims**
>
> **10.—**(1) A claimant may serve one payment claim in respect of a progress payment on —
>
> (*a*) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or
>
> (*b*) such other person as specified in or identified in accordance with the terms of the contract for this purpose.
>
> (2) A payment claim shall be served —
>
> (*a*) at such time as specified in or determined in accordance with the terms of the contract; or
>
> (*b*) *where the contract does not contain such provision, at such time as may be prescribed.*
>
> [emphasis added]

Since no separate statutory right to progress payments exists under s 5 of the SOPA where the contract itself provides for progress payments (see [26]–[31] above), there can be no question of a corresponding separate statutory entitlement to serve a payment claim under s 10 of the SOPA arising in such situations. This is made abundantly clear by s 10(2) the SOPA, which stipulates

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that the terms of a 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. In this regard, we would note that the SOPA fulfills a similar "gap-filling" role here as it does in relation to the amount and valuation of progress payments under ss 6 and 7 of the SOPA (see [29] above).

33 This does not mean that a party in such a situation is without remedy. As we observed in *Far East Square* at [53], this does not deprive it of the right to have any disputes fully and finally settled in arbitration or legal proceedings (in accordance with the dispute resolution provisions of the contract). It simply disentitles the making of further progress claims. This is so because the terms of the contract have contractually dictated this outcome.

34 The decision in *Choi Kum Peng* is thus entirely consistent with our interpretation of the SOPA. In *Choi Kum Peng*, the payment claim in question had been validly served *prior* to the termination of the contract. It was on this basis that the adjudication application was found to have been validly made pursuant to s 12(2)(*b*) of the SOPA, notwithstanding the fact that no payment response was provided to the defendant by the quantity surveyor.

The effect of the 2018 Amendments

35 A separate argument raised by Stargood before us was that the 2018 Amendments made it clear that a claimant can serve and adjudicate on a payment claim under the SOPA, even after termination of the underlying contract as it amended the definition of "contract" in the SOPA to read:

> "contract" means a construction contract or a supply contract, and includes a construction contract or a supply contract *that has been terminated*. [emphasis added]

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36 Stargood also relied on the speech of the Minister of State for National Development, Mr Zaqy Mohamad, at the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (No 38 of 2018) (*Singapore Parliamentary Debates, Official Report* (16 November 2004), vol 78 at col 1112), which stated that the amendment was to resolve "any ambiguity on the point as to whether claimants *can* apply for adjudication upon contract termination" [emphasis added]. In our judgment, this statement must be seen in the context of the overarching legislative scheme in the SOPA, in particular, the "gap-filling" role which the legislation fulfils in relation to progress payments and payment certification (see [29] and [32] above). Seen in this light, the 2018 Amendments do not have any impact where the contract itself contains provisions relating to the amount and valuation of progress payments as well as payment certification. In such situations, the terms of the contract would govern and there would be no need for the SOPA to play any "gap-filling" role. If anything, the amendment only affects contracts which are silent as to the payment certification process; we do not think that it goes so far as to allow a person responsible for certifying payments under a contract to continue to do so, even where he can no longer do so under terms of the contract. In short, all that the 2018 Amendments seeks to achieve is that the SOPA *can in principle* apply to progress payment claims after termination. This is not controversial. However, it does not and was not intended to override the terms of the contract which provide the contrary.

37 It follows from the above that the first point of reference would be the terms of the Subcontract and, in particular, any provisions therein relating to the service of payment claims following its termination. We thus turn to consider whether under the terms of the Subcontract, Stargood was entitled to serve payment claims on the Project Director following the Subcontract's termination.

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Before doing so, we would like to address a concern articulated by the Judge below in the Judgment at [21] wherein he stated that to hold that the SOPA does not apply to progress payment claims after termination "would place subcontractors and suppliers at the mercy of the main contractor or employer, who can resist or delay payment for works done or goods supplied by terminating the underlying contract on tenuous grounds". We make two brief observations to this concern. First, in our view, any termination must necessarily be *prima facie* valid. In other words, there must be some facts to support the valid contractual exercise to terminate the contract. Second, termination carries serious legal consequences. While it is not impossible for a contractor to act in an irrational or unreasonable manner in terminating a contract, it might be overstating it 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".

Issue 2: Whether the Respondent was entitled under the terms of the Subcontract to serve payment claims on the Project Director following its termination.

38 In our view, the Subcontract by its terms precludes the service of payment claims following termination under cl 33.2. This means that both PC 12 and PC 13 were not valid payment claims under the SOPA and were incapable of supporting adjudication applications.

