IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 282

Suit No 534 of 2016
(Registrar's Appeal Nos 48–52 and 85 of 2017)

Between

EBONY RITZ SDN BHD

… Plaintiff

And

SUMATEC RESOURCES BERHAD

… Defendant

And

SUMATEC RESOURCES BERHAD

… Plaintiff-in-Counterclaim

And

EBONY RITZ SDN BHD

… Defendant-in-Counterclaim

JUDGMENT

[Civil Procedure] — [Summary judgment]
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v
Sumatec Resources Bhd

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George Wei J
20 April 2017

9 November 2017 Judgment reserved.

George Wei J:

Introduction

1 The plaintiff commenced the suit underlying these appeals, Suit No 534 of 2016, for sums due and owing under two separate contracts (the Option and Financial Representation Agreement ("OFRA") and the "Guarantee"). The defendant's defence is essentially that the plaintiff has compromised its claims and/or that it is estopped from bringing these claims because of its own conduct and the conduct of one of its shareholder companies.

2 Following an application by the plaintiff for summary judgment and to strike out the defence, the defendant sought to introduce substantial amendments to its defence. The learned AR Teo Guan Kee ("the AR") allowed most of these amendments. He then granted the defendant conditional leave to

defend the claim under the OFRA, and unconditional leave to defend the claim under the Guarantee.

3 The parties brought the present set of appeals and cross-appeals against the AR's decision. In total, there are six Registrar's Appeals before me. The appeals involve several agreements and a complicated web of closely related issues concerning summary judgment, striking out of the defence, amendments, failure to provide security required in respect of conditional leave to defend, extraction of judgment and stay of execution. It will thus be helpful to set out the background in some detail.

Facts

Dramatis personae

4 The defendant is Sumatec Resources Berhad ("Sumatec"), a Malaysia-incorporated company engaged in the business of upstream oil operations. The defendant is listed on the main board of the Malaysian Exchange.

5 The plaintiff is Ebony Ritz Sdn Bhd ("Ebony Ritz"), a Malaysia-incorporated company set up as a joint venture vehicle between Hoe Leong Corporation Ltd ("Hoe Leong") as 80% shareholder and Auspicious Journey Sdn Bhd ("Auspicious Journey") as 20% shareholder.[1] Hoe Leong is listed on the main board of the Singapore Exchange. Auspicious Journey is a subsidiary of another Malaysian company, Grand Columbia Holdings Sdn Bhd. Auspicious Journey is neither a subsidiary nor an affiliate of Hoe Leong.[2]

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1 Statement of claim, paras 2–5.

2 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para [68(b)].

6 Ebony Ritz was established to acquire a 49% interest in a tanker chartering business which was owned by Sumatec. The tanker chartering business was held through its wholly-owned subsidiary, Semua International Sdn Bhd ("SISB") and four other subsidiaries which owned and managed Sumatec's fleet of oil and chemical tankers. SISB and the four subsidiaries will hereinafter be referred to collectively as "the Semua Group".[3]

7 Mr Kuah Geok Lin ("James Kuah") and his brother, Mr Kuah Geok Khim ("Paul Kuah"), are both directors of both Hoe Leong and Ebony Ritz. James Kuah is also the chief executive officer ("CEO") of Hoe Leong and the Managing Director of Ebony Ritz.

Ebony Ritz's acquisition of SISB under the 2010 SPA

8 Ebony Ritz's acquisition of Sumatec's tanker chartering business was effected through a Sale and Purchase Agreement entered into by Ebony Ritz and Sumatec on 5 May 2010 ("the 2010 SPA"). Pursuant to the 2010 SPA, Ebony Ritz purchased from Sumatec 49% of the issued and paid-up share capital of SISB (including the four subsidiaries, which would be transferred by Sumatec to SISB) for RM 44,100,000.[4]

9 By way of cl 5.1 of the 2010 SPA, Sumatec guaranteed to Ebony Ritz that the audited consolidated profit after taxation ("PAT") of the Semua Group as stated in the consolidated audited accounts would be no less than:

> (a) RM 25,000,000 in respect of the financial year ending 31 December 2010 ("FY2010"); and

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3 Statement of claim, para 6.

4 Statement of claim, para 7.

(b) RM 31,000,0000 in respect of the financial year ending 31 December 2011 ("FY2011").[5]

10 This guarantee in cl 5.1 of the 2010 SPA shall be referred to as the Financial Representation. The consequences of any "shortfall" in the PAT for FY2010 and FY2011 were provided for in the other portions of cl 5. Specifically, cl 5.2 provided that if the audited consolidated PAT was less than the guaranteed amount, adjustments to reflect any shortfall "shall be made in accordance with the [OFRA]". Clause 5.3 went on to provide that a breach or non-fulfilment of the Financial Representation would not constitute a breach of the 2010 SPA. Instead, any non-fulfilment was to be satisfied in accordance with the OFRA.

The OFRA

11 The OFRA was a separate agreement, also dated 5 May 2010, between Ebony Ritz, Sumatec and Auspicious Journey.[6] Essentially, the OFRA set out a contractual mechanism by which the shortfall in the PAT would be made good to Ebony Ritz. The material provisions of the OFRA are summarised as follows:

(a) Under cl 3.1 of the OFRA, Sumatec agreed to pay and make good to Ebony Ritz any shortfall in the audited PAT of the Semua Group for FY2010 and/or FY2011 in accordance with a specified formula.

(b) Under cl 3.3 of the OFRA, Ebony Ritz was entitled to elect to have the Financial Shortfall satisfied by three different methods:

(i) By Sumatec's issuance of new Sumatec shares to Ebony Ritz;

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5 Statement of claim, para 8; 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 90

6 Statement of claim, para 9.

(ii) By Ebony Ritz's exercise of a "Priority Call Option". Specifically, under cl 3.6 of the OFRA, Sumatec granted Ebony Ritz options to require Sumatec to transfer and sell to Ebony Ritz its shares in SISB ("the Priority Call Option Shares"); or

(iii) By a combination of the first and second methods.

12 Clause 10 of the OFRA sets out warranties and undertakings from Sumatec in respect of the Priority Call Option Shares. These included warranties that:[7]

(a) Sumatec is the legal and beneficial owner of all the Priority Call Option Shares (cl 10.1(a));

(b) The Priority Call Option Shares represent 51% of the issued and paid-up share capital of SISB (cl 10.1(b));

(c) Sumatec is entitled to sell and transfer or procure the sale and transfer of all the Priority Call Option shares to Ebony Ritz and/or its nominee(s) free from all encumbrances, and no other person has or shall have any rights of pre-emption over the Priority Call Option shares (cl 10.1(d)).

13 The OFRA, while clearly related to SPA 2010, is a separate agreement between Ebony Ritz, Auspicious Journey and Sumatec. As is made clear by paragraph (F) of the recitals,[8] the purpose of the OFRA was to set out the terms and conditions on which adjustments would be made in the event of any non-fulfilment of the Financial Representation found within the 2010 SPA. It is not

7 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 42.

8 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 26.

surprising that Clause 10 included the warranty that Sumatec was entitled to sell, transfer or procure the sale and transfer of the Priority Call Option shares free from all encumbrances. After all, the obligation was on Sumatec to pay or make good the shortfall under 2010 SPA.

14 It should also be noted that cl 19 of the OFRA provided as follows:[9]

> **19. Remedies and waivers**
>
> No failure on the part of either Party to exercise, and no delay on its part in exercising, any right or remedy under this Agreement will operate as a waiver thereof, *nor will any single or partial exercise of any right or remedy preclude any other or further exercise thereof or the exercise of any other right or remedy. The rights provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.*
>
> [emphasis added]

15 I shall return to the terms of the OFRA below. It should be noted that Hoe Leong, the majority shareholder of Ebony Ritz, is not a party to the OFRA or to the 2010 SPA.

16 The audited PAT of the Semua Group for FY2011 was RM 14,189,321. This fell short of the guaranteed amount of RM 31m under the Financial Representation.[10] It is not in dispute that under cl 3.1 of the OFRA, Sumatec became liable to make good to Ebony Ritz a sum of RM 27,017,162.68. ("the Financial Shortfall for FY2011").[11]

17 On or around 4 September 2012, Ebony Ritz exercised the Priority Call Option and served on Sumatec a notice to have the Financial Shortfall for FY2011 satisfied by transferring and selling to Ebony Ritz such number of

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9 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 46.

10 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 21.

11 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 22.

shares held by Sumatec in SISB with an aggregate value equivalent to the Financial Shortfall within five business days. However, Sumatec did not transfer shares in SISB to Ebony Ritz in accordance with the Priority Call Option.[12] Sumatec also did not pay or make good to Ebony Ritz the Financial Shortfall for FY2011 in any other manner. It follows that Sumatec was now in breach of its obligations under OFRA.

The 2012 SPA

18 Following Sumatec's failure to satisfy the Financial Shortfall for FY2011, Ebony Ritz, Sumatec, Hoe Leong and a Malaysia-incorporated company called Setinggi Holdings Limited ("Setinggi") entered into another Sale and Purchase Agreement dated 21 December 2012 ("the 2012 SPA").[13] Evidently, the parties to the 2012 SPA are not the same as the parties to the 2010 SPA and the OFRA.

19 The recitals to the 2012 SPA provided, *inter alia*, as follows:

(a) Paragraph (D) expressly refers to the OFRA and Ebony Ritz's exercise of the Priority Call Option. It acknowledges that Sumatec "[had] yet to take any steps to transfer … the Priority Call Option Shares (as defined herein) to [Ebony Ritz]".[14]

(b) Paragraph (E) goes on to refer to discussions between Hoe Leong, Ebony Ritz, Setinggi and Sumatec and the Trustee (on behalf of the CLO Bondholders) for the transfer of the Priority Option Call Shares to Ebony Ritz under the OFRA.

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12 Statement of claim, paras 15–16.

13 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 25.

14 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 361.

(c) Paragraph (F) states that Sumatec agreed to sell to Hoe Leong and Setinggi "the Sale Shares" (as defined in the paragraph below), and that Ebony Ritz agreed to release and discharge Sumatec from the accrued claims under the OFRA, subject to the terms of the 2012 SPA.

20 Under the 2012 SPA, Ebony Ritz and Sumatec agreed that Sumatec would sell its remaining 51% interest in SISB to Hoe Leong and Setinggi ("the Sale Shares").[15] Under cl 3.1, the sale was divided into two tranches:[16]

(a) There was to be a first completion ("1st Completion") whereby Sumatec would sell to Hoe Leong 2% of its interest in SISB ("the 1st Tranche Sale Shares") for RM 1.8m.

(b) There was to be a second completion ("2nd Completion"), whereby Sumatec would sell to Setinggi 49% of its interest in SISB ("the 2nd Tranche Sale Shares") for RM 17m.

21 Clauses 4, 5, 6 and Schedule 3 of the 2012 SPA set out the conditions which had to be fulfilled before the 1st Completion and the 2nd Completion could take place.[17] By way of background, the Sale Shares were encumbered by a charge which had been created by Sumatec in favour of Malaysian Trustees Berhad ("the Trustee") on behalf of several entities ("the CLO Bondholders") to secure facility agreements entered into between Sumatec and various banks in 2004, 2005, and 2007.[18] Paragraphs 1 and 7 of Schedule 3 of the 2012 SPA thus provided that the 1st and 2nd Completions would be conditional upon:[19]

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15 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 362.

16 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 27.

17 Defence and counterclaim (Amendment No 1), para 20.

18 Reply (Amendment No 1), para 28.

19 Reply (Amendment No 1), para 29.

(a) The receipt by Hoe Leong and Setinggi from Sumatec of evidence of consent from the CLO Bondholders to the sale and transfer of the Sale Shares (*ie*, both the 1st and 2nd Tranche Sale Shares); and

(b) The receipt by Hoe Leong and Setinggi of written evidence of the Trustee (on behalf of the CLO Bondholders) agreeing to release and discharge the charge over the 2nd Tranche Sale Shares.

22 Subject to the execution of the 1st and 2nd Completions, as well as the abovementioned terms and conditions, the 2012 SPA provided that Ebony Ritz would release and discharge Sumatec from Ebony Ritz's accrued claims under the OFRA,[20] which, it will be recalled, was concerned with the consequences of any non-fulfilment of the Financial Representation as defined in the 2010 SPA.

23 Clause 7 of the 2012 SPA originally provided as follows:[21]

> **7. Waiver of Rights of [Ebony Ritz]**
>
> Subject to Clauses 5.5 and 6.4, [Ebony Ritz] hereby agrees that conditional on both 1st Completion and 2nd Completion taking place (in accordance with this Agreement) and upon both 1st Completion and 2nd Completion, it shall release and discharge [Sumatec] from all liabilities, obligations, claims and demands whatsoever and howsoever directly relating to or arising from, and waives all right which it may have against [Sumatec] in respect of any accrued claims or liabilities under the [OFRA] in relation to, [Ebony Ritz's] exercise of the Purchaser Call Option and the Priority Call Option.

24 The 2012 SPA was subsequently supplemented by means of an Addendum ("Addendum No 1") dated 7 February 2013, which provided that,

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20 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 26.

