IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 43

Civil Appeal No 116 of 2018

Between

Akfel Commodities Turkey Holding Anonim Sirketi

… *Appellant*

And

Townsend, Adam

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure] — [Summary judgment] — [Conditional leave to defend]

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Akfel Commodities Turkey Holding Anonim Sirketi
v
Townsend, Adam

[2019] SGCA 43

Court of Appeal — Civil Appeal No 116 of 2018
Chao Hick Tin SJ and Woo Bih Li J
2 May 2019

30 July 2019

Chao Hick Tin SJ (delivering the grounds of decision of the court):

Introduction

1 This appeal raised the question as to the circumstances under which conditional leave to defend should appropriately be granted to a defendant and the applicable principles. The plaintiff in the action sought summary judgment for his claim on a contractual breach. The defendant company sought unconditional leave to defend on the ground that the contract was a sham or an illegal agreement. The judge in the court below gave the defendant company leave to defend on condition that it furnished security of $2m. The defendant company appealed to this court against the imposition of that condition.

2 We heard the parties on 2 May 2019, and having considered their arguments, we dismissed the appeal and upheld the conditional leave to defend

ordered by the court below. We now provide detailed reasons and some clarification on the law on the grant of conditional leave to defend.

Facts

3 The appellant, Akfel Commodities Turkey Holding Anonim Sirketi ("Akfel"), is the main holding company for a group of companies known as the Akfel Group, which is in the business of trading gas and power in Turkey. The Akfel Group was owned by two Turkish brothers, Mr Mehmet Fatih Baltaci and Mr Murad Abdurrahman Baltaci ("MFB" and "MAB" respectively and hereinafter collectively called "the Baltaci Brothers") at all material times before end of 2015. The Baltaci Brothers held all the shares in Akfel, as well as all the shares in Akfel Commodities Pte Ltd ("Akfel Singapore"), the latter being a company incorporated in Singapore in March 2015. In December 2015, they transferred all their shares in Akfel to Akfel Singapore.

4 Mr Adam Townsend, the respondent in this appeal and the plaintiff in the proceedings below, is a consultant who provides consultancy services to major energy companies around the world. Mr Townsend provided consultancy services to the Akfel Group on a non-exclusive basis since 2009, and was receiving monthly retainer fees, starting at approximately €8,000, which was periodically increased to €35,000 just before the commencement of the Consultancy Agreement (see [5] below). He was also paid bonuses and reimbursed for his expenses. There was no written agreement between the Akfel Group and Mr Townsend for his services until the execution of the Consultancy Agreement in 2016.

5 Mr Townsend's case was that, on or about 14 March 2016, another oral agreement was reached between MFB and him where on account of his

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enhanced involvement in the management of the Akfel Group, his monthly retainer fee would be increased. At the time, MFB was the Chairman, a director and the majority shareholder of Akfel Singapore, which fully owned Akfel. The oral agreement was later incorporated into a written Consultancy Agreement which was executed between Mr Townsend and Akfel. By a Deed of Guarantee, Akfel Singapore guaranteed Akfel's performance of the Consultancy Agreement. The Consultancy Agreement contained, *inter alia*, the following terms:

(a) cll 3 and 4.1: Mr Townsend undertook to (i) comply with all reasonable and lawful instructions issued by Akfel, (ii) advise Akfel and its subsidiaries, (iii) endeavour to promote the interests of Akfel and the Akfel Group, (iv) work at least 25 hours a week in carrying out consulting services and representing Akfel, (v) serve as a director for Akfel and its subsidiaries, and (vi) make himself available when reasonably required by Akfel;

(b) cll 5.1 and 5.2: Akfel was to pay Mr Townsend €45,000 per month on a quarterly basis, within 14 days of receipt of Mr Townsend's invoices, and reimburse his reasonable expenses;

(c) cl 4.2: Akfel was to do everything necessary to enable Mr Townsend to fulfil the aims of the Consultancy Agreement, including providing full and unmitigated access to Mr Townsend to the offices of Akfel and its subsidiaries and to the employees of the Akfel Group;

(d) cll 1.3 and 2.1: the Consultancy Agreement was to commence on 1 August 2016 and run for five years unless terminated as provided for

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by the terms of the agreement or by Akfel giving at least 24 months' written notice or by Mr Townsend giving at least 12 months' notice;

(e) cll 1.12 and 9.4: if Akfel terminated the Consultancy Agreement for any reasons other than those falling within cll 2.1, 9.2(a), 9.2(b) and 9.2(c) (*ie*, where it was terminated without cause), Akfel was to pay Mr Townsend liquidated damages equal to 24 months of his retainer (*ie*, €1,080,000); and

(f) cl 16: Singapore was the governing law and exclusive jurisdiction was conferred on the Singapore courts.

6 Mr Townsend claimed that Akfel had breached the Consultancy Agreement by terminating it on 16 March 2017. Akfel's primary defence was that the Consultancy Agreement was *a sham contract* – it was intended to operate as a device through which Mr Townsend would be compensated for agreeing to act as an intermediary of the Baltaci Brothers in furtherance of a scheme whereby the Baltaci Brothers would attempt to retain and exercise control over the affairs of Akfel and the Akfel Group whilst at the same time concealing their involvement in the said scheme. Further, Akfel averred that the Consultancy Agreement was concluded in furtherance of *an illegal venture*, designed to avoid or circumvent the consequences under Turkish law in respect of the Baltaci Brothers' suspected involvement with the Gulenist Terror Organisation/Parallel State Structure ("FETO/PDY") and/or the failed coup in Turkey that took place in July 2016. Akfel averred that the Consultancy Agreement was not enforceable, as enforcing it would be tantamount to sanctioning a contravention of two Turkish court orders. To understand Akfel's position, we will briefly set out the chronology of events that took place in

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Turkey during the material time and explain how the two Turkish court orders came into being.

7 Sometime in 2014, Turkish authorities commenced large-scale investigations into the affairs of FETO/PDY, including companies and organisations suspected to have provided financing to FETO/PDY and persons suspected to be connected with FETO/PDY. On 15 July 2016, FETO/PDY launched a coup against the Turkish government, which failed. In response, the Istanbul Chief Public Prosecutor's Office commenced investigations to identify persons who financed FETO/PDY in the coup attempt. The Istanbul Chief Public Prosecutor's Office applied for and obtained an injunction from the Istanbul courts on 18 August 2016 ("the August 2016 Injunction") for the confiscation of assets owned by various persons, including those of the Baltaci Brothers.

