IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHCR 18

Originating Application No 643 of 2023 and Originating Application No 643 of 2023 (Summons No 2720 of 2023)

Between

Singapore Asia Trust Company Pte Ltd

… *Applicant*

And

(1) Avium Origins Pte Ltd
(2) Avant Talents Sdn Bhd

… *Respondents*

JUDGMENT

[Civil Procedure — Interpleader — When granted]
[Evidence — Admissibility of evidence — Privilege]

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Singapore Asia Trust Company Pte Ltd
v
Avium Origins Pte Ltd and another

[2023] SGHCR 18

General Division of the High Court — Originating Application No 643 of 2023 and Originating Application No 643 of 2023 (Summons No 2720 of 2023)
AR Perry Peh
11, 12 October 2023

10 November 2023 Judgment reserved.

AR Perry Peh:

Introduction

1 In HC/OA 643/2023 ("OA 643"), the applicant seeks interpleader relief in respect of a sum of $200,000 that it had received in its capacity as escrow agent pursuant to the terms of an escrow agreement. That sum was paid to the applicant by the first respondent in performance of a contract between the first and second respondents. The escrow agreement, which remains in effect at the time of the hearing before me, provides that the applicant is only to pay out the escrow monies on: (a) the receipt from the first or second respondent of written instructions for release of the escrow monies (which I refer to as a "Release Instruction") that are "substantially in the form" as required by the relevant template Release Instruction in the escrow agreement; or (b) in compliance with a court order or judgment or a final and unappealable arbitral award. In the

event, the second respondent and subsequently the first respondent each issued Release Instructions, seeking payment of the escrow monies. The applicant, which says that it does not know to whom the escrow monies are to be paid, now comes to court seeking interpleader relief.

2 It is trite law that the purpose of interpleader proceedings is "the determination of the incidence of an *admitted* liability" [emphasis in original] (see *Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other matters* [2015] 4 SLR 1229 ("*Precious Shipping*") at [89]). In this case, it is not in dispute that there are only two events that can trigger the applicant's obligation to pay as escrow agent, as I have described above – the receipt of a valid Release Instruction that is "substantially in the form", or a court order or judgment or arbitral award ordering it to pay out the escrow monies. It is also not in dispute that only the former is applicable in this case. However, the applicant has chosen to *not* take a position on the validity of either or both of the Release Instructions that it has received from the first and second respondents. Correspondingly, it has *not* taken a position on what constitutes a valid Release Instruction for the purposes of the escrow agreement. Instead, the applicant takes the position that, for it to be entitled to interpleader relief, it suffices that the Release Instructions are not "completely out of whack", and further, in determining its entitlement to interpleader relief, the court should refrain from assessing the validity of the Release Instructions, an issue which it said went towards the question of whether the first or second respondent had a better claim to the escrow monies. Can that be correct?

Background

3 The first respondent, Avium Origins Pte Ltd ("AOPL") is the owner and operator of the "Avium Metaverse", which is an ecosystem of brands, business and entities working collaboratively in the development of, among other things, intellectual property and non-fungible tokens ("NFTs").[1] The second respondent, Avant Talents Sdn Bhd ("ATSB") is an agency representing E-sports individuals and teams and is responsible for managing an E-sports team known as the "Geek Fam".[2]

The Services Agreement and the Escrow Agreement

4 In October 2022, AOPL and ATSB entered into a Collaboration and Exclusive Services Agreement ("the Services Agreement") for the development and setting up of a decentralised e-sports organisation ("DEO"). Under the Services Agreement, ATSB was responsible for the operational strategy and the management of E-sports talent teams which were to be on-boarded to the DEO, and in particular, ATSB was to on-board the Geek Fam E-sports team to the DEO. On the other hand, AOPL was to set up an escrow account and maintain therein a minimum balance of US$300,000.[3] The minimum balance was later amended by agreement to US$200,000, and the remaining US$100,000 represented a top up that would be triggered on certain conditions, the terms of which are immaterial for present purposes.[4] Clause 8.2.4 of the Services Agreement provided for AOPL to maintain the escrow account and escrow

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1 1st Affidavit of Nathanael Lim Yao Hui ("NL1") at para 6.

2 1st Affidavit of Lim Keat Kuang ("LKK1") at para 7.

3 NL1 at para 12.

4 LKK1 at para 10.

amount "up till the date of the DEO's first NFT launch, after which, the provisions of which Clause 8.3 shall apply".[5]

5 A literal reading of clause 8.3 suggests that it contemplates a situation where the DEO's first NFT launch has taken place, and it provides for different arrangements that can be had in respect of the escrow monies, depending on the revenue level achieved by the DEO's first NFT launch.[6] If the revenue was US$1.6m or more, then AOPL would be entitled pursuant to clause 8.3.1 of the Services Agreement to close the escrow account and deal with the escrow monies as it wished. Different scenarios were provided for in the event that the revenue came in less than US$1.6m: (a) if the revenue came between US$1.2m and US$1.6m, the parties agreed to negotiate in good faith with a view towards maintaining the continuity of the business venture; (b) if the revenue came in between US$400,000 and US$1.2m, then the parties agreed to negotiate in good faith on how to make up for the shortfall to achieve the targeted revenue, and failing mutual agreement, ATSB had two options, one of which was to terminate the Services Agreement and draw down on the escrow monies pursuant to clause 8.3.2(b)(i) of the Services Agreement; and (c) if the revenue came in below US$400,000, parties would not be required to negotiate in good faith unlike in the previous scenario, and instead ATSB could avail itself of either of two options, one of which was similarly to terminate the Services Agreement and draw down on the escrow monies pursuant to clause 8.3.2(c)(i) of the Services Agreement.

6 The escrow account was set up with the applicant, Singapore Asia Trust Company Pte Ltd ("SATC"). In December 2022, AOPL, ATSB and SATC

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5 NL1 at p 48.

6 NL1 at pp 48–49.

entered into an Escrow Agreement setting out the terms upon which SATC agreed to hold and deal with the escrow amount ("the Escrow Agreement"). The sum of US$200,000 was later transferred by AOPL into the escrow account with SATC. As I have alluded to in the opening of this judgment, clause 1.4.2 read with clause 1.4.3 of the Escrow Agreement provides for two situations in which the escrow monies are to be paid out: (a) where SATC has received from AOPL or ATSB a Release Instruction that is "substantially in the form" of the template as set out in either Appendix 2 or Appendix 3 of the Escrow Agreement; or (b) where SATC has been ordered pursuant to a court order or judgment or an arbitral award to make payment of the escrow monies.

The Release Instructions issued to SATC

7 It does not appear to be in dispute that the DEO's first NFT launch never took place.[7] AOPL states that this was a result of a drop in NFT trading volumes and prices since January 2023, and so the launch would not have been commercially viable.[8]

8 On 6 April 2023 at 12.05pm, in an e-mail in which AOPL's Director Nathanael Lim ("NL") was copied, ATSB sent SATC a Release Instruction ("the 6 Apr Release Instruction").[9] According to the Escrow Agreement, any Release Instructions issued by ATSB had to be in the form of Appendix 2 of the Escrow Agreement. For present purposes, I need only produce the following portions of Appendix 2:[10]

…

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7 NL1 at para 33.

8 NL1 at paras 33–34.

9 LKK1 at p 81.

10 1st Affidavit of Wang Weimin, Dennis ("DW1") at p 30

> Service Provider Release Instructions
>
> To: SINGAPORE ASIA TRUST COMPANY LTD
>
> …
>
> We refer to the amount of USD 200,000/- ('Escrow Amount') held by you in your account maintained with …, held for our benefit pursuant to the terms of … (i) a collaboration and exclusive services agreement dated 25 October 2022 (as amended and supplemented from time to time ('the Services Agreement') and made between (1) Avium Origins Pte Ltd ('the Company') and (2) Avant Talents Sdn Bhd ('the Service Provider') and (ii) the escrow agreement entered into between you, the Company and the Service Provider dated 19 December 2022 ('the Escrow Agreement').
>
> We hereby:
>
> (a) inform you that we, Avant Talents Sdn Bhd, has become entitled to draw on the Escrow Account for the full Escrow Amount pursuant to the Services Agreement, namely:
>
> (i) the Targeted Revenue (as defined in the Services Agreement) has not been achieved;
>
> (ii) we, ATSB, hereby exercise our right to draw on the Escrow Amount in accordance with [Clause 8.3.2(b)(i) or Clause 8.3.2(c)(i)] (*delete one as appropriate*).
>
> (b) irrevocably and unconditionally instruct and authorise you to release in Avant Talents Sdn Bhd's favour and transfer, with immediate effect, in immediately available funds … from the Escrow Account …
>
> We confirm that you will have no further obligations to us under the Escrow Agreement upon you complying with the above instructions.
>
> …

9 The mention in Appendix 2 of clauses 8.3.2(b)(i) and 8.3.2(c)(i) are references to the corresponding clauses in the Services Agreement, which set out the respective options ATSB had to terminate the Services Agreement and draw down on the escrow monies in the event the revenue from the DEO's first NFT launch came in between US$400,000 and US$1.2m or below US$400,000 (see [5] above). The 6 Apr Release Instruction is identical with the form in

Appendix 2 save that it omits paragraph (a)(ii) of Appendix 2 entirely. Instead of what is reproduced above, that part of the 6 Apr Release Instruction states:[11]

> (a) inform you that we, Avant Talents Sdn Bhd, has become entitled to draw on the Escrow Account for the full Escrow Amount pursuant to the Services Agreement, namely:
>
> > (i) the Targeted Revenue (as defined in the Services Agreement) has not been achieved;

10 Shortly after the above e-mail, at 12.12pm, ATSB's director Lim Keat Kuang ("LKK"), who was also the authorised signatory for ATSB under the terms of the Escrow Agreement, replied to the e-mail chain and confirmed that the 6 Apr Release Instruction had been signed by him. Subsequently, at 3.21pm, SATC acknowledged receipt of the 6 Apr Release Instruction and asked for an amended Release Instruction with ATSB's clarification on paragraph (a)(ii) of Appendix 2, which had been omitted from the 6 Apr Release Instruction. Later that day, at 5.08pm, ATSB replied, stating:[12]

> Our Release Instructions sent to you today at 12.05pm have been correctly issued in relation to Point (i). Both reasons are mutually exclusive. We cannot reference both Point (i) and (ii) as they are separate reasons. Notwithstanding, we issue the Release Instructions here reflecting Point (ii) but with a strike-through for the above reasons. …

11 The Release Instruction attached in this e-mail at 5.08pm essentially reproduces paragraph (a) of Appendix 2, save that for sub-paragraph (a)(ii), instead of being omitted entirely as it had been previously, it is now reproduced with a strikethrough across the entirety of the paragraph.[13] It is not in dispute that this version of the 6 Apr Release Instruction is taken to have superseded its previous version, and I therefore also refer to it as the 6 Apr Release Instruction.

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11 DW1 at pp 37–38.

12 LKK1 at p 80.

13 DW1 at pp 39–40.

12 Later at 5.51pm, SATC acknowledged receipt of ATSB's Release Instructions, stating:[14]

> Thank you for the updated Release Instructions that is well received.
>
> We will make the necessary arrangement with [the bank] and keep you updated on the progress. Please do note that tomorrow is a Public Holiday in Singapore and we will write to you again on Monday.

13 Early in the morning the next day, on 7 April 2023 at 1.49am, NL replied to the e-mail chain, stating, among other things:

> It's not clear to me on what legal basis of the Services Agreement the escrow is being drawn down, and outside of the specified scenarios, would basically be contrary to the Services Agreement.

14 Later that day, at 10.31pm, AOPL sent SATC (by the same e-mail chain) a Release Instruction ("the 7 Apr Release Instruction"). According to the Escrow Agreement, any Release Instructions issued by AOPL had to be in the form of Appendix 3 of the Escrow Agreement. The preamble and administrative sections of Appendix 3 are identical to those in Appendix 2, and only the contents in paragraphs (a) and (b) of Appendix 3 are distinct, which I reproduce below:[15]

> We hereby:
>
> (a) inform you that the Company [referring to AOPL] has become entitled to the full redemption and refund of the Escrow Amount pursuant to *[Clause 8.3.1 or 8.3.2(b)(ii)] (delete one as appropriate) of the Services Agreement*
>
> (b) irrevocably and unconditionally instruct and authorise you to release in Avium Origins Pte Ltd's and transfer, with immediate effect, in immediately available funds

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14 LKK1 at p 79.

15 DW1 at p 31.

> … from the Escrow Account by way of a … issued in our favour.
>
> [emphasis added]

15 For ease of discussion, in the remainder of this judgment, I will refer to the part of Appendix 3 that I have quoted above and emphasised in italics, which requires AOPL to specify either clause 8.3.1 or 8.3.2(b)(ii) of the Services Agreement as the basis of the drawdown, as "para (a)(i)" of Appendix 3.

16 The mention of clauses 8.3.1 and 8.3.2(b)(ii) are similarly references to the corresponding clauses in the Services Agreement. As mentioned earlier, clause 8.3.1 provided that AOPL could close the escrow account and draw down the escrow monies if revenue from the DEO's first NFT launch came in above US$1.6m (see [5] above). Clause 8.3.2(b)(ii) on the other hand was the second of the two options ATSB had in the event that the revenue level from the DEO's first NFT launch came between US$400,000 and US$1.2m. Under that option, if no mutual agreement could be reached between AOPL and ATSB on the means or measures to make up the shortfall to achieve the targeted revenue of US$1.6m, instead of terminating the Services Agreement and drawing down on the escrow monies pursuant to clause 8.3.2(b)(i) (see also [5] above), ATSB could agree to the continuity of the collaboration and instead utilise the revenue raised from the DEO's first NFT launch for its monthly expenses. Although clause 8.3.2(b)(ii) does not state so explicitly, when it is read against clause 8.3.2(c)(ii), it would appear that if ATSB elected for the option in clause 8.3.2(b)(ii), ATSB would have no entitlement to draw down on the escrow monies as it was now entitled to utilise the revenue from the DEO's first NFT launch instead, and accordingly, AOPL would be entitled to close down the escrow account and obtain a refund of the escrow monies.[16]

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[16] NL1 at p 49.

17 The 7 Apr Release Instruction was identical with the form provided for in Appendix 3, save for the section in para (a)(i). Instead of what is reproduced above, it states:[17]

> We hereby:
>
> (a) inform you that the Company has become entitled to the full redemption and refund of the Escrow Amount pursuant to the breach of the Services Agreement; …

18 In the e-mail sent on 7 April 2023 at 10.31pm, AOPL also informed ATSB that it disagreed that ATSB had the right to draw down on the escrow monies, and that the conditions on which the attempted drawdown in the 6 Apr Release Instruction is based was not provided for in the Services Agreement and contrary to it. AOPL further stated, in a section of the e-mail addressed to SATC, that it disagreed with the 6 Apr Release Instruction on the basis that the conditions of the Services Agreement have not been met, and it brought to SATC's attention the 7 Apr Release Instruction.[18]

19 On Monday, 10 April 2023 10.24am, SATC replied to the e-mail chain addressing both AOPL and ATSB and stated:[19]

> … we, as Escrow Holder, have received two sets of release instructions for the Escrow Amount, one from ATSB and another from AOPL.
>
> We note that the parties appear to disagree on the release of the Escrow Amount – we would like to remind parties that, in accordance with the Escrow Agreement, we are not obliged to enquire on the merits of the Services Agreement.
>
> … we would like to formally inform the parties that we are unable to act upon the Escrow Amount due to the conflicting instructions that we have received from both AOPL and ATSB.

