IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1991] SGHC 173

Suit 1336/1990

Between

Hua Khian Ceramics Tiles Supplies Pte Ltd

… Plaintiff

And

Torie Construction Pte Ltd

… Defendant

GROUNDS OF DECISION

Civil Procedure — Summary judgment; Contract — Remedies — Damages

Version No 1: 11 Sep 2026 (01:05 hrs)

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Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd

[1991] SGHC 173

Suit 1336/1990
G P Selvam JC
30 November 1991

1 In 1989 the government embarked on a project to improve the promenade in the vicinage of the Padang. The project was managed for the government by the Public Works Department (`PWD`). The PWD awarded the contract for the construction works to the defendants, Torie Construction Pte Ltd (`the defendants`). The value of the contract was $3,090,700. The defendants were required to deposit $154,535 being 5% of the contract value as security for due performance of the contract, which they did by an insurer`s guarantee. The project called for the walkways to be laid with granite tiles imported from Spain. The contract stipulated completion of the works by 19 April 1990 and imposed liquidated damages for late completion at $800 per day.

2 The plaintiffs by an agreement evidenced by two letters undertook to supply the granite tiles to the defendants. The particulars of the tiles and the pricing were agreed as follows:

3 Description Qty/M2 Price/M2 Total amount

4 595 [times] 595 [times] 25mm 5,060 $129 $652,740

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5 295 [times] 295 [times] 25mm

6 514

7 $129

8 $ 66,306

9 300 [times] 300 [times] 75mm

10 226

11 $298

12 $ 67,348

13 720 [times] 245 [times] 20mm

14 381

15 $ 27

16 $ 10,287

17 $796,681

18 The effective delivery schedule extended from mid-December 1989 to mid-January 1990.

19 There was no term requiring the plaintiffs to pay liquidated damages for any delay in the supply of the granite tiles. There was also no express provision

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in the agreement requiring the plaintiffs to indemnify the defendants in respect of any claim from the PWD which the defendants might face.

20 **The claims**

21 The plaintiffs admittedly failed to adhere strictly to the delivery schedule. The defendants remonstrated against the delay. The plaintiffs blamed their supplier in Spain. In the event the defendants invoked a provision in the PWD contract and asked for an extension of the completion date. By a letter dated 19 May 1990 to the defendants the PWD extended the completion date of the project to 3 June 1990. In the letter the PWD stated that the extension of time was given for the supply and delivery of additional granite tiles.

22 On 4 June 1990 the defendants confirmed in writing to the PWD that the contract works had been completed on 3 June 1990. There is no question that the project was completed and handed over within the extended completion period.

23 The plaintiffs submitted invoices for the total amount of $657,290.97. The defendants paid $325,046.46 leaving a balance of $332,244.51 under six invoices. On 27 July 1990 the plaintiffs issued a writ claiming the balance amount and applied for summary judgment for that amount. The defendants did not deny that full deliveries were made as evidenced by the relevant delivery orders but resisted the application with cross-claims. On 12 November 1990 the registrar gave judgment for $126,234.99 and gave unconditional leave to defend for the balance amount of $206,009.52. The defendants thereafter filed a defence and counterclaim asserting various cross-claims. The plaintiffs appealed seeking judgment for the remaining $206,009.52. When the appeal

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came up for hearing before me on 12 March 1991, I allowed the appeal and gave judgment for the remaining amount with interest at 8%pa from 1 July 1990. I now give the grounds of my decision.

24 **The defence of set-off**

25 Order 18 r 17 of the Rules of the Supreme Court 1970 provides:

> *Defence of set-off*
>
> *Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff`s claim, whether or not it is also added as a counterclaim.*

26 The rule does not afford any guidance on the circumstances in which a defendant may set up a cross-claim as a defence. The law recognizes the following forms of set-off: (i) legal set-off, (ii) abatement, and (iii) equitable set-off. Each of these expressions is a term of art. Morris LJ in **Hanak v Green** [1958] 2 QB 9[1958] 2 All ER 141 at p 23 summed up the categories of set-off as follows:

> (a) a set-off of mutual debts;
>
> (b) in certain cases a setting-up of matters of complaint which, if established, reduce or even extinguish the claim; and
>
> (c) reliance upon equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition.

