IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 147

Suit No 1240 of 2014

Between

Inzign Pte Ltd

… Plaintiff

And

Associated Spring Asia Pte Ltd

… Defendant

And

Associated Spring Asia Pte Ltd

…Plaintiff in Counterclaim

And

Inzign Pte Ltd

…Defendant in Counterclaim

GROUNDS OF DECISION

[Contract] — [contractual terms] — [Unfair Contract Terms Act]

[Civil Procedure] — [defence of set-off]

[Civil Procedure] — [costs] — [offer to settle]

Version No 1: 27 Oct 2020 (22:40 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **2**

THE PLAINTIFF'S CLAIMS **7**

THE DEFENDANT'S COUNTERCLAIM **8**

THE ISSUES **9**

WHETHER THE DEFENDANT WAS CONTRACTUALLY BOUND TO CARRY OUT THE 100K CLEANING PROCESS? **9**

WHETHER THE DEFENDANT BREACHED ITS CONTRACTUAL OBLIGATION? **14**

WHAT LOSSES DID THE PLAINTIFF SUFFER? **14**

COSTS OF INTERNAL INVESTIGATIONS 14

LOSSES DUE TO MISSED SHIPMENT 17

Whether there was a missed shipment *18*

Whether the defendant was liable for loss of profits *20*

COSTS OF THE 100K CLEANING PROCESS 22

DEFENDANT'S COUNTERCLAIM **24**

DEFENCE OF SET-OFF **25**

COSTS **27**

CONCLUSION **32**

Version No 1: 27 Oct 2020 (22:40 hrs)

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Inzign Pte Ltd
v
Associated Spring Asia Pte Ltd

[2018] SGHC 147

High Court — Suit No 1240 of 2014
Chua Lee Ming J
26–29 September, 3 October 2017, 12 March 2018

21 June 2018

Chua Lee Ming J:

Introduction

1 The plaintiff, Inzign Pte Ltd, sued the defendant, Associated Spring Asia Pte Ltd, for breach of contract. The defendant filed a counterclaim for the price of goods which the plaintiff failed to take delivery of. On 3 October 2017, I gave judgment for the plaintiff in the sum of $52,111.37, and judgment to the defendant on its counterclaim in the sum of $78,087.60. The defendant then raised its defence of set-off. Although it had been pleaded in the defence, neither party had made submissions on the defence of set-off in closing submissions. I agreed to hear further submissions from both parties on the defence of set-off.

2 On 12 March 2018, I heard further submissions and decided in favour of the defendant on its defence of set-off. Accordingly, I varied the previous

orders that I made on 3 October 2017 to the following orders instead:

(a) the plaintiff's claim was dismissed with costs; and

(b) judgment was entered for the defendant on its counterclaim in the amount of $25,976.23 with interest and costs.

3 On the question of costs, it turned out that the defendant had made offers to settle the plaintiff's claim and the counterclaim. The offer to settle the plaintiff's claim exceeded the amount that I found the plaintiff was entitled to, whilst the offer to settle the counterclaim was less than the amount that I found the defendant was entitled to. I awarded the defendant costs on the standard basis until the date of the offer to settle and costs on an indemnity basis thereafter. I fixed the costs at $96,200 plus disbursements to be fixed by me, if not agreed.

4 Both parties have appealed against my decision. The plaintiff's appeal is against the whole of my decision given on 12 March 2018. The defendant's appeal is against my decision awarding $52,111.37 to the plaintiff (which was then set-off against the defendant's counterclaim), and the costs order.

Background

5 The plaintiffs were in the business of manufacturing and assembling products for the pharmaceutical and healthcare industries, including asthma inhalers.

6 In 2003, the plaintiff was approached by IVAX Pharmaceuticals UK Limited ("IVAX") through the Economic Development Board. IVAX was looking into the manufacture and assembly of asthma inhalers in Singapore.

Version No 1: 27 Oct 2020 (22:40 hrs)

Two of the components required for these inhalers were compression springs and flap valve spring strips (together, "the Springs"). The plaintiff contacted the defendant regarding the manufacture and supply of the Springs.

7 Both the plaintiff and the defendant held discussions with IVAX's representatives. IVAX required both the plaintiff and the defendant to undergo a pre-qualification process. From around 2003 to 2004, the defendant took part in this process. The defendant had to show that it would be able to meet the requirements set out in the following documents:

(a) Component Vendor Specifications ("CVS") for the Springs. The CVS set out, among other things, the component specifications, manufacturing process requirements, cleaning requirements, qualification testing against approved Qualification Protocols, and acceptance testing; and

(b) Qualification Protocol and Checklists ("QP Checklists) for the Springs. The QP Checklists were used for the qualification of the tooling and secondary manufacturing processes used in the supply of the Springs. Production could commence only upon successful completion of the qualification protocol.

IVAX, the plaintiff and the defendant signed the CVS[1] and the QP Checklists.[2]

8 The defendant acknowledged that the CVS and QP Checklists required the Springs to undergo a process of cleaning in a "100K cleanroom

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1 Agreed Bundle Vol. 1 ("1 AB") 157–166 (CVS for flap valve return spring strip) and 1 AB 167–175 (CVS for compression spring).

2 1 AB 202–304 (QP Checklist for compression spring) and 1 AB 305–332 (QP Checklist for flap valve return spring strip).

Version No 1: 27 Oct 2020 (22:40 hrs)

environment" before packaging ("the 100K Cleaning Process").[3] The 100K Cleaning Process was an additional process after "passivation". Passivation was a process to make the metal components of the springs passive, through removal of free ions, and to leave a protective film over the surfaces to prevent rust and corrosion; it also involved cleaning the metal components.[4] However, passivation did not require the use of a 100K cleanroom.

