IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 3

Civil Appeal No 28 of 2022

Between

Ethoz Capital Ltd

… *Appellant*

And

(1) Im8ex Pte Ltd
(2) Chua Soo Liang (suing in his personal capacity and as administrator of the estate of Chua May Ling)
(3) Tan Meng Kim

… *Respondents*

JUDGMENT

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

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Ethoz Capital Ltd
v
Im8ex Pte Ltd and others

[2023] SGCA 3

Court of Appeal — Civil Appeal No 28 of 2022
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
8 November 2022

20 January 2023 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 In our jurisprudence, the penalty doctrine makes a distinction between primary and secondary obligations, with only the latter attracting its application. In *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 ("*Leiman*"), we referred to this as the "threshold issue" in the penalty doctrine: at [99].

2 In attempts to get around this threshold, parties have resorted to what we have previously referred to as "clever drafting": *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*") at [95]. We should observe that "clever drafting" is a reference to a form of drafting which is intended to *obscure* the true nature of a provision by obfuscating its *substance* as a secondary obligation. Such practice

should not be encouraged, and if such drafting is brought to the attention of the court, it will be subject to rigorous analysis and we will not hesitate to strike it down if it is found in substance to be a secondary obligation that is in fact a penalty.

3 On the other hand, there is nothing intrinsically objectionable for parties to draft appropriate clauses to reflect their agreement that an obligation is a *primary* obligation even if it is a particularly onerous one. For example, in the context of loan agreements like those in the present appeal, even if the interest rate agreed upon is objectively unattractive, if its payment is clearly intended to be the borrower's *primary obligation*, the court will generally uphold it. It thus will not fall within the scope of the penalty doctrine. For example, in *Alternative Advisors Investments Pte Ltd and another v Asidokona Mining Resources Pte Ltd and another* [2022] SGHC 41 ("*Asidokona*"), Hoo Sheau Peng J was faced with an assertion that the contractual interest rate of 5% *per* month was "clearly extortionate" and a penalty: at [130]. She held that the penalty doctrine was not even engaged because the contractual interest rate was the primary obligation under the loan there: at [129] and [133]. While such a lender (assuming that it is an excluded moneylender) may not be very competitive or attractive to some borrowers, the penalty doctrine does not generally come in aid of borrowers who agree to pay such interest rates.

4 In the case before us, the appellant argues that the payment of a sum constituting substantial interest on several loans is a primary obligation, and thus not subject to the penalty doctrine. However, the provision that it relies on was grafted into the contract without paying sufficient attention as to how it would interact with the other terms, leading to a document with seemingly contradictory clauses such that the nature of the obligation in question was

unclear. This judgment will examine how such a conflict is to be resolved in the face of contradictory clauses in the contract.

Facts

5 The background to the present appeal is set out in *Ethoz Capital Ltd v Im8ex Pte Ltd and others* [2022] SGHC 12 by Andre Maniam J ("the Judge"). It suffices to reproduce a brief summary of the salient facts.

The Prior Facilities

6 The appellant, Ethoz Capital Ltd ("Ethoz"), is an excluded moneylender under the Moneylenders Act (Cap 188, 2010 Rev Ed) ("Moneylenders Act").

7 The first respondent, Im8ex Pte Ltd ("Im8ex"), is a privately held company. The second respondent, Mr Chua Soo Liang ("Mr Chua"), is the sole director and shareholder of Im8ex. He is also the nephew of the third respondent, Mr Tan Meng Kim ("Mr Tan"). It should be noted that Mr Tan was absent throughout the proceedings and remains unrepresented. For the purposes of this judgment, as all three respondents' interests are aligned, we will refer to them collectively as Im8ex.

8 Ethoz lent sums of $1m, $3.15m and $2.15m to Im8ex under three loan facilities for a total principal sum of $6.3m ("the Prior Facilities"). The Prior Facilities were for a term of 12 months, and their interest rate was between 6.25% to 6.5% *per* annum.

9 The Prior Facilities were secured by mortgages over four different properties which we will refer to as "the Alexandra Property", "the Hoe Chiang Property", "the Bayshore Property" which was Mr Chua's home, and "the

Taman Permata Property" which was Mr Tan's home (collectively, "the Properties"). The Prior Facilities were also guaranteed by Mr Chua and Mr Tan.

The Facilities

10 In July 2019, Ethoz and Im8ex began discussing the renewal of the Prior Facilities. This led to the signing of loan facilities that are the subject of the present appeal ("the Facilities"). They were signed in November 2019 and January 2020. Like the Prior Facilities, these were secured by guarantees from Mr Chua and Mr Tan, and mortgages over the Properties. The total principal amount borrowed by Im8ex under all the Facilities was similarly $6.3m, but this amount had been split into *four loans* of, respectively: (a) $1.425m; (b) $1.725m; (c) $1m; and (d) $2.15m. As the terms of the Facilities are identical, we will refer to the amounts borrowed under them as "the Advance".

11 As *per* Clauses 5(A) and 7(A), the Facilities were extended at an interest rate of 3.75% *per* annum, with instalment payments to be made every month over 15 years, *ie*, over 180 months. Schedule 3 of the Facilities set out the 180 instalment payments that Im8ex was obliged to make. These were equal instalment payments, made up of repayments of the Advance and interest payments.

12 Importantly, Schedule 3 also included an amount termed "Total Interest" which was the aggregate of *all* the interest payments and is the amount arrived at when the flat rate of 3.75% *per* annum is applied to the Advance.

13 Significantly, Clause 7(B) provided that the Total Interest "shall be deemed earned and accrued in full upon the drawdown of the Advance". Such a clause was, however, not present in the Prior Facilities.

14 There are also several provisions relevant in the event that Im8ex defaults on payment:

(a) Clause 15 provides that if Im8ex defaults on payment, it will pay interest ("Default Interest") on such sums from its due date to the date that it is paid. Such interest is set at a rate of 0.0650% *per* day ("the Default Interest rate") and will be "calculated daily with monthly rests". Further, any unpaid Default Interest "shall be added to the relevant outstanding amount on a monthly basis and shall itself bear interest" at the Default Interest rate.

(b) Clause 5(A) provides that in default of payment of any of the instalments in Schedule 3, Ethoz "may treat the whole of [the Facilities] or the balance thereof … together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand."

(c) Clause 14 provides that an event of default will occur if Im8ex does not pay any of the "sum[s] payable under [the Facilities] when due" (as *per* Clause 14(A)(1)), and that this will entitle Ethoz to declare that "all amounts due and owing under [the Facilities], including the Advance and the Total Interest and any default interests … be immediately due and payable."

15 Finally, under the Facilities, Im8ex can make prepayment of the Advance after six months from the date of drawdown. Clause 6(B) provides that such prepayment would include "the Advance and interest computed thereon in full", subject to conditions laid out in Clauses 6(B)(1)–(5).

Ethoz seeks to enforce the Facilities

16 Im8ex defaulted on payment within the first year of all the Facilities. Consequently, on 3 September 2020, Ethoz gave notice demanding immediate and full payment of the Advance *and Total Interest*, citing Clauses 5(A), 7(B) and 14(B) of the Facilities. They also sought delivery of vacant possession of the Properties.

17 On 15 January 2021, Ethoz filed HC/OS 30/2021 ("OS 30") which sought the following orders: first, that Mr Chua and Mr Tan deliver vacant possession of the Properties; and second, that Im8ex, Mr Chua and Mr Tan jointly and severally pay Ethoz the Advance, Total Interest, and Default Interest due under the Facilities.

18 Im8ex resisted OS 30, making broad assertions of "unconscionable interest" and "unfair terms". It also asserted that Ethoz had misrepresented the terms of the Facilities, and further, that Ethoz did not fully advise it on how the Total Interest worked.

19 OS 30 was heard by an assistant registrar ("the AR") on 5 April 2021. Three days later, the AR gave his decision, finding for Ethoz.

Proceedings below

20 Im8ex appealed against all the orders made in HC/RA 112/2021 ("RA 112"). The Judge heard the parties on 29 June 2021 and rendered his oral decision on 22 October 2021. On 2 January 2022, the Judge released his full grounds of decision which canvassed four issues: "Total Interest", "Default Interest", "Misrepresentation" and whether Im8ex could redeem the Facilities and the Properties ("Redemption").

