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

[2024] SGHC 264

Originating Claim No 214 of 2024 (Registrar's Appeal No 139 of 2024)

Between

VeriFone, Inc.

… *Claimant*

And

Firemane Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure — Summary judgment — Applicable principles for grant or refusal of summary judgment]
[Contract — Contractual terms — Contracting party owing liability claiming set-off against sums due under settlement agreement — Whether contractual requisites for set-off sum to be engaged were satisfied]
[Contract — Contractual terms — Whether clauses were primary or secondary obligations — Whether clause in settlement agreement providing for full and accelerated payment upon failure to pay settlement sum in instalments by due dates was primary or secondary obligation]

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VeriFone, Inc
v
Firemane Pte Ltd

[2024] SGHC 264

General Division of the High Court — Originating Claim No 214 of 2024
(Registrar's Appeal No 139 of 2024)
Goh Yihan J
27 August 2024

21 October 2024 Judgment reserved.

Goh Yihan J:

1 HC/RA 139/2024 ("RA 139") is an appeal by Firemane Pte Ltd, the defendant in HC/OC 214/2024 ("OC 214"), against the learned Assistant Registrar Ong Kye Jing's decision (the "AR") to grant summary judgment in the sum of US$5,427,539.70 (plus interest) to VeriFone, Inc, the claimant in OC 214.

2 After taking some time for consideration, I dismiss the defendant's appeal for the reasons below. In summary, I am satisfied that the claimant has established a *prima facie* case in respect of its claim based on the Settlement Agreement dated 18 March 2024 (the "Settlement Agreement"), and that the defendant has failed to raise a real or *bona fide* defence in either (a) the Set-Off Defence, or (b) the Penalty Defence (see at [20(b)]–[20(c)] below). There is accordingly no need to put the parties through the time and expenses associated

with a full trial. I therefore affirm the AR's grant of summary judgment on 17 July 2024, and I dismiss the defendant's appeal in RA 139.

Background facts

3 I begin with the material background facts.

The parties and their relationship

4 The claimant is a company incorporated in the state of Delaware in the United States of America. It is in the business of providing technology for electronic payment transactions and value-added services at the point-of-sale. The defendant is a company incorporated in Singapore. It is in the business of wholesale of machinery and equipment.

5 The parties concluded two contracts that form the background of this case. These are the (a) VeriFone Systems Partner Agreement APAC Region, which was novated from Harris Enterprises International Ltd to the defendant with effect from 30 June 2022, and (b) VeriFone International Partner Agreement dated 4 May 2022, by which the claimant appointed the defendant as its non-exclusive distributor and its value-added reseller. I shall refer to these contracts collectively as the "Contracts".[1]

The parties' disagreements and the Credit Note

6 Between the execution of the Contracts and the Settlement Agreement, the parties ran into some disagreements, which eventually led to them concluding the Settlement Agreement. These disagreements stemmed from, among others, a credit note in the amount of US$1m dated 4 October 2023 (the

[1] Affidavit of Thomas Rebain filed on 23 May 2024 ("TR's Affidavit") at para 5.

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"Credit Note").[2] The claimant sent the Credit Note by email to the defendant on 16 October 2023.[3] In the same email, the claimant also attached a spreadsheet that set out a breakdown of the total amount of US$3,384,116.98 that the defendant allegedly owed to the claimant.

7 According to the defendant, the Credit Note was issued to resolve alleged misrepresentations that the claimant had made. These misrepresentations concerned the supposed end of life of certain devices, which the defendant relied on to order a higher quantity of these devices. Despite the Credit Note, the defendant ultimately decided not to renew the Contracts because of the claimant's supposedly self-serving policies and inefficiency. The defendant communicated this decision by an email on 23 October 2023, as well as a letter delivered by courier to the claimant dated 26 October 2023.[4]

8 Subsequently, the claimant revoked (or purported to revoke) the Credit Note in an email dated 4 January 2024.[5] The defendant disagreed that the claimant had a basis to do so. In essence, the claimant asserted that the Credit Note was issued subject to the terms and conditions in an email dated 10 September 2023, which included the defendant making payment of past due amounts. The claimant therefore revoked the Credit Note when the defendant did not satisfy these terms and conditions. However, the defendant asserted that the Credit Note was issued without any conditions or qualifications.

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2 Affidavit of Benjamin Churchill Harris filed on 11 July 2024 ("1BCH") at para 22 and p 56.

3 1BCH at para 21.

4 1BCH at paras 25-26.

5 1BCH at para 29.

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9 The claimant also attached to the email dated 4 January 2024 two invoices, which were for late fees that the defendant allegedly owed to the claimant for the period of August–December 2023.[6] As of 26 February 2024, the defendant allegedly owed the claimant US$5,349,994 in total, comprising US$4,920,014 as principal and US$429,980 as interest, under the Contracts.[7] The defendant raised further disputes in relation to the Contracts and refused to pay up. This led to the claimant instructing its solicitors, Dentons Rodyk & Davidson LLP ("Dentons"), to serve a written demand on 26 February 2024 to demand payment of the sums due (or allegedly due) under the VeriFone Systems Partner Agreement APAC Region.[8] The sums due (or allegedly due) under the VeriFone International Partner Agreement were not included in that written demand.

The Settlement Agreement

10 The parties then commenced discussions to resolve their differences. They concluded the Settlement Agreement on 18 March 2024. The Preamble to the Settlement Agreement, which sets out the background against which the parties concluded the said Agreement, provides as follows in recitals (B)–(E):[9]

> **WHEREAS:-**
>
> [recital (A) omitted]
>
> (B) As of 26 February 2024, Firemane owes Verifone the sum of USD 5,349,994 (USD 4,920,014 as principal and USD 429,980 as interest) under the following invoices issued pursuant to the Contracts (**"Invoices"**):-
>
> [Invoices omitted]

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6 1BCH at para 29.

7 TR's Affidavit at para 6.

8 TR's Affidavit at para 10 and pp 159-160.

9 TR's Affidavit at pp 162-163.

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> (C) Firemane has raised certain claims, complaints and/or disputes in relation to the above Contracts and/or the Invoices and products and services relating thereto, including but not limited to those raised under its letter dated 26 October 2023 and its email dated 6 February 2024, which are denied by Verifone.
>
> (D) Verifone has threatened legal action to enforce its rights, and on 26 February 2024 served a Written Demand in accordance with Section 125(2)(a) of the Insolvency, Restructuring and Dissolution Act 2018.
>
> (E) The Parties now wish to enter into this Settlement Agreement to fully and finally settle the disputes and/or differences described above.
>
> [emphasis in original]

11 The email dated 6 February 2024 referred to in recital (C) was sent by the defendant's general counsel to various representatives of the claimant. The body of the email, under a subheading labelled "SUBJECT", read: "Formal Response to [the claimant]'s Email of 29 January 2024".[10] In the claimant's email of 29 January 2024, the parties had discussed, among other matters, the Credit Note.[11] In that email, the claimant reasserted its contractual right to revoke the Credit Note. In the subsequent email dated 6 February 2024, the defendant disagreed (in paras 9–11 of the email) with the claimant's assertions in this regard.[12] However, the defendant then stated (in para 12 thereof) that:[13]

> That being said, we currently endeavor to refrain from further argument regarding the Credit [Note] and/or dwelling on the same and respectfully encourage [the claimant] to play a similar role in the interest of constructive discussion such that a swift and amicable resolution to the dispute at hand can be achieved by both parties.

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10 1BCH at pp 70-74.

11 1BCH at pp 80-82.

12 1BCH at pp 70-74.

13 1BCH at p 72.

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It is therefore clear that the reference in recital (C) to the "claims, complaints and/or disputes" in the email dated 6 February 2024 includes the parties' dispute in relation to the Credit Note.

12 There are several key clauses in the Settlement Agreement in the context of this appeal in RA 139. Clauses 1 to 3 embody the "Buyback Amount", which is the consideration that the claimant would provide by buying back certain devices from the defendant. For present purposes, cl 1 provides as follows:[14]

> 1. Firemane agrees to return and deliver up to 1,190 P200 devices with part number M430-003-04-NAA-5 ("**P200 Devices"**) and up to 6,500 P400 devices with part number M435-303-14-NAA-5 ("**P400 Devices"**) which it had earlier purchased from Verifone and which are currently located in the United States, and Verifone agrees to buy back those P200 Devices at the price of USD 93.44 each and those P400 Devices at the price of USD 146.85 each, **strictly provided** that:
>
> (a) The devices are delivered to Verifone c/o Reconext at [address omitted], on or before 5 April 2024 at Firemane's own risk and cost, FOB Destination (Incoterms 2020); and
>
> (b) The devices are received by Verifone at the abovementioned Reconext facility in their original undamaged packaging, unopened and with security seals intact.
>
> The total buyback consideration payable by Verifone pursuant to the above shall hereinafter be referred to as the "**Buyback Amount**".
>
> [emphasis in original]

13 Clause 4 provides for the defendant's repayment obligations, as follows:[15]

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14 TR's Affidavit at pp 163-164.

