IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA(I) 4

Civil Appeal No 180 of 2019

Between

Offshoreworks Global (L) Ltd

… *Appellant*

And

POSH Semco Pte Ltd

… *Respondent*

In the matter of SIC/Suit No 1 of 2019

Between

POSH Semco Pte Ltd

… *Plaintiff*

And

(1) Makamin Petroleum Services Co
(2) Offshoreworks Global (L) Ltd

… *Defendants*

JUDGMENT

[Credit and Security] — [Guarantees and indemnities]
[Civil Procedure] — [Rules of court] — [Non-compliance]

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v
POSH Semco Pte Ltd

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Andrew Phang Boon Leong JA, Arjan Kumar Sikri IJ and David Edmond Neuberger IJ
1 April 2020; 5 August 2020

22 September 2020 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

Parties

1 By way of background, the Respondent, POSH Semco Ltd ("POSH"), applied for (a) summary judgment against the Appellant, Offshoreworks Global (L) Limited ("OWG"), for the sum of S$4,078,226.48 with interest and costs; and (b) a declaration that a guarantee issued by OWG to POSH was an "on-demand performance guarantee" under SIC/Summons No 50 of 2019 ("SUM 50").

2 OWG and the first defendant, Makamin Petroleum Services Co ("MPS") in SUM 50, are shareholders of Makamin Offshore Saudi Ltd ("the Charterer"), with OWG being the majority shareholder. Captain Koh Chen Tien ("Cpt Koh")

is OWG's sole shareholder and Executive Director, and was also the Managing Director of the Charterer at the material time.

3 The present appeal, Civil Appeal No 180 of 2019 ("CA 180"), is OWG's appeal against the trial judge's ("the Judge") decision to grant summary judgment to the Respondent for part of the sum claimed.

The Original Charterparty dated 28 October 2013

4 On 28 October 2013, the Charterer entered into a time charterparty ("the Original Charterparty") with POSH in relation to the vessel "POSH Pelican" ("the Vessel") on the terms of a BIMCO Supplytime 2005 standard contract and additional clauses. Pursuant to cl 41 of the Original Charterparty, the Charterer provided a bank guarantee to POSH for US$1.293m which was issued by the Royal Bank of Scotland plc ("the RBS Guarantee").

Guarantees dated 24 October 2014

5 As of 17 October 2014, POSH claimed that the Charterer owed POSH a sum of over US$3.7m pursuant to the Original Charterparty. The Charterer sought to persuade POSH to withdraw its call on the RBS Guarantee. POSH agreed to do so, provided that OWG (and three other parties related to the Charterer) furnish guarantees to POSH for the purpose of securing performance of the Charterer's obligations under the Original Charterparty. On 24 October 2014, multiple guarantees by OWG, MPS, Cpt Koh and Dr Abdullah Aseeri Ali were signed with reference to the Original Charterparty.

6 Of particular significance was the OWG Guarantee issued by OWG in favour of POSH, which provided that OWG "irrevocably and unconditionally

guarantee[d] … the due and faithful performance by the Charterer of all its obligations contained in the Supplytime 2005".

The Settlement Agreement dated 15 November 2015

7 Following the execution of the OWG Guarantee, the Charterer continued to be in significant arrears. On 15 November 2015, the Charterer and POSH entered into a settlement agreement in relation to the outstanding debt ("the Settlement Agreement"). The Settlement Agreement set out the parties' agreement on, *inter alia*, (a) the Charterer's outstanding debt under the Original Charterparty of US$2,891,241.54 as of 30 June 2015 ("the Outstanding Debt"); (b) the Charterer's payment plan to POSH with regard to the settlement sum of US$2,119,461.56 in eight monthly instalments over a period between November 2015 and June 2016 ("the Settlement Sum") in full and final settlement and discharge of any and all past or present claims that POSH had against the Charterer; (c) the amendment of the Original Charterparty by way of Addendum No 1 of the Settlement Agreement; and (d) that in the event that any of the eight instalments was not paid by the stipulated timeline, the entire Outstanding Debt would immediately become payable. The Original Charterparty, as amended by Addendum No 1 of the Settlement Agreement, shall be referred to as "the Post-Addendum Charterparty".

Breach of the Settlement Agreement

8 On 31 January 2016, the Charterer failed to make payment of the 3rd instalment under the Settlement Agreement by the agreed date. The balance of the Outstanding Debt fell due, and POSH was entitled to immediately claim the said sum under the Settlement Agreement. Between 16 February 2016 and 21 March 2016, POSH repeatedly demanded that the Charterer fulfil its obligation to pay the remaining Outstanding Debt plus sums which had accrued

under the Charterparty subsequent to 30 June 2015, while reserving its rights to withdraw the vessel and terminate the Charterparty.

9 On 26 March 2016, POSH withdrew its vessel and terminated the Charterparty for the Charterer's alleged repudiatory breach in accordance with the three-day notification period under the early termination clause of the Post-Addendum Charterparty.

