IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 121

Civil Appeal No 13 of 2020

Between

Orion-One Residential Pte Ltd

… *Appellant*

And

Dong Cheng Construction Pte Ltd

… *Respondent*

Civil Appeal No 112 of 2020

Between

Dong Cheng Construction Pte Ltd

… *Appellant*

And

Orion-One Residential Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[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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Orion-One Residential Pte Ltd
v
Dong Cheng Construction Pte Ltd and another appeal

[2020] SGCA 121

Court of Appeal — Civil Appeals Nos 13 and 112 of 2020
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
18 November 2020

22 December 2020

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 The issue as to whether a payment claim can be validly served after termination of the contract has come before our courts in a number of cases. In the court below, the High Court judge ("the Judge") held that "[t]he authorities are unanimous in their support for the proposition that payment claims made for work done prior to termination of employment are perfectly valid" – see *CEQ v CER* [2020] SGHC 70 ("the GD") at [23].

2 One of the authorities relied on by the Judge was *Stargood Construction Pte Ltd v Shimizu Corp* [2019] SGHC 261, a decision which was reversed by this court in *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 ("*Shimizu Corp*") subsequent to the release of the judgment below. In *Shimizu Corp* at [2], we observed that "[i]n 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".

3 To the extent that the Judge below appeared to have adopted the approach (in the GD at [23]) that "[a]s a matter of policy, the statutory entitlement to payment must survive termination", without regard to the terms of the contract, we disagreed with him. In finding that the payment claim was validly served, the Judge omitted to consider the terms of the underlying contract and the specific ground under which the contract was terminated. In our view, based on the ground upon which the contract was terminated, it would have been apparent that the term of the contract which purportedly justified the service of the payment claim after termination was inapplicable both as a matter of construction and on the facts.

4 In the course of the oral arguments before us, we also remarked on the futility of applying for adjudication of a payment claim more than two years following the termination of the contract. As the adjudication determination, by its nature, is not final and was in fact subject to a pending arbitration, it made no commercial sense to apply for adjudication (see [52] below). We therefore encourage parties to conduct a cost-benefit analysis prior to pursuing the adjudication route. An omission to do so would only serve to introduce a further layer of costs with no apparent benefit.

5 We heard and allowed the appeal in CA/CA 13/2020 ("CA 13") and dismissed the appeal in CA/CA 112/2020 ("CA 112") on 18 November 2020 with brief oral grounds. These are our detailed grounds.

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Background facts

The parties

6 The appellant in CA 13 and the respondent in CA 112 is Orion-One Residential Pte Ltd ("Orion"). Orion was the owner and developer of a condominium project known as the "Residential Flat Development at Lot 06836M MK 17 at 6 Jalan Ampas" ("the Project").

7 The respondent in CA 13 and the appellant in CA 112 is Dong Cheng Construction Pte Ltd ("Dong Cheng"). Dong Cheng was the main contractor of the Project between 1 February 2016 and 2 March 2017.

Dong Cheng's employment as the main contractor of the Project

8 Prior to Dong Cheng's employment by Orion, Orion had engaged another contractor, SingBuild Pte Ltd ("SingBuild"), as the main contractor of the Project. The contract between Orion and SingBuild dated 19 May 2015 ("the Contract") incorporated the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, July 2013) ("REDAS Conditions").

9 By way of a novation agreement dated 1 February 2016 entered into by Orion, Dong Cheng and SingBuild ("the Novation Agreement"), the Contract was novated by SingBuild to Dong Cheng.

10 On 29 August 2016, Orion and Dong Cheng entered into an agreement to vary the terms of the Contract ("the Supplementary Agreement"). Clause 2.5 of the Supplementary Agreement provided that Dong Cheng "shall … undertake to complete the works as set out in the annex". Furthermore, if Dong Cheng

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failed to do so, "Orion may, if they deem fit, proceed to terminate [Dong Cheng] on account of a breach to the [Contract] and the Supplementa[ry] Agreement".

