IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 305

Originating Summons No 544 of 2019 (Registrar's Appeal No 201 of 2023)

In the matter of Section 329 of the
Companies Act (Cap. 50)

And

In the matter of Section 98 of the
Bankruptcy Act (Cap. 20)

Between

Affert Resources Pte Ltd (In Court
Compulsory Winding Up)

… *Applicant*

And

(1) Industries Chimiques du Senegal
(2) Indorama Holdings BV

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure — Extension of time — Prejudice that cannot be compensated by costs]
[Civil Procedure — Affidavits]

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Affert Resources Pte Ltd (in compulsory winding up)
v
Industries Chimiques du Senegal and another

[2023] SGHC 305

General Division of the High Court — Originating Summons No 544 of 2019
(Registrar's Appeal No 201 of 2023)
Goh Yihan J
4 October 2023

26 October 2023

Goh Yihan J:

1 This was an appeal by the applicant (the "appellant") against the following parts of the decision of the learned Assistant Registrar (the "learned AR") in HC/SUM 2881/2023 ("SUM 2881") below:[1]

(a) that the appellant be granted an extension of time until 6pm on 25 September 2023 to file its expert affidavit on foreign law, failing which no expert affidavit is to be filed;

(b) that the 12th Affidavit of Abuthahir s/o Abdul Gafoor ("Mr Abuthahir") filed by the appellant on 20 September 2023 be struck out; and

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[1] Certified Transcript for HC/SUM 2881/2023 dated 21 September 2023 ("Certified Transcript for SUM 2881") at p 3 line 9 and p 3 line 29 to p 4 line 17.

(c) that the appellant pay to the respondents costs of $1,500 (all-in).

2 After hearing the parties on 4 October 2023, I granted the appellant a final extension of time until 7 October 2023 to file its expert affidavit, provided that it undertook to tender the final but unnotarised version of the affidavit to the respondents by 5 October 2023. I, however, dismissed the appellant's appeal in relation to the striking out of the 12th Affidavit of Mr Abuthahir.

3 Because I had asked the parties to tender additional submissions on the issue of extension of time, I provide these grounds of decision to examine the oft-cited principle that an extension of time should generally be granted "unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs" (see, *eg*, the Court of Appeal decision of *The "Tokai Maru"* [1998] 2 SLR(R) 646 ("*The 'Tokai Maru'*") at [23]). In my respectful view, the expression "prejudice that cannot be compensated by costs" should not be bandied around by litigants, as the appellant did in this appeal, because a meaningful analysis must still be undertaken as to whether an extension of time should be granted. Indeed, almost anything, save for those most valuable to us as human beings, *can* be compensated by money and, by extension, an appropriate costs order. There is therefore limited utility in framing the appropriate test primarily in terms of whether the other party has suffered a prejudice that cannot be compensated by costs. Instead, as a long line of cases has established, the focus of the appropriate test should be to strike a balance between the parties' interests, bearing in mind: (a) a party's interest to have its case determined on the substantive merits; (b) the counterparty's interest to have the matter resolved as expeditiously as possible; and (c) the court's interest in maintaining the due administration of civil justice.

The background facts

4 I begin with the background facts. The appellant, Affert Resources Pte Ltd ("Affert"), is a company in liquidation. Between May 2012 and June 2013, the appellant and the first respondent, Industries Chimiques du Senegal ("ICS"), entered into six contracts for ICS's purchase of sulphur from Affert. The total amount unpaid on those contracts was US$17,007,263.60 (the "ICS Debt").[2]

5 On 20 August 2014, the second respondent, Indorama Holdings BV ("IHBV"), bought 66% of the shares in ICS from Senfer Africa Limited ("Senfer"). By way of context, Affert, ICS, and Senfer were part of the Archean Group of Companies (the "Archean Group") that was based in India. The remaining 34% of the shares in ICS was held by the State of Senegal, the Government of India, and the Indian Farmers Fertilisers Cooperative Ltd. Further, ICS had a negative net worth of about US$137m and had defaulted on most of its loans.[3]

6 By the terms of the deal that IHBV had agreed to with the Archean Group, IHBV was to inject US$50m to entities in the Archean Group and their creditors. The funds would be used for: (a) the purchase of Senfer's 66% stake in ICS; and (b) the full and final settlement of all related party debts that ICS owed to the Archean Group entities, which included Affert.[4] Crucially, IHBV had purchased Senfer's shares in ICS on the understanding that ICS's related

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2 Respondents' Written Submissions dated 29 September 2023 ("RWS") at paras 6–7.

