

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

[2021] SGHC 29

Suit No 297 of 2019

Between

NCL Housing Pte Ltd

... Plaintiff

And

- (1) Sea-Shore Transportation Pte
Ltd
- (2) Kashmire Merkaney
- (3) Sushela w/o Vijayarahavan

... Defendants

JUDGMENT

[Contract] — [Formation]

[Contract] — [Contractual terms]

[Contract] — [Unconscionability]

[Credit and Security] — [Guarantees and indemnities] — [Guarantor]

[Credit and Security] — [Guarantees and indemnities] — [Discharge]

TABLE OF CONTENTS

| | |
|--|-----------|
| INTRODUCTION | 1 |
| BACKGROUND | 2 |
| PARTIES | 2 |
| THE ALLEGED ORAL AGREEMENT | 3 |
| THE LEGAL DOCUMENTS | 4 |
| THE DEFAULTS IN PAYMENT | 5 |
| THE SUIT | 5 |
| THE ORAL AGREEMENT | 7 |
| THE ORAL AGREEMENT WAS ONLY BELATEDLY RAISED | 7 |
| MDM KASHMIRE’S CASE IS INTERNALLY INCONSISTENT | 8 |
| THE CONTEMPORANEOUS COMMUNICATIONS INDICATE THAT THE LEGAL DOCUMENTS WERE INTENDED TO HAVE FULL LEGAL EFFECT..... | 10 |
| THE EVIDENCE OF THE WITNESSES DOES NOT ESTABLISH THE ORAL AGREEMENT..... | 13 |
| UNCONSCIONABILITY AND RELATED DEFENCES | 17 |
| UNCONSCIONABILITY IN RELATION TO THE FORMATION OF THE PGs..... | 19 |
| <i>Impecuniosity</i> | 21 |
| <i>Depression</i> | 22 |
| <i>Independent legal advice</i> | 24 |
| <i>Infirmity, impairment, and the other party’s knowledge</i> | 24 |
| <i>Value of the transaction</i> | 24 |
| NCL DID NOT DAMAGE SST SUCH THAT SST COULD NOT REPAY THE LOANS | 25 |

| | |
|--|-----------|
| <i>NCL did not fail to provide assistance to restructure SST's business</i> | <i>27</i> |
| <i>NCL did not fail to provide \$500,000 in working capital for SST</i> | <i>28</i> |
| <i>NCL's Mr Choo and Mr Yang did not wrongly delay or refuse to co-sign SST's cheques</i> | <i>35</i> |
| <i>NCL was justified in intervening in SST's affairs as it did</i> | <i>38</i> |
| NCL'S CLAIM DOES NOT FAIL BECAUSE IT DID NOT ACHIEVE AN EXIT FROM SST, OR DID NOT RESPOND POSITIVELY TO SETTLEMENT PROPOSALS BY SST | 39 |
| <i>The letter of intent from Kerry-ITS</i> | <i>40</i> |
| <i>"Without prejudice" communications relied upon by Mdm Kashmire</i> | <i>43</i> |
| (1) The Logos proposal..... | 45 |
| (2) The HSBC proposal | 46 |
| (3) The RHB proposal | 47 |
| (4) The proposal from Mr Paraj Kakkar and Mr Teo Yi-Dar | 47 |
| MDM KASHMIRE'S COUNTERCLAIM..... | 49 |
| CONCLUSION..... | 49 |
| MERITS | 49 |
| COSTS | 50 |

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

NCL Housing Pte Ltd
v
Sea-Shore Transportation Pte Ltd and others

[2021] SGHC 29

General Division of the High Court — Suit No 297 of 2019
Andre Maniam JC
3, 4, 5, 10, 11, 12 November, 18 December 2020

11 February 2021

Judgment reserved.

Andre Maniam JC:

Introduction

1 The Merchant of Venice warns of the perils of standing guarantor for the debt of another. As guarantor, Antonio boldly promises a pound of his flesh. When that is demanded of him, he does not shy away from the promise he made, though it might cost him his life. What saves him, instead, is the interpretation placed on the guarantee.

2 The 2nd defendant, Kashmire Merkaney (“Mdm Kashmire”), did not take issue with the interpretation of the 20 personal guarantees (“PGs”) she had signed in favour of the plaintiff (“NCL”). Instead, she claimed that the PGs were

only “for show”, “mere formalities”, and not to be enforced.¹ She said NCL agreed to that as part of an oral agreement (“the Oral Agreement”). She also put forward other reasons for not being liable, that were focused on blaming NCL and its representatives.

3 Mdm Kashmire’s 20 PGs were in respect of 20 corresponding loan agreements, for loans totalling \$4,090,830.26 (or the “Loan Amount”) from NCL to the 1st defendant (“SST”) (“the Loan Agreements”). The Loan Agreements stipulated that the loans were to be repaid within a year, and that guarantees be provided. Similarly, Mdm Kashmire claimed that the Loan Agreements, like the PGs, were only “for show”, “mere formalities”, and not to be enforced – again, pursuant to the Oral Agreement. She said that SST was supposed to have three years or more to repay the loans, and that the loans were unsecured.

Background

Parties

4 SST was Mdm Kashmire’s husband’s family company. Mdm Kashmire was its managing director;² her husband, Balan Vijayarahavan Pillai (“Mr Balan”), was its chief operations officer;³ and the 3rd defendant, her mother-in-law, Sushela w/o Vijayarahavan (“Mdm Sushela”), was a director.⁴

¹ Affidavit of Evidence-in-Chief of Kashmire Merkaney (“Mdm Kashmire’s AEIC”) at para 12(x) in 2nd Defendant’s Bundle of Affidavits of Evidence-in-Chief Volume I (“2nd Defendant’s AEIC Bundle Vol I”) at p 14; Transcript, 4 November 2020 at pp 66 lines 17–32; p 67 lines 1–23.

² Mdm Kashmire’s AEIC at para 2 in 2nd Defendant’s AEIC Bundle Vol I at p 13.

³ Affidavit of Evidence-in-Chief of Balan Vijayarahavan Pillai (“Mr Balan’s AEIC”) at para 2 in 2nd Defendant’s AEIC Bundle Vol I at p 870.

5 By October 2016, SST was in debt and urgently needed funds. Mdm Kashmire and Mr Balan had discussions with NCL (through its representatives Choo Kim Hiong (“Mr Choo”) and Yang Tse Pin (“Mr Yang”)) for NCL to lend money to SST.

The alleged Oral Agreement

6 Mdm Kashmire and Mr Balan say that the discussions culminated in the Oral Agreement that:

- (a) the Loan Agreements and PGs would not be enforced,⁵ and
- (b) the Oral Agreement would prevail over the other legal documents,⁶ such as the Share Subscription Agreement (“SSA”)⁷ and Consultancy Agreement (“CA”).⁸

7 Mdm Kashmire’s case is thus that the legal documents were either unenforceable, or enforceable only to the extent that they recorded the Oral Agreement. Put another way, the Oral Agreement is all that really matters.

8 NCL’s Mr Choo and Mr Yang, on the other hand, say that the legal documents are effective according to their terms: the Loan Agreements, SSA,

⁴ Affidavit of Evidence-in-Chief of Choo Kim Hiong (“Mr Choo’s AEIC”) at para 6 in Plaintiff’s Bundle of Affidavits of Evidence-in-Chief (“Plaintiff’s AEIC Bundle”) at p 7.

⁵ Mdm Kashmire’s AEIC at para 12(vi) in 2nd Defendant’s AEIC Bundle Vol I at p 13.

⁶ Mdm Kashmire’s AEIC at para 12(ii) in 2nd Defendant’s AEIC Bundle Vol I at p 11.

⁷ 2nd Defendant’s Agreed Bundle of Documents (“2nd Defendant’s ABOD”) at pp 264–291; Plaintiff’s Agreed Bundle of Documents (“Plaintiff’s ABOD”) at pp 235–262.

⁸ 2nd Defendant’s ABOD at pp 254–262; Plaintiff’s ABOD at pp 263–271.

and CA each had entire agreement clauses (clauses 18, 17 and 15 respectively); in any event, the legal documents did record whatever was orally agreed upon.

The legal documents

9 NCL and SST entered into the Loan Agreements for the various sums lent by NCL to SST, and Mdm Kashmire and Mdm Sushela each signed 20 corresponding PGs. The Loan Agreements and PGs spanned a period from 29 November 2016 to 4 October 2017.⁹ The initial part of the Loan Amount was disbursed shortly before the first of the Loan Agreements and PGs were signed.¹⁰

10 NCL and SST also entered into the SSA and CA, both dated 10 March 2017. Mdm Kashmire did not say that the SSA and CA were “for show”, “mere formalities”, or unenforceable; but she claimed that the Oral Agreement would prevail over any inconsistent term in the SSA and CA.¹¹

11 According to clause 3.1 of each of the Loan Agreements, each loan was repayable within a year.¹² One alleged term of the Oral Agreement, however, is that payment was *not* due within a year. Instead, the loans were only to be repaid within three years (or more) from the date of the CA (10 March 2017). This is because the loans were allegedly repayable only from the consultancy fee of \$5,454,545 to be paid by SST to NCL under the CA, which SST had three years

⁹ Mr Choo’s AEIC at para 8 in Plaintiff’s AEIC Bundle at p 7; Mdm Kashmire’s AEIC at para 5 in 2nd Defendant’s AEIC Bundle Vol I at pp 4–5.

¹⁰ Transcript, 3 November 2020, p 32 lines 10–28.

¹¹ Mdm Kashmire’s AEIC at para 12(ii) in 2nd Defendant’s AEIC Bundle Vol I at p 11.

¹² 2nd Defendant’s ABOD at p 98; Plaintiff’s ABOD at p 18.

(or more) to pay.¹³ That is another way of saying that the *guarantors* would never have to pay anything: only SST would be liable.

The defaults in payment

12 In the event, SST did not repay any of the loans to NCL (within one year, three years, or at all); nor did it pay NCL the consultancy fee.

