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

[2024] SGHC 261

Originating Application No 566 of 2024

In the matter of A Settlement
Agreement dated 31 November 2023

Between

Eileen Tay Shing Lee
(Eileen Zheng Hanni)

… *Claimant*

And

Liang Ting Pang Jeffrey

… *Defendant*

JUDGMENT

[Contract — Waiver — Waiver by election where contracting party elects between inconsistent contractual rights — Whether receipt of payments by one contracting party from another contracting party communicates clearly and unequivocally an election to abandon contractual remedy for payment under accelerated liability for whole sum in favour of instalment payments with payment liabilities staggered pursuant to payment schedule in contract]
[Contract — Variation — No oral modification clause — Whether receipt of payments by one contracting party from another contracting party sufficient under all circumstances to rebut presumption of no oral variation in absence of agreement signed and in writing such as to maintain subsisting validity of instalment payments with payment liabilities staggered pursuant to payment schedule in contract notwithstanding contractual breach triggering acceleration

of payment liability for whole sum due under acceleration provision in contract]

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v
Liang Ting Pang Jeffrey

[2024] SGHC 261

General Division of the High Court — Originating Application No 566 of 2024
Goh Yihan J
29 August, 10 September 2024

16 October 2024 Judgment reserved.

Goh Yihan J:

1 This is the claimant's application for the following orders against the defendant:

(a) that the defendant be ordered to pay the claimant the sum of $362,000.00, being the sum of all unpaid tranches of the "Repayment Sum", pursuant to cl 1.3.1 of the parties' Settlement Agreement dated 1 November 2023 (the "Settlement Agreement"), with interest; and

(b) that the costs of and/or incidental to these proceedings be paid by the defendant to the claimant on an indemnity basis pursuant to cl 1.3.2 of the Settlement Agreement.

The claimant is represented by Mr Joshua Thomas Raj and Mr Vigneesh s/o Nainar ("Mr Vigneesh"), whereas the defendant appears in person.

2 The claimant filed an affidavit dated 12 June 2024 in support of her application. This affidavit and the application were served on the defendant on 15 June 2024. Hence, the defendant was supposed to file his affidavit by 8 July 2024 (see O 6 r 12(1) read with O 3 r 3(7) of the Rules of Court 2021 (the "ROC 2021")). However, at a case conference on 2 July 2024, the defendant requested for and was given until 30 July 2024 to file and serve his affidavit. He failed to do so. At a subsequent case conference on 6 August 2024, the defendant was informed that if he did not file an affidavit, his evidence would not be before the court. Despite this, the defendant confirmed that he would not be filing an affidavit. Eventually, the defendant filed a letter dated 11 August 2024 to court on 15 August 2024. This letter sets out some factual points in relation to the present matter.

3 Notwithstanding the defendant's failure to file an affidavit, the claimant still bears the legal burden to prove her case. Because of this, I sent a list of questions to the claimant on 23 August 2024 about certain aspects of her case. The claimant's solicitors responded to those questions by a letter dated 28 August 2024. It was against this background that I heard the parties' oral submissions on 29 August 2024, whereupon I reserved judgment to consider the parties' arguments. I sent out further questions to the claimant on 3 September 2024, to which her solicitors responded with a letter to court dated 10 September 2024. On both these occasions, the questions were addressed to the claimant, but the defendant was also invited to respond to them. On both occasions, he did not respond.

4 Having taken some time to consider the parties' submissions, I allow the claimant's application and make the orders sought. I now explain the reasons for my decision, especially since the defendant is unrepresented.

Two preliminary points

5 Before I explain the substantive reasons for my decision, I make two preliminary points.

6 First, I am satisfied that the claimant had correctly commenced this application as an Originating Application as opposed to an Originating Claim because her claim arises from a contract (being the Settlement Agreement) where the material facts are not in dispute. In this regard, O 6 r 1 of the ROC 2021 provides clearly as follows:

> **Mode of commencing proceedings (O. 6, r. 1)**
>
> **1.**— (1) Unless these Rules or any written law otherwise provide, a claimant may commence proceedings by an originating claim or an originating application.
>
> (2) A claimant must commence proceedings by an originating claim where the material facts are in dispute.
>
> (3) A claimant must commence proceedings by an originating application where —
>
> (*a*) these Rules or any written law require it;
>
> (*b*) the proceedings concern an application made to the Court under any written law; or
>
> (*c*) the proceedings concern solely or primarily the construction of any written law, instrument or document or some question of law and the material facts are not in dispute.

7 I agree with the claimant that there is no dispute as to the material facts surrounding the formation of the Settlement Agreement, as well as the

defendant's subsequent non-compliance with his payment obligations thereunder. While there is some background (in relation to the defendant's purported mishandling of the claimant's investment of $190,280.00) as to why the parties entered into the Settlement Agreement in the first place, that background is generally not contested between parties and most of it is not material to determining the claimant's application. This is because her case is founded on the interpretation and enforcement of the terms of the Settlement Agreement itself. In any case, the background facts leading up to the Settlement Agreement are recorded in the preamble and the defendant does not dispute those facts. As such, the claimant correctly commenced this application as an Originating Application.

8 Second, pursuant to O 15 r 7(5) of the ROC 2021, I allowed the defendant to give oral evidence at the hearing before me. O 15 r 7(5) provides:

> **Hearing of originating applications and summonses (O. 15, r. 7)**
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> …
>
> (5) Unless otherwise provided in any written law or the Court otherwise directs, originating applications and summonses must be decided on the basis of the evidence adduced by affidavits and on oral or written submissions, without oral evidence or cross-examination.
>
> …

9 The default position for originating applications is thus for evidence to be given by affidavit without oral evidence or cross-examination, unless, among others, the court otherwise directs. Although O 15 r 7(5) provides the court with a discretion to allow oral evidence to be adduced in an originating application, it is silent on how that discretion is to be exercised. In my view, while it is trite that every discretion must be exercised in accordance with principle, it is not

necessary to define this with exactitude in the context of O 15 r 7(5). There are clearly many different scenarios whereby a court may wish for oral evidence to be adduced. It suffices to state that the exercise of the discretion under O 15 r 7(5) must be in line with the five Ideals set out in O 3 r 1(2) of the ROC 2021.

10 In the present case, I allowed the defendant to give oral evidence at the hearing before me because this ultimately ensured fair access to justice pursuant to O 3 r 1(2)(*a*) of the ROC 2021. In this regard, I accepted the defendant's explanation that he could not afford a lawyer and hence did not file an affidavit. Moreover, the evidence which the defendant intended to (and did eventually) give was similar to the facts he had asserted in his letter to court dated 11 August 2024 and filed on 15 August 2024. Hence, while Mr Vigneesh rightly caveated that he had not obtained the claimant's instructions on the defendant's evidence, the claimant would not be taken wholly by surprise. Finally, the defendant's giving of evidence did not prolong the hearing unduly and provided the court with the complete picture with which to decide the matter. However, although I allowed the defendant to give evidence here, I emphasise that the default position remains for evidence to be given by affidavit in proceedings on an originating application. My decision thus should not be interpreted as one that allows self-represented parties to give oral evidence as opposed to filing an affidavit in an originating application as a general rule. Instead, the discretion to allow or disallow the adducing of oral evidence under O 15 r 7(5) is necessarily context-specific and therefore must be exercised with regard to the particular facts of each individual case.

The claimant's case

11 With these preliminary points in mind, I turn to the claimant's case. The claimant's cause of action is for an agreed sum that became due and owing following the defendant's breach of his payment obligation under the Settlement Agreement. In this regard, cl 1.1 of the Settlement Agreement provides that:[1]

> [The defendant] unconditionally and unreservedly warrants, undertakes and agrees that he is liable to pay the Repayment Sum to [the claimant] in accordance with the payment schedule set out in the Schedule to this Agreement.

For present purposes, it is not necessary to reproduce the lengthy payment schedule in full, save to state that the defendant is obliged to make 62 separate payments,[2] comprising 60 payments of $500.00 each, one payment of $190,000.00, and one payment of $155,000.00, amounting to a total sum of $375,000.00. This sum is defined in the preamble as the "Repayment Sum" owed to the claimant by the defendant arising out of their preceding dispute outlined at [7] above. Each payment is due by specified dates, most of which are spaced approximately seven days apart from one another. The first payment was due on 6 November 2023, and the final payment would have been due on 31 December 2024. In particular, the payment of $190,000.00 was due on 31 December 2023.

12 More specifically, the claimant's action for an agreed sum is based on cl 1.3 of the Settlement Agreement, which provides:[3]

> 1.3. In the event that [the defendant] defaults on payment of any one of the tranches by the stipulated time that such

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1 Claimant's Affidavit dated 12 June 2024 ("CA") at p 16.

2 CA at pp 19-21.

3 CA at pp 16-27.

> payment is due pursuant to the Schedule, [the defendant] unconditionally and irrevocably agrees, undertakes and warrants that:
>
> 1.3.1. All unpaid tranches of the Repayment Sum, or any part thereof, shall become immediately due and payable by [the defendant] to [the claimant] without any demand or notice which is hereby expressly waived; and
>
> 1.3.2. [The claimant] shall be at liberty to commence legal proceedings against [the defendant] to claim for the Repayment Sum, or any part thereof (as the case may be), which remains due and owing under this Agreement and [the defendant] hereby waives his right to contest such proceedings and will consent to judgment being entered against him, with costs on an indemnity basis.

13 Following the parties' execution of the Settlement Agreement on 1 November 2023, the defendant began making weekly payments of $500.00 to the claimant from 5 December 2023.[4] However, the defendant defaulted on, among others, his obligation to pay $190,000.00 on 31 December 2023.[5] Therefore, the claimant argues that the defendant became liable to pay all unpaid tranches of the Repayment Sum (which presently amount to $362,000.00) immediately upon this default.[6] While the defendant claims to have paid *inter alia* $12,400.00 to the claimant prior to the execution of the Settlement Agreement, that amount cannot be used to set-off the Repayment Sum as it pre-dates that agreement.

