IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 211

Suit No 838 of 2019 (Registrar's Appeal No 243 of 2022)

Between

Powercom Yuraku Pte Ltd

… *Plaintiff*

And

(1) Sunpower Semiconductor Limited
(2) Yuraku Pte Ltd
(3) Claudio Giuseppe Bencivengo
(4) Vijaykumar Kishinchand Amesur

… *Defendants*

JUDGMENT

[Civil Procedure — Judgments and orders — Setting aside of judgment in default of defence]
[Courts and Jurisdiction — Court judgments — Declaratory]

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Powercom Yuraku Pte Ltd
v
Sunpower Semiconductor Ltd and others

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Goh Yihan JC
15 August 2022

1 September 2022 Judgment reserved.

Goh Yihan JC:

Background

1 This is the first defendant's appeal against the decision of the learned Assistant Registrar Randeep Singh Koonar ("AR Koonar") in HC/SUM 734/2022. AR Koonar had decided to partially dismiss the defendants' application to set aside a judgment entered in default of a defence being served.

2 Specifically, AR Koonar decided that the default judgment in question, HC/JUD 437/2021 ("Judgment 437"), should be varied as follows: (a) paragraph 2 of Judgment 437 shall be deleted; and (b) the words "and the Defendants' conspiracy" in paragraph 3 are to be deleted. The practical consequence of AR Koonar's decision is that there still exists a default judgment against the first defendant in the following terms:

> 1. The following actions are not valid acts of the Company:
>
> (a) The execution of the Purported Power of Attorney;
>
> (b) The convening of the PYSA EGM;
>
> (c) The Resolutions purportedly passed at the PYSA EGM, including but not limited to the Purported Rights Issue; and
>
> (d) All consequential actions and documents executed in connection thereof.
>
> 3. Damages to be assessed for losses caused to the Plaintiff by reason of the 1st and 2nd Defendants' breach of the Articles, [and] the 3rd and 4th Defendants' breach of their directors' duties.
>
> 4. Interest at such rate and for such period as this Honourable Court deems fit on such damages as may be assessed.
>
> 5. The costs of these proceedings and costs occasioned by this application be paid by the Defendants jointly and severally to the Plaintiff.

3 Having carefully considered the matter, I dismiss the first defendant's appeal. I now provide my reasons for this decision.

The plaintiff's claim

4 I set out the plaintiff's claim against the first defendant to provide context to my discussion below. The plaintiff is Powercom Yuraku Pte Ltd and was incorporated in Singapore as a joint venture between Powercom Co Ltd ("Powercom"), Sunpower Semiconductor Ltd ("Sunpower"), and Yuraku Pte Ltd ("Yuraku"). This joint venture was entered into pursuant to a shareholders' agreement dated 25 May 2009 ("the 2009 Shareholders' Agreement") between Powercom, Sunpower, and Yuraku. The plaintiff's principal business is that of developing and operating solar plants.

5 The first defendant is Sunpower. Sunpower was incorporated in Taiwan in 1984 and is in the business of designing custom-made power solutions. There are three other defendants, namely: (a) the second defendant, Yuraku; (b) the

third defendant, Mr Claudio Giuseppe Bencivengo ("Claudio"), the founder of Yuraku and a director of the plaintiff until 2011; and (c) the fourth defendant, Mr Vijaykumar Kishinchand Amesur ("Vijay"), the managing director of Sunpower and a director of the plaintiff since 25 May 2009.

6 Since the plaintiff's incorporation, the first defendant has held 10% of its shares. The second defendant holds 35% and the remaining 55% of the shares are held by Powercom. The plaintiff is governed by a large shareholding structure with subsidiaries. The plaintiff is the holding company of the Powercom Yuraku Group, which comprises various companies with business operations in Singapore, Luxembourg, and Italy. The plaintiff also has a wholly-owned subsidiary named Powercom Yuraku SA ("PYSA"). PYSA in turn wholly owns eight operating subsidiaries in Italy.

