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

[2022] SGHC 12

Originating Summons No 30 of 2021 (Registrar's Appeal No 112 of 2021)

Between

Ethoz Capital Ltd

… *Applicant*

And

(1) Im8ex Pte Ltd
(2) Chua Soo Liang
(3) Tan Meng Kim

… *Respondents*

GROUNDS OF DECISION

[Contract] — [Misrepresentation]
[Credit and Security] — [Mortgage of real property] — [Equity of redemption]
[Damages] — [Liquidated damages or penalty]

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v
Im8ex Pte Ltd and others

[2022] SGHC 12

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Andre Maniam J
29 June, 13 August, 22 October 2021

21 January 2022

Andre Maniam J:

Introduction

1 In 1996, two ladies financed the purchase of their hawker stall by a 15-year term loan from Hong Leong Finance Ltd ("HLF"). The loan was secured by a mortgage over the stall. Interest on the loan was 5.5% per annum for the first two years, and 6.75% per annum for the rest of the term. The ladies defaulted on the loan within the first year. HLF recalled the loan and went to court to seek possession of the stall; it also charged default interest at 18% per annum.

2 The High Court denied HLF judgment, instead allowing the ladies to keep the stall on the basis that they resume paying the monthly instalments: *Hong Leong Finance Ltd v Tan Gin Huay and another* [1998] SGHC 318. The

court also commented that the 18% per annum default interest rate smacked of a penalty.

3 HLF appealed. The Court of Appeal allowed the appeal in part (*Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 ("*Hong Leong*")), granting HLF judgment for the outstanding loan and possession of the stall. However, the court stayed execution of the judgment on the basis that the ladies continued paying the monthly instalments as ordered by the High Court. So the ladies got to keep their stall after all.

4 The Court of Appeal also held that the default interest of 18% per annum was a penalty. It 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 [HLF] following the breach by the [ladies]."

5 Some 23 years later, the first defendant ("Im8ex") borrowed a total of $6.3 million from the plaintiff ("Ethoz") by way of four 15-year term loans ("the Facilities"). The Facilities were secured by mortgages over four properties, including the homes of the second defendant ("Mr Chua") and the third defendant ("Mr Tan"). Interest on the Facilities was at the rate of 3.75% *flat* per annum, which is the equivalent of an *effective* interest rate of 6.444% per annum (in the region of the loan interest rates in *Hong Leong*). However, default interest was at the rate of 0.065% per day, compounded monthly, *ie*, an effective rate of 26.08% per annum (more than 8% higher than the 18% per annum which the Court of Appeal found to be a penalty in *Hong Leong*).

6 Ethoz's counsel argued that *Hong Leong* was outdated and should not be followed. I disagreed, and found the default interest here to be a penalty.

7 Ethoz also claimed that if Im8ex should default at any time, Ethoz could demand immediate payment not only of the balance of the *outstanding loan*, but also the balance of *15 years' worth of interest* (amounting to 56.25% of the loan). I found that any purported entitlement to interest for a future period, was a penalty.

8 I further found that Ethoz had misrepresented to Im8ex that the Facilities were "better" than previous loans taken by Im8ex from Ethoz for the same principal sum of $6.3 million ("the Prior Facilities"), which the Facilities had re-financed. This was untrue:

(a) the Facilities' loan interest rate was worse;

(b) the prepayment regime was worse; and

(c) the consequences of default (including accelerated payment of future interest, and a higher default interest rate) were worse.

9 As Im8ex had entered into the Facilities in reliance on Ethoz's misrepresentations, Ethoz could not enforce the Facilities to the extent that they were worse than the Prior Facilities. In particular, Ethoz could not demand payment of future interest (of up to 15 years' worth) and thereby prevent Im8ex from paying off the Facilities and redeeming the mortgaged properties.

10 I allowed Im8ex to redeem the Facilities and the mortgaged properties, by paying the balance of the loan amount ("the Advance"), together with interest at the contractual rate of 3.75% flat per annum prior to the date of redemption, *ie*, without another 13 years' worth of future interest, and without default interest.

11 Ethoz has appealed, and these are my grounds of decision.

Background

Procedural background

12 This matter came before me on a registrar's appeal – an assistant registrar ("AR") had granted Ethoz judgment for possession of the four mortgaged properties, and for the amounts it had claimed.

13 The AR regarded himself bound by the High Court decision in *Ethoz Capital Ltd v T-Pacific Pte Ltd and others* HC/RA 350/2019, HC/OS 938/2019 (1 April 2020) *[High Court]* ("*T-Pacific*"), a case between Ethoz and another borrower, involving a loan on similar terms.

14 In the present case, at first instance Im8ex did not challenge Ethoz's claim for default interest. Had this been challenged, the AR would not have been bound by *T-Pacific* (which concerned default interest of 0.0273% per day ≈ 10.28% per annum) to grant Ethoz's claim for default interest under the Facilities, which was at the higher rate of 0.065% per day ≈ 26.08% per annum: it was open to the AR to have found that to be a penalty, on the authority of *Hong Leong* in relation to 18% per annum default interest.

15 I respectfully declined to follow *T-Pacific* insofar as that case decided that upon default, Ethoz was entitled to immediate payment of interest for the whole term of the loan, including future interest.

16 Moreover, the evidence before me (with further affidavits having been filed after the AR's decision) showed that Ethoz had misrepresented to Im8ex that the Facilities were "better" than the Prior Facilities when they were not. There was no issue of misrepresentation in *T-Pacific*.

17 On appeal before me, Ethoz took the position that if I should strike down its claims for 15 years' worth of interest and/or for default interest, the matter need not go to trial; the court could just substitute a lower figure. That is what I did: I found that the clauses purporting to allow Ethoz to claim future interest, and default interest at 0.065% per day ≈ 26.08% per annum to be penalties, and thus unenforceable. They were also unenforceable because of Ethoz's misrepresentations.

18 All three defendants were collectively represented by one solicitor at first instance and through the filing of the registrar's appeal; but thereafter the defendants gave notice of their intention to act in person, following which a new solicitor was appointed only for Im8ex and Mr Chua. Mr Tan did not appear in person for the appeal hearing either. I was informed that there were concerns about his mental health, but no one was appointed as a representative of his. The defendants' positions were however aligned: Im8ex and Mr Chua thus shouldered the burden of the appeal.

The Prior Facilities

19 The Facilities refinanced the Prior Facilities, which were for a short term of 12 months, for a total principal sum of $6.3 million; secured by mortgages over properties, and guarantees:

(a) a $1,000,000 loan at an interest rate of 6.25% effective per annum in September 2018 (specifically referring to properties at Alexandra View, Bayshore Road, and Hoe Chiang Road);

(b) a $3,150,000 loan at an interest rate of 6.25% effective per annum in September 2018 (specifically referring to the three properties mentioned above); and

(c) a $2,150,000 loan at an interest rate of 6.5% effective per annum in January 2019 (specifically referring to a property at Taman Permata).

20 The Prior Facilities were governed by facility letters and facility agreements (the "Prior Facility Letters" and "Prior Facility Agreements", respectively). The mortgages over the properties were on an "all monies" basis, covering all monies owing or remaining unpaid to Ethoz under or in connection with the Prior Facilities (and later, the Facilities).

21 The properties at Alexandra View and Hoe Chiang Road were tenanted out; the Bayshore Road property was Mr Chua's home; the Taman Permata property was Mr Tan's home.

The Facilities

22 In or around July 2019, Ethoz and Im8ex began discussions on a possible renewal of the Prior Facilities. This resulted in the Facilities that are the subject of the present action, which were secured by mortgages over the same four properties, and guarantees from Mr Chua and Mr Tan:

(a) a $1,425,000 loan in November 2019 (specifically referring to the Bayshore Road property);

(b) a $1,725,000 loan in November 2019 (specifically referring to the Alexandra View property);

(c) a $1,000,000 loan in November 2019 (specifically referring to the Hoe Chiang Road property); and

(d) a $2,150,000 loan in January 2020 (specifically referring to the Taman Permata property).

23 The Facilities were for the same total principal amount of $6.3 million as the Prior Facilities. The Facilities were, however, for a long term of 180 months, *ie*, 15 years, at an interest rate of 3.75% *flat* per annum, whereas the Prior Facilities were for a short term of 12 months at interest rates of 6.25% or 6.5% *effective* per annum. The Facilities were governed by the Facility Letters and Facility Agreements that are in issue here.

24 I now address the following:

(a) Total Interest;

(b) default interest;

(c) misrepresentation; and

(d) redemption.

Total Interest

25 In the Facility Agreements, the phrase "Total Interest" is used in Clause 7(B) as follows:

> Payment of Interest: The Total Interest for the Advance as specified in Schedule 3 shall be deemed earned and accrued in full upon the drawdown of the Advance. Such interest shall be paid monthly in instalments on each Instalment Date as set out in Schedule 3. For the avoidance of doubt, the Borrower shall not be entitled, upon any prepayment under Clauses 6(A) and 6(B), to any rebate of interest paid prior to such prepayment.

26 Total Interest as specified in Schedule 3 of each Facility Agreement is a specific sum that is the total of all the monthly interest payments for 15 years, which at the contractual interest rate of 3.75% flat per annum amounts to 3.75% x 15 = 56.25% of the Advance. Schedule 3 is a table of instalment payments,

with columns for "Reducing Principal", "Monthly Principal", "Monthly Interest" and "Monthly Instalment".[1]

27 Im8ex defaulted in payment within the first year of the 15-year term, and on 3 September 2020 Ethoz gave notice citing Clauses 5(A) and 14(B), purporting to make the balance of the Advance and Total Interest immediately due and payable.[2]

28 Ethoz relied on the phrase in Clause 7(B) of the Facility Agreements: "The Total Interest for the Advance as specified in Schedule 3 shall be deemed earned and accrued in full upon the drawdown of the Advance". Ethoz also relied on *T-Pacific* which involved a loan on similar terms: the loan amount was $2.3 million, the term was 10 years, the loan interest rate was 3.75% flat per annum, and the default interest rate was 0.0273% per day ≈ 10.28% per annum. The court said the "starting position" was Clause 7 of the facility agreement (specifically, Clause 7(B)), and decided that it "fix[ed] the minimum interest that the plaintiff stands to earn under the Agreement", making the borrower liable for the full ten years' worth of interest from the date of drawdown ([3]–[4] of *T-Pacific*).

29 After that interpretation of Clause 7(B), the court turned to Clauses 6(B) and 5(A)(1) and decided that:

> (a) In the case of prepayment under Clause 6(B), the borrower would need to pay the balance of the Advance and the Total Interest, *ie*, "interest computed thereon" meant Total Interest ([6]–[7] of *T-Pacific*).

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1 Mr Ng's first affidavit, pp 83–86, 129–132, 175–178 and 221–224.

2 Mr Ng's first affidavit, para 45 and pp 298–306.

(b) In the case of default of payment under Clause 5(A)(1), Ethoz could treat the balance of the Advance and Total Interest as immediately due and payable, *ie*, "interest thereon" in Clause 5(A)(1) meant Total Interest ([8]–[10] of the judgment). The court said this would be the harmonious reading of the entirety of Clause 5(A)(1), as well as Clause 7(B) and Schedule 3.

30 The court thus decided that, on the borrower's default of payment, Ethoz was entitled to immediate repayment of the Advance and the Total Interest. This interpretation of Ethoz's facility agreements was followed in *Ethoz Capital Ltd v Thistle Energy Pte Ltd and another* HC/RA 118/2021, HC/OS 1127/2020 (10 August 2021) *[High Court]* ("*Thistle*").

31 I respectfully disagreed with those interpretations of Ethoz's facility agreements.

32 First, Clause 7(B) does not, in itself, entitle Ethoz to immediate payment of the Advance and Total Interest upon the borrower's default of payment. Ethoz recognised as much, in citing Clauses 5(A)(1) and 14(B)(2) as well.[3]

33 Instead of first interpreting Clause 7(B) as entitling Ethoz to the Total Interest as "the minimum interest that [it] stands to earn under the Agreement", and then using that interpretation to constrain the interpretation of Clauses 5 and 6, I considered it more appropriate to analyse the effect of Clause 7(B) in various contexts:

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[3] Mr Ng's first affidavit, pp 298–306; Ethoz's Submissions dated 11 August 2021 at para 39.

(a) instalment payments in accordance with Clause 5 and Schedule 3;

(b) prepayment under Clause 6;

(c) default in payment under Clause 5; and

(d) Events of Default under Clause 14.

34 That analysis then informed my decision on whether Ethoz's claim to Total Interest was a penalty in the context of:

(a) default in payment under Clause 5; or

(b) non-payment as an Event of Default under Clause 14.

Total Interest in the context of instalment payments

35 Clause 5 of the first Facility Agreements provided as follows:

> **5. INSTALMENT PAYMENTS**
>
> (A) Instalment Amount:
>
> (1) In consideration of the Facility to be granted by the Lender to the Borrower, the Borrower hereby covenants that it will repay to the Lender the Advance and interest thereon by **one hundred and eighty** (180) equal instalments of **S$12,369.79** (or by such other payment schedule as may be notified by the Lender to the Borrower from time to time) until the Advance and interest thereon are fully repaid. The respective amounts of principal and interest payable on each Instalment Date is set out in the Schedule 3 - Table of Instalment Payments, as amended, varied, supplemented, modified or replaced by the Lender from time to time. The first instalment is to be paid on the date of the Advance and each subsequent Instalment Date shall fall on the date one (1) month thereafter until the Advance and interest thereon are fully repaid. In default of payment of any of the said instalments for any

> reason whatsoever, the Lender may treat the whole of the Facility or the balance thereof for the time being owing and unpaid together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand.
>
> (2) On or before each Instalment Date, the instalment then due shall be paid by the Borrower by direct debiting of the Borrower's bank account (GIRO) to the Lender's bank account No. [XX] with **Overseas Chinese Banking Corporation Limited** (or such other bank account as the Lender may notify the Borrower in writing) or in such other manner of payment as shall be agreed between the Lender and the Borrower. If the monies standing to the credit of the Borrower in the account are insufficient to pay any instalment amount as aforesaid, the Borrower shall forthwith pay the shortfall amount indicated by the Lender to the Borrower. In addition to any default interest payable by the Borrower to the Lender and any other charges which the Lender may levy, an administrative fee of S$10.00 and any goods and services tax (if any) payable thereon shall be payable by the Borrower to the Lender for each GIRO transaction that fails to occur.
>
> (B) Final Instalment Date: Without prejudice to the foregoing, the Borrower shall repay the Advance and interest thereon (together with all other interest, fees and any other sums payable hereunder and not payable prior thereto) in full to the Lender on or before the Final Instalment Date.
>
> (C) Non-Revolving Facility: All repayments shall not be re-drawn, re-borrowed or exchanged.
>
> [emphasis in original]

36 The second, third, and fourth Facility Agreements also contained the same clause, save that the quantum of Monthly Instalments for each Facility Agreement was different.

