IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 152

Suit No 418 of 2018 (Summons No 1750 of 2020)

Between

Shree Ramkrishna Exports Pvt. Ltd.

… Plaintiff

And

J. G. Jewelry Pte. Ltd.

… Defendant

Between

J. G. Jewelry Pte. Ltd.

… Plaintiff in Counterclaim

And

(1) Shree Ramkrishna Exports Pvt. Ltd.
(2) The Jewelry Company
(3) TJC Jewelry, Inc.
(4) Govind Dholakia
(5) Rahul Dholakia
(6) Nirav Narola
(7) Amit Shah
(8) Ashish Shah

… Defendants in Counterclaim

JUDGMENT

[Civil Procedure] — [Summary judgment]

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Shree Ramkrishna Exports Pvt Ltd
v
J G Jewelry Pte Ltd

[2020] SGHC 152

High Court — Suit No 418 of 2018 (Summons No 1750 of 2020)
Ang Cheng Hock J
22 June, 13 July 2020

22 July 2020 Judgment reserved.

Ang Cheng Hock J:

1 This is the plaintiff's application for summary judgment under O 14 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") in SUM 1750 of 2020. The plaintiff asserts that this is a straightforward claim for money that the defendant owes to the plaintiff for diamonds and jewellery sold to the defendant. It argues that there is no dispute as to the quality or quantity of items delivered and the debt is proven by invoices issued to the defendant. However, the defendant argues that a closer scrutiny of the circumstances giving rise to the dispute and the defences raised will show that this is far from a straightforward claim, and not one that is suitable for summary judgment.

Background

The parties

2 The plaintiff and first defendant in counterclaim, Shree Ramkrishna Exports Pvt. Ltd. ("SRK"), is a company incorporated in India that is in the business of manufacturing and trading in jewellery and precious stones including diamonds. SRK and the second and third defendants in the counterclaim – The Jewelry Company and TJC Jewelry, Inc ("TJC") – form what the parties refer to collectively as the "SRK Entities". SRK wholly owns and controls The Jewelry Company and TJC. The SRK Entities are managed and controlled by the fourth to eighth defendants in the counterclaim: Govind Dholakia is SRK's founder and chairman; Rahul Dholakia is SRK's managing director; Nirav Narola ("Nirav") is SRK's junior partner and director and The Jewelry Company's diamond room supervisor; Amit Shah ("Amit") is The Jewelry Company's CEO; and Ashish Shah ("Ashish") is TJC's CEO and president.[1]

3 The defendant and plaintiff in counterclaim, J. G. Jewelry Pte. Ltd. ("JGJ"), is a company incorporated in Singapore that is in the business of trading jewellery and precious stones. JGJ's shareholders are Michael Bernard Kriss ("Michael"), David Miles Kriss ("David"), and Shaileshkumar Khunt ("Shailesh"), who hold 25%, 25%, and 50% of the shares respectively. Shailesh is alleged to be SRK's nominee.[2]

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1 Nirav Narola's 8th affidavit dated 17 April 2020 ("Narola's 8th Affidavit") at [9] and [41]; Michael Bernard Kriss's 13th affidavit ("Michael's 13th Affidavit") at [20]–[22], annexed to Samuel Lee Jia Wei's 2nd affidavit dated 8 May 2020.

2 Narola's 8th Affidavit at [10]–[11]; Michael's 13th Affidavit at [14].

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4 Michael and David (collectively the "Kriss brothers") also own and/or control JDM Import Co. Inc. ("JDM"), a company incorporated in New York, United States, as well as a related group of companies incorporated in the United States. Insofar as they are relevant to this case, these companies are JDM, MG Worldwide LLC, Miles Bernard, Inc., and Asia Pacific Jewelry LLC (collectively the "JDM Entities").[3] The Kriss brothers have been buying various diamonds and jewellery from SRK since around 2000.[4]

Alleged joint venture agreement

5 I have already set out some of the background facts to the present dispute in my judgment for Registrar's Appeal No 323 of 2018, and I do not propose to repeat them all here. I will only summarise the salient facts pertinent to this application for summary judgment below.