7 By an order of court dated 27 May 2019, Powercom was granted leave to bring the following actions in the name of and on behalf of the plaintiff:

(a) that Claudio and Vijay, who were directors of the plaintiff at the material time, were not duly authorised by the plaintiff in purportedly executing a power of attorney dated 23 November 2011 ("Purported Power of Attorney"), which authorised specified persons and any lawyer at the law firm of Bon, Schmitt, Steichen to act as an attorney of the plaintiff at a purported extraordinary general meeting ("PYSA EGM") of PYSA and vote in favour of all the resolutions ("the Resolutions") set out in the Purported Power of Attorney;

(b) that Claudio and Vijay were in breach of their fiduciary duties (i) to act in the best interests of the plaintiff; (ii) to avoid placing themselves in a position in which and acting in a manner where the interests of and/or

their duties towards the plaintiff conflict with the interests of and/or their duties towards the shareholders which appointed them to the board of directors of the plaintiff; and (iii) to act in the proper purposes of the plaintiff, in executing the said Purported Power of Attorney and procuring the passing of the Resolutions at the PYSA EGM; and

(c) that the first defendant and Yuraku, which are the shareholders of the plaintiff, together with Claudio and Vijay, conspired to injure the plaintiff by unlawful means, in agreeing and acting together to execute the Purported Power of Attorney and procuring the passing of the Resolutions at the PYSA EGM.

8 In this connection, Article 56A(i) and Article 84 of the articles of the plaintiff (the "Articles") provide as follows:

> 56A(i). Except with the consent of (i) Powercom and (ii) Sunpower and (iii) Yuraku (expressed in writing by them, or by their assenting votes in a General Meeting where a resolution passed at a General Meeting is required and by the assenting votes of at least one of their respective nominee Directors where a resolution of the Board is required, as the case may be)… no Subsidiary of the Company shall pass any resolution in general meeting and that the member or member's thereof, shall not sign any resolution in writing.
>
> …
>
> 84. The directors may from time to time by power of attorney appoint any corporation, limited liability partnership, firm, or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the Company for such purposes and with such powers, authorities and discretion (not exceeding those vested in or exercisable by the directors under these Articles) …

9 By these Articles, all resolutions passed by PYSA must be unanimously consented to by all parties, *ie*, Powercom, the first defendant, and the second defendant. In breach of the Articles, a purported rights issue was carried

out at the PYSA EGM (the "Purported Rights Issue"), without having complied with all the relevant requirements. These requirements were not fulfilled as Powercom (a) did not receive any notice of the resolutions; (b) did not attend and was not represented at any board meetings or general meetings of the plaintiff; and/or (c) did not consent in writing or vote at any board meetings or general meetings of the plaintiff, all in relation to the execution of the Purported Power of Attorney by Claudio and Vijay, the convening of the PYSA EGM, and/or the Resolutions purportedly passed at the PYSA EGM.

10 The practical consequence of the Purported Rights Issue was that the plaintiff allowed its stake in PYSA to be diluted from 100% to 5.5%. As such, the plaintiff's asset in the form of its stake in PYSA was reduced from €6,465,856.20 to €355,622. The plaintiff therefore claims for losses arising from the first defendant's breaches of the Articles.

11 Further, the plaintiff alleges that the first defendant, together with the other defendants, wrongfully and with intent to injure the plaintiff by unlawful means, conspired and combined to defraud the plaintiff. This was allegedly done with the sole intention of injuring the plaintiff by damaging its business.

12 The plaintiff issued the writ of summons in the main claim on 21 August 2019. Judgment 437, the judgment in default of defence, was granted on 20 September 2021. AR Koonar set aside Judgment 437 in part below and this is the first defendant's appeal against that decision.

Two procedural questions

13 Before I turn to the substantive merits of the appeal, I should address two procedural questions that surfaced during these proceedings. The first issue is whether a judgment granted in default of defence can be set aside in part. The

second is whether declarations, some of which are entered against the first defendant in Judgment 437, can be made in default of defence or on admission or by consent.

Can a judgment in default of defence be set aside in part?

14 Turning to the first question, AR Koonar set aside Judgment 437 in part because the first defendant had demonstrated the existence of triable issues in respect of the plaintiff's claim in conspiracy, but not in relation to the other claims premised on breaches of the Articles. While the first defendant had argued before him that Judgment 437 should be set aside in full, AR Koonar decided that Judgment 437 should only be set aside in part in respect of the claims for which triable issues had been shown. Although counsel for the first defendant, Ms Os Agarwal ("Ms Agarwal"), did not argue this issue before me, it does raise a question of principle, which is whether a judgment entered in default of defence can be set aside in part. Indeed, there does not appear to be a local decision that has directly discussed the issue notwithstanding its apparent commonness.