3 RWS at para 8.

4 RWS at para 9.

party outstandings would be settled as part of the acquisition.[5] To this end, IHBV, Senfer, Archean Industries Private Limited, and Indorama Corporation executed a Side Letter on 20 August 2014. The Side Letter provided that "[IHBV] shall cause [ICS] to pay to Senfer's bank account or to its order a sum of nine million United States Dollar (USD 9,000,000) as full and final one time settlement of all related parties outstandings (including loans if any) as on 30th June 2014 in ICS … provided all the relevant related parties send the required confirmations to this effect to ICS".[6]

7 Subsequently, Affert stated in a letter dated 7 October 2014 and addressed to ICS (the "Letter") that:[7]

> As per the books of Accounts of ICS USD 17,277,886 is due to [Affert] as on 17th September 2014. We confirm that we will not claim this amount as per our understanding.
>
> We hereby confirm that we will not in future dispute or make any claim on ICS or its subsidiaries for any sort of dues to [Affert].

After receiving this confirmation, as well as confirmations from other Archean Group entities to the effect that ICS's related parties outstandings had been settled, ICS made payment to Senfer's order pursuant to the Side Letter.[8]

8 On 8 February 2017, Affert was placed in creditors' voluntary winding up. Subsequently, on 18 September 2017, Affert was compulsorily wound up.

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5 RWS at para 10.

6 RWS at para 10; 1st Affidavit of Alassane Diallo dated 11 July 2019 at p 79.

7 RWS at para 11; 1st Affidavit of Abuthahir s/o Abdul Gafoor dated 24 April 2019 at p 156.

8 RWS at para 11.

Mr Abuthahir was appointed as its liquidator. Then, on 18 July 2018, Affert commenced HC/S 724/2018 ("Suit 724") against ICS. Affert was eventually substituted as the appellant in this action by its assignee in bankruptcy, Recovery Vehicle No 1 ("RV1"). This was done to pursue the ICS Debt. Relatedly, on 24 April 2019, Affert filed the underlying application to this appeal, HC/OS 544/2019 ("OS 544"). In OS 544, Affert seeks an order that its confirmation to ICS, as recorded in the Letter, that it would not be claiming the amount of US$17,277,886 from ICS, was a transaction at an undervalue and should be set aside.[9]

9 Subsequently, RV1 was not able to pursue Suit 724. This is because the Court of Appeal had found in CA/CA 31/2020 and CA/CA 32/2020 that, among other findings, Affert's claim for the ICS Debt is governed by Senegalese law and is time-barred. In the circumstances, Affert amended its claim in OS 544 to join IHBV as a respondent and to seek payment orders against both ICS and IHBV.[10]

Procedural history leading to the present appeal

10 Against the background facts above, on 6 October 2022, the respondents filed and served their reply affidavits for OS 544. One of the reply affidavits is the 3rd Affidavit of Khaled Abou El Houda, which exhibits an expert opinion that deals with the issue of when the ICS Debt had become time-barred under Senegalese law. By way of a letter dated 1 August 2023, the appellant sought

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9 RWS at paras 12–14.

10 RWS at paras 15–16.

leave to file further affidavits in OS 544 to address, among other issues, the time-bar issue.[11]

11 Later, at a pre-trial conference ("PTC") on 3 August 2023, the learned AR directed as follows:

(a) the appellant was to file its further affidavit by 28 August 2023;

(b) the respondents were to file their reply affidavit by 25 September 2023; and

(c) by the next PTC on 31 August 2023, the appellant must have filed its further affidavit, and the parties will discuss hearing dates for OS 544.

12 On 30 August 2023, the appellant informed the respondents that it intended to file an expert affidavit on Senegalese law and would do so by 21 September 2023.[12] At the PTC on 31 August 2023, the learned AR granted the appellant an extension of time until 14 September 2023 to do so. On 11 September 2023, the parties informed the court of common available hearing dates for OS 544 in late November 2023, as well as in February and March 2024. The hearing for OS 544 was then fixed for 22 and 23 November 2023.

13 On 13 September 2023, the appellant requested a further extension until 28 September 2023 to file its expert affidavit. On 17 September 2023, the

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[11] RWS at paras 17–19; Respondents' Bundle of Documents dated 29 September 2023 ("RBOD") Vol 2 at Tab 5 pp 5–8.

[12] RBOD Vol 2 at Tabs 6 and 7 pp 9–13.

learned AR granted "a final extension of time … to the [appellant] to file the expert affidavit by 20 September 2023, failing which no further affidavit is to be filed by the [appellant] without leave of [c]ourt".[13] Notably, the learned AR observed that this was the appellant's second request for an extension of time for the filing of its expert affidavit, and that the appellant had written in to seek an extension of time only on the eve of the date when the affidavit was due.

