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

[2022] SGHC 152

Originating Summons No 1198 of 2021

Between

MKY Capital Pte Ltd

… *Plaintiff*

And

MDR Limited

… *Defendant*

GROUNDS OF DECISION

[Credit And Security] — [Mortgage of real property] — [Discharge of mortgage]
[Credit And Security] — [Mortgage of real property] — [Mortgagor's rights]
[Contract] — [Contractual terms] — [Rules of construction]
[Contract] — [Contractual terms] — [Parol evidence rule]

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MKY Capital Pte Ltd
v
MDR Ltd

[2022] SGHC 152

General Division of the High Court — Originating Summons No 1198 of 2021
Ang Cheng Hock J
10, 18, 24 February, 14 March 2022

28 June 2022

Ang Cheng Hock J:

1 This was an application by the borrower, MKY Capital Pte Ltd (the "plaintiff"), seeking, in the main, an order that it was permitted to prepay a term loan and redeem the mortgage over its property by paying the principal and interest due on the loan as of the date which the plaintiff and the lender had agreed would be the date of early repayment. The lender, MDR Limited (the "defendant"), resisted the order on the basis that, while the plaintiff was entitled to repay the loan early, it was required to pay the full amount of interest for the entire tenor of the loan. Without such full payment, the defendant argued that it was not obliged to permit the plaintiff to redeem its mortgage early.

2 After considering the matter, I allowed the plaintiff's application. I provided a brief oral judgment setting out my findings, and explaining, *inter alia*, why I agreed with the plaintiff's interpretation of the loan documentation. I ordered that the plaintiff make full repayment of the loan and applicable

interest, calculated up to the date of 9 August 2021, within 10 days of its receipt of a redemption statement to be prepared by the defendant in accordance with the terms of my order. Pursuant to a subsequent application by the plaintiff,[1] I also granted an extension of time for the plaintiff to make full repayment of the loan and interest, but subject to certain conditions.

3 The defendant has now appealed against my decision that the plaintiff is entitled to repay the loan before the end of the full loan tenor with interest computed up to 9 August 2021. The defendant also appealed against my finding that the defendant had wrongfully refused to accept the plaintiff's redemption on 23 July 2021 (and in connection with the latter finding, my finding that the issue of whether there was a valid tender by the plaintiff does not arise in this case). I now set out the detailed grounds of my decision.

Facts

The parties

4 The plaintiff, a company incorporated in Singapore, was, at the material time, in the business of hotel development. It is the registered proprietor of a property at 8 Devonshire Road (the "Property"), which was subject to a mortgage in favour of the defendant, as will be explained below (see [20] below).[2]

5 The defendant, also a company incorporated in Singapore, was, at all material times, engaged in the distribution and retail of telecommunication products and services, aftermarket services and large format inkjet printing. It

[1] HC/SUM 924/2022.

[2] Wong Kee Chet's 1st Affidavit at para 4.

has been listed on the Mainboard of the Singapore Exchange Securities Trading Limited since 14 March 2003.[3]

Acquisition of the Property

6 The Property was initially owned by Eight Devonshire Management Pte Ltd ("8DM"), which was looking to sell it.[4] The plaintiff's Indonesian principals were keen to purchase the Property for the purpose of hotel development.[5] In June 2019, the plaintiff entered into talks with 8DM to acquire the Property.[6] The plaintiff eventually exercised an option to purchase the Property on 27 July 2020.[7] However, the sale was not completed because the plaintiff did not receive the anticipated funding from its investors in time.[8] The plaintiff and 8DM then agreed to extend the date of completion without penalty.[9]

7 In November 2020, 8DM defaulted on its payment obligations in respect of a loan taken from CIMB Bank Berhad ("CIMB").[10] 8DM's loan with CIMB was secured by a mortgage over the Property.[11] Upon 8DM's default in payment, CIMB took steps to auction the Property on 22 March 2021.[12] These developments prompted the plaintiff and 8DM to discuss the possibility of

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[3] Wong Kee Chet's 1st Affidavit at para 5.

[4] Wong Kee Chet's 1st Affidavit at para 7.

[5] Wong Kee Chet's 1st Affidavit at para 8.

[6] Wong Kee Chet's 1st Affidavit at para 9.

[7] Wong Kee Chet's 1st Affidavit at para 10.

[8] Wong Kee Chet's 1st Affidavit at para 11.

[9] Wong Kee Chet's 1st Affidavit at para 11.

[10] Wong Kee Chet's 1st Affidavit at para 12.

[11] Wong Kee Chet's 1st Affidavit at para 12.

[12] Wong Kee Chet's 1st Affidavit at para 12.

alternative funding to pay off the S$20 million that 8DM owed to CIMB.[13] According to the plaintiff, at that time, possible financiers included the defendant as well as VM Capital Pte Ltd ("VM Capital").[14]

8 The plaintiff had engaged one Rohit Sen ("Sen") as a consultant for the purpose of obtaining funding. Sen introduced the plaintiff to the defendant around March 2021.[15] Given the impending auction by CIMB, the plaintiff sought an urgent loan from the defendant.[16] Negotiations started in early April 2021.[17] The main discussions between the plaintiff and defendant were conducted between Sen, on behalf of the plaintiff, and one Edward Lee ("Lee"), who is the chairman and executive director of the defendant.[18] Two other representatives of the plaintiff – one Jojo Tan ("Tan"), the plaintiff's consultant on financing matters, and one Wong Kee Chet ("Wong"), a director of the plaintiff, were also communicating with Lee as part of the ongoing negotiations.[19]

9 CIMB eventually auctioned the Property on 22 April 2021, and the plaintiff submitted a bid that turned out to be the winning bid.[20] CIMB entered into a Memorandum of Contract with the plaintiff for the sale of the Property.[21] However, the plaintiff was unable to proceed with the transaction because of a

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[13] Wong Kee Chet's 1st Affidavit at para 13.

[14] Wong Kee Chet's 3rd Affidavit at para 8.

[15] Wong Kee Chet's 1st Affidavit at para 14; Edward Lee's 1st Affidavit at para 9.

[16] Edward Lee's 1st Affidavit at para 11.

[17] Edward Lee's 1st Affidavit at para 12.

[18] Wong Kee Chet's 1st Affidavit at para 16; Edward Lee's 1st Affidavit at para 1.

[19] Wong Kee Chet's 1st Affidavit at para 21; Edward Lee's 1st Affidavit at paras 13–14.

[20] Wong Kee Chet's 1st Affidavit at para 18.

[21] Wong Kee Chet's 1st Affidavit at para 18.

delay in the receipt of funds from its investors and the discussions with the defendant that were still ongoing.[22] After the failed auction purchase, the plaintiff continued negotiations with 8DM. The plaintiff and 8DM eventually reached a mutually agreeable sale price of S$30m for the acquisition of the Property.[23]

Negotiations between the plaintiff and the defendant

10 In the meantime, the plaintiff and defendant continued negotiations on the loan agreement. As mentioned, negotiations between the plaintiff and defendant began around April 2021.[24] The plaintiff's Sen, Tan and Wong as well as the defendant's Lee were the key individuals involved in the negotiations. Both sides were legally represented at all material times – the plaintiff was represented by Ho Soo Lih and Eva Wong of Drew & Napier LLC ("Drew & Napier"), while the defendant was represented by Dorothy Tay of LegalWorks Law Corporation ("LegalWorks").[25]

11 Over the course of negotiations, solicitors of both parties prepared various drafts of the term sheet and subsequently the loan agreement. The plaintiff and the defendant eventually signed a loan agreement dated 17 May 2021 (the "Loan Agreement"). Pursuant to this agreement, the defendant agreed to lend the plaintiff S$24 million, with interest payable on the loan at the rate of 3.5% per month, payable in advance at the start of each calendar month.[26] The

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[22] Wong Kee Chet's 1st Affidavit at para 19.

[23] Wong Kee Chet's 1st Affidavit at para 20.

[24] Edward Lee's 1st Affidavit at para 14.

[25] Edward Lee's 1st Affidavit at para 27.

[26] Wong Kee Chet's 1st Affidavit at pages 53–60.

plaintiff was to repay the loan in full 12 months from the disbursement date.[27] The loan was disbursed on 17 May 2021, with the first month of interest in the amount of S$840,0000 already deducted from the principal amount.[28]

The Loan Agreement

12 I will now set out the material clauses of the Loan Agreement. Clause 4 of the Loan Agreement provides:[29]

> **Loan Tenor**
>
> Parties agree that Borrower shall repay the Loan in full, together with all Interest thereon, by the Due Date provided that Borrower may extend the Due Date for a further period of 12 months (the "extended Due Date") by giving Lender at least sixty (60) days' prior written notice of such extension.
>
> [emphasis in original omitted]

13 The term "Interest" is defined in clause 1.1 as "the interest payable by Borrower to Lender on the Loan at such rates as set out in Clause 5.1.1" [emphasis in original omitted].[30] The term "Due Date" is defined in clause 1.1 as "the date falling 12 months from the Disbursement Date" [emphasis in original omitted].[31]

14 Clause 5.1 provides:[32]

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[27] Wong Kee Chet's 1st Affidavit at pages 55, 60.

[28] Wong Kee Chet's 1st Affidavit at para 29; page 60.

