Edwards Jason Glenn *v* Australia and New Zealand Banking Group Ltd [2012] SGHC 61

Case Number	: Suit No 489 of 2011
Decision Date	: 21 March 2012
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Suresh Nair and Daniel Zhu (Straits Law Practice LLC) for the plaintiff; Andy Lem and Toh Wei Yi (Harry Elias Partnership) for the defendant.
Parties	: Edwards Jason Glenn — Australia and New Zealand Banking Group Ltd

Contract – Interpretation

Contract – Penalty

21 March 2012

Tay Yong Kwang J:

Introduction

1 This case, at its simplest, is one of a borrower who took out a loan to buy properties and to invest and now refuses or is unable to pay it back. It is complicated by the mechanisms within the loan, for example, the different currencies that denominate the different tranches of the loan, as well as the different triggers that set off related calls on the loan but, at its heart, it is a case of a borrower who is facing a claim from the bank and seeking a declaration to absolve himself of his debts. In attempting to do so, the plaintiff has mounted a multi-pronged attack on the contract he signed on, claiming, among other things, that the contract is void for uncertainty and that there are multiple difficulties in the construction of the contract.

2 Having considered the evidence and the parties' three sets of written submissions tendered sequentially after the trial, I have decided to dismiss the Plaintiff's claim and to allow the Defendant's counterclaim. I now give the reasons for my decision.

Facts

Parties to the dispute

3 The plaintiff, Jason Glenn Edwards ("Edwards") is an Australian citizen who has lived in Singapore for 6 years. [note: 1] He is General Counsel at Clearwater Capital Partners [note: 2], a firm in the business of private equity and fund management. [note: 3] He was previously a partner at the law firm, Baker and McKenzie. [note: 4] It is not in dispute that Edwards is a financially astute and sophisticated customer who was proactive in buying and selling instrument funds as well as booking forward currency conversions. [note: 5] His income is paid to him in either USD or SGD. [note: 6]

4 The defendant, Australia and New Zealand Banking Group Limited ("ANZ"), is an international banking group operating in Singapore. ANZ provides banking and financial services, including deposits

services and loan facilities. [note: 7]

5 Edwards testified at the trial. An Australian property valuer who did a valuation of 61 George Street in Queensland (see [10] below), one of the properties in issue here, and an Australian estate agent engaged by the previous owner of 61 George Street to sell the said property in January 2008 were supposed to testify at the trial via video-link. However, it was agreed at the start of the trial that their affidavits of evidence-in-chief ("AEIC") be admitted without cross-examination but would be subject to submissions to be made. The witnesses who appeared for ANZ at the trial were:

(a) Ms Jodene Frances Edwards ("Jodene Frances"), a former employee of ANZ in Singapore from 2004 - June 2007. [note: 8] She is a former Private Banker in ANZ, specializing in the sale of dual and multi-currency facilities. She met Edwards sometime before January 2006 in her capacity as private banker after he was referred to her by one of her colleagues. [note: 9]

(b) Malcolm George Crispe ("Crispe"), an ANZ Associate Director of Private Banking at ANZ. He dealt with Edwards after Edwards' account was transferred to him from Jodene Frances in April 2007. [note: 10] Crispe was Edwards' Relationship Manager till April 2009, when Edwards' account was transferred to the Asset Management Unit of ANZ. [note: 11]

(c) Maya Lim, the Senior Manager, Lending Services Asia of ANZ. He dealt with Edwards from 20 April 2010 onwards.

6 Similarly, an Australian valuer engaged by ANZ to do a retrospective valuation of 61 and 75 George Street (the latter being the other property in issue here- see [9] below) was also supposed to have testified via video-link. His AEIC was also admitted by consent without cross-examination but subject to submissions to be made.

Background to the dispute

The promising start

7 In 2006, Edwards wanted to purchase property in Australia and, to this end, wanted to borrow and make mortgage payments in the currency of his income or alternatively in a low interest currency like the Japanese Yen. He sought to avoid having to convert his income into Australian Dollars to make his mortgage payments because if the Australian Dollar appreciated against the currency he was paid in, the cost of his monthly payments would rise. [note: 12] He also found borrowing in Japanese Yen not too "burdensome" as the interest rate was low. [note: 13]

8 In January 2006, ANZ advertised a package that appeared to be perfectly suited to Edwards' needs. [note: 14] It featured the ability to borrow in income currency and/or property currency and the flexibility to switch in between. [note: 15]

9 On 24 January 2006, Edwards signed a facility letter for a Multi Currency Term Loan Facility ("the Facility Letter"). Funds were made available to Edwards in Japanese Yen ("JPY"), Singapore Dollars ("SGD"), Australian Dollars ("AUD") and US Dollars ("USD"). ANZ's Standard Terms and Conditions ("the T&Cs") were issued as part of the Facility Letter. [note: 16] The stated purpose of the facility was to refinance an existing loan with Commonwealth Bank of Australia, Hong Kong, for a property located at 75 George Street, Burleigh Heads, Queensland, Australia ("75 George Street"), for investment purposes, and to finance the purchase of a residential property located in Singapore.

[note: 17] The Facility Letter was subsequently varied by variation letters dated: 22 March 2006 [note: 18], 13 April 2006 [note: 19], 27 July 2006 [note: 20], 21 August 2007 [note: 21], 10 December 2007 [note: 22], 14 July 2008 [note: 23] and 23 October 2009 [note: 24] (collectively, "the Variation Letters"). [note: 25] The Facility Letter, Variation Letters and the T&Cs together formed the entire facility agreement ("the Facility Agreement") entered into between Edwards and ANZ. [note: 26] I draw particular attention here to the 14 July 2008 variation letter ("the 14 July letter"). It is of central importance in this trial and almost the entirety of the trial was spent on interpreting the clauses in the 14 July letter (see [42] – [102] below).

The purchase of 61 George Street

10 In July 2008, Edwards wanted to purchase 61 George Street Central, Burleigh Heads, Queensland 4220 ("61 George Street"). He sought a variation of the existing loan facility to obtain additional loan funds in order to assist in financing the purchase. [note: 27] On 14 July 2008, Edwards signed the 14 July letter which set out how much funds would be made available to Edwards and what securities ANZ wanted from Edwards. It also set out terms relating to the Loan to Security Ratio ("LVR") and terms relating to the consequences of breaching certain LVRs (see [43] below for the exact terms). On or about 25 July 2008, Edwards drew down on the new facility. The amount required was AUD 1,714,879.11, of which Edwards requested that: [note: 28]

(a) AUD 1,000,000 be converted to JPY, with the resulting loan being JPY 103,709,000; [note: 29]

(b) AUD 714,879.11 be converted to USD, with the resulting loan being USD 688,078.29. [note: 30]

11 As of or about 25 July 2008, Edwards' total loan principal under the Facility Agreement ("the Total Loan Principal") was: [note: 31]

(a) AUD 269,073.04;

(b) JPY 180,297,938; and

(c) USD 997,148.29.

LVR exceeds 80%

12 On 7 October 2008, the LVR was in excess of 80%, a stipulated threshold in the Facility Agreement (see [43] below). [note: 32] On 10 October 2008, Crispe informed Edwards via email that a call had been triggered on the remaining loans. [note: 33] Crispe asked that Edwards call him to discuss his options. Crispe also attached to the email: [note: 34]

(a) A letter dated 9 October 2008 by Michael Byers, the Head of Risk and Compliance, Private Banking, Asia, by which ANZ informed Edwards that: LVR was in excess of 90% and that Edwards was required to either (1) provide additional security of a pledged cash deposit of an amount not less than AUD 1,139,000; (2) reduce the loan outstanding by AUD 1,025,000; or (3) provide other security that would be acceptable to ANZ by 20 October 2008. If he did not do either of the

three, ANZ would exercise its right to convert Edwards' loan outstandings. [note: 35]

(b) A spreadsheet summarising Edwards' position, containing the value of the securities, the amount of loan outstandings, the maximum approved LVR and the amount of payment that needed to be made by Edwards to cure the LVR breach. [note: 36]

Edwards proposes to repay loans

13 On 10 October 2008, Edwards responded that he wanted to: [note: 37]

(a) liquidate the funds that were being used as security for the facility;

(b) repay the AUD loan in full;

(c) make partial repayment of the USD loan the following week;

(d) *not* have the loans converted.

14 On or about 24 October 2008, Edwards' LVR was still in excess of 80%. [note: 38] On 31 October 2008, Edwards informed Crispe via email that he had set up the standing instruction to transfer USD 10,000 a month, beginning 3 November 2008. [note: 39] On or around 6 November 2008, USD 10,000 was received by ANZ. [note: 40]

The first conversion (JPY to AUD)

15 On 17 November 2008, Crispe informed Edwards over the phone that ANZ had decided to convert all loan outstandings to AUD, as LVR was in excess of 90%. Edwards expressed disappointment and stressed that he had the capacity to make payment to reduce the loan outstandings. [note: 41]

16 In email replies on 18 November 2008, Edwards reiterated his proposals to avoid conversion. He proposed to pay the AUD loan with: [note: 42]

(a) at least USD 200,000 from his bonus;

(b) proceeds from the sale of his Thai property; and

(c) proceeds from the sale of the Series 11 Fund.