(a) **Total Interest** – Im8ex argued that the Total Interest was a secondary obligation which arose as a remedy for the breach of Im8ex's primary obligation to repay the Advance and interest in monthly instalments. Ethoz maintained that the claim for the Total Interest did not fall within the scope of the penalty rule. In support of its position, Ethoz raised two other High Court decisions where the Total Interest was not found to be a penalty: *Ethoz Capital Ltd v T-Pacific Pte Ltd and others* HC/RA 350/2019, HC/OS 938/2019 (1 April 2019) ("*T-Pacific*") and *Ethoz Capital Ltd v Thistle Energy Pte Ltd and another* HC/RA 118/2021, HC/OS 1127/2020 (10 August 2021). The Judge declined to follow these decisions and instead examined Clause 7(B) in the context of Clauses 5, 6 and 14. He concluded that the payment of the Total Interest upon default was a secondary obligation and ultimately a penalty.

(b) **Default Interest** – Im8ex argued that the Default Interest rate in Clause 15 was also a penalty, citing the difference from the regular interest rates provided for in Clause 7(A). Ethoz argued that the assertion that Clause 15 was a penalty clause was "without any factual basis" and that the Default Interest rate was a genuine estimate of its loss. The Judge disagreed, finding that there was sufficient evidence to conclude that the rate was a penalty. In particular, he premised this conclusion on the fact that once the Default Interest rate and the regular contractual interest rate were calculated on an "effective" basis, there was clearly an "extravagant increase" in the Default Interest rate.

(c) **Misrepresentation** – Im8ex did not make any arguments on this point other than an assertion in Mr Chua's affidavit that he had been "misled" by Ethoz's representatives regarding the terms of the Facilities.

Yet, the Judge nonetheless went on to find that Ethoz had misrepresented to Im8ex that the terms of the Facilities were better than the Prior Facilities, and that Im8ex had been induced by this misrepresentation.

(d) **Redemption** – having made the above findings, the Judge then examined whether Im8ex could redeem the Facilities. The Judge allowed Im8ex to make prepayment under Clause 6(B) notwithstanding that it had defaulted on payment. Thus, Im8ex could redeem the Facilities and the mortgaged Properties by paying the Advance plus loan interest, but excluding the acceleration of the Total Interest and Default Interest given that they were found to be unenforceable penalties. As regards the payment calculation, the Judge preferred the submission of Im8ex and ordered the balance sum of $4,041,987.21 to be paid with the interest rate of 3.75% flat *per* annum.

Issues on appeal

21 Ethoz now challenges the Judge's decision on all fronts, arguing that the Judge erred in (a) finding that it had made misrepresentations that induced Im8ex into entering the Facilities; (b) finding that the payment of the Total Interest or Default Interest were unenforceable penalties; and (c) allowing Im8ex to redeem the Facilities by making prepayment under Clause 6(B). Im8ex on the other hand, largely aligns itself with the Judge's reasoning.

22 This gives rise to three principal issues before us:

(a) First, whether the Judge erred in finding that Ethoz had made misrepresentations to Im8ex that induced it into entering the Facilities ("the Misrepresentation Issue").

(b) Second, whether the Judge erred in finding that the payment of the Total Interest upon default, and the Default Interest, were unenforceable penalties ("the Penalty Issue").

(c) Third, was the Judge correct to allow Im8ex to prepay the outstanding Facilities with interest pursuant to Clause 6(B) of the Facilities ("the Redemption Issue")?

The Misrepresentation Issue

23 We deal first with the Misrepresentation Issue.

24 Below, the Judge found that Ethoz had misrepresented the terms of the Facilities to Im8ex. Summarised, his findings on each of the discrete elements of misrepresentation were as follows: (a) Ethoz, through its representatives, had represented to Im8ex that the Facilities were on better terms than the Prior Facilities ("the Better Facilities Representation"); (b) but the Facilities *were not* on better terms because the interest rate was higher, the prepayment regime was worse, and the consequences of default were harsher; and (c) Im8ex was induced by Ethoz's misrepresentations into entering the Facilities.

25 This finding, Ethoz argues, should not have been made because misrepresentation was not argued by either party before the Judge. It also argues that a finding of misrepresentation is "factually without basis".

26 We agree with Ethoz. Because misrepresentation was not argued before the Judge, there was no factual basis for him to make such a finding. This is especially so given the fact-sensitive nature of an allegation of misrepresentation.

27 Neither party made any submissions on misrepresentation before the Judge; nor did they adduce any evidence to address *all* the discrete elements of misrepresentation in their affidavits. While Ethoz submitted in RA 112 that Mr Chua could not have been "misled/mistaken" because he knew that the Facilities were on "fresh terms" and had the opportunity to review the terms, this argument was raised to rebut Im8ex's argument that Ethoz had a duty to advise Mr Chua on the terms of the Facilities. It was *not* a response to any substantive allegation of misrepresentation.

28 It is thus unsurprising that there was scant evidence to support the discrete elements of misrepresentation, and that Ethoz did not see the need to refute the discrete elements of misrepresentation in its affidavits. One example in particular, is relevant. In concluding that the Better Facilities Representation was made, the Judge relied on Mr Chua's affidavit where he deposed that he was visited by Ethoz's representatives who told him that Ethoz had a "better offer of loans for Im8ex". The Judge observed that Ethoz did not dispute this.

29 Whilst it is true that Ethoz did not expressly dispute the Better Facilities Representation, it seems to us that this was because it did not think that misrepresentation was placed into issue. This is clear from the affidavit of Ethoz's representative, where it was specifically stated that "any omission to respond or object to matters which are raised [by Mr Chua] should not be construed as an admission of such matters." In any event, we note that there was no allegation by Im8ex that it was in fact induced to enter into the Facilities on account of the Better Facilities Representation – a critical element of any misrepresentation claim.

30 This being the case, we find that there was no proper factual basis for the Judge to have concluded the Misrepresentation Issue in favour of Im8ex and Ethoz's appeal on this issue is thus allowed.

The Penalty Issue

31 Having dealt with the Misrepresentation Issue, we now turn to consider the *main* issue in this appeal – the Penalty Issue.

32 Ethoz claimed that as Im8ex has defaulted, under Clause 14(B)(2) of the Facilities, it must pay the remainder of the Total Interest immediately, along with the Advance. The Judge rejected this, finding that payment of the Total Interest upon default is an unenforceable penalty. Ethoz *also* contended that Im8ex is liable to pay Default Interest under Clause 15 of the Facilities, but the Judge rejected this too, finding that the Default Interest rate was likewise an unenforceable penalty. On appeal, Ethoz contends that the Judge was wrong to find that both provisions were unenforceable penalties.

33 A contractual provision will be held to be an unenforceable penalty where: (a) it creates a secondary obligation triggered by a breach of contract (the "threshold issue" referred to at [1] above) that (b) requires the defaulting party to pay an amount of money that seeks to hold the defaulting party *in terrorem* to their primary obligations: *Denka* at [235]. Thus, there are two distinct inquiries that must be examined.

Primary or secondary obligation?

34 We deal first with the "threshold issue".

35 Before the Judge, Ethoz did not dispute that the payment of the Default Interest is a secondary obligation, and rightly so. Its contention was only with regard to its claim for the payment of the Total Interest – it argued that its payment under Clause 14(B)(2) did not fall within the scope of the penalty doctrine. The Judge disagreed and found that it was a secondary obligation that arose upon breach of the Facilities and ultimately found that it was a penalty.

36 On appeal, Ethoz argues that the Judge erred in that the payment of the Total Interest upon default is an *accelerated primary obligation*. The main clause that it relies on is Clause 7(B) which provides that the "Total Interest … as specified in Schedule 3 shall be *deemed earned and accrued in full upon the drawdown of the Advance*" [emphasis added]. This "deeming provision", Ethoz contends, creates a "present debt to be paid at a future time". On the basis that the Total Interest is a debt – and thus a primary obligation (see *iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronics*") at [163]) – it argues that its payment upon default under Clause 14(B)(2) is simply the "acceleration" of a primary obligation. Relying on *John Wallingford v The Directors of the Mutual Society* (1880) 5 App Cas 685 ("*Wallingford*"), it argues that payment of the Total Interest under Clause 14(B)(2) thus does not fall within the scope of the penalty doctrine.

