IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 45

Suit No 77 of 2017

Between

Oversea-Chinese Banking Corporation Limited

… *Plaintiff*

And

Yeo Hui Keng

… *Defendant*

(By Original Action)

And Between

Yeo Hui Keng

… *Plaintiff*

And

Oversea-Chinese Banking Corporation Limited

… *Defendant*

And

Tan Peng Chin LLC

… *Third Party*

(By Counterclaim)

Version No 1: 27 Oct 2020 (22:41 hrs)

ORAL JUDGMENT

[Contract] — [Mistake] — [Non est factum]

[Legal Profession] — [Professional conduct] — [Breach]

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Oversea-Chinese Banking Corp Ltd
v
Yeo Hui Keng
(Tan Peng Chin LLC, third party)

[2019] SGHC 45

High Court — Suit No 77 of 2017
Tan Siong Thye J
3 – 6 July 2018; 18 February 2019

28 February 2019 Judgment reserved.

Tan Siong Thye J:

Introduction

1 The main suit concerns the validity of an all-moneys mortgage between the plaintiff, Oversea-Chinese Banking Corporation Limited ("OCBC"), and the defendant, Mdm Yeo Hui Keng ("the OCBC Mortgage"). The defendant raised the defence of *non est factum*. The defendant also took out a third party action against her solicitors, namely Tan Peng Chin LLC ("the Third Party"), for failure to explain to her and her late husband, Mr Kung Yeok Heng ("Mr Kung") that the OCBC Mortgage was an all-moneys mortgage.

2 On 22 January 2013, the defendant and Mr Kung executed the OCBC Mortgage at the Third Party's office. Under the OCBC Mortgage, the defendant and Mr Kung had mortgaged their jointly owned property at 17 East Coast

Drive, Singapore ("the Property") and all their other assets to the plaintiff. In return, the plaintiff rendered credit facilities to King-Repa Trading (S) Pte Ltd ("the Company") for an initial sum of US$8,500,000 million. Mr Kung was a shareholder and director of the Company.

3 The OCBC Mortgage was executed in the presence of Mr Wong Chung Jun ("TPW1"), who was then a solicitor employed by the Third Party. At the relevant time, the Third Party was acting for all the parties involved in the OCBC Mortgage, *ie*, the plaintiff, the defendant and Mr Kung.

4 Under the OCBC Mortgage, the defendant and Mr Kung agreed to pay the plaintiff, on demand, all sums of moneys and liabilities due or owing to the plaintiff by the Company under the credit facilities either alone or jointly, thus the term "all-moneys mortgage". This meant that both the defendant's and Mr Kung's liability to the plaintiff under the OCBC Mortgage would include all outstanding sums owed to the plaintiff by the Company above and beyond the value of the Property.

5 The initial credit facilities extended by the plaintiff to the Company were up to US$8,500,000 ("the Original Facilities"). Subsequently, these credit facilities were increased to US$9,800,000 on 17 December 2013 and ultimately these were raised to US$10,800,000 on 17 December 2014 ("the Revised Facilities").[1]

6 Mr Kung passed away on 16 April 2016.[2] In May 2016, the Company failed to make payment in respect of the trade bills issued by the plaintiff under

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1 Agreed Statement of Facts at paras 5 and 13.

2 Agreed Statement of Facts at para 14.

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the Revised Facilities. The plaintiff demanded repayment of the outstanding sum of US$1,361,977.83 plus interest from the Company, the estate of Mr Kung and the defendant under the Revised Facilities. When no payment was forthcoming from the Company, the plaintiff exercised its right to recall the entire banking facilities granted to the Company and demanded the sum of US$10,408,820.10 from the defendant on or around 31 May 2016.[3]

7 Pursuant to the OCBC Mortgage, the plaintiff exercised its right to take possession of the Property on 10 June 2016. The defendant did not object and gave the plaintiff vacant possession of the Property on or about 9 July 2016.[4] The plaintiff set off the outstanding sums under the Revised Facilities against the defendant's savings account maintained with the plaintiff the sums of S$27,504.13 and S$925.27 on 21 July 2016 and 24 August 2016 respectively. On or around 18 August 2016, the plaintiff further set off another sum of S$5,606.34 from the defendant's time deposit account maintained with the plaintiff against the outstanding sums owing under the Revised Facilities. The Property was sold by the plaintiff on or around 14 November 2016 at the price of S$7,250,000 and the plaintiff received S$6,887,993.73.[5]

8 In this suit, the plaintiff now seeks to claim the outstanding sums of US$4,888,114.64 and S$25,348.23 under the Revised Facilities from the defendant. However, the defendant contends that she is not liable under the OCBC Mortgage for the entire sum due under the Revised Facilities because the OCBC Mortgage was invalid. The defendant's case is that the mortgage she intended to execute on 22 January 2013 was one in which her liability would be

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3 Agreed Statement of Facts at paras 15 and 16.

4 Agreed Statement of Facts at para 18.

5 Agreed Statement of Facts at paras 17–20.

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limited only to the Property and/or the value thereof. She did not know that the OCBC Mortgage was an all-moneys mortgage and thus she invokes the defence of *non est factum*.

9 The defendant claims that her mistake regarding the nature of the OCBC Mortgage was caused by the Third Party, in particular TPW1. The defendant asserts that TPW1 was negligent in that he had failed to explain and properly advise the defendant that the OCBC Mortgage was an all-moneys mortgage when she was asked to sign it.

Background facts

10 Before going into the discussion of the issues in this case, it is useful and relevant to give a detailed background of the dispute before me.

Origin of the OCBC Mortgage

11 On 12 January 1996, the defendant and Mr Kung granted an all-moneys mortgage which included the Property in favour of the Bangkok Bank Public Company Limited ("Bangkok Bank") to secure certain loans disbursed by the Bangkok Bank to the Company ("Bangkok Bank Mortgage").[6]

12 In or around December 2012, Mr Kung approached the plaintiff for the refinancing of existing loans that were extended by the Bangkok Bank to the Company. The plaintiff agreed to extend to the Company credit facilities amounting to US$8,500,000 (*ie,* the Original Facilities) upon Mr Kung and the defendant executing the OCBC Mortgage which, like the Bangkok Bank Mortgage, was also an all-moneys mortgage.[7]

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6 Agreed Statement of Facts at para 4.

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The letter dated 11 January 2013

13 Pursuant to securing the Original Facilities, the plaintiff was represented by the Third Party to act as its solicitors for this transaction (the significance of this will be discussed below at [118] onwards).[8] The Third Party then sent the letter dated 11 January 2013 addressed to the defendant and Mr Kung ("the 11 Jan Letter").[9] The 11 Jan Letter explained a number of important matters concerning the OCBC Mortgage which the defendant and Mr Kung were asked to sign. The material parts of the 11 Jan Letter are as follows:

(a) It clearly explained that the OCBC Mortgage was an all-moneys mortgage by stating the following:

(i) That the Original Facilities would be "secured by, inter alia, an all moneys legal mortgage … of [the Property] on such terms and conditions as [the plaintiff] may think fit";

(ii) That the OCBC Mortgage which the defendant and Mr Kung were asked to sign was "an all moneys legal mortgage. It is a continuing security which will secure not only the banking facilities of US$8,500,000.00 … but also all further and/or additional banking facilities of any amount which [the plaintiff] may now or in the future grant to [the Company]";

(iii) That there was "no limit on the amount of [the defendant and Mr Kung's] liabilities as owners of the Property, for the

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7 Agreed Statement of Facts at paras 4, 5, 11 and 12.

8 Affidavit of Evidence in Chief of Iris Ng dated 4 May 2018 ("Iris AEIC") at para 18.

9 Affidavit of Evidence in Chief of Ong Tin Si Gwendoline dated 4 May 2018 ("Gwendoline AEIC") at Exhibit OTSG-3. See also Affidavit of Evidence in Chief of Wong Chung Jun dated 4 May 2018 ("Wong AEIC") at Exhibit WCJ-2. See also Agreed Bundle at pp 77–78 ("AB77-78").

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> debts of [the Company] under [the OCBC Mortgage]. This means that by signing [the OCBC Mortgage] as owners, [the defendant and Mr Kung] are also personally liable for all moneys owed by [the Company] to [the plaintiff]"; and
>
> (iv) That "[i]f the proceeds from the sale of the Property are insufficient to fully settle or repay all the moneys owed by the [Company] to [the plaintiff], [the plaintiff] can look to [the defendant and Mr Kung] or to [the Company] to recover payment of the balance moneys owed by [the Company]. [The plaintiff] can also look to [the defendant and Mr Kung] alone for payment of the balance moneys owed without first resorting to selling the Property in order to recover the moneys owing".

(b) It attached a copy of Annex 1 and the Memorandum of Mortgage which were part of the OCBC Mortgage.[10]

(c) It informed the defendant and Mr Kung that they have to apprise the plaintiff in writing if they do not wish the plaintiff to grant to the Company any further and/or additional banking facilities. This allowed the defendant and Mr Kung to limit the extent of their liabilities under the OCBC Mortgage by informing the plaintiff not to grant any further and/or additional banking facilities to the Company.

(d) It stated that the defendant and Mr Kung had a choice *not* to provide the mortgage to the Company and should they decide not to provide the mortgage, they should inform the plaintiff immediately.

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10 Gwendoline AEIC at para 10.

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(e) It informed the defendant and Mr Kung that the Third Party was also acting for the plaintiff and the Company in the mortgage of the Property. It further informed the defendant and Mr Kung that they had the right to appoint another firm of solicitors to act for them in relation to the OCBC Mortgage if they so wish.

(f) Finally, it requested the defendant and Mr Kung to arrange for a convenient time with the Third Party to execute the OCBC Mortgage.

14 Pursuant to the 11 Jan Letter, either Mr Kung or the defendant had arranged to meet a solicitor from the Third Party to execute the OCBC Mortgage. This meeting took place on 22 January 2013.

The OCBC Mortgage

15 As mentioned above, Annex 1 and the Memorandum of Mortgage were part of the OCBC Mortgage and were attached to the 11 Jan Letter for the defendant and Mr Kung to read.[11]

16 The relevant terms in Annex 1 which explained that the OCBC Mortgage is an all-moneys mortgage are as follows:

> … the Mortgagor [*ie,* the defendant and Mr Kung] and [the Company] hereby jointly and severally covenant with [the plaintiff] as follows:
>
> 1. To pay: -
>
> 1.1 To [the plaintiff] on demand made to [the defendant and/or Mr Kung] and/or [the Company] all such sums of money which are now or shall from time to time or at any time hereafter be owing or remain unpaid to [the plaintiff] by [the defendant and/or Mr Kung]

[11] Gwendoline AEIC at para 10.

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> and/or the [Company] either as principal or as surety and either solely or jointly or jointly with any other person …
>
> 1.2 To [the plaintiff] interest on daily balances on or in respect of the principal moneys hereinbefore covenanted to be paid or any part thereof as shall from time to time be owing or remain unpaid …
>
> 1.3 To [the plaintiff] interest on any balance owing or remaining unpaid if and when the said Accounts [*ie,* the banking facilities] shall be closed or shall cease to be current …
>
> …
>
> 7. 7.1 Where two or more persons are included in the expression "the Mortgagor" all covenants stipulations and provisions contained herein shall be deemed to be made by and to apply to and be binding upon all such persons jointly and severally and the term "the Mortgagor" shall include their legal personal representatives, successors and permitted assigns.

17 Similarly, the Memorandum of Mortgage of the OCBC Mortgage also provides as follows:

> 1. **REPAYMENT**
>
> 1.1 **Principal and Interest**
>
> (a) To pay to [the plaintiff] all monies which are now or shall from time to time or at any time be owing or remain unpaid to the [plaintiff] together with interest thereon at the time or times and in the manner and at the place set out in the Mortgage, and if no time or times are … provided [the defendant and Mr Kung] and [the Company] will repay the same to [the plaintiff] upon demand.

