A*Glasstech Pte Ltd *v* Full-Glass Pte Ltd
[2019] SGDC 75

Case Number : DC/District Court Suit No 3749 of 2017 (DC/Summonses Nos 543, 576, 703 and 3840 of 2018)

Decision Date : 24 April 2019

Tribunal/Court : District Court

Coram : Chua Wei Yuan

Counsel Name(s) : Doris Chia Ming Lai and Amos Wee Choong Wei (David Lim & Partners LLP) for the plaintiff; and Derek Kang Yu Hsien (Ho & Wee LLP) for the defendant.

Parties : A*Glasstech Pte Ltd — Full-Glass Pte Ltd

Civil Procedure – Consolidation

Civil Procedure – Summary Judgment

Civil Procedure – Striking out

Civil Procedure – Fresh evidence

24 April 2019

Deputy Registrar Chua Wei Yuan:

Background

1 The facts of this case were relatively simple, but they gave rise to four applications, in which some seemingly chicken-and-egg questions were raised. One issue that pervaded these applications, therefore, was the sequence in which they should be heard and decided.

2 The plaintiff supplied the defendant with glass products and services for several construction projects. It commenced two suits against the defendant, one in the District Court ("the DC Suit") and the other in the Magistrate's Court ("the MC Suit"). [note: 1] In both suits, it sued on unpaid invoices. The invoices in the MC suit concern one project at Jurong Gateway; the invoices in the DC Suit were in respect of all the other projects. In each suit, the defendant filed an identical counterclaim for some $2.8m in damages arising out of an alleged breach of conditions implied by virtue of the Sale of Goods Act (Cap 393, 1999 Rev Ed) for the supply of goods to the Jurong Gateway project. These damages were allegedly for losses flowing from the difference in value of the products and the costs of rectification to be incurred.

3 Originally before me were three applications in the DC Suit. In order of filing date, they were:

(a) the Plaintiff's application to strike out the counterclaim;

(b) the Defendant's application to consolidate both suits and to transfer the suits to the High Court ("the HC"); and

(c) the Plaintiff's application for summary judgment in the sum of $230,329.41 plus interest and costs.

A fourth application was filed by the defendant, after I had reserved judgment, seeking to adduce further evidence to resist summary judgment. I heard arguments at an adjourned hearing before rendering decision on all the applications.

4 While I allowed the defendant to adduce the supplementary affidavit, I struck out the counterclaim and gave summary judgment on the principal claim. In the event, I did not order a consolidation of the suits.

Decision

5 My grounds of decision below supplement and clarify the reasons I gave parties when I rendered my decision. It will not escape the parties' notice that the reasons I gave previously were organised in a slightly different manner. On reflection, it seems clearest to explain my views:

(a) first, on the sequence in which these applications should be heard and decided;

(b) next, on each of the individual applications in such sequence; and

(c) finally, on the costs of the applications.

How should the applications be heard and decided?

6 In the usual case, applications are heard and decided discretely. This is reinforced by Practice Direction 24A of the State Courts Practice Directions ("PD"), which directs that each distinct substantive application must be filed in a separate summons. That said, it is not uncommon for multiple applications to be fixed for hearing together, especially when there appear to be some relationship between the prayers sought. Indeed, this will only become the norm if the recommendations of the Civil Justice Commission and the Civil Justice Reform Committee—specifically, that there be as far as possible a single interlocutory application addressing all matters necessary to bring the matter to trial—come to pass (see the *Report of the Civil Justice Commission* (29 Dec 2017), at Chap 7, para 5; the *Report of the Civil Justice Review Committee* (Oct 2018), at para 72; Civil Justice Commission and Civil Justice Review Committee, *Public Consultation on Civil Justice Reforms* (26 Oct 2018), at paras 71–72; and the draft Rules of Court (Cap 322, R 5, 2018 Rev Ed), Part 1 Chap 7 r 8(2)–(4)). In such cases, parties might make the preliminary argument that the applications should be heard and decided in a certain order.

7 In principle, the Court has the discretion as a matter of case management to fix multiple interlocutory applications to be heard together. This tends to just, economical and expeditious resolution of disputes and, often enough, more efficient use of court resources. In such cases, it is sometimes easy—and better—to decide which application is logically prior to which and to dispose of cases in that order, because this can prevent wasted costs (*ie*, counsel need not make arguments which would turn out to be moot). In other cases, it is doubtful if such an exercise yields any net benefit because some applications may be so deeply intertwined such that one would have to enter deeply into the merits of the application to determine the order in which they should be decided, such that one would have been better off simply presenting the arguments for each application in the first place (even if some would turn out to be moot). In this latter category of cases, it would help to address the court specifically on how the outcome of each application depends on the outcome of the others. How the court approaches each set of multiple applications must depend on the facts and circumstances of the case and, in particular, the kinds of prayers and arguments presented in the applications.

8 In this case, I decided at the first hearing to hear arguments on the three applications before making substantive orders in any of them. Both parties then agreed—as I would have been inclined to direct—that the applications be argued in the order they were filed. At the adjourned hearing, I decided to hear arguments on the fourth application before deciding even the striking out and consolidation applications.

