IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 73

Suit No 858 of 2018

Between

Fundamental Investors Pte Ltd

… *Plaintiff*

And

Palm Tree Investment Group Pte Ltd

… *Defendant*

JUDGMENT

[Contract] — [Contractual terms] — [Rules of construction]
[Contract] — [Consideration] — [Estoppel]
[Contract] — [Prevention principle]
[Evidence] — [Documentary evidence] — [Proof of contents]

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v
Palm Tree Investment Group Pte Ltd

[2020] SGHC 73

High Court — Suit No 858 of 2018
Vincent Hoong J
18, 19, 20, 21 November 2019, 10, 24, 31 January 2020

17 April 2020 Judgment reserved.

Vincent Hoong J:

Introduction

1 Under the terms of a Convertible Loan Agreement ("the Loan Agreement"), the plaintiff agreed to lend a sum of S$2,000,000 ("the Loan") to the defendant. The Loan Agreement included an option – exercisable at the plaintiff's sole discretion – for the plaintiff to convert the Loan into an equity stake in the defendant's micro-loan business.

2 The plaintiff alleges that the defendant failed to repay the Loan by the contractually-stipulated repayment date. It seeks repayment of the full amount of the Loan with interest. The defendant counters that the plaintiff is estopped from so claiming by reason of its representation(s) that it would exercise the option to convert the Loan into equity. Further or alternatively, it asserts that its obligation to repay the Loan had not yet fallen due as at the time of the writ.

3 Having carefully considered the evidence and the submissions before me, I find that the plaintiff succeeds in its claim. I set out the reasons for my decision below.

Facts

Parties

4 The plaintiff is a Singapore-incorporated investment holding company. It is wholly owned by Mr Fereed Mangalji ("Mr Mangalji").[1] Ms Li Pei Shan Eva ("Ms Li") is a director of the plaintiff who manages its investments in Singapore and the region.[2]

5 The defendant is also a Singapore-incorporated company. Its primary business is to act as a holding company and private investment vehicle for prospective business ventures.[3] At the material time, the defendant owned a Philippines-incorporated subsidiary, Right Choice Lending ("RCL") (also known as Right Choice Finance), which was engaged in the business of providing micro-loans.[4] It also operated a food and beverage business in Singapore and the Philippines.[5]

6 Mr James Kodrowski ("Mr Kodrowski") is the managing director and sole shareholder of the defendant,[6] and it is undisputed that he fully controlled

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1 Plaintiff's Bundle of Affidavits of Evidence-in-Chief ("PBAEIC") at p 3, para 3

2 PBAEIC at p 107, para 1 and p 108, para 3

3 Defence (Amendment No. 2) ("Defence (2)") at para 4

4 Defendant's Bundle of Affidavits of Evidence-in-Chief ("DBAEIC") at p 11, para 4; Notes of Evidence ("NE"), 20 November 2019, 23/6-10

5 NE, 20 November 2019, 23/1-5

6 Agreed Bundle of Documents (Vol 1) ("AB1") at p 545

the defendant at the material time.[7]

Background to the dispute

The events from November 2017 – mid-December 2017

7 In or around November 2017, the defendant engaged Mr Olavs Ritenis ("Mr Ritenis"), the CEO of Ventures International Group (Singapore), to raise funds for its micro-lending business, RCL.[8] Mr Ritenis pitched RCL's micro-lending business to the plaintiff and invited the plaintiff to raise funds for RCL via the plaintiff's preferred investment structure.[9]

8 In mid-November 2017, Ms Li visited RCL's office in the Philippines to gather more information about RCL's business.[10] Subsequently, after further discussion between Mr Mangalji, Mr Kodrowski and Mr Ritenis, the parties entered into the Loan Agreement, which was dated 15 December 2017.

9 Pursuant to the Loan Agreement, the plaintiff agreed to lend a sum of S$2,000,000 to the defendant in two equal tranches of S$1,000,000 each. The recitals of the Loan Agreement explicitly provided that the purpose of the Loan was to enable the defendant to "perform its obligations for micro financing lending in Philippines".[11] The material provisions of the Loan Agreement were as follows:[12]

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7 NE, 20 November 2019, 20/9-10

8 Defence (2) at para 5.

9 AB1 at pp 58-77

10 PBAEIC at p 108, para [7]

11 AB1 at p 93

12 AB1 at pp 93-99

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

…

Termination Date means 6 months from date of this agreement.

…

2. THE LOAN

2.1 Subject to the terms and conditions set forth herein, the Lender agrees to grant the borrower a convertible loan equal to the sum of Tranche 1 and Tranche 2.

…

4. CONVERSION OF EQUITY

4.1 Tranche 1 and Tranche 2 allows for conversion to equity, in whole or in part proportionate to what has been funded before 31st March 2018, at the discretion of the Lender anytime until 31st March 2018, which will represent up to 40% of "ABC Company" to be incorporated in Singapore on terms mutually agreeable to both parties to hold 100% of RCL Philippines company shares.

5. REPAYMENT

…

5.2 Option is with Lender to exercise/not convert to equity and must be conveyed in writing on or before 31 March 2018, after which the option to convert to equity expires.

5.3 All payments by the Borrower under this Agreement shall be made in same day funds in Local Currency to the Lender Account on the due date.

…

7. COVENANTS

The Borrower covenants under this Agreement that the Borrower:

(a) will set up a special account referred to as the Lender's account for the purpose of this convertible loan guaranteed by Palm Tree Investment Group and RCL. In addition, this account will serve as collateral to the loan.

> …
>
> (c) will supply the Lender forthwith on demand with such financial documentation as may be requested by the Lender from time to time;
>
> (d) The Lender will receive 20% of annualised interest from placement of customer loans via the usage of funds from Lender's account
>
> (i) Any net interest earned (after the deduction of all reasonable administrative and operational costs of the Borrower as well as interest paid to the Lender) from placement of customer loans via the usage of funds from the Lender's account is beneficial as follows:
>
> I. In the event of conversion to equity, Lender will get 15% annualized interest and the net interest after payment to the lender will be split 60% to Borrower and 40% to Lender.
>
> II. In the event of non-conversion to equity, 100% to Lender (for the period up until the date of notification of intention not to convert, or latest up until Termination Date), such that Lender receives 20% annualized interest.

The events from mid-December 2017 – early June 2018

10 On 18 December 2017, the plaintiff transferred the first tranche ("Tranche 1") of the Loan to the defendant's UOB Account.[13]

11 In an e-mail dated 8 January 2018, Mr Kodrowski provided the plaintiff with several updates about RCL. In the e-mail, Mr Kodrowski informed the plaintiff that the defendant had an opportunity to acquire a HR/payroll software company known as AOMOS. Mr Kodrowski represented to the plaintiff that acquiring AOMOS would "open up big opportunities for RCL to offer point-of-

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13 AB1 at p 103

purchase financing as well as additional payday loan facilities and other revenue generating transactions".[14]

12 During a subsequent conference call between Mr Mangalji, Ms Li and Mr Kodrowski, Mr Kodrowski sought permission for the defendant to use a portion of Tranche 2 of the Loan to cover the cost of acquiring AOMOS.[15] Mr Mangalji gave in-principle approval for the defendant to do so.[16]

13 On 29 January 2018, pursuant to the plaintiff's request, Mr Kodrowski sent Ms Li a breakdown of the defendant's utilisation of Tranche 1 of the Loan.[17] Thereafter, the parties exchanged e-mails concerning the incorporation and the constitution of the "ABC Company" referred to at Clause 4.1 of the Loan Agreement.[18] On 2 February 2018, the parties incorporated the ABC Company, which was initially named Tech Stack Pte Ltd.[19]

14 On or around 7 February 2018, the second tranche ("Tranche 2") of the Loan was transferred by the plaintiff to the defendant's UOB account. From mid-February to early March, the parties continued to communicate on various matters, including:

(a) the change of the ABC Company's name from Tech Stack Pte Ltd to Right Choice Capital Pte Ltd ("RCC");[20]

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14 AB1 at p 132

15 PBAEIC at p 10, para 28

16 PBAEIC at p 10, para 29

17 AB1 at p 149

18 AB1 at pp 179, 182

19 DBAEIC at pp 64-66

20 AB1 at p 190

(b) the proposed terms of RCC's shareholder agreement;[21] and

(c) the provision of RCL's financial documents for the plaintiff's due diligence.[22]

15 On 21 March 2018, following requests by the plaintiff, Mr Kodrowski sent another breakdown of the defendant's utilisation of the Loan to the plaintiff.[23] On the same day, Mr Kodrowski wrote Ms Li an e-mail explaining that "[s]ince Fereed is intending to convert to equity we have not spent time apportioning costs against the initial investment".[24] Mr Mangalji responded to Mr Kodrowski's email stating that the plaintiff "[was] willing to consider the conversion and even investing incremental funds subject to finalization of the governing documents and governance structure".[25] The defendant alleges that it had become clear by this point that the parties were working towards converting the Loan into equity.[26] This is disputed by the plaintiff.[27]

16 From late March to early May 2018, the parties continued to negotiate the terms of the shareholder's agreement but were unable to arrive at a finalised draft.[28]

17 Subsequently, during a meeting in or around 8 June 2018, Mr Mangalji,

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21 AB1 at pp 189-215

22 PBAEIC at p 120, para 47

23 AB1 at p 314

24 AB1 at p 312

25 AB1 at p 312

26 DBAEIC at p 16, para 39

27 PBAEIC at p 14, para 43

28 DBAEIC at p 18, para 48

Ms Li and Mr Kodrowski met in Singapore to discuss several new investment opportunities.[29] During the meeting, Mr Mangalji made it clear to Mr Kodrowski that the plaintiff was not interested in helping the defendant to secure funding for these opportunities.[30] The parties also discussed the unresolved issues with RCL's financial documents. Mr Kodrowski indicated that these issues were being resolved with the defendant's auditors and that updated financials would be available in July 2018.[31]

The events from mid-June 2018 onwards

18 On 13 June 2018, the defendant sent Ms Li and Mr Mangalji a draft shareholder's agreement.[32] This draft was still unacceptable to the plaintiff. Furthermore, the plaintiff was dissatisfied that the defendant had yet to provide it with further information about RCL's financials.[33] Thus, sometime in or around late June 2018, Ms Li called Mr Kodrowski informing him that the plaintiff was seeking repayment of the Loan with interest.[34]

19 On 27 July 2018, Mr Ritenis e-mailed the plaintiff on behalf of the defendant to make a repayment proposal for the Loan.[35] Based on the proposal, the defendant was to repay Tranche 1 of the Loan with an interest rate of 20% per annum over three years, with interest payments commencing in March 2019

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29 PBAEIC at p 17, para 56; DBAEIC at p 18, para 49

30 PBAEIC at p 17, para 56; DBAEIC at p 18, para 49

31 PBAEIC at p 17, para 57; DBAEIC at p 18, para 49

32 AB1 at p 490

33 PBAEIC at p 18, para 60

34 PBAEIC at p 129, para 78; DBAEIC at p 18, para 50

35 AB1 at p 549

and staggered principal repayments commencing in December 2020. Tranche 2 of the Loan was to be repaid with an interest rate of 8% per annum over five years, with interest payments commencing in May 2019 and staggered principal repayments commencing in February 2023.[36]

20 The plaintiff did not accept the defendant's repayment proposal. On 30 July 2018, the plaintiff's solicitors sent a formal letter of demand to the defendant seeking repayment of the Loan with interest in accordance with the terms of the Loan Agreement.[37] The plaintiff then commenced the present Suit to enforce its purported right to repayment of the Loan.

