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

[2023] SGHC 8

Originating Claim No 28 of 2022 (Registrar's Appeal No 269 of 2022)

Between

Presscrete Engineering Pte Ltd

… *Claimant*

And

SsangYong-Wai Fong Joint Venture

… *Defendant*

GROUNDS OF DECISION

[Arbitration — Stay of court proceedings — Section 6 of the Arbitration Act 2001 — Whether the dispute fell within the scope of the arbitration agreement]

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v
SsangYong-Wai Fong Joint Venture

[2023] SGHC 8

General Division of the High Court — Originating Claim No 28 of 2022
(Registrar's Appeal No 269 of 2022)
S Mohan J
29 September, 10 October 2022

10 January 2023

S Mohan J:

Introduction

1 HC/RA 269/2022 ("RA 269") was the defendant's appeal against the Assistant Registrar's ("AR") decision to dismiss its application in HC/SUM 2805/2022 ("SUM 2805") for a stay of court proceedings in favour of arbitration, along with an appeal against the AR's costs order.

2 The defendant joint venture was the main contractor in a design and construction project involving the North South Corridor tunnel between Victoria Street and Kampong Java Road (the "N102 Project"). The claimant was its subcontractor for ground improvement ("GI") works.

3 In response to the defendant's invitation to quote, the claimant submitted a quotation for Jet Grout Pile ("JGP") and Wet Speed Mixing ("WSM") works

by way of a letter dated 11 July 2019 (the "Quotation").[1] On 21 August 2019, the defendant issued a letter of intent expressing its intention to award the GI works to the claimant, subject to "the terms and conditions of the Letter of Award and/or Sub-Contract Agreement".[2] Parties then entered into a subcontract for the GI works dated 8 November 2019 (the "Subcontract").[3] The Subcontract was described as a "Fixed Price Sub-Contract with Bill of approximate Quantities".[4] Works commenced on or around December 2019.[5] The wider N102 Project is still ongoing.[6]

4 HC/OC 28/2022 ("OC 28") was commenced by the claimant, *inter alia*, as a claim for damages stemming from the defendant's failure to pay for works performed. While the defendant has not filed its defence on the merits, parties appeared to be at odds over whether the relevant works fell within the Subcontract's scope of works, and in that connection, what payment was due.

5 On 28 July 2022, the defendant filed SUM 2805, seeking a stay of the whole of OC 28 pursuant to s 6 of the Arbitration Act 2001 (2020 Rev Ed) ("AA") and O 6 r 7(5) of the Rules of Court 2021 ("ROC"). Further or alternatively, the defendant sought a stay of proceedings pursuant to the court's general powers under O 3 r 2(2) of the ROC.[7]

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1 Statement of Claim ("SOC") at para 3(b); Affidavit of Loh Chang Kaan at para 6(b) and pp 10 to 16.

2 SOC at para 3(c).

3 SOC at para 3(d).

4 1st Affidavit of Lee Seung Hun at p 23.

5 1st Affidavit of Lee Seung Hun at para 7.

6 1st Affidavit of Lee Seung Hun at para 7.

7 1st Affidavit of Lee Seung Hun at para 20.

6 I heard the appeal on 29 September 2022, and on 10 October 2022, I allowed the defendant's appeal, providing brief oral grounds for my decision. Dissatisfied, the claimant has appealed. These are my full grounds of decision.

Background facts

JGP works

7 The claimant asserted that in the course of attempting to carry out the JGP works, it discovered that the defendant had: (a) failed to ensure that there were no obstructions or access problems for the claimant's drilling rigs; and (b) introduced additional obstructions such as restrictive hoardings and sheet pilings. This was said to have occurred across multiple locations, such as manholes 1, 2, 3, 5, 18 and 20-1.[8]

8 The claimant raised this with the defendant, whose response was for the claimant to carry out either angular (or inclined) JGP works (at manholes 1, 5, 18 and 20-1) or horizontal permeation grouting works (at manholes 2 and 3).[9] These were in place of the vertical JGP works which the claimant said it was required to perform under the original scope of works. The angular JGP and horizontal permeation grouting works (the "disputed JGP works") were then carried out.

WSM works

9 In the course of attempting to carry out the WSM works, the claimant claimed to have discovered that various underground piles (and the foundation piles at the site of the former Rochor Centre) had not been extracted. Its case

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8 Affidavit of Loh Chang Kaan at para 9; Claimant's written submissions at para 12.

9 Affidavit of Loh Chang Kaan at para 9; Claimant's written submissions at para 12.

was that the defendant was obliged to do so under the Subcontract, but had failed to do so.[10]

10 The claimant raised this with the defendant, whose response was for the claimant to carry out the WSM works using 800mm diameter piles, instead of 1,850mm diameter piles.[11] These works (the "disputed WSM works") were then carried out.

The claimant's variation claims

11 According to the claimant, because the changes to the JGP and WSM works were not within the Subcontract's scope and entailed a significant increase in costs (of approximately $1.6m), it submitted claims to the defendant for these as variation works under the Subcontract. The defendant refused to certify the variation claims, on the basis that the disputed JGP works and disputed WSM works (collectively the "disputed works") already fell within the Subcontract's original scope of works. To be sure, some payment was allowed for the disputed JGP works ($10,566.50 and $85,810.19), but these fell short of the total sums claimed, and more importantly, were (on the claimant's interpretation) described as COVID-19-related support payments, and not payments for variation.[12]

The defendant's stay application

12 In SUM 2805, the defendant's primary argument rested on s 6 of the AA (read with O 6 r 7(5) of the ROC), but it also invoked, in the alternative, the court's general powers under O 3 r 2(2) of the ROC. The defendant relied on

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10 Affidavit of Loh Chang Kaan at para 11.

11 Affidavit of Loh Chang Kaan at para 11.

12 Affidavit of Loh Chang Kaan at para 13.

the arbitration agreement contained in clause 43 of the Subcontract (the "Arbitration Agreement"):[13]

> **43. Settlement of Disputes**
>
> 43.1 Save as provided for under and/or is not inconsistent with the Building and Construction Industry Security of Payment Act, *in the event of any dispute or difference between the Main Contractor and the Sub-Contractor*, whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the termination of the employment of the Sub-Contractor under the Sub-Contract (whether by breach or in any other manner), *with regards to any matter or thing of whatsoever nature arising out of the Sub-Contract or in connection therewith*, then either Party shall give to the other notice in writing of such dispute or difference and such dispute or difference *shall be finally resolved by arbitration* in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this Clause. The tribunal shall consist of one (1) arbitrator whose appointment as arbitrator shall be agreed by the Parties in writing, or failing such agreement as may be appointed on the request of either Party by the Chairman of the Singapore International Arbitration Centre and in either case, the award of such arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be in the English language. Provided always that the Main Contractor shall have the sole discretion to commence proceedings in the courts of Singapore and/or any other jurisdiction if the Main Contractor deems fit.
>
> 43.2 An arbitrator appointed pursuant to Clause 43.1 shall have full power to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute or difference which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.
>
> 43.3 No reference for arbitration shall be initiated by either Party until the Sub-Contract Works have been completed unless the prior written consent of all the

[13] 1st Affidavit of Lee Seung Hun at pp 67 to 69.

