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

[2023] SGHC 216

Originating Claim No 406 of 2022 (Summons No 1463 of 2023)

Between

Wang Piao

… *Claimant*

And

Lee Wee Ching

… *Defendant*

JUDGMENT

[Civil Procedure — Amendments]

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v
Lee Wee Ching

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(Summons No 1463 of 2023)
Goh Yihan JC
4 July 2023

4 August 2023 Judgment reserved.

Goh Yihan JC:

1 This summons, HC/SUM 1463/2023 ("SUM 1463"), is the defendant's application to amend his defence (the "Defence") and add two defendants to the counterclaim in HC/OC 406/2022 ("OC 406"). The defendant took out SUM 1463 after summary judgment had been entered against him in HC/SUM 104/2023 ("SUM 104"). The defendant's appeal against the decision in SUM 104 is due to be heard after I decide his present application in SUM 1463.

2 After taking some time to consider the matter, I dismiss SUM 1463. I set out the reasons for my decision not least because the parties made substantive arguments before me, but also because the amendments are sought post-summary judgment under the new Rules of Court 2021 (the "ROC 2021"). In my respectful view, while it is often said that whether to allow an amendment

is a matter of the court's discretion, it is important that such discretion is exercised in a principled and consistent manner. It is therefore timely to rationalise the cases that concern amendments sought after summary judgment has been entered.

Background facts leading to the present application

3 The background facts leading to the present application can be described briefly. On 22 November 2022, the claimant commenced OC 406 against the defendant. The claim in OC 406 is for the breach of a loan agreement between the parties (the "Loan Agreement"). By the terms of the Loan Agreement, the claimant extended a sum of US$1,100,000 to the defendant. In exchange, the defendant agreed to repay the claimant the sum of US$1,950,000 within approximately six months. Thus, the claimant's case is premised on the repayment of a sum provided for in the Loan Agreement.

4 On 16 December 2022, the defendant filed the Defence in OC 406. The defendant's case is that, among others: (a) he never received any money under the Loan Agreement because the sum of US$1,099,911.66 that had been transferred to him was to purchase a "Apek Vantage Unit" on behalf of the claimant and his associates; and (b) he does not recall executing the Loan Agreement. In essence, the defendant says that the supposed loan was not really a loan, and that even if it was a loan, he does not recall entering into it.

5 On 13 January 2023, the claimant commenced SUM 104 to seek summary judgment against the defendant. On 14 April 2023, the learned Assistant Registrar (the "AR") granted summary judgment for the claimant in the sum of US$1,950,000 together with interest. The learned AR first found that the claimant had made out a *prima facie* case on the basis of the Loan

Agreement, which clearly obliged the defendant to repay the sum of US$1,950,000. The learned AR then concluded that the defendant did not show that there were any triable issues or that he had a *bona fide* defence. In this regard, the learned AR observed that the defendant did not plead that the Loan Agreement was a sham or that it had been forged. Further, the learned AR found that the defendant's attempt to recharacterise the Loan Agreement as not being a loan was incoherent and that this attempt did not explain how the defendant came to sign the Loan Agreement that was clearly stipulated to be a loan.

6 On 24 April 2023, the defendant filed an appeal against the learned AR's decision in SUM 104. On 4 May 2023, the defendant requested his solicitors to instruct Mr N Sreenivasan SC ("Mr Sreenivasan") to argue the appeal. It was in this context that the defendant took out the present application on 15 May 2023. The defendant sought to add two defendants to the counterclaim. The defendants also sought amendments to the Defence across eight broad areas, namely:[1]

> (a) to amend the timeframe during which: (i) the defendant intended to purchase one Vantage Equipment Unit for the purposes of refurbishment and resale for profit; and (ii) the claimant and Bryan (who is the claimant's associate) expressed interest to similarly acquire a Vantage Equipment Unit for refurbishment and resale;
>
> (b) to add the defence that the Loan Agreement is not enforceable as it is not supported by consideration;

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[1] Tab A to HC/SUM 1463/2023 dated 15 May 2023; Defendant's Written Submissions dated 27 June 2023 ("DWS") at pp 7–9.

