IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 58

Suit No 182 of 2016 (Registrar's Appeal No 237 of 2016)

Between

Millennium Commodity Trading Ltd

… *Plaintiff*

And

BS Tech Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Bills of exchange and other negotiable instruments] – [Conflict of laws] – [Proof of foreign law]

[Bills of exchange and other negotiable instruments] – [Delivery] – [Conditional]

[Banking] – [Cheques] – [Post-dated]

[Civil procedure] – [Summary judgment] – [Shadowy defence]

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v
BS Tech Pte Ltd

[2017] SGHC 58

High Court — Suit No 182 of 2016 (Registrar's Appeal No 237 of 2016)
Vinodh Coomaraswamy J
18, 20 July; 19 September; 17 October 2016

27 March 2017

Vinodh Coomaraswamy J:

Introduction

1 This is an action on a cheque. The cheque was drawn by the defendant in favour of the plaintiff in the sum of $678,016.94. The cheque having been dishonoured upon presentation, the plaintiff commenced this action. In due course, the plaintiff applied for summary judgment. The assistant registrar granted the defendant leave to defend the plaintiff's claim, but made that leave conditional on the defendant furnishing security for the plaintiff's claim in the sum of $450,000.

2 Both parties appealed against the assistant registrar's decision. I have upheld the entirety of his decision and dismissed both appeals. The defendant has appealed to the Court of Appeal against my decision. I therefore set out my grounds.

Facts

The parties

3 The plaintiff is an investment company incorporated in Hong Kong.[1] Its sole director and shareholder is one Kin Lam ("Lam").[2]

4 The defendant is a company incorporated in Singapore. It provides technical testing and analysis services.[3] The defendant's managing director at the time the cheque was drawn was Nadeem Tahir ("Tahir"). The defendant's other two directors at that time were Balakrishnan Padmapathi ("Padma") and B Shamalah Reddy ("Shamalah").[4]

5 Tahir ceased to be the defendant's managing director on 15 July 2015. The current directors and shareholders of the defendant are Redhy @ B Balamurugan ("Bala") and Padma.[5] Bala is Padma's son and Shamalah's husband.[6]

6 There are material differences between the plaintiff's and the defendant's accounts of the facts. In the interests of clarity, I shall canvass each party's account of events separately in setting out the background to the plaintiff's application for summary judgment.

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1 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 9.

2 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 9.

3 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 10.

4 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 11 and pages 10 and 11.

5 1st Affidavit of Redhy @ B Balamurugan dated 16 March 2016, page 7.

6 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 13.

The plaintiff's account

7 The following is the plaintiff's account of events.

8 In 2014, Lam was trying to raise €50m to finance a potential investment in a project in China using the plaintiff as his vehicle.[7] He was introduced to Bala and Tahir. Bala and Tahir told Lam that they controlled the defendant and that Padma and Shamalah were merely their nominees.[8] By a letter on the defendant's letterhead dated 2 May 2014,[9] Tahir authorised Khir Johari Bin Mohamed ("Johari") to represent the defendant in discussing, negotiating and executing an agreement with Lam. Johari was then the defendant's Head of Business Development.[10]

9 The agreement between the parties comprises a "Financial Joint Venture Agreement" dated 13 June 2014[11] as varied by an addendum dated 20 June 2014.[12] The purpose of the parties' agreement was for the defendant to procure a standby letter of credit ("SBLC") in favour of the plaintiff in the amount of €10m.[13] The precise mechanics of the agreement were as follows. Within seven banking days of signing the agreement, the plaintiff was to transfer €400,000, being 4% of the value of the SBLC, to the defendant. Upon receipt of the €400,000, the defendant was to deliver to the plaintiff a post-dated cheque drawn in the plaintiff's favour of equivalent value. Within 15 banking days of

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7 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 13; 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 10(a).

8 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 13.

9 2nd Affidavit of Kin Lam dated 26 April 2016, paragraph 12(b) and page 13.

10 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 12(b).

11 2nd Affidavit of Kin Lam dated 26 April 2016, page 14.

12 2nd Affidavit of Kin Lam dated 26 April 2016, page 18.

13 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 14.

receiving the €400,000, the defendant was to procure a SBLC and transfer €10m to the plaintiff. If the plaintiff failed to deliver the €400,000 to the defendant, the plaintiff was obliged to pay the defendant €200,000 within 15 banking days. If the defendant failed to procure the SBLC or transfer the €10m to the plaintiff, it was obliged to pay €200,000 to the plaintiff within 15 banking days.

10 The material terms of the parties' agreement, as varied by the addendum, were as follows:[14]

> 1. Upon 2 (Two) originals of the Financial Joint Venture Agreement having been delivered to the [plaintiff], the [plaintiff] obliges to confirm the fact of the present Agreement is concluded, and that the Parties are willing to follow the below stated procedures and conditions of the Agreement.
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> 2. Upon the present statement is signed within 7 (Seven) international banking days [the plaintiff] shall Wire Transfer in favor of the [defendant] the amount equal to 4 (Four) Percent of the face value of the BG/SBLC. After [the defendant] received the 4% face value of the bank instrument, the [defendant] will then deliver a 60 days post dated bank cheque in favour of [the plaintiff] equivalent to 4% (Four Percent) to [the defendant]. The mentioned posted date cheque shall be returned to [the defendant] after the transaction is completed.
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> 3. Within 15 (fifteen) international banking days from the moment the [defendant] receive 4%, [the defendant] as facilitator shall arrange the Bank instruments and also discount the Bank instruments.
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> 4. [The defendant] shall transfer Euro 10,000,000.00 (Euro Ten Million Only) to [the plaintiff] designated account.
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> 5. The balance payment of 8 (eight) percent will be deducted after the MT760 been monetized.
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> 6. If the [plaintiff] fails to deliver to the [defendant] the 4% of the face value by Wire Transfer within 7 (Seven) international banking days after signing the Agreement, it is considered to be a breach of this Agreement. The penalty is 2 (Two) Percent of the face value of the BG/SBLC that must be paid within 15 (Fifteen) International Banking days to the [defendant].

[14] 2nd Affidavit of Kin Lam dated 19 April 2016, paragraph 15 and pages 14 to 18.

> 7. The same penalty should be applied if the [defendant] fails to monetize the bank instrument after reception of the 4% by bank draft from [the plaintiff].
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> …
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> LAW & ARBITRATION: This contract is a full recourse commercial commitment enforceable under the laws of jurisdiction of the countries where this transaction is effectuated, and any dispute is to be resolved under the ICC rules for arbitration, unless the aggrieved party takes legal action in a court of jurisdiction. The U.S.A., British or European Union country Law shall be the applicable law, as the aggrieved party may choose, and shall govern the interpretation, construction, enforceability, performance, execution, validity and any other such matters regarding this contractual agreement.
>
> The Parties hereto acknowledge and agree that any discrepancy and/or dispute in application of this Agreement will be solved amicably, but if this is not possible, the arbitration procedure is to be followed.

It will be immediately appreciated that the agreement was not professionally drafted. That is especially clear from the curiously-drafted, multiple-jurisdiction choice of law and arbitration clause. I consider this clause further at [48] below.

11 On 20 June 2014, as agreed, the plaintiff transferred the €400,000 to the defendant.[15] It did so in two tranches as instructed by the defendant: €200,000 was credited to the defendant's bank account with DBS Bank[16] and €200,000 was credited to Tahir's personal bank account with HSBC Singapore.[17] The defendant then drew in the plaintiff's favour, as also agreed, a cheque in the sum of S$678,016.94. That sum was the equivalent in Singapore dollars of €400,000 at the exchange rate at that time.[18] Johari filled in the sum on the cheque after confirming the figure with Tahir. Bala then delivered the cheque to Lam.[19] The

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15 2nd Affidavit of Kin Lam dated 19 April 2016, page 19.

16 2nd Affidavit of Kin Lam dated 19 April 2016, pages 20 and 22.

17 2nd Affidavit of Kin Lam dated 19 April 2016, pages 21 and 23.

18 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 6.

cheque was post-dated to 15 August 2014.[20]

12 Between June and September 2014, Lam contacted Tahir and Johari repeatedly to ask for the €10m.[21] They persuaded him to wait. In September 2014, Lam, Johari, Tahir and Bala went to China to visit the factories involved in the project that the plaintiff was investing in. The visit gave Lam confidence that defendant would honour its obligations.[22] But in the end, the defendant failed to procure the SBLC or to transfer the €10m or any part of it to the plaintiff.

13 On 21 November 2014, Lam presented the cheque for payment. It was dishonoured. Lam informed Johari of this.[23] After consulting Tahir, Johari told Lam that the defendant had insufficient funds but that this problem would be rectified. Lam told Johari that he would present the cheque again at a later date.

14 On 24 November 2014, Lam again presented the cheque. Again, it was dishonoured.[24] The plaintiff has not to date recovered the S$678,016.94 from the defendant.

15 On 15 July 2015, Tahir ceased to be the defendant's managing director.

16 On 23 February 2016, the plaintiff commenced this action seeking judgment on the cheque for S$678,016.94. On 8 April 2016, the defendant filed

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19 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 30(c).

20 2nd Affidavit of Kin Lam dated 19 April 2016, page 24.

21 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 30(e).

22 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 30(e).

23 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 52.

24 2nd Affidavit of Kin Lam dated 19 April 2014, page 25.

its defence. I summarise the defendant's defences below at [37] – [42]. On 26 April 2016, the plaintiff applied for summary judgment.

The defendant's account

17 The following is the defendant's account of events.

18 The defendant does not deny that Tahir was its managing director at the material time,[25] nor does it dispute the general sequence of events which plaintiff has pleaded. But according to the defendant, Tahir, Johari and the plaintiff conspired to defraud the defendant or to cause loss to the defendant by unlawful means.[26]

19 In particular, Tahir and Johari acted in the defendant's name but without the defendant's authority in order personally to obtain a "commission" of €400,000 from the plaintiff.[27] The parties' agreement was not authorised by a resolution of the defendant's directors or shareholders.[28] Tahir and Johari even created a fake company stamp that differed in shape from the defendant's official stamp, and used it to endorse the agreement purportedly on the defendant's behalf.[29]

20 They did so in order personally to obtain a "commission" of €400,000 from the plaintiff.[30] Out of the €400,000 which the plaintiff paid to the defendant under the agreement, €200,000 went straight into Tahir's personal bank account.

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[25] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 9.

[26] Defendant's Defence dated 8 April 2016, paragraph 1(7)(i) to 1(7)(j).

[27] 2nd Affidavit of Redhy @ B Balamurugan dated 9 May 2016, paragraphs 17 and 18.

[28] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 20.

[29] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 31(4).

[30] 2nd Affidavit of Redhy @ B Balamurugan dated 9 May 2016, paragraph 18.