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18 The relevant terms of Annex 1 which authorise the plaintiff to increase the amount of the banking facilities to the Company without notice to the defendant and/or Mr Kung and the terms which state that the defendant and Mr Kung would nonetheless continue to be liable for the banking facilities are as follows:

> 2. 2.1 *That this Mortgage expressly authorises [the plaintiff] to make further advances or give credit in instalments or on a current, revolving or continuing account or otherwise or any other credit or banking facilities* or accommodation whatsoever from time to time *to [the defendant and/or Mr Kung] and/or [the Company]* either solely or jointly or jointly with any other person or persons in partnership or otherwise and *all moneys and liabilities owing to [the plaintiff] from time to time in connection therewith shall be secured by this Mortgage in addition to the moneys and liabilities already outstanding or incurred as at the date hereof.*
>
> 2.2 Without prejudice to the generality of the foregoing, [the plaintiff] may, at all times, *without notification to, or the consent of, [the defendant and Mr Kung] and without in any way affecting the security hereby created* increase, decrease, extend, renew or restructure all or any of the loans and advances or credit or banking facilities or any other accommodation granted or given to [the Company] from time to time whether solely or jointly with any other person or persons (in partnership or otherwise) or vary any terms and conditions thereof with or without notice to [the defendant and Mr Kung].
>
> [emphasis added]

The meeting on 22 January 2013

19 On 22 January 2013, Mr Kung and the defendant went to the Third Party's office to execute the OCBC Mortgage. They were attended to by TPW1. At that meeting, the defendant and Mr Kung were presented with the OCBC

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Mortgage, the OCBC letter to the Company on the credit facilities dated 21 December 2012, the 11 Jan Letter (see above at [13] to [18]), a letter of confirmation dated 22 January 2013 ("the Letter of Confirmation") and a "Form of Confirmation and Consent".[12] The terms of the Letter of Confirmation and the Form of Confirmation and Consent are reproduced below.

The Letter of Confirmation

20 The Letter of Confirmation acknowledged that TPW1 had explained to Mr Kung and the defendant the nature of their liabilities under the OCBC Mortgage and its practical consequences.[13] The relevant paragraphs are as follows:

> We, [Mr Kung] and [the defendant] refer to [the Third Party's] aforesaid letter to us dated 21/12/2012 and hereby confirm that [TPW1] has: -
>
> 1) explained to us the nature of [the OCBC Mortgage] and the practical consequences it will have for us;
>
> 2) advised us the seriousness of the risks involved including the nature and terms of the [OCBC] Mortgage and the amount of our liability under the [OCBC] Mortgage;
>
> 3) informed us that we have a choice whether or not to provide the [OCBC] Mortgage to [the plaintiff]; and
>
> 4) explained to us that the [OCBC] Mortgage is in [the plaintiff's] standard format, the terms of which have been fully explained to us.

21 The Letter of Confirmation also stated that the defendant and Mr Kung were aware that the Third Party was also acting for the plaintiff and the Company in the OCBC Mortgage.[14] The relevant parts are as follows:

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12 Agreed Statement of Facts at paras 7–10.

13 Gwendoline AEIC at Exhibit OTSG-5. See also AB82.

14 Gwendoline AEIC at Exhibit OTSG-5. See also AB82.

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> We further confirm that: -
>
> a) we are aware and we fully understand that:
>
> i. [The Third Party] is also acting for [the plaintiff] and [the Company] in the mortgage of the Property; and
>
> ii. we have the right to appoint another firm of solicitors to act for us in the said matter and to give us independent legal advice;
>
> b) notwithstanding paragraph (a) above, we confirm that we would like to appoint [the Third Party] to act for us in the above matter. We do not wish to appoint another firm of solicitors to act for us in the said matter;
>
> c) we wish to proceed with providing the [OCBC] Mortgage to [the plaintiff], without any further negotiations with [the plaintiff] of its terms; and
>
> d) we understand the full implications of delivering the duly executed [OCBC] Mortgage to [the plaintiff], including that [the plaintiff] is fully entitled to enforce its legal rights in accordance with the terms and conditions of the [OCBC] Mortgage.

22 It is not disputed that the defendant and Mr Kung signed the Letter of Confirmation.[15]

The Form of Confirmation and Consent

23 The Form of Confirmation and Consent[16] is a relatively short document of less than half a page and it stated as follows:

> We, [Mr Kung] and [the defendant] both of [the Property] hereby acknowledge and consent to the contents of the Facility Letter dated 21st December 2012 granted to the [Company].
>
> We further confirm that our liabilities and obligations to the [plaintiff] under the [OCBC] Mortgage … dated _____ remain valid and binding, are unaffected and continue notwithstanding anything in the Facility Letter.

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15 Agreed Statement of Facts at para 8.

16 Exhibit OTSG-6 of Gwendoline AEIC. See also AB88.

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24 Effectively, the Form of Confirmation and Consent informed the plaintiff that the OCBC Mortgage remained valid and binding on Mr Kung and the defendant.

25 It is again undisputed that the defendant and Mr Kung signed the Form of Confirmation and Consent before TPW1.[17] Although the Form of Confirmation and Consent was undated, the parties did not dispute that it was signed on 22 January 2013 at the same meeting with TPW1 at the Third Party's office.[18]

Registration of the OCBC Mortgage

26 The OCBC Mortgage signed by Mr Kung and the defendant on 22 January 2013 was formally registered on 26 February 2013.[19] The relevant terms of the executed and registered OCBC Mortgage are as stated at [15] to [18] above.

The Revised Facilities and the Company's subsequent default

27 On 17 December 2013, pursuant to a letter titled "Credit Facilities" of the same date, the plaintiff increased the quantum of the Original Facilities to US$9,800,000. On 17 December 2014, pursuant to a further letter of offer of the same date, the plaintiff again increased the quantum of the facilities granted to the Company to US$10,800,000 (*ie*, the Revised Facilities).[20]

28 As mentioned in the introduction at [6] above, Mr Kung passed away on

17 Agreed Statement of Facts at para 10.

18 Defendant's Closing Submissions at para 49.

19 AB89–98.

20 Agreed Statement of Facts at para 13.

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16 April 2016. By May 2016, the Company had failed to make payment in respect of the trade bills issued by the plaintiff under the Revised Facilities. When the outstanding sums were unpaid, the plaintiff decided to recall the entire banking facilities granted to the Company which was secured by the OCBC Mortgage. The plaintiff then exercised its right to take possession of the Property and sold it in November 2016.

29 The plaintiff also exercised its right of set-off for the outstanding sums under the Revised Facilities against the defendant's savings account and time deposit account with the plaintiff. The plaintiff now seeks the balance of the amount owed to the plaintiff under the Revised Facilities from the defendant pursuant to the OCBC Mortgage (see above at [6] to [8]).

The plaintiff sought to recover the Company's outstanding debts from the defendant

30 On or about 21 August 2016, pursuant to the OCBC Mortgage, the plaintiff, through its then solicitors, Withers KhattarWong, issued a statutory demand dated 21 August 2016, to the defendant for the outstanding amount of US$3,759,395.33. This was the net sum owed by the Company and the defendant under the Revised Facilities after deducting the open market value of the Property (the Property had not been sold yet at that point in time).[21] The plaintiff also issued a certificate signed by its authorised officer certifying the same.[22]

31 In response, the defendant instructed Lee Bon Leong & Co., the same counsel now representing the defendant in this present suit, to make an

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21 Iris AEIC at para 41. See also Exhibit IN-19 of Iris AEIC. See AB240–243.

22 Iris AEIC at para 41. See also Exhibit IN-18 of Iris AEIC. See AB239.

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application to court to set aside the statutory demand. This application was HC/OSB 69/2016.[23] The defendant raised the defence of *non est factum* in this setting aside application.

32 In HC/OSB 69/2016, the defendant filed the following three affidavits:

(a) Affidavit dated 1 September 2016 ("the defendant's 1st OSB Affidavit");

(b) Affidavit dated 13 September 2016 ("the defendant's 2nd OSB Affidavit"); and

(c) Affidavit dated 10 November 2016 ("the defendant's 3rd OSB Affidavit").[24]

33 I shall refer to these affidavits later in my judgment.

34 On 15 November 2016, the defendant's application to set aside the statutory demand in HC/OSB 69/2016 was granted because the validity of the OCBC Mortgage was in question and that this was a triable issue that required determination by the court. The plaintiff filed a Registrar's Appeal against this decision, but the appeal was dismissed on 5 December 2016.[25]

35 On or about 23 January 2017, the plaintiff's current solicitors, Allen & Gledhill LLP, issued a letter of demand dated 23 January 2017 to the defendant insisting that she pay the sums of US$4,888,114.64 and S$18,348.23 to the plaintiff by 3pm on Thursday, 26 January 2017. These are the sums owed by

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23 AB345–346.

24 AB249–344, AB352–356 and AB399–401.

25 Iris AEIC at paras 46–48. See also Exhibit IN-19 of Iris AEIC. AB443–444.

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the Company under the Revised Facilities after taking into account the net sale price of the Property, S$7,000 incurred for HC/OSB 69/2016 and the attendant Registrar's Appeal as well as interests and costs incurred by the plaintiff.[26]

36 As payment from the defendant was not forthcoming under the letter of demand above, the plaintiff commenced this Suit against the defendant on 27 January 2017.[27]

The parties' cases

The plaintiff's case

37 The plaintiff argues that the defendant was a matured and educated adult who fully understood the terms of the OCBC Mortgage and should be bound by her signature which she appended to the OCBC Mortgage. The defendant had to fulfil her obligations under the OCBC Mortgage as it was undisputed that the defendant signed the OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent. Therefore, the defendant is liable to pay to the plaintiff, on demand, all such sums of money which are owing or remain unpaid, including interest accrued, to the plaintiff by the Company under the Revised Facilities.[28]

38 The plaintiff submits that the defendant's defence of *non est factum* is inapplicable as she was properly informed of the nature of the OCBC Mortgage and its practical consequences. The 11 Jan Letter that was sent to her and Mr Kung explained that the OCBC Mortgage was an all-moneys mortgage.

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26 Iris AEIC at para 50, and Exhibit IN-21 of Iris AEIC.

27 Iris AEIC at para 51. See also Exhibit IN-21 of Iris AEIC and Setting Down Bundle page 1.

28 Plaintiff's Opening Statement at paras 17–21.

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Subsequently, on 22 January 2013 the defendant and Mr Kung had a meeting with TPW1 who explained to them the nature of the OCBC Mortgage and its practical consequences. The defendant and Mr Kung then signed the Letter of Confirmation to acknowledge that this had indeed been done. Finally, at the same meeting, the defendant and Mr Kung signed the Form of Confirmation and Consent to acknowledge that the OCBC Mortgage was valid and binding on them. Thus the defendant must have understood the documents before she signed them.[29]

39 The plaintiff submits that the defence of *non est factum* must also fail because the defendant had not exercised reasonable diligence when she signed the OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent. The defendant had not taken the opportunity to read or enquire into the documents before she signed them. [30]

40 Finally, the plaintiff argues that even if the defendant has succeeded in her defence of *non est factum,* the defendant, nevertheless, is estopped from seeking an invalidation of the OCBC Mortgage. This is because when the defendant signed the Letter of Confirmation and the Form of Confirmation and Consent, the defendant had made an unequivocal representation to the plaintiff that she understood the OCBC Mortgage and agreed to provide security for the Revised Facilities in the form of an all-moneys mortgage. The plaintiff relied on this representation and extended the Original Facilities and subsequently the Revised Facilities to the Company. When the Company defaulted and the plaintiff exercised its right of possession of the Property pursuant to the OCBC Mortgage, the defendant did not object. She acknowledged the plaintiff's right

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[29] Plaintiff's Opening Statement at paras 22–26.

[30] Plaintiff's Opening Statement at paras 27–28.