17 He also proposed to reduce the USD portion of the loan from approximately USD 997,000 to USD 350,000. [note: 43] He would then continue to pay USD 10,000 each month and add to these monthly payments to make sure the rest of the USD loan was repaid in full in less than two years. These proposed payments would leave him with the JPY portion outstanding. [note: 44]

18 In an email dated 18 November 2008, Crispe informed Edwards that the JPY loan would be converted to AUD but Edwards could retain the USD portion of the loan on the basis that USD 500,000 would be repaid by March 2009, with USD 300,000 paid from the proceeds of sale of the Thai property and USD 200,000 from Edwards' bonus. Upon conversion of the JPY loan to AUD, the proceeds from the sale of the Series 11 Fund and term deposit of AUD 44,047.27 would be used to

repay part of the AUD loan, with the remaining AUD loan being AUD 2,635,000. [note: 45] In response, Edwards' sent an email to Crispe the same day, proposing to pay an additional USD 300,000 to avoid the conversion of the JPY loan. Edwards stated that he may have to seek a loan from his employer to raise the USD 300,000. He stated that this proposal would bring the LVR down to 90% in a few months, and following from that, he could repay the remaining loans. [note: 46]

19 On 19 November 2008, Crispe called Edwards to inform him that his proposal was rejected. The JPY loan was to be converted but the USD portion of the loan could be retained. [note: 47] According to a diary note prepared by Crispe, Edwards expressed his disappointment over the JPY conversion and wanted to challenge the decision. [note: 48] Crispe advised that the decision was final and would not be reviewed. [note: 49] On 20 November 2008, when the LVR stood at 120.93%, ANZ confirmed the conversion of the JPY loan to AUD by way of email and written confirmations which set out the amounts that were converted. [note: 50] JPY 180,297,938.00 would be converted to AUD 2,962,518.97. [note: 51] The Actual conversions took place on 25 November 2008 (LVR at 119.6%), 17 December 2008 (LVR at 120.8%), and 26 March 2009 (LVR at 117%). [note: 52]

20 Between December 2008 and April 2009, Edwards liquidated some of the security that he had pledged to ANZ and used the funds to repay his loans. He also made monthly repayments of USD 10,000.00 from November 2008 to March 2010, as proposed earlier (see [17] above). [note: 53] However, he failed to make the USD 300,000 payment which was supposed to come from the proceeds of sale of the Thai property and also did not make repayments from his bonus, two repayments that were part of the same proposal. [note: 54] The USD 10,000 payments were insufficient to reduce the loan significantly and the LVR remained in excess of 90%. [note: 55] Crispe reminded Edwards in an email of 3 March 2009 that the retention of the USD portion of the loan was conditional on the payments coming from Edwards' bonus and the proceeds of sale of the Thai property. Edwards replied the same day via email, stating that his bonus was only USD 150,000 and that it was payable in instalments. More importantly, Edwards demanded to know what assurance ANZ would give him before he would commit to repayment. [note: 56]

21 As of 16 April 2009, Edwards' total outstandings under the Facility Agreement were AUD 2,591,134.06 and USD 997,148.29. [note: 57] After the earlier liquidations, the residual securities were the mortgages over 61 and 75 George Street. [note: 58] On 3 April 2009, 29 April 2009 and 30 April 2009 ANZ sent letters to Edwards proposing repayment arrangements, but these were rejected by him. [note: 59]

The second conversion (USD to AUD)

22 By 6 May 2009, ANZ had not received the USD payment from the sale of the Thai property. Crispe sent an email to Edwards on the same day informing Edwards that his USD loan outstandings would be converted to AUD if he did not furnish the sum of USD 285,000. [note: 60] Edwards replied the same day stating that the buyer of the property wanted three more months and that the funds had not been transferred. [note: 61] Crispe replied stating that ANZ was not prepared to offer any further concessions with regard to the receipt of payments and would exercise its rights under the Facility Agreement and convert the USD loan to AUD if the payments were not received. [note: 62]

23 On 7 May 2009, nearly seven months after default, [note: 63] Crispe informed Edwards that his

USD loan outstandings would be converted [note: 64] and confirmed the conversion by way of written confirmations. [note: 65] The total loan outstandings in USD of USD 997,148.29 would be converted to AUD 1,332,144.82. [note: 66] The conversions took place on 15 May 2009 [note: 67] (LVR at 118.4%), 22 May 2009 [note: 68] (LVR at 117.4%) and 25 September 2009 [note: 69] (LVR at 117.4%).

Post conversions

24 As of 25 September 2009, Edwards' total loan outstanding was AUD 3,923,278.88 ("the post conversion amount"). [note: 70]

25 In a letter dated 22 October 2009 ("the 22 October letter"), ANZ offered Edwards, on a without prejudice basis, certain terms of repayment. [note: 71] Edwards signed the letter, acknowledging that the total debt owing by him as at 19 October 2009 was that of the post conversion amount. [note: 72]

Events leading to trial

26 On 14 March 2010, Edwards sent an email to ANZ informing the bank that he was no longer able to meet him repayment obligations (as agreed to in the 22 October letter) and proposed two alternative repayment plans. [note: 73] On 29 March 2010, Edwards requested a copy of the facility letters from ANZ. [note: 74] From April to May 2010, ANZ's employees and Edwards engaged in discussions to restructure the loans. [note: 75] In May 2010, Edwards made a complaint to the Australian Financial Ombudsmen Service. [note: 76] ANZ ceased discussions with Edwards. [note: 77] In June 2010, Edwards contacted ANZ regarding the sale of 75 George Street. [note: 78] On 30 June 2010, ANZ's solicitors sent a letter of demand to Edwards. [note: 79] On 5 July 2010, Edwards commenced these legal proceedings. [note: 80] On 21 July 2010, pursuant to Clause 21 of the T&Cs, ANZ issued a Conclusive Certificate for the amount of AUD 4,021,855.59. Edwards argued that this certificate was not sent to him. [note: 81] This amount consisted of: [note: 82]

(a) Principal sum: AUD 3,923,278.88;

(b) Interest accrued pursuant to Clause 4 of the 23 October 2009 Variation Letter: AUD 95,902.51;

(c) Default Fee pursuant to Clause 7 of the T&Cs: AUD 1,024 (SGD 1,200 converted at SGD/AUD rate of 0.8535); and

(d) Valuation Fees pursuant to Clause 15 of the T&Cs: AUD 1,650.00.

27 On or about 30 August 2010, Edwards, with ANZ's consent, sold 75 George Street for AUD 1.1 million and ANZ received the sale proceeds of AUD 1,057,059.96 [note: 83], which was set off against ANZ's counterclaim. [note: 84]

Summary of Pleadings

28 Edwards' claims against ANZ are:

(a) A declaration that the two conversions amounted to breaches of ANZ's duties to Edwards

and were invalid;

(b) Further or in the alternative, damages for ANZ's breaches to be assessed;

(c) Interest;

(d) Costs; and such further or other relief as the Court deems fit.

29 ANZ's counterclaim is: [note: 85]

(a) A sum of AUD 2,964,795.63; and

(b) Default interest on the sum of AUD 4,021,855.59 at the rate of 4% per annum above ANZ's Costs of Funds, from 21 July 2010 to 29 August 2010; and

(c) Default interest on the sum of AUD 2,964,795.63 at the rate of 4% per annum over ANZ's Costs of Funds, from 30 August 2010 until date of full payment; and

(d) Costs on an indemnity basis.

Issues before this Court

30 This case centres on the construction of 2 clauses which formed part of the 14 July letter. [note: 86]

31 Edwards' case was that the only real issue was whether the Variation Letter gave ANZ the right to convert the denominations of the currency used in the loans. He submitted that the Variation Letter clearly did not give ANZ this right. [note: 87] In deploying this argument, he assailed certain words in the two clauses and argued, in the main, that the contract was uncertain.

32 Before I begin on the issues, though, it would be useful to set out the law that governs cases such as this which turn on the interpretation of contracts.

The law on contractual interpretation

33 The interpretation of a contract is an objective exercise. This was made clear by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029; [2008] 3 SLR 1029 ("*Zurich Insurance*"), where the court (at [131]) endorsed a summary of principles set out by Gerard McMeel in his book, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) ("*McMeel*"), two of which I find useful to set out as a backdrop for the exercise of construction that this case requires:

The aim of construction

First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.

The objective principle

Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her Actual

intentions. The standpoint adopted is that of a reasonable reader.

34 Lord Steyn referred to this objective exercise in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd and others* [2004] UKHL 54 (at [18]-[19]), where he addressed the approach to take when construing a commercial instrument:

> The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. ***The inquiry is objective: the question is what a reasonable person, circumstanced as the Actual parties were, would have understood the parties to have meant by the use of specific language.*** The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.
>
> ***There has been a shift from literal methods of interpretation towards a more commercial approach.*** In *Antaios Compania Naviera SA v Salen Rederierna AB*[1985] AC 191, 201 , Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed: ***"if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*** In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771, I explained the rationale of this approach as follows:
>
> > " ***In determining the meaning of the language of a commercial contract ... the law ... generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties.*** Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language."
> >
> > ***The tendency should therefore generally speaking be against literalism.*** What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 ed), vol III, p 60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process. This approach was affirmed by the decisions of the House in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 775 e-g, per Lord Hoffmann and in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 d-e, per Lord Hoffmann.

35 The objective nature of the inquiry as set out in the above case was referred to in the Court of Appeal case of *The "Asia Star"* [2007] 3 SLR(R) 1 (at [36]). I now turn to addressing the parties' arguments. As will be seen, Edwards' arguments were essentially in the same vein as the literalism Lord Steyn cautioned against.

Are the terms in the 14 July letter unknown?

36 This was an argument that Edwards raised at a rather belated stage. [note: 88] Edwards applied, on the second day of trial, to amend his pleadings to take this argument into account. [note: 89] He argued that the 14 July letter was impossible to understand because it varied a "mysterious facility letter dated 10 December 2007 whose terms are unknown" ("the 10 December Facility Letter") [note:

90] . For clarity, this was what the beginning of the 14 July letter stated: [note: 91]

> We refer to our facility letter dated 10 December 2007 (hereinafter shall be referred to as the "Facility Letter").
>
> Further to your request for an additional loan facility, we are pleased to revise the following clauses of the Facility Letter. Terms defined and references construed in the Facility Letter have the same meaning and structure in this letter.