14 Finally, as for costs, the claimant is entitled to costs on an indemnity basis from the defendant pursuant to cl 1.3.2 of the Settlement Agreement. This

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4 CA at para 23.

5 CA at para 24.

6 CA at para 27.

clause provides for the claimant's entitlement to indemnity costs if the defendant defaults on his payment obligations in relation to the proceedings for the recovery of the Repayment Sum against him or any part thereof.

15 The claimant urged the court to uphold the Settlement Agreement because, among other things, the defendant represented to the claimant that he had obtained legal advice before entering into that agreement. The defendant represented this to be so in a SMS message dated 6 December 2023,[7] as follows:

> In replying to your above msg, let me set the record straight. I did seek legal advice with re to your lawyer draft n was told not to agree to it. Knowing tour [*sic*] great love for money over our friendship, u will never withdraw your police report without your lawyer's documents. I told u many times I was advised not to sign. I had no choice cause u will never withdraw your report.
>
> Anyway I m [*sic*] not totally blind till I can't text. Thank [*sic*] to u I have a [*sic*] permanent [*sic*] impaired vision.

The SMS message that the defendant said he was replying to is an SMS message sent by the claimant on 5 December 2023,[8] as follows:

> This msg of total $12500 is reducant [*sic*]. Considering how much u owe plus there is a legal agremment [*sic*]. Also, u recently just mention cant [*sic*] see but can msg.
>
> Let me remind that u were supposed to seek legal's [*sic*] advice before signing letter with my lawyer. So dont [*sic*] use cant [*sic*] see to play with law. U had played enough tactics.
>
> What is agreed r all stated in repayment letter. U r to pay $190k end december as agreed in letter and transfer $500 every week etc. All indicated clearly in letter. Dont [*sic*] let me chase u.

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7 CA at p 369.

8 CA at p 367.

16 In addition to the defendant saying so in the above SMS message, the parties had also agreed, pursuant to cl 2.4 of the Settlement Agreement,[9] that:

> [The claimant] has obtained legal advice concerning this Agreement and has requested that [the defendant] obtain independent legal advice with respect to the same before executing this Agreement. [The defendant], in executing this Agreement, represents to [the claimant] that he has been so advised to obtain independent legal advice, or has in his discretion knowingly and willingly elected not to do so. Each Party, having considered the terms of this Agreement as a whole, confirms that the terms of this Agreement are fair and reasonable.

The claimant explained that this clause signifies that the parties had dealt with each other at an arm's length. And the defendant, at the very least, had been notified of the significance of seeking independent legal advice prior to his executing the Settlement Agreement.

The defendant's case

17 The defendant's case is that he had signed the Settlement Agreement without realising what the Repayment Sum was. According to the defendant, he only realised that he had agreed to pay the Repayment Sum in the amount of $375,000.00 after signing the Settlement Agreement. Although the defendant did not put it as such, this is essentially a plea of *non est factum*, which, if successful, operates "as an exception to the general rule that a person is bound by his signature on a contractual document even if he did not fully understand the terms of the document" (see the Court of Appeal decision of *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 ("*Mahidon Nichiar*") at [119]).

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9 CA at p 17.

18 Before me, the defendant explained that he had signed the Settlement Agreement on 1 November 2023 so that the claimant would withdraw a police report that she had made on 1 October 2023 in relation to the defendant's purported mishandling of her investments. By way of background, the claimant's evidence on affidavit is that she had made such a police report on 1 October 2023. However, while she had informed the defendant that she would not be able to withdraw the police report, she did say to him that she would inform the investigation officer about the Settlement Agreement once it had been executed. The defendant explained to me that the police report was resolved with him being given a stern warning. Given his state of mind on 1 November 2023, the defendant said that he did not realise that the Repayment Sum was $375,000.00. He said that he was surprised that the initial sum of around $190,000.00 invested with him by the claimant could have increased to a liability of $375,000.00 in the Settlement Agreement. He also maintained that, despite the SMS message of 6 December 2023, he had not sought legal advice prior to his entering into the Settlement Agreement.

19 So that I could understand the defendant's case better, I asked him some questions, to which he made, among others, the following points in evidence:

(a) He said that he understands and reads English well.

(b) He had been presented with a physical copy of the Settlement Agreement and signed it physically.

(c) He therefore agreed that he had the opportunity to go through the Settlement Agreement's contents, which were written in English, before he signed it.

(d) While he had no lawyer present with him, the claimant's lawyer had brought him through the payment schedule, tranche by tranche. He was thus aware of the various tranches of payments that he had to make. He only did not realise that the Repayment Sum totalled $375,000.00 because he had not added the various tranches up, even though he was brought through all of them.

(e) He had committed to paying the claimant up to $300,000.00 by the end of December 2023 through WhatsApp messages dated 15 July 2023.[10] This was a marked increase from the initial investment sum of around $190,000.00.

(f) While he agreed that his SMS message of 6 December 2023 conveyed that he had sought legal advice before signing the Settlement Agreement, the truth was otherwise. He had only sent out the SMS message as a "spur of the moment response" and it did not mean what it says.

(g) While he was diagnosed with cavernoma on 31 December 2021, which would cause him to have impaired vision, movement, or thinking at times, he was not affected by this condition when he signed the Settlement Agreement on 1 November 2023. In his words, he would not use that as an "excuse" in response to the claimant's application.

My decision: the claimant's application is allowed

20 Having considered the parties' evidence and submissions, I allow the claimant's application.

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[10] CA at pp 306–308.

Whether the Settlement Agreement is a valid contract

21 To begin with, the Settlement Agreement is a valid contract. In essence, the Settlement Agreement is a contract between the parties that compromises the dispute between them, which had arisen from the defendant's purported failure to deal properly with the claimant's investment sum of $190,280.00. The High Court in *Tan Kee (suing as an administrator of the estate of Poh Wong, deceased and in her own personal capacity) and Others v The Titular Roman Catholic Archbishop of Singapore* [1997] SGHC 281 had defined a settlement agreement in the following terms (at [31]), which I gratefully adopt:

> … A compromise is a settlement agreement arrived at, either in court or out of court, either before or after action, for resolving a dispute or settling a claim upon what appears to the parties, and in particular the conceder, to be fair and equitable terms, having regard to the uncertainty they are in regarding the facts or the law and facts together. Once concluded neither party may resile from the compromise or settlement as that would [*sic*] tantamount to a breach of contract and courts find such conduct unacceptable.

Being a contract, the Settlement Agreement will be valid and binding if all the elements of a contract are satisfied, and the defendant does not raise any ground (such as a vitiating factor) to set aside the Agreement.

22 First, there was offer and acceptance, both of which constitute the theoretical starting points in the formation of a contract under Singapore law (see Andrew BL Phang and Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer, 2nd Ed, 2021) at para 94), and which definitions have been set out by the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [47]–[48]. In summary, an offer is a promise by a promisor to be bound on specified terms on acceptance thereof by the promisee. An acceptance is an unqualified agreement to an offer

through an expression that one assents to be bound by its terms, whether by words or by conduct. Whether any given representation is, in fact, an offer or an acceptance will depend upon an objective construction of the intentions conveyed by the would-be promisor or promisee based on how a reasonable person would have understood them (see, *eg*, the English Court of Appeal decision of *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 at 263–264 and the English High Court decision of *Mary Ann Williams v William Carwardine* (1833) 4 B & Ad 621 at 623). Applying these principles, the Settlement Agreement was duly executed by both parties following negotiations between them. In essence, objectively ascertained, the claimant offered to settle the parties' dispute in relation to the failed investment, provided that the defendant made full and prompt payment of the Repayment Sum. The defendant accepted this offer by signing the Settlement Agreement.

23 Second, there was consideration. As the Court of Appeal explained in *Gay Choon Ing* (at [66]), consideration signifies some legally recognised return that is given or promised to be given in exchange for an enforceable promise. It is legally recognised as consideration where the person providing consideration either confers a benefit on the counterparty or bears a detriment (see *Gay Choon Ing* at [67]; see also the House of Lords decision in *Currie and others v Misa* (1875) LR 10 Exch 153 at 162). Consideration can be executory or executed. In the present case, consideration is executory because the claimant *promised* to forbear from commencing an action against the defendant, in exchange for the defendant *promising* to make full and prompt payment of the Repayment Sum. This is thus a bilateral contract where there is a counter-promise by the defendant to bear a detriment and confer a benefit through timely payment of the Repayment Sum in instalments, which constitutes his consideration exchanged in return for the claimant's promise.

24 Third, there was clear intention from the parties to create legal relations. The requirement that there be an "intention to create legal relations" connotes an intention by both parties to a purported contract that it is to have legal effect (see *Gay Choon Ing* at [71]). This depends on the objective interpretation of the particular factual matrix (see the UK Supreme Court decision of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 at [45], [47] and [54]–[56]). In this regard, the parties had lengthy discussions over WhatsApp in the course of 2023 to settle their dispute. This included, as I mentioned at [19(e)] above, the defendant's willingness to pay the claimant up to $300,000.00. These discussions show that the parties were serious about resolving their dispute. The fact that parties mention contractual documents being drafted by lawyers and signed in writing also militates, on an objective construction of their conduct, in favour of the reasonable view that the parties intended to be legally bound by these documents (see at [15]–[16] above). In the circumstances, these were clearly not gratuitous arrangements that were never intended to bind the parties. This is sufficient to show an intention to create legal relations.

25 Finally, there was certainty of the terms that were set out on the face of the Settlement Agreement. It cannot be said that there was any uncertainty as to the terms of the contract concerned here (see *Gay Choon Ing* at [47]; see also the House of Lords decision in *Walford and others v Miles and another* [1992] 2 AC 128 at 138).