37 We do not disagree that Clause 7(B) creates a debt; to rule otherwise would be to ignore its plain wording. And we also accept that the payment of such an accrued debt can in principle constitute a primary obligation.

Immediate and full payment versus instalment payment

38 But where we disagree with Ethoz is in relation to its argument that the acceleration of a primary obligation invariably falls *outside* the scope of the

penalty doctrine. Such an argument ignores the fact that the nature of a primary obligation can, in certain circumstances, change where its performance is accelerated. It is crucial to examine the nature and extent of the acceleration to determine whether the "accelerated" obligation remains a primary obligation or otherwise.

39 We deal first with *Wallingford*. There, the appellant was a member of the respondent which was a society established to accumulate capital by way of its members' monthly subscriptions. It operated a tontine-like scheme to grant advances to members upon the allotment of "certificates of appropriation". Under its rules, an advance could be allotted in one of two ways: (a) "by drawing, free of any premium or interest" or (b) "to the member or members tendering the highest premium". The appellant fell under the latter category, and an advance of £6,000 was granted to him for a premium of about £5,000. He was to repay the advance and pay the premium in equal quarterly payments over 20 years. This was secured by a mortgage bond given by the appellant to the respondent. The appellant did not make the scheduled payments and the respondent commenced an action against him seeking the recovery of a sum of money which included the advance and the premium. The respondent's rules stipulated that if there was default in payment, the payment of the advance and the premium would be accelerated: *Wallingford* at 686, 687, 696, 702 and 705.

40 The appellant's defence was that the acceleration was a penalty, but the House of Lords disagreed. Thus, Ethoz argues that *Wallingford* supports its position that an accelerated primary obligation is not a penalty, citing Lord Watson in particular. His Lordship observed that the mortgage bond "might be read either as a contract for payment by eighty instalments, payment being accelerated … in the event of default, or it might be viewed as a contract for immediate payment, with a right and privilege to the mortgagor to postpone that

payment by making regular quarterly payments of instalments"; but whatever the case was, he was of the view that neither fell within the penalty doctrine: *Wallingford* at 710.

41 We disagree with Ethoz's reliance on *Wallingford*. To begin with, quite apart from the fact that it was decided *prior* to the seminal decision of *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79 ("*Dunlop*"), it is important to bear in mind that the main issue before the House of Lords in *Wallingford* was whether the order for conditional leave to defend was rightly granted by the first instance judge. It held that the order was wrongly made and that the correct order should, *inter alia*, be for an account to be taken and for credit to be given for the value of the security which had been realised. Thus, anything said by the House of Lords about the penalty doctrine was strictly *obiter* (Lord Selbourne was "express[ing] an opinion" at 696; and Lord Blackburn "speaking not judicially, but as giving [his] own opinion" at 705).

42 Most importantly, we have some difficulty with the principle in *Wallingford* which Ethoz relies on. Lord Selbourne and Lord Blackburn both characterised the advance and the premium as being present debts that would only be payable in the future, and thus the acceleration of their payment could not be considered a penalty: *Wallingford* at 696 and 705. Similarly, Ethoz argues that the Total Interest is a present debt to be paid in the future, and thus its acceleration cannot be considered a penalty.

43 This, as termed by Professor Roger Halson, is "the Acceleration Principle", which provides that a "contractual clause that 'merely' accelerates the liability to pay an already existing debt will be enforceable" because it will avoid the regulation of the penalty doctrine entirely: Roger Halson, *Liquidated*

Damages and Penalty Clauses (Oxford University Press, 2018) ("Halson") at para 5.52 read with para 5.47.

44 But Halson *also* argues that the Acceleration Principle is based upon the "false premise that requiring a sum or sums otherwise payable in the future to be paid at an earlier point in time is not an obligation to pay more." He reasons that "[a]ssuming positive inflation, a fixed sum today has a value and purchasing power greater than the same sum in the future": Halson at para 5.53.

45 In addition to Halson's argument above, there is also the concept of the "time value of money". This is well established in the context of pre-judgment interest, which seeks to compensate a successful claimant for the *loss of use of money* between the date on which the cause of action arose, and the date of judgment: *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [137].

46 Applying this concept, when the Total Interest is paid in 180 instalments over 15 years, Ethoz would only have use of the Total Interest as and when it is paid through each instalment payment which corresponds to the same period where Im8ex would enjoy the full benefits of the Facilities. On the other hand, if Im8ex is to pay the Total Interest in full immediately upon default, Ethoz would have *immediate* use of the money while Im8ex would lose the corresponding benefit. Viewed in this manner, it is clear that there is a substantial difference between paying a debt which includes the Total Interest in full immediately upon default as opposed to paying *that same debt* over 180 instalments.

47 Consequently, in our view, Ethoz's reliance on Clause 7(B) of the Facilities is equally misplaced. Whilst it informs us that Total Interest is deemed

earned and accrued as a debt and thus its payment is a primary obligation, it does not tell us *when and how* this payment is to be made. This is critical because, as we have explained above, there is a difference between its *payment in instalments*, and its *full and immediate payment*.

48 Indeed, it seems that this distinction was considered by the House of Lords in *Wallingford*, and it was found that the agreement was that the premium was to be paid *immediately* but it *could* be paid in instalments if such instalments were paid punctually. Lord Hatherley, in concluding that there was no penalty, drew an analogy to mortgages which provide for interest rates to be reduced in the event of punctual payment. He stated that this would not be a penalty, "but a relaxation of [the contract]" which is an "indulgence" given in exchange for punctual payment: *Wallingford* at 702. Similarly, Lord Selbourne remarked that the payment was "deferred": *Wallingford* at 696. Thus, it seems that in *Wallingford*, the primary obligation was for the premium to be paid *immediately*, with an additional stipulation that its payment could be deferred if the appellant made punctual instalment payments.

49 Thus, the key inquiry is: which of the two situations (*ie,* the payment of the Total Interest in instalments or the immediate and full payment of the Total Interest) is the primary obligation, and which one is a secondary obligation triggered upon breach of contract?

The distinction between primary and secondary obligations

50 In examining this inquiry, we first consider the distinction between primary and secondary obligations, and the approach in identifying and distinguishing them.

51 A primary obligation is defined as the "essential purpose" of the contract: Bryan Garner *et al*, *Black's Law Dictionary* (Thomson Reuters, 9th Ed, 2009) ("Black's") at 1180. As was stated by George Wei J in *iTronic* at [164], "[p]rimary obligations are the legal obligations imposed upon each party to the contract to procure whatever he has promised to do." On the other hand, a secondary obligation is one that is incidental to the primary obligation: Black's at 1180. In the context of the penalty doctrine, the specific category of secondary obligation that the law is concerned with is an obligation to pay money upon a breach of contract: *Denka* at [235].

52 But the distinction is not always clear and there is a concern that parties may be able to circumvent the "threshold issue" of the penalty doctrine (as we observed at [1]–[2] above) by drafting contracts in a way that masks a *secondary* obligation as a primary obligation. Such attempts however, can be revealed by exploring several factors: (a) "the overall context in which the bargain in the clause was struck"; (b) "any particular reasons for the inclusion of the clause"; and (c) "whether the clause was contemplated to form part of the parties' primary obligations to secure some independent commercial purpose, or was only to secure the affected party's compliance with his primary obligations": *Denka* at [242] citing *Leiman* at [101].

53 These factors are not exhaustive, and the broad principle is that a *substance over form* approach – in line with the contextual approach to contractual interpretation – should be adopted: *Denka* at [95]. Indeed, it is trite that the application of the penalty doctrine is "a question of construction to be decided upon the terms and inherent circumstances of each particular contract": *Dunlop* at 86–87. This being the case, it is important that the court analyse the *whole contract*, not just the impugned clauses in isolation.

Immediate and full payment is a secondary obligation

54 Applying this approach to the facts of this case, it is clear to us that the immediate and full payment of the Total Interest is a secondary obligation that is only triggered upon breach; it is *not* Im8ex's primary obligation under the Facilities.

