Likpin International Ltd *v* Swiber Holdings Ltd and another [2015] SGHC 248

Case Number	: Admiralty in Personam No 113 of 2015 (Registrar's Appeal No 239 of 2015)
Decision Date	: 01 October 2015
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Tan Hin Wa, Jason (Asia Ascent Law Corporation) for the plaintiff; Jimmy Yim, SC, Arvindran s/o Manoosegaran and Mahesh Rai (Drew & Napier LLC) for the first and second defendant.
Parties	: Likpin International Ltd — Swiber Holdings Limited — Swiber Offshore Construction Pte Ltd

Civil Procedure – Striking Out

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 199 of 2015 was dismissed by the Court of Appeal on 25 July 2016. See [2016] SGCA 48.]

1 October 2015 Judgment reserved

Steven Chong J:

Introduction

1 Likpin International Ltd ("the plaintiff"), together with its consortium member, was awarded a contract by Vietsovpetro to perform a subsea construction project ("the VSP project") at the Nam Rong and Doi Moi oilfields in Vietnam. As the VSP project required the use of a pipe-laying vessel, the plaintiff entered into negotiations with the defendants to charter a suitable vessel. Swiber Holdings Limited ("the 1st defendant") is a public listed company while Swiber Offshore Construction Pte Ltd ("the 2nd defendant") is its wholly owned subsidiary. Two pipe-laying vessels owned by the 2nd defendant were identified for the plaintiff's chartering requirements.

2 In order to appreciate the context of the essential facts which will be examined below, it is important always to bear in mind that, at *all* material times, the plaintiff was only seeking to charter *one* vessel for the VSP project.

3 On 29 May 2009, a charterparty was entered into between the plaintiff and the 2nd defendant for one of the two vessels ("the Concorde charterparty"). The charterparty was in fact performed. Disputes, however, arose between the parties. In accordance with the arbitration clause in the Concorde charterparty, an arbitration was commenced by the 2nd defendant against the plaintiff for non-payment of charter hire ("the arbitration"). The plaintiff brought a counterclaim against the 2nd defendant for damages for breach of contract. For reasons which are not relevant for present purposes, the plaintiff and the 2nd defendant resolved their disputes and entered into a settlement agreement dated 24 March 2015 ("the Settlement Agreement").

4 The defendants thought that, with the settlement, the dispute was behind them. However, in the course of conducting routine due diligence, the defendants' banker discovered that a "protective" admiralty *in personam* writ had been issued by the plaintiff on 15 May 2015 against the 1st defendant

for breach of *another contract* ("the Procurement Agreement") for the charter of a pipe-laying vessel for the VSP project. [note: 1] The Procurement Agreement allegedly predated the Concorde charterparty.

5 The plaintiff's estimate of its unliquidated claim in the accompanying Case Details of the suit is $10,700,000. The claim against the 2nd defendant is for the tort of procuring the 1st defendant's breach of contract. The defendants entered appearance *gratis* and applied to strike out the claim in Summons No 3225/2015 ("SUM 3225/2015" or "the striking out application"). The striking out application failed before the assistant registrar ("AR") in the court below and the defendants' appeal came before me.

6 There are two parts to the defendants' arguments:

(a) In respect of the claims against the 1st defendant, their submissions are two-fold. First, they submit that there was never any concluded Procurement Agreement. Second, and in the alternative, they submit that even if the Procurement Agreement had been concluded, it would have been superseded by the Concorde charterparty.

(b) In respect of the claim against the 2nd defendant, they submit that the matters complained of in the writ were fully and finally compromised in the Settlement Agreement between the plaintiff and the 2nd defendant. [note: 2]

7 Accordingly, the defendants submit that the suit is frivolous, vexatious and/or does not disclose a reasonable cause of action as against the 1st defendant. Insofar as the 2nd defendant is concerned, they submit that the suit is an abuse of process.

The plaintiff's claim

8 The plaintiff's claim is for a breach of the Procurement Agreement which, on the face of the endorsement on the writ, was allegedly concluded between the plaintiff and the 1st defendant only (and not the 2nd defendant) in respect of the vessel, *Swiber Conquest*. As against the 1st defendant, the plaintiff claims:

> … damages for breach of an agreement to procure the supply and/or mobilisation of the ship or vessel known as the **Swiber Conquest** by 20th May 2009 for the Plaintiffs' use and/or hire in the Plaintiffs' projects (the "Agreement"). [emphasis added]

As against the 2nd defendant, the plaintiff claims:

> … damages for procuring and/or inducing breaches of the Agreement, and/or interfering with the Agreement.

9 The plaintiff has invoked the admiralty jurisdiction of the court. In response to the court's query as to which limb of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) the plaintiff's claim falls under, the plaintiff's counsel, Mr Jason Tan ("Mr Tan"), submitted that it is under s 3(1)(*h*): "any claim arising out of any *agreement relating to the carriage of goods in a ship or to the use or hire of a ship*" [emphasis added]. He acknowledged that the Procurement Agreement was in substance a charterparty for the use or hire of the *Swiber Conquest*. This is consistent with the Case Details filed by the plaintiff, where the suit is described as a "*Charter Party Claim*".

10 When the defendants filed SUM 3225/2015 on 1 July 2015, the statement of claim had not been

filed by the plaintiff. The statement of claim was only filed on 14 August 2015. At the hearing before me on 31 August 2015, Mr Tan submitted that the striking out application pertained only to the *writ* and not the *statement of claim*. Thus, despite having himself relied on the statement of claim in his oral submissions, Mr Tan, after some prevarication, eventually submitted that (notwithstanding the fact that the endorsement on the writ is bereft of essential details) the court is not entitled to take cognisance of the statement of claim when assessing the striking out application.

11 I must clarify that the claims of misrepresentation and conspiracy raised in the plaintiff's statement of claim but not endorsed on the writ do not arise for consideration in the striking out application. Order 18 r 15(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") states that a statement of claim "must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned". Given that the endorsement does not mention any claim for conspiracy or misrepresentation, and given also that it is common ground between the parties that what is at issue is the striking out of the *writ* (rather than the statement of claim), I am only concerned with whether the plaintiff's claims for the breach of the Procurement Agreement and the procuring of the said breach as endorsed on the writ are viable. While the court certainly has the power to give the plaintiff leave to amend its writ, I must emphasise that *at no time during the hearing did the plaintiff seek to amend its writ to enlarge it* to include the claims for misrepresentation and conspiracy found in the statement of claim. This is consistent with the plaintiff's submissions at the appeal. Mr Tan did not venture to deal with the claims which were not endorsed on the writ.

12 Having outlined the plaintiff's claim, I shall now consider the preliminary issue of whether the court may take cognisance of the statement of claim which was filed *after* the application was heard before the AR in the court below.

Preliminary issue: can the court take cognisance of the statement of claim?

13 A brief overview of the short procedural history of the present suit will be helpful to set the application in context:

(a) The writ was filed by the plaintiff on 15 May 2015.

(b) The defendant entered appearance *gratis* and filed the application on 1 July 2015.

(c) The AR heard and dismissed the application on 31 July 2015.

(d) The defendants filed a notice of appeal against the AR's decision on 12 August 2015.

(e) The plaintiff filed its statement of claim on 14 August 2015.