8 Against this backdrop of political turmoil in Turkey in 2016 and 2017, various changes were effected in Akfel. Starting from 28 March 2016, the Baltaci Brothers resigned from the Akfel board and Mr Townsend joined the board. From March 2016 to August 2016, the Baltaci Brothers transferred most, if not all, of their shares in Akfel Singapore to companies in which Mr Townsend was involved. As mentioned, the commencement date of the Consultancy Agreement was stated to be 1 August 2016.

9 Four months later, on 1 December 2016, due to findings on Akfel's connection with the armed terrorist organisation of FETO/PDY and its financial support of the organisation, the Istanbul courts accepted the Istanbul Chief Public Prosecutor's Office's request for the Savings Deposit Insurance Fund (SDIF) or Tasarruf Mevduati Sigorta Fonu ("TMSF"), an entity controlled by

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the Turkish state, to be appointed as trustee for Akfel ("the December 2016 Order"). TMSF therefore took control of Akfel. TMSF asked Mr Townsend to continue his work at Akfel soon after it took over the company, but it also thwarted his work by taking measures such as blocking external consultants from communicating with him. A few days later, on 17 December 2016, Mr Townsend issued Akfel an invoice for his retainer fees for the preceding quarter which Akfel failed to pay. On 16 March 2017, TMSF's lawyers sent Mr Townsend a termination letter, claiming that the Consultancy Agreement was "collusive and legally invalid":

> As a result of reviewing and analyzing the Agreement, it has been seen that the Agreement is contrary to the ordinary course of business considering certain regulations under the Agreement such as; the difference between the signing date (March 14th, 2016) and the effective date (August 1st, 2016), the evident disproportion in the periods for termination notice belonging to the parties, shortness of the non-competition obligation period, structure of the payments being non-monthly, Company's being unlimitedly liable whereas the Consultant's liability is limited and the choice of Singapore Law as the governing law of the Agreement. In this context, we opine that the explained issues are of a nature which supports the collusive character of the Agreement.

10 Subsequently, in mid-2017, MAB was identified in a Turkish indictment as a suspect who had financed the FETO/PDY. According to Mr Townsend, MAB's detention was brought to an end by the Istanbul courts after hearings were carried out in December 2017. As for MFB, Akfel took the position that investigations against MFB were still ongoing as of January 2018 because he had yet to be arrested, while Mr Townsend gave evidence that MFB was not a fugitive as his address was officially registered with the Turkish courts.

11 After Mr Townsend's services were unilaterally terminated by TMSF in March 2017 (see [9] above), he commenced Suit No 329 of 2017 against Akfel

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on 13 April 2017 claiming liquidated damages or alternatively damages for breach of the notice period, his retainer fees for the months of September 2016 to March 2017 (less part payment), and reimbursements of reasonable expenses. Assistant Registrar Cheng Pei Feng ("AR Cheng") granted Mr Townsend's application for summary judgment at first instance. Akfel's appeal was heard by Judicial Commissioner Pang Khang Chau ("the Judge"), who granted Akfel leave to defend on condition that it furnished security of $2m within six weeks ("the Condition"). Being dissatisfied with the Condition imposed by the Judge, Akfel appealed to this court against that part of the decision, seeking a revocation of the Condition.

The proceedings below

12 On 12 June 2018, the Judge delivered his decision on the appeal, and stated that Akfel "has raised a triable issue that the Consultancy Agreement is either a sham or a device to circumvent a foreseeable seizure of control over [Akfel] by the Turkish government", that Akfel "has shown a reasonable probability that it has a bona fide defence" and that there "[are] sufficient reasons [for the case] to go to trial". In coming to this conclusion, the Judge placed weight on a few circumstances. First, given that Mr Townsend had been working for Akfel since 2009 without the need for a written agreement, the sudden decision to execute a written agreement during a period of political turmoil, so close to the Baltaci Brothers divesting their shares and positions in Akfel and so close to the eventual seizure of control over Akfel by the Turkish government, deserved further investigation at trial. Second, Mr Townsend provided scant examples to support his claim that he had undertaken additional work pursuant to the Consultancy Agreement. There were good reasons to investigate at trial the real extent of the increase in Mr Townsend's job scope.

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Third, the notice period of 24 months for termination and the liquidated damages of €1,080,000, when seen in the context of the long-standing relationship requiring no such terms to be imposed before, called for further investigation into whether these terms were designed to keep Mr Townsend in control of Akfel on behalf of the Baltaci Brothers. Fourth, Mr Townsend failed to come clean on the exact date on which the Consultancy Agreement was signed. However, the Judge decided that Akfel's evidence was "on balance, skimpy and inadequate in a number of aspects" so he ordered conditional leave to defend.

13 On Akfel's application for further arguments, the Judge heard the parties on the appropriateness, in the circumstances of this case, of granting conditional leave to defend. Akfel argued that the imposition of the Condition was inconsistent with a finding that there was a reasonable probability of a *bona fide* defence or with a finding that there was some other reason to go to trial.

14 After hearing the further arguments, the Judge maintained his earlier decision of granting conditional leave to defend. He explained that there were two different approaches in dealing with a summary judgment application:

(a) A two-step approach: First, the court considers whether leave to defend should be granted. If there is a triable issue or a reasonable probability of a *bona fide* defence, then leave should be granted. Only then, and as the second step, consideration is given as to whether leave should be conditional or unconditional.

(b) A one-step approach: The court has three options to choose from in relation to the application for summary judgment – judgment, unconditional leave or conditional leave.

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15 In support of the two-step approach, the Judge relied on *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 ("*Henry Wee*"), *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*") and *Singapore Court Practice 2017* (Jeffrey Pinsler gen ed) (LexisNexis, 2017). The Judge noted that on the other hand, Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) supported the one-step approach.

16 The Judge explained that the meaning of the phrase "reasonable probability of a *bona fide* defence" depends on whether it is uttered in the context of the one-step approach or the two-step approach. In the former approach, the phrase only narrowly refers to cases calling for unconditional leave to defend, whereas in the latter approach, the phrase has a broader meaning and encompasses both situations where leave is granted, whether conditional or unconditional. The Judge opined that the two-step approach is more consistent with the wording of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), and stated that this was the approach he had adopted. Thus, the phrase used by him must be understood in the context of the two-step approach.

17 The Judge also disagreed with Akfel's submission that a finding of some other reason to go to trial was inconsistent with the imposition of conditions. The Judge held that the imposition of conditions was in the discretion of the court. He further disagreed with counsel for Akfel that the word "shadowy" must always be used to ground a case of conditional leave to defend. The key was whether the defence, in substance, came within the category of cases for which conditional leave should be granted. The real test was whether the defendant's evidence was barely sufficient to rise to the level of showing a

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reasonable probability of a *bona fide* defence or whether the evidence that the plaintiff had adduced very nearly succeeded in securing judgment.

