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

[2024] SGHC 20

Registrar's Appeal No 272 of 2023

Between

Progress ABMS Pte Ltd

… *Appellant*

And

Progress Welded Mesh Sdn Bhd

… *Respondent*

In the matter of Originating Claim No 456 of 2023

Between

Progress Welded Mesh Sdn Bhd

… *Claimant*

And

Progress ABMS Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Summary judgment — Whether defendant had a real or *bona fide* defence to the claimant's claim]
[Civil Procedure — Summary judgment — Effect of counterclaim — Whether a stay of execution of the summary judgment should be granted pending the trial of the counterclaim]
[Debt and Recovery — Right of set-off]
[Contract — Formation — Whether there was an oral contract]
[Tort — Conspiracy — Conspiracy by unlawful means]

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v
Progress Welded Mesh Sdn Bhd

[2024] SGHC 20

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24 January 2024

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Hri Kumar Nair J:

Introduction

1 Progress Welded Mesh Sdn Bhd (the "Claimant") brought this action against Progress ABMS Pte Ltd (the "Defendant") claiming $476,463.16 for the sale and delivery of construction materials.

2 After adjusting for part-payment and computational errors, the learned Assistant Registrar (the "AR") allowed the Claimant's application for summary judgment (HC/SUM 2888/2023) in the sum of $429,775.72, and declined the Defendant's application for a stay of execution pending the trial of its counterclaim. The Defendant brought the present appeal against the whole of the AR's decision. I dismissed the Defendant's appeal and now issue my full grounds of decision.

Brief facts

3 The Claimant is a company incorporated in Malaysia and is in the business of supplying construction-related materials.[1] From November 2019 to April 2023, the Claimant supplied materials to the Defendant.[2]

4 The Claimant alleges that the Defendant started falling behind in the payments of its invoices.[3] This persisted until 3 April 2023, when the last invoice was issued, and the Claimant stopped supplying materials to the Defendant.[4] The Claimant brought this claim for unpaid invoices issued between 2 February 2023 to 3 April 2023 (the "Invoices"), which total a sum of $476,463.16.

5 The Defendant pleads that it does not admit that the Claimant sold and delivered the materials reflected in the Invoices or owing the sum claimed.[5]

6 The Defendant counterclaims for:

(a) the sum of $155,557.48 – representing the loss it suffered from the Claimant's unilateral termination of an alleged oral distributorship agreement with the Defendant (the "Distributorship Agreement") ("1st Counterclaim");[6] and

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1 Tan Kean Heong's Affidavit, dated 21 September 2023 ("Tan's 1st Affidavit") at para 3.

2 Tan's 1st Affidavit at para 3.

3 Tan's 1st Affidavit at para 8.

4 Tan's 1st Affidavit at para 8.

5 Defence and Counterclaim (Amendment No. 1), dated 21 September 2023 ("D&CC(1)") at para 13.

6 D&CC(1) at para 39(a).

(b) loss of revenue and sales in the amount of at least $34,353.28, resulting from an alleged unlawful conspiracy between the Claimant and others, and/or for damages to be assessed ("2nd Counterclaim").[7]

The applicable law

7 The principles governing summary judgments are well established. In this regard, the decisions which guided summary judgment provisions under O. 14 of the Rules of Court (2014 RevEd) ("ROC 2014"), continue to apply in respect of applications under O. 9 r. 17 of the Rules of Court 2021 ("ROC 2021"): *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [58].

8 For present purposes, the relevant principles may be briefly stated as follows:

(a) to obtain summary judgment, a claimant must first show that he has a *prima facie* case for his claim(s): *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 ("*Ritzland Investment*") at [43];

(b) once the claimant establishes a *prima facie* case, the tactical burden shifts to the defendant who must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence: *Ritzland Investment* at [44]. Here, the defendant need only show that there is a triable issue or question or that for some other reason, there ought to be a trial: *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B*") at [19]; and

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7 D&CC(1) at para 39(aa)-(c).

(c) in demonstrating that there are triable issues, the defendant cannot simply rely on a bare assertion. The judge has a duty to reject assertions which are equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in themselves: *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, cited with approval in *M2B* at [19].

