IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 215

District Court Appeal No 33 of 2023

Between

SECC Holdings Pte Ltd

… *Appellant*

And

Helios PV (Asia Pacific) Pte Ltd

… *Respondent*

And

Sinohydro Corporation Limited (Singapore Branch)

… *Garnishee*

In the matter of District Court Originating Summons No 19 of 2022 (Summons No 688 of 2022)

Between

SECC Holdings Pte Ltd

… *Applicant*

And

Helios PV (Asia Pacific) Pte Ltd

… *Respondent*

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And

Sinohydro Corporation
Limited (Singapore Branch)

… *Garnishee*

JUDGMENT

[Choses in Action – Assignment]
[Contract — Formation — Intention to create legal relations]
[Contract — Formation — Certainty of terms]
[Contract — Formation — Acceptance]

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SECC Holdings Pte Ltd
v
Helios PV (Asia Pacific) Pte Ltd
(Sinohydro Corp Ltd (Singapore Branch), garnishee)

[2024] SGHC 215

General Division of the High Court — District Court Appeal No 33 of 2023
Dedar Singh Gill J
2 May 2024

20 August 2024 Judgment reserved.

Dedar Singh Gill J:

Introduction

1 This is an appeal against the decision of the District Judge (the "DJ") in DC/SUM 688/2022 ("SUM 688"). SUM 688 was a garnishee application by SECC Holdings Pte Ltd ("SECC") against Sinohydro Corporation Limited (Singapore Branch) ("Sinohydro"). In SUM 688, SECC sought to obtain a provisional garnishee order ("PGO") that all debts due or accruing due from Sinohydro to Helios PV (Asia Pacific) Pte Ltd ("Helios") be attached to answer the judgment debt owed by Helios to SECC. The DJ held that, apart from the sum of $12,948.41, Sinohydro owed no other debt to Helios at the time that the PGO was served on Sinohydro. Accordingly, save for the sum of $12,948.41, the PGO could not be made final. SECC appealed against the DJ's decision.

Having reviewed the matter in the light of the parties' submissions, I allow SECC's appeal.

Facts

The parties

2 This appeal stems from a construction dispute involving four parties. The garnishee in the present proceedings, Sinohydro, was engaged by the Land Transport Authority of Singapore ("LTA") as the main contractor for a construction project.[1] Sinohydro engaged Helios as its sub-contractor.[2] Helios in turn engaged two sub-contractors (*ie,* sub-sub-contractors) for the project: (a) SECC;[3] and (b) Nexon Engineering Pte Ltd ("Nexon").[4] SECC is the appellant in this appeal.

Background to the dispute

3 In December 2021, Sinohydro issued an interim certificate for $508,304.57 in favour of Helios (the "508K Sum"), for works that had been performed by Helios.[5] However, Sinohydro refused to release the 508K Sum to Helios for the following reasons: (a) Helios had ceased on-site works since December 2021, which caused Sinohydro to engage a third party to undertake Helios' uncompleted work; and (b) Sinohydro had received complaints from the sub-sub-contractors, alleging that they had received little payment from Helios

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1 Record of Appeal (Vol I) ("1 ROA"), p 11 at para 1(a).

2 1 ROA, p 12 at para 1(b).

3 1 ROA, p 12 at para 1(c).

4 1 ROA, p 12 at para 4(b).

5 1 ROA, p 14 at para 8.

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for the work that they had done.[6] Sinohydro informed Helios that it would not pay the 508K Sum until the third party completed and confirmed the cost of Helios' outstanding work and Helios provided evidence that it had paid the sub-sub-contractors.[7]

4 As Sinohydro did not release the 508K Sum, Helios was unable to make its own progress payments to the sub-sub-contractors (such as Nexon and SECC).[8] Helios suggested that Nexon and SECC contact Sinohydro to request that the debt owed to Helios be directly paid to them instead.[9] Nexon and SECC took different positions regarding Helios' suggestion. Nexon reached out to Sinohydro, but did not receive a response.[10] On 11 January 2022, SECC obtained an adjudication determination against Helios, ordering the latter to pay SECC $249,560.94 with interest.[11]

5 On 25 January 2022, Nexon sought the LTA's assistance in resolving Helios' failure to pay Nexon. Consequently, Sinohydro, Helios, Nexon and the LTA participated in a meeting on 27 January 2022.[12] On 26 January 2022, SECC entered judgment in the State Courts against Helios in terms of the adjudication determination plus interest and costs (the "Judgment Debt").[13]

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6 1 ROA, p 14 at para 8.

7 1 ROA, p 14 at para 8.

8 1 ROA, p 14 at para 10.

9 1 ROA, p 15 at para 10; Appellant's Case (dated 5 February 2024) ("AC"), p 4 at para 7; Record of Appeal (Vol V, Part A) ("5 ROA, Part A"), pp 124–129.

10 1 ROA, p 15 at para 10.

11 AC, p 5 at para 8; 5 ROA, Part A, pp 146–164.

12 1 ROA, p 15 at para 10.

13 AC, p 5 at para 9; Record of Appeal (Vol II) ("2 ROA"), pp 11–12.

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6 Various discussions took place between Sinohydro, Helios and Nexon. Beginning on 3 February 2022, the parties met to discuss a potential tripartite agreement under which Sinohydro would make direct payment to Nexon on Helios' behalf (the "3 Feb Meeting").[14] A second meeting occurred on 9 February 2022 (the "9 Feb Meeting"). During the 9 Feb Meeting, Sinohydro's project director, Mr Wang Hao ("Mr Wang"), informed the other attendees that Sinohydro would prepare a written tripartite agreement by 11 February 2022.[15]

7 On 11 February 2022, Sinohydro's Authorised Representative, Mr Li Qie, sent the parties a draft tripartite agreement (the "11 Feb Draft") via e-mail.[16] Over the next few days, Helios and Nexon proposed various amendments to the 11 Feb Draft. Nexon sent the parties a revised version of the 11 Feb Draft on 15 February 2022 (the "15 Feb Draft").[17] These amendments were rejected by Sinohydro.[18] On 17 February 2022, Nexon attempted to propose further amendments to the 11 Feb Draft (the "17 Feb Draft"). Sinohydro did not agree to the amendments.[19] Later that day, Mr Li Qie circulated a final draft tripartite agreement (the "Written Agreement") for the parties to sign.[20]

8 I pause to note that the parties define the "Written Agreement" differently. SECC, in the Appellant's Case, defines the "Written Agreement" as the document that was sent by Sinohydro to Helios and Nexon at 3.44pm on 10

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14 1 ROA, p 15 at para 12.

15 1 ROA, p 16 at para 13.

16 1 ROA, p 16 at para 14.

17 1 ROA, p 17 at para 15.

18 1 ROA, p 17 at para 15.

19 1 ROA, pp 18–19 at para 17.

20 1 ROA, p 17 at para 15.

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March 2022.[21] Sinohydro, in the Respondent's Case, has aligned its definition of the "Written Agreement" with that of the DJ.[22] The DJ, in turn, defined the "Written Agreement" as the draft agreement that Mr Li Qie circulated to the parties on 17 February 2022.[23] In this judgment, I adopt the DJ's definition of the "Written Agreement". This is because, in my analysis of the evidence, nothing turns on the different definitions used by the parties.

9 The Written Agreement contained four main clauses:[24]

> **Item A:**
>
> According to the certified progress payment of the C9355 project between Sinohydro and Helios … , the total amount is **SGD$508,304.57 (incl. GST)** …
>
> By mutual consent between Sinohydro and Helios, the amount **SGD$239,250.93(incl. GST**)will be temporary reserved as estimated on-site implementation cost and will be released after Helios completed all outstanding works. Hence, the current total available amount is **SGD$269053.64 (incl. GST**)[.]
>
> **Item B:**
>
> Due to the project settlement debt between Helios and Nexon, the final debt amount was **SGD$412,105.23(incl. GST**) as confirmed by Helios and Nexon. After kind negotiation among Helios, Nexon and Sinohydro, in order to expedite the debt payment of Helios and Nexon, the three parties have reached the following agreement:
>
> **Helios entrust Sinohydro to transfer the amount SGD$256,105.23 (incl. GST) in Item A to Nexon directly and the corresponding fee will be deducted from Helios' contractual rights.**
>
> **Item C:**
>
> Helios promised to complete the outstanding works described in [I]tem A within two months. …

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21 AC, p 7 at para 18(b).

22 GC, p 4 at para 2.

23 1 ROA, p 17 at para 15.

