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

[2024] SGHC(A) 8

Appellate Division / Civil Appeal No 71 of 2023

Between

Ollech David

… *Appellant*

And

Horizon Capital Fund

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure — Appeals — Leave — Permission to appeal against application to adduce further evidence]
[Civil Procedure — Summary judgment — Appeal against grant of summary judgment]
[Evidence — Presumptions — Presumption of similarity]

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Ollech David
v
Horizon Capital Fund

[2024] SGHC(A) 8

Appellate Division of the High Court — Civil Appeal No 71 of 2023
Kannan Ramesh JAD and Andre Maniam J
30 October 2023

12 March 2024

Andre Maniam J (delivering the grounds of decision of the court):

1 This was an appeal involving the default of a guarantor's obligations pursuant to a personal guarantee (the "Guarantee") securing the repayment of a credit facility. We dismissed the appeal against the decision of the judge sitting in the General Division of the High Court in *Horizon Capital Fund v Ollech David* [2023] SGHC 164 (the "*Judgment*") to dismiss: (a) the appellant's appeal against the grant of summary judgment in favour of the respondent; and (b) the appellant's application to adduce further evidence. These are the grounds of our decision.

Background facts

2 The appellant executed the Guarantee in favour of the respondent on 24 May 2022 pursuant to an agreement in which the respondent extended a loan of US$1.5m to Lemarc Agromond Pte Ltd ("LAPL") at the interest rate of 8.5%

per annum (the "Facility Agreement").[1] This had to be repaid by 31 July 2022. The Facility Agreement incorporated the terms and conditions of the uncommitted facility agreements between LAPL and the respondent. There were three uncommitted facility agreements between LAPL and the respondent entered into on the following dates: 30 November 2017, 12 December 2018, and 30 December 2019 (collectively, the "Uncommitted FAs"). The Uncommitted FAs included the following clause (the "no set-off" clause):[2]

> All payments required to be made by the Borrower [*ie*, LAPL] shall be calculated without reference to any set-off, defence or counterclaim and shall be made free and clear of and without any deduction for or on account of any set-off, defence or counterclaim.

3 The "no set-off" clause was incorporated into the Facility Agreement by the following:[3]

> Unless otherwise provided herein, the terms and conditions of the uncommitted facility agreements between Horizon [*ie*, the respondent] and Lemarc Agromond Pte. Ltd [*ie*, LAPL], as amended from time to time, are applicable to this letter of agreement.

4 The Facility Agreement provided that Swiss law was the governing law of the contract, whereas Singapore law was the governing law of the Guarantee (as stipulated in cl 23).[4]

5 The Guarantee secured LAPL's debt to the respondent under the Facility Agreement, and entitled the respondent to an indemnity from the appellant for costs and expenses incurred in certain circumstances. The appellant's father,

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1 Philippe Berta's Affidavit dated 16 January 2023 at pp 17–18.

2 Philippe Berta's Affidavit dated 2 March 2023 at paras 16–17.

3 Philippe Berta's Affidavit dated 16 January 2023 at pp 17–18.

4 Philippe Berta's Affidavit dated 16 January 2023 at pp 23–32.

Daniel, also executed a similar guarantee in favour of the respondent. Upon LAPL's failure to repay the sum and interest to the respondent, the respondent issued a written demand to the appellant for payment on 18 August 2022. The appellant did not respond to the demand. The respondent then issued another demand on 7 October 2022, which the appellant also did not respond to.

6 On 24 November 2022, the respondent commenced Originating Claim No 416 of 2022 ("OC 416").[5] The appellant then filed his Defence in OC 416 (the "Defence") on 19 December 2022.[6] The Defence claimed that the appellant's liability under the Guarantee was discharged as the respondent had been in breach of a Memorandum of Understanding dated 20 March 2020 ("MOU") entered into with LAPL.[7] In the Defence, the appellant pleaded that the respondent had agreed to provide LAPL with financing for various transactions involving commodities and would not unreasonably withhold such financing for a period of five years pursuant to the MOU. Clause 1.1 of the MOU stated that in consideration for LAPL entering into an agreement with the respondent for the purchase and assignment of certain claims, the respondent agreed to provide LAPL with certain financing for the purpose of financing imports related to various commodities transactions (each transaction with a tenure of up to 180 days and subject to the respondent's investment strategies) and that the respondent "shall not unreasonably withhold financing form [*sic*] [LAPL] throughout the term of this arrangement".[8] The appellant claimed that the respondent had rejected requests for financing from LAPL on multiple occasions between September 2020 and July 2022 without using its best

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5 Statement of Claim in HC/OC 416/2022.

6 Defence in HC/OC 416/2022.

7 Ollech David's Affidavit dated 30 March 2023 at pp 30–32.

8 Ollech David's Affidavit dated 30 March 2023 at pp 30–32.

endeavours to reasonably negotiate with LAPL's former directors and management. The appellant therefore contended that the respondent was liable under the MOU to pay LAPL damages of US$2.25m for every year it had failed to provide financing to LAPL – in sum, the respondent was liable to pay US$4.5m to LAPL (the "Alleged Claim"). The appellant sent a letter to the respondent on 16 December 2022 (the "16 Dec Letter"),[9] stating that LAPL would be applying this alleged right to damages to set off and fully discharge its debt to the claimant under the Facility Agreement.