37 Edwards then argued that the terms of the 10 December Facility Letter were essential to a proper understanding of the terms and structure of the 14 July letter. [note: 92]

38 There were two more documents that were referred to by the parties:

(a) an unsigned 10 December 2007 variation letter titled "Facility Letter 1" ("the unsigned letter"); [note: 93]

(b) another 10 December 2007 letter ("the second 10 December letter"). [note: 94]

39 Crispe testified that the unsigned letter that was produced in discovery was *the* 10 December Facility Letter. [note: 95] ANZ's arguments were as follows:

(a) The 10 December Facility Letter was immaterial to the interpretation of Clauses 14 and 16. [note: 96]

(b) The unsigned letter *was* the 10 December Facility Letter that was referred to in the 14 July letter. ANZ argued that though Edwards claimed to have signed a letter (meaning that the unsigned letter could not be the letter referred to), he did not deny that the unsigned letter bore the same terms as the 10 December Facility Letter which formed part of the facility arrangement. [note: 97]

(c) The contents of the second 10 December letter and the evidence of Crispe clarified that the second 10 December letter related to a separate term loan facility. [note: 98]

(d) This contention regarding the referencing of the correct letters was not a genuine contention but an afterthought that came up only during trial. The contention did not appear anywhere in Edwards' pleadings, earlier affidavits or AEIC, despite the unsigned letter having been disclosed by ANZ very early in the proceedings. [note: 99] The remedial Action taken by Edwards' was to seek to apply to amend his pleadings on the second day of trial. This was dismissed by the court. [note: 100]

40 As I stated when I dismissed the application to amend during the trial, I was of the view that it was incumbent on Edwards, having contested that the letter was not the same one as the one he signed, to prove his assertion by oral or documentary evidence. To continue to contend that the unsigned letter was a mystery letter that *could* have been a version different from the 10 December Facility Letter, in and of itself and without proof, would be a venture into the realm of speculation. [note: 101]

41 Ideally, of course, I would have preferred to have had sight of a signed copy of the

10 December Facility Letter. However, this was not produced and Edwards' inability to prove his assertion leaves me with the version that ANZ has produced, the unsigned letter, which I take to contain the contents of the 10 December Facility Letter.

Construction of Clauses 14 and 16 of the 14 July letter

42 The 14 July letter was a document that both parties placed a great deal of emphasis on. It was a variation letter sent to Edwards from ANZ's Head of Risk and Compliance for its Private Bank division, Michael Byers. [note: 102]

43 It would be beneficial to set out the relevant clauses of the 14 July letter in full. The relevant clauses are:

...

12. SECURITY

The following security document(s) completed shall continue to be held by the Bank as security. It is necessary for the securities to be legally enforceable and in form and substance satisfactory to the Bank:

i) A First Registered Mortgage over the property located at 75 George Street, Burleigh Heads, QLD 4220, Australia (herein referred to as "Property 1"); - Held

ii) A First Registered Mortgage over the property located at 64 [*sic*] George Street, Burleigh Heads, QLD 4220, Australia (herein referred to as "Property 2");

iii) An Assignment of the Fire Insurance Policy to the Bank or its nominees;

iv) A Letter of Charge (Direct) over the term deposit(s) ("Term Deposit") in a deposit account with Australia and New Zealand Banking Group Limited, Singapore Branch held in the name of Jason Glenn Edwards ("the "Depositor"). The total amount of the Term Deposit must be for an account to be determined by the Bank and agreed with the Borrower in accordance with the clawback conditions herein;

v) A Letter of Charge (Direct) over AUD511,650.00 of Series 11 OM-IP 220 Limited (herein referred to as "Fund") registered in the name of ANZ IPB Nominees Pte Ltd and held to our order. The Funds should be rated A or better but should any funds be replaced as a result of Clause 4 herein then the Letter of Charge shall be over the replacement funds as well. – Held

The above (i) and (ii) shall hereinafter collectively be referred to as the "Property" and together with (iii), (iv), and (v) shall herein constitute as "Security", which expression shall, where there is more than one security, include any one or more of them.

In addition to the specific security documentation detailed, the Borrower will execute (or arrange to have executed) any supplemental and ancillary documents or any other security document the Bank may require to perfect the Security detailed herein from time to time.

In order to ensure the Bank is entitled to vacant possession of any security property, the Borrower of the security provider undertakes to (if requested by the Bank) execute (or arrange to have executed) any supplementary or ancillary documentation as may be required by the Bank

from time to time.

13. CONDITIONS PRECEDENT

The Bank's obligations under this Facility Letter are subject to all the following conditions precedent being met to the Bank's satisfaction:

(a) The Bank receives a copy of the insurance for the Property;

(b) The Bank receives a copy of receipt evidencing full payment of the Borrower's equity portion for the purchase of Property 2;

(c) The Banks receives an executed copy of the Sale & Purchase Agreement of Property 2;

(d) The Bank receives a copy of a new valuation report for Property 1;

(e) The Bank receives the duplicate copy of this Facility Letter duly accepted and signed by the Borrower;

(f) Completion of all security documents;

(g) Completion of all terms and conditions outlined in this Facility Letter.

14. GENERAL CONDITIONS

The Bank reserves the right to:

(a) require the Borrower to reduce the amount owing or contingently liable under the Facility in the event that the loan/security ratio exceeds 80%. For the purpose of calculating this ratio in this sub-clause, security is the total value of the Property and Fund held and pledged to the Bank assessed in the Bank's sole discretion. The Bank may in its absolute discretion, in addition, require the Borrower to provide such further security in such form and substance as shall be satisfactory to the Bank;

(b) require the Borrower to re-denominate the Facility into a different currency other than USD/SGD/JPY upon change in currency of the Borrower's main income in USD/SGD.

...

16. CLAWBACK CONDITION

Subject to the provisions in clause 14, in the event the outstanding loan amount is denominated in a different currency to the currency of the Security, the following clawback conditions will apply:

(a) For the purposes of this clause, the loan to security ratio is the ratio of the outstanding amount(s) and/or contingent liabilities of the Facility after notional conversion(s)* (at the prevailing rate(s) as determined solely by the Bank which may include the Bank's own prevailing rate(s)) into the currency that the Property/ Fund is denominated in, expressed as a proportion of the value of assets held and charged as Property/ Fund by the Bank.

The term "currency that the Security is denominated in" shall in the case where immovable

security is concerned, refer to the currency of the country in which the immovable security is situated and in the case of movable security, shall refer to the currency in which the Security is denominated in.

* If there are more than two currencies involved in the notional conversions, the Bank shall have the sole right to determine the relevant base currency to be utilized for the notional conversions for comparison purposes.

(b) If at any time (for the avoidance of doubt, this includes the period from the booking date of any spot foreign exchange contract(s) to the value date of the same) the loan to security ratio should exceed 80%, then the bank may demand that the Borrower deposit an amount in a currency acceptable to the Bank equal to the excess over a 80% loan to security ratio in a deposit account with the Bank in the name of the Borrower but charged to the Bank and/or provide to the Bank such additional securities, in form and substance satisfactory to the Bank, and in such value as the Bank may require, at the option of the Bank.

(c) If such deposits and/or securities as provided for in CLAWBACK CONDITION – Clause 13(b) above are not received within 3 days of such demand, or should the loan to security ratio exceeds 90% at any time, then the Bank at its absolute discretion may immediately convert the relevant amount in CLAWBACK CONDITION – Clause 13(a) into any currency (at the Bank's then prevailing rate of exchange) that the Bank deems fit in order to fully eliminate its foreign exchange risks. All costs associated with such conversion will be for the Borrower's account. The Bank shall also not be held responsible in any way if it chooses not to convert at any level but instead continues to demand for additional securities or if it chooses to convert when the loan to security ratio is higher than 90%. Following any conversion, the loan to security ratio will still have to be re-instated to 80%.

...

44 It was explained by ANZ during the trial that the reference to "Clause 4" in Clause 12(v) was Actually a reference to Clause 12(iv). Having set out the relevant clauses, I now address the arguments relating to them.

Was ANZ only entitled to effect a redenomination of Edwards' loans upon a change of currency of his income, by virtue of clause 16 being read with clause 14?

45 Edwards' position is that, consistent with ANZ's promotional material and Edwards' own understanding of the matter from the outset and the clear terms of the 14 July letter, ANZ was only entitled to effect a redenomination of Edwards' loans upon a change of currency of Edwards' income. [note: 103]

46 In support of this position, Edwards relies on the words "Subject to the provisions in clause 14..." at the beginning of Clause 16 and argues that the clear and obvious meaning of these words is that Clause 16 is subservient to Clause 14. [note: 104] He argues that: [note: 105]

(a) Any limitations applicable to the dominant clause will apply equally to the subservient clause. [note: 106]

(b) Clause 14, the dominant clause, states that ANZ could *only* redenominate loans upon a change in Edwards' income currency.

(c) Clause 16, being subservient, must be limited by the same.

(d) Accordingly, because the currency of Edwards' main income never changed, ANZ did not have any right to redenominate his loans. [note: 107]

47 Edwards argues that if it was intended that Clause 16 could provide for redenomination in circumstances not envisaged by Clause 14, Clause 16 would have started with the words "Notwithstanding the provisions in Clause 14" and not "Subject to the provisions in Clause 14". [note: 108]

48 ANZ's position is that Edwards' interpretation is ill fitting and submits as follows:

(a) the meaning of "Subject to the provisions in clause 14" in Clause 16 is that the rights or obligations in Clause 16 are subject to ANZ having the rights that it has reserved in Clause 14. [note: 109]

(b) Clause 14 is not a clause that sets out limitations or conditions on ANZ's rights.

