IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 261

Originating Summons No 1099 of 2019

Between

Stargood Construction Pte Ltd

… Plaintiff

And

Shimizu Corporation

… Defendant

JUDGMENT

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Adjudication determinations] — [Jurisdiction]

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Subcontracts] — [Claims by subcontractor after termination of subcontract]

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Stargood Construction Pte Ltd
v
Shimizu Corp

[2019] SGHC 261

High Court — Originating Summons 1099 of 2019
Vincent Hoong JC
21 October 2019

6 November 2019 Judgment reserved.

Vincent Hoong JC:

Introduction

1 By Originating Summons No 1099 of 2019, the plaintiff seeks to set aside two adjudication determinations, namely Adjudication Determination No SOP/AA203/2019 ("AA 203") and Adjudication Determination No SOP/AA245/2019 ("AA 245"). The plaintiff also seeks a declaration to serve a further payment claim on the defendant.

2 Having considered the parties' submissions, I allow the plaintiff's application. I agree with the plaintiff that the adjudicator in AA 203 was wrong to conclude that upon termination of the plaintiff's employment under the subcontract ("the Sub-Contract"), the plaintiff was not entitled to submit a further payment claim and to enforce it by adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

("SOPA"). Given this finding in AA 203, it necessarily follows that the adjudicator in AA 245 was wrong in dismissing the plaintiff's payment claim on the ground that the plaintiff was bound by the adjudicator's determination in AA 203.

Facts

3 The plaintiff was one of the defendant's subcontractors of a project at 79 Robinson Road, of which the defendant is the main contractor.[1] The parties do not dispute that the defendant, by a notice of termination, terminated the plaintiff's employment under the Sub-Contract[2] pursuant to clause 33.2 of the Sub-Contract, which provides:[3]

> 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, within 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. [emphasis added]

4 After the termination of the Sub-Contract, the plaintiff served Payment Claim No 12 ("PC 12") on the defendant for the sum of $2,599,359.44.[4] The defendant did not serve a payment response to PC 12.[5] The plaintiff then

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1 Lin Jie Biao's 1st affidavit ("LJB") at pp 261 to 263.

2 LJB at pp 2436 to 2437.

3 LJB at pp 291 to 292.

4 LJB at [9] and Dino Jose Nacianceno Orino's 1st affidavit at [11].

5 LJB at [10] to [13].

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proceeded to lodge AA 203.[6] In its adjudication response, the defendant alleged, *inter alia,* that (a) PC 12 had not been served on it and (b) PC 12 was outside the purview of the SOPA.[7]

5 The adjudicator dismissed AA 203 as he was found that PC 12 was improperly served on the defendant and alternatively, on jurisdictional grounds. The adjudicator referred to *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR(R) 125 ("*Engineering Construction*") and *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*FES*") and concluded that the plaintiff was not entitled to serve PC 12. This was because the plaintiff had served PC 12 after the defendant had already terminated the Sub-Contract. This, according to the adjudicator, rendered the project director *functus officio* as regards his certifying function under the Sub-Contract. He opined at [104] of the adjudication determination ("AD"):[8]

> Because the Project Director was *functus officio* with respect to his certifying function, applying the reasoning in *Engineering Construction* (as set out above) and *FES*, no post-termination payment certification regime existed under the Sub-Contract. As such, the [plaintiff] no longer had an entitlement to serve a payment claim as the Project Director no longer had the power, under the Sub-Contract, to certify the same.

6 The adjudicator recognised that there was a conceptual difference between termination of a contract and the termination of one's employment under a contract (*LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 ("*LW Infrastructure*") at [51]–[53]). However, he did not

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6 LJB at [14].

7 LJB at pp 44 to 107.

8 LJB at pp 204 to 208 at [91] to [97] and p 210 at [104] to [105].

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think that it mattered as "there were no post-termination primary obligations in the Sub-Contract regarding [the] certification of payment claims."[9]

7 Before the adjudicator issued his AD for AA 203, the plaintiff served Payment Claim No 13 ("PC 13"), claiming the same sum as it did in PC 12. The defendant served its payment response, with its response amount stated as "nil".[10] The plaintiff did not apply to set aside AA 203 as it took the position that the adjudicator had based his determination on jurisdictional grounds and not on the substantive merits. AA 203 was therefore not binding in a subsequent adjudication under the SOPA. Hence, the plaintiff proceeded to commence AA 245.[11] In its adjudication response to AA 245, the defendant argued, *inter alia*, that the plaintiff was bound by the adjudicator's determination in AA 203.[12] The adjudicator agreed with the defendant and determined at [92][13] that:

> … I accept the [defendant's] submission and hold that the [plaintiff] is bound by the determinations of the issues determined by [the] learned adjudicator in the AD of SOP/AA203, in particular, in respect of the fundamental issue that upon termination of the Sub-Contract, the [plaintiff] was not entitled to submit any further payment claim under the Sub-Contact and enforce it by adjudication under the [SOPA]. Consequently, it follows from the AD of SOP/AA 203 and section 21(1) of the [SOPA] that the [plaintiff] was also not entitled to submit PC 13 and PC13 is therefore invalid under section 10 of the [SOPA]. [emphasis in original]

8 The adjudicator accordingly dismissed AA 245.

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9 LJB at p 211, [108] to [109].

10 LJB at [20] to [21].

11 LJB at [22] to [23].

12 LJB at p 2809.

13 LJB at p 3093.

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The plaintiff's case

9 In the main, the plaintiff argues that the adjudicator in AA 203 was wrong in determining that the plaintiff was not entitled to issue a further payment claim under the Sub-Contract after termination. First, the adjudicator failed to give effect to Parliament's intention that claims for work done or goods supplied before termination of a contract are valid.[14] Second, that there are High Court decisions that were binding on the adjudicator to the effect that a claimant is entitled to serve payment claims and for them to be adjudicated upon notwithstanding termination.[15] Finally, that the adjudicator for AA 203 had misconstrued and applied the principles in *FES* wrongly in his AD.[16]

The defendant's case

10 The defendant contends that the application should be dismissed for the following reasons:

a. The plaintiff's application requires the court to review the substantive merits of the adjudicator's decision in AA 203 which is not the court's role.[17]

b. The adjudicator was correct in finding that the project director was *functus officio* as the defendant had terminated the Sub-Contract when the payment claim was submitted. As such, the primary obligations of the parties had come to an end.[18]

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14 Plaintiff's Written Submissions ("PWS") at paras 46 to 58.

15 PWS at paras 59 to 71.

16 PWS at paras 72 to 95.

17 Defendant's Written Submissions ("DWS") at para 30.

18 DWS at para 35.

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c. The application to set aside the AD in AA 203 did not fall within any of the accepted grounds. First, there was no breach of natural justice. Secondly, it was not alleged that the adjudicator was not validly appointed. Thirdly, there was no non-compliance with one or more of the provisions of the SOPA. Finally, there was no patent error on the face of the record.[19]

c. The plaintiff did not challenge the adjudicator's finding in AA 203 that there was invalid service of PC 12 on the defendant.[20]

The issues

11 There are two issues to be determined:

(a) whether the project director was *functus officio* when the plaintiff served PC 12 on the defendant; and

(b) whether the plaintiff was entitled to serve PC 12 and PC 13 for works done prior to the termination of the Sub-Contract.

My decision

Issue 1: Whether the project director was functus officio when the plaintiff served PC 12 on the defendant

12 Fundamentally, *FES* is plainly inapplicable on the facts of the present case. The issue in *FES* was not whether a claimant could serve a payment claim and have its claim adjudicated after the termination of the contract. The Court of Appeal's observations of the architect being *functus officio* related to a

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19 DWS at paras 28 to 31.

20 DWS at paras 56 to 61.

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situation where the works had been completed and the architect had already issued the final certificate for the project, *after* the expiry of the maintenance period. In such a situation, there was simply no legal basis to submit further payment claims unless the claimant could show that the final certificate was manifestly invalid because, for example, it had been issued before the project even reached the stage of practical completion (*FES* at [39] and [42]).

13 In this case, there is no allegation that the final certificate has been issued, such that the project director is *functus officio* with respect to his certifying function. Indeed, the issue is not whether the plaintiff is entitled to serve a payment claim after the final certificate has been issued, as was the case in *FES*. The key issue in this case is whether the plaintiff can serve a payment claim and have its claim adjudicated after the termination of its employment under the Sub-Contract.

14 The defendant's notice of termination under clause 33.2 does not have the effect of terminating the entire Sub-Contract. It only serves to terminate the plaintiff's *employment* under the Sub-Contract.[21] As such, the project director is not *functus officio* with regard to his certifying function: *LW Infrastructure* at [51]–[53]. There are also no provisions in the Sub-Contract that prohibit the plaintiff from serving payment claims in a situation where the plaintiff's employment under the Sub-Contract has been terminated.