Procedural history

The respondent's application for summary judgment in HC/RA 70/2023

7 On 16 January 2023, the respondent filed an application for summary judgment. The appellant relied on the same reasons raised in the 16 Dec Letter (see [6] above) to resist summary judgment, that is, the respondent allegedly breached cl 1.1 of the MOU by unreasonably withholding financing to LAPL, thereby entitling LAPL to set off the sum it owed under the Facility Agreement and discharge the sums payable by the appellant under the Guarantee. In support of his case that there was a *bona fide* defence against the respondent's claim, the appellant alleged one instance where the respondent had rejected a request by LAPL on 18 November 2021 to finance a trade of Ukrainian corn. The Assistant Registrar ("AR") allowed the application for summary judgment on the basis that the appellant's defence was bare, unsubstantiated by evidence and lacking in particulars. The appellant appealed against that decision, by way of Registrar's Appeal No 70 of 2023 ("RA 70").

8 The Judge dismissed RA 70. He found that:

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[9] Ollech David's Affidavit dated 30 March 2023 at p 34.

(a) the respondent had shown a *prima facie* case for its claims based on the terms of the Guarantee (*Judgment* at [61]);

(b) the appellant had not raised a *bona fide* defence in relation to the respondent's alleged breaches of the MOU (*Judgment* at [62]–[67]); and

(c) no issue of Swiss law had been pleaded, and Swiss law was in any event immaterial as the appellant had failed to raise a *bona fide* defence on the merits (*Judgment* at [68]–[74]).

9 Although the Judge stated that Swiss law was immaterial, he went on to state *obiter* that if the appellant had raised a *bona fide* defence and if the appellant had pleaded an issue of Swiss law, there would have been a triable issue as to what the content of Swiss law was (*Judgment* at [68], [73]). In that scenario, the Judge would not have presumed Swiss law to be the same as Singapore law, even though it was the appellant's burden to prove the content of Swiss law, and the appellant had adduced no evidence on that.

10 The Judge expressed reservations over granting summary judgment based on the presumption of similarity – that foreign law is presumed to be the same as local law, unless proven otherwise (*Judgment* at [69]–[73]). He considered that it would have been artificial and premature, at the interlocutory stage, to finally dispose of this action on the assumption that Swiss law was similar to Singapore law in matters of contractual interpretation of the Facility Agreement (*Judgment* at [73]).

The appellant's application to adduce further evidence in HC/SUM 1161/2023

11 Before the Judge, the appellant applied to admit evidence in Summons No 1161 of 2023 ("SUM 1161"). This consisted of: (a) various WhatsApp messages (the "WhatsApp Messages") between Daniel and one Mr Dimitri Rusca ("Mr Rusca"), who was the Chief Executive Officer of SCCF Structured Commodity & Corporate Finance SA ("SCCF"), which was in turn the respondent's agent and Facility Administrator; and (b) his explanation of the meaning and effect of the WhatsApp Messages.[10] The appellant asserted the relevance of the evidence in respect of RA 70 as it concerned the merits of the respondent's claim.

12 The appellant argued that these WhatsApp Messages were not in his possession prior to the hearing before the AR. This was because Daniel could not locate the WhatsApp Messages prior to the hearing despite the appellant having asked for them. Furthermore, he submitted that the new evidence was directly relevant to the determination of RA 70, and addressed the AR's reasoning that the 16 Dec Letter was insufficient and contradictory, both internally and as against external documents. Moreover, given that the WhatsApp Messages were given in their native format, they should be regarded as credible. Finally, the appellant contended that whether the WhatsApp Messages are material should be fully investigated at trial.

13 On the other hand, the respondent argued that the applicable test under *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") to determine the admission of new evidence should be applied stringently as RA 70 was similar to proceedings having the full characteristics of a trial. It further argued that:

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[10] Affidavit of Ollech David dated 21 April 2023 at pp 24–37.

(a) the new evidence could have been obtained with reasonable diligence;

(b) the new evidence was not material because the appellant's primary defence in RA 70 was legally unsustainable and, it did not support this defence; and

(c) the new evidence was not credible or reliable.

14 The Judge did not allow the application to adduce further evidence. The reasons for the dismissal of the application may be summarised as:

(a) the new evidence sought to be introduced in SUM 1161 was not relevant (*Judgment* at [23]–[25]); and

(b) the WhatsApp Messages did not appear credible or reliable (*Judgment* at [26]).

The present appeal

15 On 7 July 2023, the appellant filed the present appeal against the Judge's decision to dismiss RA 70 and SUM 1161.

The appellant's submissions

16 We set out briefly the appellant's submissions for his appeal against the Judge's decision in RA 70 and SUM 1161.

17 For his appeal against the decision in RA 70, the appellant contended that there was a triable issue as to whether the Guarantee was unsatisfied and undischarged.[11] He argued that there remained a dispute between LAPL and the

[11] Appellant Written Submissions ("AWS") at para 4.

respondent that affected whether the debt owed by LAPL to the respondent had been fully repaid, and so whether the Guarantee remained unsatisfied and undischarged was a triable issue and the appellant had a real defence to OC 416 within the meaning of O 9 r 17(1) of the Rules of Court 2021 (the "ROC").

