

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 174

Originating Summons No 362 of 2017 (Summons No 1738 of 2017)

Between

A DELI CONSTRUCTION PTE LTD

... Applicant

And

KINGSFORD CONSTRUCTION PTE LTD

... Respondent

Originating Summons No 460 of 2017

Between

KINGSFORD CONSTRUCTION PTE LTD

... Applicant

And

A DELI CONSTRUCTION PTE LTD

... Respondent

GROUNDS OF DECISION

[Building and construction law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]

[Building and construction law] — [Dispute resolution] — [Adjudication] — [Breach of natural justice]

[Building and construction law] — [Dispute resolution] — [Stay of enforcement pending appeal]

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Kingsford Construction Pte Ltd

v

A Deli Construction Pte Ltd

[2017] SGHC 174

High Court — Originating Summons Nos 460 and 362 of 2017 (Summons No 1738 of 2017)

Tan Siong Thye J

25 May 2017

20 July 2017

Tan Siong Thye J:

Introduction

1 Kingsford Construction Pte Ltd (“Kingsford”) had two applications, namely, Summons No 1738 of 2017 (“SUM 1738”) and Originating Summons No 460 of 2017 (“OS 460”), to set aside two separate adjudication determinations (“AD”) obtained by A Deli Construction Pte Ltd (“Deli”) against Kingsford. One AD was for the adjudicated sum of \$251,455.41¹ and the other AD was for \$219,929.72.² It was not disputed that Kingsford did not file its payment responses in relation to both.

¹ AD of Giam Chin Toon SC, para 152.

² AD of Christopher Chuah, para 69(a).

2 After hearing arguments from Kingsford and Deli, I ruled that the two Payment Claims No 15 served by Deli were in compliance with s 10 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOPA”). Furthermore, Kingsford could not raise other issues such as the invalidity of the payment claims, set-off, or that wrong rates were applied for some items in Adjudication Application No 45 of 2017 (“AA45”) as it had not filed its payment responses in accordance with the SOPA. Accordingly, I dismissed Kingsford’s applications with costs fixed at \$5,000 for both cases.

3 Thereafter, Kingsford sought to stay the execution of my order pending appeal. I also dismissed this application and ordered that the payment into court by Kingsford be released to Deli forthwith.

4 The period to appeal had lapsed and there was no appeal lodged.

Background

5 Kingsford was the main contractor appointed by Kingsford Development Pte Ltd for the construction works at Hillview Peak.³ Deli was a subcontractor appointed by Kingsford to supply labour, small tools and equipment for wet trades at Hillview Peak.⁴ There were two subcontracts between the parties. One subcontract was for Blocks 103 and 105 at Hillview Peak for the contract sum of \$1,150,440 by way of a Letter of Acceptance dated 13 August 2015 (“the 13 August subcontract”).⁵ The other subcontract was for Block 101 also at Hillview Peak for the contract sum of \$1,117,490 by way of a Letter of Acceptance dated 15 August 2015 (“the 15 August subcontract”).⁶

³ Kingsford’s Submissions in OS 460, para 3.

⁴ Deli’s Submissions in OS 460 (for hearing on 25 May 2017), para 4.

⁵ Deli’s Submissions in OS 362 (for hearing on 25 May 2017), para 5.

6 On 20 January 2017, Deli served its Payment Claim No 15 under the 13 August subcontract and also its Payment Claim No 15 under the 15 August subcontract (collectively, “the two Payment Claims No 15”).⁷ Kingsford did not lodge payment responses for both claims.⁸ On 13 February 2017, Deli issued a Notice of Intention to Apply for Adjudication in respect of AA45 for the sum of \$219,929.72 (excluding GST).⁹ On 15 February 2017, Deli issued a Notice of Intention to Apply for Adjudication in respect of Adjudication Application No 43 of 2017 (“AA43”) for the sum of \$419,599.16 (also excluding GST).¹⁰