(f) The appeal was heard before me on 31 August 2015.

14 At the hearing before me, Mr Tan submitted that, as a matter of "natural justice", the court should consider the application based *only* on the circumstances as at the date when the application was filed. Thus, since the statement of claim was not in existence when the application was first filed, the plaintiff had no opportunity to address issues arising from it in its affidavits and, consequently, the court cannot take cognisance of it. Taken to its logical conclusion, the effect of Mr Tan's submission is that the court, on the hearing of an appeal against an AR's decision, is only entitled to consider matters which had been placed before the AR.

15 Not only was Mr Tan unable to adduce any authority in support of his submission, this is plainly wrong. As the Court of Appeal in *Chang Ah Lek and others v Lim Ah Koon* [1998] 3 SLR(R) 551 noted at [20], an appeal from the registrar to a judge in chambers is not an appeal in the true sense: the judge in chambers deals with the appeal "as though the matter came before him for the first time" (see *Evans v Bartlam* [1937] AC 473 per Lord Atkin at 478). The judge in chambers is also free to allow the admission of fresh evidence in the absence of contrary reasons (see *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [38]). It would be odd if the court were entitled to consider fresh evidence at an appeal hearing but unable to take cognisance of pleadings filed after the hearing.

16 It is curious that the plaintiff would object to the court taking cognisance of its own statement of claim and it certainly does not lie in the mouth of the plaintiff to now complain that it did not have an opportunity to address questions arising from *its own* statement of claim. The plaintiff, like any party in any legal proceedings, must accept the consequences of its own pleadings. If any objection were to be raised to the court taking cognisance to the statement of claim, I would have expected it to have come from the defendants, rather than the plaintiff.

17 Typically, the statement of claim provides more details of the plaintiff's claim and should help to stave off any striking out application. The reason that the plaintiff in this case is objecting to the court taking cognisance of its own statement of claim is simply because, when examined, the statement of claim serves only to highlight the irresolvable difficulties underlying the plaintiff's pleaded claim. This will be elaborated on below. I should add that it is somewhat disingenuous for Mr Tan to submit that the court is precluded from taking into account the statement of claim given that he has himself referred to it in his oral submissions.

18 I accept that at the time the application was filed, the defendants must have been prepared to proceed on the basis of the claim as endorsed on the writ, without more. I also accept that the application is to strike out the writ, rather than the statement of claim. However, I can see no reason why the court should ignore the statement of claim in assessing whether the claims endorsed on the writ should be struck out.

19 In any event, the resolution of this preliminary issue either way does not have a material impact on my decision. I would have arrived at the same conclusion even without reference to the statement of claim. As will be apparent below, the contents of the statement of claim merely affirm my overall assessment of the plaintiff's case.

The Settlement Agreement

20 The defendants' counsel, Mr Jimmy Yim SC ("Mr Yim"), pursued the appeal on the same two grounds that were raised in the court below. Although Mr Yim dealt first with the non-existence of the Procurement Agreement followed by the argument in relation to the Settlement Agreement, I will deal with these issues in reverse order for two reasons. First, the Settlement Agreement argument essentially turns on the construction of the terms of the Settlement Agreement as well as the nature and scope of the arbitration proceedings which it purported to settle. Second, the conduct of the parties (in particular, the plaintiff) in the arbitration, which eventually resulted in the Settlement Agreement, has a material bearing on the factual sustainability of the plaintiff's claim in the present suit in relation to the existence or otherwise of the Procurement Agreement. For these two reasons, it is more sensible to deal with the submissions in relation to the Settlement Agreement first.

21 Mr Yim submits that the suit is an abuse of process, at least *vis-à-vis* the 2nd defendant, because the Settlement Agreement had fully and finally compromised all matters in relation to the

arbitration, including the plaintiff's present claim against the 2nd defendant. [note: 3] The defendants rely on cl 4 of the Settlement Agreement, which states:

> Each party releases and forever discharges the other in respect of all claims, liabilities, issues and disputes in, *arising from, or having any connection whatsoever with ARB 145* without any admission of liability by the Parties, whatsoever. None of the parties shall hereinafter have or make any claim against the other Party in respect of the *matters arising from or having any connection whatsoever with ARB 145*. [emphasis added]

The 2nd defendant's position is that the plaintiff's claims in the present proceedings *arise from* and/or *have a connection* with the arbitration. It is therefore an abuse of process for the plaintiff to commence the present action.

22 Mr Tan, however, submits that the present suit relates to the Procurement Agreement between the 1st defendant and the plaintiff only, and that this was not the subject matter of the arbitration. The arbitration only concerned claims between the 2nd defendant and the plaintiff in relation to two charterparties dated 29 May 2009 and 7 July 2009 respectively. I should mention that only the first — the Concorde charterparty, which was concluded on 29 May 2009 — has a bearing on the issues in the striking out application (see [20] above). The other charterparty dated 7 July 2009 (the "Glorious charterparty") concerned another vessel, the *Swiber Glorious*, which was separately chartered to assist in the VSP project. Mr Tan accepts that another closely related agreement which he refers to as the "Conquest Agreement" was raised in the arbitration. However, he submits that the Conquest Agreement was entered into between the plaintiff and the 2nd defendant and is therefore distinct from the Procurement Agreement, which was concluded between the plaintiff and the 1st defendant. [note: 4] He further submits that neither the Procurement Agreement nor the Conquest Agreement was before the arbitral tribunal. [note: 5] In any event, Mr Tan stressed that the present suit against the 1st defendant is "for the breach of the Procurement Agreement (*and not the Conquest Agreement*)" [emphasis added]. [note: 6]

23 Considering the plaintiff's own position that the Conquest Agreement was neither before the arbitral tribunal in the arbitration nor before this court, the Conquest Agreement is clearly quite irrelevant to the striking out application. In spite of this, the plaintiff made repeated references to the Conquest Agreement in its submissions and affidavits. This only served to obfuscate the relevant issues in this application.

24 Mr Tan further submits that the 2nd defendant is precluded from relying on the Settlement Agreement to strike out the present proceedings against it on the basis of the doctrine of approbation and reprobation. [note: 7] This is because the 2nd defendant had objected to the plaintiff's reference to the Conquest Agreement in the arbitration on jurisdictional grounds. The 2nd defendant had pleaded that the Conquest Agreement did not fall within the scope of the arbitration agreements. [note: 8] In reply to the 2nd defendant's jurisdictional objection, the plaintiff asserted that the facts and circumstances surrounding the Conquest Agreement formed the commercial background to the subsequent charterparties between the plaintiff and the 2nd defendant and were therefore relevant to ascertain their meaning and effect. [note: 9]

25 In my view, the doctrine only applies if the 2nd defendant had adopted a position in the arbitration on the Conquest Agreement which is different from the position it is adopting in the current suit. Since the plaintiff accepts that the present claim is not in relation to the Conquest Agreement, whatever position the 2nd defendant might have adopted in the arbitration on the Conquest

Agreement does not arise for consideration. As such, the doctrine is simply not applicable here.

