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

[2022] SGHC 11

Originating Summons No 790 of 2021
(Summons No 4141 of 2021)

Between

Backho (S) Pte Ltd

… *Applicant*

And

KSE Marine Works Pte Ltd

… *Respondent*

JUDGMENT

[Building and Construction Law] — [Dispute resolution] — [Adjudication]
[Building and Construction Law] — [Dispute resolution] — [Limitation of actions]
[Building and Construction Law] — [Scope of works] — [Variations]
[Contract] — [Contractual terms]
[Contract] — [Formation]
[Contract] — [Variation]
[Civil Procedure] — [Extension of time]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Backho (S) Pte Ltd
v
KSE Marine Works Pte Ltd

[2022] SGHC 11

General Division of the High Court — Originating Summons No 790 of 2021
(Summons No 4141 of 2021)
Tan Siong Thye J
29 November 2021

17 January 2022 Judgment reserved.

Tan Siong Thye J:

Introduction

1 In Summons No 4141 of 2021, the applicant, KSE Marine Works Pte Ltd ("KSE"), seeks to set aside the Adjudication Determination (the "AD") dated 27 July 2021 in Adjudication Application No SOP/AA 165 of 2021 ("AA 165") pursuant to s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). At the same time, KSE also seeks to set aside the court order granting the respondent, Backho (S) Pte Ltd ("Backho"), leave to enforce the AD in Originating Summons No 790 of 2021.

2 KSE had filed the present application to set aside the AD four days after the stipulated 14-day period under O 95 r 2(4) of the Rules of Court (Cap 322,

R 5, 2014 Rev Ed) (the "ROC").[1] KSE argues that the 14-day statutory period to set aside the AD is not a mandatory deadline but merely an advisory. Thus, KSE is not prohibited from lodging the application to set aside the AD even though it had exceeded by 4 days from the prescribed period of 14 days. In the alternative, if the 14-day period is a mandatory deadline, KSE seeks leave for an extension of time to lodge the application to set aside the AD.

Background to the dispute

3 KSE and Backho are both companies incorporated in Singapore.[2] KSE is in the marine construction business. Backho's primary business activities are the rental of excavation equipment, operators, and related activities. At the material time, Mr Lee Chung Hee ("Mr Lee") was an Executive Director of KSE[3] while Mr Nam Kyuhyun ("Mr Nam") was the Managing Director of Backho.[4]

4 KSE was engaged by Hyundai Engineering & Construction Co Ltd ("Hyundai") as a subcontractor for the project known as "Reclamation and Marine Works at Tuas Western Coast" (the "Project").[5]

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1 Applicant's Written Submissions ("AWS") at para 124(a).

2 Affidavit of Lee Chung Hee dated 6 September 2021 ("LCH-1") at para 6; Affidavit of Nam Kyuhyun dated 16 September 2021 ("NK") at para 9.

3 LCH-1 at para 1.

4 NK at para 1.

5 AWS at para 5; Respondent's Bundle of Documents ("RBOD") at p 283 para 4.

The quotations

5 Following a period of negotiations,[6] on 30 August 2019, Backho sent to KSE a quotation titled "Re: Quotation for: Rental of Heavy Equipment" (Ref: QT/19/08/161/R1) for the rental of a "Super Long Arm Excavator", an operator and an option of either (a) a grab attachment or (b) a sieving bucket (the "30 August 2019 Quotation").[7] KSE opted for the second option[8] and sometime in September 2019, Backho began the rental of the Super Long Arm Excavator with a sieving bucket and an operator.[9]

6 Following another period of negotiations, Backho submitted another quotation to KSE on 4 February 2020, titled "Re: Quotation for: Rental of Heavy Equipment (Tuas West Coast)" (Ref: QT/20/02/025) (the "First 4 February 2020 Quotation").[10] This quotation provided for the rental of excavator equipment (including one Super Long Arm Excavator), dump trucks, LED lighting tower and automotive diesel oil, together with operators, a driver, four banksmen and two site supervisors.[11]

7 On the same day, upon the request from KSE, Backho also sent KSE another quotation, titled "Re: Quotation for: Transportation of Dredging Sand Material (Tuas West Coast)" (Ref: QT/20/02/026) (the "Second 4 February

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6 AWS at para 6; Respondent's Written Submissions ("RWS") at para 7.

7 LCH-1 at p 33; RBOD at para 6.

8 RWS at para 9.

9 AWS at para 7.

10 LCH-1 at para 36; AWS at para 9; NK at para 15.

11 RBOD at p 283 para 6; RBOD at p 12.

2020 Quotation").[12] The quotation stated that it was to "Provide Transportation including Manpower, Equipment, Diesel for Dredging Sand (<300m)".

8 Both the 30 August 2019 Quotation and the First 4 February 2020 Quotation provided for the supply and rental of equipment and manpower, calculated on a time-based rate (*ie*, cost per unit of time).[13] In contrast, the Second 4 February 2020 Quotation was premised on a volume-based rate (*ie*, cost per cubic metre of sand). It stipulated a unit rate of S$1.90/$m^3$ of sand transported, at an estimated guaranteed quantity of 1,000,000m^3.[14]

9 All three quotations bore Mr Nam's signature and KSE's company stamp. However, they were not signed by KSE. Nevertheless, it was not disputed that KSE had received these quotations.[15]

The Alleged Oral Agreement

10 KSE claims that, upon receiving the First 4 February 2020 Quotation, Mr Lee informed Mr Nam that this quotation was unacceptable. KSE allegedly took issue with how the rental rate of the equipment was calculated: it wanted the rate to be calculated by the volume of work done rather than by the time rented.[16] KSE claims that this was the reason that the Second 4 February 2020 Quotation was sent on the same day. As stated above (at [8]), the Second 4 February 2020 Quotation stipulated a unit rate of S$1.90/$m^3$ of sand transported for an estimated guaranteed quantity of 1,000,000m^3. It was

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12 LCH-1 at p 38.

13 RBOD at p 283 para 7; LCH-1 at pp 33 and 36.

14 LCH-1 at p 38.

15 RBOD at p 284 para 8.

16 LCH-1 at para 19.

therefore premised on a volume-based rate (*ie*, cost per cubic metre of sand). In contrast, both the 30 August 2019 Quotation and the First 4 February 2020 Quotation provided for the supply and rental of equipment and manpower, calculated on a time-based rate (*ie*, cost per unit of time).[17]

11 According to KSE, after receiving the Second 4 February 2020 Quotation, Mr Lee submitted the rate of S$1.90/m^3 for an estimated guaranteed quantity of 1,000,000m^3[18] to Hyundai, the main contractor of the Project.[19] Hyundai explained to Mr Lee that the rate was too high and negotiated for a rate of S$1.70/m^3. Hyundai and KSE agreed on this rate.[20] Mr Lee then told Mr Nam that KSE could not accept Backho's rate of S$1.90/m^3 since KSE had contracted to transport sand at S$1.70/m^3, *ie*, KSE would be making a loss at S$1.90/m^3. Mr Lee also allegedly told Mr Nam that Chuan Lim Construction Pte Ltd ("Chuan Lim") had offered a rate of S$1.45/m^3 for the same works. Mr Lee, therefore, proposed to Mr Nam for the transportation of the sand at a rate of S$1.50/m^3 (the "Agreed Volume Rate") and Mr Nam orally agreed (the "Alleged Oral Agreement"). Hence, the Alleged Oral Agreement was concluded shortly after the Second 4 February 2020 Quotation was rejected.

12 Backho denies that the Alleged Oral Agreement was concluded for the transportation of sand at a rate of S$1.50/m^3.[21] Hence, Backho continued to perform its obligations under the previously concluded contract as evidenced by the 30 August 2019 Quotation and the First 4 February 2020 Quotation: it

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17 RBOD at p 283 para 7; LCH-1 at pp 33 and 36.

18 NK at para 17.

19 LCH-1 at paras 21 and 22.

20 LCH-1 at p 102.

21 NK at para 17.

continued to supply KSE the stipulated equipment and manpower at the rates set out in those two quotations for the period of September 2019 to November 2019.[22]

Alleged goodwill payments

13 KSE claims that although the Alleged Oral Agreement was concluded, it nevertheless agreed out of goodwill to pay Backho on time-based rates for a limited period of time.[23]

14 KSE claims that on or around 20 March 2020, Backho started the sand transportation works in accordance with the Alleged Oral Agreement. However, due to the Circuit Breaker and COVID-19 measures, Backho's work did not continue for long and it had to discontinue its sand transportation works from 6 April 2020 to 19 September 2020.[24]

15 When the works started on or around 20 March 2020, the dredging volume was very low during that period. There was not enough volume of sand to be transported to justify using Backho's equipment on site. KSE then agreed, out of goodwill, to pay using time-based rates for a very limited duration.[25]

16 When the works resumed in September 2020, after the lifting of the Circuit Breaker, KSE informed Backho that the previous payments using time-

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[22] NK at para 18.

[23] LCH-1 at paras 27 and 28; AWS at para 14.

[24] AWS at para 13.

[25] AWS at para 14.

based rates would no longer apply since Backho had previously been paid only because of the issues with the low dredging quantity at that time.[26]

17 However, as the works had just resumed after the COVID-19 restrictions earlier, the dredged quantity was still low in late September. Based on further discussions between the parties in September 2020, KSE agreed to pay Backho using time-based rates for the rental of equipment from 20 September 2020 to the end of October 2020. KSE explained that this was because the works commenced from 20 September 2020, and it would take some time for Backho to mobilise its equipment before actually carrying out its works. If the works were charged on a volume basis, Backho would have earned significantly less revenue. Hence, KSE claims that it made payments to Backho on time-based rates purely out of goodwill, in view of the slower dredging works caused by the impact of the COVID-19 measures. In this way, Backho could still earn reasonable revenue in the interim.[27]

18 KSE claims that it informed Backho that starting from 1 November 2020, KSE would revert to paying Backho based on the previously Agreed Volume Rate of S$1.50/m^3 pursuant to the Alleged Oral Agreement.[28] KSE maintains that the Alleged Oral Agreement exists as Backho issued Progress Claim No 1 dated 5 January 2021 ("Progress Claim 1") using a *volume*-based rate for work done in November and December 2020.[29]

26 AWS at para 15.

27 AWS at para 16.

28 AWS at para 17.

29 AWS at para 18; LCH-1 at pp 44 to 46.

Subsequent events in 2021

19 KSE claims that Backho abandoned the contract on or around 14 February 2021.[30] Backho denies this allegation and claims that it was KSE that wrongfully repudiated their contract.[31]

20 Subsequently, on 27 February 2021, Backho issued a total of six invoices using a *time*-based rate under the 30 August 2019 Quotation and the First 4 February 2020 Quotation for work done in November 2020, December 2020, and January 2021.[32]

The AD

21 On 31 May 2021, Backho served on KSE a payment claim, "Payment Claim Reference No. 2" for work done from 30 August 2019 to 31 May 2020 ("Payment Claim 2").[33] The sum claimed therein was $1,102,042.21.

