Watchdata Technologies Pte Ltd v Kamalraj Johnson and Another
[2009] SGHC 113

Case Number : Suit 571/2007

Decision Date : 07 May 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : R Nandakumar and Noelle Seet (KhattarWong) for the plaintiff; P Suppiah and Elengovan s/o V Krishnan (P Suppiah & Co) for the defendants

Parties : Watchdata Technologies Pte Ltd — Kamalraj Johnson; Hephzibha Joybell Kamalraj

Contract

7 May 2009

Lai Siu Chiu J:

1 This was a claim for a sum of US$1,623,346.40 allegedly owed by Kamalraj Johnson and Hephzibha Joybell Kamalraj ("the defendants") to Watchdata Technologies Pte Ltd ("the plaintiff") under a deed of guarantee. At the conclusion of the trial, I found for the plaintiff. The defendants have now appealed against my judgment (in Civil Appeal No. 196 of 2008).

The facts

2 The plaintiff is a Singapore company which is a supplier and distributor of Subscriber Identity Module cards ("SIM cards") and has been in business since 2000. The defendants, who are husband ("the first defendant") and wife ("the second defendant"), are directors and majority shareholders of a locally incorporated company called Sharon Global Solutions Private Limited ("the Singapore Company"). There is a third shareholder of the Singapore Company, one Christina Lim Ser Ling. The Singapore Company provides supplies and services to telecommunications operators in India.

3 The defendants are also majority shareholders and directors of a company in India called Sharon Solutions (India) Private Limited ("the India Company"). Since 20 May 2005, one Uma Maheswari ("Uma") was another director and shareholder of the India Company.

4 Many aspects of the parties' course of dealings were disputed and thus we need to look at the available documentation. During the period from 23 April 2004 to 23 February 2006, the Singapore Company issued SIM card purchase orders signed by the first defendant as authorized signatory and accepted by the plaintiff ("the SGS Purchase Orders"). The first SGS Purchase Order dated 23 April 2004 reads as follows:

> M/s Watchdata Technologies Pte Ltd
>
> Singapore
>
> Kind Attn: Mr Michael Yu
>
> Dear Sir,

Purchase Order for 1.00 Million – 16K GSM Sim complete cards:

With reference to the above, we are pleased to confirm having placed with you the Purchase Order for the complete cards for our India operations.

Quantity : 1.00 million

Configuration : 16K Phasell + GSM

Algorithms : 128 – 1-3

Art Work : As arranged

Delivery : Immediate

Price : US$0.75 CIF Chennai

Payment Terms: 30% Advance payment; 70% after 60 days from Date of delivery

Watchdata warrants that the cards will not have any manufacturing defects and the delivery of the cards will be prompt. Watchdata also guarantees to provide the technical support to Sharon Solutions (India) Private Limited. Watchdata warrants that the cards will work on all handsets. Further, Watchdata accepts all indemnities if there is any mistake on the part of the cards with regard to quality or if there is malfunctioning including the replacement of the cards.

Kindly arrange to confirm the above.

From 30 November 2004 onwards, the SGS Purchase Orders generally did not make reference to the "India operations".

5 Several invoices issued by the plaintiff from 2004 to 2006 were also exhibited ("the plaintiff's invoices"). The invoices issued in 2004 were each labelled "Commercial Invoice". There was a column labelled "Forwarding address/ Markings" and a column for "Mode of Shipment", as well as columns for the description of goods, quantity, unit price and total price. In 2005, the format of the invoices changed. They were each labelled "Tax Invoice" and contained the plaintiff's Goods and Services Tax ("GST") Registration Number. There was a column labelled "Bill to" and another column labelled "Ship to", as well as the columns for the description of goods, quantity, unit price and total price. In general, the 2004 invoices contained the Pondicherry address of the India Company under the "Forwarding address/Markings" column ("the 2004 India invoices") whereas from 2005 onwards, they contained the Singapore Company's address in the "Bill to" column and the India Company's address in the "Ship to" column.

6 The plaintiff and the Singapore Company entered into a supply agreement dated 14 July 2004 ("the Supply Agreement") for the sale and purchase of SIM cards. Article 1 of the Supply Agreement set out its scope as follows:

ARTICLE 1 – SCOPE

The scope of this Agreement is to define the terms and conditions under which **Watchdata** agrees to supply and SGS [ie, the Singapore Company] agrees to purchase SIM cards with the specifications described in ANNEX 1 (hereinafter called "Products") as may be ordered by SGS

from time to time during the term of this Agreement.

[original emphasis]

7 The following articles of the Supply Agreement are also relevant. They read:

ARTICLE 3 – PLACE OF DELIVERY

The Products shall be addressed to:

M/s Sharon Solutions (India) Private Limited

RBF Building, PIPDIC Electronic Industrial Estate

Thirubhuvanai

Pondicherry 605 008 (India)

Attention: Ms Uma Maheswari, Manager

Or other place as indicate [sic] on the purchase order

ARTICLE 4 – TERM OF AGREEMENT

This Agreement shall come into force on its signature date by both Parties and shall, unless earlier terminated in accordance with this Agreement, expire one (1) year thereafter.

ARTICLE 5 – PURCHASE ORDERS

5.1 **SGS** may from time to time during the Term of this Agreement issue Purchase Orders for the purchase and delivery of the Products which shall be based on Quotations provided by **Watchdata**. **SGS** shall only place a purchase order for the number of batches or quantities of the Products that **Watchdata** has indicated in writing it is capable of delivering in accordance with the delivery schedule at the time the purchase order is issued.

5.2 Each Purchase Order issued for the delivery of the Products shall include the following information which shall be mutually agreed by the Parties prior to the **SGS** issuing each Purchase Order:-

i) Description of the Products being ordered;

ii) Price and quantity of deliverables ordered;

iii) Address of the place of delivery;

iv) Payment Terms; and

v) Other relevant details pertaining to the purchase and delivery of Products.

5.3 Upon receipt of the Purchase Order, **Watchdata** shall acknowledge in writing the Purchase Order and accept or reject the Purchase Order within one (1) week of receipt thereof. If the Purchase Order is not rejected in writing within one (1) week as aforesaid, the Purchase Order

shall be deemed accepted by **Watchdata**.

…

ARTICLE 12 – PAYMENT TERMS

…

12.2 There is a US$100,000 credit limit for **SGS**. At any time, the outstanding payment should not be higher than this credit limit.

…

By virtue of Article 4, the Supply Agreement expired one year after its signature date (*ie*, on 13 July 2005).

8 On 12 June 2006, the first defendant on behalf of the Singapore Company and the managing-director of the plaintiff Yu Zhilu ("Yu") signed a document entitled "Agreement to settle the outstanding issues between Watchdata Technologies Private Limited, Singapore and Sharon Global Solutions Private Limited, Singapore". The agreement stated:

It has been agreed to resolve the pending payment issues between both the parties on the supply of cards to Indian Market.

The discussions and settlement issues are as follows:

It has now been agreed that every month starting from June 2006 onwards Sharon Global Solutions Private Limited, Singapore will remit a minimum of US$200K per month till the liabilities are extinguished;

Sharon Global Solutions Private Limited is expected to clear US$500K by 15th July 2006 and Watchdata Technologies Private Limited, Singapore is expected to continue their support;

The outstanding liability will be reconciled and settled on or before 31st December 2006…

9 Shortly thereafter, on 29 June 2006, the defendants signed under seal a deed of guarantee ("the Personal Guarantee"). This was an important document. Its key terms were as follows:

1. This deed of guarantee (this "Guarantee") is made on 29th day of June 2006.

2. Kamalraj Johnson [*ie*, the first defendant]… and Hephzibha Joybell Kamalraj [*ie*, the second defendant]… agree to be the guarantors for and on behalf of Sharon Global Solutions Private Limited [*ie*, the Singapore Company]… if in case Sharon Global Solutions Private Limited ("Sharon") fails to extinguish the liability in full to Watchdata Technologies Private Limited ("WDT") [*ie*, the plaintiff] on or before 31st December 2006.

