

HCMP 1484/2019, HCA 1852/2020
& HCA 153/2021 (Heard together)
[2021] HKCFI 3707

HCMP 1484/2019

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 1484 OF 2019**

BETWEEN

CS CREDIT LIMITED (中策信貸有限公司) Plaintiff

and

MARSPAN LIMITED 1st Defendant
CHIU MARGARET (邱美琪) 2nd Defendant

HCA 1852/2020

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 1852 OF 2020**

BETWEEN

TAN WAI KEE

Plaintiff

and

MARSPAN LIMITED

1st Defendant

CS CREDIT LIMITED

2nd Defendant

HCA 153/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NO. 153 OF 2021

BETWEEN

FAR EAST CONSORTIUM LIMITED

1st Plaintiff

CIE SECRETARIAL SERVICES LIMITED

2nd Plaintiff

and

THE TRUSTEES OF THE PROPERTY OF

1st Defendant

MARGARET CHIU, A BANKRUPT

TAN WAI KEE

2nd Defendant

MARSPAN LIMITED

3rd Defendant

CS CREDIT LIMITED

4th Defendant

(Heard together)

Before: Madam Recorder Sit, SC in Court

Date of hearing: 24, 25 and 30 November 2021

Date of Judgment: 10 December 2021

JUDGMENT

1. This is the trial of (a) the mortgagee action in HCMP No.1484 of 2019 (“**1999 Proceedings**”) and (b) preliminary issues in HCA No.1852 of 2020 (“**2020 Action**”) and HCA No.153 of 2021 (“**2021 Action**”). All these proceedings concern the property located at Lot nos. 2 and 630 in Demarcation District 238 in Clearwater Bay, Sai Kung (“**Property**”). The Property comprises a four-storey house with a garden, and is said to be of substantial value.

2. The registered owner of the Property is Marspan Limited (“**Marspan**”). Ms Margaret Chiu (“**Margaret Chiu**”) is the owner of 99.9% shares in Marspan, with the remaining 1 out of 1,000 issued shares held by CIE Secretarial Services Limited (“**CIE**”).

3. Margaret Chiu has borrowed HK\$79 million from CS Credit Limited (“**CS Credit**”), and Marspan has mortgaged the Property by way of 2 legal charges to secure those loans. Margaret Chiu has defaulted in repayment of such loans, and CS Credit commenced the 2019 Proceedings against her and Marspan to seek repayment of the outstanding principal and interest and vacant possession of the mortgaged Property.

4. Meanwhile, Margaret Chiu was adjudged bankrupt on the petition of another creditor. Following that:-

(1) Mr Tan Wai Kee (“**Tan**”), the ex-husband of Margaret Chiu, commenced the 2020 Action against Marspan and CS Credit alleging that he is a 50% beneficial owner of the Property pursuant to a resulting or common intention constructive trust between Margaret Chiu and himself, and that his interest is binding on CS Credit; and

(2) Far East Consortium Limited (“**Far East**”) and CIE, companies owned by Margaret Chiu’s family members (her late father and her siblings), commenced the 2021 Action against Margaret Chiu, Tan, Marspan and CS Credit alleging Far East has a one-sixth interest in the Property by reason of a common intention constructive trust between Margaret Chiu and her late father, Mr Chiu Te-ken Deacon (“**Deacon Chiu**”), and that such

interest is binding on and takes priority over that of CS Credit.

5. CS Credit defends both the 2020 Action and the 2021 Action on the basis (*inter alia*) that it was a *bona fide* purchaser for value without notice of either Tan's or Far East's alleged equitable interests, and hence it takes free of either alleged interests.

6. Since the defence of *bona fide* purchaser for value without notice is common to both the 2020 Action and the 2021 Action and would be dispositive of the 2019 Proceedings (and possibly the other 2 actions), it was directed that this issue (and some related issues) should be tried as preliminary issues, at the same time as the trial of the 2019 Proceedings.

THE FACTS

7. The relevant facts for present purpose are largely undisputed.

8. Margaret Chiu is the only daughter of the late Deacon Chiu, a well-known Hong Kong entrepreneur who founded (*inter alia*) Far East Consortium International Limited (stock code 0035:HK) and was the former chairman of Asia Television Limited. She graduated with a law degree from Buckingham University in the United Kingdom in 1978 but has not practised law; she has a directorship in one of the family companies.

9. Tan is Singaporean and formerly a partner of Coopers & Lybrand in Hong Kong. He and Margaret Chiu got married in October 1983. Shortly before their marriage, in 1983:-

(1) Tan procured the incorporation of Marspan, which shares were held by his nominees and he was the sole beneficial owner, with himself and Margaret Chiu appointed the only directors; and

(2) he entered into a sale and purchase agreement to purchase the Property for valuable consideration, which he then nominated Marspan to take up the assignment and be the registered owner thereof.

10. By a deed of separation dated 2 November 1994 (“**Deed of Separation**”), Tan and Margaret Chiu agreed to live separately subject to the terms therein. The relevant terms for present purposes included (i) the conferral of an option by Tan on Margaret Chiu, up to 28 February 1995, to purchase the Property (or all of Marspan’s shares) at an agreed sum of HK\$6 million; (ii) Margaret Chiu’s right to live in the Property as licensee during the aforesaid option period; and (iii) in the event that Margaret Chiu did not exercise the option, the Property shall with the mutual consent of Tan and Margaret Chiu be sold at any time after 28 February 1995 and the net proceeds shall be divided equally between them. It appears that the option was never exercised, and Margaret Chiu continued to live in the Property.

11. In 1996, Marspan entered into a surrender and regrant with the Government pursuant to which it obtained an additional small strip of land that comprises the Property in its current form, for which a premium of HK\$987,000 was payable. Such premium was discharged by a cheque issued by Far East.

12. Far East says that the aforesaid premium was paid pursuant to an oral agreement between Deacon Chiu, Margaret Chiu and Tan that in consideration of Far East paying such premium, Far East would obtain a one-sixth share in the beneficial interest of the Property (“**Alleged 1996 Agreement**”).

13. In 1999, Margaret Chiu re-married to a Canadian gentleman, Mr Christopher Piche (“**Piche**”).

14. On 30 April 2002, Tan resigned as director of Marspan, and CIE was appointed a director. At that time, CIE was owned by Deacon Chiu and Mr Chiu Tat-cheong David (“**David Chiu**”), Margaret Chiu’s brother. Following that, on 3 July 2002, Tan directed his nominees to transfer all the issued shares in Marspan to Margaret Chiu (999 out of 1,000) and CIE (1 out of 1,000).

15. It is said that the above was carried out pursuant to:-

- (1) an oral agreement entered into between Margaret Chiu and Tan in around June 2002, whereby Tan was to transfer his shares in Marspan to Margaret Chiu so that she would be the legal owner of Marspan, and that if

the Property was ever sold, the proceeds would be equally divided between the two of them (“**Alleged 2002 Tan Agreement**”); and

- (2) another oral agreement entered into between Margaret Chiu, Tan, Deacon Chiu and David Chiu in early 2002 that in light of Tan’s intention to transfer the shares in Marspan to Margaret Chiu and that Far East was one of the beneficial owners of the Property, Far East should be given a share interest in Marspan (“**Alleged 2002 Far East Agreement**”).

16. Since 2004, Margaret Chiu and Piche undertook substantial renovation of the Property, which lasted close to 8 years and cost CAN\$3 million. It is said that Piche paid for most, if not almost all, of the renovation expenses.

17. In or around 2011, Margaret Chiu and Piche divorced. In the Canadian ancillary relief proceedings where the Property was one of the family assets in dispute, it was raised for the first time by Margaret Chiu, in 2013, that Tan retained an interest in Marspan and the Property by virtue of the Alleged 2002 Tan Agreement. Tan gave evidence in those proceedings, in 2015.

