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

[2023] SGHCR 4

Suit No 358 of 2022 (Summons No 482 of 2023)

Between

(1) Cosmetic Care Asia Limited
(2) OBM (Technical Services) Pte Limited
(3) Facial Care Services Pte Limited
(4) Hair System Management Pte Limited
(5) Global Beauty International Pte. Limited

… *Plaintiffs*

And

(1) Sri Linarti Sasmito
(2) PT Cosmeticindo Slimming Utama
(3) PT Cantiksindo Utama
(4) PT Hairindo Pratama

… *Defendants*

JUDGMENT

[Civil Procedure] — [Pleadings] — [Striking out]
[Civil Procedure] — [Pleadings] — [Striking out] — [Whether defendant can rely on unpleaded defence]
[Contract] — [Contractual terms] — [Interpretation]

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v
Sri Linarti Sasmito and others

[2023] SGHCR 4

General Division of the High Court — Suit No 358 of 2022 (Summons No 482 of 2023)
Assistant Registrar Andre Sim
3, 5 April 2023

2 May 2023 Judgment reserved.

AR Andre Sim:

Introduction

1 This is the 1st to 4th Defendants' application under O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC 2014") to strike out the entirety of the 1st to 5th Plaintiffs' action. In brief, parties had executed an agreement in full and final settlement of various proceedings that they had commenced against each other in Indonesia and Singapore. In the present Suit, the Plaintiffs allege that in breach of the said agreement, the Defendants failed to comply with their obligations to make certain instalment payments. The Defendants, on the other hand, claim that they were entitled to cease payments because the Plaintiffs themselves had breached their obligations relating to the discontinuance of certain proceedings.

2 I heard parties on the striking out application on 5 April 2023 and now set out my decision. In gist, I find that the Defendants have not satisfactorily established any of the grounds for striking out and I therefore dismiss the application.

Background to the dispute

The parties

3 The 1st, 2nd, 3rd, 4th and 5th Plaintiffs are related companies in that they are all wholly owned subsidiaries of the Cosmetic Care Group Limited. The 1st Plaintiff is a company incorporated in the British Virgin Islands, and is in the business of franchising and licensing, among other things, trade names, trademarks, and specialised treatments and products for weight management, hair and beauty care. The 2nd, 3rd, 4th and 5th Plaintiffs are Singapore-incorporated companies, and provide various advisory and consultancy services in relation to weight management, hair care and beauty care.

4 The 1st Defendant, Ms Sri Linarti Sasmito, is an Indonesian citizen. The 2nd, 3rd and 4th Defendants are Indonesian-incorporated companies (collectively referred to as the "PT Entities").

5 According to the Plaintiffs, the 1st Defendant is the co-founder and shareholder, and was formerly the President Director, of the PT Entities. The PT Entities are said to be in the business of providing health, beauty and weight management services. These companies were purportedly franchisees and licensees of the 1st Plaintiff, and in connection with this, had entered into various technical assistance agreements with the 2nd, 3rd and 4th Plaintiffs. It thus appears that there was a long-standing business relationship between the

parties, although the Defendants pleaded (without further elaboration) that these background facts were not admitted.

Proceedings in Indonesia and Singapore

6 Around September 2019, a dispute arose between the Plaintiffs and Defendants concerning, *inter alia,* amounts owed under a term sheet dated 23 April 2014 which the parties had executed.

7 In connection with this dispute, the PT Entities commenced legal proceedings against the 1st Plaintiff in the Central Jakarta District Court on 23 January 2019 (the "1st Indonesian Proceedings"). The PT Entities alleged, *inter alia,* that the 1st Plaintiff had breached an unwritten franchise agreement with them. The action was dismissed by the Central Jakarta District Court by way of a judgment dated 17 November 2020. The PT Entities subsequently appealed the judgment in December 2020.

8 On 14 March 2019, the 1st Plaintiff retaliated by filing a police report against the 2nd Defendant (the "Police Report") with the Jakarta Raya Metropolitan Regional Police (the "JRMR Police") in relation to certain trademark-related offences under Indonesian criminal law. This began a process of police investigations, which parties refer to as the "2nd Indonesian Proceedings".

9 On 25 June 2019, the 1st to 4th Plaintiffs (collectively, the "Suit 617 Plaintiffs") commenced legal proceedings in Singapore against the 1st Defendant. In High Court Suit No. 617 of 2019 ("Suit 617"), the Suit 617 Plaintiffs claimed, *inter alia*, the sum of IDR 8,221,181,489 against the 1st Defendant based on an acknowledgment of debt dated 18 May 2018 (the "AOD"). The 1st Defendant subsequently filed Summons No 5867 of 2019 to

challenge the validity of service of the originating process on her out of jurisdiction in Indonesia. The application was, however, dismissed and the 1st Defendant then appealed to the Court of Appeal by way of Civil Appeal No 13 of 2021 ("CA 13").

The Settlement Agreement

10 In an effort to amicably resolve these legal proceedings and police investigations, parties decided to enter into a settlement agreement dated 20 August 2021 (the "Settlement Agreement"). This agreement was to be in full and final settlement of the 1st and 2nd Indonesian Proceedings, as well as Suit 617. It bears mention that even though the 5th Plaintiff was not a party to any of these prior proceedings, it was nevertheless a contracting party to the Settlement Agreement. The following naming conventions were used in the said agreement:

(a) The Plaintiffs were collectively referred to as the "GB Parties", with the 1st to 4th Plaintiffs referred to as the "Suit 617 Plaintiffs".

(b) The Defendants were collectively referred to as the "Indonesian Parties", with the 2nd to 4th Defendant companies referred to as the "PT Entities".

11 The material terms of the Settlement Agreement are set out below. The parties' key obligations in Clauses A(1)(1) to A(1)(4) are as follows:

> A. TERMS OF SETTLEMENT
>
> 1. In full and final settlement of all actions, suits, claims, demands, causes of action, complaints of whatsoever nature (arising under the AOD, the Term Sheet and/or any other agreements between the Parties), which the Parties have and/or may have against one other, including but not limited to the Disputes, Suit 617 and the Indonesian Proceedings, each of the Parties agree, jointly and severally, as follows:-

(1) The Indonesian Parties shall pay the Suit 617 Plaintiffs the sum of IDR 2,188,000,000 (the "Settlement Sum") in the following order:-

(a) IDR 1,000,000,000 on 21 August 2021 (the "1st Instalment"), and subject to the Suit 617 Plaintiffs' compliance with their obligations under clause (A)(1)(2), (A)(1)(3) and (A)(1)(4) below; and

(b) IDR 132,000,000 on 21 September 2021, and subsequent monthly payments of IDR 132,000,000 per month on the 21st day of each month thereafter (the "Monthly Instalment Date") until full satisfaction of the Settlement Sum.

…

(2) Within seven (7) working days after the Suit 617 Plaintiffs' receipt of the 1st Instalment, the Suit 617 Plaintiffs shall discontinue Suit 617 against the Suit 617 Defendant, and the Suit 617 Defendant shall withdraw her appeal to the Court of Appeal in relation to HC/SUM 5867/2019 i.e. CA/CA 13/2021 ("CA 13"). The Suit 617 Plaintiffs and the Suit 617 Defendant further agree that that each party shall bear their own costs in relation to Suit 617.

(3) Within seven (7) working days after the Suit 617 Plaintiffs' compliance with their obligations under clause (A)(1)(2) above the PT Entities shall discontinue the 1st Indonesian Proceedings and any appeal therefrom and provide evidence of such discontinuance by way of a notice of discontinuance or its equivalent issued by the relevant court. The GB parties and the PT Entities further agree that each party shall bear its own costs for the discontinuation of the 1st Indonesian Proceedings.