27 **Legal set-off**

28 Before 1728 a defendant who had a cross-claim or was entitled to any relief or remedy against his adversary had to bring a separate action to enforce

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his right. He could not match it against the adversary`s claim. The practice was changed by statute in 1728 with the creation of the legal set-off. Though called a legal set-off, it was truly a statutory relief beginning with the English Set-Off Statutes of 1728-1734. Under these and subsequent statutes, a defendant became entitled to set off a debt against a debt. It was in substance a merger or combining of the two debts to obtain the net result. Under various set-off statutes a cross-claim for a liquidated monetary claim could be used to diminish an adversary`s claim. It did not matter that the cross-claim was completely unrelated to the plaintiff`s claim provided it was a liquidated claim. If a cross-claim for liquidated amount is properly asserted as a legal set-off, the resulting benefit to the cross-claimant can be immense especially where the main claimant is in solvent situation: **Hongkong & Shanghai Banking Corp v Kloeckner & Co AG** [1990] 2 QB 514 In this case Hirst J gave the benefit of a legal set-off to a bank with a liquidated claim against an insolvent beneficiary of a letter of credit establishing by it against an amount the bank admittedly owed to the beneficiary. Hirst J citing **Agra and Masterman`s Bank Ltd v Leighton** [1866] 2 LR Exch 56 stated that it is a well-settled rule that a legal set-off in the nature of a liquidated claim is permissible even against a claim under a bill of exchange.

29 **Abatement**

30 In times before ***Basten v Butte*** **r** [1806] 103 ER 185 a defendant who had a cross-claim against the plaintiff for breach of warranty was not permitted to use it to abate his opponent`s claim. He had to satisfy the claim against him and bring a separate action to seek redress for the breach of warranty. In **Mondel v Steele** [1841] 151 ER 1288 at p 1293 Parke B stated the old rule in these words:

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> *... where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered.*

31 In **Templer v M`Lachlan** [1806] 127 ER 576 Chambre J stated the argument in support of the rule against abatement:

> *If such defence were let in, `it would be a constant source of surprise to parties, and the extent of the inquiry, into which courts would be led by it, would be endless. ... The only reason which could induce the courts to let in such a defence, would be the hope of preventing a multiplicity of actions. But in that view, if we entertained it, I think we should be deceived.*

32 Parke B after citing **Basten v Butter** [1806] 103 ER 185 and **King v Boston** [1789] 103 ER 186 said that a departure from the old rule had been made in sale of goods or work done cases and added:

> *... in all cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, not to set-off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.*

33 Thus was born of the doctrine of abatement. As regards sale of goods the defence was given statutory effect in s 53 of the English Sale of Goods Act 1873.

34 A restatement of the doctrine was given by Lord Morrison in ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Lt*** **d** [1974] 689 AC [1973] 3 All ER 195 at p 699:

> *... it has long been a general principle of law that if one man does work for another, the latter when sued, may defend himself by showing that the work was badly done and that the claim made in respect of it should be diminished. On the same principle the purchaser of an article sold with a warranty may, when sued for the price, say that there was a breach of warranty and he may set this up in order to diminish or even extinguish the price.*

35 The abatement defence is not available in claims for freight on voyage charters for carriage of goods by sea: **Shields v Davis** [1815] 128 ER 957 **Dakin v Oxley** [1864] 143 ER 938 **Chan Sew Nang v Sindo Pasir Pte Ltd** [1989] 1 MLJ 462 carriage by air: **International Co v IAS Air Services Co** [1984] 1 WLR 573 claims under bills of exchange: **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH** [1977] 1 WLR 713[1977] 2 All ER 463 claims under documentary letters of credit: **Power Curber International Ltd v National Bank of Kuwait SAK** [1981] 1 WLR 1233[1981] 3 All ER 607 **Hamzeh Malas & Sons v British Imex Industries** [1958] 2 QB 127[1958] 1 All ER 262 and claims under performance guarantees by banks: **Edward Owen Engineering Ltd v Barclays Bank International** [1978] 159 QB [1978] 1 All ER 976

36 **Equitable set-off**

37 In the same year Parke B enunciated the doctrine of abatement, Lord Cottenham affirmed a procedural equity termed as equitable set-off whereby the Court of Chancery would restrain by injunction an action in the Common Law Courts or an execution obtained therein whenever there was an equitable ground for doing so. The mere existence of cross-demands was not sufficient. The

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defendant must establish some equitable ground rendering it unfair to him to meet the plaintiff`s claim when the plaintiff himself had not been fair to the defendant. Equity will place the parties in an equal position: **Rawson v Samuel** [1841] 41 ER 451 and **Hanak v Green** [1958] 2 QB 9[1958] 2 All ER 141

