

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

[2023] SGHC 46

Originating Application No 312 of 2022 (Registrar's Appeal No 353 of 2022)

Between

Wan Sern Metal Industries Pte Ltd

... Appellant

And

Hua Tian Engineering Pte Ltd

... Respondent

FOUNDATIONS OF DECISION

[Building and Construction Law — Dispute resolution — Adjudication — Stay of enforcement of adjudication determination]

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Wan Sern Metal Industries Pte Ltd
v
Hua Tian Engineering Pte Ltd

[2023] SGHC 46

General Division of the High Court — Originating Application No 312 of 2022 (Registrar's Appeal No 353 of 2022)

Kwek Mean Luck J

18 January 2023

27 February 2023

Kwek Mean Luck J:

Introduction

1 In the hearing below, Wan Sern Metal Industries Pte Ltd (“WS”) applied to stay the enforcement of the Adjudication Determination (“AD”) which was awarded in favour of Hua Tian Engineering Pte. Ltd. (“HT”). The Assistant Registrar (“AR”) heard and dismissed WS’s application. WS appealed against the AR’s decision.

2 The applicable legal principles are well-established and were not disputed by the parties.¹ A stay of the enforcement of an adjudication

¹ Appellant’s Written Submissions for HC/RA 353/2022 dated 11 January 2023 (“Appellant’s Written Submissions”) at paras 12; Respondent’s Written Submissions

determination may ordinarily be justified where (*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (“*W Y Steel*”) at [70] and *CEQ v CER* [2020] SGHC 192 (“*CEQ*”) at [9]) (“the *W Y Steel* test”):

- (a) there is clear and objective evidence of the successful claimant’s actual present insolvency; or
- (b) the court is satisfied on a balance of probabilities that, if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute were resolved in the respondent’s favour.

3 WS’s appeal was based on the above two limbs of *W Y Steel* and on an additional novel ground that the court may stay the enforcement of the AD on the basis that enforcement would push WS into liquidation.

4 In respect of the first issue, I examined the financial documents provided by HT and found that there is no clear and objective evidence of HT’s actual present insolvency. In respect of the second issue, I was not satisfied on the evidence that, on a balance of probabilities, the money paid to HT would not ultimately be recovered if the dispute was resolved in WS’s favour and the stay were not granted. In respect of the third issue, I found that there was no legal or evidential basis for WS’s submission that there should be a stay because the enforcement of the AD would push WS into liquidation. I hence dismissed WS’s appeal. I set out the reasons for my decision in full below.

for HC/RA 353/2022 dated 13 January 2023 (“Respondent’s Written Submissions”) at paras 9-10.

Facts

The parties

5 WS was a sub-contractor who engaged HT as its sub-contractor to do works for a property development project.

Background to the dispute

6 HT alleged that, after performing its contractual obligations, WS failed to pay HT for the works done. On 18 May 2022, HT lodged an Adjudication Application against WS pursuant to s 13 of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) (“SOPA”). On 14 June 2022, the Adjudicator issued the AD in favour of HT, for WS to pay HT \$616,670.80 (inclusive of GST).²

7 WS was dissatisfied with the AD and commenced arbitration against HT with the Singapore International Arbitration Centre (“the SIAC”) on 28 June 2022.³

Procedural history

8 HT filed an originating application seeking leave to enforce the AD as a judgment or order of the court pursuant to s 27 of the SOPA.⁴ The AR made an order in terms to, *inter alia*, enforce the AD as an order of court.⁵ On 18 August 2022, HT applied to court for an enforcement order to attach a debt due to WS

² Chen Hua’s affidavit dated 5 July 2022 at p 13.

³ Appellant’s Written Submission at para 10; Chua Ngeok Yin’s affidavit dated 14 September 2022 (“Chua Ngeok Yin’s affidavit”) at p 201.

⁴ Originating Application (HC/OA 312/2022) filed on 8 July 2022 at para 1.1.

