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

[2021] SGHC 110

Suit No 1148 of 2017

Between

North Star (S) Capital Pte Ltd

… *Plaintiff*

And

(1) Megatrucare Pte Ltd
(2) Yip Fook Meng

… *Defendants*

And Between

Yip Fook Meng

… *Plaintiff in counterclaim*

And

North Star (S) Capital Pte Ltd

… *Defendant in counterclaim*

JUDGMENT

[Contract] — [Illegality and public policy] — [Statutory illegality] — [Whether a loan given to a company is in substance a personal loan to the individual guarantor]
[Civil Procedure] — [Pleadings] — [Whether a party may rely on the defence of illegality when it is not adequately pleaded]

[Contract] — [Formation] — [Whether lenders had constructive knowledge of the guarantor's mental incapacity at the time that the guarantee was entered into]
[Contract] — [Mistake] — [*Non est factum*] — [Whether a finding of mental incapacity is sufficient to establish a plea of *non est factum*]
[Civil Procedure] — [Trial] — [Oral evidence of witness] — [What is the proper procedure for challenging the accuracy of the official transcript of a witness' oral evidence at trial]

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v
Megatrucare Pte Ltd and another

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6 May 2021 Judgment reserved.

Dedar Singh Gill J:

Introduction

1 A Credit Facility Agreement (the "Loan Agreement") for $300,000 (the "Loan") was signed by the plaintiff and first defendant, Megatrucare Pte Ltd, on 22 June 2017. On the same day, the second defendant, Mr Yip Fook Meng ("Mr Yip"), signed a personal guarantee (the "Guarantee") undertaking to pay to the plaintiff, on demand, all sums owing and payable by the first defendant under the Loan Agreement. The second defendant also handed the plaintiff a duly executed Letter of Authority (the "LOA") which assigned to the plaintiff $309,000 out of the sale proceeds of his property at Rangoon Road (the "Rangoon Road Property") upon completion of the sale on 30 June 2017. All of the above occurred at the second of two meetings held on 22 June 2017 (collectively, the "22 June meetings") with, *inter alia*, the plaintiff's and first defendant's representatives, the second defendant and the second defendant's

caregiver, Coco.[1] The date of completion of the sale of the Rangoon Road Property was a mere eight days after the Loan Agreement was signed while the date of repayment stated on the face of the Loan Agreement, 27 July 2017, was just under a month after the date of completion. The second defendant had been appointed a director of the first defendant on 14 June 2017 and was not a shareholder of the first defendant at the material time.[2]

2 The issues arising in this case stem from the second defendant's mental incapacity, caused by "mental retardation" or "mild intellectual impairment", at the time the Guarantee was signed on 22 June 2017.[3] The plaintiff is not disputing the fact of his mental incapacity even though it called this a "controversial issue".[4]

3 Mr Elangovan s/o Meyyanathan Pillai ("Mr Elangovan"), a Director of the first defendant, disbursed the Loan moneys to third parties unknown to himself on the second defendant's instructions, and gave the remainder in cash to the second defendant less the facility fee of $10,500 to the plaintiff, the service fee of $15,000 which the first defendant retained from the Loan moneys and the commission paid to the loan brokers.[5] The service fee was paid to the first defendant for making the second defendant a director of the first defendant so that the second defendant could access the Loan moneys extended to the first defendant.[6]

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1 NOE, 21 October 2020, p 50 at line 15.

2 Agreed Bundle of Documents ("ABOD") at p 58.

3 Bundle of Affidavits ("BOA") at p 254, [7(i)]; BOA at pp 150–152.

4 Plaintiff's Closing Submissions ("PCS") at [17(a)] and [139].

5 NOE, 20 October 2020, p 24 at line 29–31, p 26 at line 26–30, and p 62 at line 3–17.

6 NOE, 20 October 2020, p 51 at line 27–29; BOA at p 103, [5].

4 As the first defendant defaulted on the Loan Agreement, but has no assets to satisfy the judgment-in-default of appearance entered against it, the plaintiff now seeks to enforce the Guarantee against the second defendant.[7]

The parties' cases

Second defendant's submissions

5 As the second defendant is no longer disputing that he signed the Guarantee on 22 June 2017, this case turns on whether any contractual defences are successfully raised. This will determine if the second defendant's counterclaim for a declaration that, *inter alia*, the Guarantee is annulled, vitiated and/or unenforceable should succeed.[8] In this regard, he relies on four defences in his submissions:

(a) the illegality of the Guarantee under s 14(2)(*a*) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA");

(b) mental incapacity under the common law;

(c) mental incapacity under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("MCA"); and

(d) the doctrine of *non est factum*.

6 With regards to illegality, the second defendant submits that the Loan Agreement, under which the first defendant is the borrower, is a sham as he is the true borrower ("personal loan illegality"). As a result, the plaintiff is presumed to be a "moneylender" under s 3 of the MLA because it lent money in consideration of a larger sum being repaid and, since the Loan is not to a

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7 PCS at [5]; HC/JUD 40/2018.

8 Defence and Counterclaim (Amendment No. 1) ("D&CC1") at [17(1)].

corporation, the plaintiff is not an "excluded moneylender" (as defined in s 2 of the MLA). Under s 2 of the MLA, those presumed to be moneylenders in s 3 are also "unlicensed moneylender[s]", and any guarantee given for a loan granted by an unlicensed moneylender is unenforceable under s 14(2)(*a*) of the MLA.[9] Alternatively, the second defendant argues that even without the statutory presumption in s 3 of the MLA, the plaintiff admits that it carried on the business of moneylending and that it does not hold a moneylender's licence. This is sufficient to constitute it as an unlicensed moneylender under s 2 of the MLA and the Guarantee is hence unenforceable.

7 In respect of mental incapacity at common law, both parties confined their submissions to whether the plaintiff had knowledge of the second defendant's mental incapacity at the time the Guarantee was signed. The second defendant submits that the plaintiff should be affixed with constructive knowledge – the circumstances surrounding the 22 June meetings were "suspicious" and the evidence of its expert witness, Professor Kua Ee Heok ("Professor Kua"), illustrates that abnormalities in the second defendant's behaviour at the 22 June meetings should have put the plaintiff on notice.[10]

8 As for the MCA, the second defendant urges the court to exercise its power to "… make declarations as to … (*c*) the lawfulness or otherwise of any act done, or yet to be done, in relation to [a mentally incapacitated person]" under s 19(1)(*c*) to annul the Guarantee. The second defendant argues that the Guarantee should be annulled regardless of whether the plaintiff knew of the

9 Second defendant's Closing Submissions ("2DCS") at [14]–[16].

10 2DCS at [68].

second defendant's mental incapacity because the second defendant is "subject to an MCA Incapacity Declaration".[11]

9 Finally, the second defendant argues that *non est factum* renders the Guarantee void. He claims to have laboured under a mistaken belief that the Guarantee was a document for the sale of the Rangoon Road Property at the time he signed it.[12] He further argues that he lacks the mental ability to understand the Guarantee even if it was explained to him in English, and disputes the fact that it was explained to him in Mandarin.[13]

Plaintiff's submissions

10 The plaintiff structured its submissions to meet each of the second defendant's defences.

11 First, the plaintiff challenges the illegality defence in two respects. Procedurally, it seeks to preclude the second defendant from relying on the personal loan illegality defence because it is not pleaded in the Defence and Counterclaim (Amendment No. 1) (the "Defence") and not all relevant facts are before the court.[14] In the alternative, the plaintiff argues that the first defendant is the true borrower under the Loan Agreement.[15] Resultantly, as it lends exclusively to corporations, it is an excluded moneylender as defined in s 2 of the MLA. It follows that the plaintiff is not an "unlicensed moneylender" as the presumption in s 3 of the MLA is not enlivened and it falls outside the definition

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11 2DCS at [72].

12 2DCS at [37].

13 2DCS at [46] and [48]; Second defendant's Reply Submissions ("2DRS") at [30].

14 Plaintiff's Further Submissions ("PFS") at [30]; PCS at [122].

15 PCS at [134] and [136]; Plaintiff's Reply Submissions ("PRS") at [18].

of a moneylender in s 2 of the MLA. The Guarantee is hence not rendered unenforceable under s 14(2)(*a*) of the MLA.

12 Second, in response to the mental incapacity defence at common law, the plaintiff argues that it should not be affixed with constructive knowledge of the second defendant's mental incapacity at the 22 June meetings. Prior to the 22 June meetings, there were no unusual circumstances such as to put the plaintiff on notice. It points, *inter alia*, to the fact that a medical memo of Dr Lai Junxu ("Dr Lai") of Medical L & C Services Pte Ltd, which the plaintiff received before 22 June 2017, stated that the second defendant "ha[d] full mental capacity … and show[ed] no signs of cognitive impairment."[16] Additionally, the plaintiff highlights that none of the persons present at the 22 June meetings, or who interacted with the second defendant around 22 June 2017, described any abnormalities in the second defendant's behaviour.[17] The plaintiff also argues that the second defendant's expert witnesses "agreed that a layperson interacting with [the second defendant] would not have suspected that he lacked mental capacity …".[18]

13 Third, in relation to the plea to annul the Guarantee under s 19(1)(*c*) of the MCA, the plaintiff points out that there are no authorities supporting the annulment of contracts under this statutory provision. It also argues that the case cited by the second defendant, *Re BKR* [2015] 4 SLR 81 ("*Re BKR*"), does not involve the annulment of a contract under the MCA.[19]

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16 PCS at [21]; ABOD at p 84.

17 PCS at [29] and [31].

18 PCS at [39].

19 PRS at [49].

14 Finally, with regards *non est factum*, the plaintiff submits that the Guarantee was explained to the second defendant in English and Mandarin at the 22 June meetings and that Professor Kua's evidence shows he was likely able to understand the Guarantee when provided with such explanations.[20]

Issues to be determined

15 In light of the foregoing, the issues that arise for my determination are:

(a) Whether the second defendant is precluded from relying on the personal loan illegality defence if it was not pleaded?

(b) Whether the Guarantee is unenforceable under s 14(2)(*a*) of the MLA?

(c) Whether the plaintiff had actual or constructive knowledge of the second defendant's mental incapacity at the time the Guarantee was signed?

(d) Whether the fact that the second defendant was declared mentally incapacitated by the Family Court obliges or permits the court to annul the Guarantee under s 19(1)(*c*) of the MCA?

(e) Whether the second defendant had a defective understanding of the Guarantee which was radically different from what was actually signed, or whether he lacked the ability to understand the Guarantee at the time it was signed?

[20] PCS at [63] and [66].

Illegality

16 To re-iterate, under the defence of illegality, the second defendant argues that the Loan Agreement is a sham because he is the true borrower.[21] Consequently, any guarantee given in respect of such an illegal personal loan is unenforceable under s 14(2)(*a*) of the MLA.

Procedural objection

17 As a procedural point, the plaintiff argues that the second defendant cannot rely on the personal loan illegality defence because this was not pleaded in the Defence.

18 I agree with the plaintiff that personal loan illegality has not been adequately pleaded. The Defence does not disclose the second defendant's case that the Loan Agreement is a personal one to himself. Merely pleading that the plaintiff "*purported* to have lent to the first defendant"[22] [emphasis added] is insufficient as it is unclear who the second defendant contends the true borrower is.

19 However, even if personal loan illegality is not adequately pleaded, pursuant to *Edler v Auerbach* [1950] 1 KB 359 ("*Edler*"), affirmed in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") at [29], the court is entitled to invoke illegality of its own motion if "unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose)" and "the whole of the relevant circumstances

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21 2DCS at [24]–[25].

22 D&CC1 at [13(1)].

are before [the court]". For reference, I set out all four propositions in *Edler* (at 371):

> … [F]irst, that, where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not [the "***First Edler Proposition***"]; secondly, that, where … the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded [the "***Second Edler Proposition***"]; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it [the "***Third Edler Proposition***"]; but, fourthly, that, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not [the "***Fourth Edler Proposition***"].
>
> [emphasis added]

20 The plaintiff argues that it has been prejudiced as its directors were never given an opportunity to rebut the second defendant's assertion that he is the true borrower under the Loan Agreement.[23] As a result, not all relevant facts pertaining to personal loan illegality have been placed before the court.[24]

21 To the extent that the allegation of personal loan illegality was never put to the plaintiff's directors, and only raised belatedly in the course of trial and in the second defendant's closing submissions ("2DCS"), the plaintiff's frustration is understandable. However, such prejudice does not prevent me from ruling on the basis of personal loan illegality. Vinodh Coomaraswamy JC (as he then was) in *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 ("*ANC Holdings*") at [98] (which was affirmed by the Court of Appeal in *Ting Siew*

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23 PFS at [29].

24 PFS at [13].

May at [31] and *Fan Ren Ray and others v Toh Fong Peng and others* [2020] SGCA 117 at [15]) explained as follows:

> [i]f there is any judicial reluctance to allow a party to rely on illegality when that party has not pleaded it, the reluctance is attributable solely to the court's concern that the court may have been deprived of relevant facts and not because of possible procedural unfairness to the other party. …

22 The manner in which the case was conducted also ameliorates, to some extent the prejudice to the plaintiff. Namely, in response to [13] of the Defence, which states that "the plaintiff purported to have lent to the [first] defendant a sum of money in consideration of a larger sum being repaid" and that "the plaintiff is presumed under Section 3 of the [MLA] to be a moneylender", the plaintiff averred at [8] of its Reply and Defence to Counterclaim (Amendment No. 1) (the "Reply") that "loans are *only* provided to commercial entities for commercial purposes…, as such the Plaintiff is considered to be an excluded money lender under the [MLA]" [emphasis in original in underline; emphasis added in italics]. Evidently, the plaintiff's case, from the outset, was that the Loan Agreement was a *bona fide* corporate loan. Further, under cross-examination, one of the plaintiff's Directors, Mr Ong Leng Hock ("Mr Ong"), was given the opportunity to explain why the Loan Agreement is not a sham, albeit in response to a different case – that the LOA was the heart of a scam to claw away a portion of the second defendant's sale proceeds of the Rangoon Road Property and that the Guarantee was a mere afterthought to give the LOA a semblance of legitimacy.[25]

23 In the final analysis, pursuant to the Third and Fourth *Edler* Propositions and *ANC*, the determinative question is whether the totality of the evidence and the objective circumstances of this case disclose all relevant facts which

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[25] NOE, 6 October 2020, p 74 at line 6–20, p 75 at line 4–10, and p 77 at line 5–13.

establish the personal loan illegality defence? If so, regardless of the prejudice to the plaintiff, the defence must succeed.