24 Record of Appeal (Vol V, Part B) ("5 ROA, Part B"), pp 127–128.

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> **Helios entrust Sinohydro to transfer the amount SGD$56,000 (incl. GST) to Nexon directly after completed all outstanding works, the corresponding fee will be deducted from Helios' contractual rights.**
>
> **Item D:**
>
> …
>
> **Helios entrust Sinohydro to transfer the amount SGD$100,000 (incl. GST) from retention between Sinohydro and Helios to Nexon directly after Project DLP (2 March 2023), the corresponding fee will be deducted from Helios' contractual rights. The engineering defects liability period of the C9355 project corresponding to the scope of Nexon's implementation is undertaken by Nexon directly, and Nexon is responsible to Sinohydro directly.**

10 Helios provided four copies of the Written Agreement signed by its representative, Dato Ken Ong ("Dato Ong"), to Sinohydro on 1 March 2022.[25] These copies were signed by Nexon and returned to Sinohydro on 2 March 2022.[26]

11 On 2 March 2022, SECC filed a garnishee application against Sinohydro (*ie*, SUM 688).[27] SECC was granted a PGO dated 2 March 2022, which attached all debts due or accruing due from Sinohydro to Helios to answer the Judgment Debt of $251,012.38 (plus interest) and the costs of and incidental to the garnishee proceedings.[28]

12 As of 9 March 2022, neither Helios nor Nexon had received a copy of the Written Agreement signed by Sinohydro.[29] Helios' representative, Mr Ng

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25 1 ROA, p 19 at para 20.

26 1 ROA, p 19 at para 20.

27 Record of Appeal (Vol III, Part A), pp 132–133; AC, p 6 at para 10.

28 2 ROA, pp 13–14.

29 1 ROA, p 20 at para 21.

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Chun Ee ("Mr Ng") asked Mr Wang on the same day whether the Written Agreement had been signed by Sinohydro. After Mr Wang replied that the Written Agreement had been signed by Sinohydro, Mr Ng requested for a copy of the signed Written Agreement to be sent to him.[30]

13 On the same day, Nexon's representative, Ms May Ho ("Ms Ho"), sent an e-mail to Sinohydro requesting for payment.[31] The next day, on 10 March 2022, Sinohydro's Mr Li Yi replied to Ms Ho's e-mail at 1.11pm, stating that "since every documents are duly signed, we will release the payment as soon as possible" (the "10 March Email").[32] He then instructed Mr Wang to pay Nexon. At 1.18pm, SECC served the PGO on Sinohydro.[33] At 3.34pm, Sinohydro sent Helios and Nexon a copy of the Written Agreement that had been signed by all three parties.[34]

14 Sinohydro paid the $256,105.23 due under Item B of the Written Agreement (the "256K Sum") to Nexon on 15 March 2022.[35]

Procedural history

15 At the show cause stage of the garnishee proceedings, Sinohydro argued that only $12,948.41 (the "12K Sum") was due and owing to Helios as at the time of service of the PGO on 10 March 2022.[36] The 256K Sum had been

30 1 ROA, p 20 at para 21(a).

31 1 ROA, p 20 at para 21(b).

32 1 ROA, p 20 at para 22(a).

33 1 ROA, p 20 at para 22(b).

34 1 ROA, p 21 at para 22(c).

35 1 ROA, p 21 at para 23.

36 1 ROA, p 12 at para 4(a).

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assigned to Nexon at the time of service of the PGO, and thus could not be garnished.[37] Sinohydro also contended that the sum of $239,250.93 (the "239K Retention Sum") was a contingent debt that could not be garnished.[38]

16 The Deputy Registrar ("DR") presiding over the show cause hearing found that it could only definitively be said that Sinohydro owed Helios the 12K Sum at the time of service of the PGO.[39] As for the 256K Sum and the 239K Retention Sum, the DR ordered a trial to determine whether Sinohydro owed any other debt to Helios when the PGO was served.[40]

Arguments below

17 At the trial before the DJ, Sinohydro argued that the parties had entered into a tripartite agreement before the PGO was served.[41] In this connection, Sinohydro advanced various possible instances when the tripartite agreement could have been concluded. Sinohydro contended that the agreement was first concluded at the 3 Feb Meeting when the parties orally agreed that Sinohydro would, on Helios' behalf, pay Nexon the sums owed by Helios to Nexon.[42] This oral agreement was evidenced by, amongst other things, Ms Ho's e-mail that was sent on 3 February 2022 to Sinohydro and Helios (the "3 Feb Email").[43] The 3 Feb Email stated the following:[44]

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37 1 ROA, p 12 at para 4(b).

38 1 ROA, p 13 at para 4(b).

39 1 ROA, p 13 at para 5.

40 1 ROA, p 13 at para 5.

41 1 ROA, p 21 at para 25.

42 1 ROA, pp 21–22 at para 25(a).

43 1 ROA, p 23 at para 26.

44 5 ROA, Part B, p 32.

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> We are finally come to a conclusion as below:
>
> > 1. Helios agreed Sinohydro to made payment on behalf to Nexon for main contract works only.
> >
> > 2. Helios and Nexon had agreed to settle main contract outstanding amount first, while Helios not yet received VO approval from Sinohydro.
> >
> > 3. Sinohydro will arrange direct payment to Nexon by 10Feb2022.
> >
> > 4. Variation order to be resolve later.
>
> Appreciated for your kind effort to resolve this issues.

18 Alternatively, Sinohydro contended that the agreement was concluded at the 9 Feb Meeting when the parties orally agreed, amongst other matters, that Sinohydro would retain the 239K Retention Sum until Helios completed its outstanding works.[45] Sinohydro also submitted that it was agreed at the 9 Feb Meeting that Sinohydro would pay approximately $412,000 to Nexon on Helios' behalf in three tranches as stated in the agreement. This agreement was also encapsulated in an e-mail (the "9 Feb Email") and provided:[46]

(a) Sinohydro would pay Nexon the 256K Sum within one week after the parties signed a written tripartite agreement;

(b) Sinohydro would pay Nexon $56,000 on 15 April 2022, the date on which Helios was to complete its outstanding works; and

(c) Sinohydro would pay Nexon $100,000 on 1 March 2023, the end of the 12-month defects liability period for the project.

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45 1 ROA, p 22 at para 25(b)(iii).

46 1 ROA, pp 22–23 at para 25(b)(iv); 1 ROA, p 23 at para 26.

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19 In the further alternative, Sinohydro argued that the tripartite agreement was concluded via the Written Agreement.[47] The Written Agreement was purportedly concluded when Sinohydro communicated its acceptance of the Written Agreement to Nexon and Helios before the PGO was served.[48] According to Sinohydro, the Written Agreement captured the parties' oral agreements at the 3 Feb Meeting and the 9 Feb Meeting, or otherwise supplemented these oral agreements.[49]

20 Sinohydro argued that the effect of the tripartite agreement was two-fold:[50]

(a) it meant that the 256K Sum had been validly assigned to Nexon before the PGO was served; and

(b) it meant that the 239K Retention Sum was a contingent debt which could not be garnished because Helios had yet to complete its outstanding works.

Thus, all that was left for SECC to garnish was $12,948.41.[51]

21 Sinohydro also argued that an adverse inference should be drawn against SECC for failing to call Mr Dave Guo (Helios' country director and project director) ("Mr Guo") and Dato Ong as witnesses.[52]

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47 1 ROA, p 23 at para 25(c).

48 1 ROA, p 23 at para 25(c).

49 1 ROA, p 23 at para 25(c).

50 1 ROA, p 23 at para 27.

51 1 ROA, p 23 at para 27.

52 1 ROA, p 118 at para 191.

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22 SECC raised several arguments in response. First, it argued that the parties intended that any tripartite arrangement would be subject to the preparation, negotiation and execution of a written agreement (*ie*, the Written Agreement).[53] SECC also contended that, in any event, no oral agreement was concluded at the 9 Feb Meeting.[54] Instead, the only agreement that had been concluded was the Written Agreement. In this connection, the Written Agreement was only concluded *after* the PGO was served, when Sinohydro communicated its acceptance by sending Helios and Nexon a copy of the executed Written Agreement.[55] As such, the 239K Retention Sum and the 256K Sum could be garnished.[56]

23 Second, SECC submitted that regardless of when the tripartite agreement was executed between the parties, the 256K Sum was due and owing when the PGO was served.[57] SECC argued that the clause providing for Sinohydro to transfer the 256K Sum to Nexon (the "256K Clause") did not operate as an assignment of debt by Helios to Nexon. Instead, it operated as a direct payment arrangement whereby Sinohydro's debt to Helios would only be extinguished once Sinohydro directly paid the 256K Sum to Nexon.[58] SECC also argued that any ambiguity in the 256K Clause should be construed against Sinohydro under the *contra proferentem* rule.[59] The significance of SECC's characterisation of the 256K Clause as a direct payment arrangement is that

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53 1 ROA, p 24 at para 29(a)(i).

54 1 ROA, p 25 at para 29(a)(ii).

55 1 ROA, p 24 at para 29(a)(i).

56 1 ROA, pp 25–26 at paras 29(b)–(c).

57 1 ROA, p 25 at para 29(b).

58 1 ROA, pp 25– 26 at para 29(b)(i).

59 1 ROA, p 26 at para 29(b)(ii).

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although Sinohydro had paid the 256K Sum to Nexon, this only occurred *after* the PGO was served. Thus, the 256K Sum was still a debt that was due and owing by Sinohydro to Helios as at the time of service of the PGO. Accordingly, it was a debt that could be garnished.