6 Michael, attesting for JGJ, claims that JGJ was incorporated on 31 March 2015 in Singapore pursuant to a joint venture between the JDM Entities, on one hand, and the SRK Entities, on the other hand. The agreement between the parties to form the joint venture was concluded orally.[5] According to JGJ, the key terms of the joint venture agreement (the "Joint Venture Agreement") include the following:[6]

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3 Michael's 13th Affidavit at [18]; Narola's 8th Affidavit at [12].

4 Reply and Defence to Counterclaim dated 6 March 2020 ("RDC") at [12(b)].

5 Michael's 13th Affidavit at [31]–[35].

6 Defence and Counterclaim dated 5 February 2020 ("DCC") at [10(2)]; Michael's 13th Affidavit at [30].

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(a) JGJ would be incorporated as the joint venture company and its shares would be held by the JDM Entities and the SRK Entities on a 50-50 basis;

(b) all income and expenses generated by the JDM Entities and the SRK Entities pursuant to the joint venture were to be for the account of JGJ;

(c) jewellery and/or other goods supplied by the SRK Entities and/or the JDM Entities and billed to JGJ pursuant to the joint venture would be billed to JGJ at "cost-plus" pricing, *ie*, the cost price of the goods plus a specified mark-up required to cover any other costs including marketing, duties and taxes; and

(d) there was to be a full accounting reconciliation of the joint venture conducted by the SRK Entities at the end of each year, upon which the net profits (or losses) generated under the joint venture would be allocated to JGJ, and subsequently apportioned equally between the SRK Entities and the JDM Entities (the "Accounting Reconciliation").

7 Michael alleges that the parties also agreed that JGJ's bookkeeping, accounting and other back office responsibilities were to be carried out by the SRK Entities at their back-office in India. This meant that SRK was in charge of operating and maintaining JGJ's bank account. The instructions for all transactions through JGJ's bank account were prepared and set up for approval under Amit's and/or Nirav's direction. Ashish was the primary person who approved and released payments through the bank's online platform.[7]

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[7] Michael's 13th Affidavit at [31] and [51]–[52].

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8 SRK denies in its pleadings that there was a joint venture agreement. Instead, SRK pleads that the alleged joint venture was simply a "business arrangement", proposed by the Kriss brothers, between the JDM Entities and the SRK Entities. SRK does not deny that this business arrangement was for it to supply diamonds and jewellery for sale in the United States and elsewhere, and for the book-keeping and accounting work to be done in India, but SRK claims that the persons handling these functions reported to and took instructions from the Kriss brothers (the "Business Arrangement"). The Kriss brothers incorporated JGJ in Singapore pursuant to this Business Arrangement. SRK was not a shareholder of JGJ because SRK was "not yet ready" to enter into a joint venture with the Kriss brothers. SRK would sell the diamonds to JGJ and in turn JGJ would sell them to companies controlled and/or owned by the Kriss brothers.[8]

9 It is undisputed that, from April 2015 to 2 August 2017, SRK issued invoices totalling an aggregate sum of US$66,394,768.91 (the "Invoices") for diamonds and jewellery supplied to JGJ. This sum of US$66,394,768.91 comprises invoices amounting to a total sum of US$42,994,312.66 (the "42M Invoices"), which have been paid by JGJ; and 205 invoices amounting to a total sum of US$23,400,456.25 (the "23M Invoices"), which remain unpaid by JGJ.[9] Michael claims that the 42M Invoices were paid because the SRK Entities had control over JGJ's bank account, which allowed it to approve the payments from the account purportedly on JGJ's behalf.[10] This is disputed by SRK, who claims

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8 RDC at [12].

9 Michael's 13th Affidavit at [8] and [42]; Narola's 8th Affidavit at [17]–[18].

10 Michael's 13th Affidavit at [44(g)].

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that the Kriss brothers and/or their representatives always maintained control over JGJ's bank account.[11]

10 In August 2017, Michael alleges that the SRK Entities unilaterally and orally terminated the joint venture agreement without the Accounting Reconciliation having been conducted.[12] Thereafter, the 23M Invoices remained unpaid.