21 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 371.

subject to certain conditions, Ebony Ritz would release and discharge Sumatec from its accrued claims under the OFRA. The clause set out as follows:[22]

> Save for the compensation for the profit shortfall in the form of 61,656,000 Sumatec Resources Berhad Special Issue Shares valued at RM10.8 Million which [Ebony Ritz] hereby agrees to transfer its right to the CLO Bondholders as part of the global debt settlement with the CLO Bondholders and subject to clauses 5.5 and 6.4, [Ebony Ritz] hereby agrees that, conditional on both 1st Completion and 2nd Completion taking place (in accordance with this Agreement) and upon both 1st Completion and 2nd Completion, it shall release and discharge [Sumatec] from all liabilities, obligations, claims and demands whatsoever and howsoever directly relating to or arising from, and waives all rights which it may have against [Sumatec] in respect of any accrued claims or liabilities under the [OFRA] in relation to [Ebony Ritz's] exercise of the Purchaser Call Option and the Priority Call Option.

25 Clause 3.2 of the 2012 SPA also provided for a "HL Guarantee" by which Hoe Leong guaranteed to the Trustee (on behalf of the CLO Bondholders) the due and punctual payment by Ebony Ritz to the Trustee of the consideration for the 2nd Tranche Sale Shares.[23] The HL Guarantee was, however, conditional upon both 1st and 2nd Completions taking place and only took effect from the date of the 2nd Completion.

26 I also note that cl 3.6 of the 2012 SPA provided as follows:[24]

> On 1st Completion or three (3) months after the date of this Agreement, whichever is later, [Setingi] and [Hoe Leong] shall use all reasonable endeavours to procure a discharge of all those corporate guarantees issued by [Sumatec] in respect of loan and other facilities granted to the Semua Group by its relevant lenders ("Sumatec Guarantees"). In the event that [Setingi] and/or [Hoe Leong] fails to procure the discharge of the Sumatec Guarantees under this Clause 3.6, [Setingi] and/or [Ebony Ritz] agrees to jointly and severally indemnify

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22 Defence and counterclaim (Amendment No 1), para 22.

23 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 368.

24 1st Affidavit of Kuah Geok Lin dated 21 July 2016, pp 368–369.

> and keep [Sumatec] indemnified and harmless against any and all claims, demands, suit made against Sumatec in respect of the Sumatec guarantees.

The Guarantee

27 Ebony Ritz and SISB also entered into a separate Loan Agreement on 5 May 2010, under which Ebony Ritz agreed to loan SISB a total of RM 10m for the purpose of financing the working capital requirements of the tanker chartering business of the Semua Group.

28 In connection with this Loan Agreement, Ebony Ritz and Sumatec entered into a guarantee (also dated 5 May 2010) ("the Guarantee"). Under cl 2 of the Guarantee, Sumatec guaranteed punctual performance by SISB of all of SISB's obligations under the Loan Agreement. Specifically, by cl 2.1(b) of the Guarantee, Sumatec undertook that whenever SISB did not pay any amount due under the Loan Agreement, Sumatec would immediately on demand pay that amount to Ebony Ritz as if it were the principal obligor.[25]

29 The Loan Agreement and the Guarantee were entered into at the same time as the 2010 SPA whereby Ebony Ritz acquired 49% of SISB. It is apparent that SISB was in need of financial support for its working capital at that time.

30 Between 30 September 2010 and 23 March 2011, Ebony Ritz advanced to SISB eight loans totalling RM 10m under the Loan Agreement. Clause 6 of the Loan Agreement provided that SISB was to repay each of these loans on a specified repayment date. In the event, SISB failed to repay Ebony Ritz the Loans. On 18 April 2016, Ebony Ritz called on the Guarantee and demanded that Sumatec immediately repay RM 10m within 14 days. Sumatec did not comply with this demand.[26]

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[25] Statement of claim, para 17; 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 63.

The CLO Agreement

31 It will be recalled that the 2012 SPA was signed in December 2012 and amended in February 2013. Thereafter on 28 May 2013, Sumatec, Hoe Leong, Setinggi, SISB and the CLO Bondholders entered into another agreement called the "CLO Agreement". It should be noted that the parties to the CLO Agreement were different from the parties to the 2012 SPA.

32 The Defendant describes the CLO Agreement as "mimicking" the 1st Completion and the 2nd Completion envisioned under the 2012 SPA (see [20] above).[27] Clauses 2.2.2(a) and 2.3 of the CLO Agreement provided (in similar fashion) that Sumatec was to sell the Sale Shares to Hoe Leong and Setinggi or Hoe Leong's nominee for RM 18,800,000 in two tranches:[28]

(a) First, 2% of the shares were to be transferred from Sumatec to Hoe Leong and then to Ebony Ritz;

(b) Secondly, 49% of the shares were to be transferred from Sumatec to Setinggi.

33 The CLO Agreement also provided certain terms under which the CLO Bondholders would provide their consent for Sumatec to transfer the Sale Shares to Hoe Leong and Setinggi. One of these terms was that, pursuant to Clauses 2.2.2(b) and (c) of the CLO Agreement, SISB was to make payment of two tranches of dividends to the Trustee as follows:[29]

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26 Statement of claim, paras 18–23.

27 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 38.

28 1st Affidavit of Kuah Geok Lin dated 21 July 2016, pp 425–426.

29 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 44; 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 425.

(a) RM 5.2m ("the 1st Tranche Dividends") was to be paid to the Trustee within 7 days of the signing of the CLO Agreement;

(b) RM 6.9m ("the 2nd Tranche Dividends") was to be paid to the Trustee on 30 September 2013.

The transfer of the 1st Tranche Sale Shares

34 On or around 12 April 2013, Hoe Leong paid consideration for the 1st Tranche Sale Shares into bank accounts designated by the Trustee. The 1st Tranche Sale Shares were then transferred to Hoe Leong on or around 19 July 2013.[30] Thereafter, the shareholding in SISB was held in the following manner: Sumatec held 49%, Hoe Leong held 2% and Ebony Ritz held 49%.

35 Sumatec takes the position that by virtue of the above, the 1st Completion occurred on 30 May 2013.[31] Ebony Ritz, on the other hand, argues that the 1st Completion did not take place in accordance with the terms of the 2012 SPA.[32]

Events subsequent to the transfer of the 1st Tranche Sale Shares

36 In breach of Clause 2.2.2(c) of the CLO Agreement, SISB did not pay the 2nd Tranche Dividends to the Trustee on 30 September 2013. On 2 October 2013, James Kuah wrote (under the letterhead of SISB) to Sumatec and the Trustee, requesting an extension of time till 30 November 2013 to pay the 2nd Tranche Dividends.[33]

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30 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 45–48; Reply (Amendment No 1), para 38(b).

31 Defence and counterclaim (Amendment No 1), para 35.

32 Reply (Amendment No 1), paras 26–33 and 38(d).

33 1st Affidavit of Chan Yok Peng (5 August 2016), p 145.

37 On 6 November 2013, the Trustee received the sum of RM 610,704 from Hoe Leong as partial payment of the 2nd Tranche Dividends.[34] This meant that RM 6,289,296 remained outstanding. Despite granting SISB a second extension of time to 30 December 2013, it seems that the Trustee was never paid the outstanding amount.

38 It is not in dispute that the Trustee and/or the CLO Bondholders never provided their consent for the 2nd Tranche Sale Shares to be transferred to Setinggi. The 2nd Completion never took place.

39 On 5 April 2016, Ebony Ritz's lawyers wrote to Sumatec demanding that Sumatec pay to Ebony Ritz the Financial Shortfall for FY2011 (*ie*, the sum of RM 27,017,162.68). But Sumatec did not do so. As earlier mentioned, Ebony Ritz issued a further demand to Sumatec on 18 April 2016 for RM 10m, being the amount due under the Guarantee (see [30] above). Sumatec also did not pay this sum to Ebony Ritz.

Suit 534 of 2016

Ebony Ritz's claim

40 The suit underlying these appeals, Suit 534 of 2016, was commenced by Ebony Ritz on 24 May 2016. Ebony Ritz claims the following sums:

(a) RM 27,017,162.68 as the amount due to it under the OFRA (see [11]–[17] above) ("the OFRA claim"); and

(b) RM 10m as the amount due to it under the Guarantee (see [28]–[30] above) ("the Guarantee claim").

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[34] Reply (Amendment No 1), para 48.

Sumatec's defence and counterclaim

41 Sumatec filed its defence and counterclaim on 15 June 2016 ("the Initial Defence"), wherein it averred that:

(a) Ebony Ritz, Hoe Leong, Setinggi, the Defendant, and various other entities had entered into the CLO Agreement.[35]

(b) After the transfer of the 1st Tranche Sale Shares, Hoe Leong owned and controlled 51% of SISB "directly and through [Ebony Ritz]".[36]

(c) SISB had failed to pay the 2nd Tranche Dividends to the Trustee in accordance with the CLO Agreement, and the Trustee did not provide its consent for the 2nd Completion.[37]

(d) Sumatec had thus been "prevented from carrying out its obligations in relation to the 2nd Completion and therefore the 2012 SPA as a result of [Ebony Ritz] and its holding company's actions".[38]

42 Although this was not explicitly stated in the Initial Defence, the aforementioned "actions" by "Ebony Ritz and its holding company" appear to refer to the fact that Ebony Ritz and Hoe Leong had failed to procure SISB to pay the 2nd Tranche Dividends to the Trustee. On this basis, Sumatec denied that it was liable in respect of the OFRA claim.

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35 Defence dated 15 June 2016 at para 10(f).

36 Defence dated 15 June 2016 at para 10(h).

37 Defence dated 15 June 2016 at para 10(i).

38 Defence dated 15 June 2016 at para 10(j).

43 With respect to the Guarantee claim, the Initial Defence simply highlighted cl 3.6 of the 2012 SPA. Although this was not explicitly stated in the Initial Defence, Sumatec's position is that the guarantee which is the subject matter of the Guarantee Claim is one of the guarantees in respect of which Ebony Ritz is required to indemnify and hold Sumatec harmless under cl 3.6 of the 2012 SPA.[39] This also forms the basis of Sumatec's counterclaim against Ebony Ritz.

Procedural history

Ebony Ritz's Striking Out and Summary Judgment Applications

44 On 21 July 2016, Ebony Ritz filed Summons Nos 3547 and 3548 of 2016. Summons 3547 ("the Striking Out Application") was an application to strike out Sumatec's defence under O 18 r 19 of Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules") and for judgment to be entered against Sumatec. Ebony Ritz purported to rely on all four limbs of O 18 r 19 – *ie*, that the defence disclosed no reasonable defence; was scandalous, frivolous or vexatious; may prejudice, embarrass or delay the fair trial of the action and/or was otherwise an abuse of the process of the Court. In the alternative, Ebony Ritz also filed Summons 3548 ("the Summary Judgment Application") seeking summary judgment against Sumatec under O 14 of the Rules.

45 In support of the above applications, James Kuah deposed an Affidavit in which he opined that Sumatec's defence was unsustainable on the ground that "the only parties to the [CLO Agreement] are the CLO Bondholders, the Trustee, Sumatec, Hoe Leong, Setinggi and SISB. Ebony Ritz is not a party to the said Agreement".[40]

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39 1st Affidavit of Chan Yok Peng (5 August 2016), para 63.

40 1st Affidavit of Kuah Geok Lin dated 21 July 2016, paras 30–32.

Sumatec's Amendment Application

46 About four months after Ebony Ritz had filed the Striking Out and Summary Judgment Applications, Sumatec filed Summons No 5450 of 2016 ("the Amendment Application") on 9 November 2016. This was an application for leave to amend its Initial Defence in the manner set out in a draft annexed to the summons ("Annex A"). By these amendments, Sumatec sought to introduce the following arguments:

(a) The corporate veil of Ebony Ritz should be lifted as Hoe Leong was the alter ego of Ebony Ritz.[41] Alternatively, Hoe Leong and Ebony Ritz were agents and/or representatives of each other and all statements and/or representations made by Hoe Leong and/or Ebony Ritz to Sumatec were made by them as agents or representatives on behalf of each other.[42]

(b) While Ebony Ritz is not a party to the CLO Agreement, Ebony Ritz has obligations under and is bound by the terms of the CLO Agreement.[43] The CLO Agreement should be read together with the 2012 SPA. Their combined effect was to release and discharge Sumatec from Ebony Ritz's claims under the OFRA.[44]

(c) Ebony Ritz and Hoe Leong were the appropriate parties to procure SISB's payment of the 2nd Tranche Dividends, and are responsible for SISB's failure to do so. Sumatec has been prevented from carrying out its obligations in relation to the 2nd Completion under

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41 Defence and counterclaim (amendment no. 1), paras 6–8.

42 Defence and counterclaim (amendment no. 1), paras 9–10.

43 Defence and counterclaim (amendment no. 1), para 26.

44 Defence and counterclaim (amendment no. 1), para 25.

the 2012 SPA as a result of this.[45] Thus, Ebony Ritz is estopped from stating that the 1st and 2nd Completions did not take place in accordance with the 2012 SPA.[46]

(d) With respect to Ebony Ritz's claim for RM 27,017,168.88 under the OFRA, Ebony Ritz is not entitled to be paid in cash because the manner in which Ebony Ritz is entitled to have the Financial Shortfall for FY2011 satisfied is prescribed in cl 3 of the OFRA. Under cl 3, Ebony Ritz was only entitled to have the shortfall satisfied in three ways: (i) Sumatec's issuance of new Sumatec shares to Ebony Ritz; (ii) Ebony Ritz's exercise of certain priority call options in respect of shares held by Sumatec in SISB, granted by Sumatec to Ebony Ritz; or (iii) any combination of the first two options. Ebony Ritz had exercised a Priority Call Option on 4 September 2012 (see [17] above) and is estopped from claiming compensation in the form of cash.[47]

(e) Ebony Ritz is not entitled to be paid the full sum of RM 27,017,168.68 allegedly owed by Sumatec under the OFRA because Sumatec has already transferred 2% of the shares in SISB to Hoe Leong.[48]

The AR's orders

47 The AR heard arguments from the parties in respect of the Striking Out, Summary Judgment, and Amendment Applications on 28 November 2016. He

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45 Defence and counterclaim (amendment no. 1), paras 42–46, 50.