18 The Judge further clarified that his use of the phrase "on balance" (see [12] above) did not refer to a balancing of the defendant's evidence against the plaintiff's evidence but referred to the weighing of Akfel's evidence against the criteria for granting conditional leave to defend.

19 The Judge exercised his discretion to grant conditional leave on the basis that Akfel's case "fell below the standard of a merely weak defence [and] squarely into the realm of a defence which warranted the grant of conditional leave to defend", relying on these circumstances: (a) Akfel relied on the affidavit evidence of its Turkish lawyer (Mr Hasan Akicioglu) who did not have direct knowledge of Akfel's interaction with Mr Townsend, and no evidence from its employees who had direct knowledge was adduced; (b) Akfel filed inconsistent documents in evidence; and (c) no expert evidence on Turkish law was tendered to substantiate the legal effect alleged and the two Turkish court orders (*ie*, the August 2016 Injunction and the December 2016 Order) were technically inadmissible because they were not accompanied by certified English translations.

The parties' cases on appeal

20 On appeal, Akfel maintained its position that the Consultancy Agreement was a sham contract and that unconditional leave to defend should have been ordered, while Mr Townsend defended the Judge's decision. Akfel was represented by Mr Ramesh Kumar s/o Ramasamy, while Mr Townsend by Ms Lim Gerui.

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21 Mr Kumar reiterated the argument that once the court made a finding that there was a reasonable probability of a *bona fide* defence, unconditional leave to defend must be granted, whether a one-step approach or a two-step approach was taken. The Judge thus erred in law. Ms Lim, in response, argued that Akfel's stance was against case authority, relying on *Henry Wee*. She further submitted that whether a one-step approach or a two-step approach was taken, the exercise of discretion was governed by the same concept of requiring a defendant to show commitment.

22 Mr Kumar also repeated the submission made in the court below that it would be improper to impose conditions where the court had found that there was some other reason to go to trial, since it would be incongruous to require the defendant to show commitment to his cause when the court entertained suspicions about the plaintiff's claim. On the other hand, Ms Lim emphasised that there was no case law standing for the alleged proposition that no condition could be imposed where there was some other reason to go to trial, and in any case, the Judge did not make any finding that the plaintiff's case was suspicious.

23 On the merits, Mr Kumar reiterated Akfel's defence that the Consultancy Agreement was a sham contract, so, as a matter of principle, unconditional leave to defend should have been ordered. He pointed out that Mr Townsend did not act in accordance with the terms of the Consultancy Agreement. Mr Kumar also alleged the Consultancy Agreement was in fact created after the August 2016 Injunction or the December 2016 Order but was backdated. Further, the date of the Consultancy Agreement was chosen to be 14 March 2016 so that the date was before MFB resigned as a director on 28 March 2016. Mr Kumar also drew our attention to an internal Akfel e-mail to show that Mr Townsend was still acting as MFB's intermediary as late as on

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11 November 2016. Mr Kumar relied upon Mr Townsend's decision not to claim against Akfel Singapore under the Deed of Guarantee and the purportedly onerous terms in the Consultancy Agreement, such as the clauses on the liquidated damages, the notice period and Mr Townsend's unmitigated access to the offices of Akfel and its subsidiaries, as factors supporting Akfel's defence of sham. On the basis of these points raised, Mr Kumar challenged the exercise of discretion by the Judge. He argued that conditional leave should only be granted if the defence was shadowy.

24 Mr Kumar further highlighted that it was unclear what the Judge meant by saying that Akfel's evidence was "skimpy and inadequate" – if the Judge had imposed the Condition because he thought the defence was weak relative to the strength of the claim, that would be an error of law. Pausing here for a moment, we would observe that while we agree that it would be wrong for a judge to impose a condition on the basis of the relative strengths of the cases of the parties where the defendant has established a *bona fide* defence, this submission had to be dismissed forthwith as being devoid of merit, because the Judge had clarified, following the hearing of further arguments, that in making that remark he was not comparing the merits of the claim and of the defence when he used the phrase "on balance" (see [18] above).

25 Mr Kumar further criticised the Judge's reliance on the lack of evidence from Akfel's employees and on the inconsistency in the documents filed. He submitted that whatever evidence from any employees would be irrelevant and unnecessary given that Akfel's essential point raised only concerned the question as to whether Mr Townsend did in fact perform in accordance with the terms of the written Consultancy Agreement. Putting it another way, what Akfel was suggesting was that, if in fact Mr Townsend did not so perform, that would

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be a clear indication that the parties never intended to carry it out. As for the inconsistency in the documents filed, Mr Kumar stated that he had explained to AR Cheng that the version of the Consultancy Agreement filed in Mr Akicioglu's affidavit had the signatures removed (in contrast to the version exhibited in the affidavit from Akfel's Singapore counsel) because it was cheaper to notarise the affidavit in Turkey with the signatures redacted.

26 On the other hand, Ms Lim argued that the Judge did not misdirect himself. Ms Lim submitted that from the outset, Akfel conflated the defences of sham and illegality, when it could not in the same breath allege both defences. On the defence of sham, Akfel produced no evidence of the parties' common intention to mislead. On the defence of illegality, Akfel also failed to adduce any evidence that the Consultancy Agreement was illegal under Turkish law, and that both parties had commonly intended to commit the illegal act at the time of contracting. Second, Ms Lim highlighted that Akfel had changed its case on illegality in the course of the proceedings below. Before AR Cheng, Akfel began by arguing that the share transfers by the Baltaci Brothers to companies linked to Mr Townsend were illegal, but later conceded that there was nothing illegal about the transfers. Akfel's case then evolved into one of contravention of the December 2016 Order, but this order was not even exhibited in Akfel's show cause affidavit before AR Cheng. There was also no evidence of any contravention of the order. Third, the affidavits filed in support of Akfel's case were from a lawyer with no personal knowledge. Its case that there was mutual intention on the part of the parties to the Consultancy Agreement to enable MFB to control Akfel through Mr Townsend, and its case that the Consultancy Agreement was created after the August 2016 Injunction or the December 2016 Order were built entirely on speculations. Ms Lim also gave short shrift to Mr Kumar's explanation for the removal of the signatures in the copy of the

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Consultancy Agreement exhibited in Mr Akicioglu's affidavit. She argued that the removal of the signatures dovetailed with Akfel's case that the Consultancy Agreement was created after the August 2016 Injunction or the December 2016 Order. The copy of the agreement exhibited was an attachment to an e-mail dated 14 December 2016, and the aim behind this move (redacting the signatures) was clearly to create an impression that the agreement was not even signed at that point in time.

