Real Estate Consortium Pte Ltd *v* East Coast Properties Pte Ltd and another [2010] SGHC 373

Case Number : Suit No 376 of 2009

Decision Date : 29 December 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Thio Ying Ying and Lim Yee Ming (Kelvin Chia Partnership) for the plaintiff; Tan Denis and John George (Toh Tan LLP) for the defendants.

Parties : Real Estate Consortium Pte Ltd — East Coast Properties Pte Ltd and another

Contract – Law of Compromise

29 December 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 The present matter involves a Convertible Bond Agreement ("CBA") entered into between the plaintiff and the defendants under which the plaintiff provided to the first defendant financing of approximately $3m (referred to interchangeably by parties as "$2.95m") for a housing development project at No 25 Shelford Road ("the Shelford Project"). The defendants failed to repay the principal sum of $3m when it fell due a year later. The plaintiff subsequently terminated the CBA and claimed for moneys owed under the CBA. The defendants initially argued that the CBA was wrongfully terminated and disputed the plaintiff's rights under the CBA. Subsequently, the defendants offered to resolve the disputes amicably. This resulted in a settlement agreement between the parties. The main questions raised in the present matter are:

(a) whether the disputes which arose from the CBA were finally and conclusively resolved by the settlement agreement between the parties; and

(b) if not, whether the contentions raised by the defendants prior to the settlement had any merit.

Factual background

2 The first defendant, East Coast Properties Pte Ltd, is a real estate company incorporated by the second defendant, Ng Chun Yong Alvin. It is the developer of three residential projects, namely, the Whitley Project at No 121B Whitley Road, the Eight@East Project at No 8 East Coast Avenue and the Shelford Project.

3 The second defendant is the sole shareholder and director of the first defendant and he is also a director and/or shareholder of many other companies in the real estate construction and development industry.

4 Sometime in October 2006, the first defendant exercised an option to purchase No 25 Shelford Road for a sum of $15m. The second defendant paid a deposit in the amount of $3m ("the cash

deposit") upon exercise of the option. The first defendant obtained a loan of $12m from Hong Leong Finance ("HLF") to finance 80% of the purchase price. The security for this loan was a mortgage over No 25 Shelford Road and a guarantee from the second defendant and his father. In addition, HLF agreed to make further loans to finance the development charge and the construction costs in relation to the Shelford Project.

5 In order to "free up" the cash deposit in connection with the purchase of No 25 Shelford Road, the second defendant asked one Chan Hui-Ling Angelena ("Angelena" or "Chan") whether she was interested in investing a sum of $3m in the Shelford Project. He had known her for about five years from collaborating with her in other development projects where she had worked as an interior designer. Sometime in January 2007, the second defendant met up with Chan and one Sern Chia Lung ("Sern"), a friend and former client of Chan who was also interested in investing in the Shelford Project. The second defendant gave Chan and Sern particulars of the Shelford Project.

6 According to the second defendant, it was agreed between the second defendant and Chan in a meeting at M/s Kelvin Chia Partnership's offices in March 2007 that a loan of $3m would be granted to the first defendant. The lender would be a company incorporated by Chan and Sern. The second defendant offered a 100% return on the loan. At the trial, the second defendant averred that the parties had agreed that the loan would be repaid one year after its disbursement, as it was anticipated that purchasers of units in the Shelford Project would then be paying their 20% deposit. According to the second defendant, that was the time when the temporary occupation permit ("TOP") for the Shelford units was expected to be issued. The second defendant explained how he had figured that he would be able to pay a 100% return on the loan: the profit in the Shelford Project was projected to be $700 per sq ft of saleable space. Given a total saleable area of 40,000 sq ft, the project was projected to bring in $28m in profit. Based on this calculation, there would be more than enough money to pay the lender a 100% return on the loan at the TOP stage.

7 In the meantime, Chan persuaded Sern and three other friends (Nina Hong, Lawrence Lim, and Steve Seah) to share in the investment in the Shelford Project. The five of them came up with the $3m sum and agreed on using Real Estate Consortium Pte Ltd ("the plaintiff") as the vehicle to make their investment in the first defendant. Chan is a director and the sole shareholder of the plaintiff.

8 Chan and Sern had discussed with the second defendant about security for the investment in the Shelford Project. On 30 April 2007, Chan and Sern instructed Lee Ying Ying ("Ms Lee") of M/s Kelvin Chia Partnership to prepare a draft of the CBA intending it as some form of security for the investment.

9 Subsequently, on 2 May 2007, the second defendant had a meeting with Sern and Ms Lee at the offices of M/s Kelvin Chia Partnership. According to Sern, he went through each term in the draft CBA with the second defendant. Ms Lee was present when this took place. It was highlighted to the second defendant that the plaintiff would have an option to convert the loan into shares in the first defendant. In particular, a significant change to an earlier draft was highlighted to the second defendant. Under cl 12(c), instead of a fixed sum of $3m, the return would be a sum equivalent to 10% of the sale proceeds of the Shelford units. The plaintiff's position is that the second defendant was told at the meeting that he should consult his own lawyer on the terms of the CBA. According to Sern, the second defendant replied that he did not need to see a lawyer. Sern said that the second defendant had suggested amendments to the CBA, most significant of which was that with respect to cl 12(g) of the CBA so that if the plaintiff received a return of $3m but it subsequently turned out that 10% of the sale proceeds fell below $3m, the plaintiff would have to refund the amount by which 10% of the sale proceeds fell short of $3m. The second defendant was allegedly content with the amendment as made. The plaintiff and the defendants duly executed the CBA on the same day, on

2 May 2007.

10 According to the second defendant, Sern had "briefly explained" the terms of the CBA at the meeting of 2 May 2007. The second defendant was "taken by surprise" that cl 12 of the CBA allowed the plaintiff to benefit more than $3m. The second defendant alleged that he was assured that the transaction was a loan of $3m repayable within one year after disbursement of the loan and that the return of a further $3m was to be paid only after the TOP was issued. The second defendant asserted that he did not read the CBA in full and was unaware of the consequences of all the terms in the CBA. He signed the CBA because he "needed the funds urgently" and he "trusted Angelena".

Terms of the Convertible Bond Agreement

11 The term "Convertible Bond Agreement" is a curious misnomer since the agreement did not provide for any issuance of bonds. However, the commercial purpose of the CBA as a means of investment in the Shelford Project is apparent from the first few clauses of the CBA, the material parts of which are set out below:

1. The Borrower [*ie*, the first defendant] and [the second defendant] jointly and severally warrant to the Lender that ... the Borrower has purchased a plot of freehold land [the Shelford Land] ... and will use the [Shelford] Land for the construction of the following development [Shelford] ('Project') for sale in Singapore:

   ...

2. The Borrower and [the second defendant] jointly and severally warrant to the Lender that the Borrower has applied for the necessary approvals from the authorities ... to carry out the [Shelford] Project and will secure all outstanding approvals by such date acceptable to the Lender.

3. The Loan is being made available to the Borrower to finance the part payment of the purchase price for the [Shelford] Land. The Borrower shall use the proceeds of the Loan for the aforementioned purpose, and for no other purpose. ...

...

7. With effect from the date of the first drawdown of the Loan ('First Drawdown Date'), [t]he Lender is hereby conferred an option ('Conversion Option') by the Borrower to convert the Loan into 3,000,000, fully paid ordinary shares ('Converted Shares') in the capital of the Borrower with an issue price ('Issue Price') of S$1.00 each, and having rights ranking pari passu with the shares of the Borrower held by the [second defendant] AN ('Existing Shares'), at a conversion rate equal to the Issue Price of the Converted Shares

...

9. The Borrower and [the second defendant] jointly and severally undertake:

   (a) ...

   (b) to ensure that the Converted Shares represent at least 75% of the enlarged capital of the Borrower on fully diluted basis after the issue of the Converted Shares.

12 It can therefore be seen that the first defendant gave the plaintiff a Conversion Option to

convert the loan into shares in the Borrower comprising not less than 75% of the first defendant's share capital.

