IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHCR 03

Suit No 1105 of 2017 (Summons No 166 of 2018)

Between

FT Plumbing Construction Pte Ltd

… *Applicant*

And

Authentic Builder Pte Ltd

… *Respondent*

Originating Summons No 1262 of 2017 (Summons No 5753 of 2017)

Between

Authentic Builder Pte Ltd

… *Applicant*

And

FT Plumbing Construction Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and construction law] – [Statutes and regulations] – [Building and Construction (Security of Payments) Act (Cap 30B, 2006 Rev Ed)]

[Civil procedure] – [Stay of proceedings] – [Abuse of process]

TABLE OF CONTENTS

FT Plumbing Construction Pte Ltd
v
Authentic Builder Pte Ltd and another matter

[2018] SGHCR 03

High Court — Suit No. 1105 of 2017 (Summons No. 166 of 2018) and Originating Summons No. 1262 of 2017 (Summons No. 5753 of 2017)
Elton Tan Xue Yang AR
5, 8 February 2018

9 April 2018

Elton Tan Xue Yang AR:

Introduction

1 The plaintiff and defendant are parties to a construction contract. The defendant succeeded in an adjudication against the plaintiff and sought to enforce the adjudication determination as a judgment debt. The plaintiff applied for a stay of the enforcement proceedings and commenced a suit against the defendant, seeking a final determination of the dispute between the parties. The defendant in turn applied for a stay of the suit, alleging that the plaintiff's commencement of such proceedings amounted to an abuse of process of the court given that the plaintiff had not made payment of the adjudicated amount to the defendant. The plaintiff's response to this allegation was twofold: (a) it was genuinely unable to pay the adjudicated amount due to its financial circumstances; and (b) it believed that the defendant was itself impecunious,

such that any amounts paid to the defendant pending the determination of the underlying dispute might prove irrecoverable if the plaintiff eventually succeeded in that final determination. Out of these proceedings, two applications came before me for decision. The first was the defendant's application for a stay of proceedings in the suit pending the plaintiff's payment of the adjudicated amount. The second was the plaintiff's application for an interim stay on enforcement pending the hearing of its application for a stay of the enforcement proceedings.

2 The Building and Construction Industry (Security of Payments) Act (Cap 30B, 2006 Rev Ed) ("the Act") has been the subject of a considerable amount of judicial scrutiny in recent years. Various aspects of the Act – ranging from the jurisdiction of adjudicators and their duties in the conduct of the adjudication to the setting aside of adjudication determinations – have been reviewed by the courts, and an increasing body of case law has accrued to guide the conduct of the rapidly growing number of adjudications in Singapore.[1] The applications before me primarily concerned one of these aspects – namely, the right of a losing party in an adjudication to seek a final determination of the underlying dispute, notwithstanding the fact that it has not made payment of the adjudicated amount to the winning party. The question for my decision was whether it is an abuse of process for the losing party to commence proceedings in court to obtain a final determination despite not having paid the adjudicated amount, in circumstances where its non-payment of the adjudicated amount followed from two reasons: (a) its genuine inability to make such payment; and (b) its concern that due to the impecuniosity of the winning party, it will not be

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[1] See Law Reform Committee of the Singapore Academy of Law, *Proposals for Amending the Building and Construction Industry Security of Payment Act* (September 2015) at paras 7 and 8.

able to recover any amounts paid to the winning party if the underlying dispute is eventually decided in its favour.

3 Much of the argument before me centred on the recent decision of Foo Chee Hock JC in *Lim Poh Yeoh (alias Aster Lim) v TS Ong Construction Pte Ltd* [2017] 4 SLR 789 ("*Lim Poh Yeoh*"). Having considered the parties' submissions and evidence, I granted the defendant's stay application but subjected the stay to any decision made in the plaintiff's application to grant a stay of enforcement of the adjudication determination pending the disposal of proceedings in the suit. I also granted the interim stay on enforcement sought by the plaintiff.

4 The plaintiff has appealed against my decision on the defendant's stay application and has sought to adduce further evidence on appeal, such evidence pertaining to the plaintiff's alleged inability to pay the adjudicated amount. I therefore explain my decision on the law and my findings on the evidence that was put before me.

Facts and procedural history

5 FT Plumbing Construction Pte Ltd ("FT") carries on the business of plumbing and sanitary works. Authentic Builder Pte Ltd ("AB") is in the business of building, renovating and remodelling residential, commercial and industrial spaces.[2]

6 On 3 June 2014, AB was engaged as main contractor for a housing development project. By way of a sub-contract ("the Sub-Contract"), AB engaged FT as its sub-contractor for works described as "Supply and Installation

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2 Statement of Claim at para 1; Defence and Counterclaim at para 2.

of Plumbing & Sanitary Works, Minor Sewer and Water Services System" which were comprised in the project. For its services, AB was to pay FT the contractual sum of $2.8m, excluding Goods and Services Tax ("GST").[3]

7 FT commenced its works in July 2014.[4] On 27 July 2017, AB was served with a copy of FT's adjudication application.[5] The subject of the adjudication application was FT's Payment Claim No. 32 of 27 June 2017 ("the Payment Claim"), in which FT sought payment of $992,160.42 (inclusive of GST) for works done in the period from 25 September 2014 to 27 June 2017. In response to the Payment Claim, AB furnished a Payment Certificate No. 30 on 24 July 2017 ("the Payment Certificate") as its payment response. In the Payment Certificate, AB did not merely deny FT's entitlement to payment; it instead claimed that FT was liable to pay $2,791.31 (inclusive of GST) to it.[6]

8 On 14 September 2017, the adjudicator rendered his adjudication determination ("the Adjudication Determination"). The result was that AB was found liable to pay FT the sum of $888,693.42 (inclusive of GST). This was to be added to the adjudicator's fees (which amounted to $33,544.40), the adjudication application fee ($642) and interest. I will refer to the total sum that AB was adjudged to pay FT as "the Adjudicated Amount". The adjudicator held that FT had completed the Sub-Contract works, save for certain as-built drawings and operation manuals which he valued at $5,000.[7] Another key aspect

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3 Statement of Claim at paras 3–5; Defence and Counterclaim at paras 2–3.