And even the €200,000 which went into the defendant's bank account was immediately withdrawn by Tahir and Johari for their personal benefit.[31]

21 The plaintiff knew that the defendant obtained no benefit from the parties' agreement. Nevertheless, it wanted the defendant to be the counterparty to the agreement because it wanted a basis to recover €400,000 from the defendant should Tahir and Johari fail to perform the obligations under the agreement.[32]

22 The defendant accepts that its current managing director, Bala, was told by Tahir that the cheque was intended to be some form of collateral and, with that knowledge, did deliver the cheque to Lam in June 2014.[33] But Bala had no knowledge of the parties' written agreement until he saw a copy of it in Lam's first affidavit in this action, filed in opposition to the defendant's application for an extension of time to file its defence.[34]

Legal proceedings

The plaintiff commences action

23 The plaintiff commenced this action on 23 February 2016 to recover S$678,016.94, being the loss it had suffered as a result of the defendant's cheque being dishonoured upon presentation. The plaintiff also claims interest under s 57(*a*) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) ("the Act").

24 The defendant's defence is to deny that it owes the plaintiff the sum

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[31] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 42.

[32] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 21.

[33] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 11.

[34] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 13.

claimed.

Summary judgment

25 On 26 April 2016, the plaintiff applied for summary judgment against the defendant on its claim. An assistant registrar heard the application on 15 June 2016 and, as I have mentioned, granted the defendant conditional leave to defend.

26 The defendant maintained before the assistant registrar that it had pleaded three defences: (i) illegality; (ii) total or quantified partial failure of consideration; and (iii) fraud. The assistant registrar found that the defendant had not in fact pleaded the defence of illegality. Its submission on illegality amounted in truth to the misconceived allegation that the parties' agreement had been entered into without the defendant's authority and was therefore unenforceable by the plaintiff.[35] The assistant registrar rejected the plea of a total or quantified partial failure of consideration on the ground that the defendant had indeed received the benefit for which it had contracted on the face of the agreement.[36]

27 The assistant registrar, however, accepted the defendant's submission that the evidence, viewed in the round, raised a triable issue as to whether the plaintiff had conspired with Tahir and Johari to defraud the defendant.[37] In arriving at this conclusion, he relied on three strands of evidence identified by the defendant: (i) the addendum (see [9] above) to the agreement attached to Lam's first affidavit was not signed; (ii) the plaintiff delayed four months before

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[35] Notes of Evidence dated 21 June 2016, pages 1 and 2.

[36] Notes of Evidence dated 21 June 2016, page 2.

[37] Notes of Evidence dated 21 June 2016, page 4.

attempting to present the cheque; and (iii) an email from Tahir dated 22 March 2016 suggested that Johari had joined the plaintiff to support its claim.[38] He also noted that Tahir had received in his personal account €200,000 out of the €400,000.[39]

28 At the prompting of the defendant, the assistant registrar was also prepared to draw an inference, albeit a weak one, that the addendum had been fabricated, and that this revealed the plaintiff's intention to ensure that its breach of the agreement was waived so that the defendant could be held liable under the agreement on the cheque pursuant to the conspiracy.[40]

29 But the assistant registrar had his doubts about the defence. The evidence that the defendant presented did not directly shed light on the plaintiff's state of mind at the time the parties entered into the agreement.[41] The events on which the defendant relied for its defence which occurred after the agreement was concluded also did not give rise to an irresistible inference of fraud. All of this led the assistant registrar to conclude that the defendant's defence, though triable, was shadowy. Thus, applying *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 ("*Wee Cheng Swee Henry*"), the assistant registrar granted the defendant leave to defend conditional upon furnishing security for the plaintiff's claim.[42] He fixed the quantum of the security at $450,000.[43] That sum is two-thirds of the plaintiff's claim.

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[38] Notes of Evidence dated 21 June 2016, pages 3 and 4.

[39] Notes of Evidence dated 21 June 2016, page 4.

[40] Notes of Evidence dated 21 June 2016, page 5.

[41] Notes of Evidence dated 21 June 2016, page 5.

[42] Notes of Evidence dated 21 June 2016, page 7.

[43] Notes of Evidence dated 21 June 2016, page 7.

Third party notice

30 In May 2016, the defendant followed through on its allegations against Tahir and Johari by obtaining leave to join them to this action as third parties.

The parties' submissions

The plaintiff's submissions

31 The plaintiff advances four principal arguments.

32 First, the plaintiff submits that the cheque is an unconditional order to pay and is therefore a valid bill of exchange under s 3 of the Act. While the cheque was given pursuant to the parties' agreement as security for performance, none of this is expressed on the face of the cheque, and therefore the cheque is unconditional.[44] To support this argument the plaintiff relies on passages from A G Guest, *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (Sweet & Maxwell, 17th Ed, 2009) ("*Chalmers*") and Nicholas Elliott, John Odgers and Jonathan Mark Phillips, *Byles on Bills of Exchange and Cheques* (Sweet & Maxwell, 29th Ed, 2013) ("*Byles*"). The plaintiff also relies on *Hatton National Bank Ltd v Ocean Gourmet Pte Ltd* [2000] 3 SLR(R) 879 ("*Hatton*") to argue that the defendant, having received the €400,000, is now estopped from claiming that the cheque is not valid.[45]

33 Second, the plaintiff submits that it is settled law that in an action under the Act, the court should ignore any underlying contractual dispute, and should grant summary judgment for the claimant save only in exceptional circumstances.[46] It relies on the first instance decision in *Cassa di Risparmio di*

[44] Plaintiff's Written Submissions dated 2 August 2016, paragraph 35.

[45] Plaintiff's Written Submissions dated 2 August 2016, paragraph 38.

[46] Plaintiff's Written Submissions dated 2 August 2016, paragraph 44.

Parma e Piacenza SpA v Rals International Pte Ltd [2016] 1 SLR 79 ("*Rals International (HC)*") and on *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772 ("*Thomson Rubbers*"). Accordingly, the plaintiff submits that it has established a *prima facie* case for summary judgment.[47]

34 Third, the plaintiff argues that the defendant has failed to demonstrate a *bona fide* defence. The plaintiff submits that Tahir's and Johari's alleged lack of authority to contract on the defendant's behalf is an "internal matter"[48] for the defendant and does not make the agreement unenforceable. In any event, Tahir and Bala communicated to Lam when they first met him that they had the necessary authority to bind the defendant.[49] The plaintiff also suggests that the defendant's allegation of fraud is without basis and amounts to a "fishing expedition".[50]

35 Fourth, the plaintiff submits that even if I were to hold that the defendant has raised triable issues, I should grant it only conditional leave to defend, on the principles set out in *Wee Cheng Swee Henry* ([29] *supra*).[51] The plaintiff goes on to argue, relying on *Wee Cheng Swee Henry* and *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*"), that the condition to be attached to the leave should be that the defendant furnish security for the full value of the cheque, *ie*, S$678,016.94. Only that condition would suffice to demonstrate the defendant's commitment to its defence and to do justice to the plaintiff's case.[52]

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47 Plaintiff's Written Submissions dated 2 August 2016, paragraph 46.

48 Plaintiff's Written Submissions dated 2 August 2016, paragraph 61(a).

49 Certified Transcript dated 19 September 2016, page 19.

50 Plaintiff's Written Submissions dated 2 August 2016, paragraphs 54 and 55.

51 Plaintiff's Written Submissions dated 2 August 2016, paragraphs 63 and 64.

52 Plaintiff's Written Submissions dated 2 August 2016, paragraphs 65 and 66.

The defendant's submissions

36 The defendant also advances four principal arguments.

37 First, the defendant submits that the plaintiff's claim must fail as the plaintiff has failed to plead the applicable foreign law that governs its claim.[53] The defendant relies on the (somewhat curious) choice of law clause in the agreement (see [10] above) and cites *Singapore Civil Procedure 2016: Volume 1* (Foo Chee Hock, ed) (Sweet & Maxwell, 2016).[54] The result, according to the defendant, is that it is entitled – on that ground alone – to unconditional leave to defend.[55]

38 The defendant also argues that, even if the agreement constitutes a separate transaction from the cheque, the principle in *Piallo Gmbh v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo (HC)*") applies such that a claim on the cheque, being inextricably connected to the agreement, must also be determined by the foreign law which governs the agreement.[56] Given that the plaintiff has not pleaded any applicable foreign law, the defendant is on this ground also entitled to unconditional leave to defend.

39 Second, the defendant submits that the cheque is not a bill of exchange under s 3 of the Act because its delivery was conditional within the meaning of s 21(3)(*b*) of the Act. This is because the defendant delivered the cheque to the plaintiff on condition that it be returned to the defendant upon completion of the transaction envisaged under the agreement.[57] The defendant relies on *Yeow*

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53 Defendant's Written Submissions dated 2 August 2016, paragraph 24; Certified Transcript dated 19 September 2016, page 26.

54 Defendant's Written Submissions dated 2 August 2016, paragraph 27.

55 Defendant's Written Submissions dated 2 August 2016, paragraph 28.

56 Defendant's Written Submissions dated 2 August 2016, paragraphs 36 and 37.

Chern Lean v Neo Kok Eng and Another [2009] 3 SLR(R) 1131 ("*Yeow Chern Lean*") to suggest that title in the cheque in these circumstances did not pass to the plaintiff, who was therefore not entitled to present it for payment.

40 The defendant also relies on *Hinchcliffe v Ballarat Banking Co* (1870) 1 VR (L) 229 ("*Hinchcliffe*") for the proposition that a post-dated cheque is a bill of exchange only during the period between the date it is issued and the date which it bears.[58] Thus the defendant argues that since the plaintiff presented the cheque after the date which it bears – 15 August 2014 – it was by then no longer a bill of exchange within the meaning of the Act, and therefore the plaintiff's claim for payment on it as a cheque has no legal basis.[59]

41 Third, the defendant submits that it has raised triable issues. It argues that it has a real and *bona fide* defence of fraud arising from a number of facts, including: (i) the fact that Lam's first and second affidavits exhibited unsigned versions of the addendum while his third affidavit exhibited a different, signed version;[60] and (ii) the fact that Tahir received personally at least €200,000 out of the €400,000.[61] The defendant also contends that it has raised a real and *bona fide* defence of illegality because the agreement was concluded as an instrument of fraud against the defendant and is therefore unenforceable.[62] The defendant also raises the defence of a total or quantified partial failure of consideration on the basis that the defendant has not received the benefit of the €400,000 which went instead to Tahir and Johari (see [20] above).[63]

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57 Defendant's Written Submissions dated 2 August 2016, paragraph 42.