37 By Clause 5(A)(1) of the Facility Agreements, Im8ex covenanted to repay to Ethoz the Advance and "interest thereon" by 180 equal instalments, until the Advance and "interest thereon" were fully repaid. The phrase "Total Interest" is not used in Clause 5; instead, the phrase "interest thereon" is used four times in Clause 5(A)(1), and once in Clause 5(B).

38 Clause 5(A)(1) provided that "[t]he respective amounts of principal and interest payable on each Instalment Date is set out in the Schedule 3 – Table of Instalment Payments …" and, as noted above at [26]: the phrase Total Interest as specified in Schedule 3 is a specific sum that is the total of all the Monthly Interest payments for 15 years, amounting to 56.25% of the Advance.

39 There was then Clause 7 which specified the rate of interest on the Advance as 3.75% flat per annum (Clause 7(A)), and stipulated that such interest shall be paid monthly in instalments on each Instalment Date as set out in Schedule 3 (Clause 7(B), set out at [25] above).

40 On the terms of the Facility Agreements, if the instalments were paid in accordance with Schedule 3 for the whole 15-year term of the loan, Ethoz would have received the full amount of Total Interest, and its entitlement to Total Interest would be fairly uncontroversial.

41 The deeming provision in Clause 7(B), that the Total Interest "shall be deemed earned and accrued in full upon [drawdown]" served to protect Ethoz from a challenge to the Monthly Interest component of the Monthly Instalments.

42 *First*, each Monthly Instalment (with its Monthly Interest component) was paid in *advance*: Clause 5(A) read with Schedule 3. The first Monthly Instalment was to be paid on the date of the Advance pursuant to Clause 5(A)(1) (and indeed, that payment was a drawdown condition under Clause 4(A)(3)), the second Monthly Instalment in advance of the second month, and so on. If interest on the Advance accrued from day to day, Im8ex might dispute Ethoz's entitlement to be paid Monthly Interest, ahead of Im8ex having the use of the Advance for the relevant period. That difficulty was avoided by deeming the Monthly Interest component to have been earned and accrued upon drawdown.

43 *Second*, and relatedly, each Monthly Instalment was for the same amount, but the breakdown of the instalments into "Monthly Principal" and "Monthly Instalment" varied from instalment to instalment. The Monthly Principal amounts went up over time, and the Monthly Interest amounts went down over time. Taking the third Facility for $1,000,000 as an example, the total Monthly Interest in the first 12 Monthly Instalments totalled $72,306, some 7.23% of the Advance of $1,425,000, whereas the total Monthly Interest in the last 12 Monthly Instalments was just $2,694, some 0.27% of the Advance.

44 If Im8ex were to prepay the Facility after 12 months, it would already have paid $72,306 in Monthly Interest, but interest on the Facility at the contractual rate of 3.75% flat per annum for that period was just $37,500. The deeming provision in Clause 7(B) allowed Ethoz to assert that because the Monthly Interest comprised in the agreed Monthly Instalments for the first 12 months was "earned and accrued" upon drawdown, Im8ex was not entitled to any refund or rebate of interest. This was reinforced by the proviso in Clause 6(B)(5) that Im8ex "shall not be entitled to any return of interest paid prior to the payment", and by Clause 7(B) providing that Im8ex was not entitled, upon prepayment, to any rebate of "interest paid prior to such prepayment". Clause 6(B)(5) still preserved the possibility of a return of "interest payable on the Advance" at Ethoz's sole discretion.

Total Interest in the context of prepayment

45 Clause 6(B) of the first two Facility Agreements provided as follows:

> (B) Prepayment: The Borrower may at any time after the expiry of six (6) months from the date of drawdown of the Advance, at its option prepay the Advance and interest computed thereon in full (and not in part only) on any Interest Payment Date together with such additional amounts as may be necessary to compensate the Lender for any costs or losses (including funding losses) directly or indirectly resulting from such

> prepayment, subject to the following conditions and Clause 14 hereof:-
>
> > (1) the Borrower shall give the Lender not less than three (3) month's prior written notice of the date of the proposed prepayment, failing which the Borrower shall pay to the Lender a fee of an amount equivalent to the next three (3) month's interest due to be paid on the Advance.
> >
> > …
> >
> > (4) the Borrower shall pay to the Lender a prepayment fee of **one point five per cent (1.5%) flat** of the amount of the Advance prepaid; and
> >
> > (5) the prepayment may be subject to a return of interest payable on the Advance of such amount as may be determined by the Lender at its sole discretion Provided Always That the Borrower shall not be entitled to any return of interest paid prior to the prepayment.
>
> [emphasis in original]

46 That Clause was the same for the third and fourth Facility Agreements, save that the period in Clause 6(B) after which Im8ex could prepay, was six months and not three months.

47 Like Clause 5 (which uses the phrase "interest thereon"), Clause 6 did not use the phrase "Total Interest" in the context of prepayment. Instead, prepayment entailed Im8ex paying:

> (a) "the Advance and *interest computed thereon* in full (and not in part only) on any Interest Payment Date together with";
>
> (b) "such additional amounts as may be necessary to compensate the Lender for any costs or losses (including funding losses) directly or indirectly resulting from such prepayment"; and
>
> (c) "a prepayment fee of one point five per cent (1.5%) flat of the amount of the Advance prepaid".

[emphasis in original omitted; emphasis added in italics]

48 The phrase "interest computed thereon" in Clause 6 is not synonymous with "Total Interest" in Clause 7(B). Ethoz could easily have used the phrase "Total Interest" in Clause 6 if it intended "interest computed thereon" to mean "Total Interest", and indeed in Clause 5 as well where it used "interest thereon" instead. It does not *necessarily* follow that "interest computed thereon" in Clause 6 in the context of prepayment, or "interest thereon" in Clause 5 in the context of payment or default of payment, must mean "Total Interest" (which Ethoz would have received had the instalments dutifully been paid for the 15 years). These are different scenarios, and the meaning of the various "interest" phrases may be shaped by the context.

49 It was open to the parties to stipulate that, in the event of prepayment or default of payment, Im8ex would not need to pay the Total Interest, but only a lesser sum in terms of interest. I found that they did so by way of Clause 6.

50 I scrutinised the phrase "interest computed thereon" in Clause 6. What was there to "compute" in relation to interest on the Advance, when a specific figure was already stated as Total Interest in Schedule 3? I found that "interest computed thereon" meant interest on the Advance prior to prepayment, at the contractual rate of 3.75% flat per annum. What that was, would not be immediately apparent by looking at Schedule 3, hence the need for it to be "computed". Alternatively, "interest computed thereon" meant the total of the Monthly Interest payments prior to the date of prepayment. But "interest computed thereon" did not mean Total Interest, it meant interest for the period prior to prepayment.

51 That interpretation fitted harmoniously with the scheme of Clauses 6 and 7 in relation to interest that was "payable" or, had already been "paid". As I noted above at [44]:

(a) the proviso in Clause 6(B)(5) stated that Im8ex "shall not be entitled to any return of interest *paid* prior to the payment" [emphasis added];

(b) Clause 7(B) states that Im8ex is not entitled, upon prepayment, to any rebate of "interest *paid* prior to such prepayment" [emphasis added]; and

(c) Clause 6(B)(5) preserved the possibility of a return of "interest *payable* on the Advance" [emphasis added] at Ethoz's sole discretion.

52 Nothing in Clause 6 itself provided for acceleration of all instalment payments in a prepayment scenario. Nor did the deeming proviso in Clause 7(B) purport to make Total Interest immediately *payable* in all contexts. Instead, Clause 5(A)(1) expressly provided that "[t]he respective amounts of principal and interest *payable* on each Instalment Date is set out in the Schedule 3 – Table of Instalment Payments …" [emphasis added]. The general position was thus: the Monthly Interest amounts comprised in the Monthly Instalments were not all payable upon drawdown; they were payable on the respective Instalment Dates. Only the first Monthly Instalment (and the Monthly Interest comprised in it) was payable upon drawdown: see [42] above.

53 Moreover, the use of the phrases "interest *paid* prior to the [pre]payment" [emphasis added] in Clause 6(B)(5) and "interest *paid* prior to such prepayment" [emphasis added] in Clause 7(B) focused on interest that had already been paid prior to prepayment, *ie*, the Monthly Interest in the Monthly

Instalments that had already been paid. Im8ex had no entitlement to any return or rebate of interest, in relation to the Monthly Interest that it had already paid prior to prepayment, but under Clause 6(B)(5) Ethoz could nevertheless (in its sole discretion) make the prepayment "subject to a return of interest *payable* on the Advance".

54 The phrase "interest payable", like "interest paid", referred only to interest payable prior to prepayment, and did not extend to future interest. Pursuant to Clauses 5, Schedule 3, and Clause 7, the Monthly Interest in Monthly Instalments after the date of prepayment was not payable prior to prepayment. In a prepayment scenario, those future Monthly Instalments (and the Monthly Interest comprised in them) would never become payable in accordance with Clause 5, Schedule 3 and Clause 7; instead, Im8ex would have made prepayment of "the Advance and interest computed thereon", and redeemed the Facilities and the security for the Facilities. As such, there was no need for future interest to be addressed in the various provisions regarding return or rebate of interest paid or payable prior to prepayment. The phrase "interest payable" is wider than "interest paid", for "interest payable" would encompass Monthly Interest in Monthly Instalments prior to the date of prepayment, that had been defaulted upon, and so were "payable" but had not been "paid"; the focus nevertheless remains on interest payable or paid up to the date of prepayment, and not *future* interest.

55 This focus on interest paid or payable prior to prepayment is understandable, for (as noted above at [43]) the Monthly Interest in Schedule 3 was front-loaded such that on any Instalment Date prior to maturity of the loans, Im8ex would have paid more in interest (by way of Monthly Interest comprised in the Monthly Instalments) than if interest at the contractual rate of 3.75% flat per annum were computed on the Advance for the period since drawdown. It

was thus stipulated that Im8ex was not entitled to any return or rebate of interest paid, but Ethoz could still grant a discretionary return of such interest.

56 Consider, for example, prepayment of the third Facility for $1,000,000 at the 12-month mark. At that point, the first 12 Monthly Instalments would have been paid or payable by Im8ex, and if all those instalments had duly been paid, then according to Schedule 3 Im8ex would have paid Monthly Interest totalling $72,306 (see [43] above), and Monthly Principal totalling $31,860.72; leaving $968,139.28 as the Reducing Principal. Prepayment would entail Im8ex paying the balance of the Advance, *ie*, the Reducing Principal of $968,139.28, and interest computed on the Advance at the contractual rate of 3.75% flat per annum for the 12-month period prior to prepayment. That interest would amount to $37,500. Im8ex would already have paid more in interest ($72,306), but in view of Clause 6(B)(5) and Clause 7(B), Im8ex was not entitled to any return or rebate of interest paid. However, under Clause 6(B)(5) Ethoz could still grant a discretionary return of interest payable on the Advance, *ie*, the $72,306 in total Monthly Interest for the first 12 months.

57 In *T-Pacific*, the court held that the discretionary return of interest payable at Ethoz's sole discretion under Clause 6(B) supported the interpretation that the full measure of interest accrued under Clause 7(B) is the consideration payable to Ethoz for granting the loan (see [7] of *T-Pacific*). I respectfully disagreed. The borrower had indeed agreed to repay Ethoz the Advance and "interest thereon", in consideration of the Facility granted by Ethoz (Clause 5(A)(1)), but interest was only *payable* in accordance with Schedule 3. The Monthly Interest in Monthly Instalments after the date of prepayment was not payable prior to prepayment. Thus, the discretionary return of interest under Clause 6(B) would not apply to those future Monthly Interest payments. This indicated that "interest computed thereon" in Clause 6(B) does

not mean "Total Interest". It necessarily followed that Ethoz's entitlement to Total Interest was dependent on the circumstances.

58 In *The Angelic Star* [1988] 1 Lloyd's Rep 122 ("*The Angelic Star*"), the relevant clause provided that "the loan, together with all other monies due to the lenders by the owners, shall immediately become payable [upon default in payment]". The English Court of Appeal interpreted "all other monies due" to mean "all other monies due at the time of the happening of an event of default", and not "all other monies which would otherwise become due … in the future". If it were interpreted as covering future interest, it would have been a penalty (see further [71]–[72] below). Likewise, "interest payable" in Clause 6(B)(5) should be interpreted to mean "interest payable prior to prepayment", and not Total Interest, *ie*, the sum of all Monthly Interest payments, whether payable prior to prepayment, or which would otherwise become payable in the future.

59 The same reasoning supports the interpretation of "interest computed thereon" in Clause 6(B) as meaning interest on the Advance at the contractual rate for the period prior to prepayment. It should not be interpreted to mean Total Interest, for that would have a component of interest only payable in the future.

60 Other aspects of Clause 6 also support not interpreting "interest computed thereon" in Clause 6(B) to mean Total Interest. If "interest computed thereon" meant Total Interest, then any prepayment could result in Im8ex paying *more than the whole of the Advance and 15 years' worth of interest*, for:

> (a) under Clause 6(B) Im8ex would also have to "compensate [Ethoz] for any costs or losses (including funding losses) directly or indirectly resulting from such prepayment";

(b) if prepayment were made within 12 months of drawdown, under Clause 6(B)(4) Im8ex would have to pay a 1.5% prepayment fee on the amount of the Advance prepaid; and

(c) if Im8ex failed to give three months' prior written notice of prepayment pursuant to Clause 6(B)(1), it would also have to pay a fee of an amount equivalent to the next three months' interest due to be paid on the Advance.

