IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 89

Civil Appeal No 11 of 2020

Between

Lim Zhipeng

… *Appellant*

And

Seow Suat Thin

… *Respondent*

Summons No 56 of 2020

Between

Lim Zhipeng

… *Applicant*

And

Seow Suat Thin

… *Respondent*

In the matter of Suit No 336 of 2018

Between

Lim Zhipeng

… *Plaintiff*

And

Seow Suat Thin

… *Defendant*

JUDGMENT

[Civil Procedure] — [Pleadings] — [Whether adequately pleaded]
[Contract] — [Formalities] — [Deed] — [Sealing requirement]
[Contract] — [Consideration] — [Sufficiency of consideration]

Lim Zhipeng
v
Seow Suat Thin and another matter

[2020] SGCA 89

Court of Appeal — Civil Appeal No 11 of 2020 and Summons No 56 of 2020
Judith Prakash JA, Belinda Ang Saw Ean J and Woo Bih Li J
16 July 2020

8 September 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 This appeal involves a creditor, a debtor and a guarantor. The creditor is Lim Zhipeng ("the Appellant"). He made a substantial loan to the debtor, Cheong Wee Ker Derek ("the Debtor") who subsequently brought in his mother, Seow Suat Thin ("the Respondent"), to act as guarantor for his indebtedness.

2 As a result of his financial difficulties, the Debtor was made a bankrupt by another creditor. While the Debtor was trying to make arrangements to set aside the bankruptcy order, the Appellant kept pressing him for the repayment of the debt. The Respondent agreed to assist her son stave off the Appellant. A document entitled "Deed of Guarantee" ("the Guarantee") was subsequently signed by the Appellant and the Respondent. However, after making a part-payment towards the debt, the Respondent defaulted on the Guarantee.

3 Some months later, the Appellant sued the Respondent, seeking to enforce the Guarantee. He also filed his proof of claim against the Debtor, who remained a bankrupt. The Appellant's action was dismissed by the High Court, primarily on the ground of lack of consideration. This case presents an opportunity for this court to assess the requirements of a deed, in particular the precise ambit of the sealing requirement. We also consider whether sufficient consideration can be furnished by the forbearance to *file a proof of debt*, as opposed to the ordinary forbearance to *sue*.

Facts

Events leading up to the Guarantee

4 The Appellant and the Debtor have been acquainted for more than 20 years, as they had attended the same secondary school, and the Debtor was best friends with the Appellant's younger brother. In or around December 2016, the Appellant lent $565,000 to the Debtor. The Debtor agreed to return the Appellant $265,000 on 5 January 2017 and $330,000 on 28 March 2017.

5 The Debtor ran into financial difficulties, and did not make the scheduled repayments. In April 2017, the Appellant became worried that the Debtor would not be able to repay the debt and from then on frequently pressed the Debtor for repayment.

6 In May 2017, an institutional creditor took out bankruptcy proceedings against the Debtor on the basis of another debt, as a result of which he was made a bankrupt in July 2017. Thereafter, the Debtor "[tried] hard to annul the bankruptcy order". He was advised by his trustee in bankruptcy that if all his creditors agreed to an annulment, the bankruptcy order could be annulled.

7 Sometime between July and September 2017, the Debtor proposed to the Appellant that his mother, the Respondent, act as guarantor for the sums owed. The Debtor explained that the Respondent was in the course of selling her properties, and that she could help repay his debt from the sale proceeds of the properties.

8 The Debtor then told the Respondent that he was in financial trouble, and asked her to guarantee his debt to the Appellant. He explained that he would continue to repay the loan, and that she would only be required to pay the loan on his behalf if he defaulted on his payment. The Respondent agreed to give the guarantee.

9 Thereafter, the Appellant and the Debtor met the Respondent. At the meeting, the Appellant informed the Respondent that he had given a large loan to the Debtor and asked if it was true that she was selling her properties. The Respondent confirmed that she was doing so, and that she was agreeable to guaranteeing the loan so that if the Debtor did not repay it, she would do so from the sale proceeds of her properties.

The signing of the Guarantee

10 In mid-September 2017, the Appellant gave the Debtor a document entitled "Deed of Guarantee" to be signed by the Respondent. He asked the Debtor to arrange for the Respondent to execute the Guarantee before a witness.

11 Under the Guarantee, it was acknowledged that the sum of $490,000 remained outstanding to the Appellant, as the "Creditor", and that the Respondent would act as the "Guarantor" for the Debtor. The salient terms of the Guarantee provided that:

> 2. The Debtor and Guarantor [*ie*, the Respondent] have proposed to pay the Debt [of $490,000] to the Creditor [*ie*, the Appellant] by way of
>
> a. $150,000 from the sale proceeds of 5 Kampong Eunos … [("the Kampong Eunos property")] on or before 11 November 2017;
>
> b. $150,000 from the sale proceeds of 188 Race Course Road [("the Race Course Road property")] … on or before 1st April 2018 or upon settlement, whichever is earlier.
>
> c. $5,000 on or before the 15th day of each month starting from 15 February 2018 until the Debt is fully paid off ("the Repayment Scheme")
>
> 3. The Guarantor has agreed to guarantee the payment of the Debt by the Debtor on the terms set out below.
>
> …
>
> The Guarantor hereby guarantees the following:
>
> a. that the Debtor shall make payment on the terms of the Repayment Scheme as set out in paragraph 2 above; and
>
> b. full and immediate payment of any and all outstanding sums due from the Debtor under the Repayment Scheme, upon a notice in writing from the Creditor that the Debtor has defaulted on payment on the terms of the Repayment Scheme.
>
> …
>
> In witness whereof the parties have executed this Guarantee as a Deed on the day and year first above written.

12 The Respondent received the Guarantee from the Debtor, who read it to her and asked her to sign it before a lawyer. On 28 September 2017, the Respondent took the Guarantee to a lawyer, who read the document and translated it into Mandarin for her. The lawyer explained that if the Debtor defaulted on the payment of the loan, she would have to pay the Appellant from

the sale proceeds of her properties. After witnessing the Respondent's signing of the Guarantee, the lawyer appended his signature as a witness, and wrote next to it that he had "[o]nly explained this document to [the Respondent] – not acting as her lawyer".

