IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 133

Originating Summons No 290 of 2018

In the Matter of Section 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

And

In the Matter of the Adjudication Determination dated 11 August 2016 made in Adjudication Application No. SOP / AA 235 of 2016

Between

SH DESIGN & BUILD PTE LTD

… Plaintiff

And

BD CRANETECH PTE LTD

… Defendant

ORAL JUDGMENT

Version No 1: 27 Oct 2020 (22:40 hrs)

[Building and Construction Law] — [Building and construction related contracts] — [Guarantees and bonds]
[Building and Construction Law] — [Statutes and regulations]

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SH Design & Build Pte Ltd
v
BD Cranetech Pte Ltd

[2018] SGHC 133

High Court — Originating Summons No 290 of 2018
Tan Siong Thye J
14 May 2018

31 May 2018 Judgment reserved.

Tan Siong Thye J:

Introduction

1 This Originating Summons No 290 of 2018 ("OS 290/2018") is an application by the plaintiff, SH Design & Build Pte Ltd ("the Plaintiff") to set aside an adjudication determination ("the AD") made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act") by the adjudicator, Mr Aw Wei Keng Kelvin ("the Adjudicator"), on 11 August 2016.

2 In the alternative, should the setting aside application be refused, the Plaintiff applies for the enforcement of the AD to be stayed pending the disposal of the arbitration proceedings in Singapore International Arbitration Centre ("SIAC") Arbitration No 314/16/AB ("the Arbitration"). At the hearing for OS 290/2018, I directed the parties not to make submissions on the alternative

application pending the issuance of my written grounds of decision for the primary application. Doing so would have been akin to putting the cart before the horse. Therefore, I shall make no determination on the application for the stay in this judgment until I have dealt with the primary application.

3 In the AD, which is the subject of the primary application for setting aside, the Adjudicator decided that the Plaintiff was liable to pay the defendant, BD Cranetech Pte Ltd ("the Defendant"), the sum of $1,127,088.40 (before GST).

4 There are two main grounds postulated by the Plaintiff for the primary application. First, the Adjudicator had exceeded his jurisdiction by wrongly taking into account the amount of $1,293,600 received by the Plaintiff's assignee under the performance bond. Second, the Adjudicator should have rejected the Defendant's adjudication application ("Adjudication Application") which was invalid as it failed to contain the name and service address of the owner of the project. Following the omission, the Plaintiff submits that the Adjudicator had no power to allow the Defendant to rectify this error in the Adjudication Application.

5 I shall now give my decision and the reasons for my decision.

Facts

The parties

6 The Plaintiff is the main contractor for the construction of an integrated logistics hub ("the Development").[1] The Defendant is a specialist subcontractor

[1] Affidavit of Wong See Kar dated 12 March 2018 ("WSK's 1st Affidavit"), para 4.

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engaged by the Plaintiff for the design, supply, installation and commissioning of overhead cranes for the Development.[2]

7 The owner of the Development is SH Cogent Logistics Pte Ltd ("the Owner"). It was the Owner that had engaged the Plaintiff to construct the Development. The Plaintiff has stated that it is completely unrelated to the Owner and is a separate entity from the Owner.[3]

The Subcontract and Performance Bond

8 The Plaintiff entered into an agreement with the Defendant on 22 February 2013 for the works relating to the Development ("the Subcontract").[4] Before entering into the Subcontract, the Owner had already contracted with the Defendant on 10 December 2012 ("the 10 December Agreement") also for the provision of overhead cranes. In the 10 December Agreement there was a cl 6 which required the Defendant to provide a demand bond in favour of the Owner in order to secure the due performance of the Defendant's obligations under the 10 December Agreement. The Subcontract which was subsequently entered into between the Plaintiff and the Defendant incorporated the terms of the prior agreement that had been entered into between the Owner and the Defendant, including cl 6.[5] Therefore, the Defendant had to furnish a guarantee to the Plaintiff in the form of a demand bond. Clause 6 of the Subcontract states:[6]

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2 WSK's 1st Affidavit, para 5; Plaintiff's Written Submissions, para 11.

3 Plaintiff's Written Submissions, para 11.

4 WSK's 1st Affidavit, para 5.

5 WSK's 1st Affidavit, para 5.

6 WSK's 1st Affidavit, WSK-2, p 78.

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> 6. PAYMENT
>
> Payment schedule shall be as follows:
>
> - 20% down-payment
>
> …
>
> The [Defendant] shall provide to the [Plaintiff] a guarantee from a Bank or an Insurance Company for the amount of the down payment. The Guarantee shall be in the form of a demand bond, and shall cover the period from signing of this contract to the expiry of the 2-year warranty period.

9 Pursuant to the requirement in cl 6 of the Subcontract, the Defendant procured an on-demand performance bond dated 21 May 2013 ("the Performance Bond") for up to the sum of $1,293,600 ("the Bond Proceeds").[7] The Performance Bond was issued by MSIG Insurance (Singapore) Pte Ltd ("MSIG") in favour of the Plaintiff.[8]

10 Pursuant to cl 1 of the Performance Bond, MSIG was obligated to pay the Bond Proceeds to the Plaintiff in full upon such demand being made in writing, without the need for any proof that the Plaintiff was indeed entitled to the Bond Proceeds. Further, cl 2 of the Performance Bond provided that the sums so demanded by the Plaintiff shall be paid immediately and unconditionally by MSIG without any deduction whatsoever, notwithstanding the existence of any differences or disputes between the Plaintiff and the Defendant.[9]

The events leading to the calling of the Performance Bond

11 Pursuant to a deed of assignment dated 22 December 2015, the Plaintiff assigned to the Owner all of its rights, title, interest and benefit under the

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7 Affidavit of Wong See Kar dated 23 April 2018 ("WSK's 2nd Affidavit"), WSK-16.

8 WSK's 1st Affidavit, para 9.

9 WSK's 2nd Affidavit, WSK-16.

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Subcontract, including the Performance Bond.[10] The Defendant was duly notified of this assignment.

12 Subsequently, on the same day, *ie*, 22 December 2015, the Owner issued a notice to terminate the Defendant's employment under the Subcontract.[11] Concurrently, the Owner also issued a written demand to MSIG for payment of the Bond Proceeds.[12]

13 When MSIG did not comply with this initial demand, the Owner issued a further demand on 4 January 2016 and also commenced proceedings in Suit No 12 of 2016 to recover the full Bond Proceeds under the Performance Bond.[13]

14 On 5 January 2016, the Defendant filed Originating Summons No 4 of 2016 ("OS 4/2016") applying for an injunction to restrain the Owner from calling on the Performance Bond. After hearing parties' submissions, Kannan Ramesh JC (as he then was) dismissed the Defendant's application in OS 4/2016, thereby allowing the Owner to call on the Performance Bond unhindered.[14]

15 On 23 March 2016, pursuant to its obligations under the Performance Bond, MSIG made full payment of the Bond Proceeds to the Owner.[15]

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10 WSK's 1st Affidavit, para 11; WSK-3, p 96.

