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

[2023] SGHC(A) 6

Civil Appeal No 28 of 2022

Between

(1) Asidokona Mining Resources Pte Ltd
(2) Soh Sai Kiang

… *Appellants*

And

Alternative Advisors Investments Pte Ltd

… *Respondent*

In the matter of Suit No 734 of 2018

Between

(1) Alternative Advisors Investments Pte Ltd
(2) Supreme Star Investments Ltd

… *Plaintiffs*

And

(1) Asidokona Mining Resources Pte Ltd
(2) Soh Sai Kiang

… *Defendants*

JUDGMENT

[Agency — Ratification — Acts]
[Choses in Action — Assignment]
[Contract — Illegality and public policy — Maintenance and champerty]
[Damages — Liquidated damages or penalty]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **2**

THE ACTION BELOW 6

THE APPEAL **9**

THE THRESHOLD QUESTION **13**

INVALID RATIFICATION DEFENCE **15**

WHETHER AAI HAS DISCHARGED ITS BURDEN OF PROOF IN RESPECT OF THE LOAN DOCUMENTS AND THE DEEDS OF ASSIGNMENT 15

The Loan Documents *15*

The First Question 16

Ms Lou's evidence *16*

Mr Wong's evidence *17*

Mr Ong's evidence *18*

Conclusion on the First Question *23*

The Second Question 24

The Deeds of Assignment *28*

Significance of AAI's failure to discharge its burden of proof *29*

WHETHER THE RATIFICATION RETROSPECTIVELY FURNISHES A BASIS FOR THE ACTION 32

Further authorities *38*

Conclusion *41*

***LOCUS STANDI* DEFENCE** **41**

MAINTENANCE AND CHAMPERTY DEFENCE **43**

Version No 2: 03 Feb 2023 (10:09 hrs)

ILLEGALITY DEFENCE 46

PENALTY DEFENCE 46

CONCLUSION AND COSTS.....47

Version No 2: 03 Feb 2023 (10:09 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Asidokona Mining Resources Pte Ltd and another
v
Alternative Advisors Investments Pte Ltd

[2023] SGHC(A) 6

Appellate Division of the High Court — Civil Appeal No 28 of 2022
Woo Bih Li JAD, Kannan Ramesh JAD and Quentin Loh SJ
21 September 2022

3 February 2023 Judgment reserved.

Kannan Ramesh JAD (delivering the judgment of the court):

Introduction

1 Several difficult questions arise in this appeal. First, can a principal ratify a contract (in this case, a loan agreement) when the alleged agent did not even purport to act on behalf of the principal? Second, can the principal ratify when it cannot show that it has performed the contract (in this case, the disbursement of a loan)? Third, where legal action is commenced on a contract that has not been ratified, can ratification thereafter retrospectively remedy the cause of action and so provide legal basis for the action?

2 In our view, these questions ought to be answered in the negative. Consequently, the respondent's successful action below cannot stand, and the appeal is therefore allowed.

Background

3 The factual background to the appeal has been covered in detail in the judgment below, *Alternative Advisors Investments Pte Ltd and another v Asidokona Mining Resources Pte Ltd and another* [2022] SGHC 41 (the "Judgment"). We summarise the pertinent aspects.

4 In June 2016, the second appellant, Mr Soh Sai Kiang ("Mr Soh"), sought the assistance of Mr Wong Joo Wan ("Mr Wong") to arrange a loan of $2m (the "Loan") to the first appellant, Asidokona Mining Resources Pte Ltd ("Asidokona"). Asidokona was incorporated in Singapore and Mr Soh was its sole shareholder and director. To raise the Loan, Mr Wong contacted Mr Ong Su Aun Jeffrey ("Mr Ong"), an advocate and solicitor and then managing partner of JLC Advisors LLP ("JLC Advisors"), a Singapore law practice. Mr Wong approached Mr Ong as he was aware that Mr Ong had clients who might wish to participate in the Loan.

5 Mr Ong informed Mr Wong that he had a client (the "Investor"), who was willing to contribute $1m towards the $2m required for the Loan. Mr Wong was not informed at that time that the Investor was to be Ms Lou Swee Lan ("Ms Lou"), the sole shareholder and director of Supreme Star Investments ("SSI"), and that the investment would be made through SSI. SSI was a company registered in the British Virgin Islands (the "BVI").

6 As Mr Wong was short by $1m of the $2m required for the Loan, he decided to raise the remaining $1m himself. This comprised $500,000 from his own funds and another $500,000 which he borrowed from various persons including his colleagues at the respondent, Alternative Advisors Investments Pte Ltd ("AAI"). Mr Wong was AAI's principal director and shareholder. As

Version No 2: 03 Feb 2023 (10:09 hrs)

will be explained in greater detail below, in 2018, SSI purported to assign its interests in, *inter alia*, the Loan to AAI so that AAI could proceed to recover the debt by commencing the action below.

7 The Loan was to be for a term of three months, with interest at the rate of 5% per month, and default interest at the rate of 6% per month. Further, the Loan was to be personally guaranteed by Mr Soh and secured by a charge on Mr Soh's shares in Asidokona, representing 100% of its issued and paid-up capital (the "Charged Shares").

8 These terms were recorded in a loan agreement (the "Loan Agreement"), a deed of charge (the "Deed of Charge") and a personal guarantee issued by Mr Soh (the "Personal Guarantee") (collectively the "Loan Documents"), which were prepared by Ms Pok Mee Yau, a colleague of Mr Ong at JLC Advisors. Notably, per the Loan Documents, despite contributing only half of the Loan, SSI was the sole lender to Asidokona, and the sole chargee of the Charged Shares per the Loan Agreement and Deed of Charge respectively. Mr Wong was not stated or identified as a lender or chargee in the Loan Agreement or the Deed of Charge respectively. Therefore, the purported parties to the Loan Agreement and Deed of Charge were SSI and Asidokona, and Mr Soh and SSI respectively, and as regards the Personal Guarantee, SSI and Mr Soh.

9 The Loan Documents were signed by Mr Soh on 22 July 2016 and dated the same date. On the same day, $1.69m was disbursed by JLC Advisors from their client account to Asidokona. The sum of $1.69m was based on the loan amount of $2m less the sums of $300,000 and $10,000 that were deducted at disbursement for interest for the first three months of the Loan and transaction expenses respectively. This was in accordance with the terms of the Loan

Version No 2: 03 Feb 2023 (10:09 hrs)

Agreement. It is pertinent that the Loan Documents were not executed by SSI, or by Mr Wong for and on SSI's behalf, on that day. Instead, the Loan Documents were signed by Mr Wong purportedly for and on behalf of SSI much later in 2018 (see [12] below).

10 By May 2017, Asidokona had defaulted on the Loan. It had by then repaid some $900,000 towards interest, including the $300,000 that was deducted when the Loan was disbursed: see the Judgment at [142]. Asidokona continued to be in default in the first quarter of 2018, and by this time, the tenure of the Loan had been extended several times. As stated above at [6], in 2018, SSI purported to assign its interest in the Loan and the related instruments to AAI with a view to enabling AAI to recover the debt through the action below. The Loan Agreement and Personal Guarantee were assigned pursuant to a deed of assignment dated 30 March 2018 (the "First Deed of Assignment"), while the Deed of Charge was assigned pursuant to a deed of assignment dated 15 November 2018 (the "Second Deed of Assignment") (collectively, the "Deeds of Assignment"). The Deeds of Assignment were signed by Mr Wong, purportedly for and on behalf of SSI, and Mr Yong Chor Ken (another director and shareholder of AAI) on behalf of AAI. Mr Wong initially gave evidence that the First Deed of Assignment was signed on 30 March 2018 but later clarified that it was only signed in June 2018. As for the Second Deed of Assignment, while there was no direct evidence of when it was signed, it was likely signed on or about 15 November 2018 as the notice of the assignment was given to Asidokona that day. SSI also purportedly agreed with AAI that the proceeds recovered from the action would be split equally between them, after payment of costs. The action below was commenced by AAI on 20 July 2018 against the appellants based on the First Deed of Assignment. It would be readily apparent that the Second Deed of Assignment was executed after the

Version No 2: 03 Feb 2023 (10:09 hrs)

action below was commenced. On 8 February 2019, AAI amended its statement of claim to introduce the Second Deed of Assignment.

11 As will be explained below at [29]–[72], Mr Wong appears to have acted without SSI's knowledge and authorisation in relation to the Loan Documents and the Deeds of Assignment. SSI only ratified his actions much later. Indeed, SSI claims that it was not aware of the action below until much later in March 2020. Further, for the same reasons, it is not at all clear that, prior to the Loan, there was an agreement between SSI and Mr Wong on their respective contributions towards the principal sum of the Loan and the manner in which they would share in the repayment. We will elaborate on the lack of documentary evidence as regards such agreement below at [42].

12 It was also in the first quarter of 2018, at about the time of the events set out in [10] above, that Mr Wong discovered that the Loan Documents had not been executed by SSI. He queried Mr Ong about this and was informed, for the very first time, of the identity of the Investor (*ie*, Ms Lou) and that he (*ie*, Mr Wong) had been authorised to act as SSI's "principal and agent". Mr Wong was also told by Mr Ong to confirm with Mr Wong Kup Loon ("Mr William Wong"), Ms Lou's husband, that he was authorised to act for SSI, which he did in June or July 2018. Mr William Wong, who was not called as a witness, appears to have told Mr Wong that Mr Wong was authorised to sign the Loan Documents, and commence legal proceedings. On this basis, Mr Wong signed the Loan Documents and AAI commenced the action below in July 2018. It appears that he signed the Loan Documents after he signed the First Deed of Assignment but before the action below was commenced.