15 TR's Affidavit at p 164.

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> 4. Firemane shall pay Verifone sums due in relation to the Invoices by way of five (5) instalments (the "**Settlement Sum**"):-
>
> | Instalment amount | Payment deadline |
> |---|---|
> | USD 500,000 | 25 March 2024 |
> | USD 500,000 | 25 April 2024 |
> | USD 500,000 | 25 May 2024 |
> | USD 500,000 | 25 June 2024 |
> | USD 1,920,014 less Buyback Amount (if any) | 25 July 2024 |
>
> [emphasis in original]

It will be observed that the last row of the table refers to the "Buyback Amount", which was defined in cl 1 (see at [12] above). A plain reading of cl 4 thus provides that the Buyback Amount only applies to the fifth and final instalment amount due on 25 July 2024.

14 Next, cll 6–8 provide for, among other things, the consequences that were to follow should the defendant not fulfil its repayment obligations in cl 4:[16]

> 6. **Strictly provided** that all instalment payments are made in full by the stipulated deadlines above, and the Settlement Sum is received in full by or before 25 July 2024:-
>
> (a) Verifone shall forebear from commencing legal action and/or winding up proceedings against Firemane as it previously threatened for nonpayment of the Invoices;
>
> (b) Verifone agrees not to pursue its claim for unpaid interest in relation to the Invoices (in the sum of USD 429,980 plus additional interest accrued since 26 February 2024); and
>
> (c) Verifone agrees not to pursue its claim for the remaining sum of USD 1,000,000 due to it in relation to the Invoices.

[16] TR's Affidavit at pp 164-165.

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> 7. Time is of the essence for all instalment payments. If **any** of the instalment payments are not made in full by or before the applicable payment deadline, Firemane shall become obliged to pay Verifone the following additional sums ("**Additional Payments**") by or before 25 July 2024:-
>
> (a) The additional sum of USD 1,000,000; and
>
> (b) All interest accrued on the Invoices (i.e. the sum of USD 429,980 plus all interest accrued since 26 February 2024).
>
> For the avoidance of doubt, the Parties agree that no cure period shall apply to any payment due under this Settlement Agreement.
>
> 8. If any of the instalment payments are not made in full by or before the applicable payment deadline or if Firemane fails, refuses or neglects to pay the Additional Payments in full by or before 25 July 2024 or if there is any breach to any of the terms of this Settlement Agreement, Verifone shall be entitled to treat the full Settlement Sum plus Additional Payments (less any payments made by Firemane) as immediately due and payable, and Verifone shall be entitled to pursue all available legal and/or other remedies to collect and/or enforce payment of the same. In such event, Firemane shall not raise any defence or dispute to the claim or action and shall indemnify Verifone for all its legal costs and expenses (including all attorneys' and experts' fees and costs) incurred in relation to or in connection with the same.
>
> [emphasis in original]

15 Finally, cl 18 contains an entire agreement clause, which provides as follows:[17]

> 18. This Settlement Agreement embodies all the terms and conditions agreed on between the Parties as to the subject matter of this Agreement and supersedes and cancels all prior proposals, promises, agreements, understandings, undertakings, representations and communications made by the Parties with respect to the subject matter hereof, whether oral, written or implied. No representations, inducements, promises or

[17] TR's Affidavit at p 166.

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> agreements, oral or otherwise that are not embodied herein shall be of any force or effect.

The defendant's alleged breach of the Settlement Agreement

16 The defendant failed to make the first instalment payment of US$500,000 that was due to the claimant on 25 March 2024 under the first row of the table in cl 4 of the Settlement Agreement (see at [13] above).[18] On 26 March 2024, the claimant's solicitors, Dentons, sent an email to the defendant requesting for an update on the status of the instalment payment.[19] On the same day, Mr Joshua Harris, who is one of the defendant's directors, emailed Dentons to say that the defendant would not make the first instalment payment that day. In this email, Mr Joshua Harris did not deny that the defendant had failed to pay the first instalment on time and said that: "[w]e won't be able to make our planned payment of $500k today". Mr Joshua Harris explained that this was because of "a very frustrating few weeks, where several major payments have not arrived as planned".[20]

17 Following this, the claimant informed the defendant through a letter sent by its solicitors, Dentons, on 29 March 2024 that, due to the latter's breach of its repayment obligation pursuant to cl 4 of the Settlement Agreement, it would not be buying back any of the devices pursuant to cl 1.[21] The claimant then filed the Originating Claim and Statement of Claim in OC 214 on 30 March 2024. The defendant filed its Defence (Merits) on 26 April 2024. The claimant filed its summons in HC/SUM 1381/2024 on 23 May 2024 ("SUM 1381") for

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18 TR's Affidavit at para 14.

19 TR's Affidavit at para 15 and p 169.

20 TR's Affidavit at pp 171-172.

21 TR's Affidavit at pp 174-175.

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summary judgment in OC 214, which the AR granted on 17 July 2024 in his judgment in HC/JUD 281/2024. The defendant then appealed against the AR's decision by filing RA 139 on 31 July 2024.

The parties' general cases

18 Against these background facts, the claimant's pleaded case in its Statement of Claim is that the defendant has breached cl 4 of the Settlement Agreement by failing to make the first instalment payment of US$500,000 by 25 March 2024. Thus, the defendant became liable pursuant to cl 7 of the Settlement Agreement to pay the Additional Payments. Further, pursuant to cl 8, the claimant is entitled to treat the entirety of the Settlement Sum as immediately due and owing, in addition to the Additional Payments. The claimant therefore claims for the defendant to (a) immediately pay it the sum of US$5,425,225, being the Settlement Sum and the Additional Payments, (b) interest on the principal sum of US$4,920,014 at the contractual rate of 18% per annum provided under the Contracts from the date of writ up to the date of full payment, (c) in the alternative to (b), interest at the rate of 5.33% on the sum of US$5,425,225 from the date of writ to the date of judgment, and (d) a full indemnity of the claimant's legal costs as provided for under cl 8 of the Settlement Agreement or, alternatively, for costs to be fixed or taxed on an indemnity basis.

19 I note that, while the claimant's SUM 1381 initially sought for summary judgment in the amount of US$5,425,225 (plus contractual interest on the principal sum from the date of the writ to the date of full payment), by the time of the hearing before the AR below, the claimant had, in a letter to court dated 15 July 2024, amended the amount sought in SUM 1381 to US$5,427,539.70 instead. The AR observed on 17 July 2024 that the defendant had no objection

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to the revised figure. Hence, the AR's grant of summary judgment was for this larger sum (see at [1] above). This was because the original sum of US$5,425,225 had failed to account for contractual interest for the period of 27–29 February 2024.

20 In its Defence (Merits), apart from asserting that the claimant did not establish a *prima facie* case, the defendant advances three specific defences against the claimant's claim, which I will outline generally at this juncture. These are:

(a) First, the defendant avers that it did not breach cl 4 of the Settlement Agreement. This is because, on a proper interpretation of cl 4, the defendant's "overarching obligation" was to make payment of the Settlement Sum by 25 July 2024, irrespective of whether the payment deadline for each instalment amount had been strictly met (the "Interpretation Defence").

(b) Second, even if the defendant had breached cl 4, it has suffered loss and damage equivalent to the Buyback Amount due to the claimant's refusal to perform its obligations under cll 1–3 of the Settlement Agreement. As such, the defendant can set-off its loss and damage equivalent to the Buyback Amount against its obligation to pay the claimant the first instalment of US$500,000. Additionally, although not specifically pleaded in its Defence (Merits), the defendant avers in its affidavit for SUM 1381 that it is entitled to set-off the Credit Note against any sum that the claimant claims for. However, there are references in the defendant's Defence (Merits) to the effect that (a) the Credit Note was issued unconditionally by the claimant and was not validly revoked by them and (b) the sum of the Settlement Sum and the

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Additional Payments said to be owed under cll 7–8 of the Settlement Agreement fails to account for the Credit Note and the Buyback Amount. The defendant therefore argues that it is entitled to set-off both the Credit Note and the Buyback Amount against the moneys owed to the claimant (the "Set-Off Defence").

(c) Third, cll 7–8 of the Settlement Agreement are unenforceable as penalty clauses. The defendant is therefore not obliged to pay the Additional Payments pursuant to cl 7, nor was its liability to pay the Settlement Sum and Additional Payments validly "accelerated" pursuant to cl 8 (the "Penalty Defence").

21 For the purposes of the present appeal in RA 139, the defendant does not contest that the claimant has established a *prima facie* case. It also does not pursue the Interpretation Defence before me, which was pursued before the AR below. This is because the defendant has not made payment of the Settlement Sum by 25 July 2024. As such, even if the Interpretation Defence were accepted such that the defendant's "overarching obligation" was to make payment of the Settlement Sum by 25 July 2024, it would have breached cl 4 in any event since it has not made such payment.

22 In view of the issues that the defendant has chosen to pursue before me, I will proceed on the basis that the claimant has established a *prima facie* case and that the Interpretation Defence is not a real or *bona fide* defence. As the AR rightly observed, this means that the defendant has not advanced a full defence against the total sum of US$5,427,539.70 claimed by the claimant. This is because even if the remaining defences, *viz*, the Set-Off Defence and the Penalty Defence, are real or *bona fide* defences, they only cover a portion of the total sum claimed by the claimant.

