

Fu Yuan Construction Pte Ltd v Fab-5 Pte Ltd
[2021] SGHCR 2

Case Number : Originating Summons No 620 of 2020 (Summons No 5045 of 2020 and Summons No 5046 of 2020)
Decision Date : 02 February 2021
Tribunal/Court : General Division of the High Court
Coram : Colin Seow AR
Counsel Name(s) : Gan Guo Bin (Messrs Winston Quek & Co) for the plaintiff; Kor Wan Wen, Melissa (Optimus Chambers LLC) for the defendant.
Parties : Fu Yuan Construction Pte Ltd — Fab-5 Pte Ltd

Civil Procedure – Striking out – Inherent power of the court

Civil Procedure – Setting aside of judgment or court order – Inherent power of the court

Building and Construction – Statutes and regulations

2 February 2021

Judgment reserved.

Colin Seow AR:

Introduction

1 These proceedings concern two applications before the court, namely:

(a) the plaintiff’s application in High Court Summons No 5045 of 2020 (“SUM 5045”) for the striking out of the defendant’s application in High Court Summons No 3558 of 2020 (“SUM 3558”). SUM 3558 seeks the setting aside of both an adjudication determination obtained by the plaintiff against the defendant under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOPA”) and an order of court granting leave to enforce the same under section 27 of the SOPA; and

(b) the defendant’s application in High Court Summons No 5046 of 2020 (“SUM 5046”) seeking a variety of orders, the principal of which purports to set aside a provisional garnishee order that the plaintiff has obtained in High Court Summons No 3295 of 2020 (“SUM 3295”) in connection with the enforcement of the said adjudication determination.

2 The oral hearing for both SUM 5045 and SUM 5046 was conducted on 23 December 2020, at the end of which the court reserved judgment. I now render the court’s judgment on these applications with the grounds included.

Background to the applications

3 On 29 May 2020, the plaintiff lodged an adjudication application under the SOPA against the defendant in respect of a progress payment claim for sub-contracted works carried out by the plaintiff for the defendant (the main contractor) in a building and construction project. On 16 June 2020, the adjudicator issued an adjudication determination in favour of the plaintiff. The principal sum

of money (including GST) that the defendant was required to pay pursuant to the adjudication determination was \$906,976.22. The plaintiff served the adjudication determination on the defendant via registered post on 17 June 2020.

4 On 24 June 2020, the plaintiff commenced proceedings by way of an *ex parte* application under High Court Originating Summons No 620 of 2020 ("OS 620"), seeking the enforcement of the adjudication determination in accordance with Order 95 Rule 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") read with section 27 of the SOPA. OS 620 was granted by an Assistant Registrar on 17 July 2020. The formal order of court ("ORC 3877/2020") was extracted by the plaintiff's solicitors on 20 July 2020 and despatched, via ordinary post and email, to the defendant on the same day.

5 On 7 August 2020, the plaintiff commenced three separate garnishee proceedings each seeking to enforce the entire sum (including interest and associated costs) which the defendant was liable to pay in satisfaction of the adjudicated amount. One of those garnishee proceedings commenced was SUM 3295 (see [1(b)] above) in respect of which an Assistant Registrar made a provisional garnishee order on 11 August 2020, pending a show cause hearing to be fixed. The garnishee in SUM 3295 is Oversea-Chinese Banking Corporation Limited ("OCBC") with whom the defendant has a bank account.

6 On 21 August 2020, the defendant commenced SUM 3558 (see [1(a)] above) seeking the setting aside of both the adjudication determination and ORC 3877/2020. This was around a month after ORC 3877/2020 was purportedly served on the defendant. It is undisputed that in filing SUM 3558, the defendant did not furnish the security required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA).

7 On 18 November 2020, the plaintiff filed SUM 5045 seeking the striking out of SUM 3558, on grounds that:

(a) SUM 3558 was commenced out of time under Order 95 Rule 2(4) of the Rules of Court; and

(b) the defendant failed to furnish the requisite security under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA).

8 On the same day, the defendant filed SUM 5046, seeking the following prayers:

(1) the joinder of the defendant as a party to SUM 3295;

(2) the setting aside of the provisional garnishee order in SUM 3295, with "the sum of S\$928,150.00" currently subjected by that order released upon the defendant's solicitors' undertaking to have the said sum of money paid into court in fulfilment of the security required under Order 95 Rule 3(3) of the Rules of Court;

(3) an extension of time "for such security to be paid into court";

(4) the adjournment of the hearing of SUM 3295 to after the determination of SUM 3558;

(5) costs; and

(6) such further and other relief as the court deems fit.