9 The application for transfer of proceedings could be dealt with separately since the defendant was seeking to withdraw it. Having reflected on parties' arguments, I consider that the remainder of the applications would ideally be approached in the following manner:

(a) first, to dispose of the application to adduce further evidence and to decide if the counterclaim in the DC Suit amounts to a set-off against the claim in the DC Suit and, in so doing, decide whether the counterclaim should be struck out;

(b) next, to consider if summary judgment should be granted (and if I should, consequent to the application to adduce further evidence, allow the plaintiff a reply affidavit);

(c) third, to decide if the DC Suit and the MC Suit should be consolidated; and

(d) finally, to deal with the costs of all the applications.

10 ***First***, the application to strike out a counterclaim appeared logically prior to the application for summary judgment on the principal claim because (at least on a *prima facie* basis) the existence of the counterclaim may provide a ground to stay execution on any judgment that may be granted, and it might even amount to a defence of set-off, which would be a triable issue. The defendant argued in this case was that it was effectively compelled to plead identical counterclaims because the plaintiff had elected to split its claims across two suits. In my view, this did not require the striking out application to be decided after the other applications; it simply meant that the outcome of the striking out application might turn on an issue that is typically addressed in the context of the summary judgment application, *ie*, whether the counterclaim is capable of amounting to a set-off to the claims in the DC Suit.

11 ***Next***, as between applications for consolidation and summary judgment, one might argue—as did the defendant—that the consolidation application is logically prior, since a defence or triable issue might be disclosed in the counterclaim in the other action with which a consolidation of this action is sought. However, I considered the summary judgment application to be logically prior, since the aim of consolidation—to "save costs, time and effort and for reasons of convenience in the handling of the hearing of several actions" through which a common thread runs (*Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 141 at [4])—falls away if summary judgment is given. In other words, it would be fruitless to consolidate two actions if summary judgment could be given on the claims in one action. Even if summary judgment should be given but with a stay of execution, consolidation would still be unnecessary since I could order a stay of execute on the judgment in the DC Suit pending the disposal of the claim and counterclaim in the MC Suit.

12 ***Third***, as between the striking out and consolidation applications, the answer as to which should be decided first is perhaps the least straightforward. On the basis of my views above, it should follow that the striking out application be decided before the consolidation application. While this was ultimately what I did, this was not quite for either of the plaintiff's two arguments.

13 The plaintiff's *first* argument was that the deputy registrar presiding at one of the previous pre-hearing conferences had directed that the striking out application be disposed of first. Upon my examination of the minutes, the deputy registrar ordered only that these applications be fixed for hearing together. Indeed, it would be unusual for a deputy registrar conducting the pre-hearing conference—whose principal aim is simply to ensure that parties are ready to proceed to the hearing on the merits—to direct how the applications are to be disposed of. That issue is almost invariably left to the discretion of the court hearing the matter on its merits. The *second* argument was that in any event such an approach was taken in *Terrestrial Pte Ltd v Allgo Marine* [2013] 3 SLR 527 (HC) ("*Terrestrial*"), since in both cases there were duplicate claims (or counterclaims). In *Terrestrial*, T sued A in one suit for monies owing under a loan. In that suit, A filed a counterclaim for a breach of contract. Subsequently, A sued T in another suit for the same breach of contract. Chan Seng Onn J disagreed with the assistant registrar's order to consolidate the two suits instead of striking out the second suit; in his view, this was clearly a case where T had commenced duplicate actions and that this was vexatious and an abuse of process. However, *Terrestrial* was in my view not decisive of the order in which I should decide the applications, because the consolidation application before me might also have been premised on an argument that the plaintiff's claims in both suits were of a similar nature and the witnesses would have been the same.

14 Even if the summary judgment application was not in the picture, I would take the view that the striking out application would appear to be logically prior to the consolidation application, since the existence (or not) of certain pleadings in the DC Suit might affect whether it should be consolidated with the MC Suit. On the other hand, one might—as the defendant did—retort that sauce for the gander was sauce for the goose: the consolidation application should be heard first because the

striking out application would become moot if the suits were consolidated (*eg*, as the offending pleadings would be rewritten such that they should no longer be struck out). The former analysis appeared more attractive for two reasons. *First*, the defendant should not be allowed to circumvent a striking out application by having a consolidation application decided first. If it was legitimate for the defendant to plead identical counterclaims in both suits in the first place, then those counterclaims should pass muster in a striking out application. Otherwise, a party could always succeed on an application for consolidation on the ground in O 4 r 1(*b*) (*ie*, that some common question arises in both suits) by pleading identical counterclaims in both suits. [note: 2]*Second*, it was not entirely accurate to say that the question of striking out would become moot if both suits were consolidated. The identical counterclaim would have been as good as struck out, as consolidation would have entailed the filing of an amended defence in the lead suit containing a single counterclaim rather than two identical counterclaims.

15 ***Finally***, the application to adduce further evidence should be decided prior to the application for summary judgment, save that insofar as I should direct my mind to whether any consequential orders are necessary (*eg*, whether to allow the plaintiff a reply affidavit), it might be decided in conjunction with the application for summary judgment.

The individual applications/prayers

Transfer of proceedings to High Court

16 The defendant (correctly, in my view) sought leave to withdraw the prayer for transfer of the matter(s) to the HC.

17 I gave the defendant such leave. An application to transfer a matter to the HC must be filed in the HC (State Courts Act (Cap 321, 2007 Rev Ed), s 54B(1)); the State Courts has no power to order such a transfer. In any event, I would not have made any orders on this prayer since it did not comply with State Courts PD 24A(1)–(2), which requires each substantive prayer to be the subject of a separate application.