58 Defendant's Written Submissions dated 2 August 2016, paragraph 56.

59 Defendant's Written Submissions dated 2 August 2016, paragraphs 57 and 58.

60 Defendant's Written Submissions dated 2 August 2016, paragraph 72.

61 Defendant's Written Submissions dated 2 August 2016, paragraph 86.

62 Defendant's Written Submissions dated 2 August 2016, paragraphs 102 and 104.

42 Fourth, the defendant denies that its defences are shadowy and asserts that it is entitled to unconditional leave to defend. It cites *Van Lynn Developments Ltd v Pelias Construction Co Ltd (formerly Jason Construction Co Ltd)* [1969] 1 QB 607 ("*Van Lynn*") where the defendant secured only conditional leave to defend and argues that its defences in the present case are stronger.[64] But in the event that it is found to be entitled only to conditional leave, the defendant submits that it should not be required to furnish more than a token sum by way of security, otherwise its ability to defend the plaintiff's claim will be crippled.[65]

Applicable legal principles

43 I now briefly set out the legal principles governing an application for summary judgment. These principles are well-known and undisputed by the parties.

44 A plaintiff seeking summary judgment must first show that he has a *prima facie* case: *Thomson Rubbers* ([33] *supra*) at [9]. If he fails, his application ought to be dismissed with the usual adverse costs order. If he crosses that threshold, then the defendant comes under a tactical burden under O 14 r 3 to raise "an issue or question in dispute which ought to be tried", commonly known as a triable issue. To meet this burden, the defendant must show grounds which raise a reasonable probability that it has a real or *bona fide* defence in relation to the issues in dispute which ought to be tried: *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]. Alternatively, the defendant may attempt to show that there ought to be a trial for some other reason. If the

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[63] Defendant's Written Submissions dated 2 August 2016, paragraph 106.

[64] Defendant's Written Submissions dated 2 August 2016, paragraphs 121 and 122.

[65] Defendant's Written Submissions dated 2 August 2016, paragraph 135.

defendant fails to establish either of these grounds, the court will enter judgment against the defendant: *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [43] – [47].

Issues for determination

45 The following are the key issues which arise for my determination:

(a) whether the plaintiff has failed to plead the governing law applicable to its claim on the cheque;

(b) whether the plaintiff has a *prima facie* case;

(c) whether the defendant has raised any triable issues;

(d) whether the defendant should be granted conditional or unconditional leave to defend; and

(e) if the defendant is to be granted conditional leave, what is the appropriate sum which the defendant ought to furnish as security in order to be let in to defend the claim.

I deal with these issues in turn.

Issue 1: Governing law

46 It is trite that a Singapore court will apply Singapore law unless a litigant establishes that foreign law applies, in which case the asserter must plead and prove the foreign law as an issue of fact: *Singapore Civil Procedure 2016: Volume 1* (Foo Chee Hock, ed) (Sweet & Maxwell, 2016) at para 18/11/3; *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR(R) 183 ("*Star Cruise*") at [77]. This rule is premised on the fundamental assumption that the rights of the parties are to be given effect only because they exist in a legal

system which gives these rights their meaning and content. Thus G P Selvam J in *Star Cruise* (at [77]) said that "contracts are incapable of existing in a legal vacuum", borrowing the words of Lord Diplock in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 at 65. The natural consequence of the stated assumption is that Singapore law applies until and unless it is displaced.

47 Accordingly, the defendant's contention that the plaintiff has failed to plead foreign law gets the principle upside down. The defendant asserts that foreign law applies but maintains that the plaintiff bears the burden of pleading the applicable foreign law as fact, failing which its claim fails *in limine*. This amounts to saying that the plaintiff's claim exists in a legal vacuum unless and until the plaintiff can satisfy the court otherwise. But this directly contradicts the reasoning in *Star Cruise*. As Selvam J made clear at [77], it is for "the asserter" – *ie*, the party who asserts that foreign law applies – to establish that foreign law applies, to plead the applicable foreign law and to then prove that law as fact, since the court cannot be expected to take judicial notice of the foreign law (*cf* ss 39(*b*), 39(*c*), 40 and 59(1)(*b*) of the Evidence Act). In *Star Cruise*, both parties filed affidavits of foreign law. Selvam J thus considered the plaintiffs' failure to plead the applicable foreign law to be egregious. Indeed, he would have proceeded to adjudicate the claim on the basis of Singapore law had the parties not already expended time and effort to arrange for expert witnesses on foreign law to give evidence. If the defendant in the present case is correct, then Selvam J should have simply dismissed the action before him. But the law will not allow a party who alleges that the parties' legal relationship is governed by a system of law other than the *lex fori* to cast the burden of disproving that allegation on his opponent. The defendant's objection in the present case is therefore without merit.

48 All this, of course, is quite apart from the fact that the choice of law clause in the agreement applies to the agreement and not to the cheque. This curious clause appears to give the "aggrieved party" an option to choose the governing law from three systems of private law, none of which actually have any existence as an identifiable system of private law:[66]

> LAW & ARBITRATION: This contract is a full recourse commercial commitment enforceable under the laws of jurisdiction of the countries where this transaction is effectuated, and any dispute is to be resolved under the ICC rules for arbitration, unless the aggrieved party takes legal action in a court of jurisdiction. The U.S.A., British or European Union country Law shall be the applicable law, as the aggrieved party may choose, and shall govern the interpretation, construction, enforceability, performance, execution, validity and any other such matters regarding this contractual agreement.
>
> The Parties hereto acknowledge and agree that any discrepancy and/or dispute in application of this Agreement will be solved amicably, but if this is not possible, the arbitration procedure is to be followed.

49 It is difficult to know where to begin analysing this choice of law clause. One is compelled simply to take it at face value. First, the clause gives an aggrieved party the right to choose the substantive law which should apply in arbitral proceedings. That is not the nature of the proceedings before me. Those proceedings are in a court of law in Singapore, whose jurisdiction is unchallenged. That court applies Singapore law to resolve disputes before it, unless and until foreign law is pleaded and proved. Second, the choice of law clause plainly concerns the agreement and not the cheque. The action before me is on the cheque and not the agreement. As the plaintiff rightly points out in its written submissions, the cheque constitutes a separate contract and creates obligations for the drawer and rights for the payee that are autonomous from any underlying transaction: see *Wong Fook Heng v Amixco Asia Pte Ltd* [1992]

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[66] 1st Affidavit of Kin Lam dated 18 March 2016, page 12.

1 SLR(R) 654 at [13].[67]

50 In relation to this second point, the defendant relies on *Piallo (HC)* ([38] *supra*) to argue that, because the cheque is so closely connected to the agreement, the choice of law clause in the agreement must apply to the cheque as well. The result, according to the defendant, is that the plaintiff needs to but has failed to plead the applicable foreign law to succeed in its claim on the cheque.

51 This argument is erroneous on multiple levels.

52 First, the defendant's reliance on *Piallo (HC)* is misplaced. *Piallo (HC)* involved an application to stay proceedings under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). All that Belinda Ang Saw Ean J decided in *Piallo (HC)* was that the plaintiff's claims on cheques drawn by the defendant should go to arbitration together with its claims under the distributorship agreement from which the cheques arose. That was the result because Belinda Ang J found that the cheques and the claims were so closely connected as to warrant that result. She did not decide that the plaintiff was not entitled to have its claim on the cheques arbitrated separately from the distributorship agreement, using a summary procedure if necessary. Second, the defendant in the present case did not seem to be aware that *Piallo (HC)* was specifically overruled on the close connection test by the Court of Appeal's decision in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [42]. That decision was handed down two weeks before I heard oral arguments in the present case. The Court of Appeal held (at [42]) that an arbitration clause in a contract will generally not be treated as covering disputes arising under an accompanying bill of exchange in the

[67] Plaintiff's Written Submissions dated 2 August 2016, paragraph 43.

absence of express language or express incorporation. The fact that a bill is closely connected to an agreement or to disputes arising under an agreement is irrelevant. And third, as I have explained at [47] above, the burden is not on the plaintiff but on the defendant to plead and prove foreign law if its case is that Singapore law does not apply.

53 Accordingly, the defendant's objections as to the governing law are unsustainable. The plaintiff has no obligation to plead foreign law to succeed in its claim on the cheque.

Issue 2: *Prima facie* case

54 The issue of whether the plaintiff has a *prima facie* case may be addressed through two questions. The first is whether the plaintiff is entitled to sue on the cheque without any reference to the underlying transaction comprised in the parties' agreement. The second is whether the defendant is estopped from challenging the plaintiff's right to sue on the cheque.

55 As a general matter, while I explore the relevant legal principles in some detail, I apply them to the facts only to ascertain whether the plaintiff has satisfied the *prima facie* standard on a summary judgment application. I express no opinion on the ultimate merits of the case when they come to be considered in any final analysis.

Right to sue on the cheque

56 It is appropriate to begin by setting out the main statutory provisions in the Act which govern the issue at hand. These are ss 3(1) to (2), 13, 21(3)(*b*) and 73 of the Act:

Section 3

> (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer.
>
> (2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.
>
> **Section 13**
>
> (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.
>
> (2) A bill is not invalid by reason only that it is antedated or post-dated.
>
> **Section 21**
>
> (3) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery —
>
> …
>
> (*b*) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.
>
> **Section 73**
>
> (1) A cheque is a bill of exchange drawn on a banker payable on demand.
>
> (2) Subject to this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

57 Nothing in this case turns on the distinction between a cheque and a bill of exchange, the former being merely a species of the latter (see *Rals International (HC)* ([33] *supra*) at [147] which describes a similar relationship between a promissory note and a bill of exchange). Therefore, the caveat in s 73(2) of the Act does not apply. It is also common ground that if the cheque is not a bill of exchange under s 3 of the Act or not capable of being sued on by the plaintiff by virtue of any other provision under that statute, then the plaintiff has no *prima facie* case and its application for summary judgment must fail.

Accordingly, I focus solely on whether the fact that the cheque was post-dated and the fact that it was delivered as a form of collateral pursuant to an underlying contract could deprive the plaintiff of the right to sue on the cheque.

58 According to s 13(2) of the Act, a bill is not invalid by reason only that it is antedated or post-dated. This provision is *in pari materia* with s 13(2) of the English Bills of Exchange Act 1882, on which *Byles* ([32] *supra*) has the following to say, at para 21–006:

> A bill of exchange is not invalid by reason of its being ante-dated or post-dated; and the date appearing on the cheque is deemed to be the true date of its drawing unless the contrary be proved.
>
> Post-dated cheques have long been held to be regular instruments. A post-dated cheque does not become payable until the date shown upon it and a bank which pays it prematurely will not be entitled to debit the drawer's account. If the drawer countermands payment before the date written upon the post-dated cheque, the drawee bank must not pay it.