The parties' cases

SUM 5045

9 In SUM 5045, the plaintiff seeks the striking out of SUM 3558 pursuant to the court's inherent power under Order 92 Rule 4 of the Rules of Court. The plaintiff accepts, in the light of the Court of Appeal's holding in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [32]-[33] ("*AG v AHPETC*"), that Order 18 Rule 19 of the Rules of Court is inapplicable in the present case, given that SUM 3558 is a summons and not a pleading, an endorsement of any writ, or an originating summons.

10 The plaintiff's case for the striking out is premised on abuse of process of the court, given the defendant's failure to (a) commence the application in SUM 3558 within the 14-day timeline stipulated in Order 95 Rule 2(4) of the Rules of Court, and (b) furnish the security required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA) (see [7] above).

11 The defendant's case in resisting the striking out application can essentially be summarised as follows:

(a) First, the 14-day timeline stipulated in Order 95 Rule 2(4) of the Rules of Court should be interpreted *not* as a deadline for the taking out of an application to set aside an adjudication determination, but rather as fixing a time beyond which the making of such application would fail to attract an automatic stay of enforcement of the court order granting leave to enforce the adjudication determination. Accordingly, the making of the application in SUM 3558 beyond the stipulated 14-day timeline was neither out of time nor an abuse of process of the court.

(b) Second, the furnishing of security by the defendant under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA) would amount to the defendant providing "double security" to the plaintiff, given that funds which the defendant could have utilised for the provision of security pursuant to that rule had been "locked up" by virtue of the provisional garnishee order obtained by the plaintiff in SUM 3295. Striking out SUM 3558 in such circumstances would be prejudicial to the defendant who, as a result of the provisional garnishee order, has been rendered unable to furnish the "additional" security.

SUM 5046

12 SUM 5046, at its core, seeks the setting aside of the provisional garnishee order in SUM 3295 (see [1(b)] and [8] above). As clarified by the defendant's counsel at the oral hearing, the purpose underlying SUM 5046 is to bring about a 're-arrangement' of the manner in which the defendant's OCBC bank account funds are presently held – in particular, to free those funds from the effects of the provisional garnishee order and pay those funds into court as security for the defendant's application in SUM 3558.

13 The defendant anchors its case for the setting aside of the provisional garnishee order on the court's "residual discretion" under Order 92 Rule 4 of the Rules of Court to set aside judgments or court orders in circumstances other than the following which had been identified previously in *Ong Cher Keong v Goh Chin Soon Ricky* [2001] 1 SLR(R) 213 and *Sunny Daisy Ltd v WBG Network (Singapore) Pte Ltd* [2008] 4 SLR(R) 769:

- (a) where the order has been obtained irregularly;
- (b) where the judgment has been obtained by fraud;

(c) where an order or judgment has been obtained in default of the appearance of one of the parties to the suit.

14 The defendant relies on the High Court decision in *United Integrated Services Pte Ltd v Harmonious Coretrades Pte Ltd* [2019] SGHC 126 at [18] ("*Harmonious Coretrades (HC)*") and argues that it would be unfairly prejudiced if the provisional garnishee order is not set aside, since it has been prevented by that order to apply the funds in its OCBC bank account to stand as security pursuant to Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA). The defendant similarly also relies on its argument of "double security" outlined in [11(b)] above in support of its case that the provisional garnishee order should not be allowed to stand.

15 In addition, the defendant contends that no prejudice would be suffered by the plaintiff if the provisional garnishee order is set aside, given that the funds in the defendant's OCBC bank account will, in that result, be paid into court as security for SUM 3558. The defendant claims that, on the other hand, it faces a possibility of "severe prejudice" if its application in SUM 3558 is struck out for want of security under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA). The defendant also asserts that it does not have sufficient funds, on top of the amount that has been subjected by the provisional garnishee order, to fulfil the requisite security.

16 In opposing SUM 5046, the plaintiff takes the view that the garnishee proceedings in SUM 3295 and the requirement to provide security for SUM 3558 are separate and distinct matters (something which the defendant denies). The plaintiff argues that it was within its rights to have obtained the provisional garnishee order in SUM 3295, given that the defendant had failed to satisfy the adjudicated amount under the adjudication determination. The plaintiff denies any prejudice that the defendant would suffer if the provisional garnishee order is not set aside, and avers that the defendant has failed, on the evidence before the court, to prove that it lacks additional funds to comply with its security obligation under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA).

