IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC(I) 10

Suit No 2 of 2016

Between

BNP Paribas SA

… *Plaintiff*

And

(1) Jacob Agam
(2) Ruth Agam

… *Defendants*

JUDGMENT

[Credit and Security] — [Guarantees and Indemnities]

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BNP Paribas SA
v
Jacob Agam and another

[2017] SGHC(I) 10

Singapore International Commercial Court — Suit No 2 of 2016
Steven Chong JA, Roger Giles IJ and Dominique Hascher IJ
7 and 10 August 2017

17 November 2017 Judgment reserved.

Roger Giles IJ (delivering the judgment of the court):

Introduction

1 The Plaintiff, BNP Paribas SA ("BNP"), is an international banking institution headquartered in Paris. As later described, it sues as successor to the assets and liabilities of its former subsidiary, BNP Paribas Wealth Management ("BNPWM"). The Defendants, Jacob Agam and Ruth Agam, are Israeli nationals, and are siblings; for ease of reference and without intending any disrespect, we will refer to them as Jacob and Ruth, and together as the Agams.

2 BNP claims a sum in the order of €32 million from Jacob and Ruth, plus continuing interest and indemnity costs, under personal guarantees of loans made to their companies. For the reasons which follow, in our opinion it is entitled to succeed in its claim, and a counterclaim brought by Jacob should be dismissed.

Background to the dispute

3 Jacob and Ruth owned properties in France and Monaco ("the Agam properties") through the following companies (collectively, "the Agam companies").

(a) SCI Agam, a real estate company incorporated in France, owned a property in Paris ("the Paris property"). Jacob held 99.9% of the shares in SCI Agam, and Ruth held the remaining 0.1% of the shares.

(b) SCI Ruth Agam, also a real estate company incorporated in France, owned a property in Saint Tropez ("the Saint Tropez property"). The shareholdings were the reverse of the shareholdings in SCI Agam, Ruth holding 99.9% of the shares in SCI Ruth Agam and Jacob holding the remaining 0.1% of the shares.

(c) Det Internationale Ejendoms-OG Udviklingsselskab ApS ("Det Internationale"), a private company incorporated in Denmark, owned a property at Villa Saint Pierre in Marnes La Coquette, France ("the Saint Pierre property"). Ruth was the sole shareholder in Det Internationale.

(d) Bronton Assets Inc ("Bronton"), a private company incorporated in Panama, owned a property in Le Granada, Monaco ("the Granada property"). Jacob was the sole shareholder in Bronton.

4 Jacob was the sole director of SCI Agam and Det Internationale, and Ruth was the sole director of SCI Ruth Agam. Neither Jacob nor Ruth was a director of Bronton; it had three directors, Mr Paul Van Lienden, Mr Oscar Frye and Mr Edgardo Diaz. However, it is clear that the conduct of the affairs of the Agam companies was left to Jacob. He held a law degree from Tel Aviv University and an LLM in Securities and Corporate Finance from the University

of Pennsylvania, and had a number of business interests including as founder and Chairman of a private equity fund, the Vertical Group.

5 Prior to 2010 the Agam properties were mortgaged to ING Bank (Monaco) SAM, subsequently merged with Bank Julius Baer (Monaco) SAM, as security for loans to the Agam companies then standing at approximately €17.8 million ("the Julius Baer loans").

6 In early 2010 Jacob had initial contact with Mr Jean Chamoin and Mr Patrice Cucchi of BNPWM. BNPWM was a private bank incorporated in France providing bespoke credit and financing services. Messrs Chamoin and Cucchi described to Jacob the services which it could offer. In subsequent discussions Jacob expressed interest in leveraging on the Agam properties to create liquidity for investment purposes, and in refinancing the Agam properties with BNPWM and having it manage the investments, if a more attractive proposal than the Julius Baer loans was offered.

7 Jacob mentioned that he was particularly interested in investing in Asian markets, as he saw potential for growth, and in moving the business of the Vertical Group to Asia. Mr Chamoin introduced Jacob to Mr Charles Merimee of BNPWM's Singapore branch, who on 10 February 2010 sent to him a presentation on the services offered by that branch and information on how to open a corporate account.

8 Thereafter Mr Cucchi and Mr Merimee had many discussions with Jacob in relation to a credit refinancing arrangement. At the time Mr Cucchi was Head of Credit Restructuring for Key Clients in France, and Mr Merimee was Director of International Clients in the Singapore branch. The negotiations towards credit refinancing occupied February, March and April 2010, with the

involvement also of Mr Anthony Van Hagen on the Agam side as the Agam family's legal adviser. Mr Van Hagen was admitted as an advocate in Paris and a barrister in London.

9 In late February 2010 Mr Cucchi provided a proposal for refinancing at up to 70% of the value of the Agam properties, the loans to be used in part to repay the Julius Baer loans and the balance for investment purposes. The loans were to be secured by mortgages, pledges of the shares in the Agam companies, personal guarantees of "the beneficial owners" (that is, Jacob and Ruth), and a pledge of 30% of the loan. In further discussions Jacob said that he wanted a loan facility at up to 100% of the value of the Agam properties, and in the latter part of March 2010 Mr Cucchi provided a revised proposal on that basis but with provision for margin calls if the value of the properties fell. In the meantime, account opening documentation for Singapore accounts for the Agam companies was compiled and signed, and an account for each was opened.

10 Valuations of the Agam properties came in at a total of €61.65 million. In April 2010 Jacob asked that the refinancing at up to 100% of the value of the properties proceed.

The refinancing documents

11 Documents were provided by BNPWM to Jacob and Mr Van Hagen for review on 27 May 2010. There was agreement to sign the documents on 7 June 2010, later pushed back to 9 June 2010. Arrangements were made for the French notaries necessary for the mortgage documents, Mr Pascal Dufour of SCP Dufour et Associés ("Dufour") for BNPWM and Mr Pascal Bonne for the Agams and the Agam companies.

12 As we will later relate, there is dispute on the pleadings concerning the circumstances of Ruth's signing of documents on 9 June 2010. Signature by her is not denied, and for the present we pass over the dispute; but with it in mind we think it appropriate to describe in a little detail the signatures and dates appearing on the documents in evidence.

13 The SCI Agam documents were as follows.

(a) A facility letter dated 27 May 2010 for a five year non-revolving term loan of €20 million, signed by Mr Van Hagen for the company by way of acceptance and also in the names of Jacob and Ruth by way of third party acceptance; however, Jacob's signature and what appears to be Ruth's initialling are adjacent to and in the vicinity of the last mentioned signatures. The stated dates of signing are 3 June 2010. None of the signatures is witnessed.

(b) A mortgage of the Paris property; we refer below to the situation as to signature and dates of all the mortgages.

(c) A personal guarantee signed by Jacob and Ruth. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

(d) A memorandum of charge on securities by SCI Agam, signed by Jacob for the company. The date of the document is 3 June 2010. The signature is witnessed by Mr Merimee.

(e) A memorandum of charge on securities by Jacob and Ruth, signed by them. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

14 The SCI Ruth Agam documents were as follows.

(a) A facility letter dated 27 May 2010 for a five year non-revolving term loan of €16.5 million, signed by Mr Van Hagen for the company by way of acceptance and by Jacob and Ruth by way of third party acceptance. The stated dates of signature are 3 June 2010. None of the signatures is witnessed.

(b) A mortgage of the Saint Tropez property.

(c) A personal guarantee signed by Jacob and Ruth. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

(d) A memorandum of charge on securities by SCI Ruth Agam, signed by Ruth for the company. The date of the document is 4 June 2010. The signature is witnessed by Mr Merimee.

(e) A memorandum of charge on securities by Jacob and Ruth, signed by them. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

15 The Det Internationale documents were as follows.

(a) A facility letter dated 27 May 2010 for a five year non-revolving term loan of €19 million, signed by Mr Van Hagen and Jacob for the company by way of acceptance and by Jacob and Ruth by way of third party acceptance. The stated dates of signature are 1 June 2010. The signatures are not witnessed.