49 I agree with ANZ's argument that Clause 14 is not a clause that sets out limitations or conditions on ANZ's rights. Firstly, clause 14 relates to "General Conditions". By this, I understand that the two rights ANZ reserves to itself in Clause 14(a) and (b) are the right to require the borrower to reduce the amount owing under the Facility Agreement if LVR exceeded 80%, and the right to require Edwards to redenominate the Facility into a different currency other than USD/SGD/JPY upon a change in the currency of his main income.

50 The scenario envisioned in Clause 16 is a slightly different one. Here, the event that is being considered is that of the outstanding loan amount being denominated in a currency different from the currency of the Security. When a scenario falls under this description, the clawback conditions in Clause 16 will apply. The words "Subject to the provisions in clause 14...", in my opinion, mean that ANZ retains the two rights in Clause 14 but *in this particular situation* of there being an outstanding loan amount that is denominated in a currency different from the currency of the Security, the clawback conditions in Clause 16 will apply. In a sense, Clause 16 is a sub-specie of the general scenarios envisaged in Clause 14.

51 Accordingly, I do not agree with Edwards' submission that ANZ was only entitled to effect a redenomination of the loan upon a change of currency of his income.

Problems with Clause 16(c)

52 For ease of reference and understanding, I set out Clause 16(c) again. I have emphasized the phrases in the clause which are the bone of contention here:

> If such deposits and/or securities as provided for in ***CLAWBACK CONDITION – Clause 13(b)*** above are not received within 3 days of such demand, or should the loan to security ratio exceeds 90% at any time, then the Bank at its absolute discretion may immediately convert the ***relevant amount*** in ***CLAWBACK CONDITION – Clause 13(a)*** into any currency (at the Bank's then prevailing rate of exchange) that the Bank deems fit in order to ***fully eliminate its foreign exchange risks*** . All costs associated with such conversion will be for the Borrower's account. The Bank shall also not be held responsible in any way if it chooses not to convert at any level but instead continues to demand for additional securities or if it chooses to convert when the

loan to security ratio is higher than 90%. Following any conversion, the loan to security ratio will still have to be re-instated to 80%.

Were the references to Clause 13(a) and (b) in Clause 16(c) typographical errors?

53 Edwards' case is as follows: Clause 13(b) makes no reference to "additional securities" that Edwards may be required to furnish to ANZ. [note: 110] Similarly, Clause 13(a) does not refer to any relevant amount for any "CLAWBACK CONDITION". [note: 111] The only thing that is clear about Clause 16(c) is that it does not give ANZ the right to redenominate Edwards' facilities in the manner that it did. [note: 112]

54 ANZ's case is that the references to "CLAWBACK CONDITION – Clause 13(a)" and "CLAWBACK CONDITION – Clause 13(b)" in Clause 16(c) were typographical errors. [note: 113] ANZ does not deny making a mistake in the references to Clause 13(a) and (b). [note: 114] ANZ argues that the correct references should be to "CLAWBACK CONDITION – Clause 16(a)" and "CLAWBACK CONDITION – Clause 16(b)" respectively.

55 First, Clause 16 is the only clause in the 14 July letter that is titled "CLAWBACK CONDITION" and the inclusion of the phrase "CLAWBACK CONDITION" in the erroneous references indicates clearly that Clause 16(c) was referring to Clauses 16(a) and 16(b). [note: 115]

56 Second, the terms "relevant amount" and "deposits and/or securities" are not mentioned in Clause 13 at all. Clause 13 (titled "CONDITIONS PRECEDENT") deals with completely different subject matters and that makes it even clearer that parties could not have intended the references to be to Clauses 13(a) and 13(b), which provide that ANZ's obligations under the Facility Letter are subject to the bank receiving a copy of the insurance for the two properties in issue and a copy of the receipt evidencing full payment of Edwards' equity portion for the purchase of 61 George Street (wrongly stated as 64 George Street in Clause 12(ii) and as 6 George Street in Clause 6). .

57 Third, the initial facility letter of 24 January 2006 ("the Initial Facility Letter") that was signed by Edwards has the same "CLAWBACK CONDITION" clause at Clause 16, where the references to the sub-clauses are correct. Clause 16 of the Initial Facility Letter reads as follows:

> **16. CLAWBACK CONDITION**
>
> Subject to the provisions in clause 14, in the event the outstanding loan amount is denominated in a different currency to the currency of the Security, the following clawback conditions will apply:
>
> (a) For the purposes of this clause, the loan to security ratio is the ratio of the outstanding amount(s) and / or contingent liabilities of the Facility after notional conversion(s)* (at the prevailing rate(s) as determined solely by the Bank which may include the Bank's own prevailing rate(s)) into the currency that the Property is denominated in, expressed as a proportion of the value of the assets held and charged as Property by the Bank.
>
> The term "currency that the Property is denominated in" shall in the case where immovable property is concerned, refer to the currency of the country in which the immovable property is situated and in the case of movable property, shall refer to the currency in which the Security is denominated in.

* If there are more than two currencies involved in the notional conversions, the Bank shall have the sole right to determine the relevant base currency to be utilised for the notional conversions for comparison purposes.

(b) If at any time (for the avoidance of doubt, this includes the period from the booking date of any spot foreign exchange contract(s) to the value date of the same) the loan to security ratio should exceed 55%, then the Bank may demand that the Borrower deposit an amount in a currency acceptable to the Bank equal to the excess over a 55% loan to security ratio in a deposit account with the Bank in the name of the Borrower but charged to the Bank and/or provide to the Bank such additional securities, in form and substance satisfactory to the Bank and in such value as the Bank may require, at the option of the Bank.

(c) If such deposits and/or securities as provided for in CLAWBACK CONDITION – Clause 16(b) above are not received within 3 days of such demand, or should the loan to security ratio exceeds 65% at any time, then the Bank at its absolute discretion may immediately convert the relevant amount in CLAWBACK CONDITION – Clause 16(a) into any currency (at the Bank's then prevailing rate of exchange) that the Bank deems fit in order to fully eliminate its foreign exchange risks. All costs associated with such conversion will be for the Borrower's account. The Bank shall also not be held responsible in any way if it chooses not to convert at any level but instead continues to demand for additional securities or if it chooses to convert when the loan to security ratio is higher than 65%. Following any conversion, the loan to security ratio will still have to be re-instated to 55%.

58 ANZ then submits that the court has the power to correct obvious mistakes in the written expression of the intention of the parties and, once corrected, the contract is interpreted in its corrected form. [note: 116]

59 I find ANZ's arguments on this matter persuasive. First, the clauses referred to in Clause 16(c) were labelled "CLAWBACK CONDITION - 13(a)" and "CLAWBACK CONDITION - 13(b) above". In the 14 July letter, there are no other clauses with the heading "CLAWBACK CONDITION". Second, a similar clause in the Initial Facility Letter referred correctly to Clauses 16(a) and (b).

60 I adopt the principle set out in Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) ("*Lewison*") at para 9.01, p 465:

> As part of the process of construction the court has power to correct obvious mistakes in the written expression of the intention of the parties. Once corrected, the contract is interpreted in its corrected form.

61 The learned author goes on to cite a few cases supporting the proposition, two of which I find useful in the present case. In *East v Pantiles (Plant Hire) Ltd* [1982] E.G.L.R 111, a case which the parties also cited in their submissions, [note: 117] Brightman LJ held:

> Two conditions must be satisfied: first there must be a clear mistake on the face of the instrument; secondly it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.

62 In *G & s Brough Ltd v Salvage Wharf Ltd* [2009] EWCA Civ 21, Jackson LJ stated:

> Where a written agreement as drafted is a nonsense and it is clear what the parties were trying to say the court will, as a matter of construction, give effect to the obvious intention of the parties.

63 Clause 16(c) was deliberately inserted in the contract for one clear reason. This is to allow the bank to convert, at its discretion, the relevant amount into any currency *if* the borrower does not provide additional deposits or securities. If Clause 16(c) refers to Clause 13(a) and Clause 13(b), which speak of a copy of the insurance and a receipt for full payment respectively, it would be, in the words of Jackson LJ, nonsense. Clause 16(a) and Clause 16(b) are clearly the clauses that ANZ intended to refer to in the 14 July letter and ANZ's error, which it has admitted was a careless one, is an obvious typographical error. The obvious mistake can be easily and fairly rectified and I do not think that Edwards can honestly claim to have been misled or prejudiced in any way by the error in the clause numbers. In the same vein, Edwards was also not misled by the wrong house number in Clause 12(ii) where 61 George Street was, again carelessly, stated as 64 George Street. Accordingly, I treat the references to Clauses 13(a) and (b) as references to 16(a) and 16(b).

Even if Clause 16(c) referred to Clause 16(a) and Clause 16(b), the 14 July letter failed to identify a "relevant amount" in Clause 16(a) for the purposes of Clause 16(c)

64 Edwards argues that Clause 16(a) does not provide for any "relevant amount". [note: 118] He says that Clause 16(a) is simply a definition clause and provides for a mechanism for a notional determination of the loan to security ratio. [note: 119]

65 ANZ argues that the "relevant amount" is the outstanding amount(s) that is not in the currency of the Property / Fund ("Property" and "Fund" as defined in Clause 12 of the 14 July letter) which is the subject of the notional conversion done in Clause 16(a).

66 In my view, Edwards is correct in characterising Clause 16(a) as a definition clause. However, it is also clear from the opening words of Clause 16(a) (*viz*, "For the purposes of this clause...") that the definition of LVR set out in 16(a) applies to the entire of Clause 16. To understand the meaning of "relevant amount", one has to look at Clause 16 in its entirety. It is from examining Clause 16 as a whole that I take the view that "relevant amount" refers to the outstanding loan amount denominated in currencies other than the currency the securities are denominated in. I agree with Edwards that based on a *purely literal* reading of Clause 16(a), there is no use of the term "relevant amount" or any figure that would be seen as a "relevant amount". However, I do not think that means, in the words of Edwards, that "it is impossible to say what conversions were envisaged" and that the clause is void for uncertainty. I refer to the case of *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474; [2007] SCGA 57, where the Court of Appeal held (at [20]):

> The law on documentary construction is clear. It is an established principle of documentary interpretation that a clause must not be considered in isolation, but must instead be considered in the context of the whole document.