55 Instead, Im8ex's primary obligation is to pay the Total Interest *in instalments*. This much is clear from Clause 5 of the Facilities, which is entitled "INSTALMENT PAYMENTS". Specifically, Clause 5(A)(1) provides that, "[i]n consideration" for the Facilities, Im8ex "covenants that it will repay to [Ethoz] the Advance and interest thereon" in 180 equal instalments. While there is no explicit reference to the Total Interest, it is clear that "interest thereon" refers to the Total Interest because Clause 5(A)(1) *also* states that the "respective amounts of principal and interest payable on each Instalment Date is set out in Schedule 3" and the aggregate of the monthly instalment payments in Schedule 3 *includes* the Total Interest. Thus, what Im8ex had "promised to do" was to pay the Total Interest in 180 equal instalments as set out in Schedule 3 (see [51] above).

56 This conclusion is reinforced by Clause 7(A), which provides that the interest rate on the Advance is a flat rate of 3.75% *per* annum. Importantly, this may be varied at the "sole and absolute discretion" of Ethoz. As noted above at [11], this flat rate of 3.75% *per* annum is how the Total Interest as defined in Schedule 3 was calculated. Hence, if the interest rate is varied, the Total Interest as defined in Schedule 3 would follow. This in turn explains why Clause 5(A)(1) provides that Schedule 3 may be "amended, varied, supplemented, modified or replaced by [Ethoz] from time to time." The fact that the interest rate may be varied – and along with it, the Total Interest – further

suggests that the full and immediate payment of the Total Interest (a *fixed* sum), could not constitute Im8ex's primary obligation under the Facilities.

57 In stark contrast, there is nothing in the Facilities that suggests that Im8ex had promised to make full and immediate payment of the Total Interest absent default. Instead, on the plain text of the Facilities, such payment would only occur in the event of default as provided for in Clause 14(B)(2) of the Facilities. This is a strong indicator that the immediate and full payment of the Total Interest is a secondary obligation that only arises upon breach.

58 Against this, Ethoz argues that the immediate and full payment of the Total Interest *also* occurs if there is prepayment of the Facilities. In support, they rely on Clause 6(B) which sets out the prepayment regime under the Facilities. We will examine this in further detail below (see [106] below), but for now, all that is relevant is that Clause 6(B) provides that, subject to certain conditions, Im8ex may prepay "the Advance and *interest computed thereon* in full" [emphasis added]. Conspicuously, Clause 6(B) does not refer to the Total Interest.

59 In the face of this, Ethoz argues that "interest computed thereon" under Clause 6(B) means the *same thing* as the Total Interest. This argument was raised below but was rejected by the Judge, and rightly so. To begin with, Ethoz's argument ignores the express wording of Clause 6(B). Given that the Total Interest is a term defined in Schedule 3 of the Facilities, it would be reasonable to assume that if the parties intended for Clause 6(B) to refer to the Total Interest, they would have used this specific phrase. And unlike Clause 5(A)(1), there is nothing that ties "interest computed thereon" to Schedule 3 and the Total Interest.

60 Taking the analysis further, we also reject Ethoz's position because it is devoid of commercial sense. On Ethoz's interpretation, if Im8ex made prepayment, they would have to pay not only the Advance, but also the Total Interest. But the entire purpose of prepayment is to allow a borrower to avoid the continuing obligation to pay interest over the remaining period of the Facilities. Such purpose would be rendered nugatory if it truly were the case that the Total Interest, which represents the aggregate of the interest payments to be made during the lifetime of the Facilities, remains payable *in full* notwithstanding prepayment.

61 Furthermore, Im8ex would also have to pay any "additional amounts as may be necessary to compensate [Ethoz] for any costs or losses" resulting from prepayment (as *per* Clause 6(B)). It would also have to pay: (a) a prepayment fee of 1.5% on the amount of the Advance that was prepaid if prepayment was made within 12 months from the date of drawdown (as *per* Clause 6(B)(4)); and (b) three months' worth of interest if proper notice was not given (as *per* Clause 6(B)(1)). These additional fees, on top of the payment of the Advance and the Total Interest, would put Im8ex in a worse position than if they had not made prepayment. This underscores the commercial incongruity of Ethoz's contention that "interest computed thereon" refers to the Total Interest.

62 Hence, on a proper contractual interpretation of Clause 6(B), the Total Interest is *not* payable on prepayment. Accordingly, aside from an event of default under Clause 14(B)(2), Ethoz has been unable to identify any other situation where the Total Interest is immediately payable in full. This being the case, it cannot be said that the immediate and full payment of the Total Interest is the "essential purpose" of the Facilities (see [51] above), *ie*, it is not Im8ex's primary obligation. Instead, as it is only payable upon default, it is in substance, a secondary obligation which is triggered upon a breach of contract.

63 This conclusion – that Im8ex's primary obligation is to pay the Total Interest in *instalments* and that immediate and full payment of Total Interest is a secondary obligation arising upon breach – is also supported by the commercial context: *Leiman* at [101(a)]. The Facilities are loan agreements and in *most* loan agreements, the primary obligation of the borrower is to repay the loan sum and pay interest *instalments* tied to the time that the borrower has use of the loan sum. It would make little sense for a borrower to agree to pay for the future use of the loan sum if it no longer has use of it. The latter situation is precisely the consequence should Ethoz's submission be accepted.

Genuine pre-estimates of loss?

64 Having concluded that the full and immediate payment of the Total Interest upon default is a secondary obligation, we now turn to consider whether such an obligation and the separate obligation to pay the Default Interest (which is undisputedly a secondary obligation triggered upon breach) are unenforceable penalties.

65 The prevailing test in Singapore for whether a provision is an unenforceable penalty is set out in the seminal case of *Dunlop: Denka* at [234]. The classic statement of principle is that "[t]he essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party" while "the essence of liquidated damages is a genuine covenanted pre-estimate of damage": *Dunlop* at 87.

66 The rationale behind this is that while parties are free to enter contracts and undertake primary obligations, they are *also* free to "change their mind and break their contractual undertakings if they so wish, albeit at a price": *Leiman* at [100]. Hence, any clause that essentially *forces* compliance with the primary

obligations of a contract – thus interfering with the parties' freedom to break their contractual undertakings – will be held to be an unenforceable penalty.

67 To determine whether a clause is a penalty, several tests were developed in *Dunlop* by Lord Dunedin. These tests are *not* the only considerations that a court will look at. Nor are they necessarily conclusive, although as stated by Lord Dunedin, they are at the very least "helpful" (at 87):

(a) First, the "Greatest Loss Test" posits that a provision will be a penalty "if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."

(b) Second, the "Greater Sum Test" provides that a provision will be a penalty if "the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid."

(c) Third, the "Single Lump Sum Test" states that a penalty will be presumed where "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."

Preliminary issue: the burden of proof

68 But before we apply the above principles, we deal with Ethoz's main argument on appeal: it contends that Im8ex did not discharge its burden in proving that the Total Interest and the Default Interest rates are penal in nature. In support, it cites the case of *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1996] 3 SLR(R) 244 at [9], which held

that "[w]here a party claims that a clause is a penalty clause, the burden is on that party to prove that claim." Relying on this, Ethoz argues that Im8ex had "to lead evidence to make good [its] allegation that the Total Interest and/or [the Default Interest] claimed was penal" and "[a]bsent any such evidence … there is simply no factual basis for [Im8ex] to contend that the Total Interest or [the Default Interest] claimed was extravagant or unconscionable in comparison to the greatest loss conceivable from [Im8ex's] breach."

69 Ethoz is correct in so far as the legal burden falls on Im8ex; it is uncontroversial that the party "who asserts must prove": *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [17]. Indeed, this was acknowledged by the Judge when he accepted that the burden is on the party asserting that the provision is a penalty to prove it. But he went on to note that "the evidence may be such as to shift the *evidential* burden".

70 One instance of the latter, the Judge noted, was the case of *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 ("*Hong Leong*"), where this court observed that an "extravagant increase" from the regular interest rates to the default interest rates meant that the default interest provision there was *prima facie* unenforceable: *Hong Leong* at [20] and [27]. In such circumstances, the Judge was of the view that the evidential burden would then shift to the party relying on the provision to justify it.