18 The arguments raised by the appellant were largely identical to those raised before the Judge in RA 70. First, he asserted that there was a *bona fide* defence that the respondent's claim under the Guarantee was discharged if the underlying liability under the Facility Agreement between the respondent and LAPL had been set off.[12] Second, the appellant submitted that there were several triable issues in respect of the dispute between the respondent and LAPL. He emphasised that the Guarantee involved secondary liability that was contingent on proof of primary liability under the Facility Agreement and the respondent could not claim against the appellant under the Guarantee since LAPL had validly exercised its right of set-off against the respondent (*ie*, the triable issue of whether there was a breach of the MOU), resulting in LAPL repaying the sums under the underlying agreement. Thus, the appellant argued he no longer owed any co-extensive liability under the Guarantee.[13] Furthermore, the appellant contended that there was a triable issue as to whether the respondent had breached the MOU: given that the respondent rejected the appellant's position as to the content of the obligations under the MOU and whether there was such request for performance, the respondent could not say that there was no dispute between the parties as to whether the respondent breached the MOU. Moreover, if the respondent did breach the MOU, the appellant submitted that whether LAPL had a valid right of set-off pursuant to Swiss law was put in issue.

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12 AWS at paras 22 to 26.

13 AWS at paras 28 to 29.

19 On the premise that LAPL had such a right of set-off, the appellant contended that whether LAPL had validly exercised the right of set-off was an issue to be tried. The appellant relied on the 16 Dec Letter to show that the right had been exercised, and LAPL no longer owed a debt to the respondent under the Facility Agreement.[14] The appellant argued that he had no access to any emails or data from LAPL and the Judge erred in having "no regard" to the fact that the WhatsApp Messages were often incomplete threads which ended with requests by the respondent for video teleconferences to discuss matters verbally.[15] Flowing from this, if the right of set-off was validly exercised, the appellant argued that an issue of whether the respondent might avail himself of that right under the Guarantee would arise.[16]

20 As for the Judge's decision in SUM 1161, the appellant disagreed with the Judge's finding that it appeared odd that the appellant would opt to rely on the WhatsApp Messages if there were underlying emails to substantiate the discussion. Rather, it was not inexplicable because the appellant did not control LAPL and had no ability to produce any evidence from its servers.

21 The appellant claimed that the WhatsApp Messages painted a picture of the principal officers, Daniel, the chairman of LAPL, and Mr Rusca, the most senior executive of the respondent, discussing the lack of financing on a number of occasions, but these ended with discussions by way of Zoom teleconferences. Consequently, he took the position that a cross-examination of the witnesses at the trial would assist to determine the issue of whether LAPL had grounds to

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14 AWS at para 44.

15 AWS at para 49.

16 AWS at para 50.

exercise the right of set-off.[17] The appellant therefore urged this court to allow the appeal in respect of the Judge's decision to dismiss SUM 1161.

The respondent's submissions

22 The respondent submitted that the appeal against the Judge's decision in RA 70 and SUM 1161 should be dismissed.

23 In relation to the Judge's decision in RA 70, the respondent submitted that the crucial question was if there existed a *bona fide* defence that LAPL had a claim which it could set off against money due to the respondent, because the respondent had unreasonably withheld financing to LAPL in breach of the MOU. The respondent contended that this question ought to be answered in the negative because there were insufficient particulars and the allegation in respect of the breach of the MOU was unsubstantiated by evidence.[18] In the Defence, the appellant pleaded that "[o]n *multiple occasions* between September 2020 and July 2022, the [respondent] refused to provide LAPL with any financing [emphasis added]."[19] The respondent argued that the allegation that the respondent withheld financing from LAPL in breach of the MOU was pleaded without sufficient specificity.

24 The respondent also submitted that the affidavit of the appellant which sought to adduce further evidence in SUM 1161 only alluded to LAPL's request for financing in relation to a trade of Ukrainian corn on or about 18 November 2021. The respondent stated that there were no details about the amount of

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17 AWS at para 63.

18 Respondent's Written Submissions filed on 25 August 2023 ("RWS") at paras 83 to 86.

19 Defence in HC/OC 416/2022 at para 12(*b*)(iv).

financing requested, the counterparty to the sale, the quantity of the Ukrainian corn to be traded, the terms of the sale, the respondent's response, or the respondent's reasons for allegedly rejecting the request.[20]

25 In addition, the respondent emphasised that the 16 Dec Letter was internally inconsistent as the asserted US$4.5m amount was "subject to the verification and/or adjudication of the total amount payable".[21] Furthermore, the respondent highlighted that the appellant had not produced any documentary evidence of even one instance of the alleged financing requests that would have been made in accordance with the respondent's formal process for approving financing and thereafter rejected.[22]

26 Finally, the respondent submitted that the Judge did not need to determine (and did not determine) if the "no set-off" clause incorporated into the Facility Agreement applied to disentitle LAPL and/or the appellant from arguing that the damages arising from the alleged breach by the respondent of the MOU can be set off against the amounts owing under the Facility Agreement and the Guarantee.[23] In any case, it took the position that the issue of Swiss law did not arise as neither party pleaded the issue.[24]

27 As for the appeal against the Judge's decision in SUM 1161, the respondent raised the preliminary point that an appeal against an application to adduce further evidence in a registrar's appeal was an interlocutory application

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20 RWS at paras 87 to 90.