67 This proposition is also addressed in *Zurich Insurance*, where it was made clear that when construing contracts, the court will take a holistic approach (at [131]):

> **The holistic or 'whole contract' approach**
>
> Thirdly, the exercise is one based on the whole contract or an holistic approach. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.

68 Applying this principle, Clause 16(a) should not be considered in isolation but must be considered in the context of the whole document. In this case, Clause 16(a) refers to the "outstanding amount". Just above that, there is the phrase "... *in the event the outstanding loan amount is denominated in a different currency to the currency of the Security*...". Seen in totality, these references to the "outstanding amount" provide the answer to the question as to what "relevant amount" refers to. This outstanding loan amount which is denominated in a currency different from the currency of the Security in Clause 16 was the subject of the conversion ratio in Clause 16(a) which was referred to in Clause 16(c).

69 Accordingly, I disagree with Edwards' submissions that the 14 July letter failed to identify a "relevant amount" for the purposes of Clause 16(c).

A conversion of the loan should not have been performed, as the "outstanding loan amount" referred to in Clause 16 was not denominated in a different currency to the currency of the security

70 Edwards argues that Clause 16 does not envisage situations where loans in multiple currencies were secured by assets in multiple currencies. [note: 120] Accordingly, Clause 16 does not apply to the present case.

71 He supports this by stating, first, that the outstanding loan amount here was not denominated in a currency different from the currency of the security. Two of the loan tranches (Tranches 2 and 8) were denominated in AUD. This was the same currency as the mortgaged properties. The "outstanding loan amount" could not be converted to the currency of the security, as part of it was *already* in that currency. [note: 121]

72 Second, he states that Clause 16 refers to the "currency of the Security". This shows that the clause does not cover a situation where loans in multiple currencies were secured by securities in multiple currencies. He points out that the securities in this case included: [note: 122]

(a) a term deposit of AUD 44,047.27 and a cash pledge of SGD 42,000;

(b) an investment in a fund known as Series II OM-IP 220 Limited in the amount of AUD 511,650; and

(c) an investment in Nomura Protected Global Emerging Market Notes in the value of around USD 500,000.

73 He then closes his argument by raising the question: for the purpose of calculating the LVR, which security currency is to be used? [note: 123]

74 ANZ has four main counter-arguments. First, ANZ argues that the phrase "in the event the outstanding loan amount is denominated in a different currency to the currency of the Security" refers to the situation where any portion of the outstanding loan is denominated in a currency different from the currency of the security. [note: 124]

75 Second, ANZ points to the purpose of Clause 16. ANZ argues that Clause 16 is there to eliminate ANZ's foreign exchange risk resulting primarily from a depreciation of the currency of the security against the different currency or currencies of the outstanding loan. The risk is present as long as any part of the loan amount is in a currency that differs from the currency of the security.

Accordingly, the phrase "in the event the outstanding loan amount is denominated in a different currency to the currency of the Security" has to include the situation where any portion of the outstanding loan is in a currency different from that of the security. [note: 125]

76 Third, ANZ addresses the second argument of Edwards that the clause does not cover a situation where loans in multiple currencies were secured by securities in multiple currencies (at [72] above). ANZ argues that this argument was made without the benefit of careful examination [note: 126] and follows up by referring to Clause 12 of the 14 July letter (see [42] above). ANZ argues that under Clause 12, "Security" encompasses the mortgages over 61 and 75 George Street, the assignment of the properties' fire insurance policy to ANZ, the charge over the term deposit (AUD 44,047.27) and the charge over AUD 511,650.00 Series 11 OM-IP 220 Limited. ANZ argues that these are all denominated in AUD. [note: 127] However, Edwards, in his reply submissions, refers to paragraph 44(d) of Crispe's AEIC, where it states that ANZ held a cash pledge of SGD 42,000. Accordingly, the term deposit of AUD 44,047.27 was not the only term deposit held as security.

77 Fourth, to the question posed by Edwards as to which security currency is to be used for the purpose of calculating the LVR (see [73] above), ANZ states that the currency of the security refers to the currency of the Property (defined in Clause 12 of the 14 July letter to mean 61 and 75 George Street) *and* the Fund (as defined in Clause 12 of the 14 July letter) and the express provisions of both Clauses 14(a) and 16(a) of the 14 July letter provide guidance for this. Both the Property and the Fund are denominated in AUD. [note: 128]

78 It is clear to me that the scenario this case presents is on all fours with that envisaged in Clause 16. I agree with ANZ's arguments. The only hesitation I have with regard to the third argument of ANZ was Edwards' counter-argument in his Reply that Crispe had asserted there were other term deposits that were not denominated in AUD. [note: 129] Having referred to the paragraph cited (paragraph 44(d)), I see no such reference to the cash pledge in SGD. However, Maya Lim's evidence was that sometime in October or November 2008, a term deposit of AUD 44,047.27 (which is unobjectionable, being in AUD) *and* a cash pledge of SGD 42,000 were pledged by Edwards as security under the facility arrangement. [note: 130] Seeking to clarify this by going through the other pieces of evidence, I find that Crispe's evidence (at a different location from where counsel pointed me to) reiterates that on 30 October 2008, AUD 44,027.27 and SGD 42,000 were both pledged as security for the Facility Agreement. [note: 131] Does this now mean that there is no singular currency for the Security as claimed by ANZ and if so, is the clause operative?

79 Before I answer these questions, there appears to be some confusion over the SGD cash pledge and the AUD 44,047.27. Maya Lim's evidence was corrected by Crispe's evidence. Crispe stated that the term deposit of AUD 44,047.27 and the cash pledge of SGD 42,000 were, in addition to another term deposit of AUD 27,861.26, pledged for the purposes of a *separate* standalone facility dated 3 April 2008, under which a loan of USD 400,000 was disbursed to the Plaintiff. This loan was secured in the 3 April 2008 facility agreement by Edwards' investment of USD 500,000 in Global Emerging Market Notes. The term deposits were pledged on 15 August 2008 as additional security when the LVR for the USD 400,000 loan was breached and the SGD 42,000 was used to meet interest payments on that same loan on 10 October 2008. [note: 132] However, the SGD 42,000 was not used to pay down the interest as the said Notes were sold on 16 October 2008 and the proceeds from the sale were sufficient to repay the loan in full. As the term deposits and the cash pledge were no longer required for the USD 400,000 loan facility, a request was made on 30 October for the release of both the term deposits. The credit team approved the release of the AUD 27,861.26 term deposit. The AUD 44,047.27 term deposit *and* the cash of SGD $42,000 were pledged as security for the Facility

Agreement. The answer to the questions I posed above is that on an objective interpretation of the clause, the reference is to a singular currency for the "Security". It is evident that the "Security" consists of 61 and 75 George Street, the assignment of the Fire Insurance Policy to the Bank or its nominees, "Term Deposit" and "Fund". All these securities were in the same currency (AUD). In my opinion, the conversion of the loans was valid. Applying the construction I have adopted to the facts of the case, it is clear that the only contentious security is that of the SGD cash pledge. The two other term deposits were in AUD and could be assimilated into Clause 12(iv) (the "Term Deposit" clause). In my view, the SGD cash pledge cannot be classified as a term deposit. Instead, the provision of the said cash pledge falls under Clause 16(b), which allows ANZ to demand a deposit in a currency acceptable to the bank and/or demand additional securities should the LVR exceed 80%. At the time the cash pledge was taken in (*viz*, 30 October 2008), the LVR for the purposes of the Facility Agreement was above 80%. [note: 133]

80 Accordingly, I find that, contrary to Edwards' arguments, Clause 16 applies to the present case.

The conversion increased, rather than eliminated ANZ's foreign exchange risks

81 Edwards argues that ANZ was only entitled to redenominate his loan to "fully eliminate its foreign exchange risks" (see Clause 16(c) at [52]). He argues that ANZ's conversion of the loan at the material time would not fully eliminate ANZ's foreign exchange risks. Instead, the foreign exchange risks would have been increased. He posits the following scenario:

(a) Edwards' income was in USD/SGD;

(b) After conversion of the loan, an appreciation of the AUD would result in payment by Edwards of substantially larger sums in USD/SGD to make the requisite payments of principal and interest in AUD;

(c) This would increase ANZ's foreign exchange risks.

82 Accordingly, there was no elimination of foreign exchange risks.

83 Second, Edwards argues that the conversion of Edwards' loan into the security currency will fully eliminate ANZ's foreign exchange risks only if the security was realised when the LVR is less than 100% as the sale proceeds would settle the full outstandings. However, ANZ did not issue a margin call until LVR was 115%. [note: 134] This was ANZ trying to earn higher interest and increase the price of the loan in terms of Edwards' income currency. [note: 135]

84 ANZ argues that the meaning of its "foreign exchange risks" is very clear: it is ANZ's risk of the value of the security it holds depreciating against the loan outstanding as a result of currency fluctuations, in particular due to a depreciation of the security currency against the loan currency that is different from the security currency. [note: 136]

85 Second, ANZ argues that Edwards' submissions on ANZ's foreign exchange risks Actually address the risk of Edwards defaulting on the repayments and that Edwards' interpretation of the phrase is contrary to the ordinary and natural meaning of the phrase. [note: 137]

86 Third, ANZ attacks Edwards' arguments by stating that he makes two assumptions. The two assumptions are that the AUD continually appreciates against his income currency [note: 138] and that

Edwards' income is the main form of repayment for the outstanding loans. [note: 139] On the former, ANZ submits that had the AUD depreciated (an event ANZ describes as indeterminable and uncertain), the risk that Edwards described would be eliminated. On the latter, ANZ submitted that the main form of repayment was *not* Edwards' income but was the security that ANZ held. [note: 140]

87 I first address Edwards' arguments. It appears to me that Edwards mischaracterised the risk that ANZ was seeking to protect itself against when ANZ spoke of currency exchange risks. He seemed to allude to a default risk rather than a currency exchange risk; the risk here was that Edwards himself would default due to a conversion of the USD loan to AUD coupled with a rising AUD. Edwards, being paid in USD/SGD, would have to pay more USD as the AUD under the loan would have appreciated. This, I agree with ANZ, can be characterised as Edwards' repayment risk or Edwards' (as opposed to ANZ's) foreign exchange risk. Whether the risk highlighted by Edwards is called repayment or default, it is nonetheless *not* ANZ's foreign exchange risk which is protected in the following manner:

(a) LVR (as defined in Clause 16(a)) is set at 80%;

(b) If LVR is breached, ANZ can demand additional deposits or securities;

(c) If there are no additional deposits or securities provided or it LVR is more than 90%, then ANZ can, at any time in its absolute discretion, convert the relevant amount (outstanding loan) that the Bank deems fit in order to fully eliminate its foreign exchange risks.