⁵ Registrar’s Directions dated 12 July 2022.

from DBS Bank.⁶ The AR issued the enforcement order on 22 August 2022.⁷ On 14 September 2022, WS applied to court for a stay of the enforcement of the AD pending the disposal of the proceedings in the SIAC.⁸ The AR dismissed the application for stay and ordered costs to the applicant fixed at \$8,000.⁹ WS appealed against the AR’s decision in relation to the stay application and costs.¹⁰

Issues to be determined

9 Three issues arose on appeal based on WS’s submissions:

- (a) whether there was clear and objective evidence of HT’s actual present insolvency;
- (b) whether, on a balance of probabilities, WS would not be able to ultimately recover the moneys paid to HT if the stay were not granted and the dispute is resolved in WS’s favour; and
- (c) whether the court should grant a stay of the enforcement of the AD on the ground that payment of the adjudicated amount would cause WS to enter into liquidation.

Issue 1: Whether there was actual present insolvency

10 First, WS submitted that HT was presently insolvent. WS cited *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 (“*Sun Electric*”)

⁶ Summons for Enforcement Order (HC/EO 17/2022) filed 18 August 2022.

⁷ Enforcement Order (HC/ORC 4451/2022) dated 22 August 2022.

⁸ Summons for Stay of Enforcement of a Judgment or Order (HC/SUM 3416/2022) filed 22 September 2022.

⁹ Certified Transcript (HC/SUM 3416/2022) dated 23 November 2022 at paras 4 and 9, and p 8.

¹⁰ Notice of Appeal to a Judge of High Court in Chambers (HC/RA 353/2022) at para 1.

at [56] and [65] as the authority that the sole and determinative test for insolvency should be the “cash flow test.”¹¹ This test “assesses whether the company’s current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due” (at [65]). The court held at [65] that “current assets” and “current liabilities” refer to “assets which will be realisable and debts which fall due within 12-month timeframe.” Notwithstanding, the court also held at [67] that the timeframe for assessing the current assets and liabilities of a company “should not be set too rigidly, but should be sufficiently flexible to take into account debt and income which would be due in the reasonably near future to avoid absurd and illogical outcomes.”

11 I note that the Court of Appeal (“CA”) in *Sun Electric* held at [56] and [65] that the cash flow test is the sole applicable test for insolvency “*under s 254(2)(c) of the Companies Act [(Cap 50, 2006 Rev Ed)]*” [emphasis added] (equivalent to s 125(2)(c) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (“IRDA”). The CA did not consider whether the cash flow test is the sole test of insolvency in other situations. Nevertheless, I consider that the “cash flow test” could also apply to the *W Y Steel* test in relation to whether there is “actual present insolvency.” This would provide consistency in the law. WS and HT did not dispute the application of the “cash flow test” to the *W Y Steel* test and HT made no submissions on this point. Their submissions focused instead on the evidence for insolvency.

12 Referencing HT’s Financial Statement for the period ending 31 December 2021 (“FS 2021”),¹² WS highlighted that HT’s total assets amounted

¹¹ Appellant’s Written Submissions at para 24.

¹² Chen Hua’s affidavit dated 3 October 2022 at p 17.

to \$322,607 and its total liabilities amounted to \$136,987.¹³ However, \$238,694 of those total assets were trade receivables.¹⁴ WS asserted that HT had not provided, and refused to provide, details of those trade receivables or information showing that those receivables could be collected and/or liquidated.¹⁵ If those receivables could not be collected or liquidated, HT's total liabilities would exceed its total assets (as at 31 December 2021) and thus HT was presently insolvent. WS also claimed that HT had not provided an updated financial statement for the year ending 31 December 2022.¹⁶

13 In response to WS's submission, HT filed five affidavits through its Director, Chen Hua, to show that it was solvent. These affidavits included HT's Director's Statement and the FS 2021, which stated that HT was asset and cashflow positive at the end of the financial years ending 2020 and 2021.¹⁷ It should be noted that the FS 2021 showed that, contrary to WS's submission, HT's total assets for FY2021 was \$397,668 (as opposed to \$322,607, as submitted by WS).¹⁸ The effect of this was that, even if the trade receivables stated in the FS 2021 could not be collected or liquidated, HT's total assets still exceeded its total liabilities as at 31 December 2021.