9 Insofar as counterclaims are concerned, both parties have relied on the four-step framework set out in *Kim Seng Orchid Pte Ltd v Lim Kah Hin* [2018] 3 SLR 34 ("*Kim Seng Orchid*") at [98] on the approach to be taken when determining whether summary judgment ought to be given where there is a subsisting counterclaim.

Issues to be determined

10 Having regard to the legal principles above, the key issues in this case are:

(a) whether the Claimant has established a *prima facie* case in respect of its claim on the Invoices and whether the Defendant has established that there is a fair or reasonable probability that it has a real or *bona fide* defence;

(b) whether the Defendant's counterclaims are plausible;

(c) if the Defendant's counterclaims are plausible, whether they amount to a defence of set-off such as to entitle the Defendant to unconditional leave to defend; and

(d) if the Defendant's counterclaims are plausible, whether they warrant a stay of execution of any summary judgment.

11 In summary, I found that:

(a) the Claimant has established a *prima facie* case and the Defendant has failed to establish a fair or reasonable probability of a real or *bona fide* defence;

(b) the 1st Counterclaim was clearly not plausible;

(c) the 2nd Counterclaim was speculative. Nonetheless, even if plausible, it did not amount to a defence of set-off; and

(d) the circumstances did not warrant granting a stay of execution pending the trial of the counterclaims.

Issue 1: whether the Claimant has established a *prima facie* case or the Defendant has a real or *bona fide* defence

12 I found that the Claimant has established a *prima facie* case. It has produced the relevant purchase orders ("POs") and delivery orders ("DOs") supporting the Invoices, and has given evidence that the materials were delivered.

13 In contrast, the Defendant has adduced no evidence to refute the Claimant's position, and its contentions to the contrary were not credible.

14 First, the Defendant must know whether it had bought and received the materials reflected in the Invoices. However, the Defendant did not plead any fact or denial but only that it does not admit the claim and puts the Claimant to

strict proof.[8] No explanation was offered as to why the Defendant is unable to take a positive position on the claim.

15 Second, in the affidavit filed by its director, Lim Yeow Sung, to oppose summary judgment ("Lim's Affidavit"), the Defendant took issue with the Invoices in several respects:

(a) the Claimant did not list in its Statement of Claim ("SOC") *other* invoices which it had issued to the Defendant in January 2023;[9]

(b) the Claimant did not list payments which the Defendant had made to the Claimant, or various offsets made by the Claimant of amounts allegedly due by the Defendant to the Claimant;[10]

(c) there is a discrepancy between the amount claimed and what is stated to be owing to the Claimant in the Defendant's own books;[11] and

(d) there were 17 DOs that were not signed and acknowledged by the Defendant, and the Claimant ought to be put to strict proof of the delivery of the materials listed therein.[12]

16 However, these allegations were not pleaded. The Defendant attempts to downplay this on the basis that the SOC was bereft of details.[13] Specifically, the Defendant argues that the Claimant's failure to refer explicitly to the POs

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8 D&CC(1) at para 13.

9 Lim Yeow Sung's Affidavit, dated 5 October 2023 ("Lim's Affidavit") at para 11(a).

10 Lim's Affidavit at para 11(b).

11 Lim's Affidavit at para 12.

12 Lim's Affidavit at para 15.

13 Defendant's Submissions at para 19.

and DOs in its SOC "denied the Defendant the opportunity to scrutinise and importantly plead their position in their Defence and Counterclaim".[14]

17 This is not a satisfactory reason. The Claimant had identified the Invoices in the SOC, and the relevant POs and DOs were identified within each invoice. Further, given the substantial value of the claim, and the fact that Invoices were issued recently from 2 February 2023 to 3 April 2023, it is difficult to believe that the Defendant did not have sufficient details to plead a defence. The Defendant's position is especially contrived given that it did not deny signing 48 of the DOs, which detail materials amounting to a sum of $377,678.79. It must surely have been aware of the materials reflected in the signed DOs, but nonetheless did not take any position with respect to the same.

18 Third, and in any event, the matters set out in Lim's Affidavit (at [15] above) did not afford any *bona fide* defence to the Defendant.

(a) The Invoices are those which the Claimant maintains are unpaid. It is the Claimant's position that the other invoices identified by the Defendant have been paid. They are therefore irrelevant to the claim.

