IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 18

Suit No 4 of 2019 (Summons No 30 and 31 of 2020)

Between

Singapore Airlines Ltd

… *Plaintiff*

And

CSDS Aircraft Sales & Leasing Inc

… *Defendant*

JUDGMENT

[Civil Procedure] — [Pleadings] — [Further and better particulars]
[Civil Procedure] — [Rules of court]
[Evidence] — [Witnesses] — [Attendance]

Singapore Airlines Ltd
v
CSDS Aircraft Sales & Leasing Inc

[2020] SGHC(I) 18

Singapore International Commercial Court — Suit No 4 of 2019 (Summons No 30 and 31 of 2020)
Jeremy Lionel Cooke IJ
22 and 25 June 2020

16 July 2020 Judgment reserved.

Jeremy Lionel Cooke IJ:

1 This judgment pertains to two applications: (a) the plaintiff's application for Further and Better Particulars in SIC/SUM 30/2020 ("SUM 30"); and (b) the plaintiff's application in SIC/SUM 31/2020 ("SUM 31") for certain orders and/or directions. I address the applications in turn.

SUM 30

2 The plaintiff seeks Further and Better Particulars of paragraph 27 of the Amended Defence and Counterclaim, originally served on 24 May 2019 and amended twice since, on 1 July 2019 and 11 June 2020, in the light of what are said to be inadequate further particulars furnished on 21 November 2019 ("Further Particulars") in response to a request dated 14 October 2019. That request related to the Defence and Counterclaim (Amendment No 1) (which is

unchanged in the Defence and Counterclaim (Amendment No 2)) where the following was pleaded:

> 27. The Defendants further aver that due to the airframe not being delivered, the Defendants had to cancel both the back-to-back contract with CamAir and the agreement with Turkish Technic to acquire the two Rolls Royce engines.

3 Order 18 rule 12(3) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("ROC") provides that the court may order a party to serve on any other party particulars of any claim, defence or other matters stated in his pleading or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

4 Particulars were sought by the plaintiff as to:

(a) when the cancellations took place and of the full facts, matters and circumstances of the manner in which the defendant, CSDS Aircraft Sales & Leasing Inc, allegedly cancelled the contract with CamAir and the agreement with Turkish Technic;

(b) whether the cancellations were made orally or in writing;

(c) if orally, the names and designation of the parties representatives who made and received the communications on the part of the defendant, CamAir and Turkish Technic; and

(d) if in writing, the identity of the document that contained the relevant communications and the full particulars of such documents.

5 In the Further Particulars provided on 21 November 2019, the defendant stated that the cancellations took place "[i]n or around December 2018" and that CamAir and Turkish Technic were each contacted by telephone and informed

that the defendant or its associated company was unable to complete the contracts as the defendant had not procured the aircraft from the plaintiff. The defendant stated that the particulars sought as to the name and designation of the parties' representatives were not relevant to the pleaded case, using the same wording as that given in response to the request to identify any documents containing communications of cancellation.

6 The short point at issue is whether or not the plaintiff is entitled to the particulars that have been refused in relation to the identification of the parties' representatives, by name and designation, and the identification of any relevant documents recording the alleged cancellations. The defendant maintains that these are matters of evidence, more appropriate to issues of discovery or interrogatories and are not matters of pleading since the plaintiff knows the nature of the case being made against it and is able to plead to it.

