CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Limited) *v* Polimet Pte Ltd and others
[2014] SGHCR 8

Case Number : Suit No 758 of 2013 (Summons No 5740 of 2013 and Summons No 424 of 2014)

Decision Date : 16 April 2014

Tribunal/Court : High Court

Coram : Jean Chan Lay Koon AR

Counsel Name(s) : Hri Kumar Nair S.C. and Joseph Yeo (Drew & Napier LLC) for the plaintiff; Tan Chee Meng S.C., Lim Ke Xiu (WongPartnership LLP), Nandakumar Renganathan and Simren Kaur (RHTLaw Taylor Wessing LLP) for the defendants.

Parties : CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Limited) — Polimet Pte Ltd and others

Civil Procedure – Striking Out – Summary Judgment

Contract – Contractual Terms – Rules of Construction – Parole Evidence Rule

16 April 2014 Judgment reserved.

Jean Chan Lay Koon AR:

1 This judgment concerns two separate applications. Sum 5740/2013 is the plaintiff's application for summary judgment to be entered against all five defendants under O 14 r 1 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed) ("Rules of Court"). Sum 424/2014 is the defendants' application for the Plaintiff's claim against the 4th and 5th defendants to be struck out under O 18 r 19(1).

Background facts

2 The plaintiff is a private company incorporated in Mauritius. It was set up as a special purpose vehicle for the purpose of entering into bond subscription agreements with the defendants. The plaintiff was known as "Diamond Kendall Limited" up to its sale to Global Distressed Alpha Fund III Limited Partnership in or about July 2013 and its name was changed to CIFG Special Assets Capital I Ltd ("CIFG") on 13 August 2013.

3 The 1st defendant is a private limited company incorporated in Singapore. The 1st defendant owns a number of subsidiaries which are in the business of, amongst others, manufacturing lead-in wires and cold formed components for the glass diodes and semiconductor industry. At the material times, the 1st defendant had four wholly owned subsidiaries, namely, Delta China Technologies Ltd ("Delta"), Citi-Venture Limited ("Citi"), Fortuna Development Pte Ltd ("Fortuna") and Boulo United Diode Lead Co. ("BUDL"). Delta, in turn, had a wholly owned subsidiary FDP (Huizhou) Co. Ltd ("FDP").

4 The 2nd to 5th defendants were the initial shareholders of the 1st defendant. At present, the 2nd defendant is a director of the 1st defendant. By an agreement in writing between the plaintiff and the defendants as evidenced by, amongst others, a Convertible Bond Subscription Agreement dated 5 October 2007 ("2007 CBSA") and a Supplemental Bond Subscription Agreement dated 16 October

2008 ("Supplemental 2007 CBSA"), the 1st defendant issued and the plaintiff subscribed for the full amount of a convertible bond ("2007 Bond") with a redemption value of US$8,333,333 (subsequently increased to US$9,166,667 upon the draw-down by the 1st defendant of the Third Tranche (as defined below), pursuant to which the plaintiff would grant the 1st defendant a facility in the sum of US$5,500,000 (the "first facility"), to be drawn down in three tranches.

5 It is undisputed that the 2007 CBSA was entered into for the purposes of financing the 1st defendant's acquisition of the dumet manufacturing line of Philips Lighting B.V. and for the working capital of the dumet business. It is also undisputed that the entire first facility was drawn down by the 1st defendant. Clause 3.1(f) of the 2007 CBSA specifically required the 2nd to 5th defendants to transfer their shares in the 1st defendant to the plaintiff as a condition precedent to the plaintiff's obligation to provide the first facility. Since the execution of the 2007 CBSA, the plaintiff has been and remains the sole shareholder of the 1st defendant.

6 At all material times, during negotiation and up to the signing of the 2007 CBSA, the plaintiff's side was represented by Chris Chia Woon Liat ("Chia") and Yeo Kar Peng ("Yeo"). Pursuant to clause 3.1(m) of the 2007 CBSA, Chia and Yeo were appointed as nominee directors of the plaintiff to the Board of Directors of the 1st defendant. Yeo was also appointed as a nominee director to the Boards of Directors of Delta, Citi, Fortuna, BUDL and FDP. Even after its name change from Diamond Kendall Limited to CIFG, the plaintiff continued to be represented by Chia and Yeo in all matters related to and arising out of the bond subscription agreements.