Matters covered in arbitration

26 It is clear from the pleadings filed in the arbitration that the claim and the counter-claim made therein were based solely on the rights and obligations arising from the Concorde and Glorious charterparties concluded between the plaintiff and the 2nd defendant (see [22] above). [note: 10] Although there was some dispute in the arbitration as to whether the plaintiff could refer to the Conquest Agreement as part of the factual matrix, it is common ground that no claims were in fact made in respect of the Procurement Agreement, which the plaintiff asserts is separate and distinct from the Conquest Agreement (see [22] above). It is also clear that the jurisdiction of the arbitral tribunal was based on the arbitration agreements contained in the two signed charterparties [note: 11], which only governed "[a]ny dispute arising out of [the] Charter Party". [note: 12]

Is the present suit precluded by the Settlement Agreement?

27 The issue here is whether a claim based on the Procurement Agreement can be said to *arise from* and/or *have any connection* with the arbitration. It is clear that there was no mention of the Procurement Agreement in the arbitration. Furthermore, the 1st defendant was neither a party to the arbitration nor to the Settlement Agreement. However, Mr Yim advances the following submissions in support of the defendants' position that the Settlement Agreement nonetheless precludes the present claim, at least as against the 2nd defendant:

(a) Based on the authority of *Ang Tin Yong v Ang Boon Chye and another* [2012] 1 SLR 447 at [10], the court should take into account the surrounding circumstances, the commercial purpose of the agreement, and should avoid unreasonable results in interpreting the Settlement Agreement. [note: 13] In the present case, the plaintiff and the 2nd defendant intended a clean break of their only business relationship and it would make no commercial sense for the 2nd defendant to agree to settle if the Settlement Agreement did not include the Procurement Agreement as well. [note: 14]

(b) The phrase "having any connection whatsoever" in the Settlement Agreement has been interpreted widely by previous courts (see, *eg*, *Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan* [2004] 3 SLR(R) 184 at [18] and *Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and others* [2007] UKHL 40 at [13]). [note: 15] Given that the Procurement Agreement arose from facts and circumstances raised by the plaintiff in the arbitration, it must be covered by the Settlement Agreement. [note: 16]

28 It may well make no commercial sense for the 2nd defendant and the plaintiff to settle their disputes without encompassing claims against other parties such as the 1st defendant arising from the same underlying commercial transaction. However that, with respect, misses the point. The intention of the parties is set out in the Settlement Agreement. On its face, the Settlement Agreement does not cover any claims against the 1st defendant and obviously could not have covered the Procurement Agreement, which was allegedly between the plaintiff and the 1st defendant only (see [8] above). In my view, this must be right because the 1st defendant was not even a party to the arbitration. The use of all-encompassing phrases such as "arising from" or "having any connection whatsoever" does not assist the 1st defendant. The undeniable fact is that the present claim was not before the arbitral tribunal since the 1st defendant was not even a party to that arbitration. Therefore, any settlement of the arbitration could not have covered the present claim.

29 If the 2nd defendant had intended the Settlement Agreement to cover claims against the 1st defendant, a non-party to the arbitration, then it was incumbent on the 2nd defendant to have expressly provided for the same and for the plaintiff to have agreed to its inclusion. This was not done.

30 Mr Tan also highlighted cl 12 of the Settlement Agreement, which states that "[a] person who is not a party to this Settlement Agreement has no rights under the Contracts (Rights of Third Parties) Act (Cap 53B) to enforce or enjoy the benefit of this Settlement Agreement". [note: 17] Consequently, the 1st defendant, a non-party, cannot rely on the Settlement Agreement to strike out the plaintiff's claim against it. It appears that Mr Yim acknowledges this in his submissions, and has sought to confine his reliance on the Settlement Agreement to strike out the claim only as against the 2nd defendant. [note: 18] However, this approach does not take him very far. The claim against the 2nd defendant is for the tort of procuring the 1st defendant to breach the Procurement Agreement. Therefore, if the claim against the 1st defendant in respect of the Procurement Agreement is not subsumed in the Settlement Agreement then it must follow that the claim against the 2nd defendant for *procuring the breach of the Procurement Agreement* must likewise fall outside the ambit of the Settlement Agreement.

31 Mr Yim urges the court to come to a landing on the interpretation of the Settlement Agreement at this interlocutory stage. He submits that a trial will not be of further assistance on this issue given that it is purely a matter of interpretation of the Settlement Agreement. This may well be so. However, what is before the court is a striking out application and not an application for the determination of a preliminary issue.

32 It is well-established that at the striking out stage, the court is limited to considering whether a case is plainly and obviously unsustainable: see *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*The Bunga Melati 5*") at [32]–[33]. In that case, the Court of Appeal refrained from fully determining the legal questions that were raised at the striking out application and held that such a determination was properly the task of the trial judge (at [57]–[59] and [60]–[62]). In any case, I do not see how a full resolution of the interpretation of the Settlement Agreement will assist the defendants given that the Settlement Agreement, on its face, does not cover matters relating to the Procurement Agreement. This should be sufficiently apparent to the 2nd defendant.

33 Accordingly, I agree with the AR that it is neither plain nor obvious that the claims against the 1st and 2nd defendants in respect of the Procurement Agreement should be struck out at this stage on the basis that the claims had been finally resolved and settled under the Settlement Agreement.

The Procurement Agreement

34 Although I have found that the Procurement Agreement was strictly outside the purview of the arbitration, the plaintiff's averments in the arbitration have a material bearing on the question whether there was any concluded Procurement Agreement *at all*. The defendants argued, both in the court below and in this appeal, that no such agreement exists and therefore the suit should also be struck out on that basis. Somehow, perhaps owing to the close connection between the two arguments, the AR did not specifically deal with this argument in her decision. In her view, the Settlement Agreement was the defendants' strongest case. [note: 19] It would therefore appear that the AR had implicitly rejected the argument in relation to the non-existence of the Procurement Agreement. Although the two arguments are related, they are nonetheless separate and discrete points which warrant separate treatment and analysis. I turn to consider that argument now.

35 To recapitulate, Mr Yim submits that the proceedings should be struck out because there was no concluded Procurement Agreement as alleged and, in the alternative, that it would in any event have been superseded by the Concorde charterparty (see [6(a)] above). If Mr Yim is right, then it must also follow that the claim against the 2nd defendant for procuring the breach of the Procurement Agreement must fail since if there is no agreement to begin with then there would be no contract in respect of which a breach may be procured.

36 To determine this issue, it is necessary to examine the circumstances which led the plaintiff and the 2nd defendant to enter into the Concorde charterparty as well as the actual performance of that charterparty. This exercise is essential if we are to understand the charterparty requirements of the plaintiff since this will have a crucial bearing on the question of whether the plaintiff had ever intended to enter into more than one charterparty for the *same* VSP project in Vietnam.

37 Having considered the objective evidence and submissions before the court, I conclude that the plaintiff's present case, based entirely on the alleged existence and breach of the Procurement Agreement, is legally and factually unsustainable.

Legal unsustainability of the pleaded case on the Procurement Agreement

38 At the hearing, I pointed out to Mr Tan that the contractual claim as endorsed on the writ was bereft of details. Order 6 r 2(1)(a) of the Rules of Court requires a plaintiff to endorse the writ with a "concise statement of the nature of the claim made or the relief or remedy required in the action" if the statement of claim is not endorsed on the writ. Citing *Singapore Civil Procedure Volume I*, (GP Selvam gen ed) (Sweet & Maxwell, 2015) at para 6/2/2, Mr Yim submits that where the claim arises out of a contract, the endorsement should state the date of the contract, whether it is oral or written, between whom it was made, and the nature of the claim or the relief or remedy arising thereunder. At the appeal hearing, Mr Tan accepted that the date of the oral contract must be stated in the endorsement.

