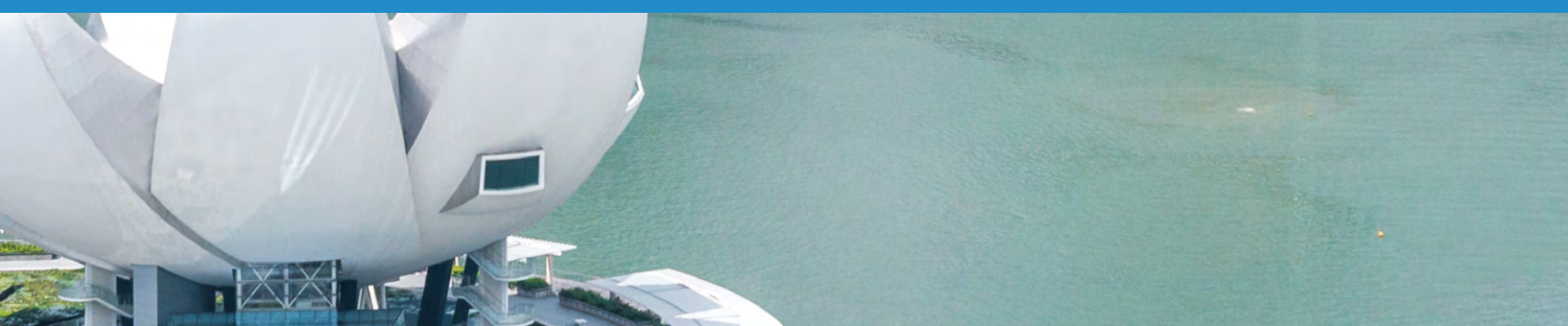
RHTLaw Asia

RHTLaw Asia Building & Construction Law

Annual Review 2020



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FOREWORD

I am pleased to present to you our RHTLaw Asia Building & Construction Law Annual Review 2020.

2020 has been an eventful and life changing year and it seems we may never go back to the way of working and living pre-COVID-19.

As a result of the COVID-19 pandemic, the government came up with numerous reliefs to help maintain the status quo and keep the construction industry on an even keel. These reliefs were contained in the COVID-19 Temporary Measures Act (COTMA) and various assistance programmes by BCA and MOM. They go a long way but because of the slow resumption of work at construction sites, most projects suffer from a lack of time and money. It is anticipated that if the Prescribed Period under COTMA is not extended beyond 30 September 2021 for construction and supply contracts, we will see an avalanche of services of Notices of Relief before expiry.

In this issue, we set out a summary of the main reliefs provided to the construction and supply industry under COTMA. Although this is a review of 2020, as a matter of practicality, we have endeavoured to state the position under COTMA as at 18 June 2021.

Based on feedback from clients, one of the main questions is, what is the interplay between the reliefs provided under contract and those under COTMA. We will cover these aspects in a webinar to be conducted in the second half of this year. If you are interested in attending our webinars, please drop us an email at conrad.campos@rhtlawasia.com or edna.lee@rhtlawasia.com.

Another main segment of this review are the cases relating to the Security of Payment Act (SOPA). It was thought that with the amendments to SOPA coming into force with effect from 15 December 2019, we should see a gradual reduction of such cases with the clarification brought about by the amendments. However, the amendments appear to have brought about its own issues, for example, in relation to bringing claims for damages, loss and expenses which are not certified under the contract or agreed by the parties. However, the cases in 2020 have gone some way to clarifying the relationship between SOPA and contract terms.

Last but not least, in the third segment, we cover all the more significant cases that occurred during 2020 in the High Court or Court of Appeal. The 2020 cases throw light on and confirm principles relating to variations, defects and performance bonds.

In due course, we will also be conducting a round table discussion on some of the key issues raised by the cases of 2020. If you would like to register your interest in participating in the discussion, please feel free to reach out to me or Edna at our email addresses in the fifth paragraph. We hope you will join us in the discussion.

We are looking forward to the full resumption of work and life activities and the lifting of COVID-19 restrictions soon. We can see the light at the end of the tunnel and are hopeful that this will take place sooner rather than later.

In the meantime, stay safe and stay healthy.

Best wishes,

Conrad Campos
Partner
Head of Building, Construction & Projects Industry Group
RHTLaw Asia LLP

COVID-19 (TEMPORARY MEASURES) ACT

The COVID-19 (Temporary Measures) Act ("Act") provides various legal reliefs to parties who are unable to perform their contractual obligations as a result of the COVID-19 pandemic. Since the Act was passed on 7 April 2020, it has been amended several times to cope with the changing circumstances in times of the pandemic. As a matter of practicality, we have endeavoured to state the position under COTMA as at 18 June 2021.

A brief summary of the various reliefs or measures set out in the different parts of the Act are as follows:

S/N	Part(s) of the Act	Date of Commencement	Expiry of Prescribed Period
1	Part 2: Temporary relief for inability to perform contracts	20 Apr 2020	30 Sep 2021 (for construction or supply contracts or any performance bond granted thereto)
2	Part 2A: Rental relief and related measures	31 July 2020	19 Nov 2020
3	Part 3: Temporary relief for financially distressed individuals, firms and other businesses	20 Apr 2020	19 Oct 2020
4	Part 4: Temporary measures for conduct of meetings	27 Mar 2020	–
5	Part 5: Temporary measures for court proceedings and Syariah court proceedings	7 Apr 2020	Any period a COVID-19 control measure is in force
6	Part 6: Temporary measures concerning remission of property tax	22 Apr 2020	31 Dec 2020
7	Part 7: COVID-19 control orders ■ Section 34(1) and (2) ■ Section 34(3) to (9) and 35	7 Apr 2020 8 Apr 2020	–
8	Part 8: Contracts affected by delay in the performance or breach of a construction contract, supply contract or related contract	30 Sep 2020	31 Mar 2021 (Any application by 31 May 2021)
9	Part 8A: Extension of time for construction contracts	30 Nov 2020	–
10	Part 8B: Temporary measures for cost-sharing in construction contracts	30 Nov 2020	30 Sep 2021
11	Part 9: Temporary measures for conduct of collective sale of property	6 Oct 2020	(Any application by 25 Mar 2021)
12	Part 10: Further reliefs for specified contracts – Re-Align Framework	14 Jan 2021	26 Feb 2021
13	Part 10A: Reliefs for construction contracts affected by increase in foreign manpower salary costs	(Not commenced yet)	30 Sep 2021
14	Part 11: Personal contract tracing data	1 Mar 2021	–

Amongst the above reliefs, Parts 2, 8, 8A, 8B and 10A of the Act are of particular relevance to the building and construction industry.

Reliefs under Part 2 of the Act

Part 2 of the Act, which commenced on 20 April 2020, applies to a Scheduled Contract entered into before 25 March 2020 in respect of obligations which had to be performed on or after 1 February 2020. Construction and supply contracts as defined in the Building and Construction Industry Security of Payment Act ("**SOPA**"), including those to which the Government is a party, qualify as a Scheduled Contract. Under this part, eligible parties are provided with temporary relief for a prescribed period of time from specified types of legal and enforcement actions where the inability to fulfil contractual obligations is, to a material extent, due to a COVID-19 event ("**subject inability**").

The Act defines a "COVID-19 event" as:

a. The COVID-19 epidemic or pandemic; or

b. The operation of or compliance with any law of Singapore or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with COVID-19.

It is worth noting that the relief measures do not operate automatically as parties who intend to seek relief are required to serve a Notification for Relief on the relevant parties within the period specified in regulations.

In the case of construction and supply contracts, additional reliefs are granted which are as follows:

- The non-defaulting party is prevented from calling on a performance bond or equivalent in relation to the subject inability for which the defaulting party has given Notification for Relief until 7 days before the date of expiry of the performance bond or such extended date.
- Where the defaulting party applies to the issuer of the performance bond or equivalent not less than 7 days before the expiry date for an extension of the term of the performance bond or equivalent and serves a notice of the application on the non-defaulting party at the same time, the term of the performance bond shall be extended to a date that is 7 days after the end of the prescribed period or such other date as may be agreed between the parties and the issuer.
- Any period for which the subject inability, occurring on or after 1 February 2020 but before the expiry of the prescribed period, subsists and falling within that period shall be disregarded in the determination of liquidated damages and/or other delay damages.
- The inability to supply goods or services in accordance with the contract, occurring on or after 1 February 2020 but before the expiry of the prescribed period and which was to a material extent caused by a COVID-19 event, is a defence to a claim for breach of contract.