14 Late at night on 20 September 2023, the appellant filed the 12th Affidavit of Mr Abuthahir. This affidavit stated that Mr Abuthahir had been "advised by West African lawyers who are members of the OHADA legal community that [five] judgments are relevant in the interpretation of the OHADA Commercial Act".[14] The affidavit also exhibited copies of the said judgments, which are in the French language, together with "Machine Translations of the Judgments in English", using Google Translate.[15] Also on 20 September 2023, the appellant filed SUM 2881, accompanied by the 13th Affidavit of Mr Abuthahir. SUM 2881 was the appellant's application for an extension of time until 28 September 2023 to file the expert affidavit.

15 On 21 September 2023, the learned AR heard SUM 2881. She ordered, among other things, that:[16]

(a) the 12th Affidavit of Mr Abuthahir was to be struck out as it was filed without leave of court;

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13 Letter from court dated 17 September 2023.

14 12th Affidavit of Abuthahir s/o Abdul Gafoor dated 20 September 2023 ("Abuthahir's 12th Affidavit") at para 11.

15 Abuthahir's 12th Affidavit at para 12 and Tabs 1–5 pp 8–78.

16 Certified Transcript SUM 2881 at p 3 lines 9–10 and 28–33 to p 4 line 6.

(b) the appellant was given a final extension of time to file its expert affidavit by 6pm on 25 September 2023, failing which no expert affidavit is to be filed by the appellant;

(c) the respondents are to file their reply affidavit by 12pm on 6 November 2023; and

(d) the parties are to file their submissions for the hearing of OS 544 on 22 and 23 November 2023 by 10 November 2023.

16 On 25 September 2023, with less than half an hour before the appellant was due to file its expert affidavit, the appellant filed the present appeal against the learned AR's decision in SUM 2881.

The applicable principles regarding extension of time in interlocutory applications generally

17 I turn now to the applicable principles regarding extension of time in interlocutory applications generally. To begin with, the court indisputably has the power to extend time generally pursuant to O 3 r 4(1) of the Rules of Court (2014 Rev Ed) (the "ROC 2014") (see also O 3 r 4(1) of the Rules of Court 2021), although this has to be read in the context of the rules which govern the circumstances. As Professor Jeffrey Pinsler ("Prof Pinsler") notes in *Singapore Court Practice 2020* (LexisNexis, 2020) (at para 3/4/1), while it is ideal that all prescribed time limits should be complied with all the time, this is rarely the case in practice because a multitude of circumstances may result in delay. This much is completely understandable.

18 As to how a court should deal with a request for an extension of time, the appellant emphasised before me that the courts have been primarily

concerned that a litigant should not be deprived of its opportunity to make a claim for breach of a rule of civil procedure "unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs".[17] In support of this principle, the appellant cited the Court of Appeal decisions of *The "Tokai Maru"*, as well as *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 ("*Chan Chin Cheung*").[18] More specifically, the appellant relied on the following observation that the Court of Appeal had made in *The "Tokai Maru"* (at [23]), which was also cited by Chao Hick Tin JA in *Chan Chin Cheung* (at [25]):

> … The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff's claims and have a determination of the issues on the merits as a punishment for a breach of these rules unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs.
>
> … Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would have the effect of depriving him of his defence because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs.
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> [emphasis in original omitted]

19 The Court of Appeal's observations in these two cases, which I am bound by, emphasise substantive fairness over procedural regularity. This is, with respect, perfectly understandable. In the context of an interlocutory application, the parties have not had the opportunity to have their cases

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17 Appellant's Written Submissions dated 29 September 2023 ("AWS") at para 17(1).

18 AWS at para 17.

determined on their substantive merits. As such, unless there is some prejudice which cannot be compensated by costs, an extension of time would usually be granted so as to allow the parties to ventilate their substantive arguments. Indeed, as Mustill LJ observed in the English Court of Appeal decision of *Erskine Communications Ltd v Worthington* [1991] TLR 330 (at 330), "it would be absurd to say that every instance of overstepping the time limit without excuse, however short and however lacking in harmful consequence to the defendant, should be punished by the loss of the action". This approach therefore balances the interest of the party seeking an extension of time in having its case determined substantively, against the interest of the counterparty in having the case determined expeditiously. Framed in this manner, an extension of time would inevitably be granted in most, if not all, general interlocutory applications, since it is difficult to conceive of a prejudice that cannot be compensated by costs.