3. Sharon Global Solutions Private Limited owes the amount of USD 2,114,846-40 as on the date of this Deed (subject to the variation of not more than USD 120,000 upon submission of documentary proof of evidencing the payment to WDT) (the "Amount Due").

4. In consideration of WDT granting time to Sharon to pay the Amount Due and not enforcing its

legal rights, thereof, the Guarantors expressly agree and undertake to step in to pay liquidate the Amount Due or any part thereof as the outstanding dues of Sharon Global Solutions Private Limited if any, in the event the Amount Due remains not fully paid by 31 December 2006.

5. This guarantee is a continuing guarantee till the liability of Sharon to WDT is fully and finally settled and the Guarantors' liability, under it are [*sic*] joint and several.

…

[emphasis added]

10 It was not disputed that after the Personal Guarantee was signed the plaintiff did not supply SIM cards to the Singapore Company except for a single order for which payment was received in full before delivery in September 2006. Instead, supplies were made to the India Company for which advance payment was made before delivery.

11 On February 2007, Yu (on behalf of the plaintiff) and the defendants (on behalf of the India Company) signed a memorandum of understanding ("the 15 February 2007 MOU"). The relevant terms were as follows:

1) This teaming agreement will come into force as and when the formalities are finalized.

2) This MoU is signed between Watchdata Technologies Pte Ltd (WD) and Sharon Solutions (India) Pvt Ltd (Sharon) on 15th Feb 2007 in Singapore.

3) The purposes of this MoU are:

a. To build an arrangement between the two companies to clear the US$1.8M outstanding trade debt (or the debt as mutually agreed upon) that Sharon owes to WD;

b. To ensure right payment process to facilitate the transactions between WD and Sharon in India;

c. To increase the market share in India and/or elsewhere;

d. To ensure uninterrupted supplies and deliveries to the customers; WD also ensures that the supplies in excess of the capacity that can be produced locally, will be effected from WD directly as complete cards.

4) It is mutually agreed upon that Sharon will transfer its 50% shares to WD as Collateral Security till the full outstanding is cleared.

5) It is mutually agreed that Mr Yu Zhilu, …representing WD and Mr Kamalraj Johnson, … representing Sharon will sit on the board of Sharon as Directors. No other director will be appointed in the board without mutual agreement and concurrence.

6) It is mutually agreed that WD will appoint a Chief Operations Officer for Sharon to be stationed at Sharon office [*sic*], Chennai to oversee the daily operations of the company on behalf of the company along with the functionaries of the Company as per the role and responsibilities as defined by the Board of Directors;

7) The Chief Operations Officer and a representative appointed by Sharon shall be authorized for

the company. All documents like Purchase Orders, Invoices, Payment or Remittance Vouchers etc as spelt out from time to time will be signed jointly.

8) It is mutually agreed that a banking account is to be opened in the name and style of Sharon Solutions (India) Private Limited, at the Federal Bank Limited, Chennai. The Banking account will be operated jointly by the nominee of Watchdata and Sharon till such time the outstanding debt is extinguished;

9) All transactions of Sharon Solutions (India) Private Limited, Chennai will be processed through this joint account;

10) WD will also station a technical support engineer either at Chennai or Pondicherry or at New Delhi to provide adequate technical support in India;

11) It is mutually agreed that each month end, Sharon will remit all operational profit after deducting all statutory and operational expenditure to WD's Singapore account till such time the outstanding liability is extinguished;

12) Once the outstanding liability is extinguished, WD will transfer back the 50% Shares of Sharon which were earlier offered as collateral security at the same face value without any appreciation or revaluation without any murmur or demur immediately;

13) Pricing will be factored in accordance with the prevailing market prices and the pricing will also have some profits for Sharon to offset the outstanding liability and to run the operations which costing will be submitted to the Board;

14) Any quantity will be delivered from WD through Sharon and the payments will be routed through the designated account only;

15) WD and Sharon will endeavor [Am] to clear the debt in truth and in spirit at the earliest but before the end of the year.

12 The plaintiff and the India Company entered into a few more agreements subsequently. On 17 March 2007, Yu (on behalf of the plaintiff) and the first defendant (on behalf of the India Company) signed a cooperation agreement ("the Cooperation Agreement"). The relevant terms of the Cooperation Agreement were as follows:

WHEREAS:

(A) Watchdata [*ie*, the Plaintiff] and Sharon [*ie*, the India Company] have entered into a Memorandum of Understanding dated 15 February 2007 ("**MOU**") in relation to the outstanding debt of approximately US$1.8 million or any lesser amount as mutually agreed ("**Debt**") owed by Sharon Global Solutions Pte Ltd (SGS) and Sharon Solutions (India) Private Limited (SSIPL).

(B) The Parties wish to enter into this Agreement to formalize some of the arrangements contemplated under the MOU.

IT IS AGREED AS FOLLOWS:

Clause 1: Obligations of Sharon and WD

In consideration of Watchdata not commencing legal or other action against Sharon Solutions (India) Pvt Ltd. In respect of the debt and agreeing to enter into this Agreement, Sharon agrees and undertakes with Watchdata as follows:

(1) Sharon shall take all action and execute all agreements and documents (including without limitation), passing the necessary resolutions at the board and/or shareholders' level and making the necessary filings with the relevant authorities in India [sic] as may be necessary to ensure that:

(a) from the date of this Agreement and during its subsistence, the board of Sharon shall comprise only 2 directors;

(b) Mr Yu Zhilu, the nominee of Watchdata shall, forthwith upon execution of this Agreement, be appointed as a director of Sharon. The other director shall be Kamalraj Johnson. Watchdata shall be entitled, at any time, by notice to Sharon require that its nominee resign from the position of director subject to another nominee being mutually agreed and appointed; and

(c) a representative nominee of Watchdata shall, forthwith upon execution of this Agreement, be appointed as the Vice President (Operation) – VPO of Sharon and shall be entitled (but not obliged) to exercise all powers typically vested in a senior management staff of such position…

(2) Watchdata shall, forthwith upon execution of this Agreement, conduct legal, financial, tax, commercial, operational, technical and other relevant due diligence on Sharon and all aspects of its business, affairs and operations ("**Due Diligence**"); Sharon shall provide all documents and materials promptly, under and according to the request of WD from time to time;

upon and subject to the following terms and conditions:

…

(b) Sharon shall cooperate fully and assist Watchdata with the Due Diligence, and shall provide that the authorised Watchdata Employee, including the nominee of Watchdata as VPO ("**Authorised Representatives**"), shall be promptly:

(i) given access to the assets of Sharon and all premises where Sharon carries on its business, activities and operations for purposes of inspection, audit and valuation;

…

(iii) furnished with all documents, information and business records relating to Sharon, its business and affairs ("**Business Records**") as Watchdata may reasonably request; and

(iv) permitted to take copies of any part of the Business Records; and

(c) Watchdata and Sharon shall enter into a separate non-disclosure agreement in connection with the provision of information by Sharon to Watchdata prior to the Due Diligence;

…

(3) the Parties agree to continue to discuss in good faith the transfer of 50% of the interest in the shares in Sharon, offered as collateral security in respect of the debt.

…

Clause 3: Legal Effect

This Agreement is intended by the Parties to be legally binding and to give rise to legally enforceable rights and obligations.

…

Clause 6: Invalidity

If any provision or part of a provision of this Agreement shall be, or be found by any authority or court of competent jurisdiction or arbitrator to be, invalid or enforceable, such invalidity or unenforceability shall not affect the other provisions or parts of such provisions of this Memorandum, all of which shall remain in full force and effect.

13 The plaintiff called on the Personal Guarantee by a letter of demand dated 8 August 2007. Based on the plaintiff's accounts, the Singapore Company had made payments amounting to US$491,500 since the date of the Personal Guarantee. The last payment made by the Singapore Company was on 3 July 2007. Hence, the amount due and outstanding to the plaintiff was US$1,623,346.40. The defendants failed to make payment and the plaintiff filed the writ of summons herein on 7 September 2007.