Version No 2: 03 Feb 2023 (10:09 hrs)

13 The action below was brought by AAI, as assignee of rights under the Loan Documents pursuant to the Deeds of Assignment, for recovery of the Loan and accrued interest, costs on an indemnity basis, and to enforce rights against the Charged Shares. SSI was added as a co-plaintiff in February 2019, but was struck off the BVI register of companies in November 2019. Subsequently, its claim was struck out in April 2020 following its failure to comply with an unless order for specific discovery (see [54] below).

14 On 23 July 2021, SSI was restored to the BVI register of companies. However, it did not apply to restore itself as a party to the action below. Notably, Ms Lou asserted that she only came to know about the Loan Documents, the Deeds of Assignment and the action below, and indeed Mr Wong's actions, on or about March 2020. On 26 July 2021, Ms Lou procured SSI to pass a director's resolution to ratify: (a) Mr Wong's execution of the Loan Documents and the Deeds of Assignment; (b) commencement by AAI of the action below; and (c) joinder of SSI to the action below in February 2019. We shall refer to this director's resolution as the "Ratification".

The action below

15 In the action below, the appellants did not seriously dispute that: (a) the sum of $1.69m, being the principal sum of the Loan less the deductions stated above, was disbursed to Asidokona from JLC Advisors' client account sometime in July 2016; (b) Mr Soh personally guaranteed Asidokona's obligation to repay the Loan; and (c) the appellants had not repaid the Loan and interest in full (see [57] of the Judgment). Instead, the appellants raised an assortment of defences, which were all not accepted by the Judge:

Version No 2: 03 Feb 2023 (10:09 hrs)

(a) First, the "*Locus Standi* Defence" – that AAI, as equitable assignee of the Loan under the Deeds of Assignment, could not sue without joining SSI, the equitable assignor, as a party to the action. The Judge noted that this was a mere procedural requirement, and exercised her discretion to dispense with it (at [69]–[79] of the Judgment).

(b) Second, the "Lack of Authority Defence" – that Mr Wong and Mr Ong lacked the requisite authority to act on SSI's behalf in relation to the Loan Documents and the Deeds of Assignment. The Judge found that it was not necessary to deal with this defence, in view of her decision on ratification in AAI's favour (at [88] of the Judgment).

(c) Third, the "Invalid Ratification Defence" – that the Ratification was invalid because: (i) SSI did not have full knowledge of the material facts when ratifying; (ii) it was not made within reasonable time; and (iii) it was an abuse of process. The Judge rejected each of these assertions, finding that the Ratification was valid (at [84]–[87] of the Judgment).

(d) Fourth, the "Illegality Defence" – that the Loan comprised in part moneys misappropriated from the client accounts of other clients of JLC Advisors. The Judge rejected this defence, arriving at the view that a *prima facie* case had been made out that the moneys for the Loan was from SSI (at [100] of the Judgment).

(e) Fifth, the "Maintenance and Champerty Defence" – that the assignment to AAI under the Deeds of Assignment was without any property right attached thereto, and that AAI did not have any genuine commercial interest in the assignment. The claim therefore savoured of

Version No 2: 03 Feb 2023 (10:09 hrs)

maintenance and champerty. The Judge did not accept this defence, noting that the cause of action was in fact incidental to assigned property rights namely, the debt due and owing under the Loan Agreement and the Personal Guarantee, and the rights that accrued in relation to the Charged Shares (at [108] of the Judgment).

(f) Sixth, the "Illegal Moneylending Defence" – that the Loan was an illegal moneylending transaction. The Judge rejected this defence on the basis that the appellants had not discharged their legal burden of showing that SSI was not an "excluded moneylender" under s 5(1) of the Moneylenders Act 2008 (2020 Rev Ed) (at [125] and [127] of the Judgment).

(g) Seventh, the "Penalty Clause Defence" – that the provisions on interest in the Loan Agreement were unenforceable as they were penalty clauses. The Judge noted that the interest rate of 5% per month was a primary obligation and thus did not engage the rule against penalties, and the appellants did not produce any evidence to show that the default interest rate of 6% per month was extravagant and unconscionable or that it was not a genuine pre-estimate of loss (at [133]–[135] of the Judgment).

16 The Judge therefore found in favour of AAI, and ordered the appellants to pay AAI the principal sum of the Loan of $2m, and interest as specified in the Loan Agreement less the sum of $900,000 which had previously been paid towards interest. She also ordered Mr Soh to deliver to AAI various documents relating to the Charged Shares, pursuant to his obligations under the Deed of Charge. Finally, she ordered the appellants to pay AAI costs on an indemnity basis, as provided for in the Loan Documents.

Version No 2: 03 Feb 2023 (10:09 hrs)

The appeal

17 We begin by noting that subsequent to the filing of this appeal and prior to the hearing before us, the second appellant was adjudged bankrupt. At the hearing, the private trustee of the second appellant's estate in bankruptcy confirmed that he was maintaining the second appellant's appeal though he would not be engaging counsel or making any arguments, and that he would abide by the orders made by the court.

18 In the appeal, the appellants substantially reiterate five of the defences raised before the Judge namely, the *Locus Standi* Defence, the Invalid Ratification Defence, the Illegality Defence, the Maintenance and Champerty Defence and the Penalty Clause Defence. The Illegal Moneylending Defence is not pursued, while the Lack of Authority Defence, for reasons we explain at [20]–[21], is no longer in issue. We summarise the parties' arguments below.

(a) In respect of the *Locus Standi* Defence, the appellants argue that there are no "special circumstances" that warrant the court waiving the requirement that SSI, as equitable assignor, should be (and remain) joined as a party to the action below. Further, there remains a real risk of double recovery because SSI is not precluded from commencing a subsequent action against the appellants on the debt. AAI argues that even though SSI's claim was struck out (see [13] above), it did not cease to be a party to the action below. The striking out only precluded SSI from taking any further part in the action. In any event, the procedural requirement for SSI to be joined as a party to the action below may be waived.

Version No 2: 03 Feb 2023 (10:09 hrs)

(b) In respect of the Invalid Ratification Defence, the appellants argue that Ms Lou did not know the source of the funds for the Loan, which renders the Ratification invalid. The Ratification was also invalid as it was not made within a reasonable time and/or was made after commencement of the action below. AAI argues that the Ratification was made within a reasonable time and the appellants have not adduced any evidence of prejudice they have suffered as a result. Further, there was a valid cause of action when the action below was commenced because the appellants' own pleaded position was that Mr Wong was authorised by SSI at all material times.

(c) In respect of the Illegality Defence, the appellants argue that the Judge erred in finding that SSI had funded the Loan. They also argue that even if SSI had funded the Loan, the Ratification would not have addressed any misuse of SSI's funds in JLC Advisors' client account as the Ratification did not extend to any acts purportedly done by Mr Ong on SSI's behalf. AAI refutes this, primarily arguing that the funds did in fact come from SSI.

(d) In respect of the Maintenance and Champerty Defence, the appellants argue that the assignments were made for the sole purpose of bringing the claim against them. Concerns over maintenance and champerty are therefore engaged. In response, AAI argues that it does have a genuine commercial interest, which would defeat any arguments of maintenance and champerty.

(e) In respect of the Penalty Clause Defence, the appellants confirm in their Appellants' Case that they are only pursuing this defence in relation to the default interest rate of 6% per month. AAI argues that the

Version No 2: 03 Feb 2023 (10:09 hrs)

default interest rate is not a penalty but has not pursued that rate as elaborated at [107] below.

19 From the parties' written and oral submissions, it was clear that the crux of the appeal is the Invalid Ratification Defence. This represented a shift in emphasis by AAI from whether Mr Wong had authority (before the Judge) to whether the Ratification was valid (before us). Before the Judge, AAI's primary case was that Mr Wong was authorised by SSI to execute the Loan Documents and the Deeds of Assignment *for and on SSI's behalf*, such authority being conveyed to him by Mr Ong and confirmed by Mr William Wong. Its alternative case was that SSI had adopted the transactions by the Ratification, *ie*, the director's resolution dated 26 July 2021 (see above at [14]). Both these cases were challenged by the appellants, with their defence on the alternative case being the Invalid Ratification Defence. Ultimately, as noted earlier at [15(b)], the Judge made no finding on the issue of authority and found that the Loan Documents and the Deeds of Assignment were validly ratified by the Ratification.

20 In its Respondent's Case, AAI did not revive its case on authority, and made only a passing reference to it in its Skeletal Submissions. Notwithstanding that the Judge made no finding on Mr Wong's authority, had AAI wished to rely on Mr Wong's authority to affirm the Judgment, it should have stated so in the Respondent's Case, *per* O 56A r 9(6) of the Rules of Court (Cap 322, 2014 Rev Ed) ("the ROC"). Nonetheless, counsel for AAI sought to belatedly assert in oral submissions AAI's case on authority. When the court pointed out to counsel for AAI the difficulty that this presented, he accepted that it was not a point he could pursue on appeal.