Whether the Guarantee is unenforceable under s 14(2)(a) of the MLA

24 To rely on s 14(2) of the MLA, the second defendant must prove that the plaintiff is an "unlicensed moneylender" (*Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [75]).

25 The second defendant submits that the plaintiff is an "unlicensed moneylender" pursuant to s 2 of the MLA because: (a) the presumption in s 3 of the MLA is raised; or (b) alternatively, that the plaintiff is, in fact, a "moneylender" under s 2 of the MLA operating without a moneylender's licence. I will now consider the first submission.

Is the presumption of moneylending in s 3 of the MLA raised?

26 To raise the presumption in s 3 of the MLA, the second defendant bears the legal burden of proving that the plaintiff is not an excluded moneylender because the plaintiff extended a personal loan to him (*Sheagar* at [75(d)]).

27 In ascertaining who the true borrower is under a loan, the substance of the transaction, and not its form, is determinative (*Sheagar* at [81]). Specifically, to establish that the Loan Agreement is a sham, the second defendant must prove that it is not intended to create enforceable legal obligations, but is intended to deceive third parties (*Toh Eng Tiah v Jiang Angelina and another appeal* [2021] SGCA 17 at [77]).

28 I now turn to the evidence to discern what the plaintiff and first defendant's intentions were when entering into the Loan Agreement.

(1) Mr Elangovan

29 Mr Elangovan admitted that the first defendant's role was to "[assist] Mr Yip to obtain a loan" from the plaintiff[26] and that he disbursed the Loan moneys to third parties unknown to himself on the second defendant's instructions and passed what remained thereafter to the second defendant less any fees due to the first defendant and the plaintiff and commission due to the loan brokers (see [3] above). Further, Mr Elangovan made clear to the plaintiff at the 22 June meetings that the "real borrower" is the second defendant.[27] Mr Elangovan's evidence is critical for two reasons.

30 On one level, it evidences Mr Elangovan's intention to create a sham corporate loan, which is in substance a personal loan to the second defendant. This intention is attributable to the first defendant. By interposing the first defendant as a conduit for the personal loan, Mr Elangovan sought to procure the service fee of $15,000 from the Loan moneys (see [3] above) and further hoped that the second defendant would invest in the first defendant in the future.[28] In the first defendant's reply to the plaintiff's letter of demand in respect of the Loan Agreement, the first defendant also directed the plaintiff to "look to [the second defendant] to make payment of the Loan Amount" based on the plaintiff's "knowledge of the mode of repayment as well as the personal guarantee".[29]

31 Second, and more crucially, if the plaintiff's directors present at the 22 June meetings had been informed that the true borrower was the second

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26 NOE, 20 October 2020, p 62 at line 28–33.

27 NOE, 20 October 2020, p 55 at line 20–26.

28 NOE, 20 October 2020, p 62 at line 18–33.

29 BOA at p 42.

defendant, and yet entered into the Loan Agreement and Guarantee, this renders the plaintiff complicit in the scheme to create a sham corporate loan so as to evade the MLA.

32 The plaintiff now ardently contests this latter aspect of Mr Elangovan's evidence. Ironically, it is the plaintiff who subpoenaed him, albeit for the limited purpose of testifying as to the second defendant's mental capacity.[30] However, I remain minded to attach significance to Mr Elangovan's evidence. Mr Elangovan had a vested interest at the 22 June meetings to shift the liability for repayment away from the first defendant. As the plaintiff recognises, he was the sole shareholder and director of the first defendant prior to the second defendant's appointment as a director on 14 June 2017.[31] As such, he would have taken pains to stress to the plaintiff's directors that the second defendant was the true borrower, as is borne out at multiple points in his testimony;[32] I set out one such portion:[33]

20 October 2020: Mr Elangovan, Cross-examination

Q: Yes, good. And you were careful to tell North Star that the real borrower is Mr Yip, "He is going to repay you and Megatrucare will not be responsible." Am I correct?

A: Yes, definitely, because I want him to know whether the---the whole thing and next---next day, he should not come after me, you see.

Q: Yes.

A: So, the---first thing was, I---I am not the guarantor, I was---very clearly, I put that statement, say, "Yes,

30 PFS at [15(c)] and [23].

31 PFS at [23].

32 NOE, 20 October 2020, p 36 at line 2–9, p 55 at line 2–26, p 57 at line 10–14, and p 61 at line 2–13.

33 NOE, 20 October 2020, p 55 at line 2–26.

> Mr Yip is---is a guarantor." Then it went on. Otherwise, definitely I put a full stop, I say no, I'm not going to pay for nothing, you see.
>
> Q: Yes, so you made it very clear to North Star people---
>
> A: Yes.
>
> Q: ---that they should not go after Megatrucare, am I correct?
>
> A: Yah.
>
> Q: Yes. And you made it very---so as far as you are concerned, this whole arrangement, the loan transaction, the real borrower is Yip – that's what you are trying to tell the Court today, am I correct?
>
> A: Yes.
>
> Q: Yes. The real borrower is not Megatrucare, am I correct?
>
> A: Yes.
>
> Q: Yes. And what you are trying to tell the Court today is that you make this very clear to North Star that Megatrucare is not the real borrower, we--- "Megatrucare will not be liable, you take back your 300,000 loan from Yip after he sold his property." Am I correct?
>
> A: Yes.

33 Mr Elangovan's reply, on behalf of the first defendant, to the plaintiff's letter of demand in respect of the Loan Agreement (see [30] above) also indicates that he had previously told the plaintiff not to approach the first defendant for repayment. He directed the plaintiff's solicitors to "look to [the second defendant] to make payment of the Loan Amount" based on the plaintiff's "full knowledge of the mode of repayment as well as the personal guarantee".[34]

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[34] BOA at p 42, [4].

34 While I accept that Mr Elangovan may also have been motivated by a similar interest at trial to deflect liability from the first defendant, I do not believe that the first defendant has that much else to lose such that Mr Elangovan's testimony should be disbelieved altogether. For one, the first defendant has already been examined as a judgment debtor and patently lacks assets to satisfy the default judgment entered against it (see [4] above). In any case, Mr Elangovan's evidence is merely one of several factors I considered when reaching my decision.

(2) Mr Ong

35 The evidence of Mr Ong, who was present at the 22 June meetings, reveals an intention to constitute the second defendant as the true borrower under the Loan Agreement.

36 Mr Ong testified that the plaintiff had looked for repayment from the second defendant "right from the very beginning" because it was understood that repayment would come from the second defendant's sales proceeds of the Rangoon Road Property.[35] The plaintiff's intention to obtain repayment from the second defendant *at first instance* is underscored by Mr Ong's testimony in cross-examination that pursuant to an "agreed spoken term" and "agreed timeline", the actual payment date was 30 June 2017, *ie*, the date of completion for the sale of the second defendant's Rangoon Road Property (whereas the date of repayment stated in the Loan Agreement was 27 July 2017).[36] The LOA executed by the second defendant, which the plaintiff served on the purchaser, purchaser's solicitors and second defendant's solicitors for the sale and purchase of the Rangoon Road Property, also required the payment of $309,000

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35 NOE, 6 October 2020, p 73 at line 16–20.

36 NOE, 6 October 2020, p 69 at line 10–12; BOA at p 45.

to the plaintiff on the *date of completion*, 30 June 2017.[37] The relevant portion of Mr Ong's testimony is as follows:[38]

6 October 2020: Mr Ong, Cross-examination

Q: Yes. But you or North Star instructed lawyers to pay 309,000 on the 30th of June through the letter of authority?

A: Yes.

Q: But the loan is not due yet, Mr Ong.

A: Because the completion of the property is on the 30th of June.

Q: We know.

A: And the agreed interest rate is locked in minimum 1 month so---

Q: We know.

A: ---we have to---it's upon *completion*.

Q: No.

A: You can repaid the loan upon expiry or on or before the expiry date of the loan.

Q: What did the borrower tell you? Did the borrower tell you, "I want to repay my loan earlier"?

A: Upon *completion* of the property---

Court: Who is---

A: ---because---

Court: ---the borrower? Let's not---

Witness: The bor---

Court: ---get things mixed up.

Witness: Megatrucare. Because it's the assignment of the sales proceed so it's the repayment of the loan is based on the completion of the property. *Even though the loan expiry technically is 1 month, but then again, it's based on the* ***agreed timeline*** *on the*

[37] ABOD at p 33.

[38] NOE, 6 October 2020, p 67 at line 30 to p 69 at line 12.

> *completion of the sales proceed. As such, the loan have to paid on the 30th of June.*
>
> Q: Is this what you have just said in your AEIC that the loan was supposed to be repaid by the 30th of June?
>
> A: Sorry, I don't get; you mean?
>
> Q: Alright, I repeat. It's---
>
> A: Yes.
>
> Q: ---fine. Was what you said stated in your AEIC---
>
> A: I can't re---
>
> Q: ---that the loan was supposed to be repaid on the 30th of June?
>
> A: I can't recall what I have said in the AEIC.
>
> Q: Alright---
>
> Court: Look at ---
>
> Q: ---you have---
>
> Court: ---your AEIC. Look at it. Look at it.
>
> A: Which---
>
> Court: Go through ---
>
> A: ---page?
>
> Court: ---the affidavit.
>
> Q: I don't know what page; it is your AEIC, you go and look through it.
>
> A: There is no date indicated 30th of June, however it's based on the ***agreed spoken term*** and also the exercise option and the letter of authority---
>
> [emphasis added]

37 However, during re-examination, Mr Ong qualified his earlier position by testifying that although the final date of repayment was 27 July 2017, repayment could be made before that:[39]

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[39] NOE, 6 October 2020, p 90 at line 8–19.

6 October 2020: Mr Ong, Re-examination

Q: Can you tell us when does repayment have to be made?

A: By the 27th.

Q: Okay, so---

A: But because this is a---secured by the assignment of sales proceed, and the completion of the sales proceed is on the 30th of June, so it can be by 30th of June. Or if the thing is delayed, up to by 30th of---27th of July. But if there is any further delay, then that would be a---a---any delay you have to inform us and we have to agreed to it.

Q: Okay, so if the loan is not repaid from the sale proceeds of the property---

A: Yes.

Q: ---but it is still repaid by the 27th of July, what happens?

A: If it's repaid by the 27th of July, then the loan is complete and the case is closed.

38 Nevertheless, the totality of Mr Ong's evidence – particularly his references to an "agreed spoken term" and "agreed timeline" (see [36] above) – evinces an intention for the Loan to be repaid by 30 June 2017. Admittedly, when taken in isolation, such intention does not necessarily mean that the plaintiff further intended to treat the second defendant as the true borrower. It is possible for a genuine borrower to legitimately arrange for the lender to seek repayment from the guarantor without first making a demand on the borrower (Geraldine Andrews & Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 7th Ed, 2015) at para 7-006). However, when viewed alongside Mr Elangovan's evidence (see [29]–[33] above) *and* the following two aspects of Mr Ong's testimony, it becomes clear that the plaintiff intended the second defendant to be the true borrower.

39 First, I find it telling that the plaintiff did not perform due diligence on the first defendant's ability to repay the Loan or whether it was operating a business at the material time.[40] Mr Ong merely performed a QuestNet Enhanced Instant Search on the first defendant *one day* before the 22 June meetings. The search contained scant details of the first defendant's financial health.[41]

40 Mr Ong suggests that the plaintiff was not concerned with whether the first defendant had the funds to repay the Loan as such repayment would "come straightly [*sic*] from the sales proceed of the [Rangoon Road] property":[42]

6 October 2020: Mr Ong, Cross-examination

Q: I am talking about Mega's ability to repay; that means from Mega's funds. How do you know Mega has the ability, Mega has the funds to repay the loan?

A: We did not check on that but the---

Q: Yes.

A: ---from the case---right from the onset of the case, it's very clear-cut the repayment of the loan is come straightly [*sic*] from the sales proceed of the property.

Q: Okay.

A: As such, there's no requirement on our part to determine Mega repayment because the re--- repayment ability of the loan is already very clear-cut from the onset that it's come from the sales proceed.

Court: So who is the borrower, Mr Ong?

Witness: Megatrucare.

Court: But you don't want to check on Mega at all?

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40 NOE, 6 October 2020, p 53 at line 5–7, 28–30.

41 NOE, 6 October 2002, p 52 at line 22; ABOD at p 30.

42 NOE, 6 October 2020, p 53 at line 28 to p 54 at line 14, and p 73 at line 7–20.

Witness:	Because Mr Yip is the director of Megatrucare, and then he himself pledged as a guarantor as well as from the sales proceed of the property. So there's a link between him and the company and the repayment of the loan.
…	
Court:	---it appears to me that you were really looking for repayment from Mr Yip, not from Megatru.
Witness:	No, Your Honour, Sir, because on the onset, they already tell us that the repayment will come from the sales proceed of Mr Yip at---
Court:	And so---
Witness:	---part of the---
Court:	Yes, so---
Witness:	Yes.
Court:	---you were looking for repayment from Mr Yip---
Witness:	Yes.
Court:	---right from the very beginning?
Witness:	Yes, because it---they came to us very clearly that the repayment will come from Mr Yip sales proceed.

