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# *ALTERAM PARTEM* NEVER LEFT *AUDI*, AT LEAST FOR THRESHOLD MATTERS[1]

**[2020] SAL Prac 2**

*Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 was widely understood to have decided that any jurisdictional objection(s) that could have been raised in the payment response stage must be included in a payment response, failing which the objection(s) cannot be entertained by the adjudicator. The Singapore Court of Appeal has since clarified this understanding in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189.

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## I. Introduction

1 It was generally thought[2] that in the context of adjudications carried out under the Building and Construction Industry Security of Payment Act[3] ("SOP Act"), the duty to raise all matters including jurisdictional issues in a payment response was unrestricted, so the respondent would not be heard on these matters by the adjudicator if they were not set out in a payment response.

1 *Audi alteram partem*: "Let the other side be heard as well."
2 See, *eg*, Tan Tian Luh & Tan Xian Ying, "The Respondent in Adjudication Proceedings – The Unwanted Child of Administrative Law" [2018] SAL Prac 5.
3 Cap 30B, 2006 Rev Ed.

2 This was a result of the Singapore Court of Appeal's interpretation of s 15(3) of the SOP Act in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*[4] ("*Audi*"). As such, *Audi*[5] has been applied to mean that a respondent is taken to have waived its right to *any* jurisdictional objection with respect to a payment claim.[6] It is the authors' experience as counsel in adjudication applications that applicants and tribunals have routinely cited *Audi* for this proposition.

3 In the recent decision of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd*[7] ("*FES*"), the Court of Appeal clarified (among other points) that the decision in *Audi* did not have such a far-reaching effect.

## II. The facts of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd*

4 The facts of *FES* are important. The contract between the parties in *FES* was the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract) (7th Ed, April 2005) (the "SIA Articles" and "SIA Conditions", respectively; and collectively, the "SIA Form of Contract").[8]

5 In *FES*, the final phase of the project works was completed on 6 May 2014.[9] Under cl 31(11) of the SIA Conditions, the contractor was to submit the final claim to the architect of the project before the end of maintenance period.[10]

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4 [2018] 1 SLR 317.

5 See *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [2] on how *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 has been cited in more than ten decisions by the High Court and Court of Appeal, of which five are related to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

6 See, *eg*, *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHC 261 at [36].

7 [2019] 2 SLR 189.

8 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [2].

9 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [7].

10 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [7].

6 On 4 August 2017, the architect issued the maintenance certificate.[11]

7 On 5 September 2017, the architect issued the final certificate.[12]

8 On 24 November 2017, the respondent, Yau Lee Construction (Singapore) Pte Ltd ("Yau Lee"), served payment claim No 75[13] ("PC 75"). The architect responded by issuing a further letter stating that there will be no further progress payments after the issuance of the final certificate.[14]

9 On 27 December 2017, Yau Lee lodged SOP/AA 406/2017 in relation to PC 75.[15]

10 The adjudicator determined in favour of Yau Lee in respect of SOP/AA 406/2017.[16] In particular, the adjudicator determined that he was "prohibited" from considering an argument that PC 75 was invalid because it was submitted after the final certificate, as this objection was not raised in a payment response.[17]

## III. The key arguments on appeal

11 The key arguments by the appellant, Far East Square Pte Ltd ("Far East"), were that the SIA Conditions did not allow Yau Lee to submit further payment claims after the final payment claim and/or after the final certificate had been issued by the architect.[18]

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11 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [8].
12 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [9].
13 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [11].
14 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [11].
15 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [12].
16 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [13].
17 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [13].
18 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [20]–[21].

12 The Court of Appeal made the following findings:

(a) Once the architect in the SIA Form of Contract issues the final certificate, the payment certification process comes to an end.[19]

(b) An important consequence of the issuance of the final certificate is that the architect's duties under the contract are concluded and the architect becomes *functus officio*.[20]

13 In addition, the Court of Appeal made the following important observations relating to the SOP Act regime:[21]

> 30 ... the SOPA is merely a legislative framework to *expedite* the process by which a contractor may receive payment through the payment certification/adjudication process in lieu of commencing arbitral or legal proceedings. It does not, in and of itself, grant the contractor a *right to be paid*. The right of a contractor to be paid ultimately stems from the construction contract, pursuant to which construction works are carried out.
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> 31 ... SOPA was not meant to alter the substantive rights of the parties under the contract, neither was it intended to give rise to a payment regime independent of the contract. In order to claim for progress payments under the SOPA, it is imperative for the contractor to first establish that he is entitled to such payment *under the contract*.
>
> [emphasis in original]

14 *FES* makes clear that a payment claim which falls outside the ambit of the SOP Act can be set aside by the adjudicator independent of any payment response.[22] This would include situations where there is no contract between the parties,[23] as well

19 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [36].

