IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 116

Suit No 586 of 2019
(Registrar's Appeal No 8 of 2020)

Between

Oversea-Chinese Banking Corporation Limited

… *Plaintiff*

And

Lim Sor Choo

… *Defendant*

GROUNDS OF DECISION

[Contract] — [Contractual terms] — [Express terms]
[Banking] — [Lending and security]

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Oversea-Chinese Banking Corp Ltd
v
Lim Sor Choo

[2020] SGHC 116

High Court — Suit No 586 of 2019 (Registrar's Appeal No 8 of 2020)
Dedar Singh Gill JC
11 February 2020

4 June 2020

Dedar Singh Gill JC:

1 This is an appeal from the decision of the Assistant Registrar dated 23 December 2019 ("the Decision") pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). In the Decision, the Asst Registrar held that the defendant was liable for US$131,512,173.91 under a judgment entered in the plaintiff's favour against the defendant's husband ("the Judgment Debt") pursuant to the terms of a joint mortgage ("the Mortgage"). The Judgment Debt arose out of a guarantee given by the defendant's husband to support a loan granted to two companies. I dismissed the appeal. The defendant has appealed against my decision. I now set out my grounds.

Facts

2 On 21 July 2011, the plaintiff ("the Bank") issued an offer letter to the defendant and her husband ("the Borrowers") offering them a loan facility of

S$2.7m ("the Loan Facility") for the purpose of purchasing a property ("the Property").[1] On 23 July 2011, the Borrowers accepted the offer letter ("the Offer Letter").[2] The Offer Letter stated that the offer was "on the terms and conditions set out … in our 'Terms and Conditions Governing Mortgage Loans'".[3]

3 Under cl 2 of the Offer Letter, the Borrowers were required to secure the Loan Facility with a mortgage over the Property.[4] To this end, the Borrowers executed the Mortgage on 26 September 2011 and registered it three days later.[5] The Mortgage was expressly subject to the terms set out in the Bank's "Memorandum of Mortgage" as then in force ("the Memorandum") and Annex 1 of the Mortgage ("Annex 1").[6] The Offer Letter, the Memorandum and Annex 1 are hereinafter collectively referred to as "the Facility Documents". In particular, cl 1.1 of Annex 1 states:[7]

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1 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 11.

2 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 22.

3 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 11.

4 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, pp 12-13.

5 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, pp 107-108.

6 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 108.

7 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 111.

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In consideration of the Mortgagee having at the request of the Mortgagor agreed to make or continuing to make available to the Mortgagor general banking facilities including but not limited to advances, revolving credit facilities, loans, guarantee facilities and term facilities whether in Singapore Dollars and/or in foreign currencies and such other general banking and credit facilities or other accommodation, up to such amount or amounts as the Mortgagee may from time to time agree by permitting the Mortgagor to overdraw on the account or accounts current or to draw down or utilise any facilities on any other account or accounts whatsoever whether current or revolving or continuing or whether in instalments or otherwise which the Mortgagor now has or may at any time hereafter have with the Mortgagee either solely or jointly or jointly with any other person or persons in partnership or otherwise (hereinafter called 'the said Accounts' which expression shall wherever the context admits include any one or more of the accounts hereinbefore mentioned) on such terms as may from time to time be fixed by the Mortgagee in its absolute discretion, the Mortgagor hereby covenants with the Mortgagee as follows:-

1. To pay:-

1.1 To the Mortgagee on demand made to the Mortgagor 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 Mortgagee by the Mortgagor either as principal or as surety and either solely or jointly or jointly with any other person or persons in partnership or otherwise whether on the said Accounts or otherwise in any manner whatsoever or for all other liabilities whether certain or contingent primary or collateral including (but without prejudice to the generality of the foregoing) the balance which at the date of such demand shall be owing or remain unpaid to the Mortgagee by the Mortgagor on the said Accounts or otherwise in any manner whatsoever whether in respect of moneys advanced or paid to or for the use or accommodation of the Mortgagor either solely or jointly or jointly with any other person or persons in partnership or otherwise or in respect of cheques bills of exchange promissory notes or other negotiable instruments signed drawn accepted or indorsed by or on behalf of the Mortgagor either solely or jointly or jointly with any other person or persons in partnership or otherwise or discounted paid or held by the Mortgagee either at the request of the Mortgagor

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> or in the course of business or otherwise or in respect of letters of credit bills notes drafts trust receipts guarantees indemnities or other documents or instruments signed by the Mortgagor either solely or jointly or jointly with any other person or persons in partnership or otherwise and held by the Mortgagee or in respect of any other banking facilities whatsoever pursuant to the terms and conditions of any offer facility or commitment letter(s) or agreement(s) in relation thereto as revised varied amended supplemented or superceded [*sic*] from time to time (hereinafter collectively referred to as 'the Letter of Offer');

4 Clauses 1.2, 1.3 and 2 provide as follows:

> 1. To pay:-
>
> …
>
> 1.2 To the Mortgagee 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 until full payment at the rate or rates and in the manner provided under the terms of any banking facilities extended by the Mortgagee to the Mortgagor from time to time or at such other rate or rates and with such periodic rests as may from time to time be fixed by the Mortgagee; and
>
> 1.3 To the Mortgagee interest on any balance owing or remaining unpaid if and when the said Accounts shall be closed or shall cease to be current at the rate or rates and in the manner aforesaid or at such other rate or rates and with such periodic rests as may from time to time be fixed by the Mortgagee from the date of such demand being made or from the date such account intended to be hereby secured shall be closed or shall cease to be current (as the case may be) whichever is the earlier until full payment is received by the Mortgagee both after as well as before judgment (if any) shall have been obtained in respect thereof.
>
> 2. That this Mortgage expressly authorises the Mortgagee 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 Mortgagor either solely or jointly or

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> jointly with any other person or persons in partnership or otherwise and all moneys and liabilities owing to the Mortgagee 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.