20 However, the above-mentioned approach has been eclipsed by a parallel approach that developed in the 1990s. Indeed, the Court of Appeal did not limit the applicable principles to its observations in *The "Tokai Maru"* and *Chan Chin Cheung*, but continued to develop the applicable principles in relation to extensions of time in other cases. within this regard, as Prof Pinsler explains in *Singapore Civil Practice 2022* (LexisNexis, 2022) (at para 3-39), the concept of what justice requires changed "when the courts began to emphasise the importance of expedition [*sic*] the interests of the administration of justice". Thus, in the English Court of Appeal decision of *Mortgage Corporation Ltd v Sandoes, Blinkhorn & Co and Gibson* [1996] TLR 751 ("*Mortgage Corporation*"), Millett LJ laid down a set of guidelines (at 752) "as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court":

> 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed.
>
> 2 At the same time the overriding principle was that justice must be done.
>
> 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation.
>
> 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice.
>
> 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort.
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> 6 Where time limits had not been complied with the parties should cooperate in reaching an agreement as to new time limits which would not involve the date of trial being postponed.
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> 7 If they reached such an agreement, they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose.
>
> 8 The court would not look with favour on a party who sought only to take tactical advantage [of] the failure of another party to comply with time limits.
>
> 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.
>
> 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.

21 In Singapore, the Court of Appeal has affirmed the guidelines in *Mortgage Corporation* on more than one occasion. For instance, in *The "Melati"* [2004] 4 SLR(R) 7, Chao JA implicitly approved these guidelines and observed (at [34]) that "[t]here is no one test or criterion which can be decisive in answering the question of whether an extension of time should be granted. It will always be a balancing exercise involving a consideration of all relevant

factors such as the nature of the act which was not fulfilled, the reason for the failure, the prejudice which an extension will cause and any other extenuating circumstances". The learned judge also made the important observation (at [34]) that the rule, that an extension of time should ordinarily be granted unless the counterparty may suffer a prejudice that cannot be compensated with costs, should not be applied rigidly, as it would "mean that a well-to-do plaintiff could flout the rules with impunity".

22 Similarly, in the Court of Appeal decision of *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin*"), Chao JA quoted these guidelines from *Mortgage Corporation* with apparent approval (at [27]) and concluded (at [30]) that, in deciding whether to grant an extension of time, a court "has to balance the competing interests of the parties concerned" and that "[i]n determining how the balance of interests should be struck and in applying the four factors mentioned [*ie*, (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the defaulting party succeeding if an extension was granted; and (d) the degree of prejudice to the counterparty] … it is the overall picture that emerges to the court as to where the justice of the case lies which will ultimately be decisive". According to Prof Pinsler, with whom I respectfully agreed, while Chao JA in *Sun Jin* did not expressly stress the importance of the administration of justice as a factor to be taken into account, the learned judge's reference to the list of considerations from *Mortgage Corporation*, which includes references to the administration of justice, as well as the existence of other authorities which specifically mention its importance, must mean that this is a significant factor under Singapore law (see *Singapore Civil Practice 2022* at para 3-44).

23 Therefore, in contrast to an approach which only weighed the parties' individual interests against each other, a parallel approach has developed which also factors in the court's interest in maintaining the due administration of civil justice. This approach is neatly summarised in the High Court decision of *Lea Tool and Moulding Industries Pte Ltd (in liquidation) v CGU International Insurance plc (formerly known as Commer Union Assurance Co plc)* [2000] 3 SLR(R) 745 ("*Lea Tool*"), where Lai Kew Chai J stated that (at [15]):

> Where the attention in the past was the interest of litigants and litigants alone, *the new approach in the administration of justice put into the equation the interest of the administration of justice and the communitarian need that limited resources of the courts' time and resources for adjudication were and are not wasted or extravagantly or lopsidedly hogged by any litigant or set of litigants*. Timeliness and specific procedural steps had to be laid down to fix dates for trial and disposal of cases. Litigants who wish to use the services of the courts are duty bound to abide by the Rules of Court and the orders made.
>
> [emphasis added]