(b) Similarly, the payments made by the Defendant for other invoices are irrelevant to the Claimant's claim. It is not the Defendant's case that it had paid any of the Invoices.

(c) Third, as regards the discrepancies between the amount claimed (*viz.* $446,463.16), and the amount computed by the Defendant's accountant (*viz.* $428,825.32), I accepted the learned AR's finding below that:

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[14] Defendant's Submissions at para 19(a).

(i) there was an error in Invoice IV0323-051[15] dated 15 March 2023, resulting in the Claimant's overcharging $16,687.44; and

(ii) the Defendant's claim for a "contra" in the sum of $950.44 is without any basis.

At the hearing, Counsel for the Defendant did not argue that these findings were wrong. This brings the Claimant's claim down to $429,775.72 – which is the amount the Claimant sought and obtained judgment for.

19 Fourth, and with respect to [15(c) and (d)] above, the assertions that the goods were not delivered, and no monies are owed, are contradicted by the Creditor Statement[16] – a document prepared by *the Defendant's* accountant. In this statement, all the Invoices are recorded, implicitly acknowledging the delivery of the materials and the amount owed. In fact, the Creditor Statement was prepared or updated as of 30 September 2023, which is *after* this action was brought and the Defence filed. No explanation was given to explain how the entries in the Creditor Statement are consistent with the Defendant's position and there is no suggestion that it was prepared in error. The Creditor Statement, and the lack of explanation for it, is a clear admission of the claim.

20 Fifth, the Defendant made part-payment of $30,000 to the Claimant on 1 August 2023, *after* the Claimant initiated court proceedings against the

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15 Tan's 1st Affidavit at p 175.

16 Lim's Affidavit at Tab A.

Defendant.[17] The Defendant pleads that this was "an act of goodwill",[18] which did not make any sense. If no goods were delivered and nothing was owed, why was there a need to make any payment at all? In Lim's Affidavit, the Defendant changed tack and claimed that the payment was made following "without prejudice" negotiations, but there is no evidence to support this. The discussions and the payment were not qualified in any way. I therefore found that the payment of $30,000 contradicts the Defendant's case and diminishes the *bona fides* of its defence.

21 Finally, the Defendant's Counsel conceded at the hearing that there was only a *bona fide* defence with respect to the unsigned DOs[19] exhibited to the Claimant's affidavit. These unsigned DOs amount to goods valued at $98,784.37, and the Defendant's Counsel urged me to grant leave to defend for this sum. But in addition to the reasons given above, the Defendant's allegation of non-delivery is inherently improbable. The value of the allegedly undelivered goods is no small sum. The Invoices were issued as recently as February 2023, with the latest one issued on 3 April 2023. If the goods identified in the unsigned DOs were not delivered, the Defendant's staff would surely have been aware of this. In any event, it should not have taken the Defendant until 5 October 2023 (when it filed Lim's affidavit) to realise that the goods (or some of them) were not delivered. That this defence was raised belatedly suggested that it is an attempt by the Defendant to opportunistically capitalise on the fact that some of the DOs were unsigned.

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17 D&CC(1) at para 14; Tan's 1st Affidavit at para 14.

18 D&CC(1) at para 14; Lim's Affidavit at para 21.

19 Tan's 1st Affidavit at pp 9-182.

22 In the circumstances, I found that the Defendant has failed to establish a fair or reasonable probability that it has a real or *bona fide* defence.

Issue 2: whether the Defendant's counterclaims are plausible

23 The threshold requirement to rely on counterclaims to resist a summary judgment, is that the counterclaims must be plausible: *Kim Seng Orchid* ([8] *supra*) at [98(a)]. If the counterclaims are not even plausible, they should not stand in the way of the claimant obtaining summary judgment of its claim, without any stay of execution pending the determination of the counterclaim: *ibid*. In a similar context, the Court of Appeal in *P H Grace Pte Ltd v American Express International Banking Corp* [1986] SGCA 13 stated (at [6]) that "[t]he approach, therefore, is to determine, first, whether it is 'not unreasonably possible' for the counterclaim of the first defendant to succeed if brought to trial".

