IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 79

Civil Appeal No 222 of 2019

Between

Samsung C&T Corporation

… *Appellant*

And

Soon Li Heng Civil Engineering Pte Ltd

… *Respondent*

In the matter of Originating Summons No 439 of 2019

Between

Soon Li Heng Civil Engineering Pte Ltd

… *Plaintiff*

And

(1) Samsung C&T Corporation
(2) United Overseas Bank Limited

… *Defendants*

GROUNDS OF DECISION

[Credit and Security] — [Performance bond] — [Unconscionability]

Version No 1: 27 Oct 2020 (22:41 hrs)

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Samsung C&T Corp
v
Soon Li Heng Civil Engineering Pte Ltd

[2020] SGCA 79

Court of Appeal — Civil Appeal No 222 of 2019
Judith Prakash JA, Belinda Ang Saw Ean J and Woo Bih Li J
17 July 2020

17 August 2020

Woo Bih Li J (delivering the grounds of decision of the court):

Introduction

1 The dispute between the parties arose from the granting of an injunction by the judge below ("the Judge") to restrain a beneficiary from receiving money under a performance bond after an adjudication determination ("AD") had been made in favour of the party who procured the issue of the bond. The beneficiary appealed and we dismissed its appeal on 17 July 2020. We state our reasons below.

Background

2 The appellant, Samsung C&T Corporation ("Samsung"), was engaged by the Land Transport Authority ("LTA") as the main contractor for the construction of the Marine Parade Station and Tunnels for the Thomson-East Coast Line ("the Project"). Samsung engaged the respondent, Soon Li Heng

Civil Engineering Pte Ltd ("SLH"), to be its subcontractor to carry out excavation and disposal works for the Project.

3 The parties entered into a Re-Measurement Sub-Contract dated 22 April 2016 ("the Subcontract").[1] Pursuant to the Subcontract, SLH procured the issue of a performance bond by United Overseas Bank Limited dated 27 June 2016 in favour of Samsung ("the PB").

4 Under the Subcontract, SLH was to excavate three types of material, namely (a) soil; (b) hardcore material; and (c) ground improvement and mixed material. There was a separate disposal site for each type of material.

5 On 31 August 2018, SLH served Payment Claim Number 20 ("PC 20") on Samsung for the sum of $3,278,935.95.[2] Samsung issued its Payment Response, in the form of payment certificate number 20 ("PR 20"), stating that Samsung should pay SLH the sum of $167,848.99 only.[3] The dispute proceeded for adjudication ("SOP 372/2018"). The adjudicator determined that Samsung was to pay SLH a certain sum. This sum was later reduced to $2,473,295.20 (including goods and services tax or "GST") ("the adjudicated sum") by an amended AD issued on 19 November 2018.[4] We will refer to the amended AD as "1AD".[5]

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1 2ACB, pp 10–14.

2 2ACB, p 6; 1SH, para 12.

3 2ACB, p 6; 1SH, para 13.

4 3ROA(J), p 159; 1AD, para 3.

5 3ROA(J), p 158; see 3ROA(A), pp 133–220.

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6 On 15 December 2018, Samsung issued a "Notice of Dispute" pursuant to cl 20.1 of the Subcontract on the basis that "[SLH's] claims in [SOP 372/2018] are without merit and that the adjudicator in that case has failed to consider the claims in light of the contractual provisions in the Subcontract".[6] This was followed by a letter from Samsung to SLH dated 17 December 2018 by which Samsung terminated the Subcontract under cl 18.2 thereof.[7]

7 On 26 December 2018, Samsung paid the adjudicated sum under 1AD to SLH.[8]

8 On 31 December 2018, SLH served on Samsung Payment Claim Number 24 ("PC 24").[9]

9 According to Samsung, it had noticed from an email from SLH to LTA dated 8 January 2019[10] that SLH was saying that it had disposed of 226,875,130kg of material as of 16 December 2018. The email also stated that the remaining loads would be disposed of based on a weight of 16,000 kg per lorry. Using those figures, Samsung applied a certain formula to determine the volume of material removed per lorry and was of the view that the actual volume of material removed was less than what SLH had previously claimed.