71 On appeal, Ethoz argues that the reasoning relied upon by the Judge "was not the express reasoning" in *Hong Leong*, and that the "fuller and more nuanced" approach in the more recent case of *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] 2 SLR 23 ("*Phoenixfin*") should be followed instead. There, this court stated at [66] that "[i]t is uncontroversial that the burden is on the party challenging contractual clauses to show why they are proscribed

penalty clauses" and thus the party should lead evidence to "make good the factual foundation" for such an argument.

72 This passage seemingly supports Ethoz's position that Im8ex should adduce evidence demonstrating that the Default Interest rates are penalties. But upon closer scrutiny, *Phoenixfin* does not offer any support to Ethoz.

73 *Phoenixfin* arose out of an application to set aside an arbitral award on several grounds. The underlying arbitration arose out of a consulting agreement. The first appellant allegedly breached the agreement, and the respondent claimed damages under certain provisions in the agreement. During the arbitration, the first appellant sought to amend its pleadings and introduce a defence premised on the penalty doctrine. Although the amendment was disallowed, the arbitral tribunal nonetheless dismissed the respondent's claim on the basis that the relevant provisions were unenforceable penalties. Before the High Court, it was found that there was a breach of natural justice, and that the tribunal had exceeded the scope of submission to arbitration. This court affirmed this decision, and in doing so, made only a passing reference to the penalty doctrine.

74 It thus cannot be said that *Phoenixfin* is authoritative on the application of the penalty doctrine. And even if it were, all it stands for is that the evidential burden is on the party asserting that a contractual provision is a penalty; this does not mean that the evidential burden cannot shift.

75 Indeed, it is well established that the evidential burden can shift once a party adduces sufficient evidence of the fact they seek to prove: *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60]. This statement of general principle, in our view, is exactly what the Judge was relying

on: when there is enough evidence before the court to show that a clause is a penalty, the burden would then shift to the other party to prove otherwise.

76 Before concluding, we pause to observe that Ethoz's argument seems to suggest that simply because the evidential burden is on Im8ex to show that the clauses in question are unenforceable penalties, Im8ex *must* adduce evidence under any circumstance and if it does not, it must necessarily fail. We reject this submission. In our view, if it is plain and obvious that there is already sufficient evidence that the provisions in question are penalties, it would make no sense that Im8ex would *still* have to adduce *more* evidence.

77 The real question is *not* whether Im8ex has adduced evidence; it is whether there is sufficient evidence before the court to show that the *immediate* payment of the Total Interest and the Default Interest rates are unenforceable penalties. If there is not, then yes, Im8ex *would* have to lead evidence to prove their assertion. But in our view, there was no need for Im8ex to have done so as it is clear on the face of the Facilities that the immediate and full payment of the Total Interest and the Default Interest are unenforceable penalties.

Full and immediate payment of Total Interest is a penalty

78 Ethoz argues that the Total Interest is the "performance interest" that it would have expected to receive had the Facilities been fully performed, and that there is nothing to suggest that it was *not* a genuine pre-estimate of its loss.

79 This argument overlooks the material inquiry. The question is not whether a provision is not a genuine pre-estimate of loss; the question is whether that provision stipulates a payment of money *in terrorem* of a defaulting party: *Dunlop* at 86. And on the face of the Facilities, the immediate and full payment

of the Total Interest is clearly a payment of money that operates *in terrorem* of Im8ex, forcing it to comply with its primary obligation under the Facilities.

80 To begin with, the Total Interest is a *single lump sum* made payable on the occurrence of one or more events as defined in Clause 14(A): see the Single Lump Sum Test as explained at [67(c)] above. In total, there are 25 different "events of default" provided for in the Facilities, some of which are serious such as insolvency (see Clauses 14(A)(5) and 14(A)(8)); and some of which are or may, depending on the facts, be relatively "trifling" such as the delivery of accounts "qualified in a manner or to an extent unacceptable to [Ethoz]" (see Clause 14(A)(15)). Relevant here is non-payment as provided for in Clause 14(A)(1), which states that failure to pay "any sum payable under [the Facilities] when due" will amount to an event of default. This would mean, for example, that the failure to pay even *one* instalment payment would entitle Ethoz to demand payment of not only the Advance, but also, the remainder of the Total Interest: a single and very substantial lump sum.

81 The above situation also satisfies the Greater Sum Test: see [67(b)] above. Taking a situation where Im8ex defaults on its tenth payment under one of the Facilities, it would have failed to pay a sum of between $8,680.56 and $18,663.19 (such figures representing the lowest and highest monthly instalment payments under the Facilities). Pursuant to Clause 14(B)(2), this would entitle Ethoz to claim not only the Advance, but also the Total Interest. Putting aside the Advance, the Total Interest that would be owed would be between $507,805 and $1,091,778 (such sums representing the remainder of the Total Interest from the lowest to the highest outstanding amount under the Facilities). These sums clearly dwarf the defaulted payments.

82 The above, in our view, would be enough to conclude that the immediate and full payment of the Total Interest is an unenforceable penalty. But before concluding, we deal with the decision in *T-Pacific*, where another High Court judge was faced with a loan agreement from Ethoz which was similar to the Facilities in the present case. In particular, the agreement there also defined the aggregate amount of interest payable as "Total Interest". There, Clause 7(B) similarly deemed the Total Interest as being "deemed to have accrued in full upon the drawdown of [the loan sum]." Like the present case, the defendant had defaulted and Ethoz sought full and immediate payment of the Total Interest. The judge found that the full and immediate payment of the Total Interest upon default was not a penalty because it was a primary obligation that was merely accelerated. In other words, she accepted the argument made by Ethoz which we have rejected.

83 But what is of particular interest to us is the observation by the judge in *T-Pacific* that the purpose behind Clause 7(B) deeming the Total Interest "accrued in full" was to "fix the *minimum interest* that [Ethoz] stands to earn" [emphasis added].

84 The language of "minimum interest" recalls a line of English cases involving vehicle hire-purchase agreements. For example, in *Financings Ltd v Baldock* [1963] 2 QB 104, the defendant defaulted on paying rental instalments for the vehicle. The plaintiff sought to invoke a clause which stipulated that if the defendant defaulted on payment, he would have to pay a sum which, with the sums he had already paid, would equal two-thirds of the total rental that would have been due under the agreement.

85 Lord Denning MR categorised this clause as a "minimum payment clause" and found that it was an unenforceable penalty. But his reasoning did

not strictly apply the penalty doctrine as laid out in *Dunlop*. Instead, he justified his decision on the basis that a lender has no right to future rentals after the agreement has been terminated and where the vehicle has been recalled: at 110 to 111. While we cannot disagree with the general sense of justice encapsulated by Lord Denning's statement, his decision on "minimum payment clauses" can nevertheless be reconciled with reference to the established principles in *Dunlop*.

86 The "essence" of a penalty is that it is a contractual stipulation that acts *in terrorem* over the offending party such that the threat of the penalty forces compliance with that party's primary obligations under the contract. The latter part of that is key: a penalty forces compliance with the contract breaker's *primary obligation*. As we noted above at [65], this is objectionable because parties should be free to breach their contracts as long as they pay the price.

87 But what if the price stipulated in the contract is, in essence, the full performance of the primary obligation that the defaulting party breached in the first place? This would indirectly force a party into compliance with their primary obligation. Thus, by fixing the "minimum payment" such that it amounts to the entire or substantial performance of the parties' primary obligation, the relevant clause would undermine the purpose behind the penalty doctrine. Hence, in our view, it must be considered a penalty.

88 Turning back to the case before us, by requiring the full and immediate payment of the Total Interest, Clauses 5(A) and 14(B)(2) were essentially forcing Im8ex to comply with its primary obligation under the Facilities (the full payment of Total Interest in *instalments*). This is yet another reason for concluding that the full and immediate payment of the Total Interest is a penalty.

The Default Interest rate is a penalty

89 We now come to the Default Interest rate of 0.0650% *per* day under Clause 15 which is "calculated daily with monthly rests".

90 Im8ex contended before the Judge that the Default Interest rate was an unenforceable penalty. The Judge agreed. He first ascertained the "effective" rates for the Default Interest rate and the contractual interest rate under Clause 7(A) and concluded that: (a) the Default Interest rate amounted to an effective interest rate of 26.08% *per* annum; while (b) the contractual interest rate amounted to an effective rate of 6.444% *per* annum. Thus, on the Judge's calculations, there was an increase of almost 20% between the regular contractual interest rate and the Default Interest rate, which is tantamount to a three-fold increase of the effective rate of 6.444% *per* annum. This increase, in the Judge's view, made it clear that the Default Interest rate was a penalty.