Issues to be determined

17 In relation to SUM 5045, the key issue for determination is whether SUM 3558 ought to be struck out pursuant to the court's inherent power under Order 92 Rule 4 of the Rules of Court, on the ground that there has been an abuse of process by virtue of:

(a) the defendant's failure to take out the application in SUM 3558 within the 14-day timeline stipulated in Order 95 Rule 2(4) of the Rules of Court; and/or

(b) the defendant's failure to furnish the security required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA).

18 In relation to SUM 5046, the principal issue to be determined is whether the provisional garnishee order in SUM 3295 ought to be set aside pursuant to the court's "residual discretion" under Order 92 Rule 4 of the Rules of Court, on the basis that the defendant has been unfairly prejudiced by its inability – owing to the provisional garnishee order – to meet its security obligation in respect of SUM 3558.

The court's analysis

SUM 5045 – plaintiff's application to strike out SUM 3558

The court's inherent power to strike out a summons under Order 92 Rule 4

19 It bears mentioning from the outset that despite the Court of Appeal's holding in *AG v AHPETC* (see [9] above) that summonses are not amenable to striking out under Order 18 Rule 19 of the Rules of Court, there is a well-established principle that courts retain the *inherent power* under Order 92 Rule 4 to strike out proceedings which amount to abuse of process of the court.

20 In *AG v AHPETC*, a non-party filed an application by way of a summons in a pending appeal before the Court of Appeal, seeking an order for it to be joined as a "co-plaintiff/co-appellant" in the underlying proceedings. The respondent in the appeal applied to strike out the summons. In denying the respondent the striking out order, the Court of Appeal observed that the striking out application, being one "brought under O 18 r 19 of the ROC", was fundamentally flawed because the procedural rule involved did not apply to a summons in a pending cause or matter (see *AG v AHPETC* at [32]). Nothing in the Court of Appeal's judgment in *AG v AHPETC* indicated or suggested any change in the extent of the court's *inherent power* to strike out proceedings pursuant to Order 92 Rule 4 of the Rules of Court.

21 Indeed, it is noted that in a subsequent case of *Cheong Wei Chang v Lee Hsien Loong and another matter* [2019] 3 SLR 326, there is ostensible recognition by the High Court that "[i]n addition to the statutory basis" as reflected in Order 18 Rule 19 of the Rules of Court, "the court also retains the inherent power to strike out an action on the basis that the proceedings are an abuse of process of the court".

22 This is indicative of the court's residual power, in addition to Order 18 Rule 19 of the Rules of Court, to strike out proceedings amounting to abuse of process of the court. Indeed, this is also consistent with the tenor with which the court's inherent power to strike out proceedings for abuse of process has been rationalised and articulated elsewhere in case law in the past, in particular in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*"). In *Chee Siok Chin*, the High Court elucidated (at [28]-[30]) the following legal principles in the context of an application seeking the striking out of an originating motion:

Principles governing striking out

28 Pursuant to O 18 r 19 of the RSC, an application for a striking out order can be based on any of the following four grounds:

- (a) it discloses no reasonable cause of action or defence;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of process of the court.

29 In addition, the court also retains a residual and inherent jurisdiction to strike out an action and/or pleading on the basis that proceedings are frivolous, vexatious or an abuse of the process of the court [...] The existence of this jurisdiction is statutorily acknowledged by and embedded within O 92 r 4 of the RSC.

30 *In what is widely regarded as the most authoritative exposition of the basis and extent of the court's inherent jurisdiction, Sir Jack I H Jacob in his celebrated article, "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23 explained that such a jurisdiction is not derived from*

any statute or rule of law but from the very nature of the court as a superior court of law. The juridical basis of the court's inherent jurisdiction lies in its authority to uphold, protect and fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The inherent jurisdiction of a court is defined by Sir Jack Jacob at 51 as "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to try to secure a fair trial between them". It is a broad, virile and necessary jurisdiction and performs the quintessential function of justice where the court dispenses procedural justice as a means of achieving substantive justice between the parties.

[emphasis added]

23 The High Court in *Chee Siok Chin* further held (at [35]) that:

35 The essence and basis of this inherent jurisdiction is largely *mirrored* in O 18 rr 19(1)(b) and 19(1)(d) of the RSC. Order 18 r 19 of the RSC however literally applies only to writ actions, originating summonses and petitions. The sub-rule itself makes no express reference to actions begun by originating motion. Given however that the present proceedings ought properly to have been initiated by way of an originating summons or writ, the present striking-out application can therefore be justified either pursuant to the express terms of O 18 of the RSC *and/or the court's inherent jurisdiction*. All said and done, the result of most applications would almost invariably be the same given that the juridical basis of *both jurisdictions* largely overlap with and are consistent with each other.

