IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 154

Suit No 621 of 2019 (Registrar's Appeal No 367 of 2019)

Between

Barun Electronics Co Ltd

… Plaintiff

And

EZY Infotech Pte Ltd

… Defendant

GROUNDS OF DECISION

[Civil Procedure] — [Summary judgment]

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v
EZY Infotech Pte Ltd

[2020] SGHC 154

High Court — Suit No 621 of 2019 (Registrar's Appeal No 367 of 2019)
S Mohan JC
17 February, 12 March 2020

30 July 2020

S Mohan JC:

Introduction

1 The underlying claims in this action relate to, *inter alia*, the manufacturing of memory cards and Ink Die cards by the plaintiff/respondent (the "plaintiff") from semi-conductor wafers sold to the plaintiff by the defendant/appellant (the "defendant").

2 In Summons 4653 of 2019, the plaintiff applied for summary judgment against the defendant (the "defendant") for a claim amounting to USD 490,443.42 in respect of various unpaid invoices. In the alternative, the plaintiff sought summary judgment for a lower sum of USD 378,247.40 after taking into

account the defendant's quantified counterclaims.[1] At the hearing below, the assistant registrar granted the plaintiff summary judgment for the full extent of its claim (the "judgment").[2] The defendant appealed against the assistant registrar's decision.

3 In Summons 479 of 2020 ("SUM 479/2020"), the defendant applied for leave to adduce further evidence for the appeal. This evidence took the form of a further affidavit from the defendant's director and Chief Financial Officer.

4 Both the appeal and SUM 479/2020 came before me on 17 February 2020. I first dealt with SUM 479/2020 and, after hearing the parties, I allowed the application. I then proceeded to hear the appeal proper, also on 17 February, and reserved judgment. I delivered judgment orally on 12 March 2020, allowing the appeal in part. I granted the defendant conditional leave to defend part of the plaintiff's claim amounting to USD 25,343.92. Consequently, I substituted the judgment granted by the assistant registrar with judgment against the defendant for the sum of USD 465,099.50 (the "revised judgment"). I declined to order a stay of execution of the revised judgment pending the determination of the defendant's counterclaims.[3]

5 As the defendant has since filed an appeal against my decision (in CA/CA 57 of 2020), I provide my written grounds of decision.

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1 HC/SUM 4653/2019; Minute Sheet (HC/SUM 4653/2019) at p 2 (in respect of alternative judgment for the lower sum)

2 HC/ORC 8249/2019

3 HC/ORC 1955/2020

Background

6 The plaintiff is a company incorporated in the Republic of Korea. It was, at all material times, in the business of developing and selling semi-conductor equipment and providing semi-conductor packaging services.[4] The defendant is a company incorporated in Singapore and is in the business of selling computer hardware and related equipment.[5]

7 From time to time, the defendant purchased semi-conductor wafers from SK Hynix Asia Pte Ltd ("Hynix"), and sold them to the plaintiff. The defendant would then issue invoices to the plaintiff when the wafers were delivered to the latter.[6] The plaintiff would use these wafers to manufacture memory cards, which it then sold to the defendant.[7] The plaintiff would thereafter issue its invoices to the defendant for the memory cards manufactured and sold when they were delivered to the defendant.[8]

8 The Hynix semi-conductor wafers that were sent to the plaintiff contained ink die, a raw material that could be extracted, tested, and used to fabricate lower-grade, but still commercially viable, micro-SD cards ("Ink Die Cards"). The plaintiff assisted the defendant with the extraction of ink die from the wafers delivered to it, and conducted tests on the extracted ink die to determine the net quantity of viable ink die that could be used to manufacture Ink Die Cards (the "Ink Die Services"). When the plaintiff had completed the

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4 Plaintiff's Submissions at para 3

5 Defendant's Submissions at para 9

6 1st Affidavit of Seung Lee at paras 10, 12; Defendant's Submissions at para 10

7 1st Affidavit of Seung Lee at para 10

8 Defendant's Submissions at para 11

extraction and tests, it notified the defendant of the amount payable for the Ink Die Services and provided the defendant with a fee quote for manufacturing the Ink Die Cards from the viable extracted ink die.[9]

9 In its Statement of Claim (Amendment No. 1), the plaintiff claimed that various invoices had been issued by the defendant to the plaintiff and *vice versa*. The invoices issued by the plaintiff to the defendant from 13 November 2018 to 20 February 2019 amounted to USD 3,639,168.82. The defendant, on the other hand, issued four invoices to the plaintiff amounting to USD 3,098,725.40. After these sums were set-off against each other and taking into account a further sum of USD 50,000 which had been paid by the defendant to the plaintiff on 8 January 2019, a net sum of USD 490,443.42 was owed to the plaintiff by the defendant.[10] The defendant did not dispute the quantum of the unpaid invoices.[11] Of the total sum claimed by the plaintiff, USD 465,099.50 relates to the manufacturing and sale of memory cards from 13 November 2018 to 22 January 2019 (the "Time Period").[12] The remaining USD 25,343.92 relates to one invoice (the "USD 25,343.92 Invoice") issued by the plaintiff for the Ink Die Services and manufacturing of the Ink Die Cards.[13]

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9 Defence and Counterclaim (Amendment No. 1) at paras 7–9; Reply and Defence to Counterclaim (Amendment No. 1) at para 8; 2nd Affidavit of Alrasu Shanmugam at paras 14 - 16

10 Statement of Claim (Amendment No. 1) at para 4

11 Plaintiff's Submissions at para 6; Defendant's Submissions at paras 18–19

12 Defence and Counterclaim (Amendment No. 1) at para 4; Reply and Defence to Counterclaim (Amendment No. 1) at para 5

13 Defence and Counterclaim (Amendment No. 1) at para 11; Reply and Defence to Counterclaim (Amendment No. 1) at para 8

10 The defendant argued that it should be granted unconditional leave to defend the plaintiff's claim as it had a plausible counterclaims amounting to a defence of legal or equitable set-off, and that it had raised triable issues of law and/or fact in its defence.[14] Alternatively, the defendant argued that the execution of any judgment granted in the plaintiff's favour should be stayed pending the hearing and disposal of the defendant's counterclaims.[15]

11 In respect of the plaintiff's claim for the outstanding invoices amounting to USD 465,099.50 (the "USD 465,099.50 Invoices"), the defendant claimed (i) that the plaintiff had failed to deliver manufactured memory cards to the defendant on time (the "delay counterclaim"), and (ii) that there was a shortfall in the quantity of memory cards delivered to the defendant (the "shortfall counterclaim"). As a result, the defendant suffered loss and damage which it was entitled to set-off against the plaintiff's claim.[16] The defendant quantified the shortfall counterclaim at USD 17,999.50.[17] It did not quantify the delay counterclaim apart from quantifying its alleged losses as a result of the cancellation of certain purchase orders by one customer (see [53] below).

12 As for the plaintiff's claim on the USD 25,343.92 Invoice, the defendant contended that of the full invoice amount, the plaintiff was not entitled to USD 21,284.95 as the Ink Die cards delivered to the defendant were faulty or defective (the "faulty cards defence").[18] In addition, the faulty or defective Ink Die cards caused the defendant loss of profits amounting to USD 14,625.52,

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14 Defendant's Submissions at para 6(a)

15 Defendant's Submissions at para 6(b)

16 Defendant's Submissions at para 18

17 Defence and Counterclaim (Amendment No. 1) at paras 33; 39

18 Defendant's Submissions at para 19(c)

which it was entitled to raise as a counterclaim and set-off against the USD 25,343.92 Invoice (the "faulty cards counterclaim").[19]

The Issues

13 The issues to be decided by me in this appeal are as follows:

(a) Whether the defendant should be granted leave to defend the plaintiff's claim, whether in full or in part; and

(b) If leave to defend is not granted to the defendant or only granted for part of the plaintiff's claim, whether a stay of execution should be granted on the judgment (or part thereof) obtained by the plaintiff pending the hearing and disposal of the defendant's counterclaim.