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6 2ACB, pp 24–25; 3ROA(J), p 8; 1SH, para 17.

7 3ROA(A), p 8; 1OJQ, para 15.

8 3ROA(J), p 10; 1SH, para 21.

9 3ROA(K), p 32.

10 2ACB, p 32.

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10 On 14 January 2019, Samsung wrote to SLH to assert that SLH had claimed in PC 24 that the "final quantity of disposal as of 16 December 2018" was 175,978 m^3.[11] However, according to information from SLH to LTA (in the email dated 8 January 2019), the actual quantity disposed of was only 136,462 m^3. That information has been referred to in the court proceedings as new evidence which Samsung had obtained.

11 Although Samsung submitted before us that there was no response from SLH to its letter dated 14 January 2019, this was not correct. SLH responded on 29 January 2019 to say that the Subcontract had provided for the quantities of soil disposed of to be measured using certain principles[12] and that the new principle of measurement mentioned by Samsung was not contained in the Subcontract.

12 On 31 January 2019, SLH submitted Payment Claim Number 25. Thereafter the parties continued to dispute the final quantity of material which SLH had disposed of.[13] A further dispute arose about the quantity of hardcore material that had been removed.

13 On 6 March 2019, Samsung issued a further notice of dispute reiterating its claims contained in the letter of 14 January 2019 and its letters subsequent to 14 January 2019. Samsung claimed that it had overpaid SLH by at least $2,057,944.79 (inclusive of GST) and demanded repayment within seven days

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11 2ACB, p 28.

12 2ACB, p 98.

13 3ROA(J), p 15; 1SH, para 39.

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failing which it would take all steps necessary to recover the sum.[14] On 7 March 2019, the disputes were once again referred to adjudication ("SOP 98/2019").[15]

14 On 3 April 2019, while SOP 98/2019 was ongoing, Samsung made a demand on the PB for the full bond amount of $826,713.53. The premise of Samsung's demand was that SLH had, in breach of the Subcontract, over-claimed in relation to works which it had purportedly performed under that contract.[16] On 4 April 2019, SLH commenced proceedings in the High Court seeking an injunction to restrain Samsung from receiving any money under the PB. It also sought and was granted an *ex parte* interlocutory injunction against Samsung on the same day pending the determination of the action. On 12 November 2019, the Judge granted the final injunction sought by SLH. In the meantime, an AD was issued on 22 May 2019 in respect of SOP 98/2019.[17]

15 It was not in dispute that the nub of Samsung's complaint about overpayment concerned matters that had already been adjudicated under 1AD. The Judge noted that for the dispute on the final quantities disposed of, the Subcontract had provided for different methods of measurement for different kinds of work and different types of material disposed of (*Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp and another* [2019] SGHC 267 ("the Judgment") at [69]). Accordingly, he did not agree that the alleged new evidence to which Samsung had referred (see [10] above) entitled Samsung to

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14 2ACB, p 119.

15 3ROA(Q), pp 4–7; 3OJQ, paras 5–8.

16 2ACB, pp 133–142.

17 3ROA(Q), pp 4–7; 3OJQ, paras 5–8.

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conclude that there was an overpayment as Samsung's approach did not take into account the various charges for different work or different types of material (the Judgment at [69] and [71]).

16 On the dispute about the quantity of hardcore material disposed of, the Judge noted that in the bills of quantities in the Subcontract, the measurement was done in terms of lorry loads and some by the "as built drawings". Thus it was not correct to approach the measurement solely by lorry loads as Samsung had done (the Judgment at [70]).

17 The Judge also noted that Samsung's claim of overpayment was allegedly supported by a table or annex attached to its further notice of dispute dated 6 March 2019. However, the breakdown in that annex did not correlate to the new evidence allegedly discovered by Samsung. Instead, it was a mere reference back to the figures in PR 20 (the Judgment at [24], [72]–[73]). After referring to various specific items of dispute, the Judge concluded that Samsung's claim of overpayment based on alleged new evidence ("the New Evidence argument") was raised as a facade to justify its call on the PB (the Judgment at [78]).

