IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 70

Originating Summons No 1412 of 2019

Between

CEQ

… *Applicant*

And

CER

… *Respondent*

GROUNDS OF DECISION

Building and Construction Law *- Building and Construction Industry Security of Payment Act* (*Cap 30B, 2006 Rev. Ed) – Setting aside adjudication determination – Payment claims - Whether a payment claim for works performed prior to termination of employment amounted to a patent error*

Building and Construction Law *– Standard form contracts – Singapore Institute of Architects standard form contracts – Architect's role - REDAS Design and Build Conditions of Main Contract – Employer's Representative's role – Whether the Architect's function in contracts governed by SIA conditions of sale is analogous to the Employer's Representative's role in contracts governed by REDAS Design and Build Conditions of Main Contract*

Building and Construction Law *- Building and Construction Industry Security of Payment Act* (*Cap 30B, 2006 Rev. Ed) – Setting aside adjudication determination – Jurisdiction of adjudicator - Whether adjudicator exceeded*

his jurisdiction in considering bond proceeds that were not explicitly stated in the payment claim.

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Lee Seiu Kin J:

Introduction

1 This was an application to set aside an adjudication determination made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)("the Act"). While the factual matrix itself is not complex, this case presents an interesting opportunity to examine the propositions set forth in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*Yau Lee*") and *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 ("*SH Design"*). The two main issues arising from this application centre around these two cases, which respectively discuss the validity of payment claims once an architect under an SIA contract is rendered *functus officio* and the jurisdiction of the adjudicator to consider bond monies. I dismissed the application. My reasons are as follows.

Facts

The parties

2 The plaintiff was the owner and developer of a residential flat development at [address redacted] ("the Project"). The defendant was the main contractor for the Project between 1 February 2016 and 2 March 2017.

Background to the dispute

3 The defendant was neither the first nor the last contractor to take on the Project. It took over from a previous contractor pursuant to a novation agreement dated 1 February 2016. This previous contractor had been engaged by the plaintiff pursuant to a contract dated 19 May 2015 ("the Contract")[1], which was novated to the defendant in its entirety.[2] Pursuant to cl 3.2 of the novation agreement, the defendant procured the issuance of a performance bond for $1,279,150.00 by [ABC] Pte Ltd (the "performance bond").[3]

4 The Contract had four important features which will prove crucial to the first issue (see [12]). Firstly, the Contract incorporated the REDAS Design and Build Conditions of Main Contract (3rd Edition, July 2013).[4] Secondly, the Contract set out a procedure for payment claims and for payment certificates to be issued in response.[5] However, this certification process was not overseen by

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1 Darma Satia Narjadin's Affidavit dated 11 November 2019 ("DSN 11NOV") p 7 para 24

2 DSN 11NOV p 7 para 27

3 DSN 11NOV pp 424-425 para 106

4 DSN 11NOV pp 28-29

5 DSN 11NOV pp115 – 117, clause 22.1; p 118 clause 22.2 and 22.3; p121 clause 24.1; p123 clause 24.3; p 124 clause 24.4.

any independent certifier. The only certifier was the employer's representative ("ER") who, as the title suggests, was the plaintiff's agent. Thirdly, the Contract had no specific procedure which brought the ER's powers of certification to an end. Fourthly, cl 30.3.1 of the Contract explicitly provided for payment even after termination of the main contractor's employment.[6]

5 The defendant's employment was terminated by the plaintiff on 2 March 2017. On the same day, the plaintiff called on the performance bond and engaged another contractor for the Project ("[DEF Contractor]").[7] [DEF Contractor] completed the project around August 2017.[8] By then, the professional parties involved in the project such as the ER, quantity surveyor, architect and professional engineers, had concluded their employment. In fact, they had wrapped up by May 2017.[9]

6 Little was heard from the defendant for almost two years. Then, from 7 March 2019 onwards, the defendant began serving payment claims on a regular, monthly basis. These claims are detailed below:[10]

Payment Claim	**Lodgement Date**	**Sums Claimed (S$)**	**Adjudication Result (if applicable)**
20	7 March 2019	2,674,773.66	-

6 DSN 11NOV p91 clause 30.3.1

7 DSN 11NOV p408 paras 41 - 43

8 DSN 11NOV p409 para 45

9 DSN 11NOV p408 para 44

10 DSN 11NOV pp409-410 paras 46 - 58

21	7 April 2019	2,777,348.22	SOP/AA 172/2019 Dismissed on jurisdictional grounds
22	7 May 2019	2,777,348.22	-
23	3 June 2019	3,110,061.83	-
24	5 July 2019	3,110,061.83	SOP/AA 246/2019 Application withdrawn
25	5 August 2019	3,262,740.23	SOP/AA 318/2019 Awarded, in part, to Defendant ($1,981,579.50)
26	5 September 2019	3,262,740.23	

7 Payment Claim 25 and the adjudication determination arising from SOP/AA 318/2019 are the subject of the present application.