59 It is therefore clear that the mere fact that the cheque is post-dated does not render it invalid. The defendant, however, relying on a number of cases, submits that a post-dated cheque is a bill of exchange only between the date of its issue and the date which it bears, and since the cheque was presented after the date which it bears, it was by then invalid.[68]

60 This submission is unfortunately based on the defendant's misreading of the cases which it cites. Those cases in fact support the view set out in the passage from *Byles* cited at [58] above and indeed lend it a measure of historical credence. I will discuss the cases briefly to illustrate this point.

61 The first case is *Forster v Mackreth* (1867) LR 2 Ex 163 ("*Forster*"). In that case, the defendant had no authority to draw bills of exchange on behalf of

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[68] Defendant's Written Submissions dated 2 August 2016, paragraph 56.

his firm but had the authority to draw cheques. The defendant drew a post-dated cheque and delivered it seven days before the date marked on it. He was then sued personally on cheque when it was dishonoured. The court held that because the post-dated cheque – not being payable on demand – was equivalent to a bill of exchange at seven days' date, the defendant had no authority to draw it and was therefore not liable on it. Kelly CB said (at 167) that "as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days date as intervene between the day of delivering the cheque and the date marked upon the cheque".[69] Kelly CB's point was to equate a post-dated cheque with a bill of exchange until at least the date marked upon the cheque. His point was not, as the defendant in the present case contends, to invalidate a post-dated cheque after that date. Accordingly, the defendant's reliance on *Forster* is misconceived.

62 The next case is *Hinchcliffe* ([40] *supra*). A customer of a bank drew two cheques, one post-dated and the other current-dated. The bank honoured the post-dated cheque even though it was presented before the date marked on it and debited the customer's account accordingly. That left insufficient funds in the customer's account to meet the current-dated cheque. The current-dated cheque was therefore dishonoured upon presentation. The customer sued the bank for damages. The Supreme Court of Victoria allowed the plaintiff's claim. The court approved the rule in *Forster* – that a post-dated cheque is in substance a bill of exchange – and held that the bank was negligent in paying the post-dated cheque before the date marked on it. The necessary premise of this decision is that the post-dated cheque was a valid instrument on and after the date marked on it. Accordingly, the defendant's reliance on *Hinchcliffe* is also misconceived.

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[69] Defendant's Written Submissions dated 2 August 2016, paragraph 56(1).

63 The third and final case is *Ashok Yeshwant Badave v Surendra Madhavrao Nighojakar and Another* (2001) 3 SCC 726 ("*Ashok*"), a decision of the Indian Supreme Court. In this case, the drawer of a cheque appealed against an order finding that he had committed the offence under s 138 of the Indian Negotiable Instruments Act 1881 of failing to pay to a payee the value of a post-dated cheque after being notified by the payee that the cheque had been dishonoured. An element of this offence was that the payee must have presented the cheque within six months of the date on which the cheque was drawn. So the drawer argued that the six-month period ran from the date the cheque was issued, and that because the payee had presented the cheque more than six months after the date of issue, the offence was not made out. The Supreme Court of India disagreed, holding (at [18]) that the six-month period ran from the date marked on the cheque, and that the payee had presented the cheque within that period. *Hinchcliffe* was cited (at [9]) with approval. The offence was therefore made out and the appeal was dismissed. Like the previous two cases, *Ashok* is also premised on the validity of a post-dated cheque on and after the date marked on it. *Ashok* too does not assist the defendant's case at all. In fact, it supports the plaintiff's case.

64 The defendant then cites Poh Chu Chai, *Law of Negotiable Instruments* (LexisNexis, 7th Ed, 2014) ("*Poh Chu Chai*") at pp 282 to 284, which the defendant submits states that whether a post-dated cheque is valid on and after the date marked on it is an issue unresolved by the Singapore courts.[70] Again, the defendant's argument is misconceived. The unresolved issue which *Poh Chu Chai* actually identifies is whether a post-dated cheque is "regular" within the meaning of s 29 of the Act, in order to enable title to the cheque to pass to a holder in due course. That is not the issue before me. There is therefore no need

[70] Defendant's Written Submissions dated 2 August 2016, paragraph 59; Certified Transcript dated 19 September 2016, page 34.

for me to express a view on it.

65 Section 13(2) of the Act states that a bill will not be invalid "only" by reason that it is post-dated. The word "only" in that provision contemplates the possibility of a post-dated cheque being invalid for other reasons. The scope of those other reasons is uncertain on the face of s 13(2) itself. The defendant claims that because the cheque was delivered as a form of collateral, it is invalid because it is conditional within the meaning of ss 3 and 21(3)(*b*) of the Act. I must therefore decide whether this could be a reason for holding a post-dated cheque invalid.

66 The plaintiff submits in response that a post-dated cheque delivered as a form of collateral or security is a valid cheque capable of being sued on independently from the underlying agreement. As authority for this proposition, the plaintiff relies on a number of cases, including *City Hardware Pte Ltd v Goh Boon Chye* [2005] 1 SLR(R) 754 and *Thomson Rubbers* ([33] *supra*). But these cases simply assume that proposition to be true without analysis or explanation. As the parties have made submissions to me on this issue, I shall proceed to discuss the principles on the application of ss 3, 13(2) and 21(3)(*b*) of the Act that are relevant to the disposition of the matter before me.

67 First, a bill of exchange may be "conditional" or "unconditional" in two distinct senses under each of ss 3 and 21(3)(*b*) of the Act. The distinction is between an unconditional order and an unconditional delivery of an order. Section 3 of the Act defines a bill of exchange as an unconditional order to pay. An order to pay which is conditional does not qualify as a bill of exchange: s 3(2) of the Act. But an unconditional order to pay can nevertheless be delivered conditionally. Section 21(3)(*b*) recognises the right of the drawer to retain title to a bill by way of conditional delivery, the effect of which is to

deprive the transferee of the right to be paid on the bill: *Yeow Chern Lean* ([39] *supra*) at [42]. It would also deprive the transferee of standing to sue on the bill, because delivery must be complete in order for title to pass. This is implied in s 21(3)(*b*) by the reference in that provision to a delivery not for the purpose of transferring property. In short, a conditional order to pay does not fulfil an essential criterion to be a bill of exchange, whereas conditional delivery of an unconditional order operates merely to deprive the transferee of the right to sue on the bill. It follows that the tests for determining conditionality under s 3(1) and s 21(3)(*b*) are different. I therefore turn to elaborate on each.

68 It is well-established that for an order to be unconditional within the meaning of s 3(1) of the Act, it must be imperative and not merely precatory, *ie*, it cannot carry within its words the option of non-compliance. The imperative is necessary to place the drawee under an obligation to the drawer to pay the value of the bill to the payee. As *Poh Chu Chai* ([64] *supra*) explains at p 28:

> The requirement that a drawer's instructions must constitute an unconditional order is no doubt imposed with the object of ensuring that the drawee is placed under a contractual obligation to carry out the drawer's instructions. The order given must be imperative. If the drawer's instructions are no more than a mere request to the drawee to carry out the drawer's instructions, the instructions will not constitute an order as the drawee has the option of not complying with the request. In *Little v Slackford* (1828) 1 Mood. & M. 171, the Court decided that a bill of exchange addressed to a drawee as follows: "Mr. Little, please to let the bearer have seven pounds, and place it to my account and you will oblige", constituted a mere request to the drawee. The instrument was not a bill of exchange because the instructions did not constitute an order to the drawee. The drawee who made payment on the bill was not barred from claiming reimbursement from the drawer even though the bill was not stamped as a bill of exchange.

69 Separately, for delivery of a bill to be conditional under s 21(3)(*b*) of the Act, the transferor must intend to suspend delivery – in the legal as opposed to

the factual sense – until a certain condition is satisfied, or to make delivery for some purpose other than to transfer title to the cheque to the transferee: *Yeow Chern Lean* ([39] *supra*) at [43]. Thus, in *Yeow Chern Lean*, the Court of Appeal held that the cheques had been delivered unconditionally because the transferor had intended to attach a condition merely to the use of the proceeds and not to the delivery of the cheques. In fact, the transferor could not have intended to retain title to the cheques, because if he had intended to do so, then the proceeds of the cheques would not have been available to the transferee and it would have been pointless to impose the condition. Therefore the fundamental question under s 21(3)(*b*) is in my view whether a transferor intends without qualification to confer title to the cheque upon the transferee.

70 A transferor must also communicate this intention clearly to the transferee: *Yeow Chern Lean* at [43]; *Byles* ([32] *supra*) at para 9–005. This is an objective test to be satisfied by the party who claims that such an intention exists. Whether a communication is sufficiently clear will depend on the circumstances of the case. But as a general rule, strong evidence will need to be shown to demonstrate that the transferor of a bill of exchange did not intend for title to the bill to pass to the transferee with delivery. These strict requirements are necessary to preserve commercial efficacy, in service of which the principle of cash equivalence exists. To develop this rationale fully, it is necessary to rehearse the commercial advantages of a bill of exchange over a mere promise to pay, which I explained in *Rals International (HC)* ([33] *supra*) at [152]:

> The cash equivalence principle gives a bill of exchange two important commercial advantages over a mere promise to pay. First, where the drawer's payment obligation under the bill has not yet fallen due, a bill offers the payee the means to monetise the promise. The payee can, quickly and effectively, convert by negotiation the drawer's promise to pay in the future into cash in the present. Second, once the drawer's payment obligation under the bill has fallen due and until that obligation is met,

> the bill is *de facto* security for the payee. The payee can, quickly and effectively, convert by legal action the drawer's promise to pay in the present into cash in the present. Simply put: the drawer is obliged to pay now and argue later.

71 The logical prerequisite for the realisation of these advantages is that the transferee must know with certainty whether and when he may present or negotiate the bill. To the extent that he is uncertain about the status of his bill as a cash equivalent, the very purpose of a bill of exchange is frustrated. In this regard, it is the proper function of the law to minimise the scope and possibility of such uncertainty in the interests of commercial efficacy. It must follow, therefore, that for a court to hold a transferee unable to sue or be paid on a bill by reason of its conditional delivery, strong and clear evidence must be presented of the transferor's intention to make only conditional delivery.

72 The circumstances which can render physical delivery conditional are varied. In *Yeow Chern Lean*, the Court of Appeal (at [42]) cited with approval a passage from a previous edition of *Chalmers* that discusses these circumstances. An updated version of that passage can now be found at p 124 of the current edition of *Chalmers* ([32] *supra*). The relevant part, upon which the defendant in the present case places great reliance in its submissions,[71] reads:

> A bill may also be delivered conditionally as collateral security, it being agreed that it will become operative only in the event of default. Upon fulfilment of the condition, a conditional delivery becomes complete and takes effect at that time.