10 In SUM 50, the Judge held that (a) summary judgment be entered in favour of POSH against OWG for the sum of US$3,306.446.50 with interest and costs ("the Summary Judgment"); and (b) OWG be granted unconditional leave to defend POSH's claim for the remaining amount of US$771,779.98, being the difference between the 30 June 2015 Outstanding Debt and the Settlement Sum (see [10(f)] below). The Judge made the following findings:

(a) The obligation by OWG to pay under the OWG Guarantee was not triggered by a demand whether justified or not, but required that there be real liability on the part of the Charterer for the OWG Guarantee to bite.

(b) There was good consideration for the OWG Guarantee.

(c) POSH was entitled to withdraw the Vessel and the Post-Addendum Charterparty was rightfully and validly terminated at the point of withdrawal of the Vessel.

(d) The terms of the Settlement Agreement and the obligations which arose thereunder fell within the ambit of the OWG Guarantee. The effect of the non-payment of the 3rd instalment in the Settlement Agreement was to accelerate the Charterer's duty to pay the Outstanding Debt.

(e) However, as the Settlement Agreement was governed by Saudi law, questions arose as to the validity of the enforcement of the acceleration provision. OWG had raised a triable issue and had an arguable defence that could only be resolved at a trial where expert evidence on Saudi law will be adduced. As a result, judgment could not be given for the remaining amount of US$771,779.98.

(f) The difference in liability of the Charterer depended on whether the acceleration was rightful or wrongful, which was calculated as the difference between the Outstanding Debt and the Settlement Sum in the Settlement Agreement. That was the only sum truly in issue between the parties on the effect of the evidence on Saudi law (*viz*, US$771,779.98).

(g) As for the issue of interest, there was a contractual interest rate at 1% per month which had to be applied for the claims made under the Post-Addendum Charterparty.

Our decision

11 We now turn to our decision. We first deal with an important preliminary issue of corporate self-representation by foreign bodies corporate.

Issue of corporate self-representation by foreign bodies corporate

12 On 16 March 2020, we allowed an application made by OWG's counsel, NLC Law Asia LLC, to be discharged. At the hearing before us on 1 April 2020, Cpt Koh appeared as an authorised representative for OWG as OWG had not appointed new solicitors, and sought an adjournment of the appeal on the basis that OWG was not legally represented. We allowed the adjournment until the week commencing 25 May 2020 and expressly ordered that no further adjournments would be entertained, noting that the hearing of the appeal would

be subject to the decision of the court as to whether the appeal could proceed if OWG was still not legally represented. At the final hearing on 5 August 2020, OWG once again appeared before the court without legal representation (notwithstanding the fact that it had effectively a little over *two months more* to secure legal representation as the hearing initially scheduled for the week commencing 25 May 2020 had been further vacated and adjourned). A preliminary issue therefore arises as to whether OWG, a Malaysian registered body corporate, must be represented by a solicitor.

13 Counsel for POSH, Mr Jason Chan SC, submitted at the hearing on 1 April 2020 that a foreign body corporate such as OWG cannot appear before the Court of Appeal hearing an SICC matter unless represented by a solicitor by virtue of O 5 r 6(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"), and cannot avail itself of the leave mechanism in O 1 r 9(2) of the same (which would permit corporate self-representation with the leave of court). However, we noted then that the imposition of such a requirement on foreign bodies corporate would lead to a somewhat unsatisfactory outcome that runs counter to the very purpose of establishing the Singapore International Commercial Court ("SICC"), which is to "grow the legal services sector and to expand the scope for the internationalisation and export of Singapore law" (see sicc.gov.sg/about-the-sicc/establishment-of-the-sicc (accessed 5 August 2020)). The issue of whether corporate self-representation for *foreign* bodies corporate is permissible in Singapore thus arises as a crucial threshold point in the present appeal.

The default position of no corporate self-representation

14 We begin by examining the key provisions governing the issue of corporate self-representation in Singapore. In Singapore, the starting point is

that a body corporate is generally prohibited from commencing or carrying on any action, as well as from entering an appearance in or defending such action, "otherwise than by a solicitor". This is provided for in O 5 r 6(2) and O 12 r 1(2) of the Rules, which state as follows:

> **Right to sue in person (O. 5, r. 6)**
>
> …
>
> (2) Subject to Order 1, Rule 9(2) and any other written law, and except in accordance with any practice directions for the time being issued by the Registrar, *a body corporate* may not *begin or carry on any proceedings* in Court *otherwise than by a solicitor.*
>
> …
>
> **Mode of entering appearance (O. 12, r. 1)**
>
> …
>
> (2) Subject to Order 1, Rule 9(2) and any other written law, and except in accordance with any practice directions for the time being issued by the Registrar, *a defendant to an action* begun by writ which is *a body corporate may not enter an appearance in the action or defend it otherwise than by a solicitor.*
>
> [emphasis added]

15 The definition of "Court" in the context of the Rules is set out at O 1 r 4(2) of the Rules ("O 1 r 4(2)") as follows:

> **Definitions (O. 1, r. 4)**
>
> …
>
> (2) In these Rules [meaning, the ROC], *unless the context otherwise requires*, "Court" means the *High Court or a District Court, or a judge of the High Court or District Judge,* whether sitting in Court or in Chambers, and includes, in cases where he is empowered to act, a Magistrate or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these Rules and, in particular, Order 32, Rule 9, by virtue of which the authority and jurisdiction of the Registrar is defined and regulated.
>
> [emphasis added]

16 We make several observations in this regard. First, the general prohibition in O 5 r 6(2) of the Rules ("O 5 r 6(2)") applies to a body corporate that *begins or carries on any proceedings*, while the general prohibition in O 12 r 1(2) of the Rules ("O 12 r 1(2)") applies to a body corporate which is a *defendant to an action begun by writ* who *enters an appearance in the action or defend it*. Second, it appears that the ambit of the general prohibition against corporate self-representation in O 5 r 6(2) extends to the High Court and, at least arguably, the SICC (see O 1 r 4(2)). This is because the SICC is a division of the Singapore High Court (see s 18A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)). By extension, the definition of "Court" in O 1 r 4 of the Rules would therefore include the SICC. On the other hand, the general prohibition in O 12 r 1(2) is *silent* on its application to the type of court proceedings, and there appears (at least on the face of the literal language of that particular rule) to be no equivalent limitation to its scope as in O 5 r 6(2), which is a point to which we shall return below (at [29]). Finally, the reference to "a solicitor" in O 5 r 6(2) and O 12 r 1(2) also includes a registered foreign lawyer for the purposes of proceedings in the SICC (see O 110 r 1(1) and r 1(4) of the Rules). Given that OWG was a defendant in SUM 50, which was a matter that was heard before the SICC, the legal regime in O 12 r 1(2) at least arguably applies and prohibits OWG's corporate self-representation in the present proceedings, and O 5 r 6(2), contrary to Mr Chan's submissions, does not.

The leave provision in O 1 r 9(2) of the Rules

17 O 5 r 6(2) and O 12 r 1(2) are, however, subject to the leave mechanism in O 1 r 9(2) of the Rules ("O 1 r 9(2)"), which provides as follows:

> (2) … [T]he *Court* may, on an application by a *company* or a limited liability partnership, give leave for an officer of the company or limited liability partnership to act on behalf of the company or limited liability partnership in any relevant matter

> or proceeding to which the company or limited liability partnership is a party, if the Court is satisfied that —
>
> > (*a*) the officer has been duly authorised by the company or limited liability partnership to act on behalf of the company or limited liability partnership in that matter or proceeding; and
> >
> > (*b*) it is appropriate to give such leave in the circumstances of the case.
>
> [emphasis added]

18 O 1 r 9(6) of the Rules ("O 1 r 9(6)") defines "company" and "Court" in O 1 r 9(2) as follows:

> (6) In this Rule [meaning O 1 r 9]—
>
> *"company" means a company* ***incorporated under the Companies Act (Cap. 50)***;
>
> "Court" means —
>
> > (*a*) the Court of Appeal, if the relevant matter or proceeding is —
> >
> > > (i) any matter, proceeding or appeal referred to in paragraph (5)(*a*); or
> > >
> > > (ii) any appeal referred to in paragraph (5)(*b*), (*c*) or (*d*) to the Court of Appeal, in respect of which no leave has been given under paragraph (2) or (3) by a court below;
> >
> > (*b*) the High Court, if the relevant matter or proceeding is —
> >
> > > (i) any matter, proceeding or appeal referred to in paragraph (5)(*b*); or
> > >
> > > (ii) any appeal referred to in paragraph (5)(*c*) or (*d*) to the High Court, in respect of which no leave has been given under paragraph (2) or (3) by a court below;
> >
> > (*ba*) a Family Court, if the relevant matter or proceeding is any matter, proceeding or appeal referred to in paragraph (5)(*ba*);
> >
> > (*c*) a District Court …
> >
> > …

> (*d*) a Magistrate's Court, …
>
> [emphasis added in italics and bold italics]

19 O 1 r 9(5) of the Rules defines "relevant matter or proceeding" as follows:

> (5) For the purposes of section 34(1)(*ea*) and (*eb*) and (3) of the Legal Profession Act and in this Rule [meaning O 1 r 9], "relevant matter or proceeding" means —
>
> > (*a*) any matter or proceeding commenced in, or any appeal under any written law from any tribunal to, the Court of Appeal;
> >
> > (*b*) any matter or proceeding commenced in the High Court and any appeal from that matter or proceeding;
> >
> > (*ba*) any matter or proceeding commenced in a Family Court and any appeal from that matter or proceeding;
> >
> > (*c*) any matter or proceeding commenced in a District Court and any appeal from that matter or proceeding; and
> >
> > (*d*) any matter or proceeding commenced in a Magistrate's Court and any appeal from that matter or proceeding,
>
> …