(4) Within seven (7) working days after the Suit 617 Defendant's compliance with her obligation under clause (A)(1)(2) above, the GB Parties shall discontinue the 2nd Indonesian Proceedings by submitting a letter withdrawing the police report for the 2nd Indonesian Proceedings. The GB Parties shall also take all necessary steps to procure the Jakarta Raya Metropolitan Regional Police to issue an Order to Stop Investigation (SP3) in respect of the subject matter of the 2nd Indonesian Proceedings. The Indonesian Parties acknowledge that the SP3 may not be issued within seven (7) working days after the Suit 617 Defendant's

> compliance with her obligation under clause (A)(1)(2) above. The GB Parties and PT Entities further agree that each party shall bear its own costs for the discontinuation of the 2nd Indonesian Proceedings.
>
> …
>
> [emphasis added in underline]

12 As can be seen, Clause A(1)(1) stipulates that the Defendants are to pay the Suit 617 Plaintiffs the sum of IDR 2.188bn (the "Settlement Sum") by way of several instalments:

(a) An initial instalment of IDR 1bn was to be paid on 21 August 2021, subject to the Suit 617 Plaintiffs' compliance with their obligations under Clauses (A)(1)(2), (A)(1)(3) and (A)(1)(4).

(b) This was to be followed by 9 monthly instalments of IDR 132m on the 21st of each month from September 2021 onwards (the "monthly instalments").

These are collectively referred to as the "Instalment Obligations", which the Defendants are alleged to have breached.

13 Under Clause A(1)(2), the Suit 617 Plaintiffs were required to discontinue their action against the 1st Defendant, and the 1st Defendant was required to withdraw her appeal in CA 13. This was to be done within 7 working days of the Suit 617 Plaintiffs' receipt of the initial instalment of IDR 1bn.

14 Thereafter, the following was to be done by certain specified timelines:

(a) As stipulated by Clause A(1)(3), the PT Entities were obliged to discontinue the 1st Indonesian Proceedings against the 1st Plaintiff and any appeal therefrom.

(b) As stipulated by Clause A(1)(4), the Plaintiffs were obliged to discontinue the 2nd Indonesian Proceedings by submitting a letter withdrawing the Police Report that had initiated the proceedings (the "1st SP3 Obligation"). The Plaintiffs were further obliged to take "*all necessary steps*" to procure the JRMR Police to issue an Order to Stop Investigation (known as the "SP3") in respect of the 2nd Indonesian Proceedings (the "2nd SP3 Obligation"). These are collectively referred to as the "SP3 Obligations", which the Plaintiffs are alleged to have breached.

15 Clauses A(1)(7) and A(1)(8) go on to specify the parties' rights and remedies in the event of default:

> (7) In the event that the *PT Entities* default on the payment obligations under clause (A)(1)(1) above by failing to make payment of any sum within 7 days of such sum falling due, the GB Parties shall be entitled to immediately commence proceedings for the sum of IDR 8,221,181,489 in the Singapore Courts against the PT Entities. In such a case, the PT Entities shall agree to submit to the jurisdiction of the Singapore courts and to have the dispute heard in Singapore. The PT Entities shall further acknowledge *the sum of IDR 8,221,181,489 (less any amounts paid to the GB Parties under the terms of this Agreement)* as the amount owing to the GB Parties. A breach of the PT Entities' obligations under clause (A)(1) will entitle the GB Parties to commence proceedings for breach of this Agreement and the PT Entities shall *indemnify* the GB Parties against all losses, damages, liabilities, costs and expenses which may be incurred by the GB Parties as a result of such default as well as legal costs, including but not limited to lawyers [*sic*] fees (on a full indemnity basis) that may be incurred in connection with enforcing the terms of this Agreement.
>
> (8) In the event that the *GB Parties* fail to comply with their obligations under clause (A)(1)(2) and clause (A)(1)(4) of the Agreement:-
>
> > (a) the PT Entities will not be required to perform clause (A)(1)[1](b) of the Agreement i.e. make monthly payments of IDR 132,000,000 to the Suit 617 Plaintiffs; and

> (b) the PT Entities will be entitled to file the necessary application to the relevant Court(s) to enforce the terms of the Agreement and compel the Suit 617 Plaintiffs' withdrawal of Suit 617 and the 2nd Indonesian Proceedings.
>
> [emphasis added in underline and italics underline]

16 Clause A(1)(7) states that if the *PT Entities* default on their Instalment Obligations "by failing to make payment of any sum within 7 days of such sum falling due", the following consequences will apply:

> (a) The Plaintiffs (*ie,* the GB Parties) shall be entitled to immediately commence proceedings against the PT Entities in the Singapore courts for the sum of IDR 8,221,181,489 (this corresponds to the amount sued for in Suit 617 based on the AOD).
>
> (b) The PT Entities shall acknowledge the sum of IDR 8,221,181,489 less any amounts paid to the Plaintiffs under the terms of the Settlement Agreement as the amount owing to the Plaintiffs (the "Default Sum").
>
> (c) The PT Entities shall indemnify the Plaintiffs against all losses and expenses which may be incurred as a result of such default, and against all legal costs that may be incurred in connection with enforcing the terms of the Settlement Agreement.

Notably, Clause A(1)(7) is only triggered if the PT Entities fail to make any instalment payment *within 7 days of the due date* (the "7-day period"). Thus, for the purpose of invoking this clause, it would not suffice that the PT Entities had made a particular payment late if such payment still fell within the 7-day period.

17 On the other hand, Clause A(1)(8) stipulates that if the *Plaintiffs* fail to comply with Clause (A)(1)(2) and their SP3 Obligations under Clause (A)(1)(4), the following consequences apply:

(a) The PT Entities will not be required to perform Clause (A)(1)(1)(b) (*ie,* make payment of the monthly instalments to the Suit 617 Plaintiffs).

(b) The PT Entities will be entitled to file the necessary applications in court to enforce the terms of the Settlement Agreement and compel the withdrawal of Suit 617 and the 2nd Indonesian Proceedings.

Events subsequent to the execution of the Settlement Agreement

18 After the Settlement Agreement was executed, the following events transpired. Pursuant to Clause A(1)(1) of the Settlement Agreement, the due date for the initial instalment of IDR 1bn was 21 August 2021. The Defendants made payment of this instalment in one or more tranches on 23 and/or 24 August 2021 (*ie,* within the 7-day period).

19 In compliance with Clause A(1)(2) of the Settlement Agreement, the Plaintiffs then discontinued Suit 617 and the 1st Defendant withdrew their appeal in CA 13 on or around 30 August 2021.

20 Thereafter, in respect of the Defendants' remaining Instalment Obligations under Clause A(1)(1):

(a) The first monthly instalment was due on 21 September 2021 (the "21 Sept instalment"). The Defendants claim to have made payment of

this on *13 October* whilst the Plaintiffs say that this was only paid on *14 October*.

(b) The second monthly instalment was due on 21 October 2021 (the "21 Oct instalment"). The Defendants claim that payment was made on *26 October* whereas the Plaintiffs say this was only done on *28 October*.

(c) The third monthly instalment was due on 21 November 2021 (the "21 Nov instalment"). It is undisputed that *no payment* was made for this instalment, or any subsequent instalments.

21 Concurrently, further developments also took place with regard to the Plaintiffs' SP3 Obligations under Clause A(1)(4):

(a) On 31 August 2021, the 1st Plaintiff's Indonesian attorney ("AKSET") submitted a letter to the JRMR Police to withdraw the Police Report and to petition for the issuance of the SP3 in relation to the 2nd Indonesian Proceedings.

