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

[2023] SGHC(A) 14

Civil Appeal No 79 of 2022 (Summons No 48 of 2022)

Between

Sunpower Semiconductor Limited

… *Appellant*

And

Powercom Yuraku Pte Ltd

… *Respondent*

In the matter of Suit No 838 of 2019

Between

Powercom Yuraku Pte Ltd

… *Plaintiff*

And

(1) Sunpower Semiconductor Limited
(2) Yuraku Pte Ltd
(3) Claudio Giuseppe Bencivengo
(4) Vijaykumar Kishinchand Amesur

… *Defendants*

JUDGMENT

[Civil Procedure — Extension of time — Extension of time to file written submissions]

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v
Powercom Yuraku Pte Ltd

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(Summons No 48 of 2022)
Woo Bih Li JAD and Debbie Ong Siew Ling JAD
25 January 2023

26 April 2023

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 This is an application by Sunpower Semiconductor Ltd ("Sunpower"), the appellant in AD/CA 79/2022 (the "Appeal"), for an extension of time to file its written submissions for the Appeal. It is well-established that in applications for an extension of time, "it is the overall picture that emerges to the court as to where the justice of the case lies which will ultimately be decisive": *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin*") at [30]. Accordingly, if fairness demands that an extension of time should be given, the court will exercise its discretion accordingly: *Newspaper Seng Logistics Pte Ltd v Chiap Seng Productions Pte Ltd* [2023] SGHC(A) 5 at [12].

2 In our judgment, we are not persuaded that the present application justifies the exercise of our discretion as such, and therefore decline to grant

Sunpower an extension of time to file its written submissions. We begin by setting out the facts of the case, before turning to the reasons for our decision.

Facts

3 The background facts to the present application revolve around a shareholders' dispute. The respondent, Powercom Yuraku Pte Ltd ("PYPL"), was incorporated in Singapore in 2009 as a joint venture between:

(a) Sunpower (*ie*, the appellant), which holds 10% of PYPL's share capital;

(b) Powercom Co Ltd ("Powercom"), which holds 55%; and

(c) Yuraku Pte Ltd ("Yuraku"), which holds 35%.

4 The incorporation of PYPL was pursuant to a shareholders' agreement dated 25 May 2009 (the "2009 Shareholders' Agreement"). PYPL's board of directors comprises:

(a) Vijaykumar Kishinchand Amesur ("Vijay") representing Sunpower;

(b) Chang Feng-Hao Simon ("Simon") representing Powercom; and

(c) Claudio Giuseppe Bencivengo ("Claudio") representing Yuraku.

5 PYPL has a subsidiary named Powercom Yuraku SA ("PYSA") in Luxembourg, which in turn has eight wholly-owned subsidiaries in Italy.

6 The dispute centres around resolutions passed at an extraordinary general meeting of PYSA (the "PYSA EGM") on or about 10 January 2012, by which a rights issue of shares in PYSA was allegedly authorised (the "Purported

Rights Issue"). The practical consequence of the Purported Rights Issue was that PYPL's stake in PYSA was diluted from 100% to 5.5%. PYPL's position is that Powercom's consent was required under the articles of association of PYPL (the "Articles"), for any resolution passed by PYSA. The need for Powercom's consent is not disputed. The dispute is whether such consent was given.

7 By an order of court dated 27 May 2019 obtained in HC/OS 948/2012, Powercom was granted leave to bring the following actions in the name of and on behalf of PYPL:

(a) that Claudio and Vijay were not duly authorised to execute a power of attorney dated 23 November 2011 (the "Purported Power of Attorney") which authorised lawyers at the law firm of Bon, Schmitt, Steichen to act as PYPL's attorney at the PYSA EGM and to vote in favour of all the resolutions set out in the Purported Power of Attorney (the "Resolutions");

(b) that Claudio and Vijay were in breach of their fiduciary duties in executing the Purported Power of Attorney and procuring the passing of the Resolutions; and

(c) that Yuraku and Sunpower, as shareholders of PYPL, had conspired with Claudio and Vijay to injure PYPL by unlawful means, in agreeing and acting together to execute the Purported Power of Attorney and procuring the passing of the Resolutions.