7 Some of the salient terms and conditions under the 2007 CBSA are:

(a) Schedule 2 setting out the schedule pursuant to which the 1st defendant was to make payment to the plaintiff towards the redemption of the bonds;

(b) By clause 9.1, the 1st defendant together with the 2nd to 5th defendants in their personal capacities as initial shareholders of the 1st defendant, also covenanted to abide by, *inter alia*, the following conditions set out at clauses 9.2 and 9.3 of the 2007 CBSA, failing which the plaintiff was entitled to withdraw the facilities granted and demand immediate redemption of the same. In particular, the defendants covenanted to maintain the financial ratios set out at clause 9.2(xxix) and clause 9.3 (xxix) of the 2007 CBSA. The financial ratios were subsequently varied by way of clause 1.1(iii) and clause 1.1(iv) of the Supplemental 2007 CBSA; and

(c) Clause 11 setting out specific events of default pursuant to which the plaintiff may, by notice to the 1st defendant, declare the 2007 Bond and the facilities extended thereunder cancelled. In that event, all the outstanding sums due will be immediately due and payable and the plaintiff would be entitled without further notice to institute proceedings to enforce such payments.

8 The 2007 CBSA also provides for an "indemnity clause" under clause 12. As the interpretation of clause 12 is a subject matter of dispute in both applications (see details in paragraphs 21 to 25 below), it is reproduced in its entirety below:

12. INDEMNITY

12.1 **General Indemnity**: The Initial Shareholders and the Issuer hereby jointly and severally

agree and undertake to fully indemnify and hold the Bondholder and its shareholders and their respective fund managers, directors, officers and employees (the "**Indemnified Parties**") harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) directly or indirectly caused to the Indemnified Parties and in particular, but without prejudice to the generality of the foregoing, for any short-fall, depletion or diminution in value of the assets of the Issuer, the Group or any Group Company resulting directly or indirectly from or arising out of any breach or alleged breach of any of the representations, warranties, undertakings and covenants given by the Initial Shareholders and/or the Issuer under this Agreement or for any breach or alleged breach of any term or condition of this Agreement.

12.2 **Conduct of Defence**: If any action, proceeding, claim or demand (including a governmental investigation) shall be instituted involving any of the Indemnified Parties in respect of which indemnity may be sought pursuant to Clause 12.1, such Indemnified Party shall promptly notify the Issuer and the Initial Shareholders in writing and the Issuer and the Initial Shareholders shall, unless the Indemnified Party elects to assume the defence itself, assume the defence thereof and appoint lawyers satisfactory to the Indemnified Party (which approval shall not be unreasonably withheld or delayed) and shall be liable to pay the fees and expenses of such lawyers related to such proceeding. If such Indemnified Party elects to appoint its own lawyers in a connected legal proceeding, the Issuer and Initial Shareholders shall pay for all reasonable legal costs as well if and only if:

(a) the use of counsel appointed by the Issuer and the Initial Shareholders to represent the Indemnified Party would present such counsel with a conflict of interest;

(b) the actual or potential defendants in or targets of such action include both (i) the Indemnified Person and (ii) the Issuer and/or the Existing Shareholder, and the Indemnified Person shall have reasonably concluded that there may be legal defences available to it;

(c) the Issuer and the Initial Shareholders shall not have employed counsel satisfactory to the Indemnified Person to represent the Indemnified Person within a reasonable time; or

(d) the Issuer and the Initial Shareholders shall have authorised the Indemnified Person to employ separate counsel at the expense of the Issuer and the Existing Shareholder.

12.3 **Defence by Indemnified Person**: In any proceeding, pursuant to Clause 12.2, if the Indemnified Person has elected to assume the defence itself or the Issuer has and the Initial Shareholders have failed to appoint lawyers satisfactory to the Indemnified Person within a reasonable time, the Issuer and the Initial Shareholders shall reimburse such fees and expenses as are incurred by the Indemnified Person. The Issuer and the Initial Shareholders shall not be liable for any settlement of any such proceeding effected without its written consent (provided that such consent shall not be unreasonably withheld or delayed), but if settled with such consent (or without such consent in circumstances where such consent shall have been unreasonably withheld or delayed as aforesaid) or if there be final judgment for the plaintiff, the Issuer agrees and the Initial Shareholders jointly and severally agree to indemnify the Indemnified Person against any loss or liability by reason of such settlement or judgment. The Issuer and Initial Shareholders shall not settle any proceeding without the written consent of the Indemnified Person (such consent not to be unreasonably withheld or delayed).

9 The 2007 CBSA also provides for an "entire agreement clause" under clause 14 and it reads as follows: -

14 PREVIOUS AGREEMENTS

14.1 **Entire Agreement**: This Agreement and the documents referred to herein are in substitution for all previous agreements, both written and oral, between all or any of the parties and contain the whole agreement between the parties relating to the subject matter of this Agreement.

10 In respect of the 2nd and 3rd defendants, it is undisputed that they are at all material times, the personal guarantors of 50% of the liabilities of the 1st defendant to the plaintiff under the 2007 CBSA as a result of a Personal Guarantee and Indemnity dated 5 October 2007 ("2007 Guarantee") executed by them in favour of the plaintiff and as varied by the Supplemental Guarantee Agreement executed on 16 October 2008 ("Supplemental Guarantee").