(b) On 1 November 2021, the JRMR police issued two summonses to the Plaintiffs requesting that two named individuals attend in person to give their testimony in relation to the 2nd Indonesian Proceedings:

(i) The first summons required the current director of the 1st Plaintiff, Ms Quek Swee Li ("Ms Quek"), to attend before the JRMR Police on 17 November 2021 to give her testimony (the "17 Nov 2021 interview").

(ii) The second summons required the former director of the 1st Plaintiff, Mr Jason Aleksander Kardachi ("Mr Kardarchi"), to attend before the JRMR Police on 18 November 2021 to give

his testimony. Mr Kardarchi was apparently the director of the 1st Plaintiff at the time that the Police Report was lodged in March 2019, but had since left the position.

The summons addressed to Ms Quek is the more important of the two. Any references to "the summons" may thus be understood as mainly referring to this summons, unless otherwise specified.

22 The Plaintiffs replied to the JRMR Police with respect to these summonses, although neither Ms Quek nor Mr Kardarchi eventually attended on the appointed interview dates in November 2021 for various reasons offered by the Plaintiffs. The details of the Plaintiffs' responses to the summonses are dealt with later below. It suffices to say, at this juncture, that parties dispute whether the Plaintiffs' responses sufficed for the purposes of fulfilling their SP3 Obligations.

23 The next year, on 31 March 2022, the present Suit was commenced.

Parties' pleaded cases

Statement of Claim

24 The Plaintiff's pleaded case is straightforward. The Defendants' Instalment Obligations under Clause A(1)(1) of the Settlement Agreement required them to make instalment payments on specified due dates. In breach of these obligations:

(a) the 21 Sept instalment was only paid on 14 October 2021;

(b) the 21 Oct instalment was only paid on 28 October 2021;

(c) the 21 Nov instalment was not paid at all; and

(d) no further monthly instalments were paid thereafter.

25 As such, the Plaintiffs invoke Clause A(1)(7) (read with Clause A(1)) to claim the following against the PT Entities and the 1st Defendant on a joint and several basis:

(a) The Default Sum of IDR 6,957,181,489 (being IDR 8,221,181,489 less the amount of IDR 1,264,000,000 which the Defendants had paid under the agreement), or alternatively, damages to be assessed.

(b) A declaration that the Plaintiffs are entitled to an indemnity against all losses and expenses incurred as a result of the Defendants' default as well as legal costs on a full indemnity basis.

Defence and Counterclaim

26 The Defendants' defence is that they were entitled to cease payment of the monthly instalments under Clause A(1)(1)(b) read with Clause A(1)(8). This is allegedly because that the Plaintiffs themselves were *already* in breach of their SP3 Obligations under Clause A(1)(4) at the time. The particulars of this breach are pleaded in the Defence and Counterclaim ("D&CC") at paragraph 8(5) as follows:

> (5) In breach of their obligations under Clause A(1)(4) of the Settlement Agreement, the Plaintiffs failed to procure the SP3. Among other things:-
>
> (a) the initial letter sent by the 1st Plaintiff for the withdrawal of the 2nd Indonesian Proceedings to the JRMR Police was a scanned copy (instead of an original), which was rejected by the JRMR Police;
>
> (b) the Plaintiffs were "tardy in responding / failed to respond to communications they received from the

> JRMR Police, thereby holding up the issuance of the SP3"; and
>
> *(c) the Plaintiffs failed to respond to the summons issued by the JRMR Police* addressed to the officer(s) of the 1st Plaintiff, for such officer(s) to present themselves to the JRMR Police *and to provide information* in connection with the 2nd Indonesian Proceedings for the purposes of procuring the issuance of the SP3.
>
> [emphasis added in underline and italics underline]

The Defendants therefore deny that the Plaintiffs are entitled to invoke Clause A(1)(7) to claim the Default Sum and/or an indemnity.

27 Following from this, the Defendants counterclaim against the Plaintiffs for breach of the latter's SP3 Obligations under Clause A(1)(4). Invoking Clause A(1)(8)(b), the PT Entities plead that they are entitled to enforce the Settlement Agreement against the Plaintiffs. The Defendants thus seek the following reliefs:

(a) A declaration that the Plaintiffs have breached their SP3 Obligations under Clause A(1)(4) of the Settlement Agreement.

(b) An order that "the Plaintiffs comply with all directions and/or requirements imposed by the JRMR Police and to procure the SP3 (in order to discontinue the 2nd Indonesian Proceedings)".

(c) Further and/or in the alternative, "equitable compensation or damages to be assessed".

To be clear, the Defendants' counterclaim itself is not the subject of the present striking out application, although it evidently overlaps with the Plaintiffs' claim.

Reply and Defence to Counterclaim, and 1st and 2nd Further and Better Particulars

28 In their Reply and Defence to Counterclaim ("R&DCC"), the Plaintiffs deny the alleged breaches of their SP3 Obligations under Clause A(1)(4) in relation to the 2nd Indonesian Proceedings. In particular, they plead that they had "responded to the summons issued by the JRMR Police and provided information to [them]".

29 In their Further and Better Particulars dated 10 October 2022 and 2 November 2022 (the "1st FNBP" and "2nd FNBP" respectively), the Plaintiffs clarify that they had done so on two occasions on 16 November 2021 and 29 August 2022. They plead the following particulars:

(a) On 16 November 2021, AKSET sent a letter on the 1st Plaintiff's behalf to the JRMR Police (the "16 Nov 2021 letter"). The letter stated that (i) the 1st Plaintiff and its director Ms Quek wished to withdraw the Police Report; and (ii) attached a notarised written statement by Ms Quek in support.

(b) On 29 August 2022, the Plaintiffs' Ms Quek attended in person before the JRMR Police to provide her oral testimony in relation to the withdrawal of the Police Report (the "August 2022 testimony").

The striking out application

30 With the parties' pleaded cases in mind, I now outline their submissions in the present striking out application under O 18 r 19(1) of the ROC 2014.

Defendants' submissions

31 According to the Defendants, the Plaintiff's claim under Clause A(1)(7) is essentially premised on the Defendants' alleged failure to pay the monthly instalments *from November 2021 onwards.* It is contended that this claim is misconceived because the Plaintiffs were *already* in breach of their own SP3 Obligations at the time, which entitled the Defendants to cease payment of the monthly instalments. Specifically, the Defendants submit the following:

(a) Pursuant to the 2nd SP3 Obligation under Clause A(1)(4), the Plaintiffs were required to take "all necessary steps" in relation to the procurement of the SP3.

(b) The Plaintiffs have *admitted* that such "necessary steps" included their officers physically attending before the JRMR Police to respond to the summonses and to provide information.

(c) The summons addressed to Ms Quek required her to physically attend the 17 Nov 2021 interview, but she failed to do so. The Plaintiffs had accordingly (at the very least) breached their SP3 Obligations *as at this date*.

(d) Since this breach *preceded* the Defendants' obligation to pay the 21 Nov instalment, the Defendants were entitled to cease payments *from November 2021 onwards*, pursuant to Clause A(1)(8)(b).

32 It is further asserted that the Plaintiffs' failure to have Ms Quek attend the 17 Nov 2021 interview amounted to a "continuing breach" or an "outstanding step" which was (a) still not rectified by the time the Plaintiffs had commenced the Suit in *March 2022*; and (b) was only rectified when Ms Quek testified in person before the JRMR Police in *August 2022*. It follows (or so the

argument goes) that the Plaintiffs simply did not have a valid cause of action at the time that the present Suit was commenced.

33 The Defendants thus conclude that the Plaintiffs' claim should be struck out on the basis that "there was no reasonable cause of action at the time of the Suit". Alternatively, it is said that the claim is scandalous, frivolous and/or vexatious, and/or an abuse of process.

