IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHCR 9

Suit No 607 of 2020 (Summons No 3914 of 2020)

Between

CGS-CIMB Securities
(Singapore) Pte Ltd

… *Plaintiff*

And

Koh Yew Choo

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Pleadings] — [Rejoinders] — [Leave]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND FACTS **2**

THE CASH TRADING AND MARGIN TRADING ACCOUNTS 3

INSTRUCTIONS TO TRANSFER SECURITIES INTO MARGIN TRADING ACCOUNT 4

MISTAKEN TRANSFER INTO CDP ACCOUNT 4

PLEADINGS **6**

APPLICATION FOR LEAVE TO SERVE A REJOINDER **9**

THE DRAFT REJOINDER 9

PARTIES' SUBMISSIONS 12

LEAVE TO SERVE REJOINDERS **15**

MATTERS WHICH MUST BE SPECIFICALLY PLEADED 15

Repetition and amplification *15*

Inefficiency and illogicality *18*

Preventing surprises *23*

SUMMARY OF PRINCIPLES 25

COUNTERCLAIMS IN REJOINDERS **27**

ANALYSIS 27

RELEVANT PRINCIPLES 35

APPLICATION TO THE FACTS **37**

CONCLUSION **41**

CGS-CIMB Securities (Singapore) Pte Ltd
v
Koh Yew Choo

[2020] SGHCR 9

High Court — Suit No 607 of 2020 (Summons No 3914 of 2020)
Elton Tan Xue Yang AR
28 September, 10 November 2020

21 December 2020

Elton Tan Xue Yang AR:

Introduction

1 This was an application under O 18 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court") by a defendant for leave to serve a rejoinder. Applications of this nature are uncommon and it has been observed that "[a]lthough it is possible to obtain leave to file rejoinders, the courts are rarely inclined to grant such leave in the absence of exceptional circumstances": see Chua Lee Ming ed, *Singapore Civil Procedure 2020*, vol 1 (Sweet & Maxwell, 2020) ("*Singapore Civil Procedure*") at para 18/4/1. Because of the rarity of such applications, there is also relatively little case law or elaboration on the nature of the circumstances in which leave may be granted.

2 In the proceedings before me, the plaintiff brought a claim against the defendant to recover the price of certain unpaid securities. The defendant denied

liability to make payment of the securities and counterclaimed for breaches of terms and conditions governing the parties' relationship, alleging that the plaintiff failed to comply with her instructions to transfer the securities to her margin trading account and pay for the securities using that account, and instead mistakenly transferred the securities to her CDP account. The plaintiff only sought payment of the securities several months later when the mistake was discovered. In its reply and defence to counterclaim, the plaintiff relied on certain other clauses in the terms and conditions which, in its view, entitled it to refuse to carry out the defendant's instructions without giving notice or reasons.

3 The defendant then applied for leave to serve a rejoinder, principally to advance two allegations: first, the clauses the plaintiff relied on were unenforceable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA"); and second, the plaintiff's reliance on these clauses constituted unfair practice under the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) ("the CPFTA"). In the proposed rejoinder, the second allegation served as the basis of an additional counterclaim and an additional ground for the defence of set-off. The defendant's application therefore called for consideration of the circumstances in which leave to serve a rejoinder may be granted, and whether and if so, when a rejoinder may contain a new or additional counterclaim.

Background facts

4 The plaintiff is a Singapore incorporated company with its principal activities in the business of stocks, shares and bond brokerage, as well as

security dealings and commodity contracts brokerage. The defendant was a customer of the plaintiff.[1]

The Cash Trading and Margin Trading Accounts

5 On or around 4 January 2013, the defendant opened a Cash Trading Account ("CTA") and a Margin Trading Account ("MTA") (collectively, "the Accounts") with the plaintiff, through which the defendant traded securities. It is not disputed that the operation of the Accounts was governed by the plaintiff's General Terms and Conditions ("the General T&Cs"), which incorporated by reference the prevailing SGX-ST Rules.[2]

6 On 25 April 2019, the defendant instructed the plaintiff to purchase various securities ("the Securities") using the Cash Trading Account. The plaintiff alleged (but the defendant denied) that the purchase price payable by the defendant for the securities, inclusive of fees and taxes, amounted to S$606,244.98 ("the Purchase Price").[3] According to the plaintiff, the Securities were duly delivered to the defendant and the due date for payment of the Purchase Price was 29 April 2019.[4] The plaintiff alleged that the Purchase Price was not paid by the due date nor since then, and that formed the basis of its claim to recover the Purchase Price, together with interest and costs.

---

1 Statement of Claim ("SOC") at paras 1 and 2; Defence and Counterclaim ("D&CC") at para 3.

2 D&CC at paras 5 and 6; Reply and Defence to Counterclaim ("R&DCC") at paras 4 and 5.

3 SOC at paras 7 and 8; D&CC at para 13.

4 SOC at para 9.

Instructions to transfer Securities into Margin Trading Account

7 The defendant denied the claim and relied on an additional set of facts in her defence and counterclaim ("the Defence & Counterclaim"), certain key aspects of which were undisputed. The parties did not dispute that on or around 2 May 2019, the defendant ordered or instructed the plaintiff to use the MTA to pay for the Securities and deposit or transfer them into the MTA.[5] It was also not disputed that despite the defendant's order or instruction, the Securities were never paid for using the MTA.[6]

8 The plaintiff explained that this was due to the fact that the defendant did not have sufficient credit limit, collateral and/or excess margin in the MTA to pay for and receive the Securities. According to the plaintiff, one of its representatives messaged the defendant on 3 May 2019, asking her to either top up S$400,000 in the MTA or dispose of other securities then held in the MTA to the value of about S$1.4m. The defendant failed to comply with either of these requirements and hence the plaintiff did not transfer the Securities into the MTA.[7]

Mistaken transfer into CDP Account

9 A few days later, on or around 6 May 2019, the plaintiff transferred and credited the Securities into the defendant's CDP account ("the CDP Account").[8] The plaintiff attributed the transfer of the Securities to the CDP Account to an

---

5 D&CC at para 14(a); R&DCC at para 11.

6 D&CC at para 14(c); R&DCC at para 13(a).

7 R&DCC at paras 13(b)–(c) and (e).

8 D&CC at para 14(d); R&DCC at para 14(a).

"internal administrative error", the plaintiff having mistakenly recorded that payment had been made for the Securities.[9]

10 The plaintiff only discovered the mistake three months later in mid-August 2019 during an internal accounting reconciliation exercise, through which the plaintiff realised that the Securities had not been paid for (whether through the MTA or at all), and that they had been transferred into the CDP Account. The plaintiff then contacted the defendant to inform her that the Securities had not been paid for and to request that she check her trading records. It was only in October 2019 that the defendant met the plaintiff at the latter's request and provided copies of her CDP Account statements for April to June 2019.[10] The plaintiff alleged that the defendant had sold off or transferred out all the Securities from her CDP Account by mid-July 2019.[11]

11 In January 2020, meetings were held between the defendant and the plaintiff's representatives. According to the defendant, the plaintiff's representatives admitted at the meetings that it was due to negligence on the part of the plaintiff that the Securities had been credited into the CDP Account rather than the MTA.[12]

12 On 7 July 2020, the plaintiff commenced these proceedings against the defendant.

---

9 R&DCC at para 14(b).

10 R&DCC at paras 15 and 16(b) and (d).

11 R&DCC at para 18(b).

12 D&CC at para 34; R&DCC at para 30(a).

Pleadings

13 As the present application centres on the parties' pleadings, it will be necessary to have closer regard to the pleaded arguments and responses. In its statement of claim, the plaintiff sought recovery of the Purchase Price, interest and costs. It relied on cll 5 and 6 of the General T&Cs, which the plaintiff interpreted as requiring the defendant to immediately satisfy all liabilities that might become due to the plaintiff.[13]

14 The defendant admitted that she had not made payment of the Purchase price.[14] Her defence was in essence that she was not liable to pay any such sums to the plaintiff. She accompanied that defence with a number of counterclaims against the plaintiff.