39 As the Subcontract provided for payment claims to be served on the Project Director as part of the payment certification process, the key inquiry is whether Stargood was entitled to serve payment claims following the Subcontract's termination. This inquiry is separate from the *functus officio* point.

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The distinction between termination of the Respondent's employment under the Subcontract and termination of the Subcontract

40 As mentioned above at [16], the Judge's primary reason for finding that Stargood could continue to serve payment claims on the Project Director notwithstanding the termination of the Subcontract under cl 32.2 was that this only had the effect of terminating Stargood's employment under the contract. Before us, a significant portion of the parties' arguments centred on the distinction between: (a) a termination of Stargood's *employment* under the Subcontract; and (b) a termination of the Subcontract (see [17] and [19] above). The question, then, is what does this distinction entail and the consequences stemming from it.

41 The distinction between a termination of a contractor's employment on the one hand and the termination of a contract appears to be well-entrenched in construction contracts, and is explained as follows in *Chitty on Contracts*, vol 2 (Hugh Beale ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty on Contracts*") at para 37-244:

> (c) Termination of Employment
>
> **Meaning.** This refers to termination of the employment of the contractor under the contract, as opposed to bringing the contract itself to an end … *Both parties remain bound by terms of the contract which are to apply upon termination coming into effect* … The consequences of termination for default are broadly equivalent to the effect of acceptance of a repudiatory breach of contract as terminating the contract. In the case of termination of the contractor's employment pursuant to the terms of the contract, however, the contract makes express provision for the consequences …

The key point which can be gleaned from this is that where the employment of a contractor is terminated pursuant to an express clause in the contract, the

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parties will remain bound by any terms which are expressed to survive such termination.

42 Stargood relied on the following passage from Chow Kok Fong, *Law and Practice of Construction Contracts*, (Sweet & Maxwell, 3rd Ed, 2004) ("*Law and Practice of Construction Contracts*") at para 13.114, which was cited with approval in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 and by the Judge in the proceedings below (see Judgment at [15]):

> The activation of the termination proceedings usually operates to alter the employer's obligations for payments. These changes may occur at two levels. Firstly, where the termination provision provides for the contract to be terminated as opposed to the determination of the contractor's employment, it would seem that the effect is that *all the arrangements under the contract comes to an end*. In these circumstances, an architect or engineer becomes *functus officio* and he can no longer certify payments or administer the contract: *Engineering Construction Pte Ltd v Attorney General (No. 2) (1994)*. For this reason, *the wording used in the provisions of contracts like the JCT and the SIA standard forms distinguish carefully between the termination of a contractor's employment and the termination of a contract*. [emphasis in original]

In our view, all that the passage states is that where a contract is terminated, any person empowered under that contract to administer the contract or certify payments would automatically cease to exist. It does not logically follow, as Stargood claimed, that such powers would necessarily continue to exist if what is terminated is only the employment of the contractor. This would still fall to be determined by the terms of the contract and necessitates a consideration of the payment mechanism under the Subcontract.

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Payment mechanism under the Subcontract

43 Though the Subcontract was not based on the Singapore Institute of Architect's Articles and Conditions of Building Contract (Measurement Contract) (7th Ed, April 2005) (the "SIA Form of Contract") as was the case in *Far East Square*, the payment mechanism thereunder was still broadly similar (see [7] above). As mentioned above at [8], cl 28 of the Subcontract calls for payment claims to be submitted to the Project Director. The Project Director is then obligated to issue a payment response to Stargood stating the amount he believes is due to the latter. Following this, Shimizu is only obligated to pay Stargood the amount stated by the Project Director in the payment response. It can be observed that the Project Director plays an important role in this process as his payment response serves as a condition precedent to Stargood's right to receive progress payments at this point. Indeed, the Project Director's certification appears to be accorded temporary finality under the terms of the Subcontract. While cl 28 of the Subcontract does not expressly state that the Project Director's certificates are not final and binding, as is the case in cl 31(13) of the SIA Form of Contract considered in *Far East Square*, the same concept is incorporated via cll 34.1 and 34.2, which provide that the Project Director's certification may only be reopened in adjudication under the SOPA or in arbitral proceedings.

Effect of termination pursuant to cl 33.2

44 The issue in the present case, then, was whether the terms of the Subcontract entitled Stargood to serve payment claims on the Project Director following termination under cl 33.2.

