AES Façade Pte Ltd
v
WYSE Pte Ltd

[2017] SGHC 171

High Court — Originating Summons No 205 of 2017 (Summons No 1227 of 2017)
Tan Siong Thye J
24 May 2017

Building and construction law — Sub-contracts — Claims by sub-contractor

Building and construction law — Statutes and regulations — Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

18 July 2017

Tan Siong Thye J:

Introduction

1 The plaintiff, AES Façade Pte Ltd ("AES"), took out *ex parte* Originating Summons No 205 of 2017 ("OS 205") to seek leave to enforce the adjudication decision in SOP/AA 495 of 2016 dated 17 February 2017 ("the AD") against the defendant, WYSE Private Limited ("WYSE"). AES succeeded and received Order of Court No 1337 of 2017 ("ORC 1337") to that effect. WYSE later took out Summons No 1227/2017 ("SUM 1227") to set aside ORC 1337. SUM 1227 also included an alternative prayer to stay all

proceedings relating to the execution of ORC 1337 pending the conclusion of arbitral proceedings between AES and WYSE.

2 On 24 May 2017, I heard the arguments of the parties and dismissed SUM 1227 in its entirety with costs fixed at $10,000. WYSE was dissatisfied with my decision and informed me that it intended to appeal. WYSE also sought to stay the execution of my order in SUM 1227 (*ie*, to stay the payment out of court for the sum of $1,072,340.48, which WYSE had previously paid into court) pending the outcome of the appeal. After hearing submissions from both parties, I disallowed the application for a stay and ordered that the sum of $1,072,340.48 was to be released forthwith to AES, as this sum represented payments which had fallen due some 13 months ago.

3 It appears that WYSE subsequently decided not to appeal. Given that the money had already been released to AES, this was perhaps unsurprising. Nonetheless, as this application concerned issues of some importance to practitioners and players in the construction industry, I now give the grounds for my decision.

Background

4 This case involved the construction of a 19-storey commercial building at 140 Robinson Road ("the Project"). WYSE was engaged as the main contractor for the Project by WyWy Development Pte Ltd ("WyWy"). WYSE in turn engaged AES as its subcontractor for the design, supply, installation, testing and commissioning, and maintenance of the façade works. The value of this subcontract ("the Sub-Contract") was $4,965,000 and the terms of the Sub-Contract incorporated, among other things, the Singapore Institute of Architects Conditions of Sub-Contract ("the SIA Conditions of Sub-Contract"). The

completion date for the main contract as well as the Sub-contract was 12 April 2016.

The contractual provisions

5 The key provisions of the Sub-Contract were cll 11.4 and 11.5 of the SIA Conditions of Sub-Contract, which read as follows:

> 11.4 The Contractor may set-off against any monies due to the Sub-Contractor under this Sub-Contract, such loss or damage suffered or incurred by him as a result of the failure of the Sub-Contractor to carry out the Sub-Contract Works with diligence or due expedition or to complete the Sub-Contract Works by the date or dates specified in Schedule III hereto or the date or dates as extended until such date as may be certified by the Contractor in his Sub-Contract Completion Certificate.
>
> 11.5 Without prejudice to the Sub-Contractor's rights under general law to dispute any set-off by the Contractor, it shall be a condition precedent for such set-off by the Contractor that:
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> (i) the set-off has been quantified in detail with particulars and with reasonable accuracy;
>
> (ii) the Contractor has given to the Sub-Contractor written notice specifying his intention to set-off the amount so quantified together with the required detailed under Sub-Clause 5(i) hereof and the grounds on which such set-off is made;
>
> and
>
> (iii) such notice shall be given to the Sub-Contractor not less than 7 days before the date of issuance of the payment response which includes the amount stated as payable, the amount due to the Sub-Contractor from which the Contractor intends to make the set-off.

These provisions were also referred to in WYSE's Letter of Acceptance dated 28 November 2014.

Problems with the Project

6 As a result of delays, the Project could not be completed on time and WyWy allegedly claimed liquidated damages of $2.05m against WYSE. WYSE's position was that AES had caused or contributed to the delays and was therefore liable to compensate WYSE for the liability it had incurred towards WyWy. WYSE attributed about $1.47m of the liquidated damages to AES. On that basis, when AES served WYSE with Payment Claim No 20 for the amount of $1,280,179.92 ("Payment Claim No 20"), WYSE refused to make payment. However, the payment response in which WYSE stated its right to set-off as a reason for withholding the amount claimed was filed out of time, on 28 December 2016.

Adjudication and enforcement attempt

7 Following WYSE's non-payment, AES lodged an adjudication application with the Singapore Mediation Centre on 29 December 2016 under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act"). AES sought the sum of $1,280,179.92 previously indicated in its payment claim.

8 The adjudication was conducted by Mr Mohan R Pillay ("the Adjudicator"). On 17 February 2017, the Adjudicator gave an Adjudication Determination ("the AD") in AES's favour for the amount of $1,077,151.37 inclusive of GST and costs ("the Adjudicated Amount"). In arriving at his decision, the Adjudicator disregarded WYSE's set-off argument, as he found that the payment response stating the reason for withholding payment had been served out of time.

9 WYSE refused to pay AES the Adjudicated Amount. On 28 February 2017, AES took out OS 205 to seek leave of court to enforce the AD as a judgment debt or order of court under s 27(1) of the SOP Act. The court granted the application and handed down ORC 1337, which required WYSE to pay the Adjudicated Amount (with interest) and the costs of OS 205.

10 WYSE then applied to this court, in SUM 1227, to set aside ORC 1337.

Parties' submissions

WYSE's submissions

11 WYSE did not challenge the validity of the AD. However, WYSE sought to set aside ORC 1337 on the ground that WYSE was entitled contractually to set off the Adjudicated Amount of $1,069,062.17 against the $1.47m of the liquidated damages (out of the total of $2.05m claimed by WyWy) which was allegedly attributable to AES. The result was that nothing needed to be paid to AES.

12 In support of this argument, WYSE pointed out that the SOP Act did not expressly prohibit set-off under the contract or general law at the stage of the enforcement of the AD. Section 27 of the SOP Act was unlike s 25 of the New South Wales Building and Construction Industry Security of Payment Act 1999 (No 46 of 1999) (NSW) ("the NSW Act"), which included an express prohibition (in s 25(4)(*a*)(i)) to that effect.

13 WYSE also argued that a set-off was a form of payment, and there was therefore no "unpaid part of the adjudication amount" to form the basis of ORC 1337.

14 It was further submitted that because the Adjudicator did not adjudicate on the merits of WYSE's set-off against AES for liquidated damages, but instead declined to consider the set-off as the payment response was lodged out of time, WYSE's claim to a set-off was akin to a repeat claim which had not been adjudicated before and which could still be a valid claim.