Issues to be determined

8 Three issues were raised in this application, but only the first two warrant discussion. The last issue was simply a non-starter. For that issue, the plaintiff's contention was that the adjudicator had not given it an opportunity to explain itself.[11] Specifically, the plaintiff took umbrage at (a) the adjudicator's observation that [DEF Contractor] was hired on short notice with no competitive tenders[12] and (b) the adjudicator's findings that the cost of rectifying defects

11 Applicant's Written Submissions ("AWS") pp 23 – 31 paras 93 – 118

12 AWS p26 para 101a

would not have been as high as the plaintiff claimed in its adjudication response.[13] Having not had a "fair chance" to address these matters, the plaintiff submitted that the adjudication was a breach of natural justice and accordingly, invalid.[14]

9 This was a wild attempt at enlisting the court's aid in overturning an unfavourable adjudication determination. The position at law is clear – the courts will not review the merits of an adjudication determination: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2014] 1 SLR 797 at [48]. The plaintiff has had ample opportunity to justify the breakdown and cost of defect rectification in its adjudication response.[15] In fact, that is precisely what the plaintiff did. The only problem was that the plaintiff made a serious and ultimately costly assumption in its submissions – that the adjudicator would accept its valuation of $740,000.00 for the cost of rectification defects without further scrutiny. The associated assertions that the adjudicator's methodology had been "entirely wrong"[16], that the adjudicator had failed to properly evaluate the cost of backcharges[17] and that the adjudicator had made "arithmetical errors" or "baseless calculations"[18] were in truth, attacks on the adjudicator's decision rather than his decision-making process. These allegations ought to have been taken up in an adjudication review application under s 18 of the Act. They are not valid grounds for judicial review of the adjudicator's decision.

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13 AWS p26 para 106b

14 AWS p26 paras 102 – 103 and p 31 para 117

15 DSN 11NOV p 394 paras 258 – 262

16 AWS p27 para 104

17 AWS p27 para 106

18 AWS p 27 para 105

10 There could have been an argument that the adjudicator's decision was tainted by extraneous (and therefore irrelevant) considerations such as concerns about the *bona fides* of [DEF Contractor]'s contract with the plaintiff. But I saw nothing necessarily wrong with such an approach. Naturally, any adjudicator is vigilant about the possibility of fraudulent or sham contracts. The plaintiff's complaint was that it did not have a chance to address the adjudicator's doubts before these were memorialized in an adjudication determination. But an adjudicator is not under any obligation to test his reasoning with the claimants/respondents before him. He is not obliged to inform the parties of his thoughts during the adjudication conference and certainly not expected to zealously search for arguments that would persuade him to adopt a different position. His duties extend to reason giving, and that was amply done in the present case. The plaintiff's real complaint therefore, was with the adjudicator's *reasoning*. Again, these went to the merits of the adjudication determination and were therefore untenable in an application to set aside an adjudication determination.

11 This left me with the two main issues for this application:

(a) Whether a payment claim for works performed prior to termination of employment amounted to a patent error. ("The Termination Issue"); and

(b) Whether the adjudicator acted in excess of jurisdiction in considering the bond proceeds in the adjudication. ("The Bond Issue").

The parties' cases and the adjudication determination

The Termination Issue

12 The adjudicator determined, firstly, that the defendant was entitled to be paid for works done up to the date of termination. In support of this, he cited s 5 of the Act which expressly provides that "[a]ny person who has carried out any construction work, or supplied any goods or service, under a contract is entitled to a [progress payment]". In the absence of any statutory or contractual bars, the fact that these payment claims were served two years after employment termination was inconsequential.[19]

13 He then considered the Court of Appeal's decision in *Yau Lee*. As he understood it, *Yau Lee* stood for the proposition that under the SIA Form of Contract, the power of the architect as an independent certifier comes to an end upon the issuance of his Final Certificate. Accordingly, any payment claim made after the issuance of his Final Certificate was invalid since the certifying authority (the architect) was *functus officio.* He concluded that *Yau Lee* did not apply to the present facts.