5 Subsequently, by way of a letter of offer in writing dated 14 July 2017, the plaintiff's branch in Hong Kong offered banking facilities to Coastal Oil (HK) Limited and Coastal Oil Singapore Pte Ltd ("the Companies").[8] The Companies duly accepted the letter of offer and utilised the banking facilities ("the Coastal Facilities").[9] By a guarantee in writing dated 19 February 2016, the defendant's husband had earlier furnished a guarantee in favour of the Hong Kong branch to pay the sums owed by the Companies ("the Guarantee").[10] On 13 December 2018, Coastal Oil Singapore Pte Ltd was placed under provisional liquidation.[11] In a letter dated 19 December 2018, the Bank demanded that the defendant's husband make full payment of the sums due and owing by virtue of the Guarantee.[12] At a creditors' meeting held on 28 December 2018, Coastal Oil Singapore Pte Ltd appointed liquidators.[13]

6 On 14 January 2019, the Bank commenced Suit No 51 of 2019 in respect of sums due and owing by the defendant's husband.[14] Since the defendant's husband did not enter an appearance, the Bank obtained default judgment against him on 8 February 2019 for the sum of US$131,512,173.91 plus

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8 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 6.

9 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 12.

10 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 6 and 17.

11 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 19.

12 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 22.

13 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 19.

14 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 10.

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interests and costs.[15] On 24 April 2019, the Bank issued to the Borrowers a notice of default.[16] On 17 June 2019, the Bank commenced this action against the defendant.

7 The defendant argued that she was not jointly and severally liable for the Judgment Debt based on a proper construction of the Facility Documents. Given that the issue of liability rested on the construction of the contractual terms, both parties agreed (upon the plaintiff's application) that the court should determine the issue pursuant to O 14 r 12 of the Rules of Court without a full trial. On 23 December 2019, the Asst Registrar delivered the Decision.

Decision below

8 In the Decision, the Asst Registrar made the following findings:

(a) first, on the proper construction of the Facility Documents, the defendant is jointly and severally liable for all sums owing and which remain unpaid to the Bank by a co-borrower;

(b) second, on the proper construction of the Facility Documents, the covenant to pay under cl 1.1 of Annex 1 includes liabilities arising out of a judgment debt that a co-borrower owes to the Bank; and

(c) third, on the proper construction of the Facility Documents, the defendant is liable to pay the Bank's costs on an indemnity basis.

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15 Lim Sor Choo's 1st affidavit dated 25 September 2019, p 23.

16 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 125.

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9 The Asst Registrar noted that the defendant's submissions were often contradictory. It was not clear whether the defendant took the view that the covenant covered moneys that the Bank loaned to:

(a) both the Borrowers under the housing loan;

(b) both the Borrowers jointly;

(c) either of the Borrowers; or

(d) either of the Borrowers, inclusive of sums owed to the Bank by way of guarantee.

10 The Asst Registrar held that the case turned solely on the construction of the Facility Documents and cl 1.1 of Annex 1 in particular. In this regard, she made two observations:

(a) first, under cl 1.1, the defendant and her husband are liable for debts owed by each or both of them to the plaintiff, independent of the housing loan and to no limit; and

(b) second, under cl 1.1, such debts include the Judgment Debt in question.

11 She concluded that the language of cl 1.1 was clear. The Borrowers had to pay "all such sums of money … [that are] owing and remain unpaid to the Mortgagor either as principal or surety and either solely or jointly … whether on the said Accounts or otherwise in any manner whatsoever or for all other liabilities". This included the Judgment Debt.

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12 As alluded to at [8(c)] above, the Asst Registrar further held that the defendant was liable to pay the plaintiff's costs on an indemnity basis under cl 15 of the Offer Letter (stating that "[the Borrowers] must at all times keep us fully covered against any … costs … including costs … arising from enforcing our rights against any security [the Borrowers] and the guarantor provide"). The Asst Registrar also noted that the defendant did not, in the proceedings, contest this issue.

The parties' arguments

13 In the present appeal, the defendant argues that no reasonable person with the knowledge available to the parties at the time of contracting would understand cl 1.1 of Annex 1 to mean that the defendant agreed to be liable for a judgment debt worth US$131,512,173.91 arising under a guarantee independently provided by her husband in respect of companies that she had no interest in. Clause 1.1 of Annex 1 should be interpreted purposively and contextually, having regard to the entirety of Annex 1 and the Facility Documents. In particular, the defendant makes the following arguments:

(a) The defendant accepts that cl 1.1 of Annex 1 covers the Borrowers' liability whether as "principal" or "surety", but argues that the term "surety" must be read with the mortgagee's covenant to extend facilities to the mortgagor "solely or jointly or jointly with any other person or persons in partnership or otherwise".[17] Given that the Bank extended the Coastal Facilities solely to the Companies (who are third parties to the Facility Documents), the situation falls outside the "surety" situation contemplated under cl 1.1 of Annex 1. If the parties had

17 Defendant's submissions, para 29.

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intended for the defendant to be liable for such moneys guaranteed by her husband under a different agreement, the Bank would have expressly identified that scenario. Clauses 1.2 and 1.3 of Annex 1 (concerning the payment of interest) are similarly confined to situations where the Bank extends the Coastal Facilities to a mortgagor solely or jointly but not where facilities are extended to a third party.