Termination of Dong Cheng's employment

11 Between 7 December 2016 and 16 January 2017, Orion sent Dong Cheng several solicitors' letters and emails to remind Dong Cheng of its approaching deadlines and outstanding tasks. The solicitors' letters also drew Dong Cheng's attention to its obligations under the Supplementary Agreement. On 22 February 2017 and 23 February 2017, Orion's solicitors exchanged emails with one Lim Kek Sok ("Mr Lim"), who purported to be Dong Cheng's director. In the course of the correspondence, Orion's solicitors specifically drew Mr Lim's attention to cl 2.5 of the Supplementary Agreement.

12 On 2 March 2017, by way of a Notice of Termination, Orion terminated Dong Cheng's employment as the main contractor of the Project. This termination was expressly stated by Orion to be "in accordance with" cl 2.5 of the Supplementary Agreement, on the basis that Dong Cheng had "failed to provide the requested documents" and "failed to complete the balance of works", and that "the manpower deployed in the last few days were inadequate and there was never any work done at all".

13 On 15 March 2017, Orion engaged another contractor to undertake the outstanding works under the Project. Around May 2017, the professional parties involved in the Project, including the Employer's Representative ("the ER"), quantity surveyor, architect and professional engineers, concluded their employment. The Project was completed around August 2017.

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PC 25 and the AD

14 About two years later, between 7 March 2019 and 3 September 2019, Dong Cheng served seven payment claims on Orion, namely Payment Claims 20 to 26. Dong Cheng also commenced three separate adjudication applications against Orion in respect of Payment Claims 21, 24 and 25.

15 For the purposes of the present appeals, only Payment Claim 25 ("PC 25") and the adjudication application arising therefrom are relevant. PC 25 was served by Dong Cheng on Orion on 5 August 2019 for the sum of $3,262,740.23. In Orion's payment response to PC 25 ("PR 25") which was sent to Dong Cheng by way of a solicitor's letter dated 22 August 2019, Orion denied Dong Cheng's claim and instead asserted a claim against Dong Cheng in the sum of $21,792.27.

16 On 9 September 2019, Dong Cheng lodged Adjudication Application SOP/AA 318/2019 in respect of PC 25 pursuant to s 13(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). By way of an adjudication determination ("AD") dated 18 October 2019, the adjudicator granted Dong Cheng's application in part, awarding Dong Cheng the sum of $1,981,579.50 including goods and services tax but excluding interest and costs. The adjudicator found, *inter alia*, that Dong Cheng was entitled to serve PC 25 despite the fact that PC 25 was served after Dong Cheng's employment had been terminated.

The decision below

17 On 12 November 2019, Orion applied in HC/OS 1412/2019 to, *inter alia*, set aside the AD. Although Orion raised three alternative grounds to set

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aside the AD, it suffices for present purposes to highlight only one. Relying on *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*Yau Lee*"), Orion submitted that PC 25 was invalid because the termination of the ER's employment rendered the ER *functus officio*. As the ER's certification was a condition precedent to the contractor's right to receive payment, any payment claim submitted after the ER was *functus officio* was invalid.

18 In response, Dong Cheng submitted that the AD should not be set aside because a payment claim for works done prior to the termination of the contractor's employment was valid. Dong Cheng further submitted that *Yau Lee* was distinguishable from the present case.

19 On 16 January 2020, the Judge dismissed Orion's application to set aside the AD. The Judge found that a payment claim for works performed prior to the termination of a contractor's employment and submitted after the termination of the ER's employment was perfectly valid (see the GD at [23]). Furthermore, the Judge distinguished *Yau Lee* on the basis that the present case involved the REDAS Conditions while *Yau Lee* involved the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract) (7th Ed, April 2005) (see the GD at [25]–[28]).