88 A key factor in the bank's consideration of protecting itself must be that the value of the loan it extends does not exceed the value of the securities it holds. Two scenarios illustrate how ANZ's protection works. Assuming that the outstanding loan amount is denominated in a currency (USD) different from the currency of the Security (AUD):

(a) Scenario 1: AUD appreciates against USD. After notional conversion, LVR is lower. There is no imminent threat of LVR breach.

(b) Scenario 2: AUD depreciates against USD. After notional conversion, LVR is higher. The rise in LVR threatens a breach of the LVR.

89 It is in Scenario 2 that ANZ will turn to Clauses 16(b) and (c) to protect itself.

90 In respect of Edwards' second argument, I dispose of it by reference to Clause 16(c). Under that clause, ANZ is free not to convert the loan at any level or to convert when the LVR is higher than 90%.

Clause 16(c) is void for uncertainty because it does not provide a mechanism for the calculation of security value

91 Edwards argues that Clause 16(c) is void for uncertainty. He argues that Clause 16(c) does not provide for a mechanism for valuing the security for the purposes of determining the LVR. He submits that the value of the security is an absolutely essential element in the LVR formula and without any provision as to how it is to be calculated, the whole formula fails. [note: 141]

92 Edwards also takes issue with ANZ's arguments that the LVR referred to in Clause 14(a) is the same as the ratio in Clause 16. First, he says that the power to determine the LVR in ANZ's sole

discretion is expressly limited in Clause 14 to that particular sub-clause (*viz*, Clause 14(a)). [note: 142] He argues too that the right bestowed upon ANZ under Clause 14(a) (*viz*, the right to seek payments to reduce the amount owing when LVR exceeds 80%) allowed for a "rough and ready" approach. This was as compared to the right that allowed ANZ to redenominate a borrower's outstanding loan to a foreign currency which would expose the borrower to interest rate and foreign exchange risks. He claimed the latter right was drastic and it could not have been parties' intentions that the "rough and ready" approach - applicable in Clause 14(a) - be applicable in Clause 16. [note: 143]

93 Lastly, Edwards argues that whenever the need arose to put in a reference to discretion, ANZ did so. He points to Clause 14(a) and 16(a) and states that any provision that ANZ may value the securities in its sole discretion is glaringly absent. [note: 144]

94 ANZ does not deny that Clause 16 does not specifically provide for the method of assessing the value of the security. [note: 145] ANZ's argument is that Clause 14(a) provides the method for assessing the value of the security. The ratio referred to in Clause 14(a) is the same ratio that is referred to in Clause 16. This ratio is the LVR. [note: 146] In addition, ANZ also refers to Clause 16(f) of the Terms and Conditions where ANZ may at its sole discretion, require a revaluation of the mortgaged property if ANZ was of the opinion that the value of the property had declined from the initial valuation amount. [note: 147]

95 Clause 16(c) refers to the LVR, as defined specifically in Clause 16(a). The LVR defined in Clause 16(a) refers specifically to the scenario set out in Clause 16 (*viz*, "the outstanding loan amount is denominated in a different currency to the currency of the Security"). The LVR set out in Clause 14(a) refers to a more general scenario which did not involve different currencies. In that sense, the two LVRs are not the same. However, I do not believe the fact that both LVRs are not the same makes the contract void for uncertainty. Accordingly, I agree with ANZ that Clause 16(c) is not void for uncertainty. It does provide a mechanism for the calculation of security value; the mechanism being that the bank would assess the values in its sole discretion.

ANZ did not rely on any valid valuation

96 Edwards' main argument here is that the valuations ANZ had on file were not valid at the time of the conversions as their validity period was expressly limited to three months. [note: 148] It is his case that when ANZ conducted its first conversion, the valuations were more than four months old and when ANZ conducted its second conversion, the valuations were more than 10 months old. Edwards states that if a valid valuation was used, his LVR would have been considerably less than the LVR stated by ANZ. He would then have been able to make payment of a sufficient sum to reduce the LVR to acceptable levels, avoiding the conversions. [note: 149]

97 To this, ANZ argues that it has the contractual right to assess the value of the security using its discretion. This is not incompatible with ANZ using the valuations for 61 and 75 George Street done on 4 July 2008. ANZ also argues that the disclaimer for the valuations of 4 July 2008 states that the report is "for the use of the party to whom it is addressed and for no other purpose, and no responsibility is accepted to any third party for the whole or part of its contents" and therefore the disclaimer stating that the valuation was valid for three months applied to ANZ only and did not apply to Edwards. [note: 150]

98 In addition, ANZ states that the values were not very outdated in any case and also contests Edwards' assertion that he would have been able to repay the loan if updated and higher valuations

were given to the securities. [note: 151]

99 I agree with ANZ's first proposition, that ANZ has the contractual right to assess the security using its sole discretion. However, a point that was not canvassed before me was whether this discretion was unfettered and, if it was not unfettered, whether it was exercised incorrectly. To answer the question, I turn to *Lewison*, who states the following principle (at 14.11):

> Where a contract confers a discretion on one party, and the exercise of that discretion may adversely affect the interests of the other party, it will usually be implicit that the discretion must be exercised honestly and rationally and for the purpose for which it was conferred.

100 Recently, the High Court has reviewed the authorities and addressed this question as well. In *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319, the Court stated (at [103]-[106]):

> A contractual discretion is not usually as unfettered as Ms Tan would like this court to believe. The authorities on contractual discretion recognise that there is a corresponding expectation that the discretion would be exercised fairly and rationally. Guidance can be drawn from *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 ("*Horkulak*"), an employment case, on the court's approach to contractual discretion at [30]:
>
> > ... while, in any such situation, the parties are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion, it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion. Thus the courts impose an implied term of the nature and to the extent described.
>
> Rix LJ in *Socimer Bank Ltd v Standard Bank Ltd* [2008] 1 Lloyd's Rep 558 ("*Socimer*") summarised the position in relation to exercise of contractual discretion as follows (at [66]):
>
> > It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also not concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria.
>
> In *JML Direct v Freesat UK Ltd* [2009] EWHC 616, Blackburn J referred to *Socimer* and *Horkulak* as authority for the proposition that discretion conferred on one party by the other is not wholly unfettered contractual discretion. As Rix LJ observed in *Socimer*, the concern is that the discretion is not abused. Hence, the courts will impose an implied term that the discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally. "Irrationally" in this connection, (Blackburn J accepts the explanation in *Socimer*) is not an objective test of reasonableness but is used in an analogous sense to the Wednesbury unreasonableness (see *Socimer* at [66]).

> The courts will not intervene so long as the contractual "discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can be properly categorised as perverse" (see *Ludgate Insurance Co Ltd v Citibank* [1998] Lloyd's Rep IP 221 at [35] summarising the principles drawn from cases like *Weinberger v Inglis* [1919] AC 606; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *Docker v Hymans* [1969] 1 Ll R 487; and *Abu Dhabi National Tanker Company v Product Star Shipping Company Limited* [1993] 1 Lloyd's Rep 397).

101 ANZ therefore does not have untrammelled discretion. Applying that to the present case, I am of the view that the exercise of discretion by ANZ in using the previous valuations was not arbitrary or capricious or perverse. The valuations done by CB Richard Ellis on 4 Jul 2008 were four months and ten months old at the time of the first and second conversions respectively. [note: 152] The value given for 61 George Street was AUD 2m while that for 75 George Street was AUD 1.3m. It would not be irrational to rely on them as the periods that had elapsed between the valuations and the conversions were not unreasonably long. It is also not uncommon to find differences in valuations done by different valuers. Edwards' valuer did a retrospective valuation of 61 George Street after inspecting it on 29 Sep 2011. He opined that its value as at 18 Nov 2008 would have been AUD 2.5m. The estate agent engaged to sell 61 George Street stated that the highest offer recorded for 61 George Street at an auction on 26 Jan 2008 was AUD 2.4m but the sale did not go through as the vendor insisted on a sale price of AUD 2.45m. No valuation was done for 75 George Street as Edwards had sold it in 2010 for AUD 1.1m. He said he was forced to do so by ANZ. ANZ's valuer did a retrospective valuation for both Australian properties. He gave his opinion as to their values on four dates, namely, 4 Jul 2008, 1 Jan 2009, 1 Jul 2009 and 19 Nov 2009. For 61 George Street, the values given were AUD 2m, 1.9m, 1.9m and 1.8m respectively. For 75 George Street, the values were AUD 1.3m, 1.2m, 1.2m and 1.1m respectively. The fact that Edwards' valuer gave a higher value to one of the Australian properties does not necessarily mean that ANZ's earlier valuations were wrong. The same comment applies to ANZ's updated valuations done for the purposes of this trial.