Splitting the Plaintiff's claims

14 As a preliminary point, O 14 r 3 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) (the "ROC") provides that unless on the hearing of an application under O 14 r 1 of the ROC the defendant satisfies the court that there is an issue or question in dispute that ought to be tried with respect to the claim or part of a claim to which the application relates, or there ought for some other reason to be a trial of that claim or part, the court may give judgment for the plaintiff against that defendant on that claim *or part* as may be just having regard to the nature of the remedy or relief claimed.

15 On a plain reading of O 14 r 3 of the ROC, having regard to the nature of the remedy or relief claimed by a plaintiff, the court may in an appropriate

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19 Defendant's Submissions at para 19(d)

case give a defendant leave to defend a part of the plaintiff's claim and grant summary judgment over the residue. There is, therefore, no obstacle in this case to this court assessing the plaintiff's claim for the USD 465,099.50 Invoices and the claim for the USD 25,343.92 Invoice separately. During the hearing, the defendant's counsel, Ms Charmaine Chan-Richard, also separated the treatment of the plaintiff's claims in her submissions in a similar fashion. I will therefore consider each of these claims in turn, but before I do so, I first touch on the applicable legal principles.

The Law

16 The legal principles governing an application for summary judgment are well-settled. The plaintiff has to first demonstrate a *prima facie* case for summary judgment. If he cannot do so, the application ought to be dismissed. Once the plaintiff has crossed that threshold, the tactical burden then shifts to the defendant opposing the application (*M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B*") at [17]-[18]).

17 In order to obtain leave to defend, a defendant must "establish that there is a fair or reasonable probability that he has a real or *bona fide* defence" (*M2B* at [17]).

18 Our courts have repeatedly emphasised that leave to defend would not be granted if "all the defendant provides is a mere assertion, contained in an affidavit, of a given situation which forms the basis of his defence" (*M2B* at [19], citing *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd and others* [1998] 1 SLR(R) 53 at [14]). Therefore, bare assertions in an affidavit will not get a defendant very far in resisting an application for summary judgment against him. The assertions must be supported by some evidence,

whether direct or indirect, and the evidence itself must be reasonably capable of belief (*Singapore Civil Procedure 2020, vol 1* (Chua Lee Ming editor-in-chief) (Sweet & Maxwell, 2019) (*"Singapore Civil Procedure"*) at para 14/4/5).

19 Following from the principles above, the court will not grant leave if the assertions in the affidavit are equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements from the same deponent, or inherently improbable in themselves (*M2B* at [19] citing *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400). As pointedly noted by Sundaresh Menon JC (as he then was) in *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam"*) at [39], whilst a summary judgment application is not to be dealt with as if it were a trial on affidavits, it does not mean that anything stated in the affidavits is to be accepted without rational consideration to determine if there is a fair or reasonable probability of a real defence.

20 The approach to be adopted in determining whether summary judgment ought to be ordered where there is a subsisting counterclaim is helpfully summarised in *Singapore Civil Procedure* at para 14/4/10 as follows:

> Whether a summary judgment ought to be ordered where there was a subsisting counterclaim will be decided based on a practical framework. First, if the counterclaim was plausible and second, if the plausible counterclaim amounted to a defence of set-off (legal or equitable), then unconditional leave to defend would be granted in respect of the entire claim. On the other hand, if the counterclaim did not amount to a defence of set-off and it was clear that the claim must succeed, and that the plaintiff would only be put to expense in proving his claim, then judgment ought to be given to the plaintiff in respect of the entire claim. Nevertheless, where the plausible counterclaim was sufficiently connected to the claim and where there were grounds for a stay of execution in light of the connected and plausible counterclaim, the court may exercise its discretion to stay the execution on the judgment until the counterclaim had

> been tried (*Kim Seng Orchid Pte. Ltd. v. Lim Kah Hin (trading as Yik Zhuan Orchid Garden)* [2018] 3 S.L.R. 34 at [97]–[98])

21 Where a counterclaim is not sufficiently plausible as to amount to a *bona fide* defence, the court can nevertheless consider whether it would be appropriate to grant conditional leave to defend. In this regard, the Court of Appeal in *Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam* [2019] 2 SLR 412 ("*Akfel"*) held at [41] that where "what the defendant has shown does not amount to a fair probability of a *bona fide* defence, but only that the defence raised is not hopeless, it is warranted for the court to impose conditional leave to defend". The court would "reserve the grant of conditional leave to cases where the defendant's evidence has *not yet reached* the level of showing a reasonable probability of a *bona fide* defence, a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence" (*Akfel* at [51]).

22 As held in *Abdul Salam* at [44] and affirmed by the Court of Appeal in *Akfel* at [46], a "condition is appropriate when the court has the sense that although it cannot be said that the claimed defence is so hopeless that, in truth, there is no defence, the overall impression is such that some demonstration of commitment on the part of the defendant to the claimed defence is called for".

The USD 465,099.50 Invoices Claim

23 Having set out in the foregoing paragraphs the principles germane to this appeal, I turn now to the plaintiff's claims. I start with a summary of the parties' arguments on the defendant's delay and shortfall counterclaims.

Parties' Submissions

Delay Counterclaim

24 At the outset, it is worth noting that the defendant did not at any material time dispute receiving the memory cards that formed the subject of the USD 465,099.50 Invoices. Nor did the defendant dispute the amount claimed by the plaintiff under the USD 465,099.50 Invoices at any material time (leaving aside the counterclaims raised by the defendant in this action by way of set-off). On this score alone, I was satisfied that the plaintiff had demonstrated a *prima facie* case for summary judgment. The tactical burden therefore shifted to the defendant to satisfy me that there existed a fair or reasonable probability of a *bona fide* defence.

25 In relation to its delay counterclaim, the defendant submitted that the parties had an oral agreement in place as to when the memory cards should be delivered. The defendant's case was that the cards would be delivered within seven to ten days of the plaintiff receiving the Hynix semi-conductor wafers. The defendant contended that, in breach of this agreement, the plaintiff did not deliver the memory cards under the USD 465,099.50 Invoices on time.[20] In addition, the plaintiff also failed to deliver the memory cards on time in 2018 outside the Time Period.[21] In contrast, the plaintiff's case was that the memory cards would only be delivered within seven to ten days of the plaintiff receiving the Hynix semi-conductor wafers and another component known as the ASolid flash controllers.[22]

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20 Defendant's Submissions at para 49

21 Defendant's Submissions at paras 49–50

22 Plaintiff's Submissions at para 53.2

26 The defendant further submitted that the plaintiff was aware (and admitted in the pleadings) that the market in 2018 for memory cards was a volatile one, and that there was either an implied term or an understanding between the parties that time was of the essence in respect of the delivery of memory cards to the defendant.[23] In order to demonstrate that the plaintiff knew the dates on which it received the Hynix semi-conductor wafers and the quantity of wafers received, the defendant exhibited, *inter alia,* documents to prove Hynix's delivery of semi-conductor wafers to the plaintiff during the Time Period.[24] It also exhibited and referred to documents to establish the quantity of memory cards delivered by the plaintiff to the defendant and the dates on which the cards were delivered during the Time Period. The defendant argued that the delay in delivery of memory cards from the plaintiff to the defendant could be evidenced by comparing the dates on which Hynix semi-conductors were delivered to the plaintiff, and the dates on which the plaintiff delivered memory cards to the defendant.[25]