26 The Settlement Agreement is therefore valid and binding between the parties unless the defendant can point to any plausible ground to find that contract to be invalid or unenforceable.

Whether the defendant has any plausible defences to the claimant's application

The "waives his right to contest" and the "will consent to judgment being entered" portions of cl 1.3.2 of the Settlement Agreement are not void for being against public policy

27 Before I consider whether the defendant has any plausible ground to find the Settlement Agreement to be invalid or unenforceable, it is noteworthy that the Settlement Agreement contains "waiver of contest" and "consent to judgment" stipulations. These are found within cl 1.3.2 of the Settlement Agreement (see at [12] above), as follows:

> 1.3 In the event that [the defendant] defaults on payment of any one of the tranches by the stipulated time that such payment is due pursuant to the Schedule, [the defendant] unconditionally and irrevocably agrees, undertakes and warrants that:
>
> [cl 1.3.1 omitted]
>
> 1.3.2 [The claimant] shall be at liberty to commence legal proceedings against [the defendant] to claim for the Repayment Sum, or any part thereof (as the case may be), which remains due and owing under this Agreement and [the defendant] hereby waives his right to contest such proceedings and will consent to judgment being entered against him, with costs on an indemnity basis.

(1) The claimant's reliance on cl 1.3.2

28 The claimant relies on cl 1.3.2 to highlight that the defendant "has waived his right to contest proceedings which are premised on his default of any one of the tranches of payments under the Schedule and has further consented to judgment being entered against him, with costs on an indemnity basis".[11]

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[11] Claimant's Written Submissions dated 14 August 2024 ("CWS") at para 26.

Thus, if cl 1.3.2 has the effect that the claimant argues that it has, then the defendant would be precluded from, among other acts, contesting the claimant's action and must consent to judgment being entered against him.

29 Prior to the hearing, I was concerned that cl 1.3.2 had the effect of ousting the court's jurisdiction and may therefore be void for being against public policy (see, *eg*, the English High Court decision of *Baker v Jones and others* [1954] 1 WLR 1005 ("*Baker*") at 1010, but disapproved of by the English Court of Appeal in *Hill v Archbold* [1968] 1 QB 686 at 694–695, although not on this point; see also *Haron bin Mundir v Singapore Amateur Athletic Association* [1991] 2 SLR(R) 494 at [20], where the High Court quoted this portion of the *ratio* of *Baker* with approval). I asked the claimant for further submissions on the point. The claimant submitted that cl 1.3.2 does not oust the court's jurisdiction to consider cases on their merits because it is premised on the defendant first breaching his payment obligations as set out in cl 1.3 read with cl 1.1. Thus, if the defendant does not breach those obligations, he is free to contest proceedings brought by the claimant. The claimant therefore says that cl 1.3.2 is really a limitation clause that limits the defendant from raising any defence in respect of a default.[12]

30 As a preliminary point, it does not, in my view, matter that cl 1.3.2 applies only if the defendant has breached his payment obligations under cl 1.3 read with cl 1.1. This is because, if the claimant brings an action against the defendant on the basis of an alleged breach of cl 1.3, whether the defendant has actually breached cl 1.3 is a question of fact for the court to resolve. This remains the case even if the evidence is clear. By causing the defendant to

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12 Claimant's Letter to Court dated 28 August 2024 ("28 Aug Letter") at p 4.

"[waive] his right to contest such proceedings and [to] consent to judgment being entered against him", the substantive effect of cl 1.3.2 may be to oust the court's jurisdiction, but whether cl 1.3.2 has this effect requires further examination.

(2) The applicable legal principles

31 I begin with the applicable legal principles on when a contractual clause may be held to be void for being contrary to public policy for attempting to oust the court's jurisdiction. The starting point is the Court of Appeal's reasoning in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*") at [29], which held that, "[i]n so far as illegality at ***common law*** is concerned, the question is whether the contract falls foul of one of the *established heads of common law public policy*" [emphasis in original], with the contours of each head having been "developed over time" historically and by way of precedent. One of these heads was held to be "contracts to oust the jurisdiction of the courts".

32 The Court of Appeal gave further guidance on the delineated scope of this historical category of contracts contrary to public policy in the case of *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 ("*CKR Contract*"), where the Court drew a distinction between contracts that exclude recourse to the court's adjudication altogether (which would be contrary to public policy) and those which merely limit the remedies available to a party in such proceedings (which would *not* be so contrary), reasoning (at [18]–[19]) as such:

> 18 However, given the fact that contracts will be held to be void and unenforceable as being contrary to public policy on

> only rare occasions, courts must be careful not to apply this particular category of illegality and public policy to every (or even most) contracts in which there are limitations placed on the rights and remedies of the contracting parties concerned. Indeed, this category of public policy appears thus far to have manifested itself in only two relatively narrow spheres of application (see, for example, *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 13.086–13.091; [R A Buckley,] *Illegality and Public Policy* [(Sweet & Maxwell, 3rd Ed, 2013)] at para 8.02 and *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at paras 16-044–16-047). The first area is where parties have agreed to exclude recourse to the court in favour of a dispute over their rights being adjudicated by a private tribunal or expert (see, for example, the oft-cited English decisions of *Scott v Avery* (1856) 5 HLC 811; *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329 and *Leigh v National Union of Railwaymen* [1970] Ch 326). The second area is where a wife covenants not to apply to court for maintenance for herself, her child, or both (see, for example the oft-cited English decisions of *Hyman v Hyman* [1929] AC 601 and *Bennett v Bennett* [1952] 1 KB 249).
>
> 19 On the other hand, limitations placed on the rights and remedies available to the parties have not been treated as an ouster of the court's jurisdiction. For example, parties are at liberty to seek to limit or even exclude altogether an innocent party's right to *damages* in the event of a *breach of contract* by the other party. Clauses which attempt to do so are (as the case may be) termed either limitation clauses or exclusion clauses. More importantly, they seek to *restrict or exclude* a ***common law*** *remedy* (since an innocent party is entitled, as of right at common law, to damages for breach of contract). What is clear, however, is that such clauses have ***never*** been treated as being void and unenforceable as clauses seeking to *oust the jurisdiction of the court*; after all *neither* party has been denied *access* to the court as such.
>
> [emphasis in original]

33 Hence, in *CKR Contract*, the Court held (at [42]) that a clause which sought to exclude a party's ability to restrain their counterparty from calling on payments under a performance bond with *inter alia* injunctive relief was a clause that sought to limit the remedies available to parties and *not* a clause that sought to oust the jurisdiction of the courts altogether (at [24]–[41]). Hence, it

did not fall within the historical common law category of contracts contrary to public policy for ousting the jurisdiction of the court.

34 It is clear that this ground for finding a contract contrary to public policy has been a narrow one historically. That is significant because, as the Court held in *Ochroid*, a contract is only void under common law where it fits within one of the pre-existing and "established heads of common law public policy" [emphasis in original omitted] (at [29]). And the learned authors of *Chitty on Contracts* vol 1 (Hugh G Beale QC gen ed) (Sweet & Maxwell, 34th Ed, 2021) have opined (at paras 18-009 and 18-010) that such *pre-existing* heads of public policy are governed by fixed principles, but which evolve as they are applied to new factual matrices. Moreover, they highlight the difficulties in distinguishing between an adapted application of prior principles governing a head of public policy, on the one hand, and creating a new head of public policy altogether, on the other, in the following fashion (at para 18-011):

> **New heads of public policy** Thirdly, there is some doubt as to whether the courts can create new heads of public policy rather than merely apply existing doctrines to new situations. … There is a general agreement that the courts may extend existing public policy to new situations and rules founded on public policy "not being rules which belong to fixed or customary law, are capable … of expansion and modification". *The difference between extending an existing principle as opposed to creating a new one will often be wafer thin.* There will, however, be an understandable reluctance on the part of the courts to create completely new heads of public policy because of the existence of governmental bodies charged with the specific task of law reform and a more activist legislature. …
>
> [emphasis in original in bold; emphasis added in italics]

35 The "wafer thin" nature of this distinction requires caution in applying an established head of public policy in common law beyond the factual matrices of prior precedents, in light of the Court's observation in *Ochroid* that the courts

will not readily create new categories of common law illegality or public policy (at [30]). This requires care in ensuring that a pre-existing head of public policy is not applied to a novel factual scenario too liberally in such a way which would amount, in practice, to a recognition of a new head of public policy altogether. The boundaries and ambit of that head have been historically forged through the fires of precedent and stand to be applied with reference to those principles.

36 Hence, it is apposite to note that the old common law authorities in this area have narrowly applied the head of clauses ousting the court's jurisdiction. The House of Lords in *Alexander Scott v George Avery* (1856) 5 HL Cas 811 held (at 847) that there is a "general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals"; whereas, there was no rule or principle in the common law "which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration". This case made clear that the head at issue was limited to a *total* exclusion of the court's ability to adjudicate a matter as opposed to prior procedural steps that had to be cleared *before* the case may be referred to court. As explained by Brett J in the English High Court decision of *Edwards v The Aberayron Mutual Ship Insurance Society (Limited)* (1875) 1 QBD 563 (at 594), that "case is an authority that the distinction is between an agreement to refer a particular point as a condition precedent to an action, and to refer all matters in dispute *so as to leave no action*" [emphasis added]. Hence, contracting parties cannot contract to "oust the Courts of their jurisdiction", but *could* contract to impose pre-conditions on such a right to bring an action without excluding it *in toto* (see the Privy Council decision in *Hallen v Spaeth* [1923] AC 684 at 689).