18. Deacon Chiu passed away in March 2015.

19. It appears that in or before 2016, Margaret Chiu had incurred substantial liabilities to various third parties. The full extent of her

liabilities is not in evidence but they included (a) HK\$25 million owed to HK Sources Finance Limited (on Margaret Chiu's own representation) and (b) liabilities owed to V Capital Limited ("**V Capital**"). On 2 March 2017, Margaret Chiu made a partial payment of HK\$7 million to V Capital, and on 6 March 2017 V Capital made a demand for an outstanding sum of US\$5,710,281.08.

20. It is not in dispute that on 1 March 2017, Margaret Chiu was introduced to CS Credit through intermediaries for the purpose of obtaining a HK\$70 million loan, and she attended a meeting with (*inter alios*) representatives of CS Credit, Mr Chow Kam Wah ("**Chow**") and Mr Law Kwan Yin ("**Law**"). CS Credit is a registered money lender under the Money Lenders Ordinance (Cap.163) ("**MLO**").

21. Following that, on 2 March 2017, CS Credit offered to advance a HK\$70 million loan to Margaret Chiu ("**1st Loan**"). She then filled out a mortgage loan application form and submitted various documents in support on 3 March 2017. In the application form, Margaret Chiu stated, under usage of the Property, "owner occupied".

22. Also on 3 March 2017, Chow and Law attended the Property for a site visit as part of CS Credit's due diligence exercise ("**Site Visit**"). There is no dispute that:-

- (1) During the Site Visit, Chow and Law only encountered Margaret Chiu and a male domestic helper.

(2) Having observed that there were a large number of dogs kept there, Margaret Chiu explained to Chow and Law that as she was living alone in the Property, she kept 14 dogs as watchdogs to protect herself.

(3) Upon inquiry, she explained that she had no children and was only living with her 14 dogs.

(4) Chow and Law were shown around the Property and visited each floor, including (*inter alia*) the living room and dining room on the lower ground floor, and took photographs of the same. The photographs showed a dining room of modern design, with contemporary art on the walls and white cupboards.

23. Thereafter, on 8 March 2017, the following documents were executed and provided to CS Credit:-

(1) a loan agreement for a 12-month term loan¹ of HK\$70 million, executed by Margaret Chiu as borrower (“**1st Loan Agreement**”);

(2) a mortgage over the Property, expressed as a legal charge, executed by (*inter alios*) Marspan (with Margaret Chiu signing on its behalf) in favour of CS Credit (“**1st Mortgage**”); and

¹ Subsequently extended for 12 months on 7 March 2018.

- (3) a written resolution of all directors of Marspan approving the 1st Mortgage (stated to have been tabled) for the purpose of the loan facility to be extended by CS Credit to Margaret Chiu pursuant to the terms of the 1st Loan Agreement, which was signed by (i) Margaret Chiu and (ii) ULU Essentials Corporation Limited (with Margaret Chiu signing on its behalf) (**“2017 BOD Resolution”**).

24. There was also an earlier written resolution of shareholders of Marspan dated 7 March 2017 approving the 1st Mortgage in substantially the same terms as the 2017 BOD Resolution, signed by Margaret Chiu and Mr Chan Chi Hing on behalf of CIE (**“2017 SH Resolution”**), which was also provided to CS Credit.

25. Thereafter, on 1 February 2018, Margaret Chiu applied for and was granted a further 12-month term loan of HK\$9 million by CS Credit (**“2nd Loan”**), secured by a third mortgage on the Property. To that end, the following documents were executed and provided to CS Credit:-

- (1) a loan agreement for a 12-month term loan of HK\$9 million, executed by Margaret Chiu as borrower (**“2nd Loan Agreement”**);
- (2) a further mortgage over the Property, also expressed as a legal charge, executed by (*inter alios*) Marspan (with Margaret Chiu signing on its behalf) in favour of CS Credit (**“3rd Mortgage”**);

- (3) a written resolution of all directors of Marspan approving the 3rd Mortgage (stated to have been tabled) for the purpose of the 2nd Loan, which was signed by (i) Margaret Chiu; (ii) CIE and (iii) ULU Essentials Corporation Limited (with Margaret Chiu signing on behalf of (ii) and (iii)) (“**2018 BOD Resolution**”); and
- (4) a written resolution of shareholders of Marspan approving the 3rd Mortgage, signed by Margaret Chiu and CIE (with Margaret Chiu signing on its behalf) (“**2018 SH Resolution**”).

26. I should mention that between the 1st Loan and the 2nd Loan, Marspan had executed a second mortgage over the Property (with CS Credit’s consent) in favour of Asset Bridge Development Limited, and that subsequent to the 3rd Mortgage, Marspan had executed 2 further mortgages over the Property in favour of third parties in June and July 2018.

27. It appears that Margaret Chiu’s financial situation had taken a turn for the worse in the second half of 2018. In September 2018 she consented to judgment being entered against her in proceedings brought by V Capital. The judgment debt was not repaid, V Capital served a statutory demand on her, and eventually petitioned for her bankruptcy in December 2018. Other creditors also began to take proceedings against Margaret Chiu in late 2018, as can be seen from the various writs registered against the Property.

28. On 12 February 2019, CS Credit through solicitors informed Margaret Chiu and Marspan that Margaret Chiu had breached the terms of the 1st Loan Agreement and the 2nd Loan Agreement, declared all sums payable thereunder to be immediately due and payable, and demanded repayment within 14 days.

29. No repayment having been made, on 17 September 2019 CS Credit commenced the 2019 Proceedings against Marspan and Margaret Chiu for repayment and vacant possession of the Property.

PROCEDURAL HISTORY

30. The 2019 Proceedings were resisted by Margaret Chiu and Marspan. They raised the following defences:-

(1) Margaret Chiu claims that Tan retains an interest in the Property, by reason of his having paid for the same, the Deed of Separation and the Alleged 2002 Agreement. Tan also filed evidence in support of such contention.

(2) Although she does not dispute that she had entered into the 1st Loan Agreement and the 2nd Loan Agreement and had received the 1st Loan and the 2nd Loan, she denies she was liable to repay the amount claimed based on various alleged non-compliance with the MLO, with respect to (i) default interest; (ii) administration fee; (iii) alleged payment of

commission to intermediaries; and (iv) alleged failure of CS Credit to check her credit worthiness.

31. In the above affirmations filed by Margaret Chiu and Tan on 14 November 2019, Margaret Chiu claims that CIE holds the one share in Marspan on trust for her. Neither mention anything about the Alleged 1996 Agreement, the Alleged 2002 Far East Agreement or Far East's one-sixth beneficial interest in the Property.

32. Thereafter, on 22 April 2020, Margaret Chiu was adjudged bankrupt on the petition presented by V Capital.

33. By then, directions had already been given by Lisa Wong J for the 2019 Proceedings to be set down for trial with 5 days reserved. It became clear soon afterwards from the orders sought from the court that CS Credit intended to proceed with the 2019 Proceedings, which the trustees in bankruptcy of the property of Margaret Chiu did not intend to participate.²

34. On 2 October 2020, the 2020 Action was commenced by Tan against Marspan and CS Credit seeking declaratory relief as per §4(1) above.

(1) In its Defence and Counterclaim, CS Credit pleads that it was mortgagee of a legal estate, that upon proper inquiries, it did not have notice, actual or constructive,

² The trustees in bankruptcy have since confirmed on 20 August 2021 that they and Marspan would take a neutral stance in relation to the issues to be tried in the 2019 Proceedings and the preliminary issues directed in the 2020 Action and the 2021 Action.

of Tan's alleged beneficial interest, and as such it is a *bona fide* purchaser or mortgagee for value without notice and is entitled to enforce the 1st Mortgage and the 3rd Mortgage, and seeks declarations to that effect by way of counterclaim.