4 Statement of Claim at para 10; Defence and Counterclaim at para 5.

5 Statement of Claim at para 11; Defence and Counterclaim at para 5.

6 Adjudication Determination at paras 9–11: Affidavit of Ng Wai Fatt dated 7 November 2017 at p60.

7 Adjudication Determination at paras 72–73: Affidavit of Ng Wai Fatt dated 7 November 2017 at p84.

of the dispute in the adjudication had pertained to variation works allegedly completed by FT and for which FT sought payment. In this regard, the adjudicator found that AB had responded only to one disputed variation item in its Payment Certificate. As for the other disputed variation items, AB had not provided any response amount nor any reason for withholding payment.[8] The adjudicator accordingly decided that s 15(3)(*a*) of the Act prohibited him from considering the reasons proffered by AB during the adjudication for withholding payment for those other disputed variation items, given that AB had not included those reasons in the Payment Certificate. Consequently, the adjudicator held that FT was entitled to the amounts it claimed for the variation works.[9] He also rejected AB's submission that FT was liable for liquidated damages for delay.[10]

9 On 7 November 2017, FT filed Originating Summons No. 1262 of 2017 ("the OS"), seeking leave to enforce the Adjudication Determination as a judgment pursuant to s 27(1) of the Act. The OS was granted by an assistant registrar the next day. Over the course of the next two months, FT proceeded to commence various enforcement proceedings against AB:

(a) Three sets of garnishee proceedings in respect of AB's bank accounts with United Overseas Bank, Malayan Banking Berhad and Oversea-Chinese Banking Corporation Limited (Summons Nos. 5435, 5436 and 5438 of 2017);

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8 Adjudication Determination at para 79: Affidavit of Ng Wai Fatt dated 7 November 2017 at p87.

9 Adjudication Determination at paras 130–131: Affidavit of Ng Wai Fatt dated 7 November 2017 at p115.

10 Adjudication Determination at paras 167–168: Affidavit of Ng Wai Fatt dated 7 November 2017 at p130.

(b) An application for AB's interest in certain immovable property to be attached and taken in execution to satisfy the adjudication determination (Summons No. 5535 of 2017) ("the Seizure Application");

(c) An application for the examination of Ler Peh Choo, a director of AB, to ascertain whether AB has any property or means (Summons No. 5536 of 2017); and

(d) Two further sets of garnishee proceedings against property developers that FT believed were indebted to AB (Summons Nos. 5858 and 5859 of 2017).

10 On 28 November 2017, AB commenced Suit No. 1105 of 2017 ("the Suit") against FT. The claims advanced by AB in the Suit encompassed much of what it had previously canvassed before the adjudicator. For instance, AB claimed (as it had before the adjudicator) that FT's claims for variation works were improper, that the variation works fell within the scope of the Sub-Contract works, and/or that the variation works had really been carried out in order to rectify defects in FT's Sub-Contract works.[11] As mentioned at [8] above, the adjudicator had found that he was precluded by s 15(3)(*a*) of the Act from considering these submissions due to AB's failure to raise them in its payment response. As before, AB disputed the value of the as-built drawings, warranties and manuals that FT had omitted to provide, claiming that those outstanding documents were worth $102,465 (rather than $5,000 as the adjudicator had decided).[12] AB also reiterated its claim for liquidated damages.[13]

11 Statement of Claim at para 20.

12 Statement of Claim at paras 32–33.

13 Statement of Claim at para 46.

11 On 6 December 2017, AB filed Summons No. 5571 of 2017 ("SUM 5571") in the OS, seeking a stay on the execution or enforcement of the Adjudication Determination pending the disposal of the proceedings that AB had commenced in the Suit. Later that month, it also filed Summons No. 5753 of 2017 ("SUM 5753"), seeking an interim stay on the enforcement proceedings pending the hearing of the Main Stay Application.

12 On 8 January 2018, FT filed Summons No. 166 of 2018 ("SUM 166") in the Suit. The relief sought by FT was the striking out of AB's statement of claim in the Suit or, in the alternative, a stay of the Suit until AB had made full payment of all outstanding sums payable under the Adjudication Determination. SUM 5753 and SUM 166 came before me concurrently for hearing.

Parties' submissions

13 The focus of parties' submissions before me was on SUM 166; more specifically, on the question of whether proceedings in the Suit should be stayed or struck out altogether given that AB had not made payment of the Adjudicated Amount thus far. I was informed that despite the multiplicity of garnishee proceedings commenced thus far, FT had only managed to retrieve a total of $9,215.66 from AB's bank accounts at the time of the hearing. This obviously represented only a fraction of the sum of more than $920,000 for which AB had been adjudged to be liable.

14 FT's central contention in SUM 166 was that AB's commencement of the Suit despite its non-payment of the Adjudicated Amount constituted an *abuse of process* of the court. Mr Tan Joo Seng, counsel for FT, relied heavily on the decision of Foo JC in *Lim Poh Yeoh*. Mr Tan argued that the present case was "on all fours" with *Lim Poh Yeoh* and urged me to find – as Foo JC had in

Lim Poh Yeoh – that AB's conduct should be recognised as an abuse of process, with the consequence that the court should exercise its inherent jurisdiction to stay the proceedings until AB had paid the judgment debt. According to FT, it is "an abuse of process of [the] court for an unsuccessful respondent to an adjudication determination to commence a claim against the claimant on the same contract without first paying the sum awarded under the determination".[14] Mr Tan further highlighted that the appeal against Foo JC's decision had subsequently been dismissed by the Court of Appeal (Civil Appeal No. 178 of 2016). I will elaborate on the facts and reasoning in *Lim Poh Yeoh* as well as Mr Tan's submissions on the judgment in my analysis below.

15 Mr Patrick Ong, counsel for AB, accepted that AB had not made payment of the Adjudicated Amount. But this, according to Mr Ong, did not necessarily yield the conclusion that AB's commencement of the Suit amounted to an abuse of process. Mr Ong drew my attention to s 34(1)(*a*) of the Act, which establishes that nothing in the Act is to affect any right that a party to a contract might have to submit a dispute relating to or arising from the contract to a court or tribunal, or to any other dispute resolution proceeding. He also highlighted various statements in the legislative debates and cases on the Act regarding the temporary finality of adjudication determinations.

16 Mr Ong vigorously argued that the present case could be distinguished from *Lim Poh Yeoh*, and thus that there were no grounds to find that AB had committed an abuse of process. In this regard, Mr Ong had two primary submissions. First, *Lim Poh Yeoh* did not stand for the proposition that it would always be an abuse of process for an unsuccessful respondent in adjudication to commence court proceedings to seek a final determination of the underlying

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[14] FT's written submissions on SUM 166 and SUM 5571 at para 19.

dispute between the parties. A crucial point of distinction between the appellant in *Lim Poh Yeoh* and AB was that – unlike the appellant in that case – AB was genuinely unable to make payment of the Adjudicated Amount and it had not done so for that reason. Therefore – unlike the result in *Lim Poh Yeoh* – it would not be appropriate for AB's suit to be stayed. Second, and in any event, AB had proper and sufficient justification for withholding payment. According to AB, FT was impecunious and therefore if AB was to pay the Adjudicated Amount (or whatever amount AB could afford to pay) to FT, there was a chance that those monies would prove irrecoverable should AB subsequently succeed in the Suit. This, Mr Ong pointed out, was also the reason why AB had filed SUM 5571 (which, as earlier mentioned, is AB's application for a stay of enforcement pending decision on the Suit).