46 Defence and counterclaim (amendment no. 1), paras 36 and 52.

47 Annex A to Summons 5450, paras 15(a)–(c).

48 Defence and counterclaim (amendment no. 1), para 38.

then reserved judgment, and eventually made the following orders on 8 February 2017:

(a) Sumatec's Amendment Application was allowed in part. Sumatec was given leave to amend its Initial Defence in the manner set out in Annex A, save that it was not permitted to make the proposed amendments to paragraph 15 of the amended defence. These were the amendments pertaining to Sumatec's argument that Ebony Ritz was precluded from claiming for RM 27,017,168.88 in cash under cl 3 of the OFRA (see [46(d)] above) ("the Paragraph 15 amendments").

(b) With regard to Ebony Ritz's Summary Judgment Application, Sumatec was given unconditional leave to defend the Guarantee claim. Sumatec was also given *conditional* leave to defend the OFRA claim. The condition imposed was that Sumatec was to provide RM 27,017,162.68 (*ie*, the entire sum claimed under the OFRA, hereinafter, "the Security") in security to Ebony Ritz by 5pm on 8 March 2017, failing which judgment would be entered against Sumatec for this sum ("the Conditional Leave Order").

(c) Ebony Ritz's Striking Out Application was dismissed, subject to the orders made with respect to the Summary Judgment Application.

The various appeals

48 On 22 February 2017, Sumatec filed the following appeals:

(a) Registrar's Appeal No 48 of 2017 ("Sumatec's Amendment Appeal"): An appeal against the AR's decision in the Amendment Application not to allow the Paragraph 15 amendments to the Initial Defence; and

(b) Registrar's Appeal No 49 of 2017 ("Sumatec's Summary Judgment Appeal"): An appeal against the AR's decision in the Summary Judgment Application giving Sumatec leave to defend the OFRA claim conditional upon Sumatec's provision of RM 27,017,162.68 in security.

49 That same day, Ebony Ritz filed the following appeals:

(a) Registrar's Appeal No 50 of 2017 ("Ebony Ritz's Amendment Appeal"): An appeal against the whole of the AR's decision in the Amendment Application (which was to allow most of Sumatec's amendments to its defence, save for the Paragraph 15 amendments);

(b) Registrar's Appeal No 51 of 2017 ("Ebony Ritz's Summary Judgment Appeal"): An appeal against the whole of the AR's decision in the Summary Judgment Application (which was to grant Sumatec conditional leave to defend the OFRA claim and conditional leave to defend the Guarantee claim); and

(c) Registrar's Appeal No 52 of 2017 ("Ebony Ritz's Striking Out Appeal"): An appeal against the whole of the AR's decision in the Striking Out Application (which was to refuse to strike out Sumatec's defence).

50 On 3 March 2017, Sumatec's solicitors, M/s Morgan Lewis Stamford LLC, wrote to Ebony Ritz's solicitors, M/s WongPartnership LLP, proposing a stay of the provision of the Security until the final disposition of the various appeals which the parties had filed on 22 February 2017. Ebony Ritz's solicitors responded on 7 March 2017, stating that they were not agreeable to a stay.[49]

[49] Defendant's submissions for Registrar's Appeal 85 of 2017, para 12.

51 Sumatec did not provide the Security by the stipulated deadline of 5pm on 8 March 2017. Instead, on 8 March 2017, Sumatec filed Summons No 1066 of 2017 ("the Stay Application"), seeking a stay of the Conditional Leave Order pending the disposal of the various Registrar's Appeals filed by the parties. That same day, Ebony Ritz sent a draft judgment ("the Draft Judgment") to Sumatec's solicitors after 5pm on 8 March 2017. Sumatec's solicitors did not respond. On 14 March 2017, Ebony Ritz submitted the Draft Judgment to the Court for approval.[50]

52 The Stay Application was heard by the AR on 17 March 2017. The AR granted Sumatec's application for a stay of the Conditional Leave Order, and declined to approve the Draft Judgment. He also ordered Ebony Ritz to pay Sumatec costs of the application fixed at $2,400 (inclusive of disbursements). On 22 March 2017, Ebony Ritz filed Registrar's Appeal 85 of 2017 ("Ebony Ritz's Stay Appeal") against the AR's decision in the Stay Application.

The parties' arguments on appeal

Ebony Ritz's submissions

53 In submissions before the AR for the Striking Out, Summary Judgment, and Amendment Applications, Ebony Ritz mainly argued that the defence, even as amended, lacked merits.[51] Similarly, for the present appeals, Ebony Ritz contends that Sumatec's defence is "unsustainable", and that "the same outcome should follow – whether pursuant to [its Amendment Appeal] … [Summary Judgment Appeal] … or [Striking Out Appeal]", namely, that Ebony Ritz should be entitled to judgment for the OFRA Claim and the Guarantee Claim.[52]

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50 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 9.

51 AR's Minute Sheet for 8 February 2017, paras 2–5.

52 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 15.

54 Indeed, while Ebony Ritz filed a separate appeal against the AR's decision to allow most of the amendments proposed by Sumatec, it has based its appeals on the proposition that any amendment which would itself be liable to be struck out pursuant to O 18 r 19(1) of the Rules will not be allowed (*Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 at [4]).[53] Thus, Ebony Ritz's case for its Amendment Appeal is the same as its case for its Striking Out Appeal: *ie*, that the defence as amended discloses no reasonable defence, or is frivolous or vexatious because it is plainly or obviously unsustainable, and therefore the proposed amendments should be disallowed and the defence should be struck out under O 18 r 19(1)(*a*) or O 18 r 19(1)(*b*) of the Rules.[54]

55 A similar argument *also* forms the core of Ebony Ritz's case for its Summary Judgment Appeal. In this regard, Ebony Ritz maintains that it has demonstrated a *prima facie* case for summary judgment, and Sumatec has failed to show that there is a fair or reasonable probability that it has a real or *bona fide* defence.[55]

56 With respect to the OFRA claim, Ebony Ritz maintains that Sumatec's defence "discloses no reasonable defence" or is "plainly or obviously unsustainable", and/or that Sumatec has failed to show a fair or reasonable probability that it has a real or *bona fide* defence. Its arguments are as follows:

(a) Sumatec's defence rests on lifting the corporate veil of Ebony Ritz. However, this would be a "futile exercise" because *Hoe Leong* was the party which entered into the CLO Agreement, and not Ebony Ritz.

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53 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 41.

54 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 42–45.

55 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 49.

Lifting the corporate veil of Ebony Ritz still would not make Ebony Ritz a party to the CLO Agreement. There was also no plea that the corporate veil of Hoe Leong should be lifted.[56]

(b) In any event, the facts and particulars relied on by Sumatec do not justify lifting the corporate veil. Although Hoe Leong is an 80% shareholder in Ebony Ritz, even sole shareholding and control of a company do not warrant piercing the corporate veil without more. The court would only pierce the corporate veil where there had been some form of abuse. Sumatec has not established the requisite level of control by Hoe Leong over Ebony Ritz, nor is it able to show that there has been any element of impropriety or abuse which would justify piercing the corporate veil.[57]

(c) Sumatec's argument that Hoe Leong and Ebony Ritz are "agents and/or representatives of each other" was "defective" because it was pleaded in "impossibly wide terms" which did not allow Ebony Ritz to know the case that it has to meet. This was "oppressive and embarrassing".[58]

(d) Sumatec's argument that it had been "prevented" from carrying out its obligations in relation to the 2nd Completion as a result of "Hoe Leong's/[SISB's]/Ebony Ritz's breach of cl 2.2.2(c) of the CLO Agreement" is untenable.[59] Notwithstanding SISB's failure to pay the 2nd Tranche Dividends to the Trustee, Sumatec was obligated to, and could have, procured the CLO Bondholder's Consent for the 2nd

56 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 53–54.

57 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 59–69.

58 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 71–76.

59 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 77.

Completion by other means.[60] Further, Sumatec has not shown how Ebony Ritz had "breached" the CLO Agreement.[61]

57 With regard to Sumatec's Amendment Appeal, Ebony Ritz maintains that the AR was right to have disallowed the Paragraph 15 amendments. It argues that its entitlement to seek compensation for the Financial Shortfall for FY2011 accords with the plain meaning of cll 3.1 and 19 of the OFRA.

58 As regards the Guarantee Claim, Ebony Ritz argues that the AR erred in granting Sumatec unconditional leave to defend because the guarantees which Setinggi and/or Ebony Ritz agreed to indemnify and keep Sumatec harmless against under cl 3.6 of the 2012 SPA do not encompass the Guarantee. In support of this point, Ebony Ritz points to the wording of cl 3.6, as well as cll 5.5, 6.4 and 9.1(f) of the 2012 SPA and certain correspondences and negotiations between the parties leading up to the 2012 SPA.[62]

59 Finally, in relation to its Stay Appeal, Ebony Ritz argues that it was entitled to judgment for the OFRA claim against Sumatec from 5pm on 8 March 2017 because Sumatec failed to comply with the Conditional Leave Order.[63] Sumatec's filing of a stay application did not operate as a stay of execution, and further, by failing to respond to the Draft Judgment, Sumatec was deemed to have consented to its terms under O 42 r 8(2) of the Rules.[64] Ebony Ritz further cites *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 174 for the proposition that an appellant must show special circumstances before a Court

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60 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 79.

61 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 80.

62 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 85–90.

63 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 13–14.

64 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 11 and 14.

will grant a stay. Although Sumatec claimed that having to pay the Security would have caused it "grave financial stress" which would "seriously impair [its] operations with immediate effect", these claims were raised belatedly, and were unsubstantiated by any evidence. Thus, Ebony Ritz contends that there were no "special circumstances" justifying a stay, and the AR should not have granted a stay of the Conditional Leave Order, or refused to approve the Draft Judgment.[65]

Sumatec's submissions

60 Unsurprisingly, Sumatec argues that the AR was right to have allowed it to amend its defence because the amendments disclose a "reasonable defence".[66] In response to Ebony Ritz's argument that the proposed amendments were drafted "vaguely, in the widest possible manner", Sumatec highlights the principle that it is only required to plead material facts, and not evidence, under O 18 r 7 of the Rules.[67]

61 Sumatec further contends that the AR erred in disallowing the Paragraph 15 amendments because they disclose two defences. First, on a proper construction of cl 3 of the OFRA, Ebony Ritz is not entitled to the cash sum of RM 27,017,162.68 under the OFRA. Second, having elected for the Financial Shortfall for FY2011 to be satisfied by shares in 2012, Ebony Ritz is estopped from claiming a cash sum in the OFRA claim.[68] I note that Sumatec's submissions do not appear to address the effect of cl 19 OFRA.

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65 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 36–40.

66 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 71–78.

67 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 69–72.

68 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 86.

62 With respect to its Summary Judgment Appeal, Sumatec argues that it has demonstrated a *bona fide* defence to Ebony Ritz's claims, and that its defence raises numerous triable issues of fact and law. In particular:

(a) Whether or not the corporate veil of Ebony Ritz should be lifted and/or whether Hoe Leong is the *alter ego* of Ebony Ritz and/or whether Hoe Leong and Ebony Ritz were agents of each other depends on the intentions of Hoe Leong and Ebony Ritz, which may only be ascertained at trial.[69]

(b) In order to determine whether Ebony Ritz has obligations under the CLO Agreement, cross-examination of the parties is necessary to ascertain what the parties agreed or understood at the relevant time.[70]

(c) The meaning of cl 3 of the OFRA is a triable issue and Ebony Ritz should be made to adduce evidence to prove that it is entitled to have the Financial Shortfall for FY2011 satisfied in kind.[71]

(d) Since Sumatec has already transferred 2% of the shares in SISB to Hoe Leong, the 1st Completion has occurred. Ebony Ritz cannot now choose an "inconsistent path" and bring the OFRA Claim. Further, this would have an impact on whether Ebony Ritz should be entitled to the full sum that it claims for the Financial Shortfall for FY2011, which itself is a triable issue unsuitable for summary determination.[72] The Court must also consider whether Ebony Ritz is "estopped" from

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69 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 101–106.

70 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 108.

71 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 127.

72 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 131.

bringing its claim under the OFRA by virtue of Hoe Leong's conduct in relation to the 1st Completion.[73]

(e) Whether or not Ebony Ritz has compromised its claims under the OFRA and the Guarantee by entering into the 2012 SPA and/or the CLO Agreement is a question of "mixed law and fact", the determination of which would require ascertaining the parties' intentions, the factual matrix and the parties' post-contractual conduct.[74]

63 I also note that in making submissions for the present appeals, Sumatec has raised a new argument that it was an "implied term" of the 2012 SPA that Ebony Ritz would not prevent Sumatec from carrying out the 2nd Completion.[75] This argument was not pleaded even in the amended defence.