18 As regards the question whether Samsung's demand was unconscionable, the Judge distinguished the relevant statutory provisions in Singapore from those applying in New South Wales, Australia. He noted that New South Wales does not have the equivalent of s 21 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") which provides for the temporary finality of an AD. He concluded that Samsung's demand on the PB had sought to undermine the temporary finality of 1AD and this was unconscionable (the Judgment at [89]–[91]).

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19 The Judge also considered whether Samsung was entitled under the Subcontract to demand payment under the PB to satisfy its overpayment claim. He referred to cl 17.7 which states:

> **[Samsung's] Offset Right**
>
> [Samsung] may recover any amount due to [Samsung] under the Subcontract through the Subcontract Performance Security or set-off, deduct or otherwise withhold it from any monies due or which may become due to [SLH] or recover them as a debt due from [SLH].

20 The Judge was of the view that the phrase "under the Subcontract" in cl 17.7 must refer to a sum due to Samsung under a particular provision of the Subcontract (the Judgment at [100]–[101]). As Samsung's demand was not made pursuant to any such provision, its demand was not consistent with the Subcontract and was not in respect of an amount for which Samsung could make a demand under the PB.

Our reasons for dismissing the appeal

21 The present grounds of decision focus on the issue of unconscionability. We need not deal with the New Evidence Argument as we are in agreement with the Judge's detailed reasons as to why the New Evidence argument cannot be accepted. Samsung was not able to show how the Judge had erred in his reasoning and conclusion. As we concluded that Samsung's demand on the PB was unconscionable for the reasons explained below, it was also unnecessary for us to reach a view as to whether Samsung would also have been precluded under cl 17.7 of the Subcontract from making the demand.

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22 At the outset, it is important to stress that SLH did not rely merely on the existence of an AD but that Samsung's reasons for making the demand had already been considered and rejected by the adjudicator. We hold that it is unconscionable for a party to call on a performance bond in circumstances where the effect of so doing will be to negate an AD prior to any final determination of the dispute between the parties. We say this because of the legislative scheme embodied in SOPA.

23 SOPA was enacted in 2004 to provide an expeditious mechanism for payment to contractors and sub-contractors in the event of a dispute between parties to a building contract. SOPA provides for an adjudicator to determine such disputes on a temporary basis pending final resolution by a court or tribunal or other appropriate dispute resolution proceeding.

24 Section 18 SOPA provides a mechanism enabling an aggrieved respondent or claimant to apply for the review of an AD. In this case, however, Samsung did not apply for such a review.

25 Section 21(1) SOPA states:

> **Effect of adjudication determinations and adjudication review determinations**
>
> **21.**—(1) An adjudication determination made under this Act shall be binding on the parties to the adjudication and on any person claiming through or under them, unless or until —
>
> (a) leave of the court to enforce the adjudication determination is refused under section 27;
>
> (b) the dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding; or
>
> (c) the dispute is settled by agreement of the parties.

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26 Section 36(1) SOPA states that the provisions of SOPA shall have effect notwithstanding any contrary contractual provision. This is reinforced in s 36(2) SOPA. The heading of s 36 refers to it as the "No contracting out" provision.

27 SLH argued that Samsung's call in the circumstances was an attempt to circumvent 1AD and the scheme under SOPA which gives an AD temporary finality.

28 On the other hand, Samsung argued that SOPA did not interfere with or affect its contractual right to call on the PB. It cited various Australian authorities but relied mainly on two: *Patterson Building Group Pty Ltd v Holroyd City Council* [2013] NSWSC 1484 ("*Patterson*") and *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2016] WASC 119 ("*Duro*"). We did not find these authorities of persuasive assistance to the proposition advanced by Samsung.