8 On 21 August 2019, Powercom commenced HC/S 838/2019 ("S 838") in PYPL's name against Sunpower, Yuraku, Claudio and Vijay, who were the first, second, third and fourth defendants respectively. Subsequently, on 3 September 2021, PYPL applied to enter default judgment against all the

defendants for their failure to serve a defence. Default judgment was granted by Kannan Ramesh J (as he then was) on 16 September 2021.

9 On 24 February 2022, Sunpower and Vijay filed HC/SUM 734/2022 to set aside the default judgment.

10 On 13 July 2022, an Assistant Registrar (the "AR") set aside the default judgment in respect of Vijay, as Vijay had yet to be properly served with the Writ of Summons and Statement of Claim, and so the default judgment had been entered prematurely. As regards Sunpower, the AR set aside part of the default judgment in relation to PYPL's claim against Sunpower in conspiracy (see [7(c)] above), but decided that the rest of the default judgment should remain. As a result, there remained a default judgment against Sunpower in the following terms:

> 1. The following actions are not valid acts of [PYPL]:
>
> (a) The execution of the Purported Power of Attorney;
>
> (b) The convening of the PYSA EGM;
>
> (c) The Resolutions purportedly passed at the PYSA EGM, including but not limited to the Purported Rights Issue; and
>
> (d) All consequential actions and documents executed in connection thereof.
>
> 3. Damages to be assessed for losses caused to [PYPL] by reason of [Sunpower and Yuraku's] breach of the Articles, [and] [Claudio and Vijay's] breach of their directors' duties.
>
> 4. Interest at such rate and for such period as this Honourable Court deems fit on such damages as may be assessed.
>
> 5. The costs of these proceedings and costs occasioned by this application be paid by the Defendants jointly and severally to [PYPL].

11 On 27 July 2022, Sunpower filed an appeal in HC/RA 243/2022 against the AR's decision. On 1 September 2022, the court below (the "Judge")

dismissed the appeal. The reasons for the Judge's decision can be found in *Powercom Yuraku Pte Ltd v Sunpower Semiconductor Ltd and others* [2022] SGHC 211 (the "Judgment").

12 On 13 September 2022, Sunpower filed an appeal to the Appellate Division of the High Court against the Judge's decision, *vide* AD/CA 79/2022 (*ie*, the Appeal). On 16 September 2022, the court issued a notice pursuant to O 18 r 33(5)(*a*) of the Rules of Court 2021, and accordingly, the parties were required to file written submissions for the Appeal by 30 September 2022.

13 After the decision of the Judge, Sunpower changed solicitors. Its new solicitors were RBN Chambers LLC ("RBN"). On 21 September 2022, RBN wrote to the court to request that the deadline for filing written submissions for the Appeal be extended to 7 October 2022, and this was granted by the court. Subsequently, RBN reached a further agreement with PYPL's solicitors, Aequitas Law LLP ("AL"), for an extension of time to 7 December 2022 for parties to file their written submissions and this was allowed by the court.

14 However, on 26 October 2022, RBN applied for an order that its solicitors cease to act for Sunpower. That order was granted on 31 October 2022, but it pertained only to S 838 and not the Appeal. Accordingly, on 14 November 2022, RBN filed an application by way of AD/SUM 39/2022 ("SUM 39") for an order that its solicitors cease to act for Sunpower in the Appeal, as well as other orders which we need not mention for present purposes. That order became unnecessary as Sunpower eventually appointed new solicitors, Withers KhattarWong LLP ("WKW"), on 2 December 2022. We say more later about the circumstances leading to RBN's applications to cease to act for Sunpower.

15 On 6 December 2022, WKW wrote to AL to propose that the deadline for filing written submissions for the Appeal be extended from 7 December 2022 to 18 January 2023, as WKW had just been engaged and was in the process of taking instructions. On 7 December 2022, WKW made the same proposal to the court as it had not received a response from AL.