Under Part 2, the relief period for construction and supply contracts, or any performance bond granted thereto, which was previously set to expire on 31 March 2021 has recently been extended for an additional 6 months, up to 30 September 2021.

Reliefs under Part 8 of the Act

Part 8 of the Act, which commenced later on 30 September 2020, provides relief for specific individuals and businesses that are affected by delays in performance or breaches in construction, supply or related contracts, where such delays or breaches are due to the COVID-19 pandemic.

As prescribed in the COVID-19 (Temporary Measures) (Part 8 Relief) Regulations 2020 ("**Part 8 Regulations**") and as summarised by the Ministry of Law (available here), the relief under Part 8 is applicable in the following 3 situations:

- Situation A: Where a person who rented goods used for construction work is or will be liable for additional rental expenses
- Situation B: Where a lessee or licensee (i.e. a tenant) of non-residential property is unable to carry out or complete renovation or fitting out works during the rent-free period
- Situation C: Where a lessor or licensor (i.e. a landlord) of non-residential property is unable to deliver possession by the date stated in the lease or licence agreement

Pertinently, pursuant to regulation 6 of the Part 8 Regulations, an application for relief under Part 8 must have been made before 31 May 2021.

Reliefs under Parts 8A and 8B of the Act

Further, Parts 8A and 8B of the Act, which came into operation on 30 November 2020, provide additional relief measures to stakeholders in the building and construction industry affected by disruptions to construction timelines as a result of the COVID-19 pandemic.

Part 8A: Universal extension of time ("EOT")

Part 8A provides a universal EOT of a period of 122 days to the completion date to address delays that arose between 7 April 2020 and 6 August 2020 (both dates inclusive). No application is required from contractors to enjoy this EOT relief as the extension will be granted automatically to all eligible construction contracts. This EOT relief applies to all construction contracts (including subcontracts) which fulfil the following criteria:

- Entered into before 25 March 2020 (except if it was renewed on or after 25 March 2020, unless it was renewed automatically);

- Remained in force on 2 November 2020; and
- There were construction works to be performed under the construction contract, as at 7 April 2020, which were not certified as completed in accordance with the contract.

However, the relief will not be applicable in any of the following situations:

- Construction works were performed at any time between 20 April 2020 and 30 June 2020 (both dates inclusive);
- Court or arbitration proceedings in respect of a failure to comply with the completion date have been commenced before 2 November 2020; or
- Any judgment, award or settlement has been made before 2 November 2020 as a result of any such proceedings.

Part 8B: Co-sharing of additional costs due to project delays

Part 8B requires the co-sharing of additional non-manpower-related qualifying costs incurred during the period between 7 April 2020 and 30 September 2021 (both dates inclusive) which arise due to delays caused by the COVID-19 pandemic. This cost-sharing relief is available to all construction contracts (including subcontracts) which fulfil the following criteria:

- Entered into before 25 March 2020 (except if it was renewed on or after 25 March 2020, unless it was renewed automatically);
- Remained in force on 2 November 2020;
- There were construction works to be performed under the construction contract, as at 7 April 2020, which were not certified as completed in accordance with the contract; and
- The party for whom the construction works are performed under the contract is not an individual (except if the individual is acting as a sole proprietor of a sole proprietorship).

Part 8B sets out the types of costs which fall within the meaning of "qualifying costs" and further clarifies those which are excluded. The co-sharing percentage between parties is 50% of the qualifying costs, subject to a monthly cap of 0.2% of contract sum and an overall cap of 1.8% of the contract sum.

It is noteworthy that eligible contractors will need to include such claim for qualifying costs in their regular payment claims which they serve on the party for whom the construction works are performed. Should there be any dispute in this regard, parties can lodge an adjudication application under SOPA for a determination by the adjudicators. A copy of the suggested template which has been prepared by the Building and Construction Authority ("**BCA**") for such cost-sharing claims by contractors is available here.

The relief period under Part 8B, which was previously set to end on 31 March 2021, has also been extended for an additional 6 months, up to 30 September 2021.

For a more comprehensive and detailed guide on the reliefs and processes under Parts 8A and 8B of the Act, the "COVID-19 (Temporary Measures) Act 2020 – Part 8A & 8B Guide" issued by the BCA is available here.

Support measures for Public Sector Construction Contracts ("PSCCs")

For construction contracts where the Government is a party, the reliefs provided under Parts 8A and 8B will apply as well. As of 30 November 2020, the previous guidelines which were issued for PSCCs have been superseded, with the exception of the following:

- Ex-gratia EOT and cost-sharing: Notwithstanding that Parts 8A and 8B apply only to contracts awarded prior to 25 March 2020, for construction contracts which were entered into on or after 25 March 2020, Government Procuring Entities ("**GPEs**") shall continue to grant equivalent reliefs of EOT and co-sharing of prolongation costs as long as the tenders were closed on or before 1 June 2020. Further, notwithstanding that construction contracts where it has been assessed that works have been performed between 20 April 2020 and 30 June 2020 (both dates inclusive) are ineligible for relief under Part 8A, GPEs shall continue to assess and grant appropriate EOT for any delay in works which arose during the period between 7 April 2020 and 6 August 2020 (both dates inclusive); and
- Co-sharing of costs of equipment owned by contractors: Notwithstanding that costs incurred in relation to equipment owned by contractors are not part of qualifying costs under Part 8B, GPEs shall continue to co-share such costs as part of the prolongation costs.

More recently, the BCA has issued a circular on a simplified claim procedure for EOT and prolongation costs in PSCCs as a result of the COVID-19 pandemic. In brief, the 3 key approaches to be adopted by GPEs in order to simplify the claim process are as follows:

- To grant common EOT for delay in works as a result of COVID-19 between 7 August 2020 to 31 December 2020, based on estimated loss of productivity based on year-on-year comparison with industry-level Certified Progress Payment, being 14 days each for August and September, 9 days for October and 6 days each for November and December 2020;
- To co-share a base 0.1% of awarded contract sum per month of delay for qualify costs of eligible contracts up to $100 million without need of substantiation; and
- To adopt common computation methods for contractor-owned equipment depreciation costs based on equipment purchase value:

Equipment Purchase Value	
$6k or below	Only top 5 will be evaluated
>$6k to $200k measures	Monthly rental market rate
>$200k	Either audited financial statement OR straight-line depreciation

For further details on the aforesaid simplified claim process, the circular dated 27 April 2021 issued by the BCA is available here.

Relief under Part 10A of the Act

In light of the increasing challenges relating to foreign manpower such as its shortages and rising cost in respect of Work Permit Holders due to the COVID-19 pandemic, Part 10A of the Act has been introduced as an additional relief to facilitate the co-sharing of increased costs amongst parties along the value chain.

Under the new Part 10A, parties, such as contractors of eligible construction contracts, may apply for an adjustment to the contract sum for the purpose of addressing the increase in manpower cost. In the 2nd Reading Speech on the COVID-19 (Temporary Measures) (Amendment No. 3) Bill by the Minister for National Development on 11 May 2021 (available here), it is made clear that this relief applies to construction contracts which fulfil the following criteria:

- Entered into before 1 October 2020; and
- Have not been completed or terminated.

An Assessor will be appointed to make a determination on the adjustment and any decision provided must be one that is just and equitable in the circumstances of the case. Details in relation to the adjustments which the Assessor may make will be stipulated in subsidiary legislation.

An important point to note is that parties who wish to seek such relief must have made a reasonable attempt to negotiate a contract sum adjustment with the other party, before any such application for an Assessor's determination can be made.

The relief period for this legislative relief will be from 1 October 2020 to 30 September 2021, or any extended date as may be prescribed. As at 18 June 2021, the commencement date of this Part 10A has not been announced.

SUMMARY OF CASES

Security of Payment Act

1. Entitlement to serve payment claim post-termination depends on the terms of the contract.

In ***Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2020] SGCA 121**, the Court of Appeal ("**CA**") overturned the High Court ("**HC**") decision in *CEQ v CER* [2020] SGHC 70 in deciding the main issue on appeal, which was whether the payment claim that was served after termination of the contractor's employment in respect of work done prior to termination was valid.

Orion-One Residential Pte Ltd ("**Orion**") was the owner and developer of a condominium project (the "**Project**"), and Dong Cheng Construction Pte Ltd ("**Dong Cheng**") was the main contractor of the Project between 1 February 2016 and 2 March 2017. The parties' contract which incorporated the REDAS Conditions (the "**Contract**") was novated by the former contractor to Dong Cheng.