13 The signed Guarantee was passed to the Appellant, who returned it to the Respondent after amendments were made to include a timeline for repayment. The Respondent signed against the amendments.

14 After some time, the Debtor informed the Respondent that he could not cope with the payments, and asked for her help. On 21 November 2017, the Respondent paid the Appellant the sum of $40,000 from the sale proceeds of her Kampong Eunos property. Thereafter, she did not make any further payments.

15 On 27 February 2018, the Appellant messaged the Respondent, stating that she had defaulted on the payment terms in the Guarantee, which provided that $150,000 of the sale proceeds from the Kampong Eunos property were payable on or before 11 November 2017, and that the sum of $5,000 was payable on or before the 15th day of each month, beginning 15 February 2018. In view of her default, the Appellant stated that he was demanding the repayment of all the outstanding sums immediately. The Respondent did not make any payment. On 28 March 2018, the Appellant lodged a proof of debt for the sum of $447,000 against the Debtor, who remained a bankrupt.

Procedural history and the Judge's decision

16 On 3 April 2018, the Appellant sued the Respondent in the High Court, claiming the sum of $447,000 pursuant to the Guarantee.

17 On 29 January 2019, counsel for the parties appeared before the assistant registrar ("the AR") on an application for summary judgment made by the Appellant. During the hearing, counsel for the Appellant stated that "[a]fter the Statement of Claim … was filed [on 3 April 2018], there were part payments. So the sum that is due and owing from the [Respondent] to the [Appellant] is $438,500." After hearing the parties' submissions, the AR entered judgment for the Appellant in the sum of $438,500.

18 On appeal, the summary judgment was set aside by the High Court judge ("the Judge"), who held that triable issues were raised as, among other things, the intention of the Appellant and Respondent in executing the Guarantee was relevant in ascertaining whether the Guarantee was enforceable as a deed. The matter duly went to trial before the Judge. After the trial, the Judge dismissed the Appellant's claim in its entirety. He also allowed the Respondent's counterclaim for the return of the $40,000 that she had paid to the Appellant.

19 In the Judge's view, the Guarantee was not enforceable as a deed as it had not been sealed. In the circumstances, the Appellant had to show that consideration was given to the Respondent in exchange for the Guarantee. However, consideration had not been adequately pleaded in the Appellant's statement of claim. Furthermore, it was unclear what consideration had been provided, and the Respondent's submission that he had provided consideration "in the form of 'forbearance in taking further action against [the Debtor] …'" was "too vague to be helpful": *Lim Zhipeng v Seow Suat Thin* [2020] SGHC 5 ("GD") at [13]. Following his finding that no consideration was provided, the Judge found that the Appellant was also unjustly enriched by the payment of $40,000, and he allowed the Respondent's counterclaim for the return of the sum: GD at [14].

Parties' submissions

20 The Appellant filed the present appeal against the entirety of the Judge's decision. In his submission, the lack of a seal is not fatal to the Guarantee being enforceable as a deed, as the Guarantee had been executed with the intention that it would be a deed. Even if the Guarantee is not enforceable as a deed, consideration was sufficiently pleaded in the Appellant's Reply and Defence to Counterclaim (Amendment No 1) ("Reply and Defence to Counterclaim"). Such consideration was provided by the Appellant's forbearance to enforce the debt against the Debtor, whether such enforcement would have taken the form of an action against the Debtor or the lodging of a proof of debt in his bankruptcy. As such, the Guarantee ought to be enforceable as a deed or as a contract.

21 The Respondent submits that the lack of a seal is fatal to the enforceability of the Guarantee as a deed. Furthermore, there is no evidence that the parties ever intended to execute the Guarantee as a deed. Therefore, consideration would be required for validity, but, as the Judge found, this was insufficiently pleaded. Furthermore, the Appellant had failed to take a consistent position on what consideration, if any, was provided, with his version vacillating from the forbearance to *enforce a debt* to the forbearance to *file a proof of debt*. Such contradictory positions are insufficient to discharge his burden to establish that consideration has been provided.

22 Apart from the above issues, the Respondent raises two additional points. The first is that the Guarantee ought not to be enforceable against her as it contravenes the provisions of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the BA"), which require a creditor to enforce his debt against a bankrupt like

the Debtor through the proof of debt process. By seeking to enforce the Guarantee, the Appellant is circumventing the proof of debt process, and public policy requires the court to intervene and prevent the avoidance of the *pari passu* distribution in bankruptcy. Secondly, the Guarantee may be avoided as there was a unilateral mistake on the part of the Respondent; had the Respondent known of the Debtor's bankruptcy at the material time, she would not have signed the Guarantee.

23 In response to these additional points, the Appellant contends that the provisions of the BA are inapplicable in the present situation, which involves a claim against the Respondent as guarantor rather than against the bankrupt Debtor. It is also submitted that there has been no unilateral mistake on the Respondent's part, as her misunderstanding as to the Debtor's bankruptcy status at the time does not constitute a fundamental mistake with respect to the *terms of the Guarantee*.

24 Finally, while reiterating that consideration was sufficiently pleaded, the Appellant seeks, by way of CA/SUM 56/2020 ("Summons for Amendment"), to amend his statement of claim to include the following paragraph:

> 12. Further or in the alternative, if the Guarantee is not a deed (which is denied), the [Respondent] had executed the Guarantee in consideration for the [Appellant's] forbearance to enforce and/or prove a debt against [the Debtor].

The issues on appeal

25 The issues which arise on appeal are:

(a) First, whether the Guarantee is a deed, such that no consideration is required for it to be enforceable.

(b) Second, if the Guarantee is not a deed, whether consideration has been sufficiently pleaded. If consideration has not been sufficiently pleaded, the relevant question is whether the Appellant ought to be granted leave to amend the statement of claim in the manner proposed in the Summons for Amendment.