64 With respect to Ebony Ritz's Guarantee Claim, Sumatec argues that whether or not it is entitled to an indemnity from Ebony Ritz in respect of the Guarantee depends on the proper construction of cl 3.6 of the 2012 SPA, which discloses a triable issue of law. Determining this issue would require the court to scrutinize the evidence to ascertain the parties' intentions.[76]

65 Finally, with respect to Ebony Ritz's Stay Appeal, Sumatec argues that the AR was right to grant the stay. RM 27m is a large sum of money, and having this amount "locked up and unavailable to Sumatec" would "cause grave financial stress" on the company. Further, Sumatec argues that it would have

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73 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 140.

74 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 133.

75 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 143–145.

76 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 147–152.

had great difficulty recovering the Security from Ebony Ritz, which has been ordered to be wound up by the Malaysian High Court on 3 August 2016.[77]

Issues to be determined

66 As I have mentioned, the thrust of Ebony Ritz's case for its Amendment Appeal, Summary Judgment Appeal, and Striking Out Appeal is essentially the same (see [54] above): *ie*, that the defence as amended discloses no reasonable defence, or is plainly or obviously unsustainable, or that Sumatec has failed to show a fair or reasonable probability that it has a real or *bona fide* defence. The court in *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2009] 1 SLR(R) 177 at [13] recognised that "the alternative application to strike out is really a mirror of the application for summary judgment", and there is often an overlap between the two applications to the extent that a decision on one will often determine the outcome of the other.

67 It follows that the key question is whether Sumatec's defence, as amended, is so lacking in merit that Ebony Ritz should be entitled to judgment without the matter proceeding to trial. This in turn may be broken down into the following issues:

(a) Whether Ebony Ritz is entitled to judgment on the OFRA claim without the matter proceeding to trial; and

(b) Whether Ebony Ritz is entitled to judgment on the Guarantee claim without the matter proceeding to trial.

68 Of course, while there is an overlap between Ebony Ritz's Summary Judgment and Striking Out Applications, distinct legal tests apply to each of

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[77] Defendant's submissions for Registrar's Appeal 85 of 2017, para 25.

these applications. The above issues will thus be discussed through the lens of the applicable legal principles.

Applicable law

Summary judgment

69 The principles of law applicable to an application for summary judgment under O 14 r 1 of the Rules are uncontroversial. The plaintiff seeking summary judgment must first show that he has a *prima facie* case for summary judgment. The burden then shifts to the defendant who must establish a fair or reasonable probability that he has a real or *bona fide* defence in order to resist summary judgment (*M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [17]).

70 Under O 14 r 3 of the Rules, the defendant may also resist summary judgment by establishing "that there is an issue or question in dispute which ought to be tried" or "that there ought for some other reason to be a trial". However, since the Defendant has not sought to resist summary judgment on the basis that "there ought for some other reason to be a trial", I need not consider this point (*Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [47]).

71 It has been noted that in summary judgment proceedings, it is generally inappropriate for the court to delve into points of construction that may take hours or days. On the other hand, the O 14 procedure is appropriate if the question of construction is short and depends on only a few documents (*Singapore Civil Procedure 2017*, Vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) ("*SCP*") at para 14/1/2, citing the decision of the English Court

of Appeal in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liquidation)* [1990] 1 WLR 153).

72 In general, where a defendant shows that he has a fair case for a defence, or reasonable grounds for setting up a defence, or even a fair probability that has a *bona fide* defence, he ought to have leave to defend (*Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]). However, O 14 r 4 of the Rules gives the Court the power to impose such conditions as it thinks fit on the defendant's leave to defend. A condition will be imposed where the defence is found to be shadowy, or where it appears to the court that a defence *may* succeed but that it is improbable that it would (*Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 at [81]–[82]).

Striking out

73 The principles relating to striking out of pleadings under O 18 r 19 of the Rules are equally well-established. In general, the power to strike out a pleading is only exercised in "plain and obvious" cases (*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter & Partners*") at [18]). As for the four specific grounds which may be relied on to strike out a pleading in O 18 r 19(1)(a)–O 18 r 19(1)(d) of the Rules, I set out a summary of the principles behind each ground:

(a) Under O 18 r 19(1)(a), the court may strike out a pleading on the ground that it discloses no reasonable defence. A reasonable defence is one that has some chance of success when only the allegations in the pleadings are considered (*The "Tokai Maru"* [1998] 2 SLR(R) 646 at [44]).

(b) Under O 18 r 19(1)(b), the Court may strike out a pleading on the ground that it is "frivolous or vexatious". The words "frivolous or vexatious" have been interpreted to refer to cases which are "obviously unsustainable or wrong" (see *Riduan bin Yusof v Khng Thian Huat and another* [2005] 2 SLR(R) 188 at [29], citing *Afro-Asia Shipping Co (Pte) Ltd v Haridass Ho & Partners and another* [2003] 2 SLR(R) 491 at [22]).

(c) Under O 18 r 19(1)(c), the Court may strike out a pleading on the basis that "it may prejudice, embarrass or delay the fair trial of the action". This may include pleadings which are unnecessary or which include improper or irrelevant details (*Tan Swee Wan and another v Lian Tian Yong Johnny* [2016] SGHC 206 at [39], citing Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 9.008).

(d) Under O 18 r 19(1)(d), the Court may strike out a pleading on the basis that "it is otherwise an abuse of process of the Court". The phrase "abuse of process" signifies that the process of the court must be used *bona fide* and properly (*Gabriel Peter & Partners* at [22]).

Decision and reasons

Whether Ebony Ritz is entitled to judgment on the OFRA claim without the matter proceeding to trial

74 Applying the legal test for summary judgment, I am satisfied that Ebony Ritz has established its claim under the OFRA on a *prima facie* basis. It is not disputed that the parties entered into the OFRA, that Sumatec unconditionally and irrevocably guaranteed that the audited PAT of the Semua Group for FY2011 would be RM 31m, that the audited PAT for FY2011 was RM

14,189,321.00, and that the Financial Shortfall for FY2011 calculated according to cl 3.1 of the OFRA was RM 27,017,162.68.[78] Further, it is not in dispute that Sumatec breached the OFRA by failing to transfer to Ebony Ritz the shares equivalent in value to the Financial Shortfall for FY2011 pursuant to the Priority Call Option which Ebony Ritz exercised on 4 September 2012.[79]

75 The burden is thus on Sumatec to establish a fair or reasonable probability that it had a real or *bona fide* defence. Sumatec's defence as amended raises several arguments to resist Ebony Ritz's claim. I shall discuss whether Sumatec has shown a "fair or reasonable probability that it has a real or *bona fide* defence" by addressing each of the following arguments in turn:[80]

(a) Ebony Ritz compromised its claims against Sumatec under the OFRA by entering into the 2012 SPA and the CLO Agreement ("the Compromise defence");

(b) Ebony Ritz is not entitled to a cash payment of the Financial Shortfall for FY2011 under cl 3 of the OFRA ("the cl 3 OFRA defence");

(c) Ebony Ritz is estopped from exercising its rights under the 2012 SPA because it was an implied term of the 2012 SPA that Ebony Ritz would not prevent Sumatec from carrying out the 2nd Completion, and Hoe Leong/Ebony Ritz have brought about the situation where the 2nd Completion should not be carried out ("the Estoppel defence").

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78 Defence and counterclaim (Amendment No 1), para 13.

79 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 129.

80 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 62.

The Compromise defence

76 As mentioned, Sumatec does not dispute that it breached the OFRA by failing to transfer to Ebony Ritz shares equivalent in value to the Financial Shortfall for FY2011. However, Sumatec argues that when this breach occurred, Ebony Ritz was faced with two options: it could either sue Sumatec for damages, or enter a compromise agreement through which it would obtain shares in SISB. By entering into the 2012 SPA, Ebony Ritz chose to pursue the latter option and cannot now abandon this position. In support of this point, Sumatec cites the decision of the High Court in *The "Pacific Vigorous"* [2006] 3 SLR(R) 374 ("*The Pacific Vigorous*"). [81]

77 The "compromise agreement" allegedly took the form of the 2012 SPA and/or the CLO Agreement. Sumatec contends that in order to discern whether the 2012 SPA and/or the CLO Agreement were a valid compromise, the court will have to scrutinise the facts to discern whether the parties "intended to dispose of their actual or potential dispute by reaching an amicable resolution through those agreements" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [42]). On this basis, Sumatec argues that there are triable issues which are unsuitable for summary determination.

78 In *The Pacific Vigorous*, the plaintiff had sold a cargo of coal to Bhatia International Ltd ("Bhatia"). As sub-charterer of the vessel, the Pacific Vigorous, Bhatia issued letters of indemnity to the head time-charterer, Eitzen, to enable delivery of the cargo to be made without the relevant bills of lading issued for the cargo being produced. Eitzen, in turn, issued back-to-back letters of indemnity to the defendant as the owner of the Pacific Vigorous. After a

[81] Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 129–130.

dispute arose between the plaintiff and Bhatia over the contractual quality of the cargo, Bhatia unilaterally deducted a sum for alleged breach of the sale contract from the total sum due to the plaintiff. The plaintiff regarded the sum paid by Bhatia as partial payment for the cargo. The plaintiff, as lawful holders of the relevant bills of lading, then commenced *in rem* proceedings against the Pacific Vigorous for the loss it had suffered due to the misdelivery of the cargo to Bhatia. Seeking to resist the plaintiff's application for summary judgment, the defendant argued that there was a triable issue as to whether the plaintiff's acceptance of part-payment for the cargo amounted to an election which precluded it from recovering damages from the defendant.

79 Belinda Ang J rejected the defendant's arguments and gave summary judgment for the plaintiff, holding that the doctrines of common law election and equitable election were inapplicable. She observed as follows:

> (a) With regard to the doctrine of common law election, Ang J observed that election at common law occurs where a person has two mutually exclusive and inconsistent rights or courses of action, and the said person by an overt act communicates to the other party that he is relying on one such right, with the effect that he is precluded from later claiming the benefit of the other right (*The Pacific Vigorous* at [15]).
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> (b) With regard to the doctrine of election in equity, Ang J stated that this doctrine meant that a party could not both accept an instrument or judgment and reject it. Election in equity was in this way referable to the principle that a person cannot approbate and reprobate an instrument or judgment. It followed that where facts exist, which attract the application of the doctrine of equitable election, the person concerned must choose whether he will take under or against the instrument or

judgment. He cannot take a benefit under the instrument or judgment without taking the burden (*The Pacific Vigorous* at [16]).

(c) Both these doctrines require an unequivocal representation by the party making the election in relation to the right or remedy allegedly being waived (*The Pacific Vigorous* at [17] and [22]).

80 On the facts of *The Pacific Vigorous*, Ang J reasoned that the doctrine of common law election was inapplicable because the plaintiff did not have two inconsistent rights as against Bhatia and the defendant. Its claims fell under two contracts (its sale contract with Bhatia and its contract of carriage with the defendant) which gave rise to separate and independent causes of action against two different parties (at [18]). The plaintiff's remedies as against Bhatia on the one hand and the defendant on the other were cumulative, not alternative remedies, such that the plaintiff was not required to choose between these two remedies (at [19]).

81 Ang J also held that the doctrine of equitable election was inapplicable because the plaintiff's acceptance of part-payment for the cargo was not an unequivocal act that outwardly signified an election (at [22]):

> I did not see that as conduct involving an implicit unequivocal representation that the cargo had been delivered to the proper person under the sale contract and that Agritrade would not claim any right that depended upon on [*sic*] an assertion of misdelivery of the cargo. As Lord Goff highlighted in *The Kanchenjunga*… an election requires an unequivocal representation by one party who in making his election is communicating his choice whether or not to exercise a right which has become available to him.

82 In oral submissions, learned counsel for Ebony Ritz, Ms Wendy Lin, argued that the *Pacific Vigorous* does *not* assist Sumatec because Ebony Ritz's

right to claim for damages under the OFRA is *cumulative* and not *alternative* to its right to pursue the shares in SISB under the 2012 SPA.

83 In my view, there is no merit to Sumatec's argument that Ebony Ritz has made an election by entering into the 2012 SPA and therefore can no longer bring an action for sums due and owing under the OFRA, or claim damages against Sumatec for breaches of the OFRA. Even on the assumption that the right to claim for damages or sums due and owing under the OFRA is indeed inconsistent with and/or alternative to the right to obtain shares in SISB through the 2012 SPA, the question is whether it could be said that Ebony Ritz had, by entering into the 2012 SPA, made an "unequivocal representation" that it would *not* be exercising its right to claim (i) payment of sums due and owing under the OFRA; or (ii) damages for breach of the OFRA. That question must be answered in the negative, in light of the *terms* of the 2012 SPA. As I have mentioned, cl 7 of the 2012 SPA (as amended by Addendum No 1) (hereinafter "Clause 7") provides as follows:

> Save for the compensation for the profit shortfall in the form of of 61,656,000 Sumatec Resources Berhad Special Issue Shares valued at RM10.8 Million which [Ebony Ritz] hereby agrees to transfer its right to the CLO Bondholders as part of the global debt settlement with the CLO Bondholders and subject to clauses 5.5 and 6.4, *[Ebony Ritz] hereby agrees that, conditional on both 1st Completion and 2nd Completion taking place (in accordance with this Agreement) and upon both 1st Completion and 2nd Completion,* it shall release and discharge [Sumatec] from all liabilities, obligations, claims and demands whatsoever and howsoever directly relating to or arising from, and waives all rights which it may have against [Sumatec] in respect of any accrued claims or liabilities under the [OFRA] in relation to [Ebony Ritz's] exercise of the Purchaser Call Option and the Priority Call Option.
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> [emphasis added]

84 Clause 7 makes clear that Ebony Ritz's agreement to release and discharge Sumatec from its accrued claims under the OFRA was *subject to the*

conditions contained in the 2012 SPA, including, *inter alia*, the condition that the 1st Completion and the 2nd Completion were to take place in accordance with the 2012 SPA. The same point is set out in Paragraph (F) of the Recitals to the 2012 SPA.