29 *Patterson* was a decision of White J of the Supreme Court of New South Wales. In that case, the plaintiff had sought an injunction to restrain a defendant from drawing down on two guarantees issued by a bank in favour of the defendant who had yet to make a claim on either of the guarantees.

30 On 15 July 2013, an adjudicator appointed under the New South Wales Building and Construction Industry Security of Payment Act 1999 ("the NSW Act") made a determination under which the defendant was to pay the plaintiff A$468,360 including GST. This amount was paid.

31 On 16 August 2013, the plaintiff submitted a progress claim for a further A$535,796.79. However, the superintendent under the building contract issued

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a progress certificate which stated that moneys were due from the plaintiff to the defendant instead. This certificate stated that the plaintiff owed the defendant A$138,143.82 excluding GST and that the superintendent was of the view that a further A$253,728.52 was also due from the plaintiff but had not certified that amount yet. Also on 16 August 2013, the superintendent issued another notice setting out 51 defects which the plaintiff was to rectify. The estimated cost of rectification was A$153,458.

32 Clause 5.2 of the Conditions of Contract stated (see *Patterson* at [3]):

> **5.2 Recourse**
>
> Security shall be subject to recourse by a party who remains unpaid after the time for payment or where the Principal claims to be owed monies by the Contractor.

33 The defendant's position was that there were moneys due to it from claims which had been adjudicated and also in respect of its claim for unrectified defects. The latter was not part of the AD there. The plaintiff disputed that the defendant had any basis to claim that money was due to it particularly in the light of the plaintiff's progress claim for over A$500,000.

34 White J was of the view that under cl 5.2, the defendant did not have to demonstrate that it was in fact owed money. It was entitled to have recourse to the security if it claimed to be owed moneys (*Patterson* at [38]). Citing *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 ("*Fletcher*") and *Clough Engineering Ltd v Oil and Natural Gas Corp Ltd* [2008] FCAFC 136 ("*Clough*") and a third case about the two alternative purposes of such a security, he was of the view that the provision did not merely provide security to the defendant for amounts that might be found to be due to it. Instead, it was

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a risk allocation device that addressed the issue of who was to be out of pocket while the dispute was determined (*Patterson* at [39]). In the latter case, a defendant could be restrained from having recourse to a security only if its claim was made fraudulently, not in good faith or unconscionably and in breach of ss 20 or 21 of the Australian Consumer Law (*Patterson* at [40]). The plaintiff did not contend that any demand by the defendant would fall under any one of these requirements but, as stated above, contended that there was no money owing to the defendant.

35 White J was of the view that as the defendant had a claim for unrectified defects which was not the subject of the AD, the defendant could have recourse to the security. It was therefore unnecessary for him to decide if the defendant could have recourse to the security to enforce a claim for repayment of money which had been paid pursuant to the AD (*Patterson* at [55]). Nevertheless, he proceeded to address that question.

36 Section 32(1) of the NSW Act states:

> **32 Effect of Part on civil proceedings**
>
> (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
>
> (a) may have under the contract, or
>
> (b) may have under Part 2 in respect of the contract, or
>
> (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

37 Section 34 of the NSW Act is in substance similar to s 36 SOPA which prevents a party from contracting out of the legislation. There is no equivalent to s 21 SOPA in the NSW Act.

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38 The substance of the plaintiff's contention was that the defendant would be acting unlawfully if it had recourse to the security to recover an amount which had already been the subject of an AD. Presumably the defendant disagreed.

39 White J considered what the situation would have been if the plaintiff had provided cash as security to the defendant instead of the guarantees. He was of the view that the plaintiff could not have affected the defendant's right to the cash unless the plaintiff was required to replenish the cash security (*Patterson* at [71]). If the defendant were to call on the guarantees then the evidence indicated that the plaintiff would be required to put its bank in funds. In substance, it would be in the same position as if the plaintiff had provided security in the form of cash (*Patterson* at [72]).