11 WSK's 1st Affidavit, para 12.

12 WSK's 1st Affidavit, para 13.

13 Plaintiff's Written Submissions, para 16.

14 WSK's 1st Affidavit, WSK-5, pp 103–104.

15 WSK's 1st Affidavit, para 13; WSK-6, p 106.

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The Adjudication proceedings

16 On 23 May 2016, the Defendant served a payment claim on the Plaintiff for the sum of $4,250,683.08 ("the Payment Claim") for the work that it had done from January 2015 to December 2015.[16] On 7 June 2016, the Plaintiff provided its payment response for a negative sum of $15,063,770.47 ("the Payment Response").[17] It should be noted that in its Payment Response, the Plaintiff had expressly accounted for the "Bond proceeds received by [the Owner]".[18]

17 On 27 June 2016, the Defendant lodged an Adjudication Application against the Plaintiff based on its purported entitlement to outstanding payment for work done under the Subcontract.[19] The Plaintiff's adjudication response was lodged on 5 July 2016. The adjudication conference was held on 18 July 2016 before the Adjudicator ("the Adjudication").[20]

18 On 11 August 2016, the Adjudicator issued the AD.[21] The Adjudicator's assessment of the adjudicated amount is as follows:[22]

	Description	**Payment Claim**	**Payment Response**	**Adjudicated Amount**
1	Value of work done	7,311,257.12	1,083,400.00	4,110,918.56

16 WSK's 1st Affidavit, para 17; WSK-8 pp 179–182.

17 WSK's 1st Affidavit, para 17; WSK-8 p 184.

18 WSK's 1st Affidavit, para 17; WSK-8 p 184.

19 WSK's 1st Affidavit, para 19.

20 WSK's 1st Affidavit, para 20.

21 WSK's 1st Affidavit, para 21.

22 WSK's 1st Affidavit, WSK-1, p 61.

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2	Less previous payment	(3,060,574.04)	(3,062,443.20)	(3,060,574.04)
		4,250,683.08	(1,979,043.20)	1,050,344.52
3	Add GST	0	(138,533.02)	0
	Subtotal	4,250,683.08	(2,117,576.22)	1,050,344.52
4	Less liquidated damages	0	(738,659.60)	(738,659.60)
5	Less deductions imposed by [Owner]	0	(13,501,134.65)	(478,196.52)
6	Add amount received under [Performance Bond]	0	1,293,600.00	1,293,600.00
	Claimed amount/Nett balance due	4,250,683.08	(15,063,770.47)	1,127,088.40

19 It should be highlighted that in arriving at the final adjudicated amount of $1,127,088.40 ("the Adjudicated Amount"), the Adjudicator had taken into account the Bond Proceeds which had already been received by the Owner as a result of the deed of assignment and the Owner's calling of the Performance Bond.

The genesis of the present application

20 On 17 August 2016, the Plaintiff wrote to the Adjudicator requesting amendments to be made to the AD pursuant to s 17(6)(*a*) of the SOP Act. This was on the basis that the Adjudicator had allegedly erred in including the Bond

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Proceeds in his assessment of the Adjudicated Amount.[23] On 29 August 2016, the Adjudicator responded, declining to amend the AD on the terms requested by the Plaintiff.[24]

21 On 13 December 2016, the Defendant obtained an Order of Court for leave to enforce the AD. This Order of Court was only served on the Plaintiff on 26 February 2018, together with a statutory demand for $1,218,104.33 (being the Adjudicated Amount with interest at the rate of 5.33% per annum).[25]

22 On 12 March 2018, the Plaintiff made the present application in OS 290/2018 to set aside the AD.

23 It should also be noted that the Plaintiff, the Defendant and the Owner are currently involved in the Arbitration, in respect of disputes arising out of the Subcontract. The Arbitration is scheduled for hearing from 16 to 27 July 2018.[26]

The parties' cases

The Plaintiff's case

24 The Plaintiff relies on the following grounds in support of its application to set aside the AD.[27]

25 First, the Plaintiff argues that the Adjudicator had acted in excess of his jurisdiction by taking into account the Bond Proceeds in assessing the Adjudicated Amount in the Subcontract.[28] The Bond Proceeds which stem from

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23 WSK's 1st Affidavit, para 23; WSK-8, p 230–231.

24 WSK's 1st Affidavit, para 25; WSK-9, p 243–244.

25 WSK's 1st Affidavit, para 29.

26 WSK's 1st Affidavit, para 14.

27 Plaintiff's Written Submissions, para 4.

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the Performance Bond were from a separate contract. This is tantamount to a cross-contract set-off, which is prohibited in adjudication proceedings under the SOP Act. Additionally, the Adjudicator should not have accounted for the Bond Proceeds because these were not included in the Payment Claim. If anything at all, the Bond Proceeds should be accounted for at the Arbitration and not at the Adjudication.[29]

26 Second, the Plaintiff argues that by taking into account the Bond Proceeds in assessing the Adjudicated Amount, the Adjudicator had effectively reversed the decision of Ramesh JC in OS 4/2016 who dismissed the Defendant's injunction application to prevent the calling of the Performance Bond. Therefore, the Adjudicator had acted in excess of his jurisdiction and the AD should be set aside.[30]

27 Third, the Plaintiff contends that the failure to state the Owner's name and service address in the Adjudication Application amounted to a breach of s 13(3)(*c*) of the SOP Act read with reg 7(2)(*a*) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the SOP Regulations"). Therefore, the Adjudicator was statutorily bound to reject the Adjudication Application pursuant to s 16(2)(*a*) of the SOP Act.[31]

28 Fourth, the Adjudicator had no power to allow the Defendant to amend the Adjudication Application to include the Owner's name and service address. Hence, the AD which was made pursuant to this defective Adjudication Application should be set aside.[32]

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[28] Plaintiff's Written Submissions at paras 32–45.

[29] Plaintiff's Written Submissions at para 84.

[30] Plaintiff's Written Submissions at paras 61–65.

[31] Plaintiff's Written Submissions at paras 102–128.

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The Defendant's case

29 First, the Defendant argues that the Plaintiff's entitlement to retain the Bond Proceeds and the obligation to account for the Bond Proceeds were matters specifically regulated by the terms of the Subcontract.[33] Thus the taking into account of the Bond Proceeds in assessing the Adjudicated Amount did not amount to a cross-contract set-off as alleged by the Plaintiff. Hence, the Adjudicator could take into account the Bond Proceeds, especially since these were included in the Plaintiff's Payment Response.[34]

30 Second, the Defendant argues that OS 4/2016, which was an unsuccessful application by the Defendant for an injunction to restrain the Owner from calling on the Performance Bond, and the AD were concerned with completely different issues.[35] Therefore, the Adjudicator's decision in the AD did not in any way affect the decision in OS 4/2016.