39 In the present case, the endorsement neither states the date of the Procurement Agreement nor whether it was oral or written. Usually, any ambiguity arising from the typical brevity of the endorsement of claim should be clarified and amplified in the statement of claim. In the present case, the contrary is true.

40 The following is pleaded in the statement of claim: [note: 20]

> 12 In so far as it was made orally or by conduct, the Procurement Agreement was made during meetings held at the 1st Defendants' [sic] offices *on or about February 2009 to on or about 20th April 2009*…
>
> 13 In so far as it was made in writing, the Procurement Agreement was evidenced by or is to be inferred from the minutes of meeting of 15th April 2009.
>
> [emphasis added]

41 I add that at the hearing before me, Mr Tan also relied on para 7 of Mr Mahmoud Shourideh's affidavit dated 24 July 2015 ("Mahmoud Shourideh's affidavit") to assert that the Procurement Agreement was concluded on 15 April 2009. In his affidavit, Mr Shourideh makes reference to the minutes of a meeting held on 15 April 2009 ("15 April 2009 minutes"). It is clear from the foregoing that as regards the most essential component of any contract — the date on which it was concluded

— the plaintiff's case has been found severely wanting. It offered no specific date in the endorsement of claim and two *different* dates in its statement of claim:

(a) on or about February 2009 to on or about 20 April 2009 insofar as it is an oral contract;

(b) 15 April 2009 insofar as it is a written contract.

42 While it is possible for a party to plead (a) that a contract was made orally and merely evidenced in a written document; or (b) that the written document *per se* constitutes the agreement of the parties to be contractually bound, there should only be *one date* on which the contract could be said to have been concluded: that is the date there was *consensus ad idem* — a meeting of minds to be bound by terms which are both certain and complete. But this is not so in the present case. No explanation has been provided to account for the wide disparity in the contract dates. It is plainly unarguable to assert that an oral contract was concluded over a two-month period. It is vexatious for the plaintiff to *experiment* by pleading different dates and different bases for the same contract. Thus, I accept the defendants' submission that the plaintiff's inability to specifically identify when the Procurement Agreement was concluded points against the existence of the said agreement. [note: 21]

43 At this juncture, I note that, by way of a letter dated 3 September 2015 (after the hearing before me had taken place), the plaintiff's solicitors wrote in to court to request for leave to file a further affidavit to specify, *inter alia*, the date of the Procurement Agreement. I will deal with the solicitor's conduct in relation to this request in a postscript to this judgment (see [81]–[84] below) but the point to be made for now is that I did not see how the filing of a further affidavit would assist the plaintiff. Quite apart from the point that this application was made only *after* the hearing was concluded (even though the plaintiff had ample opportunity to request for leave before), it seems to me that the problem with the plaintiff's case lies not with a *paucity* of evidence but with the *multiplicity* of inconsistent pleadings he has presented. If anything, the problem with the plaintiff's case is that too many different versions of the date of the Procurement Agreement have been offered to the court. In my view, the uncertainty as regards the date of the Procurement Agreement is entirely the plaintiff's own doing and it must live with the consequences which flow from its pleadings.

44 The other basic term of the Procurement Agreement, which Mr Tan accepts is in substance a charterparty, is the rate of hire. In the statement of claim, the rate of hire for the *Swiber Conquest* under the Procurement Agreement is stated as "approximately US$130,000" per day. The use of an *approximate* rate of hire is entirely inconsistent with the existence of a concluded charterparty for the use or hire of the *Swiber Conquest*. Should the law recognise a legally binding contract even though the rate of charter hire is not precisely defined, there would be endless, insoluble, disputes as to what the agreed rate of hire is. On this point, I note that Mr Tan himself conceded at the hearing before me that it was not possible to have a legally binding charterparty with approximate rates of hire. Mr Tan also accepted that the alleged approximate rate of US$130,000 per day was not stated in the 15 April 2009 minutes or in any other document before the court.

45 Thus, based on the plaintiff's writ and statement of claim, the terms of the Procurement Agreement are clearly too uncertain to form the basis of a legally enforceable contract. In the recent decision of *Harwindar Singh s/o Geja Singh v Wong Lok Yung Michael and another* [2015] 4 SLR 69, the plaintiff's contractual claim was struck out because the court found that several material terms of the oral agreement as pleaded were too uncertain to constitute a binding agreement (see [20]). With this background, it is perhaps not difficult to understand why Mr Tan was unwilling to have the court take cognisance of the plaintiff's own pleadings.

46 Moreover, in my view, it is frivolous, vexatious and an abuse of process to expect a defendant

to defend a contractual claim when the plaintiff itself admits in its pleading that it is unsure of the most salient terms of the contract: the date of the contract; whether the contract was oral or written; and the consideration which was agreed (in this case, the charter hire). As the High Court observed in *Philip Morris Products Inc v Power Circle Sdn Bhd and others* [1999] 1 SLR(R) 964 ("*Philip Morris*") at [6],

> …there must be ample and clear allegations to inform the opponent and the court in advance of the case the opponent has to meet and settle the defence and prepare for the trial. Without that the defendants will be embarrassed. It may even amount to denial of justice to the defendants as he might be able to assemble and preserve the necessary evidence to establish his defence. In other words, such incompetent and incomplete pleading might make a fair trial difficult or impossible.

47 In *Philip Morris*, as in the present case, the plaintiff's pleadings were "incomplete and incompetent" (see *Phillip Morris* at [7]) and the claim was struck out. In my view, the defects inherent in the plaintiff's pleadings render the claim legally unsustainable and are sufficient to justify its striking out.

48 As it stands, the writ and statement of claim are clearly unsatisfactory. While it is open to the court to give the plaintiff leave to amend its pleadings if the defects can be cured by an amendment (see *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 at [12]), such a step would not be appropriate in this case. When the facts which culminated in the conclusion of the Concorde charterparty are examined below, one can well understand why the plaintiff faces such immense difficulties in identifying the date of the charterparty and the rate of hire. It will also become clear that, based on the plaintiff's own evidence and its pleadings in the arbitration, the plaintiff's present claim for breach of the Procurement Agreement is a *complete non-starter*.

Factual unsustainability of the pleaded case on the Procurement Agreement

49 My finding that, even based on the plaintiff's own pleaded case, the writ does not disclose any concluded Procurement Agreement in law is sufficient to justify the striking out order. However, for completeness, I shall nevertheless examine the plaintiff's own evidence to determine whether the claim is factually sustainable. Even if I decide not to take cognisance of the statement of claim, the question remains whether there was ever a Procurement Agreement concluded on 15 April 2009 as Mr Tan, at the hearing before me, submitted (see [41] above).