15 The governing provision in question is O 19 r 9 of the Rules of Court (2014 Rev Ed) (the "ROC"), which provides that the court may "on such terms as it thinks just, set aside *or vary any judgment* entered in pursuance of this Order" [emphasis added]. The plain language of the provision is drafted broadly and suggests that the court possesses the discretion to set aside a default judgment only in part, rather than wholly. This is indeed the position taken by the learned authors of *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) ("*White Book*") at para 19/9/2:

> **Effect of rule—**The wording of this rule is wide enough to authorise the court, in its discretion, to set aside one part of the default judgment and to grant a general stay of execution on

> another part (*National Westminster Bank plc v. Humphrey* (1984) 128 S.J. 81).
>
> …

16 In my view, this position that a default judgment can be set aside in part within the context of O 19 is supported by three reasons.

Case law

17 The first reason is support found within the case law. The *White Book* (at para 19/9/2) considers the cases on setting aside a judgment in default of an entry of *appearance* under O 13 r 8 of the ROC to be "equally applicable" in the context of O 19 r 9 of the ROC, which relates to a judgment in default of *defence*. It is stated (at para 13/8/14) that "[a] judgment may be set aside *as to part only* and allowed to stand as to the rest (*Re Mosenthal, ex p. Marx* (1910) 54 S.J. 751 …" [emphasis added]. An analogy can be drawn from those cases as the language used in O 13 r 8 is essentially *identical* to that used in O 19 r 9 of the ROC. For convenience, I reproduce the relevant provisions of the ROC in succession:

> **Setting aside judgment (O. 13, r. 8)**
>
> **8.** The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.
>
> …
>
> **Setting aside judgment (O. 19, r. 9)**
>
> **9.** The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

18 The authors of *Singapore Court Practice 2021* (Jeffrey Pinsler SC gen ed) (LexisNexis, 2021) ("*Singapore Court Practice*"), at para 19/9/1, also observe that the language of O 19 r 9 "is *identical* to O 13 r 8, which concerns an application to set aside a regular or irregular judgment in default of

appearance" [emphasis added]. Hence, the authors of *Singapore Court Practice* suggest at para 19/9/2 that the principles "governing the setting aside of a regular judgment in default of *appearance* … also govern an application to set aside a regular judgment in default of *defence*" [emphasis added]. The wording of the rule in O 13 r 8 of the ROC – "on such terms as it thinks just" – entitles the court to set aside the judgment in whole *or in part* (see *Singapore Court Practice* at para 13/8/5), and this applies to O 19 r 9 of the ROC as well.

19 For completeness, the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine (CA)*") at [44] also noted that "O 19 r 9 contains an identical provision *vis-à-vis* a judgment in default of pleadings" when referring to the court's discretion under O 13 r 8 of the ROC (see also, the High Court decision of *TR Networks Ltd and Others v Elixir Health Holdings Pte Ltd and Others* [2005] SGHC 106 at [32]). Given this, there should not be a difference in principle across both Orders of the ROC. Both concern the setting aside of a default judgment and differ only in *how* the default judgment came about. This does not alter the fact that, in both cases, "the court is concerned with setting aside a judgment *obtained not on the merits but because of some non-adherence to some procedural rule*" [emphasis in original] (see *Lim Quee Choo (suing as co-administratrix of the estate of Koh Jit Meng) and Another v David Rasif and Another* [2008] SGHC 36 at [89]). The same principles should underlie both Orders.

20 Having established that the case law concerning O 13 r 8 of the ROC would equally inform us as to the proper interpretation of O 19 r 9, I now turn to the relevant cases.

21 The High Court in *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2008] 1 SLR(R) 316 ("*Mercurine (HC)*") at [20] and [22] (citing *National*

Westminster Bank plc v Humphrey (1984) 128 SJ 81 ("*National Westminster Bank*")) recognised that the court does have the discretion to set aside a part of a default judgment as opposed to the whole of it, in the context of O 13 of the ROC (which as explained above, is applicable to the present O 19 situation). However, this is subject to the qualification that the various portions of the default judgment must be severable from each other. For example, in *National Westminster Bank*, the two amounts for which judgment was given were in respect of wholly different claims based on two separate debts. Hence, the English Court of Appeal allowed the default judgment to be set aside in respect of one claim, as that claim was severable from the rest of the judgment.