9 As the defendant did not have the requisite 100K cleanroom facility, it asked to be allowed to use a company called Alantac Industrial Services Pte Ltd ("Alantac") to carry out the 100K Cleaning Process.[5] The plaintiff agreed after inspecting Alantac's 100K cleanroom facility. Alantac was also involved in the pre-qualification process.[6]

10 The defendant successfully completed the pre-qualification process and IVAX approved the appointment of the defendant as a supplier of the Springs.

11 Subsequently, the plaintiff and defendant signed a Supply Agreement dated 19 July 2005 ("the Agreement").[7] It was not disputed that schedules that were supposed to have been attached to the Agreement were not in fact attached. One of these was Schedule 2. Schedule 2 was to have set out the "technical and quality specifications and relevant drawing" which the defendant was to comply with in manufacturing the Springs (Article 4.2 read with Article 1).[8] The

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3 Affidavit of Evidence-in-Chief ("AEIC") of Tan Boon Hoe, filed on behalf of the defendant, at para 9. See, also, 1 AB 158 (para 2.2), 168 (para 2.2), 205 (para 4.1) and 307 (para 4.1).

4 AEIC of Tan Boon Hoe, at para 12.

5 NE, 28 Sep 2017, at 123:10–124:7.

6 NE, 28 Sep 2017, at 42:9–16; 1 AB 104 and 541–544; Agreed Bundle Vol. 2 ("2 AB") 590.

7 2 AB 633–647.

Version No 1: 27 Oct 2020 (22:40 hrs)

Agreement further provided that the defendant shall deliver each batch of Springs to the plaintiff with a Certificate of Compliance ("COC") stating that the Springs met the specifications (Article 4.4(f)).[9]

12 Another schedule which was not attached to the Agreement was Schedule 3, which was to have set out the prices at which the defendant was to supply the Springs to the plaintiff (Article 6.1).[10]

13 Further, the Agreement envisaged that the defendant would agree on the period within which the defendant must deliver the Springs to the plaintiff's facility once the plaintiff confirmed its requirements via the Vendor Delivery Schedule (Article 4.4(a)).[11] The defendant was to manufacture and deliver the Springs in accordance with the dates and quantities specified in the "Vendor Delivery Schedule" (Articles 4.4(d)–(e)).[12] However, no such schedule was provided by the plaintiff to the defendant.

14 Thereafter, the plaintiff and the defendant transacted between themselves in the following manner:

(a) The defendant would send the plaintiff a quotation for the Springs.[13] The quotation would set out, among other things, the unit prices of the compression springs and flap valve spring strips and the production lead time.

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8 2 AB 637; 2 AB 634.

9 2 AB 638.

10 2 AB 640.

11 2 AB 637.

12 2 AB 638.

13 See, *eg*, 2 AB 648.

Version No 1: 27 Oct 2020 (22:40 hrs)

(b) The plaintiff would place a purchase order ("PO") setting out, among other things, the quantity and delivery schedule.[14] Some of these POs were blanket orders which allowed the plaintiff to activate deliveries of requisite quantities according to its needs.

(c) The defendant would confirm acceptance of the plaintiff's PO and send it back to the plaintiff.

(d) Thereafter, the defendant would deliver the Springs to the plaintiff with a delivery order ("DO")[15] and invoice[16] the plaintiff.

15 Each batch of the Springs delivered by the defendant was accompanied by a COC signed by the defendant. Among other things, the COC certified the following:[17]

> CLEANING: ULTRASONIC WASH AND PACKED IN CLASS 100K CLEANROOM
>
> ...
>
> We certify that the items in this shipment have been inspected and met all customer specifications....

16 Sometime in December 2012, the plaintiff discovered that some of the compression springs supplied by the defendant were stained. The plaintiff conducted internal investigations which included cleaning the springs manually and cleaning the assembly machines on its premises. However, the plaintiff's internal investigations could not ascertain the cause of the stains.

17 The plaintiff then turned its attention to possible external causes.

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14 See, *eg*, 2 AB 793.

15 See, *eg*, 2 AB 784.

16 See, *eg*, 2 AB 783.

17 See, *eg*, 2 AB 650.

Version No 1: 27 Oct 2020 (22:40 hrs)

Sometime in February or March 2013, the plaintiff learnt from Alantac that it had not received Springs for washing from the defendant for certain periods of time. In July 2013, the plaintiff conducted an audit of the defendant's premises and confirmed that the defendant had not been complying with the 100K Cleaning Process.

18 The defendant did not dispute that it did not send some of the Springs to Alantac for cleaning. However, the defendant alleged that it had no contractual obligation to carry out the 100K Cleaning Process whether by itself or through Alantac.

19 In August 2013, the plaintiff asked for the COC confirming compliance with the 100K Cleaning Process to be issued by Alantac. Thereafter, the defendant delivered the Springs together with COCs issued by Alantac.

20 It was not disputed that subsequently, the plaintiff did not take delivery of 153,200 compression springs and 820,000 flap valve spring strips, ("the Outstanding Orders") the total value of which amounted to $78,087.60.

The plaintiff's claims

21 The plaintiff's case was that the defendant had breached its contractual obligations in supplying Springs which had not undergone the 100K Cleaning Process. The plaintiff's claims were for various losses alleged to have been caused by this breach.

22 The plaintiff did not pursue all of its claims as pleaded in its statement of claim. In its closing submissions, the plaintiff proceeded with the following claims:[18]

[18] Oral Submissions for the Plaintiffs, at para 98.

Version No 1: 27 Oct 2020 (22:40 hrs)

(a) $63,688.69 being the costs incurred in conducting internal investigations into the stained Springs supplied by the defendant;

(b) $315,398.55 (or in the alternative, $485,366.17, which the Plaintiff claimed was the original value of the missed shipment), being the losses suffered as a result of a missed shipment to IVAX in December 2012. The plaintiff claimed that the missed shipment was a consequence of the internal investigations that had to be carried out due to the discovery of the dirty compression springs; and

(c) $92,310.19 being the loss suffered by the plaintiff in respect of Springs which were not sent to Alantac for the 100K Cleaning Process from 2008 to 2013.