61 If Total Interest had to be paid in a prepayment scenario, it is hard to envisage what costs or losses Ethoz could suffer, which Im8ex would have to compensate Ethoz for, or why a prepayment fee of 1.5% would apply for prepayments within 12 months, or why Im8ex should pay an amount equivalent to the next three months' interest due to be paid. Such prepayment would result in Ethoz receiving immediate payment of an amount that it was prepared to accept in instalments over 15 years. Ethoz did not suggest how that might be disadvantageous to it.

62 Indeed, the reference to "an amount equivalent to the next three (3) month's interest due to be paid on the Advance" in Clause 6(B)(1) itself indicates that prepayment did not involve paying Total Interest (encompassing both Monthly Interest already payable, and Monthly Interest only payable in future). That phrase recognises that the "next 3 month's interest due to be paid" was not "payable" yet, and upon prepayment would never become payable: hence the stipulation to pay an amount "equivalent to" those interest payments. In any case, it makes no sense to have required Im8ex to pay a full 15 years' worth of interest, and the equivalent of another three months of interest payments, totalling more than 15 years' worth of interest in all, to prepay a 15-year loan (if Im8ex should do so without giving due notice).

63 In the context of prepayment, I could only interpret "interest computed thereon" to mean interest on the Advance at the contractual rate for the period prior to prepayment, or at most the total of the Monthly Interest payments prior to the date of prepayment (see [50] above). On that basis, I can see how Ethoz might suffer some costs or losses from prepayment. That might justify some compensation on top of "the Advance and interest computed thereon", or a prepayment fee, or the equivalent of three months' of interest payments for Im8ex not giving due notice. For instance, Ethoz might have obtained funding in the expectation of receiving interest payments for a longer period of time, only to find that the Advance was being repaid with interest prior to prepayment (and not beyond that).

64 The Facility Agreements had express stipulations for acceleration of payments not otherwise payable yet, which I turn to consider – but these stipulations were only in the context of default, *ie*, Clause 5(A)(1) and Clause 14(B)(2), and not in the context of prepayment under Clause 6.

Total Interest in the context of default of payment

65 Clause 5(A)(1) provided that in default of payment Ethoz "may treat the whole of the Facility or the balance thereof for the time being owing and unpaid together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand".

66 Ethoz contended that the phrase in Clause 5(A)(1), "the whole of the Facility or the balance thereof for the time being owing and unpaid together with interest thereon" meant "the Advance and the Total Interest" (which is the phrase used in Clause 14(B)(2)). The court in *T-Pacific* accepted that "interest thereon" in Clause 5(A)(1) was synonymous with "Total Interest" in Clause 7(B) and Schedule 3. As I noted above (at [48]–[49]), however, it does

not necessarily follow that all references to "interest" in the Facility Agreements must mean "Total Interest" per Clause 7(B) and Schedule 3, especially where Ethoz did not use the phrase "Total Interest", but instead "interest computed thereon" in Clause 6(B) in the context of prepayment, and "interest thereon" in Clause 5(A)(1) in the context of default in payment. A consistent and harmonious reading of different clauses addressing different matters does not require that different phrases in those different clauses all be given the same meaning (and I thus declined to follow *T-Pacific* at [10]).

67 Clause 5 did not use the phrase "Total Interest". Instead, Clause 5 used the phrase "interest thereon" five times. Clause 5(A)(1) provides that in consideration of the Facility, Im8ex agreed to repay "the Advance and interest thereon" in 180 equal instalments, until "the Advance and interest thereon" were fully repaid; the instalments were to be paid monthly until "the Advance and interest thereon" were fully repaid. "Total Interest" could well have been substituted for "interest thereon" in the above contexts, all of which dealt with full payment in accordance with the instalment schedule.

68 Clause 5(B) on the Final Instalment Date, however, provides that Im8ex shall repay "the Advance and interest thereon" in full to Ethoz on or before the Final Instalment Date. It does not follow that "Total Interest" should also be substituted for "interest thereon" in that context, because payment on or before the Final Instalment Date would encompass both payment over 15 years, and prepayment. As I analysed in the previous section, Im8ex was not obliged to pay Total Interest in prepaying the Facilities.

69 There was then the crucial phrase in Clause 5(A)(1) allowing Ethoz, upon default of payment by Im8ex, to "treat the whole of the Facility or the balance thereof for the time being owing and unpaid together with interest

thereon … as immediately due and payable" (which I refer to as the acceleration provision in Clause 5(A)(1)).

70 The separate reference to "interest thereon" indicates that the phrase "the whole of the Facility or the balance thereof" referred to the Advance or the balance thereof. That was accepted in *T-Pacific*, but the court interpreted "interest thereon" to mean "Total Interest".

71 In the absence of Clause 7(B), I would not have interpreted "interest thereon" in the acceleration provision in Clause 5(A)(1) to allow for acceleration of Monthly Interest payments for a future period, and thus not payable yet. In *The Angelic Star*, the court interpreted the acceleration provision there to only allow acceleration of the whole principal amount lent, and any interest payments already due, but not interest for a future period (hence not due yet).

72 The English Court of Appeal held that if a loan agreement provides for acceleration of instalment payments on default, that is not a penalty provided that, in addition to principal, it claims no more than accrued interest and not interest for the unexpired balance of the original period of credit. Sir John Donaldson MR said, "[c]learly a clause which provided that in the event of any breach of contract a long term loan would immediately become repayable and that *interest thereon for the full term would not only be still payable but would be payable at once would constitute a penalty*" [emphasis added]. The court declined to interpret the phrase "[t]he loan, together with all other monies due to the lenders by the owners, shall immediately become payable" as covering future interest: it only covered the principal sum, and interest prior to default. Applying the same reasoning, "interest thereon" in the acceleration provision in

Clause 5(A)(1) should be interpreted as interest on the Advance prior to default, and not interest for the remainder of the term, *ie*, Total Interest.

73 *The Angelic Star* was applied in *ZCCM Investments Holdings plc v Konkola Copper Mines plc* [2017] EWHC 3288 (Comm) ("*ZCCM*") to the acceleration of instalment payments under a Settlement Agreement. The Settlement Agreement allowed KCM to pay various sums (together with *accrued* interest) to ZCCM in instalments, but there was a provision for acceleration of payment on default. The court held at [34]: "An accelerated payment clause in a loan agreement entitles the lender to immediate repayment of the sums that he has lent: *ie* to the repayment of *his own money*." [emphasis added].

74 Ethoz contended that the deeming provision in Clause 7(B) made all the difference here: with the full 15 years' worth of interest on the Advance being deemed accrued upon drawdown, 1.5625 times the Advance became immediately *due* from Im8ex, albeit *payable* only in instalments – unless accelerated upon default pursuant to Clause 5(A)(1) and/or Clause 14(B)(2), that is.

75 The deeming provision in Clause 7(B) served to protect Ethoz's entitlement to advance payments of Monthly Interest, and also to any Monthly Interest that had been paid, or had become payable, in accordance with Schedule 3 (see [41]–[44] above). I do not however accept that it makes Im8ex liable for the Total Interest if it should default. While Clause 7(B) says that Total Interest shall be deemed earned and accrued in full upon drawdown, the numerous references to "interest" in the contractual documents indicate that Total Interest had not lost its character as "interest", *ie*, payment in respect of the use of funds for a period of time:

(a) each Facility Letter was for a "term loan facility" with a "Principal Amount" and an "Interest Rate";

(b) paragraph 10 of the Facility Letters on prepayment stated that Im8ex could "prepay the Facility in full", but that did not say that prepayment would entail Im8ex paying 15 years' worth of interest on top of the Advance, *ie*, the Total Interest; indeed, there was no reference to Total Interest in the Facility Letters;

(c) the Facility Letters did not say that if Im8ex should default, it could be required to pay the Advance plus the Total Interest; there was just a reference to default interest;

(d) each Facility Agreement was described as a "secured term loan facility agreement";

(e) the table of instalments in Schedule 3 to the Facility Agreements had separate figures for "Total Principal" and Total Interest", and for "Reducing Principal", "Monthly Principal", and "Monthly Interest";

(f) Clause 7(A) of the Facility Agreements stipulated the rate of interest on the Advance;

(g) Clause 5(A)(1) of the Facility Agreements referred to payment of "the Advance and interest thereon", and stated that the respective amounts of principal and interest payable on each Instalment Date are set out in Schedule 3;

(h) the acceleration provision in Clause 5(A)(1) provided that in default of payment of any instalment, Ethoz may treat "the whole of the

Facility or the balance thereof for the time being owing and unpaid together with interest thereon … as immediately due and payable";

(i) Clause 6 of the Facility Agreements referred to prepayment of the Advance and "interest computed thereon" upon three months' notice, with payment of a fee of "an amount equivalent to the next three (3) month's interest due to be paid on the Advance" for failure to give notice;

(j) Clause 6(B)(5) of the Facility Agreements provided for a potential return of "interest payable on the Advance" at Ethoz's sole discretion, with a proviso that Im8ex "shall not be entitled to any return of interest paid prior to the payment"; and Clause 7(B) similarly provided that Im8ex was not entitled, upon prepayment, to any rebate of "interest paid prior to such prepayment"; and

(k) the acceleration provision in Clause 14(B)(2) of the Facility Agreements provided that, following an Event of Default, Ethoz might declare "all amounts due and owing under the Facility, including the Advance and the Total Interest and any default interests, fees and any other sum then payable under this Agreement to be immediately due and payable, whereupon they shall become so due and payable."

76 I do not accept that Total Interest lost its identity as "interest", such that it was aggregated with the Advance once and for all upon drawdown, with Im8ex thereby liable to pay Ethoz 1.5625 times the Advance in all circumstances. In particular, as I held above (at [62]), Im8ex could prepay the Advance and "interest computed thereon" (meaning interest at the contractual rate for the period prior to prepayment) without having to pay the Total Interest.

Total Interest in the context of Events of Default

77 The phrase "Total Interest" was however used in the acceleration provision in Clause 14(B)(2). Where an Event of Default had occurred (including non-payment under Clause 14(A)(1)), under Clause 14(B)(2) of the Facility Agreements Ethoz could give notice to make "[a]ll amounts due and owing under the Facility, including the Advance and the Total Interest … immediately due and payable".

78 Ethoz contended that since the Total Interest was "deemed earned and accrued in full" upon drawdown (Clause 7(B)), it was "due and owing" from the time of drawdown, albeit only payable (subject to acceleration) in accordance with Schedule 3. Similarly, Clause 14(B)(2) expressly referred to Total Interest, including that among the "amounts due and owing" which Ethoz could accelerate and make immediately due and payable. I accepted that this is how the acceleration provision in Clause 14(B)(2) should be interpreted.

79 I found, however, that this was a penalty (and the acceleration provision in Clause 5(A)(1) would be too, if that should be interpreted to encompass Total Interest).

Was the acceleration of Total Interest a penalty?

80 Ethoz relied on both Clause 5(A)(1) and Clause 14(B)(2) to accelerate payment of all remaining instalments, *ie*, the balance of both the Advance and Total Interest.

81 Ethoz contended that Clause 7 allowed it to get around the restriction in *The Angelic Star* against the acceleration of future interest. It argued that the stipulation, "The Total Interest for the Advance … shall be deemed earned and

accrued in full upon the drawdown of the Advance" made 15 years' worth of interest "accrued interest", and so applying *The Angelic Star* and *ZCCM*, it was entitled to immediate payment of the Advance plus Total Interest, *ie*, 1.562 times the Advance, if Im8ex should default at any time.

82 Ethoz drew an analogy with *Wallingford v Mutual Society* (1880) 5 App Cas 685 ("*Wallingford*"). There, the defendant was a member of a society which allowed the borrowing of money by members bidding repayment amounts, with the loan going to the highest bidder. The borrower was then allowed to repay the amount he had bid, in instalments.

83 The House of Lords held that it was not a penalty for the total sum due to be immediately payable upon default. The defendant had chosen to borrow a sum of money on the basis of him naming a sum to be added to the principal and repaid. None of their Lordships described that premium (the difference between the total sum, and the amount borrowed) as being in the nature of interest.

84 In essence, Ethoz's contention was that although the Facilities appeared to be 15-year term loans with interest at a stipulated rate, Clause 7(B) transformed them into contracts whereby Im8ex had agreed to pay Ethoz 1.5625 times the amount borrowed, no matter what: whether Im8ex kept up the instalments for 15 years, or it made prepayment, or it defaulted in payment.

85 I did not accept that the effect of the deeming provision in Clause 7 is to entitle Ethoz to the Total Interest in all circumstances. In particular, I did not accept that Im8ex could only prepay the Facilities by paying 1.5625 times the Advance. This distinguishes the present case from *Wallingford*, where the borrower was, *in all circumstances*, obliged to pay the repayment amount that

he had bid: he did not have the option of paying a lesser sum in the event of prepayment.

86 Ethoz was not entitled to Total Interest in all circumstances: in the event of prepayment, only loan interest for the period prior to prepayment would have to be paid. Contrary to *T-Pacific*, I thus do not regard Total Interest as "the minimum interest that the plaintiff stands to earn under the Agreement". The portion of Total Interest referable to a future period, was still future interest, for Im8ex could avoid paying it by making prepayment.

87 In the case of non-payment, the effect of the acceleration provision in Clause 14(B)(2) (and that in Clause 5(A)(1) if interpreted the same way) was to oblige Im8ex to make immediate payment of interest for the full term, which the court in *The Angelic Star* considered would be a penalty, for including future interest.