14 His reasoning was fourfold. First, the Contract was a REDAS Form of Contract, not an SIA one.[20] Second, there was no provision under the REDAS Form of Contract for the appointment of any *independent* certifier (unlike the architect's appointment under an SIA Form of Contract).[21] Third, there was no express provision under a REDAS Form of Contract that brings the relevant certifier's powers of certification to an end.[22] Fourth, there was an express

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19 DSN 11NOV p 427 para 114

20 DSN 11NOV p 428 para 116

21 DSN 11NOV p 428 para 117

22 DSN 11NOV p 430 para 121

clause (cl 30.3.1) in the Contract which entitled the defendant to be paid even after its employment had been terminated.[23]

15 To this, the plaintiff submitted in the present proceedings that *Yau Lee* was in fact, applicable. It pointed out that the REDAS Form of Contract envisions a certifier (the ER) certifying payment claims before any payment is given. The plaintiff claimed that the ER's certification was a condition precedent to the contractor's right to receive payment, a role that could be likened to the architect's in an SIA Form of Contract.[24] Though there was no explicit provision bringing the ER's powers of certification to an end, the plaintiff claimed that when the ER's employment was terminated, his powers of certification naturally came to an end. Any payment claim after that point would accordingly, be invalid since the certifying authority was now *functus officio*.

16 The defendant, in reply, began by addressing the larger issue of whether a payment claim can be made for works prior to termination. It argued that such payment claims are certainly valid, and cited two authorities in support of that proposition. First, parliamentary debates suggested that references to "contracts" under the Act have *always* included references to construction contracts that have been terminated.[25] Accordingly, payment claims for works done prior to contract termination have always been valid. Though there was no explicit statutory language to that effect, the debates suggested that parliament had always intended that to be the case. Indeed, this has culminated in the most recent amendments to the Act which have since made that position explicit in

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23 DSN 11NOV p 430 para 122

24 AWS p 21 para 84

25 Respondent's Written Submissions ("RWS") p 9 paras 32- 24

unambiguous statutory language.[26] This, the defendant argued, was the logical and uncontroversial crystallization of a long-held parliamentary intent. Second, the defendant pointed to existing case authorities that "speak with one voice in showing that a contractor who has performed 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.": *Stargood Construction Pte Ltd v Shimizu Corp* [2019] SGHC 261 at [40] ("*Stargood Construction*").

17 The defendant then addressed the plaintiff's submissions about *Yau Lee*'s applicability to the present matter. The defendant's arguments were effectively the same as the adjudicator's (see [14] above), save for the additional argument that the issue in the present case was entirely different from that in *Yau Lee*. *Yau Lee* was about payment claims being served after the architect had issued a final certificate and thereby been made *functus officio*; the present matter was about payment claims being served after termination of the contract of employment.[27]

The Bond Issue

18 The adjudicator determined that he had jurisdiction to take into account monies received under a call on a performance bond. To do otherwise would result in the plaintiff being unjustly enriched.[28]

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26 RWS p 9 paras 31 -32

27 RWS p 20 para 69

28 DSN 11NOV p 451 para 194

19 The plaintiff's contention was that an adjudicator can only consider matters which were explicitly stated in the payment claim. The performance bond was not explicitly stated in Payment Claim 26. Instead, the defendant had simply taken it into account when calculating the amount that it had been paid to date. Although it is clear from the amounts set out in the payment claim that the bond proceeds were set off against the payments received by the defendant, the plaintiff argued that the defendant should have explicitly stated this fact in its payment claim – that is, the defendant should have mentioned it was taking the bond monies into account when it was calculating the amount that it had been paid to date. The plaintiff suggested that this legal requirement was found in *SH Design*.[29] As such, the adjudicator had no jurisdiction to consider something that was not explicitly stated in the payment claim.

20 The defendant made no submissions about this legal requirement supposedly laid down by *SH Design* and simply contended that the adjudicator was within his jurisdiction to take the bond monies into account since they were included (albeit obliquely) in the payment claim.[30]

Issue 1: The Termination Issue

21 The grounds on which an applicant can succeed in setting aside an adjudication determination are not spelt out in the Act but are instead found in the common law: *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management"*) at [74], citing *Hauslab Design & Build Pte Ltd v Vinod Kumar Ramgopal Didwania* [2017] 3 SLR 103 at [53]. The court is exercising its powers of judicial review over a tribunal established

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29 AWS p 21 para [86] – [87]

30 RWS p 21 para 76 - 77

under the Act. The common thread running through these various grounds is the "breach of a provision under the Act which is so important that it is the legislative purpose that an act done in breach of that provision should be invalid": *Comfort Management* at [75]. These are labelled mandatory provisions and identifying them is where the inquiry naturally begins.