> Parties have been obtained or where the reference is made by the Main Contractor [*ie*, the defendant].
>
> 43.4 For the avoidance of doubt, the arbitrator shall have no power whatsoever to decide on, arbitrate on or inquire into any matter for which any Party is deemed, pursuant to the Sub-Contract, to have waived his rights.
>
> 43.5 …
>
> 43.6 Any award of finding for or against the Main Contractor, wherever such award or finding concerns the Sub-Contract or Sub-Contract Works, the same shall also be binding on the Sub-Contractor on all issues except on issues relating to quantum for which there shall be separate adjudication or decision as between the Main Contractor and the Sub-Contractor. Provided always that any decision of the [Land Transport Authority] or the Main Contractor that is final and binding upon the Main Contractor and [the Land Transport Authority] under the Main Contract shall also be deemed to be final and binding as between the Main Contractor and the Sub-Contractor under the Sub-Contract.
>
> 43.7 During the time of dispute and thereafter, until the completion of the Sub-Contract Works, the Sub-Contractor shall not suspend the proper progress of the Sub-Contract Works without the prior written consent of the Main Contractor.
>
> [emphasis added]

Parties' arguments

The issue in dispute

13 The entire appeal before me turned on one issue: whether the claims in OC 28, or any part thereof, fell within the scope of the Arbitration Agreement. If they did, it followed that a stay ought ordinarily be granted in favour of arbitration. This was so because it was common ground, or at the least not seriously disputed, that the other requirements for a stay under s 6 of the AA were met.

14 More precisely, the parties were in agreement on the following points.

15 First, s 6 of the AA was the applicable provision to be construed and applied:

> **Stay of legal proceedings**
>
> **6.**—(1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after filing and serving a notice of intention to contest or not contest and before delivering any pleading (other than a pleading asserting that the court does not have jurisdiction in the proceedings) or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —
>
> (*a*) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
>
> (*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
>
> make an order, upon any terms that the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.
>
> …

16 Second, the test as described by the Court of Appeal at [63] of *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen Holdings*") was applicable in this case. This was so even though *Tomolugen Holdings* concerned a stay under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), whereas the present application was brought under s 6 of the AA: *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 at [22]. Under this test, a court will grant a stay in favour of arbitration where the stay applicant establishes a *prima facie* case that:

(a) there is a valid arbitration agreement between the parties to the court proceedings;

(b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and

(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

17 Third, it was undisputed that on the present facts, the first and third limbs of the test were satisfied.[14] Clause 43 of the Subcontract constituted a valid arbitration agreement between the parties. The Arbitration Agreement was not null and void, inoperative or incapable of being performed. To be clear, there is no express exception in s 6 of the AA (unlike s 6 of the IAA) where a stay may be refused if the arbitration agreement is found to be null and void, inoperative or incapable of being performed. Nonetheless, in my view, a court considering a stay application under s 6 of the AA can and should also consider if the arbitration agreement is null and void, inoperative or incapable of being performed as part of its consideration of whether (a) there is an "arbitration agreement" within the meaning of s 6 of the AA; and/or (b) there is "sufficient reason" for the court to refuse a stay.

18 Fourth, it followed that only the second limb from the *Tomolugen Holdings* test remained to be determined in this case, *ie*, whether the dispute in OC 28 (or any part thereof) fell within the scope of the Arbitration Agreement. It was undisputed that the burden fell on the defendant to prove this positively, on a *prima facie* standard of review: *Tomolugen Holdings* at [63]–[70].

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14 Claimant's written submissions at para 21.

19 Finally, the remaining conditions in s 6(2) of the AA were also met. In other words: (a) the claimant did not contend that there was any other reason why the dispute ought not to be referred to arbitration in accordance with the Arbitration Agreement; and (b) the defendant had, at all times, remained ready and willing to do all things necessary to the proper conduct of the arbitration. While there was some suggestion before the AR below that condition (b) was in dispute, those arguments were not pursued before me by claimant's counsel.

20 The upshot of the foregoing was that there was only one issue to be determined in this appeal: whether the dispute in OC 28 (or any part thereof) fell within the ambit of the Arbitration Agreement.[15]

The claimant's case

21 The claimant sought to resist the stay application by arguing that the disputed works were never intended to be part of the Subcontract, and thus fell outside the Subcontract's scope of works. The disputed JGP works had been expressly excluded under the Quotation. The disputed WSM works had only come about because of the defendant's failure to remove existing piles. It followed that if the disputed works did not fall within the scope of the Subcontract, then they did not fall within the scope of the Arbitration Agreement.

The defendant's case

22 The defendant argued that the claim in OC 28 "[arose] out of" or was "in connection with" the Subcontract, and as such, OC 28 related entirely to disputes which were to be referred to arbitration under the Arbitration

15 Claimant's written submissions at para 21.

Agreement.[16] OC 28 should thus be stayed. Its commencement amounted to an abuse of process – a circumvention of the parties' agreed dispute resolution mechanism (including clause 43.3, which provided that no dispute was to be arbitrated until the works under the Subcontract were completed).[17]

The AR's decision

23 The learned AR dismissed the defendant's stay application in SUM 2805. She found that the dispute did not fall within the scope of the Arbitration Agreement.

24 The AR agreed with the claimant that the disputed JGP works were not intended to be part of the Subcontract's works, and were expressly excluded under the Quotation. The defendant's instruction to the claimant to prepare new shop drawings on the new scope of works for approval by the Land Transport Authority showed that the works were not within the Subcontract's original scope of works. Conversely, there was no evidence presented by the defendant to show that the works did in fact fall within the Subcontract's scope of works.[18]

25 Given the defendant's position that the disputed works did not constitute variation works, in the AR's view, it followed that the works did not fall within the Subcontract's ambit, and in turn, the Arbitration Agreement did not apply to OC 28.[19]

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16 1st Affidavit of Lee Seung Hun at paras 14 and 15.

17 1st Affidavit of Lee Seung Hun at paras 16 to 18.