The 1st Counterclaim was not plausible

24 The Defendant has failed to establish a plausible case for a breach of the Distributorship Agreement because it cannot even establish its existence. Its pleadings and evidence had noticeable gaps in the fundamental requirements for an oral contract, namely:

(a) when the Distributorship Agreement was concluded;

(b) who had concluded the Distributorship Agreement on behalf of the parties; and

(c) the terms of the Distributorship Agreement.

When the Distributorship Agreement was concluded

25 In its Defence and Counterclaim, the Defendant makes the bare assertion that the Defendant was the Claimant's main distributor in Singapore from November 2019 to April 2023.[20] The Defendant did not specify a date when the Distributorship Agreement was entered into, but pleads that it changed its name to its current one on 25 October 2019 to reflect its connection with the Claimant.[21] I noted that this is contradicted at paragraph 37 of the Defence and Counterclaim where it is pleaded that the Distributorship Agreement was entered into "on or around October 2022",[22] which the Defendant's Counsel said was a typographical error. Even so, there is nothing in Lim's Affidavit that states when the Distributorship Agreement was entered. The failure to specify such a pivotal detail undermines its case.

Who agreed to the Distributorship Agreement

26 More importantly, nothing was pleaded, and there was no evidence, as to who entered into the Distributorship Agreement on behalf of the parties. The negotiation and conclusion of an oral agreement necessarily involve actions by natural persons acting on behalf of the parties. The Defendant, however, fails to identify these individuals. The Defendant relies on its pleading that "the Director of the Defendant, Lim Yeow Sung ("Christine") primarily communicated with Mr Lim Chin Keong who was the director and shareholder of Progress Galvanising Pte Ltd and Mr Tan Eng Chuen of CK Galvanising Sdn. Bhd".[23] But these are not particulars of the persons who entered the

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20 D&CC(1) at para 7(b).

21 D&CC(1) at para 7(c).

22 D&CC(1) at para 37.

23 D&CC(1) at para 7(d).

Distributorship Agreement on behalf of the parties. More significantly, Lim's Affidavit does not say she entered the Distributorship Agreement on the Defendant's behalf or that she was involved in it in any way.

Terms of the Distributorship Agreement

27 Finally, it was not pleaded or in evidence what the terms of the Distributorship Agreement are. The Defendant argues that because the agreement was verbal, it is "unable to plead with specificity the terms of the said agreement"[24], and that it should be given the opportunity to secure the evidence of those controlling the Claimants at the material time to support its case on the existence of the Distributorship Agreement.[25]

28 This argument is hopelessly flawed. If the Distributorship Agreement existed, then *the Defendant's* officers must also know its terms. The fact that the Defendant was unable to specify what the terms of the Distributorship Agreement are, strongly suggests that it never existed.

29 Importantly, the 1st Counterclaim is for a breach of the Distributorship Agreement on account of the Claimant terminating the same. However, unless the Defendant pleads its terms, in particular the terms relating to termination, there is no basis for asserting any breach.

30 Finally, there was no evidence to support how or why the Defendant arrived at the sum of $155,558.48 as its losses stemming from the Claimant's purported breach of the Distributorship Agreement. All the Defendant provides is a bare assertion that it has suffered "[l]oss in revenue in the average amount

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24 Defendant's Written Submissions at para 24(c)(i).

25 Defendant's Written Submissions at para 26.

of $155,558.48 for replacing the Defendant with PWM Steel as its main supplier in April 2023".[26]

31 The 1st Counterclaim was therefore clearly implausible, and I disregarded the same.

The 2nd Counterclaim was speculative

32 The Defendant's 2nd Counterclaim is for unlawful conspiracy between the Claimant and other parties including EC Excel Wire Sdn Bhd ("EC Excel"), Daniel Sim ("Sim"), Ng Heng Hong ("Ng") and/or PWM Steel Pte Ltd ("PWM"). The Defendant pleads[27] (and the Claimant did not challenge)[28] that Ng is the sole shareholder of EC Exel, which is in turn the sole shareholder of the Claimant – in other words, Ng effectively owns the Claimant.

33 The Defendant alleges that its former sales manager, Sim, had conspired with the other parties to facilitate the diversion of the Defendant's customers to PWM. Amongst other things, the Defendant adduced evidence of the following:

(a) Sim was the Defendant's Sales Manager from 1 December 2019,[29] until he resigned on 15 March 2023.[30]

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26 D&CC(1) at para 36(a).

