

**Employers' duty to respond to payment claims outside the scope of the SOPA:
Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd [2019] SGCA 36**

I. Executive summary

Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd [2019] SGCA 36 concerned the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the “SOPA”), which facilitates cash flow in the building and construction industry by providing a quick and efficient means of adjudicating (i.e. providing a formal judgement on) payment disputes with “temporary finality”.¹

Under section 10 of the SOPA, a contractor can make a “payment claim” for a “progress payment”. This is a payment to which the contractor is entitled for carrying out construction work or supplying goods or services, under a contract. The employer must provide a response (known as a “payment response”) within 21 days after the payment claim is served *or* by the date specified in the underlying contract, whichever is earlier. The response must state the amount which the employer acknowledges as due (if any) and, if that amount is less than the amount claimed, the employer’s reasons for disputing the amount claimed. If the contractor disputes the payment response or if no payment response is received within the specified time, the contractor can commence adjudication under the SOPA.

In an earlier case, *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi Construction*”), the Court of Appeal (“CA”) decided that when an employer receives a payment claim from a contractor, that employer has a “duty to speak”, meaning that it must fully spell out any objections it has in a payment response. Otherwise, it would be prevented from objecting subsequently.

In this case, the CA clarified that this “duty to speak” did not apply to payment claims falling outside the SOPA. Therefore, omitting to file a payment response to such payment claims would not estop (i.e. prevent) an employer from later raising objections to the validity of the payment claim. This was because such payment claims cannot be said to be made under section 10 of the SOPA. Thus, there was no corresponding obligation on the employer’s part to issue a payment response under the SOPA.

Here, the CA found that the payment claim in dispute fell outside the SOPA, because it was submitted after the final certificate (the certificate certifying the final balance payable from the employer to the contractor) had been issued by the architect of the project. This was because upon the issuance of the final certificate, the architect became *functus officio* (i.e. one who has fully fulfilled his duties and functions and therefore has no further legal authority). Therefore, any payment claims submitted after the final certificate had been issued could not be certified by the architect. Thus, contrary to what the contractor argued in this case, the employer was not obliged to issue a payment response to the payment claim, and it was not then estopped (or prevented) from raising objections to the validity of the payment claim despite not having issued a payment response.

The CA also clarified the interplay between the SOPA and the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract) (7th Edition, April 2005) (the “SIA Articles of Contract” and “SIA Conditions of Contract” respectively, and collectively the “SIA Form of Contract”):² specifically, how the role of the architect, as provided for in the SIA

¹ The adjudication has “temporary finality” because it binds the parties, but they can still subsequently revisit the dispute in arbitration or litigation if they wish.

² The SIA Form of Contract is a standard form contract which is widely used for construction projects.

Form of Contract, affects the progress payment regime and the impact of that role in the context of the duty to speak under the SOPA.

II. Material facts

Far East Square Pte Ltd (“**Far East**”) was the developer in a construction project (the “**Project**”), while Yau Lee Construction (Singapore) Pte Ltd (“**Yau Lee**”) was the main contractor. Yau Lee was engaged pursuant to a contract (the “**Contract**”) which incorporated the SIA Form of Contract.

The maintenance period (i.e. the period after the conclusion of project works, during which the contractor remains liable for any defects in the works) for the Project works lasted from 6 May 2014 to 5 August 2015. On 4 August 2017, the architect of the Project (the “**Architect**”) issued a certificate signifying the end of the maintenance period (the “**Maintenance Certificate**”). On 23 August 2017, Yau Lee submitted payment claim number 73 (“**PC 73**”). The Architect then issued a final certificate (the “**Final Certificate**”) on 5 September 2017, certifying the final balance payable from Far East to Yau Lee. On 12 September 2017, Far East issued a payment response to PC 73.

Despite the issuance of the Final Certificate, Yau Lee then submitted payment claim number 74 (“**PC 74**”) on 24 October 2017. In response, the Architect wrote to inform Yau Lee that since the final payment claim had to be submitted before the end of the maintenance period but Yau Lee had failed to do so, the Architect had already issued the Final Certificate on 5 September 2017, which was within three months from the issuance of the Maintenance Certificate as stipulated by the SIA Conditions of Contract. On 24 November, Yau Lee submitted payment claim number 75 (“**PC 75**”), which was exactly the same as PC 74 other than the difference in dates. Far East did not issue payment responses to both PC 74 and PC 75.