41 However, this does not explain why the plaintiff did not bother to evaluate the first defendant's creditworthiness, even if just to satisfy itself that it had the *option* of enforcing the debt against the first defendant in the event that repayment from the sale proceeds of the Rangoon Road Property was not forthcoming. In fact, when that contingency materialised, the plaintiff proceeded against the first defendant.

42 Further, such absence of due diligence stands in stark contrast to *Sheagar*. In *Sheagar*, where the loans in question were affirmed as commercial loans between commercial entities, the Court of Appeal observed at [85] that the corporate borrower "had been selected [from among a group of companies] because it had the strongest balance sheet in the group". In a similar vein, I have

no doubt that the level of due diligence conducted by the plaintiff in deciding to enter into the Loan Agreement is relevant to whether the first defendant was the true borrower. For the reasons just explained, the conspicuous lack of due diligence in respect of the first defendant undermines the plaintiff's case.

43 Second, from the following extract of Mr Ong's testimony, it is also apparent that Mr Ong knew that the plaintiff was prohibited from lending money directly to the second defendant, as the plaintiff would otherwise lose its "excluded moneylender" status under the MLA:[43]

> **6 October 2020: Mr Ong, Cross-examination**
>
> Court: Now, why didn't you lend to Mr Yip?
>
> Witness: We can't lend to Mr Yip.
>
> Court: Why?
>
> Witness: Because we, as a---*as excluded moneylender, we only can lend to private limited company* and AI---
>
> Court: Alright.
>
> [emphasis added]

This would explain why the plaintiff took pains to disguise the Loan as a corporate one, including confining the second defendant's role to that of a mere guarantor, explaining the Guarantee to him before it was signed, and proceeding against the first defendant when repayment of the Loan was not forthcoming.

44 In fact, while not directly probative of the *plaintiff's* intention at the time the Guarantee was signed, the response of Mr Gary Koh ("Mr Koh"), the loan broker, when asked who the borrower was – "because it's a corporate loan so we need a company" – also seems to have put the cart before the horse.[44] His

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[43] NOE, 6 October 2020, p 73 at line 21–26.

[44] NOE, 9 October 2020, p 9 at line 15–16.

response conveys that the first defendant was brought in so as to disguise the personal loan as a corporate one and I hardly think it is a coincidence that his understanding of the transaction aligns with that of Mr Ong's in the preceding paragraph. The relevant extract from Mr Koh's evidence is as follows:[45]

> **9 October 2020: Mr Koh, Examination-in-chief**
>
> Q: Yes, I was surprised as well. Okay, so who is Mr Yip?
>
> A: *Mr Yip is the---the borrower* or the owner of the Rangoon Road property.
>
> Q: Okay, so---
>
> (Conferring)
>
> Q: Okay, so do you know who---okay. Who is the borrower for this loan?
>
> A: The---because---*my understanding is that because it's a corporate loan so we need a company.*
>
> Q: Okay. And who is the company; do you recall?
>
> A: Basically they---they---they gave the name to mega-something limited.
>
> Q: Okay, so it's---yes.
>
> A: Mega-something.
>
> Q: Megatrucare.
>
> A: Yah.
>
> [emphasis added]

45 Considering these three aspects of Mr Ong's evidence (at [36], [39] and [43]) alongside Mr Elangovan's evidence, I find that the Loan Agreement is a sham – both the plaintiff and first defendant intended for the latter to be mere disguise to give the Loan Agreement an air of legitimacy. Mr Ong's evidence also corroborates Mr Elangovan's testimony of having explicitly told the

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[45] NOE, 9 October 2020, p 9 at line 10–22.

plaintiff that it "should not go after Megatrucare" and that they would "take back [their] 300,000 loan from Yip after he sold his property" (see [32] above).

46 As such, while Mr Ong at times maintained that the borrower was the first defendant, this contention is unreliable. The remainder of his evidence on this issue, together with Mr Elangovan's and Mr Koh's (both subpoenaed by the plaintiff), confirms the plaintiff's intention for the second defendant to be the true borrower.

(3) Objective circumstances

47 While the following circumstances have no *direct* bearing on the plaintiff's intention when entering into the Loan Agreement, these contextual clues buttress my finding that the Loan Agreement is a sham.

48 First, the stated purpose of the Loan Agreement – "to finance the working capital of the [first defendant]"[46] – is unbelievable as the Loan Agreement does not make commercial sense from the first defendant's point of view. The plaintiff intended to receive repayment from the sale proceeds of the Rangoon Road property on 30 June 2017 (see [36] above) and the minimum lock-in interest under the Loan Agreement is one month, at "3.00% (flat) per month" (*ie*, $9,000).[47] Surely it would have been more economical for the first defendant to obtain working capital directly from the sale proceeds of the Rangoon Road property on 30 June 2017, rather than to incur interest under the Loan Agreement with the plaintiff?

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46 ABOD at p 44.

47 ABOD at p 44; BOA at p 102, [4(b)].

49 Second, from the QuestNet Enhanced Individual search Mr Ong conducted on the second defendant one day before the 22 June meetings, it would have been apparent that the second defendant was not a shareholder of the first defendant and had only been appointed a director on 14 June 2017 (see [1] above).[48] Given the plaintiff's knowledge of the second defendant's insubstantial and late involvement in the first defendant's affairs, and in light of the point made in the preceding paragraph, it is more likely than not that *both* the plaintiff and first defendant intended the Loan Agreement to be a sham at the time that it was signed.

50 While the plaintiff obtained a judgment-in-default of appearance against the first defendant and examined it as a judgment debtor, I merely regarded this as part of the charade to paint the first defendant as the true borrower under the Loan Agreement.

51 Pulling all the strands together, I find that there is cogent evidence that both the plaintiff and first defendant intended the second defendant to be the true borrower and that the Loan Agreement is a sham. The form of the Loan Agreement does not reflect its substance (*Sheagar* at [81]). Consequently, the plaintiff is not an excluded moneylender as it does not lend money solely to corporations (s 2 of the MLA) and a *prima facie* presumption under s 3 of the MLA arises.

Is the presumption in s 3 of the MLA rebutted?

52 However, even if the presumption under s 3 of the MLA is raised, the plaintiff may rebut the presumption by proving that it is not in the business of moneylending: s 2 of the MLA; *Sheagar* at [75(c)]. There are two tests to

[48] BOA at p 6, [5]; Plaintiff's Opening Statement at [8]; ABOD at p 28.

determine whether a person is in the business of moneylending. The first is whether there is a certain degree of system and continuity in the moneylending transactions (the "first test"). If the answer is in the negative, the court applies the second test, which is whether the alleged moneylender is one who is willing to lend to all and sundry provided that they are from his point of view eligible (the "second test"): *Mak Chik Lun and others v Loh Kim Her and others and another action* [2003] 4 SLR(R) 338 at [11]–[12], affirmed in *Law Society of Singapore v Leong Pek Gan* [2016] 5 SLR 1091 ("*Leong Pek Gan*") at [72].

53 In the present case, the first test is answered in the negative as only one loan was extended by the plaintiff. However, in respect of the second test, I accept that the plaintiff is willing to lend to "all and sundry". The Court of Three Judges in *Leong Pek Gan* at [78] confirmed that the second test may be satisfied by evidence of a single transaction, such as in the case at present:

> Unlike the first test, the ***second*** test, which centres on whether *the lender* is one *who is willing and ready to lend to all and sundry provided they are, from his point of view, eligible*, appears to contemplate *not only* a situation where there is a certain degree of system and continuity in the transactions concerned, ***but also*** (and perhaps more importantly) a situation where *the precise facts and context suggest that* ***although*** *there is* ***only one isolated*** *transaction, that particular transaction gives rise to the* ***inference*** *that it is really* ***a manifestation of an underlying "business" of moneylending*** *inasmuch as the lender would be willing to lend to* ***all and sundry*** *provided they meet his criteria of eligibility. …*
>
> [emphasis in original in italics and bold italics]

54 In *Leong Pek Gan*, while the first test was satisfied given that there was evidence of more than one loan being extended (at [83]), the court went on to opine, in *obiter dicta*, that the second test had also been met. In relation to the second test, what was "especially significant" was that "[the lenders] and the [borrowers] did not know each other beforehand. … [T]hey were introduced to

each other by Rajan for the purpose of entering into what [the court had] found earlier to be a loan transaction" (at [84]).

55 In the present case, the manner in which the plaintiff agreed to enter into the Loan Agreement indicates that it is willing to lend to all and sundry. First, like in *Leong Pek Gan*, the plaintiff and the two defendants did not know each other beforehand. The plaintiff was only presented with the Loan application about one week before the 22 June meetings.[49] While the plaintiff alleges that the first defendant is the borrower, it did not perform due diligence on the first defendant's ability to make repayment or whether it was operating a business at the material time (see [39] above). Second, Mr Ong knew that a personal loan to the second defendant was prohibited under the MLA (see [43] above). Nevertheless, having been promised an assignment of the sale proceeds of the second defendant's property and a personal guarantee from the second defendant, the plaintiff saw an opportunity for a quick profit and proceeded to disguise what it knew was, in substance, a personal loan to the second defendant as a corporate one so as to evade the MLA.

56 Since the presumption under s 3 of the MLA remains unrebutted, it follows that the plaintiff is an "unlicensed moneylender" under s 2 of the MLA. As such, the second defendant's Guarantee given for the Loan Agreement is unenforceable under s 14(2)(*a*) of the MLA. Further, pursuant to s 14(2)(*b*), any money paid by the plaintiff under the contract for the Loan is unrecoverable. Given these findings, I need not consider the second defendant's alternative submission in respect of the personal loan illegality defence (see [25] above) and say no more on it.

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[49] NOE, 6 October 2020, p 9 at line 29 to p 10 at line 2.

Re-visiting the procedural objection

57 To recapitulate, it is clear that the evidence adduced establishes the personal loan illegality defence. I now return to the related, but distinct, question of whether all relevant facts are before the court; this is the nub of the plaintiff's procedural objection (see [20] above).

58 Having scrutinised the evidence, I find that all relevant facts have been placed before me. Even if the personal loan illegality defence had been put to the plaintiff's directors, it would ultimately be a case of their word against Mr Elangovan's. Their denials would ring hollow against the body of evidence quite apart from Mr Elangovan's account, *viz*, Mr Ong and Mr Koh's evidence and the objective circumstances surrounding the Loan Agreement which prove that the Loan Agreement is a sham.

59 *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 ("*Lena Leowardi*"), a case in which the Court of Appeal overturned the High Court's acceptance of the respondent's no case to answer submission premised on the illegality of a guarantee sued upon under the MLA is also instructive. In that case, loans had originally been extended to an individual who had since declared himself bankrupt. The lender then sued the guarantor of the loans to recover the debt. The guarantor raised a similar defence to the one at present – that the guarantee was unenforceable for being contrary to s 5 of the MLA (*Lena Leowardi* at [20]). The guarantor also argued that certain Promissory Notes, which were extraneous to the loans, were actually part and parcel of the loans. This was done so as to prove that a higher sum than the original loan amounts was to be repaid and that consequently, the presumption under s 3 of the MLA was enlivened. However, the guarantor's Defence failed to even mention the

Promissory notes and the presumption of moneylending in s 3 of the MLA (*Lena Leowardi* at [20] and [35]).

60 Given that the loans were not *ex facie* illegal, and that repayment of a greater sum than what was borrowed would be established only if extraneous evidence was relied on, *ie*, the Promissory Notes, the Court of Appeal held that the guarantor was not entitled to rely on s 3 of the MLA to establish illegality. Such extraneous evidence is inadmissible unless the circumstances relied on are pleaded (*Lena Leowardi* at [37], citing *Edler*). In other words, the First and Second *Edler* Propositions precluded the guarantor's reliance on s 3 of the MLA. Further, the Third and Fourth *Edler* Propositions did not assist the guarantor – the Court of Appeal opined that the evidence which had been led did not connect the Promissory Notes to the loan (*Lena Leowardi* at [52]–[56]).

61 Contrastingly, in the present case, while the Loan Agreement is not *ex facie* illegal, all relevant facts have been adduced at trial and these facts establish the personal loan illegality defence. The Third and Fourth *Edler* Propositions, together with my positive duty to take cognisance of evidence of illegality which is revealed (*ANC Holdings* at [84]), provide me the basis to rule on the issue of personal loan illegality.

62 In these premises, the Guarantee is unenforceable under s 14(2)(*a*) of the MLA.

63 I take this opportunity to highlight that my decision is in no way intended to constrict or prevent the flow of liquidity in commerce among smaller businesses. I am cognisant of the commercial reality that small businesses are "often unable to obtain credit facilities from established financial institutions as a result of their lack of standing, unpredictable cash flow and higher risk profile"

(*City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [48]). However, where the parties have deliberately interposed a corporate entity to disguise a personal loan as a corporate one, the courts cannot turn a blind eye.

Mental incapacity at common law

64 While my finding in respect of the personal loan illegality defence is sufficient to determine the plaintiff's claim, I proceed to consider the remainder of the parties' submissions.

65 In the alternative, the second defendant submits that the Guarantee is annulled given his mental incapacity at the material time. The test for determining whether a contract is voidable due to a party's mental incapacity is set out in *Che Som bte Yip and others v Maha Pte Ltd and others* [1989] 2 SLR(R) 60 ("*Che Som bte Yip*") at [28] and [29], and is not disputed. The second defendant must prove that the plaintiff "knew or ought to have known that the [second defendant] was mentally disordered and had no contractual capacity" (*Che Som bte Yip* at [29]). The plaintiff is not challenging the fact that the second defendant was mentally incapacitated at the material time (see [2] above). Therefore, the issue is whether, on the balance of probabilities, the plaintiff had actual or constructive knowledge of the second defendant's mental incapacity at the time the Guarantee was entered into (*ie*, 22 June 2017).