85 In the light of this, it cannot be argued that Ebony Ritz's entry into the 2012 SPA constituted an "unequivocal representation" that it was abandoning its rights to claim from Sumatec sums due and owing under the OFRA, or to claim damages from Sumatec for breaches of the OFRA. In fact, the wording of terms such as Clause 7 implicitly suggest the very opposite – *ie*, that if the conditions spelled out in the 2012 SPA were *not* complied with, then Ebony Ritz would *not* release and discharge Sumatec from its liabilities under the OFRA. It follows that the doctrine of election does not apply to bar Ebony Ritz's claims under the OFRA.

86 In a similar vein, I am of the view that the case of *Gay Choon Ing* does not assist Sumatec. Sumatec cites *Gay Choon Ing* for the proposition that where parties demonstrate that they intended to dispose of their actual or potential dispute by reaching an amicable resolution agreeable to both parties, this compromise will be recognised and given effect to by the courts (at [42]). I certainly have no quarrel with that proposition. But to "give effect" to the compromise in this case must mean to give effect to the full terms of the 2012 SPA. That includes giving effect to Clause 7, which provides in no uncertain terms that Sumatec's release from liability under the OFRA is *conditional upon* the execution of *both* the 1st and 2nd Completions in accordance with the terms of the 2012 SPA. Given the (undisputed) fact that the 2nd Completion has not taken place, Ebony Ritz has not released Sumatec from its accrued claims under the OFRA. Similarly, in *Gay Choon Ing* the Court of Appeal noted that if the the documents in that case (*ie*, the Points of Agreement ("POA") and Waiver

Letter) *did* constitute a valid compromise, "the defendant would have been released from all his legal obligations under the Trust Deed *provided that he had complied with the relevant terms of the POA*" [emphasis added] (at [11]). The implication was that if the terms of the POA had *not* been complied with, then the defendant in *Gay Choon Ing* was *not* released from his legal obligations.

87 Thus, although Ebony Ritz has entered into the 2012 SPA, and even on the assumption that the 2012 SPA is a "valid compromise", the compromise was clearly contingent and dependant on the conditions being fulfilled. Ebony Ritz, by agreeing to a *conditional* compromise, has not given up its right to claim against Sumatec for breaches of the OFRA. For similar reasons, I am of the view that Sumatec has not succeeded in raising a "triable issue" through its argument that Ebony Ritz is not entitled to the full sum that it claims for the Financial Shortfall for FY2011 by virtue of the *1st Completion* having allegedly occurred (see [62(d)] above). By specifying that the release of Sumatec's liability shall be conditional upon *both* the 1st and 2nd Completions taking place, Ebony Ritz has preserved its right to pursue its claims under the OFRA *if* the 1st and 2nd Completions do *not* take place.

88 I note that the Compromise defence put forward by Sumatec against Ebony Ritz's claim is based on *both* the 2012 SPA and the CLO Agreement.[82] However, the CLO Agreement makes no difference to my conclusion that Ebony Ritz has not compromised its claims against Sumatec. Sumatec contends that Ebony Ritz "has obligations under and is bound by the terms of the CLO Agreement",[83] which "together with the 2012 SPA, was meant to fully and finally release and discharge Sumatec from its obligations under the OFRA".[84]

[82] Defence and counterclaim (Amendment No 1), para 28.

[83] Defence and counterclaim (Amendment No 1), para 26.

I see no basis for this assertion. Ebony Ritz is not a party to the CLO Agreement. Sumatec submits that Ebony Ritz has obligations under, and is bound by, the terms of the CLO Agreement. To the extent that this argument is premised on lifting the corporate veil between Hoe Leong and Ebony Ritz, I shall shortly explain why I find that argument unsustainable (see [105]–[123] below). However, Sumatec also bases this submission partly on Recital 4 of the CLO Agreement ("Recital 4"),[85] which provides:[86]

> 4. SETTLEMENT
>
> 4.1 And whereas HLCL has proposed to purchase the balance 51% shares in SISB from the Borrower (the "SISB Shares"). 2% of the shares in SISB are to be purchased by and transferred to Ebony Ritz Pte Ltd, and 49% of the shares in SISB are to be purchased by and transferred to Setinggi. In relation to this, HLCL, Setinggi and the Borrower have entered into a sale and purchase agreement dated 2012 ("the SISB Sale and Purchase Agreement").

89 In my view, Recital 4 does not assist Sumatec. The recitals to a contract do not impose legal obligations on the parties (*Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [34]), much less make a person or entity a party to a contract. At best, Recital 4 suggests or asserts that Ebony Ritz agreed to purchase 2% of the shares in SISB. The point remains that Ebony Ritz is not a party to the CLO. The parties to the CLO are different from the parties to the 2012 SPA. The parties to the 2012 SPA are also different from the parties to the OFRA and 2010 SPA.

90 I do not see how the reference to Ebony Ritz by way of an assertion supports the submission that Ebony Ritz has compromised its claims. Unlike the 2012 SPA, the CLO Agreement makes no reference to any agreement by

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84 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 36.

85 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 40.

86 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 420.

Ebony Ritz to discharge Sumatec from its obligations under the 2010 SPA and the OFRA. I therefore fail to see how Ebony Ritz has compromised its claim through the CLO Agreement. Indeed, it appears that after entering into the 2012 SPA, Sumatec likely encountered problems in securing the consent of the CLO bondholders for the 1st and 2nd Tranche sale shares and obtaining written evidence of agreement of the Trustee to release the charge over the 2nd Tranche sale shares. The CLO Agreement which Ebony Ritz was not a party to sets out, *inter alia*, the terms and conditions under which the CLO bondholders would provide consent for the transfer of the shares. These included the obligation that SISB was to pay the 1st and 2nd Tranche Dividends on the dates specified. Unsurprisingly, the CLO bondholders were a party to the CLO Agreement.

91 In the light of the foregoing, I find that Sumatec has not raised a "triable issue" or a reasonable probability that it has a *bona fide* defence in the form of the Compromise defence. The Compromise defence cannot form a basis for Sumatec to resist summary judgment under O 14, and is also "obviously unsustainable". I therefore strike it out as disclosing no reasonable defence or as being "frivolous or vexatious" under O 18 r 19(1)(*a*) or O 18 r 19(1)(*b*) of the Rules, respectively.

The cl 3 OFRA defence

92 I turn now to consider Sumatec's argument that Ebony Ritz is not entitled to seek compensation for the Financial Shortfall for FY2011 in cash. I set out the material portions of cll 3 and 19 here:[87]

> **3. Financial Representations and Adjustment**
>
> 3.1 In the event that the audited PAT of the Semua Group for any of FY2010 and/or FY2011 is less than the amount(s) unconditionally and irrevocably guaranteed

87 1st Affidavit of Kuah Geok Lin dated 21 July 2016, pp 32–36 and 46.

by Sumatec under the Financial Representations, Sumatec agrees and undertakes to pay and make good to [Ebony Ritz] in accordance with this Clause 3) [*sic*] in respect of the Financial Shortfalls calculated as follows:

(a) in respect of the Financial Shortfall for FY2010 ("Financial Shortfall FY2010"), Financial Shortfall FY2010 = {A-[(B÷C)xA]} x 25/56

(b) in respect of the Financial Shortfall for FY2011 ("Financial Shortfall FY2011"), Financial Shortfall FY2011 = {A-[(D÷E) x A]} x 31/565

Where,

A = Ninety million Malaysia Ringgit (RM 90,000,000)

B = the actual amount in (RM) of audited PAT of the Semua Group for FY2010

C = Twenty-five million Malaysia Ringgit (RM 25,000,000)

D = the actual amount (in RM) of audited PAT of the Semua Group for FY2011

E = Thirty-one million Malaysia Ringgit (RM 31,000,000)

Provided that the aggregate of the Financial Shortfall FY2010 and the Financial Shortfall FY 2011 shall not exceed forty-five million and nine hundred thousand Malaysia Ringgit (RM 45,900,000).

…

3.3 Each of [Ebony Ritz] and Sumatec agrees that [Ebony Ritz] has the right to elect, and the Purchaser shall notify Sumatec in writing of its election (under this Clause 3.3) ("Election Notice"), to have any Financial Shortfall be satisfied by way of:

(a) the issue of new Sumatec Shares by Sumatec to [Ebony Ritz] (pursuant to Clause 3.4) with an aggregate value equivalent to the Financial Shortfall (provided that (i) the Sumatec Shares are and continue to be listed and traded on the Bursa Malaysia following such issue of new Sumatec Shares and (ii) there are no Malaysian laws or regulations prohibiting the issue of the new Sumatec Shares to, and the holding of such Sumatec Shares by, [Ebony Ritz]); or

(b) the exercise of the Priority Call Options granted by Sumatec to [Ebony Ritz] under Clause 3.6 to transfer and sell such number of Shares held by Sumatec with

> an aggregate value equivalent to the Financial Shortfall, to [Ebony Ritz] for a consideration of RM 1.00; or
>
> (c) a combination pursuant to Clause 3.7 comprising of (i) the issue of new Sumatec Shares under Clause 3.4 and (ii) the sale and purchase of Priority Call Option Shares under the Priority Call Options (as set out in Clause 3.6) ("Combination Election"), such that the effective aggregate value of the Sumatec Shares and the Priority Call Option Shares received by the Purchaser is equal to the Financial Shortfall.
>
> …
>
> **19. Remedies and waivers**
>
> No failure on the part of either Party to exercise, and no delay on its part in exercising, any right or remedy under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any right or remedy preclude any other or further exercise thereof or the exercise of any other right or remedy. The rights provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

93 Sumatec argues that the correct interpretation of cl 3 of the OFRA is a "triable issue", and emphasises the wording "Sumatec agrees and undertakes to pay and make good to [Ebony Ritz] (*in accordance with this Clause 3*) in respect of the Financial Shortfalls…" [emphasis added].[88] On a proper construction of cl 3 of the OFRA, and given that Ebony Ritz elected to have the Financial Shortfall for FY2011 satisfied by means of the Priority Call Option, it is "clear that Ebony Ritz is not entitled to have the Financial Shortfall satisfied in kind".[89]

94 In my view, the argument that Ebony Ritz is not entitled to have the Financial Shortfall for FY2011 satisfied in cash is untenable. Sumatec contends that Ebony Ritz would have to "adduce evidence to prove that it is entitled to have the Financial Shortfall satisfied in kind".[90] I see no basis for this assertion

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88 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 126.

89 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 126–127.

90 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 126–127.

that evidence must be adduced to establish the right. To begin with, the language of cl 3.3 is *permissive* and not restrictive – it states that the parties agree that Ebony Ritz "*has the right to* elect…to have any Financial Shortfall be satisfied by way of [the three methods listed in cl 3.3]". That wording does not accord with Sumatec's position that cl 3.3 "sets out exhaustively the 3 ways which the Financial Shortfall may be satisfied".[91]

95 While cl 3.1 states that "Sumatec agrees and undertakes to pay and make good [the Financial Shortfalls] to [Ebony Ritz] in accordance with this Clause 3", I disagree with Sumatec's argument that the words "in accordance with this Clause 3" should be understood to mean that Ebony Ritz was limited to the options stated in cl 3.3. The relevant provisions in OFRA should be construed together and in the light of the OFRA as a whole. This includes the point referred to earlier that the stated objective of the agreement was to set out the terms and conditions governing the adjustments to be made on account of shortfalls in the Financial Representations (see [13] above). Clause 3.1 sets out the method of calculating the Financial Shortfall and subjects Sumatec to the duty to pay and make good the shortfall "in accordance with this Clause 3." The reference to "this Clause 3" follows immediately after the words which impose the duty "to pay and make good." I am of the view that "in accordance with this Clause 3" refers to the fact that the shortfall should be calculated according to the formulae specified in cl 3.1. The core obligation imposed on Sumatec under cl 3 was the duty to pay and make good the assessed Financial Shortfall. Clause 3.3 then goes on to provide Ebony Ritz with the right to elect to have any Financial Shortfall to be satisfied by way of (i) the issue of new Sumatec Shares to Ebony Ritz; (ii) the exercise of the Priority Call Options; or (iii) a combination of (i) and (ii). It bears emphasising again that the language of cl 3.3 is *permissive* and

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[91] Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 126.

not restrictive. I therefore do not accept Sumatec's submission that Ebony Ritz is *limited* strictly to seeking compensation using the methods specified in cl 3.3

96 Further, and more to the point, Ebony Ritz's entitlement to have the Financial Shortfall for FY2011 satisfied in kind is *already* evidenced clearly by cl 19 of the OFRA, which specifies that no "single or partial exercise of any right or remedy [shall] preclude…the exercise of any other right or remedy", and further that the "rights provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law." I fully agree with the AR that this can only mean that the Plaintiff's rights to seek compensation for breaches of the OFRA are not limited to the three options listed in cl 3.3.