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17 DW1 at p 43.

18 LKK1 at p 79.

19 LKK1 at p 78.

> The Escrow Agreement does not provide for any 'order of priority' to release instructions received, nor the process in the event of conflicting release instructions. Accordingly, unless both AOPL and ATSB can resolve the conflicting release instructions, we are unable to perform our duties to release the Escrow Amount to either party.
>
> …
>
> We hope that parties can resolve this amongst themselves in order for us to perform our duties as Escrow Holder.

Subsequent developments

20 On 24 May 2023, ATSB's then-solicitors wrote to AOPL, alleging that AOPL was in breach of the Services Agreement.[20] Then, on 9 June 2023, AOPL's solicitors wrote to ATSB, denying ATSB's allegations that it had acted in breach of the Services Agreement, and stating that it was in fact ATSB that had acted in repudiatory breach of the Services Agreement and AOPL was thereby terminating the Services Agreement.[21] There appears to have been no reply by ATSB to AOPL's letter of 9 June 2023.[22]

21 On 16 June 2023, ATSB issued a letter of demand to SATC, stating that their failure and/or refusal to pay the escrow monies notwithstanding having confirmed receipt of the 6 Apr Release Instruction constituted a breach of clauses 1.4.2(a) and 1.10 of the Escrow Agreement.[23] In that letter, ATSB further stated that it was incorrect for SATC to take the position that there were "conflicting" Release Instructions because, at the time the 6 Apr Release Instruction had been received by SATC, there were no other valid Release Instructions received under the Escrow Agreement, and any subsequent Release

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20 LKK1 at para 43 and p 155.

21 LKK1 at para 44 and p 141; NL1 at para 46.

22 LKK1 at p 153.

23 LKK1 at para 45 and p 149.

Instructions that SATC received from other parties were incapable of giving rise to "conflicting" Release Instructions. ATSB demanded that SATC pay to it the escrow monies within seven days.

22 On 18 June 2023, AOPL wrote to SATC reiterating the position that it had stated earlier, namely, that ATSB had no basis for drawing down on the escrow monies.[24] AOPL further stated in the letter that the 6 Apr Release Instruction was invalid because they were not "substantially in the form set out in Appendix 2 to the Escrow Agreement". AOPL further asked that SATC, by 23 June 2023 (a) confirm that it would not make payment of the escrow monies to ATSB and (b) that it makes payment of the escrow monies to AOPL, because clause 8.2.4 of the Services Agreement (see [4] above) was "no longer applicable" and AOPL intended to close the escrow account and have the escrow monies returned to it, in line with the 7 Apr Release Instruction.

23 On 19 June 2023, SATC's solicitors wrote to both AOPL and ATSB, reiterating that it had received conflicting Release Instructions concerning the release of the escrow monies, and that the Escrow Agreement was silent on the mechanism and/or priority that would apply in the event that SATC received conflicting Release Instructions or where one party took the position that the other had no basis to issue a Release Instruction.[25] SATC asked that the dispute relating to the escrow monies be resolved between AOPL and ATSB, and stated that if AOPL and ATSB were unable to resolve their dispute, it would take out an application for interpleader relief to determine who the escrow monies were to be paid to.

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24 LKK1 at para 46 and p 152; NL1 at p 49.

25 LKK1 at para 47 and p 190.

24 Subsequently, the parties came to an agreement that SATC would not take any further action in connection with the escrow monies until the conclusion of a without prejudice meeting between ATSB and AOPL for the resolution of the dispute.[26] It appears that this meeting came to naught. On 28 June 2023, ATSB's solicitors wrote to AOPL, responding to the 9 June 2023 letter from AOPL's solicitors (see [20] above). In that letter, among other things, ATSB denied that it had acted in repudiatory breach of the Services Agreement and stated that it was in fact AOPL who had acted in repudiatory breach. ATSB further stated that it "accepts [AOPL's] repudiatory breach of the [Services Agreement] and hereby terminates the [Services Agreement]".[27] In the meantime, SATC filed OA 643 on 27 June 2023. OA 643 was served on AOPL on 6 July 2023, and served on ATSB on 3 July 2023.[28]

25 On 7 July 2023, ATSB commenced an arbitration against AOPL in respect of the dispute under the Services Agreement in the Singapore International Arbitration Centre ("SIAC"). These arbitral proceedings have been conducted in accordance with the SIAC's Expedited Procedure and were ongoing at the time of the hearing before me.[29]

26 It would appear, from ATSB's Notice of Arbitration ("NOA")[30] and AOPL's Response to the Notice of Arbitration ("RNOA"),[31] that one of the issues in the arbitration is whether ATSB or AOPL was entitled to draw down

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26 NL1 at paras 50–53.

27 NL1 at p 101.

28 Notes of Evidence ("NE"), 12 Oct 2023, p 9 line 26.

29 NL1 at paras 56 and 61.

30 NL1 at p 113.

31 NL1 at p 217.

on the escrow monies. In the NOA, ATSB disputes that it had acted in repudiatory breach of the Services Agreement by its attempted drawdown on the escrow monies (as AOPL alleged) because it had been "entitled" to draw down on the escrow monies, since AOPL failed to launch the DEO and consequently the Target Revenue specified in the Services Agreement had not been achieved.[32] This was obviously disputed by AOPL in the RNOA.[33] AOPL also states in the RNOA that, since the Services Agreement has been terminated before the DEO's first NFT launch, it was entitled to close the escrow account and draw down on the escrow monies, because the account need only be maintained up until the date of the DEO's first NFT launch.[34]

27 Subsequent to the commencement of arbitration, AOPL's solicitors wrote to ATSB's and SATC's respective solicitors, proposing that OA 643 be stayed pending the determination this issue of entitlement to the escrow monies in the arbitration. SATC's solicitors replied, stating that it had no objections. However, ATSB's solicitors objected to the stay, on the basis that the issue of AOPL or ATSB's entitlement to the escrow monies was not an issue to be determined in OA 643, because the court has not yet determined that SATC has satisfied the conditions for interpleader relief.[35]

28 The final piece of this procedural history is HC/SUM 2720/2023 ("SUM 2720"), which has been placed before me together with OA 643. SUM 2720 is an application by AOPL for two extracts in LKK's affidavits filed in support of ATSB in OA 643 to be expunged on the basis that they attract

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32 NL1 at p 123.

33 NL1 at pp 225-226.

34 NL1 at p 226.

35 NL1 at paras 56–58 and pp 210–215.

without prejudice privilege.[36] Those extracts ("the Offending Extracts) are contained in e-mails sent by NL on two occasions to officers/representatives of ATSB in an e-mail chain where SATC was copied. The first was sent on Friday, 6 April 2023 at 2.12am ("the 6 Apr E-mail"). In terms of chronology, the 6 Apr E-mail was sent *before* the e-mail containing the 6 Apr Release Instruction was sent, and *after* ATSB had sent an e-mail on 5 April 2023 attaching a Release Instruction seeking to draw down on the escrow monies.[37] I should add that this Release Instruction in the e-mail on 5 April 2023 is distinct from the 6 Apr Release Instruction and is also not the basis on which ATSB relies in seeking payment of the escrow monies. Briefly, in the Offending Extracts of the 6 Apr E-mail, NL proposed that ATSB could nevertheless be entitled to the escrow monies on the basis that ATSB and AOPL terminated the Services Agreement and in full and final settlement of all claims and liabilities under the Services Agreement. The second of the Offending Extracts is contained in an e-mail sent on 7 April 2023 at 1.49am ("the 7 Apr E-mail"). In terms of chronology, the 7 Apr E-mail preceded AOPL's e-mail later that day which contained the 7 Apr Release Instruction. Briefly, in the Offending Extracts of the 7 Apr E-mail, NL asked if any disbursement of the escrow monies that ATSB had been seeking (by way of the 6 Apr Release Instruction) was in pursuit of a termination of the Services Agreements on the terms he had previously suggested in the 6 Apr E-mail.

The applicable principles

29 Before turning to the parties' submissions, I set out the legal principles relating to the applications before me.

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36 Schedule 1 to HC/SUM 2720/2023.

37 LKK1 at pp 82–84.

Interpleader relief

30 As the High Court explained in *Precious Shipping* ([2] above) (at [17]), the court's power to grant interpleader relief is statutorily conferred by s 18(2) of the Supreme Court Judicature Act 1969 (2020 Rev Ed) ("the SCJA") read with para 4 of the First Schedule to the SCJA (see also *Perry, Tamar and another v Esculier, Jacques Henri Georges and another and another matter* [2022] 1 SLR 107 at [33]). Paragraph 4 of the First Schedule provides for two circumstances in which the court has the power to grant interpleader relief, of which only the first is relevant to OA 643:

> 4. Power to grant relief by way of interpleader —
>
> (*a*) where the person seeking relief is under liability for any debt, money, or goods or chattels, for or in respect of which the person has been or expects to be, sued by 2 or more parties making adverse claims thereon; …
>
> (*b*) …
>
> and to order the sale of any property subject to interpleader proceedings.

31 The High Court in *Precious Shipping* considered the Rules of Court (2014 Rev Ed) ("ROC 2014"). The relevant provision in the ROC 2014 concerning interpleader proceedings was O 17 (see *Precious Shipping* at [19]), in which r 1 substantially reproduces para 4 of the First Schedule to the SCJA, r 3 sets out the manner in which an application for interpleader relief is to be made, and r 5 sets out the powers of the court hearing an application for interpleader relief, the relevant parts of which I reproduce below:

> 5.—(1) Where on the hearing of an originating summons or a summons under this Order all the persons by whom adverse claims to the subject matter in dispute (referred to in this Order as the claimants) appear, the Court may order —
>
> (*a*) that any claimant be made a defendant in any action pending with respect to the subject-matter in dispute in

> substitution for or in addition to the applicant for relief under this Order; or
>
> (*b*) that an issue between the claimants be stated and tried and may direct which of the claimants is to be plaintiff and which defendant.
>
> (2) Where —
>
> …
>
> (*b*) all the claimants consent or any of them so requests; or
>
> (*c*) the question at issue between the claimants is a question of law and the facts are not in dispute,
>
> the Court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just.

32 Having considered the structure of O 17 of the ROC 2014, the High Court in *Precious Shipping* (at [20]) held that an application for interpleader relief proceeds in two stages:

(a) At "stage 1", the court ascertains if the statutory preconditions for the grant of interpleader relief have been satisfied.

(b) If the conditions precedent in stage 1 are met, then the inquiry moves to "stage 2", where the court will decide what consequential orders ought to follow. Even if the statutory conditions precedent have been met, the court has the discretion whether or not to grant interpleader relief, and where it decides to grant interpleader relief, it may make one of the three orders provided for in O 17 r 5.

33 The provisions in the Rules of Court 2021 ("ROC 2021") relating to interpleader relief, set out in O 13 r 10, are shorter. I reproduce the relevant portions of O 13 r 10 below:

> 10.—(1) A person who is in possession or control of any property may apply to the Court at any time to be released from any liability relating to the property if the person files an affidavit stating that the person —
>
> (*a*) does not make any claim to the property other than for expenses and fees relating to such possession or control;
>
> (*b*) faces or expects to face conflicting claims to the property;
>
> (*c*) does not know or does not wish to decide which of the conflicting claims is the valid one; and
>
> (*d*) is willing to abide by any direction given by the Court relating to the property.
>
> …
>
> (4) The Court must fix a case conference for the application.
>
> (5) At the case conference, the Court may decide on the conflicting claims to the property summarily or give directions regarding the hearing of the conflicting claims.

34 Comparing O 13 r 10 of the ROC 2021 and O 17 of the ROC 2014, I make three observations.

(a) First, O 13 r 10(1) sets out the requirements that must be satisfied by an applicant for interpleader relief, and it largely reproduces what is required by the statutory preconditions in para 4 of the First Schedule to the SCJA, and the formal requirements that were previously contained in O 17 r 3 of the ROC 2014.

(b) Secondly, it appears that, unlike O 17 r 5 of the ROC 2014, O 13 r 10 of the ROC 2021 is not prescriptive of the type of orders that the court may make when hearing an interpleader application. O 13 r 10 is silent on the types of orders that the court may make when hearing an interpleader application, and merely provides for the court's powers to "decide on the conflicting claims" or "give directions regarding the

hearing of the conflicting claims" at the case conference fixed for the interpleader application (see also Cavinder Bull SC gen ed, *Singapore Civil Procedure (2022) Volume I* (Sweet & Maxwell, 2022) at para 13/10/25).

(c) Thirdly, in my view, notwithstanding the difference in wording between O 13 r 10 of the ROC 2021 and O 17 of the ROC 2014, the two-stage analysis set out in *Precious Shipping* will still apply in the context of O 13 r 10. Because the court's powers to grant interpleader relief are statutorily conferred (see *Precious Shipping* at [18]), the court can only be in a position to consider whether to grant interpleader relief in the exercise of its discretion and what consequential orders if it grants interpleader relief (*ie*, stage 2) where it has been satisfied that the conditions precedent for exercising those statutorily conferred powers have been met (*ie*, stage 1). I therefore respectfully adopt the two-stage analysis in *Precious Shipping* for the purposes of OA 643.

35 I now consider the requirements under stage 1 in greater detail. Apart from the formal requirements set out in O 13 r 10(1) of the ROC 2021 relating to what must be contained in the supporting affidavit for the interpleader application, which have been complied with by SATC in this case,[38] based on the statutory preconditions in para 4 of First Schedule to the SCJA, the conditions precedent that must be met before interpleader relief can be granted are: (a) the applicant must be under a *liability* for any debt, money, goods or chattels; (b) the applicant expects to be sued by *at least two* persons; and (c) there are *adverse claims* for the debt, money goods or chattels from the persons whom the applicant expects will bring suit (see *Precious Shipping* at [27]). The

[38] DW1 at paras 22 and 28–29.

burden of proving that these preconditions have been met fall on the applicant for interpleader relief (see *Precious Shipping* at [28]).

36 The first requirement of a "liability" is typically self-explanatory, but as it will be apparent later, it deserves greater attention in this case. As for the second requirement, what the applicant must demonstrate is to show that the competing claims by the two or more claimants have a *prima facie* basis, that is, these claims have an objective basis in law and fact (see *Precious Shipping* at [33]). As for the third requirement, the applicant must demonstrate three features in order to show that the competing claims are adverse: (a) the claims are made in respect of the same subject matter; (b) the claims are mutually exclusive in that the resolution of the interpleader results in the extinction of the unsuccessful competing claim(s); and (c) there must be actual disagreement between the claimants and the applicant for interpleader relief faces an actual dilemma as to how it should act (see *Precious Shipping* at [62], [65] and [67]).