27 The final point made by Mr Kumar was that, in any event, even if the Condition could not be fulfilled by Akfel, judgment should not be entered in favour of Mr Townsend for the full amount claimed because part of the reimbursements claimed by Mr Townsend in the amount of €230,026.79 was incurred before the Consultancy Agreement came into effect. In response, Ms Lim highlighted that the purpose of imposing a condition in granting leave to defend was for a defendant to demonstrate his commitment to his defence. In any case, cl 5.2 of the Consultancy Agreement was a formal written record of Mr Townsend's entitlement to reimbursement of his expenses, an entitlement which was agreed upon between the parties from the beginning of their relationship in 2009. The Judge was aware of this issue and his order for conditional leave was based on his overall impression of Akfel's defence. He set the security amount at $2m although the total claimed sum was approximately $2.7m.

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The appeal

28 The central issue in this appeal was whether the Judge was correct in imposing the Condition when he granted leave to defend to Akfel. This question in turn engaged three sub-issues:

(a) whether unconditional leave must follow where the court finds that there is a reasonable probability of a *bona fide* defence or some other reason to go to trial;

(b) whether in this case the Judge erred in his assessment of the situation in imposing the Condition; and

(c) whether the Judge erred by ordering judgment in full if the Condition was not fulfilled.

The law

29 We will first set out the relevant provisions governing applications for summary judgment and they are O 14 rr 3 and 4 of the Rules of Court:

> **Judgment for plaintiff (O. 14, r. 3)**
>
> **3.**—(1) Unless on the hearing of an application under Rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
>
> …
>
> **Leave to defend (O. 14, r. 4)**
>
> **4.**—(1) The Court may give a defendant against whom an application under Rule 1 is made leave to defend the action with

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> respect to the claim, or part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.
>
> …

30 The legal principles governing the grant of summary judgment are well settled. The power to give summary judgment under O 14 is intended only to apply to cases where there is no doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay (*Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 ("*Habibullah*") at [21]). Where there is an issue or question in dispute which ought to be tried or there ought to be a trial for some other reason (O 14 r 3(1)), leave to defend should be granted. In *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 1 SLR(R) 465, at [18]–[19], Chan Sek Keong J (as he then was) held that there was "some other reason" for a trial where the defendant is able to satisfy the court that there are circumstances that call for further investigation. The defendant's position must be articulated with "sufficient particularity and supported by cogent evidence" (*Lau Hwee Beng and Another v Ong Teck Ghee* [2007] SGHC 90 at [33], approved in *B2C2 Ltd v Quoine Pte Ltd* [2018] 4 SLR 1 at [5]).

31 Leave to defend can be conditional or unconditional. In *Habibullah* – a case where unconditional leave to defend was granted – this court phrased the test as, 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, the defendant ought to have leave to defend (at [21]). This court in the subsequent case of *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 ("*Goh Chok Tong v Chee Soon Juan*") refused to grant leave because they could not see that there was "a reasonable probability that the defendant has a

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real or *bona fide* defence in relation to the issues" (at [25]). As for conditional leave to appeal, cases over the years have used a multitude of terms to describe the circumstances that warrant conditional leave, including "a real doubt about the defendant's good faith", "shadowy", "sham", "suspicious", and "hardly of substance", as noted by Sundaresh Menon JC (as he then was) in *Abdul Salam* (at [43]).

A one-step approach and a two-step approach?

32 The Judge in the court below evaluated the case law and concluded that there were two distinct approaches in addressing the issue of whether summary judgment should be entered – a one-step approach and a two-step approach (see [14] above). The method taken, he said, would affect the meaning of the phrase "reasonable probability of a *bona fide* defence".

33 While no case law has explicitly identified a one-step approach or a two-step approach, the Judge seemed to think that the clearest indication of a possible two-step approach would appear to have been made by the High Court in *Henry Wee*, where the following pronouncement was uttered at [81]:

> The classic formulation is that conditional leave to defend is the appropriate order when the defendant has succeeded in showing a reasonable probability of a real or *bona fide* defence which ought to be tried, but that defence is shadowy. …

34 It seems to us that the problem with this pronouncement of the law does not lie in whether one labels the process as a one-step approach or a two-step approach but in the two concepts of "succeeded in showing a reasonable probability of a real or *bona fide* defence" and "shadowy" mentioned therein. All we wish to state at this juncture is that there appears to be a contradiction in the statement: how could a defence be "shadowy" when the defendant has

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"*succeeded* in showing a reasonable probability of a real or *bona fide* defence" [emphasis added]? If the court should come to the view that looking at the case as a whole, the defence appears, or is, shadowy, then the court cannot also hold that the defendant has "succeeded in showing a reasonable probability of a real or *bona fide* defence". In such a situation, perhaps a more compatible averment could be that "while the defendant has sought to show a reasonable probability of a real or *bona fide* defence, it nevertheless appears shadowy to me".

35 We find endorsement of what we stated in the preceding paragraph in the holding of this court in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Mohd Zain*"), a case concerning applications for bankruptcy where the alleged debtors disputed the debts and sought a stay or dismissal of the applications, and where the court held that "the debtor need only raise triable issues in order to obtain a stay or a dismissal of bankruptcy proceedings" (at [16] and [18]). In determining triable issues, the court held that principles governing summary judgment equally applied here and explained that while there will either be or not be a triable issue, not all triable issues have equal merit (at [31]):

> … First, there are the cases where the defendant/debtor can demonstrate a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence (see [*Habibullah*] at [21]). In such cases, the defendant/debtor ought to be granted unconditional leave to defend or an unconditional stay or a dismissal of the bankruptcy proceedings as the plaintiff/creditor in either case would not have demonstrated that there is no reasonable doubt that he is entitled to what he seeks. Second, there are the cases where the defendant's/debtor's defence, although not hopeless, calls for a demonstration of commitment through the satisfaction of appropriate conditions (see [*Abdul Salam*] at [44]). …

36 Returning to examining the existence of the one-step approach or the two-step approach, we would refer to three cases: *Abdul Salam*, *Millennium*

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Commodity Trading Ltd v BS Tech Pte Ltd [2017] SGHC 58 ("*Millennium Commodity*"), and *Ebony Ritz Sdn Bhd v Sumatec Resources Bhd* [2017] SGHC 282 ("*Ebony Ritz*"). These cases are far from expressly advocating for a two-step approach, although a cursory glance at their reasoning may show otherwise.