The defendant's counterclaim

23 The defendant claimed the sum of $78,087.60 being its loss arising from the Outstanding Orders which the defendant claimed the plaintiff had wrongfully failed to take delivery of.

The issues

24 The issues in this case were:

(a) Whether the defendant was contractually bound to carry out the 100K Cleaning Process?

(b) If so, whether the defendant had breached this obligation?

(c) What were the losses suffered by the plaintiff arising from the defendant's breach?

Version No 1: 27 Oct 2020 (22:40 hrs)

(d) Whether the plaintiff had any defence to the defendant's counterclaim?

Whether the defendant was contractually bound to carry out the 100K Cleaning Process?

25 The defendant's case was that

(a) it had no contractual obligation to carry out the 100K Cleaning Process because the Agreement, QP Checklists and the CVS were not binding on it. According to the defendant, its supply of Springs to the plaintiff was subject only to the terms in the defendant's quotations ("the Quotation Terms"); and

(b) in the alternative, even if the Agreement was binding on it, the QP Checklists and the CVS were not, and the defendant was only required to supply the Springs in accordance with the finished component specification drawings ("the Drawings"). According to the defendant, these Drawings only required the Springs to undergo passivation.

26 In my judgment, the evidence supports the plaintiff's claim that although the Agreement did not have the schedules attached to it, the defendant had agreed to carry out the 100K Cleaning Process and the parties agreed that it could do so through Alantac.

27 First, the defendant's assertion that the Quotation Terms were the only terms agreed to between the parties, made no commercial sense at all. The Springs were to be used in the manufacture and assembly of asthma inhalers, and as such had to meet stringent standards of cleanliness. This was known to the defendant. The defendant (and Alantac) had to undergo a rigorous pre-

Version No 1: 27 Oct 2020 (22:40 hrs)

qualification process and was approved as a supplier only after IVAX was satisfied that the defendant was able to supply the Springs in accordance with the stringent requirements (including the 100K Cleaning Process). It was completely illogical that the parties would have agreed that the defendant would thereafter no longer be required to comply with these requirements. In my view, the inescapable conclusion was that the parties agreed to proceed on the basis that the defendant would supply the Springs in compliance with the requirements set out in the QP Checklists and the CVS.

28 Second, the defendant's alternative defence that it was required to comply only with the Drawings, also made no commercial sense for the same reasons given at [27] above. In addition, the defendant's claim that it was bound only by the Drawings but not the QP Checklists and the CVS was also illogical. All these documents were made available to the defendant during the pre-qualification process. The defendant admitted that the Drawings were provided to it by the plaintiff during the period from 2003 to 2004 when the defendant was undergoing the pre-qualification process.[19] There was no justification for the defendant being selectively bound by only the Drawings but not the QP Checklists and the CVS. In any event, the Drawings also required the defendant to comply with the CVS; notes in the Drawings required "product attributes to be tested in accordance with relevant vendor specifications".[20]

29 Third, *every* delivery of the Springs by the defendant to the plaintiff through the years was accompanied by a COC in which the defendant (at least, until August 2013) certified that the Springs had been packed in a 100K cleanroom and that the Springs met all customer specifications. As stated at [11]

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19 AEIC of Tan Boon Hoe, at para 10.

20 AEIC of Tan Boon Hoe, at pp 32–36, exh TBH-1 Tab 1.

Version No 1: 27 Oct 2020 (22:40 hrs)

above, the COC was a requirement under the Agreement. There was no reason for the defendant to issue the COCs unless it had agreed that the Springs were to undergo the 100K Cleaning Process. The defendant even went to the extent of issuing COCs for compression springs which had not been sent to Alantac to undergo the 100K Cleaning Process. In my view, the issuance of the COCs clearly indicated the existence of the defendant's agreement that the Springs had to undergo the 100K Cleaning Process requirement. The defendant's issuance of false COCs was even stronger evidence of such agreement as it testified to the importance that the parties attached to the COCs and the 100K Cleaning Process.

30 The defendant's explanation for these false COCs was that they were issued as a result of an oversight.[21] I found this explanation sorely wanting in credibility, especially when viewed against the fact that between 2008 and 2013, more than 70% of compression springs supplied to the plaintiff had not undergone the 100K Cleaning Process[22] and yet COCs had been issued for *all* of them. "Oversight" was a convenient but inadequate explanation.

31 Fourth, between 2008 and 2013, the defendant had engaged Alantac to carry out the 100K Cleaning Process. Again, there was no reason for the defendant to have done so unless it had agreed that the Springs had to undergo the 100K Cleaning Process. The defendant denied having sent the Springs to Alantac for purposes of the 100K Cleaning Process. I rejected the defendant's denial for the reasons set out below.

32 The defendant gave inconsistent explanations as to why it had sent the Springs to Alantac. In its defence, the defendant pleaded that prior to August

21 NE, 29 Sep 2017, at 35:23–36:9.

22 AEIC of Tan Boon Hoe, at para 66 and p 26.

Version No 1: 27 Oct 2020 (22:40 hrs)

2013, it had engaged Alantac on certain occasions only to "assist with the packaging of small quantities" of the compression springs.[23] However, the defendant's General Manager, Mr Tan Boon Hoe ("Tan") gave evidence that (a) the flap valve spring strips were sent to Alantac for passivation and packaging because the flap valve spring strips were manufactured by a third party who did not have the capabilities to carry out the passivation process,[24] and (b) "from time to time" the defendant would send the compression springs to Alantac to "package into smaller batches".[25] When further cross-examined on a COC for flap valve spring strips, Tan then claimed the springs were sent to Alantac to de-tangle the springs which had to be packed in smaller batches to facilitate delivery to the plaintiff.[26]

33 More importantly, Alantac's invoices clearly showed that it had been performing the 100K Cleaning services for the defendant over the years.[27] The defendant's explanation was that it had engaged Alantac to carry out only packaging but Alantac decided on its own to carry out additional cleaning as the marginal cost for the extra services was not high.[28] I rejected this explanation. I found the explanation completely unconvincing: there was no commercial reason for Alantac to perform the additional cleaning services in a 100K cleanroom environment for free. More importantly, the defendant's explanation was contradicted by the evidence of Mr Kwang Boon Keong Peter ("Peter Kwang"), the Managing Director of Alantac.