37 In *Precious Shipping*, with reference to O 17 of the ROC 2014, the High Court held that if the conditions precedent in stage 1 are not satisfied, the court must dismiss the interpleader application, and it has *no* powers to summarily determine the merits of the competing claims and grant judgment pursuant to that determination (see *Precious Shipping* at [87] and [91]). The court explained that there was no such general power of summary determination, for two reasons. First, the powers of the court to summarily determine claims as part of the interpleader process is specifically provided for under O 17 r 5(2) of the ROC 2014, and the statutory scheme imposes specific and clear constraints on the court's power of summary determination, which cannot be invoked in a case that does not even pass muster under stage 1 (see *Precious Shipping* at [92]). Secondly, as a matter of principle, any such power of summary determination exercised even when the conditions precedent for interpleader relief have not

been satisfied would fall outside the scope of the interpleader process, the objective of which is to allow the court to determine the *incidence* of liability, and not for the *determination* of liability (see *Precious Shipping* at [93]–[94]).

Without prejudice privilege

38 "Without prejudice" privilege is a rule affecting the *admissibility* of evidence and it is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish (see *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") at [8]). Therefore, statements or correspondence exchanged in negotiations for the settlement of disputes are subject to without prejudice privilege because if they were otherwise admissible in evidence and subject to discovery in subsequent proceedings, parties would be discouraged from making concessions to settle (see *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") at [23]).

39 "Without prejudice" privilege finds expression in s 23 of the Evidence Act 1997 (2020 Rev Ed) ("the Evidence Act") (see *Mariwu* at [24]). In cases where the communication is expressly stated to be made "without prejudice", save for exceptional situations, it will not be admissible (see s 23(1)(*a*) of the Evidence Act). Where no such express condition has been imposed, the court examines the surrounding circumstances in which the communication was made and ascertains whether they were such that the court may infer an agreement to the effect that evidence of this communication should not be given (see s 23(1)(*b*) of the Evidence Act), the classic example of which would be where the parties were in fact seeking to settle a dispute at the material time when the communications were exchanged (see *Sin Lian Heng* at [12]). There are accordingly two requirements that must be satisfied before "without prejudice"

can be invoked: (a) the communication must be an admission; and (b) there must be a dispute which the parties are trying to settle (see *Sin Lian Heng* at [13]; see also *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [17]).

The submissions

OA 643

40 SATC submits that the conditions precedent for the grant of interpleader relief are satisfied in this case because ATSB and AOPL's respective claims to the escrow monies, made pursuant to the 6 Apr Release Instruction and the 7 Apr Release Instruction (collectively, "the Release Instructions"), each have a *prima facie* basis.[39] Interpleader relief is necessary because the Escrow Agreement is silent on: (a) what it means for a Release Instruction to be "substantially in the form" of Appendix 2 or Appendix 3; and (b) the mechanism that is to be applied to determine how escrow monies are to be disbursed where SATC receives conflicting Release Instructions, as in the present case.[40] SATC also reiterates that, in accordance with the requirement that the competing claims need only have a *prima facie* basis, interpleader relief ought to be granted so long as ATSB and AOPL's competing claims are not bound to fail.[41] SATC also adds that it takes no position on what consequential orders should be made in the event the court found that it was entitled to interpleader relief.[42]

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39 SATC's written submissions at paras 25 and 30.

40 SATC's written submissions at para 30; NE, 11 Oct 2023, p 15 lines 23–32, p 16 lines 1–8.

41 NE, 11 Oct 2023, p 15 lines 27–29.

42 SATC's written submissions at para 43.

41 Both AOPL and ATSB argue that the conditions precedent for the grant of interpleader relief are not satisfied, but for different reasons. For AOPL, it argues that there can be no competing claims because ATSB plainly had no claim to the escrow monies. First, the 6 Apr Release Instruction, which completely omitted para (a)(ii) of Appendix 2, is not "substantially in the form" of Appendix 2.[43] AOPL argues that it is necessary for ATSB to specify, as part of para (a)(ii) of Appendix 2, whether it was relying on clause 8.3.2(b)(i) or 8.3.2(c)(i) (see [5] above) in drawing down on the escrow monies.[44] Secondly, at the time 6 Apr Release Instruction was issued, ATSB plainly had no basis to claim the escrow monies. As clauses 8.3.2(b)(i) and 8.3.2(c)(i) of the Services Agreement make clear, ATSB would only become entitled to the escrow monies where the first DEO NFT launch had taken place, the Target Revenue fell below US$1.6m, and ATSB consequently exercised its right to terminate Services Agreement after satisfying the other requirements therein. The Services Agreement was however not terminated at the time the 6 Apr Release Instruction was issued, and there would have been no basis whatsoever for ATSB to have issued the 6 Apr Release Instruction.[45]

42 AOPL argues that it is entitled to the escrow monies as an outcome of OA 643. This is because, following the issuance of the 28 June 2023 letter by ATSB's solicitors (see [24] above), it is now common ground between the parties that the Services Agreement has been terminated. Further, the DEO's first NFT launch has also not taken place (see [7] above). Since the Services Agreement was terminated *before* the first DEO NFT launch has even taken place, there is no longer any reason for the escrow account to be maintained and

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43 AOPL's written submissions at para 88.

44 NE, 11 Oct 2023, p 21 lines 9–11.

45 AOPL's written submissions at para 89.

no basis for SATC to hold on to the escrow monies,[46] and AOPL is accordingly entitled to restitution of the escrow monies it had paid to SATC, and so AOPL has a claim to the escrow monies.[47] AOPL therefore argues that if interpleader relief is granted, the court should order SATC to pay AOPL the escrow monies.[48] In the alternative, the court should direct that ATSB and AOPL's competing claims to the escrow monies be determined in the arbitration between them, pursuant to s 11A of the International Arbitration Act 1994 (2020 Rev Ed) ("the International Arbitration Act"), since their claims raised issues that belonged to the arbitration.[49] However, AOPL also argues that, even if interpleader relief is not granted, the court may nevertheless make an order for SATC to pay AOPL the escrow monies, because, for the reasons cited above, there is undisputedly no reason for the escrow account to be maintained and with that, there can be no dispute over title to the escrow monies – since these monies were paid by AOPL, they ought to be returned to AOPL.[50]

43 For ATSB, it argues that there can be no competing claims because only its claim to the escrow monies is valid, and AOPL can have no claim to the escrow monies. First, the 6 Apr Release Instruction is valid and "substantially in the form" of Appendix 2.[51] ATSB points to the fact that SATC had acknowledged the receipt of the 6 Apr Release Instruction at the material time, which shows that SATC too accepted the validity of the 6 Apr Release

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46 AOPL's written submissions at paras 105–108.

47 AOPL's written submissions at para 109.

48 NE, 11 Oct 2023, p 22 lines 27–30.

49 AOPL's written submissions at paras 111–113.

50 NE, 11 Oct 2023, p 23 lines 24–30.

51 ATSB's written submissions at para 63.

Instruction.[52] Secondly, under the Escrow Agreement, SATC was obliged to pay out upon receipt of the first valid Release Instruction, and so once SATC received the 6 Apr Release Instruction, any subsequent Release Instruction issued (such as the 7 Apr Release Instruction) is ineffective.[53] ATSB also disagrees with AOPL's submissions that it (ATSB) had no entitlement to the escrow monies because the underlying conditions in the Services Agreement (namely, clauses 8.3.2(b)(i) or 8.3.2(c)(i)) have not been satisfied, because under the terms of the Escrow Agreement, SATC is simply obliged to pay the escrow monies on receipt of valid Release Instructions, and SATC is not obliged to inquire into whether the conditions of the Services Agreement were satisfied before deciding to make payment.[54]

44 As for the consequential orders that the court should make if interpleader relief were to be granted, ATSB's position is that the competing claims between itself and AOPL to the escrow monies be determined in the pending arbitration between the parties.[55] ATSB also clarifies that, despite it having previously stated that it be paid the escrow monies in affidavits filed for OA 643, it was not asking for such an order if interpleader relief were to be granted, and the position in the affidavits had only been taken in support of its argument that only ATSB but not AOPL was entitled to the escrow monies.[56]

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52 ATSB's written submissions at paras 64–68.

53 ATSB's written submissions at para 77; NE, 11 Oct 2023, p 26 lines 2–5.

54 ATSB's written submissions at para 71.

55 ATSB's written submissions at para 90.

56 NE, 11 Oct 2023, p 25 lines 29–32.

SUM 2720

45 In their written submissions, AOPL and ATSB each made several arguments in connection with SUM 2720, but I surmised from their oral submissions that the following represent the gist of their respective positions.

46 AOPL argues that the Offending Extracts should be expunged because: (a) first, NL's e-mails were sent at a time when the parties were already in dispute over whether ATSB had been entitled to draw down on the escrow monies, and so they arose in the course of negotiations to resolve a dispute;[57] and (b) secondly, NL's e-mails clearly contained an admission against AOPL's interests aimed at inviting negotiations for settlement because NL stated that, notwithstanding the Services Agreement not providing for the draw down of the escrow monies in the given circumstances, ATSB could nevertheless draw down on those monies in full and final settlement of all claims under the Services Agreement.[58] Although AOPL in its written submissions did not specifically frame the dispute over ATSB's entitlement to draw down on the escrow monies as one arising *under the Services Agreement*, it is clear from the 6 Apr E-mail and the 7 Apr E-mail that NL raised objections about ATSB's drawdown because the conditions in the Services Agreement had not been satisfied. Therefore, the dispute identified by AOPL, to which the 6 Apr E-mail and the 7 Apr E-mail relate, must be a dispute over ATSB's entitlement at that time to draw down on the escrow monies under the terms of the Services Agreement.

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57 AOPL's written submissions at paras 64–69.

58 AOPL's written submissions at para 74.

47 Anticipating ATSB's argument that any dispute to which NL's e-mails relate is one in respect of the Services Agreement and not the Escrow Agreement (see [48] below), AOPL argues that any distinction maintained between the Services Agreement and the Escrow Agreement cannot be correct because no bright line should be drawn between the two – the forms in both Appendix 2 and Appendix 3 of the Services Agreement make express reference to clauses of the Services Agreement. In determining if the Release Instructions were valid under the Escrow Agreement and thus gave rise to valid claims to the escrow monies, one necessarily had to look at the terms of the Services Agreement and understand how it works.[59]

48 ATSB raises the following in response. First and foremost, the Offending Extracts cannot attract without prejudice privilege for the purposes of OA 643, because the purported admissions in the Offending Extracts arise out of the Services Agreement and OA 643 only concerns a dispute under the Escrow Agreement as distinct from the Services Agreement.[60] Secondly, at the time the 6 Apr E-mail and the 7 Apr E-mail containing the Offending Extracts were sent by NL, there was no dispute between the parties over ATSB's entitlement to draw down on the escrow monies under the Services Agreement. This is because in both of those e-mails, NL did not dispute ATSB's entitlement to the escrow monies, and instead, he was proposing a ground for ATSB to draw down on the escrow monies (in respect of the 6 Apr E-mail) and trying to understand the basis in the Services Agreement pursuant to which ATSB was seeking to draw down on the escrow monies (in respect of the 7 Apr E-mail).[61]

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59 AOPL's written submissions at para 70; NE, 11 Oct 2023, p 5, p 6 lines 1–6.

60 ATSB's written submissions at para 51; NE, 11 Oct 2023, p 11, lines 9–12.

61 ATSB's written submissions at paras 32–36; NE, 11 Oct 2023, p 11 lines 14–32, p 12 lines 1–9.

Any such dispute only arose *after* AOPL issued the 7 Apr Release Instruction,[62] and therefore the Offending Extracts, which are contained in e-mails sent before the e-mail attaching the 7 Apr Release Instruction, do not attract without prejudice privilege. Finally, even if the Offending Extracts had been exchanged in continuation of earlier negotiations that separately involved only ATSB and AOPL, the Offending Extracts would have been sent on an "open basis" in the 6 Apr E-mail and 7 Apr E-mail since SATC was also copied in those e-mails.[63] ATSB says that NL had precisely copied SATC in those e-mails containing the Offending Extracts to apprise SATC of the situation between the parties so that SATC would not act on any Release Instruction issued by ATSB, and in these circumstances, the Offending Extracts cannot attract without prejudice privilege.

The issues in OA 643

49 The submissions pertaining to (a) whether the 7 Apr Release Instruction is ineffective because the Escrow Agreement obliged SATC to pay out on receipt of the first valid Release Instruction (see [43] above) and (b) whether the 6 Apr Release Instruction is ineffective because at the time when it was issued ATSB had no claim to the escrow monies because the underlying conditions of the Services Agreement had not been fulfilled (see [41] above), deal with the issue of whether AOPL and ATSB (respectively) have a claim to the escrow monies, in addition to the claim that the other party asserts. In other words, they are directed at the issue of whether there exist *competing* claims. These issues are therefore to be dealt with in considering the second of the three conditions

62 NE, 11 Oct 2023, p 12 lines 10–15.

63 ATSB's written submissions at para 43; NE, 11 Oct 2023, p 12 lines 17–28.

precedent in the analysis under stage 1 (*ie*, SATC's expectation to be sued by two or more persons).

50 However, the issue of whether the Release Instructions are "substantially in the form" (which I hereafter refer to as a question of its validity) raises some difficulty. In part, this difficulty arises because SATC has chosen to not take a position on whether either or both of the Release Instructions are valid for the purposes of clause 1.4 of the EA. This is apparent from various parts of SATC's submissions, where it argued that interpleader relief is necessary because the Escrow Agreement is silent on what constitutes a valid Release Instruction, and that the validity of the 6 Apr Release Instruction and the 7 Apr Release Instruction had to be determined under stage 2. I cite the following two examples:

(a) In its written submissions, SATC argues that both ATSB and AOPL raised *prima facie* competing claims which have to be fully investigated before any determination can be made as to the party entitled to the escrow monies, and one of those issues that had to be investigated is whether their respective Release Instructions "had been validly issued".[64]

(b) In oral submissions, SATC explains that it had come to the court for interpleader relief because the Escrow Agreement is silent on what "substantially in the form" means and it has received two sets of Release Instructions that were not identical to the form in Appendix 2 or 3, which raised the question on whether they are "substantially in the form".[65]

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64 SATC's written submissions at para 30.

65 NE, 11 Oct 2023, p 18 lines 13–15 and 23–25.

51 When I clarified with counsel for SATC whether SATC is taking a position on the validity of either or both of the Release Instructions for the purposes of OA 643, counsel submitted that any issue pertaining to the *validity* of the Release Instructions would only come up for determination in deciding whether AOPL or ATSB had a better claim to the escrow monies (*ie*, stage 2), and does not arise for consideration in determining if SATC was entitled to interpleader relief (*ie*, stage 1).[66] Counsel submitted that, for SATC to be entitled to interpleader relief, it suffices that the Release Instructions could not be "dismiss[ed] … out of hand",[67] in other words, that they are not inarguably bad or non-complaint with the Escrow Agreement. The other parties to OA 643 take a slightly different view, but they do not object to SATC's position *per se*. ATSB argues that the issue of what constitutes a valid Release Instruction is not before the court for the purposes of stage 1, but that was on account of its submission that it had been implicit in SATC's submission about there being *conflicting* Release Instructions that SATC must *also* have accepted that both the Release Instructions were valid",[68] and further, SATC had already accepted the 6 Apr Release Instruction as being valid by acknowledging its receipt at the material time.[69] AOPL argues that the validity issue has to be determined by the court as part of stage 1, and the question of whether either or both of the Release Instructions are valid cannot be contingent on the position that SATC has taken whether for the purposes of OA 643 or previously where it had acknowledged receipt of the 6 Apr Release Instruction.[70]

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66 NE, 12 Oct 2023, p 15 lines 28–31, p 16 lines 1–3.