18 Relatedly, the defendant indicated its intention to apply to the HC to transfer both suits (in whatever form) to the HC in any event. However, since such an application has not been filed (and much less any order made), I decided the remainder of the prayers on the basis that the suits were to be tried in the State Courts. If proceedings were subsequently transferred, the Registrar or Judge making the order could then decide whether, as a consequence, it would be appropriate to vary or set aside my orders.

Adducing further evidence to resist summary judgment

19 After I had reserved judgment and, later, fixed a hearing date for parties to receive my decision, the defendant sought to adduce further evidence in the form of a supplementary affidavit principally exhibiting quotations to show only that its quantification of the counterclaim was *bona fide*. Some of these quotations were obtained after I heard arguments in the other three applications.

(1) Principles applicable to the admission of further evidence

20 I first examine the principles applicable to the admission of further evidence.

21 Neither party drew my attention to any decision on an application to adduce further evidence after judgment was reserved but before judgment was delivered.

22 In my view, the starting point should be that the court has an inherent power and the discretion to receive further evidence, if doing so is in the interests of justice. The court, not having rendered its decision, is not *functus officio* and O 14 r 2(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) contemplates that further affidavits may, with the court's leave, be received in evidence in a summary judgment application. In this regard, the court should not adopt an unduly rigid or restrictive approach in considering directions pertaining to a trial or hearing; it should examine the material advanced by parties and not shut out potentially material and relevant evidence by a strict adherence to the rules of civil procedure (*Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 at [26] *per* V K Rajah JA (delivering the judgment of the court), citing *Auto Clean 'N' Shine Services (a firm) v Eastern Publishing Associates Pte Ltd* [1997] 2 SLR(R)

427 ("*Auto Clean 'N' Shine*") at [17] *per* L P Thean JA (delivering the judgment of the court)). *Auto Clean 'N' Shine* concerned the calling of witnesses not contemplated when order arising from the summons for directions had been extracted, but in my view it applies with equal—if not more—force in the interlocutory context. And, in the context of an application to recall a witness after the close of a plaintiff's case, the court should guard against surprise or prejudice to the other party (*Ong Yoke Eng v Lim Ah Yew* [1982] 1 MLJ 226 ("*Ong Yoke Eng*") at 227 *per* Arulanandam J).

23 There is a different line of authority which sought to apply the principles in *Ladd v Marshall* [1954] 1 SLR 1489 ("*Ladd*"), which ordinarily requires three criteria to be satisfied before fresh evidence is received: that such evidence (1) could not have been obtained with reasonable diligence before trial; (2) would probably have had an important influence on the result of the case; and (3) was apparently credible. Although the *Ladd* criteria typically operate (and are most explicable) in the appellate context, a defendant at first instance was refused the opportunity to call further evidence after the close of the defendant's case on the basis that the first criterion was not met (*Yah Binti Aji v Fatimah Binti Haji Mohamed Ariffin and others* [1969] 2 MLJ 186 ("*Yah Binti Aji*")).

24 I agree with the argument that an application to adduce new evidence while a trial is subsisting should, all other things being equal, be treated more favourably than one at the appeal stage (*Singapore Court Practice 2016* (Jeffrey Pinsler ed) (LexisNexis, 2016), para 35/4/18). Also, *Yah Binti Aji* was eschewed in favour of *Ong Yoke Eng* in *Tan Kah Khiam v Liew Chin Chuan and another* [2007] 2 MLJ 445 (CA, Putrajaya). At [6], Gopal Sri Ram JCA (delivering the judgment of the court) gave three reasons why the *Ladd* principles should not apply:

> 6 …the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence. Indeed they cannot be the same … [First], although an appeal is … by way of rehearing, **there are important constraints on an appellate court** [*Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 at p 42]. Such constraints include the deference given by an appellate court to the audio-visual advantage enjoyed by the trial court. These constraints are absent at a trial. The trier of fact is yet to see and hear the witness whose evidence it is sought to be adduced by a re-opening of the case. [Second], the issue on an application to adduce further evidence before an appellate court is **whether the party seeking to adduce it could not by reasonable diligence have obtained it for use at the trial**. This **does not enter at all into the equation before the trial court**. [Third], **an application to adduce further evidence before an appellate court is temporally fixed**. That is to say, it is fixed at the point **when** all the evidence is in and the submissions are over and more importantly, the **trial judge has pronounced his views on the evidence before him**. What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appeal that if the trial judge had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court.

25 Nonetheless, I would not treat these as saying that the *Ladd* criteria are entirely irrelevant at first instance. In my view, the *Ladd* criteria remain useful in limiting the stringency with which the court treats an application to adduce further evidence. Indeed, both the parties' submissions and my decision were took into account an adaptation of the *Ladd* principles. The first criterion of unavailability can be approached by examining the reasons for not adducing the evidence earlier. (In the context of interlocutory appeals, the first criterion might not be rigorously policed, but the applicant still had to show sufficiently strong reasons why the fresh evidence was not adduced before the registrar (*Singapore Civil Procedure 2018* (Foo Chee Hock gen ed) (Sweet & Maxwell, 2018) ("*Civil Procedure*") at para 55B/1/3, citing *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR(R) 392).) The second and third criteria can be approached by inquiring into the relevance and materiality of the evidence to the matter and the reliability of the evidence. More generally, an appellate court will insist on the *Ladd* criteria more strictly if the matter had the characteristics of a full trial (*eg*, where oral evidence had been taken), even if it was an interlocutory hearing. That, in my view, is a matter that can also be considered at first instance.

