United Overseas Bank Ltd *v* Tru-line Beauty Consultants Pte Ltd and others [2010] SGHC 363

Case Number	: Suit No 1057 of 2009/E (Registrar's Appeal Nos 261 of 2010/G and 262 of 2010/L)
Decision Date	: 17 December 2010
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Lionel Tay, Ng Pei Jing and Esme Wei (Rajah & Tann LLP) for the plaintiff; Lee Chung Yen Steven and Alvin Chia (Hilborne & Company) for the defendants.
Parties	: United Overseas Bank Ltd — Tru-line Beauty Consultants Pte Ltd and others

Civil Procedure

17 December 2010

Woo Bih Li J:

Introduction

1 United Overseas Bank Limited ("UOB") instituted the main action, Suit No 1057 of 2009/E ("Suit 1057"), against its customer – Tru-line Beauty Consultants Pte Ltd (the "Borrower"), as well as the Borrower's guarantors – Lee Hwee Loo ("Lee") and Tan Wei Hong ("Tan") (collectively referred to as the "Guarantors"), for sums allegedly outstanding under two banking facilities granted by UOB to the Borrower.

2 Registrar's Appeal No 261 of 2010/G ("RA 261") is the appeal of the Borrower and the Guarantors against the decision of the Assistant Registrar ("the AR"), in Summons No 1185 of 2010/Y ("Sum 1185"), to grant summary judgment to UOB for its claim in Suit 1057. Registrar's Appeal No 262 of 2010/L ("RA 262") is UOB's appeal against the AR's dismissal of UOB's application, in Summons No 1184 of 2010/T ("Sum 1184"), to strike out paras 24–31 of the Defence and Counterclaim. I dismissed both appeals on 11 November 2010.

Background

3 UOB had granted the Borrower two banking facilities (collectively referred to as the "Banking Facilities"):

(a) a S$450,000 trust receipt facility ("the Trust Receipt Facility") under a Loan Insurance Scheme III pursuant to UOB's Letter of Offer dated 25 October 2007 ("the 1st Facility Letter"); and

(b) an overdraft account of up to S$90,000 in respect of the Borrower's current account ("the OD Facility") pursuant to UOB's Letter of Offer dated 29 October 2007 ("the 2nd Facility Letter").

On 22 October 2008, UOB sent a letter to the Borrower notifying it that the Trust Receipt Facility had been extended for a year with effect 26 October 2008 and that all the other terms and conditions

contained in the previous facility letter(s) would remain unchanged and continue to be binding on the Borrower (the "Review Facility Letter").

4 Lee and Tan were joint and several guarantors for the Borrower under two on-demand guarantees in favour of UOB ("the Guarantees"). The guarantee for the Trust Receipt Facility was dated 26 October 2007 and had a limit of S$450,000. The guarantee for the OD Facility was dated 29 October 2007 and had a limit of S$180,000. The Borrower's liabilities under the Banking Facilities were secured by the Guarantees as well as a Letter of Charge and Set-off (the "FD Charge") executed by Lee in respect of fixed deposits of not less than S$60,000 placed by Lee with UOB. Clause 9 of the Guarantees provided that the Guarantors would be sole and principal debtors *vis-à-vis* UOB for all the moneys guaranteed. By cl 13 of the Guarantees, the Guarantors agreed to indemnify UOB against all losses, damages, liabilities, claims, costs, charges and legal and other expenses sustained as a result of or arising from the Banking Facilities.

