Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani and Another [2009] SGHC 133

Case Number : Suit 773/2008, RA 7/2009

Decision Date : 04 June 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Hri Kumar Nair SC and James Low (Drew & Napier LLC) for the plaintiff; Denis Tan (Toh Tan LLP) for the first defendant; Anthony Lee Hwee Khiam, Pua Lee Siang and Shermaine Lim (Bih Li & Lee) for the second defendant

Parties : Merrill Lynch Pierce, Fenner & Smith Inc — Prem Ramchand Harjani; Renaissance Capital Management Investment Pte Ltd

Arbitration – Stay of court proceedings – Mandatory stay under International Arbitration Act (Cap 143A, 2002 Rev Ed) – Express terms prohibited set-off from liability – Whether customer entitled to set off against its liability

Arbitration – Stay of court proceedings – Mandatory stay under International Arbitration Act (Cap 143A, 2002 Rev Ed) – Whether arbitration agreement applicable – Whether mere refusal to pay amount indisputably due constituted dispute – Section 6 International Arbitration Act (Cap 143A, 2002 Rev Ed)

4 June 2009

Lee Seiu Kin J:

1 The plaintiff, Merrill Lynch Pierce, Fenner & Smith Incorporated, is a company incorporated in the United States of America. The second defendant, Renaissance Capital Management Investment Pte Ltd, is a company incorporated in Singapore, and is a customer of the plaintiff. The first defendant, Prem Ramchand Harjani, is the sole shareholder and a director of the second defendant.

2 The plaintiff's action is for the sum of US$11,712,452.47 in connection with certain transactions entered into by the first defendant on behalf of the second defendant who was a customer of the plaintiff. The plaintiff's claim against the second defendant is in debt, arising out of the transactions. The first defendant was the authorised representative of the second defendant and the plaintiff's claim against him is in fraud and conspiracy. The plaintiff also claims that the first defendant is vicariously liable for the debt of the second defendant to the plaintiff.

3 In Summons No 5188 of 2008 ("the Application"), the second defendant applied to stay the action pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), alternatively under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed)("AA") or under the inherent jurisdiction of the court. This was heard by Assistant Registrar Then Ling ("AR Then") on 2 January 2009 and she made the following orders:

> 1. All further proceedings in respect of the Plaintiff's claim against the second Defendant in fraud in this action be stayed pursuant to Section 6 of the International Arbitration Act (Cap. 143A);
>
> 2. The second Defendant's application for stay of proceedings in respect of the Plaintiffs' claim against the second Defendant in debt be dismissed;

3. The second Defendant be granted extension of time until 16 January 2009, 4.00 p.m. to file the Defence; and

4. The second Defendant does pay the Plaintiffs costs fixed at $3,000 plus reasonable disbursements.

4 In this appeal, the second defendant appealed against the refusal by AR Then in order 2 to stay the action in debt (and the consequential cost order). On 11 March 2009, after hearing counsel for the parties, I dismissed the appeal with costs fixed at $10,000. The second defendant has appealed against my decision and I now give the grounds of decision.

The Account and Arbitration Agreement

5 On 6 December 2007, the first defendant executed the plaintiff's account opening form ("Account Opening Form") for the purpose of applying for an account with the plaintiff in the name of the second defendant, being account number 1EY-07032 (the "Account"). As the plaintiff did not have a place of business in Singapore, the Account was managed in Singapore by Merrill Lynch International Bank Ltd ("MLIB") on behalf of the plaintiff. At all material times, the first defendant had sole authorisation over the Account and gave all instructions in relation to the Account, on behalf of the second defendant. The Account Opening Form contained, *inter alia*, the arbitration agreement (the "Arbitration Agreement") set out in [16] below.

The Credit Facility

6 On 9 April 2008, MLIB granted the second defendant a credit facility of US$6m. On 21 May 2008, the credit facility was increased to US$17m (the "Credit Facility"). The plaintiff's case was that at all material times, the defendants were aware that as a matter of policy, MLIB did not allow the use of the Credit Facility for the purposes of trading in Indonesian stocks.