22 On 14 June 2021, KSE served its Payment Certificate in response to Payment Claim 2.[34] In it, KSE stated as follows:[35]

> We disagree with the rental rates applied to the work done, as parties did not agree to the quotations (ref: QT/19/08/161/R1 & QT/20/02/025). Instead, the verbal agreement was for a unit rate of S$1.50/m3 for the volume of sand transported by Backho. Further, Backho provided insufficient and inadequate manpower required during the entire operation, e.g. manager, supervisors, operator, banksman & etc.

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30 AWS at para 19.

31 RWS at para 32.

32 AWS at para 19; LCH-1 at para 51, pp 150 to 155.

33 NK at pp 78 to 80; RBOD at p 285 para 13.

34 NK at pp 84 to 102.

35 NK at p 84.

> Thus, KSE has the right to deduct the costs incurred that KSE has implemented to run the operation.

23 On 25 June 2021, Backho then lodged AA 165 based on KSE's non-payment in respect of Payment Claim 2.[36] In the adjudication proceedings, KSE argued, *inter alia*, that there was no "contract that [was] made in writing" under s 4(3) of the SOPA, for two reasons:[37]

(a) First, KSE submitted that the 30 August 2019 Quotation and the First 4 February 2020 Quotation were not signed by KSE because the terms of payment were not agreed to by KSE.

(b) Second, KSE contended that the parties had instead entered into an oral agreement "some time in February 2020" for work to be done by Backho at a volume-based rate of S$1.50/m^3 of sand transported. KSE submitted that this oral agreement does not fall within any of the categories in s 4(3) of the SOPA as a contract in writing. Thus, the SOPA is not applicable to oral contracts and Backho cannot enforce payments based on an oral contract via the SOPA.

24 The adjudicator, Mr Tay Peng Cheng (the "Adjudicator"), rendered the AD on 27 July 2021.[38] In the AD, he determined, *inter alia*, that KSE was to pay Backho a sum of $716,842.21 (inclusive of 7% GST) (the "Adjudicated Sum").[39] In coming to this decision, the Adjudicator found, *inter alia*, that:

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[36] AWS at para 23; RBOD at p 285 para 13.

[37] RBOD at p 295 para 54.

[38] RBOD at p 281.

[39] RBOD at p 282 para 3(a).

(a) Pursuant to s 4(3) of the SOPA, there was a single contract in writing between the parties, evidenced by the 30 August 2019 Quotation and the First 4 February 2020 Quotation. The First 4 February 2020 Quotation was an "amendment or variation" of the 30 August 2019 Quotation. He noted that "both quotations had referred to the Tuas West Coast project, and both were essentially for the "Rental of Heavy Equipment", which was also the subject matter of both quotations". Also, "[w]hile there were differences in the type of equipment and manpower described under the 2 quotations, both quotations were, at their core, for the supply of equipment and manpower for works to be carried out at the same Tuas West Coast site."[40]

(b) He was not convinced that "there was a meeting of minds as to the Alleged Oral Agreement, or that was indeed an oral agreement reached between the parties in February 2020 (or September 2020) under which [Backho] would be paid at a rate of $1.50/m^3$ of sand transported."[41]

25 On 5 August 2021, Backho applied by way of Originating Summons No 790 of 2021 to seek leave to enforce the AD.[42] The learned assistant registrar granted Backho's application on 6 August 2021 (the "Order").[43] Service of the Order was effected on 16 August 2021.[44]

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40 RBOD at p 307 para 71.

41 RBOD at p 301 para 64.

42 Originating Summons in HC/OS 790/2021.

43 HC/ORC 4416/2021.

44 AWS at para 124(a); 2nd Affidavit of Lee Chung Hee ("LCH-2") at para 38; RWS at para 50.

26 On 3 September 2021, KSE commenced the present application to set aside the AD and the Order.[45]

The parties' cases

The applicant's case

27 KSE argues that the AD should be set aside on two separate grounds:[46]

(a) First, the Adjudicator had exceeded his jurisdiction in determining the dispute because Payment Claim 2 and AA 165 were not based on a single contract but were based on two separate contracts instead.

(b) Second, the contract which concluded in February 2020 was "based on an oral contract" that is outside the purview of the SOPA (*ie*, the Alleged Oral Agreement).

28 On the first ground, KSE claims that the Adjudicator erred in finding that there was a single contract premised on and evidenced by the 30 August 2019 Quotation, which was then amended or varied by the First 4 February 2020 Quotation. KSE makes the following arguments in support:

(a) First, there was no variation clause in the 30 August 2019 Quotation.[47]

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45 Summons in HC/SUM 4141/2021.

46 AWS at para 2.

47 AWS at para 57.

(b) Second, the parties' conduct evinced an intention to enter into two separate contracts, because:[48]

(i) The 30 August 2019 Quotation and the First 4 February 2020 Quotation arose from separate discussions and they did not bear common references.[49]

(ii) Backho issued separate invoices for the 30 August 2019 Quotation and the 4 February 2020 Quotation.[50]

(c) Third, the works and equipment under the 30 August 2019 Quotation and the First 4 February 2020 Quotation were very different and distinct.[51]

29 On the second ground, KSE claims that there was an oral contract similar to the Second 4 February 2020 Quotation, except for the applicable volume rate, which was concluded after the First 4 February 2020 Quotation and the Second 4 February 2020 Quotation were issued. KSE claims that this is supported by: (a) the parties' correspondence at the material time;[52] and (b) Backho's conduct.[53] KSE further argues that the Adjudicator failed to adequately consider the timing and circumstances of KSE's payments of the invoices allegedly issued under the First 4 February 2020 Quotation.[54]

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[48] AWS at para 63.

[49] AWS at para 64.

[50] AWS at para 69.

[51] AWS at para 79.

[52] AWS at para 92.

[53] AWS at para 98.

[54] AWS at para 107.

30 KSE submits that, if any of the two grounds is proven, Backho's payment claim does not come within the provisions of the SOPA and the SOPA does not apply to this case. Thus, the Adjudicator had no jurisdiction to adjudicate Backho's payment claim.[55]

31 As noted above (at [26]), KSE had filed the present application on 3 September 2021. Pursuant to O 95 r 2(4) of the ROC, the stipulated 14-day period, which ran from the date of service of the Order on 16 August 2021, ended on 30 August 2021. KSE argues as follows:

(a) The stipulated 14-day period was not a mandatory deadline under O 95 r 2(4) of the ROC; hence, the application was not filed out of time.[56]

(b) In the alternative, if the 14-day period was a mandatory deadline, KSE should be granted an extension of time to file the present application.[57]

The respondent's case

32 Backho claims KSE's arguments as set out above on setting aside the AD and the Order are unmeritorious.

33 In respect of KSE's first ground, Backho submits that the Adjudicator had correctly found that the works pertaining to the 30 August 2019 Quotation and those pertaining to the First 4 February 2020 Quotation were not "vastly

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55 AWS at para 30.

56 AWS at paras 118 and 119.

57 AWS at para 120.

different". On the contrary, the latter was an extension of the former.[58] In this regard, the Adjudicator had correctly reasoned that:[59]

(a) the nature of the works required under the two quotations was similar;

(b) the works pertaining to the two quotations were for the same project; and

(c) KSE admitted that the excavator supplied under the 30 August 2019 Quotation was also used for the works which was the subject matter of the First 4 February 2020 Quotation. This showed the similarity of the works required under the two quotations.

34 Moreover, Backho submits that the Adjudicator also correctly reasoned that the following were not determinative that the 30 August 2019 Quotation and the First 4 February 2020 Quotation were two separate contracts:

(a) the fact that the First 4 February 2020 Quotation did not incorporate words like "variation" or "additional works";[60] and

(b) the difference in how the invoices pertaining to the 30 August 2019 Quotation and those pertaining to the First 4 February 2020 Quotation were numbered.[61]

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58 RWS at paras 44(c)(2).

59 RWS at paras 44(c)(2)(iv).

60 RWS at para 44(c)(2)(iii).

61 RWS at para 44(c)(2)(iv).

35 In respect of KSE's second ground, Backho submits that the Adjudicator had correctly found, after considering the extant evidence, that the Alleged Oral Agreement did not exist.[62]

36 Backho further claims that this application to set aside the AD is a disguised appeal against the Adjudicator's findings which is prohibited by SOPA. Thus, the present application was an abuse of the court's process and the application should be dismissed.[63]

37 Backho also argues that KSE's application was filed out of time and should be dismissed on that ground.[64]

Issues

Issues determined at the hearing

38 At the hearing on 29 November 2021, I heard the parties' arguments on the issues pertaining to whether KSE's setting aside application was filed out of time:

(a) First, did O 95 r 2(4) of the ROC provide that the setting aside application must be filed within 14 days of the service of the Order?[65]

(b) Second, if KSE's setting aside application was filed out of time, should KSE be granted an extension of time?[66]

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62 RWS at para 47(c).

63 RWS at paras 39, 42, 45 and 48.

64 RWS at para 54.

65 Transcript (29 November 2021) at p 2 lines 4 to 10.

66 Transcript (29 November 2021) at p 9 lines 16 to 18.

39 As regards the first issue, KSE submitted that the 14-day period stipulated in O 95 r 2(4) was merely advisory and therefore not mandatory.[67] Central to this submission was that O 95 r 2 provides that the debtor "may" apply to set aside an adjudication determination within 14 days of being served with the order granting leave to enforce the adjudication determination. KSE argued that the use of the word "may" as opposed to words such as "must" or "shall" meant that the 14-day period was not mandatory. If the debtor adheres to this timeline, he benefits from having an automatic stay of enforcement of the order granting leave. With the greatest respect, this is a misreading of the provision. The use of the word "may" connotes that the debtor can elect to set aside the AD within 14 days of being served of the order granting leave.[68] It did not mean that the debtor can choose to adhere to this stipulated period. Indeed, in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*"), the Court of Appeal referred to the 14-day period under O 95 r 2(4) as a "time limit" (at [29(d)]), which the court considered to be in keeping with the scheme of expeditious resolution under the SOPA. I therefore held that, since KSE's application was filed past the stipulated 14-day period, it was filed out of time and leave of the court was required to proceed with the application to set aside the AD.

40 As regards the second issue, KSE relied on the principles set out in *Frontbuild Engineering & Construction Pte Ltd v. JHJ Construction Pte Ltd* [2021] 4 SLR 862 ("*Frontbuild Engineering*") at [28]:

> … the relevant considerations in determining if an extension of time ought to be granted are the length of delay, the reason(s) for the delay, the merits of the intended application, and whether there was undue prejudice to the defendant if the extension of time was granted.