27 The defendant also asserted that the plaintiff had not made out its case that the cards would only be delivered within seven to ten days of the plaintiff receiving the Hynix semi-conductor wafers *and* the ASolid flash controllers.[26] According to the defendant, there was no such agreement.[27]

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23 Defendant's Submissions at para 51

24 2nd Affidavit of Alrasu Shanmugam at para 32; pp 45-71 (Exhibit SA-7)

25 2nd Certified Transcript at p 2 ln 24-33; 2nd Affidavit of Alrasu Shanmugam at para 34; pp 73-112 (Exhibit SA-8); 1st Affidavit of Seung Lee at pp 28-74

26 2nd Certified Transcript at p 3 ln 14-16

27 Defendant's Submissions at para 54

28 In support of this submission, the defendant highlighted that the plaintiff did not adduce evidence of when it received the ASolid flash controllers, which would have been necessary to show when the delivery dates were intended to be.[28] Certain Powerpoint slides that the plaintiff sought to rely on to evidence the parties' agreement (see [30] below) also did not mention ASolid flash controllers, and there was no evidence that the slides were sent to the defendant at the material time.[29] Finally, the instant message exchanges that took place at the material time between the plaintiff's and defendant's representatives via the messaging platform known as KakaoTalk ("Kakao") adduced by the plaintiff in evidence did not contain discussions on actual delivery dates or timings, and therefore did not support the plaintiff's contention that the dates and timings of delivery were subject to discussion and agreement between parties.[30]

29 Counsel for the plaintiff, Mr Aaron Leong, advanced three main submissions in support of the plaintiff's case. First, he submitted that the defendant knew or ought to have known that it required both the Hynix semi-conductor wafers and ASolid flash controllers for the manufacturing of memory cards, and that accordingly, it would have been obvious that the manufacturing process could only commence after the receipt of both materials.[31] In support of this submission, the plaintiff made reference to records of Kakao conversations between Mr Seung Lee, the Vice President (Sales Division) of the plaintiff ("Mr Lee") and Mr Ashish Aggarwala of the Defendant ("Mr Aggarwala"). Mr Aggarwala was the main contact person through whom the plaintiff engaged

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28 2nd Certified Transcript at p 3 ln 14-17

29 Defendant's Submissions at paras 52-53; 2nd Certified Transcript at p 3 ln 19-25

30 2nd Certified Transcript at p 3 ln 31 to p 4 ln 17

31 Plaintiff's Submissions at para 53.2.2 – 53.2.4

with the defendant.[32] In a Kakao conversation on 12 March 2018, Mr Lee and Mr Aggarwala had a discussion about assembly costs, and this conversation demonstrated the defendant's knowledge that the plaintiff also required ASolid flash controllers in the manufacturing process.[33]

30 As for delivery time, Mr Leong submitted that this was one of the standard terms and conditions that applied to transactions between the plaintiff and its customers, and this term was not discussed between the parties.[34] The plaintiff also exhibited certain Powerpoint slides which it claimed had been sent to the defendant containing the plaintiff's business proposal. One of the slides contained the statement "Delivery- From 7 days after receiving materials". Notwithstanding this, the parties understood that delivery would in fact commence within 7 to 10 days after it received the materials because the plaintiff would only purchase the ASolid flash controllers after receiving the Hynix semi-conductor wafers, which process took an additional two to three days.[35] The plaintiff contended that the documents which the defendant sought to rely on (see [26] above) did not show that the time for delivery was 7 to 10 days after delivery of only the Hynix semi-conductor wafers, and therefore did not support their case.[36]

31 Mr Leong's second argument was that the exact shipment schedule for the memory cards was discussed and adjusted for each purchase order, and as

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32 1st Affidavit of Seung Lee at para 19

33 1st Affidavit of Bong Won Wook at p 14; Second Certified Transcript at p 9 ln 23-28

34 Plaintiff's Submissions at para 53.2.1

35 1st Affidavit of Seung Lee at paras 30.2.1- 30.2.2; p 96

36 Second Certified Transcript at p 9 ln 11-17

such there could not have been delays as alleged by the defendant.[37] To illustrate this point, Mr Leong referred to certain Kakao chats between Mr Lee and Mr Aggarwala. These chats showed that on one occasion, they discussed the type and quantity of memory cards to be shipped, and on another occasion, *when* the plaintiff would be able to receive Hynix semi-conductor wafers from the defendant in order for the plaintiff to be able to manufacture memory cards and ship them to the defendant.[38] Mr Leong submitted that these chat records showed that there was flexibility in the delivery schedule to be agreed between the parties, and the defendant had not shown any evidence to prove that there was a fixed timeframe for delivery as it now alleged.[39]

32 Third, Mr Leong submitted that the defendant did not, at any time before this suit was commenced, raise any dispute on any of the invoices issued by the plaintiff at the material time or mention any alleged counterclaim.[40] Given that the defendant pleaded that time of delivery was of the essence, it would follow that the defendant should have raised objections with the plaintiff to the late shipments or to the payment of invoices had there in fact been delays in delivery by the plaintiff and/or any losses thereby suffered by the defendant, as now asserted by the defendant. None of the affidavits filed by the defendant to resist the summary judgment application contained any evidence of any objections, whether by way of correspondence or otherwise, being raised by the defendant.[41]

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37 Plaintiff's Submissions at paras 53.3.-54

38 Plaintiffs Submissions at para 53.3; 1st Affidavit of Bong Won Wook at paras 17-18, pp 20-22

39 Second Certified Transcript at p 10 ln 9-13

40 Plaintiff's Submissions at para 55

41 Second Certified Transcript at p 10 ln 15-25

33 To buttress this argument, the plaintiff adduced a number of Kakao chat conversations between Mr Lee and Mr Aggarwala, demonstrating not just an absence of any protests or complaints by the defendant about any alleged delays, but acknowledgements by the defendant on a number of occasions (even before the Time Period) of its obligation to pay the plaintiff amounts outstanding, and that it had not done so.[42] Relevant portions of some of the exchanges on Kakao are reproduced below:[43]

> 23 May 2018
>
> 1:40 Mr Lee: Hi Ashish
>
> 1:41 We need payment update. Can you ask Shan again?
>
> 1:41 Mr Aggarwala: Spoke to him now…*he said he needs to settle some vendors but will pay u also*
>
> 1:46 Mr Lee: I need schedule first…
>
> 1:47 Mr Aggarwala: ok
>
> 9 July 2018
>
> 3:45 Mr Lee: Hi Ashish
>
> 3:45 Mr Aggarwala: Helloo
>
> 3:45 Mr Aggarwala: regarding your payment…please send email to shan
>
> 3:45 Mr Aggarwala: and me
>
> 3:46 Mr Aggarwala: i will push him then
>
> 3:46 Mr Aggarwala: *ask him to explain on why hasnt (sic) he paid you yet even after promising*
>
> 3:46 Mr Lee: Okay
>
> 5:17 Mr Lee: Sent
>
> 5:22 Mr Aggarwala: tks

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42 Second Certified Transcript at p 10 ln 27-30

43 1st Affidavit of Bong Won Wook at pp 30-33

15 November 2018

12:50 Mr Lee: Pls talk Shan. I need confirmative payment if he can't pay one time. At least weekly base he has to show me then I can make understand CEO

12:53 Mr Aggarwala: Ok

12:54 Mr Lee: Ash. You my dear friend. I'm your side but current situation is out of my control…

1:00 Mr Aggarwala: I know seung

1:01 Mr Aggarwala: [Korean]

1:32 Mr Lee: Ash. If Shan confirm to pay $100k next week, I'll try to ship each 2 box per capacity tomorrow…