13 On 8 March 2019, NCL demanded payment from Mdm Kashmire and Mdm Sushela on the PGs,¹⁴ but no payment was made.

The suit

14 NCL sued SST, Mdm Kashmire, and Mdm Sushela. SST was however then placed in judicial management and NCL discontinued its claim against SST. NCL also discontinued its claim against Mdm Sushela, as there was some issue with her capacity to continue as a litigant.

15 NCL took its claim against Mdm Kashmire to trial, seeking the sum of \$4,774,303.54 (inclusive of interest to the date of writ, 18 March 2019), further contractual interest at the rate of 10% per annum pursuant to clause 3.2 of each of the Loan Agreements, and costs on a full indemnity basis pursuant to clause 11 of each of the PGs.¹⁵

¹³ 2nd Defendant’s Defence & Counterclaim (Amendment No. 1) (“D&CC”) at paras 9(b)–(c); Transcript, 3 November 2020, p 31 lines 16–19; 10 November 2020, p 101 lines 7–25; p 102 lines 1–10.

¹⁴ Plaintiff’s ABOD at pp 390–392 and 397–399.

¹⁵ Plaintiff’s Statement of Claim (“SOC”) at p 6.

16 Besides asserting that she was not liable on the PGs because of the Oral Agreement (on the grounds of breach of agreement, or estoppel, or misrepresentation),¹⁶ Mdm Kashmire contends that it was unconscionable for NCL to claim on the PGs.¹⁷ She claims that:

- (a) NCL caused severe detriment to SST's business which resulted in SST being unable to repay the loans;¹⁸
- (b) the transaction was unconscionable – it was at an undervalue and she entered into it impecunious, depressed, and lacking legal counsel;¹⁹ and
- (c) NCL obstructed third party proposals from which SST may have been able to obtain funds to repay the loans to NCL.²⁰

17 Mdm Kashmire further contends that NCL was in breach of its obligations under the SSA, CA and the Oral Agreement,²¹ which disentitled NCL from demanding payment under the PGs. She puts forward a counterclaim for rescission of the PGs, breach of the Oral Agreement, and misrepresentation.²²

¹⁶ D&CC at paras 19–30.

¹⁷ D&CC at paras 31–37.

¹⁸ Mdm Kashmire's AEIC at paras 21–22 in 2nd Defendant's AEIC Bundle Vol I at pp 18–19.

¹⁹ D&CC at para 36(d).

²⁰ Mdm Kashmire's AEIC at paras 32–45 in 2nd Defendant's AEIC Bundle Vol I at pp 22–28.

²¹ Mdm Kashmire's AEIC at paras 57–75 in 2nd Defendant's AEIC Bundle Vol I at pp 39–46.

²² D&CC at paras 49–60.

18 I will deal first with the Oral Agreement, and then with Mdm Kashmire’s other defences and her counterclaims.

The Oral Agreement

19 Mdm Kashmire’s principal defence rests on the alleged Oral Agreement, which she and her husband Mr Balan gave evidence of. Their position is however riddled with inconsistencies: it is internally inconsistent, it is inconsistent with objective or undisputed facts, and it is inconsistent with contemporaneous documents.

The Oral Agreement was only belatedly raised

20 The Oral Agreement was raised for the first time only after NCL sued. There is no reference to the Oral Agreement in the contemporaneous emails and WhatsApp messages,²³ and it was not even raised when NCL demanded payment through lawyers in March 2019.²⁴

21 On 18 April 2019, SST’s lawyers responded. By then, NCL had already sued. SST’s lawyers’ letter was marked “without prejudice save as to costs”, but it was included in Mdm Kashmire’s bundle of documents,²⁵ and she relied upon it as a defence.²⁶ The letter stated, “[o]ur client wishes to meet with your client in an effort to obtain global resolution of the matter”. It referred to measures taken “to try and arrange for an agreed global sum to be paid to [NCL]”. It said nothing about the Loan Agreements being “for show”, “mere formalities”, or

²³ Plaintiff’s ABOD at pp 628–718.

²⁴ Plaintiff’s ABOD at pp 383–385, 390–392 and 397–399.

²⁵ 2nd Defendant’s ABOD at p 678.

²⁶ Mdm Kashmire’s AEIC at para 38 in 2nd Defendant’s AEIC Bundle Vol I at p 23.

unenforceable, or that none of the monies lent were due yet. On Mdm Kashmire's case, SST had three years or more (from 10 March 2017, the date of the CA) to repay NCL the loans (see [11] above), and on that basis, no money would be due in April 2019 – it was less than three years since the CA, and moreover less than three years since the first loan on 29 November 2016. Yet SST's lawyers said nothing about this in the 18 April 2019 letter; instead they meekly suggested settlement. Why so, if the parties had agreed that nothing was due yet?

22 All this suggests that the Oral Agreement is an afterthought, and not genuine.

Mdm Kashmire's case is internally inconsistent

23 Mdm Kashmire admits that NCL had provided the Loan Amount of \$4,090,830.26 through the Loan Agreements.²⁷ This is inconsistent with her position that the Loan Agreements were all “for show”, “mere formalities”, and unenforceable.

24 Furthermore, she pleads that the Oral Agreement was entered into between the plaintiff and the defendants, *ie*, between NCL, SST, Mdm Kashmire and Mdm Sushela.²⁸ However, in her Affidavit of Evidence-in-Chief (“AEIC”), Mdm Kashmire says that it was SST that entered into the Oral Agreement with NCL.²⁹ If the Oral Agreement were between SST and NCL, then Mdm Kashmire would not have been a party to it. Moreover, she does not

²⁷ D&CC at para 6.

²⁸ D&CC at para 7.

²⁹ Mdm Kashmire's AEIC at para 12 in 2nd Defendant's AEIC Bundle Vol I at p 11.

say it was orally agreed that *she* could enforce rights given to SST in the legal agreements between SST and NCL, *ie*, the Loan Agreements, the SSA and the CA. None of these agreements purports to allow Mdm Kashmire to do so, and clauses 13 and 15 of the Loan Agreements and the SSA (respectively) expressly exclude the application of the Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed).³⁰ Mdm Kashmire says in her AEIC that the CA and the SSA were to set out certain obligations of NCL to SST,³¹ but she does not say that any obligations of NCL *to her* were also to be included.

25 Further, Mdm Kashmire claims that a term of the Oral Agreement was that she was to continue to occupy the position of managing director of SST, and Mdm Sushela was to continue to be a director of SST.³² Mdm Kashmire says that the purported guarantors would never have agreed to provide the PGs if they could be removed as directors.³³ This is, however, inconsistent with her position that the PGs were all “for show”, “mere formalities”, and unenforceable. Why would the signing of the PGs be conditional upon Mdm Kashmire and Mdm Sushela keeping their management positions in SST, if it were agreed that the PGs were unenforceable?

³⁰ 2nd Defendant’s ABOD at pp 100 and 275; Plaintiff’s ABOD at pp 20 and 246.

³¹ Mdm Kashmire’s AEIC at paras 12(iv)–(v) in 2nd Defendant’s AEIC Bundle Vol I at pp 11–12.

³² D&CC at para 9(d).

³³ D&CC at para 9(h).

The contemporaneous communications indicate that the legal documents were intended to have full legal effect

26 When the parties involved lawyers in drafting and negotiating the legal documents, nothing was said about the legal documents not having their full legal effect. The parties’ communications point the other way.

27 In an email of 2 November 2016 from Mr Balan to Mr Choo and Mr Yang (which Mdm Kashmire was copied in), Mr Balan said “[y]es, we agree that S\$2.3[m] is the [f]ees applicable and await your *lawyers to draw the agreement as such*” [emphasis added].³⁴ If there were the Oral Agreement that some of the legal documents would be completely unenforceable, and others only enforceable to the extent they recorded what was in the Oral Agreement, one would expect Mr Balan (or Mdm Kashmire) to say so at some point – but they never did. Instead, Mr Balan simply recognised that lawyers would be drafting the necessary legal documents.

28 In a WhatsApp message on 30 November 2016, Mdm Kashmire apologised to Mr Choo and Mr Yang for not highlighting earlier that Mr Balan was a bankrupt. She said:³⁵

Mr Choo & Mr Yang my apologies for not highlighting Balan’s [bankruptcy status] initially. We have been up front on all matters it’s my fault on this as I was fearful his [bankruptcy status] will hinder [SST’s] prospects. He from the start wanted to mention [sic] but I told him not to because of the reason above. I know this put many questions in your mind but please understand & forgive me.

... this is entirely my [f]ault as I was the one who told him not to mention as the agreements would be sign under [Mdm

³⁴ 2nd Defendant’s ABOD at p 94.

³⁵ Plaintiff’s ABOD at p 658.

Sushela] and me [sic]. After his discharge would add his name in Feb when his time is better. Once again I apologize for this.

29 Mdm Kashmire’s apology for not disclosing Mr Balan’s bankruptcy status to Mr Choo and Mr Yang is fundamentally inconsistent with her contention that the PGs were “for show”, “mere formalities”, and unenforceable. She apologised for not mentioning earlier that Mr Balan was a bankrupt, and so could not sign PGs;³⁶ she went on to say that he would do so after his discharge.³⁷ If it had been agreed that the PGs were unenforceable, it would not matter whether Mr Balan also signed them, and there would have been no reason for Mdm Kashmire to think that him being bankrupt would hinder SST’s prospects, nor any reason for her to apologise to Mr Choo and Mr Yang. Indeed, Mdm Kashmire acknowledges that she signed the PGs so that Mr Choo would not pull out of the whole deal.³⁸ Her conduct is consistent only with the PGs being enforceable.

30 Mr Balan too was apologetic about his bankruptcy being uncovered, and he went further and offered security in the form of two of his family’s properties. In his WhatsApp message to Mr Choo that same day on 30 November 2016, he said:³⁹

Mr Choo our [apartment] is around 1.2m balance 300k to pay and [Mdm Sushela’s apartment] is 1.6m fully paid [if] of need ... we can pledge this to NCL to make [you] more comfortable [...] never my [intention] to deceive Mr Yang [and] [you].

³⁶ Transcript, 4 November 2020, p 69 lines 10–15.

³⁷ Transcript, 4 November 2020, p 61 lines 20–32; p 62; p 63 lines 1–22.