The parties' cases

The plaintiff's case

21 The plaintiff's claim is a straightforward action under a written contract for repayment of the Loan with interest.[38] The plaintiff alleges that, on its proper construction, the terms of the Loan required it to be repaid (a) by June 2018; and (b) with an interest rate of 20% per annum.[39] It further asserts that it should be awarded pre-judgment interest from 16 June 2018 up till the date of judgment at a rate of 20% per annum.[40]

22 Separately, the plaintiff contends that the key documents relied on by the defendant are inadmissible, because their authenticity was not proved and/or

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36 AB1 at pp 550-551

37 AB1 at pp 558-559

38 Plaintiff's Closing Submissions ("PCS") at para 35

39 PCS at para 37

40 PCS at para 73

their contents were hearsay.[41]

The defendant's case

23 The defendant denies that the Loan was due to be repaid on 15 June 2018.[42] It further contends that the plaintiff is not entitled to 20% annualised interest on *the entire loan sum*. According to the defendant, the 20% interest was only payable on the portion of the Loan which was used for customer loans.[43] Moreover, it is the *plaintiff* which bears the burden of proving the exact sum which was used for the placement of customer loans.[44]

24 The defendant also relies on two defences which, it claims, completely absolve it of liability to pay the Loan. First, it claims that the plaintiff is estopped from making any claim on the Loan.[45] Further or in the alternative, it argues that the time for repayment of the Loan was "set at large" due to the prevention principle endorsed in *Chua Tian Chu and another v Chin Bay Ching and another* [2011] SGHC 126 ("*Chua Tian Chu*").[46]

Issues to be determined

25 Based on the foregoing, the key issues to be determined are as follows:

(a) Whether the key documents on which the defendant relies are admissible;

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41 PCS at para 86

42 Defendant's Reply Submissions ("DRS") at paras 4-6

43 DCS at paras 35-39

44 DRS at paras 11-13

45 Defence (2) at para 19, DCS at para 14

46 Defence (2) at para 7(i), DCS at paras 92-94

(b) Whether, pursuant to the Loan Agreement, the plaintiff was entitled to repayment of the Loan by 15 June 2018, with 20% annualised interest on the entire sum of the Loan;

(c) Whether the plaintiff was estopped from making any claim on the Loan; and

(d) Whether the time for repayment of the Loan was "set at large" by virtue of the prevention principle.

26 If the plaintiff succeeds in its claim, whether it is entitled to pre-judgment interest at a rate of 20% per annum.

Admissibility of key documents relied on by the defendant

27 I first deal with the preliminary issue concerning the admissibility of the documents relied on by the defendant. The plaintiff's primary contention is that three of the documents which the defendant has sought to admit into evidence are inadmissible because their authenticity has not been proven, and/or their contents constitute hearsay. The documents in question and their alleged purpose(s) are as follows:

(a) *The Tab 23 Document:* This document is disclosed at Tab 5 of the defendant's Bundle of Documents and exhibited to Mr Kodrowski's Affidavit of Evidence-in-Chief ("AEIC").[47] It purportedly evidences the defendant's uses of the Loan.

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47 DBAEIC at p 163

(b) *Summary of Loans Document:* This document, which is disclosed at Tab 1 of the defendant's Bundle of Documents, allegedly constitutes evidence that RCL's customer loans had not been repaid.[48]

(c) *RCL Sales Income Graph:* This document is exhibited to Mr Kodrowski's AEIC[49] and is described by Mr Kodrowski as "a graph that illustrates the reduction in sales income".[50] It purportedly shows that the defendant pulled back on its consumer lending in reliance on the plaintiff's representations that the Loan would be converted into equity.[51]

28 It is important to clarify, at the outset, that there is a conceptual distinction between (a) the authenticity of a document and (b) the admissibility of a document as proof of the facts stated therein. The authentication of a document has to be resolved *before* determining its admissibility under the exception to the hearsay rule (see *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holding*") at [75] to [76]). I will thus address the plaintiff's objections in this sequence.

Failure to prove authenticity of the documents

29 The authentication of documents is ordinarily determined by ss 63 to 67 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"). These provisions

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48 NE, 20 November 2019, 30/4-18; NE, 21 November 2019, 91/9-26

49 DBAEIC at p 165

50 DBAEIC at p 20, para 61

51 DBAEIC at p 20, para 61

stipulate that documents may be proved by primary evidence (*ie* producing the original document for the court's inspection), or by secondary evidence (*eg* providing the court with certified copies of the original document). Documents can only be proved by secondary evidence in the circumstances specified under s 67 of the Act, which states as follows:

67.—(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(a) when the original is shown or appears to be in the possession or power of —

(i) the person against whom the document is sought to be proved;

(ii) any person out of reach of or not subject to the process of the court; or

(iii) any person legally bound to produce it,

and when, after the notice mentioned in section 68, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 76;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Singapore to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

(3) In case (b), the written admission is admissible.

> (4) In case (e) or (f), a certified copy of the document but no other kind of secondary evidence is admissible.
>
> (5) In case (g), evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

30 When the document in question consists of information that has been compiled from various sources, the collated document must be proved through primary or secondary evidence *of the underlying source information.* This was the common-sense approach adopted in the case of *Mycitydeal Ltd (trading as Groupon UK) and others v Villas International Property Pte Ltd and others* [2014] 4 SLR 1077. In that case, the first defendant contended that the plaintiff had failed to make payments on allegedly redeemed vouchers. It sought to prove its claims by relying on, *inter alia*, a table exhibited in the fourth defendant's AEIC ("the AEIC Table") which purportedly summarised the total amounts owing in respect of the vouchers. Steven Chong J (as he then was) held that the AEIC Table had not been properly admitted into evidence in accordance with the statutorily prescribed modes of proof. He stated (at [59]) that:

> [T]he total sums payable in respect of redeemed vouchers as recorded in the AEIC Table were … *not proven by production of the* ***underlying*** *primary evidence.* Although some primary evidence was adduced in the form of "sample" redeemed vouchers, it is clear that these vouchers simply do not add up to the sums tabulated in the AEIC Table. *Compiling the claim figures in a spreadsheet, D1, without adequately explaining the source of the underlying information, does not improve the first defendant's position.* [emphasis added in italics and bold italics]

31 However, the Court of Appeal in *Jet Holding* introduced a significant qualification to the evidential framework outlined above. It opined (at [51]) that:

> [W]hilst, as an important point of departure, a party seeking to introduce documents into evidence ought to comply with the provisions in the Evidence Act, if these documents are in fact marked and admitted into evidence without that party in fact satisfying the requirements in the Evidence Act *and* where there

> has been *no objection taken by the other party at that particular point in time*, then that other party cannot object to the admission of the said documents later. [emphasis in original]

32 The Court of Appeal went on to explain the rationale behind this proposition in the following terms (at [53]):

> Although the concepts of primary and secondary evidence as embodied within the provisions of the Evidence Act are of fundamental importance, the principle of *waiver* might apply if no objection is raised at the point in time when the evidence concerned is adduced … On the other hand, a failure to object could simply be construed as an *admission* that the requirements under the Evidence Act were complied with … [emphasis added]

33 In the present case, the defendant failed to prove the authenticity of the three documents listed at [27] above by complying with the relevant provisions of the Evidence Act.

34 First, the defendant did not produce primary evidence of the source documents underlying the Summary of Loans Document and the RCL Income Graph. At trial, Mr Kodrowski described the Summary of Loans document as a "summary" of information but was unable to pinpoint the source documents which had been used to prepare this summary.[52] Likewise, Mr Kodrowski's AEIC stated that the RCL Sales Income Graph was "derived from [the defendant's] monthly financial records",[53] but these records were never disclosed.

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52 NE, 21 November 2019, 90/16-18

53 NE, 21 November 2019, 14/12-13

35 Although the defendant *did* manage to identify the source documents underlying the Tab 23 Document,[54] a significant proportion of the data recorded in the Tab 23 Document is not satisfactorily accounted for. For instance, the information pertaining to the defendant's Philippines transactions was largely derived from the bank books of RCL's Philippines accounts.[55] However, these bank books only state the amounts that were credited to or debited from the defendant's account without alluding to the purpose of each transfer.

36 In addition, the defendant also did not explain how or why it was entitled, pursuant to s 67 of the Evidence Act, to prove any of the three documents through secondary evidence. These were serious evidential deficiencies which the defendant could not overcome simply by annexing the disputed documents to Mr Kodrowski's AEIC (see *Jet Holding* ([28] *supra* at [36])).

37 I further note that the plaintiff has expressly objected to the authenticity of the documents in question by filing a notice of non-admission to their authenticity under Order 27 Rule 4(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).[56] Accordingly, the exception in *Jet Holding* does not apply (see [31] above), and I agree with the plaintiff that the three documents are inadmissible because the defendant has not satisfactorily proven their authenticity.