2:00 Mr Aggarwala: He agrees for it

2:03 Mr Lee: Please ask him to send official email then we can ship tomorrow

2:03 Mr Aggarwala: Ok

2:11 Mr Aggarwala: He has sent the email

20 November 2018

4:43 Mr Lee: Hey Ash. I understand your situation but still remain some payment. So pls ask Shan to pay weekly basis even small bit

4:46 Mr Aggarwala: yes he will

4:47 Mr Lee: I need weekly payment plan for the balance…

4:56 Mr Aggarwala: ok

4 January 2019

4:46 Mr Lee: … Just update payment pls…

4:46 Mr Aggarwala: maybe start from next week

4:47 Mr Aggarwala: this week nothing

4:47 Mr Aggarwala: no funds with shan to pay

4:49 Mr Lee: Okay. I need schedule…

> 4:49 Mr Aggarwala: shan is in a meeting… i will ask him to send on Monday
>
> 4:50 Mr Lee: Okay
>
> 27 February 2019
>
> 12:37 Mr Aggarwala: yes I know dear… CFO not in office…have a meeting with Hynix with shan at 2
>
> *honestly I don't think your payment can be arranged this month*
>
> 12:37 Mr Aggarwala: this is what he told me off hand
>
> 12:38 Mr Lee: Okay. Leave my message to Shan. We're going legal solution if he doesn't pay all overdue by tomorrow
>
> 12:39 Mr Aggarwala: ok I will inform him
>
> 12:39 Mr Lee: It's not mine. CEO's direction
>
> 12:39 Mr Aggarwala: alright got it
>
> [emphasis added]

34 Apart from Kakao chat conversations, the plaintiff also adduced email correspondence between Mr Lee and the defendant's director and Chief Financial Officer Mr Shanmugam Alrasu ("Mr Shanmugam") from February to April 2019. In these email exchanges, Mr Shanmugam informed Mr Lee that the defendant needed more time to make payment of the amounts outstanding. In none of these emails did the defendant raise any issues or complaints of delay or any alleged losses suffered by the defendant arising from such delay.[44] Nor was there any intimation of any counterclaim.

35 A number of the email replies sent by Mr Shanmugam to Mr Lee were in response to Mr Lee's threat, in an email sent by him on 6 March 2019 to Mr

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[44] Second Certified Transcript at p 10 ln 32 to p 11 ln 2; 1st Affidavit of Seung Lee at para 17

Shanmugam, that the plaintiff would be compelled to take legal action if the sums then owed to the plaintiff (amounting to slightly more than USD 465,000) remained unpaid. This threat was repeated in subsequent emails of 21 March, 22 March and 8 April 2019. These were some of Mr Shanmugam's replies to Mr Lee's emails:[45]

> 6 March 2019 2.33pm
>
> Dear Seung,
>
> As you know that the memory market is very bad and all our collections are not coming on time. In addition to this, the currency fluctuation in the developing countries where we are operating also affecting our collections.
>
> We need at least a month to come out from the currency issue and get our collections.
>
> *Appreciate if you can give us some (sic) to give you the payment plan and settle the due.*
>
> 13 March 2019 2.58pm
>
> Dear Seung,
>
> I am really feel bad on the employee layoff.
>
> *We are also going through some restructuring and really we need sometime to arrange your payment.*
>
> 21 March 2019 5.49pm
>
> Dear Seung,
>
> We can understand your situation.
>
> Internally we are working to arrange some additional finance and our shareholder also agreed to increase the investment.
>
> Appreciate if you can allow us sometime to complete the formalities.

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45 1st Affidavit of Seung Lee at pp 79-87

> 22 March 2019 12.57pm
>
> Dear Seung Lee,
>
> As we had mentioned in the last mail, we are working on the following:
>
> 1 We are working on to arrange some interim finance, which will know in the first or second week of April'19
>
> 2 We are also working with two new investors and the due diligence process is going. This process will take a month time
>
> 3 Also working with the Bank to increase our line against the collateral of the building which is valued about 26m.
>
> *All the above process will take time. Appreciate if you can give us more time to complete the process and settle your due.*
>
> *Thanks for your understanding and support.*
>
> 8 April 2019 4.30pm
>
> Dear Seung Lee,
>
> *As we had mentioned in our last mail, we need some more time to finalise our financing.*
>
> *Appreciate if you can allow us some more time to resolve this.*
>
> 8 April 2019 4.42pm
>
> Hi Seung,
>
> Currently the new investment process is going on. Need at least a month or two.
>
> [emphasis added]

36 Even when the defendant received the plaintiff's lawyers' letter of demand in June 2019, the defendant remained silent and did not raise any concerns of delay or hint at any counterclaim.[46]

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46 2nd Certified Transcript at p 12 ln 2-6; 1st Affidavit of Seung Lee at pp 90-92

Shortfall Counterclaim

37 As for the shortfall counterclaim (see [11]), the defendant's case, in essence, was that the plaintiff did not deliver the same quantity of memory cards to the defendant as represented by the quantity of Hynix semi-conductor wafers sold and delivered to the plaintiff by the defendant.[47] On the other hand, the plaintiff submitted that there was an agreement between the parties that the production yield would be 99.6%. This meant that the quantity of memory cards manufactured by the plaintiff would be 99.6% of the quantity of Hynix semi-conductor wafers received and/or 99.6% of the quantity of memory cards stated in the defendant's purchase order.[48] In support of its case, the plaintiff referred to the Powerpoint slides mentioned at [30] above; one of the slides showed various percentages of contract yield, the highest being 99.6%.[49] The plaintiff also submitted that the defendant did not provide any proof that the plaintiff had to deliver 100% of the quantity stated in the defendant's purchase orders.[50] In addition, the plaintiff had delivered to the defendant memory cards in excess of the requisite 99.6% contract yield out of goodwill. Those cards were marked as being of no commercial value as they were given to the defendant for free.[51]

38 In response, the defendant submitted that the Powerpoint slides which the plaintiff sought to rely on did not support the plaintiff's case that it only had to deliver 99.6% of the quantity of memory cards stated in the purchase orders.[52]

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47 Defence and Counterclaim (Amendment No. 1) at paras 29 - 30

48 Plaintiff's Submissions at para 58

49 1st Affidavit of Seung Lee at pp 94-95; 2nd Certified Transcript at p 11 ln 11-16

50 Plaintiff's Submissions at para 57; 2nd Certified Transcript at p 11 ln 11-16

51 Plaintiff's Submissions at para 59

52 2nd Certified Transcript at p 5 ln 5-9

Insofar as the plaintiff contended that they also shipped memory cards to the defendant in excess of the 99.6% contract yield, the defendant argued that those memory cards represented rejected, defective samples which had no commercial value.[53] The defendant referred to an invoice issued by the plaintiff which contained the notations "No Commercial Value" and "Reject" in relation to two cartons of memory cards.[54]

39 Finally, as with the delay counterclaim, the defendant did not raise any complaints of any shortfall(s) in delivery at any time prior to commencement of this action by the plaintiff (see [32] to [36]).[55] In fact, the defendant made an interim payment to the plaintiff of USD 50,000 in January 2019 following several chasers from the plaintiff. The plaintiff submitted that this partial payment showed that the defendant was trying to pay the monies owed as and when they were able to, and that if it had any valid or *bona fide* counterclaims, it would not have made payment of that sum.[56]

Analysis and My Decision

40 In my view, both the delay and shortfall defence and counterclaims do not raise triable issues that would warrant granting the defendant leave to defend. The evidence with the greatest probative value in the present case would be the contemporaneous communications and correspondence exchanged at the material time. The primary question that the defendant left unanswered was why

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53 2nd Certified Transcript at p 5 ln 15-18

54 2nd Certified Transcript at p 4 ln 15-18; 1st Affidavit of Seung Lee at p 100

55 Plaintiff's Submissions at para 60

56 2nd Certified Transcript at p 11 ln 29-33; 2nd Affidavit of Alrasu Shanmugam at para 27

the defendant did not at any time, in any of the contemporaneous correspondence, raise any complaints or protests about delays in delivery and/or shortfalls in quantities delivered, or bring the alleged defence and counterclaims to the plaintiff's attention in some shape or form. This silence was, in my view, telling and significantly undermined the defendant's attempts to demonstrate that either alleged defence and counterclaim was *bona fide* or plausible. It also did not assist the defendant that there was no credible or plausible explanation for the defendant's silence. Whilst Mr Shanmugam attempted, in his further affidavit filed for the appeal (see [3]), to provide an explanation, the reasons given in that affidavit not only lacked credibility but were also, in my view, commercially implausible. I return to this affidavit a little later in these grounds.