31 Third, the Defendant submits that the requirement to furnish the Owner's name and service address under reg 7(2)(*a*) of the SOP Regulations was to ensure that the Owner was notified of the Adjudication Application. In this case the omission of the Owner's details was not fatal to the Adjudication Application as the Owner had not only been notified of the Adjudication Application but had also actively participated in the Adjudication. The solicitors that acted for the Plaintiff in the Adjudication also acted for the Owner.[36]

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32 Plaintiff's Written Submissions at paras 111–116.

33 Defendant's Written Submissions, paras 26–29.

34 Defendant's Written Submissions, paras 31–35.

35 Defendant's Written Submissions, para 30.

36 Defendant's Written Submissions at paras 47–52.

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32 Fourth, the Adjudicator had already granted leave to the Defendant to make amendments to correct the omission.[37] In this regard, the Adjudicator had absolute discretion in deciding whether or not to allow the amendments and the court cannot review the merits of his exercise of the discretion.[38] In any event, even if the Adjudicator was wrong in allowing the amendments, the omission of the Owner's name and service address without more was not a basis for the setting aside of the AD.[39]

My decision

Preliminary issue: Extension of time for the furnishing of security

33 As a preliminary point, the Defendant submitted that the Plaintiff had failed to furnish security for the unpaid portion of the Adjudicated Amount "at the same time" as the filing of the application for the setting aside of the AD, as required by s 27(5) of the SOP Act read with O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The Plaintiff had filed the application to set aside the AD in OS 290/2018 on 12 March 2018, but the direction to the Accountant-General for payment in of security was only made a day later on 13 March 2018. Therefore, given that the requisite security was not furnished in time, the Defendant argued that the application for setting aside is defective and should be dismissed.

34 The Plaintiff did not address this argument in its written submissions. However, at the hearing before me, the Plaintiff informed me that they had, prior to the hearing, filed a summons applying for an extension of time for the furnishing of the security. The Plaintiff explained that the reason for the slight

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37 Defendant's Written Submissions, para 37.

38 Defendant's Written Submissions at paras 38–41.

39 Defendant's Written Submissions at paras 42–46.

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delay was because the filing of the application in OS 290/2018 was only completed after office hours on 12 March 2018, therefore the earliest time that the Plaintiff could give directions for payment in to the Accountant-General was the next day on 13 March 2018. The Plaintiff submitted that the words "at the same time" in O 95 r 3(3) of the Rules of Court should be interpreted to mean as soon as reasonably practicable. Further, both parties agreed that no prejudice had been suffered by the Defendant.

35 I agreed with the Plaintiff and granted the application for the extension of time, thereby allowing parties to proceed with the primary application in OS 290/2018 for the setting aside of the AD.

Issues for determination

36 The main issues that have to be determined on whether or not to grant the Plaintiff's application for the AD to be set aside are as follows:

(a) whether the Adjudicator had exceeded his jurisdiction in accounting for the Bond Proceeds in the assessment of the Adjudicated Amount;

(b) whether the Adjudicator's decision had the effect of reversing the decision of the High Court in OS 4/2016; and

(c) whether the *initial* omission of the Owner's name and service address from the Adjudication Application was sufficient basis for the AD to be set aside.

I shall now deal with these issues in turn.

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Whether the Adjudicator had exceeded his jurisdiction in accounting for the Bond Proceeds

37 The Plaintiff raises the following arguments for its contention that the Adjudicator had acted in excess of his jurisdiction in accounting for the Bond Proceeds in the AD:

(a) the Adjudicator should not have accounted for the Bond Proceeds because doing so amounted to allowing a cross-contract set-off;

(b) the Adjudicator should not have accounted for the Bond Proceeds because it was not stated in the Payment Claim; and

(c) the accounting of the Bond Proceeds should be done at the Arbitration because the Adjudication is not a final settlement of the matter.

Whether the accounting for the Bond Proceeds by the Adjudicator was akin to a cross-contract set-off

38 I shall first deal with the issue of whether the accounting for the Bond Proceeds in the assessment of the Adjudicated Amount was akin to a cross-contract set-off and therefore beyond the scope of the Adjudicator's powers. In my view, the Performance Bond was part of the obligations arising out of the Subcontract and therefore accounting for the Bond Proceeds in the assessment of the Adjudicated Amount cannot be regarded as a cross-contract set-off.

39 The Court of Appeal in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 ("*Hua Rong* (CA)") made it clear that each adjudication under the SOP Act should relate only to the contract upon which the payment

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claim is founded, and should not take into account cross-claims from other contracts. The Court of Appeal stated at [68]:

> [I]n our judgment, given that a progress payment and a payment claim centre on one contract, the Payment Claim Contract, the aforementioned provisions indicate that a [SOP Act] adjudication also centres on that one contract. They thus suggest that the inquiry in a [SOP Act] adjudication relates to the claimant's entitlement under the Payment Claim Contract, and not to its entitlement taking into account separate Cross-Contract Claims.

40 *Hua Rong* (CA) was an appeal that arose out of my earlier decision in *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2018] 3 SLR 778 ("*Hua Rong*"). In *Hua Rong*, I explained why the spirit and purpose of the SOP Act would militate against allowing cross-contract claims to be considered in an adjudication. This reasoning was subsequently affirmed by the Court of Appeal (see *Hua Rong* (CA) at [72]). I stated at [36]:

> Just as bringing in multiple contracts as the basis for a claim would unduly prolong and complicate an adjudication, so, too, would bringing in multiple contracts as the basis for cross-claims, counterclaims or set-offs. This cannot have been the intention of Parliament; otherwise, what was meant to be a simple, quick and fair process for the resolution of payment disputes may instead become entangled in a web of contractual complexity which would dramatically slow down the adjudication process.

41 In *Hua Rong* the same parties were involved in two separate construction projects. When the claimant submitted a payment claim for its claim in one project, the respondent did not dispute the claim itself. However, the respondent sought to set off this claim on the basis that the claimant had made false and fraudulent payment claims in the other contract entered into by the same parties in respect of the other construction project. This claim was referred to an adjudicator who held that the respondent could not set off a counterclaim based on another contract between the parties. When the respondent sought to set aside

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the adjudication determination in that hearing before me, I concurred with the adjudicator and dismissed the application.