50 I am mindful that in a striking out application, the court should not embark on "a minute and protracted examination of the documents and facts" (see *Wenlock v Moloney* [1965] 1 WLR 1238 at 1244 per Danckwerts LJ). It is inappropriate to conduct a trial on the basis of conflicting affidavit evidence. In this regard, Mr Tan submits that several issues raised by the defendants through the affidavit of Mr Nitish Gupta filed on 22 July 2015 must be tried rather than summarily determined in this application. [note: 22] However, the plaintiff's apprehension that this matter would turn on Mr Gupta's evidence is unfounded. I will state at the outset that in the course of arriving at my conclusion that the plaintiff's claim is plainly unsustainable, I did not rely on any of the factual assertions made in the defendants' affidavits filed in support of their striking out application. Instead, I had regard only to *the plaintiff's own evidence* as well as the correspondence exchanged between the parties. In short, the claim fails by reason of the plaintiff's own evidence and the objective evidence before the court.

51 In my judgment, against the backdrop of the undisputed and objective evidence before the

court, the plaintiff's case that the Procurement Agreement is evidenced by the 15 April 2009 minutes is plainly and obviously unsustainable. I give three reasons for arriving at this conclusion:

(a) The 15 April 2009 minutes, the *only* piece of *documentary* evidence which the plaintiff relies on in support of its assertion that the Procurement Agreement was concluded on 15 April 2009, lends no support to the plaintiff's case that the Procurement Agreement (or any agreement) was concluded on that date. On the contrary, the plaintiff's own pleadings in the arbitration undermine its present assertion that the Procurement Agreement was concluded at the 15 April 2009 meeting.

(b) The contents of the correspondence exchanged between the parties and their conduct from 15 April 2009 to the conclusion of the Concorde charterparty are completely inconsistent with the plaintiff's assertion that the Procurement Agreement had been concluded on 15 April 2009.

(c) Finally, the conduct of the plaintiff after being informed that neither the *Swiber Concorde* nor the *Swiber Conquest* could be mobilised by 20–22 May 2009 (which would have amounted to an anticipatory breach of the Procurement Agreement, if such a contract had been concluded), is also completely incompatible with the conduct of a party who is at the receiving end of a breach of contract.

52 I will deal with each point in turn.

Meeting on 15 April 2009

53 The critical parts of the 15 April 2009 minutes are as follows: [note: 23]

The Parties *discussed* the following matters:

1/ Mobilization of CONCORDE to Vietnam

- Following inspection of CONCORDE… VSP… expressed concern that the vessel would not be ready in an acceptable time frame, that time frame being mobilization to Vietnam on or very soon after 1 May 2009.

- **Swiber confirm the vessel would be ready including finishing all tests and commissioning by 15 of May, ready to mobilize to Vietnam for arrival on or before 20-22 of May.**

- **Mr. Raymond Goh, confirmed that in the case Swiber can not mobilize CONCORDE by 20 May, the CONQUEST would be mobilized to Vietnam on that date, from the Conoco Project near Natuna, which at this time is expected to be finished by 18 May**,

- Likpin/Petechim/Swiber shall submit all necessary documentation on CONQUEST for VSP for consideration before/on 20 April.

…

- Mr Do Van Phuc, expressed a clear preference for CONQUEST, Swiber view of this matter is they would prefer to commit resources complete CONCORDE to VSP satisfaction, and to use the diving part of program for schedule security, as it allowed early and multi

resource solution to schedule problems.

[emphasis added in italics and in bold]

54 The plaintiff relies on the bolded paragraphs to support its case that the Procurement Agreement was concluded on 15 April 2009. It is plain that the minutes of meeting merely recorded the 1st defendant's *unilateral* assurance through its Executive Chairman and CEO, Mr Raymond Goh, that *if* the *Swiber Concorde* was unable to be mobilised for arrival in Vietnam on or before 20–22 May 2009, a substitute vessel, the *Swiber Conquest*, would be mobilised in her place. This assurance was given in response to VSP's (the end-user of the vessel to be chartered) concern that the *Swiber Concorde* (which was then still under construction) might not "be ready in an acceptable time frame". There is no record in the 15 April 2009 minutes of the plaintiff's acceptance of the 1st defendant's assurance. At the hearing before me, Mr Tan accepted that, on the face of the 15 April 2009 minutes which he relies on, the plaintiff never expressly agreed to the Procurement Agreement. What is clear, however, is that the *Swiber Conquest* would only be offered for hire if the *Swiber Concorde* were not available.

55 Therefore, on the face of the 15 April 2009 minutes, there could not have been a concluded Procurement Agreement for the *Swiber Conquest*. In addition, the 15 April 2009 minutes also recorded that VSP expressed a clear preference for the *Swiber Conquest*. The defendants, however, appeared only to be willing to offer the *Swiber Conquest* if the *Swiber Concorde* were not available. Accordingly, as at 15 April 2009, the plaintiff (who was ultimately answerable to VSP) and the defendants were still not *ad idem* on the choice of the vessel to be used for the VSP project.

56 To sum up, it is clear that the 15 April 2009 minutes merely recorded the discussions of the parties who at that time were considering the suitability and availability of the *Swiber Concorde* or the *Swiber Conquest* for the VSP project. That this was merely a *discussion* was expressly stated at the start of the 15 April 2009 minutes. Tellingly, VSP, the end-user, required the documentation as regards the *Swiber Conquest* to be submitted for their consideration before 20 April 2009. Clearly, this shows that there could not have been a concluded Procurement Agreement on 15 April 2009 since VSP, the end-user, was still awaiting receipt of the relevant documentation for the *Swiber Conquest*, which was expected to be submitted only five days later on 20 April 2009.

Plaintiff's position on the 15 April 2009 meeting at the arbitration

57 The conclusion that no Procurement Agreement was concluded at the 15 April 2009 meeting becomes even more irresistible when one looks at the *plaintiff's own pleadings* in the arbitration. As I had alluded to earlier, the plaintiff's conduct, in particular its pleaded position in the arbitration, has a very material bearing on the factual sustainability of the Procurement Agreement. In its Amended Statement of Defence and Counterclaim ("Amended Defence") in the arbitration, the plaintiff also relied on the 15 April 2009 minutes, but for a different purpose and against a different party (the *2nd defendant* instead of the 1st defendant):

> 18. The Preliminary Agreement was modified as a result of the said meeting on **15 April 2009** and the mobilization date of the Concorde was extended to 20-22 May 2009 and the [**2nd defendant**] undertook to mobilize the Conquest for the Project in the event that the Concorde was unable to meet the said extended mobilization date ("**the Conquest Agreement**").
>
> [emphasis added in bold]

58 From the plaintiff's Amended Defence in the arbitration, it is clear that the plaintiff had relied on

the same 15 April 2009 minutes to support the following allegations:

(a) A preliminary agreement entered into on 12 March 2009 was modified at the meeting on 15 April 2009, and this brought into existence the *Conquest Agreement* (and not the Procurement Agreement).

(b) The preliminary and Conquest Agreements were contracts between the plaintiff and the 2nd defendant, and not the 1st defendant as the Procurement Agreement is pleaded to be.

(c) The Conquest Agreement obliges the 2nd defendant to mobilise the *Swiber Concorde* by 20–22 May 2009 for the VSP project, failing which the *Swiber Conquest* must be mobilised by the said dates in substitution. These are the exact allegations made in respect of the Procurement Agreement against the 1st defendant in the present suit.