7 The ADs were delivered by two different adjudicators on separate occasions. On 23 March 2017, the adjudicator in AA43, Mr Giam Chin Toon SC, delivered his AD and directed Kingsford to pay Deli the sum of \$251,455.41 (inclusive of GST) plus other charges.¹¹ On 31 March 2017, the adjudicator in AA45, Mr Christopher Chuah, delivered his AD and directed Kingsford to pay the sum of \$219,929.72 (exclusive of GST) plus other charges.¹²

8 Kingsford failed to pay the adjudicated amounts and Deli applied to the court to obtain leave to enforce both the ADs in Originating Summons No 362 of 2017 and DC/OSS 56 of 2017.¹³ In response, Kingsford filed SUM 1738 and

⁶ Deli’s Submissions in OS 460 (for hearing on 25 May 2017), para 5.

⁷ Deli’s Submissions in OS 460 (for hearing on 25 May 2017), para 6; Deli’s Submissions in OS 362 (for hearing on 25 May 2017), para 6.

⁸ Kingsford’s Submissions in OS 362, para 7; Kingsford’s Submissions in OS 460, para 6.

⁹ AD of Christopher Chuah, para 11.

¹⁰ AD of Giam Chin Toon SC, para 9.

¹¹ AD of Giam Chin Toon SC, para 152.

¹² AD of Christopher Chuah, para 69(a).

¹³ Deli’s Submissions in OS 460 (for hearing on 25 May 2017), para 8.

OS 460 to set aside the two ADs in relation to the 13 August subcontract and 15 August subcontract respectively.

Parties' submissions

Kingsford's submissions

9 In the applications to set aside Deli's two ADs, Kingsford made two main arguments. First, Kingsford submitted that the two Payment Claims No 15 were invalid as they were payment claims made after the finalisation of accounts. The two Payment Claims No 14 were the final claims. Further, the two Payment Claims No 15 did not fall within the ambit of allowable 'repeat claims', such claims could be allowed even after the finalisation of accounts, as they were materially distinct from the two Payment Claims No 14.¹⁴ As the two Payment Claims No 15 were invalid the adjudicators had no jurisdiction to determine the adjudication.

10 Secondly, Kingsford also submitted that the two adjudicators breached natural justice in issuing the ADs. For SUM 1738, Kingsford said that the adjudicator failed to consider the differences between Payment Claim Nos 14 and 15 under the 13 August subcontract, namely, that Kingsford had a set-off comprising liquidated damages, the cost of rectification works, back charges for material wastage, and administrative charges for Deli's failure to adhere to certain rules and failure to provide sufficient code trade personnel.¹⁵

¹⁴ Kingsford's Submissions in OS 362, paras 12-17; Kingsford's Submissions in OS 460, paras 11-16.

¹⁵ Kingsford's Submissions in OS 362, paras 30 and 35; Affidavit of Chen Zhaohuang (OS 362), para 5.

11 For OS 460, Kingsford similarly contended that the adjudicator breached natural justice by failing to consider Kingsford's right to set-off Deli's claims against its back charges,¹⁶ by failing to consider Kingsford's claims for liquidated damages founded on Deli's failure to furnish workers of sufficient skill and its lack of timely progress under the 15 August subcontract,¹⁷ and by arriving at an erroneous adjudicated sum by using wrong rates for certain items in Payment Claim No 15.¹⁸

12 Kingsford additionally submitted that it was not precluded from challenging the ADs on the above two grounds although it did not file payment responses for both ADs. This was on the basis that the adjudicators did not consider patent errors arising on the face of the materials properly before them. Kingsford argued that it did not file payment responses for both ADs as it thought that the two Payment Claims No 14 were the final payment claims and hence Deli was precluded from filing further payment claims.¹⁹

Deli's submissions

13 Deli submitted that the two Payment Claims No 15 were valid and that Kingsford had waived its right to challenge the jurisdiction of the adjudicators. First, Deli contended that on the authority of the Court of Appeal case of *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011, parties should raise the issue of the adjudicator's lack of jurisdiction at the "earliest possible opportunity" (at [64]) so as not to delay the proceedings. Otherwise, the party

¹⁶ Kingsford's Submissions in OS 460, paras 29 and 33.

