OGSP Engineering Pte Ltd
v
Comfort Management Pte Ltd

[2017] SGHC 247

High Court — Originating Summons No 478 of 2017
(Summons Nos 2425 and 3856 of 2017)
Tan Siong Thye J
11, 14 August; 8 September 2017

Building and construction law — Statute and regulations — Building and Construction Industry Security of Payment Act

Building and construction law — Dispute resolution — Patent errors

Building and construction law — Dispute resolution — Stay of enforcement pending appeal

4 October 2017

Tan Siong Thye J:

Introduction

1 OGSP Engineering Pte Ltd ("OGSP") was hired by Comfort Management Pte Ltd ("Comfort") as a sub-contractor for its project. A dispute arose between OGSP and Comfort, as a consequence of which OGSP lodged a payment claim titled Payment Claim No 12 ("PC12") against Comfort for certain work done. Comfort did not file a payment response. Although Comfort eventually filed an adjudication response during the adjudication proceedings, the adjudication response was invalid as it was out of time. Hence, OGSP

obtained an adjudication determination dated 21 April 2017 in its favour ("the AD").

2 OGSP filed Originating Summons No 478 of 2017 ("OS 478") to enforce the AD as a judgment debt. In response, Comfort filed Summons No 2425 of 2017 ("SUM 2425") to set aside the AD.[1] Having heard the parties' submissions, I gave brief reasons to explain why I dismissed Comfort's application to set aside the AD. I now explain my reasons in further detail.

Background

3 Both Comfort and OGSP are Singapore-incorporated companies with the principal business of general construction and building works.[2] In October 2013, Comfort engaged OGSP under a sub-contract where OGSP was to supply and install a ventilation and ducting system for a warehouse in Joo Koon Circle for a fixed sum of $1.25m (excluding GST) ("the Contract").[3]

4 On 16 March 2017, OGSP issued PC12 to Comfort for work done between October 2013 and October 2014. The amount claimed was $890,262.23 (including GST).[4] On 30 March 2017, Comfort's lawyers sent an email to OGSP stating that the invoices in PC12 had already been paid and asked for additional supporting documents.[5] Notwithstanding that letter, OGSP served its Notice of

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[1] Wenda Lew's 1st affidavit, para 3.

[2] Wenda Lew's 1st affidavit, paras 4-5.

[3] Wenda Lew's 1st affidavit, para 6.

[4] Wenda Lew's 1st affidavit, para 9.

[5] Wenda Lew's 1st affidavit, para 10.

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Intention to Apply for Adjudication on Comfort on 4 April 2017. On 6 April 2017, OGSP served its adjudication application on the Singapore Mediation Centre ("SMC") and filed its submissions for the adjudication application.[6] SMC served a copy of the adjudication application on Comfort on 7 April 2017. Comfort filed its adjudication response and its submissions with the SMC on 17 April 2017.[7] OGSP objected to the adjudication response on the ground that it was out of time.

5 On 21 April 2017, the adjudicator issued his AD and held, among other things, that the sum of $890,262.23 was payable by Comfort to OGSP within seven days after the service of the AD on Comfort.[8] OGSP filed OS 478 on 3 May 2017 seeking to enforce the AD as a judgment debt and Comfort sought to set aside the AD in SUM 2425.

Parties' submissions

Comfort's submissions

6 Comfort accepted the adjudicator's finding that there was no valid payment response and adjudication response within the meaning of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "SOPA"). Hence, Comfort also accepted that, under s 15(3) of the SOPA, the adjudicator could not consider any matter that had not been raised in the

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[6] Wenda Lew's 1st affidavit, para 11.

[7] Wenda Lew's 1st affidavit, para 14.

[8] Wenda Lew's 1st affidavit, para 22.

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payment response.[9] However, it submitted that the court should still set aside the AD on two grounds.

7 First, Comfort submitted that the AD should be set aside as the adjudicator did not consider the patent errors in OGSP's claims.[10] According to Comfort, almost the whole AD dealt with whether there was a valid payment response and adjudication response and the adjudicator had applied a "blank and unthinking mind" to the substantive claims before him.[11] These substantive claims pertained to the claims for the contract sum, the retention money, the variation works and the cost of the materials.