42 In this case, the facts are materially different from that in *Hua Rong*. The accounting for the Bond Proceeds in assessing the Adjudicated Amount is *not* akin to a cross-contract set-off as alleged by the Plaintiff. The Payment Claim, and subsequently the Adjudication Application, were made on the basis of matters that had arisen out of the Subcontract and therefore the Adjudicator was bound to only consider matters arising out of the Subcontract. That said, the Performance Bond was procured by the Defendant and issued in favour of the Plaintiff pursuant to the terms of the Subcontract (see [8] above). The Performance Bond was meant to operate as a form of security to guarantee the Defendant's due performance of the Subcontract. As the Defendant quite rightly points out, the Plaintiff's entitlement to retain the Bond Proceeds was a matter specifically regulated by the Subcontract.[40]

43 The remote semblance of a cross-contract was because the Performance Bond was issued by MSIG in favour of the Plaintiff in a separate contractual document. However, the Performance Bond which was procured by the Defendant in favour of the Plaintiff in fulfilment of its obligations under cl 6 of the Subcontract was an integral part of the Subcontract and not a separate contract between the parties. The operative contract was the Subcontract and not the agreement between the Defendant and MSIG which made the Plaintiff the beneficiary of the Performance Bond. Therefore, notwithstanding that the Performance Bond may have been captured in a separate contractual document from the Subcontract, it was very much part of the Subcontract.

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[40] Defendant's Written Submissions, para 26.

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44 The Plaintiff's argument that the Bond Proceeds were received by the Owner and therefore it is the Owner that should be liable to account for them[41] is also without merit. Although it was the Owner that had called on the Performance Bond and received the Bond Proceeds, in substance it was the Plaintiff that had benefitted from the Performance Bond. As the Plaintiff and the Owner are two unrelated and separate entities involved in the Development, it can be inferred that the deed of assignment must have been done for some consideration. This is especially so since the Owner called on the Performance Bond on the same day as the deed of assignment. The Plaintiff's counsel, upon query from the court, confirmed that the deed of assignment was not gratuitous but was for the Plaintiff to square-off some of the Plaintiff's outstanding liabilities with the Owner. Therefore, notwithstanding that it was the Owner that had ultimately received the Bond Proceeds, I am of the view that this does not absolve the Plaintiff of its liability to account for them. After all, the Owner would not have been able to call on the Performance Bond without the Plaintiff's deed of assignment.

45 In these circumstances, accounting for the Bond Proceeds in assessing the Adjudicated Amount did not amount to a cross-contract set-off and accordingly the Adjudicator had acted well within his jurisdiction.

Whether the Adjudicator was obligated to consider the Bond Proceeds because these were included in the Payment Response

46 The Plaintiff argues that because the Bond Proceeds were not included in the Payment Claim, the Adjudicator had no jurisdiction to account for them in determining the Adjudicated Amount. To strengthen its argument, the Plaintiff analogises the payment claim to pleadings in civil procedure and argues

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41 Plaintiff's Written Submissions, para 34.

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that if the Defendant had not "pleaded" the Bond Proceeds in the Payment Claim, the Adjudicator could not have taken it into account in assessing the Adjudicated Amount. The analogy of pleadings may not be appropriate here as pleadings are governed under the Rules of Court while the procedure and framework of adjudications are administered under the SOP Act, which is a separate and entirely different regime from the Rules of Court. Under the SOP Act the Adjudicator was statutorily obligated to consider the Bond Proceeds because these were included in the Payment Response. Section 17(3)(*d*) of the SOP Act states:

> (3) … in determining an adjudication application, an *adjudicator shall only have regard* to the following matters:
>
> …
>
> (*d*) *the payment response to which the adjudication application relates* (if any), the adjudication response (if any), and the accompanying documents thereto;
>
> …
>
> [emphasis added]

The Court of Appeal confirmed in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] SGCA 19 ("*Comfort Management*") at [26] that s 17(3) of the SOP Act imposes a *mandatory obligation* on the adjudicator to consider all matters listed in that provision. Therefore, pursuant to subsection (*d*) of s 17(3), the Adjudicator was obligated to consider the Payment Response and all of the items included therein.

47 The Plaintiff relies heavily on *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 ("*Rong Shun*") for the proposition that an adjudicator can only award sums that were specifically included in the payment claim. Therefore, the Plaintiff argues that since the

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Bond Proceeds were not included in the Payment Claim, the Adjudicator could not have accounted for them in the Adjudicated Amount.

48 In my view, this was a mischaracterisation of the holding in *Rong Shun*. In *Rong Shun*, the respondent sought to set aside an adjudication determination on the basis that, *inter alia*, the adjudicator had exceeded his jurisdiction by adjudicating upon the applicant's oral claim for a retention sum when that claim had not been advanced by the applicant in its payment claim, and only in its notice of the adjudication application under s 13(2) of the SOP Act. There was no payment response lodged by the respondent in that case. Vinodh Coomaraswamy J held that the adjudicator had indeed exceeded his jurisdiction by adjudicating upon the retention sum, given that the applicant had not merely omitted the retention sum claim from its payment claim but went further to expressly exclude it from its payment claim. This amounted to an unsolicited admission from the applicant that the retention sum was not due. However, a material fact in *Rong Shun* was that the respondent had failed to lodge a payment response. This renders *Rong Shun* distinguishable from the present case, in which the Plaintiff had not only lodged and served the Payment Response but had also expressly included the Bond Proceeds within it. Coomaraswamy J explicitly stated at [101] of *Rong Shun* that a payment claim "fixes the parameters of the substantive content of an adjudication application, *subject only to any additional issues introduced by a duly-served payment response*." [emphasis added]. He further noted at [105] that an adjudicator would not be properly seised of a payment claim dispute under the SOP Act if the dispute did not arise from the "payment claim read together with any payment response". I concur with Coomaraswamy J that the scope of an adjudicator's jurisdiction is framed by *both* the payment claim and payment response. This is similar to the approach that I have taken pertaining to this issue at [46].

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49 For completeness I should also add that despite having found that the adjudicator should not have accounted for the retention sum, Coomaraswamy J did not set aside the adjudication determination in its entirety but instead applied the doctrine of severance to sever the part of the determination which erroneously accounted for the retention sum. However, I shall not dwell further on this tangential observation as the parties had not raised it.

50 In the present case, the Plaintiff's Payment Response clearly and correctly took into account the Bond Proceeds (see [16] above). Hence, the Adjudicator not only had the jurisdiction to account for the Bond Proceeds, but he was also statutorily obligated to account for them. Given that it was the Plaintiff that had included the Bond Proceeds in its Payment Response, this indicated that the Plaintiff acknowledged that it was only right and fair to account for the Bond Proceeds that were received by the Owner. Therefore, the Plaintiff must have intended for the Adjudicator to do the right thing by taking into account the Bond Proceeds. Ultimately, the Adjudicator did exactly what the Plaintiff had initially intended. Hence, I find it rather curious that the Plaintiff now argues that the Adjudicator should not have taken the Bond Proceeds into account.