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and gave vacant possession of the Property to the plaintiff. The plaintiff submits that this showed that the defendant further acknowledged that the OCBC Mortgage was binding on her. Therefore, the defendant was bound by the OCBC Mortgage.[31]

41 In the same vein, the plaintiff asserts that the defendant's counterclaim for the return of the sale proceeds of the Property and those moneys that the plaintiff had set off from the defendant's savings and time deposit accounts with the plaintiff should be dismissed.[32]

The defendant's case

42 The defendant submits that she is not bound by the OCBC Mortgage because of the doctrine of *non est factum*. She argues that the mortgage which she had executed as security for the Original Facilities was intended to be limited only to the Property and/or the value thereof. She asserts that she did not have sight of the 11 Jan Letter. When her late husband, Mr Kung, brought her to the Third Party's office on 22 January 2013, she was only asked to sign the OCBC Mortgage and the other documents. TPW1 did not explain anything to her. She avers that she would not have signed the OCBC Mortgage had she known that the mortgage was an all-moneys mortgage.[33]

43 Therefore, the defendant brought a counterclaim against the plaintiff for the return of the sale proceeds of the Property which the plaintiff had received and also for the return of the moneys taken by the plaintiff from the defendant's

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31 Plaintiff's Opening Statement at paras 29–33.

32 Plaintiff's Opening Statement at para 32. See also Plaintiff's Closing Submissions at paras 71 and 72.

33 Defence and Counterclaim at paras 10–12.

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savings and time deposit accounts with the plaintiff. The defendant claims that the OCBC Mortgage was never binding on her and the plaintiff had wrongfully sold the Property and set off the outstanding sums under the Revised Facilities against her savings and time deposit accounts with the plaintiff.[34]

44 The defendant also brought a claim against the Third Party for negligence and breach of duty. The defendant alleges that TPW1 of the Third Party had failed to inform her that the OCBC Mortgage was an all-moneys mortgage. TPW1 also failed to inform her that the Third Party was also acting for both her and the plaintiff and that she was not obligated to engage the Third Party as her solicitors in the execution of the OCBC Mortgage.[35] Thus, the defendant seeks an indemnity from the Third Party in respect of the plaintiff's claims against her.[36]

The Third Party's case

45 The Third Party denies that it was negligent when it represented the defendant in the OCBC Mortgage transaction. The Third Party avers that TPW1 met with both the defendant and Mr Kung and orally explained the terms of the OCBC Mortgage. In particular, TPW1 explained to the defendant and Mr Kung that it was an all-moneys mortgage, that their liabilities pursuant thereto were not limited to the value of the Property and that the moneys were jointly and severally recoverable against the defendant and Mr Kung. This was evident from the Letter of Confirmation which the defendant and Mr Kung signed.[37]

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34 Defence and Counterclaim at paras 27–30.

35 Third Party Statement of Claim at para 8.

36 Third Party Statement of Claim at para 12.

37 Defence of the Third Party (Amendment No. 1) at para 5.

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46 In the alternative, the Third Party argues that if the defendant suffered loss and damages because of the Third Party's negligence or breach of duty (which the Third Party does not admit), such loss and damages were solely caused and/or contributed by the negligence of the defendant. The Third Party argues that the defendant had neglected and/or failed to read or take reasonable steps to understand the terms of the OCBC Mortgage. If the defendant did not understand TPW1's explanation of the OCBC Mortgage, the defendant had failed to alert TPW1 and ask him to explain further.[38]

My decision

Issues to be determined

47 I have to consider the following issues:

(a) First, whether the plaintiff and the defendant were bound by the OCBC Mortgage. This issue is intertwined with the defendant's defence of *non est factum*.

(b) Second, if the defendant succeeded in her defence of *non est factum*, whether she is, nonetheless, estopped from seeking to avoid her liabilities to the plaintiff under the OCBC Mortgage; conversely, whether the defendant is estopped from seeking the return of the sale proceeds of the Property from the plaintiff and from seeking the return of the moneys taken from her savings account and time deposit account by the plaintiff.

(c) Third, whether the Third Party was negligent when it represented the defendant in the OCBC Mortgage transaction; if yes, the extent of

[38] Defence of the Third Party (Amendment No. 1) at para 10A.

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the Third Party's liability to the defendant in respect of the plaintiff's claims against the defendant.

48 I shall now address these issues in turn.

Issue 1: Whether the plaintiff and the defendant were bound by the OCBC Mortgage.

49 It cannot be gainsaid that the defendant signed the OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent (see above at [20] to [26]). It is trite law that a person of full age and understanding is normally bound by his signature on a document, whether he reads or understands it or not: *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 3-049.

50 Thus the default position is that the defendant is deemed to have understood and agreed to the obligations of the OCBC Mortgage when she signed the documents pertaining to the OCBC Mortgage. In particular, when the defendant signed the OCBC Mortgage documents she had agreed to pay to the plaintiff, on demand, all such sums of money which shall from time to time be owing or remain unpaid, including the interest accrued, to the plaintiff by the Company. However, the defendant can renege on the OCBC Mortgage if she can successfully prove on a balance of probabilities the defence of *non est factum*.

***The law on the doctrine of* non est factum**

51 I would like to state that the defence of *non est factum* should only be allowed in exceptional situations to rectify injustice and unfairness. It is fundamental that the sanctity of contract or agreement must be adhered to and

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respected. If the doctrine of *non est factum* is allowed to be invoked liberally, then anyone who is not satisfied with the contract or agreement that he has entered into will easily renege on his contractual obligations by invoking the doctrine of *non est factum*. This will lead to chaos and uncertainty to business and commerce. The House of Lords in *Saunders (Executrix of the Will of Rose Maud Gallie, Deceased) v Anglia Building Society* [1971] AC 1004 ("*Saunders*"), at 1015, expressed similar concerns:

> [The doctrine of *non est factum*] must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity.

52 In the case of *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd and others* [1992] 3 SLR(R) 855 ("*Lee Siew Chun*") this court agreed with the approach taken by the House of Lords in *Saunders*. At [63] the court stated:

> I have to bear in mind that *non est factum* is a dangerous doctrine for commercial, industrial, financial and even government institutions who routinely receive documents signed by parties outside the presence of the institutions receiving them. *If non est factum were to become an easy doctrine to invoke, no institution could feel secure that such parties would not one day disclaim their signatures and invoke the doctrine by saying they had been tricked into signing the document, and had relied on someone close to them, a defence relatively easy to raise and difficult to rebut* (even though the onus of proof would be on the signer). The attitude of the courts in modern times has been to restrict this plea as much as possible. …
>
> [emphasis added]

53 It is, therefore, proper that the doctrine of *non est factum* must be a narrow one and is applicable only in very exceptional cases.

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54 Having said that, the Court of Appeal in *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 ("*Mahidon Nichiar*") has set out the requirements for the application of the doctrine of *non est factum* at [119]:

> *Non est factum is* a specific category of mistake that 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. If successfully invoked, the transaction entered into by the document so signed is void. *Two requirements need to be established for this doctrine to apply … First, there must be a radical difference between what was signed and what was thought to have been signed. Second, the party seeking to rely upon the doctrine must prove that he took care in signing the document, that is, he must not have been negligent.*
>
> [emphasis added]

55 Hence, for the defence of *non est factum* to succeed the defendant must prove that:

(a) the OCBC Mortgage which the defendant signed was radically different from what the defendant had thought she signed ("the First Element"); and

(b) the defendant had exercised reasonable care and was not negligent when she signed the OCBC Mortgage ("the Second Element").

56 Where a party to a contract signs it in the presence of his solicitors, the Court of Appeal in *Mahidon Nichiar* explained that the lay client also has a duty to exercise basic care at [123]:

> To be clear, *we should not be understood as saying that lay clients can rely on their solicitors unthinkingly, or that they are relieved of their duty of basic care whenever they sign documents*

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> *in the presence of their solicitors.* That is not the case. The doctrine of *non est factum* … is a narrow one … It will only be successfully raised in *exceptional circumstances*, and, so, much will depend on the facts of each case. *Where a client signs a document in the presence of his solicitor, such facts as we consider to be important in determining whether or not a plea of* non est factum *can be raised include the nature of the transaction, the level of sophistication of the client, the extent of the solicitor's duty to explain the document, and the actual advice rendered by the solicitor.* If, for example, an elderly and poorly educated client enters into a complex transaction by signing a set of documents without receiving adequate legal advice on those documents, it is unlikely that he would be precluded from raising a plea of *non est factum* even if he had read the documents, simply because he would be unlikely to have understood them in the circumstances. …
>
> [emphasis added]

57 Therefore, in the determination of the doctrine of *non est factum* it is necessary to consider the defendant's level of sophistication, her educational and business background to ascertain her level of understanding of the documents as well as the extent of TPW1's duty to explain the documents and the actual advice rendered by him.

***The First Element of* non est factum**

The parties' arguments

58 The defendant pleaded that at the execution of the OCBC Mortgage she was labouring under the understanding that her liability under the OCBC Mortgage would be limited to the Property and/or the value thereof. The defendant submits that she was unaware that the OCBC Mortgage was an all-moneys mortgage when she signed the documents pertaining to this mortgage. The defendant gives the following explanations regarding the documents relating to the OCBC Mortgage.

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59 First, in relation to the 11 Jan Letter which was mailed to the defendant's residence and addressed to Mr Kung and the defendant, the defendant submits that she had never seen this letter until the commencement of these proceedings. She alleges that although the 11 Jan Letter was addressed to her and her late husband, Mr Kung, she did not read it as there was an arrangement between them that Mr Kung would open and read all letters addressed to them jointly.[39] The defendant further adds that even if she had read the 11 Jan Letter, she would not have understood its contents without the benefit of legal advice.[40]

60 Second, in relation to the Bangkok Bank Mortgage, a precursor to the OCBC Mortgage was also an all-moneys mortgage, which she executed on 12 January 1996 (see [11] above), the defendant submits that her attending solicitors then, Shook Lin & Bok LLP, also did not explain to her the nature of the Bangkok Bank Mortgage before she signed it.[41] Hence she had no knowledge and understanding of the nature and obligations of an all-moneys mortgage.

61 Third, the defendant argues that during the meeting with TPW1 together with Mr Kung on 22 January 2013, TPW1 did not explain the terms of the OCBC Mortgage to them. The defendant and Mr Kung were merely asked to sign the OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent which they did.[42]

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39 Defendant's Closing Submissions at para 24.

40 Defendant's Closing Submissions at para 28.

41 Defendant's Closing Submissions at paras 55–58.

42 Defendant's Closing Submissions at paras 88–102.

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62 Therefore, the defendant could not have known that the OCBC Mortgage was an all-moneys mortgage and not a mortgage under which her liability would be limited to the Property and/or the value thereof. Hence, she was labouring under the understanding that the mortgage she was signing was only limited to the Property and/or the value thereof. Thus, notwithstanding the 11 Jan Letter, the Bangkok Bank Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent as well as the meeting on 22 January 2013, she claims that she did not know that the OCBC Mortgage was an all-moneys mortgage.

63 The plaintiff, on the other hand, argues that the defendant must have known that she was going to sign an all-moneys mortgage when she and Mr Kung attended the meeting with TPW1 on 22 January 2013.[43] First, this was because on or around 11 January 2013, the Third Party had mailed the 11 Jan Letter which was addressed to Mr Kung and the defendant to their residential address. The plaintiff submits that the defendant must have read it or been informed of it by Mr Kung because either Mr Kung or the defendant had, upon reading the 11 Jan Letter, arranged for the meeting with TPW1 on 22 January 2013 to execute the OCBC Mortgage.[44]

64 Second, the plaintiff argues that the defendant must have understood the contents of the 11 Jan Letter because she is not an uneducated person. She graduated with a Bachelor of Arts in Economics and a Masters in Theological Studies. She was also a director of two companies – Keeping Private Limited and Fulian Enterprises (Private) Limited ("Fulian Enterprises") for more than 30 years. She confirmed that she had signed off on the audited statements for

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43 Plaintiff's Closing Submissions at paras 16–17.