8 In relation to the contract sum and the retention money, Comfort alleged that OGSP had provided "absolutely no supporting documents" evincing that the work claimed for had been done.[12] The supporting documents related to 92% of the work which had already been completed but not the remaining 8% which was part of the claim in PC12.[13] The adjudicator made a leap of logic by concluding at para 68.1 of the AD that there were "no materials or information… to suggest that the Works were not completed or that the Retention Money [was] not due for release".[14] Instead, the adjudicator should have required OGSP to provide evidence of its claims.

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[9] Respondent's Written Submissions for HC/SUM 2425/2017 ("RWS"), para 16.

[10] RWS, para 17.

[11] RWS, para 61.

[12] RWS, para 49.

[13] RWS, para 49.

[14] RWS, paras 49-51; AD at para 68.1.

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9 In relation to OGSP's claims for variation works, Comfort submitted that the only paragraph which dealt with this in the AD – para 68.2 – did not make any mention of the relevant contractual provisions such as cl 11 of the Contract.[15] If the adjudicator had applied his mind to the contractual provisions, it would have been "readily apparent" that OGSP provided no evidence of the variation works, as required under the Contract.[16] In addition, OGSP did not set out the sums it claimed in the adjudication application or in PC12, but rather only did so subsequently in its submissions in the adjudication application.[17]

10 Finally, in relation to the cost of materials claimed, Comfort submitted that based on para 68.3 of the AD, the adjudicator had not gone beyond reading OGSP's claim as presented. He did not consider that the table tendered in support of OGSP's claim did not correlate to the alleged work done.[18]

11 Comfort's second ground for setting aside the AD was that there was a fraudulent conspiracy involving OGSP, SS Mechanical and Electrical Engineering Pte Ltd ("SS Mechanical"), and Pintu Kumar Sarker ("Pintu") who was Comfort's project manager and SS Mechanical's initial sole director and shareholder. The alleged conspiracy was that OGSP would present inflated invoices for work done when no such work had in fact been done by that time, and that Pintu would facilitate the invoices.[19] Ultimately, the aim was to obtain

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[15] RWS, paras 40-41.

[16] RWS, paras 42-43.

[17] RWS, para 44.

[18] RWS, paras 58-59.

[19] RWS, para 70; Wenda Lew's 1st affidavit, para 57.

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frontloaded payments from Comfort for work not yet done, to benefit the conspirators.

12 Comfort submitted that Pintu was originally the sole director and shareholder of SS Mechanical but gave his directorship and shares to his friend, one Sankara Kumara Kannan, in July 2013.[20] However, Pintu still maintained control over SS Mechanical.[21] At the same time, in October 2013, Pintu would represent Comfort in its discussions with OGSP regarding the Contract, and managed the project until it concluded in July 2015.[22] During this time, Pintu would facilitate OGSP's fraud.[23] Comfort alleged that OGSP would award a purchase order to SS Mechanical. The latter would then issue invoices to OGSP under the purchase order which were actually false. But OGSP could then submit these invoices to Comfort for work done although there had in fact been no work done. When OGSP claimed payment for almost all the work, it then abandoned the project and forced Comfort to engage other contractors to complete the project.[24]

OGSP's submissions

13 OGSP submitted that neither of Comfort's two grounds was sufficient for the court to set aside the AD.

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[20] Wenda Lew's 1st affidavit, para 58.

[21] Wenda Lew's 1st affidavit, paras 63-64.

[22] Wenda Lew's 1st affidavit, paras 61-62.

[23] Wenda Lew's 1st affidavit, para 64.

[24] Wenda Lew's 1st affidavit, para 73.

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14 In relation to Comfort's first ground to set aside the AD which was that the adjudicator had failed to consider patent errors, OGSP made two arguments. First, OGSP submitted that the adjudicator had correctly dismissed Comfort's arguments that there were patent errors in OGSP's claim. OGSP said that Comfort was "abusing" the setting-aside application to ask the court to infer that the adjudicator had merely "rubber-stamped" the adjudication application when he had not.[25] OGSP relied on para 65 of the AD, where the adjudicator expressly noted that "even in the absence of a payment response or an adjudication response, [he] must not merely rubber stamp a claim".[26] OGSP also argued that by failing to raise the alleged patent errors at the payment response stage, Comfort had waived its right to raise this objection before the adjudicator and in court.[27]

15 Second, OGSP said that in any event there were no patent errors in its claim. For the contract sum and the retention money, OGSP submitted that it was Comfort who continually refused to verify the work done despite multiple email chasers.[28] OGSP relied on the fact that the registered inspector's inspection and the Temporary Occupation Permit ("TOP") inspection had been completed. These indicated that the work concerned had been completed.[29] OGSP acknowledged Comfort's allegations that no invoices were attached to PC12 for 8% of the work, but said that the Contract was still substantially

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[25] Applicant's Written Submissions for HC/SUM 2425/2017 ("AWS"), paras 22-27.