The parties' cases

11 SRK commenced this suit on 23 April 2018 against JGJ claiming payment for the 23M Invoices.[13]

12 JGJ has two main defences. First, JGJ alleges that the prices for the jewellery, which are the subject of the 23M Invoices, have been manipulated and are not in accordance with the terms of the Joint Venture Agreement (the "Unilateral Pricing Defence"). In particular, SRK has allegedly charged JGJ amounts in excess of "cost-plus" pricing in respect of the 23M Invoices, in breach of the Joint Venture Agreement.[14] Further, and more fundamentally, in this application, JGJ argues that the specific prices of the diamonds and jewellery sold under the 23M Invoices were never agreed with SRK before they were supplied, and there was also no prior agreement as to when such payments under the invoices would fall due.[15]

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11 Nirav Narola's 10th affidavit dated 26 May 2020 ("Narola's 10th Affidavit") at [25].

12 Michael's 13th Affidavit at [83].

13 Narola's 8th Affidavit at [5]–[6].

14 DCC at [11(2)]; Michael's 13th Affidavit at [116]–[117].

15 Notes of Argument ("NoA"), 22 June 2020, at p 6 lines 8–17 and p 7 lines 25–29.

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13 Second, JGJ claims that it *might* have had a valid set-off against the 23M Invoices claim by SRK had the SRK Entities carried out the Accounting Reconciliation in accordance with the terms of the joint venture. This is because, if the Accounting Reconciliation had been done, it *might* have turned out that the venture would have suffered losses, and SRK would have been liable to contribute to those losses by making payment to JGJ. This is described by parties as the "Reconciliation Defence". Any amount owed by SRK to JGJ and arising in this manner *could* have been set-off against what is due to the SRK under the 23M Invoices.[16] Now that the joint venture has been terminated, and the parties will not carry out the Accounting Reconciliation, the court should order SRK to give an account in accordance with the terms of the joint venture, if JGJ is able to establish its defence at trial that the Accounting Reconciliation should have been carried out. Until then, JGJ argues that no payment is due to SRK under the 23M Invoices.

14 JGJ's counterclaim against the defendants to the counterclaim is, essentially, that they had conspired to fraudulently misuse their access to JGJ's bank account to settle the 42M Invoices in SRK's favour (the "Fraudulent Misuse Counterclaim"). In relation to this, JGJ has four primary contentions. First, JGJ claims that SRK breached the Joint Venture Agreement because the 42M Invoices were issued at prices in breach of the Joint Venture Agreement and because SRK failed to conduct the Accounting Reconciliation exercise. Second, JGJ claims that the second to eighth defendants to the counterclaim induced SRK to breach the Joint Venture Agreement and conspired to procure SRK to breach the Joint Venture Agreement. Third, JGJ claims that the defendants to the counterclaim conspired to fraudulently misuse access to JGJ's

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16 Notes of Evidence ("NE"), 13 July 2020, at p 5 lines 10–32.

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bank account to make payment on the 42M Invoices. Fourth, JGJ claims that SRK has been unjustly enriched because it received payment of the 42M Invoices with the knowledge that the prices of the diamonds and jewellery charged thereunder were in excess of that agreed under the Joint Venture Agreement.[17]

The requirements of O 14 r 1 of the ROC

15 The legal principles relating to summary judgment are well established. O 14 r 1 of the ROC provides that, "[w]here a statement of claim has been served on a defendant and that defendant has served a defence to the statement of claim, the plaintiff may, on the ground that that defendant *has no defence* to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant" [emphasis added].

16 The burden is on the plaintiff to first show that he has a *prima facie* case for summary judgment. Once this is shown, the "tactical burden" – and not the legal or evidential burden – shifts to the defendant to establish that there is a fair or reasonable probability that he has a real or *bona fide* defence. A complete defence need not be shown; the defendant need only show that there is a triable issue or question or that, for some other reason, there ought to be a trial: *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B*") at [17]–[19]; see also O 14 r 3(1), ROC.