41 The underlying claim documents such as invoices and packing lists, and even the Powerpoint slides referenced by the parties were, in my view, equivocal. They did not support or conclusively prove either side's case. In respect of the delay counterclaim, the defendant's documents that established the quantities and dates of Hynix's delivery of semi-conductor wafers and the plaintiff's delivery of memory cards to the defendant did not provide proof of any agreement between the parties as to when the memory cards should have been delivered. The Powerpoint slides relied on by the plaintiff, as well as the Kakao conversations which the plaintiff used to evidence the defendant's knowledge that ASolid flash controllers were required in the manufacturing process, similarly did not record any agreed delivery timeframe. To some extent, the Kakao conversations exhibited by the plaintiff assisted the plaintiff in showing that there was some level of flexibility between the parties as to when the memory cards were to be delivered, but did not record whether there were any delays in delivery.

42 In respect of the shortfall counterclaim, the Powerpoint slides relied upon by the plaintiff indicated various percentages apart from 99.6%. The slides assisted the plaintiff somewhat in showing that the expected contract yield did not appear to be 100%, but again did not indicate whether there were any shortfalls in delivery or a contract yield which parties had agreed upon.

43 However, the contemporaneous Kakao conversations and email correspondence exchanged by the parties' representatives in relation to payment, are, in my view, material in determining the plausibility of the defendant's delay and shortfall defence and counterclaims. As I observed at [40], serious questions arise as to why the defendant did not raise even a single objection or protest in the face of repeated payment requests and demands from the plaintiff. The Kakao conversations and email correspondence referred to above (at [33] and [35]) show quite clearly the plaintiff constantly chasing the defendant over several months, spanning a period before, during, and after the Time Period, for payment of outstanding sums due to the plaintiff. If indeed there had been delays or shortfalls in deliveries over such an extended period of time (bearing in mind the defendant's case that time of delivery was of the essence), one would expect the defendant to have protested to the plaintiff in writing, or even if not in writing, in some form. In a commercial business context, the defendant's silence throughout the material time in the face of the repeated requests and demands by the plaintiff for payment was, to my mind, strongly indicative that no such *bona fide* defence and counterclaims existed. It bears emphasising that the exchanges between the parties spanned across several months from sometime in May 2018 right through to June 2019 when the defendant received the plaintiff's solicitors' legal demand. During this time, the defendant had any number of opportunities to bring issues or complaints

with regard to delays or shortfalls to the attention of the plaintiff but did not do so.

44 It is, however, not just a question of the defendant remaining silent. Not only did the defendant not object to the plaintiff's requests or demands for payment, the defendant *positively acknowledged* its obligation to pay and repeatedly requested for more time to make payment (see [32] - [35] above). Further, a partial payment amounting to USD 50,000 was also made by the defendant in January 2019. This was, to put it bluntly, not the type of conduct one might expect from a commercial business which is alleged to have suffered substantial losses as a result of continuing breaches of contract by its counterparty. Viewing the evidence as a whole, it appeared to me that the defence raised by the defendant by way of the delay and shortfall counterclaims was implausible and an afterthought.

45 I had, at [3] and [40] above, referred to Mr Shanmugam's further affidavit filed for the appeal. The purpose of this affidavit was to explain the reasons for the defendant not raising the counterclaims and the losses it alleged it had suffered in any of its communications or correspondence with the Plaintiff at the material time.[57] The defendant contended that it was relevant to have this evidence for the hearing of the appeal as the absence of any objection raised by the defendant was, according to the defendant, crucial to the decision of the assistant registrar.[58]

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57 2nd Certified Transcript at p 5 ln 22-31; 3rd Affidavit of Shanmugam Alrasu (HC/SUM 479/2020) at para 27

58 3rd Affidavit of Shanmugam Alrasu (HC/SUM 479/2020) at para 29

46 Mr Shanmugam sought to explain that sometime around January 2019, he gave instructions to his colleagues to conduct an internal investigation into the memory card business to identify the reasons behind the defendant's continual losses throughout 2018. The investigations were completed sometime around July 2019, and it was discovered that there were delays and shortfalls in the quantity of memory cards delivered by the plaintiff to the defendant.[59] The affidavit exhibited a table prepared by the defendant that showed the defendant's profits and losses from April 2018 to March 2019.[60] During the period from January to June 2019 when the email correspondence was being exchanged between Mr Shanmugam and Mr Lee, the investigations were ongoing. The defendant had not yet verified that there were delays and/or shortfalls in the quantity of memory cards delivered by the plaintiff, nor had it ascertained the period of any such delays and/or shortfalls, and the amount of losses it suffered as a result. For these reasons, no objections were raised with the plaintiff at that time.[61]

47 The plaintiff submitted that the defendant was making bare assertions to explain its silence. The defendant had not exhibited any internal communications to evidence that these investigations had taken place, and the findings of these investigations were also not adduced. The table purporting to show profits and losses was an internal document and did not prove that any losses were occasioned by the plaintiff.[62]

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59 4th Affidavit of Shanmugam Alrasu at paras 9, 11

60 4th Affidavit of Shanmugam Alrasu at p 8 (Exhibit SA-17)

61 4th Affidavit of Shanmugam Alrasu at paras 12-17

62 1st Certified Transcript at p 5 ln 22 to p 6 ln 11

48 As mentioned at [4], I allowed SUM 479/2020 and granted the defendant leave to file Mr Shanmugam's further affidavit. This was primarily to afford the defendant the full opportunity to present its case during the appeal. Nevertheless, the further affidavit left many important questions unanswered. It also contained only bare assertions not backed up by any direct or indirect evidence. Most importantly, it failed, in my view, to provide a plausible or credible explanation on why the defendant did not raise any objections to the plaintiff's claim earlier or give the plaintiff even a hint of the alleged counterclaims the defendant contends it has. Let me explain.

49 First, the defendant did not explain why it would be particularly difficult or impossible to check for delays and/or shortfalls, such that it was unable to give the plaintiff *any* indication of the defendant's concerns or potential claims at any time prior to the commencement of proceedings by the plaintiff. The defendant stated that it "took time to go through [its]records in detail and to analyse all the documents and information collected" from the investigations.[63] Notwithstanding that specific details of the delays and/or shortfalls were not yet available or that all the information had not yet been threaded together, it could at least have raised *some* protest or objection during the period the investigations were alleged to have been undertaken, even if the objection could not yet be fully particularised. Even a preliminary protest or intimation of potential claims with a reservation of rights would have put down a marker on record that the defendant had potential counterclaims, and, in the interim whilst the defendant's investigations were ongoing and pending quantification of the counterclaims, that they would not be in a position to pay the plaintiff's claims. If such a protest

63 4th Affidavit of Shanmugam Alrasu at para 10

or complaint had been raised, that might have lent some credence to the counterclaims now being asserted.