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23 Defence & Counterclaim (Amendment No 3), at paras 18–19.

24 AEIC of Tan Boon Hoe, at paras 66-67.

25 NE, 28 Sep 2017, at 115:5–6.

26 NE, 28 Sep 2017, at 173:11–175:21.

27 AEIC of Tan Boon Hoe, exh TBH-1 Tabs 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44 and 46.

28 AEIC of Tan Boon Hoe, at paras 65 and 67.

Version No 1: 27 Oct 2020 (22:40 hrs)

34 Peter Kwang's oral testimony in court was as follows:

(a) Alantac went through a lengthy process before it was qualified to carry out the washing, and thereafter the plaintiff told Alantac to deal with the defendant.[29]

(b) The washing had to be done under a cleanroom environment to prevent contamination.[30]

(c) The parts that Alantac washed were the Springs. The process involved passivation, rinsing with deionised water, washing and rinsing in a class 100K cleanroom environment, baking to dry, and then packing in the same cleanroom environment.[31]

(d) He told the plaintiff's Managing Director, Mr Phua Wee Hoe ("Phua"), that Alantac did washing for the defendant but that there was a period of time when the Springs were not sent to Alantac for washing.[32]

Whether the defendant breached its contractual obligation?

35 The defendant admitted that between 2008 and 2013, of the Springs supplied to and paid for by the plaintiff, 8,110,631 compression springs and 193,140 flat valve spring strips were not in fact sent to Alantac for cleaning and packing.[33] The defendant was therefore blatantly in breach of its contractual obligation to comply with the 100K Cleaning Process. The defendant's breach showed a wanton disregard for the fact that the Springs would be used in the

29 NE, 28 Sep 2017, at 42:9–43:21.

30 NE, 28 Sep 2017, at 43:25–44:2.

31 NE, 28 Sep 2017, at 47:9–16; 48:9–49:7.

32 NE, 28 Sep 2017, at 56:14–57:7; 60:10–14.

33 AEIC of Tan Boon Hoe, at paras 66 and 68 and pp 26 and 28.

Version No 1: 27 Oct 2020 (22:40 hrs)

manufacture of asthma inhalers and that dirty Springs could be detrimental to the well-being of users of these inhalers.

What losses did the plaintiff suffer?

36 As stated earlier at [22] above, the plaintiff claimed that the defendant's breach caused it to suffer the following losses: (a) costs of the internal investigations conducted by it, (b) losses suffered due to a missed shipment, and (c) loss suffered in respect of Springs that were not sent to Alantac for the 100K Cleaning Process from 2008 to 2013.

Costs of internal investigations

37 The defendant knew that the Springs were to be used in the manufacture and assembly of inhalers. It must have been within the reasonable contemplation of the parties that if any of the Springs were found to be stained, an investigation to establish the cause would be necessary. In my view, the plaintiff was entitled to recover its reasonable costs in carrying out such an investigation.

38 The plaintiff's discovery of stains in December 2012 was in respect of compression springs. The plaintiff then conducted an internal investigation to ascertain the cause of the stains.

39 The plaintiff claimed that internal investigations were carried out from December 2012 until April 2013 and involved the following:

(a) Deploying many of the plaintiff's employees, including its engineers, to work overtime.[34]

(b) Cleaning the springs piece by piece using a lint-free cloth.[35]

[34] AEIC of Phua Swee Hoe, at para 37.

Version No 1: 27 Oct 2020 (22:40 hrs)

(c) Cleaning the vibrating bowl which was a part of the assembly line.[36]

(d) Eventually shutting down the plaintiff's machines in January 2013 and dismantling and cleaning the machines after the above steps failed to establish the cause.[37]

(e) Operating the assembly machines on an extended basis thereby incurring significant additional operational costs.[38]

40 In my view, the plaintiff had acted reasonably in taking the above in investigating the cause of the stains.

41 The plaintiff claimed that it incurred a total amount of $63,688.69 in carrying out the internal investigations. This amount comprised the following:

(a) $48,688.69 being overtime pay; and

(b) $15,000 being "machine and operation costs".

42 I accepted the plaintiff's evidence that the overtime costs were incurred as a result of the internal investigations. The plaintiff produced its record of the overtime pay that it had incurred from December 2012 to April 2013, with supporting timesheets for December 2012 to March 2013.[39] The defendant pointed out that there was an error in the record for one of the employees (Si Xiaocheng) for December 2012 in that the overtime should be 33 hours instead

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35 NE, 26 Sep 2017, at 106:7–107:1.

36 NE, 26 Sep 2017, at 110:17–25.

37 AEIC of Phua Swee Hoe, at para 39; NE, 26 Sep 2017, at 118:16–18.

38 AEIC of Phua Swee Hoe, at para 37.

39 AEIC of Phua Swee Hoe, at para 37 and exh PSH-8

Version No 1: 27 Oct 2020 (22:40 hrs)

of 41.5 hours as stated in the plaintiff's tabulation.[40] The defendant did not point out any other errors. Based on the single error relating to Si Xiaocheng, the defendant submitted that the plaintiff's computation was not reliable. I did not think that this single error was sufficient reason for me to disregard the plaintiff's records. The defendant also pointed out in closing submissions that the timesheets were incomplete in that no timesheets for April 2013 had been attached. However, the defendant had not cross-examined the plaintiff's witnesses on this.