24 Accordingly, in my respectful view, the focus of the appropriate test to determine whether an extension of time should be granted in interlocutory applications generally should be to strike a balance between the parties' interests, bearing in mind: (a) a party's interest to have its case determined on the substantive merits; (b) the counterparty's interest to have the matter resolved as expeditiously as possible; and (c) the court's interest in maintaining the due administration of civil justice. This balance is expressed by four factors, which Chao JA outlined in *Sun Jin* (at [29]), and which Woo Bih Li JAD applied in the recent Appellate Division of the High Court decision of *Sunpower Semiconductor Ltd v Powercom Yuraku Pte Ltd* [2023] SGHC(A) 14 ("*Sunpower Semiconductor*") (at [20]–[21]): (a) the length of the delay; (b) the reasons for the delay; (c) the merits of the intended appeal (or application, as the case may be); and (d) the degree of prejudice to the other party if the

extension of time were granted. As Woo JAD explained in *Sunpower Semiconducter* (at [21]), "the court will adopt a 'far stricter approach' in applying the above factors where the application is for an extension of time to file or serve a notice of appeal, because the overriding concern in those applications is finality and ensuring that the winning party is not kept waiting 'on tenterhooks to receive the fruits of its judgment'".

25 In the end, although the consideration of whether a counterparty has suffered a prejudice that cannot be compensated by costs remains important, that cannot be the sole focus of the applicable test. Indeed, as I said earlier (see [3]), there is a limited utility to a test founded solely on such a basis because, with sufficient imagination, almost anything can be compensated by an appropriate costs order. For example, in response to meeting a shorter deadline occasioned by an extension of time, it can always be argued that the counterparty can be compensated by costs so as to enable it to hire more lawyers to work the extra hours. Returning to the present appeal, I therefore disagreed with the appellant in so far as it tried to frame the applicable test as being primarily founded on prejudice to the respondents that cannot be compensated by costs.

26 To summarise the above, in my respectful view, the applicable legal principles in relation to an application for an extension of time generally are as follows.

(a) Traditionally, a litigant should not be deprived of his opportunity to dispute the other party's arguments and have a determination of the issues on the merits, as a punishment for a breach of procedural rules, unless the other party has been made to suffer prejudice which cannot

be compensated for by an appropriate order as to costs (see *The "Tokai Maru"* at [23]).

(b) However, instead of the single-minded focus on the parties' interests, the courts have also considered the interest in maintaining the due administration of civil justice (see *Lea Tool* at [15]).

(c) Therefore, in determining whether to grant an extension of time, the appropriate test should strike a balance between: (i) a party's interest to have its case determined on the substantive merits; (ii) the counterparty's interest to have the matter resolved as expeditiously as possible; and (iii) the court's interest in maintaining the due administration of civil justice. In weighing these interests, relevant factors include: (i) the length of the delay; (ii) the reasons for the delay; (iii) the merits of the intended appeal (or application, as the case may be); and (iv) the degree of prejudice to the other party if the extension of time were granted (see *Sun Jin* at [29]).

My decision: the appeal in relation to extension of time was allowed

27 With the above principles in mind, I allowed the appellant's appeal in relation to the learned AR's decision to only grant a final extension to the appellant for it to file its expert affidavit by 25 September 2023, failing which no expert affidavit is to be filed by the appellant. Nonetheless, this was a case where the twin interests of: (a) the respondents' interest in having the matter resolved as expeditiously as possible; and (b) the court's interest in maintaining the due administration of civil justice, almost outweighed the appellant's interest in having its case determined on the substantive merits.

The appellant has shown a disregard for court-imposed deadlines to file the expert affidavit, without good reason

28 In my judgment, the appellant has shown a disregard for court-imposed deadlines to file the expert affidavit, without good reason. I say this for the following reasons.

29 First, the appellant has breached *four* court-imposed deadlines to file the expert affidavit on the following occasions: (a) 28 August 2023; (b) 14 September 2023; (c) 20 September 2023; and (d) 25 September 2023. To be clear, I was aware that the appellant only indicated its intention to file an expert affidavit on 30 August 2023, *ie*, after the first deadline lapsed. However, the appellant was aware after the PTC on 3 August 2023 that it had to file its reply affidavit by 28 August 2023. Thus, while it did file a reply affidavit on 28 August 2023, it is inexplicable why the appellant left it to 30 August 2023 to explore the possibility of filing an expert affidavit. For all intents and purposes, the appellant had acted in breach of the first court-imposed deadline of 28 August 2023 by seeking to admit a further affidavit after that date. Indeed, there was no good reason why the appellant could not have done so earlier, when the respondents had filed their expert affidavit almost a year ago, on 6 October 2022.

30 Objectively, the length of the delay was, taken on the whole, not long. This was because if the appellant were to file the expert affidavit by 7 October 2023, and counting from the original deadline of 28 August 2023, the appellant would have been out of time by only slightly more than one month. In contrast, there have been longer periods of delay, *eg*, in *The "Tokai Maru"*, where the party applying for an extension of time had delayed filing its affidavit by nine months. However, what is of concern here is not the length of delay *per se*, but

the fact that the appellant had breached *multiple* deadlines. Viewed in this light, the appellant's conduct was even more egregious, especially when it breached timelines that the learned AR had variously described as a "final extension of time"[19] (on 17 September 2023) and a "final extension" (on 21 September 2023).[20] If the learned AR's words are to mean anything, then there ought to be consequences to the appellant's conduct, which cannot be swept under the rug simply because the appellant had filed the present appeal.