[26] Respondent's Bundle of Documents for HC/SUM 2425/2017 ("RBD"), vol 3, p 1947.

[27] AWS, para 31.

[28] AWS, paras 48-49.

[29] AWS, paras 55-58.

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completed since Comfort had certified that the remaining 92% was complete and because the warehouse itself had already gone into operation and was accessible to the public.[30]

16 For the variation works, OGSP said that Comfort could not object to OGSP's claims as it took a "hands off" approach and left the issue of the variation works to OGSP.[31] When OGSP asked Comfort for clear written instructions, Comfort's representatives refused to provide any.[32]

17 Finally, for the cost of materials, OGSP said that Comfort had, on multiple occasions and through Pintu, asked OGSP to order additional materials for the project.[33] OGSP left the materials on site which were used without its permission. When it raised the issue to Comfort, the latter did not respond or offer any solutions. Hence, these were costs that were properly incurred for the project. In the circumstances, OGSP submitted that there were no patent errors in its claims.

18 In relation to Comfort's second ground to set aside the AD which was that there was a conspiracy of front loading the invoices, OGSP submitted that apart from SS Mechanical's invoices, no documents linked Pintu to OGSP. Even SS Mechanical's invoices presented were nothing out of the ordinary.[34] In fact, it was Comfort who told OGSP that the latter should contact Pintu as he

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[30] AWS, paras 59-62.

[31] AWS, para 76.

[32] AWS, para 74.

[33] AWS, paras 79-83.

[34] AWS, para 107.

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was the project manager.[35] Finally, OGSP highlighted that Comfort did not raise the allegation of conspiracy in the adjudication response and this was only raised for the first time in the affidavit of one Lew Sien Yen Wenda ("Wenda Lew") dated 26 May 2017.[36] Therefore, this showed that the allegation of conspiracy was nothing more than an afterthought.

The court's decision

Issues

19 There were two issues before the court:

(a) whether the adjudicator failed to consider any patent error in OGSP's claim such that the AD should be set aside; and

(b) whether there was a fraudulent conspiracy between OGSP, SS Mechanical and Pintu to present inflated invoices to Comfort such that the AD should be set aside.

The adjudicator's alleged failure to consider patent errors

20 Comfort's failure to lodge a payment response and its late adjudication response put it at a great disadvantage during its application to set aside the AD. Section 15(3) of the SOPA prohibits the adjudicator from considering matters not raised in the payment response:

> (3) The respondent shall not include in any 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 –

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[35] Natarajan Venkatesh's 1st affidavit, paras 55-56.

[36] AWS, para 8.

> (*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; …
>
> [emphasis added]

Therefore, the adjudicator was correct not to have considered Comfort's explanation for not honouring PC12. Comfort could not set aside the AD based on the adjudicator's failure to consider anything within its payment response and adjudication response, which Comfort rightly conceded.[37]

21 However, even if the respondent failed to file a payment response (which would prevent the adjudicator from considering the arguments raised in the payment response under s 15(3) of the SOPA), the adjudicator would still need to consider patent errors in the adjudication application. The Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") expressed the respondent's right to have patent errors considered even though it did not file a payment response in the following terms (at [50]–[52]):

> 50 Notwithstanding this, we consider the question of whether it would even have been open to W Y Steel, who had not filed a payment response, to make a submission that Osko's payment claim was patently in error…
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> 51 … In our judgment, under s 17(3) of the Act, even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material which is *properly* before him and which he is permitted and, indeed, obliged to consider. …
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> 52 In our judgment, an adjudicator is bound to consider the payment claim before him and cannot make his determination as if the fact that the respondent has not filed a response obviates the need for him to consider the material

[37] RWS, paras 16-17.

