IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 40

Suit No 457 of 2017

Between

Liberty Sky Investments Limited

… *Plaintiff*

And

(1) Dr Goh Seng Heng
(2) Aesthetic Medical Partners Pte. Ltd.

… *Defendants*

JUDGMENT

[Credit and Security] — [Guarantees and indemnity] — [Contracts of indemnity]

[Credit and Security] — [Guarantees and indemnity] — [Discharge]

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v
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20 February 2019 Judgment reserved.

Audrey Lim JC:

Introduction

1 The plaintiff ("LSI") is an investment vehicle incorporated in the Seychelles, with Florence Gong ("Florence") as its sole shareholder and director. At the material time, Florence and her husband Andy Lin ("Andy") were LSI's representatives. The first defendant ("Goh") is a medical doctor providing aesthetic services and skincare-related products and services. He founded the second defendant Aesthetic Medical Partners Pte Ltd ("AMP") in 2008. AMP was in the business of aesthetic services.

2 On 25 November 2014, LSI entered into a sale and purchase agreement with Goh ("the SPA") to purchase 32,049 shares in AMP from Goh for $14,422,050 ("the Sale Price"), purportedly on the basis of certain representations made by Goh that a trade sale of AMP would take place very

soon and, if not, that it was intended for AMP to be publicly listed by around June 2015. LSI claimed that, around the same time, it entered into an agreement with AMP whereby AMP would "indemnify" LSI the Sale Price plus 15% annualised internal rate of return ("IRR") if AMP did not achieve a trade sale or public listing ("IPO") within 24 months of the execution of the SPA ("the Purported Indemnity"). As neither a trade sale nor an IPO occurred, LSI filed this suit, *inter alia*, to claim against AMP on the Purported Indemnity.[1]

Background matters

3 Sometime in late 2013 or 2014, Florence and Andy became franchise owners of a clinic in Suzhou, China that provides laser facial treatments. At a dinner in Singapore on 23 October 2014, Goh invited Florence to purchase shares in AMP. LSI's case is that Goh made various representations to Florence to induce LSI to enter into the SPA and thereafter, Goh and Lee Kin Yun ("Lee"), who was in charge of AMP's operations, repeated the representations to Florence and Andy. These representations formed the subject of Suit No 1311 of 2015, commenced on 31 December 2015, and my decision was published as *Liberty Sky Investments Pte Ltd v Goh Seng Heng and another* [2019] SGHC 39 ("Suit 1311"). Briefly, the alleged representations were as follows:

(a) There would be a trade sale of all the shares in AMP to an important person in Singapore, namely Peter Lim, which was imminent and likely to take place within one month and with a 99% probability of being concluded.

(b) If the trade sale did not materialise, Goh intended to list AMP through an IPO on the Singapore Exchange, targeted for completion

[1] Statement of Claim, paras 6, 7 and 11.

around March to June 2015 and in any event no later than 24 months after LSI acquired the AMP shares.

(c) Goh required LSI's financial support to buy out certain minority investors in AMP with voting rights who could stifle the trade sale or IPO, as he was unable to do so then because his money was "stuck" elsewhere.

4 As neither a trade sale nor an IPO took place, LSI filed Suit 1311 and claimed against Goh for misrepresentation. In line with the claims, LSI issued a letter of demand to Goh on 24 November 2015 giving notice that it was electing to rescind the SPA.[2] Suffice to say, both parties accept that the SPA has come to an end. LSI claimed that it was entitled to and did validly rescind the SPA by virtue of the misrepresentations. Goh claimed that LSI had wrongfully repudiated the SPA as the misrepresentations were not made out.

5 On 2 December 2016 (which was after the 24-month deadline mentioned in the Purported Indemnity), LSI's counsel wrote to AMP to state that it had formally notified Goh under Clause 4(vii) of the SPA and demanded that Goh repurchase the shares and, if he did not do so, LSI would claim against AMP on a "Guarantee" (in the words of LSI's counsel) that LSI alleges is the Purported Indemnity.[3] As Goh failed to repurchase the shares, LSI's counsel further wrote to AMP on 30 December 2016 to demand that AMP make payment pursuant to the obligations outlined in its 2 December 2016 letter (*ie*, the "Guarantee", which it alleges in this suit as the Purported Indemnity).[4] AMP did not do so and in May 2017 LSI commenced this suit against Goh for a

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2 3AB 1522–1534.