(2) Application to the facts

26 I now address whether further evidence should be admitted in this case.

27 ***First***, I was generally reluctant to allow the application because parties had in fact informed the court at the pre-hearing conference that their affidavits were complete, because it would prejudice both the plaintiff (by possibly renewing a fight by changing the factual parameters and by delaying the matter) and the administration of justice (by requiring the court to reconsider a decision that was scheduled to be delivered without exhausting any right of appeal). In this regard, the plaintiff pointed out that the first three applications had been pending for a considerable time. However, I was inclined to agree with the defendant that any prejudice caused by additional evidence could be compensated by costs and a right of reply (*Ang Leng Hock v Leo Ee Ah* [2004] 2 SLR(R) 361 at [15] *per* Judith Prakash J (as she then was)).

28 ***Next***, I was not entirely satisfied that the defendant offered an excellent reason as to why it did not adduce the evidence earlier. The defendant submitted that the belatedness of this evidence should be excused because, according to it, the plaintiff made a meal of this issue (*ie*, the *bona fides* of the quantification of the counterclaim) only in submissions and it was only seeking to react accordingly. However, I was more inclined to agree with the plaintiff that, in the first place, the defendant had the burden to persuade the court that its quantification of the counterclaim was *bona fide* and should have led evidence accordingly rather than have assumed that the plaintiff would not take issue with it. I was, however, prepared to overlook this, since the inquiry in the nature of the first *Ladd* criterion is not treated with strict insistence in the context of an interlocutory matter without the characteristics of a trial, and as the further evidence related to a discrete and sufficiently narrow point.

29 ***Finally***, as regards the second and third criteria, I could also accept, respectively, that the evidence was material and relevant to one of a sub-issue in the summary judgment application (*ie*, the *bona fides* of the quantification of the counterclaim) and that it was at reliable or credible (at least *ex facie*).

30 Accordingly, I allowed the application.

31 Ordinarily, I would have given the plaintiff a right of reply. However, given my other views on the summary judgment application, this additional evidence would not have swung my decision in the defendant's favour. Accordingly, as a matter of case management, I decided to render judgment without inviting the plaintiff to file a reply affidavit. Of course, if parties appeal my decision on the summary judgment application (as they have), any further evidence the plaintiff may have on this point can be sought to be placed before the appellate court if it is so minded to consider such evidence.

Striking out of the counterclaim

32 In my view, the counterclaim in the DC Suit must be struck out.

33 The Court may, under O 18 r 19(1), strike out any pleading if it:

(a) discloses no reasonable cause of action or defence, as the case may be;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the action; or

(d) is otherwise an abuse of Court process.

34 ***First***, pleading identical counterclaims in two suits would appear to be vexatious and amount to an abuse of process. It was on these grounds a respondent's statement of claim was struck out for being identical to the counterclaim in another suit brought against it by the applicant (*Terrestrial* at [13]–[14] and [21]). The Court stated that the duplicate claim would waste court resources and increase costs. Similarly, it was vexatious and an abuse of process to bring two actions in the same court in respect of the same cause of action (*Bank of Canton Ltd v Dart Sum Timber (Pte) Ltd* [1977-1978] SLR(R) 367 (CA) at [23]). This reasoning applies to a counterclaim as it effectively operates as a separate action for which the defendant acts as plaintiff (*Terrestrial* at [15]).

35 ***Second***, a duplicate counterclaim, as an unnecessary pleading, tends to delay a fair trial of an action since it requires an opponent to plead to it, and entails double work and double filing fees (*Tong Seak Kan and another v Jaya Sudhir a/l Jayaram* [2016] SGHC 204 at [30]).

36 The defendant's riposte—also based on *Terrestrial* but at [17]—is that the Court has a discretion to allow the duplicate claims to proceed if good reasons exist. In this regard, a defendant who files a counterclaim cannot be equated to a plaintiff, as a defendant is not the instigator of litigation but the party brought into proceedings and who has to defend himself from attack (*PT Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd* [2006] SGHC 154 at [16]). According to it, the plaintiff filed two suits to pursuit the invoice claims when all the outstanding projects were part of an overarching course of dealing and all the outstanding invoices were dealt with on a consolidated statement of accounts. It was acting only as a reasonable defendant would when faced with claims split up across actions. Otherwise, the plaintiff's argument that it was its prerogative to decide how to prosecute its claim—taken to its logical extreme—meant that the plaintiff could have filed some 170 suits (*ie*, one for each suit) and the defendant would be put to hardship because it could only file a counterclaim and set-off in one, assuming it had no defence to the rest.

37 ***To begin with***, upon reflection, I found some force in the plaintiff's argument that the principle that duplicate claims are an abuse of process also applies to counterclaims. A counterclaim goes beyond a defence of set-off, since the former survives independently of the main action (s 31 of the Limitation Act (Cap 163, 1996 Rev Ed)) whereas the latter does not. In the latter case, if the debt due to the defendant exceeds the amount claimed by the plaintiff, the defendant has no remedy to the excess and must sue separately for its recovery. And, if the main action is disposed of, the defendant cannot have his set-off tried (*Civil Procedure* at para 18/17/2, citing *Gathercole v Smith* [1881] 7 QBD 626). In other words, it might have been proper for the defendant to plead the same set of facts in two suits if it amounted to a defence of set-off in one and also to a counterclaim in the other, but the defendant may have gone too far in pleading a counterclaim in both suits. Further, as between the two suits, the suit in which it was more appropriate to strike out the counterclaim was the DC Suit. It was clear that the MC Suit was the suit in which the nexus between the principal claim and the counterclaim was closer. Also, the defendant did not elect to proceed with the counterclaim in the DC Suit and withdraw the counterclaim in the MC Suit.

