IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 179

HC/OSB 66 of 2015
(Registrar's Appeal No 350 of 2015)

In the matter of Section 6 of the Bankruptcy Act (Cap. 20)

And

In the matter of Rules 97(1)(3) of the Bankruptcy Rules (Cap. 20, Rule 1)

And

In the matter of Statutory Demand dated 27 July 2015

Between

Lim Poh Yeoh (alias Lim Aster)

… *Appellant*

And

TS Ong Construction Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Statutes and regulations]

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1 September 2016

Edmund Leow JC:

Introduction

1 The appellant, Ms Lim Poh Yeoh @ Aster Lim, was the owner of a property located at 40 How Sun Drive ("the property"). She engaged the respondent, TS Ong Construction Pte Ltd, to perform certain building works on her behalf via an agreement dated 3 May 2011 ("the Contract"). The dispute arose when the appellant failed to make payment in respect of one of the progress payments and the respondent submitted the matter for adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA").[1] The respondent obtained an adjudication determination for the sum of $138,660.16 ("the AD"). In May

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[1] Adjudication Determination AA0124 at para 7 (Affidavit of Joel Leong Yiwen @ James Leong Yiwen at p 17).

2013, the respondent entered judgment in the terms of the AD and sought to enforce payment but was largely unsuccessful. Separately, the appellant commenced Suit No 92 of 2015 ("S 92/2015") in January 2015 against the respondent claiming a sum of approximately $400,000 in respect of damages arising out of alleged breaches of the Contract. Several months later, the respondent issued a statutory demand ("the SD") for the outstanding amount owed under t AD.[2]

2 The appellant then brought Originating Summons (Bankruptcy) No 66 of 2015 ("OSB 66/2015" or "the present application") to seek, among other things, to set aside the SD under r 98(2) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("BR"), arguing that she had a valid cross demand against the respondent by virtue of the claims brought in S 92/2015. The Assistant Registrar ("the AR") held that the claims in S 92/2015 were not really genuine cross demands but were instead defences to the original action so r 98(2)(*a*) of the BR did not apply. The AR dismissed the summons and awarded costs to the respondent.[3] Dissatisfied, the appellant appealed.

3 The issue in this appeal was whether the appellant had a cross demand within the meaning of r 98(2)(*a*) of the BR. Ostensibly, this turned on whether the AR was correct in construing the claims in S 92/2015 in the way he did. However, in the course of the oral hearings, it quickly became apparent that the deeper question was whether a statutory demand issued in respect of a judgment entered in the terms of an adjudication determination made under the SOPA could *ever* be set aside on the ground that the debtor had a cross

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2 Defendant's final submissions dated 21 March 2016 at paras 7–11.

3 Notes of Evidence of AR Nicholas Poon dated 25 December 2015, p 4 (Defendant's Final Submissions dated 21 March 2016 at Annex C).

demand which it was pursuing in a separate suit; and if it could, the question which then arose was whether the court ought to treat the statutory demand any differently because the judgment in question was one obtained under the SOPA. These were difficult questions of legal policy the resolution of which required consideration of two competing policy interests.

4 The first is the legislative policy which undergirds the SOPA, which is to improve cash flow in the construction industry. Central to this is the "pay first, argue later" philosophy, which accords "temporary finality" to adjudication determinations pending the final resolution of a dispute. It would seem that in order to give effect to this, adjudication determinations, particularly those embodied in judgments of the court, ought not to be easily set aside and should be readily enforceable. The second consideration, which lies at the heart of our bankruptcy regime, is that the bankruptcy procedure should not be abused as a means to prevent debtors from litigating genuine claims. Underpinning this is the well-established principle that the bankruptcy process is not an appropriate forum for the resolution of contested matters, so debtors who have genuine cross claims ought not to face bankruptcy proceedings (which could detrimentally affect their ability to carry on their suit) and should instead be entitled to pursue their claims unfettered.

5 As this was a novel issue which had yet to be considered by our courts, I directed that the parties file further submissions and I record my appreciation for their assistance. After careful consideration of their arguments, I held that as a matter of principle, it was possible for a statutory demand founded on an adjudication determination to be set aside on the basis that the debtor (the respondent in an adjudication) had a valid cross demand which it was prosecuting in a separate suit. I also held that on the facts of this case, S 92/2015 presented genuine triable issues and therefore constituted a valid

cross demand within the meaning of r 98(2)(*a*) of the BR. Given that the amount claimed by the appellant in S 92/2015 exceeded the value specified in the SD, I allowed the appeal and set the SD aside. In the light of the important point of principle involved, I granted the respondent leave to appeal to the Court of Appeal and now set out the reasons for my decision, beginning with a more detailed recitation of the relevant facts.

Background facts

6 The appellant had desired to subdivide the property into two separate lots. To that end, she engaged the respondent to construct two semi-detached houses for the appellant on the property for the sum of approximately $1m.[4] Pursuant to the Contract, the works in question were to be completed within 8 months and a temporary occupation permit was to be obtained no later than 31 January 2012.[5] However, the works were neither completed within 8 months nor was the temporary occupation permit obtained by the stated date.

7 On 1 November 2012, the respondent issued a progress payment claim for a sum of $138,660.16 for work done in April 2012. This was supported by an interim certificate dated 17 May 2012. The appellant did not submit any payment response.[6] On 6 December 2012, the respondent referred the matter to adjudication and a copy of the adjudication application was served on the appellant the next day. Under s 15(1) of the SOPA, the appellant had 7 days to

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4 Plaintiff's submissions dated 7 March 2015 at para 23.

5 The Contract at cl 4.1 (Affidavit of Joel Leong Yiwen @ James Leong Yiwen in OS 381/2013 dated 2 May 2013 at p 9).

6 Plaintiff's submissions dated 7 March 2015 at para 28; AD at para 7 (Affidavit of Joel Leong Yiwen at p 18).

file her adjudication response (*ie*, by 14 December 2012) but she did not do so within the stipulated time.

8 The appellant's failure to submit either a payment response or an adjudication response gave rise to two important consequences. First, the adjudicator was required to render an adjudication determination within 7 days of the deadline for the filing of the adjudication response (*ie*, by 21 December 2012), notwithstanding the fact that no adjudication response had been submitted (see ss 16(1) and 16(7) of the SOPA). Second, the adjudicator was enjoined to reject any adjudication response filed outside the stipulated period or – and this is crucial – from considering any reasons for withholding payment which was not contained in a payment response (see ss 15(3) and 16(2)(*b*) of the SOPA). Nevertheless, the adjudicator wrote to the appellant on 19 December 2012 to invite him to raise any point which might be relevant to the adjudication by the next day. Over the next two days, the adjudicator received several emails from the appellant's solicitors of which the last (sent at 3.40pm on 21 December 2012) set out several reasons why the respondent's claim was allegedly unsustainable.[7]

9 On 21 December 2012, the adjudicator held that the respondent's claim was valid and that it had complied with the statutory requirements under the SOPA. The adjudicator therefore determined that the appellant was liable to pay the appellant the whole of the claimed sum of $138,660.16 plus interest and costs. In the AD, the adjudicator explained that he did not consider the points raised by the appellant as he was enjoined from considering any reason for withholding any amount that was due unless the reasons were contained in a *payment response*.[8] The appellant did not pay the adjudicated amount.[9]

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7 The AD at paras 17–19.

Enforcement proceedings

10 On 14 May 2013, the respondent successfully applied under s 27 of the SOPA for judgment to be entered in the terms of the AD ("the Judgment"). It then took the following steps to enforce payment of the judgment debt:[10]

(a) On 11 September 2013, the respondent successfully applied for a garnishee order and recovered a sum of $30,722.86 from the appellant's bank account.

(b) On 24 October 2014, the respondent applied for an Order of Examination Debtor against the appellant.