17 Regarding SUM 5753 (*ie,* AB's application for an interim stay on the enforcement proceedings in the OS), Mr Ong contended that the interim stay was necessary to preserve parties' positions pending the determination of SUM 5571. Put shortly, if the multiple enforcement proceedings taken out by FT continued to unfold in the intervening period, SUM 5571 could well be rendered nugatory. Mr Ong further submitted that irreversible prejudice would be caused to AB if, pursuant to the Seizure Application which had been granted on 12 December 2017, the immovable property were sold. In response, Mr Tan denied that AB would suffer any such prejudice and submitted that, on the converse, it was FT that could be prejudiced if proceedings in the OS were stayed, since AB might begin disposing of its assets during the interim stay.[15]

18 I reserved my decision after hearing parties on 5 February 2018. On 8 February 2018, I made the following orders:

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15 FT's written submissions on SUM 166 and SUM 5571 at para 95.

(a) On SUM 166, I ordered that the proceedings in the Suit be stayed until AB made full payment of all outstanding sums payable to FT pursuant to the Adjudication Determination, but I subjected this order to any decision made in SUM 5571 to grant a stay of execution or enforcement of the Adjudication Determination pending the disposal of court proceedings in the Suit.

(b) On SUM 5753, I granted an interim stay on the execution and enforcement of the Adjudication Determination pending the hearing of SUM 5571.

The result of my order on SUM 166 is that should an order be made, following the hearing of SUM 5571, that a stay on enforcement proceedings in the OS should be imposed pending decision on the Suit, then the proceedings in the Suit should be permitted to continue notwithstanding the fact that AB had not made full payment of the outstanding Adjudicated Amount. I will explain why I took the view that this result and these consequences were appropriate.

The issues

19 Shortly put, the issue that arose for my decision in SUM 166 was whether it is an abuse of process for a losing party in an adjudication (*ie,* AB) to commence proceedings to seek a final determination of the underlying dispute between the parties in circumstances where it has not made payment of the adjudicated amount to the winning party (*ie,* FT), having omitted to make such payment because (a) it is genuinely unable to make such payment due to its financial circumstances; and (b) it believes that any amount paid to the winning party would not be recoverable due to the impecuniosity of the winning party, were the losing party to subsequently succeed in the litigation of the underlying dispute. I found that the determination of this issue required a close

examination of the reasoning in *Lim Poh Yeoh* as well as a number of Australian decisions on the same or related issues.

20 SUM 5753 is a decidedly less complex application, and this was reflected in the fact that considerably less time in argument was spent on this matter. The question in SUM 5753 was whether an interim stay on enforcement should be ordered pending the determination of the main stay application, *ie*, SUM 5571.

21 It is appropriate for me to begin with a description of the relevant law, which will consist of a brief account of the principles on the court's power to restrain abuse of process, followed by a more detailed explication of *Lim Poh Yeoh* and the exercise of those inherent powers in the context of the Act.

The law

The court's inherent power to restrain abuse of process

22 It is settled principle that the court possesses inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court: O 92 r 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). In "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23, Sir Jack Jacob described the court's inherent jurisdiction as "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them". This account of the court's inherent jurisdiction has been cited with approval locally: see, for instance, *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27] and *Chee Siok Chin and others v*

Minister for Home Affairs and another [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") at [30].

23 The concept of abuse of process has unsurprisingly received a broad definition in the case law and academic commentary. The Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 observed at [22] that the concept has been given a wide interpretation and that at its core, it "signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation." Its categories "are not closed and will depend on all the relevant circumstances of the case". In *Chee Siok Chin* at [34], V K Rajah J (as he then was) usefully categorised the instances of abuse of process into four categories: (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham; (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way; (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; and (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

24 In the exercise of its inherent powers to restrain abuse of its process, one of the options open to the court is to order a stay of proceedings. In his article, Sir Jack Jacob described an abuse of process as "connot[ing] that the process of the court must be used properly, honestly and in good faith … where an abuse of process has taken place, *the intervention of the court by stay* or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous,

vexatious or groundless litigation" [emphasis added]. It is likewise noted in *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2018) at para 92/4/4 that in invoking its inherent jurisdiction, the court may stay civil proceedings which it deems to be vexatious, frivolous or likely to cause an abuse of process of court.

The abusiveness of commencing proceedings despite non-payment of the adjudicated amount

Lim Poh Yeoh

25 In *Lim Poh Yeoh*, the plaintiff employed the defendant to construct two houses. The plaintiff commenced proceedings against the defendant, seeking damages for delay and defective works, and the defendant in turn counterclaimed for the unpaid sum owing to it for the works it had completed. Separately, the defendant applied to enforce as a judgment debt an adjudication determination that had been decided in its favour. When that application was granted, the defendant took out various enforcement measures against the plaintiff, including garnishee proceedings, an order for examination of judgment debtor and a writ of seizure and sale against the plaintiff's property. The defendant further issued a statutory demand against the plaintiff and the plaintiff applied unsuccessfully to set aside the statutory demand (that application was not before Foo JC and did not form part of his decision in *Lim Poh Yeoh*).

26 The defendant applied for a stay of the suit commenced by the plaintiff pending the plaintiff's payment to the defendant of the judgment debt as well as the costs ordered against the plaintiff in the enforcement application and the plaintiff's unsuccessful attempt to set aside the statutory demand. An assistant registrar granted the stay and the plaintiff appealed. On appeal, Foo JC ordered

that if the plaintiff failed to satisfy the outstanding costs orders and the judgment debt within one month, all proceedings in the plaintiff's suit were to be stayed.

27 In relation to the plaintiff's non-payment of costs, Foo JC rejected the plaintiff's submission that because the costs orders had been made in proceedings other than the suit, the suit should not be stayed for non-payment of those costs. He found at [9] that what was more critical was the fact that the adjudication determination formed the basis of both the enforcement proceedings and the suit; put another way, the enforcement proceedings "emanated from the same dispute [*ie*, the dispute concerning the construction contract between the parties] that animated the [suit]". Foo JC found at [10] that whether a stay should be granted pending payment of costs would depend on the twin criteria of prejudice and justice. He reasoned as follows:

> 12 In the present case, I found that the Plaintiff had the capacity and means to pay the outstanding costs ordered but was *simply refusing to do so*. The best case that Plaintiff's counsel could put forward for her during the hearing was to say that "Plaintiff has not said that she can pay but she has not said that she cannot pay" (see the notes of proceedings dated 27 September 2016). I note that the assistant registrar, in SUM 6188, had made the similar finding that the Plaintiff was *refusing to pay the sums owed*. Quite apart from the fact that the Plaintiff had never once asserted that she was unable to pay the outstanding costs (and the Judgment Debt), her course of conduct before me further reinforced my view that *she had the means to pay but chose to make a mockery of the court process*.
> …
>
> 13 At the hearing on 27 September 2016, the Plaintiff's counsel then informed me that all the interlocutory costs orders in Suit 92 had been satisfied and submitted that since a stay should only be granted where the costs from interlocutory proceedings in the same suit had not been paid, the court should not order the stay (notwithstanding that the costs and the Judgment Debt in OS 381 remained unsatisfied by the Plaintiff). It was evident to me that the Plaintiff was *simply picking and choosing which outstanding orders of court to comply with so that she would not contradict or weaken the legal position she was adopting. This brought to light the Plaintiff's attempt to game the system and there was no reason to believe*