38 ***Next***, in any event, I did not think that there was good reason to duplicate the counterclaims.

39 *First*, the counterclaim in my view could not operate as a set-off to the claim in the DC Suit (even if it might in the MC Suit).

40 A legal set-off involves a debt or liquidated sum due from the plaintiff that due and payable, and is capable of being liquidated or ascertained with precision at the time of pleading (*OCWS Logisitics Pte Ltd v Soon Meng Construction Pte Ltd* [1999] 2 SLR 376 *per* Chao Hick Tin J (as he then was); *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1991] 2 SLR(R) 901 at [10] *per* G P Selvam JC (as he then was)). In other words, such a claim cannot require investigation beyond mere calculation. The fact that the damages were named in a definite sum does not make the claim liquidated (*Knight v Abbott, Page & Co* (1882) 10 QBD 11). The defendant's counterclaim would have been clearly unliquidated and could not have amounted to a legal set-off.

41 An equitable set-off involves a counterclaim that impeaches the title to the plaintiff's legal demand and either arises out of the same transaction as the main claim or is so closely connected that it would be manifestly unjust to allow the plaintiff to proceed with his claim without regard to the cross-claim (*Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643). However, I was unable to say that the main claim was so closely connected to the counterclaim. The starting point is that each purchase order (and therefore, typically, each invoice) gives rise to a separate contractual claim. In the counterclaim, the defendant was claiming for losses flowing from the plaintiff's failure to deliver glass products that met the specifications in the defendant's purchase orders. The counterclaim, therefore, flowed specifically from specific purchase orders in respect of the Jurong Gateway project. The defendant argued that parties treated all projects as part of an overarching course of dealing because they issued and relied on consolidated statements of accounts, the plaintiff did not request separate payments for each project, and the defendant would make lump sum payments to the plaintiff to account for outstanding amounts.[note: 3] However, these matters were neither here nor there. The consolidated statement of accounts appeared to simply be a convenient way to list all the invoices on which sums were owing on an on-demand basis, since a separate statement of accounts was generated for the Jurong Gateway project. But, in any event, it would have been administratively convenient and, in my judgment, common practice to use consolidated statements of accounts and this is hardly a concession that the claims have a close degree of connection. In fact, in the consolidated statement of accounts before me, an invoice

number and project was attributed to each line item; this clearly reinforced the separate nature of the claims. Allowing a counterparty to make combined payments might well be common practice or an indulgence to the defendant and similarly should not be taken to mean that the claims were closely connected with each other.

42 *Second*, the defendant has painted an overly bleak picture of the hardship it might face. First, in principle, the starting point is that each individual claim appears to be a separate cause of action and the plaintiff has the prerogative to decide how to bring its claims. Claims on multiple invoices might become the subject of a single suit because the kinds of issues that are expected to arise and the kinds of evidence required to establish the claim might be similar. However, a plaintiff may have legitimate reasons to ringfence different sets of claims, and in my view the extent to which this is permissible is a question of degree. If the plaintiff brought 170 suits close in time despite expecting the nature of the issues and relevant evidence to be similar, his conduct may well be vexatious and an abuse of process. However, I find it hard to say that a plaintiff acts improperly by bringing two suits because it expects to face different kinds of disputes to arise in each suit. Second, the defendant is not necessarily deprived of the opportunity to pay up on the plaintiff's claim later if the plaintiff invokes the summary judgment process by virtue only of the plaintiff having proceeded in multiple actions. If there is a defence of set-off, then it would be appropriate to give leave to defend (see below at [69]). If the claim in the DC Suit is determined in the plaintiff's favour before the claim in the MC Suit is disposed of, the defendant can possibly avail itself of a stay of execution pending the determination of the MC Suit. This, in my judgment, would not be materially different from obtaining a stay of execution on a part judgment given in a single suit containing all of the plaintiff's claim.

43 Accordingly, I ordered that the counterclaim in the DC Suit be struck out.

Summary judgment

44 The plaintiff sought to enter summary judgment on the main claim. The amount was originally $232,625.62, but that was later amended to $230,329.41 to reflect the amount claimed in the amended statement of claim.

45 A summary judgment application has two stages. In the first, the plaintiff must establish a *prima facie* case for summary judgment. The defendant did not seriously dispute that the plaintiff had done so. In the second stage, the burden of persuasion shifts to the defendant to show why he should have leave to defend the claim. One way to do this is to show a fair or reasonable probability that of a real or *bona fide* defence or a factual dispute (*Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [44]). The defendant advanced two lines of argument in this regard, relating to the principal claim and the counterclaim, respectively, but I rejected both lines of argument.

(1) Disputes to the principal claim

46 Of the 386 invoices in this suit, the defendant disputed 52 on grounds concerning (1) the validity of the invoices; (2) the price lists that applied to the invoices or the prices agreed between the parties; or (3) (apparently) the calculation of prices. The total sum in dispute was $2,642.37.

