**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2022] SGCA 2**

Civil Appeal No 113 of 2018 (Summons No 44 of 2021)

Between

(1) ST Group Co Ltd
(2) Sithat Xaysoulivong
(3) ST Vegas Co Ltd

… *Applicants*

And

Sanum Investments Limited

… *Respondent*

In the matter of Originating Summons No 890 of 2016

Between

Sanum Investments Limited

… *Plaintiff*

And

(1) ST Group Co Ltd
(2) Sithat Xaysoulivong
(3) ST Vegas Co Ltd
(4) ST Vegas Enterprise Ltd

… *Defendants*

# JUDGMENT

[Civil Procedure] — [Inherent powers]
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# v
# Sanum Investments Ltd

**[2022] SGCA 2**

Court of Appeal — Civil Appeal No 113 of 2018 (Summons No 44 of 2021)
Sundaresh Menon CJ, Judith Prakash JCA and Quentin Loh JAD
2 September 2021

14 January 2022

**Quentin Loh JAD (delivering the judgment of the court):**

## Introduction

1 In *ST Group Co Ltd and others v Sanum Investments Ltd and another appeal* [2020] 1 SLR 1 ("*ST Group (CA)*"), this court allowed the appeal in CA/CA 113/2018 ("CA 113") and set aside an order granting leave for an arbitral award issued under the auspices of the Singapore International Arbitration Centre ("the SIAC Award") to be enforced in Singapore as a judgment of the High Court. We issued our judgment on 18 November 2019. In CA/SUM 44/2021 ("SUM 44"), the appellants in CA 113, namely ST Group Co Ltd ("ST Group"), Mr Sithat Xaysoulivong ("Mr Sithat") and ST Vegas Co Ltd ("ST Vegas") (collectively, "the Lao Appellants"), now seek various consequential orders following our judgment.

## Facts

### *The parties*

2 The respondent in CA 113 and SUM 44, Sanum Investments Limited ("Sanum"), is a company incorporated in Macau, and was the claimant in arbitration proceedings brought under the rules of the Singapore International Arbitration Centre ("the SIAC Arbitration"). The respondents to the SIAC Arbitration were the three Lao Appellants and ST Vegas Enterprise Ltd ("STV Enterprise"). Where necessary, we refer to all four respondents in the SIAC Arbitration as the "Lao Parties". ST Group owned various business industries in Laos, while ST Vegas and STV Enterprise were affiliated with ST Group. Mr Sithat was the president of both ST Group and STV Enterprise.

### *The substantive dispute and SIAC Arbitration*

3 The substantive dispute between the parties concerns arrangements relating to a slot machine club in Laos. In a bid to obtain relief against the Lao Parties for what it claimed were breaches of contract, Sanum commenced the SIAC Arbitration on 23 September 2015. For present purposes, it is sufficient to note here that a three-member tribunal was appointed, and that the tribunal determined that the seat of arbitration was Singapore. On 22 August 2016, Sanum obtained the SIAC Award against the Lao Parties.

### *Procedural history*

*Enforcement proceedings*

4 On 1 September 2016, Sanum commenced HC/OS 890/2016 ("OS 890/2016") seeking leave to enforce the SIAC Award in the same manner as a judgment of the High Court or an order to that effect, pursuant to s 19 of

the International Arbitration Act (Cap 143A, 2002 Rev Ed) and O 69A r 6 of the Rules of Court (2014 Rev Ed) ("ROC"). On 7 September 2016, leave was granted by the Assistant Registrar in HC/ORC 6107/2016 ("the Leave Order").

5 On 16 September 2016, Sanum filed HC/SUM 4512/2016 for an order that, pursuant to O 69A r 6(4) of the ROC, the Lao Parties may apply to set aside the Leave Order within 14 days after service of the same or, if the Leave Order was served out of the jurisdiction, within 21 days of the same. This order was granted on 20 September 2016 in HC/ORC 6397/2016 ("ORC 6397/2016"). The 21-day period expired by 27 October 2016 at the latest with no application being brought.

6 On 23 November 2016, Sanum obtained HC/JUD 792/2016 ("the Judgment") against the Lao Parties for the relief stated in the SIAC Award for, *inter alia*, US$200m as damages for breach of contract and interest at the rate of 6% per annum compounded annually from 12 April 2012.

7 On the basis of the Judgment, the following garnishee applications were made, with the respective final garnishee orders granted as follows:

| S/N | Application | Final garnishee order | Garnishee | Sums garnished |
|---|---|---|---|---|
| 1. | HC/SUM 5740/2016 (29 November 2016) | HC/ORC 477/2017 (18 January 2017) | United Overseas Bank Limited ("UOB") | US$2,154,032.02 and S$216,270.49 |
| 2. | HC/SUM 2695/2017 (13 June 2017) | HC/ORC 4233/2017 (5 July 2017) | UOB | US$2,489.45 and S$1.81 |

| S/N | Application | Final garnishee order | Garnishee | Sums garnished |
|---|---|---|---|---|
| 3. | HC/SUM 3210/2017 (12 July 2017) | HC/ORC 4443/2017 (13 July 2017) | UOB | US$197,400.00 |

8 We refer to these three final garnishee orders, *viz*, HC/ORC 477/2017, HC/ORC 4233/2017 and HC/ORC 4443/2017, as the "FGOs", and the sums garnished under the FGOs as the "Garnished Sums". The Judgment, the FGOs and the Garnished Sums are the subject of the application in SUM 44. While there were other garnishee applications, they did not result in final garnishee orders and they do not concern us here. Other enforcement applications were also brought, resulting, *inter alia*, in a writ of seizure and sale, HC/WSS 77/2016 ("WSS 77/2016") in respect of ST Group's shares in S3T Pte Ltd, which were seized by the Sheriff on 27 December 2016.

*Applications to set aside*

9 We turn now to the steps that the Lao Parties took to challenge the Leave Order, the Judgment, and the orders founded on the Judgment. Three applications were initially filed as follows:

(a) On 13 January 2017, ST Group and Mr Sithat filed HC/SUM 202/2017 ("SUM 202/2017"), an application for extension of time to apply to set aside the Leave Order, for the setting aside of the Leave Order and the Judgment, and for various enforcement actions to be set aside.

(b) On 23 March 2017, ST Group and Mr Sithat filed HC/SUM 1331/2017, seeking leave to amend SUM 202/2017 to make

it their primary position that the service of the Leave Order and ORC 6397/2016 was invalid.

(c) On 16 June 2017, ST Vegas and STV Enterprise filed an application in HC/SUM 2774/2017 for a declaration that service of the Leave Order and ORC 6397/2016 was invalid, or for an extension of time to apply to set aside the Leave Order.

10 In August 2017, Sanum agreed to the Lao Parties filing a separate application to set aside the Leave Order, pending disposal of the three applications referred to above.[1] This was filed as HC/SUM 4933/2017 ("SUM 4933/2017") on 26 October 2017. SUM 4933/2017 was fixed to be heard with the three other applications in January 2018.

11 On the first day of the hearings in January 2018, the parties reached an agreement that (a) SUM 4933/2017 and any appeal therefrom would be heard and disposed of first *without prejudice* to Sanum's position that SUM 4933/2017 was filed out of time and no extension of time should be granted to cure that defect ("the Primary Position"); and (b) if SUM 4933/2017 were to be granted, Sanum may (if it chose to do so) pursue the Primary Position, and if so, the Lao Parties may choose to pursue their requests for extensions of time and/or objections to the validity of service of the Leave Order and ORC 6397/2016.[2] The parties informed the High Court judge ("the Judge") who was scheduled to hear the applications above, of this arrangement.[3] Hence,

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1 Affidavit of Deborah Deitsch-Perez ("DDP") at para 10.