20 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [38].

21 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30]–[31].

22 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [68].

23 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [65]. The authors' views supporting this legal position can generally be found in Tan Tian Luh & Tan Xian Ying, "The Respondent in Adjudication Proceedings – The Unwanted Child of Administrative Law" [2018] SAL Prac 5.

as situations where the payment claim in question does not entitle the contractor to make progress claims under the SOP Act.[24]

15 It is the latter point that is the focus of this article, as it merits closer attention and a respondent is *more likely* to raise such an argument.

## IV. *CHL Construction Pte Ltd v Yangguang Group Pte Ltd*

16 In *FES*, the Court of Appeal held that the SOP Act "does not, in and of itself, grant the contractor a *right to be paid*. The right of a contractor to be paid ultimately stems from the construction contract" [emphasis in original].[25] This finding by the Court of Appeal is based on the definition of "progress payment" as set out in the SOP Act.[26] This finding is not controversial and is consistent with the wording of the statute.

17 Given this clear pronouncement by the Court of Appeal, the recent High Court decision of *CHL Construction Pte Ltd v Yangguang Group Pte Ltd*[27] ("*CHL v YG*") merits reconsideration.

### *A. The facts of the case*

18 In brief, the facts of *CHL v YG* are set out below:[28]

(a) The plaintiff, CHL Construction Pte Ltd ("CHL"), engaged the defendant, Yangguang Group Pte Ltd ("YG") via a subcontract dated 30 March 2017.

(b) On 9 July 2018, YG completed the works and a certificate of substantial completion was issued on 10 July 2018.

(c) On 20 July 2018, the subcontract was terminated.

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24 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [58].
25 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30].
26 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30].
27 [2019] 4 SLR 1382.
28 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [4]–[8].

(d) On 30 August 2018, YG served payment claim 10 ("PC10") on CHL, claiming for works done until 30 August 2018 and for release of half of the retention moneys.

(e) On 24 September 2018, YG submitted an adjudication application.

19 The key issue before the High Court in *CHL v YG* was identified as such:[29]

> 14 Clause 37 of the Contract ('clause 37') stipulated that the Subcontractor 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]. 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.
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> 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.
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> [emphasis in original]

## *B. What the adjudicator had decided*

20 In *CHL v YG*, the adjudicator decided thus:[30]

> 16 … given the termination of the Contract, the parties no longer had to perform their remaining obligations therein. However, all accrued rights of the parties *prior* to the said termination had to be performed. Therefore, … clause 37 (a remaining obligation) no longer applied. Given that works had been completed, the Subcontractor 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).

29 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [14]–[15].

30 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [16].

### C. *The dual track regime in* CHL Construction Pte Ltd v Yangguang Group Pte Ltd

21 The following *dicta* of Chan J at [18]–[21] of *CHL v YG* are important:

> 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 ...
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> 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].
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> 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.
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> 21 ... 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 In essence, Chan J held in *CHL v YG* that *notwithstanding* the termination of the relevant contract, due to the "dual track regime" under the SOP Act, a subcontractor remains entitled to claim for progress payments and can submit a payment claim in accordance with the contractual timeline.

## V. Can the two cases be reconciled?

23 The authors respectfully submit that certain aspects of *CHL v YG* cannot be reconciled with *FES*.

24 The following findings in *FES* merit careful consideration:[31]

(a) that the architect was *functus officio* as a result of the issuance of the final certificate under the SIA Conditions of Contract;

(b) that once the architect becomes *functus officio*, the entire certification process under the contract comes to an end;

(c) the entitlement to submit progress claims under the SOP Act stems from the underlying contract;

(d) once the role of the architect under the SIA Form of Contract has come to an end, there is simply no basis to submit further payment claims;

(e) as the architect's certificate is a "condition precedent" to the contractor's right to receive payment, the contractor would no longer be able to receive progress payments once the architect loses his capacity to issue such certificates; and

(f) any payment claim issued after the architect is *functus officio* would be incapable of being certified by the architect so as to entitle the contractor to progress claims under the SOP Act.