43 In my view, there was no reason not to accept the plaintiff's record of its payments for overtime save to make an adjustment for the one error that the defendant did point out. However, in writing these grounds, I noticed an error in the adjustment made by me. When I gave my decision to the parties, I had adjusted the amount of overtime pay from $48,688.69 to $48,597.[41] This was an error as the adjustment which I made in respect of Si Xioacheng's overtime pay for December 2012 was based on 31 hours instead of 33 hours. The amount of overtime pay which the plaintiff ought to recover should be $48,614.46[42] instead.

44 I rejected the plaintiff's claim in respect of machine and operation costs as there was no evidence explaining or supporting the computation of this claim.[43]

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40 AEIC of Phua Swee Hoe, at pp 137 and 170.

41 $48,688.69 – [($362.40/41.5) x (41.5 – 31)].

42 $48,688.69 – [($362.40/41.5) x (41.5 – 33)].

43 NE, 27 Sep 2017, at 7:1-15.

Version No 1: 27 Oct 2020 (22:40 hrs)

Losses due to missed shipment

45 The plaintiff claimed that it missed a shipment to IVAX in end December 2012 as a result of the defendant's breach. The plaintiff claimed $315,398.55 being the value of the missed shipment less certain costs including material costs and packaging costs. In substance, this was a claim for its loss of profits.

46 As stated at [22(b)] above, the plaintiff also claimed in the alternative for $485,366.17 being the original value of the missed shipment. However, the plaintiff (correctly, in my view) did not seriously pursue this alternative claim. There was no basis for such a claim.

47 The defendant disputed the plaintiff's claim that there was a missed shipment. The defendant also denied liability for loss of profits.

Whether there was a missed shipment

48 I accepted the plaintiff's submission that a shipment to IVAX in late December 2012 was scheduled but eventually not made. In my view, this was supported by the objective contemporaneous documentary evidence.

49 The evidence showed that IVAX would confirm the shipment schedule in advance and arrange the shipment schedule with the freight forwarders; the plaintiff would then ship the products in accordance with the pre-determined shipment schedule.[44]

50 By an email dated 6 December 2012, the plaintiff informed IVAX that two shipments of "PG0528" would be shipped out in December 2012 and that

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[44] AEIC of Phua Swee Hoe, at para 34; AEIC of Foo Chee Wee, at para 8.

Version No 1: 27 Oct 2020 (22:40 hrs)

IVAX would receive one shipment in January 2013 and another in February 2013.[45] "PG0528" was the code for the force holding unit ("FHU") which was the part of the inhaler that contained the Springs.[46] Each of the two shipments was for 319,488 units. IVAX acknowledged the schedule and said that it would put the third week of January and February as the dates for the deliveries in those months.[47] IVAX also reminded the plaintiff to adhere to the schedule so that IVAX could meet its own customer demand.[48] On 24 December 2012, IVAX sent the plaintiff a delivery schedule which confirmed the two scheduled deliveries of 319,488 pieces of PG0528 each in the weeks commencing 21 January 2013 and 21 February 2013.[49]

51 Freightmen Pte Ltd ("Freightmen"), the freight forwarders for IVAX, confirmed that the plaintiff shipped 319,488 pieces of FHUs to IVAX on 18 December 2012 and 240,288 pieces of "MBAs" to IVAX on 26 December 2012.[50] No FHUs were shipped to IVAX on 26 December 2012. "MBAs" referred to main body assemblies which was another part of the inhalers and which was not relevant to the subject matter of the present action.[51] Freightmen's confirmation supported the plaintiff's case that it did not manage to make the second shipment of 319,488 pieces of FHUs to IVAX in late December 2012.

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45 Agreed Bundle Vol. 4 ("4 AB") 1813.

46 AEIC of Foo Chee Wee, at para 13i; NE, 26 Sep 2017, at 10:11–11:14 and 12:16–22.

47 4 AB 1811.

48 4 AB 1811.

49 AEIC of Foo Chee Wee, at p 1715.

50 Agreed Bundle Vol. 5 ("5 AB") 2416.

51 AEIC of Foo Chee Wee, at p 1685 sub-para ii.

Version No 1: 27 Oct 2020 (22:40 hrs)

52 The plaintiff's senior manager, Mr Foo Chee Wee ("Foo") testified that on Phua's instructions, he called IVAX to explain the failure to make the second shipment in December 2012.[52]

53 The defendant submitted that even if the plaintiff did fail to make the second shipment in December 2012, there was no credible evidence that the goods were not subsequently shipped out after December 2012. I disagreed with the defendant's submission. The plaintiff had shown that it did not make the second shipment in December 2012. Foo testified that he did not ask IVAX for the shipment to be deferred[53] and I had no reason to disbelieve him. In my view, the burden shifted to the defendant to prove that the shipment was in fact made after December 2012. The defendant did not discharge this burden. The defendant could have checked with IVAX but there was no evidence that it even did so.

Whether the defendant was liable for loss of profits

54 In my judgment, it was clear that the plaintiff's loss of profits was within the reasonable contemplation of both parties at the time of contract. The defendant had to know that dirty compression springs could result in loss of profits to the plaintiff. The defendant knew that the Springs were components which the plaintiff used in manufacturing and assembling asthma inhalers for sale to its own customers. The defendant asserted that it did not know whether IVAX was the plaintiff's customer or manufacturing partner. In my view, this did not exonerate the defendant. It was sufficient that the defendant knew that the plaintiff was manufacturing the inhalers for sale to its own customers. In any event, I found the defendant's assertion difficult to believe given that the

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52 AEIC of Foo Chee Wee, at p 1686 sub-para iii.

53 NE, 27 Sep 2017, at 116:22–118:3.

Version No 1: 27 Oct 2020 (22:40 hrs)

defendant had participated in IVAX's rigorous pre-qualification process from 2003 to 2004. Further, in at least one of its emails to the defendant, the plaintiff had referred to IVAX as its customer.[54]

55 I accepted the plaintiff's evidence that in December 2012, it discovered stained springs in several batches of compression springs delivered by the defendant. It was not disputed that the compression springs delivered to the plaintiff in December 2012 were not sent to Alantac to undergo the 100K Cleaning Process.[55] As stated earlier, this constituted a breach by the defendant. The plaintiff's internal investigations found that its own machines and assembly lines were not the cause of the compression springs being stained. In my view, it was a reasonable inference that the defendant's breach was the cause of the dirty compression springs.

