Dongah Geological Engineering Co Ltd *v* Jungwoo E&C Pte Ltd

[2021] SGHC 239

Case Number : Originating Summons No 831 of 2021

Decision Date : 22 October 2021

Tribunal/Court : General Division of the High Court

Coram : Tan Siong Thye J

Counsel Name(s) : Campos Conrad Melville, Chong Jia Hao and Michelle Lim Ann Nee (RHTLaw Asia LLP) for the plaintiff; S. Magintharan and Liew Boon Kwee James (Essex LLC) for the defendant.

Parties : Dongah Geological Engineering Co Ltd — Jungwoo E&C Pte Ltd

Building and Construction Law – Dispute resolution – Adjudication

Civil Procedure – Interim orders

Civil Procedure – Injunctions

22 October 2021

Judgment reserved.

Tan Siong Thye J:

Introduction

1 In this application, the dispute between the plaintiff, Dongah Geological Engineering Co Ltd, and the defendant, Jungwoo E&C Pte Ltd, arises from the plaintiff's non-payment of the defendant's works done pursuant to a subcontract dated 1 September 2019 (the "Subcontract") for a project of the Land Transport Authority ("LTA"). The main contractor of the project is GS Engineering & Construction Corporation ("GS Engineering").[note: 1]

2 As a result of the plaintiff's non-payment of the defendant's progress payments, the defendant served a payment claim on 20 April 2021 pursuant to s 10 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") on the plaintiff for the sum of $2,501,551.45 (including GST).[note: 2] On 15 July 2021, the adjudicator rendered his adjudication determination ("AD") in Adjudication Application No. SOP/AA 108 of 2021 ("AA 108") and held that the plaintiff was liable to pay the defendant the sum of $2,428,690.04 ("Adjudicated Sum"). This comprises, *inter alia*, additional work done for light grouting ("Additional Light Grouting Works") amounting to $2,154,410.43 (excluding GST).[note: 3]

3 While the adjudication proceedings were ongoing, the plaintiff commenced arbitration proceedings against the defendant on 9 July 2021 in the Singapore International Arbitration Centre ("SIAC") in SIAC Arbitration No 210 of 2021 ("ARB 210").[note: 4]

4 The defendant thereafter applied to enforce the AD on 3 August 2021 in Originating Summons No 781 of 2021. This application made pursuant to O 95 r 3 of the Rules of Court (2014 Rev Ed) was granted by the learned Assistant Registrar in HC/ORC 4359/2021 ("Order") on 4 August 2021.

5 The plaintiff commenced the present application to set aside the AD and the Order on the ground of fraud pursuant to s 27(6)(*h*) of the SOPA. The plaintiff also seeks for a stay of enforcement

of the AD and the Order in the alternative. Further or alternatively, the plaintiff applies for the defendant to be restrained from presenting a winding up application against the plaintiff relating to the AD pending the disposal of the proceedings in ARB 210.[note: 5]

Background to the dispute

6 The plaintiff is a specialist civil engineering contractor that performs large scale infrastructure works, which include the building of road and MRT tunnels and foundation works, as well as the provision of soil investigation, treatment and stabilisation construction and technology services.[note: 6]

7 The defendant is a company which carries out foundation works and soil investigation, treatment and stabilisation works.[note: 7] It is a small construction company that undertakes subcontract works on a project-to-project basis.[note: 8]

8 On 1 September 2019, the plaintiff and the defendant entered into the Subcontract for an LTA Project, known as "NSC 101 - DESIGN AND CONSTRUCTION OF NORTH-SOUTH CORRIDOR (TUNNEL) BETWEEN ECP AND VICTORIA STREET" (the "Project"). The Subcontract was for a period of approximately five years[note: 9] and had an estimated value of $10,250,000 (excluding GST).[note: 10] Under the Subcontract, the defendant was to perform ground improvement works or deep soil mixing ("DSM"). The plaintiff was engaged by the main contractor of the Project, GS Engineering.[note: 11]

9 The defendant claims that since January 2021 the plaintiff owes it the sum of $2,501,551.45 for the aggregate progress payments for the construction works that it has carried out.[note: 12] Consequently, the defendant served the payment claim under s 10 of the SOPA on the plaintiff on 20 April 2021 for the outstanding progress payments.[note: 13]

10 On 7 May 2021, the defendant commenced AA 108 to claim the sum of $2,501,551.45 against the plaintiff.[note: 14] On 15 July 2021, the adjudicator rendered his AD and held that the plaintiff was to pay the defendant the sum of $2,428,690.04, interests, and costs of $35,213.70.[note: 15] The breakdown of the Adjudicated Sum is as follows:[note: 16]

S/N	Description	Determination
1.	Main Tunnel (DSM Grouting)	$121,951.48 (excluding GST)
2.	NCH Facility (DSM Grouting)	$324,849.91 (excluding GST)
3.	Trench Grouting (Additional Work)	$36,201.63 (excluding GST)
4.	**Light Grouting (Additional Work)**	**$2,154,410.43 (excluding GST)**

5.	Less: Deductions	– $235,739 (excluding GST)
6.	Less: Retention (5%)	– $131,870.67 (excluding GST)
7.	Add: Retention Release (3.5%)	0
8.	Add: GST (7%)	$158,886.26
	Total	$2,428,690.04 (including GST)

11 As can be seen from the table above, the sum of $2,154,410.43 awarded for the Additional Light Grouting Works constituted a significant portion of the Adjudicated Sum. For the purposes of the present dispute, the plaintiff is only contesting this head of the Adjudicated Sum.

12 Several days before the AD was rendered, the plaintiff commenced arbitration proceedings against the defendant in the SIAC in ARB 210 on 9 July 2021.[note: 17] In ARB 210, the plaintiff claims: (a) the sum of $1,232,599 against the defendant for the outstanding backcharges arising out of the plaintiff's supply of a substantial portion of the plant, equipment, materials, manpower, consumables and services necessary to carry out the Subcontract works; and (b) damages occasioned by the defendant's wrongful repudiation of the Subcontract.[note: 18]

The parties' cases

The plaintiff's case

13 The plaintiff seeks three prayers in the present application. Firstly, the plaintiff applies to set aside the AD on the ground of fraud pursuant to s 27(6)(*h*) of the SOPA and to set aside the Order pursuant to O 95 r 3 of the Rules of Court. Secondly, the plaintiff applies for a stay of enforcement of the AD and the Order should the prayer for setting aside be dismissed. Thirdly, the plaintiff seeks an injunction to restrain the defendant from presenting a winding up application against the plaintiff should the other two prayers be unsuccessful.

Setting aside the AD

14 The plaintiff argues that the adjudicator relied on two quotations procured by the defendant (the "Two Quotations") when he considered the claim for the Additional Light Grouting Works. The Two Quotations were from two contractors, Ground Mix Pte Ltd ("Ground Mix") and Segang E&C Pte Ltd ("Segang"). According to the plaintiff, the defendant represented that the Two Quotations reflected the market rate for light grouting works.[note: 19] The material portion of the AD (at [166]) reads as follows:[note: 20]

> In the premises, I accept [the defendant's] submissions that the applicable rate for the additional light grouting works is S$18.90/$m^3$. In this regard, I am also guided by the fact that the rate of S$18.90/$m^3$ appears fairly consistent with the two (2) alternative quotations that [the defendant] had procured (of S$21.50/$m^3$ and S$23.50/$m^3$), as the market rate for the light

grouting works.

15 However, subsequent to the issuance of the AD, the plaintiff discovered that the defendant's representation that the Two Quotations were reflective of the market rate for light grouting works was false. The plaintiff provides the following arguments in support:[note: 21]

(a) The defendant had submitted a quotation dated 12 April 2021 to another contractor, LT Sambo, (the "Sambo Quotation") for another project ("Sambo Project") that required ground improvement works by way of DSM and had quoted a price of $56/m^3 for DSM Main Grouting works, and $5/m^3 for DSM Light Grouting works.