14 In relation to WS's submission that HT had not provided an updated financial statement, I asked counsel for HT to confirm when the Financial Statement for the period ending 31 December 2022 would be ready. Counsel

¹³ Appellant's Written Submissions at para 22(a).

¹⁴ Appellant's Written Submissions at para 22(a); Chen Hua's affidavit dated 3 October 2022 at p 17.

¹⁵ Appellant's Written Submissions at para 22(b) and (d).

¹⁶ Appellant's Written Submissions at para 22(c).

¹⁷ Chen Hua's affidavit dated 3 October 2022 at pp 17 and 20.

¹⁸ Chen Hua's affidavit dated 3 October 2022 at p 17.

for HT informed the court that this Financial Statement was still in the preparatory stage and was likely to be ready around March 2023. The FS 2021 was also ready around the same period of the next year, in March 2022. Hence, FS 2021 was the latest available financial statement that HT could provide, as of the hearing date on 18 January 2023.

15 In any event, HT did not only adduce FS 2021. HT also provided other financial documents to show that it had made regular payments to its staff, had ongoing projects, and had liquidity in its daily accounts, over the course of 2022. These included:

- (a) records of HT's timely payments of its employees' CPF contributions and foreign worker levies for the months of June to September 2022;¹⁹
- (b) HT's payslips which showed receipt of salaries by its staff from July to August 2022, as evidence that its staff were regularly paid;²⁰
- (c) quotations, letters of awards, and payment responses to evidence HT's projects during the period February to September 2022.²¹ HT had redacted commercially sensitive data regarding project names, as HT and WS are said to be competitors in the industry. However, the unredacted documents were provided to and reviewed by the court. These documents contained certified payment responses from other companies up to late-September 2022;

¹⁹ Chen Hua's affidavit dated 3 October 2022 at pp 36-41.

²⁰ Chen Hua's supplemental affidavit dated 28 October 2022 at pp 6-26.

²¹ Chen Hua's supplemental affidavit dated 28 October 2022 at pp 35-67.

(d) HT's OCBC bank statement as of 17 November 2022 which showed that it had made payment to one VJF Systems Pte Ltd on 17 November 2022 in the amount of \$34,125.60, and that it had a positive balance of \$52,508.40;²² and

(e) HT's OCBC bank statement which showed its daily statement of accounts from June to August,²³ and November 2022 to show that it was liquid.²⁴

16 In my judgment, contrary to WS' submission, HT was not a company that had acted evasively in proving its viability as a company or had chosen to remain silent. In *CEQ*, the respondent refused to produce positive evidence of its bank account and relevant transactions before the court, despite being given ample opportunities to do so. The court in *CEQ* thus found that the respondent acted evasively at every turn in proving its viability as a company and hence failed to convince the court on this point. This stands in stark contrast to the present case, where HT had provided relevant financial statements and other financial documents, as set out at [13]-[15] above, including updated financial documents requested by the AR.

17 Ultimately, WS was unable to point to anything from the financial documents before it to indicate that HT was insolvent or why, despite the financial documents, HT should nevertheless be regarded as insolvent. On the evidence before the court as set out in the preceding paragraphs, I agreed with the AR that HT was presently solvent.

²² Chen Hua's affidavit dated 21 November 2022 at p 5.

²³ Chen Hua's affidavit dated 3 October 2022 at pp 43-45.

²⁴ Chen Hua's affidavit dated 21 November 2022 at p 5.

Issue 2: Whether there was a likelihood of recovery of moneys

18 Second, WS submitted that, if the stay were not granted, there would be no likelihood of future recovery of the moneys paid pursuant to the AD from HT, if the dispute was ultimately resolved in WS's favour as:²⁵

- (a) HT had a relatively low amount of cash in its bank account;
- (b) HT's paid-up capital of S\$150,000 was low;
- (c) the bulk of HT's assets for FY2021 were trade receivables, which HT provided no details of;
- (d) the documents produced by HT on its projects did not show whether HT had any live and/or substantial projects, when the projects had to be completed by, if they were completed, or if HT was paid;
- (e) the nature of the work also appears unsubstantial, e.g. installation of aluminium screens rather than whole construction projects;
- (f) HT had an extraordinarily "slim" workforce;
- (g) HT's office was rented rather than owned; and
- (h) if the dispute was resolved in WS's favour, HT could easily close its business.