(c) Third, if consideration has been adequately pleaded and/or if the statement of claim is amended, whether consideration was furnished by the Appellant.

(d) Fourth, if the Guarantee is enforceable as a deed or because consideration has been adequately pleaded and provided, whether the provisions of the BA or the doctrine of unilateral mistake nonetheless absolves the Respondent of liability under the Guarantee.

(e) Finally, whether the Respondent ought to have succeeded in her counterclaim for the return of the $40,000.

The first issue: Whether the Guarantee is a deed

26 The Judge was of the view that the absence of the seal in the Guarantee was fatal to a finding that it was a deed. In his view, "[i]t is elementary that a deed is an enforceable agreement without proof of consideration, and for that reason, the formalities must be complied with strictly. Without the seal, the document may still be a contract, but as in all contracts not under seal, the plaintiff must then show that consideration was given to the defendant in exchange for it" (GD at [8]).

27 It is accepted doctrine that for a deed to be enforceable as such, it must be signed, sealed and delivered. In the present case, it is undisputed that the

Guarantee was both signed and delivered by the Respondent to the Appellant. The only dispute as regards its enforceability as a deed thus centres on whether, notwithstanding the absence of a physical manifestation of a seal, the Guarantee may be said to have been "sealed".

28 The requirement for a seal to be placed on a document to validate its execution goes back to medieval times in England. Then it was the only way of effectively authenticating a document as writing was not common. Originally molten wax was poured on to the document and the maker of the document then impressed his own crest on the wax. Centuries later the molten wax was replaced by a small red circular sticker which had been mass produced and was usually affixed on the document by the lawyer who had prepared it rather than by the maker himself. The wax seals sometimes fell off after execution and the sticker seals were even less durable. Thus often a document which purported to be "signed, sealed and delivered" bore no trace of the seal by the time its enforceability was being questioned in court. Over the past century and a half the courts have frequently had to consider whether the sealing requirement has been satisfied.

29 In *Re Sarah Jane Sandilands and others* ("*Sandilands*") (1871) LR 6 CP 411, the English Court of Appeal was faced with the issue of whether a purported deed had been sealed. There, a deed was sent out to Melbourne by two married women. When the deed was sent out, it had pieces of green ribbon attached to the places where the physical seals ought to have been, but there was no wax or other material which left an impression. In all other respects, the document was complete, and it included an attestation clause which stated that it had been "signed, sealed, and delivered". The document was also accompanied by the certificates of two commissioners who had certified that

the women who produced the deed "acknowledged the same to be their respective acts and deeds". The issue before the court was whether, in the circumstances of the case, the document could be regarded as having been sealed, such that it was a deed.

30 The three judges unanimously held that, notwithstanding the lack of a physical impression of a seal, the document had been sealed. As Bovill CJ observed, "[t]o constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary. Here is something attached to this deed which may have been *intended* for a seal, but which from its nature is incapable of retaining an impression. Coupled with the attestation and the certificate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer" [emphasis added]. In similar terms, Byles J explained that "[t]he *sealing of a deed need not be by means of a seal*; it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed, and delivered by the several parties; and the certificate of the two special commissioners says that the deed was produced before them … I think there was *prima facie* evidence that the deed was sealed" [emphasis added] (*Sandilands* at 413).

31 More than a century later, the same issue pertaining to the ambit of the sealing requirement arose for the English courts' consideration in the case of *First National Securities Ltd v Jones and another* [1978] Ch 109 ("*First National*"). There, the plaintiff bank sought to enforce a document which it alleged to be a deed against the defendant mortgagor. Although the document provided that it had been "signed sealed and delivered" by the defendant, no physical seal was appended, and the defendant had simply signed across a circle

containing the letters 'L.S.'. In the High Court, the plaintiff's action was dismissed on the ground that the document was not under seal. Therefore, it had not been properly executed as a deed.

32 The Court of Appeal unanimously allowed the plaintiff's appeal, finding that the document was executed as a deed notwithstanding the lack of a physical seal. According to Buckley LJ, it was a "very familiar feature nowadays" for parties to use a printed circle with the letters 'L.S.' within it in place of a wax, wafer or seal. In such instances, the circled 'L.S.' was "intended to serve the purpose of a seal if the document [was] delivered as the deed of the party executing it" (*First National* at 227). In that case, not only was there a circle with the letters 'L.S.' within it, the defendant had also placed his signature over that circle. This, viewed in light of the attestation clause ('signed sealed and delivered'), and as there was no evidence to the contrary, sufficed to establish that the document was executed by the defendant as a deed (*First National* at 227).

33 Goff LJ agreed, holding that the sealing requirement could be satisfied notwithstanding the absence of a physical seal, as "in this day and age, we can, and we ought to, hold that a document purporting to be a deed is capable in law of being such although it has no more than an indication where the seal should be" (*First National* at 228). In the learned judge's view, the document was duly executed as a deed as (a) it described itself as a deed ('Now this deed witnesseth as follows'); (b) it contained an attestation clause in due form ('Signed sealed and delivered … by the [defendant]…'); and (c) it was signed by the defendant over the circled 'L.S', being the very place where there ought to have been a physical seal. On the evidence, it was clear that the defendant recognised and accepted the document as his deed (*First National* at 228–229).

34 Sir David Cairns agreed with the reasoning of Buckley and Goff LJJ, and observed that the formalities of a deed ought to be satisfied so long as the parties signed opposite the attestation clause in the presence of a witness (*First National* at 229):

> … I am sure that many documents intended by all parties to be deeds are now executed without any further formality than the signature opposite the words 'Signed, sealed and delivered', usually in the presence of a witness, and I think it would be lamentable if the validity of documents so executed could be successfully challenged.