(b) A mortgage of the Saint Pierre property.

(c) A personal guarantee signed by Jacob and Ruth. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

(d) A memorandum of charge on securities by Det Internationale, signed by Jacob for the company. The date of the document is 1 June 2010. The signature is not witnessed.

(e) A memorandum of charge on securities by Jacob and Ruth, signed by them. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

16 We should say at this point that the Det Internationale facility agreement was later superseded by a facility agreement dated 27 June 2011, then by a facility agreement dated 16 March 2012, and supplemented by a notification letter dated 6 November 2012. The facility became a short term loan/overdraft of €4 million and a five year non-revolving term loan of €19 million, on the same securities as those given in 2010. The facility letters of 27 June 2011 and 16 March 2012 were signed by Jacob for the company by way of acceptance and by Jacob and Ruth by way of third party acceptance.

17 The Bronton documents were as follows.

(a) A facility letter dated 27 May 2010 for a five year non-revolving term loan of €6.2 million, signed by Mr Van Hagen and Jacob for the company by way of acceptance and by Mr Van Hagen in the names of Jacob and Ruth by way of third party acceptance; the signature of Jacob and what appears to be Ruth's initialling are adjacent to and in the vicinity of the last mentioned signature. The stated dates of signature are hard to read, and could be 1, 4 or 7 June 2010.

(b) A mortgage of the Granada property.

(c) A personal guarantee signed by Jacob and Ruth. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

(d) A memorandum of charge on securities by Bronton, signed by Mr Van Lienden for the company. The date of the document is again hard to read, and could be either 1, 4 or 7 June 2010. The signature is not witnessed.

(e) A memorandum of charge on securities by Jacob and Ruth, signed by them. The date of the document is 1 June 2010. The signatures are witnessed by Mr Merimee.

18 The mortgages in evidence are copies of registration documents certified by Mr Dufour, or in Monaco by one Mr Rey. They do not bear signatures for the mortgagor. The evidence also included French Notarial Acts, being notarised acknowledgments required for mortgages over the Paris, St Tropez and Saint Pierre properties, which were also executed. We will refer to one of the Notarial Acts later in this judgment.

19 The signing and dating is odd. Apart from the Notarial Acts, none of these documents was dated 9 June 2010. The stated dates of signature of the facility letters varied, and there was no witnessing. All personal guarantees are dated 1 June 2010, and the signatures of Jacob and Ruth are witnessed, but the memoranda of charge on securities by the companies bear varied dates and some are witnessed and others not, while the memoranda of charge on securities by Jacob and Ruth are all dated 1 June 2010 and all are witnessed. Mr Merimee is the almost universal witness, but on the evidence was not at the occasion of signing on 9 June 2010.

20 We will return to this when considering the circumstances of Ruth's signing of documents.

Drawdowns and default

21 A total of €61.7 million was drawn down under the facilities. Approximately €20.2 million went to repay the Julius Baer loans, some €24.7 million was held as securities in a joint account maintained by the Agams with BNPWM's Singapore branch ("the pledged account"), and the balance was left on deposit with the Singapore branch and managed by BNPWM for discretionary investment. After the Det Internationale facility was increased by the short term loan/overdraft of €4 million, at various times during 2011/2012 further sums were drawn down.

22 It appears that at first things went smoothly. However, a rift emerged when, in January 2014, a French court ordered the seizure of the Paris property pursuant to a request for mutual assistance by United States authorities engaged in money laundering investigations. The property was not released until June 2015.

23 BNPWM considered, but the Agams disputed, that the seizure of the Paris property brought default in the margin requirements in the facility agreements. On 18 February 2014 BNPWM wrote to SCI Agam to inform it that there was a breach of the borrower and margin requirements, and required that additional collateral in the sum of €20 million be provided by 28 February 2014.

24 There was correspondence and meetings, and eventually there was agreement on use of the money in the pledged account to resolve the position. In March 2014 BNPWM sold securities in the pledged account and used the

proceeds, a sum of approximately €20 million, to repay the SCI Agam loan in full. There was also a dispute on the pleadings in relation to this action, and we will return to it.

25 But BNPWM considered that there was still default in the margin requirements in respect of the loans to the other Agam companies, since the pledged account had been drastically reduced. This brought negotiations leading to a time frame for repayment, with Jacob stating that all loans would be repaid and that steps were being taken to sell the properties and BNPWM agreeing to hold its hand. The letters by BNPWM agreeing to hold its hand, which were dated 5 May 2014, included the statement that there had been breach by SCI Ruth Agam, Det Internationale and Bronton respectively of the margin requirements constituting an event of default, but that in view of the intention to repay BNPWM would not then act on the breach.

26 The time frame was extended on a number of occasions, with BNPWM continuing to hold its hand. In September/October 2014 the Granada property was sold and the Bronton loan was repaid. The SCI Ruth Agam and the Det Internationale loans remained unsatisfied. But the anticipated sales or refinancing of the other properties did not come about, and on 19 May 2015 BNPWM wrote to SCI Ruth Agam and Det Internationale requesting additional collateral of approximately €12.15 million to meet the margin requirements.

27 The additional collateral was not provided, nor were the loans repaid. Any question of breach of margin requirements became academic when the date for repayment came on 9 June 2015.

Demands and these proceedings

28 On 11 June 2015 BNPWM issued formal letters of demand to SCI Ruth Agam and Det Internationale for repayment of their loans. On 15 October 2015 it wrote to Jacob and Ruth requiring that, as guarantors, they make payment of the amounts due and outstanding from those companies by 29 October 2015. The total amount outstanding then stood at almost €40 million.

29 Payment was not received. At the end of October 2015, in the exercise of its rights of set-off, BNPWM used the funds in Jacob's account and in the pledged account in part repayment of the loans. In early November 2015 it gave notice to Jacob and Ruth of the set-offs and of the then outstanding amounts, €12,948,707.79 under the SCI Ruth Agam loan and €17,060,811.85 under the Det Internationale loan.

30 The amounts remained unpaid, by the companies or by the Agams. BNPWM commenced these proceedings on 27 November 2015.

Some procedural history

31 The facility agreements and the personal guarantees provided for choice of Singapore law and agreement on the jurisdiction of the Singapore courts. The proceedings were commenced in the Singapore High Court. On 5 April 2016 it was ordered that they be transferred to the Singapore International Commercial Court.

32 On 25 May 2016 the Agams filed an application to stay the proceedings on a temporary basis pending the determination of legal proceedings in France. The application was heard on 30 August 2016, and in reasons published on 28 October 2016 was dismissed: see *BNP Paribas Wealth Management v Jacob*

Agam and another [2017] 3 SLR 27 ("Judgment for Stay Application"). There was no appeal from this decision.

33 In February 2016 BNP and BNPWM had executed a merger agreement providing for the "absorption" of the latter by the former, and the universal transfer of BNPWM's assets and liabilities to BNP and its winding-up without liquidation. The merger was completed in early October 2016. On 27 October 2016 BNP applied to be substituted as plaintiff in place of BNPWM. The application was opposed by the Agams. It was heard on 14 November 2016 and 12 January 2017, and in reasons published on 17 February 2017 the application was granted and substitution was ordered: see *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 4 SLR 14.

34 The Agams appealed, by leave, from this decision. The appeal was heard on 12 May 2017, and at the end of oral argument was dismissed. The Court's reasons were delivered on 18 May 2017: see *Jacob Agam and another v BNP Paribas SA* [2017] 2 SLR 1.

35 The proceedings came on for hearing in August 2017. The Agams were not represented and did not appear. We think it appropriate to record how that came about.

36 At a Case Management Conference on 12 January 2017 the proceedings were fixed for trial for 10 days commencing on 7 August 2017. At that time the Agams, who at an earlier time had been separately represented, were both represented by Hin Tat Augustine & Partners ("Hin Tat"), instructing Mr Cheong Yuen Hee as Counsel.