3 Florence's AEIC, p 90.

4 Florence's AEIC, paras 48–49 and p 89.

declaration that he re-purchase the shares from LSI at the Sale Price plus 15% IRR totalling $19,073,162, and against AMP for payment to LSI of the same amount under the Purported Indemnity. This suit was heard immediately after Suit 1311 as the facts pertaining to the SPA and the Purported Indemnity were inextricably linked and the plaintiffs were the same in both proceedings.

6 In the interim, Goh applied to strike out LSI's claim on the basis that LSI was precluded from relying on the SPA, which LSI had rescinded and thus brought to an end. AMP also applied to strike out LSI's claim on the basis that the Purported Indemnity was in effect a guarantee that was embodied in the SPA. As AMP was not a party to the SPA, LSI could not claim on the guarantee against AMP. I found that LSI had made an unequivocal election to rescind the SPA. Given that any agreement with Goh was embodied in the SPA, it was no longer open to LSI to enforce a claim against him. I therefore granted Goh's application. However, it remained open to LSI to show that an agreement between LSI and AMP continued to exist *outside* the SPA. Hence, the trial proceeded only between LSI and AMP on the Purported Indemnity.

LSI's case

7 LSI's evidence in relation to how Florence and Andy came to know Goh and others in AMP, the representations made by Goh, and the negotiations on the terms of the SPA and the various terms that speak of the Purported Indemnity have been set out in Suit 1311 and my decision therein, and I will not repeat these. Counsel for LSI and AMP have no objections to allowing the evidence given by Florence and Andy in Suit 1311 to apply in these proceedings.

8 At the outset it is important to point out that in an indemnity the

indemnitor's liability is undertaken primarily to his obligations and original to the creditor. In contrast, under a guarantee, the guarantor's liability is essentially secondary to the principal. Further, an indemnity need not be evidenced in writing, unlike a contract of guarantee pursuant to s 6(*b*) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA"). LSI accepted that if the written and signed SPA had been rescinded, then any indemnity or guarantee *within* the SPA could no longer operate to bind those parties to the indemnity or guarantee.[5]

9 Instead, LSI ran two alternative cases. It claimed that while the SPA had been rescinded, the SPA and Purported Indemnity were standalone contracts independent of each other.[6] This separate contract of indemnity survived the rescission and did not need to be evidenced in writing. Alternatively, the Purported Indemnity was an independent contract of guarantee, whereby AMP would be liable to pay LSI (the Sale Price plus IRR totalling $19,073,162) if Goh failed or refused to repurchase the shares.[7] LSI pleaded that the formality requirements for this independent guarantee had been complied with, alternatively, that AMP was nevertheless precluded on relying on the formality requirements due to the doctrine of part performance or estoppel.

10 I focus here on the Purported Indemnity terms and how they came to be. On its primary case, LSI claimed that the Purported Indemnity was entered into between LSI and AMP "on or about" 25 November 2014, whereby AMP agreed to indemnify LSI the Sale Price plus 15% IRR if AMP did not achieve a trade sale or an IPO within 24 months of executing the SPA. LSI claimed that the Purported Indemnity was "evidenced in writing" by the following:[8]

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5 17/10/18 NE 63–65.

6 Plaintiff's Opening Statement ("POS"), para 22.

7 Statement of Claim, para 10.

8 Statement of Claim, para 7.

(a) Clauses 4(ii) and 4(vii) of the SPA.

(b) An email dated 24 November 2014 sent by Goh (who was then the Group Executive Chairman, director and substantial shareholder of AMP) to Florence and Andy, in which Goh stated that "we use [AMP] to guarantee your share capital and IRR for 2 years because we did not give you sufficient time [and] material for Due Diligence …".

(c) AMP's awareness and express approval, before the SPA was executed, of the SPA terms including the Purported Indemnity contained in clauses 4(ii) and 4(vii) of the SPA. In this regard, on 25 November 2014, Lee emailed Andy, Florence, Goh and Goh's daughter Michelle (who was then the Chief Executive Officer and director of AMP) to state essentially that "[AMP] is able to guarantee the value of a contract that is approved by its Board of Directors", that "the Board has approved this SPA" and that "[AMP] is obligated to service its guarantees".

11 It is not disputed that the SPA was executed on 25 November 2014 by only LSI and Goh, and that it has in any event been terminated or rescinded. Nevertheless, LSI alleged that the Purported Indemnity existed outside the SPA, and that its terms were based on the communications and conduct of Goh and Lee (see [10] above) who had authority to act on AMP's behalf.