20 We first note that the definition of "Court" in O 1 r 9(6) includes the Court of Appeal, as well as the High Court, which, by extension, includes the SICC. We also note the following observations of the High Court in relation to the amendments to O 1 r 9 of the Rules in 2014 in *Allergan, Inc v Ferlandz Nutra Pte Ltd* [2015] 2 SLR 94 (at [31]):

> The current wording found in O 1 r 9(2) of the Rules of Court was introduced in 2011. The 2011 amendments, however, restricted the application of O 1 r 9(2) to proceedings in a District Court or Magistrate's Court. The significance of the recent 2014 amendments is that *they extended the application of O 1 r 9(2) to proceedings before the Family Court, the High Court and the Court of Appeal.* [emphasis added]

21 *However*, "company" is defined as *a company incorporated under the Companies Act* (Cap 50, Rev Ed 2006) ("Companies Act") (see O 1 r 9(6) (reproduced above at [18])). A *foreign* company which is not incorporated under Singapore's Companies Act therefore *cannot* avail itself of the leave mechanism in O 1 r 9(2). In other words, the plain definition of "company" in O 1 r 9(6) thus suggests that a foreign incorporated company such as OWG *cannot* avail itself of the leave mechanism in O 1 r 9(2).

Conclusion

22 We observe that it appears from the governing provisions set out above that foreign bodies corporate in all proceedings before the SICC as well as in all appeals from the SICC (collectively referred to as "SICC matters") must be represented by a solicitor. As the leave mechanism pursuant to O 1 r 9(2) does not (for the reasons set out above) apply to *foreign* bodies corporate, this possible legal route for corporate self-representation is *unavailable* as well to a party which is a *foreign* body corporate. Given the fact that many SICC matters will involve one or more foreign bodies corporate, this leads to a somewhat less than satisfactory result, given the *raison d'être* of the SICC (see [13] above).

23 A possible *alternative* view is that Parliament, in drafting the governing provisions in the Rules, could not have intended to impose such onerous requirements on foreign bodies corporate in SICC matters because doing so would, as we have just observed, run counter to the very objective of establishing the SICC. We therefore turn now to analyse whether it is even possible for such alternative view to be adopted, which, in our judgment, can be possibly arrived at only through one of the following two ways:

(a) First, the governing provisions in the Rules must be interpreted in such a manner that foreign bodies corporate involved in SICC matters

do not fall within the ambit of the general prohibition against corporate self-representation set out in O 5 r 6(2) *and* O 12 r 1(2).

(b) Second, if the general prohibitions in O 5 r 6(2) and O 12 r 1(2) do apply to SICC matters, the governing provisions in the Rules must be interpreted in a manner such that the leave mechanism in O 1 r 9(2) is still available to foreign bodies corporate appearing in SICC matters so as to enable corporate self-representation with the leave of court.

24 We start by analysing the first option in [23(a)] above. According to this particular argument, one could possibly interpret the wording of O 5 r 6(2) to mean that the general prohibition therein does not apply to foreign bodies corporate appearing before the SICC. This could be done by excluding the SICC from the meaning of "High Court", which is included in definition of "Court" in O 5 r 6(2) (see O 1 r 4(2)). Such an interpretation would be premised on the proposition that in drafting O 1 r 4(2), it could not have been intended that the definition of "High Court" would include the SICC. This view could be said to find support in the fact that the SICC was only officially established on 5 January 2015 (see sicc.gov.sg/about-the-sicc/establishment-of-the-sicc (accessed 5 August 2020)), *after* the 2014 amendments that extended the application of O 1 r 9(2) to proceedings before the Court of Appeal, the High Court and the Family Court (see above at [20]). Alternatively, the situation involving a foreign body corporate appearing in SICC matters could be interpreted as one that falls within the wording "unless context otherwise requires", which is an exception to the definition of "Court" in O 1 r 4(2).

25 However, this option must, in our view, be rejected for two reasons.

26 First, this argument is squarely contradicted by O 110 rr 1(1) and 3 of the Rules, which read as follows:

> **Interpretation (O. 110, r. 1)**
>
> 1.—(1) In this Order, unless the context otherwise requires —
>
> …
>
> "Court" means the Singapore International Commercial Court;
>
> …
>
> **Application of Rules of Court (O. 110, r. 3)**
>
> 3.—(1) Subject to this Order, the provisions of these Rules [that is, the Rules] apply to all proceedings in the Court and all appeals from the Court.

27 In *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd* [2017] 4 SLR 1 and *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2017] 5 SLR 148 (as well as *Telemedia Pacific Group and another v Yuanta Asset Management International Limited and another* [2017] 4 SLR 26), the SICC adopted the relevant rules in the High Court in relation to the grant of a summary judgment order and a stay of execution order, respectively. These cases reflect the effect of O 110 r 3 of the Rules which prescribes that the Rules are applicable to proceedings in the SICC if not otherwise already specifically provided for in O 110 of the Rules ("O 110") (see also *Singapore Civil Procedure 2020*, vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2019) at para 110/0/2). In the decision of this court in *BNP Paribas SA v Jacob Agam and another* [2019] 1 SLR 83, O 110 rr 1(1) and 3 of the Rules were applied in the same manner in relation to the issue of the service of court documents. It was held that since there was no provision in O 110 dealing with the issue of service of court documents, the general rules in the Rules relating to the service of non-originating processes in a non-SICC context governed the

service of the Application Documents in that case, pursuant to O 110 rr 1 and 3 of the Rules (at [61]).