24 Third, SECC argued that Sinohydro had conducted itself improperly during the trial by withholding material evidence and failing to call Mr Li Qie as a witness.[60] Fourth, SECC submitted that an adverse inference should be drawn against Sinohydro for failing to call Mr Li Qie as a witness.[61] Finally, SECC contended that Sinohydro's witnesses were not credible.[62]

Decision below

25 After considering the parties' submissions and the evidence, the DJ held that the tripartite agreement was not "subject to contract".[63] Rather, the parties regarded themselves as being bound by the oral consensus reached at the meetings prior to the execution of the Written Agreement.[64]

26 The DJ opined that it was unnecessary for her to determine whether the consensus at the 3 Feb Meeting constituted a valid and enforceable agreement.[65] However, the DJ held that the consensus reached at the 9 Feb Meeting was sufficiently certain and complete to constitute an oral agreement that was

60 1 ROA, p 109 at para 180(a).

61 1 ROA, p 109 at para 180(b).

62 1 ROA, pp 110–111 at para 180(c).

63 1 ROA, p 74 at para 108.

64 1 ROA, p 74 at para 108.

65 1 ROA, p 76 at para 113.

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binding on the parties.[66] The DJ concluded that since the 239K Retention Sum was agreed upon at the 9 Feb Meeting, this was a contingent debt that could not be garnished.[67] The DJ also held that the effect of the oral agreement was that the 256K Sum had been assigned to Nexon prior to the service of the PGO.[68]

27 The DJ also found that the Written Agreement became legally binding before the service of the PGO, when Mr Li Yi informed Ms Ho that Sinohydro had signed the documents and that payment would be released as soon as possible.[69] The DJ found that the text and relevant context indicated that the 256K Clause operated as an assignment of debt to Nexon, with the assignment having been originally agreed upon at the 9 Feb Meeting.[70] The 256K Clause in the Written Agreement merely amended the payment deadline for the 256K Sum that had previously been agreed upon at the 9 Feb Meeting.[71]

28 Given her findings, the DJ concluded that there was no remaining debt due or accruing due from Sinohydro to Helios at the time the PGO was served.[72] The DJ also found that although Sinohydro had failed to disclose material documents, this did not justify an inference that Sinohydro deliberately withheld material documents. [73] The DJ also declined to draw an adverse inference against Sinohydro for failing to call Mr Li Qie as a witness. This was because Mr Li Qie's areas of involvement were adequately covered by Sinohydro's other

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66 1 ROA, p 76 at para 114; 1 ROA, p 80 at para 123.

67 1 ROA, p 80 at para 123(b).

68 1 ROA, p 87 at para 126(a).

69 1 ROA, p 97 at para 160.

70 1 ROA, p 101 at para 170.

71 1 ROA, p 108 at para 178.

72 1 ROA, p 109 at para 179.

73 1 ROA, p 112 at para 183.

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witnesses.[74] The DJ similarly held that no adverse inference should be drawn against SECC for failing to call Dato Ong and Mr Guo as witnesses as Sinohydro had not put the drawing of such adverse inferences to any of SECC's witnesses.[75] Finally, the DJ rejected SECC's contention that Sinohydro's witnesses were not credible.[76]

29 Dissatisfied with the DJ's decision, SECC appealed.

The parties' arguments on appeal

30 On appeal, SECC contends that the remainder of the PGO amounting to $238,063.97 (exclusive of interest and costs) should be made final.[77] In this connection, SECC raises substantially the same arguments it raised before the DJ. First, it argues that no binding oral agreements were formed at the 3 Feb Meeting[78] and the 9 Feb Meeting[79]. Instead, the agreement between the parties was "subject to contract" (*ie*, the Written Agreement).[80] The Written Agreement, in turn, only became legally binding after the PGO had been served.[81] Thus, there was a debt of the 508K Sum due from Sinohydro to Helios when the PGO was served.

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74 1 ROA, p 114 at para 185.

75 1 ROA, p 118 at para 191.

76 1 ROA, p 115 at para 186.

77 AC, p 10 at para 20 and p 77 at para 173.

78 AC, pp 24–25 at paras 47–50.

79 AC, p 32 at para 66.

80 AC, pp 48–52 at paras 110–113.

81 AC, p 42.

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31 Second, even assuming that a legally binding agreement was formed before the Written Agreement was executed, SECC contends that the clause providing for the 239K Retention Sum (the "239K Retention Clause") did not form part of this agreement. The 239K Retention Clause only had contractual effect when the Written Agreement was executed, after the service of the PGO. Thus, the 239K Retention Sum was a debt that could be garnished.[82]

32 Third, SECC contends that regardless of when the legally binding agreement came into force, Sinohydro owed a debt of the 256K Sum to Helios as at the time of service of the PGO.[83] SECC contends that the 256K Clause should not be construed as an assignment of debt. Rather, it operated as a direct payment arrangement.[84] Thus, Sinohydro's debt obligation to Helios would only be discharged when Sinohydro made direct payment of the 256K Sum to Nexon. As this only occurred five days after the service of the PGO, the 256K Sum was still a debt that Sinohydro owed to Helios at the material time and could be garnished.

33 Finally, SECC contends that an adverse inference should be drawn against Sinohydro for failing to disclose certain material documents.[85]

34 In reply, Sinohydro relies on substantially the same arguments that it raised in the proceedings below. It contends that the parties reached an oral agreement at both the 3 Feb Meeting and 9 Feb Meeting.[86] Further, these oral

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82 AC, p 55.

83 AC, pp 56–74.

84 AC, p 61.

85 AC, p 76 at paras 167–168.

86 Garnishee's Case (dated 5 March 2024) ("GC"), p 14 at paras 20–21 and p 23 at para 45.

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agreements were not "subject to contract".[87] In any event, the Written Agreement was binding before the PGO was served.[88]

35 As for the 239K Retention Sum, Sinohydro argues that at the 9 Feb Meeting, the parties agreed to reserve the 239K Retention Sum until Helios completed its outstanding works.[89] Thus, SECC cannot garnish this sum. Sinohydro further argues that the 256K Clause was correctly characterised by the DJ as an assignment of debt,[90] which means that the 256K Sum cannot be garnished either.

36 Finally, Sinohydro emphasises that an adverse inference should not be drawn against it for not disclosing certain material documents.[91]

Issues before this court

37 In my view, this appeal raises the following issues:

(a) Whether the tripartite agreement was "subject to contract". In this connection, the following sub-issues arise:

(i) Whether a valid and binding agreement was formed at the 3 Feb Meeting.

(ii) Whether a valid and binding agreement was formed at the 9 Feb Meeting.

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87 GC, p 41.

88 GC, p 39.

89 GC, p 52 at para 112.

90 GC, p 57 at para 122.

91 GC, pp 68–69 at paras 150–152.

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(iii) If no valid and binding agreement was formed at either the 3 Feb Meeting or the 9 Feb Meeting, when was a valid and binding agreement formed?

(b) Whether SECC can garnish the 239K Retention Sum.

(c) Whether the 256K Clause operated as an assignment of debt or as a direct payment arrangement.

(d) Whether an adverse inference should be drawn against Sinohydro for failing to disclose material documents.

I consider each issue separately.

Was the tripartite agreement "subject to contract"?

38 The first issue is whether the tripartite agreement that was formed between Sinohydro, Helios and Nexon was "subject to contract". Where an agreement is "subject to contract", it is not binding and is unenforceable unless and until a formal written agreement has been executed: *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore* [2001] 3 SLR 437 ("*Thomson Plaza*") at [27]. The phrase "subject to contract" is meant to offer parties an escape route in case they want to call off the transaction: *Thomson Plaza* at [28]. It is not necessary, however, for the phrase "subject to contract" to be expressly stated: *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311 ("*OCBC Capital Investment*") at [28]. Rather, determining if an agreement is "subject to contract" is a matter of substance (and not form) and concerns a question of construction: *OCBC Capital Investment* at [28]. The critical question is whether the parties intended to be immediately bound to perform on the agreed terms, or otherwise agreed to defer legal relations until

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the written contract was formally executed: *OCBC Capital Investment* at [34]. Immediacy of performance is thus the touchstone of determining whether an agreement is "subject to contract": *OCBC Capital Investment* at [34].

39 In determining if the tripartite agreement was "subject to contract", I must consider whether valid and binding oral agreements were entered into at the 3 Feb Meeting and 9 Feb Meeting.

Was a valid and binding agreement formed at the 3 Feb Meeting?

Parties' arguments

40 SECC's argument is that no valid and binding agreement was formed at the 3 Feb Meeting. SECC contends that fundamental terms were missing from the communications after the 3 Feb Meeting. These missing terms included the debt due from Sinohydro to Helios, the debt due from Helios to Nexon, the sums to be paid by Sinohydro to Nexon on Helios' behalf, and the provision to be made in respect of Helios' outstanding works.[92] To buttress its argument that no valid and binding agreement was formed at the 3 Feb Meeting, SECC relies on Mr Wang's concession at trial that the contents of the 3 Feb Email "were not sufficiently certain and complete to constitute a binding and enforceable oral agreement".[93]

41 In response, Sinohydro contends that a valid and binding oral agreement was reached at the 3 Feb Meeting.[94] Sinohydro argues that the lack of

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92 AC, p 24 at para 47.