[29] Wong Kee Chet's 1st Affidavit at page 60.

[30] Wong Kee Chet's 1st Affidavit at page 55.

[31] Wong Kee Chet's 1st Affidavit at page 55.

[32] Wong Kee Chet's 1st Affidavit at page 60.

Interest, Default Interest and Float

5.1 Borrower will pay:

5.1.1. Interest on the Loan at the rate of 3.5% per month. Interest on the Loan shall accrue from day to day and shall be calculated on the basis of a 365-day year and the actual number of days elapsed. Interest shall be payable in advance at the start of each calendar month and on the Due Date (or extended Due Date, as the case may be).

5.1.2 Default Interest at the rate of 3.5% per month if Borrower shall fail to repay the Loan by the Due Date (or extended Due Date, as the case may be). Default Interest shall accrue from day to day and shall be calculated on the basis of a 365-day year and the actual number of days elapsed, commencing from the date when repayment is due until the date when Lender receives full payment.

[emphasis in original omitted]

15 Clause 2.1.5 provides:[33]

Conditions Precedent

2.1. Lender shall disburse the Loan only when the following conditions precedent are satisfied

…

2.1.5 Borrower has furnished Lender with the post-dated cheques for payment of the monthly Interest payments falling due pursuant to Clause 5.1.1.

[emphasis in original omitted]

16 Clause 21 provides:[34]

[33] Wong Kee Chet's 1st Affidavit at pages 57–58.

[34] Wong Kee Chet's 1st Affidavit at pages 68–69.

> **Entire Agreement**
>
> This Agreement contains the whole agreement between Parties relating to the subject matter of this Agreement. It supersedes all prior or contemporaneous oral or written communications, proposals, conditions, representations and warranties and prevails over any conflicting or additional terms of any quote, order, acknowledgment, or other communication between Parties relating to its subject matter during the term of this Agreement.

17 Clause 22 provides:[35]

> **Amendment**
>
> No variation of this Agreement shall be effective unless made in writing and signed by the Parties and in the case of Lender and Borrower, their respective authorised representatives.

18 Clause 24 provides:[36]

> **Independent Legal Advice/Reasonableness of Terms**
>
> Each Party confirms it has received independent legal advice relating to all the matters provided for in this Agreement and agrees that the provisions of this Agreement (including all instruments/documents entered into pursuant to this Agreement) are fair and reasonable. Further, as Parties have participated in the drafting of this Agreement, the Parties agree that any applicable rule requiring the construction of this Agreement or any provision hererof against the Party drafting this Agreement shall not apply.

19 As for security, Clause 6 provides:[37]

> **Mortgage**
>
> 6.1 Further, in consideration of Lender agreeing, at the request of Borrower to make available to Borrower the Loan, Borrower has agreed to grant a Mortgage over [the Property] to secure the discharge of the Obligations and

[35] Wong Kee Chet's 1st Affidavit at page 69.

[36] Wong Kee Chet's 1st Affidavit at page 69.

[37] Wong Kee Chet's 1st Affidavit at pages 60–61.

> all moneys and liabilities which may become due and owing by Borrower to Lender from time to time. The terms of the Mortgage shall be specified by Lender.
>
> 6.2 Borrower hereby agrees:
>
> 6.2.1. upon the occurrence of an Event of Default (defined above), Lender shall be entitled to exercise the rights and remedies conferred on it pursuant to the Mortgage, in particular, paragraph 6 of the Covenants and Conditions of the Mortgage.
>
> …

20 In accordance with clause 6, the plaintiff executed a mortgage over the Property in favour of the defendant on or about 17 May 2021.[38] The plaintiff also agreed to a set of Covenants and Conditions of Mortgage.[39]

Events leading up to the dispute

21 On 17 June 2021, interest payment for the month of June fell due but the plaintiff failed to make payment.[40] The next day, on 18 June 2021, Lee emailed the plaintiff's representatives:[41]

> [The plaintiff] has failed to make monthly interest payment that was due on 17th June 2021. Failure to make interest payment is a serious breach of our contract and would result in a Default Event. Please let us know when will payment be made.

22 On 22 June 2021, Wong, who as abovementioned is a director of the plaintiff (see [8] above), responded and requested for one to two days' time to arrange for payment to be made.[42] More than a week later, on 2 July 2021,

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[38] Wong Kee Chet's 1st Affidavit at para 28; pages 80–84.

[39] Wong Kee Chet's 1st Affidavit at pages 85–95.

[40] Edward Lee's 1st Affidavit at para 71.

[41] Edward Lee's 1st Affidavit at pages 248–249.

[42] Edward Lee's 1st Affidavit at page 248.

Wong wrote to Lee that the plaintiff would make payment on 5 July 2021 instead.[43] There was further correspondence involving requests for payment and promises of payment, but no payment was made.[44] In fact, payment of interest for the month of June 2021 was never made.[45]

23 On 16 July 2021, the plaintiff notified the defendant of its intention to redeem the loan on 23 July 2021.[46] The defendant's solicitors replied on 19 July 2021 stating that the defendant agreed to the redemption of the loan.[47] The defendant's solicitors' reply enclosed a redemption statement (the "Redemption Statement") which provided for completion to take place on 23 July 2021 and set out the various components of indebtedness that the plaintiff was required to discharge.[48] The Redemption Statement stated the redemption amount as S$33,264,171.61.[49] The breakdown in the Redemption Statement was as follows:[50]

S/N	Description	Debit (S$)	Credit (S$)
1	Loan principal	24,000,000.00	
2	Loan interest (3.5% per month) for the period of 17 May 2021 to 16 June 2021	840,000.00	

[43] Edward Lee's 1st Affidavit at page 255.

[44] Edward Lee's 1st Affidavit at paras 76–82.

[45] Edward Lee's 1st Affidavit at para 84.

[46] Wong Kee Chet's 1st Affidavit at para 30.

[47] Wong Kee Chet's 1st Affidavit at para 31.

[48] Wong Kee Chet's 1st Affidavit at para 31.

[49] Wong Kee Chet's 1st Affidavit at para 31; page 110.

[50] Wong Kee Chet's 1st Affidavit at page 110.

3	Payment received on loan interest (3.5% per month) for the period of 17 May 2021 to 16 June 2021		840,000.00
4	Loan interest (3.5% per month) for the period of 17 June 2021 to 16 July 2021	840,000.00	
5	Default interest (3.5% per month) for overdue interest payments for the period of 17 June 2021 to 23 June 2021	6,860.00	
6	Default interest (3.5% per month) for overdue interest payments for the period of 24 June 2021 to 30 June 2021	6,860.00	
7	Default interest (3.5% per month) for overdue interest payments for the period of 1 July 2021 to 7 July 2021	6,638.71	
8	Partial payment on loan interest (3.5% per month) received on 7 July 2021		18,000.00
9	Default interest (3.5% per month) for overdue interest payments for the period of 8 July 2021 to 14 July 2021	6,638.71	
10	Loan interest (3.5% per month) for the period of 17 July 2021 to 16 August 2021	840,000.00	
11	Loan interest (3.5% per month) for the period of 17 August 2021 to 16 May 2022	7,560,000.00	

12	Default interest (3.5% per month) for overdue interest payments for the period of 15 July 2021 to 23 July 2021	8,535.48	
13	Default interest (3.5% per month) for overdue interest payments for the period of 17 July 2021 to 23 July 2021	6,638.71	
		Total Debit: 34,122,171.61	Total Credit: 858,000.00
	Redemption amount (S$)		33,264,171.61

24 The plaintiff took the view that the redemption amount was incorrectly calculated.[51] Accordingly, the plaintiff's solicitors wrote to the defendant's solicitors on 26 July 2021 stating that, because of the defendant's incorrect calculation, the plaintiff was unable to complete the redemption despite having been ready, willing and able to do so since the original proposed date of 23 July 2021.[52] The letter stated that, among other reasons, the amount was incorrect because the defendant had no basis to charge loan interest for the full loan tenor up till 16 May 2022 (see item 11 of the above table at [23]) and that interest should be payable only up till 23 July 2021.[53] The defendant was invited to issue another redemption statement. However, the defendant refused to do so.[54]

25 On 6 August 2021, the defendant's solicitors wrote to the plaintiff's solicitors stating, among other breaches, that the plaintiff had neglected, refused

[51] Wong Kee Chet's 1st Affidavit at paras 33–34.

[52] Wong Kee Chet's 1st Affidavit at para 36.

[53] Wong Kee Chet's 1st Affidavit at page 112.