88 In *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*"), the applicability of the principles in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79 ("*Dunlop*") was affirmed, and the Court of Appeal reviewed the application of those principles. *Denka* decided that in Singapore, the penalty rule does not apply to situations outside of breach of contract (see [92]–[93]). In other words, the penalty rule is confined to the sphere of secondary obligations and does not apply to primary obligations (at [92]). However, the court acknowledged that the threshold of a breach of contract may be thought of as being too easy to circumvent by clever drafting (at [95]), and in that regard, "[t]he problem of drafting is dealt with in the ways that courts have always dealt with problems of construction – by prioritising substance over form, bearing in

mind all the circumstances of the case in line with the contextual approach to contractual interpretation".

89 In the present case, default of payment under Clause 5(A) was a breach of contract: the primary obligation was to make instalment payments in accordance with Schedule 3, and that had been breached. Likewise, the Event of Default relied upon to trigger Clause 14(B)(2) was a breach of contract, namely non-payment under Clause 14(A)(1): "the Borrower does not pay in the manner provided in this Agreement any sum payable under it when due".

90 The obligation to make immediate payment of all future instalments is thus a *secondary* obligation arising upon breach of a *primary* obligation by Im8ex. Payment of the Advance plus Total Interest (totalling 1.5625 times the Advance) was not a *primary* obligation, for Im8ex could make prepayment without having to pay Total Interest. Im8ex thus did not owe Ethoz a debt of 1.5625 times the Advance from the time of drawdown, for if Im8ex made prepayment at any time, it would only pay a lesser sum in interest, not Total Interest. The penalty rule thus applies to the payment of the Advance plus Total Interest.

91 If Im8ex defaulted in payment, and Ethoz could accelerate payment of all instalments, Im8ex would find itself having to pay 15 years' worth of interest although it had only had the use of the Advance for a short period of time. That contrasts sharply with Im8ex being entitled to prepay the Facilities, in which event the interest Im8ex would have to pay, would merely be loan interest for the period prior to prepayment.

92 The payment of future interest in the event of breach is not a genuine pre-estimate of damage Ethoz would suffer from Im8ex's non-payment, it is a

penalty, as recognised in *The Angelic Star* (see also *Denka* at [151]–[152]). Indeed, Im8ex did not seek to justify the payment of future interest as a genuine pre-estimate of damage. Rather, it argued that the Penalty Rule just did not apply, because it contended that the Total Interest was payable in all circumstances, but I rejected that.

93 The "single lump sum" test recognised in *Denka* at [303] also points to the acceleration of future interest being a penalty: there is a presumption that 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*" [emphasis in original], it is a penalty.

94 Here, Ethoz would get future interest for the remainder of the term, whether Im8ex was slightly late in paying one instalment, or the default was more serious – such as a complete failure to repay the Advance. That attracts the "single lump sum" presumption.

95 In similar vein, the acceleration of future interest has the effect of penalising Im8ex more for a breach early in the term, as compared to later on, when that is not referable to the damage suffered by Im8ex. So, for instance:

(a) if Im8ex defaulted in payment after one year, and thereafter repaid the Advance in full together with loan interest for that year, Ethoz would demand payment of the remaining 14 years of Monthly Interest; but

(b) if Im8ex defaulted in payment after 14 years, and thereafter repaid the Advance in full together with loan interest for 14 years, Ethoz would only demand payment of the final's year's Monthly Interest.

96 In both scenarios, if the Advance is then fully repaid with loan interest up to that point, Ethoz suffers no greater loss after 14 years, than after one year: it would have received the Advance back, together with loan interest for the period that the Advance was taken. Yet Im8ex would have to pay Total Interest in both scenarios, whether it took the Advance for just one year, or for 14 years.

97 The "greatest loss principle" (*Denka* at [254]) also points to the acceleration of future interest being a penalty. The principle, stated in *Dunlop*, is that a clause would 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*" [emphasis in original].

98 Here, the greatest loss that Ethoz could have suffered from Im8ex's non-payment, would happen if (after taking the Advance), Im8ex completely failed to pay anything. In that event, Ethoz would be out-of-pocket for the whole amount of the Advance (save for the amount of the first Monthly Instalment, which Im8ex ought to have paid as a condition precedent to drawdown). In that scenario, Im8ex would contend that it was entitled to 1.5625 times the Advance (*ie*, the Advance plus fifteen years' worth of interest) from Ethoz, with default interest besides.

99 As compensation for the loss of use of funds, however, the court typically awards interest in judgments at the rate of 5.33% per annum. Thus, without any acceleration provisions, if Ethoz sued for the unpaid Advance, it would get judgment for the amount of the Advance and interest thereon. But (absent contractual stipulation), the rate of interest awarded would be just 5.33% per annum, and if Im8ex paid the judgment debt, that would stop interest running. Ethoz could seek interest at the contractual rate of 3.75% flat per annum ≈ 6.444% effective per annum (calculated below at [148]), but that

would not be much more than the court's usual rate of 5.33% per annum. The court would not award Ethoz 1.5625 times the Advance, let alone that plus default interest of 26.08% per annum as well.

100 The acceleration of future interest would thus oblige Im8ex to pay more than the greatest loss Ethoz could have suffered from not being repaid the Advance.

101 On a related note, 1.5625 times the Advance would also be more than what Ethoz could have recovered at common law, for non-payment of the Advance by Im8ex (see *Denka* at [266]).

102 For the above reasons, I found the clauses which purported to accelerate payment of Total Interest upon default, to be unenforceable penalties.

Default interest

103 Clause 15 of the Facility Agreements provides that in the event of non-payment, Im8ex would have to pay interest on the overdue sum(s) at the rate of 0.065% per day, such interest calculated daily with monthly rests; and such interest which is due but unpaid would be added to the relevant outstanding amount on a monthly basis and would itself bear interest at the default interest rate.

104 With such monthly compounding, 0.065% per day rate of default interest is equivalent to an effective rate of some 26.08% per annum. On a conservative basis of 30-day months, the first month's interest would be 0.065% per day x 30 days = 1.95% of the overdue sum, and with monthly compounding the total amount to be paid after 12 months is $1.0195^{12} = 1.2608$. After a year,

default interest would thus amount to 26.08% of the overdue sum at the time of default.

105 Ethoz contended that, upon acceleration, the unpaid balance of both the Advance and Total Interest would be overdue and attract default interest. Thus, Ethoz's claim was for the unpaid balance of 1.5625 times the Advance, and default interest at an effective rate of 26.08% on top of that, *ie*, with some extent of interest upon interest.

106 In *T-Pacific*, the default interest rate was 0.0273% per day ≈ 10.28% per annum. The court allowed Ethoz's claim to default interest on that basis, stating at [19], "I also do not think that cl 15, which imposes default interest of 0.0273% per day, or about 9.96% per annum, would fall foul of the penalty rule." The court did not consider the monthly compounding of default interest (yielding an effective rate of 10.28% per annum), but simply reckoned the rate as "about 9.96% per annum", calculated on a simple interest basis. Either way, that rate would be lower than the default interest of 18% per annum declared to be a penalty in *Hong Leong*.

107 The default interest rate here, 0.065% per day ≈ 26.08% per annum (or 23.725% per annum without monthly compounding), is some two and a half times higher than that in *T-Pacific*, and some 8% more than the 18% per annum default interest rate in *Hong Leong*. *T-Pacific* is thus not an authority that the default interest rate in the present case is not a penalty.

108 *Thistle* concerned the same default interest rate as in this case, *ie*, 0.065% per day, which was allowed by the court. But it does not appear that in that case there was any discussion of the default interest rate, which differed from that in *T-Pacific*, and was higher than that in *Hong Leong*. I thus did not

derive any assistance from *Thistle* in my analysis of the default interest rate in the present case.

109 Moreover, neither *T-Pacific* nor *Thistle*, concerned misrepresentations by Ethoz – here, I found that Ethoz had misrepresented to Im8ex the effect and contents of the terms of the Facilities (see below at [137]–[220]).

110 I rejected Ethoz's submission that *Hong Leong* should not be followed because it was allegedly outdated.

111 While *Hong Leong* was decided in 1999, some 22 years before the present case, the loan interest in *Hong Leong* (which the court compared to the default interest rate of 18% per annum) was 5.5% per annum for the first two years, 6.75% per annum for the rest of the term. That was in the same region as the interest rate on the Facilities of 3.75% flat per annum ≈ 6.444% effective per annum.

112 Moreover, *Hong Leong* was decided with reference to the principles in *Dunlop*, recently affirmed by the Court of Appeal in *Denka*.

113 One of those principles is: "[4(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", which Lord Dunedin regarded as a corollary to "[4(a)] It will be held to be 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."

114 Those principles were cited in *Hong Leong* at [18], and at [19] the court had this to say about a stipulation for default interest: "… a provision to pay a

larger sum of money upon the failure to pay the stipulated sum within a stipulated time. Such a provision traditionally is the clearest and the classic example of a penalty." Thus, the court stated at [20]: "… a provision in an agreement for payment of a higher rate of interest in the event of default of payment of a sum due would appear to possess all the attributes of a penalty, and as such, it is *prima facie* unenforceable". The court concluded at [27]:

> … 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 … 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.

115 In support of its contention that *Hong Leong* should not be followed, Ethoz cited *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 ("*CLAAS*") at [63] and [67], where the Court of Appeal accepted that the burden rests on the defendant to show that a provision is a penalty, and he fails if the evidence before the court does not support this. The court did not, however, thereby depart from *Hong Leong* (which it cited at [66] for acceptance of the "genuine pre-estimate of loss" test).

116 Both *CLAAS* and *Hong Leong* were decided based on the principles in *Dunlop*. *CLAAS* was not a case about default interest like *Hong Leong* was, it concerned a liquidated damages clause for breach of a restrictive covenant. The court did not find that to be a penalty, for in the circumstances of that case, it could be a genuine pre-estimate of damages.

117 *Hong Leong* is not inconsistent with the proposition that it is for the defendant to show that a provision is a penalty, on the evidence before the court. That evidence was sufficient in *Hong Leong*, but it was not in *CLAAS*.

118 While the *legal* burden is on the defendant to show that a provision is a penalty, the evidence may be such as to shift the *evidential* burden to the plaintiff to justify the provision as a genuine estimate of loss.

119 One instance of this, is when the provision is a stipulation for default interest. In *Hong Leong*, the Court of Appeal considered that a provision for default interest was *prima facie* unenforceable, that the default rate was an "extravagant increase" from the loan interest rates, and that was not referable to the true amount of the loss the lender suffered from the borrowers' non-payment – it was out of all proportion in comparison with the greatest loss that could have followed from that breach – see [114] above. When the circumstances are such that a provision is *prima facie* unenforceable, the evidential burden is then on the plaintiff to justify the provision.

120 I applied the principles in *Hong Leong* in relation to the default interest rate in the present case. The default interest rate of some 26.08% per annum as compared to the usual contractual rate of some 6.444% per annum is even more "manifestly extravagant" an increase than that in *Hong Leong* from the loan interest rates of 5.5% per annum and 6.75% per annum, to the default interest rate of 18% per annum. The default interest rate of some 26.08% is also higher than the 18% per annum found to be a penalty in *Hong Leong*.

121 Ethoz cited *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others* [2017] SGHC 22 where a default interest rate of 2% per month (or 24% per annum) in Convertible Bond Subscription Agreements ("CBSAs") was

found not to be a penalty. The court noted that the plaintiff had adduced unchallenged evidence that private equity funds, similar to mezzanine funds such as the fund that owned the plaintiff, typically target an internal rate of return of between 20% and 25% per annum. The plaintiff thus contended that the defendant's default caused a lost opportunity to deploy the funds for other investments which could conceivably have generated such annualised returns.

122 There is no equivalent evidence from Ethoz in the present case. All that was said on the point was (in para 9 of Mr Ng's third affidavit):

> The Defendants' assertion that Clause 15 of the Facility Agreements is a penalty clause is equally unmeritorious especially since it is devoid of any factual basis. The default interest at a rate of 0.0650% per day is the Plaintiff's genuine estimate of the Plaintiff's loss, taking into account the Plaintiff's business considerations (including the loss of the use of funds). There is also no question of the default interest being "interest-on-interest", given that the Total Interest forms part of the agreed consideration for the grant of the loan to the 1st Defendant.

123 That contrasts sharply with the specificity of the evidence of the plaintiff in *CIFG* regarding the targeted internal rate of return. Here, Ethoz simply recited the *Dunlop* test, "genuine estimate of the Plaintiff's loss", also mentioning "business considerations (including the loss of use of funds)", bereft of details. The court is not obliged to accept a lender's bare assertion that a default interest provision (which *Hong Leong* regarded as *prima facie* unenforceable) is a genuine estimate of loss.

124 Moreover, the default interest rate of 26.08% here is higher than the 24% in *CIFG*.

125 *CIFG* can additionally be distinguished because there, the court emphasised that it was dealing with a *negotiated contract* between *properly*

advised parties of *comparable bargaining power*; there was no dispute that the terms of the CBSAs were specifically negotiated, the Initial Shareholder defendants were advised by an advisory company and a banking executive, and the terms were not unilaterally imposed by the plaintiff's owner, KC. All of that is different in the present case: Im8ex did not have as much bargaining power as Ethoz (see para 35 of Mr Chua's third affidavit); the contractual documents were not specifically negotiated – they were drafted by Ethoz; Im8ex and the individual defendants were not advised; and the terms of the Facilities were unilaterally imposed by Im8ex. Moreover, Ethoz had misrepresented to Im8ex that the Facilities were "better" than the Prior Facilities which the Facilities refinanced (which I discuss below).

126 Ethoz's other refrain was that Im8ex had not provided any evidence that the default interest rate was a penalty. However, there is sufficient evidence in the present case, as there was in *Hong Leong*, for the court to conclude that the default interest rate is a penalty. If Ethoz's point is that it was not Im8ex that provided the evidence (but Ethoz itself), what matters is not who provided the evidence, but whether the evidence before the court is sufficient – and it is.

