

SINGAPORE CONSTRUCTION LAW NEWSLETTER



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Newsletter

Chief Editor: Ho Chien Mien

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CHAIRMAN'S MESSAGE

The Society of Construction Law, since its inception five years ago, has provided members and their guests a convenient meeting point to gather socially and intellectually and discuss matters of mutual interest relating to construction law and practice.

The Society is an "extra-curricular activity" of volunteers who are busy practitioners. Thankfully, with active guidance from a dedicated and enthusiastic council and support from an able secretariat, the Society has evolved steadily since its inception in 2002, with now about 150 members and an array of educational and social events. Those who have yet to do so might want to foray into our website at www.scl.org.sg for archives of facts, details and photographs of our events.

Pursuant to the meetings of the various SCLs in Singapore during the International Conference in October 2006, the SCL in England has recently been in contact with us and other SCLs (including the recently formed new addition in Mauritius). One of the initiatives by the SCL in England has been to simplify and standardize the SCL logo to be used by SCLs around the world, and accompanied by the name of the respective country, so that SCLs around the world can have a solid identity that we can all share. The new standardized logo appears on the masthead of this newsletter.

The next International SCL Conference is being organized by the SCL in England to take place in London in October 2008. It will be a good idea to mark this event in your calendars, as the SCL there is planning an event along the size and quality of our memorable international conference in Singapore in 2006.

The Society's plans for 2008 include a joint conference with the NUS School of Building and the Environment, in addition to our annual joint conference with the Law Society; seminars, including some to be held in conjunction with the respective reports issued by the three Working Groups on contracts, costs and codes; as well as a couple of networking events for members.

On behalf of the Council, I wish all members a great and vibrant year ahead, success in their work and endeavours, as well as time to relax and enjoy the fruits of their labours.

Naresh Mahtani
Chairman

SCL(S) CALENDAR OF EVENTS 2008

DATE	2008 EVENT DETAILS
21 February	Joint Networking Cocktail with the Lighthouse Club, Singapore
21 May	Seminar on Programming by Anthony Clifford
19 June	Annual Networking Cocktail
31 July	SCL-Law Society of Singapore Annual Joint Construction Law Conference
28 August	Annual General Meeting
30 September	SCL-NUS Annual Lecture / Book-Prize Presentation

ADJUDICATION IN SINGAPORE – THE SCORE SO FAR

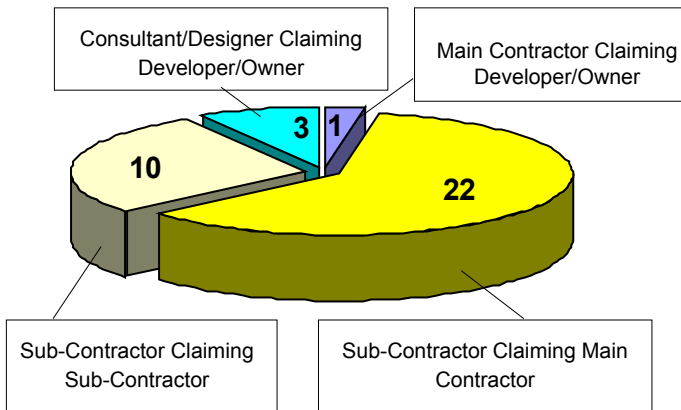
It has been 2 years since the introduction of the Security Of Payment Act in Singapore. Up to September 2007, there had been 54 applications for adjudication under the Act. In 43 of them, an astonishing 80%, the Respondent failed to issue a Payment Response, suggesting that industry practitioners are still ignorant of the implications of not adhering to the procedures required by the SOP Act despite the flood of training seminars over the past 2 years! It is likely that this figure will reduce progressively as parties become increasingly familiar with the statutory process.

How Much?

Of the 36 applications determined by Adjudicator, the maximum amount claimed was \$14.1 million and the minimum was \$11,500. The wide range in claimed amounts is encouraging. It suggests that the SOP Act is being utilised to resolve disputed claims of significant magnitude, despite the perception that adjudication represents “rough justice”. At the other end of the scale, it is encouraging that the SOP Act is being invoked to resolve rather small payment disputes which could not conceivably justify reference to arbitration.