18 AR's oral grounds of 23 August 2022 at para 10.

19 AR's oral grounds of 23 August 2022 at para 11.

26 Before the AR, the claimant also contended that the defendant was not yet ready and willing to do all things necessary to the proper conduct of the arbitration, having regard to clause 43.3 of the Subcontract. Clause 43.3 essentially provided that, save for some exceptions, arbitration could not be commenced until the Subcontract works had been completed. The AR found this to be a neutral factor, on the basis of a letter where the defendant indicated its position that any disputes must be referred to arbitration.[20]

27 Finally, there was some ambiguity as to whether the AR had addressed the disputed WSM works in her oral grounds. Those grounds only made express reference to the JGP works. The claimant accepted that the AR had not separately addressed the issue of the disputed WSM works, but argued in the appeal that her decision "appear[ed] to apply to both scopes of work[s] because the same principles that were applied [in] her decision in respect of the JGP works also applied to the WSM works".[21] Since a registrar's appeal is heard on a *de novo* basis, I considered that I did not have to conclusively resolve this ambiguity.

Issue to be decided

28 As explained above at [13]–[20], the sole issue I had to determine was whether OC 28 (or any part thereof) fell within the scope of the Arbitration Agreement.

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20 AR's oral grounds of 23 August 2022 at para 12.

21 Claimant's written submissions at para 27.

My decision

Applicable legal principles

29 The court's power to stay court proceedings under the AA is found in s 6, reproduced above at [15].

30 As to the defendant's further reliance on the general powers of the court for a stay, that rule (O 3 r 2(2) of the ROC) reads:

> **General powers of Court (O. 3, r. 2)**
>
> **2.**— …
>
> (2) Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals.
>
> (3) In exercising any power, the Court may impose any condition or give such directions that are appropriate.
>
> …

31 The assessment of whether a dispute in court proceedings (or any part thereof) falls within the scope of an arbitration agreement involves a two-stage process (*Tomolugen Holdings* at [108]):

(a) the first stage involves a determination of what is/are the matter(s) in the court proceedings; and

(b) the second stage involves a determination of whether the matter(s) identified in the first stage fall(s) within the scope of the arbitration agreement on its true construction.

32 As the Court of Appeal held in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [23], the

subject matter of proceedings would fall outside the terms of an arbitration agreement providing for the arbitration of "disputes" if: (a) there is no dispute; or (b) the alleged dispute is unrelated to the contract containing the arbitration agreement.

33 In characterising the alleged "dispute" or the "matter" in dispute, the court is not to undertake this inquiry in an overly broad manner, or in an unduly narrow and pedantic manner. In most cases, the "matter" would encompass the claims made in the proceedings: *Tomolugen Holdings* at [113].

34 Likewise, in determining whether a given "matter" is related to the contract containing the arbitration agreement, the court must be reminded of and guided by the overarching principle of curial non-intervention. The Court of Appeal cautioned in *Tjong Very Sumito* (at [24]) that the principle of *kompetenz-kompetenz* may be eroded if the courts take an expansive view of their role when challenges arise. The court must therefore proceed through a "robust application of judicial common sense, whilst always bearing in mind the limited role that the courts are expected to play in matters that appear to have been referred to arbitration". The Court of Appeal concluded with the reminder that it is "only in the *clearest* of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement" [emphasis in original].

The dispute in OC 28 fell within the scope of the Arbitration Agreement

The central flaw in the claimant's case

35 The central flaw in the claimant's reasoning was evident from this paragraph in its representative's affidavit:[22]

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22 Affidavit of Loh Chang Kaan at para 16.

> 16. Since the Defendant has consistently taken the position that the completely new works that they have asked the Claimant to do are **not** variation works under the Sub-Contract Agreement, they have effectively taken the position that these works are not part of the Sub-Contract, a position that the Claimant accepts. I am advised by the Claimant's solicitors and verily believe that since the works in question do not fall under the Sub-Contract, Clause 43 of the Sub-Contract has no application to the present dispute and there is no arbitration agreement thereon.
>
> [emphasis in original]

36 The claimant's case set up a binary. According to it, the disputed works were either:

(a) variation works under the Subcontract; or

(b) works that fell outside the Subcontract altogether, *ie*, they were not (even) variation works under the Subcontract.

The former would "aris[e] out of" the Subcontract or be "connect[ed] therewith", but not the latter.

37 In my judgment, this binary missed an important third possibility, and indeed, the defendant's very position in SUM 2805: that the disputed works constituted *original works* under the Subcontract. In this regard, the defendant argued that there was no material difference between inclined and regular JGP works, because the Subcontract made no such distinction. Further, it contended that the original scope of works already encompassed carrying out WSM works around existing piles.[23] In appreciating the defendant's position, it might also be relevant to note in passing the breadth of clause 3.3 of the Subcontract:[24]

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23 2nd Affidavit of Lee Seung Hun at para 11.

24 1st Affidavit of Lee Seung Hun at p 24.

> **3. Sub-Contract Sum**
>
> …
>
> 3.3 The Sub-Contract Sum and the Sub-Contract Schedule of Rates shall be inclusive of all ancillary, incidental, expedient, necessary and other works and expenditure of whatsoever nature and howsoever arising, *whether separately or expressly mentioned in the Sub-Contract or not*, which are either *necessary* to carry out and bring to completion the Sub-Contract Works, or which may *become necessary to overcome difficulties before completion* of the Sub-Contract Works.
>
> [emphasis added]

38 Viewed in this light, the proper framing of the issue should have been whether the disputed works were:

(a) original works under the Subcontract (*ie*, works falling within the original scope of works);

(b) variation works under the Subcontract; or

(c) works that fell outside the Subcontract altogether (*ie*, they were neither original works nor variation works under the Subcontract).

It was therefore incorrect, in my view, to conclude that simply because the defendant did not regard the disputed works to be variation works, the only remaining conclusion must have been that they fell outside the Subcontract altogether.

39 The defendant's position had always been that the disputed works fell within the original scope of works. Since that was the case, it followed that the determination of OC 28 would entail examining the Subcontract and determining whether the disputed works were indeed original works. In my

judgment, that was plainly an issue arising "in connection [with]" the Subcontract.

40 But that was not all. Even the claimant's case was clearly connected with, and *arose out of*, the Subcontract. The claimant had on several occasions taken the position that the disputed works should be regarded as variation works, even if the defendant did not in fact certify them as such. In other words, its real bone of contention was not that the defendant was wrong in refusing to pay for works falling outside the Subcontract, but that the defendant was wrong in refusing to acknowledge them as variation works.

41 In the first place, the claimant appeared to have performed the disputed works on the impression that the defendant had given instructions that amounted to variation orders (or at least with the belief that they would or should amount to variations). That explained why the claimant proceeded to submit variation claims.