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54 DRS at pp 9-11

55 AB1 at pp 531 to 536; AB2 at pp 599-672, 725-248

56 Notice of Non-Admission to Authenticity of Documents dated 8 August 2019; Notice of Non-Admission to Authenticity of Documents dated 16 August 2019

Inadmissibility of the documents as hearsay

38 The plaintiff further contends that even if the authenticity of the documents is proven, the documents are still inadmissible by virtue of the hearsay rule, which "requires the actual maker of the document in question to personally attend trial and testify about *the truth of the contents* of the document" (emphasis in original).

39 During cross-examination, Mr Kodrowski admitted that he was not the maker of the Tab 23 Document,[57] the Summary of Loans Document,[58] or the RCL Sales Income Graph.[59] These documents had been prepared by the defendant's Chief Financial Officer and/or accountants, none of whom was called as a witness at trial.

40 I note that under s 34 of the Evidence Act, entries of books of accounts which are regularly kept in the course of business are relevant (and therefore admissible despite the operation of the hearsay rule) where they relate to the issues in a particular case. Similarly, s 32(b)(i) of the Evidence Act provides an exception to the hearsay rule for entries or memorandums in books which are kept in the ordinary course of trade. However, the defendant has not sought to rely on these provisions. Furthermore and in any event, I find that these provisions would not assist the defendant since the Tab 23 document was specifically produced for the purposes of this suit.[60] It was not a

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57 NE, 21 November 2019, 41/6-13; 44/23-26

58 NE, 21 November 2019, 92/14-19

59 NE, 21 November 2019, 14/12-13

60 NE, 21 November 2019, 29/6-8

contemporaneous record which had been "regularly kept" or "kept in the ordinary course of trade".

41 In addition, although the bank books of RCL's Philippines accounts contained handwritten annotations indicating the possible transferors or transferees of the stipulated sums, Mr Kodrowski admitted that he had not made these annotations and that the person who had made them would not be testifying at trial.[61] This presents an additional problem of multiple hearsay or "hearsay upon hearsay" where the contents of the Tab 23 Document are concerned.

42 The defendant has not attempted to bring themselves within any of the possible exceptions to the rule against hearsay under s 32 of the Evidence Act. Accordingly, I find that *even if* the defendant had satisfactorily proven the authenticity of the Tab 23 Document, the Summary of Loans Document and the RCL Income Graph, the contents of all three documents would nevertheless constitute inadmissible hearsay.

Plaintiff's entitlement to repayment under the terms of the Loan Agreement

43 I now turn to the issue of whether, and to what extent, the terms of the Loan Agreement entitle the plaintiff to repayment of the Loan with interest. This inquiry encompasses two subsidiary issues: (a) whether the Loan was due to be repaid on 15 June 2019; and (b) whether the plaintiff was entitled to 20% annualised interest on the entire loan sum of S$2,000,000.

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61 NE, 21 November 2019, 75/14-76/7

Whether the Loan was due to be repaid on 15 June 2018

44 In general, the time for repayment of a loan is a question of construction of the relevant contractual terms: see *Chitty on Contracts* vol 1 (Sweet & Maxwell, 33rd Ed, 2018) at para 21-055. In the present case, Clause 5.3 of the Loan Agreement explicitly provides that "[a]ll sums by the Borrower under this Agreement shall be made… on the *due date*" (emphasis added). The term "due date" is not defined. However, Clause 1.1 of the Loan Agreement defines "Termination Date" as "6 months from the date of this agreement", *ie* 15 June 2018.

45 The plaintiff contends that the "Termination Date", as defined under Clause 1.1 of the Loan Agreement, constituted the deadline for the defendant to repay the Loan. According to the plaintiff, this is "the most reasonable interpretation" of the Loan Agreement's provisions, as it is only logical that a debtor must repay the loan when the underlying loan facility is terminated.[62] The plaintiff argues that this interpretation is also supported by:

(a) Clause 7(d)(j)(II) of the Loan Agreement, which states that interest was payable on the Loan "latest up until the Termination Date";[63] and

(b) Mr Kodrowski's supposed admission, during cross-examination, that the Termination Date was "the date the loan stops and gets repaid".[64]

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62 PCS at para 40

63 AB 1 at p 95

64 NE, 20 November 2019, 37/12-16

46 The defendant does not dispute that 15 June 2018 was the date on which the parties *originally* intended for the Loan to be repaid. Its position, however, is that this date is no longer applicable due to the "open-ended deferment of the contractual deadlines".[65] In this regard, the defendant asserts that the events and/or the communications between the parties from 22 to 31 March 2018 demonstrated that the parties had mutually agreed to postpone the deadline for the plaintiff to exercise the option to convert.[66] As such, "the contractual Termination Date [also] [could not] stand".[67]

47 I am unable to agree with the defendant's submissions. Crucially, Clause 11.2 of the Loan Agreement explicitly provides that amendments to the Loan Agreement are not binding unless recorded in writing and signed by both parties. The defendant was unable to adduce any documentary evidence to demonstrate that the Termination Date had been amended in this manner.

48 The defendant also contends that Mr Kodrowski's alleged admission was taken out of context, and that he was merely agreeing "as a matter of general principle" that there is "no purpose having a termination date except as the date the loan stops and get repaid". The relevant portion of the transcript reads as follows:

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65 DRS at para 3

66 DCS at para 89

67 DCS at para 91

> Q: So 15 June 2018 was the date that this loan would end. Agree?
>
> A: As it was originally set out in this agreement, yes.
>
> Q: Yes, and of course, because *there is no purpose having a termination date except as the date the loan stops and gets repaid. Agree?*
>
> A: *Yes.*
>
> [emphasis added]

49 I agree with the defendant that Mr Kodrowski's remarks in the passage above are somewhat equivocal; they do not foreclose the possibility that the termination date was *subsequently* altered by the plaintiff's conduct. Nevertheless, I am satisfied that this issue must be resolved in the plaintiff's favour even if Mr Kodrowski's admission is not taken into consideration. The literal meaning of the contract is clear – Clause 5.3, read with Clause 1.1 and Clause 7(d)(j)(II) of the Loan Agreement, collectively indicate that the intended deadline for repayment was the Termination Date of 15 June 2018. As the defendant has not satisfactorily proven that the Termination Date was varied or postponed, the original deadline must stand.

Whether the plaintiff was entitled to 20% annualised interest on the entire sum of the Loan

Interpretation of the Loan Agreement

50 I next consider the question of whether the plaintiff was entitled to 20% annualised interest on the entire sum of the Loan (*ie*, S$2,000,000). In this regard, the critical provision to note is Clause 7(d) of the Loan Agreement, which states as follows:

> (d) The Lender will receive *20% of annualised interest from* ***placement of customer loans*** via the usage of funds from Lender's account

> (i) Any net interest earned (after the deduction of all reasonable administrative and operational costs of the Borrower as well as interest paid to the Lender) from placement of customer loans via the usage of funds from the Lender's account is beneficial as follows:
>
> I. In the event of conversion to equity, Lender will get 15% annualized interest and the net interest after payment to the lender will be split 60% to Borrower and 40% to Lender.
>
> II. In the event of non-conversion to equity, 100% to Lender (for the period up until the date of notification of intention not to convert, or latest up until Termination Date), *such that Lender receives 20% annualized interest.*

[emphasis added in italics and bold italics]

51 The plaintiff's position is that 20% annualised interest accrued on the two tranches of the Loan, from the dates on which they were respectively disbursed (*ie*, 18 December 2017 for Tranche 1 and 7 February 2018 for Tranche 2), up until 15 June 2018, being the date on which repayment of the Loan became due. This adds up to a sum of S$168,219.18.

52 The defendant counters that it is clear, from the literal wording of Clause 7(d), that 20% annualised interest was only payable on "the portion of invested funds used for the placement of customer loans via RCL".[68] Otherwise, there would have been no need to refer to the issue of placement.[69] It further avers that this narrow interpretation of the Loan Agreement was intended by Ms Li, who was the drafter of the Loan Agreement.[70]

53 My primary task, therefore, is to construe the Loan Agreement in a

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68 Defence at para 14

69 DCS at para 36

70 DCS at para 37

manner which gives effect to the *objectively-ascertained* intentions of the parties, "in the face of conflicting subjective interpretations advanced by ingenious counsel" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [1]).

54 The starting point of this analysis is the text of the contract, which "ought always to be the first port of call" (*Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1187 (*Y.E.S. F&B Group*) at [32]). However, this task is complicated in the instant case by the fact that the wording of the Loan Agreement does not seem to admit of one clear meaning. On the one hand, Clause 7(d) states that the Lender "will receive 20% of annualised interest from the placement of customer loans". On the other hand, there is nothing in Clause 7(d)(i)(II) which purports to limit the plaintiff's entitlement to 20% annualised interest to the portion of the Loan which was used specifically for the placement of customer loans. Clause 7(d)(i)(II) simply provides that "[i]n the event of non-conversion to equity… Lender receives 20% annualized interest".

55 I thus consider that the collective import of Clauses 7(d) and 7(d)(i)(II) is *not* plain and unambiguous as the defendant asserts. As the Court of Appeal noted in *Y.E.S. F&B Group* (at [62]), "text and context interact with one another in the holistic exercise of contractual interpretation, and, particularly in situations… where the text is ambiguous, *it is the context that comes to the fore*" (emphasis added). It is also of note that the Loan Agreement was drafted by Ms Li (a non-legal professional) in negotiation with Mr Ritenis, without the benefit

of legal advice or review.[71] In such cases, the court generally "eschew[s] a strict construction of the relevant language of the contract and adopt[s] instead a more common-sense approach that considers the reasonable and probable expectations that the parties would have had" (*Y.E.S. F&B Group* at [63]). It is this "common-sense approach" which underpins my analysis of the relevant context in the present case.

56 At this juncture, I should also state that it is well-established that extrinsic evidence is admissible under s 94*(f)* of the Evidence Act to aid in the interpretation of contractual language (but not to contradict or vary it), provided that such evidence is relevant, reasonably available to all the contracting parties and relates to a clear and obvious context (see *Zurich Insurance* at [132]). However, while s 94*(f)* of the Evidence Act permits the admissibility of extrinsic evidence of the circumstances surrounding a contract, extrinsic evidence of the drafter's subjective intentions is generally inadmissible unless it can in some way be brought within the limited exceptions to the parol evidence rule under ss 97 to 99 of the Evidence Act (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [65(d)]).