67 NE, 12 Oct 2023, p 16 lines 11–27.

68 NE, 12 Oct 2023, p 2 lines 24–30, p 3 lines 1–6.

69 NE, 12 Oct 2023, p 2 lines 18–22.

70 NE, 12 Oct 2023, p 4 lines 25–31.

52 The validity of the Release Instructions ultimately goes towards whether ATSB or AOPL even have a claim to the escrow monies at all, and so it can be viewed as a factor affecting the merits of their respective alleged claims. However, given that the Escrow Agreement was and is still in effect, and the only possible trigger in this case for SATC's obligation to pay the escrow monies under the Escrow Agreement is the receipt of a valid Release Instruction (see [6] above), if there are no valid Release Instructions at all, then how would SATC's obligation to pay the escrow monies have been engaged in the first place? If that obligation is not engaged, then how can SATC be liable to either or both parties for the escrow monies? I therefore need to consider if SATC's position has been correctly taken. Accordingly, before turning to the analysis in stage 1 and stage 2 (if it arises) proper, there is a threshold question of whether the issue of the validity of the Release Instructions should be considered as part of the analysis in stage 1 in determining if the conditions precedent for grant of interpleader relief have been satisfied.

53 Accordingly, the following issues arise for determination in OA 643:

(a) Whether the issue of the validity of the Release Instructions is to be considered in determining if the conditions precedent for grant of interpleader relief have been satisfied under stage 1?

(b) In the light of the above, whether the conditions precedent for grant of interpleader relief have been satisfied? In particular, are there competing claims in the light of the arguments that ATSB and/or AOPL have respectively made? If so, should interpleader relief be granted and if so, what consequential orders ought the court make as part of stage 2?

(c) If the conditions for the grant of interpleader relief are not satisfied, can the court nevertheless make an order for the payment of

the escrow monies to AOPL, in the light of the arguments that AOPL has raised?

Whether the issue of the validity of the Release Instructions is to be considered in determining if SATC is entitled to interpleader relief

54 As stated in *Precious Shipping* ([2] above) (at [27]), there are three conditions precedent that must be satisfied before the court's power to grant interpleader relief can be engaged, derived from para 4(*a*) of the First Schedule to the SCJA: (a) the applicant is under a liability for the subject matter of the proceedings; (b) he expects to be sued by at least two persons; and (c) the claims from those persons whom the applicant expects to bring suit must be "adverse" (see also [35] above).

What does the statutory precondition of "liability" mean?

55 To satisfy the first condition precedent, the applicant must have *admitted* liability in respect of the subject matter of the interpleader proceedings – though it should be noted, this must be a single liability that can only be owed to one person (see also *Precious Shipping* at [60]). This requirement of an *admitted* liability is the very foundation of interpleader proceedings, in the absence of which, the objective of interpleader proceedings cannot be engaged. As the High Court explained in *Precious Shipping* (at [59]–[60]), interpleader proceedings exist to assist a party who wants to discharge an admitted liability or legal obligation but does not know to whom it should do so, and the interpleader process compels the real claimants to present their cases in order that the court can determine which one of them has the legal entitlement to call on the enforcement of the admitted liability or put another way, the "incidence of liability". In other words, interpleader proceedings are founded upon liability that *exists*.

56 Accordingly, for the court to be satisfied that the conditions for the grant of interpleader relief are satisfied and for the applicant to be entitled to interpleader relief, there must be *no question* that the applicant is liable in respect of the subject matter of the interpleader proceedings. Not only is a lesser standard (*eg*, where there is a good arguable case that the applicant is liable) contrary to the statutory wording in para 4(*a*) of the First Schedule to the SCJA, it would also encourage "flighty and skittish" applicants to utilise the interpleader procedure as an avenue for determining if their obligation to others have been engaged and relieve themselves from making that assessment. As the High Court cautioned in *Precious Shipping* (at [33]), albeit in a different context:

> Nervous or overly cautious stakeholders cannot hide themselves behind the skirts of the courts at the slightest sign of controversy. The office of interpleader is neither a licence for applicants to abdicate their duty to conduct an independent legal assessment of the tenability of the potential claims they face nor can it be used as an 'insurance policy' against potential litigation.

57 That there can be no question about the applicant's liability in order for it to be entitled to interpleader relief is also consistent with the reasoning in the decided cases. I consider a few of them here to illustrate:

(a) In *Precious Shipping*, there were two back-to-back contracts under which sellers agreed to supply bunkers to purchasers for use in their vessels, and to do so, the sellers contracted with physical suppliers for those bunkers. The purchasers took delivery of the bunkers and consumed them, but the physical suppliers received no payment from the sellers who were subsequently placed in voluntary liquidation, and the purchasers were also put on notice by the physical suppliers and consequently did not make payment to the sellers. The purchasers sought

interpleader relief as to who the payment of the purchase price should be made. On the facts of that case, however, there was no question that the purchasers were *liable* for the purchase price of the bunkers, because the bunkers had been stemmed and consumed (see *Precious Shipping* at [2]). The court eventually dismissed the application for interpleader relief on the basis that the physical suppliers, who lacked any contractual privity with the purchasers, did not even have a *prima facie* claim to the purchase price, and in any event, the physical suppliers' claims, all of which were maintained on non-contractual grounds, were not "adverse" to those of the sellers (see *Precious Shipping* at [84]).

(b) In *Development Bank of Singapore Ltd v Eng Keong Realty Pte Ltd and another* [1990] 1 SLR(R) 265, the applicant for interpleader relief had issued a guarantee of $170,000, on an application by the second defendant for the benefit of the first defendant. The second defendant had put up a fixed deposit of the same amount to secure the facility, which was to expire on 14 April 1988. Under the guarantee, the first defendant was entitled to demand payment on the guarantee if it was called upon to pay for any alienation of State land to extend a road to serve a development to be built on land that it had purchased from the second defendant. Under the terms of the guarantee, any such written demand would constitute sufficient evidence that the monies claimed by the demand were due and payable by the applicant without enquiry. In accordance with the terms of the guarantee, the first defendant made a written demand on 12 April 1988. There was no question before the court that the applicant was entitled to interpleader relief, and the court proceeded to find that the second defendant was entitled to the monies. Similarly, in this case, there was no question before the court that the applicant was liable on the sum of $170,000, which it either had to pay

out pursuant to the written demand, or as a debt that was repayable to the second defendant, its customer.

(c) In *IMC Shipping Company Pte Ltd v Viking Offshore & Marine AS and another* [1998] SGHC 168, the applicant had been paid $450,000 by one "Ohna". This represented the share capital that one "Viking" had to contribute under the terms of a shareholders' agreement for a joint venture company "SDI". Viking was a 30% shareholder in SDI. Subsequently, the shareholders of SDI decided to reduce its share capital rather significantly, and consequently, the amount of contribution required by Viking was reduced to $3,000. The remainder of the monies (which was $420,000 less other sums which the applicant was entitled to deduct) therefore had to be refunded, and the question was whether it was to be repaid to Ohna or Viking. The court found that applicant was entitled to interpleader relief. It held that there was no doubt that the applicant was liable for the remaining sum as a debt, because that represented excess money that the applicant was obliged to repay (at [8]).

58 Therefore, an applicant seeking interpleader relief must show that it is *liable* in respect of the subject matter of the interpleader proceedings, for example, by admitting to the relevant legal obligation which it says is engaged in the circumstances of the case, the performance of which one of the named respondents to the interpleader application is entitled to call upon, and the incidence of which it seeks to be determined by the application for interpleader relief. Of course, the applicant's admission of liability (if any) is not conclusive *per se* because ultimately, the court must be independently satisfied that the applicant is indeed liable as such before it can find that the conditions precedent for grant of interpleader relief have been satisfied. Put another way, that the

applicant is *liable* in respect of the subject matter of the interpleader proceedings is something which the court must be *satisfied* of, as part of the requirements under stage 1.

59 The satisfaction of this condition precedent (existence of liability) is therefore quite different from the second condition precedent (expectation to be sued by two or more persons). In respect of the second condition precedent, as the High Court held in *Precious Shipping* (at [34]), the applicant need only demonstrate it faces a genuine threat of multiple proceedings by showing that the competing claims have a *prima facie* basis, that is, they have an objective basis in law and fact, a threshold that can be met so long as the evidence led in support of the claims (which is assumed to be true) is not inherently incredible or out of all common sense or reason. This test of a *prima facie* case does not apply to the first condition precedent. The High Court in *Precious Shipping* did not extend the *prima facie* test to the first condition precedent, and it is apparent that the court only held it applicable to the second condition precedent (see *Precious Shipping* at [29]–[34]). That the test of a *prima facie* case does not apply to the first condition precedent also squares with principle. A *prima facie* standard makes sense in the context of the second condition precedent because the court, in deciding whether to *grant* interpleader relief, does not have to be satisfied of the *merits* of the competing claims. As the statutory wording in para 4(*a*) of the First Schedule to the SCJA suggests, the applicant's entitlement to interpleader relief is not contingent on the strength of the competing claims asserted because the applicant need only show an *expectation* to be sued by 2 or more persons. On the other hand, the *existence* of liability on the applicant's part is the very foundation of interpleader relief and it goes to the heart of whether the applicant is entitled to interpleader relief. The court must therefore be satisfied that such liability exists, and no lesser standard can suffice.

60 For completeness, I add that the third condition precedent (adverse claims) will also be something that the court must be *satisfied* with, in similar fashion to the first condition precedent (existence of liability). In other words, the court must similarly be satisfied that the competing claims (which need only be shown on a *prima facie* basis) are adverse in nature. This is because the *existence* of adverse claims similarly affects the entitlement of the applicant to interpleader relief, as the language of para 4(*a*) of the First Schedule to the SCJA makes clear. Also, in interpleader proceedings, the court does not resolve competing claims in the abstract, and that exercise is undertaken with the sole object of determining the *incidence* of the applicant's liability. If the claims are not adverse to each other, any resolution of the competing claims on their merits will not occasion the outcome of determining the incidence of liability, and that defeats the purpose for which interpleader proceedings have been brought in the first place. I respectfully add that this view is also consistent with the reasoning of the High Court in *Precious Shipping*, where it held that the claims of the physical suppliers, none of which were founded upon a *contractual* right to be paid the price of the bunkers under the purchaser-seller contract, were not adverse to the sellers' claims, which were simple claims for the contractual price for the bunkers due under those contracts (see *Precious Shipping* at [81]–[83]).

Whether the validity of the Release Instructions affects SATC's liability for the escrow monies

61 Whether the issue of the validity of the Release Instructions is to be considered under stage 1 therefore turns on whether it is a factor relating to SATC's liability for the escrow monies under the terms of the Escrow Agreement. Under clause 1.4 of the Escrow Agreement, SATC's obligation to pay out the escrow monies can be engaged only where (a) it receives a valid Release Instruction, *ie*, one that is "substantially in the form" of Appendix 2 or

Appendix 3 of the Escrow Agreement or (b) it is ordered by a court order or judgment or an arbitral award to do so. I reproduce the relevant sections of clause 1.4 below:

> 1.4 The Service Provider [referring to ATSB] and the Company [referring to AOPL] hereby irrevocably authorise and instruct the Escrow Holder to hold the Escrow Amount as stakeholder and administer the Escrow Amount as follows:
>
> 1.4.1 to pay all interest accrued (if any), or from time to time accruing, on the Escrow Amount, to the party receiving the Escrow Amount (or any portion thereof paid out in accordance with the terms of this Agreement) …
>
> 1.4.2 to *pay* the following amounts to the following persons, less bank charges:
>
> (a) the Escrow Amount to the Service Provider in accordance with the Service Provider's written instructions (*substantially in the form* set out in Appendix 2 to this Agreement) [*ie*, the Release Instructions] … of the duly authorised signatory of the Service Provider …
>
> (b) the Escrow Amount to the Company in accordance with the Company's written instructions (*substantially in the form* set out in Appendix 3 to this Agreement) [*ie*, the Release Instructions] … of the duly authorised signatory of the Company …
>
> 1.4.3 save for compliance with any final unappealable arbitration award, or order of court judgment (as the case may be), the Escrow Holder shall not be obliged to effect any payment instruction pursuant to this Agreement in the event that any instruction … given hereunder is not executed by an authorised signatory …. For the avoidance of doubt, *the Escrow Holder shall not effect an instruction other than as provided in the foregoing Clauses 1.4.2(a) and 1.4.2(b) or as otherwise noted herein*.

[emphasis added]

62 Clearly, the present case does not involve a situation where there is a court judgment or order or an arbitral award, and so this means that SATC's obligation to pay out escrow monies under the Escrow Agreement can possibly only be engaged by the receipt of a valid Release Instruction, in the absence of which, that obligation is not engaged. Put another way, in the circumstances of this case, the existence of a valid Release Instruction is coterminous with the existence of SATC's liability to make payment of the escrow monies under the Escrow Agreement. In order for the court to be satisfied that SATC has become liable for the escrow monies under the Escrow Agreement, the court must first be satisfied that SATC has received a valid Release Instruction. The validity of either or both of the Release Instructions therefore goes squarely to the question of whether SATC is entitled to interpleader relief. For these reasons, I cannot agree with SATC's submission that the validity of the Release Instructions is an issue that only arises for determination under stage 2. For SATC to be entitled to interpleader relief, the court must conclude that *at least* one of the Release Instructions is valid for the purposes of clause 1.4 of the Escrow Agreement.

63 I also disagree with SATC's submission that this validity issue need only be determined on a *prima facie* basis, and that it sufficed for the court to find that the Release Instructions cannot be thrown out of hand, *ie*, that they are not inarguably non-compliant with the terms of the Escrow Agreement. The only consequence arising from such a finding is that the court *cannot* conclude that the Release Instructions are invalid and/or that SATC's payment obligation under clause 1.4 of the Escrow Agreement has *not* been engaged. This, however, can only imply a *possibility* that SATC has become liable to pay out the escrow monies under the Escrow Agreement. That is not sufficient – for SATC to be entitled to interpleader relief, the court must be *satisfied* that SATC has become *liable* to pay the escrow monies under the Escrow Agreement. In any case, for

the reasons I have explained earlier, the test of a *prima facie* case does not apply to the first condition precedent (existence of liability). Hence, even if SATC's liability can be shown to exist on a *prima facie* basis, that is neither here nor there for the purposes of stage 1.