38 After the Judicature Act 1873 and the rules of court made thereafter, it was no longer possible to obtain the injunction against the plaintiff. The defendant was entitled to raise his cross-claims as a defence in cases where such reliefs would have been granted before the passing of the Judicature Act. The relief of equitable set-off may be raised if a defendant`s cross-claim was so closely connected with the plaintiff`s claim and it raised an equity in the sense that they must be treated with equal fairness and justice. It therefore follows that where the claim is not closely connected with the plaintiff`s claim or if there is no equity (eg the defendant comes to the court with an iniquity) the defendant would not be permitted to raise the defence of equitable set-off.

39 In instances where abatement was not permitted as in ocean freight and bill of exchange cases, equity followed the law and equitable set-off afforded no defence. The cross-claim in such cases must be pleaded as a counterclaim without the benefit of a set-off or enforced by a separate action.

40 Since the English Judicature Acts 1873-5 and the merger of the courts in England, the remedy of equitable set-off formerly available in the Court of Chancery could be set up as a defence in an action at law. The counterclaim procedure was also created by statute and rules of court. But no new substantive right of set-off was created. The right to raise in the same action a set-off, in a fused form and a counterclaim is now embodied in O 18 r 17 of the Rules of the Supreme Court 1970. Even though in modern times in view of the fusion of law

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and equity there is a tendency to apply a unified concept of set-off, the nature and extent of the defence of set-off must not be lost sight of. The efficacy of a set-off depends on its exact nature. Finally, while every set-off may be pleaded as a counterclaim, every counterclaim may not be pleaded as a set-off. Additionally, inasmuch as the defendant was, before the advent of the various forms of set-off, at liberty to commence a separate action, he may not now be compelled to plead a set-off. He is free to enforce his cross-claims by a separate action or counterclaim without raising it as a set-off: **Davis v Hedges** [1871] 6 LR QB 687

41 **Summary judgment**

42 There will be no hardship or injustice to a claimant who is content to have his claim determined at the trial together with the cross-claims against him. But delay in having to wait for the trial in many cases may cause severe or even irreparable loss to the plaintiff. Lawton LJ in **Ellis Mechanical Services Ltd v Wates Construction Ltd** [1978] 1 Lloyd`s Rep 33 at p 36 said:

> *One of the perils of commercial life for sub-contractors in the building trade is that there may develop between the main contractor and the building owner a serious dispute which leads to one or other of them repudiating the main contract. When that happens the lifeblood of the building trade, namely money, stops. It seems to me that the administration of justice in our courts should do all it can to restore that lifeblood as quickly as possible.*

43 The courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of

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the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the courts make a robust approach, to the jurisdiction under O 14.

44 In the present day context, it is in summary judgment applications that the defendant raises the set-off defence. In order to make a robust approach it is the duty of the court to closely examine points of set-off raised by a defendant and to ensure that the true purpose is not to cause delay to the plaintiff.

45 In **Invar Realty Pte Ltd v Kenzo Tange Urtec Inc & Anor** [1990] 3 MLJ 388 Yong Pung How J (as he then was) said that where a defendant objects to an application for summary judgment based on a cross-claim, the plaintiff`s claim and the defendant`s cross-claim must be taken separately. If there is no defence to a claim other than a plausible counterclaim then judgment must be entered on the claim and the cross-claim should proceed to trial with a stay of execution so that the defendant is not unjustly injured.

46 It must be borne in mind that the jurisdiction under O 14 to give leave to defend and the power to stay execution is essentially a discretionary matter. It is axiomatic that a defendant who invites the court to exercise the discretionary power must produce sufficient relevant material for the court to justify a decision in his favour. Granting a stay of execution is not a matter of course.

47 **The decision**

48 With the above principles in the forefront of my mind I sifted the evidence the defendants presented and I perceived a distinct disposition in the defendants to distort facts to obtain leave to defend. This provided a sufficient reason to proceed with great circumspection. The plaintiffs by affidavit and

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documentary evidence proved that the defendants obtained from them inflated invoices for the tiles supplied. The plaintiffs acceded to this request and reflected the true price by rendering credit notes. It was apparent that the defendants intended to use the inflated invoices to obtain some benefit from the PWD. A suggestion to that effect by the plaintiffs was not denied or disproved by the defendants. The defendants also misrepresented that the PWD had imposed liquidated damages and thereby attempted to mislead the court.

