IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 225

Suit No 1051 of 2016 (Registrar's Appeal No 79 of 2018)

Between

G1 Construction Pte Ltd

… *Plaintiff*

And

(1) Astoria Development Pte Ltd
(2) Pang Sor Tin

… *Defendants*

Suit No 1052 of 2016 (Registrar's Appeal No 80 of 2018)

Between

Mface Pte Ltd

… *Plaintiff*

And

(1) Astoria Development Pte Ltd
(2) Ong Ah Choo
(3) Pang Gee Leong
(4) Poh Ching Yee

… *Defendants*

Suit No 885 of 2017 (Registrar's Appeal No 122 of 2018)

Between

(1) Mface Pte Ltd
(2) G1 Construction Pte Ltd

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… *Plaintiffs*

And

(1) Astoria Development Pte Ltd
(2) Ong Ah Choo
(3) Ranesis Development Pte Ltd
(4) Pang Sor Tin
(5) Tan Hui Kang

… *Defendants*

GROUNDS OF DECISION

[Civil procedure] — [Summary judgment]

[Credit and security] — [Money and moneylenders] — [Illegal moneylending]

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G1 Construction Pte Ltd
v
Astoria Development Pte Ltd and another and other suits

[2018] SGHC 225

High Court — Suit No 1051 of 2016 (Registrar's Appeal No 79 of 2018), Suit No 1052 of 2016 (Registrar's Appeal No 80 of 2018), and Suit No 885 of 2017 (Registrar's Appeal No 122 of 2018)
Chan Seng Onn J
2, 16 July 2018

10 October 2018

Chan Seng Onn J:

Introduction

1 These Registrar's Appeals arise out of applications for summary judgment in three related suits.

2 Registrar's Appeal No 79 of 2018 ("RA 79") is an appeal by the defendants in Suit No 1051 of 2016 ("S 1051/2016") namely, Astoria Development Pte Ltd ("Astoria") and Ms Pang Sor Tin ("PST"), against the decision of Assistant Registrar Li Yuen Ting ("AR Li") granting summary judgment to the plaintiff in S 1051/2016, G1 Construction Pte Ltd ("G1"), for the sum of $2,968,951.43.[1]

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[1] HC/ORC 1517/2017.

3 Registrar's Appeal No 80 of 2018 ("RA 80") is an appeal by the first, second and third defendants in Suit No 1052 of 2016 ("S 1052/2016") namely, Astoria, Ms Ong Ah Choo ("OAC"), Mr Pang Gee Leong ("PGL"), against the decision of AR Li giving leave to the aforestated defendants to defend Mface Pte Ltd's ("Mface") (the plaintiff in S 1052/2016) claims amounting to $5,868,848.92 on condition that the aforestated defendants provide a banker's guarantee or pay into court that sum of money.[2]

4 Registrar's Appeal No 122 of 2018 ("RA 122") is an appeal by the defendants in Suit No 885 of 2017 ("S 885/2017") namely, Astoria, OAC, Ranesis Development Pte Ltd ("Ranesis"), PST and Mr Tan Hui Kang ("THK"), against the decision of Assistant Registrar Una Khng ("AR Khng") giving leave to the defendants to defend G1 and Mface's (the plaintiffs in S 885/2017) claims amounting to $4,912,199.65 on condition that the defendants pay into court that sum of money.[3]

5 Having heard the parties' submissions, I allowed the appeal in RA 79 in part and reduced the amount of summary judgment to $2,088,951.43. I also dismissed the appeals in RA 80 and RA 122. I now give my reasons.

Facts

Parties

6 G1 is a Singapore incorporated company in the business of construction.[4] Mface is a Singapore incorporated company in the business of website design.[5] G1 and Mface are related companies by virtue of them having

2 HC/ORC 1684/2017.

3 HC/ORC 3536/2018.

4 Defendants' Written Submissions dated 16 July 2018 ("Defendants' 16 July Submissions"), para 7.

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common directors and shareholders.[6]

7 Astoria is a Singapore incorporated company in the business of real estate development. Astoria is the developer of a residential project known as the Sycamore Tree (the "Development"). Ranesis is a Singapore incorporated company in the business of real estate development and general wholesale trading. Astoria and Ranesis are part of a group of related companies that are controlled by PST and her family members. PST is a director of Ranesis. OAC is PST's mother and the sole director of Astoria. PGL is PST's brother.[7] THK is PST's son.[8] It should be noted that PST is neither a shareholder nor a director of Astoria.[9]

8 Given the multiple suits and the multiple parties involved, I shall, for convenience, refer to G1 and Mface as the Plaintiffs, and Astoria, PST, Ranesis, OAC and their other family members and related companies as the Defendants.

The Mface Loans

9 During the period commencing 6 July 2015 and ending 28 January 2016, Mface and Astoria entered into ten loan agreements for various sums of money to be loaned by Mface to Astoria (the "Mface Loans"). The first nine Mface Loans were guaranteed by OAC and/or PGL, save for the fourth loan of $1,438,848.92 which was made on 3 August 2015.[10] It should be noted that the

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5 Defendants' 16 July Submissions, para 6.

6 Plaintiffs' Written Submissions for RA 79 ("Plaintiffs' RA 79 Submissions"), para 11; Defendants' 16 July Submissions, para 7.

7 Defendants' 16 July Submissions, paras 9 – 10.

8 Affidavit of Pang Sor Tin dated 9 January 2018 ("PST's 9 Jan Affidavit"), paras 1, 9 – 14.

9 Notes of Argument dated 16 July 2018, p 40, lines 27 – 28.

10 PST's 9 Jan Affidavit, paras 33 – 38.

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written agreements which recorded the Mface loans were all signed by Mface and Astoria exclusively.[11] The tenth loan, made on 28 January 2016, was not recorded in writing. However, the loan was disbursed by way of a cheque issued by Mface to Brilliant Tech Construction Pte Ltd, which is a company that is affiliated to the Defendants.[12]

The Construction and Collateral Agreements

10 On 14 December 2015, G1 and Astoria entered into two agreements, namely the Construction Agreement, and the Collateral Agreement (collectively, the "G1 Agreements").[13] PST also agreed to guarantee and indemnify G1 in full against any default by Astoria in respect of Astoria's obligations under the G1 Agreements.[14]

11 Under the Construction Agreement, Astoria would engage G1 as the main contractor for the Development. Astoria would pay G1 the total costs incurred in connection with the construction of the Development, along with an additional fee of $2 million upon the Temporary Occupation Permit ("TOP") for the Development being issued. This additional fee was stated to be "for [G1's] profit and recovery of other overheads".[15] The Collateral Agreement added that the total costs payable by Astoria to G1 under the Construction Agreement, would include "[i]nterest costs which [G1] has to pay to borrow from others to pay the sub-contractors and suppliers for [the Development] at a rate not exceeding 5% per month". Further, if the $2 million fee was not paid

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11 See PST's 9 Jan Affidavit, paras 19 – 58.

