

# WHEN A CLAIM FOR PAYMENT IS NOT A PAYMENT CLAIM

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## **Recent Case law developments under the Building and Construction Industry Security of Payment Act**

Cash flow is and always has been the lifeblood of the construction industry. Without adequate cash flow, contractors and subcontractors find themselves in the invidious situation of having to finance construction projects on their own. The lack of proper financial resources will have a negative impact on the regular progress of these projects thereby causing a substantial delay in their completion. In extreme cases, building projects come to a complete standstill when the contractor, no longer able to bear the burden of its financial commitments, collapses into insolvency.

In the years prior to 2005, undesirable practices that stifled cash flow were prevalent within the construction industry. These ranged from reliance on “pay when paid” clauses in construction contracts to raising any number of unmeritorious disputes against claims for payment in an effort to deny or delay due payment to the contractor. The situation became even more acute during the financial crisis when numerous construction firms in Singapore faced financial demise.

In an effort to arrest this situation, the Building and Construction Industry Security of Payment Act (the “Act”) was passed. The Act came into effect on 1st April 2005 with the stated objective of implementing changes to payment obligations across the construction industry landscape and to ensure the smooth completion of building projects in Singapore through the improvement of cash flow. The mechanism through which this objective was to be achieved was the statutory adjudication process.

The adjudication process places great emphasis on quick resolution of payment disputes in construction projects. Contractors and Subcontractors who face payment issues during the course of a project are now able to submit their payment claims to an adjudicator and obtain quick relief rather than await the completion of the project before submitting their claim under a more formal dispute resolution process such as arbitration.

The adjudication process stipulates short timelines and a failure to comply with these timelines means that the defaulting party will have to face dire consequences. The process is commenced by the Claimant serving a Payment Claim on the Respondent. After receiving this Payment Claim, the Respondent will prepare and serve a Payment Response which sets out the reasons that entitle the Respondent to withhold payment to the Claimant. Upon receipt of this Payment Response, the Claimant will have to decide whether to refer the dispute to an adjudicator. If it decides to do so, it will file and serve an Adjudication Application and the Respondent will in turn answer the claim by way of an Adjudication Response.

In this context, one key provision is Section 15(3) of the Act. That Section provides that where a Respondent fails to provide any reasons for withholding payment in its Payment Response, it will not be

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permitted to raise those reasons later in its Adjudication Response. The Response to a Payment Claim, therefore, takes on a very significant role in the adjudication process. A Respondent's omission, through inadvertence or otherwise, to respond to the Payment Claim is tantamount to the Respondent conceding to an adjudication order in terms of the Payment Claim.

This begs a very important question - when is a claim for payment by a contractor regarded as a Payment Claim under the Act thereby requiring a Respondent to respond to it by way of a Payment Response.

The form and content of a Payment Claim is prescribed in the Act and the Regulations issued under the Act. Section 10(3) of the Act provides that a Payment Claim shall state the claimed amount and shall be made in such form and manner and contain such information as prescribed. Rule 5(2) of the Building and Construction Industry Security of Payment Regulations (RG1, 2006 Rev Ed) (the "Regulations") prescribes that a payment claim shall simply be in writing, identify the contract to which the claim relates and contain details of the claimed amount.

It is significant that neither the Act nor the Regulations require the Claimant to identify or expressly state in the Claim that it is a Payment Claim made under the Act. This means that a simple claim for payment by a contractor in the course of a project could be regarded as a Payment Claim under the Act even if the contractor did not intend such a claim to be one. On the other hand, the Respondent is required to exercise an abundance of caution by serving a Payment Response to each and every claim for payment it receives in the course of a project so that it is not caught out by Section 15(3) of the Act. This lack of a requirement to expressly identify a claim as a Payment Claim under the Act gave rise to confusion and placed the potential Respondent in a very impractical situation.

This issue was recently considered by the Singapore High Court in the decision of **SUNGDO ENGINEERING & CONSTRUCTION (S) PTE LTD V ITALCOR PTE LTD SGHC 105**. In that case, the defendant was a subcontractor engaged by the plaintiff to provide services for chilled water piping for the construction of a wafer plant at Tampines Industrial Avenue. In the course of the project, disputes arose between the parties with regards to payment for works completed by the defendant.

The defendant commenced legal proceedings against the plaintiff for the recovery of these payments. These court proceedings had reached the discovery stage when the defendant served on the plaintiff a letter setting out the defendant's claim with supporting documents (referred to in the decision as the "2008 Letter").

The plaintiff failed to issue a Payment Response. The defendant took the position that the 2008 Letter constituted a Payment Claim under the Act. Upon the plaintiff's failure to file the Payment Response within the times lines prescribed under the Act, the defendant commenced adjudication proceedings by lodging an adjudication application with the Singapore Mediation Centre. At the conclusion of these adjudication proceedings, the adjudicator awarded a sum of S\$354,588.37 in the defendant's favour. The plaintiff applied to the High Court to set aside the adjudication order.

The High Court allowed the plaintiff's application and set aside the adjudication order. The Court ruled that

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the 2008 Letter did not constitute a valid Payment Claim under the Act even though the 2008 Letter complied with all the requirements as to form and content prescribed in the Act and the Regulations.

The Court found that when the defendant served the 2008 Letter on the plaintiff, the defendant did not communicate its intention that the letter was a Payment Claim under the Act. The Court observed that intention is a necessary element and that a document which complies with all the prescribed requirements will still not be considered a Payment Claim if the maker of the document does not intend the document to be a Payment Claim. The Court further observed that subjective intention alone will not suffice. As a matter of public policy, in order for a claim for payment to be regarded as a Payment Claim, this intention must be expressly communicated to the potential Respondent.

The Court also pointed out that whether such a communication has been made by the Claimant to the Respondent would be a question of fact to be determined according to the circumstances of each case. The Court observed that evidence of such communication may be in the form of covering letters, email exchanges between the parties referring to the claim in question or even oral communication between the parties. The most effective manner of communicating this intention is by stating in the claim document itself that the claim is made pursuant to the Act.

This case serves as an important reminder to future claimants under the adjudication process to ensure that when Payment Claims are drafted, express and appropriate references to the Act are made in the document so that the potential Respondent is left in no doubt that the claim for payment is indeed a Payment Claim under the Act.

The case also demonstrates the need for further refinement to the Act and the Regulations. The objective behind the Act was to ensure a speedy resolution to payment issues arising in the course of a project so that contractors and subcontractors have the necessary cash flow to continue and complete their works. The Act and the Regulations serve to protect contractors and sub contractors from the unscrupulous practices of the past. However, it is also imperative to ensure that the Act and the Regulations are not used as “instruments of oppression” against potential Respondents.

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