42 Second, its solicitors' letter dated 6 December 2021 expressly acknowledged that there was "a dispute or difference between [the parties] as to whether the work required to work around [the existing piles] constitutes a variation order or are [*sic*] part of the Sub-Contract Works [*ie*, the original works]".[25] Clearly, the claimant took the former view (that they were a variation). At this juncture, it was also worth noting that the letter went on to propose that the issue be submitted to court "notwithstanding Clause 43 of the Sub-Contract". This was, in my view, a stark concession from the claimant that clause 43, the Arbitration Agreement, *was* applicable to the parties' dispute. In

[25] 2nd Affidavit of Lee Seung Hun at p 10, paras 2–3.

effect, the claimant was seeking the defendant's consent to proceed otherwise, *in spite of* the Arbitration Agreement being applicable.[26]

43 Third, the claimant maintained this position (that the disputed works ought to be variations) even in its pleaded case in OC 28. Its Statement of Claim ("SOC") stated:

> **THE JGP WORKS**
>
> 8. In breach of the terms of the Quotation *and the Sub-Contract*, the Defendants *changed the works to be carried out in respect of JGP works* [*sic*] and failed to ensure that there were no obstructions and no access problems for all of the Claimants' drilling rigs and equipment: –
>
> Particulars
>
> **Manhole 2 ('MH 2') & Manhole 3 ('MH 3') – Permeation Grouting**
>
> …
>
> c) The Defendants have, to-date, *refused to acknowledge or certify the works done at MH 2 and MH 3 as variation works*, taking the position that the horizontal Permeation Grouting does not constitute variation works and fall [*sic*] within the scope of works to be carried out by the Claimants under the Sub-Contract. The Defendants have, however, to-date paid the Claimants a sum of S$10,566.50 for the horizontal Permeation Grouting based on an arbitrarily increased rate of S$175/$m^3$, ostensibly as a 'Covid-19 assistance', and on an arbitrarily determined volume of 60.38 m^3.
>
> **Manhole 1 ('MH 1'), Manhole 5 ('MH 5'), Manhole 18 ('MH 18') and Manhole 20-1 ('MH 20-1') – Site issues and underground obstructions**
>
> …
>
> f) The Defendants have, to-date, *refused to acknowledge or certify the works done at MH 1, MH 5, MH 18 and MH 20-1 as variation works*, and take the position that the inclined JGP works do not

[26] 2nd Affidavit of Lee Seung Hun at p 11, para 4.

constitute variation works and fall within the scope of works to be carried out by the Claimants under the Sub-Contract. The Defendants have, however, to-date paid the Claimants a sum of S$85,810.19 for the inclined JGP works based on an arbitrarily increased rate of S$135/$m^3$, ostensibly as a 'Covid-19 assistance', and on an arbitrarily determined volume of 635.63 m^3.

THE WSM WORKS

…

13. The Defendants have, to-date, *refused to acknowledge or certify the redesigned shop drawings and works carried out thereunder as variation works*, and take the position that the Claimants' works to accommodate the foundation piles left behind by the Defendants were not variation works and fall within the scope of works to be carried out by the Claimants under the Sub-Contract.

14. *In consequence of the Defendants' breaches of the Sub-Contract*, the Claimants have suffered loss and damages:–

Particulars

(i) The value of the works set out in the Claimants' Variation Work No. 3 (for MH 1, MH 2 and MH 3) to be assessed and estimated at S$149,481.70;

(ii) The value of the works set out in the Claimants' Variation Work No. 6 for MH 5 to be assessed and estimated at S$61,173.34;

(iii) The value of the works set out in the Claimants' Variation Work No. 6 for MH 18 to be assessed and estimated at S$370,652.10;

(iv) The value of the works set out in the Claimants' Variation Work No. 6 for MH 20-1 to be assessed and estimated at S$116,602.00; and

(v) The value of the works set out in the Claimants' Variation Work No. 10 for using multiple 800mm diameter piles in place of 1850mm diameter piles to be assessed and estimated at S$910,293.57.

AND THE CLAIMANTS CLAIM AGAINST THE DEFENDANTS:-

…

4) Damages to be assessed and estimated at S$1,608,202.71 [*ie*, the total of [14(i)] to [14(v)] above], less the

> sums of S$10,566.50 and S$85,810.19 already paid by the Defendants;
>
> …
>
> [emphasis added]

44 It was plain from the SOC that the claimant regarded the disputed works to be variation works. That was why the claimant sought their certification as such. Its complaint was that the defendant then refused to acknowledge or certify the works as variations, when they should be regarded as variations. These pleaded facts were incompatible with the claimant's modified position in the stay proceedings, that the disputed works fell outside the Subcontract altogether and were not variation works at all. This shift struck me as being an afterthought.

45 This contradiction went beyond the pleaded facts to the way the claimant pleaded its cause of action. Paragraph 14 of the SOC attributed the claimant's losses to the defendant's "breaches of the [Subcontract]". In other words, because of the defendant's failure to certify the disputed works as variation works, and to perform its obligation to pay for those works (as variation works), the claimant should be compensated for the losses flowing from those *contractual* breaches. With the claim so framed, it was hard to see how the dispute in OC 28 could be characterised as anything but one arising out of and connected with the Subcontract.

46 Granted, the SOC also prayed for declarations that the disputed works were "not within the scope of works to be carried out by the [claimant] under the Sub-contract". However, in my view, such a prayer remained consistent with a case that the disputed works should have constituted variation works *under the Subcontract*. Moreover, the relief sought must be construed against the overall thrust of the SOC. As reflected in [43], the claimant's entire claim in

OC 28 rested on the Subcontract and/or the Quotation. Its SOC did not even allude to an alternative cause of action or basis for recovery. It did not, for example, seek relief on the basis of *quantum meruit*; nor did it contend that the disputed works were undertaken as part of a separate or collateral contract completely unrelated to the Subcontract. Neither was its case that the disputed works could not have amounted to a valid variation, for instance on the basis that they exceeded the scope of permissible variations under the variations clause in the Subcontract (*ie*, clause 21).

47 On this view of the claimant's case, the dispute in OC 28 would naturally and almost inevitably bring into play a host of Subcontract provisions concerning matters such as instructions (clause 20), variations (clause 21), and possibly the valuation of variations (clause 22).[27]

The dispute prima facie fell within the scope of the Arbitration Agreement

48 Building on the findings detailed above, I found that the defendant succeeded in demonstrating that the dispute *prima facie* fell within the scope of the Arbitration Agreement.

49 The Arbitration Agreement was worded in some of the widest possible terms. It covered "any dispute or difference … with regards to any matter or thing of whatsoever nature arising out of the [Subcontract] or in connection therewith". As alluded to at [38] above, there was a live dispute as to whether the disputed works fell within or without the Subcontract. Whether the claimant's position was that they ought to be variations or fell outside the Subcontract altogether, the defendant's position was that these were works falling within the original scope of the Subcontract. In my view, that position

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27 1st Affidavit of Lee Seung Hun at pp 39 to 44.

was sufficient by itself to situate the dispute as one connected with, if not arising out of, the Subcontract. The entire dispute in OC 28 thus *prima facie* fell within the scope of the Arbitration Agreement.