13 Under cl 10 of the CBA, the second defendant granted the plaintiff two put options. The first put option (referred to as the "First Option" in the CBA) was exercisable upon the earliest to occur of a number of events set out in cl 11(a). Clause 11(a) stated:

> 11. The terms of the First Option are as follows:
>
> (a) The First Option is exercisable by the Lender at any time during the period after the occurrence of the ***earliest of the following events or any of the events [of default on the first defendant's part] in paragraph 17*** ... by the Lender serving on [the second defendant] a written notice ('First Option Notice') ...
>
> (i) ***12 months*** from the First Drawdown Date;
>
> (ii) the Borrower launches the Project (including any soft launch) ...
>
> (iii) the Borrower enters into an agreement with a third party to merge or consolidate the Land with another plot of land ...
>
> [emphasis added]

14 Under the First Option, the plaintiff could put to the second defendant 1.5 million converted shares ("First Option Shares") if conversion had taken place. Alternatively, if the conversion had not taken place, the plaintiff could require the second defendant to purchase a part of the loan equivalent to $1.5m ("First Option Loan") (pursuant to cl 10(a)). Once the First Option had been exercised, the second defendant was *bound to purchase* from the plaintiff the First Option Shares *or* the First Option Loan (as the case may be) at the *fixed price of $3m*. Clause 11(b) stated:

> 11. (b) Upon service of the First Option Notice, [the second defendant] shall become bound to purchase from the Lender the First Option Shares or the First Option Loan at a price of S$3,000,000 ('First Transfer Price') ...

15 The second put option (referred to as the "Second Option" in the CBA) conferred by the first defendant was in relation to the *return* on the investment. The Second Option was exercisable by the plaintiff at any time from the date of issue of the TOP for the Shelford Project *or upon the occurrence of any of the events of default by the first defendant*(under cl 17). Clause 12(a) stated:

> 12. The terms of the Second Option are as follows:
>
> (a) The Second Option is exercisable by the Lender at any time during the period from the date of issue of the Temporary Occupation Permit ('TOP') for the [Shelford] Project or the Merged Project or upon the occurrence of any of the events in paragraph 17, ... by the Lender serving on [the second defendant] a written notice ('Second Option Notice') ...

16 Under the Second Option, the plaintiff could put to the second defendant 1.5 million converted shares ("Second Option Shares"). As in the case of the First Option, if the plaintiff had not converted the loan into shares pursuant to the Conversion Option, the plaintiff could put to the second defendant a part of the loan equivalent to $1.5m ("Second Option Loan") (pursuant to cl 10(b)). The second defendant was *bound to purchase* the Second Option Shares or the Second Option Loan (as

the case may be) once the Second Option was exercised. Clause 12(b) stated:

> 12. (b) Upon the service of the Second Option Notice, [the second defendant] shall become bound to purchase from the Lender the Second Option Shares or the Second Option Loan at the price described in paragraph 12(c) ('Second Transfer Price'), ...

17 However, as was mentioned earlier, the *return* on the investment was *not* to be a fixed sum of $3m. Clauses 12(c) and 12(g)(i)–(ii) stated:

> 12. (c) Subject to paragraph 12(g), the ***Second Transfer Price*** will be equivalent to 10% of the Project Sale Proceeds ... where:
>
> For the [Shelford] Project
>
> Project Sale Proceeds = Ave[rage] Sale Price x NFA1.
>
> ...
>
> "Ave[rage] Sale Price" means the average of the selling prices (as notified to the Singapore Land Registry) of all the units in the Project; and
>
> "NFA1" means the actual net saleable area of the Project.
>
> ..
>
> (g) Where not all the units in the Project or the Merged Project have been sold by the Second Completion Date, ***the Second Transfer Price*** will be paid to the Lender in two tranches as follows:
>
> (i) the first tranche will be paid to the Lender ... on the Second Completion Date and will be an amount be [*sic*] ***equivalent to the higher of the S$3,000,000 or the amount computed using the formula in paragraph 12(c)*** based on the average selling prices and net saleable area of the units in the Project ... sold as at such date,
>
> (ii) the second tranche will be paid to the Lender within 14 days ... of the sale of all the remaining units in the Project ... and will be equivalent to the amount computed using the formula in paragraph 12(c) based on the average selling price and net saleable area of the remaining units [in the] Project ...

[emphasis added in bold italics]

18 If it turned out eventually that 10% of the sale proceeds fell short of $3m, the plaintiff would have to refund the shortfall. Clause 12(g)(iii) stated:

> 12. (g) ...
>
> (iii) where, after the sale of all the units [in] the [Shelford] Project ... it is determined that the Second Transfer Price, computed based on the formula in paragraph 12(c), is less than S$3,000,000, the Lender will refund the difference to [the second defendant] ...

19 Clause 17 of the CBA stated the various grounds on which the plaintiff was entitled to

terminate the CBA with immediate effect. In particular, cll 17(a) and (g) read as follow:

> 17. The Lender shall be ***entitled to terminate*** this Agreement immediately by notice in writing to the Borrower if:
>
> (a) the Borrower or [the second defendant] does not perform or comply with one or more of its or his obligations under this Agreement;
>
> ...
>
> (g) any event occurs or circumstances arise which the Lender reasonably determines give(s) reasonable grounds for believing that the Borrower or [the second defendant] may not (or may be unable to) perform or comply with any one or more of its or his obligations under this Agreement or which will have a material adverse effect on the Borrower, or the [Shelford] Project or the Merged Project or the Relevant Assets.
>
> [emphasis added in bold italics]

20 Clause 18 of the CBA provided that *all amounts payable under the CBA* became immediately due and payable to the plaintiff upon the termination of the CBA. In addition, cl 18 allowed for 100% interest to be charged upon termination of the CBA:

> 18. Upon termination of this Agreement by the Lender as aforesaid ***prior to the exercise of any Option*** by the Lender, ***the Loan and all amounts and any other sums then payable under this Agreement*** shall, notwithstanding anything to the contrary contained in this Agreement, become immediately due and payable to the Lender, ***together with interest on the Loan of S$3,000,000*** .
>
> [emphasis added in bold italics]

Termination of the Convertible Bond Agreement

21 It would appear that the second defendant took speculative risks in the Singapore property market in the months following the execution of the CBA. In or around June 2007 (one month after the execution of the CBA), the second defendant paid for an option for the purchase of the Dapenso Building, a nine-storey office building block in Cecil Street, for the sum of $96m without the financial resources to meet even the deposit payable upon the exercise of such option. The second defendant had to borrow a sum of $12m from one Delia Chua (introduced to him by Chan) in order that his company, East Coast (Cecil) Investment Pte Ltd, could exercise the option to purchase the Dapenso Building. He borrowed a further sum of $80m from one K S Tan to pay the balance of the purchase price. Subsequently, the second defendant secured a sub-sale of the Dapenso building to the KOP group of companies for about $120m. The second defendant admitted that he had taken a "gamble" as he would have lost Delia Chua's $12m if he had failed to borrow the $80m. He admitted that he had taken this risk as the property market in 2007 was "bullish".

22 A few months after the execution of the CBA, on 12 September 2007 the first defendant exercised an option to purchase another property, No 121B Whitley Road. This purchase was financed with a loan of $12.6m from the United Overseas Bank which also agreed to grant further loans of $2.1m for the development charge and $7.8m towards construction costs for the Whitley Project.

23 On 2 April 2008 (about one year after the CBA had been executed), Sern reminded the second

defendant of the defendants' obligation to make repayment of the principal sum of $3m by 2 May 2008. Sometime in April 2008, the second defendant informed Chan that the first defendant would not be able to repay the principal sum by 2 May 2008. The second defendant explained that the launch of the Shelford Project had to be delayed because "time was required to demolish and clear the [Shelford] [work]site".