- (2) In its Reply, Tan denies CS Credit was a *bona fide* purchaser for value without notice on the basis that there was a room adjacent to the dining area in the Property which was reserved for the use of Tan ("**Room**"), and reasonable persons in the position of Chow and Law should have realized the existence of the Room and inspected the same during the Site Visit, such that CS Credit had not carried out proper inquiries.

35. Not long thereafter, the 2021 Action was commenced by Far East and CIE on 27 January 2021, seeking declaratory relief as per §4(2) above.

- (1) In its Defence and Counterclaim, in addition to the plea of *bona fide* purchaser or mortgagee for value without notice, CS Credit also advances an alternative case of estoppel by silence, inaction or acquiescence based on (i) the 2017 SH Resolution and David Chiu's common directorship in CIE and Far East; (ii) the 2018 BOD Resolution and 2018 SH Resolution and David Chiu's common directorship in CIE and Far

East; (iii) registration of the 1st Mortgage and the 3rd Mortgage at the Land Registry; and (iv) commencement of the 2019 Proceedings.

- (2) Far East and CIE join issue with CS Credit, on the basis that (a) CS Credit had constructive knowledge of Far East's alleged interest by reason of (i) the fact that CIE was holding 1 share in Marspan and Marspan had 2 other directors (CIE and ULU Essentials Corporation Limited); (ii) Margaret Chiu was never a director of CIE; and (iii) a premium of HK\$987,000 had been paid in respect to the Property; and (b) the 2017 SH Resolution, the 2018 BOD Resolution and the 2018 SH Resolution either failed to provide the necessary approval on proper construction, or were invalid, or that Far East and CIE had no knowledge of their creation or presentation to CS Credit.

36. Pursuant to the directions of Lisa Wong J on 18 June 2021:-

- (1) The trial of the 2019 Proceedings would proceed as scheduled.
- (2) The following preliminary issues in the 2020 Action are directed to be tried at the same time as the 2019 Proceedings:-

- (a) whether CS Credit was a *bona fide* purchaser or mortgagee for value without notice of the equitable interest of Tan in the Property (if any) (“Tan’s Alleged Equitable Interest”); and
- (b) accordingly, whether the 1st Mortgage and the 3rd Mortgage are free from, and not subject to, Tan’s Alleged Equitable Interest; and
- (3) the following preliminary issues in the 2021 Action are directed to be tried as the same time as the 2019 Proceedings:-
- (a) whether CS Credit was a *bona fide* purchaser or mortgagee for value without notice of the equitable interest of Far East in the Property (if any) (“Far East’s Alleged Equitable Interest”);
- (b) whether Far East is estopped from asserting Far East’s Alleged Equitable Interest against CS Credit; and
- (c) accordingly, whether the 1st Mortgage and the 3rd Mortgage are free from, and not subject to, Far East’s Alleged Equitable Interest.

THE ISSUES

37. In light of §36 above, as well as the list of agreed issues filed by the parties, I set out the following issues for determination:-

(1) What is the amount of outstanding indebtedness owed by Margaret Chiu to CS Credit, and is CS Credit entitled to money judgment thereof.

(2) Whether CS Credit was a *bona fide* purchaser or mortgagee for value without notice of the alleged equitable interest of Tan in the Property.

(3) Whether CS Credit was a *bona fide* purchaser or mortgagee for value without notice of the alleged equitable interest of Far East in the Property.

(4) Whether Far East is estopped from asserting its alleged equitable interest against CS Credit.

38. It has been suggested by counsel for Tan and Far East that I should “assume” Tan’s and Far East’s respective alleged interests be proved and proceed to consider their arguments on that basis. I decline to do so as it is plainly not mandated by the order of 18 June 2021 (see §36(2)(a) and (3)(a) above), which inserts “(if any)” immediately after the reference to the equitable interest, making it clear that no assumption is to be made that the alleged equitable interest can or will be proved. Given the clear limits on the scope of the issues to be tried, I shall make no

finding on the alleged equitable interests on Tan or Far East, and shall only focus on the issues identified above.

THE EVIDENCE AND THE WITNESSES

39. Given:-

- (1) the trustees in bankruptcy of the property of Margaret Chiu adopt a neutral position in these proceedings and do not pursue the MLO defences raised by her in the 2019 Proceedings (see §30(2) above);
- (2) the parties' respective pleaded cases on constructive notice and estoppel (see §§34-35 above); and
- (3) the acceptance by Mr Adrian But, counsel for Tan, that (a) CS Credit did not have actual notice of Tan's alleged interest in the Property; and (b) Margaret Chiu had made the statements deposed to in CS Credit's evidence to Chow and Law during the Site Visit (as set out in §20 above),

little turns on the oral testimony of witnesses in this trial.

40. As such, notwithstanding 6 witnesses have been called by the parties, at trial only Chow and Law gave evidence and were subject to cross-examination. The statements and affirmations of Tan and the 2 witnesses called by Far East and CIE only concern their respective alleged equitable interests, and the statement filed by the remaining

witness called by Tan, Mr Gurung Lili Jang (“**Gurung**”), Margaret Chiu’s former domestic helper³, is not challenged by CS Credit. The statements and affirmations made by these 4 witnesses have been formally admitted into evidence.

41. I find CS Credit’s witnesses, Chow and Law, to be credible witnesses. They each answered questions directly and in a straightforward manner. Indeed, neither Mr But nor Mr Daniel Fung SC, counsel for Far East and CIE, challenged their credibility. To the extent that anything turns on their oral testimony, I accept their evidence on the same in its entirety.

ISSUE 1 – OUTSTANDING INDEBTEDNESS DUE TO CS CREDIT

42. As indicated in §30(2) above, Margaret Chiu does not dispute that she has entered into the 1st Loan Agreement and the 2nd Loan Agreement and has received the 1st Loan and the 2nd Loan. It is also an agreed fact between all the parties that Margaret Chiu and Marspan⁴ failed to repay (i) the outstanding principal and accrued interest since 9 December 2017 under the 1st Loan Agreement since 8 March 2018, and (ii) the outstanding principal and accrued interest since 2 June 2018 under the 2nd Loan Agreement since 1 July 2018.

43. CS Credit accepts that:-

³ A writ of *subpoena ad testificandum* was issued on the first day of the trial against Gurung, which he answered.

⁴ Who has covenanted to repay the 1st Loan and the 2nd Loan under the 1st Mortgage and the 3rd Mortgage.

(1) Although the 1st Loan Agreement and the 2nd Loan Agreement provide for default interest (i) at an enhanced rate (under both) and (ii) compounded (1st Loan Agreement), these are impermissible under section 22(1) of the MLO and it will not rely on the same. Accordingly it only claims simple interest at the contractual rate of 10.38% (tranche A under the 1st Loan Agreement), 12.255% (tranche B under the 1st Loan Agreement) and 14% (2nd Loan Agreement).

(2) It is not entitled to charge “administration fee”, which in the case of the 1st Loan Agreement was HK\$350,000 and the 2nd Loan Agreement HK\$45,000, in either case deducted from the drawing of the loan, as these are also impermissible under section 27 of the MLO, and the concession is reflected in the reduction of the outstanding principal for the 1st Loan and the 2nd Loan.