17 The threshold to raise a triable issue is low and, where there are conflicts as to fact, summary judgment is ordinarily not granted. In the event of

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17 DCC at [18]–[37].

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conflicting affidavit evidence, it is normally not appropriate for the court to attempt to resolve such conflicts on affidavit. However, the court will still need to determine whether the statements contained in the affidavits have sufficient *prima facie* plausibility to merit further investigation as to their truth: *Wiseway Global Co Ltd v Qian Feng Group Ltd* [2015] SGHC 85 at [20].

Whether there are triable issues

Unilateral Pricing Defence

18 In relation to the Unilateral Pricing Defence, Nirav attested for SRK that the Kriss brothers were aware of and agreed to the prices in the 23M Invoices because, prior to invoicing JGJ, SRK had sent a breakdown of the cost of the diamonds and the cost of labour to the Kriss brothers. JGJ had also never objected to the invoiced price.[18] It was only after JGJ commenced an application to stay this suit that JGJ first alleged that the prices in the 23M Invoices were manipulated and wrong.[19] SRK's counsel refers me to the case of *Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another* [1999] SGHC 291 ("*Orient Tainers*") to support his argument that the Unilateral Pricing Defence is an afterthought.[20]

19 However, JGJ points out that it was SRK that unilaterally came up with the prices, without any prior consultation or agreement with JGJ or the Kriss brothers. Also, SRK had full control of the invoicing process, given the SRK

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18 Narola's 10th Affidavit at [10]–[13] and [20]; Narola's 8th Affidavit at [39].

19 Narola's 8th Affidavit at [40].

20 NoA, 22 June 2020, at p 3 lines 6–10.

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Entities' control of JGJ's bank account and all of JGJ's bookkeeping, accounting and other back office functions.[21]

20 I start my analysis by making a preliminary observation about SRK's pleaded case. I note that SRK's pleadings only seek an order for payment of *the specific sum* of US$23,400,456.25 and there was no prayer for any lesser amount or for damages to be assessed. That being the case, I must point out that I am not entirely satisfied that SRK has established a *prima facie* case for summary judgment *for the amount of US$23,400,456.25 from JGJ*.

21 While it is undisputed that there were diamonds and jewellery supplied to JGJ, SRK has not shown that JGJ had accepted the prices stated in the 23M Invoices. It is trite law that a binding contract can only be formed if there is acceptance to an offer made: see *Halsbury's Laws of Singapore – Contract*, vol 7 (LexisNexis, 2019 Reissue) at para 80.028. A supplier is not entitled to payment for goods supplied based on a price stated in an invoice, unless the buyer had agreed to that price. In this case, SRK has not shown any contract between the parties or correspondence evidencing a contract, which showed that SRK and JGJ had agreed to the prices of the diamonds and jewellery to be supplied. For example, there is no evidence to show that SRK issued a quotation stipulating the price to JGJ, and that JGJ then accepted this offer by placing an order pursuant to the quotation. In my view, it is not enough for SRK to assert that there is no dispute as to the quantity and quality of the diamonds and jewellery delivered, when there is nothing which shows that there was a *consensus ad idem* on the prices of the items delivered.

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[21] Michael's 13th Affidavit at [39] and [122].

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22 I note that SRK's counsel pointed out that there was correspondence between SRK and the JDM Entities that showed that the JDM Entities had sent pre-notification orders ("PNOs") in respect of diamonds and jewellery they needed, and these PNOs set out the details as to quantities and prices. SRK argues that the JDM Entities were acting as agents on behalf of JGJ in this regard, and JGJ is thus bound to pay the Invoices based on those quantities and prices.[22] However, this is disputed by JGJ and Michael, who deny that the persons involved in making the PNOs, for example, Sunil Mandolikar and Attmaran Dhuwali, represented JGJ or the Kriss brothers.[23] It is also not pleaded by SRK that the JDM Entities acted as agents of JGJ in agreeing to prices of the diamonds and jewellery. In my view, to simply assert that JGJ is bound to pay the 23M Invoices because that was the arrangement contemplated under the Joint Venture Agreement is insufficient. To obtain judgment, what must be shown is unequivocal evidence of specific knowledge and agreement on the part of JGJ as to the prices of items ordered and delivered. Furthermore, counsel for SRK also informed me that, for this application, SRK is not relying on JGJ's previous payment of the 42M Invoices to show that JGJ had agreed to the prices of the diamonds and jewellery supplied pursuant to the 23M Invoices. That being the case, I did not refer to the previous course of dealings between SRK and JGJ in relation to the 42M Invoices in determining whether there was agreement by JGJ as to the prices of the items delivered.