[54] Wong Kee Chet's 1st Affidavit at para 37.

and/or failed to pay the interest due for the months of June and July, and setting out the default interest accrued for such failure.[55] Notice was given to the plaintiff that unless those sums were paid, the defendant would commence legal action or enforce its security.[56] The defendant's solicitors then wrote again to the plaintiff's solicitors on 23 September 2021 stating, for the first time, that the plaintiff's purported offer to redeem dated 16 July 2021 was a "sham" because the defendant did not believe that the plaintiff had the necessary funds to effect the redemption.[57] A further letter was sent on 27 September 2021 setting out the alleged breaches by the plaintiff and demanding full repayment of the loan, interest and default interest.[58] Up to this stage, the plaintiff had not responded to the plaintiff's demands and allegations.[59]

26 The defendant's solicitors then wrote to inform the plaintiff's solicitors on 28 September 2021 that the defendant had appointed receivers pursuant to clause 6.1.4 of the Covenants and Conditions of Mortgage.[60] As earlier mentioned, a mortgage over the Property had been granted in favour of the defendant in accordance with clause 6 of the Loan Agreement (see [20] above). Under clause 6.2.1 of the Loan Agreement, the plaintiff had also agreed that the defendant would be entitled to exercise rights and remedies conferred in the Covenants and Conditions of the Mortgage upon the occurrence of an "Event of Default". Failure to pay interest that fell due on 17 June 2021 (see [21] above)

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[55] Edward Lee's 1st Affidavit at paras 108–109; pages 265–266.

[56] Edward Lee's 1st Affidavit at paras 108–109; pages 265–266.

[57] Edward Lee's 1st Affidavit at paras 111–112; page 272.

[58] Edward Lee's 1st Affidavit at para 115; pages 273–274.

[59] Edward Lee's 1st Affidavit at paras 107, 110, 114, 116.

[60] Edward Lee's 1st Affidavit at para 117.

constituted an "Event of Default" under clause 10.1.1 of the Loan Agreement, which read:[61]

> **Events of Default**
>
> 10.1 Each of the following events shall constitute an event of default:
>
> 10.1.1 If Borrower fails to pay the Loan, any Interest or Default Interest, Fees or any other amounts owing under this Agreement when the same shall fall due;
>
> …

27 The plaintiff subsequently discovered on 22 November 2021 that the receivers had taken steps to sell the Property.[62] The receivers were later restrained by the court from so doing pursuant to the plaintiff's successful application (SUM 5731/2021 that was brought in these proceedings) for an interim injunction.

28 The plaintiff commenced these proceedings on 23 November 2021 seeking, in the main, declarations that the plaintiff was entitled to repay the loan in full at any time on or before the expiry of the full loan tenor, that the defendant was entitled to interest only up to and including the actual date of full repayment of the loan, and that the defendant's refusal to agree to allow a redemption of the mortgage on such a basis was wrongful.

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[61] Wong Kee Chet's 1st Affidavit at page 63.

[62] Wong Kee Chet's 2nd Affidavit at para 8.

The parties' cases

The plaintiff's case

29 According to the plaintiff, it was entitled to redeem its mortgage at any time before the expiry of the full loan tenor upon payment of interest up to the date of early repayment. This was premised on the plaintiff's case as to the proper interpretation of relevant clauses of the Loan Agreement (see [12]–[19] above). The defendant's issuance of the Redemption Statement with a redemption amount including interest for the full loan tenor was therefore wrongful.

30 In support of its position, the plaintiff emphasised that the starting point for interpreting the Loan Agreement must be the text of the relevant contractual clauses.[63] The plaintiff relied on the wording in clause 4, which states that the "… Borrower shall repay the Loan in full, together with all Interest thereon *by* the Due Date …" [emphasis added] and the wording in clause 5, which states that " … Interest on the Loan *shall accrue from day to day* and *shall be calculated on the basis of a 365-day year and the actual number of days elapsed* …" [emphasis added]. In respect of clause 4, the plaintiff contended that the use of the word "by", as opposed to a word like "on", indicated that the plaintiff was allowed to make early repayment.[64] The plaintiff also pointed to clause 5 as expressly providing that interest *accrues* and is calculated on a daily basis, as opposed to on a lump sum basis for the full loan tenor of 12 months.[65] While the plaintiff acknowledged that clause 2.1.5 required it to provide post-dated

[63] Plaintiff's Written Submissions ("PWS") at para 23.

[64] PWS at para 28; Oral submissions by counsel for the plaintiff at 18 February 2021 hearing.

[65] PWS at para 29.

cheques (see [15] above), it did not agree that clause 2.1.5 showed that the defendant's entitlement to interest for the full loan tenor had already accrued.[66]

31 Insofar as the defendant sought to rely on parties' pre-contractual negotiations to show its purported entitlement to interest for the full loan tenor, the plaintiff submitted that such arguments would run afoul of the parol evidence rule.[67] This was because such an attempt would, according to the plaintiff, amount to introducing terms that are not in the contract agreed upon by parties.[68] In the alternative, the plaintiff argued that, even if the parol evidence rule was no obstacle to the defendant's reliance on pre-contractual negotiations in this case, the criteria for reliance on extrinsic evidence, as set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"), had not been met. More specifically, the plaintiff claimed that the extrinsic evidence that the defendant sought to rely on did not meet the requirement that they related to a clear and obvious context.[69] According to the plaintiff, the pre-contractual negotiations relating to the terms of early repayment reflected a dynamic process of pre-contractual bargaining, where parties' positions were changing and divergent.[70] Such evidence therefore did not relate to a clear and obvious context. Further, the plaintiff argued that a closer look at the evidence that the defendant sought to rely on showed that the parties' conduct prior to the execution of the Loan Agreement was at best equivocal on the question of early

[66] PWS at para 30.

[67] PWS at para 35.

[68] PWS at para 35.

[69] PWS at para 39.

[70] PWS at para 42.

repayment and the amount of interest chargeable thereupon.[71] Finally, to further bolster its position, the plaintiff also pointed out that the defendant's issuance of the Redemption Statement on 19 July 2021 without any complaint (see [23] above) went towards showing that parties intended to allow early redemption.[72]

32 The plaintiff also submitted that the redemption amount was incorrect because it included *default interest*. According to the plaintiff, the default interest clause was inapplicable on the facts.[73] Clause 5.1.2 provided that default interest was payable *only* if the borrower was late in paying the principal loan amount by the "Due Date", which was defined in the Loan Agreement as 12 months from the disbursement date, *ie*, 16 May 2022.[74]

33 For all these reasons, the plaintiff argued that it was entitled to make early repayment of the loan upon payment of interest accrued up to the date of actual repayment and that the defendant's refusal to allow redemption of the mortgage on 23 July 2021 was wrongful.

The defendant's case

34 The defendant's position was that it was agreeable to early redemption, provided that the plaintiff paid full interest that would have fallen due upon the expiry of the loan tenor.[75] On the defendant's interpretation of the Loan Agreement, there was no mention of shortening the loan tenor, which consequently meant that the interest payable could not be that which would have

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[71] PWS at para 44.

[72] PWS at para 46.

[73] PWS at para 52.

[74] PWS at para 52.

[75] Defendant's Written Submissions ("DWS") at para 14.

accrued as of an earlier date than the expiry of the loan tenor.[76] Referencing clause 4, the defendant pointed out that the loan tenor was stipulated to be 12 months, with an option for extension for another 12 months, but with no option to shorten the loan tenor.[77]

35 Similarly, for clause 5, the defendant emphasised that interest was provided as chargeable "at the rate of 3.5% per month", with no indication of an option for early repayment or payment of anything less than a full year's interest.[78] For the phrase "shall be calculated on the basis of a 365-year" in clause 5, the defendant argued that the phrase supports the defendant's interpretation that interest is payable for the full 12 months.[79] For the phrase "actual number of days elapsed", the defendant contended that this was to take into account the possible extension of the loan tenor for a further 12 months.[80] Finally, the phrase "interest shall be payable in advance at the start of each calendar month and on the Due Date" was read by the defendant as providing that interest was payable in advance on a monthly basis, and since interest was payable on the Due Date, the clause provided for payment of interest for the full 12 month period.[81] Additionally, the defendant emphasised clause 22 of the Loan Agreement (see [17] above), which did not permit any variation of the terms of the Loan Agreement, unless made in writing and signed by the parties (or their authorised representatives).[82]

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[76] DWS at paras 19–28.

[77] DWS at paras 25–26.

[78] DWS at para 31.

[79] DWS at para 35.

[80] DWS at para 36.

[81] DWS at paras 37–39.

[82] DWS at paras 28–29.

36 The defendant argued that clause 2.1.5 indicated a clear intention for 12 months of interest to be paid, since it required the plaintiff to provide post-dated cheques for payment of the monthly interest.[83] Further, the defendant pointed out that there was nothing in clause 2.1.5 that allowed for any of the post-dated cheques to be returned in the event of early repayment.[84] This, according to the defendant, again showed an intention for interest for the full loan tenor to be paid.

37 Beyond the wording of the relevant contractual clauses, the defendant also relied on pre-contractual negotiations (see [51]–[60] below) to support its position. The plaintiff had sought the inclusion of a prepayment clause for repayment to be made three months after disbursement of the loan. The defendant objected and the clause was ultimately excluded from the Loan Agreement. According to the defendant, it would be absurd to interpret the Loan Agreement as one with "no minimum period" before repayment could be made given the removal of a proposed prepayment clause that stipulated a 3-month minimum period before prepayment could be made.[85] The defendant also claimed that the plaintiff had accepted that there would be no early repayment in a WhatsApp message that was sent in the course of negotiations (see [60] below).[86] The defendant also argued that it only made commercial sense to lock in 12 months' interest and not to permit prepayment that would have the effect of reducing the interest earned by it.[87]

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[83] DWS at paras 53–55.

[84] DWS at paras 56.

[85] DWS at para 93.

[86] DWS at para 95.

[87] DWS at para 77.