66 The evidence before me does not support a finding of actual knowledge. Consequently, whether the contract is rendered voidable turns on whether the plaintiff should be affixed with constructive knowledge. Preliminarily, I disagree with the second defendant's contention that *Che Som bte Yip* sets a low

bar for establishing constructive knowledge.[50] While the second defendant claims that the only suspicious circumstance in that case was the third plaintiff's execution of the mortgage deed by thumbprint (instead of by signature), the court at [32] explicitly inferred constructive knowledge from the entire "circumstances surrounding the execution of the mortgage deed by the third plaintiff, including the way in which the bank dealt with the owners/mortgagors of the said property."

67 In this case, I will consider the evidence of: (a) those present at the 22 June meetings; (b) the second defendant's own expert witnesses; and (c) the plaintiff's other witnesses, to ascertain if a reasonable person at the 22 June meetings ought to have known of the second defendant's mental incapacity.

Witnesses at the 22 June meetings

68 The first meeting on the morning of 22 June 2017 (the "First meeting") lasted between 30 minutes to an hour, and the second meeting in the afternoon of the same day (the "Second meeting") lasted for about 40 minutes.[51] Both of the 22 June meetings were held in a meeting room at Fernandez LLC's office. Fernandez LLC is the firm Mr Patrick Fernandez ("Mr Fernandez") practises under and he is the solicitor who was instructed by the second defendant to extract a replacement of the title deed for the Rangoon Road property on 21 April 2017. However, Mr Fernandez himself did not participate in the 22 June meetings and was not present when the Guarantee was signed.[52]

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50 2DCS at [67].

51 NOE, 6 October 2020, p 12 at line 1–5 (Mr Andri Simadiputra); NOE, 9 October 2020, p 28 at line 3–14 (Mr Koh).

52 BOA at p 92, [4] and [7].

69 As for those who participated in the 22 June meetings, Mr Koh testified that the second defendant looked "fine" and "very norm [*sic*]" on 22 June 2017, and that the second defendant was "happy" after the documents were signed at the Second meeting.[53] Even Mr Elangovan, who intermittently checked if the second defendant was following the discussion at the 22 June meetings, accepted that the second defendant's behaviour at both meetings was "normal".[54] As such, the second defendant has not demonstrated how his conduct at the meetings was such as to put the plaintiff on notice. The relevant portions of Mr Koh's and Mr Elangovan's testimony are as follows:[55]

9 October 2020: Mr Koh, Examination-in-chief

Q: So how was Mr Yip behaving at this meeting?

A: I think so far all his---he looks fine, okay, no---no questions.

Q: Okay, did he say anything?

A: No.

Q: He did not say anything at all during the meeting?

A: No, he just---I mean, he---he talked to Coco---

Q: Okay.

A: ---briefly, you know. And the---Coco explained to him the terms.

Q: Okay, did---so he spoke with Coco; did he speak to anyone else?

A: I---I---I---basically it's to Coco only. That---

Q: Okay.

A: ---Carol explained to Coco.

Q: Okay. Okay.

---

53 NOE, 9 October 2020, p 17 at line 31 to p 18 at line 13.

54 NOE, 20 October 2020, p 39 line 27 to p 40 at line 2, and p 42 at line 28–29.

55 NOE, 9 October 2020, p 17 at line 17 to p 18 at line 15; NOE, 20 October 2020, p 39 at line 27 to p 40 at line 2, and p 42 at line 21–27.

(Conferring)

Q: Okay. Mr Yip is now claiming that he did not understand what he was signing on the 22nd of June 2017. Do you have any thoughts on this?

A: He looks fine

Q: Okay, so can you tell us anything out of the ordinary that he did?

A: He was very norm. You know, when I always do loan deals, once the borrower get the loan approved, they are quite happy most of the time.

Q: Okay, so what was Mr Yip's behaviour aft---like after he signed the agreement---after he signed the documents? Was he---

A: Yah, he was happy.

Q: Okay. So he---Mr Yip also claims that he has no men---he had no mental capacity on the 22nd of June.

A: No.

Q: "No" as in you---

A: He looks fine, I mean, you know, basically he didn't say much. You know, he's happy Coco talked to him. Both of them were happy---

Q: Okay.

A: ---that the deal is done.

20 October 2020: Mr Elangovan, Examination-in-chief

Q: Okay, and during these two meetings, how was Yip behaving?

A: Normal. He is normal.

Q: Okay.

A: Oh, every time I asked him, "Mr Yip, you understand what they said?" He said yes. He said yes. But I---I want to be concerned, I---you know, I---I'm---as a director, I---I don't want to be in trouble, you see. And---and I want to know if---because he is going to take the money and it---so I asked him, "You are aware of all these things?" He said yes, Sir.

…

Q: Okay. So when you spoke to him in English, was he actively responding to you in---

A: Yah, he---

Q: ---English?

A: He---he---I mean, he respond well.

Q: Okay, and this was without the presence of Mr Fernandez?

A: Yes, yes.

70 At this juncture, I deal briefly with some perceived discrepancies in the evidence. First, while Mr Koh did not recall Mr Elangovan having spoken to the second defendant, I still accept Mr Elangovan's testimony. Mr Koh may have missed Mr Elangovan's exchanges with the second defendant as they appear to have been brief.

71 Second, while Mr Koh said that Dr Carol Choong ("Dr Choong"), the lead loan broker,[56] explained "the terms" to Coco who then explained them to the second defendant, this is not inconsistent with the evidence from Mr Ong and the other two Directors of the plaintiff (Mr Andri Simadiputra ("Mr Simadiputra") and Mr Quek Siew Cher ("Mr Quek")) that Mr Ong had explained the documents to the second defendant.[57]

72 To be precise, Mr Koh testified that at the First meeting, Carol was the main speaker, but that Mr Ong had taken the lead, on behalf of the plaintiff, in terms of "basic explaining [*sic*]".[58] As for the Second meeting, Mr Koh

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56 NOE, 9 October 2020, p 29 at line 9–10.

57 BOA at p 8, [8] (Mr Ong); BOA at p 56, [10] (Mr Quek); BOA at p 74, [9] (Mr Simadiputra).

58 NOE, 9 October 2020, p 13 at line 6–9.

confirmed that Carol explained matters to Coco, who then spoke to the second defendant and that Mr Ong had also explained the Loan Agreement.[59] Mr Elangovan also testified that one of the plaintiff's directors had explained matters at the First and Second meetings.[60] From these facts, it is probable that Dr Choong and Mr Ong played complementary roles at the 22 June meetings in terms of explaining the documentation involved.

73 Ultimately, what is important to note is that the evidence underscores the second defendant's limited participation in the meetings. He conversed mainly with Coco and Mr Elangovan and, according to the plaintiff's directors, simply nodded in response to Mr Ong's explanations of the documents.[61] I will explore the significance of the second defendant's limited participation subsequently (see [82(b)] and [94] below).

Second defendant's expert witnesses

74 The evidence of the second defendant's own expert witnesses, Professor Kua and Dr Manu Lal, casts doubt on whether a finding of constructive knowledge is justified.

75 By way of background, Professor Kua was appointed by the Family Justice Courts as an independent expert in FC/OSM 214/2017 (seeking, *inter alia*, a declaration that the second defendant lacked mental capacity; see [95] below) to assess the second defendant's mental capacity.[62] He was then engaged

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59 NOE, 9 October 2020, p 25 at line 22 to p 26 at line 8.

60 NOE, 20 October 2020, p 36 at line 2–9 (First meeting), p 37 at line 13–15 (First meeting), and p 38 at line 30 to p 39 at line 9 (Second meeting).

61 BOA at p 8, [8] (Mr Ong); BOA at p 56, [10] (Mr Quek); BOA at p 74, [9] (Mr Simadiputra).

62 BOA at p 260, [1].

as the second defendant's expert witness in the present suit and has therefore assessed the second defendant on 19 and 21 July 2017, 4 December 2018 and 3 January 2019.[63] He is a senior consultant psychiatrist practising at the National University Hospital and the Tan Geok Yin Professor of Psychiatry and Neuroscience at the National University of Singapore.[64] Dr Manu Lal is a senior consultant psychiatrist practising at the Institute of Mental Health who assessed the second defendant to be mentally incapacitated in 2016.[65] The second defendant contends that one of his brothers, Yip Fook Chong @ Yip Ronald, brought him to see Dr Manu Lal in order to formalize his care by the appointment of deputies under the MCA.[66]

Professor Kua

76 First, Professor Kua's evidence does not suggest unequivocally that a reasonable person ought to have known of the second defendant's mental incapacity. During cross-examination, he accepted that a layperson interacting with the second defendant in a loan transaction would *not* have any reason to suspect or believe that he lacked mental capacity.[67] Although, during re-examination, he qualified his earlier position by saying that someone who spoke to the second defendant about the Guarantee and saw the "way" the second defendant responded "would have suspected that something is amiss".[68] I should state that the accuracy of the Official Transcript of the foregoing portions of Professor Kua's testimony is not being challenged by the second defendant. The

63 BOA at pp 253, [5] and 261, [5].

64 BOA at p 257.

65 NOE, 21 October 2020, p 2 at line 10; BOA at p 145, [1].

66 Second defendant's Opening Statement at [2].

67 NOE, 21 October 2020, p 76 at line 14–17.

68 NOE, 21 October 2020, p 78 at line 22 to p 79 at line 6.

challenged portions instead relate to whether the second defendant had the capacity to understand the Guarantee, and I address this subsequently at [117]–[126]. For the purposes of the mental incapacity defence, the relevant portions of Professor Kua's testimony are as follows:[69]

21 October 2020: Professor Kua, Cross-examination

Q: I suggest to you that a layperson interacting with Yip in a financial transaction, in a loan transaction, would not have any reason to suspect that he lacked mental capacity.

A: I mean, when---when they talk to the person, and his response is more---more measured and more sluggish, they would have said that, well, there's something---something's not right, something's amiss with his reaction, yah, right. And because, even in his neighbourhood, Your Honour, people often ridicule and abuse him because---and they know---they recognise him, this person is mentally not right, and this is common in---in the community that the people with mental health problems often been abused and---and ridiculed, and they could recognise from their facial expression, they call it the facets, you know. So I---I---by going through a more detailed mental capacity, *I don't think a layperson have that ability to do that.*

Q: Okay, so I'm going to need you to agree or disagree: I put it to you that a layperson interacting with Yip in a loan transaction would not have any reason to suspect or believe that he lacked mental capacity.

A: Alright, *I agree that he has no idea. A layperson would not have the idea.*

Q: Okay, okay, okay, so the last question. I put it to you that Yip had mental capacity on the 27th of June 2017.

A: I must disagree with you, Your Honour.

21 October 2020: Professor Kua, Re-examination

Q: So when that person talks to Mr Yip about the guarantee - like I said, and I repeat for you, "Who

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69 NOE, 21 October 2020, p 76 at line 1–20, and p 78 at line 22 to p 79 at line 6.

> the borrower is; how much is borrowed; what are your obligations; what are your liabilities; what are your responsibilities; what happen when you don't pay; what we can do to you if you don't pay," all these things - will that someone talking to Yip Fook Meng about this document, 305, 306, 307, suspect something amiss about the mind of Yip Fook Meng?
>
> A: There are two parts to the question, Your Honour, one is the---the person who asked the question, yah right. The person who asked the question - who is truthful, who is empathetic - would take his time to explain, right. And---and if---if he were someone who intends to deceive him, obviously, he won't---he will not explain everything in---in the---in the---in the---in the document itself. He could delete certain issues which may be there, you know, if he finds that this person is vulnerable, you know. But when he talks to this person and see---see the way he---he respond, the way Mr Yip responded to him, you know, his---his---even his emotional responses, you know, he would have suspected that something is amiss, you know. I think his---his mentation would be a bit more slow, you know, and I think *people would know that.*
>
> [emphasis added]

77 In addition, Professor Kua accepted that if the Guarantee was explained to the second defendant, he would probably have understood what it meant (see [115] below). I regard the second defendant's ability to understand the Guarantee as another difficulty with saying that the plaintiff ought to have known of the second defendant's incapacity. Viewing this together with the inconsistency highlighted in the preceding paragraph, Professor Kua's evidence does not take the second defendant's case very far.

78 Further, while Professor Kua's nurses suspected that something was amiss from the way he walked into the former's clinic, this is not conclusive of whether the plaintiff should have been put on notice at the 22 June meetings.[70]

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[70] NOE, 21 October 2020, p 75 at line 7–8.

Professor Kua noted that the second defendant was also suffering from "painful legs" when attending his clinic and, in respect of the examinations on 19 and 21 July 2017, was "drag[ging] his swollen legs as he walk[ed]".[71] Oddities which Professor Kua's nurses observed may thus have been caused by physical, rather than mental, impairment. On a related note, "[s]hortly after settling into Fernandez LLC's office [for the First meeting], Mr Patrick Fernandez asked [the second defendant] to step out of the meeting room for a private discussion". Even if the plaintiff's directors had the opportunity to observe the second defendant leaving and re-entering the meeting room, none of the witnesses present at the 22 June meetings highlighted anything unusual about the second defendant's movements.

79 Professor Kua further noted that once a person with mental retardation, like the second defendant, "settle[d] with you", they would display "emotional resonance" and not appear "detached".[72] Coco's familiar presence at the 22 June meetings would likely have had a calming effect on the second defendant, thereby concealing signs (if any) of his mental incapacity.