24 On 10 April 2008, the second defendant unsuccessfully sought to borrow a sum of $3m from Delia Chua for the repayment of the principal sum of $3m to the plaintiff. Delia Chua informed Chan of the second defendant's request for financial assistance. This was important as it contributed to the plaintiff's grounds for belief that the first defendant was unable to repay the principal sum. Subsequently, the second defendant asked Chan and Sern for an extension of three months to repay the principal sum. In consideration of such extension, the second defendant offered to pay an additional $1m over and above what would have been due upon issue of the TOP. By 7 May 2008, the defendant managed to make payment of only $1.2m.

25 The plaintiff then decided to terminate the CBA. In a letter dated 10 May 2008, the plaintiff gave notice to the defendants of the exercise of its right under cl 17 of the CBA to terminate the CBA with immediate effect. It gave notice that the right of termination arose, *inter alia*, under cl 17(g) as the plaintiff had notice that the defendants did not have sufficient funds for the Shelford Project. That, in the plaintiff's view, provided reasonable grounds for the plaintiff's belief that the defendants might not be able to perform its obligations under the CBA. The same letter informed that the following amounts had become immediately due and payable:

(a) the principal sum of the loan in the amount of $2.95m;

(b) interest in the sum of $2.95m; and

(c) the sum of $8,051.75 being the sum of legal costs in the negotiation and preparation of the CBA.

26 The demand for payment of item (b) above was based on cl 18 of the CBA which provided that 100% interest on the loan was immediately due and payable upon termination of the CBA.

The settlement agreement

27 Initially, the defendants adopted an aggressive position against the plaintiff's termination of the CBA. The defendants' solicitors wrote a letter dated 15 May 2008 ("the first letter of 15 May 2008") to dispute the plaintiff's rights under the CBA. The following contentions were raised by the defendants:

(a) When the CBA was presented to the second defendant, he thought that it looked complicated but signed it when he was assured that the CBA provided for the terms as agreed [this resulted in the defendants' plea of *non est factum*].

(b) The CBA was a sham transaction. Chan and Sern had employed the plaintiff as a vehicle to effect a moneylending transaction and used the CBA to mask the real intention to lend money at a prohibitive interest rate.

(c) The loan given pursuant to the CBA was unenforceable as the plaintiff was not a licensed moneylender under the Moneylenders Act (Cap 188, 1985 Rev Ed) ("MLA 1985").

(d) The 100% interest rate found in cl 18 of the CBA was exorbitant. Section 23(5) of the MLA 1985 capped the chargeable interest rate at 20% per annum.

(e) The plaintiff had wrongfully terminated the CBA as there was no amount due and payable under the CBA, the plaintiff not having exercised the first option under cl 11 of the CBA.

(f) The defendants, after having had the benefit of legal advice, realised that cll 7 and 9 of the CBA would entitle the plaintiff to own 75% of the first defendant. The second defendant did not intend to confer on the plaintiff 75% ownership in the first defendant for a mere $3m. This made the CBA "grossly unconscionable" [This was not pleaded. No evidence was led on the point of unconscionability].

28 After this first letter of 15 May 2008, the defendants' solicitors wrote a "without prejudice" letter of the same date to express the defendants' intentions to negotiate in good faith with a view to achieving an amicable settlement ("the second letter of 15 May 2008"):

1. We refer to our open letter to you of the same date.

2. Notwithstanding our clients' position taken in our open latter, ***our clients are still prepared to negotiate in good faith with you with a view to reaching an amicable settlement*** including mediation …

[emphasis added in bold italics]

The defendants took matters a step further when they *offered to compromise* their issues in the letter dated 23 May 2008, the material parts of which are reproduced below:

2. ...

a. Notwithstanding that legally, our clients have been advised that there are ***strong grounds*** to dispute the claim, ***they do not wish to do so and instead wish to resolve the matter amiciably*** [*sic*].

...

c. There was a default on the first tranche …

i. ... [because] the original development [for the Shelford Project] was for some 60 over units. That was changed to 31 units for marketing purposes which led to a delay in the launch.

...

d. [The defendants] are confident of launching within the next 3 to 4 months and hence only paid $1.2 million early this month ...

[emphasis added in bold italics]

29 A series of correspondence followed thereafter between the parties to negotiate the schedule of repayment by way of instalments for the rest of the principal sum owed, interest in the sum of $2.95m and the legal costs incurred. The letter from the plaintiff's solicitors dated 28 May 2008

proposed that the defendants deliver three post-dated cheques for the sums of $2,740,870.31, $1m and $1m respectively; and a current-dated cheque of $14,051.75 inclusive of legal costs incurred. In addition, the same letter stated:

> 3. If any of the cheques shall not be met on due presentation thereof the ***whole outstanding balance of the amount owing to our client shall become immediately due and payable*** , notwithstanding the currency of the cheques representing the same.
>
> 4. In the event of default by your clients in the payment of the aforesaid amount, our client shall be at liberty to file suit against your clients and your clients shall consent to our client entering judgment forthwith for the amount thereof together with interest thereon at the rate provided in clause 22 of the said agreement and costs as provided in clauses 24 and 25 of the said agreement.
>
> [emphasis added in bold italics]

30 The defendants' solicitors replied in a letter dated 30 May 2008 agreeing to delivery of a current-dated cheque of $14,051.75 as well as to paras 3 and 4 of the plaintiff's solicitors' letter dated 28 May 2008. However, they counter-proposed a different repayment schedule.

31 An instalment payment schedule was finally *agreed* between the parties. The defendants delivered to the plaintiff four post-dated cheques as follows:

(a) a cheque dated 31 August 2008 for the sum of $1,740,870.31;

(b) a cheque dated 31 October 2008 for the sum of $1m;

(c) a cheque dated 31 December 2008 for the sum of $1m; and

(d) a cheque dated 31 March 2009 for the sum of $1m.

In addition, the defendants sent a cheque dated 10 June 2008 for the sum of $14,051.75 representing the legal costs for preparing the CBA.

32 The defendants then defaulted in making payment under the agreed instalment payment schedule. While the cheques for the respective sums of $14,051.75 and $1,740,870.31 were duly met on presentation, the defendants defaulted with respect to the three remaining instalments of $1m each. The plaintiff then filed a writ seeking:

(a) payment of $2.9m;

(b) interest in the sum of $173,391.78 at the rate of 12% per annum on the sum of $2.9m from 1 November 2008 to the date of the issue of the writ;

(c) interest on the sum of $2.9m at the rate of 12% per annum from the date of issue of the writ to the date of payment; and

(d) legal costs of $18,550.00.

The defendants' case

33 The defendants claim that the CBA was a sham and that the transaction was that of

moneylending unenforceable under the MLA 1985 as the plaintiff was not a licensed moneylender. The defendants further claim that the plaintiff was used as a vehicle to lend money at an exorbitant interest rate.

34 The second defendant claims that he did not read the CBA when he signed it and that he did not fully understand the consequences of signing the CBA. In addition, the defendants claim that the plaintiff had wrongfully terminated the CBA and that the plaintiff could not rely on cll 17(a) and 17(g) to terminate the CBA. The defendants claim to have had more than sufficient funds for the Shelford Project as evidenced by the payment of $1.2m to the plaintiff on 7 May 2008.

35 In relation to the settlement agreement, the defendants claim that they entered into the same *under economic duress*, the defendants being concerned then that the threatened legal proceedings might adversely affect HLF's financing of the Shelford Project.

36 The defendants also have a counterclaim for moneys already paid to the plaintiff on the basis that the CBA had been wrongfully terminated.

The plaintiff's case

37 The plaintiff argues that the issues raised by the defendants in relation to the CBA were irrelevant because the parties had, subsequent to the CBA, entered into a settlement agreement.

38 The plaintiff claims that, in any event, it was entitled to terminate the CBA. The plaintiff maintains that it had reasonable grounds to believe that the defendants might not be able to perform or comply with their obligations under the CBA. It was argued that the plaintiff had come to know that the defendants did not have sufficient funds for the project and might not be able to secure funds for the project on a timely basis.