44. Accordingly CS Credit should get money judgment and interest against Margaret Chiu and Marspan as follows:-

	1 st Loan Agreement (HK\$)		2 nd Loan Agreement (HK\$)
	Tranche A	Tranche B	
Outstanding principal	29,833,813.41	39,780,888.04	8,952,892.77
Outstanding contractual interest as at maturity date	3,105,234.08 (8 March 2019)	6,077,239.06 (8 March 2019)	841,326.62 (1 February 2019)
Outstanding default interest from maturity date up to commencement of	1,637,459.50	2,577,817.89	(i) 34,588.25 (on outstanding interest from 2 July 2018 to 1

2019 Proceedings (17 September 2019)			February 2019) ⁵ (ii) 856,524.61 (on outstanding principal and interest but not interest on interest from 2 July 2019 to 17 September 2019)
Daily interest from 18 September 2019 until actual payment ⁶	8,484.25	13,356.57	3,756.69

45. Each of the 1st Loan Agreement, 1st Mortgage, 2nd Loan Agreement and 3rd Mortgage contain express provision for payment of costs, charges and expenses on full indemnity basis. Although costs is always in the discretion of the court, I see no reason in this case to depart from the parties' express agreement, and will accordingly order that costs payable by Margaret Chiu and Marspan be on indemnity basis.

ISSUE 2 – BONA FIDE PURCHASER DEFENCE AGAINST TAN

A. The Law

46. It is common ground between CS Credit, Tan, and Far East and CIE that a *bona fide* purchaser of a legal estate for value without notice of the equitable interest can take the legal estate free of such equitable interest: Megarry & Wade, The Law of Real Property (9th edn) §5-005; Gray & Gray, Elements of Land Law (5th edn), §8.3.19.

⁵ Interest on interest is expressly provided for in clause 6 in Schedule 1 to the 2nd Loan Agreement, which imposes default interest on “any amount payable by [Margaret Chiu] under this [2nd] Loan Agreement”.

⁶ This covers the period after judgment, by reason of clause 14.1(a) of the 1st Loan Agreement and clause 6 of Schedule 1 to the 2nd Loan Agreement which expressly provides for default interest rate on the overdue amount from the “due date up to the date of actual payment, both before, on and after judgment”. This is an independent covenant which will not be merged into the judgment: *Forever International Capital Ltd v Ng Chun Sing* [2019] HKCFI 2796, §§22-31.

47. It is also not in dispute that the burden is on the person raising this defence to plead and prove all its elements; it is said to be a “single defence”: *Barclays Bank plc v Boulter* [1998] 1 WLR 1, 8G.

48. This defence has 4 basic elements: (i) *bona fides*; (ii) purchase of a legal estate; (iii) for value; and (iv) absence of notice. Elements (ii) and (iv)⁷ are in dispute in this case.

49. On element (ii) (purchase of a legal estate), there are 2 separate constituents.

50. The first constituent is “legal estate”. In this case one is concerned with legal charges. A charge by deed expressed to be a legal charge is a mortgage of the legal estate, see section 44 of the Conveyancing and Property Ordinance (Cap.219) (“CPO”) which provides (*inter alia*):-

“(1) After commencement of this section, a mortgage of a legal estate, including any second or subsequent mortgage of that legal estate, may be affected at law only by a charge by deed expressed to be a legal charge.

(2) Under a mortgage effected by a legal charge, the mortgagor and the mortgagee shall, subject to this Ordinance, have the same protection, powers and remedies (including but not limited to those relating to foreclosure and the equity of redemption but excluding the power of the mortgagee to enter into possession before any default by the mortgagor) as if the mortgage had been effected by way of assignment of the legal estate before commencement of this section.

...”

⁷ Although there are fleeting references to lack of “*bona fides*” in Mr But’s written submissions, it is clear that he is in fact addressing the question of notice. In any event, it has never been put to Chow or Law that CS Credit’s lack of notice (if established) was not genuine or honest. I will proceed on the basis that there is no challenge to *bona fides*.

By the above statutory fiction, a lender who takes a charge by way of legal mortgage is regarded as having obtained a legal estate, in that it is deemed to have the same protection as if a term of years had been created in its favour by the mortgagor: Gray & Gray §8.3.21. See also section 2 of the CPO, which defines “legal estate” as including a “legal charge”.

51. The second constituent is “purchase”. This arises for consideration because Mr But contends that for the purpose of the *bona fide* purchaser defence, the purchaser is confined to an owner and does not cover a mortgagee.

(1) For the reasons below, I reject Mr But’s argument, and hold that a mortgagee is a purchaser for the purpose of the *bona fide* purchaser defence.

(2) “Purchase” in the context of real property law is a term of art, and refers to a person who takes property by grant and not by mere operation of law (eg descent): Snell’s Equity (34th edn) §4-022; *Commissioners of Inland Revenue v Gribble* [1913] 3 KB 212, 216, 218; *Nuridin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119, 122L-M; *Re Trigg; Ex parte Trigg & Official Receiver* (1978) 25 ALR 207, 215.7-13. Thus, even a donee is a purchaser (albeit not for value). It has long been recognized that a mortgagee is a purchaser: Megarry & Wade §5-008; Cheshire and Burn’s Modern Law of Real Property (18th edn), p.84;

Fisher and Lightwood's Law of Mortgage (15th edn), §42.3.

(3) Mr But advances a number of arguments, none of which is sustainable.

(4) First, Mr But refers to the literal meaning of “purchaser” and says that it only refers to a buyer who acquires a property as an owner. He also refers to section 3(2) of the Land Registration Ordinance (Cap.128) which refers to “*bona fide purchaser or mortgagee for valuable consideration*” to show that there is a difference between the 2 words. However, this wholly ignores the established authorities that while “purchaser” may have different meanings depending on context (in *IRC v Gribble* the English Court of Appeal identified 4 different meanings, including the one relied on by Mr But), in the context of real property law it carries the meaning identified in (2) above. I also do not see how the mere presence of words used in a statute without more would have the effect of changing the well-established meaning of the word “purchaser” at common law.

(5) Second, Mr But relies on the statements of Kwan JA (as Kwan VP then was) in *Ng Luk Mui v Shiu Tsun Wai Vincent* [2011] 5 HKLRD 707, §40, that purchaser “*is a term of art; it is not confined to the*

situation of a sale and purchase”, and “the important thing is whether any consideration in money or money’s worth, including the satisfaction of an existing debt, was provided for the transfer of property”. He argues that these statements show purchaser is confined to a situation where there is a transfer of property. I cannot see how this assists Mr But at all. What the learned judge is saying is that an expansive meaning should be given to “purchaser”, and it can apply to situations where there is a transfer of property other than by sale and purchase. This is the antithesis of the restrictive meaning Mr But seeks to impose on “purchaser”.

- (6) Third, building on his (mis-)reading of *Ng Luk Mui* that there can only be a purchase if there is a transfer of property, Mr But argues that section 44 of the LPO has rendered it impossible thereafter for a mortgagee to be a “purchaser”, since this section removes the need for there to be a conveyance of the property for the purpose of a legal mortgage. This argument must fail since Mr But’s premise is wrong. In any event it is well known that section 44 was not introduced to change the nature of the mortgage; its purpose was to excise various unwelcomed consequences attaching to legal mortgage by assignment without in any way altering the fundamental nature of legal mortgage, hence the deeming provision: Conveyancing and

Property Ordinance (Cap 219), The Annotated Ordinances of Hong Kong (2020 Reissue), §44.02.

- (7) In any event, Mr But's construction is internally flawed, since he accepts that a mortgage is a legal estate for the purpose of this defence, which begs the question as to who could be a "purchaser" where a mortgage is concerned. Mr But has not been able to provide an answer to this question when raised.