Version No 2: 03 Feb 2023 (10:09 hrs)

21 As such, the question of Mr Wong's authority to enter into the Loan Documents and the Deeds of Assignment is not an issue in the appeal. We therefore consider whether there was valid ratification of Mr Wong's actions on the assumption that he *did not* have authority. This brings into sharp focus the validity of the Ratification which is the crux of the Invalid Ratification Defence.

22 It seems to us that there are two aspects to the Invalid Ratification Defence. First, whether AAI has discharged its burden of proof on ratification by demonstrating that SSI had by the Ratification, validly ratified the Loan Documents and the Deeds of Assignment. Second, whether the Ratification could validate the cause of action in the action below as a matter of law given that it was an event subsequent to commencement of legal proceedings.

23 The first aspect is *fundamental* as it concerns AAI's burden of proof. As the party asserting ratification, AAI has the burden of establishing it. Indeed, as Mr Wong is assumed not to have had authority, AAI has to make out ratification to sustain its claim. It seems to us that in order for AAI to discharge its burden, it must show two things. First, that Mr Wong had purported to enter into the Loan Documents and Deeds of Assignment *for and on behalf of SSI*. In other words, that he had purported to act on behalf of SSI, albeit without authority. On this, Mr Wong's exact role and conduct is key. Did he purport to act for SSI in relation to the Loan? What exactly was his role as regards SSI and Ms Lou? These are pertinent questions. Second, that SSI had performed or purported to perform the Loan Agreement. A key question here is whether SSI did disburse the full amount of the Loan to Asidokona, comprising the $1m that allegedly came from its own funds and the additional $1m that was sourced from Mr Wong, less the relevant deductions. We explain below at [69]–[70] why these are important ingredients of AAI's burden of proof on ratification.

Version No 2: 03 Feb 2023 (10:09 hrs)

24 The second aspect arises because the Ratification occurred after the action below was commenced. In other words, when the action below was commenced, it was based on contracts and deeds, *ie*, the Loan Documents and the Deeds of Assignment, that had yet to be ratified. Accordingly, on the assumption the first aspect is satisfied, the question is whether the Ratification can retrospectively furnish a legal basis for the action below.

25 We consider both aspects in turn. We should, however, note that even if the appellants fail on the Invalid Ratification Defence, the appeal may still succeed so long as any one of the other defences (see above at [17]) are made out, with the exception of the Penalty Clause Defence which pertains only to the claim for default interest on the Loan. We shall therefore also address each of these defences in turn below.

The Threshold Question

26 Before we proceed to consider the various defences above, it is important that we make an observation. By focussing their written and oral submissions on the question of ratification, the parties have missed the threshold question of whether *SSI was even aware of and agreed to the Loan*. AAI makes the point several times in its Respondent's Case that a loan, *ie*, the Loan was made to Asidokona. While the appellants do not dispute this, accepting that a loan was made does not answer the key question of whether that loan was *from SSI.* For that to be case, SSI must have been aware of and had agreed to the loan. This is a threshold question.

27 It is here that there is a troubling paucity of evidence. The glaring shortcomings in the evidence are highlighted and discussed in the next section in relation to the Invalid Ratification Defence. However, the observations made

Version No 2: 03 Feb 2023 (10:09 hrs)

there are equally apposite to the threshold question. We highlight in particular the following:

(a) Ms Lou, the sole shareholder and director of SSI, gave evidence that she had no knowledge of the Loan Documents and did not authorise Mr Wong to act on SSI's behalf at the material time (see [34] below).

(b) There is no documentary evidence on communication between Mr Wong, Mr Ong, Ms Lou and Mr William Wong that demonstrated that Mr Wong was authorised to act on behalf of SSI as regards the Loan (see [41] below).

(c) There is no documentary evidence on communication between SSI and Mr Ong on the Loan or the Loan Documents.

(d) There is no documentary evidence on communication between Mr Wong and SSI concerning the terms upon which the former's contribution of $1m towards the principal sum of the Loan would be made, and the manner in which Mr Wong and SSI would share in the repayment (see [42] below).

(e) There is no documentary evidence on communication between SSI, Mr Wong and Mr Ong regarding extensions of the tenure of the Loan (see [43] below).

(f) There is no direct evidence that SSI contributed $1m towards the principal sum of the Loan (see [52]–[53] below).

28 If SSI was aware of and had agreed to the Loan, it would be reasonable to expect that the evidential shortcomings stated above would not exist. That

Version No 2: 03 Feb 2023 (10:09 hrs)

they do is a serious concern and raises the threshold question. Indeed, the fact that on 19 February 2019, SSI purported to ratify, *inter alia*, the Loan Documents by the Ratification, well after the Loan Documents were signed by Mr Soh and the Loan was disbursed on 22 July 2016, is consistent with SSI not being aware of and agreeing to the Loan. However, troubled as we are, as the parties did not make their case on appeal on this basis, we shall not go further.

Invalid Ratification Defence

Whether AAI has discharged its burden of proof in respect of the Loan Documents and the Deeds of Assignment

The Loan Documents

29 AAI's case is that the Loan Documents were transactions entered into by SSI with the appellants. The Loan Documents reflect this: the Loan Agreement and the Personal Guarantee state that SSI is the "Lender", while the Deed of Charge states that SSI is the "Chargee".

30 Given that SSI is described in those terms, the following questions arise: did SSI in fact purport to contract with the appellants on the terms of the Loan Documents and if so, who purported to act on its behalf in 2016? AAI asserts that Mr Wong was that person. According to AAI, Mr Wong acted on behalf of SSI in relation to the Loan.

31 Mr Wong is therefore a key person in respect of the Loan Documents. This raises the following further questions:

(a) First, did Mr Wong in fact purport to act on behalf of SSI in relation to the Loan (the "First Question")?

Version No 2: 03 Feb 2023 (10:09 hrs)

(b) Second, did SSI in fact provide the funds for the Loan (the "Second Question")?

32 As noted earlier, on ratification, it is AAI's burden to show that: (a) Mr Wong did purport to act on behalf of SSI; and (b) SSI funded the Loan. On the first, if it cannot be shown that Mr Wong purported to act on behalf of SSI, it would not be correct to conclude that SSI could ratify. We discuss this point in greater detail below at [33]–[51]. On the second, if it cannot be shown that the Loan was in fact funded by SSI, it would also not be correct to conclude that SSI could ratify (see [52]–[60] below).

The First Question

33 On the First Question, as observed earlier, AAI's case before the Judge was that Mr Wong acted for and on behalf of SSI in respect of the Loan as he was authorised to do so at all material times. However, its three witnesses – Ms Lou, Mr Wong and Mr Ong – all gave contradictory evidence on this issue. We elaborate below and in so doing, also address the point about Mr Wong's authority (even though it is not an issue) in so far as it is relevant to the question of whether he was even purporting to act for and on behalf of SSI in respect of the Loan especially at the material time between 2016 and 2018.

MS LOU'S EVIDENCE

34 As the sole director and shareholder of SSI, Ms Lou was the witness best placed to attest to this issue. She stated unequivocally in her affidavit of evidence-in-chief ("AEIC") that as she did not know about the Loan Documents and the Deeds of Assignment, "it was [her] position that SSI had not authorised the same at the material time". In Ms Lou's answers to interrogatories (filed on

Version No 2: 03 Feb 2023 (10:09 hrs)

3 March 2021) sought by the appellants, she unequivocally stated that SSI did not authorise the Loan and did not appoint Mr Wong and/or Mr Ong to act on SSI's behalf.

35 She maintained the above position during cross-examination, and consistent with that, in the Ratification, which she signed, it was stated at para 1.6 that "[t]he Director, notwithstanding the *initial absence of knowledge at the relevant time* …" [emphasis added] ratified the transactions.

MR WONG'S EVIDENCE

36 Mr Wong's evidence was that he was informed *only in 2018* by *Mr Ong* that he had authority to execute the Loan Documents on behalf of SSI, at about the time when the First Deed of Assignment was executed. Mr Ong also told him to confirm this with Mr William Wong, which Mr Wong did in June or July 2018, following which he signed the Loan Documents. *Mr Wong also testified that he had not seen the Loan Documents prior to signing them in 2018*.

37 When queried on the identity of the party from SSI who dealt with Mr Ong in the period from July 2016 to 2018, Mr Wong said that he "wouldn't know the answer". Mr Wong's evidence was therefore that he was not authorised by SSI between 2016 to 2018, nor did he know who was acting on its behalf. If that is the case, it follows that he could not have purported to act for SSI in that period. In other words, on his own evidence, Mr Wong did not purport to act on behalf of SSI when the Loan Documents were first put in place in 2016. This is consistent with the fact that Mr Wong did not even sign the Loan Documents in 2016.

