Ng Hock Kon v Sembawang Capital Pte Ltd
[2009] SGCA 50

Case Number	: CA 191/2008, OS 1480/2007
Decision Date	: 20 October 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Ronald Choo Han Woon and Loke Shiu Meng (Rajah & Tann LLP) for the appellant; Suresh Sukumaran Nair, Jonathan Tan and Muralli Rajaram (Allen & Gledhill LLP) for the respondent
Parties	: Ng Hock Kon — Sembawang Capital Pte Ltd

Agency

Contract

Credit and Security

20 October 2009 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This appeal concerns the rights of an owner, Ng Hock Kon ("the Appellant"), who is resisting enforcement proceedings against his property, 73 Jalan Seaview ("the Property"). The Property is the subject of an action for possession brought in the High Court by the mortgagee, Sembawang Capital Pte Ltd ("the Respondent"), which, at the material time, was in (*inter alia*) the business of property financing. The mortgage in question ("the Mortgage") was granted on 12 June 2000 pursuant to a deed of settlement of the same date entered into between the Appellant and the Respondent ("the Deed"). Under the Deed, the Appellant agreed to repay his debts to the Respondent via monthly instalments. Any default on an instalment would entitle the Respondent to enforce its rights in accordance with a prescribed procedure. In this appeal, the Appellant contends that, having merely defaulted on three instalments amounting collectively to $5,400, he is entitled to relief from enforcement. We ought to mention that, according to the Deed, the total amount which the Appellant owed the Respondent was a sum in excess of $4m. This sum was repayable in monthly instalments in the manner set out at [9] below.

2 On 23 October 2008, the trial judge ("the Judge") ordered, *inter alia*, delivery of vacant possession of the Property to the Respondent (see *Sembawang Capital Pte Ltd v Ng Hock Kon* [2009] 1 SLR 833 ("the Judgment") at [48]). Dissatisfied with the Judge's decision, the Appellant appealed to this court primarily on the grounds that: (a) the Judge took into account irrelevant factors in granting vacant possession of the Property to the Respondent; and (b) the circumstances of the case entitled him to relief from enforcement of the Mortgage, which was in substance a form of forfeiture.

3 After hearing counsel on 9 and 20 April 2009, we reserved judgment, but not before indicating our concerns over the unsatisfactory nature of the various notices that had been sent by the Respondent to the Appellant pursuant to the prescribed enforcement procedure. We granted the parties time to make further submissions on this issue. After a careful consideration of these

submissions as well as all the material circumstances of this case, we have decided to allow the appeal. These are our reasons.

Background facts

The events leading to the execution of the Deed

4 In 1995, a company, HSC International Investment Pte Ltd ("HSC"), entered into a facility agreement with the Respondent ("the HSC facility") to borrow $2m to purchase various units in an apartment/office building known as Golden Lion International Investment Centre ("GLII Centre") in Zhenjiang, China. The Appellant, together with his fellow directors at HSC, one Lee Keng Soon ("Lee") and one Chia Meng Seng ("Chia"), executed personal guarantees to secure the HSC facility. The Appellant also decided to purchase for himself several units in GLII Centre and obtained a separate personal term loan of $1m from the Respondent for that purpose. The personal loan to the Appellant was granted on 16 July 1996, and was jointly and severally guaranteed by HSC as well as Lee and Chia. On 7 April 1997, the Appellant, again in his personal capacity, entered into a second facility agreement with the Respondent for $400,000. This second loan, which was for the Appellant's purchase of yet more units in GLII Centre, was also jointly and severally guaranteed by HSC, Lee and Chia.

5 The Appellant and HSC subsequently defaulted on their respective loans and, eventually, judgments in default of appearance were obtained against the Appellant, Lee and Chia as guarantors. In a surprising turn of events, Lee later sought to set aside one of the default judgments entered against him (*viz*, the default judgment in Suit No 2250 of 1998) on the ground that the Respondent had fallen foul of the Moneylenders Act (Cap 188, 1985 Rev Ed) (which has since been repealed) in extending loans to the Appellant and HSC. Consequently, Lee argued, the default judgment entered against him should be set aside since the loans upon which that judgment was based were illegal and unenforceable. Lee succeeded in his argument and, on 12 August 1999, the default judgment entered against him in Suit No 2250 of 1998 was conditionally set aside. The Respondent filed a notice of appeal against the decision, but, on 25 November 1999, it withdrew the said notice. In February 2000, Lee successfully set aside the two remaining default judgments entered against him (*viz*, the default judgments in Suits Nos 2251 and 2252 of 1998).

6 The Appellant, who, from a legal standpoint, was arguably in a similar position as Lee apropos the legality of the loans from the Respondent, did not, however, adopt the same legal tack. Instead, in June 2000, he proceeded to enter into the Deed with the Respondent, which provided, amongst other matters, for the repayment in instalments of the loans made to him. The legal purport of some of the terms of the Deed and the Mortgage now take centre stage in the present appeal.

Relevant recitals and clauses of the Deed

7 As mentioned at [1] above, both the Deed and the Mortgage were dated 12 June 2000. The Deed was, according to its preamble, made "supplemental to the Mortgage",[note: 1] with the latter constituting "security for [the Appellant's] liabilities arising under [the] Deed"[note: 2] (see recital E of the Deed, which is also reproduced at [8] below).

8 In the Deed, the Appellant (referred to therein as "the Debtor") acknowledged his indebtedness to the Respondent (referred to therein as "the Creditor") of approximately $4m in the following terms:[note: 3]

(A) The Debtor is, at the date of this Deed, indebted to the Creditor in the sum of S$ 1,720,877.34 under two Facility Agreements dated 16 July 1996 and 7 April 1997 …

(B) The Debtor is, at the date of this Deed, further indebted to the Creditor in the sum of S$ 2,651,083.85 under Guarantees in respect of loans made by the Creditor to various third parties …

(C) The said sums of S$ 1,720,877.34 and S$ 2,651,083.85 constitute the total indebtedness of the Debtor to the Creditor, including legal costs, interest and any other costs (hereinafter referred to as "the Total Debt") …

(D) The Debtor has proposed to make payment to the Creditor of the sums specified in this Deed in full and final settlement of the Total Debt to the Creditor … by payment of the amounts and in the manner appearing below …

(E) The Debtor has agreed to execute a Mortgage over his property at 73 Jalan Seaview [*ie*, the Mortgage as defined at [1] above] … in favour of the Creditor by way of security for his liabilities arising under this Deed …

…

(G) The Creditor has agreed to accept the said payments … and Mortgage in full, final and complete discharge and satisfaction of the Creditor's claims against the Debtor … subject to the conditions herein …

9 While there was nothing peculiar in the Deed's recitals, we note that the specific terms relating to the duration of repayment were nothing short of extraordinary. Clause 1 of the Deed stipulated that:[note: 4]

The Debtor hereby irrevocably and unconditionally covenants with the Creditor that he will pay the following sums to the Creditor in the manner herein specified (hereinafter referred to as the "Instalments"):–

(i) S$1,000 within the first 7 days of each calendar month for six months commencing 1 May 2000; and

(ii) Thereafter, $1,800 within the first 7 days of each calendar month until the Total Debt is fully and finally discharged.

10 A simple calculation reveals that, according to the repayment scheme, the Appellant was given around 200 years to repay his (approximately) $4m debt. Further, it appears from the Deed that no interest was charged on the instalments. The Respondent has not deigned to explain the reason for this generous repayment schedule. Be that as it may, we can safely infer from this arrangement that the parties never considered that time was to be of the essence apropos the full repayment of the Appellant's outstanding debts. This is an important consideration in construing the Deed, which we shall return to later (at [57] below).

11 We now turn to the other salient terms of the Deed. Less atypical but no less relevant are the clauses governing default on the instalments to be paid. Clause 7 provided, *inter alia*, that:[note: 5]

This agreement shall terminate upon the occurrence of any of the events listed below *provided*

always that the Creditor *shall give* the Debtor *two weeks* [*sic*] *notice in writing* to rectify any default on the Debtor's part:–

a. if the Debtor fails to pay any Instalment on the due date (including, without limitation, when any payment by cheque is dishonoured for any reason whatsoever) …

…

[emphasis added]

Clause 8 provided that:[note: 6]

Upon the termination of this agreement by virtue of Clause 5 above, all the sums owed by the Debtor then outstanding under this Deed shall become immediately due and payable without presentment, demand, protest or other formalities of any kind, all of which are hereby expressly waived by the Debtor; and the Creditor shall be entitled to exercise all such rights and remedies as it shall or would have been entitled to exercise, including but not limited to the Creditor's right to foreclose on the Mortgage.