35 About a decade after *First National* was decided, in 1989, legislation was enacted in the United Kingdom ("UK") to abolish the requirement of sealing for the execution of deeds in many situations (see *Chitty on Contracts* vol 1 (H Beale ed) (Sweet & Maxwell, 31st Ed, 2012) at paras 1-105–1-106). As regards deeds executed by an individual, s 1(1)(*b*) of the Law of Property (Miscellaneous Provisions) Act 1989 (Cap 34) (UK) made clear that "[a]ny rule of law which … requires a seal for the valid execution of an instrument as a deed by an individual … is abolished." Explaining the reason for the abolition of the sealing requirement, the Lord Chancellor, Lord Mackay of Clashfern, stated that (United Kingdom, House of Lords, *Parliamentary Debates* (24 January 1989) vol 503 ("UK Law of Property Debates") at col 509):

> … At present, if an individual needs to execute a deed, he must sign, seal and deliver it. *Sealing is, for most people, a meaningless formality.* They do not have a seal, and the deed is sealed by sticking a small circle of red paper on it, or simply by drawing a circle. Not only is the requirement meaningless; it has also given rise to argument in the courts as to precisely what it is necessary to do in order to seal a deed. The Law Commission has recommended that for individuals, sealing should no longer be a requirement. Corporate seals are not affected by this change. [emphasis added]

36 Legislative amendments to circumscribe the necessity of sealing have also been passed in Singapore. In 2017, the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") was amended, disposing of the need for Singapore-incorporated companies to use common seals in the execution of deeds. The amendment was spurred by similar amendments in Australia, Canada, Hong Kong, New Zealand and the UK, which no longer require the use of common seals (see *Singapore Parliamentary Debates, Official Report* (10 March 2017), vol 94 (Indranee Rajah, Senior Minister of State for Finance)). Following the amendment, "[a] company may execute a document described or expressed as a deed without affixing a common seal onto the document by signature … on behalf of the company" by authorised officer(s) of the company (s 41B(1) of the Companies Act).

37 Notwithstanding the perceived outdatedness of the sealing requirement, save to the extent that it has been removed by statute (*eg,* s 41B of the Companies Act), it remains a necessary requirement at common law, hence the presence of the phrase "signed, *sealed* and delivered" in the testimonium and execution clause of a deed. In so far as sealing remains a necessary requirement, authorities such as *First National* remain instructive in the determination of whether the sealing requirement has been satisfied. As the Judge himself

explained in *Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd* [2009] 2 SLR(R) 806 ("*Cytec*") at [4]:

> … When the requisite intention is clear, the courts have held that the non-affixation of a seal on a deed was of no material consequence: see *First National* …

38 Explaining the *First National* decision in different words, Warren L H Khoo J stated that "[i]n sum, it was held that if a document is executed by a person with the intention of delivering it as his act and deed, that would be sufficient even if no seal is used" (*United Overseas Bank Ltd v Lea Tool and others* [1998] 1 SLR(R) 373 ("*Lea Tool*") at [23]). In *Lea Tool*, however, the judge concluded that the guarantee in dispute was not executed as a deed, as the document itself did not purport to be a deed, a physical seal was not affixed to it, and the defendant, being a person of little education, was unfamiliar with the distinction between a deed and an ordinary contract. In those circumstances, merely signing opposite the words "signed, sealed and delivered" was insufficient for the document to be a deed (*Lea Tool* at [22] and [24]).

39 The Appellant relies on the cases cited above to contend that while the attachment of a physical seal, by way of wax, wafer, indentation or other physical mark, would be the best indication of an intention to seal a document, the cases establish that the sealing requirement can be fulfilled even if there is no physical impression or manifestation of a seal. He argues that to satisfy the sealing requirement, it is sufficient that the maker of the document *intended* to deliver the document as his act and deed.

40 In the present case, it is undisputed that there is no physical manifestation of a seal on the Guarantee. Nonetheless, like the document in *First National*, the Guarantee expressly identifies itself as a *deed*. Indeed, the

short two-paged document is entitled "DEED OF GUARANTEE", its final paragraph stipulates that "the parties have executed this Guarantee as a *Deed* …" [emphasis added], and the execution portions of the document provide for it to be "signed, sealed and delivered" by the parties executing it. These are clear indications, the Appellant says, that the Guarantee was intended to be executed as a deed, as opposed to as an ordinary contract. Furthermore, unlike the defendant in *Lea Tool*, the Respondent in the present case had sought the advice of a lawyer, who explained the document to her, prior to her signing it in the presence of the same lawyer.

41 Although it could be inferred that during her visit to the lawyer, the Respondent would have taken any action that the lawyer told her needed to be done to execute the document in proper form, there is no evidence she was told about the sealing requirement. Unfortunately, the lawyer the Respondent saw was not called as a witness. She herself did not testify that he had explained the distinction between a deed and an ordinary contract to her or what it meant to "seal" a document nor did the Appellant's counsel press her on this. It is noteworthy in this connection that the lawyer wrote below his signature that he had not acted as a lawyer. The Respondent admitted during cross-examination that she "knew the effect" of what she was signing:

> Q I put it to you that you knew the effect of what you were signing when you signed the deed of guarantee.
>
> A I agree.

In our view, however, this admission does not imply that she knew and intended the document to be a deed rather than an ordinary contract of guarantee. All it shows is that the Respondent understood that by executing the Guarantee she

would be taking on the liability of serving as the guarantor for her son's debt to the Appellant.

42 The difficulty for the Appellant in this case is that there is no evidence, apart from the Respondent's desire to assist the Debtor by granting a guarantee in favour of the Appellant, that the Appellant intended to execute a deed. In *Sandilands* the document was accompanied by certificates certifying that it was the makers' act and deed. In *First National* the document bore a signature over an inscribed circle with the letters 'L.S.' which was held to be sufficient to indicate a seal. Here there was not even that. In these circumstances, the more relevant authority is *TCB Ltd v Gray* [1986] Ch 621 ("*TCB*"), a decision of the English High Court.