49 The defendants attacked the plaintiffs` entitlement to judgment under four main heads:

> (i) Defects in the tiles relating to non-conformity with samples relating to colour.
>
> (ii) Physical defects in the tiles.
>
> (iii) Delay in the supply of the tiles.
>
> (iv) Loss of reputation.

50 The defendants relied heavily on the liquidated damages and 5% retention clauses in the PWD contract. These matters were actus res inter alios. As there was no undertaking by the plaintiffs to indemnify the defendants they do not concern the plaintiffs. In any event the defendants completed the works by 3 June 1990 and the PWD accepted the works without complaint. The cross-claim based on colour, even if the sale was by sample, was spurious in view of the fact that the PWD had made no complaint about the tiles. Accordingly there was no plausible defence based on colour. The defendants said the PWD in future might make a claim against them. Apart from the speculative nature of the claim there was no legal ground for an indemnity from the plaintiffs. An indemnity can arise on the basis of an agreement, a statutory provision or implication of law. There was no such basis in this case. In any event all

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evidence pointed towards the PWD not making a claim based on delay or delivery of wrong quality of tiles.

51 The defendants produced a document showing rejection of a small quantity of tiles by the defendants. The rejection was purportedly accepted by an employee of the plaintiffs who was said to have switched camps. That document had been tampered with. It had not been raised before the registrar. The claim of the plaintiffs for the full quantity of tiles supplied was initially admitted by the defendants in accordance with the delivery orders. For these reasons and the doctrine of substantial performance I excluded this cross-claim for the purpose of summary judgment.

52 The cross-claims based on delay were raised under two sub-heads. First, the defendants contended that because of the failure on the part of the defendants to complete the project by the initial completion date, the PWD imposed liquidated damages. Affirmative statements to that effect were made by the defendants` solicitors on their instructions. This later turned out to be unfounded for two reasons. The PWD had in fact granted an extension and the works had been completed within the extended period. Further the PWD at the behest of the plaintiffs unequivocably confirmed that no liquidated damages would be imposed.

53 Under the second sub-head the defendants argued that as a result of the delay in the delivery of the tiles it suffered loss in that they had incurred additional expenses. These alleged expenses were grossly exaggerated and founded on self-serving and spurious evidence. They produced documents from one National Jaya, another supplier of the defendants, without producing all the relevant documents. They were all bare and bland allegations without substance.

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There was great uncertainty in the amount for which they could make out the alleged losses if at all. It was not possible to decide on the amount, if any, for which leave to defend or stay of execution should be given.

54 Finally, the defendants said that their reputation had suffered as a result of the delay in the delivery of the tiles. It is settled law that there can be no claim for general damages for loss of reputation arising out of a breach of contract: **Addis v Gramophone Co Ltd** [1909] AC 488 On the contrary, it was shown that the PWD had in fact awarded a large contract to the defendants notwithstanding the Padang Promenade Project.

55 Under all the circumstances and for the reasons set out above, the defendants failed to make out a serious and sincere case which would entitle them to be given leave to defend or stay of execution. They are not, however, by reason of the refusal of leave to defend precluded from prosecuting their alleged cross-claims as counterclaims or by a separate action.

56 After I gave judgment to the plaintiffs, the defendants applied to make further arguments. I acceded to hear further arguments. At the hearing the defendants attempted to use the procedure to present a new case by adducing fresh evidence. In my view the attempt to adduce fresh evidence after I had made an order was an abuse of the process of court. The circumstances in which the defendants sought to adduce evidence called for the application of the principle laid down in **Ladd v Marshall** [1954] 1 WLR 1489[1954] 3 All ER 745 The evidence sought to be placed before the court after delivery of judgment was not such that it could not have been obtained with reasonable diligence for the use at the hearing before the registrar and the initial hearing of appeal before me. The hearing before the registrar was three months after the filing of the

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application for summary judgment. The hearing before me was five months after the hearing before the registrar. By the time I heard the appeal the defendants had filed five affidavits. In all conscience the court could not permit the filing of innumerable affidavits and shifting of grounds with immunity. The fact that the defendants may proceed with a counterclaim or a separate action meant that no real injustice or hardship was done to the defendants.

57 **Outcome:**

G P Selvam JC

Manjit Singh (Manjit Darshan & Partners) for the plaintiffs/appellants
Chandra Mohan (Tan Rajah & Cheah) for the defendants/respondents

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