16 In the meantime, PYPL filed its written submissions on 7 December 2022, but Sunpower did not. Pursuant to O 18 r 33(12) of the Rules of Court 2021, the Appeal was deemed withdrawn unless the appellate court otherwise orders.

17 On 9 December 2022, PYPL wrote to the court to object to Sunpower's request for a further extension of time. On 13 December 2022, the court directed Sunpower to file a formal application for an extension of time.

18 On 28 December 2022, Sunpower filed the present application, namely AD/SUM 48/2022 ("SUM 48"), to extend the deadline to file its written submissions for the Appeal to 18 January 2023. Since that date has passed, Sunpower has proposed to file its written submissions within seven days of the court's order if its application is allowed.

19 It is important to bear in mind that written submissions have been filed by the solicitors for Sunpower and PYPL in respect of the present application for an extension of time.

Our decision

20 The parties agree that in considering an application for an extension of time, the court will have regard to four factors (see *Hau Khee Wee and another*

v Chua Kian Tong and another [1985-1986] SLR(R) 1075 at [14]; *Sun Jin* at [29]):

(a) the length of the delay;

(b) the reasons for the delay;

(c) the merits of the intended appeal; and

(d) the degree of prejudice to the other party if the extension of time were granted.

21 These factors are to guide the court and are non-exhaustive. It has also been observed that the court will adopt a "far stricter approach" in applying the above factors where the application is for an extension of time to file or serve a notice of appeal, as the overriding concern in those applications is finality and ensuring that the winning party is not kept waiting "on tenterhooks to receive the fruits of its judgment": *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*") at [33]; see also *Ong Cheng Aik v Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR(R) 561 ("*Ong Cheng Aik*") at [14]–[16]. The present application being one for an extension of time to file *written submissions*, we are mindful that the four factors need not apply with the same stringency as they would in an application for permission to file a notice of appeal out of time: *Ong Cheng Aik* at [14] and [16]. Ultimately, as we have noted above at [1], the task before us is to consider where the justice of the case lies, or put another way, to determine whether Sunpower's application is one deserving of sympathy: *Sun Jin* at [30]; *Ong Cheng Aik* at [16].

22 With this in mind, we turn to consider the above factors in the context of the present case.

Length of the delay

23 On the length of the delay, PYPL argues that it is six weeks as calculated from the deadline for filing written submissions in the Appeal (*ie*, 7 December 2022) to the date of 18 January 2023 initially proposed by Sunpower. In so far as PYPL relies on previous extensions of time to argue that there is an overall delay of 15 weeks from the time that Sunpower was originally supposed to file its submissions following the issuance of the notice pursuant to O 18 r 33(5)(*a*) of the Rules of Court 2021 (*ie*, 30 September 2022) to 18 January 2023, we agree with Sunpower that the previous extensions of time should be disregarded in calculating the length of the delay as the default was from 7 December 2022. Furthermore, it is unclear that the reasons for the previous extensions of time suggest dilatory tactics by Sunpower.

24 On the other hand, we take into account the previous extensions only to note that this is not a situation where PYPL rebuffed every request for an extension of time. It did agree to previous requests for an extension of time.

25 The submissions for Sunpower do not specify what the period of delay was. For present purposes, we are prepared to take into account the filing date of the present application for an extension of time. As this was on 28 December 2022, the period between 7 December and 28 December 2022 is three weeks. Even then, this is not a short delay.

Reasons for the delay

26 We now come to the reasons for Sunpower's failure to observe the 7 December 2022 deadline. They centre on the health of Vijay's mother. Vijay is Sunpower's sole director and the person instructing its solicitors.

27 According to Vijay, his mother had been suffering from Stage 4 terminal cancer since 2020 and was frequently rushed to hospital and operated upon. On or around 10 October 2022, she was admitted to hospital. He had to stay by her side to take care of her as she was in a critical condition. Vijay's mother passed away on 31 October 2022. He was occupied with fulfilling the last rites and funeral formalities which traditionally last for about a month. He was not in a frame of mind or position to provide RBN with instructions or to arrange a deposit of funds requested by RBN. He asked RBN for more time to make that deposit.

