IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 267

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*

JUDGMENT

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

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v
Samsung C&T Corp and another

[2019] SGHC 267

High Court — Originating Summons No 439 of 2019
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9 May, 14 June, 15 July 2019

12 November 2019 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 The present dispute arises from the first defendant's call on a performance bond ("PB") which is provided by the second defendant, a bank. By this application, the plaintiff seeks to restrain the first defendant's call on the PB on the ground that the call was unconscionable.

Facts

Background

2 The first defendant was employed by the Land Transport Authority ("LTA")[1] as the main contractor for the construction of the Marine Parade

[1] Referred to as the "employer" by the adjudicator.

Station and Tunnels for the Thomson-East Coast Line ("the Project").[2]

3 As the main contractor, the first defendant engaged the plaintiff as its subcontractor to carry out excavation and disposal works for the Project.[3] A Re-Measurement Sub-Contract ("the Subcontract") dated 22 April 2016 was entered into between the parties.[4] The value of the Subcontract was about S$16.5m. Pursuant to the Subcontract, a performance bond was furnished as security for the performance and completion of the Subcontract by the plaintiff ("the PB").[5] By the PB, the second defendant, the first defendant's bankers, covenanted to pay up to S$826,713.53 on the first defendant's demand.[6]

4 As part of the Subcontract, the plaintiff excavated three categories of material, namely (a) soil; (b) hardcore material; and (c) ground improvement and mixed material. The site of disposal for each of the above three categories depended on the type of the material:[7]

(a) soil was to be disposed directly to the LTA's dumping ground, which is also referred to as the Marina East Staging Ground ("MESG");[8]

(b) hardcore material was to be disposed to another dumping ground sourced by the plaintiff ("plaintiff's dumping ground"). This is because hardcore material would not be accepted by LTA at the MESG; and

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2 Shin Hyuk's affidavit ("SH") p 3, para 4.

3 Plaintiff's Bundle of Documents Vol 1 ("PBOD1") p 39, para A.

4 PBOD1 p 37.

5 PBOD1 p 46.

6 PBOD1 p 118.

7 Ong Jun Quan's second affidavit ("OJQ2") pp 2 – 3, para 7.

8 SH p 522, para 169.

(c) ground improvement and mixed material was to be disposed to an intermediate treatment site, which is referred to by the parties as "TOL" or the "plaintiff's staging ground" (hereinafter the "TOL treatment area"), where the material would be treated. For example, ground improvement material was subjected to crushing to render the material suitable for disposal at the MESG.[9]

Payment Claim 20

5 On 31 August 2018, the plaintiff served Payment Claim No. 20 ("PC 20") on the first defendant for the sum of S$3,278,935.95.[10] The first defendant issued its Payment Response, in the form of a payment certificate no. 20 ("PR 20") stating that the plaintiff should instead pay the first defendant the sum of S$167,848.99.[11] The dispute proceeded for adjudication proceedings ("SOP 372/2018"). The adjudicator determined that the first defendant was to pay the plaintiff S$2,473,295.20.[12] I will refer to the adjudication determination as "1AD". It was issued on 9 November 2018.

6 On 15 December 2018, the first defendant issued a "Notice of Dispute" to the plaintiff on the basis that "[the plaintiff'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."[13] This was followed shortly by a letter issued by the first defendant to the plaintiff dated 17

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9 OJQ2 pp 2 – 3, para 7.

10 PBOD1 p 126.

11 PBOD1 p 130 and p 138 at para 7.

12 PBOD1 p 137 at para 3(a).

13 SH Tab 4, p 248.

December 2018 where the first defendant informed the plaintiff that it was invoking its contractual right to terminate the Subcontract under clause 18.2 of the Subcontract,[14] which provides that "[i]f the [first defendant] decides it is necessary for [its] convenience, then the [first defendant] may at any time by notice to the [plaintiff] forthwith terminate the Subcontract …".[15]

7 Thereafter, on 26 December 2018, the adjudicated sum under 1AD was paid by the first defendant to the plaintiff.[16]

Payment Claim 24

8 On 31 December 2018, the plaintiff served on the first defendant its Payment Claim No 24 ("PC 24").[17]

The first defendant raises an issue in relation to the final quantity of disposal

9 According to the first defendant, sometime in January 2019, it compared figures for the amount of materials disposed of as stated in emails sent by the plaintiff to the LTA with the contents of PC 24. The first defendant found that there were discrepancies.[18]

10 On 14 January 2019, the first defendant wrote to the plaintiff. It asserted that the plaintiff had claimed in PC 24 that the "final quantity of disposal as of 16 December 2018" was 175,978 m^3. However, according to information that

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14 SH Tab 5, p 251.

15 PBOD1 p 66, clause 18.2.

16 PBOD1 p 6 at para 16; SH p 8 para 21 and Tab 6, p 253.

17 SH pp 322 – 326.

18 SH p 10, paras 25 – 26.

had been provided by the plaintiff to the LTA in an email dated 8 January 2019, the first defendant did some calculations and determined that the "final quantity of disposal" was only 136,462 m^3.[19] The calculations were based on certain *assumptions* made by the first defendant. For example, it was assumed that one could derive the *volume* of the disposed quantity from the *weight* figure used in the email to the LTA by using the conversion rate of "2000 kg/m^3". Hence, 226,875,130 kg of material which was stated by the plaintiff in its email to the LTA as having been sent from the site to the TOL treatment area as of 16 December 2018 was calculated to be equal to 113,438 m^3 of material. For quantities that had been transported from the site to the plaintiff's dumping ground and the MESG, the first defendant calculated the volume of the quantities disposed of by reference to the lorry loads and an assumption that each lorry load carried 8 m^3 of material.[20]

11 On 29 January 2019, the plaintiff replied to the first defendant. It pointed out that the adjudicator in 1AD had already dealt with the disputes between the parties and determined the correct method of measurement to apply, as per the Subcontract, to assess the quantities of the different materials excavated and disposed of. The plaintiff asserted that its claims for payment in PC 24 was in accordance with these same methods of measurement. The plaintiff went on to describe the first defendant's calculations in its letter of 14 January 2019 as being based on some "hitherto undisclosed" method of measurement and weight conversion formula, which was not in accordance with the terms of the Subcontract.[21]

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19 SH p 256.

20 SH p 256.

21 SH p 328.

12 On 7 February 2019, the first defendant replied to assert that it was entitled to "challenge in arbitration" the reasoning which the adjudicator in SOP 372/2018 had adopted in coming to his determination.[22] The letter went on to state:[23]

> You have applied the wrong rates and/or quantity and claimed for items which you have no basis to claim for in Payment Claim No. 24 by misapplying the provisions in the Subcontract. Amongst others, you have arrived at your claim amount by mixing methods of calculation, using both drawings and lorry loads for the purpose of overlapped counting upon a single item. You have therefore consistently over-claimed in your payment claims. [emphasis in original]

13 In that letter, the first defendant went on to accuse the plaintiff of making a *fraudulent* over-claim. Further, it was stated:[24]

> We should point out that our final disposal quantity certified in Payment Certificate No. 24 is 135,850 m^3, which is very close to the figure of 136,462 m^3 that you have reported to the LTA. This would mean that if you have consistently applied a single method of calculation be it based on drawings (135,850 m^3) or lorry (136,462 m^3) there would have been no significant difference between the final quantity disposal figure reported by you to LTA and the figure claimed in your Payment Claim No. 24. [emphasis in original]

14 The plaintiff replied on 18 February 2019 to again point out that the first defendant was not adhering to the methods of measuring quantities that were set out in the Subcontract. The plaintiff also pointed out that the first defendant's assertion that a figure of 136,462 m^3 had been submitted by the

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22 SH p 330.

23 SH p 330.

24 SH p 330.

plaintiff to the LTA was untrue because this figure had never appeared in any of the records or emails sent by the plaintiff to LTA.[25]

15 The first defendant wrote on 27 February 2019 to state that it was relying on the plaintiff's own data on the lorry loads and the weight of quantities reported to the LTA as being disposed of from the worksite. The first defendant also asserted that the conversion formula of 2000 kg/m^3 was the same as that mentioned in the plaintiff's email to LTA, that is, 16,000 kg per lorry, on the assumption that each lorry carried 8 m^3.[26] The letter went on with the first defendant accusing the plaintiff of "persistent dishonest conduct of making inflated claims".[27]

The first defendant raises an issue in relation to the disposal of hardcore material

16 Around the same time when the first defendant raised the issue with the plaintiff in relation to the "final disposal quantity", it also raised another issue in relation to "hardcore disposal".

