BUILDING & CONSTRUCTION ADJUDICATION – 2019 COURT OF APPEAL DECISION IN FAR EAST SQUARE PTE LTD V YAU LEE CONSTRUCTION (SINGAPORE) PTE LTD

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Introduction

In the case of Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd 2 SLR 189 ("Far East"), the Court of Appeal considered whether the claimant had the right to apply for adjudication under the Building and Construction Industry Security of Payment Act ("SOP Act"). The construction contract, in that case, incorporated, with some modifications, the standard terms of the Singapore Institute of Architect's Articles and Conditions of Building Contract (Measurement Contract) ("SIA Form Contract"). The claimant in the case served the relevant payment claims on the respondent after the architect had already issued a final certificate in accordance with the terms of the construction contract.
This update provides a brief summary of the decision and some key takeaway points for those in the construction industry.

The case before the High Court

Far East was the developer's successful appeal from its unsuccessful application to the High Court to set aside the adjudication determination that had been made in the contractor's favour on the basis of a patent error. In the case before the High Court, the developer argued that the adjudication determination ought to

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be set aside as the adjudicator therein had no jurisdiction to determine the adjudication application. The developer argued this to be the case as the payment claims submitted by the contractor and which formed the basis of the claimant's adjudication application were submitted after the architect had already issued a final certificate. The developer argued that as a consequence of having been submitted after the architect's issuance of the final certificate, the payment claims fell outside the scope of the SOP Act. The High Court ruled in favour of the contractor on the basis of the duty to speak espoused in Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd 1 SLR 317 ("Audi Construction"). The High Court accepted the contractor's argument that the developer was estopped from objecting to the validity of the payment claim in question as the developer failed to serve a payment response in relation thereto. The developer appealed and won on appeal.

The case before the Court of Appeal

In *Far East*, the Court of Appeal considered whether the developer had a duty to speak in respect of the payment claims in question. The Court of Appeal answered this question in the negative. The Court of Appeal interpreted the relevant clauses of the SIA Form Contract and held that the SIA Form Contract imposed as a condition precedent to a contractor's right to payment, an architect's certification of the value of the works that have been done. Having held that the said condition precedent had not (and, indeed, could not) been fulfilled in relation to the payment claims in question, the Court of Appeal held that the duty to speak referred to in *Audi Construction* was not engaged. The Court of Appeal held that the said duty to speak arose, in respect of objections to the jurisdiction of an adjudicator in an adjudication under the SOP Act, only in relation to payment claims which fell within the scope of the SOP Act.

The rationale underscoring the Court of Appeal's decision

The SIA Form Contract does not *expressly* state that the issuance of an architect's certificate is a condition precedent to a contractor's entitlement to payment and/or to apply for adjudication under the SOP Act. However, the Court of Appeal's finding was well-reasoned on the following bases:

- Whilst section 5 of the SOP Act provides that any person that has carried out any construction work under a contract is entitled to a progress payment, section 6(a) provides that the quantum of the said entitlement "*shall*" be calculated "*in accordance with the terms of the contract*". In other words, section 5 stipulates the *circumstances* in which a contractor is entitled to a progress payment (namely, when the contractor has carried out any construction work or has supplied any goods or services under a contract), whilst section 6 *prescribes* that the said entitlement *must be quantified* in accordance with the terms of the contract, and if the contract is silent in relation thereto, section 6(b) provides that the said entitlement is to be quantified on the basis of the value of the work done or goods or services supplied;
- Clause 31(2)(a) of the SIA Form Contract states that the basis of a contractor's payment claim shall

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comply with the valuation rules set out in sub-clause (4), which sub-clause goes on to prescribe the method with which the architect is to value the works. Simply put, this clause constitutes the "*terms of the contract*" referred to in section 6 of the SOP Act;

- Clause 31(2)(a) of the SIA Form Contract also requires the contractor to serve a copy of its payment claim on the architect. The Court of Appeal highlighted that the wording of clause 31(2)(a) *entitled* a contractor to serve a payment claim on the developer, but *required* (by using the word "shall") the contractor to forward a copy of the same to the architect; and
- Clause 31(3) of the SIA Form Contract requires the architect to issue an interim certificate within 14 days after the architect's receipt thereof. Put another way and read with clause 31(2)(a), the mandatory wordings in the SIA Form Contract in relation to a contractor's forwarding of a copy of its payment claim to the architect, together with the architect's issuance of an interim certificate within 14 days of its receipt thereof, rendered the issuance of an architect's certificate in relation to a payment claim a condition precedent to the claimant's entitlement to the said payment claim.