22 Section 17(3) of the Act is one such mandatory provision (see *Comfort Management* at [77]). It is also the relevant provision for the Termination Issue. Where an adjudicator makes an adjudication determination in favour of a claimant despite patent errors in the payment claim, the court will deem that the adjudicator had failed to recognise those errors and thereby had failed to comply with s 17(3) of the Act: *Comfort Management* at [79]–[84]. The question therefore, turns to: (a) whether a payment claim for works done prior to termination is invalid; and (b) whether a payment claim submitted after the termination of the ER's employment is invalid.

23 The authorities are unanimous in their support for the proposition that payment claims made for work done prior to termination of employment are perfectly valid. As a matter of policy, the statutory entitlement to payment must survive termination. The Act was designed to protect and facilitate cash flow in the building and construction industry. Such legislative intent would be hobbled if employers could simply terminate their contracts and escape payment obligations under the Act: *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364 at [17]-[18] and *Stargood Construction* at [21]. Indeed, a contractor's cash flow concerns do not end upon termination of its employment. As Woo Bih Li J observed in *Choi Peng Kim and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 at [38], a contractor may have multiple concurrent projects and the liquidity injections from one project may very well go towards satisfying expenses for another.

Termination of one contract does not mean termination of the need for cash flow altogether. The Act upholds that commercial need and the case law has accordingly, followed suit.

24 I turn to consider *Yau Lee*, which stands for two propositions. First, payment claims under the SIA Form of Contract are invalid if they are submitted after the final certificate has been issued by the architect: *Yau Lee* at [39]. Second, these sort of payment claims constitute a patent error, and are therefore grounds for an adjudicator's determination to be set aside for breach of s 17(3) of the Act: *Yau Lee* at [71] – [72].

25 In my view, *Yau Lee* is distinguishable from the present case. Firstly, this matter involved a REDAS Form of Contract while *Yau Lee* concerned an SIA Form of Contract. This distinction is crucial (see below at [28]). Secondly, the ER's role in a REDAS Form of Contract is markedly different from the architect's role in an SIA Form of Contract. The architect in an SIA Form of Contract "plays a fundamental role in the entire construction process" *Yau Lee* at [32]. He is the administrator of the construction contract (*Yau Lee* at [33]) and "plays an integral role in the payment certification process" (*Yau Lee* at [34]). Indeed, he is the "quasi-adjudicator of both the contractor's right to receive payment for work done as well as the employer's right to withhold payment on account of any cross-claim": *Yau Lee* at [32] citing *Chin Ivan v HP Construction and Engineering* [2015] 3 SLR 124 at [13]. The ER on the other hand, is neither an independent certifier nor a referee between the parties in any meaningful sense. He is the employer's representative and thereby an agent of the employer. His certifications are not an *objective assessment* of works done and monies due. They are instead, mere signals of the employer's assent to the payment claim, as submitted by the contractor. This makes them a categorically

different kind of certification from that of the architect's in an SIA Form of Contract.

26 Thirdly, there are explicit provisions which mark the end of the architect's duties under the contract and render him *functus officio*. The issuance of the Final Certificate (as provided for in cl 31(12)(a) of the SIA Conditions of Contract) brings his certification powers to an end (cl 37(3)(i) of the SIA Conditions of Contract). There is simply no analogous provision or series of events that renders the ER *functus officio*.

27 The plaintiff was of course, keenly aware that the present matter was not on all fours with *Yau Lee*. It sought therefore, to apply *Yau Lee* by analogy. Taking its case at its highest, *Yau Lee* could be said to stand for a broader proposition. Namely, that in any contract where a certificate functions as a condition precedent to the contractor's right to receive payment, payment claims would be invalid if made after the certifier was rendered *functus officio*. I could not accept that *Yau Lee* stood for such a broad proposition. For one, the Court of Appeal spent a considerable part of its judgment examining the structure, demands and procedure of the SIA Form of Contract (see *Yau Lee* at [32] – [38]). This contextualised and demarcated the scope of its decision to specifically contracts drafted pursuant to the SIA Form of Contract.

28 Moreover, such a generous reading of *Yau Lee* takes an excessively simplistic view of certificates as "condition precedents to payment". In the SIA Form of Contract context, certificates which activate a contractor's right to receive payment are more than just tickets for cash. They are the product of independent assessment and proper evaluation of the works done and monies owing between the parties. They are instruments of governance in a carefully constructed standard form which envisions that "all areas of possible financial

controversy, except most cases of breach of contract by the Employer and all terminations of the Contract by either party" are to be regulated by the certificates of the Architect." (*Guidance notes on Articles and Conditions of Building Contract* (Singapore Institute of Architects, 3rd Ed, 2011) at p 1). The ER in a REDAS Form of Contract does nothing of this sort. The ER's certificates are no more than steps in a payment procedure, and hardly carry the same weight as a certificate issued by an architect who plays an "*integral role* […] in the *administration* of the SIA Form of Contact": *Yau Lee* at [39] (emphasis added). And so naturally, once the architect becomes *functus officio*, the entire administration and payment process in an SIA Form of Contract must come to an end. The same cannot necessarily be said for an ER operating under the auspices of the REDAS Form of Contract. To simply argue that both the architect's and ER's certificates were "condition precedents" to payment and thereby analogous in some manner, is to forget the unique obligations of each role under its respective contractual scheme.