17 On 15 January 2019, the first defendant wrote to the plaintiff to request for clarification relating to "hardcore disposal". It asserted that, from "official records" that the plaintiff had provided to the LTA, it could calculate that 109,365 m^3 of non-hardcore material had been disposed to the MESG, with a remaining 4,073 m^3 of hardcore material left at the plaintiff's TOL treatment area. This was a far cry from the 47,040 m^3 of hardcore material which,

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25 SH p 333.

26 SH p 335.

27 SH p 336.

according to the first defendant, the plaintiff claimed in PC 24 had been processed by way of sieving and crushing at the TOL treatment area. One assumption used by the first defendant in this calculation, as with the issue in relation to the "final quantity disposal", was a formula to convert *weight* into *volume*.[28]

18 On 17 January 2019, the plaintiff replied to point out that volumes referred to by the first defendant were never reported to the LTA. The plaintiff also pointed out that it had never claimed that 47,040 m^3 of hardcore material was processed at the TOL treatment area. It alleged that the first defendant had "cherry picked" parts of PC 24 and changed the "true meaning of [the plaintiff's] claims."[29]

19 On 22 January 2019, the first defendant wrote to reiterate its position that there was a discrepancy with the hardcore disposal claimed by the plaintiff in PC 24 and what was stated in the reports provided to LTA. It stated that this discrepancy could not be "reconciled". The first defendant went on to conclude that the plaintiff had over-claimed the "amount of hardcore related processing works [it] performed" in [PC 24].[30]

20 The plaintiff replied on 12 February 2019 to simply state that it had explained itself in the previous correspondence.[31]

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28 SH p 340.

29 SH p 363.

30 SH p 365.

31 SH p 371.

The first defendant's further notice of dispute

21 As in the usual course, payment claims made by parties under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") regime are cumulative in the sense that they set out all the claims for the work that has been performed under the contract, less the amounts that have already been adjudicated or paid for. Hence, the plaintiff's PC 24 included the work already done and claimed for in PC 20. While the first defendant took issue with PC 24, the nub of its complaint about over-claims was with reference to the work that had already been claimed for under PC 20. This was evident in the first defendant's further notice of dispute, which is described below.

22 On 6 March 2019, the first defendant sent the plaintiff the "further notice of dispute". The first defendant stated that, since the earlier notice of dispute, it had:[32]

> uncovered further evidence of amongst others, your over-claim and our overpayment on *your previous payment claims up until payment claim no. 20. In particular, we have uncovered evidence that you have made fraudulent claims in connection with hardcore disposal and final quantity disposal.* [emphasis added]

23 In that further notice of dispute, the first defendant went on to assert that the plaintiff had inflated claims in relation to hardcore and final quantity disposal amount by S$1,972,628.60 (without GST). After deducting retention monies of S$49,315.72 that was with the first defendant, and after accounting for GST of S$134,631.90, the total sum claimed by the first defendant from the

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[32] SH p 373 at para 2.

plaintiff as an overpaid amount was S$2,057,944.79.[33] It demanded payment from the plaintiff of this sum of S$2,057,944.79 within seven days from the further notice of dispute.[34]

24 The further notice of dispute enclosed, amongst other things, a table showing how the over-claimed amount of S$2,057,944.79 had been calculated. The table showed a comparison between (a) what the plaintiff claimed in PC 20 for various items of work and (b) the first defendant's certification of what was due for that item of work, as had been set out in PR 20, which was obviously lower. The difference in amount between (a) and (b) for each item was described as the "overpayment". Tallying the alleged "overpayments", and after deducting the retention monies and adding GST, the first defendant arrived at the sum of S$2,057,944.79, which it claimed to have overpaid the plaintiff.[35]

Payment Claim 25 and a further set of adjudication proceedings

25 While these allegations that the plaintiff had made inflated claims were being alleged and refuted, on 31 January 2019, the plaintiff served Payment Claim No 25 ("PC 25") on the first defendant. In PC 25, the plaintiff claimed the sum of S$2,972,383.24.[36] As the first defendant again disputed the plaintiff's entitlement to the sum claimed, the matter was referred to adjudication ("SOP 98/2019") on 7 March 2019.[37]

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33 SH p 378.

34 SH p 373 at para 4.

35 SH pp 377 – 378.

36 PBOD1 p 229.

37 PBOD1, p 13, paras 17 – 19 and Ong Jun Quan's third affidavit ("OJQ3") p 10, para 9.

26 In its response to the adjudication application in SOP 98/2019, the first defendant raised a preliminary point that the plaintiff had made fraudulent claims for hardcore disposal and final quantity disposal. It invited the adjudicator to decide that the plaintiff had made such fraudulent claims in PC 24, and since PC 25 included the fraudulent claims, it was tainted with fraud and should be rejected outright without having to go into the merits of the various items of work claimed.[38]

Call on the PB

27 On 3 April 2019, while SOP 98/2019 was ongoing, the first defendant called on the PB for its full amount of S$826,713.53.[39] It was stated in the letter to the second defendant that:[40]

> [B]riefly, the premise of our bond call is that the Subcontractor, [the plaintiff], had amongst others, in breach of the Subcontract, over-claimed and we have overpaid an amount in excess of the current bond value in relation to works which the [plaintiff] claimed to have performed under the Subcontract.

28 On 4 April 2019, the plaintiff filed the present originating summons, seeking an injunction to restrain the first defendant's call on the bond.[41] As payment on the bond was imminent at the time of commencement of proceedings, the plaintiff urgently applied for and obtained an interlocutory injunction on an *ex parte* basis from the duty judge pending the determination of the originating summons.[42]

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38 SH pp 486 – 488, paras 23 – 32; OJQ3 at p 48, paras 77 – 78.

39 SH p 388, para 4.

40 SH p 388, para 4.

41 Summons for injunction.

42 5 April 2019 Minute Sheet.

29 The first defendant then filed a substantive affidavit to oppose the application in the originating summons. The second defendant took no position and indicated that it would comply with any order that the court made.

The parties' cases

30 The plaintiff relies on a number of submissions to show that the first defendant's call on the bond was unconscionable. In summary, the plaintiff asserts that the timing of the call was calculated to render the adjudicator's determination in SOP 98/2019 academic.[43] The plaintiff also asserts that the first defendant's allegations of fraudulent over-claims are but a poor cover for the first defendant to re-visit the same points that it had made in SOP 372/2018, in relation to how the works were to be measured.[44] Hence, this is an attack on the temporary finality of 1AD. Finally, it is also asserted that the first defendant's claim, which is for recovery of an alleged overpayment, is not a sum due under the Subcontract, and thus it cannot be the subject of a call on the PB according to the terms of the Subcontract.[45]

31 The first defendant rejects the contention that it has acted unconscionably in calling on the PB. In relation to the timing of the call on the PB, the first defendant's explanation is that the question of fraudulent claims was not really a key issue in SOP 98/2019.[46] It emphasises that it is not seeking to challenge 1AD, and that it has made full payment under that adjudication

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43 Plaintiff's Written Submissions ("PWS") p 40, para 94.

44 Supplementary Counsel Note (15 July 2019) p 1.

45 Counsel Note, p 1; Minute Sheet (9 May 2019), p 2.

46 Minute Sheet (14 June 2019) pp 5 – 6.

determination.[47] The first defendant argues that the facts regarding the over-claim for the hardcore and final quantity disposal were only discovered after 1AD was issued, when it reviewed the emails sent by the plaintiff to the LTA.[48] Finally, the first defendant argues that the terms of the Subcontract entitle it to call on the PB to recover any alleged overpayments.

The issue before the court

32 The substantive issue before the court is whether the first defendant's call on the bond was unconscionable.

33 It is settled law in Singapore that, apart from fraud, unconscionability is a ground which would warrant the court granting an injunction to restrain a beneficiary of a performance bond from calling on it: *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*") at [18] and *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE Properties*") at [6].

34 Where unconscionability is alleged, the court will consider the parties' conduct leading up to the call on the performance bond in the entire context of the case. For injunctive relief to be granted, the burden is on the plaintiff to satisfy the court that there is a strong *prima facie* case of unconscionability on the beneficiary's part in calling on the bond: *Mount Sophia* at [21].