Subsequently, on 29 August 2016, Orion and Dong Cheng entered into an agreement to vary the terms of the Contract (the "**Supplementary Agreement**"). In particular, Clause 2.5 of the Supplementary Agreement ("**Clause 2.5**"), which reads as follows, conferred on Orion an express right to terminate Dong Cheng's employment in the event of a breach:

> *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.*

In March 2017, due to Dong Cheng's non-compliance, Orion terminated Dong Cheng's employment by way of a Notice of Termination which was expressly stated to be in accordance with Clause 2.5, and subsequently engaged another contractor to complete the outstanding works under the Project.

On 9 September 2019, Dong Cheng lodged an adjudication application in respect of one Payment Claim no. 25 ("**PC 25**"). By way of an adjudication determination dated 18 October 2019 ("**AD**"), the adjudicator granted Dong Cheng's application in part as he found that Dong Cheng was entitled to serve PC 25 notwithstanding the fact that it was served after termination of its employment.

On 12 November 2019, Orion took out an application to set aside the AD which was then dismissed by the HC on 16 January 2020. Orion then proceeded to appeal against the HC decision.

On appeal, Orion argued that Dong Cheng was not entitled to serve PC 25 because – as Dong Cheng's employment was terminated pursuant to Clause 2.5, Clause 30.3 of the REDAS Conditions ("**Clause 30.3**", which Dong Cheng relied upon as the basis for its entitlement to serve a payment claim post-termination) did not apply. Conversely, Dong Cheng maintained its position that Cl 30.3.1 of the REDAS Conditions, which reads as follows, entitled it to serve a payment claim even after the termination of its employment:

> *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.*
>
> *...*

Orion's appeal was allowed. The CA disagreed with the HC judge below that "[a]s a matter of policy, the statutory entitlement to payment must survive termination", without regard to the terms of the contract. On the facts, the CA found that Dong Cheng's employment was terminated pursuant to Clause 2.5, as expressly stated in the Notice of Termination and parties' correspondence, and not Clause 30.3. The CA observed that Clause 30.3 applies only if the contractor's employment is terminated under Clause 30.2. In this regard, there was no mention whatsoever of Clause 30.2 in the parties' correspondence and the reasons for Orion's termination of Dong Cheng's employment also did not fall within any of the situations set out in Clause 30.2.2. For these reasons, the CA found that Clause 30.3 was not applicable and Dong Cheng's reliance on Clause 30.3 as the basis of its entitlement to serve PC 25 was wholly misplaced.

Further, the CA held that even if Clause 30.3 was applicable, it would not have entitled Dong Cheng to serve PC 25 because on the facts, (1) the precondition for payment under Clause 30.3, that is, to ascertain all of the costs incurred by the employer as a result of the termination, had not been met, and (2) Clause 30.3 was not concerned with progress payments but was intended to provide for the final settlement of accounts between parties in the event of termination for breach.

Comment:

The right to submit payment claims under SOPA after termination of contract will depend on the terms of contract. SOPA does not give a separate and independent statutory right to payment after termination, even if it was work done before termination.

Be alert to particular conditions or supplemental agreements taking precedence over standard form contracts.

The right to payment after termination may be precluded under some express termination clauses or require the satisfaction of condition precedents which can postpone the right to payment. Occasionally, a contract can provide for more than one right to terminate with difference consequences, and care should be taken when exercising a particular right to terminate under the contract as they can give rise to different consequences.

Different terms in the contract usually govern the right to a progress payment and the right to a final account and care should be taken as to which right is relied upon when seeking payment after termination.

2. No submission of payment claim after termination of contract for works done prior to termination where the terms of the contract provide to the contrary.

In ***Shimizu Corporation v Stargood Construction Pte Ltd* [2020] SGCA 37**, the CA overturned the HC decision in *Stargood Construction Pte Ltd v Shimizu Corporation* [2019] SGHC 261 in deciding whether the respondent ("**Stargood**") could serve a payment claim on the appellant ("**Shimizu**") after termination of contract for works done prior to the termination.

Shimizu was the main contractor of a project at 79 Robinson Road, and Stargood was one of its subcontractors. Subsequently, by way of a notice of termination, Shimizu terminated Stargood's employment under the subcontract ("**Subcontract**").

Following certain alleged breaches of the Subcontract on the part of Stargood, Shimizu issued a notice of default followed by an exercise of its termination rights under Clause 33.2 of the Subcontract.

Clause 33.2 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.

Clause 33.4 reads:

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…

Clause 33.5 provides:

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 …

After the Subcontract was terminated, Stargood served payment claim no. 12 ("**PC 12**"). As no payment response was served by Shimizu, Stargood proceeded to lodge adjudication application SOP/AA 203 of 2019 ("**AA 203**"). The adjudicator dismissed AA 203 on the basis that PC 12 was improperly served on Shimizu and that Stargood was not entitled to serve PC 12 after termination of the Subcontract as the project director was *functus officio*.

Before the adjudication determination for AA 203 was issued, Stargood served payment claim no. 13 ("**PC 13**") for the same amount claimed in PC 12. Shimizu then served a payment response with a "nil" response amount. As Stargood took the position that the adjudicator in AA 203 dismissed the application purely on jurisdictional grounds and not on the substantive merits, it proceeded to lodge a second adjudication application SOP/AA 245 of 2019 ("**AA 245**"). The adjudicator in AA 245 also dismissed the application as he determined that Stargood was bound by the adjudicator's determination in AA 203, in particular, that Stargood was not entitled to submit any further payment claim under the Subcontract under SOPA.

Stargood then applied to set aside both the adjudication determinations in AA 203 and AA 245, and further sought a declaration to serve a further payment claim on Shimizu.

In allowing Stargood's application, the HC held that as Shimizu had only terminated Stargood's employment, rather than the entire Subcontract, Stargood could continue to rely on the payment certification process. Further, a contractor who has carried out works under a construction contract can "continue to claim for such works even after its employment under the contract has been terminated … because the contractor has an accrued statutory entitlement to payment, which necessarily survives the termination". In other words, the SOPA gave an independent statutory right to progress payments even if the entire Subcontract had been terminated.

Shimizu then appealed against the HC decision and its appeal was allowed. The CA held that:

a. The SOPA did not provide an independent right to continue to serve payment claims for works completed regardless of the provisions of the underlying contract. Whether a party can continue to serve a payment claim after termination will depend on the terms of the contract. There is thus no separate statutory entitlement to a progress payment where a contract already makes provisions for such payments. The SOPA regime only applies where the statutory conditions are satisfied, and one such statutory condition is when the contract does not contain the relevant provision. There is no "dual railroad track system" for progress payments. Similarly, the amendments to the SOPA in 2018 ("**2018 amendments**") on whether claimants can apply for adjudication upon contract termination 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. The 2018 amendments only affect contracts which are silent as to the payment certification process. The 2018 amendments merely provide that the SOPA can in principle apply to progress payment claims after termination. It is not intended to override the terms of the contract which provide to the contrary.

b. On the facts of the case, under the terms of the Subcontract, Stargood was not entitled to serve payment claims following its termination.

Comment:

The important takeaway from this case is that it is important for parties entering into contracts to be clear about when the right to make SOPA claims comes to an end. It should be noted that when the right to submit SOPA claims comes to an end, it does not mean that there is no further recourse for the aggrieved party. The aggrieved party can still seek a remedy through the courts or arbitration.

3. Setting aside an adjudication determination on the ground of fraud.

In ***Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] SGCA 88**, the CA upheld the HC decision in *CFA v CFB* [2020] SGHC 101 and affirmed that an adjudication determination ("**AD**") obtained by fraud is voidable at the instance of the innocent party. (Note: s 27(6) of the SOPA Amendment Act 2018, which came into force on 15 December 2019 and therefore did not apply to the AD in question, provides for fraud as a ground for setting aside AD.)

Pursuant to a written subcontract entered into on 3 August 2018, the main contractor, Mero Asia Pacific Pte Ltd ("**Mero**") engaged Façade Solution Pte Ltd ("**Façade**") as a subcontractor to fabricate, deliver and install 864 window panels for a construction project.

On 10 October 2019, Façade commenced adjudication proceedings against Mero on the basis that there was no payment response to its payment claim dated 25 September 2019 ("**PC**"). The PC was for a total sum of $830,938.73, which substantially comprised payments for the fabrication of *all* 864 window panels and related storage costs. It was not disputed that at the time of the PC, 489 out of the 864 window panels remained undelivered. The adjudicator, who ruled in Façade's favour, found that Mero had indeed failed to provide a payment response in time and also held that the undelivered panels, though undelivered and uninstalled, were claimable under s 7(1)(b) of SOPA pursuant to the HC decision in *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] 4 SLR 901 ("***Chuang Long***").