12 PST's 9 Jan Affidavit, paras 60 and 61, p 144.

13 PST's 9 Jan Affidavit, para 62, pp 146 – 160, 176 – 177.

14 PST's 9 Jan Affidavit, para 63.

15 PST's 9 Jan Affidavit, p 146.

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on time, an interest rate of 5% per annum would be levied on the fee until payment was made.[16]

Procedural history

Suits 1051 and 1052 of 2016

12 On 5 October 2016, G1 commenced S 1051/2016 against Astoria and PST to claim $2,968,951.43 for works allegedly done on the Development by G1 pursuant to the G1 Agreements. Mface simultaneously commenced S 1052/2016 against Astoria, OAC, PGL and Poh Ching Yee for the repayment of $5,868,848.92 in loans made pursuant to the Mface Loans, as well as a further claim for $3,357,612.08. I will refer to S 1051/2016 and S 1052/2016 collectively as the Initial Suits.

13 Subsequently, G1 and Mface applied for summary judgment in S 1051/2016 and S 1052/2016 respectively. On 6 March 2017, at the conclusion of the hearing for the summary judgment application before AR Li, G1 successfully obtained summary judgment for $2,968,951.43 in S 1051/2016. However, AR Li granted the defendants in S 1052/2016 conditional leave to defend the claim for $5,868,848.92 provided that they provide a banker's guarantee or pay into court that sum of money by 3 April 2017. Failure to meet this condition would result in judgment being entered for Mface. The defendants were also given unconditional leave to defend the further claim of $3,357,612.08. It transpired that the defendants in S 1052/2016 failed to satisfy the condition for leave to defend. Consequently, judgment was entered against the defendants for $5,868,848.92 in favour of Mface.

14 The Plaintiffs thereafter commenced proceedings to enforce the two

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16 PST's 9 Jan Affidavit, p 176.

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judgment sums. On 11 April 2017, G1 and Mface each successfully applied to attach Astoria's interest in the Development for the satisfaction of the judgments (the "Attachment Orders").[17] On 10 and 13 April 2017, Mface also applied for writs of seizure and sale to be issued against OAC, Astoria and PST for all moveable properties and shares (the "WSS").[18] On 26 April 2017, pursuant to HC/WSS 16/2017, construction related equipment and building materials which were found on the premises of the Development were seized by the Sheriff of the Supreme Court.[19]

The Settlement Agreement

15 On 11 May 2017, the Plaintiffs entered into a settlement agreement (the "Settlement Agreement") with Astoria, for which OAC, Ranesis and PST agreed to act as guarantors (the "Guarantors").[20] In essence, the Settlement Agreement was for the Plaintiffs to discontinue all enforcement actions and outstanding suits against the Defendants, in exchange for $13.8 million to be paid by Astoria. The Settlement Agreement provided as follows:[21]

> **1. [G1 and Mface's] OBLIGATIONS / CONSIDERATIONS**
>
> [G1 and Mface] agree that they will:
>
> (i) discontinue all proceedings enforcing their judgments against Astoria, [OAC] and/or [PST] and/or [PGL] including the examination of judgment debtor proceedings against them,
>
> (ii) within 7 working days, give notice to the court to release the movable items seized by Mface in HC/WSS 16/2017, the shares of [OAC] seized by Mface in

17 PST's 9 Jan Affidavit, para 79; pp 221 – 223.

18 PST's 9 Jan Affidavit, paras 81 – 82; pp 244 – 260.

19 PST's 9 Jan Affidavit, pp 248 – 258.

20 PST's 9 Jan Affidavit, p 294 – 295.

21 PST's 9 Jan Affidavit, p 297 – 299.

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HC/WSS 5/2017, and the shares of [PST] seized by G1 in HC/WSS 19/2017,

(iii) discontinue the law suit HC/S 1052/2016 in the High Court of Singapore, and

(iv) not make any other antecedent claim against [Astoria, OAC, Ranesis and PST] (as this Agreement is intended to be a full and final settlement of all claims by [G1 and Mface] against [Astoria, OAC, Ranesis and PST] and [PGL] as at the date of this Agreement),

provided that there is no default at all by any one of [Astoria, OAC, Ranesis and PST] under this Agreement and/or under any Guarantee and Indemnity agreement mentioned below.

2. [Astoria, OAC, Ranesis and PST's] OBLIGATIONS / CONSIDERATIONS

2.1 Astoria shall pay Mface up to S$13.8 million (which sum includes G1's claims against [Astoria, OAC, Ranesis and PST]) progressively based on the schedule of payments … with the understanding among the Parties that should Astoria be late in any one payment due under the schedule of payments, Astoria shall be given another 21 days from the due date to make good the default.

2.2 a) [OAC] shall give a guarantee and indemnity to Mface for Astoria's due performance of Astoria's obligations under this Agreement up to S$5,000,000 … and once Astoria has made a total payment of S$5,000,000 to Mface pursuant to this Agreement, [OAC shall cease to be liable to [G1 and Mface].

…

2.3 a) [Ranesis] shall give a guarantee and indemnity to Mface for Astoria's due performance of Astoria's obligations under this Agreement up to S$2,000,000 … and once Astoria has made a total payment of S$7,000,000 to Mface pursuant to this Agreement, Ranesis shall cease to be liable to [G1 and Mface].