35 However, unconscionability does not lend itself to a precise definition. Thus, as the Court of Appeal recognised in *Eltraco International Pte Ltd v CGH*

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47 SH p 25, para 79.

48 1DWS p 10, para 24 and p 12, para 33.

Development Pte Ltd [2000] 3 SLR(R) 198 at [31]: "[i]n determining whether a call on a bond is unconscionable, *the entire picture* must be viewed, taking into account all the relevant factors" [emphasis added]. Hence, it is inappropriate to look simply for a "smoking gun" that would show unconscionability on the beneficiary's part. Ultimately, the relevant facts must be assessed against the entire context of the case (*Mount Sophia* at [45]):

> … a finding of unconscionability is a conclusion applied to conduct which the court finds to be so lacking in *bona fides* such that an injunction restraining the beneficiary's substantive rights is warranted. Sufficient reasons must be given to the court to enable it to come to such a conclusion, and it is necessary that these reasons are drawn from a thorough consideration of the relevant facts as viewed in the entire context of the case, taking into account the parties' conduct leading up to the call on the bond. This should not be confused with a consideration of the merits of the case, for the inquiry here is concerned with breadth rather than depth and remains a *prima facie* inquiry. With all that said, we reiterate that it is very difficult for a single piece of evidence, read without the benefit of the context surrounding its making, to be definitive proof of a strong *prima facie* case of unconscionability.

36 The importance of considering the entire context is demonstrated by the facts of *Mount Sophia* itself. There, the appellant developer was the beneficiary of an on-demand performance bond that had been provided by the respondent contractor to secure the performance of the respondent's obligations under the building contract between the parties. Contractual disputes arose at about the time for completion and it was alleged that the respondent had to pay the appellant liquidated damages as a result of the delay in completion. Before parties could refer the dispute to arbitration pursuant to the contract, the appellant called on the bond, allegedly because it believed that it was entitled to the liquidated damages. The judge allowed the respondent's application for injunctive relief, reasoning that an email from the architect of the project dated 4 October 2010 suggested that there had been an understanding between the

appellant and the architect to manipulate the contractual completion date from 19 July 2010 to 4 April 2010, thus increasing the amount of liquidated damages payable by the respondent ("the 4 October 2010 email"). According to the judge, this constituted a strong *prima facie* case of unconscionability which justified the grant of an injunction.

37 The Court of Appeal upheld the judge's decision to grant an injunction, but cautioned that the overall tenor and entire context of the conduct of the parties had to be considered. In this respect, the 4 October 2010 email, while certainly probative, was insufficient by itself to demonstrate a strong *prima facie* case of unconscionability. Other factors that fed into the context of the appellant's call on the bond had to be evaluated. In this respect, the court considered first that there existed a serious question as to whether the delay was occasioned by the respondent, or whether it had been caused by the appellant. From the evidence of the case, it appeared that the appellant did not genuinely believe that the respondent was responsible for the delay. Another curious event was that the architect had issued directions to the respondent requiring it to extend the validity of the bond, failing which the appellant would call on the bond. The court considered that it did not seem proper for the appellant to threaten to call on the bond in order to get the respondent to extend the bond, especially since such an instruction came by way of an architect's direction (see *Mount Sophia* at [47]–[53]).

38 Viewing the circumstances in *totality*, the court concluded that there was a strong *prima facie* case of unconscionability justifying the continuance of the injunction restraining the appellant's call on the bond pending arbitration. In coming to its conclusion, the court emphasised that "no single factor was conclusive. It was the entire chronology of the case, viewed in relation to all

the relevant factors … that convinced us that a strong *prima facie* case of unconscionability had been established" (*Mount Sophia* at [54]).

39 The same approach was adopted in *JBE Properties*. There, the developer awarded a construction contract to the contractor. A performance bond for S$1.1515m was furnished for the developer's benefit pursuant to the contract. When the cladding of the building turned out to be defective, the developer solicited bids from other contractors before the contractor could rectify the defects. The developer received four bids ranging from S$2.165m to S$2.741m to rectify the defects. The developer accepted a bid for S$2.2m from one WTC, and called on the performance bond in full on that basis. The contractor applied to restrain the call on the bond for being unconscionable. The judge granted the injunction, holding that the call on the bond was "clearly unconscionable, abusive and bordered on being fraudulent". The main reasons for his decision were: (a) the letter of award issued by the developer to WTC was a one-page document devoid of any details as to WTC's scope of "rectification works"; (b) WTC did not appear to have the relevant expertise to carry out the rectification works; (c) WTC's quoted price was "a hefty six times more" than the S$371,665 which the subcontractor originally appointed by the contractor was charging for the cladding works that were the main subject of the rectification works; (d) the Superintending Officer had issued a completion certificate for the project which was priced at S$11.515m, and it would have been most surprising for him to have done so if rectification works costing S$2.2m (as the developer contended) remained outstanding; and (e) the highest quotation obtained by the contractor for the rectification works was only S$560,000, suggesting that WTC's quoted price was "grossly inflated".

40 The Court of Appeal upheld the judge's decision to restrain the call on the bond on account of its unconscionability, adding only that on a proper

interpretation of the bond, it appeared to be a true indemnity performance bond such that it was limited to indemnifying the developer against *actual* losses that it sustained due to the contractor's breach of the construction contract. The nature of the bond, coupled with the fact that the developer had not proven that it had suffered actual loss arising from the contractor's breach of the construction contract, bolstered the finding that the call on the bond was unconscionable (*JBE Properties* at [19] and [30]).

41 With the foregoing principles in mind, I turn to consider whether the relevant facts as viewed in the entire context of the case support the plaintiff's contention that the first defendant's call on the PB was unconscionable.

Was the call on the PB unconscionable?

42 In considering the relevant facts of the case, I first deal with the question of the timing of the call on the PB. Then, I will consider the arguments that the call on the PB was motivated by improper purposes, as well as the related question about the temporary finality of 1AD. Finally, I will consider the provisions of the Subcontract as to when there can be recourse to the PB.

Timing of the call on the PB

43 The first category of submissions which the plaintiff relies on to assert that the call on the bond was unconscionable relates to the timing of the call.

44 It is argued that the matter of the fraudulent claims was in issue before the adjudicator in SOP 98/2019. However, before the issue on fraud could be determined by the adjudicator, the first defendant called on the PB.[49] In the

[49] PWS p 39, para 93.

adjudicator's determination in SOP 98/2019 eventually issued on 22 May 2019, he rejected the allegations of fraud.[50] He also determined that the first defendant had to pay the plaintiff the sum of S$2,382,451.60.[51] The plaintiff argues that the first defendant had called on the PB on 3 April in an attempt to steal a march on the adjudicator in relation to the issue of the fraudulent claims, hoping to effectively render the adjudicator's determination in SOP 98/2019 purely academic.[52] Further, the plaintiff also argues that the call was made at a time when the first defendant knew that the plaintiff's consultant, who was handling the payment claims for the plaintiff, was travelling outside of Singapore. This was done strategically to minimise the plaintiff's chance of obtaining urgent injunctive relief to prevent payment on the PB.[53]

45 The first defendant rejects the plaintiff's contentions about the timing of the call. In relation to the plaintiff's consultant being away from Singapore, this was not even a matter which the first defendant considered before calling on the bond.[54] As for the calling of the PB in the midst of SOP 98/2019, the first defendant's explanation is that the question of fraudulent claims was not really a key issue in those adjudication proceedings.[55] That is because the first defendant had not in its adjudication response asserted that there should be a refund of the overpaid amount. The issue of fraud was raised as a preliminary point to "invalidate" the entire adjudication application on the basis that it was unsafe to entertain the claims in PC 25 since the first defendant could show that

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50 OJQ3 p 48 para 77 – p 50 para 84.

51 OJQ3 p 8 para 3(a).

52 PWS p 40, para 94.

53 PWS p 41, paras 97 – 98.

54 1DWS p 52, paras 134 – 135.

55 Minute Sheet (14 June 2019) pp 5 – 6.

PC 24 included fraudulent over-claims.[56] In short, PC 25 had been tainted by fraud. Since the adjudicator in SOP 98/2019 would not decide whether the first defendant would be entitled to a refund from the plaintiff for the fraudulent over-claims, there was no need for the first defendant to wait until the determination is issued before calling on the PB.[57]

46 Considering the evidence in totality, I do not find that the timing of the call tends to show that the first defendant's call on the PB was unconscionable.