It only emerged later on, after the issuance of the AD, that Façade had in fact not been in the position to deliver all of the window panels. Façade did not disclose the fact that 169 of the undelivered panels were in its supplier's warehouse in China, rather than in its possession, and that it was facing serious problems with its supplier. Notwithstanding that Mero had repeatedly attempted to pay the adjudicated sum in exchange for the undelivered panels, Façade persistently refused to provide Mero with any proof of its possession of the said panels and simply insisted on being paid.

Mero then applied to the HC to set aside the AD, with fraud being one of its pleaded grounds. The HC allowed Mero's setting aside application on the ground of fraud and dismissed Façade's application to enforce the AD. Façade subsequently appealed against the HC decision.

On appeal, the CA laid down the two-step test in setting aside an AD on the ground of fraud as follows:

a. **Step 1: "The AD must be based on facts which the party seeking the claim knew or ought reasonably to have known were untrue", where the innocent party must establish:**

- The facts which are relied on by the adjudicator in arriving at the AD;
- That those facts were false;
- That the claimant either knew or ought reasonably to have known them to be false; and
- That the innocent party did not in fact, *subjectively* know or have *actual* knowledge of the true position throughout the adjudication proceedings. There is no requirement for the innocent party to "show that the evidence of fraud could not have been obtained or discovered with reasonable diligence during the adjudication proceedings".

b. **Step 2: "Whether the facts in question were material to the issuance of the AD"**

- The CA preferred the materiality requirement established in *Royal Bank of Scotland plc v Highland Financial Partners LP and others* [2013] 1 CLC 596 ("***RBS***") (i.e. the false facts must have been an operative cause in the issuance of the AD) over the Opposite Verdict Requirement which was applied by the HC (i.e. the fresh evidence *would* have provided an opposite verdict).
- "Materiality is established if there is a real prospect that had the adjudicator known the truth, the outcome of the determination *might* have been different. In other words, the facts must have been an *operative cause* in the issuance of the AD." (emphasis in original)
- As stated in *RBS*, "the question of materiality of fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence".

On the facts, the CA found that the AD was obtained on Façade's fraudulent misrepresentation that it had control over all the undelivered panels when it did not. The fact that the 169 panels were not within Façade's possession or control was deliberately withheld from Mero and the adjudicator throughout the adjudication proceedings.

The fraudulent misrepresentation was material to the AD because the adjudicator accepted Façade's submission that it was entitled to payment for the materials that it had prefabricated for the project even though the materials had yet to be delivered to Mero, based on s 7(1)(b) of SOPA and the authority of *Chuang Long* that under s 7(1)(b) SOPA, prefabricated materials are claimable even if undelivered. Had the adjudicator known the true facts that Façade had no control over the 169 panels, the real inquiry would have been whether it was still entitled to payment for all the undelivered panels. The case of *Chuang Long*, which was relied on by the adjudicator to allow Façade's claim, could not apply as it did not stand for the proposition that a subcontractor would be entitled to payment for fabricated materials even though it was not in the position to deliver them under the contract.

Further, notwithstanding that the court has the power to sever an AD in part under common law (which is also now recognized under the newly enacted s 27(8)(a) of SOPA), the CA declined to do so for the parts of the AD infected by fraud as the fraudulent misrepresentation in this case was "sufficiently serious in nature as it went towards the appellant's *entitlement* to payment for the undelivered panels itself", was deliberately concealed both during and after the adjudication proceedings, was aggravated by the fact that Façade had purported to claim for storage charges for all the panels, and the 169 panels comprised 20% of Façade's total claim. The fraud was therefore not *de minimis*. Moreover, the claim could not textually and substantially be severed as there remained a dispute as to the quantity of panels that Façade could deliver.

Notably, the CA warned against submitting a payment claim and/or an adjudication application on the basis of subsequent developments which the claimant, legitimately or otherwise, anticipates may happen, as such a payment claim would nonetheless be premised on facts which were untrue at the time of submission, and may infect the AD with fraud.

The CA therefore upheld the HC decision to set aside the AD on the ground of fraud and Façade's appeal was dismissed.

Comment:

The test as to what constitutes fraud and the materiality of such fraud in obtaining the decision has now been clarified.

Although SOPA proceedings take a lighter touch and a rough and ready approach on issues of evidence and proof, if it is subsequently found out that a claimant has fraudulently misrepresented the facts so as to obtain part or all of the adjudication determination, the adjudication determination is liable to be set aside.

Further, once the adjudication determination is tainted by fraud, the court will set aside the whole determination even if the fraud only affects a part of the determination, which is not *de minimis*.

4. Subsequent adjudication determinations do not supersede prior ones.

The CA in ***Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd*** **[2020] 1 SLR**, overruling 2 recent HC decisions, held that adjudication determinations do not supersede one another. Instead, they are each enforceable independently in their own right unless or until impugned on the grounds as provided in Section 21 of SOPA.

The respondent ("**UIS**"), the main contractor for a project, engaged Civil Tech Pte Ltd ("**CTPL**") to carry out construction works. CTPL in turn engaged the appellant ("**HCPL**") as its subcontractor for reinforced concrete works.

After HCPL obtained an adjudication determination of $1.261m against CTPL on 31 August 2018, it sought to garnish all debts due from UIS to CTPL. On 2 November 2018, during a show cause hearing attended by HCPL and UIS, a final garnishee order ("**FGO**") was made on the basis that UIS had no objections to the application.

Subsequently, UIS changed its position because it formed the view that CTPL was insolvent and owed money to UIS instead. The FGO had been premised on an adjudication determination rendered on 23 October 2018 for UIS to pay CTPL $1.369m ("**AD1**"), whereas in a later adjudication determination rendered on 3 November 2018 ("**AD2**") the adjudicator took into consideration the values determined in AD1 and nonetheless arrived at a finding that CTPL owed $1.176m to UIS. UIS therefore applied to stay the enforcement of the FGO and set it aside.

Although the CA agreed with UIS that courts have the inherent power to set aside a judgment or court order in circumstances where such an order is needed to prevent injustice, bearing in mind that the essential touchstone for the invocation of the court's inherent power is that of "need", the court decided that there was insufficient reason or injustice to invoke this power given that:

a. It was not disputed that AD1 was not impugned under any of the three grounds as provided in s 21 of SOPA, AD1 was imbued with temporary finality and binding as between UIS and CTPL.

b. AD2 did not supersede AD1 such that AD1 was no longer enforceable. Although AD2 found that it was UIS that had a net claim against CTPL for $1.176m, that did not have the effect in law of giving UIS a claim against CTPL. Instead, all that was decided under AD2 was that UIS did not have to pay CTPL on that payment claim.

c. Even though the consequence of upholding the FGO would be that HCPL would have its claim against CPTL satisfied in full whereas UIS would not be able to set-off its debt to CTPL against claims it might have against CTPL and possibly receive less than the full value of its claim in CTPL's liquidation, this did not warrant the setting aside of the garnishee order as there was no error in law or mistake of fact when UIS raised no objections at the show cause hearing.

Comment:

This is a timely clarification that adjudication determinations remain valid and binding until impugned by s 21 of SOPA. The rationale is that adjudication determinations have temporary finality and amounts can be adjusted at the final account stage or in litigation or arbitration.

The problem arises if one of the parties becomes insolvent mid-way through the contract, and even so, a vigilant respondent can safeguard his interests by ensuring that there is a stay of enforcement on the ground of insolvency.

In the present case, given that AD2 was rendered on 3 November 2018, UIS would already have been aware of its set-off rights against CTPL at the time of the show cause hearing garnishee proceedings on 2 November 2018, but somehow did not resist the FGO being made.

This case is another timely reminder for parties to SOPA proceedings to assert their rights as soon as they become aware of them.

5. Stay of enforcement of an adjudication determination pending appeal and arbitration.

The case of ***CEQ v CER* [2020] SGHC 192** concerns an application for a stay of enforcement of an adjudication determination ("**AD**") pending the appeal of a HC decision to set aside the AD and the disposal of arbitration proceedings. (Note: This stay application flows from an earlier decision in *CEQ v CER* [2020] SGHC 70, where the HC dismissed CEQ's application to set aside the AD. CEQ then appealed against the said HC decision.)