³⁸ Transcript, 4 November 2020, p 71 lines 24–27; p 73 lines 7–9; p 75 lines 6–30; p 76 lines 22–32; p 77 lines 1–4.

³⁹ Plaintiff’s ABOD at p 698.

31 I do not believe that Mr Balan was offering security for what the parties had allegedly agreed would be an unsecured loan. Instead, he was offering security because he knew full well that the loans were meant to be secured. In the event, Mr Choo declined Mr Balan’s offer of security over his family’s properties, not because the loans were intended to be unsecured, but because NCL would have the PGs as security.⁴⁰ Mr Balan acknowledges that if the Loan Agreements and PGs were not signed, SST would not get any further funds from NCL.⁴¹ The Loan Agreements and PGs were important to NCL and SST; Mdm Kashmire and Mr Balan knew that – those documents were not just “for show”, “mere formalities”, and unenforceable.

32 Mdm Kashmire was legally represented – at least at the time the SSA and CA were negotiated in March 2017, if not at the time when the first of the PGs were signed (from late November 2016). Mdm Kashmire continued signing PGs until October 2017. Mr Balan’s email of 28 March 2017 was copied to a lawyer from Providence Law Asia LLC (“Providence Law”),⁴² and Mdm Kashmire accepts that Providence Law was representing her, and also SST.⁴³ So much for her plea that she was not legally represented,⁴⁴ which she then did not address in her AEIC.

33 Mdm Kashmire’s lawyer from Providence Law said, “my client would also like a longstop date of a year so that the monies from the banking facility

⁴⁰ Transcript, 3 November 2020, p 29 lines 15–32; p 30 lines 1–16.

⁴¹ Transcript, 10 November 2020, p 102 lines 19–26.

⁴² 2nd Defendant’s ABOD at p 292.

⁴³ Transcript, 4 November 2020, p 88 line 32; p 89 lines 1–6; p 97 lines 1–3; p 99 lines 23–25; Plaintiff’s ABOD at pp 276–280.

⁴⁴ D&CC at para 36(d).

can be used to repay *the debts that have been personally guaranteed first* (i.e. the monies already disbursed by your client)” [emphasis added].⁴⁵ Providence Law referred to the PGs as real guarantees – evidently it did not think that the PGs were “for show”, “mere formalities”, or unenforceable, and that shows that neither did its client Mdm Kashmire!

34 Ironically, Mdm Kashmire also says that it was orally agreed as part of the Oral Agreement that certain terms of the Oral Agreement were to be expressly stated in the CA and the SSA.⁴⁶ These included: “[t]hat [NCL] would not demand for the repayment of any outstanding loan monies provided to [SST] under the various [Loan Agreements] and PGs, notwithstanding the expiry of the respective periods for repayment under the various [Loan Agreements] and PGs.”⁴⁷ As this was allegedly supposed to be “expressly stated” in the CA,⁴⁸ Mdm Kashmire (or Mr Balan) should have instructed the lawyers accordingly, but they did not. Nothing of the sort was stated in the CA, but Mdm Kashmire and Mr Balan did not raise any issue about this at the time,⁴⁹ although on Mdm Kashmire’s case this would have been a breach of the Oral Agreement.

The evidence of the witnesses does not establish the Oral Agreement

35 In view of the above, it was an uphill task for Mdm Kashmire and Mr Balan to persuade the court through their evidence that the Oral Agreement existed.

⁴⁵ Plaintiff’s ABOD at p 278.

⁴⁶ Mdm Kashmire’s AEIC at paras 12(iv)–(v) in 2nd Defendant’s AEIC Bundle Vol I at pp 11–12.

⁴⁷ Mdm Kashmire’s AEIC para 12(iv)(b) in 2nd Defendant’s AEIC Bundle Vol I at p 12.

⁴⁸ Mdm Kashmire’s AEIC at para 12(iv) in 2nd Defendant’s AEIC Bundle Vol I at p 11.

⁴⁹ Transcript, 4 November 2020, p 119 lines 17–32; p 120; p 121 lines 1–13.

36 Both Mdm Kashmire and Mr Balan, however, had difficulty answering questions about what was (or was not) in their AEICs, and about the various inconsistencies in Mdm Kashmire's case. Mdm Kashmire's pleaded assertion that she was not legally represented, was untrue (see [32] above). Mdm Kashmire and Mr Balan also sought belatedly to introduce hearsay evidence (see [80]–[81] below), and to refer to a meeting or discussion with Mr Choo (see [108] below) that was not in their AEICs and was not put to Mr Choo.

37 During cross-examination, both Mdm Kashmire and Mr Balan gave demonstrably untrue responses, just so that they could keep on saying what they wished, rather than to let NCL's counsel continue with his questions. I highlight one instance for each of them.

38 When testifying about a potential loan from HSBC, Mdm Kashmire gave evidence that NCL was a machine equipment supplier, when she knew full well that it was not (as she acknowledged):⁵⁰

Q. I'm just dealing with the \$2 million only first. Now that is for a loan to be directly disbursed and paid to machine and equipment supplier. So you confirm that this part of any proposed loan is not to pay NCL, because *NCL is not a machine equipment supplier, from which the [Loan Amount] was incurred, correct? Do you accept that?* That's not a---

A. **Yes.** *Can I elaborate?*

Q. No, you just need to---*if you disagree, you can elaborate. If you accept that, then we can move on.*

A. **I disagree.**

Q. So NCL is a machine equipment supplier, who could then receive that \$2 million?

A. You said if I disagree, I could elaborate, right?

⁵⁰ Transcript, 5 November 2020, p 139 lines 31–32; p 140 lines 1–23; p 141 lines 11–16.

Q. Yes, sure, alright.

A. So I disagree, let me elaborate.

Q. Alright. So---

Court: No. Mdm Kashmire, can you answer the subsequent question first? Are you saying that NCL is [a machine equipment supplier], and Mr Mulani [NCL's counsel], finish [the] question.

Mr Mulani: Yes.

Q. ***Are you saying that NCL is therefore a machine equipment supplier?***

A. ***No, they are not.*** But [NCL's Counsel] said I couldn't elaborate, so ***that's why I said that.*** So that I can explain.

Court: Mdm Kashmire, I don't want you to say you disagree when actually you agree, but you say you disagree so that you can keep talking.

...

Q. The [\$2 million] states clearly it's for machine---

A. Yes, it states that.

Q. ---equipment supplier.

A. Yes, it states that.

Q. It says, ***you agree NCL is not a machine equipment supplier?***

A. ***Agree.***

[emphasis added]

39 When testifying about the same potential loan from HSBC, for which a personal guarantee from Mr Balan's sister Jayanthi Vijayarahavan ("Mdm Jayanthi") was required, Mr Balan went in circles before finally admitting that he had not told Mdm Jayanthi about it:

(a) First Mr Balan said, “[a]t that time, this was conveyed to her and she was okay [to be a] party to [the personal guarantee]”.⁵¹ This was a lie.

(b) Next, he said he had a power of attorney from her, but then clarified that that did not allow him to sign a personal guarantee on her behalf.⁵²

(c) Finally, he admitted that he had not even told Mdm Jayanthi that a personal guarantee was required of her, let alone obtained her consent to giving that.⁵³

Q. *So you did not inform [Mdm Jayanthi] then of this, and asked for her approval---for her consent to be a personal guarantor. That’s very simple. That’s---*

A. ***I will disagree---***

Q. *---the truth---*

A. ***---I will disagree to your answer and I will elaborate later.***

Q. No, so tell me did you---

Court: *Mr Balan, I need an answer. Did you tell [Mdm Jayanthi] about this and did she agree to sign a personal guarantee?*

Witness: ***No, she was not informed.***

40 Mdm Kashmire also made a wild allegation that NCL was in breach of some obligation to lend SST a total of \$5m, and not just \$3,978,000 as stated in

⁵¹ Transcript, 11 November 2020, p 33 lines 29–31; p 34 lines 1–3.

⁵² Transcript, 11 November 2020, p 34 lines 2–24.

⁵³ Transcript, 11 November 2020, p 35 lines 4–12.

the SSA.⁵⁴ This was not in her pleadings, not in her AEIC, and it was baseless. In oral closing submissions, the allegation was quite rightly abandoned by Mdm Kashmire's counsel.⁵⁵

41 In contrast, the evidence of Mr Choo⁵⁶ and Mr Yang⁵⁷ was not shaken in cross-examination, and I accept it.

42 I find that there was no Oral Agreement as alleged by Mdm Kashmire, and that the legal documents (*ie*, the Loan Agreements, PGs, SSA and CA) are enforceable according to their terms.

43 Mdm Kashmire's defences of breach of the Oral Agreement, estoppel, and misrepresentation⁵⁸ are all based on the existence of the Oral Agreement. It follows that I reject them all.

Unconscionability and related defences

44 Mdm Kashmire's other defences can be grouped as follows:

⁵⁴ Transcript, 5 November 2020, p 10 line 26; p 26 lines 18–19; p 38 lines 12–32; p 39 lines 1–13; p 115 lines 5–17; p 116 lines 18–27.

⁵⁵ Transcript, 12 November 2020, p 72 lines 18–31; p 73; p 74 line 1.

⁵⁶ Transcript, 3 November 2020, p 33 lines 8–27; pp 40–44; p 45 lines 29–32; pp 46–48; p 49 lines 1–5 and 18–32; p 50 lines 1–25; p 58 lines 13–32; p 59; p 60 lines 1–27; p 62 lines 24–32; p 63; p 64 lines 1–22; p 66 lines 1–4; p 68 lines 1–14; p 75 lines 9–31; p 76; p 77 lines 1–27; p 83 lines 10–31; pp 84–85; p 86 lines 1–8; p 92 lines 13–32; p 93 lines 1–7; p 104 lines 30–32; p 105; p 106 lines 1–25; p 109 lines 27–32; p 110 lines 1–12.

⁵⁷ Transcript, 4 November 2020, p 12 lines 16–32; p 13; p 14 lines 1–16; p 15 lines 20–32; p 16 lines 1–31; p 20 lines 9–12; p 26 lines 23–31; p 28 lines 2–17 and 27–32; p 29; p 30 lines 1–17; p 33 lines 27–32; p 34 lines 1–16.

