IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 382

DC Suit 50715/1998

Between

OCWS Logistics Pte Ltd

… *Plaintiff*

And

Soon Meng Construction Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Pleadings; Equity — Defences — Equitable set-off

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OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd

[1998] SGHC 382

DC Suit 50715/1998
Chao Hick Tin J
21 November 1998

Judgment:

CHAO HICK TIN J

Pursuant to an agreement in July/August 1994 (`the 1994 contract`) the plaintiffs engaged the defendants as sub-contractors for the general repainting of certain buildings of the Ministry of Defence at Changi for a lump sum of $300,000. Under that contract the defendants were to obtain the supplies of materials from the plaintiffs and the latter were entitled to deduct the cost thereof from the contract sum. During the progress of the works, payments were made by the plaintiffs to the defendants. Upon completion of the contract, and on final computation, an amount of $144.458.65 was found to be owing from the defendants to the plaintiffs. This is not disputed by the defendants.

2.What the defendants claimed is that they have a defence of set-off which exceeds the $144,458.65 owed by them to the plaintiffs. This set-off arose under an agreement between the parties signed on 9 January 1995 (`1995 contract`) whereby the parties agreed to `work together and/or share resources for the purposes of carrying out sub-contracting works involving repainting and/or

upgrading works.` Pursuant to the 1995 contract, works were undertaken and completed at three locations, namely, HDB Tampines site, HDB Bukit Panjang site and HDB Choa Chu Kang site. The defendants claimed that there is a sum of $397,969.95 due from the plaintiffs in respect of the works done in those three sites and sought to set it off against the sum of $144,458.65 due from them to the plaintiffs. In the alternative, the defendants counterclaimed for that sum.

3.However, the plaintiffs contended that under that 1995 contract not only is there nothing owed by them to the defendants, it is the defendants who are liable to pay to the plaintiffs to the tune of $925,772.25.

4.The plaintiffs applied for summary judgment in respect of their claim for $144,458.65 under the 1994 contract. The deputy registrar of the subordinate courts granted the application with no stay of execution pending the trial of the defendants` counterclaim. The defendants appealed. I dismissed the appeal and now give my reasons.

5.The defendants have not filed an affidavit to substantitate their defence of set-off. They relied wholly upon the defence filed. Of course O 14 r 4(1) provides that a defendant may show cause against an O 14 application by `affidavit or otherwise`. The burden is on the defendant. A bald assertion in a defence filed may not be sufficient. It would have to depend on the nature of the defence. As stated in para 14/4/4 of the ***Supreme Court Practice*** :

> *The use of the term `or otherwise` is not intended to open wide the door for giving leave to a defendant who has no real defence; the primary obligation remains on the defendant to `satisfy` the court that there is a triable issue or question or that there ought to be a trial for some other reason.*

6.In general, any debt or liquidated sum due from a plaintiff to a defendant can be set-off against the plaintiff`s claim. This is the legal set-off or independent

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set-off. An unliquidated claim of the defendant for damages can be set-off if it arises from the same transaction as the claim of the plaintiff or is closely connected with the subject matter of the claim: see **Hanak v Green** [1958] 2 QB 9 and ***Morgan & Son Ltd v Martin Johnson & Co Ltd*** [1949] 1KB 107. This is the principle of equitable set-off. Order 18 r 17 of the Rules of Court does not create any right of set-off. It merely provides the mechanism whereby a set-off can be raised: see ***Bullen & Leake & Jacob`s Precedents of Pleadings*** (13th Ed) at p 1416.

7.The development of the law of set-off is far from satisfactory. Before 1873 two main sets of courts could claim jurisdiction over the same cause of action. However, they applied different rules. One applied common law and the other equity. The common law courts were less receptive to set-off than courts of equity. The Statute of Set-Off did not allow a set-off if either of the claims was unliquidated. Therefore, a seller could obtain a judgment for the price of goods even though the goods were defective. This apparently led to the plea of abatement. As observed by Staughton LJ in ***Axel Johnson*** (at pp 275-276):

> *Its historical development has led to results which appear to lack logic and sense ... It can be said there is a case for reform of the law, which has to be discovered in a number of diverse rules based on no coherent line of reasoning.*

8.In any case, it is settled law that for set-off to apply, the cross-claim must be `capable of being liquidated or ascertained with precision at the time of pleading`: per Tindel CJ in **Morley v Inglis** [1837] 4 Bing NC 58 at p 71. In the later case **Stooke v Taylor** [1880] 5 QBD 569 at p 575 Cockburn CJ said the plea of set-off `is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained.`

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9.As regards the defence of equitable set-off the Court of Appeal addressed it in **Pacific Rim Investment Ltd v Lam Seng Tiong** [1995] 3 SLR 1 as follows:

> *First, the exercise of equitable set-off is only permitted, if equitable considerations support such an exercise. It arises where there are good equitable grounds for directly impeaching the title to the legal demand which the creditor is seeking to enforce. As Lord Denning MR succinctly said in* ***The Nanfri****, at pp 974-975:*
>
> *`... it is not every cross-claim which can be deducted. It is only cross-claims* ***that arise out of the same transaction or are closely connected with it****. And it is only cross-claims which go directly to impeach the plaintiff`s demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.`*
>
> *Secondly, the right to equitable set-off may be expressly excluded by contract. Such a possibility was recognized by Goff LJ in* ***The Nanfri****, at p 988:*
>
> *`... equitable set-off is part of the general law and can only be excluded by clear provisions to that effect ...`*
>
> *Thirdly, there are exceptions, and they include claims for freight in voyage charters, actions on dishonoured bills of exchange and certain actions on bank guarantees:* ***Sim v Rotherham Metropolitan Borough Council*** *and other actions at p 413. In these instances, equity seems to have followed the common law by recognizing the exceptions to common law abatement. [Emphasis added.]*

10.In relation to legal set-off it is important to distinguish between a dispute about a right on which a claim or cross-claim is based and a dispute about the sum to which the right entitles the person who enjoys it. In the former situation, the plaintiff cannot prevent the defendant from relying on it by way of set-off for the purposes of O 14: **Axel Johnson AB v Mineral Group AG** [1992] 1 WLR 270 at p 272. In ***Axel Johnson*** the plaintiffs bought a cargo of oil from the defendants under a joint venture arrangement and paid a price which was US$148,972 less than the price computed by the defendants. The defendants pleaded that balance as a set-off to a claim by the plaintiffs against them of

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US$89,915 for demurrage in relation to a later contract under the joint venture arrangement. There was no dispute about the sum to which the defendants claimed, only that they needed to make good the contractual right which they asserted. The English Court of Appeal, reversing the High Court decision, held that the defendants` claim could be set-off against the plaintiffs` claim and that the defendants were entitled to defend.

11.The defendants` counsel in the present case relied strongly on ***Axel Johnson*** and in particular the following statement by Legatt LJ at p 272:

> *For set-off to be available at law the claim and cross claim must be mutual, but they need not be connected. They need not be debts strictly so-called, but may sound in damages. The question is ... whether the demand is* ***capable of being liquidated or ascertained with precision*** *at the time of pleading. [Emphasis added.]*

12.In my view the words underscored above are the words which the defendants did not give sufficient consideration to. The fact that the defendants have in their defence put a figure to what they claimed does not mean that it has become a liquidated sum or a sum ascertained with precision at the time of pleading. It is of interest to note that in **B Hargreaves Ltd v Action 2000 Ltd** [1993] BCLC 1111, the English Court of Appeal held that a surveyor`s valuation of construction costs could not be set-off as they were not in common law readily ascertainable as a monetary debt.

13.The defendants` counsel argued that their cross-claim under the 1995 contract consisted of two components - one is for costs of works amounting to $264,232.90 and the other is for variation works. In respect of the former component, he submitted it is a liquidated claim. It seems to me clear that the defendants have conveniently disregarded the fact that the plaintiffs have also claimed set-off (under the same 1995 contract) against the defendants` cross-

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claim of $264,232.90 and which set-off of the plaintiffs is in a sum more than $264,232.90. In my view it is absurd for the defendants to ask this court to look only at their claim for costs of works of $264.232.90 without also looking at the set-off arising from the same transaction. The defendants` claim for costs of works under the 1995 contract cannot be viewed separately from the set-off claimed by the plaintiffs, as they arose from the same transaction. Accordingly, both components of the cross-claim of the defendants under the 1995 contract are truly unliquidated and neither may be set-off against the plaintiffs` claim in the present action as the latter is clearly under a different contract and the amount is admitted. Thus, in respect of that cross-claim of the defendants, both the question of entitlement and the question of quantum are disputed by the plaintiffs. Both issues relating to that claim will necessarily require extensive investigation. This is unlike the position in Axel Johnson where the quantum of the cross-claim was not disputed, only the right to claim was. Therefore, the defendants` contention that they have a legal set-off must fail.

14.It is incontrovertible that the defendants` cross-claim arose out of a separate and distinct transaction and there is no connection whatsoever between the claim herein of the plaintiffs and the cross-claim (which is really a counterclaim) of the defendants. Accordingly, the contention based on equitable set-off must also fail. In such a situation, in the words found in para 14/4/14 of the ***Supreme Court Practice*** `the proper order should be for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim.`

15.I would like to make one final observation. I can see nothing unjust in requiring the defendants to pay up what they admitted to be owing to the plaintiffs. As the defendants` cross-claim or counterclaim, which arose out of a separate transaction and is for an unliquidated sum, is disputed by the plaintiffs, the defendants must prove that claim and the quantum thereof. In the

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circumstances of this case, there would be injustice to the plaintiffs if the amount admitted as due and owing to them is not paid.

Chao Hick Tin J

Tan Joo Seng (Chan Tan & Partners) for the plaintiffs
Stephen Soh (Bernard Rada & Lee) for the defendants

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