> *that the Plaintiff was unable to satisfy the other outstanding orders of court*. In this regard, I agreed with the observations of the assistant registrar below that "[i]n effect, the [P]laintiff will use the power of this Court when it suits her and disregard it when it does not".
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> [emphasis in original removed; emphasis added]

28 Foo JC held at [14] that a stay of proceedings would therefore not cause prejudice to the plaintiff, and noted that the situation was unlike that in *Morton v Palmer* (1882) 9 QBD 89 where Cave J held (at 91) that it would be "entirely contrary to justice that, without being at liberty to exercise any discretion whatever in the matter, the Courts should be compelled to say that a man who may have a just claim should be prevented from pursuing it further because he may be *unable to pay the costs of some interlocutory proceeding* in which he may have failed perhaps from no fault of his own" [emphasis added]. Foo JC then proceeded as follows (at [15]):

> The above cases reminded us of an important safeguard: that *the court should be careful not to stifle a genuine claim*. Indeed, the law and its particular rules sought to hold the ring between parties. However, *as against a recalcitrant party who was gaming the system this way, there was no question of stifling a genuine claim*. The Plaintiff *simply needed to play by the rules and pay up the outstanding costs (which she was able to do)* to reactivate the present proceedings. In my view, her conduct amounted to an *abuse of the process of the court* and could not be countenanced. I therefore ordered that Suit 92 be stayed if the Plaintiff did not satisfy the outstanding costs orders within a month. [emphasis added]

29 Foo JC then turned his attention to the plaintiff's non-payment of the judgment debt (*ie,* the amount that the adjudicator had found the plaintiff to be liable to pay the defendant). In this regard, Foo JC found that the plaintiff's conduct of the proceedings likewise constituted an abuse of process. He began by highlighting that the judgment debt had originated from an adjudication determination, and quoted from the Court of Appeal's judgment in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [59],

where the Court of Appeal had held – upon a review of certain provisions of the Act, including those governing adjudication review applications (s 18) and applications to set aside adjudication determinations (s 27) – that "where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason". Foo JC observed at [18] that the scheme of the Act was accordingly "based upon successful claimants being paid speedily".

30 The second point Foo JC made likewise flowed from the quoted passage from [59] of *W Y Steel*. It concerned s 27(5) of the Act, which provides as follows:

> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

Foo JC noted that the effect of s 27(5) was that any respondent in an adjudication that wished to challenge the outcome of an adjudication determination "must still either pay the adjudicated amount to the claimant or pay the unpaid amount into court as security". He then held as follows (at [19]):

> … This point was germane in guiding my decision to stay the proceedings if the Plaintiff did not pay the Judgment Debt. While I noted that the Plaintiff was not in fact seeking to review the Adjudication Determination, and therefore the above cited provisions did not apply to the Plaintiff, it would be *perverse for the reasons herein for her to be allowed to deprive the Defendant of its right to prompt payment.* The Plaintiff was *effectively choosing not to pay the Judgment Debt in the hope that upon having the matter determined at trial, the court would find in her favour* and she would never have to pay this sum to the Defendant. I saw *no reason why someone in her position should be better off, for instance, than a respondent who was seeking to challenge the validity of an adjudication determination (who would be compelled to make the payment pursuant to provisions*

> *of [the Act] before such a challenge could proceed).* In fact, it could be said that it was even more imperative for someone in the Plaintiff's position to pay the Judgment Debt in the interim since she herself recognised the validity of the Adjudication Determination. [emphasis added]

31 Foo JC then reviewed two decisions of the New South Wales Supreme Court, *Tombleson v Dancorell Constructions Pty Ltd* [2007] NSWSC 1169 ("*Tombleson*") and *Nazero Group Pty Ltd v Top Quality Construction Pty Ltd* [2015] NSWSC 232 ("*Nazero*"), which I will describe in greater detail subsequently. In brief, Foo JC found at [20] that the "common theme emanating from these decisions was that parties should not be allowed to *withhold payment* of the adjudicated sum whilst seeking to effectively overturn the adjudication determination at the same time" [emphasis added].

32 Foo JC noted at [21] that this could be "the first case where a party in the Plaintiff's position *elected not to pay the judgment debt* pending the determination of their dispute in the underlying contract" [emphasis added]. He remarked that "such unilateral action on the Plaintiff's part drove a coach and horses through the scheme established under [the Act] and cynically defeated its legislative intent". In closing, Foo JC held as follows:

> 22 … it was again significant to me that *the Plaintiff was ultimately able but unwilling to pay the Judgment debt* (as noted above [in the section of the judgment on the Plaintiff's non-payment of costs]). There was, therefore, to my mind no issue of depriving her of access to the court to have her case heard in Suit 92 because *it was within her control to pay the Judgment Debt and have the matter revived.*
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> 23 … In my view, the court could not stand by while the Plaintiff was abusing its process; it was incumbent upon the court to bring such abuse to an end. This was also to disabuse the Plaintiff of any further ideas she might have of *circumventing the rules*, for instance, by refusing to pay the Defendant (pending an appeal) should she fail in Suit 92.
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> 24 In the light of *the Plaintiff's deliberate conduct*, I therefore found it necessary to exercise the court's inherent

> power to stay the proceedings in Suit 92 until she paid all outstanding costs ordered by the court and the Judgment Debt in OS 381. As noted above (at [5]), however, I granted her one final indulgence to pay these outstanding sums; in default all proceedings in Suit 92 were to be stayed.
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> [emphasis added]

Australian decisions

(1) Tombleson

33 The relevant legislation in New South Wales is the Building and Construction Security of Payment Act 1999 ("the NSW Act"). Under s 25(1) of the NSW Act, an adjudication certificate can be filed as a judgment for a debt and enforced accordingly. If the respondent commences proceedings to have that judgment set aside, he is required to pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings: s 25(4)(b) of the NSW Act. Section 25(4)(b) of the NSW Act is therefore *in pari materia* with s 27(5) of our Act (see [30] above).

34 In *Tombleson*, the plaintiff commenced proceedings in the New South Wales Supreme Court against the defendants, seeking orders in the nature of a writ of certiorari quashing the decision of the adjudicator (who was the second defendant). The plaintiff sought declarations that the determination and the adjudication certificate were void, as well as injunctions preventing the first defendant from taking any action in order to enforce the determination. In response, the defendant applied for a stay of the proceedings until the plaintiff had paid into court as security the unpaid portion of the adjudicated amount.