23 Thus, while I accept that SRK has a *prima facie* case for payment of *some* amount due from JGJ, there is certainly a triable issue as to whether SRK

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22 Narola's 10th Affidavit at [15]–[18]; Plaintiff's written submissions dated 15 June 2020 ("PWS") at [37]–[39].

23 Michael's 13th Affidavit at [44]–[46].

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is entitled to its claim of the figure of US$23,400,456.25, or some lesser amount, and, if so, how much.

24 I do not find SRK's reliance on the case of *Orient Tainers* ([18] *supra*) to be helpful because much depends on the specific facts of each case. As counsel for JGJ pointed out, just as SRK complains that the Unilateral Pricing Defence is an afterthought, it is peculiar that SRK did not demand payment on the first invoice due under the 23M Invoices until a year after the invoice fell due.[24] According to JGJ, this shows that SRK itself never considered that payment fell due when the credit terms in the invoices expired, because there was never an agreed contractual term as to the time for payment.

25 Furthermore, in *Orient Tainers* ([18] *supra*), there was no suggestion that the first defendant was not aware of the contemporaneous invoices *at the time* they were issued. It is on this basis that the High Court in that case could conclude that the first defendant's failure to raise any objections until months later meant that the objection to the invoices was an afterthought. In the present case, JGJ's case is that it was not aware of the Invoices *at the time* they were issued. JGJ's case is that the SRK Entities' personnel at their back office received orders directly from customers; issued PNOs on JDM Entities' behalf, who were purportedly acting as agents for JGJ; issued the Invoices on SRK's behalf to JGJ; and issued the Invoices on JGJ's behalf to the JDM Entities and to TJC.[25] The SRK Entities maintained and operated JGJ's bank account through which they procured JGJ to pay the 42M Invoices (see [9] above). Therefore, JGJ's case is that it did not know of the prices in the Invoices at the

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24 NE, 13 July 2020, at p 29 lines 1–6.

25 Michael's 13th Affidavit at [44]; Defendant's written submissions dated 15 June 2020 at [14].

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time they were issued. If all this is proven, it cannot be said that JGJ's objections thereafter are clearly an afterthought. In my view, a trial would be required to investigate these issues.

26 SRK also submits that, even if JGJ's Unilateral Pricing Defence is accepted, that would mean that SRK would be entitled to at least US$15,860,173.25. SRK highlights that this sum is reflected in JGJ's financial statements for the financial year ending 31 December 2016, as adjusted in March 2018, to reduce the amount payable by JGJ to SRK by US$7,540,283.00 to the figure of US$15,860,173.25.[26] By then, these proceedings had already started. There are also two audit confirmation letters dated 10 September 2018 from JGJ to SRK which highlight that the sums of US$2,892,873.38 and US$12,967,291.87 are owed by JGJ to SRK.[27]

27 However, from the evidence available at this stage of the proceedings, it is not clear to me that this adjustment was in relation to all of the 23M Invoices and, if not, to which of them. In the first place, it is also not clear to me that the figures in the financial statements for the year ending 31 December 2016 were all a reference to payments due to SRK under the 23M Invoices. This is unclear because, as counsel for SRK accepted, the bulk of the 23M Invoices were issued only in 2017.[28] As for the audit confirmation letters, these were withdrawn by JGJ not long after they were issued to SRK. Michael has attested that the audit confirmation letters were sent in error by a staff without checking against the detailed accounting books and records of JGJ, which it is claimed was being

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26 NoA, 22 June 2020, at p 3 line 18–p 4 line 4; PWS at [66]–[82]; Narola's 10th Affidavit at [43]–[53].