37 A further Case Management Conference was fixed for 17 July 2017 before Steven Chong JA, to deal with some immediate pre-trial matters. On the morning of the conference, Hin Tat filed an application to stay the proceedings pending the determination of proceedings brought by Ruth and others in Tel Aviv ("the Israeli proceedings"). The Israeli proceedings had been commenced on 11 July 2017.

38 When the parties appeared before Steven Chong JA on 17 July 2017, Hin Tat did not take up the stay application. Instead, Ms Angeline Soh of Legis Point LLC said that her firm had been appointed for the specific and limited purpose of the stay application; that Mr Samuel Chacko, Counsel for the application, was away until 3 August 2017; and that the trial may have to be vacated as a result of the application. Given the imminence of the trial, Steven Chong JA declined to delay the stay application. After offering several alternative dates for the Agams' choice, he fixed it to be heard by him on an urgent basis on 26 July 2017; Ms Soh requested a hearing by the full bench, but accepted that it could be heard by him as a single judge. This specifically is in accordance with O 110 r 53(1A) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which provides as follows:

> Despite paragraph (1), any one of the 3 Judges appointed for any proceedings in that paragraph may hear *any interlocutory application* or case management conference in those proceedings. [emphasis added]

39 On 24 July 2017, Hin Tat filed an application to be discharged as solicitors for the Agams. In a joint affidavit dated 24 July 2017, Counsel from Hin Tat, Mr Tan Hin Tat and Mr Mohamed Zikri bin Mohamed Muzammil, informed the Court that:

(a) Hin Tat had agreed to act for the Agams on the basis that Mr Cheong would act as Lead Counsel;

(b) after the decision of the Court of Appeal in May 2017, in early June 2017 Hin Tat received communications from the Agams' overseas lawyers making "disparaging and/or insulting remarks" regarding their conduct of the application for substitution;

(c) the distrust shown was such that Hin Tat could not continue to act, and they so informed the Agams;

(d) Mr Cheong subsequently said that he would cease to act;

(e) on a number of occasions Hin Tat told the Agams immediately to seek new suitable solicitors and counsel for the trial;

(f) on 30 June 2017 the Agams informed Hin Tat that they had appointed Mr Chacko of Legis Point LLC to act as Counsel in respect of a stay application only, but that they wished Hin Tat to remain on the record and to assist in filing the stay application;

(g) on or about 20 July 2017, Hin Tat informed the Agams that it would be impossible for the firm to prepare for and attend the hearing of the stay application on 26 July 2017 or the trial, and urged them immediately to appoint new counsel;

(h) on 21 July 2017, the Agams accepted the request of Hin Tat to discharge themselves as solicitors.

40 On 26 July 2017, the stay application was listed before Steven Chong JA. At the hearing of the stay application, only Mr Zikri appeared for the Agams; counsel from Legis Point LLC was not present. Mr Zikri, who was then still on record for the Agams, informed the Court that he had received no instructions from the Agams to act in relation to the stay application. Counsel

for the Plaintiff, Mr K Muralidharan Pillai, moved for a dismissal of the stay application with costs on the ground that Mr Zikri had no instructions to proceed and the Court so ordered.

41 The discharge application was also listed before Steven Chong JA on 26 July 2017. At the hearing of the discharge application, following the dismissal of the stay application, Mr Zikri further informed the Court that Hin Tat had advised the Agams to seek new counsel to represent them in the proceedings and accompanying matters as early as 2 June 2017; that the Agams had told Hin Tat of the appointment of Mr Chacko in connection with the stay application in early June 2017; that Mr Chacko had told Mr Zikri that he would not be taking over the conduct of the proceedings; and that the Agams had said that they were looking for a new set of lawyers to represent them.

42 Steven Chong JA ordered that Hin Tat be discharged as solicitors for the Agams. He made it a condition of the order that Hin Tat would not exercise a lien for unpaid fees, so that the Agams' new lawyers would have access to all necessary documents to prepare for trial.

43 The following observations on these events are apposite.

44 The Agams knew from early June 2017 that Hin Tat and Mr Cheong would not appear for them at the trial, and that either at their request or at his insistence Mr Chacko would not act as Counsel for the trial. They initiated the departure of Hin Tat and Mr Cheong as their lawyers by their dissatisfaction with the representation. So far as appears, they did not seriously seek to retain solicitors or counsel for the trial, and it seems that they had no intention of participating in the trial on the appointed dates.

45 When the Agams instructed Legis Point LLC for the stay application in June 2017, the Israeli proceedings had not been commenced; they were commenced at least a month later, and it appears that their commencement was delayed until three weeks before the trial. Given the imminent trial dates, it was incumbent on the Agams and their Counsel to be prepared to deal with the stay application urgently, but they asserted the unavailability of their appointed Counsel until four days before the trial. It is difficult to resist the conclusion that the Agams brought the stay application as a ploy with the objective of bringing about vacation of the trial dates.

46 Following the discharge of Hin Tat, the Agams did not engage any new solicitors or counsel to represent them at the trial. No formal application was ever filed by the Agams to vacate the trial dates. In the event, the trial proceeded as scheduled in the Agams' absence.

The issues on the pleadings

47 We first refer to what may be called the French law issues, common to the defences of Jacob and Ruth. These may be summarised as defences:

(a) that the SCI Ruth Agam facility agreement was contrary to the law of France because under its company statutes SCI Ruth Agam was only permitted to enter into agreements relating to real estate transactions; and so the facility agreement was "ultra vires, illegal, void and unenforceable" and all securities provided pursuant to it were likewise illegal, void and unenforceable including the personal guarantee;

(b) that for a number of other reasons such as contravention of the French Consumer Code, the facility agreements were in breach of and/or

unenforceable under French law, and that the choice of Singapore law as provided for in the facility agreements and the personal guarantees was "not a bona fide and/or genuine choice of law" and French law was the natural applicable law; and

(c) that BNPWM failed to discharge its obligations as a French bank under the laws of France in respect of its duty of care to advise on risks and consequences and a statutory duty of care "to act in an honest, fair and professional manner which is conducive to the customer's interest"; implicitly, again, this defence presupposed that French law applied notwithstanding the choice of Singapore law.

48 At the Case Management Conference on 17 July 2017, at which the question of giving evidence at trial of an expert in French law had been raised, the Agams' solicitors informed the Court that they did not wish to adduce any evidence on French law and that they no longer sought to prove issues of French law. By then, the time limit for filing affidavits of evidence-in-chief had expired. Despite the pleaded French law issues, no expert report or affidavit on French law was filed on behalf of the Agams. Thus the defences reliant on the French law issues fell away upon abandonment by the Agams, including (since its only point was to clear the way for the application of French law) the challenge to the choice of Singapore law. The Agams' deliberate election in not filing any expert witness statement on French law notwithstanding the pleadings is consistent with our earlier observation at [45] that by then, they were planning for the vacation of the trial dates *via* a further stay application.

49 For completeness, we add that the Agams, in their pleadings, also challenged the Singapore jurisdiction clause in the personal guarantees by arguing that under French law a jurisdiction clause which gives one party the

unilateral and absolute discretion to commence proceedings in any jurisdiction as it deems fit is invalid and that BNPWM, by commencing proceedings in France to enforce the mortgages, has elected for the jurisdiction of the French courts and is accordingly estopped and/or has waived its rights to proceed in Singapore. This challenge does not raise any substantive defence on the merits which we need to consider. In fact, the pleading runs contrary to the concession by the Agams in their unsuccessful application for a temporary stay of proceedings (see [32] above), in which they accepted that they were bound by the jurisdiction agreement in favour of the courts of Singapore (see Judgment for Stay Application at [53]).

50 Signature of the personal guarantees was not denied. The French law issues aside, in the respective Defences of Jacob and Ruth a number of defences were put forward. Perhaps as a legacy of their earlier separate representation, the Defences were framed differently; it is convenient to summarise first Ruth's defences and then Jacob's defences.