28 In the meantime, the parties attempted mediation through the Singapore Mediation Centre ("SMC") from about 12 October 2022. However, the intended mediation was cancelled. The primary reason for the cancellation appears to be the absence of a response from Sunpower to the SMC's request for confirmation that the mediation was to proceed, and for which a deposit was to be paid by each party. Hence on 10 November 2022, the SMC informed the parties that the mediation was cancelled.

29 On 14 November 2022, Vijay sent an e-mail to the SMC to say that he was unavailable to attend to the matter in view of the demise of his mother. His unavailability forced him to seek new counsel. The SMC responded to say that it would hold the matter till it heard from Vijay about his new counsel. It is unclear to the court whether Sunpower then pursued mediation or, if so, if it was rejected by PYPL.

30 Vijay places much emphasis on his mother's ill health and demise and the need to approach new solicitors after RBN ceased to act for Sunpower. However, it seems to us that the reason why RBN ceased to act for Sunpower should be considered more closely. As mentioned, Vijay stated (in his

supporting affidavit for the present application) that due to his mother's ill health and demise, he had not been in a frame of mind to provide instructions or to arrange for a deposit requested by RBN. To be fair, what he meant was that RBN had asked him to place a deposit of more funds, as he had already placed some funds with RBN. The further deposit was for RBN's fees and disbursements.

31 However, in RBN's affidavit for its application to cease acting for Sunpower in the Appeal (*ie*, SUM 39), there was no mention of the ill health of Vijay's mother or her demise. According to RBN, it made various requests between 8 September 2022 and 26 October 2022 for funds to commence work for a related suit, HC/S 695/2019, and the Appeal. Save for a certain sum of money which RBN had received initially, no further funds were provided to RBN. On 6 October 2022, Vijay sent RBN an e-mail to assure RBN that the funds would be sent between 15 and 25 October 2022. On 19 October 2022, Vijay sent an e-mail to say he was awaiting an update on the transfer of the funds to RBN. On 30 October 2022, Vijay then sent an e-mail to say that he had received confirmation that the funds would be despatched to RBN. However, RBN did not receive the funds.

32 There was no need for Vijay to file an affidavit to respond to RBN's affidavit since, subsequently, RBN's application for its solicitors to cease to act for Sunpower in the Appeal was overtaken by the appointment of WKW in place of RBN. However, as mentioned, Vijay did file an affidavit in support of Sunpower's present application for an extension of time (*ie*, SUM 48). In that affidavit, Vijay mentioned the cessation of RBN as Sunpower's solicitors. However, importantly, he did not say that RBN's explanation for ceasing to act for Sunpower was inaccurate or incomplete. Neither did he exhibit any e-mail

or correspondence from him to RBN stating that his mother's condition was the reason for his failure to transfer the requested funds to RBN.

33 Had Vijay's mother's condition been the true reason why he was not in a "frame of mind" to transfer funds or give instructions to RBN, it stands to reason that he would have at least informed RBN of the same or asked RBN to seek a further extension of time to file Sunpower's written submissions on account of his mother's condition, before RBN had to apply for its cessation. Put simply, it was in Vijay's interest to explain his situation to RBN, so that RBN might grant him more time to make payment of the requested funds and/or seek an extension of time to file Sunpower's written submissions, which would minimise the need for Vijay to attend to the Appeal while he cared for his ill mother. Yet there was neither any evidence of any attempt to communicate the foregoing to RBN, nor has there been an explanation of why RBN was not informed. Crucially, this was also not a case where Vijay was unaware that the deadline of 7 December 2022 was imminently approaching. This is made clear by the fact that on 21 November 2022, Vijay sent an e-mail to AL noting that the deadline for Sunpower to file its written submissions was "originally scheduled for 7th Dec 2022", and requesting that AL seek an extension of time on Sunpower's behalf.