2 DDP at para 11.

3 DDP at p 94.

the remaining three applications were adjourned pending the determination of SUM 4933/2017.

12 The relief sought in SUM 4933/2017 was as follows:

> 1. The Orders of Court dated 7 September 2016 (HC/ORC 6107/2016) and 20 September 2016 (HC/ORC 6397/2016) granting [Sanum] leave to enforce the Final Award dated 22 August 2016 in SIAC ARB No. 184 of 2015 ('Award') in the same manner as a Judgment of the High Court or an order to the same effect, be set aside;
>
> 2. The Judgment dated 23 November 2016 (HC/JUD 792/2016) in terms of the Award *(and all other orders obtained by [Sanum] in enforcement (and in aid of enforcement) of the Award and / or the Judgment)* be consequently set aside;
>
> 3. Costs of an incidental to and / or consequential to this application to be paid by [Sanum] to the [Lao Parties]; and
>
> 4. Such further and/or other relief as this Honourable Court deems fit.
>
> [emphasis added]

13 In SUM 4933/2017, the Judge held that Macau was the correct seat of arbitration and that the appointment of a three-member tribunal was incorrect, but that the Lao Parties had not shown prejudice arising from these procedural irregularities (see *Sanum Investments Ltd v ST Group Co, Ltd and others* [2020] 3 SLR 225 at [106], [110] and [114]). STV Enterprise, however, was not a party to the relevant agreement and so was not properly a party to the SIAC Arbitration nor bound by the Award (at [107(c)]). Hence, the Judge dismissed the application in relation to the Lao Appellants but allowed the application in relation to STV Enterprise.

*The appeals*

14 CA 113 was the Lao Appellants' appeal against the Judge's dismissal of SUM 4933/2017 in relation to them, while CA/CA 114/2018 ("CA 114") was

Sanum's cross-appeal against the Judge's decision in relation to STV Enterprise. As noted above, we issued our judgment in these appeals on 18 November 2019. We dismissed CA 114, finding that the Judge was correct to find that STV Enterprise was not a party to the relevant agreement. Nothing turns on CA 114 in the present application.

15 Turning to CA 113, although SUM 4933/2017 had included a prayer for relief relating to the Judgment and *all other orders* obtained to enforce the Judgment (see [12] above), the Lao Appellants' case in CA 113 only made reference to the setting aside of the Leave Order and ORC 6397/2016. The appeal, therefore, centred on that specific relief, and we were not addressed on any other consequential matters. We return to the significance of this fact below.

16 In CA 113, we found that the wrong choice of seat in Singapore as opposed to Macau was a sufficient basis on which to conclude that the SIAC Award could not be enforced, without there being need for proof of prejudice, and allowed the appeal. At [109] of *ST Group (CA)*, our conclusion was stated as follows:

> For the reasons given above, we allow CA 113 and set aside the Leave Order granted to Sanum. …

SUM 44 concerns, in essence, what else should be done as a consequence of this conclusion in CA 113.

*Post-appeal developments*

17 There are four particular developments after our decision in CA 113 which are relevant to our determination of SUM 44. These pertain to: (a) the drafting of the order of court for CA 113; (b) the pending applications in OS 890/2016; (c) the application for the return of the Garnished Sums in the

High Court; and (d) subsequent arbitral proceedings. We set out the material facts concerning each of these in turn.

(1) Drafting of the court order

18 After CA 113 was allowed on 18 November 2019, the Lao Appellants' counsel, Haridass Ho & Partners ("Haridass"), wrote to Sanum's counsel, WongPartnership LLP ("WongPartnership") on 27 November 2019 seeking a return of the Garnished Sums together with interest thereon.[4] WongPartnership replied that its Primary Position was that the application in SUM 4933/2017 was out of time and the question of whether an extension of time should be granted was pending, and the request was therefore premature.[5] On 6 January 2020, WongPartnership offered not to pursue the Primary Position if, *inter alia*, the Garnished Sums were placed in escrow instead.[6] The Lao Appellants did not agree.[7]

19 The Lao Appellants then attempted to introduce various consequential orders into the order of court. As this is of some significance to the background of SUM 44, we set out the relevant parts of the draft orders that were exchanged by the parties. The material parts of the draft order proposed by the Lao Appellants on 19 February 2020 read as follows:[8]

> 4. The Judgment dated 23 November 2016 (HC/JUD 792/2016) in terms of the Award (and all other orders obtained by the Respondent in enforcement (and in aid of enforcement) of the Award and/or the Judgment) is consequently set aside.

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4 Affidavit of Tan Boon Yong Thomas ("TBYT") at p 24.

5 TBYT at p 26.

6 TBYT at p 27.

7 TBYT at para 21.

8 See letter to court from Haridass Ho & Partners dated 12 March 2020.

> 5. The Respondent shall forthwith return to the 2nd Appellant the following sums garnished together with interest thereon at 5.33% per annum from the date of the respective Final Garnishee Order to the date of payment:
>
> …

20 In response, Sanum proposed a draft order on 21 February 2020, the relevant parts of which read as follows:[9]

> …
>
> 3. Without prejudice to any orders that may be made by the Court in HC/SUM 202/2017, HC/SUM 1331/2017 and HC/SUM 2774/2017:
>
> > The Orders of Court dated 7 September 2016 (HC/ORC 107/2016) and 20 September 2016 (HC/ORC 6397/2016) granting the Respondent leave to enforce the Final Award dated 22 August 2016 in SIAC ARB No. 184 of 2015 ('Award') in the same manner as a Judgment of the High Court or an order to the same effect, are set aside.
> >
> > The Judgment dated 23 November 2016 (HC/JUD 792/2016) in terms of the Award ~~(and all other orders obtained by the Respondent in enforcement (and in aid of enforcement)~~ of the Award and/or the Judgment) is consequently set aside.

21 This disagreement was notified to the court on 12 March 2020. A Case Management Conference was held on 27 July 2020 to deal with the drafting of the order of court. The learned Assistant Registrar communicated to the parties this court's indication that "the draft orders of court should only contain matters that were placed before the Court of Appeal and that were addressed by the Court of Appeal in their judgment of 18 November 2019". She went on to note that the matters relating to the release of the garnished sums, the return of the share certificate, and the reservation of Sanum's rights had not been dealt with by this court in CA 113. The parties took this indication and subsequently

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[9] See letter to court from Haridass Ho & Partners dated 12 March 2020.

agreed on an order of court, which was extracted as CA/ORC 133/2020 on 20 August 2020, on the following terms:

> 1. The Appeal is allowed.
>
> 2. The decision of the Honourable Justice Belinda Ang dated 18 June 2018 in HC/SUM 4933/2017 is set aside in relation to the Appellants herein.
>
> 3. The Orders of Court dated 7 September 2016 (HC/ORC 6107/2016) and 20 September 2016 (HC/ORC 6397/2016) granting the Respondent leave to enforce the Final Award dated 22 August 2016 in SIAC Arb No. 184 of 2015 ('Award') in the same manner as a Judgment of the High Court or an order to the same effect, are set aside.
>
> 4. Unless parties are able to come to an agreement on costs, they shall furnish their written submissions on costs, limited to ten pages within fourteen (14) days hereof.

As can be seen, this order reflected our conclusion in *ST Group (CA)* at [109], and did not touch on the status of the Judgment, the FGOs, or the Garnished Sums.