In *Far East*, it was no longer possible for the architect to issue such a certificate, as the architect had, in accordance with the SIA Form Contract, issued a final certificate, and therefore lost the ability to issue any further certificates thereafter. As such, in *Far East*, the requirement prescribed by clause 31(2)(a) of the SIA Form Contract was no longer capable of being fulfilled, with the consequence that the contractor's entitlement to progress payments under section 5 of the SOP Act could no longer be quantified, as mandatorily required by section 6 of the SOP Act, in accordance with the "*terms of the contract*". Resultantly, as the contractor could not establish an entitlement to payment, the Court of Appeal held that the contractor was not entitled to apply for adjudication under the SOP Act and that the respondent was accordingly not under the duty to speak specifically referred to in *Audi Construction*.

Takeaways from the Court of Appeal's decision for construction contracts incorporating the SIA Form Contract

Contractors should note that a construction contract that incorporates the terms of the SIA Form Contract has the effect of precluding them from being entitled to payment under a payment claim unless and until the project architect has issued an interim certificate in relation to the said payment claim. As a contractor, you can go on to accept the architect's certification and interim certificate or choose to dispute the same (by, for example, filing for adjudication under the SOP Act).

Further, you should also note that under the SIA Form Contract the architect's final certificate is just that – final – and that the architect *cannot* certify any payment claims you issue thereafter because the SIA Form Contract does not allow the architect to do so. Any such certification will no doubt be challenged by your employer, and in the light of the Court of Appeal's decision in *Far East*, such a certificate is likely to be meaningless in any event. You may therefore wish to negotiate for an amendment to your construction

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contract for more flexibility, by, for example, expressly providing for an alternative mechanism under which you can claim payment even after a final certificate has been issued, if you are of the view that such an alternative mechanism is necessary for your scope of work.

Alternatively, if you have already entered into a construction contract which incorporates the SIA Form Contract and which does not provide for such an alternative mechanism, you may wish to explore whether it is viable for you to bring your claim against your employer before the courts or, if there is an arbitration agreement (as is the case in the SIA Form Contract), commencing arbitration against your employer on other bases, e.g., a common-law entitlement to recover a reasonable sum for work done (also known as *quantum meruit*).

Key takeaways from the Court of Appeal's decision for other construction contracts

The factual matrix of the case in *Far East* precluded the contractor therein from having recourse to adjudication under the SOP Act. The outcome of the case is a lesson learnt on the part of the contractor therein. Simply put, a contractor that is not entitled to receive payment under their construction contract is similarly not entitled to apply for an adjudication of its payment claim under the SOP Act. As a contractor, you must take note of the terms of your entitlement to payment under the construction contract and act in accordance therewith in order to establish a right to be paid for the work you have done. If, as a contractor, you have taken the position that an outstanding amount is due to you for work done under a construction contract which incorporates the terms of SIA Form Contract *after* the project architect has issued a final certificate, you will not be able to apply for adjudication under the SOP Act and will have to commence arbitration instead. In other words, where, as a contractor, your construction contract imposes upon you additional requirements or conditions precedent to your entitlement to payment, ensure that you comply with these strictly. If you are unable to do so for reasons out of your control, try negotiating with your employer for a waiver of your compliance therewith immediately in writing.

Conclusion

To conclude, *Far East* makes clear that a claimant must first address the issue that was presented to the Court of Appeal in that case – namely, that it is contractually entitled to payment – in order to establish that its payment claim falls within the ambit of the SOP Act and that it is entitled to commence adjudication. Then, and only then, can a putative respondent be said to be under the duty to speak espoused in *Audi Construction* such that it is estopped from advancing any objections not stated in its payment response.

Accordingly, contractors should not take for granted their entitlement to commence adjudication by virtue of their employer's silence and failure to provide a payment response. As a contractor, review your construction contracts thoroughly and ascertain comprehensively the terms that you have to comply with and the conditions that must be fulfilled in order for you to be contractually entitled to payment. This will

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help you ensure that your adjudication applications are not defeated on the jurisdictional basis that was successfully argued by the respondents in *Far East*. Employers should do likewise to avoid incurring unnecessary costs in defending against invalid adjudication applications on the merits.

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