AES's submissions

15 AES submitted that WYSE's application to set aside the AD was an abuse of process and an attempt to circumvent s 15(3) of the SOP Act. If WYSE had wished to rely on a set-off in the adjudication, it should have served a payment response within the required timeframe. WYSE had failed to do so and could not evade the consequences of its failure by seeking to rely on the set-off at this stage, where AES was seeking enforcement of the AD.

16 AES also argued that WYSE could not rely on the set-off provision in cl 11.4 of the Sub-Contract as it was void under s 36(2) of the SOP Act.

Issues

17 The central issue in this application was whether ORC 1337 should be set aside. This depended on whether the SOP Act permitted a respondent to raise a set-off – specifically, one which was disputed and was not itself the subject of an order, judgment, award or adjudication determination – against an adjudicated amount found to be payable under an adjudication determination.

18 The second issue was whether, if I did not set aside ORC 1337, I should grant a stay of execution of the order pending the determination of arbitral proceedings between the parties regarding AES's liability for the liquidated damages.

19 Ultimately, I rejected WYSE's application concerning the two issues above. This gave rise to the third issue when WYSE's counsel immediately made an oral application for a stay of execution of my order pending the resolution of an appeal to the Court of Appeal, which WYSE intended to file. Whether to grant that stay was the last issue I had to decide.

The statutory context

20 Before considering the main issues in this application, it was crucial to first appreciate the rationale of the SOP Act and to understand the purpose of the adjudication process, which derives its legitimacy from the SOP Act. This was necessary not only as a matter of common sense, but also because the principle of purposive interpretation enshrined in s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) mandates the court to prefer "an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not)".

The object and purpose of the SOP Act

21 The object and purpose of the SOP Act was definitively set out by Sundaresh Menon CJ, delivering the judgment of the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*"). To paraphrase, the court held (at [18]) that Parliament had introduced the SOP Act to provide the construction industry with a low-cost, efficient and quick process for the adjudication of payment disputes so that main contractors do not unfairly or unreasonably delay or withhold payment from their sub-contractors. Such actions or strategies by main contractors would invariably hinder the downstream cash flow which is the life blood of the construction industry. This was and is of special concern given that sub-contractors often do not have much financial resilience, and may rely on the anticipated payments coming in on time

in order to meet their own obligations to other parties. Thus, disputes between contractors and sub-contractors over entitlements to payment could have serious knock-on effects on other players in the construction industry. In the absence of a mechanism to speedily resolve such disputes, the proliferation of such disputes, and the delay in the resolution of such disputes would carry the potential to cause insolvencies and significantly disrupt the industry as a whole.

22 As observed in *W Y Steel* (at [18]–[19]), the SOP Act was intended to solve this problem in the following manner:

> 18 … The Act achieves its stated purpose of ***facilitating cash flow*** in the building and construction industry in two principal ways. *First, it establishes that parties who have done work or supplied goods are entitled to payment as of right: see s 5 of the Act.* ***Second, it creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved: see s 21 of the Act. This is what is referred to as temporary finality.***
>
> 19 As stated by Mr Cedric Foo Chee Keng ("the Minister of State"), the then Minister of State for National Development, in his speech at the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) ("the SOP Bill"), which was later enacted as Act 57/2004 (see Singapore Parliamentary Debates, Official Report (16 November 2004) vol 78 at col 1112 ("Singapore Parliamentary Debates vol 78, col 1112")):
>
> > The SOP Bill will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. *It also* ***facilitates cash flow*** *by establishing a fast and low cost adjudication system to resolve payment disputes.* …
>
> [emphasis added in italics and bold italics]

23 At the same time, Parliament recognised that quick justice may not be perfect. An adjudication process speedy enough to ensure that payment was made before its withholding became commercially dangerous was necessary. It was acknowledged that the adjudication process might not be expected to

provide the same level of scrutiny and sophisticated legal analysis as would be available before a court or an ordinary arbitral tribunal. In that sense adjudication under the SOP Act delivers a "roughshod" kind of justice, which is compensated for by the fact that the adjudication only has "temporary finality", *ie*, finality until the dispute is "reopened at a later time and ventilated in another more thorough and deliberate forum" (*W Y Steel* at [22]). As the court observed in *W Y Steel* (at [20]), one aspect of this notion of temporary finality is:

> … the idea that the parties to a construction contract should "pay now, argue later": *per* Ward LJ in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] 1WLR 2344 at [1]. *The appeal of this philosophy is apparent: payments, and therefore cash flow,* ***should not be held up by counterclaims and claims for set-offs*** *that may prove to be specious at the end of lengthy and expensive proceedings that have to be undertaken in order to* ***disentangle the knot of disputed claims and cross-claims****.* … [emphasis added in italics and bold italics]

In other words, there is no injustice to the parties despite the haste and roughshod quality of justice in the adjudication process as the parties may continue to pursue their respective rights in arbitration or litigation.

24 However, it must not be forgotten that *until the parties' rights are finally resolved through arbitration or litigation* (or, of course, by alternative processes such as mediation), an adjudication determination is final and binding on the parties. This was reiterated in the strongest terms by the Court of Appeal in *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890 at [30]– [31]:

> 30 It would be helpful to begin with a reiteration of the concept of temporary finality, which undergirds the adjudication regime in Singapore. In short, ***the Act creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are***

> ***ultimately and conclusively determined or resolved whether by arbitration or litigation.*** This generally takes place after the completion of the works and the arbitrator or the court is empowered *in that context*, to review, open up, and set aside the earlier adjudication determination. ***But until then, the adjudication determination binds the parties.***
>
> 31 Admittedly, this abbreviated process of dispute resolution is a species of rough justice (*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [22]). ***But we tolerate this because it ensures that payments are made upfront. Because cash flow is the life blood of those in the building and construction industry, timeous payment for work done or materials supplied ensures that the construction work will proceed with minimal disruption as far as this is possible*** (*W Y Steel* at [18]). Any shortcomings in the process is offset by the fact that the resultant decision only has temporary finality in that there remains the possibility of argument and reversal of the adjudicator's determination after the construction project is completed in another more thorough and deliberate forum (*W Y Steel* at [22]). We echoed this in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 ("*Grouteam*") at [63] albeit in a slightly different context.
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> [emphasis in original in italics; emphasis added in bold italics]

25 In addition to the general purpose and context of the SOP Act, and its core concept of temporary finality, some specific provisions of the SOP Act were of particular relevance to this application: namely, ss 15(3), 27 and 36.

Set-off under s 15(3) of the SOP Act

26 Under the SOP Act, parties are allowed to state their respective positions, legal arguments, and relevant facts to the adjudicator for him to consider. However, some restrictions apply. Section 15(3) is the provision specifically concerned with set-off and other reasons for withholding payment on the part of a respondent. In the context of a construction contract, any reasons for withholding payment should be stated in the payment response; they cannot be held back and raised for the first time in adjudication. The precise

consequences of failing to include a reason at that stage are spelled out in s 15(3)(*a*) of the SOP Act, which reads:

> (3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —
>
> (*a*) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant;

In other words, no withholding reason may be raised or considered in an adjudication if it was not included in the payment response. An adjudicator lacks the power or jurisdiction to consider such reasons.