…

2.4 a) [PST] shall give a guarantee and indemnity to Mface for Astoria's due performance of Astoria's obligations under this Agreement up to S$13,800,000 …

…

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> **3. In the Event of a Default under this Agreement and/or in any related Guarantee and Indemnity Agreement signed between the Parties**
>
> When there is a default in this Agreement or in any said Guarantee and Indemnity agreement by any one of [Astoria, OAC, Ranesis and PST], then Mface and/or G1 shall be entitled to:
>
> (i) continue enforcing their judgments against Astoria, [OAC] and/or [PST] and/or [PGL], and
>
> (ii) sue all or one or more of [Astoria, OAC, Ranesis and PST] for the total sums due to Mface under this Agreement whether they are due for payment yet or not in accordance with the said schedule of payments, less the principal sum of any judgment already obtained … by [G1 or Mface] in HC/S 1051/2016 or HC/S 1052/2016, and when all or one or more of [Astoria, OAC, Ranesis and PST] are so sued, they shall not defend the law suits and shall allow Mface and/or G1 to obtain default or summary judgment against them.
>
> For avoidance of doubt, when there is a default in this Agreement or in any said Guarantee and Indemnity agreement by any one of the Debtors, Mface shall not be entitled to sue the defendants in HC/S 1052/2016 again for the balance of Mface's claims in that suit which has been discontinued pursuant to this Agreement.

16 The $13.8 million that Astoria would have to pay Mface pursuant to the Settlement Agreement comprises the following sums:

(a) $8,837,800.35 being the total sum awarded under the summary judgments obtained in the Initial Suits;

(b) $3,357,612.08 being the sum that the defendants in S 1052/2016 had been given unconditional leave to defend; and

(c) an additional sum of $1,604,587.57.

17 On 16 May 2017, Mface requested the Sheriff of the Supreme Court to release the properties that were seized under the WSS.[22] On 26 May 2017, Mface

[22] Affidavit of Lee Kok Choy dated 10 October 2017 ("LKC's 10 Oct Affidavit"), para

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filed a Notice of Discontinuance for parts of its claim in S 1052/2016 for which summary judgment had not been obtained, *ie*, the $3,357,612.08 for which the defendants in S 1052/2016 had been given conditional leave to defend.[23] At the hearing before me on 2 July 2018, both counsel confirmed that the Plaintiffs had also taken steps to discontinue examination of judgment debtor proceedings within a reasonable time.[24]

18 Notwithstanding the Plaintiffs' efforts to discontinue enforcement proceedings as listed in [17] above, it was undisputed that the Plaintiffs did not take any action to withdraw the Attachment Orders. This forms the basis for the Defendants' allegation that the Plaintiffs had committed a repudiatory breach of the Settlement Agreement leading to its termination. This will be discussed in further detail below.

19 Although the first cheque that Astoria caused to be issued was dishonoured, payment of the first instalment of $50,000 was eventually made by way of a cashier's order.[25] However, the cheque from Astoria for the second monthly instalment of $500,000 was dishonoured.[26] No further instalment payments were forthcoming from Astoria or any of the Guarantors.[27]

26.

23 Affidavit of Lee Kok Choy dated 26 December 2017 ("LKC's 26 Dec Affidavit"), para 27, pp 82 – 86; LKC's 10 Oct Affidavit, para 27.

24 Notes of Argument dated 2 July 2018, p 14, line 31.

25 LKC's 26 Dec Affidavit, para 31; Defendants' 16 July Submissions, para 35.

26 LKC's 10 Oct Affidavit, paras 38 – 39.

27 LKC's 26 Dec Affidavit, paras 34 and 37.

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Suit 885 of 2017

20 On 21 September 2017, the Plaintiffs commenced S 885/2017 against Astoria, the Guarantors, and THK to claim the remaining $13.75 million that was due pursuant to the Settlement Agreement. THK was made a defendant in the suit because he held two million shares in Ranesis as a constructive trustee.[28]

21 The Defendants filed Notices of Appeal to a Judge of High Court in Chambers on 27 March 2018, in respect of AR Li's decision to grant summary judgment and conditional leave to defend in the Initial Suits. I gave leave to the Defendants to appeal out of time. The hearing for RA 79 and 80 was fixed for 16 July 2018.

22 The Plaintiffs subsequently applied for summary judgment in respect of the sum of $13.75 million. At the hearing on 23 April 2018, AR Khng held that it would not be appropriate for her to give summary judgment in respect of $8,837,800.35, being the sum awarded under the summary judgments obtained in the Initial Suits, given that those orders for summary judgment were pending an appeal before me. Therefore, she granted unconditional leave to defend the sum of $8,837,800.35. Nevertheless, she held that the rest of the sums due under the Settlement Agreement could be severed from this sum, and gave the defendants in S 885/2017 conditional leave to defend the sum of $4,912,199.65, provided that they pay into court that sum of money by 18 June 2018. It is undisputed that this condition was not satisfied.

23 On 7 May 2018, the Defendants filed a Notice of Appeal to a Judge of High Court in Chambers against the decision of AR Khng granting conditional leave to defend the sum of $4,912,199.65. I note that there was no cross appeal

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[28] PST's 9 Jan Affidavit, para 88.

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by the Plaintiffs in respect of AR Khng's decision to give unconditional leave to defend the sum of $8,837,800.35.

The parties' cases

24 The parties' arguments before me are largely the same as those made at the hearings below. In respect of RA 79, the Defendants' main argument is that the G1 Agreements are sham contracts which are used to disguise illegal moneylending transactions. As for RA 80, they similarly contend that the Mface Loans are illegal moneylending transactions. Therefore, this renders the G1 Agreements and the Mface Loans underlying the Initial Suits unenforceable pursuant to s 14(2) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA").[29] They submit that this is sufficient to raise a triable defence, and therefore they should have been given unconditional leave to defend the claims in the Initial Suits. The Defendants further argued that the summary judgment order granted in respect of S 1051/2016 should not be allowed to stand because it includes a double claim of $880,000 which is part of the claim in S 1052/2016.[30]

25 In response, the Plaintiffs contend that they had in fact carried out construction works at the Development pursuant to the G1 Agreements, and this is supported by objective contemporaneous evidence.[31] Therefore, the G1 Agreements are not sham contracts. As for the allegation that the Mface Loans are illegal moneylending transactions, the Plaintiffs contend that the loans were only made to corporations, and therefore Mface is an excluded moneylender under s 2 of the MLA.[32]

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29 Defendants' Written Submissions dated 12 April 2018 ("Defendants' 12 April Submissions"), paras 3(a)(ii), 3(a)(iii) and 3(b)(ii).