The pleadings

14 The pleadings of both parties were each amended a few times before the trial commenced. In its latest statement of claim ["Statement of Claim (Amendment No 2"], the plaintiff claimed that the defendants were liable to pay the plaintiff US$1,623,346.40 pursuant to the Personal Guarantee. The plaintiff contended that the defendants had guaranteed the principal debt owed by the Singapore Company to the plaintiff under the SGS Purchase Orders, which constituted written contracts between the plaintiff and the Singapore Company in respect of the SIM cards supplied under the respective SGS Purchase Orders.

15 The plaintiff averred that it would only commence production of the SIM cards after it received what is known as an "input file" from the Singapore Company (which in turn obtained it from Indian telecommunications operators), containing the quantity of SIM cards to be manufactured and descriptions of the customisation required for the SIM cards in a given purchase order. After manufacturing the SIM cards in accordance with the input files, the plaintiff would then deliver the SIM cards to a place designated by the Singapore Company. Each time that delivery of SIM cards was made, the plaintiff would issue an invoice in respect of that delivery. The quantity stated in any one purchase order might be supplied in several batches over a period of time, *ie*, there could be one or more input files corresponding to each purchase order. On some occasions, the plaintiff and defendants would agree that the plaintiff supply less than the quantity stated in an input file. On such occasions, the Singapore Company would be charged for only the quantity actually supplied.

16 The plaintiff annexed to its Statement of Claim (Amendment No 2) a table ("Schedule 2") which set out the plaintiff's invoices and showed which SGS Purchase Orders they were issued in respect of, and the specific payments made by the Singapore Company to the plaintiff in respect of those invoices. Payments which were not made specifically towards any particular invoice were designated as "general payment" and also deducted from the balance in Schedule 2. The final balance in Schedule 2 showed an outstanding debt of US$1,623,346.40 owed by the Singapore Company as at

3 July 2007. The plaintiff also annexed a statement of accounts ("Schedule 3") which utilised the "first in first out" ("FIFO") accounting system (*ie*, payments made by the Singapore Company were used to pay off the earliest invoices first, rather than being attributed to specific invoices). The amount outstanding under Schedule 3 was also US$1,623,346.60 as of 3 July 2007.

17 The plaintiff averred that the 2004 India invoices were addressed by error to the India Company whenever the place designated by the Singapore Company for delivery was in India. The plaintiff maintained that all invoices issued were sent to the Singapore Company for payment, and that the contracting parties remained at all material times the plaintiff and the Singapore Company pursuant to the SGS Purchase Orders.

18 The plaintiff acknowledged that in addition to written contracts in the form of the SGS Purchase Orders, it had also entered into the Supply Agreement with the Singapore Company. Its position was that insofar as the SGS Purchase Orders were issued during the term of the Supply Agreement, the terms of the Supply Agreement applied to the SGS Purchase Orders.

19 In their latest defence filed on 28 July 2008 ["Defence (Amendment No 3")], the defendants denied that the SGS Purchase Orders constituted written contracts between the plaintiff and the Singapore Company and put the plaintiff to strict proof that the dealings between the plaintiff and the Singapore Company were as has been detailed in [15] above.

20 The defendants contended that the Supply Agreement was a separate and distinct contract from the SGS Purchase Orders and that the Singapore Company had entered into the Supply Agreement as agents for the India Company.

21 The defendants admitted giving the Personal Guarantee and also admitted that the sum of US$2,114,864.40 was referred to therein. However, they maintained that if at all they were liable as guarantors, it was only in respect of SIM cards supplied under the Supply Agreement to the Singapore Company. They contended that as the plaintiff had admitted in para 3 of its original Statement of Claim filed on 7 September 2007 ("the original Statement of Claim") that it was "[p]ursuant to the Supply Agreement [that] the plaintiff supplied SIM Cards to Sharon Global Solutions Private Limited", the plaintiff was estopped from saying that the SIM cards were supplied to the Singapore Company otherwise than under the Supply Agreement.

22 The defendants also contended that all the sums due to the plaintiff for which the Personal Guarantee was given have been fully paid.

23 The defendants further contended that there was no consideration moving from the plaintiff to support the alleged Personal Guarantee. In the alternative, the defendants contended that the consideration for the Personal Guarantee was past consideration. In the premises, they asserted that the Personal Guarantee was not binding on them.

24 The defendants said that even if they were liable under the Personal Guarantee, they had been discharged for a few reasons: first, the plaintiff had by the 15 February 2007 MOU extended the time of payment of any sum due from the India Company; and secondly, para 3(a) of the 15 February 2007 MOU stated that it was the India Company that owed the plaintiff US$1.8m and therefore the plaintiff had accepted the India Company as the principal debtor in place of the Singapore Company. The defendants contended that they were not liable as guarantors of the debt owed by the India Company.

25 The defendants contended that under article 19 of the Supply Agreement any dispute,

controversy or claim arising out of the Supply Agreement should first be settled by arbitration and since the plaintiff had not taken steps towards arbitration, it was not entitled to maintain the present action against the defendants.

26 The defendants also contended that by virtue of article 12.2 of the Supply Agreement, their liability (if it existed) should not exceed US$100,000.

27 Specifically, the defendants contended that they were not liable in respect of some 18 invoices listed in Schedule 3 of the Statement of Claim (Amendment No 2) amounting to US$1,143,159.25 (*viz*, invoices nos. 247, 251 to 253, 255 to 259, 261 to 262, 264 to 265, 267, 269 to 271 and 273), being invoices for transactions entered into prior to the Supply Agreement and also between the plaintiff and the India Company.

28 The defendants also contended that they were not liable in respect of some 33 invoices listed in Schedule 3 of the Statement of Claim (Amendment No 2) amounting to US$1,143,159.25 (*viz*, invoices nos. 276 to 279, 281 to 287, 289 to 291, 295 to 296, 303, 305, 310, 312, 314, 319 to 320, 323, 327, 329, 331 to 332, 337, 339, 342, 344 and 347) which, although issued for transactions during the period of validity of the Supply Agreement, related to SIM cards supplied to the India Company.

29 The defendants further denied liability in respect of the invoices for SIM cards supplied after the expiry of the Supply Agreement on 13 July 2005.

30 In its Reply ["Reply (Amendment No 3)"], the plaintiff maintained that the sale of SIM cards as represented by the invoices set out in Schedule 2 of the Statement of Claim (Amendment No 2) was to the Singapore Company. The plaintiff essentially denied all the defendants' contentions as detailed above. It made several other points in its Reply (Amendment No 3) worth noting. The plaintiff pointed out that the defendants' position that the Singapore Company entered into the Supply Agreement as agents for the India Company contradicted its position that it was only liable for the supplies made to the Singapore Company under the Supply Agreement.

31 Further the plaintiff averred, the 15 February 2007 MOU was specifically entered into only with the India Company as it was intended that, without affecting the Personal Guarantee, it would give the plaintiff confidence that there was an additional avenue for it to obtain payment for the debts owed by the Singapore Company, the defendants personally and the India Company. It was not intended to grant either the defendants or the Singapore Company additional time to pay the debt. The plaintiff averred that the parties had agreed and it was at all material times clear that the defendants remained obliged to repay the plaintiff after the 15 February 2007 MOU was signed. The plaintiff added that the 15 February 2007 MOU was not legally enforceable as it would not come into force until the terms set out therein were finalised, which was never done.

The evidence

32 The plaintiff called eight witnesses to prove its case while the defendants and Uma testified for the defence.

The plaintiff's case

33 The plaintiff's first witness was Szeto Yan Chi Patrick ("Szeto") who was the plaintiff's Business Director from January 2005 to September 2007. He gave evidence on the signing of the Cooperation Agreement and its aftermath.

34 Szeto stated in his affidavit of evidence-in-chief ("AEIC") that he was asked by Yu to attend meetings with the first defendant in Chennai to discuss the Cooperation Agreement that was eventually signed on 17 March 2007. Szeto was in Chennai from 13 March 2007 to 3 April 2007. In cross-examination, he clarified that he had participated in meetings held on 14, 15, 16 and 17 March 2007.