31 Second, the appellant has never offered any good reason for its failure to meet the court-imposed deadlines. This can be seen from the following instances.

(a) When the appellant did not meet the 28 August 2023 deadline, the appellant, through its solicitors' letter dated 30 August 2023 which was filed with the court on 31 August 2023, indicated that it had filed its reply affidavit. However, with respect to the expert affidavit, the appellant merely stated that it "still wishes to file a reply affidavit with respect to Sengalese [*sic*] law and has been taking steps in this regard".[21] It then proposed to file the expert affidavit on 21 September 2023 and for the respondents to file their reply affidavit by 12 October 2023. The appellant provided no other explanation as to why it could not have taken steps much earlier to engage an expert, when it has had access to the respondents' expert affidavit from 6 October 2022. The appellant also provided no explanation as to why, despite knowing about the

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19 RBOD Vol 2 at Tab 13 p 41.

20 RBOD Vol 2 at Tab 17 p 148.

21 RBOD Vol 2 at Tab 8 p 17.

court-imposed deadline for it to file its further affidavit by 28 August 2023, it wrote belatedly to the respondents on 30 August 2023 to bring up the filing of its expert affidavit. Despite the proposed deadline of 21 September 2023, the learned AR allowed only an extension of time until 14 September 2023 (see [12] above).

(b) When the appellant could not meet the 14 September 2023 deadline, its solicitors reached out to the respondents' solicitors on 13 September 2023 to seek an agreement for an extension of time. The appellant proposed the deadline of 28 September 2023. It explained that "there have been certain issues that have arisen in relation [*sic*] the said persons that have been approached and this has resulted in our client needing more time and also considering alternative person(s)".[22] There were no further particulars as to how many persons were approached, or when they were approached. The appellant also asserted that "there may be no prejudice suffered by [the respondents] if the said further extension is agreed to".[23]Again, despite the proposed deadline of 28 September 2023, the learned AR allowed only an extension of time until 20 September 2023 (see [13] above).

(c) When the appellant could not meet the 20 September 2023 deadline, it sought a further extension on 20 September 2023 via SUM 2881. However, it did not provide any good reason why it could not meet the deadline of 20 September 2023. All that was asserted in the 13th Affidavit of Mr Abuthahir was that "[w]hile [the appellant] has

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22 RBOD Vol 2 at Tab 9 p 21.

23 RBOD Vol 2 at Tab 9 p 21.

endeavoured to keep to the Court's deadlines, it has been unable to do so as [the appellant] had required time to secure an expert and to finalise the expert's appointment".[24] While Mr Abuthahir then explains that the appellant has since engaged Ms Sylvie Bebohi ("Ms Bebohi") as its expert, he does not provide any reason why she would only "be in a position to submit her opinion by 28 September 2023".[25] The AR allowed an extension of time until 25 September 2023 (see [15] above).

(d) When the appellant could not meet the 25 September 2023 deadline, it filed the present appeal. However, the only reasons it gave were that "[t]here was a limited pool of experts / legal practitioners who had qualifications in OHADA law that were available for appointment" and that "[g]iven the time difference between Singapore and Senegal / Cameroon, it was significantly more challenging to instruct prospective experts given the time difference, the volume of materials and the tight deadlines".[26] In my view, these are not good reasons. For one, I cannot understand how the time difference would make it difficult to engage an expert. Also, given the time that the plaintiff has had since 6 October 2022, I cannot understand how it can assert that it was subjected to tight deadlines.

32 Third, not only did the appellant fail to meet court-imposed deadlines, it appears that the appellant could not even meet its *own* proposed deadline of 28 September 2023. In this regard, on 20 September 2023, the appellant

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24 RBOD Vol 2 at Tab 16 p 129.