(c) to add the defence that the Loan Agreement is an illegal moneylending agreement and is therefore unenforceable;

(d) to make clear that no loan amount was transferred to the defendant pursuant to the Loan Agreement and, therefore, there was no obligation for the defendant to make payment on the "Equipment Sale Price" under the Loan Agreement;

(e) to make clear how the Loan Agreement had been varied by conduct;

(f) to add the defence that the proper interpretation of the Loan Agreement is that it is implied that the payment of the "Equipment Sale Price" by the defendant to the claimant was contingent on the Apek Vantage Unit being sold at the "Equipment Sale Price" of US$1,950,000, and/or that any interest charged for late payment was on the "Loan Amount" of US$1,100,000 and not the "Equipment Sale Price" of US$1,950,000;

(g) to add the defence that the interest charged for late payment is a penalty clause and is therefore unenforceable; and

(h) to add the defence of set-off in light of the counterclaim commenced against the claimant, Bryan, and Apek. By way of background, the defendant commenced the counterclaim on the basis that, if the defendant is found liable to the claimant under the Loan Agreement, then the defendant should be given compensation for the Apek Vantage Unit that was shipped out due to the claimant, Bryan, and/or Apek for zero benefit to the defendant.

7 With these background facts, as well as the amendments sought by the defendant, in mind, I turn now to the applicable law.

The applicable law

The general approach to amendments

The ROC 2021 does not prescribe a more restrictive approach

8 To begin with, the present application is made under O 9 rr 10 and 14 of the ROC 2021. Order 9 r 10, which is about the adding and removing of parties, relates to the defendant's proposed amendment to add the defence of set-off in light of the counterclaim. In turn, O 9 r 14, which is about the amendment of pleadings, relates to the rest of the defendant's proposed amendments. Given the centrality of O 9 r 14, I set out the relevant parts of the provision:

> **Amendment of pleadings (O.9, r.14)**
>
> **14.—**(1) The Court may allow the parties to amend their pleadings.
>
> (2) In a special case, the Court may consider events that occurred after the originating claim is filed to be pleaded even though they do not relate back to the date of the filing of the originating claim.
>
> (3) The Court must not allow any pleading to be amended less than 14 days before the commencement of the trial except in a special case.

9 Before me, Mr Edmund Kronenburg ("Mr Kronenburg"), who appeared for the claimant, argued that the general approach to amendments is now more "restrictive" following the passage of the ROC 2021. In support of this argument, Mr Kronenburg pointed to O 9 r 14(3), which expressly prohibits the amendment of any pleading less than 14 days before the commencement of a trial except in a "special case". Mr Kronenburg also pointed out that a court is

bound to apply the Ideals in O 3 r 1 of the ROC 2021, and those Ideals point towards a more restrictive approach to amendments.

10 I agree with Mr Kronenburg in so far as the ROC 2021 prescribes a more restrictive approach to amendments in one specific situation, which is the amendment of any pleading less than 14 days before trial. Indeed, as the learned authors of *Singapore Rules of Court: A Practice Guide 2023 Edition* (Chua Lee Ming editor-in-chief) (Academy Publishing, 2023) ("*Singapore Rules of Court*") point out, the rationale for O 9 r 14(3) is "to eliminate the prevalent practice of parties seeking to amend pleadings very close to the trial date or even on the first day of trial, which could result in wastage of court hearing time and possibly the adjournment of the trial" (at para 09.042, citing Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) ("*Civil Justice Commission Report*") at p 18, para 6). Apart from this situation, there is nothing in the *Civil Justice Commission Report* which suggests that the ROC 2021 is meant to prescribe a more restrictive approach to amendments. Indeed, in their survey of the differences between the provisions relating to amendments in the Rules of Court (2014 Rev Ed) (the "ROC 2014") and those in the ROC 2021, the learned authors of *Singapore Rules of Court* allude to O 9 r 14(3) of the ROC 2021 as being the only exception to the seemingly unrestricted approach prescribed by O 20 r 5(1) of the ROC 2014, under which a court can allow amendments at any stage of the proceedings.

11 Accordingly, as a preliminary point, I do not think that the ROC 2021 prescribes a more restrictive approach to amendments save for the one specific situation prescribed in O 9 r 14(3). For completeness, I likewise do not think that the Ideals, which, while prescribing for "expeditious proceedings", should be extrapolated to impose a more restrictive approach to amendments when

there is only the one express reference to such an approach in O 9 r 14(3). As such, the prevailing principles in relation to amendments as established under the ROC 2014, other than the amendment of any pleading less than 14 days before trial, should continue to apply for amendments sought under the ROC 2021. It is to these principles that I now turn.

The prevailing principles in relation to amendments

12 It is clear, as the Court of Appeal pointed out in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502, albeit referring to O 20 r 5(1) of the ROC 2014, that "the court may grant leave to amend a pleading at any stage of the proceedings" (at [101]). Although this no longer applies to the specified situation in O 9 r 14(3) of the ROC 2021, this general statement is still accurate to the extent that it conveys that the courts have a broad discretion in deciding whether to allow amendments.