64 Another of SATC's submission is that it is merely an escrow agent, and it has an obligation to pay out the escrow monies at some point in time.[71] That, however, does not mean that SATC is *presently* liable to pay out the escrow monies under the Escrow Agreement, which is what the court must be satisfied of in order to find that SATC is entitled to interpleader relief *at this juncture*. The relationship between SATC, AOPL and ATSB over the escrow monies is governed by the terms of the Escrow Agreement. The Escrow Agreement provides that neither AOPL nor ATSB is entitled to unilaterally terminate the Escrow Agreement without the prior written consent of the other party.[72] As at the time of the hearing before me, it was also not in dispute that the Escrow Agreement remains in effect, and it has not been terminated – a point that is apparent from one of the reliefs sought by AOPL in the arbitration with ATSB, which is a declaration that AOPL be entitled to close the escrow account and that the escrow monies be released to AOPL.[73] SATC would obviously be liable to return the escrow monies when the Escrow Agreement comes to an end, but in so far as the Escrow Agreement remains in effect, whether it can be liable for the escrow monies to either or both parties at this juncture will turn on parties' rights and obligations as provided for in the Escrow Agreement. For now, that liability is coterminous with the receipt of a valid Release Instruction by SATC. Indeed, if counsel's submission were to be accepted, it would effectively mean

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71 NE, 12 Oct 2023, p 15 lines 7–9.

72 DW1 at p 22.

73 NL1 at p 227.

that stakeholders like escrow agents can come to court to seek interpleader relief whenever they receive conflicting instructions from the parties to whom they have undertook to provide escrow services, without having to first independently assess whether their obligation to release payment to either or both parties has been triggered by the terms of the escrow arrangement they had all agreed to. That would go against the purpose and objective of interpleader relief (see *Precious Shipping* at [33]).

Are the conditions precedent for the grant of interpleader relief satisfied?

65 I now turn to consider stage 1 proper, which raises the following questions:

(a) First, what constitutes a valid Release Instruction for the purposes of clause 1.4 of the Escrow Agreement, and in the light of that, whether either or both of the Release Instructions are valid?

(b) If so, secondly, in the light of the arguments that AOPL and ATSB have respectively raised, whether there exist competing claims?

(c) If so, thirdly, whether these claims are adverse to each other?

Whether either or both of the Release Instructions are valid

66 To determine this issue, I have to consider what constitutes a valid Release Instruction for the purposes of clause 1.4 of the Escrow Agreement – in other words, what is a Release Instruction that is "substantially in the form" of Appendix 2 or Appendix 3 of the Escrow Agreement? The requirements of Appendix 2 and Appendix 3 of the Escrow Agreement, and the Release Instructions which AOPL and ATSB respectively issued, have been set out earlier (see [8]–[17] above).

67 AOPL submits that for a Release Instruction to be "substantially in the form", it has to specify, as stated in para (a)(ii) of Appendix 2 and para (a)(i) of Appendix 3, the relevant clause in the Services Agreement on which a party relies in issuing a Release Instruction and seeking payment of the escrow monies.[74] Accordingly, the 6 Apr Release Instruction is invalid because it omitted entirely para (a)(ii) of Appendix 2 and therefore failed to specify the clause in the Services Agreement that ATSB relied on for the drawdown.[75] Counsel for AOPL fairly pointed out that, if I agreed with him on this submission, then the 7 Apr Release Instruction is similarly invalid because it also omitted para (a)(i) of Appendix 3 and did not specify the relevant clause in the Services Agreement on which AOPL relied for the drawdown.[76] On the other hand, ATSB submits that a valid Release Instruction is one that contains "substantially what is set out or required in Appendix 2", among other formal requirements specified in clause 1.4 of the Escrow Agreement. This, however, does not require para (a)(ii) of Appendix 2 to be stated, and so the 6 Apr Release Instruction is valid.[77] Counsel for ATSB submits that the words "delete one as appropriate" in the context of Appendix 2 means that the issuing party can just state either para (a)(i) of Appendix 2 *or* para (a)(ii) of Appendix 2, and so the omission of para (a)(ii) does not affect the validity of a Release Instruction based on Appendix 2.[78] ATSB also places great emphasis on the fact that SATC had initially acknowledged the receipt of the 6 Apr Release Instructions and confirmed that it was making the necessary arrangements to effect payment of the escrow monies to ATSB. According to ATSB, this shows that SATC had

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74 NE, 11 Oct 2023, p 21 lines 9–13.

75 AOPL's written submissions at para 88.

76 NE, 11 Oct 2023, p 21 lines 12–13.

77 NE, 11 Oct 2023, p 28 lines 1–18.

78 NE, 11 Oct 2023, p 28 lines 11–24.

been satisfied that the 6 Apr Release Instruction met the formal requirements under the Escrow Agreement.[79]

68 Consistent with its position that the validity of the Release Instructions is not an issue arising for determination in deciding if SATC is entitled to interpleader relief, SATC also does not take a position on what constitutes a valid Release Instruction for the purposes of the Escrow Agreement.[80] I have some difficulties with this. If SATC is coming to court seeking interpleader relief, surely it must be SATC's position that its liability under the Escrow Agreement has been triggered, and correspondingly, that it has received a valid Release Instruction. That being the case, SATC should be able to – and indeed, ought to – take a position on what, in its view, constitutes a valid Release Instruction for the purposes of the Escrow Agreement. Of course, SATC's subjective view of this matter would not *per se* be conclusive of what constitutes a valid Release Instruction under the terms of the Escrow Agreement, but at the very least, it would shed some light on the contractual intentions of the parties to the Escrow Agreement and in particular on what they perceive of the form that a Release Instruction that is "substantially in the form" of Appendix 2 or Appendix 3 should take.

69 In this case, it is not in dispute that, save for the part of para (a)(ii) of Appendix 2 (in respect of the 6 Apr Release Instruction) and para (a)(i) of Appendix 3 (in respect of the 7 Apr Release Instruction), the Release Instructions are for all intents and purposes formally compliant with what is required under the Escrow Agreement. Accordingly, the only issue that has to be decided is whether a Release Instruction that is "substantially in the form" is

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79 ATSB's written submissions at paras 66–68.

80 NE, 12 Oct 2023, p 16 lines 29–31, p 17 lines 1–3.

one which requires the following: (a) first, para (a)(ii) of Appendix 2 or para (a)(i) of Appendix 3 be properly set out in a Release Instruction; and (b) secondly, the relevant *clause* (not clauses) of the Services Agreement pursuant to which the drawdown was made, the options relating to which are provided for in para (a)(ii) or para (a)(i) itself, also be specified in that field. In my judgment, this must be answered in the affirmative, for the two reasons that follow.

70 First, such an interpretation of "substantially in the form" is consistent with the objective of the Escrow Agreement and the commercial function undertaken by SATC as an escrow agent. As a starting point, I accept that the Escrow Agreement and the Services Agreement are *independent* and *separate* contracts. It is however important to recognise that the Escrow Agreement does not exist in abstract, and its performance is meant to facilitate the parties' commercial relationship under the Services Agreement. SATC is obviously aware of the commercial relationship between ATSB and AOPL, pursuant to which the Escrow Agreement had been entered into and the escrow account set up – for example, recital (A) of the Escrow Agreement makes reference to the Services Agreement. SATC would therefore know that the *deposit* of monies into the escrow account by AOPL had taken place pursuant to the terms of the Services Agreement, and correspondingly, any *withdrawal* of monies from the escrow account, while strictly speaking governed by the terms of the Escrow Agreement, takes place in parallel with developments under the Services Agreement.

71 I also accept that SATC is not required to independently inquire into whether the underlying conditions in the Services Agreement have been met when deciding whether to act upon any Release Instructions it receives. SATC is entitled to *assume*, on the basis of a Release Instruction it has received, that

the underlying conditions for drawdown in the Services Agreement have been met. This is provided for in clause 1.6 of the Escrow Agreement, which states that a party who issues a Release Instruction to draw down on the escrow account also "warrants, represents and undertakes" that the conditions of the Service Agreement have been met and that it is entitled under the terms of the Services Agreement to the drawdown.[81] Similarly, there is nothing in clause 1.4 of the Escrow Agreement which requires SATC to scrutinise a Release Instruction it receives beyond the formal requirements set out in clause 1.4. Clause 1.17 makes this even clearer by specifying that, in respect of any payment made pursuant to a valid Release Instruction, it is "conclusively presumed" that the amounts paid are in fact due and payable to the relevant party and "in no circumstances" does SATC have an obligation to inquire into whether the amount paid is in fact due and payable.[82] Indeed, it would appear that SATC has little time if any to make inquiries as to substance – clause 1.10 of the Services Agreement provides that the escrow agent will upon receipt of valid Release Instructions use reasonable endeavours to submit to the bank payment instructions "on the same day".

72 However, it is one thing to say that the Escrow Agreement and Services Agreement are independent contracts and that SATC need make no independent inquiry with respect to the satisfaction of the conditions in Services Agreement, but quite another to also say that SATC, before acting on a Release Instruction received, need *not* be satisfied that the drawdown is taking place pursuant to the Services Agreement. This, if taken to its logical conclusion, would mean that SATC comes to be obliged to act on any drawdown, even if it had been initiated independently of developments relating to the Services Agreement. That will be

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81 DW1 at p 22.

82 DW1 at p 24.

a commercially absurd result because the Services Agreement is the very foundation of the Escrow Agreement's existence.

73 Therefore, in my view, the parties could not have intended that SATC have no regard whatsoever to the conditions in the Services Agreement when deciding whether to act upon a Release Instruction. Further, because the Escrow Agreement effectively shifts the burden to the issuing party (*ie*, AOPL or ATSB, as the case may be) to ensure that the conditions in the Services Agreement have been met before it seeks a drawdown and so relieves SATC of having to make any inquiry to that effect, it follows that SATC is entitled to rely on any Release Instruction received *alone* to determine if the requested drawdown is taking place pursuant to the Services Agreement. Accordingly, a valid Release Instruction for the purposes of clause 1.4 of the Escrow Agreement must be capable of satisfying SATC that the drawdown is taking place pursuant to one of the contractual provisions in the Services Agreement that the parties had designated under the scheme of the Escrow Agreement as possible bases for drawdown of the escrow monies, *ie*, those clauses set out in para (a)(ii) of Appendix 2 or para (a)(i) of Appendix 3. It is therefore an essential requirement of any valid Release Instruction that: (a) para (a)(ii) of Appendix 2 or para (a)(i) of Appendix 3 be stated in full; and (b) the issuing party *specifies* in para (a)(ii) or para (a)(i) the relevant clause in the Services Agreement that is relied upon for the drawdown, based on the options provided for in para (a)(ii) or para (a)(i). Put another way, a Release Instruction that is "substantially in the form" of Appendix 2 or Appendix 3 must not omit para (a)(ii) of Appendix 2 or para (a)(i) of Appendix 3 (respectively), and the relevant clause of the Services Agreement provided for in each of those paragraphs that is relied on by the issuing party for the drawdown must be specified.

74 Secondly, I find this interpretation of "substantially in the form" supported by clause 1.5 of the Escrow Agreement. That clause provides that upon the issuance of Release Instructions, the issuer must notify the other party (*ie*, ATSB or AOPL, as the case may be) "immediately" by copying that party's officers (which include, among others, NL and LKK) in the same e-mail in which the Release Instruction had been issued. One can reasonably expect that the purpose of such notification is so that the other party is being made aware of the drawdown and so that it can raise a dispute about the drawdown if it wishes. The commercial backdrop against which the escrow account had been set up, which is not in dispute, must be borne in mind – the escrow monies are to be paid out only when certain conditions in the Services Agreement are met and in pursuit of developments relating to the Services Agreement, and both AOPL and ATSB would not have intended for these monies to be paid out on demand (see also [72] above). Therefore, if one party issues a Release Instruction that omits to specify the relevant clause of the Services Agreement that is relied on for the drawdown, the other party would necessarily raise a dispute about the drawdown and take steps to prevent payment by SATC. Even if we *assume* that that the Escrow Agreement can be read as obliging SATC to pay out on the receipt of the first valid Release Instruction so that any subsequent dispute raised is ineffective (a point that I will come to later), once SATC receives a notice of dispute by one party in respect of a Release Instruction issued by the other, it would surely be brought to a pause. Of course, the effect of clause 1.16 of the Escrow Agreement is that ATSB or AOPL will fully indemnify SATC in respect of any claims, proceedings or losses arising from any payment SATC makes pursuant to a Release Instruction, but surely the commercially realistic thing that SATC may wish to do is to avoid such legal proceedings against the disputing party completely by not making any payment

to the issuing party at all in the face of such a dispute. Put it simply, whenever a dispute is raised, SATC is most unlikely to proceed with making payment.

75 Therefore, given the notification procedure contemplated for in clause 1.5 of the Escrow Agreement, if para (a)(ii) of Appendix 2 or para (a)(i) of Appendix 3 could be omitted from Release Instructions issued under the Escrow Agreement, parties would necessarily find themselves in a situation of dispute whenever a Release Instruction is issued and this would bring the entire escrow arrangement to a standstill. That would defeat the purpose of ATSB and AOPL entering into the Escrow Agreement in the first place – which is for payment to be held by an independent stakeholder so that it can be drawn down at agreed junctures in their commercial relationship without the risk of such payment being held up by any disputes that they come to be separately embroiled in.

76 As mentioned earlier, ATSB argues that SATC's acknowledgment of receipt of the 6 Apr Release Instruction showed that SATC agreed with the validity of that Release Instruction. That was cited in support of ATSB's position on what "substantially in the form" means. SATC's acknowledgment of receipt might well reflect that it *subjectively* viewed the 6 Apr Release Instruction as being valid, but that does not assist ATSB for present purposes. What constitutes a valid Release Instruction or one which is "substantially in the form" is a matter to be determined by the court as a matter of interpreting the Escrow Agreement (which includes Appendix 2 and Appendix 3). After all, this is an issue that the court must reach a finding on, before the court can conclude that SATC's liability has been engaged, which is one of the three conditions that it must be satisfied of before SATC can be entitled to interpleader relief.

77 For the reasons above, the 6 Apr Release Instruction, which omits para (a)(ii) of Appendix 2 in its entirety and therefore omits to specify the relevant clause in the Services Agreement pursuant to which the drawdown is made, is *not* "substantially in the form" and is therefore invalid. The same applies to the 7 Apr Release Instruction, which omits para (a)(i) of Appendix 3 and is therefore defective for the same reason. It follows from this that neither of the Release Instructions were valid, and in these circumstances, SATC's payment obligation under the Escrow Agreement would not have been engaged either on 6 April 2023 or 7 April 2023 when the Release Instructions were respectively issued. SATC therefore has no liability in respect of the escrow monies under the terms of the Escrow Agreement, which is the subject matter for interpleader relief. For this reason alone, SATC is not entitled to interpleader relief, and I therefore dismiss OA 643.

Whether there are competing claims

78 With the conclusion above, OA 643 is to be dismissed. For completeness, however, I address the arguments that ATSB and AOPL have raised in connection with the issue of competing claims. To recall, they are: (a) that SATC is obliged under the terms of the Escrow Agreement to pay out on receipt of the first valid Release Instruction and so any subsequent Release Instruction SATC receives (*ie*, the 7 Apr Release Instruction) is ineffective; and (b) at the time the 6 Apr Release Instruction was issued, the conditions for drawing down on the escrow monies under the Services Agreement have not been satisfied by ATSB, and so ATSB had no claim to the escrow monies at the material time. For the purposes of addressing these arguments, I will proceed on the assumption that both the Release Instructions are valid such that both ATSB and AOPL had a claim to the escrow monies by virtue of the Release Instructions they have respectively issued.