50 Even if it is accepted that the investigations took time, then by June 2019 when the defendant received a legal demand from the plaintiff's solicitors, the prospect of legal action if the plaintiff's claim was not paid would have been plain as day. It must have been apparent to the defendant by then that the defendant had potentially suffered losses on account of its alleged delay and shortfall counterclaims. If there were indeed investigations carried out by the defendant, those investigations would have already been ongoing for some five to six months by the time the defendant received the plaintiff's legal demand. Yet, even then, there was no intimation at all from the defendant of any alleged counterclaim. In these circumstances, the purported explanation given by the defendant for its silence simply does not, in my view, sit well at all with commercial plausibility.

51 I also agree with the plaintiff that the defendant did not produce any supporting evidence to show that any such internal investigations had indeed taken place. The fact that the evidence on the alleged internal investigations was not disclosed or mentioned by the defendant prior to the appeal did give rise to a reasonable inference that the defendant had come up with this explanation in an attempt to plug a fatal gap in its case, in response to the assistant registrar's decision below. The plaintiff, in its affidavit filed on 18 September 2019 supporting the application for summary judgment, had already raised the point that none of the allegations raised in the defendant's counterclaim had been raised by the defendant at any time prior to the commencement of legal

proceedings and were "absurd" to the plaintiff.[64] Yet, the defendant said nothing about this point in its show cause affidavit filed on 2 October 2019 to resist the summary judgment application.

52 To further demonstrate the implausibility of the explanation advanced by the defendant in Mr Shanmugam's further affidavit, I would highlight a piece of evidence that the defendant relied on in support of its delay counterclaim.

53 In its show cause affidavit, as an illustration of the losses the defendant claimed it had suffered on account of delays occasioned by the plaintiff, the defendant exhibited a letter sent by a company known as Tun Tauk Lin Co., Ltd (a customer in Myanmar) ("T.T.L"),[65] to "Ezy Infotech Company Ltd.". The letter was dated 26 March 2019 and in that letter, T.T.L sought payment of a sum of USD 43,271 in settlement of T.T.L's claim. From the tenor of the letter, it was apparent that this sum was sought by T.T.L to resolve the matter amicably without having to resort to legal recourse. According to the defendant, its customer T.T.L had cancelled certain orders for memory cards and claimed compensation from the defendant as the defendant had been unable to deliver the memory cards to T.T.L on time. As a result, the defendant suffered a loss of profit which it quantified at USD 36,300, and was also liable to compensate T.T.L in the amount of USD 43,271.

54 The defendant submitted that it was entitled to set-off these amounts against the plaintiff's claim as the delay was occasioned by the plaintiff's breach.[66] First, I noted that the letter from T.T.L was addressed to Ezy Infotech

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64 1st Affidavit of Seung Lee at para 27

65 2nd Affidavit of Alrasu Shanmugam at para 70(b); p 116 (Exhibit SA-9)

66 2nd Affidavit of Alrasu Shanmugam at para 70

Company Ltd.,[67] which the defendant's counsel acknowledged was a different entity from the plaintiff.[68] It was therefore unclear to me how this letter supported the defendant's delay counterclaim. Putting that aside, even if I were to accept that the letter was addressed to the defendant or that the claim by T.T.L. somehow found its way to the defendant,[69] it was telling that even in the face of this letter seeking compensation for two specific orders that had been cancelled, the defendant *still* said nothing to the plaintiff on the alleged delay counterclaim and losses flowing from these cancelled orders.

55 Even if the investigations the defendant alleged were ongoing at the time, on the defendant's case, this was a specific customer which had cancelled two orders worth approximately USD 683,000[70] because of alleged delays and was now seeking compensation from the defendant. This claim did not need investigation and even if it did, it would have been almost immediately apparent if the delay that caused those orders to be cancelled by T.T.L was occasioned by the plaintiff's failure to deliver on time. Again, bearing in mind the defendant's contention that time of delivery was of the essence, that the defendant did not at any time protest to the plaintiff *even on this specific claim*, is, to my mind, incredible and simply implausible from a commercial viewpoint.

56 I make one last point on this. In the defendant's Defence and Counterclaim (Amendment No. 1) ("DCC") filed on 6 November 2019, the defendant pleaded that in addition to T.T.L, *other* customers of the defendant

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67 2nd Affidavit of Alrasu Shanmugam at p 116

68 2nd Certified Transcript at p 6 ln 1-9

69 2nd Certified Transcript at p 6 ln 11-13

70 2nd Affidavit of Alrasu Shanmugam at p 114-115(Exhibit "SA-9)

also cancelled their orders for memory cards placed with the defendant due to the defendant's inability to deliver the memory cards within the contractually stipulated time. The defendant asserted that its inability to meet their customers' orders was in turn due to the plaintiff's delay in delivering the manufactured memory cards to the defendant, which in turn caused the defendant to suffer loss and damage including loss of profits.[71]

57 However, the defendant's show cause affidavit filed on 2 October 2019 did not contain any reference at all to any other customers having also cancelled their orders with the defendant. Nor was any evidence of claims or complaints by other customers exhibited to the affidavit. I made reference to the filing dates of the DCC and the show cause affidavit because the DCC was filed approximately a month *after* the show cause affidavit. Nevertheless, the point remains that by the time the show cause affidavit was filed, the evidence pertaining to the cancellation of orders by other customers, if it existed, must have already been available. Even if it was not available then, it certainly would have been by the time the appeal was heard by me. However, there was nothing in the show cause affidavit or the further affidavit filed for the appeal making even the slightest reference to other orders having also been cancelled by other customers on account of delays in delivery occasioned by the plaintiff. In the circumstances, I could not help but form the impression that the delay and shortfall defence and counterclaims were afterthoughts raised by the defendant in an attempt to stave off summary judgment.

58 As stated in *Kim Seng Orchid Pte ltd v Lim Kah Hin (trading as Yik Zhuan Orchid Garden* [2018] 3 SLR 34 ("*Kim Seng* Orchid") at [101], the

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71 Defence and Counterclaim (Amendment No. 1) at paras 23 - 24

"essence of the inquiry" with regard to whether a counterclaim was *bona fide* was the plausibility of the counterclaim. Based on all of the evidence, including the contemporaneous evidence that was placed before me, I was not satisfied that the delay and shortfall counterclaims asserted had the requisite degree of plausibility to give rise to a fair or reasonable probability of a real or *bona fide* defence.

59 The defendant raised two other points in support of its position that the delay and/or shortfall counterclaims amounted to a defence of legal and/or equitable set-off, such that it should be granted unconditional leave to defend.

60 First, it argued that it would require expert evidence to be adduced on the prevailing market prices for memory cards on the day the defendant should have received the cards from the plaintiff, and the day on which the defendant in fact received the cards. According to the defendant, the difference between the prices would be the loss and damage suffered by it in respect of the delay counterclaim.[72] When questioned by me as to how the defendant could satisfy the court that it should be given leave to defend when there was no indication of whether the counterclaim exceeded the claim, Ms Chan-Richard for the defendant submitted that for an equitable set-off, the court would not be concerned with the quantum of the counterclaim, but instead with whether the counterclaim is closely connected to the claim.[73] In my view and as elaborated below, this submission did not quite address the issue the defendant was confronted with in the appeal.

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72 Defendant's Submissions at paras 58-60

73 2nd Certified Transcript at p 7 ln 2-6

61 While an equitable set-off may operate when the sums claimed are not liquidated sums, the loss nevertheless has to be quantifiable by means of a reasonable assessment made in good faith (*Hiap Tian Soon Construction Pte Ltd and another v Hola Development Pte Ltd and another* [2003] 1 SLR(R) 667 at [36], citing *Pacific Rim Investments Pte ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim*") at [27]). In this case, no such assessment was made or presented to the court, even on a rough and ready basis for the purpose of defending a summary judgment application.

