

## Client Alert

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## Post-termination and Repeat Claims under the Building and Construction Industry Security of Payment Act ("**SOPA**")

In the event of a contractual termination, there may arise situations where a contractor's tools, equipment or materials are withheld at site and used by the employer or replacement contractor even after the termination of the contract. This may be expressly provided for under the contract, and will likely be for the purpose of reducing any delay and cost to the employer of having to source for replacement tools, equipment or materials. However, the issue of whether a contractor's claims for such post-termination use could fall within the adjudication scheme under SOPA remained undecided in the Singapore courts till now.

In *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] SGHC 85, the Singapore High Court considers this issue, amongst other issues surrounding repeat claims and objections to an adjudicator's jurisdiction.

### 1. Background

Asplenium Land Pte Ltd (the "**Plaintiff**") entered into a contract as the employer with CKR Contract Services Pte Ltd (the "**Defendant**") as the contractor for the construction of a residential condominium development. On 24 October 2014, the Plaintiff terminated the contract. Subsequently, the Defendant commenced arbitration proceedings on 10 November 2014.

#### Payment Claim 21

On 22 December 2014, the Defendant served Payment Claim 21 on the Plaintiff, which proceeded for SOPA adjudication between 6 to 26 March 2015. The Plaintiff applied for a review of the adjudicator's determination on 2 April 2015, which resulted in a reduced adjudicated amount.

#### Payment Claim 22

On 7 October 2015, the Defendant served Payment Claim 22 on the Plaintiff. On 30 October 2015, the Plaintiff provided their Payment Response 22. On 12 November 2015, the Defendant lodged an adjudication application in respect of Payment Claim 22.

#### High Court proceeding

On 19 November 2015, the Plaintiff filed an originating summons seeking, amongst other reliefs, the withdrawal of the adjudication application in respect of Payment Claim 22 and a declaration that Payment Claim 22 is invalid.

The Plaintiff argued that the bulk of the claims in Payment Claim 22 comprised repeat claims that were prohibited under the SOPA adjudication scheme, and also that claims for the period after the termination of the contract could not come under SOPA's adjudication scheme.

The adjudicator decided not to proceed with the adjudication hearing in respect of Payment Claim 22 after being informed of the hearing of the High Court proceeding.

## 2. Issues before the High Court

The High Court identified the two main issues that were in contention:

- (a) whether Payment Claim 22 contained prohibited repeat claims; and
- (b) whether the post-termination claims were prohibited under SOPA.

## 3. The High Court's Decision

### (a) Whether Payment Claim 22 contained prohibited repeat claims

#### **Prohibited repeat claims**

The court started by examining and comparing Payment Claims 21 and 22, and concluded that the latter was for the identical items of work, goods and services claimed in former, save for some immaterial differences in the Defendant's valuations and the inclusion of the post-termination claims.

In that regard, the court restated the law that for the purposes of SOPA, a payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication (see *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("**Terence Lee**") and *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("**Admin Construction**"). The court also clearly stated that a repeat claim was prohibited only if it had previously been adjudicated on the merits.

Therefore, since all the claims in Payment Claim 22 (apart from the post-termination claims) had been made in Payment Claim 21 and subsequently adjudicated on their merits, the court concluded that such claims were all prohibited repeat claims.

There were two practical and related points that also arose from the court's decision.

#### **(i) Relevance of the payment response**

An interesting feature of this case was that the Defendant argued that because the Plaintiff had changed their valuation of the works in Payment Claim 22 as compared to Payment Claim 21, it rendered Payment Claim 22 a different claim and therefore not a prohibited repeat claim.

The court disagreed, and held that the Plaintiff's Payment Response 22 reserved the Plaintiff's primary position by stating clearly that Payment Claim 22 was a repeat claim. All the revaluations by the Plaintiff were made "without prejudice" to this primary position.

Moreover, the court held that it was understandable that the Plaintiff had to carry out the revaluations because of the nature of the SOPA scheme, which allowed for "interim" payments which may be revisited in court proceedings or arbitration.

## **(ii) Jurisdictional issues a matter for the court, not the adjudicator**

The court held that the invalidity of such repeat claims was a matter that went to the jurisdiction of the adjudicator, and should be raised immediately with the court and not before the adjudicator. (*Terence Lee*)

The court also noted that although the adjudicator was legally wrong in not following *Terence Lee* and should have proceeded with the adjudication on the non-jurisdiction issues, in a practical sense he was proved right not to incur all the costs of the adjudication just to have the determination set aside by the court finally.

### **(b) Whether the post-termination claims were prohibited under SOPA**

Apart from the repeat claims, the Defendant sought to bring post-termination claims comprising the rental and value of materials/tools/equipment. However, the Plaintiff relied on Clause 32(8)(b) of the Conditions of Contract that entitles them to "make use of all temporary buildings, plant, tools, equipment, goods or unfixed materials upon the Site, all of which shall vest in and be deemed to be the property of the Employer".

The court held that post-termination claims could not be the subject of a payment claim as they did not fall under the contract, and consequently that the adjudicator had no jurisdiction to adjudicate them. Considering the Australian case of *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269, the materials/tools/equipment were taken over, rather than their being supplied by the contractor under an agreement or another arrangement.

On a proper construction of the contract, the court also found that the parties had agreed that the relief available to the Defendant upon a wrongful termination of the contract by the Plaintiff shall be by way of compensation in the nature of damages.

## **4. Conclusion**

### **Prohibited repeat claims**

After the initial years of uncertainty, the position on repeat claims cannot be clearer: for the purposes of SOPA, a payment claim or any part thereof will be prohibited only if it had previously been adjudicated on the merits.

However, even for such prohibited repeat claims, potential respondents should be careful to ensure that their payment responses do not expose them to a further adjudication application on the basis that their valuations have changed for previously adjudicated items. There may be such changes in valuations over the course of time (especially if there are pending arbitration proceedings) and a potential respondent should carefully reserve its rights in respect of such changes.

### **To adjudicate or not to adjudicate**

More for adjudicators, where a jurisdictional challenge is validly submitted, the interests of expedition, avoiding delay and saving costs are weighed in the scales. In deciding whether or not to proceed with the adjudication on non-jurisdictional issues, an adjudicator may be faced with the unsatisfactory state of affairs of the adjudication determination having been issued before the jurisdictional issue being decided in the court proceedings. This is due to the nature of the SOPA scheme and its short timelines.

This involves a balancing exercise involving on the one hand, the prevention of dilatory tactics in the guise of jurisdictional challenges and the subversion of the intent of SOPA; and on the other, the prevention of wasted costs of the adjudication if the determination were to be set aside by the court finally on the other.

### **Post-termination claims are prohibited under SOPA**

The decision in this case has helpfully established the law that post-termination claims could not be the subject of a payment claim as they did not fall under the contract, and consequently that the adjudicator had no jurisdiction to adjudicate them.

In the context of materials/tools/equipment being withheld upon the termination of the contract, such materials/tools/equipment will likely be considered to have been taken over by the employer rather than being supplied by the contractor under a separate agreement. This is especially so if the contract has made provisions for such eventualities.