15 The defendant first referred to certain SGX-ST Rules applicable in April 2019, which stipulated that if a buying customer (such as the defendant) failed to make payment to its "Trading Member" (such as the plaintiff) for its trade on the "Intended Settlement Day", the Trading Member was to force sell the securities on the following "Market Day", which was a day on which the SGX-ST was open for trading in securities or futures contracts. If the Trading Member reasonably expected full payment from the buying customer, the Trading Member might defer the forced sale for up to two Market Days. The defendant argued, and the plaintiff did not deny, that these rules were incorporated by reference into the General T&Cs (see [5] above). The defendant further alleged that the plaintiff breached these rules by failing to force sell the Securities on

---

13 SOC at para 6.

14 D&CC at para 20.

the following Market Day after the Settlement Date of 29 April 2019 (see [6] above), or at the latest by two Market Days after the Settlement Date.

16 In addition, the defendant pleaded that the plaintiff owed her several implied duties, including the obligations to (a) make timely requests to the defendant for payment of any purchased securities; (b) inform her in a timely manner in the event of non-payment; (c) obtain and/or act on her instructions in relation to the manner of payment; (d) comply with her instructions regarding the account(s) into which the securities were to be deposited or transferred; and (e) inform her if these instructions had not been complied with.[15] The plaintiff breached these implied duties by, amongst other things, failing to comply with the defendant's instructions to pay for the Securities from the MTA and to deposit the Securities into the MTA.[16]

17 By reason of these breaches, the defendant claimed that she had suffered loss and damage as a result of the fall in market prices of the Securities and her inability to carry out her usual trading activities in respect of the Securities.[17] Based on the same facts, she added a further counterclaim for damages arising from the plaintiff's negligence. In the event that the defendant was found liable to pay any sums to the plaintiff, she claimed an entitlement to set off the damages sought in her counterclaims in diminution or extinguishment of the plaintiff's claim.

18 In its Reply and Defence to Counterclaim (Amendment No. 1) ("the Reply & Defence to Counterclaim"), the plaintiff admitted that the Securities

---

15 D&CC at para 9.

16 D&CC at para 28(e).

17 D&CC at para 29.

were mistakenly transferred to the CDP Account (see [9] above). The plaintiff nevertheless denied that it had committed any breach of the SGX-ST Rules, on the basis that it was "reasonable for the Plaintiff to expect full payment from the Defendant" since the defendant had instructed it on 2 May 2019 that the Securities be paid for using the MTA. Thus the plaintiff was "fully entitled to not force-sell the Securities".[18] By 6 May 2019, the Securities had been transferred into the CDP Account and so the plaintiff lacked the necessary possession and control of the Securities to force sell them.[19]

19 More relevantly to the present application, the plaintiff also denied the existence of the implied duties and, in support of this position, pointed to cll 2A and 20.1 of the General T&Cs which "provide that whilst the Plaintiff may act on the instructions of the Defendant, the Plaintiff is also at its sole and absolute discretion entitled to refuse to carry out such instructions, without having to give any notice or reason for such refusal to the Defendant".[20] According to the plaintiff, these clauses entitled it to "refuse to carry out any instructions from the Defendant in relation to the [CTA] and the MTA, without having to give any notice or reason for such refusal to the Defendant".[21]

20 The plaintiff further argued that even if these duties could be implied, it had not breached them since it had always made timely requests to the defendant for payment, who was at all material times fully aware that the Settlement Date for the Securities was 29 April 2019.[22] In any event, the defendant had

---

18 R&DCC at paras 22(b) and (c).

19 R&DCC at para 18(a).

20 R&DCC at para 8(a).

21 R&DCC at para 16(a).

22 R&DCC at para 10(a)–(d).

acquiesced in any such breach since she ought to have known by May or June 2019, by virtue of the monthly CDP Account and MTA statements she received, that the Securities had been transferred to the CDP Account rather than the MTA. Yet she had failed to communicate any dissatisfaction about this to the plaintiff.[23]

21 Finally, in relation to the defendant's purported entitlement to a set-off, the plaintiff referred to cl 15.1 of the General T&Cs, which specified that all payments that the defendant was liable to pay to the plaintiff should be made immediately and "without set-off, counterclaim or other deductions or withholdings of any nature whatsoever".[24]

Application for leave to serve a rejoinder

The draft rejoinder

22 In HC/SUM 3914/2020, the defendant applied for leave to serve a Rejoinder and Reply to Defence to Counterclaim ("the Rejoinder"). There were broadly three parts to the Rejoinder, which was annexed in draft to the application. The first two of these were responses to the plaintiff's reliance on cll 2A and 20.1 of the General T&Cs (see [19] above).

23 First, the defendant sought to argue that to the extent that cll 2A and 20.1 permitted the plaintiff to refuse to carry out the defendant's instructions without giving reasons and to dispense with giving the defendant notice if it refused to carry out those instructions, those clauses were unenforceable under s 3 of the UCTA. The defendant explained that she had dealt as a consumer *vis-à-vis* the

---

[23] R&DCC at paras 14(d)– (e) and 25(b).

[24] R&DCC at paras 31(1)–(c).

plaintiff and on the plaintiff's standard terms of business, pursuant to s 3(1) of the UCTA. Insofar as cll 2A and 20.1 purported to have the effect described by the plaintiff in its Reply & Defence to Counterclaim, the plaintiff was claiming to be entitled to render no performance at all in relation to part of its contractual obligations. The defendant submitted that cll 2A and 20.1 did not satisfy the requirement of reasonableness.[25]

24 In addition, the defendant averred that cl 15.1 of the General T&Cs (see [21] above) was likewise subject to s 3 read with s 13(1)(*b*) of the UCTA and did not satisfy the requirement of reasonableness.[26] For convenience, I shall refer to these allegations as "the UCTA Pleading".

25 Second, the defendant sought to argue that insofar as the plaintiff was claiming to be entitled to rely on cll 2A and 20.1 to refuse to carry out her instructions without giving any reasons or notice, this constituted unfair practice under s 4 of the CPFTA. The defendant described the plaintiff's supply of brokerage services as a "consumer transaction" within the meaning of s 2(1) of the CPFTA.[27] There were four limbs to the defendant's reliance on the CPFTA. In summary, these were:

> (a) By omitting to inform the defendant that (i) her instructions to pay for the Securities through the MTA and to deposit the Securities into the MTA had not been carried out; and (ii) the Securities had been deposited into the CDP Account without having been paid for, the defendant was "reasonably deceived or misled to think that the

---

25 Draft Rejoinder and Reply to Defence to Counterclaim ("Draft Rejoinder") at para 5.

26 Draft Rejoinder at para 20.

27 Draft Rejoinder at para 6.

Securities had been paid for using her MTA and deposited and/or transferred into the MTA". According to the defendant, this constituted unfair practice under Section 4(*a*) of the CPFTA.[28]

(b) By relying on contractual terms (that is, cll 2A and 20.1) to negate its duty to comply with the defendant's instructions without informing her, the plaintiff was taking advantage of the defendant while knowing, or while it ought reasonably to know, that the defendant was not in a position to protect her own interests. This constituted unfair practice under s 4(*c*)(i) of the CPFTA.[29]

(c) The plaintiff had taken advantage of the defendant by including the General T&Cs terms which were harsh, oppressive or excessively one-sided so as to be unconscionable. This was unfair practice under s 4(*d*) read with s/no. 11 of the Second Schedule to the CPFTA.[30]

(d) The plaintiff had used small print to conceal a material fact from the defendant, namely, that it need not comply with the defendant's instructions regarding the manner of payment and the account(s) the Securities were to be transferred into. This was unfair practice under s 4(*d*) read with s/no. 20 of the Second Schedule to the CPFTA.[31]

26 The defendant submitted that by reason of these unfair practices, she was entitled to damages under s 6 of the CPFTA, and further entitled to set off

---

28 Draft Rejoinder at para 6(ii).

29 Draft Rejoinder at para 6(iii).

30 Draft Rejoinder at para 6(iv).

31 Draft Rejoinder at para 6(v).

such damages in diminution or extinguishment of the plaintiff's claim.[32] I shall refer to this as "the CPFTA Pleading". It should be noted that the UCTA Pleading differed from the CPFTA Pleading in an important respect: the latter sought to advance a further or additional counterclaim for damages and an additional basis for the defence of set-off, whilst the former was offered purely as a defence (namely, the unenforceability of cll 2A, 15 and 20.1).