67 AWS at paras 115 to 119; Transcript (29 November 2021) at p 3 line 20 to p 9 line 15.

68 Transcript (29 November 2021) at p 8 lines 1 to 3.

41 KSE submitted on the above considerations in turn:

(a) With respect to the length of delay, the court in *Frontbuild Engineering* granted an extension of time for a two-month delay. *A fortiori*, an extension of time should be granted for the present four-day delay.

(b) With respect to the reason for the delay, the present delay was due to KSE's disruption in cashflow caused by the COVID-19 situation. Hence, KSE had difficulties in paying the Adjudicated Sum into court for its setting aside application.

(c) With respect to the merits of the setting aside application, KSE submitted that it has proffered several valid reasons in respect of its application, which form the subject matter of the present case.

(d) With respect to whether prejudice was caused to Backho, KSE submitted that Backho suffered no prejudice by the short delay of four days.

42 Backho submitted in response that: (a) KSE's explanation for its delay was inadequate; (b) it suffered prejudice in the form of further delays to the restoration of its cash flow; and (c) an extension of time would contravene the legislative intent of the SOPA.[69] Backho further submitted that *Frontbuild Engineering* should be distinguished because: (a) the court did not deal with the principle of temporary finality there; (b) the facts of that case involved a

[69] RWS at para 53.

defective order that granted leave to enforce the adjudication determination while the Order in the present case was validly served.[70]

43 At the hearing, I pointed out that the court in *Frontbuild Engineering* need not have articulated the principle of temporary finality where such a consideration was a given in the context of the SOPA.[71] Indeed, I should add here that if the court in *Frontbuild Engineering* was not advertent to the consideration of temporary finality, why did it consider the length and reasons for the delay in filing the setting aside application? I also pointed out that, on Backho's reasoning, the court would never be allowed to grant even an extension of a day.[72] This cannot be the case. I also add here that Backho's attempt at distinguishing *Frontbuild Engineering* is, with the greatest respect, unmeritorious. The court there ultimately found that the defect in the order was an "irregularity" falling within O 2 r 2(1) of the ROC and exercised its curative discretion to rectify that defect (at [27]). Hence, it is not necessary to examine if a defective order in that case is a distinguishing factor since the respondent's alleged distinguishing factor did not even exist.

44 In my view, in examining an application for an extension of time, the foremost considerations must be whether the applicant had a good reason for the delay and whether prejudice has been caused to the respondent. In the present case, I accepted that the delay of four days in filing the present application was due partly to the COVID-19 situation, which in turn created problems for KSE in raising the Adjudicated Sum to be paid into court which is a mandatory requirement. Moreover, having regard to the parties' submissions,

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70 Transcript (29 November 2021) at p 11 line 26 to p 12 line 17.

71 Transcript (29 November 2021) at p 12 lines 19 to 20.

72 Transcript (29 November 2021) at p 15 lines 12 to 13.

I found that there was no substantial prejudice to Backho as the delay was only for four days.[73] Hence, I granted KSE an extension of time.

45 I shall now turn to the issues to be determined in this judgment.

Remaining issues to be determined

46 The following issues are to be determined:

> (a) Is KSE's application to set aside the AD a disguised appeal against the Adjudicator's findings and therefore an abuse of the court's process?
>
> (b) Were there one or two contracts that the Adjudicator should have considered in AA 165?
>
> (c) Did the Alleged Oral Agreement exist?

My decision

The applicable law

47 Before examining the substance of the matter proper, I pause to note the Adjudicator's holding on the applicable law in the AD:[74]

> 13 It appears from the Adjudication Application that on 31 May 2021, [Backho] served on [KSE] its payment claim, specifically "Payment Claim Reference No. 2" (the "**Payment Claim**"), by hand and email. In the Payment Claim, [Backho] claimed the sum of S$1,102,042.21 (including GST) for work done in the reference period of 30 August 2019 to 31 May 2021. Such service of the Payment Claim appears to be in order, and no issue was also taken by [KSE] in relation to the service of the

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[73] Transcript (29 November 2021) at p 20 lines 3 to 6.

[74] RBOD at p 285 paras 13 and 14.

> Payment Claim *per se*. The Payment Claim was the subject of the Adjudication Application.
>
> 14 As the Payment Claim was *served after the commencement* of the Building and Construction Industry Security of Payment (Amendment) Act 2018 (the "**SOP Amendment Act**"), ***pursuant to Section 25 of the SOP Amendment Act, all other sections of the [SOPA] (except for Section 10) presently in force shall apply to this adjudication.***
>
> [emphasis in original in bold; emphasis added in bold italics]

48 Section 25(2) of the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) (the "SOPA Amendment Act") states as follows:

> **Saving and transitional provisions**
>
> **25.—**
>
> …
>
> (2) Section 10 of the [SOPA] as in force immediately before the date of commencement of section 5 *continues to apply* to the service of a payment claim in relation to a contract that was entered into before that date.
>
> [emphasis added]

49 The rest of the subsections under s 25 of the SOPA Amendment Act concern the situation where the payment claim was served *before* the current version of the SOPA came into force. Here, as stated above (at [47]), Payment Claim 2 was served *after* that date. Hence, I agree with the Adjudicator's holding that save for s 10, all other sections of the SOPA presently in force shall apply in the determination of the present case.

Is KSE's present application a disguised appeal and an abuse of the court's process?

50 Backho submits that KSE's present application "is a deliberate abuse of the court's process and a deliberate disguised appeal on the merits of the [l]earned Adjudicator's findings".[75]

51 Sections 27(5) and 27(6) of the SOPA state as follows:

> **Enforcement of adjudication determination as judgment debt, etc.**
>
> **27.**— …
>
> …
>
> (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.
>
> (6) The grounds on which a party to an adjudication may commence proceedings under subsection (5) include, but are not limited to, the following:
>
>> (*a*) the payment claim was not served in accordance with section 10;
>>
>> (*b*) the claimant served more than one payment claim in respect of a progress payment, otherwise than permitted under section 10;
>>
>> (*c*) the payment claim was in respect of a matter that has already been adjudicated on its merits in proceedings under this Act;
>>
>> (*d*) the adjudication application or the adjudication review application was not made in accordance with the provisions of this Act;
>>
>> (*e*) the adjudicator failed to comply with the provisions of this Act in making the adjudication determination;

[75] RWS at para 42.

> (*f*) the adjudication determination requires the claimant to pay an adjudicated amount to the respondent;
>
> (*g*) a breach of the rules of natural justice occurred in connection with the making of the adjudication determination;
>
> (*h*) the making of the adjudication determination was induced or affected by fraud or corruption.

52 Backho submits that the nature of a setting aside application under s 27(5) is "not an appeal on the merits of the adjudicator's findings".[76] Backho relies on, *inter alia*, the Court of Appeal's statement in *Citiwall* at [48]:[77]

> … in hearing an application to set aside an AD and/or a s 27 judgment, *the court does not review the merits of the adjudicator's decision*, and *any setting aside must be premised on issues relating to the* ***jurisdiction of the adjudicator***, a breach of natural justice or non-compliance with the SOPA. Applications to set aside ADs and/or s 27 judgments are thus akin to judicial review proceedings, and are not appeals on the merits of the adjudicator's decision. In our judgment, it is consistent with the purpose of the SOPA, which is to facilitate cash flow in the building and construction industry, that the court, in hearing such applications, *does not review the merits of the AD in question*.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

Yet, as can be seen from the above, that authority clearly states that the court is entitled to examine issues relating to the adjudicator's jurisdiction. Indeed, arguments relating to an adjudicator's jurisdiction do not touch on the merits of the adjudicator's decision on the substantive dispute.

53 In the present case, KSE's arguments regarding the Adjudicator's findings relate to the latter's jurisdiction in determining the substantive dispute

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76 RWS at para 38(5).

77 RWS at para 38(5)(b).

in AA 165. As stated above (at [27]), KSE contends, in essence, that the Adjudicator had exceeded his jurisdiction.

54 However, Backho appears to suggest in the extreme that the court should not consider the findings of the Adjudicator *at all* since they purportedly touch on the merits of his decision.[78] This is a misunderstanding of the applicable law set out above. To the extent that the Adjudicator had made findings *pertaining to his jurisdiction*, the court is entitled to review such findings. This is an exercise of the court's supervisory jurisdiction, which refers to "the inherent power of the superior courts to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions": see *Citiwall* at [41]–[45]. Indeed, this proposition is succinctly explained in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 19.9 (cited with approval in *Citiwall* at [45]):

> … [U]nlike arbitrators, the courts ultimately exercise a ***supervisory function*** over any dispute settlement tribunal and this extends to both arbitration and *adjudication proceedings*. This function is invoked *when an application is made to the court to enforce* an arbitral award or *an adjudication determination*. In this latter role, the primary function of the court is to *ensure that the arbitrator or* ***adjudicator acts within his jurisdiction*** in that he has to conduct himself properly in accordance with the terms as framed by the applicable legislation and with the principles of natural justice. The challenge which is frequently mounted against an adjudication determination is thus an application to the courts to exercise this supervisory function.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

55 Hence, KSE's present application is neither a disguised appeal nor an abuse of the court's process. I shall now turn to examine the grounds of KSE's application.

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[78] RWS at paras 40, 44(a), 47(a).

Was AA 165 premised on one or two contracts?

The applicable law

56 As stated in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 ("*Rong Shun*") at [38], the SOPA "mandates that *one* adjudication application be founded on *one* payment claim which arises from *one* contract" [emphasis in original]. Indeed, this position was stated by the Court of Appeal in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 as well (at [65]–[68]):

> 65 Section 2 of the [SOPA] defines a "progress payment" as "a payment to which a person is entitled … under *a* contract" [emphasis added]. Similarly, s 5 confers a statutory right to a progress payment to one "who has carried out any construction work, or supplied any goods or services, under *a* contract" [emphasis added].
>
> 66 Section 10 of the [SOPA] states:
>
> > **Payment claims**
> >
> > **10.**—(1) A claimant may serve one payment claim in respect of a progress payment on —
> >
> > > (a) one or more other persons who, *under the contract concerned*, is or may be liable to make the payment; or
> > >
> > > (b) such other person as specified in or identified in accordance with the terms of *the contract* for this purpose.
>
> 67 Regulation 5 of the [Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed)] states:
>
> > **Payment claims**
> >
> > 5.—…
> >
> > (2) Every payment claim shall —
> >
> > …
> >
> > > (*b*) identify ***the contract to which the progress payment that is the subject of the payment claim relates***[.]