91 Neither party has contested the Judge's calculations. This being the case, we shall proceed on the basis that the figures arrived at are correct. Thus, Clause 15 provides that Im8ex would have to "pay interest at an increased rate upon [its] failure to pay any instalment [by] the stipulated time". In other words, "it [is] a provision to pay a larger sum of money upon the failure to pay the stipulated sum within a stipulated time". In the case of *Hong Leong,* it was observed that this would "traditionally [be] the clearest and the classic example of a penalty", citing Lord Dunedin's second test in *Dunlop*: the Greater Sum Test (see [67(b)] above). On this basis, this court in *Hong Leong* concluded that such a provision "would appear to possess all the attributes of a penalty" and would be "*prima facie* unenforceable": at [19]–[20].

92 But this court in *Hong Leong* went further and also drew the distinction between a "retrospective increase in interest" and "a term imposing an increased rate of interest from the date of default". It was noted that cases had held that the former situation was a penalty, while the latter generally was not. But after surveying foreign case law, it concluded that the latter situation *could* be a penalty, if the increase from the regular interest rate was "exceptionally large": *Hong Leong* at [20]–[26].

93 Applying this to the case before it, this court in *Hong Leong* concluded that the increase between the regular interest rate and the default interest rate there (an increase of between 11.25% and 12.5%) was "eminently an extravagant increase … and was not referable to the true amount of loss suffered by [the lender] following the breach by [the borrower]." It thus concluded that it was an unenforceable penalty: *Hong Leong* at [27].

94 Thus, the express reasoning in *Hong Leong* is that where there is an "extravagant increase" between the regular interest rate in a loan and the default interest rate, such increase not being referable to the greatest loss suffered by the lender, the default interest will be held to be a penalty.

95 As to this, Ethoz argues that there is no factual basis for concluding that the Default Interest rate was extravagant or unconscionable in comparison to the greatest conceivable loss. In support, Ethoz relies on *Asidokona* (see [3] above). There, the default interest rate was 6% *per* month, and it was submitted by the defaulting party that such a rate was "clearly extortionate" and an unenforceable penalty. This argument was dismissed by the judge, who noted that this was a mere assertion: at [134]. Thus, it seems that Ethoz's argument is that the same reasoning should apply here as Im8ex has not adduced any evidence either.

96 But Ethoz's reliance on *Asidokona* ignores an important part of the judge's reasoning. In concluding that there was no evidence to show that the default interest rate of 6% *per* month was extravagant and unconscionable, the judge *also* noted that it was *only 1% more* than the regular interest rate of 5% *per* month: *Asidokona* at [135]. Hence, it is apparent that an important part of the judge's reasoning was that there was no significant difference between the default interest rate and the regular contractual interest rate.

97 But the same cannot be said here. On its face, the increase between the Default Interest rate and the regular interest rate is clearly an extravagant increase; as the Judge calculated, once both rates are compared on an effective basis, the increase is about 20% or of more than 300% the base rate in relative terms. Thus, it is not clear to us what other evidence Ethoz considers Im8ex should put forward – all the cards are on the table, so to speak, and they show that the increase in the Default Interest rate *is* indeed extravagant. We thus agree with the Judge that there is enough evidence to show that Clause 15 is *prima facie* an unenforceable penalty.

98 It thus falls on Ethoz to show that the Default Interest rate *is* a genuine pre-estimate of its loss. In doing so, it first cites a single paragraph in an affidavit that one of its representatives had filed in the matter:

> [Im8ex's] assertion that Clause 15 of [the Facilities] 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 [Ethoz's] genuine estimate of [its] loss, taking into account [its] business considerations (including the loss of the use of funds).

99 Clearly, this is not a sufficient explanation. Having stated that the Default Interest rate is a genuine estimate of loss stemming from, *inter alia*, the loss of the use of funds, Ethoz could have gone on to show calculations

substantiating this assertion. Indeed, as it is Ethoz's own "business considerations" that are cited, such figures would be especially within its knowledge, and thus they would bear the burden of adducing evidence on the matter: s 108 of the Evidence Act 1893 (2020 Rev Ed). That it did not, suggests to us that the above paragraph is simply an assertion devoid of any evidential basis.

100 Ethoz also raises the Moneylenders Act and the accompanying Moneylenders Rules 2009 (S 72/2009) ("Moneylenders Rules"), which when read together, provides that a licensed moneylender must not enter into a contract for a loan under which the late interest charged exceeds 4% *per* month. On this basis, it argues that a default interest rate of about 0.0650% *per* day (which translates to about 1.95% *per* month) is not extravagant or unconscionable.

101 We reject this argument. To begin with, it misses the entire point of the penalty doctrine. A clause will be held to be an unenforceable penalty where it stipulates a payment of money that is *in terrorem* of the defaulting party – *that* is the relevant inquiry, not whether the payment of money is in line with statutory provisions.

102 Further, even if the statutory provisions relied upon by Ethoz are relevant, they would not assist its case. The 4% prescribed by the Moneylenders Act and Moneylenders Rules is the *maximum* interest rate, which if exceeded, may result in *criminal liability*. Criminal liability, by virtue of its severe consequences, will necessarily set higher standards than doctrines which only apply in the civil context such as the penalty doctrine. Thus, the mere fact that the Default Interest rates have not reached the *criminal threshold*, does not mean that they cannot be unenforceable penalties as we have found them to be.

The Redemption Issue

103 Having affirmed the Judge's decision that both the full and immediate payment of the Total Interest and the Default Interest are unenforceable penalties, we now turn to the Redemption Issue.

104 Below, the Judge allowed Im8ex to redeem the Facilities by making prepayment under Clause 6(B). He ordered that Im8ex pay a sum of S$4,041,987.21 by 31 October 2021, and if it did not, it would pay additional interest to Ethoz at a rate of 3.75% *per* annum from that date until the date of redemption. On appeal, Ethoz takes issue with both the basis on which the Judge allowed Im8ex to redeem the facilities, as well as the rate of interest that he ordered Im8ex to pay.

Basis for redemption

105 We deal first with whether the Judge's basis for redemption was the correct one. In our view, it was not. Prepayment could not be properly invoked as Im8ex was in default. Further, it is clear from the evidence that Im8ex never purported to invoke the contractual right to prepay. Instead, the proper basis for redemption is simply for Im8ex to invoke its equitable right of redemption.

Prepayment under Clause 6(B)

106 Below, the Judge allowed Im8ex to make prepayment under Clause 6(B) of the Facilities. This provides when Im8ex can make prepayment, and the terms of such prepayment:

> (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;
> >
> > (2) timeline notice of prepayment once having been received by the Lender the said notice of prepayment shall be irrevocable and binding on the Borrower;
> >
> > (3) all prepayment made shall not be re-drawn, reborrowed or exchanged;
> >
> > (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]

That clause was substantially the same across all the Facilities, save that the period in Clause 6(B) after which Im8ex could prepay was three months and not six months for the last two Facilities (loan sums of $1,000,000 and $2,150,000).

107 Clause 6(B)(1) specifically provides that Im8ex is required to give Ethoz not less than three months prior written notice of the date of the proposed prepayment (failing which to pay the equivalent fee) in order to invoke the clause and make prepayment accordingly. The Judge found that three months' notice had been given, referring to the correspondence between the respective parties' lawyers. In Im8ex's lawyers' letter dated 7 December 2020, it was communicated to Ethoz that Im8ex had been sourcing for refinancing but that the amount of interest claimed made it difficult for other financial institutions

to step in. This, the Judge found, sufficed in substance to amount to prior written notice.

108 In our view, this factual finding was incorrect. If Im8ex had intended to invoke the right to prepay under Clause 6(B) then it would have to strictly follow the stipulation in that clause (see *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 at 480: "the conditions of the contract must be strictly performed"). The clause required "written notice of the date of the proposed prepayment" which was simply never given to Ethoz. At most, Im8ex had merely indicated that it was seeking financing from alternative sources; but it never came forward with *any* proposal on the prepayment date. As such, no written notice was ever provided by Ethoz within the meaning of Clause 6(B).