5 UOB's Standard Terms and Conditions Governing Banking Facilities (the "Standard Terms") were annexed to the 1st Facility Letter and the 2nd Facility Letter and were binding upon the Borrower. Clause 8 of the Standard Terms stated:

> **8. WAIVER WITHOUT PREJUDICE**
>
> The Bank may neglect or forbear to enforce any of the terms in this Agreement or waive on such conditions as it deems fit any breach by you of the same *without prejudice to its right at any time afterwards to act strictly in accordance with the originally agreed terms* in respect of the existing or subsequent breach. [emphasis added]

Clause 10 of the Standard Terms provided as follows:

> **10. EVENTS OF DEFAULT**
>
> On the occurrence of any of the following events of default (i) the Bank shall cease to be under any further commitment to you and all outstandings under the entire credit line ("the Outstandings") shall become due and payable immediately... :
>
> (a) If you breach any term of this Agreement including failure to pay any amount due under this Agreement on the due date or on demand, if so payable;
>
> (b) If you are unable to pay your debts when they become due or commit an act of bankruptcy or insolvency;
>
> ...
>
> (e) If you default *under any other agreement* involving the borrowing of money or the granting of advances or credit which gives the holder of the obligation concerned the right to accelerate repayment or withdraw the advance or credit;
>
> ...
>
> [emphasis added]

6 On or about 3 April 2009, UOB issued an irrevocable Letter of Credit No. 1TMLC033498 for the sum of EUR26,565.42 ("the L/C") to the Borrower in favour of Davines S P A ("Davines"). At the

material time, the Borrower was Davines' local exclusive distributor of hair products.

7 On 21 May 2009, UOB faxed a document titled Collection Notice Term Bills to the Borrower ("the Collection Notice") informing the Borrower that UOB had received documents from Davines for the sum of EUR26,565.42 in respect of the L/C and seeking the Borrower's instructions with regards to discrepancies in the documents. The reference number for the Collection Notice was 1TMTB011222. The Borrower ticked and signed an option on the Collection Notice which stated that it required a Trust Receipt. It returned the Collection Notice to UOB on the same date.

8 On 26 May 2009, 9 June 2009 and 10 June 2009, UOB had sent SWIFT messages to Davines' negotiating bank to inform it that the documents remained refused and that UOB was holding the documents until it received "a waiver from [the Borrower] and agree[d] to accept it, or receive[d] further instructions from [Davines' negotiating bank], prior to agreeing to accept a waiver".

9 As the Borrower failed to repay UOB the moneys owed under three bills outstanding on the Borrower's current account (Bill No. 1TMIL102592 for EUR43,990.29; Bill No. 1TMIL110572 for EUR9,398.26; and Bill No. 1TMIL102928 for US$20,926.80), UOB sent a letter of demand (the "Recall Letter") on or about 8 July 2009 to the Borrower and the Guarantors demanding that they make full payment of the outstanding due within five days from the date of the Recall Letter, failing which all of the Borrower's Banking Facilities would be deemed to have been recalled by UOB and UOB would proceed to uplift the fixed deposit pledged under the FD Charge. Although there was a typographical error in Tan's address (the street number was stated as "83" instead of "82"), Tan did not dispute receipt of this letter.

10 It was undisputed that the Borrower and the Guarantors failed to comply with the demands stated in the Recall Letter.

11 UOB recalled the Banking Facilities on or about 13 July 2009. UOB also sent Lee a Withdrawal Advice slip dated 31 July 2009 to inform Lee that UOB had uplifted a fixed deposit under the FD Charge.

12 On 3 August 2009, UOB sent a letter to the Borrower to inform it that Bill No. 1TMTB011222 for the amount of EUR26,565.42 under the L/C would be due on 18 August 2009 ("the Term Bill Notice"). The Term Bill Notice stated:

> PLEASE ADVISE US ON YOUR PREFERRED SETTLEMENT MODE BY SELECTING THE OPTIONS BELOW:
>
> ( ) WE HAVE BOOKED EXCHANGE RATE AT _____ UNDER CONTRACT NO: _____.
>
> ( ) PLEASE DEBIT MY SINGAPORE/FOREIGN CURRENCY ACCOUNT NO. _____ WITH YOU ON DUE DATE.
>
> ( ) WE REQUIRE TRUST RECEIPT FOR THE BALANCE OF 30 DAYS OF TRUST RECEIPT PERIOD AVAILABLE TO US. PLEASE INDICATE CURRENCY OF TR (FOREIGN OR SINGAPORE).

