

STAYING THE ENFORCEMENT OF AN ADJUDICATION DETERMINATION

[2022] SAL Prac 10

Justin **TAN**

*Accredited Specialist in Building and Construction Law;
Senior Associate, WongPartnership LLP.*

I. Introduction

1 A respondent on the receiving end of an adjudication determination made under the Building and Construction Industry Security of Payment Act 2004¹ (“SOP Act”) typically has little choice but to pay the adjudicated amount in accordance with the adjudication determination to the claimant.

2 However, when the respondent views that the claimant is potentially insolvent, the respondent would try to obtain a court order to stay the enforcement of the adjudication determination to avoid paying the claimant. This is especially if the respondent intends to seek a final determination of the dispute at trial or arbitration.

3 Such an issue surfaced before the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd*² (“W Y Steel”), where the respondent sought a stay of enforcement of the adjudication determination pending arbitration, over concerns regarding a claimant’s solvency. In that case, the Court of Appeal refused the respondent’s application for such a stay, the reasons for which will be discussed in this article.

4 Recently, two respondents were successful in persuading the High Court to grant partial stays of enforcement of the

1 2020 Rev Ed.

2 [2013] 3 SLR 380.

adjudication determinations against their respective claimants in the cases of *CEQ v CER*³ (“CEQ”) and *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd*⁴ (“Dongah”).

5 *CEQ* and *Dongah* are very helpful to respondents who seek a stay of enforcement against financially distressed claimants. This article summarises the principles and factual considerations regarding such stay applications. It also sets out a secondary point – respondents making such stay applications should first pay the adjudicated amount into court.

II. Overview of legal position under Building and Construction Industry Security of Payment Act 2004

6 It is settled under the SOP Act that a successful claimant to an adjudication determination would generally be entitled to payment quickly, given the overarching purpose under the SOP Act for parties to “pay now, argue later”, as summarised by the Court of Appeal’s decision in *WY Steel*.⁵

7 However, *WY Steel* emphasised that the claimant’s right to payment was not unfettered. The court retained its discretion to stay enforcement of an adjudication determination in certain cases to secure the ends of justice, particularly where the respondent’s residual right to have its claims ventilated in full was affected.⁶

8 Subsequently, the court in *WY Steel* held that it could stay enforcement of an adjudication determination if there is evidence of the claimant’s actual present insolvency, or evidence (on a balance of probabilities) that if the stay was not granted, the money paid to the claimant would not ultimately be recovered after final determination:

3 [2020] SGHC 192. While *CEQ v CER* [2020] SGHC 192 was the subject of an appeal in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791, the appeal was decided on issues unrelated to the stay of enforcement of the adjudication determination.

4 [2021] SGHC 239.

5 *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [20].

6 *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [60] and [62].

70 In our judgment, a stay of enforcement of an adjudication determination may ordinarily be justified where there is clear and objective evidence of the successful claimant's actual present insolvency, or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body. ... a court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract.

9 It also bears highlighting from *W Y Steel* that the court will closely scrutinise whether the claimant's financial distress was caused by the respondent's failure to pay the adjudicated amount, or if the claimant's financially distressed state was due to reasons unrelated to the respondent.

III. Principles for granting a stay of enforcement

10 In *CEQ*, the High Court clarified that the two limbs set out in [70] of *W Y Steel* regarding a stay of enforcement were disjunctive. Therefore, a stay of enforcement could be made even if it was not possible to establish actual present insolvency, if there was a real risk of dissipation of funds or an abuse of process by the claimant:⁷

10 ... *the inquiry under the second situation is broader in nature and will necessarily encompass instances where the successful claimant's actual present insolvency is established.* ... Conversely, even where actual present insolvency is not established, it should remain open to a party seeking a stay to produce some other evidence to convince the court of its case in accordance with the second situation above.