35 Szeto revealed that, in Chennai, the first defendant had frequently (*viz*, two to three times a day) asked Yu and one Wang You Jun ("Wang") a director of the Plaintiff (see [54] below) at the various meetings whether the Personal Guarantee could be discharged as a result of the parties' entering into the Cooperation Agreement. Both Yu and Wang specifically said that they did not agree to the first defendant's request.

36 In particular, Szeto recalled a meeting on 16 March 2007 at which the participants included the defendants, Yu, Uma and himself. According to Szeto, at this meeting, the first defendant again asked that the Personal Guarantee be discharged and replaced by the Cooperation Agreement. Yu categorically answered "no" and told the first defendant that the Personal Guarantee would be discharged upon the plaintiff's receipt of payment of the principal debt in full. The first defendant appeared to agree to that.

37 Szeto deposed that after the Cooperation Agreement was signed, he was tasked by the plaintiff with overseeing the operations of the India Company to see if the India Company had any assets to pay the Singapore Company's debt. He asked Uma for the bank records, Indian telecommunication operators' purchase orders and other accounting records of the India Company but was not given any. He was also not given any authority to sign any cheques. Unable to do anything constructive, Szeto left India on 3 April 2007. He returned to India on 18 April 2007 but the situation did not improve. Uma only gave him some outdated bank statements which he exhibited in his AEIC. He returned to Singapore in mid-May 2007. In cross-examination, he stated that he was never appointed as a senior management staff of the India Company. When counsel for the defendants produced two letters addressed to the Federal Bank Limited, Chennai dated 28 March 2007 and 4 April 2007 and signed by himself, Szeto said that he had been deceived into signing those letters thinking that he had the authority to do so when in fact his signature was ineffective.

38 The plaintiff's next witness was Andrew Teh ("Teh"), an employee of the plaintiff from 20 October 2004 to 31 January 2008. Teh (PW2) testified on the signing of a Memorandum of Understanding dated 20 December 2004 which was exhibited in an affidavit of the first defendant ("the 2004 MOU") and which the defendants relied on as proof that the plaintiff knew that the India Company was the principal for whom the Singapore Company was acting as agent in the supply of SIM cards (see [60] below). Teh deposed that the 2004 MOU was not signed by him as the defendants alleged. He stated that the 2004 MOU could not be genuine for several reasons: first, the signature that appeared on the 2004 MOU which was allegedly his was not in fact his. Secondly, although his title in the 2004 MOU was stated as "General Manager" he was in fact only appointed as the plaintiff's General Manager (Asia) with effect from 1 January 2006. Thirdly, there would have been no reason for him to sign the 2004 MOU as in 2004, he was not managing the plaintiff's telecommunications products nor did sales in India fall within the scope of his duties at that time. Fourthly, the 2004 MOU stated that the plaintiff's corporate address was at No. 10 Eunos Road 8 #12-05, Singapore Post Centre, but in December 2004 the Plaintiff's registered address was in the OUB Centre and it was operating at Chai Chee Road. Finally, the defendants' allegation that the 2004 MOU was in fact signed by Teh on 20 December 2005 could not be true as Teh was in Manila on a business trip on 20 December 2005 (for which he exhibited his passport as proof).

39 The subsequent witness for the plaintiff, Paul Westwood ("Westwood") gave further evidence

on the authenticity of the 2004 MOU. Westwood (PW3) was a professional handwriting and document examiner with 40 years of experience in his field. Pursuant to instructions from the plaintiff's solicitors, he had undertaken an examination of a reproduction of the 2004 MOU ("Q1") (which was provided by the India Company as the best available copy of the document), for the purpose of determining the genuineness or otherwise of Q1 and the 2004 MOU. Westwood was instructed to confine his examination to the genuineness of the first defendant's signatures on Q1 ("the questioned signatures"). In his report, he observed that the remarkable degree of coincidence between various pair combinations of the questioned signatures with respect to four discrete stroke elements was far more than one would expect in freely written signatures as complex as the questioned signatures. He concluded that his observations gave rise to serious doubt as to the genuineness of Q1 and the original 2004 MOU which it purported to represent. In cross-examination, Westwood suggested that the slight differences which did exist between the questioned signatures might be a result of digital manipulation of the signatures.

40 Another witness called by the plaintiff was Pessy Chan Pei Sze ("Pessy"), who was the plaintiff's Senior Operation Executive in February 2007. Pessy (PW4) gave evidence on an e-mail allegedly sent by Uma to her on 15 February 2007 ("the 15 February 2007 e-mail"), authorising Pessy to deduct "server payments" made by the India Company from the outstanding debt owed by the Singapore Company (and thus reducing the amount of debt owed by the Singapore Company). When she took the stand, Pessy stated that she could not recall whether she had received the 15 February 2007 e-mail but stated that if she had, she would have forwarded it to Michael (viz Yu who was known as Michael Yu in the plaintiff's office). She could not recall whether the e-mail had been discussed between herself and Yu. She confirmed that when Neo Jit Jit ("Neo") (see [53] below) had asked her (by an e-mail dated 15 April 2008) whether she received the 15 February 2007 e-mail, she had replied (also by way of an e-mail which was exhibited in Neo's AEIC): "Not that I can recall…Btw, what is server payments?"

41 The key witness for the plaintiff was Yu (PW5), who was/is also the president of the plaintiff. In his AEIC, Yu confirmed that the plaintiff's mode of operations with respect to the supply of SIM cards to the Singapore Company beginning in 2004 was as pleaded above (in [15]). He deposed that the Supply Agreement merely encapsulated the existing relationship between the plaintiff and the Singapore Company and put it on a formal footing. Yu stated that at the time the plaintiff entered into the Supply Agreement, it was only familiar with the Singapore Company. The defendants had informed Yu that the India Company was a substantial company but Yu had his doubts, which was why the plaintiff only dealt with the Singapore Company. He deposed that the plaintiff did not "monitor" the Supply Agreement's expiry date and continued to supply SIM cards to the Singapore Company even after the Supply Agreement expired based on purchase orders issued by the Singapore Company. Thus, even though from the documents there appeared to be three relevant periods of supply (*viz*, the periods before, during and after the Supply Agreement), in actual fact there was a seamless supply to the Singapore Company based on the SGS Purchase Orders.

42 Yu pointed out that the Singapore Company had acknowledged that it was liable to pay under the plaintiff's invoices (whether containing the name of the India Company or the Singapore Company) in its own statement of accounts for 1 April 2004 to 31 March 2005 ("the Singapore Company's statement of accounts"). The Singapore Company's statement of accounts included the 2004 India invoices. Furthermore, the second defendant had signed (on behalf of the Singapore Company) audit confirmations for the years 2004, 2005 and 2006 ("the audit confirmations"). By the audit confirmations, the defendants (on behalf of the Singapore Company) had agreed that the sums stated as owing from the Singapore Company, which matched the plaintiff's statement of accounts, was correct.

43 Yu deposed that the Singapore Company built up a substantial debt to the plaintiff for the supply of SIM cards and by the end of 2005, he met with the defendants almost daily to try to resolve the situation. Yu wanted a schedule for all the arrears due to the plaintiff to be paid by instalments coupled with a personal guarantee signed by the defendants, and asked the plaintiff's solicitors to draft the personal guarantee. This led to the defendants' signing of the 12 June 2006 agreement and, shortly thereafter, the Personal Guarantee. However, as at 31 December 2006, the defendants failed to clear the outstanding debt. Yu therefore met the defendants a few times to discuss the clearing of the outstanding debt. During one of these meetings, the first defendant informed Yu that he would use the India Company's receivables to clear the outstanding debt. Yu and the first defendant continued intensive discussions during the period from January to March 2007. Yu told the defendants that if they did not clear the outstanding debt, the plaintiff had no choice but to sue them on the Personal Guarantee. The first defendant then offered shares in the India Company as additional security to the plaintiff.