Issue 2: The Bond Issue

29 The starting point was s 17(3)(c) of the Act:

> **17.**—(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:
>
> > (*c*) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;

30 As stated earlier, the plaintiff's complaint was that the payment claim submitted by the defendant should have *explicitly* made reference to the bond monies which were considered when calculating sums that had previously been paid to the defendant. On a plain reading of the provision, I could not find any support for that supposed legal requirement. If an item is included in the

payment claim, then the adjudicator shall have regard to it. Here, there was no dispute between the parties that the bond monies were indeed included in the computation of the amount due in the payment claim. The question turns to whether *SH Design* established such a legal requirement – namely that for an item to be considered as part of the payment claim, it must always be *explicitly* particularized and claimed. In support, the plaintiff quoted *SH Design* at [57]:

> Finally, the Adjudicator had the jurisdiction to account for the Bond Proceeds because these were included in the Payment Response, notwithstanding that these were not *stated* in the Payment Claim.
>
> [emphasis added]

31 This was a pedantically literal interpretation of the judgment. Tan Siong Thye J was not introducing a new legal requirement in that paragraph of *SH Design*. Paragraph [57] was merely a summary of the three sub-issues concerning the adjudicator's jurisdiction. Tan J's actual findings about an adjudicator's obligation to consider bond monies were found in paragraphs [46] to [50]. In those paragraphs, there was no discussion of how *explicitly* a claimant had to state an item in its payment claim for it to be considered by the adjudicator. The real question there was simply whether "an adjudicator's jurisdiction is framed by *both* the payment claim and payment response" (emphasis in original): *SH Design* at [48]. The closest statement that could have supported the plaintiff's case was found in paragraph [48]:

> […] given that the applicant had not merely omitted the retention sum claim from its payment claim but went further to *expressly* exclude it from its payment claim[,] [t]his amounted to an unsolicited admissions from the applicant that the retention sum was not due
>
> [emphasis added]

32 But even this did not bring the plaintiff's arguments much further. If

something were *expressly excluded* from a payment response or payment claim, the adjudicator would naturally be unable to consider it under s 17(3)(c) of the Act. But it does not follow that there is a corollary requirement to explicitly describe the component parts of an item in a payment claim, especially if it had already been explained in the accompanying adjudication application.

33 Indeed, the provision allows adjudicators to have regard to not just the adjudication application itself (s 17(3)(c) of the Act, as reproduced above), but also the "submissions and responses of the parties to the adjudication" (s 17(3)(g) of the Act) and "any other matter that the adjudicator reasonably considers to be relevant to the adjudication" (s 17(3)(h) of the Act). The bond monies could easily fall into any of these categories and may therefore be considered by the adjudicator. The defendant's adjudication application for example, clearly made mention of and explained how the "Amount previously paid by the [plaintiff] to the [defendant]" was derived.[31] The plaintiff itself acknowledged this in its own adjudication response.[32] It therefore does not lie in the mouth of the plaintiff to claim that it "could only [have] rel[ied] on guesswork"[33] in figuring out how the sums previously paid were calculated. Both parties clearly knew that the bond monies had been considered when calculating the amounts previously paid. The plaintiff was not "deprived […] from addressing the [defendant's] claim"[34] at all. In fact, it made ample rebuttals on that subject in its adjudication response.[35] Moreover, the bond monies were

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31 DSN 11NOV page 329 para 179

32 DSN 11NOV

33 AWS p 22 para 89

34 AWS p 22 para 89

35 DSN 11NOV pp 396 – 399, paras 282 - 301

eminently relevant to the adjudication since, as the adjudicator rightly pointed out, the failure to account for them posed a serious risk of unjust enrichment. On that basis, I concluded that the adjudicator was well within his jurisdiction to consider the bond monies.

Conclusion

34 For the reasons above, I dismissed the appeal and awarded costs to the defendant.

Lee Seiu Kin
Judge

Ng Hweelon and Tay Ming Xun (Veritas Law Corporation) for the plaintiff;
Chong Chi Chuin Christopher and Josh Samuel Tan Wensu (Drew & Napier LLC) for the defendant.