50 The learned AR observed that the defendant produced no evidence that the disputed works were works falling within the Subcontract.[28] In my respectful view, that was not the pertinent question – the pertinent question was whether the defendant had produced enough evidence to show that the *dispute* was one falling within the scope of the *Arbitration Agreement*. This followed from how the two-stage inquiry in *Tomolugen Holdings* (as set out at [31] above) has been framed: (a) what *matter(s)* is/are in the court proceedings; and (b) whether the *matter(s)* fell within the scope of the *arbitration agreement* on its true construction. To this end, I found that sufficient evidence had been adduced, in the form of the Arbitration Agreement, the other terms of the Subcontract, and the SOC. These provided sufficient tools in this case to (a) assess what the matters in OC 28 were; (b) define what the Arbitration Agreement's scope was; and (c) then put the two together to arrive at a conclusion.

51 In fairness to the AR, it may be that evidence concerning the works performed and the Subcontract's scope of works would form a relevant consideration in this inquiry. However, that would not be the *central* inquiry in deciding whether or not to grant the stay. The defendant did not, in SUM 2805, have to prove its substantive case that the disputed works were original works – that is a question to be determined in the arbitration. Moreover, O 6 r 7(4) of the ROC provides that a defendant who raises a jurisdictional challenge to a claim is not required to file its defence on the merits. What the defendant did have to show was that there was a *dispute* between the parties as to whether the

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[28] AR's oral grounds of 23 August 2022 at para 11.

works fell within the Subcontract or not, and that this dispute fell within the ambit of the Arbitration Agreement.

52 Even if one were to adopt the AR's approach and focus on the *works* in question instead of the *dispute*, I would still have found that there was at least a *prima facie* case that the disputed works fell within the Subcontract. This was not a case where the allegedly excluded works occurred, for example, at a different location, in a different time period, or under a different project, or where the works were plainly and obviously of a different nature (for instance, demolition versus façade repair). At its core, the issue was a change in the methods and materials used for the GI works. The JGP works, for example, involved a change in the method of grouting, but they were meant to achieve the very same outcomes (the introduction of grout) at the manholes. The WSM works likewise involved a change in the diameter of piles used (from 1,850mm to 800mm) to accommodate the existing, unremoved piles, but they too were performed to achieve the same outcomes for which the claimant was engaged. Further, as noted above, the claimant's own pleaded position was that these works ought to have qualified as variation works *under the Subcontract* (see above at [35]–[47]). Given my primary view that this was an issue to be finally decided in the arbitration, I say no more on it. It suffices to observe that, even without scrutinising the evidence in detail, it was apparent to me from the broad contours of the case that the *prima facie* threshold would be clearly met in this case.

The claimant failed to show that the dispute fell outside the scope of the Arbitration Agreement

53 Even if one were to scrutinise the claimant's case and the specific arguments and evidence it presented as to why a stay should be refused, the same conclusion would have been reached.

(1) The Quotation

54 The claimant relied on its Quotation to show that it did not contract to perform angular JGP or horizontal permeation grouting works, and instead only contracted to perform vertical JGP works. According to the claimant, this conclusion found support in two parts of the Quotation.

55 First, paragraph D.3 of the Quotation stated that "[a]ny price quoted is strictly for the quoted items only. Any additional work done or material consumed will be charged accordingly."[29]

56 Second, the claimant pointed to the proposed "Price and Scope of Work" set out in the Bill of Quantities ("BOQ").[30] Under the table "for JGP Works – All Prov Qty", the supply and installation of JGP was listed as item 2.5.[31] Table 1 was then followed by a few notes.[32]

57 The claimant relied particularly on note 3 – that "[a]ll above rates quoted are based on vertical JGP method; angular or horizontal JGP are excluded from our rates and shall be quoted separately" – to suggest that the disputed JGP works (which used angular or horizontal methods) fell outside of the quoted works, and thus, outside the Subcontract's scope of works.

58 I could not accept this conclusion. Accepting it would have required me to accept that the claimant's use and interpretation of the Quotation had to be correct. But that inference would have required the claimant to pass through a

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29 Affidavit of Loh Chang Kaan at p 12.

30 Affidavit of Loh Chang Kaan at p 10.

31 Affidavit of Loh Chang Kaan at p 13.

32 Affidavit of Loh Chang Kaan at p 14.

number of additional legal and factual hoops. One would have to examine, for example:

(a) What was the legal status of the Quotation *vis-à-vis* the Subcontract? For instance, was the Quotation incorporated into the Subcontract?

(b) Assuming that the Quotation was relevant to the Subcontract (by incorporation or otherwise), what was the weight or significance to be given to the Quotation *vis-à-vis* the rest of the Subcontract? For instance, would statements in the Quotation take precedence over potentially inconsistent terms?

(c) Construing the Quotation, was the claimant's reliance on, and interpretation of, note 3 correct? For example, did the exclusion of angular JGP and horizontal permeation grouting "from [the] *rates*" [emphasis added] mean an exclusion from the *Subcontract*? What did the statement that the rates shall be quoted "separately" mean – for instance, did it mean a supplementary quotation would be needed, or a separate contract altogether? Further, how was note 3 meant to sit alongside note 7? It appeared that by virtue of note 7, items not mentioned in the BOQ were to be considered as variation orders: "[o]ur price is based on what have been quoted in [*sic*]. Any item that is not mentioned in the [BOQ] *will be considered as VO*" [emphasis added].

59 These were not straightforward questions. Take for example, the legal relationship between the Quotation and the Subcontract (*ie*, the first question above, in [58(a)]). Clause 1.1(iv) of the Subcontract defined the "Sub-Contract" to mean "th[e] Sub-Contract Agreement and the documents as specified in

Clause 4".[33] Clause 4.1 in turn stated that "[t]he Sub-Contract shall comprise the documents which are set out in Appendix 2 and such documents shall be deemed to form and be read and construed as part of the Sub-Contract".[34]

60 Appendix 2 then listed the following documents:

> The Sub-Contract shall comprise the following documents:-
>
> (i) This Sub-Contract Agreement including the Appendices;
>
> (ii) The attached List of Drawings including all relevant Drawings under the Main Contract;
>
> (iii) The attached List of Specifications including all relevant Documents under the Main Contract;
>
> …
>
> (iv) Letter of Intent Ref: SSYWFJV/N102/PRE/02.07/2019-08/0001 dated 21 August 2019 (This Sub Contract Agreement will prevail over this letter in the event of conflict, inconsistency, and ambiguity with this Sub-Contract Agreement);
>
> (v) Other documents forming part of the Sub-Contract

61 On the face of these provisions at least, nowhere was the Quotation expressly named.

62 Moreover, the Subcontract contained in clause 46 an entire agreement clause, the exact meaning and effect of which presented yet another question of contractual interpretation:[35]

> **46. Entire Agreement**
>
> 46.1 Except where expressly provided otherwise in this Sub-Contract, this Sub-Contract constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations,

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33 1st Affidavit of Lee Seung Hun at p 20.