27 The third and remaining part of the Rejoinder consisted of a miscellany of responses to various other paragraphs of the Reply & Defence to Counterclaim, largely denying or otherwise not admitting to those paragraphs. I will refer to these as "the Miscellaneous Pleadings".

Parties' submissions

28 The defendant's application was based on O 18 r 4 of the Rules of Court, which states simply:

> **Pleadings subsequent to reply** (O.18, r.4)
>
> **4.** No pleading subsequent to a reply or a defence to counterclaim shall be served except with the leave of the Court.

29 The defendant's submissions before me centred on the UCTA and CPFTA Pleadings. The defendant pointed out that cll 2A, 15 and 20.1 of the General T&Cs were raised for the first time in the Reply & Defence to Counterclaim, and thus it "would not have made sense for the Defendant to have addressed these clauses prior to the proposed Rejoinder and Reply to Defence to Counterclaim".[33] In this regard, the defendant relied on the Court of Appeal's decisions in *Bachoo Mohan Singh v Public Prosecutor and another matter*

---

32 Draft Rejoinder at para 7.

33 Defendant's submissions at para 5.

[2010] 4 SLR 137 ("*Bachoo Mohan Singh*") and *Lim Zhipeng v Seow Suat Thin and another matter* [2020] SGCA 89 ("*Lim Zhipeng*").[34]

30 The defendant further submitted that O 18 r 8 of the Rules of Court did not merely permit, but in fact "required", the defendant to serve the UCTA and CPFTA Pleadings. In particular, if the defendant had not pleaded that the plaintiff's reliance on cll 2A and 20.1 amounted to unfair practice under the CPFTA, this would have taken the plaintiff by surprise within the meaning of O 18 r 8(1)(*b*).[35]

31 Finally, the defendant argued that there was no rule against a party raising a new claim in a subsequent pleading. In its view, the Rules of Court "implicitly acknowledge that a party may in fact do so". The defendant referred to O 18 r 10, which states that a party "shall not in any pleading make an allegation of fact, *or raise any new ground or claim*, inconsistent with a *previous pleading* of his" [emphasis added]. If there were in fact a prohibition on the raising of claims or counterclaims in subsequent pleadings, the restriction in O 18 r 10 would be otiose. In the defendant's submission, "the true principle of law is this: there is no arbitrary rule that new claims may never be pleaded in a subsequent pleading, in situations when these new claims are in response to matters raised by the other party in their preceding pleading". That was the case regarding the further counterclaim in the CPFTA Pleading.[36]

32 The plaintiff referred me to the decision of Judicial Commissioner Foo Chee Hock in *Champion Management Pte Ltd v Kee Onn Engineering Pte Ltd*

---

34 Defendant's submissions at paras 14–16.

35 Defendant's submissions at para 11.

36 Defendant's submissions at paras 12–13 and 17.

[2017] SGHC 116 ("*Champion Management*") on the principles governing the granting of leave to serve rejoinders. The plaintiff did not in fact object to the defendant's service of a rejoinder in order to set out the UCTA Pleading. It "accept[ed] that these are matters that are necessary and must be specifically pleaded, especially in light of the provision of Order 18 Rule 8 of the Rules of Court".[37]

33 But the plaintiff took exception to the inclusion of the CPFTA Pleading in the Rejoinder, on the basis that "a Rejoinder is not the appropriate pleading for a party to introduce a new cause of action". It first reasoned that a Rejoinder ought to be treated as, or as analogous to, a Reply, given that O 18 r 18 assimilates a "counterclaim [to] a statement of claim" and "a defence to counterclaim [to] a defence". The plaintiff then referred me to a line within para 18/3/2 of *Singapore Civil Procedure*, which states that a plaintiff "must, however, take care not to put forward in his reply a new cause of action which is not raised either on the writ or in the statement of claim", and which cites *Williamson v L. & N. W. Ry. Co.* (1879) 12 Ch. D. 787 ("*Williamson*") as authority for that proposition. Since the defendant was "effectively seek[ing] to introduce an additional cause of action via a pleading that is akin to a Reply and not a Statement of Claim or Counterclaim", the plaintiff urged me to refuse the defendant leave to include the CPFTA Pleading in the Rejoinder.[38]

34 After hearing parties' oral arguments, I directed the parties to file a joint supplementary bundle of authorities for a number of cases that were raised at

---

37 Plaintiff's submissions at paras 18–19.

38 Plaintiff's submissions at paras 21–28.

the hearing, and granted parties leave to file further written submissions on those cases, if they wished. Both parties chose to do so.

Leave to serve rejoinders

35 I will now examine the cases and materials to draw out relevant principles, before summarising these principles at [57] below.

Matters which must be specifically pleaded

Repetition and amplification

36 I begin with *Champion Management*, which the plaintiff relied upon and which is to my knowledge the most recent local decision on leave to serve rejoinders.

37 In *Champion Management*, it was the plaintiff's case that it had not agreed to certain variation orders submitted by the defendant and that the defendant had not carried out the variation works. The defendant denied these allegations. In its reply, the plaintiff referred to two emails (which had already been mentioned in the statement of claim) to show that the variation orders had not been approved and the variation works had not commenced. The defendant sought leave to serve a rejoinder to respond to the reply.

38 The High Court refused to grant leave. In dismissing the application, JC Foo referred to para 18/4/1 of the 2017 edition of *Singapore Civil Procedure*, which stated that leave to serve a rejoinder would only be granted if it was "*really required* to raise matters which must be specifically pleaded" [emphasis in original], and cited the case of *Norris v Beazley* (1877) 35 LT 845 ("*Norris v Beazley*") as supporting authority. The "corollary of this proposition was that a rejoinder must not be a mere repetition of what had already been pleaded": at

[5]. On the facts, JC Foo found that the proposed rejoinder contained "ringing echoes" of what the defendant had already pleaded in its defence, which already contained the "substance of the dispute". He observed that "[a]lthough the Proposed Rejoinder specified the precise [variation orders] in issue (*ie,* VOs 1, 2, 3 and 4), this was merely an *amplification* of the Defence" [emphasis in original]. JC Foo concluded that "the redundancy of [the relevant paragraphs] was too clear for any argument" and therefore dismissed the application: at [7]–[9] and [13].

39 The case of *Norris v Beazley* which was referenced in *Champion Management* was a decision of the English Court of Common Pleas and is also instructive as to the circumstances in which leave to serve a rejoinder may (or may not) be granted. The claim in that case was for non-payment of part of the purchase price of a steamship. The defence was, amongst other things, that the purchase had been induced by fraudulent concealment. Neither the defendant not any person on his behalf had seen the steamship. On this basis, the defendant counterclaimed for consequential damages for misrepresentation. In his reply, the plaintiff pleaded that the steamship had in fact been inspected by an individual named Capper, a member of the defendant's company. The defendant sought leave to serve a rejoinder to plead that Capper had an interest in the sale of the ship and had colluded and conspired with the plaintiff to induce the defendant to purchase the ship.