7 In support of that proposition, the defendant contends that the application for these particulars is an abuse of process because further and better particulars are not to be confused with evidence and "if the only object of the summons be to obtain the names of witnesses or some other clue to the evidence of the other party, it will be dismissed", citing the commentary in *Singapore Civil Procedure 2020* (Vol 1) (Chua Lee Ming gen ed) (Sweet & Maxwell, 2020) ("*Singapore Civil Procedure 2020*") at para 18/12/51. It is said that the request is merely a "fishing expedition" in circumstances where the plaintiff is perfectly able to plead and answer to the case put. It is said, citing *Sharikat Logistics Pte Ltd v Ong Boon Chuan and others* [2011] SGHC 196 ("*Sharikat Logistics*") at [7] (which in turn cites *BA Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* 72 BLR 26, 33), that "[t]he basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it". Only "material facts" need

to be pleaded and evidence is not required (*Sharikat Logistics* at [8]). "Material facts" are those which are necessary for a party to know the case it has to meet. As put in *Element Six Technologies Ltd v Ila Technologies Pte Ltd* [2017] SGHCR 16 at [12(b)], "[m]aterial facts are the facts that are necessary for the purpose of formulating a complete cause of action, so that the opposing party is given fair notice of the case to be met and may direct his evidence to the relevant issues".

8 There can be no doubt as to the general principles applicable and the distinction to be drawn between pleading facts and evidence. Nonetheless, when facts are pleaded, they must be pleaded with sufficient particularity for the other party to know the case it has to meet and to assess what evidence it needs to adduce to meet that case.

9 It is for that reason that both practice and the authorities require details of pleaded contracts, variations or cancellations to be given, by reference to what have become fairly standard forms of words. The point is clearly made by Vivian Ramsey IJ in *Arovin Ltd and another v Hadiran Sridjaja* [2018] 5 SLR 117 ("*Arovin Ltd*"), citing the commentary in what was then the *Singapore Court Practice 2018* (Jeffrey Pinsler gen ed) (LexisNexis, 2018) at para 18/12/10, where an ordinary form of request is set out. That accords with my experience both domestically in the United Kingdom and internationally in arbitration and other courts in which I have sat, where a standard form along these lines is adopted with minor variations:

> … stating whether the said [agreement/variation/cancellation] was made orally or in writing; if orally stating when, where and between whom the said [agreement/variation/cancellation] was made and stating the substance of the words used and all

> relevant terms relied on: if in writing identifying all material documents.

10 The learned judge in *Arovin Ltd* went on to point out the difference between using particulars to seek evidence, namely as to how a matter is to be proved, as opposed to particulars of the facts which are to be proved, referring to the then current *Singapore Civil Procedure 2018* (Foo Chee Hock editor-in-chief) (Sweet & Maxwell 2018) at para 18/12/5 (in identical terms in the current commentary) as to what was required when pleading an agreement. At [5] of *Arovin Ltd*, the judge stated that, in circumstances where there were express understandings reached orally, particulars could properly be requested of the identity of those between whom the oral communications were made as well as the date upon which and the time and place at which the communications took place.

11 The same point is made in *Surge Electrical Engineering Pte Ltd v Powertec Engineers Pte Ltd* [2002] SGHC 280 and in *Singapore Civil Procedure 2020* at para 18/12/51 that it matters not if a party is, by reason of the order to produce such required particulars, compelled to disclose the names of its witnesses or some part of the evidence upon which it proposes to rely at trial.

12 In such circumstances the plaintiff is entitled to the particulars requested, and the defendant is required to identify the individuals who were involved in the cancellation arrangements. The request, following on from the previous answer that the cancellation arrangements were made by telephone in or about December 2018 requires the defendant to state the name and designation of each of the parties' representatives who made and received the relevant communications and if there was any communication in writing, to identify the

documents containing those communications, giving full particulars of the documents in question.

13 In an affidavit filed on behalf of the defendant, it was suggested that there was inexcusable delay in bringing the application, but the point was not pursued in the defendant's submissions and has no substance because the parties were, in the interim period between November 2019 and the date of the summons, engaged in attempts to settle this matter, which resulted in an adjournment of various dates fixed for hearings and, moreover, no prejudice could be shown to flow from the delay in any event.

14 The plaintiff is therefore entitled to the orders sought and to costs. Costs are to be assessed if they cannot be agreed on between the parties.