(b) Clause 1.1 of Annex 1 should not be construed literally and in a vacuum and instead regard must be had to the context of the Facility Documents.[18] Specifically, cl 6 of Annex 1 provides that in the event of any inconsistency between the terms and conditions in the Mortgage and those in the Offer Letter, the terms and conditions in the Offer Letter prevail. Further, the purpose of cl 1.1 of Annex 1 is a narrow one. Clauses 1.2 and 1.3 of Annex 1 do not apply to any other facility except to the Loan Facility extended to the Mortgagors. Likewise, cl 2 of Annex 1, which operates to secure the Loan Facility with the Mortgage, does not address a liability akin to the Judgment Debt. The "in consideration" clause prior to cl 1 similarly emphasises that the relevant subject matter in question is the Loan Facility and nothing more. Moreover, cl 1(a) of the Offer Letter sets out the purpose of the Loan Facility, which is to "finance [the] purchase of the Property for Investment by the Mortgagor(s)".[19] Clause 2 of the Offer Letter also refers to the mortgage-security that the Borrowers had to execute. Finally, cl 1.1 of the Memorandum provides for repayment of the Mortgage, which again

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18 Defendant's submissions, paras 24-25, 33.

19 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 11.

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focuses on the Mortgage.[20] The Facility Documents had to guide the interpretation of cl 1.1 of Annex 1 because the court construes linked contracts consistently with one another: *Durham v BAI (Run Off) Ltd (in scheme of arrangement)* [2012] ICR 574 at [69].

(c) During oral arguments, counsel for the defendant argued that the broad expression "otherwise in any manner whatsoever" in cl 1.1 of Annex 1 is qualified and explained by the subsequent phrase "whether certain or contingent primary or collateral including … the balance which at the date of such demand shall be owing or remain unpaid to the Mortgagee by the Mortgagor" in cl 1.1 of Annex 1. These examples do not include a judgment debt or a guarantee independently given by a co-mortgagor. The defendant relies on the remark by Lord Neuberger of Abbotsbury PSC in *Arnold v Britton* [2015] 2 WLR 1593 ("*Arnold*") at [17] that "… the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision". If the Bank had intended to provide for the situation before the court, the drafter would have directed the language to such a scenario.

(d) In addition, the defendant relies on decided cases in the UK to argue that the court should construe an "all moneys" clause narrowly. For example, the English Court of Appeal in *Lloyds TSB v Shorney* [2002] 1 FLR 81 ("*Lloyds*") refused to allow an expansive interpretation of an "all moneys" clause and prevented the bank from bringing within the mortgage terms liabilities that arose under guarantees given by the

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[20] Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 50.

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mortgagor subsequent to the executed mortgage. The defendant also cites the judgment of Lord Millett in *AIB Group (UK) Ltd v Martin and another* [2002] 1 WLR 94 ("*AIB"*) at [8] and [15], who expressed the possibility of interpreting an "all moneys" clause in a manner that avoided imposing "secondary liability as surety in addition to a primary liability as principal debtor".

(e) Finally, the defendant relies on several Australian decisions to argue that "all moneys" clauses should be construed to exclude liabilities of a *character fundamentally different* from those contemplated by the agreement. In the Australian decision of *Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 13146 ("*Estoril*") at 13151–13152, Young J articulated several guidelines illustrating how courts often approach dragnet clauses, one of which states that "[o]nly debts of the same type or character as the original debt are secured by the mortgage". The guideline was affirmed and applied in *Perpetual Trustee Company Ltd v Mariam Mohamad Moussa* [2013] NSWSC 131 at [59] (holding that an "all moneys" clause does not extend to include liability in restitution) and *In the Matter of John Peter Piccolo, Dean Royston McVeigh v National Australia Bank Limited* [2000] FCA 187 at [85] (accepting that an "all moneys" clause would not extend to secure tortious liability). This approach is contended to be consistent with the Court of Appeal's approach in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Y.E.S.*") at [31], which provides that where the plain and unambiguous meaning of the text leads to an absurd result, the court will have to undertake careful analysis of the text and context to ascertain whether the text is indeed plain and unambiguous. Here, the stark facts put the case into such a category

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where the plain and unambiguous meaning of the text led to an absurd result, in three ways.[21] First, the new liability arose as a result of a guarantee provided in support of debts owed by third party companies with which the defendant had no connection. Second, the obligation amounting to US$131,512,173.91 was different in nature and scale to the S$2.7m property loan. Third, the rights under the Guarantee merged into the Judgment Debt (the liability which the Bank now relies on) and that is, on any view, a liability fundamentally different from the property loan.

14 In response, the plaintiff argues that the language of the Facility Documents is clear and that the court must give effect to what a document, which the parties have contractually agreed to be bound by, expressly and specifically states:

(a) Clause 1.1 of Annex 1 requires the Mortgagors to pay "on demand … all such sums of money which are now or shall from time to time or at any time hereafter be owing … to the Mortgagee … either as principal or as *surety* and either solely or jointly or jointly with any *other* person or persons in partnership or *otherwise* whether on the said Accounts or *otherwise in any manner whatsoever* or for *all other liabilities* …" [emphasis added].[22] Furthermore, cl 7 of Annex 1 provides that "[w]here 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

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21 Defendant's submissions, para 41.

22 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 111.

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such persons jointly and severally".[23] The Memorandum provides that the Borrowers would "hereby jointly and severally covenant with the Bank … [t]o pay to the Bank all monies which are now or shall from time to time or at any time be owing or remain unpaid to the Bank".[24] Moreover, cl 9.26 of the Memorandum provides that "where two or more persons are included in the expression 'the Mortgagor' or 'the Borrower' all covenants stipulations and provisions herein contained shall be deemed to be made by and to apply to and be binding upon all such persons jointly and severally".[25]

(b) The defendant's purposive and contextual approach cannot override the plain wording of the contract. No canon of construction allows the court to ignore the intention of the parties, effectively rewriting the terms of the contract: *Y.E.S.* at [32]; *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [30]; *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 ("*Lucky Realty*") at [3]. More specifically, this approach was affirmed by the Singapore Court of Appeal in the context of an "all moneys" clause: see *Re Tararone Investments Pte Ltd* [2001] 3 SLR(R) 61 ("*Re Tararone*") at [19].

