

CASE UPDATE



Singapore High Court clarifies scope of prohibition of “repeat claims” under the SOPA.

23 May 2016

Introduction

1. In *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] SGHC 85 (“**Asplenium Land**”), the Singapore High Court decided that a repeat claim that was prohibited under the Building and Construction Industry Security of Payment Act (“**SOPA**”) was a payment claim which had previously been brought to adjudication and had been determined on its merits.
2. The High Court also gave its views on how adjudicators should manage jurisdictional challenges, the operation of Section 17(5) of the SOPA, and whether claims arising out of tools and equipment withheld at the site after the termination of the contract can form the subject of a valid payment claim.

Facts

3. In this case, the Plaintiff, Asplenium Land Pte Ltd, was the employer for the construction of a residential condominium development. The Defendant, CKR Contract Services Pte Ltd, was the contractor engaged for the project.
4. The Defendant’s contract was terminated before the project was completed. The Defendant then served Payment Claim No. 21 which proceeded for adjudication. The said adjudication eventually resulted in an adjudicated amount payable to the Defendant.
5. Subsequently, the Defendant served Payment Claim No. 22 and proceeded for adjudication again.
6. Other than some immaterial differences in the Defendant’s valuations and the inclusion of certain post termination claims, the Defendant’s Payment Claim No. 22 was identical to its Payment Claim No. 21.
7. While adjudication proceedings were ongoing, the Plaintiff applied to the High Court for (among other things) a declaration that Payment Claim No. 22 is invalid and that the adjudication proceedings be withdrawn by the Defendant. The adjudicator stayed the adjudication proceedings pending the outcome of the Plaintiff’s court application.

For any queries relating to this article, please contact:

Christopher Tan
christophertan@leenlee.com.sg

Tan Jin Yong
tanjinyong@leenlee.com.sg

Authors:
Christopher Tan
Tan Jin Yong

Lee & Lee
50 Raffles Place, #06-00
Singapore Land Tower,
Singapore 048623
T : (65) 6220 0666

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A repeat claim that was prohibited under the SOPA was a payment claim which had previously been brought to adjudication and had been determined on its merits.

8. The High Court examined the Court of Appeal's decision in *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 ("**Chua Say Eng**"), and the High Court's earlier decisions in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 and *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157.
9. The High Court then concluded that a claimant may "roll-up" any payment claim which was not paid or paid in full.
10. However, when the claims had previously been brought to adjudication and had been determined on its merits, such claims are prohibited under the SOPA. **An adjudication on the merits includes a situation where a claim was dismissed for insufficiency or want of evidence.**
11. The Court also affirmed that the effect of such a prohibited repeat claim was that it was invalid and should be set aside.

Where a jurisdictional challenge is validly submitted to the Court, the adjudicator may stay the adjudication pending the outcome of the Court's decision.

12. Despite the Court of Appeal's decision in *Chua Say Eng*, many adjudicators have continued to address jurisdictional challenges as part of their functions under Section 16(2)(a) of the SOPA to determine whether an adjudication application complies with Section 13(3)(a), (b) and (c).
13. On the facts, the adjudicator decided to hold in abeyance the adjudication proceedings pending the High Court's decision. The High Court appears to agree with the adjudicator's practical decision as it saves costs and avoid delays for the parties.
14. However, under Section 17(1)(b) of the SOPA, the parties' consent is required for an extension of time for an adjudicator to make a determination. This means that it is not always the case that the adjudicator can hold in abeyance the adjudication proceedings. Unless the parties' consent is obtained, the adjudicator may have to proceed with the adjudication without considering the jurisdictional challenges that are before the Court.

Unless the facts surrounding the premise of the valuation have changed, adjudicators are bound by the valuation of previous adjudicators.

15. As part of its arguments, the Defendant argued that the adjudicator for Payment Claim No. 22 need not be bound by the determination of the value of work by the adjudicator for Payment Claim No. 21. This is allegedly because the Plaintiff had changed their valuation of the works claimed by the Defendant and therefore "the facts surrounding the premise of the adjudicator's decision" has changed.
16. Section 17(5) of the SOPA provides that the adjudicator of any subsequent adjudication application shall give the same valuation of work done as that previously determined. The exception is if the subsequent adjudicator is satisfied that the value of the work has changed since the previous determination.

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17. The High Court clarified that the exception to the rule - that subsequent adjudicators are bound by the determination of the value of work by a previous adjudicator – applied only “where the facts surrounding the premise of the valuation has changed”. This include situations where there were variations in or additions to the construction work, or the goods or services supplied. The exception must be “specifically raised” and required “compelling evidence”.
18. On the facts, the Defendant failed to show that the facts surrounding the premise of the valuation in Payment Claim No. 21 had changed. Payment Claim No. 22 contained the same claims which had been previously valued and adjudicated on their merits. The adjudicator for Payment Claim No. 22 ought to be bound by the valuation made by the previous adjudicator for Payment Claim No. 21.

Claims arising out of tools and equipment withheld at the site after the termination of the contract cannot form the subject of a valid payment claim.

19. The Plaintiff relied on Clause 32(8)(b) of the Singapore Institute of Architects Articles and Conditions of Building Contract (9th ed, Reprint, August 2011), which forms part of the contract between the parties, to make use of all temporary buildings, plant, tools, equipment, goods or unfixed materials on the site. The Defendant disputed the Plaintiff’s conduct and sought to claim for this.
20. The High Court held that tools and equipment withheld at the site after the termination of the contract were not supplied “under a contract” pursuant to Section 5 of the SOPA. The claims arising out of this cannot therefore form the subject of a payment claim and the adjudicator has no jurisdiction to adjudicate them.
21. In the event that the Defendant wishes to challenge the Plaintiff’s withholding of the tools and equipment, it was for the Defendant to claim against the Plaintiff for damages at general law.

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The following partners lead our departments:

Kwa Kim Li
Managing Partner
kwakimli@leenlee.com.sg

Quek Mong Hua
Litigation & Dispute Resolution
quekmonghua@leenlee.com.sg

Owyong Thian Soo
Real Estate
owyongthiansoo@leenlee.com.sg

Tan Tee Jim, S.C.
Intellectual Property
tanteejim@leenlee.com.sg

Adrian Chan
Corporate
adrianchan@leenlee.com.sg

Louise Tan
Banking
louisetan@leenlee.com.sg