37 In *Abdul Salam*, the High Court explained that there was an issue as to the precise terms of the contract in question and it "could not say that the plaintiff had conclusively established its right to judgment or that there was no reasonable doubt as to what the precise terms of the contract were" (at [42]); therefore, the court gave "leave to defend". Having decided that, the court then considered the question as to whether a condition should be imposed (at [43]) and proceeded to impose the condition of requiring the defendant to furnish security before the defendant would have leave to defend.

38 *Millennium Commodity* is a case concerning a claim for a monetary sum in a dishonoured cheque that was given by the defendant to the plaintiff pursuant to an agreement between them. The High Court held that the defendant had succeeded in raising a triable issue of whether the plaintiff had conspired with the defendant's ex-director and another to defraud the defendant and in raising a triable issue of whether the agreement was unenforceable for illegality, before moving to the question of the proper form of leave to defend to be granted (at [96], [98] and [113]).

39 In *Ebony Ritz*, the High Court in giving the following statement of the law applicable to summary judgment likewise seemed to imply an adoption of the two-step approach (at [72]):

> In general, where a defendant shows that he has a fair case for a defence, or reasonable grounds for setting up a defence, or even a fair probability that has a *bona fide* defence, he ought to

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> have leave to defend ([*Habibullah*] at [21]). However, O 14 r 4 of the [Rules of Court] gives the Court the power to impose such conditions as it thinks fit on the defendant's leave to defend. A condition will be imposed where the defence is found to be shadowy, or where it appears to the court that a defence *may* succeed but that it is improbable that it would ([*Henry Wee*] at [81]–[82]). [emphasis in original]

40 At this juncture we would like to return to the passage in *Mohd Zain* which we have set out at [35] above. There, the court classified triable issues into two categories, one attracting unconditional leave to defend and the other attracting conditional leave to defend.

41 Looking at these judicial pronouncements, we do not see them as advocating a two-step approach. It seems to us that the court was really saying that the process is a single composite exercise, depending on the overall picture which emerges to the court. If the judge is satisfied that the plaintiff has shown a *prima facie* case for judgment but is also satisfied that the defendant has demonstrated a fair probability of a *bona fide* defence, unconditional leave to defend should be granted. In determining whether such a demonstration has been made by the defendant, factual assertions made by the plaintiff and not disputed by the defendant may be taken into account by the court. But where what the defendant has shown does not amount to a fair probability of a *bona fide* defence, but only that the defence raised is not hopeless, it is warranted for the court to impose conditional leave to defend.

42 We think that the dichotomy between a one-step approach and a two-step approach is neither helpful nor necessary and could instead obscure the nature of the analysis, if we are viewing the defence raised and whether leave to be granted should be unconditional or conditional. If the two-step approach is meant to suggest that the first step is for the court to determine whether the

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plaintiff has shown a *prima facie* case for judgment, and if the plaintiff has not even shown that, then the application for summary judgment should be dismissed and the claim should go to trial, that is logical. However, if the plaintiff has shown that, then as the second step, the issues raised in defence will be scrutinised. To view this second step as involving two distinct sub-steps (*ie*, (a) whether leave to defend should be granted and (b) whether it should be conditional or unconditional) could lead to the unhappy use of incompatible terminologies mentioned at [34] above. That said, consideration of summary judgment will invariably entail separate analysis of the plaintiff's case and the defendant's case. Through this evaluation, the court will form a view as to which category the case falls under: (a) there is *no* issue or question in dispute which ought to be tried or that there is *no* other reason for a trial of that claim (judgment should thus be entered); or (b) there is an issue or question in dispute which ought to be tried or there ought for some other reason to be a trial of that claim, and this latter category is further divided into (i) circumstances warranting conditional leave and (ii) circumstances warranting unconditional leave. Obviously, even where the court decides that there is no triable issue and no other reason to go to trial, the court will necessarily have come to a view not only on the claim but also on the defence. Similarly, where the court should come to the view that leave to defend be given, it must also necessarily and concurrently apply its mind as to whether the leave to be granted should be conditional or unconditional.

43 It seems to us that the apparent suggestion in some precedent cases for the adoption of a sequential two-step approach is in fact merely a reflection of the ways in which summary judgment applications have been disposed of by the courts and grouped accordingly – cases warranting conditional leave and cases warranting unconditional leave are grouped as sub-categories of cases

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where leave should be granted. Often, whether in cases or in textbooks, the category of cases where no leave to defend should be granted is explained first before they move on to explain the difference between cases for which conditional leave to defend is appropriate and those for which unconditional leave is appropriate. Perhaps this sequential explanation could be the cause giving rise to the apparent two-step approach. We reiterate that the analysis for a summary judgment issue is not sequential, but is logically a composite examination of both the claim and the defence as a whole.

44 We now turn to examine the circumstances where it is appropriate to grant an order of conditional leave to defend.

The breadth of discretion given to the court in imposing any condition

45 The discretion given to the court to determine whether to grant unconditional or conditional leave to defend under O 14 r 4(1) of the Rules of Court is wide. Leave can be granted "on such terms as to giving security or time or mode of trial or otherwise as [the court] thinks fit". Case law, while explaining the circumstances that call for a grant of conditional leave to defend, has reaffirmed this broad discretion.

46 In *Abdul Salam*, the court referred to the multitude of terms used to describe circumstances warranting conditional leave, including the term "shadowy", and commented that they were somewhat pejorative and could obscure the true principle. The court further formulated the principle as follows (at [44]):

> … a condition is appropriate when the court has the sense that *although it cannot be said that the claimed defence is so hopeless that, in truth, there is no defence, the overall impression is such that some demonstration of commitment on the part of the*

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> *defendant to the claimed defence is called for*. For this reason, the condition must not be one which the defendant would find impossible to meet… [emphasis added]

47 This principle was approved by this court in *Mohd Zain* (at [40]), and the court also went on to state that the usual standard for conditional leave is "whether the case advanced by the defendant/debtor is shadowy" (at [18]). It further explained that the imposition of conditions in appropriate cases is in line with the rationale underpinning summary judgment. The objective of the summary judgment procedure is "to minimise any delay to a meritorious claimant/creditor before his unchallengeable rights are recognised and enforced" (at [20]). The imposition of conditions on the grant of leave to defend achieves the same objective, because "where a defendant is only able to raise a shadowy defence but the court wishes to give him the benefit of the doubt", the imposition of conditions will "preserve the claimant's interests to the extent that it is possible" (at [20]).