> properly before him. The adjudication does not become a mere formality. The adjudicator is obliged to adjudicate, and in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner …
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> [emphasis in original]

22 Nevertheless, it must be emphasised that the court "should not review the merits of an adjudicator's decision" (*Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 at [66]). Thus, my focus was confined to the issue of whether the adjudicator had failed to consider and spot patent errors in the adjudication application.

23 As to what is meant by patent errors, the Court of Appeal in *W Y Steel* intimated that this would refer to "errors manifest from the material that was properly before the [a]djudicator" (at [54]). This was similarly stated by Lee Seiu Kin J in *Aik Heng Contracts and Services Pte Ltd v Deshin Engineering & Construction Pte Ltd* [2015] SGHC 293 where he noted that patent errors were those that were "on the face of that material" [emphasis omitted] (at [30]). In *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174, I provided an illustration of a patent error at [35] as follows:

> … For instance, if the documentary evidence submitted by the claimant plainly contradicted its claimed amount, the respondent would be entitled to point that out to the adjudicator. Indeed, this accords with the plain and simple meaning of "patent" under the Oxford Dictionary which refers to something that is "easily recognisable" or "obvious". Hence, the adjudicators in this case had to spot obvious and clear cut errors in the payment claims.

In the present case, I adopted these statements of the law and found that the search for patent errors must be limited to the face of the relevant documents.

24 With these principles in mind, I turn now to explain why I found that the adjudicator did not fail to consider any alleged patent errors in this case.

25 The adjudicator was aware that he had to scrutinise OGSP's adjudication application for patent errors. This was clear from para 65 of the AD, where the adjudicator noted that "even in the absence of a payment response or an adjudication response, I must not merely rubber stamp a claim. I must consider the material properly before me and consider if there are patent errors".[38] Having set out this general approach, the adjudicator went on to examine the documents properly before him at paras 67 to 69 and concluded that "[h]aving gone through this AA, I am of the view that there are no reasons for me to suspect that there are any patent errors and so I hold".[39] Hence, this was *not* a case where the adjudicator did not know that he had the duty to consider patent errors and hence failed to do so.

26 Comfort's argument was essentially that despite having been aware of his duty to look out for patent errors, the adjudicator either failed to spot these errors or had paid lip service to his duty. Neither of these was tenable on the facts before me. Instead, the adjudicator had explicitly referred to the "full lump sum contract price", the "VO 2 [*ie*, the variation order]", and the "Costs of Materials". He had compared these claims made by Comfort against the documents in the adjudication application. There was no evidence at all to suggest that the adjudicator had not done what he said.

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[38] RBD, vol 3, p 1947, para 65.

[39] RBD, vol 3, p 1949, para 69.

27 Comfort additionally submitted that the adjudicator had failed to spot a patent error as he did not consider the contractual provisions before him, particularly cl 11, as required by s 17(3)(*b*) of the SOPA. Section 17(3)(*b*) provides that:

> (3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:
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> …
>
> (*b*) the provisions of the contract to which the adjudication application relates;
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> …

28 In my view, s 17(3) does not prescribe what the adjudicator *must* consider. Rather, it sets out the *outer limits* of what the adjudicator can consider, *ie*, the adjudicator cannot consider anything outside what is stated in s 17(3). When a case falls within the outer limits set by s 17(3), the relevant provision is s 15(3), which provides that where the respondent does not file a payment response, the adjudicator cannot consider the respondent's "reason[s] for withholding any amount". Hence, I did not accept Comfort's submissions that the adjudicator in this case was obliged to look at the contractual provisions by virtue of s 17(3) of the SOPA. Instead, the adjudicator would have been wrong to consider the reasons that Comfort provided unless these were reasons that were already on the face of the record, *ie*, patent errors.

29 In any event, even if Comfort were right and the adjudicator needed to consider cl 11, I was not satisfied that this was a patent error. The relevant portions of cl 11 provide that OGSP must have provided "relevant supporting documents" for its claim for variation works, which the adjudicator clearly considered at para 68.2 of the AD. The adjudicator looked at the "table summarizing the details" of the variation order and a letter dated 25 October

2016 enclosing two appendices of drawings. The adjudicator clearly considered these to be sufficient supporting documents. To the extent that Comfort was arguing that these were not *sufficient* supporting documents, this was an attempt to review the merits of the adjudicator's decision. As I noted above at [22], it is not the function of the court to review the AD's merits in a setting-aside application.