12 LSI further stated that it had given consideration for the Purported Indemnity by entering into the SPA without sufficient opportunity to conduct proper due diligence of AMP, and this was done at the request of Goh (who was at that time also representing AMP)[9]. Florence explained that the deal to buy Goh's AMP shares had to be completed quickly as Goh had informed her that a

9 Statement of Claim, para 8.

trade sale was imminent and that he needed her and Andy's money to buy out the minority investors. Andy thus asked for an assurance that there would be a "guarantee" or minimum return on their investment should the trade sale or IPO not occur, hence the "guarantee" for their capital (the Sale Price) plus the 15% IRR to protect their investment.

13 On LSI's alternative case, the Purported Indemnity was a contract of guarantee which existed outside the SPA and on the same terms as in the Purported Indemnity, in that AMP would guarantee Goh's default to the sum of the Sale Price plus 15% IRR. It should be noted however, that in LSI's Closing Submissions, it took the position that the Purported Indemnity was in the nature of an indemnity and not a guarantee.[10]

AMP's defence

14 AMP claimed that the Purported Indemnity was in essence a contract of guarantee which did not comply with the requirements in s 6(*b*) of the CLA, and that LSI's primary case that the Purported Indemnity was an indemnity, was a mischaracterisation intended to circumvent the requirements of s 6(*b*) of the CLA.[11] AMP further claimed that the terms of the Purported Indemnity were not independent of, but contained in, the SPA. As AMP was not a party to the SPA or the Purported Indemnity, and as the SPA had been rescinded or terminated, LSI could no longer rely on the terms of the Purported Indemnity within the SPA.

15 Although Nelson Loh ("Nelson") (who is AMP's current director appointed on 26 June 2015) testified on AMP's behalf, he was not involved in

10 Plaintiff's Closing Submissions ("PCS"), paras 57 and 62.

11 Defence, para 8; Defendant's Closing Submissions ("DCS"), paras 86 and 90; Defendant's Opening Statement ("DOS"), paras 20–21.

the negotiations relating to the SPA or the Purported Indemnity. His evidence was hence largely unhelpful and I will refer to it only where relevant.

Issues to be determined

16 The issues to be determined are as follows:

(a) First, what are terms of the Purported Indemnity?

(b) Second, is the Purported Indemnity a part of the SPA, or is it a separate and independent agreement from the SPA? If the latter, when was the Purported Indemnity concluded?

(c) Third, is the Purported Indemnity, on a proper construction of its terms, an indemnity or a guarantee?

(d) Tied to the above issues, was AMP a party to the Purported Indemnity, and what is the effect of the SPA having come to an end?

Terms of the Purported Indemnity

17 Putting aside whether the Purported Indemnity is a contract of indemnity or guarantee, whether it is part of or independent from the SPA, and whether AMP was a party to it, I first determine what its terms are.

18 In its pleadings, LSI relied on various documents as evidence of the Purported Indemnity agreement, including clauses 4(ii) and (vii) of the SPA and various correspondence. However, it was not clear from LSI's pleadings or Florence's and Andy's affidavits of evidence-in-chief ("AEIC") what the material terms of the Purported Indemnity agreement were. It was only in court that Andy, the main person who had negotiated the SPA and the Purported

Indemnity on LSI's behalf, stated that the terms of the Purported Indemnity were those reflected in clauses 4(ii), (iv), (v), (vii) and (viii) of the SPA.[12]

19 Taking LSI's case at its highest, I find that the terms of the Purported Indemnity would have been those reflected in clauses 4(ii), (iv), (v), (vii) and (viii) of the SPA. To be clear, this is *not* a finding that the Purported Indemnity between LSI and AMP existed. Rather, assuming the Purported Indemnity existed, I considered what it terms would have been. The SPA expressly defined the obligations of the "Seller" (*ie*, Goh) and the "Company" (*ie*, AMP) regarding the shares that Goh was selling to LSI and what would happen if there was no trade sale or IPO. I set out the relevant terms of clause 4:

12 Florence's AEIC, paras 13 and 29; 16/10/18 NE 90–100; 17/10/18 NE 19.

> ii. [AMP] guarantees the value of [LSI's] capital for 24 months from SPA date.
>
> …
>
> iv. If [AMP] is sold at a trade sale at a price below [LSI's] purchase price +15% IRR within 24 months from SPA date, [LSI] is entitled to recoup their cost+15% annualized IRR from [AMP].
>
> v. If an IPO event takes place instead of a trade sale, the share price is determined by the market circumstances and the capital and IRR guarantee will not apply.
>
> ….
>
> vii. In the event there is no IPO or trade sale at the end of the 24 months from SPA date, [LSI] can sell the above shares back to [Goh] or [AMP] with a prior notification of 21 days, at the principle [*sic*] and annualized IRR as specified above. The principle [*sic*] and the IRR return are guaranteed by [AMP]. The payment and share transfer shall be completed within 21 days.
>
> viii. After 24 months from SPA date, the above capital and IRR guarantees will lapse.
>
> …

20 Andy claimed that the Purported Indemnity contained a further term, which Goh had agreed to, to the effect that LSI could call on Goh or AMP to indemnify LSI in the sum of the Sale Price plus IRR *regardless of whether LSI returned or sold the shares back to Goh or to AMP* ("the Additional Term").[13] I reject LSI's claim. The Additional Term was not pleaded or mentioned in Florence's or Andy's AEICs, and not found in any of the correspondence, documents or draft term sheets and SPAs discussed prior to the signing of the SPA. On the contrary, the Additional Term is at odds with clause 4(vii) of the SPA (which LSI claimed was a term of the Purported Indemnity). Although LSI relied on the part which states that "[t]he principle [*sic*] and the IRR return are guaranteed by [AMP]", clause 4(vii) must be read in totality. The clause, which

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[13] 16/10/18 NE 21–23, 99.

was requested by Andy during the negotiations of the SPA,[14] essentially provided that if there was no trade sale or IPO, LSI had the option to *sell the shares* back to Goh or to AMP at the Sale Price plus IRR, with such Sale Price and IRR guaranteed by AMP. Hence, the words stating that "[t]he principle [*sic*] and the IRR return are guaranteed by [AMP]", located between the parts of the clause detailing the share buy-back or buy-out mechanism, must be read in context of clause 4(vii), *ie*, that LSI's obtainment of the Sale Price and IRR was contingent on the sale of the shares back to Goh or to AMP. I will return to the construction of clause 4(vii) when determining the nature of the Purported Guarantee.

21 Indeed, Andy equivocated on whether LSI would have to return the shares to avail itself of the indemnity, at times accepting it would have to and at times disagreeing.[15] That he could not give clear evidence about such a material term as the mechanism of indemnification fortifies my view that no such term existed. In fact, Andy subsequently admitted that if LSI called on the Purported Indemnity against AMP, LSI would have to give up the shares as it could not benefit twice. Andy also agreed that it would be absurd for LSI to be able to claim the return of the Sale Price and IRR while retaining the shares.[16]

22 Hence, I find that the terms of the Purported Indemnity would have been as reflected in clauses 4(ii), (iv), (v), (vii) and (viii) of the SPA but would not have included the Additional Term.

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14 16/10/18 NE 72.

15 16/10/18 NE 21–25, 65.

16 16/10/18 NE 22–23, 64, 106–107, 115.

Whether the Purported Indemnity was independent of the SPA

23 I find that LSI was unable to demonstrate that the Purported Indemnity was an agreement that was *independent of*, and *outside*, the SPA. It is unclear how and when the terms of this separate and independent Purported Indemnity agreement were arrived at.

24 I first deal with LSI's attempt to bolster its claim by asserting that the only witnesses that had provided personal knowledge of the alleged agreement were Florence and Andy. Both had asserted that there was an independent agreement. LSI's counsel, Mr Singh SC, submitted that AMP could have called the other negotiating individuals such as Goh or Lee to testify to refute LSI's case, and that AMP's omission to do so was because Goh and Lee would confirm the existence of an independent Purported Indemnity agreement.[17]

25 I find LSI's reliance on this submission to be misplaced. LSI bears the burden of proving the facts it asserts. I find that Florence's and Andy's testimonies by themselves do not support the existence of an independent agreement. There is no property in a witness, and Mr Singh SC rightly conceded that it was open to LSI to call Goh and Lee if its case was that their evidence would support the existence of an independent agreement. This is all the more so here since Goh was no longer a director of AMP.[18]

Genesis of terms of Purported Indemnity agreement

26 I start with LSI's case on how the Purported Indemnity agreement arose as a separate agreement. LSI's pleadings were nebulous about how the terms crystallised into a separate agreement that was independent of the SPA. In court,

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17 Plaintiff's Closing Submissions ("PCS"), paras 3(c) and (d), and 12.