SUM 31

15 The plaintiff's application in SUM 31 is for, in the main, the following orders/directions:

> (a) that the trial in SIC/S 4/2019 be bifurcated, with the trial on the issue of liability in relation to the plaintiff's claims and the defendant's counterclaim be heard separately from, and prior to, the hearing of an assessment of damages for the plaintiff's claims and the defendant's counterclaims (if necessary);
>
> (b) in respect of the trial on liability only, that evidence shall be given by way of Affidavits of Evidence-in-Chief, and the taking of oral evidence (including examination-in-chief, cross-examination and re-examination) shall be dispensed with; and
>
> (c) that within four weeks of an order made in respect of SUM 31,

(i) the plaintiff shall file its application to amend its Statement of Claim (Amendment No. 2) filed on 21 May 2020, setting out particulars of its loss and damage; and

(ii) the plaintiff shall provide to the defendant additional documents that it relies on in respect of its loss and damage.

16 The parties have agreed that I should determine this application on paper without oral submissions pursuant to directions given by the court.

The powers of the court

17 The relevant provision appears at O 33 r 2 of the ROC that is effective for the Singapore International Commercial Court ("the SICC") by reason of O 110 r 3 of the ROC, which also provides that the court may, if it considers that doing so is necessary or desirable for the just, expeditious and economical disposal of any proceedings in the court, make such order as the court considers just and appropriate.

18 Order 33 rules 2 and 3 of the ROC provide as follows:

> **Time, etc., of trial of questions or issues (O. 33, r. 2)**
>
> **2.** The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.
>
> **Determining mode of trial (O. 33, r. 3)**
>
> **3.**—(1) In every action begun by writ, an order made on the summons for directions shall determine the mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.

> (2) In any such action different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
>
> …

19 The power of the Singapore High Court to order a split trial of different issues, and in particular to order a split trial of liability issues from issues of damages is indisputable and its decision as to mode of trial is pre-eminently a matter of case management for the court's discretionary determination.

20 Order 38 rules 1 to 3 of the ROC provide, so far as relevant:

> **General rule: Witnesses to be examined (O. 38, r. 1)**
>
> **1.** Subject to these Rules and the Evidence Act (Cap. 97), and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court.
>
> **Evidence by affidavit (O. 38, r. 2)**
>
> **2.**—(1) Without prejudice to the generality of Rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of affidavit and, unless the Court otherwise orders or the parties to the action otherwise agree, such a witness shall attend trial for cross-examination and, in default of his attendance, his affidavit shall not be received in evidence except with the leave of the Court.
>
> (2) In any cause or matter begun by originating summons and on any application made by summons, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.
>
> …

> **Evidence by particular facts (O. 38, r. 3)**
>
> **3.**—(1) Without prejudice to Rule 2, the Court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.
>
> (2) The power conferred by paragraph (1) extends in particular to ordering that evidence of any particular fact may be given at the trial —
>
> (*a*) by statement on oath of information or belief;
>
> (*b*) by the production of documents or entries in books;
>
> (*c*) by copies of documents or entries in books; …

21 Again, it is clear from the above provisions that the Singapore High Court has the power to allow evidence to be given by a number of different means and although, in an ordinary trial, Affidavits of Evidence-in-Chief and cross-examination are the norm, it is open to the court to adopt a procedure akin to that for originating summonses and to dispense with cross-examination and the attendance of witnesses where it is just and convenient to do so. Order 38 rule 2 of the ROC specifically provides for the court not to follow the ordinary procedure and to order otherwise or for the parties so to agree. The court is not bound by the absence of agreement of the parties to a different procedure.