43 Like our case, *TCB* involved the validity of a guarantee. The guarantee had been amended by the defendant's solicitor as his client's attorney. The defendant argued that the power of attorney conferred on his solicitor was invalid as it was unsealed. It simply contained the standard testimonium and execution clause for a document under seal. Browne-Wilkinson VC, accepting the submission, stated at 633:

> The power of attorney is described as being a general power of attorney made by [the defendant]. It reads:
>
> > "I appoint Robert Rowan to be my attorney in accordance with section 10 of the Powers of Attorney 1971. In witness whereof I have here set my hand and seal the day and year first above written."
>
> It is signed by [the defendant] and opposite his signature there appear the words "signed sealed and delivered by [the defendant] in the presence of" and then Mr. McGuiness witnesses it.
>
> Section 1(1) of the Powers of Attorney Act 1971 reads:

> "An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power."
>
> As I have said, there is no seal or other mark on the document to indicate that it has been sealed, nor is there any oral evidence to suggest that [the defendant] did anything when executing it beyond signing it. On the contrary, Mr. McGuiness said that the lack of a seal or wafer on the document was an oversight on his behalf. *Approaching this evidence on any normal basis I would be unable to find as a fact that anything constituting sealing took place. Indeed, on the ordinary test of balance of probabilities, I would hold that it did not.*
>
> I was pressed by Mr. Reid for [the plaintiff] with a line of cases culminating in *First National …* in which the courts have adopted a benign approach in deciding that a document has been executed as a deed. The courts have gone a long way towards holding that any document delivered as a deed (even though nothing is done to the document itself at the time of execution) is proved to have been executed under seal. *Yet no case in the High Court has been cited to me in which the court has gone as far as it would necessary to go in this case, there being nothing to indicate that something amounting to sealing took place beyond the fact that the words of the document refer to its having been sealed.* If I were to hold that this document was in fact sealed, I would not only be flying in the face of what actually happened, but also disregarding the statutory requirement that the document should be sealed. I think it would be wrong to extend the legal fiction any further and I decline to do so. If it is open to [the defendant] to raise the point, I would hold that the power of attorney had not in fact been sealed.
>
> [emphasis added]

44 It appears to us that on the state of evidence in this case, we too would be extending the legal fiction too far if we were to hold that the Guarantee had been sealed. We recognise that the holding in *TCB* did not result in success for the defendant as the Vice-Chancellor went on to hold that he was estopped from denying that the power of attorney was sealed. The Vice-Chancellor explained (at 634):

> … [The defendant] has executed a document drafted as a deed and which says that he has thereunto set his hand and seal.

> The document states in terms that it was signed, sealed and delivered in the presence of Mr. McGuiness. There is therefore a representation of the fact that it was in fact sealed. [The defendant] executed the document with the intention that it should be relied on as a power of attorney and knowing that [the plaintiff] were going to rely on it as such. [The plaintiff] in fact relied on it to their detriment, since they advanced money in reliance on documents executed under the power. The case therefore has all the necessary elements of a classic estoppel.
>
> …
>
> … I prefer to hold that in the ordinary case a person so executing a deed is subsequently estopped from denying that he has sealed it rather than to find as a fact that something has occurred which we all know has not occurred.

45 It would appear to be fairly settled law, therefore, that a person who has executed a document that states it has been "signed sealed and delivered" would, in the usual course, be estopped from denying the sealing if he has delivered the document to the other party knowing that the latter will rely on the document and that party did indeed rely on it to its detriment. In this case it would have been open to the Appellant to plead estoppel and to prove his reliance which would not have been hard to do since he did stop pursuing the Debtor for payment while awaiting receipt of the instalment payments set out in the Guarantee. Unfortunately for the Appellant, estoppel was not pleaded by him and thus cannot be relied on in this case.

Second and third issues: Consideration

46 Our finding as regards the first issue means that we must consider the issues pertaining to consideration. We are of the view that even though the Guarantee was *not* a deed, it is still enforceable against the Respondent because consideration was adequately pleaded and furnished by the Appellant.

Consideration was adequately pleaded

47 As regards the alleged lack of pleading, a party's reply and defence to counterclaim forms part of his pleadings in the action: see O 18 r 3 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC"). The main purpose of the reply is to enable the plaintiff to raise facts in answer to matters raised for the first time in the defence, which matters require a response from the plaintiff: *Singapore Civil Procedure* vol I (Chua Lee Ming ed) (Sweet & Maxwell, 2020) at para 18/3/2.

48 Reviewing the pleadings, it is readily apparent that consideration is not mentioned in the Appellant's statement of claim. This is unsurprising, as the Appellant's case was premised on the enforceability of the Guarantee as a *deed*, in respect of which no consideration is required.

49 The issue of consideration was first mentioned in the *Respondent's* Defence (Amendment No 1) and Counterclaim ("Defence and Counterclaim"). At paragraph 13 of her Defence and Counterclaim, it was pleaded that "she never intended the Guarantee to be a Deed of Guarantee … and/or *there was no consideration for the [Respondent] signing the Guarantee*" [emphasis added]. Similarly, at paragraph 18 of her Defence and Counterclaim, it is asserted that "the [Appellant] provided no consideration", and he was thereby unjustly enriched by her payment of $40,000.

50 In paragraph 9 of his Reply (Amendment No 1), the Appellant denied this averment, stating that "[p]aragraph 13 of the Defence … is denied. The [Appellant] avers that the [Respondent's] intentions, motivations and whether or not she had sought legal advice on her entering into the Guarantee are not matters for the [Appellant] to be concerned with. The [Respondent] is put to

strict proof of the same." While this blanket denial does not directly address the issue of consideration, it suffices to traverse the issue; as stated in O 18 r 13 of the ROC:

> 13.—(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under Rule 14 operates as a denial of it.
>
> (2) *A traverse may be made either by a denial* or by a statement of non-admission and either expressly or by necessary implication.
>
> …
>
> [emphasis added]

51 Furthermore, in the Appellant's Defence to Counterclaim (which is found in the same set of pleadings as the Reply), it was stated at paragraph 14 "that in relation to the [Respondent's] allegation that there was no consideration, there was forbearance to enforce and/or prove a debt against [the Debtor]." While this pleading would have been more appropriately placed in the Reply (as opposed to the Defence to Counterclaim), it shows that once consideration was pleaded as an issue by the Respondent, the Appellant pleaded the material facts in response to her allegation, averring that consideration was provided by his forbearance to enforce and/or prove the debt against the Debtor.