13 As to the principles guiding the exercise of this broad discretion, Chan Sek Keong CJ, in the seminal Court of Appeal decision of *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*"), summarised the applicable principles in the following manner (at [113]):

> The guiding principle is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined (see *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 ("*Wright Norman*") at [6], *Chwee Kin Keong* at [102], *Asia Business Forum* at [10] and *Ketteman v Hansel Properties Ltd* [1987] AC 189 ("*Ketteman*") at 212; see also *Singapore Civil Procedure 2007* at para 20/8/8 and *Singapore Court Practice 2006* at para 20/5/3). However, an important caveat to granting leave for the amendment of pleadings is that it must be just to grant such leave, having regard to all the circumstances of the case. Thus, this court held in *Asia Business Forum* that the court, in determining whether to grant

> a party leave to amend his pleadings, must have regard to "the justice of the case" (at [12]) and must bear in mind (at least) two key factors, namely, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs and whether the party applying for leave to amend is "effectively asking for a second bite at the cherry" (at [18]). These two key factors were endorsed recently again by this court in *Susilawati* at [58].

As can be seen from this passage, the general or guiding principle is that amendments should be "allowed if they would enable the real question and/or issue in controversy between the parties to be determined". This is in turn based on the Court of Appeal's earlier statement in *Wright Norman and another v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 ("*Wright Norman*") (at [6]).

14 There are other cases which have added to the principles in relation to amendments. For example, in the Court of Appeal decision of *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 ("*Ng Chee Weng*"), Andrew Phang Boon Leong JA explained that the broader rationale behind the general principle, that an amendment which would enable the real issues between the parties to be tried should generally be allowed, is that "[t]he court should be extremely hesitant to punish litigants for mistakes they make in the conduct of their cases, by deciding otherwise than in accordance with their rights" (at [24]). However, the learned judge observed that this rationale had been qualified in, for instance, the High Court decision of *Tang Chay Seng v Tung Yang Wee Arthur* [2010] 4 SLR 1020, where Tan Lee Meng J explained the need to differentiate "between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage" (at [11]). Furthermore, Phang JA in *Ng Chee Weng* also pointed out that "[e]ven if an amendment is in order, the court will not allow the amendment if it is obvious that the amended claim would be struck out at trial" (at [106]).

15 In my respectful view, while the exercise of a court's discretion to allow an amendment to pleadings has been couched in such general terms as described above, it would be helpful to rationalise exactly what phrases such as "real question in controversy between the parties to be determined" mean, and how they should be applied. In saying this, I do not intend to detract from the broad discretion that the courts have in deciding whether to allow such amendments, but only to provide an analytical framework that can be applied consistently and with certainty across cases.

16 First, as a threshold question, a court needs to determine the stage of the proceedings in which the amendment to the pleadings is being sought. This is because, in so far as can be discerned from the case law, the principles relating to amendments apply differently depending on the stage of the proceedings in which the amendments are sought. Indeed, as Lord Griffiths pointed out in the House of Lords decision of *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220, "to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence". It would therefore be useful for a court to situate, at the outset, the circumstances in which amendments to the pleadings are being sought. Generally, the later an application is made, the stronger would be the grounds required to justify it, but because it is a matter of the court's discretion, no hard and fast rules may be laid down (see the Court of Appeal decision of *Asia Business Forum Pte Ltd v Long Ai Sin and another* [2004] 2 SLR(R) 173 ("*Asia Business Forum*") at [12]). This determination may affect the specific application of the general principles to follow.

17 Second, having determined the stage of the proceedings in which the amendments are sought, the court should consider whether the amendments

sought "would enable the real question and/or issue in controversy between the parties to be determined". Given the overarching rationale that the courts "should be extremely hesitant to punish litigants for mistakes they make in the conduct of their cases" (see *Ng Chee Weng* at [24]), this general principle is an appropriate starting point because it prioritises the interest of the amending party to advance his or her case substantively. As to what this general principle entails, the learned authors of Sir Jack Jacob and Iain S Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) ("*Pleadings*") equate this with the amendment application being made in "good faith" (at p 198). In my view, it goes without saying that an amendment application must be made with the genuine intention to enable the real question or issue in controversy between the parties to be determined. It would, for example, not be right for the amendment to be made to vex the opposing party or for any other ulterior motive (see *Pleadings* at p 198). Practically, a court can discern this from the circumstances of the case, including the materiality of the proposed amendment. As such, it is clear that a court will disallow an amendment that is useless (see *Ng Chee Weng* at [106]) or merely technical or trivial. This will necessarily involve a rudimentary assessment of the merits of the amendment because, for instance, a pleading that is bad in law would certainly not amount to a real question or issue in controversy between the parties to be determined (see the English High Court decision of *Collette v Goode* (1878) 7 Ch D 842). A court cannot be expected to adjudicate on a bad pleading that is likely to be struck out in any event.