34 Significantly, despite the narrow way that the Defendants have framed the Plaintiffs' case at [31] above, it is clear that the Plaintiffs are also claiming late payments of the monthly instalments from as early as *September and October 2021* (see [24] earlier). As to this, the Defendants contend as follows:

> (a) There was no breach in respect of the 21 Sept instalment because it was the Plaintiffs themselves that had directed the PT Entities to "conduct payment" on 13 October 2021. The PT Entities duly made payment on that date, which was accepted by the Plaintiffs. Further and/or in the alternative, the Plaintiffs are not entitled to rely on the alleged breach to invoke Clause A(1)(7). This is because the Plaintiffs had unequivocally elected to continue receiving subsequent monthly instalments under Clause A(1)(1), and/or had otherwise waived their right to invoke Clause A(1)(7) to sue for the Default Sum.
>
> (b) Furthermore, there was no late payment for the 21 Oct instalment. Payment was made on 26 October 2021, which fell within the 7-day period following the due date (see also [20(b)] above).

Notably, the aforementioned defence of waiver by election was *not* pleaded in the D&CC. I will return to this point in my analysis later below.

Plaintiffs' submissions

35 The Plaintiffs deny that any of the grounds for striking out are made out.

36 As regards the Plaintiffs' own claim, they maintain that the Defendants had: (a) made late payment of the 21 Sept and 21 Oct instalments; and (b) failed to make payment of the 21 Nov instalment entirely. They contend that they had never waived the Defendants' breaches in respect of the former two instalments. In any event, since the 21 Nov instalment was never paid, the Plaintiffs insist that they were entitled to invoke Clause A(1)(7) *at the very latest* by 29 November 2021, once the 7-day period for that instalment had lapsed.

37 At the hearing, I queried counsel whether the Plaintiffs were still relying on the alleged late payment for the 21 Oct instalment to invoke Clause A(1)(7). It was only then that counsel clarified that Plaintiffs were not. In my view, this must be correct since Clause A(1)(7) would only be triggered if the PT Entities failed to make payment within the 7-day period. Even on the Plaintiffs' own case, the instalment was paid on 28 October 2021 before the period had expired (see [24(b)] above). This therefore leaves only the 21 Sept and 21 Nov instalments in issue.

38 As for the alleged breach of their SP3 Obligations under Clause A(1)(4) in relation to the 2nd Indonesian Proceedings, the Plaintiffs respond as follows:

> (a) The Plaintiffs did not breach their SP3 Obligations. The 2nd SP3 Obligation, as correctly interpreted, did not go so far as to require the Plaintiffs to procure Ms Quek to physically attend the 17 Nov 2021 interview before the JRMR Police given the circumstances at the time (see next sub-paragraph). The Defendants have failed entirely to show that this interpretation is legally unsustainable.

(b) Moreover, the Plaintiffs have put forward clear evidence that they had complied with their SP3 Obligations by responding to the summonses from, and providing information to, the JRMR Police. The Plaintiffs also had good reasons for Ms Quek's inability to attend the 17 Nov 2021 interview – namely, that Indonesian COVID-19 travel restrictions prohibited Ms Quek from entering Indonesia from Singapore; and she was medically advised against travelling due to a pre-existing medical condition. There is nothing factually unsustainable about the Plaintiffs' case.

(c) In any event, the JRMR Police have already issued the SP3 on 31 December 2022, subsequent to Ms Quek's August 2022 testimony.

39 Notably, the Plaintiffs' reply affidavit also alleges that the Defendants were in breach of their obligations to discontinue the 1st Indonesian Proceedings and any appeal therefrom under Clause A(1)(3). It is said that the PT Entities have failed to comply with their obligations to date, and that the Plaintiffs had in fact been notified that the Jakarta High Court had issued a verdict on 23 September 2021 to affirm the District Court's judgment in the proceedings. This allegation is, however, unpleaded and was raised for the first time in the Plaintiffs' reply affidavit in the present application.

Applicable legal principles for striking out

40 O 18 r 19(1) of the ROC 2014 states as follows:

> Striking out pleadings and endorsements (O. 18, r. 19)
>
> 19.—(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

> (*a*) it discloses no reasonable cause of action or defence, as the case may be;
>
> (*b*) it is scandalous, frivolous or vexatious;
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

41 The applicable legal principles on striking out are well-established. The threshold for the court to exercise its power to strike out a claim is a high one. The power is only invoked in "plain and obvious cases" – the claim must be obviously unsustainable, the pleadings unarguably bad, and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out (*Singapore Civil Procedure 2021 vol I (Cavinder Bull gen ed)* (Sweet & Maxwell, 2021) at para 18/19/6).

42 In the present case, the Defendants rely upon the three limbs in O 18 rr 19(1)(*a*), 19(1)(*b*) and 19(1)(*d*), although it is clear from their submissions that the first limb forms the spearhead of their application. The guiding principles governing each limb may be summarised thus:

> (a) Under O 18 r 19(1)(*a*), pleadings may be struck out if they disclose no reasonable cause of action. A reasonable cause of action is one with *some* chance of success, when only the allegations in the pleadings are considered: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [21]. This follows from O 18 r 19(2), which provides that no evidence shall be admissible on an application under this limb. On such an application, the pleaded facts are generally presumed to be true in favour of the plaintiff: *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R)

844 ("*Tan Eng Khiam*") at [29], cited in *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd and others* [2021] 5 SLR 738 at [2] and [21].

(b) Under O 18 r 19(1)(*b*), pleadings may be struck out if they are "scandalous, frivolous or vexatious". Allegations that are made needlessly and not related to the relief sought may be considered scandalous. In a similar vein, a claim is "frivolous or vexatious" if it is "plainly or obviously unsustainable". As explained in *The* "*Bunga Melati 5*" [2012] 4 SLR 546 (at [32]-[33] and [39]):

(i) an action is legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; and

(ii) an action is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance", for example, if it is "clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

(c) Under O 18 r 19(1)(*d*) and the inherent jurisdiction of the court, pleadings may be struck out if they are an abuse of the court process. An "abuse of process" means using the court machinery as a means of vexation and oppression in the process of litigation – for example, where a claim is brought not for the purposes of relief but for some other collateral or ulterior motive: *Gabriel Peter* at [22].

43 As stated at [42(a)] above, in considering whether the pleading in question discloses a reasonable cause of action under O 18 r 19(1)(*a*), the court proceeds *only* on the basis of the parties' pleadings without reference to any evidence. This stands in contrast to applications brought under the other limbs of O 18 r 19(1), in which affidavit evidence may be used (see *Tan Eng Khiam* at [29]-[30]). This point is crucial for present purposes because the Defendants' written submissions relied extensively upon affidavit evidence without any regard for the distinction between the different limbs of O 18 r 19(1). When I highlighted this at the hearing, the Defendants' counsel accepted the point, although she nevertheless maintained that the Plaintiffs' pleadings did not reflect any valid cause of action.

Issues to be considered

44 In view of the parties' pleadings and submissions, I find that the present dispute may be distilled into two key issues, as follows:

(a) *Issue 1*: Are the Plaintiffs entitled to invoke Clause A(1)(7) on account of the Defendants' alleged breach in respect of the *21 Sept instalment*? This follows from:

(i) the Plaintiffs' case that *at the earliest*, the Defendants' late payment of the 21 Sept instalment outside the 7-day period entitled them to invoke Clause A(1)(7); and

(ii) the Defendants' defence that there was no such late payment or alternatively, that the Plaintiffs had waived any such breach.

(b) *Issue 2*: Are the Plaintiffs entitled to invoke Clause A(1)(7) on account of the Defendants' alleged breach in respect of the *21 Nov*

instalment, or were the Plaintiffs already in breach of their SP3 Obligations at the time? This follows from:

(i) the Plaintiffs' case that the Defendants were in breach, *at the very latest*, by failing to pay the 21 Nov instalment within the 7-day period, thereby triggering Clause A(1)(7); and

(ii) the Defendants' case that pursuant to Clause A(1)(8), they were entitled to cease instalment payments *from November 2021 onwards* because the Plaintiffs themselves were *already* in breach of their SP3 Obligations at the time.