> 68 These provisions concern progress payments and payment claims. They are significant because they indicate that for the purposes of a progress payment and a payment claim, only *one* contract is material: the Payment Claim Contract. Pertinently, a progress payment is the subject of a payment claim (see s 10(1) of the Act), which is in turn the subject of an adjudication under the Act (see s 12(1) of the Act). In this light, in our judgment, given that a progress payment and a payment claim centre on one contract, the Payment Claim Contract, the aforementioned provisions indicate that a SOPA adjudication also centres on that one contract. They thus suggest that the inquiry in a SOPA adjudication relates to the claimant's entitlement under the Payment Claim Contract, and not to its entitlement taking into account separate Cross-Contract Claims.
>
> [emphasis in original]

57 The legal position set out above is well-established and uncontentious. I shall now turn to my findings on this issue.

My findings

58 In the AD, the Adjudicator held as follows:[79]

> 71 On balance, I find that the evidence before me supports a conclusion that pursuant to Section 4(3) of the [SOPA], there was a *contract in writing before the parties*, that was evidenced by the 30 August Quotation and the First 4 February Quotation, and further supported by the parties' conduct affirming the same. I also find that *the First 4 February Quotation was, as submitted by [Backho], an **amendment or variation** of the 30 August Quotation*. In this regard, I note that both quotations had referred to the Tuas West Coast project, and both were essentially for the "Rental of Heavy Equipment", which was also the subject matter of both quotations. While there were differences in the type of equipment and manpower described under the 2 quotations, both quotations were, at their core, for the supply of equipment and manpower for works to be carried out at the same Tuas West Coast site.
>
> 72 In the circumstances, I find that the Payment Claim in the Adjudication Application did arise from a 'contract that is made in writing' satisfying Section 4 of the [SOPA]. In

79 RBOD at p 307 paras 71 and 72.

> particular, I determine that the present case clearly falls within Section 4(3)(a) and (d) of the [SOPA], as ***the contract was contained within the 30 August Quotation and the First 4 February Quotation*** (notwithstanding that the quotations were not signed by [KSE]) and [KSE] had paid invoices that were issued with reference to these 2 quotations. In my view, and I find, the parties have entered into a construction contract that was made in writing which is premised upon and evidenced by the 30 August Quotation and amended or varied by the First 4 February Quotation (the "Agreement").
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

59 KSE submits that the Adjudicator had erred in coming to his findings, for the reasons set out above at [28]. I reproduce them here for ease of reference:

(a) First, there was no variation clause in the 30 August 2019 Quotation.[80]

(b) Second, the parties' conduct evinced an intention to enter into two separate contracts, because:[81]

(i) The 30 August 2019 Quotation and the First 4 February 2020 Quotation arose from separate discussions and they did not bear common references.[82]

(ii) Backho issued separate invoices for the 30 August 2019 Quotation and the 4 February 2020 Quotation.[83]

80 AWS at para 57.

81 AWS at para 63.

82 AWS at para 64.

83 AWS at para 69.

(c) Third, the works and equipment under the 30 August 2019 Quotation and the First 4 February 2020 Quotation were very different and distinct.[84]

60 Whether the AD was premised on a payment claim that arose from one or two contracts turns on the central issue of ascertaining the parties' objective intentions. In *Rong Shun*, the High Court was faced with the same issue: whether the adjudicator had acted in excess of his jurisdiction because he had, *inter alia*, adjudicated on a payment claim which did not arise from a single contract. In determining that the payment claim arose from a single contract comprising two scopes of work, the court examined the parties' objective intention when the applicant accepted the respondent's counteroffer during their negotiations: *Rong Shun* at [76], [81] and [91].

61 Hence, I shall first address KSE's submissions before moving on to the crux of my analysis: did the parties intend for one or two contracts to be concluded from the 30 August 2019 Quotation and the First 4 February 2020 Quotation?

(1) The lack of a variation clause in the 30 August 2019 Quotation

62 KSE submits that because the 30 August 2019 Quotation does not contain a variation clause, having regard to "well-established legal principles on variations", the First 4 February 2020 Quotation "cannot be said to be a variation of the 30 August 2019 Quotation".[85] Hence, KSE submits that "the Adjudicator's determination is inconsistent with contractual legal principles

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84 AWS at para 79.

85 AWS at paras 57 to 60.

including those governing amendments or variations to a construction contract".[86]

63 In my view, KSE's submission is premised on a misunderstanding of the present legal context.

64 KSE relies on Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) ("*Law and Practice of Construction Contracts*") at paras 5.001 and 5.017 in support of its submission:[87]

> **5.001** The term "variation" in construction contracts is used to describe a change to the scope of works in a construction contract. A variation may consist of the introduction of additional terms ("extras") or the omission of items of work ("omissions") or a change in the character, quality or nature of work". …
>
> …
>
> **5.017** The general position is that, unless the contract provides to the contrary, an architect, engineer or any person purporting to represent either party has no authority to vary the terms of the contract or to order extras or otherwise vary the quantity or nature of the works. Accordingly, the power to order variations derives its force primarily from the terms of the construction contract. Consequently, a variation order issued in terms which contradict the terms of the power or which fall outside the scope of the power is an *invalid* variation order.
>
> [emphasis in original]

65 Relying further on *Law and Practice of Construction Contracts*, KSE submits as follows:[88]

> Given this well entrenched position, it has been observed that construction contracts would typically provide express

86 AWS at paras 43 and 46.

87 AWS at paras 51 and 53; KSE's Bundle of Authorities at Tab 14.

88 AWS at para 54.

> provisions to enable variations of the work scope to be ordered. Otherwise, absent the power to vary the contract, the changes/ additional works will have to be carried out under a fresh agreement or pursuant to an express agreement to vary: [*Law and Practice of Construction Contracts*] at [5.004], [5.007].

66 The present dispute does *not* concern whether there was a variation order issued by any party. If there was a clause that enabled variations of the scope of works to be ordered, the issue then is whether the parties were vested with the power under the terms of a construction contract to be able to order a subsequent variation of the works unilaterally. In contrast, the material issue here is whether the parties had agreed to amend or vary the construction contract. This concerns the parties' objective intentions. Indeed, these two distinct situations are implicitly acknowledged in KSE's own submission as set out above (at [65]).

67 Hence, it cannot be said that the Adjudicator had disregarded the applicable law regarding contractual variations in the context of construction contracts. Instead, it was KSE who misunderstood the applicable legal context. I therefore reject KSE's submission that the lack of a variation clause means, *ipso facto*, that the First 4 February 2020 Quotation cannot be a variation of the 30 August 2019 Quotation.

(2) Were the works pertaining to the 30 August 2019 Quotation and those pertaining to the First 4 February 2020 Quotation different?

68 As elucidated above (at [58]), the Adjudicator found that in respect of the 30 August 2019 Quotation and the First 4 February 2020 Quotation, "both quotations were, at their core, for the supply of equipment and manpower for works to be carried out at the same Tuas West Coast site". KSE takes issue with this finding.

69 KSE submits that the works pertaining to the 30 August 2019 Quotation and those pertaining to the First 4 February 2020 Quotation are "very different and distinct".[89] In essence, KSE contends that the former pertained to sea-based works while the latter pertained to land-based works.[90]

(a) The 30 August 2019 Quotation provided for the rental of one Super Long Arm Excavator with an operator and a sieving bucket (see [5] above). It was to be used on board a vessel at sea. This excavator was used to remove debris from the seabed, such as tree trunks, tyres and other rubbish, and to load the debris onto a barge.

(b) In contrast, the First 4 February 2020 Quotation provided for the rental of excavator equipment (including one Super Long Arm Excavator), dump trucks, LED lighting tower and automotive diesel oil, together with operators, a driver, four banksmen and two site supervisors (see [6] above). These equipment were used to transport dredged sand on land to a different part of the Project.

70 KSE argues that since the works pertaining to the First 4 February 2020 Quotation were done *on land*, there was no need for a grab attachment or a sieving bucket to be supplied, which were options under the 30 August 2019 Quotation (see [5] above) for use on board a vessel *at sea*. Moreover, KSE contends that the works for the First 4 February 2020 Quotation were more complex and required a team of workers as stated above.[91]

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89 AWS at para 79.

90 AWS at paras 80 and 81.

91 AWS at paras 80 and 81.

71 Backho rejects KSE's submissions that the works pertaining to the 30 August 2019 Quotation were sea-based works. It submits instead that the Super Long Arm Excavator was not loaded onto any barge or vessel and was not used to pick up debris from the seabed. Rather, it was used "to excavate the marine soil on land as part of the [Project]".[92]

72 At the hearing, the parties did not dispute that the Super Long Arm Excavators supplied under the two quotations were different ones.[93] In other words, KSE was supplied with two separate Super Long Arm Excavators. However, I note that the rates pertaining to these two excavators were different. I set out the pertinent extracts of the two quotations below:[94]

30 August 2019 Quotation

Item	Description	Unit	Rate	Amount
1	Option 1: Rental of Super Long Arm Excavator with Grab Attachment, Operator and exclude Diesel			
	Monthly Rate, min. 1 month per 8hrs per day	Month	\$9,500	Rate Only
	Overtime Rate (Mon-Sat)	Hour	\$65	Rate Only
	Overtime Rate (Sun & PH)	Hour	\$65	Rate Only
	Mobilization & Demobilization	Trip	\$450	Rate Only

[92] RWS at para 12.

[93] Transcript (29 November 2021) at p 34 line 11 top 36 line 17.

[94] RBOD at pp 1 and 12.

2	Option 2: Rental of Super Long Arm Excavator with Sieving Bucket, Operator and exclude Diesel			
	Monthly Rate, min. 1 month per 8hrs per day	Month	$9,500	Rate Only
	Overtime Rate (Mon-Sat)	Hour	$65	Rate Only
	Overtime Rate (Sun & PH)	Hour	$65	Rate Only
	Mobilization & Demobilization	Trip	$450	Rate Only

First 4 February 2020 Quotation

Item	Description	Unit	Rate	Amount
1	Rental of 1.2 m3 Super Long Arm Excavator with Operator and exclude Diesel x 1 Unit			
	Monthly Rate, min. 1 month per 10hrs per day	Month	$14,000	Rate Only
	Overtime Rate (Mon-Sat & Sun/PH)	Hour	$54	Rate Only
	Mobilization / Demobilization	Trip	$600	Rate Only

73 In my view, whether the nature of the works pertaining to the two quotations were similar or different and whether the rates pertaining to the Super Long Arm Excavator quoted therein were the same or different have little relevance in determining the intention of the parties to enter into one contract or two contracts.