Issues in the present case

39 The following issues arise for determination:

(a) Did the issues raised in the defence form the subject matter of a valid and binding compromise agreement?

(b) If so, what was the effect of the compromise agreement?

(c) Whether there was, in any event, any merit or basis in the issues?

The decision

First Issue –Did the issues form the subject matter of a valid and binding compromise agreement?

40 The overarching question in the present matter is whether the issues raised by the defendants were the subject matter of a compromise agreement; and, if so, what was the *consequence* of compromising those issues. In determining the definition of "compromise", reference is made to the Court of Appeal decision *Gay Choon Ing v Loh Sze Ti Terence Peter* and another appeal [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") where the observations of David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 6th Ed, 2005) ("*Foskett*") at para 1-01 were endorsed (at [41]):

Compromise can be defined as *the settlement of dispute by mutual concession*, its essential

> foundation being the ordinary law of contract ... A more practical and, perhaps, more apt definition would be *the complete or partial resolution by agreement of differences before final adjudication by a court or tribunal of competent jurisdiction*. [emphasis in original]

The Court of Appeal (at [43]) clarified that a compromise is essentially based on contract and for a compromise to be reached between two parties, there must, of necessity, be "an actual or potential dispute between parties that can be disposed of". It was observed at [42]:

> ... where parties have demonstrated that they intend to dispose of their dispute by reaching an amicable resolution agreeable to both parties, this compromise or settlement will be recognised and given effect to by the courts.

41 The High Court decision in *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] 2 SLR(R) 136 was also endorsed by the Court of Appeal at [44], where it was noted that Lai Kew Chai J had cited *Foskett's* following observations:

> A compromise is little more than a species of contract. What distinguishes it from other contracts is *the requirement of a dispute or differences between parties which are eventually settled*. In Foskett, *The Law and Practice of Compromise* it is written (at p 5):
>
> > Bearing in mind its essential nature, it is submitted that a compromise in the true sense of the term cannot arise until some dispute or difference of view exists between the parties which, by agreement, they resolve. It is not necessary for there to be pending litigation, but there must be some 'actual' or 'potential' dispute.
>
> [emphasis in original]

42 On the facts of the present case, it is clear that the issues had been compromised by a settlement agreement between the parties. The issues were first raised in the first letter of 15 May 2008 by the defendants' solicitors. Thereafter, the defendants signified in the second letter of 15 May 2008 their intention to negotiate in good faith "with a view to reaching an amicable settlement". The defendants' intentions were made patently clear when, in the letter dated 23 May 2008, it was stated that the defendants "[did] not wish" to dispute the plaintiff's claim and wished to "resolve the matter amicably". The defendants' letter dated 30 May 2008 *accepted* the terms set out in paras 2 to 5 of the plaintiff's letter dated 28 May 2008. Finally, the defendants *affirmed* the compromise agreement by delivering four sets of post-dated cheques in the defendants' letter dated 9 June 2008; this was unequivocal acceptance of the instalment payment schedule proposed by the plaintiff. Looking at the correspondence between the parties in its totality, there is no doubt that a valid "compromise agreement" (or "settlement agreement") had been formed. The plaintiff agreed not to pursue its claim under the CBA (forbearance to sue) in exchange for the defendants' payment of the instalment sums by way of post-dated cheques delivered to the plaintiff.

The argument on economic duress

43 Based on the defendants' pleaded case, the only substantive argument against the compromise agreement was that it was reached under economic duress. The defendants allege that they were forced to enter into the settlement agreement under economic duress. According to the second defendant, when he informed Chan in April 2008 that the defendants would not be able to repay the principal sum of $3m by 2 May 2008, Chan informed him that failure to do so would result in "serious repercussions". The defendants took this as a threat that legal action would be instituted against them. The defendants alleged that Sern had warned the second defendant over the telephone on

14 May 2008 that legal action would be taken if the defendants failed to make payment of the balance of $2.75m (since only $1.2m had been paid). The defendants claim that on the same day, on 14 May 2008, at around 10.30am, Chan told the second defendant over the telephone to settle as the plaintiff's solicitors were ready to take legal action against the defendants.

44 In my view, the defence of economic duress is clearly untenable. Quite apart from the fact that *prima facie* the threat of legal action to enforce one's legal rights is not a wrongful threat, the evidence does not bear out the defendants' allegation.

45 First, it is clear that the offer to settle was *initiated* by the defendants themselves. Given that the offer to settle was made by the defendants, the attempt to avoid the settlement agreement with the lame allegation of economic duress borders on the frivolous.

46 Second, I am unable to accept the defendants' assertion that Sern and Chan forced the second defendant over the telephone (over two separate telephone calls on 14 May 2008) to settle. If the threats had indeed been uttered on 14 May 2008 and if there had been, as alleged, a series of threats made over the telephone since April 2008, there was not even the slightest hint of the same in the defendants' first letter dated 15 May 2008. Neither were the alleged threats of legal proceedings raised or mentioned in the defendants' e-mail correspondence of 28 May 2008 and 4 June 2008.

47 Third, the defendants' actions after the compromise agreement was made were inconsistent with the alleged economic duress. For example, instead of making protest that the settlement agreement was made under duress, the defendants actually *requested for an extension of time* to make the payment of the accelerated sum of $3m in the e-mails dated 24 November 2008 and 9 December 2008. In addition, the second defendant himself wrote an e-mail dated 25 February 2009 to seek an extension of time to make payment.

48 Fourth, the second defendant admitted during cross-examination that throughout the period, from June 2008 (when the settlement agreement had been formed) to the commencement of the action in April 2009, he had *never disputed* the plaintiff's rights under the settlement agreement. After showing the second defendant the series of correspondence up to the e-mail dated 24 November 2008, the second defendant was asked:

> Q. Do you agree that from all these actions, you've never disputed our client's rights under the settlement agreement?
>
> A. Like I said, I was forced to go into this --
>
> Q. No. You have not disputed our client's rights? Just answer the question.
>
> A. No.
>
> ...
>
> Court: Can I just clarify. What is the "no"? What does the "no" mean? ... The question was "You have not disputed our client's rights? Just answer the question. Answer: No." Do you mean you have not disputed, that you agree?
>
> A. I have not disputed.

49 Fifth, it was undisputed that the defendants had the benefit of independent legal advice throughout the process of negotiating the terms of the settlement agreement as well as after the settlement agreement had been entered into. The defendants also had a viable alternative to settlement, they could have defended their claim. After all, the second defendant himself admitted in court that he had told the plaintiff (and had legal advice to the effect) that the defendants had "strong grounds" to dispute the plaintiff's claim:

> Q. At page 226 [the second letter of 15 May 2008], you agree that notwithstanding that legally, you have been advised there are strong grounds to dispute the claim, you say you do not wish to do so and instead want to resolve the matter amicably.
>
> A. Yes.

50 There was even more confidence shown in the defendants' first letter of 15 May 2008 where the defendants represented to the plaintiff that:

> 20. ... our clients wholly reject your claim. We are instructed that if you persist in claiming against our clients, we have firm instructions to vigorously defend the claim and hold you fully liable for all cost [*sic*] incurred.

In my view, there is not an iota of evidence of any form of illegitimate pressure placed by the plaintiff.

51 In any event, even if I were to accept the defendants' allegations that Chan and Sern had threatened the second defendant that the plaintiff would take legal action if the defendants failed to make payment of the principal sum, that alone is insufficient to amount to "illegitimate pressure". It has been observed in *Chitty on Contracts*, vol 1 (Sweet & Maxwell, 30th Ed, 2009) at para 7-050 (endorsed in *Shunmugam Jayakumar v Jeyaretnam Joshua Benjamin* [1996] 2 SLR(R) 658 at [51] ("*Shunmugam*"); also see *Miles v New Zealand Alford Estate Company* (1886) 32 Ch D 266 and *Jayawickreme v Amarsuriya (since deceased)* [1918] AC 869) that:

> Since recourse to law is the remedy for redress provided by the law itself, it is obvious that prima facie a threat to enforce one's legal rights by instituting civil proceedings cannot be an unlawful or wrongful threat. Consequently a contract which is obtained by means of such a threat must prima facie be valid, and cannot be impeached on grounds of duress. So an ordinary bona fide compromise is clearly a valid contract even though exacted under threats to bring (or defend) legal proceedings. ... Even a threat to bring proceedings where there is no ground of action in law is prima facie not an unlawful threat, at least where the threat is made *bona fide*, and is not manifestly frivolous or vexatious.