20 On Orion's application, the Judge granted a stay of enforcement of the AD pending the appeal of the Judge's decision and the disposal of arbitration proceedings (see *CEQ v CER* [2020] SGHC 192). This was on the condition that $500,000 from the sums held in court was to be released to Orion's solicitors, to be utilised solely towards Dong Cheng's legal fees and disbursements for the appeal of the Judge's decision and the arbitration

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proceedings. This stay of enforcement was the subject of Dong Cheng's appeal in CA 112. Given that our decision in CA 13 had rendered the appeal in CA 112 moot, it was not necessary for us to address the merits of CA 112. Instead, for the purposes of these grounds of decision, we shall focus on the parties' arguments and our decision in respect of CA 13.

The parties' arguments on appeal

21 On appeal, Orion maintained its submission that Dong Cheng was not entitled to serve PC 25. In support of this submission, it relied on a new argument that placed greater focus on the terms of the Contract, which had not been raised before the Judge in the proceedings below. Specifically, Orion submitted that as Dong Cheng's employment was terminated pursuant to cl 2.5 of the Supplementary Agreement, cl 30.3 of the REDAS Conditions (which was relied upon by Dong Cheng as the basis for its entitlement to serve a payment claim post-termination) did not apply. Alternatively, Orion submitted that cl 30.3 did not preserve the ER's role in certifying payment claims.

22 In response, Dong Cheng submitted that its right to serve a payment claim after the termination of its employment was preserved by way of cl 30.3.1 of the REDAS Conditions. Furthermore, Dong Cheng submitted that the issue of whether the ER was *functus officio* was irrelevant, because the ER's certificate was not a condition precedent to Dong Cheng's right to receive payment. Alternatively, Dong Cheng submitted that the ER was not *functus officio* because it still had certain responsibilities and/or powers under the Contract even after the termination of Dong Cheng's employment.

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Our decision

The operative termination provision

23 As this court observed in *Yau Lee* ([17] *supra*) at [31] and reiterated in *Shimizu Corp* ([2] *supra*) at [2] and [21], the starting point of the analysis must always be the terms of the contract. 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" (*Shimizu Corp* at [28]). Thus, in order to determine whether a contractor is entitled to serve a payment claim after the termination of its employment, the court must have regard to the terms of the contract, with particular reference to the rights that were exercised by the parties leading up to termination of the contractor's employment.

24 For the avoidance of doubt, there was no need in this case to distinguish between the termination of Dong Cheng's employment and the termination of the Contract, as nothing turned on such a distinction. Nevertheless, for clarity's sake, we shall proceed on the basis that it was Dong Cheng's employment which was terminated. We note that this is in line with cl 2.5 of the Supplementary Agreement which refers to Orion's right to "terminate [Dong Cheng]" (see [25] below), as well as cl 30.3 of the REDAS Conditions, which refers to the "termination of the employment of the Contractor" (see [27] below).

25 We now turn to examine the relevant provisions in the Contract. In this regard, two provisions were particularly pertinent in our analysis. The first was cl 2.5 of the Supplementary Agreement which was the precise basis for Orion's termination of Dong Cheng's employment. Clause 2.5 reads as follows:

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> **2. AMENDMENT TO THE PRINCIPAL AGREEMENT**
>
> …
>
> 2.5 [Dong Cheng] agree that they shall, within sixty (60) days upon the disbursement from the escrow account, undertake to complete the works as set out in the annex save for item 63 of the Schedule Annex A and in the event that [Dong Cheng] fails to complete the said works, Orion may, if they deem fit, proceed to terminate [Dong Cheng] on account of a breach to the [Contract] and the Supplementa[ry] Agreement and to call on the Performance bond under the Supplementa[ry] Agreement and the Novation Agreement.

26 It was not disputed that cl 2.5 of the Supplementary Agreement conferred on Orion an express right to terminate Dong Cheng's employment. This right of termination served as an *additional* basis on which Orion could terminate Dong Cheng's employment.