Dr Manu Lal

80 I turn next to the evidence of Dr Manu Lal, who had examined the second defendant on 9 December 2015 and 28 January 2016.[73] While these examinations precede the 22 June meetings, Dr Manu Lal's general impressions of how the second defendant fared in a social setting remain relevant. From those two assessments, he did not observe any "oddities of behaviour" and instead opined that the second defendant could "understand information

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71 NOE, 21 October 2020, p 75 at line 10–21; BOA at p 262, [6(I)].

72 NOE, 21 October 2020, p 75 at line 14–21.

73 BOA at p 149.

relevant to a decision relating to his … property and affairs", even if he was unable to weigh such information in order to make decisions.[74] The following portion of Dr Manu Lal's report also attests to the second defendant's ability to respond to questions put it him:[75]

> … When asked how he would like to spend that money if the full amount of 6000 dollars is given to him, he replied he will pay his property and income taxes with the money and spend the remaining on lottery and 4D. …

81 Admittedly, one portion of Dr Manu Lal's testimony suggests that someone with prior knowledge of the second defendant, and whose meeting with him "carrie[d] some stakes", would look out for something abnormal and have his suspicions aroused:[76]

> **21 October 2020: Dr Manu Lal, Cross-examination**
>
> Q: So based on your interactions with Yip during these two assessments, in your view, is there anything about his behaviour that will make a lay person suspicious about the state of his mental capacity?
>
> A: Well, I suppose, everything was contextual.
>
> Q: Well, I mean it's a "yes" or "no" based on your observations with---of him at these two interviews.
>
> Court: Mr Lee, allow the doctor to answer the question.
>
> Lee: Will do.
>
> Q: Please.
>
> Witness: Thanks---thanks, Your Honour.
>
> A: I mean, I know, I know. It may sound a bit vague but the reality is that there is something called an observation and there's---the next step is the inference. Now, just on the basis of he's sitting there quietly - there's no oddities of behaviour - doesn't lead anyone to draw any conclusion. Just

74 BOA at pp 150 and 152.

75 BOA at p 150.

76 NOE, 21 October 2020, p 11 at line 20 to p 12 at line 27.

watching a person sitting quietly – cooperative, no odd behaviour, nothing - is just an observation.

Q: Yes.

A: To suspect that there's something abnormal or something amiss isn't inference. Now, in order to draw a inference, you need something more, you know. So, let's say if Mr Yip was to meet someone for the first time. This person has no prior knowledge of Mr Yip and they just shake hands and they say "Hi", "Hello, it's a nice weather" and they go away. Then likely the other person may not suspect anything. *On the other hand, the situation is that the person who is meeting Yip has come there with some prior knowledge about Mr Yip.* His meeting with Mr Yip carries some stakes. There is reason---there is reason for him to look out if there's something abnormal. The person, in his own astuteness, you know, about judging people from people's behaviour, so all---all that also needs to be taken into account.

Q: Okay, so---

A: So it all depends, you know, what the overall situation is.

Q: There are a lot of other factors, right? But---

A: Sorry?

Q: There are a lot of other factors---

A: Yes, correct.

Q: ---to be considered.

A: Correct.

Q: But someone meeting him for the first time, generally you won't think there's anything wrong with him.

A: Yes. Yes. If it's a very brief conversation as I said, you know---

Q: Yes.

A: ---as I---as I tried to elaborate in that example - just "Hi", "Hello" – that's all.

[emphasis added]

82 However, not much turns on the foregoing portion of Dr Manu Lal's testimony for the following reasons:

(a) For one, Dr Manu Lal's actual observations of the second defendant recorded in his report (see [80] above) cast doubt on the contention that a person "with some prior knowledge about Mr Yip" and whose meeting with the second defendant "carrie[d] some stakes" would suspect "something" is amiss.

(b) More crucially, given the second defendant's limited participation in the meetings (see [73] above), especially having spoken primarily to Coco and Mr Elangovan, there was no clear opportunity for the plaintiff's directors to have witnessed behavioural abnormalities, slowness in thought or other indicia which Dr Manu Lal (and for that matter, Professor Kua) claim would have put a reasonable person on notice.

(c) Dr Lai's medical memo, which the plaintiff had received from the loan brokers on or after 17 June 2017 but before the 22 June meetings, stated that there were no issues with the second defendant's mental capacity.[77] This being the "prior knowledge" (to borrow Dr Manu Lal's words) which the plaintiff's directors attended the 22 June meetings with, there was no reason for the plaintiff to have suspected that anything was amiss.

83 On the whole, Dr Manu Lal's evidence, which in any case does not speak to the second defendant's behaviour *at the 22 June meetings*, does not support a finding of constructive knowledge.

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[77] ABOD at p 84.

Plaintiff's other witnesses

84 The evidence of the plaintiff's other witnesses who interacted with the second defendant around the date the Guarantee was signed is relevant to my decision as well. While they did not observe the second defendant on 22 June 2017, their impressions of the second defendant would shed light on how the plaintiff's directors would have perceived him at the 22 June meetings.

85 I turn first to Dr Lai, who had examined the second defendant on 17 June 2017 for about 30 to 45 minutes.[78] The second defendant was referred to Dr Lai by Mr Fernandez. Preliminarily, I note that the second defendant has not waived solicitor-client privilege (*ie*, legal advice privilege under s 128 of the Evidence Act (Cap 97, 1997 Rev Ed)) in respect of the reason for his referral to Dr Lai by Mr Fernandez.[79]

86 Dr Lai only conducted an Abbreviated Mental Test on the second defendant which would not have enabled him to pronounce on the second defendant's capacity to manage his property and affairs.[80] Nevertheless, Dr Lai's observations relating to whether a reasonable person ought to have known of the second defendant's mental incapacity remain relevant. Dr Lai observed that the second defendant could manage basic finances as he knew the valuation of his Rangoon Road Property and was able to account for how he went about daily activities like obtaining food.[81] He ultimately opined that a person conversing with the second defendant in relation to the Loan Agreement and

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78 NOE, 7 October 2020, p 16 at line 26–27.

79 BOA at p 92, [6].

80 NOE, 7 October 2020, p 16 at line 28–29, and p 20 at line 10–14.

81 NOE, 7 October 2020, p 25 at line 31–32, and p 26 at line 25–30.

Guarantee would not doubt his mental capacity and that the second defendant would be able to understand the documents if explained in layman terms:[82]

> **7 October 2020: Dr Lai, Cross-examination**
>
> Q: Dr Lai, you have totally misunderstood this clause. I put it to you, you are not a lawyer, but I put it to you that you have totally misunderstood Clause 8. So let me ask you this general question, Dr Lai, look at me: I suggest to you that anyone discussing Clause 8 with Yip Fook Meng would suspect that there's something wrong about his mind. Do you agree or disagree?
>
> …
>
> A: Just answer if you agree, you disagree. If you disagree or you agree, your---not your counsel, plaintiff counsel later on can help you clarify. You just answer my question, whether you agree or you disagree.
>
> Q: Okay, I disagree.
>
> …
>
> A: Alright, fine, therefore, if someone discusses Clause 6 with Yip Fook Meng, would that someone suspect that there's something wrong about his mind? Discusses mean that he explain and---
>
> A: Yah, so---
>
> Q: Yes.
>
> A: --- if someone explains, it may be easier for me to understand, and I think it is possible that he will understand.

87 While I do not place reliance on Dr Lai's conclusion that the second defendant would have been able to understand the Guarantee given the

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82 NOE, 7 October 2020, p 37 at line 11–28, and p 38 at line 18–24.

limitations of the examination he performed, his general impression of the second defendant does paint a picture of normalcy.

88 Further, Mr Daniel Poon Choon Kow ("Mr Poon"), the Commissioner for Oaths before whom the second defendant signed the LOA on 21 June 2017, gave evidence that he "would … have satisfied [himself]" that the second defendant was mentally rational and capable of understanding the contents of the LOA, and that "[a]t the very least, there were no circumstances which would make [him] think otherwise."[83] However, as Mr Poon did not have recollection of this particular commissioning, I am careful not to attach disproportionate weight to his evidence.[84]

89 Finally, Mr Fernandez had met up with the second defendant more than once between 21 April and 16 June 2017 to take instructions on the extraction of a replacement title deed for the Rangoon Road Property.[85] He did not find anything "untoward" that was a cause for concern vis-à-vis his role as a solicitor.[86]

90 In these circumstances, Dr Lai, Mr Poon and Mr Fernandez's evidence contradicts the second defendant's submission that the second defendant's behaviour (see [92(g)] below) should have aroused the plaintiff's directors' suspicions, such as to justify affixing the plaintiff with constructive knowledge.

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83 BOA at p 128, [5].

84 BOA at p 128, [4].

85 NOE, 20 October 2020, p 5 at line 26–29.

86 NOE, 20 October 2020, p 6 at line 15–20.

Evaluation of the evidence

91 Ultimately, I agree with Dr Manu Lal's testimony that whether a person dealing with the second defendant would be suspicious of his mental capacity is "contextual" and depends on many factors.[87]

92 The second defendant submits that there were *seven* suspicious circumstances that justify affixing the plaintiff with constructive knowledge:

(a) The second defendant was not a shareholder of the first defendant and had only become a director a few days before signing the Guarantee;[88]

(b) The second defendant had seen the Guarantee for the first time at the Second meeting and signed it without asking any question or saying anything;[89]

(c) The Guarantee is in English and the plaintiff's directors knew that the second defendant did not understand English;[90]

(d) The plaintiff's directors knew that the second defendant obtained no benefit from being a guarantor;[91]

(e) Mr Fernandez distanced himself from the 22 June meetings even though the meetings were held at his office;[92]

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87 NOE, 21 October 2020, p 11 at line 20 to p 12 at line 16.

88 2DCS at [68(1)].

89 2DCS at [68(2)].

90 2DCS at [68(3)].

91 2DCS at [68(4)].

92 2DCS at [68(5]).

(f) The second defendant, who is Chinese-speaking, was apparently running a business together as co-directors with an Indian man who is not Chinese-speaking;[93]

(g) Professor Kua's evidence was that the second defendant looked sullen, had slow mentation, gave monosyllabic replies and that his nurses suspected something as soon as the second defendant entered the former's clinic.[94]

93 However, in the present case, I do not regard the foregoing factors to be sufficient to establish constructive knowledge:

(a) The veracity of the point at [92(b)] about the second defendant not "saying anything" when signing the Guarantee is itself doubtful given Mr Elangovan had spoken to the second defendant (see [69] above). Mr Koh also testified that the second defendant had spoken to Coco during the Second meeting.

(b) The point at [92(c)] is unsupported by the evidence. Professor Kua,[95] Dr Lai,[96] Mr Elangovan,[97] Mr Fernandez,[98] Dr Manu Lal,[99] and Mr Ong[100] have all given evidence that they have spoken to the second defendant in English.

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93 2DCS at [68(6)].

94 2DCS at [68(7)].

95 NOE, 21 October 2020, p 44 at line 29 to p 45 at line 1.

96 NOE, 7 October 2020, p 35 at line 18–24.

97 NOE, 20 October 2020, p 42 at line 16–27.

98 NOE, 20 October 2020, p 3 at line 29–32, and p 4 at line 28 to p 5 at line 4.

99 NOE, 21 October 2020, p 38 at line 7–15.

100 NOE, 6 October 2020, p 61 at line 2–4.

(c) I dismiss the factor at [92(f)] as being plainly irrelevant.

(d) The factors at [92(a)], [92(d)] and [92(e)] have little direct bearing on whether the plaintiff was put on notice as to the second defendant's *mental incapacity*. These factors could equally be explained by the fact that the Loan Agreement was, in truth, an illegal personal loan. In particular, I do not find the point at [92(d)] to be credible, given Mr Ong testified that the plaintiff did not check how the first defendant would apply the Loan moneys.[101]

94 Even taking the second defendant's case at its highest, in that the receipt of Dr Lai's medical memo together with Mr Fernandez's absence from the 22 June meetings *may* have come across as being unusual, I do not accept that the plaintiff was put on notice. To the contrary, Mr Elangovan and Mr Koh's testimony of the second defendant's unremarkable behaviour at the 22 June meetings (see [73] above), and the evidence of the second defendant's experts, Dr Lai, Mr Poon and Mr Fernandez undermines the contention that the plaintiff ought to have known of the second defendant's mental incapacity. The plaintiff was also shown the exercised Option to Purchase ("OTP") the Rangoon Road Property before the 22 June meetings, which recorded the second defendant as having signed the OTP in the presence of one Mohamed Haron bin Hassan, a registered estate salesperson at the material time.[102] The OTP would have given the plaintiff less reason to question the second defendant's capacity to enter into the Loan Agreement.

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101 NOE, 6 October 2020, p 52 at line 15–19.

102 ABOD at p 26; NOE, 6 October 2020, p 65 at line 8–10.

95 I am fortified in my conclusion by one final consideration – the circumstances surrounding the drafting of an affidavit affirmed by the second defendant on 7 July 2017 (the "Mental Capacity Affidavit") in support of FC/SUM 2315/2017 ("SUM 2315/2017"). In SUM 2315/2017, the second defendant sought an order to discharge an interim injunction restraining him from selling the Rangoon Road Property and to strike out FC/OSM 214/2017 which, *inter alia*, sought a declaration of mental incapacity and the appointment of deputies for him under the MCA. The Mental Capacity Affidavit was filed by Mr Fernandez, the solicitor representing the second defendant in SUM 2315/2017 at the material time. In the Mental Capacity Affidavit, the second defendant averred that he possessed mental capacity and that he had "pledged the sale proceeds of the property to take a loan of $300,000 from [the plaintiff]".[103] The Mental Capacity Affidavit was also withheld by the second defendant until less than a week before trial despite Yip Li-Fen (the second defendant's niece and litigation representative)[104] conceding that various medical reports in the affidavit were "relevant". It was only disclosed on 30 September 2020 when requested for by the plaintiff.[105] Crucially, Mr Fernandez testified that he had drafted the Mental Capacity Affidavit on the second defendant's instructions:[106]

> **20 October 2020: Mr Fernandez, Examination-in-chief**
>
> Q: Okay. This affidavit was filed by Basco Loyd Torres(?) on the 7th of July. Can you tell us who that is?
>
> …

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103 Plaintiff's Supplemental Bundle of Documents ("PSBD") at [9] and [15].