109 Indeed, in the oral submissions before the court, Im8ex's counsel, Mr Ranvir Kumar Singh ("Mr Singh"), candidly acknowledged that Im8ex did not specifically give the requisite notice under Clause 6(B). While he then argued that Im8ex was unable to give specific notice because the amount to be prepaid included the exorbitant sums constituting the Total Interest – and thus other financial institutions could not lend that amount – that is irrelevant. The language of Clause 6(B) does not require Im8ex to come up with a proposed mode of repayment. It merely requires "written notice of the *date of the proposed prepayment*" [emphasis added]. When confronted with this reasoning, Mr Singh eventually conceded that the requisite notice was not provided and Im8ex never actually came forward with any proposed date of prepayment.

110 That Mr Singh conceded on this point is not surprising given that Im8ex did not place reliance on Clause 6(B) in its initial arguments before the Judge. The issue was only raised in further submissions when the Judge asked whether Im8ex could make prepayment following an event of default.

111 In any event, it is clear that there cannot be any prepayment made after an event of default. Clause 6(B) provides that Im8ex's right to prepay the Advance and the interest computed thereon is "subject to … the provision of Clause 14". The right to make prepayment pursuant to Clause 6(B) is displaced or lost as soon as Ethoz demands for full and immediate payment pursuant to Clause 14(B) when an Event of Default has occurred. It would make no sense to speak of "prepayment" of a debt which is already due and payable in full upon default. This reading of Clause 6(B) is supported by the fact that it does not make any express reference to the payment of default interest. This demonstrates that it was never intended to operate in a situation where the borrower was already in default.

Relief against forfeiture

112 We now move on to consider the Judge's *original* basis for justifying the redemption of the Facilities, which in our view, was also incorrect.

113 The Judge initially justified his decision by way of relief against forfeiture in his oral grounds. But he later changed his mind when he delivered his full written grounds of decision on 21 January 2022, explaining that there was "no need to invoke relief against forfeiture". Instead, he allowed Ethoz to redeem the Facilities and the Properties by paying the Advance and loan interest, in line with the prepayment provision pursuant to Clause 6 of the Facilities, albeit "shorn of the unenforceable penalties of accelerated Total Interest and default interest".

114 With respect, it was inappropriate for the Judge to have done this. In any event, our view is that the doctrine of relief against forfeiture does not apply in the mortgagor-mortgagee context.

115 We note that in coming to his view that relief against forfeiture could be invoked, the Judge had referred to *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim Investments*") at [39]–[62]. However, that case arose in a different factual context. There, a party to a contract for the sale of land failed to make certain payments on time, resulting in completion not taking place. Relief was then sought against the forfeiture of payments made for the purchase of land, and for an order of specific performance. This court stated that "in appropriate cases, in a *contract for the sale of land* relief against forfeiture would be granted, notwithstanding a breach by the party seeking such relief of an obligation of which time was made of the essence" [emphasis added]: at [60]. It appears from the language of this court's statement that that proposition was limited to the context of payments made under contracts for the *sale of land*.

116 Rather than *Pacific Rim Investments*, reference should instead be made to cases which are factually similar to the present situation concerning a mortgagor-mortgagee relationship. One such case, as raised by Ethoz, is *Ng Hock Kon v Sembawang Capital Pte Ltd* [2010] 1 SLR 307 ("*Sembawang Capital (CA)*").

117 There, a mortgagor had mortgaged his home as security for his liabilities and had subsequently defaulted on paying his instalments. The mortgagee then applied to the court for orders that, *inter alia*, the mortgagor deliver vacant possession of the mortgaged property and for liberty to sell the mortgaged property. In the High Court, Kan Ting Chiu J was of the view that the scope of equitable relief against forfeiture was not closed and could extend beyond the context of the purchase of land: *Sembawang Capital Pte Ltd v Ng Hock Kon* [2009] 1 SLR(R) 833 ("*Sembawang Capital (HC)*") at [43].

118 On appeal, the mortgagee argued that relief against forfeiture was not applicable in the mortgagor-mortgagee context "because the equity of redemption, which was the embodiment of such relief, was already available to the [mortgagor]": *Sembawang Capital (CA)* at [34(a)]. This court *agreed* with the mortgagee's argument, observing that "the notion of relief from forfeiture is [irrelevant] when the issue is whether the mortgagee is contractually entitled to enforce its rights" because "the [mortgagor] can always pay up the amount due before the Property is sold and thereby avert forfeiture": *Sembawang Capital (CA)* at [35].

119 To put it another way, there is no need to invoke relief against forfeiture as the mortgagor retains a beneficial interest in the property under the *equity of redemption* which entitles the mortgagor the right to obtain a retransfer of the land when the debt is fully repaid: Tang Hang Wu and Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Law Land* (LexisNexis, 4th Ed, 2019) ("*Tan Sook Yee*") at p 576. The equity of redemption (other than by operation of common law) is also referenced under s 77(3) of the Land Titles Act 1993 (2020 Rev Ed) ("Land Titles Act") which provides as such: "For the purpose of enforcing the right to obtain a discharge conferred by this section, the mortgagor is deemed to have an equity of redemption." This must be contrasted to other situations such as contracts for the purchase of land (as mentioned by Kan J in *Sembawang Capital (HC)* at [43]) where there is no equivalent concept of the equity of redemption.

The equity of redemption

120 In view of the above, we find that the Judge below had erred in originally basing his decision for Im8ex to redeem the Facilities in accordance with the

doctrine of relief against forfeiture. His later justification – prepayment under Clause 6(B) of the Facilities – was also wrong for the reasons above.

121 Instead, the appropriate basis is simply to permit Im8ex to exercise its equity of redemption. If the mortgagor does not redeem by the contractually stipulated time, he has the equitable right to redeem which will be "his until he exercises it, or until the mortgagee exercises his right to foreclose": *Tan Sook Yee* at p 578. On redemption, the mortgagor is entitled to have the mortgaged property reconveyed to him.

122 Further, the court has the jurisdiction to afford the defaulting mortgagor a chance of paying off the mortgage by granting a short period of relief: *Hong Leong* at [12]. Under s 22 of the Conveyancing and Law of Property Act 1886 (2020 Rev Ed), where a mortgagor has missed the contractually stipulated date for discharging the mortgage, he may nevertheless revive the power of discharge by giving three months' written notice of his intention to discharge the mortgage. Taking all the circumstances into consideration, granting a period of three months (from the date of this judgment) to allow the defaulting mortgagor-Im8ex to redeem the Facilities appears to be reasonable. Im8ex is to pay the balance of the Advance and loan interest on the outstanding amount shorn of the unenforceable penalties of accelerated Total Interest and Default Interest.

123 If Im8ex fails to redeem the mortgages within the period of three months from the delivery of this judgment, then the mortgagee-Ethoz is entitled to pursue the available remedies including (but not limited to) exercising the power of foreclosure and sale of the property under s 76 of the Land Titles Act. The effect of the mortgagee foreclosing is that the mortgagor's equity of redemption is then extinguished, and the entire ownership of the property is then vested in

the mortgagee: *Tan Sook Yee* at p 603; *State Bank of India Singapore v Rainforest Trading Ltd and another* [2011] 4 SLR 699 at [100], citing *Elders Forestry Ltd v Bosi Security Services Ltd* [2010] SASC 223 at [147].

Amount for redemption

124 In this connection, as regards the amount that Im8ex is required to repay Ethoz, Im8ex wrote to the court by letter dated 21 October 2021 where it calculated the outstanding sum to be paid and interest based on a flat interest rate of 3.75% *per* annum as at the redemption date of 31 October 2021. This totalled $4,041,987.21, which the Judge below accepted as the correct amount to be paid. Im8ex was thus ordered to pay this amount of $4,041,987.21 (see above at [20(d)]). By letter dated 21 October 2021, Ethoz submitted that the outstanding sum with interest to be repaid was $4,621,813.88 instead.