79 The existence of competing claims need only be shown on a *prima facie* standard (see [36] and [59] above). A preliminary issue arises as to how I should address ATSB and AOPL's arguments, which are directed at showing that the asserted competing claim *does not exist*, in the context of the *prima facie* standard. The *prima facie* standard imposes a relatively low bar that the applicant has to surmount to demonstrate that a competing claim *exists* – as the High Court explained in *Precious Shipping* ([2] above) (at [34]), it is not very far away from a requirement that the competing claims be "not bound to fail". Correspondingly, if a party seeks to do the opposite and refute the existence of a competing claim, the converse standard should apply, and a higher threshold is imposed on it. The party objecting to the competing claim therefore needs to show that, for the reasons it has cited, the asserted competing claim is bound to fail and cannot exist, or put another way, unsustainable. This makes sense because in determining the applicant's entitlement to interpleader relief under stage 1, the court neither delves into nor has to be satisfied of the merits of the asserted competing claims. In the same vein, for the court to conclude that competing claims do not exist even on a *prima facie* standard, it is not sufficient for the arguments raised to merely show that the competing claim is *unmeritorious*. These arguments have to go further and show that the claim is legally or factually *unsustainable*.

(1) Whether the Escrow Agreement obliges SATC to pay out on the first valid Release Instruction received

80 With the above in mind, I now turn to the arguments, beginning with ATSB's first. This boils down to whether the Escrow Agreement can be interpreted as obliging SATC to pay out on the receipt of the first valid Release Instruction, so that any subsequent Release Instruction, even if valid, would be ineffective since the escrow monies have already been paid out and so the issuer

of the subsequent Release Instruction can have no claim to the escrow monies under the Escrow Agreement.

81 The exercise of interpreting a contract is to assign to the language of the text of a contract the most appropriate meaning which the words can legitimately bear, through which the parties' intentions as expressed in the contract are objectively ascertained (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [28]). In the exercise of contractual interpretation, the text ought always to be the first port of call for the court, with recourse made to the context at relevant junctures, both of which interact with each other (see *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [32]–[35]).

82 The starting point, therefore, are the provisions of the Escrow Agreement. ATSB was not able to point to me a specific provision in the Escrow Agreement which obliges SATC to pay out on receipt of the first valid Release Instruction. Upon clarification, ATSB submits that this position followed from reading clauses 1.4.2(a), 1.4.2(b), 1.9, 1.10 and 1.14 in their totality. I also clarified with ATSB's counsel whether this argument was premised on an express or implied term, and counsel confirmed that it was premised on an express term.[83]

83 I do not see any merit in ATSB's submission. There is nothing in the identified clauses that provide for SATC to make payment upon receipt of the first valid Release Instruction. I have already set out clause 1.4 earlier. Clause 1.9 provides that ATSB and AOPL agree that upon confirmation by the bank of

[83] NE, 11 Oct 2023, p 26 lines 7–23.

receipt of payment instructions from SATC (which are sent by SATC to the bank after SATC receives a valid Release Instruction), then the escrow amount is deemed to have been released to the party issuing the valid Release Instruction. Clause 1.10 provides that if ATSB and AOPL wish to drawdown on the escrow monies, they are to issue valid Release Instructions three business days before the day of the intended drawdown, and further, that SATC endeavours to submit to the bank payment instructions on the same day valid Release Instructions are received, though the parties acknowledge and accept that this is not a guarantee that the escrow monies will be released on the same day, and that SATC has no control over the timing and receipt of the escrow monies once such payment instructions are delivered and acknowledged by the bank. Clause 1.14 provides that SATC is under no liability to ATSB or AOPL if it fails to comply with the terms of the Escrow Agreement, as a result of its compliance with the terms of a court judgment or order or arbitral award or liquidation or insolvency proceedings relating to the bank with which the escrow monies are held or any of the parties. None of these clauses – whether on their own in conjunction with one another – can be read as obliging SATC to pay the escrow monies on receipt of the first valid Release Instruction. Reading them in their "totality", as counsel argues, does not make a difference, unless the point is that these identified clauses suggests that a term to the effect argued by ATSB had to be implied into the Escrow Agreement. That, however, is not ATSB's position and accordingly I make no further comment on the same.

84 Since there is no merit whatsoever in ATSB's argument that the Escrow Agreement obliges SATC to pay out on the first valid Release Instruction, it comes far from showing that any claim which AOPL has over the escrow monies by virtue of the 7 Apr Release Instruction (assumed to be valid) is

unsustainable. ATSB's argument therefore does not show that AOPL has no competing claim on a *prima facie* standard.

(2) Whether ATSB has no claim to the escrow monies under the Escrow Agreement because the conditions in the Service Agreement were not met when the 6 Apr Release Instruction was issued

85 To be clear, AOPL's counsel clarified at the hearing before me that this argument, first introduced in AOPL's written submissions, had been directed at ATSB's position taken in its affidavits that ATSB is entitled to be paid the escrow monies (see also [44] above).[84] In other words, the point is, in the event interpleader relief was granted, ATSB should not be entitled to the escrow monies as an *outcome* of stage 2 of the interpleader proceedings. It is therefore not AOPL's position that no competing claim by ATSB arises from the 6 Apr Release Instruction because ATSB did not have a basis under the Services Agreement to draw down on the escrow monies at the material time.

86 In any event, as this argument appears to have been raised in the written submissions in the context of attacking ATSB's competing claim, I will address it for completeness. Quite clearly, it is unsustainable. As explained earlier, the Escrow Agreement only obliges SATC to scrutinise any Release Instruction received as a matter of form. While SATC must be *notified* of the relevant clause in the Services Agreement pursuant to which the drawdown of the escrow monies was taking place, by virtue of para (a)(ii) of Appendix 2 or para (a)(i) of Appendix 3 (see [73] above), it does not have to be *satisfied* that the underlying conditions in the clause stated have in fact been met. Clause 1.6 of the Escrow Agreement further demonstrates that SATC, on receipt of a valid Release Instruction, is entitled to assume that the relevant condition of the Services

[84] NE, 12 Oct 2023, p 10 lines 5–26.

Agreement specified in the Release Instruction as the basis for the drawdown has been satisfied. Therefore, assuming that the 6 Apr Release Instruction was a valid Release Instruction, whether the conditions in the Services Agreement for drawdown on the escrow monies by ATSB had in fact been satisfied at the time the 6 Apr Release Instruction was issued cannot have any effect on the sustainability of ATSB's claim to the escrow monies under the terms of the Escrow Agreement.

87 On this point, counsel for AOPL highlighted that inasmuch as there is nothing in the Escrow Agreement obliging SATC to inquire into whether there is a basis for a requested drawdown with reference to the conditions in the Services Agreement, there is also nothing preventing SATC from refusing payment, if it takes the view that there is no valid basis for the drawdown.[85] I doubt that is correct because the Escrow Agreement obliges SATC to pay upon the receipt of a *valid* Release Instruction, whatever the view it may take of whether the underlying condition in the Services Agreement (that would be specified in the Release Instruction as the basis for the drawdown) has been satisfied. If the Escrow Agreement does not oblige SATC to inquire into whether the conditions in the Services Agreement specified in the Release Instruction have been satisfied, and obliges SATC to pay out on the receipt of a valid Release Instruction, the validity of a claim that a party can have to the escrow monies by virtue of a Release Instruction under the terms of the Escrow Agreement cannot turn on whether the underlying conditions in the Services Agreement have in fact been satisfied.

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[85] NE, 12 Oct 2023, p 10 lines 9–11.

Whether there are adverse claims

88 For the reasons above, assuming both the Release Instructions were valid and so ATSB and AOPL each had a claim pursuant to the Release Instructions they respectively issued, I would have been satisfied that they gave rise to competing claims on a *prima facie* standard. I would also have been satisfied that these claims were adverse to each other, for the following reasons: (a) the requirement of "symmetry" would be satisfied because both claims are made in respect of the same subject matter and the same legal obligation – namely, SATC's obligation under the Escrow Agreement to pay out the escrow monies on receipt of a valid Release Instruction; (b) these claims are also mutually exclusive in that only either AOPL or ATSB can be entitled to the escrow monies, and so if the court finds (as part of stage 2) in favour of one of them the competing claim maintained by the other party necessarily falls away; and (c) if indeed both the Release Instructions were valid, SATC would have faced an actual dilemma as to how it should perform its obligations under the Escrow Agreement, because the Escrow Agreement does not provide for any mechanism of priority for successive valid Release Instructions nor does it provide for how SATC should act where it receives two sets of valid Release Instructions each calling for payment in favour of one party.

If the statutory conditions precedent for the grant of interpleader relief are not satisfied, whether the court can nevertheless order payment of the escrow monies to AOPL?

89 I now turn to AOPL's argument that even if the court finds that SATC is not entitled to interpleader relief, it can nevertheless order payment of the escrow monies to AOPL, in the light of the undisputed fact that the Services Agreement has been terminated. To recall, this argument runs as follows. AOPL and ATSB issued letters to each other, alleging the other of breach and stating

that the Services Agreement had been terminated (see [20] and [24] above). Under the Services Agreement, the escrow account with SATC is to be maintained up until the DEO's first NFT launch, which in these circumstances will not take place, given both parties' expressed intentions to terminate the Services Agreement. There is accordingly no basis for the escrow account to be maintained and for SATC to hold on to the escrow monies. I have several difficulties with this argument.

90 While parties have indeed expressed an intention to terminate the Services Agreement, that does not necessarily mean that the Services Agreement has been terminated by virtue of their expressed intentions and at the time those letters were issued. Whether the parties' stated intention had such an effect would depend on whether their termination had been rightful in the first place and whether they had the requisite legal and factual basis, at the time of issuing those letters, to bring the Services Agreement to an end. Those are questions to be determined in the arbitration – AOPL's case is that ATSB had acted in repudiatory breach of the Services Agreement for various reasons and therefore it was entitled to terminate the Services Agreement,[86] while ATSB's case is that AOPL's purported termination was wrongful and constituted a repudiatory breach that it also accepted to terminate the Services Agreement.[87] Because the underlying bases pursuant to which both parties sought to terminate the Services Agreement are disputed and are to be determined in the arbitration, whether the Services Agreement has in fact been terminated and when exactly it came to an end are also matters to be determined in the arbitration. Until such a determination is reached in the arbitration, it cannot be concluded that the Services Agreement has been terminated.

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86 NL1 at p 225.

87 NL1 at pp 123–124.

91 Importantly, even if I were to agree with AOPL's counsel and accept that the Services Agreement had been terminated so that there is no longer any factual basis for the escrow account to be maintained, there is no legal basis upon which I can make orders for payment of the escrow monies to AOPL. As the High Court held in in *Precious Shipping* ([2] above) (at [91] and [94]), the court had no power to make any summary determination that one party is entitled to the subject matter of the interpleader proceedings in the event the conditions precedent for interpleader relief are not satisfied. The fact that O 13 r 10 of the ROC 2021 lacks an equivalent of O 17 r 5 of the ROC 2021 (which specifies the types of orders that the court may make in the event the applicant is found to be entitled to interpleader relief) does not detract from this. As a matter of principle, until the court comes to be satisfied that the statutory conditions precedent for the grant of interpleader relief are satisfied, the interpleader proceedings exist as between the applicant and the competing claimants, and the sole issue concerning them is whether the applicant ought to be entitled to interpleader relief; it is only where the statutory conditions precedent are satisfied that the court's power to grant interpleader relief is enlivened, the applicant drops out of the picture and the competing claims come to be adjudicated upon (see *Precious Shipping* at [58], citing *De La Rue v Hernu, Peron & Stockwell, Limited* [1936] 2 KB 164 at 172–173). In the present case, since OA 643 was dismissed at stage 1, the court's powers to grant interpleader relief have not been enlivened, and consequently it cannot make any orders in connection with the subject matter of the interpleader proceedings, *ie*, the escrow monies.

92 Putting that point aside, it should be pointed out that the escrow account is maintained pursuant to the terms of the Escrow Agreement, and not the Services Agreement. While both agreements serve related commercial

functions, they are after all distinct and independent since their effect is limited by their respective four corners. SATC will only cease to have a basis for holding on to the escrow monies if the Escrow Agreement has been terminated. Therefore, even if the Services Agreement has been brought to an end as counsel submits, that has no bearing on the status of the Escrow Agreement, an issue which turns upon the terms of the Escrow Agreement itself. As I alluded to earlier, it is not in dispute that the Escrow Agreement is still in effect (see [64] above), and in accordance with the terms of that agreement, it is for SATC to hold on to the escrow monies.

93 It is also for this reason that *Tay Yok Swee v United Overseas Bank Ltd* [1994] 2 SLR(R) 36 and *Hong Leong Bank Bhd v Manducekap Hi-Tec Sdn Bhd* [2009] 7 MLJ 124, which AOPL's counsel had cited to me in support of the submission that the court can nevertheless make orders for payment of the escrow monies even if the conditions precedent for interpleader relief have not been satisfied, can be distinguished. As the High Court explained in *Precious Shipping* (at [98]), in both of those cases, the applications for interpleader relief were dismissed because there had been no serious disputes on the question of title to the subject matter of the interpleader proceedings. The orders made by the court in respect of the subject matter of the interpleader proceedings were therefore a result of it recognising the consequences of its findings on the question of title. In other words, any summary determination made in respect of the subject matter of the interpleader proceedings in those cases was an incident of the finding or conclusion that the court had reached as part of its analysis in stage 1 which it had also relied on in concluding that the conditions precedent for interpleader relief were not satisfied. I reached no such finding here. On the other hand, it is undisputed that the Escrow Agreement subsists, and since I have also found that both the Release Instructions were invalid and so neither ATSB

nor AOPL had a claim to the escrow monies by virtue of the Release Instructions they respectively issued, the escrow monies ought to remain held by SATC in accordance with the terms of the Escrow Agreement.

The issues in SUM 2720

94 As I will explain below, the Offending Extracts satisfy the two-fold requirements for invoking without prejudice privilege. With that, the only question that remains is whether without prejudice privilege nevertheless cannot be invoked in these proceedings, for the reasons that ATSB has raised in its arguments: (a) that the Offending Extracts relate to a dispute under the Services Agreement and not the Escrow Agreement; and (b) that the Offending Extracts were sent in an open e-mail chain in which SATC was copied.

95 Accordingly, the following issues arise for determination in SUM 2720:

(a) Whether the fact that the Offending Extracts related to a dispute under the Services Agreement but not the Escrow Agreement means that without prejudice privilege cannot be invoked in respect of the Offending Extracts for the purposes of OA 643?

(b) If not, whether the fact that the Offending Extracts had been sent in an open e-mail chain involving SATC means that they lose the protection of without prejudice privilege?

The Offending Extracts* prima facie *attract without prejudice privilege

96 I begin by explaining why the Offending Extracts on their face satisfy the requirements for invoking without prejudice privilege.