28 There is no express provision in O 110 dealing with the issue of corporate self-representation. Hence, the general prohibition against commencing or carrying on any action, as well as from entering an appearance in or defending such action, "otherwise than by a solicitor", in O 5 r 6(2) and O 12 r 1(2) will apply equally to *all proceedings in the SICC and (as a matter of logic and common sense) to all appeals from the SICC* pursuant to O 110 rr 1 and 3 of the Rules.

29 Second, in any case, even if the general prohibition in O 5 r 6(2) were to be interpreted in a manner that excludes SICC matters, we cannot see how the language of O 12 r 1(2) can be interpreted to exclude SICC matters. In particular (and as we have noted at [16] above), the language of O 12 r 1(2) does not contain any limitations with regard to the application of the general prohibition in so far as the types of court proceedings are concerned. *Further*, if we accept the proposition that for foreign bodies corporate appearing before the SICC, the general prohibition in O 5 r 6(2) does not apply to a *plaintiff who begins or carries on the proceedings*, while the general prohibition in O 12 r 1(2) applies to a *defendant entering an appearance in an action or defending it*, this would lead to *an inexplicable inconsistency* between the two rules. An illogical procedural advantage would be created in favour of a plaintiff over a defendant when, in fact, the *converse* ought to be true inasmuch as a defendant should, instead, be offered a slight procedural advantage over a plaintiff because the defendant is effectively before the court involuntarily. For example, in the High Court decision of *Bulk Trading SA v Pevensey Pte Ltd and another* [2015] 1 SLR 538 ("*Bulk Trading*"), it was observed that the court should be more willing to grant leave pursuant to O 1 r 9(2) where the company is the defendant

because the defendant company is effectively before the court involuntarily (at [100]–[101]).

30 For the above reasons, we are of the view that the first option must be rejected. Indeed, given our analysis above, there is no countervailing exception based on context (see [24] above) that could be relied upon by a foreign body corporate.

31 We turn now to analyse the second possible option (at [23(b)]): if the prohibitions in O 5 r 6(2) and O 12 r 1(2) do apply to SICC matters, can O 1 r 9(2) nevertheless be interpreted so as to avail foreign bodies corporate of the *leave mechanism* in *O 1 r 9(2)* in order to appear in SICC matters with the leave of court? In our judgment, the second option must also be rejected. There is simply no way of interpreting "company" in O 1 r 9(2) to include *foreign* bodies corporate which are *not* incorporated under Singapore's Companies Act. The definition of "company" in O 1 r 9(6) (see [18] above) is unequivocally clear. This is further supported by the observations made by Steven Chong J (as he then was) in *Bulk Trading* that the leave mechanism in O 1 r 9(2) was *not* available to foreign bodies corporate (at [22]), although we do note that these observations were made in a non-SICC context:

> … the present application [pursuant to O 1 r 9(2) of the ROC] is correctly made only in respect of Pevensey *Singapore* and not Pevensey *Indonesia*, as the definition of "company" in O 1 r 9(6) of the ROC refers only to a company incorporated under the Companies Act (Cap 50, 2006 Rev Ed). [emphasis added]

32 For the above reasons, we hold that under the present legal regime, the prohibitions against corporate self-representation in O 5 r 6(2) and O 12 r 1(2) do apply to SICC matters *and* that the leave mechanism in O 1 r 9(2) is not available to foreign bodies corporate appearing in SICC matters as a possible legal avenue for corporate self-representation with leave of court. There are

limits to the manner in which given provisions (here, rules of court) can be interpreted. This court *cannot effectively rewrite* the relevant rules in order to achieve what it perceives will be a just and fair result. That would be an impermissible exercise of a *legislative* function and would be clearly beyond the jurisdiction and power of the court. Any change must therefore be made by way of the appropriate legislative amendments.

33 We pause to observe that there are of course cogent policy reasons behind the general prohibition against the lay representation of companies (including foreign bodies corporate) and for the requirement for a *local* corporate litigant, as opposed to a *foreign* body corporate, to first seek leave of court before being able to represent itself in proceedings. This was succinctly discussed in *Bulk Trading* (at [47]–[48]) as follows:

> 47 There are sound reasons for requiring a corporate litigant to first seek leave of court before being able to represent itself in proceedings. In *Winn v Stewart Bros Constructions Pty Ltd* [2012] SASC 150 …, Blue J identified three such rationales at [38] which can all be linked to the court's inherent desire to ensure that justice is administered both fairly and efficiently in the interests of the immediate parties and the wider public:
>
> > 1. The opposite party may be *disadvantaged by the time and cost of the proceeding being extended due to the company not being represented by a legally qualified advocate.*
> >
> > 2. The public interest in *the efficient and timely administration of justice may be prejudiced* by the time and cost of the proceeding being extended due to the company not being represented by a legally qualified advocate.
> >
> > 3. The public interest in the fair administration of justice may be prejudiced by the fact that *a lay advocate (unlike a legally qualified advocate) does not owe a duty to the court and to the parties in the litigation to ensure that the court is properly informed and not misled*.
>
> 48 In light of these real and practical concerns, it is not difficult to see why the general prohibition against the lay

> representation of companies in O 5 r 6(2) and O 12 r 1(2) of the ROC has not been completely abolished by recent amendments. If such a course had been adopted, it would, in my view, tilt the balance too heavily in favour of considerations of *access to justice* while at the same time neglecting the abovementioned concerns. … Having conducted such an assessment [of whether leave should be given under O 1 r 9(2)], the court can then arrive at an informed view on whether it would, on a whole, be unduly prejudicial to the administration of justice if the lay representative is allowed to have carriage of the proceedings. Viewed in this way, the court can be said to perform an important sieving function under O 1 r 9(2).
>
> [emphasis added]

34 However, it is unfortunate that the present legal regime does not permit foreign bodies corporate the possibility of availing themselves of the leave mechanism in O 1 r 9(2). As a result, the court is also deprived of its "important sieving function" to grant leave (see *Bulk Trading* at [48]). We observe that such an outcome is neither pragmatic nor desirable in the context of *SICC matters*, which (as already mentioned at [22] above) almost always involve at least one party who is a foreign body corporate. The imposition of such an onerous requirement on these parties runs counter to the very objective of establishing the SICC in the first place, which is to grow the legal services sector and to expand the scope for the internationalisation and export of Singapore law (see [13] above). In the present appeal, for example, OWG's lack of representation by a solicitor prevents the *substantive* merits of its oral submissions from being heard simply because OWG is *procedurally* prohibited from corporate self-representation and is also unable to apply for leave from the court to represent itself at the hearing before us. We highlight this issue as a gap or *lacuna* in the current legal regime governing corporate self-representation, and are of the view that this issue is sufficiently significant to merit consideration for the introduction of appropriate legislative amendments in the future.

35 Accordingly, even though Cpt Koh applies to appear as an authorised representative on behalf of OWG at the hearing before us, OWG has failed to appear by an advocate and this court could exercise its discretion to dismiss the appeal pursuant to O 57 r 18(1) of the Rules, which provides that "[i]f on any day fixed for the hearing of an appeal, the appellant does not appear in person or by an advocate, the appeal *may* be dismissed" [emphasis added]. We do however observe that there is minimal prejudice against OWG in the present appeal for two reasons. First, at the hearing on 1 April 2020, in granting OWG's adjournment, we expressly ordered that no further adjournments would be entertained, noting that the hearing of the appeal would be subject to the decision of the court as to whether the appeal can proceed if OWG is still not legally represented. Adequate and sufficient notice was given to OWG and, indeed, as a result of a further adjournment of this hearing, it was in fact granted *an additional period of slightly over two months* to secure legal representation. Second, in any event (and more importantly), given that we had, at the hearing itself, yet to decide the issue of corporate self-representation by foreign bodies corporate, we therefore permitted Cpt Koh to nevertheless proffer (in addition to the written submissions already tendered to this court) his oral submissions to us in fairness to OWG. Indeed, having considered the respective parties' written and oral submissions, we are of the view that OWG's appeal ought to be dismissed even on its merits, the reasons for which we now turn to briefly explain.

The Consideration Issue

36 We begin with the issue of whether the OWG Guarantee was void as it was given for past consideration ("the Consideration Issue"). In the proceedings below, OWG argued that the OWG Guarantee was given for past consideration and was hence void. In our view, the Judge rightly rejected this argument and

was correct in finding that there was, in fact, sufficient consideration in law for the OWG Guarantee.

37 On appeal, OWG submitted that the OWG Guarantee was void because it was given for *past consideration* and that the express wording in paragraph 1 of the OWG Guarantee should be regarded as the best evidence of what parties saw was the consideration for the OWG Guarantee. However, as the Judge rightly observed, OWG's reliance on the wording of the first paragraph of the OWG Guarantee is untenable and excessively technical. We agree with the Judge's assessment that OWG's proposed literal interpretation of the first paragraph of OWG Guarantee was devoid of commercial common sense. In our judgment, the first paragraph of the OWG Guarantee referred, instead, to the *continuing future* performance of the Original Charterparty instead.

38 Further, the Judge rightly took into account the circumstances under which the OWG Guarantee was issued. The contemporaneous evidence of the parties' correspondence in October 2014 demonstrated that the parties had entered into the OWG Guarantee in order to secure the withdrawal of POSH's call on the RBS Guarantee and the continued performance of the Charterparty. There was clear *legal* benefit and detriment from POSH's forbearance to sue. This, in and of itself, renders OWG's argument on past consideration a moot one.