As mentioned earlier, it is undisputed that the Defendants did *not* make payment of the 21 Nov instalment. Notably, sub-paragraph (b)(ii) represents the Defendants' *sole* defence to this non-payment. If this defence is made out, the Defendants would be entitled to invoke Clause A(1)(8) in respect of the Plaintiffs' default. Conversely, if the Defendants cannot show that the Plaintiffs were themselves in breach of the SP3 Obligations by that time, they are left with no defence in this regard.

45 The success of the Defendants' present application thus hinges on them establishing any of the grounds for striking out in respect of *both Issues 1 and 2* above. Pertinently, it does not suffice for the Defendants to merely succeed on Issue 1 and fail on Issue 2. This is because in such an event, even if there was no breach as regards the 21 Sept instalment, the Plaintiffs would still (at the very least) be able to invoke Clause A(1)(7) in respect of the non-payment of the 21 Nov instalment. With this in mind, I now consider the Defendants' application proper.

Whether the Plaintiffs' pleadings disclose a reasonable cause of action

46 With respect to both Issues 1 and 2, I find that the Plaintiffs' pleadings clearly disclose a reasonable cause of action. This is a straightforward claim for breach of contract, and the Plaintiffs' pleaded case can be put simply as follows: (a) Clause A(1)(1) of the Settlement Agreement obliged the Defendants to pay the 21 Sept instalment and the 21 Nov instalment on their respective due dates; (b) in breach of these obligations, the 21 Sept instalment was only paid on 14 October 2021 after the lapse of the 7-day period, whilst the 21 Nov instalment was never paid; and (c) Clause A(1)(7) therefore entitles the Plaintiffs to claim the Default Sum and an indemnity against the Defendants. In my judgment, the Plaintiffs have pleaded the material facts necessary to formulate a complete cause of action for breach of contract.

47 In their D&CC, the Defendants do make a general denial of any breaches relating to the 21 Nov, 21 Oct and 21 Nov instalments. In my view, however, this does little to assist the Defendants. I observe two points here:

(a) As far as the 21 Sept instalment is concerned, the D&CC itself does not even positively assert any defence or justification for making payment after the expiry of the 7-day period. According to their pleaded defence, the Defendants were entitled to cease payment of the monthly instalments by November 2021 *at the earliest.* As the pleading stands, this leaves little more than a bare denial on Issue 1.

(b) As for the 21 Nov instalment, the Defendants do plead that pursuant to Clause A(1)(8), they were entitled to cease payment of the monthly instalments from November 2021 onwards because the Plaintiffs themselves were already in breach of their SP3 Obligations at the time. Nevertheless, in the Plaintiffs' R&DCC and 1st and 2nd

FNBPs, they specifically *denied* being in breach of their SP3 Obligations and gave particulars of the steps that they had taken to comply.

48 It bears emphasis that when applying O 18 r 19(1)(*a*), the court's central focus is on the sufficiency of the plaintiff's pleadings. In *Gabriel Peters* at [21], the Court of Appeal explained the inquiry as follows:

> 21 The guiding principle in determining what a "reasonable cause of action" is under O 18 r 19(1)(a) was succinctly pronounced by Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 All ER 1094. A reasonable cause of action, according to his lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. *As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial,* the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement.
>
> [emphasis added in underline and italics underline]

49 For this purpose, the pleaded facts are presumed to be true in favour of the plaintiff and no affidavit evidence may be admitted. As explained by the High Court in *Tan Eng Khiam* at [28]-[30], this is because it is essentially a question of law whether a plaintiff's pleaded claim discloses a reasonable cause of action:

> 28 The defendant's application to strike out the plaintiff's claim must be considered in light of the foregoing analysis of the Act and the established principles applicable to strike out an action under O 18 r 19 of the Rules of the Supreme Court 1970 ("the RSC") [*ie,* the predecessor to O 18 r 19 of the ROC 2014].
>
> 29 A cause of action is a claim based on a legal entitlement or the violation of a legal right. *The assertion of a claim must set out all the essential acts to support the claim. If a purported claim does not comply with these criteria or the statement of claim on its face shows that it is not sustainable, a defendant may apply to strike out the statement of claim on the ground that it does not*

> *disclose a reasonable cause of action*. No affidavit can be filed in support of such application *because it is essentially a question of law* and *the pleaded facts are presumed to be true in favour of the claimant*: see RSC O 18 r 19(2).
>
> 30 On the other hand, where the claim is stated to be invented or its prosecution fated to be futile and fruitless, the application should be founded on the other grounds. In that case facts are everything. An affidavit of facts in support of such grounds must be filed.
>
> [emphasis added in underline and italics underline]

50 I have expressed the view at [46] above that on their pleadings, the Plaintiffs have formulated a complete cause of action for breach of contract. On Issue 2, the Plaintiffs expressly denied the alleged breach of their SP3 Obligations in their R&DCC. Presuming in the Plaintiffs' favour that their pleaded facts are true, it stands to reason that they have a reasonable cause of action under O 18 r 19(1)(*a*). To my mind, that the Defendants themselves have taken a contrary position on Issues 1 and 2 in their own pleadings does not thereby render the Plaintiffs' pleaded claim fundamentally defective or otherwise unarguable. Any dispute as to the pleaded facts may more appropriately be taken up under the other limbs of O 18 r 19(1), or otherwise at trial.

51 In the same vein, I do not think that the Defendants' alleged defence of waiver by election at [34(a)] above is capable of salvaging their application under O 18 r 19(1)(*a*). This is notwithstanding the Defendants' heavy reliance on the same in their submissions. To begin with, the alleged defence does not go far enough since it deals only with Issue 1 but not Issue 2 (see [45] above).

52 The more serious difficulty, however, is that the alleged defence of waiver is not even pleaded by the Defendants in their D&CC. The Plaintiffs' counsel appears not to have noticed this seeing as he did not raise the objection himself during the hearing. Nevertheless, when I mentioned this to the

Defendants' counsel, she did not dispute that the alleged defence is indeed unpleaded. Counsel nevertheless insisted that even so, the Defendants are still entitled to rely on it because their legal submissions in the course of a striking out application are not confined to the pleadings.

53 To my mind, however, this cannot be correct as a matter of principle. Notably, in the context of interlocutory proceedings under O 14 of ROC 2014, the Court of Appeal has firmly held in *Olivine Capital Pte Ltd and another v Chia Chin Yan and another matter* [2014] 2 SLR 1371 that parties are bound by the four corners of their pleadings. Subject to very limited exceptions, a defendant cannot rely on a defence that has not been pleaded. At [41] and [43], the Court of Appeal reasoned as follows:

> 41 … As Woo J pointed out in [*Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786], *if a defendant is not bound by his pleadings in O 14 proceedings, it could lead to an absurd situation*. A defendant could succeed in resisting O 14 proceedings on the basis of an unpleaded defence. If an amendment to the defence to include that unpleaded defence is subsequently disallowed, the defendant will not be able to rely on the unpleaded defence at trial, with the potential result that he would have no arguable defence. This paradoxically means that summary judgment should have been entered in the plaintiff's favour in the first place. This would undermine the *raison d'être* of O 14, which is precisely the expeditious resolution of cases which do not require a full-blown trial.
>
> …
>
> 43 … [We] therefore hold that a fresh defence that has not been pleaded cannot be relied on by the defendant in O 14 proceedings *unless* the defence is amended *or* unless the case is an exceptional one where the court concerned is of the view that there are good reasons to permit reliance on such a fresh defence (for instance, if the fresh defence strikes at the heart of the court's powers, as was the case in *Poh Soon Kiat*). …
>
> [emphasis added in italics and italics underline]

54 Whilst I do not have the benefit of any direct authority on the issue, I am of the view that a similar logic would apply to striking out applications under

O 18 r 19(1). If a defendant is permitted to raise a substantive defence in the course of a striking out application which is not found in its pleadings, this could lead to absurd results. A defendant could succeed in striking out a plaintiff's claim at an interlocutory stage on the basis of an unpleaded defence, even though the defendant may not actually have been able to rely on that defence at trial and the plaintiff's action might otherwise have a reasonable prospect of success. Had the matter proceeded further, there is no certainty that any application by the defendant to include the new defence in its pleadings would succeed, and the defendant may well have been prevented from raising the unpleaded defence at trial. Such an inconsistent outcome would surely undermine the rationale of O 18 r 19(1), which is to strike out claims at the interlocutory stage only in "plain and obvious" cases where it is clear that the action is so fundamentally flawed that it would eventually fail at trial.