¹⁷ Affidavit of Chen Zhaohuang (OS 460), para 6(d).

¹⁸ Affidavit of Chen Zhaohuang (OS 460), para 6(b)-(c).

¹⁹ Kingsford's Submissions in OS 362, paras 31-37; Kingsford's Submissions in OS 460, paras 30-34.

who failed to raise the objection would be taken to have waived it. In this case, Kingsford did not file the payment responses. Hence it was deemed to have waived its objection that the adjudicators did not have jurisdiction.²⁰

14 Secondly, even if Kingsford did not waive its right to challenge jurisdiction, the two Payment Claims No 15 were valid as they fulfilled the formal requirements set out in the SOPA and the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) (“the SOPA Regulations”).²¹

The court’s decision

15 Kingsford challenged the two ADs of Deli basically on two grounds:

- (a) The two Payment Claims No 15 were invalid and thus the adjudicators had no jurisdiction to adjudicate the payment claims.
- (b) There was a breach of natural justice as the adjudicators failed to consider Kingsford’s set-off and counterclaim.

I rejected both submissions and I shall now explain each in turn.

Were the two Payment Claims No 15 valid?

16 A payment claim is valid as long as it fulfils the formal requirements set out in SOPA and the SOPA Regulations. This was expressed by the Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng*

²⁰ Deli’s Submissions in OS 362 (for hearing on 25 May 2017), paras 12-15; Deli’s Submissions in OS 460 (for hearing on 25 May 2017), paras 21-27.

²¹ Deli’s Submissions in OS 362 (for hearing on 25 May 2017), paras 16-26; Deli’s Submissions in OS 460 (for hearing on 25 May 2017), paras 12-20.

(formerly trading as Weng Fatt Construction Engineering) and another appeal
[2013] 1 SLR 401 (“*Chua Say Eng*”) at [78]:

... the correct test for determining the validity of a payment claim is whether a purported *payment claim satisfies all the formal requirements in s 10(3)(a) of the Act and reg 5(2) of the SOPR. If it does, it is a valid payment claim ...*

[emphasis added]

17 The relevant requirements in the SOPA are contained in s 10, which reads:

Payment claims

10.—(1) A claimant may serve one payment claim in respect of a progress payment on —

- (a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or
- (b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

(2) A payment claim shall be served —

- (a) at such time as specified in or determined in accordance with the terms of the contract; or
- (b) where the contract does not contain such provision, at such time as may be prescribed.

(3) A payment claim —

- (a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and
- (b) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim

relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

18 Regulation 5 of the SOPA Regulations complements s 10 of the SOPA by prescribing the required form, manner and contents of a payment claim as follows:

Payment claims

5.—(1) Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, then a payment claim made under the contract shall be served by the last day of each month following the month in which the contract is made.

(2) Every payment claim shall —

- (a) be in writing;
- (b) identify the contract to which the progress payment that is the subject of the payment claim relates; and
- (c) contain details of the claimed amount, including —
 - (i) a breakdown of the items constituting the claimed amount;
 - (ii) a description of these items;
 - (iii) the quantity or quantum of each item; and
 - (iv) the calculations which show how the claimed amount is derived.

19 Although Kingsford did not file its payment responses, both the adjudicators granted Kingsford the liberty to argue that the two Payment Claims No 15 were invalid. The two adjudicators then dealt with the validity of the two Payment Claims No 15 at great length. Both came to the conclusion that the respective Payment Claims No 15 were valid as these were in compliance with s 10 of the SOPA and reg 5 of the SOPA Regulations. In fact, both the adjudicators deliberated on this issue in their ADs very comprehensively:

Mr Giam Chin Toon SC in paras 48 to 76 of his AD, and Mr Christopher Chuah in paras 41 to 47 of his AD.

20 Kingsford, being dissatisfied with the decisions of both adjudicators on this issue, then brought this action to the court to set aside the two ADs on the exact same grounds of invalidity.