38 In respect of the default interest, the defendant maintained that it was entitled to those sums. This is because of the plaintiff's failure to pay the interest that was due on 17 June 2021.[88]

39 Finally, the defendant argued that the plaintiff's offer dated 16 July 2021 to make early repayment was a sham because it was an invalid tender. On that basis, interest continued to run even past 23 July 2021 (which, as abovementioned at [23], was the date on which parties agreed for redemption to take place before the dispute on the amount due arose). The defendant contended that, for the tender (or offer of redemption in this case) to be valid, the mortgagor (*ie*, the plaintiff) must have on hand and keep aside the whole sum for the mortgagee.[89] However, according to the defendant, the plaintiff had no real intent to redeem because it did not have sufficient funds. The plaintiff provided evidence of funding from VM Capital in the form of a loan for S$20 million.[90] However, the defendant pointed out that the sum of S$20 million (and the lower sum of the actual disbursement after deduction of upfront interest and facility fee) substantially fell short of what it viewed to be the correct redemption amount of about S$33.3 million (see [23] above). The defendant also pointed out that VM Capital would only have disbursed the funds if the defendant had consented to the simultaneous release of the mortgage.[91] According to the defendant, this meant that the tender or redemption offer by the plaintiff was conditional, and therefore invalid.[92] The defendant thus

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[88] DWS at para 121.

[89] DWS at paras 133(ii)–(iii).

[90] Wong Kee Chet's 1st Affidavit at page 116.

[91] DWS at para 133(iv).

[92] DWS at para 133(iv).

submitted that there was no basis for the plaintiff to claim an interest-free period on the basis of its offer to redeem.[93]

Whether the plaintiff has incurred the interest for the full loan tenor upon the disbursement of the loan

40 After reviewing the parties' submissions, the affidavits filed by the parties, and the oral arguments by counsel, I found that, on a proper construction of the terms of the Loan Agreement, the plaintiff was entitled to repay the loan before the end of the full loan tenor by paying the loan amount and interest calculated up to the date when the parties agreed redemption should take place. In other words, I disagreed with the defendant's contention that the interest for the full 12-month tenor of the loan had *accrued* upon the disbursement of the loan to the plaintiff on 17 May 2021 and was thus payable to the defendant regardless of the fact that that the plaintiff was making an early repayment of the loan.

The text of the Loan Agreement

41 In contractual interpretation, the text of the contract is the first port of call. As held by the Court of Appeal in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") (at [30]), the purpose of interpretation is to "give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from *the contextual meaning of the relevant contractual language*" [emphasis added]. The court in *Yap Son On* also emphasised (at [30]) that "*the text of [the parties'] agreement is of first importance*" [emphasis in original]. Starting therefore with the text of the Loan Agreement, I looked first to clause 4 of the Loan Agreement which, as earlier set out, provided for the loan tenor

[93] DWS at para 149.

(see [12] above). To recapitulate, clause 4 stated that " … the Borrower shall repay the Loan in full, together with all Interest thereon, *by the Due Date* …" [emphasis added].[94] The phrase "by the Due Date" indicated that the loan may be repaid any time before the Due Date and not necessarily only on the Due Date. In my view, there was nothing ambiguous about the wording of clause 4, which indicated quite clearly that early repayment of the outstanding loan and interest by the plaintiff was permitted. As such, I found that the various arguments by the defendant that the plaintiff was not allowed to repay the loan early were rather spurious. Indeed, these arguments obscured the true objection that the defendant was raising, which was that the plaintiff was not permitted to repay the loan and redeem its mortgage early, *unless* it also made full payment of the full interest over the entire 12-month tenor of the loan.

42 The real question in dispute before the court in these proceedings was the amount of interest to be paid by the plaintiff in the case of early repayment. Was the full interest over 12 months already earned by the defendant upon the full disbursement of the loan on 17 May 2021, such that any early repayment by the plaintiff would require the payment of the principal and the full 12 months of interest (which worked out to S$10,080,000, being 3.5% interest per month for 12 months in relation to the principal loan amount of S$24m)? Put another way, had all the interest over the 12-month tenor of the loan already *accrued* by then? In my judgment, the answer to this question lay in clause 5. More specifically, clause 5.1.1 of the Loan Agreement provided that "[i]nterest on the Loan *shall accrue from day to day* and shall be *calculated on the basis of a 365-day year and the actual number of days elapsed*" [emphasis added].[95] This made it quite clear that interest was incurred and calculated based on the

[94] Wong Kee Chet's 1st Affidavit at page 60.

[95] Wong Kee Chet's 1st Affidavit at page 60.

"actual number of days elapsed" and therefore supported the interpretation that interest payable by the plaintiff as of the date of repayment was to be calculated *up to that date*. If the intent of the parties was that all 12 months of interest was incurred upon the disbursement of the loan, clause 5.1.1 would not have been worded in the way it was. Instead, it would have utilised words to the effect that the interest for the entire loan tenor would *accrue* upon the disbursement of the loan, save that payment of such interest would be made in monthly instalments.

43 I was unable to accept the defendant's arguments that the absence of a term in the Loan Agreement that the loan could be prepaid early would indicate that there was no option of payment of anything less than 12 months of interest. I found that such an argument was neither here nor there, and it ignored the words used in clause 5.1.1 as to how and when interest would accrue. As for the defendant's argument that the phrase "actual number of days elapsed" was to take into account the possible extension of the loan tenor for a further 12 months, I did not see how this would follow logically from these words used in clause 5.1.1. After all, an extension of the loan tenor by 12 months would simply mean, if one was to follow the flow of the defendant's arguments, that the interest over the next 12 months would again accrue immediately at the beginning of the second 12-month period.

44 As for the defendant's reliance on the first and third sentences in clause 5.1.1 (see [14] above) respectively that interest was chargeable "at the rate of 3.5% per month" and that "[i]nterest shall be payable in advance at the start of each calendar month and on the Due Date", I found that this simply indicated the rate of interest and when it fell due to be paid. These words do not determine how interest would be calculated if early repayment was made on any specified date that may be agreed by the parties as the date of redemption. For that, one

has to refer to the second sentence in clause 5.1.1 which deals with the precise question of when interest accrues, which is "day to day", and based on "the actual number of days elapsed". The latter is clearly a reference to a calculation of the accrued interest up to a particular date, such as the actual date of repayment of the loan and redemption of the mortgage.

45 The defendant then referred to clause 2.1.5 of the Loan Agreement, which it claimed required the plaintiff to provide eleven post-dated cheques towards interest for the 12-month loan tenor as a condition precedent for the disbursement of the loan (see [36] above). This was not actually complied with by the plaintiff, but the defendant nevertheless disbursed the loan.[96] I found that the clause did not assist the defendant's suggested interpretation of the Loan Agreement. Clause 2.1.5 stated that the post-dated cheques were for "monthly Interest payments falling due pursuant to *Clause 5.1.1*" [emphasis added] (see [15] above). Thus, clause 2.1.5 simply pointed back to clause 5.1.1 and it was that latter clause that had to be examined in order to determine when interest accrued on the loan and how it was to be calculated up to any particular date. In this regard, I agreed with the plaintiff's submission at the hearing that, if there was any early repayment of the loan and the accrued interest up to the date of such repayment, the plaintiff would clearly be entitled to countermand all uncashed post-dated cheques, if such cheques had indeed been given to the defendant prior to the loan's disbursement.

The pre-contractual negotiations

46 The defendant also argued that, in interpreting the contractual provisions, regard should be had to the parties' negotiations leading to the

[96] Edward Lee's 1st Affidavit at para 64.

signing of the Loan Agreement. According to the defendant, these pre-contractual negotiations purportedly showed that parties had agreed on payment of interest for the full loan tenor even in the event of early repayment.

47 As already mentioned (see [41] above), the starting point when the court approaches an issue of interpretation of the contract is the text that the parties have chosen to use in the contractual document. However, it is permissible for parties to refer to the relevant context in which the contract was entered in order to give effect to the intention of the parties, as objectively ascertained. This is provided that the relevant contextual points are clear, obvious and known to the contracting parties. The well-known requirements for reference to extrinsic evidence for contractual interpretation were laid down by the Court of Appeal in *Zurich Insurance* (at [125], [128]–[129], [132]) and bear reiteration. First, the evidence had to be relevant. Secondly, the evidence had to be reasonably available to all the contracting parties. Thirdly, the evidence had to relate to a clear or obvious context.

48 Under Singapore law, it does appear that reference to the pre-contractual negotiations of the parties *may* be permissible, if the requirements for reliance on extrinsic evidence have been fulfilled (see *eg*, *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [23(c)]; see also *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [62]). I thus did not accept the submission by the plaintiff that reliance on pre-contractual negotiations between the plaintiff and defendant would necessarily violate the parol evidence rule, which is encapsulated in s 94 of the Evidence Act 1893 (2020 Rev Ed) ("EA"). It all depends on the purpose for which the extrinsic evidence is referred to. If the defendant was relying on the evidence of negotiations to introduce new terms into the Loan Agreement, I would agree with the plaintiff that such an attempt

should be rejected because of the parol evidence rule. Not only that, the parties had also specifically included an "entire agreement" clause in the Loan Agreement at clause 21 (see [16] above). The effect of a usual "entire agreement" clause is to preclude any party to the contract from asserting that there are other terms which formed part of the contractual bargain between the parties, but which were not included in the written contractual document (see *eg*, *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") at [25]). Clause 21 of the Loan Agreement was such an "entire agreement" clause and had that intended effect.