37 Further guidance may be taken from the approach of the English Court of Appeal in *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329, that drew a distinction (at 342–343 (*per* Denning LJ)) between (a) "[taking] the law out of the hands of the courts" altogether, in favour of a private tribunal, "without any recourse at all to the courts in case of error of law", which is void for being contrary to public policy, and (b) merely making the tribunal the final arbiter on all questions of law and fact in their dispute, but without excluding altogether the courts' examination of the tribunal's decision, which is valid. And likewise, the English High Court Chancery Division, in both *Lawlor and others v Union of Post Office Workers* [1965] Ch 712 and *Leigh v National Union of Railwaymen and another* [1970] Ch 326, had affirmed that contractual provisions, which require a litigant to exhaust domestic remedies within an associative body before recourse is had to the courts, is not contrary to public policy. It is also *not* contrary to public policy to impose by contract that a litigant must have recourse to arbitration within a set period of time, after which their claim will be treated as having been waived altogether (see the House of Lords decision in *Atlantic Shipping and Trading Company, Limited v Louis Dreyfus and Company* [1922] 2 AC 250 at 255–256).

38 The crucial distinction is therefore between a *total* exclusion of recourse to the courts of law to adjudicate on one's legal rights versus imposing conditions and limitations upon that recourse without altogether shutting out the courts under all circumstances. This narrowed scope of the head of contracts that are void for ousting the jurisdiction of the courts explains the principled rationale behind the Court of Appeal's distinction in *CKR Contract* between a complete exclusion of recourse to the courts and limitations on the rights and remedies available to parties once such recourse is had (at [18]–[19]). It stems, in part, from a proper unwillingness of the courts to liberally expand the pre-

existing scope of common law illegality and public policy beyond the ambit of the established heads found in historical precedents (see *Ochroid* at [29]–[30]; see also the Court of Appeal decision of *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 at [27]–[28], [36] and [76]–[77]).

(3) Clause 1.3.2 is not void for being against public policy

39 I now turn to apply the above principles (at [31]–[38]) to the facts here, starting with the "waives his right to contest" part of cl 1.3.2, by which the defendant "waives his right to contest such proceedings", with the words "such proceedings" referring to the claimant's action to reclaim the Repayment Sum (or part thereof) in the event of a breach of the payment schedule in cl 1.1. To begin with, I disagree with the claimant that this part of cl 1.3.2 is a limitation clause because it limits the defendant from raising any defence. This is because the practical effect of such a clause is *not only* to preclude the defendant from raising any defence, but to prevent the defendant from (a) challenging whether the claimant has established the elements of her cause of action, and (b) raising defences in answer to the claimant's cause of action.

40 However, in the claimant's favour, neither of these effects have the consequence of totally excluding the defendant's recourse to courts of law to adjudicate his rights (see at [38] above). First, I do not think that it is as objectionable to prevent a defendant from raising defences to a claim. This is because, in a situation where a defendant does not, for instance, enter a notice to contest or not to contest, the court can enter judgment in favour of the claimant without needing to consider the defendant's defence (see the General Division of the High Court decision of *Shanmugam Kasiviswanathan v Lee Hsien Yang and another matter* [2024] 5 SLR 194 ("*Shanmugam*") at [19]). If

a court can do that, then I do not think it is against public policy for parties to agree that a defendant cannot raise any defences in a claim brought against him. A defendant is entitled to decide, of his own free will, not to defend against a claim. If he is entitled to so decide, freedom of contract would suggest that he can elect to do so at the time the claim is filed or on a prior occasion when he strikes a contractual bargain (see, *eg*, as an analogy, the holding of the High Court in *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 at [20]–[26], that where the parties were free to elect a consensual manner for service of documents in bankruptcy proceedings, they were also free to do so by way of contract).

41 However, in relation to barring a defendant from challenging whether a claimant has established the elements of its cause of action, I am more hesitant to say that that is always possible. This is because, while a claim can be decided without reference to a defendant's defence, a court must always be satisfied that a claimant has made out the elements of its cause of action on its own evidence, even if the defendant does not contest the proceedings (see *Shanmugam* at [19]). Thus, by precluding a defendant from challenging whether a claimant has established the elements of its cause of action, a clause that the defendant "waives his right to contest" arguably ousts the court's jurisdiction to consider whether a claimant has made out its claim. That said, on balance, I decide that such a clause does not oust the court's jurisdiction. This is because, even where the parties agree to enter into a consent order, the court still retains the residual jurisdiction to ensure that the consent order is in accordance with the law, including that the claimant has made out its case (see the decision of the General Division of the High Court in *Management Corporation Strata Title Plan No 4701 v MCL Land (Vantage) Pte Ltd (in members' voluntary liquidation)*

[2023] 4 SLR 1529 at [4], cited by the Court of Appeal in *QBE Insurance (Singapore) Pte Ltd and another v Relax Beach Co Ltd* [2023] 2 SLR 655 at [44]). This must be correct because a court surely cannot be asked to render a consent order that is inconsistent with the law. Since the court retains this residual jurisdiction, it follows that a "waives his right to contest" clause, even if it has the effect of precluding a defendant from challenging whether the claimant has established its cause of action, does not oust the court's jurisdiction to ultimately decide the dispute at hand. This is especially as, on the facts here, the operation of cl 1.3.2 is premised on a contractual precondition – *ie*, a breach on the defendant's part of the payment schedule in cl 1.1 read with cl 1.3. A court would have to be independently satisfied that that precondition was satisfied for cl 1.3 to even come into play, inclusive of the obligation not to contest the claimant's claim. Hence, due to the court's exercise of this residual jurisdiction, the effect of cl 1.3.2 is *not* to completely exclude recourse to courts of law on the part of the defendant (see at [38] above).

42 The same analysis applies to the "will consent to judgment being entered" part of cl 1.3.2. Precisely because a court needs to be independently satisfied that a claimant has discharged its burden of proof and made out its case even when the parties have agreed to a consent order, it is not objectionable that a clause compels a defendant to consent to judgment against him. A defendant is always entitled to consensually elect to consent to judgment being entered. He should also be free to make that election at the time of his contracting in the exercise of his freedom to contract (see at [40] above; see also, *eg*, the General Division of the High Court decisions in *Spamhaus Technology Ltd v Reputation Administration Service Pte Ltd* [2023] SGHC 294 at [35] and *Hyflux Ltd (in compulsory liquidation) and others v Lum Ooi Lin* [2024] 3 SLR 1158 at [45]). Likewise, the court will have to be independently satisfied that it is not

rendering a consent judgment that is contrary to law (see at [41] above). Thus, for the same reasons, an obligation to consent to judgment does not completely shut out recourse to the jurisdiction of the courts (see at [38] above), which always retains a residual jurisdiction to ensure that it is not making an unlawful order or judgment (see, *eg*, the General Division of the High Court decision in *Chan Kwong Shing Adrian (in his capacity as the joint and several trustee of the bankruptcy estate of Ng Yu Zhi) and another v Invidia Capital Pte Ltd (in creditors' voluntary liquidation)* [2024] 4 SLR 1224 at [3]).

43 Accordingly, I do not think that the "waives his right to contest" and the "will consent to judgment being entered" parts of cl 1.3.2 are void for being against public policy. Specifically, I do not think that they can be said to oust the jurisdiction of the court.

44 However, while the claimant pointed out in her written submissions that cl 1.3.2 compels the defendant to waive his right to contest and to consent to judgment being entered against him,[13] the reality is that the defendant is not contesting the application. The defendant did not file a reply affidavit, nor did he make any legal submissions. However, because the court retained the residual jurisdiction to ensure that the claimant has made out her case before entering a consent order, I allowed the defendant to give oral evidence and explored defences that he could have raised based on the evidence so adduced. Further, the claimant did not seriously pursue her position that the defendant should consent to judgment being entered against him.[14] Therefore, in the

13 CWS at para 26.

14 28 Aug Letter at pp 6–7.

interests of justice, I go on to consider whether the defendant can raise any plausible defences against the claimant's claim.

The defendant cannot raise a claim of non est factum

45 As I mentioned above, the defendant's main defence appears to be one of *non est factum*.

(1) The applicable legal principles

46 It is trite that two requirements need to be satisfied for the doctrine to apply: (a) there must be a radical difference between what was signed and what was thought to have been signed, and (b) the party seeking to rely on the doctrine must prove that he or she took care in signing the document, that is, he or she must not have been negligent (see *Mahidon Nichiar* at [119]). In applying the doctrine, a court should bear in mind the fundamental point that *non est factum* "should only be allowed in exceptional situations to rectify injustice and unfairness" (see the High Court decisions of *Oversea-Chinese Banking Corp Ltd v Yeo Hui Keng (Tan Peng Chin LLC, third party)* [2019] 5 SLR 172 (*"Yeo Hui Keng")* at [51] and *Chan Gek Yong v Violet Netto (practicing as L F Violet Netto) and another and another matter* [2019] 3 SLR 1218 at [62]). Indeed, as Tan Siong Thye J (as he then was) said in *Yeo Hui Keng* (at [51]), if the doctrine of *non est factum* were invoked liberally, then the sanctity of contract will be adversely affected since a party can all too easily renege on his or her contractual agreement. This is because the general rule is that a signature to a document by a person of full age and understanding binds that person, whether or not he or she read or understood it; hence, the default position is that a party is deemed to have agreed to the agreement recorded in a document that he or she signed, in turn necessitating a

narrowed application of the *non est factum* doctrine (see the General Division of the High Court decision in *BGC Partners (Singapore) Ltd and another v Sumit Grover* [2024] SGHC 206 at [33]–[34]).