48 The court in *Henry Wee* at [81] also provided some guidance on the wide discretion that the court has in deciding whether to impose any condition:

> … Characterising a defence as shadowy is *as much a matter of impression as it is of analysis*. If one tries to capture that characterisation in words, one can say that a defence is shadowy if the defendant's evidence is *barely sufficient to rise to the level of showing a reasonable probability of a* bona fide *defence*. Alternatively, *one can say a defence is shadowy if the evidence is such that the plaintiff has very nearly succeeded in securing judgment*. [emphasis added]

49 In short, the discretion given to the court to impose any condition on the leave to defend is a wide one and each case has to be decided on its own facts. Ultimately it is the overall sense of the court which will be determinative.

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50 We note that the phrase "reasonable probability of a *bona fide* defence" was adopted by this court in *Goh Chok Tong v Chee Soon Juan*, and the phrase "a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence" was adopted by this court in *Habibullah*. However, both these cases discussed *unconditional leave to defend* and the court was not concerned with the scenario of conditional leave to defend. It will be recalled that in *Mohd Zain* (see [35] above), it was explained that where the defendant could establish "a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence", unconditional leave to defend should be granted. That leave should not be made conditional where there is a fair probability of a defence is also the position taken by the authors of *Singapore Civil Procedure 2019* vol 1 (Sweet & Maxwell, 2019) at para 14/4/12.

51 In some subsequent cases, the phrase "reasonable probability of a *bona fide* defence" was used synonymously with the first limb in O 14 r 3(1) of finding a triable issue, in situations where conditional leave was not examined. Examples include *Wayne Burt Commodities Pte Ltd v Singapore DSS Pte Ltd* [2017] SGHC 70 at [7] and *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [44]. Although the synonymous use of the phrase with the first limb of O 14 r 3(1) is not to be faulted where the issue of conditional leave is not in question, it could result in confusion. We have earlier at [34] above alluded to the statement made by the court in *Henry Wee* and the apparent difficulty caused thereby. We would reiterate that a court is entitled to hold that the defendant has succeeded in showing a "reasonable probability of a *bona fide* defence" but it cannot in the same breath say that the defence is "shadowy". We agree that conditional leave is warranted where "the defendant's evidence is barely sufficient to rise to the

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level of showing a reasonable probability of a *bona fide* defence" and where "the evidence is such that the plaintiff has very nearly succeeded in securing judgment" (see [48] above). For clarity of thought, we would reserve the grant of conditional leave to cases where the defendant's evidence has *not yet reached* the level of showing a reasonable probability of a *bona fide* defence, a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence.

52 We now turn to the second situation under O 14 r 3(1) where there is "some other reason" for the claim to go to trial. This rule clearly states that where "there is an issue or question in dispute which ought to be tried or … there ought for some other reason to be a trial of that claim or part", judgment should not be entered. Order 14 r 4(1) then goes on to give the court the discretion to impose any condition on the leave to defend in both limbs of O 14 r 3(1). Akfel submitted that under the second limb (*ie*, other reason for a trial) there should be a bar to imposing any condition on the leave to defend. We were unable to accept this contention. Neither was it supported by case law. For example, in *Mohd Zain*, in reference to the first limb under O 14 r 3(1), this court held that where there is a triable issue, a court can either grant conditional or unconditional leave to defend (see [35] above). The same reasoning must necessarily apply to the second limb of having a trial for "some other reason".

53 Given that the discretion granted to the court is a wide one, we again were unable to accept Akfel's submission that conditional leave to defend could only be granted where the word "shadowy" was used to describe the defence. Although the word "shadowy" has often been used to describe a defence that warrants conditional leave to defend, such a finding is not necessary in order to grant conditional leave. As the court noted in *Abdul Salam*, the various terms

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used to describe a defence warranting the grant of conditional leave to defend should not conceal the true principle. Mr Kumar, counsel for Akfel, further submitted that a shadowy defence was one that appeared to have been raised *purely* to delay a meritorious claimant from enforcing his unchallengeable rights. We agreed with Ms Lim that this situation would warrant entering of judgment instead. Mr Kumar further posited that in most cases where conditions were imposed, there was uncontroverted evidence that tended to contradict the defence's case, referring to *Mohd Zain*, *Henry Wee* and *Paclantic Financing Co Inc and Others v Moscow Narodny Bank Ltd* [1984] 1 WLR 930. Since such evidence was absent on the facts of this case, he argued that unconditional leave should be granted. While those cases are helpful in shedding light on the kinds of circumstances justifying conditional leave to defend, they are, however, only examples of the exercise of discretion by the court. They cannot be taken to stand for the principle that conditional leave should only be granted where there is undisputed evidence that tends to contradict the defence's case. It would be wrong to so unjustifiably narrow the scope of the rule.

Whether the Judge erred in his assessment of the case

54 We now turn to deal with the second sub-issue of whether the Judge erred in his assessment of the case (see [28] above). In his first oral judgment, the Judge found that Akfel had shown "a reasonable probability that it has a bona fide defence" and that there were "sufficient reasons to go to trial" (see [12] above). Mr Kumar argued that an order for unconditional leave to defend must necessarily follow from this finding. As we have explained above, the phrase "reasonable probability of a *bona fide* defence" should be reserved to describe a case where unconditional leave should be granted. However, we acknowledge that the case law which the Judge had to consider might not have

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been quite so clear on this point, and the Judge understood the phrase to encompass all situations where leave to defend should be granted in what he termed as a two-step approach. The Judge explained to the parties in detail that he had used the phrase in that sense, and that he was guided by the "key" consideration of whether "the defence, in substance, [came] within the category of cases for which conditional leave ought to be granted". In the light of the Judge's clear clarification at the hearing of further arguments that this case "fell below the standard of a merely weak defence [and] squarely into the realm of a defence which warranted the grant of conditional leave to defend", his use of the phrase "reasonable probability of a *bona fide* defence" in his first oral grounds was undoubtedly immaterial to the correctness of his decision in granting conditional leave.

55 We found that the Judge did not err in his exercise of discretion in imposing the Condition. The Judge did not err in placing weight on the fact that Akfel did not adduce any evidence from its employees who had interacted with Mr Townsend to substantiate its defence of sham. Akfel argued that evidence from its employees was not necessary given that its case essentially engaged the question as to whether Mr Townsend did perform in accordance with the terms of the written Consultancy Agreement. However, it was clear that to establish its claim of sham, Akfel had to go further than just showing that Mr Townsend had not performed fully in accordance with those terms – in order to establish that an agreement was a sham, a common intention to mislead must be proven (*Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 at [52]). Akfel adduced no evidence from its employees to show such a common intention. What was before the court were mere assertions, with no specific evidence. Even if it were shown that Mr Townsend did not perform exactly in accordance

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with those terms, that was no indication of the Consultancy Agreement being a sham. It might well just indicate a breach. Whether any consequence would follow from the breach would depend on the nature of the breach.