49 If, on the other hand, a party is referring to extrinsic evidence in the form of pre-contractual negotiations as an aid to interpret a particular clause or expression used in the contractual document, that would be allowed. That would not run afoul of the parol evidence rule (see s 94(*f*) of the EA) or the "entire agreement" clause in clause 21 of the Loan Agreement (see *Lee Chee Wei* at [41]). However, it is important to bear in mind that the reference to the pre-contractual negotiations must not only satisfy the three requirements for the admission of extrinsic evidence as set out in *Zurich Insurance,* but it is also limited to assisting in the interpretation of a term, a clause, a phrase, a sentence or some other expression, that the parties have used in the contractual document. Hence, the party seeking to rely on the extrinsic evidence in the form of pre-contractual negotiations for the purpose of interpretation must be clear in identifying the particular term, clause, phrase, sentence or expression, that the extrinsic evidence seeks to elucidate in terms of the meaning to be ascribed to it (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [72]–[74]). Otherwise, the reference to the pre-contractual negotiations would often stray into attempts to persuade the court to

re-write the contract by the introduction of terms that are not found in the written document (see *Zurich Insurance* at [122]).

50 In this case, the defendant submits that its reference to pre-contractual negotiations was not an attempt to introduce a term into the Loan Agreement, but it was to assist in the interpretation of the contractual document. As I have already stated, this is permissible. However, the defendant made no serious attempt to identify exactly which clause or term or expression in the Loan Agreement its reference to the pre-contractual negotiations seeks to assist in interpretation. In my view, this was an insurmountable hurdle in the defendant's attempt to refer to the pre-contractual negotiations on the interest payable if there was early repayment. Be that as it may, I did proceed to review the evidence of pre-contractual negotiations on this issue of interest that the defendant sought to rely on to determine if the requirements for their admission as extrinsic evidence were otherwise met. I set out the evidence in the record of such negotiations in the following paragraphs.

51 As earlier mentioned (see [8] above), negotiations began in early April 2021. The possibility of early repayment was raised in a WhatsApp exchange on 21 April 2021 between Tan, who as explained above (at [8]) was one of the parties who represented the plaintiff in negotiations, and Lee, who as earlier explained (at [8]) is the chairman and executive director of the defendant and who was intimately involved in the negotiations.[97] Tan stated that " … the 3.5% [interest rate] is killing both parties" and appeared to suggest the inclusion of the option to make early repayment by saying "[t]hen u can charge them 3 mths also if [*sic*] incase earlier redemption". To this, Lee responded:

[97] Edward Lee's 1st Affidavit at page 100.

> We can just do as agreed. Then when your funds ready for early redemption we can discuss again. Of course I want money back early so I can reinvest in stocks

52 The initial draft of the Loan Agreement was prepared by the defendant's solicitors and sent to the plaintiff's solicitors on 3 May 2021.[98] The key terms that had been agreed upon included the provision of a Cashier's Order of S$20 million in favour of CIMB and an interest rate of 3.5% per month for a loan tenor of 12 months.[99] On 6 May 2021, the plaintiff's solicitors wrote back with a revised draft term sheet.[100] The key revision in that term sheet was the inclusion of a prepayment clause.[101] Lee objected to the inclusion of the prepayment clause. In an email dated 6 May 2021 to Dorothy Tay of LegalWorks and copying Sen and Tan, Lee stated:[102]

> …
>
> 2) NO PREPAYMENT CLAUSE. WE CAN NEGOTIATE THIS WHEN [THE PLAINTIFF] HAS THE RESOURCES TO PAY …
>
> …

53 Sen replied to Lee's email later that same day. In response to the portion of Lee's email that has been reproduced above at [52], Sen replied:[103]

> [The plaintiff's] counsel requested us to agree on some broad principles on this. We told them that this was discussed.

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[98] Edward Lee's 1st Affidavit at para 30.

[99] Edward Lee's 1st Affidavit at para 28.

[100] Edward Lee's 1st Affidavit at para 32.

[101] Edward Lee's 1st Affidavit at para 32.

[102] Edward Lee's 1st Affidavit at page 137.

[103] Edward Lee's 1st Affidavit at page 145.

54 On 9 May 2021, the plaintiff's solicitors sent a revised draft term sheet to the defendant's solicitors.[104] Under "Tenure of Loan", which stated "1 year from the Disbursement Date with option to extend for a further 1 year", the plaintiff's solicitors added the following sentence:[105]

> The Borrower can redeem the loan at the end of three months on payment of a prepayment penalty of [3.0%].

55 Next to that sentence, the plaintiff's solicitors included what appears to be a comment, stating:[106]

> Please note this is a first charge with 42.0% annual interest. The borrower should [*sic*] atleast have the right to redeem it within a reasonable period. They should not be forced to service this ultra-expensive loan for 12 months

56 On 10 May 2021, Lee wrote to Dorothy Tay of LegalWorks, copying Sen and Tan, objecting to the inclusion of the prepayment clause:[107]

> …
>
> 2) The minimum 1 year period cannot change. We can negotiate when [the plaintiff] has the money and wants to pre pay or fully redeem. [The defendant] can reinvest the money so we would welcome negotiations of prepayment, but we will be negotiating from the fixed cancellation 12 month as agreed, there will be a discount, but that discount would be what the stock market and other opportunities are at that time. If [the defendant] can make 100% on another investment, we would take the prepayment to reinvest the money, but if opportunities are lower, the discount is lower, if no opportunities, then it would be the risk-free rate discounted.
>
> …

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[104] Edward Lee's 1st Affidavit at para 36.

[105] Edward Lee's 1st Affidavit at pages 161–162.

[106] Edward Lee's 1st Affidavit at page 162.

[107] Edward Lee's 1st Affidavit at page 164.

57 Subsequently on 10 May 2021, a WhatsApp exchange took place between Sen and Lee in which Sen said, "I understand the 3.5% / month for 12 months is not negotiable. I am waiting for [the plaintiff] to confirm on that".[108]

58 Later that same day, the plaintiff's solicitors sent a revised draft of the loan agreement to the defendant's solicitors.[109] The revised draft included a pre-payment clause as follows:[110]

> **Loan Tenor**
>
> …
>
> 4.2 Prepayment: The Borrower shall have the right, after three (3) months from the Disbursement Date, at any time and from time to time to repay the Loan in full, upon giving 1 month's prior written notice to the [*sic*] Lenderand payment of a prepayment fee equivalent to [*sic*] 3%of the Loan.

59 Lee responded in an email dated 11 May 2021 to Eva Wong of Drew & Napier:[111]

> …
>
> 3) We have already discussed this many times and this was agreed right from the start with the original term sheet. As at signing no prepayment. Both parties are open to negotiate the prepayment for full redemption or partial payment. Money has an opportunity cost. So if there are better opportunities when a prepayment is proposed, it would only make commercial sense for [the defendant] to encourage early repayment with no penalties just to get our capital back to re-invest. So the penalty would be discounted based on willing borrower and willing lender basis at the time of negotiations which would range between the full term penalty and zero penalty, depending on the comparative opportunities that are being forgone with capital stuck with this loan. [The defendant] is in the business

[108] Edward Lee's 1st Affidavit at page 235.

[109] Edward Lee's 1st Affidavit at para 39.

[110] Edward Lee's 1st Affidavit at pages 184–185.

[111] Edward Lee's 1st Affidavit at page 210.

> of rolling our capital by allocating to stocks, bonds, pre-IPOs, mezzanine, private equity, etc
>
> …

60 After this email, the matter was put on hold since parties could not agree on the commercial terms, as evidenced in an email dated 11 May 2021 from the defendant's solicitors to the plaintiff's solicitors stating, " … we are instructed to put the matter on hold; as parties could not come to an agreement on the commercial terms".[112] Eventually, the plaintiff agreed to removal of the proposed prepayment clause over WhatsApp group chat messages, where a message addressed to Lee stated "[s]ee revised terms below and confirm it's in order … tenure 12 months with no prepayment …".[113] Consequently, the finalised loan agreement did not include the proposed prepayment clause.

61 The difficulty I had in relation to the correspondence between the parties on this issue of interest that the defendant had relied on is that I found that they did not fulfil the requirement, set out in *Zurich Insurance*, of providing a clear or obvious context that would assist in the interpretation of any particular clause in the Loan Agreement. This is for several reasons.

62 First, it is quite apparent from the chronology of correspondence above that the issue of interest in the case of early repayment was not only the subject of correspondence exchanged between the parties, but also oral discussions that might have taken place between different individuals representing the plaintiff and the defendant. In other words, the picture presented to the court does not appear entirely complete in terms of the discussions between the parties on this issue. One indication of this is in Sen's email of 6 May 2021 (see [53] above)

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[112] Edward Lee's 1st Affidavit at page 209.