44 Plaintiff's Reply Closing Submissions at para 62(a).

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Fulian Enterprises which included the statement of comprehensive income, balance sheet, statement of changes in equity and statement of cash flow.[45] The defendant had also assisted in her father's company, an investment company dealing in real estate properties, as a book keeper for decades.[46]

65 Third, the plaintiff maintains that TPW1 had explained to the defendant and Mr Kung the nature of the OCBC Mortgage and its consequences, particularly that it was an all-moneys mortgage, before they signed the OCBC Mortgage on 22 January 2013. This is evidenced from the Letter of Confirmation which the defendant and Mr Kung signed acknowledging that TPW1 had done so. The Third Party had in place a system and safeguards to ensure that mortgagors executing mortgage documents understood the terms of the mortgage.[47]

66 Finally, the plaintiff argues that this is not the first all-moneys mortgage which the defendant had signed. As mentioned above at [11], the defendant had also mortgaged the Property to the Bangkok Bank on the same all-moneys basis. The plaintiff submits that the court should not place any weight on the defendant's account that the solicitors advising her then did not explain the nature of the Bangkok Bank Mortgage before she signed it. This is because her account of what had happened during the execution of the Bangkok Bank Mortgage was inconsistent.[48]

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45 Plaintiff's Closing Submissions at para 59.

46 Plaintiff's Closing Submissions at para 4(e).

47 Plaintiff's Closing Submissions at paras 15–21.

48 Plaintiff's Closing Submissions at paras 28–34.

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67 Given the above, the plaintiff submits that the defendant must have known the nature of the OCBC Mortgage before the meeting with TPW1 on 22 January 2013. Thus, her case that the OCBC Mortgage was radically different from what she thought she signed must fail.

My decision on the issue of the First Element of non est factum

(a) Is the defendant's perceived mortgage limited to the Property radically different from the OCBC Mortgage, an all-moneys mortgage?

68 First, I shall examine whether a mortgage on the Property which the defendant thought she had signed and an all-moneys mortgage are radically different. The Court of Appeal in *Mahidon Nichiar* found that there was a radical difference between what a signor thought she signed and the document signed. In that case, the Court of Appeal held that "the renunciation of the Appellants' rights to be co-administrators of Father's estate and the renunciation of the Three Siblings' beneficial interests in the estate were completely distinct matters that bore no correlation to one another" (see *Mahidon Nichiar* at [121]). The guiding principle as to what is merely different as compared to what is "radically" different is to see whether what the signor thought she signed and what she actually signed were "completely distinct matters that bore no correlation to one another".

69 In my view, a mortgage to secure banking facilities limited to the Property and an all-moneys mortgage to secure banking facilities are both commercial instruments dealing with the same subject matter – which is to provide security for banking facilities. Where they differ is in the extent of the mortgagor's liability. Thus, these two mortgages, as secured security instruments, are not radically different.

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70 However, the consequences in the event of default may or may not be different depending on how much assets the mortgagor owns. In this case, if the defendant had owned only the Property then the consequences between the two types of mortgages would be the same. But if the defendant had owned the Property and many other assets and properties, then the consequences could be radically different. This must also depend on the size of the debt. In other words, the larger the debt, the bigger the difference. On the other hand, if the defendant had owned the Property and some small savings and time deposit accounts, then the consequences also would not be radically different.

71 Nevertheless, I am of the view that to ascertain whether the First Element of *non est factum* has been satisfied, the focus has to be on the nature or type of the perceived and actual documents rather than on the actual consequences of these documents which may or may not be radical as it will have to depend on many imponderables and the circumstances of each case as I have explained above.

72 Hence, I am of the view that the all-moneys mortgage (*ie,* the OCBC Mortgage) and the mortgage limited to the Property as perceived by the defendant are not radically different in nature as these are different types of mortgages offered by the plaintiff to their mortgagors to secure banking facilities. Hence, the defendant has failed to establish the First Element of the defence of *non est factum*.

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(b) Did the defendant know that she had signed an all-moneys mortgage (*ie*, the OCBC Mortgage)?

73 On the evidence, I find that the defendant *knew* that she was asked to sign an all-moneys mortgage before she appended her signature on the OCBC Mortgage.

(I) THE 11 JAN LETTER

74 With regard to the 11 Jan Letter, I find that the Third Party did mail this letter to the defendant and Mr Kung and that it reached their residence. The 11 Jan Letter is of paramount importance to the pivotal issue of whether the defendant knew that the OCBC Mortgage was an all moneys mortgage as it clearly stated that the OCBC Mortgage was an all-moneys mortgage. I also find that either the defendant or Mr Kung must have read the 11 Jan Letter because if neither the defendant nor Mr Kung had read the 11 Jan Letter they would not know that they could arrange a meeting with TPW1 on 22 January 2013.

75 The defendant does not deny receipt of the 11 Jan Letter. Her defence is that she did not read it. The defendant knows the importance of the 11 Jan Letter and that her defence of *non est factum* will collapse if she was aware of the contents of this letter. That was why she tried to explain that although the 11 Jan Letter was addressed to her and Mr Kung, she did not open and read it. She said that there was an understanding between her and Mr Kung that for such a letter, the latter would open and read it. In other words, she deferred to Mr Kung the 11 Jan Letter and relied on the old adage saying that "dead men tell no tales". However, when I questioned the defendant on whether Mr Kung knew that the OCBC Mortgage was an all-moneys mortgage she said "I don't know whether he [knew] or not, but if he [knew] it, he would have told me".[49] If this was true

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then Mr Kung would have told her that the OCBC Mortgage was an all-moneys mortgage as Mr Kung would have known of the nature of the mortgage as this was explained in the 11 Jan Letter.

76 Furthermore, the evidence is clear that either Mr Kung or the defendant or both of them had read the 11 Jan Letter. I also find that the defendant must have been informed of the OCBC Mortgage at the very least. The defendant admitted that Mr Kung would tell her that the letter was about a mortgage.[50] The defendant's case is that Mr Kung informed her that it was a mortgage limited only to the Property and/or the value thereof.[51] I am unable to accept the defendant's version of the events. I find that it is inconceivable that Mr Kung had grossly misread the 11 Jan Letter and the OCBC Mortgage when all the documents unmistakably indicated that it was an all-moneys mortgage. Mr Kung was an experienced businessman and this was not the first banking facility he was involved in for the Company which was secured by an all-moneys mortgage (see above at [11]). Both the defendant and Mr Kung knew that the OCBC Mortgage was a credit refinancing facility for the Bangkok Bank Mortgage, which was also an all-moneys mortgage.

77 It is also important to note that Mr Kung and the Company were involved in the negotiations over the Original Facilities and the means of securing those banking facilities with the plaintiff.[52] Mr Kung even signed a "Deed of Guarantee and Indemnity" to secure the Original Facilities.[53] If what

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49 Transcript, 5 July 2018 at p 21 lines 7–13.

50 Transcript, 4 July 2018 at p 29 lines 1–20.

51 Transcript, 4 July 2018 at p 30 line 5 to p 31 line 8.

52 Iris AEIC at paras 8–12. See also Exhibit IN-2 and Exhibit IN-4 of Iris AEIC.

53 Exhibit IN-4 of Iris AEIC. See also AB50–58.

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the defendant had said was to be believed then Mr Kung had deliberately misled the defendant into believing that the contents of the 11 Jan Letter and the OCBC Mortgage attached was a mortgage limited to the Property. I find this difficult to accept as the defendant trusted and loved Mr Kung and their relationship together was not an unhappy one.[54] Thus, it is more probable that Mr Kung had informed the defendant of the contents of the 11 Jan Letter and that the OCBC Mortgage was an all-moneys mortgage.

78 From these circumstances, it is difficult to believe the defendant that Mr Kung did not inform her that the OCBC Mortgage was an all-moneys mortgage.

79 The defendant further submits that even if she had read the 11 Jan Letter, she would not have understood its contents without the benefit of legal advice.[55] The defendant also argues that the plaintiff and the Third Party had not proven to this court how a person with the defendant's educational qualifications could possibly have understood the contents of the 11 Jan Letter and the OCBC Mortgage.[56] I find the defendant's arguments on this point hard to accept and entirely misconceived.

80 For one, the onus is on the defendant to prove *non est factum* and that she, with her educational qualifications and experience, could not understand the 11 Jan Letter and the OCBC Mortgage. As the plaintiff has rightly highlighted, the defendant is not an uneducated person (see above at [64]). She

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54 Affidavit of Evidence in Chief of Yeo Hui Keng ("Defendant's AEIC") at paras 9, 20–22.

55 Defendant's Closing Submissions at para 28.

56 Defendant's Closing Submissions at paras 29–32 and Defendant's Reply Submissions at para 15.

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cannot be compared to "an elderly and poorly educated client" (see *Mahidon Nichiar* at [123]). She is obviously more capable than that. I also find that the language used in the 11 Jan Letter is simple and straightforward. I cannot fathom how someone who is as educated and experienced as the defendant would struggle to understand the words "[there is] no limit on the amount of [the defendant and Mr Kung's] liabilities as owners of the Property, for the debts of [the Company] under [the OCBC Mortgage]", or the words "[t]his means that by signing [the OCBC Mortgage] as owners, [the defendant and Mr Kung] are also personally liable for all moneys owed by [the Company] to [the plaintiff]" and the relevant paragraphs of the 11 Jan Letter (see above at [13(a)]). These are words clear and simple enough to put both Mr Kung and the defendant on notice regarding the wide-ranging effect of the OCBC Mortgage.

81 In fact, at the trial, the defendant admitted that she could understand the 11 Jan Letter with little difficulty[57]:

> **Q:** … Now, from Tan Peng Chin's perspective, they have explained that they told you about the all monies legal mortgage, the nature of the all monies mortgage, in this letter dated 11 January. They also told you at a meeting at their offices on 22 January. You understand that; right?
>
> **A:** You mean from the letter here [*ie*, the 11 Jan Letter]?
>
> **Q:** Yes.
>
> **A:** Yeah.

82 Therefore, I find that Mr Kung would have had read and understood what the 11 Jan Letter meant. Given the happy relationship between Mr Kung and the defendant, the defendant would have been informed about the "all-

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[57] Transcripts, 4 July 2008, p 27 line 24 to p 28 line 7.

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moneys" aspect of the OCBC Mortgage. Finally, if the defendant had read the 11 Jan Letter, she would have understood its contents.

(II) THE MEETING WITH TPW1 ON 22 JANUARY 2013

83 I shall discuss in detail my findings regarding the meeting on 22 January 2013 below when I address the issue of whether the Third Party was negligent towards the defendant. At this stage, it suffices for me to state that I am satisfied that TPW1 had explained to the defendant and Mr Kung the nature of the OCBC Mortgage and its salient terms, including that it was an all-moneys mortgage. Therefore, I find that the defendant knew that the OCBC Mortgage which she signed on 22 January 2013 at the meeting in the presence of TPW1 was an all-moneys mortgage.

(III) THE BANGKOK BANK MORTGAGE

84 Finally, turning to the Bangkok Bank Mortgage, the defendant similarly alleged that her attending solicitors then did not explain the nature of the Bangkok Bank Mortgage to her but instead merely asked her to sign the documents. I find this difficult to believe. In the defendant's 1st OSB Affidavit, she mentioned that she did not "recall if [she] had signed earlier Mortgage documents related to the Company and/or [the] Property".[58] She then changed her position in her 3rd OSB Affidavit when she said that the terms of the Bangkok Bank Mortgage were not explained to her.[59]

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58 AB250.