Thereafter, in December 2018, Yau Lee lodged an adjudication application in relation to PC 75. The parties proceeded with the adjudication. Far East’s main objection during the proceedings was that PC 75 had been submitted after the issuance of the final payment claim and/or the Final Certificate. Far East argued that PC 75 therefore failed to comply with the SIA Conditions of Contract and section 10(2)(a) of the SOPA, and was hence invalid. However, the adjudicator (the “**Adjudicator**”) agreed with Yau Lee that because Far East had not raised this objection in a payment response to PC 75, he (the Adjudicator) was “prohibited” from considering Far East’s objection under the SOPA, following the CA’s decision in *Audi Construction*. The Adjudicator issued its decision (the “**Adjudication Determination**”), finding Far East liable to pay Yau Lee \$2,276,284.68.

Far East unsuccessfully applied to the High Court (“**HC**”) to set aside the Adjudication Determination. Instead, the HC ordered that the Adjudication Determination be enforced, expressly rejecting Far East’s argument that it was not obligated to file a payment response if the payment claim was invalid due to it falling outside the ambit of the SOPA. The HC also found that to allow the Architect to unilaterally treat PC 73 as the final payment claim and to issue a final certificate on that basis would result in injustice to Yau Lee. On appeal, however, the CA disagreed with the HC and set aside the Adjudication Determination.

III. Issues on Appeal

On appeal to the CA, 3 main issues were considered:

- (a) whether further payment claims can be submitted after the final certificate has been issued by the architect under the SIA Form of Contract;
- (b) if (a) was answered in the negative, whether Far East was nevertheless estopped (i.e. prevented) from objecting to the validity of PC 75 because it had not filed a payment response; and
- (c) in any case, whether PC 75 constituted a “patent error”, i.e. an error which enabled Far East to object to PC 75 despite the lack of a payment response, because it fell outside the SOPA (as a

result of being submitted after the Final Certificate was issued).

A. *Whether further payment claims can be submitted after the final certificate has been issued by the architect under the SIA Form of Contract*

The CA stressed that the SOPA does not independently grant a contractor a right to be paid. The right to be paid stems from the underlying construction contract; the SOPA merely expedites the payment process. A contractor can only claim for progress payments if it can establish that it is entitled to such payment under the contract. Therefore, whether Yau Lee was entitled to submit payment claims under the SOPA depended on whether it was entitled to receive payment under the Contract.

Turning to the Contract here, the CA stated that the SIA Form of Contract (which was incorporated into the Contract) was designed to be administered by an architect, without whom the payment process cannot function. Specifically, the issuance of an architect's certificate, certifying the amount payable to the contractor, is a condition precedent to the contractor's right to receive payment. In other words, a contractor cannot receive payment without first receiving a certificate from an architect.

However, once an architect issues a final certificate, his duties under the contract are concluded and he becomes *functus officio*. Accordingly, an architect's power to issue certificates only extends until the issuance of the final certificate. Thereafter, the entire certification process under the contract comes to an end.

Thus, once the Architect issued the Final Certificate, he became *functus officio* and lost his capacity to issue further certificates. Accordingly, Yau Lee would no longer be entitled to further progress payments. This meant that PC 75, which was submitted after the issuance of the Final Certificate, fell outside the scope of the SOPA. As such, there was no basis for Yau Lee to submit it at all.

B. *Whether Far East was estopped from objecting to the validity of PC 75 because it had not filed a payment response*

The CA acknowledged that a respondent employer has a "duty to speak", by including in its payment response the objections on which it wishes to rely before the adjudicator. However, this duty would not apply to a situation where the payment claim fell outside the scope of the SOPA, and therefore did not entitle the contractor to commence adjudication under the SOPA in the first place. Since PC 75 was a payment claim of this kind, it could not be said to have been made under the SOPA and could not be regarded as a payment claim within the meaning of the SOPA. Far East therefore had no obligation to issue a payment response, and could not be estopped from challenging the Adjudication Determination.

The CA also provided a non-exhaustive list of other examples of payment claims which would fall outside the scope of the SOPA. Such payment claims include those which are made pursuant to oral contracts, or submitted beyond the six-year limitation period set out in the SOPA.

C. *Whether PC 75 constituted a "patent error" because it fell outside the SOPA (because it had been submitted after the issuance of the Final Certificate)*

Given that Far East was not estopped from objecting to the validity PC 75, it was not necessary for the CA to set out its views on this issue. Nevertheless, the CA explained that a "patent error" is an obvious, manifest or otherwise easily recognisable error, which is in the material on which adjudicators rely to make their decisions. Here, it should have been clear from the material presented to the Adjudicator that PC 75 was outside the scope of the SOPA, given that it was clearly submitted *after* the Architect's role in the certification process had concluded. Therefore, PC 75 constituted a

patent error. Since a respondent who has not submitted a payment response is entitled to object to the validity of payment claims on the basis of patent errors in the material presented to the adjudicator, the CA observed that Far East would, in any case, be entitled to set aside the Adjudication Determination notwithstanding its lack of a payment response.