25 RBOD Vol 2 at Tab 16 p 130.

26 AWS at para 28.

proposed the deadline of 28 September 2023.[27] Despite this, on 25 September 2023, the appellant filed the present appeal. In its submissions dated 29 September 2023, the appellant prayed for "leave to file the Expert Affidavit within [three] days after any order made herein".[28] Since the appellant knew that the present appeal had been fixed to be heard on 4 October 2023 when it drafted this prayer in its submissions, the appellant was effectively asking for an extension of time until 7 October 2023 to file the expert affidavit. For good order, I also noted that the appellant had submitted in its submissions dated 29 September 2023 for this appeal that "as of the date of this affidavit [*sic*], [the appellant]'s expert has prepared her expert opinion pending the hearing of RA 201 on 4 October 2023".[29] In so far as this suggests that the expert affidavit had yet to be filed as of 29 September 2023, this means that the appellant likely breached its own proposed deadline of 28 September 2023. Indeed, even when the respondents wrote to the appellant to invite it to provide the expert affidavit by 28 September 2023, the appellant did not do so. As the respondents rightly pointed out, if the appellant was intending to buy even more time by this appeal to file the expert affidavit, then that would be an impermissible abuse of the court's process.[30]

33 Fourth, the appellant has not given the respondents and the court much notice before taking out applications to seek the various extensions of time. Indeed, its requests for extensions of time were made either at the last minute, or even after the deadline had already passed. These requests were also made

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27 HC/SUM 2881/2023 at para 1.

28 AWS at para 39.

29 AWS at para 25.

30 RWS at para 33.

despite the learned AR having indicated twice below that her deadlines were "final" (see above at [30]). Moreover, even in its submissions filed for this appeal, there were references within wrongly referring to the submissions being an "affidavit",[31] and which seemed to be copied directly from what appeared to be an affidavit. Such slip-ups, when taken in the round, showed that the appellant has not been taking the court's processes seriously.

34 For all these reasons, I was satisfied that the appellant has shown a disregard for court-imposed deadlines to file the expert affidavit without good reason.

The respondents would suffer prejudice

35 Moreover, the appellant's multiple breaches of court-imposed deadlines have caused the respondents prejudice. In this regard, given that hearing dates for OS 544 have been fixed on 22 and 23 November 2023, it is clear that any delay in the appellant's filing of its expert affidavit would invariably reduce the respondents' time to file a reply affidavit. To my mind, the fact that hearing dates have been fixed must be a significant factor in assessing prejudice. In contrast, in *The "Tokai Maru"*, the court held that (at [30]) because proceedings were at a relatively early stage such that trial dates had not been fixed, there was "plenty of time" for the respondents to file a reply affidavit, and the prejudice could be compensated by costs.

36 While the appellant asserted that this prejudice could be compensated by costs, I was not convinced that the focus should be so narrow. Of course, the

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[31] AWS at para 25.

respondents could be compensated with costs in as much as their lawyers can work longer hours to make up for the extra time the appellant took to file its expert affidavit. But this cannot be how the test of prejudice is to be applied, otherwise costs will be sufficient in most situations. In my view, the respondents have been prejudiced because they would have less time to respond to the plaintiff's expert affidavit through no fault of their own, and when they have tendered their expert affidavit a full year ago. The inherent unfairness in this situation is clear: the respondents have complied with the court-imposed deadlines thus far, but are now made to suffer the consequences of the appellant's repeated breaches.

37 Although the practical solution was to move the hearing dates from November 2023 to early 2024, it was no answer for the appellant to suggest this to justify its present application for extension of time. It is the respondents' prerogative to want the matter to be determined as expeditiously as possible. Indeed, it is also the court's prerogative for the expeditious determination of the matter in order to uphold the due administration of civil justice, where a party cannot hog a court's time and resources for adjudication. Therefore, the appellant should not be allowed to dictate timelines by its own default.

38 Ultimately, with the above considerations in mind, my decision boiled down to the question of whether: (a) the appellant's disregard for the court-imposed timelines; and (b) the prejudice caused to the respondents, should outweigh the appellant's opportunity to dispute the respondents' defence on a substantive basis.

The appellant should have the opportunity to dispute the respondents' claim on the time-bar issue

39 The appellant understandably submitted that if it were denied an extension of time, it would be "unduly deprived of its opportunity to dispute the [respondents'] claims on the Time Bar Issue".[32] This was particularly since the appellant had yet to file any opinion on foreign law in OS 544. Instead, the only expert affidavit on foreign law filed in OS 544 thus far has been from the respondents. Thus, if the appellant was not able to file any expert affidavit, the respondents' expert affidavit would be unrebutted in relation to issues pertaining to Senegalese law.