125 The difference in the two competing sums stemmed from two reasons: (a) as regards the appropriate basis to calculate the loan interest payable, Ethoz used Schedule 3 to determine the amount upon redemption; and (b) Ethoz added the equivalent of three months interest for Im8ex's failure to give three months' prior notice in making prepayment in accordance with Clause 6(B) of the Facilities. The latter issue (b) is now a non-starter. The three months interest under Clause 6(B) contemplates a situation where the borrower intends to prepay immediately without providing the requisite notice. Thus, the three months interest is simply a measure of the interest which the lender would have earned had such notice been given. Clearly, it has no application at all in this case since it is common ground that no notice of prepayment under Clause 6(B) was ever given.

126 Turning then to the prior issue (a) of the appropriate basis for calculating the loan interest payable upon redemption, in our view, the interest to be paid should follow Clause 5A(1) read with Schedule 3 of the Facilities. We have found that the obligation to make monthly instalment repayments as *per* Clause 5A(1) read with Schedule 3 of the Facilities is a primary obligation (see above at [55]), and thus the monthly repayments calculated under Schedule 3 is the appropriate basis given that this was what parties had contractually agreed to and Im8ex had been paying the previous instalments based on Schedule 3 from inception.

127 In the decision below, the Judge noted that the "Monthly Interest" component in Schedule 3 was "front-loaded" such that Im8ex would have to pay more in interest within each monthly instalment, than if interest at the contractual rate of 3.75% flat *per* annum were computed on the Advance for the entire period upon drawdown. This reference to "front-loaded" interest simply meant that the amortisation of the loan was such that the interest component in each monthly instalment (consisting of the interest and principal components) would be larger initially and would gradually decrease over the 180 payments. In other words, the interest component paid each month was unequal and more would have to be paid earlier on. Correspondingly, the principal component in each monthly repayment would increase to arrive at the *same* monthly instalment. To illustrate this, we reproduce part of the table of instalment payments in Schedule 3 for the Bayshore Property mortgage:

SCHEDULE 3

TABLE OF INSTALMENT PAYMENTS

Total Principal : $1,425,000.00
Total Interest : $801,562.50

Instal No.	Reducing Principal	Monthly Principal	Monthly Interest	Monthly Instalment
1	$1,421,487.21	$3,512.79	$8,857.00	$12,369.79
2	$1,417,925.42	$3,561.79	$8,808.00	$12,369.79
3	$1,414,314.63	$3,610.79	$8,759.00	$12,369.79
4	$1,410,653.84	$3,660.79	$8,709.00	$12,369.79
5	$1,406,944.05	$3,709.79	$8,660.00	$12,369.79
6	$1,403,185.26	$3,758.79	$8,611.00	$12,369.79
7	$1,399,377.47	$3,807.79	$8,562.00	$12,369.79
8	$1,395,520.68	$3,856.79	$8,513.00	$12,369.79
9	$1,391,613.89	$3,906.79	$8,463.00	$12,369.79
10	$1,387,658.10	$3,955.79	$8,414.00	$12,369.79
11	$1,383,653.31	$4,004.79	$8,365.00	$12,369.79
12	$1,379,599.52	$4,053.79	$8,316.00	$12,369.79
13	$1,375,496.73	$4,102.79	$8,267.00	$12,369.79
14	$1,371,343.94	$4,152.79	$8,217.00	$12,369.79
15	$1,367,142.15	$4,201.79	$8,168.00	$12,369.79
16	$1,362,891.36	$4,250.79	$8,119.00	$12,369.79
17	$1,358,591.57	$4,299.79	$8,070.00	$12,369.79
18	$1,354,242.78	$4,348.79	$8,021.00	$12,369.79
19	$1,349,843.99	$4,398.79	$7,971.00	$12,369.79
20	$1,345,396.20	$4,447.79	$7,922.00	$12,369.79
21	$1,340,899.41	$4,496.79	$7,873.00	$12,369.79
22	$1,336,353.62	$4,545.79	$7,824.00	$12,369.79
23	$1,331,758.83	$4,594.79	$7,775.00	$12,369.79
24	$1,327,114.04	$4,644.79	$7,725.00	$12,369.79
25	$1,322,420.25	$4,693.79	$7,676.00	$12,369.79

The start date of the loan was 22 November 2019 and if repayment was to be made on 31 October 2021 (the redemption date stipulated by the Judge in his oral judgment), there would be 24 months (inclusive) of instalment payments to be paid and this brings us to the sum of $198,989.00 if we add up the figures in the "Monthly Interest" column up to instalment number 24. This is the outstanding instalment to be paid under Schedule 3. In contrast, if Schedule 3 was not used, and we utilise a flat rate of 3.75% *per* annum but amortised the interest payments equally, we would arrive at the figure of $103,946.92 instead ($1,425,000 x 3.75% x 710/365 days). In essence, if the interest is "front-loaded" under Schedule 3 then more interest needs to be repaid by Im8ex to redeem the Facilities earlier.

128 The Judge below decided that Ethoz was not entitled to insist on this "front-loaded" interest payment in Schedule 3 as a result of Ethoz's "misrepresentation that the Facilities were better than the Prior Facilities". Further, the Judge also did not refer to Schedule 3 of the Facilities as he allowed prepayment under Clause 6(B) – which does not refer to Schedule 3 unlike Clause 5(A)(1). However, as we have now determined that redemption cannot be made in accordance with Clause 6(B) (see above at [111]); and, that the misrepresentation point was never properly pleaded and placed into issue (see above at [30]), the Judge's reasoning no longer holds water and falls away. This would mean that, in the absence of any other reasons, this court should respect the parties' agreement to have "front-loaded" interest payments according to Schedule 3 and the judgment debt should be calculated on that basis. The mere fact that the interest component was "front-loaded" does not make it any less a primary obligation. As canvassed above (at [3]), it is unobjectionable for parties to draft appropriate clauses to reflect their agreement to take on primary obligations, however onerous it might be perceived with hindsight. Given that the parties willingly agreed to the interest payment table in Schedule 3 of the Facilities, the court should not intervene and re-write their agreement. Thus, the proper approach to computing the interest payable would be with reference to the interest amounts which would have fallen due under Schedule 3.

129 Referring to Schedule 3 of the Facilities, the total outstanding amount to be repaid upon redemption would come up to $4,520,210.88 (this would effectively be the amount of $4,621,813.88 submitted by Ethoz based on Schedule 3, but excluding the three months interest in lieu of notice payable under Clause 6(B) totalling $101,603). This is what Im8ex has to pay to redeem the Facilities. As mentioned above at [122], granting a short period of three months of reprieve from this judgment to allow Im8ex to redeem the Facilities

appears to be reasonable. Upon the expiration of the three months, Ethoz is at liberty to foreclose. In any event, the parties have liberty to apply should they consider that this amount should be revised in any way with reference to our above finding.

130 The amount to be paid under Clause 5(A)(1) read with Schedule 3 of the Facilities is thus found to be $4,520,210.88. Thereafter, interest continues to be payable by Im8ex on the judgment debt of $4,520,210.88 at the statutory rate of 5.33% until full payment is made. This would be a departure from the holding below that Im8ex need not pay interest beyond 19 January 2022.

Conclusion

131 For the above reasons, we allow the appeal in part, but upholding the main part of the Judge's findings that the payment of the Total Interest upon default and the Default Interest, were unenforceable penalties.

132 As for costs, there are three separate matters to deal with:

(a) HC/SUM 5245/2021 was Ethoz's application for a stay of execution of the Judge's orders below. It was ordered that the cost of this application be costs in the appeal. As Ethoz has failed in the appeal, we award costs fixed at $1,500 as submitted by Im8ex.

(b) CA/OA 4/2022 was Im8ex's application to transfer this appeal from the Appellate Division of the High Court. As costs were also ordered to be in the cause, we award costs fixed at $7,000 all in to Im8ex.

(c) Finally, for the present appeal, both parties have pegged their costs at $70,000 which is within the range of Appendix G to the Supreme Court Practice Directions 2013. Given that Ethoz did succeed on some

of the issues albeit not the principal (penalty) issue, we award costs of $50,000 to Im8ex, all in.

133 The usual consequential orders apply.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of the Appeal

Wong Soon Peng Adrian, Ang Leong Hao and Bryce Yeo (Rajah & Tann Singapore LLP) for the appellant;
Ranvir Kumar Singh (UniLegal LLC) for the first and second respondents;
The third respondent absent and unrepresented.