It is clear that the majority of valid applications submitted fall under the category of ‘Sub-Contractor Claiming Main Contractor’. By contrast, only **one** application involved a main contractor claiming payment from a Developer / Owner. This confirms the main contractors well-voiced concerns that they would be “caught in the middle”. Nevertheless, there is no good reason for main contractors to avoid utilising the SOP Act, particularly if their sub-contractors intend to do so. The statistics, at this stage, suggest that the old habit of delaying payment to sub-contractors in order to improve the main contractors’ cash flow still continues.

Who is involved?



Taking into consideration determination dates from available information provided by the SMC, we have derived an estimate of adjudication applications made at intervals of 6 months. The trend line shows a progressive increase in applications, suggesting a growing awareness of the SOP Act as a means of expediting payment.

Rate of Growth



Behind the Statistics

The numbers do not tell the whole story. In a surprising, but far-sighted move, the Singapore Mediation Centre (Authorised Nominating Body under the SOP Act) arranged for the open publication of all Adjudicators’ written awards (known as “determinations” in the SOP jargon) after careful deletion of all reference to parties and project specific information.

It is striking that these determinations have dealt at great length with issues of procedure and jurisdiction but have little if any, technical content. Success or failure has clearly been dependent upon compliance with the “paperwork”. Until the parties learn to follow the correct procedures ‘on site’, this will continue to be a problem. There is a risk that the reputation of the adjudication process will suffer, unfairly, if adjudicators are unable to progress beyond the preliminary issues and make reasoned determinations according to the technical merits.

*Christopher Nunns
Partner, EC Harris*

JOINT SOCIAL AND NETWORKING EVENT WITH LIGHTHOUSE CLUB

SCL (Singapore) had a joint social and networking evening with the Lighthouse Club (Singapore) in the evening of 21 Feb 2008 at the Penny Black at Boat Quay. The get-together, held over drinks and food, gave members of both societies and their guests a wonderful opportunity to meet each other, and to learn of the objectives and activities of the respective societies. The Lighthouse Club promotes fellowship and co-operation amongst its members, and also maintains a Benevolent Fund to provide financial assistance to victims of accident or illness in the construction industry. At the event, amongst other things, the leaders of both societies invited attendees to join the respective societies and discussed future joint events.



SECURING THE FINAL PAYMENT IN A CONSTRUCTION CONTRACT

THE DECISION IN TIONG SENG CONTRACTORS (PTE) LTD V. CHUAN LIM CONSTRUCTION PTE LTD

The Building and Construction Industry Security of Payment Act 2004¹ was enacted to redress some of the difficulties arising from progress payment delays in construction contracts which had, for many years, affected the financial state of contractors, sub-contractors, sub-subcontractors and suppliers. The general framework and central features of the regime have been discussed elsewhere² but this may be briefly summarized for the purpose of the present note.

Section 5 of the Act confers a right to progress payment on a party who undertakes construction work or supplies goods and services in relation to construction work. It thus ensures that the right of a contractor, consultant, sub-contractor or supplier ("the claimant") to be paid progressively could no longer be arbitrarily dismissed by the party who has to pay for the works, supplies or services ("the respondent"). Once a claim for payment has been served, the new regime expects the sum claimed to be paid in full. In the absence of full payment, the respondent has to furnish a payment response within a prescribed period setting out the reasons why he is only paying part of this amount or nothing at all.³ A claimant who is not satisfied with either the amount paid on the claim or with the Respondents' position as stated in the payment response may refer the difference to be settled by adjudication under the Act. This is intended to provide a temporary but binding resolution of a dispute pending arbitration or trial. It is carefully prescribed under the regime so that the determination can be delivered speedily. An adjudicator has basically between 7 and 14 days to determine a dispute referred to him in accordance with the provisions of the Act.