56 Cleanliness was clearly an important requirement in the manufacture of the inhalers. In my view, it was also within the reasonable contemplation of the parties that any discovery of stains on the compression springs would necessarily call for an investigation into the cause. The plaintiff acted reasonably in carrying out its internal investigations and this led to the missed shipment.

57 I concluded therefore that there was a sufficient causal link between the defendant's breach and the plaintiff's missed shipment. The plaintiff was therefore entitled to claim damages in the form of its loss of profits arising from the missed shipment. Nevertheless, the plaintiff still had to prove its loss of profits.

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54 2 AB 557.

55 Oral Submissions for the Plaintiffs, at Annex C1, p 5.

Version No 1: 27 Oct 2020 (22:40 hrs)

58 In my view, the plaintiff failed to prove its loss of profits. The plaintiff was unable to substantiate how it came to the sum of $315,398.55 that it claimed. In any event, that amount did not represent its true loss of profits. It was clear that in computing that amount, the plaintiff had not deducted all of its expenses. One glaring example was that the plaintiff had not deducted labour costs.[56]

59 More importantly, however, I agreed with the defendant that the terms of the agreement between the plaintiff and the defendant included the Quotation Terms. The plaintiff did transact with the defendant on the basis of these quotations issued by the defendant. Clause 6 of the Quotation Terms precluded any claim for loss of profits. Accordingly, the plaintiff was precluded from making its claim for $315,398.55 since this represented a claim for loss of profits.

Costs of the 100K Cleaning Process

60 The defendant admitted that, between 2008 and 2013, 8,110,631 compression springs and 193,140 flat valve spring strips that were supplied to, and paid for by, the plaintiff had not in fact undergone the 100K Cleaning Process at Alantac. The plaintiff computed the quantity of flat valve spring strips that had not undergone the 100K Cleaning Process to be 123,730.[57] For the reasons set out below, this dispute over the quantity was immaterial.

61 The plaintiff's claim of $92,310.19 was computed based on the rates which Alantac charged for the 100K Cleaning Process.[58] The defendant

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56 NE, 28 Sep 2017, at 89:18–90:25.

57 Oral Submissions for the Plaintiffs, at Annex C2.

58 Oral Submissions for the Plaintiffs, at para 98i.

Version No 1: 27 Oct 2020 (22:40 hrs)

confirmed the unit cost charged by Alantac for the 100K Cleanroom Process was $0.011 per compression spring and $0.025 per flat valve spring strip.[59]

62 In my view, the plaintiff was not entitled to its claim in full. I agreed with the defendant that the plaintiff would have suffered no loss in respect of Springs which had been used in the FHUs sold to IVAX. The plaintiff had been paid by IVAX for the FHUs and there had been no claim by IVAX in respect of any of the FHUs. Further, the plaintiff was also not entitled to recover its loss in respect of flat valve spring strips because the plaintiff did not find any issues with the cleanliness of any of the flat valve spring strips.[60] It was not the plaintiff's case that any of the flat valve spring strips supplied by the defendant could not be used because they were dirty.

63 The same, however, could not be said of the compression springs which were affected by the stains and therefore could not be used. The plaintiff was entitled to recover its loss in respect of these compression springs. In my view, the rate charged by Alantac for the 100K Cleaning Process was a reasonable basis for the computation of the loss suffered by the plaintiff as a result of the defendant's breach.

64 As the missed shipment (*ie*, the second scheduled shipment of FHUs in late December 2012) was for 319,488 FHUs, I awarded the plaintiff the sum of $3,514.37[61] as the loss suffered by it in respect of 319,488 compression springs.

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59 AEIC of Tan Boon Hoe, at paras 66–67.

60 NE, 26 Sep 2017, at 139:9–19.

61 319,488 x $0.011.

Version No 1: 27 Oct 2020 (22:40 hrs)

65 The defendant sought to rely on a three-month limitation period provided for under cl 6 of the Quotation Terms. However, I agreed with the plaintiff that the three-month limitation period was unreasonable, and that pursuant to s 6(3) read with s 11(2) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), the defendant could not rely on the 3-month limitation period to exclude or restrict its liability for its breach. Three months was far too short a period of time within which the plaintiff could reasonably be expected to ascertain the cause of the dirty compression springs and to commence action.

Defendant's counterclaim

66 It was not disputed that between August and September 2013, the plaintiff ordered a total of 2m compression springs and 1m flap valve spring strips from the defendant. The plaintiff took delivery of these Springs in batches and paid for them. There was no dispute that the Springs that were delivered to the plaintiff complied with the required specifications. In particular, the Springs had been sent to Alantac to undergo the 100K Cleaning Process and the deliveries were accompanied by the requisite COCs.

67 The plaintiff refused to take delivery of the balance of 153,200 compression springs and 820,000 flap valve spring strips (*ie*, the Outstanding Orders). The total price of the Outstanding Orders was $78,087.60.

68 The plaintiff had an option to cancel the order for compression springs after 1m pieces had been delivered but this option was only exercisable if the defendant failed to meet the required specifications over three consecutive batches delivered.[62] This option was not triggered. Phua's evidence was that the plaintiff continued to obtain the Springs from the defendant whilst it sourced for

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62 4 AB 2060.

Version No 1: 27 Oct 2020 (22:40 hrs)

an alternative supplier and that the plaintiff stopped accepting delivery of the Outstanding Orders "immediately upon identifying an alternative supplier with the requisite qualifications".[63] This was the real reason why the plaintiff refused to take delivery of the Outstanding Orders.

69 It was clear that the plaintiff had no defence whatsoever to the counterclaim. I therefore found for the defendant on its counterclaim.