55 This view is in line with the general principles governing parties' pleadings. As emphasised by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [34]-[40], pleadings define the parameters of the case and the issues to be tried at trial. The general rule is that parties are bound by their pleadings because every litigant is entitled to be informed in advance of the case he has to meet, so that he may effectively challenge the same. This is crucial to ensuring fairness and upholding the principles of natural justice in the proceedings. The law does permit departure from the general rule in "limited circumstances" where the other party will not suffer from any irreparable prejudice or where it would be clearly unjust for the court not to do so. Such cases are, however, likely to be uncommon (*V Nithia* at [41]).

56 While the Court of Appeal's remarks in *V Nithia* were made in the context of the court issuing a final ruling after the end of trial, a similar line of reasoning would apply to a striking out application under O 18 r 19(1). Even though such an application comes at an interlocutory stage, it ultimately seeks a summary dismissal of a plaintiff's action (or a defendant's defence, as the case may be) *without a trial*. In such circumstances, it remains of paramount importance that parties have proper notice of each other's cases before the draconian power of striking out is invoked.

57 In the present case, there lies a real risk that permitting the Defendants to raise an unpleaded defence would unfairly prejudice the Plaintiffs in this application. I accept that it is not strictly necessary for the Defendants to specifically plead the precise words "election" or "waiver". Nevertheless, their pleadings should have at the very least disclosed the *material facts* which would support such a defence, so as to give the opposing party fair notice of the substance of their case (see, in this regard, the reasoning in *V Nithia* at [43]). As observed by the High Court in *Royal Melbourne Institute of Technology v Stansfield College Pte Ltd and another* [2018] SGHC 232 at [124], "A waiver is, by its very nature, fact-dependent and pleading the material facts is an indispensable foundation upon which a plea of waiver rests". Yet, the D&CC here makes no mention of the material facts underlying the alleged defence of waiver (*ie,* that the Plaintiffs accepted the alleged late payment of the 21 Sept instalment, and continued to demand and/or accept subsequent payments of the monthly instalments). The Plaintiffs accordingly did not have an opportunity to respond to the point in their R&DCC.

58 Furthermore, the Defendants' arguments on waiver were only raised for the first time in their *final* reply affidavit filed in support of the present application. As such, the only opportunity that the Plaintiffs had for dealing with

the point was in their written and oral submissions before me. In this regard, as I will discuss at [66]-[72] below, I find the Plaintiffs' limited attempt at a rebuttal to be somewhat unpersuasive. In fairness to the Plaintiffs' counsel, he is confined to making submissions on the legal effect of the Plaintiffs' conduct (as alleged by the Defendants) since the Plaintiffs did not have an opportunity to reply on affidavit.

59 Notwithstanding this, it is evident that limited notice was given to the Plaintiffs as regards the unpleaded defence of waiver. Bearing in mind the fundamental objection in principle at [54] above, there is a real risk of prejudice to the Plaintiffs in not being afforded the fullest opportunity to respond. As succinctly observed in *V Nithia* at [37], "[w]hen procedure is defective, the very substance of the result may rightly be called into question". It bears mention that even after I had drawn counsel's attention to the fact that the alleged defence was unpleaded, there was no indication from the Defendants that they intended to apply for leave to amend their D&CC.

60 I therefore do not think that the Defendants should be permitted to rely on an unpleaded defence (for Issue 1) to strike out the Plaintiffs' action. This goes for all three limbs in O 18 rr 19(1)(*a*), 19(1)(*b*) and 19(1)(*d*) that the Defendants rely on (see [73] and [88] below).

61 I only add that in an application for striking out under O 18 r 19(1)(*a*), the above reasoning applies with even more force. Given that only pleadings may be considered for the purposes of this limb, it *necessarily* follows that any substantive defences raised by a defendant to show that the plaintiff has no reasonable cause of action must also be grounded in the pleadings. The Plaintiffs have no pleaded response (to the alleged defence of waiver) that can be presumed true in their favour, simply because the said defence was never

pleaded to begin with. In my judgment, this cannot be held against the Plaintiffs. I am accordingly unable to accept the alleged defence of waiver on Issue 1.

62 Having found that the Plaintiffs' pleadings disclose a reasonable cause of action as regards both Issues 1 and 2, I decline to strike out their claim under O 18 r 19(1)(*a*).

Whether the Plaintiffs' claim is scandalous, frivolous and/or vexatious

63 I next consider whether the Plaintiffs' claim ought to be struck out on the ground that it is scandalous, frivolous and/or vexatious. Having concentrated their submissions on O 18 r 19(1)(*a*), the Defendants did not make any new substantive points specific to this alternative limb in O 18 r 19(1)(*b*). Nevertheless, their arguments under limb (*a*) may also be understood as going toward this alternative limb (*b*).

64 Based on the Defendants' submissions, their primary argument appears to be that the Plaintiffs' case is "frivolous and vexatious" in that it is legally and/or factually unsustainable on Issues 1 and 2. I examine these issues in turn.

Issue 1

65 The Plaintiffs' position on Issue 1 is simple – since the Defendants had failed to pay the 21 Sept instalment within the 7-day period, the Plaintiffs are entitled to invoke Clause A(1)(7) to claim the Default Sum.

66 The Defendants, on the other hand, deny any such breach and also raise the defence of waiver by election (see [34(a)] above). Their line of argument is briefly as follows. There was no breach in relation to the 21 Sept instalment because it was the Plaintiffs themselves that had directed payment to be made on 13 October 2021. Furthermore, even after the alleged breach, the Plaintiffs

nevertheless continued to: (a) accept payment for the 21 Sept instalment; (b) accept payment for the 21 Oct instalment; and (c) demand payment of the 21 Nov instalment. By this conduct, the Plaintiffs had unequivocally *elected to affirm* their right to receive further instalment payments *instead of* invoking their alleged right to immediately claim the Default Sum under Clause A(1)(7). Since these two rights were "inconsistent" with each other, the Plaintiffs must be taken to have irrevocably waived their right to invoke Clause A(1)(7) for the alleged default on the 21 Sept instalment. Having done so, the Plaintiffs cannot now "go back" and change their mind.

67 As noted at [58] earlier, the Plaintiffs did not have an opportunity in their pleadings or their affidavit to respond to this alleged defence of waiver. In legal submissions, their sole rebuttal is that subsequent to the Defendants' breach, the Plaintiffs' acceptance of any further instalment payments did not constitute a waiver because there was no election made between two inconsistent rights. Instead, the Plaintiffs' right to continue receiving further instalment payments and their right to sue for the Default Sum are said to be entirely "*consistent*" and "*cumulative*". Accordingly, so the argument goes, the Plaintiffs were entitled to exercise one right without abandoning the other.