The Purchase of PTTI Shares

7 On 23 June 2008, in a telephone conversation between the first defendant and one Jeremy Roy ("JR"), an employee of MLIB, the first defendant instructed the plaintiff to purchase (the "Order") 120 million shares in PT Triwira Insanlestari (the "PTTI Shares") for the second defendant at a limit of IDR 1,100 per share. The telephone conversation in which the Order was placed and the conversations prior to and after the Order were recorded, and the defendants do not dispute them. These and other contemporaneous records reveal that the following took place on 23 June 2008:

(a) at around 11.36am, the first defendant called JR and asked him to check on the trading price of the PTTI Shares. JR informed the first defendant that he would check and then call him back in 5 minutes to let him know the same;

(b) at around 11.40am, after checking the system, JR called the first defendant (the "11.40am Telephone Conversation") to inform him that the indicative trading price of the PTTI Shares was IDR 1,150 per share. The first defendant then told JR that he was keen to purchase 150 million PTTI Shares, and that he would call JR later to place the order. JR responded by asking the first defendant when he would be transferring funds to pay for his intended purchase, to which the first defendant replied that he would do so the following day (*ie* 24 June 2008);

(c) at around 12.19pm, the first defendant called JR (the "12.19pm Telephone Conversation") and placed the Order;

(d) at around 12.30pm, JR called the first defendant again (the "12.30pm Telephone Conversation"). The first defendant confirmed what he said at the 11.40am Telephone Conversation, that he would pay for the PTTI Shares by transferring funds into the Account by the following day (*ie* 24 June 2008);

(e) at around 12.55pm, the Order was put on the open market. It began to be filled by sellers in tranches. The first trade was done at 12.59pm;

(f) at 1.59pm, Rajesh Wilson ("RW"), at the time an employee of MLIB, called the first defendant to inform him that the Order had been placed. The first defendant reiterated his earlier statement that he would pay for the PTTI Shares by transferring funds into the Account by the following day (*ie* 24 June 2008); and

(g) the last tranche of the Order was filled at 3.18pm.

The second defendant's failure to pay

8 The second defendant admitted that the Order was placed and fulfilled pursuant to the first defendant's instructions (see para 46 of the affidavit filed by the first defendant on 31 October 2008 for the purpose of the Mareva Application) ("the first defendant's MI Affidavit"). It was also not disputed that payment for the PTTI Shares fell due on the settlement date of 26 June 2008 (the "Settlement Date"), and that the total sum payable for the purchase of the PTTI Shares was IDR 132,587,475,000 (the "IDR Settlement Amount").

9 Between 23 June 2008 and 25 June 2008, JR made enquiries with the first defendant on the transfer of the IDR Settlement Amount into the Account. On 25 June 2008, in response to JR's enquiries, the first defendant again said that the IDR Settlement Amount would be paid into the Account by the Settlement Date. Amongst other things, the second defendant forwarded a copy of a Standard Chartered Bank remittance application form dated 21 June 2008 which indicated that an amount of US$14,863,200 was to be remitted to the second defendant's account with Northern Trust International Banking Corporation in New Jersey (the "Remittance Form"). On the Settlement Date, the plaintiff arranged for its custodian bank in Indonesia, the Hong Kong and Shanghai Banking Corporation (Jakarta), to pay the IDR Settlement Amount to the Jakarta Stock Exchange to complete the purchase of the PTTI Shares. However the plaintiff did not receive the IDR Settlement Amount in the Account by the Settlement Date. On the Settlement Date, when the plaintiff attempted to debit US$14,318,301.84 (which is equivalent to the IDR Settlement Amount) from the Account, the plaintiff found that there were insufficient funds in the Account. The Account then went into deficit.

10 Thereafter the plaintiff made repeated demands to the first defendant on various occasions to settle the IDR Settlement Amount. The first defendant repeatedly promised that he would arrange to settle the IDR Settlement Amount. In the event the plaintiff did not receive full payment for the PTTI Shares but the first defendant and the second defendant made part payment of the IDR Settlement Amount. In total, US$2m were paid in two separate payments of US$50,000 on 9 July 2008 and US$1.95m on 10 July 2008.