104 BOA at pp 173 and 174, [1] and [2].

105 NOE, 22 October 2020, p 29 at line 17–19; NOE, 6 October 2020, p 5 at line 1–7.

106 NOE, 20 October 2020, p 3 at line 10 to p 4 at line 2.

> Witness: Your Honour, Loyd Basco is my personal assistant in the firm.
>
> Q: Okay. And this affidavit was interpreted to Yip in Mandarin by Leong Zhenling, Pearly. Who is that?
>
> A: Your Honour, this Pearly Leong was my trainee at the time when this affidavit was affirmed by Mr Yip.
>
> Q: Okay. And who drafted this affidavit?
>
> A: *Affidavit was drafted by myself on the instruction of Mr Yip.*
>
> Q: Okay. And the affidavit recounts information that is personal to Yip, for example, that his family members would bully him and were trying to force him to execute a will to leave 106 Rangoon Road to them. How did you know of this information?
>
> A: This information, Your Honour, was shared by my client in the course of the preparation of this affidavit.
>
> Court: Yes.
>
> Q: Okay. And in what language did you---did Yip communicate this information to you?
>
> A: Now, my communication with Mr Yip was in English. But being a cautious person that I am, I also ensured that whatever that I spoke to Mr Yip and whatever Mr Yip spoke to me in English, my trainee translated in Mandarin as well.
>
> [emphasis added]

96 While the Family Court's Order of 30 October 2017 in FC/OSM 214/2017 declared that the second defendant was unable to make decisions relating to his property and affairs due to "an impairment of, or a disturbance in the functioning of, [the second defendant's] mind or brain", the second defendant ultimately did not contest that application.[107] In other words, the Mental Capacity Affidavit was never tested in court. The reliability of the *contents* of the Mental Capacity Affidavit aside, Mr Fernandez's testimony

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107 FC/ORC 5596/2017; ABOD at p 131; Minute sheet for FC/OSM 214/2017 on 30 October 2017.

indicating that the second defendant possessed the capacity to instruct him around the time that the Guarantee was signed is significant. I found this to be another difficulty with the second defendant's case that a reasonable person interacting with him in a commercial setting ought to have known of his mental incapacity. For completeness, while the second defendant and Yip Li-Fen insinuated Mr Fernandez's involvement in a conspiracy to scam the second defendant,[108] this allegation was not put to Mr Fernandez in cross-examination and it therefore does not diminish the credibility of his testimony.

97 In these premises, I am not satisfied that the plaintiff had actual or constructive knowledge of the second defendant's mental incapacity on 22 June 2017. I do not find for the second defendant on the grounds of mental incapacity at common law.

98 I make brief mention of the following reports relied on by the plaintiff. Dr Terence Leong's ("Dr Leong") and Dr Tan Chai Beng's ("Dr Tan") reports (annexed to the second defendant's Mental Capacity Affidavit) spoke to the normalcy of the second defendant's behaviour. Dr Leong's report stated that while the second defendant had mild mental retardation, he was not mentally ill and was "alert, kempt, pleasant, relevant and coherent in Mandarin and Cantonese, euthymic, not suicidal or agitated, [had] no psychotic symptoms, [was] well oriented and [was] cognitively intact."[109] Dr Tan's report stated that the second defendant was "rational, lucid and could converse both in English and Cantonese. … He was oriented to time, place and person. His remote and past memory was normal."[110] However, as Dr Leong and Dr Tan were not

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108 2DCS at [64] and [68(5)]; 2DRS at [51]; NOE, 22 October 2020, p 31 at line 13–15.

109 PSBD at p 25, [8].

110 PSBD at p 20.

witnesses in these proceedings, their reports are inadmissible hearsay and I did not consider them when arriving at my decision.

Mental Capacity Act

99 The second defendant further submits that s 19(1)(*c*) of the MCA empowers the court to annul the second defendant's personal guarantee. In my view, the issue I have to resolve is as follows: does the Family Court's declaration that the second defendant lacked mental capacity oblige, or permit, annulling the Guarantee under s 19(1)(*c*)?

100 Whether I am compelled to annul the Guarantee in light of the declaration of the second defendant's mental incapacity turns on whether the MCA is intended to override the common law requirement of proving the counter-party's knowledge of the mental incapacity. As our MCA is modelled after the UK's Mental Capacity Act 2005 (c 9) (UK) ("UK Mental Capacity Act") (*Singapore Parliamentary Debates, Official Report* (15 September 2008), vol 85 at col 109 (Dr Vivian Balakrishnan, then Minister for Community Development, Youth and Sports)), materials which elucidate the legislative intent and scope of the UK Mental Capacity Act are instructive for our purposes. It is clear to me that the UK Mental Capacity Act is not intended to displace the rule at common law that, in general, a contract entered into by a person who lacks capacity to contract is voidable *only if* the other contracting party has actual or constructive knowledge of the lack of capacity (Explanatory Notes to the UK Mental Capacity Act at [45]). Consequently, a declaration of mental capacity under our MCA does not by itself annul the incapacitated party's contract, especially one concluded prior to the declaration.

101 Notwithstanding the above, does the court have a residual discretion to annul a contract concluded by a mentally incapacitated person under s 19(1)(*c*)

of the MCA where the contract was concluded prior to the declaration of mental incapacity? Even if I accept that the court has such a discretion, the second defendant has not furnished the grounds on which I should exercise it in his favour. The Court of Appeal decision cited by the second defendant, *Re BKR*,[111] concerns the setting aside of a trust and a transfer of assets from two banks to a third which were created and/or effected prior to the declaration of the third respondent's mental incapacity. However, *Re BKR* does not stand for the proposition that the courts should similarly intervene in contractual relations.

102 In conclusion, I am not prepared to annul the Guarantee under s 19(1)(*c*) MCA on the basis of the second defendant's mental incapacity where the common law does not see fit to do so.

Non est factum

103 Finally, and in the alternative, the second defendant argues that he is not bound by the Guarantee by virtue of the doctrine of *non est factum* (Latin for "it is not my deed"). *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 at [119] states that the two requirements for invoking this doctrine are: (a) that there is a radical difference between what was signed and what was thought to have been signed (the "first element"); and (b) that the party seeking to rely on the doctrine was not negligent in signing the document (the "second element"). Further, a plea of *non est factum* requires clear and positive evidence before it can be established: *Saunders (Executrix of the Will of Rose Maud Gallie, deceased) v Anglia Building Society* [1971] AC 1004 ("*Saunders*") at 1019.

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111 2DCS at [70].

First element of non est factum

104 Under the first element of the test for *non est factum*, the second defendant makes three arguments. First, he submits that he mistakenly believed that he was signing documents for the sale of the Rangoon Road Property, and not a personal guarantee for a loan. He took this position in his examination with Professor Kua on 3 January 2019, AEIC and oral testimony.[112] At his examinations with Professor Kua on 19 and 21 July 2017, the second defendant is also recorded as being unable to understand the contents of the LOA, OTP and statutory declaration filed to obtain a replacement certificate of title for the Rangoon Road Property ("SD"). However, he accepted that he had signed these three documents when he was shown his signature.[113] Second, the second defendant argues that the Guarantee was not explained to him in Mandarin at the 22 June meetings.[114] Third, the second defendant claims that he lacks mental capacity to understand the Guarantee even if it had been explained to him.[115]

105 I am unable to accept the second defendant's first argument that he harboured a mistaken belief as to the effect the Guarantee. On the whole, he has not adduced "clear and positive evidence" of such a defective understanding given his evidence is not internally consistent (*Saunders* at 1019). On one hand, he claims that, from his point of view, he signed the Guarantee to sell the Rangoon Road Property. The second defendant also highlights Dr Lai's testimony that he was told that the purpose of the second defendant's mental

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112 BOA at p 253, [6(ii)]; BOA at p 170, [4]; NOE, 22 October 2020, p 92 at line 24–29; D&CC1 at [14(3)].

113 BOA at p 264, [6(III)(i)]–[6(III)(ii)].

114 2DCS at [45]–[47].

115 2DCS at [48].

assessment was the sale of the second defendant's shop, and not the signing of a guarantee.[116]

106 On the other hand, the second defendant gave evidence that the Mental Capacity Affidavit, in which he admitted to pledging the sale proceeds of the Rangoon Road Property to take the Loan from the plaintiff, is true and that his AEIC in the present suit is false:[117]

> **22 October 2020: Second defendant, Cross-examination**
>
> Q: I put it to you that the affidavit you affirmed on the 7th of July 2017 was drafted according to your instructions.
>
> A: I agree.
>
> Q: I put it to you that the contents of the affidavit of 7th July 2017 *represents the truth*.
>
> A: I agree.
>
> …
>
> Q: Okay, please turn to the bundle of affidavits at page 169.
>
> …
>
> Q: I put it to you that the words in this AEIC are *untrue*.
>
> A: I agree.
>
> [emphasis added]

The second defendant also asserts legal advice privilege over the reason he engaged Dr Lai's services.[118]

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116 NOE, 7 October 2020, p 13 at line 24–28, and p 50 at line 19–29.

117 PSBD at p 7, [15]; NOE, 22 October 2020, p 76 at line 14–19, and p 78 at line 13–14.

118 BOA at p 92, [6]

107 I find that the second defendant's account of having misunderstood the Guarantee is contradicted by his *own* evidence and is wholly unreliable. As such, his plea of *non est factum* cannot succeed on the basis of there being a radical difference between what was believed to be signed and what the Guarantee actually means. To successfully establish *non est factum*, the second defendant must instead prove that his mental incapacity impaired his understanding to such an extent that the element of consent required for contractual formation is totally lacking (*Saunders* at 1025; *Ford (by his tutor Watkinson) v Perpetual Trustees Victoria Ltd* (2009) 257 ALR 658 ("*Ford*") at [85]).

108 However, the tests to render a contract voidable due to a party's mental incapacity (see [65] above) and void under a plea of *non est factum* (see [103] above) are not identical. Just because a party is mentally incapacitated does not necessarily mean that his/her plea of *non est factum* will succeed. In connection with the definition of mental incapacity at common law, the English High Court in *Fehily and another v Atkinson and another* [2017] Bus LR 695 ("*Fehily*") at [102] made clear that mental capacity encompasses a range of cognitive functions (*eg*, processing and weighing information) of which *understanding* is merely a part. This definition of mental capacity in *Fehily* is consistent with the statutory one in ss 4(1) and 5(1) of Singapore's MCA. Aedit Abdullah J also confirmed in *BUV v BUU and another and another matter* [2019] SGHCF 15 at [31] that the absence of any one cognitive function in s 5(1) (*eg*, to use or weigh information to make a decision) will result in a finding of incapacity. In other words, one may be able to understand a document explained to him/her but yet lack mental capacity.

109 Mental incapacity may only ground a plea of *non est factum* if it deprives the relevant party of "any real understanding of the purport of a particular document". This was held by Lord Reid in *Saunders* (at 1016):

> … I think [the plea of *non est factum*] must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation ***any real understanding*** of the purport of a particular document, whether that be from defective education, illness or ***innate incapacity***.
>
> [emphasis added]

110 I make several observations in relation to Lord Reid's statement of the law. First, the party's ability to understand information is assessed in relation to the particular document in question, *ie*, the Guarantee in this case.

111 Second, while Lord Reid framed the question as the party's ability to understand the document "without explanation", this aspect of his statement should be confined to the facts of *Saunders*, in which no proper explanation of the deed was offered to Mrs Gallie. Where the document is actually explained to the party in question, the court should consider if such explanation imparted the requisite degree of understanding of the document such that the party's signature represents his/her consent to the contract (*Ford* at [12] and [85]).

112 Third, Lord Reid did not expound on what "any real understanding" entails. However, some guidance may be gleaned from Lord Pearson, who stated in *Saunders* (at 1034) that:

> In my opinion, the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed. By "sufficiently understanding" I mean *understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be.* …

[emphasis added]

113 With these principles in mind, the first element of *non est factum* (as reformulated at [107] above) turns on the determination of two issues: (a) whether the second defendant had the ability to understand the Guarantee if it was explained to him at the 22 June meetings; and (b) whether and how the Guarantee was explained to him at the 22 June meetings.

Whether the second defendant had the ability to understand the Guarantee if it was explained to him at the 22 June meetings

114 I deal first with the second defendant's argument that he lacked the mental capacity to understand the Guarantee even if it was explained to him. In this regard, the medical evidence is a guide for the court (*Fehily* at [84]).

(1) Professor Kua

115 Initially, Professor Kua's report of 27 July 2017 concluded that being mentally retarded and mentally incapacitated, the second defendant would have difficulties understanding complex financial transactions and documents.[119] Further, in his subsequent report of 4 January 2019, he recorded having shown the second defendant the Guarantee, in response to which the second defendant said that this was what Coco had asked him to sign for the sale of the Rangoon Road Property in mid-2017.[120] However, during re-examination, Professor Kua accepted that if the relevant documents (including the Guarantee) were explained to the second defendant in the "proper way, he would probably understand what it means":[121]

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119 BOA at p 264, [6(III)].