73 A brief discussion of the relevant authorities at this juncture is useful. For the first proposition in the text quoted above, *Chalmers* cites the case of *Alsager v Close* (1842) 10 M & W 576 ("*Alsager*"). That was an action in trover brought by the assignees of a bankrupt against the transferee of a bill of

[71] Defendant's Written Submissions dated 2 August 2016, paragraph 46.

exchange drawn in the amount of £1,600. The bankrupt had delivered the bill, before his bankruptcy, to the transferee as an indemnity for a bond which the bankrupt had executed jointly with a third party. The transferee had promised to return the bill in the event that the bond was cancelled. The bankrupt's assignees now showed the transferee the cancelled bond and demanded the return of the bill. The transferee refused to deliver up the bill, and later even obtained £800 on the bill. Lord Abinger CB, with whom Gurney B and Rolfe B agreed, allowed the assignees' claim. They held that the assignees had title to sue on the bill, standing as they did in the shoes of the bankrupt, and that the transferee had converted the bill to his own use by receiving the money on it (at 583):

> The bill was deposited with the defendant for a special purpose, and his duty was to hold it until that purpose was determined. I do not think that a man who holds a bill for a particular purpose of this nature has a right, without authority, to go and receive money on the bill. I think, therefore, the receipt of £800 was an actual conversion; so that, quâcunque viâ, the bankrupt might have maintained the action.

74 For the proposition that delivery is complete upon fulfilment of the condition, *Chalmers* cites the case of *Clifford Chance v Silver* [1992] 2 Bank LR 11 ("*Clifford Chance*"). *Poh Chu Chai* ([64] *supra*) at pp 140 to 141 also relies on this authority for the proposition that once the condition is met, the drawer's liability to pay crystallises. In *Clifford Chance*, a cheque was indorsed by the solicitors of a purchaser of land to solicitors of the vendor towards payment of a deposit, but on the condition that the cheque was to be "returnable on demand until we authorise you to effect an exchange". The English Court of Appeal held that the initial delivery of the cheque was conditional under s 21(2)(*b*) of the English Bills of Exchange Act 1882, which is *in pari materia* with s 21(3)(*b*) of the Act. But the court also held that delivery became unconditional when the contracts for the sale of the property were exchanged

and the conditions stipulated were fulfilled. Sir Christopher Slade put it thus:

> In my judgment, on the facts of this case and in view of section 21(2) of the Bills of Exchange Act 1882, delivery to Clifford Chance of the cheque for £100,000 did not take place until 10th January 1991, when the deposit of £100,000 payable under the first agreement became due and Clifford Chance ceased to hold the cheque to the order of Frederick Hass & Stone. By virtue of section 31(3) of the 1882 Act a bill payable to order is "negotiated" (only) by the indorsement of the holder completed by delivery. In my judgment therefore the cheque was negotiated on 10th January 1991.

75 Another case which should be mentioned is *Marina Sports Ltd v Alliance Richfield Pte Ltd* [1990] 1 SLR(R) 385 ("*Marina Sports*"). The defendant relies on this case to argue that the delivery of the cheque was conditional under s 21(3)(*b*) of the Act.[72] In *Marina Sports*, the broker of the sale of a vessel issued the seller a post-dated cheque with specific instructions not to present the cheque until after the broker had received payment from the buyer. The seller presented the cheque before that happened and the cheque was dishonoured. The broker subsequently countermanded the cheque because of the seller's alleged bad faith. The High Court upheld the District Court's refusal to grant summary judgment on the cheque, opining simply that there were triable issues and that the broker should be given conditional leave to defend. While the court's reasoning was elliptical, it clearly took into account the broker's argument that "since the cheque had been issued conditionally and the condition had not been fulfilled, there was no valid delivery under s 21" (at [9]).

76 It can be seen from these cases that it is possible to effect conditional delivery of a bill where that bill is intended as a form of collateral for an obligation to pay arising from an underlying contract, whether that contract is a

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[72] Certified Transcript dated 19 September 2016, pages 32 and 33.

bond (*Alsager*), a contract for the sale of land (*Clifford Chance*) or a contract for the brokerage of a sale of a chattel (*Marina Sport*). But these cases also demonstrate that the intention to effect conditional delivery must be objectively established. In each of these cases, it was objectively clear that the transferee had taken physical delivery of the bill subject to an express condition which the transferor had clearly attached to the delivery.

77 I add that the mere fact that a bill is post-dated does not clearly and objectively establish that the transferee intended to attach a condition to delivery which was to endure beyond the date marked on the bill. Post-dating a bill suggests only that the transferor intends the transferee to present the bill unconditionally on or after the date it bears, and that the burden lies on anyone who asserts the contrary to establish the contrary. Indeed, this must be implicit in any bill of exchange if the principle of cash equivalence is to have any meaning.

78 A contrasting example would be the cheque in *Marina Sports*. That cheque was delivered with specific instructions to the transferee not to present it until further advice from the transferor even on or after the post-dated due date: *Marina Sports* at [5]. While the High Court did not comment on whether this would be sufficient to make delivery conditional within the meaning of s 23(2)(*b*), I am inclined to think, for the purpose of illustrating the principle being discussed here, that it would have. But I express no view on how else conditional delivery might be effected in practice. All will depend on the circumstances.

79 The scope of s 13(2) of the Act is now sufficiently clear for the purposes of the present case. While a bill is not invalid by reason "only" that it is post-dated, it is invalid if it embodies a conditional order to pay: s 3(2) of the Act. It would, however, not be invalid if it were delivered conditionally. Conditional

delivery in the sense contemplated by s 21(3)(*b*) of the Act goes not to the validity of the bill, but to whether title to the bill passes to the transferee. Thus, while a conditionally-delivered bill may be a valid bill, the holder of that bill will not be able to sue on it until delivery is completed through the fulfilment of the condition.

80 To summarise, the following propositions are clear from the authorities:

(a) For an order to be unconditional within the meaning of s 3(1) of the Act, it must be imperative and not precatory. An instrument which contains a conditional order to pay is not a bill of exchange. The focus here is on a condition imposed on the *drawee* of the bill and not on the payee or transferee of the bill.

(b) For physical delivery of a bill to be conditional within the meaning of s 21(3)(*b*) of the Act, the transferor must intend to hold delivery in suspense until a certain condition is satisfied or to make delivery for some purpose other than that of transferring title to the bill to the transferee. In either case, the transferor must communicate his intention clearly to the transferee. Conditional delivery deprives the transferee of title to the bill and consequently of the right to sue on it, so long as the condition remains unsatisfied.

(c) The party who asserts that physical delivery of a bill was intended to be conditional delivery of the bill within the meaning of s 21(3)(*b*) bears the burden of proving that on an objective test. As a general rule, strong evidence will be necessary to establish that the transferor of a bill intended to attach a condition to delivery.

81 With these principles in mind, I turn to the facts of the case. As regards

the possibility that the cheque is a conditional order and therefore invalid under s 3(2) of the Act, the defendant produced no evidence and raised no argument that in drawing the cheque in favour of the plaintiff, the defendant gave only tentative or conditional instructions to the drawee, DBS Bank, to pay the plaintiff the value of the cheque. The defendant's suggestion that the cheque is not unconditional for the purposes of s 3(1) of the Act therefore has no basis.

82 On a proper view of the law, it is clear that the defendant's real and only sustainable argument is that it effected physical delivery of the cheque to the plaintiff subject to a condition within the meaning of s 21(3)(*b*) of the Act. Insofar as the defendant attempts to characterise the condition as a "contingency" that invalidated the cheque, it mistakenly relies on cases in which bills were invalidated because they contained a conditional order to the drawee to pay within the meaning of s 3(1) of the Act.[73] Given that the defendant's order to DBS Bank was not conditional, it is not necessary to discuss those cases. I therefore turn to consider the defendant's argument under s 21(3)(*b*) of the Act.

83 Without expressing a final view on the merits, and taking the defendant's case at its highest, I accept that the initial delivery of the cheque may have been conditional. This is because cl 2 of the parties' agreement, which I have reproduced at [10], expressly required the plaintiff to return the cheque to the defendant after the defendant had procured the SBLC. This contractual requirement to return the cheque is arguably analogous to the promise made by the defendant in *Alsager* ([73] *supra*) to return the bill upon the cancellation of the bond for which the bill had been transferred to him as an indemnity.

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[73] Defendant's Written Submissions dated 2 August 2016, paragraphs 49 to 53.

84 Further, cl 2 of the parties' agreement arguably evidences a clear communication by the defendant of its intention to withhold title to the bill at initial delivery. But just as it was implicit that the defendant in *Alsager* would obtain title to the bill upon a default on the bond, so too in the present case, it is implicit that the plaintiff would obtain title to the cheque if the defendant failed to perform its obligations under the parties' agreement. It is not in dispute that that is what in fact happened. Therefore, the plaintiff has at least a *prima facie* case that it has title to sue on the cheque.

85 In this regard, I also take the view that the plaintiff has a *prima facie* case that the time within which the defendant must perform its obligations under the parties' agreement had lapsed, such that the plaintiff had title to the cheque when it presented the cheque for payment. What this time is may be discerned from cll 2 and 3 of the parties' agreement, which are reproduced at [10] above. The effect of cl 2 of the parties' agreement was to stipulate that the cheque was to bear the date 15 August 2014. The effect of cl 3 was to oblige the defendant to procure the SBLC within 15 international banking days after the plaintiff had transferred to the defendant 4% of the value of the SBLC. The plaintiff made the transfer on 20 June 2014. It is common ground that the defendant did not procure the SBLC as contractually stipulated or at all. When 15 banking days had elapsed from 20 June 2014, any condition arising from cl 3 of the parties' agreement ceased to operate. By 15 August 2014, the defendant's delivery of the cheque to the plaintiff – even if conditional at the outset – had become completely unconditional. When the plaintiff presented the cheque on 21 November 2014 and re-presented it on 24 November 2014, therefore, it had title to the cheque and was fully entitled to do so.

86 In response, the defendant submits that there is no evidence of any discussion between the parties as to what would happen to the cheque should

the defendant default on its obligation under cl 3 of the agreement, and therefore the burden lies on the plaintiff to establish that it was entitled to sue on the cheque.[74] But the law dictates that the very opposite is true. As I explained at [77] above, it is implicit in the nature of a bill of exchange that the defendant *qua* transferor intended that the plaintiff should be entitled to present the cheque. If it was the defendant's intention that the plaintiff should not be entitled to present the cheque even if the defendant defaulted on its obligation under cl 3 of the parties' agreement and even after 15 August 2014, the burden was on the defendant to make this further condition objectively clear to the plaintiff at the time it physically delivered the cheque to the plaintiff and the burden is on the defendant to establish that further condition in these proceedings. It did not do so then and cannot do so now. The court, confronted now simply with the cheque as it stands, must accept and give effect to the plaintiff's right to sue on it. By pointing to the fact that there is no evidence of the parties' intentions as to the consequences of the cheque in the event of a default, when it has the burden of producing that evidence, the defendant has ironically undermined its own submission that delivery was conditional and remained conditional after 15 August 2014. This results from a classic application of the cash equivalence principle.