There was a dispute at the material time over ATSB's entitlement to draw down on the escrow monies under the terms of the Services Agreement

97 Quite clearly, in both the 6 Apr E-mail and the 7 Apr E-mail in which the Offending Extracts are contained (see [28] above), there had been a dispute over ATSB's entitlement to draw down on the escrow monies under the terms of the Services Agreement. It is not in dispute that the 6 Apr E-mail came after ATSB's first attempt on 5 April 2023 at 2.40pm to draw down on the escrow amount ("the 5 Apr E-mail").[88] For context, the 5 Apr E-mail merely references the Escrow Agreement and attaches a Release Instruction for payment, though this was not the Release Instruction on which ATSB relies for its claim to the escrow monies. That first attempted drawdown took place after some negotiations and discussions between ATSB and AOPL, which I will briefly address later (see [100] below). For present purposes, it suffices to note that NL stated in the 6 Apr E-mail in unequivocal terms that because there had been no NFT launch, ATSB was *not* entitled to the escrow monies under the terms of the Services Agreement. This was reiterated by NL in the 7 Apr E-mail, which was sent after ATSB issued the 6 Apr Release Instruction. In that e-mail, NL stated that it was unclear on what basis ATSB was seeking to draw down on the escrow monies, and that ATSB's drawdown in those circumstances would be contrary to the terms of the Services Agreement. Plainly, in these e-mails, NL disagreed with and therefore disputed ATSB's entitlement to draw down on the escrow monies, because he took the view that the underlying conditions in the Services Agreement have not been met. This shows nothing but a dispute over whether ATSB was entitled to draw down on the escrow monies under the terms of the Services Agreement. I do not see how these e-mails (and consequently the Offending Extracts contained therein) can be read in any other way.

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88 2nd Affidavit of Nathanael Lim Yao Hui ("NL2") at para 8; LKK1 at pp 83–84.

98 At this juncture, let me address two arguments raised by ATSB in connection with this point. First, ATSB argues that in both the 6 Apr E-mail and the 7 Apr E-mail, NL was merely seeking to clarify with ATSB the basis on which ATSB was seeking to draw down on the escrow monies, and accordingly, there was no dispute at the material time over ATSB's entitlement to the escrow monies under the terms of the Services Agreement. I disagree with this submission. In respect of the 6 Apr E-mail, NL stated as a matter of fact that, at that material time, ATSB had no entitlement to the escrow monies, because the DEO's first NFT launch had not taken place yet. Given the fact that this e-mail was sent shortly *after* ATSB made the first attempt to draw down on the escrow monies in the 5 Apr E-mail, the 6 Apr E-mail can only be read as indicating NL's disagreement with ATSB's entitlement to draw down on the escrow monies under the terms of the Services Agreement. In respect of the 7 Apr E-mail, while NL did state that it was "not clear" on what basis of the Services Agreement ATSB was seeking to draw down on the escrow monies, when the entirety of that e-mail is read and understood in context, that clearly is not a clarificatory statement, as ATSB submits.[89] Given what NL had already stated in the 6 Apr E-mail, NL was simply reiterating his previous position that ATSB was not entitled under the Services Agreement to draw down the escrow monies at that juncture.

99 Secondly, ATSB points out that AOPL's application in SUM 2720 only seeks to expunge selected paragraphs of the 6 Apr E-mail and the 7 Apr E-mail and excludes some paragraphs of those e-mails from SUM 2720.[90] To be clear, these are the same paragraphs that I have relied on above in concluding that a dispute existed at the material time in relation to ATSB's entitlement to draw

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89 ATSB's written submissions at para 35.

90 NE, 11 Oct 2023, p 11 lines 18–20, p 12 lines 2–4.

down the escrow monies under the terms of the Services Agreement. I do not find this submission to assist ATSB. In fact, AOPL rightly excluded those paragraphs – because they merely stated NL's position on the issue of whether ATSB was entitled to the escrow monies, and so by definition could not be read as an admission against AOPL's interests, and it is only the parts of the e-mails with the latter effect that can be the subject of without prejudice privilege. These paragraphs, for which without prejudice privilege had not been claimed, merely provide the context in which the paragraphs in the Offending Extracts are to be read and give an indication as to "the surrounding circumstances" in which the Offending Extracts were communicated so that the court can ascertain if it may be inferred that there had been an agreement between parties that evidence of the Offending Extracts not be given (see, for example, *Sin Lian Heng* ([38] above) at [12]). There is nothing as a matter of law which requires AOPL to also claim without prejudice privilege over the other paragraphs.

100 In ATSB's written submissions, it also made the point that there was no dispute at the material time regarding ATSB's entitlement to draw down on the escrow monies under the terms of the Services Agreement.[91] The background to this submission is long and involved, as is evident from the affidavits filed by ATSB and AOPL in SUM 2720, but in sum it involves two conflicting accounts by LKK and NL about the discussions and negotiations that had been taking place between ATSB and AOPL in the lead up to ATSB's first attempt to draw down on the escrow monies in the 5 Apr E-mail:

(a) According to LKK, AOPL had agreed to pay for ATSB's "Monthly Expenses" under the Services Agreement and the parties were in discussion during February and March 2023 on how much such

[91] ATSB's written submissions at para 38(b).

payment could be effected, and eventually it was agreed between ATSB and AOPL that some of the Monthly Expenses be paid using digital currency and the remainder using fiat money by drawing down on the escrow account, and it was in accordance with this that ATSB proceeded to draw down on the escrow account.[92]

(b) NL refutes LKK's account and maintains that AOPL never agreed to pay for ATSB's "Monthly Expenses", which were to be claimed from a specified account upon the DEO's first NFT launch pursuant to the terms of the Services Agreement.[93] In AOPL's discussions with ATSB, it did agree to cover part of ATSB's own business expenses out of goodwill on account of cashflow issues faced by ATSB. However, these were distinct from the "Monthly Expenses" under the Services Agreement.[94] NL states that parties then engaged in subsequent discussions on how AOPL could make some payments to ATSB, which eventually culminated in AOPL's proposal for ATSB draw down from the escrow account and for the business relationship under the Services Agreement to be terminated.[95] NL emphasises that the 5 Apr E-mail in which ATSB made the first attempt to draw down on the escrow account flowed from those earlier discussions and negotiations between the parties, and because ATSB did not specify in that e-mail that the drawdown had been premised on the proposed

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92 2nd Affidavit of Lim Keat Kuang ("LKK2") at paras 14–28.

93 3rd Affidavit of Nathanael Lim Yao Hui ("NL3") at paras 16–17.

94 NL3 at paras 18–19 and 39.

95 NL3 at paras 40–52.

settlement that AOPL had previously raised, he therefore sent the 6 Apr E-mail to clarify the position.[96]

101 Counsel for both ATSB and AOPL rightly did not rely on these conflicting accounts of NL and LKK in their submissions on whether the Offending Extracts attracted without prejudice privilege. There was no way by which the court could come to prefer one account over the other on the basis of the conflicting affidavit evidence alone. However, what is common in both LKK's and NL's accounts is that the first attempted drawdown by ATSB in the 5 Apr E-mail did not take place on the basis that the conditions in the Services Agreement relating to ATSB – namely, clauses 8.3.2(b)(i) or 8.3.2(c)(i) – had been met and the attempted drawdown had taken place *outside* of the terms of the Services Agreement. In other words, whether NL's or LKK's account is to be preferred, it has no bearing on whether there was a dispute at the material time regarding ATSB's entitlement to the escrow monies under the terms of the Services Agreement.

The Offending Extracts contain an admission against AOPL's interests

102 Next, it cannot be seriously disputed that the Offending Extracts were an admission against AOPL's interests communicated by NL through the 6 Apr E-mail and the 7 Apr E-mail in an attempt to settle the dispute over ATSB's entitlement to the escrow monies under the Services Agreement. In the Offending Extracts found in the 6 Apr E-mail, NL stated that notwithstanding that ATSB had no entitlement to the escrow monies under the terms of the Services Agreement, given the parties' underlying commercial intention as to what the escrow monies were meant for, it made sense for ATSB to draw down

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96 NL3 at para 55.

on the same, but on the condition that this was in full and final settlement of all claims and liabilities under the Services Agreement, which was also to be terminated. The Offending Extracts of the 7 Apr E-mail reiterated what was said in the 6 Apr E-mail, namely, that if the escrow monies were to be disbursed, it was to take place on the terms previously stated in the 6 Apr E-mail.

103 Plainly, by the Offending Extracts, AOPL was taking the position that, notwithstanding the conditions in the Services Agreement not having been satisfied and correspondingly ATSB lacking entitlement to the escrow monies under the terms of the Services Agreement, AOPL was nevertheless agreeable to ATSB drawing down on the escrow monies in full and final settlement of any dispute that the parties had in respect of the Services Agreement. I cannot read the Offending Extracts as meaning anything other than admission against AOPL's interests and which were communicated in an attempt to settle the parties' dispute over ATSB's entitlement to the escrow monies under the terms of the Services Agreement. It is important to appreciate that the Offending Extracts came after NL first stated his position that ATSB was *not* entitled to the escrow monies because the underlying conditions in the Services Agreement have not been met. In spite of that, NL accepted that ATSB could still draw down on the escrow monies, but only on the basis that the parties settled any dispute they had in connection with the Services Agreement.

104 To clarify, the material before me only allowed me to conclude that a dispute over ATSB's entitlement to the escrow monies under the Services Agreement existed at and from the time the 6 Apr E-mail was sent (see [97] above). On the material before me, I was not able to determine definitively whether there existed such a dispute *before* the 6 Apr E-mail was sent, because that would have required me to choose between NL's or LKK's respective accounts of the lead up to ATSB's first attempted drawdown in the 5 Apr

E-mail, which I am not minded to (see [101] above). On the basis that any such dispute only existed at and from the time the 6 Apr E-mail was sent, the Offending Extracts in that e-mail are protected by without prejudice privilege pursuant to the "first shot" principle (see *Sin Lian Heng* at [32]) as it is clearly a communication seeking to initiate settlement negotiations to compromise the dispute that the parties had over whether ATSB was entitled to the escrow monies under the terms of the Services Agreement. Of course, it goes without saying that if any such dispute had existed *before* the 6 Apr E-mail was sent, the Offending Extracts would necessarily also be protected by without prejudice privilege, without the need for any recourse to the "first shot" principle.

Whether it matters that the Offending Extracts relate to a dispute under the Services Agreement and not the Escrow Agreement?

105 With the above in mind, I now turn to the first substantive issue for SUM 2720. I understand the point raised by ATSB to be that, because OA 643 concerns a dispute under the Escrow Agreement and *not* the Services Agreement, and since the rule of without prejudice privilege is one affecting the *admissibility* of evidence, any communications pertaining to disputes under the Services Agreement would not be relevant or admissible evidence for the purposes of OA 643 anyway, and so no without prejudice privilege can be claimed in respect of the Offending Extracts in OA 643 and proceedings arising therefrom. Having carefully considered this submission, I do not find that it assists ATSB in resisting SUM 2720.

106 At the time when the parties prepared their respective cases for OA 643, it would not have been warranted for them to conclude that any dispute under the Services Agreement will be entirely unrelated to the issues in OA 643 so that the evidence to which the Offending Extracts relate is necessarily irrelevant

and inadmissible. I accept that OA 643 concerns a dispute under the Escrow Agreement, and I also agree that SATC's *entitlement to interpleader relief* can only turn on the terms of the Escrow Agreement alone because that is the only contractual document which sets out the parties' rights and obligations in so far as the parties' commercial relationship pertaining to SATC's holding of the escrow monies is concerned. However, if SATC is found to be entitled to interpleader relief, one of the issues thereby arising is whether the court may make a summary determination as to whether ATSB or AOPL is entitled to the escrow monies. That raises a question of whether ATSB or AOPL had a better claim to the escrow monies, which would turn on the Services Agreement, it being the foundation of the escrow arrangement (see [70] and [72] above). Therefore, if the court's powers to make such a summary determination are enlivened, the scope of the issues in OA 643 would broaden to encompass disputes under the Services Agreement. Of course, I have found that SATC is not entitled to interpleader relief and so in the event, the issue of summary determination does not arise for consideration. However, the relevance of facts under the Evidence Act turns not on what the *actual* issues in the proceeding or action are but on *how* the parties would have conducted their cases. Section 5 of the Evidence Act provides that evidence may be given of "every fact in issue and of such other facts … declared to be relevant". A "fact in issue" is defined in s 2(1) of the Evidence Act as including:

> any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability *asserted or denied* in any suit or proceeding necessarily follows …
>
> [emphasis added]

107 The parties did not, and in any event would not have, conducted their cases in OA 643 on the basis that it only dealt with the issue of SATC's entitlement to interpleader relief and that *no* issue of summary determination

would arise. Indeed, in LKK's responsive affidavit filed in OA 643, he stated in unequivocal terms that if the court grants SATC interpleader relief, then the court should find that ATSB is entitled to the escrow monies. I accept that LKK did frame ATSB's entitlement to the escrow monies as arising "pursuant to the Escrow Agreement",[97] but any issue of summary determination would involve a resolution of ATSB's and AOPL's competing claims to the escrow monies, and whether one or the other had a better claim to the escrow monies would turn on the commercial relationship between them, *ie*, the Services Agreement, and not on the Escrow Agreement, which dealt only with the relationship between ATSB and AOPL (on the one hand) and SATC (on the other) in connection with SATC's obligations to ATSB and AOPL for the escrow monies. It would not have been unreasonable for the parties to anticipate that the issue of summary determination would arise in OA 643, and for that issue, any dispute between ATSB and AOPL relating to the Services Agreement would have been relevant.

108 However, even if I were wrong, so that the dispute in OA 643 concerns only the Escrow Agreement and the Services Agreement (and any dispute relating thereto) is wholly irrelevant to OA 643, I am satisfied that the circumstances in which the Offending Extracts were communicated meant that they nevertheless ought to be protected by without prejudice privilege. Whether a communication is to be protected by without prejudice privilege should not turn so narrowly on whether it is related to the specific issues in dispute in the proceeding in question. Aside from the fact that there appears to be no direct authority for this proposition (see also [116] below), if technicalities like these were resorted to, it would be contrary to the reality that negotiating parties would often speak freely about all issues in the litigation when seeking a

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97 LKK1 at paras 55 and 57.

settlement (see generally *Ofulue and another v Bossert* [2009] AC 990 ("*Ofulue*") at [7]). The rule of without prejudice privilege is as much a rule of policy as it is a rule of evidence. Instead of resorting to narrow distinctions turning on whether the communications are related to the issues in dispute, a better approach is to consider whether the policy underlying the without prejudice rule – namely, that parties to disputes not be discouraged from making attempts at peaceful resolution of their disputes for fear that their communications during negotiations may be used to their prejudice in subsequent proceedings (see *Sin Lian Heng* ([38] above) at [1]) – justifies affording protection to the communication in question, having regard to its substance. To this end, the questions to be asked are: (a) whether the communication in question is one which would have had the effect of resulting in the settlement of the dispute in the proceeding in question; and (b) whether depriving the communication of without prejudice privilege would have the effect of discouraging the party making it from having made that communication. To be clear, I should add that, since s 23(1) of the Evidence Act is silent on the limits of the without prejudice rule, this approach would not be inconsistent with the same and s 2(2) of the Evidence Act would not prevent it from being given effect to.