The Borrower replied on 7 August 2009, selecting the third option.

13 On 14 August 2009, UOB sent a SWIFT message to Davines' negotiating bank to inform it that UOB was returning the full set of discrepant documents (see [7] above) on that day. On 17 August 2009, UOB sent a Debit Advice to the Borrower informing the Borrower that UOB had deducted the

sum of S$170.00 from the Borrower's account as cancellation charges under the L/C.

14 On or about 24 August 2009, UOB's solicitors, Rajah & Tann LLP ("R&T") sent a further letter of demand to the Borrower demanding payment of the total outstanding sums under the Banking Facilities. The letter was titled:

> BANKING FACILITIES GRANTED BY UNITED OVERSEAS BANK LIMITED AND SECURED BY A CONTINUING PERSONAL GUARANTEE FOR THE PRINCIPAL SUM OF S$180,000.00 AND A CONTINUING PERSONAL GUARANTEE FOR THE PRINCIPAL SUM OF S$450,000.00 EXECUTED BY TAN WEI HONG AND LEE HWEE LOO IN FAVOUR OF UNITED OVERSEAS BANK LIMITED (COLLECTIVELY, THE "GUARANTEES")

It detailed the outstanding sums as follows:

> We are further instructed that you have defaulted and/or failed to make payment on the outstandings in respect of the following:-
>
> (1) Overdraft facility, such that the amount found due and owing by you to our clients as at 17 August 2009 amount to **S$25,014.93** with further interest continuing to accrue from 18 August 2009 until the date of full settlement;
>
> (2) Letter of Credit facility, such that the amount found due and owing by you to our clients as at 17 August 2009 amount to **EUR26,565.42** with further interest continuing to accrue from 18 August 2009 until the date of full settlement; and
>
> (3) Loan Insurance Scheme III Trust Receipt facility, such that the amount found due and owing by you to our clients as at 17 August 2009 amount to **EUR101,616.82 and US$21,285.05** with further interest continuing to accrue from 18 August 2009 until the date of full settlement.
>
> [emphasis in bold in original]

On the same day, R&T sent a further letter (erroneously dated 21 August 2009) to the Guarantors demanding from the Guarantors full payment of the total outstanding sum under the Banking Facilities of S$25,121.93, EUR128,182.24 and US$21,285.05 together with further legal interest and legal costs. The letter to the Guarantors stated that a copy of R&T's letter of demand to the Borrower dated 24 August 2009 was enclosed but the Guarantors claimed that the said letter was not in fact enclosed. R&T's letters were served on the Borrower and the Guarantors by way of AR Registered Mail and Certificate of Posting. The letters to the Guarantors were not sent to their address as stated in the Guarantees but were instead sent to their addresses as stated in an Enhanced Instant Search on the Borrower which UOB conducted on 14 August 2009. The Borrower and the Guarantors did not dispute UOB's claim that they had acknowledged receipt of R&T's letters.

15 According to UOB, by a letter dated 23 September 2009, R&T notified the Borrower and the Guarantors that the sum of EUR128,182.24 as stated in the letters mentioned at [14] above was reduced to EUR101,616.82, due to the cancellation of the L/C.

16 The Borrower and the Guarantors exhibited, in their joint affidavit of 5 April 2010, a letter dated 30 October 2009 from Davines which stated that Davines would not be renewing its distribution agreement dated 25 June 2009 with the Borrower on its expiry on 31 December 2009. The reason given in the letter was as follows:

It is a matter of fact that there has been a *significant default* in payments. (which we have revised it according to your request, but unfortunately, *the payment schedule was not adhered*) [emphasis added]

17 On 15 December 2009, UOB filed a Writ of Summons and Statement of Claim against the Borrower and the Guarantors in which it sought:

(a) the total outstanding sum of S$25,772.98 (inclusive of interest) due and owing in respect of the OD Facility, plus further interest from 9 December 2009 up to the date of full payment;

(b) the total outstanding sum of EUR102,931.47 and US$21,550.63 due and owing in respect of the Trust Receipt Facility, plus further interest from 9 December 2009 up to the date of full payment and all loss in foreign exchange, if any; and

(c) costs and disbursements on a full indemnity basis.