87 For these reasons, I consider that the plaintiff has succeeded in establishing a *prima facie* case for its claim on the cheque. The defendant's submissions that the cheque is invalid and that its delivery remains conditional are without merit. These submissions raise no triable issues.

Estoppel

88 The plaintiff, relying on *Hatton* (see [32] above), also briefly put

[74] Certified Transcript dated 19 September 2016, pages 23 and 24.

forward the argument that the defendant, having secured the benefit of the €400,000 which the plaintiff transferred to it, is in any case now estopped from claiming that the cheque is invalid.[75] *Hatton* is a case about payment in international trade. A seller drew bills of exchange on a buyer pursuant to a contract for the sale of goods. The seller's bank discounted the bills and presented them to the buyer, who accepted them. In exchange, the bank released to the buyer the bills of lading covering the goods. The buyer then failed to pay the bank and the bank sued on the bills of exchange, seeking summary judgment for the sum owed. The buyer argued that the bills were invalid under s 3(2) of the Act as they were contingent orders to pay. The High Court rejected this argument, holding (at [12]) that the buyer, having secured the advantage of obtaining the goods by accepting the bills, could not now claim that the bills it accepted were not valid bills. The court thus dismissed the buyer's appeal and upheld the assistant registrar's order granting summary judgment to the bank.

89 In my view, *Hatton* may be distinguished in several respects and is not of immediate assistance to the plaintiff. First, unlike the buyer in *Hatton*, the defendant here is not really challenging the validity of the cheque. The cheque clearly contains an unconditional order to pay. As I observed at [82] above, what the defendant is really saying is that the cheque was delivered conditionally. Second, whereas the buyer in *Hatton* was the drawee of the bill, the defendant in the present case is the drawer of the cheque and DBS Bank is the drawee. This relates to the third difference, which is that *Hatton* did not involve a cheque but a bill of exchange, and the principles on acceptance with respect to each type of bill are different. Neither the plaintiff nor the defendant in the present case submits whether a *Hatton*-type estoppel could arise notwithstanding these differences. Since I have already decided that the plaintiff has established a

[75] Plaintiff's Written Submissions dated 2 August 2016, paragraph 38.

prima facie case, I prefer to express no view on whether the defendant is estopped in any way from challenging the plaintiff's right to sue on the cheque.

Issue 3: Triable issues

90 It is well-established that an application for summary judgment on a dishonoured cheque will succeed unless the defendant raises an arguable case of fraud, illegality or a total or quantified partial failure of consideration: *Marina Sports* ([75] *supra*) at [8] – [10]; *Rals International (HC)* ([33] *supra*) at [151]. The defendant has advanced arguments under each head. I consider them in sequence.

Fraud

91 The defendant's contention on fraud is that the plaintiff conspired with Tahir and Johari to defraud the defendant through the parties' agreement. It highlights four strands of evidence to support this contention.

92 First, the defendant submits that the plaintiff fabricated the second version of the addendum to the agreement, which was exhibited in Lam's third affidavit.[76] It is not disputed that the effect of the addendum was to extend retrospectively, from two to seven international banking days after the conclusion of the agreement, the period within which the plaintiff was to transfer to the defendant 4% of the value of the SBLC. The plaintiff transferred the 4% to the defendant on 20 June 2014, which was seven days after the conclusion of the agreement on 13 June 2014. For that reason, according to the plaintiff, it was necessary to "regularise" this transaction by way of the addendum.[77] The defendant, however, has spotted that the versions of the

[76] Defendant's Written Submissions dated 2 August 2016, paragraph 74.

[77] 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 18(b).

addendum exhibited in Lam's first and second affidavit were unsigned, while the version of the addendum exhibited in Lam's third affidavit was signed.[78] The defendant claims that the signed version was created for the purposes of this action so that it could not be argued that the plaintiff was itself liable for a breach of the agreement. Indeed, the defendant goes so far as to suggest that even the agreement is fabricated after the event.[79] In a subsequent affidavit, the plaintiff explains that Lam was unable to find the signed copy of the addendum at the time he affirmed his first two affidavits, and found it only later.[80]

93 Second, the defendant submits that the parties' agreement was concluded under suspicious circumstances. While Tahir was the defendant's managing director at the material time, it was Johari who signed the agreement on the defendant's behalf.[81] The oval rubber stamp applied to the agreement does not resemble the rubber stamp which the defendant usually applies to its agreements.[82] There is also a note allegedly written by Tahir stating it was the plaintiff who failed to provide bank coordinates and a credit facility in a bank to facilitate the issuance of the SBLC.[83] Finally, the defendant alleges that Johari joined the plaintiff in November 2014.[84] It produced an email from Tahir dated 22 March 2016 which he says that Johari had "join[ed] hand" with the plaintiff, who had been "trying to play with us from last one n half year".[85] The defendant therefore submits that it is premature for the court to enter judgment for the

78 Defendant's Written Submissions dated 2 August 2016, paragraph 72.

79 Defendant's Written Submissions dated 2 August 2016, paragraph 74.

80 4th Affidavit of Kin Lam dated 20 June 2016, paragraph 16(b).

81 Defendant's Written Submissions dated 2 August 2016, paragraph 81.

82 Defendant's Written Submissions dated 2 August 2016, paragraph 83.

83 Defendant's Written Submissions dated 2 August 2016, paragraph 84; 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, pages 27 to 31.

84 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 43.

85 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, page 33.

plaintiff without hearing the evidence of Tahir, now a third party to this action, who would be able to explain the suspicious circumstances in which the agreement was concluded.[86] Apart from maintaining that Johari was authorised to deal with the plaintiff on behalf of the defendant,[87] the plaintiff does not respond specifically to the allegations concerning the rubber stamp and Tahir's correspondence.

94 Third, the defendant submits that it is a suspicious circumstance that the plaintiff was required to transfer €200,000 out of the €400,000 to Tahir's personal account.[88] The defendant also suggests that the bank documents evidencing this transfer are not authentic.[89]

95 Fourth, the defendant casts suspicion on the plaintiff's claim by pointing to a cluster of allegedly "inexplicable" acts by the plaintiff. One of these acts is the plaintiff's delay in presenting the cheque more than three months after the date which it bears.[90] The plaintiff explains this delay on the basis that Tahir and Johari convinced it to delay presenting the cheque, saying that the defendant still intended to comply with its obligations under the parties' agreement.[91] The defendant also points to other allegedly suspicious conduct, including the fact that the plaintiff chose not to address the defendant's allegation that Johari had become an employee of the plaintiff until the assistant registrar appeared to consider this a serious issue;[92] the fact that the plaintiff engaged debt collectors

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86 Defendant's Written Submissions dated 2 August 2016, paragraph 85.

87 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 16(a).

88 Defendant's Written Submissions dated 2 August 2016, paragraph 86.

89 Defendant's Written Submissions dated 2 August 2016, paragraph 87.

90 Defendant's Written Submissions dated 2 August 2016, paragraph 91.

91 3rd Affidavit of Kin Lam dated 30 May 2016, paragraph 30(e).

92 Defendant's Written Submissions dated 2 August 2016, paragraph 94.

to demand payment of the value of the cheque when it was now claiming that it had a straightforward claim on the cheque;[93] and the fact that the plaintiff waited some 15 months before commencing this action against the defendant.[94]

96 Having considered all the evidence, I am of the view that the assistant registrar was correct to hold that the defendant has succeeded in raising a triable issue of whether the plaintiff had conspired with Tahir and Johari to defraud the defendant. The plaintiff's explanation of why it initially produced an unsigned version of the addendum is, at this stage, less than convincing. Further, as the defendant points out,[95] there is no objective evidence to support the plaintiff's explanation for its delay in presenting the cheque, *ie*, that Tahir and Johari had persuaded it not to present the cheque earlier. Finally, it is somewhat coincidental that Johari allegedly left the defendant to join the plaintiff at about the time he allegedly completed withdrawing the €200,000 in the defendant's account for his own benefit[96] and at about the time the plaintiff presented the cheque. I note also that Tahir's email, to the extent that it was written to suggest that Tahir himself was not involved in any alleged foul play against the defendant, is inconsistent with the defendant's case that Tahir conspired with the plaintiff and Johari to defraud the defendant. While I do not think that this inconsistency is fatal to the defendant's contention that there is a triable issue of fraud, I return to this point below at [119] below in my discussion on the proper form of leave to defend to be granted.

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93 Defendant's Written Submissions dated 2 August 2016, paragraph 97.

94 Defendant's Written Submissions dated 2 August 2016, paragraph 97.

95 Certified Transcript dated 19 September 2016, pages 48 and 49.

96 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, paragraph 42.

Illegality

97 The defendant's case on illegality is premised on its case on fraud. The defendant submits that since the parties' agreement was concluded to perpetrate a fraud on the defendant, it must be unenforceable as an illegal contract. The defendant cites para 16–017 of *Chitty on Contracts* (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty*"), which states that where the object of a contract is the perpetration of a fraud, the contract is illegal and therefore unenforceable.[97]

98 Given that I accept that the defendant has raised a triable issue of fraud committed through the instrumentality of the parties' agreement, and given that the proposition stated in *Chitty* is indisputable, it would follow that I find there to be a triable issue of whether the agreement is unenforceable for illegality. I so hold.

Failure of consideration

99 The defendant's final argument[98] is that it has suffered a quantified partial failure of consideration. In this regard, it puts forward two principal arguments.[99]

100 First, the defendant argues that it did not receive the benefit of any part of the €400,000 which the plaintiff transferred to the defendant under the parties' agreement.[100] Tahir received €200,000 in his personal account. And although the remaining €200,000 was transferred into the defendant's bank account, Tahir and Johari withdrew all of it in stages between June and

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97 Defendant's Written Submissions dated 2 August 2016, paragraph 102.

98 Defendant's Written Submissions dated 2 August 2016, paragraph 105.

99 Certified Transcript dated 19 September 2016, pages 36 and 37.

100 Defendant's Written Submissions dated 2 August 2016, paragraph 106.

November 2014.[101] Thus, relying on *Ooi Ching Ling Shirley v Just Gems Inc* [2003] 1 SLR(R) 14 ("*Ooi Ching Ling*") at [43], the defendant argues that it has suffered a failure of consideration because it has not enjoyed the benefit of what it bargained for.

101 Second, the defendant argues that the plaintiff is obliged to pay it a sum of €200,000,[102] which it has yet to receive. This is because the plaintiff failed to transfer 4% of the value of the SBLC, *ie*, the €400,000, to the defendant within two international banking days after 13 June 2014 as required under cl 2 of the parties' agreement (disregarding the addendum). As the plaintiff breached this obligation, the plaintiff became liable under cl 6 of the agreement to pay the defendant a penalty of 2% of the value of the SBLC, *ie*, €200,000. The defendant disregards the addendum, which serves to extend the contractual deadline for the plaintiff to transfer the €400,000, because the defendant rejects the enforceability of the addendum on grounds of fraud.