(c) On 22 January 2015, the respondent obtained a writ of seizure and sale against the property. However, the respondent said that it was unable to execute the sale of the property as the property was mortgaged and the mortgagor-bank did not consent to the sale.

11 On 28 January 2015, shortly after the respondent obtained the writ of seizure and sale, the appellant commenced S 92/2015. In her statement of claim ("SOC"), the appellant listed a litany of complaints, ranging from the delay in the completed of the works to the poor workmanship and omissions to supply certain contractually stipulated fixtures. For these, the appellant claimed for more than $400,000 in damages.[11] In its Defence and Counterclaim ("Defence") the respondent denied liability and counterclaimed for a sum of $248,195.40 which it said it was still owed under the Contract.[12]

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8 The AD at paras 20 and 26.

9 Defendant's final submissions dated 21 March 2016 at para 8.

10 Defendant's final submissions dated 21 March 2016 at para 9.

11 SOC at para 28 (Affidavit of Lim Poh Yeoh dated 24 August 2015 at p 48).

12 On 22 April 2015, the appellant applied, *via* Summons No 1903 of 2015 for a stay of execution of the Judgment pending the determination of S 92/2015. This was heard and dismissed by the same Assistant Registrar who heard the present application in the first instance. The appellant appealed in Registrar's Appeal No 155 of 2015 and her appeal was heard and dismissed by Foo Chee Hock JC on 26 May 2015.[13] I will refer to the summons and the appeal collectively as the "stay application".

13 Meanwhile, the respondent took steps to prepare and serve the SD. The SD was dated 27 July 2015 and it specified that the appellant owed the respondent a total sum of $144,609.13. This sum comprised the outstanding amount on the judgment debt (after making a deduction for the sum recovered under the garnishee order) plus interest and costs.[14] On 27 July 2015, the respondent's solicitors wrote to the appellant's solicitors to ask if they had instructions to accept service of process. They asked for a reply by noon the next day failing which, they said, they would "serve the [SD] on [the appellant] directly."[15] No reply was received by the stated time. Instead, the appellant's solicitors only replied on 29 July 2015 to state that the appellant "is outstation and *should* be back by middle August 2015. We shall revert then [emphasis added]." However, they did not specify if they had instructions to accept service of the SD.[16] On the same day, the respondent's solicitors replied to state that they had assumed, in the absence of a reply, that the appellant's

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12 Defence at paras 14 and 16 (Affidavit of Tan Teck Seng dated 23 September 2015 at TTS-2).

13 Defendant's final submissions dated 21 March 2016 at para 11.

14 Defendant's final submissions dated 7 March 2016 at para 20.

15 Affidavit of Tan Teck Seng dated 23 September 2015 at TTS-1.

16 Affidavit of Lim Poh Yeoh dated 24 August 2015 at p 22.

solicitors had no instructions to accept service and so they had already begun to serve the SD on the appellant personally.

14 The respondent took the following steps to effect service of the SD:

(a) On 28 July 2015, Mr Johari Bin Jamaludin, a service clerk in the employ of the respondent's solicitors, attempted to effect service of the SD on the appellant at her home but was unsuccessful.[17]

(b) On 30 July 2015, Mr Johari once again attempted to effect service of the SD on the appellant at her home but was unsuccessful.

15 On 3 August 2015, a copy of the SD was delivered to the appellant's home by Mr Johari and it came into the possession of the appellant's son, Mr Ron Tan. The precise circumstances under which this took place were disputed but I am not of the view that very much turned on this disagreement. It suffices to say that it was undisputed that the appellant was overseas at the time and she only returned to Singapore on 17 August 2015.[18]

16 On 24 August 2015, the appellant filed the present application seeking to set aside the SD on the ground that the SD had not been validly served. In the alternative, the appellant prayed for the following five forms of relief, which were as follows:

(a) Prayer 1 was a request for an abridgement of time for the service of OSB 66/2015;

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17 Defendant's final submissions dated 7 March 2016 at para 19(e).

18 Affidavit of Lim Poh Yeoh dated 9 October 2015 at para 5.

(b) Prayer 2 was a request for an extension of time to make the application to set aside the SD (*ie*, OSB 66/2015);

(c) Prayers 3–5 related to the appellant's substantive application to set aside the SD under rr 98(2)(*a*)–98(2)(*c*) of the BR respectively.

17 It was apparent that prayers 1 and 2 had been brought out of an abundance of caution. Rule 97(1) of the BR provides that an application to set aside a statutory demand has to be filed within 14 days of the date on which the demand is served and r 97(6) provides that any such application (together its accompanying affidavit) then has to be served on the debtor within 3 days of the filing of the application. Thus, if 3 August 2015 (the date the SD was left with the appellant's son) were accepted as the date of service, the appellant's application, which was only filed on 24 August 2015, would be out of time. This would necessitate an application for an extension of time.

The proceedings before the AR

18 When the parties appeared before the AR, the appellant submitted that the SD had not been validly served. She contended that in order for the respondent to rely on substituted service, it first had to have taken reasonable steps to effect personal service but had not done so. She contended that the attempts on 28 and 30 July 2016 did not satisfy this requirement as the respondent knew that appellant was overseas at the time but nevertheless attempted to effect service knowing full well that it would be futile.[19] As for the substantive prayers, the appellant's argument was two-fold. First, she contested the validity of the judgment debt, arguing that the claims in S 92/2015 arose "from the same set of facts giving rise to the adjudication".

[19] Appellant's skeletal arguments before the AR dated 13 October 2015 at para 15.

Second, she argued that she had a valid cross demand in the form of her claims in S 92/2015, the value of which exceeded the sum claimed in the SD.[20]

19 The hearings before the AR took place over three days. The AR first addressed the question of the validity of service. He held that the SD had been validly served. However, he held that service only took place on 17 August 2015 (instead of 3 August 2015, as the respondent had submitted) as the appellant was out of the country before then. For this reason, prayers 1 and 2 were rendered otiose and he made no orders as to them. As for the substantive prayers, he dismissed prayers 4 and 5 (which related to the application to set aside the SD under rr 98(2)(*b*) and 98(2)(*c*) respectively) straightaway. However, he reserved his decision in respect of prayer 3 to consider the matter more carefully. After receiving further rounds of submissions, he took the view that the Plaintiff's claims in S 92/2015 were not valid cross-demands within the meaning of r 98(2)(*a*) of the BR but were, instead, defences to the "original action" (*ie*, the AD) which could, and should have been raised earlier but were not. In support of this, he relied on the decision of this court in *Tan Hup Yuan Patrick v The Griffin Coal Mining Co* [2014] 4 SLR 221 ("*Patrick Tan*").[21]

The parties' respective cases

20 The issues had narrowed considerably by the time the case came before me, and they narrowed further still during the course of the hearings. Neither party challenged the AR's decision in respect of prayers 1 and 2 and were content to proceed on the assumption that if the SD had been validly

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20 Minute sheet of AR Nicholas Poon dated 3 November 2015.

21 Notes of Evidence of AR Nicholas Poon dated 25 December 2015, p 4 (Defendant's Final Submissions dated 21 March 2016 at Annex C).

served, the present application would have been filed and served in time.[22] The appellant was content to rest her case solely on the ground that she had a valid cross demand (*ie*, prayer 3, which related r 98(2)(*a*) of the BR) and did not bring any arguments in respect of prayers 4 and 5 (notably, she no longer contended that the statutory demand debt was disputed on substantial grounds). All that remained for decision, therefore, were two preliminary objections (one from each of the parties) and the question whether the SD ought to be set aside under r 98(2)(*a*) of the BR. I will first set out the respective positions of the parties before turning to my analysis.