(b) Ground Mix and Segang are small companies and their profiles suggested that they were not qualified or did not have the capacity to carry out capital intensive works like ground improvement DSM works.

(c) When the plaintiff wrote to Ground Mix and Segang to enquire the basis of the Two Quotations, both contractors could not provide references to other projects which they had bidded for where DSM works were required and the tendered DSM Light Grouting works were at rates similar to $21.50/m^3 or $23.50/m^3. The defendant also failed to procure the two contractors to substantiate the rate of $21.50/m^3 or $23.50/m^{3}on affidavit.

(d) On 14 July 2021, *ie*, one day before the AD was issued, GS Engineering had agreed after negotiations with the plaintiff that, *inter alia*, the rate for variation work of DSM Light Grouting that had not been agreed in the bill of quantities in the contract between GS Engineering and the plaintiff was to be $10/m^3 for a cement dosage of ≤60kg/m^3. This rate is consistent with the Sambo Quotation for DSM light grouting works of $5/m^3 at a cement dosage of 50kg/m^3. The agreement between GS Engineering and the plaintiff is evidenced by a letter by GS Engineering dated 10 August 2021 (the "GS Engineering Letter").[note: 22]

16 The plaintiff argues that the defendant *knew* that the Two Quotations of S$21.50/m^3 and S$23.50/m^{3}from Ground Mix and Segang respectively could not be a genuine representation of the market rate for DSM light grouting works prior to commencing AA 108 because:[note: 23]

(a) the Sambo Quotation (in April 2021) for DSM light grouting works (cement dosage of 50kg/m^3) was at a rate of S$5/m^3, less than four times the rate of $21.50/m^3 or $23.50/m^3 of the Two Quotations (in March 2021); and

(b) the Two Quotations were contrived in that they were obtained by the defendant to support its own claim for DSM light grouting works (cement dosage at ≤60kg/m^3) at $18.90/m^3.

17 The plaintiff further argues that the defendant's misrepresentation was an operative cause in the adjudicator's decision. Had the adjudicator known of the truth about the two contractors that provided the Two Quotations and the Sambo Quotation ($5/m^3 for a cement dosage of 50kg/m^3), there would be a real prospect that the outcome of the AD might have been different.[note: 24]

Stay of enforcement of the AD

18 The plaintiff seeks a stay of enforcement of the AD as it claims that any monies paid to the defendant would not be recovered if the dispute were resolved in the plaintiff's favour in ARB 210. The plaintiff claims this is because the defendant:[note: 25]

(a) has no ongoing operations or projects;

(b) is looking to sell its only remaining DSM equipment;

(c) operates out of a virtual office and the residential home of Mr Park Jaehyun ("Mr Park"), the sole director and one of two shareholders of the defendant;

(d) has only a handful of employees; and

(e) has two shareholders, Mr Park and Mr Hong Sang Young ("Mr Hong"), and Mr Hong, who together with Mr Park are the personal guarantors for the defendant's loan of $500,000 from DBS Bank, has returned to Korea with no plans to come back to Singapore.

19 The plaintiff seeks a stay of enforcement of the entire Adjudicated Sum of $2,428,690.04, even though it only disputes the sum of $2,154,410.43 pertaining to the Additional Light Grouting Works. In oral submissions, the plaintiff explained that it does not dispute that the sum of $1,205,565.01 is due to the defendant pursuant to the AD, for its work done under the Subcontract. However, in ARB 210, the plaintiff claims (a) the sum of $1,232,599 against the defendant for the outstanding backcharges arising out of the plaintiff's supply of a substantial portion of the plant, equipment, materials, manpower, consumables and services necessary to carry out the Subcontract works; and (b) damages arising from the defendant's wrongful repudiation of the Subcontract.[note: 26] A breakdown is set out in the table below:[note: 27]

S/N	Description	Quantum
1.	PC 9 (DSM Grouting at Main Tunnel & NCH Facility)	$275,639
2.	PC 10 (DSM Grouting at Main Tunnel & NCH Facility)	$153,151
3.	Trench Grouting (Additional Work using the rate of $7/m^3 for cement dosage of 60kg/m^3)	$13,408.01
4.	Light Grouting (Additional Work using the rate of $7/m^3 and volume of 96,283m^3)	$673,981
5.	Retention sum released (5%)	$89,386
Subtotal (undisputed amount due to defendant)		$1,205,565.01
6.	Less plaintiff's claim for backcharges	– $1,232,599
7.	Less loss arising from Jungwoo's wrongful repudiation	– Damages to be assessed

Total (*ie*, monies owed to plaintiff if it succeeds in ARB 210)	– ($27.033.99 + damages to be assessed)

As can be seen from the table above, the plaintiff argues that if it were to succeed in ARB 210, the defendant would owe the plaintiff the sum of more than $27,033.99. If the plaintiff pays the defendant any monies now, it risks being unable to recover any monies from the defendant if the plaintiff later succeeds in ARB 210. Hence, the plaintiff claims that the stay of enforcement should apply to the whole of the Adjudicated Sum.

Injunction against winding up application

20 The plaintiff claims that it is solvent and that it has already paid the Adjudicated Sum into court. Hence, the plaintiff argues that it would be an abuse of process if the defendant commences a winding up application.[note: 28]

The defendant's case

21 The defendant submits that the plaintiff's three prayers should not be granted.

Setting aside the AD

22 The defendant argues that the AD should not be set aside. The defendant's main submissions are as follows.

23 Firstly, the adjudicator did not rely on the Two Quotations in rendering the AD. Instead, pursuant to Art 11.9(i) of the Subcontract, the adjudicator accepted the rate of $18.90/$m^3$ because that rate was similar to the trench grouting rate of $18.90/$m^3$.[note: 29] In this regard, Art 11.9 of the Subcontract provides as follows:[note: 30]

> In case new items which are not listed, or listed but have no defined unit rate in the Bill of Quantities occur during the performance of Subcontract Works, the unit rate for these items shall be calculated *at i) similar Unit Prices and Rates in the Bill of Quantities*, ii) if there are no similar Unit Prices and Rates to be applicable, then at the reasonable then-current market rate to be agreed by the Parties, or iii) in the event of disagreement, at such rate as the Contractor shall determine as appropriate, in his opinion, which shall be used to settle both Interim Final Account and Final Account hereof. For the avoidance of doubt, this paragraph shall be applied to the determination for the new items for Change In Works.
>
> [emphasis added]

24 Secondly, the plaintiff is estopped or precluded from disputing the rate of $18.90/$m^3$ pertaining to the Additional Light Grouting Works in the AD. This is because the plaintiff (a) did not dispute this rate in its payment response as required under s 15(3) of the SOPA; (b) did not dispute the authenticity of the Two Quotations throughout the adjudication proceedings; and (c) did not make any attempt to review the findings of the AD or the merits pursuant to s 18 of the SOPA.[note: 31]

25 Thirdly, the defendant submits that the plaintiff's attempt at adducing fresh evidence in the form of the GS Engineering Letter should not be allowed. If there was an agreement regarding the

price for light grouting works between GS Engineering and the plaintiff, this should have been raised in the plaintiff's payment response or adduced during the adjudication proceedings.[note: 32]

26 Even if the GS Engineering Letter was admitted, the defendant submits that no weight should be placed on it as GS Engineering is the main contractor and has a vested interest in making false statements on behalf of the plaintiff. According to the defendant, the GS Engineering Letter was also issued under suspicious circumstances. Although the GS Engineering Letter was issued pursuant to a secret meeting with the plaintiff on 14 July 2021, *ie*, one day before the AD was rendered, it took GS Engineering more than three weeks to write the GS Engineering Letter, which was dated 10 August 2021. By then, the plaintiff was given notice that the defendant was granted leave on 4 August 2021 to enforce the AD and that the defendant was indeed seeking to do so on 5 August 2021. In any case, the rate of $\$10/m^3$ for a cement dosage of $\leq 60kg/m^3$ in the GS Engineering Letter is irrelevant to the Subcontract rates entered between the plaintiff and the defendant, because the Subcontract rates are not pegged to those in the main contract.[note: 33]