30 It was very unfortunate that Comfort took a condescending approach when it replied to OGSP's PC12 on 30 March 2017. Comfort took the view that it did not need to file a payment response and it must live with the consequences of its decision. If Comfort was so determined to dispute PC12, as its solicitors have done so vigorously in these proceedings, then it should have lodged a payment response with all the reasons that it had canvassed before the court. The adjudicator would then be obliged to consider those reasons subject to the limits in s 17(3) of the SOPA. Comfort refused to take this golden opportunity and it could not use this court as a forum to ventilate its arguments as to the merits, having chosen to sit on its hands when it could have lodged a payment response. The Court of Appeal in *W Y Steel* faced a similar application and it had this to say (at [54]):

> … W Y Steel was not seeking to rely on errors manifest from the material that was properly before the Adjudicator. Rather, it was seeking to remedy the irremediable consequences of its failure to file a payment response. Significantly, the Adjudication Determination expressly stated … that the Adjudicator did consider "the parties' submissions and the matters an adjudicator can consider … pursuant to the provisions of section 17(3) of the [Act]", and there is nothing to indicate that he did not in fact do so. Certainly, there was nothing in the arguments presented before us that went to making good W Y Steel's suggestion that the Adjudicator had applied a blank or unthinking mind to the issues before him. Accordingly, this argument also fails.

31 The Court of Appeal's comments in *W Y Steel* were also apposite in this case. I rejected Comfort's attempt to introduce its arguments on the merits of its case by the back door.

32 Accordingly, I was satisfied that the adjudicator did look out for patent errors and found there were none before he delivered the AD. But even assuming that the adjudicator did overlook some patent errors, whether the court would set aside the AD would depend on the seriousness and the extent of the patent errors. If the patent errors were minor and had a marginal or insignificant impact on the adjudication sum, then logically these would be insufficient to set aside the AD. The court would not readily set aside an adjudication determination for the slightest reasons. This approach is also in line with the overall purpose and objective of the SOPA, which is to provide quick justice for the building and construction industry that has cashflow as its lifeblood. I noted these concerns in the recent case of *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] SGHC 171 ("*AES Façade*") at [23] as follows:

> 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]). …

A court that readily sets aside adjudication determinations would not be acting in line with the purpose of the SOPA. This is because it would allow unsatisfied respondents to set aside adjudication determinations based on inconsequential

failures to consider patent errors, thereby delaying the quick justice envisaged by the SOPA.

33 However, this was not the case here as I found that the adjudicator had not been in breach of his duty to consider patent errors on the face of the materials before him. Thus, there was no need to deal with the issue of whether the errors were sufficiently material to warrant a setting aside. Accordingly, I rejected Comfort's submissions that the AD should be set aside on this ground.

Allegations of OGSP's conspiracy to defraud Comfort

34 It was not entirely clear whether the statutory scheme under the SOPA provides for the challenge of adjudication determinations on the ground that it had been obtained by fraud. However, some decided cases appear to have made comments to that effect. In *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264, I noted that "[a]lthough there have been no cases that have held that fraud should be a ground for setting aside an adjudication determination, I am of the opinion that it is a valid ground for setting aside" (at [31]). I did not, however, ultimately make a finding of fraud on the facts. This case went on appeal but the finding on fraud was irrelevant for the purposes of the appeal (see *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482 at [8]).

35 A similar sentiment was expressed by Lee Seiu Kin J in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2012] SGHC 194 at [7], where Lee J concluded that the adjudication determination in that case was valid "except for the possible exception of a clear case of fraud". Again, this finding was not referenced on appeal.

36 In the Supreme Court of New South Wales case of *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095 ("*CivComm*"), the New South Wales Supreme Court interpreted the provisions of the Building and Construction Industry Security of Payment Act (Act 46 of 1999), which is *in pari materia* with the SOPA. The court concluded at [31]–[32] that where an adjudication determination was obtained by fraud in which the adjudicator was not involved, the adjudication determination may be set aside by court proceedings akin to the situation where a judgment was obtained by fraud. The court went on to explain that this may occur where the application is based on facts discovered after the judgment which are material, and it is reasonably clear that the fresh evidence would have provided an opposite verdict.