62 The quantum of an asserted counterclaim is relevant to whether summary judgment ought to be granted. As stated by the Court of Appeal in *Pacific Rim* at [35], citing *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927*,* cross-claims can only be deducted when they "go directly to impeach the plaintiff's demands, that is, [if they are] so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim". Without even an estimation of the quantum of the asserted counterclaim, how would the court be in any position to make informed decisions on (i) whether, and to what extent, the quantum of the asserted counterclaim exceeds that of the claim, (ii) the appropriate order to be made, and (iii) whether it would be manifestly unjust for any summary judgment granted to be enforced or otherwise, for its execution to be stayed? These questions cannot be answered by applying guesswork but must be grounded on some credible evidence that is before the court.

63 For example, it is an established principle that even where a counterclaim amounts to a defence, but the sum of the claim exceeds that of the counterclaim, summary judgment may be granted for so much of the claim that exceeds the counterclaim. Further, should summary judgment be granted over the whole or part of the claim, the quantum of the counterclaim is also a factor

for the court to take into consideration in deciding whether to grant a stay of execution (see *Kim Seng Orchid* ([58] *supra*) at [98]). As stated in *Singapore Civil Procedure* at para 14/4/10:

> Since, if the amount of set-off or counterclaim exceeds the plaintiff's claim, the defendant is (all things being equal) entitled to leave to defend or a stay of execution, as the case may be, in respect of the whole claim, while if it is less, the plaintiff is entitled (all things being equal) to judgment for the difference, *it behoves the defendant to particularise the amount of his set-off or counterclaim or to specify or indicate how it is made up or calculated, so that the court has material on which to make the proper order* (*Silberline Asia Pacific Inc v. Lim Yong Wah Allan* [2006] S.G.H.C. 27).
>
> [emphasis added]

64 Further, in the context of a summary judgment application, a party's ability (or inability as the case may be) to present an estimation of the quantum of an asserted counterclaim may also point to the plausibility (or lack thereof) of the alleged counterclaim. As succinctly summarised by the authors of *Singapore Civil Procedure* at para 14/4/10, the "jurisdiction to give leave to defend or to stay execution is essentially a discretionary matter and the defendant who invites the court to exercise the discretionary power must produce sufficient material for the court to justify a decision in his favour".

65 On the defendant's own case, its internal investigations (assuming any had taken place) lasted for about six months (see [46] above). As such, it had ample time to obtain or compute at least an estimate of its asserted counterclaim. Given that the defendant operates in this business, it should have been able to provide evidence of at least an estimate of the prevailing prices and its losses due to the delays alleged. If, as Ms Chan-Richard submitted, there was a concern

that any evidence from the defendant itself would be self-serving,[74] the defendant could have engaged an expert to provide expert evidence for the purposes of the summary judgment proceedings. Such evidence could have assisted to at least provide an estimate of the value of the defendant's counterclaim and how it was arrived at. However, none of these steps was taken by the defendant. I disagreed with the defendant's argument that the quantum of the counterclaim was a triable issue for which expert evidence would only be adduced at the trial.

66 The second point raised by the defendant was that where a dispute relates to an oral agreement, summary judgment should generally not be granted. In support of this argument, the defendant relied on *Naughty G Pte Ltd v Fortune Marketing Pte Ltd* [2018] 5 SLR 1208 ("*Naughty G*") and *M2B* ([16] *supra*). However, the court is required to consider all of the evidence available before it in totality and critically. The court will not deprive the plaintiff of its entitlement to summary judgment if it finds that the defence is not credible after having regard to its consistency with contemporaneous documents, its inherent plausibility, and other compelling evidence (see *Kim Seng Orchid* ([58] *supra*) at [37]). Therefore, the mere existence of an alleged dispute over the terms of an oral agreement in and of itself is not sufficient for the defendant to obtain leave to defend. In *Naughty G* (at [56(a)-(b)], citing *ARS v ART* [2015] SGHC 78 at [53]), the court observed that in "ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time", and "where possible, the court should look first at the relevant documentary evidence". *Naughty G* was not a case involving summary

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74 2nd Certified Transcript at p 6 ln 25-29

judgment but a decision rendered after trial, and the issue before the court revolved around determining the terms of an oral agreement. Nevertheless, applying the observations above by analogy, in light of the contemporaneous documents and other available evidence before me, including the contemporaneous conduct of the parties which I referred to earlier in these grounds, I saw no basis on which to grant the defendant leave to defend this part of the claim.

67 Accordingly, I ordered the summary judgment granted by the assistant registrar in respect of the plaintiff's claim amounting to USD 465,099.50 to stand. I rejected the defendant's submission that it should be granted unconditional leave to defend this claim and also rejected its alternative submission for a stay of execution of the judgment pending the determination of the delay and shortfall counterclaims. I return to the point on stay of execution below.

The USD 25,343.92 Invoice Claim

Parties' submissions

68 As for the USD 25,343.92 Invoice claim, the defendant's defence was that the plaintiff was not entitled to USD 21,284.95 as the goods supplied by the plaintiff were faulty/ defective. In addition, the defendant submitted that it had a counterclaim amounting to USD 14,625.52 for lost profits due to the supply by the plaintiff of the defective goods, which it could raise by way of set-off.[75] The defendant submitted that whether the goods were faulty/defective is a matter to be determined at trial. The defendant adduced email correspondence

[75] Defendant's Submissions at paras 19(c)-(d); 78

wherein the defendant's representative informed the plaintiff's representatives by email on 19 March 2019 that the Ink Die cards were not working.[76] The email states as follows:

> Dear Warren,
>
> The recently shipped 4gb, 8gb inkdie Cards our customer telling all the Cards are not working.
>
> microSD 4GB (AM2691LT) 12, 602
>
> microSD 4GB (AK2689) 9,626
>
> microSD 8GB (AK2689) 23,266
>
> microSD 8GB (AM2691LT) 2,683
>
> What are the controllers used for the above Cards. Can we get the Firmware to upgrade the cards? How Can we make the cards working?

The breakdown of the memory cards in the email correspondence matches that of the February 2019 invoice.[77] The defendant also argued that the plaintiff did not demand payment for this February 2019 invoice prior to the commencement of the suit, and the invoice was also not included in the plaintiff's initial unamended Statement of Claim.[78] The plaintiff submitted that it had asked the defendant, in a telephone conversation, to send some of the faulty/ defective Ink Die Cards to the plaintiff for it to investigate, but the defendant did not do so. The defendant also did not mention that the Ink Die cards were defective at any other point in time thereafter, such as in further emails or Kakao chat messages. As the defendant did not make any further requests for a return or replacement of the allegedly faulty Ink Die Cards, the plaintiff assumed the issue had been

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76 2nd Affidavit of Alrasu Shanmugam at paras 21-24; p 41 (Exhibit SA-6)

77 2nd Affidavit of Alrasu Shanmugam at para 23; p 40

78 2nd Certified Transcript at p 8 ln 9-11

resolved.[79] The defendant's allegation that the cards were faulty was also a bare allegation.[80] In relation to the telephone conversation which the plaintiff stated it had with the defendant, the defendant submitted that it did not have any further right of reply to the affidavit in which the plaintiff had made reference to this telephone conversation. Nonetheless, the defendant argued that whether this conversation even took place and what was said were matters to be proved by evidence at trial.[81]

Analysis and My Decision

69 In this case, while the defendant had adduced an email in support of its allegation that the Ink Die Cards were faulty, the question does arise as to why the defendant did not bring up the issue in any other subsequent correspondence with the plaintiff. The defendant's silence buttresses the plaintiff's argument that the defendant had merely asserted that the Ink Die cards were faulty/defective, but provided little evidence in support of its claim. However, at the same time, the assertion by the plaintiff that its representative had (in a telephone conversation) spoken to the defendant about this after receiving the defendant's email is also not corroborated by any evidence. The defendant also did not provide any basis for the quantification of its counterclaim. It merely asserts that its loss of profits is quantified at USD 14,625.52 without providing any details as to how such a precise amount was arrived at.