Stay of enforcement of the AD

27 The defendant argues that a stay of enforcement of the AD should not be granted.

28 The defendant submits that its current financial distress was caused by the plaintiff's conduct in the first place. The plaintiff had failed to make its due progress payments since January 2021 and continually refused to pay the Adjudicated Sum after the AD was rendered on 15 July 2021.[note: 34]

29 The defendant also submits that the plaintiff has not shown clear and objective evidence of the defendant's actual present insolvency. This is for the following reasons:

(a) According to the defendant, the plaintiff cannot rely on its termination of the Subcontract on 25 June 2021 to allege the defendant's insolvency, as the termination was done for an improper motive of punishing the defendant for commencing AA 108 on 7 May 2021. In any case, such termination does not amount to evidence of its insolvency.[note: 35]

(b) The fact that the defendant does not have any other projects other than the Project does not suggest that the defendant is insolvent, because the defendant was contractually bound to only undertake the Project for the contracted period, *ie*, from 1 July 2019 to 30 September 2024.[note: 36]

(c) The plaintiff was fully aware from 1 September 2019 that the defendant's registered office was not their physical office, and the defendant did indeed have an operational office at another address.[note: 37]

(d) Contrary to what the plaintiff claims, the defendant is currently making arrangements to retrieve its equipment from the plaintiff's worksite.[note: 38]

(e) The defendant is able to explain why it has not filed its annual returns for the year 2020 and has provided evidence of its GST declaration to the Inland Revenue Authority of Singapore ("IRAS") for the period of 1 January 2021 to 30 June 2021 to prove that it is an operational and solvent company with a revenue of more than $1m a year.[note: 39]

(f) The fact that DBS Bank was willing to grant the defendant a loan of $500,000 on 15 April

2020 and that it has not taken any action against the defendant shows that the defendant is solvent.[note: 40]

(g) Mr Hong left Singapore due to personal reasons and not because the defendant was insolvent.[note: 41]

30 In oral submissions, the defendant argues that, in the alternative, if a stay of enforcement of the AD is granted, only the disputed part of the Adjudicated Sum should be withheld from it. As stated above, the plaintiff accepts that the defendant is entitled to $1,205,565.01 under the Adjudicated Sum. Hence, the defendant argues that the stay should not extend to this sum.

Injunction against winding up application

31 The defendant submits that pursuant to ss 27(1) and 27(2) of the SOPA, the party that has succeeded in an AD would be able to commence all necessary enforcement proceedings, including a winding up application.[note: 42]

Issues to be determined

32 There are three main issues in this case:

(a) Should the AD be set aside on the ground of fraud pursuant to s 27(6)(*h*) of the SOPA and accordingly the Order pursuant to O 95 r 3 of the Rules of Court should also be set aside [Prayer (a)]?

(b) Should a stay of enforcement of the AD and the Order be granted, if the court grants Prayer (a) [Prayer (b)], and if so, should the court exclude the undisputed sum of $1,205,565.01?

(c) Should an injunction to restrain the defendant from commencing a winding up application against the plaintiff be granted, if the above prayers are granted [Prayer (c)]?

My decision

Setting aside the AD

33 The plaintiff applies to set aside the AD on the ground of fraud pursuant to s 27(6)(*h*) of the SOPA as well as the Order made pursuant to O 95 r 3 of the Rules of Court.

The applicable law

34 Section 27(6)(*h*) read with s 27(5) of the SOPA provides that a party to an adjudication may commence proceedings to set aside the adjudication determination if the making of the adjudication determination was induced or affected by fraud or corruption.

35 In *Facade Solution Pte Ltd v Mero Asia Pacific Ltd* [2020] 2 SLR 1125 ("*Facade Solution*"), the Court of Appeal set out a two-step test for setting aside an AD on the ground of fraud and held that the burden of proof falls on the innocent party. The court stated as follows (at [28]–[38]):

Step 1: The AD must be based on facts which the party seeking the claim knew or ought reasonably to have known were untrue

…

30 In seeking to set aside an AD, the innocent party would have to establish:

(a) the facts which were relied on by the adjudicator in arriving at the AD;

(b) that those facts were false;

(c) that the claimant either knew or ought reasonably to have known them to be false (see [29] above); and

(d) that the innocent party did not in fact, *subjectively* know or have *actual* knowledge of the true position throughout the adjudication proceedings.

31 Our reason for restricting the requirement at [30(d)] to subjective or actual knowledge is to preclude a claimant, *ie*, the fraudulent party, from asserting that the innocent party could have discovered the true position and therefore *ought* to have known of the facts. In other words, there is no requirement on the innocent party to show that the evidence of fraud could not have been obtained or discovered with reasonable diligence during the adjudication proceedings. …

…

33 Where it is established that an AD is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence. A fraudulent party cannot be allowed to claim that he could have been caught had reasonable diligence been exercised, but because he was not caught, he should be allowed to get away with it. Such a view would bring the administration of justice into disrepute and it would be unprincipled to hold in effect that there is no sanction on the fraudulent party because he could have been found out earlier. Parties dealing with the court, and in the same vein, with the adjudicator in the adjudication of their disputes under the Act are expected to act with utmost probity.

Step 2: Whether the facts in question were material to the issuance of the AD

34 Second, the innocent party has to establish that the facts in question were material to the issuance of the AD. …

35 … Materiality is established if there is a real prospect that had the adjudicator known the truth, the outcome of the determination *might* have been different. In other words, the facts must have been an *operative cause* in the issuance of the AD. It matters not what the claimant did or did not think was material at the relevant time. What matters is that the court is satisfied that the false facts were *material* to the making of the original order based on the reasoning and arguments at the time the order in question was made. The objective of the Act is to facilitate cash flow in the building and construction industry, by among other methods, creating an intervening process of adjudication, which, although provisional in nature, is final and binding on the parties until their differences are ultimately and conclusively determined (see s 21 of the [SOPA]; [*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380] at [18]–[20] and *Citiwall* [*Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797] at [48]). The requirement of materiality provides the right balance in promoting the objective of achieving temporal finality in ADs by prescribing the circumstances under which they may be set aside on the ground of fraud. This would ensure that ADs will not be set aside based on mere allegations

of fraud. There must be compelling evidence of fraud before the court.

…

38 In conclusion, the burden of establishing all the components necessary to set aside an AD falls on the innocent party. An AD obtained by fraud should be *voidable* at the instance of the innocent party. It is after all, for the innocent party to decide whether or not it wishes to abide by the AD even if it was procured by fraud.

[emphasis in original]

My findings

36 In my judgment, I shall consider the elements of the *Facade Solution* test in turn.

(1) Step 1 of the *Facade Solution* test

37 I shall begin with Step 1 of the *Facade Solution* test, which examines if the AD was based on facts which the defendant here knew or ought reasonably to have known were untrue.

(A) The first element

38 The first element of Step 1 requires the plaintiff to establish the facts which were relied on by the adjudicator in arriving at the AD.

39 I note that the defendant did represent to the adjudicator that the rates stated in the Two Quotations, *viz*, $21.50/m^3$ and $23.50/m^3$, were the market rate for the DSM light grouting works. The defendant stated so in its reply submissions in the adjudication proceedings (at [37(g)]):[note: 43]

Finally, [the defendant] highlights 2 quotations that was given by other grouting companies which have quoted for a rate of $21.50/m^3$ and $23.50/m^3$. In the premises, the rate of $18.90/m^3$ is clearly fair and reasonable as compared to the market rate.

40 However, I am not satisfied that the adjudicator had relied on this representation.

41 It is important to read the adjudicator's holding (at [166]) in context with his preceding analysis (at [161]–[165]), and I reproduce it in full here:[note: 44]

161 The outstanding question in respect of the claim for the additional light grouting works is the applicable rate for such works.