27 The second provision was cl 30.3 of the REDAS Conditions, which Dong Cheng claimed conferred on it a right to serve a payment claim post-termination. Clause 30.3 reads as follows:

> **30.3. Effects of Termination for Default**
>
> In the event of the termination of the employment of the Contractor under clause 30.2,
>
> 30.3.1. the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained.
>
> 30.3.2. the Employer may employ other contractors to complete the design and construction of the Works and rectify any defects in the Works. …
>
> 30.3.3. the Employer shall be entitled to appoint his own design consultant or qualified person or the Contractor's design consultant or qualified person …

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> 30.3.4. upon the final completion of the Works, the Contractor may be permitted upon notice given by the Employer's Representative to remove the construction equipment, plant, temporary works, tools, temporary buildings and unfixed materials from the Site …
>
> 30.3.5. the Employer may recover from the Contractor liquidated damages for delay in completion arising from the termination under this clause …
>
> 30.3.6. the Employer's Representative shall as soon as practicable after termination of the Contractor's employment, determine the value of the Works completed at the time of termination.
>
> 30.3.7. the Employer shall be entitled to recover from the Contractor the following:
>
> > 30.3.7.1. the extra costs (if any) incurred in the design and completion of the incomplete Works,
> >
> > 30.3.7.2. the costs of rectification of defects (if any),
> >
> > 30.3.7.3. liquidated damages payable for delay in completion, and
> >
> > 30.3.7.4. any other loss or expense incurred arising from the termination of the Contractor's employment,
>
> from any sum due to the Contractor under clause 30.3.6 or as a debt. If there are no such extra costs, the Employer shall pay any balance to the Contractor.

28 It is apparent from the express language of cl 30.3 that cl 30.3 only applies "[i]n the event of the termination of the employment of the Contractor under clause 30.2". Clause 30.2, in turn, provides that if the contractor commits any of the acts and/or omissions specified under cll 30.2.2.1–30.2.2.8, the employer "may without prejudice to any other rights and remedies under the Contract … give a Notice of Termination of the employment of the Contractor". Upon receipt of such notice, "the Contractor's employment shall immediately terminate". Another point to note is that cl 30.3.1 is couched in negative terms

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in that "the Employer *shall not be liable* to make any further payments to the Contractor" [emphasis added] unless certain conditions are fulfilled, the significance of which will be addressed at [33] to [37] below.

29 In this case, we found that Dong Cheng's employment was terminated pursuant to cl 2.5 of the Supplementary Agreement. The basis for the issuance of the Notice of Termination was expressly stated to be cl 2.5 of the Supplementary Agreement. In the parties' correspondence leading up to the issuance of the Notice of Termination, Orion had consistently referred to the Supplementary Agreement. For instance, in an email dated 23 February 2017, Orion's solicitors drew Mr Lim's attention specifically to cl 2.5 of the Supplementary Agreement. On the other hand, there was no mention whatsoever of cl 30.2 of the REDAS Conditions in the parties' correspondence. Furthermore, the reasons for Orion's termination of Dong Cheng's employment, as set out in the Notice of Termination, did not fall within any of the situations set out in cl 30.2.2.

30 In these circumstances, it was abundantly clear that Orion had relied solely on cl 2.5 of the Supplementary Agreement to terminate Dong Cheng's employment. Clause 2.5 obliged Dong Cheng to complete the works as set out in the annex of the Supplementary Agreement within 60 days of the disbursement from the escrow account. A failure to do so would amount to a breach of contract on Dong Cheng's part, upon which Orion would become entitled under cl 2.5 to terminate Dong Cheng's employment. In the present case, when Orion invoked cl 2.5 to terminate Dong Cheng's employment, *ipso facto,* Dong Cheng's employment under both the Supplementary Agreement and the Contract were terminated.