21 I must first emphasise that the Court of Appeal in *Chua Say Eng* explicitly stated that the court should not review the merits of an adjudicator's decision. This is a sound direction as otherwise, the adjudication process will be frustrated by actions of respondents who are dissatisfied with the adjudicator's decision like in this case. The purpose of the SOPA, which is to allow the claimant to have an expedited process to his claim, will be defeated. This was succinctly explained by the Court of Appeal in *Chua Say Eng* in the following terms (at [66]):

The role of the court in a setting-aside action

66 Turning now to the court's role in a setting-aside action, we agree with the holding in [*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733] that the *court should not review the merits of an adjudicator's decision*. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.

[emphasis added]

22 Although ADs are only of temporary finality, the Court of Appeal in *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890 reiterated that the AD binds the parties (at [30]–[31]):

30 It would be helpful to begin with a reiteration of the concept of temporary finality, which undergirds the adjudication regime in Singapore. In short, *the Act creates an*

intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved whether by arbitration or litigation. This generally takes place after the completion of the works and the arbitrator or the court is empowered *in that context*, to review, open up, and set aside the earlier adjudication determination. But until then, the adjudication determination binds the parties.

31 Admittedly, this abbreviated process of dispute resolution is a species of rough justice (*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (“*W Y Steel*”) at [22]). *But we tolerate this because it ensures that payments are made upfront. Because cash flow is the life blood of those in the building and construction industry, timeous payment for work done or materials supplied ensures that the construction work will proceed with minimal disruption as far as this is possible* (*W Y Steel* at [18]). Any shortcomings in the process is offset by the fact that the resultant decision only has temporary finality in that there remains the possibility of argument and reversal of the adjudicator’s determination after the construction project is completed in another more thorough and deliberate forum (*W Y Steel* at [22]). We echoed this in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 (“*Grouteam*”) at [63] albeit in a slightly different context.

[emphasis added]

23 Thus the basic premise is that Kingsford was bound by the two ADs unless it could show that the adjudicators had failed to comply with the mandatory provisions of SOPA that put their jurisdiction in doubt. One of Kingsford’s key challenges was that the two Payment Claims No 15 were invalid as the two Payment Claims No 14 for each subcontract were identified by Deli as the ‘final’ payment claims. Therefore Deli should not have made further payment claims thereafter and the adjudicators should have dismissed both Deli’s adjudication applications. However, I agreed with both the adjudicators that the two Payment Claims No 15 were valid notwithstanding the labelling of Payment Claims No 14 as final claims. This is because the two Payment Claims No 15 were in compliance with s 10 of the SOPA and reg 5 of the SOPA Regulations. I shall now delve deeper into this issue.

24 As mentioned, Kingsford submitted that the two Payment Claims No 15 were invalid because they were issued after the ‘final’ claims under both subcontracts. The completion date under both subcontracts was 30 April 2016. On 8 December 2016, about seven months after the completion date, Deli issued the two Payment Claims No 14. They were labelled as ‘final’ claims. But about one month *after* these ‘final’ claims, Deli issued two further payment claims – the two Payment Claims No 15.

25 Although Kingsford acknowledged that there was no mechanism in the subcontracts to determine which payment claims would be final, it submitted that it would be reasonable to treat the first payment claim following the completion date of the subcontracts as the ‘final’ one. These would be the two Payment Claims No 14.

26 Kingsford did acknowledge that the SOPA allows for ‘repeat claims’ (claims filed after the final payment claim) as long as the final claim was unpaid and had not yet been decided by the adjudicator. However Kingsford argued that the two Payment Claims No 15 were not repeat claims as the items and amount therein were materially different from the two Payment Claims No 14.²²

27 Kingsford cited *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 4 SLR 615 (“*Lau Fook Hoong*”) to support its argument that the two Payment Claims No 15 were invalid as the two Payment Claims No 14 were labelled as the final payments. This authority was also referred to by Kingsford to the two adjudicators who were not persuaded by

²² Kingsford’s Submissions in OS 362, paras 16-20, 26; Kingsford’s Submissions in OS 460, paras 15-19, 25.