40 The judge below offered to allow the defendant leave to amend his defence, but refused to grant leave to serve a rejoinder. The defendant's appeal to the Court of Common Pleas was dismissed. The Court of Common Pleas held that if the defendant's case was that Capper had committed a fraud upon the defendant by collusion with the plaintiff, that fact ought to have been set up in the defence and counterclaim. The defendant had earlier pleaded in the defence

and counterclaim that the purchase was induced by fraud, and it must have been within the defendant's knowledge at the time he served the defence and counterclaim that Capper was a party to the fraud. In these circumstances, what the defendant was really doing through the rejoinder was simply to state the matters contained in his defence "in a more detailed way". For this reason, Denham J held that the rejoinder would be "*objectionable as a repetition*. … [T]he statement of defence and counter-claim between them included all the matter now sought to be amplified by means of the rejoinder." [emphasis added]. He further observed that the judge below had given "permission to the defendant to amend his counter-claim if he thought that Capper ought to be named in it". Denham J concluded with the remark that "[p]leadings should be as short as they reasonably can be, provided they raise the points in issue between the parties, and matters of evidence are not to be introduced into them.": at 846.

41 I pause to make two observations. First, it may be discerned that the court in *Champion Management* understood the principle that leave to serve a rejoinder will only granted for "matters which must be specifically pleaded" to mean that leave will not be granted for mere repetition – even amplification – of matters earlier pleaded. If the fact or averment in question was pleaded earlier, it must be superfluous to plead it again specifically. Second, while the court in *Norris v Beazley* likewise found that the matters sought to be pleaded in the rejoinder were "objectionable as a repetition", the court's reasoning also reveals a second understanding of that principle: if a matter could, and indeed should, have been raised in an earlier pleading, it cannot be considered as a matter that must be specifically pleaded by way of a rejoinder. The appropriate course in such a scenario would be to seek leave to amend the earlier pleading in order to incorporate that matter. I will now elaborate on this second understanding.

Inefficiency and illogicality

42 I suggest that the second understanding of the principle, and the approach in *Norris v Beazley*, is reflected in the Court of Appeal's decision in *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131 ("*Yeow Chern Lean*"). In that case, the relevant claim was to recover proceeds of certain cheques on the basis of conversion or monies had and received. The appellant, who was the defendant in the suit, sought to introduce by way of an affidavit of evidence-in-chief evidence that the cheques were in fact repayments of monies owed by the respondent, who was the claimant. When the respondent applied to strike out those paragraphs in the affidavit of evidence-in-chief on the basis that those facts had not been pleaded, the appellant sought leave to serve a rejoinder to plead those facts and also to introduce a defence that the claim in conversion must fail because the respondent had no right of possession of the cheques after he handed them over.

43 The High Court refused to grant leave and the Court of Appeal dismissed the appeal. Chao Hick Tin JA began by observing that "[t]he purpose of requiring leave to be granted before a Rejoinder can be filed is to *ensure finality in the pleading process*. There must be an end at some stage (see *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2007) at para 18/4/1)." [emphasis added]. He held that the matters sought to be raised in the proposed rejoinder were "not a necessary response to the Reply": at [35]. The appellant "was in fact seeking to introduce new issues by way of the Rejoinder and this was certainly not in order. *The proper avenue to raise these matters would have been by way of an amendment to the Defence.*" [emphasis added]. Chao JA observed that the appellant had in fact also applied for leave to amend his defence to introduce essentially the same matters as those in the proposed rejoinder. However, that application was rejected (and the appeal from the rejection

dismissed) because of the extreme lateness of the application; it had been filed only after the respondent had given testimony and been cross-examined, which meant that allowing the amendment of the defence at that stage would have been unfair and prejudicial to the respondent: at [36].

44 The decision of the English Court of Appeal in *Hall v Eve* (1876) 4 Ch. D. 341 ("*Hall v Eve*"), which was referred to in *Norris v Beazley* and cited with approval by the Court of Appeal in *Bachoo Mohan Singh* at [27], applies similar reasoning in the parallel context of replies, and offers a helpful example of circumstances in which an amendment to an earlier pleading would not have been appropriate. The claim in *Hall v Eve* was for specific performance of an agreement for the lease of land with the option to purchase the freehold at a specified price. The defence was that the agreement had been put to an end by certain breaches by one of the defendants. In his reply, the plaintiff pleaded that the agreement had not been breached and remained operative; but if there had in fact been any breaches, the defendants had either waived them or were otherwise not entitled by reason of such breaches to determine the agreement. The defendants applied to set aside the reply as irregular and erroneous, arguing that the plaintiff should have pleaded all these matters in the statement of claim. At first instance, the judge agreed with the defendants, set aside the reply and granted the plaintiff leave to amend his statement of claim.

45 The Court of Appeal allowed the plaintiff's appeal. James LJ held that it was "most illogical" that the plaintiff should have to amend his statement of claim since it was "no part of the statement of claim to anticipate the defence, and to state what the Plaintiff would have to say in answer to it.": at 345. James LJ warned against any return to the "old inconvenient system of pleading" where a plaintiff had to "allege in his bill imaginary defences of the Defendant, and make charges in reply to them". In a concurring opinion, Bramwell JA

remarked memorably that the rule in pleading still was that "you should not leap before you came to the stile". The allegation that the defendant had waived the alleged forfeiture was not part of the plaintiff's complaint or the relief claimed; rather, the complaint was that the defendants had breached the agreement and the relief sought was specific performance. In these circumstances, it would be "out of place and illogical if this new matter … were put into the statement of claim". Bramwell JA went on to say (at 348):

> … I cannot help thinking ***it would be a mischievous thing to anticipate a defence that may never be made***. *If the Plaintiff were to do this, he might also anticipate every form of defence, and that would lead to great length of pleading.* It appears to me that an allegation that the Defendants had waived their right is much ***more cheaply, conveniently, and compendiously made in the reply than by amendment in the statement of claim***. [emphasis added in italics and bold italics]

46 In *Bachoo Mohan Singh*, the Court of Appeal cited these remarks of James LJ and Bramwell JA in *Hall v Eve* with approval and held that it was part of "settled pleading practices" that "it is not the function of a statement of claim to anticipate a defence": at [72]. This principle was reiterated by the Court of Appeal in the more recent decision of *Lim Zhipeng*, where the appellant sued upon a deed of guarantee and one of the disputed issues was whether, if the guarantee was unenforceable as a deed since it had not been sealed, the appellant had sufficiently pleaded the existence of consideration so that the guarantee would nevertheless be enforceable. The judge below held that the appellant ought to have pleaded consideration in his statement of claim, and applied to amend the statement of claim once he became aware of the possible deficiencies in the deed. Giving the judgment of the Court of Appeal, Judith Prakash JA disagreed with the judge. After referencing the observations of the court in *Bachoo Mohan Singh*, Prakash JA held at [54] that since the issue of consideration was not raised until the respondent filed her defence and counterclaim, it "*would not have been appropriate for the Appellant to pre-empt*

the issue and raise it in his statement of claim. … [E]ven if the claim was not premised on a deed, it is not necessary for a plaintiff to plead consideration until the absence of consideration is raised as a defence." [emphasis added]. Since the appellant had traversed the issue of consideration in his reply and provided further details in his defence to counterclaim, consideration had been adequately pleaded.

47 The cases reveal two broad reasons why the courts are generally disinclined to require a party to anticipate the response of his counterparty, either within his earlier pleading or by way of an amendment to the earlier pleading.

48 The first is the potential inefficiency and wastefulness associated with a party speculating about the counterparty's responses to the pleading and addressing these prophylactically. That was the point made by Bramwell JA in *Hall v Eve*, when he remarked that such an approach "would lead to great length of pleading" and that the plaintiff's responses could be set out much more "cheaply, conveniently, and compendiously" within a subsequent pleading rather than by way of an amendment to the statement of claim (see [45] above).