30 Defendants' 12 April Submissions, paras 3(a)(i) and 32.

31 Plaintiffs' RA 79 Submissions, para 32.

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26 In respect of RA 122/2018, the Defendants raise three arguments.[33] First, they argue that the illegality of the underlying transactions in the Initial Suits also taint the Settlement Agreement, and therefore it too is unenforceable. Second, the Defendants assert that the Settlement Agreement is void because it was entered into under duress. Third, the Defendants argue that the Plaintiffs had committed a repudiatory breach of the Settlement Agreement, which the Defendants subsequently accepted.

27 In the alternative, if I were to find that the appropriate order would be to give conditional leave to defend, the Defendants argue that the conditional leave sum should nevertheless be reduced to $1 million, on account of their poor financial circumstances.[34]

Principles on which unconditional and conditional leave to defend are granted

28 In an application for summary judgment, the standard that has to be met for the court to grant unconditional leave to defend is that the defendants must show that they have a fair case for defence, or reasonable grounds for setting up a defence, or a fair probability that they have a *bona fide* defence: see *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2018) at para 14/4/5. In *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32, the High Court stated at [25]:

> It is a settled principle of law that in an application for summary judgment, **the defendant will not be given leave to defend based on mere assertions alone**: *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray and Christopher John Walters*

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32 Plaintiff's Written Submissions for RA 80/2018 ("Plaintiffs' RA 80 Submissions), para 22.

33 Defendants' Written Submissions dated 29 June 2018 ("Defendants' 29 June Submissions"), para 43.

34 Defendants' 16 July Submissions, para 91.

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> [1984] 1 Lloyd's Rep 21 at 23. The court must be convinced that there is a reasonable probability that the defendant has a real or *bona fide* defence in relation to the issues. In this regard, the standard to be applied was well-articulated by Laddie J in *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580, where he said at 593 to 594 that:
>
> > [I]t is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendants and … look at the whole situation. The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it were probably accurate. **If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so.** It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief.
>
> [emphasis added in bold]

29 Where the defendants have succeeded in showing a reasonable probability of a real or *bona fide* defence which ought to be tried, but that defence is *shadowy*, the appropriate order to grant should be conditional leave to defend. A defence is shadowy if the defendants' evidence is *barely sufficient* to rise to the level of showing a reasonable probability of a *bona fide* defence: *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 at [81].

Decisions below

AR Li's decision

30 With regard to S 1051/2016, AR Li found that the defendants, Astoria and PST, had failed to refute material allegations in G1's affidavit. These included progress reports, monthly admissions by the defendants, and invoices and supporting documents pertaining to the work done by G1 pursuant to the G1 Agreements. Further, the defendants had not furnished any evidence to

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substantiate its claim that the G1 Agreements are indeed a sham. Therefore, she found that there was no real defence or triable issue and granted summary judgment.[35]

31 With regard to S 1052/2016, AR Li was of the view that the defendants in that suit had raised the following triable issues:

(a) Whether Mface is a moneylender as defined in the MLA;

(b) Whether G1 is an excluded moneylender, which had not been adequately addressed in the affidavits; and

(c) Whether the defence of *non est factum* applies to OAC. I note that at the hearing before me, the Defendants' counsel abandoned this argument.

However, notwithstanding these triable issues, AR Li was of the view that there was little evidence before her to support the defendants' case. Further, it was not denied that Astoria had borrowed money from Mface and therefore some payment ought to be offered as a demonstration of commitment to the defence. Therefore, she gave leave to defend on the condition that the defendants pay into court or provide a banker's guarantee for the claimed sum.

AR Khng's decision

32 With regard to the summary judgment sums granted pursuant to the Initial Suits, AR Khng stated that cl 3 of the Settlement Agreement contemplates that in the event of default, the Plaintiffs could continue to enforce their judgments in the Initial Suits. However, given that those judgments were being appealed against, she decided that it would not be appropriate for her to enter summary judgment in respect of those sums, *ie*, $8.838 million.[36]

35 AR Li's Minute Sheet dated 6 March 2017 ("AR Li's Minute Sheet"), p 4.

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33 AR Khng held that the arguments on illegal moneylending only applied to the sums in the Initial Suits, therefore the rest of the sums under the Settlement Agreement *ie*, $4,912,199.65, could be severed.[37] AR Khng also stated that she had serious reservations about the merits of the defences of duress and repudiation raised by the Defendants.[38] Specifically, in relation to the duress argument, she stated that there was no reason why actions to enforce a judgment could be seen as illegitimate pressure. As for the argument on repudiation, she stated that there was no clear and unequivocal acceptance of the repudiation, and in any case the Plaintiffs should have been given an opportunity to rectify the breach.

34 For those reasons, she found that the defences raised were shadowy at best, and held that an appropriate order would be to grant conditional leave to defend claims amounting to $4,912,199.65.

Issues to be determined

35 These are the issues to be determined in these Registrar's Appeals:

(a) in relation to RA 79, whether the Defendants' assertion that the G1 Agreements are sham contracts meant to disguise illegal moneylending transactions presents a reasonable probability of a real or *bona fide* defence (the "Sham Contracts Defence"); and

(b) in relation to RA 80, whether the Defendants' assertion that the Mface Loans are illegal moneylending transactions and hence unenforceable presents a reasonable probability of a real or *bona*

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36 AR Khng's Certified Transcript dated 23 April 2018 ("AR Khng's Transcript"), pp 3 – 4.

37 AR Khng's Transcript, p 4.

38 AR Khng's Transcript, p 5.

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fide defence that is more than shadowy (the "Illegal Mface Loans Defence").