57 For present purposes, it is critical to note that at the point of drafting, both the plaintiff and the defendant had intended for the Loan to be used solely for the purposes of micro-lending. This is expressly set out in Recital (A) of the Loan Agreement, which states: "Borrower has requested the loan from the Lender in order to perform its obligations for micro financing lending in

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71 NE, 19 November 2019, 68/31-69

Philippines". In addition, both Ms Li[72] and Mr Ritenis[73] confirmed during cross-examination that, as at the time when the Loan Agreement was prepared, the parties had only intended to use the Loan for micro-lending and nothing else.

58 Thus, I consider that the phrase "from the placement of customer loans" in Clause 7(d), when read together with Clause 7(d)(i)(II) and understood in light of the relevant context, was essentially intended to be *descriptive* in nature. It was supposed to convey the plaintiff's expectations that it would receive 20% annualised interest on the entire Loan sum, which was (*factually* speaking) intended to be used only for the placement of customer loans. This, in my view, is the most logical and reasonable interpretation of Clause 7(d).

59 It was only subsequently, in or around January 2018, that the plaintiff agreed that the Loan could be used for the purpose of acquiring AOMOS in addition to being deployed for micro-lending. However, there is no evidence to suggest that the defendant's obligation to pay interest on the entire Loan sum was waived or varied simply because of the change of use of the Loan. As such, the only reasonable inference is that Clauses 7(d) and 7(d)(i)(II) continued to govern the plaintiff's entitlement to interest, such that the plaintiff remained entitled to 20% annualised interest on the entire Loan sum. After all, this was what the parties had originally intended, and the agreement between them had never changed.[74]

60 I also reject the defendant's suggestion[75] that Ms Li had agreed to its

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72 NE, 19 November 2019, 73/5-8

73 NE, 21 November 2019, 115/20-24

74 PCS at para 67

75 DCS at para 37

preferred interpretation. In my view, the defendant has misconstrued Ms Li's evidence. The part of Ms Li's cross-examination which the defendant seeks to rely on is as follows:

> Q: But would you not agree with me, Ms Li, that the reference in 7(d) to 20% interest of placement of customer loans via usage of funds envisages a situation that you may not lend out all of the loans, and so that's why you only charged 20% on what you had disbursed?
>
> A: I didn't think about that at that time.
>
> Q: Okay. But now that it's been brought to your attention---like I've said, we're not---
>
> A: *Okay, yes.*
>
> Q: ---trying to fix what happened in the past, do you agree with me at least on the face of it, if you could go back and redraft this, would you redraft it to make it a bit clearer? Or you're happy with---
>
> A: Yah, I would. Yah, if I have lawyers, I would.
>
> [emphasis added]

The excerpt above begins with the defendant's counsel asserting that the parties had envisaged that the Loan would be used for purposes other than micro-lending. To this, Ms Li's response was "I didn't think about that at that time". The words which followed ("Okay, yes") were *not* an addition to her previous response, but an acknowledgement that she was listening to counsel's next question.[76] In arriving at this interpretation, I am supported by the fact that Ms Li had clearly stated, during an earlier segment of her cross-examination, that

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76 PRS at para 24

she had intended for the 20% annualised interest to accrue on the "full 2 million".[77]

61 In any event, I am of the view that the evidence of Ms Li's subjective interpretation of the Loan Agreement is inadmissible since (a) it does not fall within s 94*(f)* of the Evidence Act (see [56] above); and (b) neither party has attempted to bring it within the specific exceptions under ss 97 to 99 of the Evidence Act.

62 Finally, I would add that it is inherently improbable that the parties could have intended for the defendant to use the Loan monies interest-free as long as it did not deploy them for microfinance purposes. As the plaintiff has pointed out, both parties were commercial entities dealing in an arm's-length transaction. Neither party would have expected a commercial loan like this one to be issued interest-free, regardless of the purpose(s) for which the loan monies were used.

Defendant's failure to prove that Loan was utilised for purposes other than for micro-finance

63 For completeness, I should also deal with the plaintiff's alternative argument, *ie* that it is entitled to 20% annualised interest on the entire sum of the Loan *even if* the defendant's narrow interpretation of Clause 7(d) is correct. In this regard, the plaintiff's position is that the defendant can only establish a positive defence to the plaintiff's claim for interest if it can:

(a) prove what Loan amounts were used for purposes other than for micro-loans, and therefore should not attract interest; and

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77 NE, 19 November 2019, 73/5-8

(b) satisfy the court that the uses referred to in (a) above were *contractually-authorised* uses of the Loan.[78]

64 According to the plaintiff, the use of the Loan is a fact which lies especially within the defendant's knowledge.[79] Accordingly, the defendant bears the burden of proving (a) under s 108 of the Evidence Act, which states:

> **108.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

65 The defendant counters that under s 103 of the Evidence Act, the party who asserts the facts on which his cause of action is based must prove the existence of those facts. As such, it is the *plaintiff* which bears the burden of proving which portion of the Loan was used for micro-loans.

66 In my judgment, the defendant has misunderstood the relationship between ss 103 and 108 of the Evidence Act. It is true that the general rule, as set out under s 103 of the Evidence Act, is that the plaintiff must prove all the facts necessary to establish his case. This is not disputed by the plaintiff. However, s 108 *qualifies* the rule under s 103 of the Evidence Act (see Jeffrey Pinsler, SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ("*Evidence and the Litigation Process*") at 12.031). Accordingly, the crucial question to be answered in the instant case is whether s 108 of the Evidence Act applies in the present case to *re-allocate* the burden of proving the defendant's uses of the Loan from the plaintiff to the defendant.

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78 PCS at para 68

79 PCS at para 69

67 The Court of Appeal has emphasised that s 108 of the Evidence Act should only be invoked in "very limited circumstances", since "[w]idely construed and lifted out of its context, it will reverse the burden of proof of the essential ingredients of the [claimant's] case by which section 103 [of the Evidence Act] is cast on the [claimant]" (see *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [68]). The scope of s 108 of the Evidence Act was discussed in the context of a civil matter in *Surender Singh s/o Jagdish Singh and another (administrators of the estate of Narindar Kaur d/o Sarwan Singh, deceased) v Li Man Kay and others* [2010] 1 SLR 428 ("*Surender Singh*"). In that case, Lai Siu Chiu J (as she then was) distilled the key principles relating to the provision, which were summarised by the Court of Appeal in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 as follows:

> (a) First, s 108 of the Evidence Act applies only to circumstances where the defendant *alone* has knowledge of a particular fact. If any other person has knowledge of the same fact, s 108 will not apply (see *Surender Singh* at [217]).
>
> (b) Secondly, s 108 of the Evidence Act operates in a "commonsense way" and the "balance of convenience and the disproportion of the labour, that would be involved in finding out and proving certain facts" must be taken into account in deciding whether the incidence of the burden of proof has shifted (see *Surender Singh* at [219]).
>
> (c) Thirdly, the plaintiff can only invoke s 108 of the Evidence Act if it establishes a *prima facie* case that the fact which it asserts is true. In other words, a mere allegation will not suffice; the plaintiff must "establish facts which give rise to a suspicion" (see *Surender Singh* at [221]).

68 I find that the first requirement is satisfied in the present case, since the defendant is the *only* party which could have been fully aware of all the details surrounding its use of the Loan.

69 Turning to the second requirement, the defendant alleges its usage of the Loan is not a matter which lies especially within its knowledge since "all documents relating to this issue have been disclosed".[80] I am not persuaded by this argument. As the plaintiff points out, the defendant's primary evidence of how the Loan was utilised consists of the Tab 23 Document, which (for reasons outlined at [27] to [42] above) is inadmissible. Many of the source documents which allegedly form the basis of the Tab 23 Document are also inadmissible under the hearsay rule (see [41] above). In my assessment, the circumstances are such that it would be "disproportionately difficult" for the plaintiff to prove the defendant's use of the Loan.

70 However, I am not satisfied that the plaintiff has established a *prima facie* case that the defendant did not use *any* of the Loan monies for purposes other than for micro-loans. This is especially so since the plaintiff concedes that it had authorised the defendant to use PHP 4,500,000 of the Loan for the acquisition of AOMOS.[81] To make out a *prima facie* case, the plaintiff would have to adduce at least *some* evidence to show that *no* part of the Loan was used to acquire AOMOS, despite the parties' earlier agreement to the contrary. Merely alleging that the defendant "has not adduced any evidence of the amount actually paid for this … purpose"[82] is not enough.

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80 DRS at para 13

81 PCS at para 70, PBAEIC at pp 10-11, paras 27-32

82 PCS at para 70

71 Accordingly, I find that the plaintiff is not entitled to rely on s 108 of the Evidence Act. Nevertheless, the plaintiff is entitled to 20% annualised interest on the entire sum of the Loan, by virtue of my earlier findings at [50] to [61] above.

Whether the plaintiff was estopped from making any claim on the Loan

72 I now turn to address the defendant's argument that that the plaintiff was "estopped from making any claim on the Loan".[83]

73 The parties are agreed that in order to successfully make out an estoppel defence, the defendant must prove that the following elements are satisfied (see for example *Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and others* [2018] SGHC 263 at [140]; *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 at [83]):

(a) First, there must be a clear and unequivocal representation by the promisor, whether by words or conduct, that it will not enforce its strict legal rights;

(b) Second, the promisee must act in reliance on the promise and suffer detriment as a result; and

(c) Third, it must be "inequitable" for the promisor to resile from his promise.

74 I now examine each of these three requirements in turn.

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83 Defence (2) at para 19

Clear and unequivocal representation by the plaintiff

Whether the defendant is permitted to rely on its amended defence

75 Before dealing with the defendant's submissions on this issue, I first address the plaintiff's preliminary objection that the defendant has "blatantly revamp[ed]" its defence from a defence of estoppel *by words* to a defence of estoppel *by conduct*, and therefore should not be permitted to rely on its amended (and previously unpleaded) defence of estoppel *by conduct.*

76 The plaintiff avers that the defendant had "pleaded and particularised the crux of its estoppel defence as a specific oral representation allegedly spoken by Mr Mangalji over phone and video calls, where he said to treat monies as permanent capital". It argues that this is evident from:

(a) paragraph 19 of the defendant's Defence (Amendment No. 2) dated 3 July 2019 ("Defence (2)"), which states the defendant's case that "the Plaintiff is estopped… by reason of *express* representations or promises" (emphasis added); and

(b) paragraph 19(a) of Defence (2), which states that the "best particulars" which the defendant could provide of the plaintiff's alleged representations were that "the Plaintiff's Fereed Mangalji had stated that the invested sums be treated as permanent capital for the ABC company".