49 The second reason is that such an amendment may involve illogicality in the flow of argument within the pleadings. On the facts of *Hall v Eve*, it would have been "out of place and illogical" (to use Bramwell JA's words) to require the plaintiff to amend his statement of claim to explain that the agreement for which he sought specific performance had not been rendered inoperative due to breaches by one of the defendants; and that if those breaches had indeed occurred, they had either been waived by the defendants or were not grounds for the defendants to determine the agreement. An amendment of this nature and extent would have involved the plaintiff anticipating and rebutting the entire

defence even it had even been made. Similarly, in *Lim Zhipeng*, it would have been illogical for the plaintiff to explain the existence of consideration for the guarantee in his statement of claim when his case was based on the guarantee being a deed. In contrast, no such illogicality would have arisen on the facts of *Norris v Beazley* and *Yeow Chern Lean*, which were both cases where leave to serve a rejoinder was refused. In *Norris v Beazley*, since the issue of fraud had already been raised in the defence, there would have been no illogicality in the defendant either pleading at that point that Capper was a participant in the fraud, or later amending the defence to plead Capper's involvement. *Yeow Chern Lean* was an even clearer case given that the intended defence (that the cheques were repayments owed by the respondent) could easily have been pleaded in the defence without illogicality, but the appellant only raised this much later, within an affidavit of evidence-in-chief.

50 The authors of *Singapore Civil Procedure* also provide the helpful example of a defendant raising a counterclaim for libel, the plaintiff in its reply and defence to counterclaim pleading qualified privilege, and the defendant pleading express malice by way of a rejoinder: at para 18/4/1 (see also O 78 r 3(3) on a similar manner of pleadings in defamation actions). This pattern of argument – point, counterpoint and rebuttal – is logical and orderly.

51 Summarising from these authorities, when the court is faced with an application for leave to serve a rejoinder, it will likely consider whether the matters sought to be pleaded could have been raised in an earlier pleading, either at the time of the earlier pleading or by way of an amendment to it. The court will be less inclined to reach this conclusion if, for example, this would have involved the defendant anticipating the plaintiff's response to the defence and counterclaim.

Preventing surprises

52 A third perspective on the principle that leave to serve a rejoinder will only be granted for matters which must be specifically pleaded is offered by the authors of *Singapore Civil Procedure* at para 18/4/1. The authors specifically reference O 18 r 8 in their explanation: "Leave to serve a rejoinder or subsequent pleading will not be granted unles it is really required to raise matters which must be specifically pleaded *(see r.8)*" [emphasis added]. O 18 r 8(1) provides:

> **Matters which must be specifically pleaded (O. 18, r. 8)**
>
> **8.**—(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (*a*) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (*b*) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (*c*) which raises issues of fact not arising out of the preceding pleading.

53 As the authors of *Singapore Civil Procedure* go on to explain, the essence of O 18 r 8 is that "[w]herever a party has a special ground of defence or raises an affirmative case to destroy a claim or defence, as the case may be, he must specifically plead the matter on which he relies for such purpose." This means that "[i]t often is not enough for a party to deny an allegation in his opponent's pleading; he must go further and dispute its validity in law, or set up some affirmative case of his own in answer to it. It will not serve his turn merely to traverse the allegation; he must confess and avoid it." The example is given of a defendant who faces a claim for breach of contract. It would be "idle" for such a defendant merely to traverse (and so deny) the claims; he must instead confess (meaning, admit) that he made the contract, but avoid the effect of that

confession by pleading (for instance) fraud or limitation, or that the contract has been duly performed or perhaps rescinded.

54 It is notable that O 18 r 8 is specifically referenced in O 18 r 3(1), which describes the circumstances in which a reply must be served by a plaintiff: "A plaintiff on whom a defendant serves a defence *must serve a reply on that defendant if it is needed for compliance with Rule 8*; and if no reply is served, Rule 14(1) [which sets up an implied joinder of issue on the defence where there is no reply to it] will apply." [emphasis added]. Thus the principle of confession and avoidance applies not only in the context of responses to claims, but also responses to defences.

55 Citing Buckley LJ in *Re Robinson's Settlement, Gant v Hobbs* [1912] 1 Ch. 717 at 728, the authors of *Singapore Civil Procedure* state that "[t]he effect of the rule is, for reasons of practice and justice and convenience, to *require the party to tell his opponent what he is coming to the court to prove*." [emphasis added]. This is a cardinal rule of pleading that the courts have repeatedly emphasised. In the Court of Appeal's recent decision of *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd* [2020] 1 SLR 606 ("*Liberty Sky Investments*"), Andrew Phang Boon Leong JA observed at [16] that "[t]he entire spirit underlying the regime of pleadings is that each party is aware of the respective arguments against it and that neither is therefore taken by surprise". That is an aspect of natural justice because it prevents a "trial by ambush", but it also promotes substantive justice in terms of the outcome of the dispute, since "procedural fairness and substantive justice interact with each other and cannot survive without the other": see *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [37]. To that end, "the rules of procedure, though important, are merely a means to the end of attaining a fair

resolution of the parties' dispute and are not an end in themselves. The courts are thus not required to adopt an overly formalistic and inflexibly rule-bound approach to procedure, and in particular to pleadings. This explains why, for example, the courts may allow an unpleaded point to be raised if no prejudice is caused to the other party.": see *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2018] SGHC 264 ("*Sun Electric*") at [32]. Ultimately, the "underlying consideration of the law of pleadings is to prevent surprises at trial": see *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [46]. That is also enshrined in O 18 r 8(1)(*b*) of the Rules of Court.

56 I respectfully suggest that this should remain the lodestar in the court's assessment of whether leave may be granted for the service of a rejoinder. If the counterparty (in this context, the plaintiff) would be taken unfairly by surprise by the party's failure to plead the matter in question, such that the counterparty would not be given "fair notice of the substance of such a case" (*V Nithia* at [43]), then reasons of procedural and substantive justice would ordinarily weigh in favour of permitting the party to serve a rejoinder. The court's discretion is guided by the imperative of ensuring that "each party is aware of the respective arguments against it and that neither is therefore taken by surprise" (to use the words of *Liberty Sky Investments*), although this will be balanced against the policy of ensuring finality in the pleading process (see [43] above).

Summary of principles

57 I now summarise the principles that guide the exercise of the court's discretion in an application for leave to serve a rejoinder:

(a) Leave to serve a rejoinder will not be granted unless it is really required to raise matters which must be specifically pleaded.

(b) This entails that:

(i) The rejoinder must not be a mere repetition or amplification of what has already been pleaded.

(ii) It is inappropriate for the matters sought to be pleaded in the rejoinder to be raised either at the time of an earlier pleading or subsequently by way of an amendment to that earlier pleading.

(A) In assessing whether it would be appropriate to raise the matters in an earlier pleading, the court will consider: (i) the logicality of the flow of arguments within the pleadings; and (ii) whether the matters in question might be set out more cheaply, conveniently and compendiously by way of a rejoinder, rather than in the earlier pleading.

(B) The court may find it inappropriate for the matters sought to be pleaded through a rejoinder to be raised within an earlier pleading where, for instance, this would involve the defendant anticipating the plaintiff's response to its earlier pleadings.

(iii) If not pleaded specifically, the matters in question may take the counterparty by surprise (see O 18 r 8(1)(*b*)), meaning that the counterparty would lack fair notice of the substance of the case sought to be proved at trial. This is likely to be the court's primary consideration but it will be balanced against the policy of ensuring finality in the pleading process.