93 AC, p 24 at para 48.

94 GC, p 14 at para 21.

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quantification of the debt is immaterial.[95] What matters is that there is a clear identification of the debt being assigned.[96] To support its argument, Sinohydro relies on *Sutherland, Hugh David Brodie v Official Assignee and another* [2021] 4 SLR 752 ("*Sutherland*"). Sinohydro argues that the court in *Sutherland* observed that even though the sale proceeds of a property were not yet quantified, there would have been a valid assignment of the proceeds of sale. Sinohydro submits that *Sutherland* supports the view that quantification of the debt is immaterial to finding a valid assignment.

No valid and binding agreement was formed at the 3 Feb Meeting

42 In my view, Sinohydro's reliance on *Sutherland* is misplaced. In *Sutherland*, to persuade the bank to hold off on enforcing its rights under a mortgage, the debtors asked the applicant to help repay the instalments due under the mortgage. The applicant agreed on the condition that if the property were sold and the bank repaid the debt, he would be repaid from the surplus sale proceeds ahead of the other unsecured creditors. This agreement was only recorded in an assignment agreement after a bankruptcy application was filed against the debtors. When the bankruptcy order was made and the property was sold, the Official Assignee took the view that the applicant could not rely on the assignment agreement. The applicant, on the other hand, sought the court's ratification of the agreement under s 77(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed).

43 Philip Jeyaretnam JC (as he then was) held that this was an appropriate case to ratify the assignment agreement (*Sutherland* at [39]). He observed, in

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95 GC, p 15 at para 25.

96 GC, p 15 at para 25.

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obiter, that the requirements of an equitable assignment would also have been satisfied on the facts (*Sutherland* at [41]). But nowhere does the judgment say that it was not necessary for the debt to be quantified to find a valid assignment.

44 In fact, it appears that the debt in *Sutherland* was easily quantifiable. The applicant made payments amounting to $414,000 to the debtors' mortgagee. In return, the applicant only expected to be repaid *exactly what he himself paid – he did not ask for a single cent of interest* (*Sutherland* at [2]). In other words, there was no doubt as to the precise sum that was due to him. While the terms of the purported equitable assignment provided that the outstanding sale proceeds (that remained after the bank was repaid) would be assigned to the applicant, there was a *mechanism* for ascertaining the precise sum to be assigned. The sum would be the outstanding sale proceeds *up to* the sum of $414,000. This stands apart from Sinohydro's assertion that there can be an assignment in the absence of *any* quantification of the sum being assigned. Thus, Sinohydro's reliance on *Sutherland* does not take it far in asserting that the lack of quantification of the debt is immaterial.

45 Having disposed of Sinohydro's misplaced reliance on *Sutherland*, the question remains as to whether a valid and binding agreement was formed at the 3 Feb Meeting. The court will engage in an objective interpretation of the facts to determine if the parties objectively intended to contract: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 03.006. Determining whether there is a valid and binding agreement is thus an objective inquiry: *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40].

46 The terms of an alleged contract must also be certain for it to be valid and enforceable. An uncertain term exists but is otherwise incomprehensible:

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Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd) [2013] 4 SLR 1023 ("*Rudhra Minerals*"). A term is also uncertain if there is no objective or reasonable way of carrying out the term, thus rendering the agreement unworkable: *Rudhra Minerals* at [32].

47 It is further not uncommon for parties to agree to be bound by a set of essential terms on which they have agreed, even though there are ongoing discussions on the incorporation of more detailed terms. Thus, just because the incorporation of the more detailed terms has not been resolved does not mean that the contract based on the essential core terms could not come into existence: *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [52]. The question is whether the *essential* terms have been agreed upon.

48 Turning to the contents of the 3 Feb Email, the alleged consensus was boiled down to the following four points (see [17] above):[97]

(a) "Helios agreed Sinohydro to made payment on behalf to Nexon for main contract works only".

(b) "Helios and Nexon had agreed to settle main contract outstanding amount first, while Helios not yet received VO approval from Sinohydro".

(c) "Sinohydro will arrange direct payment to Nexon by 10Feb2022".

(d) "Variation order to be resolve later".

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97 5 ROA, Part B, p 32.

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49 On an objective reading of the 3 Feb Email, there was no contract formed at the 3 Feb Meeting. While the DJ noted that the e-mail used conclusory language (*eg*, "agreed", "had agreed" and "will arrange"), the parties had yet to agree on the precise sum which Sinohydro was to pay Nexon. Sinohydro's position is that the fact that the precise sum was unknown is immaterial. Rather, what is critical is the existence of the essential core term, *ie*, an assignment of Sinohydro's debt to Nexon for the value of the "main contract works".[98]

50 I will consider below whether the agreement as contemplated by the parties was actually an assignment agreement. However, for present purposes, the precise sum which Sinohydro had to pay Nexon *was* an essential term. For the alleged agreement to be enforceable, the parties should have been clear on the amount which Sinohydro was to pay Nexon. As a matter of logic, Sinohydro would have been unable to perform its contractual obligation to pay Nexon if it did not know the precise sum that it had to pay. In the present case, there was no mention of the quantum to be paid by Sinohydro to Nexon. Instead, Sinohydro concedes that the parties continued to engage in further discussions after the 3 Feb Meeting to determine the precise quantum that Sinohydro would pay to Nexon.[99] Since the parties had not agreed on the amount that Sinohydro had to pay Nexon, any agreement formed at the 3 Feb Meeting would have been unworkable and hence could not have amounted to a valid contract: see *Rudhra Minerals* at [32].

51 My conclusion that no contract was formed at the 3 Feb Meeting is buttressed by three points. First, while the DJ opined that it was unnecessary to determine whether the consensus at the 3 Feb Meeting was sufficiently certain

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98 GC, p 19 at para 35.

99 GC, p 19 at para 35.

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and complete to constitute an oral agreement,[100] she expressed doubt in this regard during the trial:[101]

> Court: Sorry, Mr Ching, I'm a bit confused because my impression from reading Mr Wang's AEIC is that an oral agreement was reached on 9th February, not 3rd February. On 3rd February, there may have been agreement on broad principles or payment on behalf, but things like the amount were not firmed up so I don't think--- I may be mistaken, but I don't recall Mr Wang's AEIC asserting that an agreement was already reached on 3rd February. …
>
> …
>
> But then, after the AEICs were filed, my impression was that the alleged 3rd February oral agreement was not being pursued anymore in light of the evidence which showed that there was no agreement between the parties at that time on what the debt--- what was the debt owed by Sinohydro to Helios, as well as the debt owed by Helios to Nexon. Because, if you don't even have the amount of the debt confirmed, I don't see how the--- any purported agreement can come into place, if the very chose in action that is purportedly going to be assigned is not even properly identified. …
>
> …
>
> I mean--- okay, if that's the case your client wants to advance on based on the evidence, I mean--- it's your client's liberty to do so. But I think your client should seriously consider whether or not he wants to pursue this [line] because I think it's undisp--- it's quite clear on the evidence that as of 3rd February, critical things like the amount that's owed from Helios to Nexon, and from Sinohydro to Helios wasn't even confirmed yet.

52 Second, the parties' conduct after the 3 Feb Email suggests that the terms set out in that e-mail lacked the requisite certainty and completeness to constitute a binding and enforceable agreement. For instance, after the 3 Feb Email was sent, Mr Wang sent a message expressing a desire to meet Mr Ng

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100 1 ROA, p 76 at para 113.

101 Record of Appeal (Vol III, Part F) ("3 ROA, Part F"), p 35 ln 30 to p 37 ln 21.

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and Mr Guo (from Helios) to "discuss the payment negotiations and the progress".[102] This shows that Mr Wang wished to follow up on the 3 Feb Meeting and negotiate the specific sums that would be paid. Indeed, Mr Wang agreed to such a characterisation of his message during his cross-examination.[103] This is consistent with my conclusion that there was no binding agreement formed at the 3 Feb Meeting. Mr Wang even conceded under cross-examination that in his view, the terms set out in the 3 Feb Email were not sufficiently certain and complete as the parties did not know how much had to be paid.[104] This explains why further negotiations were carried out and supports the view that no binding contract was reached at the 3 Feb Meeting.

53 Third, the parties did not rely on any formula or mechanism to determine the final amount that Sinohydro was to transfer to Nexon for the value of "main contract works". Instead, the parties relied on "concessions on the main contract", which again shows that the precise sum due from Sinohydro to Nexon was uncertain as at the 3 Feb Meeting. In this connection, Helios' Mr Guo sent the following message on 7 February 2022 to a WeChat group that comprised representatives of Sinohydro and Helios:[105]

> I just contacted with Nexon, according to Nexon main contract, Helios owe them a total of $ 394,490.9 (excluding GST). This amount is after the deduction for all unfinished work. Currently, they are unwilling to make any concessions on the main contract … My recommendation is that Tom communicate with Nexon again, maybe it can deduct a 50k to bring the amount to $ 244,490.9 (excluding GST) … As for VO, Nexon able to provide more concessions.