127 Here, as in *Hong Leong*, the court had information about the loans in question, including the loan interest rate and the default interest rate. The loans were also secured – in *Hong Leong*, over a hawker stall; here, over four properties, with personal guarantees from Mr Chua and Mr Tan. In evaluating the consequences of default, it is relevant that the contract provided for security. Here, the provision of security was a condition precedent to drawdown (Clause 3 of the Facility Agreements read with Schedule 1, paras 9–20). Moreover, the principal amounts of the various loans were limited to the amount stated in the contractual documents, or between 71.67% and 75% of the fair market value of the respective properties, whichever is lower (Clause 1(a) of the

Facility Letters). The parties thus expected Ethoz to be fully secured for the principal amount of the Advance, and indeed Ethoz was: Im8ex was able to raise enough to pay the balance of the Advance and loan interest to date, by selling one of the properties and using the remaining three as collateral for a loan from a new financier. The fact that Ethoz was expected to be secured for at least the amount lent, is relevant in deciding whether a 26.08% per annum default interest rate is a genuine estimate of Ethoz's loss from default in payment.

128 One added feature of the present case, is that the Facilities refinanced Prior Facilities granted by Ethoz to Im8ex for the same total principal sum of $6.3 million, secured by the same four properties, and also secured by guarantees. The Prior Facilities had a lower default interest of 0.0273% per day ≈ 10.28% per annum, as compared to the Facilities at 0.065% per day ≈ 26.08% per annum. That huge increase in the default interest rate (an increase of some 16% per annum, or over two and a half times more) is not proportionate to the slight increase in the loan interest rate of the Facilities as compared to the Prior Facilities.

129 Of the three Prior Facilities, two (for a total of $4,150,000) were at an effective rate of 6.25% per annum, the third (for $2,150,000) was at an effective rate of 6.50% per annum. For the whole principal amount of $6.3 million, that is equivalent to a blended effective interest rate of 6.34% per annum, *ie*, ($4,150,000 x 6.25%) + (2,150,000 x 6.5%) / $6.3 million.

130 The Facilities, for the same total principal amount of $6.3 million at a flat rate of 3.75% per annum (which as noted below at [148] is equivalent to an effective rate of some 6.444% per annum), were at a slightly higher interest rate.

131 The large increase in the default interest rate is thus not explicable with reference to the slight increase in the loan interest rate from the Prior Facilities to the Facilities. Indeed, Ethoz had misrepresented to Im8ex that the Facilities were at a *lower* interest rate than the Prior Facilities, when in fact the interest rate of the Facilities was *higher*.

132 Presumably, Im8ex would describe the Prior Facilities' default interest rate of 0.0273% per day ≈ 10.28% per annum (as it did the Facilities' default interest rate of 0.065% per day ≈ 26.08% per annum) as a genuine estimate of its loss, taking into account business considerations (including the loss of use of funds). But if 10.28% per annum were a genuine estimate of Ethoz's loss, that would itself indicate that 26.08% per annum was not also a genuine estimate of Ethoz's loss. And it still begs the question: why the dramatic increase?

133 All that I can infer from the facts of the present case, and the decisions in *T-Pacific* and *Thistle*, is that Ethoz may have increased the default interest rate across the board, comparing 2018 facilities (like that in *T-Pacific* and the Prior Facilities in this case) to 2019 facilities (like that in *Thistle*, and the Facilities in this case). But that still begs the question: why?

134 Ethoz did not answer that question. It put forward nothing in the external environment, or in the relationship between Ethoz and Im8ex, or specific to Ethoz, or specific to Im8ex, to justify the increase in the default interest rate.

135 I found the Facilities' default interest at the rate of 0.065% per day ≈ 26.08% per annum to be a penalty.

136 The default interest is even more so a penalty if (contrary to my holding above) Ethoz's claim for accelerated Total Interest upon default in payment is

not a penalty, for Ethoz would already be receiving 1.5625 times the Advance, and the default interest would be calculated on the unpaid balance of that (with a principal component and an interest component).

Misrepresentation

Ethoz's representations

137 Mr Chua dealt primarily with one Ms Ong Xing Pei ("Ms Ong") from Ethoz in negotiating the Facilities on behalf of Im8ex. At paras 36 and 37 of Mr Chua's third affidavit, filed on 30 June 2021, he said:

(a) Ethoz offered to renew the Prior Facilities.

(b) He agreed in principle to renew those loans but told Ethoz not to increase the interest rate (his WhatsApp message of 24 October 2019, 2:39:38pm to Ms Ong said, "Pls don't increase the interest"; Ms Ong replied on 24 October 2019, 2:51:25pm, "We have proposed to my mgmt the same terms as last year").[4]

(c) On or around 12 November 2019, Ms Ong and her superior visited him and told him that Ethoz had a better offer of loans for Im8ex: they said the interest rate was lower, *ie*, 3.75% flat per annum instead of 6.25% effective per annum or 6.50% effective per annum, and the term of the loans was longer, *ie*, 180 months (15 years) instead of 12 months. From para 9 of Mr Chua's first affidavit filed on 8 March 2021, Ms Ong's superior would have been team leader Mr Edmund Chow ("Mr Chow") who settled the terms of the loan. At that meeting, they

[4] Mr Ng's third affidavit, p 148.

handed Mr Chua the first two Facility Letters; the Facility Agreements followed shortly after.

138 The affidavit filed by Ethoz in response, was not from Ms Ong or Mr Chow, but from its Executive Vice President Mr Ng Boon Tee ("Mr Ng") (who filed all of the affidavits from Ethoz in this action). He asserted at para 14 of his third affidavit, dated 21 July 2021, that the Prior Facilities were irrelevant. However, he went on in para 15 to set out Ethoz's account of the background facts, "for completeness". He acknowledged at para 15(3) that "the initial intention was to extend facilities to [Im8ex] on similar terms as that in the Prior Facilities (without any increase on the interest rate levied)" but Ethoz "subsequently proposed to extend fresh facilities on fresh terms as set out under the Facility Letters and Facility Agreements instead, which provided for repayment over 180 months and charged an interest rate of 3.75% flat per annum."

139 Further, Mr Ng said at para 15(4) of his third affidavit, that Im8ex had the opportunity to review each of the Facility Letters and Facility Agreements, and to obtain legal advice if it so wished, prior to signing the same.

140 Mr Ng did not dispute Mr Chua's assertion that Ethoz had represented to him that the Facilities were on better terms than the Prior Facilities, and, specifically, that the interest rate was lower *ie*, 3.75% flat per annum instead of 6.25% effective per annum or 6.50% effective per annum.

141 Indeed, Ethoz's counsel submitted that the Facilities *were* on better terms than the Prior Facilities, specifically, because the Facilities were at a lower interest rate:

(a) at the hearing of HC/SUM 2951/2021, Im8ex's application to adduce Mr Chua's third affidavit as further evidence (which I granted), Ethoz's counsel submitted with reference to paras 36 and 37 of Mr Chua's third affidavit, that Im8ex knew the Facilities were on different terms than the Prior Facilities, it knew it was being offered *lower* interest; and

(b) at the hearing on 13 August 2021, he submitted that the *lower* interest was a *quid pro quo* for the acceleration provisions in the Facilities making a full 15 years' worth of interest payable if Im8ex were to default.

Ethoz's representations were false

142 On the evidence, Ethoz had misrepresented to Im8ex that the Facilities were on better terms than the Prior Facilities. The Facilities were not on better terms. Specifically:

(a) the loan interest rate of the Facilities was *higher* than that of the Prior Facilities (when it was represented to be *lower*);

(b) the prepayment regime was worse under the Facilities; and

(c) the consequences of default (including accelerated payment of future interest, and a higher default interest rate) were worse under the Facilities.

Interest rate

143 The Facilities were *not* at a lower interest rate than the Prior Facilities, contrary to what Ethoz had represented to Im8ex.

144 Of the three Prior Facilities, two (for a total of $4,150,000) were at an effective rate of 6.25% per annum, the third (for $2,150,000) was at an effective rate of 6.50% per annum. For the whole principal amount of $6.3 million, that is equivalent to a blended effective interest rate of 6.34% per annum, *ie*, (($4,150,000 x 6.25%) + ($2,150,000 x 6.5%)) / $6.3 million.

145 The Prior Facilities were on an *effective* interest basis, whereas the Facilities were on a *flat* rate basis. How does the blended effective rate of 6.34% per annum under the Prior Facilities compare to the rate under the Facilities?

146 I use the third of the Facilities, for the principal sum of $1,000,000, to illustrate. Interest of 3.75% *flat* per annum for 180 months (15 years) means that a total of 3.75% x 1,000,000 x 15 would be paid in interest, *ie*, $562,500 (which is the Total Interest stated in Schedule 3).[5] Although the outstanding principal amount decreases over time (as shown by the "Reducing Principal" column in the same schedule), that does not affect the interest payable, which is at a *flat* rate on amount of the Advance, *ie*, $1,000,000.

147 On an *effective* interest rate basis, however, interest would be calculated on a decreasing principal amount over the term of the loan. Thus, a *flat* interest rate is the equivalent of a higher *effective* interest rate, if the principal amount is reduced by instalment payments over time.

148 Using an online mortgage calculator on a Singapore Government agency website (<https://www.moneysense.gov.sg/financial-tools/mortgage-calculator>), a *flat* interest rate of 3.75% per annum on a 15-year loan with equal monthly instalments is equivalent to an *effective* interest rate of 6.444% per

5 Mr Ng's first affidavit, p 175.

annum, with interest calculated on reducing principal amounts (to be precise, the effective interest rate is slightly above 6.444% per annum: applying 6.444% per annum, the calculator works out a monthly payment of $8,680.32 (as compared to $8,680.51 in Schedule 3), and a total payment of $562,457.21 in interest (as compared to $562,500 in Schedule 3) – these are marginal differences.)

149 The Facilities, for the same total principal amount of $6.3 million at a flat rate of 3.75% per annum (which as noted above at [148] is equivalent to an effective rate of some 6.444% per annum), were at a *higher* loan interest rate than the blended effective interest rate of the Prior Facilities. Ethoz misrepresented to Mr Chua and Im8ex that the Facilities were at a *lower* interest rate. Mr Chua had asked Ms Ong not to raise the interest rate; Ms Ong replied to say that "the same terms as last year" had been proposed to Ethoz's management; and then Ethoz represented that it had a *better* offer for Im8ex, with a *lower* interest rate.

Prepayment

150 The prepayment regime under the Facilities was also worse than that under the Prior Facilities.

151 Im8ex was concerned about when it could redeem the loans, and on what terms, as is evident from Mr Chua's messages to Ms Ong. In Mr Chua's message of 26 June 2019, 2:26:19pm, he asked, "what's the notice period for full redemption? Any penalty?"[6] Ms Ong's reply of 26 June 2019, 2:34:01pm was:

6 Mr Ng's third affidavit, p 146.

"You will need to give 3 mths prior written notice. N there will be a prepayment fee of 1% on the outstanding principal amt prepaid."[7]

152 Mr Chua and Ms Ong exchanged further messages about early redemption: Mr Chua queried why there should be a prepayment fee of 1% if three months' notice were given and the loans were repaid after 12 months; Ms Ong explained that prepayment would apply for the new contract. Indeed, two of the three Prior Facilities would mature in or around September 2019, and for those, payment on maturity would not be ***pre***payment. Ms Ong then sent her message of 9 September 2019, 6:32:56pm: "For the calculation of early redemption, I'll email u tmr morn".[8] If such an email were sent thereafter, it was not in the evidence before me. In the event, the Prior Facilities were not redeemed before maturity, or at maturity; instead the full principal amount of $6.3 million became the subject of the Facilities – with a slight gap between the maturity of the first two of the Prior Facilities (for a total $4.15 million) in September 2019, and the commencement of the first three of the Facilities (for the same total of $4.15 million) in November 2019.

153 There was no specific discussion about how the prepayment provisions for the Facilities compared with those for the Prior Facilities. Ethoz simply represented to Mr Chua in November 2019 that the Facilities were "better" than the Prior Facilities, specifically highlighting the supposedly lower interest rate, and the longer term of 180 months (15 years) as compared to 12 months. Three of the four Facilities were then granted in November 2019.

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7 Mr Ng's third affidavit, p 146.

8 Mr Ng's third affidavit, p 146.

154 Before the last of the Facilities was granted in January 2020, Ms Ong messaged Mr Chua on 13 January 2020, 3:46:31pm (a Monday) to say: "Hi Mr Chua, are u free on wed aftnn to pass u the letter of offer? I'm waiting for the letter of offer to be out within these 2 days. Conditions all remain the same. Can redeem 3 mths later. Will scan a copy to you first once I get it."[9]

155 That letter of offer (the fourth Facility Letter) was dated 13 January 2020; Ms Ong messaged Mr Chua on Wednesday, 15 January 2020 to say she had just sent him the letter of offer, and Mr Chua replied the same day to say, "let me have a read".

156 Ms Ong's representation of "[c]an redeem 3 mths later" correctly stated that the fourth Facility Letter allowed prepayment after the first three months. So did the third Facility Letter. The first two Facility Letters had a longer initial period of six months, during which there was no right of prepayment.

157 However, Ms Ong only mentioned *when* Im8ex could effect prepayment. She did not say *what* prepayment would entail. She did not inform Mr Chua that it was Ethoz's position that prepayment would involve Im8ex paying the Advance and 15 years' worth of interest, *ie*, Ethoz would have to pay 1.5625 times the Advance, even if Im8ex were to prepay as early as three or six months after drawdown. Mr Chua could not have had that in mind; he would not have had to do that under the Prior Facilities.

158 Under the Prior Facilities, if early redemption were effected, there was a prepayment fee of *1%* of the Advance prepaid (under Clause 6 of the Prior Facility Agreements). Under the Facilities, however, the corresponding

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9 Mr Ng's third affidavit, p 151.

prepayment fee was higher, at *1.5%* of the Advance prepaid, in the event of prepayment within the first 12 months. In this regard too, the Facilities were worse for Im8ex than the Prior Facilities.