Whether the Adjudicator was required to account for the Bond Proceeds notwithstanding that the Adjudication only offers temporary finality

51 The Plaintiff accepts that the Bond Proceeds will have to be accounted for eventually. However, it contends that this accounting should only take place at the Arbitration which is scheduled to be heard in July 2018 and not at the Adjudication. The Plaintiff's argument is that the Adjudication is not a full and final settlement of the matter.[42] With respect, I disagree.

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42 Plaintiff's Written Submissions, paras 80–101.

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52 A performance bond is a form of security and the issuance of such a bond does not mean that the holder of the bond has an absolute right to keep the proceeds from the bond permanently. The bond holder's entitlement to the bond proceeds will have to be decided when the parties' rights and obligations are determined. Therefore, any final statement of account must take into account the bond proceeds. This was the principle laid down by Morison J in *Cargill International S.A. and Another v Bangladesh Sugar and Food Industries Corporation* [1996] 4 All ER 563 ("*Cargill*"). As was stated by Potter LJ in the English Court of Appeal decision of *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 at 431, which approved the analysis in *Cargill*:

> If the amount of the bond is not enough to satisfy the seller's claim for damages, the buyer is liable to the seller for damages in excess of the amount of the bond. On the other hand, if the amount of the bond is more than enough to satisfy the seller's claim for damages, the buyer can recover from the seller the amount of the bond which exceeds the seller's damages.

This principle was cited with approval by Belinda Ang Saw Ean J in *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478 at [11].

53 In this case the Adjudicator's duty was to comprehensively determine the rights and obligations of the parties under the Subcontract, having regard to the Payment Claim and the Payment Response. Having assessed that the Defendant was already liable to the Plaintiff for the works done, before taking into account the Bond Proceeds, the Adjudicator was obligated to give credit for the Bond Proceeds which were stated in the Payment Response. Therefore, the Adjudicator was right to have accounted for the Bond Proceeds in assessing the Adjudicated Amount.

54 The Plaintiff asserts that the accounting for the Bond Proceeds can only take place at the trial or arbitration of the dispute, because an adjudication only

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gives temporary finality as it does not prohibit parties from commencing further proceedings. This assertion is misconceived. While it is true that adjudications under the SOP Act are meant to provide parties only with *temporary* finality (see, for example, *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*Osko*") at [22]), nevertheless, it should be regarded as final and binding until the dispute is further determined through litigation or arbitration. Indeed, the Court of Appeal in *Osko* stated at [18] that the process of adjudication "although provisional in nature, *is final and binding on the parties to the adjudication* until their differences are ultimately and conclusively determined or resolved" [emphasis added]. The dispute between the parties may carry on to arbitration or litigation, or it may well be that the adjudication marks the end of the matter for the parties. Therefore, an adjudicator has to account for any monies that have been raised before him and have already been paid out pursuant to the performance bond in order to conclusively determine the net amounts outstanding between the parties. In this case the Subcontract was terminated on the same day as the call on the Performance Bond by the Owner, *ie*, 22 December 2015. Therefore, there was a need to finalise the accounts between the parties. This was precisely what the Adjudicator had done.

55 Before moving on, I would briefly deal with two related arguments raised by the Plaintiff. The first argument is a hypothetical scenario postulated by the Plaintiff. If the Plaintiff/Owner had called on the Performance Bond after the AD was issued, it would have been able to retain the entirety of the Bond Proceeds because the Adjudicator would not have accounted for them.[43] Therefore, the Plaintiff contends that it should not be prejudiced simply because of the timing with which it called on the Performance Bond. With respect, the Plaintiff's argument is untenable for two reasons. First, even if the Plaintiff had

[43] Plaintiff's Written Submissions, para 67.

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called on the Performance Bond after the AD was issued, the Plaintiff would still be obligated to account for any excess portion of the Bond Proceeds after accounting for the Adjudicated Amount although this could not be done at the Adjudication. It is true that the Adjudicator would not have accounted for the Bond Proceeds in the Plaintiff's hypothetical scenario given that the Bond Proceeds were non-existent at the time and this could not have been within the foreseeable scope of the Adjudicator's duty. Furthermore, the Bond Proceeds would not logically be in the Payment Response. Second, and more fundamentally, just because the Performance Bond is called after the issuance of the AD does not change the principle that the Plaintiff is not entitled to retain the Bond Proceeds permanently and must account for any excess amount after a determination of the dispute between the parties.

56 The second argument that the Plaintiff raises is that the Adjudication was not a full and final determination of the matter, as the Adjudicator did not make a conclusive determination on the full damages sought in respect of the Plaintiff's alleged back charges. Therefore, given that the Adjudication was not a full and final settlement of the matter, the Adjudicator should not have accounted for the Bond Proceeds since he had not made a final determination on the Plaintiff's claim for the back charges.[44] This argument does not appear to be factually correct. In its Payment Response the Plaintiff claimed liquidated damages of $738,659.60 from the Defendant. The Adjudicator granted this amount. The Plaintiff claimed a further sum of $13,501,134.65 as this amount was imposed by the Owner as back charges. The Adjudicator only awarded a much lesser sum of $478,196.52 to the Plaintiff for the back charges. The Plaintiff may not be satisfied with the Adjudicator's award but this does not mean that he did not consider the issues raised in the Payment Response. On the

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44 Plaintiff's Written Submissions, paras 84–97.

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contrary, he stated at para 73 of the AD that he "was not convinced that the Respondent had discharged its burden of proof" in respect of the back charges claimed by the Plaintiff that were disallowed by the Adjudicator.[45] Therefore, contrary to the Plaintiff's assertions and notwithstanding the pending Arbitration, the Adjudication was a full, final and binding settlement of the matter, albeit one of temporary finality, pending a conclusive determination, if any, of the parties' dispute.

57 In summary, my findings on this issue are that the Adjudicator did not act in excess of his jurisdiction by accounting for the Bond Proceeds as these were not a cross-contract set-off. The Adjudication was a proper forum for the accounting of the Bond Proceeds even though it provides temporary finality, as the AD is final and binding nonetheless until the parties' differences are conclusively determined. Finally, the Adjudicator had the jurisdiction to account for the Bond Proceeds because these were included in the Payment Response, notwithstanding that these were not stated in the Payment Claim.

Whether the AD has the effect of reversing the decision in OS 4/2016

58 The Plaintiff contends that by accounting for the Bond Proceeds in the assessment of the Adjudicated Amount, the Adjudicator had effectively reversed the decision of Ramesh JC in OS 4/2016.[46] To recapitulate, this was a dismissal of the Defendant's application for an injunction to prevent the Owner from calling on the Performance Bond.

59 With respect, this contention is entirely without merit. The issues in OS 4/2016 and those in the Adjudication were completely different. It is trite

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45 WSK's 1st Affdaivit, WSK-1, p 58.

