IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 62

Originating Summons No 1465 of 2018

Between

CHL Construction Pte Ltd

… *Plaintiff*

And

Yangguang Group Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Termination of contract]

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CHL Construction Pte Ltd
v
Yangguang Group Pte Ltd

[2019] SGHC 62

High Court — Originating Summons No 1465 of 2018
Chan Seng Onn J
16 January, 19 February 2019

8 March 2019 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") seeks to provide a fast and low-cost system for contractors to receive payment for completed works.

2 Nonetheless, in certain cases, the construction contract may be terminated before the contractor has been fully paid for completed works. In such instances, SOPA is equivocal about the timeline for claiming for such works under the statutory regime.

3 In this case, I consider whether, with respect to SOPA claims, contractual provisions relating to SOPA timelines (*eg,* for the making of payment claims or payment responses) survive termination of the contract.

Facts

4 By a Sub-Contract dated 30 March 2017 ("the Contract"),[1] the plaintiff, CHL Construction Pte Ltd ("the Main Contractor"), engaged the defendant, Yangguang Group Pte Ltd ("the Sub-Contractor") as the sub-contractor for an "Architectural Wet Trade Works" project ("the Project")[2] for the sum of $443,921.87 ("the Contract sum").[3]

5 On 9 July 2018, the Sub-Contractor completed the works for the Main Contractor, and a Certificate of Substantial Completion ("CSC") was received the next day.[4]

6 Shortly after, on 20 July 2018, the Contract was terminated for reasons irrelevant to the present proceedings.[5]

7 On 30 August 2018, the Sub-Contractor served Progress Claim 10 ("PC10"),[6] claiming for works done until 30 August 2018 and for the release of half of the retention monies (being 2.5% of the Contract sum).[7]

8 The Main Contractor disputed the amount claimed under PC10, causing the Sub-Contractor to submit an Adjudication Application on 24 September 2018.[8]

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1 Chua Shueh Er's 1st Affidavit (28 November 2018) ("Chua's Affidavit"), CSE-1 Tab 2 at p 59.

2 Chua's Affidavit, CSE-1 Tab 2 at p 59.

3 Chua's Affidavit, CSE-1 Tab 2 at p 59.

4 Chua's Affidavit, para 28, and CSE-1 Tab 9 at p 914.

5 Chua's Affidavit, para 43, and CSE-1 Tab 1 at p 45, para 23.

6 Chua's Affidavit, CSE-1 Tab 3.

7 Chua's Affidavit, paras 31–33.

8 Chua's Affidavit, CSE-1 Tab 4.

9 On 22 October 2018, the Amended Adjudication Determination ("AD")[9] was released, and it was determined that the sum of $95,704.37 (including GST) was payable by the Main Contractor to the Sub-Contractor.[10]

10 Dissatisfied, the Main Contractor filed the present application, seeking to set aside the AD.

PC10 was served in contravention of s 10(2)(*a*) SOPA

Summary of dispute

11 The dispute centred around PC10, and whether it was served in contravention of s 10(2)(*a*) SOPA.

12 If s 10(2)(*a*) SOPA had indeed been breached, given that it is "a mandatory provision, breach of which would render an adjudication determination invalid" (*Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [53]), the AD which was given in respect of PC10 would be rendered invalid, and the Main Contractor's setting-aside application must be allowed.

13 Section 10(2) SOPA states that a payment claim must be served in accordance with the timelines in the contract between the parties unless the contract does not contain a provision to such effect:

> (2) A payment claim shall be served —
>
> (*a*) at such time as specified in or determined in accordance with the terms of the contract; or
>
> (*b*) where the contract does not contain such provision, at such time as may be prescribed.

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9 Chua's Affidavit, CSE-1 Tab 1.