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102 5 ROA, Part B, p 16.

103 Record of Appeal (Vol III, Part E), p 205–206.

104 3 ROA, Part F, pp 40–41.

105 5 ROA, Part B, p 18.

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54 On cross-examination, Mr Wang conceded that the parties still intended to discuss whether there could be further "concessions on the main contract":[106]

> Q: So, essentially, the terms are being discussed and negotiated. And he's asking whether Tom can help talk to Nexon to get the figures down, yes?
>
> A: This was what was agreed between Helios and Nexon. And then, Helios informed us of what was agreed between them. So, Helios suggested that I get Tom to communicate further with Nexon.
>
> Q: Okay. And when you say this was what Helios agreed with Nexon, you agree that there are still things to be discussed?
>
> A: Yes.
>
> Q: That would include, to quote the language, "concessions on the main contract", yes? It's just the language there, Mr Wang Hao. Not trying to trip you up. It's just they are unwilling to make any concessions.
>
> A: Yes.

Put shortly, given the uncertainty as to the sum that Sinohydro was to pay to Nexon, the alleged agreement at the 3 Feb Meeting could not have been valid and enforceable.

55 Even if a binding agreement had been entered into at the 3 Feb Meeting, I fail to see how the 3 Feb Email supports Sinohydro's argument that the parties agreed to *assign* Sinohydro's debt to Nexon. The first clause in the 3 Feb Email states that "Helios agreed [*sic*] Sinohydro to made [*sic*] payment *on behalf* to Nexon for main contract works only" [emphasis added]. In my view, such language is more consistent with the vicarious performance of Helios' contractual obligation by Sinohydro than an assignment.

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106 Record of Appeal (Vol III, Part E) ("3 ROA, Part E"), p 210 ln 8–21.

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56 Having found that no valid and binding agreement was formed at the 3 Feb Meeting, I turn to consider whether a valid and binding agreement was formed at the 9 Feb Meeting instead.

Was a valid and binding agreement formed at the 9 Feb Meeting?

Parties' arguments

57 The DJ found that a valid and binding agreement was reached at the 9 Feb Meeting.[107] On appeal, SECC argues that the 9 Feb Email could not have encapsulated a valid and binding agreement. This is because the contents of the 9 Feb Email and the 11 Feb Draft contain material differences.[108] For instance, SECC points out that the 9 Feb Email did not mention the temporary reservation of the 239K Retention Sum (while the 11 Feb Draft did), suggesting that no agreement was reached at the 9 Feb Meeting.[109] SECC also points to the discussions and negotiations following the circulation of the 11 Feb Draft. SECC argues that these discussions suggest that the parties continued to negotiate on fundamental terms such that the 9 Feb Email could not encapsulate a binding agreement.[110]

58 Sinohydro's response is that the DJ's findings are well-founded.[111] Sinohydro argues that the failure by Nexon and itself to reply to confirm or acknowledge the 9 Feb Email was silence in the face of an agreement, not in the

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107 1 ROA, p 80 at para 123.

108 AC, pp 27–29 at para 56.

109 AC, p 28 at para 56(a).

110 AC, pp 37–38 at para 78.

111 GC, p 24 at para 47.

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face of an offer.[112] Sinohydro also contends that since it followed up on the 9 Feb Email with the 11 Feb Draft (instead of raising questions or asking for further negotiations), this shows that the parties reached a binding consensus at the 9 Feb Meeting.[113] The absence of the 239K Retention Sum in the 9 Feb Email was explicable on the basis that it was not of much concern to Nexon.[114] In fact, Sinohydro contends that at the 9 Feb Meeting, Sinohydro *did* propose to reserve the 239K Retention Sum and Helios agreed to that proposal.[115] Thus, Sinohydro submits that a valid and binding tripartite agreement was formed at the 9 Feb Meeting.

No valid and binding agreement was formed at the 9 Feb Meeting

59 I begin by setting out the contents of the 9 Feb Email:[116]

> The meeting had resolved and concluded as below:
>
> > 1. The contract works had been finalise at $1,122,019.20 (excl. GST) and outstanding amount is $422,105.23 (as per Progress Claim 07)
> >
> > 2. Nexon had agreed to give a discount of $10,000 hence Helios/Sinohydro to make direct payment of $412,105.23
> >
> > 3. Helios had agreed to Nexon request regarding maincon- Sinohydro to undertake the responsibility to make direct payment to Nexon.
> >
> > 4. Sinohydro agreed to Helios/Nexon to undertake the responsibility to make full direct payment to Nexon and the payment schedule for $412,105.23 as per below:

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112 GC, p 26 at para 53(a).

113 GC, p 27 at para 53(c).

114 GC, p 29 at para 59(d).

115 GC, p 29 at para 59(c).

116 5 ROA, Part B, p 50.

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> (i) 1st payment $256,105.23 – tentatively payment by 18Feb2022 [within 1 week after all party signed the agreement].
>
> (ii) 2nd payment $56,000- payment scheduled at 15Apr2022.
>
> (iii) 3rd payment $100,000- payment scheduled at 1Mar2023
>
> 5. Wang Hao to ensure Sinohydro contract team to provide the agreement by 11Feb2022 (Friday).
>
> 6. All parties target to sign the agreement latest by 14 Feb2022 (Monday) and the 1st payment shall be within 1 week upon all parties signed.
>
> 7. Nexon propose Variation works to be discuss later.

60 At first blush, the 9 Feb Email seems to suggest that a valid and binding agreement was concluded at the 9 Feb Meeting. After all, as noted by the DJ, conclusory language was used in the 9 Feb Email.[117] However, there are several indicators which suggest that the 9 Feb Email was *not* meant to encapsulate a valid and binding contract.

61 First, the terms of the 11 Feb Draft differ from the terms in the 9 Feb Email. For instance, the 9 Feb Email states that the second payment of $56,000 was scheduled for 15 April 2022.[118] The 11 Feb Draft, however, provides that Sinohydro would only pay the sum of $56,000 to Nexon after Helios completed all outstanding works within two months.[119] Another example relates to the third payment of $100,000 as reflected in the 9 Feb Email. While the 9 Feb Email states that payment was scheduled for 1 March 2023,[120] the 11 Feb Draft states that payment was to be made by Sinohydro after the expiry of the defects

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117 1 ROA, p 46 at para 69.

118 5 ROA, Part B at p 50.

119 5 ROA, Part B at p 60.

120 5 ROA, Part B at p 50.

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liability period on 2 March 2023.[121] I note that the 11 Feb Draft is similar to the Written Agreement. The difference in the deadlines and the imposition of additional conditions in the 11 Feb Draft indicate that the parties did not intend to be bound by the 9 Feb Email.

62 Secondly and more importantly, cl 6 of the 9 Feb Email provides that all parties were to aim to sign the agreement by 14 February 2022. The first payment was to be made within one week after all the parties had signed.[122] Under cl 6, the first payment of the 256K Sum would be paid *after* the parties had signed the agreement. This indicates that the parties did not intend to be immediately bound to perform on the agreed terms in the 9 Feb Email. Instead, the parties agreed to defer legal relations until a written agreement was signed. Thus, although the 9 Feb Email did not expressly use the phrase "subject to contract", the consensus reached *was* subject to the execution of a written agreement.

63 My conclusion that the consensus reached at the 9 Feb Meeting was subject to contract is fortified by the discussions and negotiations that followed:

(a) The 11 Feb Draft required the signature of all three parties. Three days after the 11 Feb Draft was circulated, Helios attempted to include a "back to back" clause in the 11 Feb Draft, which was rejected by Sinohydro.[123]

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121 5 ROA, Part B at p 60.

122 5 ROA, Part B at p 50.

123 5 ROA, Part B at pp 20–21.

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(b) A day later, Ms Ho circulated the 15 Feb Draft proposing amendments to the 11 Feb Draft.[124] This draft did not substantively amend the terms of the 11 Feb Draft but sought to refine the terms set out in the 11 Feb Draft. This draft also required all three parties to sign the agreement.

(c) Two days later, *ie*, on 17 February 2022, Nexon sent out the 17 Feb Draft.[125] The 17 Feb Draft sought to incorporate various amendments to the 11 Feb Draft, such as a timeline for the payment of the 256K Sum.[126]

In my view, the continuing negotiations and the fact that all three agreements required the signatures of the parties supports my conclusion that any consensus at the 9 Feb Meeting was subject to contract. The DJ thus erred in finding that the 9 Feb Email constituted a valid and binding contract. The DJ was also incorrect in finding that the tripartite agreement was not "subject to contract".

When was a valid and binding agreement formed?

64 I have found that neither the 3 Feb Email nor the 9 Feb Email constituted valid and binding agreements. Instead, the consensus reached at the 9 Feb Meeting was subject to contract (*ie*, the signing of the Written Agreement). The question then is when the Written Agreement became valid and binding on the parties.