18 On 27 January 2010, the Borrower and Guarantors filed a joint Defence and Counterclaim. It was admitted in paras 9 and 15 of the Defence and Counterclaim that the Borrower did not pay UOB the outstanding sums stated in the Recall Letter and that an event of default had occurred under cl 10(a) of the Standard Terms (see [5] above). The main grounds of the Defence were that:

(a) each Facility Letter and the Standard Terms annexed thereto constituted a separate and distinct agreement between the Borrower and UOB and UOB could only recall the facility in respect of which the Borrower was in default, and not all banking facilities granted to the Borrower;

(b) UOB had continued to grant banking facilities under the Trust Receipt Facility to the Borrower notwithstanding the non-compliance with the demands stated in the Recall Letter; and

(c) the liability of the Guarantors had not arisen since UOB did not give an effective or proper service of a written demand on the Guarantors.

19 I would mention that the Defence and Counterclaim also alleged that the guarantee dated 26 October 2007 was not binding on the parties as there was no consideration from UOB in respect of that guarantee. No elaboration was given of this defence. Neither was it pursued in arguments before me. I will therefore not say any more about this defence.

20 At paras 24–31 of the Defence and Counterclaim, it was alleged that UOB had wrongfully, and in breach of the 1st Facility Letter, terminated the L/C which had been issued to Davines in payment of the goods purchased by the Borrower from Davines and that this had caused Davines to decide not to renew or extend the Borrower's exclusive distribution agreement with Davines, thereby occasioning loss to the Borrower. It was pleaded at para 22 of the Defence and Counterclaim that:

22. The Defendants will seek to set-off so much of the Counterclaim herein as will be sufficient to diminish or extinguish the Plaintiff's claim herein.

21 UOB's pleaded response to the issues raised in paras 24–31 of the Defence and Counterclaim, as stated in UOB's Reply and Defence to Counterclaim filed on 9 February 2010, was that it was lawfully entitled, under the terms of the 1st Facility Letter, 2nd Facility Letter, Standard Terms and Review Facility Letter, to terminate the whole of the Banking Facilities, including the L/C. I noted that the issues highlighted at [7] above (and discussed at [25] below) with regards to the discrepancies in

the L/C and the communication between UOB and Lee on whether the L/C documents ought to be rejected because of the discrepancies were not raised in UOB's pleadings albeit they were subsequently discussed in an affidavit filed on behalf of UOB on 23 April 2010.

Decision

The application to strike out paras 24–31 of the Defence and Counterclaim (RA 262)

22 UOB's application to strike out paras 24–31 of the Defence and Counterclaim was made pursuant to O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC") and was made on the ground that the counterclaim disclosed no reasonable cause of action and/or:

(a) was scandalous, frivolous or vexatious; and/or

(b) may prejudice, embarrass or delay the fair trial of the action; and/or,

(c) was otherwise an abuse of the process of Court.

23 The main issue in the counterclaim was whether UOB's cancellation of the L/C was wrongful and in breach of contract and, if so, whether this had occasioned loss to the Borrower for which it was entitled to claim damages from UOB.

24 The L/C was an *irrevocable* documentary credit. An irrevocable credit constitutes an independent contract between an issuing bank and the beneficiary which, in the absence of fraud, is not affected by any irregularities in the underlying contract in pursuance of which the credit was issued (see *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 at [19]). The principle of autonomy of credit, excepting fraud, is sacrosanct in the law of letter of credit and any inroad into the principle will undermine and annihilate the trust and confidence in the use of documentary credits in international trade. As such, the contractual relationship between the issuing bank and the applicant for the credit cannot affect the relationship between the issuing bank and the beneficiary (*Agritrade International Pte Ltd v Industrial and Commercial Bank of China* [1998] 1 SLR(R) 322 at [21] and [22]). UOB's pleaded defence to the counterclaim, *ie*, that it was entitled to recall all banking facilities granted to the Borrower (including the L/C), was irrelevant to the issue whether it ought to pay on the L/C.