21 RWS at paras 92 to 93.

22 RWS at para 94.

23 RWS at para 105.

24 RWS at paras 106 to 107.

which required permission to appeal.[25] The phrase "interlocutory application" under paragraph 3 of the Fifth Schedule of the Supreme Court of Judicature Act 1969 ("SCJA") referred to "an application whose determination may or may not finally determine the parties' rights in the cause of the pending proceedings in which the application is being brought". In its submissions, the respondent stated that an order would fall within paragraph 3(*l*) of the Fifth Schedule of the SCJA if it was an order made at an interlocutory application and which "does not finally dispose of the rights of the parties", citing *Zhang Lan v La Dolce Vita Fine Dining Group Holdings Ltd* [2023] SGHC(A) 22 at [26].[26] As the appellant had not applied for permission to appeal against the Judge's decision in SUM 1161, the respondent submitted that this court had no jurisdiction to consider whether to affirm or overturn the decision by the Judge in SUM 1161.[27] The respondent argued that there were practical consequences which flowed from the requirement for permission to appeal against the Judge's decision in SUM 1161 which should not be ignored. In any case, the respondent urged this court to uphold the Judge's dismissal of SUM 1161 as the Judge did not misapply the law nor misapprehend the facts and the decision was not plainly wrong.[28]

Issues before this court

28 The following issues were before this court:

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25 RWS at para 62.

26 Respondent's Bundle of Authorities at Tab 17.

27 RWS at para 64.

28 RWS at paras 68 to 69.

(a) Whether permission to appeal was required for an appeal against the Judge's dismissal of the application to adduce further evidence in SUM 1161.

(b) If [(a)] was answered in the affirmative, whether permission to appeal should be granted for an appeal against the Judge's decision in SUM 1161, and in particular:

(i) whether there was a *prima facie* error, either an error of law or an error of fact obvious on the record;

(ii) whether the appeal involves a question of general principle to be decided for the first time; and

(iii) whether the appeal involves a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

(c) Whether the Judge was correct in dismissing the appeal against the AR's decision to grant summary judgment in favour of the respondent in RA 70:

(i) whether the respondent had shown a *prima facie* case for judgment in OC 416; and

(ii) whether the appellant had a *bona fide* defence to the claim in OC 416.

Our decision

Whether permission to appeal was required for the appeal against the Judge's decision in SUM 1161

29 Before we considered the appeal against the Judge's decision in SUM 1161 on its merits, we agreed with the respondent that there was the preliminary question of whether the appellant required permission to appeal against the decision. In his submissions, the appellant did not address this point and instead proceeded to argue that he satisfied the *Ladd v Marshall* test, regardless of whether the requirements were applied in a strict or attenuated manner.[29]

30 This issue first arose at a case management conference ("CMC") on 25 July 2023, where the parties had stated their positions on whether the appellant's appeal in respect of the Judge's decision to dismiss SUM 1161 required permission to appeal.[30]

31 The appellant argued that the application for adducing further evidence in SUM 1161 was made in conjunction with RA 70, and that no permission to appeal against the decision in RA 70 was required. The appellant further argued that O 18 r 4(3) of the ROC allowed a party to file one appeal in respect of applications that were heard together. In this connection, the appellant argued that it did not make sense for him to have had to apply for permission to appeal against the Judge's decision in SUM 1161 when he did not need permission to appeal against the Judge's decision in RA 70. Conversely, the respondent argued at the CMC and in its submissions before us that permission to appeal was required for an appeal against the Judge's decision on SUM 1161 pursuant

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29 AWS at paras 57 to 58.

30 Minute Sheet in AD/CA 71/2023 dated 25 July 2023.

to s 29A(1)(*c*) of the SCJA read with the Fifth Schedule, paragraph 3(*l*). While SUM 1161 and RA 70 were dealt with at the same hearing, the respondent argued that this did not relieve the appellant from having to obtain permission to appeal against the Judge's decision in SUM 1161 as required under the SCJA.

32 In our view, the appellant required permission to appeal against the Judge's decision to dismiss SUM 1161. Pursuant to s 29A(1)(*c*) of the SCJA read with paragraph 3(*l*) of the Fifth Schedule, the Judge's dismissal of the application to adduce further evidence was an order made at an interlocutory application that did not come within the exceptions listed in paragraphs 3(*l*)(i) to (x) and it did not finally dispose of the rights of the parties. The appellant's argument that the application to adduce further evidence in SUM 1161 was made in conjunction with RA 70 (see [31] above) was beside the point. Even if SUM 1161 and RA 70 were related and the determination of whether to allow SUM 1161 required the consideration of whether the further evidence sought to be adduced was relevant to RA 70, SUM 1161 and the appeal in RA 70 remained separate applications.