The appellant's case

21 The appellant continued to maintain that the SD had not been validly served. Her argument, in essence, was as follows. Under r 96 of the BR, substituted service may only be used *after* a creditor had taken reasonable steps to effect personal service on a debtor. The respondent's second attempt to effect personal service (on 30 July 2015) could not be considered reasonable because the respondent *knew* that she was overseas and would only return to Singapore in the middle of August and ought to have waited till then before attempting personal service. Thus, the respondent was not entitled to rely on substituted service and the fact that it had sought to do so was a procedural defect "so fundamental in nature that it [could not] be cured."[23]

22 As for the substantive issue, the appellant submitted that as a matter of principle, a claimant could *never* avail himself of the bankruptcy process to enforce the payment of an adjudicated amount. The appellant proffered an

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22 Defendant's final submissions dated 7 March 2016 at paras 15–16.

23 Plaintiff's final submissions dated 7 March 2016 at paras 14–18.

argument from silence. She pointed out that the SOPA did not provide for this to be done and that during the parliamentary debates accompanying the passage of the SOPA, nothing had been said about the *initiation* of bankruptcy proceedings to enforce the payment of an adjudicated amount. She therefore submitted that it was not open for the courts to supply Parliament's omission by following the lead of other jurisdictions in allowing claimants to bring bankruptcy proceedings to enforce the payment of an adjudicated amount.[24]

23 In the alternative, the appellant contended that even if bankruptcy proceedings could be initiated, such proceedings (and this includes the statutory demands issued as a prelude to the bringing of such proceedings) could still be set aside according to the usual grounds available in the BR. This was so, she argued, even if the statutory demand was founded on a judgment of the court. The appellant stressed that the initiation of bankruptcy proceedings was a "draconian step" and so the court ought not to allow a debtor to be subject to it if he had a genuine cross demand. Furthermore, the appellant argued that adjudications conducted under the SOPA only had "temporal finality and should not be regarded in the same way as [a] judgment in ordinary proceedings which is final and conclusive for all purposes".[25] In conclusion, she submitted the claims in S 92/2015 presented "genuine and serious cross claim[s]" which raised serious triable questions that unfortunately could not be tried, because she had not filed an adjudication response in time.[26]

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24 Plaintiff's 2nd further submissions dated 6 May 2016 at paras 23–26; 33–35.

25 Plaintiff's 2nd further submissions dated 6 May 2016 at para 45.

26 Plaintiff's 2nd further submissions dated 6 May 2016 at paras 59–60.Plaintiff's 1st further submissions dated 21 March 2016 at paras 9–12.

The respondent's case

24 The respondent submitted that the appeal should be dismissed *in limine* because the present application was caught by two aspects of the doctrine of *res judicata*. The first was the doctrine of issue estoppel. The respondent argued that the main issue in contention here was the same as that which had been raised in the stay applications, namely, "whether the [appellant] is entitled to a stay of enforcement of the judgment debt." This was a question which had already been answered in the negative and the respondent argued that the appellant was estopped from raising the same issue again.[27] The second was the doctrine of the abuse of process. It was argued that the respondent's "true purpose" was to "stymie payment" of the adjudicated sum.[28] It was submitted that the present application was nothing more than a collateral attack on the stay application, albeit one presented under the guise of a challenge to the SD founded on r 98(2)(*a*) of the BR.[29]

25 Turning to the substantive issue, the respondent submitted, in response to the appellant's contrary contention, that a judgment which was entered in the terms of an adjudication determination could be enforced like any other judgment of the court – *ie*, through the initiation of insolvency proceedings. In fact, the respondent argued, "the preference ought to be for full effect to be given to [the] adjudicator's decisions, in line with the legislative intent behind the SOPA." The reason for this was that the SOPA was designed to improve cash flow in the industry, and to allow statutory demands to be set aside merely upon the presentation of a cross demand would frustrate this intent.[30]

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27 Defendant's final submissions dated 21 March 2016 at paras 22–23 and 27(b).

28 Defendant's further submissions dated 6 May 2016 at paras 62–63.

29 Defendant's final submissions dated 21 March 2016 at paras 29–31.

The respondent then argued that the present application should be dismissed on two grounds. The first was that the claims in S 92/2015 were more properly classified as "defences" to the Judgment and therefore did not engage r 98(2)(*a*) of the BR. This was the point relied on by the AR (see [19] above). The second was that the appellant was abusing the process of the court. In this regard, the respondent repeated the same points it made in respect of its submissions on *res judicata* (see [24] above).[31]

My decision

26 In the light of the foregoing, the following issues presented themselves for determination:

(a) First, had the SD been validly served?

(b) Second, was the appellant precluded from bringing the OSB 66/2015 by virtue of the doctrine of *res judicata*?

(c) Third, did the appellant have a valid cross demand within the meaning of r 98(2)(*a*) of the BR?

The validity of service

27 Rule 96 of the BR governs the service of statutory demands and it provides, in material part, as follows:

> 96.—(1) The creditor *shall take all reasonable steps to bring the statutory demand to the debtor's attention.*
>
> (2) The creditor shall make *reasonable attempts to effect personal service* of the statutory demand.

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30 Defendant's further submissions dated 6 May 2016 at para 48.

31 Defendant's further submissions dated 6 May 2016 at paras 52–55.

> (3) *Where the creditor is not able to effect personal service, the demand may be served by* ***such other means as would be most effective in bringing the demand to the notice of the debtor***.
>
> …
>
> (6) A *creditor shall not resort to substituted service of a statutory demand* on a debtor unless —
>
> > (a) the *creditor has taken all* ***such steps which would suffice to justify the court making an order for substituted service of a bankruptcy application***; and
> >
> > (b) the *mode of substituted service would have been* ***such that the court would have ordered in the circumstances***.
>
> [emphasis added in italics and bold italics]

Rule 96(6) makes specific reference to the grant of leave for the substituted service of bankruptcy applications so it will be useful to have regard to that provision as well. This is r 111(1) of the BR which provides as follows:

> If the court is satisfied by affidavit or other evidence on oath that ***prompt personal service*** *cannot be effected* because the debtor is keeping out of the way to avoid service of a creditor's bankruptcy application, *or for any other cause, the court may order substituted service to be effected in such manner as it thinks fit*.
>
> [emphasis added in italics and bold italics]

28 Three propositions may be gleaned from the above:

(a) First, the overarching objective is to take all reasonable steps as might be necessary to bring the statutory demand to the debtor's attention (see rr 96(1)–96(3) of the BR). In *Re Rasmachayana Sulistyo (alias Chang Whe Ming) ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 ("*Re Ramachayana*") at [27], VK Rajah J (as he then was) explained that

the "underlying philosophy of pragmatism and substantial justice" permeated the service provisions of our bankruptcy statutes.

(b) Second, a creditor may only resort to substituted service if he has taken such steps as would satisfy the court that prompt personal service cannot be effected, whether because the debtor is keeping out of the way to avoid service or for "any other cause" (see r 96(6)(*a*) of the BR read with r 111(1) of the same).

(c) Third, such substituted service must be of a mode as would have been ordered by the court in an application for the substituted service of a bankruptcy application and it should be the means most effective in bringing the statutory demand to the attention of the debtor (see rr 96(3) and 96(6)(*b*) of the BR read with r 111(1) of the same).

29 Thus, in every case where the substituted service of a statutory demand is challenged, there are two questions that must be answered. First, was the creditor entitled to avail himself of substituted service? Second, was the mode of substituted service employed suitable? I will take each in turn.