97 In reaching this decision, I emphasise that in the course of these appeals Sumatec did not proffer any arguments addressing the import of cl 19, or explaining why, notwithstanding the existence of cl 19, Sumatec maintained its position that the only means by which Ebony Ritz is entitled to seek satisfaction of the shortfall are those set out in cl 3.3. This was despite it *acknowledging* the fact that cl 19 was the decisive factor in the AR's decision to disallow the Paragraph 15 Amendments.[92]

98 Accordingly, I am of the view that Sumatec has not raised a "triable issue" or a "reasonable probability that it has a *bona fide* defence" in the form of the cl 3 OFRA defence. I therefore affirm and uphold the AR's decision to disallow the Paragraph 15 amendments.

99 As an aside, I note that with respect to the OFRA claim, the statement of claim simply states that Ebony Ritz "claims … the sum of RM 27,017,162.68".[93] This sum appears to have been claimed as *an amount due and*

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92 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 85–90.

owing (pursuant to Sumatec's *primary* obligation to make good the Financial Shortfall for FY2011 under the OFRA), and not as *damages* (pursuant to Sumatec's *secondary* obligation to compensate Ebony Ritz after Sumatec breached the OFRA by failing to honour the Priority Call Option). But given my decision that the 2012 SPA did not result in a compromise of Ebony Ritz's rights under OFRA (because the conditions were never met) Ebony Ritz would at the very least have a right to bring a claim for damages for Sumatec's failure to comply with the Priority Call Option. Sumatec does not dispute that there was a shortfall in the Financial Representations and that it was under a duty to make these good under OFRA. The Priority Call Option was, of course, one method whereby the Financial Shortfall as assessed could be made good, but Sumatec failed to satisfy the Financial Shortfall by that method. The 2012 SPA, too, might have resulted in a compromise of Ebony Ritz's rights under the OFRA if the conditions had been met by Sumatec. But it did not have that result since Sumatec did not fulfil the conditions. The point I make is that even if Ebony Ritz did not have the right to seek payment in cash for the Financial Shortfall, it would be entitled to damages.

The Estoppel defence

100 I turn now to address the argument that Ebony Ritz is estopped from exercising its rights under the 2012 SPA.[94] I found this argument somewhat difficult to follow in that, by bringing its claims in these proceedings, Ebony Ritz was *not* exercising its rights under the 2012 SPA at all. The rights which Ebony Ritz is asserting arise instead from the OFRA and the Guarantee. However, as I understand it, Sumatec's argument is that Ebony Ritz is estopped from arguing *that the 1st and 2nd Completions have not taken place in*

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93 Statement of Claim, para 25(1).

94 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 62(c).

accordance with the terms and conditions of the 2012 SPA.[95] Presumably, the point is that this estops Ebony Ritz from asserting that it is still entitled to pursue its claims under the OFRA, because it has agreed to release Sumatec from its liabilities under the OFRA if the 1st and 2nd Completions have taken place.

101 Sumatec would need to cross numerous legal hurdles in order to establish the above defence. Specifically, the argument that Ebony Ritz is estopped from asserting that the 1st Completion has not taken place is premised on the following propositions:

(a) Hoe Leong paid RM 1.8m for the 1st Tranche Sale Shares without insisting on adherence to the conditions stated in the 2012 SPA;[96]

(b) Hoe Leong's act of initiating the sale and transfer of the 1st Tranche Sale Shares (which are the subject of the 1st Completion) was a representation, and that Sumatec relied on this representation in transferring the 1st Tranche Sale Shares to Hoe Leong which shares were then to be transferred to Ebony Ritz.[97] By virtue of *Hoe Leong's* actions, *Ebony Ritz* is estopped from asserting that the 1st Completion did not take place.

102 As for the argument that Ebony Ritz is estopped from asserting that the 2nd Completion has not taken place, this is premised on the following propositions:

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95 Defence and counterclaim (Amendment No 1), paras 36 and 52.

96 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 98(d).

97 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 140.

(a) It was an implied term of the 2012 SPA that Ebony Ritz would not prevent Sumatec from carrying out the 2nd Completion;[98]

(b) Hoe Leong prevented Sumatec from fulfilling its obligations in relation to the 2nd Completion by failing to provide the HLCL Guarantee and/or by failing to cause SISB to pay the 2nd Tranche Dividends to the Trustee in accordance with the CLO Agreement.

(c) Hoe Leong's actions should be treated as those of Ebony Ritz, because Hoe Leong is either the alter ego or an agent of Ebony Ritz.

103 Sumatec's estoppel arguments in respect of both the 1st Completion and the 2nd Completion are premised on the identification of Ebony Ritz with Hoe Leong. Put another way, Sumatec's purported defences require the court to treat Ebony Ritz and Hoe Leong as one and the same. As for the 1st Completion, the only way that *Hoe Leong's* act of initiating the sale and transfer of the 1st Tranche Sale Shares could estop *Ebony Ritz* is if Hoe Leong was either an agent of Ebony Ritz and/or its *alter ego*. Similarly, in respect of the 2nd Completion, the argument that *Ebony Ritz* prevented Sumatec from carrying out the 2nd Completion by failing to cause SISB to pay the 2nd Tranche Dividends is premised on the assertion that Ebony Ritz was "the majority shareholder" of SISB.[99] Since Ebony Ritz only held 49% of the shares in SISB, while Hoe Leong held 2% of the shares in SISB, classifying *Ebony Ritz* as the majority shareholder is premised on identifying Ebony Ritz with Hoe Leong and thereby treating Hoe Leong's shares as belonging to Ebony Ritz.

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98 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 145.

99 Defence and counterclaim (Amendment No 1), para 40(b).

104 Given that identifying Hoe Leong with Ebony Ritz was as central as it was to the Estoppel defence, it is not surprising that the AR's decision on whether to grant Sumatec leave to defend was based very much on the merits of Sumatec's submissions on *alter ego* and lifting of the corporate veil.[100] My view is that the Estoppel defence is not a *bona fide* or sustainable defence for *several* reasons: not only because the arguments on *alter ego*/lifting of the corporate veil are weak, but also because Sumatec's wider case on estoppel is wholly devoid of merit. I shall deal first with the arguments on agency and lifting of the corporate veil, before explaining why I find the Estoppel defence unsustainable on the whole.

The agency argument

105 Sumatec argues that there is a triable issue arising from whether or not Hoe Leong and Ebony Ritz were agents or *alter egos* of each other. In support of this, Sumatec cites an extract from *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) at para 2.69 ("*Walter Woon*"),[101] where the learned author describes *Smith, Stone and Knight Ltd v Lord Mayor, Alderman and Citizens of the City of Birmingham* [1939] 4 All ER 116 ("*Smith, Stone & Knight*") as an example of a judicial exception to the separate entity doctrine (*Walter Woon* at p 64). The learned author goes on to state that this was a case in which the "agency" was "implicit" and was "inferred by the court from the circumstances of the case" (*Walter Woon* at para 2.69). Sumatec contends that its defence cannot be disposed of summarily because determining whether an implicit agency relationship exists between Hoe Leong and Ebony Ritz would require the court to inquire into the facts and circumstances.

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100 AR's Minute Sheet for 8 February 2017, paras 19–35.

101 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 102.

106 Ebony Ritz for its part says that the agency argument is pleaded in "impermissibly and impossibly wide terms" and is "bereft of any material facts".[102] It complains that Sumatec has not even identified which of Hoe Leong and Ebony Ritz is the alleged principal, and which is the agent; with the effect that "Ebony Ritz simply does not (and cannot) know what case it has to meet".[103] On that basis, Ebony Ritz says that the agency argument is "oppressive and embarrassing".[104] Although Ebony Ritz did not contend that the agency argument specifically should be struck out under O 18 r 19(1)(c) of the Rules, the language used calls that provision to mind.

107 The arguments on agency are certainly not pleaded in the most satisfactory manner or with the greatest clarity. Sumatec's case appears to be *both* that Ebony Ritz was "an agent of Hoe Leong",[105] *and also* conversely that "Hoe Leong is the alter ego of Ebony Ritz".[106] However, at least as far as the 1st Completion is concerned, since the point contended for is that Ebony Ritz is estopped by virtue of Hoe Leong's conduct, it must be Sumatec's position that *Ebony Ritz was the principal, and that Hoe Leong was the agent* (since it would not make sense to speak of Ebony Ritz as *agent* being estopped by the conduct of Hoe Leong as *principal*). Thus, Sumatec would need to succeed in showing that *Hoe Leong* is the agent of Ebony Ritz to make out at least one necessary aspect of the Estoppel defence – that Ebony Ritz is estopped from arguing that the 1st Completion has not occurred.

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102 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 72.

103 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 76.

104 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 76.

105 Defence and counterclaim (Amendment No 1), para 8(c).

106 Defence and counterclaim (Amendment No 1), para 8.

108 The authorities cited by Sumatec itself suggest that any argument that Hoe Leong is an agent of Ebony Ritz is doomed to fail. In *Smith, Stone & Knight*, Atkinson J commented at 121 that it is a question of fact in each case whether a subsidiary was carrying on business as the company's own business or as its own. After reviewing a few cases, Atkinson J formulated six indicia for the purposes of determining the question: who was really carrying on the business (or put differently, whether a company is an agent of another):

(a) Were the profits treated as the profits of the parent company?

(b) Were the persons conducting the business appointed by the parent company?

(c) Was the company the head and the brain of the trading venture?

(d) Did the company govern the adventure, deciding what should be done and what capital should be embarked on the venture?

(e) Did the company make the profits by its skill and direction?

(f) Was the company in effectual and constant control?

109 In the Singapore context, it has been noted by the Court of Appeal that the above indicia are "helpful guidelines" but not a conclusive or definitive test applicable in all circumstances in determining whether a business is carried on by a subsidiary as the principal or as an agent for its holding company (*Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association and another* [2000] 3 SLR(R) 177 at [22]). *Walter Woon* at para 2.69 suggests that, in addition to the above factors, an agency arrangement may more readily be inferred where the negotiations leading to a contract are all conducted by the

alleged principal, even though the contract is formally entered into by the alleged agent.

110 Applying the above factors, Hoe Leong is evidently not Ebony Ritz's agent. As Ebony Ritz emphasises, Hoe Leong is a public company listed on the Singapore Exchange since 2005.[107] While it is true that its directors include James Kuah and Paul Kuah, who are also directors of Ebony Ritz (see [7] above), the Kuah brothers are only two out of Hoe Leong's six-member board of directors.[108] There is no basis for saying that Ebony Ritz was "the head and the brain" of Hoe Leong, or that Ebony Ritz "governed" Hoe Leong, or indeed that Ebony Ritz was "in effectual and constant control" of Hoe Leong.

111 As for the negotiations leading to the conclusion of the 2012 SPA, Sumatec's *own* submission is that they were led by *Hoe Leong* on behalf of Ebony Ritz, and not the converse.[109] Therefore, I find that the argument that Hoe Leong was an agent or *alter ego* of Ebony Ritz is unsustainable. It follows that the argument that Ebony Ritz is estopped by virtue of Hoe Leong's conduct is also untenable. For similar reasons, I see no merit in the argument that Hoe Leong holds shares in SISB as agent for Ebony Ritz. Thus, insofar as Sumatec's position that Ebony Ritz is estopped from saying the 2nd Completion has not occurred rests on the contention that Ebony Ritz is the "majority shareholder" of SISB and failed to procure it to pay the 2nd Tranche Dividends to the Trustee, that position is also unsustainable.

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107 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 17.

108 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 68.

109 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 112.

The corporate veil argument

112 Apart from the arguments on agency, another means by which Sumatec seeks to identify Hoe Leong with Ebony Ritz is through its pleading that "the corporate veil of Ebony Ritz should be lifted".[110] While Ebony Ritz complains that the amended defence is unclear as to who the alleged controller of Ebony Ritz is,[111] Sumatec's position appears to be that *Hoe Leong* is the "controlling mind and spirit" of Ebony Ritz,[112] and that Ebony Ritz was "not a separate entity from Hoe Leong".[113] In support of this position, Sumatec cites the following factors:[114]

(a) Sumatec primarily negotiated with Hoe Leong in the lead up to the signing of the 2012 SPA;

(b) Hoe Leong and Ebony Ritz share the same "communication details" (this appears to refer to similar fax numbers and mailing addresses);

(c) External parties allegedly viewed Hoe Leong and Ebony Ritz as being "one and the same or interchangeable";

(d) The 2012 SPA "confers no benefit on Ebony Ritz" if it is truly regarded as a separate legal entity from Hoe Leong because it would have agreed to release and discharge Sumatec from liability under the

110 Defence and counterclaim (Amendment No 1), para 7.

111 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 53, footnote 67.

112 Defence and counterclaim (Amendment No 1), para 8(b).

113 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 110.

114 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 112–119.