18 Third, having determined whether the amendments sought would enable the real question or issue in controversy between the parties to be determined, the court should consider whether it is nonetheless just to allow the amendments. The focus of the enquiry here shifts from the party seeking to

amend the pleadings to the opposing party. This gives effect to Andrew Phang Boon Leong JC's (as he then was) allusion in the High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 that procedural justice is an important aspect of the holistic ideal of justice itself (at [5]). Thus, as the learned judge said later in *Ng Chee Weng*, "if the procedure used to achieve the outcome is not fair, that itself will taint the outcome" (at [28]). In this regard, the court can consider a non-exhaustive list of factors. But the principal factors will be those listed by Chan CJ in *Review Publishing* (at [113]), namely: (a) whether the amendments would cause any prejudice to the other party which cannot be compensated in costs; and (b) whether the party applying for permission to amend is effectively asking for a second bite at the cherry. What these factors mean and how they are to be applied will depend on the facts of each case, as informed by the starting determination of the stage of the proceedings in which the amendments are sought.

19 In my respectful view, approaching an amendment application in the three-step analytical framework above will promote consistency and certainty in such applications.

The specific approach to amendments to a defence after summary judgment

An amendment sought after summary judgment is post-judgment

20 With the above analytical framework in mind, I turn to the specific approach to amendments to a defence after summary judgment is entered against the defendant. This is the precise situation in the present application. To begin with, the situation after summary judgment is entered into is clearly post-judgment (see the Court of Appeal decision of *Hwa Lai Heng Ricky v DBS Bank Ltd and another appeal and another application* [2010] 2 SLR 710 ("*Ricky Hwa*") at [13]). As such, the principle that amendments of pleadings should be

permitted "sparingly" in the post-judgment context (see *Ricky Hwa* at [13]) should apply. Apart from the interests of the immediate parties to the action, there is also the public interest that judicial proceedings be conducted efficiently and with finality (see the Court of Appeal decision of *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [122]). Indeed, in the post-judgment context, the losing party should generally not be permitted to disrupt this sense of finality by applying for amendments.

21 I briefly discuss three High Court cases that reflect the court's regard for finality. First, in *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, third party)* [2006] 2 SLR(R) 268, the plaintiff obtained interlocutory judgment against the defendant. The defendant then sought to introduce a new defence based on a limitation of liability clause at the assessment of damages stage. The court dismissed the defendant's application to amend his defence because "[t]o allow the defendant to introduce a limitation of liability clause at this late stage might, if the clause is found applicable, be to the irreparable prejudice of the plaintiff" (at [32]).

22 Next, in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258, the defendant applied for leave to plead an alternative defence for the first time, nine days after judgment was entered. The court denied the defendant's application, which was "wholly inappropriate" because the defendant had "ample opportunity to consider how to plead its case". Indeed, the defendant had made two earlier amendments to the defence but offered no credible explanation as to why the alternative defence had not been pleaded earlier (at [65]).

23 Finally, in *Joshua Steven v Joshua Deborah Steven and others* [2004] 4 SLR(R) 403, the defendants sought leave to amend their counterclaim a few

weeks after the trial concluded. The court dismissed the application because, among other reasons, the defendants had sought to introduce a distinct defence for the first time, when they had "ample time before and during the trial" to deal with the defence (at [4]–[6]).

24 These cases all show that amendments of pleadings should be permitted "sparingly" in the post-judgment context. Therefore, as a starting point, it is an important factor to be considered in the specific application of the relevant principles to amendments of pleadings after summary judgment is entered that such an application is sought post-judgment.

The determination of the real issues in controversy between the parties

(1) The reason for the amendments

25 From this starting point as informed by the specific context of amendments sought post-summary judgment, I come to the consideration of whether the amendments sought would enable the real question or issue in controversy between the parties to be determined. While each case must turn on its own facts, it appears that, in the specific context of an amendment sought post-summary judgment, the courts will consider the reason for the amendments, for instance, whether the party seeking the amendment had always maintained the defences.