11 Upon the failure of the second defendant to pay for the PTTI Shares, the plaintiff purported to exercise its rights under the Terms & Conditions of the Account ("Terms & Conditions") and began to liquidate the PTTI Shares and other assets standing in the Account to reduce the IDR Settlement Amount. By 17 November 2008, the plaintiff had sold 8,214,500 of the 120 million PTTI Shares for a total of US$790,331.75. Accordingly, the amount outstanding to the plaintiff was US$11,712,452.47 ("Outstanding Sum") as of 20 October 2008. On the same day, the plaintiff filed the writ in this action

to recover the Outstanding Sum.

The plaintiff's case

12 The plaintiff's basic case is that the second defendant had failed to effect full payment of the IDR Settlement Sum when the same fell due on the Settlement Date (the "Claim") in breach of the agreement between the parties. There are other causes of action, but they are not relevant as they have been stayed.

13 On 21 October 2008, the plaintiff filed Summons No 4615 of 2008 (the "Mareva Application") to obtain a Mareva Injunction (the "MI") against the defendants. On 17 November 2008, Judith Prakash J granted the MI. The defendants' appeal against that decision in Civil Appeal No 187 of 2008 (the "Mareva Appeal") was dismissed with costs by the Court of Appeal on 16 January 2009.

The application for stay of proceedings

14 On 25 November 2008, the second defendant filed the Application to stay this suit in favour of arbitration pursuant to s 6 of the IAA or s 6 of the AA. Before AR Then below, the second defendant based its request for the stay on two "disputes" which it said brought the scope of the Claim within the terms of the Arbitration Agreement, namely:

(a) there is a "legal dispute" as to whether in fact the second defendant is liable to pay for the PTTI Shares in view of the plaintiff's conduct ("Liability Issue"); and

(b) the second defendant has a valid counterclaim for damages as a result of the plaintiff's conduct ("Counterclaim Issue").

15 In relation to the Liability Issue, AR Then held that the second defendant had acknowledged and admitted its debt to the plaintiff and she found that the second defendant was unable to show the existence of a dispute. In the circumstances, AR Then held:

> **The court has jurisdiction to determine if the matter before the court is the subject of the arbitration agreement between the parties and whether there is in fact a dispute. To this end, the court is entitled to look at the parties' documents and correspondence as per *Getwick* and *Dalian***.
>
> **From the recorded telephone conversations between the parties, it is clear that Defendant had instructed Plaintiff to purchase PTTI Shares and that Defendant intended to pay for the purchase of the PTTI Shares by 25 June 2008. Defendant failed to do so. I also note Defendant's position in relation to Plaintiff's application for Mareva injunction, where Defendant stated that they always intended to make payment for the shares**.
>
> **In my view, all these point to the fact that Defendant had acknowledged and admitted to the debt they needed to pay. Accordingly, I find that there is no dispute with respect to the claim in debt and will dismiss the stay application in relation to the claim in debt. I will however grant a stay application in relation to the claim in fraud**.
>
> [emphasis in original]

The Law

16 The Arbitration Agreement provides as follows:

> This Agreement contains a predispute arbitration clause that pertains to [the plaintiff's] accounts only. …
>
> …
>
> You agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but not limited to, those involving any transaction in any of your accounts with Merrill Lynch, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof.
>
> Any arbitration pursuant to this provision shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which Merrill Lynch is a member, or the National Association of Securities Dealers, Inc., but if you [fail] to make such election by registered letter or telegram addressed to Merrill Lynch at the office where you maintain your account before the expiration of five days after receipt of a written request from Merrill Lynch to make such election, then Merrill Lynch may make such election.