77 The plaintiff also emphasises that the defendant's pleaded case was "the result of a painstaking interlocutory exercise to pin down [the defendant's]

defence, narrow down issues and avoid ambushes at trial".[84] This notwithstanding, the defendant "rewr[o]te its case at the last minute"[85] by focusing, in its Closing Submissions, on the plaintiff's alleged representations *by conduct* that it would was "eventually going to convert to equity".[86]

78 As explained in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [38], the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter which the parties have decided not to put in issue. However, the law permits a departure from this rule in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so (see *V Nithia* at [38]; *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]).

79 In my judgment, the defendant should not be permitted to rely on its unpleaded defence of estoppel *by conduct*. From the pre-trial stage right up to the opening of the trial, the defendant had *clearly* and *consistently* taken the position that its estoppel defence was premised on Mr Mangalji's alleged oral representation(s) that the Loan monies would be treated as "permanent capital". This was apparent from the following communications and/or events:

(a) The plaintiff had expressly requested, by way of a letter dated 19 February 2019, for further and better particulars of the alleged representations which formed the basis of the defendant's estoppel

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84 PCS at para 7

85 PRS at para 5

86 DCS at para 10

defence.[87] The defendant's answer was that "the Plaintiff's Fereed Mangalji communicated the Alleged Representations orally through phone calls and video calls with the Defendant's James Kodrowski".[88]

(b) The plaintiff was of the view that the defendant's response did not sufficiently answer its request. Accordingly, it took out HC/SUM 2812/2019 seeking further particulars of Mr Mangalji's alleged oral representations.[89]

(c) The defendant took the position that its pleading at paragraph 19(a) of its Defence (Amendment No. 1) dated 2 January 2019 ("Defence (1)") already provided the "*best* answers and recollection" that the defendant had in respect of what was sought (emphasis added). It amended paragraph 19(a) of Defence (1) to reflect this position. It also deleted its other references to the plaintiff's "communications" of its intention to convert to equity at paragraphs 12, 13, 20, 21, 24, 25, and 26 of Defence (1).

(d) About a month before the start of trial, the defendant's counsel inserted a list of unpleaded issues – some of which ostensibly related to a defence of estoppel by *conduct* – into the *non-agreed* list of legal issues in the Lead Counsel Statement. The plaintiff explicitly raised its objections to these issues in its Opening Statement[90] and in an e-mail dated 20 September 2019. The defendant did not amend its pleadings.

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87 SDB at p 18

88 Setting Down Bundle ("SDB") at p 18

89 Plaintiff's Skeletal Submissions, HC/SUM 2812/2019 at para 20

90 Plaintiff's Opening Statement at paras 49-51

80 In light of these events, the plaintiff did not expect – and had no legitimate reason to expect – that the defendant would be relying on a defence of estoppel *by conduct*. As such, the plaintiff's witnesses, Mr Mangalji and Ms Li, did not address the defendant's contentions on this point in their AEICs. The plaintiff's Closing Submissions were also written on the basis that the defendant's estoppel defence was premised exclusively on Mr Mangalji's alleged oral representation(s).[91] The plaintiff was only able to address the defendant's unpleaded defence of estoppel by conduct in its Reply Submissions, which it had to file *less than a month* after the defendant's Closing Submissions were filed. This was clearly prejudicial to the plaintiff.

81 As such, the defendant should not be permitted to rely on its unpleaded defence of estoppel by conduct. However, even if I am wrong on this point, I am of the view – for reasons which will be explained in further detail below – that the defendant's defence of estoppel, whether by words or conduct, fails on the facts in any case.

Mr Mangalji's alleged oral representations

82 I begin by addressing the defendant's *pleaded* defence of estoppel by words, which hinges on the defendant's assertion that Mr Mangalji had stated that the defendant should treat the Loan monies as "permanent capital".[92] The defendant alleges that the effect of Mr Mangalji's oral representation(s) was to generate a mutual understanding between the parties that the plaintiff *would* exercise the conversion option in the Loan Agreement.[93]

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91 PCS at para 116

92 DCS at para 19

93 Defence (2) at para 7(a) and 19(a)

83 The plaintiff denies that Mr Mangalji had made any such oral representation(s). It further avers that there was no understanding between the parties that the plaintiff would exercise the conversion option.[94]

84 I first examine the defendant's allegation that Mr Mangalji had *himself* admitted to using the term "permanent capital" in relation to the Loan. This allegation is based on the following segment of Mr Mangalji's cross-examination:

94 PCS at para 118

> Q: … You are aware that it is my client's case that at the time when these negotiations were being discussed, right, the defendant's version is that you had in your mind that you wanted a permanent arrangement, the words "permanent" in capital, "use my money as permanent capital", was used. Are you aware of that? … [C]an I have your response to that assertion that has been made by the defendants?
>
> A: *I have---I have used that term in the context historically. Upon conversion*, it can be deemed to be permanent capital because by having money that is "smart money" in your capital stack, it gives you the ability to go market---the idea that you---you know, you got smart investors in your company. So in that context, I have used it, I believe, in---*when we were negotiating earlier in---in November.*
>
> Q: Okay. So you at least agreed that that phrase had been mentioned by you in the course of---
>
> A: It---it---it's a term of art.
>
> Q: Right.
>
> A: It's a term of art. It---it---it refers to *once you made the loan and then you convert it and then it becomes part of a permanent capital. …*
>
> [emphasis added]

85 I accept that Mr Mangalji's words "I have used that term in the context historically" are tantamount to an admission that he has used the words "permanent capital" in relation to the Loan on a previous occasion (or occasions). However, as the plaintiff has correctly pointed out, the words "permanent capital" do not mean anything in isolation – their meaning necessarily depends on the context in which they are used.[95] Reading Mr Mangalji's evidence in context, it is clear that he did not admit to saying that the Loan would *certainly* become permanent capital or that it was *already*

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95 PRS at para 12

permanent capital. He was merely using the terms "permanent capital" to describe a situation which would occur *if* the option to convert were exercised.

86 In addition, Mr Mangalji only admits to using the words "permanent capital" during the course of his negotiations with Mr Kodrowski *in November 2017.* This was prior to the execution of the Loan Agreement on 15 December 2017. I agree with the plaintiff that these pre-contractual negotiations should be given limited weight, as they took place *before* the crystallisation of the plaintiff's contractual rights.[96] It is difficult to see how the plaintiff could have represented that it would not enforce a legal right which had not yet come into existence. Further, the terms of the Loan Agreement explicitly conferred a *choice* on the plaintiff to convert the Loan into equity *at its own discretion.*[97] This would not have been necessary if the parties had already arrived at a common understanding that the plaintiff would *undoubtedly* be converting the Loan into "permanent capital".

87 Next, I consider the evidence of the defendant's witnesses, Mr Kodrowski and Mr Ritenis. The defendant argues that both Mr Kodrowski and Mr Ritenis had given evidence that the plaintiff had referred to the Loan monies as "permanent capital". It contends that their evidence is persuasive since they were both "consistent in their evidence and corroborated each other's version of events".[98]

88 I am unable to accept these submissions. First, I do not find Mr Kodrowski to be a consistent or reliable witness. While Mr Kodrowski

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96 PCS at para 135

97 Clauses 4.1 and 5.2 of the Loan Agreement

98 DCS at para 19

repeatedly emphasised that Mr Mangalji had used the term "permanent capital", he was unable to recall the sentence(s) in which the term had been used. During cross-examination, Mr Kodrowski asserted that Mr Mangalji had told him, "I want you to use this as permanent capital".[99] In his AEIC, however, Mr Kodrowski stated that Mr Mangalji indicated that he "wanted the loan monies to be treated *more* like permanent capital" (emphasis added).[100] I agree with the plaintiff that these two representations are not identical and should not be treated as such. Further, Mr Kodrowski was also unable to recall exactly *when* the alleged oral representation(s) were made. In his AEIC, he averred that the representations were made during the period from November to December 2017 while the parties were negotiating the loan agreement,[101] and during a conference call in January 2018.[102] On the stand, however, Mr Kodrowski took the position that the alleged oral representation(s) were made in "November, December, January, February and March".[103] It bears noting that in his oral evidence, Mr Kodrowski not only increased the frequency of the alleged oral representations, but also made them sound more unequivocal than in his AEIC. It appears to me therefore that Mr Kodrowski may have exaggerated and embellished his position in his oral evidence, and I place little weight on Mr Kodrowski's claims in this regard.

89 Mr Ritenis' evidence is likewise ambiguous. The defendant relies on a specific portion of Mr Ritenis' cross-examination, where he acknowledged that

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99 NE, 20 November 2019, 38/23-26

100 DBAEIC at p 12, para 9

101 DBAEIC at p 12, para 9

102 DBAEIC at p 13, para 15

103 NE, 20 November 2019, 50/29-51/32

Mr Mangalji had expressed an intention that the funds be treated as permanent capital "on a number of occasions".[104] However, it is telling that Mr Ritenis subsequently admitted that he was unable to clearly recall the particular sentence(s) or the precise context in which the words "permanent capital" had been used.[105] Mr Ritenis also acknowledged that Mr Mangalji had not said that the loan was *already* permanent capital or should *presently* be treated as such.[106] For these reasons, I am unable to place much weight on Mr Ritenis' testimony.

90 Having surveyed the evidence of the material witnesses, I now turn to examine the contemporaneous documentary evidence which, in my view, further buttresses Mr Mangalji's position that he had *not* represented that the Loan monies should be treated as "permanent capital".