Version No 2: 03 Feb 2023 (10:09 hrs)

MR ONG'S EVIDENCE

38 Mr Ong's evidence, however, was very different from the evidence of Ms Lou and Mr Wong. In his AEIC, Mr Ong stated that "[f]rom the start, SSI wanted to be a 'sleeping' contributor to the Loan, and was content to have the Loan administered by [Mr Wong] and/or his nominees. In this regard, [Ms Lou] and SSI had expressly authorised [Mr Wong] to act as SSI's principal and agent in respect of the Loan". He also stated that he had "in [his] capacity as the solicitor and partner-in-charge of SSI informed [Mr Wong] that [Mr Wong] had been authorised by SSI to act on its behalf in respect of the Loan". During cross-examination, Mr Ong acknowledged that he had not disclosed any documentary evidence of instructions from Ms Lou that: (a) Mr Wong was authorised to act on SSI's behalf, and (b) Mr Ong was authorised to inform Mr Wong that he was so authorised.

39 Mr Ong also testified that both Ms Lou and Mr William Wong gave instructions regarding the Loan. The extract below of Mr Ong's evidence during cross-examination is salient:

> Q: Now I just pause there first, on the first sentence you said that [Ms Lou] wanted to be a sleeping contributor. Now again, her evidence is this, and I have asked her about your affidavit, she disagreed. She said again, she did not even know about it at the time. And as I said earlier, she only knew about it --- about the Suit in March 2020 and about the loan details in late 2020 or early 2021. So again, she's disagreed to your statement at paragraph 17 and what would you like to say about that?
>
> A: *No, I would say that was incorrect. The loan was discussed with her and with William Wong. Of course, it is correct that William Wong was the --- William was the one who was --- would lead the discussions and would give instructions. That is correct. But she was aware of it, and she did not disagree when William gave the confirmation to go ahead with the loans. …*
>
> [emphasis added]

Version No 2: 03 Feb 2023 (10:09 hrs)

40 We pause to note that Mr William Wong was: (a) not called by AAI as a witness; and (b) neither a shareholder nor an officer of SSI. Mr Ong's avowal that Mr William Wong was authorised to give him instructions therefore amounted to nothing more than a bare assertion. It also goes against Ms Lou's evidence that she never gave Mr William Wong any authority to transact on behalf of SSI.

41 There are other difficulties with Mr Ong's evidence. There is a complete absence of documentary evidence that Mr Wong was to act on behalf of SSI. This is quite extraordinary. If Mr Wong was supposed to act on behalf of SSI, there would have been documentary evidence on at least four aspects. First, communication passing between Ms Lou, Mr William Wong, Mr Ong and Mr Wong as regards Mr Wong's authority. Instead of relying on Mr Ong's oral and bare evidence, this would have been the easiest and most credible way for AAI to have demonstrated that Mr Wong was authorised to act on SSI's behalf. However, such documentary evidence was never produced.

42 Second, documents evidencing Mr Wong's arrangement with SSI on his contribution towards the principal sum of the Loan, and the manner in which Mr Wong and SSI would share in the repayment. On AAI's case, Mr Wong and SSI were equal contributors to the principal sum of the Loan of $2m (see above at [6]). However, as noted above at [8], SSI was the sole lender and contracting party to the Loan Documents. For AAI's case to have traction, SSI must have sourced $1m of the $2m from Mr Wong. This must reasonably mean that prior to the disbursement of the Loan, an agreement would have been in place between SSI and Mr Wong on the terms upon which Mr Wong would contribute towards the Loan and share in the repayment. Documents evidencing the discussions and negotiations that led to such an agreement ought to therefore

Version No 2: 03 Feb 2023 (10:09 hrs)

exist. However, no documentary evidence was produced by AAI. Indeed, there was also no evidence to this effect from Mr Wong. Instead, Mr Wong's evidence suggests that the only agreement was between SSI and AAI in March 2018, when the First Deed of Assignment was executed, which related to splitting of the proceeds recovered from the action below. There was no suggestion that there was any agreement as described above between Mr Wong and SSI, prior to the Loan. This undermines AAI's case that Mr Wong acted on behalf of SSI in relation to the Loan. Also, it is odd that the Deeds of Assignment were executed assigning rights under the Loan Documents to AAI if there was a prior agreement between Mr Wong and SSI as regards their respective contribution towards the Loan and manner in which they would share in the repayment.

43 Third, communication between Ms Lou, Mr William Wong and/or Mr Wong and Mr Ong on the extensions of the tenure of the Loan. The Loan was extended on multiple occasions: see [139] of the Judgment. Since SSI was the sole lender, an extension could only have been granted by SSI or by Mr Wong on SSI's behalf if he was authorised to act on its behalf. Communications between SSI and Mr Wong and/or Mr Ong regarding the extension of the Loan should therefore exist. However, no documentary evidence of such communication was produced by AAI.

44 Fourth, it is not disputed that Asidokona made payments of about $900,000 in interest between July 2016 and May 2017. However, Ms Lou's evidence during cross-examination was that SSI never received any payments from the appellants. Mr Wong's evidence was that the interest payments were made by Mr Soh to Mr Wong's own account, Mr Ong's account or JLC Advisors' client account. No documentary evidence was produced to show that:

Version No 2: 03 Feb 2023 (10:09 hrs)

(a) SSI received any part of the interest payments subsequently, and (b) discussions had taken place between SSI and Mr Wong on how the interest payments were to be shared. The absence of such evidence undermines AAI's case that Mr Wong acted or purported to act on SSI's behalf in respect of the Loan. We will elaborate on this point when addressing the Second Question below at [57].

45 A further difficulty with Mr Ong's evidence is the manner in which Mr Wong's authority was conveyed. It is unclear why Ms Lou would choose to authorise Mr Wong through Mr William Wong and Mr Ong instead of doing it herself. Also, it is unclear why Mr Wong was later told by Mr Ong to confirm his authority with Mr William Wong if there was prior authorisation by SSI (see above at [12]). Mr Ong could have confirmed Mr Wong's authority himself or shown communications with Ms Lou and/or Mr William Wong on Mr Wong's authority.

46 Finally, if Mr Wong was authorised to act for SSI, why was the Ratification even needed? Indeed, there is a prior question of why Mr Wong did not even sign the Loan Documents in 2016. AAI contends that the Ratification was done "in abundance of caution", but the evidence does not support this. A WhatsApp message dated 21 March 2020 (the "21 March 2020 message") sent by Mr Wong to Ms Lou prior to the Ratification is telling:

> … the judge during the discovery asked me to either confirm that I have authority to act for SSI or for the owner to file an affidavit to confirm SSI has no other documents requested. … along the way, I even asked [Mr William Wong] to keep SSI alive simply because SSI is a plaintiff and shouldnt be disposed.
>
> …
>
> My lawyers have essentially said there are 3 options:

Version No 2: 03 Feb 2023 (10:09 hrs)

> 1. ***If you as director or if u authorise [Mr William Wong] and he then authorise me, can confirm or rectify that I had the authority***, the suit can continue. And also confirm that SSI has no other documents.
>
> 2. ***If u maintain that u knew nothing about the loan and I acted without authority, I respect your position … So if that is your position, I would discontinue the suit***. But in doing so, both my lawyer and I would need your authority to file the notice of discontinuance. I will be liable for legal cost of the borrower.
>
> 3. If I cannot get your authority, then I can only file the notice of discontinuance for [AAI] but not SSI. … It is not my intention to have troubled u. ***It appears I trusted Jeffrey too much and relied on his representations. But I did check with William somewhat***.
>
> [emphasis added]

47 It is evident from the message that Mr Wong was unsure whether he had been authorised by SSI. He sought clarification from Ms Lou on her position as regards his authority, postulating various scenarios. This hardly speaks to Mr Wong being authorised. Mr Wong did not directly address the vacillations in the 21 March 2020 message when he was asked about them during cross-examination. Instead his evidence was that Ms Lou did not reply to the 21 March 2020 message until about a year later, which was around the time he found out, from her answers to interrogatories filed on 3 March 2021, that her position was that he was not authorised (see above at [34]). He nonetheless maintained that he had authority to act on behalf of SSI because Mr Ong had told him so and he had also confirmed this with Mr William Wong. He explained that as he had detailed his discussions with Mr William Wong in the 21 March 2020 message, Ms Lou could have refuted the message if what he said was untrue, but she did not do so. However, Mr Wong's explanation ignores the uncertainty he harboured over his authority that is redolent in the 21 March 2020 message. If he had been told by Mr Ong and Mr William Wong that he was authorised, why the vacillations in the 21 March 2020 message?

Version No 2: 03 Feb 2023 (10:09 hrs)

48 Ms Lou was asked about the 21 March 2020 message during cross-examination, and she confirmed that she did not confer authority on Mr Wong in March 2020, which would in any event be too late as the material time was between 22 July 2016 and 2018. It was only on 26 July 2021 that she passed the director's resolution resulting in the Ratification. Viewing the evidence in totality, the 21 March 2020 message is *not* consistent with AAI's position that the Ratification was done out of an "abundance of caution". In fact, it is consistent with Mr Wong not being authorised to act on behalf of SSI in relation to the Loan.

49 As can be seen from the above, the *only* evidence that AAI adduced to demonstrate that Mr Wong purported to act on behalf of SSI in relation to the Loan turned on whether he was in fact authorised by SSI to do so. This in turn was based *solely* on Mr Ong's evidence that SSI had informed him of this. But Mr Ong's evidence presents significant difficulties when juxtaposed against the evidence of Ms Lou and Mr Wong. Ms Lou's evidence was consistent in that SSI did not authorise Mr Wong to act on behalf of SSI at the material time. Equally significant was Mr Wong's own evidence that he *did not* purport to act, let alone act, on behalf of SSI in relation to the Loan as he was not even aware that he was authorised by SSI. He was only informed by Mr Ong and thereafter Mr William Wong sometime in 2018 that he was authorised. There is thus a glaring lacuna in the evidence on the identity of the party that acted or purported to act for SSI at the material time. That person certainly was not Mr Wong. It was not AAI's case that someone else purported to act on behalf of SSI.