47 The first defendant had made its position clear in the notice of further dispute sent to the plaintiff in March 2019 that it was demanding the payment of approximately S$2m as the amount of the over-claim that was due to it (see [23] above). The parties had, prior to this demand, already exchanged correspondence on this issue of the alleged over-claims. Hence, it should have come as no surprise to the plaintiff that the first defendant might attempt to call on the PB. The fact that the plaintiff's consultant was travelling is neither here nor there because it is clear that the plaintiff had more than one officer who was familiar with the matter, as can be seen from the list of attendees in the adjudication proceedings in SOP 372/2018[58] and SOP 98/2019.[59] Hence, I am not prepared to infer that the first defendant was guilty of any unconscionable conduct when it called on the PB despite knowing that the plaintiff's consultant was travelling.

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56 SH pp 486 – 488, paras 23 – 32.

57 Minute Sheet (14 June 2019) p 5 – 6.

58 PBOD1 p 141.

59 OJQ3 pp 11 – 12, para 18.

48 The plaintiff's other complaint about timing is that the first defendant called on the PB while the adjudication proceedings in SOP 98/2019 were ongoing. The plaintiff emphasised that the call was made after the first defendant had indicated to the adjudicator in SOP 98/2019 that it would be raising the point about fraudulent over-claims in the previous payment claims.[60]

49 However, I accept the first defendant's submissions that the issue of the amount of the fraudulent over-claims was not squarely before the adjudicator in SOP 98/2019.[61] The first defendant did not seek a return of the alleged over-claimed amount of approximately S$2m by way of a set-off in its payment response to PC 25. Instead, what was argued by the first defendant in those adjudication proceedings was that PC 25 was tainted by fraud because the previous payment claim (*ie,* PC 24) was fraudulent in nature. This in turn was because it had incorporated the amounts already claimed and adjudicated upon in SOP 372/2018, in relation to PC 20, which included deliberate over-claims. The general submission made by the first defendant was that a party cannot make a further payment claim if a previous payment claim was shown to be fraudulent. As such, the first defendant contended that the adjudicator should completely reject PC 25 as being tainted by fraud, and should not have to deal with or consider the "merits" of PC 25.[62]

50 Ultimately, this submission was not accepted by the adjudicator. In rejecting the submission, the adjudicator expressed the view that the first defendant's allegations of fraud were based on certain assumptions, which he

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60 PWS pp 39 – 40, paras 93 – 94 and SH pp 486 – 488, paras 23 – 32.

61 Minute Sheet (14 June 2019) pp 5 – 6.

62 SH pp 486 – 488, paras 23 – 32.

found to be questionable.[63] However, I agree with the first defendant that the adjudicator was not asked to determine the size of the alleged over-claim. In fact, as correctly put by the first defendant, the adjudicator would not have been in a position to decide on the amount of the alleged over-claim because there was no attempt by the first defendant to set-off the alleged over-claim amount against the amount claimed by the plaintiff in PC 25. Instead, the only amount that the first defendant sought to set-off from the plaintiff's claim in PC 25 related to backcharges in the sum of S$497,989.77, which sum did not include the alleged over-claim amount.[64]

51 As such, I do not think that the call on the PB in the midst of SOP 98/2019 is in itself sufficient to establish unconscionability. In my judgment, it may well be legitimate for a beneficiary to call on a bond or other performance security, provided that the call is consistent with the parties' contractual arrangements, even when its claim is before an adjudicator in adjudication proceedings under the SOPA. It is the determination by the adjudicator that creates the limited estoppel on the claims that have been decided. Prior to that determination, I do not see why a beneficiary would necessarily be regarded as acting unconscionably in invoking its contractual rights to call on its security.

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63 OJQ3 pp 49 – 50, paras 80 – 84.

64 SH p 27, para 86; PBOD1 pp 234 and 246.

The call on the bond was motivated by improper purposes

The parties' arguments

52 Apart from the timing of the call of the bond, the plaintiff also asserts that the first defendant's call on the bond was motivated by improper purposes. In particular, the plaintiff argues that the first defendant's contention that it was relying on new facts discovered only in January 2019 in the form of the emails from the plaintiff to the LTA to justify the allegation that there has been fraudulent over-claims was but a poor "cover" for the first defendant to re-visit the same points that it had made in SOP 372/2018. This is evident, according to the plaintiff, from the fact that the first defendant referred to its figures raised in PR 20 to explain how it arrived at the over-claim amount of S$2,057,944.79, and not on any new figures or facts found in the plaintiff's emails to the LTA.[65]

53 There is a related point in this regard about the temporary finality of adjudication determinations. Under s 21 of the SOPA, an adjudication determination binds the parties until leave to enforce the determination is refused, the dispute is settled, or until a final resolution of the parties' dispute, in this case, by arbitration (*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [18], [63] and [71]). According to the plaintiff, by making allegations that the plaintiff had made fraudulent over-claims in PC 20 in relation to hardcore and final quantity disposal and calling on the PB on this basis, the first defendant was effectively seeking to overturn parts of 1AD because the adjudicator had decided the amounts due to the plaintiff for such

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65 Supplementary Counsel Note (15 July 2019) p 1.

work. This undermined the temporary finality of that adjudication determination.[66]

54 The first defendant rejects the plaintiff's assertion that it had called on the bond for improper purposes. In this regard, it reiterates that the facts regarding the over-claim were only discovered after 1AD was issued on 9 November 2018, as the emails sent by the plaintiff to the LTA that led to the alleged discovery of the fraudulent over-claims were only sent in January 2019.[67] It is this discovery that entitled the first defendant to positively assert that the plaintiff had made an over-claim and then call on the PB.[68] As for the quantum of the over-claim in the amount of S$2,057,944.79, the first defendant candidly agrees that it has relied on the figures in its PR 20 to calculate the overpayment because there is no other way to determine what is the actual amount of the over-claim other than to use the first defendant's asserted methods of measuring the amount of quantities,[69] even though these methods had already been rejected by the adjudicator in SOP 372/2018 as can be seen in 1AD.[70]

55 In relation to the temporary finality of 1AD, the first defendant emphasises that the temporary finality of 1AD is not being challenged. It has made payment in full under that adjudication determination.[71] According to the first defendant, it is entitled to disagree in good faith with the determination and

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66 Supplementary Counsel Note (15 July 2019) p 3.

67 1DWS p 10, para 24 and p 12, para 33.

68 1DWS p 14, paras 40 – 42.

69 Minute Sheet (15 July 2019), p 3.

70 PBOD1 p 155 para 51 – p 158 para 55.

71 SH p 25, para 79.

still insist that the plaintiff has over-claimed for the purposes of justifying the call on the PB.[72] This is despite the fact that the over-claim amounts had been adjudicated to be payable in 1AD. The plaintiff can then take the dispute to arbitration against the first defendant, in accordance with the terms of the contract between them, so that the question of whether there has been overpayments can be finally resolved.[73]

56 The first defendant initially emphasised that this was a re-measurement contract, although its counsel later agreed in the course of the hearing that there was no contemplated re-measurement exercise that would be carried out now that the Subcontract was at end. Rather, what the first defendant had done was to re-measure by itself the quantities disposed by the plaintiff using its own methods and it was entitled to do this in spite of the decision in 1AD.

Restating a position that was rejected in SOP 372/2018

57 As I have already recounted, the plaintiff had served on the first defendant PC 20, claiming the amount of S$3,278,935.95.[74] The first defendant's payment response, PR 20, was that the plaintiff should instead pay the first defendant the sum of S$167,848.99.[75] There were numerous points of contention between the parties in the adjudication proceedings. One major point was how the work done by the plaintiff should be measured.

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72 1DWS pp 24 – 25, para 63; p 46, paras 112 – 113; p 36, para 94.

73 1st Defendant's Reply Submissions ("1DRS") p 9, para 34; Minute Sheet (15 July 2019), p 3.