39 At this juncture, it might nevertheless be apposite to make some observations on the doctrine of past consideration since it was canvassed in such a substantive manner by OWG. It is established that an act done before a promise and unconnected to the promise cannot be consideration for the promise because it is not done in *exchange* for the promise (see *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*")

at para 04.011). That said, the past consideration rule does not simply look at strict chronology (see the decision of this court in *Sim Tony v Lim Ah Ghee (trading as Phil Real Estate & Building Services)* [1995] 1 SLR(R) 886 at [16] and [21]). As observed by this court in *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713, a strictly chronological approach in determining whether consideration is past or not is deeply unrealistic and unnecessarily restrictive, and undermines the freedom of contracting parties as well as the sanctity of commercial transactions (at [38]).

40 Instead, what is crucial is the nexus between the act said to be consideration and the promise, and that the later act must be causally linked to the earlier promise. Therefore, the court's inquiry is whether, at the time of the earlier act, a later promise was contemplated or required. If so, that connects the earlier act to the subsequent promise and establishes that they are part of the same transaction (see *The Law of Contract in Singapore* at para 04.017). In the decision of *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), this court further explained that the courts look to the substance rather than the form of the transaction. Hence, what looks at first blush like past consideration will still pass legal muster if there is, in effect, a single (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee) (at [83]).

41 We turn now to the question of whether a promisee's performance of an *existing* contractual obligation can be regarded as sufficient consideration. The traditional view is that it cannot, since the promisor obtains no benefit in law as it obtains nothing to which it was not already legally entitled and the promisee suffers no detriment for doing that he was already bound to do: see *The Law of Contract in Singapore* at para 4.042. However, the modern view accepts that

performance of an existing contractual obligation can be good consideration. In the widely-cited decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*Williams*"), the English Court of Appeal held that consideration need not be a legal benefit to the counterparty but could be a factual or practical benefit obtained or detriment avoided (at least in so far as the situation concerns the promise to perform, or the actual performance of, an existing contractual duty owed to the same party). *Williams* has been cited and recognised in a number of Singapore cases, including the decisions of this court in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 at [9]–[13] and *Gay Choon Ing* at [70], as well as the Singapore High Court decision of *Teo Seng Kee Bob v Arianecorp Ltd* [2008] 3 SLR(R) 1114. Evidently, the Singapore courts adopt a liberal view in finding consideration. On the present facts, there was also *factual* or *practical* benefit to the Charterer which constituted valid consideration. As evident from the email dated 22 October 2014 from Ms Gariballa Ahmed, this benefit was in the form of keeping the commercial relationship between the Charterer and POSH strong and in maintaining the level of trust among the management of both companies. However, we note that it was not even necessary for POSH to rely on this strand of argument given what we have held above (at [38]). We should also observe that in the recent appeal to this court in *Ma Hongjin v SCP Holdings Pte Ltd* Civil Appeal No 45 of 2019 (9 July 2020), an argument was made that the doctrine of consideration ought to be dispensed with in the context of contractual *variations*, which argument was *rejected* by the court (detailed grounds of judgment will delivered later). Put simply, the doctrine of consideration applies to *both* the formation *and* the variation of contracts.

42 Accordingly, having examined the substance of the transaction and considered the existence of the arrangements that were concluded at about the

same time at the end of October 2014 when the OWG Guarantee was given, namely, (a) the agreement to the payment plan; (b) the forbearance of POSH to sue or suspend the performance of the Charterparty; and (c) the withdrawal of the call on the RBS Guarantee, we are of the view that the Judge correctly found that there was sufficient consideration in law for the OWG Guarantee.

Other issues

43 We now turn to the other issues on appeal.

44 First, we consider the issue as to whether the Post-Addendum Charterparty fell outside the general purview of the OWG Guarantee and whether OWG was consequently discharged from the OWG Guarantee upon signing the said Addendum on 15 November 2015. We do not find OWG's submissions meritorious. We are of the view that the Judge correctly found that Addendum No 1 was merely a variation in the Original Charterparty that was not so fundamental as to take one outside the terms of the OWG Guarantee, despite having noted the significant changes to the existing charter. We also find that the present facts are sufficiently distinguishable from the case of *Melvin International SA v Poseidon Schiffahrt GmbH (The "Kalma")* [1999] 2 Lloyd's Rep 374.

45 Second, OWG's submissions on appeal that the Judge had erred by holding that the Post-Addendum Charterparty was terminated at the point of withdrawal of the Vessel in accordance with cl 12 must be rejected. We agree with the Judge that POSH was entitled to terminate the Post-Addendum Charterparty. The parties' correspondence from 16 February 2016 to 26 March 2016 evidenced the Charterer's clear indication that it would not pay the outstanding charter hire despite POSH's repeated demands. In our judgment, there was no wrongful termination as the requisite notice pursuant to cl 31(b) of

the Post-Addendum Charterparty had been given from as early as 16 February 2016. As such, we reject OWG's wrongful termination defence.