15 This is unlike *Engineering Construction* (which was decided before the SOPA came into operation) where it was the *contract* and not the *contractor's*

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21 LJB at p 292.

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employment that had been terminated. This distinction is material. In *LW Infrastructure*, Judith Prakash J (as she then was) pointed out at [51]:

> There is, however, a clear conceptual distinction between the termination *of the contract* and termination *of one's employment* under the contract. This distinction was explained in [Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004)] ([44] *supra* at p 598):
>
> > 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….* For this reason, *the wording used in the provisions of contracts like the JCT and the SIA standard forms distinguish carefully between the determination of a contractor's employment and the termination of a contract. …*
>
> [emphasis in original]

16 For these reasons, the adjudicator in AA 203 was wrong to conclude that the project director was *functus officio* as regards his certifying function under the Sub-Contract upon the termination of the plaintiff's employment under the Sub-Contract.

Issue 2: whether the plaintiff was entitled to serve PC 12 and PC 13 for works done prior to the termination of its employment

17 The issue thus turns to whether the plaintiff can serve its payment claim for works done *prior* to the termination of its employment under the Sub-Contract.

18 Section 5 of the SOPA makes it clear that a person who has carried out any construction work, or supplied any goods or services, under a contract is

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entitled to a progress payment. If proven on the merits, the works that are claimed for under PC 12 and PC 13 relate to works for which the plaintiff has an *accrued* entitlement to payment, as it is undisputed that they relate to works which the plaintiff had carried out before the termination of its employment by the defendant.[22]

19 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. This is because the contractor has an *accrued* statutory entitlement to payment, which necessarily survives the termination: *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [21]–[22], *AU v AV* [2006] SGSOP 9 at [13] and *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364 at [17]–[18].

20 That the contractor's entitlement to payment survives termination accords with the legislative intent of the SOPA, which seeks to facilitate cash flow in the building and construction industry. As Woo Bih Li J observed in *Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 at [38]:

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22 PWS at para 10 and DWS at para 6.

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> … Most contractors have more than one project. The money received under one project may be used for the same project and/or for other projects. The fact that a project is ended by termination and that the contractor is no longer carrying out works thereunder does not necessarily mean that his concern for cash flow ends. The fact that he is no longer carrying out works under that project does not mean that all his expenses come abruptly to a halt. Furthermore, he might also be under liabilities and/or have made payments to other subcontractors or suppliers for the same project for which he was seeking reimbursement, plus the profit element, from the owner before the project is terminated.

21 Hence, it cannot be right that the SOPA no longer applies to works done before the termination of the said contract. Such an interpretation 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. Apart from contradicting the express wording under s 5 of the SOPA, this clearly militates against the underlying legislative intent of the SOPA.

22 It is noteworthy that there has been a recent amendment to the SOPA. Instead of "a construction contract or a supply contract" (s 2 of the SOPA), a "contract" under the SOPA will soon be defined as "a construction contract or a supply contract, *and includes a construction contract or a supply contract that has been terminated*" [emphasis added]: clause 2(*b*) of the Building and Construction Industry Security of Payment (Amendment) Bill (No 38 of 2018) ("SOP (Amendment) Bill of 2018").

23 This amendment was explained during the second reading of the SOP (Amendment) Bill of 2018 (*Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 (Zaqy Mohamad, Minister of State for National Development) ("Parliamentary Debates")):

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> Another amendment, also at clause 3, will make clear that claims for work done or goods supplied before termination are valid. This is to *address any ambiguity* on the point as to whether claimants can apply for adjudication upon contract termination… [emphasis added]

24 Although the SOP (Amendment) Bill of 2018 has not come into force, the Parliamentary Debates makes it clear that the SOP (Amendment) Bill of 2018 does not change the current position. It seeks only to "address any ambiguity". Hence, it must be correct that, even at present, a contractor or supplier who is entitled to a progress payment may still serve such a payment claim *after* the termination of the contract, so long as the claim relates to works done or goods and services supplied *before* the termination of the contract.