47 However, to show a *bona fide* dispute, the defendant had to adduce some evidence, direct or indirect, to support its assertions (*Calvin Klein, Inc v HS International Pte Ltd* [2016] SGHC 214 at [45] and [76]).

48 The defendant's dispute was a bare denial. Its affidavit contained only a summary of its position. There was no documentary evidence brought to my attention, nor were there any detailed assertions on the circumstances under which parties agreed to a different price list or price.

49 The defendant argued that its bare denial was sufficient to raise a triable issue, given that the plaintiff pleaded a "bare" statement of claim. I was not persuaded by this argument. The plaintiff exhibited the price lists, invoices and delivery orders in its 1st affidavit filed in support of this application, and in its 2nd affidavit it exhibited an *aide-mémoire* that corresponded each price list, invoice and delivery order to each transaction. In my judgment, the defendant had been given sufficient particulars and evidence to give a considerably more detailed response, but its account of events contained far too many gaps for me to accept that the factual disputes it had raised were *bona fide*.

50 There were 2 invoices the validity of which was disputed. They were, according to the defendant, in respect of "replacement for [a] previous [purchase order]" and "an urgent replacement for [the plaintiff's] supply of broken glass" respectively and that it never agreed to pay for them. However, both invoices were preceded by a purchase order issued by the defendant. If the defendant was demanding a replacement (for defective goods, for example) for which it should not have had to pay rather than making a fresh order, it did not explain why it had issued purchase orders.[note: 4]

51 There were 13 invoices where the pricing was in issue. Of these, the disputes in 2 invoices were in respect of items to which some price lists were said to apply. The defendant disputed this position, but did not explain how the price lists were departed from and how the alternative agreement was reached.[note: 5] In respect of another invoice, the defendant did not state the plaintiff's position correctly in the first place.[note: 6] In respect of the remaining 10 invoices, even though the plaintiff says that the price was based on a verbal agreement, these prices were reflected in the purchase orders. In contrast, the defendant simply said that it had agreed to a different price without even specifying whether the agreement was oral or written or by conduct. The defendant did not highlight that it had raised any kind of objection in relation to these invoices when they were issued.

52 As regards the other 37 invoices where calculation appeared to be in issue, the defendant did not seriously pursue this point in submission. Even on affidavit, the defendant merely stated the total surface area of the glass products/services by which it had been allegedly overcharged. However, in the invoices containing multiple line items (of which there were many), and the defendant did not specify clearly which line item(s) it had taken issue with. Neither did the defendant offer an alternative calculation to show what exactly the dispute was.

53 In these circumstances, I did not grant leave to defend on the basis of triable issues arising out of disputes regarding the principal claim. If I was wrong on the above, then I would have been inclined to grant judgment for $227,687.04 and leave to defend the residue (*ie*, $2,642.42). Even then, the plaintiff indicated that it was prepared to abandon its claim on the disputed invoices if the court was minded to consolidate both suits on the basis of those invoices. In such a case, therefore, I would have given the plaintiff oral leave to amend its statement of claim and summary judgment application to reflect a claim for $227,687.04, and give judgment on the amended claim instead.

(2) The counterclaim

54 The defendant also pleaded a counterclaim for damages arising from an alleged breach of the contracts of supply in respect of the Jurong Gateway project.

55 Given that I had struck out the counterclaim (see above at [32]–[43]), this line of argument would fall away.

56 If, however, I was wrong to strike out the counterclaim, then I would have applied the following approach to determine if summary judgment should be granted (*Kim Seng Orchid Pte Ltd v Lim Kah Hin (trading as Yik Zhuan Orchid Garden)* [2018] 3 SLR 34 (HC) at [98]–[99] *per* Chan Seng Onn J):

(a) First, consider if the counterclaim is plausible (*ie*, success at trial is reasonably possible). If not, summary judgment may be granted.

(b) But, if so, the court should next determine if it amounts to a defence of set-off, whether legal or equitable. If set-off is available, unconditional leave to defend should be granted.

(c) But, if not, the court may give judgment and then determine if execution should be stayed pending the disposal of the counterclaim, having regard to whether the claim and counterclaim are sufficiently connected and whether there are grounds to stay execution.

(I) Whether leave to defend could have been granted

57 The plaintiff argued that the counterclaim was not plausible because the defendant had not suffered the alleged loss and damage which it claimed to have suffered. Insofar as the defendant claimed to have suffered reputational loss and losses of multiple contracts, no particulars were given, and insofar as the losses were said to relate directly to the alleged breach of contract, the defendant had not suffered any losses because the defendant had not incurred any expenses in actually rectifying the losses. At the time this application was first argued, there were also no receipts or quotations to show how the defendant quantified its losses. The affidavit filed on the defendant's behalf merely stated that these were genuine calculations and estimates—these, according to the plaintiff, were mere assertions that could not form the basis of a defence. After the supplementary affidavit was filed, the plaintiff argued that the fact that these quotations were obtained belatedly and reinforced the point that the plaintiff had not actually incurred losses yet (and, therefore, the quantification was not *bona fide*).

58 The defendant confirmed that it had not replaced the glass allegedly defective glass products, but it pointed out that there was no requirement in law that a party claiming the cost of curing defective goods must have undertaken rectification works. In any event, the defendant would be put in a difficult position if it had to rectify the problems at its own cost before being able to recover that sum from the plaintiff.