34 1st Affidavit of Lee Seung Hun at p 24.

35 1st Affidavit of Lee Seung Hun at pp 69 to 70.

> communications, negotiations and understandings concerning the subject matter of this Sub-Contract.
>
> 46.2 Each of the parties acknowledges that:
>
> (i) it does not enter into this Sub-Contract on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty, term or other provision (in any case whether oral, written, express or implied) made or agreed to by an [*sic*] person (whether a party to this Sub-Contract or not) except those expressly repeated or referred to in this Sub-Contract and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Sub-Contract; and
>
> (ii) this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Sub-Contract which was induced by fraud, for which the remedies available shall be all those available under the law governing this Sub-Contract.

63 Apparent inconsistencies between the Quotation and other parts of the Subcontract presented yet another question (*ie,* the second question above, in [58(b)]). On the face of the documents, the Bill of Quantities in the *Subcontract* (Appendix 4) did not appear to contain the same qualification found in note 3 to the Quotation's BOQ.[36] The Subcontract's Bill of Quantities covered a number of items, including the following:

S/N	Description	Unit	Quan-tity	Unit Rate (S$)	Amount (S$)	Remark
1	**Preliminary**				…	WSM: 3 Rig
1.1	Mobilisation and Demobilisation	LS	…	…	…	

[36] 1st Affidavit of Lee Seung Hun at p 95.

S/N	Description	Unit	Quan-tity	Unit Rate (S$)	Amount (S$)	Remark
2	**Ground Improvements WSM**				…	
2.1	Installation of Ground Improvement for tunnels	m^3	…	…	…	#
3	**Ground Improvements WSM (Joint Grouting)**				…	
3.1	Installation of Ground Improvement	m^3	…	…	…	
3.2	Installation of Ground Improvement between d-wall joints at soil soil [*sic*] side	m		…	rate only	##
4	**Sewer Area_Ground Improvements JGP**				…	
4.1	Installation of Ground Improvement	m^3	…	…	…	
	…					

(The ellipses ("…") under the "Quantity", "Unit Rate (S$)" and "Amount (S$)" columns indicate figures that have been omitted from these grounds of decision.)

64 Saliently, the only two remarks contained in the Bill of Quantities (represented by "#" and "##" in the table at [63]) were as follows:

> Notes:
>
> # Measurement of WSM will be based on WSM volume only. (Payable depth : Measure from Toe of WSM to toe of light grout / soffit of WSM)

> ## Measurement will be based on depth of WSM installed, regardless of numbers and sizes of WSM installed at d-wall joints (soil side). In the event that more than 1 no of WSM at one joint is installed, calculation will still be based on 1 number.

65 There was therefore an omission of the qualification found in note 3 to the Quotation's BOQ from the Subcontract's Bill of Quantities. The significance of this omission, and the interplay between the two bills of quantities, were questions that did not admit of ready answers on the available evidence.

66 These examples provided but a flavour of the difficulties with accepting the claimant's argument at face value. In light of these unanswered questions, the claimant's reliance on and interpretation of the Quotation could not be regarded as self-evidently correct, such that it was inconceivable (even to a court hearing a stay application) that the dispute was one connected with the Subcontract. On the contrary, they simply served to fortify my view that there were several questions arising out of or in connection with the Subcontract that may arise in the determination of this claim.

67 The claimant also relied on the Quotation in relation to the WSM works.[37] In particular, it highlighted that the Quotation stated that the quoted rates were based on certain assumptions, which were later disproven through the defendant's breaches:[38]

> **A. <u>Our quoted rates are based on</u>:**
>
> 1. …
> 2. …

---

37 SOC at para 4.

38 Affidavit of Loh Chang Kaan at para 7 and p 10.

> 3. There are *no obstructions* and *no access problems* for all our drilling rigs and equipment throughout our works.
>
> 4. *Removal and clearance of under-ground obstructions shall be by others* at no costs to us.
>
> 5. *Protection, demolition and disposal of the existing structures and underground services shall be by others* at no costs to us.
>
> …
>
> [emphasis added in italics; emphasis in bold and underline in original]

68 Plainly, the same unanswered questions from [58] also applied here. In addition, the mere fact that quotes were based on certain assumptions did not say much about what was to happen if those assumptions were disproved. Risk could be allocated in a multitude of ways. The inquiry as to risk allocation would almost certainly necessitate a deeper examination of the Subcontract's precise arrangements. One aspect of these arrangements was clause 3.5 of the Subcontract, which deemed the claimant to have acquainted itself with the actual site condition, and precluded the consideration of claims based on a change in site condition (save as otherwise provided for in the Subcontract):[39]

> **3. Sub-Contract Sum**
>
> …
>
> 3.5 The Sub-Contractor shall be deemed to have acquainted himself with the actual site condition, location and development (both future and current) and have made provisions and/or contingency in the Sub-Contract Sum with regards to the means of access, special site restrictions and constraints. No claim whatsoever will be considered on account of lack of information or changes in site condition save as otherwise provided for in this Sub-Contract.

[39] 1st Affidavit of Lee Seung Hun at p 24.

69 The upshot was that the Quotation did not conclusively demonstrate that the disputed works could not have fallen within the Subcontract. It may be that the claimant will ultimately prevail in its reliance on the Quotation, but that is a matter to be properly resolved before the tribunal hearing the claim's merits.

(2) The preparation of new shop drawings

70 The claimant also argued that the defendant's instruction to prepare new shop drawings for the Land Transport Authority's approval of the disputed works showed that these works were not within the Subcontract's original scope of works.

71 In my view, matters were not so clear-cut. The claimant did not point me to anything in the Subcontract that necessitated such an inference. Neither did anything in the chain of e-mails instructing the claimant to prepare these drawings shed much light.[40] The gist of those e-mails was that shop drawings were urgently needed so that external approvals could be sought. The e-mails were largely a combination of chasers for drawings to be submitted, and technical suggestions on how the drawings ought to be modified to secure the approvals sought. These said virtually nothing about the legal significance of having to prepare new drawings. This point was therefore a neutral factor in my analysis.

(3) The Responsibility Matrix

72 While the claimant did not rely on this squarely in resisting the stay application, it placed reliance on a "Responsibility Matrix" in its main claim in

[40] Affidavit of Loh Chang Kaan at pp 17 to 23.

OC 28.[41] According to the claimant, the Responsibility Matrix in Appendix 3A of the Subcontract was a table setting out the scope and/or responsibility of each party in relation to certain activities or works.[42] Clause 1.2(cc)[43] of the Additional Conditions (Appendix 3 of the Subcontract) provided that the Subcontract works included the "Listed Responsibility Matrix as set out in Appendix 3A".