[emphases added]

The defendant's failure to bring SUM 3558 within the 14-day timeline stipulated in Order 95 Rule 2(4)

24 Order 95 Rule 2(4) of the Rules of Court provides that:

Within 14 days after being served with the order granting leave, the debtor may apply to set aside the adjudication determination and the adjudication determination shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the adjudication determination, until after the application is finally disposed of.

25 As mentioned earlier, leave to enforce the adjudication determination was granted on 17 July 2020, following which ORC 3877/2020 was extracted by the plaintiff's solicitors and despatched, via ordinary post and email, to the defendant on 20 July 2020 (see [4] above). Order 95 Rule 2(3)(b) of the Rules of Court permits the service of such order on the defendant "by sending a copy to him at his usual or last known place of business".

26 Putting aside for the moment the plaintiff's purported service of ORC 3877/2020 on the defendant via email and focusing on the service of the same via ordinary post, it would be safe to say that ORC 3877/2020 was "unless the contrary is proved, ... deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post" (see section 2(5) of the Interpretation Act (Cap 1, 2002 Rev Ed)). In the absence of contrary proof before this court, and having regard to the fact that 20 July 2020 fell on a Monday, it does not seem controversial to deem service of ORC 3877/2020 to have been effected via ordinary post a working day or two after 20 July 2020, and in any event (if even more latitude is to be accorded) by the end of the week commencing 20 July 2020 (see also *Qingjian International (South Pacific) Group Development Co Pte Ltd v*

Capstone Engineering Pte Ltd [2014] SGHCR 5 at [18]-[26]). Accordingly, the taking out of SUM 3558 by the defendant on 21 August 2020 would amount to around four weeks after ORC 3877/2020 was deemed to have been served, and between two to three weeks beyond the 14-day timeline stipulated in Order 95 Rule 2(4) of the Rules of Court.

27 The defendant contends that a non-compliance with the 14-day timeline under Order 95 Rule 2(4) could not be regarded as an abuse of process of the court, because the 14 days prescribed under that rule was not a deadline for the taking out of SUM 3558, but rather a representation of the time beyond which an application such as SUM 3558 would fail to attract an automatic stay of enforcement of ORC 3877/2020 (see [11(a)] above).

28 This court is unable to accept the defendant's interpretation of the 14-day timeline in the rule, with the reasons as follows. Firstly, the defendant cites no authority in support of its interpretation. Secondly, and more importantly, in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 where the Court of Appeal summarised the scheme of the statutory provisions governing the enforcement of adjudication determinations, it was explained (at [29(d)]-[29(e)]) that:

(d) Within 14 days after being served with the s 27 leave order, the debtor may apply to set aside the [adjudication determination], which shall then not be enforced until the setting-aside application is finally disposed of: see O 95 r 2(4). The reference in O 95 r 2(4) is, specifically, to the setting aside of an [adjudication determination]; but the better view, in our judgment, is that in keeping with the scheme of expeditious resolution under the SOPA, the time limit set out in O 95 r 2(4) applies not only to an application to set aside an [adjudication determination], but also to an application to set aside a s 27 judgment.

(e) Even after a s 27 judgment has been entered, *but no later than 14 days after being served with the s 27 leave order*, the debtor may apply to set aside the [adjudication determination] and/or the s 27 judgment: see O 95 r 3(1) read with O 95 r 2(4).

[emphasis added]

The words "no later than 14 days after being served with the s 27 leave order" leave little doubt in this court's mind that the 14 days stipulated in Order 95 Rule 2(4) of the Rules of Court is to be interpreted as the *deadline* by which the relevant setting aside application must be brought. An application brought after the 14-day deadline – as is the case with SUM 3558 – would accordingly be out of time and in breach of Order 95 Rule 2(4).

29 With the analysis above, the question now turns on whether the defendant's breach of the 14-day timeline constitutes an abuse of process of the court. In *Chee Siok Chin* (at [34]), the High Court held that the instances of abuse of process can be systematically classified into the following four categories:

(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

30 Based on the above classification, a breach of a procedural rule does not, in and of itself, amount to abuse of process. Were it to be the case, one would imagine that the High Court would have expressly stated so in *Chee Siok Chin*. In any case, the discernible touchstone of abuse of process common across all the four categories above is the *improper* use of court proceedings and procedures, and not a mere default in complying with a procedural rule. This is also consistent with a relatively oft-cited observation made in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (per Lord Diplock, who delivered the leading judgment of the House of Lords) that the court's inherent power to strike out proceedings as an abuse of process is one:

which any court of justice must possess to prevent misuse of its procedure in a way which, *although not inconsistent with the literal application of its procedural rules*, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. [emphasis added]

Lord Diplock's characterisation of such distinctive feature of abuse of process has been recognised and accepted in our local case law (see, eg, *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [20]).