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31 In our view, cl 30.3 of the REDAS Conditions did not apply. As we have observed above, cl 30.3 only applies if the contractor's employment is terminated under cl 30.2. In this case, however, Dong Cheng's employment was terminated pursuant to cl 2.5 of the Supplementary Agreement. Therefore, cll 30.2 and 30.3 of the REDAS Conditions did not come into play at all. For these reasons, Dong Cheng's reliance on cl 30.3 as the basis of its entitlement to serve PC 25 was entirely misplaced.

Our observations regarding cl 30.3 of the REDAS Conditions

32 In any case, even if cl 30.3 of the REDAS Conditions were applicable, we did not think that it would have entitled Dong Cheng to serve PC 25. First, a precondition for payment under cl 30.3 was the ascertainment of *all* the costs incurred by the employer as a result of the termination. On the facts of the present case, however, such costs had yet to be ascertained. Second, and more fundamentally, cl 30.3 was not concerned with *progress* payments. Instead, it was intended to provide for the *final* settlement of accounts between the contractor and employer in the event that the contractor is terminated for breach. We explain these two reasons in turn.

The costs of termination had not been ascertained

33 It is apparent from cl 30.3 of the REDAS Conditions that any payment payable by the employer thereunder is conditioned upon the ascertainment of all costs incurred by the employer as a result of the termination. This is evident from the language of cl 30.3.1 which is couched in *negative* terms, providing that:

> [T]he employer *shall not* be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification

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> costs for remedying any defects, liquidated damages for delay and *all other costs incurred by the Employer as a result of the termination* has been ascertained. [emphasis added]

34 Based on the language of cl 30.3.1, the costs referred to therein ("the Termination Costs") do not only refer to the costs that have actually been expended by the employer post-termination (*eg*, the costs of engaging another contractor to complete the works). It also includes any *damages* that are due to the employer as a result of the termination of the contractor's employment. In other words, the Termination Costs encompass not only the costs required to bring the project to completion but also any sums that the contractor is legally liable to pay to the employer as a result of its breach of contract.

35 Dong Cheng submitted that in this case, the Termination Costs had been ascertained.

(a) Orion had set out in PR 25 the "costs of the design, execution and completion of the incomplete Works", "rectification costs for remedying any defects", and "all other costs incurred by the Employer as a result of the termination". Orion had deducted $639,575 and $100,425 for "[i]ncomplete rectification works for remaining defects and document submissions" and deducted $112,207.61 for a "CONQUAS score penalty".

(b) As regards "liquidated damages for delay", such liquidated damages could only be imposed up to the date of the Handing Over Certificate. Since the Handing Over Certificate was issued by the ER to Dong Cheng on 31 March 2016, any period for which Dong Cheng could potentially be liable for liquidated damages would have ended by 31 March 2016 at the latest. Thus, any claim for liquidated damages

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> would have "crystallised" by 5 August 2019 when PC 25 was served. On Dong Cheng's argument, a liquidated damages claim which had crystallised would be treated as having been "ascertained" within the meaning of cl 30.3.1.

36 We did not accept this submission. In the first place, it was unclear whether the costs set out in PR 25 were exhaustive, *ie*, whether they encompassed "all other costs" incurred by Orion as a result of the termination of Dong Cheng's employment. More importantly, although Orion had set out *some* of the costs which it had incurred, it did not follow that *all* such costs had been "ascertained". Indeed, this was evident from the fact that Dong Cheng subsequently applied for adjudication of PC 25, *challenging* the deductions made in PR 25. Not only that, the merits of PC 25 were, at the time of the appeal, *the subject of ongoing arbitration proceedings* between the parties, in which Orion had counterclaimed against Dong Cheng for liquidated damages. This was a critical fact which completely undermined Dong Cheng's submission that the Termination Costs had been ascertained. If Orion's claim for damages against Dong Cheng was still in dispute and had yet to be finally determined, it could hardly be said that such damages had been "ascertained". It was thus clear that contrary to Dong Cheng's submission, the Termination Costs had not been ascertained. Since the parties could not agree on the quantum of the Termination Costs, these costs would only be ascertained *after* they have been finally determined by a competent court or tribunal.