27 The natural consequence of this is that in a case where *no* payment response was provided within the statutorily allowed timeframe (*ie*, either within the initial period for providing a payment response under s 11(1), or within the dispute settlement period under s 12(4) read with s 12(5)), no withholding reasons, including set-off, may be raised in adjudication. These strict legal requirements under the SOP Act have been forcefully and succinctly explained in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) ("*Chow Kok Fong 2013*") (at para 6.64):

> … The sting is felt when the respondent files his adjudication response. *If he fails to issue a payment response, he* ***forfeits any right to raise any cross-claim, counterclaim and set-off*** *in the adjudication response and the adjudicator is required under the Singapore SOP Act to exclude those issues from his consideration.* Consequently, the respondent's case in such an event is limited to 'procedural or jurisdictional objections'. …
>
> [emphasis added in italics and bold italics; footnotes omitted]

28 These principles were applicable to the present case. The Adjudicator found that the last day for WYSE to serve a payment response was 23 December 2016. Further, WYSE had only served a purported payment response on 28 December 2016. This was out of time, and as a result, the Adjudicator was constrained by s 15(3)(*a*) of the SOP Act to refuse to consider the set-off which WYSE had attempted to raise. None of this was disputed in SUM 1227, but it formed a crucial part of the necessary context for my decision on the live issues.

Enforcement under s 27 of the SOP Act

29 If a respondent fails to pay an adjudicated amount, a claimant has recourse to the court under s 27. The section reads as follows:

> **Enforcement of adjudication determination as judgment debt, etc.**
>
> 27.—(1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.
>
> (2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.
>
> (3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.
>
> (4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the judgment shall be for the unpaid part of the adjudicated amount.
>
> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

Prevention of contracting out under s 36 of the SOP Act

30 Finally, s 36 is highly pertinent as it voids any contractual term that defeats the provisions of the SOP Act. The relevant provisions read:

> **No contracting out**
>
> 36.—(1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.
>
> (2) The following provisions in any contract or agreement (whether in writing or not) shall be void:
>
> *(a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof;*
>
> (b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.
>
> …
>
> [emphasis added in italics]

31 Having set out the relevant context and provisions of the SOP Act, I shall now explain the various issues in my decision.

Decision

The first issue: Was WYSE allowed to raise the contractual set-off against the Adjudicated Amount?

32 This question required the examination of two provisions under the SOP Act: first, whether s 27 contained an implied prohibition, and second, whether s 36 (the provision against contracting out) would render void the contractual provisions on which WYSE's set-off depended.

Did s 27 of the SOP Act implicitly prohibit the raising of a disputed set-off, which was not the subject of any judgment, order, award or adjudication determination, against an adjudicated amount?

33 Before I deal with the issue in this case I would like to make some observations and examine different scenarios in which set-offs could possibly be made against an adjudicated award. When a claimant and respondent *both agree to a set-off* after an adjudication determination is made, this would not pose any problems as parties have chosen to resolve their differences amicably regardless of the legality of the set-off under the SOP Act. Problems also would not arise where the claimant *does not dispute* a respondent's right to the sum sought to be set off (*ie*, the claimant recognises the respondent's right to be paid that sum). Another scenario in which set-off against an adjudicated amount would likely be uncontroversial would be when the sum sought to be set off is the subject of an existing court order, judgment, arbitral award, or another adjudication determination. I do not propose to analyse the legal issues arising from the above scenarios in detail or to give any definitive answer as to whether set-off against an adjudicated amount under those circumstances would indeed be permissible under the SOP Act. I merely observe, first, that a convincing argument could be made in those circumstances, and secondly, that those were not the circumstances in which SUM 1227 arose.

34 The issue in this case was whether s 27 of the SOP Act implicitly prohibits a *disputed and unadjudicated* set-off from being raised against an adjudicated amount. I found that s 27 does contain such an implicit prohibition, for the reasons set out below.

(1) The absence of an express prohibition of set-off against an adjudicated amount was a neutral factor

35 WYSE argued that since the SOP Act was enacted in 2004 after a review of other statutes in UK and Australia, the court should begin by taking reference from those statutes. It was contended that the SOP Act was particularly similar to the NSW Act. The court was referred to s 25(4)(*a*)(i) of the NSW Act, which prohibits a respondent from raising cross-claims against the claimant who seeks to enforce an adjudication determination. Section 25 reads:

> **25 Filing of adjudication certificate as judgment debt**
>
> (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
>
> (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
>
> (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
>
> (4) If the respondent commences proceedings to have the judgment set aside, *the respondent:*
>
> *(a) is not, in those proceedings, entitled:*
>
> *(i) to bring any cross-claim against the claimant, or*
>
> *(ii) to raise any defence in relation to matters arising under the construction contract, or*
>
> *(iii) to challenge the adjudicator's determination***,** and
>
> (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.
>
> [emphasis added in italics]

36 I noted that a provision somewhat similar in effect can also be found in s 79 of the Construction Contracts Act 2002 of New Zealand (NZ). That

provision applies to "any proceedings for the recovery of a debt" and prohibits consideration of "any counterclaim, set-off, or cross-demand" unless it is the subject of a judgment or is undisputed. In contrast, the Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ("HGCRA") of the United Kingdom does not include any such provision. The relevant provision, s 108(3) of the HGCRA, merely states that "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration … or by agreement".

37 The essence of WYSE's argument was that since the SOP Act was modelled after the NSW Act, the omission of the prohibition found in s 25(4)(*a*)(i) of the NSW Act must mean that the SOP Act *allows* cross-claims and set-offs.

38 I was unable to accept this argument. Drafting is not an exact science, and material which one set of drafters might decide to include for the avoidance of doubt may be material which a different set of drafters might, equally reasonably, consider to be sufficiently and so clearly implied as to go without saying. One could just as easily flip the matter around, and ask: if Parliament had actively considered the question and decided that there *should be* such a right, why would it not have said so in the statute? Such speculation, in general, leads nowhere unless there is something in the secondary material (especially the Hansard) which suggests that there was disagreement over, or concern regarding, the effect of the omitted provision, and that the omission was intended to exclude that effect.

39 Furthermore, if I were to accept that the omission of a provision similar to s 25(4)(*a*)(i) of the NSW Act implied that cross-claims could be raised at the enforcement stage, that same logic would also apply to the omission of a

provision similar to s 25(4)(*a*)(ii) of the NSW Act, which concerns "any defence in relation to matters arising under the construction contract". This would imply that s 27 of the SOP Act allows the raising of "any defence in relation to matters arising under the construction contract" at the stage where an adjudication determination is sought to be enforced as a judgment. That outcome would plainly make a mockery of the requirement that *all* withholding reasons which a respondent wished to rely on must be included in the payment response, and that an adjudication determination should be final and binding until the dispute is permanently resolved in court or in arbitration. Understandably, WYSE did not suggest that raising such a defence to resist enforcement of an adjudication determination would be permissible – yet that was the inescapable consequence of WYSE's argument on this point.