40 Secondly, White J was of the view that the NSW Act would not preclude the defendant from having recourse to a guarantee if the defendant's claim was made before there was a reference to an adjudication. He also did not think that the plaintiff could undo such a claim on a guarantee by recourse to the procedures in the NSW Act (*Patterson* at [73]). A claim that the defendant was required to reinstate security would not be a claim that the plaintiff was entitled to a progress payment (*Patterson* at [74]). Accordingly, White J was of the view that the NSW Act would not preclude the defendant from calling on a guarantee to recover an amount which had been the subject of an AD (*Patterson* at [75]).

41 We start our analysis on the persuasiveness of the Australian decisions by referring to the distinction first raised in *Fletcher* ([34] *supra*), and adopted in *Clough* ([34] *supra*), as to whether the purpose of a contractual provision requiring the issuance of a security is merely to provide security for amounts

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that might be found due to a beneficiary or is a risk allocation device that addresses the issue as to who is to be out of pocket while the dispute is being determined (see *Patterson* at [39]). If it is the former, the beneficiary is not entitled to demand payment under the security pending resolution of any dispute. If it is the latter, the beneficiary is entitled to demand payment pending such resolution, unless there is some ground to restrain it from doing so, other than the existence of a dispute.

42 In Singapore, the distinction between the two types of security is expressed differently although with similar consequences. It is a distinction between a security payable on default and one payable on demand. Even for security of the latter type, the purpose of the bond may be described as providing security to the beneficiary for the counterparty's performance of its obligations under the building contract between them. However, the mere reference to this purpose does not necessarily mean that the security is of the first type mentioned in *Fletcher*. For example, in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44, the Court of Appeal said at [24] that "a performance bond is basically a security for the performance of the main contract". However, the mention of this purpose was not to draw the distinction mentioned in *Fletcher* but rather to emphasize that a performance bond is not so sacrosanct and inviolate such that the court can intervene only on the ground of fraud.

43 For a security payable on default, the beneficiary must establish the default of the counterparty before being entitled to payment under the security. This is similar to the first type mentioned in *Fletcher*. We pause to reiterate that

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our reference to "the counterparty" is to the other party in the building contract and not to the issuer of the security.

44 For a security payable on demand, the beneficiary is *prima facie* entitled to be paid under the security immediately once he makes a demand on the issuer of the security. The beneficiary does not have to establish the counterparty's default even if the terms of the security require it to assert that the counterparty is in default when demand for payment is made. This is similar to the second type mentioned in *Fletcher*. However, under the second type, it is still open to the counterparty to restrain the beneficiary from obtaining payment if the counterparty can establish a ground for the injunction. In Singapore, either fraud or unconscionability provides such a ground.

45 Once it is established that the security is payable on demand, the above consequence follows. The distinction mentioned in *Fletcher* is no longer meaningful. The remaining question is whether the counterparty is able to establish either of the two grounds. It is also useful to bear in mind that *Fletcher* was not a case dealing with an AD. Neither was *Clough* ([34] *supra*). While the burden is on the counterparty to establish one of the two grounds, it is often the case that a beneficiary will elaborate to some extent the reasons for its demand in response to the counterparty's action or application for an injunction, even though as between the beneficiary and the issuer of the bond, a demand alone without an equivalent elaboration often suffices. However, we were not persuaded by White J's analogy to a cash security. The point is that the PB is not cash held by Samsung. The two grounds are relevant only in the context of a security which is not cash.

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46 As for White J's comparison with a situation in which a call is made before a reference to adjudication, Samsung raised a similar argument before us. Samsung contended that if 1AD precluded it from receiving any benefit under the PB, then this would encourage a respondent not to raise a claim before an adjudicator so that it could not be said that its claim had been rejected. Also, if Samsung were injuncted in the circumstances, this would encourage beneficiaries to make a call at the first available opportunity, at least before an AD is issued. In other words, it would encourage beneficiaries to pre-empt the AD.