47 Therefore, the inquiry is whether the party *could* have read and understood the document, and not whether he or she in fact *did* (see the General Division of the High Court decision in *Wang Fumin v Citibank Singapore Ltd* [2022] SGHC 106 at [135]). In most cases, this generally takes the form of the party pleading *non est factum* showing, *inter alia*, proof of their *incapacity* to read and understand the contents of documents (see the General Division of the High Court decision in *Tonny Permana v One Tree Capital Management Pte Ltd and another* [2021] 5 SLR 477 at [81]), such as, for example, owing to blindness, illiteracy, illness, or innate incapacity (see the House of Lords decision in *Saunders (executrix of the will of Rose Maud Gallie, deceased) v Anglia Building Society* [1971] AC 1004 ("*Gallie v Lee*") at 1015–1016), although these examples are by no means exhaustive of the ways by which the party pleading *non est factum* may show that he or she was not negligent (see, *eg*, *Mahidon Nichiar* at [122]–[124]). Even then, such a person with an incapacity must still show that they took reasonable precautions under the circumstances to determine the terms of the document they are signing to show that they had not acted negligently (see *Gallie v Lee* at 1016).

(2) *Non est factum* is not made out on the defendant's evidence

48 Applying these principles at [46]–[47] above, I do not think that the defendant has made out a defence of *non est factum*.

49 First, while the Repayment Sum of $375,000.00 is undoubtedly much more than the initial investment amount of around $190,000.00, it is not "a

radical difference" from what the defendant thought to have been signed. In this regard, what is merely different as compared to what is "radically" different is dependent on whether what the signor thought he or she signed and what he or she actually signed were "completely distinct matters that bore no correlation to one another" and "involved radically different legal outcomes" (see *Mahidon Nichiar* at [121]).

50 In the present case, the point of reference as to what the defendant thought he had signed is not the sum of around $190,000.00. Even by the defendant's own evidence (see at [19(e)] above), he had been willing to pay the claimant a sum of up to $300,000.00 on the basis that he had mishandled the claimant's initial investment. Thus, it is clear on the evidence that the defendant did not hold any subjective belief that the Settlement Agreement contemplated a Repayment Sum of much less than $300,000.00 (see *Yeo Hui Keng* at [73]–[87]). If so, it cannot be said that the Repayment Sum of $375,000.00 is "radically different" from what the defendant thought to have been signed.

51 By way of comparison, it was held in *Yeo Hui Keng* that an all-moneys mortgage and a mortgage limited to a property were not "radically different" from one another as they were merely "different types of mortgages offered by the plaintiff to their mortgagors to secure banking facilities" (at [72]), and the focus of the inquiry into difference is on the "nature or type of the perceived and actual documents rather than on the actual consequences of these documents" (at [71]). This coheres with the standard in *Gallie v Lee* of a transaction that is "essentially different in substance or in kind from the transaction intended" (at 1026) where the difference is one "which goes to the substance of the whole consideration or to the root of the matter" (at 1019). Here, the "nature or type" of the Settlement Agreement was not fundamentally

different from what the defendant had envisaged, *ie*, payment of a sum in tranches to settle his dispute with the claimant in respect of his alleged mishandling of her investment moneys. It is a far cry from the scenario in *Mahidon Nichiar* where renouncing one's right to be a co-administrator of an estate was clearly radically different, both in law and in substance, from also renouncing all of one's beneficial interests in that estate (at [121]). Hence, the defendant cannot show that the Settlement Agreement was "radically different" from what he had envisaged that he had signed.

52 Second, I find that the defendant was negligent in signing the Settlement Agreement, bearing in mind that "what amounts to reasonable care will depend on the circumstances of the case and the nature of the document which it is thought is being signed" (see *Gallie v Lee* at 1023, relied on in *Mahidon Nichiar* at [123]). In considering this objective standard, the High Court had held in *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd and others* [1992] 3 SLR(R) 855 ("*Lee Siew Chun"*) (at [61]) that a court must ask itself what a reasonable person, possessing the qualities of the defendant concerned, should have done in the circumstances.

53 Applied to the present case, the defendant, being literate in English and having had the opportunity to go through a physical copy of the Settlement Agreement, ought reasonably to have taken the time to carefully read that agreement before signing it. Having failed to do so, he deprived himself of the opportunity to be put on notice as to its terms (see *Lee Siew Chun* at [61]). Had he done so, the defendant would have realised that the Repayment Sum is defined to comprise the sum of $375,000.00 at the top of the second page, in recital (G) of the preamble. Thus, the defendant need not even have added up the individual tranches of payments in the payment schedule to realise the total

quantum of the Repayment Sum. In any case, the defendant candidly admitted that the claimant's lawyer had brought him through each tranche of payment in the payment schedule. He therefore ought reasonably to have added up these tranches so that he knew the total sum he was committed to paying. This is not a case where a layperson had reasonably relied on their solicitor to make sense of a particularly complex transaction that they could not otherwise understand (see *Mahidon Nichiar* at [122]–[124]) or that of an "elderly spinster who might, if she read the document, be none the wiser and who might *not be **able** to* distinguish between a mortgage and a conveyance" [emphasis added] (see *Gallie v Lee* at 1023). The defendant was clearly capable of appreciating that the Settlement Agreement was a contract for him to pay moneys to the claimant in tranches to settle their dispute, as evidenced by his subsequent payments and messages to the claimant both before and after that contract had been executed.[15] Finally, even if the defendant behaved reasonably in not adding up these tranches, it ought not to have escaped his eye that the two greatest payment amounts in the schedule are $190,000.00 (due on 31 December 2023) and $155,000.00 (due on 31 December 2024), which add up to $345,000.00. Thus, it ought not to have escaped his attention that he was signing for an amount of more than $300,000.00.

54 Third, on whether the defendant consulted with a lawyer prior to signing the Settlement Agreement, I find that the defendant did consult with a lawyer before signing the Settlement Agreement. This is plainly what his own SMS message to the claimant dated 6 December 2023 said.[16] While the defendant has tried to explain that he had sent the message as a "spur of the

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15 CA at paras 16–20 and 23 and pp 334–353 and 366–400.

16 CA at p 369.

moment response", it is difficult for me to ignore what is clearly objective evidence that speaks for itself. Thus, the defendant had ample opportunity, even before the execution of the Settlement Agreement, to examine its contents together with legal advice. While the defendant's SMS message of 6 December 2023 states that he was legally advised *not* to sign the Settlement Agreement, that cannot be used by the defendant to impugn that agreement now. To the contrary, it actually militates in favour of a finding of negligence on the defendant's part, as this is certainly not a case like *Mahidon Nichiar* at [122]–[124] where laypersons had *relied* on the advice of their solicitors to sign documents because they reasonably formed the view that those solicitors were adequately looking out for their best interests in their rendering such advice. Rather, to the contrary, this is a case where the defendant, by his SMS message, had taken legal advice, had been advised *not* to sign the contract, and having considered his circumstances, still made the conscious choice to sign the Settlement Agreement with the benefit of that legal advice. He must be held to that election.

55 Fourth, and more broadly, the defendant does not deny that he signed the Settlement Agreement. It is also undisputed that he had begun to make payment on 5 December 2023, which was more than one month after the execution of the Settlement Agreement. Yet, the defendant only objected to the Settlement Agreement belatedly. In the circumstances, his arguments against the Settlement Agreement appear to be mere afterthoughts. This is precisely the kind of situation that the doctrine of *non est factum* should not be applied to so as to unravel a contract that had been validly entered into.

The defendant cannot assert a set-off

56 The defendant said to me that he had made prior payments of $14,232.00 (on 2 March 2022) and $12,400.00 (from March to September 2023) prior to the parties entering into the Settlement Agreement on 1 November 2023 and he was unclear as to why these sums cannot be used to "offset" the Repayment Sum. In essence, the defendant is asserting a set-off defence.

57 The simple answer is that these payments all pre-date the Settlement Agreement. Thus, they cannot count towards the satisfaction of the Repayment Sum, being completely unrelated to it.

The defendant has not and cannot assert duress or unconscionability

58 For completeness, the defendant has not asserted any defences of duress or unconscionability. Even if he did, I do not think that either is made out by the evidence.

59 First, on duress, the only possible source of duress, if at all, is that the claimant had made a police report on 1 October 2023,[17] and the defendant thought that he had to agree to the Settlement Agreement for the claimant to withdraw her report. However, as the claimant attested to in her unchallenged affidavit, the claimant told the defendant that she could not withdraw the police report and could only inform the investigation officer of the Settlement Agreement.[18] Moreover, given that the defendant, by his own evidence, was let off with a stern warning, this shows that the claimant's police report was, at

17 CA at pp 355–357.

18 CA at para 17.

least in the view of the police, not unmeritorious. In any case, it is unclear whether the claimant's making of a police report can amount to a recognised form of duress at law, sufficient to vitiate the Settlement Agreement.

60 The applicable test would be whether the making of the police report and a potential threat to maintain it unless the defendant signed the Settlement Agreement would even constitute *illegitimate* pressure under circumstances which had overborne the contracting party's will (see the House of Lords decision in *Universe Tankships Inc of Monrovia v International Transport Workers Federation and others* [1983] 1 AC 366 at 400). In relation to the threat of *lawful* action, the legitimacy or illegitimacy of the threat will depend on such circumstances as whether the threat is an abuse of the legal process, is not *bona fide*, is unreasonable, or is unconscionable, in the light of all circumstances (see the High Court decision of *Tam Tak Chuen v Khairul bin Abdul Rahman and others* [2009] 2 SLR(R) 240 at [50]). Whether an act is illegitimate thus "entails an objective evaluation of the pressure exerted and the overall circumstances" (see the General Division of the High Court decision in *Oon Swee Gek and others v Violet Oon Inc Pte Ltd and others and other matter* [2024] SGHC 13 at [60(b)]). Such circumstances would include *inter alia* whether the threat was being made in order to exploit the contracting party's vulnerable position or had been unreasonably made in order to extract contractual concessions from them (see, *eg*, the High Court decision of *Tjong Very Sumito and others v Chan Sing En and others* [2012] 3 SLR 953 at [255]–[258]).