162 The parties were *ad idem* that the Subcontract did not provide any Unit Price or Rate for light grouting works. In the premises, I agreed with [the plaintiff] that Article 11.9 of the [Subcontract] sets out the procedure to be followed in such a situation:

> *"11.9 In case new items which are not listed, or listed but have no defined unit rate in the Bill of Quantities occur during the performance of the Subcontract Works, the unit rate for these items shall be calculated at i) similar Unit Prices and Rates in the Bill of Quantities, ii) if there are no similar Unit Prices and Rates to be applicable, then at the reasonable then-current market rate to be agreed by the Parties, or iii) in the event of disagreement, at such rate as the Contractor shall determine as appropriate, in his opinion, which shall be*

used to settle both Interim Final Account and Final Account hereof. For the avoidance of doubt, this paragraph shall be applied to the determination for the new items for Change In Works."

163 On this basis, [the defendant] submitted that the applicable rate for the additional light grouting works should be S$18.90/$m^3$, as light grouting works and trench grouting works are largely similar with the only difference being "*the eventual purpose for which the treated soil is used – trench grouting is used to create a trench for a retaining wall and light grouting is used to create a stable platform at the ground level for subsequent works*" (see paragraph 37(b) of [the defendant]'s Reply Submissions). ***As [the plaintiff] had agreed to the rate of S$18.90/$m^3$ for the trench grouting works, that should likewise be the applicable rate for the light grouting works.*** [The defendant] had also prepared a table at paragraph 37(f) of [the defendant]'s Reply Submissions illustrating the ***similarities between the trench grouting works and the light grouting works*** …

…

164 As stated at [151] above, it is salient to mention that [the plaintiff] neither disputed the applicable rate for the additional light grouting works nor did it provide an alternative rate for assessing the additional light grouting works in PR 12. Nonetheless, it orally submitted at the 2nd Adjudication Conference that the applicable rate for the additional light grouting works should be "*pro-rated or benchmarked against the rate used for "DSM Grouting" works*" (see paragraph 56 of the AR Submissions). It further orally submitted at the 2nd Adjudication Conference that light grouting works are different from both DSM and trench grouting works in terms of grouting capacity (or cement dosage) and sought on this basis, to derive an applicable rate for the light grouting works by comparing the grouting capacity and/or efficiency of the light grouting works with that of the DSM Grouting works (see paragraphs 58-62 of the AR Submissions).

165 In my view, while there appeared to be some *possible* correlation between the cement dosage and/or grouting capacity of the various types of grouting works as well as applicable rate, it is unclear to me if such a simplistic calculation of the applicable rate for the light grouting works should be adopted, in particular, because the cement dosage (and/or grouting capacity) and the applicable rate may not be linearly correlated. ***Instead, I am satisfied that there is sufficient similarity between the trench grouting works and the light grouting works for them to be assessed at the same rate, in accordance with limb (i) of Article 11.9 of the [Subcontract].***

166 ***In the premises***, I accept [the defendant]'s submissions that the applicable rate for the additional light grouting works is S$18.90/$m^3$. In this regard, I am ***also guided*** by the fact that the rate of S$18.90/$m^3$ appears fairly consistent with the two (2) alternative quotations that [the defendant] had procured (of S$21.50/$m^3$ and S$23.50/$m^3$), as the market rate for the light grouting works. …

[original emphasis in italics; emphasis added in bold italics]

42 From the above, it is clear that the adjudicator did not rely primarily on the Two Quotations as being reflective of the market rate in coming to his decision.

43 The adjudicator's preceding analysis shows that he was relying on the defendant's submission.

As can be seen above, the defendant's submission in AA 108 was that the applicable rate for the Additional Light Grouting Works should be S$18.90/$m^3$, as light grouting works and trench grouting works are largely similar. In contrast, the plaintiff submitted to the adjudicator that (a) the applicable rate for the Additional Light Grouting Works should be pro-rated or benchmarked against the rate used for DSM Grouting works, and (b) sought to derive an applicable rate for the light grouting works by comparing the grouting capacity and/or efficiency of the light grouting works with that of the DSM Grouting works. The adjudicator stated in clear terms that he rejected the plaintiff's submission because it was simplistic: cement dosage and the applicable rate may not be linearly correlated. The adjudicator then stated that he was "[i]nstead" satisfied that there was sufficient similarity between the trench grouting works and the light grouting works for them to share the same rate pursuant to Art 11.9 of the Subcontract.

44 In coming to his holding, the adjudicator stated that "[i]n the premises" he accepted the defendant's submissions that the applicable rate for the Additional Light Grouting Works is $18.90/$m^3$. This phrasing unequivocally connotes that he was relying on his preceding analysis where he accepted that there was sufficient similarity between the trench grouting works and the light grouting works. Accordingly, his observation with regard to the Two Quotations as being indicative of the market rate appears to be merely confirmatory in nature.

(B) The second element

45 Next, I shall examine if the plaintiff has proven the second element of Step 1 of the *Facade Solution* test. The issue here is whether the Two Quotations gave a false indication of the market rate.

46 The plaintiff submits that the profiles of Ground Mix and Segang show that they do not have the proper standing to quote rates for light grouting works that were reflective of the market rate. Ground Mix and Segang are small companies with little paid-up capital: $450,000 and $100,000 respectively. It is therefore doubtful as to whether such companies could carry out high capital expenditure works such as DSM main grouting works. Moreover, based on searches done on their profiles on the Building and Construction Authority ("BCA") online Directory, they do not appear to be licensed or registered with BCA to carry out DSM works. Segang's profile on the Accounting and Corporate Regulatory Authority ("ACRA") Business Profile also shows that its principal activities are foundation works and the renting of industrial machinery and equipment, so it is unclear if Segang actually carries out light grouting works. As for Ground Mix, its registered office is a virtual office address that is shared by several other companies, which casts doubt on whether it is an operational business.[note: 45]

47 The plaintiff wrote to these two contractors on 10 August 2021 for a "detailed explanation and substantiated figures" of how they derived the rates in the Two Quotations.[note: 46] However, they refused to provide any basis for the Two Quotations, or any market evidence of the DSM works which they had bidded for or performed.[note: 47]

48 The plaintiff also relies on lower rates in the Sambo Quotation of $5/$m^3$ and that agreed with GS Engineering of $10/$m^3$ to show that the rates in the Two Quotations, $21.50/$m^3$ and $23.50/$m^3$, were not reflective of the market rate.[note: 48]

49 Hence, the plaintiff claims that the Two Quotations were grossly inflated, contrived and false.[note: 49]

50 In my view, the plaintiff has not proven that the Two Quotations do not accurately represent the market rate.

51 To begin with, the plaintiff's submissions regarding Ground Mix and Segang rely on tenuous speculative evidence such as their business profiles and the location of their registered offices. There is no evidence to suggest that these two contractors have deliberately come up with an inflated figure to support the defendant. Ground Mix and Segang may be small companies, but it does not necessarily follow that they cannot provide quotations that accord with the market rate. The plaintiff also did not adduce expert evidence to show what the market rate for light grouting works should have been.

52 Next, I place little weight on the rate of $10/m^3 agreed with GS Engineering. Given that GS Engineering is the main contractor for the Project, I agree with the defendant's submission that it has a vested interest in agreeing on a lower rate. If the plaintiff pays the defendant a lower rate, it is plausible that GS Engineering would accordingly owe the plaintiff lesser monies for work done for the Project. It is also suspicious that the plaintiff and GS Engineering would come to such an agreement on 14 July 2021, *ie*, one day before the AD was issued. They could have reached such an agreement at any time before the adjudication proceedings started.