⁵⁸ D&CC at paras 19–30.

- (a) unconscionability in the formation of the PGs;⁵⁹
- (b) conduct by NCL that damaged SST such that SST could not repay the loans;⁶⁰ and
- (c) conduct by NCL in relation to a possible exit from SST, or settlement proposals put forward by SST.⁶¹

45 Mdm Kashmire's reliance on the Oral Agreement also affects these defences, *eg*:

- (a) correspondence sent by NCL to SST's suppliers, customers and employees, was an attempt to force SST to pay off the loans before they were due, in breach of the Oral Agreement;⁶²
- (b) it was unconscionable for NCL to call on the PGs as NCL had represented that repayment need only come from the consultancy fee under the CA (an aspect of the Oral Agreement),⁶³ and the demand was thus not *bona fide*;⁶⁴
- (c) NCL took advantage of Mdm Kashmire's weakness by not explaining that the written terms of the PGs and the consequences

⁵⁹ D&CC at paras 36(a)–(d).

⁶⁰ D&CC at paras 33–35.

⁶¹ D&CC at para 36(e).

⁶² D&CC at paras 17 and 33.

⁶³ D&CC at para 31.

⁶⁴ D&CC at para 32.

thereof would be contrary to the terms agreed under the Oral Agreement;⁶⁵

(d) the transaction is at an undervalue because (among other things) Mdm Kashmire would be personally liable for the Loan Amount contrary to the terms of the Oral Agreement;⁶⁶ and

(e) NCL rejected SST’s proposals to return the Loan Amount even before payment was due (again, because of the Oral Agreement).⁶⁷

46 It follows that I reject all of Mdm Kashmire’s contentions that are dependent on the existence of the Oral Agreement. Nevertheless, in this section, I consider if any of her defences can still stand.

Unconscionability in relation to the formation of the PGs

47 Both parties cited *BOM v BOK and another appeal* [2019] 1 SLR 349 (“*BOM v BOK*”) where the Court of Appeal (at [141]–[142] in particular) explained the doctrine of unconscionability as it applies in Singapore, which I respectfully summarise as follows:

(a) the party relying on the doctrine must show that he was suffering from an infirmity that the other party exploited in procuring the transaction;

(b) if the party succeeds in doing so, the other party has the burden to demonstrate that the transaction was fair, just and reasonable;

⁶⁵ D&CC at para 36(d).

⁶⁶ D&CC at para 36(d)(iv).

⁶⁷ Mdm Kashmire’s AEIC at para 32 in 2nd Defendant’s AEIC Bundle Vol I at p 22.

- (c) the infirmity may take the form of the party being poor and ignorant, or other forms of infirmities – whether physical, mental and/or emotional in nature;
- (d) the infirmity must have been of sufficient gravity as to have acutely affected the party’s ability to make decisions.
- (e) the infirmity must have been, or ought to have been, evident to the other party procuring the transaction.
- (f) whether the transaction is at a considerable undervalue and whether the party had independent legal advice, are very important factors, but not mandatory.

48 In the present case, Mdm Kashmire claimed to be impecunious (but she did not say she was ignorant) and suffering from depression, and she pleaded that NCL knew or ought to have known this; she also claimed not to have had independent legal advice.⁶⁸

49 Mdm Kashmire alleges that NCL exploited the above weakness or infirmity “by not explaining that the written terms of the PGs would be *contrary to the terms agreed under [the Oral Agreement]* and the consequences thereof” [emphasis added].⁶⁹ Put that way, her case on unconscionability is based on the Oral Agreement, and it fails. But if Mdm Kashmire seeks to make out a case of unconscionability independent of the Oral Agreement, that fails too.

⁶⁸ D&CC at paras 36(a)–(d).

⁶⁹ D&CC at para 36(d).

Impecuniosity

50 Mdm Kashmire does not satisfactorily prove that she (and Mdm Sushela) were impecunious at the time; nor does she make out that her alleged impecuniosity affected her ability to make decisions. SST needed funds, but it does not follow that Mdm Kashmire and her family were impecunious then. Indeed, as noted at [30] above, on 30 November 2016 after NCL found out that Mr Balan was a bankrupt, Mr Balan offered two of his family's properties (which he said were worth \$2.5m together) as security. SST was a business with a long history, and the family could have accumulated wealth from it over the years. Hence, even if Mdm Kashmire and her family were impecunious, NCL would not have known that.

51 Moreover, Mdm Kashmire was not immediately expected to pay NCL \$4m under the PGs. The monies lent by NCL to SST were disbursed over a period of time from November 2016 to October 2017, and SST had a year to repay each loan – and that is what Mdm Kashmire agreed to guarantee.

52 By an email of 2 November 2016, Mr Balan had painted a rosy picture of SST being able to increase profits by \$329,000 a month or \$3,848,000 per year, if only it had \$5m in funding.⁷⁰ SST was portrayed as having good turnaround prospects, such that it could repay the loans from NCL and give NCL a return on top of that.

⁷⁰ Mr Choo's AEIC at para 38(e) in Plaintiff's AEIC Bundle at p 16; 2nd Defendant's ABOD at pp 87 and 90–91.

53 Mdm Kashmire latches on to Mr Balan's representations and argues that since NCL thought SST would be profitable, and that SST had valuable properties at Benoi Sector and Pioneer Sector, NCL agreed that its loans to SST would all be unsecured. This is perverse. Whatever NCL thought about SST's worth and prospects, the fact remains that NCL required personal guarantees from Mdm Kashmire and Mdm Sushela, which were duly provided by the PGs. NCL requiring personal guarantees despite positive representations as to SST's worth and prospects, indicates that NCL wanted the PGs as security.

Depression

54 On Mdm Kashmire's own testimony, NCL would not have known that she was suffering from any medical condition, nor that she was taking anti-depressants, at the material time.⁷¹ She also said that her mental state did not affect how she functioned – she still functioned well:⁷²

- Q. ... I'm trying to tell you there is now way for [NCL] to ever have known that you were depressed at that time because you and [Mr Balan] were conveying confidence in the business and trying to convince [NCL] to invest a significant amount of money. So would you agree with me that they would not have known [that you were depressed] at the time?
- A. That's two different things You know, my mental well-being and my confidence to sell something and get a client in for business is [sic] two different separate things. ***I still function well***, *I still did my work, I was still cooking at home, I was a mother and everything*. So ... it's my own mental state of mind, I'm not going to, you know---I---I do not know how to answer your question.

⁷¹ Transcript, 4 November 2020, p 84 lines 9–31; p 87 lines 2–11.

⁷² Transcript, 4 November 2020, p 87 lines 23–32; p 88 lines 1–15.

Q. Alright. So I'm going to put it to you that if you were taking antidepressants then, you did not tell [NCL] you were taking antidepressants, would you agree?

A. **I didn't tell them I was taking antidepressants**, but--

Q. Thank you.

A. ---definitely, everyone knew, looking at me, that I was very stressed and very worried.

Q. *I put it to you also there is no way for [NCL] to have been aware then in November 2016 ... that you were in such a medical condition then.*

A. Yes.

Q. *There's no way for [NCL] to be aware?*

A. **They wouldn't have known.**

[emphasis added]

55 Mdm Kashmire pleads that she had, in various conversations with NCL's representatives during negotiations, expressly informed NCL that she was diagnosed with depression sometime in 2013.⁷³ This is false, given what she accepted on the stand.

56 NCL would not have known that Mdm Kashmire was taking anti-depressants, or that she was suffering from any infirmity at the time. If she were on anti-depressants, depressed, or worried as she claims, presumably her husband Mr Balan would have known that, but he handed her the PGs to sign nevertheless – evidently, he did not think it inappropriate for her to sign legal documents then.

⁷³ D&CC at para 36(c).

Independent legal advice

57 The evidence shows that there were lawyers representing Mdm Kashmire and SST (at least in March 2017), and she accepted that (see [32] above); moreover, her lawyers had been instructed that debts owed by SST to NCL were personally guaranteed (see [33] above). Furthermore, Mdm Kashmire continued to sign the PGs until October 2017. I thus do not accept her plea that she lacked independent legal advice.

Infirmity, impairment, and the other party's knowledge

58 Even if Mdm Kashmire were suffering from an infirmity at the time, she still needs to prove that it affected her decision making (see [47(d)] above). But she says it did not. She says she “still function[ed] well” (see [54] above). Moreover, any such infirmity or impairment was not something which NCL knew or ought to have known of.

Value of the transaction

59 On whether the transaction was at an undervalue,⁷⁴ the PGs were not on extortionate terms: they were in respect of loans which were repayable within a year from the date of each of the Loan Agreements, interest free for the first year, with interest at 10% per annum thereafter. Mdm Kashmire was not required to guarantee the consultancy fee which SST contracted to pay NCL. Any unhappiness about the consultancy fee or with NCL acquiring a stake in SST for nominal consideration are essentially matters between NCL and SST which do not affect the enforceability of the PGs between NCL and Mdm Kashmire.

⁷⁴ D&CC at para 36(d).

60 In any event, given that SST needed funds, and NCL was asked to commit in the region of \$4m, the whole arrangement is not unfair, unjust, or unreasonable. For the risk which NCL took, it has ended up being a shareholder and creditor of an insolvent company – SST (in judicial management); and with a claim in this suit against Mdm Kashmire on the PGs she signed.

NCL did not damage SST such that SST could not repay the loans

61 Mdm Kashmire relies on the proposition that a surety may be discharged if the creditor has acted in bad faith towards her (*Bank of India v Trans Continental Commodity Merchants Limited and Jashbai Nagjibhai Patel* [1983] 2 Lloyd’s Rep 298), and the proposition that a party cannot take advantage of his own wrong to escape from his contractual obligations (*Cheung Yong Sam Investments Pte Ltd v Land Equity Development Pte Ltd* [1992] 3 SLR(R) 533 at [40]).

62 Her contention is that NCL itself brought about SST’s inability to repay the loans. That, however, has no basis in fact.