The argument on failure of consideration

52 The defendants next argued that there had been a total failure of consideration to form a valid settlement agreement. The argument ignores the fact that the plaintiff could have sued the defendants to enforce its rights under the CBA but refrained from so doing as the parties had entered into the settlement agreement. It is established law that forbearance to sue constitutes sufficient consideration: see the Court of Appeal decisions of *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [71]; *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250; and the High Court decisions of *Imperial Steel Drum Manufacturers Sdn Bhd v Wong Kin Heng* [1997] 1 SLR(R) 297; *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd* [2000] 1 SLR(R) 204.

Second issue – What is the effect of the compromise agreement?

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. This oft-stated principle has been regarded as self-evident as its rationale has seldom been adequately articulated. It has been observed in the leading commentary in David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 7th Ed, 2010) ("*Foskett 2010*") at paras 8-01 and 8-02 ([40] *supra*):

> 8-01 The purpose of a compromise is to ***put an end to the disputation*** in which the parties had hitherto been engaged. Such cause or causes of action as each had, or may have had, prior to the conclusion of the agreement are discharged ...
>
> 8-02 Given the normal meaning, purpose and effect of a compromise, the natural inference is that the common intention of the parties is that ***the compromise will henceforth govern their legal relationship in connection with the disputes*** in which they had been engaged and that, accordingly, those disputes would still be regarded as 'dead' even in the event of breach of the compromise. In these circumstances, recourse to the original claims will not be permitted unless, upon a true construction of the compromise, it is clear that this is what the parties intended. ...
>
> [emphasis added in bold italics]

54 *Foskett 2010* makes clear that the factual and legal basis upon which the parties have entered into the compromise agreement cannot be reopened, at paras 2-01, 2-16 and 6-01:

> 2-01 … a compromise in the true sense of the term does not arise until some dispute or difference of view exists between the parties which, by agreement, they resolve. ...
>
> ...
>
> 2-16 The assertions, denials and counter-assertions comprising the dispute need have no foundation in fact or in law provided they are made in good faith. If a party to a compromise attempts to escape its consequences by alleging that the claim has no legal effect or factual foundation, the court will decline to investigate such an allegation. ...
>
> ...
>
> 6-01 An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action. ...

55 These principles were accepted by the Court of Appeal in *Gay Choon Ing* ([40] *supra*) at [54] and [56]:

> 54 Once an agreement has been established ... that concludes the matter. In the Singapore High Court decision of *Tan Kee v The Titular Roman Catholic Archbishop of Singapore* [1997] SGHC 281, for example, G P Selvam J observed, as follows (at [31]):
>
> > A compromise is a settlement agreement arrived at, either in court or out of court, either

> before or after action, for resolving a dispute or settling a claim upon what appears to the parties, and in particular the conceder, to be fair and equitable terms, having regard to the uncertainty they are in regarding the facts or the law and facts together. *Once concluded neither party may resile from the compromise or settlement as that would [be] tantamount to a breach of contract* and courts find such conduct unacceptable. [emphasis added]

...

> 56 Indeed, the *objective* nature of the entire inquiry has been underscored in many cases. For example, in the decision of this court in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440, M Karthigesu JA noted (at [30]) that:
>
> > Under this test [for determining whether the parties have reached an agreement], once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party, therefore, do not prevent the formation of a contract.
>
> [emphasis in original]

56 The same view was held in *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 at [25]:

> The courts are bound to scrutinise with care any attempt by a disputant to renege a contract of compromise on the ground that it is unenforceable for some reason. As the editors of *Chitty on Contracts, Vol 1* (28th Ed, 1999) state at para 17-013, '[t]here is a manifestly obvious public policy in favour of encouragement and enforcement of compromises of disputes which the parties themselves have agreed to'. The editors further comment at para 23-013 that:
>
> > Once a valid compromise has been reached, it is not open to the party against whom the claim is made to avoid the compromise on the ground that the claim was in fact invalid, provided that the claim was made in good faith and was reasonably believed to be valid by the person asserting it.

In *Shunmugam* ([51] *supra*) at [50], it was observed that:

> ... the defendants by the contract of compromise precluded themselves from raising such defences. Once the compromise was concluded the defendants impliedly waived all defences and contentions they could have raised. In other words neither party may eat the cake and have it as well.

57 In England, the Court of Appeal in *Prudential Assurance Co Ltd v McBains Cooper (a firm) and others (CA)* [2000] 1 WLR 2000 observed at 2005:

> It is elementary that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose ...

In *Plumley v Horrell* (1869) 20 LT 473, Lord Romilly MR said:

> ... *Prima facie* everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of a compromise. When I compromise a law suit with

my adversary, I mean that the question is not to be tried over again. ...

58 Based on these authorities, it is clear that disputes between the parties have been resolved by a validly formed compromise agreement entered into in good faith and therefore the issues that previously divided them are *brought to an end*; the parties are not allowed to renege on their mutual compromise for to do so would be to breach the contract. The rationale behind this general principle lies in contract. Where a compromise agreement has been validly formed, that puts an end to the parties' disputes. The parties are not allowed to reopen the prior issues. This is not because they are *estopped* from doing so, but because there *no longer exists* any issues between the parties. Subject to the *parties' intentions* as manifested in the language of the compromise agreement, any issues between the parties have been *resolved* with the terms and conditions (express and implied) found in the compromise agreement. The compromise agreement therefore essentially takes over as the basis of the parties' legal and contractual relationship. In this way, save for any prior issues expressly reserved, the only *relevant* disputes (if any) are those arising from the *compromise agreement*.

59 The *raison d'etre* for this principle are manifold and may well extend to broader considerations concerning alternative dispute resolution and the efficacy of the administration of justice. There is much public interest in the final resolution of disputes; *interest reipublicae ut sit finis litium* (see *Foskett 2010* ([40] *supra*) at 6–02. In a sense, parties with unresolved disputes ought to have better claim to the court's time and resources than those who have already settled their disputes in good faith. There is in addition the sound policy in holding parties to their compromised bargain to ensure commercial certainty. This consideration is especially compelling when it comes to commercial transactions involving corporate men acting with the benefit of legal advice. However, the general principle is subject to inherent limits. It cannot be said that a compromise agreement *is an absolute bar* to reopening disputes *regardless of the circumstances* surrounding the agreement. Lord Denning, in the English Court of Appeal decision of *Binder v Alachouzos* [1972] 2 QB 151 ("*Binder*"), cautioned against possible abuse of a compromise agreement (at 157 and 158):

> ... The judges will ... not allow a moneylender to use a compromise as a means of getting round the [Moneylenders] Act. They will inquire into the circumstances giving rise to the compromise. They will not allow the moneylender to take unfair advantage of the borrower. Even if the borrower consents to judgment being entered against him, the courts will go behind that consent, if the justice of the case so requires. For instance, where the interest charged was so high that it was presumed to be harsh and unconscionable, the court refused to enforce a consent to judgment: see *Mills Conduit Investment Ltd. v. Leslie* [1932] 1 K.B. 233.
>
> On the other hand, it is important that the courts should enforce compromises which are agreed in good faith between the lender and borrower. If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a *bona fide* agreement of compromise.