27 Narola's 8th Affidavit at [26] and pp 1439–1440 (Tab 4).

28 NoA, 22 June 2020, at p 3 line 4.

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withheld by the SRK Entities.[29] While this explanation for the withdrawal of the letters is rejected by SRK as being no explanation at all, I find that it is not so inherently improbable that it lacks *prima facie* plausibility. This is an issue that turns on the credibility of Michael, and it must be tested at trial.

28 Given these disputes of fact concerning the Unilateral Pricing Defence, and the fact that neither SRK's nor JGJ's version of events are inherently improbable, it is not the function of the court to decide in this application whether the affidavit evidence given by SRK or JGJ is more credible and believable. That is a matter for trial.

Reconciliation Defence

29 In summary judgment applications, the defendant must show that its defence is a plausible one, in that it has raised something of substance which might possibly defeat the claim brought by the plaintiff, either entirely or partially. The court will not accept fanciful and speculative possibilities as being sufficient to raise a plausible defence.

30 I had difficulties understanding the Reconciliation Defence raised by JGJ and how it would function as a defence to the claim by SRK under the 23M Invoices. The main difficulty with JGJ's Reconciliation Defence is that it is not able to inform me, with any certainty, as to whether *any* sums might be owing from SRK to JGJ, even if the Accounting Reconciliation is carried out now. It is speculative that such an eventuality will arise.

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[29] Michael's 13th Affidavit at [155]–[156] and pp 830–832.

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31 It may well be the case that the reason for the need to speculate is because of SRK's breach of the Joint Venture Agreement in not carrying out the Accounting Reconciliation, as JGJ has alleged. However, the remedy for that breach appears to me to be a claim by the JDM Entities against SRK so that the necessary orders for some form of an account may be obtained. It is one step removed to say that, after a proper account is taken, SRK *may* be found to owe JGJ moneys because the business venture has generated losses *and* SRK is required to contribute to such losses.

32 Yet another problem with JGJ's Reconciliation Defence is that it appears to me to be inconsistent with the Unilateral Pricing Defence, which appears to accept that SRK is entitled to be paid for the diamonds and jewellery that it supplies to JGJ at a cost-plus pricing model, without waiting for the Accounting Reconciliation to be done. In fact, it appears logical that the Accounting Reconciliation would take place only after payment is made by JGJ to SRK for the diamonds and jewellery supplied. While it is not impermissible for a defendant to have inconsistent defences, the marked difference between these two defences taken by JGJ and the speculative nature of the Reconciliation Defence leads me to question whether it can be said to raise a triable defence on the evidence presently before me.

33 However, given my views on the Unilateral Pricing Defence and the Fraudulent Misuse Counterclaim (see below), I do not need to come to a definitive conclusion as to whether the Reconciliation Defence raises triable issues. There are already reasons for a trial. At the trial, it remains open to JGJ to attempt to persuade the court that the Reconciliation Defence is one that can succeed.

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Fraudulent Misuse Counterclaim

34 As for the Fraudulent Misuse Counterclaim, which may provide JGJ with a set-off against SRK's claim, Nirav attested for SRK that the Kriss brothers and their JDM Entities had complete control over the payments out of JGJ's bank account and that the payment process involved the Kriss brothers.[30] As already pointed out, this is hotly disputed by JGJ.

35 When determining whether summary judgment ought to be ordered where there is a subsisting counterclaim, the following framework is applicable: *Kim Seng Orchid Pte Ltd v Lim Kah Hin (trading as Yik Zhuan Orchid Garden)* [2018] 3 SLR 34 ("*Kim Seng Orchid*") at [97]–[98].

(a) First, the court should consider whether the counterclaim is plausible.