22 The terms of Orders 33 and 38 of the ROC cited above therefore do not make any exercise of the powers referred to conditional on the consent of the parties. The defendant, however, argues that the position is different in the SICC by reason of the terms of Order 110 of the ROC which specifically apply to it. Order 110 itself, by reason of the words "Subject to this Order" which appear below, provides that it must prevail over the Rules for the High Court which are otherwise incorporated into the practice of the SICC. Order 110, so far as relevant, provides as follows:

> **Application of Rules of Court (O. 110, r. 3)**
>
> **3.**—(1) Subject to this Order, the provisions of these Rules apply to all proceedings in the Court and all appeals from the Court.
>
> (2) Despite any provision of these Rules but subject to paragraph (3), the Court may, if it considers that doing so is necessary or desirable for the just, expeditious and economical disposal of any proceedings in the Court —
>
> (*a*) make such order as the Court considers just and appropriate; or
>
> (*b*) set aside, amend or supplement any of the following:
>
> (i) any order made under sub-paragraph (*a*);
>
> (ii) any order amended under this sub-paragraph;
>
> (iii) any supplementary order made under this sub-paragraph.
>
> (3) Where any provision of these Rules makes the exercise of a power by the Court conditional on a party agreeing or consenting to the exercise of that power by the Court, paragraph (2) does not authorise the Court to exercise that power without the agreement or consent of that party.

23 Under O 110 r 23 of the ROC, the SICC may specify applicable rules of evidence in the circumstances set out therein. I reproduce O 110 r 23 as follows:

> **Court may specify applicable rules of evidence (O. 110, r. 23)**
>
> **23.**—(1) The Court may, on the application of a party, order that —
>
> (*a*) any rule of evidence found in Singapore law, whether under the Evidence Act (Cap.97), in these Rules (but not in this Rule) or elsewhere, shall not apply; and
>
> (*b*) such other rules of evidence (if any), whether such rules are found in foreign law or otherwise, shall apply instead.
>
> (2) An application under paragraph (1) can only be made if all parties agree on —
>
> (*a*) the rules of evidence that shall not apply for the purposes of paragraph (1)(*a*); and

> (*b*) any rules of evidence that shall apply instead for the purposes of paragraph (1)(*b*).
>
> (3) In making an order under paragraph (1), the Court may, for the just, expeditious and economical disposal of the proceedings —
>
> (*a*) modify the parties' agreement under paragraph (2), but only with the parties' consent; and
>
> (*b*) stipulate such further conditions that supplement and are consistent with the parties' agreement (or modified agreement) as the Court sees fit.
>
> (4) The Court may, from time to time, amend or supplement any order under paragraph (1), but only in accordance with paragraph (3) and after hearing the parties.
>
> …

24 Further, O 110 r 51 of the ROC provides:

> **Court may dispense with attendance by solicitors and oral arguments in certain matters (O. 110, r. 51)**
>
> **51.** The Court may dispense with the attendance of the parties' solicitors, and give the Court's decision without hearing oral arguments, in any of the following matters:
>
> (*a*) an ex parte application;
>
> (*b*) an application to which all parties have consented;
>
> (*c*) any matter in relation to which the parties consent to dispense with the attendance of their solicitors and oral arguments.

25 The effect of O 110 r 23 of the ROC, in my judgment, is to maintain the provisions of the ROC relating to evidence applicable to the Singapore High Court for the SICC unless the parties otherwise agree on an application to vary them. There is no such agreement here, so that the provisions of Orders 38 and 33 of the ROC continue to apply without the need for the consent of the parties. The court may order split trials and accept evidence on affidavit without cross-examination if it considers it just to do so.

26 However, the effect of O 110 r 51 of the ROC is that the SICC cannot dispense with oral arguments save in the circumstances set out therein, none of which apply here because the current position is that the defendant does not accede to the request to do so, despite having originally suggested this for the whole trial on liability and damages.

The court's decision

27 There is only one question that really arises on the present application for a bifurcated or split trial, and that is whether or not such a bifurcated trial is likely to produce substantial savings in time and expense, without causing any prejudice or injustice. It is plain, in my judgment, that the order for a bifurcated trial is likely to have this effect without causing any prejudice to either party or injustice. It appears to me to be self-evident that both time and costs can be saved and that the defendant's objections are ill-founded.