Kingsford's submissions. I was also not convinced by this argument as *Lau Fook Hoong* is distinguishable from the present case.

28 *Lau Fook Hoong* was an application to set aside an AD on the ground that it was null and void. The court ruled against the applicant and dismissed the application as the applicant failed to furnish security for costs as required under s 27(5) of the SOPA. Thereafter the court went further to examine the provisions of s 10 of the SOPA and the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (7th Ed, April 2005) ("the SIA Conditions") regarding final payment claims. The court stated (at [51]):

... it is, at the very least, arguable, that a payment claim issued at any time after the issuance of the final claim or final payment claim and thus not in accordance with the SIA Conditions 2005 or the SIA Conditions 2011 respectively, is invalid as it failed to comply with s 10(2)(a) of the SOPA ...

The relevant provision in the SIA Conditions that the court was referring to provided that the architect would issue a 'Final Certificate' within three months of certain documents being received. Therefore any payment claims issued after the 'final' claim (being the claim in relation to the Final Certificate) would be invalid.

29 The reasoning in *Lau Fook Hoong* was that the breach of the SIA Conditions could potentially be a breach of a mandatory provision, namely, s 10(2)(a) of the SOPA, since that provision explicitly provides that a payment claim shall be served "at such time as specified in or determined in accordance with the terms of the contract". In other words, for a breach of a contractual provision to invalidate a payment claim, the SOPA provisions must make reference to the contractual provisions such that a breach of the latter can be said to be a breach of the former. This is also consistent with *Chua Say Eng*

which stands for the proposition that the *only* requirements for the validity of payment claims are compliance with the SOPA mandatory provisions and the SOPA Regulations.

30 In this case, however, Kingsford informed the court that it was not arguing that the SIA Conditions were applicable to the parties in this case. This point was rightly acknowledged because cl 4 of each subcontract did not incorporate the SIA Conditions. That clause stated, “The conditions of this Subcontract shall comply fully with all terms and conditions as set out in the Main Contract (Singapore Institute of Architect Nine Edition, August 2011)”. This means that Kingsford cannot argue that a breach of the SIA Conditions is also a breach of the SOPA mandatory provision.

31 Instead, Kingsford relied on the fact that the two Payment Claims No 14 were labelled as final payment claims by Deli to found its claim that the two Payment Claims No 15 were invalid. But nothing in the subcontracts provides for final payment claims. Indeed, cll 5.1 to 5.4 of each subcontract prescribes the procedure for making payment claims between the parties. But they did not provide for any mechanism for determining which payment claims were ‘final’, and the effect of deeming such payment claims ‘final’. As the two Payment Claims No 15 did not contravene these contractual terms, Kingsford’s argument could not stand. The contractual terms in this case were entirely unlike the SIA Conditions in *Lau Fook Hoong*, which specifically provided for the provision of a ‘Final Certificate’.

32 Accordingly, I dismissed Kingsford’s claim and found that the two Payment Claims No 15 were valid.

Breach of natural justice

33 Kingsford further submitted that there was a breach of natural justice as the adjudicators did not give it an adequate opportunity to be heard by disregarding its arguments that it had a valid set-off and counterclaim against Deli's two Payment Claims No 15.²³

34 Kingsford relied on back charges to say that it had a right to set-off Deli's claims. It submitted that these back charges were referred to in the two Payment Claims No 14, which were documents placed before the adjudicators. According to Kingsford, when the adjudicators considered the issue of the validity of the two Payment Claims No 15, they had made references to the two Payment Claims No 14 but they failed to consider the back charges referred to within. Kingsford submitted that the adjudicators should have taken these back charges into account even though Kingsford failed to file its payment responses. This is because natural justice requires the adjudicators to consider whether there were patent errors, which included the purported back charges. In support of this proposition, Kingsford cited *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [51]. I set out this quote in its proper context (at [51]–[52]):

51 With respect, we do not think this is correct. In our judgment, under s 17(3) of the Act, even where ***no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material which is properly before him*** and which he is permitted and, indeed, obliged to consider. In such circumstances, ***there is nothing to stop a respondent who has failed to file any payment response or adjudication response from raising patent errors*** on the face of the material *properly* before the adjudicator to contend that the payment claim should not be allowed in part or at all. We reiterate that ***such errors must be plain and evident on the***

²³ Kingsford's Submissions in OS 362, para 30; Kingsford's Submissions in OS 460, para 29.

face of the material that is properly before the adjudicator.