52. On element (iv) (absence of notice):-

- (1) The doctrine of notice is relevant because one is dealing with a situation where there are 2 innocent parties, each enjoying rights. The earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice): *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 195G-H.

- (2) Specifically with respect to constructive notice, if the party asserting that he takes free of the earlier rights of another *knows of certain facts which put him on inquiry* as to the possible existence of the rights of that other and he *fails to make such inquiry or take such other steps as are reasonable to verify* whether such earlier right does or does not exist, he will have

constructive notice of the earlier right and take subject to it: 195H *op.cit.*

(3) The standard required of the purchaser, where constructive notice is in issue, is to make all usual and proper inquiries: Megarry & Wade §5-017. One asks what enquiries would have been made as a matter of prudence (“ought reasonably”), having regard to what is usually done by men of business under similar circumstances: *Sun Sek Haw v Au So Kum* [1999] 3 HKLRD 12, 22B-E. This is said to be a high standard: *Sun Sek Haw* 21E.

(4) The inquiry as to whether a purchaser has made all usual and proper inquiries is a fact-sensitive one and depends on all the circumstances of the case: *Sun Sek Haw* 21H.

(5) Given the inquiry is fact-sensitive, it would not be possible to conclusively define the circumstances in which a purchaser will have constructive notice, but generally speaking:-

(a) If the purchaser (X) in fact appreciates that a proprietary right in the property probably exists, he has actual notice.

(b) If a reasonable person with the attributes of X should have appreciated based on *facts already available* that the proprietary right probably existed, X has constructive notice of the existence of the right, and further inquiry would not be necessary.

(c) If the *facts known to X* would give a reasonable purchaser in his position serious cause to question the propriety of the transaction, X must make inquiries which would have revealed the probable existence of a proprietary right.

See *Papadimitriou v Credit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265, §§12-20; see also Megarry & Wade §5-018 (adopted in *Ho Lai Lei v Mang Wan Kwan Simon* [2020] HKCFI 527, §112).

(6) In scenarios (b) and (c) in (5) above, it is important that there must be facts already known to the purchaser that would point to the probable existence of a right, or that there is serious cause to question the propriety of the transaction.

(7) Further, in scenario (c) in (5) above where the purchaser should make inquiries, there must be a causal link between such further inquiries and the revelation of the probable existence of the right. See

also *Sun Sek Haw* 22D-E, where Rogers JA held that “the question which should be asked is would the enquiries which a conveyancing solicitor would have made as a matter of prudence have revealed the fact which would have given the purchasers constructive notice”.

- (8) It is argued by Mr Fung (whose argument is adopted by Mr But) that relying on *Asian Oceanic Bank Ltd v Lambang Maju Sdn Bhd*, HCMP 4151/1993 (*unrep.*, 26 May 2000) §25, as a matter of principle the court should assume that any inquiry that ought to have been made by the purchaser would have yielded an honest answer, such that there is no need to consider causation. I do not think *Asian Oceanic Bank* is in any way inconsistent with the need to establish a causal link. In that case the bank was found to have constructive notice that the shares charged to it were subject to trusts. The trusts were documented in various declarations of trusts, and the bank never made any inquiry. The court found that had the bank inquired into the root of the title, that would have led to the declarations of trust, and the prior interest would have been revealed. Similarly, in *Pillgrem v Pillgrem* [1881] 18 ChD 93 (which was cited in *Asian Oceanic Bank* §25), no inquiry was made at all, and the usual and proper inquiry would have led to the purchaser calling for an abstract of title, which would have

revealed the prior trust. In both cases, the court had examined and were satisfied, on the facts, that had inquiries been made, they would have led to revelation of the existence of the prior right. Thus, they in fact support, and not negate, the need for causation.

- (9) While each case turns on its own facts (see (4) above), the fact of possession by someone other than the purchaser's counterparty is a highly relevant factor: *Wong Chim-ying v Cheng Kam-wing* [1991] 2 HKLR 253. That said, whether there is constructive notice ultimately turns on the application of (2) and (3) above to the facts of the case, and the benchmark is what is usually done by men of business under similar circumstances. Thus, it is said that if a purchaser has made a reasonable inspection of the property and cannot discover the residence of the beneficiary, he will not be fixed with constructive notice of the beneficiary's rights: Goo & Lee, Land Law in Hong Kong (4th edn) §7.32, and an inspection does not require an in-depth scrutiny of everything present: Cousins on The Law of Mortgages (4th edn), §9-58.

B. The Parties' Pleadings Cases

53. CS Credit's pleaded case in the 2020 Action (as well as the 2021 Action) is:-

(1) It had advanced the 1st Loan and the 2nd Loan to Margaret Chiu.

(2) The 1st Mortgage and the 3rd Mortgage were charges by deed expressed to be legal charges and hence mortgages of a legal estate.

(3) It did not have notice, actual or constructive, of Tan's alleged interest (or Far East's alleged interest) at the time when the 1st Mortgage and the 3rd Mortgage were executed, by reason of (i) Margaret Chiu's statement in the mortgage loan application form that the Property was "owner occupied" (see §21 above); (ii) the Site Visit, during which no possession or occupation by anyone other than Margaret Chiu was discovered (see §22 above); (iii) representations made by Margaret Chiu to CS Credit on 1 March 2017 (see §20 above) and at the Site Visit that she was the sole owner and a director of Marpsan which owned the Property and the only person residing at the Property; and (iv) Margaret Chiu and Marspan had never informed CS Credit of Tan's (or Far East's) alleged interest.

54. Tan joins issue with CS Credit on whether CS Credit had made proper inquiries, and specifically pleads as follows:-

"6. As a reply to Paragraph 22 of the D&C of [CS Credit], the Plaintiff avers that [CS Credit] failed to make proper inquiries as alleged, or at all.

6.1 A room located next to the dining area of the Property (“**the Room**”) has been reserved for the use of [Tan].

6.2 As the Room is just next to the dining area, there are movable partitions placed outside the door of the Room so as to make the dining area in a much more neat and tidy manner without exposing the existence of the Room at the dining area.

6.3 [Chow] and [Law], the representatives of [CS Credit], should have not (*sic.*) realized and inspected the Room in the Property during the inspection on 3 March 2017.

6.4 A reasonable person should have realized and inspected the Room upon site inspection.

6.5 [CS Credit] failed to make proper inquiries for the Plaintiff’s Equitable Interest at the time when the First Mortgage and the Third Mortgage were executed.

6.6 In any event, [CS Credit] had made no inspection at the Property and did not make any proper inquiries at all at the time when the Third Mortgage was executed on 1 February 2018.”

55. Thus, the issue of usual and proper inquiries is squarely joined between the parties on whether CS Credit ought to have inspected the Room and ought to have realized that Tan was in occupation thereof.

56. I have set out the parties’ pleaded case in some detail because at the trial, Tan attempted to rely on the nomination by Tan of Marspan to be the registered owner of the Property (see §9(2) above) as a further basis for challenging CS Credit’s *bona fide* purchaser defence. I will deal with that in §63 below.

C. Analysis

57. The legal burden being on CS Credit to establish the defence, I will examine each of the elements identified in §48 above.

58. With respect to (i) *bona fides*; (ii) purchase of legal estate; and (iii) for value, I am satisfied that they have been established.

(1) For *bona fides*, there is no evidence to suggest that CS Credit acted other than genuinely and honestly. See also footnote 7 above.

(2) For purchase of legal estate, I have found that a mortgagee is a purchaser for the purpose of the *bona fide* purchaser defence (§51 above), and Mr But accepts that the 1st Mortgage and the 3rd Mortgage concern the legal estate.

(3) For valuable consideration, CS Credit plainly had given value, namely the 1st Loan and the 2nd Loan.