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My decision: the appeal in RA 139 is dismissed

The applicable principles on summary judgment

23 I turn now to the applicable law on the grant of summary judgment. I begin by observing that the language of O 9 r 17 of the Rules of Court 2021 (the "ROC 2021") is not entirely identical with that in O 14 rr 1 and 3 of the Rules of Court (2014 Rev Ed) (the "ROC 2014"). However, the legal principles that are applicable to the grant of summary judgment under ROC 2021 do not differ from that under ROC 2014. Indeed, I made a similar observation in the General Division of the High Court decision of *Horizon Capital Fund v Ollech David* [2023] SGHC 164 (at [58]), namely, that there is nothing in the contents of the *Report of the Civil Justice Review Committee* (2018) (Chairperson: Indranee Rajah SC) which suggests otherwise. As such, the legal principles espoused in those cases governed by O 14 of the ROC 2014 continue to be relevant in guiding the grant or refusal of summary judgment applications filed under the present regime in O 9 r 17 of the ROC 2021. Indeed, these older cases governed by the ROC 2014 are regularly applied by the High Court where summary judgment applications under the ROC 2021 are concerned (see, *eg*, *Ang Hong Wei and others v Ang Teng Hai and another* [2024] SGHC 14 at [35(c)]; *Progress ABMS Pte Ltd v Progress Welded Mesh Sdn Bhd* [2024] SGHC 20 at [8]; and *Ho Chee Kian v Ho Kwek Sin* [2024] 3 SLR 888 at [13]).

24 The purpose of the summary judgment procedure is to enable a claimant to obtain a quick judgment without trial where there is plainly no defence to the claim (see *Ho Choon Han v SCP Holdings Pte Ltd* [2022] SGHC 260 at [17] and *Asian Eco Technology Pte Ltd v Deng Yiming* [2023] SGHC 227 at [7]). In particular, where the defendant's only defence rests on a point of law which the

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court can readily appreciate to be misconceived, then such a case is one wherein summary judgment without a full trial is appropriate (see the High Court decisions of *Ling Yew Kong v Teo Vin Li Richard* [2014] 2 SLR 123 at [30] and *Samsonite IP Holdings Sarl v An Sheng Trading Pte Ltd* [2017] 4 SLR 99 at [152]).

25 However, in an application for summary judgment, it is the claimant who first bears the burden of proof of showing that it has a *prima facie* case for judgment in its favour. Only after it has successfully discharged that onus does the burden of proof then shift to the defendant to establish that there is a fair or a reasonable probability that it has a real or *bona fide* defence to the claim (see the High Court decision of *Associated Development Pte Ltd v Loong Sie Kiong Gerald (administrator of the estate of Chow Cho Poon, deceased) and other suits* [2009] 4 SLR(R) 389 at [22]). As such, the question of whether the defendant has a real or *bona fide* defence to the claim is only engaged after the claimant has managed to discharge its anterior burden of making out a *prima facie* case on the merits (see the High Court decisions of *Rankine Bernadette Adeline v Chenet Finance Ltd* [2011] 3 SLR 756 at [10]–[12] and *Thomas Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772 at [9]).

26 If a claimant fails to show a *prima facie* case for summary judgment, then his or her application will be dismissed. The threshold for establishing a *prima facie* case requires demonstrating that the claimant's case is viable, when considered on its face, without considering the defendant's defence or counterarguments (see the General Division of the High Court decision in *Mak-Levrion Kah Kay Natasha (alias Mai Jiaqi Natasha) v R Shiamala* [2024] 4 SLR 616 at [16]). The court proceeds to evaluate the defendant's case,

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and any alleged deficiencies therein, only *after* the claimant has met that *prima facie* threshold for its own case, when considered on its own.

27 After the claimant has shown a *prima facie* case for summary judgment in its favour, the tactical burden is then on the defendant who, in order to obtain leave to defend, must show a fair or reasonable probability that he or she has a real or *bona fide* defence to the claim (see the High Court decisions of *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]; *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [44]–[45] and *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B World Asia*") at [17]–[18]). To discharge this tactical burden, the case law uses the language of the defendant having to show that there are triable issues or that, for some other reason, there ought to be a trial (see *M2B World Asia* at [19]; see also the High Court decisions of *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 at [35]–[38] and *KLW Holdings Ltd v Straitsworld Advisory Ltd and another* [2017] 5 SLR 184 at [15]–[18]).

28 However, the court is not required to accept the defendant's evidence on affidavit unquestioningly. Indeed, it has been emphasised that mere assertions on affidavit swearing to or affirming the defendant's defence will not suffice to show a real or *bona fide* defence (see the High Court decisions of *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 ("*LKY v CSJ*") at [24]–[25] and *Ma Hongjin v SCP Holdings Pte Ltd* [2018] 4 SLR 1276 ("*Ma Hongjin*") at [32] and [45]). That will be the case where the assertions are lacking in precision, inconsistent with the objective evidence or other statements of the same deponent, or inherently improbable in themselves, among other reasons (see *M2B World Asia* at [19] and *Ma Hongjin* at [32] and [45]; see also the High

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Court decisions of *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] 2 SLR 601 at [10]–[11] and *Calvin Klein, Inc and another v HS International Pte Ltd and others* [2016] 5 SLR 1183 at [45] and [76]). A bare assertion is not enough (see the High Court decision of *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd and others* [1998] 1 SLR(R) 53 at [14]). Thus, where the defendant is unable to discharge this tactical burden, then the claimant is entitled to summary judgment.

A preliminary issue: whether the defendant filed and served a reply affidavit in SUM 1381 which complied with O 9 r 17(3) of the ROC 2021

29 As a preliminary issue, the claimant submitted before the AR that the defendant did not submit any evidence to support its pleadings in its Defence (Merits). The claimant relied on O 9 r 17(3) of the ROC 2021, which states that "[i]f the defendant disputes the application in any way, the defendant must file and serve the defendant's affidavit on the claimant within 14 days after service of the claimant's application and affidavit". The claimant further relied on O 9 r 17(4), which provides that "[t]he defendant's affidavit must contain all the evidence that is necessary or material to the defence". Contrary to these provisions, the defendant's reliance on the affidavit of its director ("1BCH"), Mr Benjamin Churchill Harris ("Mr Harris"), was not proper because that affidavit had not been affirmed, notarised and filed in court pursuant to O 15 r 18. In this regard, 1BCH was filed and served under the cover of the affidavit of the defendant's solicitor, Mr Kishan Pillay s/o Rajagopal Pillay, on 6 June 2024, which was within 14 days of the claimant's filing and serving of their supporting affidavit for SUM 1381 on 23 May 2024. However, 1BCH itself was not signed, notarised and filed by the deponent for more than a month thereafter.

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30 Indeed, 1BCH was only signed, notarised and filed on 11 July 2024. This was after the initial hearing of SUM 1381 before the AR on 4 July 2024 but before the AR delivered judgment on 17 July 2024. It appears from the record that Mr Harris had been unable to sign or affirm 1BCH in time because he was in The Netherlands at the material time, and the affidavit was filed under solicitor's cover due to "urgency". Further, while 1BCH was first notarised on 19 June 2024, the defendant's solicitors only noticed that this notarisation was done "wrongly" shortly before 4 July 2024. This is why 1BCH was not signed, notarised and filed by the time SUM 1381 was first heard on 4 July 2024. In the end, the AR granted the defendant an extension of time for it to file the properly signed and notarised 1BCH by 11 July 2024, and reserved judgment until after that was done.

31 While the claimant has not raised the question of whether the defendant provided evidence in proper form in SUM 1381 before me on appeal, I take this opportunity to make a few points as to the importance of adhering to the civil procedural requirements in relation to affidavits. To begin with, I respectfully agree with the AR's approach below to grant the defendant an extension of time to file 1BCH, on the facts of the present case. The question of whether to grant an extension of time under O 3 r 4(1) of the ROC 2021 is a question of procedural discretion, for which the court must bear in mind the achievement of the Ideals in O 3 r 1 "in all its orders or directions", *per* O 3 r 1(3) of the same.

32 In that respect, granting the defendant an extension to file 1BCH in its proper form – *ie*, notarised and sworn or affirmed by the deponent himself, and not under the defendant's solicitor's covering affidavit – would further the Ideals of the ROC 2021, and especially the meting-out of "fair and practical results suited to the needs of the parties" under O 3 r 1(2)(*e*) of the ROC 2021.

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The delay here was not an inordinately long one, as 1BCH was to have been filed by 6 June 2024, and was filed in proper form on 11 July 2024. There were also good reasons for the delay, including practical considerations arising from the fact of Mr Harris being in The Netherlands during the material period and the initially erroneous notarisation of 19 June 2024. Moreover, as the fundamental purpose behind requiring parties to file and serve their reply affidavits in good time is to give the applying party sufficient time to consider the evidence of the opposing party in preparation for the hearing of the summons at issue, it is not insignificant that 1BCH, when filed under solicitor's cover on 6 June 2024, was extensive and comprehensive. As such, it gave the applying party – the claimant, in this case – sufficient notice of the defendant's evidence, well in advance of the hearing of SUM 1381 on 4 July 2024. Therefore, the grant of an extension of time to file 1BCH in proper form was a fair and practical approach for the AR to take below. It properly balanced the procedural rights of the claimant to know in advance the evidence that the defendant would seek to rely on in opposition to SUM 1381, on the one hand, against the practical difficulties that were faced by the defendant in filing 1BCH in proper form by the applicable deadline, on the other hand.