28 In a letter dated 15 May 2020 ("the 15 May letter"), the defendant's lawyers suggested that the trial of all the issues take place on paper alone without any oral evidence or the presence of lawyers to make oral submissions. On 22 May 2020, the plaintiff replied to say that the issues of damages required cross-examination of witnesses and proposed a split trial in which liability issues were determined on paper (as the defendant had suggested), but that the issue of damages be heard separately on the normal basis, *ie*, with oral evidence and cross-examination. In the defendant's reply letter dated 26 May 2020, it adopted an "all or nothing" approach in response, *ie*, that either all of the issues were addressed by written submissions or not at all.

29 The basis upon which it had been suggested by the defendant – in the 15 May letter – that the whole dispute be determined on paper alone can be seen from the following terms of that letter:

> 3. Our clients are of the view that all of the facts in this matter can be proved on the documents, the authenticity of which is not in issue, and that the matter can be decided on written submissions. In fact, none of the issues involve witness testimony requiring cross-examination.
>
> 4. Our clients thus propose that an application under Order 110 Rule 23 be made by consent, seeking an order of court that:
>
> > a. only written Witness Statements exhibiting the necessary documentary evidence be tendered as evidence; and,
> >
> > b. that the following rules of evidence requiring the taking of oral evidence (through examination-in-chief, cross-examination and re-examination of witnesses) be dispensed with:
> >
> > > i. Sections 137 to 168 of the Evidence Act (which deal with the Examination of Witnesses at trial);
> > >
> > > ii. Order 38 Rule 1 of the Rules of Court (which provides the general rule that witnesses are to be examined); and,
> > >
> > > iii. All other related rules be subject to necessary modifications to reflect the intention of parties to dispense with the taking of oral evidence.
>
> 5. Our clients further propose that all arguments be presented by way of written submissions, with parties agreeing to dispense with the attendance of their solicitors and oral arguments in the Suit under Order 110 Rule 51. This can be achieved by a simultaneous exchange of Written Submissions and a further simultaneous exchange of Reply Submissions.
>
> 6. Our clients are of the view that such an application would allow the Suit to be dealt with expeditiously and would save costs.
>
> [emphasis in underline in original]

30 It is clear therefore that the defendant desired all aspects of the dispute to be determined on paper alone, a step beyond the manner now proposed by

the plaintiff for the liability aspect only, which does not seek for all submissions be made in writing without opportunity for oral argument.

31 Despite all the arguments which the defendant now advances as to the need for special circumstances or complex issues of damages to justify a split trial on liability and damages, the position is clear on the authorities and as a matter of practice. A court may bifurcate a trial if it is just and convenient to do so, and that is the position if substantial cost and time is likely to be saved if the liability issues are resolved first. Reference need only be made to *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [64] and *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 at [22].

32 In *Scintronix Corp Ltd v Ho Kang Peng and another* [2011] SGHC 28, the court held that in recent years the "[c]ourts in Singapore, as their counterparts in England, have been more amenable to bifurcate hearings". I cite the relevant paragraphs as follows (at [25]–[26]):

> 25 The rules on the bifurcation of hearings are not written in stone. Bifurcation is intrinsically related to case management. When policies on case management change, the attitude on bifurcation changes accordingly. The contrast between the position in the 1950s as exemplified by *Polskie* – that bifurcation is "a rare occasion" – and the position in the 1970s as manifested in *Coenen* – that time has come to adopt a new approach such that in the future the courts should be more ready to make bifurcation orders – clearly reflects this change.
>
> 26 *Polskie* and *Coenen* are English decisions, and the developments that gave rise to the aforementioned change do not necessarily apply to Singapore. However, the Court of Appeal 's observation in *Lee Chee Wei* [*v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*")] that the trial should have been divided into liability followed by damages is entirely applicable. *Courts in Singapore, as their counterparts in England, have been more amenable to bifurcate hearings*. The Court of Appeal's observation in *Lee Chee Wei* that the hearing should have been bifurcated reflects