22 One factor in determining severability is to assess whether the same defence is being raised against the different claims, such that the claims would fall together if the defence were made out. Thus, in *Mercurine (HC)* (at [22]–[23]), the court found that the two claims were not severable from each other as the same defence was being put forward to both the rental arrears claim and the possession of the premises claim. This finding by the High Court that the claims were not severable was affirmed on appeal in *Mercurine (CA)* (at [102]), where the Court of Appeal stated as such:

> 102 … However, as the Judge rightly pointed out (see [19] above), the Possession Order and the Money Judgment ***were not severable*** from each other since Mercurine intended to rely on the ***same defence*** against Canberra's claims for both unpaid rent and possession of the Premises. Therefore, we ordered that the Default Judgment *as a whole* would be deemed to be set aside if Mercurine succeeds in the Consolidated Suit.
>
> [emphasis in original; emphasis added in bold italics]

23 It is apposite to note at this juncture that in the present case, the claim in conspiracy is severable from the breaches of the Articles claim as they are distinct and the defences raised are different. In respect of the defence to the

conspiracy claim, the focus is on the lack of an intention to injure, while the focal point for the defence against the breaches of the Articles claim is whether consent was given for the share capital increase. The parts of the default judgment corresponding to these two claims are thus severable and can be set aside in part. While there is an overlap in relation to the arbitration clause defence, that does not matter since no triable issue is raised (as explained below at [38]–[40]).

Analogy with other areas of procedural law

24 The second reason in support of the proposition that a default judgment can be set aside in part within the context of O 19 is supported by analogy with other areas of procedural law. In this regard, I agree with AR Koonar that the present situation is similar to an application for summary judgment, where judgment can be entered on just part of a claim (see O 14 r 4(1) of the ROC).

25 Moreover, this is also similar to the Court of Appeal's remarks in *Mercurine (CA)* (at [19], [102] and [107]) that the court may amend a default judgment to reflect the correct amount claimed (when too much was claimed at first) instead of setting it aside entirely, if it is clear that even if the irregular default judgment was set aside, the defendant was bound to lose. Thus, where it appears that the defendant has not raised a plausible defence in relation to the correct amount claimed, the Court of Appeal in *Mercurine (CA)* saw no purpose in setting aside the full default judgment, given that the defendant is bound to lose on that amount. Instead, the court can exercise its jurisdiction to amend the judgment instead of setting it aside altogether (see also the High Court decision of *Philip Securities (Pte) v Yong Tet Miaw* [1988] 1 SLR(R) 566 at [4]). Thus, if a default judgment can be amended in part, this lends further support to the view that a default judgment can indeed be set aside in part.

Policy

26 More broadly, whether resolved on the plain wording of O 19 r 9, as an analogue to summary judgments being granted on part of a claim, or as an exercise of the court's power to amend rather than set aside incorrect claim amounts in a default judgment, I consider that the court's power to set aside default judgments only in part is consistent with the broader policy behind the setting aside of default judgments. This policy is, as AR Koonar noted, to avoid time and costs wasted in litigating issues which are plainly and obviously unsustainable. As such, if one part of a default judgment is clearly devoid of any triable issues, then it makes little sense in terms of procedural economy to maintain the entire default judgment simply because other parts of it raise triable issues.

27 Also, while the new Rules of Court 2021 are not applicable in the present case, this would also be consistent with the ideals set out in O 3 r 1, including the need to prioritise the achievement of fair access to justice, practical results, and an efficient use of court resources.

28 Accordingly, having regard to the reasons above, I should preserve the parts of Judgment 437 that the first defendant is unable to raise triable issues to. Accordingly, the first defendant's appeal will fail unless it can show that the defences which AR Koonar rejected as giving rise to triable issues do, in fact, give rise to such issues.

Can a declaration be made in a default judgment?

29 Turning to the second procedural question in the present proceedings, Ms Agarwal made a belated argument during the oral arguments that a declaration should not be made in default of defence or on admission or by

consent, citing the decision of the English Court of Appeal in *Wallersteiner v Moir* [1974] 1 WLR 991 ("*Wallersteiner v Moir*") and a portion from the *White Book*. This point was made in connection to O 15 r 16 of the ROC which stipulates, in the relevant part, that the court "may make binding declarations of right whether or not any consequential relief is or could be claimed". In response, counsel for the plaintiff, Mr Wan Chi Kit, argued that the proposition in *Wallersteiner v Moir* was cited incorrectly by the first defendant, and that the present case does not fall within that proposition as the factual issues in play are straightforward.