51 The defences raised by Ruth were as follows:

(a) First, a defence of *non est factum*, being the dispute on the pleadings concerning the circumstances of her signature of documents on 9 June 2010; it was accordingly denied that BNP is entitled "to rely on the Personal Guarantees or any other document signed by the 2nd Defendant on 9 June 2010 or otherwise" ("the *non est factum* issue").

(b) Secondly, that the account opening documentation for the SCI Ruth Agam account with the Singapore branch is "not legally binding on her and she is not liable to the Plaintiffs [sic] as claimed or otherwise" ("the account opening issue").

(c) Thirdly, that SCI Ruth Agam has a claim for damages which will diminish and/or extinguish BNP's claim, as a result of the letter from BNPWM of 5 May 2014 asserting breach of the borrower and global margin requirements being issued "without any just cause or reason" ("the margin call issue").

52 Jacob raised the following defences:

(a) First, that it was a condition of the personal guarantees that both Agams should be and remain parties, and that if the personal guarantees are not enforceable against Ruth by reason of *non est factum* or other defences raised by her, he is likewise discharged from all liability under the personal guarantees ("the parties issue").

(b) Secondly, that he is discharged from liability under the personal guarantees because BNPWM wrongly declared breaches of margin requirements and events of default under the SCI Ruth Agam, Det Internationale and Bronton facility agreements, and thereby impaired the ability of SCI Ruth Agam and Det Internationale to refinance their loans with third parties and caused their default, and "materially increased the risk to the Defendants under the Personal Guarantees" ("the margin call discharge issue").

(c) Thirdly, that BNP's claim is diminished by set-off because BNPWM applied the approximately €20 million from the pledged account to repay the SCI Agam loan alone, in breach of instructions to apply the sum to reduce the liability of all the Agam companies ("the instructions issue").

(d) Fourthly, that SCI Agam and Det Internationale have claims against BNP for damages which will diminish or extinguish the claim against him ("the company claims issue").

53 We will address each of these issues in turn. However before that, we examine the Agams' personal liability under the personal guarantees, leaving aside the defences.

The personal guarantees: liability apart from the defences

54 The SCI Ruth Agam and the Det Internationale personal guarantees are in materially the same terms. "The Guarantor" is Jacob and Ruth, and by cl 31 (which we later set out) they are jointly and severally liable.

55 Clause 1 relevantly provides:

> **1. Guarantee to Pay on Demand**
>
> The Guarantor hereby unconditionally and irrevocably guarantees and undertakes, as a continuing obligation, to pay to the Bank upon first written demand by the Bank all amounts and discharge all obligations and liabilities which are now or shall at any time or times be owing or payable by the Borrower to the Bank in whatever currency anywhere for any reason or on any account or otherwise in any manner whatsoever from the Borrower whether as principal or as surety, solely or jointly with any person or persons (in whatever style, name or form), whether actually or contingently … together with in all the cases aforesaid all interest (as well after as before any demand or judgment) at such rate or rates as may from time to time be fixed or determined by the Bank … legal charges on a full indemnity basis occasioned by or incident to this or any other security held by or offered to the Bank for the same indebtedness or by or to the enforcement of any such security (the "Guaranteed Amounts" which expression shall include all or any part of them as the context may require).

56 Clause 2 provides:

> **2. Sole/Principal Debtor**

> As between the Bank and the Guarantor, the Guarantor shall be liable for the Guaranteed Amounts as if it were the sole principal debtor and not merely as surety.

57 Clause 17 further provides:

> **17. Indemnity**
>
> As a separate, additional, independent and continuing obligation, the Guarantor unconditionally and irrevocably undertakes with the Bank that the Guarantor will, as original, primary and independent sole obligor, upon first written demand by the Bank, make payment of the Guaranteed Amounts by way of a full indemnity in such currency and otherwise in such manner as the Bank may specify by notice to the Guarantor and that the Guarantor will indemnity the Bank against all losses, claims, costs, charges and expenses to which it may be subject or which it may incur whilst acting in good faith under or in connection with the Guaranteed Amounts or this Guarantee…

58 Further informing the Guarantor's liability, cl 8 relevantly provides:

> **8. Actions by the Bank**
>
> This Guarantee and the Guarantor's liability hereunder shall not be prejudiced, diminished, discharged or affected in any way nor shall the Guarantor be released or exonerated by anything which would not discharge it or affect its liability if it were the sole principal debtor instead of guarantor, including but not limited to: –
>
> …
>
> (f) any legal or other limitation on or insufficiency in the borrowing powers or disability or incapacity of or other fact or circumstance relating to the Borrower or any other person;
>
> (g) any irregularity, unenforceability, illegality or invalidity of or any defect in any provision in any agreement, security guarantee, indemnity, right remedy or lien or any obligation of the Borrower or any other persons thereunder to the intent that the Guarantor's obligations under this Guarantee shall remain in full force and effect and this Guarantee shall be construed accordingly as if there were no such irregularity unenforceability, illegality or invalidity;
>
> …

> (l) any other matter or thing or event whatsoever which but for this provision would constitute a defence, discharge or release to the Guarantor.

59 With the abandonment of the French law issues, which in part were directed to the liability of SCI Ruth Agam and Det Internationale, there is no issue over the liability of the Agam companies and it does not matter whether the personal guarantees are contracts of guarantee or contracts of indemnity. We think it appropriate nonetheless to express our view on this issue. A principal debtor clause such as cl 2 is generally insufficient to convert a contract of guarantee into a contract of indemnity: see *PT Jaya Sumpiles Indonesia and another* v *Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 at [52]–[56]. Here there is more than a principal debtor clause, see cll 17 and 8(f)–(g), and we consider that the personal guarantees are contracts of indemnity. We note that in the 2016 stay application the Agams accepted that the personal guarantees, on their face, could be enforced as indemnities: see Judgment for Stay Application at [40].

60 The outstanding indebtednesses of SCI Ruth Agam and Det Internationale fall within the Guaranteed Amounts as defined in cl 1 of the personal guarantees. Written demand was admitted on the pleadings by Jacob, although not by Ruth, and was in any event proved. Subject to the defences abovementioned, Jacob and Ruth are liable for the amounts payable by the companies.

The *non est factum* issue

61 Ruth alleges in her Defence that:

> (a) in 2010 Jacob informed her that BNPWM was offering a more attractive proposal than the existing Julius Baer loans, and she agreed to

enter into a new financial arrangement with BNPWM if Jacob and his companies were also doing so and if the terms were more favourable;

(b) in early June 2010 Jacob asked her to attend in Paris "to execute the requisite documents with regard to refinancing the St. Tropez Property and Villa St. Pierre" with BNPWM;

(c) on 9 June 2010 she "attended at the offices of [BNPWM's] Notary in Paris";

(d) when she did so, only two females were present; neither the notary nor a representative of BNPWM was in attendance;

(e) the two females did not explain any of the documents to her; she was merely asked to sign or initial in the places indicated by them by pointing, and she did so;

(f) she signed "on the basis that she was signing documents for the opening of an account with [BNPWM] for [SCI Ruth Agam] and Det Internationale and to re-finance the mortgages for the St. Tropez Property and Villa St. Pierre";

(g) she was not aware that she was signing the personal guarantees or any other documents which would impose any liability on her;

(h) she was never informed that the personal guarantees would be required from her, but was informed that the terms of the financial arrangements with BNPWM would be more favourable;

(i) she does not speak, read, write or understand English or French, and only speaks, reads, writes and understands the Hebrew language;

(j) she would not have agreed to enter into any financial arrangements with BNPWM if the terms were more onerous by requiring her to undertake personal liability by way of the personal guarantees or otherwise.