33 If the appellant required permission to appeal in respect of SUM 1161, he would need to satisfy this court that permission ought to be granted. Permission to appeal would be granted only if (a) there is a *prima facie* case of error in the underlying decision; (b) the underlying decision involves a question of general principle decided for the first time; or (c) the underlying decision involves question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

34 We disagreed with the appellant's contention that O 18 r 4(3) of the ROC allowed the appellant to file a Notice of Appeal in respect of the Judge's decision in SUM 1161 *and* RA 70. This would have circumvented the

permission to appeal requirement set out in the SCJA, and that was impermissible.

35 Order 18 r 4 of the ROC is reproduced below:

> **One appeal for each application (O. 18, r. 4)**
>
> **4**.—(1) Subject to paragraph (2), each party is allowed to file only one appeal for each application unless the Court otherwise orders.
>
> (2) In the case of a single application pending trial dealing with more than one matter and where permission to appeal is required for one or more of the matters, each party must file a separate notice of appeal for matters which require permission to appeal, and for matters which do not require permission to appeal.
>
> (3) ***Where several applications are heard together, each party may file one appeal in respect of all the applications heard together.***
>
> [emphasis added]

36 Order 18 r 4(3) allowed a party to file one appeal in respect of multiple applications heard together. The provision represented a streamlining of the administrative process of filing appeals against applications, rather than any change to the requirement of obtaining permission to appeal. Indeed, the title of O 18 r 4, "One appeal for each application", suggested that the rule sought to lay down the parameters of the default rule that a party is allowed to file only one appeal for each application. Thus, only a single notice of appeal needed to be filed for an appeal against a single judgment even if the judgment dealt with multiple applications: *Singapore Rules of Court: A Practice Guide* (Chua Lee Ming and Paul Quan) (Academy Publishing, 2023) at para 18.012.

37 It was clear that s 29A(1)(*c*) of the SCJA and paragraph 3(*l*) of the Fifth Schedule to the SCJA provided unequivocally that permission to appeal was

required for interlocutory decisions falling outside of the list of applications within paragraph 3(*l*). As the ROC must be read within the governing act, the SCJA, the rules therein were subject to the prevailing provisions in the SCJA. Order 18 r 4(3) could not override the requirement of obtaining permission to appeal, as set out in the SCJA. Our interpretation of O 18 r 4(3) was moreover consistent with the key guiding principles for the amendments raised by the Civil Justice Review Committee in the Report of the Civil Justice Review Committee (at p 6): (a) enhanced judicial control over civil litigation to ensure more effective and efficient disposal of cases; and (b) default case management track with options to streamline procedures for cases leading up to trial and prevent unnecessary interlocutory applications which take up the time and resources of parties and the courts.

38 Given that the appellant had not sought and obtained permission to appeal against the Judge's decision in SUM 1161, this court did not have jurisdiction to consider the merits of an appeal against the Judge's decision on SUM 1161. The question in [28(b)] was rendered moot as a result.

39 We considered next the appellant's appeal against the Judge's decision in RA 70.

Whether the Judge was correct in dismissing the appeal against the AR's decision to grant summary judgment in favour of the respondent in RA 70

40 In summary judgment applications:

(a) first, a claimant must show that he has a *prima facie* case for judgment; and

(b) second, to obtain leave to defend, the defendant must establish that there is a fair or reasonable probability that he or she has a real or *bona fide* defence.

(See *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [43] and [44].)

41 A defendant needs to show that there is a triable issue or question, and this cannot be a mere assertion of a given situation which forms the basis of the defence, or assertions that are equivocal, lacking in precision, inconsistent or inherently improbable: *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19].

Whether the respondent had shown a prima facie case for judgment in OC 416

42 The respondent had established a *prima facie* case for judgment in OC 416. Pursuant to the Facility Agreement dated 24 May 2022, LAPL was to repay the loan of US$1.5m from the respondent by 31 July 2022. LAPL did not repay the amount owed. Subsequently, the respondent served two letters of demand on the appellant invoking his contractual obligation under the Guarantee which provided that the appellant "either alone or jointly with any other person or persons … hereby jointly and severally guarantee on demand in writing being made … to pay and satisfy to the [respondent] free of set-off or counterclaim or any restriction", per cl 1 of the Guarantee. The appellant did not dispute that the respondent had established a *prima facie* case for judgment, but he contended that he had a *bona fide* defence.

Whether the appellant had a bona fide defence

(1) Whether the appellant had a *bona fide* defence based on the Alleged Claim which was premised on the respondent's alleged breaches of the MOU

43 We agreed with the Judge that the appellant had not established a *bona fide* defence in relation to the respondent's alleged breaches of the MOU on the basis that the appellant had not furnished sufficient evidence to substantiate the allegation of the respondent's breach of cl 1.1 of the MOU.