10 Chua's Affidavit, CSE-1 Tab 1, p 56, para 47(a).

14 Clause 37 of the Contract ("clause 37") stipulated that the Sub-Contractor had to withhold its penultimate payment claim "until *three months after the Certificate of Substantial Completion* has been received by" the Main Contractor [emphasis added].[11] At the hearing before me, it was accepted that PC10, being a claim for work done until completion and for half of the retention monies (2.5% of the Contract sum), was the penultimate payment claim.[12]

15 Hence, if, notwithstanding the termination of the Contract, clause 37 remained applicable in stipulating the timeline for the service of the penultimate payment claim, PC10, having been served less than three months after the CSC was received (see [5] – [7] above), was served prematurely and in contravention of s 10(2)(*a*) SOPA.

The Adjudicator's decision

16 The Adjudicator held that given the termination of the Contract, the parties no longer had to perform their remaining obligations therein.[13] However, all accrued rights of the parties *prior* to the said termination had to be performed. Therefore, the Adjudicator held that clause 37 (a remaining obligation) no longer applied. Given that works had been completed, the Sub-Contractor was accordingly entitled to claim for the value of work done (an accrued right) as well as all the retention monies (5% of the Contract sum).[14]

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11 Chua's Affidavit, CSE-1 Tab 2 at p 67.

12 FTR 16 Jan (Chamber 4C), 11:06 am.

13 AD, paras 24–26.

14 AD, para 26.

Dual-track regime for construction claims

17 Before determining the effect of the contractual termination on clause 37, it is important to distinguish the two distinct modes of claims for contractors. As Lee Seiu Kin J explained in *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 at [30]:

> … Under the SOP Act, a party who carries out any construction work or supplies any goods or services under a construction contract is entitled to progress payments (s 5). While that ***statutory entitlement to payment*** *is founded on the underlying contract, it is* ***separate and distinct*** *from a party's* ***contractual entitlement to be paid***. The result is a "dual railroad track system" consisting of the statutory regime under the [SOPA] which operates concurrently with, but is quite distinct from, the contractual regime. … [emphasis added]

18 If a contractor elects to rely on the statutory track, SOPA applies. Under SOPA, a contractor is entitled to payment upon the completion of works, as detailed in ss 2 and 5 SOPA:

> 2. …
>
> "payment claim" means a claim made by a claimant for a progress payment under section 10; …
>
> "progress payment" means a payment to which a person is *entitled* for the *carrying out of construction work* …
>
> 5. Any person who has carried out any construction work … under a contract is *entitled* to a progress payment.
>
> [emphasis added]

SOPA timelines apply notwithstanding termination

19 If a contractor exercises its statutory entitlement to progress payment for the completion of construction work via a payment claim, s 10(2) SOPA provides that such "payment claim *shall* be served (*a*) … in accordance with the

terms of the contract; or (*b*) where the contract does not contain such provision, at such time as may be prescribed" [emphasis added].

20 Consequently, a SOPA payment claim *must* be served in accordance with the timeline set out in s 10(2) SOPA, which expressly applies to "payment claim[s]" and does not alter the timeline simply because of a subsequent termination of the contract.

21 Therefore, contrary to the Adjudicator's determination, termination of the contract subsequent to the point of time the statutory entitlement to payment had arisen and accrued does not alter the timeline for service of a SOPA payment claim that applies to that contractor's accrued *statutory* entitlement to payment. Instead, the timeline for service is determined at the point the statutory entitlement to payment arises; if the contract stipulates such a timeline, the contractual timeline applies pursuant to s 10(2)(*a*) SOPA. Like the contractor's statutory entitlement to payment, this timeline remains unchanged even if the contract is subsequently terminated.

22 This interpretation is consistent with prior decisions, which have held that contractual provisions relating to timelines survive termination for the purposes of claims under SOPA: *AET Pte Ltd v AEU Pte Ltd* [2010] SCAdjR 771 (*"AET*") at [37]–[43]; *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156 ("*Taisei*").

23 In *Taisei,* the main contractor, Taisei, had terminated the appointment of the subcontractor, Doo Ree. After the termination, on 29 November 2008, Doo Ree submitted Payment Claim 25 ("PC25"). Less than 21 days after, on 19 December 2008, Doo Ree lodged an adjudication application. A day later, on 20 December 2008, Taisei lodged its payment response.