In determining the issue of stay, the HC turned to examine the situations in which a stay of enforcement of an AD should be granted. As set out by the CA in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("***W Y Steel Construction***"), a stay of an AD "may ordinarily be justified where: (a) there is clear and objective evidence of the successful claimant's actual present insolvency; or (b) the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute were resolved in the respondent's favour."

The HC further noted that if there is a real risk of dissipation of the awarded sum or any *prima facie* evidence or suspicion that the claimant's claim is an abuse of process, the court must intervene. The HC also held that it is crucial for the court to consider whether a successful claimant needs the adjudicated sum to sustain its operations at present. It is more likely that the court may grant a stay of enforcement if the successful claimant no longer has any operations or does not need the adjudicated sum to keep its operations running as the "purpose of ensuring timely payments of adjudicated sums under Act is no longer engaged".

On the facts, the HC found that while the evidence adduced is not enough to prove CER's actual present insolvency, CEQ nonetheless satisfied the threshold required for a stay to be granted. The HC noted that CER acted evasively in establishing its viability as a company, which in turn affects its ability to prove that money paid to it will be recoverable in the event CEQ succeeds on appeal. Notwithstanding that the court had repeatedly pointed out to CER that the simplest method for it to prove that it has ongoing work and receivables is to produce evidence of its bank account and relevant transactions or to state the reasons why it is unable to do so on affidavit, CER repeatedly refused to provide any information or explanation.

Notably, the HC rejected CER's argument that the 2 situations where a stay should be granted as identified by the CA in *W Y Steel Construction* were "two limbs of a test that are not entirely disjunctive". The HC clarified that the 2 situations are "alternative situations where a stay should be granted". In other words, it is sufficient to provide "clear, objective evidence of the other party's actual present insolvency", without having to provide further evidence of the probability of non-recovery. Conversely, even where actual present insolvency is not proven, a party can provide some other evidence to persuade the court of its case in accordance with the second situation.

On the facts of the present case, the court held that "without any ongoing business or the need for cash, the purpose of ensuring timely payments of adjudication sums under Act is no longer engaged. There is no pressing need in this case for [CER] to be paid the adjudicated sums, and granting a stay of enforcement will not in any way detrimentally affect it."

Accordingly, the HC granted CEQ the stay of enforcement of the AD.

Comment:

This case is a timely reminder that the grounds for staying the enforcement of an adjudication determination is twofold, either proof of insolvency or proof on a balance of probabilities that if the stay was not granted, the money paid to the claimant would not ultimately be recovered if the dispute was resolved in the respondent's favour.

6. "Day" in the SIA standard form of contract (Lump Sum Contract, 9th edition) means calendar day.

In ***Trustee of the estate of Tay Choon Huat, deceased v Soon Kiat Construction & Maintenance Pte Ltd* [2020] SGHC 212**, the sole issue before the court was whether the defendant's adjudication application ("**AA**") was lodged late, which turns on whether the word "day" in clause 31(15)(a) of the SIA Conditions (Lump Sum Contract, 9th Edition) ("**Clause 31(15)(a)**") included public holidays. Clause 31(15)(a) requires the Employer to respond to the Contractor's interim payment claim by providing a payment response "within 21 days" after service of the interim payment claim on the Employer.

Based on the following reasons below, the HC found that the word "day" in Clause 31(15)(a), and in the parties' contract which incorporates the SIA Conditions, includes public holidays, and the AA was therefore made out of time:

a. "The drafters of the SIA Conditions chose not to incorporate the SOPA definition of "day", while incorporating the SOPA definitions of "payment claim" and "payment response"."

b. "The parties agreed on a Contract Period of six calendar months that expressly included public holidays."

c. "It was also common ground that "day" in relation to liquidated damages included public holidays."

d. "clause 31(2)(b) of the SIA Conditions is based on the concept of a "day" including public holidays, and cannot sit with the SOPA definition of "day" as excluding public holidays."

e. "A consistent treatment of [all various periods of time provided for in the Contract] (in terms of whether public holidays are included or excluded) would avoid confusion and ambiguity, and be preferable."

7. Setting aside an adjudication determination: Jurisdictional objection & contract formation.

The case of ***CIK v CIL* [2020] SGHC 274** involves an application to set aside an adjudication determination ("**AD**") where the adjudicator found that he had no jurisdiction to hear the matter due to a lack of contract between the parties. The AD was set aside by the HC as it found on the facts that the adjudicator had jurisdiction given that a written contract did exist between the parties, in the form of a letter of appointment which was sent by way of email on 17 October 2018 from CIL to CIK.

8. Prior to the 2018 amendments to SOPA, liquidated damages claims were allowed.

In ***Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2020] SGHC 191**, it was found that adjudicators under the pre-amendment SOPA regime had jurisdiction to award or take into account liquidated damages. Such jurisdiction flowed from the entitlement to claim any liquidated damages raised in a payment response.

Range's application to set aside the adjudication determination was dismissed, as liquidated damages were clearly described in Goldbell's payment response, and the adjudicator had therefore been well within his jurisdiction to take the liquidated damages into account. This decision was affirmed by the CA in [2021] SGCA 34.

Variations

9. Variation clauses requiring instructions to be in writing should be complied with strictly.

In ***Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*** **[2020] SGHC 165**, the court held that a subcontractor was not contractually entitled to payment for variation works instructed orally since the variation clause required instructions to be in writing, and had to recover payment on restitutionary quantum meruit basis instead. Although the decision also dealt with liquidated damages and defects claims, it is the discussion regarding variations which is particularly instructive.

The Plaintiff ("**Comfort**") entered into a lump sum construction contract with the first defendant ("**OGSP**") in October 2013 for the ACMV system of a project in Jurong (the "**Works**"). The main contractor had subcontracted the Works to Lead Management Engineering & Construction Pte Ltd, which in turn subcontracted the Works to Comfort. Comfort then sub-sub-contracted the Works to OGSP under a back-to-back contract.

The contract contained a detailed mechanism for the approval and valuation of variations, including Clause 11.1 which was interpreted as requiring "some form of writing as a condition precedent for [OGSP's] right to claim payment for a variation":

11. VARIATION OF THE WORKS

11.1 The Contractor shall not alter any of the Contract Works except as approved by the Purchaser, but the Purchaser shall have the right from time to time during the execution of the Contract Works to request the Contractor by notice in writing to alter, omit (with a corresponding deduction in Contract Price), add or otherwise vary any part of the Contract Works after consultation with the Contractor without invalidating the Contract, but within the limits of the Contract Price, and the Contractor shall carry out such variation and be bound by the same conditions as far as applicable as though the said variations would in the opinion of the Contractor involve a claim for additional payment, the Contractor shall before proceeding therewith notify the Purchaser thereof in writing and obtain the Purchaser's approval beforehand. In the event the variation involved a reduction of contractor's original work scope, the contractor shall not be entitled to claim for loss of profit whatsoever as a result of the scope of work being reduced.

The court found that OGSP had failed to adduce any evidence to show that Comfort issued a written instruction to carry out OGSP's VO2. OGSP relied on the following documents as instructions in writing: (1) a spreadsheet submitted by OGSP's project manager to Comfort detailing the variations, (2) handwritten sketches or drawings prepared by OGSP's site supervisors, and (3) handwritten drawings alleged to have been prepared by Comfort's project manager. These documents failed

to satisfy the condition precedent that the variation instructions be in writing as the spreadsheet, sketches, and drawings prepared by OGSP were not instructions *from* Comfort, while the handwritten drawings allegedly prepared by Comfort's project manager were found to have actually been prepared by OGSP's site supervisors.