(c) Courts in foreign jurisdictions have similarly affirmed a broad construction of "all moneys" clauses. In particular, the House of Lords in *AIB* did not hesitate to construe an "all moneys" clause such that one borrower's liability extended to debts incurred solely by the other party

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23 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 112.

24 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 50.

25 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 103.

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when both had undertaken to be jointly and severally liable for each other's debts.

Issue before the court

15 The only issue is whether, on a proper interpretation of the Facility Documents, the language of cl 1.1 is broad enough to include the Judgment Debt.

My decision

16 Having read the parties' submissions and heard the oral arguments, I found that the defendant was jointly and severally liable for the Judgment Debt pursuant to cl 1.1 of Annex 1. I elaborate on my reasons below.

17 At the outset, the defendant's reliance on a purposive and contextual approach to interpreting the Facility Documents is misplaced. The following principles set out by the Court of Appeal in *Yap Son On* are relevant:

(a) the text of the parties' agreement is of first importance in ascertaining the parties' objective intentions (at [30]); and

(b) in ascertaining the meaning that the words of a contract would convey to a reasonable person with the relevant background knowledge, the words used by the parties occupy primacy of place (at [38]).

18 That the language of an agreement assumes central importance is an incontrovertibly well-established principle: see *Y.E.S.* ([13(e)] *supra*) at [32]; *Lucky Realty* ([14(b)] *supra*) at [3]. The defendant accepted in her own submissions to the court that "[i]t is not for the Court to rewrite the parties' bargain" and "[i]f the language is unambiguous, the Court must apply it": *Al*

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Sanea v Saad Investments Co Ltd (in liquidation) [2012] EWCA Civ 313 at [31].[26] More specifically, "all-obligations" or "dragnet" clauses such as cl 1.1 are not exempt from the general principles of contractual interpretation, for it has been observed in *Burgess on Law of Loans and Borrowing* (Struan Scott ed) (Sweet & Maxwell, Looseleaf Ed, March 2016 release) ("*Burgess*") at para 5.17 that "[i]n interpreting such clauses the usual starting point is that general contract principles apply". Accordingly, I cannot accept the defendant's approach that begins and ends with a purposive and contextual interpretation of the agreement.

19 Rather, I arrive at my conclusion on the basis of the unambiguously clear language of the Facility Documents. On a plain reading of cl 1.1 of Annex 1, I find that the words "all such sums of money which are now … owing or remain unpaid to the Mortgagee by the Mortgagor either as principal or as surety and either solely or jointly … whether on the said Accounts or otherwise in any manner whatsoever or for all other liabilities" encompass a range of liabilities that includes the Judgment Debt. The fact that the defendant's husband entered into the Guarantee independently does not bring the situation beyond cl 1.1 because cl 7 of Annex 1 makes clear that "[w]here 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".[27] There is no principle of interpretation warranting a departure from the broadly-worded and wide-ranging language of Annex 1.

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26 Defendant's submissions, para 16.

27 Chua Tiong Nam Martin's 1st affidavit dated 29 August 2019, p 112.

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20 The defendant's assertion that the broad language in cl 1.1 of Annex 1 is qualified by the subsequent phrase "whether certain or contingent primary or collateral including … the balance which at the date of such demand shall be owing or remain unpaid to the Mortgagee by the Mortgagor" holds no water. This attempt to narrow the scope of cl 1.1 neglects the words "all other liabilities … including (but without prejudice to the generality of the foregoing)". The defendant also ignores the second half of cl 1.1, which states that the Borrowers' obligation to pay extends to "the balance … on the said Accounts or otherwise in any manner whatsoever whether … in respect of … *guarantees* … signed by the [Borrowers] … *solely* … or in respect of any other banking facilities whatsoever" [emphasis added]. Since the Judgment Debt stemmed from the Guarantee, it also falls squarely within the language of this part of cl 1.1.

21 Contrary to the defendant's submission, the "in consideration" clause in Annex 1 does not only refer to the Loan Facility. The "in consideration" clause states:

> In consideration of the Mortgagee having at the request of the Mortgagor agreed to make or *continuing to make available* to the Mortgagor general banking facilities *including but not limited to* … guarantee facilities … whether in Singapore Dollars and/or in foreign currencies … up to amount or amounts as the Mortgagee may from time to time agree …, the Mortgagor hereby covenants with the Mortgagee:
>
> [emphasis added]

Plainly, the "in consideration" clause covers a broad spectrum of banking facilities.

22 In addition, the defendant misconstrues Lord Neuberger's observation in *Arnold* ([13(c)] *supra*) at [17] in asserting that the language of the document "must have been specifically focussing on the issue covered by the provision". The entirety of the passage is reproduced here:

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> 17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. *And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*
>
> [emphasis added]

Considering the passage in full, Lord Neuberger was not prescribing a novel canon of interpretation but was instead underscoring the centrality of the text and textual interpretation to the construction of contractual terms. This is diametrically opposed to the defendant's case. Indeed, the Singapore Court of Appeal in *Yap Son On* ([14(b)] *supra*) at [38] affirmed Lord Neuberger's exposition in *Arnold* and emphasised, in similar terms, that "the words used by the parties occupy primacy of place".