46 Plaintiff's Written Submissions, paras 61–65.

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law that the court may only grant an injunction to restrain the calling of an otherwise unconditional performance bond where there is fraud or unconscionability (see, for example, *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [46]). Therefore, the only issue that could have been before Ramesh JC in OS 4/2016 was whether there was fraud or unconscionability such as to warrant the injunction. Ramesh JC did not have to decide whether the Owner was justified in the calling of the Performance Bond. On the other hand, at the Adjudication, the Adjudicator had to consider the substantive payment dispute arising out of the Subcontract. The Adjudicator's determination of the issues in the Adjudication has no bearing whatsoever on Ramesh JC's decision to dismiss the injunction application and also did not affect the Owner's right to call on the Performance Bond. In fact, the Owner had successfully called on the Performance Bond and was paid the Bond Proceeds on 23 March 2016. Ramesh JC's decision in OS 4/2016 cannot be interpreted to go so far as to entitle the Plaintiff to keep the Bond Proceeds permanently. On the contrary, if the Adjudicator had not taken into account the Bond Proceeds, the Plaintiff would be obligated to account for any excess amount from the Bond Proceeds after deducting whatever was due from the Defendant.

Whether the initial omission of the Owner's name and service address is sufficient basis for the AD to be set aside

60 The Plaintiff argues that because the Defendant had failed to include the name and service address of the Owner in the Adjudication Application form, it has breached s 13(3)(*c*) of the SOP Act read with reg 7(2)(*a*) of the SOP Regulations. Therefore, this rendered the Adjudication Application invalid and the AD that was issued pursuant to this defective application should be set aside.

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61 It should, however, be pointed out that this omission was rectified by the Adjudicator granting an application for an amendment by the Defendant. Therefore, the proper issue to consider is whether the *initial* omission of the Owner's name and service address is sufficient to render the AD liable to be set aside.

The scope of the Adjudicator's discretion to allow amendments pursuant to reg 7(2A) of the SOP Regulations

62 Before getting to that, I shall first address the Plaintiff's contention that the Adjudicator had acted in excess of his jurisdiction by granting leave to the Defendant to make the aforementioned amendment pursuant to reg 7(2A) of the SOP Regulations. This requires an understanding of the correct interpretation of reg 7(2A). Regulation 7(2A) states:

> (2A) The adjudicator appointed under section 14 of the Act may, *at any time before the making of the determination* and on such terms as to costs or otherwise as he thinks just, allow such amendments to be made to an adjudication application *as he thinks fit*.
>
> [emphasis added]

63 The Plaintiff relies on a circular issued by the Building and Construction Authority to assert that the Adjudicator's power under reg 7(2A) is restricted to allowing amendments of clerical errors.[47] The Plaintiff also relies on s 17(6) of the SOP Act which provides that an adjudicator may correct a mistake in an adjudication determination if such a mistake was (a) a clerical mistake; (b) an error arising from an accidental slip or omission; or (c) a defect of form, to argue that an adjudicator's powers under reg 7(2A) should be similarly restricted.[48] Further, the Plaintiff argues that it would be against legislative intention for the

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47 Plaintiff's Written Submissions, para 104.

48 Plaintiff's Written Submissions, paras 105 and 110.

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powers under reg 7(2A) to be interpreted in an expansive manner, as it would detract from the strictness with which conditions and timelines under the SOP Act have to be adhered to.[49]

64 In my view, a plain reading of reg 7(2A) makes it abundantly clear that the Adjudicator has a discretion in deciding whether or not to allow amendments to be made to adjudication applications. This is so long as the amendment is done before the making of the determination and the amendment does not infringe any of the other provisions in the SOP Act.

65 In relation to the concern that allowing such amendments may detract from the strictness with which conditions and timelines have to be adhered to, the adjudicator's power to impose costs and other remedial measures on the parties serves as a sufficient deterrent against such non-compliance. It also serves as a remedy for any prejudice that may be caused to the other party as a result of allowing amendments to adjudication applications.

66 This expansive reading of reg 7(2A) also accords with the view taken in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) ("Chow Kok Fong") at para 9.73 which states:

> [T]he BCA stated that the intention behind these amendments is to allow for the correction of clerical errors in the adjudication application. While that may well be the intention of the BCA, it is arguable that this intention is not reflected in the wording of the new regulation, and unless the regulation is amended, *it is unlikely to be construed by adjudicators and parties in the narrow sense intended by the BCA*. [emphasis added]

Therefore, I find that the Adjudicator was acting within his jurisdiction in allowing the Defendant to amend the Adjudication Application.

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[49] Plaintiff's Written Submissions, para 109.

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67 I note that the Plaintiff has referred this court to a previous adjudication determination where the adjudicator had adopted a narrow reading of his powers to allow amendments under reg 7(2A). I also note that prior to this matter the courts have not had a chance to consider the interpretation of reg 7(2A) and this may have resulted in some differing interpretations being taken by adjudicators. Therefore, it is hoped that this decision will be able to engender greater clarity and uniformity in the application of reg 7(2A) amongst the adjudicators under the SOP Act.

Whether the initial omission of the Owner's name and service address is a sufficient basis for setting aside the AD

68 I turn next to consider whether the initial omission of the Owner's name and service address is sufficient basis for the AD to be set aside. In this regard, I am of the view that despite technically being a breach of the conditions under the SOP Act and the SOP Regulations such an omission is insufficient basis for the AD to be set aside. First, the grounds on which an AD may be set aside are set out by Judith Prakash J (as she then was) in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*"). Prakash J stated at [45]:

> … I consider that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:
>
> (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
>
> (b) the service by the claimant on the respondent of a payment claim (s 10);
>
> (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
>
> (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);

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> (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));
>
> (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
>
> (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

69 Further, in Chow Kok Fong at para 9.53, it is stated in relation to the grounds set out by Prakash J in *SEF Construction* that:

> Non-compliance outside this list of essential conditions would not … have the effect of denying the adjudicator his competence to adjudicate and this would include non-compliance with the provisions of section 13(3)(a), (b) and (c).

70 The Court of Appeal in *Comfort Management* reiterated at [75] that the unifying basis of the grounds in *SEF Construction* was whether there –

> has been a breach of a provision under the [SOP] Act which is so important that it is the legislative purpose that an act done in breach of that provision should be invalid … We labelled such a provision *a mandatory condition*, and we considered that breaching it would result in the adjudication determination being invalid. [emphasis added]

71 It is apparent that any omission of the Owner's name and service address from the adjudication application form, initial or otherwise, does not fall within the grounds in *SEF Construction* listed above. Therefore, it is not a basis for setting aside the AD.