Counterclaims in rejoinders

Analysis

58 Quite apart from the rarity of applications of this nature, I did not find it by any means intuitive that a party should be permitted to include a counterclaim or further counterclaim in a rejoinder. This was for three reasons. First, the service of a rejoinder already extends the pleadings, and the bringing of a counterclaim or additional counterclaim within the rejoinder calls for the counterparty (that is, the plaintiff) to be given an opportunity to respond, which further prolongs the pleading process. Second, such an application throws up the obvious question as to why the counterclaim or further counterclaim could not have been brought in an earlier pleading, namely, the defence and counterclaim. Third, it was not obvious to me how a counterclaim could properly be responsive to the types of matters pleaded in a reply.

59 Counsel for the defendant observed that it was common ground between the parties that a rejoinder should be treated analogously to a reply, but disagreed with the plaintiff's argument that new or additional causes of action cannot be raised in a reply (see [33] above). Counsel supported this submission by referencing the commentary in *Singapore Civil Procedure* on O 15 r 2(2) of the Rules of Court. O 15 rr 2(1) and (2) provide:

> **Counterclaim against plaintiff** (O.15, r.2)
>
> 2.—(1) Subject to Rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.
>
> (2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person

> making the counterclaim were the plaintiff and the person against whom it is made a defendant.

60 The authors of *Singapore Civil Procedure* explain (at para 15/2/2) that "in the [Rules of Court] so far as practicable the counterclaim is assimilated to the position of a statement of claim endorsed on a writ of summons", and "[u]nder these Rules … *[a] plaintiff may counterclaim to [a] counterclaim by [a] defendant* (para. (2) and see *Renton Gibbs & Co. v. Neville & Co.* [1900] 2 Q.B. 181, CA (Eng))" [emphasis added]. The authors go on to describe the effect of O 18 r 2(2) as follows (at para 15/2/6):

> **Counterclaim to a counterclaim—**Paragraph (2) *enables the plaintiff to raise a counterclaim to the counterclaim raised by the defendant against him*, even though the plaintiff's counterclaim may be no more than a mere protection against the defendant's counterclaim, and *even though the cause of action on which it is found arose after the issue of the writ.* See *Toke v Andrews* (1882) 8 Q.B.D. 428, DC (Eng), *Renton Gibbs & Co. v. Neville* [1900] 2 Q.B. 181, CA (Eng), *Lewis Falk Ltd. v. Jacobwitz* (1944) 171 L.T. 36. A plaintiff will require leave of the court to raise a counterclaim to the counterclaim of the defendant (see O. 18 r.4).
>
> A defendant claiming against a third party may counterclaim against the counterclaim made by a third party (see *The Normar* [1968] P. 362; [1968] 1 All E.R. 753).
>
> [emphasis added]

61 In their commentary on O 18 r 4 (which is reproduced at [28] above), the authors further explain that a rejoinder "may be necessary … where the plaintiff raises a counterclaim to the defendant's counterclaim, to which the defence can only be contained in a rejoinder": see para 18/4/1.

62 The inclusion of a counterclaim in a reply is of course highly uncommon and there is to my knowledge no local decision on the issue. I found the cases cited in *Singapore Civil Procedure* to provide useful guidance on when this might be permissible, and more generally (and relevantly for the application

before me) on when a further claim or counterclaim might be an appropriate response to a preceding pleading.

63 I begin with *Renton Gibbs & Co. Limited v Neville & Co* [1900] 2 QB 181 ("*Renton Gibbs*"), a decision of the English Court of Appeal. The plaintiffs claimed the balance of an account for work done for and materials supplied to the defendants. In their defence, the defendants admitted the sums due but counterclaimed for breach of a non-solicitation agreement by the plaintiffs. The plaintiffs pleaded in their reply that they were not bound by the agreement, given that the contracting party was the previous owner of the business and not the plaintiffs themselves; but if the agreement did bind them, the defendants were liable to pay damages by breaching their duties as the plaintiffs' agents under the agreement when they added unreasonable and excessive amounts of commission or remuneration for themselves.

64 The defendants applied to strike out the plaintiffs' counterclaim on the basis that a counterclaim could not be set up by a plaintiff in its reply or at all, since there was no provision in the Rules of Court permitting plaintiffs to bring counterclaims, which were therefore were only available to defendants. They argued that the plaintiffs should have amended the statement of claim to introduce the subject matter of the counterclaim as an alternative cause of action. The defendants' application was allowed by a district registrar but this was overturned on the plaintiffs' appeal to the High Court. The matter then went on to the Court of Appeal, which dismissed the defendants' appeal.

65 Giving the principal judgment of the Court of Appeal, Collins LJ questioned whether the rules "necessitate[d] the putting of the parties to the unnecessary expense of beginning the pleadings *de novo*": at 18. In his view, it was "clear that it would be *inequitable to allow the defendants to have the*

benefit of their counterclaim free altogether from the matters raised in the reply" [emphasis added]. Collins LJ further noted that the plaintiffs did not in fact wish to rely upon the non-solicitation agreement upon which the defendants based their counterclaim, and that the plaintiffs had in fact denied that such agreement was binding on them. Hence, if the plaintiffs were required to address the agreement in their statement of claim, "they would be *embarrassed by having to set up a cause of action, whose existence they deny, inconsistent with and hampering their real cause of action*" [emphasis added]. In these circumstances, "it would be an *obvious injustice* to the plaintiffs to oblige them to introduce this question under the contract into the statement of claim by an amendment. The *natural place* for it is in the reply in which it is now found. ... I do not think that we are prevented from allowing the plaintiffs to so shape their case." [emphasis added]. He concluded that it would be "unjust to the plaintiffs to make them set up as a claim that which they only want as a defence and a shield to the counter-claim."

66 Romer LJ's concurring opinion (at 187) is equally valuable because it summarises the factors discussed by Collins LJ within a statement of principle:

> … *If a plaintiff when he sees a counter-claim finds that he has omitted to raise a claim in addition to that already raised in the statement of claim, he ought,* ***as a rule, to raise that claim by amendment of his statement of claim***. That is the regular course… ***To this rule there are exceptions***. *If on looking at the nature of the additional claim which the plaintiff wants to set up it appears to be one that* ***cannot be added to the original statement of claim without inflicting hardship and injustice on the plaintiff***, *and further that it would be an* ***injustice not to allow him to set it up***, *the Court has jurisdiction to allow him to set it up in his reply.* … In this case it is impossible to require the plaintiffs to amend their statement of claim and begin all over again, and *it would be an injustice not to allow them to set up the claim as an answer to the counter-claim.* I think that the Court ought in the circumstances of this case to allow the plaintiffs to set up their claim for breach of the contract in answer to the defendants' counter-claim founded on that contract, and to do this in *the only way practically open to*

> *them*, namely, by a counter-claim in reply to the counter-claim of the defendants. [emphasis added in italics and bold italics]

67 The second useful decision is that of the English High Court in *Toke v Andrews* (1882) 8 QBD 428 ("*Toke v Andrews*"), which preceded *Renton Gibbs* and was cited by the Court of Appeal in its decision. In *Toke v Andrews*, the plaintiff brought a claim for unpaid rent. After the action was commenced but before the defence was filed, another quarter's rent became due to the plaintiff. On the same day that such rent became due, the defendant served a notice to quit and, by the determination of the tenancy, became entitled to an outgoing valuation which he counterclaimed in his statement of defence. In his reply, the plaintiff sought the quarter's rent by set-off and counterclaim, as well as tithe rentcharge left unpaid by the defendant on his quitting and which was necessarily paid by the plaintiff. The defendant applied to strike out the counterclaims in the reply on the ground that these were new causes of action and the plaintiff could not bring these counterclaims in his reply.