102 I am satisfied that ANZ Acted honestly and in good faith in relying on the valuations done by CB Richard Ellis on 4 Jul 2008. Although both these valuation reports stated that "[t]his valuation can be relied upon for a period of three months from the date of valuation for first mortgage security purposes only", that does not mean that they are of no value whatsoever after three months. It merely means that no liability attaches to the valuer if ANZ chooses to rely on the reports after the three-month period. Accordingly, I am of the view that ANZ Acted within its "sole discretion" in valuing the Australian properties in the way that it did. The argument by Edwards that an updated valuation would have shown that the LVR was lower and that he could have avoided conversion is thus disposed of as well.

Subsequent conduct of the parties

103 Edwards' main arguments are that any ambiguity in the contract should be construed against the maker of the contract, that subsequent conduct is irrelevant and that the subsequent conduct relied on does not support ANZ's position. [note: 153]

104 ANZ's arguments are in the alternative. First, ANZ reiterates its argument that Clauses 14 and 16 of the 14 July letter entitled ANZ to effect the conversions in the circumstances that it did. [note: 154]

105 In the alternative, ANZ submits that the conduct of the parties will resolve any ambiguity in

the Clauses in favour of the interpretation offered by ANZ. [note: 155] ANZ argues:

(a) that this Court can look at the subsequent conduct of the parties;

(b) that Edwards was fully aware of how the facility worked and was aware of ANZ's entitlement to convert Edwards' loan outstandings;

(c) that Edwards was aware that the conversions had been effected;

(d) that Edwards was fully aware of the value attributed to the mortgaged properties in the LVR calculations;

(e) that this Court should take note of Edwards' reaction to the conversions;

(f) that Edwards acknowledged his debt in the 22 and 23 October 2009 letters;

(g) that Edwards made various unfulfilled promises to repay.

106 Both parties cited the pronouncements of the Court of Appeal in *Zurich Insurance* to bolster their case. However, the parties agreed that subsequent conduct does not have to be looked at. Edwards submits that the subsequent conduct does nothing for ANZ's case and ANZ argues in the alternative only that subsequent conduct has to be referred to. As I have found that Clauses 14 and 16 of the 14 July letter entitled ANZ to effect the conversions in the circumstances that it did, there is no need to address this alternative argument.

ANZ's default interest rate is penal

107 Edwards argues that the ANZ's default interest rate is manifestly extravagant and is not a genuine preestimate of loss, stating that the only additional loss that could be suffered in such circumstances is the additional administrative costs involved in recovery. He also argues that there is no evidence that ANZ incurred AUD cost of funding and it would have been illogical to do so since Edwards' loans were not in AUD.

108 ANZ states that the interest rates applicable to Edwards pre-default was 1% - 1.25% above Cost of Funds. As such, the increase in interest in the event of default was only an increase of 2.75% - 3%. ANZ also argues that it did incur cost of funding. Crispe explained ANZ's borrowing as follows: [note: 156]

Q. And this is just a conversion, right? The bank didn't borrow this Australian dollar amount?

A. The bank does borrow those amounts, yes. They are not a paper profit/paper loss to the bank. When the client borrows US dollars, the bank borrows that on behalf of the customer.

Q. Right, but when the bank converts a US dollar loan into Australian dollars --

A. Then we buy --

Q. -- the bank is not buying Australian dollars?

A. No. We buy US dollars and we sell Australian dollars. So we buy the US dollars to be able to have the US dollars to pay out the US dollar loan and obviously sell the Aussie dollars, so the

client owes us that back.

Q. Is there any document to show that the bank borrowed this money in Australian dollars?

A. None that I have. However, it would be run by our treasurer, our markets operation.

109 The Court of Appeal recently reaffirmed the principles with regard to penalty clauses in *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (at [63]):

> Where parties stipulate in a contract the sum to be paid in the event of a breach, the contract sum is enforceable if it is a genuine pre-estimate of loss but not if it constitutes a penalty. It is for the party being sued on the agreed sum to show that the term is a penalty. Therefore, the burden is on the Respondent to prove that the term was a penalty.

110 As to what a penalty is, the Court of Appeal in the same case stated (at [64]):

> I n *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79, Lord Dunedin explained, at 86-87, that the question whether a sum stipulated was a penalty or liquidated damages was a question of construction to be decided "upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach". He then laid down the following guidelines, at 87, to assist in determining if a clause for payment of a fixed sum was a penalty or a genuine pre-estimate of loss:
>
> (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.
>
> (c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".

111 In my view, the increase in interest rates is neither extravagant nor unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. The burden is on Edwards to show that the increase was so extravagant that it cannot constitute a genuine pre-estimate of the damages which ANZ would suffer. He has not discharged this burden.

112 Edwards has no evidence to back up his claim that ANZ did not borrow the AUD that it converted Edwards' loans into. He simply states that it would not have made sense to do so. With that, he wraps up his argument that ANZ did not incur any cost in funding the AUD conversions. These bare assertions are insufficient to discharge the burden.

113 In addition, Edwards cites the case of *Hong Leong Finance Ltd v Tan Gin Huay & another* ("*Hong Leong Finance*") [1999] 1 SLR(R) 755. He cites paragraphs 26 and 27 which I find to be useful here but I also add the principles that the Court of Appeal set out in paragraphs 24 and 25:

> [24] More relevant to this appeal was the decision of Colman J in *Lordsvale Finance plc v Bank of*

Zambia [1996] QB 752 which concerned the question of default interest in a syndicated loan. In that case, the defendant bank entered into two facility agreements with two syndicates of banks under which the sums of US$100m and $130m were made available to the defendant. **The agreements provided that in the event of default the defendant was to pay interest during the period of default at the aggregate rate of (a) the cost of obtaining dollar deposits to fund the banks' participation, (b) the margin (which was defined as 1½ per cent) and (c) an additional, but unexplained, one per cent.** When the facility advances fell due for repayment the defendant defaulted. The plaintiffs, who were assignees of the rights of certain members of the syndicates, claimed payment of the principal sum together with default interest due under the agreements. On the hearing of an application for summary judgment under O 14 of the rules of the Supreme Court, the plaintiffs did not proceed with the claim for summary judgment for interest. It was ordered that the defendant should have leave to defend upon condition that it paid £800,000 into court, but that in default of payment the plaintiffs were to be at liberty to sign judgment for the principal sum claimed "plus interest (if any) to be assessed". The defendant failed to comply with the condition for payment and judgment was entered against it in the agreed terms. The defendant failed to pay the default interest and the plaintiff commenced a second Action to recover it.

[25] Colman J comprehensively reviewed not only some authorities of great antiquity but also American, Canadian and Australian authorities, and ***held, inter alia, that the additional rate of one per cent could not be said to be* in terrorem *and that it was consistent with an increase in the consideration for the loan by reason of the increased credit risk represented by a borrower in default, and that accordingly, the provision for payment of the default interest was fully enforceable.*** The learned judge said at 763:

> ***[T]he borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated. Merely for the pre-existing rate of interest to continue to accrue on the outstanding amount of the debt would not reflect the fact that the borrower no longer has a clean record. Given that money is more expensive for a less good credit risk than for a good credit risk, there would in principle seem to be no reason to deduce that a small rateable increase in interest charged prospectively upon default would have the dominant purpose of deterring default.*** That is not because there is in any real sense a genuine pre-estimate of loss, but because there is a good commercial reason for deducing that deterrence of breach is not the dominant contractual purpose of the term.

He later said at 763-764:

> There would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach.

Reverting to the case before him the learned judge concluded, at 767:

> ***If the increased rate of interest applies only from the date of default or thereafter there is no justification for striking down as a penalty a term providing for a modest increase in the rate. I say nothing about exceptionally large increases. In such cases it may be possible to deduce that the dominant function is in terrorem the borrower. But nobody could seriously suggest that a 1 per cent increase could be such. It is in***

my judgment consistent only with an increase in the consideration for the loan by reason of the increased credit risk represented by a borrower in default.

[26] ***On the authorities which we have considered, a provision in a contract stipulating an increased rate of interest applicable from the date of default is, depending on the circumstances, enforceable and will not be struck down as a penalty, provided that the increase (or difference) is not "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach" (per Lord Dunedin in Dunlop Pneumatic Tyre ([18] supra) at 87). It is otherwise, if the increased rate is "exceptionally large".***

[27] In the present case, cl 18 of the standard terms and conditions and cl 10 of the terms of the mortgage provided for payment of default interest at the rate of 18% per annum for late or non-payment of moneys due under the mortgage. As laid down in *Dunlop Pneumatic Tyre* [1915] AC 79 at 86 and *Esanda Finance* (1989) 63 ALJ 238 ([22] *supra*) at 242, these provisions should be construed from the point of view of the parties at the time of entering into the transaction, and the character of these provisions as penal or compensatory is to be perceived as a matter of degree depending on all the circumstances, including the nature of the subject matter of the agreement. Looking at these provisions objectively and "judged of" as at the time of the execution of the mortgage, it seems to us that the default rate at 18% per annum was eminently an extravagant increase from the rate of 5.5% for the first two years of the term loan and 6.75% thereafter and was not referable to the true amount of the loss suffered by the appellants following the breach by the respondents. The effect of these provisions is that the first respondent would have to cough up $1,750 per month (or $56.81 a day), which far exceeded the original monthly instalments of $939.65 (at 5.5%) or $1,017.65 (at 6.75%). In our opinion, this rate was fixed *in terrorem* of the respondents and was intended to deter a breach of the agreement. In our judgment, the default interest at the rate of 18% per annum was manifestly extravagant and was out of all proportion in comparison with the greatest loss that could conceivably be proved to have followed from the breach by the respondents and was therefore a penalty and was unenforceable, As such, the default interest claimed by the appellants is irrecoverable. The appellants' argument that the default rate was unexceptional in the market and that other finance houses also charged default interest at rates of 18% or more per annum was really besides the point. If default interest at 18% per annum was a penalty, as we held it was, the fact that it was an industry-wide practice did not make it less so.