33 However, a note of caution is in order, namely, that litigants must avoid treating the filing of an affidavit under solicitor's cover as an adequate – as well as a more *convenient* – method of satisfying court orders or procedural rules in respect of the filing of affidavits, including in interlocutory proceedings. As this case illustrates, an affidavit filed under the covering affidavit of a solicitor that is unsworn or unaffirmed by the *underlying* deponent is a deficient one, because the party possessing the personal knowledge required to aver to the facts deposed therein has not sworn to or affirmed the truth thereof. It is that oath or affirmation which gives the affidavit the value of evidence in law – hence, the

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rule in O 15 r 18 of the ROC 2021 that: "[a]n affidavit is a statement of evidence in the English language, signed and affirmed before a commissioner for oaths." The most that the solicitor's covering affidavit can do is swear or affirm to the truth of the underlying unsworn or unaffirmed affidavit to the *best* of his or her knowledge – which will, invariably, be suboptimal compared to the deponent himself or herself swearing or affirming to the truth of the same.

34 While this is a suboptimal scenario, the court can accommodate this scenario in light of the genuine practical difficulties that a party may have in adducing its affidavit in proper form, as I have stated at [32] above. Civil procedural rules are not so harsh as to disproportionately penalise a defaulting party for circumstances that are outside of their control. Indeed, it is trite that "[a] balance has to be struck between, on the one hand, instilling procedural discipline in civil litigation and, on the other, permitting parties to present the substantive merits of their case notwithstanding a procedural irregularity" (see the Court of Appeal decision of *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 at [14], relying on *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [20]).

35 However, it remains the burden of the defaulting party to provide a good reason as to why an affidavit in its proper form cannot be filed on time. Indeed, as the Family Court had observed in *WUC v WUD* [2024] SGFC 10 at [3], there "[t]he affidavit was also filed in the form of a solicitor's cover affidavit. As of the date of these written Grounds, the Husband has not filed his affidavit *in the proper form*" [emphasis added], alluding to the undesirability of an affidavit filed under solicitor's cover as not being "in the proper form". Likewise, in the District Court decision of *Yang Guoxiu v Chin Chien Yong* [2017] SGDC 179,

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a party had an unless order imposed against him to exchange his affidavit of evidence-in-chief ("AEIC") by a given date. The party was found to have defaulted on this unless order by exchanging an AEIC filed under solicitor's cover as opposed to one affirmed by himself. The District Court thus observed there (at [43]) that "the affidavit which was provided to the Plaintiff during the exchange was not the Defendant's AEIC. Instead, it was an AEIC affirmed by one of the Defendant's Counsel, Mr Kok." The District Court took a dim view of the defaulting party's conduct in that case, finding that there were ample opportunities for him to have filed his AEIC in the proper form to comply with the unless order, but that he had intentionally failed to do so (at [46]–[47]).

36 As such, it should not be forgotten that an unsworn or unaffirmed affidavit filed under solicitor's cover is not an affidavit in proper form. Moreover, even if the defaulting party can provide a good explanation for this default, the onus remains on that party to correct the impropriety in due time and at the next reasonably available opportunity. Hence, while temporary allowances can be made for the genuine difficulties of a party in filing their affidavit in the proper form on time, it should not be forgotten that such a covering affidavit is but an interim stopgap measure and not a permanent redress. The onus will remain on the defaulting party to (a) provide an adequate explanation for their inability to file their affidavit in the proper form by the applicable deadline, and then (b) correct the deficiency as soon as is reasonably practicable for them to do so by filing their affidavit in the proper form.

37 In the present appeal, as 1BCH was filed in proper form on 11 July 2024, and the defendant adequately explained to the AR below its reasons for not being able to do so by the earlier deadline of 6 June 2024, I shall say no more

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on this subject, and I proceed to consider the merits of the parties' arguments on RA 139.

Whether the Set-Off Defence is a real or* bona fide *defence

The parties' arguments

38 I turn first to the Set-Off Defence. In this regard, the defendant argues that it has two claims which can be set-off against the claimant's claim for US$5,427,539.70. These are the Buyback Amount (see at [12] above) and the Credit Note (see at [6] above).

39 In respect of the Buyback Amount, the defendant argues that the claimant had failed to pay it the Buyback Amount pursuant to cll 1–3 of the Settlement Agreement. The defendant was prepared to deliver the P200 Devices and the P400 Devices (collectively, the "Buyback Devices") to the claimant by 5 April 2024 pursuant to cl 1 of the Settlement Agreement. However, the claimant had "repudiated" cll 1–3 of the Settlement Agreement on 29 March 2024, as communicated in a letter sent by its solicitors, Dentons, on that date (see at [17] above). Therefore, the defendant submits that it has suffered loss amounting to the Buyback Amount, which can be the subject of a legal set-off against the amount claimed by the claimant in OC 214 under cll 7–8 read with cl 4 of the Settlement Agreement. In addition, the defendant says that the Buyback Amount can also be the subject of an equitable set-off against the amount claimed by the claimant. The defendant argues that this can be done because there is a "sufficient degree of closeness" between the Buyback Amount and the claimant's claim in OC 214.

40 In respect of the Credit Note, the defendant argues that it had not been compromised in the Settlement Agreement. The defendant argues that the AR

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erred in finding otherwise below because the claimant's position had always been that the Credit Note was revoked. Thus, the claimant actually proposed to "re-introduce" the Credit Note by deducting the sum of US$1m from payments to be made by the defendant under the Settlement Agreement. The defendant then counter-proposed in its email of 6 February 2024 (see at [11] above) that the parties:

> … refrain from further argument regarding the Credit [Note] and/or dwelling on the same and respectfully encourage [the claimant] to play a similar role in the interest of constructive discussion such that a swift and amicable resolution to the dispute at hand can be achieved by both parties.

41 While the defendant's argument on the Credit Note was not clear to me from reading its written submissions, I understood from Mr Chan Michael Karfai ("Mr Chan"), counsel for the defendant, during the hearing before me on 27 August 2024 that the defendant's position is simply that the Credit Note was not a part of the matters compromised between the parties in their Settlement Agreement.

42 In response, the claimant argues that the Buyback Amount can amount to a set-off but that its quantity is zero. The claimant says that it was not obliged to continue with the buyback of the Buyback Devices under cll 1–3 of the Settlement Agreement where the defendant had breached cl 4 of the same. Moreover, the Buyback Amount is not payable in cash. It was intended to be a potential further discount on the sums payable by the defendant to the claimant, which would only be applied at the time of and against the fifth and final instalment payment, pursuant to the last row of the table found in cl 4 of the Settlement Agreement.

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43 As for the Credit Note, the claimant's position is that the parties' prior disputes regarding the Credit Note were one of the matters compromised under their Settlement Agreement. Accordingly, this means that the defendant can no longer raise any claim relating to the Credit Note.

My decision: the Set-Off Defence is not a real or bona fide *defence*

(1) The Buyback Amount in the Settlement Agreement was never engaged

44 In my judgment, even if the defendant were entitled to claim a legal or equitable set-off in respect of the Buyback Amount, it would make no difference to the outcome because the Buyback Amount was never engaged under the terms of the Settlement Agreement. There is thus no need to even consider whether the defendant satisfies the requirements of a legal set-off (as found in the General Division of the High Court decision of *Re Ocean Tankers (Pte) Ltd (in liquidation)* [2023] SGHC 330 (at [85])) or an equitable set-off (as found in the Court of Appeal decision of *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 (at [35]–[37])). However, I have reached this conclusion via a different route from that in the claimant's submissions.

45 To begin with, cl 4 of the Settlement Agreement provides clearly that the Buyback Amount is to be subtracted from the sum of US$1,920,014, which is the fifth and final instalment amount. That much is clear from the plain text of the last row of the table in cl 4, which reads: "USD 1,920,014 less Buyback Amount (if any)" (see at [13] above). This means that, unless and until the defendant pays the first four instalments, the Buyback Amount never stands to be credited against the owed sum of US$1,920,014 in its favour. The Buyback Amount is only engaged at the point that the fifth and final instalment is to be paid to the claimant.

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46 To put it another way, the *only* role that was envisaged by the parties for the Buyback Amount, when placed within the wider contractual architecture of the Settlement Agreement, was to act as a discount against the amount owed by the defendant to the claimant under the fifth and final instalment, *specifically*. This is clear from the fact that the Buyback Amount is mentioned in only two clauses of the Settlement Agreement. First, cl 1, which sets out the obligation of the parties to deliver and purchase the Buyback Devices, whilst defining the "total buyback consideration payable by Verifone pursuant to the above" as "the **'Buyback Amount'**" [emphasis in original]. Second, cl 4, which sets out how the Buyback Amount operates to reduce the quantity owed by the defendant to the claimant in respect of the fifth and final instalment payment in the table thereunder. Notably, no mention of the Buyback Amount is made whatsoever in cll 7–8, which are the clauses that set out the amounts to be paid by the defendant to the claimant in the event of a breach of cl 4 of the Settlement Agreement. It is *not* stated in those clauses, for example, that the amounts owed to the claimant are that stipulated in cll 7–8 "less Buyback Amount (if any)", as is the language employed in the last row of the table in cl 4.