(b) Second, the court should then determine whether the counterclaim that it has found to be plausible amounts to a defence of set-off, whether legal or equitable. If it finds that the plausible counterclaim does amount to a defence of set-off, then unconditional leave to defend should be granted in respect of the whole of the claim.

(c) Third, if the counterclaim does not amount to a set-off, the court may then consider whether there is a connection between the claim and the counterclaim. If there is no connection between the claim and counterclaim, the court should generally grant summary judgment of the whole claim, without a stay pending the determination of the unconnected counterclaim.

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30 Narola's 10th Affidavit at [25] and [53].

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(d) Fourth, if the court is satisfied that there is a connected and plausible counterclaim, this may provide grounds for the court to stay execution of the whole judgment (or a portion thereof) pending the determination of the connected and plausible counterclaim.

36 I am satisfied that the Fraudulent Misuse Counterclaim is plausible. Neither SRK's nor JGJ's version as to whether the SRK Entities had misused their access to JGJ's bank account can be said to be obviously more credible than the other. In light of the conflicting evidence on this issue, it cannot be said that it is not reasonably possible for the Fraudulent Misuse Counterclaim to succeed at trial.

37 I am also satisfied that there is a triable issue as to whether the Fraudulent Misuse Counterclaim amounts to an equitable set-off. The Fraudulent Misuse Counterclaim alleges that the SRK Entities fraudulently misused their access to JGJ's bank account to pay SRK on the 42M Invoices. It appears to me that the 42M Invoices and the 23M Invoices are part and parcel of the same series of transactions. Indeed, it is *SRK's own case* that JGJ's payment of the 42M Invoices estops or precludes JGJ from denying liability under the 23M Invoices (see [38] below). Thus, if the Fraudulent Misuse Counterclaim is established at trial, then JGJ might well be able to raise an equitable set-off as a defence to SRK's claim on the 23M Invoices.

Estoppel

38 I should also point out for completeness that SRK did plead that JGJ is estopped or precluded from denying liability under the 23M Invoices because payment for the 42M Invoices had been made; SRK was given access to JGJ's

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bank account; and a system was put in place for the preparation of the PNOs.[31] However, as earlier pointed out at [22] above, SRK's counsel clarified that he was not relying on this argument for SRK's application for summary judgment.[32]

Whether leave to defend should be granted

39 In *Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd* [2003] 3 SLR(R) 462 ("*Bakery Mart*"), the respondent applied for summary judgment to recover advances of moneys loaned to the appellant. In its defence, the appellant claimed that the parties had entered into a corporate restructuring agreement and set up a holding company, and that the moneys given had been taken into account when deciding the shareholding ratio in the holding company. Therefore, the appellant argued that the moneys advanced were not repayable. While the agreement was not formally executed, the appellant argued that an agreement had come into effect by virtue of part performance or oral agreement.

40 The Court of Appeal granted the appellant unconditional leave to defend. The Court of Appeal observed that "this was not a straightforward case of a loan which had to be repaid on demand" and the "true intention of the parties could only be ascertained at trial". Pertinently, the Court of Appeal also observed that, even if precise issues could not be identified, the "very involved dealings between the parties" meant that that was a case where there ought, "for some other reason", to be a trial: O 14 r 3(1), ROC; *Bakery Mart* at [16], [21] and [24].

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31 RDC at [16]–[17] and [22].

32 NoA, 22 June 2020, at p 5 lines 27–29; NE, 13 July 2020, at p 59 lines 22–28.

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41 The situation in this application is somewhat similar. It is apparent that the parties have "very involved dealings", as the Kriss brothers had allegedly dealt with SRK since 2000 (see [4] above) and the alleged joint venture/business arrangement had functioned over the course of two years. There are also multiple parties involved, and Nirav's and Michael's differing accounts of the facts alone demonstrate the extent to which the present case is disputed. Such a case is, as in *Bakery Mart*, unsuitable for summary judgment.