D. Other issues

The CA also addressed alternative arguments raised by Yau Lee and clarified the law relating to other aspects of the certification regime under the SIA Form of Contract.

First, where an architect has improperly withheld a payment certificate, a contractor may bring a claim for adjudication under the SOPA notwithstanding the absence of certification. The same applies for final certificates which are invalid. For a final certificate to be valid, it must comply at first glance with the requirements for an architect's certificate to be accorded "temporary finality" under the SIA Form of Contract. These requirements include the absence of fraud, compliance with the terms of the contract, and the architect acting in good faith. For example, a final certificate cannot be validly issued before the project has been practically completed. If the Final Certificate had been invalid, this would have meant that Yau Lee had a basis for its claim, because the Architect's role would not yet have validly ended. However, in this case it was undisputed that PC 75 was submitted by Yau Lee after the issuance of the Final Certificate, by which time the Architect was *functus officio*. Moreover, the Final Certificate had been issued in accordance with the terms of the SIA Form of Contract, and was therefore presumed to be valid.

Second, an architect is entitled to issue a final certificate even if the final payment claim has not been submitted. This is because the SIA Conditions of Contract provide that the final certificate shall be issued within 3 months of receipt of the final payment claim or the issuance of the maintenance certificate, whichever is later. Thus, even if a contractor chooses not to issue a final payment claim, the architect can still proceed to issue the maintenance certificate followed by the final certificate. This is what happened in the present case.

Third, Yau Lee had argued that since PC 75 was essentially a repeat of PC 73, Yau Lee's right to issue a repeat claim would persist even after the Final Certificate was issued. This was because repeat claims were permissible under the SOPA if an adjudicator had not yet considered and decided on the claim. The CA's response was that the SOPA prevented payment claims from being invalidated solely on the basis that they were submitted late, but this could not apply for the purpose of validating a payment claim submitted after the Architect became *functus officio*, such as PC 75.

Fourth, the CA stated that the SOPA was enacted to facilitate cash flow during the course of project works, and the issuance of the final certificate typically signifies that project works have ended. After this point, the rationale for expedited payment under the SOPA would cease to apply, and no further works would be carried out. Therefore, the fact that Yau Lee was prevented from submitting further payment claims after the Architect issued the Final Certificate did not go against the purpose and operation of the SOPA.

Finally, preventing Yau Lee from bringing PC 75 to adjudication under the SOPA would not have resulted in injustice to it, because Yau Lee could still take its claim to arbitration.

IV. Conclusion

In summary, upon issuance of the Final Certificate, the Architect's role expired and therefore, the payment claims submitted by Yau Lee thereafter were outside the purview of the SOPA. Accordingly, Far East had no obligation to submit a payment response, and was not estopped from challenging the

adjudication determination. Since PC 74 and PC 75 were invalid, the adjudication proceedings were effectively void.

V. Lessons learnt

This case clarifies how the payment certification process functions under the SIA Form of Contract. Employers, contractors and architects alike should take note of the key points raised by the CA.

For employers, the case does not alter the general legal position (and best practice) that an employer should: (a) issue payment responses within the specified timeframe for all payment claims, and (b) include in those payment responses all the reasons (for disputing the amount claimed) on which they intend to rely, so as to avoid falling foul of the duty to speak. However, this duty has limits; it is unnecessary to respond to payment claims which fall outside the SOPA to begin with. Thus, declining to respond to such claims will not prejudice an employer's ability to raise such an argument in adjudication.

That said, employers should be very confident that a payment claim indeed falls outside the SOPA before choosing not to respond. If in doubt, it may be more prudent to issue a payment response stating the objection, since this case does not appear to suggest that an employer's position would be prejudiced by issuing a payment response which strictly need not have been issued.

For contractors, this case drives home the importance of submitting *all* payment claims before the issuance of the final certificate, because upon such issuance, the payment certification process comes to an end. Any payment claims submitted thereafter are invalid unless the final certificate itself is invalid.

Finally, architects should note the CA's discussion of the standards to which they are held when issuing certificates. To ensure the validity of final certificates, architects should always ensure that they perform their functions in good faith, and to the best of their uninfluenced professional judgment. Employers on their part should also not attempt to interfere with or influence an architect's judgment, lest they jeopardise their own legal position if the validity of a certificate is later challenged.

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