The Singapore Act borrowed to a large extent the model found in the New South Wales *Building and Construction Industry Security of Payment Act 1999*. Both the 1999 New South Wales Act and the Singapore Act emphasized prompt progress payments – that is, the payments made by a building owner to a contractor during the execution of the works. Under most construction contracts, progress payments are typically made on estimates of the value of the works carried out within a designated period. In industry parlance, a progress payment made during the course of a project is normally distinguished from the final progress payment made at the end of the contract. The latter is typically described simply as the "final payment". It is determined after a careful valuation of the work done and after the valuation has been adjusted against the contract price for variations, the payments made previously up to that date and other incidents encountered in the carrying out of the works. The final payment has been aptly described as "the final balancing of account between the contracting parties". Unfortunately, both Acts are silent as to whether the respective security of payment regime extends to the final payment of a construction contract.

It is arguable that the policy considerations which apply to progress payments do not apply to a final payment of a construction contract. Firstly, the certification of the final payment is expected towards the end of the contract when the risks associated with non-payment are generally less likely to threaten the delivery and completion of the works. Secondly, it might be thought that since the final payment is an incident encountered at the end of the contract, parties should be able to submit disputes relating to the final payment for final resolution by the courts or arbitration. Thirdly, quantity surveyors generally consider the final payment to constitute a definitive statement of the final financial position between the parties in respect of the subject contract and, accordingly, the final statement should not be subject to the same pressures of timelines as those encountered with the processing of progress payments. In 2002, the New South Wales Supreme

Court held that the term "progress payment" as originally defined under the New South Wales Act 1999 could not be construed to include a final payment which is payable following completion. Austin J in *Jemzone Pty Ltd v. Trytan Pty Ltd (2002)*⁴ considered that the definition of "progress payment" in that Act and decided that the ambit of the Act does not extend to the amount demanded in the Final Account of a project "regardless of any genuine dispute or offsetting claim".⁵

At one level, it may be contended that the position taken by the NSW Supreme Court in *Jemzone* is sustainable if a narrow view is taken of the policy objectives of security of payment legislation and that is to ensure that the cash flow of a contractor or service provider is not disrupted during the course of the project. At the broader level, it may be suggested that if the statutory provision is construed in this manner, it does not go all the way to support the policy objective of ensuring prompt payment for construction work or services.⁶ Here, the premise is that even the protracted withholding of a final payment arising from the existing dispute resolution routes will exact too high a premium from the contractor or service provider because by blocking payment on one project, this will affect the financial resources of the contractor or service provider for other projects.⁷ There is also the consideration that the position taken in *Jemzone* may not be easily reconciled with the fact that the ambit of the Act expressly extends to a contract under which the contractor is to be paid a single, one-off payment. That the New South Wales legislature recognized some of the policy difficulties presented by the *Jemzone* decision was demonstrated when the New South Wales Act was promptly amended so that the Act subsequently expressly provides for the definition of "progress payment" to include "the final payment for construction work carried out (or for related goods and services supplied) under a construction contract".⁸

The High Court in Singapore recently considered the subject in *Tiong Seng Contractors (Pte) Ltd v. Chuan Lim Construction Pte Ltd (2007)*⁹ and provided what will be welcomed within the industry as a timely "determinative pronouncement".¹⁰ The case involves the payment of a "Final Claim" arising from an earthworks subcontract. The Final Claim was for an amount of \$481,156 in respect of which the main contractor paid a sum of \$210,554 leaving unpaid the remainder of \$270,602. When further payment was not forthcoming, the sub-contractor sought adjudication under the Security of Payment Act. Before the adjudicator, the main contractor argued that the payment claim had been issued after the Final Claim and that, accordingly, it could not be relied upon to found a claim under the Act. The adjudicator determined that the sub-contractor was entitled to receive a further sum of \$169,950 plus 5% GST and further determined that the main contractor should pay 60% of the costs of adjudication. The total sum awarded in favour of the sub-contractor amounted to \$182,542. The main contractors took out an originating summons to set aside the adjudication on the grounds that the Act does not extend to "final claims" and that accordingly the adjudicator had no jurisdiction to make the determination in respect of the subject adjudication application.