59. The real bone of contention lies in constructive notice. I approach this issue as follows.

60. First, as explained in §52(2) and (6) above, there needs to be facts already known to CS Credit that would point to the probable existence of a right or serious cause to question the propriety of the transaction. The existence of the prior right – which is the subject matter

of the inquiry – cannot be such a fact (otherwise it would be actual notice).

(1) In this case, I cannot identify any fact which would indicate to CS Credit that there was a possible prior right or serious cause to question the same.

(a) The Property has always been held by Marspan, since 1983.

(b) Margaret Chiu has been the holder of 999 shares in Marspan, with CIE holding the remaining one share, since 2002. It is common practice in Hong Kong to hold properties through corporate vehicles, and before the amendments to the company legislation in 2003, a company incorporated in Hong Kong must have at least 2 shareholders; hence it was not surprising to see in private companies the vast majority of the shares being held by one person, and a very small amount of shares being held by another person or entity as nominee for the majority shareholder. In this case, the shareholding in Marspan was 999 : 1, and CIE by its own name suggests it is a secretarial service company.

(c) As for Margaret Chiu, she belongs to a well-known and wealthy family. In 2017 she was

also said to be involved in substantial real estate development business in the Mainland in her own right. It would not be surprising for her to own the Property of considerable value as her residence.

(d) Further, in 2017 Margaret Chiu was single, and she has no children.

(2) Nor has Tan pleaded or identified any fact which was already known to CS Credit in 2017 that he says would have raised question.

(3) Mr But relies heavily on *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783. However that case clearly illustrates the need to have something that triggers the doubt such as to call for further inquiries. In that case the matrimonial home was in the husband's sole name, husband and wife have separated but not yet divorced, and the wife did not sleep in the house but returned daily to take care of the children while the husband was out. The husband applied for a mortgage loan stating he was single, and the mortgagee's broker at the site visit noted that the husband had 2 children who were living in the house. The court held that the mortgagee was put on notice because there was an inconsistency between the husband's assertion that he was single and that he was living with 2 children, such

that the mortgagee ought to have made further inquiries of his marital status which would then have received that he was still married and the wife might have an interest in the matrimonial home.

(4) In his written closing, Mr But raised, for the first time, that certain matters ought to have put CS Credit on alert of the need to make further inquiries, namely Margaret Chiu *could have* borrowed from her family members, *could have* borrowed from financial institutions at considerably lower interest rate instead of borrowing from a moneylender, her being a guarantor for her real estate project in the Mainland *could have* meant that other entities had created or could assert rights over the Property, and since there were news reports about discord between the first and second families of Deacon Chiu (even though no mention was made of Margaret Chiu being involved), her family members *might* assert interests over the Property.

(5) I decline to take into account the allegations in (4) above. First and foremost, these are factual matters but they have never been raised before, such that CS Credit never have any chance to deal with them evidentially. Second, these are no more than mere speculation and I cannot see how they can even be supported on the evidence Mr But refers to. Third, I

also cannot see how some of these bare assertions could be causally linked to there being some prior equitable interest in the Property (see eg the assertion that there was family discord not involving Margaret Chiu).

61. Second, even assuming Tan can overcome the above hurdle, I do not see how, on the evidence, the existence of the Room was something that Chow and Law could reasonably have discovered.

(1) As stated in Tan's own pleading, the Room was deliberately concealed from the outside (where the dining room is) (see §55 above, Reply §6.2).

(2) This is borne out by the photographs attached to Gurung's witness statement (assuming for the time being they captured the situation as at March 2017, see §62 below), which show that 4 near-floor-height decorative Chinese wooden panels were placed against the wall of the dining room, wholly concealing the narrow opening in the wall which leads to the Room behind it. Mr But argues that the wooden panels did not extend all the way up to the ceiling and there was a small gap between the top of one panel and the ceiling, and that one can easily see the unsealed space below the ceiling, and that (he says) means the Room could be visually discoverable. I do not accept that. The gap is a very small one immediately under the false ceiling

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B and cannot be easily observed. More importantly one
C cannot tell from the gap itself that there is a corridor
D and Room concealed behind. Having looked at the
E photographs repeatedly (that being the only evidence
F available before the court), I am satisfied that unless
G someone removes the panels to reveal the opening in
H the wall, someone present in that dining room could
I not have realized there was an opening behind the
J wooden panels which lead to the Room.
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(3) Mr But argued that CS Credit ought to have obtained
building plans of the Property from the Buildings
Department so that it would be aware of the exact
layout and configuration of the Property, such that
Chow and Law could go through “all corners” of and
“exhaustively inspect” the Property. I do not accept
that in the absence of specific facts which trigger
alarm (for which there is none in this case, see §60
above), it is within the scope of the usual and proper
inquiries of a prudent mortgagee to either obtain
building plans of the property the subject matter of the
intended mortgage, or to carry out an exhaustive
inspection of the same going through every corner.

R 62. Third and in any event, I cannot see how, even if Chow and
S Law had inspected the Room, it can be said that they would have realized
T it was occupied by someone who might have an equitable interest in the
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Property. This relates to the physical state of the Room and whether causation can be shown.

(1) Although the legal or persuasive burden rests on CS Credit to prove the *bona fide* purchaser defence, having raised the specific factual allegation of the Room to undermine that defence Tan bears the evidential burden with respect to the same.

(2) There is no evidence before the court as to the state of the Room in March 2017. Although certain photographs have been exhibited to Gurung's witness statement (including those described in §61 above), there is no evidence as to when those photographs were taken, or whether they captured the appearance of the dining room and the Room in March 2017. I have specifically raised that question with Mr But during opening submissions but he informed me he had no instructions to that effect; nor was he able to improve on that position by closing. I should point out that the dining room photographed by Chow and Law during the Site Visit was a very different one from that shown on Gurung's photographs – the former is of modern décor (see §22(4) above), whereas the one shown on Gurung's photographs was of traditional Chinese design, with a lot of dark wooden furniture and Chinese paintings on the wall. Thus, there is simply no evidence before the court that Gurung's

photographs showed the condition of the dining room and the Room as at March 2017. On that alone Tan would have failed to discharge his evidential burden and this argument must fail.

(3) Even if one were to assume Gurung's photographs showed the position as at March 2017, I cannot see how they could have led to the need for further inquiries. The photographs show a bland ensuite bedroom, with a bed, a wooden cupboard housing a wardrobe and a television, a wooden chest of drawers and a bean bag on the floor. The Room is lightly decorated with 2 paintings on the wall, a vase on the chest, a toy husky, and what one would colloquially describe as "coffee table books" on the shelves of the cupboard. The bed is covered with a white embroidered bedspread. No personal effects (eg clothes, personal hygiene products) can be observed in the Room. The same goes for the bathroom, which shows some porcelain decorations and a porcelain bowl holding a number of hand towels, as one would normally see in a guest bathroom. In other words, the Room (including the bathroom) bear all the hallmarks of a guest room, within nothing to suggest that it was being occupied by someone, least to say someone who might have an equitable interest in the Property.

- (4) That Margaret Chiu would have an ensuite guest room in the Property is hardly surprising and would not have raised any issue or doubt. She was known to be from a wealthy family. The Property was of substantial size. She had no children and lived alone in the Property. I cannot see how a wealthy lady who lives on her own in a vast property having a guestroom is something that would have put CS Credit on notice or would have called for further inquiry.

63. At this juncture I should address Mr But's argument that CS Credit should be affixed with constructive notice because there is no evidence that it had carried out "title investigation" on the Property, and that if it had done so, it would have discovered the nomination by Tan of Marspan to be the registered owner (see §9(2) above), which would then have put CS Credit on notice of possible equitable interest asserted by Tan.