59 If we assume both the pleaded case in the arbitration and the plaintiff's present case on the Procurement Agreement to be true, the implications would simply be absurd. It would mean that, at the same meeting on 15 April 2009, the plaintiff did two things: first, it modified its earlier contract with the 2nd defendant to bring into existence the Conquest Agreement; and second, it entered into a new contract with the 1st defendant (*ie* the Procurement Agreement). *Both* these contracts would be for the use of the *same* vessels (*ie*, the *Swiber Concorde* or *Swiber Conquest*), which were to be made available by 20–22 May 2009, for the *same project* (*ie*, the VSP project). If this was truly what happened, the plaintiff would be under separate contractual obligations towards *both* the 1st defendant and the 2nd defendant to pay the rate of charter hire for the *Swiber Concorde* or the *Swiber Conquest* when either vessel is delivered to the plaintiff. There is no sensible reason why the plaintiff would have contracted with *two separate parties* for the charter of the *same vessel for the same project* and therefore expose itself to double liability for the charter hire.

60 Having taken the position in the arbitration that the Conquest Agreement was concluded between the plaintiff and the *2nd defendant* at the 15 April 2009 meeting, it is simply fallacious for the plaintiff to now claim in this action that the 15 April 2009 minutes evidenced a separate Procurement Agreement in respect of the same vessels between different parties, *ie* the plaintiff and the *1st defendant*.

61 It is indeed ironic for the plaintiff to have invoked the doctrine of approbation and reprobation against the defendants, albeit incorrectly. The doctrine of approbation and reprobation "precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised" (see *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* ("*Treasure Valley*") [2006] 1 SLR(R) 358 at [31]). Since the arbitration was ultimately settled, the plaintiff in the present case could be said not to have "exercised a right" in relation to the Conquest Agreement. Thus, the doctrine does not, *stricto sensu*, apply. However, there is a wider dimension to the doctrine which discourages the adoption of "inconsistent attitudes" and warns that stark shifts in positions from previous proceedings would be viewed "with some circumspection and scepticism" (*Treasure Valley* at [30]).

62 Based on the spirit of the doctrine, any court will undoubtedly look dimly on the plaintiff's attempt to rely on the 15 April 2009 minutes to advance a *different contract* (*ie*, the Procurement Agreement) against a *different party* (*ie*, the 1st defendant) from that which was advanced in the arbitration. Even if the doctrine is strictly not applicable, as I had observed at [60], it is simply fallacious for the plaintiff to rely on the 15 April minutes to advance two different contracts against two different parties. The plaintiff appears to have adopted what the Malaysian High Court in *Syarikat Panon Sdn Bhd v Zacon Engineering Works Sdn Bhd* [2007] 8 MLJ 309 at [18] described as an "*ad hoc*

approach to litigation". I agree such an approach is to be frowned upon.

63 I note that in Mahmoud Shourideh's affidavit at para 8, the plaintiff also asserts that the Conquest Agreement is evidenced by the 2nd defendant's letter dated 16 April 2009. This is strictly irrelevant since, by the plaintiff's own case, the Conquest Agreement is not before me. Moreover, I do not see how the contents of the letter can assist the plaintiff at all. It reads:

> Further to our meeting in Singapore on 15th April with VSP Inspection Delegation and Petechim Likpin Consortium, [the 2nd defendant] hereby provide to you this letter, to confirm to you, the availability of the pipe lay vessel SWIBER CONQUEST for the subject project, 20th May 2009.

64 The letter must be read in context. At the 15 April 2009 meeting, the parties were discussing the availability of the *Swiber Concorde* and *Swiber Conquest*. The letter was simply a follow up letter to update the plaintiff that the *Swiber Conquest* would be available for the VSP project on 20 May 2009. [note: 24] It does not mention a separate contract *at all*. It is misconceived for the plaintiff to rely on the follow up letter of 16 April 2009 to conjure up another contract with the 2nd defendant for the same vessel. In any event, the existence or otherwise of the Conquest Agreement does not assist the plaintiff in explaining away the many implausibilities inherent in its assertion that the Procurement Agreement was concluded on 15 April 2009 between the plaintiff and the 1st defendant.

65 In my judgment, having regard to the plaintiff's own evidence (in the form of the 15 April 2009 minutes and the plaintiff's own pleaded case in the arbitration), it is plainly and obviously unsustainable for the plaintiff to assert that the Procurement Agreement had been concluded between the plaintiff and 1st defendant at the 15 April 2009 meeting.

Conduct and correspondence between 15 April 2009 and 29 May 2009

66 The above conclusion is separately supported by the conduct of and the correspondence between the parties *after 15 April 2009*.

67 First, in an email dated 7 May 2009 (well *before* the mobilisation date of 20–22 May 2009 under the alleged Procurement Agreement) from the plaintiff to the 2nd defendant [note: 25], the plaintiff forwarded a draft charterparty in respect of the *Swiber Conquest* ("the draft charterparty") to the 2nd defendant for the latter to "review internally and send back". It is pertinent to note that under additional clause no 1 of the draft charterparty, the plaintiff agreed to use its best efforts to obtain VSP's consent for the *Swiber Concorde* to be used in lieu of the *Swiber Conquest*.

68 What is most notable is that the plaintiff clearly contemplated that there may be more rounds of amendment and negotiation, explaining that he limited the persons in the email chain to "avoid too many people being involved in the email merry go round". This statement is clearly inconsistent with there having been a concluded Procurement Agreement for the delivery of the *Swiber Concorde* or the *Swiber Conquest* on or about 20–22 May 2009. I agree with Mr Yim that if the Procurement Agreement had been concluded on 15 April 2009 with the 1st defendant, there would be no good reason for the plaintiff to be sending the 2nd defendant a draft charterparty for review. Indeed, there would be no reason for the plaintiff to even contemplate entering into a second contract with the 2nd defendant for the VSP project *if* it had already entered into the Procurement Agreement for the use of the *Swiber Conquest*.

69 It bears emphasising that the plaintiff only wanted *one* vessel for the VSP project (see [2] above). By then, according to the plaintiff's own case in relation to the Procurement Agreement, it had *already* secured the charter of the *Swiber Concorde* or alternatively the *Swiber Conquest*, if the

Swiber Concorde was not available. It is significant to note that the mobilisation dates for either vessel under the Procurement Agreement (*ie*, 20–22 May 2009) had not even arrived when the draft charterparty was sent to the 2nd defendant on 7 May 2009. The ineluctable inference, therefore, is that the parties were taking steps to finalise the draft charterparty in respect of the *Swiber Conquest* following their meeting on 15 April 2009 and that no concluded agreement had yet been reached at the meeting. This was why the plaintiff had sent a draft charterparty for the 2nd defendant's review.

70 Second, the correspondence between the parties from 13 May 2009 to 18 May 2009 show that parties were not *ad idem* about the vessel to be used for the VSP project (*ie* either the *Swiber Concorde* or *Swiber Conquest*), and were still in negotiations. [note: 26] The plaintiff and VSP clearly wanted the *Swiber Conquest* for the VSP project [note: 27], whilst the defendants maintained that they were only prepared to offer the *Swiber Concorde*. [note: 28] Needless to say, the identity of the vessel is a critical term of any anticipated charterparty. The lack of agreement over the vessel to be used for the VSP project completely undermines the plaintiff's argument that the alleged Procurement Agreement had been concluded on 15 April 2009.