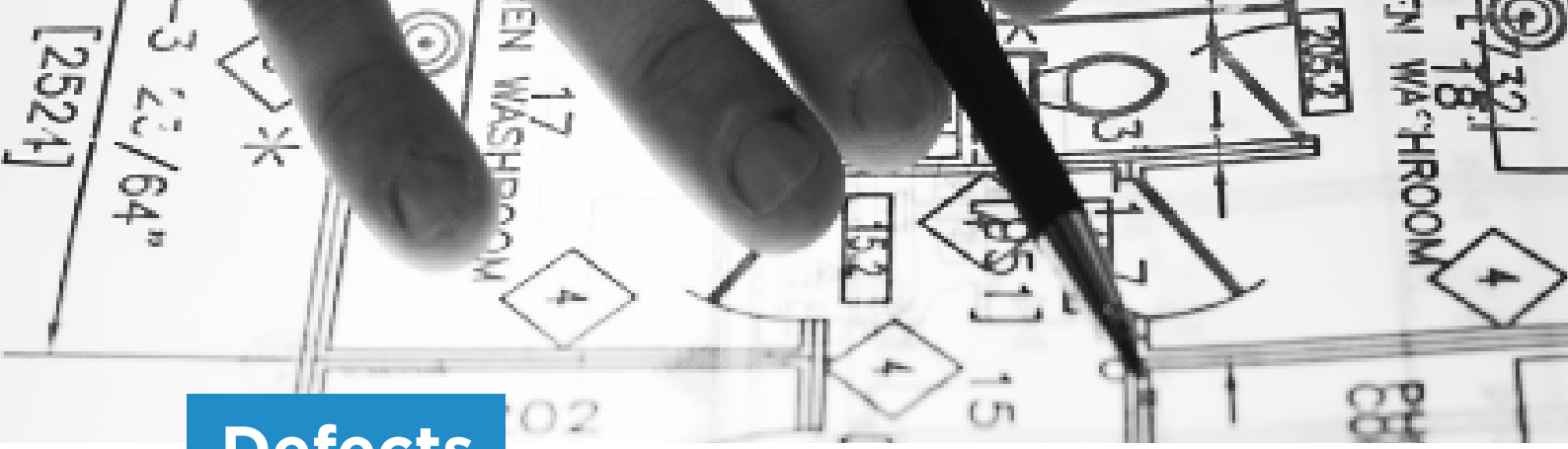
Although the court accepted that "in a suitable situation, the employer may be estopped by his conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract", and further that there was evidence of a high degree of informality in how parties dealt with variations under the contract, it decided that there was no evidence that Comfort had waived the condition precedent of a written instruction in respect of VO2 specifically.

OGSP was however entitled to recover $414,552, being two-thirds of the amount claimed for VO2, on a restitutionary quantum meruit basis. The conditions to recover quantum meruit had been made out as OGSP did carry out at least part of VO2 before it withdrew from the site, the benefit of those works accrued to Comfort as it had been paid for those works, and OGSP was not contractually entitled to recover payment for VO2 either under the express terms or by reason of waiver of the condition precedent.

Comment:

This case demonstrates the necessity of complying with contractual requirements for variation orders. If a contractor proceeds with such variation work without compliance with the contractual requirements, it would not be entitled to payment for such variation work that was done under contract, unless it can prove that the contractual formalities had been waived, which is not easy to do.

A contractor can however rely on the ground of quantum meruit or restitution if it can show that it did do the work and the counterparty had benefited at its expense. However, a contractor may not be able to claim the price of the variation works based on the rates or the cascading principles for the valuation of variation work as set out in the contract.



Defects

10. Where a contractor's works are defective, the contractor is liable for damages even if the other party does not intend to rectify the defects. Contracts may also validly incorporate documents coming into existence after the contract is formed.

In ***GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167**, a main contractor was entitled to recover substantial (as opposed to nominal) damages even though it did not intend to rectify the defects in its subcontractor's work. The court also found on the facts that specifications in the main contract were validly incorporated into the subcontract notwithstanding that they came into existence after the subcontract was formed.

The Plaintiff ("**GA**") entered into a $2.19m lump sum contract with the Defendant ("**Sun Moon**") in June 2014 for the design, supply, and installation of various furnishings for a freehold industrial development which included a glass curtain wall system. White spots, specks and bubbles appeared on the glass panels which were not present when the glass was installed, and which began to appear only after TOP was issued in June 2016.

Sun Moon alleged that with the exception of a few replacement works that GA carried out in a few units of the project, GA had suffered no loss as a result of the glass defects. Further, neither the owner nor the individual subsidiary proprietors had commenced any legal proceedings or sought to recover damages from GA. The Defendant also alleged that the specifications relating to glass in the main contract, namely the Architectural Specifications and National Productivity and Quality Specifications, were not incorporated because they came into existence only after the parties entered into the subcontract.

Rejecting Sun Moon's arguments, the court endorsed the exception to the general rule that a plaintiff is entitled to recover damages only for loss which a breach of contract causes the plaintiff itself to suffer. The exception is that a plaintiff is allowed to recover substantial damages for the loss of its performance interest in not receiving the benefit of the bargain for which it contracted, and the measure of damages is the cost of securing the performance of that bargain.

The court decided that GA was entitled to rely on this exception to recover damages for the loss it has suffered in not getting the benefit it contracted for, and that it should not be a prerequisite to show that GA had already carried out the repairs or intends to do so. In other words, GA had an expectation interest that Sun Moon would carry out the Works in accordance with the subcontract, which the law would vindicate with an award of substantial damages.

The court also dismissed Sun Moon's argument that the glass specifications which came into existence after the subcontract was made were not incorporated, holding that there is no principle of law

that a document which comes into existence only after a contract is formed cannot be incorporated by reference into that contract. The court reasoned that in principle, parties can agree to incorporate by reference the terms of a future contract which one of the contractual counterparties will negotiate and then enter into with a third party. Whether the terms of that later contract are in fact incorporated into the parties' earlier contract is simply a matter of contractual construction. It all depends on the parties' intention, objectively ascertained from the terms of their contract.

On the present facts, the clear reference to "all provisions of the main contract … applicable to the Subcontract works" and "all main contract … specifications" in cll 8.1 and 24.1(b) respectively of the subcontract put it beyond doubt that the parties did intend for certain specifications contained in the main contract, whenever that might come into existence, further to govern the specialised nature of the glass curtain wall works.

Comment:

GA Engineering is a useful illustration of the exception to the general rule that a party is entitled to recover damages only for loss it has suffered itself. A party can claim the loss of its performance interest in not receiving the benefit of the bargain for which it contracted.

The measure of damages is "*the cost of securing the performance of that bargain*" rather than the actual loss suffered by that party.

This case also illustrates that parties are at liberty to agree to be bound by key terms or specifications that are still being negotiated, including where the future terms are negotiated and agreed by one of the counterparties with a third party, so long as such intention is clearly stated.

11. Where there is a defect liability clause, an owner who unreasonably prevents a contractor from rectifying defects can only recover that amount that would have cost the contractor to rectify the defects.

In ***Sandy Island Pte Ltd v Thio Keng Thay*** **[2020] 2 SLR 1089** it was decided that, under a standard form Sale of Purchase Agreement ("**SPA**") prescribed by the Housing Developers Rules, where an employer does not provide a contractor with its contractual opportunity to rectify defects during the defects liability period, the employer can still recover the cost of repairing the defects but the sum recovered may be limited to how much it would cost the contractor to rectify the defects.

The appellant was the developer of Sandy Island, a collection of 18 waterfront villas located in Sentosa Cove. The respondent purchased from the developer a four-storey detached bungalow at the price of $14.32m. Soon after entering into possession, the respondent complained of numerous defects in the property. Eventually, the parties carried out a joint inspection of the property. The appellant thereafter asked for access to investigate the defects, establish the causes of the same and propose rectification steps.

However, despite the appellant's provision of numerous method statements to the respondent, the latter refused to grant the appellant permission to carry out rectification works on the basis that the proposed works were unsatisfactory and insufficient. Eventually, as the parties remained at an impasse, the respondent engaged a new contractor to carry out the rectification works.

After reviewing the judicial and academic authorities, the CA concluded that:

> *… unless there are clear words or a clear and strong implication from the express words used in a defects liability clause or in the contract, an owner or employer in a building and construction contract containing a defects liability clause does not thereby lose the right to a claim for damages*

at common law for defects in the building … A defects liability clause typically confers a right on the contractor to return to site, to rectify defects at his own cost as well as the obligation to do so if called upon by the owner or employer; there is the concomitant right of the owner or employer to require the contractor to return to site and rectify the defects in the building. … Accordingly, if the owner or employer does not, without good reason, exercise this option to call for the contractor to return to site and rectify defects or having exercised that right, without good reason, prevents the contractor from carrying out such rectification, then such omissions or acts will impact on the owner's or employer's duty to mitigate and will be relevant to the amount of damages the owner or employer may recover from the contractor at common law.

The court also observed that the defects liability clauses contained in the REDAS Conditions, PSSCOC, and SIA Conditions "have consistently treated their respective defects liability clauses as merely offering an alternative procedure for rectifying construction defects". It also endorsed the view that "where the Employer does not provide the Contractor with a contractual opportunity to rectify defects during the defects liability period, the Employer can still recover the cost of repairing the defects but the sum that the Employer can recover may be limited to how much it would cost the Contractor to rectify the defects".