31 Thus, in a situation such as in the present case where the defendant's offending conduct is in the nature of a default of a procedural rule stipulated in the Rules of Court, the court would be remiss in its judgment if it were to make a quantum leap and equate such default as amounting to an abuse of process of the court. The defendant, in bringing SUM 3558 out of time, has but committed a default of a procedural rule, in contrast to an abuse of process as envisaged by legal doctrine.

The defendant's failure to furnish security in respect of SUM 3558

32 In relation to an application to set aside an adjudication determination or a judgment obtained pursuant to section 27 of the SOPA, Order 95 Rule 3(3) of the Rules of Court provides that:

The applicant must, at the time of filing the application, provide security for the unpaid portion of the adjudicated amount that he is required to pay in consequence of the adjudication determination or judgment by means of a direction to the Accountant-General in Form 219(a).

33 For completeness, section 27(5) of the SOPA provides that:

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.

34 It is not in dispute that the defendant has failed to pay the adjudicated amount in consequence of the adjudication determination and ORC 3877/2020. It is also not disputed that the defendant, in commencing SUM 3558 to set aside the adjudication determination and ORC 3877/2020, did not provide security as required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA).

35 As mentioned earlier, the defendant submits that furnishing security under Order 95 Rule 3(3) in

the present case would be prejudicial as it would effectively require the defendant to provide “double security” for the unpaid adjudicated amount, since funds in the defendant’s OCBC bank account that could be applied as the security had been “locked up” by virtue of the provisional garnishee order in SUM 3295 (see [11(b)] above). This is, however, a curious submission given that the defendant at the same time in oral submissions concedes that the plaintiff was entitled to have taken out the garnishee proceedings in SUM 3295, after the defendant failed to take out any setting aside application within the 14-day timeline prescribed in Order 95 Rule 2(4) of the Rules of Court.

36 As explained by Professor Jeffrey Pinsler in *Singapore Court Practice 2017* (LexisNexis, 2017 Ed) at para 49/1/1:

The garnishee proceeding is a *method of enforcement* by which the judgment creditor seeks to recover the sum of money owed to him by the judgment debtor from a third party (the garnishee) who is indebted to the judgment debtor. *In this way, the debt owed by the garnishee to the judgment debtor (if the debt is larger than the judgment amount, that part of the debt which would be necessary to satisfy the judgment sum) is attached by order of court for the benefit of the judgment creditor.* [...] [emphases added]

37 Garnishee proceedings are thus a means of *enforcing* judgment debts and, by their very nature, geared towards the *satisfaction* of judgment debts. By design, such proceedings are not a means of procuring a SOPA adjudication debtor’s *security* under Order 95 Rule 3(3) of the Rules of Court, and the fact that a provisional garnishee order could potentially result in the satisfaction of an adjudicated amount does not simply render or transform the provisional garnishee order into a means of security for the adjudication debtor’s attempt to set aside the adjudication determination (including the order granting leave to enforce the adjudication determination). In this regard, it is further apposite to note that the *only* mode of fulfilling the required security for such an attempt by the adjudication debtor is the payment “into the court” of the unpaid portion of the adjudicated amount, as legislatively contemplated in section 27(5) of the SOPA (see [33] above). Garnishee proceedings (including provisional garnishee orders) do not, by their nature, typically involve or entail the payment of money into court.

38 Given the above analysis, the defendant’s assertion in the present case of a potential “double security” is thus a false and erroneous characterisation. Having said that, however, the inquiry which still remains to be answered is whether the defendant’s failure to furnish the security amounts to an abuse of process of the court. It is to this inquiry that I now turn.