91 Crucially, the parties' e-mail correspondence reveals that they had *never* arrived at a mutual understanding that the plaintiff would be exercising the option to convert:

(a) In an e-mail dated 1 February 2018, Mr Kodrowski sent Ms Li a draft constitution for the intended ABC Company stating that "[a]mendments [*sic*] constitution can be updated *once* Fereed wants to push ahead with conversion" (emphasis added).[107]

(b) In an e-mail from Mr Kodrowski to Ms Li dated 13 February 2018, Mr Kodrowski stated, "We'll provide a full reconciliation at the

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104 NE, 21 November 2019, 117/12-19

105 NE, 21 November 2019, 118/30-119/3

106 NE, 21 November 2019, 119/27-31

107 AB1 at p 179

time of conversion to equity or *if there is no conversion* then at the end of the agreement period" (emphasis added).[108]

(c) In an e-mail from Mr Kodrowski to Ms Li (copying Mr Mangalji and Mr Ritenis) dated 21 March 2018, Mr Kodrowski stated that "Since Fereed is intending to convert to equity, we have not spent time apportioning costs against the initial investment". Within a day, Mr Mangalji sent an e-mail to Mr Kodrowski dated 22 March 2018 stating, "We are *willing to consider* the conversion and even investing incremental funds *subject to finalization of the governing documents and governing structure*. Moreover, there are … [c]ertain due diligence requirements that need to be fulfilled" (emphasis added).[109]

(d) In an e-mail from Mr Kodrowski to Mr Mangalji and Ms Li dated 26 March 2018, Mr Kodrowski offered to *extend the deadline* for the exercise of the Option under Clause 4.1 of the Loan Agreement from 31 March 2018 to 30 April 2018.[110]

92 The defendant counters that the latest understanding between the parties was documented in an e-mail which Mr Ritenis sent to the plaintiff on 27 July 2018.[111] In this e-mail, Mr Ritenis states:[112]

> 2. *The original intent of both parties was always for conversion to equity*, and for a balanced partnering arrangement, such that Fereed could play a significant value-adding role as a substantial shareholder.

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108 AB1 at p 189

109 AB1 at p 312

110 AB1 at p 348

111 DCS at para 23

112 AB1 at p 555

> 3. It was the *strongly stated mutual intent for conversion to equity (and having "permanent capital" that remains in the business)* that made it viable for Kodi to enter into the $2M arrangement at that time. Had it been a "pure debt" arrangement, Kodi would probably have only been able to accept a lower funding amount at the time such as $1M, and probably also at a lower interest rate than 20%.

However, as the plaintiff points out, this e-mail was not a *contemporaneous* record of the parties' intentions. Although it was sent before the plaintiff threatened legal action,[113] it was specifically composed as a negotiation tool to encourage the plaintiff to accept the defendant's repayment proposal.[114] It was also written about a month *after* the plaintiff had demanded repayment of the Loan. I am therefore unable to place any reliance on this e-mail.

93 Finally, I turn to consider the plaintiff's submission that Mr Mangalji could not have made the alleged representation(s) because the prerequisites to the plaintiff's exercise of the option had not been satisfied. There were allegedly two such prerequisites: (a) the satisfaction of the plaintiff's due diligence requirements; and (b) the finalisation of the shareholders' agreement for the intended ABC Company.

94 In my assessment, the satisfaction of the plaintiff's due diligence requirements was *not* a prerequisite to the plaintiff's exercise of the option. The plaintiff referred me to Clause 7(c) of the Loan Agreement, which states that "The [defendant] covenants under this Agreement that the [defendant]… will supply the [plaintiff] forthwith on demand with such financial documentation as may be requested by the [plaintiff] from time to time". However, the terms

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113 DCS at para 23

114 PRS at para 15

of the Loan Agreement do not suggest that satisfaction of the plaintiff's due diligence requirements was a mandatory precondition to the plaintiff's exercise of the option. Ms Li also acknowledged that she had never explicitly informed the defendant that this was the case.[115]

95 I find, however, that there is merit in the plaintiff's suggestion that the shareholders' agreement had to be finalised before the plaintiff could consider exercising the option. Clause 4.1 of the Loan Agreement stated that the ABC Company was to be incorporated on terms which were "mutually agreeable to both parties". During cross-examination, Mr Kodrowski acknowledged that this meant that the parties had to reach an agreement on the constitution and the shareholders' agreement of the intended ABC Company before the plaintiff could exercise the conversion option.[116] Mr Ritenis went further by conceding that these were steps that had to be completed even before the plaintiff could *decide* whether it wanted to exercise the conversion option.[117] From a perusal of the documentary evidence, I am satisfied that parties were never *ad idem* on the terms of the shareholders' agreement. In my view, this is a factor which lends credence to the plaintiff's version of events.

96 I thus find, on a balance of probabilities, that Mr Mangalji did not make the alleged oral representations that the Loan monies should presently be treated as permanent capital, or that they would certainly be treated as such.

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115 NE, 19 November 2019, 91/14-17

116 NE, 21 November 2019, 45/16-32

117 NE, 21 November 2019, 120/32-121/16

The plaintiff's conduct

97 As stated at [81] above, it is strictly unnecessary for me to consider the defendant's unpleaded defence of estoppel *by conduct.* Nevertheless, I will cursorily address the defendant's contentions on this point for completeness.

98 The defendant has set out four acts of the plaintiff which, in its view, constitute representations that the plaintiff was "eventually going to convert to equity".[118] These are as follows:

(a) it was Mr Mangalji who had first proposed the figure of S$2,000,000 as the amount of the Loan;[119]

(b) the plaintiff executed the Loan Agreement with "haste and urgency";[120]

(c) the plaintiff had sufficient information for the purpose of their investment from the outset;[121] and

(d) the defendant gave the plaintiff constant updates and sought approvals on several management and operation decisions.[122]

99 In my judgment, all of these allegations are either irrelevant or without factual basis.

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118 DCS at para 10

119 DCS at paras 25-30

120 DCS at paras 31-39

121 DCS at paras 40-45

122 DCS at paras 46-51

(a) First, *even if* it is assumed (for the purposes of argument) that it was Mr Mangalji who had first proposed the figure of S$2,000,000, this fact is plainly irrelevant to the defendant's case. The defendant has not explained how the amount of the Loan (or the fact that it was first proposed by the plaintiff) "communicated" the plaintiff's intention to exercise the option.

(b) Secondly, *even if* the plaintiff did execute the Loan Agreement with "haste and urgency", this did not necessarily indicate that it was "already looking at only proceeding with the equity conversion option". It is entirely speculative for the defendant to suggest that this was the case.

(c) Thirdly, whether or not the plaintiff had sufficient information for the purpose of its investment was a matter that lay within its own knowledge and discretion. The plaintiff's internal views on this matter, if uncommunicated, could not have amounted to a "representation" that it would eventually exercise the option. There was also no suggestion that the plaintiff had in fact communicated any such views.

(d) Finally, and as pointed out by the plaintiff, a representation "by conduct" must necessarily originate from the plaintiff, who is the alleged "promisor" in this case. The defendant's *own conduct* of providing updates and seeking approvals cannot constitute such a representation.[123]

100 Given my findings above, the defendant's defence of estoppel fails and it is therefore strictly unnecessary for me to examine the other elements of

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123 PRS at para 32

estoppel. Nevertheless, and in any event, I find that the defendant is also unable to prove that it had relied on the alleged representation(s) to its detriment, or that it would be inequitable for the plaintiff to resile from its alleged promise. I elaborate on the reasons for this below.

Detrimental reliance by the defendant

101 It is trite that the burden of proving detrimental reliance "remains throughout on the party raising the estoppel" (*Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896 ("*David Lam*") at [63]). In *David Lam*, Steven Chong JC (as he then was) held (at [56]) that detrimental reliance in the context of estoppel includes:

> (a) instances where the promisee had *already* suffered the "detriment" in question, *eg* through the expenditure of time/money, or by incurring a liability; and
>
> (b) instances where the promisee would suffer a "detriment" *if* the promisor is permitted to resile from his promise, *eg* because it has changed its position in reliance on the promise, or because it would be deprived of a benefit if the promise is not kept.

102 In the present case, the defendant argues that it has expended time and money by taking the following actions "with a view of the eventual conversion to equity":[124]

> (a) the payment of fees to convert RCL into a full finance company, which resulted in the expenditure of PHP 300,000;

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124 DCS at para 52

(b) the incorporation of RCC, which resulted in the expenditure of S$1,633;

(c) the hiring of staff for RCC, which resulted in the expenditure of approximately S$42,163.06;

(d) the acquisition of AOMOS, which resulted in the expenditure of S$280,000; and

(e) the expenditure of funds on the development and integration of AOMOS, which amounted to PHP 307,680.

103 In addition to the above, the defendant also claims that it has:

(a) incurred a liability by incorporating RCC and hiring staff for RCC;[125]

(b) changed its position by expending money and resources on the items set out at [102] above;[126] and

(c) been deprived of a benefit as the monies which were used for the acquisition of AOMOS and the incorporation of RCC could have been used for the purposes of micro-lending pursuant to the agreement.[127]

104 I now examine each of these contentions in turn.

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125 DCS at para 77

126 DCS at para 78

127 DCS at para 79

Expenditure of time and money

(1) First act: Payment of fees to convert RCL into a full finance company

105 During cross-examination, Mr Kodrowski explicitly acknowledged that the conversion of RCL into a finance corporation was a process which began in September 2017, long before the parties began communicating with one another.[128] Therefore, the defendant does not assert that it converted RCL into a finance corporation on the plaintiff's request; such a conversion would have taken place in any event. Rather, its case is that it *expedited* the conversion process because of the plaintiff's alleged representation(s) that the Loan would be converted into equity.

106 I note, as a preliminary observation, that the defendant has not adduced any evidence to support this contention. Indeed, the defendant's case is contradicted by Mr Kodrowski's e-mail to Mr Mangalji and Ms Li dated 8 January 2018 ("the 8 January 2018 e-mail").[129] In that e-mail, Mr Kodrowski listed "several key updates about RCL", some of which were "for [Mr Mangalji's and Ms Li's] info" while others required their "input… from a partner perspective". One of the items on this list was the conversion of RCL into a finance corporation. In relation to this item, Mr Kodrowski stated:

> **Conversion to Finance Corp –**
>
> - We now have a contact within SEC who can help fast track our application within January. There are some costs involved in the expediting but I believe the *benefits far outweigh the costs … With the PTIG acquisition [of AOMOS] pushing through below* I believe there is more time pressure to get this conversion done *so RCL is ready to integrate corporate loans and e-wallet as soon as possible with the new software entity.*

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128 NE, 20 November 2019, 24/29-25/2

129 AB1 at p 133

107 From this passage, it is apparent that there were two key reasons for expediting the conversion of RCL into a finance corporation: (a) the benefits of doing so "far outweigh[ed] the costs"; and (b) the defendant's acquisition of AOMOS. The plaintiff's conversion of the Loan into equity was *not* one of these reasons.