It should be noted that, although cl 8 of the Deed referred to "the termination of this agreement by virtue of *Clause 5*"[note: 7] [emphasis added], the relevant termination clause was actually cl 7 instead.

Relevant clauses of the Mortgage

12 While the repayment terms of the Deed were nothing short of extraordinary, the Mortgage itself contained the standard terms for loans given by financial institutions. We highlight now the salient clauses of the Mortgage:[note: 8]

5. Where the monies hereby secured are not payable on demand such monies shall immediately be due and payable and the security herein immediately enforceable without demand or notice of any kind (all of which are hereby expressly waived) in any of the following events (hereinafter referred to as "the Events of Default"):-

5.1 if the [Appellant] shall default [on] payment of any of the monies hereby secured or any other monies herein covenanted to be paid …

…

6. 6.1 At any time after the monies secured shall have become payable under the provisions of the Mortgage, the [Respondent] shall forthwith be entitled to exercise all or any of the statutory powers of a mortgagee in respect of the Mortgaged Property [*ie*, the Property as defined at [1] above] and in particular, but without prejudice to the generality of the foregoing, the power of sale by giving to the [Appellant] fourteen (14) days' notice in writing, without any of the restrictions whatsoever imposed by Section 25 of the CLPA [Conveyancing and Law of Property Act (Cap 61) (1994 Rev Ed)].

…

7. …

…

7.16 Any notice or certificate to be given to, or demand to be made on, the [Appellant] shall be deemed to have been duly given or made if it is in writing, signed by an Authorised Officer of the [Respondent], and delivered personally or sent by telex, facsimile, telegram or pre-paid post addressed to the [Appellant] and forwarded to:–

(a) *the address of the [Appellant] as shown in the Mortgage* or, where a new address has been notified in writing to the [Respondent], that new address; or

(b) the address of any property comprising the Mortgaged Property.

A communication sent by mail shall be deemed to have been received by the [Appellant] and the [Respondent] on the second day after posting (excluding days on which no mail deliveries are normally made).

…

[emphasis added]

Relationship between the Deed and the Mortgage

13 We should, at this juncture, highlight that, while the Deed is expressed in its preamble to be "supplemental to the Mortgage",[note: 9] the circumstances in which the entire repayment arrangement between the Appellant and the Respondent was entered into shows that the Deed should not be construed as being subordinate to the Mortgage, nor are its clauses of secondary importance in relation to those in the Mortgage. "Supplemental" does not in the present context mean "subordinate".

14 Indeed, in our view, the reality in the present case is that it is *the Deed* that is the principal document for the following reasons. *First*, it is the Deed that: (a) sets the context in which the repayment arrangement between the parties was agreed upon, and (b) provides for the execution of the Mortgage. The Deed also contains the settlement terms for the total amount due to the Respondent from the Appellant (see recitals D, E and G of the Deed, which are reproduced at [8] above). *Second*, it is the Deed and not the Mortgage that stipulates how the outstanding amount is to be repaid. *Third*, it is the Deed (specifically, cll 7 and 8 thereof) that prescribes the circumstances in and the procedure by which the Deed may be terminated and, consequently, when and how the powers under the Mortgage may be exercised. *Fourth*, it bears emphasis that the Mortgage is a standard document which, unlike the Deed, was not drafted to address the specific and highly unusual aspects of the settlement arrangement entered into between the parties.

The Appellant's default on the instalments due under the Deed

15 The first six years after the Deed was entered into were uneventful. The Appellant promptly paid the monthly instalments during this period. Then, in September 2006, the Appellant suddenly defaulted. This default persisted in the months of October and November 2006.

The notice of default

16 In a letter to the Appellant dated 8 November 2006[note: 10] ("the Notice of Default"), the Respondent highlighted the former's default on his instalments for the months of September, October

and November 2006. A copy of the letter was apparently sent to and received by HSC's auditors on 8 November 2006, as evinced by certain notations made on that copy of the letter, which is reproduced below:[note: 11]

8 November 2006

Ng Hock Kon — **URGENT**

C/o HSC International Investment Pte Ltd — BY HAND

371 Beach Road

#09-04 KeyPoint

Singapore 199597

Dear Mr Ng,

Deed of Settlement Dated 12 June 2000

Default in payment of September, October and November 2006 Instalments

We refer to the Deed … between [the Respondent] and yourself dated 12 June 2000.

We note that you are in default of payment of your instalments for the months of September, October and November 2006, amounting to the sum of **S$5,400.00**.

Kindly rectify your abovementioned default immediately, and in any event within fourteen (14) days of the date hereof, otherwise the Deed … will be terminated.

Yours sincerely,

[signature]

Richard Quek

Director

On behalf of [the Respondent]

[Company stamp of HSC's auditors]

Acknowledged receipt by

Name: *Jeslin*

Date: *8/11/06* [Date stamp with the notation "RECEIVED *9 Nov 06*"]

I/C No.: *S8411383B*

[emphasis in bold in original; handwritten words in original in italics]

We note that, while Ms Jeslin (a former employee of HSC's auditors) acknowledged receipt of the Notice of Default on 8 November 2006, there is, next to her acknowledgment, a date stamp which states "RECEIVED", followed by the handwritten words "9 Nov 06". We have been unable to ascertain from counsel whose handwriting this is. In any case, since (as the Judge found at [28] of the Judgment) this copy of the Notice of Default (*ie*, the copy that was sent to HSC's auditors) was never forwarded to the Appellant by the auditors, this issue need not detain us any further.

17 In contrast, a copy of the Notice of Default was found by the Judge to have been extended to the Appellant's wife, Ms Yu Limin ("Yu"), despite her vigorous denials that she had been given a copy. Yu did, however, acknowledge that she had called up the Respondent and had spoken to Ms Loh Tien Ngee ("Loh"), a group finance manager of the Respondent, as well as proposed a meeting to discuss the Appellant's arrears in payment. When Yu and Loh eventually met on 9 November 2006, Yu was asked to sign a copy of the Notice of Default (but was not, so Yu alleged, given a copy of the notice). It bears mention that, prior to signing the Notice of Default, Yu informed Loh at this meeting (referred to hereafter as "the 9 November 2006 meeting") that the Appellant had been hospitalised because he was seriously ill. Loh, we note, did not inquire if Yu had been authorised by the Appellant to accept the Notice of Default on his behalf.

18 Whether Yu's acceptance and acknowledgment of the Notice of Default constituted service of this notice on the Appellant is a pivotal issue that will be addressed more fully later (see below at [39]–[49]).

The notice of termination and the Appellant's response

19 The Appellant failed to rectify his default as required by the Notice of Default. Consequently, a notice of termination dated 12 December 2006 ("the Notice of Termination") was sent to the Appellant. It was addressed to the Appellant and was, apparently, delivered "by hand"[note: 12] to HSC. It is pertinent to point out that the Deed itself contained no provision for either substituted or deemed service, and also did not contain any specific provisions as to how or where either a notice of default or a notice of termination was to be served. It should also be noted that, in the Notice of Termination, the Respondent expressly stated that it was giving the Appellant:[note: 13]

> … **one (1) months'** [*sic*] **notice** from the date hereof of its intention to exercise its right to enter into possession of the … Property and to receive [the] rents and profits thereof. [emphasis in bold in original]

By including the above statement in the Notice of Termination, the Respondent was (presumably) seeking to comply with s 75(2) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"), which states that "[t]he power of entry into possession conferred by [s 75 of the LTA] shall not be

exercised until one month's notice has been given to the mortgagor or chargor". For ease of reference, we shall hereafter use the expression "s 75 notice" to denote the statutory notice given by a mortgagee to a mortgagor pursuant to s 75(2) of the LTA.

20 On 29 January 2007, the Appellant wrote to the Respondent. In this letter ("the January 2007 letter"),[note: 14] the Appellant, *inter alia*, denied receipt of the Notice of Default and instead adverted to a meeting which he had attended at the Respondent's office on 25 January 2007, where a senior officer of the Respondent had been present. The Appellant alleged that, at this meeting, he was not given the opportunity to explain why he could not make his instalment payments. He asserted that the Respondent was behaving unreasonably.