30 The respondent had taken three steps to effect service of the SD before 3 August 2015. It first wrote to the appellant's solicitors to inquire if they would accept service of the SD on behalf of their client before *twice* attempting to effect personal service on the appellant at her known place of residence (on 28 and 30 July 2015): see [13]–[14] above. I did not accept the appellant's argument that the respondent should have waited for the appellant to return from her travels and that the respondent's failure to do so meant that it had not taken "reasonable" steps to effect personal service. First, the reply from the appellant's solicitors that the appellant "should be back by middle

August 2015" was vague (see [13] above) and it left the matter uncertain and indeterminate. As the AR pointed out, it was well within the respondent's rights to ascertain for itself whether the appellant was at home.[32] Second, even if it were the case that the appellant would only be back by the middle of the month, there was no obligation for the creditor to wait for her to return before effecting service. Debtors do not have a right to be served in a manner and time of their choosing; rather, the question for the court is whether *prompt* personal service can be effected. In my judgment, the respondent was fully entitled to rely on substituted service here.

31 The next question that arises is what form this substituted service should take. It was undisputed that the respondent had been effecting service of court documents to the appellant at her residence for several years – this includes the documents pertaining to the garnishee proceedings, the examination of judgment debtor, and the writ of seizure and sale.[33] In the circumstances, it was eminently reasonable for the respondent to have attempted to effect service by leaving it with the appellant's son at her known place of residence. In the event, it was plainly an effective means of bringing the appellant's attention to the existence of the SD as the appellant was quickly alerted to the existence of the SD upon her return to Singapore and promptly took steps to file the present application.

32 I note that the AR had held that the date of service ought to be 17 August 2015 (when the appellant returned from overseas) and not 3 August 2015, when the SD was handed to Mr Ron Tan. As I understand it, the AR was making an assessment that this would be a condition that a court making

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[32] Minute sheet of AR Nicholas Poon dated 3 November 2015.

[33] Defendant's final submissions dated 7 March 2016 at para 19(h).

an order for the substituted service of a bankruptcy application would have made in similar circumstances (see r 96(6) of the BR): *ie*, that service would not be deemed to be effective until after the appellant returns from overseas. In my judgment, the AR was fully entitled to make this call. I stress that the principle which informs the service provisions is one of substantial justice. This qualification properly balances the respondent's interest to having the SD served expeditiously with the appellant's interest in having ample notice of the SD in order that she might consider the legal avenues available to her.

33 I therefore held that the AR was correct in determining that the SD had been validly served on 17 August 2016. This being the case, the present application was filed within the stipulated statutory timeline and there was no need to make any orders as to prayers 1 and 2.

34 As a final point, I would add that even if I were wrong and the respondent was not entitled to rely on substituted service, I would not have set the SD aside. I reject the appellant's submission that all improprieties in service "cannot be cured" and must invariably result in the setting aside of a statutory demand. That proposition runs counter to the plain words of r 278 of the BR, which provides as follows:

> Non-compliance with any of these Rules or with any rule of practice shall not render any proceeding void unless the court so directs, but such proceeding may be set aside wholly or in part, amended or otherwise dealt with in such manner and upon such terms as the court thinks fit.

As I noted above, it was evident that the appellant was plainly made aware of the existence of the SD soon upon her return and filed the present application within short order. No prejudice had been occasioned by the improper service and to the extent that there was prejudice, it could easily be remedied, either through the grant of an appropriate extension of time for the filing of the

present application or through a grant of costs. In my assessment, this would be entirely in keeping with the spirit of pragmatism, which pervades and informs the court's treatment of the service requirements in our bankruptcy statutes.

The doctrine of res judicata

35 In *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Limited (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [98], the Court of Appeal clarified that the doctrine of *res judicata* comprises three distinct but interrelated principles: (a) cause of action estoppel; (b) issue estoppel; (c) the "extended doctrine of *res judicata*" or the doctrine of the abuse of process. In these grounds, I will concern myself only with the last two.

Issue estoppel

36 It was clear to me that no issue estoppel arose on these facts. As the Court of Appeal clarified in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15], four conditions have to be satisfied in order for the doctrine of issue estoppel to be invoked. I need only focus on the fourth, which is that there must be an identity in subject matter. In order for an estoppel to arise, the issue that the court is being asked to decide afresh must already have been part of the *ratio decidendi* of the earlier decision – that is to say, it "must have been a 'necessary step' to the decision or a 'matter which it was necessary to decide, and which was actually decided, as a groundwork of the decision'" (see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 965 per Lord Wilberforce).

37 The respondent's central argument was that the "issue" in both the stay application and in the present application was whether the appellant "[was] entitled to prevent the [respondent] from enjoying the fruits of the Judgment." With respect, I could not agree. The object of the stay application was to halt the enforcement of the Judgment generally; its ambit was far wider than that of the present application, which pertained only to the enforcement of the Judgement *through the bankruptcy process*. Further, and more importantly, the specific *legal issues* canvassed in both applications were quite distinct. The issue in the stay application was whether there were "special circumstances" that warranted a grant of a stay of execution. The argument that was put was that that the respondent might not be able to satisfy any judgment that might be made in respect of the appellant's claims in S 92/2015. This argument was rejected by the AR on the ground that there was no evidence that the respondent would not be able to satisfy any judgment that might be entered against it. In other words, the focus was on the alleged impecuniosity of the respondent.[34] This decision was upheld by Foo JC on appeal. By contrast, the issue in the present application was whether S 92/2015 constituted a valid cross demand within the meaning of r 98(2)(*a*) of the BR. The focus was on the characterisation of the claims in S 92/2015 and, as I will soon go on to show, the primary points of contention were whether these claims presented genuine triable issues and whether they were more properly classified as defences to the adjudication. In my judgment, the issues in these two sets of applications were different and, therefore, the doctrine of issue estoppel did not bite.

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[34] Notes of Evidence of Assistant Registrar Nicholas Poon in HC/SUM 1903/2015 at p 1, line 46 to p 2, line 11; and p 6, line 29 to p 7, line 12.

Abuse of process

38 I turn to the extended doctrine of *res judicata* or the defence of the abuse of process. The inquiry here, as the Court of Appeal explained in *TT International* at [105], is whether the litigant ought to be estopped from raising a matter not because it had already been decided (if it were so, this would engage either the doctrine of cause of action estoppel or issue estoppel) but because it *ought to have been raised but had not* (see *TT International* at [105]). As Sundaresh Menon JC (as he then was) emphasised in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [53], the inquiry was directed "not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been." I apply that approach here.

39 The respondent put forward three broad reasons in favour of its submission that the present application was an abuse of process:

(a) First, it submitted that the appellant ought to have brought her claims at the time of the adjudication.[35]

(b) Second, it was submitted that there was an unseemly delay in the initiation of S 92/2015 – it had only been commenced two years after the adjudication and only after various enforcement proceedings had been taken out.[36]

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35 Defendant's further submissions dated 6 May 2016 at paras 62(a) and (h).

36 Defendant's further submissions dated 6 May 2016 at paras 62(g) and (h).

(c) Third, the respondent's persistent failure to make payment of the adjudicated amount and her failure to satisfy the costs orders against her demonstrated her "contumelious conduct".[37]

40 Much as I deplored the casual insouciance with which the appellant appeared to treat orders of the court, I was mindful that what was at issue before me was not the appellant's disobedience with court orders – which is a matter that should, if at all, be taken up in separate proceedings – but the narrower and more specific question of whether the appellant was abusing the process of the court by seeking to raise before it an issue which could and should have been raised before. Of the three points raised by the respondent, the only one which was directly on point was the first, namely, the contention that the claims in S 92/2015 ought to have been raised during the adjudication. However, the principal difficulty with this argument is that it does not comport with the nature of the adjudicatory process under the SOPA.