40 In short, the absence from the SOP Act of a provision similar to s 25(4)(*a*)(i) of the NSW Act was a neutral factor. It was necessary to consider what the SOP Act *did* say, in the context of its object and purpose, to determine whether a similar provision prohibiting the raising of a disputed and unadjudicated set-off was intended to be implied. In England, for example, the absence of such an express provision from the HGCRA had not prevented English courts from effectively reading in such a requirement (see the analysis beginning at [58] below). There was no reason why a Singapore court would not do the same, provided this did not compromise the object and purpose of the SOP Act.

(2) The language of s 27 implies a payment and not discharge of the adjudicated amount by way of a purported set-off

41 On its face, s 27 appears to contemplate an actual payment. The section uses the words "pay", "paid" and "unpaid" several times. Section 27(4) refers to "the unpaid part of the adjudication amount", while s 27(5) refers to "the

unpaid portion of the amount that [a party seeking to set aside an adjudication determination or judgment] is required to pay". By the ordinary meaning of the words, one would expect these words to relate to a payment of funds by way of cash, check, or other accepted mode of payment. Other provisions of the SOP Act confirm that this everyday sense of the word "pay", and its variants, was the one intended by Parliament. In particular, s 15(3) refers to "any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and *set-off*" [emphasis added]. Clearly, the statute treats a set-off as a *reason for withholding payment*, rather than as a *mode of payment*.

42 WYSE argued that the references in s 27 to the unpaid part or portion actually meant that set-off was permitted as a method of payment. It further argued that since the Adjudicated Amount had been set-off against AES's larger debt, there was no unpaid part or portion capable of being the subject of an enforcement order. I rejected this argument. WYSE's interpretation would distort the intent and meaning of s 27 of the SOP Act. Firstly, s 27 does not expressly or impliedly indicate that WYSE could set-off against AES's Adjudicated Amount. Secondly, s 27 is a provision on enforcement of an adjudication determination and AES was required to file an affidavit to state the whole of the Adjudicated Amount that had not been paid at the time the application for leave to enforce the AD was filed. Section 27 did not require WYSE to file an affidavit. Hence there is no provision under s 27 for WYSE to state the details of this set-off. This further indicates that Parliament had no intention to allow a respondent to raise a set-off or other defence at the enforcement stage.

43 WYSE relied on two English cases for its propositions. The first of these cases, *In re Harmony and Montague Tin and Copper Mining Company* [1873] 8 Ch App 407 ("*Harmony*"), concerned whether a shareholder had made

"payment in cash" for the purposes of the Companies Act 1867 (c 131) when he had, by the company's agreement, had his account credited with the price of a property he had sold to the company and debited with the amount payable on his shares (at 408). The English Court of Appeal reasoned that the relevant provision of the Companies Act 1867 had been introduced to prevent shareholders from taking shares in consideration of supplying goods to the company at a later date, an arrangement which would mean that creditors would find themselves deprived of the remedies they would usually expect to have against the persons registered as shareholders (at 412). Therefore, Sir W M James LJ (with whom Sir G Mellish LJ agreed) held (at 412):

> … if a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash.

44 I did not find *Harmony* to be of much assistance in the present case. To begin with, the court there was concerned with the interpretation of an entirely different statute with completely different aims. The court there found that the purpose of the provision was, in essence, to combat the mischief of deceptive share subscription agreements by which shareholders and company colluded to the creditors' detriment. Maintaining cash flow to the company was not a direct concern. In that context, it was only sensible to say that a genuine transaction by way of set-off would constitute payment (specifically, payment in cash).

45 Moreover, the kind of transaction contemplated in *Harmony* was one in which both parties had consented to the set-off and, in effect, agreed to treat the

set-off as payment of their respective obligations (see 408 and 412). In such circumstances, the set-off "merely constitutes an agreed method of payment" (see Rory Derham, *Derham on the Law of Set-Off* (Oxford UP, 4th Ed, 2010) at para 16.01, in which *Harmony* is cited). But the fact that parties can *agree* on set-off as a method of payment does not mean that a *disputed, unilaterally determined* set-off would suffice as payment at common law, let alone under the SOP Act. To put it simply, a claimant would be free to choose to accept a set-off offered by a respondent as payment, but the respondent cannot *insist* that the claimant do so. In the latter situation, if the court were to recognise the set-off as effective payment, it would not be merely dispensing with "the formality … of the money being handed over and taken back again" (*Harmony* at 412). It would be forcing the claimant to accept an unproven and disputed defence asserted by the respondent. That would not be fair.

46 As for the possible argument that AES consented in advance to the set-off by agreeing to cl 11.4 of the SIA Conditions of Sub-Contract, I refer to my analysis at [78]–[81] below. For much the same reasons reflected there, I was of the view that although AES had indeed consented to set-off against sums due under the Sub-Contract, this consent did not extend to set-off against an adjudicated amount under an adjudication determination, particularly when the liquidated damages, central to the set-off, would be vigorously contested.

47 The second case relied on by WYSE was *Burton (Collector of Taxes) v Mellham Ltd* [2006] 1 WLR 2820 ("*Mellham*"). That case concerned whether a taxpayer could set off, against a sum of mainstream corporation tax ("MCT") due, a sum of advance corporation tax ("ACT") already paid by a taxpayer – which the revenue would otherwise have been obliged to repay – and thereby treat the tax due as having been paid by virtue of that set-off (at [16]–[17]). The House of Lords answered that question in the affirmative, but its decision

turned, among other things, on the language of the statute in question. As Lord Walker of Gestingthorpe (with whom the other Law Lords agreed) stated (at [20]):

> … the reference in section 246N(2) to tax being "set off" looks forward to section 246Q(2) which refers to an amount being "set off against the company's liability to corporation tax for the relevant period" … This is not an ordinary set of cross-claims. It is treating a payment of ACT by a company to the revenue as discharging in advance a liability for MCT to be paid by the same company to the revenue.

This highly specific wording made it clear that a taxpayer had a right to set-off *and* that exercising that right had the effect of satisfying, in advance, the taxpayer's payment obligation with regard to MCT for the relevant period. No similar provision can be found in the SOP Act.

48 The court in *Mellham* also considered reasons of policy that do not apply to the SOP Act. Lord Walker observed that although maintaining the cash flow of the revenue was one purpose of the statute, this could be achieved through *deterrence* in the form of additional interest imposed for non-payment (at [21]). Further, given that the ultimate purpose of the statute was the management of the tax system, the court found that "there is no good reason why 'payment' … should not include other forms of discharge or satisfaction" (at [23]). Neither of these statements applied in the context of the SOP Act, which did not provide for deterrent measures and which was passed to ensure that sub-contractors would not be deprived of the cash flow they required to meet their obligations to other parties.