CONCLUSION ON THE FIRST QUESTION

50 The absence of documentary evidence on Mr Wong's role as regards SSI speaks for itself. In addition, AAI has not satisfactorily explained why Mr

Version No 2: 03 Feb 2023 (10:09 hrs)

Ong's evidence should be accepted over: (a) Mr Wong's evidence that he only found out sometime in 2018 that he was authorised; and (b) Ms Lou's evidence that she did not *at all* authorise Mr Wong prior to the Ratification. Both Mr Wong and Ms Lou were AAI's own witnesses and indeed the witnesses salient on the question of authority. AAI is bound by their evidence since it did not apply to treat them as hostile witnesses and cross-examine them. Indeed, they were willing witnesses. AAI cannot choose to prefer Mr Ong's evidence simply because it is conveniently favourable to its cause, without first satisfactorily reconciling it with Mr Wong's and Ms Lou's evidence. Mr Wong's and Ms Lou's evidence directly undermines Mr Ong's evidence. It is difficult to understand how AAI can credibly assert that Mr Wong acted for SSI because he was authorised to do so when Mr Wong himself says that he: (a) only found out in March 2018 that SSI had not signed the Loan Documents; and (b) did not purport to act on behalf of SSI as he was not aware that he was authorised until he spoke to Mr Ong and thereafter Mr William Wong in June or July 2018.

51 Thus, in the face of the difficulties with Mr Ong's evidence outlined above, and the palpably contradictory evidence from Ms Lou and Mr Wong, it also cannot be credibly said that Mr Wong acted or purported to act on behalf of SSI in relation to the Loan. Thus, the First Question cannot be answered in the affirmative. As AAI is unable to show that Mr Wong purported to act on behalf of SSI in relation to the Loan, it is incorrect to conclude that SSI was able to ratify the Loan Documents. We expand on this point below at [68]–[72].

The Second Question

52 We turn to the Second Question (see above at [31(b)]) – whether the funds for the Loan came from SSI. Mr Ong testified that Ms Lou and Mr William Wong maintained a pool of funds in a client account with JLC

Version No 2: 03 Feb 2023 (10:09 hrs)

Advisors, and $1m from this pool was used for the Loan. AAI relied on a transfer of $1m from SSI to JLC Advisors in April 2016 (about three months before the Loan) (the "April 2016 transfer"). Mr Ong's evidence during cross-examination was that the $1m from the April 2016 transfer was used by SSI for the Loan. However, he admitted that he had not shown that there was any money in JLC Advisors' client account for SSI (let alone the $1m from the April 2016 transfer) available for disbursement when the Loan was disbursed on 22 July 2016.

53 Documentary evidence to support Mr Ong's evidence was again palpably missing. Documentary evidence showing the source of the funds could only have come from SSI and/or JLC Advisors. It should have been easy enough for AAI to procure. If Mr Ong's evidence were true, documents showing remittance of $1m from SSI to JLC Advisors and its subsequent use towards the Loan on SSI's instructions would have been with JLC Advisors and SSI. After all, according to Mr Ong, SSI maintained a client account with JLC Advisors to which the $1m was sent and subsequently used towards the Loan.

54 In fact, following multiple chasers, specific discovery was sought by the appellants from AAI and SSI in HC/SUM 6459/2020, and AAI and SSI were ordered to produce, among other things, documents relating to SSI's source of the funds for its $1m share of the Loan. AAI's then solicitors wrote to JLC Advisors requesting compliance with the order. Mr Vincent Lim ("Mr Lim"), a partner of JLC Advisors, responded that JLC Advisors had "checked [their] records and [their] office, but [had] not found any physical file for this matter". Mr Lim also explained that "[they had] also checked [their] server and email records" but the documents that they found did not directly show that the $1m

Version No 2: 03 Feb 2023 (10:09 hrs)

for the Loan came from SSI. The response from Mr Lim was quite extraordinary if indeed the $1m that was used towards the Loan was clients' moneys.

55 Three aspects are critical. First, Ms Lou consistently maintained that SSI never had any funds with JLC Advisors. In her answers to interrogatories filed on 3 March 2021, she stated that she "had never maintained a pool of funds in JLC Advisors' client account in [her] sole name or in joint names with Mr [William] Wong", and that "with respect to matters relevant to this Suit, SSI did not own and maintain any bank account in which funds were ever received from or transferred to JLC Advisors".

56 She also confirmed during cross-examination that the $1m for the Loan that purportedly came from SSI *did not in fact belong to SSI or herself*. When asked during re-examination about the April 2016 transfer, Ms Lou acknowledged that SSI did transfer $1m to JLC Advisors. However, she maintained that this $1m was not transferred to fund the Loan. She explained that she had made the April 2016 transfer on Mr William Wong's instructions, but she did not ask him what the money was for and where it went to.

57 Second, as noted earlier at [44], AAI has not shown that any payments made by the appellants towards interest were received by SSI. Ms Lou's evidence during cross-examination was that SSI never received any payments by the appellants. The payments appear to have been made to Mr Wong, Mr Ong or to JLC Advisors' client account. In contrast, Mr Ong disagreed with the suggestion by the appellants' counsel during cross-examination that payments were not made to SSI, without producing any documentary evidence to support his evidence.

Version No 2: 03 Feb 2023 (10:09 hrs)

58 Third, there appears to be a discrepancy in the amount supposedly contributed by SSI. It was not disputed that Mr Wong had contributed $1m and he had detailed the sources from which he obtained the $1m (see above at [6]). It was also not disputed that only $1.69m was actually disbursed to Asidokona, after accounting for interest and transaction expenses: see above at [9] and the Judgment at [19]. This means that SSI could have at most contributed the balance of $0.69m. Without explaining where the shortfall of $0.31m went, there is an inherent difficulty with AAI's case that SSI had contributed $1m towards the Loan.

59 Mr Ong's evidence poses difficulties when juxtaposed against Ms Lou's evidence and Mr Lim's response. Mr Ong acknowledged that he did not produce *any* documents to show that SSI transferred $1m to JLC Advisors for the purpose of the Loan, that the purported SSI client account even existed, that money from the SSI client account was used, and that repayments were made to SSI.

60 In the circumstances, the Second Question too cannot be answered in the affirmative as AAI has not discharged its burden to show that the $1m for the Loan came from SSI. Accordingly, it cannot be correct to conclude that SSI could ratify. To do so would be an attempt by SSI to adopt as its own moneys that has not been shown to belong to it. Indeed, Ms Lou's evidence was that SSI ratified the Loan, *not because the funds came from it*, but because the Loan Agreement provided that SSI was the lender. That speaks to this very point. We expand on this point below at [70].

Version No 2: 03 Feb 2023 (10:09 hrs)

61 Since the two questions cannot be answered in the affirmative, it follows that AAI has failed to discharge its burden on ratification in relation to the Loan and the Loan Documents. We turn to consider the Deeds of Assignment.

The Deeds of Assignment

62 If the Loan Documents were not authorised, no rights were assigned to AAI when the Deeds of Assignment were executed. That leaves the question of ratification of the Deeds of Assignment, which was a subsequent event.

63 For completeness, it should be noted that AAI did not plead that the Loan Documents were ratified as a result of SSI authorising Mr Wong to execute the Deeds of Assignment. The sole event of ratification pleaded was the Ratification. Indeed, the Ratification extended to Mr Wong's actions with regard to the Deeds of Assignment which would suggest that Mr Wong acted without authority as regards those transactions as well.

64 It follows from our decision above (at [61]) that if it cannot be said that SSI was able to ratify the Loan Documents, it cannot also be said that ratification of the Deeds of Assignment will assist AAI. The Deeds of Assignment purport to assign rights under the Loan Documents. For the rights thereunder to be assigned, one must first conclude that SSI could ratify the Loan Documents.

65 Relevant parts of the First Deed of Assignment are as follows:

> …
>
> **RECITALS**
>
> (A) [SSI] is the lender under the Loan Agreement …
>
> (B) [SSI] has advanced monies to [Asidokona] under the Loan Agreement …

Version No 2: 03 Feb 2023 (10:09 hrs)

> (C) [SSI] has agreed to assign all its legal and beneficial right, title and interest in the Debt and the Loan Agreement and the Guarantee to [AAI] …
>
> …
>
> **2.1 Assignment of rights**
>
> Subject to the terms of this deed, [SSI] unconditionally, irrevocably and absolutely assigns to [AAI] all [of SSI's] rights, title, interest and benefits in and to:
>
> 2.1.1 the Debt;
>
> 2.1.2 the Loan Agreement; and
>
> 2.1.3 the Guarantee,
>
> …

66 The Second Deed of Assignment contains similar provisions except that they relate to the Deed of Charge.

67 The very *premise* of the assignment under the Deeds of Assignment was that SSI had rights to assign arising from the Loan Documents. But these rights could only have arisen if: (a) Mr Wong acted or purported to act on behalf of SSI in respect of the Loan Documents; and (b) the funds for the Loan did come from SSI. We have addressed these points in our analysis on the burden of proof above in relation to the Loan Documents, finding that AAI has failed to discharge its burden. Thus, the question of assignment of rights to AAI under the Deeds of Assignment does not arise.