30 The starting point is that a declaration can generally only be made after proper argument and cannot be made merely on admissions by the parties whether in pleadings or otherwise (see *White Book* at para 15/16/3 and para 15/16/8 citing *Wallersteiner v Moir*), nor in default of compliance with rules of court. Buckley LJ stated as such in *Wallersteiner v Moir* at 1029: "It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading". However, that "practice" does not prohibit the court from making a declaration in exercise of its discretionary power in appropriate situations, and the court can enter judgment in default of defence "as the plaintiff appears entitled to on his statement of claim" (see *Halsbury's Laws of Singapore – Civil Procedure* vol 4 (LexisNexis, 2016 Reissue) at para 50.236). Indeed, para 15/16/3 of the *White Book* further elaborates upon this point:

> … On the other hand, the rule of the court that a declaration will not be granted when giving judgment by consent or in default without a trial is a *rule of practice* and *not of law* and will give way to the paramount duty of the court to do the fullest justice to the plaintiff to which he is entitled … (*Patten v. Burke Publishing Co. Ltd.* [1991] 1 W.L.R. 541; [1991] 2 All E.R. 821). …
>
> [emphasis added]

Thus, the proposition stated in *Wallersteiner v Moir* is merely a *rule of practice and not of law*. It is a salutary rule which must give way to the paramount duty of the court to do justice.

31 That said, when should a court shy away from giving a declaratory judgment in default of pleading, as is the case at present? In this regard, the context of *Wallersteiner v Moir* is important. In that case, the defendant had sought a counterclaim against the plaintiff and sought a declaration from the court that the plaintiff had been guilty of fraud, misfeasance and breach of trust. At first instance, a declaration in default of defence was granted, but this was then reversed by the English Court of Appeal. Buckley LJ opined (at 1029) that if "declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently". The allegation of fraud is a serious one and Buckley LJ was concerned with that. In a similar vein, Scarman LJ was of the view that injustice might well be done to the plaintiff "if without the benefit of trial the court should declare him fraudulent, guilty of misfeasance and of breach of trust" (at 1030), and that justice could be done by giving money judgments (final or interlocutory) while leaving until after trial the decision whether "to declare [the plaintiff] guilty of fraud, misfeasance or breach of trust". The tenor of these statements is that the court would be reluctant to declare a person guilty of fraud which is based solely on one side's unproven allegations where there was no full hearing conducted to test the evidence. This likely stems from the inherent difficulty of proving civil fraud and the need for more cogent evidence to prove it precisely because of the serious implications of a finding of fraud (see the decision of the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [160]–[161]).

32 The situation in *Wallersteiner v Moir* can be contrasted to that in *Patten v Burke Publishing Co Ltd* [1991] 1 WLR 541 ("*Patten v Burke*") which concerned a claim for breach of contract. The defendant company had failed to pay royalties due to the plaintiff in exchange for the right to print and publish the plaintiff's book. The English High Court held that a declaration should be granted, where the undefended claim is for breach of contract, to declare that the contract is at an end by reason of the defendant's repudiation and that the plaintiff is no longer bound by it (see also, *White Book* at para 15/16/3). In my view, the decision in *Patten v Burke* is supported by two reasons. The first is that the declarations sought in *Patten v Burke* flow naturally from the success of the underlying claim for breach of contract. Put another way, the declarations in that case merely spell out the consequences of the contract being breached, such as that the plaintiff is no longer bound by it. The second reason that undergirds the decision in *Patten v Burke* is that the granting of the declaration would do justice to the plaintiff since it would leave the plaintiff free to negotiate a fresh contract with other third-party book publishers by making it clear that the plaintiff was no longer bound by the contract with the defendant (at 544).

33 These two reasons were absent in *Wallersteiner v Moir*. First, the declaration that the plaintiff was guilty of fraud did not flow from any underlying cause of action; this was a standalone declaration. Second, because the declaration was a standalone one, it was not immediately clear what direct benefit it would afford the defendant (who had sought the declarations in a counterclaim against the plaintiff) in that case. It is not apparent that the defendant's entitlement to £500,000, ordered in default of defence, was dependent on the declaration that the plaintiff was guilty of fraud. Conversely, the omission of the declaration in *Patten v Burke* could have seriously inhibited the plaintiff in that case in any attempt to negotiate the terms of the publication

of his works or other similar books in future (at 544). Also, in contrast to *Wallersteiner v Moir*, there was no allegation of fraud in *Patten v Burke* which required more cogent evidence to prove and resulted in more severe consequences.