60 In *Binder*, a lender commenced action against the borrower for default in repayment of loans. The borrower claimed that the loans were unenforceable as they were made in the course of the business of moneylending. Before trial, an agreement was reached between the parties which provided that the lender's actions would be discontinued and that the borrower should make payment of a sum of money by way of instalments. It was further expressly agreed that the Moneylenders Act did not apply to the loan transactions. Lord Denning (at 158) found that the dispute as to whether the lender was a moneylender had already formed the subject matter of a *bona fide* compromise agreement, and it followed that the dispute could not be reopened unless the lender had taken "undue advantage" of the borrower.

61 I respectfully agree with the proposition in *Binder* that a compromise agreement is not *an absolute bar* to reopening issues. There are indeed circumstances in which a compromise agreement could be set aside. However, inasmuch as the court will not make a contract for the parties; there is limited scope for the court to determine whether the terms contracted between two commercial parties were "fair and reasonable". In my view, having regard to the fact that the juridical basis of a compromise agreement lies in contract, the circumstances in which issues that have been resolved by a compromise agreement can be reopened, *must necessarily lie in the law of contract*. As such, prior issues may still be relevant and may even be "live" in situations where the compromise agreement was tainted by illegality or affected by fraud, duress, undue influence or mistake. In circumstances such as these, there cannot be said to be a resolution of issues in the true sense. The compromise agreement would therefore be set aside (or depending on the circumstances, declared to be *void ab initio*) and the issues that have never truly been compromised would be live again.

62 In the present case, I have considered the defendants' argument based on economic duress and have found it to be without basis. The issues raised by the defendants have been put to an end by way of the settlement agreement.

Third issue – Whether there was, in any case, any merit or basis in the issues?

63 In any event, even assuming *arguendo* that the issues were reopened, I find that the defendants' arguments in relation thereto lack merit for the reasons set out below.

The argument on non est factum

64 According to the second defendant, the signing of the CBA was only a "formality" to him. He had allegedly understood the transaction to be a simple loan of $3m repayable within one year after disbursement of the loan, and a profit of an additional $3m was to be paid only after the TOP had been issued. The second defendant contended that Sern had only "briefly explained" the terms of the CBA at the meeting of 2 May 2007. He claimed that he did not read the CBA and was unaware of the effect of all the terms in the CBA. He had only signed the CBA because he "needed the funds urgently" and he "trusted Angelena".

65 In my view, the second defendant's defence of *non est factum* was doomed to fail. He is an educated person and an experienced market player used to taking risks in the development and construction business. The second defendant is a director/shareholder of more than five development companies and a shareholder of one construction company; he had also managed several development projects at the same time. Indeed, his penchant for risk-taking was evident from the fact that he had managed several development projects that were highly leveraged. As was earlier recounted (at [21] above) he took a gamble with money he borrowed from Delia Chua when, through his company East Coast (Cecil) Investment Pte Ltd, he exercised an option to purchase Dapenso Building.

66 The second defendant's risk-taking did not stop there. About four months after the execution of the CBA, the first defendant exercised an option to purchase another property, No 121B Whitley Road. As was mentioned earlier (at [22] above) this purchase was financed with a loan of $12.6m from the United Overseas Bank with additional facilities of $2.1m for the development charge and $7.8m for construction costs for the Whitley Project. The second defendant admitted that there was an outstanding sum of around $2m required for the Whitley Project ("the shortfall") and that he used the funds reserved for the Shelford Project to cover this shortfall:

> Q. So that [$]2.95 million is the amount that is the difference, right, that you have to pay for

the completion of Whitley Road?

A. Yes.

...

A. I had already completed the purchase of Whitley, and now because of my shortfall I have to scramble for money to kick start the project till launched. I have already obtain[ed] the BP [building permission] for Whitley which means that once I take over the site I am able to sell the project but at current market I reckon that I need to build a showflat in order for any sale. I am currently managing both the projects ...

Q. Meaning Shelford and Whitley?

A. Yes.

Q. ... using the funds that I have reserved for Shelford to cover the shortfall.

So your shortfall is the $2 million, right, the amount that you have to pay for the completion of Whitley, and the $1 million deposit?

A. Yes.

67 Furthermore, there are serious doubts as to the second defendant's credibility as a witness. Even if the court were to believe his version that the CBA was a "simple" loan agreement, it was still a loan of a sum of $3m that was repayable one year later, with a promised return of 100% on the loan. These are not insubstantial sums. In the circumstances, it would require a lot to believe the second defendant's testimony that he virtually shut his eyes while signing the CBA:

Q. ... This agreement [the CBA] was signed and initialled by you on every page, right?

A. Yes.

Q. At the top of every page are the clear words, "Convertible Bond Agreement". The title on every page?

A. Yes.

...

Q. So even if you don't look at the text of it, you agree with me that you would be looking at the title, Mr Ng?

A. No. Why would I be looking at the top when I'm signing at the bottom? I don't understand.

Q. So you would not be looking at the bottom when you are signing at the bottom, and you would not be looking at the top either? So basically you are not looking at this document; that is your evidence before the court?

A. Yes.

Q. Mr Ng, I ask you to reconsider that answer. Is that what you are telling the court?

A. Yes.

Q. "I don't look at the top, I don't look at the bottom, and I don't look at what's in between"?

Court: Effectively you blindfolded yourself and signed it?

A. In some ways I can say that, yes.

68 Having said repeatedly that he did not read any part of the CBA when signing it, the second defendant threw his credibility out of the window when he gave the contradictory testimony that he *had* indeed read a part of the CBA:

Q. So even though [for example] I trust you ... would I not be questioning you about [the CBA] and certainly checking before I sign it?

A. -- what was in the [CBA] on the first page, it says there's a lender, there's a borrower and there is $3 million. That, to me, is [a] simple loan agreement.

...

Court: So you did read part of [the CBA].

A. On the top. Because it provides that there's a lender, there's a borrower, and there's $3 million.

...

Court: So you did read the first paragraph?

A. Yes.

69 Lastly, there is undisputed contemporaneous evidence (from the first letter of 15 May 2008) to show that Sern had explained to the second defendant and that the second defendant had understood the structure of the transaction in the CBA during the meeting on 2 May 2007:

4. [Chan] subsequently convened meetings ... where he was introduced to one Sern, Bee Im, and Kelvin Chia. [The second defendant] said [the first defendant] needed S$3 million to free up the cash deposit that had been put into the Shelford project. It was discussed at the meetings that the loan would take the form of a payment of S$3 million to [the first defendant] which could be reimbursed within a year when the Shelford project was expected to be launched and a further return on investment of a $1 for $1 i.e. a return of $3 million would be paid when TOP for the project was expected to be issued which could take 2 years or more.

5. At a final meeting on 2 May 2007, [Chan], Sern and [the second defendant] met in Kelvin Chia's office during which Sern presented a somewhat different structure. ***[The second defendant] was told and understood*** it to be that the 2nd tranche payment was to be equal to 10 per cent of the proceeds of sale which was estimated to be about $39 million. The return on investment would thus be $3.9 million instead of a $1 for $1 return.

[emphasis added in bold italics]

70 This first letter of 15 May 2008 contains an unequivocal admission that the second defendant fully understood the transaction he had entered into. This undisputed documentary evidence is consistent with the second defendant's admission that at the meeting of 2 May 2007 Sern did direct the second defendant's attention to cl 12(c) of the CBA which would entitle the plaintiff to 10% of the sale proceeds of the Shelford units:

> Q. When Sern first brought up this 10 per cent to you, he did turn your attention to clause 12(c); right?
>
> A. He did explain.
>
> Q. Did he flip it to page 4 and show it to you? You were going through the terms; right?
>
> A. Yeah.
>
> Q. If that was going to be a term of concern for you, then in the final document, as you are turning and flipping to sign, surely you would cast your eye back to the same place where you had a problem; right?
>
> A. I would think so, yes.

71 For the reasons above, I find that the second defendant's plea of *non est factum* is disingenuous.

The "sham" argument

72 The defendants contend that the CBA was a sham to hide the true moneylending nature of the transaction which as such was unenforceable under the MLA 1985, the plaintiff not being a licensed moneylender. The defendants further claim that Chan and Sern had used the plaintiff as a vehicle to lend money at an exorbitant interest rate.