OFRA in return for Sumatec selling 51% of its shares in SISB to Setinggi and Hoe Leong;

(e) Hoe Leong was an 80% shareholder of Ebony Ritz;

(f) James Kuah and Paul Kuah are directors of both Hoe Leong and Ebony Ritz; and in addition, James Kuah is the CEO of Hoe Leong and the Managing Director of Ebony Ritz.[115]

113 Sumatec also argues that the AR failed to have regard to the Court of Appeal's decision in *The "STX Mumbai" and another matter* [2015] 5 SLR 1 ("*STX Mumbai*"), which Sumatec characterises as a case in which the Court of Appeal found that "the Appellant could rely on a company, STX Pan Ocean's insolvency in anticipating a breach by that company's subsidiary" because of certain facts which "lent itself [*sic*] to making out the *alter ego* argument".[116]

114 The law on piercing the corporate veil was comprehensively examined by Vinodh Coomaraswamy J in *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd and others* [2016] 1 SLR 1129 ("*Simgood*"), which decision was upheld on appeal in *Simgood Pte Ltd v MLC Barging Pte Ltd and others* [2016] SGCA 46. Coomaraswamy J distilled the following principles at [195]:

(a) The starting point in Singapore law is that a company has a separate legal personality from its owners and controllers, even if it is one of a number of companies which form a group of companies through common or interlocking ownership or control (*Adams and others v Cape Industries plc and another* [1990] Ch 433);

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115 Defence and counterclaim (Amendment No 1), para 6.

116 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 118.

(b) The doctrine of separate legal personality is not displaced simply because companies are organised as a "single economic unit" (*Public Prosecutor v Lew Syn Pau and another* [2006] 4 SLR(R) 210 at [212]);

(c) The doctrine of separate legal personality is not displaced simply because the owners of a company have incorporated it for the purpose of insulating themselves or other group companies from liability. That is the very purpose of the limited liability company.

115 Coomaraswamy J also endorsed the holding of Lord Sumption JSC in the UK Supreme Court decision of *Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415 ("*Prest*") at [34] that the corporate veil may be pierced only to prevent the abuse of corporate legal personality (*Simgood* at [199]). Coomaraswamy J noted Lord Sumption JSC's distinction between the "concealment principle" and the "evasion principle". The concealment principle was at play where, notwithstanding the interposition of a company to conceal the identity of the real actors, a court would look behind the corporate façade to identify the real actors. The evasion principle was where the court would disregard the corporate veil if a company has been used to defeat a right or frustrate the enforcement of a right against the person in control of the company which exists independently of the company involvement (*Prest* at [28]; *Simgood* at [200]). While Lord Sumption JSC and Lord Neuberger PSC had taken the view that it was only in cases of evasion that the corporate veil should be pierced, the other members of the UK Supreme Court had not endorsed such analysis without qualification (*Simgood* at [201]).

116 Based on the arguments before him, Coomaraswamy J declined to make a finding as to whether or not the doctrine of lifting the corporate veil should be limited to cases falling within the evasion principle under Singapore law

(*Simgood* at [202]). He proceeded on the basis that the plaintiff's submissions for lifting the corporate veil were based on the concealment principle, and on the facts, declined to lift the corporate veil as between the various corporate defendants. In coming to that view, Coomaraswamy J made clear that "some measure of connectedness or closeness" between two companies will not justify disregarding their separate legal personalities (*Simgood* at [211]). Thus, the fact that several companies may be family owned and may have common directors or shareholders will not justify lifting the corporate veil (*Simgood* at [205] and [210]), nor will the fact that the owners or controllers of that company have not honoured a strict demarcation between the various corporate entities in e-mail correspondence (*Simgood* at [206]).

117 Putting aside for now the distinction between the concealment principle and the evasion principle, Coomaraswamy J certainly endorsed the view that the doctrine of lifting the corporate veil was limited to cases where there had been an abuse of corporate form. That view was also approved by Lee Kim Shin JC in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [95] (also citing *Prest*).

118 Having considered the arguments and the relevant principles, I am of the view that the attempt to lift the corporate veil of Ebony Ritz is devoid of merit. The commonality of "communication details", that Hoe Leong and Ebony Ritz shared two common directors, and that certain third parties may have referred to Hoe Leong and Ebony Ritz interchangeably are facts insufficient for this court to disregard the separate legal personality of these two entities. As for the argument that the 2012 SPA "confers no benefit on Ebony Ritz" because it would have agreed to release and discharge Sumatec from liability under the OFRA in return for the transfer of SISB shares to *Setinggi and Hoe Leong*, that simply accords with the uncontroversial principle that parties may contract for

a benefit to be conferred on a third party. Further, while Sumatec submits that Hoe Leong was the controlling mind and spirit of Ebony Ritz and has "sole control" over the direction and operations of Ebony Ritz, this overlooks the fact that Ebony Ritz is 20% owned by Auspicious Journey, which has a nominated director, Mr Kuek Kien Joo, sitting on the board of Ebony Ritz.[117]

119 As regards the element of abuse or impropriety, learned counsel for Sumatec, Ms Thenuga d/o Vijakumar, stated in oral submissions that the impropriety stems from the fact that "Hoe Leong who holds 51% can now say, I did not help you with the 2nd Completion, but be that as it may, Ebony Ritz is holding 49%, and I'm now going to sue you for the 2010 obligations". However, I see nothing illegitimate or abusive about the way that the parties agreed to (conditionally) compromise their rights and liabilities under the 2012 SPA. Lord Sumption JSC observed that the corporate veil may be lifted "if a company's separate legal personality is being abused for the purpose of some *relevant wrongdoing*" (*Prest* at [27]). Sumatec does not suggest that Hoe Leong has used Ebony Ritz to perpetrate any *wrongdoing*. It says that it is improper for Hoe Leong or Ebony Ritz to now pursue its claims under the OFRA only in the sense that Hoe Leong and Ebony Ritz are now allegedly "estopped" from so doing. But facts giving rise to an *estoppel* (if indeed the facts give rise to an estoppel) do not necessarily give rise to a finding of abuse.

120 There is nothing to suggest that Ebony Ritz has been used as a sham or façade. To the extent Sumatec may complain that the structure of the 2012 SPA makes it such that Hoe Leong is entitled to the benefit of the 1st Tranche Sale Shares without a corresponding burden of procuring SISB to pay the 2nd Tranche Dividends, I find nothing abusive or improper about this.

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117 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 68(b).

121 As an aside, Sumatec chose to enter into the 2012 SPA at a time when it was *already* liable for having breaching its obligations to Ebony Ritz under the 2010 SPA and the OFRA. It is undisputed that there was a shortfall in SISB's PAT for FY2011; that Sumatec was liable to make this shortfall good under the OFRA; and that Sumatec failed to make good the shortfall after Ebony Ritz exercised the Priority Call Option. That failure was the very reason the 2012 SPA came about. Given this context, I fail to see how Sumatec can argue that either Hoe Leong or Ebony Ritz *should* bear any obligation to assist it in facilitating the 2nd Completion by securing the consent of the CLO Bondholders. Yet, by asserting that there is "impropriety" in Hoe Leong obtaining the 1st Tranche Sale Shares without having to procure SISB's payment of the 2nd Tranche Dividends, Sumatec implies that "propriety" demands that Hoe Leong or Ebony Ritz should be responsible for facilitating the performance of the conditions stipulated in the 2012 SPA and/or the CLO agreement. I am unable to agree. It follows that Sumatec has failed to make out any kind of abuse or impropriety that would justify lifting of the corporate veil.

122 For completeness, I note that Sumatec has relied heavily on the case of *STX Mumbai.* I agree entirely with Ebony Ritz that this was a decision concerning anticipatory breach, and lifting of the corporate veil was not in issue. The Court mentioned lifting the corporate veil *solely* in the course of summarising the Appellant's arguments (*STX Mumbai* at [29]).

123 I therefore find that Sumatec's submissions on agency and lifting of the corporate veil are unsustainable. Insofar as the AR felt that these arguments were not so unsustainable as to warrant their immediate striking out,[118] I would

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118 AR's Minute Sheet, 8 February 2017, para 35.

respectfully differ. As I shall explain below, I also felt that given the deficiencies in the Estoppel defence *as a whole*, Sumatec has not been able to establish a reasonable probability that it was a *bona fide* defence.

The Estoppel defence as a whole

124 As I have mentioned, Sumatec's Estoppel defence is premised upon the identification of Hoe Leong with Ebony Ritz. The difficulties with the arguments on agency and lifting of the corporate veil *alone* would found a conclusion that this defence is unsustainable. In addition, even if I disregard those difficulties, there are other deficiencies with the Estoppel defence.

125 To begin with, one of the key planks of the defence is the argument that Ebony Ritz prevented Sumatec from carrying out the 2nd Completion by failing to procure SISB to pay the 2nd Tranche Dividends to the Trustee (see [102(b)] above). I saw a degree of irony in this argument since, following the transfer of the 1st Tranche Sale Shares, Ebony Ritz actually held 49% of the shares in SISB, which put it in the *exact same position* as Sumatec itself, which *also* held 49% of the shares in SISB at that time (see [34] above).

126 However, even if I assume that Ebony Ritz's identity could be conflated with Hoe Leong's, and Ebony Ritz was thus a "majority shareholder" owning not merely 49% but *51%* of the shares in SISB, and even if I further assume that Ebony Ritz was thereby in a position to procure SISB to pay the 2nd Tranche Dividends to the Trustee, I fail to see how that would further Sumatec's defence. I agree with Ebony Ritz that Sumatec has not explained how it was "*prevented* from carrying out its obligations in relation to the 2nd Completion".[119] It seems to me that the substance of Sumatec's complaint is *not* that it has been *prevented*

[119] Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 78.

from carrying out its obligations, but rather that Ebony Ritz and/or Hoe Leong have not *assisted* it to procure the CLO Bondholders' consent by paying the 2nd Tranche Dividends, despite being in a position to do so. However, I fail to see the basis on which Sumatec argues that it was entitled to expect such assistance.

127 Even if it were true that Ebony Ritz and/or Hoe Leong had prevented Sumatec from performing its obligations under the 2012 SPA, this would not afford Sumatec a *bona fide* defence. Sumatec contends that it was an implied term of the 2012 SPA that Ebony Ritz would not prevent Sumatec from carrying out the 2nd Completion (see [102(a)] above). Putting aside the point that this "implied term" is not pleaded in the defence, the more fundamental problem is that Sumatec does not go on to plead what the *impact* of such an implied term is. In this regard, I agree with Ebony Ritz that Sumatec has not pleaded how the alleged "prevention" affords Sumatec a defence to the OFRA claim.[120] If indeed such an obligation of non-prevention were implied into the 2012 SPA, taking Sumatec's case at its highest, the conclusion that would follow would be that Ebony Ritz had breached the 2012 SPA. It would *not* follow that Sumatec was thereby automatically discharged from its obligations under the OFRA. I also note that notwithstanding the opportunity it was given to amend its defence, Sumatec has not pleaded how the alleged implied term fits into the wider scheme of the Estoppel defence.

128 I note that it has been observed that a court presiding over a summary judgment proceeding should "be slow to venture into a contextual assessment of words and/or conduct encompassed in a claim of estoppel" (*SCP* at para 14/4/5). However, equally, "a bare, unsubstantiated or incoherent claim of estoppel will generally not make any significant headway in raising triable

120 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 78.

issues or demonstrating any probability of a *bona fide* defence at all" (*SCP* at para 14/4/5, citing *AmFraser Securities Pte ltd v Goh Chengyu* [2014] SGHCR 14 at [32] and [33]). On the facts before me, I am of the view that Sumatec's Estoppel defence is indeed bare and substantiated. Thus, I find that the Estoppel defence is unsustainable and does not raise any triable issue.

129 To summarise, I find that the Compromise defence, the cl 3 OFRA defence and the Estoppel defence are devoid of merit. The AR was of the view that the defence to the OFRA claim was a "shadowy one at best", and on that basis granted Sumatec conditional leave to defend.[121] I respectfully depart from that decision as, in my view, Sumatec has failed to demonstrate a reasonable probability that it has a *bona fide* defence at all. I therefore grant Ebony Ritz summary judgment on the OFRA claim.

Whether Sumatec is entitled to judgment on the Guarantee claim without the matter proceeding to trial

130 Ebony Ritz has appealed against the AR's decision to grant Sumatec unconditional leave to defend the Guarantee Claim. Sumatec's defence to the Guarantee Claim centres on cl 3.6 of the 2012 SPA, which I reproduce here for convenience:

> On 1st Completion or three (3) months after the date of this Agreement, whichever is later, [Setinggi] and [Hoe Leong] shall use all reasonable endeavours to procure a discharge of all those corporate guarantees issued by [Sumatec] in respect of loan and other facilities granted to the Semua Group by its relevant lenders ("Sumatec Guarantees"). In the event that [Setinggi] and/or [Hoe Leong] fails to procure the discharge of the Sumatec Guarantees under this Clause 3.6, [Setinggi] and/or [Ebony Ritz] agrees to jointly and severally indemnify and keep [Sumatec] indemnified and harmless against any and all claims, demands, suit made against Sumatec in respect of the Sumatec guarantees.

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121 AR's Minute Sheet, 8 February 2017, para 34.

131 Sumatec's position is that the Guarantee falls within the "Sumatec Guarantees" mentioned in cl 3.6, and since Setinggi and Hoe Leong have failed to procure the discharge of the Guarantee, Ebony Ritz must indemnify and keep Sumatec harmless against any claim or demand made in respect of the said Guarantee. On the other hand, Ebony Ritz argues that cl 3.6 only applies to loans granted by third parties to the Semua Group.[122] In support of this position, Ebony Ritz raises the following points:

(a) Clauses 5.5 and 6.4 provide that if the 1st Completion and the 2nd Completion respectively do not take place in accordance with the 2012 SPA, Ebony Ritz's rights under the "Transaction Documents" are unconditionally reserved, and there would be no "waiver, release or discharge of any of [Sumatec's] liability under the Transaction Documents". Further the term "Transaction Documents" is defined to include the 2010 SPA, the OFRA, the Loan Agreement and the Guarantee.[123]

(b) If the parties had intended for Ebony Ritz to indemnify Sumatec against claims arising from the Guarantee, the 2012 SPA would simply have provided for a straightforward discharge of the Guarantee, rather than providing that Ebony Ritz would indemnify Sumatec against any claims in respect of the Guarantee.[124]

(c) During the negotiations leading up to the 2012 SPA, it was expressly contemplated that the Sumatec Guarantee would cover only three specific guarantees.[125]

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122 Reply (Amendment No 1), para 60(a).