23 In any event, the defendant's proposition that the language of a document "must have been specifically focussing on the issue covered by the provision" is unsustainable. The defendant cannot reason backwards to argue that the parties did not contemplate an occurrence and therefore conclude that the contract did not cover that situation. It is for the court to examine the language of the document to see whether the words have the versatility to accommodate the circumstances. As observed in *Burgess* at para 5.16:

> Most professionally drawn loan agreements define 'borrowings' in such a way as to include not only the sums currently the subject of the agreement but also future sums lent or in respect of which the borrower might become indebted to the lender or, indeed, in respect of which the lender might find itself

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> guarantor of the borrower's obligations. Such clauses are usually tied to some security. An example would be:
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> > 'The mortgagor hereby charges to the Bank its undertaking (including goodwill) and all its assets whatsoever and wheresoever both present and future … with the repayment to the Bank of all moneys now or hereafter to become owing or payable to the Bank by the mortgagor in any circumstances or manner whatsoever including but without limiting the foregoing either alone or in conjunction with any person … or on any other account whatsoever including any moneys which may be due and owing by the mortgagor to the Bank under or by virtue of any instrument or guarantee executed by the mortgagor in favour of the Bank to secure repayment of any advance made by the Bank to any person ALSO any moneys which the Bank shall pay or become liable to pay for or on account of the mortgagor either by direct advances or by reason of the Bank's entering into any guarantee for or on behalf of the mortgagor'.

24 Even assuming for the sake of argument that the defendant's contextual and purposive approach applies in the present case, the attempt to limit cl 1.1 with reference to cll 1.2 and 1.3 of Annex 1 (as set out at [4] above) does not succeed. It is precisely because the words in cll 1.2 and 1.3 are restrictive that one might argue that cl 1.1 was, in contrast, intended to be broader than the other two clauses. Clauses 1.2 and 1.3 merely refer to interest on any balance owing to the Bank out of any other facilities, but cl 1.1 is the only clause referring to "all such sums of money" and was thus intended to cover a wide range of liabilities.

25 Finally, the authorities that the defendant relies on do not assist her case. The Singapore Court of Appeal's decision governing the construction of an "all moneys" clause, *Re Tararone* ([14(b)] *supra*), does not cohere with the defendant's approach. In *Re Tararone*, the bank sought to enforce a charge over money in a fixed deposit account maintained by Tararone, which was created to secure the debt of Sogo. Specifically, the relevant clause provided that Tararone

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would secure the overdraft facility "together with all monies and liabilities which may be owing to [the bank] from time to time": see *Re Tararone* at [14]. When Sogo eventually experienced financial difficulties, the bank indicated (without informing Tararone) that it would honour specific cheques provided that the deductions did not exceed the security. Sogo then drew 33 cheques and made a further three GIRO deductions. Subsequently, Sogo and Tararone were placed under judicial management. The judicial managers of Tararone resisted the bank's application, and the sole issue was whether the charge as properly construed secured Sogo's liabilities in respect of the 33 cheques and three GIRO deductions. The High Court held that "all monies and liabilities which may be owing to [the Bank] from time to time" under cl 1(c) of the facility letter referred to "ancillary debts such as interests and costs arising under the facility" but not "money or liability outside the facility": see *Re Tararone Investments Pte Ltd* [2001] 1 SLR(R) 352 at [2]. The Court of Appeal helpfully summarised the High Court's ruling at [12] of its judgment:

> 12 The judge below held that the charge was only to secure the $18m overdraft debt which Sogo owed to DBS at the time the charge was created and that the phrase 'all moneys and liabilities which may be owing to the Bank from time to time' appearing in the facility letter related to ancillary debts such as interests and costs arising under the facility; it could not mean any money or liability outside the facility. He was of the view that while the wording of the charge seemed to be wide, the clauses therein must be read together to determine the parties' intention. Clause 4 referred to the termination provision of the facility letter and the right of the chargor to withdraw such amount from the FD as was commensurate with the sums repaid by Sogo in accordance with the repayment schedule. Clause 6 referred to Tararone's obligation to keep the charge as a continuing security up to $18m and the expression 'continuing security' ought not be given a wider meaning than was plain in the context of the facility letter and the charge. He felt that it could not have been the intention of the parties that the charge should secure any further loans made by DBS to Sogo when the overdraft facility granted under the letter of 4 March 1998 had been terminated.

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26 The High Court's ruling was reversed on appeal. In allowing the bank's claim to enforce these subsequent drawdowns, the Court of Appeal rejected Tararone's argument that the expression "all monies and liabilities" was limited to the overdraft facility. The Court of Appeal held at [15]–[19]:

> 15 We would observe that, if that was the intended meaning, then the word 'thereunder' should appropriately have appeared after the phrase 'may be owing'. Indeed, if that was the intention, there would have been no necessity to refer to 'all monies and liabilities which may be owing to the bank from time to time'. It would have sufficed to merely state 'The above facility shall be secured by …'
>
> 16 We shall now turn to consider the provisions in the charge. Under cl 1, the charge was expressly stated to be in respect of 'advances, loans credit and/or other banking facilities or accommodation' given to Sogo, all of which facilities are collectively referred to as 'the banking facilities'. Under that clause, Tararone covenanted to pay to DBS, on demand, all sums of money owing by Sogo in respect of those banking facilities. Clause 2 charged the FD with the repayment of all moneys owing by Sogo to DBS. Tararone further confirmed that the FD would be held by DBS as a continuing security for the due payment of all of Sogo's liabilities owing from time to time to DBS. Clause 3 authorised DBS, without notice to Tararone, to appropriate all or any part of the FD towards payment of all of Sogo's liabilities to DBS. Finally, cl 6 reaffirmed that notwithstanding the other provisions, the charge 'shall be and remain a continuing security for all moneys and liabilities from time to time owing by Sogo to DBS in respect of the banking facilities'. In the light of the terms of these clauses, there cannot be any doubt that this was an 'all money' charge.
>
> 17 While it is true that the original reason for the creation of the charge was the $18m overdraft facility which DBS had then granted to Sogo, and which DBS were prepared to continue to extend to Sogo, the express terms of the charge clearly go beyond that. Nowhere is it stated, nor can it be implied, that the charge merely secures the payment of the overdraft facility. The court ought to give effect to what the document expressly and specifically stated.
>
> 18 In this connection reference may be made to *Bank of India v Trans Continental Commodity Merchants Ltd* [1983] 2 Lloyd's Rep 298 and *Re Rudd & Son Ltd* [1986] 2 BCC 98, 955. Admittedly, in these two English cases, the charging provisions were not identical to that of the present case and they also specified 'on any account whatsoever' or 'any other account',