26 Thus, in *Ricky Hwa*, the Court of Appeal allowed the appellant to amend his pleadings because, among others, "the judgment given in favour of the Respondent was a *summary* judgment" [emphasis in original] (at [13]). The court further observed that, unlike in the High Court decision of *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc and another* [1990] 2 SLR(R) 66 ("*Invar Realty*"), the summary judgment entered against the appellant in *Ricky Hwa* was

not based on a clear and unambiguous admission and permitting the appellant to amend his defence would raise for decision an important issue between the parties that had not been ventilated in the courts below. It is significant that the appellant had raised these defences before the Assistant Registrar at first instance. However, the Assistant Registrar refused to consider these defences because they had not been pleaded and, in any event, did not raise any triable issues, while the Senior Assistant Register later refused to allow the appellant to amend his defence then (at [5]–[6]). Therefore, the court seemed to place importance on the fact that the appellant had, in good faith, always maintained the very defences he sought to introduce at the Court of Appeal. This was not a belated attempt to introduce new arguments post-judgment.

27 In contrast, in *Invar Realty*, the second defendant obtained summary judgment against the plaintiff on its counterclaim. The plaintiff appealed against the decision, and also applied to amend its defence to the counterclaim. The court dismissed the plaintiff's amendment application because summary judgment had been entered on the plaintiff's admission of the sum in contention. As such, the court regarded it as impermissible for the plaintiff to seek, through its amendment and the ensuing appeal, to remove the admission on which summary judgment was based. Not only was this an entirely new point raised for the first time on appeal, but it also undercuts the very admission which the plaintiff had made below (at [22]).

28 The upshot of *Ricky Hwa* and *Invar Realty* is that the courts will consider the reason for the amendments sought after summary judgment has been entered. If the party seeking the amendments has consistently maintained the defences but was denied from arguing them at first instance for procedural reasons, then that party should generally be given an opportunity to amend and argue those very points. In contrast, if a party seeks to introduce new points by

way of an amendment on appeal, although it was open to him or her to pursue those points below, then the courts may not so readily allow the amendment. This is all the more so if the amendment sought is in direct contradiction to the case run below.

29 Parenthetically, Mr Kronenburg argued before me that the affidavit filed in support of the amendment should contain reasons for why the amendment is being sought. He therefore suggested that an amendment application should be dismissed in the absence of such reasons. This is because a court would have no material to determine if the application was brought for a sufficiently good reason. While such reasons will be helpful, I do not think that it is necessary for a party seeking an amendment to state these reasons expressly in the supporting affidavit. This is because, as *Ricky Hwa* and *Invar Realty* show, the courts can draw the relevant inferences from the surrounding facts without the reasons for the amendment being expressly stated on affidavit.

(2) The materiality of the proposed amendments

30 The materiality of the proposed amendments is a related consideration from whether the amendments sought would enable the real question or issue in controversy between the parties to be determined. This is because, as I alluded to above, a court should not be asked to adjudicate on a pleading that is clearly unsupported in law.

31 Thus, in the Court of Appeal decision of *Olivine Capital Pte Ltd and another v Chia Chin Yan and another matter* [2014] 2 SLR 1371 ("*Olivine Capital*"), the respondent sought a determination under O 14 r 12 of the ROC 2014 as to whether a compromise letter released him from any liability to the appellants in relation to a damaged sewer. The Assistant Registrar held that

the letter did have this effect, a decision which was upheld by the High Court on appeal. The appellants appealed to the Court of Appeal, seeking to set aside the summary determination under O 14 r 12, and sought to amend their pleadings to introduce a new point premised on mistake. The court allowed the appellants to amend their pleadings to argue the point. In doing so, the court set out a comprehensive survey of the law on mistake, so as to "illustrate why the relevant issues cannot be resolved on the basis of affidavit evidence alone, but can only, instead, be resolved at a trial" (at [61]). While the court observed that whether the appellants could successfully rely on the point on mistake could only be determined after a ventilation of the full facts at trial (at [72]), the court must have considered that the appellants had, at the very least, an arguable case on this point. Indeed, if the appellants had a plainly inarguable case, the court would surely not have remitted the matter for trial, only to waste precious judicial resources.

32 Therefore, it is clear that the courts will consider the materiality of the proposed amendments. This is especially true in the context of amendments sought post-summary judgment because the very purpose of the summary judgment procedure is to enable a claimant to obtain a quick judgment where there is plainly no defence to the claim without trial (see the High Court decision of *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [59], citing *Ling Yew Kong v Teo Vin Li Richard* [2014] 2 SLR 123 at [30]). As such, it would be antithetical to this purpose of summary judgment for a court to allow plainly unsustainable defences to be introduced by way of amendments to the pleadings.