61 Considering all the circumstances, a threat to maintain a police report, even assuming that that is what the claimant had done, could not be said to be illegitimate on the facts here. The claimant's affidavit evidence, which the

defendant did not rebut or challenge, shows that this was not a case where she had made a police report in bad faith in order to extort the defendant in an unreasonable or unconscionable manner (see, *eg*, the UK Supreme Court decision of *Times Travel (UK) Ltd and another v Pakistan International Airlines Corpn* [2023] AC 101 at [5]–[9]). She clearly believed in the merits of her complaint and filed the complaint not to extort the defendant but because she truly felt she had been wronged by him and wanted justice. She did not exploit the complaint in order to extract contractual concessions from the defendant. Rather, she candidly admitted to him at the time that she did not have the power to withdraw the police report altogether, as the course of the investigation was in the hands of the investigation officer. On the factual matrix here, the claimant's offer to inform the investigation officer of the Settlement Agreement if the defendant signed it – *even if* it were somehow interpreted as a threat to maintain the police report if he did not sign it – cannot be said to be illegitimate. It is not illegitimate for persons to file and maintain *bona fide* complaints of illegality they have suffered with the police where one genuinely believes they have been wronged in law by another.

62 Second, on unconscionability, that defence would not be available to the defendant either. In *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM*") at [141]–[142], it was held by the Court of Appeal that the narrow doctrine of unconscionability in Singapore law required that the party pleading it show that he or she had laboured under an infirmity which the other party exploited in procuring that transaction. Only if that burden were met would the burden shift to the other party to show that the terms of the agreement were fair, just, and reasonable, having regard to such indicia as the terms of the transaction and the presence or absence of independent legal advice. Here, the defendant candidly said that he was not relying on his condition of cavernoma as an

"excuse" to get out of the Settlement Agreement. The defendant's evidence was clear that his cavernoma was not material to his having signed the Settlement Agreement. Even if it were, there is no evidence that the claimant knew of that infirmity at the time of their contracting or exploited that infirmity such as to procure the defendant's signature on the Settlement Agreement. Hence, bearing in mind that the defence of unconscionability is to be narrowly construed and applied (see *BOM* at [143]), I find that, on the facts before me, that defence is likewise not available to the defendant.

Whether the claimant waived her right to immediate repayment of the Repayment Sum

63 Since the defendant cannot raise any plausible defence, it follows that the Settlement Agreement is valid and enforceable on the evidence before me. Moreover, pursuant to cl 1.3.1 of the Settlement Agreement, the defendant's breach of his payment obligation in cl 1.1, specifically, his obligation to pay $190,000.00 by 31 December 2023, resulted in the remainder of the Repayment Sum becoming immediately due and payable. This constituted a debt, which the claimant is entitled to pursue on an action for an agreed sum.

64 However, I noticed from the claimant's affidavit evidence that she had continued to receive payments *after* the defendant's breach on 31 December 2023.[19] I therefore asked the claimant whether there was any legal significance arising from this conduct. Having considered her solicitors' response, I am satisfied that she is not precluded from pursuing the agreed sum that was immediately due and payable, *per* cl 1.3.1, despite her receiving payments from the defendant after 31 December 2023.

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19 CA at para 23.

65 I arrive at this conclusion for two reasons:

(a) first, the claimant's conduct in accepting these payments after 31 December 2023 was not clear and unequivocal as to amount to a waiver by election; and

(b) second, the claimant's conduct did not rebut the presumption against oral modification arising from cl 2.5 of the Settlement Agreement.

66 I address each of these reasons in turn.

The claimant has not clearly and unequivocally communicated her intention to the defendant to waive her right to pursue payment under the accelerated liability in cl 1.3.1 of the Settlement Agreement

(1) The applicable legal principles

67 I begin with the Court of Appeal's explanation of the doctrine of waiver by election (as opposed to waiver by estoppel) in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") in the following terms (at [54]):

> … In the true sense of the word, however, waiver means a voluntary or intentional relinquishment of a known right, claim or privilege: Sean Wilken QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") at para 3.14. On this definition, the only form of waiver that befits that label is waiver by election. This doctrine concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The*

> *Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33].

68 Accordingly, where a party "unequivocally chooses not to exercise one of two inconsistent rights, and he is aware of the circumstances giving rise to the existence of that right, he would be deemed as having elected to waive that right" (see the Appellate Division of the High Court ("Appellate Division") decision in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] 2 SLR 468 at [43]). The test to be applied is one of clear and unequivocal communication to the counterparty of one's election to abandon an accrued right in favour of another (see *Terigi, Morgan Bernard Jean and others v Hook, Laurence* [2023] SGHC(A) 3 ("*Morgan Terigi*") at [55]–[56]).

(2) There was no waiver by election on the facts

69 Applying the above principles at [67]–[68] to the facts here, I find that there were two inconsistent rights that had accrued in the claimant's favour on the defendant's breach on 31 December 2023, *viz*, her right to receive staggered payments pursuant to the instalments in the payment schedule *per* cl 1.1, on the one hand, and her right to the full accelerated sum *per* cl 1.3.1, on the other hand.

70 This follows from the reasoning of the learned Assistant Registrar Andre Sim (the "AR") in *Cosmetic Care Asia Ltd and others v Sri Linarti Sasmito and others* [2023] SGHCR 4 ("*Cosmetic Care*"), with which I agree and adopt here. In that case, the learned AR (in interlocutory proceedings for an application to strike out pleadings) held (at [69]) that there was a similar inconsistency between two contractual rights there, one for the receipt of instalment payments, the other for a right to immediate payment on default. He disagreed with the

submission that the two rights could be exercised consistently and cumulatively with each other. Instead, he found them to be mutually exclusive (at [72]). This was because reliance on the staggered payments gives rise to a liability to pay a stated sum by a stipulated due date, whereas a sum accelerated on default was a liability to pay a default sum the quantum of which *crystallised* at the date of default, minus the sums already paid *as of* ***that*** date (at [71]). If both rights are exercised at the same time, there is a necessary inconsistency in terms of when the creditor is entitled to moneys from the debtor and the quantum thereof. It followed that the creditor "[a]rguably" abandoned a right to the full accelerated sum on default once they accepted the next instalment payment following the breach (at [71]–[72]), prefaced as such because the learned AR was ruling on a striking out application and was not delving into a full merits examination of the case before him, especially as the defence of waiver was unpleaded in that case and the striking out was refused on other grounds (at [72]–[73]).

71 I respectfully agree with the above analysis found in *Cosmetic Care* (at [67]–[72]). It is squarely applicable to the facts here, in that the right of the claimant to seek full payment of the accelerated sum due on 31 December 2023 (*ie*, the date of default) *per* cl 1.3.1 is necessarily inconsistent with her right to be paid in instalments based on the tranches and due dates set out in a payment schedule *per* cl 1.1 of the Settlement Agreement. It follows from *Audi Construction* (at [54]) that, if the claimant had clearly and unequivocally expressed that she was electing to pursue her remedy under cl 1.1 for payment in instalments, she would, necessarily, also be communicating her intention to abandon her contractual remedy under cl 1.3.1 for payment of the accelerated sum (*ie*, the Repayment Sum less the moneys already paid as of 31 December 2023).

72 The posterior question is, therefore, whether the claimant's words and conduct here could be said to amount to a clear and unequivocal communication of her intention to invoke her rights under cl 1.1 of the Settlement Agreement, so as to amount to a communication of her intention to abandon her mutually exclusive right that had accrued under cl 1.3.1 for the accelerated sum. I do not find that to be the case on the facts here.

73 I begin by observing that the mere act of receiving moneys from the defendant, by itself, and without more, is ambiguous as to whether the moneys are being received under cl 1.1 (as an instalment payment) or under cl 1.3.1 (as part payment of a larger liability, defraying the outstanding sum due but without entirely discharging it). In other words, the mere act of the claimant accepting payments from the defendant, without any communication from her making it unequivocally clear as to whether she regarded said payment as an instalment payment under the payment schedule or a partial payment of the defendant's liability under cl 1.3.1, is equivocal as to which of the two is the real intention.

74 Accordingly, to cross the high threshold of a clear and unequivocal communication of one's intention to abandon the inconsistent right, pursuant to *Audi Construction* (at [54]) and *Morgan Terigi* (at [56]), one must examine the words and conduct of the claimant following the breach of 31 December 2023. This has to be done in the round, to determine how a reasonable person would have understood the claimant's actions toward the defendant at the time. The issue is whether it can be objectively said that the claimant clearly and unequivocally communicated to the defendant that she was abandoning her rights in cl 1.3.1 and resting on her rights in cl 1.1 of the Settlement Agreement. I do not find that to be the case here.

75 First, the situation may be different if the claimant never raised any issue to the defendant about his failure to pay $190,000.000 by 31 December 2023 and continued accepting payments from him in the quantities and by the due dates stipulated in the payment schedule for an extended period of time after the breach. Such conduct would amount to a clear and unequivocal expression of her intention to maintain the staggered payments under the payment schedule, notwithstanding the defendant's breach.

76 Indeed, I observe that that appears to be what happened here in relation to the defendant's failure to make his timely instalment payments during the month of November 2023, that is, *before* the defendant's obligation to pay $190,000.00 arose on 31 December 2023. On the claimant's affidavit evidence, the defendant only began making payments based on the payment schedule on 5 December 2023 and, in her words, he "had failed to make four payments in the month of November 2023 and had only commenced payments on his instalments on 5 December 2023".[20] The failure to make the November 2023 instalment payments would have sufficed, in themselves, to trigger the acceleration of the payment liability *per* cl 1.3.1 of the Settlement Agreement, and yet the claimant took no steps to demand the full accelerated sum and continued receiving instalment payments in the sums and around the due dates in the payment schedule from 5 December 2023 onwards. She received four instalment payments of $500.00 each from 5–26 December 2023,[21] around the due dates prescribed in S/Ns 5–8 of the payment schedule, albeit one day late.[22] In my view, such conduct on the part of the claimant in November to December

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20 CA at para 26.