11 Pursuant to the 2007 CBSA, the First Tranche of the 2007 Bond amounting to US$3,000,000 was issued by the 1st defendant to the plaintiff on 29 October 2007. The Second Tranche and Third Tranche of the 2007 Bond, amounting to US$2,000,000 and US$500,000 respectively, were also issued by the 1st defendant to the plaintiff on 28 April 2008.

12 Subsequently in or around 2008, the defendants requested by way of, amongst others, a letter from the 1st defendant dated 16 June 2008 and the plaintiff agreed to grant the defendants an additional facility of US$2,800,000. By a further agreement in writing between the plaintiff and the defendants as evidenced by a Convertible Bond Subscription Agreement dated 16 October 2008 ("2008 CBSA") and a Supplemental Bond Subscription Agreement dated 16 October 2008 ("Supplemental 2008 CBSA"), the 1st defendant issued and the plaintiff subscribed for the full principal amount of a convertible bond ("2008 Bond") with a redemption value of US$4,666,667 pursuant to which the plaintiff would grant the 1st defendant an additional facility in the sum of US$2,800,000. It is undisputed that the additional facility was also drawn down by the 1st defendant.

13 Some of the salient terms and conditions under the 2008 CBSA are:

(a) Schedule 2 setting out the schedule for the 1st defendant to redeem the 2008 Bond;

(b) By clause 9.1, the defendants covenanted to maintain the financial ratios set out at clauses 9.2 (xxviii) and 9.3 (xxviii) of the 2008 CBSA;

(c) By clauses 9.2 (xxx) and 9.3 (xxx), the defendants also covenanted to perfect, execute and/ or register the security documents (as defined in the 2008 CBSA) within a specified time where required by the plaintiff; and

(d) Clause 11 setting out the specific events of default pursuant to which the plaintiff may, by notice to the 1st defendant declare the 2008 Bond and the facilities extended thereunder cancelled. In that event, all the amounts due under the 2008 CBSA will be immediately due and payable.

14 Similarly, the 2008 CBSA also provides for an "indemnity" clause and an "entire agreement" clause under clause 12 and clause 14.1 and the wordings of these clauses remain the same as the 2007 CBSA.

15 Likewise, it is also undisputed that the 2nd and 3rd defendants personally guaranteed 50% of the liabilities of the 1st defendant to the plaintiff under the 2008 CBSA pursuant to the Personal Guarantee and Indemnity dated 5 October 2008 executed by them in favour of the plaintiff ("2008 Guarantee"). Pursuant to the 2008 CBSA, the 2008 Bond with a nominal value of US$2,800,000 was issued by the 1st defendant to the plaintiff on 31 October 2008.

16 About a year later, the plaintiff and the defendants entered into a Supplemental Convertible Bond Subscription Agreement dated 28 October 2009 ("Supplemental 2009 CBSA"). The Supplemental 2009 CBSA essentially granted the 1st defendant a two year grace period in respect of its payment obligations under the 2007 CBSA and the 2008 CBSA and also eased the financial ratios to be maintained by the 1st defendant under the 2007 CBSA and 2008 CBSA. Pursuant to clause 1.2 of the Supplemental 2009 CBSA, the provisions of the 2007 CBSA, Supplemental 2007 CBSA, 2008 CBSA and Supplemental 2008 CBSA, including the abovementioned clauses 12.1 and 14.1, were incorporated into the 2009 Supplemental CBSA.

17 For ease of reference, the 2007 CBSA, the Supplemental 2007 CBSA, the 2008 CBSA, the Supplemental 2008 CBSA and the Supplemental 2009 CBSA shall be collectively referred to as the "Bond Subscription Agreements". The 2007 Guarantee, 2008 Guarantee and the Supplemental Guarantee executed by the 2nd and 3rd defendants shall be collectively referred to as the "Personal Guarantees".

Summary of plaintiff's claims and defendants' disputes

18 The plaintiff in this case has applied for summary judgment against all five defendants. The plaintiff's primary claim against the 1st defendant is for its failure to make payment of the outstanding sum due under the terms of the Bond Subscription Agreements in accordance with Schedule 2. In the circumstances, an Event of Default within the meaning of clause 11.1 of the 2007 CBSA and 2008 CBSA has occurred. By way of letters dated 26 March 2012, 10 April 2012 and 5 August 2013 (collectively referred to as the "letters of demand"), the plaintiff issued demands on the defendants for the sums owing under the Bond Subscription Agreements. As the plaintiff did not receive any payment from the defendants, it then cancelled the facilities by way of a letter dated 15 August 2013 through its solicitors and demanded the immediate repayment of all outstanding sums, amounting to US$18,685,447 as at 7 June 2013.