37 I agreed with these observations and found that where an adjudication determination was obtained by fraud that did not pertain to the adjudicator, it may be set aside under the SOPA. Although no provision within the SOPA expressly provides that an adjudication determination obtained by fraud can be set aside by the court, it is trite that the court will not allow its processes to be used to facilitate fraud. An adjudication determination is enforced by applying to the court for an order to enforce it as a judgment debt. Hence, the court will not assist in this process where the adjudication determination had been obtained by fraud on the part of one party. Furthermore, in this case, both parties accepted that fraud was a ground to set aside the AD.

38 However, I did not find any evidence of fraud on the facts of this case. Comfort alleged that OGSP had entered into a conspiracy with SS Mechanical and Pintu to defraud it. According to Comfort, under the conspiracy OGSP would claim inflated sums to be collected from Comfort. Pintu and SS Mechanical would assist in this process as Pintu was the point of contact

between Comfort and OGSP as the project manager. Hence, Pintu would have known of any 'frontloading' (*ie*, inflated claims) that had taken place. To support its claim, Comfort produced an audio transcript of its meeting with Pintu. It asserted that the transcript was evidence of the "frontloading" by OGSP, in that Pintu had admitted to the frontloading during the course of the interview with one Lim Fatt Seng ("Lim") and Wenda Lew.[40]

39 I had carefully perused the transcript provided[41] and found nothing to suggest that Pintu had admitted that there was frontloading. On the contrary, when Lim pointedly asked him whether he had frontloaded the payment claims, Pintu expressly denied it. The relevant parts of the transcript provided as follows:[42]

> [Lim]: Because you got the [Purchase Order] so therefore you front loaded the progress claim. You know what is call front-loading of the progress claim? You claim as much as you claim but the work is not done.
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> [Pintu]: No, no we put the price and give the OGSP (inaudible 18:33) and not the Lead to decide but the Lead Management how many percent certify, same certifying from us.
>
> …
>
> [Lim]: How does Leads check the progress claim and certify?
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> [Pintu]: This one I don't know. Normally we give, then the Hoo Yin Shi sometime give one time, sometime we chasing chasing they give. But who go and certify verify go and certify they normally don't tell us.

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[40] RWS, paras 72-76.

[41] RBD, vol 3, pp 1972-1981.

[42] RBD, vol 3, p 1977.

40 Contrary to Comfort's submissions, this passage did not assist its case that Pintu had admitted to frontloading. Instead, Pintu had not only denied the allegation but had also explained that there were back-to-back contracts between OGSP and Comfort, and between Comfort and Lead Management Engineering & Construction Pte Ltd ("Lead"). Under these contracts, OGSP would complete work for Comfort which would in turn complete work for Lead. Hence, the process of certifying work done was managed by Lead and not by Comfort or Pintu himself. Therefore, Pintu could not have facilitated the process of making inflated claims nor could he have been part of any conspiracy with OGSP to submit inflated claims. Pintu's position was consistent with cl 4 of the Contract, which provides that the payment from Comfort to OGSP would only be due 30 days after Comfort received the payment from Lead.[43] It made sense that Lead (and not Pintu) would have been the one verifying the claims because Comfort would only make payments to OGSP after Lead had certified and made payments to Comfort.

41 In addition to the fact that the audio transcript did not show that Pintu had admitted to frontloading, I also noted that the meeting with Pintu was only conducted very recently – on 22 May 2017.[44] The setting aside application was filed four days later on 26 May 2017. It was clear to me that the meeting with Pintu was conducted in preparation to boost Comfort's chances in these proceedings. Despite Comfort's best efforts, the transcript alone was simply insufficient to establish a conspiracy to defraud.

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[43] RBD, vol 1, p 27.

[44] RBD, vol 3, p 1972.

42 In a further attempt to bolster its thin evidence that there was fraud, Comfort sought to admit Wenda Lew's third affidavit on the day of the hearing itself. Essentially, Wenda Lew's third affidavit stated that OGSP had twice asked Comfort for assistance to fill up its audit confirmation forms which stated that as of 31 March 2016 and 31 March 2017, the amount receivable from Comfort due to OGSP was $73,077.79.[45] According to Wenda Lew, these audit confirmations "contradict the claims made by OGSP in the adjudication".[46] Comfort submitted that OGSP knew that it was only owed $73,077.79 but claimed $890,262.23. This showed that OGSP did not honestly believe that the items stated in PC12 were true. Hence, OGSP fraudulently intended to deceive Comfort in the adjudication. In response, Comfort submitted that OGSP did not include the sums in Variation Order No 2 ("VO2") in the audit confirmation because at the time of the audit confirmation, the adjudication application had not yet been made. Hence, OGSP was unable to recognise the sum of $621,282.73 due under VO2 as "revenue".[47]