17 It is clear from the express words of the Arbitration Agreement that it will not apply if there is no "controversy" or dispute to be determined between the plaintiff and the second defendant. In Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (1982, London Butterworths), the learned editors state at pp 90 and 91 as follows:

> **2 Clauses requiring a 'dispute' or 'difference'**
>
> Arbitration clauses usually define the jurisdiction in terms of 'disputes' and 'differences'. Under clauses in this form, the existence of a dispute or difference is a condition precedent to the right to arbitrate. …
>
> (a) *Undisputed Claims*
>
> First, an action can properly be brought in the High Court in respect of an admitted claim, even though the contract contains an arbitration clause … for unless there is a dispute, there is nothing to be referred to arbitration. The same principle applies to a claim which is partly admitted: the claimant is entitled to judgment on the admitted portion, and a stay will be granted as to the remainder.
>
> Where the defendant has not actively admitted the claim, but has so far failed to deny it, it would seem that there is no 'dispute' then in existence, and the claimant not only can but must prosecute his claim by action, rather than by arbitration. …
>
> [emphasis in original]

The parties agree that the relevant provision is s 6 of the IAA and this provides as follows:

> 6. —(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

18 Section 6(2) of the IAA applies only when a stay application has been made in accordance with s 6(1) of the IAA. It is clear from a plain reading of s 6(1) of the IAA that if the existing court proceedings are not in respect of a matter which is the subject of an arbitration agreement, then the court has no jurisdiction under s 6(2) to order a stay – see *Dalian Hualiang Enterprise Group Co Ltd and another v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 ("*Dalian*"), at [20]. The Court in *Dalian* held at [25] that it had jurisdiction to determine if the matter before the court was the subject of an arbitration agreement between the parties. However, if "a dispute clearly does not come within the scope of the arbitration agreement, there is no discretion. The court cannot order a stay" – see *Dalian* at [51].

19 The second defendant contended that so long as it disputes the plaintiff's claim, an order to stay the proceedings must be made. However this position is not consistent with the authorities. Indeed if that were the position in law, then all that is needed to avoid proceedings would be a mere assertion by the defendant that he is not liable and, no matter how preposterous that assertion, a stay would have to be given. The authorities are clear that this is not the case – see *Dalian*. While the Court will not determine the merits of the dispute, it is fully entitled to determine if a dispute exists which falls within the terms of the arbitration agreement.

20 In this regard, it is clear that the Court has jurisdiction to construe the arbitration agreement to discover its full ambit and will determine whether there has been a clear and unequivocal admission of liability – *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] HKCU 1020 ("*Getwick*") at [23]. A clear and unequivocal admission of liability and quantum can take a variety of forms. In *Getwick*, the Court held that (at [23]):

(4) A clear and unequivocal admission of liability and quantum can no doubt take a variety of forms. Admissions contained in correspondence or any other documents or even by conduct may … suffice. …

21 A mere refusal to pay an amount that is indisputably due will not constitute a dispute entitling the defaulting party to an arbitration – see *London and North Western Railway Co v Jones* [1915] 2 KB 35. Indeed, a mere refusal to pay an amount indisputably due can amount to an abuse of process calling for the Court's intervention. In *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129 at 135, the Court held that while the courts will not go into the merits of a claim to determine if a dispute is genuine:

There may be a case for intervention if the party seeking the arbitration is acting in bad faith and thereby abusing the Court's process by applying for a stay … Resort to arbitration in respect of a mere refusal to pay an amount indisputably due could amount to such an abuse.

22 In *Dalian*, the first plaintiff ("DHE") entered into a contract with the defendant ("LD") to buy soya beans ("Armonikos contract"). The Armonikos contract was assigned to the second plaintiff ("DJOM"). Pursuant to the Armonikos contract, DJOM claimed an outstanding sum ("Debt") from LD, being payment of despatch money and overage premiums. A representative of LD ("SY") and LD's own statement of accounts confirmed that LD accepted the Debt was due and payable. When LD refused to pay the Debt, DJOM and DHE brought an action in the High Court to recover the same. LD applied for a stay of the action on the ground that there was an arbitration agreement and the dispute