11 ... This principle must be applied flexibly. Thus, if a successful claimant is found, at the enforcement stage, *to be in circumstances indicating, for example, a real risk of dissipation of the disputed funds awarded to it, the court must intervene. The same may be said if there*

7 *CEQ v CER* [2020] SGHC 192 at [10] and [11].

is any prima facie evidence or suspicion that the claimant had been using its claim as an abuse of process. ...

[emphasis added]

11 Further, the court in *CEQ* emphasised the importance of a claimant disclosing its financial documents to the court, to demonstrate its financial solvency and that it was not dissipating funds:⁸

21 *The simplest way in which the [claimant] can prove that it has ongoing work and receivables would be to adduce evidence of its bank account and the relevant transactions before the court. In the event that it is unable to do so for valid reasons, the Respondent could simply state those reasons on affidavit. ... [emphasis added]*

12 *CEQ* was applied in the High Court's subsequent decision of *Dongah*. Like in *CEQ*, the court in *Dongah* emphasised that a claimant should disclose its financial documents (*ie*, bank account statements, transactions showing ongoing work, progress claims and certificates, and annual returns and financial statements) to support its claims of solvency:

83 To begin with, the [claimant] has declined to furnish (a) its bank account statements for the last six months showing its cash balance; (b) any relevant transactions showing that it has ongoing work and receivables; (c) project documents for any ongoing projects including contracts, correspondence, and progress claims and certifications; (d) annual returns and financial statements for the financial year ending 30 June 2020; and (e) financial statements for the financial year ending 30 June 2019. The [claimant] claims that these documents are confidential. Yet, these documents would have been the most relevant to clearly show that the [claimant] is presently solvent or that it has ongoing work and receivables.

13 While the decisions of *CEQ* and *Dongah* regarding disclosure of financial documents may seem stringent on claimants, these requirements must be considered in the light of the evidence of the claimant's financial distress.

8 *CEQ v CER* [2020] SGHC 192 at [21].

14 In *CEQ* and *Dongah*, the court's observations about the claimant's non-disclosures were made after the respondent had first provided cogent evidence of the claimant's parlous financial status.

IV. Claimant's financial status in *CEQ*, *Dongah* and *WY Steel*

15 In *CEQ*, the High Court found that there was evidence of the claimant possibly dissipating assets and would not be able to repay any money to the respondent. Such evidence included:⁹

- (a) sharing a common address with the main contractors awarding the projects;
- (b) having a bankrupt's residential address as the claimant's registered address;
- (c) failing to file annual returns since 2014;
- (d) multiple changes of directors and shareholders; and
- (e) projects adduced were not performed by the claimant at all.

16 Given the claimant's evasiveness and silence in the face of the serious allegations levelled by the respondent, the court in *CEQ* found that a partial stay of enforcement of the adjudication determination should be granted.¹⁰

17 However, the court in *CEQ* allowed a partial release of the adjudicated sums amounting to \$500,000 to the claimant to pay its legal fees at arbitration and on appeal.¹¹

18 Similarly, in *Dongah*, the court accepted the respondent's evidence that the claimant was in financial distress and that the respondent might not be able to recover any payment made to the claimant. This was evident by the following:

9 *CEQ v CER* [2020] SGHC 192 at [16].

10 *CEQ v CER* [2020] SGHC 192 at [19].

11 *CEQ v CER* [2020] SGHC 192 at [24]–[26].

- (a) the claimant's lack of ongoing operations;¹²
- (b) the claimant's sale of its only expensive equipment;¹³ and
- (c) one of the claimant's major shareholders returning to Korea with no plans to return to Singapore.¹⁴

19 As such, the court in *Dongah* was persuaded that a partial stay of enforcement of the adjudication determination should be granted, with a partial sum released on account of it being undisputed between the parties.¹⁵

20 The claimants' conduct and scant disclosures in *CEQ* and *Dongah* can be contrasted with the claimant in *W Y Steel*, who filed five affidavits detailing its financial status, including one deposed by its auditor. The details provided by the claimant in *W Y Steel* included:¹⁶

- (a) details of the claimant's ongoing lawsuits with other parties;
- (b) details of its existing contracts and leases; and
- (c) its auditor explaining that the claimant's poor financial status was mainly caused by the respondent.