37 Since the precondition in cl 30.3.1 had not been met, Orion was not liable under the Contract to make any further payments to Dong Cheng, nor was Dong Cheng entitled under the Contract to any payment from Orion. Therefore,

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cl 30.3 could not be used by Dong Cheng as the basis for its entitlement to serve PC 25.

Clause 30.3 of the REDAS Conditions did not concern progress payments

38 In our judgment, a more fundamental reason why cl 30.3 could not form the basis of an entitlement to serve PC 25 was that a payment made under cl 30.3 was not a *progress payment*. Rather, cl 30.3 concerned the final settlement of accounts between the parties in the event that the contractor is terminated by the employer for breach of contract. As such payments were not progress payments, they did not fall within the ambit of the SOPA.

39 It is useful to first examine the relevant statutory provisions. Section 10 of the SOPA refers to a "payment claim *in respect of a progress payment*" [emphasis added]. The term "progress payment" is defined in s 2 as "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract". Sections 5 and 6 of the SOPA further provide that:

> **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.
>
> **Amount of progress payment**
>
> **6.** The amount of a 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 construction work carried out, or the goods or services supplied, by the person under the contract.

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40 Based on the statutory framework set out above, it is evident that the SOPA facilitates *progress payments*, which are payments predicated upon and directly linked to the carrying out of construction work or the supplying of goods or services under a contract. The quantum of such payment depends on the terms of the contract, or the value of the work carried out or of the goods or services supplied.

41 Next, we turn to the contractual framework for progress payments under the Contract. This was set out under cl 22 of the REDAS Conditions, as amended by the Particular Conditions. In particular, cl 22.1 provides that:

> The Contractor shall be entitled to Progress Payments for the Works carried out or supplied under this Contract by way of periodic valuation of the Works or part thereof carried out by the Contractor at the period for making Payment Claim stated in clause 22.2.1 hereof.

42 It is clear that cl 22.1 largely mirrors progress payments as defined in the SOPA. The amounts of such progress payments are determined through the process of periodic valuation of the works or part thereof carried out by the contractor.

43 In contrast, any payments made under cl 30.3 of the REDAS Conditions are structured in a significantly different manner. Read in its totality, cl 30.3 operates as follows:

(a) Clause 30.3.6 mandates the ER to determine the value of the works completed at the time of the termination of the contractor's employment as soon as practicable after such termination.

(b) Clause 30.3.7 entitles the employer to recover certain costs referred to in cll 30.3.7.1–30.3.7.4 as a debt from the contractor, or to

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deduct such costs from the value of the works as determined by the ER pursuant to cl 30.3.6. Following such deductions (if any), the employer shall pay any balance to the contractor.

(c) Clause 30.3.1 suspends the employer's liability to make any further payments to the contractor (including the payment referred to in cl 30.3.7) until the Termination Costs have been ascertained. We note that the costs referred to in cll 30.3.7.1–30.3.7.4 substantially correspond with the Termination Costs. This makes practical sense as it is only when such costs have been ascertained that the employer will know how much it can set off and accordingly, how much, if any, it is liable to pay to the contractor.

(d) Clauses 30.3.2 and 30.3.3 pertain to the rights and obligations of the employer and contractor between the time of termination and the time when the works are completed. After the works are completed, cl 30.3.4 governs how the contractor and/or the employer may deal with the construction equipment, plant, temporary works, tools, temporary buildings and unfixed materials from the project site.