(1) Prepayment of the Prior Facilities

159 For the Prior Facilities, Clause 6 of the Prior Facility Agreements first provided in sub-Clause (A) that prepayment within the first six months was generally not allowed. Clause 6(B) then provides as follows:

> (B) Prepayment: The Borrower may at any time after the expiry of six (6) months from the date of drawdown of Advance, at its option prepay the Advance and interest computed thereon in full (and not in part only) on any Interest Payment Date together with such additional amounts as may be necessary to compensate the Lender for any costs or losses (including funding losses) directly or indirectly resulting from such prepayment, subject to the following conditions and Clause 14 hereof:-
>
> > (1) the Borrower shall give the Lender not less than three (3) month's prior written notice of the date of the proposed prepayment, failing which the Borrower shall pay to the Lender a fee of an amount equivalent to the next three (3) month's interest due to be paid on the Advance.
> >
> > …
> >
> > (4) the Borrower shall pay to the Lender a prepayment fee of **one per cent (1%) flat** of the amount of the Advance prepaid.
>
> [emphasis in original]

160 Two scenarios can be considered: (a) full payment of the Advance after a year; and (b) full payment of the Advance after six months.

161 In the first scenario, there would be no prepayment, and no prepayment fee – that would be payment of the Advance on maturity (12 months from drawdown), in accordance with the parties' agreement.

162 In the second scenario, assuming Im8ex had duly given three months' notice of the proposed prepayment, pursuant to Clause 6(B) of the Prior Facility Agreements Im8ex would have to pay Ethoz the Advance, and a prepayment fee of 1% on the Advance. As interest accrued from day to day, if Im8ex had already paid the first six months' interest on the Advance, Im8ex would not have to pay any further interest in respect of the remaining six months of the 12-month term.

163 The reference in Clause 6(B) of the Prior Facility Agreements to prepayment of "the Advance and interest computed thereon" would be a reference to the Advance and interest thereon prior to the date of prepayment, computed based on the loan interest rate. It could not mean interest for the whole 12 months of the term, for the last six months' worth of interest had not accrued, and would not accrue. Again, Clause 19(A) of the Prior Facility Agreements stipulated that "Interest on the Advance … shall accrue from day to day".

164 Clause 6(A) of the Prior Facility Agreements provided that within the first six months, if Ethoz consented to prepayment, Im8ex would have to pay a prepayment fee of 1% on the Advance (also stipulated in Clause 6(B)(4) for prepayment after six months), as well as "an amount equivalent to 12 months' interest on the Advance less any amounts of interest already paid to the Lender under Clause 7 as at the date of the prepayment" (Clause 6(A)(2)). There is no equivalent stipulation in Clause 6(B) for prepayment after six months, that a full 12 months' worth of interest had to be paid.

165 If Ethoz had intended that a full 12 months' worth of interest had to be paid, whether prepayment took place within the first six months (with Ethoz's consent), or after six months (which Im8ex could do as a matter of right),

Clause 6(A)(2) would have been drafted to apply to all prepayments. But it was not, and Clause 6(B) does not have that effect either.

166 At worst, prepayment of the Prior Facilities would thus entail Im8ex paying the Advance plus a full 12 months' worth of interest at ***6.34%*** *effective per annum* (amounting to ***1.0634*** *times the Advance*), and a prepayment fee of 1% of the amount of the Advance prepaid.

(2) Prepayment of the Facilities

167 For the Facilities, Clause 6 of the Facility Agreements on prepayment first provided in Clause 6(A) that the Borrower shall not prepay the Advance within a certain period (for the first two Facilities, this was six months; for the third and fourth Facilities, this was three months). Clause 6(A) of the Facility Letter was more restrictive than that for the Prior Facilities, in that it made no provision for repayment within that initial period (of three or six months) with Ethoz's consent (unlike Clause 6(A) of the facility letters for the Prior Facilities). But in principle Ethoz could still consent.

168 Clause 6(B) of the first two Facility Agreements then provided as follows:

> (B) Prepayment: The Borrower may at any time after the expiry of six (6) months from the date of drawdown of the Advance, at its option prepay the Advance and interest computed thereon in full (and not in part only) on any Interest Payment Date together with such additional amounts as may be necessary to compensate the Lender for any costs or losses (including funding losses) directly or indirectly resulting from such prepayment, subject to the following conditions and Clause 14 hereof:-
>
> > (1) the Borrower shall give the Lender not less than three (3) month's prior written notice of the date of the proposed prepayment, failing which the Borrower shall pay to the Lender a fee of an amount equivalent to the

> next three (3) month's interest due to be paid on the Advance.
>
> …
>
> (4) the Borrower shall pay to the Lender a prepayment fee of **one point five per cent (1.5%) flat** of the amount of the Advance prepaid; and
>
> (5) the prepayment may be subject to a return of interest payable on the Advance of such amount as may be determined by the Lender at its sole discretion Provided Always That the Borrower shall not be entitled to any return of interest paid prior to the prepayment.

[emphasis in original]

169 That clause was the same for the third and fourth Facility Agreements, save that the period in 6(B) after which Im8ex could prepay, was six months and not three months.

170 Clause 6(B) in the Prior Facility Agreements had been on the same terms, save that:

(a) the prepayment fee of the Prior Facilities was lower at 1%, whereas the prepayment fee of the Facilities was 1.5%; and

(b) the Facility Agreements had an extra sub-Clause (5) relating to a possible return of interest at Ethoz's sole discretion.

171 The presence of Clause 6(B)(5) of the Facility Agreements (about a possible discretionary return of interest) does not add much, if anything, to the stipulation in Clause 7(B), that "[f]or the avoidance of doubt, the Borrower shall not be entitled, upon any prepayment under Clauses 6(A) and 6(B), to any rebate of interest paid prior to such prepayment." That stipulation in Clause 7(B) was common to both the Facilities, and the Prior Facilities (where it appears in Clause 7(B)(1) of the Prior Facility Agreements). The simple point is, any return or rebate of interest paid was at Ethoz's sole discretion (which Ethoz could

grant, with or without Clause 6(B)(5) of the Facility Agreements), it was not something Im8ex had an entitlement to.

172 Ethoz contended that under Clause 6(B) of the Facility Agreements for the Facilities, if Im8ex wished to prepay after the first six months, having given the requisite three months' notice, Im8ex would have to pay the Advance plus a full 15 years' worth of interest (*ie*, Total Interest as per Clause 7(B) and Schedule 3). As I stated above, I did not agree with that interpretation.

173 For present purposes, it suffices to say that Ethoz had misrepresented to Im8ex that the Facilities were better than the Prior Facilities, when in terms of prepayment the provisions were worse:

> (a) the prepayment fee for the Facilities was higher (***1.5%*** as compared to ***1%***); and
>
> (b) if Ethoz is right, prepayment of the Facilities would entail Im8ex paying the Advance plus a full ***15 years'*** *worth of interest* at 3.75% flat per annum ≈ ***6.444%*** *effective per annum* (amounting to ***1.5625*** *times the Advance*), whereas if Im8ex prepaid the Prior Facilities at worst it would pay the Advance and ***one year's*** *worth of interest* at ***6.34%*** *effective per annum* (amounting to ***1.0634*** *times the Advance*).

174 Ethoz never told Im8ex that it considered Im8ex obliged to pay the Advance plus 15 years' worth of interest in all circumstances: whether Im8ex paid the instalments for 15 years, or Im8ex made prepayment, or Im8ex defaulted in payment. It just told Im8ex that the Facilities were better, but that was untrue.

Consequences of default

175 A further difference between the Facilities and the Prior Facilities, relates to the acceleration of payment, and other consequences, if Im8ex should default in payment.

176 Under the Prior Facility Agreements:

(a) Clause 7(C) provided as follows: "Default: In default of payment of any of the said interest payment for any reason whatsoever, the Lender may treat the whole of the Facility together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand" (Clause 5(A)(1) of the Facility Agreements is similar);

(b) Clause 14(A)(1) provided that the Events of Default included: "Non-Payment: the Borrower does not pay in the manner provided in this Agreement any sum payable under it when due" (the Facility Agreements have the same clause);

(c) Clause 14(B) on "Cancellation/Acceleration" provided that if any Event of Default had occurred:

> … the Lender may by notice to the Borrower declare:-
>
> (1) the Commitment and/or Facility to be cancelled, whereupon it shall be cancelled; and/or
>
> (2) all amounts due and owing under the Facility, including the Advance and the Total Interest and any default interests, fees and any other sum then payable under this Agreement to be immediately due and payable, whereupon they shall become so due and payable.

(The Facility Agreements have the same clause); and

(d) Clause 15 provided for payment of default interest on any overdue sums at the rate of 0.0273% per day, compounded monthly (the Facility Agreements have the same clause, save that the rate was increased to 0.065% per day).

177 If Im8ex had defaulted in payment during the term of the Prior Facilities:

(a) under Clause 7(C) of the Prior Facility Agreements, Ethoz could "treat the whole of the Facility together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand";

(b) that would be an Event of Default and under Clause 14(B)(2) of the Prior Facility Agreements, Ethoz could give notice to make "[a]ll amounts due and owing under the Facility, including the Advance and the Total Interest … to be immediately due and payable"; and

(c) Clause 15 of the Prior Facility Agreements stipulated default interest at the rate of 0.0273% per day.

178 Assume Im8ex defaulted at the six-month mark, having paid the first six months' worth of interest. Ethoz could require immediate payment of the Advance, and any unpaid interest prior to default. But Ethoz could not require immediate payment of 12 months' worth of interest, relying on Clause 7(C) and/or Clause 14(B)((2) of the Prior Facilities. Interest for the remaining six months of the term would not be due and owing at the six-month mark, for Clause 19(A) of the Prior Facility Agreements stipulated that "Interest on the Advance … shall accrue from day to day". "Due" in a clause on default means "due at the time of default" – interest for a future period is not "due": see *The Angelic Star*.

179 Accordingly, interest for the remaining six months:

(a) would not be "due and owing under this Agreement" within Clause 7(C) of the Prior Facility Agreements; and

(b) would not be "due and owing under the Facility" within Clause 14(B)(2) of the Prior Facility Agreements.

180 The use of the undefined phrase "Total Interest" in Clause 14(B)(2) of the Prior Facility Agreements cannot transform interest for a future period, which is thus not "due and owing", into something that is "due and owing". "Total Interest" in Clause 14(B) of Prior Facility Agreements cannot retrospectively be ascribed the same meaning as "Total Interest" in Clause 14(B) of the Facility Agreements (which came later, and which Im8ex would not have seen at the time of the Prior Facilities). Crucially, the Prior Facility Agreements had no stipulation that interest on the Advance was deemed earned and accrued in full upon drawdown (like Clause 7(B) of the Facility Agreements). On the contrary, Clause 19(A) of the Prior Facility Agreements stipulated that "Interest on the Advance … shall accrue from day to day" – that shuts the door on any claim for interest for a future period.

181 Under the Facilities, however, if Im8ex defaulted in payment at the six-month mark after having paid the first six instalments:

(a) under Clause 5(A)(1) of the Facility Agreements, Ethoz could "treat the whole of the Facility or the balance thereof for the time being owing and unpaid together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand";

(b) that would be an Event of Default and under Clause 14(B)(2) of the Facility Agreements, Ethoz could give notice to make "[a]ll amounts due and owing under the Facility, including the Advance and the Total Interest … immediately due and payable; and

(c) Clause 15 of the Facility Agreements stipulated default interest at the rate of 0.065% per day.

182 As stated above, I accepted that Clause 14(B) of the Facility Agreements allows acceleration of Total Interest as defined in Clause 7(B) with reference to Schedule 3. Ethoz contended that Clause 5(A)(1) too had the same effect, but I did not accept this.

183 On the terms of the Prior Facilities, if Im8ex defaulted at the six-month mark:

(a) it could only be liable to pay the Advance and interest prior to default, or (if Total Interest in Clause 14(B) of the Prior Facilities means one whole year's worth of interest), at worst another six months' worth of interest; and

(b) the amount overdue would attract default interest of 0.0273% per day ≈ 10.28% per annum.

184 In contrast, on the terms of the Facilities, if Im8ex defaulted at the six-month mark:

(a) it could be liable to pay the Advance and 15 years' worth of interest; and

(b) the amount overdue would attract default interest at the higher rate of 0.065% per day ≈ 26.08% per annum.

185 Thus, on the terms of the Prior Facilities, if Im8ex defaulted in payment, at worst it would have to pay the Advance and ***one year's*** *worth of interest* at an effective rate of ***6.34%*** *effective per annum* (amounting to ***1.0634*** *times the Advance*), with default interest at 0.0273% per day ≈ ***10.28%*** *per annum*.

186 On the terms of the Facilities, however, if Im8ex defaulted in payment, it would have to pay the Advance and ***15 years'*** *worth of interest* at 3.75% flat per annum ≈ ***6.444%*** *effective per annum* (amounting to ***1.5625*** *times the Advance*), with default interest at 0.065% per day ≈ ***26.08%*** *per annum*.

187 Im8ex was thus much worse off if it defaulted under the Facilities, than if it defaulted under the Prior Facilities.

188 As I note above, Ethoz's counsel sought to justify the consequence of accelerating 15 years' worth of interest under the Facilities, by contending that this was a *quid pro quo* for Im8ex enjoying *lower* interest under the Facilities; but in fact, the Facilities were at a *higher* interest rate. There was no *quid pro quo*.

The longer term of the Facilities

189 In representing that the Facilities offered were better than the Prior Facilities, besides the supposedly lower loan interest rate of the Facilities (which was a misrepresentation), Ethoz mentioned the longer term of 180 months (15 years) as compared to 12 months.

190 From the evidence, however, Im8ex was not looking for a longer term in the first place. It was content to renew on the same basis, *ie*, another 12 months on the same terms, when Ethoz represented that it had a better offer.

191 The Facilities allowed Ethoz 180 months to pay the Advance in instalments, whereas under the Prior Facilities Ethoz was obliged to pay the Advance in a lump sum at the end of 12 months. As a corollary, however, under the Facilities Im8ex was potentially exposed in a default scenario (and Ethoz contends also in a prepayment scenario) to paying the Advance plus 15 years' worth of interest, amounting to 1.5625 times the Advance; whereas under the Prior Facilities with their 12-month term, at worst Ethoz would have to pay the Advance plus 12 months' worth of interest, amounting to 1.0634 times the Advance.