44 Yu deposed that the 15 February 2007 MOU was drafted by the defendants and himself. He confirmed that its purpose was as stated in the plaintiff's Reply (Amendment No 3) (see [30] above). He stated that he did not ask the plaintiff's solicitors to vet the 15 February 2007 MOU as it was not intended to be a legally binding document. Yu said that he did not pay attention to the description in the 15 February 2007 MOU of the persons who owed the debt to the plaintiff. According to him, even at the time the 15 February 2007 MOU was signed, the defendants acknowledged to him that they had a liability to pay under the Personal Guarantee and promised that they would settle the debt as soon as possible.

45 Yu deposed that no payments were made by the defendants or the defendants' companies after the 15 February 2007 MOU and thus in March 2007 he told the defendants that they should settle the outstanding debt due under the Personal Guarantee without further delay. The defendants then proposed that Yu visit the India Company so that he could see that it was a credible company and to see what arrangements could be made for payment of the outstanding debt. Yu visited India with Szeto in March 2007, during which trip the Cooperation Agreement was signed. Yu stated that the Cooperation Agreement was merely a preparatory agreement to implement the monitoring of the India Company's cash flow so that the plaintiff could assess the financial position of the India Company, as it was envisaged in the 15 February 2007 MOU that the India Company would transfer 50% of its shares to the plaintiff as security for the debt. In cross-examination, he stated that although he had signed the Consent form to act as a director dated 17 March 2007, he never actually became a director of the India Company.

46 Yu stated that at the time the terms of the Cooperation Agreement were being discussed, the first defendant wanted the plaintiff to discharge the defendants from the Personal Guarantee by putting a clause in the Cooperation Agreement to that effect; Yu informed the first defendant that this was impossible and the latter accepted it.

47 When he testified, Yu explained why the plaintiff had amended the Statement of Claim and the accompanying statements of accounts during the course of the proceedings. According to him, the annexed statements of accounts in the first Statement of Claim (which only listed the invoices issued in 2005) were based on the FIFO accounting principle. After using the payments from the Singapore Company to clear the debt under the earliest invoices, the balance invoices happened to fall within the duration of the Supply Agreement. Subsequently, the plaintiff filed for summary judgment. In the course of the hearings and pursuant to the judge's direction (so that he could make a decision based on the face of the documents), the plaintiff amended the statement of accounts to show every transaction between the plaintiff and the Singapore Company beginning from 2004, using the running account method. However, the defendants then claimed that the running account method should not

be used because some payments had been made in reference to specific invoices. Hence, the plaintiff amended the Statement of Claim again, adding a master statement of accounts prepared by himself and Neo in which all specific payments were set off against the specific invoices while the FIFO principle applied to non-specific payments (*ie*, Schedule 2 of the Statement of Claim (Amendment No 2)). Yu pointed out that no matter which method was used, the same amount of debt owed by the defendants (*viz*, US$1,623,346.14) was obtained.

48 Yu averred that he believed that the 15 February 2007 e-mail allegedly sent by Uma to Pessy was a fabricated document as it was usual for Pessy to forward to him e-mails which she received, which had not been done in this instance. He had asked a third party expert to check Pessy's laptop for evidence of the e-mail and no trace of it was found, although Yu also informed the court that the expert had said this could not prove that the e-mail did not exist because others had used the laptop after Pessy; thus, the hard disk might have already been affected. Yu stated that the plaintiff had never signed a server agreement with the India Company and thus received those payments designated as "server" payments from the India Company as general payments to clear the outstanding debt of the Singapore Company in respect of the SIM cards supplied. Those payments had already been reflected in Schedules 2 and 3 of the Statement of Claim (Amendment No 2).

49 Neo (PW6) was at the time of the trial the plaintiff's operations manager. Neo deposed that in 2004 and 2005, the plaintiff received payments for the SIM cards supplied pursuant to the SGS Purchase Orders as and when the Singapore Company decided to make payment. The plaintiff would allocate each payment received to the earliest invoices on a FIFO basis. Starting from 1 January 2006, the plaintiff required the Singapore Company to make advance payments for all the SIM cards delivered that year. Apart from these advance payments, the defendants made additional payments in 2006 which, after applying the FIFO method, managed to satisfy the invoices issued in 2004. This was why the statement of accounts annexed to the original Statement of Claim only listed the invoices for transactions beginning from 2005.

50 Neo deposed that on or about 12 October 2006, she met the second defendant at the Singapore Company's office for the purpose of reconciling the plaintiff's accounts with the Singapore Company's accounts. It was then that the second defendant gave her a copy of the Singapore Company's statement of accounts. Neo also pointed out that the second defendant had signed the plaintiff's audit confirmations for the financial years ended 2004, 2005 and 2006. Except for the audit confirmation for the year ended 2004, the amounts in each of the audit confirmations matched the outstanding sums at the relevant dates in the plaintiff's statement of accounts. The amount stated in the audit confirmation for the year ended 2004 was slightly lower (by the sum of US$65.25) than the balance in the plaintiff's statement of accounts as at 31 December 2004 because the plaintiff had become GST-registered since 13 December 2004 and the GST payable was by error not taken into account in the audit confirmation.

51 Neo deposed that she had caused searches to be done with the Registry of Companies to determine the registered address of the plaintiff in December 2004. She confirmed that in December 2004, the registered address of the plaintiff was at OUB Centre. She further deposed that the plaintiff's operating address in December 2004 was Chai Chee Road and that the plaintiff only shifted to the Singapore Post Centre in July 2005. Copies of the lease agreements signed by the plaintiff in respect of the premises at Chai Chee Road and Singapore Post Centre were exhibited in her AEIC.

52 Neo deposed that in December 2004 there was only one rubber stamp for the plaintiff. She made two further rubber stamps in May 2006 which were identical to the rubber stamp used in 2004. The first letter of each word in these rubber stamps was capitalised and the rest of the letters were not.

53 Neo stated that as Pessy was the most junior employee of the plaintiff, any e-mails sent by Uma would normally be sent to either Neo or another of the plaintiff's employees, Tian Hui (see [55] below) and copied to Pessy. Neo stated that she had checked both her own and Tian's computers and neither computer had any record of the 15 February 2007 e-mail. Neo deposed that she had called Pessy and enquired about the e-mail. Pessy had orally and via e-mail confirmed that she was not aware of the 15 February 2007 e-mail. Neo exhibited a copy of Pessy's e-mail response which has already been set out above (at [40]).

54 The next witness for the plaintiff was Wang You Jun ('Wang") a director of the plaintiff. His evidence was somewhat confusing. In his AEIC Wang (PW7) averred that he was in India on 17 March 2007 when the Cooperation Agreement was signed and that at the meeting the first defendant had asked that the defendants be discharged from the Personal Guarantee. Yu who was also present at the meeting, rejected the request. In cross-examination however, Wang said first, that no such request was made; then that there were two meetings, one in Pondicherry on 15 March 2007and one in Chennai on 16 March 2007 and he could not remember at which meeting the request was made; then later said he could not remember whether the first defendant actually made the request; and finally said that he had only heard of the request via the interpretation of Yu.

55 The last witness for the plaintiff was Tian Hui ("Tian"), the technical consultant of the plaintiff from November 2003 to August 2006 and the plaintiff's sales manager at the time of the trial. She deposed that she was the main person handling the account of the Singapore Company and coordinated the deliveries of SIM cards pursuant to the SGS Purchase Orders. According to Tian (PW8), the Singapore Company only had one account in respect of the transactions pursuant to the SGS Purchase Orders and the account was with the Singapore Company.

56 Tian deposed that she was the person who generated the plaintiff's invoices in 2004. She stated that the names and addresses under the "Forwarding address/Markings" column in the invoices were stated based solely on the location to which the SIM cards were being delivered, *ie*, the addresses stated were shipping addresses. As far as she was aware, the plaintiff's contractual relationship was with the Singapore Company and the invoices were issued to the Singapore Company notwithstanding that they may have contained the name of the India Company in the "Forwarding address/Markings" column.