43 I did not accept Comfort's submissions that Wenda Lew's third affidavit, along with its attached documents like the audit compliance emails, showed that OGSP did not genuinely believe in the sums that it claimed in PC12. Michelle Kuah ("Kuah"), who was OGSP's financial controller,[48] deposed on an affidavit that the sums in the audit compliance forms were low because of accounting uncertainties. According to Kuah, the audit compliance

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[45] Wenda Lew's 3rd affidavit, paras 4-5.

[46] Wenda Lew's 3rd affidavit, para 6.

[47] Michelle Kuah's 1st affidavit, paras 10-13.

[48] Michelle Kuah's 1st affidavit, para 1.

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forms had been prepared in accordance with the Singapore Financial Reporting Standards. These standards provided that a company's revenue could only be recognised where "it is probable that the economic benefits associated with the transaction will flow to the entity"[49] and that OGSP's auditors were hence "reluctant" to allow such sums to be included when there was not enough information about them. She further explained that this lack of information was due to Comfort's own refusal to provide OGSP with information. Moreover, at this time the adjudication application had yet to be filed.[50]

44 Comfort did not file any affidavit to contradict Kuah's evidence even though it had the chance to do so, having filed the first affidavit of one Ong Siow Ping, Comfort's accountant, just three days later.[51] Instead, Comfort's solicitors sought to question the veracity of her findings during their submissions. Without further evidence provided by Comfort, I found that the reduced claim was more likely to have been an issue with OGSP's accounting practices or requirements, than to constitute evidence of fraud.

45 Accordingly, I found that Comfort did not establish that there had been a conspiracy amongst OGSP, SS Mechanical and Pintu to defraud Comfort. The audio transcript and Wenda Lew's third affidavit, whether taken separately or together, were insufficient to establish the requisite fraudulent intention.

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[49] Michelle Kuah's 1st affidavit, paras 8-9.

[50] Michelle Kuah's 1st affidavit, paras 10 and 12.

[51] Ong Siow Ping's 1st affidavit, para 1.

Stay of enforcement pending appeal

46 After I dismissed Comfort's application to set aside the AD in SUM 2425, Comfort took out Summons No 3856 of 2017 ("SUM 3856") to apply for a stay of enforcement of the AD pending Comfort's appeal. In essence, Comfort submitted that if the stay were not granted, then Comfort would not be able to recover its monies even if the dispute were ultimately resolved in its favour.[52]

47 Comfort did not submit that OGSP was insolvent as Comfort had no basis to do so. However, Comfort alleged that OGSP had a history of declaring dividends for its shareholders even if this resulted in it having much lesser accumulated profits.[53] In this case, Comfort submitted that OGSP would declare dividends in favour of Rotating Offshore Solutions Ltd ("ROS"), OGSP's majority shareholder, to reduce the losses that ROS had suffered for the financial year ending 31 March 2016.[54]

48 In response, OGSP submitted that Comfort's allegations were speculative and baseless.[55] OGSP explained that it had declared dividends to its shareholders out of its retained profits from previous financial years[56] and in any event it had been profitable at the points in time when the dividends were

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[52] Respondent's Written Submissions for HC/SUM 3856/2017 ("RWS 3856"), para 2.

[53] RWS 3856, paras 23-32.

[54] RWS 3856, para 46.

[55] Appellant's Written Submissions for HC/SUM 3856/2017 ("AWS 3856"), para 21.

[56] AWS 3856, para 23.

(*cont'd on next page*)

declared.[57] Comfort's submissions were based on cherry-picked information designed to cast OGSP in a bad light.[58] As for ROS, OGSP submitted that ROS had been consistently making profits for all the financial years that Comfort claimed to have reviewed.[59] In any event, ROS was only OGSP's majority shareholder, not its *sole* shareholder, and cannot simply "order" OGSP to declare dividends to negate ROS's own losses as Comfort alleged.[60] Finally, OGSP submitted that Comfort was using a "double-barrelled" approach to frustrate its right to the adjudicated amount, relying on the recent decision in *AES Façade*.[61]

49 I rejected Comfort's submissions and did not grant its application for a stay. The Court of Appeal in *W Y Steel* confirmed at [60] that the court "retains the discretion to order a stay of enforcement of an adjudication determination where it is necessary to do so in order to secure the ends of justice". The court then proceeded to set out the situations where a stay may ordinarily be justified at [70] as follows:

> 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 …

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[57] AWS 3856, para 25.