Significance of AAI's failure to discharge its burden of proof

68 To summarise, AAI has failed to discharge its burden to prove that Mr Wong purported to act on behalf of SSI in relation to the Loan, and the Loan was funded by SSI. This raises the question of whether SSI could have ratified the Loan Documents. The issue of assignment under the Deeds of Assignment

Version No 2: 03 Feb 2023 (10:09 hrs)

is consequential on this question being answered in the affirmative for the reasons set out above at [67]. In our view, on the evidence before us, it would not be correct to conclude that SSI validly ratified for two reasons.

69 First, it has not been shown that Mr Wong purported to act on behalf of SSI in relation to the Loan Documents. Logically, the principal ratifies the conduct of another who has purported to act on its behalf. Such a party would have purported to act on behalf of the principal, albeit without authority, and the principal would later ratify the unauthorised acts of that party. But as we have explained earlier, Mr Wong's evidence was that he *did not* in fact purport to act for SSI between 2016 and 2018 (see above at [36]). Mr Wong had not even seen the Loan Documents prior to 2018, and was only informed of his alleged authority for the first time by Mr Ong in 2018. He also testified that he did not know who represented SSI from 2016 to 2018. It was not AAI's case that someone other than Mr Wong purported to act on behalf of SSI. Mr Ong did not say this as well. His evidence was that Mr Wong acted on behalf of SSI in relation to the Loan because he was authorised by SSI at all material times. This, as noted above, was contradicted by Mr Wong's and Ms Lou's evidence. Thus, if AAI has not discharged its burden of showing that Mr Wong purported to act on behalf of SSI, it would be incorrect to conclude that SSI could and did validly ratify the Loan Documents.

70 Second, it has not been shown that the funds for the Loan came from SSI. As such, it would be incorrect to conclude that SSI could and did validly ratify the Loan Documents. By ratifying, a principal retrospectively confers authority on the unauthorised conduct of another who has purported to act on its behalf. It adopts and accepts such conduct as its own; in the case of a contract purportedly made on its behalf, the contract is adopted. The principal is

Version No 2: 03 Feb 2023 (10:09 hrs)

therefore obliged to perform the contract *vis-à-vis* the third party, and is consequently liable for non-performance. In this case, prior to the Ratification, the Loan had been disbursed and some interest payments had been made by Asidokona. However, the identity of the party who had funded the Loan has not been established to be SSI on the evidence (nor, for that matter, was any individual or entity other than Mr Wong identified in this regard). Further, it has not been established that the interest payments were received by SSI. If it has not been shown that SSI, or someone purportedly on its behalf, had performed SSI's obligations under the Loan Agreement and received the corresponding benefits, it cannot be correct to conclude that SSI could validly ratify the Loan Documents. To recognise that it could in such circumstances could lead to SSI adopting as its own the Loan and the funds disbursed thereunder when the funds could very well belong to another. We draw attention again to Ms Lou's somewhat cavalier response that she ratified the Loan Documents because SSI was stated as the lender in the Loan Agreement and not because it had funded the Loan (see [60] above). We should point out that we might have reached a different conclusion if SSI had ratified *prior* to the Loan being disbursed, as it could have ratified and subsequently provided or organised the funds for the Loan. But that was not the case here.

71 We also observe that if SSI had in fact received and retained the interest payments, that might be seen as implied ratification: see *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 22nd Ed, 2021) ("*Bowstead & Reynolds*") at paras 2-075 and 2-077. However, AAI did not plead implied ratification and in any event, implied ratification would not be consistent with the *express* ratification subsequently made, *ie*, the Ratification. Implied ratification would also not be consistent with the evidence set out above at [55], given that it is unclear that SSI received interest payments made by Asidokona. This would be

Version No 2: 03 Feb 2023 (10:09 hrs)

consistent with Ms Lou's evidence that she had no knowledge of the transactions until March 2020 as the interest payments were made between July 2016 and May 2017 (see above at [44]).

72 In the circumstances, we are unable to conclude on the evidence that SSI could and did validly ratify the Loan Documents by the Ratification. AAI has failed to discharge its burden of proof on ratification. It follows that ratification of the Deeds of Assignment does not assist AAI. We therefore respectfully disagree with the Judge that the Ratification was valid and allow the appeal on this ground.

Whether the Ratification retrospectively furnishes a basis for the action

73 Having held in favour of the appellants on the first aspect of the Invalid Ratification Defence, there is strictly speaking no need to consider the second aspect, which assumes that AAI has in fact discharged its burden of proof on ratification. Nonetheless, as the parties have made extensive submissions on this aspect, we shall address it on the assumption that AAI discharged its burden of proof. The second aspect is whether the Ratification could retrospectively furnish a basis for the action below as it occurred after commencement of the action.

74 The retrospective nature of ratification is well-accepted: it "causes the legal consequences of the agent's act to relate back to the time the agent performed those acts as if they had been properly authorised at the outset" (Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*The Law of Agency*") at para 06.009). But the retrospective nature of ratification should not be overstated, lest it causes unfairness to third parties. This tension is best illustrated by *Bolton Partners v Lambert* (1889) 41 Ch D 295 ("*Bolton*"),

Version No 2: 03 Feb 2023 (10:09 hrs)

which held that the result of ratification is that the agent would be conferred authority from the outset, and a third party would therefore be bound by the contract once ratified. The court in *Bolton* therefore prevented a third party from withdrawing from the contract, even if the third party had announced its intention to withdraw prior to the ratification by the principal.

75 While the retrospectivity of ratification as stated in *Bolton* is well-accepted, that case has been criticised in various other cases and academic commentaries for also saying that the third party is prevented from withdrawing from the contract *before* the principal ratifies. The crux of the criticism is that giving ratification full retroactive effect in such circumstances would be unfair to the third party as until the principal ratifies, there is arguably no contract between the principal and the third party. Thus, it ought to be open to the third party to walk away from the contract *before the principal has ratified*. The unfairness is illustrated by the fact that the principal has the option to ratify the contract or to walk away from it. In contrast, the third party is placed in a vulnerable position and is at the mercy of the principal because of its inability to walk away on the basis of the proposition in *Bolton*: see *Bowstead & Reynolds* at paras 2-087 and 2-090; see also *The Law of Agency* at para 06.050. While this question does not arise in the appeal, we do see merit in the criticism. As a matter of principle, it is difficult to see why the third party may not validly withdraw from the contract when there is no contract enforceable either by the agent or the principal prior to ratification: see Tan Cheng Han, "The Principle in Bird v Brown Revisited" (2001) 117(Oct) LQR 626 ("*Bird v Brown Revisited*") at 628–629. However, this a point that is best left to be explored in an appropriate case as the issue does not arise here.

Version No 2: 03 Feb 2023 (10:09 hrs)

76 The criticism of *Bolton* underscores an underlying concern that the retrospective effect of ratification, if given too wide an effect, could give rise to unfairness. There must be limitations to ratification in order to "significantly reduce the uncertainty and injustice that third parties have to put up with": see *The Law of Agency* at para 06.052. In this vein, there are generally three widely recognised limitations to ratification (see *The Law of Agency* at paras 06.060–06.088; see also *Bowstead & Reynolds* at paras 2-089–2.092):

(a) Ratification may not be effective if it will affect property rights.

(b) Ratification would not be allowed where it would exceed a time limit, to the prejudice of the third party.

(c) Ratification must be done within a reasonable time.

77 It is these limitations which the appellants have sought to invoke. Their case, fundamentally, is that if the Ratification was upheld as valid, they would suffer unfair prejudice as it was made only after commencement of the action below. However, in focusing on the commencement of the action below, the appellants shine light on a related and indeed primary issue: namely, whether AAI had a valid cause of action at the time of commencement of the action below and if not, whether the retrospectivity of ratification is able to remedy that.

78 It is a fundamental rule of civil procedure that a plaintiff must have a valid cause of action at the time of commencement of action: see *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd* [1994] 1 SLR(R) 505 ("*Saga Foodstuffs*"); Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2017) at para 5/1/3 ("*Singapore Court Practice*"); *Atkin's Court Forms*

Version No 2: 03 Feb 2023 (10:09 hrs)

Singapore – Chapter I, Writ of Summons (LexisNexis, 2020) at para 52. It has been suggested that where no cause of action exists at the time a writ is issued, the action has no basis in law, the action is void *ab initio* and the plaintiff should be required to commence fresh action: *Singapore Court Practice* at para 5/1/3. This is also consistent with the approach taken in relation to the amendment of a writ or pleading with leave under O 20 r 5 of the ROC. Generally, a claimant would not be allowed to introduce a new cause of action in relation to which limitation has set in by way of an amendment because it would have the effect of allowing circumvention of the limitation period: see *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 at [33]–[34].