(2) Remaining applications in OS 890/2016

22 On 21 February 2020, the Lao Parties filed HC/SUM 846/2020 ("SUM 846/2020") for leave to withdraw the three outstanding applications referred to at [9] above. The Lao Parties also brought HC/SUM 2318/2020 ("SUM 2318/2020") on 5 June 2020 to apply for the Sheriff's release of the shares that were seized under WSS 77/2016 (see [8] above). These applications were fixed to be heard by the Judge on 30 July 2020.

23 On 29 July 2020, the parties reached an agreement that Sanum would no longer pursue its Primary Position, and that SUM 846/2020 and SUM 2318/2020 would be resolved by consent.[10] On 30 July 2020, the parties

[10] DDP at para 18(d).

indicated to the Judge that they had agreed to the disposal of these applications with no order as to costs. The orders were granted by consent (see HC/ORC 4140/2020 and HC/ORC 4141/2020). Hence, of all the enforcement orders obtained in OS 890/2016, only the FGOs remained.

24 Subsequently, on 13 August 2020, Haridass wrote to WongPartnership seeking the return of the Garnished Sums.[11] On 20 August 2020, WongPartnership responded that they were taking their client's instructions and would endeavour to respond by 1 September 2020.[12] On 1 September 2020, however, WongPartnership indicated that they were still taking their client's instructions.[13]

(3) Application to the High Court for the return of the Garnished Sums

25 In the absence of a response, Mr Sithat applied to the High Court on 4 September 2020 for the return of the Garnished Sums in HC/SUM 3785/2020 ("SUM 3785/2020"). SUM 3785/2020 sought return of the Garnished Sums with interest of 5.33% per annum from the date of the respective FGOs until payment to Mr Sithat.

26 Mr Sithat's position was essentially that Sanum had no legal basis for retaining the Garnished Sums. Sanum's position in the application was that the order should not be granted as the Lao Appellants had failed to seek the necessary orders in CA 113 and could not now seek to improve their position in SUM 3785/2020.[14] Sanum also argued that the correct forum for seeking the

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11 TBYT at p 42.

12 TBYT at p 44.

13 TBYT at p 45.

14 Sanum's Submissions in SUM 3785/2020 at para 17.

consequential orders was the Court of Appeal. Further, or in the alternative, it was not just or equitable for the court to order the return of the Garnished Sums as it would render any potential award or order made by an International Chamber of Commerce ("ICC") tribunal in Sanum's favour in the Macau-seated arbitration against the Lao Appellants nugatory.[15]

27 The application was heard on 9 and 12 November 2020 by the Judge. On 12 November 2020, the Judge held that under O 92 rr 4 and 5 of the ROC, she did not have the power to make the consequential orders sought in SUM 3785/2020, and dismissed the application.

(4) Arbitration proceedings in Macau

28 Alongside these developments in Singapore, on 11 December 2019, Sanum had filed a mediation request with the Macau office of the ICC International Centre of Alternative Dispute Resolution. The request to mediate was refused by the Lao Appellants. On 29 January 2020, Sanum commenced a Macau-seated arbitration with the ICC International Court of Arbitration ("the ICC Arbitration"). On 9 November 2020, in those proceedings, Sanum filed an application to the tribunal ("the ICC Tribunal") for interim measures, to enable it to retain the Garnished Sums pending the resolution of the ICC Arbitration. This was withdrawn without prejudice in the light of the dismissal of SUM 3785/2020 (see [27] above). However, when the Lao Appellants renewed their request before this court for the Garnished Sums to be returned in November 2020 by way of correspondence (see [30] below), Sanum renewed its

[15] Sanum's Submissions in SUM 3785/2020 at para 3.

application to the ICC Tribunal for interim measures on 30 November 2020 ("the Interim Measures Application").[16]

29 On 25 January 2021, the Interim Measures Application was heard by the ICC Tribunal. On 26 March 2021, the ICC Tribunal granted the following interim measures ("the Interim Measures"):[17]

(a) Sanum would retain the Garnished Sums unless and until a Singapore court ordered them to be returned to Mr Sithat.

(b) If and when a Singapore court ordered the Garnished Sums to be returned, the moneys would be placed in an escrow account pending a final award in the ICC Arbitration, less any amounts that Sanum might have by then paid to the ICC towards the Lao Appellants' costs deposits and fees and the sum of S$7,224.50 awarded as costs in SUM 3785/2020.

**The application in SUM 44**

30 On 23 November 2020, *ie*, 11 days after the Judge decided not to grant the orders sought, Mr Sithat made his request for consequential orders to this court by way of correspondence.[18] On 1 December 2020, Sanum stated its objections to such a request in a letter to this court.[19] On 25 March 2021, we issued various directions in relation to Mr Sithat's request, indicating that a formal application should be filed, and providing timelines for the application, together with a list of issues to be addressed.

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16 DDP at para 17(c).

17 DDP at para 17(d).

18 DDP at pp 220–230.

19 DDP at pp 231–240.

31 On 9 April 2021, SUM 44 was filed, consisting of three substantive prayers that: (a) the Judgment be set aside; (b) the FGOs be set aside; and (c) the Garnished Sums be returned together with interest thereon at 5.33% per annum from the date of the respective FGOs until payment to Mr Sithat.

32 After receiving the parties' first round of written submissions, we directed parties to file a further round of written submissions to address specific queries that we had, specifically in relation to the relevance of the ICC Tribunal's Interim Orders. Our decision takes into account both the first and second rounds of submissions.

***The Lao Appellants' position***

33 The Lao Appellants argue that this court has the inherent jurisdiction to set aside the FGOs following the setting aside of the Leave Order, citing Singapore, English, and Australian authorities.[20] The refusal of this court to enforce the SIAC Award "necessarily extinguishes the underlying debt arising from [the Leave Order and ORC 6397/2016] … and the resulting Judgment".[21] *A fortiori*, there is no longer any basis for the FGOs.[22] This court should now exercise its powers to set aside the Judgment and the FGOs and to order the return of the Garnished Sums. The exercise of the inherent power of the court is justified as allowing Sanum to retain the Garnished Sums would result in manifest injustice.[23] None of the objections raised by Sanum have merit.[24] The Lao Appellants take the position that there has been no delay on their part, as

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20 Lao Appellants' Submissions at paras 7–12.

21 Lao Appellants' Submissions at para 15.

22 Lao Appellants' Submissions at para 17.

23 Lao Appellants' Submissions at para 19–20.

24 Lao Appellants' Submissions at paras 21–24.

they have "expeditiously" sought the return of the Garnished Sums, but have been met by "stalling tactics" by Sanum.[25] The Lao Appellants further highlighted that the escrow arrangement detailed in the Interim Order had been agreed between the parties, and that the prejudice alleged by Sanum was beside the point.[26]

34 As for the issue of interest, the Lao Appellants argue that interest of 5.33% per annum from the date of the respective FGOs should apply, citing cases to the effect that where moneys are returned, interest should also be paid on those moneys.[27] Mr Sithat, they argue, has been deprived of the use of the moneys since 2017. Further, Sanum's claim that it had not earned substantial interest is irrelevant.[28] The interest should run from the dates of the respective FGOs and not from the judgment of this court in CA 113, and the interest rate should be the default of 5.33% per annum.[29]

***Sanum's position***

35 In its earlier correspondence as well as written submissions, Sanum accepted that this court had the jurisdiction, upon making the decision in CA 113, to set aside the Judgment and the FGOs.[30] It also accepted that by setting aside the Leave Order in CA 113, the SIAC Award was "effectively

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25 Lao Appellants' Submissions at para 25.