63 Mdm Kashmire’s complaints span a wide range:

(a) NCL failing to provide any assistance to restructure SST’s business;⁷⁵

(b) NCL failing to provide \$500,000 in working capital for SST;⁷⁶

⁷⁵ D&CC at para 19.

⁷⁶ D&CC at para 15.

- (c) NCL failing to secure a \$3,000,000 banking facility by its refusal to provide a guarantee;⁷⁷
- (d) NCL's Mr Choo and Mr Yang delaying or refusing to co-sign SST's cheques;⁷⁸
- (e) NCL interfering in SST's relationship with its suppliers, customers and employees;⁷⁹
- (f) NCL's removal of Mdm Kashmire as managing director and director of SST;⁸⁰ and
- (g) NCL making premature demands for the repayment of the Loan Amount under the Loan Agreements and payments pursuant to the PGs.⁸¹

64 Point (g) above can quickly be disposed of. I have found that the Oral Agreement does not exist, and accordingly NCL's demands were not premature: they were justified on the terms of the Loan Agreements and the PGs.

65 Before I address Mdm Kashmire's other allegations, two points must be borne in mind:

- (a) It is for Mdm Kashmire to show how NCL's behaviour (which she complains of in this suit) had damaged SST such that SST could not

⁷⁷ D&CC at paras 13–14.

⁷⁸ D&CC at para 16.

⁷⁹ D&CC at para 17.

⁸⁰ Mdm Kashmire's AEIC at para 38 in 2nd Defendant's AEIC Bundle Vol I at p 23.

⁸¹ D&CC at paras 31–35.

repay the loans. A number of her complaints relate to a period *after* SST had defaulted in repayment of each of the loans (as it did by October 2018). Those matters could not have caused SST's default as at October 2018.

(b) Mdm Kashmire complains about what Mr Choo and Mr Yang supposedly did or failed to do, such as to provide personal guarantees for banking facilities, and to promptly sign cheques as directors and cheque signatories of SST. It does not, however, necessarily follow that NCL would be vicariously liable for Mr Choo's and Mr Yang's conduct in their individual capacities, or in their capacities as directors of SST. There were no pleadings or submissions on vicarious liability – instead, it seemed to be assumed that if some complaint against Mr Choo or Mr Yang managed to stick (and none did), that would implicate NCL. That was misguided.

NCL did not fail to provide assistance to restructure SST's business

66 The CA states in preamble (A)⁸² that SST requires assistance ("Assistance") to expand its existing business, including a restructuring of the company to enable it to repay certain outstanding debts as defined in clause 6.2(a) of the SSA ("Outstanding Debts").⁸³ Clause 2.2 of the CA then states that NCL agreed to provide the necessary Assistance.⁸⁴ The SSA provides in clause 6.2 that that NCL would:⁸⁵

⁸² 2nd Defendant's ABOD at p 255; Plaintiff's ABOD at p 264.

⁸³ 2nd Defendant's ABOD at pp 270–271; Plaintiff's ABOD at pp 241–242.

⁸⁴ 2nd Defendant's ABOD at p 256; Plaintiff's ABOD at p 265.

⁸⁵ 2nd Defendant's ABOD at pp 270–271; Plaintiff's ABOD at pp 241–242.

- (a) assist SST in repaying the Outstanding Debts, which amount to \$3,478,000;
- (b) make available the sum of \$500,000 to SST as working capital, which shall be disbursed to SST as and when required, provided always that any use of this amount is subject to the approval of NCL; and
- (c) assist SST to obtain a banking facility for the sum of \$3,000,000.

67 NCL did all of this, and more. Although NCL was only obliged to lend SST a total of \$3,978,000 (for the repayment of the Outstanding Debts and provision of working capital), NCL lent more: \$4,090,830.26 in all. I address the working capital and banking facility aspects more specifically below.

NCL did not fail to provide \$500,000 in working capital for SST

68 On top of the \$3,478,000 required to repay the Outstanding Debts, NCL lent SST \$612,830.26 to meet other obligations,⁸⁶ thereby providing SST with working capital of more than \$500,000.

69 Mdm Kashmire argues that none of the \$612,830.26 counts as working capital, because it was provided by NCL for specific purposes as requested by SST. Her contention is that she and Mr Balan should have been provided with \$500,000 that they could use as they pleased (and no matter how much NCL provided upon SST's requests, none of that would count as working capital).⁸⁷ That is not what the SSA provides. It was expressly stipulated in clause 6.2(b)

⁸⁶ Mr Choo's AEIC at para 41 in Plaintiff's AEIC Bundle at p 20.

⁸⁷ Mdm Kashmire's AEIC at para 58 in 2nd Defendant's AEIC Bundle Vol I at p 39; Transcript, 5 November 2020, p 15 lines 24–32; p 16 lines 1–3; p 20 lines 4–32; p 21 lines 1–8; p 22 lines 1–25.

of the SSA that the working capital would be disbursed as and when required, and that its use was subject to the approval of NCL.⁸⁸ There is no merit to this complaint, which moreover was only raised after NCL sued.

NCL did not fail to assist SST to obtain a banking facility for the sum of \$3,000,000

70 NCL did assist SST to obtain a banking facility for the sum of \$3m. With NCL’s assistance, SST obtained a facility letter from United Overseas Bank (“UOB”) for a banking facility in the sum of \$3m.⁸⁹ However, SST was unable to meet the conditions stipulated by UOB. That facility was to be secured by a first legal mortgage over properties at Benoi Sector and Pioneer Sector, and a joint and several guarantee for \$3m to be executed by Mr Choo, Mr Yang and Mdm Kashmire.

71 In July 2017, however, JTC stated that it would not be able to issue any offer letter for the Benoi Sector plots until arrears had been fully paid up by SST.⁹⁰ In turn, UOB noted that the Benoi Sector property would not be a core collateral for the loan since JTC’s confirmation on the lease was still pending.⁹¹ On 25 August 2017, UOB’s Ms Janelle Lee (“Ms Lee”) asked that certain documents be furnished to facilitate the revised loan request to be based mainly on a personal guarantee as well as SST’s business viability going forward, namely:⁹²

⁸⁸ 2nd Defendant’s ABOD at p 271; Plaintiff’s ABOD at p 242.

⁸⁹ 2nd Defendant’s ABOD at pp 360–377.

⁹⁰ 2nd Defendant’s ABOD at p 440.

⁹¹ 2nd Defendant’s ABOD at p 437.

⁹² 2nd Defendant’s ABOD at p 437.

- (a) SST's latest management accounts;
- (b) SST's latest three months aging report of debtors and creditors;
and
- (c) SST's latest order books (specifying contract listing and period of contract).

72 On 25 August 2017, Mr Choo asked Mr Balan to liaise with Ms Lee on the documents that she required.⁹³ In the event, no subsequent facility letter came from UOB. Ms Lee sent a further email on 28 November 2017, this time to say, "I refer to my phone conversation with Mr Choo earlier and noted that we shall proceed to cancel the loan request for [SST]".⁹⁴ Mr Choo explained that UOB had called him and wanted to close the case because UOB could not come up with a new offer.⁹⁵

73 Mdm Kashmire's pleaded case is that NCL breached its obligation to assist SST to obtain a \$3m banking facility, because NCL "refused to provide the guarantee that was required for the [\$3m] banking facility on behalf of [SST]".⁹⁶ This is plainly unsound: UOB never asked NCL to provide any guarantee – the only guarantee referred to in the UOB facility letter was a personal guarantee from Mr Choo, Mr Yang and Mdm Kashmire.⁹⁷

⁹³ 2nd Defendant's ABOD at p 437.

⁹⁴ Plaintiff's ABOD at p 281.

⁹⁵ Transcript, 3 November 2020, p 41 line 32; p 42 line 1; p 111 lines 15–31; pp 112–113; p 114 lines 1–25.

⁹⁶ D&CC at para 14.

⁹⁷ 2nd Defendant's ABOD at p 361.

74 Mdm Kashmire then says that Mr Choo and Mr Yang refused to execute that personal guarantee, and so *NCL* breached its obligation to assist SST. First, this does not follow: if Mr Choo and Mr Yang were unwilling to take on personal liability as guarantors, that does not place *NCL* in breach. Second, *NCL*'s obligation was to "assist" SST (and it did); *NCL* was not obliged to "obtain" the banking facilities for SST, come what may.

75 In written closing submissions, Mdm Kashmire's counsel recognised the "common practice of using the word '[a]ssist' in drafting agreements for outcomes controlled by third parties which would generally be out of one's control".⁹⁸ However, he submitted that here, "assist" should not be given its usual meaning, since parties viewed the UOB loan facility as a certainty⁹⁹ – thus, "assist" should mean that *NCL* were obliged to obtain the facility for SST, and if UOB declined to grant the facility for any reason whatsoever, *NCL* would be in breach of contract and could be sued by SST.¹⁰⁰ I reject this.

76 Although *NCL* was optimistic about getting the banking facility, *NCL* did not accept an absolute obligation to obtain the facility come what may. Hence the obligation was simply to "assist". UOB might well refuse to grant a facility to SST; *NCL* did not agree that if that happened, it would be in breach of its obligations to SST.

77 Consistent with this, the SSA makes express provision for the possibility that the banking facility might not be obtained. Clause 6.4 states:¹⁰¹

⁹⁸ 2nd Defendant's Closing Submissions ("DCS") at para 14.

⁹⁹ DCS at para 14.

¹⁰⁰ DCS at para 15.

¹⁰¹ 2nd Defendant's ABOD at p 271; Plaintiff's ABOD at p 242.

The Parties hereby agreed that in the event that the banking facility cannot be made available before any of the Outstanding Debts become due and payable, [NCL] shall continue to provide cash loans to [SST] to repay any of the Outstanding Debts, provided always that once the banking facility is approved, [SST] shall utilise the banking facility to repay all the the [sic] cash loans provided by [NCL].

78 Thus, if the banking facility was not obtained, NCL was to continue lending SST money (up to the limit in the SSA), and NCL duly did so, indeed lending more than it was obliged to. It was contended on behalf of Mdm Kashmire that this clause only made provision for *delay* in obtaining the banking facility, and not for the banking facility *not being obtained at all*.¹⁰² I disagree. On its terms, clause 6.4 applies to both such scenarios – it applies so long as the banking facility “cannot be made available before any of the Outstanding Debts become due and payable”. Here, the banking facility was never obtained, and the parties proceeded in accordance with clause 6.4 of the SSA.