21 CA at para 23.

22 CA at p 19.

2023 clearly conveyed to the defendant that she considered the scheduled payment obligations to subsist, thus operating to the necessary exclusion of the accelerated liability in cl 1.3.1, *per* the reasoning of the learned AR in *Cosmetic Care* (at [71]–[72]). Indeed, the claimant does not appear to dispute this, as nowhere in her affidavit or her written submissions has she sought to argue that the liability to pay the full accelerated sum *per* cl 1.3.1 kicked in due to the defendant's non-payments in November 2023 or slightly late payments in the period of 5–26 December 2023. Clearly, this is because, at *that* point in time, she was still of the view that the payment schedule should continue to remain in existence, with the defendant making payments thereunder. In this period, she continued in her SMS messages to chase for and accept instalment payments from the defendant.[23]

77 The claimant's acts *following* the defendant's failure to pay $190,000.00 by the due date of 31 December 2023 stand on a different footing. After that breach, in her SMS messages sent to him in January and February 2024, she repeatedly drew the defendant's attention to the default with the phrases: "[s]till pending $190k update"[24] and "[p]lease update $190k transfer date".[25] She also repeatedly chased the defendant for the payment of that late sum, with successively later timelines, each coupled with a statement that she would pursue further action if the defendant failed to make such payment. Several messages in March and April 2024 have the claimant threatening to take further action if that tranche was not paid by the end of April 2024.[26] During this time,

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23 CA at pp 347–348 and 366–370.

24 CA at pp 374–375.

25 CA at p 379.

26 CA at pp 383–400.

the defendant continued to make instalment payments of $500.00 each from 2 January to 23 April 2024,[27] roughly corresponding with the due dates set out in the payment schedule (but not precisely).[28]

78 Within these messages, the claimant did not specify whether the further action she threatened would take the form of an action for the defendant's omission to make the instalment payment of $190,000.00 *alone* or for the full outstanding sum accelerated under cl 1.3.1 – *ie*, the Repayment Sum (owed on 31 December 2023) subtracting all moneys paid before that date and since. Each of the messages in question is equivocal and ambiguous on that question – for example, "[a]ction will be taken if money not in next month",[29] "OTHERWISE, ACTIONS WILL BE TAKEN",[30] "THE NECESSARY STEPS WILL BE TAKEN UP EARLIER",[31] "MY LAWYER WILL HANDLE",[32] "ONCE ACTIONS TAKEN, NO TURNING BACK",[33] "NO MONEY IN BY APRIL. ACTION WILL DEFINITELY BE TAKEN",[34] and "OTHERWISE, THAT IS IT",[35] amongst other such examples. It is pertinent to note that the defendant had also agreed in a message on 5 March 2024 that he would "transfer 190000 end of April",[36] with such agreement on his part being mentioned in the claimant's

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27 CA at para 23.

28 CA at pp 19–20.

29 CA at p 388.

30 CA at p 389.

31 CA at p 391.

32 CA at p 393.

33 CA at p 394.

34 CA at p 398.

35 CA at p 399.

36 CA at p 384.

subsequent messages dated 26 April 2024 (not contemporaneously contradicted by the defendant in his replies).[37]

79 Against these facts, I reiterate that the relevant test is whether the claimant had *clearly and unequivocally* communicated to the defendant, in this period, that she was electing to pursue the inconsistent right to payments under the Settlement Agreement's payment schedule, operating to the exclusion of her right to the accelerated sum under cl 1.3.1 of the same. I cannot find that this standard is met. Although *a* possible interpretation of the claimant's words and conduct is that she had abandoned her right to payment of the accelerated sum on 31 December 2023 by offering an extension of time for the defendant to pay $190,000.00 (by end April 2024) whilst receiving more instalment payments of $500.00 in the interregnum, that is far from *the only* reasonable interpretation of the same.

80 Another possible interpretation of her words and conduct, which in my view cannot be unambiguously excluded on the facts, is that the claimant had, in the words of the Appellate Division in *Morgan Terigi* (at [56]), held her accrued rights under cl 1.3.1 "in abeyance" to work out an alternative settlement with the defendant without abandoning her rights under cl 1.3.1 in all circumstances. From her communications with the defendant, she agreed to give him a final opportunity to pay the $190,000.00 by end April 2024, if not, she would take further (unspecified) action against him. This can be construed as an *offer* to the defendant to abandon her (the claimant's) right to the accelerated sum and to maintain the staggered payment schedule *if* and *only if* he met her condition of paying $190,000.00 by end April 2024, which condition was *not*

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37 CA at pp 397–400.

met. As such, while the claimant held her accrued rights "in abeyance" in the meantime, she reserved the right to seek full payment under cl 1.3.1 *if* the defendant failed to meet her condition, as he did here.

81 On the latter construction, the interim payments received by the claimant in January to April 2024 were not received as instalment payments under cl 1.1 but went towards defraying the full outstanding liability owed by the defendant under cl 1.3.1, which the claimant *might* agree to waive in the event that he met her condition of paying $190,000.00 by end April 2024 (which he did not). It is not necessary for me to find that this was, in fact, how a reasonable person would certainly have understood the claimant's words and conduct at the time. Since the test for waiver by election is a clear and unequivocal communication of an intention ***to*** *waive*, *per Audi Construction* (at [54]) and *Morgan Terigi* (at [55]–[56]), I cannot find that that standard is satisfied based on the facts here. The claimant's intentions were ambiguous and equivocal in this period, in that they *could* be construed as a waiver (if the interpretation at [79] is adopted) but they could *alternatively* be construed as a non-waiver (if the interpretation at [80] is taken instead). There is simply no way to categorically find that she had communicated either intention clearly to the defendant, with the result that there is no waiver by election on the facts.

82 Adding to the ambiguity is the fact that many of the subsequent tranche payments made by the defendant *after* April 2024 do not follow the amount of $500.00 for most of the instalments set out in the payment schedule in the Settlement Agreement. For example, $400.00 was paid on 9 May 2024, with $100.00 paid on 10 May 2024, $250.00 paid on 16 May 2024, another $250.00 paid on 17 May 2024 (when $500.00 was due on 6, 13, and 20 May 2024), and so on. This further adds to the uncertainty as to whether the acceptance of these

payments can be *clearly* construed as a communication of an intention to hold open the payment schedule in the Settlement Agreement to the exclusion of liability for the full accelerated sum under cl 1.3.1 of the same, with these being part payments that defray the defendant's liability for the whole lump sum that was still outstanding (see at [73] above). Of course, if the claimant had clearly and unequivocally expressed her intention to waive her rights under cl 1.3.1 through her words and conduct in the January–April 2024 period, it would be irrelevant that her acts thereafter are equivocal on the same, since an election, once made, is final, binding, and cannot be unilaterally taken back (see *Audi Construction* at [54]). That, however, was not the case here. Instead, the claimant's conduct following the defendant's default on 31 December 2024, from January–June 2024 (as more payments were being received and accepted by her), was simply ambiguous and equivocal throughout.

83 Accordingly, I find that the claimant has not waived by election her right to the Repayment Sum (minus all moneys already paid) under cl 1.3.1 of the Settlement Agreement. She has *not* clearly and unequivocally communicated to the defendant her intent to so waive her rights by clearly and unequivocally stating her intention to rely upon a mutually exclusive and inconsistent right, namely, her right to staggered payments under a payment schedule *per* cl 1.1 of the same. However, it is important for a creditor in a similar position to be aware that a continued insistence on staggered payments may well suffice to waive a right to full and immediate repayment. A creditor should therefore carefully consider the consequences of his or her conduct when a debtor fails to make an instalment payment.

The claimant had not, by necessary implication, agreed to depart from the "no oral modification" provision in cl 2.5 of the Settlement Agreement

84 Due to my finding at [83] above, it is not strictly necessary for me to consider whether the position is affected by the parties having placed a "no oral modification" clause in cl 2.5 of the Settlement Agreement. Nevertheless, as this case presents an opportunity to expound on the interplay between the respective tests for waiver by election (in *Audi Construction* at [54]), on the one hand, and for orally modifying or varying a contract in the face of a "no oral modification" clause (*per* the Court of Appeal decision in *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] 2 SLR 153 ("*Charles Lim*")), on the other, I proceed to consider this issue as well.

85 I begin by setting out cl 2.5 of the Settlement Agreement, which states:[38]

> This Agreement may not be changed orally and any written change or amendment must be signed and accepted by the Parties.

86 This position is shored up by cl 2.3 of the Settlement Agreement, which is a "no oral waiver" clause and provides as follows:[39]

> No failure by [the claimant] to insist upon the strict performance of any term or condition of this Agreement, or to exercise any right or remedy under this Agreement, and no acceptance of full or partial payment made during the default of [the defendant], shall constitute a waiver of any such term or condition of this Agreement, or a waiver of any such right or remedy, or a waiver of any such default by [the defendant], unless expressed in writing and signed by each Party. Any express waiver of any provision of this Agreement will affect only the term or condition specified in such waiver and only for the time and manner specifically stated therein and shall not be deemed to be a waiver of any other breach, or of a subsequent

38 CA at p 17.

39 CA at p 17.

> breach of the same or any other term or condition herein contained.