18 17/10/18 NE 43; Nelson's AEIC, at para 8.

Andy stated that the "indemnity obligation was formed through all our communications and emails [with Goh and Lee] *before* we signed the SPA" [emphasis added].[19] However, closer scrutiny of all the correspondence reveals no reference to any *independent* indemnity or guarantee outside of the SPA. All references to an indemnity or a guarantee are to the terms found in the SPA eventually signed. The exception would have been the purported Additional Term but I have found that there is no such term. I would add that Andy's vacillating evidence on the Additional Term (which coincidentally would have been the only term that did not duplicate the SPA) only reinforces my view that there was no separate agreement aside from the SPA.

27 As to the terms allegedly "evidenced" in the SPA,[20] it suffices to point to some documents that LSI relied on. First, on 25 November 2014, just before signing the SPA, Andy emailed Lee stating as follows:[21]

> **Thanks for the updated SPA.** One quick question, if we are part of the shareholders, is it legally viable that we are guaranteed by [AMP]. If yes, we are OK for the guaranteed [*sic*] by [AMP] instead of [Goh] personally.
>
> **As for the other terms [clause 4(iii)], the management contract is of course separate from the shareholder's trade sale. And it should be applied to all shareholders equally. Therefore there is no need to put it in this SPA. We understand and fully support it but [no] need to put it in this SPA.**
>
> [P]lease find the [document] without old term [clause 4(iii)]. Once you are OK with it, Florence will sign and mail it to you.
>
> [emphasis added in bold]

Clearly, Andy was referring to a guarantee (adopting the terminology used in the email) *within* the SPA, as the email was sent in relation to negotiations

19 16/10/18 NE 54.

20 Statement of Claim, para 7.

21 Andy's AEIC, p 144.

pertaining to the SPA terms. Equally significant is how Andy deliberately distinguished the "other terms" of a management contract as being outside of the SPA with there being no need to put these terms in the SPA, but saw no need to state the same for the Purported Indemnity being offered by AMP despite its importance to Andy and Florence.

28 Second, on 22 November 2014, Andy emailed Goh as follows:[22]

> **I read through the agreement once again and changed some typos.** Made some changes to **clarify** the relationship of guarantee on clause [4]ii and vii. Please understand that we are investing with some of our close friends … **We need to make the clauses transparent to them. That is our way of doing things … always be transparent and straightforward** …
>
> …
>
> … The capital and an annualized IRR of 15% are guaranteed by [AMP] and [Goh] within 24 months after the share transfer completed, with the exception of an IPO event, in which the value of the shares will be determined by the market circumstances.
>
> Attached please **the agreement latest version**. Please make sure we are all on the same page [*sic*]…
>
> [emphasis added in bold]

Andy's email made it clear that any sort of assurances about a guarantee (or purported indemnity) being offered were in the context of clarifying the interpretation of the clauses within the SPA, and not as a standalone guarantee (or indemnity) being offered by AMP. Pertinently, Andy took care to ensure that such a clarification of the terms was reflected *within* the SPA to make sure that all negotiating parties were *ad idem*.

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22 Andy's AEIC, p 152.

29 Third, Andy emailed Goh and Lee on 22 November 2014 to propose some changes *to the draft SPA*. Andy made an amendment *to the draft SPA* to the effect that Goh (in addition to AMP) would guarantee the Sale Price and IRR.[23] Goh then replied to Andy on 24 November 2014 as follows:[24]

> Hi [A]ndy,
>
> [Lee] noticed that the **guaranteed** [*sic*] for the capital is upgraded to both by "[AMP and Goh]" **in the final [document]**.
>
> [I] will like to explain that it is not possible for me to guarantee anything beyond my contributions and my commitments in any transaction.
>
> … [W]e use [AMP] to guarantee your share capital and IRR for 2 years is because we did not give you sufficient time [and] material for [d]ue [d]iligence …
>
> …
>
> … [Lee] **will prepare the final [document] for everyone to sign** …
>
> [emphasis added in bold]

30 It is clear from the parties' correspondence that any indemnity or guarantee to be given was reflected in the document that was to be signed (*ie*, the SPA), and that both parties had negotiated the indemnity or guarantee within the SPA. Goh's personal liability as a guarantor was added by Andy *in the draft SPA* and subsequently removed *from the draft SPA* when Goh objected. Following this email, Lee sent the revised SPA to Andy, who replied by email on 25 November 2014 (see [27] above).