56 The Judge also did not err in taking into account the inconsistency between documents filed by Akfel (see [19] above). This discrepancy, as explained earlier, was between a version of the Consultancy Agreement that was exhibited in Mr Akicioglu's affidavit and a version exhibited in an affidavit from Akfel's Singapore counsel. In the former version, the signatures were removed, and the explanation given by Akfel's counsel was simply that it was cheaper to notarise the affidavit in Turkey without the signatures. This was purely a statement from the Bar and there was no substantiation of this reasoning at all.

57 The overarching character of Akfel's defence was its lack of evidence. Akfel asserted boldly that the Consultancy Agreement was concocted by Mr Townsend and the Baltaci Brothers in furtherance of a scheme under which the Baltaci Brothers would seek to retain and exercise control over the affairs of Akfel and the Akfel Group whilst concealing their involvement in the said scheme. Yet, the only evidence Akfel produced in support of its claim was from Mr Akicioglu who did not have direct knowledge as to the parties' intention and actions leading to the execution of the Consultancy Agreement and had no interaction with Mr Townsend. Mr Akicioglu had frankly deposed in his affidavit that he "[did] not have any personal knowledge in respect of a lot of the matters stated in the Plaintiff's [*ie*, Mr Townsend's] Affidavit". All that Mr Akicioglu had raised in his affidavit were mere suspicions: he described the political turmoil in Turkey at the material time and the dispositions of shares by the Baltaci Brothers, which he said cast suspicions on the Consultancy

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Agreement. He also claimed that Mr Townsend had "assisted in the setting up of corporate structures and been involved in concluding written contracts [and] that [should] at least suggest some attempt to obscure the true nature of payments made (or to be made) out of the Group's finances" [original emphasis omitted].

58 It was telling that Mr Kumar could not state with conviction whether Akfel was running the defence of sham or illegality, even though the two defences might be incompatible, and was only able to repeat the refrain that it had pleaded both defences. This lack of certainty permeated Akfel's defence. The reasoning which Akfel relied upon for both its defences of sham and illegality was largely unsubstantiated. Akfel's allegation that the Consultancy Agreement was actually entered into after the August 2016 Injunction or the December 2016 Order rested on a mere conspiracy theory that was circuitous in reasoning, for it assumed that the agreement was backdated pursuant to an illegal scheme or a hidden motive making the agreement a sham. Akfel sought to make much out of the non-specificity of the date of signing of the Consultancy Agreement, when the original Consultancy Agreement was in fact kept by Akfel's employees after execution. Akfel could have adduced evidence supporting its conjecture, but it did not. Moreover, the so-called onerous terms in the Consultancy Agreement could hardly be strong evidence to show that it was a sham or an illegal agreement. In any case, the Judge did take into account the issues relating to the date of signing and the terms of the Consultancy Agreement in favour of Akfel by granting leave to defend, albeit conditional, on the basis that there was a triable issue.

59 Akfel further relied upon the fact that after the Consultancy Agreement came into effect, Mr Townsend did not strictly follow its terms. Mr Kumar

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highlighted the following. First, Mr Townsend accepted payment of €35,000 for August 2016 and did not demand his full fee of €45,000. In this regard, Akfel was not convinced by Mr Townsend's explanation that it took him longer to ramp up the services he was to provide so he billed for that month's services under the old rate. Second, Mr Townsend issued an invoice for €45,000 per month for the quarter September 2016 to November 2016, without offsetting for the €15,000 per month that was paid by Akfel Gaz Sanayi Ve Ticaret Anonim Sirketi to Mr Townsend's company for the months of September 2016 and October 2016, which according to Mr Townsend's case formed part of his retainer fees. In response to these allegations, Ms Lim for Mr Townsend pointed out that it was Mr Townsend's unrefuted evidence that he performed the Consultancy Agreement. The Judge had taken into account the lack of specificity regarding the extent of increase in Mr Townsend's job scope envisaged by the Consultancy Agreement as a ground to grant leave. In any event, as we have stated at [55] above, non-compliance with specific term(s) does not indicate sham. We know from everyday experience that parties to a contract often do not carry out its terms to the letter and no one suggests that such a contract is a sham.

60 Mr Kumar drew our attention to an internal Akfel e-mail dated 11 November 2016 on the topic of proposed bonus structure and salary adjustment which contained the line "AT to discuss with MFB", to argue that Mr Townsend was acting as MFB's intermediary. Ms Lim rightly pointed out during the hearing that this e-mail was written before TMSF was appointed as trustee for Akfel on 1 December 2016; thus, any involvement of MFB did not indicate illegality as at the date of the e-mail.

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61 Akfel's reliance on Mr Townsend's decision not to claim for damages from Akfel Singapore under the Deed of Guarantee did not advance Akfel's case either. We could not see why Mr Townsend should be prejudiced just because he did not choose to concurrently pursue against the guarantor, Akfel Singapore. It is pertinent to note that in *Wiseway Global Co Ltd v Qian Feng Group Ltd* [2015] SGHC 85 ("*Wiseway*") at [30], it was held that an adverse inference could not be drawn from a decision by a plaintiff not to pursue a remedy against a guarantor in the absence of more evidence.

62 In *Wiseway*, the defendant tried to resist summary judgment on allegations that the contract had been entered into by the parties to disguise and further an illegal arrangement designed by the plaintiff. The High Court in that case granted summary judgment, on the basis that it was insufficient for the defendant to raise a mere logical possibility. The court stressed that there needed to be some evidence, direct or indirect, to support the defendant's bare assertions (at [33]). In *Millennium Commodity*, the court granted conditional leave to defend because it seemed "improbable that the defendant [would] succeed in showing" its defence that the plaintiff had conspired with an ex-director of the defendant and another to defraud the defendant (at [114]). The court took into account, *inter alia*, the fact that there was no evidence which shed direct light on the plaintiff's state of mind and the defendant's evidence was far from strong (at [115] and [116]). The general picture which emerged was that the defendant had allegedly no knowledge of the circumstances surrounding its ex-director's involvement, and that being the case, there was no basis at all for the bold assertion that the plaintiff conspired with the ex-director and another to defraud the defendant (at [120]). The court concluded that while "the defence [was] not wholly devoid of substance, the overall impression [was] such that some demonstration of commitment on the part of the defendant to the

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claimed defence [was] necessary" (at [123]). The same reasoning should apply in the present case. Akfel only produced evidence as to the political circumstances prevailing in Turkey and the dispositions of the shares by the Baltaci Brothers at the material time, and no evidence as to the formation of the Consultancy Agreement. Moreover, Akfel did not challenge the Judge's reliance on the fact that it produced no expert evidence on Turkish law as to the legal effect of the Turkish court orders. Additionally, these orders were technically inadmissible because no certified English translations were tendered.