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124 5 ROA, Part B at pp 83–88.

125 5 ROA, Part B at pp 92–108.

126 5 ROA, Part B at pp 105–113.

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Parties' arguments

65 SECC argues that the Written Agreement only became enforceable after the service of the PGO on Sinohydro. This is because Sinohydro had sent the signed Written Agreement to both Helios and Nexon more than two hours after the service of the PGO.[127]

66 On the other hand, Sinohydro contends that the Written Agreement was enforceable after Mr Li Yi sent a reply to Ms Ho on 10 March 2022 (*ie*, the 10 March Email). This was *before* the PGO was served.[128]

A valid and binding tripartite agreement was formed when Sinohydro replied on 10 March 2022

67 The law adopts an objective approach towards contractual formation (see [45] above). On 9 March 2022, Ms Ho requested payment from Sinohydro by way of an e-mail.[129] She explained that all the documents had already been signed by Helios and Nexon.[130] Mr Li Yi of Sinohydro responded in the 10 March Email that "since every documents [*sic*] [was] duly signed, [Sinohydro] will release the payment as soon as possible" and instructed Mr Wang to "help to arrange payment to [N]exon".[131] Mr Li Yi copied Helios on this e-mail.[132] Ms Ho replied that Nexon would be awaiting "the soonest payment".[133]

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127 AC, p 47 at para 105.

128 GC, pp 39–40 at para 83.

129 5 ROA, Part B, p 234.

130 5 ROA, Part B, p 234.

131 5 ROA, Part B, pp 233–234.

132 3 ROA, Part E, pp 163–164.

133 5 ROA, Part B, p 233.

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68 Helios was copied throughout this entire e-mail correspondence. Mr Li Yi acknowledged the signed copies of the Written Agreement and agreed that the documents were in order. He instructed Mr Wang to release the payment to Nexon. This constituted acceptance of the Written Agreement by Sinohydro. The Written Agreement was thus valid and enforceable when Mr Li Yi sent the 10 March Email, which was *before* the PGO was served.

69 Since the Written Agreement had been validly entered into before the PGO was served, the remaining issues are whether SECC could garnish either the 239K Retention Sum or the 256K Sum. I turn to consider these issues.

Can SECC garnish the 239K Retention Sum?

Parties' arguments

70 Sinohydro contends that the parties reached a binding agreement at the 9 Feb Meeting to reserve the 239K Retention Sum until Helios completed its outstanding works.[134] According to Sinohydro, this was recorded in the Written Agreement which had contractual force prior to the service of the PGO.[135] The 239K Retention Sum was thus a contingent debt that was not attachable to the PGO as Helios had not completed all its outstanding works.[136]

71 SECC argues that since the Written Agreement was concluded after the service of the PGO, the clause relating to the 239K Retention Sum only had

134 GC, p 52 at para 112.

135 GC, p 52 at para 112.

136 GC, p 5 at para 3(b) and pp 28–30; 5 ROA, Part B, pp 156–157 at paras 181–185.

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contractual force then.[137] SECC did not make any arguments on whether the 239K Retention Sum was a contingent debt that could not be garnished.[138]

72 I have already found that the consensus reached at the 9 Feb Meeting was subject to the execution of the Written Agreement (see [63] above). I have also found that the Written Agreement was executed *before* the service of the PGO (see [67]–[68] above). Thus, the question that remains is whether SECC can garnish the 239K Retention Sum.

SECC cannot garnish the 239K Retention Sum because it was a contingent debt

73 The attachment of a debt due to a judgment debtor is provided for under O 49 r 1(1) of the Rules of Court (2014 Rev Ed) ("ROC 2014"). Order 49 r 1(1) of the ROC 2014 provides that where a judgment creditor has obtained a judgment or order for payment against the judgment debtor, the court can order the garnishee to pay the judgment creditor any debt due or accruing due to the judgment debtor from the garnishee as is sufficient to satisfy the judgment or order and the costs of the garnishee proceedings.

74 For a debt to be due or accruing due, there must be a relationship of creditor and debtor existing between the judgment debtor and the garnishee respectively: *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2020) ("*Singapore Civil Procedure*") at para 49/1/10. There must thus be money that is due and owing to the judgment debtor: *Singapore Civil Procedure* at para 49/1/10.

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137 AC, p 56 at paras 122–123.

138 See AC, pp 10–11 at para 20(b) and pp 55–56 at paras 119–123.

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75 The general principle is that a debt that is presently owing but payable in the future can be garnished: *Vintage Bullion DMCC (in its own capacity and as representative of the customers of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) v Chay Fook Yuen (in his capacity as joint and several liquidator of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) and others and other appeals* [2016] 4 SLR 1248 ("*Vintage Bullion*") at [41]. On the other hand, a contingent debt cannot be garnished: *Vintage Bullion* at [41].

76 In the present case, the Written Agreement provided that the 239K Retention Sum would be "temporary [*sic*] reserved as estimated on-site implementation cost and will be released after Helios completed all outstanding works".[139] In my judgment, this was a contingent debt as Sinohydro had no obligation to pay Helios the 239K Retention Sum unless and until the latter had completed its outstanding works. Put another way, the debt comprising the 239K Retention Sum was contingent on Helios completing all outstanding works. I note that Helios' Mr Ng testified that Helios had not completed all the outstanding works.[140] Accordingly, the 239K Retention Sum is a contingent debt that cannot be garnished by SECC .

Can SECC garnish the 256K Sum?

Parties' arguments

77 Having dealt with the 239K Retention Sum, the next question is whether SECC can garnish the 256K Sum.

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139 5 ROA, Part B, p 252.

140 3 ROA, Part E, p 164 at lines 29–32.

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78 SECC submits that the 256K Clause is a direct payment clause and not an assignment of debt. SECC argues that the DJ erred in construing the 256K Clause as an assignment of debt for the following reasons.

79 First, the DJ adopted an overly technical and legalistic approach to the construction of the 256K Clause. In this regard, she failed to appreciate the following facts: (a) that the Written Agreement was not drafted by lawyers; and (b) that the Written Agreement was originally drafted in Chinese and translated into English via a translation software.[141] Instead, the DJ should have adopted the "common-sense approach" to contractual interpretation that the Court of Appeal had adopted in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [50].[142]

80 Second, the 256K Clause did not include an indemnity clause that immediately extinguished Sinohydro's debt to Helios. This was significant as the Court of Appeal in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley*") relied on the existence of an indemnity clause to conclude that the relevant clause operated as an assignment of debt.[143]

81 Third, SECC also argues that the DJ failed to consider the reasonable and probable expectations of the parties when interpreting the 256K Clause.[144] In this connection, SECC highlights that the tripartite agreement was meant to resolve Sinohydro's persistent refusal to release the certified progress payment

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141 AC, p 63 at para 135.

142 AC, p 64 at para 137.

143 AC, p 73 at para 154.

144 AC, pp 64–69 at paras 138–147.

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of $508,304.57 to Helios.[145] It would not have been in Sinohydro's interests to assume a liability towards Nexon, which it would have done if the 256K Clause was an assignment of debt. Further, the 15 Feb Draft indicated that the parties' reasonable and probable expectations of the 256K Clause were that it would operate as a direct payment arrangement and not as an assignment of a debt.[146] Finally, Mr Ng testified that Helios' own understanding of the tripartite agreement was that Sinohydro would remain liable to Helios for the 256K Sum until Sinohydro paid the sum to Nexon.[147]

82 In response, Sinohydro contends that the DJ correctly construed the 256K Clause as an assignment of debt for the following reasons. First, such an interpretation is consistent with the text of the clause and the DJ was entitled to refer to the dictionary meanings of several phrases such as "entrust" and "transfer". The common-sense approach in *Xia Zhengyan* was qualified by the subsequent decision of *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") wherein the Court of Appeal clarified that *Xia Zhengyan* should not be read as marking a dilution of the objective approach towards contractual interpretation (at [74]).[148] Second, SECC's reliance on *Broadley* is misplaced as *Broadley* does not stand for the proposition that an indemnity clause is *required* before a clause can be construed as an assignment of a debt.[149] Third, little weight should be placed on the 15 Feb Draft as it was not accepted by the parties.[150] Fourth, Mr Ng's testimony only reflects his own subjective

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145 AC, p 66 at para 143.

146 AC, pp 64–65 at paras 138–140.

147 AC, pp 66–68 at paras 144–147.

148 GC, p 56 at para 120; Garnishee's Written Submissions (filed on 25 April 2024), p 20 at para 52.

149 GC, p 53 at para 115.

150 GC, p 61 at para 133.

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understanding of the effect of the 256K Clause. This is irrelevant to the objective construction of the 256K Clause.[151]

83 If Sinohydro is right that the clause operated as an assignment of debt, this would defeat attachment and SECC would be unable to garnish the 256K Sum: see *Singapore Civil Procedure* at para 49/1/33.