74 Consider a hypothetical situation where A contracts with B for B to supply the cars and drivers needed to transport VIP attendees to an international conference. It would be artificial to view each rented car and accompanying

driver as a separate contract between A and B unless the contractual parties clearly states that each car rented is a separate contract. Instead, it would more likely be the case that such instances are terms of a single contract between A and B. To make this analogy closer to the facts of the present case, suppose the initial terms of the single contract stipulated that the drivers are to only transport the VIP attendees *to* the conference. Subsequently, A and B agree that A would rent *more* cars and drivers to transport some additional VIP attendees back to their places of residence or even to other locations upon their request. This additional arrangement would constitute a different scope of work which nevertheless relates to the same contract. A and B also agree that these drivers are to be more handsomely remunerated for their efforts. These additional facts alone neither indicate that the additional arrangements are made pursuant to a variation of the previous contract, nor imply that it is made pursuant to a separate contract. Rather, as I have stated earlier (see [60] above), this issue must turn on the parties' objective intention at the material time.

75 Hence, I place little weight on the parties' submissions on the nature and scope of works relating to the 30 August 2019 Quotation and the First 4 February 2020 Quotation. I shall turn next to the substance of the analysis: what did KSE and Backho objectively intend at the material time? Did KSE and Backho intend to have a separate contract each time KSE rented an equipment for the Project?

(3) The parties' objective intention

76 KSE submits that the parties' conduct evinced an intention to enter into two separate contracts arising from the 30 August 2019 Quotation and the First

4 February 2020 Quotation.[95] Its submission relies on two arguments (see [28(b)] above):

(a) The 30 August 2019 Quotation and the First 4 February 2020 Quotation arose from separate discussions and they did not bear common references.[96]

(b) Backho issued separate invoices for the 30 August 2019 Quotation and the 4 February 2020 Quotation.[97]

77 In respect of KSE's first argument, KSE relies on the authority of *Rong Shun*, where the court dealt with the issue of whether a payment claim arose from a single contract. In that case, the High Court found that the parties' conduct evinced an intention to enter into one contract comprising two scopes of work. The court had regard to the following facts: (a) the respondent extended a single invitation to the applicant to tender for two scopes of work; and (b) the two quotations bore the *same* reference number as well as *same* heading which referred to the main contract between the respondent and the Housing and Development Board. The court stated as follows (at [76]–[81]):

> 76 … In my view, an analysis of the evidence shows that the parties' conduct evinced an intention, objectively ascertained, to enter into only one contract comprising two scopes of work.
>
> 77 I begin the analysis with the tender phase. The respondent's evidence is that it made a separate invitation to tender for each scope of work and suggests that it is therefore a mere coincidence that the applicant was awarded both scopes. The respondent has not, however, produced any documentary or other independent evidence to support its suggestion. I do not accept it. I accept instead the applicant's

95 AWS at paras 63 and 83.

96 AWS at para 64.

97 AWS at para 69.

evidence that the respondent extended a single invitation to the applicant to tender for both scopes of work. This is consistent with the respondent's own evidence that, in the course of preparing its tender to the HDB for the main contract, the respondent "sent out invitations to different contractors, inviting them to quote for the electrical installation works … and for the fire alarm installation works …". That approach is, to my mind, more consistent with the commercial realities at the time, bearing in mind that the two scopes of work arose from one main contract and were to be carried out in conjunction with each other at the same locations.

78 I now turn to the quotations themselves. The two original quotations, both dated 20 December 2012, bore the same reference number, *ie*, "RSEC- 1212151". This indicates to me that the applicant viewed the two quotations as, in contractual substance, capable of giving rise to a unified obligation.

79 This is fortified by the heading for each quotation: "ADDITION & ALTERATION WORKS TO MULTI-STORY CAR PARKS (BATCH 7)". This heading repeats verbatim the title of the main contract between the respondent and the HDB, leaving out only the HDB's internal contract number. This indicates to me that the applicant attached paramount significance to the fact that both quotations arose from the same main contract and not to the fact that each quotation comprised a different scope of work. In this regard, I accept the applicant's evidence that its practice was to submit separate quotations for separate scopes of work even if those separate scopes of work were to be governed by a single contract.

80 It is true that the applicant: (a) issued two separate quotations for each scope of work on 20 December 2012; (b) each quotation incorporated a clause expressly providing that that quotation included only the items specified in the tender contract breakdown attached to that quotation; and (c) that each quotation had annexed to it a different tender contract breakdown for each scope of work. That does suggest, as the respondent submits, that the parties entered into two contracts and not one. But in my view, none of these facts suffices to outweigh objectively the weight of the evidence I have analysed above pointing in the other direction. In my view, the quotations were separated for administrative convenience rather than with contractual effect. Further, the clause in question is a *pro forma* clause in the *pro forma* parts of the applicant's quotations. It is therefore difficult to ascribe any specific objective intent to the applicant from the incorporation of that clause in these quotations as to whether it intended to form one contract or two with the respondent. It also appears to me that the objective intent of the parties, ascertained in

> context, was for the tender contract breakdown and the clause which referred to it to govern the *content* of the parties' contract rather than its *formation*. Those breakdowns do not, therefore, advance the respondent's submission that the parties' objective intent was to enter into two contracts rather than one.
>
> 81 I therefore find that the parties' objective intent, when the applicant accepted the respondent's counteroffer during their negotiations on 20 December 2012, was to enter into a single contract comprising two scopes of work.
>
> [emphasis in original]

78 KSE submits that in contrast, the 30 August 2019 Quotation and the First 4 February 2020 Quotation bore *distinct* reference numbers and also did not refer to a single main contract.[98] Also, the quotations in the present case were made pursuant to requests at different points in time and not pursuant to a single invitation to tender. KSE argues that, even on Mr Nam's evidence, the 30 August 2019 Quotation was issued pursuant to a discussion on 30 August 2019 while the First 4 February 2020 Quotation was issued after separate discussions in early February 2020.[99] Also, in Backho's e-mail dated 4 February 2020 which attached the First 4 February 2020 Quotation, Backho did not refer to the earlier 30 August 2019 Quotation or the works undertaken thereunder and did not mention the word "variation".[100] Backho wrote in that e-mail as follows:[101]

> Dear Sir,
>
> We are pleased to attached [*sic*] our quotation for your perusal.
>
> Please don't hesitate to contact us for further clarifications.
>
> Thank you.
>
> …

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98 AWS at para 66.

99 AWS at para 67; NK at paras 10 and 15.

100 AWS at para 67.

101 LCH-1 at p 35.

Hence, in KSE's view, the contents of the e-mail were consistent with the parties negotiating a new contract.[102]

79 In my view, the absence of the factors in *Rong Shun* (which KSE points out above) in the present case does not immediately imply that there are two contracts instead of one. KSE misunderstands the substance of the court's analysis in *Rong Shun*.

80 In *Rong Shun*, the court first examined the issue of whether the respondent had extended a single or separate invitation to the applicant to tender for two scopes of work (at [77]). This is an examination of whether there was an overarching agreement for a single contract between the parties. The court found that there was no contemporaneous documentary evidence in support. The court then considered the applicant's evidence (presumably non-written) that it had extended a single invitation to the respondent to tender for two scopes of work, which the court found was consistent with other parts of the respondent's evidence (at [77]). In the present case, this court undertook this analysis *before* examining the plain wording of the quotations (at [78]–[80]) to decipher whether the parties had intended to have one continuous contract for the two quotations or the parties intended to have two separate contracts from the two quotations. This analysis of the parties' intention is largely fact driven.

81 Likewise, in the present case, I first examine whether there was contemporaneous documentary evidence to reveal the intention of the parties at the material time of the 30 August 2019 Quotation and the First 4 February 2020 Quotation. At the hearing, the parties agreed that there was no such written

102 AWS at para 68.

evidence pertaining to discussions in August 2019 or February 2020.[103] However, before examining the plain wording of the 30 August 2019 Quotation or the First 4 February 2020 Quotation, I shall examine the parties' testimony as to whether there was an overarching agreement for a single contract between the parties. At the hearing, KSE agreed with my approach:[104]

> Court: You see, Mr Lee, was there---
>
> [Mr Lee]: Yes.
>
> Court: ---any contemporaneous evidence to show the discussions that the parties had at that time?
>
> [Mr Lee]: In August. Is that what you are referencing, Your Honour?
>
> Court: Either in August or February.
>
> [Mr Lee]: In August, we don't have.
>
> Court: February?
>
> [Mr Lee]: In February, we just have the two quotations coming in, that is---
>
> Court: So, in other words, there was no contemporaneous written discussion between the parties?
>
> [Mr Lee]: No, there isn't. Yes.
>
> Court: Then we have to rely on affidavit.
>
> [Mr Lee]: Yes.

82 In my view, there is indeed such an overarching agreement on the facts. Having examined both Mr Lee's and Mr Nam's evidence, it is clear that Backho was to supply *all* requisite equipment to KSE to perform its excavation works under the Project, *because KSE did not have such equipment*.

[103] Transcript (29 November 2021) at p 48 lines 24 to 26.

[104] Transcript (29 November 2021) at p 48 lines 15 to 28.

83 Mr Nam stated as such in his affidavit:[105]

> 10. On 30 August 2019, Mr Lee Chung Hee, the Executive Director of KSE contacted me. He informed me that KSE had secured the project from Hyundai for the Reclamation of Marine Works at Tuas Western Coast ["the Project"] and *required excavation equipment for the project because KSE did not have any such machine to undertake the project.* Mr Lee was at all material time aware that the Backho is in the business of supplying rental excavation machine and manpower to undertake reclamation works on a fixed monthly/hourly rate. Mr Lee wanted to know if Backho was agreeable to provide ***all*** the excavation equipment, excavator operators, supervisor, bunksman and other related services as and when required by KSE for the project. I agreed with Mr Lee on 30 August 2019 that Backho will provide KSE with the excavator equipment, excavator operators, material and ***all*** support for the said project, as and when KSE required, on a rental based, on our usual monthly/hourly rate [hereinafter referred to as the "said agreement"].
>
> …
>
> 15. In early February 2020, KSE Marine required ***additional equipment*** for their Tuas Project *under the agreement reached on 30 August 2019.* Accordingly, Mr Lee contacted me and informed me that KSE required additional equipment, operators, dumptrucks, bunksmen and other services for the same project at Tuas West. He wanted to know the rates for these additional equipment and services which Backho would be supplying under the underlying contract reached on 30 August 2019.
>
> …
>
> 19. … I categorically deny the false allegations made therein, particularly that the First February 2020 was a "new agreement" ["Land contract"] for the supply for rental excavation, workers, materials different and were not a variation or addition to the contract already reached in 30 August 2019 for Backho to supply/rent KSE Marine of ***all*** the excavation equipment, operators and services for the Tuas Project. …

[105] NK at paras 10, 15 and 19.