[113] Edward Lee's 1st Affidavit at page 216.

when he referred to discussions on the issue of interest in the case of early repayment. Another instance is in Lee's email of 11 May 2021 (see [59] above) where he refers to the fact that the parties had discussed the issue of interest "many times". In their affidavits, the parties had not elaborated on the contents of those discussions and whether any common understanding was actually reached on this issue in the course of those discussions.

63 Second, it does not appear to me from the written correspondence referred to by the defendant that they clearly show that the parties understood and intended that the plaintiff must pay the full interest for 12 months even in the event of early repayment. As mentioned (at [58] above), Drew & Napier had proposed the inclusion of a prepayment clause, which would fix the amount payable as a "fee" for prepayment at 3% of the principal amount of the loan. In reply, the defendant's Lee stated in an email dated 11 May 2021 to Eva Wong of Drew & Napier that "[a]s at signing no prepayment. Both parties are open to negotiate the prepayment for full redemption or partial payment … So the penalty would be discounted based on willing borrower and willing lender basis at the time of negotiations which would range between the full term penalty and zero penalty … ".[114] This was somewhat similar to what he had stated in his earlier email of 10 May 2021 to his solicitor, Dorothy Tay, on the same issue, which had been copied to some of the representatives of the plaintiff (see [56] above).

64 In short, it appears to me that Lee was suggesting that, if there was going to be early payment of the loan by the plaintiff, the parties could discuss, when that time came, how much interest would be paid by the plaintiff as a "penalty" for early repayment. I should say that it is clear from the use of the words "full

[114] Edward Lee's 1st Affidavit at page 210.

term penalty" and "zero penalty" in Lee's email of 11 May 2021 (see [63] above) that Lee must have been referring to whether the full amount of interest would be payable or interest only up the date of repayment. In other words, Lee was saying that the issue of the amount of interest would be up for discussion at that time. It is significant that Lee did not state that, upon early repayment, interest for the full loan tenor must be paid, but subject to any waiver by the defendant of its right to insist on the full interest after the parties had had an opportunity to discuss the amount of interest that it would be fair for the plaintiff to pay. Lee was proposing that the parties negotiate at that stage how much interest would be paid by the plaintiff.

65 I also noted the defendant's reliance on the plaintiff's representative's WhatsApp message as the plaintiff's purported acceptance that there would be no early repayment (see [60] above). Indeed, the WhatsApp message read "tenure 12 months with no prepayment". However, from my review of the parties' exchanges, it appears that there was no landing reached on the issue of how much interest would be payable in the event of an early repayment of the loan. The WhatsApp message did not unequivocally show that the plaintiff accepted that it would have to pay the full 12 months' interest if it tried to make early repayment. Further, the WhatsApp message followed closely after Lee's email of 11 May 2021 to Eva Wong of Drew & Napier stating his position on the inclusion of the prepayment clause. This suggested that the plaintiff was simply accepting Lee's position that no prepayment clause would be included in the Loan Agreement. In other words, I understood "tenure 12 months with no prepayment" in the WhatsApp message to simply mean that clause 4 would state the loan tenor of 12 months and the proposed prepayment clause was to be removed.

66 Third, there was a point in the negotiations after Lee's email of 11 May 2021 where the deal appeared to have stalled because of the lack of agreement on the commercial terms. This is evident from the email from Dorothy Tay's email dated 11 May 2021 referred to above (at [60]), where she referred to the matter as being "on hold". It is unclear as to what happened next or what discussions might have taken place, or what compromises might have been reached, but from the correspondence on the record, it appears that Drew & Napier later withdrew its proposed prepayment clause from the draft Loan Agreement. In a way, this demonstrates the lack of clarity as to the proper context to the eventual execution of the Loan Agreement. It is entirely unclear whether or not parties had reached some consensus on the issue of the amount of interest payable in the case of early repayment, or perhaps, whether each party might have taken advice from their own counsel and was content to execute the Loan Agreement in its final form, confident that its legal position on this issue was protected.

67 The difficulties that the court faced in this case when determining the context in relation to the issue of interest payable illustrates the sometimes intractable problems that one has to deal with when examining pre-contractual negotiations. As pointed out by counsel for the plaintiff, pre-contractual negotiations often reflect a dynamic process of bargaining, where parties' positions are changing over time and their views are divergent. The task for the court is to determine whether one can discern a clear or obvious context on how to interpret the Loan Agreement insofar as the issue of the amount of interest payable is concerned. The best that I could ascertain is that the parties appeared to be content to leave the question of the "fee" or "penalty" payable as a matter for further discussion if the plaintiff chose to make early repayment. It follows from this that there was no consensus reached on how much interest would be

paid in the case of early repayment. In other words, one cannot say that the pre-contractual negotiations provided a "clear and obvious" context on how to interpret the Loan Agreement insofar as it concerned the question of the amount of interest payable if there was to be early repayment.

The appropriate date of redemption

68 In light of the proper interpretation of the Loan Agreement, I found that the defendant had, by issuing the Redemption Statement which insisted on the plaintiff paying interest for the full loan tenor,[115] wrongfully refused to accept early repayment of the loan and redemption of the mortgage which would otherwise have taken place on 23 July 2021. Not only that, I found that the defendant was egregiously wrong, by insisting in the Redemption Statement that the plaintiff was liable for default interest. Clause 5.1.2 of the Loan Agreement only entitled the defendant to charge default interest "if [the] Borrower shall fail to repay the Loan by the Due Date", and the Due Date was 16 May 2022. Thus, in my view, it could not be seriously contended that the defendant was entitled to charge default interest based on the terms of the Loan Agreement for the late payments of interest instalments that fell due on 17 June 2021 and 17 July 2021. Simply put, the time when the defendant could charge default interest had not arrived. Default interest was only chargeable if the terms of the Loan Agreement provided for it, and in this case, clause 5.1.2 was clearly inapplicable. I should add, for completeness, that the parties had made submissions on whether clause 5.1.2 was a penalty clause. However, given my finding that the clause was inapplicable in the circumstances, the issue as to whether clause 5.1.2 was a penalty clause did not arise.

[115] Edward Lee's 1st Affidavit at page 270.

69 It was important to bear in mind that, on the facts of this case, the plaintiff and defendant had agreed to an early repayment date of 23 July 2021. This was clear from the fact that the plaintiff had offered by its solicitors' letter of 16 July 2021 to repay the loan and accrued interest on 23 July 2021. On 19 July 2021, the defendant's solicitors accepted the date of 23 July 2021 as the date where early repayment could take place (see [23] above). On that basis, I found that the defendant should only have charged interest on the loan owing up to 23 July 2021. If there had been due payment by the plaintiff of the principal and interest accrued, the defendant would have been obliged to permit redemption of the mortgage on that date.

70 However, on the face of the documents before the court in these proceedings, the written evidence did suggest that the plaintiff only had the funds to make payment of the loan and interest on 2 August 2021, and not 23 July 2021. Counsel for the plaintiff acknowledged at the hearing that there were only two documents before the court indicating the sources of the plaintiff's financing. The first was a letter of offer from VM Capital dated 13 July 2021[116] and the second was an investment agreement between the plaintiff and PT.Organik Semesta Subur ("PT Organik") dated 2 August 2021.[117] The VM Capital letter of offer was for a loan of S$20 million, with disbursement of only S$18,199,200 after a deduction of upfront interest and the facility fee.[118] This sum fell short of the plaintiff's own calculation of the amount to be repaid on 23 July 2021, which was S$25,018,000.[119] Rather, it was the investment agreement with PT Organik which gave the plaintiff access to further funding

[116] Wong Kee Chet's 1st Affidavit at page 116.

[117] Wong Kee Chet's 3rd Affidavit at page 27.

[118] Wong Kee Chet's 1st Affidavit at page 117.

[119] Originating Summons, prayer 4.

in the amount of S$10,000,000, and thus would have allowed it to make early repayment of the loan and accrued interest. However, as mentioned, it appeared from the date of the investment agreement with PT Organik that it was only executed on 2 August 2021.

71 At the hearing, counsel for the plaintiff accepted that seven days from 2 August 2021 would have been a date when full repayment could have been made, *if* the court were to come to the view that the plaintiff would only have been able to make full repayment once the investment agreement of 2 August 2021 with PT Organik was entered into. Of course, I should caveat that counsel did *not* accept that the plaintiff would not have been able to make full repayment on 23 July 2021, if there had been no dispute as to the amount repayable. Be that as it may, in my judgment, given the written evidence before the court as to the plaintiff's funding sources, it would not have been right to stop interest from running on 23 July 2021 or 2 August 2021. Instead, I ordered that interest at the rate stipulated under the Loan Agreement was to run until 9 August 2021, which I found to be the date that the plaintiff *would* have been able to make full repayment to the defendant of what was due under the Loan Agreement.

The issue of a valid tender by the plaintiff

72 There was a further issue that was raised by the defendant on the question of the amount of interest due. The defendant argued that interest on the loan did not, in any event, stop running until the date of my decision in these proceedings *unless* there had been a valid tender of payment made by the plaintiff. The defendant submitted that there had not been a valid tender of the amount due under the Loan Agreement, including the interest owed, even if one was to assume that interest was only to be calculated up to the agreed redemption date of 23 July 2021. This was because it appears from the

documents produced by the plaintiff in these proceedings that the plaintiff did not have the funds available to repay the defendant on 23 July 2021. The defendant argued that the plaintiff's letter of 16 July 2021 offering to redeem the loan on 23 July 2021 was a sham.