59 AB400.

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85 At the trial, when the defendant was asked by the plaintiff's counsel whether she remembered what happened at the signing of the Bangkok Bank Mortgage, her answer vacillated and she said she could not remember[60]:

> **Q:** … Do you remember what happened at this Bangkok Bank mortgage signing?
>
> **A:** No.
>
> **Q:** And following on from your answer, if you cannot remember what happened at the signing of the Bangkok Bank mortgage, then to be fair there are two possibilities: *number one, the terms were explained to you; number two, the terms were not explained to you, correct?*
>
> **A:** *Correct.*
>
> **Q:** And you can't recall so, therefore, you don't know which is which because you simply can't recall; correct?
>
> …
>
> **Q:** The Bangkok Bank mortgage. *You can't recall whether it is one or two, because you simply cannot recall following on from your answer; correct?*
>
> …
>
> **A:** *Okay. Yeah, if you – yeah.*
>
> **Court:** *Sorry, what do you mean "yeah"?*
>
> **A:** *Yeah, correct.*
>
> [emphasis added]

86 Despite the defendant's inability to remember the signing of the Bangkok Bank Mortgage, she, nonetheless, saw fit to allege that Shook Lin & Bok LLP, who advised her on the Bangkok Bank Mortgage, was negligent and did not explain to her the nature of the Bangkok Bank Mortgage. Therefore, I find that her explanation regarding the execution of the Bangkok Bank Mortgage was a mere afterthought and self-serving.

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60 Transcripts, 3 July 2018 at p 133 line 3 to p 134 line 8.

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87 On a balance of probabilities, I find that the overall evidence clearly indicates that the defendant knew that the OCBC Mortgage she signed on 22 January 2013 was an all-moneys mortgage. This ground alone is sufficient to dismiss the defendant's defence of *non est factum.* Nevertheless, for completeness, I shall examine the Second Element of *non est factum*, *ie*, whether she was negligent or she had failed to exercise reasonable care before she signed the OCBC Mortgage.

The Second Element of **non est factum**

The parties' arguments

88 The defendant submits that she was neither careless nor negligent when she signed the OCBC Mortgage. She avers that even if she had read the OCBC Mortgage, she would not have understood its terms (*ie*, she would still be none the wiser).[61] As mentioned above, the defendant also avers that she did not read the 11 Jan Letter as there was a "domestic arrangement" between her and Mr Kung whereby the defendant would give all letters jointly addressed to them to Mr Kung for him to read.[62] Thus the defendant argues that she was entitled to rely on TPW1's advice. However, she alleges that TPW1 failed in his duties to explain the documents and the OCBC Mortgage she was asked to sign. Hence she was not careless for not understanding the OCBC Mortgage.[63]

89 With regard to the Letter of Confirmation and the Form of Confirmation and Consent, the defendant argues that there is nothing on the face of these documents that identifies the OCBC Mortgage as an all-moneys mortgage.

61 Defendant's Reply Submissions at paras 28–41.

62 Defendant's Closing Submission at para 24 and Defendant's Reply Submissions at paras 4–5.

63 Defendant's Reply Submissions at para 15.

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Furthermore, these documents did not state that the defendant had agreed to be a guarantor for the Company's debts beyond the value of the Property.[64]

90 Finally, the defendant argues that the 11 Jan Letter was not reproduced and placed before her and Mr Kung during the meeting with TPW1 on 22 January 2013.[65]

91 The plaintiff, on the other hand, argues that the defendant had been careless because she failed to take reasonable precautions in ascertaining what she was signing. First, she admitted that she did not even read the OCBC Mortgage. Second, she was careless in not taking any interest in the 11 Jan Letter. Third, she did not even read the Letter of Confirmation and the Form of Confirmation and Consent when she signed them. Fourth, even if she did read them, she was nonetheless careless in not enquiring into the OCBC Mortgage which was referred to therein. Fifth, even if TPW1 did not explain the OCBC Mortgage to her, she was, nonetheless, capable of understanding the OCBC Mortgage.[66]

92 The plaintiff also argues that it had engaged the Third Party who had put in place a system to explain mortgage documents to mortgagors who intend to execute them. This process includes sending beforehand a letter explaining the nature of the mortgage, similar to the 11 Jan Letter. Subsequently, when the defendant and Mr Kung met TPW1 on 22 January 2013 a copy of the 11 Jan Letter was handed to them to read before they signed the documents. The plaintiff submits that the Third Party followed the system in this case.[67]

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64 Defendant's Closing Submissions at para 52 and Defendant's Reply Submissions at paras 16–22.

65 Defendant's Closing Submissions at paras 26–27.

66 Plaintiff's Closing Submissions at paras 50–59.

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93 Finally, the plaintiff argues that the defendant has a habit of signing important documents without having due regard for what she was signing.[68]

My decision on the issue of the Second Element of non est factum

94 Having already found that TPW1 did explain the nature and the salient terms of the OCBC Mortgage to the defendant and Mr Kung (see [83] above), I shall discuss whether the defendant was careless in signing the OCBC Mortgage despite TPW1's explanation.

95 For this issue I shall refer to the case of *Lee Siew Chun*, where the court ruled that to determine whether the Second Element of *non est factum* had been established (*ie,* that the defendant is not careless), the court must ask itself what a reasonable person, possessing the qualities of the defendant, should have done when faced with the OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent (see *Lee Siew Chun* at [61]).

96 In *Lee Siew Chun*, the court found that the plaintiff was semi-literate, however, if she had read (or tried to read) the document, she would have realised, or at least suspected, that the document she was asked to sign was not what it was made out to be by the party making the request thus, she should have made queries. If she did not read the document, she deprived herself of the opportunity to be put on notice and that was carelessness: see [61] of *Lee Siew Chun*.

97 In this case, I find that the defendant was careless by failing to ask TPW1 any questions regarding the nature of the OCBC Mortgage. The Letter of

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67 Plaintiff's Closing Submissions at para 21.

68 Plaintiff's Closing Submissions at para 63.

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Confirmation and the Form of Confirmation and Consent would have put her on notice to ensure that she understood the OCBC Mortgage or at least had understood TPW1's explanation.

98 As discussed at [80] above, the defendant had a tertiary education and would have no difficulty understanding the nature of the 11 Jan Letter. Similarly, she admitted that she understood the Letter of Confirmation and the Form of Confirmation and Consent. The defendant agreed that it would take her only a few minutes to read the Letter of Confirmation which is about a page and she would not have any difficulty understanding it. This is her evidence in court[69]:

> **Q:** Mdm Yeo, look at this document, it's a one-page document. And at a glance, at a glance, you can read the document in less than a few minutes. Would that be a fair statement?
>
> **A:** Yes. At a glance.
>
> **Q:** And you can read it in a matter of minutes; right?
>
> **A:** Yes.
>
> **Q:** You have no difficulty with the English stated here; correct?
>
> **A:** Yeah.
>
> **Q:** Meaning you have no difficulty; correct. …
>
> **A:** Yes.

99 The Letter of Confirmation and the Form of Confirmation and Consent would have been sufficient to put the defendant on notice that TPW1 had an obligation to explain the nature and the salient terms of the OCBC Mortgage to the defendant and Mr Kung. The Letter of Confirmation stated that both the defendant and Mr Kung acknowledged that TPW1 had "explained to us the

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69 Transcripts, 3 July 2018, p 125 at lines 13 to 25.

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nature of [the OCBC Mortgage] and the practical consequences it will have for us" and the defendant signed the Letter of Confirmation (see above at [20]–[22]). As already mentioned, the defendant admitted that she had no difficulty understanding the Letter of Confirmation[70] and she was also not deprived of the chance to read the Letter of Confirmation.[71]

100 Further, the defendant admitted that it was very important to her that the extent of the mortgage to the plaintiff be limited only to the value of the Property because anything more could have a negative effect on her abilities to provide for her then young family.[72] Thus, the defendant would have been put on notice upon reading the Letter of Confirmation to at least ensure that she understood TPW1's explanation of the OCBC Mortgage or that she had assurances from TPW1 that the extent of her liabilities under the OCBC Mortgage would not extend beyond the Property. I find it difficult to accept that the defendant would sign the Letter of Confirmation when TPW1 had not explained the OCBC Mortgage to her or if she did not understand TPW1's explanation.[73]

101 With regard to the Form of Confirmation and Consent, this document would further impress upon the defendant the need to enquire or at least take steps to understand the OCBC Mortgage. The Form of Confirmation and Consent clearly stated that Mr Kung and the defendant "confirm … our liabilities and obligations to the Bank under the Mortgage No. ID/362804P …" (see above at [23] and [25]). Given that the limit of her liability under the OCBC Mortgage was important to her, any ordinary reasonable person in her shoes

70 Transcripts, 3 July 2018 at p 125 lines 13–25 and p 127 lines 22–24.

71 Transcripts, 4 July 2018 at p 8 lines 10–18.

72 Transcripts, 5 July 2018, p 23 line 16 to p 24 line 13.

73 Transcripts, 4 July 2018 page 63 lines 3–8 and Transcripts 5 July 2018 p 23 line 18 to p 24 line 13.

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would not have signed the Form of Confirmation and Consent if she did not understand the nature of the OCBC Mortgage. Similarly, a reasonable person in her shoes who was deeply concerned about her liability would not sign the Form of Confirmation and Consent without receiving any assurances from her solicitors that the OCBC Mortgage was only limited to the value of the Property.

102 The defendant's attitude at the signing of the documents on 22 January 2013 was irresponsible if her story was to be believed. At the trial, she said the following[74]:

> **Q:** Mdm Yeo, you were able to understand the language in the letter of confirmation. You were able to understand the language in the form of confirmation and consent. *Do you accept that you must exercise care and read the mortgage document before you signed it? Or are you saying that "oh no, I don't have to bother I will rely 100 per cent on my lawyers, notwithstanding that I can read the document myself"? Which is which?*
>
> **A:** *I will rely on the lawyer.*
>
> **Q:** So you don't have – according to you, you don't have to read at least perhaps the material terms of the mortgage yourself?
>
> **A:** Material terms is –
>
> **Q:** You don't have to read the mortgage at all, you just sign it, according to you?
>
> **A:** *If he [ie, the lawyer] didn't say, if he didn't explain or show me, then I presume it should be a standard one.*
>
> …
>
> **Q:** For both mortgages. You were told this [that the defendant's liability under the Bangkok Bank Mortgage and OCBC Mortgage was only up to the value of the Property] by your husband for both mortgages, and wouldn't you think it is reasonable, since this was an

[74] Transcripts, 4 July 2018, p 33 lines 3 to 20 and p 69 line 18 to p 70 line 11.

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> important point for you, and your husband had told you in respect of both mortgages, that you should have confirmed this with the lawyers for both mortgages?
>
> **A:** *I think the lawyer should have the responsibility to confirm with me, not me asking.*
>
> **Q:** Now, Mdm Yeo,[ ]the lawyers, or at least for the OCBC mortgage, have said that they did tell this to you, all right? Now, my question is this: if this was important to you, and your husband had told you this, and you remember that your husband had told you this, for both the mortgages, *don't you think it is reasonable for you to have clarified this or confirmed this with the lawyers? Reasonable or not reasonable?*
>
> **A:** *Not reasonable because the responsibility is not on me.*
>
> [emphasis added]

103 The defendant's attitude is *precisely* the kind of behaviour which would preclude her from the defence of *non est factum*. It bears reiterating the Court of Appeal's statement in *Mahidon Nichiar* at [123]: "we should not be understood as saying that *lay clients can rely on their solicitors unthinkingly, or that they are relieved of their duty of basic care whenever they sign documents in the presence of their solicitors*" [emphasis added].

104 Thus, the defendant was negligent for failing to read the documents before her and/or enquire into the OCBC Mortgage. Also, given the defendant's experience and educational qualifications it is more probable that the defendant did not ask TPW1 any questions about the OCBC Mortgage because TPW1 had explained the obligations and liabilities to the defendant and Mr Kung and they understood what they were about to sign.