> [emphasis in original omitted; emphasis added in italics and bold italics]

84 In contrast, Mr Lee's version of the events was that, as regards the works under the First 4 February 2020 Quotation, Backho was selected over another available subcontractor to carry out the works under this "entirely different contract":[106]

> 14. As stated in My [*sic*] 1st Affidavit, somewhere around early February 2020, I entered into new discussions with Backho's NKH for an entirely different contract involving the transportation of dredged sand on land which resulted in the Land Contract. KSE could have engaged other subcontractors to carry out the *excavation work* on an ad-hoc basis.
>
> 15. Indeed, we had in fact asssessed the costs for hiring Chuan Lim Construction Pte Ltd ("**Chuan Lim**") instead of Backho at the time. Chaun [*sic*] Lim was only charging a rate of S$1.45 per m3 of sand transported for similar works, but in the end we decided to work with Backho because we were not confident that Chuan Lim's costs would actually remain at such level after taking into account all operational issues that could impact the final costs. KSE eventually decided to work with Backho on the new works since Backho is Korean and parties had a trusting working relationship at that time.
>
> [emphasis in original in bold; emphasis added in italics]

As can be seen from the above, Mr Lee explained that: (a) Backho was to carry out "excavation works", *ie*, a broad and all-encompassing head of work, under the First 4 February 2020 Quotation; (b) KSE and Backho had a "trusting working relationship at that time"; and (c) Backho was selected over a subcontractor which had allegedly provided a cheaper rate. Mr Lee also took

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106 LCH-2 at paras 14 and 15.

pains to further emphasise the magnitude of the works under the First 4 February 2020 Quotation.[107]

85 To begin with, implicit in Mr Lee's explanation was that KSE was in need of a substantial degree of manpower and equipment to carry out the works in the Project, at least at the time of negotiating the First 4 February 2020 Quotation. As a contractor, KSE must have naturally known, *at the outset*, about what they would require in order to execute the works in the Project. Hence, this corroborates Mr Nam's evidence that KSE needed a huge amount of manpower and equipment at least at the time of the 30 August 2019 Quotation.

86 Next, I note that KSE did not have independent evidence (by affidavit or otherwise) to show that KSE had assessed the cost of hiring Chuan Lim prior to the issuance of the First 4 February 2020 Quotation.

87 Hence, considering the two different narratives before me, the more credible narrative has to provide a better account of KSE's *need* and *willingness* to employ Backho to conduct large-scale excavation works for the Project over a cheaper subcontractor and the parties' good ongoing working relationship at the time of the First 4 February 2020 Quotation, bearing in mind that KSE would have known of such a need at the outset of the Project. In my view, on a balance of probabilities, it was Mr Nam's narrative that is more convincing. In the absence of contemporaneous written evidence, it is more probable and is in keeping with good commercial sense that the parties had already agreed for Backho to provide KSE with all the necessary equipment and manpower for excavation work for the Project at the time of the 30 August 2019 Quotation. Hence, the First 4 February 2020 Quotation indicated a variation of a single

[107] AWS at para 18.

previously concluded contract for the support and supply of equipment and manpower for the Project starting from the 30 August 2019 Quotation.

88 With such an overarching agreement for Backho to supply all the requisite equipment, the subsequent ancillary issues, such as whether the quotations bear a common reference or whether they bear the word "variation", are patently trivial. This was simply the case that KSE needed more equipment for the works in the Project in February 2020 and Backho was happy to supply them on top of the previously supplied equipment in August 2019. Hence, the parties intended a single contract contained within the 30 August 2019 Quotation and the First 4 February 2020 Quotation. In other words, the different rates for the two separate Long Arm Excavators across these two quotations, along with the rates pertaining to the additional equipment and manpower supplied under the First 4 February 2020 Quotation, are different terms of the same contract.

89 Hence, with the greatest respect, KSE has not fully appreciated the approach taken by the court in *Rong Shun*. On the contrary, my analysis is consistent with the approach in *Rong Shun* and the general principles pertaining to contractual interpretation *ie* to establish the intention of the parties in the contract.

90 I shall turn next to KSE's second argument, which is that Backho had itself treated the 30 August 2019 Quotation and the 4 February 2020 Quotation as separate contracts by issuing two different sets of invoices for each of them.[108]

[108] AWS at para 70.

91 For the invoices in respect of the rental of the Super Long Arm Excavator under the 30 August 2019 Quotation, Backho referred to the reference number of the 30 August 2019 Quotation, "QT/19/08/151/R1".[109] The invoices were also expressly referred to as "claims", and the claims were numbered sequentially, with separate numbering from the set of invoices/claims in respect of the First 4 February 2020 Quotation: see table below.

Invoices under the 30 August 2019 Quotation:

Claim No (as stated in the invoices)	Invoice No	Date	Period of alleged works claimed
1	191005	14 October 2019	20 September 2019 – 30 September 2019
2	191119	20 November 2019	October 2019
3	191210	9 December 2019	November 2019
4	200111	10 January 2020	December 2019
5	200207	10 February 2020	January 2020
6	200324	9 March 2020	February 2020
7	200426	9 April 2020	March 2020
8	200516	13 May 2020	April 2020
9	201033	31 October 2020	September 2020
10	201117	13 November 2020	October 2020
11	210228	27 February 2021	November 2020
12	210230	27 February 2021	December 2020
13	210232	27 February 2021	January 2021

[109] AWS at para 70(a).

92 For the invoices in respect of the rental of equipment under the First 4 February 2020 Quotation, Backho referred to the different reference number, *ie*, that of the First 4 February 2020 Quotation, "QT/20/02/025". There was no reference to the earlier 30 August 2019 Quotation.[110] The invoices were submitted as sequential claims, separately numbered from the set of invoices issued in respect of the 30 August 2019 Quotation: see table below.

Invoices under the First 4 February 2020 Quotation

Claim No (as stated in the invoices)	Invoice No	Date	Period of alleged works claimed
1	200325	9 March 2020	February 2020
2	200427	9 April 2020	March 2020
3	200517	13 May 2020	April 2020
4	200914	23 September 2020	August 2020
5	201032	31 October 2020	September 2020
6	201116	13 November 2020	October 2020

93 Where Backho omitted to state the reference number of the First 4 February 2020 Quotation but sought to claim works under that quotation, the claims did not include the claims for works under the 30 August 2019 Quotation and continued to be sequential claims following from the earlier set of claims under the First 4 February 2020 Quotation (*ie*, continuing from Claim No 6 in the table above at [92]): see table below.

110 AWS at para 70(b).

Other invoices under the First 4 February 2020 Quotation

Claim No (as stated in the invoices)	**Invoice No**	**Date**	**Period of alleged works claimed**
7	210229	27 February 2021	November 2020
8	210231	27 February 2021	December 2020
9	210233	27 February 2021	January 2021
10	210326	16 March 2021	1 February 2021 – 24 February 2021

94 In addition, KSE highlights that, as can be seen from the tables above, there were several instances where two separate invoices for each quotation were even issued and dated the same day – *ie*, one based on the 30 August 2019 Quotation, and the other based on the First 4 February 2020 Quotation.[111]

95 KSE submits that the above evidence shows that Backho itself intended for the 30 August 2019 Quotation and the First 4 February 2020 Quotation to be distinct transactions and contracts.[112]

96 To recapitulate, I have found above (at [87]–[88]) that there was an overarching agreement for Backho to supply *all* the necessary equipment for KSE to carry out its works under the Project. In the circumstances, the organisation of the invoices is simply a matter of convenience for Backho. There is also much clarity and transparency in billing KSE who would appreciate how the amount in the invoices were derived. I therefore agree with the Adjudicator's finding that "the numbering of the invoices is an *administrative* issue, and what

111 AWS at para 72.

112 AWS at para 71.

is more relevant is the substance behind the invoices and the conduct of the parties, and not the form of the invoices" [emphasis added].[113] Hence, I place little weight on KSE's submissions regarding the form of the invoices above.

97 KSE alleges that there was an Alleged Oral Agreement with Backho which was concluded around February 2020 to charge based on the volume of earth excavated instead of the time-based rental of equipment and manpower for the Project.[114] Backho admitted that there was a discussion but there was no agreement as the parties could not agree on the rate.[115] I shall discuss this issue of the Alleged Oral Agreement in greater detail below. However, this event is relevant for the purpose of determining whether the parties intended to have a single contract or two contracts from the two quotations. KSE submits that the Alleged Oral Agreement is similar to and was concluded pursuant to negotiations for the Second 4 February 2020 Quotation. As I have stated above (at [87]), it makes no commercial sense to operate the 30 August 2019 Quotation on a time-based rate independently and concurrently with the Alleged Oral Agreement. This reasoning applies *a fortiori* to the Alleged Oral Agreement, which was priced based on the volume of earth excavated for works in the Project, as opposed to the time-based rental of equipment in the First 4 February 2020 Quotation. Hence, on KSE's argument, it would have been logical for the Alleged Oral Agreement to supersede the 30 August 2019 Quotation and the First 4 February 2020 Quotation. This implies that KSE and Backho contemplated their business association in the Project as one contractual relationship before this case went for adjudication.

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113 RBOD at p 306 para 70.

114 LCH-1 at paras 15 to 22.

115 NK at para 17.

(4) Conclusion on whether AA 165 was premised on one or two contracts

98 For the above reasons, I find that there was only one applicable contract on the facts. From my finding that there was an overarching agreement for Backho to supply *all* the necessary equipment for KSE to carry out its works under the Project (at [87]–[88]), the First 4 February 2020 Quotation indicated a variation of a single previously concluded contract. Hence, I dismiss KSE's first jurisdictional objection that AA 165 was premised on two different contracts and hold that the Adjudicator did not act in excess of his jurisdiction on this ground.

Did the Alleged Oral Agreement exist?

The applicable law

99 The SOPA expressly states that its provisions shall apply to contracts that are "made in writing". Sections 4(1), 4(3) and 4(4) of the SOPA provide as follows:

> **Application of Act**
>
> **4.**—(1) Subject to subsection (2), *this Act shall apply to any contract* that is *made in writing* on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore.
>
> …
>
> (3) For the purpose of this section, a contract shall be treated as being made in writing —
>
> > (*a*) if the contract is made in writing, whether or not it is signed by the parties thereto;
> >
> > (*b*) if the contract is made by an exchange of communications in writing;
> >
> > (*c*) if the contract made otherwise than in writing is recorded by one of the parties thereto, or by a third party, with the authority of the parties thereto; or

> (*d*) if the parties to the contract agree otherwise than in writing by reference to terms which are in writing.
>
> (4) Where a contract is not wholly made in writing, the contract shall be treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties thereto is in writing.
>
> [emphasis added]

100 Indeed, the above position is clearly stated by the court in *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277 at [109]: "… it is a jurisdictional requirement that the adjudicator's determination be based on a written contract. The court is therefore entitled to look into the merits of the adjudicator's decision in this respect."