should be referred to arbitration. LD disputed that it had admitted to the Debt and the submissions arguments centred on whether there was an admission binding on LD. In addition, LD raised a set-off in respect of its claim against another company ("FH") in respect of another contract. LD's assertion was that it was entitled to set off the sum owed to it by FH ("FH Counterclaim") as FH was treated as part of the same group as DHE and DJOM in respect of the running account between the companies. Woo Bih Li J ("Woo J") held that the court has jurisdiction to determine if there was a dispute. He further held that LD had accepted that the sums would be due and payable but for the FH Counterclaim. There was therefore no dispute as LD had admitted to the Debt and that it was due. As regards LD's claim that it was entitled to a set-off, Woo J held that the dispute in respect of the FH Counterclaim related to a different contract and was separate and distinct from the Debt and/or the underlying contract under which the Debt arose. Woo J rejected LD's submission that the FH Counterclaim "undoubtedly falls within the scope of the arbitration agreement" as it was a bald argument.

23 In *Getwick*, the plaintiff was the defendant's sub-contractor. The plaintiff brought claims against the defendant for payment of variation works, additional works and monies due under various payment certificates. The court held, amongst other things, that it was entitled to determine if there has been an admission by the defendant. In this respect, the court held that an admission can take a variety of forms and may be contained in correspondence, documents or even by conduct. On the facts, however, in respect of the payment certificates, the court found that the defendant had not admitted to the debt as the defendant had not accepted that the work done by the plaintiff was up to standard and there was a pending final account. However, in respect of payment of a cheque which was subsequently dishonoured, the court held that the handing over of the cheque amounted to an admission by the defendant of a debt in the amount of the cheque and ordered summary judgment in respect of the same.

The Liability Issue

24 The second defendant does not dispute that the PTTI Shares were purchased pursuant to the second defendant's instructions (given by the first defendant) and that payment for the PTTI Shares was made by the plaintiff on the second defendant's behalf. The second defendant does not dispute the quantum of the IDR Settlement Sum or that the second defendant has not made full payment of the same. The sole issue is whether the second defendant has admitted its liability to pay for the PTTI Shares. In this regard, the defendants have, on their own evidence, admitted numerous times that the second defendant is liable to the plaintiff for the purchase of the PTTI Shares. It has consistently been the second defendant's own position that they are obliged to, and will, pay for the PTTI Shares which the plaintiff purchased on its behalf. The second defendant had, in the following events, accepted that it is liable for the Outstanding Sum:

(a) Prior to the placing of the Order, the telephone transcripts between JR and the first defendant show that the latter had stated that he would pay for the PTTI Shares.

(b) On 23 June 2008, just after the Order was placed, the first defendant continued to admit that the second defendant was liable to, and would, pay for the PTTI Shares. This is found in the 12.19pm Telephone Conversation, in which the first defendant stated that he was aware of the price of the PTTI and would be transferring the requisite funds. Similarly, in a telephone conversation at 1.59pm between the first defendant and RW, the first defendant said that he would send the funds for all the PTTI Shares. These transcripts show that the first defendant acknowledged that the second defendant had to pay for the PTTI Shares. Indeed, the first defendant took pains to reassure RW and JR that he would be transferring the monies the following day.

(c) In the suit to recover the Debt, the second defendant had made statements in affidavits and submissions that it had intended to pay the Debt:

(i) At para 22 of the appellants' case in the Mareva Appeal, the defendants state:

> The Appellants contend that there are sufficient objective evidence as well as taking the evidence in totality to rebut any inference of dishonesty and particularly that the Appellants did not intend at all to pay for the purchase of the 120 million PTTI shares.

(ii) At para 37 of the defendants' skeletal submissions dated 28 October 2008 filed for the purposes of the Mareva Application, the defendants state:

> Further, how can the second Defendant be accused of not intending to pay for the purchase? The second Defendant had more than [USD] 10,000,000.00 worth of separate equity with the Plaintiff, which the Plaintiff could liquidate to pay for the purchase. Furthermore, the second Defendant did with sincerity attempt to make payment when they remitted on 9 and 10 July 08 paid the Plaintiffs USD 2,000,000.00, which is not an insignificant sum.