- (1) First, this is not Tan's pleaded case on constructive notice (see §55 above). Mr But argues that the nomination was pleaded in Statement of Claim §3. But that was part of the factual background, and it has never been Tan's case that he relies on the nomination as a basis to impute constructive notice. Not having raised it as an issue it is wholly unsurprising that CS Credit did not address it in its evidence. Further, Mr But in his cross-examination never raised any issue concerning nomination, least to say putting the same to

CS Credit's witnesses. In the circumstances it is simply not open to Tan to rely on this.

(2) Second and in any event, I also fail to see how the fact of the nomination would have put CS Credit on notice or give rise to inquiry. Tan nominated Marspan, his acknowledged nominee corporate vehicle, to hold the Property. That was and still is common practice in Hong Kong. Mr But cites the Law Society's circular on "Nomination to Take Up Assignment of Land" and various textbooks referring to the need for caution when nomination is involved. However it is clear from those references that they are referring to a situation where the person paying the consideration and the nominated person are different individuals; here we are talking about a situation where the corporate vehicle is effectively the payor's alter ego. I do not see how these authorities assist Mr But at all.

(3) In closing Mr But goes even further. He argues that CS Credit ought to have picked up Marspan's initial shareholding and inquired who the shareholders and directors of its 2 nominee shareholders were, as well as to inquire into Margaret Chiu's marital history to find out whether there would have any nuptial agreements affecting the title of the Property. These are again wholly unpleaded matters, for which Tan has adduced no evidence, and Mr But has not put to CS

Credit's witnesses. I decline to pay heed to such allegations.

64. In the premises, I find that Tan has failed to discharge his evidential burden, and that CS Credit has discharged its legal burden to show no constructive notice.

65. Finally, I should address a new argument raised by Tan at trial which he terms the "validity" argument. It goes as follows – since Marspan was a bare trustee for Tan and does not own any beneficial interest in the Property, the 1st Mortgage and the 3rd Mortgage are "invalid" since there was no interest in the Property to which these Mortgages could attach. This argument is thoroughly bad and I reject it for the following reasons.

- (1) First, it is unpleaded. Mr But argues that it is covered by Statement of Claim §15, where the material parts assert that "*... it is averred that even if [CS Credit] had acquired any interests in the property under the [1st and 3rd Mortgages] (which is not admitted), [Tan's] beneficial interests in the Property would in any event be binding on the [1st and 3rd Mortgages] in favour of CS Credit]. It is further averred that [CS Credit's] alleged interest in the property under the [1st and 3rd Mortgages] (which is not admitted) would be void as against [Tan], and/or would lose priority to [Tan's] prior beneficial interests in the Property ...*" In

particular, Mr But fastens on the word “void” to say that his contention is pleaded.

(2) I do not accept that. The wholly unparticularized “void” has to be read in context and the context clearly suggests that Tan was contending on the basis of priority. Nor is it open to Mr But to argue that this is a matter of law and no pleading is required. This is no mere formality. On this contention Tan claims to be entitled to 100% of the beneficial interest in the Property. I have difficulty understanding how that could be squared with his other contention that pursuant to the Alleged 2002 Tan Agreement Margaret Chiu was to have 50% beneficial interest in the Property. These are mutually inconsistent positions. In the premises it is incumbent upon Tan to clearly plead and particularize his case, otherwise no one – including the court – can know exactly what his case is.

(3) Second, this argument is in any event not open for determination in this trial, since it is premised on Tan having established his alleged beneficial interest, and as I have indicated in §38 above no such assumption can be made for this trial.

(4) Third and in any event, this argument is hopeless in law.

(a) Marspan is the registered owner of the Property. The 1st Mortgage and the 3rd Mortgage are legal mortgages. Clearly the 1st Mortgage and the 3rd Mortgage can secure the legal estate; the only issue is whether CS Credit as mortgagee takes subject to Tan's alleged prior equitable interest (ie a question of priority).

(b) Mr But refers to authorities concerning charging orders imposed by court to support his argument. Such reliance is misplaced as it ignores the fundamentally different nature of a legal charge and a charging order imposed pursuant to section 20A of the High Court Ordinance (Cap.4) ("**HCO**"). A charging order does not confer any proprietary interest in the land: *Sino Billion Ltd v Lam Chok Wai* [2003] 2 HKC 167, §12; it only has *like effect* as an equitable charge: section 20B(3) of the HCO. The conditions of their respective creation are completely different. A charging order does not involve the giving of any value. The holder of a charging order is not a purchaser of the legal estate. Their consequences are also different – an equitable charge only has a right to apply for an order for sale or for a receiver, and has no right to foreclose or take possession: *Sino*

Billion §12(4). No analogy can be drawn between the two.

66. Accordingly, I find that CS Credit is a *bona fide* purchaser for value without notice as against Tan, and takes free of Tan's alleged equitable interest (if any).

ISSUE 3 – BONA FIDE PURCHASER DEFENCE AGAINST FAR EAST

67. Far East and CIE only take issue on constructive notice. Their pleaded case is set out in Statement of Claim §18, and refers to 3 matters – (i) Margaret Chiu was not 100% shareholder of Marspan and CIE held one share; (ii) Margaret Chiu was not the sole director of Marspan and CIE and ULU Essentials Corporation Limited were also directors of Marspan; and (iii) the payment of premium by Far East (see §11 above).

68. Although Mr Fung says he continues to rely on all 3 matters, he acknowledges that if he cannot rely on (iii), he would be on "thin ground". Thus, the real issue concerns whether the payment of the premium for the surrender and regrant is something which would have given rise to constructive notice or would have called for further inquiry.

69. I do not consider Mr Fung's reliance on the payment of the premium is able to undermine CS Credit's case on absence of constructive notice. Put another way, the surrender and regrant (to which the premium related) was not a fact that would have caused CS Credit to

believe there was a possible equitable interest, or otherwise to put CS Credit on inquiry.

70. First, it is important to identify what facts were available to CS Credit. The only thing that was visible and hence could be known to CS Credit was the surrender and regrant registered against the Property at the Land Registry. These documents referred to the fact a premium had been paid, but did not cast any light on who paid the same.

71. Second and therefore, a causal link needs to be established between the payment of the premium and that someone else (not Marspan) paid the same; or put another way, why would the fact that a premium had been paid for the regrant lead CS Credit to think that someone else must have paid for the same?

72. The only response provided by Mr Fung is that Marspan is a corporate shell. I do not accept that. First, it is unclear to me that Mr Fung has an evidential basis for such assertion – there is simply no evidence in this trial as to the financial position of Marspan. Just because it is a corporate vehicle holding the Property for Tan and thereafter Margaret Chiu does not necessarily mean that it had no other asset or would not have been able to finance the premium at the time. Second and in any event, the position is even more stark when one looks at it from the point of view of CS Credit – what is the basis to suggest that just because the registered owner is a private company, that necessarily means that (a) it has no funds of its own; (b) it has to look to outsiders (not its shareholders) for funding; and that (c) such outside funders would not

have protected their position by obtaining security which would be reflected in the Land Registry?

73. I therefore find that Far East and CIE cannot rely on the surrender and regrant (and the payment associated with that) to show that CS Credit should be affixed with constructive notice. As such, CS Credit is a *bona fide* purchaser for value without notice as against Far East, and takes free of its alleged equitable interest (if any).

ISSUE 4 – ESTOPPEL DEFENCE AGAINST FAR EAST

74. In light of my findings on Issue 3, it is not necessary for CS Credit to rely on the alternative basis of estoppel. However, in case I am wrong, and as parties have made full submissions on the same, I will also address this issue.