39 In *FT Plumbing Construction Pte Ltd v Authentic Builder Pte Ltd and another matter* [2018] SGHCR 3 (“*FT Plumbing*”), an adjudication debtor commenced, *inter alia*, a suit against the adjudication creditor when the latter sought to enforce an adjudication determination as a judgment debt. The purpose of the suit was to seek a final determination of the dispute between the parties. The adjudication creditor, in response, applied for a stay of the suit, alleging that the adjudication debtor’s commencement of the suit amounted to an abuse of process as the adjudication debtor had not made any payment of the adjudicated amount. In reviewing the case law in Singapore and Australia, an Assistant Registrar concluded (at [51]) that:

where a plaintiff has not made payment of the adjudicated amount because it is *genuinely unable to do so as a result of its financial situation*, its commencement of proceedings to obtain a final determination of the underlying dispute in those circumstances cannot, without more, be considered an abuse of process such that the proceedings should be stayed. (emphasis added)

40 This court finds this statement of the law in *FT Plumbing* to be *mutatis mutandis* applicable in

cases such as the present one, considering that both *FT Plumbing* and the present case involve and engage, to a large extent, the same principle and policy considerations underpinning the doctrine of “temporary finality” of adjudication determinations in the SOPA regime (see, eg, *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890 at [30], and *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [59]).

41 In any case, this court considers that a SOPA adjudication debtor’s failure to provide security under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA) because of a genuine inability to do so as a result of its financial situation does not, without more, fall within the description of any of the established categories of abuse of process outlined in *Chee Siok Chin* (see [29] above, and also *FT Plumbing* at [52]-[53]). It is also worth highlighting in this regard that as a matter of general practice, courts do, where appropriate, vigilantly consider and weigh the possibility of stifling genuine claims in situations where its inherent power is sought to be invoked on allegations of abuse of process (see, eg, *Lim Poh Yeoh (alias Aster Lim) v TS Ong Construction Pte Ltd* [2017] 4 SLR 789 at [15], and *FT Plumbing* at [58]-[59]).

42 In the present case, the defendant claims that it does not have sufficient funds, on top of what has been provisionally garnished in SUM 3295, to fulfil the security required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA). The defendant further highlights that the plaintiff had commenced two other garnishee proceedings (see [5] above) in addition to SUM 3295, and that those two garnishee proceedings had since been withdrawn. Indeed, this was the case as reflected in the case file, which indicates that in a pre-trial conference conducted by a Senior Assistant Registrar on 4 November 2020, leave was granted for the withdrawal of those two garnishee proceedings on the basis that (a) the plaintiff had been informed that there was no debt due from the garnishee in one of those proceedings (a company) to the defendant, and (b) the garnishee in the other proceedings (another bank) had indicated to the plaintiff that it did not maintain any account with the defendant.

43 The plaintiff, on the other hand, contends that the defendant has failed to prove that it did not have access to additional funds for putting up the security, and submits that the defendant is “more likely than not” to have the financial means to do so, given that:

- (a) the defendant has continued to function without any indication of financial distress despite the provisional garnishee order having been made in SUM 3295;
- (b) an ACRA search on the defendant reveals that it has a paid-up capital of at least \$1 million;
- (c) while it would have been easy for the defendant to adduce audited accounts or bank statements to provide that it did not have the financial means to raise additional funds, the defendant has deliberately chosen not to do so; and
- (d) based on the defendant’s OCBC bank account statements which have been tendered before the court, there were several substantial incoming funds during the period between August 2020 and December 2020 which the defendant has failed to account for.

44 Having perused the evidence adduced, this court is unable to accept the plaintiff’s case that the defendant has funds additional to what has been provisionally garnished in SUM 3295 to serve as the security required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA). The reasons are as follows.

(a) Firstly, apart from OCBC, no other bank has been made known by the evidence to be maintaining an account for the defendant. While as mentioned before there was another separate garnishee proceedings taken out by the plaintiff against another bank as the garnishee, that garnishee proceeding had since been withdrawn after the bank indicated that it did not maintain any account with the defendant (see [42] above).

(b) Secondly, the fact that the defendant has been able to continue operating as an ongoing concern in spite of the provisional garnishee order in SUM 3295, and the fact that the defendant had a paid-up capital of at least \$1 million, are not conclusive of the defendant's ability to raise the additional funds needed to put up the required security. Particularly in relation to the defendant's paid-up capital, this court notes that the amount of funds which is currently the subject of the provisional garnishee order in SUM 3295 is already somewhat in the ballpark of \$1 million, at around \$928,000. [\[note: 1\]](#) To the extent that the plaintiff might be suggesting that companies ought generally be taken as a matter of fact to have around double in actual funds than their paid-up capital, that is speculative.