33 As for the standard to be applied in assessing the materiality of the proposed amendments in this context, Mr Sreenivasan argued before me that the court should not "try" the pleadings at an amendment application. I disagree

because the weight of the authorities clearly show that the courts assess – and to that extent, "try" in a loose sense of the word – the materiality of any proposed amendment. In the specific context of such amendments being sought to introduce new defences to reverse a decision to grant summary judgment, I am of the view that the proper standard to assess the materiality of these amendments is the same as that used to assess the defences that a defendant raises to counter a *prima facie* case raised by a claimant for summary judgment. Thus, in this context, the party seeking to amend the pleadings must establish that there is a fair or reasonable probability that the pleadings disclose a *bona fide* defence (see the High Court decision of *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [17], citing the High Court decision of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [43]–[47]). The reason for this test is practical: if a court allows amendments that introduce defences that are plainly unsustainable to resist summary judgment, only to reject those defences at the appeal against summary judgment, then those amendments would have been useless to begin with except to prolong the defendant's sense of comfort.

The prejudice to the claimant who has been granted summary judgment

34 In so far as the prejudice to the claimant who has been granted summary judgment is concerned, while the claimant has clearly obtained a judgment, the courts have also recognised that a summary judgment is still relatively early in the entire trial process. This has resulted in amendments to pleadings being allowed even after summary judgment has been entered, on the basis that any prejudice caused to the claimant can be compensated by costs. For example, the court in *Olivine Capital* said this, albeit in relation to an O 14 r 12 determination on the documents as opposed to affidavit evidence in greater detail (at [46]):

> The present case concerns O14 proceedings, which, *ex hypothesi*, take place before (or in place of) a trial. If the Appellants are allowed to amend their defence to the Respondent's counterclaim, the Respondent can hardly be said to suffer from prejudice that cannot be compensated by costs, especially as a full-blown trial with oral cross-examination has not taken place. On the contrary, if the Appellants are not allowed to amend their defence to the Respondent's counterclaim and consequently fail to resist the Respondent's O14 r 12 application, that could be tantamount to a denial of justice.

35 Mr Kronenburg sought before me to confine this paragraph to an O 14 r 12 determination on questions of law or construction of documents. He argued that a court would certainly be more ready to allow amendments in such a situation because the courts are confined to the documents concerned. While I appreciate his position, I think that this paragraph in *Olivine Capital* is, as Mr Sreenivasan argued, of general application to summary judgments. This is because, like an O 14 r 12 determination, when a summary judgment is ordered, no trial has taken place. However, what amounts to "justice" will obviously turn on the facts of each case. To that extent, I agree with Mr Kronenburg that different considerations may apply to summary judgments that are not premised on the determination on questions of law or construction of documents.

Not allowing the defendant to have a "second bite of the cherry"

36 In relation to not allowing a defendant to have a "second bite of the cherry", it is important that this expression, as colourful as it is, is not bandied around as a shorthand without any real meaning beneath (see, *eg*, the High Court decision of *Jiangsu New Huaming International Trading Co Ltd v PT Musim Mas and another* [2023] SGHC 27 at [5]–[6]). In my view, this expression means that a party should not have a second opportunity to do something he missed the first-time round (see parenthetically the Court of Appeal decision of *Asia Business Forum* at [18]). In the context of amendments, this means that a

party who had the chance to make amendments cannot later apply to make further amendments if no new circumstance arose to justify that application.

37 I am fortified in my view above by the usage of this expression in the context of amendments. Indeed, in the Court of Appeal decision of *CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Ltd* [2022] 1 SLR 284 (at [20]), the court found that the appellant's application to amend its defence and counterclaim, which was made after the lower court had delivered judgment and before the hearing of the appeal, was a "second bite of the cherry". Similarly, in the High Court decision of *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd and another* [2021] SGHC 1 (at [47]), the court found that the defendants "had already been granted their second bite of the cherry", and the court therefore dismissed the defendants' application to amend its pleadings for the second time.

38 With that being said, I caution against taking this expression out of its context, which may mean something quite different in another context. To illustrate my point, this expression has also been used in the context of an appeal. For instance, in the Court of Appeal decision of *Lim Oon Kuin and others v Ocean Tankers (Pte) Ltd (interim judicial managers appointed)* [2022] 1 SLR 434 (at [32]), the court held that where a party brought an appeal against a decision granting summary judgment, that party could not mount the appeal on the exact same argument that was raised in the lower court, as this would "be simply impermissibly seeking a second bite of the cherry before a differently empanelled *coram*". The same expression was used by the Court of Appeal in *Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR(R) 529 (at [8]) to describe a party's application to the High Court for leave to appeal after the then-Subordinate Courts had already refused to grant that party leave to appeal. Therefore, where an appeal is concerned, I find that the expression "second bite

of the cherry" means that a party has a fresh opportunity to make his case. As is evident, the meaning is different from the context of amendments.