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72 Second, and more fundamentally, the requirement for the name and service address to be included in the adjudication application form is so as to enable the Singapore Mediation Centre to notify the principal or owner concerned of the adjudication application who may have an interest in the adjudication (see Chow Kok Fong at para 9.62). In the present case, the Owner did not suffer any prejudice from the initial omission of its name and service address as it was fully apprised of the impending adjudication proceedings. The Owner had sent a letter to the Plaintiff dated 7 April 2016 with details and supporting documents for alleged back charges which it urged the Plaintiff to take into account in its Payment Response.[50] Furthermore, the Owner had participated in the Adjudication by sending two representatives to attend the Adjudication.[51] The solicitors that acted for the Plaintiff in the Adjudication also acted for the Owner. Therefore, the Adjudication Application should not be rendered defective merely because of a technical omission which had caused no prejudice to the Owner. Accordingly, I decline to set aside the AD on this basis.

Summary

73 In summary, I dismiss the Plaintiff's application for the AD to be set aside. The Adjudicator had not acted in excess of his jurisdiction in taking into account the Bond Proceeds in assessing the Adjudicated Amount. On the contrary, I am of the view that he was legally obligated to account for the Bond Proceeds.

74 The proceeds from the calling of a performance bond are not to be retained by the bond holder permanently and have to be accounted for once the rights and obligations of the parties have been determined. In the present case,

50 Affidavit of Sam Shee Choong dated 4 April 2018 ("SSC's 1st Affidavit"), SSC-1, p 8–11.

51 WSK's 1st Affidavit, WSK-1, p 45.

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the Adjudication was a determination of the rights and obligations of the Plaintiff and the Defendant as the Subcontract had already been terminated. Therefore, the Plaintiff was obligated to account for any excess amounts of the Bond Proceeds after subtracting the monies due from the Defendant.

75 I also disagreed with the contention that the Adjudicator had nullified the effect of Ramesh JC's decision in OS 4/2016 by taking into account the Bond Proceeds. This is because the issues considered in both proceedings were completely different. The purpose of the injunction application to prevent the calling of the Performance Bond is also diametrically different from that of the Adjudication.

76 I am satisfied that the Adjudicator had acted *intra vires* in allowing the Defendant to amend its Adjudication Application. In any event, the omission of the Owner's name and service address from the Adjudication Application form was not a valid basis for the AD to be set aside. On the facts, even though the Owner's name and service address were omitted, the spirit and intention under the SOP Act regarding the provision of these details were nevertheless fulfilled as the Owner took an active part in the Adjudication.

Conclusion

77 While it is true that adjudications under the SOP Act are somewhat "roughshod" (*Osko* at [22]) and therefore "have in recent years been the subject of close judicial scrutiny" (*Comfort Management* at [1]), the determinations rendered thereunder do represent a form of finality for parties and should be respected as such. Unfortunately, the Plaintiff has misunderstood this principle by bringing this present application to resist payment of the Adjudicated Amount on wholly untenable grounds. For the aforesaid reasons, I dismiss the Plaintiff's primary application for the AD to be set aside. I shall now hear parties

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on the alternative prayer for a stay of enforcement of the AD pending the disposal of the Arbitration.

Post-judgment addendum

78 The parties appeared before me again on 31 May 2018, where I delivered a summary of my oral judgment to dismiss the Plaintiff's application in OS 290/2018 for setting aside the AD. Subsequent to the delivery of my judgment, the parties addressed me on the Plaintiff's alternative application in OS 290/2018, which was an application for a stay of enforcement of the AD pending the disposal of the Arbitration. The Plaintiff also made an oral application for an Erinford injunction, which is a stay pending the appeal against my decision.

79 After hearing the parties' submissions and having considered the evidence before me, I dismissed both the stay application pending the disposal of the Arbitration as well as the application for the Erinford injunction. The Plaintiff indicated that it will be appealing against both my decisions to dismiss its application for a stay of enforcement as well as its application for an Erinford injunction. Therefore, I include this post-judgment addendum to provide the grounds of my decision on the alternative application.

The parties' cases on the stay application and Erinford injunction

80 The Plaintiff stated that the Defendant's right to enforce the AD must be balanced against its corresponding right to reverse the AD, which is only meant to have temporary finality. In this regard, the Plaintiff argued that even if the stay was granted pending the disposal of the Arbitration, the Defendant's right to the Adjudicated Amount would not be affected if it were decided in the Arbitration that the Defendant was indeed entitled to such sums.[52] The Plaintiff

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also asserted that the Defendant's decision to enforce the AD one and a half years after it was issued showed that the Defendant did not have any cash flow concerns and would not be prejudiced if the Adjudicated Amount remained in court pending the disposal of the Arbitration. On the other hand, the Plaintiff asserted that it would be unable to recover the Adjudicated Amount even if it succeeds in the Arbitration, given that the Defendant is facing financial difficulties.[53]

81 In response, the Defendant submitted that the Plaintiff's stay application was intended as a backdoor attempt to undermine the adjudication process.[54] The Defendant argued that the evidence relied on by the Plaintiff did not suffice to show that, on a balance of probabilities, the Plaintiff would be unable to recover the Adjudicated Amount if it succeeds in the Arbitration.[55]

82 As for the Erinford injunction, the Plaintiff submitted that the factors the court should consider were first, the likelihood of success of the appeal, and second, whether the appeal would be rendered nugatory if a stay was not granted. The Plaintiff informed the court that its grounds for applying for the Erinford injunction would be the same as its grounds for the stay application, and made no further arguments in support of this application. The Defendant consequently did not provide a response to this application.

My decision on the stay application

83 It is well established that a successful claimant in a SOP Act adjudication is entitled to receive the adjudicated amount quickly and should

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52 Plaintiff's Written Submissions, para 140.

53 Plaintiff's Written Submissions, paras 143–146.

54 Defendant's Written Submissions, para 54.

55 Defendant's Written Submissions, paras 58–63.

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not be denied payment without very good reason. In this oft-cited passage, the Court of Appeal in *Osko* explained at [59] that:

> [T]he purpose of the [SOP] Act is to ensure (*inter alia*) that even though adjudication determinations are interim in nature, successful claimants are paid. To this end, under s 22(1), the respondent must pay the adjudicated amount either within seven days after being served with the adjudication determination (see s 22(1)(*a*)), or by the deadline stipulated by the adjudicator (see s 22(1)(*b*)). The claimant can suspend work (see s 26(1)(*d*)) or take a lien on goods supplied (see s 25(2)(*d*)) if the respondent fails to pay. If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s 18(3). If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s 27(5). This requirement is repeated in O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). *These provisions all point to one thing: 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.* [emphasis added]

84 With this principle in mind, the Court of Appeal in *Osko* went on to state at [70] that a stay would only be granted where there was:

> [C]lear 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]

85 Ultimately, the Court of Appeal emphasised at [71] that:

> [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]

I had stated in my earlier decision in *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174 ("*Kingsford*") at [44] that when striking a balance between the claimant's entitlement to receive quick payment and the

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respondent's entitlement to recover the money upon subsequent dispute resolution, "the overall objective of the [SOP Act], which is to ensure cash flow in the construction industry, should ultimately be given more weight."