21 In the light of the claimant's disclosures to the court in *W Y Steel*, the Court of Appeal rejected the respondent's application for a stay of enforcement, holding that there was insufficient proof of the claimant's insolvency and further that the respondent was the main cause of the claimant's financial state.¹⁷

12 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2021] SGHC 239 at [86].

13 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2021] SGHC 239 at [88].

14 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2021] SGHC 239 at [89].

15 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2021] SGHC 239 at [103].

16 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [58].

17 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [72].

22 Compared to the claimants in *CEQ* or *Dongah*, the forthright disclosures of the claimant in *WY Steel* were plainly decisive in demonstrating to the court that it was neither insolvent nor seeking to dissipate assets.

23 In the light of the above, it seems that respondents must first show a *prima facie* case of the claimant's insolvency, intention to dissipate assets or that money paid to the claimant would not ultimately be recovered after final determination of the disputes, before claimants would be required to disclose their financial status to disprove the respondents' allegations.

V. Payment into court

24 Apart from the High Court's decisions in *CEQ* and *Dongah*, respondents seeking a stay of enforcement should also be aware of the District Court's decision in *SC Construction & Renovation Pte Ltd v Jinzhou Construction Pte Ltd*¹⁸ ("*SC Construction*"), which held that respondents should also make an offer to pay the adjudicated amount into court when seeking a stay of enforcement.

25 In *SC Construction*, the respondent applied for a stay on the enforcement proceedings commenced by the plaintiff without applying to set aside the adjudication determination. The court stated that without offering to pay the adjudicated amount into court, the respondent could be circumventing the SOP Act process requiring payment to be first made before any subsequent challenge to the adjudication determination:

19 A respondent who wishes to set aside the adjudication determination had to make payment into court of the unpaid adjudicated amount as security. By filing the High Court suit and making the application for stay of enforcement purely on the strength of its pleaded case in the High Court suit *without intimating how payment of the Adjudicated Amount would be made, the [respondent] appeared to be circumventing the SOPA process which required payment to be made first before any challenge could be made to the adjudication outcome.* [emphasis added]

18 [2019] SGDC 98.

26 Since the respondent in *SC Construction* did not make an offer to pay the adjudication determination into court, the court refused to grant the respondent's application for a stay of enforcement of the adjudication determination.¹⁹

27 While *SC Construction* was not considered in either *Dongah* or *CEQ*, parties should still abide by this decision, as the requirement to pay the adjudicated amount into court strikes a fair balance between the rights of the claimant and respondent.

VI. Conclusion

28 The High Court's decisions in *CEQ* and *Dongah* are welcomed, as they provide clarity to respondents who seek a stay of enforcement of the adjudication determination, as well as claimants who seek to resist such an application.

29 A respondent seeking a stay of enforcement should show cogent evidence of a claimant's financial insolvency or likelihood of a dissipation of assets, and should also be prepared to pay the adjudicated amounts into court.

30 Once the respondent has shown such cogent evidence, the claimant should make every necessary disclosure to the court to demonstrate its solvency and entitlement to the fruits of the adjudication determination. Failing to do so may result in adverse findings and a stay of enforcement of an adjudication determination being ordered by the court.

19 The author notes that the respondent's appeal in *SC Construction & Renovation Pte Ltd v Jinzhou Construction Pte Ltd* [2019] SGDC 98 was allowed in part by the High Court. However, as no grounds of decision were released by the High Court, there is no confirmation on whether the point on paying the adjudicated amount into court was allowed or dismissed. In any case, it would continue to be good practice to make such an offer to pay the adjudicated amount into court.