52 Despite recognising that the Appellant had pleaded consideration in his Reply and Defence to Counterclaim (GD at [11]), the Judge observed that consideration was not pleaded in the statement of claim, and that the "failure to plead the consideration given is fatal to the [Appellant's] claim" (GD at [13]). In the Judge's view, the appropriate course of action was for the Appellant to have amended the statement of claim after the deficiencies of the Guarantee as

well as its status as a deed had been highlighted by him on the appeal from the summary judgment.

53 But, as V K Rajah JA explained in *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] 4 SLR 137 at [72]:

> … It has long been settled that it is not the function of the statement of claim to anticipate a defence. As was explained in a seminal English case on pleading procedure, *Hall v Eve* (1876) 4 Ch D 341, by James LJ (at 345–346):
>
> > The Plaintiff is left as much at liberty in his reply as in his statement of claim. … *It is no part of the statement of claim to anticipate the defence, and to state what the Plaintiff would have to say in answer to it. … [T]he reply is the proper place for meeting the defence by confession and avoidance…*
>
> [emphasis in original]

54 Given that the issue of consideration was not raised until the Respondent filed her Defence and Counterclaim, it would not have been appropriate for the Appellant to pre-empt the issue and raise in it in his statement of claim. This is particularly so as the Appellant's claim was premised on a "*deed* of guarantee" [emphasis added], for which consideration was not required for validity. We add that even if the claim was not premised on a deed, it is not necessary for a plaintiff to plead consideration until the absence of consideration is raised as a defence. Once the issue was raised, the Appellant appropriately traversed the issue in his Reply, and provided further details in his Defence to Counterclaim (see [51] above) although, perhaps, it would have been clearer if these had been provided in the Reply proper. The Reply and Defence to Counterclaim form part of the Appellant's pleadings. We hold, therefore, that consideration was adequately pleaded. Given that finding, there is no need for the Appellant to amend the statement of claim to plead the consideration. Accordingly, we make no order on the Summons for Amendment.

Whether consideration was furnished

55 As consideration was adequately pleaded, our focus turns to whether sufficient consideration was furnished by the Appellant.

56 In *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [67], this court accepted the following passage as a workable definition of consideration (citing *Currie v Misa* (1875) LR 10 Exch 153 at 162):

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or ***some forbearance,*** detriment, loss, or responsibility, given suffered, or undertaken by the other … [emphasis in original removed, emphasis added]

57 Such "forbearance usually takes the form of the creditor refraining from *instituting legal proceedings* or *proving in a bankruptcy* or winding-up" [emphasis added] (Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 7th Ed, 2015) at para 2-014).

58 In *Crears v Hunter* (1887) 19 QBD 341, Esher MR explained that "a binding promise to forbear would be a good consideration for a guarantee". Hence, "if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt" (at 344 and 345). In that case, the defendant's father had borrowed money from the plaintiff. With his father unable to repay the debt, the defendant signed a promissory note whereunder he and his father would be jointly and severally liable to repay the debt with an annual interest rate of 5%. Although the defendant was under no obligation to repay the debt when he signed the note, the English Court of Appeal unanimously held that the plaintiff's forbearance to sue the defendant's father on account of the promissory note was good

consideration for the defendant's liability on the note although there was no contract for the plaintiff to forbear from suing.

59 Similarly, in *Malayan Banking Bhd v Lauw Wisanggeni* [2003] 4 SLR(R) 287 ("*Malayan Banking*"), the plaintiff-bank was held to have furnished good consideration to the defendant, Lauw, by forbearing to sue the debtor, Kang. As the court explained (*Malayan Banking* at [11]–[12]):

> 11 Lauw clutched at straws when he claimed that the bank furnished no consideration for his Deed of Undertaking. It is well established that a forbearance to sue, even for a short time, may, in appropriate circumstances, be consideration for a promise …
>
> 12 After having executed the Deed of [Undertaking] for his own reasons to enable Kang to have more time to settle the amount owed by the latter to the bank, Lauw is in no position to argue that the Deed of Undertaking is unenforceable on the ground of absence of consideration. …

60 A forbearance to file a proof of debt also suffices as valuable consideration. For example, in *Re Cuthbert, ex parte Monnoyer British Construction Co Ltd (now Monnobar British Construction Co Ltd), by Joseph Stephenson its Liquidator v The Trustee* [1936] 1 All ER 342 ("*Re Cuthbert*"), the creditor was pursuing a debt of £500 against the debtor. While the debtor was on the brink of bankruptcy, one Cuthbert met with the creditor's representative and stated that "in consideration of the [creditor] agreeing at [Cuthbert's] request not to prove in the bankruptcy of [the debtor] for the sum of £500, … [Cuthbert] thereby promised and agreed to pay the [creditor] the said sum of £500 … after the expiration of six weeks from the date thereof" (at 343). On the basis of Cuthbert's undertaking, the creditor did not file its proof of debt against the debtor, who was adjudged a bankrupt on 3 April 1931. Shortly thereafter, on 27 November 1931, Cuthbert, who had not paid the £500

to the creditor, was also adjudged a bankrupt. The creditor filed a proof of debt of £500 against Cuthbert's estate, but this was rejected by the Official Receiver. On the creditor's appeal, the court held that the creditor's forbearance to prove in the debtor's bankruptcy at Cuthbert's request was valuable consideration, and the Official Receiver ought therefore to have admitted the creditor's proof of debt in Cuthbert's estate in full (at 344):

> … Now according to *Currie v Misa*, valuable consideration is clearly defined as some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. In my opinion there is no doubt that **the giving up by the [creditor] of its right to prove in the bankruptcy of [the debtor] is good consideration for the promise by Cuthbert to pay them the amount agreed.** The [Official Receiver], therefore, was not justified in rejecting the proof which must be admitted in full. …
>
> [emphasis in original removed, emphasis added in bold]

61 Based on the authorities, it is clear that a forbearance to sue or a forbearance to file a proof of debt can amount to adequate consideration, so long as the creditor's forbearance stems from an express or implied request to so forbear.