75. First, the principles applicable to estoppel by silence, inaction or acquiescence is as follows:-

(1) This estoppel arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations.

(2) The essential elements to found the estoppel are:-

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- (a) a representation or conduct amounting to representation intended to induce a course of conduct on the part of the person to whom this is made, which can take the form of silence or inaction where there exists a duty to speak;
 - (b) an act or omission resulting from the representation by the person to whom the representation is made; and
 - (c) detriment to such person as a consequence of the act or omission.
- (3) A duty to speak in (2)(a) above will arise:-
- (a) where a person, having a title or right to property of any kind, perceives that another person is innocently, and ignorantly, conducting himself with reference to the property in a manner inconsistent with such right or rights;
 - (b) where the owner becomes aware that someone is attempting to dispose of his property, and in such circumstances he is bound to assert his rights and, if he fails to do so, he may be estopped against the disponee; or
 - (c) when anything in order to a purchase is publicly transacted, and third person, knowing thereof,

and of his own right to the lands intended to be purchased, doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase: §8.2.

(4) Since knowledge or awareness is vital, the knowledge required is actual or Nelsonian knowledge; in other words, the beneficiary must know or should have known the true position.

(5) Such knowledge must have arisen as at the date of the transaction disposing of the property.

See *Mo Ying v Brillex Development Ltd* [2015] 2 HKLRD 985, §§8.2, 8.7 11.8; Spencer Bower: Reliance-Based Estoppel (5th edn) §§3.9, 3.15.

76. Second, the only issue of contention between the parties is knowledge of Far East. Although CS Credit has pleaded a number of different matters on its case of knowledge, Mr Dawes SC, counsel for CS Credit, has confirmed that he is only relying on the 2017 SH Resolution (see §24 above).

(1) CS Credit's argument goes as follows:

(a) On Far East's own evidence⁸, CIE was Far East's nominee for holding the one share in Marspan.

(b) One of CIE's directors, Mr Chan Chi Hing ("Chan"), signed the 2017 SH Resolution on behalf of CIE.

(c) Chan accepts that he signed the 2017 SH Resolution and was informed by Margaret Chiu prior to signing that it was for her to borrow money.

(d) Accordingly, Chan's knowledge should be attributed to CIE, which in turn should be attributed to Far East.

(2) Thus, there are 2 levels of attribution. The first is the attribution by CIE to Far East. Mr Fung faintly argued against it, but given (i) Far East's own evidence that CIE was its nominee for the purpose of holding the one share, and (ii) that purpose must include safeguarding Far East's beneficial interest in the Property which encumbrance by way of the 1st Mortgage would fall within, it is plain that any knowledge CIE might have acquired with respect to the 1st Mortgage must be attributed to Far East.

⁸ Paragraph 9 of Wendy Yung's witness statement.

(3) The second level is attribution by Chan to CIE.

(a) The relevant facts are as follows. Chan was one of 4 directors of CIE at the time. The only evidence he gave is that Margaret Chiu had asked him to help her sign a resolution urgently as she intended to borrow money, and he signed as requested without knowing the details of the intended loan, and there was no board meeting or resolution of CIE authorizing him to sign the same.

(b) The question is whether in the circumstances of this case, the knowledge of Chan, as one of 4 directors of CIE, could be attributed to CIE.

(c) Whether a single director's (as opposed to the board acting collectively) knowledge can be attributed to the company depends on the nature of the matter under consideration, the relative position of the officer and other relevant facts and circumstances of the case: *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 173 (this part of Denning LJ's dicta was not commented on adversely by the Court of Final Appeal in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, §71).

(d) Thus, where a director has an executive role (eg as managing director), or has responsibilities falling within the scope of the matters of which knowledge is sought to be imputed, his knowledge may be imputed to the company: Bowstead and Reynolds on Agency (22nd edn), §30-030 (4).

(e) Where the act or conduct in question may be adverse to the company's interests (eg it is unlawful), a director's knowledge of the same may be attributed on an additional basis, namely his duty to the company, as an aspect of the duty to act in the best interests of the company, to inform the board of the unlawful act: *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 404. That, however, is not the present case.

(f) Accordingly I have to consider whether there is any basis to suggest that Chan's role and responsibilities in CIE were such that he should be treated as CIE's agent vis-à-vis the one share in Marspan and the Property such that his knowledge could be imputed to CIE. The burden is on CS Credit – as the party asserting the estoppel – to so establish.

(g) I do not consider CS Credit has discharged its burden. There is no evidence as to (i) what businesses or operations CIE carried on at the time; (ii) Chan's role and responsibilities in CIE; or (iii) any other fact as may cast light on who in CIE was responsible for handling or dealing with Marspan and the Property. As such, there are simply insufficient facts for CS Credit to make good its case that Chan's knowledge with respect to the 2017 SH Resolution and its contents should be attributed to CIE.

(4) I should also mention that Mr Fung has taken a pleading point, objecting that CS Credit has not pleaded CIE was Far East's agent. In light of my findings above nothing turns on this, but for completeness I find that this point has already been raised in Defence and Counterclaim §23.1.

(5) Accordingly, CS Credit's case on estoppel with respect to the 1st Mortgage fails.

77. Third, as to the 3rd Mortgage, Mr Dawes relies on the registration of the 1st Mortgage. Whilst I accept that the purpose of the registration is to give notice, causation still needs to be established, and CS Credit is unable to show that just because the 1st Mortgage had been entered into in a manner inconsistent with Far East's interests there would

necessarily be the 3rd Mortgage. As such I also find CS Credit's case on estoppel with respect to the 3rd Mortgage fails.

CONCLUSION

78. To conclude:-

(1) With respect to the preliminary issues in the 2020 Action in §36(2) above, my answers are:-

(a) Yes.

(b) Yes.

(2) With respect to the preliminary issues in the 2021 Action in §36(3) above, my answers are:-

(a) Yes.

(b) No.

(c) Yes.

(3) In the 2019 Proceedings, I will give money judgment and interest against Marspan and Margaret Chiu as per §44 above.

- (4) In the 2019 Proceedings, I will further direct that Marspan do deliver up to CS Credit vacant possession of the Property.

79. As to costs:-

- (1) In the 2019 Proceedings, I will direct that Marspan and Margaret Chiu pay costs of CS Credit on an indemnity basis (see §45 above).

- (2) In the 2020 Action, I see no reason why costs should not follow the event. I make a costs order *nisi* that Tan pays the costs of this trial of preliminary issues to CS Credit, to be taxed if not agreed.

- (3) In the 2021 Action, again costs should follow the event. Although CS Credit does not succeed on the estoppel issue, its success on the *bona fide* purchaser defence results in the substantive relief it obtains vis-à-vis the Property. Accordingly I also make a costs order *nisi* that Far East and CIE pay the costs of this trial of preliminary issues to CS Credit, to be taxed if not agreed.

(4) For each of the orders above, I also grant certificate for two counsel.

(Eva Sit SC)
Recorder of the High Court

Mr Victor Dawes, SC and Mr Danny Tang, instructed by Stevenson, Wong & Co, for CS Credit Limited (plaintiff of HCMP 1484/2019, 2nd defendant of HCA 1852/2020 and 4th defendant of HCA 153/2021)

Mr Adrian But and Mr Tommy Cheung, instructed by C F Lee & Co, for Tan Wai Kee (plaintiff of HCA 1852/2020 and 2nd defendant of HCA 153/2021)

Mr Daniel R Fung, SC and Mr David Chen, instructed by Hon & Co, for Far East Consortium Limited (1st plaintiff of HCA 153/2021) and CIE Secretarial Services Limited (2nd plaintiff of HCA 153/2021)