62 These allegations are contested in BNP's evidence. On the evidence of Mr Cucchi, present on 9 June 2010 at the Dufour offices to execute the documentation were Jacob and Ruth accompanied by Mr Van Hagen; himself on behalf of BNPWM; Mr Bonne, the Agams' notary; Mr Dufour, BNPWM's notary; and two others from the Dufour offices, Mr Jean-Louis Eyrolle and Ms Sandrine Godet. He spoke primarily in English to the Agams and Mr Van Hagen, as he had always conversed with Jacob in English. He recalled a specific exchange with Ruth: he saw her writing her name on pages which should be signed, told her in English that she should be signing not writing her name, and Ruth was amused and said in English that that was her signature. Mr Cucchi said that Ruth did not ask questions about the documents she was signing and did not appear to be lost or confused. The execution took about two hours. He could not now specifically remember what documents were signed, except for the Notarial Acts, but would have ensured that all documents required by BNPWM were signed.

63 There is no evidence from Ruth to support the allegations in her defence, and no evidence from (for example) Jacob or Mr Van Hagen to controvert the account of the occasion of signing on 9 June 2010 given by Mr Cucchi. There is, in any event, a preponderance of evidence which in our view demonstrates that Ruth's allegations cannot be accepted.

64 It was known from the late February 2010 proposal that personal guarantees would be required, including by an email of 26 February 2010 from

Mr Cucchi to Mr Van Hagen. On 2 June 2010 Mr Cucchi emailed Mr Van Hagen confirming 9 June 2010 for execution, including "[w]e need Ruth to sign the PG (it can be done on Monday if needed but she should be there [till] the 9th) …". It would be remarkable if Mr Van Hagen, as the Agams' legal adviser, did not make Ruth aware of the personal guarantees as part of the refinancing.

65 Each of the SCI Ruth Agam and the Det Internationale facility letters provided for third party acceptance, and we have earlier noted their signature by Jacob and Ruth by way of third party acceptance; it was in the terms –

> 3rd PARTY ACCEPTANCE
>
> We hereby irrevocably and unconditionally acknowledge the above terms and conditions and agree to the execution of the Memorandum of Charge on Securities and the Personal Guarantee in favour of the Bank as security for the Borrower's liabilities and obligations to the Bank.
>
> | | |
> |---|---|
> | Signed and Agreed by: | Signed and Agreed by: |
> | [signed by Jacob] | [signed by Ruth] |

66 Ruth's signature here and elsewhere was by the name "Ruth Agam", being some confirmation of the exchange recalled by Mr Cucchi. If Ruth had any facility in English, it would be difficult not to appreciate the reference to the Personal Guarantee.

67 Apart from Mr Cucchi's evidence of speaking to Ruth in English, there were in evidence a number of documents in French and English signed by Ruth other than the memoranda of charge on securities earlier mentioned, indicating to the contrary of her allegation that she only speaks, reads, writes and understands Hebrew. Examples are Articles of Association of SCI Ruth Agam (in French), a declaration of beneficial ownership of SCI Ruth Agam dated 29 March 2010 (in English) and a letter to BNPWM dated 10 June 2010 requesting the opening of a pledged sub-account (in English). More directly,

when Dufour's offices sent a draft document to the Agams' notary, Mr Bonne, and asked among other things for confirmation that Jacob and Ruth spoke French, Mr Bonne replied by an email of 4 June 2010, "Mr Jacob AGAM and Mrs Ruth AGAM speak French. We can make them confirm by e-mail if you wish". And on 4 October 2011 Mr Van Hagen sent to Ruth in Israel a document in English required by BNPWM, writing to her in English, "please sign the enclosed document from BNPPARIBAS and return to my office by DHL". It is scarcely credible that Mr Bonne and Mr Van Hagen would have so acted if Ruth understood only Hebrew.

68 Of particular significance in our view is the French Notarial Act earlier mentioned. The Notarial Act for SCI Ruth Agam is in French, is dated 9 June 2010, and in translation records:

> Mrs Ruth AGAM, above named, acting in her capacity as representative of the Borrower, off [sic] Israeli nationality, was assisted by Mr Anthony VAN HAGEN, Lawyer, domiciled professionally in Paris (8th) 6 Avenue George V, interpreter chosen by her to hear her wishes expressed in the English language and to render them and express them in French to the author hereof as well as to translate this deed for her. Mr Anthony VAN HAGEN has also signed this deed.
>
> A reading of this deed having been made to the Parties and the signatures collected by Miss Sandrine GODET, clerk authorized for this purpose and sworn in by deed filed as minutes of the said OFFICE, who also signed.
>
> And the notary signed on the same day.
>
> The signatures of Mr Jean-Louis EYROLLE, Mrs Ruth AGAM, Mr Anthony VAN HAGEN, miss [sic] Sandrine GODET and Mr Pascal DUFOUR, the latter being a notary in Paris, follow.

69 Again, it is scarcely credible that Mr Dufour or Mr Van Hagen would have put their signatures to the Notarial Act unless Mr Van Hagen had indeed assisted Ruth to ensure that her English was rendered into French and the document in French was conveyed to her, and more, unless Ruth had indeed

been present on 9 June 2010 together with others involved in the execution of the documents.

70 It may be added that when the Det Internationale facility was increased in June 2011 and again in March 2012, the new facility letters included third party acceptances stating confirmation "that the Personal Guarantee dated 1 June 2010… executed by us in favour of the Bank shall remain in full force and effect and continue to be binding on us"; they were signed by Ruth.

71 We return to the signing and dating of the refinancing documents earlier described. The dates are not consistent with execution in a two-hour session on 9 June 2010, and Mr Van Lienden could not have signed at that session. Mr Merimee was not present on 9 June 2010, as was also his evidence, although he signed as witness on the personal guarantees and most of the charges on securities. But the dates are also not consistent with Ruth signing on a single occasion before two females. There does not seem to be a pattern explaining the divergent dates, and it should be recalled that in her defence Ruth places the signing before the two females on 9 June 2010.

72 Whatever the explanation for the dating, it is not known to us. We have taken into consideration the dating and what appears to have been unwarranted signing by Mr Merimee as witness. We are comfortably satisfied that Mr Cucchi's evidence of execution by Ruth on 9 June 2010 should be accepted and that, while he could not specifically remember what documents were signed, they included the SCI Ruth Agam and Det Internationale refinancing documents.

73 A person is generally bound by his signature on a contractual document even if he did not fully understand its terms. The defence of *non est factum* is a

narrow exception to that position, for which there must be a radical difference between what was signed and what was thought to have been signed and the person must show that he took care in signing the document: see *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 at [119]. In our view, there is no basis for finding that in either of these respects Ruth has the benefit of the defence.

The account opening issue

74 The defence is not easy to comprehend, and we set out its pleading –

> 17E. The 2nd Defendant avers that on or about 26 August 2011, the Plaintiffs sent a letter to her lawyers, Cabinet Van Hagen and Bronton Assets Inc. requesting that she and one "Van Lienden" or "Frye" or "Diaz" sign 2 one page documents and return the signed copies to the Plaintiffs.
>
> 17F. The signed copy of the aforementioned one page document was returned to the Plaintiffs on or about 12 October 2011, and this same document is now used by the Plaintiffs to show that the 2nd Defendant had signed the Account Opening Documentation. This document is found in the second page 11 of the Account Opening Documentation, which was certified to be a true copy on 1 July 2016 by the Plaintiffs.
>
> 17G. Neither the 2nd Defendant nor her lawyers nor "Van Lienden" (who eventually signed one of the one page documents) paid any attention to the bottom wherein the Plaintiffs' Mr Charles Merimee stated that he had witnessed the signatures of the 2nd Defendant on 7 April 2010 and "Van Lienden"'s signature on 29 March 2010.
>
> 17H. The signed documents were returned to the Plaintiffs on or about 12 October 2011. These documents are now used by the Plaintiffs to show that the 2nd Defendant had signed the Account Opening Documentation.
>
> 17I. In the premises, the 2nd Defendant avers that the Account Opening Documentation is not legally binding on her and she is not liable to the Plaintiffs as claimed or otherwise.