68 The application was dismissed at first instance and the appeal to the High Court was dismissed by Field J and Huddleston B. Giving the opinion of the court, Field J held (at 432–433) that the counterclaims had been "*properly brought forward at the only stage and in the only manner in which [they ccould] be raised*. If [they] had arisen before action the plaintiff might have been properly told to amend his statement of claim… And it is *not owing to any fault of his own that he is placed in this position*, but in consequence of the defendant having counter-claimed as he has done." [emphasis added]. In addition, it would "seem *somewhat strange justice* to hold that the judgment so to be pronounced is to proceed solely upon the allegations in the [defendant's] counter-claim, without taking into account *the cross rights of the plaintiff arising out of the very same contract and at the very same moment of time upon and at which the defendant's claims have their foundation*." [emphasis added].

69 The third decision is that of the English High Court in *Lewis Falk, Limited v Jacobwitz* (1944) 171 L.T. 36 ("*Lewis Falk*"). The plaintiff claimed an injunction against the defendant to prevent the latter from threatening to sue the former for infringing a registered design for embroidered material. In his defence, the defendant admitted that he had so threatened the plaintiff and counterclaimed for an injunction restraining the plaintiff from infringing his design. In its reply, the plaintiff alleged that the registration was invalid and counterclaimed for rectification and cancellation of the registered design. Morton J remarked that the question of whether one could have a counterclaim to a counterclaim "strikes strangely on one's ears", but observed that the plaintiff was nonetheless a defendant to a counterclaim for infringement. He therefore could not "see why [the plaintiff] should be precluded from counterclaiming merely because the claim for infringement happen[ed] to be contained in the counterclaim and not in a statement of claim". Allowing the plaintiff to bring a counterclaim in its reply "would be convenient in this matter and other cases".

70 In its supplementary written submissions, the plaintiff also referred me to the case of *Williamson* (see [33] above), which is a decision that preceded the three cases I have just described, including the higher authority of *Renton Gibbs*. In *Williamson*, the plaintiff claimed that the defendants, which owned the Chester and Holyhead Railway, wrongfully interfered with a private roadway belonging to the plaintiff following certain works by the defendants. The defendants denied wrongful interference and referred to several sections of the Chester and Holyhead Railway Act, under which the railway had been constructed and the works carried out. In his reply, the plaintiff cited further sections of the same legislation which provided that if there was any interference with a private road in the exercise of powers under the legislation, and the owners of the railway did not construct a substituted road, the owners

would be liable to pay penalties to the owner of the private road. The plaintiff claimed that he was entitled to recover these penalties in the same action. In the reply, the plaintiff also made frequent references to his answers to certain interrogatories that had been administered to him by the defendants, without setting out those answers in the reply itself. He also pleaded "much matter which was in fact evidence, and contained argumentative deductions from and statements of the effect in law of the facts stated or referred to."

71 Hall VC struck out the entirety of the reply. He held that it was a "fatal defect" in the reply that the plaintiff had merely referred to his answers to the interrogatories without setting them out in the pleading itself. In doing so, the plaintiff was likely to trigger contests and disputes as to what part of his answers to the interrogatories he intended to rely upon, and this would be "greatly embarrassing to the Defendants in dealing with the case": at 792. Hall VC then remarked (at 793): "It seems to me that that alone is sufficient to dispose of the case, and I desire to say that that is the main ground on which I wish to rest my judgment".

72 Hall VC went on to refer to "other features in this case which seem[ed] to point to this pleading not being such as the Court would be disposed to sanction", but emphasised that it was ultimately "not necessary to say whether [these features] of themselves, and without what [he had] already adverted to, would have justified the course [he took]". One of these other features was the fact that the defendants would be "embarrassed" by the plaintiff's additional claims regarding the penalties because the defendants had not responded to those claims in its pleadings. The defendants should not be put in a position where they were left to risk the possibility of the court "fall[ing] back" on the plaintiff's secondary case under the penalties if its primary case failed. However, that would only apply if the defendants were to "disregard [the new

claims] altogether and to *refrain from going into any rejoinder*" [emphasis added]: at 793. Another feature of the reply Hall VC pointed out was that "there [was] a vast deal in [the] reply which [was] mere evidence and mere argument and ought not to be in the pleadings at all": at 793.

73 On a close reading of the decision, I do not understand Hall VC to have rejected the possibility of a plaintiff including a new or additional claim in his reply. That is for two reasons. First, Hall VC made it clear that he preferred to rest his decision to strike out the entirety of the reply on the fact that the plaintiff had simply referred to his answers to the interrogatories without pleading the substance of those answers in the reply itself. Another defect in the reply was the plaintiff's inclusion of evidence and legal argument in reply, since these were not the proper subject of pleading. I therefore find it difficult to read Hall VC's comment about the inclusion of additional claims in the reply as anything more than *obiter*.

74 Second, and more importantly, Hall VC's concern regarding the plaintiff's inclusion of additional claims in its reply was that the defendant would not have responded to those additional claims in the defence. But as Hall VC himself pointed out, that could be done by way of a rejoinder. I suggest that Hall VC was simply referring to the uncontroversial principle that a party faced with a claim (or counterclaim) against it must be given the opportunity to state his defence to it. Just as a defendant should be given the chance to address a plaintiff's claims, and a plaintiff the chance to answer a defendant's counterclaims, so should a defendant be given the chance to do so in respect of a plaintiff's further claims. I therefore do not take *Williamson* to be authority for the proposition that a plaintiff may not advance a new or additional claim or counterclaim in its reply, *if the defendant is then afforded a chance to respond to the claim or counterclaim by way of a rejoinder*. Insofar as the commentary

in *Singapore Civil Procedure* tends to suggest otherwise (see [33] above), I would respectfully disagree. That is so given the nature of Hall VC's reasoning, as well as the subsequent decisions of *Renton Gibbs*, *Toke v Andrews*, and *Lewis Falk*.

Relevant principles

75 I now attempt to draw out a number of principles from these cases. I accept that these cases do not offer a perfect analogue to the application before me; first, for the obvious reason that they concern the inclusion of counterclaims or additional claims in replies; and second, because *Renton Gibbs*, *Toke v Andrews* and *Lewis Falk* are cases in which the counterclaims in question were responses to the defendant's counterclaims. The application before me concerns the inclusion of a further counterclaim in a rejoinder, and the proposed counterclaim is not in response to any further claim or counterclaim advanced by the plaintiff in its Reply & Defence to Counterclaim. I take the view, however, that these cases nevertheless offer useful guidance on the circumstances in which further claims or counterclaims can be mounted in subsequent pleadings, and distil from them the following principles relevant to the application before me:

(a) The ordinary rule is that the defendant should seek to amend his defence (or defence and counterclaim) to include the new or additional counterclaim, rather than bring the counterclaim by way of a rejoinder.

(b) However, an exception to the rule may be granted where, on looking at the nature of the new or additional counterclaim that the defendant wishes to set up, the court is satisfied of the following:

(i) First, the cause of action appears to be one that cannot be added to the defence and counterclaim without inflicting

hardship and injustice on the defendant. An example is where, if the defendant were required to set up the new or additional cause of action by amending its defence and counterclaim, the defendant would be embarrassed because the cause of action is inconsistent with and hampers its real cause of action as reflected in the defence and counterclaim (see *Renton Gibbs*).

(ii) Second, it would be an injustice not to allow the defendant to set up the cause of action within the present action at all. Put another way, it would be inequitable to allow the plaintiff to have the benefit of its claims altogether free from the defendant's new or additional cause of action. This may be the case where, for instance, the cause of action involves cross-rights arising from the very same contract and at the very same time as the plaintiff's claims (see *Toke v Andrews*).

(iii) Third, a rejoinder is the only stage at which the defendant might practicably have advanced the cause of action. A defendant would not have been in a position to bring the cause of action earlier where, for instance, the elements of the cause of action crystallised only after the defence (or defence and counterclaim) was served (see *Toke v Andrews*).