74 PBOD1 p 126.

75 PBOD1 p 130 and p 138 at para 7.

58 The plaintiff argued that the measurement should be by reference to the actual quantities of work done. The plaintiff relied primarily on drawings issued by the LTA to the first defendant, and by site measurement drawings which had been signed off by both the plaintiff and first defendant. For certain specific items of work, the plaintiff relied on the number of lorry loads, as it argued that this method of measurement was specified by the bill of quantities in the Subcontract.[76]

59 On the other hand, the first defendant argued that the amounts claimed by the plaintiff should have been based on the design quantities contemplated by the construction drawings. This was the proper way of measurement required under the Subcontract. As such, the plaintiff's claims in PC 20 were inflated and excessive.[77]

60 On this issue, the adjudicator decided that, under the terms of the Subcontract, the plaintiff was entitled to payment for quantities measured either by the drawings issued by the LTA or the site measurement drawings.[78] In cases where the bill of quantities stipulated that certain types of work were to be measured by "loads", that meant that the quantities should be calculated by reference to the number of lorry loads. Hence, the first defendant's arguments that the quantities of work were to be measured by reference to construction drawings were rejected.[79]

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76 PBOD1 p 153, para 47

77 PBOD1 pp 153 – 154, para 48.

78 PBOD1 pp 157 – 158, para 55.

79 PBOD1 pp 159 – 161, paras 59 – 61.

61 I will give several examples of the adjudicator's findings which, as will be explained below, are relevant to the issue of whether the allegations of fraudulent over-claims are but a front to rehash arguments that were already raised and rejected by the adjudicator in SOP 378/2018.

(1) Measurements adopted in 1AD

62 For item B7 in the bill of quantities, which is listed as the "[d]isposal of hardcore mixed with soil",[80] the adjudicator determined that the plaintiff was entitled to payment based on the number of lorry loads of materials.[81] Thus, as claimed in PC 20, the plaintiff was entitled to the amount of S$222,900 for this item of work. The amount allowed was the number of lorry loads multiplied by the agreed unit rate of S$300 per lorry load,[82] with each lorry load carrying 8 m^3 of materials, as specifically provided for in the bill of quantities.[83] The adjudicator expressly rejected the first defendant's contention that the quantities should be determined by reference to "cubic m" or the volume disposed of as shown by the construction drawings.[84] The difference between what was accepted by the adjudicator and the first defendant's figure was S$171,900.[85]

63 For item D1 in the bill of quantities, which is listed as "[d]isposal of suitable [and] not suitable excavated material to LTA's Staging Ground",[86] the

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80 PBOD p 127.

81 PBOD1 pp 160 – 161, para 61.

82 PBOD1 p 127 and pp 195 – 196, paras 154 – 156.

83 PBOD1 pp 127 and 133.

84 PBOD1 pp 159 – 161, paras 60 – 63.

85 $222,900 - $51,000: PBOD1 p 133.

86 PBOD1 p 127.

plaintiff relied on drawings issued by LTA as well as drawings prepared for joint measurements that were signed by both the plaintiff and first defendant.[87] The adjudicator accepted this method of measuring the quantities of work. He did not accept the first defendant's contention as to the applicable rate to be used and also the alternative quantities put forward by the first defendant.[88] He determined that the plaintiff was entitled to S$268,822.70,[89] and he did not accept the first defendant's alternative figure of S$212,363.47.[90] The difference between what was allowed by the adjudicator and the first defendant's figure was S$56,459.23.[91]

64 Another example is item D5, listed in the bill of quantities as "[d]isposal of unsuitable material not accepted by LTA's Staging Ground". This referred to material such as slime or sludge.[92] Consistent with the sum claimed in PC 20, the adjudicator determined that the plaintiff was entitled to S$270,256 for this item of work.[93] The first defendant did not state any specific reason in PR 20 for refusing payment, save to state that the plaintiff was only entitled to S$43,168 for such work.[94] The difference between what the adjudicator awarded and the first defendant's figure was S$227,088.

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87 PBOD1 p 201, para 181.

88 PBOD1 pp 192 – 197, paras 147 – 163.

89 PBOD1 p 202, para 183.

90 SH p 377.

91 SH p 377.

92 PBOD1 p 206, para 198.

93 PBOD1 p 127 and p 207 at para 201.

94 PBOD1 p 131.

65 Item D7 in the bill of quantities is listed as the "[d]isposal of unsuitable material to LTA's Staging Ground including double handling in [the TOL treatment area]".[95] This referred to slime that was mixed with hard materials.[96] In PC 20, the plaintiff claimed for S$599,032 under item D7, being the product of 26,937 m^3 of slime multiplied by the agreed unit rate of S$19 per m^3 of such slime that was disposed.[97] The first defendant contended the disposal of materials under item D7 ought to be charged at the unit rate of S$11 per m^3, which was the same unit rate for item D1.[98] The adjudicator rejected the first defendant's contention as item D1, unlike item D7, did not refer to slime. The evidence before the adjudicator showed that the plaintiff had been specifically instructed to segregate the slime from the hardcore materials, such that the slime had to be transported to the TOL treatment area before being sent to MESG, the LTA Staging Ground. Hence, the adjudicator found that it was incorrect to apply the unit rate applicable for item D1, which did not relate to slime.[99] Accordingly, the adjudicator determined that the plaintiff was entitled to the sum of S$598,272[100] for this item of work, as compared to the first defendant's figure of S$104,272,[101] a difference of S$494,000.

66 Item I2 in PC 20 was a claim for variation works by the plaintiff. It was described as "[s]ieving/segregation/separation of materials (i.e. wsm slime &

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95 PBOD1 p 127.

96 PBOD1 p 203, para 188.

97 PBOD1 p 127.

98 PBOD1 pp 203 – 204, para 190.

99 PBOD1 pp 204 – 205, paras 191 – 193.

100 PBOD1 p 205, para 194.

101 PBOD1 p 131.

the likes) mixed with hardcore & etc in [the TOL treatment area]".[102] The adjudicator found that the plaintiff was entitled to be paid for this work which had been done. The plaintiff's claim for the work done under item I2 was supported by drawings issued by LTA and site measurement drawings. The adjudicator accepted these quantities and also the rates submitted by the plaintiff. He determined that the plaintiff was entitled to S$507,744.30 for this item of work. He found that the first defendant in PR 20 did not challenge the quantity claimed and also did not offer any alternative rate or quantity for the work done here.[103]

67 Item I7 in PC 20 was a claim for variation works which the plaintiff described as "[c]rushing of excavated lumpy soil". The adjudicator found that the first defendant was liable to pay the plaintiff for such work because there was nothing in the Subcontract which required the plaintiff to crush hardcore materials to render them suitable for acceptance at MESG, the LTA Staging Ground. In support of its claimed quantity, the plaintiff relied on drawings from LTA and site measurement drawings. This was accepted by the adjudicator, who determined that the plaintiff was entitled to be paid S$319,072.80.[104] The adjudicator noted that the first defendant did not specifically challenge the quantities claimed for this item of variation work and did not offer any alternative rate or quantity.[105]

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102 PBOD1 p 129.

103 PBOD1 pp 214 – 215, paras 228 – 229.

104 PBOD1 p 175, para 98; p 217, para 238; p 218, para 242.

105 PBOD1 p 218, para 241.

68 I have gone through the examples above as to the adjudicator's findings on various claims for work done to show that the adjudicator had in large agreed with the plaintiff on the ways to measure the quantities of work done, *ie*, by reference to "as built drawings" rather than "design drawings", and also that the proper method of measuring quantities for certain specific items of work as per the terms of the Subcontract was to refer to the number of lorry loads and the applicable unit rate.

(2) The alleged over-claimed amounts are merely figures which had been rejected by the adjudicator in SOP 372/2018

69 I turn now the first defendant's allegations of over-claims. One of the alleged over-claims is in relation to the final quantities disposed. From my review of the Subcontract bill of quantities,[106] and as can be seen from 1AD, it is clear that parties had agreed to different methods of measurement for different kinds of work and different types of materials disposed of. For example, the same quantity of materials may be subjected to different types of charges depending on what kind of work is done by the plaintiff on those materials. Given this, I cannot agree with the first defendant that there is an over-claim *merely* by referring to its calculation of the final disposal quantity and comparing it with the sum of the quantities in PC 24, *without* taking into account which portions of the quantities claimed in PC 24 were subject to which of the many different charges for different work done.