79 In any event, Mdm Kashmire fails to prove that Mr Choo and Mr Yang refused to sign the requisite personal guarantee.¹⁰³ Mr Choo’s message of 25 August 2017 asked Mr Balan to liaise with Ms Lee regarding the documents that she required (see [72] above),¹⁰⁴ and that shows that Mr Choo was not opposed to making a revised loan request based on a personal guarantee and UOB being satisfied with SST’s business viability. Moreover, Mr Choo testified that he was prepared to sign a personal guarantee for the UOB facility, but he

¹⁰² DCS at para 13.

¹⁰³ Mdm Kashmire’s AEIC at para 46 in 2nd Defendant’s AEIC Bundle Vol I at p 29.

¹⁰⁴ 2nd Defendant’s ABOD at p 437.

believed that UOB was not satisfied with the business viability of SST, and that is why no revised facility letter was given.¹⁰⁵

80 At trial, Mdm Kashmire and Mr Balan belatedly referred to an alleged telephone call from Ms Lee to Mr Balan (which Mdm Kashmire claims to have overheard), where Ms Lee supposedly said that it was because Mr Choo and Mr Yang would not sign the personal guarantee, that UOB was not proceeding to offer a banking facility.¹⁰⁶ Ms Lee was not called as a witness, and what was attributed to her is hearsay. No notice to admit hearsay evidence was given as required by O 38 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), and Mdm Kashmire's counsel did not point to any exception in the Evidence Act (Cap 97, 1997 Rev Ed) allowing the admission of hearsay evidence, that might avail Mdm Kashmire (and I did not consider that any would).

81 The alleged telephone call with Ms Lee was not mentioned in Mdm Kashmire's or Mr Balan's AEICs, and it was not put to Mr Choo or Mr Yang when they were on the stand. I regard evidence of what Ms Lee supposedly said to be inadmissible, and in any event I am not persuaded that the telephone call happened.

82 Both Mdm Kashmire and Mr Balan acknowledged that Mr Choo was disappointed when UOB eventually confirmed that it was unable to give a loan to SST.¹⁰⁷ Mdm Kashmire even mentioned this in her WhatsApp message to Mr

¹⁰⁵ Transcript, 3 November 2020, p 40 lines 4–24.

¹⁰⁶ Transcript, 5 November 2020, p 52 lines 20–32; p 53; p 54 lines 22–29; 10 November 2020, p 82 lines 12–32; p 83 lines 1–10; p 84 lines 12–16; p 85 lines 18–24.

¹⁰⁷ Transcript, 5 November 2020, p 59 lines 17–32; 10 November 2020, p 88 lines 9–12; Plaintiff's ABOD at pp 646–647.

Choo on 28 September 2017, in which she said, “I know I fully understand [your] frustrations that [UOB’s] loan did not come in [and] NCL has funded the loan to SST”.¹⁰⁸ Mr Choo’s disappointment is inconsistent with it being Mr Choo’s own fault that the UOB bank loan did not materialise. In relation to UOB not offering a banking facility, there was not one word of criticism against Mr Choo, Mr Yang, or NCL, until after NCL sued.

83 Mdm Kashmire’s focus on the banking facility also makes no sense. Her contention is that, if a banking facility of \$3m were obtained and the monies from that were used by SST to repay NCL, to that extent, SST’s debt to NCL would be discharged and so too would the PGs she had given.

84 The SSA however envisages that NCL would lend SST more than \$3m, specifically \$3,978,000 (and in the event NCL lent SST even more: \$4,090,830.26). Thus, to the extent of \$978,000 or more, Mdm Kashmire would, as a guarantor under the PGs, still be liable to NCL even if a \$3m banking facility had been obtained and used to repay NCL. She would also be liable to the bank as a guarantor of the \$3m facility. In effect, Mdm Kashmire’s complaint is simply that it should be UOB suing her for the first \$3m of the debts she was guaranteeing, rather than NCL suing her for all of it – the bank facility would not have freed her of liability. In any event, as I mentioned above (at [77]), the SSA makes specific provision for the possibility that the banking facilities might not be obtained, in which case NCL would continue lending money to SST, and Mdm Kashmire (as guarantor) would be liable to NCL for the full amount lent.

¹⁰⁸ Plaintiff’s ABOD at p 647.

85 Indeed, Mdm Kashmire’s fixation on the UOB banking facility (for which she was required to sign a personal guarantee) goes against any expectation that she would never be personally liable for any of SST’s debts.

86 There was no breach on NCL’s part in relation to the banking facility not being obtained, nor was any breach alleged until after NCL sued.

NCL’s Mr Choo and Mr Yang did not wrongly delay or refuse to co-sign SST’s cheques

87 As I observed above at [65(b)], if complaints are made about the conduct of Mr Choo and Mr Yang in their capacity as directors or signatories of SST, that does not *per se* implicate NCL.

88 In the main, the alleged delay or non-signing of cheques relates to a period *after* SST had already defaulted in repayment – it was obliged to repay each of the loans by October 2018, and it did not. Mdm Kashmire also fails to show that the alleged delay or non-signing of cheques was wrongful in the first place,¹⁰⁹ or how it rendered SST unable to repay the loans.¹¹⁰

89 In her pleadings,¹¹¹ Mdm Kashmire refers to brief particulars of the alleged delay or refusal to co-sign cheques since 16 April 2019 – that is half a year after SST was already in default of each of the Loan Agreements.

¹⁰⁹ Transcript, 5 November 2020, p 79 lines 19–32; pp 80–84; p 85 lines 1–10; p 88 lines 5–32; p 89; p 90 lines 1–17.

¹¹⁰ Transcript, 5 November 2020, p 107 lines 20–32; p 108 lines 1–21; p 109 line 32; p 110 lines 1–16; p 111 lines 7–16 and 19–32; p 112 lines 1–19.

¹¹¹ D&CC at para 16 and Table A of Annex 1.

90 There is also a general allegation that the alleged delay or refusal to co-sign cheques had started since or about the time NCL realised that SST would be unable to procure the \$3m banking facility (which would have been by October 2017).¹¹² Mdm Kashmire said that she would particularise the various instances, but this was never done, beyond two occasions mentioned in her AEIC:¹¹³

- (a) when Mr Choo was away “in the middle of a safari”; and
- (b) when Mr Choo was away in Kelantan.

91 On both occasions, Mr Yang’s assistance was sought and obtained, and the situation was resolved.¹¹⁴ There is no evidence of what harm (if any) SST suffered from the slight delay due to Mr Choo being away and so unable to directly attend to the signing of cheques (for which I would not fault Mr Choo, Mr Yang, or NCL). Moreover, for the period prior to 16 April 2019, Mdm Kashmire and Mr Balan were unable to identify any particular cheque that was eventually never signed because Mr Choo and Mr Yang refused to do so.¹¹⁵

92 As for the period from 16 April 2019 onwards, it was fraught: not only was SST already in default of its repayment obligations, NCL had discovered that Mdm Kashmire and Mr Balan had been siphoning funds from SST by setting up another company, Sea-Shore Holdings Pte Ltd (“SSH”). SSH was

¹¹² D&CC at paras 14 and 16.

¹¹³ Mdm Kashmire’s AEIC at para 28 in 2nd Defendant’s AEIC Bundle Vol I at p 21.

¹¹⁴ Transcript, 5 November 2020, p 83 lines 16–25; pp 84–86; p 87 lines 1–3 and 23–32; p 88 lines 10–18; p 90 lines 21–32; p 91 lines 1–14; 11 November 2020, p 9 lines 12–32; pp 10–11; p 12 lines 1–20; p 16 lines 20–24; p 17 lines 18–27.

¹¹⁵ Transcript, 5 November 2020, p 82 lines 9–32; pp 83–87; p 88 lines 1–18; 10 November 2020, p 123 lines 27–29.

incorporated on 18 May 2018 and customers of SST were asked to pay SSH instead.¹¹⁶ NCL engaged a forensic accounting firm to conduct a special investigative audit, from which NCL concluded that over \$1m had been siphoned from SST through the use of SSH.¹¹⁷

93 Mdm Kashmire claims that SSH was incorporated to get around Mr Choo and Mr Yang delaying or refusing to co-sign cheques,¹¹⁸ but that is a poor excuse given that for the period prior to SSH being incorporated, Mdm Kashmire is only able to point to two occasions when Mr Choo was away (as mentioned above at [90]–[91]), and on each occasion, as the contemporaneous communications show, the situation was quickly resolved.

94 Further, Mdm Kashmire claims that whatever was diverted from SST to SSH was then used for the benefit of SST, but she did not satisfactorily account for it.¹¹⁹ The setting up of SSH was wrongful in the first place: for one thing, it is expressly provided in clause 2.2(e) of the SSA that Mr Choo and Mr Yang would be bank signatories “such that any transactions of [SST] shall require [Mr Choo] or [Mr Yang] to be a joint signatory to authorise payment for any transactions of [SST]”.¹²⁰

¹¹⁶ Mr Choo’s AEIC at para 75 in Plaintiff’s AEIC Bundle at p 33.

¹¹⁷ Mr Choo’s AEIC at para 76 in Plaintiff’s AEIC Bundle at p 33.

¹¹⁸ D&CC at para 18; Mdm Kashmire’s AEIC at paras 78–79 in 2nd Defendant’s AEIC Bundle Vol I at p 47.

¹¹⁹ Mdm Kashmire’s AEIC at para 80 in 2nd Defendant’s AEIC Bundle Vol I at p 47; Transcript, 5 November 2020, p 97 lines 13–16; p 101 lines 31–32; p 102 lines 1–15; p 104 lines 26–32.

¹²⁰ 2nd Defendant’s ABOD at p 267; Plaintiff’s ABOD at p 238.

95 It was quite understandable for Mr Choo, Mr Yang and NCL to want to take stock of the situation then, and to be even more circumspect about signing cheques. What they did in the period from April 2019 onwards was prompted by Mdm Kashmire's and Mr Balan's breaches of their duties to SST, which moreover circumvented the SSA.