47 While it is true that a beneficiary who makes a call before an AD may appear to be in a more advantageous position than one who does so after an AD, that is the consequence of an on-demand bond. Furthermore, each case is fact-sensitive. While the counterparty may not be able then to rely on an AD to establish unconscionability, it may be able to rely on other evidence to establish this. For example, if the call is made too early, the counterparty may be able to show that in fact there is no basis to allege that the beneficiary is entitled to claim any money from it especially in the light of unpaid work or materials supplied by the counterparty.

48 Furthermore, if a beneficiary were to deliberately avoid making a claim before an adjudicator simply to preserve its right to claim under a performance bond, that might itself be evidence of unconscionability. In doing so, it would also have prejudiced its own chances of obtaining a favourable ruling from the adjudicator.

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49 In any event, it seemed to us that the situation would be worse for the counterparty if, even after an AD, a beneficiary could still claim overpayment under a bond for reasons which had been rejected by an adjudicator.

50 We come now to *Duro* ([28] *supra*). That is a decision of Le Miere J of the Supreme Court of Western Australia. There, Samsung was the beneficiary of two performance bonds procured by the counterparty. The counterparty was the plaintiff who sought an interlocutory injunction to restrain Samsung from taking any step to obtain payment under the bonds. One of its arguments was that Samsung's demand for payment under the bonds was in disregard of three binding determinations made under the Construction Contracts Act 2004 (WA) ("the WA Act").

51 Under cl 5.2(i) of the General Conditions of the contract between the parties, Samsung was entitled to convert into money any security if Samsung considered, acting *bona fide*, that it would be entitled to recover the relevant amount from the counterparty under the subcontract. Clause 5.2(b) restrained the plaintiff from taking any step to injunct Samsung from receiving payment under the security.

52 Le Miere J referred to the distinction mentioned in *Clough* ([34] *supra*), which adopted the distinction from *Fletcher* ([34] *supra*), about the two purposes of such a security and, taking into account cl 5.2 of the General Conditions, concluded that the bonds were of the second type (*Duro* at [23]). In the light of cl 5.2, he was also of the view that in the context of an application for an interlocutory injunction, the burden was on the plaintiff to establish a strong case and not merely an arguable case that Samsung was not acting *bona fide* in claiming that it was or would be entitled to recover sums from the

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plaintiff under their contract (*Duro* at [26]). Applying the traditional principles in relation to interlocutory injunctions, *Duro* also had to establish that the balance of convenience favoured the grant of the injunction.

53 Section 38 of the WA Act provides that an AD is binding on the parties to a construction contract notwithstanding that there are other proceedings relating to the payment dispute before an arbitrator or other person or a court or other body. Section 53 of the WA Act provides that a party cannot contract out of the Act.

54 As mentioned, the plaintiff had obtained three ADs. Under each of them, Samsung was to pay a certain sum to the plaintiff. The plaintiff argued that demanding payment under the bonds was to disregard, and fail to comply with, binding determinations made under the WA Act. It relied on s 38, but not s 53, of the WA Act. Le Miere J disagreed with the plaintiff.

55 He was of the view that the WA Act preserves rather than overrides the parties' contractual rights except for the provision of Part 2 (which did not apply to the case) (*Duro* at [41]). Samsung was only obliged to pay the adjudicated amount under each AD. The determination did not alter the contractual rights or finally determine them. The adjudicator's construction of the contract or the facts found by the adjudicator did not alter the proper construction of the contract nor any facts in contest between the parties (*Duro* at [47]). Therefore, while Samsung was obliged to pay the amounts adjudicated, Samsung retained all of its contractual rights including its right to have recourse to the bonds (*Duro* at [48]). Samsung was not obliged to follow the reasoning or conclusions of the adjudicators (*Duro* at [51]). This was Le Miere J's view even though s 36(d) WA Act states that an adjudicator must give reasons for his determination.