26 Lao Appellants' Submissions at para 23 and Lao Appellants' Further Submissions at para 7.

27 Lao Appellants' Submissions at paras 27–28.

28 Lao Appellants' Submissions at para 30.

29 Lao Appellants' Submissions at paras 31 and 35.

30 Sanum's Submissions at para 4(a).

annulled" and the debt arising from the SIAC Award was extinguished.[31] However, it took the position that the court should not now exercise its powers to set aside the Judgment and FGOs, as to do so would not "do justice" between the parties, given the Lao Appellants' conduct and the inordinate delay in pursuing the consequential orders.[32]

36 Further, an order for the return of the Garnished Sums would not be one that properly falls within the court's inherent powers, as that should be the subject of a substantive claim,[33] given that Sanum is able to raise a defence of legal or equitable set-off.[34] In any event, even if the return of the Garnished Sums were to be determined as a "consequential" matter, no order should be made.[35] Many of these points related to alleged dissipation of assets by the Lao Appellants and the risk that an award in the ICC Arbitration would be rendered nugatory. In its further written submissions, Sanum also highlighted that having to place the sums in escrow according to the Interim Measures would be prejudicial to it. It would have to raise sums equivalent to the Garnished Sums, as those had been fully expended in the course of litigation proceedings.[36] It would also be prevented from using any sums so raised for its business and investments pending the conclusion of the ICC Arbitration.[37] This prejudice would be exacerbated by the delays in the ICC Arbitration occasioned by the Lao Appellants' conduct, and this prejudice would not be compensated for

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31 Sanum's Submissions at para 4(b).

32 Sanum's Submissions at paras 8–10.

33 Sanum's Submissions at para 12.

34 Sanum's Submissions at para 14.

35 Sanum's Submissions at paras 17–22.

36 Sanum's Further Submissions at para 4(a).

37 Sanum's Further Submissions at para 4(b).

because any interest earned in escrow would be minimal and there was little prospect of Sanum being compensated by the Lao Appellants even if it was eventually successful.[38]

37 In the alternative, if the Garnished Sums are to be returned, interest should only run from a date much later than the dates of garnishment[39] and should not be at the rate of 5.33% per annum.[40] Further, if the consequential orders are made, they should be stayed pending the determination of the ICC Arbitration.[41]

**Issues to be determined**

38 It is now common ground between the parties that the effect of our decision in CA 113 was that the SIAC Award could not be enforced and that the underlying debt arising from the SIAC Award was extinguished. It is also common ground that the Judgment and the FGOs no longer have a legal basis, in that they are based on an extinguished debt. Consistent with these positions, the parties are also agreed that this court had the power to set aside the Judgment and the FGOs upon its judgment in CA 113, and continues to have this power which can now be exercised in SUM 44. The parties are, however, in disagreement as to the following issues:

(a) Should this court exercise its power to set aside the Judgment and the FGOs?

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38 Sanum's Further Submissions at paras 4(c) and 4(d).

39 Sanum's Submissions at para 23.

40 Sanum's Submissions at para 24.

41 Sanum's Submissions at para 26.

(b) Did this court have the power to order the return of the Garnished Sums and does it continue to have that power?

(c) If so, and if the Judgment and FGOs should be set aside, should the Garnished Sums be ordered to be returned?

(d) If so, what (if any) interest should be payable on the Garnished Sums?

(e) If the consequential orders are granted, should they be stayed?

**Should the Judgment and FGOs be set aside?**

39 The parties' disagreement turns on whether this court should exercise its inherent powers to set aside the Judgment and the FGOs. Both parties rely on this court's judgment in *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 ("*Harmonious Coretrades*") and apply that decision to reach different conclusions. As the scope of what this court decided in *Harmonious Coretrades* is significant here, we first set out the facts and decision in that case.

40 In *Harmonious Coretrades*, United Integration Services Pte Ltd ("UIS"), a main contractor, had engaged a third party, Civil Tech Pte Ltd ("CTPL"), a subcontractor, to carry out construction works. CTPL, in turn, engaged Harmonious Coretrades Pte Ltd ("HCPL") as its subcontractor. On 31 August 2018, HCPL obtained an adjudication determination against CTPL under the Building and Construction Industry Security of Payments Act (Cap 30B, 2006 Rev Ed) ("SOPA"), but CTPL failed to make payment. HCPL then obtained leave to enforce the adjudication determination as a judgment of the court, and commenced garnishee proceedings against UIS, for all debts due

from UIS to CTPL to be attached. On 15 October 2018, a provisional garnishee order was made against UIS, and at the show cause hearing, UIS indicated that it had no objections to the application.

41 UIS, however, eventually took the position that it did not owe any debt to CTPL, but that CTPL owed *it* money instead. It claimed that the garnishee order was premised on a debt owing from UIS to CTPL based on an adjudication determination between UIS and CTPL dated 23 October 2018 ("AD1"). However, it argued that by virtue of a subsequent adjudication determination rendered on 23 November 2018 ("AD2"), UIS no longer owed CTPL any debt, as the adjudicator in AD2 had taken into consideration the value of AD1 and found that CTPL nevertheless owed UIS a net sum of around S$1.2m. UIS applied to the High Court against HCPL and CTPL for a stay of enforcement of any adjudication determinations and a stay on the garnishee order. The High Court granted an unconditional stay of enforcement of AD1. UIS also applied to set aside the garnishee order, and the High Court judge allowed that application. HCPL appealed to this court against the decision to set aside the garnishee order.

42 As a starting point, this court held that it had the power to set aside the garnishee order: *Harmonious Coretrades* at [38]. The following caution, however, was sounded at [40]:

> … [T]his is not a licence to litigants to make frivolous applications to set aside judgments or court orders. The court's inherent power to set aside a judgment or court order should never become a back-door appeal or an opportunistic attempt to relitigate the merits of the case.

43 Following from that, certain illustrations were provided for cases where the inherent power could be justifiably invoked. The first of these situations is particularly apt for the present case (at [40]):

> *One … situation where the court's inherent power could be justifiably invoked might be where the substratum or the very foundation of a court order has been destroyed*, such that the continued existence or future performance of the court order would lead to injustice …
>
> [emphasis added]

44 This court identified the "touchstone" for the invocation of the inherent power as one of "need" (at [43]). On the facts, there was no injustice and the grounds relied on by the judge were not sufficient to justify the setting aside of the garnishee order.

(a) First, the judge had based his decision on the view that the debt underlying the garnishee order had been held in abeyance because of the unconditional stay of enforcement of AD1. That decision, in turn, was based on the judge's view that AD2 had superseded AD1. However, this court disagreed on that point. AD1 was not superseded by AD2 because of the nature of adjudication determinations under SOPA (see *Harmonious Coretrades* at [45] and [52]). Further, AD2 did not have the effect of creating a debt owing from CTPL to UIS. In truth, AD2 (which arose out of a claim by CTPL against UIS) only held that UIS did not have to pay CTPL on the payment claim raised, and, given the nature of adjudication determinations under SOPA, the determination could not have had the legal effect of giving UIS a claim against CTPL on the basis of the counterclaim (at [53]–[54]).

(b) Secondly, there was no injustice occasioned by CTPL's insolvency. This court held that the critical point was that the show cause hearing had gone on without an objection from UIS. Indeed, *no objection could have been raised* given the debt created by AD1. The

mere fact that CTPL was insolvent and UIS would not be able to claim fully against CTPL did not, therefore, give rise to injustice (at [61]).