46 Third, we also agree with the Judge that, notwithstanding cll 3 and 11 of the Settlement Agreement, the terms of the Settlement Agreement and the obligations which arise under it do fall within the ambit of the OWG Guarantee.

47 Fourth, we reject OWG's argument that the RBS Guarantee was not intended to apply any dues under the Settlement Agreement. The RBS Guarantee most definitely fell within the ambit of cl 4 of the Settlement Agreement, which allowed POSH to "pursue recovery of the entire Outstanding Debt (or any part of balance thereof) through *any means* ... " [emphasis added]. Further, the Charterer had not provided any instructions to POSH on the manner in which the call proceeds should be appropriated, nor had the Charterer raised any objections to POSH's setting off of the call proceeds against the aggregate amount set out in its letter to the Charterer dated 10 March 2016. POSH was entitled to set off the call proceeds against the chosen invoices that were listed in Appendix B of the Settlement Agreement, and the Charterer admitted in the Settlement Agreement that such sums were due.

48 Fifth, OWG submitted that there was a discrepancy between the amount that the Second Commercial Circuit Court at the Seat of the Commercial Court of Dammam ("the Saudi Court") had ordered the Charterer to pay POSH in relation to the Vessel on 17 May 2019 (*ie*, US$2,812,904.26) in Case No 10029/3/Q, and the principal amount that the Judge had entered summary judgment for (*ie*, US$3,306,446.50). It is well-established that a judgment or an award against a principal debtor is not binding on the guarantor and is not evidence against the guarantor in an action by the creditor against the guarantor based on the judgment or the award. Instead, should the creditor sue the

guarantor, it must prove the guarantor's liability in the same way as it must prove the principal debtor's liability if it were to bring an action against the principal debtor (see *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 ("*Re Kitchin*") approved in the decision of this court in *PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 at [42]). We observe that the Judge had correctly found that POSH was not entitled to rely on the Saudi Court's judgment against the Charterer as a basis to argue that OWG was similarly liable for the amounts ordered in the Saudi Court judgment in light of the *Re Kitchin* principle. OWG had in fact accepted the application of this principle in the context of the Saudi Court's findings on primary liability in its skeletal arguments. In the same vein, the amount that the Saudi Court had ordered the Charterer to pay POSH should not be in any way relevant to or binding on the principal amount that the Judge had entered summary judgment for in the court below. As a final point, we note a distinction between both proceedings before us and the Saudi Court. The Saudi Court made an order against *the Charterer*, while the present appeal pertains to a determination of liability against *OWG* premised upon its obligations under the OWG Guarantee.

49 Sixth, OWG submitted that it was not liable for the interest amounts claimed by POSH under Invoice Nos 2008041 and 2008387 because the said invoices fell within the scope of the Settlement Agreement and that the levying of contractual interest was prohibited under Saudi Arabian law, given that Saudi Arabian law governed items falling within the Settlement Agreement pursuant to cl 12. However, such a submission must be rejected. While POSH and the Charterer may have entered into the *Settlement Agreement* governed by Saudi Arabian law, the fact remains that the claim against OWG was premised on the

OWG Guarantee, which is governed by Singapore law pursuant to paragraph 15 of the OWG Guarantee.

50 Last but not least, the Judge, in our view, correctly held that the indemnity provision in paragraph 4 of the OWG Guarantee was wide enough to include the interest on the claim and there was also no reason why the contractual provisions on the rate of interest set out in the Post-Addendum Charterparty should not be given effect.

51 At the hearing on 5 August 2020, Cpt Koh informed the court that the Charterer had settled the sums due to POSH in relation to the Saudi Court proceedings, which also dealt with the primary liability issue in the present appeal. Cpt Koh argued that there should be no claim in the Singapore courts because payment had already been made to POSH. We reject such an argument for several reasons. First, POSH informed the court at the appeal hearing that as of 5 August 2020, no settlement had been reached between the parties and POSH had yet to receive any payment by the Charterer in relation to the order made by the Saudi Court. Second, we note that the present appeal deals solely with the *liability* of OWG, while any payment made by the Charterer to POSH in lieu of the Saudi Court proceedings is relevant only at the *enforcement* stage. Finally, Mr Chan provided (correctly, in our view) an undertaking at the hearing on 20 August 2020 that POSH would not be seeking double recovery in either jurisdiction at the enforcement stage.

Conclusion

52 For the reasons set out above, we dismiss the appeal in CA 180 and affirm the Judge's findings on the Summary Judgment. Unless the parties are able to come to an agreement on costs, they are to furnish, within ten days from

the date of this judgment, written submissions limited to five pages each, setting out their respective positions on the appropriate costs orders for the appeal.

Andrew Phang Boon Leong Judge of Appeal	Arjan Kumar Sikri International Judge	David Edmond Neuberger International Judge

Koh Chen Tien as an authorised representative for the appellant;
Chan Tai-Hui Jason SC, Kek Meng Soon Kelvin, Oh Jialing Evangeline and Gan Yun Han Rebecca (Allen & Gledhill LLP) for the respondent.