In her judgment, Lai Siu Chiu J, reviewed the background of the legislation, noting that the Singapore Act was modeled on statutes on this subject in other jurisdictions, such as Australia, UK and New Zealand and discussed the judgment of the NSW Supreme Court in *Jemzone* in relation to the definition of “progress payments” under the New South Wales Building and Construction Industry Security of Payment Act, 1999 (“the NSW Act”) as well as the subsequent amendments to that definition. She ruled that on a proper interpretation of the Act, the definition “progress payments” should include “final payments”. In ruling as she did, the learned judge considered that “final payments” can only be excluded from the ambit of the Act by express wording to that effect:

It would not suffice to infer a legislative intention to exclude simply on the basis that “final payments” were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. If the legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad ranging definition in the main limb must be determinative.¹¹

The learned judge was of the view that a plain reading of “a payment that is based on an event or a date” or a “single or one-off payment” clearly encompasses final payments. She observed:

Such a conclusion is vindicated by the fact that the Act at no time makes any distinction between “final claims” and “non-final claims”. Implying such a distinction from the supplementary limb would severely impair the protection afforded by the Act, as it would create a *carte blanche* for contractors to renege on the final stages of payment, which would have an equally deleterious effect on cash flow affecting other ongoing construction projects.¹²

Lai J considered that the policy objective of the Act is to safeguard “the continued viability of contractors who are victims of payment delays or disputes made in bad faith perpetuated by upstream contracting parties” and that, from this perspective, “it makes no sense to draw an artificial distinction between allegedly “final” and “non-final” payments, as the withholding of either would create the exact same downstream ripple effect intended to be “deterred and weeded out” by the Act.”¹³ Finally, in ruling that the Act should extend to final payments, she said at paragraph 35 of her judgment:

My interpretation is reinforced by Chow Kok Fong in “*Security of Payment and Construction Adjudication*”, who expressed (at p 73) a similar opinion which merits reproduction in full:

[I]f the objective is to encourage good payment behaviour on the part of the various parties down the contractual chain, there is little reason why the payment discipline intended by the BCISP Act should not be allowed to visit final payments as well. The definition of ‘progress payment’ in the Act expressly includes ‘a payment that is based on an event or a date’. Furthermore, the same considerations which justify the coverage of the Act to include contracts which provide for a single, one-off payment would apply to the security of the final payment as well. It is considered that where the final payment is expressed to be triggered by reference to an event such as the issue of a Final Completion Certificate, one view is that the claim for a final payment in such a situation would fall within the description of ‘a payment that is based on an event or a date’ as stipulated in paragraph (b) of the definition of ‘progress payment’ in the Act. On this construction, the definition of ‘progress payment’ under the Act would extend to include a final payment claim made pursuant to the Final Certificate issue under clause 31(10) of the SIA Conditions of Building Contract and a payment claim following the Final Account Certificate issued under clause 32.5(7) of the Public Sector Standard Conditions of Contract.

It has been two and a half years since the Singapore CISP Act has come in force. On the whole, the results have been positive

and well received within the industry. There is little doubt that the decision in *Tiong Seng Contractors (Pte) Ltd v. Chuan Lim Construction Pte Ltd* (2007) settles for the time being what has been one of the few uncertain aspects of the Act. One immediate result of the decision therefore is that there is no urgency to amend the definition of “progress payment” to expressly include a final payment through an amending legislation as was done in New South Wales.

An important implication for owners and consultants in the industry, however, will be the impact of the decision on the time taken to process final accounts, the basis of which is used to determine the final payment to the contractor or service provider. The fact that claimants are prepared to invoke the Act to demand timely settlement of final payment claims means that consultants, particularly quantity surveyors, no longer have the luxury to allow themselves anything from 3 months to 9 months to process and evaluate final payment claims – together with claims for variations and other adjustments to the contract sum. Although adjudication under the Act is not a final determination of the amounts due to a contractor or supplier, it must be borne in mind that the regime ultimately involves a transfer of the risk of insolvency. Consequently the decision in *Tiong Seng v. Chuan Lim* is likely to raise the stakes for the owner if, as a result of the new pressures of time, final accounts are not satisfactorily resolved between the parties. The good news is that these issues have been addressed satisfactorily elsewhere. Following the 2002 Amendment Act, the construction industry in New South Wales have come to accept this reality and final payment negotiations and documentation have been substantially simplified and shortened.