123 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 88.

124 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 90(b).

125 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 90(c).

132 Ebony Ritz's alternative position is that cl 3.6 does not include corporate guarantees issued by Sumatec in respect of loans granted to the Semua Group which matured or became due prior to the 2nd Completion.[126] As I understand it, this argument is based on cl 9.1(f) of the 2012 SPA, which provides as follows:[127]

> 9.1 [Sumatec] undertakes to each of [Hoe Leong] and [Ebony Ritz] that it will procure that, between the date of this Agreement and 2nd Completion, each Semua Group Company shall (subject always to the Shareholders' Agreement):
>
> …
>
> (f) pay and discharge all its debts and liabilities when they mature or become due or are expressed to be due.

133 Ebony Ritz says that since Sumatec has undertaken to procure the Semua Group Companies to pay and discharge all their debts and liabilities prior to the 2nd Completion, cl 3.6 cannot extend to corporate guarantees issued by Sumatec in respect of loans which matured or became due prior to the 2nd Completion, because the payment of such loans were *Sumatec's* obligation.

134 In resisting Ebony Ritz's application for summary judgment on the Guarantee Claim, Sumatec argues that determining the proper construction of cl 3.6 would require the court to consider "the relevant contractual, contextual and commercial background against which the document containing the disputed words and phrases came about" to ascertain the contracting parties' objective intentions.[128] In this regard, Sumatec highlights that Ebony Ritz itself has referred to the parties' negotiations to support its interpretation of cl 3.6.[129]

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126 Reply (Amendment No 1), para 60(b).

127 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 374.

128 Defendant's submissions for Registrar's Appeals 48–52 of 2017, para 149.

129 Defendant's submissions for Registrar's Appeals 48–52 of 2017, paras 150–151.

135 In the end, I have come to the view that the AR was right to have granted Sumatec unconditional leave to defend the Guarantee Claim for the following reasons:

(a) While Ebony Ritz says that Sumatec's construction of cl 3.6 is untenable because it is inconsistent with cll 5.5 and 6.4, such inconsistency is not plain or obvious to me. Taking cl 5.5 as an example, the idea that Ebony Ritz's rights under the Guarantee would be preserved if the 1st Completion does not occur in accordance with the 2012 SPA is not *necessarily* inconsistent with cl 3.6. Clause 3.6 requires Setinggi and Hoe Leong to use all reasonable endeavours to procure a discharge of certain corporate guarantees "[o]n 1st Completion *or three (3) months after the date of this Agreement, whichever is later*" [emphasis added].[130] At least one possible interpretation of this is that Setinggi and Hoe Leong's obligation to use reasonable endeavours to obtain a discharge of the corporate guarantees takes effect only *after* the 1st Completion occurs, and correspondingly Setinggi and/or Ebony Ritz's obligation to indemnify Sumatec only takes effect *after* the 1st Completion occurs. I should clarify that I do not say that this *is* the correct interpretation of cll 3.6 and 5.5. I state this only to illustrate that it is not plain or obvious that cll 5.5 and 6.4 make Sumatec's interpretation of cl 3.6 untenable.

(b) While Ebony Ritz says that Sumatec's construction of cl 3.6 is untenable because it is inconsistent with cl 9.1(f), it is not plain or obvious to me that there are inconsistencies between these two provisions. The idea that Sumatec undertakes to procure SISB to pay its debts and liabilities (cl 9.1(f)) is not necessarily inconsistent with Ebony

130 1st Affidavit of Kuah Geok Lin dated 21 July 2016, p 368.

Ritz's undertaking to indemnify and hold Sumatec harmless against claims made pursuant to the Guarantee (cl 3.6).

(c) To the extent that any inconsistency exists between cl 3.6 and cll 5.5, 6.4 and 9.1(f), the question of how to resolve such inconsistency is a triable issue. In this regard, I agree with the AR that one relevant consideration might be whether cl 3.6 is intended to take precedence over the other allegedly inconsistent clauses of the 2012 SPA.[131]

136 I am also mindful of the need for the court to consider the context of the parties' agreement as part of the interpretive exercise (*Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] SGCA 42 at [39]). While Ebony Ritz has pointed to the parties' negotiations in the lead up to the conclusion of the 2012 SPA, I agree with Sumatec that this evidence will have to be taken in context. I therefore affirm the AR's decision to grant Sumatec unconditional leave to defend the Guarantee claim.

Conclusion

137 To summarise my decision so far, I grant Ebony Ritz summary judgment in respect of the OFRA claim, and Sumatec unconditional leave to defend the Guarantee claim. It follows that:

(a) Sumatec's Amendment Appeal is dismissed as the AR was right to have disallowed the Paragraph 15 amendments;

(b) Sumatec's Summary Judgment Appeal is dismissed. Ebony Ritz's Summary Judgment Appeal is allowed to the extent that I have

131 AR's Minute Sheet, 8 February 2017, para 39.

departed from the AR's decision to grant *conditional* leave to defend the OFRA claim and have granted Ebony Ritz summary judgment instead.

(c) Ebony Ritz's Amendment Appeal is partly allowed as I find that many of the amendments sought to be introduced via the Amendment Application were themselves liable to be struck out. I affirm the AR's decision insofar as he allowed Sumatec to make the amendments pertaining to the Guarantee claim.

(d) Ebony Ritz's Striking Out Appeal is allowed insofar as it follows from my decision to grant Ebony Ritz summary judgment on the OFRA claim that Sumatec's defence to the OFRA claim "discloses no reasonable defence" or is frivolous or vexatious. However, I affirm the AR's decision insofar as he declined to strike out Sumatec's defence to the Guarantee claim.

Ebony Ritz's Stay Appeal

138 What remains is Ebony Ritz's Stay Appeal wherein it appealed against the AR's decision refusing to approve the Draft Judgment following Sumatec's failure to provide the Security in respect of the OFRA claim. The procedural history relating to the Stay Appeal has already been set out at [50]–[52] and [59] above. However, to recap:

(a) On 8 February 2017, the AR granted Sumatec conditional leave to defend the OFRA claim on condition that security for the full amount was provided by 5pm on 8 March 2017, failing which judgment would be entered against Sumatec.

(b) On 22 February 2017, Sumatec filed *inter alia,* its Summary Judgment Appeal, which was the appeal against the AR's conditional leave order in respect of the OFRA claim.

(c) On 3 March 2017, Sumatec proposed a stay of the provision of the security until the final disposition of the various appeals which the parties had filed on 22 February 2017. The proposal was rejected by Ebony Ritz's solicitors on 7 March 2017.

(d) On 8 March 2017, shortly before the time for Sumatec to furnish the Security expired at 5pm, Sumatec filed its Stay Application at 4.27pm. Shortly afterwards, at 5.56pm, Sumatec served the application for stay on Ebony Ritz. Ebony Ritz responded by seeking to enter judgment against Sumatec for the OFRA claim. To that end, Ebony Ritz sent the Draft Judgment to Sumatec's lawyers after 5pm.[132]

(e) By 13 March 2017, Ebony Ritz had not received any response from Sumatec on the Draft Judgment. Ebony Ritz asserts that under O 42 r 8(2) Sumatec was thereby deemed to have consented to the terms of the Draft Judgment.[133]

(f) On 14 March 2017 Ebony Ritz submitted the Draft Judgment to the Court for approval.

(g) On 17 March 2017, the AR heard and granted Sumatec's Stay Application and declined to approve the Draft Judgment.

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132 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, paras 6–8.

133 Plaintiff's submissions for Registrar's Appeals 48–52 and 85 of 2017, para 9.

139 Ebony Ritz's position is that the AR erred in granting the stay and in refusing to approve the draft judgment. It relies on the well-known principle that an appeal does not operate as a stay of execution and contends that so long as a court order stands, the successful party is entitled to have it respected and obeyed. Indeed, by the time Sumatec served the application for a stay on Ebony Ritz, the time for complying with the conditional leave order had expired.

140 Sumatec's position is that it was entirely within the AR's discretion to grant the stay of execution.[134] Moreover, Sumatec submits that the AR was correct in making that decision, given that Sumatec requires "high cash flow availability to continue with its regular operations", and having to provide RM 27,017,162.68 would have caused it "grave financial stress".[135] Sumatec also alleges that there was a "serious risk" that Sumatec would not have been able to recover any monies paid to Ebony Ritz, given that Ebony Ritz has been ordered to be wound up.[136]

141 Whilst it may not be necessary to decide Ebony Rtiz's Stay Appeal given my decision to allow Ebony Ritz's appeal against the conditional leave order and to grant summary judgment on the OFRA claim, I make the following comments on the issues that have arisen.

142 First, it is clear that despite having had a month to comply with the conditional leave order, Sumatec waited until the eleventh hour to file the application for a stay, when time providing the Security had very nearly expired. It also served the application on Ebony Ritz after the time for providing the Security had already expired. It is also clear that Ebony Ritz were aware on 8

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134 Defendant's submissions for Registrar's Appeal 85 of 2017, para 16.

135 Defendant's submissions for Registrar's Appeal 85 of 2017, para 22.

136 Defendant's submissions for Registrar's Appeal 85 of 2017, para 25.

March 2017 when they sent the Draft Judgment to Sumatec's lawyers for approval that Sumatec had: (i) filed the appeal; and (ii) proposed parties should consent to a stay. Does this make a difference? I am of the view that, on the facts before me, it does not. Sumatec was equally aware by 7 March 2017 that Ebony Ritz did not consent to a stay. They knew time was fast running out and that Ebony Ritz was entitled to enter judgment after 5pm on 8 March 2017. No attempt was made to apply and obtain an urgent stay from the Court before the expiration of time. Indeed, the application was only made and served 22 minutes before the expiry of time. The date of the hearing was some three weeks later.

143 Second, it is also clear that when Ebony Ritz submitted the Draft Judgment to the Court for approval on 14 March 2017, Ebony Ritz was aware that the application for stay would be heard in three days' time. The AR comments that it was not appropriate for Ebony Ritz to seek entry of judgment when they knew a stay application had been made.[137]

144 Third, O 42 r 7(1) provides that a judgment or order of the court takes effect from the day of its date. *SCP* explains at para 42/7/2 that a judgment takes effect from the time when the judge pronounces it, rather than the date upon which it is drawn up and entered. Further, at para 42/7/7 it is stated that every order should be drawn up and extracted (with some exceptions) and that an omission to do this does not relieve a party from the obligation to obey the order unless the order is of such a kind as to render obedience contingent on the service of the order. O 42 r 8 sets out provisions on the preparation of the judgment or order and the submission of the draft to the solicitor of the other party. Ebony Ritz relies on O 42 r 8(2) and deemed consent by Sumatec to the terms on the basis that Sumatec did not respond to the Draft Judgment.

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137 AR's Minute Sheet for 17 March 2017, p 8, line 1.

145 Having regard to these provisions, I am of the view that the burden is on Sumatec to make a timely application for a stay of execution under the Rules. The fact that they knew Ebony Ritz did not agree to a stay by consent only served to make the matter much more urgent. Ebony Ritz, even though it was appealing for summary judgment, was entitled in any case to the "fruits" of the orders that had been granted. Sumatec must have known that under the order granting conditional leave to defend, Ebony Ritz was entitled to enter judgment from the moment time expired. The order expressly provides that failing provision of the security by 5pm 8 March 2017 "judgment shall be entered against the Defendant for this sum, with interests as well as costs to be paid by the Defendant to the Plaintiff, to be taxed or agreed".[138] The fact that a party has made an application for stay does not mean that some form of interim stay goes into existence to cover the period between application and the hearing of the stay application. If an interim stay was needed, Sumatec could and should have sought an interim stay pending the hearing of the stay application especially since they had received the Draft Judgment.

146 The submissions of Ebony Ritz on its Stay Appeal concentrates on the above points and they assert that they were entitled to enter judgment after 5pm 8 March 2017. On the other hand, Sumatec relies on the AR's finding that entry of judgment would have rendered the application for stay nugatory. The difficulty however is that Order 42 r 7 is clear that a judgment takes effect from the time when it is pronounced rather than the date when it is drawn up and entered. That said, *SCP* explains at para 42/7/4 that execution cannot issue till after entry of judgment.

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138 ORC No 1212 of 2017.

147 Accordingly, I am of the view that the AR erred in not accepting the Draft Judgment. The parties did not, in their submissions before me, go into the substantive question as to whether grant of a stay was in any event appropriate on the facts of the case. I make no further comment since I have in any case found that Ebony Ritz is entitled to summary judgment and that the AR erred in granting conditional leave in the first place on the OFRA claim.

148 I shall hear the parties on costs.

George Wei
Judge

Wendy Lin Weiqi and Goh Wei Wei (WongPartnership LLP) for the plaintiff;
Thenuga d/o Vijakumar (Morgan Lewis Stamford LLC) for the defendant.