47 Adopting a holistic approach, bearing in mind the aim of contractual construction "is to ascertain the meaning which it would convey to a reasonable business person" (see the Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [131]), a reasonable reader would conclude that the only role contemplated by the parties for the Buyback Amount was for it to act as a set-off against the fifth and final payment in cl 4 of the Settlement Agreement. Thus, the plain wording of "USD 1,920,014 less Buyback Amount (if any)" in the last row of the table in cl 4, without the Buyback Amount being mentioned in any other clause (save for it being defined

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in cl 1), is susceptible of no other construction than that the Buyback Amount is only applicable at the point when the defendant is liable to pay the fifth and final instalment to the claimant, which is due by the stated deadline of 25 July 2024 (see the Court of Appeal decisions of *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31] and [40], as well as *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [19(d)]). It is the liability to make that final payment which triggers or engages the applicability of the Buyback Amount. And the liability to make payment of that final instalment only continues to subsist if the prior four instalments are paid on time, such that the "acceleration" provision in cl 8 has not kicked in.

48 In the present case, it is undisputed that the defendant did not pay the first instalment of US$500,000 on the due date stated in cl 4, *viz*, 25 March 2024 (or any instalment by any of the due dates thereafter). Therefore, at no point did the Buyback Amount materialise to the defendant's benefit, since a necessary condition for the applicability of the Buyback Amount to be triggered, namely, continuing liability for payment of the fifth and final instalment on time under cl 4, was never satisfied. Nor could it be satisfied once the first instalment had been missed by the defendant and the "acceleration" provision in cl 8 was triggered. This renders unnecessary the discussion of whether the defendant would have been able to raise either a legal set-off or equitable set-off in respect of the Buyback Amount since it never stood to be applied in the first place.

49 Before me, Mr Chan argued that the parties had intended for the defendant to take the benefit of the Buyback Amount even if it had failed to pay the preceding four instalments prior to the fifth and final instalment. According to Mr Chan, this is because cl 1 of the Settlement Agreement obligated the

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defendant to deliver the Buyback Devices to the claimant by 5 April 2024, with the claimant to notify the defendant of any defects with those devices by 23 May 2024 under cl 3.[22] Therefore, Mr Chan submitted that the claimant would only have been able to assess the true quantity of the Buyback Amount after 23 May 2024, which explains why the Buyback Amount was tagged to the fifth and final instalment, which is due on a date that post-dates 23 May 2024. However, as I pointed out to Mr Chan, the due dates for the third and fourth instalments also post-dated 23 May 2024. Therefore, had the parties really intended to structure the Settlement Agreement as he suggested, the parties could have annexed the Buyback Amount to those other instalments as well. In any event, even if the parties did so, the fact remains that the payment schedule contemplates that the Buyback Amount would only kick in on the condition that the defendant had paid the preceding instalment amounts. Given that the defendant failed to pay even the first instalment, it must follow that the Buyback Amount never materialised to its benefit.

50 Further, I disagree with the defendant that it would be entitled to sue the claimant for breach of contract because the latter breached its obligations under cll 1–3 of the Settlement Agreement. In my view, the claimant was correct to assert in its solicitors' letter of 29 March 2024 that it was no longer obliged to perform the buyback once the defendant had failed to pay the first instalment amount of US$500,000 on 25 March 2024. This is because the very prerequisite of the Buyback Amount becoming applicable as a credit against the fifth and final instalment amount of US$1,920,014 is that the defendant must have paid the four preceding instalment amounts on time before that point such that the

22 TR's Affidavit at pp 163-164.

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liability to make payment of the final instalment sum continues to exist (see at [46]–[48] above).

51 Given that the defendant failed to make the very first instalment by the stipulated deadline, it follows that the Buyback Amount would never kick in since that prerequisite was impossible to satisfy at that point. It follows that the claimant would no longer have to perform the buyback pursuant to cll 1–3, which would have been an exercise in futility. In that event, forcing the claimant to continue the buyback under cll 1–3 would have been entirely pointless since it is, in effect, obligating a party to confer a benefit on their counterparty which cannot possibly materialise in the counterparty's favour.

52 I note, in this respect, that the English High Court Queen's Bench Division (Commercial Court) recognised in *Waterfront Shipping Co Ltd v Trafigura AG* [2007] EWHC 2482 (Comm) a principle of futility in contractual construction, in the following terms (at [34]):

> … That principle can be articulated as follows: if, for example, a particular contractual requirement was not fulfilled by the Claimant, but in circumstances where the fulfilment of that requirement would have added nothing of value to either party, then the requirement would be futile, and the claim would not be barred. …

53 Likewise, the English High Court Queen's Bench Division (Commercial Court) held in *Mansel Oil Ltd and another v Troon Storage Tankers SA* [2008] EWHC 1269 (Comm) at [65] that "in certain cases, compliance with a condition precedent to the exercise of rights is not required if it is futile, useless and unnecessary". This was, in turn, based on the English Court of Appeal decision of *Barrett Bros (Taxis) Ltd v Davies Lickiss and Milestone Motor Policies at Lloyd's, Third Parties* [1966] 1 WLR 1334, wherein Lord Denning MR had reasoned (at 1339), in relation to the terms of an

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insurance contract that required the insured to send the full particulars of the accident to the underwriters, that:

> … First, it was unnecessary for the motor-cyclist to send the documents to the insurers. They had all the relevant facts, and that absolved the motor-cyclist from doing more. The police headquarters at Blackpool by their letter of June 18, 1964, gave to the insurers all the material information. The insurers would be entitled, if they so wished, to send their own representative to the magistrates' court and watch the proceedings or, indeed, to take such other steps, if any, as they were entitled to take. Seeing that they had received the information from the police, it *would be a futile thing to require the motor-cyclist himself to give them the self-same information. The law never compels a person to do that which is useless and unnecessary.*
>
> [emphasis added]

54 For my part, I prefer to approach the present case not based upon a so-called "futility principle", especially as I note that the cases at [52]–[53] above were principally concerned with the inapplicability of a condition precedent to a benefit inuring in the *performing* party's favour under a contract. In truth, this is but a reflection of the broader canon of contractual construction, *viz*, that "a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction" (see *Zurich Insurance* at [131] and the Court of Appeal decision of *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [34]).

55 In the present case, to require the claimant to participate in a buyback which would confer an entirely useless benefit on the defendant – *viz*, the Buyback Amount – after events have occurred which render it *impossible*, pursuant to the terms of the parties' contract, for that benefit to materialise in the latter's favour, would be a very unreasonable result indeed. I can find no clear and explicit words in the Settlement Agreement which would compel such

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a construction. Thus, I find that the claimant, on a proper construction of cl 1 of the Settlement Agreement, is not obligated to engage in a futile and unnecessary exercise of taking part in a buyback that would confer a benefit on the defendant that cannot, under any circumstances, possibly come to fruition in law. At the risk of repetition, but to summarise, the application of the Buyback Amount in the defendant's favour never stood to be engaged. That applicability was never triggered because the defendant ceased to be liable to pay the final instalment under cl 4 for the Buyback Amount to be applied as a discount against that liability in the first place. That was so when the defendant failed to make the first instalment payment, which terminated its liability to make staggered instalment payments under cl 4, replaced instead with the accelerated liability under cl 8. Regardless of whether the requirements for a legal or equitable set-off are met, the result is the same and the amount owed to the claimant remains unchanged. Hence, the defendant does not have a real or *bona fide* defence in the form of the Set-Off Defence on the basis of the Buyback Amount.

56 I now proceed to consider the merits of the Set-Off Defence on the basis of the Credit Note.

(2) The Credit Note is irrelevant as it was compromised in the Settlement Agreement

57 In my judgment, the defendant cannot rely on the Credit Note as a set-off because it had been compromised under the Settlement Agreement. The entire *raison d'être* of a compromise agreement is to settle the ongoing dispute and contentious issues between the parties and to put an end to that dispute, such that those very issues are put to bed instead of being resurrected and relitigated even after the agreement has been contracted. As held in *LKY v CSJ* (at [25]), "[o]nce a valid compromise has been reached, it is not open to the party against

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whom the claim is made to avoid the compromise on the ground that the claim was in fact invalid" (relying on *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 28th Ed, 1999) at para 23–013). Hence, the High Court held in *Shunmugam Jayakumar and others v Jeyaretnam Joshua Benjamin and others* [1996] 2 SLR(R) 658, in relation to a contract of compromise over a defamation lawsuit, that (at [20]) the defendants had already accepted their liability for the defamations. Accordingly (at [21]), they were "precluded from retracting their admission even if they later felt that they could have raised a defence to the claim … That is *the nature of a contract of compromise*." [emphasis added]. Thus, the High Court held in *Real Estate Consortium Pte Ltd v East Coast Properties Pte Ltd and another* [2011] 2 SLR 758 that (at [53]):

> At the trial, the defendants attempted to resurrect the same issues that formed the subject matter of the compromise agreement. In my view, the defendants are precluded from doing so. Where parties have agreed to resolve their dispute amicably by way of a validly formed settlement agreement, the settlement agreement alone governs the parties' legal relationship; the *effect* of the settlement agreement is to *put an end* to the issues previously raised by the defendants. …
>
> [emphasis in original]

58 This follows from the very object and purpose of a compromise contract, as succinctly stated in the English Court of Appeal case of *Plumley v Horrell* (1869) 20 LT 473, quoted by the Court of Appeal with approval in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 (at [41]), where Lord Romilly MR had stated (at 474) that "a compromise means that the question is not to be tried over again. … When I compromise a law suit with my adversary, I mean that the question is not to be tried over again." Thus, the pertinent question here is whether the Credit Note formed part of the subject-matter of the parties' Settlement Agreement. If so, the defendant is prevented from relitigating its old claims as to the validity of the Credit Note and the

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invalidity of the claimant's revocation (or purported revocation) of the same. Whether it was so compromised is an issue of the construction of the Settlement Agreement.