24 Even though the court was cognisant of the fact that the contract had been terminated by the time PC25 was submitted, it held that the adjudication application was premature, given that clause 16.3 of the (terminated) contract required Doo Ree to give Taisei 21 days to respond to the payment claim (PC25) before Doo Ree lodged its adjudication application (*Taisei* at [17], [81]). Here, Doo Ree had lodged its adjudication application less than 21 days after submitting PC25.

25 However, both *AET* and *Taisei* did not detail the reasons for their findings, and were therefore of limited guidance to this court. Nonetheless, the results therein support the conclusion at [21] above that the contractual timelines must be adhered to for payment claims under SOPA for work done prior to termination *even if* the contract has been terminated.

PC10 was a SOPA payment claim, and was accordingly served too early

26 In this case, while PC10 was ostensibly a claim for works done until 30 August 2018 (*ie,* including work done after the termination date of 20 July 2018), the parties did not dispute that no work was in fact done after 10 July 2018, when the CSC was received. In fact, there was no work left to be done, as the works were already completed and the Contract was terminated shortly after. Hence, PC10 was essentially a claim for works done until 10 July 2018, prior to the termination of the Contract.

27 Having completed the works on 10 July 2018, the Sub-Contractor was statutorily entitled to a "progress payment", which it could claim for via a "payment claim" under SOPA (s 2 SOPA).

28 The Sub-Contractor did make such a "payment claim" for works done until 10 July 2018 via PC10, which it submitted for adjudication on 24

September 2018. Hence, PC10 was indubitably a SOPA, rather than a contractual, claim.

29 The Contract was still subsisting when the works were completed and the CSC was obtained on 10 July 2018. Therefore, the Sub-Contractor's statutory entitlement to further progress payment had arisen and accrued as of that date (*ie,* 10 July 2018). The SOPA payment timeline for that accrued entitlement to further progress payment under SOPA would accordingly have to follow that which was specified in s 10(2) SOPA read with clause 37 of the then subsisting Contract. Clause 37 of the Contract stipulated that the penultimate payment claim (being PC10) had to be served not earlier than three months after the receipt of the CSC (see [14] above). This timeline was not abided by when PC10 was served on 30 August 2018, less than three months after the CSC was received on 10 July 2018.

30 As a result, unless clause 37 can be shown to be void, PC10 was served too early, in breach of s 10(2)(*a*) SOPA, and the AD will be invalid.

Clause 37 is not voided by s 36(2) SOPA

31 In further arguments, the Sub-Contractor submitted that clause 37 was void as it contravenes s 36(2) SOPA,[15] which provides that:

> (2) The following provisions in any contract or agreement (whether in writing or not) shall be void:
>
> > (*a*) a provision under which the operation of this Act or any part thereof is, or is purported to be, *excluded, modified, restricted or in any way prejudiced*, or that has the effect of excluding, modifying, restricting or prejudicing *the operation of this Act* or any part thereof;

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15 Defendant's Reply to the Plaintiff's Submissions at para 14.

> (*b*) a provision that may reasonably be construed as an *attempt to deter a person from taking action* under this Act.
>
> [emphasis added]

32 A balance between competing considerations has to be struck in determining whether a contractual clause offends s 36(2) SOPA. As McDougall J observed in relation to New South Wales' equivalent of s 36(2) SOPA (Building and Construction Industry Security of Payment Act 1999 (NSW) s 34(2)) in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707 at [78]:

> … The Act seeks to strike some balance between competing considerations. On the one hand, there is the *protection of the entitlement of those who perform construction work*, or supply related goods or services, to receive progress payments. On the other, there is the *freedom of parties to contract* as they wish. … [I]n interpreting the "avoidance provisions", it is necessary to pay due regard to the objects of and policy underlying the Act. But, that having been said, I do not think that anything in the Act generally … requires the Court to strain to find that a provision of a contract offends the Act. [emphasis added]

33 In *John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited & Ors* [2012] QCA 150 ("*John Holland*"),[16] the main contractor applied to set aside an adjudicator's decision. One issue that arose was whether clauses 12.6(h) and 12.6(i) of the contract were void.