73 Although the transaction originated as a loan, there are features in the CBA that suggest the plaintiff's intention was to invest in the Shelford Project. Firstly, the plaintiff was contractually entitled under cll 7 and 9 of the CBA to convert the loan into shares in the first defendant comprising not less than 75% of the enlarged capital of the first defendant. This was a valuable right exercisable at any time after the First Drawdown Date which, in the event the Shelford Project was successful, would enable the plaintiff to obtain the lion's share of the first defendant's profits. Secondly, under the First Option (see [14] above) the plaintiff was able to put to the second defendant $1.5m of the loan or (if already converted) 1.5 million of the converted shares at a price of $3m. This effectively made the second defendant a guarantor for the repayment of the $3m loan. Moreover, it enabled the plaintiff, even after conversion of the loan into shares, to avoid the consequences of such conversion if the first defendant suffered any set-backs in the Shelford Project. Thirdly, upon exercise of the Second Option (see [15] to [18] above), the plaintiff would obtain a return equivalent to 10% of the sale proceeds (under cl 12(c) of the CBA). This return could be more or less than $3m depending on the prices at which all the units in the Shelford Project were sold. Essentially, the plaintiff's return depended on how successful the Shelford Project was. If the Shelford Project did well, the plaintiff could hold on to the converted shares and enjoy the fruits as a shareholder. If the Shelford Project did not do well, the plaintiff could exercise the put options. Even though the terms of the CBA were preponderantly in favour of the plaintiff, that does not preclude the plaintiff from maintaining that it had invested in the Shelford Project. The defendants' solicitor's e-mail dated 9 December 2008 shows that the defendants also regarded the plaintiff as having invested in the Shelford Project. It stated:

a. The client [defendants] has been responsible enough to repay the principal sum of $3 [million] owing to your clients [the plaintiff] ...

b . **W *hat remains owing is only the return on your clients' [the plaintiff] investment*** . But originally this was not due for payment until the TOP of the Shelford project. But this repayment got accelerated because of our clients' [the plaintiff] default in making the repayment of the principal sum on a timely basis. ...

[emphasis added in bold italics]

74 In addition, the defendants' solicitors wrote a letter dated 4 November 2008 to request for an extension of time to make payment under the settlement agreement where it was acknowledged that the additional sum of $3m was the profit on the Shelford investment:

Kindly persuade your clients [the plaintiff] to be understanding having regard to the present circumstances ... Your clients have recovered the capital sum. The remaining $3 million is ***really the profit*** which was to be drawn from the proceeds of the Shelford project ...

[emphasis added in bold italics]

75 It can be seen therefore that the defendants themselves regarded the sum of $3m as a *profit* on the plaintiff's *investment*. This was unequivocally affirmed by the second defendant's testimony under cross-examination:

Q. Can I turn your attention to 1AB246. That is a letter dated 4 November 2008, where your lawyers then were asking for an extension of time to pay under the settlement agreement. Right?

A. Yes.

Q. Then at page 247, the second paragraph, two lines down: "The remaining $3 million is really the profit which was to be drawn from the proceeds of the Shelford project upon TOP which is a long way off." That's one statement that was made?

...

A. --- sorry, I don't follow.

Q. Page 247, the second paragraph, the third line: "The remaining $3 million is really profit ..." That's what your lawyers say. Do you agree with that statement?

A. Yes.

76 The defendants' contention that the CBA was a sham was given a boost when Chan stated under cross-examination that the plaintiff never intended to convert the loan unless the Borrower went into default. That answer did not make commercial sense for if the Borrower went into default, it would likely have been in poor financial health. In such a situation, it is unlikely, to say the least, that the plaintiff would have chosen to become a shareholder. (In so saying, I am not unaware that in exceptional circumstances, it might be that a creditor would want to gain control of a debtor company to bring it to even keel. Nor have I forgotten that the plaintiff could extricate itself by exercise of the put options.) The notes of evidence suggest that it is possible that Chan was

confused when she gave the answer (under cross-examination that the plaintiff never intended to convert the loan into shares unless the Borrower went into default):

> Q. Your conversion of the loan was never intended ... that was never intended to be the case?
>
> A. Only if he cannot pay us our 3 million?
>
> ...
>
> Q. So therefore this whole thing about convertible bond is a sham, isn't it? It was never intended for it to be what it is.
>
> A. No, it was intended for it to be what it is, because after the first year or whichever event that happens earlier, ***we are allowed to basically convert the loan and then we sell it back to him for the 3 million*** . So there was a provision there for that purpose, and ***we don't really have to convert it into shares into his company*** .
>
> Q. You just said that the purpose of converting, if there was a default?
>
> A. Through the shares of the company. But at one year I can convert the loan for payment of the 3 million.
>
> Q. We know all that. It was not to convert. It's to sell to Alvin. It's not a convert. To sell either the shares converted or to sell the loan, or half.
>
> A. Okay.
>
> Q. It's not a convert ... at the end of one year you ... either sell to Alvin 1.5 million shares or $1.5 million of the loan that was given. It's no conversion at that stage. If you have converted into shares, you will sell it to Alvin, which he must buy, at the end of one year. If it is not converted into shares, you sell the loan amount itself.
>
> A. So how can it be a sham, because it's stated that at the end of one year I can sell my shares back to him?
>
> [emphasis added in bold italics]

However, there is no need for conjecture. Even assuming that the CBA was drafted by the plaintiff's lawyer to forestall any allegation that the loan was a moneylending transaction, we would still need to examine the facts to see whether, shorn of the convertibility feature, the transaction indeed breached the MLA 1985.

77 In this regard, it must be remembered that the objective of the MLA 1985 is not to prohibit legitimate commercial transactions as emphasised in the decision of *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [47] ("*City Hardware*"):

> The defence of moneylending is often invoked in Singapore by unmeritorious defendants who are desperate to stave off their financial woes. Such defendants should not regard the MLA as a legal panacea. It should be viewed as a scheme of social legislation designed to regulate rapacious and predatory conduct by unscrupulous unlicensed moneylenders. Its pro-consumer protection ethos was never intended to impede legitimate commercial intercourse or to sterilise the flow of money. It is not meant to curtail the legitimate financial activity of commercial entities that are capable

of making considered business decisions. The court has always taken and will continue to take a pragmatic approach in assessing situations when this defence is raised. The MLA is not invariably contravened in transactions where the object of the transaction is to raise money. In the final analysis, the economic objective of an arrangement to provide credit should not be confused with its legal nature.

78 In any event, given that the plaintiff had indisputably made only one loan, there was insufficient evidence adduced by the defendants to establish a "system and continuity" which one would expect to see in the alleged moneylending business (see *Ang Eng Thong v Lee Kiam Hong* [1998] SGHC 64 at [21]; *Mak Chik Lun v Loh Kim Her* [2003] 4 SLR(R) 338 at [11]; and *Agus Anwar v Orion Oil Ltd* [2010] SGHC 6). Neither is there sufficient evidence, from the mere fact of a one-time loan, to find that the plaintiff was ready and willing to lend money to "all and sundry" (see *Litchfield v Dreyfus* [1906] 1 KB 584 at 589). That said, there is *nothing in principle* to prevent a court from finding that even a one-time loan could constitute a moneylending business if there was sufficient evidence to support such a finding. A single loan is sufficient to give rise to a *rebuttable* presumption that the lender is a *moneylender* under s 3 of the MLA 1985. Ultimately, whether a person is a moneylender and whether there exists a moneylending business are questions of fact: see *City Hardware* ([77] *supra*) at [24]. The arrangements involved must be considered in totality to determine the substance of the transaction: see *City Hardware* at [24] and *Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd* [1995] 2 SLR(R) 170 at [13]. On an overall view, taking into account all the facts and circumstances, I am of the view that there was a genuine commercial purpose for which the CBA was entered into. The defendants' contention is therefore dismissed.