86 In the hearing before me, the Plaintiff accepted that it could not adduce evidence of the Defendant's "actual present insolvency". However, it elected to rely on the other ground upon which a stay could be granted, *ie*, if the court was satisfied on a balance of probabilities that if the stay were not granted, the money paid to the Defendant would not ultimately be recovered if the dispute between the parties were finally resolved in the Plaintiff's favour at the Arbitration.

87 In my view, the Plaintiff had not adduced sufficient evidence to discharge its burden of proof. The only evidence the Plaintiff relied on to support its assertion that it would be unable to recover the Adjudicated Amount was the Defendant's failure to make payment of the "deposit required by the SIAC" despite repeated reminders since 25 October 2017.[56] To clarify, there were two sets of deposits that the Plaintiff alleged the Defendant refused to pay. First, there was the deposit in respect of the costs for the Owner's main claim against the Defendant ("the First Deposit"). In this regard, the Owner had made payment of the Defendant's share of the First Deposit, on the Defendant's behalf. The Owner, thereafter, sought an interim award from the arbitrator, compelling the Defendant to reimburse the Owner for half of the First Deposit that it had paid on the Defendant's behalf. The Defendant maintained that it did not consider itself bound to pay half of the First Deposit, as it would be akin to funding the Owner's claim against it.[57] Given that the interim award is still pending determination by the arbitrator, the Defendant was well within its right

56 WSK's 1st Affidavit, para 55; Plaintiff's Written Submissions, para 144.

57 Defendant's Written Submissions, para 59.

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to withhold payment to the Owner. Therefore, the Defendant's non-payment of the First Deposit does not necessarily give rise to the inference that it is facing financial difficulties or would otherwise be unwilling to meet its financial obligations.

88 Second, there was the deposit in respect of the costs of the Defendant's counterclaim against the Plaintiff and the Owner (the "Second Deposit"). The parties did not dispute that the Defendant had made payment of the first tranche of the Second Deposit, but had failed to make payment of the second tranche. The Defendant explained that this was a deliberate decision on its part, and it was ultimately its choice and not its obligation to make payment of the second tranche of the Second Deposit, given that it bore the risk of SIAC terminating the arbitration if the Second Deposit was not furnished. I found this to be a credible explanation, and accordingly I did not find that this gave rise to the inference that the Defendant was in financial difficulty or would be unwilling to meet its financial obligations.

89 In the circumstances, the evidence before me relating to the Defendant's non-payment of the deposits in the Arbitration was neutral at best, and it did not give rise to the inference that the Plaintiff would be unable to recover the Adjudicated Amount should it succeed in the Arbitration.

90 I would also deal briefly with the Plaintiff's assertion that the Defendant does not have any cash flow concerns, given that it waited one and a half years before enforcing the AD. Therefore, the Defendant would not be prejudiced if the Adjudicated Amount was held in court pending the imminent disposal of the Arbitration. I found it curious that the Plaintiff would run such an argument, given that it is a double-edged sword. If I accepted the contention that the Defendant does not have any cash flow concerns, this would severely weaken

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the Plaintiff's argument that it would be unable to recover the Adjudicated Amount due to the Defendant's impecuniosity. Indeed, I was of the view that if the Defendant were truly in financial difficulties, it would not have waited one and a half years before enforcing the AD.

91 Therefore, all things considered, I dismissed the Plaintiff's application for a stay of enforcement of the AD pending the disposal of the Arbitration.

My decision on the Erinford injunction

92 An Erinford injunction is an order for a stay of execution of a judgment pending the appeal of the matter. The Erinford injunction derives its name from *Erinford Properties Ltd and Another v Cheshire County Council* [1974] 2 WLR 749. Megarry J stated at 755 that:

> [W]here the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one upon which the successful party ought to be free to act despite the pendency of an appeal. *One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied.* … A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. …
>
> There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton L.J. in Wilson v. Church (No. 2), 12 Ch.D. 454, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said at p. 458, "… *when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory*."
>
> [emphasis added]

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This has been accepted as good law in Singapore: see, for example, *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd* and another [1993] 2 SLR(R) 741 at [33] and *Sin Herh Construction Pte Ltd v Hyundai Engineering & Construction Co Ltd and another* [2017] SGHC 3 at [28].

93 It can be distilled from the judgment of Megarry J that there are two primary factors a court will consider when deciding whether to grant an Erinford injunction. First, whether there is a likelihood that the appeal will succeed. Second, whether the appeal will be rendered nugatory if a stay was not granted.

94 On the first factor, the Plaintiff submitted that there were certain issues in this judgment which were novel and had hitherto not been considered by the Singapore courts. This did not mean that the Plaintiff had a *prima facie* likelihood of success in the appeal. I have earlier mentioned at [77] that the Plaintiff had brought this present application to resist payment of the Adjudicated Amount on wholly untenable grounds. Thus the Plaintiff's likelihood of success in the appeal is dim.

95 On the second factor, given that the Plaintiff had failed to convince the court that it would be unable to recover the Adjudicated Amount should it succeed in the Arbitration, it follows that it would also be unable to prove that the appeal would be rendered nugatory if a stay was not granted. Therefore, on that basis I would decline to grant an Erinford injunction.

96 The facts of the present case are similar to that in *Kingsford*. In *Kingsford*, upon my dismissal of the applications for setting aside the adjudication determinations, the plaintiff immediately applied for the order to be stayed pending its appeal. I observed at [45] that the plaintiff appeared

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unwilling to allow the defendant to have the benefit of the money that was paid into court, despite the adjudication determinations and the dismissal of the applications to set aside the adjudication determinations. Ultimately, I held that the purpose of the SOP Act militated in favour of releasing the monies paid into court pending appeal, and declined to grant a stay. The same considerations are applicable in the present case. Given that the Defendant had been awarded the Adjudicated Amount by the Adjudicator, and further, that the application to set aside the AD had been dismissed, I see no further reason to continue depriving the Defendant of the Adjudicated Amount. Additionally, it had not been proven to my satisfaction that the Plaintiff would be unable to recover the Adjudicated Amount should it succeed in the Arbitration or if it succeeds on appeal.

97 Accordingly, I ordered that the sums paid into court be released to the Defendant forthwith.

Tan Siong Thye
Judge

Chuah Chee Kian Christopher, Koh Swee Yen, Lee Hwai Bin, Tay Bing Wei and Sheryl Ang (WongPartnership LLP) for the plaintiff; Yam Wern-Jhien (Rajah & Tann Singapore LLP) for the defendant.

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