35 Patricia Bergin J (as she then was) granted the stay. She accepted at [17] that s 25(4)(b) of the Act, which required a respondent to pay the unpaid portion of the adjudicated amount into court pending the determination of the setting-

aside proceedings (see [33] above), did not apply because that provision concerned applications to set aside judgments and the defendant had not sought an order of that nature. She emphasised at [18], however, that the court would "not only [be] cautious to ensure justice between the parties, but also to ensure that the legislation under which [the] application [was] brought [was] *not circumvented*" [emphasis added]. Bergin J held as follows (at [19]):

> The plaintiff is attempting to *prevent the defendant from enforcing the judgment* by injunction rather than seeking to set aside the judgment. … If the Court is satisfied that such an application is for the purpose of *getting around or circumventing the provisions of the Act* then an order may be made staying the proceedings on the condition that such stay will remain unless money is paid into Court. Such an approach may diminish the drafting of innovative pleading to ensure that s 25(4) is not triggered to obtain the benefit of proceedings into Court whilst the contractor loses the benefit of the Act. [emphasis added]

Having found that the plaintiff's pleading sought to avoid the triggering of s 25(4)(b) of the Act, she exercised her discretion to stay the proceedings until the unpaid amount was paid into court.

(2) Nazero

36 In *Nazero*, the plaintiff brought an action against the defendants in the New South Wales Supreme Court, seeking declarations that an adjudication determination was "an abuse of processes of the [NSW Act]", that it be quashed and be void and of no effect; an order restraining the first defendant from seeking to enforce any judgment based on the adjudication determination; and an injunction or permanent stay of the enforcement of the adjudication determination. The first defendant in turn applied for an order that the plaintiff pay the unpaid portion of the adjudicated amount into court as security, and in the alternative, an order staying proceedings unless the plaintiff made such

payment into court. In this case, the first defendant had not yet filed an adjudication certificate as a judgment for a debt.

37 David Hammerschlag J held at [26] that although s 25(4) of the NSW Act did not apply, it was nonetheless appropriate that proceedings be stayed unless the plaintiff paid the unpaid portion of the adjudicated amount into court. He observed at [29] that the court possessed inherent power to stay proceedings and an "incidental power" to control and to ensure the proper and fair use of its jurisdiction. After describing the decision in *Tombleson*, he reasoned at [40] that the "starting point" in the exercise of his discretion was the "general policy aims" of the NSW Act and the specific aims of particular pertinent sections. A general policy aim was "to give enforceable rights to progress payments" and another was "to ensure the speedy and effective determination of disputes about them". At [42] of his judgment, Hammerschlag J held as follows:

> The policy of the [NSW] Act, as reflected in s 25(4)(b), is that a claimant is to be given protection of payment into court when a respondent seeks, whether by injunction or otherwise, *to inhibit the claimant's enforcement of an adjudication in its favour*. [emphasis added]

38 He found that although the defendant had not yet filed an adjudication certificate, it was open to the defendant to do so and in such event the plaintiff would have "little option but to seek to have the judgment set aside to protect its position, in which event, s 25(4)(b) of the [NSW] Act would mandate payment into court". Hammerschlag J further held at [44]:

> It is not apt to describe a requirement to pay into court an amount the subject of a statutory obligation to pay into court an amount the subject of a statutory obligation to pay, pending a challenge to that obligation, as a fetter on the right to make the challenge. *It may be a practical inhibition, depending on the specific financial circumstances of the challenger. This could be a factor relevant to the exercise of discretion, but in the present case, [the plaintiff] leads no evidence of hardship.* [emphasis added]

(3) Pettersson

39 In *R v Scott Pettersson; Ex parte Fenshaw Pty Ltd* [2015] TASSC 33 ("*Pettersson*"), the plaintiff obtained a general order to show cause in respect of an adjudication determination. In summary, the plaintiff alleged that the adjudicator lacked jurisdiction to determine the application; that the plaintiff had been denied natural justice; that the adjudicator had failed to exercise his jurisdiction by failing to determine the adjudication application in accordance with the Tasmanian Building and Construction Industry Security of Payment Act 2009 ("the Tasmanian Act"), had exceeded his jurisdiction in other respects and had erred in law. The defendant, who had filed an adjudication certificate as a judgment against the plaintiff, applied for a stay of proceedings commenced by the plaintiff until it had paid the amount due under the judgment into court or to the defendant.

40 David Porter J in the Supreme Court of Tasmania granted the stay sought by the defendant. He observed at [19] that although s 27(5)(b) of the Tasmanian Act (which is *in pari materia* to s 27(5) of our Act) did not apply, the court retained an unfettered discretion to grant a stay in its inherent jurisdiction. Porter J reviewed a number of Australian decisions, including *Tombleson* and *Nazero*. In relation to *Tombleson*, Porter J surmised at [22] that "the critical factors [in that case] were that injunctive relief was being sought in respect of enforcement of the judgment, and there was a *manifest intention to avoid the operation of the [NSW] Act*" [emphasis added]. In relation to *Nazero*, Porter J indicated at [35] that he would be adopting the approach taken by Hammerschlag J, and held that "[a]n additional factor *relevant to the exercise of the discretion* is the *failure of the [defendant] to obtain satisfaction of its judgment*, *the [plaintiff's] apparent financial situation*, and the offer which was made of a payment into court in

support of its own interlocutory application for an injunction which was not pursued" [emphasis added].

41 Porter J concluded at [37]–[38] that ordering a stay was not a step lightly taken, but that having considered the relevant factors, proceedings should be stayed pending the plaintiff's payment into court of the amount owing under the adjudication determination.

Stay of the Suit

42 In my judgment, when determining whether it is an abuse of process for a plaintiff to commence proceedings seeking a final determination of the underlying dispute despite not having made payment of the adjudicated amount to the defendant, it is necessary to have regard to the *reason for the non-payment*. This is, on one level, no more than an application of the trite principle that when the court ascertains whether there has been an abuse of process, the court must examine "all the relevant circumstances of the case" (see [23] above). It is also reflected in Foo JC's detailed consideration of why the plaintiff in *Lim Poh Yeoh* had failed to make payment.

Genuine inability to pay

Analysis of the case law

43 Having considered the facts and reasoning in *Lim Poh Yeoh*, I do not find that this case is authority for the proposition that, in circumstances where the plaintiff (who is the losing party in an adjudication) is genuinely unable to pay the adjudicated amount and therefore does not do so, it would be an abuse of process for the plaintiff to nonetheless commence proceedings against the defendant (the winning party in the adjudication) to obtain a final determination of the underlying dispute between the parties. I did not accept Mr Tan's

submission that *Lim Poh Yeoh* stands for the unyielding proposition that it is "an abuse of process of [the] court for an unsuccessful respondent to an adjudication determination to commence a claim against the claimant on the same contract without first paying the sum awarded under the determination" (see [14] above).

44 It is crucial to note that *Lim Poh Yeoh* was a case in which the plaintiff *had* the ability to pay the judgment debt and the costs ordered against her, but had *deliberately chosen not to do so* before commencing proceedings against the defendant. This was a point that Foo JC made repeatedly and throughout his judgment, both in relation to the plaintiff's omission to pay costs as well as the judgment debt. With regards to costs, he found that the plaintiff "had the capacity and means to pay the outstanding costs ordered but was simply refusing to do so". In choosing not to pay despite the fact that "she had the means to pay", she was "mak[ing] a mockery of the court process" (see the quoted passages at [27] above). The pith of the plaintiff's improper conduct was her considered strategy to employ the processes of the court in a contrived and improper manner – in Foo JC's words, she was "a recalcitrant party who was gaming the system" and who "simply needed to play by the rules and pay up the outstanding costs (which she was able to do)" (see [28] above).