34 As we have mentioned above, Vijay was corresponding with RBN up until 30 October 2022 at the least. That Vijay inexplicably omitted mentioning that he could not attend to the matter because of his mother's ill health, despite being aware that RBN was waiting for funds and that the deadline for Sunpower's written submissions was upcoming, suggests to us that his mother's condition was *not* in fact the reason why he had failed to make the deposit or to instruct RBN. Rather, when coupled with the fact that RBN never received the requested funds despite assurances from Vijay that the moneys had been

transferred, the picture that emerges to us is that Vijay had simply been unwilling or lacked the means to pay RBN, which was what led RBN to discharge itself.

35 In the circumstances, while the court has sympathy for the loss of Vijay's mother, we are of the view that Vijay and Sunpower have used his mother's condition as a false excuse for the failure to meet the deadline of 7 December 2022. The real cause of the delay was not Vijay's alleged inability to instruct RBN due to his mother's ill health and death and the consequent late appointment of WKW, but the reason why RBN ceased to act for Sunpower in the first place: namely, Vijay's failure to furnish the funds requested by RBN. In the absence of any compelling explanation why Vijay failed to make payment to RBN as requested, we do not see how there is good reason for the delay in the present case.

The merits of the Appeal

36 We now turn to the merits of the Appeal. Sunpower relies on *Bank of India v Rai Bahadur Singh and another* [1993] 2 SLR(R) 1 ("*Bank of India*") to argue that in applications not involving an extension of time to file a notice of appeal, the merits of the appeal should not take "centre-stage" in the analysis. In that case, the court declined to consider the merits of an appeal in deciding whether to grant an extension of time. This was because the notice of appeal had been filed within time, and the extension of time pertained solely to the service of the record of appeal. The application, if allowed, therefore would not involve depriving the respondent of an "accrued right" to a final judgment in its favour, in the same way allowing an application for an appeal out of time would (at [27]–[28]).

37 We are of the view that *Bank of India* does not stand for the proposition that, generally, the court should not consider the merits of an appeal where a notice of appeal has been filed within time. In our judgment, the court's reasoning in *Bank of India* must be understood in relation to the facts of that case. In *Bank of India*, the appellants' solicitors had duly filed the record of appeal. However, due to a careless oversight on the part of their clerk, the record of appeal was not served on the respondents' solicitors. The court noted that it "was apparent the appellants had followed all the steps prescribed by the Rules of the Supreme Court" and that the appellants should not be "shut out of court due to a genuine mistake" (at [25] and [32]). Neither had any prejudice been caused to the respondents (at [31]). It appears that it was in those exceptional circumstances that the court considered it appropriate to omit considering the merits of the appeal altogether.

38 In our view, generally speaking, the court may and should consider the merits of the appeal in an application for an extension of time, especially if it is clear that the appeal has no merits. As mentioned above, the overarching consideration in the court's decision must be the overall justice of the case. We do not see how, save for in the most exceptional of cases, this inquiry can logically be undertaken without regard to the merits of the case. As the Court of Appeal explained in *Lee Hsien Loong* (albeit in the context of an application for an extension of time to file a notice of appeal), the merits of the appeal are of "signal importance" when the appeal is truly hopeless, as in such circumstances, granting an extension of time would "be an exercise in futility, resulting in a waste of time as well as resources for all concerned" (at [20]). We consider that these observations also apply even where the application does *not* involve an extension of time to file a notice of appeal. It follows that the merits of the appeal are therefore a relevant consideration in such applications.

39 In any event, Sunpower has also submitted that the Appeal has merit, and we turn to those arguments next. We note that although the present application is for an extension of time to file written submissions for the Appeal, Sunpower has effectively made submissions on the merits of the Appeal.

40 Sunpower's first argument is that a declaratory judgment should not be made in default of defence, as the judgment obtained by PYPL invalidates the Purported Rights Issue and affects third parties. The court ought not to declare as a fact that which might not be proved, and justice can be done by according PYPL damages instead.