(c) Thirdly, the defendant has adduced statements of its only known operating bank account (ie, the OCBC bank account) for the period between August 2020 and December 2020. [\[note: 2\]](#) Based on those statements, the standing balance in the defendant's OCBC bank account during that period fluctuated between a low of around \$501,000 (in around mid-August 2020) and a high of around \$1,355,000 (in late October 2020), and ending with around \$962,000 as at 9 December 2020 (where the statements in evidence end). It is also apparent from the statements that the defendant did not only receive incoming transfers into the OCBC bank account during the period, but instead had a mixture of both incoming and outgoing transfers of funds. More importantly, the statements in evidence indicate that at no point during that period did the defendant have funds, over and above that subjected by the provisional garnishee order, which could have been used to secure the entire unpaid portion of the adjudicated amount.

45 In sum, this court finds that there is good and sufficient reason to believe that the defendant genuinely could not have been able to execute sufficient funds to secure the unpaid portion of the adjudicated amount for the purposes of the defendant's application in SUM 3558, bearing crucially in mind that the grant of the provisional garnishee order in SUM 3295 on 11 August 2020 (see [5] above) – including the service of that order on OCBC on 19 August 2020, as the evidence further suggests [\[note: 3\]](#) – pre-dated the defendant's commencement of SUM 3558 on 21 August 2020 (see [6] above). Under these circumstances, the court finds no abuse of process arising from the defendant's failure to provide the security under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA).

SUM 5046 – defendant's application to set aside the provisional garnishee order in SUM 3295

The applicable principles

46 The defendant cites the authority of *Harmonious Coretrades (HC)* in its application to set aside the provisional garnishee order in SUM 3295, and relies on the court's "residual discretion" under Order 92 Rule 4 of the Rules of Court (see [13]-[14] above). In doing so, the defendant accepts that its application is not made under any of the following circumstances previously specified by case law:

- (a) where the order has been obtained irregularly;
- (b) where the judgment has been obtained by fraud;

(c) where an order or judgment has been obtained in default of the appearance of one of the parties to the suit.

47 For good measure, this court notes that the decision in *Harmonious Coretrades (HC)* was appealed to the Court of Appeal, and although on the facts the Court of Appeal disagreed with the ultimate result arrived at by the High Court, it affirmed the High Court's general holding that the three specified circumstances above are not exhaustive and that the court retains a residual discretion – flowing from its inherent power preserved under Order 92 Rule 4 of the Rules of Court to prevent injustice – to set aside a judgment or court order (see *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [36]-[37] ("*Harmonious Coretrades (CA)*"). The Court of Appeal was, however, quick to emphasise (at [40]) that its holding:

is not a licence to litigants to make frivolous applications to set aside judgments or court orders. The court's inherent power to set aside a judgment or court order should never become a back-door appeal or an opportunistic attempt to relitigate the merits of the case. One such situation where the court's inherent power could be justifiably invoked might be where the substratum or the very foundation of a court order has been destroyed, such that the continued existence or future performance of the court order would lead to injustice. [...]

Whether the provisional garnishee order should be set aside

48 The parties' cases in this regard have been summarised at [12]-[16] above. To the extent that their cases deal with the defendant's assertion of "double security" and its lack of additional funds to fulfil the security required under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA), this court repeats and adopts the analysis made in [35]-[38] and [42]-[45] above.

49 As such, the remaining contentions to be evaluated are as follows:

(a) the defendant's contention that it would be unfairly prejudiced if the provisional garnishee order is not set aside, since it has been prevented by that order to fulfil the security under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA); and

(b) the defendant's contention of "severe prejudice" if its application in SUM 3558 is struck out for want of the required security.

50 This court rejects these contentions, for the following reasons. Firstly, the fact that the provisional garnishee order has prevented the defendant from fulfilling the security under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA) does not, in and of itself, render the making of the provisional garnishee order an injustice under the law. If the contrary were to be true, an acutely unsatisfactory inroad undermining the binding effects of judgments and court orders would exist where judgments and court orders can be set aside simply on superficial consequentialist grounds. The thought of entertaining this possibility in the present case becomes even more perverse considering the fact that the defendant itself has conceded that the plaintiff was entitled to have taken out the garnishee proceedings in SUM 3295, following the defendant's failure to take out any application to set aside the adjudication determination and/or ORC 3877/2020 within the 14-day timeline stipulated in Order 95 Rule 2(4) of the Rules of Court (see [35] above).