39 For completeness, I set out the various contexts in which this expression has been used:

(a) adducing further evidence under the *Ladd v Marshall* [1954] 1 WLR 1489 requirements (see the Appellate Division decision of *Liu Shu Ming and another v Koh Chew Chee and another matter* [2023] SGHC(A) 15 at [28]);

(b) application for an extension of time to file a proof of debt (see the Court of Appeal decision of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 at [89]);

(c) disguising a setting aside application as, in substance, an appeal on the legal merits of the arbitral award (see the High Court decision of *CDM and others v CDP* [2021] 4 SLR 1272 at [87]);

(d) the court's discretion to order a retrial under the Criminal Procedure Code when the trial judge erred in law (see the High Court decision of *Beh Chai Hock v Public Prosecutor* [1996] 3 SLR(R) 112 at [39]); and

(e) a second application for criminal motion, of which 22 of 26 questions were identical to the first application (see the Court of Appeal decision of *Mah Kiat Seng v Public Prosecutor* [2011] 3 SLR 859 at [10]).

Summary

40 In summary, when deciding on an application for amendments, the court should apply the following three-stage analytical framework:

(a) First, the court should determine the stage of proceedings at which the amendments are sought. This would affect how the general principles apply. More broadly, the later an application is made, the stronger would be the grounds required to justify it.

(b) Second, the court should consider whether the amendments sought would enable the real question or issue in controversy between the parties to be determined. It is relevant to consider whether the application is made in good faith, and whether the proposed amendments are material.

(c) Third, the court should consider whether it is just to allow the amendments, by assessing, *eg*, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs, and whether the applying party is effectively asking for a second bite of the cherry.

41 More specifically, when there is an application for amendments to a defence after summary judgment is entered, the three-stage analytical framework will apply as follows:

(a) First, the court should take into account the stage of proceedings, *eg*, post-judgment as in the present case. Amendments should be granted sparingly in order not to disrupt the finality of litigation.

(b) Second, when considering whether the application is made in good faith, it is relevant to consider whether the applying party has always maintained the defence or if the applying party is seeking to introduce new points. When considering whether the proposed amendments are material, the applying party must establish that there is a fair or reasonable probability that the pleadings disclose a *bona fide* defence.

(c) Third, in assessing whether it is just to allow the amendments, the court should consider whether the amendments will allow the applying party to have a second opportunity to do something he missed the first-time round.

My decision: SUM 1463 is dismissed

42 With the above principles in mind, I dismiss SUM 1463 and disallow the defendant's proposed amendments for the following reasons.

The proposed amendments will not allow for the determination of the real issues in controversy between the parties

43 As a starting point, I do not think that the proposed amendments will allow for the determination of the real issues in controversy between the parties.

There is no good reason for the amendments

44 First, the facts surrounding the present application are more like those in *Invar Realty* as opposed to those in *Ricky Hwa*. Unlike in *Ricky Hwa*, where the appellant had consistently maintained his defences from the first instance hearing, the defendant has sought to introduce the amendments only at the appeal against summary judgment. This is despite him accepting that the

proposed amendments to the Defence "arise from the same and/or substantially the same underlying facts pleaded in the Defence",[2] which suggests that he could have applied to amend the Defence at an earlier stage. While delay is not a determinative factor in deciding whether to allow an amendment (see *Wright Norman* at [23] and [39]), it is clearly a significant factor where summary judgment has already been entered.

45 Further, similar to *Invar Realty*, the summary judgment below was entered on the basis of the defendant's concession, through his counsel before the learned AR, that the funds were disbursed by the claimant to the defendant and that the defendant had receipt of the funds. As such, the fourth proposed amendment that the defendant did not receive the funds will, borrowing from the words of the court in *Invar Realty* (at [22]), "result in effect in the removal of the admission on which the judgment against them was based".

The proposed amendments do not raise any plausible defences

46 Second, I do not think that the proposed amendments raise any plausible defences:

(a) The first proposed amendment of the timeframe is clearly contradicted by the defendant's own evidence. The defendant in his affidavit dated 6 February 2023 stated that he "intended to purchase a single AMAT Vantage Tool from Macquarie and/or IM Flash sometimes in or around June or July 2018".[3] I do not think that the defendant can now change his version of the events, given that this was

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2 Agreed Bundle of Cause Papers dated 27 June 2023 at p 72.