25 The Court of Appeal carefully considered whether the architect was *functus officio* (in respect of his payment certification duties)[32] before arriving at its decision in *FES*.

26 So, would the *manner* in which the architect becomes *functus officio* in respect of his payment certification duties be relevant to the analysis of whether the architect becomes *functus officio*? What happens if the architect or certifier becomes *functus officio* by reason of a termination of the subcontract as in *CHL v YG*?

31 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [38]–[39].

32 Going forward for convenience, unless otherwise stated, the reference to "*functus officio*" would in this article be limited to the payment certification obligations of the architect or certifier.

27 The authors' view is that *how* the certifier becomes *functus officio* is not relevant. This is because *FES* says that the inquiry is whether the certifier *is functus officio*,[33] which in turn will decide whether the relevant payment claim can be validly submitted for the purposes of the SOP Act.

28 Any analysis of whether the certifier is *functus officio* cannot be based solely on whether or not the contract has been terminated. Indeed, there is a distinction in construction contracts between termination of the contract and termination of the contractor's employment under the contract.[34] Arriving at a conclusion that the certifier's primary obligation to certify progress payments survives, or comes to an end, by simply analysing whether the contract was terminated or whether the subcontractor's employment under the contract was terminated is incomplete.

29 The analysis must include whether the primary obligation[35] of the certifier in certifying progress claims survives termination

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33 See *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [45] where the Court of Appeal held thus:

> … The Judge held at [47] of the decision … that *Lau Fook Hoong* was inapplicable to the present case on the basis that PC 73 was not the final payment claim. The Judge appeared to have focused his inquiry on whether or not PC 73 was in fact a final payment claim; and if it were not, *Lau Fook Hoong* would be inapplicable and PC 75 would be valid. However, we are of the view that it was immaterial whether or not PC 73 was Yau Lee's final payment claim. The key question, which the Judge did not consider, was whether a payment claim could be validly submitted after the Architect had issued the Final Certificate. For the reasons as explained at [36]–[39] above, no further payment claims can be validly issued after the final certificate has been issued. Therefore, even if PC 73 were not the final payment claim, PC 75 would still be invalid because it was indisputably submitted after the Final Certificate was issued. As such, there is strictly no need for us to determine whether PC 73 was the final payment claim and we will say nothing more on the issue.

34 See, *eg*, *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 at [51].

35 In general, *eg*, as *per* Vivian Ramsey IJ in *CPIT Investments Ltd v Qilin World Capital Ltd* [2017] 5 SLR 1 at [157]:

> If a party is in repudiatory breach of a contract and the other party accepts that conduct as terminating the contract, then both parties are discharged from further performance of the primary obligation. Secondary obligations then arise in terms of damages. …

In addition, Prakash J in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 at [53] held that:

> In truth, therefore, the mere termination of LCS's employment under the subcontract on 12 May 2003 would not *ipso facto* have affected

*(cont'd on the next page)*

(be it of the contract, or of the employment), and this can only be done by an analysis of the relevant terms governing certification of progress payments.[36] On *any* termination, a certifier may not be *functus officio* in respect of all of his contractual duties, but only in respect of the duty to certify progress claims.[37]

### *A. Statutory entitlement is "parasitic" on the contractual entitlement*

30 In *FES*, the Court of Appeal took the view that that the statutory entitlement of applying for an adjudication was parasitic on the contractual payment mechanism in the contract. The SOP Act was intended to expedite the process by which contractors received payments, but did not, in and of itself, grant

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> the existence of the liquidated damages clause, although the claim of liquidated damages for the period *after* termination of LCS's employment would still be barred, applying the reasoning in *British Glanzstoff* ([13] *supra*), in the absence of express provision to the contrary. ...

In other words, the phrase "survive termination" is used as shorthand for the concept that consideration must be given as to what happens to the various contractual clauses of the contract when (a) the contract is terminated; and (b) the employment under the contract is terminated. It may be that certain clauses survive termination (or termination of employment) while other clauses do not.