45 With regards to the outstanding judgment debt, Foo JC likewise found that the plaintiff was acting abusively. She had simply "elected not to pay the judgment debt" despite the fact that she was "ultimately able … to pay" the sum (see [32] above). For this reason, Foo JC found that there was "no issue of depriving her of access to the court to have her case heard".

46 *Lim Poh Yeoh* can therefore properly be described as a case in which the court had found the plaintiff to be acting abusively in commencing proceedings

because her non-payment of the adjudicated amount followed from a deliberate and wilful decision not to do so in spite of her manifest ability to make such payment. It is far from clear whether Foo JC would have found the plaintiff to be guilty of an abuse of process had he been satisfied that she was genuinely unable to make payment and had therefore omitted to do so for that reason alone. It is particularly unclear because of the note of caution Foo JC sounded at [15] of the judgment, where he stated that it was an "important safeguard" that "the court should be careful not to stifle a genuine claim". He reiterated this at [22] of his judgment, where he considered whether there was any "issue of depriving [the plaintiff] of access to the court to have her case heard in [the suit that she commenced]". On the facts before him, however, he found that there was "no question of stifling a genuine claim" because the plaintiff was merely gaming the system (see [28] above).

47 Neither do I find that the Australian decisions – *Tombleson*, *Nazero* and *Pettersson* – provide an unambiguous answer to the question (although valuable guidance can be found in these cases). This is due in large part to the nature of the orders sought by the plaintiffs in those cases. That in turn framed the scope of the question before the court. The plaintiffs in all these cases sought relief that directly impugned the adjudication determination and/or the resultant judgment debt. In other words, the purpose of the proceedings they commenced was to nullify the adjudication determination and stymie its enforcement – in substance though not in form, to have the adjudication determination and/or the judgment *set aside* – rather than to seek a *final determination* of the underlying dispute between the parties. The Australian courts found that their conduct amounted to an attempt to circumvent the statutory requirement that they first pay security into court and therefore that they were abusing the process of the court.

48 For instance, in *Tombleson*, the plaintiff sought orders quashing the adjudication determination and injunctions preventing the defendant's enforcement of the adjudication determination, despite not having paid the adjudicated amount. Bergin J essentially found that the abusiveness of the plaintiff's conduct lay in her attempt to circumvent s 25(4)(b) of the NSW Act, which required a respondent to pay security into court pending proceedings to have the judgment set aside. As described at [40] above, Porter J had, in *Pettersson*, commented that *Tombleson* involved a plaintiff that had "a manifest intention to avoid the operation of the [NSW] Act". Likewise, the plaintiff in *Nazero* had applied for the adjudication determination to be quashed and the defendant prevented from enforcing any judgment based on it. Hammerschlag J held that a claimant should be given protection of payment into court in circumstances where the respondent was taking action "to inhibit the claimant's enforcement of an adjudication in its favour" (see [37] above). In other words, what the plaintiffs in these cases had sought to do (albeit indirectly) was to have the adjudication determination rendered ineffectual and its enforcement prevented – as if the adjudication determination and the judgment entered thereupon had been set aside – without having first paid the necessary security into court.

49 In my judgment, the fact that the plaintiffs in those cases had in substance sought to set aside the adjudication determinations and/or prevent their enforcement, rather than to obtain a final determination of the underlying disputes, is a critical point of distinction. An application to set aside an adjudication determination has a very different nature and carries very different consequences from an action to finally determine the rights and obligations between the parties to the construction contract. This flows from the temporary finality of adjudication determinations – that is, the characteristic that

adjudication determinations are "final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved whether by arbitration or litigation": *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890 at [30]. Even if an adjudication determination is set aside, the right of the parties to seek and obtain that ultimate and conclusive determination of the merits of their respective cases remains. That is why s 34(1)(*a*) of the Act prescribes, crucially, that "[n]othing in this Act shall affect any right that a party to a contract may have … to submit a dispute relating to or arising from the contract to a court or tribunal, or to any other dispute resolution proceeding". It is also why, pursuant to s 34(3) of the Act, an adjudicator shall terminate the adjudication proceedings if, before his determination of the dispute, the dispute is determined by a court or tribunal or at any other dispute resolution proceeding. A determination of temporary finality is unnecessary in the presence of a final determination.

50 Consequently, one cannot draw the conclusion that a plaintiff's commencement of proceedings to seek a resolution of the underlying dispute in the absence of payment of the adjudicated amount is an attempt to circumvent s 27(5) of the Act – and is accordingly an abuse of process – in the same way that an application to quash or nullify adjudication determinations in the absence of payment of security into court is. That is not to say that commencement of such proceedings does not or cannot amount to abuse. It is simply to say that one cannot effectively analogise the two types of proceedings without falling into error.

My approach

51 In my judgment, where a plaintiff has not made payment of the adjudicated amount because it is genuinely unable to do so as a result of its

financial situation, its commencement of proceedings to obtain a final determination of the underlying dispute in those circumstances cannot, without more, be considered an abuse of process such that the proceedings should be stayed.

52 That must be so for a number of reasons. First, where a plaintiff does not make payment because its impecuniosity renders it simply unable to do so, the basis for an allegation of abusive conduct falls away. The plaintiff does not pay up not by choice but by circumstance. It would not be open to the defendant to argue – as it did in *Lim Poh Yeoh* – that the plaintiff has made a wilful and conscious decision to withhold payment from the defendant before commencing proceedings, either because of a perceived entitlement to withhold the sum or an expectation that it will succeed in the final determination. As discussed at [44]–[46] above, that was the force behind the defendant's complaint in *Lim Poh Yeoh* that the plaintiff was acting abusively. But the thrust of that complaint is blunted where the plaintiff's non-payment stems from genuine impecuniosity. In *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 at [55], the Court of Appeal of the Supreme Court of Western Australia held that "[t]he broad purpose of the [Western Australian Construction Contracts Act 2004, which is *in pari materia* to our Act], insofar as it relates to payment disputes, is to ensure that, in construction contracts, progress claims are paid on time and that principals obliged to pay *do not act as their own judge and jury* and hold up payment on their own assertion that they have a defect warranting refusal to pay" [emphasis added]. That objection simply does not materialise in the circumstances that I have described.

53 One must return to the definition of an abuse of process of the court – that is, the "improper use of the court's machinery … as a means of vexation and oppression in the process of litigation", for instance where the process of

the court "is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way" (see [23] above). It is not obvious to me that an impecunious plaintiff that commences proceedings to obtain a final determination can be described as having exploited the court's process in a manner or for a purpose that is improper or in bad faith.

54 Second, there is no conflict between the imperative of ensuring speedy payment to the victorious party in adjudication, on the one hand, and permitting a genuinely impecunious plaintiff from seeking a final determination of the underlying dispute, on the other.