108 More crucially, the defendant has not shown how the expedition of the conversion of RCL into a finance corporation caused it to incur more expenditure *than it otherwise would have incurred* if it had proceeded with the conversion at its originally-intended pace. Its only evidence on this point is the Tab 23 Document, which (for reasons set out at [27] to [42] above) is inadmissible.

109 I therefore find that the expedited conversion of RCL into a finance corporation cannot constitute an act of "detrimental reliance" on the defendant's part.

(2) Second act: Incorporation of RCC

110 The defendant submits that "[i]t cannot be disputed that there would have been no need to incorporate [RCC] if the Plaintiff was not going to convert to equity".[130] I accept that the incorporation of RCC would not have served any useful purpose if the plaintiff did not ultimately convert the Loan into equity. However, in order to establish that this was an act of detrimental reliance, the defendant must do *more*: It must show that the incorporation of RCC was *causally connected* to its reliance on the plaintiff's alleged representation(s) (see *David Lam* ([99] *supra* at [65])). I find that the defendant has not successfully

130 DCS at para 58

proven this causal connection. Instead, it appears that the incorporation of RCC was undertaken pursuant to the defendant's own *self-generated* expectations instead of any inducement by the plaintiff.

111 In the 8 January 2018 e-mail, Mr Kodrowski stated, "[a]s a result of *these developments*, I would like to expedite the forming of the SG entity" (emphasis added). However, none of the "developments" mentioned in the 8 January 2018 e-mail related to the plaintiff's conversion of the Loan into equity. It is also telling that Mr Kodrowski did not explicitly seek Mr Mangalji's or Ms Li's input on the "forming of the SG entity". On the stand, Mr Kodrowski conceded that RCC's incorporation had been a recommendation on *his* part.[131]

112 In the circumstances, I find that the incorporation of RCC was not an act of detrimental reliance. Rather, as outlined above, it was an act which the defendant had undertaken because of its own *self-generated* expectation that the plaintiff would eventually convert the loan into equity.

(3) Third act: Hiring of staff for RCC

113 The defendant argues that it hired staff for RCC in reliance on the plaintiff's alleged representation(s) that it would convert the Loan into equity. This assertion is premised solely on the following section of Mr Mangalji's cross-examination, where he was queried on his interpretation of the 8 January 2018 e-mail:[132]

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131 NE, 20 November 2019, 106/29

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> Q: Right. Now, [Mr Kodrowski] then talks about recruitment. He would like to hire a senior operations manager who would transition to COO within 12 months from starting. Do you see that?
>
> …
>
> Q: Did you agree to that proposal?
>
> A: *I---it was not my position to agree or disagree. He basically said he wants to do this.* And then he goes on to ask me and then he asked me for it.
>
> …
>
> Q: Okay. And you see here, the next sentence, he says he wants your input on the equity compensation component for the package for this management team. Right? The bottom sentence.
>
> …
>
> Q: Do you have an explanation why then he would be seeking your input on this?
>
> A: I think that---this is just a supposition on my part. You have to ask him what he meant. But in my view, the way I read it is that given that there was a possibility of some future equity to be provided to this individual, that *he may, you know, want to run it by me*.
>
> (emphasis added)

114 In the excerpt above, Mr Mangalji was being cross-examined on two separate matters: (a) the defendant's decision to hire a Chief Operating Officer ("COO") for RCC, and (b) the equity compensation component of the package for RCL's senior management team. I agree with the plaintiff that (b) is irrelevant to the defendant's submissions on this point as it affects the *remuneration*, as opposed to the *recruitment*, of RCC's staff. In relation to (a), Mr Mangalji's evidence was clear: Mr Kodrowski had simply informed him of the defendant's decision to hire a COO, without asking him (Mr Mangalji) for

any input on that decision. I am unable to see how this lends any assistance to the defendant's case.

115 In any event, I find that Mr Mangalji's evidence is of limited utility because it does not shed any light on the fundamental issue of whether the plaintiff's alleged representation(s) *influenced* the defendant's decision to hire staff for RCC. Consequently, I find that the defendant has not discharged its onus of proving that its act of hiring staff for RCC was carried out *in reliance on* the plaintiff's representation(s).

(4) Fourth and fifth acts: Acquisition and/or integration of AOMOS

116 I now turn to consider the defendant's contention that "money and resources [were] expended for the integration and development of AOMOS".[133]

117 In my view, this argument can be shortly disposed of because the defendant has not adduced *any* credible evidence to prove that it incurred the expenditure referred to in its pleadings. The only documentary records of AOMOS' acquisition are the incorporation papers for two Philippines corporate holding entities. But, as conceded by Mr Kodrowski, these papers do not reflect the defendant's acquisition costs.[134]

118 There is also a paucity of evidence in relation to the costs of integrating AOMOS. During cross-examination, Mr Kodrowski asserted that these costs were reflected in the Tab 23 Document.[135] However, for reasons already set out

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133 DCS at para 69

134 NE, 20 November 2019, 142/4-11

135 NE, 20 November 2019, 140/31-141/23

at [27] to [42] above, the Tab 23 Document is inadmissible and cannot be relied upon as evidence of the defendant's expenditure.

119 I find, also, that there is little evidence to suggest that the acquisition and/or integration of AOMOS was carried out *in reliance on* the plaintiff's alleged representation(s). The defendant argues that the AOMOS acquisition was a *long-term* strategic investment which the defendant had only undertaken because of the plaintiff's alleged representation(s) that it would eventually convert the Loan into equity.[136] I am unable to agree with this submission. The contemporaneous documentary evidence suggests that the acquisition was intended to bring about *short-term* benefits for the defendant's micro-lending business – benefits which would, in all likelihood, accrue *before* the Termination Date of the Loan Agreement. This explains why the acquisition had to be carried out quickly and with some urgency. For example, in the 8 January 2018 e-mail, Mr Kodrowski stated that his goal was to complete the AOMOS acquisition "in the next 90 days", so that RCL could expand the customer base for its micro-lending business by accessing the employees of AOMOS' corporate clients.[137]

120 The defendant also referred me to paragraph 30 of Mr Mangalji's AEIC, where he stated, "I also made clear to Mr Kodrowski that if PTIG was going to use the Loan for the acquisition of AOMOS, the acquisition should take place through ABC Company rather than through PTIG".[138] The defendant argues that Mr Mangalji's proposed course of action was consistent with the plaintiff's

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136 NE, 19 November 2019, 8/6-9

137 AB1 at p 134

138 PBAEIC, p 10 at para 30

alleged intention to convert.[139] However, the defendant has not adduced evidence to show that this statement induced any measure of *reliance* on its part. I therefore decline to give any weight to this argument.

121 For the above reasons, I find that the defendant has not discharged its burden of proving that it suffered detrimental reliance from the acquisition and/or integration of AOMOS.

Other forms of "detriment"

122 I now briefly touch on the defendant's contentions relating to the other forms of "detriment" which it has allegedly suffered. To recap, they are as follows:

(a) incurring a liability by incorporating RCC and hiring staff for RCC;[140]

(b) changing its position by expending money and resources on the items set out at [102] above;[141] and

(c) being deprived of a benefit as the monies which were used for the acquisition of AOMOS and the incorporation of RCC could have been used for the purposes of micro-lending pursuant to the agreement.[142]

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139 DCS at para 68

140 DCS at para 77

141 DCS at para 78

142 DCS at para 79

123 It is apparent that these manifestations of "detriment" are premised on the exact same acts of expenditure as those set out at [102] above. I earlier held that these acts of expenditure were *not* carried out in reliance on the plaintiff's alleged representation(s). I find, correspondingly, that the alternative forms of "detriment" proposed by the defendant do not constitute "detrimental reliance" in the present case.

Whether it was inequitable for the plaintiff to resile from its alleged representation(s)

124 I now come to the third and final requirement of promissory estoppel. This involves the issue of whether it was "inequitable" for the plaintiff to resile from its alleged representation(s) to the defendant.

125 The requirement that it be "inequitable" for the promisor to resile from his promise is one which eludes any attempt at precise definition. Ultimately, the issue must be determined by taking into account all the relevant circumstances. For example, if it is shown that a promisor has dishonestly induced the promisee to act on his promise, such evidence would undoubtedly weigh in favour of the promisee, rendering it inequitable for the promisor to renege. Conversely, if the promisee were guilty of improper behaviour, the balance would be tipped in favour of the promisor (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in* Singapore") at paras 4.086 to 4.087).

126 The defendant argues that it had expended a significant sum of money (in excess of S$300,000) on the understanding that the plaintiff would eventually convert to equity. On the defendant's case, this expenditure, coupled with (a) the plaintiff's conduct during the period from December 2017 to March 2018, (b) the fact that the plaintiff had readily postponed the option exercise

date, and (c) the fact that the plaintiff had continued to discuss and negotiate the terms of the shareholders' agreement with the defendant up till June 2018, renders it inequitable for the plaintiff to now resile from its promise.[143]

127 The plaintiff counters that there are two reasons why it would not have been inequitable for the Loan to be repaid *even if* the first two elements of an estoppel had been established. First, the defendant has failed to repay the Loan even though it had a reasonable period of time to do so. Secondly, the defendant has acted with "unclean hands" by (a) fabricating evidence and/or (b) using the Loan monies for unauthorised purposes.[144]

128 I am not persuaded by the plaintiff's arguments. Firstly, I do not think that the defendant was given reasonable notice of the plaintiff's intention to seek repayment of the Loan. The plaintiff submits that the defendant "has had more than 1½ years to repay the Loan, which is more than 3 times the entire 6-month duration of the Loan Agreement".[145] However, the plaintiff only formally demanded repayment of the Loan sometime in or around late June 2018. It subsequently commenced this Suit against the defendant *less than two and half months later*, on 29 August 2018. Assuming for the purposes of argument that the defendant had indeed acted on the plaintiff's representation(s) to its detriment, it would not have been reasonable for the plaintiff to expect the defendant to repay the full amount of the Loan plus interest within that short duration of time.

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143 DCS at para 84

144 PCS at para 279

145 PCS at para 286

129 Secondly, I am unable to accept the plaintiff's contention that the defendant has acted with "unclean hands". Although I have earlier found (at [27] to [42] above) that the Tab 23 Document is inadmissible, the plaintiff's allegation that the defendant had *deliberately* fabricated the Tab 23 document as *false evidence* is speculative and unsubstantiated. Further, the plaintiff's submission that the defendant had "misused the bulk of the Loan for purposes other than micro-lending without the defendant's agreement"[146] is inconsistent with its own earlier assertion that "the great majority of the Loan was still deployed for consumer Loans and continued to generate interest after the repayment date".[147] The plaintiff has not provided a consistent account of the defendant's use(s) of the Loan.