21 In the same letter, the Appellant also offered to continue his instalment payments pending the Respondent's replies to his various queries on (*inter alia*) the total outstanding amount which he owed the Respondent, although he emphasised that his offer was "[s]trictly without prejudice to [his] rights".[note: 15] Enclosed in the letter were four cheques, each for $1,800, made out to the Respondent in settlement of the instalment arrears and for payment of the instalment for January 2007. We understand from counsel that the Appellant has since continued to pay his monthly instalments on their respective due dates and the Respondent has accepted these payments. Therefore, there are currently no outstanding instalment arrears.

22 The Appellant also disclosed in the January 2007 letter his abbreviated account of the genesis of the Deed. According to him:[note: 16]

> … [Y]ou [*ie*, the Respondent] … persuaded me to settle amicably and execute the Deed of Settlement [*ie*, the Deed] which I did. I did not have the benefit of legal advice when the Deed of Settlement was prepared by your lawyers. You … told me to pick up the Deed of Settlement and sign it in the presence of a lawyer as a witness which I did and [I] returned the Deed to you. I was told by you that all I had to do was to pay monthly instalments of $1,800.00 to you which I also did and had [*sic*] done so. I do not understand fully the Deed of Settlement.

We need not make any finding on this version of the material events. We are minded to observe that it might be plausibly argued that the arrangement between the parties, given the length of repayment and the amounts involved, could have been infused with some of the characteristics of a landlord-tenant relationship. If that was indeed the case, then all the usual legal and equitable considerations that apply to a lease or tenancy could arguably have some relevance. However, as we have decided this appeal on other narrower grounds, we need not resolve this debatable point in these proceedings.

Events after the January 2007 letter

23 Subsequently, the Respondent sent another notice dated 16 February 2007 ("the 16 February 2007 letter") to the Appellant (see [67] below for the particulars of how this notice was served). The 16 February 2007 letter curtly referred to the Notice of Default and the Notice of Termination, emphasising that a total of $4,239,961.19 was due and owing to the Respondent. It then stated that the Respondent "[had] opted … to grant [the Appellant] a final opportunity to make full payment"[note: 17] and proceeded to give the Appellant s 75 notice for the second time as follows:[note: 18]

> … [The Respondent] hereby gives you [*ie*, the Appellant] **one (1) month's notice** from the date hereof of its intention to exercise its right to enter into possession of the … Property and to receive [the] rents and profits thereof. [emphasis in bold in original]

(It should be noted that, since the Respondent stated in the 16 February 2007 letter that it was giving the Appellant "a final opportunity to make full payment",[note: 19] the s 75 notice set out in that letter effectively superseded the earlier s 75 notice contained in the Notice of Termination (see also [63] below).) Additionally, the Respondent alerted the Appellant via the 16 February 2007 letter that, pursuant to cl 6 of the Mortgage (reproduced at [12] above), it was giving the Appellant "**fourteen (14) days' notice** from the date hereof of its intention to exercise its power of sale against the … Property"[note: 20] [emphasis in bold in original].

24 Following the 16 February 2007 letter, a further letter dated 23 February 2007 ("the 23 February 2007 letter") was sent to the Appellant by the Respondent's solicitors, in which some of the allegations raised by the Appellant in the January 2007 letter were dealt with. The 23 February 2007 letter stated:[note: 21]

> 3. … [Y]ou [*ie*, the Appellant] did attend at [the Respondent's] premises on 25 January 2007. While there, you offered explanations for your failure to make your required payments under the Deed of Settlement [*ie*, the Deed]. It appeared to [the Respondent] that you wished … [it] to forgive your defaults under the Deed of Settlement and to proceed on the basis that you had faithfully made your monthly payments of S$1,800.00.
>
> 4. [The Respondent] cannot do that, and hence cannot agree to your proposal to continue making monthly payments of S$1,800.00. The Deed of Settlement has been breached, [the] Notice of Default has been issued, and the sum of S$4,239,961.19 became due to [the Respondent]. Whilst [the Respondent] may be sympathetic to your explanations for past defaults, you will appreciate that it is unable to simply waive them in the circumstances of this case.

25 The 23 February 2007 letter did not elaborate on the specific reason(s) why the Respondent was "unable to simply waive"[note: 22] the Appellant's "past defaults".[note: 23] After noting the Appellant's illness and his inability to make payments during the relevant period, the letter reiterated (at para 13) the Respondent's decision to give the Appellant "a final opportunity to make full payment"[note: 24] as follows:[note: 25]

> … [The Respondent] has decided to grant you [*ie*, the Appellant] a further month (from 16 February 2007) to make full payment of the sum due to it before enforcing its rights as mortgagee. This is reflected in the fresh Notice issued to you on 16 February 2007 [*ie*, the 16 February 2007 letter]. …

The 23 February 2007 letter also stated that the Respondent had encashed two cheques which it had received from the Appellant on 6 and 21 January 2007 respectively, and would proceed to encash the four cheques which the Appellant had enclosed in the January 2007 letter. In passing, we note that the one-month extension granted by the Respondent was not a waiver of its rights, but merely a deferment of its rights. Further, this extension was probably granted *pro forma* in that, if the Appellant had the money to pay the full amount demanded by the Respondent, he would not need one month to make payment; if, on the other hand, he did not have the requisite funds, no amount of time would help as the Property itself was worth substantially less than the (approximately) $4m due to the Respondent under the Deed.

26 Following the 23 February 2007 letter, an exchange of correspondence took place between the parties, beginning with the Respondent's letter dated 22 March 2007, in which the Respondent emphasised that, whilst it would be enchasing two cheques from the Appellant dated 3 March 2007 and 3 April 2007 respectively, it was reserving its rights against the Appellant. In response, the

Appellant emphasised that he had never received any written notice of default and had been denied an opportunity to rectify his default. Upon reaching this impasse, the Respondent initiated the present action for possession against the Appellant.

The hearing before the Judge

Whether there was proper service of the Notice of Default

27 At the trial in the court below, the Appellant contended that Yu had never been served with the Notice of Default even though she had been asked to sign a copy of that document at the 9 November 2006 meeting. As mentioned at [17] above, this claim was rejected by the Judge. However, the Judge accepted that the Notice of Default had not been explained to Yu. He also held that, even though a copy of the Notice of Default had been sent to and received by HSC's auditors, that copy was never forwarded to the Appellant (see [16] above).

28 The Judge concluded that, for the purposes of serving the Notice of Default on the Appellant, it was sufficient that a copy of the notice had been "handed to and received by Yu as an agent of the [Appellant]" (see the Judgment at [30]); in the Judge's view, "that constituted delivery of the notice to [the Appellant]" (see the Judgment at [39]). It bears emphasis that the Judge made no express finding that Yu had either handed the Notice of Default to the Appellant or conveyed its contents to him. The Judge appeared content to conclude that service of the Notice of Default on Yu was tantamount to service on the Appellant (see generally [30]–[39] of the Judgment).

Whether relief from forfeiture ought to be granted

29 The second argument which the Appellant raised in the court below was that he should be granted relief from enforcement of the Mortgage as he had defaulted on his monthly instalments only because of his hospitalisation between 30 October 2006 and 3 November 2006, which had been caused by the worsening of his ankylosing spondylitis, a debilitating condition. Further, the instalments which he had defaulted on amounted collectively to a mere $5,400, a drop in the ocean compared to the (approximately) $4m that he owed the Respondent in total. The Appellant argued that, given that he had been paying his monthly instalments promptly for the six years preceding his default, he was entitled to relief from forfeiture. (These submissions on relief from forfeiture were originally at the forefront of the Appellant's case on appeal.)

30 The Judge noted that the Appellant was seeking "to preserve his right to remain in possession of [the Property] by paying the monthly $1,800 payments and to prevent the [Respondent] from selling the [Property]" (see the Judgment at [41]), as opposed to asserting his right to redeem the Mortgage. In assessing whether the former right was an interest for which relief from forfeiture could be granted, the Judge observed (at [43] of the Judgment):

> The scope of the equitable relief [from forfeiture] is not closed. It is well settled that it is available against the forfeiture of deposit and instalment payments made towards the purchase of land, as well as the contractual right to buy land, see *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1 … and the cases discussed therein. In the present case, the interests involved are the right to continued possession of the mortgaged property and the continued legal ownership of the property. These interests are more substantial (or at any rate not less substantial) than payments of deposit and instalment payments, and the right to complete a purchase of land. As the relief applies to the latter interests, it must be available to the former interests.