59 In my view, the defendant is correct in principle that there is no distinction between cases where the cost of cure had been incurred and those where it had yet to be incurred. However, I was not fully satisfied that the entire counterclaim was plausible. First, it appeared that the defendant was seeking double recovery by claiming for both diminution in value[note: 7] and cost of cure. Second, even among the heads of claim for the cost of cure, the further evidence submitted did not fully satisfy me that the whole of the counterclaim was reasonably quantified. It is one thing for the defendant not to have undertaken rectification works; it is another for it not to have even gotten some quotations for them. This was a fact that called for an explanation and it may well be the case that the works for which a quotation had not been obtained until recently were not reasonably necessary (even if the quantification of the amount was *bona fide*). However, I was prepared to accept that at least some part of the counterclaim was quantified *bona fide* since there would have been at least a diminution in value claim, and in any event since the plaintiff had been quoted sums far exceeding the value of the principal claim for various rectification works even before the summary judgment application had been argued. Accordingly, for the purpose of resisting summary judgment, I would accept that the counterclaim would have been plausible to some extent.

60 However, in my view, I took the view that the counterclaim could not have amounted to a defence of set-off as against the claims in the DC Suit (see above at [39]–[41]).

61 Accordingly, I did not grant leave to defend the claim on the basis of a set-off, and I entered judgment on the principal claim in the plaintiff's favour.

(II) Whether a stay of execution on the judgment could have been granted

62 The remaining issue, therefore, was whether a stay of execution on the judgment would have been granted pending the disposal of the counterclaim (if it had not been struck out).

63 I would not have ordered a stay.

64 A stay is discretionary, and depends on whether the defendant can persuade the court that it would be fair and just in all the circumstances of the case to stay the immediate enforcement due to the pending trial of the counterclaim. The court may consider the degree of connection between claim and counterclaim, the strength and quantum of the counterclaim, and the plaintiff's ability to satisfy judgment on the counterclaim (*United Overseas Bank Pte Ltd v Tru-line Beauty Consultants Pte Ltd* [2011] 2 SLR 590 at [45]; *Kim Seng Orchid* at [98(d)]). In relation to the degree of connection, it appears that *if* the counterclaim "arises out of quite a separate and distinct transaction" or is "wholly foreign to the claim" or has "no connection [with] the claim", the court should generally grant summary judgment without a stay (*Kim Seng Orchid* at [98(c)]).

65 I was, on the whole, not persuaded that it would have been fair and just to stay execution of the judgment. ***First***, for the reasons discussed above at [41], I took the view that the counterclaim arose out of quite separate and distinct transactions from those which were the subject of the main claim in the DC Suit. ***Additionally***, I was not persuaded by the defendant's argument that the current counterclaim arose only due to the plaintiff's failure to perform its obligations under the sub-contract.[note: 8] It appeared that the transactions which led to the DC Suit and the counterclaim were not contemporaneous,

and that some claims in the DC Suit even predated the offending supply of glass products. The claims in the DC Suit were based on invoices dated between late January 2016 and early February 2017. In contrast, the defendant did not plead with specificity when the plaintiff delivered the glass products which were said not to conform to specifications. All it said was that the products were delivered "sometime around 2014 to 2017". The invoices in the MC Suit were rendered between late September 2016 and mid-January 2017 and, in any event, the defendant complained of offending supply of glass products only in late April 2016.[note: 9] ***Finally***, the defendant did not draw my attention to its alleged ability to satisfy any judgment that might have been granted.

Consolidation

66 The defendant prayed for the DC Suit and MC Suit to be consolidated on such terms as the Court thought just or for both suits to be tried before the same judge at the same time or one immediately one after another, with consequential directions as to the further conduct of the suits.

67 Considering that I had entered summary judgment on the claim and that the counterclaim had been struck out, the DC Suit was fully disposed of and there was no longer any reason to consolidate both suits.

68 Had I granted leave to defend the action on the basis of the disputed invoices only, I would also not have consolidated both suits. The defendant argued that the key witnesses for the trial of the DC Suit and the MC Suit would be the same, *ie*, the individuals involved in the contractual arrangements between the parties. If the defendant's response to the summary judgment application is any guide, the evidence in the DC Suit would be highly specific, relating to what appeared to be *ad hoc* agreements on prices, methods of calculation in the invoices, and the validity of 2 sales. In contrast, the defendant responded to the MC Suit with a bare denial and a counterclaim. As the defendant did not specify further what exactly it was disputing in the MC Suit, the plaintiff would be put to strict proof of its entire claim. Accordingly, the kind of issues that would arise and evidence that would be led in the MC Suit be materially different even if the witnesses would be similar. However, I can accept that it would save time for both the court and the parties to have the same judge try both actions. Accordingly, I would have ordered the MC Suit to be tried by the same judge immediately after the trial of the DC Suit.

69 But, if the counterclaim could operate as a set-off, I would (as explained above) not have struck it out and I would have given leave to defend. As a consequence I would have consolidated the suits with consequential directions for parties to file amended pleadings (which would have included a direction that the defendant plead a single counterclaim).