44 While the ER's valuation of the works completed at the time of termination under cl 30.3.6 (see [43(a)] above) is similar to the process for the valuation of progress payments under cl 22, the similarity between cll 22 and 30.3 ends there. Clause 30.3 contemplates that several additional steps are to be taken in calculating the amount ultimately due to the contractor (if any), including the ascertainment of certain costs and deductions from the value of the works. This is to be contrasted with the progress payment regime set out separately in cl 22, which is concerned primarily with the value of the works. In addition, cl 30.3.1 goes one step further to *preclude* the contractor from

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claiming any payments (including progress payments) until the project is completed and the relevant costs ascertained and deducted. In other words, by virtue of cl 30.3.1, the progress payment regime set out in cl 22 no longer applies once the contractor is terminated for breach. Therefore, cl 30.3 has nothing to do with progress payments and cannot give rise to a right to serve a progress payment claim. Rather, cl 30.3 provides a mechanism for the final settlement of accounts between the parties upon the employer's termination of the contractor's employment.

45 This finding was further reinforced by the fact that the SOPA was never intended to deal with damages claims. Under s 17(2A) of the SOPA, an adjudicator is expressly precluded from considering "damage, loss or expense" that is not supported by (a) a document showing agreement between the parties on the quantum; or (b) any certificate or other document that is required to be issued under the contract. Although s 17(2A) only came into force on 15 December 2019, *after* PC 25 was served, the purpose of s 17(2A) was to give effect to what had always been intended under the SOPA. As the Minister of State for National Development, Mr Zaqy Mohamad ("the Minister of State"), explained at the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) (*Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94 ("2018 Parliamentary Debates")), s 17(2A) was intended to exclude "complex claims" involving "complicated prolongation costs, damages, losses or expenses". Such claims unduly lengthened the adjudication process and "[went] beyond the original scope of the [SOPA], which [was] intended to cover claims for work done or goods and services supplied".

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46 In this case, however, the scope of the Termination Costs includes damages suffered by the employer as a result of the termination. Furthermore, there is no mechanism under cl 30.3 providing for certification or any other document to support the damages claimed. An adjudicator faced with a payment claim based on cl 30.3 would therefore be precluded from considering such damages claimed by the employer, despite such damages being an integral part of any payment payable under cl 30.3. That being the case, it must follow that the payments provided for under cl 30.3 do not fall within the ambit of the SOPA regime.

Other observations

47 We make two final observations in relation to Dong Cheng's entitlement to serve a payment claim post-termination. First, we note that Dong Cheng's counsel, Mr Patrick Ong Kok Seng ("Mr Ong"), referred to a speech given by the Minister of State at the 2018 Parliamentary Debates. The Minister of State stated that:

> Another amendment, also at clause 3, will make clear that claims for work done or goods supplied before contract termination are valid. This is to address any ambiguity on the point as to whether claimants can apply for adjudication upon contract termination.
>
> That said, we understand that it is common industry practice for contract terms to suspend payment until a later date if a contractor has defaulted, leading to the termination of the contract. When this happens, the [SOPA] will pay heed to terms pre-agreed by parties. As such, clause 3 will require adjudicators to respect the contract clauses on suspension of payment for terminated contracts. This means that claimants that have defaulted on the contract will need to abide by contract terms, and they will be able to submit a payment claim under the [SOPA] only after the conditions in the contract have been met.

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48 Based on this, Mr Ong submitted that the SOPA contemplated that payment claims may be submitted even after the termination of a contractor's employment. However, this argument had already been canvassed by this court previously. In *Shimizu Corp* ([2] *supra*) at [36], we observed that the Minister of State's 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". As such, the amendments made to ss 2 and 4(2)(*c*) of the SOPA simply mean that the SOPA can *in principle* apply to progress payment claims served post-termination as well as payment claims made after the lifting of a contractual suspension of payment. This is subject always to any terms of the contract which provide to the contrary. In this case, as we found above, the terms of the Contract did not entitle Dong Cheng to serve a payment claim after the termination of its employment.