49 In short, both English cases cited by WYSE concerned the interpretation of provisions in statutes very different from the SOP Act. They also concerned very different set-offs: the first concerned mutually-agreed set-off and the second concerned a set-off which the relevant statute clearly stipulated would

serve as advance payment of the sum which would otherwise be due. Finally, nothing in either case could overcome the difficulty presented by s 15(3) of the SOP Act, which classified a set-off as a reason for *withholding* payment (and thus implicitly not a *form* of payment). Consequently, I found that WYSE's argument lacked a sufficient basis in relevant authority, and should be rejected.

(3) The scheme of the SOP Act, as well as its object and purpose, required set-offs against an adjudicated amount to be excluded

50 In addition to the language used in the SOP Act, its scheme and its underlying object and purpose require s 27 to be interpreted as mandating actual payment of the Adjudicated Amount and not discharge by way of a disputed set-off.

51 As earlier stated, the object and purpose of the SOP Act is to protect cash flow in the construction industry and to create a quick and efficient means of providing temporary finality to any disputes that may arise. The intended result is for employers to "pay first, argue later", so that sub-contractors would not be held up waiting till the end of a long-drawn dispute (especially concerning set-offs, cross-claims and counterclaims) for payment (see *W Y Steel* ([21] *supra*) at [20]). One of the mechanisms by which this is intended to be achieved is enshrined in s 15(3), which clearly states that any reasons for withholding payment, including a set-off, must be included in the payment response or be wholly disregarded by the adjudicator. Such a strict requirement is necessary because of the tight timelines imposed under the SOP Act; without s 15(3), a claimant might not have sufficient time to prepare himself for the case he was to meet at the adjudication. This in turn would lead to either difficulties for the claimant's case, or a delay of the adjudication in order to allow the claimant to respond. By including s 15(3), Parliament nipped such problems in

the bud by requiring strict compliance before a set-off (or any other reason for withholding payment) could be raised at all.

52 WYSE had failed to comply with s 15(3), and had therefore suffered the consequence of having its defence of set-off disregarded in the adjudication. This did not mean that WYSE had no other legal recourse. WYSE could have pursued its claim for liquidated damages in a separate action. Indeed, WYSE had done precisely that by commencing arbitral proceedings against AES for its claim for liquidated damages. However, WYSE was not entitled to raise its claim for set-off at the present stage where AES sought to enforce the AD. Interpreting s 27 to allow WYSE to raise set-off against the Adjudicated Amount would be unacceptable and would cut against the scheme and the object and purpose of the SOP Act, for five reasons.

53 First, it would mean that WYSE would be given a second bite of the cherry. Although the merits of WYSE's attempted set-off were disregarded, WYSE nonetheless did have an opportunity to present its arguments to the Adjudicator and attempt to persuade him that time should be reckoned so as to count WYSE's payment response as being within time. Had WYSE succeeded, the merits of the set-off argument would have been considered at that stage. It would be unfair to AES for WYSE to have a second chance now.

54 Secondly, the adjudication process had already been completed with the Adjudicator issuing the AD. To allow set-off to be raised against the Adjudicated Amount under the AD would mean that the pains taken by the Adjudicator in his deliberations, and by the parties' counsel in participating in the process, would be wasted. Wastage of time and costs would be understandable and inevitable if the Adjudicator had committed a fundamental error, such as an error as to his jurisdiction, or a breach of natural justice, but

not when the adjudication had been carried out entirely properly and it had only been WYSE which had failed to comply with the SOP Act (and had paid the price for it).

55 Thirdly, it would bring the adjudication process into ill repute as WYSE, the party in default, would have been allowed to frustrate a valid and final AD.

56 Fourthly, as explained above, the adjudication process was meant to be a simple and quick process to ensure that an adjudicated amount owed to a claimant (such as AES) was paid without delay. Even disregarding the wastage of costs (as discussed at [54] above), the additional delay occasioned by WYSE's attempt to raise a set-off in SUM 1227 was already an added prejudice which should not be permitted to occur in future. In contrast, WYSE's substantive rights in these transactions had not been compromised and indeed it had already commenced arbitral proceedings to recover its liquidated damages.

57 Fifthly, and closely related to the fourth reason, WYSE's reading of s 27 would be incongruous with the overall object and purpose of the SOP Act. Section 15(3) would lose the sting which was so crucial to the efficient administration of the SOP Act regime. Instead of respondents being incentivised to bring forth all their reasons for withholding payment in the payment response in order for them to be heard in the adjudication, respondents would instead be free to pick and choose when to make their arguments of set-off, cross-claim, or counterclaim (and possibly even other reasons for withholding). Taken to an extreme, this interpretation of the SOP Act would cause considerable delay instead of expedition: a respondent could mount a defence at the adjudication stage based on reasons disclosed in the payment response, but hold additional reasons back to spring on a claimant when the claimant attempts to enforce the

adjudication determination. This would be an unacceptable perversion of the statute.

58 The reasons stated above, particularly the fifth reason, were supported by *Chow Kok Fong 2013*, in which the learned author observed that:

> [7.42] … It would follow that it would be ***very rare that an unsuccessful party can avoid payment of the adjudicated amount***. He can resist enforcement by applying to set aside an adjudication determination pursuant to section 27(5) but this requires that he first pays into the court as security the unpaid portion of the adjudicated amount.
>
> [7.43] The position is therefore similar to that in the United Kingdom. In *VHE Construction plc v RBSTB Trust Co Ltd* (2000), Judge Hicks QC stated that ***to permit a set-off against a sum awarded by an adjudicator would be tantamount to defeating the purpose of the Housing Grants, Construction and Regeneration Act 1996 (the 'HGCRA')***. The premise is that Parliament has decreed that any sums awarded by an adjudicator should be paid and the courts must be expected to enforce those decisions. If there is a set-off provision in the subject contract, it may be expected that the adjudicator would take this into account in formulating the terms of his determination.
>
> [footnotes omitted; emphasis added in bold italics]

59 Another English authority in support of the above position was *William Verry Limited v The Mayor and Burgesses of the London Borough of Camden* [2006] EWHC 761 (TCC). There, Ramsey J held that any contractual right that might allow a party to avoid the obligation to comply with the adjudicator's decision must be disallowed, because (at [24]):

> … The intention of Parliament must be that the decision is binding and enforced [at] an interim stage. If the decision were no more than another contractual obligation, which could be breached ***or could be reduced or diminished by other contractual obligations,*** then the fundamental purpose of providing cash flow in the construction industry would be undermined. [emphasis added in bold italics]

60 A similar conclusion was reached by the English Court of Appeal in *Ferson Contractors Ltd v Levolux AT Ltd* [2003] EWCA Civ 11 ("*Ferson*"), in which Sir C Mantell LJ (with whom the other judges of the court agreed) stated (at [30]):

> … The intended purpose of s 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. … ***The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down.*** … [emphasis added in bold italics]

The "earlier part of this judgment" referred to in the above quote discussed Parliament's intention that an adjudicator's decision be binding, and be complied with, until there was a final determination of the dispute. The court found that the contractual provisions concerning set-off, in that sub-contract, could not apply to sums owing under an adjudication determination.