63 At this juncture, we pause to refer to three foreign cases relied upon by Akfel for the proposition that where a court entertains suspicions about the plaintiff's case, the proper course would have been to grant unconditional leave to defend, namely, *Billion Silver Development Ltd v All Wide Investments Ltd* [1999] HKCA 467 ("*Billion Silver*"), *Extraktionstechnik Gesellschaft Fur Anlagenbau MBH v Oskar* (1984) 128 SJ 417 ("*Extraktionstechnik*") and *Peter Nolan v Graham Michael Wright* [2009] EWHC 305 (Ch) ("*Peter Nolan*"). In *Extraktionstechnik*, the English Court of Appeal held that unconditional leave to defend should be granted where there were suspicions that the plaintiff's claim might be made in bad faith or there was something shadowy about it or, worse, that it might be tainted with illegality (at 8). This proposition was adopted by the Hong Kong Court of Appeal in *Billion Silver* and by the English High Court in *Peter Nolan*. These cases expounded on the situation where there were grounds for suspicion of bad faith or illegality in relation to the plaintiff's case, or where it was shadowy. Counsel for Akfel, however, equated such a situation with a finding that the plaintiff's claim deserved "further investigation" and that there were sufficient reasons for the claim to go to trial. These are two different situations. Where a plaintiff's claim deserves further

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investigation, it means that there may be deficiencies in the claim such that the plaintiff is unable to prove unchallengeable rights at the summary judgment application stage, which is very different from a finding that the plaintiff's claim is made in bad faith or is tainted with illegality. The Judge in the present case did not make any finding that Mr Townsend's claim was made in bad faith or was tainted with illegality. Moreover, the assertions by Akfel of bad faith and illegality on the part of Mr Townsend had no real foundation, and were only conjectures. Therefore, we did not think the proposition in *Extraktionstechnik* was engaged on the facts of this appeal.

64 A related submission of Akfel was that in a case involving a defence on the ground of sham or illegality, unconditional leave must be given where the court finds that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim, because that necessarily means that there is suspicion of bad faith or illegality on the part of the plaintiff. We did not agree this would necessarily follow. It would depend on the circumstances of each case. In *Millennium Commodity*, conditional leave to defend was granted where the defence alleged was on the grounds of illegality and fraud. While there may be a triable issue or some other reason to go to trial in a case where the defence is one of illegality, sham or fraud, whether a condition should be imposed depends on whether on an overall assessment of the defence the case calls for a demonstration of commitment from the defendant.

65 Lastly, some final observations before we leave this topic. At [12] above, we set out four matters which gave the Judge some concern. In brief they were: why a written agreement now after so many years; no evidence of additional work; different notice periods for Akfel and Mr Townsend to

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terminate the Consultancy Agreement; and the exact date on which the Consultancy Agreement was signed. Our first observation is that we could not see anything peculiar for the parties to want to put an oral arrangement into writing after some time, particularly when there are significant changes. In view of the political situation then prevailing in Turkey, and the fact that the Baltaci Brothers wanted to protect their interest and Mr Townsend was prepared to act for the Akfel Group and on account of that he drove a hard bargain, we could not see how that should *per se* render the Consultancy Agreement a sham. No evidence was tendered to show that under Turkish law such an agreement would be illegal or invalid. In the absence of specific prohibiting law prevailing in Turkey, a person should be entitled to make whatever arrangement he deems necessary to protect his own interest. As regards the question of the exact date on which the Consultancy Agreement was signed, the document itself stated the date to be 14 March 2016. Mr Townsend did not state the exact date of signing but he said the original copy was kept with Akfel's office in Turkey. The staff there should know when they received that copy. We appreciated the significance of the date of execution. Would it be before the August 2016 Injunction and/or the December 2016 Order? The staff there should have been able to help. But Akfel adduced nothing on that. On our part, in the circumstances, these four matters did not seriously trouble us.

Whether the Judge erred in ordering judgment in full if the Condition was not fulfilled

66 On the third sub-issue (see [28] above), Akfel submitted that non-fulfilment of the Condition should not lead to judgment for the full amount claimed by Mr Townsend since part of the reimbursements he claimed was incurred before the commencement of the Consultancy Agreement. Order 14 r 4(1) of the Rules of Court states that conditional leave to defend an action can

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be granted with respect to the claim, or part of a claim. On the facts of this case, it was clear to us that the Judge gave an "overall assessment of the evidence adduced and arguments made", and decided to order security of a substantial sum. We could see no error in his decision to assess the claim in its entirety and order security for a substantial portion of the claim to be furnished as a demonstration of commitment by Akfel to its defence. Also, there is nothing in the Rules of Court which requires that the security sum imposed must be of the full sum in the statement of claim. While we recognised that a portion of the reimbursements claimed was incurred before the commencement of the Consultancy Agreement, it was not in dispute that under the previous oral agreement Mr Townsend was also entitled to reimbursement of his expenses incurred and was in fact so reimbursed. That was stated in his affidavit dated 25 November 2017 in support of his summary judgment application and was not disputed by Akfel. Furthermore, in the Statement of Claim (Amendment No 2), Mr Townsend did not say that he was only claiming for expenses incurred under the Consultancy Agreement. Indeed, he stated that he was claiming for the sum of €392,467.30 being expenses incurred "in the course of his engagement". Moreover, in the same affidavit there was an annex which set out the date on which each expense claimed was incurred and the dates ranged from November 2015 to December 2016.

Conclusion

67 In the light of the reasoning above, we dismissed Akfel's appeal. This was an appropriate case for some commitment to be demonstrated on the part of the defendant. We allowed Akfel two weeks from the date of our decision on this appeal to put in the security, failing which the consequences would follow.

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Costs were awarded to Mr Townsend and were fixed at $20,000, inclusive of disbursements.

Chao Hick Tin
Senior Judge

Woo Bih Li
Judge

Ramesh Kumar s/o Ramasamy, Ashish Kamani, Afzal Ali and Lim Min Li Amanda (Allen & Gledhill LLP) for the appellant;
Lim Gerui, Chan Jin Yi, Wesley and Toh Ming Min (Drew & Napier LLC) for the respondent.

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