(iii) At para 24 of the defendants' skeletal submissions dated 7 November 2008 filed for the purposes of the Mareva Application, the defendants state:

> Further, it is not disputed that when the second Defendant was not able to pay the full purchase price in time, to prove their sincerity, the second Defendant paid USD2 million on 9 and 10 July 08. USD2 million is not a small sum of money. If the Defendant[s] were committing a fraud or was not intending to pay for the purchase, why would they pay the USD2 million to the Plaintiff?

(iv) At para 40 of the first defendant's MI Affidavit, the first defendant explained that the second defendant's investors had US$17m worth of investments held through a company known as Pioneer Capital Management Company ("Pioneer Capital") and expressly stated that the second defendant "intended to utilize these monies to purchase the [PTTI Shares]". However, on the defendants' own case, these funds were not remitted on account of difficulties with Pioneer Capital.

(v) At para 22 of the first defendant's stay affidavit, he states:

> Subsequent to the confirmation of the placement of the order by Jeremy Roy on the same day, Rajesh Wilson informed me that the Plaintiff had made a mistake in approving the purchase using the credit facility. At Rajesh Wilson's request, I agreed to make payment for the purchase within the next few days.

(vi) In fact, at para 49 of the first defendant's MI Affidavit, the first defendant again explains why, on his own case, he agreed to make payment:

> As I was expecting the monies from Pioneer to come in, I said that my group was hoping that the monies would come in sometime around 27 June 2008 or earlier, which is why I did indicate that we would try to make payment by 26 June 2008.

(d) On 25 June 2008, the first defendant faxed a copy of the Remittance Form to the plaintiff. The first defendant admitted that he did so in order to persuade the plaintiff that the second

defendant would transfer funds to pay for the PTTI Shares. In para 51 of the first defendant's MI Affidavit he specifically informed Pioneer Capital that he "required immediate payment of this sum to [the plaintiff]".

(e) After 25 June 2008, the first defendant continued to promise that the second defendant would pay for the PTTI Shares in the following correspondence and conversations:

(i) On 27 June 2008, the first defendant sent an email to RW stating:

> I confirm with you the money will be [sic] arrive by today latest in the evening.
>
> As soon [sic] I get the copy of Io3, I will forward to you.
>
> Sorry for the inconvenient [sic] and thank you.

(ii) On 1 July 2008, the first defendant arranged for representatives of the plaintiff to speak with one Antonio (introduced by the first defendant and purported to be a banker), and who reassured the plaintiff that monies had been transferred and would reach the plaintiff that night or the following morning. At para 55 of the first defendant's MI Affidavit, he confirmed this conversation.

(iii) On 3 July 2008, during a telephone conversation between the first defendant, Amit Gupta ("AG"), Nikhil Advani ("NA") and Christopher Yeo ("CY") (the last three being employees of MLIB at the time), the first defendant confirmed that he would transfer US$14m into the Account to settle the payment for the PTTI Shares and that the funds had not been paid into the Account on account of a problem at his end. NA requested a breakdown of the proposed payments from the first defendant. The first defendant replied that he would provide a breakdown the next day and that the second defendant would send a letter setting out a breakdown of the proposed payments. During this conversation, NA also carefully summarised the sequence of events leading to the purchase of the PTTI Shares and what happened thereafter. The first defendant agreed with the summary which made it clear that he had promised to transfer funds to pay for the PTTI Shares.

(iv) On 4 July 2008, NA and AG met the first defendant in Jakarta. The first defendant acknowledged that he had earlier represented to RW that US$14.3m would be paid into the Account by 26 June 2008 to pay the IDR Settlement Amount. The first defendant further said that he had previously instructed Pioneer Capital to remit US$14.3m into the Account, but Pioneer Capital did not do so due to liquidity problems.