68 It is well-established that a waiver by election arises where a party has, by words or conduct, communicated clearly and unequivocally that it has elected not to exercise one of two *inconsistent* rights. Once an election is made, it is final and binding, and the party will be taken to have abandoned the right it has elected not to exercise. This proposition is reflected in the Court of Appeal's holding in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [54]:

> … This doctrine [of waiver by election] concerns a situation where a party has a choice between two *inconsistent* rights. If

> he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election…
>
> [emphasis added in underline and italics underline]

69 Here, the key issue in dispute is whether, upon the Defendants' alleged default on the 21 Sept instalment, the Plaintiffs had made an election between two *inconsistent* rights, namely: (a) their right to *continue receiving further instalment payments* under Clause A(1)(1); and (b) their right to *immediately bring an action for the Default Sum* under Clause A(1)(7) in respect of the said breach. Since parties made extensive submissions on this issue of waiver, I express the following views subject to the holding at [73] below.

70 On the face of things, I have some misgivings about the Plaintiffs' rebuttal. To my mind, whether the two rights in question are inconsistent with each other is ultimately a matter of contractual interpretation. On a plain and objective reading of the Settlement Agreement as a whole, I am inclined to think that parties must have intended the exercise of these two rights to be mutually exclusive, granted that the agreement does not expressly specify so.

71 After a breach occurs, the continued operation of the instalment scheme, which apportions the payment of the *Settlement Sum* (IDR 2.188bn) over *multiple tranches*, does not sit well with the Plaintiffs still being concurrently and cumulatively entitled to bring an action for the *considerably larger* Default Sum *immediately*. In particular, there appears to be a common component in the Settlement Sum and the Default Sum that would be dealt with inconsistently. I explain as follows:

(a) The Default Sum is stipulated to be the sum of IDR 8,221,181,489 *less any instalment payments made under the agreement,* and invoking Clause A(1)(7) would entitle the Plaintiffs to *immediately* bring an action for this. Crucially, whatever the claim amount may be (as at the time of the suit) would necessarily include an amount that corresponds to *as yet unpaid instalments.* These instalment amounts would otherwise have been deducted from the claim amount had they been paid.

(b) On the other hand, the Plaintiffs' right under Clause A(1)(1) is to receive payment of further (and as yet unpaid) instalments *only on their respective due dates* and no earlier.

(c) At the time of breach, if both rights are exercised at the same time, there appears to be an inconsistency as to *when* the Plaintiffs would be entitled to the amounts that are the subject of as yet unpaid instalments. To illustrate the point, after the alleged default on the 21 Sept instalment, the Plaintiffs would have the following two options:

(i) If the Plaintiffs elected to exercise their right under Clause A(1)(1), they would be entitled to receive the next 21 Oct instalment only on its stipulated *due date*.

(ii) On the other hand, if the Plaintiffs invoked Clause A(1)(7) at the time of breach, they would be entitled to *immediately* bring an action for the Default Sum, which would include an amount corresponding to the unpaid 21 Oct instalment that had not been deducted.

Arguably, if the Plaintiffs chose to accept payment for the 21 Oct instalment under the former option, then they must have abandoned their

right to immediately sue for the entire Default Sum (with that instalment amount *not* deducted) instead.

72 It is therefore not easy to see how the two rights in Clauses A(1)(1) and A(1)(7) can be exercised "consistently" and "cumulatively" in respect of the same breach. Arguably, the neater and more persuasive interpretation is that parties simply intended the exercise of the two rights to be mutually exclusive. If so, then assuming for the sake of argument that the Defendants' version of events is correct, there is much force in their submission that the Plaintiffs had effectively made a binding election between two inconsistent rights (see [66] above).

73 Notwithstanding the apparent merit in the Defendants' submission, however, I am ultimately not prepared to strike out the Plaintiffs' claim under Issue 1 because of the fundamental difficulties with the unpleaded nature of the defence. As explained at [52]-[60] above, so long as the alleged defence of waiver remains unpleaded, it would not be safe to strike out the action on that basis. Absent the alleged defence, there is really nothing factually or legally unsustainable about the Plaintiffs' case that the late payment of the 21 Sept instalment entitles them to invoke Clause A(1)(7). In any event, the Plaintiffs' action for the Default Sum would not be liable to be struck out anyway given the view that I reach on Issue 2 below.

Issue 2

74 Issue 2 essentially turns on whether the Plaintiffs were in breach of their SP3 Obligations in November 2021, since that is the Defendants' sole defence for the non-payment of the 21 Nov instalment (see [44(b)] above).

75 To recapitulate, under Clause A(1)(4), the Plaintiffs' 1st SP3 Obligation was to discontinue the 2nd Indonesian Proceedings by submitting a letter withdrawing the Police Report. The 2nd SP3 Obligation was to take "*all necessary steps*" to procure the JRMR Police to issue the SP3. The latter obligation is pertinent for present purposes.

76 Based on their submissions, parties put forth conflicting legal interpretations of the Plaintiffs' 2nd SP3 Obligation:

(a) According to the Defendants, the Plaintiffs' obligation to take "all necessary steps" required them to procure Ms Quek's *physical* attendance before the JRMR Police on *17 November 2021*, in accordance with the summons addressed to her. Since she failed to do so, the Plaintiffs were in "continuing breach" from that date onwards.

(b) On the other hand, the Plaintiffs argue that the 2nd SP3 Obligation is akin a "best endeavours" or "all reasonable endeavours" clause. In their view, the obligation, as correctly interpreted, did not go so far to require them to procure Ms Quek's physical attendance before the JRMR Police on 17 November 2021 given the circumstances at the time. Instead, the steps that they had taken at the material time sufficed for the purposes of complying with their obligation.

77 As a matter of legal sustainability, I agree with the Plaintiffs that their interpretation of the 2nd SP3 Obligation is an entirely plausible one. The phrase "*all necessary steps*" is not defined in the Settlement Agreement. *What* steps the Plaintiffs are required to take and *when* the Plaintiffs are required to take any given "step" is plainly open to argument. This is especially so if the circumstances prevailing at the time may be taken into account. In this vein, it is perfectly arguable that the 2nd SP3 Obligation ought to be construed as an

obligation to take "all reasonable endeavours" or "best endeavours". As explained by the Court of Appeal in *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 at [73]-[74], such an obligation is "not a warranty to procure the contractually-stipulated outcome" and what steps ought to be taken by the obligor is a "fact-sensitive inquiry".

78 The Defendants nevertheless advance two arguments in support of their interpretation. First, it is said that the Plaintiffs have *admitted* that that their 2nd SP3 Obligation required them to have their officers physically attend before the JRMR Police to respond to the summons and provide information. In support of this, the Defendants refer to the particulars of breach pleaded in their D&CC at paragraph 8(5)(c) (see [26] above). They then refer to the Plaintiffs' response in the R&DCC at paragraph 11(c), as set out below:

> 11. In respect of the particulars pleaded at paragraph 8(5) of the Defence:
>
> …
>
> (c) Paragraph 8(5)(c) of the Defence is denied. The Defendants had responded to the summons issued by the JRMR Police and provided information to the JRMR Police in connection with the 2nd Indonesian Proceedings.

79 In my view, however, there was simply no such admission by the Plaintiffs. Nowhere in the Plaintiffs' pleadings do they go so far as to concede that the 2nd SP3 Obligation required them to have their officers *physically* attend before the JRMR Police. Still less did they concede that such physical attendance (by Ms Quek) must have taken place on *17 November 2021* (and no later). There is nothing here that is fatal to the Plaintiffs' proposed legal interpretation.