105 With regard to the defendant's argument that the 11 Jan Letter was not available to her at the meeting with TPW1 on 22 January 2013, I am more inclined to believe TPW1's and Ms Gwendoline Ong Tin Si's ("TPW2")

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evidence that it was their practice to give the defendant and Mr Kung a copy of that letter. TPW2 explained that it was her standard procedure to give a copy of the letter similar to the 11 Jan Letter whenever the Third Party handled a mortgagor who came to the Third Party's office to execute a mortgage.[75] If the defendant failed to read the 11 Jan Letter and the other documents before she signed them, she would have been more than careless. The defendant would have been reckless and her indifference could have been due to her wilful blindness.

106 Finally, the defendant's arguments that she did not read the OCBC Mortgage because she trusted her late husband[76] works against her. It is not the defendant's case that her husband or TPW1 exercised any form of undue influence on her such that she was not afforded the chance to read the OCBC Mortgage, the 11 Jan Letter, the Letter of Confirmation and the Form of Confirmation and Consent which were all before her on 22 January 2013. In fact, no one prevented her from reading these documents.[77] Hence, she had the opportunity to read these documents but she chose not to read them before she signed them. She was also under no pressure or obligations to sign the documents without reading them. The defendant admitted that she did not read the documents and regretted it. In court during cross-examination by the Third Party's counsel the defendant said "It's … after the incidents of this case, well I, you know, I sort of regret that, you know, I didn't read the documents."[78] She also chose not to ask TPW1 any questions. The defendant was negligent and failed to exercise due care when she signed these documents. Therefore, she

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75 Gwendoline AEIC at para 19.

76 Transcripts, 5 July 2018 at page 22 lines 14–22.

77 Transcripts, 5 July 2018 at page 23 lines 9–12.

78 Transcript, 4 July 2018 at page 32 lines 7–9.

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should be held liable for the consequences of the documents she had signed and she should not be allowed to renege on the OCBC Mortgage.

Summary

107 In summary, I find that, on a balance of probabilities, the defendant had failed to prove her defence of *non est factum*. The OCBC Mortgage which the defendant signed was *not* radically different from what the defendant had thought she signed, *ie*, a mortgage limited to the value of the Property. In fact, the evidence indicates that the defendant knew the OCBC Mortgage was an all-moneys mortgage. I also find the defendant was negligent and careless when signing the OCBC Mortgage as she had taken a perfunctory approach towards the signing of the mortgage documents. She made no effort to read the OCBC Mortgage or ask TPW1 any questions to understand the nature and terms of the OCBC Mortgage. On the evidence it appears that there was wilful blindness on the defendant's part.

108 From the foregoing, the OCBC Mortgage is not void and the plaintiff can rely on it. Thus, the defendant is liable to pay the plaintiff the outstanding sums under the Revised Facilities.

Issue 2: Is the defendant estopped from seeking an invalidation of the OCBC Mortgage?

109 Having already found that the defendant's defence of *non est factum* has not been established and that the OCBC Mortgage is binding on the defendant, it is unnecessary for me to consider the plaintiff's other argument of estoppel which is that the defendant is estopped from seeking an invalidation of the OCBC Mortgage even if the defendant has succeeded in its defence of *non est*

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factum. However, for completeness, I shall examine the merits of the plaintiff's argument on the principle of estoppel.

110 The plaintiff asserts that it relied on the Letter of Confirmation and the Form of Confirmation and Consent as unequivocal representations made by the defendant to the plaintiff that the defendant understood the terms of the OCBC Mortgage and is bound by the OCBC Mortgage. In reliance on these representations, the plaintiff disbursed the moneys under the facilities to the Company to its detriment. Therefore, the plaintiff asserts that the defendant cannot now turn back on her words and seek to invalidate her obligations under the OCBC Mortgage on the grounds that she did not understand what she signed.[79]

111 The defendant, on the other hand, argues that when *non est factum* is established and the OCBC Mortgage is invalidated, all documents relating to the OCBC Mortgage and the defendant's agreement to be bound by it will also be invalidated. Thus, it is not open to the plaintiff to rely on the Letter of Confirmation and the Form of Confirmation and Consent as representations that the defendant has understood the OCBC Mortgage which in fact was not the case.[80]

112 The defendant further argues that the equitable doctrine of estoppel is inapplicable because the plaintiff failed to fulfil its duty towards the defendant. The duty to explain to the defendant carefully was laid down in the case of *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 ("*Etridge*") and in the *Code of Consumer Banking Practice* which outlines the minimum standards of

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79 Plaintiff's Closing Submissions at paras 65 to 72.

80 Defendant's Closing Submissions at para 146.

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good banking practice which customers can expect from the bank. The defendant argues that the plaintiff's duty as laid down in *Etridge* and the *Code of Consumer Banking Practice* is basically to ensure that the defendant had been properly advised on her obligations under the OCBC Mortgage, especially when she was Mr Kung's wife and had no benefit from the OCBC Mortgage. Having failed to fulfil this duty, it is, therefore, inequitable for the plaintiff to rely on the representations made by the defendant regarding her understanding and agreement to be bound by the OCBC Mortgage.[81]

113 Finally, the defendant argues that if *non est factum* is established the defendant can avoid her liabilities under the OCBC Mortgage. Hence, the plaintiff is liable to return to her the net sale proceeds from the sale of the Property and the moneys the plaintiff had taken from her savings account and time deposit account which the plaintiff had used to set off against the sums owed by the defendant under the OCBC Mortgage.

114 Therefore, the issue before me is: assuming the defence of *non est factum* had indeed been made out, is the defendant, nonetheless, estopped from seeking to invalidate her obligations to the plaintiff?

The law

115 In the Canadian Supreme Court case of *Prudential Trust Company Ltd v Cugnet* [1956] SCR 914, the court had to consider whether estoppel can preclude a plea of *non est factum*, Locke J made the following findings:

> The question as to whether the respondents are entitled to rely upon the defence is raised by the plea of estoppel by conduct in the reply to the statement of defence. The basis for the contention is that Edmond Cugnet having, by his conduct,

[81] Defendant's Closing Submissions at paras 147 to 155.

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> enabled Hunter and his principals to sell what appeared on the face of it to be a half interest in the mineral rights to a purchaser for value acting in good faith, he cannot dispute the validity of the instruments as against the latter. The estoppel, it is said, arises by reason of the negligence of Edmond Cugnet. The question is the same as that referred to by Buckley L.J. in *Carlisle and Cumberland Banking Company v Bragg* [1911] 1 KB 489 at 494, in the following terms: -
>
> > There has been so much discussion during the argument as to the plea of *non est factum*, and the relevance of negligence in relation to it under the circumstances of this case, that I wish to say a few words expressing my view of the law on the subject. In an action upon a deed, the defendant may say by way of defence that it is not his deed, *non est factum. If it is found to be his deed, the plaintiff gets judgment and there is an end of the case. But suppose that it is found not to be his deed, and he succeeds on* non est factum*, the case is not necessarily over, because the plaintiff may say "True you have established that this is not in fact your deed, but you are estopped by your conduct from saying that it is not your deed, and I can recover against you, although it is not your deed." It is only in this latter case that the question of estoppel comes into action.* Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel.
>
> [emphasis added]

116 Likewise, in this case, although the court may find that the defence of *non est factum* has been established, that is not the end of the matter because it is still open to the plaintiff to argue that the defendant is, nonetheless, estopped from avoiding her obligations under the OCBC Mortgage. To do so, the plaintiff bears the burden to prove that estoppel has been made out and that it is in the interest of equity that the defendant is liable under the OCBC Mortgage.

117 To establish estoppel by representation, the Court of Appeal in *The "Bunga Melati 5"* [2012] 4 SLR 546 at [41] succinctly laid down the principles as follows:

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(a) a representation had to be made by the defendant;

(b) the defendant must have actual authority with regard to the subject of the representation; and

(c) the plaintiff had acted upon the said representation to its detriment.

My decision on the issue of estoppel

118 The plaintiff had granted credit facilities to the Company and the defendant had provided security in respect of these credit facilities under the OCBC Mortgage. It was the practice of the plaintiff that when executing such mortgages, it would usually engage an outside law firm who had subject matter expertise in this field to handle the execution of such transactions.[82] In this case, the plaintiff had engaged the Third Party to handle the execution of the OCBC Mortgage. When the plaintiff engaged an outside law firm to handle such transactions, the plaintiff would provide the outside law firm a uniform set of instructions to ensure that a comprehensive and properly standardised mortgage procedure is followed ("Instructions").[83] These Instruction were also issued to the Third Party in this case.[84]

119 In the event that the Third Party represents both the plaintiff and the mortgagor, the Instructions provide as follows[85]:

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82 Iris AEIC at para 13.

83 Iris AEIC at para 15.

84 AB561 – AB567.

85 AB564.

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> **15 MULTIPLE REPRESENTATION**
>
> Where you have been retained or have accepted instructions to act for more than one party to a transaction where a diversity of interests exists between the parties, it is your responsibility to determine how you are best able to discharge your duties including to disclose the multiple representation and all material facts relating to the parties and to the transaction. We require your confirmation (in the form as asset out in our Report on Title) that you have advised each of the party providing security and/or support for this transaction about the nature, effect and consequences of the transaction including that the Bank is fully entitled to enforce its legal rights in accordance with the terms and conditions of the security furnished.

120 In other words, the plaintiff had specifically instructed the Third Party that for the execution of such mortgages, the Third Party must disclose to all the parties that it was also representing the plaintiff as well. The Third Party was then required to provide its written confirmation that it had advised all the parties concerned about the nature, effect and consequences of the transaction. The purpose of obtaining this written confirmation was to ensure that the Third Party had properly advised the relevant parties that it was also representing the plaintiff in the transaction.

121 I find that the above arrangement whereby a bank engaged an outside law firm to handle the execution of mortgages is entirely acceptable provided that the bank places sufficient safeguards to ensure that the mortgagor is sufficiently advised on his obligations under the mortgage. As Lord Nicholls had said in *Etridge* at [79]:

> If the bank is not willing to undertake the task of explaining itself, the bank must provide the solicitor with the financial information he needs for this purpose. Accordingly, it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case.

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122 Based on the above arrangement, the plaintiff had relied on the Third Party to advise and explain to the defendant and Mr Kung on the OCBC Mortgage and other related documents pertaining to this transaction as required under the Instructions. The Third Party was engaged by the plaintiff to handle the execution of the OCBC Mortgage. The Third Party had also informed the defendant that it was also representing the plaintiff. The plaintiff was not present when the defendant and Mr Kung executed the OCBC Mortgage and signed the Letter of Confirmation and the Form of Confirmation and Consent. Thus, the plaintiff did not deal directly with the defendant when the defendant executed the OCBC Mortgage. Hence, there was no interaction between the plaintiff and the defendant.

123 The only means by which the plaintiff could have known that the defendant understood the OCBC Mortgage and agreed to be bound by the obligations thereunder were the signed Letter of Confirmation and the Form of Confirmation and Consent. The Letter of Confirmation and the Form of Confirmation and Consent both stated in unequivocal terms that the defendant understood the terms of the OCBC Mortgage and that she had agreed to be liable for the obligations thereunder (see [20] to [25] above).

124 In that light, I find that there is no way for the plaintiff to know the defendant's state of mind when the defendant executed the OCBC Mortgage and signed the Letter of Confirmation and the Form of Confirmation and Consent. Thus the plaintiff would not have suspected anything was amiss, if any. Given the Instructions issued to the Third Party, it is reasonable for the plaintiff to rely on the signed OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent as unequivocal representations by the defendant that the defendant understood and agreed to be bound by the OCBC

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Mortgage and that the Third Party had followed the Instructions properly. The plaintiff was one step removed from the saga which was what transpired during the execution of the OCBC Mortgage. Hence, it is inaccurate for the defendant to allege that the plaintiff knew that the defendant was not properly advised. There was no way for the plaintiff to know this. Therefore, I reject the defendant's argument that the plaintiff had come with unclean hands.[86]

125 I shall now address the defendant's second argument which is that it is inequitable for the plaintiff to invoke estoppel because it has failed to fulfil its duty towards the defendant under *Etridge* and the *Code of Consumer Banking Practice*. On this, I find that *Etridge* is not applicable in this case. The defendant acknowledges that she has not pleaded undue influence nor is she raising it[87]. But she submits that TPW1 should have exercised greater care in his discharge of his duty to explain to her as the defendant was the wife of Mr Kung, the director of the borrower Company and she had no beneficiary interest in the OCBC Mortgage. I shall discuss this at length below at [136] onwards. However, for the purpose of this issue it suffices for me to highlight that the defendant takes no issue with the OCBC Mortgage if the liability is limited to the Property. If this was the defendant's case she would not have alleged that TPW1 had failed to discharge his duty diligently. Therefore, it appears that her grievance against TPW1 that he had failed to alert her that the OCBC Mortgage was an all-moneys mortgage may have been an afterthought.