34 In my view, assuming that there are no other reasons to set aside the default judgment in the present case, justice would be done to the plaintiff here by granting the declarations in the default judgment. As with my analysis of *Wallersteiner v Moir* and *Patten v Burke*, I give two main reasons for this conclusion. First, just like the declarations in *Patten v Burke*, the declarations in Judgment 437 flow naturally from the underlying cause of action, which is that the first and second defendants breached the Articles by, among others, improperly executing the Purported Power of Attorney and procuring the passing of the Resolutions at the PYSA EGM. Second, these declarations are directly important to the plaintiff in that it is seeking to invalidate certain acts to regain control of its shareholding in PYSA, apart from obtaining damages in future. Apart from these two main reasons, I add that the factual issue here is rather straightforward. Simply put, it is whether there was consent given for the share capital increase in PYSA. This stands in contrast to the complex factual matrix in *Wallersteiner v Moir* where there were serious allegations of fraud (amongst other things) and where the court was therefore uncomfortable with granting the declaration sought without cogent evidence tested at trial.

35 For these reasons, I disagree with the first defendant that the declarations in Judgment 437 cannot be made against it, should Judgment 437 not be set aside. Having resolved the two procedural questions, I turn now to the substantive merits of the present appeal before me.

Should Judgment 437 (the default judgment) against the first defendant be set aside?

The law

36 Since the first defendant has not cross-appealed against AR Koonar's decision that Judgment 437 is a regular default judgment, the first defendant must show that it has a *prima facie* defence in the sense that there are triable issues. The seminal case in this regard is *Mercurine (CA)*. The Court of Appeal held that if the default judgment is a regular one, the court must consider if the defendant is able to raise a *prima facie* defence (at [60]). It is important to note that the defendant bears the burden to show that its defence raises triable issues so that, notwithstanding its default which resulted in judgment being properly entered against it, the court should exercise its discretion to deprive the plaintiff of its rights under the (regular) default judgment. In exercising its discretion, the court will conduct a balancing exercise of various factors (at [98]–[99]).

37 In view of the law, the first defendant's position is that, based on the affidavits filed by the parties for the present application, there are several complex legal and factual issues that need to be addressed at a trial. For present purposes, I examine the two relevant defences which the first defendant raises.

My decision: Judgment 437 (the default judgment) against the first defendant should not be set aside

The arbitration clause

38 First, the first defendant submits a triable issue is whether the present dispute should be referred to arbitration or heard by this court. The first defendant points to a valid dispute resolution mechanism in the 2009 Shareholders' Agreement which should not be ignored. The 2009 Shareholders'

Agreement governs the "terms and conditions regulating the relationship between the [second defendant, Powercom and the first defendant] as shareholders in [the plaintiff]", "record[s] the manner in which the affairs of [the plaintiff] shall be regulated", and "regulate[s] their relationship with each other, the organisation and operation of [the plaintiff]", in relation to the supply of solar modules by Powercom to the plaintiff and its associated companies. As such, the first defendant argues that the matters raised in the main suit relate to "the organisation and operation of the plaintiff", which is within the ambit of the 2009 Shareholders' Agreement and therefore invokes the arbitration clause.

39 I disagree with the first defendant that this raises a triable issue. As AR Koonar pointed out, the problem for the first defendant is that the arbitration clause concerned is in the 2009 Shareholders' Agreement, to which the plaintiff is *not* a party to. The first defendant attempts to sidestep this obvious difficulty with its case by saying that the plaintiff's claim is really a claim for losses suffered by Powercom, which is bound by the arbitration clause. This argument must obviously fail because it does not address the core problem, which remains that the plaintiff is not a party bound by the arbitration clause. It bears repeating that Powercom has been given leave to commence a derivative action in *the plaintiff's* name. As such, it does not matter that Powercom is bound by an arbitration clause if the plaintiff is not.

40 Accordingly, I do not consider the first defendant to have raised a triable issue in relation to the arbitration clause.

Powercom's purported consent to the share capital increase in PYSA

41 Second, the first defendant submits that it has not breached the Articles. This is because, contrary to the plaintiff's claim that Powercom did not consent

in writing, the required consent was obtained in writing pursuant to the e-mail from Mr Simon Chang (Powercom's director) ("Mr Chang") to Claudio dated 23 December 2011. While the first defendant also argued in this connection that there were complex issues of fact and law in relation to whether the first defendant had breached the plaintiff's Articles, I see the only relevant issue as whether Powercom had consented to the share capital increase, which turns on the e-mail I just alluded to. There is no need for the first defendant to add complexity to a straightforward issue in relation to Judgment 437.