31 Upon reviewing the facts of the case, the Judge found that the terms of settlement were favourable to the Appellant. Although the latter owed the Respondent a total of more than $4m, he was given ample time to repay this sum by monthly instalments of $1,800 without interest and was permitted to remain in possession of the Property free of rent (see the Judgment at [45]). The Judge also found that the Respondent had exercised forbearance in enforcing its rights against the Appellant in that it had terminated the Deed only after the Appellant had defaulted on three consecutive instalments, even though cl 7 of the Deed allowed termination once there was default on *any* instalment (see the Judgment at [46]). Further, even after the Appellant had defaulted on payment for three consecutive months, Loh was prepared to listen to Yu's "sob story" (*ibid*) about the Appellant's illness even though Yu did not make any payment or any acceptable proposal for a settlement at the 9 November 2006 meeting (*ibid*). Consequently, the Judge found that "the necessary elements of unconscionability and injustice [were] absent" (see the Judgment at [47]). Whilst expressing sympathy that the Appellant could lose the Property because of his inability to pay his monthly instalments for only a few months, the Judge pointedly observed (*ibid*):

> … [The Appellant's] misfortune was not of the [Respondent's] doing. Neither the [Respondent's] exercise of its right as mortgagee, nor the [Appellant's] loss of the benefits under the Deed is … unconscionable or unjust.

32 Eventually, the Judge ruled in favour of the Respondent and made the following orders on 23 October 2008 (see the Judgment at [48]):

> (a) … the [Appellant] is to deliver to the [Respondent] vacant possession of the [Property] in three months from the date hereof [*ie*, 23 October 2008];
>
> (b) … the [Appellant] is to pay to the [Respondent] the outstanding amount of the debt three months from the date hereof while continuing to pay the monthly instalments of $1,800 in the meantime;
>
> (c) … the [Respondent] is at liberty to enforce the [M]ortgage by way of public sale, sale by tender, or private treaty on such terms and conditions and generally as the [Respondent] may think fit;
>
> (d) … the [Appellant] is to pay the [Respondent's] costs in these proceedings on an indemnity basis, to be taxed if not agreed; and
>
> (e) there be liberty to apply.

The present appeal

The parties' arguments

33 In their respective written cases for this appeal, the parties focused on the issue of relief from forfeiture. In asserting that relief from forfeiture should be granted, the Appellant's counsel referred to what he termed the "wider"[note: 26] meaning of unconscionability as follows:[note: 27]

> The wider meaning of unconscionability allows the court to take into account all the circumstances of the case and is not restricted solely to the conduct of the party asserting the legal right [*ie*, the Respondent in the present case].
>
> It can refer to … a situation when injustice is caused by [the] insistence of one party "on a legal

right for the unjust enrichment of [that] party where to do so would be to take advantage of the other party's special vulnerability [or] misadventure. One factor relevant to such unjust enrichment … may be *the ability of one party to exact a harsh penalty for a trivial breach*."

[emphasis added]

The Appellant's notion of a "wider"[note: 28] meaning of unconscionability appeared to be premised on the *absence of unconscionable conduct* on the part of the party applying for relief, rather than on the *presence of unconscionable conduct* on the part of the party against whom relief was sought. Simply put, the Appellant was proposing that, because he had not acted in an unconscionable or reprehensible manner, it would be unconscionable for the Respondent to enforce its strict legal rights against him.

34 The Respondent's rejoinder was that:

(a) the court had no discretion to grant relief from forfeiture because the equity of redemption, which was the embodiment of such relief, was already available to the Appellant; and

(b) even if the court had the discretion to grant relief from forfeiture, on the facts of the case, the Judge had not erred in refusing to exercise his discretion in favour of granting relief.

35 In our view, the Appellant's attempt to invoke the court's assistance to obtain relief from forfeiture in the context of an ordinary mortgagor-mortgagee relationship has no merit. We do not think that the notion of relief from forfeiture is relevant when the issue is whether the mortgagee is contractually entitled to enforce its rights. As counsel for the Respondent pointed out correctly, the Appellant can always pay up the amount due before the Property is sold and thereby avert forfeiture. This conclusion is, however, not the end of the matter for the Appellant, as we shall explain below.

The real issues for consideration

36 In our view, the present appeal, on closer analysis, really turns on two simple questions, namely:

(a) whether the Respondent properly terminated the Deed in accordance with its terms, thereby giving it the right to enforce the Mortgage; and

(b) if the question in sub-para (a) above ("Issue (a)") is answered in the affirmative, whether all the statutory preconditions for enforcement were complied with by the Respondent.

In respect of Issue (a), the specific matters for our consideration are, first, whether the Notice of Default was served on the Appellant (see in this regard cl 7 of the Deed (reproduced at [11] above), which, in substance, makes service of a notice of default on the Appellant a condition precedent for terminating the Deed), and, second, if the Notice of Default was served on the Appellant, whether the period of time which he was given to rectify his default (referred to hereinafter as the "notice period") via that notice complied with the notice period stipulated in cl 7 of the Deed. As for the question posed at sub-para (b) above ("Issue (b)"), the specific point which we have to consider is whether the Respondent gave the Appellant proper s 75 notice as required by s 75(2) of the LTA. We shall now discuss these matters *seriatim*.

Issue (a): Whether the Respondent terminated the Deed properly

(1) General observations regarding notices of default

37 Before we go into the specific questions which are pertinent to Issue (a), we wish to highlight a few general points concerning notices of default. Broadly speaking, the purpose of a notice of default is to adequately put the defaulting party (referred to hereafter as "the debtor") on notice that it has failed to fulfil its obligations under an agreement and to give the latter a reasonable opportunity to rectify the default (where this is permitted by the terms of the agreement). In a case where non-compliance with a notice of default may affect the debtor's property rights, the terms or contents of the notice and the service thereof on the debtor must comply strictly with the requirements set out in the agreement, especially where valuable proprietary rights are at stake. Further, *vis-à-vis* service of a notice of default, if the mode of service is not contractually prescribed, the notice must, in our view, be brought to the personal attention of the debtor. This applies *a fortiori* where the agreement in question is a term loan repayable by instalments, for which full payment can be accelerated in the event of a default on any one instalment, because, under such an agreement, the nature of the debtor's obligation can be radically altered from that of making periodic payments to that of making immediate payment of the entire outstanding amount in one lump sum.

(2) Was there proper service of the Notice of Default on the Appellant?

38 As mentioned at [36] above, the first question which we have to consider apropos Issue (a) is whether the Notice of Default was served on the Appellant. If that notice was not thus served, an essential condition precedent for terminating the Deed would not have been satisfied; *ie*, the Respondent would not have terminated the Deed properly in accordance with its terms.

39 In the court below, the Appellant denied having been served with the Notice of Default, but the Judge found that he had been served through Yu, who was his agent. Specifically, the Judge held that the handing of the Notice of Default to Yu at the 9 November 2006 meeting constituted service of the notice on the Appellant. The Judge's reasoning is set out at [30] and [38]–[39] of the Judgment as follows:

> 30 What is the effect of the handing of the letter [*ie*, the Notice of Default] to Yu? To answer this question, it is necessary to consider the circumstances under which the letter was delivered to her. *The [Respondent] had no dealings with her. Its dealings were with the [Appellant], her husband. The meeting of 9 November 2006 was convened at the request of Yu expressly to discuss the [Appellant's] liabilities under the Deed and Yu informed the [Appellant] of the meeting in advance, and briefed him on it afterwards*. By Yu's own evidence, she and Loh were talking about the [Appellant's] liabilities under the Deed with a view to seeking a resolution of the [Appellant's] liabilities. In the circumstances, I find that the letter was handed to and received by Yu as an agent of the [Appellant].
>
> …
>
> 38 *In this case, was the delivery of the [N]otice [of Default] to Yu as the [Appellant's] agent delivery to the [Appellant]?* To use the AR registered post analogy, a notice would be deemed to be delivered if the AR card was signed by the addressee's wife. In another scenario, if someone had gone to A's residence, and handed to A's wife a notice addressed to A, and she accept[ed] it knowing that it was for A, that would surely be sufficient delivery of the notice to A.
>
> 39 *Thus, when Yu went to the meeting as [the Appellant's] agent, and was handed the [Notice of Default], that constituted delivery of the notice to him*.