36 See, *eg*, cl 31.2(3) of the Public Sector Standard Conditions of Contract for Construction Works 2014 (7th Ed, July 2014) which provides that upon termination of employment, no sums shall be certified as due to the contractor "until the Superintending Officer has ascertained and certified an amount ... representing the total of the cost to the Employer of completion and remedying of any Defects, damages for delay in completion (if any) ... or otherwise and all other expenses incurred by the Employer". It is arguable (at the very least) that this has the effect of causing the superintending officer's and the employer's powers of certification under cl 32.2 to cease and be replaced with a separate certification regime. See also the discussion on *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67 at para 33 below.

Compare, *eg*, cl 33(5) of the SIA Building Contract 2016 Without Quantities (Singapore Institute of Architects, 1st Ed) which provides that in the event of a contractor-initiated termination, "[t]he Architect shall have no powers of certification under this clause" and cl 40(3) "The Employer shall be entitled to serve a payment response ...".

It is therefore important to note the distinction between the "architect/the superintending officer" *versus* the "employer", and who the relevant certifier under the contract in question is.

37 See, *eg*, the role of the superintending officer under cl 32.2 of the Public Sector Standard Conditions of Contract for Construction Works 2014 (7th Ed, July 2014) ("PSSCOC") *versus* the role under cl 31.2(3) of the PSSCOC.

the contractor an independent right[38] to be paid outside of the construction contract.[39]

31 This is why in *FES*, on the issuance of the final certificate by the architect, and based on the SIA Conditions of Contract, the primary obligations in the subcontract relating to payment certification also came to an end,[40] thereby rendering the architect *functus officio* in his certification duty. The contractual payment mechanism under the subcontract having come to an end, there was no longer any *primary* contractual obligation relating to payment[41] for the SOP Act to enforce.

32 This analysis is reinforced by *FES* at [40] where the Court of Appeal made a distinction between an architect who *improperly* withholds a certificate and a situation where the architect is contractually *unable* to issue a further certificate by reason of being *functus officio*. In the former situation, the contractual payment mechanism is operative and the SOP Act can assist to enforce the same; in the latter situation, the contractual payment mechanism is no longer operative, there is no primary contractual obligation capable of being enforced by the SOP Act, and, therefore, a payment claim compliant with the SOP Act cannot be submitted.

38 Note that where a construction contract does not contain any provisions as to *when* a payment claim is to be served, then s 10(2)(*b*) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act") read with reg 6 of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) will apply as the default provisions governing the submission of the payment claim. This *does not* detract from the Court of Appeal's holding in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 mentioned above, which deals with the *antecedent question* of whether the payment claim in question is *within the ambit* of the SOP Act.

39 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [31].

40 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [38]–[39].

41 See n 36 above.

## *B.* Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd

33 In the Queensland case of *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd*[42] ("*Walton Construction*"), Peter Lyons J came to the same conclusion as the Court of Appeal in *FES* in respect of the Queensland Building and Construction Industry Payments Act 2004 ("Queensland Act"). In this regard, the following paragraphs are instructive:[43]

> [38] When a contract is terminated for repudiatory conduct, accrued rights survive. Rights which arise under a term of a contract which, as a matter of construction, was intended by the parties to survive termination, are also available to the parties notwithstanding termination: for example, rights which arise under an arbitration clause, or a liquidated damages clause. However the specific identification of such clauses, and the rationale for their operation after termination, demonstrate that generally, terms of a contract do not operate after termination. The effect of clause 44.10 seems to me to be that the right to make progress claims, together with the accrual pursuant to the contract of the dates on which those claims might be made, ceases with the exercise of the contractual right to terminate, conferred by clause 44.
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> ...
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> [41] Thus, s 8(2) of the New South Wales Act commences, '***reference date***, in relation to a construction contract ...'. The definition in the BCIP Act commences, '***reference date***, under a construction contract ... '. Further, paragraph (b) of s 8(2) of the New South Wales Act commences with the words 'if the contract makes no express provision with respect to the matter'; whereas paragraph (b) of the definition in the *BCIP Act* uses a different expression, as noted, relating to whether the contract 'provide(s) for the matter'.
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> [42] The use of the expression 'under a construction contract' found in the Queensland definition makes it somewhat more difficult to conclude that a reference date occurs after termination. There is then no longer a contract 'under' which there might be a reference date. The conclusion that a reference date does not occur after termination of a contract is, in my view, also consistent with

42 [2011] QSC 67.

43 *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67 at [38] and [41]–[42].