45 The Lao Appellants emphasise the statement by this court that it would be justified to invoke the court's power to set aside a court order "where the substratum or the very foundation of a court order has been destroyed".[42] Sanum, however, argues that no clear need has been established and it would not be just and equitable to grant the orders to set aside the Judgment and FGOs, arguing that (a) SUM 44/2021 is "exceedingly belated"; and (b) the court should take into account Sanum's valid claims against the Lao Appellants and the Lao Appellants' attempts in frustrating Sanum's efforts to seek satisfaction of its claims.[43]

46 In our judgment, we should exercise our powers to set aside the Judgment and the FGOs.

47 First, there is a clear need, in the interests of justice, to set aside the Judgment and the FGOs. This is a necessary concomitant to the setting aside of the Leave Order. The entire substratum of the Judgment and FGOs has ceased to exist. Not setting aside these orders would lead to the situation of entirely invalid court orders remaining formally operative. This would be unjust and would bring the legal system into disrepute. Nothing in *Harmonious Coretrades* suggests that other considerations would be sufficient to outweigh this concern once it is determined that the substratum of the prior court order has been nullified or no longer exists. As noted above, a central aspect of this court's decision in *Harmonious Coretrades* was that the upstream debt created by AD1

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42 Lao Appellants' Submissions at para 19.

43 Sanum's Submissions at paras 7–10.

was *not* nullified or in any way modified by AD2, and AD2 did *not* have the effect of creating a debt downstream. In other words, the debt underlying the garnishee order in that case arising from AD1 remained valid and enforceable. By contrast, in this case, it is common ground that the Judgment and FGOs were entirely without basis given the flaws in the SIAC Award. On that basis, the decision in *Harmonious Coretrades* is clearly distinguishable.

48 Secondly, in any event, even if some balancing exercise needs to be undertaken, we consider that the factors raised by Sanum are not so persuasive as to merit a different conclusion. In the first place, we consider that Sanum's complaint of delay is overblown.

(a) While it is not clear exactly why the Lao Appellants had failed to seek all the relief sought in SUM 4933/2017 when they appeared before us in CA 113, due weight must be given to the fact that because of Sanum's reservation of its Primary Position (see [18] above), the result of CA 113 would still have been subject to whatever position that Sanum would then take on the issue of whether the application to set aside was filed out of time. Indeed, as we have recounted above, the history of the matter after our decision in CA 113 shows that a significant part of the alleged delay arose from Sanum's retention of its Primary Position, before it ultimately agreed not to pursue it in July 2020 (see [23] above). We pause to observe that there is an unsatisfactory aspect about the way in which both parties have conducted this matter. In reserving its Primary Position, Sanum and its counsel allowed the matter to proceed all the way to this court, with the Lao Appellants and their counsel similarly in agreement, without specifically bringing this fact to our attention. Our decision in CA 113 may have been rendered entirely hypothetical since Sanum could still object that the application

to set aside was out of time. However, as Sanum eventually decided not to pursue its Primary Position, we need not comment further except to highlight this court's recent decision in *Tan Ng Kuang Nicky (the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation)) and others v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135.

(b) In any event, the Lao Appellants' conduct in seeking to set aside the Judgment and FGOs cannot be said to be dilatory. CA 113 was decided on 18 November 2019. Just over a week later, in correspondence, the Lao Appellants demanded the return of the Garnished Sums (see [18] above). Sanum refused, claiming to rely on its Primary Position. Further correspondence followed. While Sanum offered not to pursue the Primary Position on 6 January 2020, this was subject to a number of conditions which the Lao Appellants were entitled to reject. It was only around 29 July 2020 that Sanum confirmed that it would no longer rely on its Primary Position. Around two weeks later, on 13 August 2020, Haridass again wrote to seek the return of the Garnished Sums. As of 1 September 2020, WongPartnership was still taking instructions. In response, just three days later, the application for consequential orders was made to the High Court (see [25] above). Sanum objected to the application and took the position that the Court of Appeal was the correct forum. The High Court dismissed the application on 12 November 2020, and 11 days later, the Lao Appellants wrote to this court seeking the consequential orders. Throughout this process, the Lao Appellants also attempted to seek the setting aside of the Judgment and FGOs in the Order of Court to be extracted in CA 113, but failed (see [18]–[21] above). In our view, the Lao Appellants had always acted with due despatch, and, for the larger part of this period,

were *waiting on Sanum* in relation to Sanum's Primary Position and its position on the return of the Garnished Sums. If anything, the bulk of any delay was due to Sanum, not the Lao Appellants.

49 Sanum's other argument, based on the alleged merits of its underlying claim which is now being litigated in the ICC Arbitration and the alleged acts of the Lao Appellants in failing to satisfy Sanum's claims, are, with respect, misplaced in this context. Whatever the merits of Sanum's claims, the fact remains that the Garnished Sums were transferred to Sanum under FGOs which were based on the Judgment, which should never have been entered. It is not clear at all how the existence of pending disputes elsewhere would be relevant to whether a judgment which has lost its substratum and court orders based on that judgment should be set aside. It bears noting that this is not an application for an injunction in aid of arbitral proceedings elsewhere. Nor is it clear how the allegations concerning the Lao Appellants' conduct, even if true, would be relevant to the narrow question of whether court orders which have lost their substratum should be set aside. These arguments do not outweigh the *inherent* need to maintain consistency in court orders and to set aside judgments and court orders that should never have been made. We accept that the existence of the ICC Arbitration is a relevant factor when considering the scope of the relief we should order, but that is a distinct question. It does not prevent the setting aside of the Judgment and FGOs.

**The power to order the return of the Garnished Sums**

50 The next issue pertains to the return of the Garnished Sums – the parties join issue on whether the court has the power to order that the Garnished Sums be returned and, if so, whether the court should exercise those powers in this

case. We deal first with the question of the existence of the court's powers to do so.

51 The Lao Appellants argue that the court has the inherent power to order the return of the Garnished Sums with interest. Sanum argues that this is not a matter which "properly falls within this court's inherent jurisdiction/powers to make 'consequential orders'", but is something that must be pursued in separate proceedings.[44] It was surprising to us that Sanum's counsel took this position in this application – we would have thought that it was beyond peradventure that this court does have the power to order the return of sums paid under orders or judgments that have been reversed or otherwise nullified as a result of an appeal. However, for completeness, and in deference to the submissions made on this point, we set out our views on this aspect of the court's inherent powers.

52 As a starting point, Sanum's argument as stated is far too broad and cannot be sustained. It is clear to us that an appellate court has the inherent power to order a return of sums paid under a judgment or order that has been reversed on appeal. Citing the case of *Rodger v Comptoir D'Escompte de Paris* [1871] LR 3 PC 465 ("*Rodger*"), a judgment of the Privy Council on appeal from Hong Kong, this court in *Singapore Airlines Ltd and another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and others* [2001] 1 SLR(R) 38 ("*Singapore Airlines*") at [19]–[23] adopted the analysis of *restitution* in deciding whether interest should be ordered on a judgment sum which was returned upon a successful appeal. There was no dispute over the return of the judgment sum itself (and, we would add, rightly so). The dispute related to whether the repayment should include interest calculated at 6% (the rate prescribed for judgment debts under the then O 42 r 12 of the Rules of Court

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[44] Sanum's Submissions at para 12.

(1997 Rev Ed)) or, only such interest that was earned on the judgment sum which had been placed on fixed deposit. This court held that, in order to do justice to the parties, it should focus on restitution from the respondents (who had acted reasonably in placing the judgment sum on fixed deposit with a reputable financial institution) rather than on compensation to the appellants. This court therefore ordered the return of the judgment sum plus whatever interest had been earned thereon (see *Singapore Airlines* at [23]). Subsequently, in *Crédit Agricole Indosuez v Banque Nationale de Paris* [2001] 1 SLR(R) 609 ("*Crédit Agricole*"), this court again dealt with the award of interest on a judgment sum. In doing so, this court approved (at [5]) the following passage from *Goff and Jones on the Law of Restitution* (Sweet & Maxwell, 5th Ed, 1998) at p 457:

> It is then settled that a successful appellant can compel the respondent to restore all benefits gained through the judgment which has been reversed. The appellant has a right of 'restitution' of money paid by him … The court will also order that interest shall be paid.