79 Applying the principles above, there was no valid cause of action at the time of commencement of action. This is because the Loan Documents, as well as the Deeds of Assignment, had not been ratified prior to commencement of the action below in July 2018. As noted by Professor Tan Cheng Han ("Prof Tan") (see *Bird v Brown Revisited* at 628–629 and *The Law of Agency* at para 06.052), there is no contract enforceable by the principal until ratification takes place. When the action below was commenced, there was neither an enforceable contract nor any enforceable assignment which could be sued on. The action was therefore void *ab initio*. To elaborate:

(a) No contract was formed by SSI with Asidokona on the Loan Agreement and the Deed of Charge, and with Mr Soh on the Personal Guarantee *until SSI ratified Mr Wong's actions*. Similarly, there was no assignment between SSI and AAI *until SSI ratified Mr Wong's actions in executing the Deeds of Assignment*. SSI did not ratify these transactions prior to the commencement of action. Ratification only occurred on 26 July 2021. In fact, the Second Deed of Assignment was

Version No 2: 03 Feb 2023 (10:09 hrs)

only entered into on 15 November 2018, meaning even on a retrospective basis, the relation back was to a time that came *after* the date of commencement of action.

(b) Consequently, prior to commencement of action, SSI had no rights under the Loan Documents to assign to AAI, and no rights were assigned to AAI under the Deeds of Assignment. Thus, AAI had no causes of action under the Loan Agreement and Deed of Charge against Asidokona and under the Personal Guarantee against Mr Soh when the action below was commenced. The action was therefore liable to be struck out as it was in breach of the fundamental rule of civil procedure that a valid cause of action must exist when the action was commenced. It was not struck out because the appellants were not aware of the facts.

80 The question then is whether the retrospective effect of ratification can validate a cause of action that was not in place when action was commenced. More specifically, can the Ratification retrospectively validate the causes of action under the Loan Documents and the First Deed of Assignment with effect from the date of commencement of action? This question does not arise as regards the Second Deed of Assignment as it was entered into on 15 November 2018, *after the commencement of action*. In our view, the answer is no. If the action is void *ab initio*, it follows that an act undertaken post-commencement cannot restore validity to the action. The correct course of action for AAI to have taken, as noted in *Singapore Court Practice* at para 5/1/3 (see [78] above), was to have commenced a new action after the Ratification. Alternatively, action should have been commenced only after the Ratification.

Version No 2: 03 Feb 2023 (10:09 hrs)

81 Our conclusion is supported by the case of *Wittenbrock v Bellmer* (1880) 57 Cal 12 ("*Wittenbrock*") from the Supreme Court of California, which was cited by the appellants. *Wittenbrock* involved a plaintiff suing on a mortgage and a promissory note. The mortgage and note had been assigned to the plaintiff by the president of the Germania Building and Loan Association (the "Association"), but the authority of the president to do so was denied. Several months after the action had been commenced, the trustees of the Association attempted to ratify the previous actions of its president. The court rejected the contention that the ratification was effective as against the defendants (at 13):

> … But after this action had been pending for several months, the trustees of the Association attempted to ratify the previous action of its president in the premises, and it is claimed that such ratification related back to the date of the act ratified, and was equivalent to an original authority, according to the maxim that *omnis ratihabitio mandato œquiparatur*. That such was its effect, as between the Association, its president, and the assignee, we do not doubt. *And yet we are unable to discover any principle upon which the defendant's rights could be affected by such ratification. Conceding that at the date of the commencement of the action the plaintiff had no cause of action, it does not seem to us that he could maintain the action upon a cause of action subsequently acquired against the defendant.* The case was at issue, and if it had been tried at any time prior to the date of the ratification, the judgment must have been for the defendant. Could a stranger to the action step in at any time before the trial and deprive the defendant of that right, by placing in the hands of his adversary an instrument upon which he might have maintained an action? or one which he alleged that he had, but in fact did not have, when he commenced the action? Clearly, not. *If a party has no cause of action at the time of the institution of his action, he cannot maintain it by filing a supplemental complaint founded upon matters which have subsequently occurred*.
>
> [emphasis added]

We endorse the proposition stated in *Wittenbrock*.

Version No 2: 03 Feb 2023 (10:09 hrs)

Further authorities

82 For completeness, we deal with a number of authorities that were brought to our attention. These authorities are distinguishable. First, there are several English authorities that seem to suggest that ratification after commencement of action can have retroactive effect so long as no unfair prejudice is caused to third parties: see *Danish Mercantile Co Ltd and others v Beaumont and another* [1951] Ch 680 ("*Danish Mercantile*"); *Smith v Henniker-Major & Co (a firm)* [2003] Ch 182 ("*Smith v Henniker-Major*"); and *Presentaciones Musicales SA v Secunda* [1994] Ch 271 ("*Presentaciones Musicales*"). However, these cases are distinguishable as they do not concern a situation where there was no valid cause of action at the time of commencement of action.

83 In *Danish Mercantile*, a dispute arose in a company. A director of the company commenced action in the name of the company against the defendants without seeking prior approval from the company or the board of directors. The company was subsequently wound up and a liquidator was appointed. The defendants then applied to strike out the name of the company as plaintiff, and the liquidators then ratified the commencement of action. The court held (at 687–688) that it was open at any time to the plaintiff to ratify the commencement of action. If this was done, the defects in the action would be cured, and the defendant cannot subsequently object to the action. In *Smith v Henniker-Major*, a director of the company assigned the company's causes of action to himself despite lacking the power to do so. Subsequently, there was a purported ratification of the assignment by the company and the court had to decide whether the ratification was effective. Robert Walker LJ held (at [71])

Version No 2: 03 Feb 2023 (10:09 hrs)

that ratification was not effective if it would unfairly prejudice the counterparty, which was found to be the case there.

84 In *Presentaciones Musicales*, a writ was issued against the defendants. The defendants then learnt that the plaintiff company had been "dissolved" ten months before the writ was issued. The defendants sought a stay of the action alternatively, for the plaintiff's claim to be struck out as an abuse of process, on the basis that the action was commenced *without authority* (as the plaintiff was dissolved at that time). Commencement of the action was later ratified by the liquidators although some of the causes the action had become time-barred. This would suggest that ratification would not be permissible as it would result in the limitation period being extended. However, the majority of the court addressed this by holding that since the writ was "*not a nullity*" [emphasis added], the ratification was valid (at 280 and 281). The approach of the majority has been criticised for using the notion of nullity to extend the limitation period: see *Bird v Brown Revisited* at 641. A critical analysis of *Presentaciones Musicales* is unnecessary for the purpose of this judgment, but this case is relevant in so far as it consistent with the proposition that if the act sought to be ratified was a nullity, there would be nothing to ratify.

85 The crucial point of distinction between the present case and the three cases above, is that in those cases, there were valid causes of action at the time of commencement of action. That is not the case here. The issue in those cases was that there was no authority vested in the agents to commence the action or effect the assignment of the cause of action. Consequently, the acts sought to be ratified were actions commenced without authority where valid causes of action existed. Those actions were therefore not nullities, unlike here where there was no valid cause of action when action was commenced.

Version No 2: 03 Feb 2023 (10:09 hrs)

86 We should point out that in the present case, even the commencement of the action below was itself unauthorised as that too was only ratified subsequently by the Ratification. While we accept that an action commenced without authority may be ratified, that is subject to there being a valid cause of action when the action was commenced. An action commenced without a valid cause of action is void *ab initio* and therefore a nullity. As explained by Prof Tan in *Bird v Brown Revisited* at 641, it is a well-established principle that a nullity can never be ratified because there is nothing to be ratified to begin with.

87 Apart from the three cases above, we also consider a line of three Singapore decisions, which we had asked the parties to address us on in further submissions: *The Jarguh Sawit* [1997] 3 SLR(R) 829 ("*Jarguh Sawit*"), *BXH v BXI* [2020] 1 SLR 1043 ("*BXH*") and *POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165 ("*POA Recovery*").

88 In *Jarguh Sawit*, the appellants argued that pursuant to a deed of assignment dated 5 August 1996, they had acquired all the relevant rights belonging to Oxford Jay International Pte Ltd ("OJI") under a memorandum of agreement dated 7 May 1992 ("MOA") with Navigation Maritime Bulgare ("NMB"). The deed of assignment was executed *after* the writ was served. The appellants then sought to amend their counterclaim to include the damages suffered by OJI because of NMB's breach of the MOA. The Court of Appeal allowed the amendment and held that OJI's claim for damages against NMB was already in existence as at the date of the writ, and that it did not matter that the cause of action only vested in the appellants after that date.

89 Subsequently, in *BXH*, the Court of Appeal expressed doubts on whether the authorities relied upon in *Jarguh Sawit* stood for the proposition that an

Version No 2: 03 Feb 2023 (10:09 hrs)

assignment after commencement of action could retrospectively vest rights in an assignee. This court noted in *POA Recovery* that the Court of Appeal's observations on *Jarguh Sawit* in *BXH* were compelling (see *POA Recovery* at [83]). However, *POA Recovery* held that because the observations in *BXH* were made in *obiter*, this court was bound by the *ratio decidendi* in *Jarguh Sawit*. We agree with *POA Recovery* that the observations in *BHX* are compelling.