[58] AWS 3856, para 26.

[59] AWS 3856, para 40.

[60] AWS 3856, para 48.

[61] AWS 3856, para 50.

The court also noted that the party asking for a stay must satisfy the "high threshold" of demonstrating that a stay is required because it "will not readily be granted having regard to the overall purpose of the [SOPA], which is precisely to avoid and guard against pushing building and construction companies over the financial precipice" [emphasis omitted] (at [71]).

50 Comfort did not meet this high threshold. OGSP is perfectly entitled to declare dividends for its shareholders as long as it did not put its company in the red. Even the evidence that Comfort cited to the court did not show that OGSP was insolvent or was about to be insolvent. Hence, Comfort could not rely on this ground for its stay application.

51 In *W Y Steel*, W Y Steel argued for a stay because there were 11 lawsuits that had been filed against Osko and the latter would have to pay off the default judgments granted against it in two of the 11 lawsuits. Further, Osko was currently in a net current liability position and had lent money to one of its directors despite its financial difficulties (at [57]). Notwithstanding these liabilities, the Court of Appeal refused to grant the stay, noting that W Y Steel's evidence was offset by Osko's evidence that it was solvent even though its paid-up capital was admittedly just $25,000 (*W Y Steel* at [58] and [72]). The same conclusion applied in the present case. OGSP's financial controller, Kuah, deposed on an affidavit that OGSP declared its dividends based on previous retained profits[62] and that OGSP did not invariably declare dividends without thinking. For instance, in the financial year ending 31 March 2016, OGSP did not declare dividends in favour of ROS even though it made profits in that

[62] Michelle Kuah's 2nd affidavit, para 7.

(*cont'd on next page*)

financial year.[63] I was unable to agree with Comfort that there was sufficient evidence that OGSP would declare dividends to such an extent that it would be unable to return the adjudicated sum should Comfort succeed on appeal.

52 Furthermore, even if OGSP's financial statements indicated that it had been in some financial difficulty, Comfort would have known of this at the time it engaged OGSP as a sub-contractor. The Court of Appeal in *W Y Steel* noted at [70] that it was relevant "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". In this case, even if OGSP could be considered financially weak, this had already been its financial position in October 2013 according to Comfort's own evidence and Comfort must be taken to have engaged OGSP as its sub-contractor with that knowledge. The Court of Appeal in *W Y Steel* made a similar finding at [72]:

> 72 … Further, to the extent that the accounts of Osko demonstrated that it was in some financial distress, the accounts in question covered the period from 1 December 2010 to 30 November 2011, the very period in which Osko signed on as a sub-contractor to W Y Steel. …

The court concluded that W Y Steel could not rely on Osko's financial distress because it had already known of Osko's situation at the time it engaged the latter. For the same reasons, I rejected Comfort's submissions that the court should exercise its discretion to stay enforcement of the AD pending appeal.

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[63] Michelle Kuah's 2nd affidavit, para 11.

Conclusion

53 In summary, I was satisfied that the adjudicator found no patent errors before he made the AD. There was also no evidence to suggest that there was fraud in PC12. Accordingly, I dismissed Comfort's application to set aside the AD in SUM 2425. In the meantime, Comfort had taken out Suit No 509 of 2017 against OGSP, Pintu and RSP Engineering Pte Ltd (previously known as ROS) ("RSP") for loss and damage arising from OGSP's alleged breaches of the Contract and the purported conspiracy between OGSP, Pintu and RSP.

54 Comfort then took out SUM 3856 seeking a stay of enforcement of the AD pending its appeal of SUM 2425. I also dismissed this application.

55 I ordered Comfort to pay costs to OGSP for both applications, which were fixed at $9,000 (including disbursements) for SUM 2425 and $5,000 (including disbursements) for SUM 3856.

Tan Siong Thye
Judge

Nicholas Philip Lazarus and Elizabeth Toh Guek Li
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and the respondent in SUM 2425/2017 and SUM 3856/2017;
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in SUM 2425/2017 and SUM 3856/2017.