73 I did not accept the defendant's submission. In my view, the issue of whether there had been a valid tender by the plaintiff that stopped interest on the loan from continuing to run from 23 July 2021 did not arise.

74 The concept of a valid tender is explained in *Fisher and Lightwood's Law of Mortgage* (Wayne Clark ed) (LexisNexis Butterworths, 13th Ed, 2010) ("*Fisher and Lightwood*") at para 47.37 as follows:

> Upon the contractual date of redemption or upon the expiration of the notice of intention to redeem, the mortgagee is taken to know the amount due to him. If he unjustifiably refuses to accept an unconditional tender of all that is due, it will be at his own risk as to the costs of any necessary redemption action.
>
> …
>
> Interest ceases to run upon the mortgage debt from the time at which a proper tender of the whole amount due is shown to have been made …
>
> [internal citations omitted]

75 Further explanation as to when this principle is applicable is provided in Edward F. Cousins & Ian Clarke, *Cousins on the Law of Mortgages* (Sweet & Maxwell, 3rd Ed, 2010) at para 30–37:

> A mortgagor exercises his right to redeem in one of two ways—either (i) out of court, by inducing the mortgagee to accept a tender of the money due under the mortgage; or (ii) by bringing the mortgagee into court in an action for redemption and afterwards complying with the court's order for the payment of the mortgage debt. He has, of course, no right whatever to redeem, either at law or in equity, until the day named in the mortgage as the date for repayment. Before that date he cannot maintain an action for redemption against the mortgagee, while

> if he tenders to the mortgagee a sum representing principal and full interest right up to the contract date, plus costs, the latter is not bound to reconvey the security nor, indeed, to accept the money. The case is, however, different if the mortgagee by demanding payment or by taking steps to enforce payment (for example, by taking possession) himself disturbs the relation between the parties set up by the contract. The mortgagor may then redeem at once and need only tender the amount of the principal, plus interest *up to the date of the tender* and costs.
>
> [internal citations omitted; emphasis in original]

76 It was also explained in *Fisher and Lightwood* (at para 47.37) that there are several requirements in order for there to have been valid tender by the mortgagor:

> … from the time of the tender the money [must have been] kept ready by the mortgagor and no profit [must afterwards be] made from it. Upon proof to the contrary interest will still run. The money should be paid into court if there are proceedings pending in which this can be done or put on deposit, the mortgagor accounting for the interest thereon to the mortgagee. There must be an actual tender of the money due. The court will not stay the interest on proof of a proposal by the mortgagor to set off against the mortgage sums due to him from the mortgagee on another account between them.
>
> [internal citations omitted]

77 Under the terms of the Loan Agreement in this case, I have already found that the plaintiff was entitled to make early repayment by repaying the principal amount of the loan and the interest calculated up to the date of repayment. Upon doing so, the plaintiff is entitled to redeem the mortgage on the Property. The circumstances in this case did not involve the borrower/mortgagor raising any defence of tender in a claim brought by the lender/mortgagee to enforce its security. Instead, the plaintiff of its own accord notified the defendant of its intention to redeem the mortgage on 23 July 2021, which was prior to the expiry of the date when the loan was due for repayment. This was not a situation where the defendant had already exercised any right of enforcement in respect of mortgaged property. In response to the plaintiff's

request for early payment and redemption, the defendant raised no objection to the date of 23 July 2021 that had been proposed by the plaintiff as the date of redemption, and issued a redemption statement.[120] Crucially, at that time, the defendant did not raise any challenge as to the plaintiff's ability to make payment. The defendant did not ask for proof of the plaintiff's ability to fund repayment. It was only much later, on 23 September 2021, when the parties were already at loggerheads on the amount of interest due, that the defendant first raised the issue of the plaintiff possibly lacking funds.[121] That being so, given the circumstances of this case, I found that no issue actually arose as to whether the plaintiff had made a valid tender to make payment of the amount owed as of 23 July 2021. The only issue in dispute between the parties was the proper amount of interest due as of the early repayment date of 23 July 2021, and not any question of whether the plaintiff had adequate sources of financing.

78 It is true that I have found (at [70] above), from the documents produced in these proceedings, that the plaintiff appears to only have had sufficient available financing from 2 August 2021. This did not mean, however, that the offer to repay the loan and redeem the mortgage by its letter of 16 July 2021 was a sham. It might well have been the case that the plaintiff could have arranged its financing from PT Organik to be available by 23 July 2021, *if* the defendant had produced an accurate redemption statement on 19 July 2021 instead of demanding an amount that was well in excess of what was due. The matter of financing had been overtaken by the emergence of the dispute between the parties over the amount of interest payable. As things turned out, the plaintiff could only produce in these proceedings the letter of additional financing from PT Organik dated 2 August 2021 (see [70]). This evidence could

[120] Edward Lee's 1st Affidavit at page 269.

[121] Edward Lee's 1st Affidavit at page 272.

not be ignored by the court. As such, I fixed the date of redemption as 9 August 2021, being seven days after the additional financing became available. That was the earliest date which I determined that the plaintiff would have been able to make repayment of what it owed to the defendant under Loan Agreement and to seek a redemption of its mortgage. This meant that the defendant would suffer no prejudice, or at least none that was a result of the plaintiff's conduct, because interest would continue to accrue on the loan until 9 August 2021.

79 In its submissions, the defendant cited a number of cases on how the principle as to a valid tender applied. I have set out the key facts in those cases and what they decided below (see [80]–[84]). But, a review of those authorities would show that they deal with rather different circumstances. In most of them, the mortgagee's right to enforce the mortgage had arisen because the underlying loan obligations had fallen due. The mischief that the courts are concerned with in those situations is that, once the time had passed for the mortgagor or borrower to discharge its payment obligations, the mortgagor should not be allowed to put up a tender that it does not intend to or cannot fulfil, with the effect of reducing the intervening interest. It was in that context that the question arose in those authorities cited by the defendant as to whether there was indeed evidence that the mortgagor had genuinely been ready, willing and able to discharge its payment obligations such that it could then avail itself of the defence of tender. On the facts of this case, I have found that the plaintiff did have access to the necessary financing by 2 August 2021, and would have been able to repay the owed amount and redeem the mortgage by 9 August 2021.

80 In *Kinnaird v Trollope* [1889] 42 Ch 610, the mortgagee had commenced an action to recover the principal and interest from the mortgagors upon the insolvency of a third party to whom the mortgagors had sold and assigned the equity of redemption in the mortgaged premises. In response, the

mortgagors took out a summons to make repayment within one month of the principal with interest to date of payment, and costs, and thereby stay the enforcement action and redeem the property. The summons was heard on 18 November 1886, but no order was made because the mortgagee refused to reconvey the property. The matter was eventually decided on a later date and the court ordered that an account should be taken of what was due to the mortgagee, and a certificate was issued. The mortgagors took issue with the computation of interest and argued that interest after 18 November 1886 should be disallowed. The issue of whether there was valid tender on 18 November 1886 that stopped the running of interest thus arose. Stirling J held that the mortgagors' summons to stay the mortgagee's proceedings was not equivalent to a tender by them, and so interest must be paid by the mortgagors up to the date of actual repayment.

81 Turning to *Edmondson v Copland* [1911] 2 Ch 301 ("*Edmondson*"), the mortgagee had given the mortgagor notice to pay off the mortgage, and that if payment was not made within three months, the mortgagee intended to sell the property. A week after the expiry of the three-month period, the mortgagor tendered the amount of principal and interest to date, which the mortgagee refused to accept. The mortgagor commenced a redemption action. It was decided and a certificate rendered to the effect that good tender had been made by the mortgagor and refused by the mortgagee, and interest was not to run subsequent to the tender. The mortgagee then took out a summons to vary the certificate. Joyce J held that there had been "good tender" but that the mortgagor was liable for interest from the date of tender to the date of actual payment because he had not actually set the money aside in that period.

82 More recently in *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (in liq) (No 5)* [2008] FCA 1700 ("*Australian*

Securities and Investments Commission"), receivers had been appointed to wind up an investment scheme and were directed to sell the principal asset of the investment scheme. The first and second mortgagees with loans secured over the principal asset were ordered to deliver up duly executed discharges of mortgage. There was a dispute over the sum that the second mortgagees had secured over the principal asset. Pending the resolution of the dispute, the balance of the proceeds of sale that remained after the first mortgagee had been paid were kept in an interest-bearing account. The sum owed to the second mortgagees was determined, and the sum was paid out of the interest-bearing account to the second mortgagees accordingly. The issue was whether the second mortgagees were entitled to interest on the debt from the date that the sum was paid into the interest-bearing account till the date of actual repayment. The Federal Court of Australia considered the general principle that interest runs till the mortgage is discharged by actual payment, as well as the exception of refusal of valid tender which will result in interest ceasing to run. However, Finkelstein J was also of the view that "tender of the amount due is not always required" and decided that tender was not required in the case at hand because the second mortgagees had made clear that they would not discharge the second mortgage unless they received the disputed sum that they claimed was due to them. The judge concluded that, at the point when the sale proceeds were paid into the interest-bearing account, the obligation to continue paying interest under the mortgage was discharged.