61 Against these English authorities, which I found to be highly persuasive, WYSE cited several other English cases which purportedly supported the contrary position. On the basis of those cases, WYSE contended that English law permits a contractual set-off against an adjudicated sum where such set-off does not offend the policy of the legislative scheme. I did not disagree with that statement; indeed, I recognised that there may be limited situations in which set-off against an adjudicated amount might be permissible (see [33] and [45] above). However, it appeared to me that the facts of those cases and the statutory context were materially different from this case.

62 One such case was the decision of the English Court of Appeal in *Parsons Plastics v Purac Ltd* [2002] EWCA Civ 559 ("*Parsons*"). The court held that the respondent was entitled to exercise its contractual right of set-off – which had not been raised in the adjudication – against the *ad hoc*

adjudicator's decision. It was critical to note that in *Parsons* the adjudication process was not brought under the HGCRA. The parties had been concerned over the jurisdiction of the adjudicator under the HGCRA, as the relevant work was not a "construction operation" as defined therein. They hence chose *ad hoc* adjudication under the terms of the subcontract. The premise of that adjudication was therefore the subcontract of the parties, and not anything mandated by the HGCRA. As the court in *Ferson* observed (at [29]), the consequence was that the court in *Parsons* did not need to consider the effect of s 108 of the HGCRA. It follows that the outcome might have been different had the adjudication been conducted under the HGCRA. Thus, *Parsons* was not germane to this case.

63 Another case referred to by WYSE was *Balfour Beatty v Serco Limited* [2004] EWHC 3336 ("*Balfour*"), in which Jackson J (as he then was), after having surveyed the authorities, stated (at [53]):

> a. Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).
>
> b. Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

64 The first proposition was sensible, but was unlikely to be relevant to the Singapore context. It was intended to address the situation where an adjudicator had not made a specific finding on the availability of a set-off, but had made findings of fact which logically implied that a set-off must be available. The

SOP Act regime requires that all withholding reasons for the adjudicator's consideration must be specified in the payment response, such a scenario would not occur. Either the set-off was raised, in which case the adjudicator would have to decide on it, or it was not, in which case it would not be possible to imply the availability of a set-off in the manner described in *Balfour*.

65 As for the second proposition, with respect to the learned judge, I doubted whether this was an accurate reflection of the state of the English authorities. The controlling authorities were two English Court of Appeal cases: *Parsons* and *Ferson*. *Parsons*, as earlier stated, was not even an HGCRA case, a fact which the court in *Ferson* used to distinguish *Parsons* (see *Ferson* at [29]). The court in *Balfour* should therefore have been guided by the holding in *Ferson*, which made it clear that Parliament's intention trumped any contractual provisions to the contrary (see [60] above). With that in mind, it could not accurately be said that the availability of set-off would depend upon the terms of the contract and the circumstances of the case.

66 It may also be noted that, ultimately, the court in *Balfour* granted summary judgment to the claimant and disallowed the respondent's claims, which included liquidated damages which were strongly disputed. This was decided because the contract between the parties contained provisions "requir[ing] both parties to give effect forthwith to the adjudicator's decision", provisions which, the court noted, accorded with the statutory requirements and with Parliamentary intention (at [54]). Arguably, the court in fact applied the rule in *Ferson*, albeit without saying so.

67 WYSE further cited *JPA Design and Build Limited v Sentosa (UK) Limited* [2009] EWHC 2312 (TCC) ("*JPA*") to illustrate that English law allowed two adjudication decisions to be set-off against each other. Coulson J

reasoned that since two judgments or orders could be set-off, there was no reason why the same should not apply to two adjudication decisions (at [27]). Given that *both* adjudication decisions had to be complied with forthwith, Coulson J's reasoning could be viewed as simply an extension of the observation in *Harmony* ([43] *supra* at 412) that it would be pointless to insist "that the formality should be gone through of the money being handed over and taken back again." I was inclined to agree with this decision (as I acknowledged, in substance, at [33] above), but those were simply not the facts of the present case. WYSE was attempting to set off liquidated damages which had *not* yet been the subject of any other adjudication decision, judgment or order, and were moreover hotly disputed by AES. Consequently, the decision in *JPA* was of no help to WYSE.

68 Finally, WYSE cited *Thameside Construction Co Ltd v Stevens and another* [2013] EWHC 2071 (TCC) ("*Thameside*"). AES also referred to this case. There, Akenhead J reviewed the previous cases and attempted to summarise the circumstances in which set-off could operate. The court clearly stated that set-off against an adjudicated amount was exceptional and normally prohibited (at [24(c)]–[24(e)]):

> …
>
> (c) *The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.*
>
> (d) There are limited exceptions. If there is a specified contractual right to set-off which does not offend against the statutory requirement for immediate enforcement of an adjudicator's decision, that is an exception albeit that it will be a relatively rare one. Where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing that a balance should actually be paid, it may well be that a legitimate set-off or withholding may be justified when that amount falls due for payment or certification in the future. (See *Squibb*).

> (e) Where otherwise it can be determined from the adjudicator's decision that the adjudicator is permitting a further set-off to be made against the sum otherwise decided as payable, that may well be sufficient to allow the set-off to be made (see *Balfour Beatty*).
>
> [emphasis added in italics]

69 It appeared to me that this case assisted AES and not WYSE. Any contractual provision allowing set-off against an adjudicated amount would certainly offend the SOP Act. Section 17(2)(*a*)–(*b*), read together, required an adjudicator to state the amount to be paid and the date on which it was payable. Section 22(1) of the SOP Act would then automatically convert that determination into an obligation on the respondent's part to pay the specified sum. Thus, the "limited exceptions" contemplated in *Thameside* could not apply to the present case.

70 To summarise, when the English cases were considered in their proper context, they supported AES's contention. This only fortified my conclusion that, based on the local context of the SOP Act and Parliament's object and purpose in passing it, the set-off argued for by WYSE could not be permitted.

(4) WYSE's attempt to raise a set-off against the Adjudicated Amount was not akin to a repeat claim for a premature or untimely payment claim

71 Finally on this issue, WYSE also argued that since the merits of the set-off had not been decided by the Adjudicator, the situation was similar to that where a claimant's payment claim had been dismissed as being either premature or untimely. Such a claim could validly form the subject of a subsequent payment claim and adjudication (see *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609).

72 With respect, WYSE's argument on this point was a *non sequitur*. A repeat claim was specifically permitted under s 10(4) of the SOP Act, whereas nothing in the SOP Act specifically permitted what WYSE was attempting to do. Moreover, even if a set-off rejected due to the respondent's failure to include it in a timely payment response could be raised as a valid reason for withholding in a subsequent adjudication, that suggestion did not assist WYSE. AES had *not* commenced a new adjudication application, but had instead sought to enforce *the same* adjudication determination in which the set-off had been rejected. The analogy drawn was inappropriate and irrelevant.