Given that the Act now extends unequivocally to final payments, contractors and service providers may be more prepared to leave matters to be decided by adjudication under the Act. The conventional dispute settlement process in the industry is arbitration but it has been shown to be relatively more protracted and more expensive when compared with adjudication. Unless the losing party in adjudication considers himself seriously aggrieved, he is likely to leave things as decided by the adjudicator. This reinforces the case for each party to ensure that the final accounts of a project and the valuation of the final payment should be undertaken with a sufficient degree of effort and detail. The tendency to relegate these tasks to the end of the project will be clearly untenable: this is a regime which will not be forgiving of a consultant with a huge backlog of work.

CHOW KOK FONG

LL.B.(Hons), B.Sc.(Bldg)(Hons), M.B.A.,
F.R.I.C.S., F.C.I.Arb., F.C.I.S., F.S.I.Arb.
Chartered Arbitrator

(Footnotes)

- 1 (Cap. 30B). The Act came into operation on 1 April 2005, hereinafter called the “Singapore BCISP Act”.
- 2 See, for example, Chow Kok Fong, “Reforming Payment Behaviour in the Construction Industry” *Inter Se* May-June 2005.
- 3 Section 11 of the Singapore BCISP Act.
- 4 [2002] NSWSC 395.
- 5 *ibid.*, para 39.
- 6 Chow Kok Fong, *Security of Payments and Construction Adjudication* (Singapore: Lexis Nexis 2005) at p. 73.
- 7 Adjudication determination of Philip Jeyaretnam, SC in *AU v. AV* [2006] SGSOP 9 at [13].
- 8 See definition of “Progress Payment” under section 4 of the NSW BCISP Act 1999 as amended by the NSW Building and Construction Industry Security of Payment Amendments Act 2002.
- 9 [2007] SGHC 142.
- 10 [2007] SGHC 142 at ¶22.
- 11 [2007] SGHC 142 at ¶27.
- 12 [2007] SGHC 142 at ¶28.
- 13 [2007] SGHC 142 at ¶33.

The 3rd Annual Construction Law Conference 2007 held on 17 July 2007, jointly organised by the Law Society of Singapore and the Society of Construction Law



Anil Changaroth and Mohan Pillay



President of the Law Society, Philip Jeyaretnam, S.C., giving the Opening Address at the Conference

The Annual Meeting of the Society of Construction Law held on 24 August 2007



From left: Chairman Naresh Mahtani and Vice-Chairman Christopher Nunns



The audience at the AGM

Seminar on Dispute Resolution in the Energy Sector held on 19 October 2007



Professor Michael Furmston, Chairman of the SCL, Naresh Mahtani and Chairman of the Singapore Institute of Arbitrators and SCL Committee Member Johnny Tan

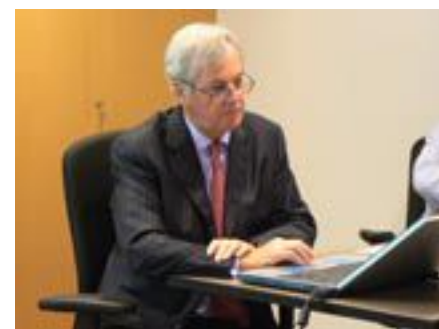


Dr Robert Gaitskell, QC, of Keating Chambers, London, addressing the attendees


Seminar on Use of Advanced Forensic Animations in the Resolution of Complex Dispute Claims held on 29 November 2007



The rapt audience at the seminar



Keith Pickavance addressing the audience




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September 2007

What's in this book?

- As the regime introduced by the SOP Act is still fairly new in Singapore and the demand for text on related topics, one of which is statutory adjudication, is high, this book fulfills a crucial element in that demand.
- This book adopts a novel approach to the treatment of the topic – to allow SOP Act to be read together with the standard forms of building contracts.
- Discussion of available adjudication determinations which have emerged since SOP Act was passed.

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