In relation to RA 122, if issues (a) and (b) above are both answered in the negative, it follows that the Defendants' argument that the Settlement Agreement is tainted by the illegality of the underlying transactions must be rejected. Nevertheless, I will proceed to determine:

(c) whether the Defendants' assertion that the Settlement Agreement had been entered into under duress presents a reasonable probability of a real or *bona fide* defence that is more than shadowy (the "Duress Defence"); and

(d) whether the Defendants' assertion that the Plaintiffs had committed a repudiatory breach of the Settlement Agreement, which was subsequently accepted by the Defendants, presents a reasonable probability of a real or *bona fide* defence that is more than shadowy (the "Repudiation Defence").

36 If issues (a) to (d) above are all answered in the negative and the decisions of the ARs below are upheld, I will then go on to consider whether the conditions imposed by the ARs below should nevertheless be reduced on account of the Defendants' allegedly poor financial circumstances. Additionally, should the order for summary judgment in S 1051/2016 stand, I will also consider whether there was indeed a double claim of $880,000 as alleged by the Defendants.

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My decision

Issue (a): The Sham Contracts Defence

37 The Defendants assert that the G1 Agreements are sham contracts used to mask the fact that loans were made by G1 to assist in the financing of the Development. G1 would pay Astoria's suppliers and subcontractors first on Astoria's behalf then seek reimbursement thereafter.[39] They argue that this is corroborated by the following:

(a) First, that contrary to what was stated on the Construction Agreement (see [11] above), G1 was never appointed or recognised as the main contractor for the Development. Instead, OAS Engineering was at all material times the main contractor.

(b) Second, that G1's claims comprise entirely of payments that it had made on behalf of Astoria to third parties, which is odd given that one would expect G1 to have their own claims for construction work they had carried out if they were indeed the main contractors.

(c) Third, G1 had to disguise personal loans made to PST as payment for Central Provident Fund workers' levies in its monthly statement of account.

38 Even taking the Defendants' case at its highest, and assuming that the G1 Agreements are indeed sham contracts meant to disguise loans that were made by G1 to Astoria for the purposes of financing the Development, these loans would not be illegal and unenforceable if they were only made to corporations. The relevant portions of the MLA state as follows:

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[39] Defendants' 29 June Submissions, para 51(b).

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> **2.** In this Act, unless the context otherwise requires —
>
> …
>
> "excluded moneylender" means —
>
> …
>
> (*e*) any person who —
>
> …
>
> (iii) lends money solely to —
>
> (A) corporations
>
> …
>
> **5.**—(1) No person shall carry on or hold himself out in any way as carrying on the business of moneylending in Singapore, whether as principal or as agent, unless —
>
> …
>
> (*b*) he is an excluded moneylender;
>
> …

I note that the G1 Agreements were entered into between G1 and Astoria exclusively. Therefore, G1 would *prima facie* be an excluded moneylender within the meaning of s 2 of the MLA unless it can be shown that it had made loans to a non-corporation.

39 In this regard, the Defendants allege that G1 had made a personal loan to PST by way of two cash cheques: OCBC-000082 for $10,000 and OCBC-000086 for $75,000.[40] The Defendants stated that these two cheques had been handed personally to PST, and the fact that PST was able to produce the OCBC-000086 cheque shows that the money was given to her as a personal loan. In response, the Plaintiffs pointed me to their list of claims from 23 November 2015 to 31 January 2016, where these payments made pursuant to the two cash cheques were recorded as payments to Bravo Building Construction ("Bravo")

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[40] Affidavit of Pang Sor Tin dated 8 May 2018 ("PST's 8 May Affidavit"), paras 17 – 18.

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for "Bank" and "CPF – Worker Levy".[41] At the hearing on 16 July 2018, counsel for the Defendants accepted that apart from the fact that PST had held these cash cheques, he did not have any other evidence of money that went directly to PST from the Plaintiffs.[42]

40 I find it highly improbable that the Plaintiffs had made a personal loan to PST. The mere fact that the cash cheques were physically handed to PST does not necessarily mean that they were intended as personal loans to her. PST might have just been collecting the cash cheques on behalf of Bravo, which explains why the cheques were physically given to her and why she was able to produce a copy of the cheque. However, this does not mean that she kept the money for her own use. Indeed, the Defendants are not able to adduce any evidence of the money from the cash cheques going into PST's personal account. Further, the list of claims that the Plaintiffs referred to had been signed and acknowledged by PST,[43] which suggests that she herself accepted that those payments were intended for Bravo and were not personal loans. Therefore, even if the G1 Agreements were meant to disguise loans, these loans would not be illegal under the MLA. Accordingly, the Defendants' assertion that the G1 Agreements were meant to disguise *illegal* moneylending transactions does not present a reasonable probability of a real or *bona fide* defence.

41 Given that it is unnecessary for me to determine whether the G1 Agreements are sham contracts, I shall say nothing further on this issue.

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41 Affidavit of Lee Kok Choy dated 5 January 2017 ("LKC's 5 Jan Affidavit"), p 73, s/n 3, 16.

42 Notes of Argument dated 16 July 2018, p 54, lines 4 – 20.

43 LKC's 5 Jan Affidavit, p 73.

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Issue (b): The Illegal Mface Loans Defence

42 I turn next to consider the Defendants' allegation that the Mface Loans are also illegal moneylending transactions. The Plaintiffs accept that Mface had entered into loan agreements, and that there was interest charged on the loans at a rate of approximately 5% per month. However, they rely again on s 2 of the MLA to argue that they are excluded moneylenders which renders the Mface Loans legal. Therefore, the sole issue for determination is whether the Mface Loans were made exclusively to corporations.

43 In this regard, the Defendants allege that the Mface Loans were actually personal loans to PST. Specifically, they rely on an alleged oral agreement that was entered into between PST and the controllers of the Plaintiffs, and it was pursuant to this alleged oral agreement that Mface had disbursed the ten Mface Loans to her from July 2015 to January 2016.[44] The Plaintiffs, however, point out that that the written agreements which record the Mface Loans clearly show that the loans were made by Mface to Astoria exclusively.[45]

44 As in issue (a) above, I also find it highly improbable that the Mface Loans were actually personal loans made to PST. The Court of Appeal in *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 stated at [81] that:

> [t]he MLA must not be seen by desperate defendants as a "legal panacea" to stave off their financial woes. Accordingly, it was incumbent on the Appellant to place cogent evidence before [the court] to make good its assertion that [the loans] were sham corporate loans.