62 Here, the Debtor had failed to repay the debt to the Appellant by the due date of 28 March 2017. From April 2017, the Appellant continuously pursued the Debtor for repayment. In the meantime, the Debtor was facing pressure from other creditors and, in July 2017, was made a bankrupt. The Debtor was then informed by his trustee in bankruptcy that the bankruptcy order could be annulled if he could obtain the consent of his creditors and he turned his efforts to that goal. However, while he was seeking to annul the bankruptcy, the Appellant continued to demand repayment of the substantial debt. Pressured by

the Appellant, the Debtor sought the help of his mother, the Respondent, to serve as the guarantor for his debt.

63 At their subsequent meeting, the Respondent confirmed to the Appellant that she was willing to repay the Debtor's debt in the event that the Debtor was unable to do so. The Respondent testified that she had agreed to serve as the Debtor's guarantor as the Debtor had informed her that he would be "in deep trouble" if she did not do so. Given that the Debtor was "desperate for [her] to sign the document, [she] agreed to sign it". Notwithstanding her willingness to guarantee her son's debt, the Respondent sought time to make the repayment of the moneys owed by the Debtor, as she was awaiting the sale of her Kampong Eunos and Race Course Road properties.

64 After the meeting, the Appellant had the Guarantee drawn up, and asked the Debtor to arrange for the Respondent to execute the Guarantee. The Guarantee tracked the terms of the meeting between the parties; it provided that the Respondent was to serve as the guarantor for the Debtor's debt, and further that the payment of the debt would be made in instalments out of the sale proceeds of the Respondent's properties as she had requested. According to the Appellant, in exchange for the Guarantee, he would stop taking any further action against the Debtor: "basically, for signing the [G]uarantee, I will not pursue the case, I will not pursue what [the Debtor] owes me further." The Respondent shared the same sentiment, as she explained during cross-examination that she had signed the Guarantee to protect her son from any further action by the Appellant with regard to the debt:

> Q Okay. Would you agree that you were trying to protect [the Debtor] from the [Appellant] taking further action against him by signing the guarantee?
>
> A He is my son, so I definitely have to help him.

> Q Okay. So was it your understanding then that if you enter into this guarantee, then at least the [Appellant] would stop taking action against [the Debtor]? For the time being at least.
>
> …
>
> Q Is it your understanding that if you provided the guarantee to the [Appellant], then he would at least stop pursuing the claim against [the Debtor] for the time being?
>
> A This was what [the Debtor] told me.
>
> Q Okay. Did [the Debtor] tell you what action the [Appellant] was going to take against him?
>
> A No. It's just that if he couldn't pay, then I have to help him to pay.
>
> …
>
> A That is, if he didn't pay, then the [Appellant] would sue him.

65 On the basis of that understanding, the Guarantee was signed on 28 September 2017.

66 In keeping with his end of the bargain, following the execution of the Guarantee, the Appellant refrained from taking any action against the Debtor. In particular, he did not file a proof of debt in the Debtor's bankruptcy although in September 2017 he was still within time to do so. Instead, he began reminding the Debtor and the Respondent to abide by the payment schedule set out in the Guarantee. However, after the initial payment of $40,000 on 21 November 2017, no further payments were made by the Respondent. On 27 February 2018, the Appellant wrote to the Respondent to inform her that she had defaulted on the terms of the Guarantee, and that he would thus be demanding repayment of the outstanding sum immediately. Shortly thereafter, on 28 March 2018, as it appeared that the Respondent was not going to comply with the terms of repayment set out in the Guarantee, the Appellant lodged a proof of debt for the

sum of $447,000 against the Debtor, who remained a bankrupt. This action was well past the four-month deadline for filing of proofs which commenced on the date of the Debtor's bankruptcy in July 2017 (s 88A(2) of the BA) and, accordingly, required an application for an extension of time to the Official Assignee (s 88A(4) of the BA).

67 From the above chronology of events, the bargain struck between the Appellant and Respondent was clear – in exchange for the Respondent guaranteeing the Debtor's debt, the Appellant undertook to abide by the Respondent's implied request not to take further action against the Debtor and to allow the Debtor or the Respondent to pay the debt in instalments. The Appellant kept to his end of the bargain, furnishing good consideration by forbearing to "take action" against the Debtor until it became clear that the Respondent would not be complying with the terms of the Guarantee.

68 Unlike the Judge, we find it to be irrelevant that the Appellant did not precisely identify whether his forbearance entailed a forbearance to sue or a forbearance to file a proof of debt (see GD at [13]). As explained at [56]–[61] above, a forbearance to sue or a forbearance to file a proof of debt suffices as good consideration. The focus of the inquiry is whether the creditor, pursuant to an express or implied request, has forborne from taking some form of action which he is legally entitled to take.

69 Here, what is material is that the Appellant had, following his meeting with the Respondent and the Debtor, and after the signing of the Guarantee, kept to his end of the bargain with the Respondent by forbearing to take any action against the Debtor with respect to the debt. Such forbearance, even for a short time, amounts to good consideration (*Malayan Banking* at [11]). Hence, even

though the Guarantee is not enforceable as a deed, we hold that the Appellant's claim against the Respondent ought to be allowed, as consideration was both adequately pleaded and furnished by the Appellant's forbearance to take action against the Debtor.

Fourth issue: Whether there are grounds on which the Respondent can avoid liability

70 The Respondent seeks to avoid liability under the Guarantee by alleging that it contravenes the *pari passu* principle as enshrined in the BA, and that there was a unilateral mistake on her part.