52 In our judgment, an adjudicator is bound to consider the payment claim before him and cannot make his determination as if the fact that the respondent has not filed a response obviates the need for him to consider the material properly before him. ***The adjudication does not become a mere formality. The adjudicator is obliged to adjudicate,*** and in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner ...

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

35 With due respect, Kingsford’s counsel had misunderstood *W Y Steel*. It is true that the Court of Appeal directed that the adjudicator should not approve the claimant’s payment claim as a mere formality or rubber stamp the claim in situations where there is no payment response. However, in doing so, the Court of Appeal did not say that the adjudicator had to act as though the payment response was present. Rather, the adjudicator was entitled to look only at the materials properly before him and make his determination based on such materials. This excludes the payment response, since it had not been filed by the respondent and therefore was not *properly* before the adjudicator. However, the respondent was still entitled to make arguments based on the materials which were before the adjudicator and point out “patent errors” on the face of the materials. For instance, if the documentary evidence submitted by the claimant plainly contradicted its claimed amount, the respondent would be entitled to point that out to the adjudicator. Indeed, this accords with the plain and simple meaning of “patent” under the Oxford Dictionary which refers to something that is “easily recognisable” or “obvious”. Hence, the adjudicators in this case had to spot obvious and clear cut errors in the payment claims.

36 While the adjudicators could consider “patent errors” relating to the payment claims, they could go no further lest they contravened s 15(3)(a) of the SOPA. Section 15(3)(a) of the SOPA reads:

(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or

The subcontracts in this case were construction contracts. Since Kingsford had failed to file its payment responses, pursuant to s 15(3)(a) of the SOPA, the adjudicators were precluded from considering Kingsford’s arguments on its purported set-off or counterclaim.

37 However, as mentioned above, the adjudicators could consider “patent errors” relating to the payment claims. They did indeed do so and varied the payment claims accordingly. This can be found in Mr Giam Chin Toon SC’s AD at paras 77 to 152 where he went through the items in the payment claim line by line and eventually reduced the payment claim amount drastically from \$419,599.16 to \$251,455.41. Mr Christopher Chuah also deliberated on the payment claim at paras 48 to 67 of his AD and concluded that Deli’s claims were all “sufficiently substantiated”.²⁴ In fact, both adjudicators even went so far as to consider Kingsford’s claims relating to the back charges and set-off, but they rightfully precluded these claims as these were not in the payment responses and were therefore disallowed by s 15(3)(a) of the SOPA.

²⁴ AD of Christopher Chuah, paras 52, 58, 61, and 66.

38 Accordingly, I found that the adjudicators did not breach natural justice in arriving at their conclusions in the ADs.

Conclusion on the challenge to the ADs

39 Kingsford had repeatedly tried to set off Deli's legitimate claims. It did so twice before two separate adjudicators and once before this court. The arguments in all the three fora were the same.

40 I was satisfied that the two Payment Claims No 15 were valid payment claims as these were made in accordance with the SOPA, the SOPA Regulations, and the subcontracts. There was also no breach of natural justice when the adjudicators did not consider Kingsford's back charges and set-off in their deliberations. This was because Kingsford failed to lodge its payment responses and s 15(3)(a) of the SOPA forbade the adjudicators from taking cognisance of these claims. This appeal was unmeritorious and the applications to set aside the ADs had to be dismissed with fixed costs.