19 The plaintiff also claimed that it is entitled to terminate the Bond Subscription Agreements for the 1st defendant's failure to fulfil various conditions subsequent such as failure to maintain the requisite financial ratios, failure to provide the relevant financial information and reports for the years 2009 to 2011, failure to register with the relevant authorities debentures granted by the 1st defendant's subsidiary FDP in favour of the plaintiff under the Bond Subscription Agreements within the relevant period.

20 The plaintiff further claimed that it is entitled to terminate the Bond Subscription Agreement on the basis that the following two events amounted to events of default within the meaning of clause 11.1 of the 2007 CBSA and 2008 CBSA:

(a) The alleged unilateral disposal of 75 LIW machines and 20 Melf machines by FDP, which the plaintiff claimed amounts to a disposal of a substantial portion of FDP's total assets;

(b) Notwithstanding the plaintiff's objections, FDP unilaterally proceeded to suspend all its

operations for a period of three months commencing from 1 August 2013.

21 As against the 2nd to 5th defendants, the plaintiff sought to recover the whole of the 1st defendant's alleged liability pursuant to the general indemnity provision in clause 12.1 of the 2007 and 2008 CBSA. It is the plaintiff's case that pursuant to clause 12.1, each of the defendants jointly and severally agreed and undertook to fully indemnify the plaintiff and keep the plaintiff indemnified from and against all losses, costs, liabilities and expenses caused to the plaintiff arising directly or indirectly from any breach of the Bond Subscription Agreements. In respect of the 2nd and 3rd defendants, the plaintiff further sought to enforce the Personal Guarantees against them for 50% of the 1st defendant's alleged liability.

22 In summary, counsel for the plaintiff, Mr Hri Kumar Nair, *S.C.*, argued that this is a case for summary judgment as the 1st defendant was in clear breach of the various terms of the Bond Subscription Agreement and the 2nd to 5th defendants were clearly liable to indemnify the plaintiff pursuant to clause 12.1. As for the 2nd and 3rd defendants, they are also liable to indemnify the plaintiff up to 50% of the 1st defendant's liability by virtue of the Personal Guarantees executed by them.

23 On the other hand, the defendants contended that the plaintiff's reliance on the general indemnity provision under clause 12.1 as an unlimited guarantee making all four individual defendants personally liable for the whole of the contractual obligations of the 1st defendant is a strained reading of clause 12.1, in isolation from clause 12.2 and clause 12.3. Counsel for the defendants, Mr Tan Chee Meng, *S.C.* ("Mr Tan"), submitted that a holistic interpretation of clause 12.1, read together with clause 12.2 and clause 12.3, suggests that clause 12.1 merely covers third party proceedings, claims and/or demands instituted against the plaintiff. Clause 12.1 should not be read in isolation such that the defendants, in particular the 4th and 5th defendants are required to fully indemnify the plaintiff and keep the plaintiff fully indemnified from and against all losses, costs and expenses caused to the plaintiff arising directly or indirectly from any breach of the Bond Subscription Agreements.

24 Mr Tan further argued that the interpretation as contended by the plaintiff flies in the face of the carefully designed transaction as a whole under which the 2nd and 3rd defendants gave limited 50% personal guarantees and the 4th and 5th defendants gave none. It was the 4th and 5th defendants' case that their losses were limited only to the loss of their respective shares in the 1st defendant company and nothing more, and their case was further reinforced by the commercial background to the transactions, including the pre-contract negotiations and subsequent conduct of the parties. On this basis, the 4th and 5th defendants took out the striking out application under Sum 424/2013.

25 The defendants further alleged that prior to the signing of the 2007 CBSA, Chia and Yeo entered into an alleged oral agreement with the 2nd defendant, who was acting for and on behalf of all defendants, that the liability of the 4th and 5th defendants would be limited to the loss of their shares in the 1st defendant and nothing more. Further and/or in the alternative, clause 12.1 was included as part of the 2007 CBSA under a mutual mistake of fact and the defendants had commenced Third Party proceedings against Chia and Yeo for, amongst others, misrepresentation.

26 The 1st defendant also disputed liability on the basis that its alleged failure to pay the plaintiff the sums due and outstanding under the Bond Subscription Agreements were occasioned by the

plaintiff's and its representatives' wrongdoing and unreasonable interferences with the management and business operations of the 1st defendant and its subsidiaries, which were in breach of the Shareholders' Agreement dated 5 November 2007 (see details in paragraph 48 below). In light of the factual matrix, this was not an appropriate case for summary judgment and unconditional leave should be given to defend.

Approach to be adopted

27 Given the concurrent applications for striking out and summary judgment, it appears to be undisputed that if the Court is with the defendants as to the interpretation of clause 12.1, then the plaintiff's claim against the 4th and 5th defendants should be struck out. On the other hand, if the Court is not with the defendants on this point, it will have to go on to consider if the plaintiff has raised a suitable case for summary judgment against all five defendants.