57 Tian also deposed that a memorandum of understanding ("the Al Hatim MOU") which the defendants alleged had been signed by Teh on 20 December 2005 at the same time as the 2004 MOU was in fact sent to her by the second defendant by e-mail, signed by her on behalf of Teh and faxed back to the defendants. Tian exhibited the relevant e-mail correspondence in her AEIC.

The defendants' case

58 The first defendant pointed out in his AEIC that Neo in an affidavit affirmed on 17 March 2008 classified the plaintiff's invoices in three categories, of which the third category contained 50 invoices which she then averred related to invoices for deliveries of SIM cards to the India Company and for which payment was received from the India Company 50 invoices. He also pointed out several alleged discrepancies between the statement of accounts attached to the plaintiff's letter of demand dated 8 August 2007 and the statement of accounts in the original statement of claim. He also referred to other alleged admissions by the plaintiff's witnesses including by Neo, in an affidavit filed on 3 December 2007 where she stated (at para 24), that the plaintiff had supplied SIM cards to the Singapore Company under the terms of the Supply Agreement, and by Yu in an affidavit filed on 3 December 2007 in which he stated that the purpose of the 15 February 2007 MOU with the India Company was to give the plaintiff more confidence that the debt to the plaintiff which "included" the

sum due from the Singapore Company would be repaid.

59 The first defendant deposed that the India Company did comply with the terms of the Cooperation Agreement. He averred that Yu was appointed director of the India Company and produced documents to prove this including an application form for a provisional director identification number ("DIN") signed by Yu. He also averred that Szeto had been appointed as a senior management staff. The first defendant deposed that after obtaining the India Company's customer data, pricing list and other sensitive information, Yu had registered a company in India on 30 August 2007 on behalf of the plaintiff to compete with the India Company in the SIM card market for the same customers. He suggested that this was the motive for the plaintiff's commencement of this action against the defendants.

60 In cross-examination, the first defendant maintained the position that the SGS Purchase Orders were all placed by the Singapore Company on behalf of the India Company as agents, relying on the phrase "for our India operations" in the preamble of the purchase orders issued in 2004.

61 The first defendant stated that copies of the plaintiff's invoices would be received at the Singapore Company. However, he said that the material and consignment details as well as the original invoices would be sent to the India Company and that as agent, the Singapore Company had a right to have the invoices. When counsel for the plaintiff pointed out that the first defendant had included in the list of invoices allegedly due to be paid by the India Company (see his AEIC at [9] and [10]) invoices in which the name and address in the "Forwarding address/ Markings" column were the Singapore Company's, his response was that his AEIC was wrong.

62 In respect of the Singapore Company's statement of accounts, the first defendant testified that it included invoices containing the India Company's name and address in "Forwarding address/Markings" column because the Singapore Company wanted to keep track of all the transactions that took place between the plaintiff and the Singapore Company when the latter was acting as agent for the India Company.

63 He accepted that he had not produced evidence of any instance where the Singapore Company acted as agent for the India Company; nor any written agency agreement between the Singapore Company and the India Company, nor had he given any evidence in his AEIC as to how an agency relationship came about between the two companies.

64 The first defendant accepted that the first SGS Purchase Order contained all the information prescribed in article 5.2 of the Supply Agreement (except the description of the products being ordered and the address of place of delivery, which he acknowledged were also not found in the purchase orders sent during the period of Supply Agreement.

65 He accepted that the Personal Guarantee contained no reference to the Supply Agreement and did not dispute that even during the term of the Supply Agreement, contracts for the supply of SIM cards were formed only when the purchase orders issued by the Singapore Company were accepted by the plaintiff, and that the Supply Agreement governed these individual contracts.

66 The first defendant did not deny signing the Personal Guarantee and did not dispute that the plaintiff's consideration for the Personal Guarantee was the granting of time to the Singapore Company to pay the outstanding debt. However, he maintained that the US$2,114,846.40 figure in the Personal Guarantee covered debts owed by the Singapore Company and by the India Company. He alleged that no statement of accounts was presented by the plaintiff at the time of the signing of the Personal Guarantee. He also stated that he had had no chance to view the draft of the Personal

Guarantee prior to the date of signing.

67 In an apparent contradiction of the pleaded Defence, the first defendant insisted that 15 February 2007 MOU did not amount to a transfer of debt and that his only position was that the debt was always payable only by the India Company.

68 When it was pointed out to him that the contention that the defendants were discharged under the Personal Guarantee by the extension of time for the payment of any sum due from the India Company implied that the defendants were liable for the debt of the India Company under the Personal Guarantee, the first defendant gave an account of the genesis of the 15 February 2007 MOU that was not present in his AEIC, *viz*, that the defendants had signed the Personal Guarantee without the benefit of detailed accounts as at that time they thought it was the Singapore Company which owed the debt to the plaintiff. Subsequently, after looking at the India Company's accounts, the defendants realised it was not the Singapore Company which owed the debt. They informed Yu of this and Yu then suggested signing 15 February 2007 MOU.

69 When counsel for the plaintiff pointed out that cl 1(3) of the Cooperation Agreement meant that there was no agreement yet for even the transfer of shares in the India Company as envisaged by article 4 of the 15 Feb 2007 MOU, the first defendant's response that this was because there were exchange control formalities to be complied with. The first defendant claimed that the second defendant and Uma had in fact submitted their resignations as directors of the India Company and the India Company had started the process for acceptance of the resignations, but accepted that no evidence had been produced to support this claim. The first defendant acknowledged that he had no proof that the application form for a DIN signed by Yu was actually submitted.

70 The first defendant testified that he did not mention the 2004 MOU in his AEIC because it was a disputed document. He denied that the questioned signatures were digital replications and stated that as he used to work as a banker his signature would be very uniform. It should be noted that when the first defendant first brought up the 2004 MOU in his affidavit filed on 26 October 2007 (in response to the plaintiff's application for a Mareva injunction), he gave no indication that the 2004 MOU was signed other than on 20 December 2004. In a subsequent affidavit filed on 13 November 2007 however, he stated that the 2004 MOU was actually signed on 20 December 2005 at the same time as the Al Hatim MOU by Teh who placed different rubber stamps on the two MOUs. Then in his affidavit filed on 19 August 2008, the first defendant shifted his position to state that the 2004 MOU was signed on 18 December 2005.

71 The first defendant claimed that he was carbon-copied the 15 February 2007 e-mail from Uma. He claimed that he could not give proof of this as his computer was damaged stating (at N/E 353-354):

> In fact that computer I have given to the – it was quite an old computer which was using and I – it fell down in the aircraft, and then, afterwards, I gave it to the church and it has gone to the church, and I changed my computer some time in this May.

He also testified that he did not allow the computer expert to image Uma's computer's hard disk because it was Uma's personal computer and he was not authorised to let the expert do so.

72 The second witness foe the defence was the second defendant. She admitted that she managed the operations of the Singapore Company from 2004 to 2007. However, she claimed that she never maintained nor perused the Singapore Company's accounts, as she had very little knowledge of accounting.

73 The second defendant described the SGS Purchase Orders as non-binding "forecast documents/orders". She said that they could not be confirmed contracts because they only confirmed the pricing of the SIM cards; the quantity, configuration, artwork and security information could only be confirmed when the input files came in.

74 The second defendant did not dispute that Neo had visited the Singapore Company's office on 12 October 2006. However, she said that they did not discuss or carry out the reconciliation of the plaintiff's and Singapore Company's accounts. She also testified that the Singapore Company's statement was in fact given by Neo to the Singapore Company's ledger keeper and that she was not aware that the ledger keeper had given a copy to Neo.

75 The second defendant testified that she had signed the audit confirmations without verifying the sum stated therein by reference to any statement of accounts because at that time the plaintiff and the Singapore Company enjoyed a good working relationship and she trusted the plaintiff to give the correct figure. She claimed she signed the audit confirmations under pressure from Neo that if she did not sign, the plaintiff would not honour the SGS Purchase Orders.

76 The second defendant confirmed that the Singapore Company had received invoices sent by Tian in 2004 for shipments of SIM cards.