49 Second, we also note that s 10(2) of the SOPA provides that:

> (2) A payment claim must be served —
>
> (*a*) not later than —
>
> (i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or
>
> (ii) the date prescribed for the purpose of this subsection if the contract does not contain such terms; and
>
> (*b*) not later than 30 months after the following, whichever is applicable:
>
> (i) the date on which the goods and services to which the amount in the payment claim relates were last supplied;
>
> (ii) the latest of the following dates:
>
> (A) the date on which the construction work to which the amount in the

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> payment claim relates was last carried out;
>
> (B) the issuance date of the last document, as at the time the payment claim is served, certifying the completion of the construction work under a contract;
>
> (C) the issuance date of the last temporary occupation permit as at the time the payment claim is served.

50 Thus, s 10(2) provides that a payment claim must be served not later than 30 months following one of the relevant events set out in s 10(2)(*b*). This is in contrast to s 10(4) of the SOPA as enacted prior to the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ("the pre-2018 SOPA"), which provided a much longer "limitation period" of six years. The shortened period of 30 months was reached as a form of compromise between the time periods suggested by the Singapore Academy of Law (SAL) Law Reform Committee and industry players (see the 2018 Parliamentary Debates).

51 At first glance, s 10(2) of the current SOPA and s 10(4) of the pre-2018 SOPA may appear to suggest that a contractor's entitlement to serve a payment claim persists post-termination, as long as the payment claim is served before the end of the "limitation period" prescribed in the respective provisions. However, it should be observed that in accordance with our analysis above, these provisions only apply to *progress* payment claims. Where the contractor's employment is terminated by the employer and where there is no contractual entitlement to serve progress payment claims post-termination, it would follow that the "long-stop" date of 30 months under the SOPA (or six years under the pre-2018 SOPA) would not assist to enable the contractor to serve any progress payment claim.

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The futility of applying for adjudication of PC 25

52 Before concluding, we observe that irrespective of the *legal* position on the relevant issues (*ie*, whether Dong Cheng was entitled to serve a payment claim post-termination), it made no *commercial* sense for Dong Cheng to serve PC 25 and then apply for adjudication of PC 25. This was done more than two years following the termination of Dong Cheng's employment, and about two years after the Project itself was completed. Regardless of the outcome of adjudication, the merits of the case would still be subsequently reopened by a competent court or tribunal. In fact, that was precisely the case here – PC 25 was at the time of the appeal still the subject of pending arbitration proceedings between the parties. At the hearing before us, Mr Ong could not provide any logical reason why Dong Cheng applied for adjudication under the SOPA regime. In our view, Dong Cheng's decision to serve PC 25 and to apply for adjudication of PC 25 only served to introduce a further layer of unnecessary legal costs, with no benefit whatsoever to either party.

53 It is trite that an adjudication determination has only temporary finality. This makes sense in the context of the SOPA regime, which ordinarily operates while a project is underway and the contractor requires payment on a more expedited basis. Indeed, we have observed that the temporary finality conferred on an adjudication determination is a corollary of the expedited nature of its process (see *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [22]). At the end of the day, however, the parties' rights and obligations are conclusively and finally determined in substantive proceedings conducted after the project has been completed. We would encourage parties to bear this in mind and conduct a proper cost-benefit analysis before deciding to pursue

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adjudication under the SOPA regime. Otherwise, it is ultimately the parties themselves, saddled with unnecessary legal costs, who will lose out.

Conclusion

54 For all of the above reasons, we allowed Orion's appeal in CA 13 and set aside the AD. Given that the AD was set aside, the stay of enforcement of the AD granted by the Judge (see [20] above) naturally fell away. Accordingly, we dismissed Dong Cheng's appeal in CA 112. We also awarded costs of $50,000 in favour of Orion, inclusive of disbursements.

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

Valliappan Subramaniam and Ng Hweelon (Veritas Law Corporation) for the appellant in CA/CA 13/2020 and the respondent in CA/CA 112/2020;
Ong Kok Seng, Ang Minghao and Tan Ting Ting (Patrick Ong Law LLC) for the respondent in CA/CA 13/2020 and the appellant in CA/CA 112/2020.

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