53 Sanum's objection that these authorities did not decide "whether and under what circumstances the Court should order that the principal sum be repaid" cannot be sustained. Importantly, although the question of the return of the judgment sum itself was not in dispute before this court in both these cases, this court did approve the underlying principle of restitution which governed both the return of the sum paid under the reversed judgment and interest thereon. Hence in both cases, orders were made for the return of the judgment sum and interest thereon. In *Singapore Airlines* at [23], this court's conclusion was as follows:

> … All that justice requires is that *they should return the sums received*, plus whatever interest earned thereon, to the appellants and we accordingly so order.
>
> [emphasis added]

In *Crédit Agricole* at [10], this court's decision was as follows:

> … In the result, we would order that the respondents, *besides refunding the judgment sum*, also pay to the appellants interest at 6% per annum … from the date of receipt of the judgment sum to the date of the judgment of this court.
>
> [emphasis added]

It can be seen from both *Singapore Airlines* and *Crédit Agricole* that this court was proceeding on the basis that it had the power, on an appeal, to order the return of sums paid under a judgment or order that was reversed together with interest thereon.

54 Furthermore, in a recent decision of this court – albeit one released after the parties had filed their first round of submissions in SUM 44 – in *Crest Capital Asia Pte Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another* [2021] 2 SLR 424 ("*Crest Capital*"), this court proceeded on the basis that it did have the power to order "restitution of benefits conferred pursuant to a judgment that is subsequently reversed", which it referred to as the "restitutionary rule" (at [11]).

55 As the Lao Appellants correctly submit, this position is consistent with English and Australian authorities. In England, the House of Lords stated in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 ("*Nykredit*") at 1637 as follows:

> … [W]hen ordering repayment the House is unravelling the practical consequences of orders made by the courts below and duly carried out by the unsuccessful party. The result of the appeal to this House was that, to the extent indicated, orders made in the courts below should not have been made. This result could, in some cases, be an idle exercise unless the House were able to make consequential orders which achieve, as nearly as is reasonably practicable, the restitution which this result requires. *This requires that the House should have the power to order repayment of money paid over pursuant to an*

> *order which is subsequently set aside. It also requires that in suitable cases the House should have power to award interest on amounts ordered to be repaid. Otherwise the unravelling would be partial only.*
>
> [emphasis added]

56 Similarly, the High Court of Australia in *Commonwealth v McCormack* (1984) 55 ALR 185 ("*McCormack*") stated at 186–187:

> *Restitutio in integrum* is the right of every successful appellant: per Lord Field in *Cox v Hakes* (1890) 15 App Cas 506 at 547. An appellant who has satisfied a judgment for the payment of money is entitled, on the reversal of the judgment, to repayment of the money paid by him with interest: *Rodger v Comptoir D'Escompte de Paris* (1871) LR 3 PC 465; *Merchant Banking Co v Maud* (1874) LR 18 Eq 659. In the former case, Lord Cairns said, at p 475: '… one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression "the act of the court" is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter to the highest court which finally disposes of the case.' …

The High Court of Australia proceeded to hold that the court which had heard the appeal had the power to make that order for return of the money with interest.

57 The reasoning of the cases above applies in the present case. Although the appeal in CA 113 was not against the Judgment itself (unlike a normal case of an appeal against a decision of the lower court after trial), but was an appeal against the Leave Order which had enabled the Judgment to be entered, there is no logical or legal distinction between the two situations. The fact remains that as the Leave Order was set aside on the basis that the arbitration was wrongly seated in Singapore and the resultant SIAC Award could not be enforced here; it followed that the Judgment and the FGOs should never have been made, and

there was a clear need to "unravel" the consequences (to adopt the language of *Nykredit*) of the court's orders.

58 The basis for restitution appears to be policy, *ie*, the unravelling of the orders made by the court below in order to give effect to the appeal: see Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at para 26–05 (see also *Crest Capital* at [11]):

> … In our view, the better explanation of the claimant's right lies in the policy consideration, also identified by McFarlane, that the courts' power to force litigants to transfer benefits to other litigants is partly justified by procedural mechanisms whose function is to reduce the risk of judicial error. These include the right to appeal, a necessary concomitant of which is the right to recover money paid under the initial judgment following a successful appeal. Without this the legal system would be caught in self-contradiction and the appellate process would be rendered 'nugatory'. …

This is also consistent with the *dicta* in *Rodger* at 475–476, where the court's power to order the return of such moneys (with interest) is justified on the basis of the need to "take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court." It is also the basis implied by the House of Lords in *Nykredit* at 1636–1637 (quoted at [55] above).

59 Against these authorities, Sanum refers to the case of *Re Iris McLaren (No 2)* [2019] NSWSC 1894 ("*Re Iris*"), a decision of the New South Wales Supreme Court, which it submits supports its position that the claim for return of the Garnished Sums *cannot* be dealt with summarily on an application for consequential orders. *Re Iris* is clearly distinguishable on the facts. It involved rival claims by two beneficiaries ("TAM" and "HN" respectively) under two respective wills. TAM, who was the sole beneficiary under a 2013 will (and who was granted probate under the 2013 will) successfully had her grant of

probate upheld in the first instance court. HN, who was one of the beneficiaries under the earlier will and contested TAM's grant of probate, was ordered to pay TAM costs which were taxed at A$121,000. TAM proceeded to successfully garnish monies held by HN's solicitors (who were holding proceeds due to HN in unrelated personal injury proceedings). The matter reached the High Court of Australia which overturned the judgment in favour of TAM on the ground that there had been a denial of procedural fairness and remitted the proceedings for a new trial. The High Court set aside the grant of probate to TAM and the order of costs made at first instance against HN and in favour of TAM. It was in those circumstances that HN asked for a return of the taxed costs. Importantly, it was because of procedural complications that the matter was not dealt with summarily. HN had applied for a return of the taxed costs by motion, which was normally dealt with summarily, but the judge considered that the claim for recovery of sums paid under the garnishee order was a substantive one. Although the court was willing to deal with the matter by motion if there was agreement between the parties or if that course was procedurally fair to the party against whom judgment was sought, a complication arose because TAM's counsel asked for an adjournment as there might be a substantive defence, or a cross-claim as TAM was likely to proceed against her former solicitors who were responsible for garnishing the monies. In the circumstances of that case, the judge felt he had no alternative but to put the matter on a more formal procedural course and made directions for HN to file a cross-claim seeking restitution and for the filing of any defence or cross claim by way of response from TAM (see *Re Iris* at [7] to [11]). *Re Iris* therefore cannot stand for the broad proposition that *all* claims for the return of moneys paid under judgments or orders that have been reversed cannot be dealt with in an application for consequential orders. This would contradict the authorities referenced above, which, with all due respect, are more persuasive and from courts of superior

jurisdiction (even within Australia itself). The real question raised by Sanum's submission appears to be whether the existence of potential defences or cross-claims (*ie*, counterclaims or set-off) would render it *inappropriate* to deal with an application for the return of such moneys in an application for consequential orders. This is a less a question of whether an order *can* be made, and more a question of whether it *should* be made. It is to this question that we now turn.