71 A reference to the plaintiff's statement of claim serves to confirm this. At para 14(a) of the statement of claim, the plaintiff pleads that it agreed that the vessel would be the *Swiber Concorde*. The *Swiber Conquest* would only be substituted for the *Swiber Concorde* "[i]f the Concorde could not be mobilised to arrive by 20th May 2009" (para 14(e)). To begin with, this is at variance with the endorsement on the writ that the Procurement Agreement was in respect of the *Swiber Conquest*. Furthermore, even after 15 April 2009, the parties were clearly still in negotiations regarding the vessel to be used and the plaintiff was still reluctant to accept the *Swiber Concorde* because of VSP's clear preference for the *Swiber Conquest*. This comes through clearly in the emails sent by Alan Roberts, the plaintiff's project manager, dated 13 May 2009 and 14 May 2009, where he highlighted that accepting the *Swiber Concorde* would expose the plaintiff to more risks [note: 29]. In my view, this is completely at odds with the plaintiff's current case (as found in the statement of claim) that on 15 April 2009, it had agreed to use *Swiber Concorde* and, if not available, the *Swiber Conquest* for the VSP project by concluding the Procurement Agreement.

72 Finally, the correspondence between the parties on 28 and 29 May 2009 also reveal that parties were still negotiating the terms of an anticipated charterparty. On 28 May 2009 at 11.57pm, the plaintiff wrote to the defendants stating that they "need to clear this up, but seem to be getting stuck on basics". [note: 30] On 29 May 2009 at 7.27am, the defendants replied stating that "we are close to getting this Charter Party resolved and agreed". [note: 31]

73 In my view, all the relevant correspondence points inexorably to the conclusion that no Procurement Agreement was concluded on 15 April 2009. For completeness, I should add that a second draft charterparty for the *Swiber Conquest* was sent by the plaintiff to the 2nd defendant on 27 May 2009. This second draft charterparty proposed that the vessel's delivery date be 2 June 2009. These two drafts illustrate the fact that the parties were still in negotiations. These negotiations eventually culminated in the conclusion of the charterparty for the *Swiber Concorde* and not the *Swiber Conquest* (which was the vessel proposed in the two draft charterparties) on 29 May 2009 between the plaintiff and the 2nd defendant. Of particular significance is the fact that the Concorde charterparty expressly provided that the date of delivery of the *Swiber Concorde* be 5 June 2009, and not 20–22 May 2009. More significantly, the parties in fact used the *Swiber Concorde* to perform the charterparty, though it led to disputes which were settled under the Settlement Agreement. Finally, the agreed charter hire under the Concorde charterparty was either US$1.3 million or US$1.4 million (depending on an option to extend), and not the daily rated *approximate* charter hire of US$130,000

per day under the alleged Procurement Agreement.

The plaintiff's reaction to the alleged breach of the Procurement Agreement to mobilise the vessel by 20 –22 May 2009

74 Finally, the plaintiff's reaction on being informed that the defendants could not deliver the *Swiber Concorde* or the *Swiber Conquest* by 20–22 May 2009 is wholly inconsistent with the conduct expected of a party who has a legal right to demand the delivery of either vessel by those dates.

75 From the evidence before me, it appears that the defendants first informed the plaintiff that the *Swiber Conquest* would not be available for mobilisation on 20–22 May 2009 at a meeting on 12 May 2009. [note: 32] As highlighted at [67] above, by then, the plaintiff had sent the draft charterparty for the 2nd defendant's review. Subsequently, by way of a letter dated 18 May 2009, the 2nd defendant informed the plaintiff that both the *Swiber Conquest* (due to repair works) and the *Swiber Concorde* (due to delayed sea trials) would not be ready by 20–22 May 2009. [note: 33] The *Swiber Concorde* would only be available from 4 June 2009, while the *Swiber Conquest* would only be available from 13–15 June 2009. Neither vessel was delivered on 20–22 May 2009.

76 Conspicuously absent from the correspondence that followed is *any* hint that the 1st and/or 2nd defendant had breached the Procurement or even the Conquest Agreement. Indeed, at the hearing before me, Mr Tan accepted that the plaintiff never protested the purported late delivery of either vessel. The complete silence on this subject points to the fact that there could not have been any concluded Procurement Agreement at that time.

77 I have also reviewed in particular the minutes of meeting dated 21 May 2009 [note: 34] and the email correspondence between the parties from 27–29 May 2009 [note: 35]. If there were a concluded Procurement Agreement which required the 1st defendant to mobilise the *Swiber Concorde* or even the *Swiber Conquest* by 20–22 May 2009, one would have expected some mention of the alleged breach. Yet, there was no intimation that the defendants were in breach of any prior agreement — whether it be the Procurement Agreement or the Conquest Agreement. Instead, the plaintiff was recorded in the 21 May 2009 minutes of meeting to have stated that the late delivery of the *Swiber Conquest* "was not acceptable and as such has to consider the new vessel SWIBER CONCORDE as it can start earlier". [note: 36] It is clear that as late as 21 May 2009 (which was within the original mobilisation window of the *Swiber Concorde* under the Procurement Agreement) the plaintiff was still *considering* the use of the *Swiber Concorde*. This is completely inconsistent with the alleged Procurement Agreement.

78 In the circumstances, I find that the plaintiff's claim for breach of the Procurement Agreement is factually unsustainable because the basis for the claim — *ie*, the existence of the Procurement Agreement — is "fanciful because it is entirely without substance", and is "contradicted by all the documents… on which it is based" (see *The Bunga Melati 5* at [39(b)], citing the decision of the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 at [95] per Lord Hope). Such factual unsustainability renders the claim plainly and obviously unsustainable (see *The Bunga Melati 5* at [39]). In my judgment, therefore, the action should be struck out on the basis that it is frivolous, vexatious and an abuse of the court's process.

79 I observe in passing that it is highly unusual for a party to pursue a claim for breach of contract when neither the existence of the contract nor its breach was ever raised in correspondence prior to the institution of the proceedings. This in itself would be insufficient to strike out the claim. However, when taken together with the other difficulties plaguing the plaintiff's case, I find that this is a clear

instance where striking out is appropriate. In fact, the defendants became aware of the proceedings not through service by the plaintiff but through notification by its bankers who discovered the writ in the course of its routine due diligence. Having reviewed the plaintiff's own evidence as well as its inconsistent and incoherent pleadings in the present proceedings and in the arbitration, it is perhaps understandable why the writ was not served.

Conclusion

80 In conclusion, I allow the defendants' appeal. Accordingly, the writ is struck out in its entirety, and I award costs to the defendants here and below fixed at $20,000 inclusive of disbursements.

Postscript — Conduct of solicitors seeking leave to file affidavits after the hearing

81 I was disturbed by the conduct of the plaintiff's solicitors following the end of the hearing. At the hearing on 31 August 2015, I reserved judgment and indicated that I would be releasing my decision in due course. Thereafter, the following exchange of correspondence ensued.

(a) On 3 September 2015, the plaintiff's solicitors wrote in to seek leave to file an affidavit in response to Mr Nitish Gupta's affidavit of 22 July 2015. The plaintiff's solicitors claimed that during the hearing before me, Mr Tan had sought leave to file a reply affidavit but that leave had been refused.