130 Nevertheless, given my findings that the first two elements of estoppel have not been satisfied in the present case, I remain of the view the defence of estoppel ultimately cannot succeed.

Whether the time for repayment of the Loan was set at large due to the prevention principle

131 I now proceed to examine the defendant's second defence, *ie* that the time for repayment of the Loan was "set at large" due to the operation of the so-called 'prevention principle'. The operation of the prevention principle was explained by Andrew Ang J (as he then was) in the following passage from *Chua Tian Chu* ([24] *supra*) at [60] and [63]:

> The equitable remedy afforded by the prevention principle is derived from the well established legal maxim that no man shall take advantage of his own wrong. Setting time at large ensures

146 PCS at para 289

147 PCS at para 321

> that whoever "prevents a thing from being done shall not avail himself of the non-performance he has occasioned" …
>
> …
>
> When an employer/purchaser is found to have performed acts of prevention, in the absence of an extension of time clause in the agreement, the contractual time for completion is no longer binding. …

132 The defendant submits that the parties had agreed for the defendant to "take various steps, including the expenditure of monies that would have been used for the micro-lending business".[148] Accordingly, the prevention principle applied such that the time for the repayment of the Loan was "set at large" and had not yet fallen due at the time of the commencement of this Suit.[149]

133 The plaintiff asserts that the prevention principle is only applicable to cases where a party is making a claim for *liquidated damages* or *penalties* flowing from a failure by the other party to complete performance of works by a stipulated contractual deadline.[150] Further or alternatively, the defendant has not shown any wrongs or acts of prevention committed by the plaintiff.[151]

134 I first address the issue of whether the prevention principle is potentially applicable to a claim for a repayment of a debt. In my view, the prevention principle applies generally to *all* contracts, regardless of their nature or subject-matter. In *Chua Tian Chu*, Andrew Ang J described the prevention principle as a doctrine "derived from the well established legal maxim that no man shall take advantage of his own wrong" (at [60]). Likewise, in *Evergreat Construction Co*

148 DRS at para 55

149 DRS at para 57

150 PCS at para 325

151 PCS at para 326

Pte Ltd v Presscrete Engineering Pte Ltd [2006] 1 SLR(R) 634 ("*Evergreat Construction*"), V K Rajah J (as he then was) explained that the prevention principle is "wedded to notions of fair play and commercial morality" (at [51]). These are universally-applicable principles which are relevant in virtually every contractual context.

135 It is also noteworthy that in other Commonwealth jurisdictions, the prevention principle has been applied to various types of contracts, such as lease agreements (see for example, *Alghussein Establishment v Eton College* [1998] 1 WLR 587), share purchase agreements (see for example, *Nitscheke and others v Foraco Australia Pty Ltd and another* [2014] SASC 88), and contracts for the sale of property (see for example, *Kensland Realty Ltd v Whale View Investment Ltd and another* [2002] 1 HKLRD 87). I can see no practical or principled justification for restricting the applicability of the prevention principle to contractual claims of a specific nature. In my view, the prevention principle is applicable to claims for the repayment of debts.

136 Next, I consider the issue of whether the plaintiff has committed an act (or acts) of prevention in the present case. In *Yap Keng Boon Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 ("*Sonny Yap*") at [34], an act of prevention was defined as an act which "operates to *prevent, impede, or otherwise make more difficult* for a contractor to complete the works by the date stipulated in the contract". A narrower definition was adopted in *Evergreat*, where Rajah J held (at [52]) that "[i]n order to invoke this principle it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of the party's prior *breach of contract*" (emphasis added).

137 There is nothing to suggest that the plaintiff has breached the Loan Agreement, and the defendant makes no argument to that effect. Accordingly, I find that the narrow definition in *Evergreat* is not satisfied in the present case.

138 Likewise, the plaintiff has not carried out any act(s) of prevention falling within the broader definition in *Sonny Yap*. In the first place, the defendant's expenditures which were *mutually agreed upon* by both parties (*eg*, expenditure on micro-finance or on the acquisition of AOMOS) cannot properly be characterised as acts of prevention on the plaintiff's part. As the plaintiff points out, a situation where two parties have a mutual agreement to do (or not to do) something is very different from a situation where one party has *prevented* or *impeded* the other party's ability to fulfil its obligations under a contract.[152]

139 Likewise, the defendant's expenditures which were *not* approved or agreed to by the plaintiff cannot be regarded as acts of "prevention" on the plaintiff's part. Simply put, the plaintiff cannot be said to have "prevented" an outcome in which it has had no input or involvement.

140 Accordingly, the defendant's argument that the time for repayment was "set at large" must be rejected.

Whether the plaintiff is entitled to pre-judgment interest at a rate of 20% per annum

141 Having established that the plaintiff succeeds in its claim for repayment of the Loan with 20% annualised interest, I now turn to the final issue – whether the plaintiff is entitled to pre-judgment interest at a rate of 20% per annum.

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152 PCS at para 327

142 Pre-judgment interest refers to the compensation awarded to a successful claimant for the time value of money the use of which was lost between the date on which the claimant's cause of action arose and the date of the judgment (*Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 ("*Grains*") at [137]). The court's power to award pre-judgment interest is governed by s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed), which provides as follows:

> **12.**—(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, *if it thinks fit*, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. [emphasis added]

143 As the literal wording of this provision suggests, the decision to award pre-judgment interest (and if so, what the appropriate interest rate should be) is a matter which lies entirely within the court's discretion. The Court of Appeal in *Grains* helpfully set out a list of factors which courts can consider in exercising this discretion (see *Grains* at [140]):

> (a) in the absence of a prescribed rate, what rate of interest would be appropriate to the relevant period(s);
>
> (b) whether the claimant was dilatory in the bringing and conduct of the proceedings;
>
> (c) whether the claimant had received compensation for the loss suffered from a source other than the defendant;
>
> (d) whether the claimant had sought and been awarded with damages which include damages for the loss of the use of money;
>
> (e) whether the debt is paid immediately after proceedings are commenced; and
>
> (f) whether the parties have agreed that pre-judgment interest should not be recoverable.

144 As a *general rule*, however, "claimants who have been kept out of pocket without basis should be able to recover interest on money that is found to have been owed to them from the date of their entitlement until the date it is paid" (*Grains* at [138]). Furthermore, if the parties do not submit on the rate of pre-judgment interest, the default rate of 5.33% interest per annum, which is prescribed by para 5 of the Supreme Court Practice Direction No 1 of 2007, will usually apply (*Grains* at [143]).

145 In the present case, the claimant highlights three "special circumstances" which, it claims, justify its demand for pre-judgment interest at a *higher* rate of 20% per annum. These are as follows:[153]

(a) First, by wrongfully retaining the Loan and the interest earned thereunder, the defendant has deprived the plaintiff of the used of its funds for other investment and revenue-generating activities.

(b) Secondly, by failing to comply with its repayment obligations, the defendant has in effect extended the Loan duration to almost five times the original six-month term, which is "manifestly unfair" to the plaintiff.

(c) Thirdly, awarding pre-judgment interest of 20% per annum is also necessary to prevent the defendant from being *better off* by deciding to breach its repayment obligations.

153 PCS at paras 77-80

146 In relation to (a), the defendant argues that it did not use the Loan monies for its own benefit.[154] In my view, however, the *manner* in which the defendant utilised the Loan is irrelevant to the inquiry at hand. What is significant for present purposes is the fact that the defendant did not *repay* the Loan in a timely fashion, and therefore put the plaintiff out of pocket for a significant duration of time. The effects of the defendant's delay were particularly serious because the plaintiff was (and still remains) in the business of making investments with its funds.[155]

147 In relation to (b), the defendant contends that the plaintiff has not cited any authority to show that "manifest unfairness" is one of the grounds warranting an award of pre-judgment interest, much less at a rate of 20% per annum. This argument is untenable. As aforementioned, the decision to award pre-judgment interest is discretionary in nature. The court is certainly entitled to consider "manifest unfairness" in the exercise of this discretion, particularly if it features prominently on the facts of a particular case.

148 In relation to (c), the plaintiff's key submission is that it would not be unfair to award pre-judgment interest at a rate of 20% per annum since the defendant's usual cost of capital is between 15% to 23% per annum. The defendant's counterargument is that the plaintiff should not have compared the interest rate of the Loan to the defendant's usual cost of capital.[156]

149 I agree that the defendant's *usual* cost of capital is irrelevant to the inquiry of whether it is fair to award pre-judgment interest at a rate of 20% per

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154 DCS at para 19

155 PCS at para 77

156 DRS at para 21

annum *on the facts of this particular case.* Nevertheless, there is force in the plaintiff's argument that the defendant would be better off if it is awarded pre-judgment interest at the default rate of 5.33% per annum. As the plaintiff points out, imposing an interest rate of just 5.33% would effectively convert the plaintiff's six-month loan at 20% per annum into something roughly equivalent to a two-and-a-half year loan at 8% per annum.[157] Such an outcome would be grossly unfair to the plaintiff.

150 In the circumstances, I consider that it is fair to award interest from the date of the accrual of the loss (*ie,* 16 June 2018) to the date of this court's judgment at a rate of 20% per annum. In my view, this is a fair estimation of the opportunity cost suffered by the plaintiff in having been kept out of the sums to which it was entitled.

Conclusion

151 In summary, my decision is as follows:

(a) The plaintiff succeeds in its claim for repayment of the Loan amount of S$2,000,000 with 20% annualised interest on the entire sum of the Loan; and

(b) The plaintiff succeeds in its claim for pre-judgment interest from 16 June 2018 to the date of this judgment, at a rate of 20% per annum.

152 I will hear parties on the issue of costs at a later date. Parties are to file their submissions on costs, limited to ten pages each, within 14 days from the date of this judgment.

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157 PCS at para 78

Vincent Hoong
Judge

Gerui Lim and Amber Estad (Drew & Napier LLC) for the plaintiff;
Tan Sia Khoon Kelvin David and Sara Ng (Vicki Heng Law Corporation) for the defendant.