126 I further find that the plaintiff's practice of issuing the Instructions to the Third Party and requiring the Third Party to furnish certain confirmations pursuant to the Instructions (see above at [118] to [120]) were sufficient

86 Defendant's Closing Submissions at para 150.

87 Defendant's Closing Submissions at para 119.

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safeguards for the plaintiff to ensure that the defendant and other mortgagors were sufficiently and adequately advised as to the nature and terms of the mortgage documents they were executing. Thus, the defendant continues to be liable to the plaintiff under the OCBC Mortgage on the principle of equitable estoppel.

127 In the same vein, the defendant is also estopped from making her counterclaim for the return of the net sale proceeds from the sale of the Property and the moneys the plaintiff had taken from her savings account and time deposit account which the plaintiff had used to set off against the sums owed by the defendant under the OCBC Mortgage. For one, the defendant's case is that her liabilities under the OCBC Mortgage is only up to the value of the Property. Thus, it is not open to her to seek a return of the net sale proceeds of the Property from the plaintiff. Second, the defendant is estopped from invalidating the OCBC Mortgage by virtue of the representations she had made in the Letter of Confirmation and the Form of Confirmation and Consent. In that light, her counterclaim has lost the foundation stone to stand on.

128 If the *non est factum* arose out of the Third Party's negligence in failing to explain and advise the defendant on the OCBC Mortgage, then the defendant may have a recourse against the Third Party for indemnity. I now turn to this issue.

Issue 3: Is the Third Party liable for negligence?

The parties' arguments

129 The defendant argues that TPW1 did not explain to her and Mr Kung the terms, obligations and liabilities of the OCBC Mortgage.[88] The defendant

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further asserts that the meeting with TPW1 lasted about five minutes.[89] The defendant submits that there is no credible evidence to show that the defendant was ever shown the agreement relating to the Original Facilities, the 11 Jan Letter or other documents. Even if she were shown these documents, she was not sophisticated enough to understand them on her own.[90] The defendant also claims that the Third Party was negligent as TPW1 did not explain the OCBC Mortgage to her.[91]

130 The Third Party argues that there is no negligence on the part of TPW1 and TPW2. The Third Party relies on the 11 Jan Letter, the Letter of Confirmation and the Form of Confirmation and Consent to show that the defendant was adequately advised on the nature and consequences of executing the OCBC Mortgage.[92] The Third Party submits that it had put in place a system to ensure that mortgagors who approached them were all well-advised on the nature of the mortgage they were about to execute. This involved sending a letter of explanation first to the mortgagors – which is the 11 Jan Letter in this case. The defendant and/or Mr Kung then arranged for a meeting with the Third Party thereafter. At that meeting which was on 22 January 2013, a copy of the 11 Jan Letter was handed to the defendant and Mr Kung. The Third Party explained the nature and salient terms of the OCBC Mortgage to the defendant and Mr Kung before they executed the mortgage and signed a letter acknowledging that the Third Party had explained the mortgage to them.[93]

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88 Third Party Statement of Claim at para 5. See also Defendant's Closing Submissions at para 136.

89 Third Party Statement of Claim at para 5(f).

90 Defendant's Closing Submissions at para 126.

91 Defendant's Closing Submissions at paras 92 and 96.

92 Third Party's Closing Submissions at para 5.

93 Third Party's Closing Submissions at para 6–12.

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My decision on whether the Third Party was negligent

131 Before I consider the parties' arguments, I wish to state at the outset that the defendant's case is that TPW1 did not even explain the terms of the OCBC Mortgage to the defendant and Mr Kung. This is different from the situation in which the allegation is that TPW1 did not provide an adequate explanation of the OCBC Mortgage to them. Thus, I shall disregard the defendant's arguments that TPW1 was negligent for failing to adequately explain the OCBC Mortgage to the defendant and Mr Kung. Hence, I shall confine my discussion to whether TPW1 did in fact explain the terms of the OCBC Mortgage to the defendant and Mr Kung.

132 It is also not disputed that the Third Party was also the defendant's solicitors in the execution of the OCBC Mortgage and that it owed a duty of care to explain to the defendant the terms of the OCBC Mortgage, which was an all-moneys mortgage.[94]

The Third Party's standard of care to the defendant

133 The defendant argues that the Third Party had failed to discharge its duty of care to her and was negligent. The defendant referred to *Foo Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 ("*Foo Maun Yee*") at [40] in which the court opined that to determine whether a conveyancing solicitor had acted in breach of his duties of care and skill, the court had to consider whether his conduct had fallen below the standard expected of a reasonably competent conveyancing solicitor.

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94 Third Party's Closing Submissions at para 2.

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134 The defendant further submits that the duties of care and skill required of a conveyancing solicitor go beyond that in *Foo Maun Yee*. It must include the duties laid down in *Etridge* which were approved in the Court of Appeal decision of *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*") at [59].

135 In the context of this case, the defendant submits that the duties of the Third Party must include checking directly with the defendant the name of the solicitor she had decided to act for her and to ensure that her solicitor communicated directly with her. The solicitor should also inform the defendant that the purpose of these duties was so that the defendant would not be able to dispute that she was legally bound by the documents once she had signed them.[95]

136 I do not agree with the defendant. The principles in *Etridge* apply where the bank (in *Etridge*) or TPW1 (in our case) is dealing with a situation where the mortgagor was under some form of undue influence or where a situation of undue influence might arise in the circumstances. This in fact was the position before the Court of Appeal in *Sudha Natrajan* at [60] and [64]:

> 60 *However, the appellant did not plead, nor is it her case in this appeal, that a presumption of undue influence had arisen which had not been rebutted by the respondent, such that the Deed should be set aside.* Had she done so on the basis that on the case run by the respondent, the presumption of undue [influence] would have been triggered, then perhaps she might have succeeded. Without deciding the issue, *since it is not necessary in the circumstances, it seems to us that such an argument which rests on how the law views certain transactions, might not have been inconsistent with the appellant's case that she never signed the Deed. In such a situation, because of how the law views such transactions, it is incumbent on those seeking to enforce a transaction to prove that they had done whatever was needed to purge the transaction of any presumptive taint.*

95 Defendant's Closing Submissions at paras 117 and 132.

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> But the appellant did not plead or run that case. Instead, her argument before us seeks to transpose the substantive principle of equity laid down in *Etridge* to the sphere of the law of evidence. …
>
> …
>
> 64 … However, *the presumption of undue influence was never pleaded or raised.* Had it been pleaded, it might well have been possible for the case to be mounted that if the Deed was not forged, a presumption of undue influence would have arisen on the facts presented and that it was incumbent on the respondent to rebut that presumption for the reasons and in accordance with the principles set out in *Etridge* … and as we see it at present, this could possibly co-exist with the case on forgery as an alternative on the basis of what we have said at [60] above … *But even assuming this were so, it was not raised in these proceedings until the appeal and that was simply too late. We reiterate that these are provisional views. We do recognise that there may be another perspective – in particular that the presumption of undue influence should be seen as nothing other than an evidential aid and if the case of undue influence is not available for the reasons we have outlined at [55] above, then it should remain so notwithstanding that reliance is placed on a presumption instead of on proof of primary facts.* As we have said, it is not necessary for us to resolve this issue here and we leave the resolution of this issue open for another occasion.
>
> [emphasis added]

137 In this case, the defendant did not plead a case of undue influence and the defendant acknowledged this.[96] This is further reinforced by the fact that the defendant's case is that she went to meet TPW1 together with her late husband, Mr Kung, to sign the OCBC Mortgage, the Letter of Confirmation and the Form of Confirmation and Consent. She alleged that the entire meeting lasted for about five minutes.[97] She admitted that no one pressured her to sign the documents and that she was not deprived of the opportunity to read the documents before signing them. She also admitted that there was no undue

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96 Defendant's Closing Submissions at para 119.

97 Third Party Statement of Claim at para 5(f).

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influence exerted on her by either Mr Kung or TPW1.[98] Thus I find that the *Etridge* principles are not relevant in this case.

138 On the nature of the solicitor's duties, the Court of Appeal in *Mahidon Nichiar* stated at [122]:

> … This was a case, instead, where a group of lay and unsophisticated clients had gone to the solicitors in the expectation that the latter were looking out for and would advise them properly as to their interests in connection with the execution of a document that formed part of a set of probate papers dealing with a somewhat complicated arrangement. This reliance on the solicitors was not at all unreasonable. Indeed, as the following oft-cited passage in *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [68] highlights, ***there is in fact a natural dependency which solicitors must generally expect when they have conduct of legal matters, especially where unsophisticated or vulnerable lay clients are involved:***
>
> > … *[T]he public rely upon lawyers for wise and effective counsel. This is especially the case when clients are particularly vulnerable. This could be due to a number or variety of reasons – or, indeed, a combination thereof. These include impecuniousness, a lack of schooling and/or language and (invariably, with the exception of legally-trained persons) a lack of legal knowledge.* In this last-mentioned regard, it is not merely an absence of legal knowledge. To many laypersons (even highly educated ones), the law constitutes a morass of technical – even arcane – rules. Many even fear the law when the precise opposite should be the case. … The present proceedings illustrate all the dangers that must be assiduously avoided. *Lawyers must convey what the precise legal situation is with limpid clarity, taking into consideration the fact that their clients may not always share the same language, intellectual or legal facility as them.* The legitimacy of law in general and of legal personnel in particular depends on this. Still less must laypersons be lulled into a false sense of security and/or into a situation of misinformation. Whenever in doubt, lawyers should clarify. *They must begin from the*

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98 See Transcripts, 4 July 2018 at p 8 lines 10–18 and Defendant's Closing Submissions at para 119.

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> *assumption that laypersons are more likely to rely upon them than not – if only because they are professionals schooled in the law and whose calling is therefore to advise on the law in all its various aspects.* They must, wherever applicable, advise laypersons to seek independent legal advice if they are unable to assist – for example, because of a possible conflict of interests. …
>
> [emphasis in original in italics and emphasis added in bold italics]

139 Finally, where the solicitor is acting for multiple clients with conflicting interests, as in this case, and one of the clients enters into a transaction that prejudices her interests and benefits the conflicting interests of another client, it is incumbent on the solicitor to fully advise the client who was prejudiced as to the terms and effects of the transaction: see *Mahidon Nichiar* at [80].

140 I shall now consider whether the Third Party had discharged this duty. This will require the determination of the defendant's and TPW1's credibility.

The defendant's credibility

141 On the evidence, I find that the defendant is not a credible witness. First, the defendant testified that she could not remember what took place at the meeting on 22 January 2013 with TPW1. She could neither remember the date of the meeting with TPW1, the name of the solicitor who attended to her at that meeting, nor the number of documents she signed at the meeting. But she assertively remembered clearly that the meeting "lasted for about five(5) minutes".[99] If she could not remember what happened on 22 January 2013, how could she have said with such strong certainty that the meeting only lasted 5 minutes?

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99 Defendant's AEIC at para 16.