120 BOA at p 253, [6(ii)].

121 NOE, 21 October 2020, p 77 at line 27 to p 78 at line 14.

21 October 2020: Professor Kua, Re-examination

Q: The question is not that he is asked to read it; the question is: The person discusses or talks or converses with Yip Fook Meng about the guarantee, "Who is the borrower; what happens when you---the borrower doesn't pay; and what would happen to you; what we can do to you," you know what I mean, the obligations, the rights, the liabilities under the guarantee. When sometime talks to Fook Meng, Yip Fook---Mr Yip about this guarantee - when I say about this guarantee, I'm talking about, "Who the lender is; what is your role; what is your obligation; what is your responsibility; what is your liability; what would happen to you if the loan is not repaid" - would someone talking to Yip Fook Meng about this guarantee suspect that something is amiss about his mind?

A: Okay, if---even if someone with---with him, that kind of level of intelligence, if someone *explained to him clearly the consequences*, you know, everything and---that he---what does it mean, you know, and ask him make a decision, and provided, at that point in time, he's also physically well, you know, and he know the consequences - very important, he must know the consequences if he was---if he were to sign that---that - then I would say that he---***if he's done the proper way, he would probably understand what it means***.

Q: Okay, I think I know where you are coming from. What you are saying is whether or not Mr Yip could understand, right, so---but that's not the issue here. We are now into a different issue, it's actually quite speculative.

[emphasis added]

116 The second defendant seeks to discredit the foregoing portion of Professor Kua's testimony in re-examination by arguing that he was "talking about a hypothetical person with the level of intelligence of Yip", and not the second defendant.[122] However, this interpretation over-fixates on the phrase "even if someone with". Read in its entire context, I have no doubt that Professor

122 2DRS at [29].

Kua had the second defendant in mind when he said "he would probably understand what it means". Mr Vincent Yeoh's (second defendant's counsel) ("Mr Yeoh") preceding question concerned the second defendant directly, *viz*, whether someone talking to the second defendant would suspect that something is amiss about his mind. It is also clear from Mr Yeoh's response, "Okay, I think I know where you are coming from. What you are saying is whether or not [the second defendant] could understand, right …" immediately following the portion of Professor Kua's testimony in question, that Mr Yeoh interpreted Professor Kua's response as pertaining to the second defendant's understanding.[123]

117 Separately, the second defendant challenges the veracity of three portions of the Official Transcript recording Professor Kua's cross-examination (the "Challenged Portions of Professor Kua's testimony"). This challenge first surfaced in the second defendant's Reply Submissions of 21 January 2021,[124] by way of a one-page letter from Professor Kua, dated 18 January 2021, annexed to the Reply Submissions. The Challenged Portions of Professor Kua's testimony are where the Official Transcript records Professor Kua as stating that the second defendant "could" understand the LOA, OTP, SD or Guarantee when he had examined the second defendant in 2017 and 2019. The second defendant argues that Professor Kua had actually said that the second defendant "*couldn't*" understand the relevant document. The plaintiff takes the opposing view that the Official Transcript is accurate.[125] For ease of reference, I reproduce the

123 NOE, 21 October 2020, p 78 at line 1–14.

124 2DRS at [24]–[25].

125 Plaintiff's Letter to the Court on 16 February 2021 at [2].

Challenged Portions of Professor Kua's testimony (emphasised in italics) and their surrounding context in the Official Transcript:[126]

21 October 2020: Professor Kua, Cross-examination

Q: So the personal guarantee and the letter of authority which, according to his affidavit, he understood everything about it as to the nature and fact of it. And so I just think it's odd that, on 7th of July, he could say that, "I know what letter of authority is, I know what the personal guarantee is, I know my liabilities"---

…

Q: Okay, so after those two assessments, you did assessment of his mental capacity, and you just showed him the letter of authority, right? So that is the inconsistency I'm talking about, because, in his affidavit, they explained what the letter of authority is---he didn't explain what the letter of authority is, but he knew what the effect was. But down here, he's saying he doesn't know at all.

A: Yah.

Q: Right, all the questions were, "I don't know," or, "I don't understand," which is in totally contradiction to this.

A: Right, so, Your Honour, when I showed him the three letters, I asked him, "Have you seen this letter," before I showed him the back with signature. He said, "I've never seen this letter before." So I turned it around to see signature, he said, "Oh, I understand, right." So---so---so granted that the---the---the documents were---were quite complex, you know, but he *could* understand what it means,

126 NOE, 21 October 2020, p 64 at line 32, p 65 at line 1–3, 18–32, and p 66 at line 1–6, 13–21.

> you know [the "***First Challenged Portion of Professor Kua's Testimony***"].
>
> Q: Yes, but---
>
> A: There was no lawyer there to assist him; by himself, you know, he *could* understand [the "***Second Challenged Portion of Professor Kua's Testimony***"].
>
> Q: Oh, yes, correct, so I mean, I'm not talking about it---I'm not talking about him reading the document because even Dr Lai couldn't interpret the document well. So I'm saying if someone explained to him the general nature of a personal guarantee, would he be able to understand it?
>
> …
>
> A: It would be wonderful, Your Honour, if you all can go back in time and sit down beside the---the---the lawyer to listen to him explain to Mr Yip, you know, that would be wonderful, you know, see whether he understand it, you know. What I'm telling you, it would---would be null and void, you know, what is it and what happened 3, 4 years ago, you know---
>
> Q: Yes.
>
> A: ---what the lawyer---lawyer say, you know. But if I assess him, he *could* understand [the "***Third Challenged Portion of Professor Kua's Testimony***"].
>
> Q: He told you he could understand? Okay. …
>
> [emphasis added]

118 I do not accept the second defendant's belated challenge to the veracity of the Official Transcript. In the absence of any authority on the proper procedure for bringing such a challenge, I take reference from *Chan Kok Kiang v Tan Swan Cheng and another* [1968-1970] SLR(R) 707 ("*Chan Kok Kiang*"). That case involved an application, on appeal, to amend the Notes of Evidence of the trial by adding in a note taken by one of the appellant's/defendant's

counsel at trial. The Court of Appeal's guidance on the procedure for bringing such an application is instructive for our purposes (*Chan Kok Kiang* at [6]):

> … If it is intended that any note taken by counsel at the trial of an action be accepted as part of the notes of evidence for use by an appellate court, it is desirable that the trial judge and counsel for the other party or parties should be supplied at the *earliest possible opportunity* with a copy of the note so made for correction or acceptance or otherwise. If the trial judge and counsel for all parties *agree* to the original or a corrected version then such agreed original or corrected version can properly be included in the record of appeal as part of the notes of evidence. Where no version can be so agreed, then in any application for leave to include the note made or taken by counsel at the trial, the *affidavit* in support of the application ought to set out the circumstances under which the note was made or taken and the steps taken to obtain the agreement of all concerned together with all correspondence relating to the attempt to obtain such agreement.
>
> [emphasis added]

119 The appellant's application in that case was rejected because it was brought at a very late stage in the proceedings and the trial judge and the respondent's counsel were *unable to verify* whether the note sought to be introduced was an accurate verbatim record of what the trial judge had said at the trial (*Chan Kok Kiang* at [7]).

120 In light of the principles in *Chan Kok Kiang*, the second defendant should have scrutinised the Official Transcript and given the court and opposing counsel written notice of his intention to challenge the Official Transcript at the earliest possible opportunity ("Written Notice"). The Written Notice should have stated his belief that the Official Transcript was wrong and the basis for this belief, so as to enable the court to reach a decision on how to progress the matter. If the plaintiff's agreement to amend the record was not forthcoming, parties' should have, once again, written in to the court, which may then have taken the option of re-calling Professor Kua.

121 In this case, the second defendant's failure to provide the court or opposing counsel with a Written Notice and prematurely contacting Professor Kua prior to receiving the court's directions on this issue removed the option of recalling Professor Kua as a witness. What is also inexplicable is how the second defendant was prepared to mount the present challenge before even obtaining the audio recording of the proceedings; the audio recording was only requested by the plaintiff on 30 January 2021.

122 Having reviewed the audio transcript of the trial proceedings, and considering the Challenged Portions of Professor Kua's testimony in their context, I am unable to verify the accuracy of the second defendant's proposed alterations and dismiss his challenge to the Official Transcript.

123 However, even if I am wrong and the Challenged Portions of Professor Kua's testimony are indeed inaccurate, this does not affect my decision. For the following reasons, I do not think that the Challenged Portions of Professor Kua's testimony have a material bearing on whether the second defendant possessed the ability to understand the Guarantee *with* proper explanations.

124 First, the First and Second Challenged Portions of Professor Kua's testimony (see [117] above) do not concern the Guarantee; they concern the LOA, OTP and SD. In fact, just before the First Challenged Portion of Professor Kua's testimony, Professor Kua recounted the second defendant as saying "Oh, I understand, right" when he was shown his signature on the LOA, OTP and SD.

125 Second, when Professor Kua showed the second defendant the LOA on 19 July 2017, he claims to have explained it to the second defendant in Hokkien.

However, no evidence was led as to how such explanations were phrased.[127] Similarly, when the Guarantee was shown to the second defendant on 3 January 2019, we do not have evidence of how Professor Kua's nurse attempted to translate the Guarantee to the second defendant as his nurse was not called as a witness.[128]

126 For these reasons, even if the Challenged Portions of Professor Kua's testimony are changed, they do not credibly demonstrate that the second defendant was unable to understand the Guarantee at the 22 June meetings, had proper explanations been given. I say this even though I also do not accept the plaintiff's unsupported contention that the second defendant was malingering when he was assessed by Professor Kua.

127 For completeness, given the reasons at [123] and [124] above, I also place little weight on another part of Professor Kua's testimony where he states that second defendant "couldn't understand the content of the [LOA]" (which is, naturally, unchallenged by the second defendant).[129]

128 Instead, whether the second defendant was able to understand the Guarantee must be examined in light of the circumstances at the two meetings on 22 June 2017 where Mr Ong did explain the Guarantee.

(2) Dr Manu Lal

129 Dr Manu Lal assessed the second defendant in December 2015 and January 2016; this is before the Guarantee was signed. However, his report of

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127 NOE, 21 October 2020, p 46 at line 1–8.

128 BOA at p 254, [6(iii)].

129 NOE, 21 October 2020, p 45 at line 30.

3 February 2016 remains instructive in the following respects as both himself and Professor Kua agree that the degree of the second defendant's mental incapacity is unlikely to fluctuate.[130] While likewise finding that the second defendant was mentally incapacitated, Dr Manu Lal credited the second defendant with being able to do the following in relation to his property and affairs: (a) "understand information relevant to a decision"; (b) "retain information long enough to make a decision"; and (c) communicate this decision. However, he assessed the second defendant to be unable to "weigh information" in order to "make decisions in his best interest" and hence mentally incapacitated.[131]

130 Further, Dr Manu Lal's record of the second defendant being able to account for how he would spend $6,000 and $1,000 shows that the latter retained the cognitive ability to make basic financial decisions (see [80] above). Dr Manu Lal's observation of the second defendant in this regard is consistent with Dr Lai's (see [86] above), as the latter recorded the second defendant's awareness of the valuation of the Rangoon Road Property and his ability to manage his daily activities. The second defendant's awareness of his financial situation (even if limited), lends support to the position that he would have been able to understand the Guarantee if it were explained in layman terms.

131 In summary, the expert evidence leads me to conclude that the second defendant retained the ability to understand the Guarantee if properly explained to him.

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130 NOE, 21 October 2020, p 24 at line 1–31 (Dr Manu Lal), and p 56 at line 26 to p 57 at line 11 (Professor Kua).

131 BOA at pp 152 and 153.

Whether and how the Guarantee was explained at the 22 June meetings

132 Having dismissed the second defendant's contention that he is *unable* to understand the Guarantee, I now turn to consider the adequacy of the explanations of the Guarantee provided to the second defendant; this dovetails with Professor Kua's view that the second defendant would probably have been able to understand the Guarantee had it been properly explained to him (see [115] above). Bearing in mind Professor Kua's caution that the *consequences* of the Guarantee must be "clearly" explained, and as I subsequently address at [138] and [142], in the circumstances of this case, the explanation is "proper" if it is clear and captures the key feature(s) of the document (*Fehily* at [101]).

133 A preliminary issue that arises is whether Mr Ong explained the Guarantee in *both* English and Mandarin. It is not disputed that Mr Ong explained the Guarantee in English at the 22 June meetings.[132] The second defendant claims that the Guarantee was not explained to him in Mandarin.[133] I do not accept this.

134 In respect of the First meeting, Mr Ong's testimony that he explained the Guarantee in Mandarin is corroborated by Mr Simadiputra[134] and Mr Quek.[135] Even if the latter two were unable to recall the exact words Mr Ong used to explain the Guarantee in Mandarin,[136] this does not mean that no such

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132 2DCS at [44]–[46].

133 2DCS at [45]–[47].

134 NOE, 6 October 2020, p 12 at line 30, and p 16 at line 4–8.

135 NOE, 6 October 2020, p 109 at line 18–19.

136 NOE, 6 October 2020, p 18 at line 15–16 (Mr Simadiputra), and p 109 at line 28–30 (Mr Quek).

explanation was provided. Mr Koh also testified that Mr Ong had spoken in Mandarin at the First meeting.[137]

135 In respect of the Second meeting, the evidence is slightly less clear:

(a) Mr Ong's testimony is that he explained the Guarantee in Mandarin at the Second meeting.[138] However, Mr Simadiputra and Mr Quek's evidence that Mr Ong had spoken in Mandarin (see [134] above) appear to be confined to the First meeting.