73 For all the above reasons, I concluded that s 27 of the SOP Act prohibited WYSE from raising a disputed set-off against an adjudicated amount.

Did s 36 of the SOP Act render cll 11.4 and 11.5 of the SIA Conditions of Sub-Contract void?

74 A further question was whether s 36 of the SOP Act prohibited the set-off argued for by WYSE, even if s 27 did not prohibit it.

75 To recapitulate, WYSE contended that it had a contractual right of set-off under cl 11.4 read with cl 11.5 of the SIA Conditions of Sub-Contract, which had been incorporated into the Sub-Contract. The issue was whether such provisions would be caught by s 36 of the SOP Act, which is reproduced at [30] above.

76 In determining whether cll 11.4–11.5 contravened s 36(2)(*a*) of the SOP Act, two questions arose:

(a) If cll 11.4–11.5 did apply to a post-adjudication scenario, would they "ha[ve] the effect of excluding, modifying, restricting or prejudicing the operation of [the SOP Act] or any part thereof"?

(b) Did cll 11.4–11.5 apply to a post-adjudication scenario as a matter of contractual interpretation? If they did not, it would be difficult to see how they could offend s 36(2)(*a*). By the same token, however, they could not then be of any assistance to WYSE.

77 The first question was easily answered. If cll 11.4–11.5 indeed purported to confer on WYSE a right to raise a set-off even after an adjudication determination had been handed down, they would clearly contravene s 36(2)(*a*) because – as I have already explained at [57] above – such an outcome would allow for unacceptable delaying tactics and subvert the object and purpose of the SOP Act.

78 With regard to the second question, I was of the view that cll 11.4–11.5 should not be interpreted to extend to the post-adjudication context, and the clauses were therefore not voided by s 36(2)(*a*). Such a finding of course did nothing to help WYSE in this case. It may, however, be of some interest to the industry given that the SIA Conditions of Sub-Contract are in wide usage, and so it is worth explaining the reasoning which led me to that conclusion.

79 As a starting point, it should be noted that the court would not readily interpret a provision as being intended to contravene a statute. This was noted in *Ferson* ([60] *supra* at [30]), where Mantell LJ held that the court would first attempt to interpret the contract consistently with the statute, and only strike down the clause if that attempt failed. In that case, the court successfully saved the clauses – which provided for set-off – by deciding that the clauses "must be read as not applying to monies due by reason of an adjudicator's decision" (at [30]).

80 In my view, the same reading applied to the clauses in *Ferson* should apply to cll 11.4–11.5 of the SIA Conditions of Sub-Contract. There was no reason why the phrase "set-off" in these clauses could not be interpreted as referring to the set-off expressly permitted under s 15(3) of the SOP Act *provided the procedural requirements were strictly complied with*. Read in this light, there was nothing objectionable about cll 11.4–11.5, and WYSE would have been entitled to raise a set-off in the adjudication if it had duly notified AES of the set-off in a timely payment response. This situation was unlike that in *Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210, which was cited by AES. The clause in dispute in that case (at least on the plaintiffs' reading) purported to disallow a contractor from making an adjudication application under the SOP Act. That was a clear-cut case of a clause which, if given the reading the plaintiffs contended for, would be caught by s 36(2)(*b*), which rendered void "a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act".

81 The language used in cll 11.4–11.5 confirmed the above interpretation. Clause 11.4 only purported to allow WYSE to "set-off against any monies due to the Sub-Contractor under this Sub-Contract", and not against monies due by virtue of any other reason. In principle, after an adjudication determination is made, the obligation to pay the adjudicated amount is no longer merely an obligation arising under the underlying contract. It may have *derived* from the obligations contained in the underlying contract, but it has by virtue of the adjudicator's decision *acquired* an additional status as a statutory obligation imposed by s 22(1) of the SOP Act, which mandates that the respondent (here, WYSE) has to pay the adjudicated amount to the successful claimant (here, AES). Thus, the adjudicated amount did not comprise merely "monies due … under this Sub-Contract", and a set-off could not be raised against it. Moreover, cl 11.5 stated that "notice [of the set-off] shall be given to the Sub-Contractor

not less than 7 days before the date of issuance of the payment response which includes the amount stated as payable". Such language could only make sense in the context of set-off against an amount claimed but not yet adjudicated, as no payment response would be required in relation to an adjudicated amount under an adjudication determination.

82 Consequently, cll 11.4–11.5 of the SIA Conditions of Sub-Contract, when correctly interpreted, would not have offended s 36(2) of the SOP Act. They were therefore not void, as AES had argued. At the same time, when correctly interpreted, these contractual provisions did not allow WYSE to raise a set-off against the Adjudicated Amount.

83 Given my findings above, it was not strictly necessary for me to consider this question. For completeness, however, I shall make some brief observations.

Observations on the substantive merits of the purported set-off

84 As earlier stated, the purported set-off raised by WYSE related to the liquidated damages of $2.05m imposed by WyWy, WYSE's employer. WYSE contended that the delay was partly caused by AES and attributed liability for $1.47m of the liquidated damages to AES. Although WYSE asserted that there was no genuine dispute as to its substantive entitlement to raise the set-off, this was strongly denied by AES. AES contended that it had not caused the delay, and stated that it had completed the works on time, *ie*, by 12 April 2016, barring some minor defects. AES also alleged that the delays were the result of WYSE's own acts and omissions. AES questioned whether the claim that WyWy had sought liquidated damages from WYSE was *bona fide*, because WyWy and WYSE were closely connected – they shared the same directors and same registered office address. The suggestion appeared to be that WyWy and WYSE

could have colluded to inflate the damages which WYSE could attempt to claim from AES.

85 It was not disputed that the issue of set-off would be hotly contested. Given my earlier holdings, I did not need to reach a conclusion on the substantive issues concerning the set-off. It suffices for me to comment that even if I had been persuaded that WYSE was entitled, in principle, to raise a set-off against the Adjudicated Amount on the basis of cll 11.4 and 11.5 of the SIAC Conditions of Sub-Contract, I would not necessarily have found it appropriate to set aside ORC 1337. To do so would effectively allow WYSE to unilaterally decide the amount of the liquidated damages to be attributed to AES when the latter had strongly contested its liability to pay those liquidated damages. I would have had to carefully consider the likelihood of each party ultimately succeeding. I would also have had to weigh the prejudice to WYSE if it had to pay out the Adjudicated Amount against the prejudice to AES if it was deprived of the Adjudicated Amount until the final resolution of the dispute. Given the strong and well-established policy considerations in favour of main contractors paying first and arguing with sub-contractors later (as detailed at [21]–[23] above), I would have required convincing reasons why it should be AES and not WYSE who should bear the risk of possible prejudice.