On the facts, the court found that cl 17 of the SPA did not preclude the respondent from commencing any common law claim but, having given the appellant a notification of defects under the clause, insofar as he failed to grant access for rectification of the admitted defects, such failure may affect the quantum of damages he is able to recover at common law as a consequence of a failure to mitigate damages.

Comment:

Sandy Island reinforces the underlying principle that defects liability clauses are intended for the practical and commercial benefit of *both employer* and contractor, which explains why an owner who without good reason does not seek recourse to a defects liability clause, or having initially sought such recourse, unreasonably prevents the contractor from rectifying the defects, would not be barred from claiming common law damages for the defective work. However, the amount he can recover for his actual costs for rectifying the defects will be impacted by his failure to mitigate his loss by first seeking recourse to the contractor under the defects liability clause. The amount that could be recovered would usually be limited to the amount that would have cost the contractor to rectify the defects.

Performance Bonds

12. It is unconscionable to make a demand on a performance bond where the effect would be to negate an adjudication determination prior to any final determination of the dispute.

In ***Samsung C&T Corp v Soon Li Heng*** **[2020] 2 SLR 955**, the CA held that it was unconscionable for a party to make a demand on a performance bond in circumstances where the effect of so doing would be to negate an adjudication determination ("**AD**") prior to any final determination of the dispute between the parties.

The appellant ("**Samsung**") was the main contractor for one of LTA's projects. The respondent ("**SLH**") was its subcontractor for excavation and disposal works and was to excavate three types of material, namely soil, hardcore material and ground improvement and mixed material. Pursuant to the Subcontract, SLH procured the issue of a performance bond by a bank in favour of Samsung.

By an AD dated 19 November 2018, it was determined that Samsung was to pay SLH a certain sum ("**first AD**") under SLH's payment claim no. 20. On 15 December 2018, Samsung issued a "Notice of Dispute" under the Subcontract on the basis that "SLH's claims in the [SOPA adjudication] are without merit and that the adjudicator in that case failed to consider the claims in light of the contractual provisions in the Subcontract". This was followed by a letter by which Samsung terminated the Subcontract. However, on 26 December 2018, Samsung paid the adjudicated sum under the first AD.

On 31 December 2018, SLH served on Samsung another payment claim ("**PC24**"). Thereafter, on 14 January 2019 Samsung wrote to SLH to assert that SLH had claimed in PC24 that the "final quantity of disposal as of 16 December 2018" was 175,978 m^3 when, according to an email from SLH to LTA dated 8 January 2019, the actual quantity disposed of was only 136,462 m^3. SLH responded on 29 January 2019 to say that the Subcontract had provided for the quantities of soil disposed of to be measured using certain principles, and that the new principle of measurement mentioned by Samsung was not contained in the Subcontract.

Thereafter the parties continued to dispute the final quantity of material which SLH had disposed of as well as the quantity of hardcore material that had been removed. On 7 March 2019, the parties' disputes were once again referred to adjudication (the "**second adjudication**"). On 3 April 2019, while the second adjudication was still ongoing, Samsung made a demand on the performance bond for the full bond amount of $826,713.53 on the premise that SLH had, in breach of the Subcontract, over-claimed in relation to works which it had purportedly performed.

The CA, affirming the HC decision to restrain the payment under the performance bond, held that Section 21 of SOPA provided that an AD will have temporary finality until one of the events specified in Section 21(1) occurred. It found that Australian

authorities were not persuasive as the Australian legislative framework did not have the equivalent to Section 21 of SOPA, and that although a performance bond was a risk allocation device, a call by the beneficiary could still be restrained on the grounds of fraud and unconscionability.

On the facts, the CA found that the nub of Samsung's complaints about overpayment concerned matters that had already been adjudicated under the first AD. While Samsung was entitled to disagree with and challenge the views of the adjudicator, it was entitled to do so only in final dispute resolution proceedings. Samsung could not, on the one hand, pay the adjudicated amount but, on the other hand, recover overpayment by making a demand on the PB on the basis of reasons which had been rejected by the adjudicator as to do so would undermine the AD's temporary finality.

It was also accepted by the CA that the alleged new evidence of the email sent by SLH to LTA on 8 January 2019 did not entitle Samsung to conclude that there was an overpayment, that Samsung did not use the correct approach in computing the quantities, and that Samsung's contentions in court were in any case not consistent with the new evidence.

Comment:

Although a performance bond is a separate agreement and a mechanism for risk allocation, it would be unconscionable to call upon it on grounds that had been adjudicated under SOPA if to do so would be to negate the adjudication determination. This is because of the temporary finality of adjudication determinations.

As the court observed, a beneficiary who makes a call before an adjudication determination may appear to be in a more advantageous position than one who does so after an adjudication determination, but that is a consequence of an on-demand bond. Whether it is unconscionable to make an early call on the performance bond before the outcome of an adjudication determination would turn on the facts of each case.

13. Insolvency of the beneficiary of a bond is not a ground for restraining the call of the bond.

In ***Sulzer Pumps Spain, SA v Hyflux Membrane Manufacturing (S) Pte Ltd*** **[2020] 5 SLR 634**, it was decided that Hyflux's restructuring and potential insolvency were not sufficient reasons to grant an injunction restraining Hyflux's call on a performance bond.

The first respondent ("**Hyflux**") was the sub-contractor for its related company, Hydrochem Pte Ltd, for a project concerning the design and construction of a desalination plant in Oman. Hyflux in turn engaged the applicant ("**Sulzer**") as its sub-contractor through two purchase orders in 2015 to supply and install pumps. Sulzer manufactured the pumps, delivered them to Hyflux, and installed them under Hyflux's supervision.

Hyflux soon encountered difficulties with the pumps, which repeatedly failed between November 2017 and May 2019. Hyflux alleged that the recurring failure of the pumps was caused by design flaws which were only rectified by Sulzer in May 2019, and that Sulzer was hence in breach of its warranty obligations. In contrast, Sulzer denied the existence of such design flaws, contending that the failures were caused by Hyflux's use of the pumps outside of the recommended permitted flow and speed range.

The documents showed that problems had first surfaced in late 2017, and that they were urgently and repeatedly highlighted by Hyflux to Sulzer. These problems persisted despite replacement of damaged parts. Hyflux disputed Sulzer's root cause analysis and had informed Sulzer of its technical basis for such dispute via e-mails in January 2018. The same month, Hyflux informed Sulzer that Sulzer had breached their warranty obligations, and that Hyflux would enforce its rights, including by calling on the bond. Hyflux alleged that subsequently, despite Sulzer's initial remedial plan, the pumps still failed.

Sulzer proposed yet another remedial plan in June 2018 involving the design and supply of new balance discs, which was targeted at fixing the root cause Hyflux had previously identified. The remedial works were only completed by Sulzer in May 2019, after which the operation of the pumps generally stabilised. From May 2019 until September 2019, Hyflux continued to monitor the plant to ensure that the pump failures were fully and finally resolved. In October 2019, Hyflux called on the bond.

The court held that there was a clear genuine dispute between the parties as to the root cause of the pump failures and the call on the bond did not lack bona fides. Sulzer insisted that the root cause was the first respondent's improper use of the pumps outside the permitted ranges, while this is vehemently denied by Hyflux, who had sent Sulzer several e-mails stating so. There was nothing to show that this dispute was contrived, minor, or fully resolved to everyone's satisfaction, and also no evidence that Hyflux did not genuinely believe that there is such a dispute and/or did not genuinely believe that Sulzer had breached its warranty obligations.

Sulzer also sought to argue that if there was any doubt about the existence of unconscionability, an injunction should be granted considering the financial state of Hyflux which was undergoing restructuring. Any payment made by Sulzer would be difficult to recover due to Hyflux's financial difficulties, making such payment unfair.

Dismissing these arguments, the court decided that the fact that Hyflux was in the midst of restructuring, or even if hypothetically on the verge of insolvency, would not be reason to grant an injunction if unconscionability is not made out. The rationale for the strict threshold for granting injunctions was that a performance bond is a security that has been bargained for, and the court should not disrupt the status quo unless the applicant meets the threshold of proving either unconscionability or fraud. The fact that the obligor may be exposed to the financial constraints of the beneficiary was not good enough reason to bar the call if no other reason exists.

The court also emphasized that unfairness is neither a separate standalone ground for an injunction restraining a call on a performance bond. To introduce unfairness as a standalone criterion would be to broaden the scope of these injunctions to such an extent that the bond's role as security would be significantly undermined. Unfairness is only one factor amongst other factors, albeit an important one, in determining unconscionability, which refers to conduct lacking bona fides and is not a free ranging inquiry of fairness in a loose sense as contended by Sulzer that would go against the strictures on protection of the sanctity of the agreement entered into by the parties.