75 On the evidence, what happened was as follows.

76 The accounts of the Agam companies with the Singapore branch of BNPWM were opened in April–May 2010, following approval by BNPWM's Client Acceptance Committee. In giving its approval, the Committee asked that some documentary requirements be regularised including obtaining director's signatures on page 11 of certain SCI Ruth Agam and Bronton account opening documents.

77 The signatures were eventually obtained only in October 2011. On 26 August 2011 Mr Francois Regis of BNPWM sent to Mr Van Hagen two pages, one for signature by Ruth and the other for signature by Mr Van Lienden, Mr Frye or Mr Diaz. Each was a statement that a person named in the client information form was appointed by "the Company" (SCI Ruth Agam or Bronton) as its agent for receipt of legal process. On 12 October 2011 Mr Van Hagen returned the pages "duly signed by Ms Ruth Agam and Mr Paul Van Lienden". The copies in evidence each contain, in a box marked "For Internal Use Only", the signature of Mr Merimee to a statement that he "witnessed the signature(s) and verified the identity of the person(s) whose name(s) appear above", with the date 7 April 2010 for the copy with Ruth's signature.

78 Mr Merimee gave evidence that it was not unusual for the Committee to proceed with opening accounts so long as the main documentation had been signed, leaving minor matters to be rectified at a later time. The accounts of SCI Ruth Agam and the Bronton were opened and operated upon in and from April–May 2010. It is clear enough that he signed the pages in 2011 as purported witness and with a backdated date.

79 It appears that the pleaded defence rests upon the late execution of the pages, and Mr Merimee's signing as witness to Ruth's signature when he had not witnessed the signing by Ruth and the backdating to 7 April 2010. We are

unable to see how these matters affect Ruth's liability under the personal guarantee of SCI Ruth Agam's loan, let alone that of Det Internationale, and the step to no liability in para 17I of Ruth's Defence is not explained. The accounts were opened notwithstanding that the pages were not then signed. There was nothing clandestine about subsequently obtaining the signature of the pages, and Mr Merimee's incorrect witnessing and backdating, although to be deprecated, did not detract from the subsequent signature. Even if it had, it remained that the accounts had been opened, and were operated on, and any consequence for Ruth's liability under the personal guarantees because of the incorrect witnessing and backdating escapes us.

The margin call issue

80 Ruth alleges in her defence that SCI Ruth Agam has a claim for damages which will reduce or extinguish BNPWM's claim. In summary, she alleges that:

(a) the St Tropez property was purchased by SCI Ruth Agam with a view to redevelopment, and was subdivided and one part transferred to a company owned by Jacob, SCI Madlen Alagami;

(b) in January 2014 SCI Ruth Agam and SCI Madlen Alagami entered into a joint venture agreement with a Portuguese company to redevelop the property;

(c) the joint venture agreement could be terminated if there were breach in connection with any mortgage of the property;

(d) on or about 5 May 2014 BNPWM sent a letter to SCI Ruth Agam asserting breach of the borrower and global margin requirements in the financing ("the default letter");

(e) on 1 June 2014 the parties to the joint venture agreement entered into an agreement terminating it;

(f) accordingly, the redevelopment did not proceed, and SCI Ruth Agam and SCI Madlen Alagami lost a profit of approximately €30 million each; and

(g) the default letter was issued "without any just cause or basis".

81 We have earlier referred to the default letter of 5 May 2014; it was not a letter requiring that the default be remedied, but rather said that BNPWM would not act upon the default in light of the steps towards repayment.

82 Neither SCI Ruth Agam nor SCI Madlen Alagami was a party to the proceedings. It was alleged that SCI Ruth Agam was "in the process of" commencing proceedings against BNPWM to recover damages for the loss of profits.

83 Even on the assumption that a claim to damages by SCI Ruth Agam could be entertained in its absence, an immediate answer to the defence is the "no set-off" provision in the financing documents. The facility letters include that BNPWM's Standard Terms, as attached thereto, "shall apply to and form an integral part of this Facility Letter and shall be deemed to be incorporated herein as if the same were set out specifically…". The Standard Terms provide in cl 3.2:

> All payments to be made under the Facility Letter or hereunder shall be made…free and clear of and without any set-off, counterclaim, deduction or withholding whatsoever.

84 Such a provision, if applicable on its proper construction, is recognised and given effect having regard to the legitimate commercial expectations of the

claiming party of payment in full without the need to litigate a cross-claim: see *Koh Lin Yee v Terrestrial Pte Ltd and another appeal* [2015] 2 SLR 497, especially at [67]. Repayment of the SCI Ruth Agam loan is payment to be made under its facility agreement, and is required notwithstanding any claim by SCI Ruth Agam for lost profits.

85 But Ruth did not appear at the trial and lead evidence in support of the allegations, and there is no evidence of the joint venture agreement and its termination, of profits the joint venture would have made, or otherwise (on the same assumption) to make out a diminution or extinguishment of BNP's claim. The defence has not been prosecuted, and quite apart from the "no set-off" provision it cannot be upheld.

86 It is not necessary to consider whether or not there was "just cause or basis" for the default letter, and it should be said that the Defence did not descend to explanation of why there was not.

The parties issue

87 Jacob's defence rested on the personal guarantees being unenforceable against Ruth. Since we consider them enforceable against her, any consequential discharge of Jacob from liability does not arise.

88 In any event, we do not accept that Jacob would have been discharged from liability if the guarantees had been unenforceable against Ruth.

89 Clause 31 of the personal guarantees relevantly provides –

> **31. Joint & Several Liability**
>
> Where the Guarantor consists of more than one persons… the expression "Guarantor" shall be references to all or each or any of such persons (as the context may require) and all

> representations, warranties, undertakings, liabilities and obligations of the Guarantor shall be deemed to be made by such persons on a joint and several basis… This Guarantee shall be valid, binding and enforceable upon any one of the Guarantors who have signed hereof notwithstanding that it has not been signed or given by any one or more of the Guarantors named or intending guarantors and notwithstanding that the provisions herein are not binding on one or more Guarantors who signed herein (whether due to lack of capacity or improper execution or any other reason whatsoever), to the intent that the remaining Guarantors shall continue to be bound herein as if such other Guarantor(s) had never been a party to this Guarantee.

90 This provision is clear in its terms, and would have preserved Jacob's liability in the event that the personal guarantees were not enforceable against Ruth.

The margin call discharge issue

91 Jacob alleged in his defence, summarising from a rather confused pleading, that BNPWM's assertion of breach by SCI Agam of margin requirements in February 2014 was "wrongly declared"; that it also wrongly declared breach by Det Internationale and Bronton of margin requirements (this was not explained, but appear to have been the 5 May 2014 letters); and that (at para 13 of Jacob's Defence):

> (v) The Plaintiff was aware that SCI Ruth Agam, Det Internationale and Bronton needed to refinance and/or sell the properties to repay their loans. The 1st Defendant had also communicated this to the Plaintiff's representatives on various occasions.
>
> (w) However, by reason of the Plaintiff's wrongful declaration of an event of default, the Plaintiff impaired SCI Ruth Agam's and DET [sic] Internationale's ability to refinance their loans with third parties.
>
> (x) The Plaintiff's wrongful conduct therefore caused the default of SCI Ruth Agam and Det Internationale and materially increased the risk to the Defendants under the Personal Guarantees.

> (y) By reason of the matters above, the 1st Defendant is discharged from all liability under the Personal Guarantees.

92 It should be recalled that BNP's claim follows expiry of the terms of the loans, and does not depend upon an event of default.