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56 Le Miere J had referred to the cases of *Patterson* ([28] *supra*) and *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd* [2015] FCA 1371 ("*Fabtech*"). We have discussed *Patterson*. *Fabtech* was a decision of Besanko J of the Federal Court of Australia in Queensland. Besanko J had dismissed an application for an injunction to restrain a beneficiary from having recourse to two bank guarantees after an AD. However, it is important to bear in mind that one of the claims by the beneficiary was for liquidated damages which exceeded the aggregate amount of the guarantees and the beneficiary had not raised its claim for liquidated damages before the adjudicator (*Fabtech* at [6]–[7]). That said, it is true that Besanko J was of the view that once payment is made pursuant to an AD under the Queensland Building and Construction Industry Payments Act 2004 ("the Queensland Act"), the Act ceases to have any effect on events thereafter. At [38], Besanko J said:

> … For what period then is the [respondent] to be precluded from enforcing the guarantees? On what basis is one to infer that the applicant is to enjoy the fruits of the adjudicator's decision until a court or arbitrator decides to the contrary? The fact that the [Queensland] Act provides no answer to these questions means, I think, that recourse to the Bank Guarantees does not have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of the Act. Once the payment pursuant to the adjudicator's decision is made, the [Queensland] Act ceases to have any effect on events thereafter and the respondent's rights under the Subcontract Agreement are expressly preserved by s 100(1) of the [Queensland] Act.

57 In the present case, the Subcontract did not have a provision similar to cl 5.2(b) in *Duro*. Even if it had done, it would have been arguable that such a provision would not assist Samsung here on the facts because it would have been an attempt to contract out of SOPA. In any event, Le Miere J referred to cl 5.2 to conclude that the security there was of the second type mentioned in

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Clough. It was undisputed that in the present case the PB was an on-demand bond, *ie*, the second type, and the burden was on SLH to establish unconscionability which was the ground it relied on for its action.

58 The NSW Act, the WA Act and the Queensland Act do not contain any provision that is the equivalent of s 21 SOPA. Indeed, s 21(1) answers the question posed by Besanko J in *Fabtech*, *ie*, for how long is the applicant to enjoy the fruits of an AD? There, the legislation was silent on the question. The answer in Singapore is that the enjoyment will continue until one of the events specified in s 21(1) occurs. We align ourselves with the views expressed by the Judge in [82] and [84] of the Judgment. While Samsung is entitled to disagree with and challenge the views of the adjudicator, it is entitled to do so only in final dispute resolution proceedings between the parties, whether before a court or tribunal or otherwise. The contractual rights of parties are circumscribed by SOPA and the scheme under SOPA and not the other way around. Otherwise the "no contracting out" provision in s 36 SOPA would be meaningless. We did not agree that, on the one hand, Samsung must pay the adjudicated amount but, on the other hand, it can recover overpayment by making a demand on the PB and rely on reasons which have been rejected by the adjudicator to resist a restraining order. If it could do so, the temporary finality of the AD would be undermined.

59 If Samsung had threatened SLH that it would make a demand on the PB if SLH sought an adjudication or, thereafter, demanded payment under 1AD, it would have been clear that Samsung would have been attempting to circumvent the legislative scheme. To us it was clear that Samsung's conduct in making its

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demand on the PB after it had paid SLH pursuant to 1AD was equally a circumvention of the scheme.

60 It is arguable that the above view about temporary finality is reinforced by s 17(5) SOPA. Under that provision, a subsequent adjudicator is to give the same value for construction work carried out or goods or services supplied as that previously determined in an AD unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous determination. However, we defer any further discussion on this provision as the parties did not refer to it in arguments.

61 In the circumstances, we dismissed Samsung's appeal with costs. We varied the terms of the injunction (granted by the Judge) slightly to make it clear that it will continue until the dispute between the parties has been finally determined by the court or in arbitration proceedings or by agreement between the parties, at which point parties shall be at liberty to apply for discharge of the order.

Judith Prakash Judge of Appeal	Belinda Ang Saw Ean Judge	Woo Bih Li Judge

Lee Peng Khoon Edwin and Er Hwee Lee Danna Dolly (Eldan Law LLP) for the appellant;
Poon Guokun Nicholas and Choy Chee Yean (Breakpoint LLC) for the respondent.

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