25 Para 9(d) of the Defence and Counterclaim acknowledged that UOB had sent the Collelction Notice (see [7] above) to the Borrower. The Collection Notice, as exhibited in affidavit evidence, referred to two discrepancies: (1) the L/C had expired; and (2) the invoice showed that the product was free of charge. It was the Borrower's position (as pleaded at paras 9(e)-(f) of the Defence and Counterclaim) that the Borrower had indicated to UOB that it wished to accept the discrepancies and that it required a Trust Receipt to finance the payment. On the other hand, UOB alleged, in para 32 of an affidavit filed on its behalf by Lau Kim Koon ("Lau"), a First Vice President of its Group Special Assets Management, on 23 April 2010, that on 26 May 2009, the Borrower had informed UOB that the Borrower wished to reject the documents from Davines in view of discrepancies. Lau was relying on a handwritten note to this effect made by a UOB staff, one Pui Wah, about a telephone conversation with one Lisa. The handwritten note was made on a copy of the Collection Notice. Lau's allegation that the Borrower had rejected the documents was not pleaded by UOB.

26 In her affidavit filed on 3 May 2010, Lee confirmed that she is known as Lisa Lee but she disputed that she had informed Pui Wah that the Borrower wished to reject the documents.

27 In view of the disputed facts and UOB's failure to raise the discrepancies in the L/C in its pleadings, it was arguable that the Borrower had positively responded to UOB's inquiry (in the Collection Notice) whether to accept the discrepancies (see [7] above) and that consequently UOB was obliged to pay on the L/C.

28 The question whether UOB's omission to pay on the L/C had caused Davines to terminate the distributorship agreement with the Borrower was another, although related, matter. On this question, I noted that Davines' letter dated 30 October 2009 (see [16] above) referred to a significant default of more than one payment because the plural "payments" was used. In addition, the Borrower had apparently suggested a payment schedule which it did not adhere to. The letter therefore suggested that the non-payment by UOB under the L/C was not the true cause for Davines' termination of the distributorship agreement. However, no further evidence was given on this question and I was not able to reach any conclusion on the question. Accordingly, I declined to strike out paras 24–31 of the Defence and Counterclaim.

The application for summary judgment (RA 261)

29 UOB's claim against the Borrower and the Guarantors was premised on their failure to effect repayment of sums due under the Banking Facilities granted to them by UOB. The Borrower and the Guarantors did not dispute the amount owing to UOB. They also did not dispute that they had received the letters of demand sent by R&T (see [9] above). The grounds of the Defence, as set out at [18] above, are discussed below.

(a) Whether UOB was entitled to recall the Trust Receipt Facility when the Borrower had only defaulted under the OD Facility.

30 The Recall Letter (see [9] above) clearly stated that *all* banking facilities would be recalled if the outstanding sums due to UOB were not settled. The argument by the Borrower and the Guarantors that the 1st Facility Letter and the 2nd Facility Letter were separate and independent agreements and that UOB was not entitled to recall the Trust Receipt Facility when the Borrower had only defaulted under the OD Facility was unsustainable in light of cl 10(e) of the Standard Terms (as set out at [5] above) which clearly allowed UOB to recall the Banking Facilities as long as the Borrower defaulted under *either* the Trust Receipt Facility *or* the OD Facility.

(b) Whether UOB had waived its right to recall the Trust Receipt Facility.