55 In an oft-cited passage from *W Y Steel*, the Court of Appeal described the appeal of the philosophy behind the Act as follows (at [20]):

> … payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of *lengthy and expensive proceedings that have to be undertaken in order to disentangle the knot of disputed claims and cross-claims*. [emphasis added]

In the recent decision of *Audi Construction Pte ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317, the Court of Appeal reiterated (at [1]) that the aim of the Act was to establish "a fast and low cost adjudication system to resolve payment disputes (citing the speech of Mr Cedric Foo Chee Keng, then Minister of State for National Development, at the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004): *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113), in the light of "the need to ensure that contractors and subcontractors in the construction industry receive timely payments for work done and materials supplied". The goal of facilitating speedy payment to preserve cash flow in the construction industry would not be promoted but would instead be undermined by "the grinding detail of the traditional approach

to the resolution of construction disputes" (*Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739 at [14]).

56 In circumstances where a plaintiff is genuinely unable to pay and therefore does not do so before commencing an action for a final determination, the issue of speedy payment being hindered by the length and expense of proceedings does not arise. What has occurred in this situation is simply that the pursuit of payment by the defendant has run its course and come up empty. In other words, the defendant's inability to have its judgment debt satisfied cannot be attributed to the plaintiff's stubborn refusal not to pay because of a belief in the merits of its case and a desire to prosecute the matter fully before a court or arbitral tribunal. It is not the "grinding detail of the traditional approach to resolution of construction disputes" that would have formed the obstacle to the defendant's recovery of the judgment debt. Rather, the defendant's attempt to recover the adjudicated amount would have been unfruitful because that attempt had been directed at an impecunious plaintiff.

57 In these circumstances, there would appear to be little justification for preventing the plaintiff from proceeding to seek a final determination. This leads into a third point. As the Court of Appeal noted in *W Y Steel* at [61], while "the claimant who successfully secures an adjudication determination in his favour has a right to be paid … there is a *competing residual right* on the part of the respondent to have his claims ventilated in full in court or in some other dispute resolution proceeding" [emphasis added]. That is a right that is referenced implicitly in s 21(1)(*b*) and expressly in s 34(1)(*a*) of the Act. Those provisions "underscore the idea of an unsuccessful respondent having the right to try to reverse (either in whole or in part) the temporarily final adjudication determination". The Court of Appeal in *W Y Steel* further highlighted that "[f]or this right not to be nugatory, a respondent who is initially unsuccessful must

have an avenue open to him that will enable him finally to achieve effective justice". Accordingly, I do not see how precluding a plaintiff from commencing or continuing proceedings where it has shown itself to be unable to make payment would promote or serve the ends of the Act. On the contrary, it appears to me that that approach would in fact fail to give effect to s 34(1)(*a*) and denude the plaintiff's right to a final determination.

58 Fourth, it is worth noting that the courts in *Nazero* and *Pettersson* both found that it was relevant to consider the plaintiff's financial situation in determining whether it was appropriate, in the exercise of the court's discretion, to stay proceedings pending payment of the adjudicated amount into court or to the defendant. In *Nazero*, Hammerschlag J referred to the plaintiff's financial difficulties as "a practical inhibition" that the court might take into account, although the plaintiff in that case had led no evidence of financial hardship (see [38] above). Porter J reached a similar finding in *Pettersson*, although he also thought it relevant that the defendant had not obtained satisfaction of its judgment (see [40] above); all of these factors were, essentially, to be weighed in the balance in determining how the court should exercise its discretion in the case.

59 It is equally worth highlighting that although the abusiveness of the plaintiffs' conduct in seeking to circumvent ss 25(4)(b) and 27(5)(b) of the NSW and Tasmanian Acts respectively was clear – due to the nature of the orders sought in those cases (as discussed at [47]–[50] above) – Hammerschlag and Porter JJ nevertheless considered that the plaintiffs' impecuniosity would be relevant to the exercise of their discretion whether to stay the proceedings. In my view, this is entirely consistent with the requirement that in determining whether an abuse of the court's process has occurred, the court must consider all the circumstances of the case.

Irrecoverability of paid amounts

60 As described at [16] above, Mr Ong's second argument was that AB had not paid the adjudicated amount because it believed that FT itself was impecunious, and therefore any amount paid to FT might well be irrecoverable if AB were ultimately to succeed in the final determination. This, according to Mr Ong, also justified AB's decision to commence proceedings despite not having paid the adjudicated amount, such that AB's conduct could not be regarded as an abuse of process.

61 When I pointed out to Mr Ong that the financial status of FT was in fact the primary issue in SUM 5571 (*ie,* AB's application in the OS for a stay of enforcement pending the disposal of the Suit), which AB had filed on the basis that any monies paid to FT before the disposal of the Suit would be irrecoverable, and that SUM 5571 was not before me for decision, Mr Ong submitted that it would not be necessary for me to consider whether FT was *in fact* impecunious. Mr Ong took the position that AB's *belief*, taken alone and without more, that monies paid to FT would be irrecoverable, was sufficient reason for me to find that AB's decision to commence proceedings despite not having paid the adjudicated amount was not an abuse of process. He therefore did not put before me any evidence, or even attempt to argue, that FT was in fact impecunious.

62 I found Mr Ong's argument to be implausible. If that argument were accepted, then all it would take for a plaintiff to successfully resist an allegation of abuse of process in circumstances where it had commenced proceedings despite having failed to pay the adjudicated amount would be for the plaintiff to depose to a *belief* that it would not be able to recover sums paid to the defendant, were it subsequently to succeed in the final determination. That result would

seriously undermine the purpose of the statutory scheme and frustrate a successful claimant's "entitlement to receive the adjudicated amount quickly and [not] be denied payment without very good reason" (see [29] above). I do not think that an unproven and untested belief that the successful claimant would not be good for any sums paid to it is a sufficient reason to deny payment to it altogether pending the final determination of the dispute.

63 It is necessary in this regard to consider the requirements that must be met by a party that seeks a stay on the enforcement of an adjudication determination. In *W Y Steel*, the Court of Appeal accepted at [60] that "where the adjudicated amount is paid to a claimant in serious financial distress, there is a chance that the money may not be recoverable by the time the rights of each of the parties are finally determined". However, it is clear from the Court of Appeal's decision that a mere belief on the part of the applicant is insufficient if it desires to obtain a stay of enforcement:

> 70 In our judgment, a stay of enforcement of an adjudication determination may ordinarily be justified where there is *clear and objective evidence of the successful claimant's actual present insolvency*, or where the court is *satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body. …* [emphasis added]

In other words, it is essential that the applicant's belief be tested and proven on the basis of the evidence. The Court of Appeal underscored this by observing that while it was "prepared to recognise the possibility of granting a stay of enforcement of an adjudication determination because of the possibility of a different outcome emerging eventually, a stay will not *readily* be granted having regard to the overall purpose of the Act, which is precisely to avoid and guard

against pushing building and construction companies over the financial precipice" [emphasis in original].