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44 PST's 9 Jan Affidavit, paras 17 – 18; Defendants' 16 July Submissions, para 57.

45 Plaintiffs' RA 80 Submissions, para 29.

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Further, the court "would not grant leave to defend if all the defendant provides is a mere assertion, contained in an affidavit, of a given situation which forms the basis of his defence": *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19]. In the present case, the only evidence that the Plaintiffs have adduced to support their allegation that the Mface Loans were personal loans made to PST are bare, self-serving assertions made in PST's own affidavit about an alleged oral agreement. This is contrasted with the contemporaneous documentary evidence that the Defendants have adduced *ie*, the written agreements for the Mface Loans, which state clearly that the loans were between Mface and Astoria (see above at [9]). Even though there was no formal written agreement recording the tenth loan, there was documentary evidence to show that the loan was disbursed to Brilliant Tech Construction Pte Ltd which is also a corporation.

45 The Defendants argue that pursuant to the oral agreement, the loans would be made to PST and she would be the one to decide how the funds would be subsequently disbursed to the various companies under her control.[46] Yet, counsel for the Defendants admit that the money had flowed straight from Mface's bank account to the bank accounts of the various companies and had bypassed PST's bank accounts.[47] In my view, this alleged oral agreement appears to be a belated fabrication by the Defendants in an attempt to disqualify Mface from being an excluded moneylender. Indeed, counsel for the Plaintiffs stated that the entire narrative about the alleged oral agreement only came about after the amendment of the pleadings, which was more than a year after the original pleadings were filed.[48]

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46 Notes of Argument dated 16 July 2018, p 18, lines 5 – 7.

47 Notes of Argument dated 16 July 2018, p 24, lines 19 – 28.

48 Notes of Argument dated 16 July 2018, p 40, lines 6 – 23.

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46 The assertion that the Mface Loans are in fact personal loans and are therefore illegal moneylending transactions would only give rise to a real or *bona fide* defence if the Defendants are able to establish with some credible evidence the existence of this oral agreement. On the whole, I find the evidence on that to be very weak and largely based on a bare assertion. Therefore, the Defendants' assertion that the Mface Loans were illegal moneylending transactions do not present a reasonable probability of a real or *bona fide* defence. At best, such a defence can only be regarded as shadowy. Accordingly, there is no reason for me to disturb the decision of AR Li to grant conditional leave to defend in S 1052/2016.

47 Given that I have found in Issue (a) that the Sham Contracts Defence does not present a reasonable probability of a real or *bona fide* defence, and further that Issue (b) has been answered in the negative, it follows that the Defendants' argument in RA 122 that the Settlement Agreement is tainted by illegality must also be rejected. I turn then to consider the two other defences that the Defendants' have raised in RA 122.

Issue (c): The Duress Defence

48 The Defendants attempt to set aside the Settlement Agreement on the basis that they had only entered into it under duress from the Plaintiffs. The Defendants allege that the seizure of the construction equipment on the premises of the Development was calculated to exert pressure on Astoria, because the Plaintiffs knew that Astoria had already overrun the contractual TOP and was incurring liquidated damages. Therefore, the Defendants were forced to enter into the Settlement Agreement so that the Plaintiffs would discontinue their enforcement proceedings. Otherwise, the TOP of the Development would continue to be delayed and Astoria would continue incurring liquidated

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damages.

49 The Plaintiffs cited *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at [51], where Quentin Loh J stated that the two elements for actionable duress are first, pressure amounting to compulsion of the will of the victim, and second, the illegitimacy of the pressure exerted. First, the Plaintiffs argue that any pressure that they may have exerted was not illegitimate because they were simply exercising their lawful right to enforce the judgments they had obtained.[49] Second, the seizure of the equipment would not have amounted to a compulsion of the will of the Defendants. The total value of the equipment seized only amounted to a few thousand dollars, and therefore it is inconceivable that the Defendants would have been compelled to enter into the Settlement Agreement for $13.8 million over the seizure of these equipment which would have been easily replaceable.[50]

50 I agree with the Plaintiffs' submissions. Given that the Plaintiffs had obtained summary judgment in respect of the Initial Suits, they were fully entitled to commence proceedings to enforce these judgments, including the issuance of writs of seizure and sale. I fail to see how these legitimate actions could amount to an actionable duress that could vitiate the Settlement Agreement. Accordingly, I find that the Defendants' defence of duress is shadowy at best, and there is no reason for me to disturb the decision of AR Khng giving conditional leave to defend.

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49 Plaintiffs' Written Submissions for S 885/2017, para 61.

50 Plaintiffs' Written Submissions for S 885/2017, para 62.

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Issue (d): The Repudiation Defence

51 The Defendants allege that the Plaintiffs had failed to fulfil their obligation under the Settlement Agreement to discontinue all enforcement actions, specifically by failing to withdraw the Attachment Orders. Therefore, they had committed a repudiatory breach of the Settlement Agreement, which the Defendants accepted subsequently.[51] The Defendants also contend that this repudiatory breach was committed after they had made payment of the first instalment, but before the second instalment was due, and this entitled them to not have to make payment of the subsequent instalments.[52]

52 The Plaintiffs raise two arguments in response. First, they argue that cl 1 of the Settlement Agreement specifies the exact steps to be taken to discontinue enforcement proceedings, and it does not explicitly require the Plaintiffs to withdraw the Attachment Orders. Therefore, the Plaintiffs are under no obligation to do so.[53] Second, they argue that the obligation to discontinue enforcement proceedings are contingent on there being no default on the part of the Defendants. Therefore, since the Defendants had defaulted on their second monthly instalment, the Plaintiffs are entitled to resume their enforcement actions.[54]

53 It is clear from cl 1 that if the Defendants were to default on any of the instalment payments, the Plaintiffs would thereafter be entitled to resume all enforcement actions. Therefore, the question that remains is what the Plaintiffs' obligations were *before* the default occurred, and whether their failure to

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51 Defendants' 29 June Submissions, para 69.