90 At first glance, it may appear that *Jarguh Sawit* is relevant, given that it involves a post-writ assignment of a cause of action. However, it is distinguishable. The key is that – as explained by the Court of Appeal at [62] – "[t]he cause of action was in existence at the date of the writ". Specifically, OJI's claim for damages against NMB was already in existence at that point. Here, however, as explained at [79] above, at the time of commencement of the action below, *neither SSI nor AAI* had a contract to sue the appellants on. The action below as commenced was therefore fundamentally defective, and could not be cured by a ratification after commencement of action.

Conclusion

91 In conclusion, there was no valid cause of action when the action below was commenced. The action was therefore void *ab initio*. For this reason, the Ratification did not (nor could it) retrospectively validate the cause of action. Accordingly, we allow the appeal on this basis as well.

***Locus Standi* Defence**

92 We turn to consider the other defences raised by the appellants, starting with the *Locus Standi* Defence. In the action below, the appellants asserted that SSI, as the equitable assignor of the Loan, had to remain a party to the action

Version No 2: 03 Feb 2023 (10:09 hrs)

for AAI to proceed. This was rejected by the Judge, who noted that the requirement of joining an equitable assignor as a co-plaintiff was a procedural requirement and exercised the court's discretion to dispense with the requirement (at [73] and [76] of the Judgment).

93 The appellants' primary contention on appeal is that the Judge took the possibility of double recovery too lightly: SSI may, notwithstanding the outcome of the action, institute action against the appellants on the same debt in the future. However, this concern is unfounded.

94 As a starting point, we observe that the issue of *locus standi* only arose *after* SSI had its claim struck out in April 2020 (see [13] above). We note that SSI was struck off the BVI register of companies in November 2019 and was restored to the BVI register of companies on 23 July 2021. The appellants submits that the reinstatement of a company that was struck off the register does not retrospectively confer validity on an action pursued when it did not possess legal status: see *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] 4 SLR 832 at [86]. There is some force in the appellants' argument but in our view, the more important point is what SSI did *after* it was reinstated.

95 After it was reinstated, SSI did not apply to set aside the striking out order. Instead, it carried out the Ratification on 26 July 2021 to allow AAI to pursue the cause of action as its assignee and in its place. Also, Ms Lou, as AAI's witness, stated in her AEIC (at para 11) that SSI would not be commencing any further action against the appellants in relation to the Loan Documents because it had assigned the causes of action to AAI. Having done so, SSI is bound by the assignment and the outcome of the action. SSI cannot approbate and reprobate.

Version No 2: 03 Feb 2023 (10:09 hrs)

96 Should SSI subsequently pursue an action based on the rights that it had assigned to AAI, that *may* be an abuse of process because it had: (a) ratified the assignment of the causes of action to AAI; and (b) not objected to AAI pursuing the action below to enforce those rights. But it is premature to deal with this point at this juncture when there is no indication that SSI would take this course. Instead, this is something for the appellants to raise at the appropriate juncture if so advised.

97 In the circumstances, the Judge was correct to conclude that risk of double recovery was overstated. The appellants' fears as regards SSI taking different, variant and inconsistent positions against them in the future are not well-founded.

Maintenance and Champerty Defence

98 The third defence mounted by the appellants is that the assignment savours of maintenance and champerty. The approach taken by the court in respect of such a question is as follows (*Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775 ("*Lim Lie Hoa*") at [36], citing *Trendtex Trading Corporation v Crédit Suisse* [1982] AC 679 ("*Trendtex*") at 703):

> The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

99 In the Judgment, the Judge found that SSI had by the Deeds of Assignment, assigned to AAI its property rights and not just bare causes of action; hence, following *Lim Lie Hoa* and *Trendtex*, the assignment was

Version No 2: 03 Feb 2023 (10:09 hrs)

effective (at [108]). The rights in question were the rights under the Loan Documents.

100 The appellants now suggest that it is insufficient for the cause of action to be ancillary to assigned property rights; instead, the court should inquire as to whether the property rights were assigned for the sole purpose of allowing the cause of action to be maintained in court.

101 There is little support for the proposition taken up by the appellants. Though the appellants cite a number of authorities, they may all be traced back to the case of *Ellis v Torrington* [1920] 1 KB 399, in which Scrutton LJ held (at 412–413):

> … When the person who assists is himself interested in the subject matter of the suit before its commencement there is neither champerty nor maintenance. Three owners of property may assist one of them in suing to protect the property and may share in what is recovered. This is neither maintenance nor champerty, because none of the three has a bare right of action. Each has a right of action relating to his interest in the property. So in this case when the respondent, who had bought the freehold, took also an assignment of the right to recover damages for dilapidations against the first lessee, *he was not buying in order merely to get a cause of action*; he was buying property and a cause of action as incidental thereto. …
>
> [emphasis added]

102 The appellants rest their case on the portion italicised above. In the present case, AAI was assigned a debt which was in default. As such, it must have been anticipated that the assignment of rights in relation to the debt was to be coupled with the cause of action to enforce the debt by way of legal proceedings. It is difficult to see how it can be said that the debt was assigned for the *sole* purpose of allowing the cause of action to be maintained in court in the present case. In any event, AAI is not a disinterested party because its

Version No 2: 03 Feb 2023 (10:09 hrs)

controlling shareholder and director, Mr Wong, had contributed $1m towards the principal sum of the Loan. There is therefore neither champerty nor maintenance.

103 In any event, the case of *Lim Lie Hoa* directly undermines the proposition now taken up by the appellants. In *Lim Lie Hoa*, an ex-wife took assignment of her ex-husband's interest in the residuary estate of his deceased father, *in order to* bring an action against the personal representatives of the estate (at [14]–[16] and [17]). Notwithstanding this, the Court of Appeal deemed that there was no maintenance or champerty, since the cause of action was ancillary to the interest assigned. In so holding, the court noted that "[t]he fact that at the time of the assignment it was contemplated that the [ex-wife] would have to sue the [personal representative] to recover what is due does not raise any question of maintenance or render the assignment champertous" (at [37] and [39]). In other words, contrary to the appellants' suggestion, the taint of maintenance and champerty does not attach to an assignment of a property right simply because litigation was contemplated.

104 In summary, there is no reason to accept the appellants' proposition that an assignment would savour of maintenance or champerty if it had been made for the sole purpose of allowing an action to be brought. Once this proposition is rejected, there is no reason to disturb the Judge's reasoning. The property rights attached to the Loan and the Charged Shares were assigned, and the cause of action is ancillary to those rights; there is no reason to strike down that assignment.

Version No 2: 03 Feb 2023 (10:09 hrs)

Illegality Defence

105 Turning to the Illegality Defence, the appellants submit that AAI has not shown that SSI contributed $1m towards the principal sum of the Loan; instead, it is "the irresistible inference" that JLC Advisors had misappropriated the $1m from the accounts of its other clients.

106 As earlier explained (see [60] above), AAI failed to discharge its burden of proof to show that the funds for the Loan did in fact come from SSI. However, we did not make a finding that the funds *did not* come from SSI. For the Illegality Defence to succeed, there must be a *positive* finding that the funds came from other clients of JLC Advisors. Ultimately, the burden of establishing the Illegality Defence lies with the appellants. Given the seriousness of the allegations of fraud and misappropriation, the standard of proof is high. While we have found that AAI has not discharged the burden of showing that SSI funded the Loan (see [60] above), this does not necessarily lead to the inference that the moneys were misappropriated by JLC Advisors/Mr Ong from the funds belonging to other clients. As the party advancing the defence, this is a burden for the appellants to discharge. This they have failed to do.

Penalty Defence

107 Finally, in relation to the Penalty Defence, on appeal, the appellants have dropped the argument that the interest rate of 5% per month was impermissible. The only point of contention was whether the default interest rate of 6% per month amounted to a penalty. However, at the hearing of the appeal, counsel for AAI informed the court that AAI would not be pursuing the additional margin of 1% per month. In other words, AAI agreed to limit the default interest rate to 5% per month. There is therefore no need for us to decide whether the

Version No 2: 03 Feb 2023 (10:09 hrs)

default interest rate, as adjusted, is a penalty as the appellants do not challenge the interest rate of 5% per month. In any event, as we have allowed the appeal, this issue is moot.

Conclusion and costs

108 We therefore allow the appeal. While the appellants have succeeded in this appeal, we exercise our discretion to depart from the general rule that costs follow the event due to the manner in which the appellants have conducted their case, both at first instance and on appeal. Further, we note that, by succeeding in their appeal, the appellants have received an unintended windfall in the form of being relieved of liability to repay part of a loan that they received in 2016. Thus, we order that each party is to bear their own costs in respect of the appeal and the action below. The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

Quentin Loh
Senior Judge

Gregory Vijayendran Ganesamoorthy SC, Chua Kee Tian Lester (Cai Qizhan Lester), Tomoyuki Lewis Ban and Kevin Wong Jin Wei (Rajah & Tann Singapore LLP) (instructed),

Version No 2: 03 Feb 2023 (10:09 hrs)

Mulani Prakash P and Safiuddin bin Mohamed Naseem (M & A Law Corporation) for the first appellant;
Mulani Prakash P and Safiuddin bin Mohamed Naseem (M & A Law Corporation) for the second appellant;
Narayanan Sreenivasan SC, Rajaram Muralli Raja and Chloe Wang Wenyi (K&L Gates Straits Law LLC) for the respondent.

Version No 2: 03 Feb 2023 (10:09 hrs)