NCL was justified in intervening in SST's affairs as it did

96 For the same reasons, NCL was justified in intervening in SST's affairs as it did, in relation to SST's suppliers, customers and employees; and by taking steps to remove Mdm Kashmire as managing director,¹²¹ and Mdm Sushela as director of SST.¹²² It is perverse that Mdm Kashmire would seek to rely on these matters (which were a legitimate response to her wrongful conduct) as some sort of a defence to NCL's claim against her.

97 It was submitted that NCL was angry with Mr Balan and Mdm Kashmire and so it wanted to sink SST and bankrupt Mdm Kashmire.¹²³ But it makes no sense to suggest that NCL would destroy a company which owed them millions of dollars and in which it had a substantial shareholding, just because it was angry with Mr Balan and Mdm Kashmire. Not only is this not pleaded, Mdm Kashmire's AEIC makes an assertion going the other way: that NCL had a secret agenda to gain unfettered control over SST and sell it for profit.¹²⁴ If that were so, it would benefit not only NCL as a 45% shareholder in SST, but also the remaining 55% shareholders in SST (including Mdm Kashmire's family).

¹²¹ Plaintiff's ABOD at pp 353–355.

¹²² Plaintiff's ABOD at pp 356–358.

¹²³ DCS at para 10.

¹²⁴ Mdm Kashmire's AEIC at para 45 in 2nd Defendant's AEIC Bundle Vol I at p 28.

Mdm Kashmire thus contends that NCL was trying at the same time to destroy her family, and to enrich them. I reject both suggestions. The evidence simply shows that NCL was seeking to protect its investment in SST, and in so doing, it tried to see if it could still save SST. Mr Choo rejected the suggestion that he sought to sink SST, and explained:¹²⁵

I don't say get even. You know, I mean, we also try to see whether still can save or not, the company. Because with them continue to siphon the money and it just like police catching a thief [sic] ... I found it very tiring though.

... In fact, I scolded [Mr Balan]. I said, 'I really feel sorry for your family.' ... '[Y]our father had built up the empire but end up you come here and cheat.'

98 If anyone sank SST despite the support provided by NCL, it was Mr Balan and Mdm Kashmire.

NCL's claim does not fail because it did not achieve an exit from SST, or did not respond positively to settlement proposals by SST

99 Mdm Kashmire says that it was unconscionable for NCL not to accept certain proposals which allegedly might have allowed SST to repay the loans.¹²⁶

100 This is not unconscionability in the sense recognised in *BOM v BOK* ([47] *supra*): Mdm Kashmire's contention is not that liability does not arise in the first place. Rather, she contends that even if SST were in default of its repayment obligations, and she were liable as guarantor, NCL could lose all of its rights against SST and against her, if NCL did not explore proposals that might have resulted in NCL getting some money back. The contention, put bluntly, is that a creditor can lose his entire debt if he does not reasonably

¹²⁵ Transcript, 3 November 2020, p 109 lines 27–32; p 110 lines 1–12.

¹²⁶ D&CC at para 36(e).

respond to settlement proposals, and the debtor will then get off scot-free. Nothing in principle, policy, or precedent, was put forward to support this bizarre proposition. In any event, the facts are against Mdm Kashmire.

101 On the terms of the Loan Agreements, the loans from NCL were all due within a year of the respective amounts being lent. The earliest loan was on 29 November 2016 (with repayment due by 29 November 2017), the latest loan was on 4 October 2017 (with repayment due by 4 October 2018). As of 4 October 2018, SST was thus indebted to NCL in the full sum of \$4,090,830.26 lent, together with interest; and Mdm Kashmire was liable for the same as a guarantor under the PGs.

The letter of intent from Kerry-ITS

102 Of the various proposals Mdm Kashmire relies on,¹²⁷ only one was earlier than October 2018 – an approach from Kerry-ITS Holdings Pte Ltd (“Kerry-ITS”).

103 On or around 8 December 2017, Mr Balan obtained a letter of intent from Kerry-ITS for a potential investment of \$3.5m “to effect a buyout of certain minority shareholders of [SST] (including [NCL]), restructuring of [SST], and subscription by [Kerry-ITS] of 30% of the issued and paid up capital of [SST] [post-restructuring]”.¹²⁸ The letter of intent was expressly marked “subject to contract and board approval”, and Kerry-ITS did not commit to making the potential investment.

¹²⁷ D&CC at para 36(e).

¹²⁸ 2nd Defendant’s ABOD at p 462–464; Mdm Kashmire’s AEIC at para 33 in 2nd Defendant’s AEIC Bundle Vol I at p 22.

104 By the time of the letter of intent, NCL had lent a total of \$4,090,830.26, and SST was already in default of payment of the earliest loans made on 29 November 2016 (which totalled \$743,055.27); the figure rises to \$816,277.13 if the \$73,221.86 lent on 8 December 2016 were also included.

105 NCL understandably wished to understand what exactly Kerry-ITS' offer entailed. On 9 December 2017, Mr Choo sent Mr Balan a WhatsApp message asking: “[a]re u saying [Kerry-ITS] will buy [NCL’s] share [in SST] at \$3.5m? On top of that SST still has to pay [NCL] back the loan of \$4m?”¹²⁹ Mr Choo wished to understand whether NCL would only get \$3.5m (for some of its shares in SST) when it had lent SST some \$4m; or might it get paid for its shareholding in SST and also be repaid the loan of \$4m on top of that?

106 Mr Balan’s reply was, “[a]s we spoke yesterday ... I had mentioned that their offer price I do not know and expected around 4m ...”.¹³⁰ Mr Choo then said, “[s]ince [Kerry-ITS] is interested in [NCL’s] shares in SST], *we want to be the party to talk to them*” [emphasis added].¹³¹ Mr Balan replied, “[n]o issues I will check with [Mr William Loh from Kerry-ITS (“Mr Loh”)] and revert”.¹³² Mr Choo sent a further message to Mr Balan to say that he will “let go all [of NCL’s] shares [in SST] and [Kerry-ITS] will hold 45% [of the shares] in SST [instead of] the [terms] [you] have offered them [*ie*, a 30% stake]”.¹³³

¹²⁹ Plaintiff’s ABOD at p 682.

¹³⁰ Plaintiff’s ABOD at p 682.

¹³¹ Plaintiff’s ABOD at p 682.

¹³² Plaintiff’s ABOD at p 682.

¹³³ Plaintiff’s ABOD at p 682.

107 In the event, NCL never got to meet with Kerry-ITS.¹³⁴ Mr Loh from Kerry-ITS was never made aware that NCL wanted to meet;¹³⁵ instead, Mr Balan told him that NCL wanted \$7.5m to exit from SST (which is not what Mr Choo's message had said), which Mr Loh and Kerry-ITS did not agree to.¹³⁶

108 Mdm Kashmire and Mr Balan belatedly claimed that Mr Choo had asked for \$7.5m for NCL to exit from SST,¹³⁷ but their stories did not match. Mdm Kashmire said that this was at a meeting between Mr Balan and Mr Choo, which she overheard;¹³⁸ Mr Balan said that it was over the telephone.¹³⁹ Neither version was in Mdm Kashmire's or Mr Balan's AEICs, neither version was put to Mr Choo. I accept Mr Choo's evidence that he never asked for \$7.5m; he simply wanted a better understanding of what Kerry-ITS had in mind.¹⁴⁰

109 Mr Choo wanted to explore Kerry-ITS' interest further, but because of what Mr Balan (incorrectly) told Mr Loh of Kerry-ITS,¹⁴¹ nothing developed.

110 There was nothing objectionable in the conduct of Mr Choo and NCL in relation to the approach from Kerry-ITS. I am, moreover, sceptical that Kerry-ITS would eventually have agreed to purchase from NCL a 30% shareholding in SST for \$3.5m. Mr Loh (and Kerry-ITS) only had limited information about

¹³⁴ Transcript, 3 November 2020, p 74 lines 22–32; p 75 lines 1–8.

¹³⁵ Transcript, 11 November 2020, p 60 lines 1–19.

¹³⁶ Transcript, 11 November 2020, p 23 lines 1–18.

¹³⁷ Transcript, 5 November 2020, p 130 lines 18–25; 11 November 2020, p 23 lines 30–31.

¹³⁸ Transcript, 5 November 2020, p 130 lines 26–32; p 131; p 132 lines 1–13.

¹³⁹ Transcript, 11 November 2020, p 51 lines 14–27.

¹⁴⁰ Transcript, 3 November 2020, p 76 lines 8–31; p 77 lines 1–27; p 118 lines 22–31; p 119.

¹⁴¹ Transcript, 11 November 2020, p 59 lines 12–22.

SST at the time of the letter of intent. Mr Loh knew that SST owed money to creditors, and that it was “in trouble” and “in a bit [of a] problem” (as he described it).¹⁴² But he did not know the specifics of SST’s finances: he did not even know that SST owed money to NCL, let alone that over \$4m was owed, some of which was already due for repayment.

111 Should NCL lose its claim for over \$4m just because Kerry-ITS had once suggested that it might buy some of NCL’s shareholding in SST for \$3.5m? No. Kerry-ITS never paid NCL anything, SST’s debt to NCL remains, and Mdm Kashmire remains liable as guarantor under the PGs. Indeed, how the letter of intent from Kerry-ITS might ever provide Mdm Kashmire with a defence to NCL’s claim on the PGs, was never properly articulated.

“Without prejudice” communications relied upon by Mdm Kashmire

112 The remaining four proposals all involve “without prejudice” discussions about a potential settlement.

113 The first three of these were conveyed by SST’s lawyers’ “without prejudice save as to costs” letter of 18 April 2019.¹⁴³ By this time, all the loans under the Loan Agreements were due from SST, NCL had demanded payment, and NCL had sued. Mdm Kashmire also cites a fourth proposal, which came even later, on 6 May 2019.¹⁴⁴

¹⁴² Transcript, 11 November 2020, p 61 lines 3–17.

¹⁴³ 2nd Defendant’s ABOD at p 678.

¹⁴⁴ D&CC at para 36(e)(C).