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> which are not to be found in our instant charge. However, in our opinion, these differences notwithstanding, they do not render the charge here any less an 'all-money' charge. While the words 'any other account' do not appear in the present charge, it must be borne in mind that cl 1 refers to 'advances, loans, credit and/or other banking facilities or accommodation'. It is a very wide clause. If the intention was merely to secure that specific overdraft account, it would have easily so stated. Furthermore, Tararone also covenanted to pay on demand 'all sums of moneys *which now or thereafter from time to time and at any time* shall be owing' in respect of the aforesaid banking facilities. This is again inconsistent with any intention to only repay the debt in the overdraft account.
>
> 19 In our judgment, the charge is truly a charge in respect of all moneys from any account which are owed by Sogo to DBS. We would reiterate that, if the overdraft account was all that the parties had in mind, they would have simply referred to that and would not have widened the clause to cover any 'advances, loans, credit and/or other banking facilities'. Most of the clauses in the charge may well be standard provisions (as cl 4 is clearly not) but there is no canon of construction which allows the court to ignore the express words in a document, or to rewrite the terms which the parties have agreed, unless a plain construction of the words would lead to absurdity.

27 In my view, the reasoning in *Re Tararone* applies with equal force in the present case. The clause here contains similarly broad language such as "all such sums of money which are now or shall from time to time or at any time hereafter be owing or remain unpaid", "either as principal or as surety" and "or otherwise in any manner whatsoever or for all other liabilities".

28 Additionally, the leading UK decision in respect of "all moneys" clauses, *AIB* ([13(d)] *supra*), supports the approach in *Re Tararone*. In *AIB*, Mr Martin was a property developer doing business in his own capacity and in partnership with Mr Gold. Mr Martin and the partnership borrowed money from the bank, which was secured by mortgages provided by both men individually. Clause 1 of the mortgage agreement provided that "[i]f the expression 'the mortgagor' includes more than one person it shall be construed as referring to

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all and/or any one of those persons and the obligations of such persons hereunder shall be joint and several". Clause 2(1) stated as follows:

> The Mortgagor hereby covenants with each of the Bank and the Company that it will on demand pay or discharge to the Bank and the Company:–
>
> > (1) all sums of money which have been or are now or may hereafter at any time or from time to time be advanced to the Mortgagor by the Bank or the Company (as the case may be);
> >
> > (2) all other indebtedness and/or liabilities whatsoever of the Mortgagor to the Bank or the Company (as the case may be) present, future, actual and/or contingent and whether on any banking or other account or otherwise in any manner whatsoever including such indebtedness and/or liabilities due under the terms hereof (whether alone or jointly with any other person and in whatever style, name or form and whether as principal or surety);
>
> …

29 When the partnership failed, the bank called in all the loans. The question posed before the House of Lords was whether a co-mortgagor (Mr Gold) could be jointly and severally liable for the debt owed to the bank by the other co-mortgagor (Mr Martin) alone, pursuant to the "all moneys" clause at [28] above. Jacob J answered the question affirmatively. The Court of Appeal agreed with the judge. The House of Lords upheld the Court of Appeal's decision unanimously. As Lord Scott of Foscote noted, it was clear that both mortgagors had covenanted to pay "all other indebtedness and/or liabilities whatsoever of the mortgagor to the bank" (*AIB* at [41]), even if this left "Mr Gold under obligations that he had not foreseen and had not intended at the time he signed the mortgage" (*AIB* at [44]). In my view, the present case finds a strong analogue in *AIB*, for cl 1.1 of Annex 1 is equally broad as the "all moneys" clause in that decision.

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30 The defendant in the present case attempted to reiterate Mr Gold's argument that the "all moneys" clause should be construed on a distributive basis such that liabilities for the separate debts of the individuals are attributed to the individuals who had originally incurred the debt. I find no basis to accept this argument. While both the Court of Appeal and House of Lords grappled with this submission, neither court accepted the argument. Lord Rodger of Earlsferry held that the joint and several "all moneys" clause precluded the notion that liability entailed mere payment of a *pro rata* share of debts: *AIB* at [48]. Notwithstanding the sympathy that the law lords had for Mr Gold's plight, the House of Lords felt constrained to construe the words as they stood in the absence of any rectification.

31 As alluded to by the defendant (see [13(d)] above), Lord Millett opined that it was possible to construe cl 2(1) in a distributive manner to avoid duplicative and secondary liability as a surety in addition to primary liability as a debtor: *AIB* at [8] and [15]. When read together with the interpretation clause, cl 2(1) provided that (*AIB* at [49]):

> Mr Martin and Mr Gold and each of them hereby jointly and severally covenant with … the bank … that they and each of them will on demand pay or discharge to the bank … all sums of money … advanced to Mr Martin and Mr Gold or either of them by the bank …

32 Two interpretations of this clause were considered in *AIB* ([13(d)] *supra*). On one view, the provision imposed an obligation on both Mr Martin and Mr Gold, jointly and severally, to repay all sums granted to them in partnership and also to repay all sums loaned to them individually. On the other hand, Lord Millett thought it was possible to interpret the clause such that liability for the individual debts would be attributed only to the person who incurred the debts. The law lord arrived at this view by virtue of the maxim

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reddendo singular singulis, which permitted the separation of plurals into their respective singular components. Lord Millett explained in *AIB* at [15]–[18]:

> 15 … A distributive construction is commonly adopted when a plural subject is followed by a plural predicate and the plurals are broken down into their component singulars. An example from everyday speech would be to say: 'A and B took their children to school.' Prima facie the word 'their' means 'belonging to both of them'. But this is not its only possible meaning, and if A and B are not married it is obviously not its meaning. In that case the word 'their' means 'of each of them'. But this means that A and B took *their respective* children to school, not each other's children. The children are distributed to the relevant parent. And it goes further than that. Although the word 'school' is in the singular, it may conceal a plural. If necessary, the sentence means that A and B took the children to their respective schools.
>
> 16 This is a well-established principle of construction. It often, and perhaps usually, gives the words their most natural meaning. It parades under a Latin name *reddendo singula singulis*. This simply means that, when plurals are broken down, each singular component must be attributed to its respective singular and not to every other possible singular. It is a broad and general principle which departs from the literal and grammatical meaning and does not depend upon minutiae of language.
>
> 17 In the present case the principle would operate in two ways. It would apply the interpretation clause to clause 2(1) by attributing the obligation to repay the moneys advanced to Mr Martin and Mr Gold jointly to their joint and several covenant, thereby removing the unnecessary duplication resulting from the attribution of the same obligation to their individual covenants. This reading preserves the identity between the covenantor and the subject-matter of the covenant, and makes no difference to the effect of the joint mortgage. It is the most natural way to read the operative clause and ought not to be controversial. Mr Martin and Mr Gold thereby jointly and severally covenant to pay the joint debts and each of them separately covenants to pay the separate debts.
>
> 18 Critically, however, a distributive application of the interpretation clause would not stop there. It would also attribute the obligation to repay the separate debts of 'the mortgagor', not to each member of the class, but to the relevant member who owed them. This is a perfectly legitimate, and in my opinion the more natural, way to apply the interpretation clause. It treats a covenant by two or more persons (insofar as

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> it means by each of them) to discharge their debts (in so far as it means the debts of each of them) as a covenant by each of them to discharge his own debts and not the debts of the other or others. Put shortly, it treats the obligation of two or more persons to pay their debts as an obligation to pay their respective debts.

33 Be that as it may, I am not persuaded to apply the foregoing analysis here for two reasons. First, Lord Rodger cast doubt on the utility of the maxim at [50], since it could not operate contrary to the intention of the parties to divide or withdraw separate debts from joint and several liability. Second, in any event, Lord Millett made the foregoing observation by way of *obiter dicta* and ultimately did not dissent in *AIB*. Observing that the other law lords were "unanimously of the opinion" that the distributive construction was not legitimate, Lord Millett was "not prepared to dissent from that view": see *AIB* at [22].

34 That *AIB* concerned a partnership does not make it a different type of case because the liabilities in a partnership are the respective liabilities of the individual partners. The authors of *Burgess* note at para 2.54:

> At English law a partnership has no legal personality separate from the personalities of its individual (or corporate) members. The liabilities of the partnership are directly the liabilities of the individual partners.
>
> … The terms of a loan transaction or a guarantee/security entered into by the partnership may provide that the partners' obligations extend beyond the partnership debt to encompass the purely personal obligations of a partner. This was the position in *AIB Group (UK) Ltd v Martin*. …

35 The UK decision of *Lloyds* ([13(d)] *supra*) is distinguishable. Unlike the present case, the facility documents in *Lloyds* at [3] contained a fixed monetary cap on the mortgage and guarantee ("provided that the total amount recoverable by the Bank from the Mortgagor under this Mortgage shall not exceed the sum of One Hundred and Fifty Thousand Pounds (£150,000)"). Nevertheless, the

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bank permitted the husband to incur liabilities exceeding the capped sum without the wife's consent or knowledge. After her husband's default, the wife paid the bank the fixed monetary cap stipulated under the guarantee and mortgage, conceding that she was liable for this sum. On these facts, the court accepted that this was the extent of her liability and that the wife had discharged her obligation.

36 The defendant relies on *Estoril* ([13(e)] *supra*) to argue that "[o]nly debts of the same type or character as the original debt are secured by the mortgage": see *Estoril* at 13151. *Estoril* was cited in *Re Tararone* ([14(b)] *supra*) at [30]–[31]:

> 30 Finally, we ought to mention that counsel for Tararone relied upon the following passage of Young J in the Australian case *Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 13,146 to contend that, in relation to the present charge, it should sensibly be read down to circumscribe its application:
>
> > However, in my view it is valid to say in Australia that when one sees a mortgage in wide words and, as I believe is the situation in the instant case, one would get absurdities if one read the wide words literally, one should pause to see whether the parties intended when they entered into the mortgage that it should cover the circumstance which has now arisen.
>
> 31 We do not see how this passage assists Tararone when the crucial qualification in that passage is 'one would get absurdities if one read the wide words literally'. The absurdities which counsel thought existed in the present charge was the alleged contradiction between cl 1 and cl 4. We have explained above the consistency between the two clauses. To give cl 1 of the charge its plain meaning would not lead to any absurdity. It is a common phenomenon for banks, in granting facilities, to require the execution of an 'all money' charge. It is also a common feature for banks to set a limit to the facilities it would accord to the borrower, which facilities would be secured by a charge.

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37 There are two reasons why *Estoril* does not provide a lifeline to the defendant's case.

38 First, as alluded to in *Re Tararone* at [30]–[31], the guideline requiring "debts of the same character" is only engaged on the condition that "one would get absurdities if one read the wide words literally": *Estoril* at 13154. The court considers whether the debts are "of the same type or character" *after* it is established that the language of the mortgage term would result in absurdities. Here, no absurd result arises from the plain language of cl 1.1 of Annex 1. Where there is no such absurdity, the literal words apply even if the language is broad. Since the defendant is unable to establish that one would arrive at absurdities if one read the wide words in cl 1.1 of Annex 1 literally, I find no basis to consider whether the debt is of the "same type or character".