[emphasis added]

40 The Respondent sought to support the Judge's finding on the grounds that "Yu [had] consistently dealt with the Respondent on matters pertaining to the Deed",[note: 29] and that "authority to receive the Notice of Default had been given by the Appellant to Yu expressly or impliedly by reason of the broad general authority given to her in respect of the Deed at the meeting of 9 November 2006".[note: 30] With respect, we are unable to agree with both the Judge's reasoning and the Respondent's submissions on this issue for the following reasons.

41 First, it is common ground that Yu met Loh on 9 November 2006 for a specific reason, *viz*, to negotiate for indulgence apropos repayment of the Appellant's debts and to explore the possibility of an overall settlement. Loh did not ask Yu if she was authorised to receive the Notice of Default on the Appellant's behalf before obtaining her signature on the notice. Further, neither Yu nor the Appellant informed the Respondent that Yu had authority to receive legal notices on the Appellant's behalf.

42 Second, the Judge's reference to "the AR registered post analogy" (see the Judgment at [38]) is not altogether apt. The notion of constructive service – an inarticulate premise of the Judge's finding – does not exist in law. A notice is either served or not served. Service on the intended recipient by registered or pre-paid post is deemed to be sufficient only if there is a contractual or statutory provision to that effect in favour of the party serving the notice. Such a provision will normally stipulate that the sending of the notice by registered or pre-paid post to a particular address will constitute sufficient service of that notice on the intended recipient. Examples of statutory provisions of this nature are ss 48A(1)(*a*)(ii), 48A(1)(*b*)(ii) and 48A(1)(*c*)(ii) of the Interpretation Act (Cap 1, 2002 Rev Ed), s 157(1)(*d*) of the Bankruptcy Act (Cap 20, 2000 Rev Ed), s 72(4) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) and s 60A(1)(*a*) of the LTA (reproduced at [69] below).

43 In the present case, the Respondent cannot rely on s 60A(1)(*a*) of the LTA to argue that there was deemed service of the Notice of Default on the Appellant as, *inter alia*, that notice is not "a notice that is required or authorised by [the LTA] to be given to or served on a person" for the purposes of s 60A(1) of the LTA. There is also no provision in the Deed stating that service on the Appellant's agent or at a particular address is deemed to be service on the Appellant. This is to be contrasted with the Mortgage, which provides in cl 7.16 (reproduced at [12] above) that, *inter alia*:[note: 31]

> Any notice … to be given to … the [Appellant] shall be deemed to have been duly given … if it is … delivered personally or sent by telex, facsimile, telegram or pre-paid post addressed to the [Appellant] and forwarded to:–
>
> (a) the address of the [Appellant] as shown in the Mortgage or, where a new address has been notified in writing to the [Respondent], that new address; or
>
> (b) the address of any property comprising the … Property.

Clause 7.16 of the Mortgage is, however, of no avail to the Respondent in the present case because, although the Respondent served the Notice of Default on both HSC's auditors and Yu, it did not bother to send a copy of the notice to the Appellant at *the Property* by pre-paid post as stipulated in cl 7.16.

44 Third, we find that the Respondent's assertion that "Yu [had] consistently dealt with the Respondent on matters pertaining to the Deed"[note: 32] overstates matters. In support of this claim, the Respondent referred to its letter dated 9 June 2004[note: 33] ("the Respondent's 9 June 2004 letter") concerning (*inter alia*) the Appellant's liabilities under the Deed. This letter was expressed to be for Yu's attention (see the words therein "Attention: Yu Limin"[note: 34] [underlining in original]), and, subsequently, Yu discussed its contents with Loh over the telephone (the Appellant's reply to the Respondent's 9 June 2004 letter, which was dated 11 June 2004,[note: 35] referred to this telephone discussion between Loh and Yu). The Respondent also adverted to a telephone conversation between Loh and Yu in January 2007. On that occasion, Yu had, on the Appellant's instructions, called Loh to "inquire about the status of the refinancing arrangements".[note: 36]

45 As regards the Respondent's 9 June 2004 letter, we are of the view that, even though it was expressed to be for Yu's attention, it has no legal significance *vis-à-vis* the question of whether or not Yu was authorised to receive on the Appellant's behalf the Notice of Default, which was issued some two and a half years after that letter was written. Further, it is unclear what transpired during the subsequent telephone conversation in which Yu and Loh discussed the contents of that letter. One therefore cannot draw any inference based on this telephone conversation and/or the Respondent's 9 June 2004 letter that Yu was an agent of the Appellant for *all* purposes. What is evident, in contrast, is that the Appellant's reply to the Respondent's 9 June 2004 letter was signed by the Appellant himself and not by Yu.

46 As for the telephone call which the Appellant instructed Yu to make to Loh in January 2007, we are of the view that it would require a great stretch of the imagination to regard that simple act *per se* as evidence that Yu was authorised to act as the Appellant's agent. In any case, even if Yu had been the Appellant's agent (in the limited sense of being the Appellant's agent to "inquire about the status of the financing rearrangements")[note: 37] when she made that telephone call to Loh, this does not show that she (Yu) was the Appellant's agent for all purposes at the 9 November 2006 meeting. That it was Yu who called for the meeting and that the Appellant was aware that she was going to meet the Respondent's representative (specifically, Loh) may be said to have cloaked Yu with apparent authority to act for the Appellant at that meeting, but that authority was limited to "talking about the [Appellant's] liabilities under the Deed with a view to seeking a resolution of the [Appellant's] liabilities" (see the Judgment at [30]). In this regard, it should be noted that the Appellant had only, in his own words, expected Yu to "go and see what could be done"[note: 38] at the 9 November 2006 meeting. Given these circumstances, we cannot accept that it could be implied that Yu was the Appellant's agent for the purposes of receiving the Notice of Default.

47 We are of the view that, *vis-à-vis* the 9 November 2006 meeting, the Appellant only gave Yu authority to negotiate a possible settlement and to seek the Respondent's indulgence in making payments under the Deed. There was no previous intimation prior to that meeting that Yu would be served with a notice of default at the meeting, nor was she (or the Appellant) expecting to be served with such a notice at the meeting. There is therefore no reasonable basis for either Loh or the Respondent to suppose that the Appellant had impliedly conferred on Yu authority to receive the Notice of Default on his behalf, or that Yu had either actual or implied authority to do so.

48 Given that the Notice of Default had significant legal consequences, cogent evidence was required that Yu was authorised to receive that notice on the Appellant's behalf. As we noted at [17] above, Loh did not inquire of Yu if she (Yu) was indeed thus authorised. In law, a wife is not presumed to be the agent of her husband simply because of her status as his spouse. Although there are some old English cases that appear to suggest that a wife has a certain degree of presumed

authority (arising from cohabitation) to act for her husband, the existence of this presumption is attributable to the fact that, until the late 19th century, women in England were unable to own property in their own names separately from their husbands and thus could not be held liable on contracts (see F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at para 3-040; *cf* s 14 of the Civil Law Act (Cap 43,1999 Rev Ed), which shows that this presumption of authority does *not* apply in Singapore). Further, the above-mentioned English cases deal with the specific issue of the authority of a wife to pledge her husband's credit. In short, the marital relationship between Yu and the Appellant and the circumstances in which Yu arranged for the 9 November 2006 meeting certainly did not justify any assumption by either Loh or the Respondent that authority had been expressly or impliedly conferred on Yu to accept service of the Notice of Default on the Appellant's behalf.

49 For the reasons given above, we are of the view that the Respondent has not shown that, when a copy of the Notice of Default was handed to Yu at the 9 November 2006 meeting, the latter had authority, whether express or implied, from the Appellant to receive the notice on his behalf. Indeed, there is no evidence that, at that point in time, the Appellant (or Yu) had any expectation to receive a formal notice of default. The handing of the Notice of Default to Yu at the 9 November 2006 meeting – which is the specific conduct relied on by the Respondent as the act of service of the notice on the Appellant – *did not*, therefore, amount to service on the Appellant; in other words, the Appellant was not served with the Notice of Default at all. It follows that an essential condition precedent for terminating the Deed was not satisfied. Consequently, the Respondent *did not* terminate the Deed properly.

50 The above conclusion is in itself sufficient to dispose of Issue (a) and, indeed, this entire appeal (because, given that the Respondent did not terminate the Deed properly, it was not entitled to enforce the Mortgage and, thus, it is not necessary to consider Issue (b) at all). In the interest of completeness, however, we shall nonetheless give our views on the second specific question pertinent to Issue (a) (*viz*, whether the notice period set out in the Notice of Default satisfied the notice requirement in cl 7 of the Deed) and Issue (b) in the rest of this judgment.