73 The claimant's references to the Responsibility Matrix, again, only served to fortify my conclusion that the dispute was connected with the Subcontract.

74 In respect of the disputed JGP works, the SOC made reference to a statement in the Responsibility Matrix that the defendant would provide 400kg/m^3 of cement. It added that the claimant would show at trial that this quantity of cement was a reasonable estimate for vertical JGP works, but would have been an underestimate in the case of angular JGP or horizontal permeation grouting (the inference therefore being that parties only intended for vertical JGP works to be carried out under the Subcontract).[44]

75 In my judgment, it was telling (for the purposes of the stay application) that the claimant itself expected to rely on the *contents* of the Subcontract (*ie*, the Responsibility Matrix) to establish its claim.

76 In respect of the disputed WSM works, the claimant provided a detailed explanation for why a modification to the WSM works was required:

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41 SOC at para 6.

42 1st Affidavit of Lee Seung Hun at p 91.

43 1st Affidavit of Lee Seung Hun at p 83.

44 SOC at para 6(b).

(a) It highlighted that S/N 14 of the Responsibility Matrix placed the responsibility to "[r]emove all existing underground structure, obstruction and utilities which are affected to [*sic*] Sub-Contract works" on the defendant as the main contractor.[45]

(b) This included removing the foundation piles at the site. This was an express requirement of the defendant's main contract with the Land Transport Authority and was incorporated[46] into the Subcontract by way of a drawing[47] (namely Subcontract Drawing No T/N102/TUN/ST/2411, entitled the "Envisaged Construction Sequence at Rochor Centre").

(c) The claimant asserted that it had entered into the Subcontract on the basis of the sequence of works described in this drawing. Under "Stage 1" of the depicted works, the first in a list of three items was "[d]emolish Rochor Centre and extract foundation piles of buildings", and the third item in the list was to "[i]nstall ERSS walls and ground improvement for NSC main tunnel and ER-8".[48] According to the claimant, this meant that prior to any ground improvement by the claimant, the defendant had to remove the foundation piles. However, the defendant had failed to do so.

77 In my judgment, the foregoing demonstrated just how closely intertwined the disputed WSM works were with the Subcontract. To determine whether the disputed WSM works ought to have qualified as variation works,

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45 SOC at para 9.

46 1st Affidavit of Lee Seung Hun at p 100.

47 Affidavit of Loh Chang Kaan at para 12 and p 25; SOC at para 10.

48 Affidavit of Loh Chang Kaan at para 12 and p 25.

one might have to go on to consider the following questions which are connected with the Subcontract:

(a) What was the effect of S/N 14 of the Responsibility Matrix? In particular, I noted that S/N 14 did not solely concern the defendant; it also provided that the *claimant* was to provide *assistance* to the defendant in removing the existing structures *etc*.[49] This was reiterated in clause 1.2(h) of the Additional Conditions (Appendix 3 of the Subcontract),[50] which included the provision of assistance in removing all unidentified underground obstructions as part of the Subcontract's scope of works. The proper allocation of roles between parties required a proper construction of the Subcontract.

(b) What was the effect of the defendant's purported non-compliance with the Responsibility Matrix? For example, might any non-compliance be excused by clause 41 of the Subcontract, which appeared to limit the defendant's liabilities? Clause 41 provided as follows:[51]

> **41. Limitations of Main Contractor's Liabilities**
>
> 41.1 Any neglect or failure whatsoever on the part of the Sub-Contractor to obtain any necessary and reliable information shall not relieve him from any risks, obligations or liabilities for the completion of the Sub-Contract Works. The Sub-Contractor shall be deemed to have made a detailed and sufficient inspection and examination of the site and its surroundings and to have satisfied himself by way of his own analyses, surveys, investigations, researches, and verifications independently of the Sub-Contract documentation and shall have no claim against the Main Contractor in

49 1st Affidavit of Lee Seung Hun at p 92.

50 1st Affidavit of Lee Seung Hun at p 80.

51 1st Affidavit of Lee Seung Hun at p 66.

> respect thereof or in respect of any site or soil conditions, access to the site or any difficulties in relation to carrying out the Sub-Contract Works.
>
> 41.2 Provided that if during the execution of the Sub-Contract Works the Sub-Contractor encounters physical obstructions or physical conditions which obstructions or conditions were not reasonably foreseeable by an experienced contractor, the Sub-Contractor shall forthwith give notice thereof to the Main Contractor. On receipt of such notice, the Main Contractor shall, if in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced contractor, determine any extension of time to which the Sub-Contractor is entitled under Clause 35 and the amount of any costs or loss and expenses which may have been incurred by the Sub-Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Sub-Contract Sum.
>
> …

(c) How should Subcontract Drawing No T/N102/TUN/ST/2411 be understood, and what was its proper effect in the scheme of the Subcontract?

78 In short, the claimant's case on the disputed WSM works found its roots in the defendant's purported obligations *under the Subcontract*. Any assessment of those obligations and the alleged breaches of those obligations must take reference from what the parties had intended and agreed upon under the Subcontract. The dispute pertaining to the WSM works was thus, at the least, connected with the Subcontract. The claimant did not credibly suggest how else its claim concerning the WSM works should have been understood.

(4) Additional payments from the defendant

79 There was also something to be said about the $10,566.50 and $85,810.19 that the defendant had paid in relation to the disputed JGP works (see [11] above). The claimant sought to dismiss these as being financial support

payments extended in the wake of the COVID-19 pandemic (as the claimant had earlier flagged up manpower shortage issues to the defendant[52]), and not additional payments made in recognition of a variation of works. The material parts of the defendant's e-mail read:[53]

> From: [Lee Seung Hun] …
>
> Sent: 07 May 2021 17:17
>
> To: Tan Kian Ming …
>
> …
>
> Subject: RE: N102 - Request for Resumption of Grouting Works at MH 2 & MH 18 (Presscrete Reply No 1)
>
> …
>
> First of all, I would like to clarify your comments with regard to what [the defendant] additional supporting offer even though [the defendant] does not have contractual responsibility.
>
> *Due to circumstance of COVID_19, as main contractor tries to support Presscrete as below*
>
> 1) JGP inclined Volume : 3,065 m3
>
> - increase $60/m3 which means that from $75/m3 to $135/m3
>
> - increase Ratio: $60 / $75 = 80%
>
> - Additional Cost: $60 x 3,065 = $183,900
>
> 2) Permeation Grouting Volume: 923m3
>
> - increase $100/m3 which means that from $75/m3 to $175/m3
>
> - increase Ratio: $100 / $75 = 133.3%
>
> - Additional Cost: $100 x 923 = $92,300
>
> 3) Cement Wastage 10% increase : 40 kg/m3 (to make clear, I did not say waive, I consider 10% wastage)
>
> - Quantity 6,800m3 x 0.04 ton/m3 = 272 ton
>
> - 272 ton x $95 = $25,840

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52 Affidavit of Loh Chang Kaan at p 40.