41 Sunpower's point is that the funds from the Purported Rights Issue were used to pay creditors of PYSA and its subsidiaries. A decision reversing the Purported Rights Issue would mean that the funds would have to be refunded. In our view, this is not a valid argument. Sunpower is implying that the funds would have to be refunded by the creditors, but this is not so. As is clear from the text of the default judgment at [10] above, the default judgment invalidates the *issue* of further shares by PYSA, and not the subsequent payment of moneys by PYSA to its creditors. The creditors will therefore simply keep the moneys. It is the shareholders who funded PYSA who might be adversely affected, but they did so at their own risk if they knew that Powercom had not consented to the Purported Rights Issue as is admittedly required by the Articles.

42 Furthermore, if there is clearly no defence, there is no reason why the court should require a trial first before making a declaration. It is important to bear in mind that the AR set aside the default judgment against Vijay only because that judgment had been irregularly obtained and not because Vijay has a valid substantive defence.

43 To the extent that Sunpower argues that Vijay has a right to file his defence (for the time being), we agree. However, we are unable to accept Sunpower's argument that a declaration that the Purported Rights Issue was wrongfully effected would "deprive Vijay of the right to present his defence", and therefore should not have been made. The declaratory judgment is against Sunpower (along with Yuraku and Claudio), and not Vijay. Vijay may still file his defence and it is not Vijay who is making the Appeal. For the same reasons, we disagree with Sunpower that Vijay would also be deprived of "an investigation at trial as to the validity of the [Purported Rights Issue]". In any event, it remains to be seen whether he has a valid substantive defence to begin with, such that he is entitled to an investigation of evidence at trial.

44 That said, it has come to our attention that there may be a discrepancy between the default judgment, which allows PYPL to have damages assessed for losses caused to it by reason of *Vijay's* breach of his director's duties, and his right to file a defence. As this was not a point taken by Sunpower and it is a point for Vijay to take in his own individual capacity, it should be addressed elsewhere. If indeed there is such a discrepancy, then perhaps the solution is for PYPL either to apply to rectify the default judgment, or to confirm that it will not pursue damages against Vijay until and unless it obtains judgment against Vijay. We stress that these are only suggestions for consideration to minimise further dispute.

45 Sunpower's second argument on the merits is that the dispute on the Purported Rights Issue falls under an arbitration provision in the 2009 Shareholders' Agreement. We note that there is already a default judgment against Sunpower. That judgment has to be set aside before Sunpower can rely on an alleged arbitration provision and not the other way round.

46 In any event, it is clear that PYPL was not a party to the 2009 Shareholders' Agreement and PYPL is the plaintiff in S 838. Sunpower attempts to overcome this by arguing that the arbitration provision was incorporated into the Articles.

47 First, it argues that Art 56A(i) of the Articles (set out at [8] of the Judgment), which PYPL relies on to contend that the Purported Rights Issue was invalid, "was taken from clause 5.1.9 of the [2009] Shareholders' Agreement bearing the arbitration clause". This is misleading because it gives the impression that the arbitration provision was found in cl 5.1.9. It was not. It was found instead in cl 21.2 of the 2009 Shareholders' Agreement. In any event, whether Art 56A(i) was based or derived from cl 5.1.9, the short point is that Art 56A(i) did not include any arbitration provision.

48 Second, Sunpower argues that the arbitration provision in the 2009 Shareholders' Agreement applies because cl 17.6 of that agreement states that "[i]f any provisions of the memorandum or articles of association of [PYPL] at any time conflict with any of the provisions of this Agreement, the provisions of this Agreement shall prevail". This is a new argument raised through WKW. In any event, we are of the view that there is no conflict. This is a case where, simply put, the arbitration provision applies only to PYPL's shareholders and not PYPL.

49 Third, Sunpower argues that the terms of the 2009 Shareholders' Agreement were incorporated during discussions between Simon, Vijay and Claudio. Sunpower refers to three e-mails between them, but these e-mails only made passing reference to the 2009 Shareholders' Agreement. There was no mention about incorporating any arbitration provision into the Articles.