(3) Did the notice period in the Notice of Default comply with the notice requirement set out in the Deed?

51 Dealing, first, with the question of whether the notice period in the Notice of Default satisfied the notice requirement in cl 7 of the Deed, cl 7 states that the Respondent must give the Appellant "*two weeks* [*sic*] *notice* in writing to rectify any default on the [Appellant's] part"[note: 39] [emphasis added]. In our view, this must mean 14 *clear* days' notice – *ie*, the 14-day period starts to run only upon service of a notice of default on the Appellant. To hold otherwise would mean, for example, that the Respondent could serve the Notice of Default on the Appellant only on the 13th day from 8 November 2006, leaving the latter with one day to rectify his default. Indeed, in the present case, it is pertinent to note that, if (*contra* our decision at [49] above) the Notice of Default was served on the Appellant (via service of a copy of that notice on Yu at the 9 November 2006 meeting), it was served one day *after* 8 November 2006, the date stated on the face of the notice.

52 In the present case, the notice period stated in the Notice of Default was "fourteen (14) days of *the date hereof*"[note: 40] [emphasis added]. The meaning of the phrase "the date hereof" is, as Lim Teong Qwee JC aptly observed in *Lee Hin Realty Pte Ltd v Lee Tah Wee David* [1995] 3 SLR 521 ("*Lee Hin Realty*") at 526, [23], "not entirely free from doubt". It can mean *either* the date stated on the face of the notice *or* the date of service of the notice. This ambiguity is immaterial where the notice is served on the same day as the date which it bears on its face (as was done in *Lee Hin Realty*) – in such a scenario, the date of service and the date stated on the face of the notice are

the same, and it does not matter which of these dates is taken to be the date referred to by the phrase "the date hereof". Where, however, the date stated on the face of the notice does not coincide with the date of service (which would be the scenario in the present case if we assume, *contra* our decision at [49] above, that the Notice of Default was served on the Appellant when a copy of it was handed to Yu at the 9 November 2006 meeting), it can be of great significance which of these two dates – *viz*, the date of service or the date stated on the face of the notice – is taken to be "the date hereof".

53 As mentioned at [51] above, we are of the view that, on a proper construction of cl 7 of the Deed, a notice of default issued by the Respondent pursuant to this clause must give the Appellant a notice period of 14 days *starting from the date of service* of the notice on him. If the words "the date hereof" in the Notice of Default are interpreted as the date of service, the notice period set out in that notice would satisfy the "two weeks [*sic*] notice"[note: 41] prescribed by cl 7 of the Deed. If, on the other hand, the words "the date hereof" are interpreted as the date stated on the face of the Notice of Default, then the notice period set out therein would not be in compliance with the notice requirement in cl 7 of the Deed as the Appellant would not have 14 clear days to rectify his default if the Notice of Default is served on him on a day later than the date stated on the face of the notice.

54 Before this court, the Respondent relied on the case of *Dimsdale Developments (South East) Ltd v De Haan* (1984) 47 P & C R 1 ("*Dimsdale*") to contend that the phrase "the date hereof" in the Notice of Default should be interpreted as the date of service and, thus, "the Appellant was validly given … 14 days' [*sic*] to rectify his default".[note: 42] In *Dimsdale*, the purchasers of a piece of property argued that the notice to complete which the vendors served on them was invalid because the said notice sought completion "within 28 days *from the date hereof*" [emphasis added] (*id* at 5), whereas the contract for the sale and purchase of that property stated that a notice to complete had to give the recipient "28 days *after service* of the notice" [emphasis added] (*id* at 3) to complete. Gerald Godfrey QC, sitting as a deputy judge of the English High Court, observed (*id* at 9):

> … I appreciate that the notice [to complete] was dated November 10, 1981, and was expressed to be a notice to complete within 28 days "from the date hereof." But a notice is something which is intended to bring its contents to the attention of the recipient and cannot do that until it reaches him. *I am of the opinion that, speaking generally, a reference in a notice to "the date hereof" is at least as apt to refer to the date of its service as to the date on which it is and is expressed to be sent, and that the former date (the date of service) is actually to be preferred where, as here*,
>
> (a) the notice is given pursuant to a contractual provision referring to that date;
>
> (b) the effect of so regarding it is to save, rather than to destroy, the validity of the notice; and
>
> (c) the recipient treated it as valid, or at least took no exception to it, until well after the 28 days had expired, and certainly had no ground for asserting that the reference to "the date hereof" in any way misled him.

[emphasis added]

55 In our view, *Dimsdale* does not take the Respondent's case much further other than to underscore the point that the phrase "the date hereof" is ambiguous and must, in every case, be interpreted contextually. It appears that, in deciding in *Dimsdale* (at 9) that the words "the date hereof" referred to the date of service, Deputy Judge Godfrey QC ("Dy Judge Godfrey") was heavily

influenced by the factual context of that case (see point (c) of the passage from *Dimsdale* quoted in the preceding paragraph). More importantly, although Dy Judge Godfrey held on the facts that the phrase "the date hereof" meant the date of service, he also alluded (*id* at 9) to the English High Court case of *Rightside Properties Ltd v Gray* [1975] Ch 72 ("*Rightside Properties*"), where Walton J accepted that the words "the date hereof" meant the date of actual or presumed receipt of the notice rather than the date expressed on the face of the notice. Commenting on this particular ruling by Walton J, Dy Judge Godfrey stated (see *Dimsdale* at 9):

> … [I]f the view [Walton J] took in [*Rightside Properties*] was inconsistent with the view I take in this [*ie*, *Dimsdale*] I must express my respectful *dissent* from him. [emphasis added]

56 It appears from the above quotation that Dy Judge Godfrey did not think that the phrase "the date hereof" meant the date of actual or presumed receipt of the notice. It is, however, not uncommon for the date of service of a notice to also be the date of its actual or presumed receipt (that would be the case where, for instance, the notice is served on the intended recipient in person). It thus appears (with respect) rather anomalous for Dy Judge Godfrey, given his view that it was *preferable* to interpret the words "the date hereof" as *the date of service* in cases where the three factors which he outlined (at 9 of *Dimsdale*) were present, to have also held that the words "the date hereof" should not be interpreted as the date of actual or presumed receipt. This in turn calls into question the amount of weight to be placed on his assertion that (*ibid*):

> … [S]peaking generally, a reference in a notice to "the date hereof" is at least as apt to refer to the date of its service as to the date on which it is and is expressed to be sent, and … the former date (the date of service) is actually to be preferred [where the three factors outlined in *Dimsdale* at 9 (see the quotation at [54] above) are present] …

57 The words "the date hereof" are, as we stated at [55] above, to be construed contextually, and it is possible that they will bear different meanings in different settings. We are of the view that, *in the light of the factual context of the present case*, it would strain common sense and all notions of fairness to construe the words "the date hereof" in the Notice of Default in favour of the Respondent. This is because, as we pointed out at [10] above, the Respondent was content to allow the Appellant around 200 years to repay the outstanding amount due to it. (It appears that the Respondent may have granted the Appellant this uncommonly generous repayment period in consideration of the latter compromising, by entering into the Deed, his right to challenge the default judgments entered against him. As we noted at [6] above, unlike his co-guarantor, Lee, the Appellant did not challenge the validity of the loans extended by the Respondent to him and HSC.) Clearly, as far as the Respondent was concerned, the repayment of the full amount due to it was never time-sensitive.

58 Construing the words "the date hereof" in the Notice of Default strictly then, these words refer to *the date stated on the face of the notice*. On this interpretation, the notice period set out in the Notice of Default *does not* comply with the notice period prescribed by cl 7 of the Deed because, if the Notice of Default is served on the Appellant on a day after the date which it bears on its face, the Appellant would have less than the requisite period of 14 clear days to rectify his default. We note that the Deed was not terminated till 12 December 2006 (*viz*, the date stated on the face of the Notice of Termination), by which time more than 14 days had elapsed, regardless of whether the notice period is reckoned from the date stated on the face of the Notice of Default (*ie*, 8 November 2006), which is "the date hereof" on our interpretation of these words as used in the Notice of Default, or from the date on which that notice was served on the Appellant (which would be 9 November 2006 assuming, *contra* our decision at [49] above, that the Notice of Default was served on the Appellant when a copy of it was handed to Yu at the 9 November 2006 meeting). This does

not, however, alter the fact that the Notice of Default, *on its face*, did not comply with cl 7 of the Deed in so far as the notice period which it gave the Appellant was shorter than the notice period stipulated in cl 7 (see also [61] below).