101 I shall now turn to my findings on this issue.

My findings

102 As stated above (at [29]), KSE claims that the Alleged Oral Agreement was based on the Second 4 February 2020 Quotation after the First 4 February 2020 Quotation was rejected. It seems that KSE submits that the Alleged Oral Agreement was to significantly change the approach towards the Project from a time-based rental of equipment and manpower to a rate based on the volume of earth excavated. As I have explained above (at [97]), on KSE's case, it would make no commercial sense for the volume-based arrangement in the Alleged Oral Agreement not to apply to the 30 August 2019 Quotation. KSE had not provided any explanation or evidence that the Alleged Oral Agreement would not apply to the 30 August 2019 Quotation. This point therefore weakened KSE's allegation that there was an Alleged Oral Agreement.

103 KSE claims that the existence of the Alleged Oral Agreement is supported by: (a) the parties' correspondence at the material time;[116] and (b) Backho's conduct.[117] KSE further argues that the Adjudicator failed to adequately consider the timing and circumstances of KSE's payment of the invoices allegedly issued under the 30 August 2019 Quotation and the First 4 February 2020 Quotation.[118]

104 I shall address KSE's submissions in turn.

(1) The parties' correspondence

105 KSE submits that the parties' correspondence at the material time supports its claim that the Alleged Oral Agreement was concluded after the Second 4 February 2020 Quotation was rejected (see [10]–[11] above).

106 On 3 September 2020, Mr Kim Sun Jun ("Mr Kim"), KSE's then Project Manager, sent the following text message to Mr Nam:[119]

> Hello Mr Nam. Our dredging machine has already been verified, but the land equipment is not ready, so we can't start working. I keep talking with PM Mr Kim about your overdue payment. I think we need 2 long arms, 2ADTs, and 1 dozer during the daytime, and 2 long arms at night. Other things, we currently have 4 lights and I need a supervisor to manage the day and night shift. We'll prepare the Banksman. Currently, we can guarantee *5,000m3 per day and 120,000m3 per month*. We've proceeded with the charter contract because the work was not ready yet, but *now our management also wants to make a unit price contract with you.*
>
> [emphasis added]

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[116] AWS at para 92.

[117] AWS at para 98.

[118] AWS at para 107.

[119] LCH-1 at p 80; AWS at para 93.

According to KSE, since the above text message states that "… our management also wants to make a unit price contract with you", it therefore suggests that there was no previously concluded contract using a volume-based rate.[120] However, Mr Lee has explained that a more accurate translation would be: "[p]reviously, work was not smooth, so we just had proceeded with a charter, however, our headquarters likewise wants the unit base contract". Mr Lee contends that there was a translation error since the word "make" does not exist in the Korean text but somehow has been included in the erroneous English translation. Hence, the Adjudicator would have been confused by this translation and influenced by it into concluding that the Alleged Oral Agreement did not exist at the time this text message was sent. KSE also submits that there was no need for KSE to inform Backho that it could "guarantee 5,000m3 per day and 120,000m3 per month", which refers to the volume quantity of dredged sand, if there was no prior agreement for payment to be by volume, as stipulated in the Second 4 February 2020 Quotation.[121]

107 On 31 October 2020, Mr Kim sent the following text message to a WhatsApp group chat with Backho:[122]

> …
>
> *Starting November 1st, the contract with Backho Company will be changed from charter to contract, please make every effort to manage your productivity.* I want to start working as soon as possible and do it until late. And I think it is not desirable to do oil top up time at once. It's enough to charge it in half. And if oil company continue complain, I think we should change oil company. This causes a lot of losses. Since there is no manager of your company, I am in the position of managing it, but I also have a limit. I've asked your MD several times, but 1)You must need to replace one with a big bucket. 2)Add 1 dozer operator

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120 AWS at para 94; LCH-1 at para 30.

121 AWS at para 95.

122 LCH-1 at p 39; AWS at para 96.

> at nightshift 3) Add 2 at nightshift ADT drivers very urgently. I am not in a position to wait any longer and I want your prompt action.
>
> [emphasis added]

KSE claims that in the above context, the words "charter to contract" was understood by the parties to mean that after September 2020 and October 2020, the rates would revert from time-based rates to the volume-based rates that had been originally agreed pursuant to the Alleged Oral Agreement (see [18] above). Mr Kim reminded Backho to "manage productivity" because payment was on volume-based rates.[123]

108 In my view, the above correspondence does not show the existence of the Alleged Oral Agreement.

109 In respect of Mr Kim's text message to Mr Nam on 3 September 2020, I do not see how Mr Lee's alternative translation assists KSE's case. Mr Lee's claim that the message should have read, "[p]reviously, work was not smooth, so we just had proceeded with a charter, however, our headquarters likewise wants the unit base contract", also suggests there was no previously concluded contract which used a volume-based rate. KSE's act of informing Backho in that message that it could "guarantee 5,000m3 per day and 120,000m3 per month", which refers to the volume quantity of dredged sand, therefore relates to the negotiation of a *new* contract's terms, one which payment would be based on volume instead of time. Given that this negotiation took place in September 2020, many months after the Alleged Oral Agreement was allegedly concluded sometime around 4 February 2020, the above evidence plainly does not assist KSE's case.

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[123] AWS at para 96.

110 In respect of Mr Kim's text message on 31 October 2020, the Adjudicator noted that there is no evidence of Mr Nam assenting to this message.[124] With regard to this finding, KSE submits that "it is more significant that Mr Nam did not deny the arrangement" as Mr Nam did not, for instance, "say he was puzzled by the statement" or "question what was the 'contract' which the charter was supposed to be changed to".[125]

111 Quite apart from the Adjudicator's reasoning and KSE's attempted rebuttal of it, I find that Mr Kim's text message on 31 October 2020 simply does not have much probative value. From a plain reading of the above asserted change from a "charter" to a "contract", this phrase connotes, at most, a more permanent arrangement between KSE and Backho as opposed to one that is more *ad hoc*. This is especially the case since the correspondence is between laymen. There is no evidence as to the terms of the "contract" that would allegedly take effect on 1 November 2020 and therefore whether that "contract", which was vague and ambiguous, was the Alleged Oral Agreement.

112 Hence, the correspondence above does not support KSE's case.

(2) Backho's conduct

113 KSE then submits that Backho's own conduct subsequent to KSE's 31 October 2020 text message from Mr Kim (see [107] above) reinforces the existence of the Alleged Oral Agreement.[126]

124 RBOD at p 303 para 64(h).

125 AWS at para 97.

126 AWS at para 98.

114 On the one hand, KSE alleges that the following evidence shows that Backho had claimed payment for its works done on a volume-based rate in affirmation of the Alleged Oral Agreement:

(a) Consistent with the payment of the works on a volume basis, Backho requested for the survey data on 10 December 2020 so that it could "prepare for submission of the progress claim".[127]

(b) Backho affirmed the Alleged Oral Agreement by submitting Progress Claim 1 dated 5 January 2021 for the works done in November 2020 and December 2020 using a volume-based rate of S$1.90/m^3.[128]

(c) Mr Nam sent Mr Kim a text message on 6 February 2021 to request for the survey data for October 2020, November 2020, December 2020 and January 2021 and requested for payment before Chinese New Year 2021.[129]

115 On the other hand, Backho submits that it is clear from the WhatsApp correspondence between the parties that even by 13 January 2021, KSE had not provided Backho with the survey data.[130] The WhatsApp messages state as follows:[131]

13 January 2021

Mr Nam: Mr Kim isn't answering my call. How should I discuss it with him? *And we didn't receive any survey data* in November and December.

[127] LCH-1 at p 43; AWS at para 99.

[128] LCH-1 at p 46; AWS at para 100.

[129] AWS at para 103; LCH-1 at p 82.

[130] RWS at para 29.

[131] RBOD at p 278.

> Mr Nam: Why don't you settle the September and October payments first and we discuss it again later? After five months of outstanding payment, it seems you're not willing to pay by raising the issue of work hours now. Let me have your answer.
>
> **15 January 2021**
>
> Mr Kim: Please send me the standby invoices for Apr, May, Jun and Jul which I mentioned yesterday.
>
> [emphasis added]

Hence, any contract premised on a volume-based rate was not concluded by 13 January 2021. The Alleged Oral Agreement therefore could not have been concluded shortly after the Second 4 February 2020 Quotation.

116 As for Progress Claim 1, Mr Nam explained that from 3 September 2020 to 13 January 2021, there were negotiations between Backho and KSE to revise the agreement concluded on 30 August 2019 to use volume-based rates.[132] However, in considering whether to agree to such an agreement, Backho requested KSE to provide the applicable quantum of earth work. Backho explained that this was why it prepared Progress Claim 1 to "explore" whether KSE would agree to the quantum of the earth work and the rate of $\$1.90/m^3$. KSE, however, rejected Backho's proposed rate, so Backho continued to make claims under the previous time-based rates. Admittedly, it may appear odd that Backho submitted Progress Claim 1 to "explore" the possibility of payment on a volume-based rate. However, it would be even stranger to accept KSE's version of the events. As the Adjudicator rightly noted, the sums that Backho claimed in Progress Claim 1 for November and December 2020 each was $355,001.70.[133] However, Backho eventually only claimed lesser sums of

132 RWS at paras 25(c) and 30; NK at para 29.

133 RBOD at p 303 para 64(g); RWS at para 35(c)(8).

$195,721.30 for November 2020 and $159,818.38 for December 2020, on a time-based rate under the 30 August 2019 Quotation and the First 4 February 2020 Quotation. Had there been the Alleged Oral Agreement, Backho would have been able to claim higher sums using a volume-based rate in Progress Claim 1 as opposed to a time-based rate under the two aforementioned quotations. I therefore agree with the Adjudicator's findings that "[i]f there was indeed an agreement reached that [Backho] should be paid based on volume-based rates, there would be little reason for [Backho] to switch back to time-based rates, and claim a lower amount" and that "[t]his therefore militates against a conclusion that such an agreement on volume-based rates was reached". In any case, in my view, the fact remains that Progress Claim 1 was premised on a rate of $\$1.90/m^3$. This rate was unacceptable to KSE as KSE contends that the Agreed Volume Rate was $\$1.50/m^3$. Hence, the fact that Progress Claim 1 was submitted on 5 January 2021 shows that the Alleged Oral Agreement did not exist in February 2020.

117 More broadly, the above evidence (at [114]) is but one aspect of Backho's conduct. The larger picture was that Backho had sent KSE many invoices from February 2020 to November 2020, which all referred to the 30 August 2019 Quotation and the First 4 February 2020 Quotation (see [91] and [92] above). Pursuant to these two quotations, payment was to be on time-based rates. As the Adjudicator rightly reasoned:[134]

> … Such conduct would be completely contradictory to [KSE's] position that an agreement was reached in February 2020 (or even in September 2020) that [Backho] would be paid for work done on a volume basis, at a rate of $S\$1.50/m^3$ of sand transported. [Backho] would not have consistently sent invoices referring to the 30 August Quotation and the First 4 February Quotation, if there was such an agreement reached that it was to be paid on a volume-based rate instead.