3 Agreed Bundle of Cause Papers dated 27 June 2023 at p 255; 1st Affidavit of Lee Wee Ching dated 6 February 2023 at para 93.

an event in the past and not a new circumstance that arose after he had filed his affidavit. For this same reason, I also do not accept the defendant's submission that I should grant his application because "the amendments do not change the basic premise or case theory of the [d]efendant's case".[4]

(b) The second proposed amendment that the loan is not supported by consideration is plainly unsustainable as the claimant has provided consideration by parting with the sum of US$1,100,000 to his detriment, in exchange for the defendant repaying the sum of US$1,950,000 within approximately six months. This is consistent with the understanding of consideration to be a return recognised in law which is given in exchange for the promise sought to be enforced (see the Court of Appeal decision of *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [66]).

(c) The third proposed amendment that the Loan Agreement is an illegal moneylending agreement is clearly contradicted by the defendant's own evidence that the parties dealt with each other as friends. As the claimant points out,[5] the defendant himself attests to how the parties "worked quite closely on various deals and transactions" and "had a longstanding relationship, in which we largely dealt with each other based on mutual trust and without things being documented".[6] I find that this does not, on balance, appear to be a relationship that the parties would share if they had entered into an illegal moneylending

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4 DWS at para 16.

5 4th Affidavit of Wang Piao dated 5 June 2023 at para 22.

6 1st Affidavit of Lee Wee Ching dated 6 February 2023 at paras 19 and 29.

agreement. Indeed, the Moneylenders Act 2008 (2020 Rev Ed) does not apply to "persons who lend money as an incident of another business or to a few old friends by way of friendship" (see the High Court decision of *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [19]–[20]).

(d) The fourth proposed amendment that the defendant did not receive the sum is clearly contradicted by his concession through counsel before the AR below. The defendant's counsel conceded then that the funds had been disbursed by the claimant to the defendant and that the defendant had had receipt of the funds.

(e) The fifth proposed amendment that the Loan Agreement had been varied by conduct is insufficiently particularised.

(f) The sixth proposed amendment that the payment of the "Equipment Sale Price" was contingent on the Vantage Tool being sold at US$1,950,000 is untenable. I cannot see how a plain reading of the Agreement would lead to this outcome. In any event, this is a matter of interpretation and does not necessitate a trial to resolve. It may be summarily determined under O 9 r 19 of the ROC 2021, which would save time and costs for the parties (see the High Court decision of *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2016] 2 SLR 597 at [12]–[13]).

(g) The seventh proposed amendment as to the penalty clause defence is clearly not applicable because the claimant is seeking the repayment of a debt, not a claim for liquidated damages (see the seminal House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 at 86–88,

affirmed in the Court of Appeal decision of *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 at [103] and [151]–[152]).

(h) The eighth proposed amendment is not viable as, given my conclusions above, I do not find a viable set-off available to the defendant.

47 As such, I do not think that the proposed amendments will allow for the determination of the real issues in controversy between the parties.

The other considerations

48 My conclusion that the proposed amendments will not allow for the determination of the real issues in controversy between the parties would be sufficient to dismiss the present application. However, had I decided otherwise, I would also have found that the prejudice to the claimant cannot be entirely compensable by costs, which would still support to some extent the denial of the amendments. Indeed, in so far as the claimant has successfully obtained summary judgment against the defendant, the only recourse the defendant should be allowed to obtain is an appeal against that decision. The defendant cannot apply for amendments and use it as a backdoor to raise an appeal, while delaying the proceedings through his application.

49 Further, although I would hesitate to use the expression, I find that the defendant is indeed attempting to have a "second bite of the cherry". While the defendant has not previously amended the Defence, this is not a fact in his favour, because all of the presently proposed amendments are defences that could have been raised before summary judgment was entered against him. Having failed to make the amendments previously, the defendant cannot now

apply to make these amendments when no new circumstances have arisen to justify this application.

Conclusion

50 For all the reasons above, I dismiss the defendant's application for amendments in SUM 1463. Unless the parties can agree on the costs for this application, they are to write in with their submissions on costs within 14 days of this decision, limited to seven pages each.

51 The parties are also to write in to the Registry to seek a date for the hearing of the appeal against the decision in SUM 104.

Goh Yihan
Judicial Commissioner

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Narayanan Sreenivasan SC, Jerrie Tan Qiu Lin and Partheban s/o Pandiyan (K&L Gates Straits Law LLC) (instructed), Thrumurgan s/o Ramapiram, Tan Lai Tian Timothy, Mohamad Hasbu Haneef bin Abdul Malik and Lokman Hakim bin Mohamed Rafi (Trident Law Corporation) for the defendant.