70 Overall, while I did not think that the threshold of a fair probability of a real or *bona fide* defence had quite been met by the defendant based on the (at

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79 1st Affidavit of Bong Won Wook at paras 10-11

80 2nd Certified Transcript at p 12 ln 16-20

81 2nd Certified Transcript at p 14 ln 12-17

best) minimal evidence adduced, I ultimately found that this part of the claimed defence was nevertheless not so hopeless that the defendant should be shut out from defending it altogether. Following the principles laid down in *Abdul Salam* ([19] *supra*) and *Akfel* ([21] *supra*) (see [21]–[22] above), this was, in my view, an appropriate case where the defendant should be given leave to defend this part of the plaintiff's claim but on condition that security be furnished by it as a demonstration of its commitment to its claimed defence.

71 I therefore granted the defendant conditional leave to defend this part of the plaintiff's claim for the sum of USD 25,343.92.

72 I was conscious that the sum claimed by the plaintiff of USD 25,343.92 spanned *both* the defendant's faulty/defective cards *defence* and its faulty/defective cards *counterclaim*. I wish to make it clear that in granting the defendant conditional leave to defend this part of the plaintiff's claim, I was not acknowledging the viability of the defendant's faulty/defective cards counterclaim. As it stands, the faulty/defective cards counterclaim is also based on not much more than a bare assertion and one email from the defendant to the plaintiff. Rather, I considered that the defendant had pleaded its case such that the faulty/defective cards defence and the faulty/defective cards counterclaim, *taken together*, constituted its response to the plaintiff's claim for the USD 25,343.92 Invoice. Further, the defendant's defence and counterclaim on the USD 25,343.92 Invoice claim are clearly interlinked, in that the counterclaim is contingent upon the success of the defence. Given that I have found the faulty/defective cards defence to be not so hopeless as to warrant summary judgment, I decided to grant the defendant conditional leave to defend the entire sum claimed by the plaintiff under the USD 25,343.92 Invoice.

Stay of Execution

73 Having granted the defendant conditional leave to defend the claim in relation to the USD 25,343.92 Invoice, the question remains whether the revised judgment granted in relation to the USD 465,099.50 Invoice should be stayed pending determination of the defendant's shortfall and delay counterclaims.

74 The defendant argued that if the court upheld the judgment, it should be stayed pending the hearing and disposal of its counterclaims, for the following reasons: first, there was a close degree of connection between the plaintiff's claim in the suit and the defendant's counterclaims; second, the defendant had *bona fide* and strong counterclaims; and third, that the plaintiff's financial status meant that it was unlikely to be able to satisfy any judgment, if granted, on the counterclaims.[82]

75 The plaintiff relied on *Kim Seng Orchid* ([58] *supra*) and argued that the court should not grant a stay of execution where a counterclaim was not a plausible one. It submitted that the defendant's evidence was such that its counterclaim was unlikely to succeed at trial, and accordingly, a stay of execution should not be granted.[83]

76 In the present case, as I have determined that the defendant's delay and shortfall counterclaims were not plausible, it follows that a stay of execution should not be granted. Whether a counterclaim had the requisite degree of plausibility is the first step in the framework set out in *Kim Seng Orchid* ([58] *supra*) at [98]:

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82 Defendant's Submissions at paras 6(b);104 – 108.

83 2nd Certified Transcript at p 12 ln 32 to p 13 ln 12

> (a) **Step 1: whether the counterclaim is plausible** — the court should first consider whether the counterclaim is plausible, *ie*, whether it is reasonably possible for the counterclaim to succeed at trial (or in the slightly tortured formulation adopted in *Sheppards*, whether the counterclaim is "so far plausible that it [is] not unreasonably possible for it to succeed if brought to trial"). If the counterclaim is *not* plausible, then its presence ought not to stand in the way of the plaintiff obtaining summary judgment of its whole claim, without any stay pending the determination of the counterclaim, and the court should so rule. If the court finds that the counterclaim *is* plausible, then **Step 2** follows.
>
> …
>
> [emphasis in original]

77 For the same reasons that I rejected the defendant's submission that it should be granted unconditional leave to defend on the basis of its counterclaims, I also rejected the defendant's alternative submission that I should order a stay of execution of the revised judgment pending the determination of the defendant's counterclaims. As I found that the counterclaims were not plausible, their presence should not stand in the way of the plaintiff obtaining the revised judgment without any stay of execution pending the determination of the counterclaims.

78 Ms Chan-Richard relied on *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 (*"Hawley & Hazel"*) in an attempt to persuade me that there should be a stay of execution pending the determination of the defendant's counterclaims *even if* I was of the view that the counterclaims were not viable.[84]

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84 2nd Certified Transcript at p 7 ln 30 to p 8 ln 2

79 In *Hawley & Hazel*, Justice Lai Siu Chiu (as she then was) allowed the plaintiff's appeal against the assistant registrar's dismissal of the plaintiff's summary judgment application against the defendant. Lai J granted the plaintiff summary judgment on its whole claim but also stayed execution of the judgment pending the counterclaim even though she "entertained grave doubts on its merits" at [36].

80 In my view, *Hawley & Hazel* did not assist the defendant. First, each case has to be determined on its own facts. Second, whether to grant a stay of execution pending determination of a counterclaim is ultimately a matter of the court's discretion. From the judgment in *Hawley & Hazel*, the reasons why the stay was granted are not apparent. I also note that *Hawley & Hazel* was decided before *Kim Seng Orchid* ([58] *supra*) where the practical framework to guide a court when determining a summary judgment application was set out. As I have held at [76], applying Step 1 of the *Kim Seng Orchid* framework to the facts of this case, the revised judgment granted to the plaintiff should not be stayed pending determination of the defendant's counterclaims.

Conclusion

81 For the above reasons, I allowed the defendant's appeal in part, to the extent that conditional leave was granted to the defendant to defend the plaintiff's claim pertaining to the USD 25,343.92 Invoice. Leave to defend was granted on the condition that the defendant furnished security in the sum of USD 25,343.92 by way of a payment of that sum into court or by such other mode of security as may be agreed by the parties. The security was to be furnished by the defendant within 21 days of the date of my order, and parties were given liberty to apply.

82 The judgment below in respect of the plaintiff's claim for the sum of USD 465,099.50 was to stand with no stay of execution. To that extent, the judgment below was substituted with judgment against the defendant for the sum of USD 465,099.50.

83 As for costs, both parties agreed that in substance, the plaintiff had succeeded and should be awarded costs of the appeal. The defendant submitted that a sum of $3,500 (inclusive of disbursements) would be appropriate whereas the plaintiff submitted that $5,000 would be appropriate. In accordance with the costs guidelines set out in Appendix G of the Supreme Court Practice Directions, I ordered costs of the appeal to be fixed at $4,000 inclusive of disbursements to be paid by the defendant to the plaintiff.[85] As for the costs of the hearing below, Ms Chan-Richard submitted that as the defendant had succeeded partially, the costs order should be varied to $8,000. Mr Leong, on the other hand, argued that the costs order below should remain. I agreed with Mr Leong and accordingly, did not disturb the assistant registrar's order on costs.

S Mohan
Judicial Commissioner

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85 Certified Transcript (12 March 2020) at pp 10-11

Leong Yu Chong Aaron and Cherisse Foo Ling Er (Oon & Bazul LLP) for the plaintiff;
Charmaine Chan-Richard and Sharmila Sanjeevi (Legis Point LLC) for the defendant.