114 On Mdm Kashmire’s case, when NCL sued, nothing was then due from SST, since SST was to have at least three years (not one year as stated in each of the Loan Agreements) to repay, and so payment would only be due on 29 November 2019 at the earliest.

115 The 18 April 2019 “without prejudice” letter from SST’s lawyers did not however say that nothing was then due – it simply said SST had taken measures to try and arrange for an agreed global sum to be paid to NCL, citing the three proposals. The letter further requested that the parties meet together with their respective solicitors on a without prejudice basis to explore the same.¹⁴⁵

116 Not only was nothing said about the loans not being due yet, the Loan Agreements were not said to be “for show”, “mere formalities”, or unenforceable – that position was only taken in Mdm Kashmire’s pleadings in the suit.

117 Mdm Kashmire’s desperate attempt to rely on “without prejudice” communications as a defence, goes against the very essence of “without prejudice” privilege: that such communications will not prejudice the parties’ legal rights.

118 It was up to NCL whether it wished to explore SST’s “without prejudice” overture for a resolution of the matter, or to insist on its legal rights and press on with the suit.

¹⁴⁵ 2nd Defendant’s ABOD at p 678.

119 No legal basis was suggested for the assertion that the “without prejudice” communications could defeat NCL’s claims. NCL had perfectly good claims against SST, Mdm Kashmire, and Mdm Sushela when NCL sued, and, in principle, what SST said on a “without prejudice” basis could not be a defence to that. Moreover, whatever SST *said*, it *paid* nothing.

120 Mdm Kashmire tries to say that NCL prevented SST from seeking funding that could have been used to repay NCL,¹⁴⁶ but nothing of the sort happened. NCL was only a 45% shareholder in SST, and Mdm Kashmire and Mr Balan were free to seek to persuade the remaining shareholders in SST that the various proposals were viable and should be pursued.

121 In the event, none of those proposals materialised, and SST did not manage to obtain any new funds, which speaks volumes of the lack of viability of the various proposals. A review of the proposals shows that NCL could not be faulted for how it responded (or did not respond) to them.

(1) The Logos proposal

122 Logos SE Asia Pte Ltd (“Logos”) made a joint venture proposal dated 11 April 2019 in the form of an expression of interest that did not commit Logos to entering into the potential joint venture with SST.¹⁴⁷

123 Mdm Kashmire points to the section in the proposal on “Fit Out Allowance”:¹⁴⁸

¹⁴⁶ D&CC at para 36(e).

¹⁴⁷ 2nd Defendant’s ABOD at pp 679–689.

¹⁴⁸ 2nd Defendant’s ABOD at p 687.

A sum of up to [S\$15] million of fit out allowance to be provided to [SST] after the completion of the property purchase and upon commencement of development activities.

The parties shall agree on the list of items on which the fit out allowance is to be spent and the documentation needed.

124 Mdm Kashmire says that SST could have used that money to pay off NCL. But that is not what the proposal says – the money was for fitting out purposes, not for repayment of existing debts. Moreover, the proposal did not merely entail Logos putting funds into SST. It involved the purchase by Logos from SST of two properties that SST did not even own at the time.¹⁴⁹ SST needed to acquire those properties (for purchase by Logos as part of the proposed joint venture) before it could look to any “Fit Out Allowance” from Logos. In the event, nothing resulted from the Logos proposal.

(2) The HSBC proposal

125 There was then a proposal for SST to obtain a loan from HSBC on the collateral, *inter alia*, of an all monies joint and several guarantee from Mr Balan, Mdm Kashmire, Mdm Sushela, and Mr Balan’s sister Mdm Jayanthi.¹⁵⁰ Mdm Jayanthi never agreed to give such a guarantee – she was not even told of it (see [39] above). It was also a condition of the potential loan from HSBC that the suit commenced by NCL had to first be discontinued, or SST had to have fully repaid or resolved matters with NCL, or SST had to have placed \$4.7m with HSBC with repayment to NCL based on an agreed schedule.¹⁵¹ The monies from the potential loan were expressly *not* for repayment to NCL – SST had to resolve NCL’s claim first; it might then obtain a term loan of \$2m to be directly

¹⁴⁹ 2nd Defendant’s ABOD at p 680.

¹⁵⁰ 2nd Defendant’s ABOD at pp 690–692.

¹⁵¹ 2nd Defendant’s ABOD at p 692.

disbursed and paid to machine/equipment suppliers (which SST was not – see [38] above); and a further facility of up to \$8m for receivables financing (*ie*, factoring).

126 SST was unable to repay or resolve NCL’s claim, and NCL did not discontinue the suit. Accordingly, no loan was obtained from HSBC.

(3) The RHB proposal

127 The third proposal involved SST obtaining a loan from RHB, in an indicative amount of \$1.6m (far short of what was required to repay NCL).¹⁵² That was expressed as being “subject to the considerations below being met”, but there was no evidence as to what those considerations were. In the event, no such loan materialised.

128 Mr Balan acknowledged that RHB (like HSBC) would not have given any loan unless the litigation with NCL was removed, and they did not take it any further because they could not remove the litigation and the bank stopped it at that.¹⁵³

(4) The proposal from Mr Paraj Kakkar and Mr Teo Yi-Dar

129 The last proposal came from Mr Paraj Kakkar (“Mr Kakkar”) and Mr Teo Yi-Dar (“Mr Teo”).¹⁵⁴ There was a “without prejudice” meeting and “without prejudice” correspondence on 6 May 2019.¹⁵⁵ Again, Mdm Kashmire

¹⁵² 2nd Defendant’s ABOD at p 693.

¹⁵³ Transcript, 11 November 2020, p 32 lines 23–32; p 33 lines 1–6; p 36 lines 3–18.

¹⁵⁴ D&CC at para 36(e)(C).

¹⁵⁵ 2nd Defendant’s ABOD at p 736.

should not have relied on this in an attempt to prejudice NCL's legal position in this suit.

130 NCL reasonably proposed a settlement sum of \$4,090,000, which was slightly less than the \$4,090,830.26 which NCL had lent to SST, with no provision for any further payment to NCL in terms of interest, costs or a consultancy fee. The proposed repayment term was: \$300,000 upon execution of the intended sale and purchase agreement, and the balance to be paid in seven equal monthly instalments from 1 July 2019 to 1 December 2019. NCL also asked that judgment be entered in the suit, which judgment it would not enforce.¹⁵⁶ Further, NCL wanted a guarantee from the intended purchaser for the settlement sum.¹⁵⁷

131 The response from Mr Kakkar and Mr Teo by email was a counter-proposal that the suit be *withdrawn*, with further payments after the first \$300,000 to be paid in nine monthly instalments starting only after 90 days after satisfaction of all the supplementary terms (including withdrawal of the suit, and NCL relinquishing majority control of the board of SST).¹⁵⁸ The intended purchaser also declined to provide a guarantee for the settlement sum.¹⁵⁹ The counter-proposal was not acceptable to NCL – in effect, it would have to withdraw the suit after receiving just \$300,000 of its \$4m claim, with no

¹⁵⁶ 2nd Defendant's ABOD at pp 737–738.

¹⁵⁷ Supplementary Affidavit of Evidence-in-Chief of Yang Tse Pin ("Mr Yang's Supplementary AEIC") at para 55 in Plaintiff's AEIC Bundle at pp 462–463; Transcript, 3 November 2020, p 78 lines 3–32; p 79 lines 1–25; p 93 lines 2–9; 4 November 2020, p 3 lines 23–31.

¹⁵⁸ 2nd Defendant's ABOD at pp 739–742.

¹⁵⁹ Mr Yang's Supplementary AEIC at para 55(b); Transcript, 4 November 2020, p 3 lines 23–31.

assurance of further payments. In the event, nothing became of the proposal after Mdm Kashmire was removed from SST's board of directors on 7 May 2019.

132 There was nothing unreasonable in how NCL responded (or did not respond) to the various "without prejudice" proposals. In the first place, it was wrong of Mdm Kashmire to rely on these matters to prejudice NCL's legal rights in this suit, and they simply do not help her.

Mdm Kashmire's Counterclaim

133 In view of my findings above, I dismiss Mdm Kashmire's counterclaim for rescission of the PGs. Her remaining counterclaims are for breach of the Oral Agreement, and for misrepresentation.¹⁶⁰ These are premised on the Oral Agreement, the existence of which I have rejected (see [42] above). It follows that I dismiss her counterclaim as a whole.

Conclusion

Merits

134 Mdm Kashmire threw a host of allegations against NCL and its representatives, but none of them stuck. Her defence and counterclaim fails, and what is left is NCL's claim against her on the PGs. NCL did not seek a pound of flesh from her: it only asked that she honour her promise to pay the \$4,090,830.26 which NCL had lent SST, together with contractual interest thereon (totalling \$4,774,303.54 inclusive of interest up to the date of writ, 18 March 2019).

¹⁶⁰ D&CC at paras 49–60 read with paras 9 and 26–30.

135 I thus grant NCL judgment for:

- (a) the sum of \$4,774,303.54 as claimed; and
- (b) further contractual interest (pursuant to clause 3.2 of each of the Loan Agreements)¹⁶¹ on the principal sum of \$4,090,830.26 at the rate of 10% per annum from 18 March 2019 to payment.

Costs

136 NCL also claimed costs on a full indemnity basis pursuant to clause 11 of the PGs;¹⁶² but it was submitted on Mdm Kashmire's behalf that no costs order should be made against her as she is now legally aided, citing s 12(4)(c) of the Legal Aid and Advice Act (Chapter 160, 2014 Rev Ed).¹⁶³ In the circumstances, I will hear the parties further on costs.

Andre Maniam
Judicial Commissioner

Prakash Mulani and Ruelia Rufus
(M&A Law Corporation) for the plaintiff;
John Jeevan Noel and Victor Khong Wei De
(Pereira & Tan LLC) for the second defendant.

¹⁶¹ 2nd Defendant's ABOD at p 98; Plaintiff's ABOD at p 18.

¹⁶² 2nd Defendant's ABOD at p 103; Plaintiff's ABOD at p 137.

¹⁶³ DCS at para 54.