59 In the present case, it is clear from the evidence that the parties' dispute over the claimant's alleged revocation of the Credit Note was one of the matters that they had intended to resolve in the Settlement Agreement. As I mentioned at [11] above, recital (C) of the Preamble to the Settlement Agreement refers to various disputes that the parties had intended to resolve, including "those raised under … [the defendant's] email dated 6 February 2024, which are denied by [the claimant]". The recitals to the Preamble end with a line that reads: "**NOW THEREFORE** … the Parties **HEREBY AGREE** to fully and finally settle the abovementioned disputes and/or differences as follows:" [emphasis in original], including *inter alia* the disputes referenced in recital (C) above.

60 I had set out the facts surrounding the defendant's email of 6 February 2024 at [11] above and will not repeat them in full. Crucially, the defendant's general counsel had stated in that email that: "we currently endeavor to refrain from further argument regarding the Credit [Note]", encouraging the claimant "to play a similar role in the interest of constructive discussion such that a swift and amicable resolution to the dispute at hand can be achieved by both parties". When considered against the background that this email was, on its face, intended as a "Formal Response" to the claimant's email of 29 January 2024, in which the claimant's representative expressed that the Credit Note was invalid as it had been given to the defendant on a conditional basis, it is clear that the reference in recital (C) to the "claims, complaints and/or disputes" in the email dated 6 February 2024 must include *inter alia* the parties' dispute in relation to the Credit Note and the validity or revocation thereof.

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61 As such, the parties' dispute in relation to the Credit Note was settled under the Settlement Agreement. The defendant is hence not entitled to rely on the Credit Note to set-off part of the claimant's claim in OC 214. It follows that the defendant has failed to demonstrate that it has a real or *bona fide* defence in the form of the Set-Off Defence, on either the Buyback Amount or the Credit Note.

62 I finally proceed to consider whether the Penalty Defence establishes a fair or reasonable probability of a real or *bona fide* defence to the claimant's OC 214.

Whether the Penalty Defence is a real or **bona fide** *defence*

The parties' arguments

63 In relation to cl 7, the defendant argues that cl 7 is, contrary to the AR's conclusion below, a secondary obligation. This is because the primary obligation under cl 7 is for the defendant to make payment of the instalment amounts in full by each respective deadline in cl 4. If the defendant fails to satisfy this primary obligation in cl 4, then the secondary obligation in cl 7 arises to pay the Additional Payments. This is further amplified by the phrase "shall become obliged". Moreover, the AR erred in deciding that cl 7 operated to reinforce the primary obligations in cl 4 for the defendant to make timely payment, and in cl 6 for the claimant to forbear from commencing legal action and pursuing the Additional Payments.

64 More broadly, the defendant argues that the point of the Settlement Agreement was to compromise the claimant's original claim, which means that the claimant should no longer expect to receive the full original sum of US$5,349,994 (owed as of 26 February 2024; see at [9] above). This can be

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seen in, among others, recital (E), which provides that the "[p]arties now wish to enter into this Settlement Agreement to fully and finally settle the disputes and/or differences described above", which shows the parties' intention to compromise the claimant's original claim of US$5,349,994 under the Invoices issued under the Contracts (see at [10] above).

65 In response, the claimant's position is that the Settlement Agreement represents the claimant agreeing to offer the defendant a goodwill "discount" or reduction on the sums owed – in the sum of US$1m plus all interest accrued under the Invoices – on the strict condition that the defendant complied with the agreed instalment payment schedule for the payment of the balance sum. The Settlement Sum is therefore the value of the claimant's claim for the principal sum of US$4,920,014 (without interest) less the sum of US$1m. In sum, the purpose of cl 7 is to remove the benefit of the said agreed "discounts" if the defendant did not comply with the conditions in cl 4. The claimant is thus asking the defendant to be held to its original liability. The defendant is not being asked to pay any additional amount to the claimant as compensation for a breach.

66 In relation to cl 8, the defendant submits that the AR was right in holding that it is a secondary obligation but erred in concluding that it is not a penalty clause. This is because the AR had extended his previous error in holding that the bargain struck under the Settlement Agreement was for the defendant to pay the claimant the original principal sum of US$4,920,014 with interest, subject to a discount if cl 4 was complied with. This is supported by cl 9, which specifies that "[u]pon full payment of the Settlement Sum", the claimant shall fully and finally release the defendant from its obligation to pay the Invoices. The acceleration of the Settlement Sum and Additional Payments is therefore *in*

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terrorem of the defendant's primary obligation to pay the Settlement Sum in the amounts and by the due dates under cl 4.

67 In response, the claimant argues that cl 8 simply removes the benefit of an extension of time in cl 4 for the outstanding payments owed to the claimant by the defendant. The defendant also cannot credibly contend that it is being unfairly penalised by having to pay this sum sooner rather than later. As such, the AR erred in holding that the "acceleration" clause in cl 8 was "arguably a secondary obligation", when it was intended to be part of the defendant's primary obligation to pay the original sums that had fallen due, with the possibility of an extension of time if cl 4 were complied with. However, *in arguendo*, the claimant agrees with the AR's finding that, even if cl 8 were "arguably a secondary obligation", it was not a penal provision as the amounts due represented a genuine pre-estimate of loss.

My decision: the Penalty Defence is not a real or bona fide *defence*

(1) The applicable law

68 The traditional approach, summarised by the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 ("*Dunlop v New Garage*"), was that a party is not permitted to enforce a penalty clause against the defaulting contracting party. The distinction drawn by Lord Dunedin (at 86) was between "a payment of money stipulated as in terrorem of the offending party", on one hand, and a "genuine covenanted pre-estimate of damage", on the other.

69 This traditional approach has been followed by the Court of Appeal in its seminal decision in *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka v Seraya*").

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The Court declined (at [151]–[152]) to adopt the broader test that was laid down by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, *viz*, whether the detriment imposed on a party in default of their primary obligation in a secondary obligation of the contract was out of all proportion to the legitimate interest of the innocent party in the performance of that primary obligation. Instead, the Court (at [151]–[152] and [185(b)]) upheld the traditional understanding of the "penalty rule" in Lord Dunedin's speech in *Dunlop v New Garage*, namely, that the legal test is whether the secondary obligation prescribes a genuine pre-estimate of the likely loss flowing from the breach of the primary obligation at the time of contracting, with the *only* legitimate interest of the innocent party being its interest in being adequately compensated for the losses sustained from that breach.

70 Thus, when confronted with a claim that a provision in a contract is an impermissible penal clause, the court's inquiry is structured into two steps. The anterior question is whether the alleged penal clause is a primary or secondary obligation, as the rule against penalties is only engaged respecting a secondary obligation prescribing a detriment for a breach of a primary obligation (see *Denka v Seraya* at [92]–[93]). The distinction between the two types of obligations was explained by Lord Diplock in the House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 ("*Photo Production*") at 848–849, namely, that primary obligations are the promised performance that are determined and bargained-for by parties in their contract; whereas, secondary obligations are the "substituted" obligations that are triggered by a "failure to perform a primary obligation" in order to provide "concomitant relief" to the innocent party against the defaulting party. These can arise from common law or the express words of a contract. By default, the common law prescribes the secondary obligation of payment of compensatory

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damages for a breach of a primary obligation in the parties' contract (see David Foxton, "How useful is Lord Diplock's distinction between primary and secondary obligations in contract?" (2019) 135 LQR 249; see also *Photo Production* at 849). However, parties may prescribe different concomitant reliefs in their contract for a failure to perform a primary obligation. Such contractual secondary obligations will be subject to the penalty rule in *Dunlop v New Garage*.

71 In determining whether a clause constitutes a primary or a secondary obligation, the court would take a "substance over form" approach (see the Court of Appeal decision of *Ethoz Capital Ltd v Im8ex Pte Ltd and others* [2023] 1 SLR 922 ("*Ethoz*") at [53]). This is a question of contractual construction, as well as the object and purpose of the stipulation (see, generally, Tham Chee Ho and Tan Zhong Xing, "Contract Law" *Singapore Academy of Law Annual Review of Singapore Cases* (forthcoming)), who also note but discount some commentators' doubts over the distinction between primary and secondary obligations (see, *eg*, Sarah Worthington, "Penalty Clauses" in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2017)). Hence, in ascertaining whether a clause is *in substance* a secondary obligation, the court will have regard to such factors as the "overall context in which the bargain in the clause was struck", the "reasons why the parties agreed to include the clause in the contract", and "whether the clause was entered into and contemplated as part of the parties' primary obligations under the contract in order to secure some independent commercial purpose or end" or was instead intended "to hold the affected party *in terrorem* in order thereby to secure his compliance with his primary obligations" (see the Court of Appeal decision of *Leiman, Ricardo and*

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another v Noble Resources Ltd and another [2020] 2 SLR 386 ("*Ricardo Leiman*") at [101]).