53 I also place little weight on the Sambo Quotation.

54 The defendant submits that the Project was different from the Sambo Project. Here, the Project involved additional underground light grouting and trench grouting works to a depth of 17.9m from the surface. In the case of the Sambo Quotation, that project only involved surface light grouting works to a depth of 5m. Moreover, the present Project needed additional light grouting works, which rates were not fixed by the contract. For the Sambo Quotation, it concerned original works which rates were fixed by contract. It accords with common sense that the rates for additional works not covered by the original contract will inevitably be higher than any original works due to the urgent and unforeseen nature of additional work.[note: 50]

55 The plaintiff submits that the project pertaining to the Sambo Quotation did not involve light grouting works to only 5m. Rather, such works were to be done up to a depth of at least 23.5m below sea level or 27.5m below ground level, deeper than the depth of 17.9m in the Project.[note: 51] In this regard, in Summons No 4188 of 2021, the plaintiff adduced further evidence such as LTA drawings to support its submission. In response, the defendant argues that there is evidence to show that the Sambo Quotation involved light grouting works to *4m*, not 5m. The defendant contends that: (a) there is a document titled "DSM Cycle time" that was provided to LT Sambo by the defendant, which states that the depth of the light grouting works pertaining to the Sambo Quotation was 4m;[note: 52] (b) by a simple comparison of the total quantities used in the DSM work for the Project and the Sambo Project, *viz*, 1,798,586m^3 and 157,630m^3 respectively, the depth pertaining to the works for the two projects must be different. With regard to (b), Mr Park argues as follows:[note: 53]

> Further, I verily believe that it is absurd for [Mr] Jung [*ie*, the managing director of the plaintiff] to suggest … that the scope of the light grouting works which [the defendant] had with [the plaintiff] [additional works to the depth of 17.9m + additional trench grouting works] was the same of [*sic*] that LTA/Surbana with LT Sambo [*ie*, the Sambo Project] because a *simple comparison of the total quantity of 1,798,586m^3 DSM work … with the only the substantially lesser total quantity of 157,630m^3 of the light grouting works tendered by [the defendant]* … clearly shows that the depth of light grouting work is only 0.88m from ground level and

categorically rebuts Mr Jung's false theory that the light grouting works tendered for by [the defendant] to LT Sambo [**4 m** depth from the surface] is the same or "similar" as the same additional works for 17.9 m depth of undertaken [*sic*] in the Dongah project [*ie*, the Project]. The DSM and light grouting quantities in BQ provided by LT Sambo do not support Mr. Jung's affidavit because *for if it is true then for a light grouting depth 23.5m, light grouting quantity should be reasonably more than 4 million m^3 (DSM 1,798,586 m^3 / DSM Thickness 10.0m x Light grouting depth 23.5m = Light grouting 4,226,677 m^3).*

[original emphasis in bold; emphasis added in italics]

56 In my view, it is unnecessary to decide whether the Sambo Project involved a similar depth or not. Even if it did, the Sambo Quotation would just show one instance of a lower rate ($5/$m^3$) than the Two Quotations ($21.50/$m^3$ and $23.50/$m^3$). That is plainly insufficient to show that the Two Quotations were not reflective of the market rate. Rather, it simply indicates that the parties to the Sambo Project had managed to negotiate for a lower rate.

57 Indeed, the defendant had quoted a much higher rate of $35/$m^3$ for light grouting works in another tender for Tuksu E&C Pte Ltd (the "Tuksu Tender"). The defendant submits that this higher rate shows that the applicable rate for light grouting works would depend on the nature of the works needed for the project.[note: 54] However, the plaintiff submits that the rate quoted in the Tuksu Tender cannot be relied upon. According to the plaintiff, the project for the Tuksu Tender (the "Tuksu Project") has main grouting rates that are more than two times that of the present Project, which shows that the ground improvement works required for these two projects are dissimilar. In contrast, the works for the Project and the Sambo Project are comparable because the DSM main grouting rates are similar.[note: 55]

58 Again, the plaintiff's submission is unmeritorious. Even if it is the case that the works for the Project and the Sambo Project are similar but the applicable rates for light grouting works are dissimilar, that does *not* imply that there is fraud in the present case. Construction agreements are bespoke transactions. The agreed rate for light grouting works in every tender depends not only on *the nature of the works* needed for the project at hand, but also *the parties' bargaining power* in the transaction. The rates from the Two Quotations, the Sambo Quotation, the agreement with GS Engineering and the Tuksu Tender range from as low as $5/$m^3$ to as high as $35/$m^3$. This shows that the rate for light grouting works can vary significantly depending on the project at hand. The difference in rates does not by itself evidence any impropriety in any of the transactions. Moreover, as stated in *Facade Solution* at [35], "[t]here must be compelling evidence of fraud before the court". It must *a fortiori* follow that the court cannot impute fraud solely based on a difference in rates across tenders.

59 Overall, the plaintiff's evidence in support of its claim is speculative at best. I reiterate that proof of fraud demands a high threshold to be met. On the facts, I find that the plaintiff is unable to prove that the Two Quotations were inauthentic and false.

60 Moreover, for the reasons below, it is apparent that the plaintiff's submission was a mere afterthought.

61 First, pursuant to s 15(3) of the SOPA, the allegation that the Two Quotations were not genuine should have been raised in the plaintiff's payment response, if this was indeed true. This was not done. Furthermore, as noted by the adjudicator at [164] of the AD, the plaintiff did not proffer

other alternative rates during the adjudication proceedings. The plaintiff could have also written to Ground Mix and Segang much earlier if it had suspected that the Two Quotations had departed egregiously from what it perceived to be the market rate.

62 Second, it is obvious that the quotations of the Sambo Project and GS Engineering are important to the plaintiff. The plaintiff could have sought the quotations from GS Engineering and the Sambo Project earlier for these quotations to be included in its payment response. If it had done so, these quotations, which were crucial to the plaintiff's case in AA 108, could have been considered by the adjudicator. Yet, glaringly, this was not done.

63 I note that on the authority of *Facade Solution*, evidence of fraud could be adduced at any time. However, *Facade Solution* does not preclude the court from making appropriate inferences from the plaintiff's conduct. To begin with, I have found that the evidence that the plaintiff relies on to support the purported fraud is speculative at best (see [59] above). Next, as elucidated above at [61]–[62], this evidence should have been adduced in the payment response for the adjudicator's consideration. Considering the plaintiff's conduct in totality, it suggests that the plaintiff is mounting a last-ditch attempt at setting aside the AD on the purported allegation of fraud. It is clear that the plaintiff failed to adduce its tenuous evidence during the adjudication proceedings and now attempts to adduce them in order to set aside the AD, couching them as indicative of fraud. The plaintiff's present application to set aside the AD on the ground of fraud is simply a mere afterthought.

(C) The third element

64 I turn now to the third element of Step 1 of the *Facade Solution* test. The plaintiff has to prove that the defendant knew or ought to reasonably have known the facts in question to be false.

65 The plaintiff relies heavily on the Sambo Quotation in its submission for this issue. As regards the Sambo Quotation, the defendant tendered the rate of $\$5/m^3$ for the Sambo Project on 12 April 2021. This was about the same time the defendant served Payment Claim 12 on the plaintiff on 20 April 2021 wherein the defendant claimed the rate of $\$18.90/m^3$. Hence, the plaintiff submits that it is inconceivable that the defendant genuinely believed that the Two Quotations of $\$21.50/m^3$ and $\$23.50/m^3$ were reflective of the market rate.[note: 56]

66 In my analysis for the second element of Step 1 (see [53]–[56] above), I have placed little weight on the Sambo Quotation. It did not show that the Two Quotations veered wildly off what the market rate was. Having made this finding, it follows that the defendant could not have known that the Two Quotations did not reflect the market rate. Moreover, as I have also noted above, the defendant had quoted a much higher rate of $\$35/m^3$ for the Tuksu Tender. It is thus difficult to believe that the defendant would know that a comparatively *lower* rate of $\$18.90/m^3$ for the Project would be *higher* than the market rate.