31 By the end of July 2009, UOB had recalled the whole of the Banking Facilities and had proceeded to uplift a fixed deposit of S$61,142.47 pledged under the FD Charge. The Borrower and the Guarantors were informed of this series of events. The Term Bill Notice dated 3 August 2009 (see [12] above) was a reminder to the Borrower to pay outstanding sums in a bill that was rendered pursuant to the L/C which was granted *before* the Recall Letter was sent (see [6] and [9] above) and was *not* a further grant of banking facilities to the Borrower. Although the Borrower had indicated, in its reply to the Term Bill Notice on 7 August 2009, that it required a trust receipt to settle the bill, such a trust receipt was never in fact granted to the Borrower as is evident from the fact that the sum of EUR26,565.42 due under the bill referred to in the Term Bill Notice was classified as an amount due under a "Letter of Credit facility" instead of under the Trust Receipt Facility in UOB's letter of demand dated 24 August 2009 (see [14] above). In any event, pursuant to cl 8 of the Standard Terms (as set out at [5] above), any indulgence or waiver granted by UOB was without prejudice to its right to recall the Banking Facilities at its sole discretion where there had been a breach of the agreements between the parties. UOB had, at the latest, exercised this right on 23 September 2009 (see [15] above), after the bill stated in the Term Bill Notice was due.

(c) Whether UOB had given an effective or proper service of a written demand on the Guarantors.

32 The Guarantors claimed that UOB had not given an effective or proper service of a written demand on them. Two reasons were cited by the Guarantors as follows:

> (a) the letter of demand to the Borrower dated 24 August 2009 was not enclosed in the letter of demand to the Guarantors dated 21 August 2009 (see [14] above); and
>
> (b) the service of the letters of demand on the Guarantors by AR Registered Post was bad because the notices were not sent to the Guarantors' address as stated on the last page of the Guarantees.

I was of the opinion that the Guarantors' liability to UOB had arisen in the present case for the two reasons below (at [33] and [34] – [40]).

33 First, whilst the Guarantors' obligations under the Guarantees only arose when a demand in writing was made against them (pursuant to cl 1 of the Guarantees), there was no legal requirement that the letter of demand to the Borrower had to be provided to the Guarantors. The letters of demand to the Guarantors dated 21 August 2009 and 23 September 2009 clearly stated the amounts owing to UOB by the Borrower.

34 Secondly, whilst it would have been advisable for R&T to have sent the letters of demand to both the Guarantors' address as stated in the Guarantees as well as the Guarantors' last-known addresses, its failure to do the former did not affect UOB's claim against the Guarantors.

35 Clause 1 of the Guarantees provided as follows:

> ... we the undersigned hereby unconditionally guarantee that we will *on demand in writing made on us* pay to you or discharge on a full indemnity basis all moneys and liabilities whatsoever which shall for the time being be due owing or incurred by [the Borrower] ...
>
> [emphasis added]

Clause 28 of the Guarantees stated:

> 28. NOTICES – Any demand, notice or other communication to [the Guarantors] *may be sent* by telefacsimile, telex or otherwise in writing to the telefacsimile number or telex number last known to [UOB] or to [the Guarantors'] *registered address*. Any demand, notice or other communication made or given to [the Guarantors] shall be *deemed to be received* ... (if sent by telefacsimile or telex) on the day of despatch or two (2) days after being sent by prepaid post to [the Guarantors'] registered address and in proving such service it shall be sufficient to prove that the demand, notice or communication was properly addressed and posted. [emphasis added]

It was arguable that the reference to "registered address" in cl 28 meant the address stated in the last page of the Guarantees as asserted for the Guarantors. Even then, I was of the opinion that cl 28 was intended for UOB's benefit and was permissive rather than mandatory. Therefore, the interpretation relied on by the Guarantors, UOB would be able to rely on the deeming provision in cl 28 if the letters of demand had been sent to the address stated in the last page of the Guarantees. As they were not sent to that address, UOB would have had to prove that the demands had been received by the Guarantors if that was an issue. However, the Guarantors did not dispute that they

had received the letters of demand.