72 Once it is ascertained that a clause in the contract is a secondary and not a primary obligation, the next step is to determine whether it is a penal provision or an obligation to pay liquidated damages as a genuine pre-estimate of the loss flowing from the failure to perform the primary obligation assessed by parties at the time of their contracting. In determining that question, the court will have regard to the four principles articulated by Lord Dunedin in *Dunlop v New Garage* (at 87–88), cited with approval by the Court of Appeal in *Denka v Seraya* (at [66]), as follows:

(a) first, the provision is penal if the stipulated sum is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proven to have flowed from the breach;

(b) second, the provision is penal if the breach consists only in the non-payment of money and it provides for the payment of a larger sum;

(c) third, there is a rebuttable presumption that the provision is penal if the sum stipulated for was payable on the occurrence of events which were of varying gravity; and

(d) fourth, the provision is *not* penal due to the impossibility of precisely pre-estimating the true loss in the circumstances.

73 I turn now to apply the foregoing principles in [68]–[72] above to determine whether the defendant has a real or *bona fide* defence in the Penalty Defence for cll 7–8 of the Settlement Agreement. I consider, first, whether they constitute primary or secondary obligations upon a proper construction of that

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agreement. If they are secondary obligations, I consider whether they violate the penalty rule in *Dunlop v New Garage* and *Denka v Seraya*.

(2) Clause 7 is a primary obligation and not a secondary obligation

74 Clause 7 of the Settlement Agreement provides that, in the event of a default on the defendant's part on the timely payment of *any* of the instalments in cl 4, the defendant is obligated to pay to the claimant the Additional Payments listed therein of US$1m and all interest accrued on the Invoices both before and after 26 February 2024 (see at [14] above).

75 On a proper construction of the Settlement Agreement, I agree with the AR that cl 7 is a primary and not a secondary obligation. Put another way, it was part of the promised performance which the claimant bargained-for from the defendant and not an ancillary or concomitant relief for a breach of cl 4 (see at [70] above).

76 As a preliminary point, it is not decisive of the issue that cl 7, on its express terms, is only triggered and comes into operation on a breach of cl 4. The inquiry as to whether a stipulation is a primary or a secondary obligation is one which prioritises substance over form (see at [71] above). The way that the parties have framed or structured the obligation is not dispositive or determinative. Hence, a clause that is framed, as a matter of form, as a primary obligation not conditional upon a breach of any other contractual obligation may be found, in substance, to be a secondary obligation, having regard to the underlying commercial purpose of the parties' contractual bargain (see *Ricardo Leiman* at [104]–[108]). This flows from the principle that parties cannot avoid the application of the penalty rule by way of clever drafting. They cannot recast

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what is, in substance, a secondary obligation by framing it in the terms of a primary obligation (see *Ethoz* at [52] and *Denka v Seraya* at [95]).

77 Properly considered, the present is a case where cl 7 bears the formalities of a secondary obligation – *ie*, being engaged only upon a breach of cl 4 – but is, in commercial substance, a primary obligation. In arriving at this conclusion, it is necessary to first understand the overall commercial object of the Settlement Agreement as a contract of compromise. According to recital (B) of the Preamble to the Settlement Agreement, as of 26 February 2024, the defendant owed US$5,349,994 to the claimant under the Invoices, consisting of a principal sum of US$4,920,014 and accrued interest of US$429,980. While the defendant had raised disputes in relation to those Invoices (in recital (C)), the claimant was seeking to commence legal action to have the defendant wound up through its statutory demand pursuant to s 125(2)(*a*) read with s 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (in recital (D)). Although the defendant raised claims and disputes over that debt, in the event of the court not accepting that these disputes were meritorious, that would militate against the court exercising its discretion in the defendant's favour and in favour of granting the winding up sought (see the recent decision of the General Division of the High Court in *Kingsmen Exhibits Pte Ltd v RegalRare Gem Museum Pte Ltd and another matter* [2024] SGHC 238 at [15]–[16] and [18]–[22]).

78 Hence, the parties agreed to amicably resolve their dispute over the debt of US$5,349,994 instead of resorting to litigation. Considering the interplay of cl 4 against cll 6–8, the parties' compromise was that the claimant agreed to offer an avenue for the defendant to effectively pay off that debt whilst accepting the detriment of a *discount* on the quantity owed (*ie*, the Additional

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Payments in cl 7) *and* a delay in their receipt of that sum through the staggered payment schedule in cl 4. This can be discerned from the fact that the Settlement Sum in cl 4, added to the Additional Payments in cl 7 (not including interest accruing after 26 February 2024), adds up to the sum said to be owed to the claimant as of 26 February 2024 in recital (B), *viz*, US$5,349,994. The claimant's consideration was hence twofold under cl 4: (a) a reduction in the quantum it would receive and (b) a delay in the time at which it would receive that sum. The benefit that would accrue to the defendant, as stated in cl 6 read with cl 9, was that if the payment schedule in cl 4 was satisfied, the claimant would consider the defendant's debt under the Invoices fully paid-up and no winding-up proceedings would be filed against the defendant on that sum.

79 However, in exchange for that benefit conferred by the claimant, the defendant's consideration moving to the claimant was that it had effectively accepted the validity of the debt it owed to the claimant, *ie*, US$5,349,994 as of 26 February 2024 under the Invoices. It did so by contracting under cl 7 to pay the Settlement Sum and the Additional Payments (which add up to US$5,349,994, plus the additional interest accrued after 26 February 2024), if it did not satisfy the payment schedule set out under cl 4. This was *de facto* an agreement on the defendant's part to accept the validity of its debt of US$5,349,994 (owed as of 26 February 2024) under recital (B) to the Preamble. Or, to put it another way, the defendant had waived its ability to revisit the alleged disputes it originally raised about the validity of its debt under the Invoices, *per* recital (C) of the Preamble, as those alleged disputes would not be relevant to challenging the validity of its liability under cl 7. However, it was willing to do so in exchange for the reciprocal benefits extended by the claimant in return – namely, the staggered payment schedule under cl 4, which would

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discount the quantity of the amount it would pay and grant an extension of time to pay that discounted amount (see at [78] above).

80 Hence, properly construed, cl 7 is not a secondary obligation, even though it is formally framed in the terms of an obligation triggered by a default upon another contractual obligation, *ie*, cl 4. Rather, it was part of the parties' primary bargain.

81 This point is best fortified with an example. Consider the case of a claimant who sues a defendant for the tort of conversion, alleging the wrongful conversion of a subject-matter property and seeking compensatory damages in the amount of US$1m. The parties agree to settle the lawsuit with a contract of compromise. The contract stipulates in cl 1(a) that the defendant shall return the property to the claimant and pay US$500,000 by a given deadline, failing which, in cl 1(b), the defendant agrees to pay the full sum of US$1m to the claimant.

82 On a proper construction, it would not be correct to say that cl 1(b) is a secondary obligation triggered only by a default on cl 1(a) of the compromise contract. Although, formalistically, cl 1(b) only arises if cl 1(a) is not complied with, that structure only makes sense when considered against the commercial object of that contract, *ie*, to *compromise* the claimant's lawsuit against the defendant for US$1m in damages for conversion. The object behind cl 1(b) is therefore *not* to provide an ancillary relief to the claimant to remedy a breach of cl 1(a) by the defendant (see *Ricardo Leiman* at [99]). Rather, *both* cl 1(a) *and* cl 1(b) form the very primary compromise bargained-for between the parties. In this example, the defendant agrees to accept the validity of the claimant's full claim in cl 1(b). In return, the claimant gives the defendant an avenue to pay a sum *less than* its full claim of US$1m via cl 1(a). Both clauses are part of the *primary* bargain promised by the parties to each other in order to settle their

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differences on an outstanding dispute through a reciprocal give-and-take thereupon.

83 Likewise, here, cl 7 was not a secondary obligation to vindicate the primary obligation in cl 4. In summary, on a proper construction of the Settlement Agreement, cl 7 was an inseparable part of the bundle of *primary* rights and obligations exchanged between the parties that formed the heart and essence of their compromise. It was the defendant's acceptance of the validity of the debt in recital (B), which was the defendant's consideration in [79] above, given in return for the claimant's consideration in [78] above. The real object behind cl 7 was *not* to secure the defendant's compliance with cl 4; rather, it was *part* of the primary rights and obligations bargained-for between the parties in order to obtain the commercial purpose of the Settlement Agreement, *ie*, to compromise on the disputed debt of US$5,349,994 (said to have been owed as of 26 February 2024) in a give-and-take between them (see *Ricardo Leiman* at [101(c)]). Accordingly, as cl 7 is a primary and not a secondary obligation, the penalty rule in *Dunlop v New Garage* and *Denka v Seraya* has no application to it (see *Ricardo Leiman* at [114] and *Denka v Seraya* at [92]–[94]). The defendant therefore has no real or *bona fide* defence in the form of the Penalty Defence respecting cl 7 of the Settlement Agreement.