77 She testified that the defendants did not bother to check the sum stated as owing under the Personal Guarantee against the Singapore Company's accounts again because of the good working relationship with plaintiff. She claimed that the Singapore Company only finalised its accounts in January 2008.

78 According to the second defendant, the first defendant had asked her to resign as director of India Company but that resignation was not registered. She testified that the application for joint account envisaged by article 8 of 15 February 2007 MOU was made, but the account was never actually opened and transactions after the 15 February 2007 MOU for the supply of SIM cards were not processed through a joint account. She acknowledged that no shareholder agreement had been entered into for the transfer of the India Company's shares as envisaged by the 15 February 2007 MOU. She maintained that the plaintiff's claim could not stand because the India Company "took the debt" under the 15 February 2007 MOU.

79 The second defendant agreed that the Cooperation Agreement was for the purpose of undertaking due diligence on the India Company before there could be acceptance of the India Company's shares that were being offered as collateral.

80 The second defendant revealed that she was not actually present when Teh allegedly turned up at the Singapore Company's office and signed the 2004 MOU. When it was pointed out that in an affidavit jointly sworn by the defendants on 13 November 2007 the defendants had stated that Teh signed the 2004 MOU in both their presence, the second defendant claimed she could not remember whether the signing had taken place as averred.

81 The defence's final witness was Uma who became an alternate director of the India Company in 2005 and also owned 50,000 shares in the India Company. She was Assistant Vice-President of the India Company and in charge of looking after its finance and taxation matters.

82 Uma testified that she had signed the Cooperation Agreement as a witness and was well aware of its terms. She said that the preamble referred to a debt owed by "Sharon Global Solutions…*and* Sharon Solutions (India) Private Limited [emphasis added]" because the Singapore Company acted on

the India Company's behalf as agents. She disagreed that the purpose of the Cooperation Agreement was to facilitate the plaintiff's conducting of due diligence on the India Company in order to decide whether to accept the India Company's shares as security.

83 Uma confirmed that she was the person who dealt with Szeto in respect of disclosure of documents. She testified that she showed him the confidential documents kept in the India Company's office in Chennai, including purchase orders, customer invoices and bank statements. She explained that she did not submit her resignation as director of the India Company because as alternate director she would automatically cease to be director once the second defendant resigned.

84 Uma testified that she was the one who discovered on a Registrar of Companies website that Yu had registered a company in Bangalore, India on 30 August 2007. She did not dispute that she had produced no evidence that the plaintiff's new company was in direct competition with the India Company. She maintained that the plaintiff's new company bypassed the India Company to deal directly with the Indian telecommunications operators.

85 She claimed that she was not aware that an order had been made for the production of the hard disk of her laptop to the plaintiff's expert in Singapore when the expert visited the India Company's office on 2 October 2008. In a sudden twist, she revealed that she had been in Pondicherry with the laptop at the time. She had filed a police report stating that the laptop had been stolen from her car on 30 October 2008. She claimed that she had left the laptop on the passenger seat and testified in cross-examination that someone had broken the glass window of the car and stolen it (this detail was absent in the police report).

The parties' submissions

86 In the closing submissions for the plaintiff, its counsel essentially repeated the contentions in the pleadings and the positions taken by the plaintiff's witnesses in their evidence. Hence, I shall not repeat the points here.

87 In the closing submissions for the defendants, their counsel focused on three main submissions. The first was that the Supply Agreement was valid only for one year, from 14 July 2004 to 13 July 2005. Thus, it was submitted that the defendants could only be liable as guarantors for supplies made during that period, and for that matter only up to a limit of $100,000 by virtue of article 12.2. Counsel for the defendants pointed out that the cause of action in the original statement of claim filed on 7 September 2007 was based on the supplies made under the Supply Agreement. This was so even after the first amendment of the Statement of Claim on 5 February 2008. Furthermore, it was pointed out that article 5.4 of the Supply Agreement provided that: "At all times the terms of this agreement shall prevail over the terms of any purchase order to be issued."

88 The second submission was that an inference that the Singapore Company was acting as agents for the India Company in contracting with the plaintiff could be made on the basis of three documents. The first document was the 15 February 2007 MOU, under which the plaintiff had accepted the India Company as the debtor for US$1.8m (by virtue of paras 2, 3 and 15 of the 15 February 2007 MOU). The second document was the Cooperation Agreement, which was entered into between the plaintiff and the India Company and referred to the debt "owed by Sharon Global Solutions Pte Ltd (SGS) *and* Sharon Solutions (India) Private Limited [emphasis added]". Clause 1 of the Cooperation Agreement also provided that the plaintiff would not commence any legal action against the India Company "in respect of the debt". Finally, there was a non-disclosure agreement entered into between the plaintiff and the India Company exhibited in Uma's affidavit.

89 The third submission was that the defendants had been discharged from their liability under the Personal Guarantee by virtue of the plaintiff's acceptance of the India Company as the debtor under the 15 Feb 2007 MOU, Cooperation Agreement and non-disclosure agreement. The Privy Council decision of *Commercial Bank of Tasmania v Jones* [1893] AC 313 was cited as authority for the proposition that the acceptance of another person as full debtor, constituting novation of the principal debt, operates as an absolute release of the guarantor of the principal debt.

The decision

90 I accepted the plaintiff's contention that the Singapore Company and the plaintiff had a contractual relationship based on the terms of supply as set out in the SGS Purchase Orders even before the Supply Agreement came into being. The procedure stipulated for the supply of SIM cards under articles 5.2 and 5.3 of the Supply Agreement was the same as that which was used prior to the Supply Agreement and indeed even after its expiry. It was not disputed that even during the period of the Supply Agreement, individual contracts for the supply of SIM cards were only formed when the purchase orders issued by the Singapore Company were accepted by the plaintiff.

91 The alleged admission by Neo that the plaintiff's supply of SIM cards was under the terms of the Supply Agreement was made prior to the amendment of the Statement of Claim. The relevant statement of claim by the time of the trial was the Statement of Claim (Amendment No 2).

92 The Singapore Company itself had included amounts representing transactions pursuant to purchase orders issued prior to the Supply Agreement in the Singapore Company's statement of accounts. I did not believe the second defendant's evidence that this statement of accounts was actually generated by the plaintiff. On balance, Neo had been a more credible witness than the second defendant (I will deal with other instances of the second defendant's lack of credibility below) and I accepted her version of the events that had taken place on 12 October 2006 (see [50] above). The Singapore Company's own acceptance of the debts under the purchase orders in its statement of accounts further meant that the defendants' arguments that the plaintiff should have proceeded to arbitration first and that the claim should be limited to US$100,000 could not stand.

93 I noted that the defendants never disputed signing the Personal Guarantee which clearly stated that the amount of US$2,114,846.40 was owed by the Singapore Company and made them the guarantors of this debt. The story which emerged in the cross-examination of the first defendant that it was later discovered that the debt was actually owed not by the Singapore Company but by the India Company was clearly an afterthought. It was inherently incredible that the defendants would have signed a guarantee for such a large sum without first double-checking the amount by reference to the Singapore Company's accounts. Although Wang's evidence on whether the first defendant had asked to be discharged from the Personal Guarantee on 16 March 2007 prior to the signing of the Cooperation Agreement was confused, taking into account the testimony of Szeto and Yu, I found on a balance of probabilities that the defendants were aware that they were liable for the sum stated in the Personal Guarantee, as guarantors of the principal debt owed by the Singapore Company. Consideration was unnecessary as the Personal Guarantee was by way of deed; in any event if it was, the consideration was constituted by the plaintiff's granting time to the Singapore Company to pay the outstanding debt as stated in para 4 of the Personal Guarantee. The fact that the Personal Guarantee did not make any reference to the Supply Agreement further reinforced my view that the basis of the plaintiff's claim against the defendants lay in the SGS Purchase Orders and not the Supply Agreement.