34 Clauses 12.6(h) provided that a payment claim submitted by the sub-contractor would be void if it did not comply with certain conditions, such as ensuring that the payment claim was submitted to the main contractor's project manager. If the payment claim was so void by virtue of clause 12.6(h), clause 12.6(i) then provided that the sub-contractor's payment claim would be deferred to the same day of the following month (*John Holland* at [6] and [8]).

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16 Defendant's Supplementary Bundle of Authorities at Tab A.

35 Fraser JA (White JA and Peter Lyons J agreeing) held that clause 12.6(i) was void under Queensland's equivalent of s 36(2) SOPA (Building and Construction Industry Payments Act 2004 (Qld) s 99(2)) as it deferred the sub-contractor's statutory entitlement to progress payment (*John Holland* at [21]).

36 Therefore, the Sub-Contractor submitted that, by deferring its penultimate payment claim by at least three months after the receipt of the CSC, clause 37 offended s 36(2) SOPA.

37 On one hand, the deferment of the Sub-Contractor's right to submit its penultimate payment claim by virtue of clause 37 appears to offend the object of SOPA, which entitles a contractor to payment upon completion of works (s 5 SOPA). This is to facilitate cash flow for parties in the construction industry (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112 (Cedric Foo Chee Keng, Minister of State for National Development)).

38 On the other hand, SOPA accords primacy to the parties' agreement with respect to payment claim timelines (see s 10(2) SOPA at [13] above). In accordance with this, the parties agreed, via clause 37, that the penultimate payment claim was to be submitted at least three months after the receipt of the CSC. This was so as to give the Main Contractor sufficient time to assess the total value of the Sub-Contractor's works upon completion. Being a re-measurement contract, a final measurement of the work done and certified was necessary for valuing all the works completed by the Sub-Contractor.[17]

39 Furthermore, as the penultimate payment claim included a claim for half of the retention monies, more time would also be needed by the Main Contractor

[17] Chua's Affidavit, para 34.

to investigate if there were any uncompleted works or defects to be highlighted to the Sub-Contractor, all of which would have to be subsequently made good by the Sub-Contractor. The three-month window following the issuance of the CSC would therefore be helpful in allowing sufficient time for completing any uncompleted works or making good any defects. If they remain uncompleted or unrectified, it would then allow the Main Contractor to raise a set-off in response to the penultimate payment claim.

40 Hence, clause 37 is unlike clause 12.6(i) in *John Holland*, which applied indiscriminately to defer *all* progress payment claims so long as they did not conform with the contractual conditions for the submission of payment claims; the contractual conditions included providing the payment claim in the appropriate format and to deliver them to the main contractor's project manager (*John Holland* at [6]). Patently, failure to comply with such contractual conditions would not cause a significant delay in the valuation of works such as to justify a one-month deferment of the sub-contractor's right to payment for works done. In contrast, the deferment of the payment of the penultimate payment claim by virtue of clause 37 was justified for the reasons stated in [38] and [39] above.

41 Given its limited scope (applying to the penultimate payment claim only) and that the deferment was justified, I find that clause 37 is not voided by s 36(2) SOPA.

Conclusion

42 In conclusion, notwithstanding the termination of the Contract, clause 37 (which is not voided by s 36(2) SOPA) was applicable and PC10,

having been served less than three months after the CSC was received, was served too early, in breach of s 10(2)(*a*) SOPA. I therefore set aside the AD.

43 I will hear the parties on costs, if not agreed.

Chan Seng Onn
Judge

Ong Li Min Magdalene and Quek Li Ting (WongPartnership LLP)
for the plaintiff;
Lim Kim Hong (Kim & Co)
for the defendant.