> the general nature of the payments for which provision is made by the *BCIP Act*, that is to say, payments which are of a provisional nature, made over the life of the contract.
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> [emphasis in original]

34 Peter Lyons J thus found that the Queensland Act was intended to secure progress payments which are of a provisional nature, and made during the life of the contract; as such, on the termination of the contract, the right to make a progress claim ceases and there is no more entitlement to make a progress claim, and *a fortiori* no entitlement to enforce a progress claim under the Queensland Act.

35 Despite the differences in the Singapore and Queensland Acts, the approaches in *Walton Construction* and *FES* are based on the same principle: that the respective security of payment legislation is established in aid of the contractual payment entitlement as set out in the subcontract and does not arise independently of the subcontract. To evaluate this, considerations of whether a payment entitlement continues to be a primary obligation post-termination will have to be analysed.

### *C. The difficulties with* CHL Construction Pte Ltd v Yangguang Group Pte Ltd

36 In *CHL v YG*, when the subcontract was terminated on 20 July 2018, were there any payment certification duties that survived the termination of the subcontract? Chan J found in *CHL v YG* that the termination of the contract *does not affect* the timelines for a contractor's "accrued statutory entitlement to payment":[44]

> 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

44 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [21]–[22].

> s 10(2)(*a*) SOPA. Like the contractor's statutory entitlement to payment, this timeline remains unchanged even if the contract is subsequently terminated.
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> 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*').
>
> [emphasis in original]

37 This reasoning does not sit well with *FES*, in so far as the statement at [22] of *CHL v YG* that "contractual provisions relating to timelines survive termination for the purposes of claims under SOPA" suggests that the SOP Act provides some statutory basis to preserve the timelines in a subcontract post termination *independent of* the contractual provisions. For the purposes of enforcing a payment claim under the SOP Act, *CHL v YG* suggests that contract law does not play a substantive part in the analysis of whether the payment provisions in a subcontract survive termination.

38 If the authors' understanding of *FES* is correct, then the reasoning in *CHL v YG* contradicts *FES*.

39 If the question "could PC10 have been validly submitted post termination of the subcontract on 20 July 2018"[45] was asked in *CHL v YG*, applying the analysis in *FES*, the analysis would then centre on whether, as a question of contract law, the payment certification provisions survived the termination. This would give rise to a consideration of what (if any) primary or specific obligations survived the termination of the subcontract.

40 Chan J's statement in *CHL v YG* is not without difficulty in the light of *FES*. Chan J stated that:[46]

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45 See *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [45] where the Court of Appeal identified the key question as "... The key question, which the Judge did not consider, was whether a payment claim could be validly submitted after the Architect had issued the Final Certificate. ...".

46 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [21].

> ... 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. ... [emphasis in original].

41 According to Chan J, this "statutory entitlement" is exercised via a payment claim served in accordance with s 10(2) of the SOP Act. It suggests that there is a statutory entitlement which arises and accrues independently of the contract.

42 However, under s 10(2)(*a*) of the SOP Act, the payment claim shall be served "at such time as specified in or determined in accordance with the terms of the contract".[47] Post termination, any such term regulating the service of a payment claim for a progress payment, would be a primary obligation that would not, in general law, survive a termination.[48]

43 Further as stated by the Court of Appeal,[49] a progress payment as defined by s 2 of the SOP Act is one that is made *under* a contract. On termination, the obligation to contractually certify or respond to payment claims therefore generally ceases.

## *D.* Engineering Construction Pte Ltd v Attorney-General

44 The case of *Engineering Construction Pte Ltd v Attorney-General*[50] ("*Engineering Construction*") is instructive on this point.

45 In *Engineering Construction*, one of the issues was whether on the termination of a subcontract, the government (acting through its divisional director[51]) was still entitled to issue

47 *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [13].
48 *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67 at [38].
49 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [30].
50 [1994] 1 SLR(R) 125.
51 Although the contract provided for a superintending officer, the right to issue extensions of time and liquidated damages certificates was reserved to the director of the environmental engineering division of the Ministry of Environment: *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR(R) 125 at [1(b)] and [2].

certificates relating to extensions of time for the date of completion and liquidated damages arising from the delay of completion of the contract.[52]

46 The contractor had submitted[53] that the divisional director was *functus officio* and relied on the case of *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd*:[54]

> 3 Mr Jeyaretnam submits that the issue of certificates by the director under cll 32(a) and 31(a) is an act of performance of the primary obligations of the contract and these obligations have been discharged upon the contractor's acceptance of the Government's repudiation on 30 April 1992. The certificates were issued some months later. He refers to *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Limited (in liquidation)* (1935–1936) 54 CLR 361 at 379–380 where Dixon and Evatt JJ said:
>
> > In general, the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of the contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which, for many purposes, is conceived as possessing proprietary characteristics, the fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation.
>
> 4 He says that the director was *functus officio* when he purported to issue the certificates. Mr Soh submits that the fact of delay by the contractor has already occurred and the issue of certificates does not involve further performance of the contract.