(b) Mr Elangovan states that the conversation in the Second meeting was "all in English", although he also conceded that he does not know Chinese and "[i]f they talked to themselves, [he] wouldn't know whether they talked Chinese or not."[139]

(c) Mr Koh says that Mr Ong explained the Loan Agreement in English at the Second meeting, but not the Guarantee.[140] However, he admits that he had stepped out of the Second meeting to make some calls.[141]

136 All things considered, I find that on the balance of probabilities, the Guarantee was explained by Mr Ong in Mandarin at the Second meeting. For one, the testimonies of Mr Elangovan and Mr Koh do not forcefully challenge Mr Ong's account as neither could positively say whether or not Mandarin was used. In addition, at the First meeting, Mr Ong had established that the second

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137 NOE, 9 October 2020, p 24 at line 17–19.

138 NOE, 6 October 2020, p 46 at line 7 to p 50 at line 4.

139 NOE, 20 October 2020, p 37 at line 16–24, and p 39 at line 20–25.

140 NOE, 9 October 2020, p 27 at line 11–16.

141 NOE, 9 October 2020, p 26 at line 9–19.

defendant was more comfortable conversing in Mandarin and had addressed him in both English and Mandarin.[142] I see no reason for Mr Ong to have abandoned this practice at the Second meeting.

137 Further, I accept that the second defendant understands both English and Mandarin. The second defendant testified as to being able to understand Mandarin and in fact admits this at [68(6)] of 2DCS.[143] In any event, the testimony of Mr Ong,[144] Dr Lai,[145] Mr Fernandez,[146] Dr Manu Lal[147] and Professor Kua[148] show that the second defendant understands Mandarin. Additionally, I agree with the plaintiff that the second defendant is able to understand basic English. The following witnesses confirmed that they had conversed with the second defendant in English: Professor Kua,[149] Dr Lai,[150] Mr Elangovan,[151] Mr Fernandez[152] and Dr Manu Lal.[153]

138 Turning to the adequacy of the explanation provided at the First and Second meetings proper, I find that Mr Ong's explanations of the second defendant's obligations under the Guarantee were reasonably clear and easy to

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142 NOE, 6 October 2020, p 61 at line 1–8.

143 NOE, 22 October 2020, p 75 at line 6–7.

144 NOE, 6 October 2020, p 61 at line 5–8.

145 NOE, 7 October 2020, p 35 at line 18–20.

146 NOE, 20 October 2020, p 3 at line 31 to p 4 at line 2.

147 NOE, 21 October 2020, p 32 at line 24.

148 NOE, 21 October 2020, p 44 at line 27–28.

149 NOE, 21 October 2020, p 44 at line 29 to p 45 at line 1.

150 NOE, 7 October 2020, p 35 at line 18–24.

151 NOE, 20 October 2020, p 42 at line 16–27.

152 NOE, 20 October 2020, p 3 at line 29–32, and p 4 at line 28 to p 5 at line 4.

153 NOE, 21 October 2020, p 38 at line 7–15.

follow. At the First meeting, it is unclear if Mr Ong had sight of the Guarantee.[154] However, he still explained, in Mandarin, the general nature of the Guarantee which was later signed at the Second meeting:[155]

> **6 October 2020: Mr Ong, Examination-in-chief**
>
> Q: Now, try your best to repeat what you talked about? If you---if that part is spoken in English, you speak in English. If part of it is spoken in Mandarin, then you speak in Mandarin. And when you speak in Mandarin, you---after a sentence or two, you pause and allow the Court interpreter to interpret it back to English for the Court's record. You understand?
>
> A: Yup
>
> Q: Alright. So you tell us what you said in the morning of the 22nd in relation to the facility agreement and the guarantee, bearing in mind that if you spoke in English, then you speak in English. If you spoke in Mandarin, then you repeat the Mandarin words.
>
> …
>
> A: (Through interpreter) "And Mr Yip will be the personal guarantor for this loan. *In the event Megatrucare fail to pay the debt, then Mr Yip would be responsible for this $300,000 loan plus interest.* And there's another condition to this loan, that is, I understand that the Rangoon Road house has been sold. So the sale proceeds from this sale transaction will be used to pay off this loan."
>
> Q: So to be clear, on that day, you used the word "sales proceed"?
>
> A: Yup.
>
> [emphasis added]

139 As regards the Second Meeting, the precise wording of Mr Ong's explanation of the Guarantee was not elicited at trial. However, Mr Ong stressed

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154 NOE, 6 October 2020, p 12 at line 24–27 (Mr Simadiputra), and p 100 at line 24–28 (Mr Quek); NOE, 9 October 2020, p 24 at line 15–16 (Mr Koh).

155 NOE, 6 October 2020, p 39 at line 4 to p 40 at line 4.

that the "main point" he drove across to the second defendant was that "he will be fully liable should Megatrucare not pay up":[156]

> **6 October 2020: Mr Ong, Re-examination**
>
> Q: Okay, when explaining the guarantee, what was the main point you were trying to drive across to the 2nd defendant - to Mr Yip?
>
> A: The main point is that he is providing a personal guarantee as a guarantor for the loan of 300,000 taken by Megatrucare, and that he will be fully liable should Megatrucare did not pay up.
>
> …
>
> Q: Okay, Kenneth, what was the main effect of this guarantee on page 53?
>
> A: The main effect is that Mr Yip, to give personal guarantor [*sic*] on behalf of Megatrucare should Megatrucare not pay up the loan amount. The---

140 Additionally, Mr Ong's explanations of relevant parts of the Loan Agreement at the Second Meeting would have reinforced the second defendant's understanding of the Guarantee. Mr Ong explained Clause 3 of the Loan Agreement in Mandarin in these terms:[157]

> **6 October 2020: Mr Ong, Examination-in-chief**
>
> A: (Through interpreter) … Point 3 is about Mr Yip, you being the personal guarantor for this loan; meaning to say that *if Megatrucare did not pay for this loan, then you would be responsible for this debt.* Mr Yip, please take a look at your name and your IC number and confirm. Point 3.2 is about this house that was sold. You promise that you would use the sale proceeds to pay to North Star. …
>
> [emphasis added]

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156 NOE, 6 October 2020, p 87 at line 31 to p 88 at line 18.

157 NOE, 6 October 2020, p 44 at line 5–11.

141 Also, at the Second Meeting, and in English, Mr Ong stated, in relation to the Loan Agreement, that:[158]

> **6 October 2020: Mr Ong, Examination-in-chief**
>
> A: … Security given for the loan will be personal guarantee by Mr Yip in such form---by Mr Yip and also the letter of authority for the payment of the sales proceed on completion of sales and purchase of 106 Rangoon Road …

142 While it was revealed under cross-examination that Mr Ong had misunderstood Clauses 4(b), 5(b), 6 and 8 of the Guarantee, this is irrelevant.[159] The second defendant need not have understood every ancillary or procedural aspect of the Guarantee. Instead, if Mr Ong's explanations were sufficient to give the second defendant an understanding of the key features of the Guarantee (*Fehily* at [101]), such that the second defendant would be alive to the "fundamental difference between the actual document and the document as [he] had believed it to be", this would defeat the plea of *non est factum* (*Saunders* at 1034). In light of the evidence, I am satisfied that Mr Ong's explanations in English and Mandarin captured the key features of the Guarantee, namely, that the second defendant would become personally responsible to repay all outstanding amounts under the Loan Agreement if the first defendant failed to do so (Clauses 1 and 2 of the Guarantee).[160]

143 Further, even though Mr Ong said that his Mandarin is "not very good", this does not advance the second defendant's case.[161] Mr Ong also said that his Mandarin proficiency was suited for "basic conversation", and I further note

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158 NOE, 6 October 2020, p 42 at line 14–16.

159 NOE, 6 October 2020, p 49 at line 23–25; 2DCS at [46].

160 ABOD at pp 53–55.

161 NOE, 6 October 2020, p 50 at line 3.

that his Mandarin was adequate enough for the court translator to interpret;[162] using complex vocabulary would likely confuse the second defendant rather than lend clarity. In any event, Mr Ong also explained the Guarantee in English and, for this reason, even if I am mistaken that the Guarantee was explained in Mandarin at the Second meeting, this does not affect my conclusion.

144 To recapitulate, I find that Mr Ong explained the key features of the Guarantee in both English and Mandarin to the second defendant in a "proper" manner that would have duly informed him of the consequences of the Guarantee he was signing. This is not inconsistent with my earlier finding that the Loan Agreement is a sham as the plaintiff would have sought to clothe the Guarantee with legitimacy by ensuring it was formally and appropriately executed (see [43] above).

Evaluation of the evidence

145 In light of the expert evidence, Mr Ong's explanations and the exceptional nature of the *non est factum* doctrine, I am not satisfied that the second defendant's ability to understand the Guarantee was impeded to the extent required under *Saunders* (see [109] and [112] above).

146 In fact, the second defendant's Mental Capacity Affidavit affirmed on 7 July 2017 casts further doubt on his assertion that he misunderstood or was unable to understand the Guarantee, especially given Mr Fernandez's testimony that he drafted the Mental Capacity Affidavit on the second defendant's instructions (see [95] and [96] above). I also stress that the Mental Capacity

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162 NOE, 6 October 2020, p 50 at line 3.

Affidavit was withheld by the second defendant until less than a week before trial (see [95] above).[163]

147 While the Mental Capacity Affidavit does not make direct reference to the Guarantee, the following two paragraphs reveal an awareness that he is *personally* liable to repay the Loan:[164]

> 15. I have pledged the sale proceeds of the property to take a loan of $300,000 from North Star (S) Capital Pte Ltd. The Applicants have exhibited a letter of authority at page 53 and alleged that I am being defrauded because the sale proceeds are being paid to MBT Capital Pte Ltd.
>
> …
>
> 35. A further delay in the sale of the property is prejudicial to me for the following reasons:
>
> …
>
> b. From the sale proceeds, I must settle the repayment of the loan to North Star (S) Capital Pte Ltd in the sum of $309,000 on or before 27 July 2017. If I fail to do the same, *I will be subjected to recovery action, including bankruptcy*.
>
> [emphasis added]

148 In these premises, I reject the second defendant's contention that the present facts of this case are on all fours with *Ford*, where a plea of *non est factum* succeeded because the mortgagor there could not have understood the nature of the documents he was signing due to his intellectual impairment (*Ford* at [90]).[165] The most crucial difference is that the mortgagor in *Ford* (at [85]):

> … could not have understood either document *if it had been read to him*…; no explanation of the documents signed by [the

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163 NOE, 6 October 2020, p 5 at line 1–7.

164 PSBD at pp 7 and 10.

165 2DCS at [60].

> mortgagor] would have been adequate to provide him with an understanding or appreciation of their true meaning or effect even at a basic or visceral level and that [the mortgagor] did not understand the loan agreement or mortgage at the time he entered them or at the trial …
>
> [emphasis added]

149 It bears emphasising that Professor Kua accepted the probability of the second defendant understanding the documents despite having found that the second defendant was mentally incapacitated in his 2017 and 2019 reports (see [115] above). In the same vein, it is implicit from Lord Reid's statement of the law in *Saunders* (see [109] above) that mental incapacity does not necessarily establish a plea of *non est factum*. Lord Pearson appears to have made the same point by pronouncing on the degree to which one's ability to understand the document signed must be impaired by "permanent or temporary reasons (not limited to blindness or illiteracy)" (see [112] above) before a plea of *non est factum* will succeed. Indeed, the distinction between the defences of mental incapacity and *non est factum* should be maintained so as not to render the former otiose. It is therefore clear that the Family Justice Court's order declaring the second defendant mentally incapacitated on 30 October 2017 does not preclude a finding that he was able to understand the Guarantee sufficiently on 22 June 2017.

150 For completeness, I did not take into consideration the reports of Dr Tan and Dr Leong, which both certified the second defendant as possessing mental capacity, when arriving at my decision on this issue as they are inadmissible hearsay evidence.

Second element of non est factum

151 Parties who seek to invoke *non est factum* on the basis of their innate incapacity, illness or defective education must still take "such precautions as

they reasonably can" (*Saunders* at 1016). Given my conclusion in respect of the first element, it is unnecessary for me to make a finding in respect of this second element of *non est factum*. Suffice to say that it does not go in the second defendant's favour that he failed to obtain independent advice on the Guarantee before signing it, despite his appointment of counsel for other affairs such as the replacement of the title deeds of the Rangoon Road Property, sale of the Rangoon Road Property, or challenging his family's MCA application (*ie*, FC/OSM 214/2017) and applying to set aside an interim injunction prohibiting the sale of the Rangoon Road Property.[166]

Conclusion

152 In conclusion, I dismiss the plaintiff's claim on the ground that the Guarantee was given in relation to an illegal personal loan.

153 Accordingly, I grant the second defendant's counterclaim for a declaration that the Guarantee is unenforceable under s 14(2)(*a*) of the MLA. For completeness, I mention the following. The counterclaim, as pleaded, sought a declaration that the LOA is similarly unenforceable. However, as the second defendant did not take this up in his submissions, I make no finding on the LOA.[167]

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166 FC/SUM 2315/2017; BOA at p 177, [14] (Yip Li-Fen) (Essex LLC for sale of property and Ong & Shan LLC to obtain replacement title certificate); NOE, 20 October 2020, p 4 at line 3–6 (Fernandez LLC to resist Mental Capacity Application and apply to set aside injunction); PSBD at p 8, [19]–[21].

167 D&CC1 at [17(1)]; 2DCS at [13] and [73].

154 I will hear parties on costs separately.

Dedar Singh Gill
Judge of the High Court

Ivan Lee Tze Chuen and Letchamanan Devadason (LegalStandard LLP) for the plaintiff;
Yeoh Oon Weng Vincent (Malkin & Maxwell LLP) for the second defendant.