28 With this approach, I shall now go on to deal with the respective applications.

Sum 424/2014 – striking out

29 The principles relating to striking out under O 18 r 19(1) are well established. In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649, the Court of Appeal ("CA") stated that the power to strike out should only be exercised in plain and obvious cases and should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. As to what the threshold is for a "reasonable cause of action", the guiding principle was said to be a cause of action which has some chance of success when only the allegations in the pleadings are considered and as long as the statement of claim discloses some cause of action or raises some question fit to be decided at trial, there mere fact that the case is weak and is not likely to succeed is no ground for striking it out: at [21].

30 In the more recent case of *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 at [110], Andrew Phang Boon Leong JA also held that the more draconian power of the court to strike out a claim at the interlocutory stage under limb (a) of O 18 r 19(1) can only be exercised if it is patently clear that there is no reasonable cause of action on the face of the pleadings. In The "*Bunga Melati 5"* [2012] 4 SLR 546, the CA also noted at [34] that prior local case law centered the test on whether the action is "plainly or obviously unsustainable" and that the generality of the test of sustainability is precisely what enables a court to do justice based on the facts before it. The CA then went on at [39] to set out some guidelines to assist the courts in applying the test. The first guideline was that a claim is legally unsustainable if it is clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove, he will not be entitled to the remedy that he seeks. The second guideline is that a claim is factually unsustainable if it is possible to say with confidence before the trial that the factual basis for the claim is entirely fanciful because it is entirely without substance. An example was said to be a case where it is "clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

31 Bearing the above principles of striking out in mind, the issue before the Court is whether it is so plain and obvious that clause 12.1 should be interpreted to only cover third party proceedings and/or actions instituted against the plaintiff, as contended by the defendants. This issue turns primarily on the plain and ordinary meaning of clause 12.1. In *Uzbekistan Airways v Jetspeed Travel Pte Ltd* [2009] 1 SLR(R) 1, the learned Andrew Ang J held at [21] that in general, the words of the contract are to be understood in their natural and ordinary meaning, bearing in mind the context in

which the contract had been made.

32 I am of the considered view it is not plain and obvious that clause 12.1 should be interpreted in such a restrictive manner, as submitted by the defendants. On the plain and ordinary meaning of clause 12.1, I am in agreement with the plaintiff that pursuant to clause 12.1, the initial shareholders (which include the 4th and 5th defendants) and the 1st defendant had contractually agreed to indemnify the plaintiff in a number of events and one of these events includes losses suffered by the plaintiff arising from a breach of any term or condition of the agreement. As clearly stated in its heading, clause 12.1 is a "general indemnity" clause. There is nothing unusual for commercial contracts, such as the present Bond Subscription Agreements, to include such general indemnity clauses whereby one party can seek compensation from the other party either for breach of contract or for failure to perform the contract properly on the part of the latter or a third party (as in this case).

33 I am also not in agreement with the defendants' submissions that clauses 12.2 and 12.3 have the effect of restricting the application of clause 12.1 to only cover third party proceedings or claims instituted against the plaintiff. On the contrary, clause 12.2 makes it clear that it deals with a separate and distinct situation when an action or proceeding is instituted involving any of the indemnified parties in which indemnity may be sought under clause 12.1. The support for this is found in the opening phrase of clause 12.2, which reads, " ***If*** any action, proceeding… shall be instituted involving any of the Indemnified Parties in respect of which indemnity may be sought pursuant to Clause 12.1, such Indemnified party shall promptly notify the Issuer and the Initial Shareholders…".

34 The Oxford English Dictionary (Second Edition) (Clarendon Press Oxford, 1989) defines " ***if*** " as:

> Introducing a clause of condition or supposition (the protasis of a conditional sentence). On condition that; given or granted that; In (the) case that; supposing that; on the supposition that.

As such, clause 12.2 kicks in only *on condition or on supposition* that an action has been instituted involving the plaintiff in respect of which an indemnity may be sought under clause 12.1 and under these circumstances, the defendants shall assume the defence thereof and appoint lawyers satisfactory to the plaintiff, unless the plaintiff elects to assume the defence itself. In such a situation or where the defendants have failed to appoint lawyers satisfactory to the plaintiff within a reasonable time, clause 12.3 then kicks in to provide that the defendants shall reimburse such fees and expenses as incurred by the plaintiff.

35 Reading clause 12.2 and clause 12.3 together, one reaches the conclusion that these two clauses deal with the separate and distinct situation when an action has been instituted involving the plaintiff in respect of which the plaintiff is entitled to seek indemnity under clause 12.1. They do not in any way seek to circumscribe the scope of application of clause 12.1. In other words, clause 12.1 deals with the general and clauses 12.2 and 12.3 deal with the specific.