Stay of execution pending appeal

41 When the applications were dismissed, Kingsford immediately applied for the order to be stayed pending its appeal. Kingsford further informed the court that it had taken arbitral proceedings against Deli.

42 Deli resisted this application. I agreed that there should not be any further delay of the payment claims. The Court of Appeal in *W Y Steel* held that a successful claimant was entitled to receive the adjudicated amount quickly and could not be denied payment without good reason. This was explained at [59]:

59 ... [T]he purpose of the Act is to ensure (*inter alia*) that *even though adjudication determinations are interim in nature, successful claimants are paid*. To this end, under s 22(1), the respondent must pay the adjudicated amount either within seven days after being served with the adjudication determination (see s 22(1)(a)), or by the deadline stipulated by the adjudicator (see s 22(1)(b)). The claimant can suspend work (see s 26(1)(d)) or take a lien on goods supplied (see s 25(2)(d)) if the respondent fails to pay. If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s 18(3). If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s 27(5). This requirement is repeated in O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). These provisions all point to one thing: *where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason*.

[emphasis added]

43 However, the Court of Appeal did explain that there could be instances where the claimant would not be allowed to receive payment (by staying the enforcement of an AD). First, if there is clear and objective evidence of the successful claimant's actual insolvency. Secondly, if 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 when the dispute between the parties was finally resolved in the respondent's favour. This was stated at [70]:

70 In our judgment, *a stay of enforcement of an adjudication determination may ordinarily be justified where there is clear and objective evidence of the successful claimant's actual present insolvency, or where 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 between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body*. Further, we agree with HHJ Coulson QC in *Derek Vago* that 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.

[emphasis added]

44 But in order to strike a balance between the two concerns set out above (namely, the claimant’s entitlement to receive quick payment, and the respondent’s entitlement to recover the money upon subsequent dispute resolution), the Court of Appeal in *W Y Steel* further emphasised at [71] that:

... a stay will not *readily* be granted having regard to the overall purpose of the Act, which is precisely to avoid and guard against pushing building and construction companies over the financial precipice.

[emphasis in original]

In other words, the overall objective of the SOPA, which is to ensure cash flow in the construction industry, should ultimately be given more weight.

45 It appears that Kingsford was unwilling to allow Deli to have the benefit of the money that was paid into court despite the ADs and the dismissal of the applications to set aside the ADs. It also commenced further arbitral proceedings against Deli. This is similar to the situation in *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626, where the court ordered that the money paid into court be released to the defendant even though the matter was pending appeal (at [45]). The court reasoned that there was no express provision in the SOPA governing the release of monies paid into court pending appeal, but that any such requirement would need to be consistent with the “overarching purpose of ensuring the flow of liquidity in the construction industry through the provision of an expeditious means of resolving payment disputes” (at [42]). In other words, the purpose of the SOPA militates in favour of releasing the monies paid into court pending appeal. I agreed and adopted the same reasoning.

46 Indeed, the court decried such an attempt to avoid payment in *Lim Poh Yeoh (alias Aster Lim) v TS Ong Construction Pte Ltd* [2017] SGHC 11. The issue there was not strictly a review of the AD but rather was about the non-payment of a judgment debt, although the judgment debt originated from an AD under the SOPA. Foo Chee Hock JC noted that the SOPA was premised on successful claimants being paid speedily, and concluded that such attempts to avoid payment of judgment debts were an abuse of the court process (at [20]):

... parties should not be allowed to withhold payment of the adjudicated sum whilst seeking to effectively overturn the adjudication determination at the same time. The Plaintiff's attempt to withhold payment while using Suit 92 to overturn the Adjudication Determination must be construed as an abuse of the process of the court.

Accordingly, I ordered that the sums paid into court be released to Deli forthwith.

Tan Siong Thye
Judge

Luo Ling Ling (Aequitas Law LLP) for the respondent in
OS 362/2017 and for the applicant in OS 460/2017;
Swah Yeqin, Shirin and Chong Kuan Keong (Chong Chia & Lim
LLC) for the applicant in OS 362/2017 and for the respondent in
OS 460/2017.