27 D&CC(1) at para 11.

28 Defence to Counterclaim, dated 5 October 2023 ("Defence to Counterclaim") at para 12(b).

29 Lim's Affidavit at p 35.

30 Lim's Affidavit at para 22(b)(i)(8); and D&CC(1) at para 22.

(b) Sim incorporated PWM on 3 March 2023 (while he was still employed by the Defendant),[31] and was named its sole shareholder and director.[32]

(c) Emails and messages were sent by Sim throughout March 2023, some of which while he was still in the Defendant's employ. In these communications, Sim attempted to divert business from the Defendant's customers to PWM.[33] For instance, in an email sent by Sim to Ssangyong-Wai Fong Joint Venture on 15 March 2023, he says:[34]

> Our Malaysia factory Progress welded mesh sdn bhd had appointed PWM Steel Pte Ltd to supply construction materials in Singapore.
>
> Future enquiry for steel welded mesh, Re-inforcement bars, Security fencing, PVC chain link, please email us at [xxx] or contact me at [xxx].

(d) Sim downloaded the Defendant's confidential information (including its customer list)[35] and forwarded them to his personal and corporate email account with PWM.[36] Sim subsequently deleted 37GB worth of such confidential information from his email account with the Defendant.[37]

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31 Lim's Affidavit at pp 30-34.

32 D&CC(1) at para 10(b).

33 D&CC(1) at para 25; and Lim's Affidavit at Tab F.

34 Lim's Affidavit at p 72.

35 D&CC(1) at para 25(c); and Lim's Affidavit at p 45.

36 D&CC(1) at para 25(d); and Lim's Affidavit at p 49.

37 D&CC(1) at para 25(a); and Lim's Affidavit at p 46.

(e) Not long after Sim resigned from the Defendant, and on or around 6 April 2023, Ng became a 60% shareholder in PWM.[38]

34 Sim is not a party to this action and did not file an affidavit. Nonetheless, the evidence raises questions as to Sim's conduct and whether PWM had improperly benefited from the same. Given the chronology of events, including that Ng became the majority shareholder of PWM in early April 2023 shortly after Sim resigned from the Defendant, it is not unreasonable to infer that Ng had planned with Sim to establish PWM while Sim was still employed by the Defendant, with the intention that Ng would become its main shareholder and establish PWM's relationship with the Claimant. However, there are several hurdles the Defendant must overcome.

35 First, there is no evidence that Ng was, or ought to have been, aware of Sim's (alleged) improper conduct or was a party to the same. The evidence of Ng's involvement was scant, and even less so for the Claimant. The only basis the Defendant had for implicating the Claimant was the allegation that the Claimant, PWM and EC Excel were all "alter egos" of Ng.[39] But the only basis for this was Ng's ownership of EC Excel (and therefore the Claimant)[40] and his majority shareholding in PWM.[41] I note that Ng is only *one* of the Claimant's directors,[42] and as regards PWM, Ng has a 60% shareholding,[43] and is not even

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38 D&CC(1) at para 10(c).

39 D&CC(1) at para 11.

40 D&CC(1) at para 11; and Defence to Counterclaim at para 12(b).

41 D&CC(1) at para 11; Lim's Affidavit at p 31.

42 Lim's Affidavit at p 25.

43 Lim's Affidavit at p 31.

a director there.[44] Nonetheless, I note that while the Claimant pleads that Ng was not aware of Sim's conduct,[45] Ng did not file any affidavit although he is the (effective) owner and a director of the Claimant. I also accept that the Defendant may not possess relevant materials (if any) in respect of the conspiracy (if any), and would likely require discovery from other parties to establish its claim. This leads to the next point.

36 Second, for reasons not properly explained, the Claimant has not joined the parties who it claims are the chief perpetrators of the conspiracy – namely, Sim, Ng and PWM – in this action. I accept that not all parties to a conspiracy need to be joined (see, for example, *Beyonics Asia Pacific Ltd and others v Goh Chan Peng* [2022] 1 SLR 1; and *Yap Chwee Khim v American Home Assurance Co* [2001] 1 SLR(R) 638). However, the Defendant's failure to join them is unusual given that the evidence (if any) of the alleged conspiracy is likely to be in their possession (and in the case of Sim and PWM, in Singapore) and PWM would be the direct beneficiary of the conspiracy. Further, insofar as the Defendant's business or customers have been or are being diverted to PWM, PWM would be the party to give an account with respect to the loss (if any) suffered by the Defendant. Instead, the Defendant chose to bring the conspiracy claim only against the Claimant, although it is out of jurisdiction and played no apparent (active) role in Sim's (alleged) misconduct. This raises questions as to whether the claim in conspiracy is a serious one or advanced mainly (or entirely) to delay judgment.

