

Repeat Claims Under The Security of Payment Act – Choosing The Lesser Evil

*Nandakumar Renganathan and Valerie Seow, RHTLaw Taylor Wessing LLP**

Recently, Justice Lee Seiu Kin ("**Justice Lee**") in *LH Aluminium Industries v Newcon Builders Pte Ltd* [2014] SGHC 254 ("*LH Aluminium*") had the opportunity to revisit the complex issue of repeat claims and provide important observations on the different approaches which the Singapore courts had taken.

Facts of the Case

The defendant was the main contractor of a project described as "Additions and Alterations to Existing 3 Storey Commercial Development/Light Rapid Transit System Depot cum Station on Lot 3496C MK11 at Choa Chu Kang/Woodlands Road".

The plaintiff was appointed as the sub-contractor for the aluminium and glazing installation works for the project.

Between June 2013 and December 2013, the plaintiff repeatedly served on the defendant the same payment claim in the sum of \$631,683.71 every month (except October 2013). In response to each claim, the defendant issued a payment response for the sum of \$0.

On 2 December 2013, the plaintiff served the final payment claim for work done up to 22 November 2013 on the defendant ("**the Final Payment Claim**"). However, the plaintiff had not carried out any new work since June 2013. On 20 December 2013, the defendant issued a final payment response for the sum of \$0.

On 3 January 2014, the plaintiff submitted an adjudication application under the SOP Act. Subsequently, an adjudication determination was made in favour of the plaintiff. Following the plaintiff's application to court to enforce the adjudication determination, the defendant applied to set it aside. The Assistant Registrar dismissed the defendant's application and the defendant appealed to the High Court.

Repeat Claims

One of the issues raised by the defendant in *LH Aluminium* was that the plaintiff's Final Payment Claim was prohibited under s 10(1) of the SOP Act as it was a claim that merely repeated earlier claims without any additional item of claim.

In essence, s 10(1) of the SOP Act provides that a claimant may serve one payment claim for a progress payment on the relevant payor under the contract in question. Section 10(4) of the SOP Act provides that nothing in s 10(1) shall prevent the claimant from including in the payment claim



("Claim B") an amount that was the subject of a previous payment claim ("Claim A") served under the same contract which had not been paid by the payor. However, Claim B must have been served within 6 years after the construction work to which the amount in Claim A relates was last carried out.

The defendant argued that a literal reading of s 10(1), together with s 10(4), showed that s 10(1) prohibited repeat claims given that s 10(1) stipulated that only one payment claim may be served for a progress payment and the word "including" in s 10(4) indicated that the amount in Claim A should only form part, and not the whole, of Claim B. This position was supported by *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 ("**Doo Ree**"), where an Assistant Registrar held that the service of repeat claims was not permitted on a plain reading of both s 10(1) and s 10(4).

Justice Lee, however, observed the following:

- the Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering)* [2013] 1 SLR 401 ("**Terence Lee**") noted in passing that it did not agree with the Assistant Registrar's finding in *Doo Ree* that s 10(1) prohibited all repeat claims;
- following *Terence Lee*, there was a split in judicial opinion on whether repeat claims are allowed under the SOP Act;
- on the one hand, Justice Woo Bih Li in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("**JFC Builders**") considered that s 10(1) prohibited the making of a repeat claim (defined as "one which merely repeats an earlier claim without any additional item of claim, whether for additional or repair work or otherwise"), notwithstanding the *obiter dicta* of the Court of Appeal in *Terence Lee*;
- on the other hand, Justice Quentin Loh in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("**Admin Construction**") opined that *Terence Lee* had "put the matter beyond doubt" and a repeat claim was not prohibited unless the payment claim or any part thereof had been validly brought to adjudication and dismissed on its merits;
- extra-judicially, *Terence Lee* "has been understood to stand for the proposition that the [SOP] Act only prohibits a repeat claim that has been adjudicated and dismissed on its merits"; and
- the split in judicial opinions as evidenced by the differing judicial opinions in *JFC Builders* and *Admin Construction* was noted by the Assistant Registrar in *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd* [2013] SGHCR 16.



Choosing the Lesser Evil

Justice Lee took the view that s 10 of the SOP Act was "equivocal as to whether a repeat claim is permitted and it is a matter of judicial policy in interpreting the Act so as to achieve its objectives". He recognised that there were both advantages and disadvantages in disallowing repeat claims.

On the one hand, Justice Lee noted that "permitting repeat claims opens the [SOP] Act to abuse by rendering the deadline nugatory as a claimant could merely issue and serve a repeat claim". But he felt that "the more serious concern is that this paves the way for a claimant to ambush the respondent by repeatedly serving the same payment claim month after month" (which *LH Aluminium* was a good example of). The danger was that once the respondent failed to serve a payment response within the deadline, the claimant could file an adjudication application which he would be virtually certain of obtaining a determination in his favour.

On the other hand, Justice Lee reasoned that permitting repeat claims would provide "a cooling off period during which the claimant can carefully consider his options or monitor developments and still have the option of resurrecting his right to adjudication by submitting a repeat claim".

As the "benefits and pitfalls in the two approaches [were] finely balanced". Justice Lee opined that the critical issue was which approach was "more capable of being ameliorated by industry practice and judicial policy". In his view, permitting repeat claims was the "lesser evil", given that "the industry appears to have developed the practice of volleying back zero payment responses to repeat payment claims". Moreover, prohibiting repeat claims would result in an increase in adjudication applications. In any event, Justice Lee believed that the passing observations in *Terence Lee* were "too deeply entrenched to be changed" and preferred its approach which permitted repeat claims that had not been dismissed by an adjudicator on its merits.

Conclusion

On the facts, Justice Lee found that the Final Payment Claim was a valid claim and did not breach s 10(1) of the SOP Act. Hence, the adjudication determination based on the Final Payment Claim was a valid determination. After considering the defendant's other arguments, he eventually dismissed the defendant's appeal.

Nevertheless, he recognised that his decision on the issue of repeat claims was the "result of a balancing exercise between two unsatisfactory situations" and urged a holistic review of the SOP Act, as there were also other areas that were complicated and vague. Indeed, legislative reform may well be the only way to resolve the repeated difficulties caused by the interpretation of repeat claims under the SOP Act.





Nandakumar Renganathan

Nandakumar Renganathan is a founding member of RHTLaw Taylor Wessing and the Deputy Head of the firm's Litigation and Dispute Resolution Practice. He is well regarded as an experienced Counsel and has acted for both public listed and private limited companies in commercial claims. He has advised and acted for Management Corporations in claims against subsidiary proprietors. He has also acted for several sub-contractors and main contractors in claims relating to various aspects of building construction which includes interior renovation and structural and supply claims.

*The article was written with the assistance of Ms Valerie Seow, a Practice Trainee with RHTLaw Taylor Wessing LLP.