102 To evaluate these arguments, it is necessary to discuss briefly the principles governing failure of consideration as a defence to an action on a bill of exchange. The basic principle is that a bill of exchange, like any other contract, is not enforceable unless it is supported by consideration: *Poh Chu Chai* ([64] *supra*) at 230; *Byles* ([32] *supra*) at para 19–001. But while a party who seeks to enforce a contract generally bears the burden of establishing that it is supported by consideration, the position is reversed in the context of bills of exchange, where under s 30(1) of the Act the existence of consideration is presumed until the contrary is proved by the party resisting the action on the bill: *Poh Chu Chai* at 230; *Byles* at para 19–003. It is the rebuttal of this presumption that is commonly referred to as the defence of failure of

[101] Defendant's Written Submissions dated 2 August 2016, paragraph 106.

[102] Defendant's Written Submissions dated 2 August 2016, paragraph 107.

consideration against an action on a bill of exchange. It follows that we are concerned with the contractual sense of consideration as the exchange of benefit and detriment which combines with offer and acceptance to create an enforceable agreement: see *Fielding & Platt Ltd v Selim Najjar* [1969] 1 WLR 357; *Pollway Ltd v Abdullah* [1974] 1 WLR 493. After all, s 27(1) of the Act provides that "valuable consideration" for a bill may be constituted by "any consideration sufficient to support a simple contract" as well as "any antecedent debt or liability". These principles were summarised by Scott LJ in *Churchill and Sim v Goddard* [1937] 1 KB 92 at 109 and 110:

> [V]arious decisions about failure of consideration were cited to establish the well-accepted principle that if the consideration for a bill of exchange wholly fails, then as between immediate parties the contract created by the instrument is discharged and the acceptor released. These authorities also call for no discussion, as there is no doubt as to the principle.
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> …
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> The presence of consideration is not an essential element of a bill of exchange contract as of an ordinary contract not under seal – it is presumed by the Act, and was presumed by our Law Merchant before the Act. But as between immediate parties the defendant is entitled to prove absence of consideration moving from the plaintiff as a defence to an action on the bill, and it is in replication to this defence that it was important for the appellants to point out that the respondent's acceptance recorded the receipt of the consideration, and further that the consideration was in fact given. There can to my mind be no question in the present case that the appellants gave good consideration – i.e., "value" within the meaning of the Act. …

103 We are therefore not concerned with a failure of consideration, or as some commentators prefer to call it, failure of "basis", in the sense in which it is used in the law of restitution. In that sense, the term "failure of basis" is said to denote more accurately the negation of the basis for making a payment, and therefore to constitute a ground for restitution or to be an "unjust factor" for reversing unjust enrichment: *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell *et al*, eds) (Sweet & Maxwell, 9th Ed, 2016) at paras 12–10

to 12–15.

104 Next, while total failure of consideration is a complete defence to an action brought on a bill of exchange, partial failure of consideration affords a *pro tanto* defence provided it is for a liquidated and ascertainable amount: *Byles* ([32] *supra*) at paras 19–036 to 19–037; *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 at 720. Some earlier authorities apparently treated the claim on a bill as indivisible, so that partial failure of consideration even if liquidated could not be pleaded as a defence, but the modern law, in the way I have just stated it, is clear: *Byles* at para 19–037 n 114.

105 Finally, it would be useful to discuss a case involving a dishonoured cheque in which these principles were applied, namely, *Autobiography Ltd v Byrne* [2005] EWHC 213 (Ch) ("*Autobiography*"), which is cited with approval in *Byles* ([32] *supra*) at para 19–011. A wife drew a cheque on a joint account with her husband to meet a debt of a company in which they were both shareholders, and of which the husband was a director. The company then procured for the creditor a bank draft, which was paid, but the cheque was later dishonoured. The wife's defence against the company's claim on the cheque was that no consideration had passed from the company. Allowing the claim, the court held that the cheque was supported by consideration because it was unrealistic to suggest that no benefit had been conferred on the wife given her interest in the company. The court emphasised that consideration here had to be viewed in a commercial context, which suggested that the wife did not intend the cheque as a gift to the company. *Autobiography* thus illustrates that the focus is on determining whether consideration has moved from the drawer, and if the cheque has been issued in a commercial context, that should be taken into account too.

106 In view of these principles, I turn to consider the defendant's two arguments. As regards its first argument, it is clear to me, firstly, that the defendant's reliance on *Ooi Ching Ling* ([100] *supra*) is misconceived because that case concerns failure of consideration in the restitutionary, not contractual, sense. Thus, to the extent that the defendant's argument is premised on restitutionary principles, I reject it.

107 Second, given that the plaintiff did transfer €200,000 into the defendant's bank account, it cannot be said that no consideration moved from the plaintiff in support of the cheque. If Tahir and Johari later applied those funds for their own personal benefit, that is simply irrelevant to the question whether the cheque was supported by consideration from the plaintiff.

108 Third, the defendant has not raised the argument that because €200,000 out of the €400,000 was transferred to Tahir and not to the defendant, there was a partial failure of consideration based on an ascertainable amount of €200,000, and it can therefore rely on a *pro tanto* defence that absolves it of liability to pay half the sum in the cheque. But even if this argument were to be raised, I would reject it. It is well-established that while consideration must move from the promisee, it need not move to the promisor, as long as the promisee suffers some detriment at the promisor's request: Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) at para 3–024. Here, the fact that €200,000 went to Tahir and not to the defendant does not change the fact that the plaintiff paid out a sum total of €400,000 as requested by the defendant as consideration for the cheque. I also take into account the commercial context of this case: *Autobiography* ([105] *supra*); in the light of the clear terms of the agreement, it is inconceivable that the defendant issued the cheque to the plaintiff as a gift.

109 For these reasons, I reject the defendant's first argument.

110 The defendant's second argument looks less like an argument that it suffered a failure of consideration and more like an argument that it is entitled to assert an equitable set-off in the value of €200,000 should the plaintiff succeed, or a submission that any judgment for the plaintiff must be coupled with a stay of execution as to €200,000 pending the defendant's formulation and advancement of a suitable counterclaim. The defendant raised neither possibility. In any event, the former means nothing without an actual counterclaim advanced by the defendant, and the latter was not applied for and need not be considered further.

111 Accordingly, I find that there is no triable issue as to whether the defendant has suffered a total or quantified partial failure of consideration.

112 However, as I have found that the defendant has raised triable issues of fraud and illegality, it is nevertheless entitled to leave to defend, in one form or another.

Issue 4: Conditional or unconditional leave

113 I now come to the form of the leave to defend which I should grant the defendant. The applicable principles were summarised in *Wee Cheng Swee Henry* ([29] *supra*) at [81]:

> The classic formulation is that conditional leave to defend is the appropriate order when the defendant has succeeded in showing a reasonable probability of a real or *bona fide* defence which ought to be tried, but that defence is shadowy. Characterising a defence as shadowy is as much a matter of impression as it is of analysis. If one tries to capture that characterisation in words, one can say that 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. Alternatively, one can say a defence is shadowy if the evidence is such that the plaintiff has very nearly succeeded in securing judgment.

114 In *Rals International (HC)* at [151], I observed that the cash equivalence principle is deeply embedded in our law, both substantive and procedural. In our procedural law, it means that a court will give summary judgment to a plaintiff suing on a bill of exchange save in exceptional circumstances. The nature of a bill of exchange as a cash equivalent implies, logically and conceptually, that a plaintiff suing on a bill of exchange will almost always come very close to securing judgment against the defendant. That formulation mirrors the language of *Wee Cheng Swee Henry*. I consider this implication to be a true and accurate description of the plaintiff's case here. At this stage of the proceedings, it seems to me improbable that the defendant will succeed in showing that the plaintiff, Tahir and Johari fraudulently procured the cheque from the defendant through the instrumentality of the parties' agreement. As a result, it is appropriate to impose a condition on the defendant's leave. I come to this conclusion for several reasons.

115 First, the defendant has produced no contemporaneous evidence of any form of coordination or correspondence between Lam, Tahir and Johari at or around 13 June 2014 to indicate that they prepared and executed the parties' agreement in order to defraud the defendant. Instead, the defendant relies only on events after the agreement was concluded as circumstantial evidence of the alleged fraud. In particular, as the assistant registrar observed, there is no evidence that sheds direct light on the plaintiff's state of mind on 13 June 2014 when the agreement was concluded.[103]

116 Second, not only is the evidence of fraud not contemporaneous with the parties' agreement – as one would expect it to be if the defendant's case on fraud were well-founded – but the evidence is also far from strong. For example, I

[103] Notes of Evidence dated 21 June 2016, page 5.

accept that there is no immediately apparent explanation for the plaintiff's delay in presenting the cheque. But equally, there is no evidence to show that the defendant, in November 2014, considered the plaintiff's delay in presenting the cheque as raising a suspicion of fraudulent conduct. For example, the defendant did not react to presentation by telling the plaintiff that it was not entitled to present the cheque or by countermanding the cheque.

117 Third, fraud on the part of the plaintiff is not a reasonable explanation for the plaintiff's conduct. To date, the plaintiff is the only party that has suffered any loss under the parties' agreement. It transferred €400,000 to Tahir and the defendant. It has received absolutely nothing in return. If the plaintiff succeeds in its claim on the cheque, it will recover only the value of the sum it transferred. A fraudster is hardly likely to part with a significant sum of money only to seek its recovery a few months later. By contrast, the defendant cannot point to any value or interest it had in its possession before the agreement which it lost as a result of entering into the agreement.

118 Accordingly, I also do not regard as credible the assertion contained in a handwritten note allegedly by prepared by Tahir to the effect that it was the plaintiff who defaulted on the parties' agreement and thus failed to provide the defendant with the necessary bank coordinates.[104] If the plaintiff had already discharged the greater obligation of transferring €400,000 to the defendant and Tahir, there is no apparent explanation for why the plaintiff would not have readily discharged the lesser and simpler obligation of providing the defendant the necessary banking coordinates to facilitate the transfer of the €10m under the agreement.

119 Fourth, the defendant's own evidence undermines its own case more

[104] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, page 28.

than it supports it. I consider first the difficulties associated with Tahir's email dated 22 March 2016. First, while the email suggests that Bala did not know about the parties' agreement,[105] this does not assist the defendant's case if Tahir was the managing director of the defendant at the material time and was doing business on behalf of the defendant. That latter fact is not denied by the defendant and is a fact which is consistent with the plaintiff's case. Second, there is an inconsistency between Tahir's suggestion in the email that he was not involved in the plaintiff's attempt to "play" with the defendant on the one hand, and the defendant's case that Tahir was involved in the conspiracy to defraud the defendant on the other. Third, there is a further inconsistency between Tahir's assertion in the email that Johari knew about the transaction and Tahir's statement in a letter dated 25 March 2014[106] that only Tahir was involved in the transaction and that no other directors or associates were involved.