70 The allegation concerning the over-claim for hardcore disposal suffers from a different difficulty in that the bill of quantities in the Subcontract, as recognised by the adjudicator in 1AD, measures some of the quantities of

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106 PBOD1 p 97.

hardcore disposal claimable by the plaintiff in terms of lorry loads *and* some by the "as built drawings". Thus, in some cases, the *actual* quantities of hardcore materials transported by the plaintiff may be irrelevant because the measurement proceeds *on the basis of the number of lorry loads involved*. If so, the mere fact that there is a difference in the volume of hardcore material claimed in PC 24 and the first defendant's own calculation does not tell us whether there has in fact been an over-claim under the terms of the Subcontract.

71 Further, and more fundamentally, I disagree that it was possible for the first defendant to ascertain a figure of final disposal quantity from the weight figures found in the plaintiff's emails in January 2019 to the LTA. The single conversion formula used by the first defendant to convert weight to volume does not take into account the different types of material disposed of, such as slime, sludge, hardcore, soil, *etc*, which densities will vary widely. It cannot properly and sensibly be a basis to assert that the volume of material disposed of is different from what is stated in PC 24.

72 The difficulties with the first defendant's position is perhaps best demonstrated by its quantification of the amount of the alleged over-claim of S$2,057,944.79. After having written to the plaintiff on both the alleged over-claim for both hardcore disposal and final disposal quantity in January 2019, the first defendant issued its further notice of dispute where it set out the alleged amount of over-claim as S$2,057,944.79.[107] The breakdown of the over-claim can be seen in an annex to the further notice of dispute.[108] One would have expected to see in this breakdown of the amounts that constitute the over-claim

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107 SH p 378.

108 SH pp 377 – 378.

a correlation with the new evidence that has been uncovered by the first defendant in January 2019. But, that is not the case.

73 Instead, when one examines this breakdown, and as admitted by counsel for the first defendant,[109] it is a mere reference back to the figures in PR 20. These figures had already been considered and rejected by the adjudicator in SOP 372/2018, as reflected in his decision in 1AD. In other words, the over-claim amounts are simply the amounts which the adjudicator had specifically considered and awarded to the plaintiff.

74 For item B7, referred to at [62] above, the first defendant included the amount of S$171,900 as an item of over-claim.[110] This is simply the difference between the S$222,900 claimed by the plaintiff in PC 20 for item B7, which was awarded by the adjudicator,[111] and the alternative figure of S$51,000 put up by the first defendant in PR 20 for the same item.[112] As explained at [62], the adjudicator had determined that the first defendant had not properly measured the quantities as it relied on the construction drawings instead of the number of lorry loads, which is the agreed unit of measurement provided for item B7 under the Subcontract bill of quantities.[113] It is clear from this example that the first defendant's contention that this is an over-claim is simply, in reality, its disagreement with the determination of the adjudicator on this item of work, instead of being based on any newly uncovered evidence. The first defendant

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109 Minute Sheet (15 July 2019) at p 3.

110 SH p 377.

111 PBOD1 p 127.

112 PBOD1 p 133.

113 PBOD1 p 97, No "B6": Disposal of Hardcore mixed with soil".

is simply insisting on its method of measurement as being the correct one, despite the decision of the adjudicator in 1AD.

75 The same thing is done for item D1 in the breakdown, where the first defendant contends that the plaintiff has over-claimed in the sum of S$56,459.23.[114] As explained at [63] above, the adjudicator had accepted the plaintiff's reliance on "as built drawings" to determine the quantities involved. The first defendant has not explained to me how this sum of S$56,459.23 is an over-claim based on the new evidence uncovered, and the alleged overclaim is again simply the difference between the amount awarded by the adjudicator and the amount certified by the first defendant for item D1.[115] It appears to me again that this, quite obviously, is just a disagreement with the adjudicator's determination on this item of work.

76 Items D5 and D7, explained at [64] and [65] above, can be taken together. In its breakdown, the first defendant has included the sums of S$227,088.00 and S$494,000.00 as over-claimed amounts.[116] However, these items of work were allowed by the adjudicator for disposal for slime and sludge, and also for work done by the plaintiff in segregating the slime and sludge from the hardcore material. There was no explanation by the first defendant in its submissions or its affidavits before me as to how claims for these types of work correlated to the over-claims on the final disposal quantity or the hardcore disposal. I am left to conclude that this again is simply the first defendant's

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114 SH p 377.

115 See SH p377.

116 SH p 377.

disagreement with the determination of the adjudicator rather than any genuine grievance about an over-claim.

77 Perhaps the clearest illustrations that the first defendant has been unable to quantify the alleged over-claims in the amount of S$2,057,944.79 in relation to the final disposal quantity and the hardcore disposal are items I2 and I7. It will be recalled that these were variation works claimed by the plaintiff, which were permitted by the adjudicator, as explained at [66] and [67] above. The first defendant has included the sums of S$507,744.30 and S$319,072.80 as over-claimed amounts for items I2 and I7 respectively.[117] However, these works were in relation to the sieving/segregation/separation of materials mixed with hardcore, and crushing of excavated lumpy soil, and they do not relate to the volume of material disposed of. The crux of the first defendant's complaint is that there was an over-claim of the *volume* of material disposed of by the plaintiff. Despite this, there is no explanation by the first defendant as to why these sums under items I2 and I7 are now asserted to be over-claims, as the basis to call on the PB.

78 Counsel for the first defendant explained at the hearing before me that the total volume of hardcore disposal and final disposed quantities as calculated by them in PR 20 has now been vindicated because the new volume figures (extrapolated from the weight figures in the plaintiff emails to LTA) are quite close to the figures in PR 20.[118] However, it must not be forgotten that the first defendant had asserted in PR 20 that the method of measurement of quantities is by reference to design or construction drawings, a position that the adjudicator

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117 SH p 378.

118 Minute Sheet (15 July 2019) p 3.

in 1AD had rejected. That being the case, the onus is on the first defendant to show the amounts of the over-claim by reference to the newly uncovered evidence, not just by restating figures in PR 20 which were calculated on a different basis altogether. But, there has been no real explanation or justification of these figures by the first defendant, just simply an assertion that these figures represent the over-claim amounts. This is quite fatal, in my judgment, because this reveals that the first defendant's "call on the bond [was] motivated by [the] improper purpose" (*Mount Sophia* at [37]) of seeking to overturn parts of the adjudicator's findings in SOP 372/2018. This was done by way of a purported reliance on the alleged newfound discoveries of fraudulent over-claims on the plaintiff's part. In fact, the above discussion reveals that the differences between the amounts awarded by the adjudicator in 1AD and the figures in PR 20 form the true basis of its call on the PB, and that the alleged overclaims which were supposedly only uncovered after SOP 372/2018 has been raised as a façade to justify the first defendant's call on the PB.

79 It bears emphasis that I make no findings about whether the plaintiff had or had not made any fraudulent over-claims. In evaluating whether the call on the bond was unconscionable, the court does not consider the "substantive entitlements of the parties". This is because, during the interlocutory proceedings for an injunction, the court is not in a position to determine the "reliability and probative value" of the evidence, and the key consideration in an injunction application is simply whether the "overall tenor and entire context of the conduct of the parties support a strong *prima facie* case of unconscionability" (*Mount Sophia* at [40]). My findings relate solely to the circumstances surrounding the call on the PB. Given that the figures claimed to support the call on the PB are but a restatement of the figures in PR 20, I am inclined to agree with the plaintiff that the call on the PB was motivated by the

improper purpose of clawing back some of the sums paid under 1AD, on the pretext of alleged newly discovered fraudulent over-claims that had been made by the plaintiff or because that there has been some kind of re-measurement done by the first defendant.

80 Therefore, in my judgment, the S$2,057,944.79 that the first defendant claims as being overpaid, and which formed the basis for its call on the PB, quite clearly just stemmed from its disagreement with the adjudicator's determination on various items of work in 1AD.

81 Given my conclusion above that the first defendant was simply dissatisfied with the adjudication determination in 1AD and looking to claw back some portion of it by calling on the PB, the related question is whether this would offend the principle that the determination enjoys temporary finality.

Temporary finality of 1AD

82 Under s 21 of SOPA, an adjudication determination binds the parties until three situations arise. First, when leave of court to enforce the adjudication determination is refused pursuant to s 27 of SOPA (s 21(1)(*a*) of SOPA). Second, when the dispute between the parties is full and finally settled, whether by arbitration, court proceedings or otherwise (s 21(1)(*b*) of SOPA). Third, when the dispute is settled by agreement of the parties (s 21(1)(*c*) of SOPA). Until any of these three situations arise, the parties must comply with and respect that determination. In that sense, there is a limited form of issue estoppel that binds the parties in relation to the items of work and amounts payable as determined by the adjudicator. In my judgment, it would offend the temporary finality of an adjudication determination if a party is permitted to effectively "re-open" that decision by calling on a performance bond to claim amounts that

were disallowed by the adjudicator in his determination, or to recover amounts that were allowed by the adjudicator in his determination.