109 In this case, by the time the 6 Apr E-mail came to be sent, the parties were disagreed on whether ATSB was entitled to draw down the escrow monies under the terms of the Services Agreement, following ATSB's first attempted drawdown in the 5 Apr E-mail. Subsequently, the 6 Apr Release Instruction was issued by ATSB. Of course, SATC's initial response was to acknowledge the 6 Apr Release Instruction in spite of what had been stated by NL in the 6 Apr E-mail, but what subsequently transpired is clear, and the parties' disagreement over ATSB's entitlement to the escrow monies under the Services

Agreement placed SATC in a bind and in the event SATC did not go ahead with making payment to ATSB, despite appearing to have initially acknowledged the 6 Apr Release Instruction as being valid. The communication in the Offending Extracts proposed an alternative basis, apart from the Services Agreement, by which ATSB could come to be entitled to and draw down on the escrow monies, and pursuant to which SATC could possibly perform its obligations as escrow agent under the Escrow Agreement and pay out the monies to ATSB when ATSB follows up with a Release Instruction, which it did by the 6 Apr Release Instruction. Against all these, it must be borne in mind that the Escrow Agreement is silent on the applicable mechanism of priority where AOPL disagrees with ATSB's Release Instructions and *vice versa*, and so the communication in the Offending Extracts provided a possible way out for SATC, in the face of the disagreement between AOPL and ATSB over ATSB's entitlement to the escrow monies. Of course, given my conclusions on what constitutes a valid Release Instruction and that the Release Instructions were both invalid (see [77] above), SATC would not have been obliged to act upon the 6 Apr Release Instruction anyway. That, however, is immaterial. The point is, if the parties had *agreed* on how the escrow monies could be paid out, which is what the communications in the Offending Extracts sought to achieve, the dispute as to how SATC was to perform its obligations under the Escrow Agreement – which now forms the subject matter of OA 643 – could have been avoided altogether.

110 Therefore, while the Offending Extracts did not directly raise an issue relating to the Escrow Agreement, it nevertheless represented an attempt to compromise the dispute *relating to* the Escrow Agreement because if it had been acted upon by the relevant parties, it would have resolved the *perceived* difficulties SATC faced in performing its obligations under the Escrow

Agreement and therefore avoided the need for OA 643 to have been taken out. If the communication in the Offending Extracts is not protected by without prejudice privilege, then surely AOPL would have been discouraged from making it. Because AOPL was effectively proposing a basis on which ATSB could be entitled to the escrow monies, there is a distinct possibility that this can be used against AOPL, even in the context of legal proceedings taken out with respect to the Escrow Agreement. In such proceedings, questions would necessarily arise as to whether SATC had been obliged to act upon the 6 Apr Release Instruction, and AOPL, which had an interest in the escrow monies, would obviously dispute that and argue that ATSB had no claim to the escrow monies at the material time. It is in this situation that AOPL's concessions in the Offending Extracts could be used against it. For these reasons, even if one takes the view that OA 643 raises only issues pertaining to the Escrow Agreement, the Offending Extracts nevertheless ought to be protected by without prejudice privilege for the purposes of these proceedings, even though the Offending Extracts did not directly raise an issue relating to the Escrow Agreement.

111 At this juncture, let me turn to the House of Lords' decision in *Ofulue* ([108] above), which AOPL cited in arguments. The facts of *Ofulue* are as follows. The claimants had been registered owners of a property which they leased to tenants, and the tenants then sub-leased the property to the defendant and her father. The claimant discovered the unauthorised sub-lease in 1987 and thereafter commenced possession proceedings against the defendant and her father. In the 1987 proceedings, among other defences raised, the defendant and her father admitted that the claimants had title to the property and took the position that they had been granted a lease. In the course of the 1987 proceedings, they also sent a letter to the claimants marked "without prejudice",

stating that the claimants were entitled to six years' arrear of rent (thus acknowledging the claimants' title to the property) and concluding with an offer to purchase the property. Eventually, that offer was rejected. Subsequently the defendant's father died, and the 1987 proceedings was automatically stayed by virtue of the Civil Procedure Rules. Then, in 2003, the claimants issued fresh proceedings against the defendant in respect of the property. For these proceedings, the defendant's position is that she had obtained title to the property by way of adverse possession. One of the issues before the House of Lords was whether, for the purposes of the subsequent proceedings, the without prejudice letter, which in effect was an acknowledgment by the defendant (and her father) of the claimant's title to the property, was protected by without prejudice privilege and thus inadmissible as evidence in those proceedings (see *Ofulue* at [61]–[65] and [72]). The admissibility of that letter determined the question of whether the claimant's action for adverse possession against the defendant was time barred.

112 By a four to one majority, the House of Lords held that the letter was protected by without prejudice privilege. Of their Lordships' reasons, Lord Neuberger's and Lord Hope's are directly relevant to the points raised above. Lord Neuberger held that a statement made in without prejudice negotiations to settle *earlier* proceedings should similarly be protected by without prejudice privilege in respect of *subsequent* proceedings, and for this particular case, since the only sentence in the letter which the claimants seek to adduce as evidence is the very sentence containing the actual offer to settle the earlier proceedings, it clearly was within the scope of the without prejudice rule (see *Ofulue* at [87] and [90]). Lord Hope noted that in the 1987 proceedings, the issue of the claimants' title was indeed not in issue by virtue of the admission by the defendant and her father at that time, but the offer made in the letter could not

have been made without an acknowledgment of the claimants' title, and so this acknowledgment was a necessary part of the offer in that letter (see *Ofulue* at [10]). As the offer did not result in any settlement and the issue that had given rise to the proceedings had not gone away, there remained a risk that what was said in the letter might be later used to the defendant's prejudice. Public policy therefore weighed in favour of the letter being protected by without prejudice privilege to the same extent in subsequently commenced proceedings (see *Ofulue* at [9]). Lord Hope reiterated that the without prejudice rule is not mechanistic but generous in its application and the limits of the rule ought to be delineated by the ability of parties to speak freely when they are attempting to negotiate a compromise (see *Ofulue* at [12]).

113 I make three observations about *Ofulue*. First, *Ofulue* is distinguishable from the present case. Although the majority framed the communication about the claimant's letter as being "not in issue" in the 1987 proceedings, in my respectful view, their Lordships did not mean to say that the admission to title was wholly *unconnected* or *unrelated* to the issues in dispute in the 1987 proceedings. Indeed, the admission by the defendant and her father to the claimants' title would have been connected to the issues in that dispute because it formed the basis on which the defendant and her father could resist the claimant's claim for possession by arguing that they had been granted a lease of the property. Evidently, the majority did not regard the issue of the claimant's title as being wholly unconnected to the issues arising in the 1987 proceedings, because they viewed the case as *not* engaging the "independent fact" exception in *Rush & Tompkins Ltd v Greater London Council and another* [1989] AC 1280 ("*Rush & Tompkins*") (at 1300) (see *Ofulue* at [39] and [92]), a point to which I will return later. The minority, Lord Scott, framed the issue of the claimants' title as being one that was *common ground* between the parties in the

1987 proceedings (and not that it was *unconnected* to the 1987 proceedings), and it was on that basis that Lord Scott came to the view that the letter could not be protected by without prejudice privilege (see *Ofulue* at [34]–[35]).

114 Secondly, in my respectful view, the majority' reasoning in *Ofulue* reinforces the conclusion that I have reached above. The majority frowned upon an approach where the dividing line for whether a communication comes to be protected by without prejudice privilege turned on whether it related to an issue in contention in the proceedings. Instead, they recognised that dissecting identifiable admissions and withholding protection from the remainder of the communication would create practical difficulties and run counter to the objective of giving protection to the parties so that they can speak freely about all issues in the litigation (see *Ofulue* at [7] and [89]). They therefore found it significant that the admission in the without prejudice letter was a necessary part of any attempt to settle the 1987 proceedings and in those circumstances, the letter had to be protected by without prejudice privilege (see *Ofulue* at [10] and [90]). In this case, in the 5 Apr E-mail, ATSB had taken the position that it was entitled to draw down on the escrow monies by issuing Release Instructions to SATC, with which AOPL disagreed in the 6 Apr E-mail. An admission that ATSB was entitled to the escrow monies was similarly a necessary part of any attempt by AOPL to resolve the dispute over how SATC should perform its obligations under the Escrow Agreement, in the light of ATSB and AOPL's disagreement over whether ATSB was entitled to draw down on the escrow monies under the terms of the Services Agreement. In any subsequent proceeding concerning such a dispute over SATC's obligations under the Escrow Agreement, the Offending Extracts must be protected by without prejudice privilege.

115 Finally, I turn to briefly consider the "independent fact" exception, which is stated in the following terms in *Rush & Tompkins* (at 1300):

> … the admission of an 'independent fact' in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in *Waldridge v Kennison* (1794) 1 Esp 142. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise …

116 The parties did not address the "independent fact" exception in their submissions and similarly none of the Singapore case law that they have cited has considered the "independent fact" exception. In any case, I would not have considered it as being relevant. The effect of the "independent fact" exception is that an admission otherwise attracting without prejudice privilege could nevertheless be admitted in evidence, provided it is being relied upon to prove a fact independent of the substance of the admission. In *Waldridge v Kennison* (1794) 1 Esp 142, referred to in the above extract from *Rush & Tompkins*, the admission in question was made in the course of negotiations aimed at settling an action brought on a bill of exchange issued by the defendants. The admission was subsequently relied on in the action, but not in respect of the subject matter of that action (*ie*, the bill of exchange), and only to prove that the handwriting on the bill belonged to the defendant. Whether the "independent fact" exception is engaged therefore turns primarily on the purpose for which the admission is being relied upon and how that relates to the subject matter of the action. It is not the effect of the "independent fact" exception that material otherwise attracting without prejudice privilege would necessarily be deprived of that privilege so long as it was unrelated to the issues in dispute. In any event, it is unclear whether the "independent fact" exception even forms part of Singapore law, and it has also been regarded as exceptional and questionable. Lord

Griffiths highlighted in *Rush & Tompkins* (at 1300) that this was "exceptional", and in *Ofulue* (at [39]), Lord Rodger stated in *obiter* that the "independent fact" exception would undermine the effectiveness of the without prejudice rule in encouraging parties to speak freely when negotiating settlements.

Whether it matters that the Offending Extracts were sent in an open e-mail chain?

117 I now turn to the second and final issue for SUM 2720. Without prejudice negotiations can come to an end when a party seeking to change the basis of those negotiations spells that out with clarity and brings home to the offeree that the basis of negotiations has changed, and any offer subsequently made as part of those open negotiations will not be subject to without prejudice privilege (see Colin Passmore, *Privilege* (Sweet & Maxwell, 4th Ed, 2019) at paras 10-142 and 10-143). Therefore, if an offer to settle was made as part of open correspondence or negotiations, then no privilege can be claimed in respect of that offer.

118 *Dixon Stores Group Ltd v Thames Television Plc* [1993] 1 All ER 349 ("*Dixon Stores*"), which was cited to me by ATSB, illustrates this. In that case, an action was commenced by the plaintiff against the defendant, alleging that a television programme broadcast by the defendant was defamatory. Subsequently, without prejudice correspondence was exchanged between the parties but this did not result in a settlement. Later, the defendant wrote to the plaintiff two letters with identical contents, stating that it wished to negotiate a compromise and suggested that it could make an apology and statement in open court. The first letter was not headed and not marked as without prejudice while the second letter was specifically marked as an open letter. The offer was not accepted. The issue in that case was whether the letters could be admitted in

evidence and referred to by the defendant in their cross-examination of the plaintiff's witnesses. The court held that the defendant was entitled to refer to the letters because they were not part of continuing without prejudice negotiations and had been written after those negotiations had finished and came to nothing. In particular, the court said (see *Dixon Stores* at 351):

> The privilege exists in order to encourage bona fide attempts to negotiate a settlement of an action and if the letter is not written to initiate or continue such a bona fide attempt to effect a settlement it will not be protected by privilege. But conversely, if it is written in the course of such a bona fide attempt, it will be covered by privilege, and the absence of any heading or reference in the letter to show it is written without prejudice will not be fatal.

119 The fact that the Offending Extracts had been sent in an open e-mail chain does not deprive it of protection by without prejudice privilege. The purpose of the Offending Extracts was to resolve the dispute that ATSB and AOPL had over ATSB's entitlement to the escrow monies under the terms of the Services Agreement. This is a dispute which pertained to the subject matter of the Escrow Agreement, and it also affected SATC's performance of its obligations under the Escrow Agreement. The effect of the Offending Extracts was to propose a way forward and provide a basis on which SATC could act upon the Release Instruction it received from ATSB and avoid a dispute over what SATC should do with the escrow monies under the terms of the Escrow Agreement, which subsequently became the subject of OA 643. It therefore made sense for SATC to have been copied into the e-mail chain. The fact that SATC had been so copied did not make the negotiations in the 6 Apr E-mail and the 7 Apr E-mail "open" negotiations.

120 Alternatively, if I were to accept that the 6 Apr E-mail was a continuation of any previous negotiations between ATSB and AOPL over ATSB's entitlement to the escrow monies (see [100] above), the fact that SATC

was copied would not have transformed the negotiations in the 6 Apr E-mail and the 7 Apr E-mail into discussions of an "open nature". Given the role that SATC played in respect of the subject matter of those discussions, *ie*, the escrow monies, it cannot be in any way characterised as a third party wholly uninterested in the discussions between ATSB and AOPL. Those discussions determined how SATC was to act upon Release Instructions it received and how it could perform its obligations under the Escrow Agreement, and so SATC had as much an interest as ATSB and AOPL themselves to be kept informed of developments in those negotiations.

Conclusion

121 For the reasons above, I allow SUM 2720 and order that the Offending Extracts be expunged from the affidavit in which they are contained. I dismiss OA 643 on the basis that, at the material time or at this juncture, SATC has no liability to ATSB or AOPL in respect of the escrow monies under the terms of the Escrow Agreement, because its obligation to pay the escrow monies under the Escrow Agreement has not been engaged by a valid Release Instruction. This follows since both the Release Instructions are invalid and are not "substantially in the form" as required by Appendix 2 or Appendix 3 of the Escrow Agreement. With this conclusion, no consequential orders can be made in respect of the escrow monies that are the subject matter of OA 643.

122 If I were wrong on the above, and so ATSB and AOPL each had a claim to the escrow monies under the Escrow Agreement by virtue of the Release Instructions they respectively issued, then I would have been satisfied that their competing claims were shown on a *prima facie* basis and were adverse to each other. However, even if SATC were entitled to interpleader relief, I would not have found it appropriate to make any summary determination of ATSB and

AOPL's competing claims to the escrow monies. It cannot be seriously in dispute that the question of whether ATSB or AOPL was entitled to the escrow monies under the terms of the Services Agreement is an issue to be determined in the pending arbitration (see [26] above). I would therefore have ordered that OA 643 be stayed and directed that the issue of ATSB and AOPL's respective entitlement to the escrow monies be determined in the pending arbitration, pursuant to s 11A of the International Arbitration Act.

123 With that, it leaves me to record my appreciation to all counsel for their thorough submissions and assistance. I will hear parties separately on the consequential directions to be made as well as on the costs of OA 643 and SUM 2720.

Perry Peh
Assistant Registrar

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