67 Therefore, I find that the third element of Step 1 is not satisfied.

(D) The fourth element

68 The last element of Step 1 of the *Facade Solution* test requires the plaintiff here to have no subjective knowledge or actual knowledge of the true position throughout the adjudication proceedings.

69 The plaintiff submits that during the time of the adjudication proceedings, it was unaware of:

(a) Ground Mix's and Segang's company profiles; and (b) these two contractors' inability to substantiate the Two Quotations with market evidence. The plaintiff also emphasizes the Court of Appeal's holding in *Facade Solution* at [33] that "[w]here it is established that an AD is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence".[note: 57] Hence, it is immaterial that the plaintiff could have written to Ground Mix and Segang earlier to request them to provide the basis of the Two Quotations.

70 As I have stated earlier (see [61]–[63] above), the plaintiff's allegation of fraud is a mere afterthought as there is no evidence to support it. In addition, I place weight on the plaintiff's *acceptance* of the Two Quotations as genuine during the adjudication proceedings. Indeed, as stated above (see [39] above), the defendant argued that the Two Quotations were reflective of the market rate in its reply submissions in the adjudication proceedings (at [37(g)])[note: 58] which, for convenience, is reproduced below:

> Finally, [the defendant] highlights 2 quotations that was given by other grouting companies which have quoted for a rate of $21.50/m^3$ and $23.50/m^3$. In the premises, the rate of $18.90/m^3$ is clearly fair and reasonable as compared to the market rate.

The Two Quotations were attached to the reply submissions[note: 59] and forwarded to the plaintiff at the adjudication proceedings. Hence, the plaintiff knew that the defendant was going to rely on the Two Quotations as a guide to the market rate for light grouting works in the hearing for the AD. Yet, the plaintiff did not raise any objection to the authenticity of the Two Quotations after being put on such notice.[note: 60] I reiterate that the plaintiff's lack of objection was recognised by the adjudicator in the AD (at [164]), which is reproduced below:

> As stated at [151] above, it is salient to mention that [the plaintiff] neither disputed the applicable rate for the additional light grouting works nor did it provide an alternative rate for assessing the additional light grouting works in PR 12. Nonetheless, it orally submitted at the 2nd Adjudication Conference that the applicable rate for the additional light grouting works should be "*pro-rated or benchmarked against the rate used for "DSM Grouting" works*" (see paragraph 56 of the AR Submissions). It further orally submitted at the 2nd Adjudication Conference that light grouting works are different from both DSM and trench grouting works in terms of grouting capacity (or cement dosage) and sought on this basis, to derive an applicable rate for the light grouting works by comparing the grouting capacity and/or efficiency of the light grouting works with that of the DSM Grouting works (See paragraphs 58-62 of the AR Submissions).
>
> [emphasis in original]

As can be seen from the above, the nature of the plaintiff's objection was that it proffered a better way to calculate the applicable rate for the Additional Light Grouting Works. The plaintiff did not submit that the Two Quotations had deviated acutely from the market rate and thus should not be used, despite having full knowledge that the Two Quotations were in the defendant's submission. The plaintiff must, therefore, have acquiesced to this submission by the defendant, *viz*, that the Two Quotations did reflect the market rate. Furthermore, the ACRA searches which the plaintiff had recently done to impugn Ground Mix's and Segang's business standing – and therefore the authenticity of the Two Quotations – could have easily been done for the purpose of the adjudication proceedings. But this was not done. Hence, I find that the plaintiff accepted and, therefore, knew that the Two Quotations were genuine during the adjudication proceedings.

71 Having implicitly conceded that the Two Quotations did reflect the market rate, the plaintiff's subsequent attempts at contacting Ground Mix and Segang and impugning their business standing are nothing other than a last-ditch attempt at finding a ground to set aside the AD.

72 The plaintiff additionally submits that the defendant had attempted to conceal the documents relating to the Sambo Quotation. This submission is unmeritorious and I place little weight on the Sambo Quotation as evidence that the Two Quotations did not reflect the market rate (see [53]–[56] above).

73 Therefore, I find that the fourth element of Step 1 of the *Facade Solution* test is not satisfied. The plaintiff has not proven any of the elements in Step 1.

(2) Step 2 of the *Facade Solution* test

74 I turn now to examine if the plaintiff has proven Step 2 of the *Facade Solution* test. This concerns whether the facts in question were material to the issuance of the AD, *ie*, if there is a real prospect that had the adjudicator known the truth, the outcome of the AD might have been different.

75 I have found earlier that the adjudicator did not even rely primarily on the Two Quotations in arriving at his decision (see [40–[44] above). To recapitulate, this was because the adjudicator had decided that since the Additional Light Grouting Works were similar to the additional trench grouting works, their applicable rates should be the same. This was the ground that was relied on by the adjudicator in deciding this issue. It must follow that even if the adjudicator had known that the Two Quotations were not reflective of the market rate for light grouting works, the outcome of the AD would have been the same.

76 Therefore, I find that Step 2 of the *Facade Solution* test is not satisfied.

Conclusion on setting aside the AD

77 For the above reasons, I find that the plaintiff has not proven on a balance of probabilities that the *Facade Solution* test is satisfied on the present facts. Hence, the AD will not be set aside on the ground of fraud pursuant to s 27(6)(*h*) of the SOPA. Accordingly, the Order for the enforcement of the AD stands.

Stay of enforcement of the AD

78 The plaintiff seeks a stay of enforcement of the AD and the Order as it claims that any monies paid to the defendant would not be recovered if ARB 210 is resolved in the plaintiff's favour.

The applicable law

79 In *W Y Steel Construction v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [70], the Court of Appeal held that a stay of enforcement of an adjudication determination "may ordinarily be justified" where:

> (a) there is clear and objective evidence of the successful claimant's actual present insolvency; or
>
> (b) where the court is satisfied on a balance of probabilities that if the stay were not granted, the monies 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.

80 In *CEQ v CER* [2020] SGHC 192 ("*CEQ*"), the court clarified that the two limbs of the above test are disjunctive. The court stated as follows (at [10]):

> I pause to note that the above are alternative situations where a stay should be granted. In the course of arguments, the Respondent sought to argue that these situations were two limbs of a test that are "not entirely disjunctive" – in that the first limb of the test was a "useful *indicator*" of whether the second has been fulfilled. I am unable to agree with this interpretation. I accept that the inquiry under the second situation is broader in nature and will necessarily encompass instances where the successful claimant's actual present insolvency is established. However, where a party seeking a stay of enforcement is able to produce clear, objective evidence of the other party's *actual present* insolvency, that suffices to give pause to the enforcement process of the adjudication determination. There is no need to produce further evidence of the possibility of non-recovery, as the term "useful indicator" would suggest. Conversely, even where actual present insolvency is not established, it should remain open to a party seeking a stay to produce some other evidence to convince the court of its case in accordance with the second situation above. To hold otherwise would unduly tip the balance in favour of a successful claimant far beyond what was envisioned by the Court of Appeal in [*W Y Steel*].
>
> [emphasis in original]

81 The court in *CEQ* further elucidated (at [11]) that the second limb of the *W Y Steel* test does not require "a closed category of specific *financial* events to occur or be present before the court grants the relief of a stay" [emphasis in original]. Rather, the second limb "ought to be more properly recognised as a guiding principle that is to be applied in every case that comes before the court: the court must countenance and ameliorate *any* potential for impossibility of recovery by a successful appellant, *ie*, a respondent who loses at first instance but succeeds on appeal" [emphasis in original]. Hence, instances where a stay should be granted under the second limb include: (a) circumstances indicating "a real risk of dissipation of the disputed funds awarded to the [successful claimant]"; and (b) situations where there is "any *prima facie* evidence or suspicion that the claimant had been using its claim as an abuse of process".

82 The court in *W Y Steel* added that the two limbs are not the only considerations before the court in deciding whether to grant a stay (at [70]):

> Further, … 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.

My findings

(1) Should a stay of enforcement be granted?