52 Notes of Argument dated 2 July 2018, p 11, lines 24 – 25; p 13, lines 1 – 3.

53 Notes of Argument dated 2 July 2018, p 16, lines 23 – 27.

54 Notes of Argument dated 2 July 2018, p 18, lines 17 – 20.

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withdraw the Attachment Orders would have resulted in a repudiatory breach at that point in time. I reproduce cl 1 of the Settlement Agreement for ease of reference:

> **1. [G1 and Mface's] OBLIGATIONS / CONSIDERATIONS**
>
> [G1 and Mface] agree that they will:
>
> (i) **discontinue all proceedings enforcing their judgments** against Astoria, [OAC] and/or [PST] and/or [PGL] including the examination of judgment debtor proceedings against them,
>
> (ii) within 7 working days, give notice to the court to release the movable items seized by Mface in HC/WSS 16/2017, the shares of [OAC] seized by Mface in HC/WSS 5/2017, and the shares of [PST] seized by G1 in HC/WSS 19/2017,
>
> (iii) discontinue the law suit HC/S 1052/2016 in the High Court of Singapore, and
>
> (iv) not make any other antecedent claim against [Astoria, OAC, Ranesis and PST] (as this Agreement is intended to be a full and final settlement of all claims by [G1 and Mface] against [Astoria, OAC, Ranesis and PST] and [PGL] as at the date of this Agreement),
>
> provided that there is no default at all by any one of [Astoria, OAC, Ranesis and PST] under this Agreement and/or under any Guarantee and Indemnity agreement mentioned below.
>
> [emphasis added in italics and bold italics]

54 It is apparent that cl 1 specifically provided for (1) the discontinuance of enforcement of judgment debtor proceedings, (2) giving notice to the court within seven days of entering into the Settlement Agreement to release the moveable items seized under the WSS and (3) the discontinuance of S 1052/2016. It is not disputed that the Plaintiffs had done all of these things. However, the issue is whether the Plaintiffs are also obligated to withdraw the Attachment Orders. I find that the obligation on the part of the Plaintiffs to "discontinue all proceedings enforcing their judgments against" the Defendants

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is broad enough to include the withdrawal of the Attachment Orders. After all, the Attachment Orders are made for the satisfaction of the judgments that the Plaintiffs had obtained in the Initial Suits. Therefore, the discontinuance of *all* enforcement proceedings would certainly have to include the withdrawal of the Attachment Orders.

55 Be that as it may, I do not think that the Plaintiffs' failure to withdraw the Attachment Orders alone is sufficient to terminate the Settlement Agreement, such as to allow the Defendants to avoid its payment obligations. It is trite that a breach of contract does not automatically discharge or bring a contract to an end. A breach merely gives the innocent party a right to bring a contract to an end, but the contract comes to an end only if it so chooses. An innocent party is only taken to have accepted a breach so as to discharge the contract if its words or actions clearly and unequivocally demonstrate this; and an innocent party may only be taken to have elected to affirm a contract if its words or actions clearly and unequivocally indicate that that was its intent: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at paras 17.221 – 17.223. Therefore, even if the Plaintiffs had committed a repudiatory breach as the Defendants contend, the Defendants would still have had to make clear their intention to accept the breach and terminate the Settlement Agreement.

56 To this end, the Defendants rely on a letter dated 13 September 2017 that was sent by their then solicitors to the Plaintiffs' solicitors (the "13 September Letter"). The material portion of the 13 September Letter states as follows:[55]

> 6. The [Settlement Agreement] between G1 Construction Pte. Ltd and Mface Pte Ltd, Mdm Ong Ah Choo, Ranesis

[55] PST's 9 Jan Affidavit, pp 341 – 342.

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> Development Pte. Ltd and Mdm Pang Sor Tin … is void and unenforceable. In particular, your clients seek to recover sums from illegal moneylending transactions. Your clients are not entitled to rely upon or make any demands under the [Settlement Agreement].
>
> 7. In the premises, your clients' allegations of any breach of the terms of the [Settlement Agreement] on our clients' part are denied and rejected outright.
>
> 8. Further, your clients are fully aware that they are not entitled to execution in respect of the [Development], units of which had been sold by our clients … In particular, some purchasers had informed our clients that their banks had refused to release the payments. Please confirm by 4.00p.m. on 14 September 2017 whether:
>
> 8.1 your clients will cancel or withdraw the [Attachment Orders], for registration of the judgments;
>
> …

57 They argue that the 13 September Letter evinces an unequivocal intention on their part to accept the breach and terminate the contract. With respect, I disagree. The 13 September Letter merely states that the Settlement Agreement is "void and unenforceable", which is different from saying that the agreement had been terminated because the Defendants accept the Plaintiffs' repudiatory breach. In fact, nowhere in the letter is the fact of the repudiatory breach even mentioned. The only reference to the Attachment Orders is in para 8, but even then, that does not amount to an unequivocal acceptance of the Plaintiffs' repudiatory breach. Simply stating that the Defendants were "not entitled" to the Attachment Orders falls short of informing the Plaintiffs that they have committed a repudiatory breach. There is also no further mention of an intention to accept this alleged breach and treat the contract as terminated.

58 Furthermore, an unreasonable delay by an innocent party to take positive steps to communicate its decision to discharge the contract may permit an inference that the innocent party had elected to affirm the contract: *The Law of*

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Contract in Singapore at para 17.223. The Defendants state that they had discovered the failure to withdraw the Attachment Orders on 4 August 2017.[56] Yet there was no communication between the Defendants and the Plaintiffs on this alleged repudiatory breach until the 13 September Letter. If indeed this was such a fundamental term of the Settlement Agreement, one would have expected the Defendants to inform the Plaintiffs of it much more expediently. In any event, the 13 September Letter was only sent *after* the second instalment was due *ie*, 30 July 2017.[57] Therefore, by this time, the Defendants themselves would have been in breach of the Settlement Agreement.

59 Therefore, I am of the view that the Defendants' defence of repudiation is also shadowy at best. Accordingly, there is no reason for me to disturb the decision of AR Khng and her decision granting the Defendants conditional leave to defend the sum of $4,912,199.65 in S 885/2017 stands. However, the question remains as to whether the Defendants are warranted in requesting for a reduction in the sum to be paid into court, to which I now turn.