52 *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR(R) 125 at [2].
53 *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR(R) 125 at [3]–[4].
54 (1935–1936) 54 CLR 361.

47 Lim Teong Qwee JC found that that once the contract was terminated, there was no provision in the contract that could be construed to preserve the director's power to issue certificates. As such, the director became *functus officio* upon termination, and could no longer issue any certificate:[55]

> 8 I am unable to find any provision in the contract that can be construed to preserve the power of the director to issue certificates under cll 31(a) and 32(a) upon the contract coming to an end before completion of the works by reason of a wrongful act of the Government and in my opinion the director had no such power after 30 April 1992.
>
> ...
>
> 30 There is a further matter as to the extension of time certificate under cl 32(a). So long as the contract continues in force the [superintending office ("SO")] can issue site instructions, or the contractor may encounter exceptionally inclement weather or indeed any of the events upon the happening of which completion time may be extended may still occur. ... And it does not follow that where the contractor has overrun the date for completion when the contract is terminated the period of delay cannot be shorter upon completion (if the contract had not been terminated) than at the time of termination. ... *In my opinion the first extension of time certificate cannot be final until the works are actually completed and since further performance has been taken out of the contractor's hands altogether cl 32(a) can no longer operate. The director became* ***functus officio*** *the issuing of any certificate under cl 32(a) upon termination of the contract on 30 April 1992.*
>
> 31 I come now to the question asked in this originating summons. The answer is 'No'. The Government is not entitled to deduct or recover LAD in respect of any period during which the contractor is held by the arbitrator to have been in delay prior to 30 April 1992. LAD cannot be deducted or recovered unless the director has issued an extension of time certificate under cl 32(a) and an LAD certificate under cl 31(a) and he was *functus officio* the issue of such certificates after the wrongful termination of the contract by the Government on 30 April 1992. He had no power to issue the second extension of time certificate and the second LAD certificate both dated 29 September 1992 and these certificates are null and void. Of course the Government may be entitled to

55 *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR(R) 125 at [8] and [30]–[31].

> damages at law for the contractor's breach for delay but that will have to be claimed and proved in the ordinary way.
>
> [emphasis added]

48 The decision of *Engineering Construction* predated the enactment of the SOP Act, but the analysis of the powers (or lack thereof) of the certifier on first principles is consistent with *FES*.[56] On first principles, this requires an analysis of the contract and whether any payment claim entitlements survive a termination.

## VI. The dual track regime

49 Based on *FES*, the reference to the "dual track" regime established under the SOP Act in *CHL v YG*[57] that the progress payment entitlement under the SOP Act is a separate regime from the underlying contract would no longer be good law.

50 Perhaps another way of expressing the parasitic nature of the SOP Act enforcement of a payment claim for progress payments is that there is a single progress claim track that is supported by the SOP Act as long as the subcontract is afoot.

51 This single track is laid by the subcontract, and the SOP Act enforcement engine will enforce progress claims properly running on this track only. Once the subcontract terminates, the track ends and the SOP Act enforcement engine stops.

52 Is this unfair? It depends how one looks at it. If one accepts that the SOP Act was only intended to enforce progress claims (subject to the subcontract), then *pacta sunt servanda*: agreements must be kept, and this interpretation of the SOP Act is merely holding the parties to their contractual bargain. On the other hand, if one considers that the SOP Act was intended to *create* new

56 Section 36(4) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act") provides that the SOP Act was not intended to affect the operation of any other law.

57 And cases like *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210; and *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852.

extra-contractual entitlements without limitations, then one may disagree with this interpretation of the SOP Act.