83 To begin with, the defendant has declined to furnish (a) its bank account statements for the last six months showing its cash balance; (b) any relevant transactions showing that it has ongoing work and receivables; (c) project documents for any ongoing projects including contracts, correspondence, and progress claims and certifications; (d) annual returns and financial statements for the financial year ending 30 June 2020; and (e) financial statements for the financial year ending

30 June 2019.[note: 61] The defendant claims that these documents are confidential.[note: 62] Yet, these documents would have been the most relevant to clearly show that the defendant is presently solvent or that it has ongoing work and receivables.

84 In *CEQ*, the court was faced with the same situation where the respondent in the stay application claimed that the evidence of its bank account was confidential. Finding the respondent's submission on confidentiality to be unmeritorious, the court stated as follows (at [21]–[22]):

> 2 1 ***The simplest way in which the Respondent can prove that it has ongoing work and receivables would be to adduce evidence of its bank account and the relevant transactions before the court*** **. In the event that it is *unable to do so for valid reasons, the Respondent could simply state those reasons on affidavit***. Not only was this a point that I had made repeatedly to the Respondent, I had given ample opportunity to it to provide the evidence or explanation. Despite this, it stubbornly maintains its position and repeatedly refuses to either disclose the information or to even explain its refusal to do so.
>
> 22 Instead, the Respondent sought to rely on the English case of *Farrelly (M & E) Building Services Ltd v Byrne Bros (Formwork) Ltd* [2013] Bus LR 1413 ("*Farrelly*"), for the proposition that "there is no general obligation on a party when seeking enforcement to disclose to the other party confidential information of its financial and business position so that the other party can consider whether there are grounds for applying for a stay of any judgement" (see *Farrelly* at [91]). This argument, however, quite simply misses the point. ***The issue is not whether the Respondent has any obligation to disclose the information. Rather, if it chooses not to do so, or indeed provide any explanation as to why it does not disclose, then it fails to convince the court that it has any ongoing business or receivables***. Further, the proposition in *Farrelly* relates to disclosure to *another party* in the proceedings. In such instances, it is understandable that one may desire to keep information confidential *vis-à-vis* others in the industry. Such considerations do not apply here.
>
> [original emphasis in italics; emphasis added in bold italics]

85 On the present facts, I note that the defendant only sought to explain why it did not file its annual returns for the year 2020.[note: 63] It did not explain why it chose not to provide the plaintiff with its bank account statements. Following the analysis in *CEQ* above, the defendant's failure to do so weighs against the finding that the defendant has ongoing business or receivables.

86 Next, the defendant does not have fresh construction projects presently.[note: 64] It is thus without a steady stream of income at present. There is therefore reason to suspect the defendant's financial health.

87 However, the defendant contends that its present lack of construction projects was caused by the plaintiff. The defendant claims that it was contractually bound until the plaintiff's repudiation of the Project to "only undertake" the Project for the contracted period, *ie*, 1 July 2019 to 30 September 2024.[note: 65] In response, the plaintiff submits that the Subcontract "was never an exclusive contract and [the defendant] was always at liberty to take on other works".[note: 66] Indeed, the defendant did not refer the court to a specific clause in the Subcontract prohibiting it from undertaking additional projects during the contracted period. Rather, Mr Park, the sole director of the defendant, stated in his affidavit of evidence-in-chief that "[the plaintiff] is fully aware that [the defendant], being [a] small construction company, is solely dependent on [the plaintiff] for payment/cash flow and will not be able to undertake other projects whilst the [Subcontract] was in

progress".[note: 67] Hence, I find that the defendant's submission in this regard is unmeritorious.

88 Moreover, there is evidence that the defendant is selling its remaining equipment. Indeed, the defendant claims to have two sets of DSM machines and there is evidence that the defendant has sold one set and is attempting to sell the other.[note: 68] While the defendant claims to have two sets of DSM machines,[note: 69] only one set is stored at the yard where it stores its unused equipment[note: 70] and there is none at the Project site.[note: 71] By the defendant's own admission, DSM machines are expensive.[note: 72] There is, therefore, reason to suspect that the defendant is liquidating its assets to raise cash due to its poor cash flow.

89 Also, the defendant is a foreign company with two Korean shareholders, Mr Park and Mr Hong.[note: 73] Mr Park is the sole director of the defendant.[note: 74] The defendant does not deny that Mr Hong has returned to Korea with no plans to return to Singapore.[note: 75] As I have stated earlier at [88], there is evidence that the defendant is selling its remaining equipment. This suggests a possible plan for both the shareholders to exit the defendant, despite the defendant's contention that Mr Hong left due to personal reasons.[note: 76] Hence, there is a real risk that the defendant's other shareholder and sole director, Mr Park, may also return to Korea after the defendant has received the Adjudicated Sum and then wind up the defendant subsequently.

90 Although there is insufficient clear and objective evidence of the defendant's actual present insolvency, there are indications that the defendant is in some substantial degree of financial distress. Hence, the first limb of the *W Y Steel* test may not be satisfied.

91 However, I am persuaded that if the stay were not granted, the monies paid to the defendant, *ie*, the Adjudicated Sum, would not ultimately be recovered if the dispute between the parties were finally resolved in the plaintiff's favour in ARB 210. The evidence indicates, on a balance of probabilities, that its sole foreign director intends to liquidate the company and its foreign shareholder, Mr Hong, had left Singapore. This would cause the plaintiff grave difficulties in recovering monies that could be owed to it when ARB 210 is concluded in its favour. Both parties had estimated that the arbitration proceedings would take about a year to a year and a half to complete. The second limb of the *W Y Steel* test is therefore satisfied.

92 For the above reasons, a stay of enforcement of the AD is appropriate. However, I shall now consider whether the stay of enforcement should apply to the entire Adjudicated Sum.

(2) Should a stay of enforcement extend to the entire Adjudicated Sum?

93 Having found that a stay of enforcement of the AD should be granted, I turn to examine if the entire Adjudicated Sum should be withheld from the defendant, or a partial release of this sum is warranted.

94 To recapitulate, the plaintiff submits that the whole of the Adjudicated Sum (*ie*, $2,428,690.04) should be withheld. The defendant submits that: (a) a stay of enforcement should not be granted; or (b) in the alternative, if such a stay is granted, the undisputed portion of the Adjudicated Sum (*ie*, $1,205,565.01) should be released to it.

95 In my analysis below, I shall refer to the breakdown of the relevant sums in the table below ("Table 1"):

S/N	Description	Quantum
1.	Adjudicated Sum	$2,428,690.04
2.	Less undisputed amount due to defendant from AD (*ie*, amount that plaintiff does not dispute in ARB 210)	– $1,205,565.01
3.	**Remainder of Adjudicated Sum (*ie* , part of the disputed amount in ARB 210)**	**$1,223,125.03**
4.	Less plaintiff's claim for backcharges	– $1,232,599
5.	Less loss arising from defendant's wrongful repudiation	– Damages to be assessed
Amount due to plaintiff not covered by Adjudicated Sum if plaintiff succeeds in ARB 210		– ($9,473.97 + damages to be assessed)

96 The breakdown in Table 1 stands in contradistinction to the plaintiff's breakdown (see [19] above), which is reproduced in a simplified version here ("Table 2"):

S/N	Description	Quantum
1.	Undisputed amount due to defendant from AD (*ie*, amount that plaintiff does not dispute in ARB 210)	$1,205,565.01
2.	Less plaintiff's claim for backcharges	– $1,232,599
3.	Less loss arising from defendant's wrongful repudiation	– Damages to be assessed
Amount due to plaintiff if plaintiff succeeds in ARB 210		– ($27,033.99 + damages to be assessed)

97 Table 1 and Table 2 provide breakdowns of sums due to the plaintiff in the case where the plaintiff succeeds in ARB 210. The difference is that Table 1 concerns the situation where the AD is *not* set aside while Table 2 concerns the situation where the AD *is* set aside.[note: 77]

98 Table 1 shows the situation where the court only orders the remainder of the Adjudicated Sum (S/N 3 of Table 1) to be withheld from the defendant. In other words, the court grants a release of the undisputed sum of $1,205,565.01 (S/N 2 of Table 1) to the defendant.