42 Returning to the issue of purported consent, Mr Chang had said in the material e-mail:

> … time is crucial as of the moment, we shouldn't be discussing under what name the money would be injected into the company (loan or equity). With [the first and second defendants'] sincerity as shareholders to save the [plaintiff] and [the group] from insolvency, there is no reason for Powercom to obstruct …

The first defendant argues that this means Powercom had no reason to obstruct the injection of funds into PYSA and had in fact consented to the share capital increase in PYSA. In any event, Ms Agarwal also submitted before me that the correct context and interpretation of this e-mail is disputed by the parties and is therefore a triable issue that should be tested at trial.

43 I disagree with the first defendant that the e-mail means what the first defendant says it does. The plain wording of the e-mail, which I set out below, speaks for itself:

> Dear Claudio and board members,
>
> Please be reminded that Powercom Yuraku SA Luxembourg is 100% subsidiary of Powercom Yuraku Pte. Singapore. To resolve the lack of fund in this company is through share capital increase in Singapore or loan from shareholders.

> PCM Group is 55% shareholder of Powercom Yuraku Pte. Singapore, as shareholder we have done our best and injected exceeding our 55% share responsibility, as of present the total loan PCM has given into this company and group amounts to Euro 7,809,300.00. With the financial crisis faced by the company and group as of the moment, the immediate solution is to bring additional fund into the mother company. Time is crucial as of the moment, we shouldn't be discussing under what name the money would be injected into the company (loan or equity). With Yuraku and Sunpower's sincerity as shareholders to save the company and the group from insolvency, there is no reason for us to obstruct, thus please arrange to remit the available fund into below account no.:
>
> Powercom Yuraku Pte. Ltd.
>
> Deutsche Bank Singapore Branch
>
> Account no. [redacted]
>
> Please note that from the very beginning, the flow of the funds have always been from Powercom Yuraku Pte. – to – Powercom Yuraku SA, then to Yur Power I~IX, thus the same procedure should be retained, as this is the only legal way.
>
> …
>
> There is nothing to worry, the money remitted will have its record. After we resolve our issues with the creditors by paying them back with the fund made available by Yuraku and Sunpower, then that is the time we discuss if the fund is to be categorized as loan or equity.
>
> Regards,
>
> Simon

44 Before me, Ms Agarwal relied heavily on the words "we shouldn't be discussing under what name the money would be injected into the company" and "there is no reason for us to obstruct". The first defendant in effect argues that these words should be construed as Mr Chang consenting to Claudio's proposal made in an e-mail on 22 December 2011 for the share capital increase to take place in PYSA. Like AR Koonar, I regard this as plainly untenable.

45 In relation to the words "we shouldn't be discussing under what name the money would be injected into the company", I do not agree with the

first defendant that this means that it did not matter to Mr Chang whether the share capital increase took place in the plaintiff or PYSA. Instead, it is plainly clear from the e-mail that Mr Chang meant that parties should not be discussing whether the injection should be treated as a capital injection or a loan.

46 In relation to the words "there is no reason for us to obstruct", I do not agree with the first defendant that this means Mr Chang, on behalf of Powercom, had given consent to the share capital increase in PYSA. Indeed, like AR Koonar, I find that the first defendant's interpretation conveniently ignores the rest of the e-mail. In this regard, a plain reading of the entire e-mail reveals that: (a) Mr Chang thought that the lack of funds in PYSA should be resolved through a share capital increase in Singapore *or* a loan from its shareholders; (b) Mr Chang had asked Claudio to remit the funds to the *plaintiff's* bank account (instead of PYSA); and (c) Mr Chang reiterated that from the very beginning, the flow of funds had always been from the plaintiff to PYSA and then to the Italian subsidiaries and the same procedure should be retained. There is nothing in this exchange which even begins to suggest that Mr Chang had consented to a share capital raise in PYSA.

47 Ms Agarwal also argued that I should not conclude that Mr Chang did not consent to the share capital increase in PYSA, just because the bank account provided for in the e-mail (see above at [43]) was the plaintiff's Singapore bank account instead of PYSA's. It was Claudio's evidence that Mr Chang had requested for the funds to be remitted into the plaintiff's account, to be further transmitted to PYSA and the Italian subsidiaries. As such, the fact that Mr Chang provided the plaintiff's bank account details, does not mean that he had not consented to the share capital increase in PYSA. In other words, just because the plaintiff's bank account is stated in the e-mail, does not necessarily mean that the share capital increase must also take place in the plaintiff.