44 The 16 Dec Letter relied on by the appellant only alleged that financing requests were made by LAPL to the respondent between September 2020 and July 2022 without further evidence or particularisation. The appellant was a director of LAPL from March 2016 to September 2022 and Daniel was the chairman of the parent company of LAPL. This undermined the appellant's submission that he had no way to retrieve the relevant email correspondence or other documentary evidence. Consequently, we agreed with the Judge that the appellant had not provided sufficient evidence to support his allegation that the respondent had breached cl 1.1 of the MOU.

45 We had two further reasons for arriving at our conclusion that the appellant did not show that he had a *bona fide* defence to the claim, as explained below.

(2) Whether the appellant could raise the Alleged Claim

46 In our view, there was a threshold question of whether the appellant had standing to raise the Alleged Claim under the MOU. The appellant alleged in his Defence that the respondent had breached the MOU between LAPL and the respondent, the result of which was that the respondent was liable to LAPL for

US$4.5m in damages. According to the appellant's submission, this sum would be set off against the sum of US$1.5m owed by LAPL to the respondent under the Facility Agreement. The appellant relied on cll 2 and 6 of the Guarantee to show that the set off would extinguish the credit facility secured by the Guarantee.[31] Clause 2 of the Guarantee read as follows:[32]

> This Guarantee shall be considered as satisfied or discharged provided that i) the petition for bankruptcy initiated by Yueyang Guansheng Investment Development Company Limited against [LAPL] before the Singapore courts is withdrawn (as evidenced by official court document) and ii) *the credit facility granted to the Borrower [ie, LAPL], principal and interest, is fully repaid.*
>
> [emphasis added]

Clause 6 of the Guarantee is reproduced below:[33]

> The Fund [ie, the respondent] is also at liberty, without prejudice to any other rights the Fund may have, at any time and from time to time to place and keep for such time as the Fund may think prudent any money received, recovered or realised … but *notwithstanding any other provision of this Guarantee, where the Borrower [ie, LAPL] repays the full funds which are marked specifically to discharge this credit facility secured by this Guarantee then in such case, this Guarantee shall be fully discharged.*
>
> [emphasis added]

The effect of cll 2 and 6 of the Guarantee was that any repayment obligations arising under the Guarantee were discharged if LAPL repaid the full amount due to the respondent under the Facility Agreement. It was not disputed that the bankruptcy petition against LAPL was withdrawn on 10 June 2022.

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31 AWS at paras 22 to 26.

32 Philippe Berta's Affidavit dated 16 January 2023 at pp 23–32.

33 Philippe Berta's Affidavit dated 16 January 2023 at pp 23–32.

47 The appellant sought to rely on an alleged set-off arising under the MOU between LAPL and the respondent, to discharge the respondent's liability to LAPL, and consequently to discharge the appellant's liability under the Guarantee. However, the appellant was not a party to the MOU, and he did not explain how he could derive any rights under it.

48 Moreover, by cl 1 of the Guarantee the appellant had agreed to guarantee on demand in writing LAPL's repayment of the loan, free of set-off. Clause 1 of the Guarantee stipulated as follows:[34]

> IN CONSIDERATION of the Fund at my/our request granting a specific credit facility dated on or about the date hereof in the amount of USD 1'500'000.00 to [LAPL] (hereinafter called "the Borrower") either alone or jointly with any other person or persons to such extent and for so long as the Fund may think fit, I/we, the undersigned HEREBY JOINTLY AND SEVERALLY GUARANTEE on demand in writing being made on me/us by the Fund or any of the Fund's Managers, Officers or the Fund's Solicitors ***to pay and satisfy to the Fund free of set-off or counterclaim or any restriction***, condition or deduction whatsoever whether present or future, certain or contingent, primary or collateral from the Borrower solely or from the Borrower jointly with any other person or persons or whether as a principal surety or from any firm in which the Borrower may be a partner including the amount of notes or paid negotiable instruments and other loans credits, including trust receipts, letters of credit, shipping guarantees, or advances made to or for the accommodation or at the request either of the Borrower solely or jointly with any other person or persons or of any such firm as aforesaid or for any money for which the Borrower may be liable as surety or in any other way whatsoever (notwithstanding the relationship of Fund and Borrower may have ceased) TOGETHER with in all the cases aforesaid all interest (whether compounded or not) at such rate as shall be payable by the Borrower together with discount, commission fees and other charges including all legal charges, costs and expenses on a full indemnity basis incurred and/or incurring due to the Fund from the Borrower and/or in the enforcement of the Fund's rights and remedies against the Borrower and/or any of us until full payment is received by the

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[34] Philippe Berta's Affidavit dated 16 January 2023 at pp 23–32.

> Fund bother after as well as before the date of demand or judgment up to the date of payment.
>
> [emphasis added]

49 The appellant could not assert a right of set-off as a defence, in the face of the express words that the appellant was to pay and satisfy to the respondent the secured sum of the specific credit facility under the Facility Agreement together with any applicable interest and other charges "free of set-off or counterclaim or any restriction" (see cl 1 of the Guarantee).