120 The general picture which emerges therefore is that Tahir was involved in concluding the parties' agreement, and that the defendant now has allegedly no knowledge of the precise circumstances surrounding Tahir's involvement. This is no basis at all for the bold assertion that the plaintiff conspired with Tahir and Johari to defraud the defendant.

121 Next, I consider the handwritten note allegedly prepared by Tahir which I referred to at [118] above. It appears to be written on the company notepaper of a company called MTN Investments Pte Ltd, which has the address 41 Senoko Drive, Singapore 758249.[107] Notably, this was also the defendant's address at least until October 2014[108] and possibly even until April 2016.[109]

[105] Defendant's Written Submissions dated 2 August 2016, paragraph 84.

[106] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, page 24.

[107] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, pages 27 to 31.

While the defendant submits that, as an engineering company, it is not in the business of investing and therefore had no reason to be involved in procuring the SBLC,[110] it makes no mention in these proceedings of the existence of MTN Investments Pte Ltd. Tahir has been a director of MTN Investments Pte Ltd since 2009.[111] It is ostensibly an investment company possibly connected to the defendant and possibly operating out of the same address. Accordingly, one cannot help but suspect that the defendant has not told the court all that it knows about the background to the parties' agreement. In light of this, I find it difficult to give serious weight to the defendant's allegation that the plaintiff is involved in a fraud perpetrated against it through the instrumentality of the agreement.

122 Fifth, in view of these reasons, I do not see how the facts of *Van Lynn* ([42] *supra*) highlight the strength of the defendant's case, as the defendant seeks to argue.[112] In *Van Lynn*, the plaintiff took an assignment of the defendant's debt from a bank and sought summary judgment on the debt. At first instance, the defendant secured leave to defend conditional on securing the entire claim by a payment into court. The English Court of Appeal upheld the decision. It held the notice of assignment to be valid and the defendant's defences of fraud and conspiracy between the plaintiff and the bank to be without basis and shadowy at best. Insofar as there appears to be more circumstantial evidence in the present case indicative of fraud, that evidence is riddled with holes and inconsistencies. Neither is it correct to say that any defence which is stronger than that in *Van Lynn* will result in unconditional leave.

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[108] 2nd Affidavit of Kin Lam dated 26 April 2016, page 10.

[109] 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, page 37.

[110] Defendant's Written Submissions dated 2 August 2016, paragraph 102.

[111] 1st Affidavit of Redhy @ B Balamurugan, page 9.

[112] Defendant's Written Submissions dated 2 August 2016, paragraphs 121 and 122.

123 Accordingly, while I accept that the defendant has made out a prospect of a defence of fraud or illegality, it is one which falls short of justifying unconditional leave to defend. While the defence is not wholly devoid of substance, the overall impression is such that some demonstration of commitment on the part of the defendant to the claimed defence is necessary: *Abdul Salam* ([35] *supra*) at [44]. I have therefore imposed a condition.

Issue 5: Appropriate sum as security

124 The court has an unqualified and widely framed discretion as to the type of condition to impose on a grant of leave to defend to ensure that justice is done in any particular case: *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd* [2014] 2 SLR 446 ("*Chimbusco*") at [39]. As O 14 r 4(1) of the Rules of Court anticipates, however, the condition imposed typically requires the defendant to provide security for all or part of the plaintiff's claim. In the present case, the assistant registrar fixed the quantum of security to be provided by the defendant at $450,000. I have arrived at the same conclusion.

125 The quantum of the security to be required of a defendant must be fixed with two factors in mind: first, doing justice to the plaintiff in light of the strength of the plaintiff's case and the uncertainties attached to the defendant's defences; and second, doing justice to the defendant in light of her financial means: *Wee Cheng Swee Henry* ([29] *supra*) at [112]. In considering the second of these factors, the court should be guided by the following principles, as stated in *Wee Cheng Swee Henry* at [118]:

> (a) having decided to grant a defendant leave to defend, it is wrong in principle to impose a condition on that leave which the defendant would find impossible – as opposed to merely difficult – to comply with;

(b) the defendant bears the burden, in every sense of the word, of showing that it would be impossible – as opposed to merely difficult – to comply with a condition which the court proposes to impose on the leave to defend;

(c) in discharging that burden, the defendant has a duty fully and frankly to disclose her financial position to the court; and

(d) in considering whether it is impossible – as opposed to merely difficult – for the defendant to comply with the condition, it is legitimate to have regard not just to the defendant's own financial resources, but also to the financial resources of those who might reasonably be expected to extend financial assistance to her in her hour of need.

126 The defendant sought to adduce before me additional evidence of its financial means through Bala's fifth and eight affidavits. I allowed the defendant's application.[113] It appears to me that, in light of the usual manner in our procedure by which a condition comes to be attached to leave to defend, the defendant ought to be allowed an opportunity to put evidence of his means before the court, ideally before the assistant registrar but even on appeal to a judge in chambers. As Brooke LJ said in *Anglo-Eastern Trust Ltd & Another v Kermanshahchi* [2002] EWCA Civ 198 at [68]:

> It has always been a feature of the summary judgment procedure that the plaintiff … is unlikely to want to refer to the possibility of a conditional order being made, and the defendant is unlikely, unless pressed, to want to refer to any lack of means when asserting that its defence has a real prospect of success. The former would regard any reference to a conditional order as a sign of weakness because its desire is to persuade the court that the defendant has no real defence. The latter is unlikely to wish to parade its lack of means when contesting the merits of the claim, because this might encourage the court to look more

[113] Certified Transcript dated 19 September 2016, page 50.

> critically into the merits of the defence it wishes to put forward in response to a claim which it knows it cannot pay. In these circumstances a court should not as a general rule make an order of the type made [by the court below] in the absence of any evidence about the defendant's means unless it is satisfied that the defendant has been given appropriate prior notice, which may be given informally by letter (as opposed to a formal application), to the effect that if the summary judgment application fails the claimant will be seeking a conditional order along the lines set out in the letter. The defendant can then prepare a witness statement as to its means, for production at the stage of the proceedings when the court says it intends to make a conditional order.

127 However, the defendant bears the burden of fully and frankly disclosing its assets. It is not for the plaintiff to produce evidence of the defendant's means or even to identify for the defendant the specific manner in which the plaintiff asserts that the defendant's disclosure is inadequate. Having received and considered the defendant's evidence of its means, I agree with the plaintiff that that evidence is insufficient to meet the burden on the defendant to avoid any condition whatsoever being attached to its leave to defend. I turn now to consider the parties' arguments.

128 The plaintiff advances two principal arguments why the defendant should be ordered to provide security for the full value of the plaintiff's claim, *ie*, $678,016.94. First, the plaintiff submits that the defendant's ledger accounts exhibited in Bala's third affidavit show that the defendant has the means to provide the full sum as security.[114] Second, the plaintiff submits that the further evidence adduced by the defendant is inadequate in three respects: (i) the statements of the defendant's three bank accounts are only for the month of August 2016 when this action was commenced in February 2016, which raises a concern over whether the defendant has dissipated its assets between those two dates;[115] (ii) apart from these bank statements and a list of some of its

[114] Certified Transcript dated 19 September 2016, page 21.

liabilities, the defendant has failed to list its assets or to show that its banking facilities have been frozen;[116] and (iii) there is no objective evidence to support Bala's allegations that his mother, Padma, is unable to fund the defendant or that Bala and his wife, Shamalah, are undergoing divorce proceedings.[117]

129 The defendant on the other hand submits, first, that the assistant registrar was wrong to rely on the ledger account exhibited in Bala's third affidavit. The account recorded only the movements of money into and out of the defendant's bank account between November 2013 and September 2014 and did not in any event reveal the defendant's financial means either in that period or today.[118] Even if the court were to rely on the ledger account, the defendant submits that it should have relied on the last page, which states a closing balance of only $112,720.81.[119]

130 Next, the defendant submits that, even if it is ordered to provide security, the starting point for the quantum should be €200,000. That is the penalty sum which the defendant is entitled to as a result to the plaintiff's default in failing to transfer the €400,000 within two international banking days. But given that even that sum would stifle the defence and the third party proceedings against Tahir and Johari, the court should fix only a "token sum" as the quantum for security.[120]

131 I accept the plaintiff's submission on the inadequacy of the financial

[115] Certified Transcript dated 19 September 2016, page 43.

[116] Certified Transcript dated 19 September 2016, page 43.

[117] Certified Transcript dated 19 September 2016, pages 43 and 44.

[118] Defendant's Written Submissions dated 2 August 2016, paragraph 131.

[119] Defendant's Written Submissions dated 2 August 2016, paragraph 134; 3rd Affidavit of Redhy @ B Balamurugan dated 10 May 2016, page 40.

[120] Defendant's Written Submissions dated 2 August 2016, paragraph 135.

information which the defendant has disclosed, insofar as it relates to the defendant and its sole directors and shareholders. Indeed, the defendant acknowledges that it has produced no direct evidence of the defendant's shareholders' financial standing.[121] It also has no response to the plaintiff's submission that Bala has made only a bare assertion that neither he nor his mother is in a position to inject fresh funds into the defendant.[122]

132 In the circumstances, I have come to the same conclusion as the assistant registrar. I have ordered that the defendant furnish $450,000 as security for the plaintiff's claim. While there is no starting point in fixing the quantum of security (see *Chimbusco* ([124] *supra*) at [39]), I would have been minded to require the defendant to furnish security for the full value of the plaintiff's claim, bearing in mind the strength of the plaintiff's case, bearing in mind that it is an action on an instrument which is the equivalent of cash and bearing in mind the weakness of the defendant's defence. I have then applied to that figure a discount of one-third. That is the maximum concession which I can make to the defendant's uncorroborated evidence and submissions about its financial status and that of the persons who stand behind it.

Conclusion

133 For all these reasons, I have dismissed both the plaintiff and defendant's appeals against the order of the assistant registrar. I have granted the defendant leave to defend the plaintiff's claim, that leave conditional on the defendant furnishing security to the plaintiff for its claim in the sum of $450,000 by way of a banker's guarantee or in such other form as the parties may agree. I have also ordered the costs of and incidental to the appeals to be costs in the cause.

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[121] Certified Transcript dated 19 September 2016, page 42.

[122] Certified Transcript dated 19 September 2016, page 42.

Vinodh Coomaraswamy
Judge

Chong Xin Yi, Yeo Mui Lin and Wong Jun Weng
(Ignatius J and Associates) for the plaintiff;
Ganga Avadiar and Asik Sadayan (Advocatus Law LLP)
for defendant.