41 By design, an adjudication conducted under the SOPA is not supposed to be a forum for careful and considered deliberation. It is supposed to produce an expeditious and low-cost resolution of disputes to facilitate cash flow in the construction industry. This is the reason why the timelines are so tight and the consequences of non-adherence so draconian. Many of the procedural safeguards that one would associate with the arbitral and curial processes are absent in the adjudicatory process because it is a fundamental premise of the SOPA that the adjudication is not the final word (see *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482 at [30]). This is so even if the adjudication determination is embodied in a judgment of the court. Section 34(1)(*a*) of the SOPA expressly states that parties always have a right

[37] Defendant's further submissions dated 6 May 2016 at paras 62(e), 62(j) and 63.

to submit their dispute to a court or tribunal for a final determination of their legal entitlements. As Judith Prakash J (as she then was) explained in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [25], this preserves "the right of the parties to argue that the adjudication determination was wrong as part of their contentions in relation to disputes over the contract and the works which are being dealt with in arbitral or court proceedings." This is precisely what the appellant now seeks to do through S 92/2015 where it has brought claims arising out of the Contract to the court for determination and I could not agree that its attempt to do so constituted an abuse of process.

42 Furthermore, the appellant's failure to submit a payment response or an adjudication response in time effectively sounded the death knell for its case (see [8]–[9] above). As a result, the adjudication proceeded on what was essentially an *ex parte* basis and the appellant was not able to raise the matters which it now seeks to bring in S 92/2015 (to the extent that such matters could have been raised then; as I explain below at [46], some of the matters in S 92/2015 only arose after the adjudication). I would make it clear that I do not, for a moment, condone the appellant's laxity in this regard, but my point is simply that the appellant's exclusion from the adjudication made it even more difficult to conclude that it was an abuse of process for the appellant to seek to set aside the SD on the ground that it had a cross demand against the respondent arising out of the contract.

Did the appellant have a valid cross demand?

43 I now move to the substantial question in this appeal, which is whether the appellant had a cross demand. I begin with the law. The statutory demand procedure is an important element of the creditors' bankruptcy petition. It is, in essence, a test of solvency. If a debtor does not comply with a statutory

demand within a stipulated time, it is an indication that the debtor is generally unable to pay his/her debts and a statutory presumption arises to that effect (see s 62(*a*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed)). This paves the way for a bankruptcy application to be brought. However, the reliability of this test is undermined if the debtor shows that he has a cross-claim that equals or exceeds the value of the statutory demand debt because if the debtor succeeds in his cross-claim, he can satisfy the debt. In such a case, the inference that the failure to satisfy the statutory demand is an indication of the debtor's inability to pay his debts is not safe. This is the rationale which underpins r 98(2)(*a*) of the BR, which provides:

> 98(2) The court shall set aside the statutory demand if —
>
> (a) *the debtor* ***appears*** *to have a valid counterclaim, set-off or* ***cross demand*** which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand;
>
> [emphasis added in italics and bold italics]

44 Each of the constituent expressions in the phrase – "counterclaim, set-off or cross demand" (which I shall, for the sake of convenience, refer to using the composite expression "cross claim") – has a slightly different meaning (see *Hurst v Bennett and others* [2001] 2 BCLC 290 ("*Hurst*") at [53] *per* Peter Gibson LJ) but the crux of the inquiry is simply whether the debtor has a cross-claim against the creditor the effect of which is that, if successful, would liquidate the statutory demand debt (see *Hurst* at [34] *per* Arden LJ).

45 It is settled law that it is not the function of the bankruptcy court, on the hearing of an application brought under r 98(2)(*a*) of the BR, to conduct a full hearing of the putative claim (see *Wee Soon Kim Anthony v Lim Chor Pee* [2006] 2 SLR(R) 370 ("*Lim Chor Pee*" at [15]). Rather, the role of the court is simply to determine, after having regard to "all the circumstances" whether the

claim in question raises a "genuine triable issue". In this regard, guidance may usefully be sought from para 144(3) of the *Supreme Court Practice Directions* ("the PD"), which provides as follows:

> (3) When the debtor:
>
> > (a) claims to have a counterclaim, set-off or cross demand (whether or not he could have raised it in the action or proceedings in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
> >
> > (b) disputes the debt (not being a debt subject to a judgment or order),
>
> *the Court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue.*
>
> [emphasis added]

If this test is satisfied, the statutory demand should normally (though not invariably) be set aside (see *Patrick Tay* at [14] citing *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Chimbusco*") at [29]).

The claims in S 92/2015

46 The appellant's claim against the respondent in S 92/2015 relates to, among other things, claims for liquidated and unliquidated damages for delay in the completion of the works, poor workmanship, a failure to provide a performance bond or adequate insurance and the like. In the SOC, the appellant listed five heads of claim the value of which totalled more than $400,000. I shall just mention three, which were for quantified sums:[38]

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[38] SOC at para 28 (Affidavit of Lim Poh Yeoh dated 24 August 2015 at p 28).

(a) Liquidated damages of $175,000 for the 351 day delay in the completion of the works (the TOP at the rate of $500.00 per day, pursuant to cl 4.2 of the Contract).

(b) Rectification costs of $70,750 necessitated by the respondent's failure to perform the works with reasonable skill and care.

(c) Damages of $166,066.81 for further consequential losses arising out of the respondent's delay in the completion of the works.

47 In the schedules to the SOC, which comprised 14 pages of dense tabulated text, the appellant set out long itemised lists of the various defects as well as the various expenses which it had allegedly incurred as a result of the delay. This was amplified in the affidavit that the appellant filed in support of this application, where the appellant set out the background to the dispute and provided further details of the claims.[39]

48 In its Defence, the respondent traversed each of the allegations in the SOC. In respect of the claim for delay, the respondent did not deny that the temporary occupation permit had been obtained later than contractually specified (though it contended that the period of delay was only 261 days rather than 351), but it pleaded that the appellant had caused the delay either by failing to pay one of her consultants on time (resulting in a delay in the grant of permission from a regulator) or because of the repeated changes made to the design of the works.[40] As for the defects, the respondent denied liability completely, pleading that such defects as there were had already been

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[39] Affidavit of Lim Poh Yeoh dated 24 August 2015 at paras 10(a)(ii).

[40] Defence at paras 3–4 (Affidavit of Tan Teck Seng dated 23 September 2015 at TTS-2).

rectified. The remaining claims were denied in full for various reasons. Just as an example, the respondent pleaded, in relation to the claim for the failure to provide a performance bond, that the appellant had orally agreed to dispense with the need for one "on or about March to April 2011".[41]

49 It was abundantly clear to me that these were disputes which gave rise to triable issues. Among the very many issues that would have to be determined include the reasons for the delay in the completion of the works, the nature of the defects and whether there had been adequate rectification, and whether there had been an oral agreement to dispense with the need for a performance bond. These were all matters the veracity of which could not be determined at this juncture, based purely on affidavit evidence and without the benefit either of discovery process or of the evidence being tested in cross-examination. The value of these claims also exceeded the debt specified in the SD: the claim for liquidated damages alone is $175,000, which exceeded the approximately $144,000 claimed in the SD. In my judgment, therefore, S 92/2015 raised genuine triable issues and it constituted a valid cross demand within the meaning of r 98(2)(*a*) of the BR.

50 Were this to be the whole of the matter, I would have had no hesitation in ordering that the SD be set aside. As Dyson LJ observed in *Remblance v Octagon Assets Ltd* [2010] 2 All ER 688 at [44], it would usually be unjust to require a debtor to face the consequences of bankruptcy where he appears to have a valid cross claim. However, there were two additional complications that arose in this context:

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[41] Defence at para 8(a) (Affidavit of Tan Teck Seng dated 23 September 2015 at TTS-2).

(a) The first was the respondent's argument, which the AR had accepted at first instance, that on the authority of *Patrick Tan* the matters complained of in S 92/2015 could have been raised as defences in the adjudication and therefore cannot be considered a cross demand within the meaning of r 98(2)(*a*) of the BR.

(b) The second was the fact that the SD was issued pursuant to an adjudication determination. The parties took diametrically opposed positions on how this ought to affect the analysis. On the one hand, the appellant submitted that the bankruptcy process was *never* available for the enforcement of an adjudication determination since adjudication determinations only enjoyed "temporary finality". On the other hand, the respondent submitted that it was precisely because the judgment was based on the SOPA that it was *less* liable to be set aside.