40 This was, to my mind, a strong factor in favour of allowing an extension of time. Ultimately, as Mr Ang Leong Hao, who appeared as instructed counsel for the appellant, submitted, the appellant should have the opportunity to dispute the respondents' claim. While I was troubled by the appellant's disregard for the various court-imposed timelines, I was mindful that the prejudice caused to the respondents could be addressed practically and not solely by the award of an adverse costs order. For example, as Ms Kong Man Er ("Ms Kong"), who appeared for the respondents, submitted, the respondents could be given more time to file their reply affidavit and for the hearing dates to be shifted to the near future. Indeed, Ms Kong very reasonably suggested that should there be alternative hearing dates identified so that the respondents have correspondingly more time to file their reply affidavits, any prejudice caused to the respondents would be reduced. Moreover, unlike trial dates which may be harder to fix, the present appeal concerned an Originating Summons to be heard over one or two

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[32] AWS at para 24.

days. This would therefore be easier to refix and would not result in wasted court dates, if at all.

41 For all these reasons, while I thought this was a case where the appellant's disregard for previous deadlines should bear more severe consequences, I was ultimately not convinced that the justice of the case laid in shutting out the appellant altogether in its ability to file its expert affidavit. However, I would caution that where there has been a pattern of outright disregard for the court-imposed deadlines, there could be more severe consequences in an appropriate case. Were it otherwise, timelines and deadlines would lose all meaning if they can always be overridden by an adverse costs order.

My decision: the appeal in relation to the 12th Affidavit of Mr Abuthahir is dismissed

42 For completeness, I dismissed the appellant's appeal in relation to the striking out of the 12th Affidavit of Mr Abuthahir dated 20 September 2023. While the appellant did not address this directly, this affidavit was clearly filed without the leave of court. It was clear from the court's letter on 17 September 2023 that the appellant was granted a "final extension of time … to file the expert affidavit by 20 September 2023, failing which no further affidavit is to be filed by the [a]ppellant without leave of [c]ourt". The context of the learned AR's letter is as below:

> AR Karen Tan notes that this is the second request for an extension of time for the expert affidavit to be filed by the Appellant which was originally due to be filed on 28 August 2023 and that the Appellant wrote in to seek an extension of time on the eve of the date the affidavit is due. The Appellant has had sufficient time to obtain and file this affidavit. Accordingly, a final extension of time is granted to the Appellant to file the expert affidavit by 20 September 2023, failing which

> no further affidavit is to be filed by the Appellant without leave of Court. The Respondent to file the reply affidavit by 1 November 2023.

It was clear that the court's permission to file an affidavit was limited to the expert affidavit only. Since Mr Abuthahir is not an expert on Senegalese law, his affidavit was filed without the court's permission.

43 In any event, substantial portions of this affidavit cannot be received, filed or used in the court given that it has not been adequately translated into the English language. While s 40 of the Evidence Act 1893 (2020 Rev Ed) provides that "any statement of the law contained in a book purporting to be printed or published under the authority of the government of the country, and to contain any such law, and any report of a ruling of the courts of the country contained in a book purporting to be a report of the rulings, is relevant" when a court "has to form an opinion as to a law of any country", this has to be read alongside the applicable procedural rules. In this regard, O 92 r 1 of the ROC 2014 provides that "[e]very document if not in the English language must be accompanied by a translation thereof certified by a court interpreter or a translation verified by the affidavit of a person qualified to translate it before it may be received, filed or used in the [c]ourt". This is consistent with the requirement that "[f]oreign court decisions extracted from publications of law reports, *translated into English*, may … be cited as evidence of the foreign law" (see the High Court decision of *Wong Kai Woon alias Wong Kai Boon and Another v Wong Kong Hom alias Ng Kong Hom and Others* [2000] SGHC 176 at [54]) [emphasis added].

44 When applied to the present case, the affidavit concerned was not helpful towards the determination of Senegalese law since it exhibits judgments

in the French language that are not translated into coherent English. Also, in so far as s 40 applies, there must surely be a coherent translation into English in accordance with O 92 r 1, and not one done by Google Translate, as the appellant has done. More broadly, given the time that the appellant has had since 6 October 2022 to engage an expert, it was puzzling why, even if it were relying on s 40, it did not have the time to obtain proper translations.

Conclusion

45 For all these reasons, I allowed the appellant's appeal in relation to the extension of time but dismissed its appeal in relation to the striking out of the 12th Affidavit of Mr Abuthahir. I declined to disturb the costs order made by the learned AR below. I awarded the respondents costs fixed at $5,000 (all-in).

Goh Yihan
Judge of the High Court

Ang Leong Hao and Sia Bao Huei (Rajah & Tann Singapore LLP) (instructed), Darrell Low Kim Boon and Petrina Tan Heng Kiat (Bih Li & Lee LLP) for the appellant;
Kong Man Er and Tan Sih Si (Drew & Napier LLC) for the respondents.