36 In any event, as the Court dealing with a striking out application, I only have to ask myself if it is so *plain and obvious* that clause 12.1 should be interpreted to only cover third party actions instituted against the plaintiff. When the issue is framed in this manner, the answer is clear: it is not plain and obvious that clause 12.1 should be interpreted in such a restrictive manner.

37 Considering that a striking out is only warranted for plain and obvious cases, I do not see the need to go into details to address the defendants' remaining arguments in support of their application. These are issues best left for determination at trial. The fact I have refused to exercise my discretion

to strike out the plaintiff's case also does not mean that my interpretation of clause 12.1 is determinative. I therefore dismiss the 4th and 5th defendants' application under Sum 424/2014.

Sum 5740/2013 – summary judgment

38 I then go on to deal with the plaintiff's application for summary judgment against all five defendants under Sum 5740/2013.

39 It is trite that summary judgment should not be given where the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried. The power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay. Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend: *Habibullah Mohamed Yousuff v Indian Bank* [1999] 3 SLR 650 at [21].

40 Leave to defend must be given unless it is clear that there is no real substantial question to be tried and that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial: *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2013) ("*Singapore Civil Procedure 2013*") at [14/4/5] (page 144). It is further provided that where there are unexplained features of a claim and defence which are disturbing, the Court should not make tentative assessments of the respective chances of success of the parties or the relative strengths of their good or bad faith, and should not on such an examination grant the defendant conditional leave to defend, but should give unconditional leave to defend: *Singapore Civil Procedure 2013* at [14/4/5] (page 145).

41 In the event of conflicting affidavit evidence, it is normally not appropriate for a judge to attempt to resolve such conflicts on affidavits. It is trite that O 14 proceedings are not decided by weighing two affidavits: *Eng Mee Yong & Ors. v Letchumanan* [1979] 2 MLJ 212. Nonetheless, the Court must be mindful that the duty of a judge does not end as soon as a fact is asserted by one party and simply denied by the other party in an affidavit; where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has the duty to reject such assertion or denial, thereby rendering the issue not triable. Apart from identifying the issues of fact and law, the Court must go one step further and determine whether they are triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially: *Bank Negara Malaysia v Mohd Ismail & Ors.* [1992] 1 MLJ 400 and the *Singapore Civil Procedure 2013* at [14/4/2] (page 143).

42 The Court may give the defendant leave to defend either unconditionally or conditionally, that is to say, "on such terms as to giving security or time or mode of trial of otherwise as it thinks fits". This may include paying some or all of the money or damages claimed into Court. Such conditions may be imposed where there is a good ground in the evidence for believing that the defence set up is a sham defence or the Court "is prepared very nearly to give judgment for the plaintiff". Conditional leave should be granted where the defence set up is a sham defence or shadowy or there is something suspicious in the defendant's mode of presenting his case: *Singapore Civil Procedure 2013* at [14/4/12] (page 153).

43 Mr Tan sought to raise several triable issues in relation to each of the defendants. In respect of the 4th and 5th defendant, counsel argued that there is a triable issue of mutual mistake and allegations of misrepresentation by Chia and Yeo who were representatives of the plaintiff at all material times. In respect of the 1st defendant, Mr Tan submitted that there are also triable issues such as whether the circumstances and causes of default are attributable to the plaintiff, in particular, unreasonable interference by Chia and Yeo with the management of the 1st defendant and its trading subsidiaries, in breach of clauses 2(a) and (b) of the Shareholders' Agreement. As guarantors up to 50% of the 1st defendant's liability, the 2nd and 3rd defendants will have available to them the same defences as the 1st defendant. These issues are best left for trial.

44 I have to first bear in mind that the plaintiff's application for summary judgment is against all five defendants. However, the plaintiff's primary claim is against the 1st defendant company. The plaintiff's claim against the 2nd and 3rd defendants is based on the Personal Guarantees executed by them and the general indemnity clause under clause 12.1. As for the 4th and 5th defendants, the plaintiff's claim is only based on the general indemnity clause. If the Court is of the view that there are sufficient triable issues raised in respect of the plaintiff's primary claim against the 1st defendant, then logically, the summary application against the 2nd to 5th defendants must also fail as the individual defendants should be entitled to avail themselves of the same defences raised by the 1st defendant.

45 Bearing the above in mind, I shall now proceed to consider the summary judgment application against the 1st defendant. It is the plaintiff's case that in breach of clauses 2.5, 4, 5 and 6 of the 2007 CBSA and 2008 CBSA, the 1st defendant had failed to make payment of the outstanding amounts due in accordance with Schedule 2 which amounted to an event of default pursuant to clauses 11.1(a), (b) and (h) of the 2007 CBSA and clauses 11.1 (a), (b) and (g) of the 2008 CBSA.