Does Patrick Tan apply here?

51 In *Patrick Tan*, the creditors were originally the plaintiffs in a suit which they had brought against the debtor. Sometime after the commencement of the suit, the parties settled their differences and entered into a consent judgment. The debtor failed to pay the sums due under the consent judgment and the creditors issued a statutory demand for the outstanding sum owed. The debtor then sought to set aside the statutory demand on the ground that he had a valid cross claim arising from the creditors' alleged breach of a *separate* agreement under which the debtor was to have extended discounts on several letters of credit in consideration for which the suit would be deemed settled. Woo Bih Li J dismissed the application, observing that this was not a genuine application to set aside a statutory demand on the basis of a cross claim. The thrust of the debtor's argument that the suit was settled and therefore gave rise

to no further obligations of payment. This should, if at all, have been raised as a *defence* to the creditor's claim in the suit. However, he had not done that then, and it was too late to do so now for two reasons: first because of cause of action estoppel (arising from the consent judgment) and second because of the well-established principle, embodied in para 144(2) of the PD, that the courts will not inquire into the validity of a judgment debt.

52 With respect to the AR, *Patrick Tan* is readily distinguishable. The appellant makes it clear in her supporting affidavit that she does not seek to deny the judgment debt; rather, she *admits to it* but asserts that there is a countervailing liability in the form of the respondent's *other* breaches of the Contract the sum of which exceed the statutory demand debt.[42] This is quite different from *Patrick Tan*, where the whole object of the alleged cross claim suit was to undermine the foundation of the consent judgment. In the circumstances I could not agree that the claims in S 92/2015 ought to be classified as defences to the claim brought in the adjudication. Furthermore, I also note that *Patrick Tan* involved a consent judgment whereas the present case concerns an adjudication determination (albeit one that is sought to be enforced *via* a judgment), which does not give rise to any issues of *res judicata* in later civil proceedings (see [41] above and *Max Cooper & Sons Pty Ltd v M & E Booth & Sons Pty Ltd* (2003) 202 ALR 680 at [34]).

The relationship between the SOPA and the bankruptcy process

53 Rule 27(1) of the SOPA relates to the enforcement of adjudication determinations and it provides, in material part, that:

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42 Affidavit of a Affidavit of Lim Poh Yeoh dated 24 August 2015 at paras 10(a)(ii) and 10(b).

> 27.—(1) An adjudication determination made under this Act may, with leave of the court, *be enforced in the same manner as a judgment or an order of the court to the same effect.*
>
> (2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.
>
> [emphasis added]

54 It is clear from this that a debt owing under an adjudication determination may, with leave, be enforced in like manner as any judgment of the court. This includes enforcement by way of the insolvency/bankruptcy process. This is reinforced by s 21 of the SOPA, which provides that an adjudication determination is binding on the parties to the adjudication until such time as the dispute is conclusively determined by a court or tribunal. As will be clear in the course of this judgment, this is also the position taken throughout the Commonwealth. I therefore rejected the appellant's contention that a judgment entered in the terms of an adjudication determination can never be enforced through the bankruptcy process and instead accepted the respondent's submission that it was fully entitled to issue the SD.[43]

55 However, this only settles the question of whether enforcement through the bankruptcy process is even available to begin with. It still leaves open the question as to how the court ought to exercise its discretion. In this regard, the respondent argued forcefully that the 'pay now, argue later' framework set out under the SOPA which facilitates cash flow in the construction industry would be frustrated if a party could get out of payment by making all sorts of unfounded cross-claims. For this reason, it was submitted that the courts should exercise its discretion *not* to set a statutory demand, even in the face of an ostensible competing cross demand, if such a statutory demand were founded on a judgment debt obtained following an

[43] Defendant's further submissions dated 6 May 2016 at para 44.

adjudication.[44] As against this, the appellant submitted that it was unthinkable that a person should be faced with the prospect of bankruptcy (which carried serious consequences) when he/she had subsisting proceedings on foot which, if successful, would liquidate the debt claimed in the SD.[45]

56 It is clear that there are substantial policy arguments going both ways. I propose to examine this issue by first focusing on the position in the cases before turning to consider the matter from first principles.

(1) The foreign authorities

57 I begin with the position in Australia. In *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 ("*Diploma*"), the Supreme Court of Western Australia was faced with an application to set aside a statutory demand issued pursuant to a judgment entered in the terms of two adjudication determinations made under the Construction Contracts Act 2004 (WA) ("the WA CCA"). The debtor sought to set aside the statutory demand on the ground that it had a pending suit against the creditor which amounted to an "offsetting claim", which is defined in s 459H of the Corporations Act 2011 (Cth) ("Australian Corporations Act") as a "counterclaim, set-off or cross demand." In the statement of claim for the suit, the debtor sought, among other things, a declaration that the sum of approximately $530,000 which had been ordered to be paid pursuant to the adjudication determinations (and the subsequent judgment entered on them) were not due and payable because of irregularities in the payment claims submitted.

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44 Defendant's further submissions dated 6 May 2016 at paras 47–49.

45 Plaintiff's 1st further submissions dated 21 March 2016 at para 43; Plaintiff's 2nd further submissions dated 6 May 2016 at para 41.

58 Pullin JA, delivering the judgment of the court, held that the prayer for a declaration amounted effectively to a claim that the creditor was "not 'in truth' indebted for the amount certified as due and payable in the [adjudication] determination[s]" (at [73]). This, he held, could not constitute an offsetting claim within the meaning of s 495H of the Australian Corporations Act. He explained that while adjudication determinations under the WA CCA only enjoyed interim finality, they nevertheless gave rise to debts which were due and payable and that any judgments entered upon them could not be challenged in bankruptcy proceedings (at [59] and [62]). Thus, the validity of a statutory demand premised on a judgment debt founded on an adjudication determination could not be impugned on the basis that there is a "genuine dispute" as to the validity of the underlying debt.

59 He said that while it was always open for a debtor to seek to set aside a statutory demand if he had "offsetting claims arising from transactions separate from those that give rise to a judgment debt based upon an adjudication under the [WA CCA]" (at [68]), such claims could not take the form of a contention that the debtor was not in fact indebted for the amount determined by the adjudicator (at [73]). Claims of this nature amounted, in truth, to an assertion that the adjudication determination, and thus the judgment founded on it, was wrong – these were not genuine offsetting claims.

60 This point was discussed in greater length by the Supreme Court of New South Wales in *Douglas Aerospace Pty Ltd v Indistri Engineering Albury Pty Ltd* [2015] NSWSC 167 ("*Douglas*") where the court was likewise faced with an application to set aside a statutory demand that was issued on a judgment entered in the terms of an adjudication determination. The sum claimed in the statutory demand was approximately $229,000. The debtor applied to set aside the statutory demand on two grounds: (a) there was a

genuine dispute as to $126,000 and (b) because he had an offsetting claim worth approximately $107,000. Together, they exceeded the value of the statutory demand debt. Brereton J unhesitatingly rejected the first ground of challenge, affirming the rule in *Diploma* that as long as a judgment debt stands, there cannot be a "genuine dispute" as to its validity. He clarified that this was so even if the judgment in question arose from an adjudication determination that was being challenged (at [91]):

> … the existence or pendency of an arguable claim in curial proceedings that the adjudication does not reflect the true legal rights of the parties cannot amount to a "genuine dispute" about the existence or amount of a judgment debt in respect of an adjudication. That is because the judgment that arises upon filing an adjudication certificate determines that the judgment debt is indisputably due and payable, and remains so unless and until it is set aside. *The fact that the judgment may be less conclusive than an ordinary judgment (because of the effect of s 32) does not affect this, because so long as it stands the debt exists. This accords with the legislative policy that adjudicated debts should be paid notwithstanding the pendency of any curial dispute as to whether they reflect the true legal rights of the parties*, and that if it is ultimately found that they do not reflect those rights, can later be recovered by way of restitution. … [emphasis added]