80 Second, the Defendants also emphasise that it was only after Ms Quek gave the August 2022 testimony in person that the JRMR Police finally issued the SP3 on 31 December 2022. According to the Defendants, this confirms that Ms Quek's testimony in person was indeed a "necessary step" to procure the JRMR Police's issuance of the SP3. Since this step was still "outstanding" as of November 2021, the Plaintiffs are said to have been in "continuing breach" from then onwards.

81 Whilst I can accept that the aforementioned fact may well be relevant to whether Ms Quek's physical attendance before the JRMR Police was a "necessary step", it can hardly be said to be conclusive of the correct legal interpretation. Moreover, it also does not go to show *when* the "step" in question must have been completed in order for the Plaintiffs to be taken as having complied with their obligation (*ie,* on 17 November 2021 or on any later occasion).

82 I accordingly do not think there is anything legally indefensible about the Plaintiffs' interpretation of the 2nd SP3 Obligation.

83 Turning next to factual sustainability, the Plaintiffs list the following positive steps that they had taken to comply with their SP3 Obligations:

(a) On 31 August 2021, on behalf of the 1st Plaintiff, AKSET submitted a letter (dated 27 August 2021) to the JRMR Police to withdraw the Police Report and to petition for the issuance of the SP3. On 7 September 2021, AKSET then submitted the original copy of the letter to the JRMR Police.

(b) On receiving the summons addressed to Mr Kardarchi, AKSET forwarded the summons to him and requested his attendance before the

JRMR Police on the appointed date. AKSET also sent a letter (dated 16 November 2021) to the JRMR Police explaining that (i) Mr Kardarchi was no longer a director of the 1st Plaintiff; (ii) the 1st Plaintiff no longer had access to his business activities; but (iii) to facilitate the process, the summons had been forwarded to Mr Kardarchi at his last known office address. No further request was subsequently received from the JRMR Police with respect to this summons.

(c) As regards the summons addressed to Ms Quek, she was unable to attend in person before the JRMR Police on the appointed day of 17 November 2021. This was because: (i) COVID-19-related travel restrictions in Indonesia prohibited Ms Quek from entering the country from Singapore; and (ii) Ms Quek's doctor had also advised her against travelling as she had a pre-existing medical condition that put her at a higher health risk in the event of a COVID-19 infection.

(d) Nevertheless, to facilitate the JRMR Police's issuance of the SP3, AKSET sent the 16 Nov 2021 letter. The letter: (i) explained that Ms Quek was unable to attend in person because she was "domiciled in Singapore" and had "health conditions" which restricted her travel during the ongoing COVID-19 pandemic; (ii) annexed a notarised statement by Ms Quek to explain the 1st Plaintiff's withdrawal of the Police Report as part of the terms of the Settlement Agreement; and (iii) asked whether Ms Quek could testify via online means if additional testimony was still required from her.

(e) The 1st Plaintiff also authorised AKSET to liaise with the JRMR Police to enquire about the status of the withdrawal of the Police Report and any further assistance that might be required to facilitate this. To this end, AKSET met with the JRMR Police on three occasions on 16

December 2021, 11 February 2022 and 1 March 2022. However, the JRMR Police said each time that the matter was still "pending" without any request for follow-up action by the Plaintiffs.

(f) Subsequently, after Ms Quek had attended before the JRMR Police to give the August 2022 testimony, the JRMR Police finally issued the SP3 on 31 December 2022.

84 The Defendants, however, dismiss the Plaintiffs' efforts as mere "excuses" and argue as follows:

(a) First, the Plaintiffs did not plead any of these "excuses" as a defence to the alleged breach of their 2nd SP3 Obligations.

(b) Second, in relation to the 16 Nov 2021 letter, there is no evidence to confirm that the JRMR Police had (i) accepted any of Ms Quek's excuses as a justification for her non-attendance; and/or (ii) agreed to allowing Ms Quek to testify via online means.

(c) Third, the follow-up meetings between AKSET and the JRMR Police are not pleaded. In any event, even taking the Plaintiffs' case at its highest, the JRMR Police had stated that "the status was still pending" as of March 2022 when the present Suit was commenced. This demonstrates that "the SP3 issue was far from resolved even back then" and it was therefore "premature and erroneous for the Plaintiffs to have assumed that they had complied with their SP3 Obligations".

85 In my judgment, these criticisms fail entirely to meet the high threshold required to show that the Plaintiffs' case is factually unsustainable. To begin with, the Defendants offer little basis to deny that the Plaintiffs actually took the

positive steps that they say they did. Insofar as the Defendants argue that such steps fell short of complying with the Plaintiffs' SP3 Obligations, that would simply be a matter for trial.

86 It is true that in their pleadings, the Plaintiffs did not specify all the positive steps that they had allegedly taken to comply with their SP3 Obligations. Nevertheless, they did at least plead that they had provided information and responded to the summons issued by the JRMR Police by way of the 16 Nov 2021 letter and the August 2022 testimony. Even if the Plaintiffs' factual case is limited to these two steps, they would still have a defensible case given the documentary evidence they had adduced in support (see [83(c)-(d)] above). Moreover, the Plaintiffs would *still* be entitled to advance their legal interpretation of the 2nd SP3 Obligation (at [76(b)] above), and to argue that the 16 Nov 2021 letter sufficed for the purposes of complying with their obligation in view of the prevailing circumstances in November 2021.

87 I am consequently satisfied that the Plaintiffs have a tenable case in fact and at law as regards the alleged breaches of their SP3 Obligations. Since these alleged breaches represent the Defendants' only defence for the non-payment of the 21 Nov instalment, it follows that the Plaintiffs' claim in respect of such non-payment ought to also stand. I therefore decline to strike out the Plaintiffs' claim under O 18 r 19(1)(*b*).

Whether there is an abuse of the Court's process

88 For much the same reasons discussed above, I do not think there is any abuse of process here. The Plaintiffs have a perfectly reasonable claim for breach of contract. Contrary to the Defendants' submission, there is nothing to suggest that the Plaintiffs had instituted this suit without a valid cause of action as a means to vex or oppress them. The Defendants' application to strike out the

Plaintiffs' action under O 18 r 19(1)(*d*) and/or the court's inherent jurisdiction must also fail.

The alleged non-discontinuance of the 1st Indonesian Proceedings

89 For the sake of completeness, I refer to the Plaintiffs' fresh allegation at [39] above that the Defendants had breached their obligations under Clause A(1)(3) to discontinue the 1st Indonesian Proceedings and any appeal therefrom. The Defendants contend that this allegation is a non-starter because it is not even pleaded; the allegation is thus said to be "not only irrelevant in this suit, but also in this striking out application". It suffices to say that I agree with the Defendants on this score, in line with the general rule that parties are bound by their pleadings (as discussed at [53]-[61] earlier). I only add that the Defendants cannot then be heard to complain when their unpleaded defence of waiver fails for the same reason.

90 In any event, the Plaintiffs' counsel clarified in the hearing before me that they are not relying on this alleged breach as a substantive ground for resisting the striking out application. Counsel explained that the Plaintiffs had merely raised this in relation to the issue of costs. Whether the court is entitled to take such unpleaded allegations into account as a matter of costs can be dealt with at the appropriate juncture. Given the circumstances, I need not say any more at this time.

Conclusion

91 For the foregoing reasons, I find that the Defendants have failed to establish any of the grounds for striking out. The striking out application under O 18 r 19(1) of the ROC 2014 is therefore dismissed in its entirety. I will hear parties on costs at a later date.

Andre Sim
Assistant Registrar

Adrian Wong Soon Peng, Sarah Sim Hui Li and Sia Bao Huei (Rajah & Tann Singapore LLP) for the applicant defendants;
Oommen Mathew, Lim Si Cheng and See Wern Hao (Omni Law LLC) for the respondent plaintiffs.