84 I turn now to consider the merits of the Penalty Defence regarding cl 8 of the Settlement Agreement.

(3) Clause 8 is a primary obligation and not a secondary obligation

85 I similarly find that, on a proper construction of cl 8, the object behind cl 8 was *not* to vindicate or enforce other primary obligations in the Settlement Agreement. Rather, similar to cl 7, cl 8 formed part of the reciprocal give-and-

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take between parties on their dispute over the alleged debt of US$5,349,994 (owed as of 26 February 2024) in recital (B) (see at [78]–[79] and [83] above).

86 Clause 8 provides that, in the event of a breach of any of the terms of the Settlement Agreement, the defendant is obliged to pay to the claimant the Settlement Sum in cl 4 and the Additional Payments in cl 7. This sum shall be "immediately due and payable" at the time of such breach. The effect of cl 8 is that, when the defendant defaulted on cl 4 by failing to make the first instalment payment on time, the Settlement Sum and Additional Payments were payable to the claimant.

87 However, cl 8 cannot be construed in isolation from the commercial object and purpose of the Settlement Agreement, *viz*, for parties to compromise on the disputed debt of US$5,349,994 (owed as of 26 February 2024) in recital (B). It is hence significant that the Settlement Sum and Additional Payments (not including any interest accrued after 26 February 2024) add up to the sum said to have been due to the claimant in recital (B) on 26 February 2024, *viz*, US$5,349,994 (see at [78] above). The practical effect of cl 8 kicking in would be that, as of that date, the defendant would owe to the claimant the sum said to have been owed to the claimant in recital (B), with interest for the period between 26 February 2024 and the date of the default.

88 As such, similar to cl 7, cl 8 forms part of the parties' primary bargain, as explained at [78]–[79] above, in furtherance of compromising on the disputed debt of US$5,349,994 (owed as of 26 February 2024) in recital (B). Thus, the claimant's consideration to the defendant was *inter alia* establishing a means in cl 4 by which the defendant may pay *less* than the amount that was allegedly due to it under the Invoices as of 26 February 2024, as well as an extension of time to pay the reduced sum, in which case, *per* cll 6 and 9, the defendant would

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not be liable for the remaining amount and the claimant would not institute winding-up proceedings over the disputed debt (see at [78] above).

89 The defendant's consideration given in return to the claimant was that it would effectively recognise the validity of the disputed debt in recital (B). That admission was conferred in both cl 7 and cl 8. Clause 7 had the effect of making the defendant liable for the full sum allegedly due to the claimant, stated in the disputed debt in recital (B), which would then be payable to the claimant by 25 July 2024, if the staggered payment schedule in cl 4 was not satisfied (see at [79] above). Clause 8's effect is that if *inter alia* the staggered payment schedule in cl 4 was not satisfied, the defendant would be liable, on the date of that default, for the full sum allegedly due to the claimant in the disputed debt in recital (B) with interest for the period between 26 February 2024 and the date of that default. In other words, this was the defendant's effective admission of the validity of the debt in recital (B), or to put it another way, its waiver of its right to raise disputes over the validity of the recital (B) debt under the Invoices, replaced with the defendant's compromised liability in cl 8 instead.

90 To slightly modify the hypothetical provided at [81]–[82] above, *vis-à-vis* the facts of cl 8 in particular, assume instead that the claimant succeeds in obtaining a judgment debt for its conversion lawsuit in the amount of US$1m, in the first-instance, which sum is due on 1 January 2010. The defendant files an appeal against that judgment debt and fails to satisfy the judgment debt, accruing post-judgment interest from 1–31 January 2010. On 1 February 2010, the parties reach a compromise agreement on the pending appeal. Clause 1(a) allows the defendant to pay US$500,000 to the claimant by 1 March 2010, in which case the claimant forgoes the remaining sum of US$500,000 and interest. Clause 1(b) states that if the defendant fails to make the payment in cl 1(a) on

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time, the defendant is liable for the full sum of US$1m by 1 April 2010. Lastly, cl 1(c) provides that if either cl 1(a) or cl 1(b) is *not* satisfied, the full sum of US$1m is immediately due, with interest accruing from 1 January 2010.

91 Formalistically, cl 1(c) is framed as a secondary obligation that kicks in only on a breach of other obligations in the compromise agreement. Moreover, as a matter of form, cl 1(c)'s effect is to "accelerate" the liabilities provided for in cll 1(a) and 1(b). However, the commercial *object* of cl 1(c) is *not* to provide a remedy for the claimant to enforce the defendant's obligations in cll 1(a) and 1(b). Considered against the purpose of the compromise contract, cl 1(c) is a primary benefit bargained-for by the claimant and provided by the defendant as consideration in return for the benefit of the claimant's compromise in cl 1(a) – namely, an acceptance of the validity of the defendant's debt under the judgment debt of 1 January 2010. In the same way as cl 1(a) puts the defendant in a better position *vis-à-vis* their position prior to the parties compromising their appeal – *ie*, by enabling them to pay less than the judgment debt being appealed against – cl 1(c) puts the claimant in a better position *vis-à-vis* its position prior to that compromise by affording it the benefit of an *undisputed* judgment debt, in the event of the compromise in cl 1(a) not coming to fruition, which was previously under dispute via an appeal. The compromise hence obviates parties' respective litigation risks in exchange for a substantive compromise upon their asserted or putative legal positions. Likewise, here, cl 8 was part of the primary benefits extended by the defendant to the claimant (see at [89] above) in return for the primary benefits extended by the claimant to the defendant in cl 4 read with cll 6 and 9 (see at [88] above).

92 Accordingly, this sets cl 8 of the Settlement Agreement apart from the "acceleration" clause considered by the Court of Appeal in *Ethoz* (at [14(b)]–

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[14(c)]). Applying a purposive construction, the commercial object of the loan and mortgage agreement in *Ethoz* is very different from that of the Settlement Agreement here. The entire purpose of a loan is to advance moneys in return for repayment at subsequent dates with interest. Against that commercial purpose, the Court construed the contract there to find that the primary obligation is the payment of the loan, with the total interest, in *instalments* over time (at [54]–[56]). In contrast, immediate payment of the total interest, that would otherwise have been payable *over time* (but for the debtor's default), is not intended to confer a primary benefit bargained-for by the creditor in that loan agreement, as (at [63]) "in *most* loan agreements, the primary obligation of the borrower is to repay the loan sum and pay interest *instalments* tied to the time that the borrower has use of the loan sum" [emphasis in original]. In other words, a loan is a trade-off between the quantity and time value of money. A creditor bargains for the receipt of a higher quantity of money, to be received over time at an interest. The debtor bargains for the time value of money through delayed repayments. Thus, the obligation to pay the entire total interest, due *over time*, immediately on default, is *not* part of the primary rights and obligations of a loan agreement. Instead, it was properly construed as a secondary obligation intended to enforce the primary obligation of *inter alia* timely repayment in instalments on the part of the debtor (at [54]–[63]).

93 The present contract is an entirely different bargain altogether. It is not a loan or mortgage agreement but a contract of compromise. The claimant was *not* bargaining for a receipt of a higher quantity of moneys at an interest whilst sacrificing the time value of their moneys by advancing a sum to be repaid over time. Instead, the purpose of the Settlement Agreement was to compromise on the parties' dispute over the debt allegedly owed to the claimant in recital (B). Considered against that background and purpose, cl 8 cannot be construed as a

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secondary obligation to enforce the terms of *inter alia* cl 4. Rather, it was an inseparable part of the benefits and burdens exchanged between the parties, as at [87]–[89] above, in order to compromise on their respective positions *vis-à-vis* the disputed debt in recital (B).

94 As a primary obligation, the penalty rule in *Dunlop v New Garage* has no application to cl 8 (see *Ricardo Leiman* at [98]–[100] and *Ethoz* at [1]–[3]). It follows that the defendant has no real or *bona fide* defence in the form of the Penalty Defence, in respect of either cl 7 or cl 8 of the Settlement Agreement.

95 Since I have concluded that the defendant has not established any real or *bona fide* defence against the claimant's *prima facie* case, I dismiss the defendant's appeal in RA 139 and affirm the AR's grant of summary judgment on SUM 1381 below.

Costs order below

96 For completeness, as I have dismissed RA 139 and affirmed the grant of summary judgment in SUM 1381 below, I similarly affirm the costs order of the AR below, namely, for the defendant to pay costs of $65,000 (all-in) to the claimant on an indemnity basis. Having regard to the AR's reasons delivered at the hearing on 17 July 2024, I agree with the AR that it was fair to grant costs on an indemnity basis, considering cl 8 of the Settlement Agreement, in which the defendant agreed to indemnify the claimant for all legal costs and expenses incurred in connection with any proceedings to recover the sums due under cl 8, such as that in OC 214. Having dismissed the appeal in RA 139 against the AR's decision below, I see no reason to disturb the AR's costs order on the same.

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Conclusion

97 For all the reasons above, I dismiss the appeal in RA 139 and affirm the grant of summary judgment by the AR below. I also affirm the AR's costs order on SUM 1381.

98 On the appropriate costs order for RA 139, unless the parties are able to agree, they are to tender written submissions on the same within seven days of this decision, limited to seven pages each.

Goh Yihan
Judge of the High Court

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