50 Fourth, Sunpower argues that PYPL consented to be bound by the arbitration provision in the 2009 Shareholders' Agreement when it relied on that agreement to plead its conspiracy claim, in paragraphs 32 and 33 of its Statement of Claim. However, paragraph 32 merely refers to the 2009 Shareholders' Agreement to show how Claudio and Vijay were at the material time (a) nominated and appointed as directors of PYPL; (b) executive directors of Yuraku and Sunpower respectively; and (c) represented and acted on behalf of Yuraku and Sunpower. Paragraph 33 refers to the conspiracy pleaded in paragraphs 31 and 32. In short, paragraphs 32 and 33 do not even mention the arbitration provision or any intent by PYPL to be subject to an arbitration agreement.

51 In the circumstances, we reject Sunpower's arguments that the arbitration provision applies to PYPL's claim.

52 Sunpower's main argument on the merits revolves around the interpretation of an e-mail dated 23 December 2011 from Simon addressed to Claudio and other board members (the "23 December 2011 E-mail"). Sunpower's position is that Powercom consented to the Purported Rights Issue in this e-mail. The Judge set out the wording of the 23 December 2011 E-mail in the Judgment (at [43]). He also set out detailed reasons why, on a plain reading of the 23 December 2011 E-mail, Powercom had not consented to the Purported Rights Issue, and had instead been asking for funds to be injected into *PYPL* by way of a loan or rights issue (at [44]–[50]).

53 Before us, Sunpower argues that Simon could not have intended for a rights issue to be done at the PYPL level as the funding was needed by PYSA. It also argues that in an e-mail dated 7 December 2011, Powercom had refused an offer by Sunpower and Yuraku to perform a share capital increase in PYPL.

However, in that e-mail, Powercom had expressed a preference for the sale of some assets instead. Powercom did not then say that there should be a share capital increase at the PYSA level. Whether or not the funds were needed by PYSA, the relevant question is what Powercom (through Simon) agreed to. We therefore do not consider this to be material.

54 Next, Sunpower refers to an e-mail from Claudio on 22 December 2011, in which Claudio stated that a share capital increase in PYSA was "the best, and the sole, solution to save the company and the group". In our view, this does not assist Sunpower, as Simon replied via the 23 December 2011 E-mail mentioned above. We agree with the Judge that it is clear from the plain wording of the 23 December 2011 E-mail that Simon wanted any injection of funds to be at the PYPL level, and not the PYSA level.

55 Sunpower's arguments are essentially an attempt to avoid the clear wording of the 23 December 2011 E-mail by focusing on what Simon must have intended, but Simon's intention is plain from the e-mail itself. To the extent that Sunpower relies on earlier e-mails to argue that the context suggests a different interpretation of the 23 December 2011 E-mail, those earlier e-mails do not assist it for the reasons we have explained above. Sunpower argues that there is a need for a trial and suggests that there is a need to cross-examine Simon. We do not agree. In our view, there is no ambiguity on the face of the 23 December 2011 E-mail, nor any raised by the surrounding context. The 23 December 2011 E-mail clearly did not amount to consent to the Purported Rights Issue. There is accordingly no triable issue raised in this regard, and we reject Sunpower's main argument on the merits of the Appeal.

56 In sum, we find that Sunpower has failed to provide any compelling reasons for the delay, which was not insignificant in length, and that Sunpower's

case in the Appeal is in any event meritless. It is therefore clear to us that the justice of the present case weighs *against* granting Sunpower a further extension of time and that Sunpower's application is not deserving of the court's sympathy. In the circumstances, it is unnecessary for us to further consider whether there would be prejudice to PYPL if the application for an extension of time were granted.

Conclusion

57 We dismiss the application. It follows that the Appeal is therefore deemed withdrawn. Sunpower is to pay PYPL costs of the present application fixed at $8,000 (inclusive of disbursements). The usual consequential orders apply.

58 For completeness, we mention that Sunpower is now represented by WongPartnership LLP in place of WKW, as Sunpower changed its solicitors after WKW filed written submissions for the present application.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

Chenthil Kumarasingam and Lim Chong Hian (Withers KhattarWong LLP) for the appellant;
Lim Tat and Wan Chi Kit (Aequitas Law LLP) for the respondent.