(3) The conclusive evidence clause

50 Clause 5 of the Guarantee provided that any certificate by an officer of the respondent as to the monies and liabilities being due and remaining or incurred to the respondent from or by LAPL or a copy of the account of LAPL contained in the respondent's book of account signed by any officer of the respondent must be taken as binding and conclusive evidence as to the monies and liabilities for the time being due and remaining or incurred to the respondent in "all Courts of law and elsewhere, save for manifest error".[35] The respondent produced a certificate of the amount owed by LAPL in the letter of demand from the respondent's solicitors to the appellant of 7 October 2022.[36] The certificate took the form of the document from a representative of the respondent dated 4 October 2022 which stated:[37]

> As Alternative Investment Fund Manager of Horizon Capital Fund [*ie*, the respondent], Luxembourg, this is to confirm that outstanding under the Specific Credit Facility of USD

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35 Philippe Berta's Affidavit dated 16 January 2023 at pp 23–32.

36 Philippe Berta's Affidavit dated 16 January 2023 at pp 35–36 (Letter from the respondent's solicitors to the appellant dated 7 October 2022).

37 Philippe Berta's Affidavit dated 16 January 2023 at p 37 (Letter from Fuchs Asset Management dated 4 October 2022).

> 1'500'000.00 extended to Lemarc Agromond Pte Ltd [*ie*, LAPL] on May 24, 2022 by the Horizon Capital Fund [*ie*, the respondent], and maturing July 31, 2022, is USD 1'542'854.00 as at September 30, 2022.

51 That was binding and conclusive evidence of the amount due from the respondent to the LAPL under the Facility Agreement which, by the Guarantee, the appellant had agreed to pay. The appellant did not demonstrate any manifest error to displace the certificate.

The issue of presumption of similarity of Swiss law to Singapore law

52 The Judge found the content of Swiss law to be immaterial as the appellant had failed to show a *bona fide* defence on the merits. He also noted that the appellant had failed to plead a triable issue in relation to the content of Swiss law.

53 However, the Judge went on to state *obiter* that if the appellant had raised a *bona fide* defence and had pleaded an issue of Swiss law, there would have been a triable issue as to what the content of Swiss law was (*Judgment* at [68], [73]). With respect, we did not agree with this.

54 It is well established that even where foreign law might appear applicable, a court may regard foreign law as the same as local law in the absence of any pleading or proof of the *content* of the foreign law.

55 The requirements of pleading and proof are conceptually separate. In *FS Cairo (Nile Plaza) LLC (Appellant) v Lady Brownlie (as Dependant and Executrix of Professor Sir Ian Brownlie CBE QC) (Respondent)* [2021] UKSC 45 ("*Brownlie*"), the UK Supreme Court clarified that there were two rules at play: (a) the default rule; and (b) the presumption of similarity (at [111] and [112]). The default rule is not concerned with establishing the content of foreign

law but treats English law as applicable in its own right where the *applicability of foreign law* is not pleaded by either party. The presumption of similarity is a rule of evidence concerned with what the *content of foreign law* should be taken to be. There is no issue in the application of the default rule *where neither party has asserted that foreign law is applicable in pleadings*, even if the case is one to which a foreign system of law would clearly have to be applied if either party chose to rely on that fact: *Brownlie* at [114]–[116].

56 The present case was an example of the default rule applying, for the appellant had not pleaded any issue of Swiss law. In *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd* and another [2014] 1 SLR 860 ("*EFT*"), the Court of Appeal held (at [61]) that it is for the party who wishes to assert an applicable foreign law that is different from Singapore law, to plead that. Otherwise, the court would simply apply Singapore law (*EFT* at [62]). . Here, the parties' pleadings did not put in issue the application of Swiss law, and accordingly by the default rule Singapore law would be applicable.

57 We agreed with the Judge that the issue of Swiss law must be pleaded: *Judgment* at [68]. If, however, the appellant had pleaded an issue of Swiss law, it would have been his burden to prove the *content* of Swiss law. The burden of proof of foreign law lies on the party who bases his claim or defence on it: *EFT* at [61], Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed (2012) at paras 9-025 to 9-026. If the party who seeks to rely on foreign law adduces no evidence, or insufficient evidence to displace the presumption of similarity, the court may simply apply the *lex fori*.

58 Whether the presumption of similarity applies, however, depends on the circumstances of the case, and the court will not apply the presumption where

it is unjust and inconvenient to do so: *D'Oz International Pte Ltd v PSB Corp Pte Ltd and another appeal* [2010] 3 SLR 267 ("*D'Oz*").

59 The Judge expressed reservations about applying the presumption of similarity in interlocutory matters, and especially in applications for summary judgment or striking out that could finally dispose of an action (*Judgment* at [69], [72] and [73]). He did, however, acknowledge that there was no "absolute proposition that the presumption of similarly can *never* apply in interlocutory applications which seek to finally dispose of an action, or at least part of it, on its merits." (*Judgment* at [71]).