61 On the subject of "offsetting claims", he explained that there was a distinction between what he termed "true" offsetting claims and those claims which were, in essence, collateral challenges to the validity of the judgment debt (such as that the claim in *Diploma*). Following *Diploma*, he held that the latter could not be relied on when challenging the validity of a statutory demand. The mark of a true offsetting claim, he held, was that it did not challenge the judgment debt and instead "admits it, but asserts that there is a countervailing liability" (at [98]). He stressed that it was always open for a debtor to set aside a statutory demand founded on an adjudication determination if he had a *true* offsetting claim. In this regard, he rejected the

creditor's argument that this was inconsistent with the principle that the validity of judgment debts may not be questioned or that a special rule should be applied where the judgment debt was founded on an adjudication determination. The remarks he made at [95] are instructive:

> … There is *nothing inconsistent with holding that although a debt is beyond dispute, a demand for it may be met by an offsetting claim*. Once it is appreciated that this encompasses any offsetting claim, which need have no connection with the debt, *the special characteristics of the debt – including any legislative policy reflected in the statute that creates it – are not relevant to the availability of an offsetting claim* [cf *John Shearer Ltd v Gehl Co*]. … [emphasis added]

62 Earlier in the judgment (at [56]–[57]), he explained that the reason why a statutory demand should be set aside if there is an offsetting claim of an equal or greater amount is because in such a situation, the debtor's inability to satisfy the statutory demand ceases to be a reliable indicator of his solvency (this is consistent with my analysis of the statutory demand procedure in Singapore: see [43] above). Two points follow from this. First, it does not affect the principle that the validity of a judgment debt may not be questioned. The setting aside of a statutory demand on the basis that a cross claim exists does not call into question the validity of the judgment debt. Second, the provenance of the statutory demand debt is, when seen in this light, irrelevant to the analysis and should not affect the debtor's right to rely on the existence of an offsetting claim as a ground for setting aside a statutory demand. For the foregoing reasons, he ordered that the statutory demand be varied to the extent that the amount claimed was reduced to $122,000 to reflect the value of the offsetting claim which the debtor had put forward.

63 From Australia, I turn to the United Kingdom. In *Shaw and another v MFP Foundations & Piling Ltd* [2010] 2 BCLC 85, the English High Court had to consider the proper approach to be taken by the court towards

applications to set aside statutory demands founded on judgments entered on adjudication determinations. The arguments made there were similar to those made here. The creditor submitted that the court should give great weight to the policy of the Housing Grants, Construction and Regeneration Act 1996 (UK) ("HGCRA"), which was to facilitate cash flow in the construction industry and should therefore be slow to set aside such statutory demands. The debtor, by contrast, submitted that there was no reason to treat such statutory demands any differently from any other case where a debtor could show a genuine cross-claim. They each sought to rely on cases decided in the Technology and Construction Court and the Bankruptcy Court respectively, which seemed to favour different outcomes.

64 After a careful examination of the relevant cases, Judge Stephen Davies (sitting as a Judge of the High Court) held that there was no conflict in the authorities. Instead, he held that the correct position was that the court would "have regard to all relevant circumstances, and will not be circumscribed in the exercise of its discretion" (at [49]). The remarks made by the court in respect of the interaction between the system of adjudication set up under the HGCRA and the insolvency regime are instructive (at [50]):

> So far as the [creditor's] position is concerned, in my judgment *there is a* ***clear difference between enforcing an adjudicator's decision in the Technology and Construction Court, which itself will provide the platform for the usual panoply of enforcement proceedings, and seeking to use that decision and/or the enforcement judgment itself to found bankruptcy proceedings*** *even where there is a genuine and substantial cross-claim* which the debtor is either actively pursuing or for genuine reasons has been unable to pursue thus far. *Although the [creditor] places considerable emphasis on the policy behind the 1996 Act, ie the pay now, litigate later philosophy,* ***there is nothing in my judgment either in the [HGCRA] or the [Scheme for Construction Contracts] which indicates that it was intended that this should displace the position as applied to personal insolvency by r 6.5(4) of the***

> ***Insolvency Rules*** *or, for that matter, to corporate insolvency by case law.* … [emphasis added in italics and bold italics]

65 After examining the various arguments put forward, he held that the statutory demand ought to be set aside and the debtor be allowed to pursue its claims unencumbered by the prospect of having to contend with bankruptcy proceedings (at [61]). *Shaw* was subsequently followed in *R & S Fire and Security Services Ltd v Fire Defence plc* [2013] 2 BCLC 92 where Newey J noted that the decision in *Shaw* was consistent with many other decisions of the English courts (at [13]).

66 It is interesting to note that at [55] of his judgment, Judge Stephen Davies raised the possibility that in certain cases, debtors could raise a combination of arguments, some of which were more properly classified as defences to the judgment debt and some of which were "true" cross claims (in the *Douglas* sense: see [61] above). He said that it was an "interesting issue as to what the correct approach" ought to be in such situations. However, he did not have to decide the issue as it was undisputed that the claim before him was a genuine and substantial cross claim the value of which, if established, would equal or exceed the statutory demand debt (see *Shaw* at [56]). This distinction between disputes which give rise to genuine claims as to the underlying debt and those which relate only to cross claims was extensively discussed in the Australian authorities where the position is clear (see [57]–[61] above): a statutory demand founded on a judgment entered in the terms of an adjudication determination may not be set aside on the ground that there is a "genuine dispute" over the judgment debt; however, it may be set aside on the ground that the debtor has a genuine cross claim.

67 Finally, I turn to briefly consider the position in New Zealand, where the issue is governed by statute. Section 79 of the Construction Contracts Act 2002 (NZ) ("NZ CCA") provides as follows:

> In *any proceedings for the recovery of a debt* under section 23 or section 24 or section 59, the *court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings* other than a set-off of a liquidated amount if—
>
> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.
>
> [emphasis added]

68 For a time, there had been a difference in view as to whether this provision applied to the issuance of statutory demands and the institution of winding up proceedings. In *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 ("*Laywood*"), the New Zealand Court of Appeal examined the competing views and held that the expression "proceedings for the recovery of a debt" included insolvency proceedings. As a consequence, debtors were absolutely precluded from applying to set aside a statutory demand based on judgment debts arising out of adjudication determinations on the ground that they had cross claims. Arnold J, who delivered the judgment of the court, acknowledged that this "may produce hardship" as a debtor might have a meritorious cross claim which it could not raise in the adjudication proceedings (for example, because the matters giving rise to the cross claim only arose after the adjudication, as was the case in *Laywood*). However, he held that to hold otherwise would be to "create another hardship – it would keep the party in whose favour the adjudicator had ruled from its entitled under the [NZ] CCA, and thereby frustrate its purpose" (at [64]).

(2) The principle of the matter

69 It seems to me that the positions in Australia and the UK are consistent with that which obtains under the SOPA. Under s 21 of the SOPA, adjudication determinations, although provisional in nature, are binding on the parties in the adjudication until their differences are ultimately and conclusively resolved. Thus, an argument (however genuine and strong) that the adjudicated amounts were not as a matter of contractual right due and payable can *never* be a ground for setting aside a statutory demand based on a judgment obtained on an adjudication determination (*ie*, applications under r 98(2)(*b*) of the BR). This principle also applies with equal force to preclude the setting of statutory demands on the basis of cross claims which seek to deny the validity of the judgment debt. This is consistent with para 144(2) of the PD and with Woo J's decision in *Patrick Tan*, where it was likewise held that it was not open for a debtor to seek to set aside a statutory demand by challenging the validity of the judgment debt on which it was based (see [50]–[52] above).