53 The authors' view is that the Court of Appeal's interpretation in *FES*, that the SOP Act *does not* give rise to rights *that are non-existent* under the contract, is consistent with the statutory intent. Parties should be free to decide what claims are within or outside the scope of the SOP Act.[58] For example, if the parties had agreed on four milestone payments in respect of a four-year contract, the SOP Act does not step in to alter this arrangement.[59]

## VII. The issue of timing of payment claims

54 The authors highlight that this article addresses the *antecedent* question of whether there is a payment claim within the ambit of the SOP Act as understood by the Court of Appeal in *FES*.

55 While it is beyond the scope of this article, the authors are of the view that the question of the *timing* of the submission of the payment claim (in the sense of whether the payment claim is submitted early or late) is *not the same* as this antecedent question of "threshold jurisdiction" (to borrow the Court of Appeal's phrase in *FES*). Indeed, the authors' view is that issues of timing may well be analogised to a defence of limitation.[60] However, it is quite beyond the scope of this article to address this issue.

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58 Subject to s 36 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

59 See the definition of "progress payment" under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), especially the second limb.

60 A defence of limitation must be specifically pleaded and relied upon by the defendant. A failure to do so disentitles the defendant to rely on the defence of limitation. Likewise, the onus is on the respondent to raise a "jurisdictional objection" to the validity of a payment claim that was not served in time. However, this "jurisdictional objection" is conceptually *different* from a "jurisdictional objection" that goes to the issue of threshold jurisdiction: in the former scenario, the objection is that the claim is within the ambit of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act"), but had failed to comply with a formal requirement in terms of timing; in the latter scenario, the objection is that the claim is *not even* within the ambit of the SOP Act to begin with.

The authors accept that this distinction is a fine one and can be extremely difficult to draw (especially in cases of wrongful termination, and issues of

*(cont'd on the next page)*

## VIII. Amendments to the Building and Construction Industry Security of Payment Act

56 More importantly, what are the implications of *FES* in the light of the amendments to the SOP Act? As identified in an earlier article, how should one interpret the amendments to s 15 of the SOP Act, given that they appear to "codify" the decision of *Audi*?[61]

57 In this regard, there are two key amendments to s 15 of the SOP Act enacted by the Building and Construction Industry Security of Payment (Amendment) Act 2018[62] (the "SOP Act Amendments"). The first is to s 15(3) of the SOP Act, and the second is the introduction of s 15(3A) of the SOP Act.

### *A. Codification of* Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*?*

58 The SOP Act Amendments appear to codify *Audi*: an "objection" must not be included in the adjudication response unless it was included in the payment response. While the *literal* wording of the amended s 15(3) of the SOP Act suggests that *any* objection must be included, this *literal* interpretation cannot be correct. Two simple examples would suffice to demonstrate this point:

> (a) Firstly, there are objections which *could not* have been raised in a payment response, such as objections to the *timing* of the lodgement of an adjudication application for a valid payment claim. A literal interpretation would mean that *even though* a claimant has lodged his adjudication application late, the respondent cannot object as the "objection" is not found in a payment response. This is supported by the new s 15(3A)*(a)* of the SOP Act, which provides an exception where the "circumstances [for the

whether a payment claim was served before or after termination). This is the reason for the authors' qualification, and why this issue has not been addressed in detail, as it would stray beyond the ambit of this article.

61 See Justin Tan, "The Amendments to the Building and Construction Industry Security of Payment Act – Implications for Potential Claimants and Respondents" [2019] SAL Prac 15 at paras 39–40.

62 Act 47 of 2018.

objection] ... only arose after the respondent provided the relevant payment response".

(b) Secondly, and more importantly, there are objections in the nature of *FES*, such as where the contract is not even within the ambit of the SOP Act. As made clear in *FES*, it would be contrary to legislative intent to say that the failure to raise such an "objection" in the payment response would mean that the respondent *cannot raise* such an objection in the adjudication response. Indeed, if the amendments to s 15(3) of the SOP Act and the introduction of s 15(3A) are merely to *codify Audi*, then since *FES* is merely a *clarification* of the ambit of *Audi*, there is no reason why the reasoning in *FES* would not *still apply* to the SOP Act Amendments.

## IX. Conclusion

59 In conclusion, *FES* is a welcome decision that clarifies the operation of *Audi* and makes clear that the SOP Act does not,[63] in general, supersede the contract entered into by the parties.

63 Subject to specific statutory enactments to the contrary. See, *eg*, the 21 days' maximum limit for the time to serve a payment response in s 11 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).