Costs

70 As regards the summary judgment application, the plaintiff sought costs of $10,000. It submitted that it would have sought an even larger amount but for the scale costs of $3,000–$10,000 in O 59, Appendix 2, Part II, para 1(3)(*c*), as substantial affidavits had been filed—the plaintiff filed an affidavit of nearly 1,300 pages and had to peruse the defendant's affidavit of nearly 1,400 pages. The defendant submitted that costs should be fixed at $6,000, as the upper end of the scale should be reserved for full-day hearings. The striking out, consolidation and summary judgment applications were argued within half a day, and the documents although voluminous were of a similar nature.

71 As regards the striking out application, the plaintiff sought $8,000 in costs, taking into account that $6,000–$20,000 would be awarded in costs in the High Court (Supreme Court Practice Directions, Appendix G, Section II(B)) where the whole suit or defence was struck out. According to it, this was one such case, as I had struck out the entire counterclaim, which was a standalone action. In addition, it highlighted that the plaintiff had to request for particulars of, and file a defence to, the counterclaim. The defendant submitted that costs should be fixed at $3,000, as the plaintiff advanced a straightforward argument that ultimately founded on the duplication of the counterclaim, and bearing in mind its submission on the costs that should be awarded in the summary judgment application.

72 As regards the consolidation application, the plaintiff sought $3,000 in costs. It submitted that I had effectively ruled in the plaintiff's favour, notwithstanding that I had made no order on the application, since my view was that the consolidation application was without merit. The defendant submitted that costs should be fixed at $2,000, as less time was spent on this application and as it was of lesser importance in some ways than the striking out application.

73 As regards the application to adduce further evidence, the plaintiff sought $2,500 in costs, citing the fact that this was an unusual application, that it had to peruse the defendant's 45-page affidavit and argue at a hearing of 1.5 hours. The defendant submitted that no order as to costs should be made, as the plaintiffs had reasonably refused to consent to the application. Costs, if at all, should be payable by the plaintiff only if the plaintiff had to file an affidavit either to oppose the application or in reply to the further affidavit in respect of the summary judgment application.

74 In my view, the plaintiff's costs submissions were completely untenable. The costs it sought, when combined, totalled $23,500 plus disbursements. As regards the summary judgment application, the factual arguments were relatively simple even if the claim was for a very large quantum. The most notable features of the matters before me were the tedium of the voluminous documents, and the difficulty of disentangling the multiple applications. I agreed with the defendant that the highest end of the costs scale should be awarded in matters not only in which a large quantum is at stake, but also which entail a long hearing and involve difficult factual and legal issues. Considering these matters, I fixed costs at $8,000.

75 The striking out application was rather straightforward even though the quantum of the counterclaim was large and, as it turned out, the consolidation application was of subordinate importance in the sense that it turned on the outcome of the summary judgment application. As the consolidation, striking out and summary judgments were argued together, I found the defendant's costs submissions more than fair. I therefore fixed costs of the two applications, respectively, at $3,000 and $2,000. To be added to these costs orders were GST thereon and, since parties agreed to try to agree on disbursements, reasonable disbursements to be taxed if neither agreed nor fixed upon a request made within 14 days of my order.

76 As regards the application to adduce further evidence, I accept that it was an unusual application, and that the defendant was the blameworthy party in bringing the application. However, I was not minded to make any costs orders. I note that the plaintiff resisted the application vigorously even though the defendant had early on offered to pay costs and the opportunity for a reply affidavit. I also note that the other costs orders that I had made were very substantial—$13,000 in total excluding GST and disbursements. In my view, that sum was adequate to compensate the plaintiff for the prejudice it had suffered in having to address this application.

Conclusion

77 In summary, my orders were as follows:

(a) on the application to adduce further evidence to resist the summary judgment application:

(i) order in terms of the prayer for leave to file a further affidavit; and

(ii) no order as to costs;

(b) on the application to strike out the counterclaim:

(i) order in terms of the prayer to strike out the counterclaim (*ie*, paragraphs 6–15 of the Defence & Counterclaim (Amendment No 1)); and

(ii) that the defendant pay the plaintiff costs of this application fixed at $3,000.00 plus GST thereon and disbursements to be taxed if neither agreed nor fixed upon a request made within 14 days of my order;

(c) on the application for summary judgment:

(i) order in terms of the prayer for summary judgment in the sum of $230,329.41 plus interest at 5.33% per annum from the date of writ to the date of judgment; and

(ii) that the defendant pay the plaintiff costs of this application and this action fixed at $8,000.00 plus GST thereon and disbursements to be taxed if neither agreed nor fixed upon a request made within 14 days of my order; and

(d) on the application for consolidation and transfer of proceedings:

(i) leave to withdraw the prayer for transfer of proceedings to the HC;

(ii) no order on the other prayers apart from costs; and

(iii) that the defendant pay the plaintiff costs of this application fixed at $2,000.00 plus GST thereon and disbursements to be taxed if neither agreed nor fixed upon a request made within 14 days of my order.

78 The defendant has appealed my decisions on the striking out, consolidation, and summary judgment applications.

[note: 1]MC/MC Suit No 21545 of 2017.

[note: 2]D Subs, para 16a, 17–18.

[note: 3]TKH's 3rd afdv, para 15–19; TKH's 4th afdv, p 439 *et seq*.

[note: 4]Item 8; 92.

[note: 5]Item 91; 208.

[note: 6]Item 287.

[note: 7]Defence & Counterclaim, para 15(a).

[note: 8]D Subs, para 58.

[note: 9]TKH's 4th affidavit, p 522.

BACK TO TOP