70 This principle of temporary finality also finds expression in s 27 of the SOPA, which allows claimants the option of seeking leave to enforce the adjudication determination as a judgment of the court, and affords them the full suite of enforcement options available thereto. However, like the English High Court in *Shaw* (see [64] above), I do not find anything in the Act that suggests that the usual rules which govern the use of these enforcement proceedings are displaced. Where the SOPA intends to afford claimants a right over and above that which exists under the common law, this is *specifically* provided for in the statute. For instance, under the common law, a contractor is not entitled (in the absence of an express term to this effect in the contract) to suspend work merely because his hirer has not paid him (see *Jia Min Building*

Construction Pte Ltd v Ann Lee Pte Ltd [2004] 3 SLR(R) 288 at [56]–[57]) but s 26 (1) of the SOPA specifically affords claimants the right to suspend work if the respondent does not pay the adjudicated amount.

71 While the policy objective of facilitating cash flow in the construction industry is vital, I do not think that Parliament intended it to be one that was to be achieved at all costs. Notably, our SOPA does not contain the equivalent of s 79 of the NZ CCA, which clearly precludes a respondent from relying on the existence of a cross claim as a ground for resisting enforcement proceedings for the debt (see [67] above). It is particularly important to bear this in mind when one is concerned with the insolvency process, which is qualitatively different from other mechanisms of enforcement. As the Court of Appeal emphasised in its recent decision in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 ("*Jannie Chan*") at [18], "bankruptcy proceedings are not intended as a means for a single creditor to enforce his debt but is instead a method for the collective realisation of the assets of the debtor in order to *maximise recovery for the general body of creditors*" [emphasis in original omitted and emphasis added in italics]. As the Court of Appeal pointed out (at [17] and [19]), this requires a delicate balance between the competing interests of all the stakeholders in the bankruptcy process: the creditors (not all of whom would benefit equally from the initiation of bankruptcy proceedings), debtors, and wider society . All the rules that govern the bankruptcy process, including the provisions governing the setting aside of statutory demands, are instituted in service of this.

72 The upshot of all this is that if Parliament intended that the SOPA regime would take precedence over the usual rules of the insolvency/bankruptcy regime, then it would have said so explicitly, but this was not the case. In fact, it seemed to me that the opposite was intended.

During the second reading of the Building and Construction Industry Security of Payment Bill (Bill 54/2004) ("SOPA Bill"), then Minister Cedric Foo Chee Keng clarified that that the SOPA regime would not upset the existing system of creditor priorities under the insolvency regime (see *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1118–1119 (Cedric Foo Chee Keng, Minister of State for National Development) ("Second Reading Speech"). He said as follows:

> Payment disputes involving insolvency are not covered under the Bill. If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable. This is to avoid upsetting creditor priorities under existing insolvency laws. For example, if a respondent is unable to pay the adjudicated amount because he is insolvent or under judicial management, the principal, in this case, cannot pay the claimant directly either.

Slightly later in the same session, Dr Amy Khor Lean Suan, a Member of Parliament, pointed out that if the SOPA regime "would not over-ride the current law on insolvency", subcontractors might be left without a feasible remedy if the main contractors went insolvent and the developer elected not to make direct payment (at col 1124). To this, Mr Foo replied (at col 1133):

> [Dr Khor] also asked why insolvency is not dealt with here, although payment woes in the construction industry are indeed a form of injustice. *But* ***in the area of insolvency, there is a higher justice that must be served****. There is an established priority of payments that have to be made to different parties who have suffered as a result of a party going insolvent. So this priority should not be upset just because of the payment woes in the construction industry.* So we have therefore left insolvent cases alone so as not to disrupt a process which is working well. [emphasis added in italics and bold italics]

73 While the cited passages did not deal with the specific question before me, I nevertheless considered them to be instructive. It seems to me to be clear that Parliament's intent was that to the extent that there is a normative conflict

between the legislative policy of facilitating cash flow in the construction industry and the wider purposes of the insolvency process (the "higher justice", as Mr Foo put it), the former must yield to the latter. Thus, while a successful claimant is fully entitled to seek leave to enforce the determination as a judgment and thereafter to pursue the recovery of the adjudicated amount in insolvency proceedings, he must abide by the rules governing the insolvency process. It is important to stress that even if the recovery of the debt through insolvency proceedings were foreclosed, a creditor still has a panoply of other enforcement mechanisms at his disposal.

74 The respondent had placed great emphasis on the fact that it has had "no other option but to issue the statutory demand" as it had tried but failed to enforce the judgment through other means.[46] Much as I sympathised with the respondent's plight, I was mindful that there were many competing interests involved. Any decision I made in this case would not only have implications not only for the present case (affecting not only the appellant herself but also any other creditors she might have), but also future cases which come before the courts. If successful claimants in adjudications were allowed to pursue respondents to insolvency (or bankruptcy, as the case may be) regardless of the underlying state of the account, that would represent a significant change in the law which I did not think Parliament intended and it would be a change with ramifications which extend far beyond the construction industry.

75 At the end of the day, the question whether the normal rules of insolvency should be displaced in this context engages a large number of interlocking and interacting interests and considerations. It is possible that Parliament might, upon further consideration, decide to enact a provision

[46] Defendant's further submissions dated 6 May 2016 at paras 62(d)–62(f).

similar s 79 of the NZ CCA to prevent debtors from resisting enforcement proceedings on the ground that they have a cross claim. This would represent a reordering of the hierarchy of norms and such a step would certainly be open to Parliament, which is best placed to consider such polycentric questions of policy, but it was not, in my judgment, one which was open to the court.

(3) Should the SD be set aside?

76 I therefore approached this as I would any other application to set aside a statutory demand and on that footing, I found that there was ample reason to set aside the SD. I had already found that the appellant's cross claim in S 92/2015 gave rise to triable issues. I also found that it was sufficiently quantified in monetary terms (thus distinguishing this case from *Diploma*) and clearly broader in scope than the adjudication as it related also to many other heads of damages which could not have been brought during the adjudication (in particular, I have in mind the claims for inadequate rectification of defects, which could only have been discovered after the works had been completed).

77 While I accept that some of the claims in S 92/2015 could potentially have been brought during the adjudication (in particular, the claim for liquidated damages for delay), it was still brought safely within the limitation period specified for such claims. In any event, even if it were accepted that the appellant had been late in initiating the suit, this did not mean that the present application was doomed to fail. In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [34], it was held that the fact that a cross claim could have been brought during earlier arbitration proceedings between the parties did not absolutely preclude a debtor from using it as a ground for resisting a

winding up. It was but one factor, albeit a weighty one, that had to be considered in the overall balance. If this applies in the context of previous arbitration proceedings then *a fortiori*, this must hold true where the earlier proceedings was an adjudication, which was never intended to be a final forum for the resolution of all the disputes between parties (see [41] above). The appellant plainly has a right to seek a final resolution of the dispute between her and the respondent. A declaration of bankruptcy could potentially put an end to all this, rendering the appellant's statutory right to seek a final determination of the dispute in a court of law nugatory. In my judgment, and viewing matters in the round, I held that the SD should be set aside.

Conclusion

78 To summarise, I allowed the appeal to the extent that I held that prayer 3 of the present application (the application to set aside the SD under r 98(2)(*a*) of the BR) should be granted. However, I affirmed the AR's decision to make no orders on prayers 1-2 and to dismiss prayers 4-5.

79 In relation to costs, I set aside the costs order made by the AR. As the appellant had succeeded substantially, I awarded it the costs of the appeal and of the proceedings below fixed at $10,000 all in (inclusive of disbursements).

Edmund Leow
Judicial Commissioner

Joseph Ignatius and Chong Xin Yi (Ignatius J & Associates) for the appellant;

Alvin Chang and Carmen Chen (M&A Law Corporation) for the respondent.