> the present attitude. This development may be a response to the increased caseload of the courts. Bifurcation enables the courts to deal with more cases, and depose with those cases where liability is not established. Even in a case where liability is established, there is still savings of court time, as the damages can be dealt with by a registrar, allowing the judge to go on and hear other cases.
>
> [emphasis added in italics]

33 The overall position here is straightforward. There is an argument as to which party is in repudiation of the Aircraft Purchase Agreement of 19 September 2018. Both parties agreed at one point that this could be resolved on the documentary exchanges between the parties, and nothing has changed in that respect. The defendant has not suggested (and any such suggestion would ring hollow in the light of the 15 May letter set out above) that there is any evidence of the plaintiff's witnesses in their affidavits which needs probing in cross-examination on issues of liability. Whilst the issue as to which party is in repudiation is in itself by no means straightforward, the witness evidence, above and beyond the documentary exchanges, is not suggested by either party to be in any way determinative of the result. The evidence in the affidavits, apart from exhibiting the documents, is not critical to the outcome and neither party maintains that it is. The evidence of the witnesses of fact is effectively uncontested or irrelevant to the main issues and falls within the ambit of what is suggested in *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795 at [21] and *Industrial & Commercial Bank Ltd v PD International Pte Ltd* [2003] 1 SLR(R) 382 at [17]–[23] (see also *Arab Monetary Fund v Hashim (No 7)* [1993] 1 WLR 1014). The evidence needed for the determination of liability has been agreed – by the parties' lawyers in mutual exchanges in correspondence – to be documentary, as exhibited to the affidavits or pleadings.

34 Each party has a claim for damages on the basis of the other's repudiation. It is obvious that if liability is decided in a split trial, there will then

only be a need to investigate and decide the claim of one of the two parties to damages. The plaintiff has not yet given particulars of its claim for damages, but the defendant has done so, claiming US$6.5m for lost profits and US$1m for damage to reputation. The defendant's case gives rise to the need for oral evidence and testing on cross-examination, as argued at paragraph 21 of the plaintiff's submissions in its letter of 25 June 2020. That appears to me to be incontestable and the defendant does not now suggest otherwise. There is thus a clear distinction between the liability claim where no live evidence is needed from either side and the defendant's damages claim where live evidence is required. Whether or not the plaintiff's damages claim requires live evidence is currently unknown. The savings involved in not having to explore both the plaintiff's and the defendant's claim for damages for repudiation, and instead only having to determine the issue of damages in respect of one of them after liability has been found one way or the other, are clear.

35 The plaintiff, in its own application in SUM 31, seeks an order that it file an application to amend its Statement of Claim (Amendment No 2) setting out the particulars of its loss and damage, and provide to the defendant additional documents that it relies on in respect of its loss and damage, within four weeks of an order made in respect of SUM 31. I agree that this is a sensible proposal.

36 I need say no more on the issue of a bifurcated trial and the question of evidence in that regard. The plaintiff succeeds in its application for the orders sought as set out at [15] above.

37 It is however plain that, unless the parties so agree, the attendance of lawyers to argue the case cannot be dispensed with, although a virtual hearing

of oral submissions can be arranged if required, in view of the COVID-19 situation.

38 In the circumstances, costs must follow the event, and costs are to be the subject of assessment if not agreed between the parties.

Jeremy Lionel Cooke
International Judge

Tan Teck San Kelvin, Chen Chuanjian Jason, Chng Hu Ping (Drew & Napier LLC) for the plaintiff;
Roderick Edward Martin *SC*, Rajaram Ramiah, Yap Yongzhi Gideon, Eugene Tan (RHTLaw Asia LLP) for the defendant.