Finally, Sulzer also argued that Hyflux's conduct surrounding the call lacked bona fides. In this case, it was not disputed that the issues relating to the pumps were resolved in May 2019, but Hyflux only made the call more than six months after the issues were resolved, and nearly two years after they first arose. Further, Sulzer argued that prior to making the call, no attempt was made to recover the money which had been paid to Sulzer for the remedial works, with the call being only made immediately prior to its expiry. The thrust of the argument was that the delay showed lack of bona fides in that Hyflux did not genuinely believe that it had a right to call on the bond. Hyflux explained that this was because it needed some time to verify if the pumps were fully fixed and Sulzer had threatened not to remedy the defects if they were not paid. The payment for the remedial works were upon reservation of its rights. The court held that whether there was unconscionable delay turns on the facts on each case, depending on the commercial circumstances, including the nature of the dispute and depth of disagreement. On the facts, the court found that given the long period of pump failure, including repeated failure despite repeated attempts at remedial works, it was reasonable for Hyflux to monitor the pumps for some time to see how matters panned out. A six-month time lag did not ipso facto show unconscionable conduct or bad faith, especially where the correspondence between the parties showed an ongoing genuine dispute.

Comment:

It is important to voice the complaints to the obligor prior to making a call. A failure to do so may suggest a lack of bona fides.

A genuine dispute as to the beneficiary's right to call on performance bond does not give rise to unconscionability.

While a call should not be made prematurely, a delay in making a call on the bond may suggest a lack of honest belief on the part of the beneficiary that it is entitled to call on the performance bond.

The test for restraining a call on a performance bond is fraud or unconscionability, and in the case of the latter, a high threshold of a prima facie case is required.

Unfairness is a relevant consideration in ascertaining if there is unconscionability, but in itself is not sufficient to constitute unconscionability.

Unconscionability requires bad faith or lack of an honest belief and whilst all unconscionable conduct has an element of unfairness, not all "unfair" conduct amounts to unconscionability.

The fact that a beneficiary is in the midst of restructuring or on the verge of insolvency would not be reason to grant an injunction if unconscionability is not made out. A performance bond is a security that has been bargained for and the court will not disrupt the status quo in the absence of fraud or unconscionability.

14. What is the difference between an on-demand performance bond and an indemnity bond?

The case of ***Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234** provides a useful restatement of the difference between an on-demand performance bond and an indemnity bond. The court explained that a bond is susceptible to the following four possible interpretations, with the distinction between the first three and the fourth being that the former is conditioned on documents (and is of the on-demand type) while the latter is conditioned on extant facts (and is conditional in nature):

a. First, that nothing more than a written claim is required.

b. Secondly, that the written claim must assert a breach of the underlying contract.

c. Thirdly, that the written claim must assert a breach of the underlying contract and sustained losses.

d. Finally, that there must in fact have been a breach of the underlying contract and sustained losses.

In the case of an indemnity bond (as opposed to an on-demand bond), a beneficiary must prove that it has suffered actual losses as a matter of fact, and this can only be definitively done after an independent determination, arbitral award, or admission from a relevant party. The provision of documents, regardless of the volume and specificity, is insufficient to conclusively prove the matter.

On the facts, the court found that the bond in question was in *pari materia* with the one considered in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47, which stated that the obligation to indemnify was against "all losses, damages, costs, expenses or [sic] otherwise sustained by [the beneficiary]" and which the CA held was an indemnity bond instead of an on-demand bond.

Having assessed the plaintiff's supporting affidavit, the court held that the plaintiff had shown sufficient evidence of loss ($475,940.74 with an additional $8,167.54 due to administrative charges) which would justify the plaintiff's call on the bond in the amount of $397,687.50. The court accordingly found that the plaintiff's call on the bond was valid, and that the defendant was liable to pay the plaintiff under it.

Comment:

This case is a useful reminder that not all bonds are alike, and it is necessary to ascertain the type of bond in question to ascertain when the right to call on the bond arises.

Whereas an on-demand performance bond requires a call on the bond in accordance with its terms, an indemnity bond usually requires proof of actual loss.

As a matter of risk management and governance, parties entering into contracts should be alert to the differences between an indemnity bond and on demand performance bond, to negotiate accordingly taking into account commercial requirements and bargaining position, and to plan and manage the works accordingly.

15. What are the factors determining whether a call on a performance bond is unconscionable?

In ***CEX v CEY* [2020] SGHC 100**, Justice Lee Seiu Kin observed that although the courts have sensibly refused to provide an exhaustive definition of unconscionability, from a review of the authorities the following framework may be discerned for evaluating whether an injunction restraining a performance bond should be granted:

a. Identify the nature of the performance bond: The preliminary question is whether the bond is an on-demand performance bond to begin with, which is a matter of contractual interpretation and the inquiry naturally begins with the document itself. That is, courts should be slow to consider extrinsic evidence or the external context when interpreting the contractual document outlining the performance bond.

b. Ascertain whether the call falls within the terms of the bond.

c. Evaluate whether the "overall tenor and entire context of the conduct of the parties support a strong prima facie case of unconscionability", unconscionability having been broadly (but not exhaustively) described to involve elements of unfairness and conduct lacking in good faith. These elements have most commonly manifested in the following manner:

    i. calls for excessive sums;

    ii. calls based on contractual breaches that the beneficiary of the call itself is responsible for;

    iii. calls tainted by unclean hands, eg, supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;

    iv. calls made for ulterior motives; and

    v. calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

Miscellaneous

16. What is the proper interpretation of "full resolution of all outstanding issues with [a third party]... in relation to ... payment"?

In ***Min Hawk Pte Ltd v SCB Building Construction Pte Ltd* [2020] SGHC 13**, a main contractor ("**SCB**") and its aluminum glazing subcontractor ("**Min Hawk**") entered into a payment agreement which provided that Min Hawk would only receive the 2nd tranche of payment ($286,841.56 out of the $486,641.56 owing by SCB) upon "full resolution of all outstanding issues with Big Box Pte Ltd ("Big Box"), the employer for the Project, in relation to work done by [SCB] and to payment payable by Big Box to [SCB]". The court interpreted "full resolution" as meaning a final determination of the amount payable by Big Box to SCB, which required not just the entering of a judgment against Big Box, but also SCB's winding up application against Big Box, the sale of Big Box's building, and payment of Big Box's secured creditors.

Comment:

Min Hawk v SCB Illustrates a potential pitfall when drafting a term of a settlement agreement that is contingent on external events, and the importance of getting the definitions right especially where the term turns on payment from a third party.

17. Contracts may be enforceable even if price and delivery date have not been agreed.

In ***Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4**, a subcontractor was found liable for liquidated damages under a Letter of Award ("**LOA**") where price had not been negotiated yet, and the delivery schedule was to be issued to the subcontractor subsequently.

Punj Lloyd Limited, the main contractor of the Petronas Rapid Project, had engaged the plaintiff ("**Ramo**") to construct the pre-engineered structure and prefabricated building for an accommodation camp. Ramo awarded the defendant ("**DLE**") the subcontract for the supply, fabrication, painting and delivery of structural steel under an LOA which contained a preamble stating: "This letter shall constitute a binding agreement between [Ramo] & [DLE] based on the following terms and conditions" but provided that (1) price was "to be negotiated" and (2) the delivery date would be "issued to DLE to enable [Ramo] to complete the Main Contract Works ... by the [C]ontractual Completion Date".

Although Ramo did not dispute that it had to show an already binding document to assure Punj Lloyd that it had already secured a subcontractor, the court rejected DLE's argument that this meant the LOA was not intended to be binding. Instead, it was found that the LOA was binding subject to the finalization of price, and that DLE had agreed to the seemingly disadvantageous term of a delivery schedule dictated by Ramo when it later negotiated and agreed on the price. DLE was found liable for RM2,891,750 in liquidated damages.

Comment:

DLE's liability for liquidated damages is a timely reminder that a subcontractor's agreement to be bound by the terms of a main contract, for example a delivery schedule to be issued by the employer, will be binding even if the terms are not made known yet.

If DLE's intention was only to provide paperwork to satisfy Punj Lloyd that a subcontractor had been secured, and that the parties did not intend for the paperwork to be binding, this should be made clear by stating in a cover letter or email that the paperwork was "subject to contract" or that it would take effect when specific terms such as delivery schedule and price are agreed in writing.

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