Defence of set-off

70 The defendant was entitled to rely on its claim for $78,087.60 in respect of the Outstanding Orders both as a defence of set-off against the plaintiff's claim as well as a counterclaim: O 18 r 17 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"). Set-off is only available in respect of debts or liquidated demands due between the same parties in the same right: *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2018) ("*SCP 2018*") at para 18/17/3. It was not disputed that this requirement was met in the present case.

71 The defendant relied on legal set-off, equitable set-off and set-off by judgment. I agreed with the defendant that it was entitled to rely on any of these set-offs.

72 A legal set-off involves a debt or liquidated sum due from the plaintiff to the defendant that is capable of being liquidated or ascertained with precision at the time of pleading: *SCP 2018* at para 18/17/4. In this case, the defendant's counterclaim for $78,087.60 in respect of the Outstanding Orders clearly

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63 AEIC of Phua Swee Hoe, at para 59.

Version No 1: 27 Oct 2020 (22:40 hrs)

satisfied this requirement and entitled the defendant to a legal set-off against the plaintiff's claim.

73 An equitable set-off may apply whether the amount is ascertained or not, so long as the cross-claim arises from the same transaction as the plaintiff's claim or is closely connected with it such that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into account the cross-claim: *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & another* [1995] 2 SLR(R) 643 at [35]. In the present case, the defendant's counterclaim did not arise out of the same transaction as the plaintiff's claim but it was sufficiently closely connected with the subject matter of the plaintiff's claim such that it would be manifestly unjust not to take it into account.

74 Set-off by judgment arises under the Court's inherent jurisdiction to set-off cross-liabilities which have been established by judgments, leaving one single liability for the balance sum: *Longyuan-Arrk (Macao) Pte Ltd v Show and Tell Productions Pte Ltd and another suit* [2013] SGHC 160 at [66]. In the present case, the set-off clearly involved cross-liabilities established by judgments.

75 In the present case, the amount found due to the defendant on its counterclaim exceeded the amount found due to the plaintiff on its claim. This meant that the defendant succeeded in its defence to the plaintiff's claim and was therefore entitled to an order that the plaintiff's claim be dismissed. As the amount awarded on the counterclaim exceeded that awarded on the plaintiff's claim, the defendant was also entitled to judgment for the balance of its counterclaim after the set-off.

Version No 1: 27 Oct 2020 (22:40 hrs)

76 The plaintiff argued that even if the defence of set-off succeeded, the plaintiff's claim should not be dismissed because the plaintiff had succeeded in proving breach by the defendant. The plaintiff urged me to exercise my inherent jurisdiction to prevent an unjust result.

77 I disagreed with the plaintiff. In my view, the inherent jurisdiction of this Court did not allow me to disregard the principles of set-off or the consequences of a successful defence of set-off. In any event, it could not be said that there was anything unjust in the result. A successful defence of set-off against the whole of the plaintiff's claim necessarily meant that the plaintiff had succeeded in establishing its claim, but that that claim was extinguished by the defendant's successful cross-claim.

78 Accordingly, my final orders were that the plaintiff's claim be dismissed and that judgment be entered for the defendant for the balance of its counterclaim. It follows from the error described in [43] above that the judgment on the counterclaim should be for the balance sum of $25,958.77[64] instead of $25,976.23.

Costs

79 The defendant had successfully defended the plaintiff's claim. There was no reason why costs should not follow the event. The defendant was therefore entitled to costs of defending the plaintiff's claim. In addition, the defendant had succeeded in obtaining judgment for the balance of its counterclaim after the set-off and was therefore also entitled to costs on its counterclaim, see: *Hanak v Green* [1958] 2 WLR 755, at pp 767 and 770 cited in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1966] MLJ 286.

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64 $78,087.60 - $48,614.46 - $3,514.37.

Version No 1: 27 Oct 2020 (22:40 hrs)

80 The defendant then informed me that on 25 August 2015, it had made two offers to settle. The first was an offer to settle the plaintiff's claim on the following terms ("the Claim OTS"):

(a) The defendant shall pay the plaintiff $100,000.

(b) The plaintiff shall pay the defendant's costs up to the date of the acceptance of the offer.

81 The second was an offer to settle the counterclaim on the following terms ("the Counterclaim OTS"):

(a) The plaintiff shall pay the defendant $70,000.

(b) The plaintiff shall pay the defendant's costs up to the date of the acceptance of the offer.

82 The plaintiff did not accept the offers. The defendant submitted that pursuant to O 22A r 9 of the Rules, it was entitled to costs on a standard basis ("standard costs") up to the date the offers to settle were served and on an indemnity basis ("indemnity costs") thereafter.

83 O 22A r 9 provides for two situations where an offer to settle is not accepted:

(a) Where an offer to settle is made by a *plaintiff* and he obtains a judgment not less favourable than the terms of the offer to settle. In this case, the *plaintiff* is entitled to standard costs to the date the offer was served and indemnity costs thereafter, unless the Court orders otherwise: O 22A r 9(1).

Version No 1: 27 Oct 2020 (22:40 hrs)

(b) Where an offer is made by a *defendant* and the *plaintiff* obtains judgment not more favourable than the terms of the offer to settle. In such a case, the *plaintiff* is entitled to standard costs to the date the offer was served and the *defendant* is entitled to indemnity costs thereafter, unless the Court orders otherwise: O 22A r 9(3).

Where an offer to settle has been made by a defendant and the plaintiff's claim is dismissed, the plaintiff has to pay standard costs up to the date of service of the offer and indemnity costs thereafter: *SCP 2018* at para 22A/9/2.

84 In the present case, the final orders that were made were that the plaintiff's claim was dismissed with costs and judgment was entered on the counterclaim for the sum of $$25,976.23[65] with costs. However, these orders were the result of the defence of set-off. Underlying these orders were my findings that the plaintiff was entitled to recover $52,111.37[66] on its claim and the defendant was entitled to recover $78,087.60 on its counterclaim ("the underlying findings").