42 Furthermore, a court should generally not grant summary judgment where an oral contract is sued on, and the terms thereof or the contract's very existence is disputed, unless the plaintiff can satisfy the court that (a) even on the defendant's version he is entitled to judgment; or (b) the defendant's version is not truthful or capable of belief: *M2B* ([16] *supra*) at [24]. In this case, there is no written agreement for the sale of diamonds and jewellery to JGJ, and similarly, no written agreement for the alleged joint venture or business arrangement. The nature of the parties' restructured relationship (whether a joint venture or the Business Arrangement) and the terms of the alleged joint venture are critical to determine if JGJ's defences have merit, since JGJ pleads that the prices in the 23M Invoices breached the terms of the Joint Venture Agreement. Michael has attested in detail his version of events and the alleged terms of the Joint Venture Agreement (see [5]–[10] above), and these claims are not inherently improbable. In these circumstances, without the benefit of cross-examination, a court cannot conclude that the prices in the 23M Invoices were properly accepted by JGJ. The true nature and, more importantly, the terms of the alleged *oral* joint venture or business arrangement in this case cannot be determined conclusively without a trial.

43 In addition, the circumstances of the payment of the 42M Invoices; whether the SRK Entities handled JGJ's bookkeeping, accounts and other back

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office functions under the alleged joint venture; and the circumstances leading to the alleged non-completion of the Accounting Reconciliation are all triable issues or fact. Both parties have provided conflicting accounts of these events that are not inherently improbable. For instance, a trial would be required to determine if it is true, as JGJ has alleged, that Amit and/or Ashish had fraudulently misused their access to JGJ's bank account to cause payment of the 42M Invoices to SRK[33] or whether, instead, the Kriss brothers and their JDM Entities had, as Nirav attested, complete control over the payments out of JGJ's bank account.[34]

44 For the above reasons, I find that there are triable issues. As such, I will grant JGJ leave to defend the claim against it. The remaining question is whether I should impose conditions on the granting of leave to JGJ to defend the case.

Whether conditions should be imposed

45 Conditional leave to defend may be ordered where the defendant's defence has been shown to be "shadowy" or that it is "improbable" that the defence will succeed. A defence is shadowy if the defendant's evidence is barely sufficient to rise to the level of showing a reasonable probability of a *bona fide* defence or if the evidence is such that the plaintiff has very nearly succeeded in securing judgment: *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 at [81].

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33 Michael's 13th Affidavit at [36]–[41].

34 Narola's 10th Affidavit at [25].

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46 SRK's counsel relies on the case of *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*") at [19]–[20] and [41] and submits that, even if leave were to be granted to JGJ to defend, this should at least be conditional on JGJ paying the entire sum claimed under the 23M Invoices into court because the defences raised are commercially illogical, different and evolving, and contradicted by JGJ's own conduct.[35]

47 I find that the present case can be distinguished from *Abdul Salam*. Unlike the defendant's characterisation of the transaction in *Abdul Salam*, which appeared to make little commercial sense, JGJ's defences here, while not straightforward, do not flout commercial sense. For instance, there is nothing illogical about JGJ being allegedly overbilled under the Unilateral Pricing Defence. On JGJ's case, the Fraudulent Misuse Counterclaim may also give rise to an equitable set-off which it can apply to SRK's claim under the 23M Invoices. Thus, in my judgment, *Abdul Salam* is of limited assistance to SRK.

48 SRK has not convinced me that JGJ's defences are "shadowy" or so improbable that they are unlikely to succeed. In the circumstances, I do not think that this is an appropriate case for me to exercise my discretion to impose conditions on the grant of leave to defend.

Conclusion

49 For the above reasons, I grant JGJ unconditional leave to defend. As is usual when such an order is made, the costs of SUM 1750 of 2020 will be in the cause.

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35 PWS at [106] – [108].

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Ang Cheng Hock
Judge

Bazul Ashhab Bin Abdul Kader, Tanya Thomas Vadaketh and Gursharn Singh Gill s/o Amar Singh (Oon & Bazul LLP) for the plaintiff;
Lee Sien Liang Joseph, Chan Junhao Justin and Samuel Lee Jia Wei (LVM Law Chambers LLC) for the defendant.

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