51 Secondly, the defendant's claim of "severe prejudice" in the event that its application in SUM 3558 is struck out for want of security is a red herring. As demonstrated by this court's analysis at [32]-[45] above, the plaintiff could not have succeeded in striking out SUM 3558 on the ground which it has pursued, *viz.* abuse of process of the court. In any case, and once again, there seems to be a

measure of disingenuity in the defendant's claim of prejudice given its own concession that the plaintiff was in fact entitled to have commenced the garnishee proceedings in SUM 3295. Having found itself properly caught in a bind regarding its freedom to use its OCBC bank funds, it lies ill in the defendant's mouth to suggest an unravelling of the remedial headway that the plaintiff has rightfully made thus far vis-à-vis the defendant's bank funds. The defendant in the present case is in fact to a very large extent the author of its current predicament, and further to that – to borrow the Court of Appeal's words in *Harmonious Coretrades (CA)* (see [47] above) – the "substratum or the very foundation" of the provisional garnishee order has not been challenged at all such as to give rise to a properly justifiable invocation of the court's inherent power to set aside that order.

52 Thirdly, the defendant's clarification in oral submissions that the true underlying purpose of SUM 5046 is to bring about a 're-arrangement' of the manner in which its OCBC bank funds are presently held (see [12] above) belies any genuine prejudice that the defendant is seeking to assert. On the contrary, the defendant's attempt in SUM 5046, at its very core, strikes the court as an exercise motivated not by what the defendant considers to be in the interests of justice between the parties, but by what it considers to be *convenient* having regard to its *own* interests. On a related note, it should also be highlighted that the defendant, in an attempt during the course of the hearing to convince the court to consider a deferment of the garnishee show cause proceedings in SUM 3295 until SUM 3558 has been disposed of (see also prayer (4) at [8] above), had made a completely bald and unsubstantiated submission that it might not (in the event that SUM 3558 is allowed) be able to fully recover from the plaintiff the funds that are subjected by SUM 3295. The fact that the defendant would resort to such a patently unsupportable argument in court adds the view that the defendant's purpose underlying SUM 5046 is not just self-serving but also a desperate one.

53 Having regard to the circumstances as well as the foregoing reasons, this court thus considers that the defendant's application in SUM 5046 is tantamount to a frivolous one for which no litigant should have a licence to pursue (see *Harmonious Coretrades (CA)* at [40], cited at [47] above).

Conclusion

54 In relation to SUM 5045, this court finds no abuse of process warranting a striking out of SUM 3558 to have arisen from the defendant's failure to commence SUM 3558 within the 14-day timeline stipulated in Order 95 Rule 2(4) of the Rules of Court (see [24]-[31] above), and its failure to furnish the required security under Order 95 Rule 3(3) (read with section 27(5) of the SOPA) (see [32]-[45] above). Nevertheless, this court will emphasise that it still behoves the defendant – being the applicant in SUM 3558 – to address the Judge hearing SUM 3558 on the lateness of its filing. Insofar as SUM 3558 was commenced unaccompanied by the required security, it is not difficult to surmise that the lack of security could potentially become moot given that the defendant's effort in SUM 5046 to essentially stymie the making of the provisional garnishee order in SUM 3295 absolute has been found to be frivolous (see [48]-[53] above). This court envisages that the garnishee show cause hearing in SUM 3295 should proceed soon hereafter in the usual course of practice.

55 In SUM 5046, the various prayers sought by the defendant are referred to in [8] above. The court has arrived at the view that the principal relief sought (ie, prayer (2)) is frivolous (see [48]-[53] above). In doing so, the court has also found no reason to allow prayer (4) which essentially seeks a deferment of the garnishee show cause hearing in SUM 3295 until SUM 3558 has been disposed of (see [52] above). The remaining substantive prayers sought in SUM 5046 are, accordingly, the joinder of the defendant as a party to the garnishee proceedings in SUM 3295 (ie, prayer (1)) and the extension of time for the defendant to pay the security into court under Order 95 Rule 3(3) of the Rules of Court (read with section 27(5) of the SOPA) (ie, prayer (3)). On these remaining prayers, the court was given to understand by the defendant in the course of the oral hearing that they are

essentially contingent upon the grant of prayer (2) (ie, the setting aside of the provisional garnishee order in SUM 3295), and that they would fall away in the event that the court declines to grant the setting aside of the provisional garnishee order in SUM 3295.

56 In conclusion, and subject to any issue relating to costs:

(a) SUM 5045 is dismissed; and

(b) in relation to SUM 5046, prayers (2) and (4) are dismissed with no order made on all the other prayers.

57 I will hear the parties on any issue relating to costs.

[\[note: 1\]](#) Chan Tak Pheng's affidavit dated 18 November 2020, at [17].

[\[note: 2\]](#) Chan Tak Pheng's affidavit dated 16 December 2020, pp 6-34.

[\[note: 3\]](#) Chan Tak Pheng's affidavit dated 18 November 2020, p 123.