Conclusion on the first issue

86 Since I had found that WYSE was not entitled to raise the purported set-off against the Adjudicated Amount, there was no basis to refuse enforcement of the AD. I therefore dismissed WYSE's primary prayer in SUM 1227 to set aside ORC 1337.

The second issue: Should a stay of execution be ordered in respect of ORC 1337 pending the determination of arbitral proceedings on the claim for liquidated damages against AES?

87 WYSE's alternative prayer was for a stay of execution of ORC 1337 pending the outcome of the arbitral proceedings between WYSE and AES in respect of the underlying dispute. AES opposed the stay of the execution as it had been waiting for payment for the past 13 months.

88 I was not inclined to grant the stay. As held by the Court of Appeal in *W Y Steel* ([21] *supra* at [59]), a successful claimant would, ordinarily, be entitled to receive the adjudicated amount without undue delay. This was explained as follows:

> 59 … [T]he purpose of the 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 in bold italics]

89 The Court of Appeal further explained that a stay of enforcement of an adjudication determination should be permitted in the following two instances (at [70]):

> 70 In our judgment, a stay of enforcement of an adjudication determination may ordinarily be justified where there is ***clear and objective evidence of the successful claimant's actual present insolvency, or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body.*** Further, we agree with HHJ Coulson QC in *Derek Vago* that a court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract. [emphasis added in bold italics]

The court further emphasised (at [71]) that it would not readily grant a stay given that the purpose of the SOP Act was "precisely to avoid and guard against pushing building and construction companies over the financial precipice."

90 In the present case, WYSE employed a double-barrelled approach to frustrate AES's attempts to be paid the Adjudicated Amount. First, it commenced court action to set aside ORC 1337 through SUM 1227. At the same time, WYSE commenced arbitration proceedings to claim for liquidated damages and, in those proceedings, purported to set-off the Adjudicated Amount against the liquidated damages claimed. When all these failed (since I found that such a set-off could not justify WYSE's non-payment of the Adjudicated Sum), WYSE sought, through its alternative prayer in SUM 1227, to stay the execution of ORC 1337.

91 In my view, WYSE's actions were similar in substance to, although different in form from, those of the respondent in *Lim Poh Yeoh (alias Aster Lim) v TS Ong Construction Pte Ltd* [2017] SGHC 11. The respondent in that case had taken out a suit against the claimant for, among other things, liquidated damages for delay and unliquidated damages for defective works. At the same

time, the respondent refused to pay the adjudicated amount, and had taken out an originating summons to set aside a statutory demand which the claimant had served on it on the basis of an order of court granting the claimant leave to enforce the adjudication determination as a judgment debt. Foo Chee Hock JC held that this was an abuse of the court process (at [20]), stating that:

> 20 … parties should not be allowed to withhold payment of the adjudicated sum whilst seeking to effectively overturn the adjudication determination at the same time. The Plaintiff's attempt to withhold payment while using Suit 92 to overturn the Adjudication Determination must be construed as an abuse of the process of the court.

Foo JC went on to elaborate his finding in stronger terms (at [21]):

> 21 Based on the Defendant's research, this could be the first case where a party in the Plaintiff's position elected not to pay the judgment debt pending the determination of their dispute in the underlying contract. ***It would be fair to say that such unilateral action on the Plaintiff's part drove a coach and horses through the scheme established under SOPA and cynically defeated its legislative intent.*** [emphasis added in bold italics]

The same could be said in the present case.

92 As for WYSE's argument that this would leave AES unnecessarily secured (as WYSE had allegedly given AES credit for the Adjudicated Amount in the arbitration), this appeared to be something which the tribunal could easily resolve by adding that amount back to WYSE's claim; it was not a matter which would affect the substance of that dispute.

93 For the above reasons, I also dismissed WYSE's alternative prayer in SUM 1227 for a stay of the execution of ORC 1337.

The third issue: Should a stay of execution be ordered in respect of SUM 1227 pending the outcome of the appeal against my decision?

94 WYSE was resolutely determined not to satisfy AES's claim for the Adjudicated Amount, although it did not dispute it. After I ruled against WYSE, its counsel immediately sought to stay the order of this court pending the outcome of WYSE's intended appeal. At that time, AES had already been deprived of the Adjudicated Amount for about 13 months.

95 Conceptually, an application for a stay of execution of my order pending appeal was quite distinct from the earlier application for a stay of execution of ORC 1337 pending the arbitration. The basis of WYSE's application was s 27(5) of the SOP Act, which reads:

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

WYSE argued that "pending the final determination of those proceedings" meant that the money should be released after the outcome of the appeal.

96 As AES submitted before me, this same argument was recently canvassed, and rejected, by Kannan Ramesh JC (as he then was) in *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626. In the course of a comprehensive analysis of the issue, Ramesh JC observed (at [40]) that "the term 'final determination of those proceedings' had to be construed in the context of the Act". With that in mind, Ramesh JC considered the relevant authorities and reached the following conclusion:

> 42 In my judgment, the overarching purpose of ensuring the flow of liquidity in the construction industry through the provision of an expeditious means of resolving payment disputes means that ***the courts should be wary of construing any provision in a manner that would defer payment to successful claimants.*** This was the approach taken in *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 which interpreted s 27(5) in the same manner. ***It could not have been intended by Parliament that such considerations could be circumvented easily by the filing of an appeal,*** and I did not think it appropriate to imply what would in effect be a statutorily prescribed stay of execution pending appeal in the absence of any such intent. [emphasis added in bold italics]

Ramesh JC ordered that the money paid into court be released to the successful defendant (the sub-contractor/claimant) notwithstanding that the matter was still pending appeal.

97 I concurred with this view. Moreover, although I did retain the usual discretion to stay the execution of my order (including the release of the money) pending the outcome of the appeal, I could see no good reason why AES should be deprived of the money for a moment longer. On this point, WYSE's counsel pointed out that if the money was released, WYSE's intended appeal would be rendered nugatory. That was not strictly correct as WYSE could pursue its case at the appellate court. If WYSE were to succeed in the appeal, AES would have to return the money. Thus, the appeal would only be nugatory if AES were to prove unable to comply with the order for such return, and there was no evidence before me to show that that would likely be the case. The prejudice to AES would be greater for allowing WYSE's application than the prejudice to WYSE from disallowing the application. I therefore ordered that the money paid into court be released to AES forthwith.

Conclusion

98 For all the above reasons, I dismissed both WYSE's primary and alternative prayers in SUM 1227, as well as WYSE's oral application for a stay of my order pending WYSE's contemplated appeal to the Court of Appeal.

99 Having heard counsel for both parties on costs, I ordered costs fixed at $10,000 (inclusive of disbursements) to be paid by WYSE to AES.

Tan Siong Thye
Judge

Ian Marc Rosairo de Vaz, Tay Bing Wei and Chek Xinwei Liana (WongPartnership LLP) for the plaintiff;
Philip Antony Jeyaretnam SC, Melissa Thng Huilin and Amogh Nallan Chakravarti (Dentons Rodyk & Davidson LLP) for the defendant.