19 I did not find that the factors highlighted by WS proved that, on a balance of probabilities, moneys paid to HT would not ultimately be recovered if the stay were not granted and the dispute was resolved in WS' favour.

²⁵ Appellant's Written Submissions at para 31.

20 In relation to [18(a)–(b)] above, HT’s allegedly low paid-up capital of \$150,000 and relatively low bank balance did not, in themselves, indicate that there was a risk of non-recovery. There had been no sharp decline in HT’s financial position that suggested that the low bank balance indicated that HT was in some form of financial trouble. Fundamentally, HT’s net assets and cashflow FY2021 were positive, as indicated in its Financial Statements.²⁶

21 Second, in relation to [18(c)–(e)] above, WS was not able to point to any part of the financial documents provided by HT to suggest that HT had cashflow problems, previous problems with its trade receivables, or that there was specific cause for concern over the recoverability of HT’s trade receivables. As mentioned above, I reviewed the unredacted project documents provided by HT and was satisfied that there was sufficient evidence of records of work awarded and payments due to HT. That the projects involved work such as installation of aluminium screens rather than whole construction projects was simply a reflection of the nature of HT’s business. The fact that HT was engaged for only parts of construction projects, rather than the project as a whole, did not mean that WS could not recover money from HT. It was also noteworthy that WS was also a sub-contractor for various projects, rather than being the main contractor.

22 WS had also not satisfactorily explained how the factors set out in [18(f)–(g)] above were indicative of a risk of non-recovery. Depending on the nature of the business and its business model, operating on a “slim” workforce could be said to show prudence and better prospects of viability. The same could be said of the fact that HT rented its office. The size of a workforce and/or whether office premises are rented do not, in themselves, speak towards the

²⁶ Chen Hua’s affidavit dated 3 October 2022 at pp 17 and 20.

likelihood of non-recovery. They are at best neutral factors. Moreover, HT had adduced evidence to show that their employees were paid regularly. This thus showed that, although its workforce was “slim,” HT was able to sustain its workforce and operations.

23 Finally, WS alleged that HT could easily close its business if the dispute was resolved in WS’s favour. It should be borne in mind that closure of business brings along other repercussions for the directors and the staff. It is the likelihood of HT closing its business, rather than the ease, that is the pertinent question. In the present case, WS had not adduced any evidence that indicated a likelihood that HT would be unable to pay WS and would choose instead to close its business.

24 Further, I agreed with the observations of the AR that, unlike the situations in *CEQ* and *Dongah Geological Engineering Co Ltd v Jungwoo EC Pte Ltd* [2021] SGHC 239 (“*Dongah*”), no evidence had been produced here pointing to any possible dissipation of assets or potential liquidation of the company, multiple changes of directors/shareholders, suggestion of bankruptcy of any of the officers with a connection to HT, or of key company officers leaving Singapore with no intention to return. There was therefore nothing to suggest that HT intended to cease operations, leaving WS with a paper judgment, if the dispute was ultimately resolved in its favour.

25 Moreover, it was held in *W Y Steel* at [70] that, in considering whether to stay the enforcement of an adjudication determination, a court may “properly consider whether the claimant’s financial distress was, to a significant degree, caused by the respondent’s failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract.”

In this case, the adjudicated amount withheld by WS from HT amounted to around \$643,923.38, based on HT's submissions. As evidenced by the financial documents it had produced, HT was not presently in financial distress. While there was nothing that showed whether HT's financial position had weakened compared to when the parties entered into their contract, any weakening of HT's financial position could certainly be attributed, at least in part, to WS's failure to pay the adjudicated amount.

26 Based on the evidence adduced, nothing suggested that WS would be unable to recover the moneys paid to HT pursuant to the AD if the stay were not granted and the dispute was resolved in WS's favour. I therefore found that a stay should not be granted on this ground.

Issue 3: Whether enforcement would push WS into liquidation

27 Third, WS sought a stay on the ground that enforcement of the AD would push it into liquidation, given its weak financial position. It submitted that payment pursuant to the AD would defeat the purpose of the SOPA regime, which the court in *W Y Steel* described at [20] as "pay now, argue later." WS submitted that if payment now rendered WS insolvent, it would not be able to "argue later."