93 The asserted risk could only be SCI Ruth Agam and Det Internationale's ability to repay the loans, and the sale of the properties was on any view not affected. But it is not self-evident that declaring an event of default impairs refinancing, or that it materially impaired the ability of SCI Ruth Agam and Det Internationale to refinance their loans. The alleged impairment is not further particularised, and no evidence from the Agams supports it. To the contrary, Jacob's reports to BNPWM of progress in selling or refinancing do not refer to difficulties; rather, in a letter of 28 November 2014 Mr Van Hagen advised that "[w]e realistically expect to close the refinancing process [for the St Tropez and St Pierre properties] by the end of Q1 2015".

94 In our view this defence does not avail Jacob, and it is unnecessary to consider whether cl 8 of the personal guarantees, which, in broad terms, negates discharge of the Guarantor's liability by any action of BNPWM, may have answered it. But we should add that we are not satisfied that BNPWM was wrong in asserting that there was a breach of the margin requirements.

95 The Agams' response in February–March 2014, through Mr Van Hagen and in particular by a letter of 24 February 2014, came down to the contention that the mortgage of the Paris property remained effective and had priority over any seizure of the property, and that in any event on updated valuations the remaining properties were sufficient collateral for the Agam companies' loans. This issue was not resolved, as the parties agreed on the use of the €20 million from the pledged account to repay the SCI Agam loan, which brought in turn a

shortfall on the margin requirements in respect of the SCI Ruth Agam, Det Internationale and Bronton loans. Any impairment in refinancing as a means of repaying according to the subsequent timetable would have come from breach of those margin requirements, not from the earlier disputed assertion of breach, and we see no reason to conclude that BNPWM was wrong in asserting breach of the margin requirements in respect of the other Agam companies. For that reason also, this defence does not avail Jacob.

The instructions issue

96 Jacob alleges in his defence that BNP's claim is diminished by a set-off arising from BNPWM's failure to follow the instructions of the Agam companies. Summarising the thrust of a rather confused pleading, it is alleged that:

(a) after BNPWM had required from SCI Agam the additional collateral of €20 million, in a telephone conversation on 25 February 2014 Jacob agreed with Mr Arnaud Tellier of BNPWM that the €20 million would be paid without admission of default and would be allocated pro rata between the Agam companies;

(b) Jacob was subsequently informed that for administrative reasons the payment "should be effected through SCI Agam";

(c) accordingly, Jacob "signed written instructions on 3 March 2014 [sic] to effect payment" to SCI Agam's account;

(d) BNPWM applied the entire €20 million in repayment of the SCI Agam loan, not pro rata between the Agam companies;

(e) in doing this BNPWM acted in breach of an implied term to take reasonable care in executing the instructions of the Agam companies; alternatively negligently; alternatively fraudulently; alternatively in breach of a trust on which it held the €20 million;

(f) had there been allocation pro rata between the Agam companies, the indebtednesses of SCI Ruth Agam and Det Internationale would have been reduced by approximately €5.02 million and €7 million respectively.

97 It is not clear whether the set-off is by SCI Ruth Agam and Det Internationale or by Jacob; the pleading refers to an implied term in a contract with "the Defendants and the Companies". Again, SCI Ruth Agam and Det Internationale are not parties. It is not necessary to go into this. As with the margin call issue, the immediate answer is the no set-off provision which is part of the refinancing documents. But in our view there is no substance in the complaint as to the allocation of the €20 million.

98 The complaint is framed as a failure to follow the instructions of the Agam companies to allocate the €20 million on a pro rata basis. The instruction, however, was clear: as authorised signatory, on 4 March 2014 Jacob sent to BNPWM an instruction to sell securities in the pledged account and the instruction, "Please arrange to transfer the amount of EUR 20,186,164.48 from [the pledged account] and arrange for an internal transfer to account 8068062 in name of SCI AGAM."

99 More correctly, the complaint would appear to be that BNPWM failed to adhere to an agreement, made between Jacob and Mr Tellier, that the

€20 million would be allocated pro rata. But Mr Tellier denied any such agreement.

100 Mr Tellier was then the Chief Executive Officer of the Singapore branch of BNPWM. He gave evidence of telephone conversations with Jacob on 25 and 26 February 2014, to the last of which Mr Merimee was also a party. In that last conversation Mr Merimee suggested using assets in the pledged account to satisfy the margin call and repay the SCI Agam loan, and after discussion it was agreed that they would work towards that solution and that Mr Tellier would seek internal approval for its implementation (required because with the reduction of the pledged account there could be breaches of margin requirements for the other three Agam companies). A feature of the conversation was Jacob's insistence that "for 'wealth tax' purposes" BNPWM should continue to hold a mortgage over the Paris property notwithstanding repayment of the SCI Agam loan. Mr Tellier obtained approval and informed Jacob of it on 27 February 2014. The instructions of 4 March 2014 followed.

101 Mr Merimee gave evidence of the last telephone conversation to the same effect as that of Mr Tellier. His evidence included that on 4 March 2014 Mr Francois Regis of BNPWM sent to Jacob for signature the instructions to sell and to transfer earlier mentioned together with an instruction headed with the SCI Agam account, "Kindly make a full repayment on the existing loan", and that all were returned duly signed. The last of these instructions could not be more clear, and is scarcely consistent with allocation to the SCI Agam account for administrative reasons.

102 Jacob's pleading referred to the telephone conversation of 25 February 2014, but did not mention the telephone conversation of 26 February 2014. The telephone conversations of 25 and 26 February 2014 were recorded, and the

recording and a transcript were in evidence. They fully bear out Mr Tellier's account.

103 Mr Tellier's account is further supported by an email he circulated within BNPWM on 27 February 2014, stating "I have agreed with Mr Agam the prompt repayment of the 20M loan to SCI Agam as the first step of the resolution", and by an internal email of the same date from Mr Merimee stating that "[w]e got the confirmation by telephone that the client is OK to payback [sic] the existing SCI Agam loan + interests [sic] using the pledged account #8068266." In March 2014 there were subsequent discussions between Jacob and Mr Tellier, leading to Jacob writing on 13 March 2014 that he and Ruth had decided "irrespective of the bank's position relating to the outstanding mortgages of the properties in Marnes La Coquette, Monaco and Saint Tropez, to proceed with the liquidation of all loans outstanding to [BNPWM]". Implicit in this was that the SCI Agam loan, with its mortgage of the Paris property, had been repaid, but no complaint was made.

104 We note that in the Defence it is alleged that the agreement with Mr Tellier was confirmed by a letter dated 27 February 2014 from Mr Van Hagen. The letter relevantly read:

> Pursuant to Mr Agam's telephone conference with Mr Arnaud Tellier I am instructed on behalf of Mr Agam to respond to your correspondence dated February 18 and February 24.
>
> Irrespective of our previous objection for you to call for borrower margin requirements as requested by you in your previous correspondence our client is in agreement to settle this matter with you with immediate effect by reducing the global amount of the loan outstanding by an amount of EUR20.000.000 by deduction from the global account pledged to your bank.
>
> We hereby authorise your bank at its discretion to use the available cash and sell securities in the pledge account to reduce borrowings by an amount of EUR20.000.000. As agreed between Mr Tellier and Mr Agam this reduction of debt is in full

> and final settlement of the request made by you in your letter February 18.
>
> Furthermore all mortgages outstanding will remain in force against the global borrowings made by the respective parties.

105 Mr Tellier explained that the letter was unclear in its reference to "reducing the global amount of the loan outstanding". On his evidence, the further reference to all mortgages remaining outstanding was predicated upon repayment of the SCI Agam loan.

106 We do not think that the letter materially detracts from the evidence of Mr Tellier and Mr Merimee. We are satisfied that no agreement was made that the €20 million would be allocated pro rata. The instructions of 4 March 2014 governed, and BNPWM did not act wrongly.

107 We add that on one view of the pleading, Jacob also alleged that he was discharged from liability as guarantor because of the failure to follow instructions. If that was intended as a defence, for the reasons above we do not accept it.