94 The defendants' contentions were often contradictory and sat ill together. They could not maintain on the one hand that the Singapore Company had signed the SGS Purchase Orders and

entered into the Supply Agreement as agent for the India Company and on the one hand, contend that they were only liable for the supply of SIM cards to the Singapore Company during the period of the Supply Agreement or that the 15 February 2007 MOU had effected a transfer of the Singapore Company's debt to the India Company. It was little wonder that the defendants themselves often could not maintain a consistent position. For example, the first defendant had maintained in his AEIC (at para 13) that the plaintiff at all material times knew and accepted that the Singapore Company entered into the Supply Agreement as agents for the India Company. He later contradicted this position when he testified that he had never said that the plaintiff's contractual relationship was with the India Company. Finally, upon being pressed, he reverted to his original position that when the Supply Agreement was signed, the plaintiff's contract was with the India Company. Yet another example of his inconsistency was the first defendant's averment that the 15 February 2007 MOU transferred the debt to the India Company. Later, he changed his position on the stand stating that his position was that the debt was always payable only by the India Company. His wife on the other hand, maintained on the stand that the 15 February 2007 MOU had transferred the debt to the India Company.

95 In my view, there was insufficient evidence to show that the Singapore Company had issued the SGS Purchase Orders and entered into the Supply Agreement as agent for the India Company. The phrase "for our India operations" in the SGS Purchase Orders in 2004 did not preclude the Singapore Company purchasing as principal the SIM cards to be shipped to India. There was nothing on the face of the Supply Agreement to indicate that the Singapore Company was contracting on behalf of another party. I also accepted the plaintiff's position that the 15 February 2007 MOU was merely intended to give another avenue for the repayment of the debt accumulated by the Singapore Company and Yu's evidence that he had failed to notice that the debt was stated as owing from the India Company, because the 15 February 2007 MOU was not vetted by his solicitor. Thus, the 15 February 2007 MOU could not constitute evidence of an agency relationship between the Singapore Company and the India Company. I also accepted the plaintiff's position that the Cooperation Agreement was signed for the plaintiff to carry out due diligence on the India Company in order to decide whether or not to accept its shares as collateral (which position the second defendant did not dispute). Thus, the Cooperation Agreement followed on from the 15 February 2007 MOU and was part of the plaintiff's effort to find additional avenues for the repayment of the debt due from the Singapore Company. It did not constitute evidence of an agency relationship between the Singapore Company and the India Company.

96 At this point it is apposite to deal with the 2004 MOU as the defendants had averred in their joint affidavit dated 13 December 2007 that the plaintiff would not have signed the 2004 MOU with the India Company if it had not known that the India Company was the principal in the contracts for the supply of SIM cards. The testimony of Teh and Westwood clearly showed that the 2004 MOU was a fabricated document. The defendants' own constant change in position on when the 2004 MOU was signed was also damning. Furthermore, Neo's evidence on the plaintiff's rubber stamps and Tian's testimony on the signing of the Al Hatim MOU undermined the defendants' claim that Teh had signed both the 2004 MOU and the Al Hatim MOU on 20 December 2005 using different stamps. The defendants' rather desperate attempt to rely on a fabricated document and the falsehoods they had to tell to establish its genuineness cast serious doubts on their general credibility.

97 I accepted Tian's evidence on the reason for the India Company's name and address being on the 2004 India invoices. The Supply Agreement itself envisaged that the India Company's address would generally be the billing address (see article 3 of the Supply Agreement set out in [7] above). It was particularly significant that the Singapore Company had itself included the 2004 India invoices in its statement of accounts (and as mentioned in [92] above, I did not believe that the Singapore Company's statement of accounts was generated by the plaintiff). I concluded that the Singapore

Company was liable to pay the plaintiff in respect of the 2004 India invoices. I also found that the plaintiff's explanation (as given by Yu and Neo) of why the statements of accounts were different in each version of the Statement of Claim was sound. Thus, the defendants' reliance on the discrepancies in the various statements to cast doubt on the genuineness of the plaintiff's claim was unsustainable. It was also noteworthy that the defendants had accepted that they owed the sums stated in the audit confirmations (which corresponded with Schedule 2 of the plaintiff's Statement of Claim (Amendment No 2)). It was utterly incredible that the second defendant did not verify the sums by checking the Singapore Company's accounts before signing the audit confirmations. In any case, if she chose not to do so, she could not now disavow her signature on the audit confirmations. The second defendant's uncorroborated testimony, that she only signed the audit confirmations under pressure, was not mentioned in either her or her husband's affidavits and was clearly a weak attempt at trying to cast doubt on the binding effect of her signatures on the audit confirmations.

98 Having rejected the defendants' contention that the Singapore Company was acting as agent for the India Company, I then considered whether there was a transfer of the principal debt from the Singapore Company to the India Company under the 15 February 2007 MOU. It was eminently clear from para 1 of the 15 February 2007 MOU that it was not a legally enforceable agreement. The Cooperation Agreement ought to have formalised the arrangements envisaged by the 15 February 2007 MOU and thereby brought it into force, but the Cooperation Agreement was never in fact implemented. The defendants' own evidence showed that while the processes had commenced for the resignation of the second defendant and Uma as directors of the India Company and for Yu to be appointed director (in compliance with cl 1(1)(a) and (b) of the Cooperation Agreement), they were never completed. On Uma's own evidence, it appeared that only the purchase orders, customer invoices and bank statements for 2007 were given to Szeto and thus cl 2 of the Cooperation Agreement was also never effected. Apart from the few documents exhibited by Szeto, no other documents belonging to the India Company were produced as having been furnished to Szeto. On the second defendant's own evidence, the joint account envisaged in para 8 of the 15 February 2007 MOU was never formally opened. Nor was the transfer of shares from the India Company carried out as evinced by cl 1(3) of the Cooperation Agreement.

99 Since the 15 February 2007 MOU was not legally binding and it was not brought into effect by the Cooperation Agreement, the defendants' submission that they had been discharged from their obligations under the Personal Guarantee by virtue of the extension of time to pay the debt and/or a novation of the principal debt under these agreements could not stand.

100 The defendants' claims that the debt owed by the Singapore Company had been settled in full was completely unsubstantiated by any documentary evidence and was also unsustainable in the face of the plaintiff's clear statements of accounts. As for the contention that the server payments should be set off against the sum claimed, I found, on considering the evidence of Yu, Pessy, Neo, the first defendant and Uma that the 15 February 2007 e-mail was undoubtedly a fabrication and was never in fact sent by Uma to Pessy. The first defendant's claim that he was copied the e-mail was extremely dubious given the lateness of the revelation that his laptop was damaged (not to mention his unconvincing account of how it was damaged) and reflected poorly on his credibility. Uma's own story about how her laptop was stolen was even more incredible and mind-boggling. She could not satisfactorily explain (see N/E 469) why she chose to leave the laptop in plain view on the passenger seat next to the driver's car. Her flimsy explanation that she had to leave it on the seat next to her when driving had nothing to do with storing it away in the boot as any sensible person would have done, if a laptop was to be left in an unattended car or overnight. In any case, it was clear from the plaintiff's statement of accounts that the payments designated as server payments by the India Company had already been taken into consideration in calculating the amount claimed in this action.

101 Although it is true that the plaintiff had set up a new company in India, there was no evidence to prove that this new company was in fact in competition with the India Company. In any case, the plaintiff had established its claim based on hard facts and documentary evidence and there was no reason to dismiss the claim even if it had the effect of driving a competitor under.

Conclusion

102 Throughout the proceedings, the defendants gave inconsistent and sometimes inherently incredible evidence. Their evidence often underwent surprising evolutions as reflected in their witnesses' evidence on the 2004 MOU and the 15 February 2007 e-mail. I entertained serious doubts on their credibility as well as that of their witness Uma. In contrast, the plaintiff presented a straightforward and coherent case with ample documentary evidence.

103 Consequently, I awarded judgment to the plaintiff on its claim in the sum of US$1,623,346.60 with interest from the date of the writ (7 September 2007) with costs on a standard basis to be taxed unless otherwise agreed.

Copyright © Government of Singapore.