36 The Guarantors submitted that the common law position required that personal service of the letters of demand be effected if the contractual mode of service (*ie* cl 28 of the Guarantees) did not apply. The Guarantors relied on the holding of the Malaysia High Court in *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1 ("*Allied Bank*") (at 36D-I) as follows:

> ... In this case, there is no evidence of any agreement between the parties with regard to the mode of service of the notice of demand. The only provision on this issue is contained in the letter of offer which merely states that repayment shall be on demand without condescending to particularize the form of service. *This, to my mind, means that the notice of demand must be served personally on the defendant in the absence of any agreement to the contrary*. In saying this, I draw support from the book entitled *Law of Banking* (3rd Ed) (Vol II) by Poh Chu Chai where the learned author in writing on service of notices of demand in guarantee cases says at pp 352-353:
>
> > When a guarantee imposes a duty on a creditor to give a notice of demand to a guarantor, there is a presumption that the notice will be served on the guarantor personally unless the manner in which the notice is to be served is spelt out in the guarantee. The requirement for personal service imposes an additional burden on a creditor. In practice, it is more usual for a guarantee to provide for the form and manner in which a notice of demand is to be served on a guarantor. Very often, a guarantee will allow a creditor to serve a notice of demand on a guarantor either by ordinary mail or by registered mail instead of by way of personal service. This mode of service is equivalent to a form of substituted service. Under this mode of service, a creditor discharges his duty to a guarantor the moment a notice of demand is duly addressed and posted. The risk of a notice going astray and not getting to a guarantor owing to a miscarriage by the post office falls on the guarantor as the parties have by agreement thrown the risk of miscarriage on the guarantor. Equally, if a guarantor avoids the receipt of a notice of demand, either by changing his address without notifying the creditor or refuses to accept delivering of the notice, he is deemed to have notice of the letter of demand the moment a notice duly addressed is posted.
>
> > [emphasis added]

37 On appeal from the decision of the Malaysia High Court in *Allied Bank*, however, the Court of Appeal held that the High Court's ruling that the notices of demand had to be served personally could not be comprehended. The Court of Appeal held ([2006] 5 MLJ 145 at [17]):

> ... There is no express provision for personal service amongst the terms and conditions stated in the letter of offer which is the agreement and such a ruling would tantamount to importing a term into the agreement. We do not think that the court could under the circumstances of this case read into the agreement such a term or condition. In conclusion we would hold that the learned JC was wrong in law and in fact in not admitting in evidence the said notices of demand and the AR cards. On the evidence, the demand was received by the respondent or his office staff, ie, his servant or agent and the learned JC should have held that a valid demand has been made.

38 There was no express provision for personal service amongst the terms and conditions of the Guarantees and I did not read such a term into the Guarantees. To avoid confusion, I would mention that the reference to "personal service" in the passages quoted above should not be equated with "personal service" under the RoC. O 62 r 2 of the RoC, which states that personal service must be effected by a process server of the Court or by a solicitor or a solicitor's clerk whose name and

particulars have been notified to the Registrar, only applies to "personal service" of a document which by an express provision of the RoC or by order of the Court is required to be so served (see O 62 r 1 of the RoC).

39 The purpose of making a written demand on the Guarantor is to ensure that he is made aware when his obligation is triggered and to give him an opportunity to meet his obligation. As mentioned, the Guarantors did not dispute that they had in fact received the letters of demand. The Guarantors need not have been direct recipients of the letters of demand from UOB.

(d) Whether the counterclaim may be set off against UOB's claim

40 The Borrower and the Guarantors argued that the Borrower had a valid counterclaim against UOB for UOB's failure to honour the L/C and that this counterclaim may be set off against UOB's claim. The Borrower and the Guarantors submitted that the court should not grant judgment to UOB or, if judgment was granted, it should be stayed.