The applicable law

84 For there to be an equitable assignment, three requirements must be present: (a) there must be an intention to assign; (b) the chose in action being assigned must be clearly identified; and (c) the assignor must demonstrate through some act that he is passing the chose in action to the alleged assignee: *Tsu Soo Sin v Oei Tjiong Bin and another* [2009] 1 SLR(R) 529 ("*Tsu Soo Sin*") at [16]. The concept of *transfer* is a principal feature of an assignment: see Greg Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2nd Ed, 2016) ("*Assignment of Contractual Rights*") at para 3.04. Indeed, the effect of the transfer is to transfer to the assignee the ownership of a right that has been vested in the assignor: *Assignment of Contractual Rights* at para 3.04.

85 However, the assignment of a debt should be distinguished from the vicarious performance of a debt obligation: *Assignment of Contractual Rights* at para 3.08; *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty on Contracts*") at para 22-084. Under the latter scenario, a contracting party may delegate the performance of its contractual obligation to a third party if the obligation does not call for personal performance. If the performance is given on behalf of the contracting party and with the intention

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151 GC, pp 62–63 at para 135.

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of discharging the contracting party, then performance by the third party will discharge the contracting party. However, the contracting party will remain liable for the non-performance of the contractual obligation: *Chitty on Contracts* at para 22-084; *Assignment of Contractual Rights* at para 3.08. In the present case, an obligation to pay money can plainly be vicariously performed: *Chitty on Contracts* at para 22-085.

86 The distinction between the assignment of a debt and the vicarious performance of a debt obligation was recognised by the Court of Appeal in *Broadley*. In *Broadley*, a supplier and a sub-contractor entered into a contract for the supply of equipment. As the main contractor did not pay the sub-contractor, the sub-contractor began defaulting on its payments to the supplier. The supplier and sub-contractor agreed that the sub-contractor would authorise its main contractor to pay the supplier on its behalf, and this would fulfil the main contractor's debt obligation to the sub-contractor. The parties then signed the following undertaking:

> We, [the sub-contractor] … hereby authorises [the main contractor] … to pay on our behalf, the total outstanding balance due to [the supplier], which sums to S$423,407.35 including GST, details as attached and agreed by the supplier. We agree that this amount be deducted from our Remaining Contract Amount with [the main contractor].
>
> This agreement has been agreed by [the main contractor], [the sub-contractor] and [the supplier]. This letter indemnifies [the sub-contractor], and is free of any responsibility and is no longer liable with regards to the outstanding balance with [the supplier].

The Court of Appeal referred to the first clause as the "authorisation clause", while the second clause was called the "indemnity clause": *Broadley* at [23].

87 After reviewing the undertaking, the Court of Appeal in *Broadley* opined that the authorisation clause seemed to provide that the main contractor would

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pay the outstanding sum to the supplier on the sub-contractor's behalf, in concurrent fulfilment of the main contractor's obligation to the sub-contractor (at [24]). In other words, the authorisation clause appeared to provide for: (a) the vicarious performance of the debt obligation; and (b) the concurrent fulfilment of the main contractor's obligation to the sub-contractor. However, the Court of Appeal went on to note that because the indemnity clause clearly intended to release the sub-contractor from all liability in respect of the outstanding sum, the authorisation clause operated as an assignment of debt: *Broadley* at [24]. This meant that the supplier would not have any cause of action against the sub-contractor and the sub-contractor would likewise not have any cause of action against the main contractor: *Broadley* at [24].

88 In the present case, the issue is whether the 256K Clause acted as an assignment of debt or a direct payment arrangement (*ie*, where Helios' debt obligation to Nexon would be vicariously performed by Sinohydro, in concurrent fulfilment of Sinohydro's own debt obligation to Helios). This requires the court to interpret the 256K Clause.

89 In interpreting contracts, the starting point is the text the parties have used: *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 ("*CIFG*") at [19(a)]. At the same time, the court may have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties: *CIFG* at [19(b)]. Indeed, it is important to consider the context in which the agreement was made because this places the court in the best position to determine the parties' objective intentions: *CIFG* at [19(c)]; *Xia Zhengyan* at [45]. The meaning ascribed to the terms of a contract must also be one that the expressions used by the parties can reasonably bear: *CIFG* at [19(d)].

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The 256K Clause was a direct payment arrangement and SECC can garnish the 256K Sum

90 The DJ construed the 256K Clause as an assignment of debt after having regard to both the text and context of the clause. With respect, the DJ erred as both the text and context of the clause indicate that it was meant to operate as a direct payment arrangement.

The text of the 256K Clause

91 In concluding that the text of the 256K Clause operated as an assignment of debt, the DJ relied on the following textual elements: (a) the use of the word "transfer" in the clause; (b) the use of the word "entrust" in the clause; (c) the inclusion of the phrase "the corresponding fee will be deducted from Helios' contractual rights" in the clause; and (d) the title of the Written Agreement, which reads "Transference of Obligatory Right and Debit Agreement".[152] The 256K Clause is reproduced below:[153]

> **Item B:**
>
> Due to the project settlement debt between Helios and Nexon, the final debt amount was **SGD$412,105.23(incl. GST)** as confirmed by Helios and Nexon. After kind negotiation among Helios, Nexon and Sinohydro, in order to expedite the debt payment of Helios and Nexon, the three parties have reached the following agreement:
>
> **Helios entrust Sinohydro to transfer the amount SGD$256,105.23 (incl. GST) in Item A to Nexon directly and the corresponding fee will be deducted from Helios' contractual rights.**

92 As a preliminary matter, the DJ found that the 11 Feb Draft was drafted in Chinese by Mr Wang and subsequently translated into English through a

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152 1 ROA, pp 101–102 at para 171.

153 5 ROA, Part B, p 253.

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translation software.[154] It is also common ground that the Written Agreement was substantively identical to the 11 Feb Draft.[155] Where an agreement has been drafted in English by parties who are not native speakers of the English language, the court should be cognisant of the fact that the parties may not have been sensitive to the finer nuances of the English language: *Yap Son On* at [74]. Further, where a contract is drafted by laypersons, the court should bear in mind that they could not be expected to have expressed themselves with the exactitude expected of experienced legal draftsmen: *Yap Son On* at [74]. In such circumstances, a "common sense approach" should be adopted instead of a technical and legalistic approach to contractual interpretation that places an excessive focus on the structure and language of the clause: *Xia Zhengyan* at [50]; *Yap Son On* at [74].

93 In the present case, Mr Wang did not have a good command of the English language. While the DJ accepted that Mr Wang minimally possessed a "basic working proficiency of English",[156] she also noted that Mr Wang's proficiency in the English language might not have been at the level where he was comfortable enough to draft and file his affidavits in English. Indeed, Mr Wang testified that while he could understand some short English phrases, he was sometimes unable to understand complete English sentences as he did not understand some English terms.[157] Mr Wang's unfamiliarity with the English language is also evident from the fact that he: (a) relied on Mandarin while negotiating and drafting the Written Agreement;[158] and (b) relied on a translation

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154 1 ROA, p 117 at para 189(b).

155 1 ROA, p 63 at para 88(a).

156 1 ROA, p 116 at para 187.

157 3 ROA, Part F, p 63 ln 6–32.

158 3 ROA, Part F, p 63 ln 12–21.

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software to translate each sentence of his Chinese draft of the Written Agreement to English.[159] The court should have regard to this linguistic limitation when construing the 256K Clause objectively: *Yap Son On* at [74].

94 Bearing this contextual point in mind, I am unable to agree with the DJ for several reasons. First, while the use of the word "transfer" may appear at first blush to be consistent with an assignment, the essence of an assignment is the transfer of the *ownership of a right* (see [84] above). In my view, the use of the word "transfer" refers to Sinohydro undertaking the obligation to pay the 256K Sum to Nexon directly. In other words, it refers to Sinohydro's obligation to "transfer" the 256K Sum to Nexon. This is because the word "transfer" immediately precedes the phrase "the amount SGD$256,105.23". The word "transfer" does not go so far as to suggest that Helios transferred to Nexon its *contractual right* to the debt owed by Sinohydro.

95 Second, while the dictionary definition of "entrust" may entail giving someone a duty for which they are responsible for, this does not necessarily mean that the 256K Clause acted as an assignment of debt. I agree with SECC's submission that it is unclear whether this had the consequence of *immediately* extinguishing Sinohydro's debt obligation to Helios and Helios' debt obligation to Nexon.[160] In the circumstances, the word "entrust" merely imposes an obligation on Sinohydro to pay the 256K Sum directly to Nexon. This could be consistent with either an assignment of debt or a direct payment arrangement. Thus, the use of the word "entrust" is equivocal.

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159 3 ROA, Part F, p 63 ln 19–21.