28 Firstly, there was no legal basis for WS's submission. In my view, WS's submission completely misinterpreted *W Y Steel* and attempted to use it for a proposition which *W Y Steel* did not put forth. The phrase cited by WS related to the need for an expeditious regime under SOPA. As the court in *W Y Steel* explained at [20]: "... payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of lengthy and expensive proceedings that have to be undertaken in order

to disentangle the knot of disputed claims and cross-claims.” In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi Construction*”), the CA explained at [1] that the aim of SOPA was to establish “a fast and low cost adjudication system to resolve payment disputes” (quoting the *Singapore Parliamentary Debates, Official Report* (16 November 2004), vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development)), in the light of “the need to ensure that contractors and subcontractors in the construction industry receive timely payments for work done and materials supplied.”

29 *W Y Steel* did not establish that, where a party is on the verge of insolvency, there should be a stay of enforcement of an adjudication determination. The only two grounds for such a stay were laid out in *W Y Steel*, as set out at [2] above.

30 Indeed, as rightly highlighted by HT, if WS did have genuine financial difficulties, that would equally point to a need to ensure that HT recovered the adjudicated amount without further delay.²⁷

31 Second, even if there were such legal basis, there was absolutely no evidential basis for WS’s submission that payment pursuant to the AD would push WS into liquidation. At the hearing of the appeal, WS referred to two documents:

- (a) First, WS referred to a cashflow statement,²⁸ which showed that WS’s cash inflow for July 2022 was \$1.014m and its outflow was \$1.073m. However, that same cashflow statement evidenced payments

²⁷ Respondent’s Written Submissions at paras 69 and 74.

²⁸ Chua Ngeok Yin’s affidavit at p 255.

by WS of \$20,000 to its director, \$329,681 to its suppliers, and \$209,579 in salaries. It was not evident from this cashflow statement that WS could not adjust such payments and avoid liquidation, if it made payment to HT for the sums due on the AD.

(b) WS also referred to a document to show that it is nearing its \$1m limit of an overdraft facility.²⁹ However, this, in itself, did not show that WS was nearing the limits of its financing facilities or that it had no other available sources of financing.

32 When it was pointed out that those documents did not show whether WS would be unable to “argue later” or if WS had other sources of financing, counsel for WS replied that he had nothing to add on in terms of factual evidence of insolvency. It was also noteworthy that WS’s reliance on its cash inflow and outflow to establish that payment pursuant to the AD would render it insolvent is contrary to WS’s submission that the cash flow test should apply to determine insolvency for HT. Critically, WS had not provided any evidence on its current assets or liabilities, or its recent financial position, to show that it could not pay its debts as and when they fell due.

33 Furthermore, WS had cited, in support of its case, *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2018] 4 SLR 1192 (“*Strategic Construction*”) at [19], which stated that, in winding up applications, businesses “that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover” (quoting *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [82]). In light of this quote in *Strategic Construction*, it was not clear on present evidence that WS would be put into liquidation, even

²⁹ Chua Ngeok Yin’s affidavit at p 246.

if there was a winding up application, as there would also be a consideration of whether WS has “a chance of recovery.”

Conclusion

34 For the reasons set out above, in a similar vein to the court’s finding in *W Y Steel* at [72], I found that “it [was] evident that [WS] had not met the high threshold that was required to justify granting a stay of enforcement of the Adjudication Determination.” The submissions of WS were without merit and unsupported by the evidence. Granting WS a stay would defeat the purpose of SOPA, which, as explained in *Audi Construction*, is to ensure that, in light of the need for timely payment in the construction industry, there is a fast and low-cost system to resolve payment disputes. I hence dismissed the appeal. Finally, I awarded costs to HT in the amount of \$8,000 all-in.

Kwek Mean Luck
Judge of the High Court

Ashok Kumar Rai and Yeo Wei Ying Jolyn (Cairnhill Law LLC) for
the appellant;
Daniel Tay and Lee Yun Long (Chan Neo LLP) for the respondent.