(v) On 7 July 2008, AG spoke with the first defendant, who said that he would be transferring US$1m on 7 July 2008 and another US$1m on 8 July 2008 into the Account from Lippo Bank. However, no such funds were received on those dates.

(vi) On 9 July 2008, RW met the first defendant and reminded him to settle the outstanding sums due to the plaintiff as soon as possible. On the same day, a sum of US$50,000 was remitted into the Account.

(vii) During a meeting in MLIB's office in Singapore on 10 July 2008 (the "10 July 2008 Meeting") between the first defendant, NA, AG, RW, Aseem Arora, the Managing Director of MLIB ("AA"), and Chan Chee Wai Andrew, the General Manager of MLIB, the first defendant again acknowledged that he had represented to RW that he would transfer the funds into

the Account by the Settlement Date to pay the IDR Settlement Account. He claimed that he had instructed Pioneer Capital to remit the necessary funds to the Account but Pioneer Capital failed to do so due to liquidity problems. The first defendant said that he had requested his lawyers to write to Pioneer Capital to demand payment, and furnished the MLIB officers with a letter dated 8 July 2008 purportedly from the second defendant's lawyers, Messrs Hartono Tanuwidjaja & Partners, to Pioneer Capital. AA requested a payment schedule and the first defendant said that he would send over a repayment schedule by 14 July 2008.

(viii) On that same day (*ie* 10 July 2008), a sum of US$1.95m was remitted into the Account.

(ix) By way of a letter dated 15 July 2008, the second defendant represented to the plaintiff that the sums of US$5m and US$8m would be paid into the Account on 25 July 2008 and 8 August 2008 respectively. These sums were not paid. The relevant portion of the said letter states:

> As per discussed in our previous meeting we would like to request that payment for our shares purchase to be as follows, first payment will be made on latest 25 July 2008 for $5,000,000 (five million dollar) and the rest $8,000,000 by latest 8 Augustus 2008 respectively.

(x) On 28 July 2008, during a telephone conversation between the first defendant and RW, the first defendant said that funds would be transferred to the Account by the end of the day. He further promised that there would be two payment tranches, namely, US$1.95m on 28 July 2008 and US$3.05m on 29 July 2008. These sums were also not paid.

(f) The second defendant made part payment of the IDR Settlement Sum in the sum of approximately US$2m on or around 10 July 2008 ("Part Payment"). At para 59 of the first defendant's MI Affidavit, the first defendant state the reason for such payment:

> 59. At the same time, *to show our sincerity, we made a decision to pay what we could first to the Plaintiff. It was on that premise that on 9 and 10 July 2008 I had arranged for US$2 million to be paid*. This amount should put paid to any suggestion that there was any improper conduct in the purchase of these shares. *If we or the second Defendant or anyone was intending to commit a fraud, why would I, our investors or the second Defendant make arrangements to pay US$2 million to the Plaintiff? US$2 million is not a small amount of money by any stretch of imagination*. [emphasis added]

25 The first defendant made a bare allegation in his first stay affidavit that "there is a legal dispute as to whether in fact [the second defendant] is now liable to pay for the shares in view of the Plaintiff's conduct". Similarly, in the second defendant's stay skeletal submissions, the second defendant alleged that the fact that the PTTI Shares were not registered in the second defendant's name gave rise to a "legal dispute as to whether [the plaintiff is] entitled to claim for the purchase price of the PTTI Shares". In the circumstances there could not have been a dispute that the second defendant is liable to pay to the plaintiff the purchase price of the PTTI Shares.