37 To reinforce my concern above, it was only disclosed at the hearing that the Defendant had already commenced action as early as May 2023 in the

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44 Lim's Affidavit at p 31.

45 Defence to Counterclaim at para 24.

District Court (DC/OC 743/2023) for damages in respect of Sim's (alleged) misconduct, but named only Sim and PWM as defendants. The Defendant's counsel's submission that it intends to consolidate both actions does not address the point as Ng and the Claimant are not parties in either action. I also note that pleadings in DC/OC 743/2023 closed in July 2023, but the matter has not progressed since.

38 In the circumstances, I entertained serious doubts about the viability of the 2nd Counterclaim (as against the Claimant). In any event, given the lack of evidence *vis-à-vis* the Claimant, it remains speculative. However, even if the 2nd Counterclaim is plausible, it ultimately makes no difference to the outcome of this appeal, for the reasons given below.

Issue 3: whether the Defendant's 2nd Counterclaim amounts to a defence of set-off

The 2nd Counterclaim did not amount to a legal set-off

39 It is trite that the defence of legal set-off requires the counterclaims to be for a *liquidated* amount: *Re Ocean Tankers (Pte) Ltd (in liquidation)* [2023] SGHC 330 at [85]. This is clearly not the case for the 2nd Counterclaim, which is a claim for unliquidated damages arising from the Claimant's alleged unlawful means conspiracy.

The 2nd Counterclaim did not amount to an equitable set-off

40 In determining whether a counterclaim amounts to an equitable set-off, it need not be the case that the claim and crossclaim arise out of the same contract: *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [49], citing *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*")

with approval. However, equitable set-off is available only where "a sufficient degree of closeness is established in the connection between the respective claims", and where "the respective claims are so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other": *Abdul Salam* at [28].

41 I found no sufficient connection between the Claimant's claim and the 2nd Counterclaim. They do not even arise out of the same subject matter. The Claimant's claim is for goods sold and delivered between the period of 1 February 2023 to 3 April 2023, and has nothing to do with the allegations underpinning the conspiracy claim, which relates to Sim's breach of duties, the misuse of the Defendant's confidential information and the loss of the Defendant's *future* business. The Defendant argues that the alleged conspiracy resulted in the Defendant's cash flow being affected which impacted its ability to pay the Claimant – an assertion for which no evidence was led – but this does not connect it to the Claimant's claim in the slightest.

42 In the premises, I was satisfied that the 2nd Counterclaim did not amount to a defence of set-off. Consequently, the Defendant has failed to establish a fair probability of a *bona fide* defence which would justify granting it leave to defend the Claimant's claim. The Claimant should not be put to the expense and inconvenience of proving its claim at trial.

Issue 4: whether the 2nd counterclaim warrants a stay of execution

43 Nevertheless, if the counterclaim is sufficiently plausible and connected to the claimant's claim, the court may exercise its discretion to stay the execution of the summary judgment until the counterclaim is tried and resolved: *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003]

2 SLR(R) 170 ("Cheng Poh") at [11]; *Kim Seng Orchid* at [98]. Logically, the degree of connectedness required here would be lower than that required to establish the defence of equitable set-off.

44 In determining if the main claims and counterclaims are sufficiently connected such as to warrant a stay, the courts will first consider if they arise out of the same transaction: *Cheng Poh* at [11]. Where the claims and counterclaims arise out of the same transaction, the correct order to make would be that while judgment should be entered in respect of the claims, it should be stayed pending trial of the counterclaims: *ibid*. But where a counterclaim does not arise out of the same transaction or is not connected with the transaction, then special circumstances must be shown for there to be a stay of execution: *Cheng Poh* at [18].