39 Second, as Young J repeatedly observed in *Estoril* at 13151–13152, the operation of the guideline ultimately depends on the construction of each mortgage:

> In the United States of America, as can be seen from Nelson G and Whitman D, *Real Estate Finance Law* (2nd ed, 1988), pp 899-902, there have been a series of cases in which, what the Americans call 'dragnet clauses' have been read down by the courts. The learned authors say at p 899 that in the absence of such a method of construction, 'A mortgagor might naively execute upon his house a mortgage containing a dragnet clause and consequently find himself locked in to that particular lender for the rest of his life.' The learned authors then say: 'Dragnet clauses are generally upheld, but because their apparent coverage is so broad, and because the mortgagor is often unaware of their presence or implications, the courts tend to construe them narrowly against the mortgagee.' *However, it must be emphasised that this is a question of construction.* …
>
> …
>
> Nelson and Whitman at pp 900-2 set out nine guidelines which illustrate how courts often approach dragnet clauses *provided*

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> *that the language permits* them to do so. These can be summarised as follows:
>
> …
>
> (2) Only debts of the same type or character as the original debt are secured by the mortgage.
>
> …
>
> … Generally it seems to me the guidelines set out in Nelson and Whitman are applicable to Australian conditions though *I emphasise once more that it all depends on the construction of the individual mortgage.*
>
> [emphasis added]

On the facts, the court found in favour of the bank. In doing so, Young J held at 13154 – 13155:

> … It is not to be thought that merely because the business had changed and expanded that the mortgages which were taken out to secure working capital were not to operate as such security. But Mr Einfeld QC says that the debts which are now being sought to be charged against Estoril are so far removed from what was originally contemplated that the moneys are not within the wide all moneys clause. With respect I disagree. Even though the parties may well not have contemplated at the time of entering into the mortgages that there would be a million dollars in legal costs which came about because Mr Wimborne, the principal of Estoril, became involved with a Saudi Arabian Prince, nonetheless the parties anticipated that there would be costs and expenses including legal costs which could possibly arise in connection with the banking and which might be added on to the principal sum.
>
> Accordingly even though I am of the view that there is some such rule of construction such as Mr Einfeld QC suggests, I do not believe that it gives any comfort to Estoril in the present case. It is thus a situation where one should direct one's mind to the particular words used to see whether this liability for costs and this liability for interest is properly able to be brought within the words which the parties have used.

This is, in substance, no different from the approach that the Singapore courts apply. As I reason at [19] above, a plain construction of the Facility Documents indicates that the defendant is liable for the Judgment Debt.

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40 Finally, I note that *AIB* ([13(d)] *supra*) has been cited with approval in the Hong Kong decision of *Standard Chartered Bank (Hong Kong) Ltd v Pak Kwan Ho* [2018] HKEC 580. That case is very similar to the present one. There, the court held that a wife who was a co-mortgagor could not escape liabilities incurred by her husband under an "all moneys" mortgage (at [26]):

> 26. The use of 'all monies' clause has become a common banking practice. The Legal Charge containing such a clause is the prevalent type of security instrument adopted by most commercial banks in all ordinary transactions. Under such a charge, a co-mortgagor is jointly and severally liable to the lender for all his indebtedness as well as that of his co-mortgagor, unless a limit has been set, whether jointly incurred or alone, and whether incurred at or after the execution of the legal charge. Whether a co-mortgagor has knowledge of the level of indebtedness of his co-mortgage before entering into the 'all monies' mortgage is irrelevant. Nor is his knowledge of the co-mortgagor incurring new liabilities thereafter. Such a construction has been given effect by the highest court of England. I am unable to see how the 2nd defendant can escape from such consequence by arguing that her husband's Personal Loans and Corporate Loans were non-existent at the time of execution of the Legal Charge and were not within her contemplation. At the time she signed the Legal Charge, none of those loans were in existence, and neither were the Mortgage Loans. But on a fair reading of clause 1.01 as extended by clause 1.03, the 2nd defendant is liable for all present and future indebtedness incurred jointly by her and the 1st defendant or by either of them alone. This may not be what she subjectively intended. The court is not privy to the negotiation of the Legal Charge. It may not take into account the subjective intention of the 2nd defendant. This is the typical case where the ordinary meaning of the words makes sense in relation to the entire document and the factual background, though the consequences may appear hard for the defendants or either of them. Accordingly, the 2nd defendant is jointly liable with the 1st defendant in respect of his Personal Loans and the Corporate Loans of his companies.

Likewise, I see no compelling legal reason to depart from the approach in *AIB*.

41 Ultimately, it is not uncommon for banks to draft clauses in the widest possible terms to mitigate the uncertainty of future circumstances. It goes

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without saying that at the time of signing the contract, the Borrowers could not have known that the defendant's husband would subsequently incur a liability upwards of US$131m. But neither did the Bank and, in the final analysis, the Borrowers did sign the Facility Documents. Unfortunately for the defendant, the established rules of contractual interpretation, which accord paramount importance to the language used, leave no room for the courts to rewrite the express terms of contracts presented before them. Even hard cases and sophisticated arguments cannot avoid what a contract plainly provides.

Conclusion

42 For these reasons, I dismissed the defendant's appeal with costs to the plaintiff.

Dedar Singh Gill
Judicial Commissioner

Tan Kai Yun, Lorraine Koh Xin Yu and Rajan Menon Smitha (WongPartnership LLP) for the plaintiff;
Yogarajah Yoga Sharmini and Kannan s/o Balakrishnan (Haridass Ho & Partners) for the defendant.

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