59 The Respondent also relied on the House of Lords case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 ("*Mannai*") to contend that "the Appellant was validly given … 14 days' [*sic*] to rectify his default".[note: 43] With respect, that case is of no assistance to the Respondent as it concerned an entirely different factual scenario.

60 In *Mannai*, the tenant was entitled to terminate its leases as follows (*id* at 752):

> The tenant may by serving not less than six months' notice in writing on the landlord or its solicitors such notice to expire on the third anniversary of the term commencement date determine this lease and upon expiry of such notice this lease shall cease and determine and have no further effect …

The tenant gave notice to terminate its leases via letters stating that the leases were to determine on 12 January 1995. However, the third anniversary of the term commencement date of each lease (*ie*, the date on which a termination notice given by the tenant was to expire) was actually 13 January 1995. Relying on this ground, the landlord claimed that the termination notices issued by the tenant were invalid. At first instance, the trial judge held that those termination notices were valid, but, on appeal, the English Court of Appeal accepted the landlord's contention that they were invalid. On further appeal, the House of Lords ruled (by a majority of 3:2) that the tenant's termination notices were effective as, on the facts, the landlord could not credibly say that it had been misled or that there was real uncertainty as to the intent of the notices.

61 The essence of the majority's reasoning in *Mannai* was that a notice could be valid notwithstanding "a minor misdescription" (*id* at 773 *per* Lord Steyn) therein if, when the notice was construed against its contextual setting, it was clear and unambiguous to a reasonable recipient how and when the notice was to operate. In *Mannai*, since the tenant's termination notices were to be read in the context of a specific reference to the term commencement date of each of the leases concerned, the actual date of determination of each lease was readily and objectively ascertainable despite the clerical error. The present appeal does not, however, concern a mere "minor misdescription" (*id* at 773). As we mentioned earlier (at [36] above), cl 7 of the Deed effectively made the giving of "two weeks [*sic*] notice in writing"[note: 44] a *condition precedent* for terminating the Deed. The Notice of Default did not, on its face, give the Appellant the requisite notice period of 14 clear days in that it gave him a notice period of only 14 days from the date stated on its face (*viz*, 8 November 2006) when it should, instead, have given him a notice period of 14 days from the date of its service. As a result, an essential condition precedent for terminating the Deed was not complied with – this was far removed from the "minor misdescription" (*ibid*) which the law lords in *Mannai* were faced with.

Issue (b): Whether the Respondent complied with all the statutory preconditions for enforcing the Mortgage

62 We turn now to Issue (b), *viz*, whether the Respondent, assuming that it was entitled to enforce the Mortgage, satisfied all the statutory preconditions for enforcing a mortgage. Specifically, the question is whether the s 75 notice which the Respondent gave to the Appellant was in compliance with s 75(2) of the LTA. As mentioned at [50] above, it is not necessary for us to decide Issue (b) given our finding (apropos Issue (a)) that the Notice of Default was not served on the Appellant such that the Deed was not properly terminated to begin with, but we shall nonetheless

consider it for completeness.

63 Section 75(2) of the LTA states:

> The power of entry into possession conferred by this section [*ie*, s 75] shall not be exercised until one month's notice has been given to the mortgagor or chargor.

In assessing whether this requirement was satisfied in the present case, we need only consider the s 75 notice contained in the 16 February 2007 letter since, as pointed out at [23] above, that notice superseded the earlier s 75 notice given via the Notice of Termination.

64 In the 16 February 2007 letter, the s 75 notice was set out as follows:[note: 45]

> TAKE NOTICE that [the Respondent] hereby gives you [*ie*, the Appellant] **one (1) month's notice** *from the date hereof* of its intention to exercise its right to enter into possession of the … Property and to receive [the] rents and profits thereof. [emphasis in bold in original; emphasis added in italics]

Vis-à-vis this letter, it seems to us clear that, by the phrase "the date hereof",[note: 46] the Appellant intended to refer to *the date stated on the face of the letter* (*cf* the ambiguity of these words in the context of the Notice of Default). This can be seen from para 13 of the 23 February 2007 letter, where the Respondent's solicitors informed the Appellant that the Respondent had decided to give him "one further month (*from 16 February 2007*) to make full payment"[note: 47] [emphasis added]. We would in any case interpret the words "the date hereof" in the 16 February 2007 letter in the same way that we have interpreted the corresponding words in the Notice of Default (see [57]–[58] above) – *viz*, as the date stated on the document's face – because, given the factual context of this appeal, it is only just and equitable that any ambiguity in the s 75 notice is resolved against the Respondent's favour. Thus, by the 16 February 2007 letter, the Respondent gave the Appellant one month's notice starting from 16 February 2007 (the date stated on the face of that letter) of its intention to enter into possession of the Property. This is *not* sufficient to satisfy the notice requirement in s 75(2) of the LTA as interpreted by the High Court in *Singapore Finance Ltd v Ben's Electrical Engineering Pte Ltd* [1986] SGHC 55 ("*Singapore Finance*") apropos the then equivalent of s 75(2) of the LTA (namely, s 65(2) of the Land Titles Act (Cap 276, 1970 Rev Ed)).

65 In *Singapore Finance*, a case which we drew to counsel's attention at the hearing of this appeal, the notice given by the mortgagee of its intention to enter into possession of the mortgaged property was less than the statutorily prescribed one-month period (*id* at [6]). The mortgagee's counsel submitted that, since the mortgagee had not actually sought to enter into possession until more than one month from the date on which notice had been given (*id* at [5]), there had been "substantial compliance" (*ibid*) with the then equivalent of s 75(2) of the LTA. Chan Sek Keong JC rejected this argument on the ground that (see *Singapore Finance* at [13]):

> … A Section 65(2) notice must be given in writing and *it must be a notice of one month. It is not a notice to the mortgagor of the mortgagee's intention to take possession followed by a lapse of one month*. [emphasis added]

He accordingly ruled that the mortgagee had no right to enter into possession of the mortgaged property as it had not complied with the then equivalent of s 75(2) of the LTA.

66 In our view, the High Court's strict insistence in *Singapore Finance* that the mortgagor be given

"a notice of one month" (*id* at [13]) entails that the one-month period specified in s 75(2) of the LTA starts to run only from *the date of service* of the s 75 notice, and not from the date stated on its face. To hold otherwise would mean (as we pointed out at [51] above in our discussion of the notice period prescribed by cl 7 of the Deed) that the mortgagee can serve s 75 notice on the mortgagor only, say, 28 days after the date stated on the face of the notice and yet still contend that it has complied with s 75(2) of the LTA. We note too that, in *UMBC Finance Ltd v Giffard Development Pte Ltd* [1993] 3 SLR 107, the High Court endorsed (*id* at 117, [28]) the decision in *Singapore Finance*. As far as we are aware, this strict approach in mandating one clear month's notice has been observed without difficulty in practice ever since *Singapore Finance* was decided in 1986.

67 In the present case, the 16 February 2007 letter was sent to the Appellant:

(a) at the Property by advice of receipt ("AR") registered post;

(b) at HSC's office, likewise by AR registered post; and

(c) at the office of the Appellant's sole proprietorship, Hock Kon Trading ("HKT"), by both AR registered post as well as by facsimile.

This can be seen from the salient parts of that letter as follows:[note: 48]

16 February 2007 BY AR REGISTERED POST

Ng Hock Kon

73 Jalan Seaview

Singapore 438386

…

cc. HSC International Investment Pte Ltd BY AR REGISTERED POST

371 Beach Road

#09-04 KeyPoint

Singapore 199597

cc. Hock Kon Trading BY AR REGISTERED POST AND FAX

31 West Coast Highway Fax No.: [xxx]

#01-01 West Coast Used Car Centre

Singapore 117864

68 Under cl 7.16 of the Mortgage, which mirrors the deemed service provision in s 60A(1)(*a*) read

with s 60A(4)(*b*) of the LTA:[note: 49]

> Any notice or certificate to be given to, or demand to be made on, the [Appellant] shall be deemed to have been duly given or made if it is in writing, signed by an Authorised Officer of the [Respondent], and delivered personally or sent by telex, facsimile, telegram or pre-paid post addressed to the [Appellant] and forwarded to:–
>
> > (a) the address of the [Appellant] as shown in the Mortgage or, where a new address has been notified in writing to the [Respondent], that new address; or
> >
> > (b) the address of any property comprising the … Property.
>
> A communication sent by mail shall be deemed to have been received by the [Appellant] and the [Respondent] on the second day after posting (excluding days on which no mail deliveries are normally made).
>
> …

Applying cl 7.16 of the Mortgage to the copies of the 16 February 2007 letter which were sent to the Appellant (at the Property, at HSC's office and at HKT's office) by AR registered post, the deemed dates of service of those copies would be 18 February 2007, with the result that the Appellant was not given notice of one clear month from the date stated on the face of the 16 February 2007 letter (which, as we held at [64] above, is "the date hereof" for the purposes of this letter) of the Respondent's intention to enter into possession of the Property.