45 As explained above (at [41]), the Claimant's claim and the 2nd Counterclaim do not arise out of the same transaction. Therefore, the onus is on the Defendant to show "special circumstances" justifying a stay of execution. Some of the considerations the court may have regard to include the degree of connection between the claim and counterclaim, the strength and quantum of the counterclaim and the ability of the plaintiff to satisfy any judgment on the counterclaim: *Kim Seng Orchid* at [98(d)]. Ultimately, the question is whether granting a stay would be in the interests of justice.

46 In this regard, the Defendant relied on the following arguments in support of a stay:

(a) It is the Claimant's conspiracy which resulted in the Defendant's inability to make payments for the Invoices. The alleged loss suffered

by the Defendant affected its cash flow and impacted the Defendant's ability to pay the Claimant.[46]

(b) If the Defendant succeeds in the 2nd Counterclaim, "the Defendant will not have to pay the full sum of $429,775.72 claimed by the Claimant".[47]

(c) Because "Ng, the Claimant's Director entered a conspiracy with Sim to set up PWM to cause loss and damage to the Defendant, the veil of incorporation can be lifted against the Claimant and Ng [will] be made to bear the loss and damage suffered by the Defendant".[48]

(d) The Claimant is a foreign company and if the Defendant pays the sum claimed now but succeeds in its counterclaims, the Defendant must bring an action in a foreign jurisdiction to enforce the judgment.[49]

47 In my judgment, these did not sufficiently establish special circumstances to justify granting a stay of execution, or that a stay should be granted in the interests of justice.

(a) For the reasons at [32]–[38] above, I found the 2nd Counterclaim speculative. Further, the Defendant has failed to adduce any evidence of loss, save for the sum of $34,353.28. This is trivial compared to the value of the claim.

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46 Defendant's Written Submissions at para 30.

47 Defendant's Written Submissions at para 32(a).

48 Defendant's Written Submissions at para 32(b).

49 Defendant's Written Submissions at para 32(c).

(b) The Defendant has not led any evidence to support the assertion that the alleged conspiracy had affected its cash flow.[50] Further, and in any event, the timeline suggests that any losses caused by the conspiracy were not the reason for the Defendant's failure to pay the Invoices. Sim only incorporated PWM on 3 March 2023,[51] and left the Defendant on 15 March 2023.[52] Any losses stemming from the conspiracy would therefore only have materialised well after March 2023. It should not have affected the Defendant's ability to pay the Invoices – the majority of which were issued in January and February of 2023.[53]

(c) The argument at [46(b)] is a non-starter as it applies to all counterclaims. There is nothing "special" about having to pay the judgment sum as it falls due.

(d) The argument at [46(c)] relates to why the Claimant should be held responsible for the loss and damage suffered by the Defendant. It also assumes that the Defendant will succeed in its conspiracy claim. This has little to do with why a stay of execution is warranted in this case.

(e) While the argument at [46(d)] raised a practical concern for the Defendant, it did not, in my view, amount to "special circumstances". Cross-border enforcements are not uncommon. Further, the enforcement of Singapore money judgments in Malaysia is relatively straight-forward given the existing reciprocal enforcement arrangements:

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50 Defendant's Written Submissions at para 30.

51 D&CC(1) at para 24(a); and Lim's Affidavit at pp 30-34.

52 Lim's Affidavit at para 22(b)(i)(8); and D&CC(1) at para 22.

53 SOC at para 5.

Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) (No 99 of 1958) (M'sia); see also *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] 1 SLR(R) 112 at [33]. There is also no evidence of any risk that the Claimant will be unable to satisfy the judgment.

(f) Further, the Defendant has parties in Singapore it can claim the same loss from, namely PWM and Sim. For the Defendant to succeed in conspiracy against the Claimant, it must necessarily establish its claim against PWM and Sim. As stated above (at [37]), the Defendant commenced proceedings against them in May 2023.

Conclusion

48 I accordingly dismissed the appeal with costs. Summary judgment was affirmed for the sum of $429,755.72 against the Defendant, with no stay of execution.

Hri Kumar Nair
Judge of the High Court

M. Lukshumayeh (Lukshumayeh Law Corporation) (instructed), Shehzhadee binte Abdul Rahman (M/S Shehzhadee Law Corporation) for the appellant;
Nicholas Leow (Netto & Magin LLC) for the respondent.