48 I do not think that this argument takes the first defendant very far. The fact that there is such a practice to remit the funds onwards to PYSA, does not, by itself, prove that the share capital increase should take place in PYSA. The fact of the matter is that the e-mail does not even confirm whether the transfer of funds (no matter which bank account was provided) would be by way of capital injection or loan. There is simply nothing in the e-mail to suggest that Mr Chang had provided the requisite consent.

49 It goes without saying that the interpretation of a document must consider the relevant context. The first defendant therefore argues that the proper context can only be established through a full trial, where the conflicting evidence can be tested through cross-examination. However, this proposition is much too broad. If, as the first defendant implies, the context behind documentary proof must always be tested at trial, then there would simply be no scope for the expedited judgment provisions within the ROC (such as default and summary judgments) to operate. This cannot be the case. Rather, the proper proposition must be that where the document speaks for itself, and there is nothing in the context that can plausibly refute what the document says, then there is no need for the contextual evidence to be tested at trial. In my judgment, the e-mail concerned speaks for itself: it does not, by any measure, amount to the requisite consent that would entitle the first defendant to raise a triable issue.

50 Accordingly, I do not consider the first defendant to have raised a triable issue in relation to Powercom's purported consent to the share capital increase in PYSA.

Related proceedings abroad

51 Although not necessary for my decision, I also consider Ms Agarwal's submission that there are related proceedings in other jurisdictions like Luxembourg on similar issues. According to the affidavit of Claudio,[1] the plaintiff commenced proceedings (on or about 26 November 2012) before the Commercial Court of Luxembourg, seeking to avoid the share capital increase in PYSA and claiming that the Purported Power of Attorney was invalid. Thus, Ms Agarwal argued that any default judgment rendered by the Singapore courts would affect the proceedings abroad as there is an overlap in issues. In contrast, no real prejudice would be suffered by the plaintiff if the default judgment was set aside and parties were heard at trial in Singapore.

52 I reject this argument for the following reasons. First, the first defendant's written submissions on this point are brief,[2] and were not elaborated upon much further during the hearing before me.[3] The first defendant ought to have gone on to demonstrate the degree to which the respective proceedings have advanced, the degree of overlap of issues and parties, and the risk of conflicting judgments (see the decision of the Court of Appeal in *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 at [39]–[40]). This would go towards whether Singapore is the natural forum.

53 But more substantively, it is unclear to me whether issues of the natural forum (including the presence of parallel foreign proceedings) can factor into

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1 Affidavit of Claudio Giuseppe Bencivengo at [11] (Defendant's Bundle of Documents ("DBOD") Tab 11).

2 First defendant/appellant's written submissions at para 48.

3 Minute Sheet in HC/RA 243/2022 dated 15 August 2022 at p 4.

the analysis of whether the first defendant can establish "a *prima facie* defence in the sense of showing that there are triable or arguable issues" for the purpose of setting aside a default judgment (see *Mercurine (CA)* at [60] as well as the decision of the High Court in *Oversea-Chinese Banking Corp Ltd v Frankel Motor Pte Ltd and others* [2009] 3 SLR(R) 623 at [21]). It appears that it does not form part of the *Mercurine (CA)* test. Hence, the argument raised by the first defendant regarding the related foreign proceedings is not relevant for present purposes.

Conclusion

54 In conclusion, I find that the first defendant has not raised any triable issues in respect of the purported defences against the plaintiff's claim against it. Since I have determined that it is possible for a default judgment to be sustained in parts where triable issues have not been raised, and since I have also decided that declarations can be granted in a default judgment in appropriate cases such as the present one, it must follow that AR Koonar's decision to uphold part of Judgment 437 is correct.

55 Accordingly, I dismiss the first defendant's appeal. Unless the parties can agree on costs, they are to file their written submissions on costs within seven days from the date of this judgment.

Goh Yihan
Judicial Commissioner

Lim Tat and Wan Chi Kit (Aequitas Law LLP) for the plaintiff;
Lakshanthi Kumari Fernando, Tan Wei Ming and Os Agarwal (Holborn Law LLC) for the first defendant and fourth defendant;
Second defendant and third defendant absent and unrepresented.