(1) The applicable legal principles

87 The effect of a "no oral waiver" clause is clear (see generally Lau Kwan Ho, "No Oral Modification Clauses: Autonomy, Certainty or Presumption" [2021] CLJ 443). In this case, the effect of cl 2.3 is akin to a "no oral modification" clause, in that the parties have agreed that there is to be no waiver of any term, condition, right, or remedy, unless such waiver is expressed in writing and signed by each party. The test for determining whether parties have agreed to depart from a "no oral modification" clause (set out by the Court of Appeal in *Charles Lim*) hence will not differ from the test to determine if the parties have validly departed from a "no oral waiver" clause. That is clear from the Court's approving citation (at [44]) of the New York Court of Appeals case of *Beatty v Guggenheim Exploration Co* [1919] 225 NY 380 ("*Beatty*"), in which Cardozo J opined as follows (at 387–388):

> … The president and the general manager, with knowledge that the plaintiff had reserved this privilege of withdrawal, consented that the investment be retained. The question is whether the employer may now have the aid of a court of equity to impress upon the investment the quality of a constructive trust.
>
> The question would answer itself if it were not for the covenant that there shall be no waiver or amendment not evidenced by a writing. The employer sets up this covenant to nullify its oral consent. The employee asserts that the covenant is nugatory. Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. "Every such agreement is ended by the new one which contradicts it" (*Westchester F. Ins. Co. v. Earle*, 33 Mich. 143, 153). What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again. … The plaintiff had reserved the right to withdraw from the joint enterprise if his employer disapproved of it, and in that event to treat his advances as a loan. On the

> faith of the consent, he turned a loan into a purchase. It is too late, years afterwards, for the employer to cancel the consent, and insist that the purchase be turned back into a loan.
>
> We hold, therefore, that the consent, though oral, gives protection to the agent, and acquits him of a breach of contract. …

88 Hence, in *Beatty*, notwithstanding the "no oral waiver" clause there, that did not prevent the employers from validly giving oral consent for the plaintiff to become interested in the Perry-Treadgold contract, effectively waiving the covenant that the plaintiff would not become interested in any similar business, despite the fact that the contract included a provision that its covenants could only be waived if such waiver was signed by the parties and in writing (at 384–385). In the passage at [87] above, Cardozo J found that the consent was valid such that the plaintiff was not acting in breach of contract, allowing the covenant to be waived *without* a signed and written waiver (at 387–388). The Court in *Charles Lim* quoted this decision with approval (at [44]), finding (at [45]) that it stood for the proposition that "an *initial* limitation imposed by a [no oral modification] clause can be unwound by the same parties at a *later* date" [emphasis in original], and "recognises the more *recent* intention of the parties to vary a contract albeit orally notwithstanding their *earlier* agreement to the contrary" [emphasis in original]. Bearing in mind that *Beatty* was a case about a "no oral waiver" clause, the Court clearly took the view that there was no difference, in principle, between a "no oral modification" clause and a "no oral waiver" clause, such that the same approach should be taken to a purported departure from either such clause by the contracting parties.

89 That surely must be correct, since the effect of a waiver is not materially different from an amendment or modification to a contract and *de facto* varies the parties' contractual arrangement. Indeed, the effect of the oral waiver in

Beatty was to amend or vary the parties' covenant that the plaintiff would not become interested in business similar to the Perry-Treadgold contract by adding a hitherto absent derogation from that covenant in respect of that specific business venture. Likewise, here, the effect of the claimant waiving her right to pursue an accelerated sum in cl 1.3.1 on breach of the defendant's instalment payment obligations in cl 1.1 on 31 December 2023 is also to effectively vary cl 1.3.1 by introducing a fresh exception to the general rule in cl 1.3.1 that a default of cl 1.1 would give rise to an accelerated liability to pay the Repayment Sum *immediately*, by carving out a new exception to cl 1.3.1 in respect of the defendant's default of 31 December 2023, derogating from the plain language of cl 1.3.1 in the process.

90 Hence, as a matter of principle, the approach of the Court of Appeal to a "no oral modification" clause in *Charles Lim* (at [61]), which affirmed the observation in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [90], *viz*, "that a term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation", which would instead "raise a rebuttable presumption that, in the absence of writing, there has been no variation", should also apply to an oral waiver (or purported oral waiver) in the face of a "no oral waiver" clause as well (see, *eg*, the General Division of the High Court decision in *BGC Partners (Singapore) Ltd v Yap Yuk Hee and others* [2021] SGHC 279 at [50]). The effect of a purported oral waiver or a purported oral modification is, in either scenario, to purport to orally *vary* a contract in the face of a clause that prohibits oral variations.

(2) The rebuttable presumption raised by the "no oral waiver" and "no oral modification" clauses of the Settlement Agreement has not been rebutted on the facts

91 Accordingly, I proceed to consider if the rebuttable presumption of "no oral waiver" or "no oral modification" of the Settlement Agreement (specifically, in regards to cl 1.3.1) has been rebutted on the facts here. I find that it has *not*. I note, in this regard, that the Court in *Charles Lim* described the test of what rebuts the rebuttable presumption (at [54]) in the following terms:

> … The test should be whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the [no oral modification] clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.

Accordingly, the question is whether the parties here "had by necessary implication agreed to depart from a [no oral modification] clause" (see *Charles Lim* at [61]).

92 I find that there is no "necessary implication" from the words or conduct of the parties here to rebut the presumption against any oral modification of the terms of the Settlement Agreement and, by the same token, oral waivers of the rights and remedies thereof. This follows logically from my analysis at [74]–[82] above, by which I had found (at [83] above) that the claimant had *not* clearly and unequivocally communicated her intention to waive her rights under cl 1.3.1 in favour of cl 1.1 of the Settlement Agreement, in respect of the default of the defendant to make timely payment on 31 December 2023. I would add that, while I cannot definitively exclude such a possibility, it would be a rare case that would produce a divergent outcome between the application of the test of clear and unequivocal communication with respect to waivers by election (*per Audi Construction* at [54]) and an agreement by necessary implication to

depart from a "no oral modification" clause (*per Charles Lim* at [61]). Indeed, there is a clear logical connection between the two legal tests. The logic of the Court in *Audi Construction* (at [54]) is premised on the idea that, where a party has at its disposal two inconsistent and mutually exclusive rights, and clearly communicates an intention to pursue one, that must, *by necessary implication*, come at the expense of the other, thereby impliedly communicating an intention to abandon the latter in favour of the former.

93 While it cannot be determinatively said that the outcomes between the two tests would necessarily be the same in *every* possible factual matrix, at least on the facts before me, I could not see that the outcome for the claimant would differ between the two. In other words, *if* I had found that she had clearly and unequivocally expressed to the defendant that she would be waiving her rights to immediate payment *per* cl 1.3.1 (in favour of maintaining his instalment payment obligations in cl 1.1), she would also have, by necessary implication, agreed to depart from the "no oral waiver" clause in cl 2.3 and the "no oral modification" clause in cl 2.5. This is because it is a necessary implication of her clear election of an *inconsistent* right that she had abandoned a *mutually exclusive* right in cl 1.3.1 and, by necessary implication, she had agreed to derogate from cl 1.3.1 in respect of the defendant's default of 31 December 2023, which would require an oral variation of that provision in so far as that derogation is concerned. And likewise, as I found that the claimant has *not* clearly and unequivocally stated her wish to waive by election her rights under cl 1.3.1 *vis-à-vis* the defendant's default of 31 December 2023, it follows that she cannot be said, by necessary implication from her words and conduct, to have agreed to depart from the "no oral waiver" clause in cl 2.3 and "no oral modification" clause in cl 2.5 in order to derogate from cl 1.3.1's plain terms without a signed and written agreement or waiver.

94 Hence, I likewise find that, owing to the "no oral waiver" clause in cl 2.3 and the "no oral modification" clause in cl 2.5, the claimant did not validly waive or vary the terms of cl 1.3.1, in respect of the defendant's failure to make timely instalment payments by 31 December 2023, without an agreement signed by the parties and in writing. As such, the claimant did not waive her right to seek full payment of the Repayment Sum (minus the moneys paid already) in cl 1.3.1 of the Settlement Agreement.

Whether the claimant is entitled to costs on an indemnity basis

95 As it is not disputed that the defendant breached cl 1.1 of the Settlement Agreement by failing to pay $190,000.00 by the due date of 31 December 2023, the obligations in cl 1.3 were triggered. That includes the obligation in cl 1.3.2 that, where the claimant commences proceedings for the Repayment Sum (or part thereof), the defendant would be liable for her costs therein on an indemnity basis.

96 As I have found that the "waives his right to contest" and "will consent to judgment being entered" parts of cl 1.3.2 are *not* void for being contrary to public policy (see at [43] above), I do not have to consider whether the liability for indemnity costs is a distinct and severable obligation surviving the voiding of those parts of cl 1.3.2 (see, *eg*, the House of Lords decision in *Rose and Frank Company v J R Crompton and Brothers, Limited and others* [1925] AC 445 at 454).

97 Given that the defendant did breach cl 1.1 and the present application falls within the category of "proceedings" for payment of the sums owed under cl 1.3.1 (*ie*, the Repayment Sum less the moneys already paid), I agree with the

claimant that she is entitled to indemnity costs for these proceedings pursuant to cl 1.3.2 of the Settlement Agreement.

Conclusion

98 For all the reasons above, I allow the claimant's application, and the reliefs prayed for in HC/OA 566/2024.

99 I will hear the parties on the quantum of costs due. For the avoidance of doubt, and following the guidance of the Appellate Division in *Marchmont Pte Ltd v Campbell Hospitality Pte Ltd and others* [2024] SGHC(A) 30 at [40]–[43], while I have had to decide that the claimant is entitled to indemnity costs of these proceedings as that is an issue directly arising from the Settlement Agreement, I clarify that the time for appeal against this decision starts to run as of today. This is because, pursuant to O 19 r 4(1) read with O 19 r 4(2)(*a*)(i) of the ROC 2021, this court has heard and determined all matters in this application, including costs.

Goh Yihan
Judge of the High Court

Joshua Thomas Raj and Vigneesh s/o Nainar (Tang Thomas LLC)
for the claimant;
The defendant in person.