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134 RBOD at p 301 para 64(b).

118 However, as set out above (at [13]–[18]), KSE attempted to explain the above invoices, made on time-based rates, as goodwill payments to Backho. To recapitulate, KSE claims that despite the conclusion of the Alleged Oral Agreement, it paid Backho using time-based rates from 20 March 2020 to the end of October 2020 out of goodwill. This was in light of the disruptions to the works caused by the COVID-19 measures. Thereafter, payments were to revert to the use of a volume-based rate from 1 November 2020 onwards.

119 I pause to note that KSE has not adduced any direct evidence to show that the above payments were made on a goodwill basis. There is no documentary evidence that KSE told Backho that the payments were made on a goodwill basis. KSE instead invites the court to infer this fact from the circumstances of KSE's payments to Backho (see [125] below).

120 Further, in support of the narrative that KSE made goodwill payments, KSE submits that Backho did not issue payment claims on a time-based rate after November 2020.[135] However, on 27 February 2021, two weeks after Backho had allegedly abandoned its works (see [20] above), Backho realised that its claims would be lower using volume-based rates.[136] Hence, Backho issued, at one go, six invoices for works purportedly carried out pursuant to the 30 August 2019 Quotation and the First 4 February 2020 Quotation for the months of November 2020, December 2020 and January 2021 (see Claim Nos 11–13 at [91] and Claim Nos 7–9 at [93] above).

121 KSE's submission above is rather far-fetched. KSE claims that Backho's issuance of six invoices on 27 February 2021 was motivated by a realisation

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135 AWS at para 105.

136 AWS at para 106.

that it could have claimed for higher sums using time-based rates rather than volume-based rates. Yet, there is no evidence to support KSE's assertion of Backho's alleged motivation.

122 In contrast, Backho could satisfactorily explain why it had issued six invoices on 27 February 2021. Backho submits that from 16 March 2020 to 5 May 2021, Backho was consistently chasing KSE for KSE's outstanding payments for works carried out in September 2020 to January 2021.[137] This submission is supported by WhatsApp correspondence between Mr Nam and Mr Kim:[138]

16 March 2020

[Mr Kim]: Mr Nam! Long time no see. I'm texting you first because I couldn't reach you on the phone. I recently heard *the* ***payment issue*** *wasn't solved smoothly*. You've been ***waiting for a long time***. I heard there was a problem with the number of people who were put on the night shift, even though it's almost settled and is implemented both day and night. I hope this is simply a payment issue. I've been talking on the phone with Director Lee at my head office, and I heard the payment issue will be resolved this week.

[Mr Kim]: I'm sorry it wasn't handled properly. Anyway, if what we've already started doesn't pose another problem, I hope we can proceed smoothly with mutual cooperation. Thank you for your hard work.

24 March 2020

[Mr Kim]: First of all, I received confirmed [*sic*] that the *payment issue* will definitely be resolved tomorrow. …

137 RWS at paras 25(a) and 29.

138 RBOD at pp 275 to 278.

31 March 2020

[Mr Nam]: Good morning, Mr Kim. Thank you for your hard work. Please contact me about the *payment*.

[Mr Kim]: Good morning, Mr Nam. It's frustrating for me, too. The head office handles the money. Director Lee will be calling you.

30 August 2020

…

[Mr Kim]: Thank you for ***waiting for a long time***. You can resume the work from tomorrow. Please get Backho's operators ready. … It is estimated that work of 5000m^3 or more per day is possible. …

…

16 September 2020

[Mr Kim]: Mr Nam, do you have anything to update us? We've been pressed for the payment issue again.

24 September 2020

[Mr Kim]: Mr Nam, how're you? I heard you're working on the *payment issue* with Director Lee.

7 October 2020

[Mr Kim]: Even the charter is like this, and I don't know if I can sign a contract. I'm not even an employee of Backho. I'm really tired.

…

6 February 2021

…

[Mr Nam]: Please send us the survey data from October to January and I'll tell you if we can perform the work *after payment is made* before the Lunar New Year.

[Mr Kim]: All right.

14 February 2021

[Mr Kim]: … Hasn't *the payment for November* been made yet? We haven't received any payment since December. …

…

[Mr Nam]: And *the payment hasn't been made yet.*

[emphasis added in italics and bold italics]

Pertinently, the last exchange above on 14 February 2021 clearly shows that Backho had not received payments since November 2020. The previous exchange also indicates that Backho was chasing for payments from October 2020 to January 2021. In the circumstances, I find that the contemporaneous issuing of six invoices on 27 February 2021 was motivated by a need to pursue *previous* payments for Backho's rental of equipment from October 2020 to January 2021 under the previously concluded contract within the 30 August 2019 Quotation and the First 4 February 2020 Quotation. It was not, as KSE claims, done because Backho realised that its claim would be lower using volume-based rates. In fact, Backho would have been able to claim higher sums using a volume-based rate in Progress Claim 1 as opposed to a time-based rate (at [116] above).

(3) The timing and circumstances of KSE's payments of the invoices

123 KSE submits that the Adjudicator had failed to consider the timing and circumstances of KSE's payments of the invoices purportedly made pursuant to the 30 August 2019 Quotation and the First 4 February 2020 Quotation. KSE submits as follows:[139]

> a. When the works started in or around 20 March 2020, the dredging volume was very low and there was not enough volume of sand to be transported to justify Backho's equipment on site. KSE then agreed, out of goodwill, for payment to be based on rental rates for a very limited duration. This was to assist Backho so that it could earn a reasonable revenue because had calculations based on a unit price structure under the Land Contract been strictly enforced, Backho's revenue

139 AWS at para 108.

would have been very low due to the low volume of sand that was subject to dredging at the time.

b. Thus, notwithstanding that Backho claimed based on rental rates for works under the Land Contract, KSE paid Backho for the works carried out in the months of February 2020 to April 2020 (prior to the Circuit Breaker) out of goodwill.

c. After the Circuit Breaker and when works could resume, based on a further discussion on 29 September 2020, KSE since again agreed to assist Backho by paying based on rental rates from 20 September 2020 to the end of October 2020. This indulgence given by KSE was again made purely out of goodwill, in view of the fact that Backho would take some to re-mobilise the equipment before carrying out unit based chargeable work, and that there was slower dredging works as a result of the works only just re-starting because of the earlier COVID-19 circuit breaker restrictions and the slow release of workers from the dormitories. It was however made clear to Backho that starting from 1 November 2020, KSE would, in all circumstances, revert to paying Backho based on the previously Agreed Unit Rate of S$1.50 per m3 pursuant to the Land Contract.

124 The above submission is simply a bare narration of what KSE asserts to be the true facts pertaining to the present dispute. In the circumstances, I do not see how the Adjudicator had, in KSE's view, failed to consider the timing and circumstances of KSE's payments of the aforementioned invoices.

125 As alluded to above (at [119]), KSE suggests that the court should infer that its payments on a time-based rate were out of goodwill. KSE argues that its payments for the sand transportation works were not for the exact amounts in Backho's invoices. Instead, KSE made lump sum payments without indicating that they were for the invoices pertaining to the First 4 February 2020 Quotation:[140]

140 AWS at paras 109 to 111.

(a) a sum of $80,000 on 2 October 2020;[141]

(b) a sum of $120,000 on 11 November 2020;[142] and

(c) a sum of $150,000 on 22 January 2021.[143]

KSE therefore argues that the manner in which it made the above payments shows that KSE neither affirmed the First 4 February 2020 Quotation nor accepted the invoices pertaining to that quotation.[144]

126 As seen from the evidence above (at [122]), Backho was chasing for payments from KSE from March 2020 to May 2021. During this period of time, the payments on October 2020, November 2020 and January 2021 were effected, but Backho continued to chase KSE for payment. In my view, these lump sum payments can either indicate that:

(a) they were unconnected to the invoices pertaining to the 30 August 2019 Quotation or the First 4 February 2020 Quotation and therefore made on a goodwill basis; or

(b) they were simply insufficient for full payment for moneys due under the 30 August 2019 Quotation or the First 4 February 2020 Quotation.

In the absence of further evidence, the fact that lump sum payments were made to Backho alone does not assist KSE's case.

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141 LCH-1 at p 316.

142 LCH-1 at p 317.

143 LCH-1 at p 319.

144 AWS at para 112.

(4) KSE has not discharged its burden of proof

127 In light of the analysis above, KSE has not discharged its burden to prove, on a balance of probabilities, that the Alleged Oral Agreement exists. Rather, I am persuaded that Backho's conduct indicates strongly that it had sought to claim in the six invoices payments under the contract within the 30 August 2019 Quotation and the First 4 February 2020 Quotation (see [122] above).

(5) Conclusion on the Alleged Oral Agreement

128 For the above reasons, I dismiss KSE's second jurisdictional objection that AA 165 was premised on an oral agreement and hold that the Adjudicator did not act in excess of his jurisdiction on this ground.

Conclusion

129 As stated above (at [38]–[44]), KSE's present application to set aside the AD was clearly filed out of time as it exceeded the stipulated 14-day period under O 95 r 2(4) of the ROC. This deadline of 14 days is not advisory and KSE had failed to comply with it to set aside the AD. However, I accepted the reasons for non-compliance and there is no substantial prejudice to Backho. Thus, I granted KSE an extension of time.

130 However, for the above reasons, KSE has not proven any of its two grounds to set aside the AD. My findings are as follows:

(a) In respect of the first ground that there were two contracts, *ie*, the 30 August 2019 Quotation and the First 4 February 2020 Quotation, I find that there was in fact an overarching agreement for Backho to supply *all* the necessary equipment for KSE to carry out its works under

the Project, the First 4 February 2020 Quotation was a variation and an addition to the 30 August 2019 Quotation. AA 165 was therefore premised on a single contract (see [58]–[98] above).

(b) In respect of the second ground that the Second 4 February 2020 Quotation was an oral agreement, KSE failed to prove that the Alleged Oral Agreement exists. Hence, AA 165 was not premised on an oral contract but on a contract made in writing within the 30 August 2019 Quotation and the First 4 February 2020 Quotation (see [105]–[128] above).

Accordingly, I dismiss KSE's application to set aside the AD and the Order.

131 I shall hear parties on the issue of costs.

Tan Siong Thye
Judge of the High Court

Lee Peng Khoon Edwin, Amanda Koh Jia Yi and Yap Wei Xuan Mendel (Eldan Law LLP) for the applicant;
S. Magintharan and Liew Boon Kwee James (Essex LLC) for the respondent.