79 The defendants made a further submission. They argued that the sum of $3m (claimed by the plaintiff as interest) was "exorbitant". That can be readily dismissed. The plaintiff's claim for the sum of $3m as "interest" was founded upon cl 18 of the CBA which states as follows:

> Upon termination of this Agreement by the Lender as aforesaid ***prior to the exercise of any Option*** by the Lender, the Loan and all amounts and ***any other sums then payable*** under this Agreement shall, notwithstanding anything to the contrary contained in this Agreement, become immediately due and payable to the Lender, together with interest on the Loan of S$3,000,000. [emphasis added in bold italics]

80 Clause 18 allowed for any sums "*then*" payable under the CBA "*prior to the exercise of any option*" to be immediately due and payable. Since the return based on 10% of the selling price was contingent upon the exercise of the second option under cl 12(a), the plaintiff would not be entitled to the return if the CBA was terminated prior to the exercise of the second option. In the circumstances, the "interest" of $3m was effectively, and in substance, in lieu of the estimated return on the investment that the plaintiff could have obtained if it had exercised the Second Option at the TOP stage. In this regard, cl 18 is in substance an express provision for the plaintiff's expectation losses, that is, what the plaintiff would have obtained if the defendants performed their obligations under the CBA up to the TOP stage. The second defendant could not complain about the exorbitant interest as it was he who offered a 100% return on the investment based on his optimistic projected profits from the sale of the Shelford units. His affidavit recounted that:

> 26. ... It was at [the] meeting [in March 2007] that it was discussed and agreed that a loan of $3 million would be given ... and that in return for the loan of $3 million, the lender would be paid another $3 million. ... all parties were also aware that the projection of the potential receipts for the sale of the property *were based on the bullish market in the early half of 2007*.
>
> 27. Angelena and Kelvin Chia were also aware that the 1st Defendant was projecting the sale

at $1,400.00 psf based on land and development cost[s] of approximately $700 psf. *The potential profit was at that time projected to be $700 psf x 40,000 sq ft of saleable space, [which] would have netted $28 million in profit[s]*. Based on this calculation, the 20% that would have been collected upon launch [of the Shelford units] would have been $11.2 million ...

[emphasis added]

81 Indeed, the second defendant admitted in court that the 100% return on the investment was *offered* by him to Chan:

Q. ... You are saying that $3 million is excessive, it's exorbitant. Is that your case?

A. Yes.

Q. It is also your evidence that you were the one who went to Angelena and said, "I will give you a one plus one", so $3 million was suggested by you. Did you tell your lawyer that?

A. One-for-one, yes.

Q. So $3 million was suggested by you. It's not "exorbitant"; agree?

A. $3 million suggested by me, what, the interest?

Q. Yes. You were going to give them a return of $3 million; right?

A. Yes.

Q. So it cannot be exorbitant because it was suggested by you, right? You were the one who proposed it?

A. Yeah, but they claim it under interest, so ...

Q. So?

A. It's --

Q. You can call it interest, return, liquidated damages, we'll leave that for submission in law --

A. Okay.

Q. -- but in your mind, this amount of money, is it still excessive, now that I'm pointing out to you that you were the one who suggested it yourself? It cannot be; right?

A. Yes.

82 Given that the 100% return on the investment (constituting a sum of $3m) was offered by the second defendant himself, it did not lie in his mouth to assert that the 100% return was exorbitant.

The termination of the CBA

83 Following the first defendant's failure to repay the principal sum of $3m 12 months from the first drawdown date, the plaintiff had the right to terminate the CBA under cl 17(a). Curiously, the plaintiff

failed to use cl 17(a) as an independent ground in its termination letter dated 10 May 2008, relying instead on cl 17(g). In any event, I find that the plaintiff was entitled to terminate the CBA under cl 17(g). There was more than sufficient evidence to provide the plaintiff reasonable grounds for belief that the defendants were unable to make repayment of the principal sum of $3m.

84 The plaintiff had, on 2 April 2008, effectively given notice of its intention to demand the return of the principal sum when the plaintiff reminded the second defendant to make repayment of the principal sum by 2 May 2008. In response thereto, the defendants made the *material admission* that the first defendant would not be able to repay the principal sum of $3m by 2 May 2008. It was admitted in the defence that:

> 13. (d) (i) Sometime in the beginning of April 2008, the 2nd Defendant informed Angelena that the 1st Defendant would not be able to repay the principal sum of $3 million by 2 May 2008. ...

85 There were also admissions in the defence to the effect that the second defendant did not have the funds to repay the principal sum:

> 13. (d) (ii) ... These threats resulted in the 2nd Defendant making an offer to pay an additional $1 million *to buy time* as the Defendants thought that the loan of $3 million was due on 2 May 2008. ...
>
> (d) (iii) ... on 2 May 2008, the 2nd Defendant in the mistaken belief that the $3 million was due and payable issued a cheque postdated to 7 May 2008 for $2.95 million made payable to the Plaintiff *when in fact the 2nd Defendant had no such funds available*.
>
> [emphasis added in bold italics]

86 In addition, the second defendant had, by way of an e-mail dated 30 April 2008 to the plaintiff's solicitors, requested for a three-month extension of time to pay the sum of $3m and had offered to pay the plaintiff the sum of $1m in consideration of such extension of time. The letter stated that the defendants were unable to launch the project in November and December 2007 owing to unexpected market conditions. The promise to make repayment of the principal sum after a three-month extension was an empty one as the second defendant had admitted that he had no money for completion of the Shelford Project:

> Q. Here you request for an extension of three months to pay $3 million; agree?
>
> A. Yes.
>
> Q. Then you offered to top up $1 million.
>
> A. Yes.
>
> Q. Where were you going to get this $3 million from? You can't get it from Delia, Eight@East Coast is going to -- so what did you have in mind when you sent this e-mail? ***Did you have any certainty of monies coming in in three months*** **?**
>
> A. ***I have no monies at all*** , so I'm just hoping that I can launch the project in time.
>
> [emphasis added in bold italics]

87 Indeed, the request for extension of time appeared to be a delaying tactic to allow the second defendant enough time to borrow money from Delia Chua to repay the plaintiff. Delia Chua informed Chan of the second defendant's request. Most pertinently, the second defendant himself *conceded* that the plaintiff had the contractual right to terminate the CBA:

> Q. They have every reason to believe that you are not able to fulfill [*sic*] your obligation, and one of the obligations is that you are supposed to pay them the money, the $3 million; right?
>
> A. Yes.
>
> Q. Since you weren't able to pay them the $3 million within the first anniversary, they have a right to terminate; right?
>
> A. Yes.

88 The second defendant also conceded that because the defendants had defaulted in making repayment of the principal sum, the plaintiff was entitled to accelerate the repayment of the loan:

> Q. Can you read paragraph b. "What remains owing is only the return on your client[']s investment. But originally this was not due for payment until the TOP of the Shelford project. But this repayment got accelerated because of our clients' default in making the repayment of the principal sum on a timely basis." Do you see that?
>
> A. Yes.
>
> Q. Do you agree with me that what your lawyers are saying -- with your approval, of course, your instructions -- is that you are the one in default of making the principal repayment, and that's why they are able to accelerate this return. Right? That's what it says?
>
> A. Yes.
>
> Q. Sorry, that's what it says? Do you agree with that?
>
> A. Yes, I guess so.

89 Given the material admissions made by the second defendant, there is no room for the second defendant to argue that the CBA was wrongfully terminated. For this reason, there is no need to consider the other clauses relied upon by the plaintiff to terminate the CBA. The defendants' counterclaim (based on the contention that the CBA was wrongfully terminated) is also dismissed.

Conclusion

90 For all the foregoing reasons, I allow the plaintiff's claim with respect to the following:

(a) Payment of the sum of $2.9m.

(b) The sum of $173,391.78 being the contractual interest due at the date of issue of the writ;

(c) Further interest on the said sum of $2.9m at the contractual rate of 12% per annum from the date of issue of the writ to payment;

(d) Costs to be taxed unless agreed.