53 Affidavit of Loh Chang Kaan at p 27.

> 4) Success Fee after completed Ground Improvement Works
>
> - $100,000
>
> * Total Cost support is $402,040
>
> …
>
> In conclusion, [the defendant] tries to support you a lot with regard to the Ground Improvements works. However Presscrete still keeps insisting your opinion and delay of our works.
>
> …
>
> I kindly and strongly suggest that Please accept what [the defendant] offered the above and immediately carry out the works.
>
> If you do not accept our additional support and keep insisting your opinion, *I will take the action base on the contract* as I said previously during the meeting.(5th of May, 2021)
>
> [emphasis added]

80 In my judgment, it was not self-evident that the claimant's interpretation had to be correct. First, the facts did not all point in the same direction. In a preceding e-mail, the *claimant* described the defendant's proposal in terms that would suggest that they were a "top up [to] the contract rate":[54]

> From: Tan Kian Ming …
>
> Sent: Friday, May 7, 2021 4:16 PM
>
> To: [Ann Hyokeon]
>
> …
>
> Subject: Re: N102 - Request for Resumption of Grouting Works at MH 2 & MH 18 (Presscrete Reply No 1)
>
> …
>
> We refer to the meeting at your site office on 29th April 2021 & 5th May 2021 …
>
> …
>
> In the meeting you have *verbally offered to top up the contract rate for inclined grouting with another $60 per m3* (*Proposed*

[54] Affidavit of Loh Chang Kaan at p 29.

> *Revised rate* inclined JGP $135 per m3) and offered a rate of Permeation grouting of $175 per m3 (not in the BQ). In addition, you will waive off all the cement wastages used for the manhole ground improvement works for the contract. You also offered that *upon completion* of the manhole ground improvement works, you would *also grant us a lump sum of $100,000.00 upon completion of the works*.
>
> [emphasis added]

81 There was therefore some evidential basis to infer that the $10,566.50 and $85,810.19 were part of some proposed variation to the Subcontract, to facilitate the completion of works *under* the Subcontract's original scope.

82 Second, and more significantly, whatever the stated and actual purposes were for the sums being extended, what mattered to this stay application was that they appeared to have been paid to the claimant *qua* subcontractor under the Subcontract. Additionally, the fact that the claimant proceeded to accept these payments *may* have a bearing on whether it should be taken to have regarded the disputed works as falling within the Subcontract (Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) at para 5.168):

> An issue may arise in relation to any attempt to rely on a change in scope of contract for the purpose of taking an item of work outside the contract rates of the original contract. In most cases the claimant has to elect between seeking a restitutionary remedy in *quantum meruit* or a claim for damages. Understandably, an 'innocent contractor' may be expected to choose one of these positions in the alternative. *However, if the contractor continues to execute the disputed work over a period of time and begins to accept payment in respect of the work on the terms of the original contract, the contractor may be precluded from subsequently maintaining that it is executing the disputed works under protest.* [emphasis added]

83 In making these observations, I do not suggest that these facts and legal propositions necessarily favour either the claimant's or the defendant's case. That is a matter for the arbitral tribunal's determination. Rather, they

demonstrate that the *types of issues* that would arise for consideration in the claim were closely connected with the Subcontract, and as such, fell within the scope of the Arbitration Agreement.

(5) The SOC's prayers for declarations

84 Thus far, the case has been analysed as one for damages. But the claimant's SOC also sought declarations that the disputed works were "not within the scope of works to be carried out by the [claimant] under the [Subcontract]".

85 Plainly, this presented a dispute connected with the Subcontract. To determine whether the declaration ought to be granted, the court or tribunal would need to decide: (a) what the Subcontract's scope of works were; and (b) whether the disputed works fell within the Subcontract's scope of works. In my view, in so far as the "matter" in OC 28 related to the declaratory relief sought, that "matter" too was connected with the Subcontract and therefore fell within the scope of the Arbitration Agreement.

The defendant was and remained ready and willing to do all things necessary to the arbitration's proper conduct

86 Finally, I was also satisfied that the defendant was and remained ready and willing to do all that was necessary to the proper conduct of the arbitration and further, that there was no sufficient reason for the court to refuse to stay this action. This remained the case even though under clause 43.3 of the Subcontract, the claimant may only commence arbitration after the works under the Subcontract have been completed, unless the parties consent in writing otherwise. That sub-clause was agreed to by the parties, and party autonomy prevails. There was no suggestion by the claimant that the provision was unjust

or unfair in any way. Further, as I indicated above at [19], before me, the claimant did not dispute that the defendant was ready and willing to do all things necessary to the proper conduct of the arbitration. Nor was there any suggestion by the claimant, whether in its affidavit or submissions, that there existed any sufficient reason why the court should nevertheless refuse to stay the action even though the dispute *prima facie* fell within the scope of the Arbitration Agreement.

Conclusion

87 For the foregoing reasons, I allowed the defendant's appeal. In my judgment, the entire dispute in OC 28 fell within the scope of the Arbitration Agreement. If nothing else, given the defendant's position that the disputed works fell within the Subcontract's original scope of works, the parties' dispute *prima facie* fell within the ambit of the Arbitration Agreement. Whether the defendant will be able to prove its case on the merits remains an open question. Likewise, whether the claimant can succeed on its claim, as pleaded, remains to be seen. But these are not questions to be answered by this court. Having agreed to refer disputes arising out of or connected with the Subcontract to arbitration, the claimant must be kept to its contractual bargain.

88 I therefore reversed the AR's decision dismissing SUM 2805 and, in its place, I made an order under s 6 of the AA staying OC 28 in favour of arbitration, as prayed for by the defendant in SUM 2805. In light of my decision to allow the appeal and order a stay under s 6 of the AA, it was not necessary for me to decide whether the claimant would have succeeded on its alternative application for a stay based on O 3 r 2(2) of the ROC.

89 With regard to costs, in RA 269, the defendant also appealed against the AR's order below that it pay costs fixed at $12,000 (all-in) to the claimant.

Given my decision on the stay application, I also reversed the AR's costs order. I fixed costs of the application below at $13,000 (all-in) to be paid by the claimant to the defendant – this increased figure took into account differences in the parties' disbursements. Costs of the appeal were fixed in the sum of $10,000 (all-in), also to be paid by the claimant to the defendant.

S Mohan
Judge of the High Court

Twang Kern Zern and Simone Bamapriya Chettiar (Central Chambers Law Corporation) for the claimant;
Luis Inaki Duhart Gonzalez (Selvam LLC) for the defendant.