46 The defendants disputed liability on the basis that the 1st defendant's alleged failure, neglect and/or refusal to pay the sums due and outstanding under the Bond Subscription Agreements were occasioned by the plaintiff's own wrong doing and action. Specifically, Chia and Yeo had (a) interfered in the management of the business of the 1st defendant and its trading subsidiaries; (b) unreasonably controlled the banking facilities of the 1st defendant and its trading subsidiaries; (c) decided to terminate the non-VAT sales of BUDL in exercise of their rights and powers as nominee directors of the 1st defendant. These wrong business and management decisions adversely affected the business and financial situation of the 1st defendant and its trading subsidiaries, in particular, cash flow, which ultimately affected the 1st defendant's financial ability to meet its payment obligations under the Bond Subscription Agreements.

47 The 2nd and 3rd defendants' affidavits then went on to set out in great detail the ways in which Chia and Yeo had repeatedly and significantly overstepped their anticipated role as nominee directors of the 1st defendant and its subsidiaries, for instance, (a) putting in place bureaucratic approval processes for routine business payments to suppliers; (b) placing restrictions on operation of the trading companies' banking facilities, including specific examples of Yeo's highly destructive delay and refusal to permit FDP to negotiate standard banking facilities essential to its operations; (c) giving directive to BUDL to terminate the long-standing practice of local non-VAT sales in the People's Republic of China ("PRC") since the inception of BUDL in December 1995.

48 The defendants argued that the evidence established a breach of clause 2 (a) and (b) of the Shareholders' Agreement and that clause 3.1(m) of the 2007 CBSA did not confer upon Chia and Yeo the powers to interfere in the 1st defendant's business operations in the manner and extent that they did. For example, clause 3(m)(vii) only entitled Chia and Yeo to object to the 1st defendant (and its subsidiaries) entering into any abnormal or unusual contract outside the ordinary course of business. Yet they instructed the 1st defendant's subsidiaries to cease all non-VAT sales in the PRC despite such sales being part and parcel of the daily business for which the defendants have obtained PRC legal opinion which concluded that such sales were acceptable.

49 Of course, Yeo disputed the defendants' case in her affidavit filed on 6 December 2013. However, insofar as she makes several factual assertions that differ from the defendants' evidence, I am of the view that an O 14 proceeding is not the most appropriate of forums to resolve such issues of fact. Whether there was excessive interference with management in breach of the Shareholders' Agreement which lead to the 1st defendant's inability to pay is a matter for trial.

50 Besides the failure to make payments due under the Bond Subscription Agreements, the plaintiff also contended that each of the following breaches entitled the plaintiff to declare an event of default and to demand full payment:

(a) Suspension of FDP's operation which was in breach of clause 11.1(g) of the 2007 CBSA and clause 11.1(f) of the 2008 CBSA;

(b) Failure to maintain the requisite financial ratios which was in breach of clause 2.1(v) of the Supplemental 2009 CBSA;

(c) Unauthorized disposal of FDP's assets in breach of clause 9.2(v) and 9.3 (v) of the 2007 CBSA and 2008 CBSA read together with clause 11.1(b) and/or clause 11.1(f) of the 2007 CBSA and clause 11.1(e) of the 2008 CBSA;

(d) Failure to register the relevant debentures as required under clause 9.2(xxx) of the 2008 CBSA.

51 To each of these alleged breaches, the defendants raise several responses:

(a) Although the provisions of clauses 9.2 and 9.3 were introduced as "conditions subsequent", they could not on analysis be regarded as "conditions", any breach of which entitled the other party to treat the contract as repudiated. They should be considered as innominate terms. To this end, the earlier demands made by the Plaintiff while warning of potential termination for non-payment, made no reference to the possibility of termination for non-compliance with these provisions and hence, supported the defence's case that these were not conditions but innominate terms.

(b) Steps announced in the letter by Yeo dated 29 March 2011 were entirely inconsistent with any assertion of a right to bring the agreements to an end on the basis of the alleged deviation from the relevant ratios. In other words, the plaintiff prescribed steps to be taken to remedy the non-compliance and the 1st defendant cooperated.

(c) In respect of the supposed failure to register the relevant debentures, there was an issue of whether it was even possible under PRC laws to register the debentures in the first place, as required under clause 9.2(xxx).

(d) It was also debatable whether the disposal of FDP's assets in this case amounted to a disposal of a "substantial part" of FDP's assets within clause 11.1(f). These assets that were being disposed of were surplus assets which had been left idle for one and half years to a few years and the disposal was also recommended by FTI Consulting (Singapore) Pte Ltd, the consultancy company appointed by the plaintiff.