Whether the condition imposed should be reduced on account of the Defendants' impecuniosity

60 The Defendants seek to reduce the conditional leave sum to $1 million, on the basis that this is the maximum sum they can afford. They state that all the Defendants are in dire financial circumstances, and the only defendant with any asset of value is Astoria *ie*, the Development. However, Astoria would only be able freely withdraw the monies from the developer's account when the TOP for the Development is obtained. Therefore, in the interim, Astoria does not have any accessible assets save for $2,933.63.[58]

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56 AR Khng's Transcript, p 8, lines 19 – 20; Defendants' 29 June Submissions, para 80.

57 PST's 9 Jan Affidavit, p 304.

58 Defendants' 16 July Submissions, para 89.

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61 The principles governing the variation of conditional leave orders on the basis of a defendant's financial position are set out in *Chin Tyng Lei v Lim Yoon Ngok* [2006] SGHC 104, where Lai Siu Chiu J cited with approval at [23] the commentary in *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) as follows:

> When granting conditional leave to defend, the court is required to consider all the circumstances, which include the financial circumstances of the defendant, and for practical purposes, should not impose a condition, e.g. the payment into court of such a sum of money as would make fulfilment of the condition impossible and that impossibility was known or should have been known by the court by reason of the evidence placed before it; and therefore *it would be a wrong exercise of discretion to grant the defendant leave to defend on condition that he should pay into court a sum which he would never be able to pay*, for that would be tantamount to giving judgment for the plaintiff, notwithstanding the court's opinion that there was an issue or [a] question in dispute which ought to be tried … [emphasis added]

62 Counsel for the Defendants produce Astoria's unaudited management accounts as evidence for its alleged impecuniosity.[59] At the outset, I informed counsel that I would be very cautious to base a finding of impecuniosity solely on unaudited management accounts.[60] It would be easy for a party to produce unaudited financial statements which give an appearance of impecuniosity to support its claims. In particular, I questioned counsel for the Defendants on whether Astoria had made loans to any related companies, directors or shareholders.[61] When confronted with the management accounts that he himself had produced, counsel was forced to concede that Astoria had made $15,640,232.73 worth of loans to related companies in Malaysia, namely Pilecon Engineering Sdn Bhd and Scenic Marina Sdn Bhd.[62] In my view, it

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59 Pang Yee Teck's affidavit dated 1 June 2018 ("PYT's 1 June Affidavit), pp 18 – 21.

60 Notes of Argument dated 16 July 2018, p 83, lines 17 – 29.

61 Notes of Argument dated 16 July 2018, p 82, lines 12 – 15, 28 –30; p 83, line 1.

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would be incumbent on Astoria to seek repayment of these loans to make payment of the conditional sum. No evidence is produced before me that they have tried to seek repayment of the loans to related companies. There is also no indication that they intend to seek repayment of these loans. I therefore do not think that a reduction in the conditional leave sum set by the ARs below is warranted and accordingly I reject the Defendants' application.

Double claim of $880,000

63 As a final point, I will deal with the Defendants' contention that the summary judgment order granted in respect of S 1051/2016 should not be allowed to stand because it includes a double claim of $880,000 that has already been included in the claim for S 1052/2016.[63] Having reviewed the supporting documents, I agree with the Defendants that the same documents were used by the Plaintiffs to substantiate claims amounting to $880,000 in both S 1051/2016 and S 1052/2016. This therefore indicates that there is indeed a double claim of $880,000 in S 1051/2016. At the hearing before me on 16 July 2018, counsel for the Plaintiffs accepted the same.

64 However, contrary to what the Defendants have suggested, I see no reason to set aside the entire summary judgment order on the basis of this double claim. In my view, the mistake can easily be remedied by reducing the amount of summary judgment granted in S 1051/2016 by $880,000. Therefore, I would allow the appeal in RA 79 in part and reduce the amount of summary judgment in S 1051/2016 to $2,088,951.43, with unconditional leave to defend the balance sum of $880,000. I understand that the Plaintiffs will not be pursuing their claim for this sum of $880,000.

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62 PYT's 1 June Affidavit, p 21.

63 Defendants' 12 April Submissions, para 32.

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Conclusion

65 In summary, I allow the appeal in RA 79 in part and reduce the amount of summary judgment to $2,088,951.43 on account of the agreed double claim to the extent of $880,000 in the original judgment debt. I dismiss the appeal in RA 80, and amend AR Li's order with respect to the date of payment of the conditional leave sum to 16 August 2018, 4.00pm. Finally, I dismiss the appeal in RA 122, and amend AR Khng's order with respect to the date of payment of the conditional leave sum to 16 August 2018, 4.00pm. Additionally, it is agreed by consent that para 3 of AR Khng's order be amended to:

> 3. If the condition set out above at Paragraph 1 is not satisfied, then the Plaintiffs shall be entitled to enter judgment:-
>
> (a) against the 1st Defendant, 2nd Defendant and 4th Defendant for sum of S$4,912,199.65 and costs of $20,000.00 (inclusive of disbursements) in joint and several liability; and
>
> (b) against the 3rd Defendant for the sum of $2,000,00.00 and costs of $20,000.00 (inclusive of disbursements) in joint and several liability with the 1st Defendant.

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66 As for costs, I order the costs of RA 79 inclusive of disbursements to be fixed at $7,000 to be paid by the Defendants to the Plaintiffs, and costs of and consequential to the amendment of the defence to be fixed at $1,500 to be paid by the Defendants to the Plaintiffs. The costs of RA 80 inclusive of disbursements are to be fixed at $7,000 to be paid by the Defendants to the Plaintiffs, and costs of and consequential to the amendment of the defence to be fixed at $1,500 to be paid by the Defendants to the Plaintiffs. Finally, the costs of RA 122 inclusive of disbursements are to be fixed at $9,000 to be paid by the Defendants to the Plaintiffs.

Chan Seng Onn
Judge

Tan Sheng An Jonathan and Chui Ziyang Marcus (Tan Lee & Partners) for the Plaintiffs;
Low Yi Yang (JLC Advisors LLP) for the Defendants.

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