The Counterclaim Issue

26 In the first defendant's stay affidavit, it was claimed that the second defendant was entitled to

a set-off ("the Counterclaim"). The second defendant's case was that when the monies from Pioneer Capital were delayed, the first defendant decided to use the Credit Facility to pay for PTTI Shares. The defendants claim that prior to 23 June 2008, they had obtained approval to use the Credit Facility to purchase the PTTI Shares ("Alleged Agreement"). It is the defendants' claim that in breach of the Alleged Agreement, the second defendant was informed that it could not use the Credit Facility to pay for the PTTI Shares. In this regard, it is the defendants' case (at para 48 of the first defendant's MI Affidavit) that on 23 June 2008, after the Order had been placed, the first defendant subsequently received a call from RW during which RW informed him "… in a panic … that there was a major problem as the risk management of the Plaintiff had reviewed the matter and said that the credit facility cannot be utilized to purchase [PTTI Shares]" (the "Panic Conversation"). The Panic Conversation is the basis on which the defendants allege a breach of the Alleged Agreement. The defendants say that they suffered as a result of being unable to use the Credit Facility to purchase the PTTI Shares, and that they had to take urgent and "mitigating steps [to obtain] funds to pay for the PTTI Shares" (see para 7 of the defendants' second stay affidavit). This in turn is the basis of the defendants' counterclaim.

27 However, the first defendant's sequence of events does not make sense. It is undisputed that he placed the order at 12.19pm and informed JR at about 12.30pm that he would place funds in the Account the following day. In the circumstances, on the first defendant's best case, the Panic Conversation must have taken place between those two conversations with JR. But the 11.40am Telephone Conversation demolishes the allegation of the Panic Conversation. The first defendant had already represented to JR that he would transfer the necessary funds into the Account before he gave instructions to purchase the PTTI Shares. In the circumstances, there can be no issue of him believing that he could draw down on the Credit Facility at the time he placed the order, and then subsequently being told that he could not borrow. In any event, the Alleged Agreement is inconsistent with the first defendant's own evidence. The defendants had all along said that they would pay for the PTTI Shares. Even in the 3 July 2008 conversation, when NA was summarising the plaintiff's position, at no time did the first defendant raise the issue of the Counterclaim or even mention the Credit Facility. Instead, the first defendant continued to assure the plaintiff that the second defendant would honour its debt.

28 It was only in a letter from their solicitors dated 5 August 2008 that the first defendant and the second defendant alleged for the first time that the purchase of the PTTI Shares was made using the Credit Facility. This about turn occurred more than one month after the Settlement Date. It is completely inconsistent with the first defendant's own evidence, letters and email promising payment. Nevertheless, whatever the merits of the Counterclaim, it does not undermine the admissions of liability, and therefore does not afford the second defendant a basis to stay these proceedings for two reasons.

29 Firstly, the Counterclaim is premised entirely on the second defendant's liability to pay for the PTTI Shares. In other words, the second defendant admits that having placed the Order, it has to pay for the PTTI Shares. Its position is however that it had arranged to use the Credit Facility to pay, pending the transfer of the money from Pioneer Capital. Taking the defendants' case at its highest, the only conceivable basis for the second defendant to have to "mitigate its damages" and/or to "suffer loss" is that it was and continued to be under an obligation to pay for the PTTI Shares. If the second defendant was not under any obligation to pay for the PTTI Shares, once it found out that it could not use the Credit Facility, it could have walked away from the Order.

30 Secondly, the fact that there is a Counterclaim is not a ground for staying the proceedings. In the first place, it is clear from the second defendant's own case that the true party against whom the second defendant is bringing its Counterclaim is MLIB and not the plaintiff. Further, even if the second

defendant has a claim for set-off and/or counterclaim against the plaintiff, the second defendant is bound by the Terms and Conditions of the Account, cl 94 of which expressly provides that it is not entitled to set-off the same from its liability in respect of the Order. Where the terms of an agreement expressly prohibit set-off, a counterclaim cannot be set-off against the plaintiff's claim even if the counterclaim is valid and a defendant would not be entitled to raise any claims they may have for a set-off or counterclaim against the plaintiff as a defence to the plaintiff's claim – see *Citibank NA v. Lee Hooi Lian & Anor* [1999] 4 SLR 469. Therefore, even if the second defendant had a counterclaim against the plaintiff, such counterclaim will have to be separately pursued whether in an action in court or by arbitration.

Conclusion

31 For the reasons set out above, I dismissed the second defendant's application herein with costs.