41 In *United Overseas v Peter Robinson (trading as Top Shop)* (Civil Division, 26 March 1991, unreported), Bingham LJ, in delivering the judgment of the English Court of Appeal, summarised the approach of the court to set-offs and counterclaims raised in opposition to summary judgment applications. Bingham LJ's guidelines were adopted by the Singapore High Court in *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 at [33] where Lai J set out the four classes of cases in the court's determination of whether summary judgment should or should not be granted as follows:

> (a) The first class would be where the defendant can show an arguable set-off whether equitable or otherwise. To the extent of such set-off, the defendant would be entitled to unconditional leave to defend. It would be for the judge to decide whether such an arguable set-of is shown or not.
>
> (b) The second class would be where the defendant sets up a bona fide counterclaim arising out of the same subject-matter as the action and connected with the grounds of defence. In this class of case, ... the order should not be for judgment on the claim subject to a stay of execution pending trial of the counterclaim, but should be for unconditional leave to defend even if the defendant admits the whole or part of the claim.
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> (c) The third class would be where the defendant has no defence to the plaintiff's claim so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim. In such a case, the order should not be for leave to defend, but should be for judgment for the plaintiff on the claim and costs until the trial of the counterclaim.
>
> (d) The fourth class would be where the counterclaim arises out of quite a separate and distinct transaction, or is wholly foreign to the claim, or there is no connection between the claim and the counterclaim. The proper order should then be for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim.

42 In *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*"), Sunderesh Menon JC referred to the judgment of Potter LJ in *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd's Rep 93 ("*Bim Kemi*").

43 At [26] of *Abdul Salam*, Menon JC said:

Potter LJ reviewed the authorities at [24] – [30] of the judgment, and the following propositions emerge from the authorities:

> (a) There is a general right to equitable set-off in cases where there is a close relationship or connection between the dealings and the transactions which give rise to the respective claims : see *Hanak v Green* [1958] 2 QB 9.
>
> (b) It is not necessarily the case that the claim and cross-claim must arise out of the same contract: see *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137.
>
> (c) There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances: see *The Government of Newfoundland v The Newfoundland Railway Company* (1888) 13 App Cas 199.
>
> (d) In determining how close the connection needs to be, the court should not get bogged down in the nuances of differently expressed formulations, save that there must be a close and inseparable relationship between the claims. Beyond this, the outcome can be left to be governed by notions of fairness and whether the circumstances are such that it would be manifestly unjust to allow one claim to be enforced without regard to the other: see *Bim Kemi* ... at [29].

Menon JC also said at [28]:

> ... The question of whether a sufficient degree of closeness is established in the connection between the respective claims is not determined by some sort of formulaic process. In each case, the question turns on whether the respective claims are so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other.

44 Although the Borrower's claim was in respect of UOB's cancellation of the L/C and the L/C was issued pursuant to one of the Banking Facilities and UOB was claiming for sums due and payable to it under the Banking Facilities, I was of the view that this did not give rise to a sufficient degree of proximity to raise a set-off. The claim by UOB did not include any sum in respect of the L/C. The Borrower's claim in respect of the L/C was separate from UOB's claim. This was also a case where UOB should not be put to the trouble and expense of proving its claim since its claim was admitted. I was therefore of the view that judgment should be entered for UOB.

(e) Whether there should be a stay of execution if judgment is granted to UOB

45 The degree of connection between the claim and counterclaim, the strength of the counterclaim and the ability of a plaintiff to satisfy any judgment on the counterclaim are some of the considerations which the court may take account of in the exercise of its discretion whether or not to order a stay of execution of judgment (see *Singapore Civil Procedure 2007*, Sweet & Maxwell Asia at pp144 and 145 in the commentary at O14/4/10 headed "Set-off and Counterclaim"). I have already expressed my view on the degree of connection between the claim and counterclaim. Secondly, as elaborated at [28] above, the counterclaim was suspect and it might even turn out to be fraudulent. Thirdly, it was indisputable that UOB could satisfy any judgment obtained by the Borrower in its counterclaim. In the circumstances, I declined to order a stay of execution on the judgment for UOB.

Conclusion

46 For the foregoing reasons, I dismissed both appeals. I made no order on costs for each appeal.

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