**Should the court order that the Garnished Sums be returned?**

60 In our judgment, this court *should* make the necessary order for the return of the Garnished Sums.

61 The starting point is that the Garnished Sums should be returned as a matter of justice. This is necessary to do justice, as no court should countenance a defendant being deprived of moneys because of a court order that is eventually found to be wrong or which should not have been made. Sanum was given the Garnished Sums only because of the FGOs, which were based on the Judgment, which itself was entered only because of the Leave Order. This is entirely supported by the authorities cited above, not only in Singapore but also in England, Australia and by the Privy Council on appeal from Hong Kong. There can be little doubt that in order to unravel the effects of court orders that were wrongly made, the court should order the return of the moneys.

62 The question here is whether this starting point should be departed from in this case. Sanum's first argument is that the appellate court should not determine this matter on an application but should require the Lao Appellants to file a claim for restitution. This argument, as we have noted above, is based on Sanum's erroneous reliance on *Re Iris*. *Re Iris* does not stand for a broad proposition that if an objection to the return of moneys is raised, then the

appellate court cannot make an order for the return of those moneys summarily and that the Lao Appellants should make a claim for restitution. Furthermore, we observe that the court in *Re Iris* to which HN had made his application was not the appellate court that had allowed HN's appeal. Indeed the judge recognised that where an appellate court set aside a judgment or order made by a lower court and money has been paid under that judgment or order, the appellate court has the power to order restitution of the amount so paid (citing *Rodger*) (see [44]). The court went on to opine that such a right of restitution did not depend on the existence of procedural rules but was an "inherent power to make orders for restitution" and that "it may be better described as an obligation, since restitution is not discretionary" (see [46]).

63 There is authority from the same jurisdiction that shows that if an appellate court is faced with such an application, the order for return of such sums should be made. In *Production Spray Painting and Panel Beating Pty Ltd v Newnham (No 2)* (1992) 27 NSWLR 659, a decision of the Supreme Court of New South Wales Court of Appeal, the court was faced with an application for consequential orders upon a successful appeal. The unsuccessful parties sought to resist restitution by arguing that they had counterclaims for fraud or deceptive conduct under the relevant legislation. The New South Wales Court of Appeal rejected this submission:

> *The attempt by the opponents to resist restitution by setting up cross claims for fraud or deceptive conduct must also fail.* In a case such as this an order for restitution follows *as of course* from the quashing of the orders of the Industrial Commission and the Court has *no discretion to withhold such relief*. The jurisdiction of a court exercising appellate or supervisory jurisdiction to order restitution in favour of the successful litigant is necessarily of a summary nature, and is inherently unsuitable for the determination of disputed questions of fact or the trial of cross claims. In any event the trial of cross claims would involve the exercise of original jurisdiction. …

[emphasis added]

64 In coming to this conclusion, the New South Wales Court of Appeal cited various English authorities to that effect, namely *R v Jones* (1722) 1 Str 474 (93 ER 643) and *R v Wilson* (1836) 3 Ad and E 830 (111 ER 629). In its view, the absence of original jurisdiction on an application for consequential orders was not a reason against granting those consequential orders, but was in fact why those other arguments could not even be entertained.

65 We note that the question of what kinds of defences may be raised in relation to a claim or an application that sums paid out under a judgment or court order should be returned is not before us in SUM 44. Sanum also submits that it *may* be able to raise a set-off against the Garnished Sums, enabling it to retain the sums. This is not an answer to the current need to unravel the consequences of a court order where the entire basis therefor has disappeared. Merely raising this possibility is not sufficient to outweigh the need to reverse the effects of the Leave Order. Whether Sanum will succeed in the ICC Arbitration is something this court cannot form any view on, tentative or otherwise. Indeed it should not attempt to do so whilst those arbitration proceedings are ongoing.

66 We are not convinced by Sanum's other reasons which it claims render it unjust for us to order the return of the Garnished Sums. We are unable to see how the arguments that (a) the ICC Arbitration would be rendered nugatory; (b) the Lao Appellants have acted to frustrate enforcement efforts; and (c) there is a real risk dissipation of assets, are relevant to the issue in this application. These are ultimately considerations that are collateral to the fundamental purpose of the present application, which is to unravel the effect of a prior court order which has lost all validity. The gist of Sanum's argument is that it should be allowed to retain the Garnished Sums, which were initially paid under the FGOs

for the purpose of enforcing the Judgment, for the present purposes of providing security for the outcome of the ICC Arbitration. This is not permissible. Sanum is seeking to obtain an advantage over the Lao Appellants on the basis of its receipt of moneys paid on the strength of a court order that was ultimately incorrect. Put bluntly, Sanum wants to take advantage of a court's prior error.

67 In any event, we do not see how there can be any injustice caused to Sanum in the light of the ICC Tribunal's Interim Measures. To recapitulate the current position, Sanum had made the Interim Measures Application to the ICC Tribunal. The ICC Tribunal granted the Interim Measures, including, an order that if and when a Singapore court orders the Garnished Sums to be returned, the moneys shall be placed in an escrow account pending final award in the ICC Arbitration. Sanum would be allowed to deduct from this sum any amounts that Sanum has by then paid to the ICC towards the Lao Appellants' costs deposits and fees, as well as the sum of S$7,224.50 awarded as costs in SUM 3785/2020. We have been informed that this escrow arrangement was in fact agreed upon by the parties.[45] At our invitation, the Lao Appellants have agreed to be bound by the Interim Order and have undertaken to abide by the terms of the Interim Order or any other orders made by the ICC Tribunal in relation to the Garnished Sums in the event that this court decides SUM 44 in their favour.

68 In our judgment, any allegations of injustice (even if they were relevant) are adequately met by the escrow arrangement described. We do not find any of the reasons that Sanum has now raised against the escrow arrangement to be persuasive.[46] First, Sanum states that it has already spent the garnished monies on legal costs and claims it would be prejudiced by having to raise the sums of

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45 Lao Appellants' Further Submissions at para 7.

46 See Sanum's Further Submissions at para 4.

money to be placed into escrow. In our view, this is a risk that it undertook when it decided to use the moneys obtained under the FGOs for its own purposes, when it was always a possibility that the Leave Order and, hence, any consequential enforcement orders, could be set aside. Secondly, Sanum argues that pending the conclusion of the ICC Arbitration, Sanum would be prevented from using the escrow sums for its purposes and that the escrow sums could be drawn down to pay the Lao Appellants' share of the costs deposits. However, this overlooks the fact that this arrangement was agreed upon by the parties in the ICC Arbitration. It is not for us to allow Sanum to resile from the arrangement. Thirdly, Sanum points to delays in the ICC Arbitration occasioned by the Lao Appellants' "unreasonable" conduct. This is a matter for it to take up with the ICC Tribunal, as a matter of the management of the arbitration's progress, and we do not see why this should convince us not to give weight to the substantial concern to unravel the effects of an incorrectly granted court order. Fourthly, Sanum argues that it would be unlikely to be compensated for any losses it would suffer from the escrow arrangement in the event that it succeeds in the ICC Arbitration, as any interest earned on the escrow sums would be minimal and there is little prospect of the Lao Appellants compensating Sanum, given the Lao Appellants' lack of assets. However, we must observe that the ICC Arbitration is still afoot. As we have noted above, it is not for us to form a view as to who will eventually prevail at the ICC Arbitration, and it is not for us to speculate on Sanum's chances of enforcing any award or seeking compensation against the Lao Appellants in the event they succeed.