83 The first defendant submits that the temporary finality of 1AD is not being challenged. It has made payment in full under that determination. It respects and has complied with that determination.[119] But, it is also entitled to disagree in good faith with the determination and still insist that the plaintiff has over-claimed.[120] In support, the first defendant refers to the case of *AM Construction Technology Pte Ltd v South Island LG Pte Ltd and Liberty Insurance Pte Ltd* [2015] SGDC 181 ("*AM Construction*"). There, the contractor sought to restrain the developer from receiving payments under an on-demand performance bond until the final determination of the intended arbitration between the parties. In the entirety of the circumstances, the district judge concluded that, while the bond was called a mere ten days after the developer had paid out on an adjudication determination, this was insufficient to show that the call on the performance bond was unconscionable.

84 In my view, the SOPA regime exists in large separately and independently from the contractual arrangements between the parties as to security. Ultimately, whether and when a bond may be called depends on the contractual arrangements between the parties. However, a call on a bond may in certain circumstances be regarded as unconscionable and/or in bad faith, and thus should be enjoined, if the beneficiary attempts to justify its call based on arguments that have already been decided (and dismissed) in an adjudication determination. I accept the plaintiff's counsel's submissions that, if a call made

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119 SH p 25, para 79.

120 1DS p 10, para 21; p 28, para 69.

in such circumstances is permitted, the temporary finality of the adjudication determination may be undermined.[121] This is because, on the one hand, the sub-contractor receives a sum pursuant to the adjudication determination, but, on the other hand, it might then have to use some part of that sum to reimburse its bank because the main contractor has called for payment under the bond for matters already decided by the adjudicator in the sub-contractor's favour. This would contradict the stated purpose of SOPA, which is to facilitate cash flow in the building and construction industry, in particular for sub-contractors: see *W Y Steel* at [18].

85 It seems to me that the first defendant appears to accept this proposition as correct because it does not put forward its case as one where it simply disagrees with the determination of the adjudicator in 1AD *per se* and hence is entitled to re-assert its position in those adjudication proceedings as the basis upon which to call on the PB. Rather, the first defendant based its call on the PB as one which was based on *new* evidence discovered *after* the adjudication proceedings in 1AD were completed. However, as already explained, I do not accept that this was a genuine reason because the first defendant was wholly unable to justify the amount of its claim for overpayments by reference to any new evidence. Furthermore, by its attempt to resurrect the amounts that it had relied on in PR 20, the first defendant has revealed that its true grievance is not because of any newly discovered evidence of over-claims, whether fraudulent or otherwise, or any genuine re-measurement that it conducted, but a simple refusal to accept that it is bound by the adjudicator's determination in 1AD at this time. Herein lies the fundamental difference between the present case and *AM Construction*. While in *AM Construction*, the developer had called on the

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121 Minute Sheet (15 July 2019) p 2.

performance bond based on genuine disputes that had *not* been the subject of the adjudication determination (*AM Construction* at [55] and [75]), the first defendant here is seeking to call on the performance bond precisely to undermine 1AD, by masking its call as one based on *new* evidence when a proper analysis shows that this is not the case.

86 For the same reason, *AES Façade Pte Ltd v Wyse Pte Ltd and another* [2018] SGHC 163 also does not assist the first defendant. In that case, the subcontractor sought to restrain its main contractor from calling on the full guaranteed sum under the performance bond. The subcontractor argued that the call was an "unfair attempt to 'claw back' the monies paid out following the adjudication determination", which had been decided in the subcontractor's favour. Lee Seiu Kin J did not accept the subcontractor's argument as the issue of liquidated damages for delay, on which the main contractor justified its call on the bond, had consistently been relied on by the main contractor. The main contractor had been unable to raise the issue of liquidated damages during the adjudication as its payment response had been served out of time and thus could not be considered by the adjudicator. Hence, it could not be said that the call was a retaliatory attempt to claw back some of the amount paid under the adjudication determination since the basis of the call, being the liquidated damages, was not even in issue in the adjudication. That case is thus different from the present one. Here, the first defendant is in fact trying to claw back some of the sums paid out under 1AD, based on issues that had been ventilated during the adjudication proceedings in SOP 372/2018.

87 A question may arise as to whether Singapore courts ought nonetheless to grant the same amount of latitude to parties to call on their contractual entitlement to security as in the Australian cases cited in *AM Construction*. Of the two cases cited therein, *Patterson Building Group Pty Ltd v Holroyd City*

Council [2013] NSWSC 1484 ("*Patterson*") is more analogous to our present situation. There, the contractor sought to restrain the employer from calling on two guarantees which it had obtained in favour of the employer. A question was raised as to whether the employer was entitled to have recourse to the security to recover amounts paid pursuant to an adjudicator's determination. In particular, the issue was whether allowing such a call would "have the effect of excluding, modifying, or restricting the operation of the" Building and Construction Industry Security of Payment Act 1999 (New South Wales) ("NSW SOPA") (*Patterson* at [59]). That provision is s 34 of the NSW SOPA, which has its counterpart in s 36 of our SOPA. White J held that there was nothing inconsistent with allowing the employer to exercise its security by calling on the bond. This was because the adjudicator's determination had already achieved its desired effect of requiring the employer to make payment to the contractor when it otherwise would not have been obliged to make such payment prior to the final determination of the parties' contractual rights. According to the judge, the contractor had voluntarily assumed the risks associated with obtaining the performance bond, and it would "substantially weaken" the purpose of granting such bonds if a call could be restrained simply because it would cause hardship or damage the contractor's reputation (*Patterson* at [70]–[75] and [79]). Thus, the contractor's application to restrain the call on the guarantees was dismissed.

88 The district judge in *AM Construction* considered the decision of *Patterson*, and relied on it as a basis to conclude that "the [contractor] would not be worse off by the call on the Performance Bond than if it did not have the benefit of the adjudication determination. On the flip side, the [developer] should not be made worse off by the adjudication determination such that he is

being deprived from exercising his contractual right as agreed upon by parties" (*AM Construction* at [74]).

89 However, the status of an adjudication determination appears to differ in Singapore and New South Wales, Australia. Section 32(1)(*a*) of the NSW SOPA provides that "nothing in this Part affects any right that a party to a construction contract: (a) may have under the contract …". In accordance with that provision, a "determination is not a determination of the parties' contractual rights and obligations. The adjudication determines, on an interim basis, an amount to be paid by the defendant to the plaintiff in respect of its claim for a progress payment, but, otherwise, and subject to s 34 of the [NSW SOPA], the adjudication does not affect the parties' rights under the contract" [emphasis in original removed] (*Patterson* at [22]). Therefore, under the NSW SOPA, an adjudication determination in New South Wales appears to be a simple means of obtaining "prompt interim progress payment". This is made clear by the decision of the New South Wales Court of Appeal in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140 at [62]:

> It is not correct that retention of security "undoes" an adjudicator's determination … The adjudicator's determination remains, and brings payment of the adjudicated amount, but that is interim and subject to a different position being established in relation to payment for the relevant work or related goods and services, contractually or in proceedings. If in civil proceedings it is decided that the contractor was entitled to $10 or $30, rather than the $20 determined by the adjudicator, that does not undo the adjudicator's determination. It has done its work in **ensuring "prompt interim progress payment on account, pending final determination of all disputes"** (per Ipp JA in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* …) [emphasis added]

90 In contrast, s 21 of our SOPA, which has no equivalent in the NSW SOPA, has been interpreted as according an adjudication determination the status of temporary finality. This is to be distinguished from the interim status

accorded to adjudication determinations under the NSW SOPA. As the Court of Appeal explained in *W Y Steel* at [18], s 21 of SOPA "creates an intervening, provisional process of adjudication which, although provisional in nature, is *final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved*" [emphasis added]. Hence, the temporary finality accorded to adjudication determinations in Singapore operates as a limited form of issue estoppel on the disputes raised before the adjudicator, in the sense that the adjudicator's determination of such issues are "final and binding" *unless and until* it is overcome by one of the three circumstances highlighted in s 21 of the SOPA, such as where the dispute is finally determined by a court or tribunal (s 21(1)(*b*) SOPA). Hence, insofar as the judge in *AM Construction* concluded at [74] that the beneficiary of a bond ought not to be made worse off by an adjudication determination such that he is being deprived of his contractual right to call on said bond, I will add the following caveat – in calling on the bond, the beneficiary cannot rely on contentions and claims that were disposed of by an adjudicator against the beneficiary, and whose determination remains binding on the beneficiary. Otherwise, the beneficiary would be contravening the principle of temporary finality (guaranteed by s 21 of SOPA).