52 It is trite law that the Court dealing with a summary judgment application should not be required to embark on a protracted and minute examination of facts and evidence before granting an order for summary judgment. The Court should also not make tentative assessment based on the weight of affidavits. In the event of conflicting affidavit evidence, it is normally not appropriate for the Court to attempt to resolve such conflicts on affidavits. I am of the considered view that such detailed examination of evidence and what construction or interpretation should be attributed to the various clauses of the Bond Subscription Agreement is something that is best left determined at trial and the Court should be careful of usurping the role of the trial court.

53 As explained in paragraph 44 above, if the Court is of the view that summary judgment should not be entered against the 1st defendant as there are several triable issues, it will also not be appropriate to enter summary judgment against the 2nd to 5th defendants. Be that as it may, I shall still briefly deal with some of the remaining arguments which the plaintiff put forth in its submissions in the O 14 application against the 4th and 5th defendants. The plaintiff sought to convince the Court that the 4th and 5th defendants' claim of an alleged oral agreement between Chia, Yeo and the 2nd defendants that the liability of the 4th and 5th defendants would be limited to the loss of their shares is a non-starter in law because of the entire agreement clause in clause 14.1 as well as the parole evidence rule.

54 On this point, I am not in entire agreement with the plaintiff's submissions. The defendants appeared to be alleging some form of misrepresentation on the part of Chia and Yeo. It is also not entirely clear in law that entire agreement clause can purport to exclude a claim in misrepresentation. The Court of Appeal in *Lee Chee Wei v Tan Hor Peow Victor & Ors* [2007] 3 SLR(R) 537 held at [28] that:

> …whether or not an entire agreement clause can purport to exclude a claim in misrepresentation remains a matter of some controversy (cf *Thomas Witter Ltd v TMP Industries Ltd* [1996] 2 All ER 573 ("Thomas Witter"); and see *Inntrepreneur Pub Co v East Crown Ltd* at 614 – "An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force cannot affect the status of a statement as a misrepresentation".

55 As the Court dealing with a summary judgment application, I only need to ask myself whether the defendants have raised a triable issue that the agreement as embodied in the 2007 CBSA did not reflect the true intention of all parties and/ or there may have been possible misrepresentation made by the plaintiff's representatives as to the scope of the 4th and 5th defendant's liability under the Bond Subscription Agreements. I considered the documentary records, in particular, the successive Terms Sheets that were put up prior to the signing of the contract. The defendants submitted that the Term Sheets traced the evolution of the parties' dealings from the first draft Term Sheet through the third draft to the Final Term Sheet and these Term Sheets clearly showed an agreed position in which the only personal liability the individual shareholders were prepared to undertake for the 1st defendant's financial obligation, beyond the risk of forfeiting their shares, consisted of only the limited personal guarantees given by the 2nd and 3rd defendants. At [138] of their submissions, the plaintiff relied on the parole evidence rule to argue that such extrinsic evidence is inadmissible. The parole

evidence rule states that where a contract has been determined by the Court to contain all the terms of the parties' agreement, no extrinsic evidence is admissible to vary, contradict, add to or subtract from the terms of that document: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd.* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [40].

56 The Court of Appeal in *Zurich Insurance* held at [112] that the parole evidence rule only operates where the contract was intended by the parties to contain all the terms of their agreement. Where the contractual terms are ambiguous on their face, it is likely that the contract does not contain all the terms intended by the parties. Furthermore, in order to ascertain whether the parties intended to embody their entire agreement in the contract, the Court may take cognizance of extrinsic evidence or the surrounding circumstances of the contract. At [114], the Court of Appeal affirmed its approval of the contextual approach to contractual interpretation and held that extrinsic evidence is always admissible even if there is no ambiguity in the contract sought to be interpreted and the Court is not precluded from admitting extrinsic evidence *imprimis* to determine if the terms of the documents require explanation in light of that evidence.

57 In view of the foregoing, I agree with the defendants' submissions that evidence of pre-contract dealings between the parties are admissible and are relevant because it explains how the overall bargain was to be given effect. The documentary evidence and largely corroborative affidavit evidence of the 2nd to 5th defendants that there was an alleged common understanding that the liabilities of the 4th and 5th defendants were limited only to the loss of their shares, cannot be ignored and are, in my view, sufficient to raise a triable issue in this case.

58 In the course of the hearing, it was also brought to my attention that the defendants had commenced Third Party proceedings against Chia and Yeo for, amongst others, misrepresentation. Although I am not precluded from entering summary judgment just because there are ongoing Third Party proceedings, I am not minded to shut out the defendants' case at this relatively early stage of the proceedings as Chia and Yeo were clearly acting as the plaintiff's representatives at the material times.

Conclusion

59 For the foregoing reasons, I am of the considered view that there are several triable issues in this case and this is not an appropriate case for summary judgment. I thereby dismiss the plaintiff's application under Sum 5740/2013.

60 I shall now hear parties on the costs of both applications.