(b) On 4 September 2015, the defendants' solicitors responded to state that the plaintiff's letter was a "complete mischaracterisation of what in fact occurred at the hearing" especially since no such application was made during the hearing.

(c) On 8 September 2015, the Registry, at my direction, replied to state that no such leave application had been made and described the plaintiff's solicitors' assertion to the contrary as "a serious mischaracterisation" of the hearing. It was also clarified that, "[a]t the outset of the hearing, the court had asked the Plaintiff's counsel, Mr Jason Tan, whether he was ready to proceed with the appeal given that he had written to the Registry… to complain about the Defendants' alleged delay in the service of the Notice of Appeal. *Mr Jason Tan confirmed to the court that he was ready to proceed and on that basis the appeal was heard*" [emphasis added]. I gave this direction after consulting my contemporaneous minute sheet (which had been filed on the day of the hearing), which did not record the plaintiff's solicitors having made such an application. If an application had been made, I would have recorded it together with the arguments in support thereof and my decision on the alleged application.

(d) On 10 September 2015, the plaintiff's solicitors replied in the following terms:

> 5. In fact, our Jason Tan had stated to the court in the afternoon session of 31st August 2015, that he was "hobbled" by the difficulty that all the affidavits filed thus far had been in respect of the writ, and not the Statement of Claim, and the Plaintiffs had no chance to file a reply affidavit to Nitish Gupta's Affidavit. *The learned Steven Chong J however stated that the Plaintiffs were to proceed with the materials presently before the court.*
>
> …
>
> 9. … *It is to be recalled again that leave was in fact sought before the learned Jacqueline Lee AR and Steven Chong J for the Plaintiffs to file another affidavit, but was refused* in both cases. …

[emphasis added]

While the letter did not explicitly say so, it is clear that the plaintiff's solicitors were implicitly suggesting that the court's record of the proceedings was incorrect in that the application for leave to file an additional affidavit had been made. The plaintiff's solicitors also maintained their application for leave to file a reply affidavit.

82 I should mention that the plaintiff's solicitors did seek leave before the AR to file an affidavit to respond to Mr Nitish Gupta's affidavit but had been refused leave. Nevertheless, the hearing proceeded and the plaintiff prevailed. As the appeal is a rehearing, the plaintiff is fully entitled to *revive* its request to file a reply affidavit prior to or at the start of the hearing if it was so minded but no such request was ever made. That is not to say that leave would have been granted. Instead, in response to my question whether he was ready to proceed with the appeal as he had objected to the alleged "late" service of the defendants' notice of appeal, Mr Tan confirmed that he was ready to proceed. In any event, as it is now clear from my decision, Mr Tan's anxiety to reply to Mr Nitish Gupta's affidavit was misplaced to begin with. I have been able to dispose of the application without any regard to the factual assertions set out in Mr Nitish Gupta's affidavit (see [50] and [51] above). Although several difficulties of the plaintiff's case were raised during the appeal hearing, they arose from fatal inherent defects in the plaintiff's own case and not merely from any lack of evidence as to the date of the Procurement Agreement.

83 What is perhaps most disturbing is that the letters from the plaintiff's solicitors were jointly signed off by Mr Leonard Chia, the partner in charge of the case. Mr Chia did not attend the appeal hearing. I would have expected any solicitor, particularly a partner in that position, to have at least checked the court's minute sheet to properly ascertain the correct account before writing to the court in such terms. However, I understand that no request was ever made by the plaintiff's solicitors for a copy of the court's minute sheet. One can perhaps overlook this in the case of the 3 September letter but certainly not in the case of the 10 September letter. By then, the plaintiff's solicitors' account of events had been contradicted not just by the other party, but also *by the court*. I hope that senior lawyers having charge of the case will in future provide better guidance to their younger colleagues in their correspondence with the court instead of unthinkingly adopting their account without any regard to the official record of the proceedings. At the very least, I would expect them either to inspect the court's record or to check with the opposing counsel as to what transpired at the hearing especially if he or she did not attend the hearing. Regrettably, this was not done in this case.

84 As a final word, I will reiterate that it is improper for the plaintiff's solicitors to *repeatedly* request for leave to file further affidavits to address issues which were raised during the appeal especially after the court had already considered the request and declined it. At the start of this year, Choo Han Teck J observed somewhat disapprovingly that "[t]he practice of sending further submissions is gaining currency, but in my view, ought to stop. When the deadline for submissions as directed by the court has passed, no counsel should submit any further argument (or any matter) without the leave of court" (see *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2015] SGHC 96 at [5]). I agree entirely. What Choo J said about the practice of sending further submissions applies with equal, if not greater, force to repeated applications for leave to file supplementary affidavits where leave had previously been sought but refused.

[note: 1] Affidavit of Nitish Gupta dated 22 July 2015 at para 5

[note: 2] Defendants' submissions dated 27 August 2015 ("Defendants' submissions") at para 2(c)

[note: 3] Defendant's submissions at para 2(c)

[note: 4] Affidavit of Mahmoud Shourideh dated 24 July 2015 at para 10, Affidavit of Jason Tan dated 15 July 2015 at para 17, Plaintiff's submissions for hearing on 31 August 2015 ("Plaintiff's submissions") at para 43

[note: 5] Plaintiff's submissions at paras 46 – 47

[note: 6] Plaintiff's submissions at para 14

[note: 7] Plaintiff's submissions at paras 64 – 67

[note: 8] Para 3 – 5 of the Reply to Defence and Counterclaim (ARB 145) at DBOD p 129

[note: 9] Para 2 – 4 of the Reply to Defence to Counterclaim (ARB 145) at DBOD p154 – 155

[note: 10] See para 1 of the Statement of Claim (ARB 145) at DBOD p 45, para 109 – 110 of Amended Statement of Defence and Counterclaim (ARB 145) at DBOD p 121

[note: 11] See para 49 of the Statement of Claim (ARB 145) at DBOD p 60

[note: 12] See para 50 of the Statement of Claim (ARB 145) at DBOD p 60

[note: 13] Defendant's submissions at [70]

[note: 14] Defendant's submissions at [72]

[note: 15] Defendant's submissions at [73]–[74]

[note: 16] Defendant's submissions at [75]

[note: 17] DBOD p216

[note: 18] Defendant's submissions at p20, [58] onwards

[note: 19] AR Lee's minute sheet dated 31 July 2015 at p16, DBOD p 574

[note: 20] Statement of Claim at paras 12 and 13, DBOD p477

[note: 21] Defendants' submissions at para 46(c)

[note: 22] Plaintiff's submissions at para 71

[note: 23] DBOD p270-271

[note: 24] DBOD p469, Plaintiff's submissions at [42] – [43]

[note: 25] DBOD p 361

[note: 26] DBOD p 375 – 384

[note: 27] DBOD p 375 and 383

[note: 28] DBOD p 378 and 380

[note: 29] DBOD p 375 and 382

[note: 30] DBOD p 418

[note: 31] DBOD p 418

[note: 32] DBOD p 375

[note: 33] DBOD p386 – 387

[note: 34] DBOD p 389 – 393

[note: 35] DBOD p 400 – 421

[note: 36] DBOD p390

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