85 Applying O 22A rr 9(1) and 9(3) to the two final orders would have meant that

(a) the plaintiff would have to pay standard costs for the dismissal of its claim up to the date of service of the Claim OTS and indemnity costs thereafter, since the final order dismissing the claim was clearly not more favourable than the terms of the Claim OTS, and

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65 This should now be $25,958.77.

66 This should now be $$52,128.83 (*ie*, $3,514.37 + $48,614.46).

Version No 1: 27 Oct 2020 (22:40 hrs)

(b) the defendant would only be entitled to standard costs on its counterclaim since the final order on the counterclaim was less favourable than the terms of the Counterclaim OTS.

86 However, in my view, the result at [85(b)] above would be unfair to the defendant. After all, I had found that the defendant had succeeded in proving its counterclaim of $78,087.60 and this finding was more favourable to it than the terms of the Counterclaim OTS. The defendant should be entitled to indemnity costs on its counterclaim from the date of service of the Counterclaim OTS.

87 On the other hand, applying O 22A rr 9(1) and 9(3) to the underlying findings meant that

(a) the plaintiff would be entitled to standard costs for its claim until the date of service of the Claim OTS and the defendant would be entitled to indemnity costs thereafter; and

(b) the defendant would be entitled to standard costs for its counterclaim until the date of service of the Counterclaim OTS and indemnity costs thereafter.

88 The result in [87(a)] above would be unfair to the defendant because it would have defeated the purpose of its defence of set-off. Having succeeded in its defence of set-off which extinguished the plaintiff's claim, the defendant was entitled to have the plaintiff's claim dismissed with costs. The defendant should not have to pay the plaintiff any costs in respect of the claim.

89 A strict application of O 22A rr 9(1) and 9(3) in the present case therefore would not produce a fair result that would be consistent with the intent of O 22A r 9. Fortunately, the drafters of the Rules in their wisdom saw it fit to

Version No 1: 27 Oct 2020 (22:40 hrs)

preserve the court's discretion to order otherwise in O 22A rr 9(1) and 9(3). This overriding discretion is also preserved in O 22A r 9(5).

90 In my view, taking into consideration the terms of the offers to settle, the underlying findings and the final orders, the fair order to make was that the plaintiff was to pay the costs of the dismissal of its claim and the costs of the counterclaim on the standard basis up to the date of service of the offers to settle and on the indemnity basis thereafter.

91 The plaintiff pointed out that although the Claim OTS provided for the defendant to pay $100,000 to the plaintiff, it also required the plaintiff to pay the defendant's costs up to the date of acceptance of the offer. The plaintiff submitted that the Claim OTS was not valid because

(a) it did not comply with O 22A r 9(3) which provides that the plaintiff is entitled to standard costs to the date the offer was served; and/or

(b) it was not a serious and genuine offer.

92 I disagreed with the plaintiff's submissions. First, O 22A r 9(3) merely provides for the cost consequences if a plaintiff obtains judgment not more favourable than the terms of the offer to settle. It does not prescribe what terms as to costs may be included in an offer to settle. A defendant is free to include such terms as to costs that it considers appropriate in its offer to settle. Second, it is true that an offer to settle must be a serious and genuine offer and that for it to be a serious and genuine offer, it should also contain reasonable terms: *Ram Das V N v SIA Engineering Co Ltd* [2015] 3 SLR 267 at [23]. However, in my view, the term in the Claim OTS requiring the plaintiff to pay costs did not mean

Version No 1: 27 Oct 2020 (22:40 hrs)

that the offer was not a serious and genuine offer. There was no other reason to doubt that the Claim OTS was a serious and genuine one.

93 As for the quantum of the costs, the plaintiff submitted that defendant costs for its counterclaim should be awarded on the State Courts scale pursuant to O 59 r 27(5) of the Rules. I disagreed. The plaintiff had commenced this action in the High Court. The counterclaim was closely connected to the subject matter of the plaintiff's claim. Clearly, there was sufficient reason for the counterclaim to be brought in this action and there was no reason to deny the defendant costs on the High Court scale.

94 The trial took about four and a half days. Taking into consideration the issues, the fact that some of the issues had been decided against the defendant, and that the defendant was entitled to indemnity costs after the date of service of the offers to settle, I ordered the plaintiff to pay the defendant total costs fixed at $96,200 plus disbursements to be fixed by me if not agreed.

Conclusion

95 The plaintiff succeeded in proving that the defendant had breached its contractual obligations. However, it was only able to prove losses suffered in the amount of $52,111.37.[67] The defendant succeeded in its counterclaim claim for $$78,087.60.

96 The defendant also succeeded in its defence to set-off the amount due to it on its counterclaim against the amount found due to the plaintiff on the plaintiff's claim. As the former exceeded the latter, the plaintiff's claim was extinguished and the claim was therefore dismissed with costs. Judgment was

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67 This should now be $52,128.83 (see fn 66 above).

Version No 1: 27 Oct 2020 (22:40 hrs)

entered for the defendant for the balance amount of $25,976.23[68] on its counterclaim with costs.

97 The defendant had served separate offers to settle the claim and the counterclaim. The plaintiff did not accept the offers. As the terms of the Claim OTS and Counterclaim OTS were more favourable to the plaintiff and the defendant (plaintiff in counterclaim) respectively, I ordered the plaintiff to pay costs on the claim and counterclaim on the standard basis up to the date of service of the offers and on the indemnity basis thereafter. I fixed the total costs at $96,200 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge

Ronnie Tan, Beitris Yong and Liew Serenella Yen
(Central Chambers Law Corporation) for the plaintiff by original action and defendant in counterclaim;
Lai Yew Fei and Tao Tao (Rajah & Tann LLP) for the defendant by original action and plaintiff in counterclaim.

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[68] This should now be $25,958.77 (see [78] above).

Version No 1: 27 Oct 2020 (22:40 hrs)