71 In our view, her argument that the Guarantee is against public policy as it contravenes the *pari passu* principle is without merit. As this court explained in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 ("*Jannie Chan*") at [21] and [22]:

> 21 But what about a creditor who holds third party securities? The short answer is that third party securities are irrelevant. … [T]hird party securities, even if given up, will not form part of the eventual estate of the debtor divisible among his creditors. They are accordingly irrelevant for the purposes of determining if a creditor may present a bankruptcy application and consequently, there is no reason why a creditor who holds third party securities should be precluded from presenting a bankruptcy application …
>
> 22 This is the consistent position which has been taken in a long and unbroken line of common law authorities which stand for the proposition that the existence of third party security does not affect the right of a creditor to be admitted to the bankruptcy process and to prove the full amount of his debt …
>
> [emphasis added]

72 While the above observations were made in a different context, they affirmed the principle that a creditor may enforce the full amount of his debt as

against a bankrupt (via the proof of debt process) and/or against any third party who has furnished security. By enforcing any third party security with respect to the bankrupt's debt, the creditor does not contravene the policy underpinning the *pari passu* principle since the third party security never forms part of the bankrupt's estate, and does not constitute an asset that would be divisible amongst the bankrupt's creditors. In fact, the successful enforcement of a third party security would reduce the creditor's claim against the bankrupt by the sum of the security, since the creditor cannot recover more than is due to him. Indeed, the enforcement of a security benefits the bankrupt's remaining creditors generally, as the particular creditor's claim in the proof of debt process would be accordingly reduced upon his successful enforcement of the third party security.

73 In the present action, the Appellant has only sought to enforce the Guarantee against the Respondent, who furnished a third party security with respect to the Debtor's debt. In so doing, the Appellant has not sought to circumvent the proof of debt process, but simply seeks alternate means of recovering the sum owed to him. This is entirely permissible, as "[i]t has long been the position that a creditor with several remedies at his disposal can choose whether to enforce and, if so, which one to enforce, at what time, in which order, and in whatever way, subject only to the rule that he cannot recover more than is due to him … The election is solely for the creditor to make. A surety has no right as such to require the creditor to proceed against the principal … or against any security provided for the debt guaranteed before proceeding against [the surety] himself" (*Jannie Chan* at [36]). Thus, the only restriction on the Appellant's right to enforce the Guarantee is that his claim against the Debtor must be reduced by any sum recovered under the Guarantee. This, as mentioned,

serves to benefit the Debtor's remaining creditors generally, and cannot be said to contravene the policy underpinning the *pari passu* principle.

74 The argument about a unilateral mistake also misses the mark. For a unilateral mistake to vitiate a contract, it must be proved that (a) one party has made a mistake; (b) the mistake is a sufficiently important or fundamental mistake *as to a term* of the contract; and (c) the non-mistaken party has actual knowledge of the mistaken party's mistake (*Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [42]).

75 The key terms of the Guarantee require the Respondent to serve as a guarantor for the Debtor, and to pay the debt in accordance with the Repayment Scheme set out in the Guarantee if the Debtor failed to do so. The Respondent was not mistaken as to her obligations in this regard. She understood her role as a guarantor as can be seen from her correct explanation of it during the trial (see [64] above). Hence, there was no mistake on her part of sufficient importance *vis-à-vis* any *term* of the Guarantee which would suffice to vitiate the Guarantee. Furthermore, there was no evidence that the Appellant was aware of her alleged mistake.

Fifth issue: Whether the Respondent can recover the $40,000

76 Finally, we deal with the Respondent's counterclaim for the $40,000 which she had paid to the Appellant. From her pleadings, the counterclaim is premised on the alleged lack of consideration:

> The [Respondent] pleads that she is entitled to the return of the $40,000 made by her to the [Appellant] on or about 21 November 2017, *for which the [Appellant] provided no consideration, and thereby the [Appellant] is unjustly enriched.* [emphasis added]

77 The failure of consideration, which is synonymous with a "failure of basis", is an unjust factor that requires a two-part inquiry: first, what was the basis for the transfer in respect of which restitution is sought; and second, did that basis fail? The first part of the inquiry "is largely common sense", but a transfer may nonetheless have more than one basis (*Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 at [46], [47] and [52]).

78 In our view, regardless of the validity of the Guarantee (which we have found to be supported by consideration), the counterclaim should have been dismissed as the sum of $40,000 was voluntarily paid to the Appellant towards settlement of the Debtor's outstanding debt. Even absent the Guarantee, the desire to reduce the Debtor's debt was a fundamental basis for the Respondent's payment (see [64] above). No issue of unjust enrichment could therefore arise as $40,000 was indeed offset from the Debtor's outstanding debt and so the basis for payment did not fail.

Conclusion

79 For the foregoing reasons, we allow the Appellant's appeal and set aside the judgment below.

80 In the circumstances, judgment shall be entered for the Appellant against the Respondent in the sum of $438,500. While the Appellant had sought to claim $447,000 in his statement of claim, counsel for the Appellant had informed the AR on 29 January 2019 that the Appellant's claim had been reduced to $438,500, to account for "part payments" which the Appellant had received. No evidence was tendered in court to contradict this concession.

81 Costs should follow the event. The Appellant shall have his costs of the hearing below as taxed or agreed. We make no order on the costs of the Summons for Amendment. As for the costs of the appeal, the Respondent shall pay the Appellant the same fixed at $30,000 plus reasonable disbursements to be taxed or agreed. There will be the usual consequential orders.

Judith Prakash	Belinda Ang Saw Ean	Woo Bih Li
Judge of Appeal	Judge	Judge

Tan Wen Cheng Adrian and Tan Choon Yuan Delson (August Law Corporation) for the appellant in Civil Appeal No 11 of 2020 and the applicant in Summons No 56 of 2020;
Kanthosamy Rajendran and Prasanna Prabhakaran (RLC Law Corporation) for the respondent in Civil Appeal No 11 of 2020 and Summons No 56 of 2020.