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142 Second, her evidence on what transpired at the 22 January 2013 meeting was also inconsistent. In the proceedings to set aside the statutory demand, the defendant stated in the defendant's 1st OSB Affidavit that she "recall[ed] only signing the [OCBC] Mortgage and [leaving] straight thereafter. … No other documents were shown or explained to me".[100] In the Defendant's AEIC, she stated that "[a]s for the [Letter of Confirmation] and the [Form of Confirmation and Consent] – in short, I have absolutely no memory of signing either of them. … I genuinely have no recollection as to when or why I signed them".[101] At the trial, she testified that she could not recall who gave her the Letter of Confirmation and the Form of Confirmation and Consent to sign during the meeting on 22 January 2013.[102] She also admitted that she could not recall when she signed the Letter of Confirmation and the Form of Confirmation of Consent.[103] She even admitted she was only able to explain the circumstances leading to her signature on these documents *after* these documents were disclosed to her in these proceedings.[104]

143 However, it is an undisputed fact that the defendant signed the Letter of Confirmation, the Form of Confirmation and Consent and the OCBC Mortgage in the presence of TPW1 on 22 January 2013.

144 Despite the defendant's temporary amnesia in the recollection of the events on 22 January 2013 which caused her to have "*absolutely no memory*" of signing the Letter of Confirmation, the Form of Confirmation and Consent

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100 AB251.

101 Defendant's AEIC at para 46.

102 Transcripts, 4 July 2018 page 22 line 5 to page 24 line 15.

103 Transcripts, 4 July 2018 page 7 line 2, page 19 lines 2 to page 22 line 9.

104 Transcripts, 4 July 2018, page 16 lines 16–19.

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and the OCBC Mortgage, she accused the Third Party of engineering her signed acknowledgement without giving her an opportunity to read these documents.

145 At the trial, she maintained that she could not recall who gave the Letter of Confirmation and the Form of Confirmation and Consent to her for her signature. Yet, she insisted that she could remember that she was not given the opportunity to read them before signing[105]:

> **Q**: So let's see what your final position is. Was it Mr Wong or was it someone who gave you this document to sign?
>
> **A**: I don't know. I – I can't recall. Okay. I don't remember.
>
> **Q**: You don't know, you can't recall, "I don't remember". If you can't remember even who gave you this document to sign, how can you say that you have no opportunity to read this document?
>
> **A**: It's – you cannot remember means you cannot remember, right?
>
> **Q**: Exactly. So if you cannot remember, then it must be that there's no basis for you to say you have no opportunity to read this document.
>
> **A**: But I signed it. So, you know.
>
> …
>
> **Q:** With respect, I don't think it's two different things, but let me ask you then: what is your basis for saying that you had no opportunity to read this document at page 88?
>
> **A:** I was asked to sign without giving me explanation or telling me what I'm going to sign.
>
> **…**
>
> **Q:** But I think you do understand my questions and let me ask you again. Were you given an opportunity to read this document at page 88?
>
> **A:** No.

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105 Transcripts, 4 July 2018, page 22 line 5 to page 24 line 15.

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> **Q:** And you maintain that position, even though you cannot remember who gave this document to you. Is that your evidence?
>
> **A:** Yes.

146 Later, she changed her position and admitted that no one stopped her from reading these documents[106]:

> **Q:** The lawyers did not tell you that you are not allowed to read [the Letter of Confirmation]?
>
> **A:** Ha?
>
> **Q:** The lawyers did not tell you that you are not allowed to read this; agree?
>
> **A:** I don't think he would say that.
>
> …
>
> **Q:** The lawyers just basically asked you to sign the letter. Didn't give you a threat you have to sign the letter otherwise you will not be allowed to leave the premises?
>
> **A:** Yeah.
>
> **Q:** And if you had felt, in your mind, that you needed time to read this document, then it would have been your responsibility to tell the lawyers "please give me a bit more time to read it"; you agree? It's very reasonable, isn't it?
>
> **A:** It didn't occur to me.
>
> …
>
> **Court:** What do you mean by you are not given an opportunity to read? Did anyone tell you you cannot read?
>
> **A:** Ha?
>
> **Court:** Did anyone tell you that you cannot read these documents?
>
> **A:** No, no, the lawyer never say that. But I didn't read.

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106 Transcripts, 4 July 2018, page 87 line 9 to page 90 line 18 and Transcripts, 5 July 2018, page 23 lines 5 to 12.

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147 It is, therefore, clear that the defendant's attempts to explain her signature on the Letter of Confirmation and Form of Confirmation and Consent are self-serving and mere afterthoughts. The defendant made a seismic change of position from having "*absolutely no memory*" of signing these documents to suddenly remembering that she was not given an opportunity to read them before signing.

148 For the above reasons, I am not inclined to believe the defendant's evidence regarding the events on 22 January 2013.

The contemporaneous evidence and TPW1's credibility

149 I would like to make some general observations regarding the evidence of the Third Party's witnesses, namely TPW1 and TPW2. They had executed numerous mortgage documents in the course of their work. Thus, they could not remember the details of every execution of the mortgage documents without reference to contemporaneous documents as they did not keep attendance notes.[107] Furthermore, TPW1 had to rely on their usual practice or procedure to explain what could have happened at the 22 January 2013 meeting with the defendant and Mr Kung as this was a normal transaction.[108] TPW2 was not present at the 22 January 2013 meeting as she had assigned the execution of the OCBC Mortgage to TPW1.[109] If the entire evidence of the Third Party rests solely on its normal practice or procedure I would be extremely cautious to accept it. However, in this case there are contemporaneous documents which

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107 Defendant's Closing Submissions at para 67. See also Transcript, 5 July 2018 at p 34 lines 2–9.

108 Transcripts, 5 July 2018 at p 43 line 2 to p 54 line 14.

109 Gwendoline AEIC at para 20.

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are corroborative evidence to assist TPW1 to recall the events on 22 January 2013.

150 The contemporaneous documents for the meeting on 22 January 2013 were the Letter of Confirmation, the Form of Confirmation and Consent, the 11 Jan Letter and the OCBC Mortgage. The Letter of Confirmation signed by the defendant and Mr Kung on the date of the meeting on 22 January 2013 is a contemporaneous record of what transpired at the meeting on 22 January 2013. The Letter of Confirmation stated that the defendant and Mr Kung acknowledged that TPW1 had explained to them their liabilities under the OCBC Mortgage. The Letter of Confirmation also informed the defendant and Mr Kung that the Third Party was also acting for the Company and the plaintiff. It stated that the defendant and Mr Kung could appoint another solicitor to advise them on the OCBC Mortgage, but they chose not to.

151 TPW1 admitted that he could not recall exactly what transpired at the meeting with the defendant and Mr Kung on 22 January 2013. This is understandable as it is humanly impossible to remember the details of every execution of a mortgage given the fact that TPW1 had, by then, handled some 300 banking and conveyancing files.[110] TPW1 also admitted that he could only give evidence based on his usual practice as this was a normal case of execution of a mortgage.[111] This is consistent with the Third Party's defence that nothing out of the ordinary happened during the meeting with the defendant and Mr Kung on 22 January 2013. In other words, TPW1 had explained the salient terms of the OCBC Mortgage to the defendant and Mr Kung according to his usual practice.[112] When the defendant's counsel put to TPW1 that he merely

110 Mr Wong AEIC at para 3. Transcripts, 5 July 2018, page 35 lines 7–15.

111 Mr Wong AEIC at para 7.

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placed the documents before the defendant and Mr Kung for them to sign without explaining the documents to them, TPW1 gave an unequivocal, forceful and poignant response[113]:

> **Q:** You don't know, fair enough. I put it to you, in fact, Mr Wong, that what happened on 22 January 2013 when Mr Kung and Mdm Yeo came to your office, all you did was put the documents before them and request them to sign. I put it to you that is the position.
>
> **A:** I strongly disagree, counsel. As it stands, *it's an insult to myself to even hear that statement.* Clients, there are clients appearing before me signing an all monies mortgage, it could be for any particular event, it could be a momentous event when they bought a house, it could be any other transaction matter. In this case it's a refinancing which is something the mortgagors has done before, and again *you are suggesting that a reasonable prudent person appearing before anybody would just sign a document without being explained to, I think that is a certain level of absurdity here.* Then again, I say why would I – essentially the reliance is on what would have been in the usual course of events for signing an all monies mortgage. Again, as solicitors we understand that it's also a huge undertaking which is why I'm saying that an all monies mortgage, *to the best of my ability, I'll explain to the mortgagors the terms of the all moneys mortgage, the salient terms, before they sign the all monies mortgage***.**
>
> [emphasis added]

152 Therefore, I do not agree with the defendant's argument that *solely* upon the fact that there are no attendance notes, this court must find TPW1 unworthy of credit. The credibility of a witness must depend on his testimony and be measured against the overall evidence, particularly that which is contemporaneous in nature. Looking at the evidence, I find TPW1 to be a credible and truthful witness.

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112 Mr Wong AEIC at para 7.

113 Transcripts, 5 July 2018, p 132 line 10 p 133 line 11.

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153 In the light of the foregoing, when I compare the defendant's evidence against the Third Party's evidence, I am satisfied, on a balance of probabilities, that TPW1 did explain the nature and terms of the OCBC Mortgage – particularly that it was an all-moneys mortgage – to the defendant and Mr Kung at the meeting on 22 January 2013. There is no evidence to suggest that TPW1 was negligent when he handled the execution of the OCBC Mortgage and when he explained the nature and terms of the OCBC Mortgage to the defendant and Mr Kung.

154 Therefore, I find that the Third Party was not negligent in advising the defendant on the nature of the OCBC Mortgage. Logically, it follows that it is unnecessary for me to decide the apportionment of liability between the defendant and the Third Party in relation to the claim by the plaintiff against the defendant.

Summary of findings

155 To summarise, I find that the defendant's defence of *non est factum* has not been made out. The defendant had known that the OCBC Mortgage was an all-moneys mortgage since receiving the 11 Jan Letter which was sent to her and Mr Kung prior to their execution of the OCBC Mortgage on 22 January 2013. Furthermore, I find that TPW1 and the Third Party were not negligent in advising the defendant and Mr Kung on the nature and terms of the OCBC Mortgage at the meeting on 22 January 2013. The defendant understood that the OCBC Mortgage was an all-moneys mortgage before she signed it on 22 January 2013. In any event, I am unable to accept that the defendant did not read or take any reasonable steps to understand the nature of the OCBC Mortgage.

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156 Even if the defence of *non est factum* had been established, I find that the defendant is estopped from seeking to avoid her liabilities under the OCBC Mortgage. The plaintiff was not involved in the defendant's execution of the OCBC Mortgage. The plaintiff had relied on the signed Letter of Confirmation and the signed Form of Confirmation and Consent as unequivocal representations by the defendant stating that she understood and agreed to be bound by the OCBC Mortgage. In reliance thereof, the plaintiff had disbursed the sums under the Revised Facilities to the Company to its detriment. Therefore, in the light of the circumstances of this case, the defendant should also rightly be estopped from relying on *non est factum* to avoid her obligations towards the plaintiff under the OCBC Mortgage. In the same vein, the defendant is estopped from claiming a return of the net sale proceeds from the sale of the Property and the moneys the plaintiff had taken from her savings account and time deposit account which the plaintiff had used to set off against the sums owed by the defendant under the OCBC Mortgage.

Conclusion

157 For the above reasons, I rule in favour of the plaintiff and dismiss the defendant's counterclaim against the plaintiff. I also dismiss the defendant's claim against the Third Party.

158 The defendant will pay costs to the plaintiff for the main suit and the counterclaim. The defendant will also have to pay costs to the Third Party. The costs will be agreed or taxed.

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Tan Siong Thye
Judge

Ong Boon Hwee William, Alexander Yeo and Royston Tan Chu Zheng (Allen & Gledhill LLP) for the plaintiff;
Beh Eng Siew and Lim Jia Ying (Lee Bon Leong & Co) for the defendant;
Lok Vi Ming, SC, Lee Sien Liang Joseph, Carren Thung Qiaolin and Natalie Joy Huang Kim Lian (LVM Law Chambers LLC) for the third party.

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