99 In Table 2, the plaintiff sets off the sums pertaining to its claim with the *undisputed* portion of the Adjudicated Sum (*ie*, the amount that it does not dispute in ARB 210).

100 The plaintiff submits that the court should adopt its breakdown in Table 2. It claims that because there is a net amount due to the plaintiff in this situation, the court should grant a stay of enforcement for the entirety of the Adjudicated Sum. This argument is unmeritorious. As I have stated earlier at [97], the plaintiff's breakdown in Table 2 is only relevant where the AD is set aside. Here, I have found the AD should *not* be set aside (see [77] above).

101 I thus proceed to examine the situation represented by Table 1.

102 In my judgment, the crucial point to note is that if the plaintiff succeeds in ARB 210, it is entitled to claim the sums due for backcharges and damages (S/N 4 and S/N 5 of Table 1) from the remainder of the Adjudicated Sum (S/N 3 of Table 1). This is because the Adjudicated Sum has been paid by the plaintiff into the court. Where a release of the undisputed sum (S/N 2 of Table 1) to the defendant is granted, the remainder of the Adjudicated Sum (S/N 3 of Table 1) will *continue to be held by the court* till ARB 210 is concluded. Hence, the plaintiff's concerns regarding the defendant's inability to pay the possible sums due to it falls away.

103 Hence, I am satisfied that a partial release of the Adjudicated Sum, *ie*, the release of the undisputed sum of $1,205,565.01, to the defendant should be ordered as the plaintiff does not deny that it owes the defendant this sum. Accordingly, I grant a partial stay of enforcement of the AD.

Injunction against winding up application

104 I turn now to the last issue regarding the injunction to restrain the defendant from commencing a winding up application against the plaintiff pending the disposal of the proceedings in ARB 210.

105 It is unnecessary to examine whether the defendant has a legal basis to commence such an application against the plaintiff. Since the plaintiff has already paid the Adjudicated Sum into court, there is simply no reason for the defendant to commence a winding up application against the plaintiff.

106 Furthermore, since I have granted a partial stay of enforcement of the AD and the Order, it would be inimical to the defendant's interests to commence a winding up application against the plaintiff. After all, the defendant would need the plaintiff to participate in ARB 210 for a final determination as to whether the defendant is entitled to any part of the Adjudicated Sum.

107 Hence, I do not make any order for the injunction sought.

Conclusion

108 For the above reasons, I allow the plaintiff's claim in part. I summarise my findings and orders as follows:

(a) As I have found that the plaintiff has not proven that the AD should be set aside on the ground of fraud pursuant to s 27(6)(*h*) of the SOPA, I do not set aside the AD and the Order for its enforcement.

(b) I order a partial stay of enforcement of the AD pending the disposal of the proceedings in ARB 210, *ie*, the release of the undisputed sum of $1,205,565.01 to the defendant. If the partial stay is not granted, the Adjudicated Sum paid to the defendant may not ultimately be recovered if the dispute between the parties is finally resolved in the plaintiff's favour. However, if the plaintiff succeeds in ARB 210, it can recover the sums due from the remainder of the Adjudicated Sum, *viz*, $1,223,125.03, which continues to be held by the court. Hence, I order that the plaintiff pays the defendant the undisputed sum of $1,205,565.01 from the amount paid into court.

(c) Since there is no reason for the defendant to commence a winding up application against the plaintiff as the undisputed sum will be released from the Adjudicated Sum the plaintiff has paid into court, I make no order for an injunction against the defendant to prevent it from doing so.

109 I shall hear parties on the issue of costs.

[note: 1]Plaintiff's Written Submissions ("PWS") at para 3.

[note: 2]Defendant's Written Submissions ("DWS") at para 10.

[note: 3]PWS at paras 4 to 5.

[note: 4]PWS at para 23.

[note: 5]HC/OS 831/2021.

[note: 6]PWS at p 4 para 1.

[note: 7]DWS at para 5.

[note: 8]DWS at para 6.

[note: 9]PWS at para 27.

[note: 10]PWS at para 25.

[note: 11]PWS at p 4 para 3; DWS at para 7.

[note: 12]DWS at para 9.

[note: 13]DWS at paras 10 and 14.

[note: 14]DWS at para 14.

[note: 15]DWS at para 33; PWS at para 4.

[note: 16]PWS at para 4.

[note: 17]PWS at para 23.

[note: 18]PWS at para 24.

[note: 19]PWS at paras 7 and 8.

[note: 20]1st Affidavit of Jung Kyung Su at p 566.

[note: 21]PWS at para 8.

[note: 22]1st Affidavit of Jung Kyung Su at p 440.

[note: 23]PWS at para 9.

[note: 24]PWS at paras 10 and 11.

[note: 25]PWS at para 12.

[note: 26]PWS at para 24.

[note: 27]PWS at para 33.

[note: 28]PWS at para 14.

[note: 29]DWS at para 33(c)(v)(3).

[note: 30]1st Affidavit of Jung Kyung Su at p 70.

[note: 31]DWS at paras 33(c)(iii), 34, 59 and 60.

[note: 32]DWS at para 60(e).

[note: 33]DWS at para 60(e)(1)–(3).

[note: 34]DWS at para 91.

[note: 35]DWS at paras 92 and 93.

[note: 36]DWS at para 94; 1st Affidavit of Jung Kyung Su at p 67.

[note: 37]DWS at para 97.

[note: 38]DWS at para 99.

[note: 39]DWS at para 102.

[note: 40]DWS at paras 104 and 105.

[note: 41]DWS at paras 106 and 107.

[note: 42]DWS at para 51(2).

[note: 43]1st Affidavit of Jung Kyung Su at para 35 and p 404.

[note: 44]1st Affidavit for Jung Kyung Su at pp 564 to 566.

[note: 45]PWS at paras 46 and 47.

[note: 46]PWS at para 48.

[note: 47]PWS at para 49.

[note: 48]PWS at para 51.

[note: 49]PWS at para 39.

[note: 50]DWS at para 69(d).

[note: 51]3rd Affidavit of Jung Kyung Su at para 8.

[note: 52]2nd Affidavit of Park Jaehyun at para 7(c) and p 8.

[note: 53]2nd Affidavit of Park Jaehyun at para 7(d).

[note: 54]DWS at para 69(d)(5).

[note: 55]PWS at paras 68 to 69.

[note: 56]PWS at paras 52 and 53.

[note: 57]PWS at paras 59 to 63.

[note: 58]1st Affidavit of Jung Kyung Su at para 35 and p 404.

[note: 59]1st Affidavit of Jung Kyung Su at pp 418 to 421.

[note: 60]DWS at para 81.

[note: 61]1st Affidavit of Park Jaehyun at p 89; PWS at paras 76(e) and 77.

[note: 62]DWS at para 48.

[note: 63]1st Affidavit of Park Jaehyun at para 76.

[note: 64]DWS at paras 94 and 96.

[note: 65]DWS at para 94.

[note: 66]PWS at para 27.

[note: 67]1st Affidavit of Park Jaehyun at para 69(a).

[note: 68]PWS at para 76(c).

[note: 69]1st Affidavit of Park Jaehyun at para 10.

[note: 70]1st Affidavit of Jung Kyung Su at para 60; 1st Affidavit of Kim Dong-Hwi at para 7; DWS at para 100.

[note: 71]1st Affidavit of Jung Kyung Su at pp 306 and 309.

[note: 72]DWS at para 101.

[note: 73]PWS at para 76(f).

[note: 74]PWS at para 76(d).

[note: 75]PWS at para 76(f).

[note: 76]DWS at para 106.

[note: 77]PWS at para 33.