91 On the facts, I am of the view that the first defendant's statements and conduct belie its true motives behind the call on the PB, which is not a proper one since it seeks to undermine the temporary finality of 1AD. In my judgment, this shows unconscionability affecting the call on the PB.

The provisions in the Subcontract

92 Finally, the plaintiff submits that the call on the PB is inconsistent with the terms of the Subcontract, thus bolstering a finding that the call was made

unconscionably. The terms of the Subcontract are relevant because it shows the agreement between the parties as to the purpose of the PB. If the call on the PB is not one that is contemplated by the terms of the Subcontract, this would constitute further evidence of unconscionability, as the first defendant would stand to gain more than what it bargained for under the Subcontract (see *JBE Properties* at [11]).

93 Thus, in *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd* [1998] 3 SLR(R) 961, the defendant-buyer was restrained from calling on the performance guarantee as the non-delivery of rice was due to floods caused by a typhoon, and there was a "*force majeure*" clause in the contract. In the circumstances, the court felt that it was unconscionable for the defendant to receive payment under the performance guarantee. The decision was recognised as an example when it would be unconscionable to call on a performance bond or guarantee in the Court of Appeal decision of *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at [46].

94 Also, in *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter* [2019] 4 SLR 1324 ("*Ryobi Tactics*"), the subcontractor was engaged by the main contractor for three different construction projects, namely the Changi, the Jurong, and the Chestnut projects. A total of four subcontracts were entered into. Under each subcontract, the subcontractor was to furnish the main contractor with a performance bond. When disputes arose in relation to the Chestnut project *only*, the main contractor called on the full value of all four performance bonds. Kannan Ramesh J held that on the face of the performance bonds, the main contractor was not entitled to call on the three performance bonds that related to the Changi and Jurong projects for losses which it allegedly suffered in relation to the Chestnut project. Thus, on an application of

contractual principles, the calls on those three performance bonds ought to be restrained. In any case, the calls on the performance bonds were unconscionable because clause 5.6(b) of the subcontracts indicated that the parties intended the performance bonds to be called only when the main contractor had reason to believe that the corresponding subcontract had been breached. To allow the calls on the performance bonds in circumstances when the corresponding subcontract had not been breached would be to condone the breach of the relevant subcontract (*Ryobi Tactics* at [36]). Consequently, it was held that the calls on the performance bonds that related to the Changi and Jurong projects would be restrained as they were unconscionable for going beyond the terms of the underlying subcontracts.

95 In this case, clause 2.2.1 of the Subcontract provides that the plaintiff must provide to the first defendant an "irrevocable, unconditional and payable on-demand performance security" in a form set out in the appendix to the Subcontract.[122] The PB that was issued by the second defendant was on these terms, and could therefore be called upon by the first defendant "on demand".[123]

96 The plaintiff's counsel submits that the use of the terms "performance security" suggests that the PB was to secure the performance of the plaintiff's duties and obligations under the Subcontract.[124] This is confirmed by the terms of the PB, which provide that it is to be "held by [the first defendant] as security for and until the performance and completion by the [plaintiff] of all the

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122 PBOD1 p 46.

123 PBOD1 p 118, para 1.

124 PWS p 28, para 64.

conditions of the Subcontract in all respects".[125] In this case, the Subcontract had already been terminated in December 2018[126] and there were no other duties, obligations or outstanding work for the plaintiff to perform. Hence, according to the plaintiff, the PB should not have been called upon by the first defendant in circumstances that were unrelated to the plaintiff's performance of any outstanding work.[127]

97 I do not accept the plaintiff's argument. I do not think that the words "performance security" as used in the Subcontract when referring to the PB can be read as expansively as the plaintiff contends. It was simply a description of the PB and nothing more than that. In any event, it was not correct that the termination of the Subcontract meant the cessation of all of the plaintiff's duties and obligations. In fact, clause 2.2.3 of the Subcontract provides that the PB "shall be valid until the completion of the Subcontractor's responsibilities and obligations for the remedy of defects in the Subcontract Works".[128]

98 The more relevant provision in the Subcontract is clause 17.7, which provides:[129]

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125 PWS p 28; PBOD1 p 118, para 1.

126 SH p 251.

127 PWS p 32, para 76

128 PBOD1 p 46.

129 PBOD1 p 65.

> **[The first defendant's] Offset Right**
>
> The [first defendant] may recover *any amount due* to the [first defendant] *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 the [plaintiff] or recover them as a debt due from the [plaintiff].
>
> [emphasis added in italics]

99 This is the only term in the Subcontract which sets out when the PB may be called by the first defendant. The plaintiff submits that clause 17.7 circumscribes and limits when the PB may be called by the first defendant.[130] The first defendant does not contend that clause 17.7 is only an example of when a call on the PB may be made and is *not* exhaustive of all circumstances permitting a call on the PB. Instead, the parties locked horns over the interpretation of clause 17.7 and, more particularly, what is meant by "any amount due to [the first defendant] under the Subcontract".[131]

100 The plaintiff submits that the phrase must refer to a sum due to the first defendant under a particular provision of the Subcontract. Hence, it cannot refer to the first defendant's claim for recovery of overpayments due to an over-claim, fraud or mistake because such a claim by the first defendant would lie in restitution.[132] On the other hand, the first defendant urges me to take a more generous reading of the phrase "amount due … under the Subcontract". It argues that, if the first defendant has paid over a sum to the plaintiff pursuant to the terms of the Subcontract, and it subsequently realises it has made an

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130 Minute Sheet (9 May 2019) p 2.

131 PBOD1 p 65; 1DWS p 34, para 86; PWS p 28, paras 64 – 66.

132 Minute Sheet (9 May 2019), p 2.

overpayment, its right to recover the overpaid amount must surely be "due … under the Subcontract".[133]

101 I find that the plaintiff's interpretation is more consonant with the literal and natural reading of the clause, which makes clear that the sum claimed (or the "amount due") must be so due "*under* the Subcontract" [emphasis added].[134] I am therefore unable to accept the first defendant's interpretation of clause 17.7 because it would require me to read words into that clause, in particular that the amount due under the Subcontract includes sums that were allegedly overpaid under the Subcontract. There is nothing to indicate that such a reading is necessary or obviously something missed out by the parties had they only thought about the matter.

102 As such, I find that the first defendant's call on the PB was not consistent with the terms of the Subcontract between the parties, in that, the recovery of an alleged overpayment was not a purpose for which the first defendant could call on the PB. That the call on the PB was for reasons which the parties had not agreed is thus another factor which indicates unconscionability.

Conclusion

103 Considering the above matters in the entirety of their context, I find that the call on the PB was unconscionable and ought to be restrained. The call on the PB was motivated by the improper purpose of effectively overturning parts of the adjudicator's determination in 1AD, and this undermines the temporary finality of 1AD. The call on the PB was also inconsistent with the terms of the

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133 1DWS p 34, paras 85 – 86.

134 PBOD1 p 65.

Subcontract, which on its proper interpretation does not show that parties envisaged that the PB can be called so that the first defendant can recover alleged overpayments made to the plaintiff.

104 For the above reasons, I grant prayers (1) to (3) of Originating Summons 439 of 2019. Parties are at liberty to apply to the court for further directions at such time there is a final resolution of the first defendant's claims against the plaintiff for the alleged overpayments, whether through arbitration or otherwise.

105 I will hear the parties separately on the question of costs.

Ang Cheng Hock
Judge

Poon Guokun Nicholas (Breakpoint LLC) for the plaintiff;
Lee Peng Khoon Edwin and Er Hwee Lee Danna Dolly (Eldan Law LLP) for the first defendant;
The second defendant absent and unrepresented.