[emphasis added]

114 Applying the principles set out in *Hong Leong Finance* leads me to the conclusion that the default interest rate is not penal. The calculation of the default interest here is similar to that in *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752. It was (a) the cost of funds or the prime lending rate, (b) the margin, which was 1%-1.25%, and (c) the additional 3.75%- 4%. The increase in interest rates here is nowhere close to the increase in interest rates in *Hong Leong Finance*. There, it was 5.5% to 18% or 6.75% to 18%, which is an increase of 12.5% or 11.25% respectively.

Conclusion

115 In *Soon Kok Tiang and others v DBS Bank Ltd and another matter* [2011] SGCA 55, the Court of Appeal observed (at [63]):

In view of our decision in this appeal, we think it apposite and timely to remind the general public that under the law of contract, a person who signs a contract which is set out in a language he

is not familiar with or whose terms he may not understand is nonetheless bound by the terms of that contract. Illiteracy, whether linguistic, financial or general, does not enable a contracting party to avoid a contract whose terms he has expressly agreed to be bound by. The principle of caveat emptor applies equally to literates and illiterates in such circumstances.

116 If those who are unschooled in the law or in finance are held to such a standard, what more a person who is familiar with both? In the present case, Edwards cannot claim that he is not familiar with the language of the contract he entered into. He is clearly far from illiterate. Edwards is a lawyer who works in the finance industry, who took out a mortgage loan with ANZ on terms he agreed to and who knew what he was getting into. However, the same terms, which could have benefited him had the course of the financial markets taken a different direction, have now saddled him with obligations which he no longer wishes to or is unable to bear and which he now wants this court to relieve him of. On the facts here, the court is not able to grant him the relief he seeks. The contract read as a whole is not uncertain. Where there were careless errors, they were clear on the face of the document and could be addressed using the principles of contractual interpretation.

117 In the circumstances, Edwards fails in his claim (see [28] above) against ANZ and ANZ's counterclaim (see [29] above) against him succeeds.

118 Edwards should pay ANZ the costs of these proceedings on an indemnity basis in accordance with Clause 15 of the T&Cs. However, ANZ should bear some responsibility for the many errors in the 14 July letter, some of which have engendered the contentions made in this trial. I therefore order that Edwards pay ANZ 90% of the costs of these proceedings on an indemnity basis.

[note: 1] Plaintiff's Opening Statement ("*POS*") at [10]

[note: 2] Notes of Evidence ("*NE*"), 31 October 2011, Page 120 at line 2

[note: 3] AEIC of Jodene Frances Edwards ("*JFE*") at [18]

[note: 4] *JFE* at [18]

[note: 5] Plaintiff's Reply Submissions ("*PRS*") at [122(6) and (7)]

[note: 6] *POS* at [10]

[note: 7] AEIC of Maya Lim ("*ML*") at [3]

[note: 8] *JFE* at [2]-[3]

[note: 9] *JFE* at [11]

[note: 10] AEIC of Malcolm George Crispe ("*MGC*") at [6]

[note: 11] *MGC* at [7]

[note: 12] *POS* at [11]

[note: 13] *POS* at [11]

[note: 14] *POS* at [13]

[note: 15] *POS* at [13]

[note: 16] *MGC* at [17]; AEIC of Jason Glenn Edwards ("*JGE*") at page 38

[note: 17] *JGE* at page 28; *MGC* at 46

[note: 18] *JGE* at page 49; *MGC* at 52

[note: 19] *JGE* at page 55; *MGC* at 58

[note: 20] *JGE* at page 59; *MGC* at 62

[note: 21] *JGE* at page 65; *MGC* at 63

[note: 22] *JGE* at page 78; Agreed Bundle of Documents ("*AB*") 1130

[note: 23] *JGE* at page 92; *MGC* at 68

[note: 24] *MGC* at 75

[note: 25] *JGE* at [7] and *MGC* at [16(e)]

[note: 26] *MGC* at [18]

[note: 27] *MGC* at [39]

[note: 28] *MGC* at [47]

[note: 29] *MGC* at page 193

[note: 30] *MGC* at page 194

[note: 31] *MGC* at [48]

[note: 32] *MGC* at [54]

[note: 33] Defendant's Core Bundle ("*DCB*") at 154

[note: 34] *MGC* at [55]

[note: 35] *AB* at page 451

[note: 36] *AB* at page 452

[note: 37] *MGC* at [56]; *MGC* at page 197

[note: 38] *MGC* at [57]

[note: 39] *MGC* at [59]; *MGC* at page 255

[note: 40] *MGC* at [60]

[note: 41] *MGC* at [61]; *MGC* at page 250

[note: 42] *MGC* at [62]; *MGC* at page 258

[note: 43] *MGC* at page 258

[note: 44] *MGC* at [62]; *MGC* at page 258

[note: 45] *MGC* at [64]; *MGC* at page 257

[note: 46] *MGC* at [65]; *MGC* at page 257

[note: 47] *MGC* at [67]

[note: 48] *MGC* at page 262

[note: 49] *MGC* at page 262

[note: 50] *DCS* at [42]

[note: 51] *DCS* at [42]; *MGC* at [68]

[note: 52] *MGC* at page 265-273

[note: 53] *DCS* at [43]

[note: 54] *DCS* at [43]

[note: 55] *MGC* at [84]

[note: 56] *MGC* at [86]

[note: 57] *MGC* at [80]; Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at pages 358-359

[note: 58] *MGC* at [81]

[note: 59] *DCS* at [45]

[note: 60] *DCB* at 190; Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 300

[note: 61] Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 300

[note: 62] *DCB* 189; Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 299

[note: 63] *MGC* at [95]

[note: 64] Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 298

[note: 65] *DCS* at [46]

[note: 66] *MGC* at [96]; Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at pages 319- 324

[note: 67] Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 320

[note: 68] Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 322

[note: 69] Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 324

[note: 70] *DCS* at [48]; *MGC* at [99]

[note: 71] *DCS* at [49]

[note: 72] Defendant's Bundle of Affidavits of Evidence in Chief, Vol 2, at page 326

[note: 73] *DCS* at [50]; *AB* at page 616-617

[note: 74] *DCS* at [51]; *AB* at page 637-638

[note: 75] *DCS* at [52]

[note: 76] *DCS* at [53]

[note: 77] *DCS* at [53]

[note: 78] *DCS* at [54]

[note: 79] *JGE* at [60]

[note: 80] *JGE* at [60]

[note: 81] *JGE* at [63]

[note: 82] *ML* at [52]; *ML* at page 127

[note: 83] *ML* at pages 133-134

[note: 84] *DCS* at [54]

[note: 85] *ML* at [59]

[note: 86] *DCS* at [2], [25]

[note: 87] *POS* at [26]

[note: 88] *PRS* at [38]

[note: 89] *NE*, 1 November 2011, page 87, line 16

[note: 90] *PCS* at [84]

[note: 91] *AB* at 1144

[note: 92] *PCS* at [85]

[note: 93] *AB* at 1130

[note: 94] *AB* at 1135

[note: 95] *DCS* at [102]

[note: 96] *DCS* at [100]

[note: 97] *DCS* at [103]

[note: 98] *DCS* at [104]

[note: 99] *DCS* at [106]

[note: 100] *DCS* at [107]

[note: 101] *NE*, 1 November 2011, pages 87-97

[note: 102] *DCB* at 29-34

[note: 103] *PCS* at [93]

[note: 104] *PCS* at [96]

[note: 105] *PCS* at [104]

[note: 106] *PCS* at [104]

[note: 107] *PCS* at [95]

[note: 108] *PCS* at [105]

[note: 109] *DCS* at [113]

[note: 110] *PCS* at [121]

[note: 111] *PCS* at [121]

[note: 112] *PCS* at [122]

[note: 113] *DCS* at [141]

[note: 114] *DCS* at [167]

[note: 115] *DCS* at [161]

[note: 116] *DCS* at [142]

[note: 117] *PRS* at [69] and *DCS* at [143]

[note: 118] *PCS* at [131]

[note: 119] *PCS* at [131]

[note: 120] *PCS* at [140]

[note: 121] *PCS* at [142]

[note: 122] *PCS* at [145]

[note: 123] *PCS* at [145]

[note: 124] *PCS* at [194]

[note: 125] *PCS* at [198]

[note: 126] *DCS* at [200]

[note: 127] *DCS* at [202]

[note: 128] CDS at [204]

[note: 129] *PRS* at [82]

[note: 130] *ML* at [29]

[note: 131] *MGC* at [74]

[note: 132] *MGC* at [70]-[72]

[note: 133] *MGC* at [54]

[note: 134] *PCS* at [151]

[note: 135] *PCS* at [151]

[note: 136] *DCS* at [206]

[note: 137] *DCS* at [209]

[note: 138] *DCS* at [210(a)]

[note: 139] *DCS* at [210(b)]

[note: 140] *DCS* at [213]-[216]

[note: 141] *PCS* at [161]

[note: 142] *PCS* at [157]

[note: 143] *PCS* at [158]

[note: 144] *PCS* at [160]

[note: 145] *DCS* at [223]

[note: 146] *DCS* at [224]

[note: 147] *DCS* at [225]

[note: 148] *PCS* at [175]

[note: 149] *PCS* at [178]

[note: 150] *DCS* at [235]-[237]

[note: 151] *DCS* at [241]

[note: 152] *PCS* at [176]

[note: 153] *PCS* at [212]

[note: 154] *DCS* at [307]

[note: 155] *DCS* at [308]

[note: 156] *NE*, 2 November 2011, page 110 at line 7-25