60 The Judge stated as follows (*Judgment* at [72]):

> In interlocutory matters, where there is a dispute as to the content of foreign law, making a summary determination based on the presumption of similarity might occasion injustice if, for instance, it is improbable that the foreign law in question is similar to the *lex fori*. This can be the case if the *lex fori* belongs to a different legal tradition from the foreign law in question, or if the rule of the *lex fori* is clearly unique. In such circumstances, to shut out a defendant's defence simply because he has not adduced sufficient evidence of the content of foreign law at the interlocutory stage would be premature.

61 He went on to say (*Judgment* at [73]):

> As the legal traditions of Switzerland and Singapore are different, it would be artificial and premature, at the interlocutory stage, to finally dispose of this action on the assumption that Swiss law is similar to Singapore law in matters of contractual interpretation. Therefore, had this issue arisen, I would have been inclined to find that the defendant raised a triable issue as to the content of Swiss law and, specifically, whether it provides that LAPL's right of set-off was excluded by the Facility Agreement.

62 We did not agree with the Judge that if the appellant had pleaded Swiss law, he could have avoided the presumption of similarity simply because the legal traditions of Switzerland and Singapore were different. We did not agree

with the Judge's view that if the *lex fori* belonged to a different legal tradition from the foreign law in question, it was *improbable* that the foreign law had any similarity to the *lex fori*. That would mean it was improbable that Swiss law was similar to Singapore law on any issue whatsoever. A more granular approach would be appropriate. Indeed, the UK Supreme Court considered the appropriateness of the presumption of similarity of the *lex fori* and the foreign law in question specifically "on the matter in issue" (*Brownlie* at [126]).

63 Here, the issue was whether the "no set-off" clause incorporated into the Facility Agreement should be given effect to. We were not persuaded that Swiss law would regard such a clause as ineffective, merely because the legal traditions of Swiss law and Singapore law are different.

64 The Judge cited the English Court of Appeal decision of *National Shipping Corp v Arab* [1971] 2 Lloyd's Rep 363 as a helpful authority that cautioned against summary judgment being granted on the presumption that foreign law is the same as the *lex fori*. The claim in that case was on an agreement that was either governed by the law of Saudi Arabia or the law Pakistan, but not English law. The plaintiffs sought summary judgment relying on the presumption that, whichever foreign law governed the agreement, it should be presumed to be the same as English law. The defendant did, however, put forward some evidence as to what the laws of Saudi Arabia and Pakistan were, and that they were different from English law. Davies LJ said he did not think the evidence was in a very satisfactory state; Buckley LJ said that the evidence that had been filed was certainly not as clear and as forceful as one would wish, and that the Court was entitled to feel some surprise that the evidence was not really rather more satisfactory than it was – he said there was very little satisfactory evidence as to what consequence either system of law would produce when applied to the facts of the case. The point is: the defendant

there had put forward *some* evidence to show that the applicable foreign law was different from local law.

65 In contrast, the appellant in the present case put forward *no* evidence that Swiss law would not give effect to the "no set-off" clause incorporated into the Facility Agreement. Instead, at first instance the appellant contended that the respondent (that is, the claimant in OC 416) had not adduced evidence on Swiss law, when it was the appellant's burden to plead and prove Swiss law if he wished to rely on it. On appeal before the Judge, the appellant continued to argue (incorrectly) that it was the respondent's burden to prove that the LAPL's right of set-off had validly been excluded pursuant to Swiss law. Throughout, the appellant did not plead that Swiss law would not give effect to the "no set-off" clause incorporated into the Facility Agreement, and he put forward no evidence to that effect either.

66 There remained the general proposition recognised in *D'Oz*, that the presumption of similarity of laws was a rule of convenience that the courts may rely upon where the content of foreign law was not pleaded or proved, unless it would be unjust or inconvenient to do so given the circumstances of the case (*D'Oz* at [25]).

67 In the circumstances of the present case, even if the appellant had pleaded an issue of Swiss law, but put forward no evidence as to what Swiss law was, it would not have been unjust or inconvenient to apply the presumption of similarity of laws in granting the respondent summary judgment. The appellant would need to have done more to raise a triable issue of Swiss law.

68 More fundamentally, not only was there a "no set-off" clause incorporated into the Facility Agreement governed by Swiss law, by cl 1 of the

Guarantee that was governed by Singapore law, the appellant had agreed in writing to guarantee LAPL's repayment of the loan on demand, free of set-off (see [48]–[49] above). That was coupled with a conclusive evidence clause in cl 5 of the Guarantee, pursuant to which a certificate of LAPL's indebtedness was issued (see [50] above). In the final analysis, in such circumstances, it would not have been sufficient for the appellant merely to dispute whether LAPL still had a right of set-off under the Facility Agreement.

Conclusion

69 For the above reasons, we dismissed the appeal against the Judge's decisions in RA 70 and SUM 1161, with costs in the sum of $20,000 inclusive of disbursements, and consequential orders.

Kannan Ramesh
Judge of the Appellate Division

Andre Maniam
Judge of the High Court

The appellant in person;
Poon Guokun Nicholas and Lee Tat Weng Daniel (Breakpoint LLC)
for the respondent.