192 Im8ex was not looking for a period of more than 12 months to repay the Advance; on the contrary, it wanted to be able to prepay the Facilities with a minimum of restrictions and adverse consequences. The Facilities offered were much worse for Im8ex than the Prior Facilities in that regard.

193 It is also instructive to consider the value of the properties which were offered as security for the loans. The Facility Letters each limited the principal amount lent, to the stated amount of the Advance, or no more than 75% of the fair market value of the respective properties, whichever was lower. Thus, what was lent would not be more than 75% of the fair market value of the properties.

194 On Ethoz's case, however, Total Interest of 56.25% (3.75% x 15 years) was immediately added to the Advance, and that would have to be paid by Im8ex in all scenarios, including early redemption. If the amount lent were 75% of the fair market value of the properties, adding 56.25% to the Advance would

exceed the fair market value of the properties by over 17% (0.75 x 1.5625 = 1.1719). Indeed, if the Advance were anything more than 64% of the fair market value of the properties, adding 56.25% to the Advance would exceed the fair market value of the properties (0.64 x 1.5625 = 1). Accelerated payment of future interest would result in the sale proceeds of the properties being insufficient to meet Ethoz's claims, and it would not be possible to re-finance the loans using the same properties as collateral either. Im8ex's difficulties in re-financing were recounted by Mr Chua in his first affidavit at paras 14 to 15.

195 Mr Chua was particularly upset about the Hoe Chiang Road property which he owned – he said that it had *en bloc* potential which Ethoz was aware of, and *en bloc* negotiations were ongoing when the property was provided as security to Ethoz. If Im8ex were obliged to pay 15 years' worth of interest in a re-financing situation, that would get in the way of re-financing and early redemption of the Facilities. If an *en bloc* sale were to happen, Mr Chua could not take advantage of it unless he could get the mortgage discharged. But the Facility Agreement purported to lock Im8ex into the Facilities, such that Im8ex could not sensibly get out (see para 3(b) of Mr Chua's first affidavit). Ironically, allowing Ethoz to foreclose would mean that Ethoz, not Mr Chua, would benefit from any *en bloc* sale.

196 In the context of the parties' discussions at the time, Ethoz's *general* representation that the Facilities were "better" than the Prior Facilities was a ***mis***representation. Ethoz's *specific* representation that the Facilities were at a lower rate than the Prior Facilities was also a ***mis***representation.

Inducement

197 On the evidence, I accept that Im8ex was induced by Ethoz's misrepresentations into taking up the Facilities.

198 Indeed, Ethoz's counsel's submission that Im8ex knew it was being offered *lower* interest under the Facilities, is implicit recognition that Im8ex had relied on Ethoz's misrepresentation that the interest rate under the Facilities was *lower*, when in fact it was *higher*.

199 Ethoz, however, contended that whatever misrepresentations it had made, the terms of the Facility Agreements would have shown Im8ex what the truth was, and so Im8ex remained bound by the Facility Agreements. Ethoz relied on the Court of Appeal's decision in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 for this proposition.

200 Ethoz's contention stems from a misreading of the Court of Appeal's decision in *Broadley*. There, the alleged representation was based on silence: at a meeting, the subcontractor had remained silent in response to the supplier saying that if the main contractor did not pay, *the subcontractor would remain liable to the supplier* for the outstanding sum. The three parties however then signed an undertaking that authorised the main contractor to pay the supplier on the subcontractor's behalf ("the Undertaking"), and also stated that *the subcontractor was released of all liability to the supplier*. The signed Undertaking was thus contrary to the subcontractor's position as stated at the earlier meeting.

201 The Court of Appeal found that the subcontractor's silence did not amount to a representation in the first place – at best, it was ambiguous; moreover, the parties expected that a written agreement would be forthcoming, and the subcontractor's disagreement with the supplier's stated position was manifest from the terms of the draft Undertaking.

202 The Court of Appeal went on to find that even if the subcontractor's silence amounted to a misrepresentation, it was corrected by the draft Undertaking, such that the supplier could not have been induced by the misrepresentation into signing the Undertaking. That aspect (inducement) is the most pertinent for present purposes, in particular the following:

> 35 The present case is one where the misrepresentation (assuming the silence constituted a representation) was dispelled by the express terms of the contract …
>
> 36 *Peekay* stands for the proposition that a plaintiff would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, which the plaintiff placed importance on, read and signed, and which the defendant expected that the plaintiff would read and understand, contradict or correct the defendant's misrepresentation. … It is still the law that representees are not obliged to test the accuracy of the representations made to them, and it does not matter if they had the opportunity to discover the truth as long as they did not actually discover it (*Peekay* at [40]). But where the true position appears clearly from the terms of the very contract which the plaintiff says it was induced to enter into by the misrepresentation (*Peekay* at [43]), the position is quite different. After all, it is a corollary of the basic principle of contract law that a person is bound by the terms of the contract he signs, notwithstanding that he may be unaware of its precise legal effect. Such a claimant should be taken to have actually read the contract and known the falsity of the earlier representation. To hold otherwise would undercut the basis of the conduct of commercial life – that businessmen with equal bargaining power would read their contracts and defend their own interests before entering into contractual obligations, and that they would rely on their counterparties to do the same.
>
> …
>
> 38 In our judgment, the reasoning in *Peekay* applies with equal force to the present case. The Undertaking clearly contradicted or corrected the position that Broadley would remain liable for the Outstanding Sum. Both parties knew and acted on the basis that the written Undertaking was meant to be the operative contract between them and not the oral agreement made at the Second Meeting. It was incumbent on Mr Lin to read and understand the Undertaking, which was brief and simple and which he had ample time to read before signing. Broadley's position was patently obvious from the Undertaking. If Mr Lin did not understand or did not agree to

> its terms, he could have declined to sign the Undertaking or sought clarification as to the legal effect of the Undertaking (either from Mr Govin or through legal advice). If he chose instead to sign the Undertaking without seeking any clarification, this was completely pursuant to his own assumption that it reflected the agreement at the Second Meeting, and the consequences arising therefrom must fall on Alacran alone. This is especially so in the present case since the indemnity clause was not buried in a mass of small print but clearly appeared just above the space for signature by the parties.
>
> …
>
> 40 We find that Mr Govin's misrepresentation (if any) did not induce Mr Lin to enter into the Undertaking. The above analysis is distinct from cases where a representation is made as to the effect and contents of the contractual document, such as in *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805 [("*Curtis*")] where the shop assistant told the plaintiff that the document she was about to sign limited the shop's liability to a lesser extent that the document stated or *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97 [("*Waterhouse*")] where the defendant was induced to sign a guarantee for a loan by the bank's misrepresentation as regards the scope and content of the guarantee. In *Peekay* it was not argued that the bank had represented anything as to the effect of the investment documents: *Peekay* at [60]. Here, it is common ground that the parties intended that the agreement reached at the Second Meeting would form the basis of their written agreement … The parties met before the Undertaking was signed and could have made changes to the Undertaking had they desired to do so. But even if such a representation were made, in our judgment, Mr Lin similarly could not be said to have been induced by this representation to enter into the Undertaking. That representation was made well before the Undertaking was even drafted, and Mr Lin was given more than enough time to review its contents. The divergence from the representation, if any, was obvious in the language of the Undertaking, and for the reasons set out at [38] above, we find that this argument cannot assist Alacran.

203 First and foremost, the present case is one where the misrepresentations *were* about the ***effect and contents*** of the contractual documents, namely that the Facilities were on better terms than the Prior Facilities, and in particular that the interest rate was lower. The Court of Appeal (at [40]) specifically regarded

such cases (citing *Curtis* and *Waterhouse* as examples) as distinct from the situation in *Broadley*.

204 In *Curtis*, the plaintiff was asked to sign a document by drycleaners, so that they could disclaim liability for damage in relation to beads and sequins. In fact, the document contained a condition stating that the drycleaners were "not liable for any damage howsoever arising". The dress the plaintiff sent for cleaning was then stained. The plaintiff was awarded damages for negligence, and that decision was upheld by the English Court of Appeal. As Denning LJ put it, the drycleaners were disentitled to rely on the exemption because the plaintiff's agreement to it had been obtained by misrepresentation.

205 In *Waterhouse*, an "all monies" guarantee was signed, after the bank led the guarantor to believe that it would only guarantee money borrowed to purchase a piece of land. The bank then sought to enforce the guarantee for a separate overdraft. The English Court of Appeal held that the bank could not do so. Woolf LJ said, "[m]isrepresentation can always amount to a defence to a claim on a contract if that misrepresentation was made by the party seeking to enforce the contract ... As a result of the misrepresentation, the father was misled and the bank never having corrected the misrepresentation is not entitled to rely on the guarantees which the father entered into …" Sir Edward Eveleigh said, "the guarantee was signed under a mistake which was negligently induced by the manager and, therefore, the mistake prevents the signature from having a binding effect inter partes". He was also of the opinion that there was a breach of duty to the defendant which disentitle the bank to enforce the guarantee.

206 In the present case, at first instance the AR considered that, notwithstanding any misrepresentation by Ethoz, on the authority of *Broadley* Im8ex would remain bound by the terms of the Facilities. The decision in

Broadley does not have that consequence – the misrepresentation was as to the effect and contents of the contractual documents between Ethoz and Im8ex, namely that Ethoz was offering better terms (which was not the case), including a lower interest rate (which was also not the case).

207 The AR also cited two High Court decisions which followed *Broadley*: *Wen Wen Food Trading Pte Ltd v Food Republic Pte Ltd* [2019] SGHC 60 ("*Wen Wen*") at [19], and *Jin Ling Enterprise Pte Ltd v E C Prime Pte Ltd* [2019] SGHC 209 ("*Jin Ling*") at [75]. These decisions are likewise distinguishable.

208 In *Wen Wen*, the plaintiff alleged that the defendant had represented that the plaintiff could operate in the defendant's food-court for a period of at least six years. The plaintiff said it relied on this representation when entering into the Licence Agreement. However, the booking form that was signed was for a two-year period. This was followed by the Licence Agreement, likewise for a two-year period, with an entire agreement clause that stated that the plaintiff "has not relied upon any oral or written representation made to it by the Company …" It was not contended that the defendant had misrepresented the effect and contents of the Licence Agreement. In the circumstances, the plaintiff's claim alleging misrepresentation and wrongful repudiation of the Licence Agreement was struck out.

209 In *Jin Ling*, the plaintiff wished to use certain commercial units for a "zichar" restaurant involving heavy cooking. It claimed that it had been induced to purchase the units by misrepresentations, including one that the units could be used as shops or restaurants that involved heavy cooking. The sale and purchase agreements, however, stated in Clause 20M that the approved use of the units was "as a shop in the grant of the Written Permissions for the Building

… [and] the Purchaser shall not use the Unit[s] or allow the Unit[s] to be used for any purpose other than the approved use as specified above …"

210 Prior to the signing of the sale and purchase agreements, there had been correspondence between the parties' solicitors:

(a) the plaintiff asserted that the defendant had represented that the Units had been approved as "restaurants", and asked to amend Clause 20M;

(b) the defendant denied the alleged representation, and rejected the plaintiff's request to amend Clause 20M.

211 In those circumstances, the court found that the plaintiff was not induced by misrepresentation to enter into the sale and purchase agreements. Again, it was not asserted that there was a misrepresentation as to the effect and contents of the contractual document: the plaintiff knew full well that Clause 20M contradicted the alleged representation, and asked to amend it; the defendant refused to amend Clause 20M, and the parties proceeded to sign the sale and purchase agreements.

212 I would also mention *Ma Hongjin v Sim Eng Tong* [2021] SGHC 84, where the court found that the defendant had not been induced by misrepresentation to enter into a loan agreement. The court expressly noted that no representation as to the contents or effect of the contractual document was alleged: "The plaintiff does not plead that the defendant made any representation, whether by words or conduct, as to the contents of the Master Loan Agreement or the effect of Recital A and cl 1.1." (at [77]).

213 For completeness, I would add that the proposition from *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511, which the Court of Appeal in *Broadley* accepted at [36] is not an absolute one; it is that: "a plaintiff would not *ordinarily* be held to be induced by a misrepresentation if the express contractual terms, which the plaintiff placed importance on, read and signed, and which the defendant expected that the plaintiff would read and understand, contradict or correct the defendant's misrepresentation." [emphasis added]

214 Thus, even if the misrepresentation is not as to the effect and contents of the contractual document (as it was in this case), *Broadley* does not oblige a court to find that the misrepresentation has not induced the contract, if in the circumstances of a particular case it has.

215 Here, the parties had dealt with each other before, in relation to the Prior Facilities, for which there were the Prior Facility Letters and Prior Facility Agreements. The discussions on a possible renewal then started on the basis that Ethoz might offer the *same* terms as those of the Prior Facilities; that led to the misrepresentation that *better* terms were being offered for the Facilities. The misrepresentations were made at a meeting when Mr Chua was presented with the first two Facility Letters, with the Facility Agreements following shortly after. They were misrepresentations as to the effect and contents of the contractual documents that Im8ex was being asked to agree to.

216 In the circumstances, Ethoz cannot avoid the consequences of its misrepresentations by contending that it expected that Im8ex would assiduously comb through the contractual documents for the Facilities, and discover that Ethoz had misrepresented the position.

217 Each Facility Letter was some six pages long, and each Facility Agreement another 39 pages long. It would not be immediately apparent that the change from an "effective" interest rate of over 6% per annum to a "flat" rate of 3.75% per annum, actually resulted in the interest rate being higher, not lower (as represented). Indeed, Ethoz's own counsel was unaware that the Facilities were *not* at a lower interest rate. Nor is comparing the provisions regarding default and prepayment a simple matter.

218 Further, the full consequences of default were not spelled out in the Facility Letters: in particular the Facility Letters did not mention that Im8ex might have to pay the Advance plus 15 years' worth of interest if it should default (that was only stipulated in the Facility Agreements, which Im8ex only received later). The Facility Letters mentioned default interest (in para 5), but nothing was said about Ethoz being able to accelerate payment (per Clause 14(B) or Clause 5(A)(1) of the Facility Agreements). Similarly, the paragraph on "prepayment" in the Facility Letters did not say that Im8ex would have to pay the Advance plus 15 years' worth of interest if it wanted to prepay the Facilities (which is Ethoz's position). The Facility Letters simply stated in para 10.5, "Prepayment of the Facility is subject to full settlement of the Loan Agreement …". Ethoz's argument on this rests on the clauses in the Facility Agreement.