160 AC, p 70 at para 150(c).

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96 Third, the use of the phrase "will be deducted from Helios' contractual rights" appears to suggest that such deduction will occur in the future, after Sinohydro transfers the 256K Sum to Nexon. This is similar to the wording of the authorisation clause in *Broadley* (see [86] above), which in and of itself did not amount to an assignment of debt. Sinohydro argues that "will be" does not connote the future extinction of Helios' contractual right because the phrase was also used under Item A of the Written Agreement (see [8] above) to refer to the immediate reservation of the 239K Retention Sum as a retention sum. In my view, this means that the effect of the phrase "will be" is, at best, equivocal. In coming to this conclusion, I bear in mind that Mr Wang did not have a good command of the English language and that the Written Agreement was translated, sentence by sentence, through a translation software.[161]

97 Fourth, while the title of the Written Agreement is "Transference of Obligatory Right and Debit Agreement", this does not necessarily refer to an *immediate* transfer. As such, it does not conclusively point to the 256K Clause being an assignment of debt.

98 In my judgment, it is significant that the 256K Clause bears a close resemblance to the authorisation clause in *Broadley*. In *Broadley*, the authorisation clause provided that where the main contractor made payment (on behalf of the sub-contractor) to the supplier, the sum paid would be deducted from the amount the main contractor owed to the sub-contractor. On this basis, the Court of Appeal opined (*Broadley* at [24]) that the authorisation clause appeared to provide for the main contractor to pay the outstanding sum to the supplier on the sub-contractor's behalf in concurrent fulfilment of the main contractor's obligation to the sub-contractor. In the present case, the 256K

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161 3 ROA, Part F, p 63 ln 19–21.

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Clause is similar in that it states that the 256K Sum that Sinohydro pays Nexon will correspondingly be deducted from the amount that Sinohydro owes Helios. As such, the 256K Clause appears to provide for Sinohydro to transfer the 256K sum to Nexon on Helios' behalf in concurrent fulfilment of Sinohydro's debt to Helios.

99 What elevated the authorisation clause in *Broadley* to an assignment of debt was the presence of the indemnity clause, which indicated an immediate extinguishment of the sub-contractor's debt obligation to the supplier (at [24]). There is no such indemnity clause in the present case that immediately extinguishes Sinohydro's debt obligation to Helios upon entry into the Written Agreement. While Sinohydro submits that no particular form of words is required to effect an equitable assignment, *Broadley*'s interpretation of the authorisation clause is persuasive as it closely mirrors the wording of the 256K Clause. As there is no indemnity clause which expressly extinguishes Sinohydro's debt obligation to Helios immediately, I am of the view that the text of the 256K Clause is more consistent with a direct payment agreement than an assignment of debt.

100 For the avoidance of doubt, I emphasise that my finding is limited to the specific facts in the present case (*ie*, the specific wording of the 256K Clause). An indemnity clause is not always required before the court can find that there is a valid assignment; no particular form of words is required to establish an equitable assignment: *Tsu Soo Sin* at [32]–[33].

The relevant context of the 256K Clause

101 The background to the tripartite agreement also supports the view that the 256K Clause provides for a direct payment arrangement. In interpreting

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contracts, the court will give regard to the overall commercial purpose of the parties in entering into the transaction: *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 at [41(e)]. In the present case, it is undisputed that the tripartite agreement was precipitated by Sinohydro's refusal to release a certified progress payment of $508,304.57 to Helios.[162] Sinohydro's refusal to release the progress payment to Helios caused Helios to be unable to make its own progress payments to its sub-contractors, such as Nexon. As the DJ rightly noted in her judgment, the parties had commenced discussions in order to "resolve Sinohydro's refusal to make payment to Helios, so that Helios could pay its subcontractors".[163]

102 In the circumstances, I agree with SECC's submission that the parties would likely have agreed on terms favourable to Sinohydro in order to coax Sinohydro to agree to make the payments in the first place.[164] This is fortified by the fact that Mr Wang's position in the trial below was that Nexon and Helios had to enter into the tripartite agreement on Sinohydro's terms if they wanted its assistance.[165] It would not have made commercial sense for Sinohydro to assume a new obligation to Nexon. In my judgment, the parties would have entered into a direct payment agreement as opposed to an assignment of the debt as the former would have been more favourable to Sinohydro.

103 For completeness, SECC also relies on various matters to support its argument that the parties intended for the 256K Clause to operate as a direct payment arrangement. In this connection, SECC refers to amendments that were

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162 1 ROA, pp 14–15 at paras 8–11.

163 1 ROA, p 15 at para 11.

164 Appellant's Skeletal Arguments (dated 25 April 2024), p 10 at para 12(b).

165 1 ROA, p 107 at para 117(b); 3 ROA, Part E, p 240 ln 17–20.

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proposed to the tripartite agreement in the 11 Feb Draft and the 15 Feb Draft. However, as I have previously found that the tripartite agreement was concluded on 10 March 2022, this means that SECC is relying on pre-contractual negotiations to aid in contractual interpretation.

104 The issue of whether pre-contractual negotiations can be admitted for the purposes of aiding in contractual interpretation remains open in Singapore: *Xia Zhengyan* at [69]; *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265 at [46]. As I do not have the benefit of full submissions on this issue, I do not consider this case to be the appropriate occasion to resolve this difficult question. In any event, our courts have suggested that pre-contractual negotiations, such as draft agreements, may not provide a clear and obvious context for contractual interpretation and it may thus not fulfil the third requirement stated in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 for adducing extrinsic evidence, *ie*, that the extrinsic evidence relates to a clear or obvious context: *Xia Zhengyan* at [65].

105 In closing, since there is no ambiguity in the 256K Clause, it is not necessary to consider the applicability of the *contra proferentem* rule: see *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [51].

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Should an adverse inference be drawn against Sinohydro for failing to disclose material documents?

Parties' arguments

106 SECC contends that an adverse inference should be drawn against Sinohydro for failing to disclose material documents. SECC points out that the documents withheld by Sinohydro at trial included correspondence concerning the proposed draft written agreements circulated after the issuance of the 11 Feb Draft.[166]

107 In turn, Sinohydro submits that an adverse inference should not be drawn against it for failing to disclose the aforementioned documents.[167] Considering the DJ's finding that the 9 Feb Email constituted a valid and binding agreement, it was not necessary to disclose the correspondence relating to the further draft that was circulated after the issuance of the 11 Feb Draft. Sinohydro further contends that Mr Wang may have failed to appreciate the relevance of the undisclosed documents.[168] Finally, Sinohydro contends that the drawing of an adverse inference is not justified since there was no discovery process leading up to the trial.[169]

An adverse inference should not be drawn against Sinohydro

108 The basis for drawing an adverse inference can be traced to Illustration (*g*) of s 116 of the Evidence Act 1893 (2020 Rev Ed) ("EA"). Section 116 of the EA provides that the court may presume the existence of any

166 AC, p 75 at para 164.

167 GC, p 68 at para 148.

168 GC, p 68 at para 151.

169 GC, p 69 at para 152.

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fact which it thinks likely to have happened, having regard to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case at hand. Illustration (*g*) to s 116 provides that the court may presume that evidence which could be but is not produced would if produced be unfavourable to the person who withholds it. Illustration (*g*) usually applies if a party unreasonably fails to call a witness or adduce other material evidence.

109 In my view, the facts here do not call for the drawing of an adverse inference. While I accept that Mr Wang conducted himself less than satisfactorily in omitting to disclose the documents, I note that the correspondence and documents *were* before the DJ. SECC itself contended in its submissions below that it had "done its utmost to find and put the Undisclosed Documents before this Honourable Court".[170] To SECC's credit, the omitted documents were exhibited in the agreed bundle in the proceedings below.[171] The DJ made explicit reference to, and relied on, the omitted documents in her judgment.[172] In other words, the omitted documents were ultimately produced before the court, albeit by SECC. The omitted documents are also exhibited before this court in the present appeal. Thus, there is no basis to rely on Illustration (*g*) to s 116 of the EA to draw an adverse inference against Sinohydro as the court is able to evaluate and determine the effect of the *actual* documents that were purportedly withheld.

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170 4 ROA, Part B, p 38 at para 103.

171 5 ROA, Part B, pp 12–25, 71–88 and 90.

172 1 ROA, p 112 at para 183.

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Conclusion

110 For the above reasons, I conclude that:

(a) The tripartite agreement between Sinohydro, Helios and Nexon was "subject to contract". This contract (*ie*, the Written Agreement) was formed on 10 March 2022, *before* the PGO was served.

(b) SECC cannot garnish the 239K Retention Sum as it is a contingent debt, *ie*, a future debt that is contingent on Helios completing all outstanding works.

(c) SECC can garnish the 256K Sum because the clause operated as a direct payment arrangement. Since Sinohydro only paid Nexon the 256K Sum *after* the PGO was served, this debt remained due and owing at the time the PGO was served.

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111 I thus allow the appeal and set aside the orders made by the DJ. I will hear the parties separately on the appropriate orders that should be made, including on costs and disbursements.

Dedar Singh Gill
Judge of the High Court

Vishi Sundar and Ho Chen Ju Joshua (WongPartnership LLP) for the appellant;
Sim Chee Siong, Ching Meng Hang and Lee Tze En Chrystal (Rajah & Tann Singapore LLP) for the garnishee.

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