(c) If the defendant is granted leave to serve a new or additional counterclaim through a rejoinder, the plaintiff should be given an opportunity to provide a defence to the new or additional counterclaim so as to avoid the possibility of embarrassment (see *Williamson*).

76 I should emphasise that the granting of leave to include a new or additional counterclaim in a rejoinder is exceptional procedure, especially in

light of O 15 r 2(1) which ordinarily requires a defendant to add a counterclaim to his defence. The court will not do so unless (as is reflected in the factors described above) justice requires that the defendant be given the opportunity to mount the counterclaim by a rejoinder. The exception is warranted only on the basis that procedure is ultimately the handmaiden of justice, not its master (see [55] above; and *SIC College* at [46]), and the court is not bound to adopt an overly formalistic and inflexibly rule-bound approach to procedure, and in particular to pleadings (*Sun Electric* at [32]; and *V Nithia* at [39]).

Application to the facts

77 I now apply these principles to the application before me, beginning with the UCTA Pleading. The plaintiff did not object to the defendant setting up the UCTA Pleading by way of a rejoinder and accepted that it was necessary for the defendant to specifically plead these matters in light of O 18 r 8 of the Rules of Court (see [32] above). I agreed with the parties. The UCTA Pleading was plainly not a mere repetition or amplification of matters pleaded in the Defence & Counterclaim. The defendant could not practicably have raised the UCTA Pleading in the Defence & Counterclaim, nor would the defendant have had any reason to do so given that cll 2A, 15.1 and 20.1 were only surfaced by the plaintiff in the Reply & Defence to Counterclaim. There was no indication before that that these clauses formed any part of the parties' cases. For this reason, I also found that the arguments in the pleadings would only flow logically if the UCTA Pleading were set up in the Rejoinder, as a counterpoint to the plaintiff's argument that the clauses relieved the plaintiff of any obligation to carry out the defendant's instructions without giving notice or reasons. Indeed, requiring the defendant to amend her Defence & Counterclaim, which preceded the making of that argument, would have involved the defendant anticipating the plaintiff's reliance on those clauses.

78 I also agreed that unless the UCTA Pleading were expressly set out in a pleading, the plaintiff would likely be taken by surprise within the meaning of O 18 r 8(1)(*b*). I recall the recent decision of Choo Han Teck J in *Tian Kong Buddhist Temple v Tuan Kong Beo (Teochew) Temple* [2020] SGHC 273, where Choo J held at [10] that athough parties should not plead legal principles at length as this tends to obscure matters to which the court must direct its attention, it is nevertheless crucial that "if a party intends to raise a particular point of law on the facts as pleaded, he ought … to plead such a point expressly or, at the very least, give the opponent fair notice of the substance of his claim through his pleadings… That is part of the purpose underlying the law of pleadings, namely, to prevent surprises at trial…". In that case, Choo J found that the respondent's failure to plead facts supporting the doctrine of ostensible authority led the appellant to suffer irreparable prejudice in the course of the trial. Given that the prevention of surprises at trial is the court's overriding consideration with respect to pleadings (see [55]–[56] above), I found that the circumstances justified granting the defendant leave to serve the Rejoinder to set out the UCTA Pleading.

79 I turn to the CPFTA Pleading. To begin, I was satisfied that the CPFTA Pleading came within the scope of O 18 r 8(1)(*b*), similar to the UCTA Pleading. I did not in fact understand the plaintiff to have disagreed that the CPFTA Pleading was a matter that was liable to take the plaintiff by surprise if left unpleaded, the plaintiff's sole contention being that counterclaims cannot be introduced in rejoinders (see [33] above). For similar reasons as regards the UCTA Pleading, I found that the CPFTA Pleading was not a mere repetition or amplification of matters earlier pleaded by the defendant, and that it would be inappropriate and impracticable for the defendant to either have advanced the CPFTA Pleading within the Defence & Counterclaim, or now amend her Defence & Counterclaim to incorporate the CPFTA Pleading. Simply put, these

clauses were not in issue until the Reply & Defence to Counterclaim, and requiring the defendant to set out the CPFTA Pleading before that would be wholly premature and have involved her anticipating the plaintiff's argument.

80 I was also satisfied that although the CPFTA Pleading contained an additional counterclaim, the circumstances justified an exception to the rule that such counterclaims should ordinarily be brought by way of an amendment to the defence and counterclaim. In reaching this conclusion, I had regard to the nature of the intended counterclaim (see [75(b)] above). The defendant's argument was that the cause of action under the CPFTA did not arise until the plaintiff "relie[d] on [cll 2A and 20.1] to negate its duty to comply with the Defendant's instructions without informing the Defendant".[39] Before me, counsel explained that the defendant's position was that the plaintiff's *pleading* of cll 2A and 20.1 in the Reply & Defence to Counterclaim constituted the said reliance on cll 2A and 20.1, and was thus itself a material fact underpinning the intended cause of action. This meant that the cause of action not only crystallised after, but indeed *as a result of*, the Reply & Defence to Counterclaim.

81 I therefore found that the CPFTA counterclaim could not be added to the Defence & Counterclaim by amendment without inflicting hardship and injustice on the defendant, who would be embarrassed in so doing because the cause of action would not have arisen at that stage of pleading. I also accepted that it would be an injustice not to allow the defendant to set up the cause of action within these proceedings (as opposed to a fresh action), given the relevance and proximity of the intended cause of action to the plaintiff's reliance

---

[39] Draft Rejoinder at para 6(iii).

on cll 2A and 20.1 in its Reply & Defence to Counterclaim. The matters arose from the same factual foundations and any bifurcation of their determination would not only be inconvenient and wasteful but also risk inconsistent findings on whether the plaintiff might properly rely on those clauses. Finally, I accepted that the service of a rejoinder was the only stage at which the defendant might feasibly or practicably have brought the counterclaim. In analogy to *Toke v Andrews*, the cause of action crystallised only after the Reply & Defence to Counterclaim had been served (and going by the defendant's case, was in fact a direct result of what had been pleaded there).

82 For avoidance of doubt, I should highlight that this analysis did not require me to take any view on the *merits* of the intended cause of action (including the question of whether a party's pleadings might constitute a material fact supporting a cause of action). In the circumstances, I was satisfied that the defendant should be granted leave to set up the CPFTA Pleading in the Rejoinder. I further permitted the plaintiff to serve a surrejoinder to set out its defence to the additional counterclaim, so as to prevent any risk of its embarrassment in not having had the opportunity to do so (see [75(c)] above).

83 I did not grant the defendant leave to include the Miscellaneous Pleadings in the Rejoinder. The defendant's argument was simply that since "the Plaintiff has already acknowledged that [the Rejoinder] would need to be filed in any event for the Defendant's pleading of the UCTA", no real harm would come to the plaintiff if leave for the Miscellaneous Pleadings – which were "merely pleaded as part and parcel of [the Rejoinder]" – were also granted.[40] I did not accept this argument. I found that the Miscellaneous

---

40 Defendant's submissions at para 18.

Pleadings were nothing more than subsequent responses to other matters set out in the Reply & Defence to Counterclaim, and did not meet the requirements for leave set out at [57] above. In particular, the policy of ensuring finality in the pleading process militated against the granting of leave to plead them.

Conclusion

84 For the above reasons, I granted the defendant leave to serve the Rejoinder in order to set out the UCTA and CPFTA Pleadings, but not the Miscellaneous Pleadings. I also granted the plaintiff leave to serve a surrejoinder to provide its defence to the additional counterclaim in the CPFTA Pleading.

Elton Tan Xue Yang
Assistant Registrar

Ho Seng Giap (He Chengye) and Adly Rizal Bin Said (Tito Isaac & Co LLP) for the plaintiff;
Tan Kia Hua (Chen Jiahua) (WongPartnership LLP) for the defendant.