83 In *Iain Lawrie Shearer & Ors v Spring Capital Ltd & Ors* [2013] EWHC 3148 (Ch) ("*Iain Lawrie Shearer*"), the claimants were guarantors of loans carrying significantly high interest rates that had been made by the lender to certain companies. When the lender found out that the companies had failed, it made demands for repayment. The effect of these demands was that the sums

due under the various loan agreements became immediately repayable, and the lender became entitled to enforce security that it held. The claimants negotiated with the lender and entered into a standstill agreement, pursuant to which the lenders agreed not to enforce any security for a period of time, subject to the terms and conditions of the agreement. One day before the standstill period came to an end, the claimants sent a letter of tender to the lender, confirming that they held the relevant sum and indicating that the securities which the lender held would fall to be redeemed upon acceptance of the tender. However, the lender disputed the correct sum that was due and refused to accept the tender. The claimants then commenced redemption proceedings, while the lender brought an application seeking summary judgment (or striking out in the alternative) on the allegations that valid tender had been made. Daniel Alexander QC, sitting as a deputy judge of the Chancery Division of the English High Court, refused to grant summary judgment or striking out. Instead, he granted the interim injunction sought by the claimants to restrain the lender from taking enforcement measures against any of the claimants' assets charged to the lender. The court held that there were triable issues on, among others, whether the absence of a costs offer was fatal to the tender and whether the tender was valid if it was made conditional upon execution of a release of existing security held by the lender.

84 For completeness, I note that the case of *Young v Queensland Trustees Ltd* [1956] 99 CLR 560 was also cited by the defendant. However, the context in which tender was discussed was quite different. The executors of the lender's estate sought repayment on various loans made to the borrower. The borrower admitted to the loans but argued that he had repaid those loans. The trial judge disbelieved the borrower's story. The borrower then appealed, arguing that the trial judge should have accepted his uncontradicted testimony to the effect that

he had repaid the money, and that the burden of proving otherwise lay on the plaintiff executors. The High Court of Australia considered whether the executors bore the burden to disprove that payment had been made, or whether the borrower bore the burden of proving that payment had been made. The court considered that, although it is the case that in an action for breach of contract, the claimant must prove the breach, "the common law does not and never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract". The court found that, if indebtedness in a sum as such were a mere breach of contract, it would not be necessary for a defendant who sets up a plea of tender to bring into court the amount of debt with his plea. The court ultimately found that the burden lay on the borrower to prove his defence, and that he was unable to do so.

85 I should add that the defendant argued that there was no valid offer of redemption, whether one takes the redemption date as 23 July or 9 August 2021, because VM Capital would only have disbursed the funds if the defendant had consented to a simultaneous release of the mortgage. The defendant argued that this meant that the offer to redeem was not unconditional.[122] The defendant also argued that the funds for repayment had not been set aside.[123] In other words, the plaintiff had not drawn down on its sources of financing and set the moneys aside for the purposes of making repayment, pending the resolution of the dispute over the quantum of interest payable.

86 I found these arguments to be rather divorced from commercial reality. One cannot seriously expect the plaintiff's financiers to disburse funds without some assurance that the defendant would discharge its mortgage over the

[122] DWS at para 133(iv).

[123] DWS at para 133(iii).

Property. After all, the plaintiff's financiers would also be taking security over the Property in exchange for disbursing their funds. Indeed, VM Capital, in its letter of offer, required its facility to be secured by a first legal mortgage on the Property (among other security) and required as a condition precedent to disbursement of the loan that the necessary consents be obtained for its mortgage.[124] This is hardly surprising given that the subject of the financing involves the Property.

87 *Iain Lawrie Shearer* (see [83] above) was a decision on an interlocutory application for summary judgment or, in the alternative, striking out. It does not stand for the proposition that an offer for repayment which is subject to a discharge of the mortgagee's existing security would never qualify as a valid tender because it would not be regarded as an unconditional offer. In fact, in *Iain Lawrie Shearer*, the deputy judge provided his preliminary view (at [219]) that a mortgagor *can* validly make a tender subject to a condition of simultaneous release of security by the existing lender. He then went on to explain (at [226]–[227]):

> I think it is clear that it is perfectly reasonable to impose such a condition and at the very lowest arguable that, if money is only available on fulfillment of that condition, that will not mean that it is to be treated as unavailable for the law of tender.
>
> … it is inherent in the very nature of a redemption that there will be no period of time at which borrower or lender should be at risk (on the one side of non-payment and on the other of retention of the security for the debt). It can therefore be seen to be inherent in the act of tender that the normal expectation would be mutual simultaneous exchange were there to be acceptance.

88 In my view, it would depend on the condition in question that qualifies the commitment to pay, as well as the surrounding circumstances. In each case,

[124] Wong Kee Chet's 1st Affidavit at pages 120; 124.

the court has to determine whether the condition was one that showed that the offer for repayment was not genuine, or that the condition was not a reasonable one. On our facts, I was completely unpersuaded by the defendant's arguments that the offer for repayment by the plaintiff was not genuine. The defendant also failed to show that the plaintiff had imposed any conditions to repayment that would be regarded as unreasonable.

89 I also found it rather absurd for the defendant to contend that the plaintiff ought to have drawn down on its sources of financing and set them aside for repayment of the amount due under the Loan Agreement, even while the dispute with the defendant was ongoing. That would not be sensible from a commercial point of view. First, the plaintiff's new financiers would not have disbursed the funds unless there was certainty as to the amounts owed to the defendant, and obtained assurance that the defendant would discharge its mortgage upon being repaid what was properly due. Secondly, even if such disbursement of funds was allowed by the financiers well ahead of actual repayment to the defendant, one surely cannot insist that the plaintiff must take on the burden of incurring the interest and other charges on the newly drawn funds, pending the resolution of the legal dispute with the defendant, simply to demonstrate that it had set aside funds for repayment. Indeed, had the plaintiff drawn down on the VM Capital funding, it would have incurred interest of close to S$1 million between the agreed redemption date of 23 July 2021 and the date of my decision in these proceedings on 24 February 2022, given that the letter of offer stipulated interest at a rate of at least 0.667% per month (with VM Capital reserving the right to change the rate of interest).[125] I prefer the more modern approach taken by Finkelstein J in *Australian Securities and Investments Commission*, as

[125] Wong Kee Chet's 1st Affidavit at page 117.

compared to the views of Joyce J in *Edmondson*, that it is not always the case that an actual tender of the amount due is required in order for interest on the loan secured by the mortgage to cease running. Although these two cases did not directly address a situation where a tender is made on the basis that new lenders are willing to provide funds to pay off the existing loan, there was acknowledgment by the deputy judge in *Iain Lawrie Shearer* of the difficulties faced by courts in applying the principles on tender in the context of modern lending practice (at [193]–[194]):

> The basis and ambit of the proposition that a tender is invalid if draft release documents are not provided in advance of the tender of the outstanding sum has gone unexamined in the cases cited to me for many years …
>
> In the 21st century of complex re-financings, the real problem may not be borrowers making spurious tenders … but lenders keeping people from redeeming their assets with spurious objections, a right by which both pre- and post- 18th century equitable jurisprudence has laid great store.

90 In view of the above analysis, if the borrower/mortgagor is able to demonstrate that he has been able to obtain an offer, or offers, of re-financing of the amounts owed to the lender/mortgagee, and the borrower/mortgagor then offers to make repayment on a specified date, that would, in my view, ordinarily be sufficient to stop the incurrence of interest on the loan amount as at that date. This is, of course, subject to any terms of the loan or mortgage that might stipulate otherwise. The mere fact that the offer to make repayment does not fall within the paradigm case of a valid tender where a borrower attends upon the lender with the full sum in hand ought not to be a bar against a finding that the borrower has made a valid tender. The mischief that the principle is concerned with, as already mentioned (at [79] above), is to prevent specious tenders made with the intention of reducing the intervening interest, but with no genuine intent to repay at the stated time.

Conclusion

91 In the circumstances, I allowed the plaintiff's application. I ordered the defendant to prepare a redemption statement of the amounts due as at 9 August 2021, in accordance with the interpretation of the Loan Agreement as set out in my decision. I also ordered that the plaintiff was to make full repayment within 10 days of receipt of the redemption statement.

92 For completeness, I should note that I also found the defendant's appointment of receivers to be valid because, in accordance with the relevant contractual provisions in the Loan Agreement and mortgage documents executed, the plaintiff's failure to make interest payments on time for the months of June and July 2021 constituted events of default which entitled the defendant to appoint receivers (see [26] above). I therefore ordered that the defendant should be at liberty to apply for costs and expenses of the receivership to be borne by the plaintiff.

93 As for costs, the general principle is that costs follow the event. I therefore ordered the defendant to pay the plaintiff one set of costs for OS 1198/2021 and SUM 5731/2021, which was the plaintiff's successful application for an interim injunction to restrain the defendant from selling the Property, fixed in the amount of S$15,000, inclusive of disbursements.

Ang Cheng Hock
Judge of the High Court

Siraj Omar SC, See Chern Yang and Chan Yun Wen Charmaine (Drew & Napier LLC) for the plaintiff;
Lazarus Nicholas Philip and Elizabeth Toh Guek Li (Justicius Law Corporation) for the defendant.