219 On the evidence before me, I found that Im8ex was induced by Ethoz's misrepresentations into taking up the Facilities; *Broadley* does not stand in the way of that finding.

220 Im8ex did not seek to avoid the Facilities on account of the misrepresentations; instead, akin to the defendants in *Curtis* and *Waterhouse*, Im8ex sought to preclude Ethoz from relying on the terms of the Facilities to

the extent that they were less favourable to Im8ex than those of the Prior Facilities. In particular, Im8ex asserted that it ought to be allowed to prepay the Facilities by paying the Advance plus loan interest prior to prepayment, as it could have done had the Facilities been on the same terms as the Prior Facilities. I agreed with this.

Could Im8ex redeem the Facilities and the mortgaged properties by paying the Advance plus loan interest?

The right to redeem the Facilities and the mortgaged properties

221 Ethoz contended that Im8ex could no longer prepay the Facilities – Ethoz said that after Im8ex defaulted, and Ethoz accelerated payment of all remaining instalments, Im8ex had no alternative but to pay the Advance plus Total Interest plus default interest.

222 However, I found the acceleration of Total Interest to be a penalty, and the default interest also to be a penalty, and so Ethoz could not enforce those aspects of the Facilities against Im8ex. The acceleration of the Advance was unobjectionable, but Im8ex was quite willing to pay the Advance plus loan interest prior to the date of prepayment.

223 Moreover, given Ethoz's misrepresentations, Ethoz could not enforce the terms of the Facilities to the extent that they were less favourable to Im8ex than those of the Prior Facilities. In particular, under the Prior Facilities Im8ex could make prepayment on the basis of paying the Advance plus loan interest till the date of prepayment, and under the Facilities it should be allowed to do likewise. Indeed, prepayment under the Prior Facilities would have involved Im8ex paying no more than the Advance plus loan interest for 12 months.

224 Nothing in the Facility Agreements says that Im8ex could no longer make prepayment if it had defaulted, or if it had defaulted and Im8ex had accelerated payment of the Advance. For the full Advance to be immediately payable is not inconsistent with Im8ex still being able to prepay the Facilities pursuant to Clause 6 by paying the full Advance and loan interest prior to the date of prepayment.

225 Given that the law is protective of the equity of redemption, when property is provided as security for a loan, I would incline towards an interpretation of the Facility Agreements that allows the borrower to still make prepayment notwithstanding that there has been a default, or even acceleration of payment of the principal sum lent.

226 In any event, if acceleration of Total Interest, and default interest, cannot be enforced against Im8ex, what remains is the Advance and loan interest. Once Im8ex paid that, Ethoz would have received what was due to it, and could not refuse to release the securities it held.

227 *Hong Leong* expressly recognises that even after default, the mortgagor can still pay off the mortgagee, indeed, they may adjourn a summons for possession to afford the mortgagor a chance of doing so (at [12]).

228 This matter first came before me on 29 June 2021, when I granted the application by Im8ex and Mr Chua to adduce further evidence. Additional affidavits were filed, and the registrar's appeal was then heard by me on 13 August 2021. It was then adjourned for further submissions and also for the first and second defendants to provide an update as to whether they could refinance the Facilities, if Im8ex only had to pay the Advance and loan interest prior to the date of repayment.

229 At the adjourned hearing on 22 October 2021, Im8ex indicated that it could indeed refinance the Facilities on that basis. There was then a dispute over calculations, which I resolved in Im8ex's favour.

Payment calculations

230 Im8ex calculated that it would need to pay Ethoz a further $4,041,987.21 if payment were made on 31 October 2021. This accounted for:

(a) the proceeds of the Alexandra View property (which was sold, and the proceeds paid to Ethoz or its solicitors on 29 April 2021);

(b) loan interest on the principal sum of $1,725,000 on the second Facility, which specifically referred to the Alexandra View property, for the period prior to 29 April 2021;

(c) loan interest on the other Facilities for the period prior to 31 October 2021; and

(d) legal costs of $15,000 which had been awarded to Ethoz at first instance.

231 Ethoz, on the other hand, maintained that Im8ex needed to pay not only the Advance, but also Total Interest and default interest.

232 Even without Total Interest and default interest, Ethoz still put forward a higher figure of $4,621,813.88. That and Im8ex's figure of $4,041,987.21 differed principally for two reasons:

(a) Ethoz was using Schedule 3 to reckon loan interest payable upon redemption; and

(b) Ethoz added the equivalent of three months of Monthly Interest for Im8ex's alleged failure to give three months' prior notice.

233 I disagreed with Ethoz on both these points, and accepted Im8ex's calculations.

234 As I decided above at [50], in a prepayment scenario "interest computed thereon" [*ie,* on the Advance] within Clause 6 means interest at the contractual rate of 3.75% flat per annum for the period prior to prepayment. It does not mean the sum total of the Monthly Interest payments in Schedule 3 for the period prior to prepayment. Indeed, Ethoz itself had not asserted that this is what "interest computed thereon" meant: Ethoz contended that the phrase meant Total Interest.

235 Moreover, given Ethoz's misrepresentation that the Facilities were better than the Prior Facilities, it should not be allowed to insist on front-loaded interest per Schedule 3: there was no such front-loading in the Prior Facilities, where interest simply accrued day to day, and was payable monthly.

236 As for the need to give three months' prior written notice, I found that Im8ex had done so:

(a) In correspondence between solicitors, Im8ex had indicated that it wished to seek refinancing and pay off Ethoz: in Im8ex's solicitors' letter of 7 December 2020, they said that Im8ex disputed (in particular) the interest charged by Ethoz, which it found very exorbitant, unfair, and indeed usurious. They went on to say that Im8ex had been sourcing for refinancing but the amount of interest claimed by Ethoz made it impossible for any other financial institution to step in and take over as

they could not structure a loan sufficient to pay off Ethoz's claims, based on the security of the four properties.

(b) Mr Chua said at para 13 of his first affidavit that after Im8ex had defaulted, Mr Chow told him to take steps to sell his properties to repay Ethoz – hence he took steps to sell one property (Alexandra View). Mr Chua said (at para 14) that he had approached other finance companies to seek refinancing, but to no avail given Ethoz's claims to Total Interest and default interest. Mr Chua went on to say (at para 15) that "the extremely high interest will prevent me from redeeming the mortgages of all four (4) properties." Ethoz would have known from Mr Chua's first affidavit (filed on 8 March 2021) that Im8ex wished to pay off Ethoz, but were unable to do so because of Ethoz's claims to Total Interest and default interest.

(c) In Mr Chua's third affidavit (filed on 30 June 2021, earlier exhibited to Mr Chua's second affidavit filed on 23 June 2021), he said that in an attempt to repay Ethoz, Im8ex attempted to raise loans from other lenders; he said he approached Hong Leong Finance Ltd and Singapura Finance Ltd, exhibiting his correspondence with Singapura Finance Ltd dating back to August–September 2020.[10] He concluded by saying at para 73 that if the court were to find that Total Interest and default interest were penalties, then loans could be obtained from other lenders to enable Im8ex to repay the appropriate outstanding sum and avert foreclosure of the mortgaged properties. Indeed, that is precisely what happened.

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10 Mr Chua's third affidavit, pp 169–172.

(d) At the hearing on 13 August 2021, Im8ex's counsel submitted that Im8ex could well have refinanced the Facilities but for the large claims (for Total Interest and default interest) made by Ethoz. The hearing was then adjourned for further submissions and also to allow Im8ex to provide an update as to whether it could refinance the Facilities if it only needed to pay the Advance and loan interest prior to the date of redemption. Again, Ethoz would know from that that Im8ex wished to pay off the Facilities and redeem the mortgaged properties.

237 In any event, as Ethoz's claims to Total Interest and default interest were what had prevented Im8ex from paying off Ethoz, from late 2020 or early 2021, Ethoz should be precluded from adding to the bill a further three months of Monthly Interest on account of Im8ex allegedly not giving three months' prior written notice to pay off the Facilities.

238 Im8ex was content to pay off Ethoz by paying the Advance plus loan interest at the contractual rate of 3.75% flat per annum prior to the date of redemption. Im8ex did not take issue with the loan interest rate, presumably because it did not realise that this was slightly more than the loan interest rate under the Prior Facilities.

239 I made no adjustment in relation to the loan interest rate. I simply allowed Im8ex to pay off the Facilities, and redeem the mortgaged properties, by paying the Advance and loan interest at the contractual rate of 3.75% flat per annum for the period prior to redemption. Im8ex had calculated the balance amount payable if redemption were to take place on 31 October 2021, as $4,041,987.21.

240 Ethoz contended that interest should continue to run on the second Facility although it had on 29 April 2021 received the proceeds of Alexandra View property in the sum of $2,295,241.80, and a further sum of around $48,000 was paid to its solicitors to account of costs ($15,000 being what was awarded at first instance). Adjusting for the correct amount of costs, Ethoz received the net sum of $2,329,055 towards what was due on the Facilities. That exceeded the amount due on the second Facility by $608,855.10.

241 Ethoz argued that as it was holding the proceeds of the Alexandra View property in escrow, Im8ex should continue paying interest on it. I disagreed. Any escrow arrangement was necessarily subject to the outcome of the proceedings, where I found that Ethoz was not entitled to Total Interest or default interest. Moreover, since 29 April 2021, Im8ex did not have the use of the funds that were paid to Ethoz. Accordingly, from 29 April 2021 no interest should run against Im8ex in respect of the $2,329,055 that Ethoz had received from the Alexandra View property. It does not however appear that Im8ex adjusted the interest payable on the other three Facilities by the credit of $608,855.10 in its favour.

242 Im8ex indicated that it might have logistical difficulties in redeeming the Facilities and the mortgaged properties by 31 October 2021, and I allowed it till 19 January 2022, which essentially corresponded with the three-month availability period of the new loan Im8ex had obtained.

243 I further ordered that Im8ex was to pay interest at the contractual rate of 3.75% flat per annum on the balance sum of $4,041,987.21. In retrospect, that was over-generous to Ethoz, for the balance sum had itself included an interest component.

Relief

244 When I gave my decision, I had stated that the outcome could be justified by way of relief against forfeiture: see *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 at [39]–[62]. In appropriate cases, the court has the jurisdiction to grant relief against the forfeiture of an interest in land (here, the mortgaged properties), the forfeiture being by way of security for the payment of money.

245 On further reflection, there is no need to invoke relief against forfeiture: allowing Ethoz to redeem the Facilities and the mortgaged properties by paying the Advance and loan interest, is in line with the stipulation on prepayment in Clause 6 of the Facility Agreements, shorn of the unenforceable penalties of accelerated Total Interest and default interest. In any event, because of Ethoz's misrepresentations, Ethoz could not prevent Im8ex from redeeming the Facilities in the same way that Im8ex could have redeemed the Prior Facilities, *ie*, by paying the Advance and loan interest prior to redemption. Im8ex could not impede such redemption by accelerating Total Interest and charging default interest of 26.08% per annum. It is also consonant with the jurisdiction recognised in *Hong Leong*, to afford Im8ex the opportunity to pay off Ethoz to redeem the mortgaged properties.

246 In *Hong Leong*, it appears that the borrowers were not able to pay off the loan in full, yet the Court of Appeal (by granting a stay of execution) allowed them to keep the mortgaged property if they kept up the instalment payments as ordered by the High Court.

247 Here, Im8ex did not seek that accommodation: it was quite prepared to pay off the loans in full, with loan interest for the period prior to redemption. Instead of granting Ethoz judgment for possession of the mortgaged properties,

and a monetary sum, it was appropriate to allow Im8ex some time (in line with [12] of *Hong Leong*) to pay off Ethoz – without Im8ex having to pay 15 years' worth of interest, or default interest.

248 Even if I had allowed the first instance judgment in favour of Ethoz to stand, I would have stayed execution on that judgment (as the Court of Appeal did in *Hong Leong*). That stay would have been conditioned on Im8ex redeeming the Facilities and the mortgage properties on the same terms that I had allowed it to.

Conclusion

249 For the above reasons, I set aside the judgment that had been granted to Ethoz at first instance, and instead allowed Im8ex to redeem the Facilities and the mortgaged properties, by paying the Advance and loan interest at the contractual rate of 3.75% flat per annum for the period prior to redemption, without Im8ex having to pay 15 years' worth of interest, or default interest.

250 In the circumstances of the case, I made no order as to costs of the registrar's appeal. Im8ex had defaulted in payment, but I had found that it was not liable to pay 15 years' worth of interest, or default interest: those aspects of the Facilities were unenforceable penalties. Moreover, I had found that Ethoz misrepresented to Im8ex that the Facilities were "better" than the Prior Facilities, when they were not – in fact, they were much worse.

Postscript – stay of execution

251 After my decision, Ethoz applied for a stay of execution. Im8ex and Mr Chua indicated that they did not object, but they said they should not be prejudiced in the event of Ethoz losing the pending appeal. Should that happen,

they asked that interest payable to Ethoz be capped as at 19 January 2022 (the deadline I had set for Im8ex to redeem the Facilities and the mortgaged properties). On the other hand, Ethoz cited O 56A r 16 of the Rules of Court (2014 Rev Ed) which states that interest for such time as execution has been delayed must be allowed unless the High Court's General Division or Appellate Division otherwise orders.

252 I granted the stay on the basis that if it delayed the redemption of the Facilities beyond 19 January 2022, Im8ex need not pay interest to Ethoz for the period after that date unless the Appellate Division otherwise orders in conjunction with the pending appeal.

Andre Maniam
Judge of the High Court

Adrian Wong, Ang Leong Hao and Timothy Ng
(Rajah & Tann Singapore LLP) for the applicant;
Ranvir Kumar Singh (UniLegal LLC)
for the first and second respondents;
The third respondent absent and unrepresented.