69 The Respondent sought to argue that communication by facsimile was "instantaneous"[note: 50] and, thus, *vis-à-vis* the copy of the 16 February 2007 letter which was sent to the Appellant at HKT's office by facsimile, the date of service would have been the same as the date stated on the face of that letter. From this perspective, the Respondent submitted, the s 75 notice contained in the 16 February 2007 letter "would have satisfied the requirements of section 75 of the LTA, even on the statutory interpretation given to it in the *Singapore Finance* case"[note: 51] [emphasis in bold italics in original omitted]. In this connection, the Respondent highlighted s 60A(1)(*a*) of the LTA, which was introduced via s 21 of the Land Titles (Amendment) Act 2001 (Act 25 of 2001). This provision, which came into operation on 20 August 2001, states:

> **60A**.—(1) Unless otherwise expressly provided in this Act, a notice that is required or authorised by this Act to be given to or served on a person may be given to or served on that person —
>
> > (*a*) by posting it or sending it by facsimile transmission to his address for service (within the meaning of this section [see s 60A(2) of the LTA]) or to his last known place of residence or business …

70 With respect, we do not think that s 60A(1)(*a*) of the LTA is of assistance to the Respondent. This is because the Respondent's submission that the copy of the 16 February 2007 letter which was sent to the Appellant at HKT's office by facsimile was served on him on 16 February 2007 is correct only if it can be shown that the document was indeed received at HKT's office on that day. This requirement stems from s 60A(4)(*a*) of the LTA, which stipulates:

> Where any notice or other document is —
>
> > (*a*) sent by facsimile transmission in accordance with subsection (1), it shall be deemed to

have been duly served on the person to whom it is addressed *where there is an acknowledgment by electronic or other means to the effect that the notice or document has been received* at the address for service or [the] place of residence or business, as the case may be …

[emphasis added]

71 The effect of s 60A(4)(*a*) of the LTA is that a document sent by facsimile pursuant to s 60A(1)(*a*) is deemed to have been received by the intended recipient only if there is an actual acknowledgment of receipt "by electronic or other means to the effect that the … document has been received at the address for service or [the] place of residence or business" (*per* s 60A(4)(*a*)). It is not sufficient for the sender to merely show that it has sent a document to the intended recipient by facsimile. Unfortunately for the Respondent, it has been unable to adduce evidence to prove that the copy of the 16 February 2007 letter which was sent to the Appellant at HKT's office by facsimile was indeed received at that office. The facsimile log produced by the Respondent only indicates that HKT's facsimile number was dialled on 16 February 2007 – *ie*, it only indicates that the Notice of Termination was *probably* sent to the Appellant at HKT's office by facsimile on that date. This alone, however, cannot amount to an acknowledgment of receipt of the 16 February 2007 letter at HKT's office and, thus, the Respondent cannot rely on s 60A(1)(*a*) read with s 60A(4)(*a*) of the LTA to argue that there was deemed service of that letter on the Appellant on 16 February 2007 itself (or, for that matter, on any other date).

72 On the basis of the decision in *Singapore Finance* ([64] *supra*) then, the s 75 notice contained in the 16 February 2007 letter was not valid because the Respondent did not give the Appellant one clear month's notice – *ie*, notice of one month from the date of service of that letter – of its (the Respondent's) intention to enter into possession of the Property. According to cl 7.16 of the Mortgage (as well as s 60A(1)(*a*) read with s 60A(4)(*b*) of the LTA), there was deemed service of the 16 February 2007 letter on the Appellant only on 18 February 2007 *vis-à-vis* those copies of the letter which were sent to the Appellant by AR registered post (as we pointed out in the preceding paragraph, the copy of the 16 February 2007 letter which was sent to the Appellant by facsimile *cannot* be deemed to have been served on him at all because the requirement set out in s 60A(4)(*a*) of the LTA has not been satisfied). Yet, the Respondent started the clock on 16 February 2007 itself, as can be seen from para 13 of the 23 February 2007 letter (see [64] above). Consequently, no proper s 75 notice was given to the Appellant via the 16 February 2007 letter.

Conclusion

73 In view of our finding (apropos Issue (a)) that the Notice of Default was not served on the Appellant at all, with the result that the Deed was not properly terminated by the Respondent, the present appeal is allowed. Considering that the Appellant's case before this court centred on the issue of relief from forfeiture (in respect of which we ruled against the Appellant) rather than on the issue of whether the Notice of Default was served on the Appellant, we think that the proper costs order is that the Appellant is to have the costs of the hearing in the court below, but only half of the costs of the appeal. The usual consequential orders are to be observed.

[note: 1] See the Appellant's Core Bundle ("ACB") at vol 2, p 20.

[note: 2] *Id* at vol 2, p 21.

[note: 3] *Id* at vol 2, pp 20–21.

[note: 4] *Id* at vol 2, p 21.

[note: 5] *Id* at vol 2, p 22.

[note: 6] *Id* at vol 2, p 23.

[note: 7] *Ibid*.

[note: 8] See ACB at vol 2, pp 32–42.

[note: 9] *Id* at vol 2, p 20.

[note: 10] *Id* at vol 2, p 46; see also the Record of Appeal ("ROA") vol 3(A) at p 81.

[note: 11] See ROA vol 3(A) at p 81.

[note: 12] See ACB at vol 2, p 47.

[note: 13] *Ibid*.

[note: 14] See ACB at vol 2, pp 48–49.

[note: 15] *Id* at vol 2, p 49.

[note: 16] *Ibid*.

[note: 17] See ACB at vol 2, p 59.

[note: 18] *Ibid*.

[note: 19] *Ibid*.

[note: 20] *Ibid*.

[note: 21] See ACB at vol 2, p 52.

[note: 22] *Ibid*.

[note: 23] *Ibid*.

[note: 24] See ACB at vol 2, p 59.

[note: 25] *Id* at p 53.

[note: 26] See the Appellant's Case at, *inter alia*, para 55.

[note: 27] *Id* at paras 55–56.

[note: 28] *Id* at, *inter alia*, para 55.

[note: 29] See the Respondent's third supplementary submissions filed on 23 July 2009 ("the Respondent's third supplementary submissions") at para 32.

[note: 30] *Id* at para 27.

[note: 31] See ACB at vol 2, p 41.

[note: 32] See the Respondent's third supplementary submissions at para 32.

[note: 33] See the bundle of documents filed on 23 July 2009 in support of the Respondent's third supplementary submissions ("the Respondent's 23 July 2009 BOD") at Tab 9.

[note: 34] *Ibid*.

[note: 35] See the Respondent's 23 July 2009 BOD at Tab 10.

[note: 36] See para 12 of the Appellant's affidavit filed on 5 March 2008 (at Tab 11 of the Respondent's 23 July 2009 BOD).

[note: 37] *Ibid*.

[note: 38] See p 140 of the certified transcript of the notes of evidence of the hearing before the Judge on 1 April 2008 (at Tab 8 of the Respondent's 23 July 2009 BOD).

[note: 39] See ACB at vol 2, p 22.

[note: 40] *Id* at vol 2, p 46.

[note: 41] *Id* at vol 2, p 22.

[note: 42] See the Respondent's supplementary written submissions filed on 13 April 2009 ("the Respondent's 13 April 2009 submissions") at para 27.

[note: 43] *Ibid*.

[note: 44] See ACB at vol 2, p 22.

[note: 45] *Id* at vol 2, p 59.

[note: 46] *Ibid*.

[note: 47] See ACB at vol 2, p 53.

[note: 48] *Id* at vol 2, pp 59–60.

[note: 49] *Id* at vol 2, pp 41–42.

[note: 50] See the Respondent's 13 April 2009 submissions at para 42.

[note: 51] *Ibid*.

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