69 On the whole, we are satisfied that with the escrow arrangement in place, none of the allegations of injustice (if they are considered relevant) are sufficiently weighty to convince us not to give effect to the fundamental need

to reverse the effects of an incorrect court order. In this regard, we will make the necessary orders so that the escrow arrangement can be given effect to under the supervision of the ICC Tribunal.

**Interest on the Garnished Sums**

70 We turn then to the question of what interest, if any, should be paid on the Garnished Sums to be returned. The Lao Appellants seek interest at the rate of 5.33% per annum from the date of the FGOs until payment of the Garnished Sums to Mr Sithat.[47] Sanum argues instead that interest should only run from a date much later than the dates on which the sums were garnished, and, in any event, the rate of interest should only be the interest actually earned or reasonably estimated to be earned.[48]

71 We begin our consideration of this issue with the basis for interest in this context. As this court noted in *Singapore Airlines* at [20], there is no statutorily prescribed interest rate for the return of sums paid out pursuant to a judgment or court order. However, as highlighted in *Singapore Airlines* at [21] (see also *Crédit Agricole* at [8]–[9]), there is authority that the return of such money should generally be with interest, citing *Rodger*:

> It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, by the person who by mistake and by wrong obtained possession of

47 Lao Appellants' Submissions at para 27.

48 Sanum's Submissions at para 24.

> the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all courts to arrive at will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

72 The basis for interest to be paid on such sums that are returned appears to be part of the court's inherent powers to make the necessary orders to give effect to the underlying policy of unravelling the effect of court orders that have been found to be incorrect or which have been set aside, *ie*, what this court has referred to as part of its "equitable jurisdiction" (see *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482 ("*Citiwall*") at [34]; see also *Nykredit* at 1637B). In that regard, we do not consider that the authorities set out an *absolute* rule, but only a general one that in most instances, justice will require that the money paid out be returned with interest. We note that in *Rodger* (at 476), the ultimate appeal was to "what the justice of such a case demands" and in *Meerkin v Rossett Pty Ltd* [1999] 2 VR 31 at [11] (cited in *Singapore Airlines* at [22]), the reference is again to what "does justice as between the appellant and the respondent to an appeal" (see also *Citiwall* at [34]).

73 We note that in both *Singapore Airlines* and *Crédit Agricole*, the judgments were reversed on appeal, and the substantive disputes between the parties appear to have been completely settled by the decisions of this court. There were no more pending proceedings and the matters were essentially concluded by the time this court considered the question of the award of interest on the sums paid out under the judgments that had been reversed on appeal. By contrast, in the present case, the dispute between the parties is still pending

resolution. Our decision in CA 113 was a decision that the SIAC Award could not be enforced because the arbitration was wrongly seated under the relevant arbitration agreement. It followed that Sanum was entitled to attempt to obtain another award that was not irregular in a properly-seated arbitration (subject to any bars, procedural or substantive, that the Lao Appellants may seek to raise, on which we make no comment).

74 Sanum has done so by commencing the ICC Arbitration in Macau. The matter is pending resolution before the ICC Tribunal. The parties have agreed on an escrow arrangement reflected in the Interim Measures made by the ICC Tribunal. While it is true that as part of the restitution of what it had received, Sanum should *prima facie* have to return the sums with interest, the broader point is that the question of who is ultimately successful in the substantive dispute is of greater significance to the issue of who should pay interest on the sums found to be due in the arbitration, which will necessarily overlap with who should pay interest on the Garnished Sums, if at all, and the amounts paid into escrow. In the cases cited above, no such question arose because the appeals also resolved the substantive disputes between the parties.

75 We are therefore satisfied that there are very good reasons for us not to make any order as to interest on the Garnished Sums *at this stage*, and to allow the ICC Tribunal to determine, at the end of the arbitration, how the interest, if any, on the Garnished Sums should be borne. To clarify, this is not a determination that the Lao Appellants are *not* entitled to interest on the Garnished Sums at all. Instead, we are of the view that the ICC Tribunal is best placed, in the interests of justice between these litigants, to decide whether any interest should be paid and if so at what rate. While it is clear to us that Sanum cannot retain the Garnished Sums, we do not think that the needs of justice

require the issue of whether it should be returned with interest and if so, at what rate, to be decided by us now.

76 We state for the avoidance of doubt that this decision is one that is fact-sensitive and appropriate in this case. In other instances where there are other pending proceedings, it may still be necessary for an order as to interest to be made. It will depend on the facts and circumstances of each case. In the majority of cases, the guidance in *Singapore Airlines* and *Crédit Agricole* would apply. That said, in this case, our decision is that there shall be no order as to interest, without prejudice to the ICC Tribunal's own determination of whether interest on the Garnished Sums that are paid into escrow should be paid by either party, and if so, at what rate, at the end of the ICC Arbitration.

**Should our orders be stayed pending the determination of the ICC Arbitration?**

77 The final point raised by Sanum was that even if we were to grant the orders sought by the Lao Appellants, the orders should be stayed pending the determination of the ICC Arbitration. We see no merit to this contention. First, the ICC Tribunal has already determined that the Interim Measures should be put in place pending its own determination. Secondly, the reasons put forward by Sanum justifying a stay are essentially the same as its allegations of prejudice which have already been dismissed above.

78 However, to ensure that our orders are executed in a manner consistent with the ICC Tribunal's Interim Measures, we will make an allowance for time for the parties to bring our decision to the ICC Tribunal's attention for directions to be sought. This is a matter of practicality, especially given the Lao Appellants' undertaking to us that they will abide by the terms of the Interim Measures. This is reflected in our orders below.

**Conclusion**

79 Our orders are therefore as follows:

(a) The Judgment (*ie*, HC/JUD 792/2016) is set aside.

(b) The FGOs dated 18 January, 5 July and 13 July 2017 respectively are set aside.

(c) Sanum shall return the Garnished Sums, *ie*, the sum of US$2,353,921.47 and S$216,272.30. We leave it to the parties to make the necessary arrangements and/or seek the necessary directions from the ICC Tribunal as to *how* this is to be effected in the light of the Interim Measures.

(d) We make no order as to the payment of interest on the Garnished Sums and direct the parties to refer this issue to be placed before and decided by the ICC Tribunal for the reasons given above. For the avoidance of doubt, the ICC Tribunal shall be free to decide whether any interest is to be paid on the Garnished Sums, and if so, at what rate and for what period, including but not limited to whether, and if so, by whom, at what rate and for what period, interest should be paid on the Garnished Sums that are paid into escrow as part of the Interim Measures.

(e) Our orders above shall be suspended for a period of 60 days, or such other period (whether shorter or longer) as the ICC Tribunal shall order, for the parties to inform the ICC Tribunal of our orders and to seek the ICC Tribunal's directions as to how the moneys are to be paid over and/or held in escrow. Parties are at liberty to apply for an extension of this suspension if necessary. For the avoidance of doubt, Sanum shall

not be required to pay any of the Garnished Sums until the ICC Tribunal's directions are obtained.

(f) There shall be liberty to apply.

80 We further order that Sanum is to pay the costs of SUM 44, fixed at S$15,000 (all-in), to the Lao Appellants. The usual consequential orders will apply.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Francis Xavier s/o Subramaniam Xavier Augustine SC, Tan Hua Chong Edwin (Chen Huacong), Kristin Ng Wei Ting, Tay Bok Chong Alvin (Rajah & Tann Singapore LLP) (instructed), Tan Boon Yong Thomas (Haridass Ho & Partners) for the applicants;
Yeo Khirn Hai Alvin SC, Lin Weiqi Wendy, Chong Wan Yee Monica (Zhang Wanyu) and Teh Zi Ling Stephanie (Zheng Ziling) (WongPartnership LLP) for the respondent.