64 In my judgment, the same approach should be taken to assess a plaintiff's attempt to resist an application for a stay of proceedings due to its non-payment of the adjudicated amount, where the plaintiff's refusal to pay flows from its belief that it will not be able to recover any monies paid to the defendant if the dispute between the parties were eventually resolved in its favour. That belief must likewise be tested and proven on the evidence. If the position were otherwise, it would be a matter of utmost ease for a plaintiff to justify its non-payment despite being able to pay. It is also difficult to accept that the plaintiff's belief in the defendant's impecuniosity is *bona fide* and genuinely held if the plaintiff does not produce the necessary evidence to show why it holds such a belief.

Application to the facts

65 Mr Tan robustly argued that AB was not, in fact, genuinely unable to make payment of the adjudicated amount. He referred me to AB's Statement of Financial Position as at 31 December 2016 ("the Statement of Financial Position").[16] The Statement of Financial Position showed that as at 31 December 2016, AB had total assets of $26,781,148 and total liabilities of $24,527,636. That meant that AB had net assets of $2,253,512. This was compared to the outstanding amount (after taking into account the amounts recovered by FT in the garnishee proceedings) of $921,421.94.[17]

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16 Affidavit of Wai Kok Fatt dated 8 January 2018 at p25.

17 Affidavit of Wai Kok Fatt dated 8 January 2018 at para 8.

66 Mr Ong had several arguments in response. First, he pointed out that the Statement only showed AB's accounts in 2016 and did not reflect AB's more recent financial circumstances. Second, based on AB's Statement of Profit or Loss and other Comprehensive Income for the Financial Year ended 31 December 2016,[18] AB had suffered a net loss of $36,731 in 2016. Third, AB did not have any new construction projects in 2017.[19] The state of AB's finances could be gleaned from the fact that FT had only managed to garnish $9,215.66 from AB's bank accounts thus far.[20]

67 I did not find that these were satisfactory responses. The only Statement of Financial Position placed before me was for the financial year ended 31 December 2016, and that document showed that AB had sufficient assets to pay the Adjudicated Amount (indeed, the recorded value of AB's assets was more than twice that of the Adjudicated Amount). Mr Ong informed me that AB was not yet in possession of its 2017 accounts. He did not indicate when the 2017 accounts would be produced. In my judgment, even if AB was unable to put before me a more recent set of accounts because those accounts were not yet available to it, it remained open to AB to adduce other documentary evidence to shows its alleged debts and liabilities. I found it striking that AB had failed to adduce *any* such documentary evidence to support its argument that it was genuinely unable to make payment of the outstanding sums. Indeed, Ler Peh Choo, the deponent of AB's affidavits, did not annex any documents to support his claims that (a) AB was unable to pay the Adjudicated Amount; (b) AB did not have any new construction projects in 2017; and (c) AB made losses of a few million dollars in the project involving FT.[21] In my judgment, these were

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18 Affidavit of Wai Kok Fatt dated 8 January 2018 at p24.

19 Affidavit of Ler Peh Choo dated 2 February 2018 at para 9.

20 Affidavit of Ler Peh Choo dated 2 February 2018 at para 11.

factual claims in relation to which one would have expected a director of AB to have at least *some* documentation in support. As they stood, they were merely bare assertions on his part. Neither did I accept that AB's net loss of $36,731 in 2016 was sufficient, either taken alone or together with the other evidence, to prove its impecuniosity. It does not follow from the fact that a company has made a net loss in a given year that it does not have sufficient assets to meet its liabilities.

68 Given the evidence before me, I rejected AB's claim that it was genuinely unable to make payment of the Adjudicated Amount and therefore had not done so before commencing proceedings against FT. Thus its attempt to resist SUM 166 despite its non-payment rested solely on its second argument, which concerned the alleged irrecoverability of any amount paid to FT pending the disposal of proceedings in the Suit. In that regard – and as described earlier (see [61] above) – AB did not adduce any evidence of FT's alleged impecuniosity, nor did Mr Ong seek to convince me that on the facts and evidence, FT was impecunious. He accepted that that matter was the subject of decision in SUM 5571. I therefore ordered that proceedings in the Suit should be stayed, subject to any decision in SUM 5571 that FT was indeed in such dire financial circumstances that it was appropriate to grant a stay of enforcement pending disposal of proceedings in the Suit. Upon such a decision in SUM 5571, proceedings in the Suit would be permitted to resume because FT's impecuniosity and the resulting risk of irrecoverability would also furnish proper grounds for AB to resist FT's stay application in the Suit, *ie,* SUM 166 (see [64] above).

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[21] Affidavit of Ler Peh Choo dated 2 February 2018 at para 10.

Interim stay of enforcement proceedings

69 I agreed with Mr Ong that it was necessary to for an interim stay on enforcement to be granted in order to preserve parties' positions pending decision on SUM 5571. This was due to the risk that that application might otherwise be rendered nugatory. The enforcement proceedings that FT had commenced (and was entitled to commence) were both extensive and advanced. Mr Ong informed me that following the grant of the Seizure Application on 12 December 2017 (see [17] above), more than a month had passed since FT's registration of the order of court for seizure and sale in respect of AB's immovable property. Therefore, once FT had obtained the consent of United Overseas Bank (the mortgagee of the immovable property), it could immediately proceed to sell the property pursuant to O 47 r 5(*a*) of the Rules of Court. This was not disputed by FT.

70 According to the evidence of Ler Peh Choo, the value of the immovable property was around $900,000.[22] Mr Ong further argued that given the value of the property and its proximity to the Adjudicated Amount, FT already had security pending the determination of SUM 5571.

71 I accepted Mr Ong's submissions. It was not apparent to me that any or any substantial prejudice would be caused to FT if I were to grant the interim stay. No evidence was provided in support of FT's allegation that AB would begin disposing of its assets in the intervening period (see [17] above). The extent of the prejudice would simply be that FT would be kept out of its money for the period of the stay, which would not be for a substantial duration. At the time I delivered my decision, SUM 5571 was scheduled to be heard on 19 March

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22 Affidavit of Ler Peh Choo dated 2 February 2018 at para 16.

2018, which was merely one month and 11 days away. On the converse, the potential consequences for AB if no interim stay were granted appeared to be considerably more serious, as Mr Ong had pointed out. In the circumstances, I was satisfied that an interim stay should be ordered, such stay to extend until the determination of SUM 5571.

Conclusion

72 For the reasons that I have explained in these grounds, I made the orders set out at [18] above. I further ordered that (a) in respect of SUM 166, AB was to pay FT costs fixed at $5,000; and (b) in respect of SUM 5753, FT was to pay AB costs fixed at $2,000. Both sets of costs orders were to be inclusive of disbursements.

Elton Tan Xue Yang
Assistant Registrar

Mr Tan Joo Seng (Chong, Chia & Lim LLC) for the applicant in SUM 166/2018 and the respondent in SUM 5753/2017;
Mr Patrick Ong and Ms Chong Yi Mei (Patrick Ong Law LLC) for the respondent in SUM 166/2018 and the applicant in SUM 5753/2017.