The company claims issue

108 Jacob alleged that each of the Agam companies and SCI Madlen Alagami variously had claims against BNP for damages, being (a) for charging interest incorrectly under French law; (b) for the lost profits from the joint venture (see the margin call issue); (c) for misapplying the €20 million and wrongly declaring breach of the margin requirements (see the instructions issue and the margin call issue); and (d) for wrongly commencing foreclosure proceedings in France in respect of the St Tropez and St Pierre properties. He said that SCI Ruth Agam and Det Internationale could set off their damages in reduction or extinguishment of BNP's claim.

109 The references to claims by companies other than SCI Ruth Agam and Det Internationale were redundant, and there was overlap with other defences. It is sufficient, in our view, to state that, for like reasons to those we have outlined in dismissing the margin call issue, the defence(s) cannot be upheld.

Business records evidence

110 In our consideration of the defences, particularly the *non est factum* issue, we have had regard to statements of fact in documents. An example is Mr Bonne's statement in the email of 4 June 2010 that Jacob and Ruth speak French. We explain an evidentiary aspect of that regard.

111 Where such a statement is not an admission, and regard is had to it not for itself but as evidence of the fact stated, it is hearsay, and is p*rima facie* inadmissible in evidence. A substantial exception to the hearsay rule, however, is admissibility of a statement pursuant to s 32 of the Evidence Act (Cap 97, 1997 Rev Ed), relevantly providing in s 32(1)(*b*) that a statement of fact is admissible:

> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> …
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,
>
> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons;

112 Usually the admission of such statements into evidence under what is commonly called the business records exception is not contentious, and passes

without mention. Since the Agams are not represented and do not appear at the trial, we think that we should specifically advert to it.

113 In compliance with O 38 r 4 of the Rules of Court and pursuant to s 32(1)(*b*) of the Evidence Act, BNPWM gave notice of its intention to introduce into evidence hearsay statements in no less than 279 documents. It appears that there was an excess of caution, since most of the documents do not require the business records exception – again, as examples, a March 2010 valuation of the St Tropez property is relevant for itself and the letter from Mr Van Hagen of 24 February 2014 is relevant as a communication. In our view, however, all the documents are business records, and we consider that the statements of fact therein to which we have had regard are admissible.

114 We add that by s 32(3) of the Evidence Act, a statement is not admissible "if the court is of the view that it would not be in the interests of justice to treat it as relevant". We do not consider that the admission of the statements is contrary to the interests of justice.

The counterclaim

115 Jacob counterclaimed for damages and for a declaration that he is discharged from all liability under the personal guarantees. He first "repeat[ed] paragraphs 7 to 17 [of the Defence] by way of counterclaim". He then alleged wrongful conduct by BNPWM in November 2015 in obtaining a conservatory order in France over his shares in SCI Agam, asserting that its action was vexatious, oppressive and an abuse of process because BNPWM held sufficient security over the St Tropez and Saint Pierre properties.

116 The paragraphs of the Defence relevantly raised French law issues (para 7), the parties issue (para 12), the margin call discharge issue (para 13), the

instructions issue (para 14) and the company claims issue (paras 15, 16). For the reasons we have given, Jacob is not entitled to the declaration; in particular, the asserted claims in diminution or extinguishment are claims by the Agam companies or SCI Madlen Alagami, not by Jacob, and he cannot raise them by way of counterclaim. Jacob is not present to prosecute a damages claim in relation to the conservatory order, and there was no evidence to support such a claim.

117 The counterclaim must be dismissed.

Quantum

118 Other than by the defences alleging diminution or extinguishment of the SCI Ruth Agam or Det Internationale indebtedness, quantum was not in issue.

119 After commencing the proceedings, BNPWM took action in France to realise its mortgage security. As at the conclusion of the present trial, no moneys had been received in reduction of the amounts then claimed. The French proceedings do not affect BNP's recovery under the personal guarantees, which provide in cl 12 that the liabilities and obligations of the Guarantor:

> … may be enforced, irrespective of:–
>
> (a) whether any demands, steps or proceedings are being or have been made against the Borrower, any other guarantor and/or any third party; or
>
> (b) whether or in what order any security to which the Bank may be entitled in respect of the Guaranteed Amounts is enforced; …

120 In a commonly found provision, cl 23 of the personal guarantees provides:

> **23. Conclusive Evidence**

> In any proceedings relating to this Guarantee a statement as to any amount due to the Bank under this Guarantee which is certified as being correct by an officer of the Bank shall, unless otherwise provided in this Guarantee, be accepted by the Guarantor as conclusive evidence that the amount appearing thereon is in fact due and payable.

121 Certified statements dated 10 August 2017 gave the amounts owing as at that date of €13,913,543.12 for SCI Ruth Agam and €18,332,048.67 for Det Internationale. BNP is entitled to recover those sums from the Agams.

Interest

122 The interest rate in the facility letters is 3 months EURIBOR plus 1.0% per annum, compounded three-monthly and calculated on the basis of a year of 360 days. By the Standard Terms and Conditions, which as we have said were incorporated into the facility letters, additional interest would be charged on overdue sums at a further 3% per annum "up to and including the date of actual payment (as well after as before judgment)".

123 Clause 21 of the personal guarantees provides –

> **21. Default Interest**
>
> If the Guarantor fails to pay any amount in accordance with this Guarantee, the Guarantor shall pay interest in the currency in which the amount is outstanding on that amount from the time of default up to the time of actual payment (as well after as before judgment) at the rate applicable to the Guaranteed Amounts or such other rate or rates as the Bank may in its absolute discretion determine.

124 In the result, interest will run on the sums above from 10 August 2017 until payment, including after judgment, at 3 months EURIBOR plus 1.0% per annum plus 3% per annum, calculated on the basis of a year of 360 days and compounded three-monthly.

Costs

125 Clause 18 of the personal guarantees relevantly provides that the Guarantor:

> … shall on demand pay, in each case on the basis of a full indemnity, to the Bank all costs and expenses (including legal and out-of-pocket expenses) incurred in connection with… the preservation, enforcement or the attempted preservation or enforcement of any of its rights under this Guarantee.

126 This provision was pleaded in the Statement of Claim, and costs were claimed on an indemnity basis in reliance upon it.

127 While the Court has a discretion as to costs which may override a contractual agreement in order to avoid manifest injustice, the contractual agreement of the parties will ordinarily be upheld by ordering costs on an indemnity basis (see *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] 3 SLR 909 at [90]–[95] and cases there considered). BNP is entitled to costs, and in our opinion the costs should be on an indemnity basis.

Orders

128 Correctly having in mind future recovery under its mortgage or other security, BNP offered an undertaking not to recover sums due and owing from SCI Ruth Agam and Det Internationale "more than once". In our view, a preferable form of undertaking is an undertaking to give credit to the Agams for sums recovered in the realisation of securities held in respect of the loans to SCI Ruth Agam and Det Internationale and applied in reduction or repayment of those loans.

129 Subject to BNP's confirmation of the aforesaid undertaking, we make the following orders:

(a) The Agams are to pay BNP on a joint and several basis:

(i) the sums of €13,913,543.12 (in respect of SCI Ruth Agam) and €18,332,048.67 (in respect of Det Internationale), being the amounts due and owing to BNP (inclusive of contractual interest calculated until 10 August 2017), as at 10 August 2017; and

(ii) interest on the aforesaid sums at the rate of 3 months EURIBOR plus 1.0% per annum plus 3% per annum calculated on the basis of a year of 360 days and compounded three-monthly, from 10 August 2017 until the date of full payment.

(b) Jacob's counterclaim against BNP is dismissed.

(c) Costs of this action and counterclaim to be awarded on an indemnity basis, to be paid by the Agams to BNP on a joint and several basis.

Steven Chong	Roger Giles	Dominique Hascher
Judge of Appeal	International Judge	International Judge

K Muralidharan Pillai, Luo Qinghui, Foo Ming-En Mark and Andrea Tan (Rajah & Tann Singapore LLP) for the plaintiff; defendants absent.