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45 Clause 33.4 of the Subcontract is the provision which governs the effects of a termination carried out pursuant to cll 33.2 or 33.3 and the relevant portions read:

> Upon termination of the [Subcontract] under Clauses 33.2 or 33.3 hereof:
>
> (a) [*Shimizu*] shall be entitled to damages on the same basis as if [*Stargood*] had wrongfully repudiated the Sub-Contract …
>
> …
>
> [emphasis added]

Significantly, cl 33.4 provides that upon termination of the Subcontract, Shimizu shall be entitled to damages on the same basis as if Stargood had wrongfully repudiated the Subcontract. No provision is made for Stargood to make any payment claim in such a situation.

46 Instead, cl 33.5 provides that if the Subcontract 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:

> *Unless* the *termination* of the Main Contract *was caused by or arose from any default or breach of contract by* [*Stargood*] (in which event [Stargood] shall be liable to [Shimizu] on the same basis as provided for in Clause 33.4 hereof), [*Stargood*] shall in that event be entitled to payment for work done and materials supplied by him on the [Subcontract] Prices and Rates … [emphasis added].

47 Thus, under the Subcontract, especially cl 33.4, Stargood has no contractually provided right to serve a payment claim for work done prior to termination if the Subcontract is terminated for its default. On the contrary it is only in the event that the Subcontract is terminated as a consequence of the termination of the Main Contract for some reason that is unconnected to its breach is there a right to serve a payment claim. That does not mean that

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Stargood is precluded from obtaining payment. Rather, this would typically be raised as a set-off against the damages due to Shimizu, or if Stargood can prove that the termination was in fact without basis, it would be able to sue for damages for wrongful termination and to add the value of any work done which remains outstanding.

48 As the Subcontract in the present case was *not silent* as to whether Stargood was entitled to submit a payment claim for work done prior to termination under cl 33.2, there is no question of any gap-filling by s 10 of the SOPA. Instead, the terms of the Subcontract, which provide for a contrary position in 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, will govern such a scenario. It follows from this that any distinction between termination of employment or termination of the sub-contract, for the purposes of this appeal, is strictly irrelevant. In any event, it appears quite clear to us from the notice of termination that the Subcontract was terminated and not merely the employment of the subcontractor *ie*, Stargood.

49 In the circumstances, we are of the view that Stargood was not entitled to serve PC 12 and PC 13 under the terms of the Subcontract.

Observations on whether the project director became *functus officio vis-à-vis* his payment certification functions following termination of the Subcontract

50 Based on the above analysis, it is not strictly necessary for us to decide whether the Project Director became *functus officio* in relation to his payment certification functions upon the termination of the Subcontract and the

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consequences of his becoming so. However, as this point was argued before us, we make some brief and provisional observations.

51 First, we do not think that a distinction can be drawn between a case where the payment certifier becomes *functus officio* as a result of the completion of the contract (as was the case in *Far East Square*), or the termination of a contract. In either case, he no longer has the ability to certify payments under the contract in question unless it expressly provides so. Here, the provisions in cl 33.4, which governed the effects of termination, did not do so. This would mean that the Project Director became *functus officio* upon the termination of the Subcontract, leaving aside the issue of whether Stargood was entitled to serve a payment claim at that point under the terms of the Subcontract. To this extent, we doubt the Judge's finding that *Far East Square* was inapplicable.

52 Second, one of the points raised during the course of the hearing before us was the effect of the Project Director becoming *functus officio* on Stargood's right to serve a payment claim if the Subcontract provided for the certificate to function as a condition precedent to payment. This appears to be a new point which was not raised before the Judge in the proceedings below. It was argued that such conditions are void under s 36 of the SOPA as being inconsistent with s 17(4) of the SOPA. However, as noted above at [43], the adjudicator and/or arbitrator is entitled to re-open any certificates issued by the Project Director. There is thus no question of whether the certificates issued were intended to be final and binding on the parties. Having said that, for the purposes of the appeal, there is no need for us to decide on the impact of s 17(4) of the SOPA. In our view, it would be preferable to fully explore the contours of the *functus officio* point in a subsequent case with the assistance of an *amicus curaie*.

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Conclusion

53 For the above reasons, we allow the appeal and set aside the orders made by the Judge below.

54 In the light of the parties' respective costs schedules and the fact that the principal point which led to the appeal being allowed was raised by this court for the parties' consideration, we order Stargood to pay Shimizu costs fixed at $25,000 inclusive of disbursements. The costs order below is reversed in favour of Shimizu. The usual consequential orders will apply.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Yong Boon On, Amanda Koh Jia Yi and Lee Shu Qing (Eldan Law LLP) for the appellant;
Christopher Chong and Chen Zhihui (Drew & Napier LLC) for the respondent.

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