25 It is therefore clear that the adjudicator in AA 203 had wrongly decided the issue of whether the plaintiff was entitled to serve payment claims for works done prior to the termination of its employment under the Sub-Contract. This error went towards the jurisdiction of both adjudicators in AA 203 and AA 245 (where the latter held that the plaintiff remained bound by the prior adjudicator's erroneous findings in this regard). Hence, I am satisfied that there are just grounds to set aside both ADs: see *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [48].

26 However, the adjudicator's primary ground for the rejection of the plaintiff's claim in AA 203 was the improper service of PC 12 on the defendant. The plaintiff has not contested this issue in the hearing before me. For this reason, I find that this aspect of the adjudicator's determination in AA 203 ought not to be set aside. The court has the power to set aside a severable part of an AD for jurisdictional error if it is both textually and substantially severable from the remainder of the determination: *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [141] and [155].

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27 I accordingly exercise my discretion to sever only those parts of the AD of AA 203 which dealt with the issue of whether the plaintiff could issue a payment claim post-termination of the Sub-Contract.

Engineering Construction *and* LW Infrastructure *are inapplicable to the SOPA regime*

28 From the foregoing, it can be seen that under the SOPA regime, a contractor's entitlement to progress payment is premised on work done, or goods and services supplied, under a contract. Such an accrued entitlement to payment survives termination of the contract. In this regard, the SOPA and the relevant cases relating to the SOPA above do not distinguish between cases where the *entire* contract is terminated, and cases where only the *employment* under the contract is terminated. Instead, the fundamental concern is whether the right to payment accrued under the SOPA. This is consistent with the Parliamentary Debates, which simply makes clear that, under the SOPA, "claims for work done or goods supplied before termination are valid", with no distinction between the types of termination (*ie,* of the entire contract or the employment only).

29 Hence, for claims under the SOPA, any distinction between the termination of a contractor's *employment* and of the *entire contract* are immaterial. This is not at odds with both *Engineering Construction* and *LW Infrastructure,* as they were both cases which did not involve the SOPA. While *Engineering Construction* pre-dated the SOPA, *LW Infrastructure* was concerned with an appeal against an arbitrator's award under s 49(1) of the Arbitration Act (Cap 10, 2002 Rev Ed).

30 Nonetheless, my decision does not turn on this issue as the fact remains that the adjudicator in AA 203 committed the error in finding that the project

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director was *functus officio* in relation to his certifying functions. This was against the authority of *LW Infrastructure* (see [15] above).

Declaratory order

31 As for the declaratory order sought, I am satisfied that the three requirements as summarised in *DNKH Logistics Pte Ltd v Liberty Insurance Pte Ltd* [2019] 4 SLR 1063 at [23] have been satisfied. They are: (a) that the plaintiff has a real interest in bringing the action; (b) that there is a real controversy between the parties; and (c) that the declaration relates to a right which is personal to the plaintiff and which is enforceable against the defendant.

32 In the main, since both adjudicators dismissed the plaintiff's claims for work done prior to the termination of its employment under the Sub-Contract, there remains a real controversy to be resolved by way of adjudication under the SOPA. This is clearly the plaintiff's personal right, and it has a real interest, in the form of monetary satisfaction (if successful), in having its claims against the defendant adjudicated under the SOPA.

Conclusion

33 For the above reasons, I allow the plaintiff's application and grant the following orders:

> (a) That the AD made in AA 203 be set aside in part. In particular, the adjudicator's findings in relation to PC 12 being an invalid payment claim as it was served after the termination of the Sub-Contract are set aside. This includes, but is not limited to, [104]–[107], [110]–[116], [128]–[132] of the AD.

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(b) That the AD made in AA 245 be set aside in its entirety.

(c) A declaration that the plaintiff is entitled to serve a further payment claim on the defendant for construction work done under the Sub-Contract known as the "SUB-CONTRACT FOR SUPPLY LABOUR FOR CONCRETING AND REBAR WORK & SUPPLY MATERIAL AND LABOUR FOR FORMWORK" pursuant to s 10 of the SOPA. Such construction work that may be claimed for is expressly limited to work done *prior* to the termination of the plaintiff's employment under the Sub-Contract.

34 I will now hear parties on the question of costs.

Vincent Hoong
Judicial Commissioner

Chong Chi Chuin Christopher and Chen Zhihui (Drew & Napier LLC) for the plaintiff;
Lee Peng Khoon Edwin, Yong Boon On, Amanda Koh Jia Yi and Lee Shu Qing (Eldan Law LLP) for the defendant.

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