31 Finally, on 7 December 2014, after the SPA was signed, Florence emailed Goh stating the following:[25]

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23 Andy's AEIC, para 51.

24 Andy's AEIC, pp 145–147.

> … One of our close friends want [*sic*] us to confirm that in the event there is no IPO or trade sale within 24 months, the guarantee from [AMP] includes the capital and 15% IRR, [w]hich we believe the answer is YES. This is on the term 4/vii …

In that email, Florence proceeded to replicate *exactly* the terms of clause 4(vii) of the SPA. Goh replied to state "Yes. [G]uarantee is as stated [and] confirmed". On the stand, Florence admitted that what she had wanted Goh to confirm was worded exactly the same as clause 4(vii) of the SPA.[26] In my view, Florence was not making reference to an independent agreement, but one fully encapsulated within the SPA.

32 Andy testified that he had to be satisfied that either Goh or AMP would be liable for ensuring the value of LSI's investment before LSI would sign the SPA, and that without this assurance he would not have asked Florence to sign the SPA.[27] No doubt, an assurance of the value of their investment was important to them. This also demonstrated that given such an important term, Andy and Florence would not have been content for any indemnity or guarantee agreement to be merely *evidenced* by various correspondence and the conduct of the negotiating individuals (as they claimed) without a concrete and final piece of agreement embodying all the terms to that effect. Indeed, it was apparent to me that the entire course of negotiations between Andy and Florence on one side and Goh and Lee on the other was an attempt to ensure that the significant terms of any indemnity or guarantee were embodied within the SPA. Andy's testimony bore this out. Andy agreed that even when negotiating the indemnity or guarantee with Lee (see [27] above), he was looking at the SPA.[28] In the

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25 Florence's AEIC, pp 78–79.

26 Florence's AEIC, p 77; 17/10/18 NE 4–5.

27 16/10/18 NE 110–111.

28 16/10/18 NE 110–111.

circumstances, it is plain that the intent was for any agreement (be it an indemnity or a guarantee) to exist *within*, and as part of the terms of, the SPA.

Timing of formation of the Purported Indemnity agreement

33 I turn to the timing of the formation of the Purported Indemnity agreement. From LSI's own case and evidence, it is unclear when a separate Purported Indemnity agreement was formed, which strongly suggests that there was no separate and independent agreement that existed outside the SPA.

34 LSI's Statement of Claim and Florence's AEIC were nebulous, merely stating that an indemnity agreement arose "on or about/around 25 November 2014".[29] It appears that Florence and Andy's ability to somehow point to an exact time when the indemnity was formed *only arose when they were on the stand*, and even then their testimonies in this regard were inconsistent.

35 When questioned in court on the moment the agreement arose, Andy pointed to his query to Lee on 25 November 2014 on whether AMP would guarantee the Sale Price and IRR (see [27] above). Andy stated that it was at the point where Lee replied to his email (also on 25 November 2014), assuring him *prior* to the signing of the SPA, as follows:

> To answer your question, in Singapore company law, the company is able to guarantee the value of a contract that is approved by its Board of Directors.
>
> **The Board has approved this SPA**.
>
> The shareholders of [AMP] … are not direct guarantee [*sic*] but indirect guarantee [*sic*] by each commitment [and] contribution to the viability [and] sustainability of [AMP's] continuing business.
>
> …

[29] Statement of Claim, para 7; Florence's AEIC, para 9.

> [AMP] is obligated to service the guarantees. The value of the guarantee will be zero if [AMP] is insolvent and liquidated.
>
> [emphasis added in bold]

Andy stated that this was the "handshake" moment when the contract arose.[30] Florence's evidence on the stand was also that the indemnity agreement was concluded *before the SPA was signed*.[31] Yet at the same time, Andy affirmed in court that the indemnity agreement came into existence *when Goh signed the SPA*,[32] which contradicted his explanation that the indemnity agreement was concluded when Lee informed him, prior to the SPA being signed, that AMP could guarantee the Sale Price and IRR.

36 Likewise, Mr Singh SC submitted in LSI's closing submissions that LSI *accepted AMP's offer of the indemnity when Florence signed the SPA* on 25 November 2014.[33] In other words, the indemnity agreement was concluded at that point in time. This was at odds with Florence and Andy's evidence that the indemnity agreement arose *before* Florence signed the SPA.

37 Hence, the fact that LSI could not even maintain a coherent story about when the independent agreement arose suggests that there was no such independent agreement. Mr Singh SC's suggestion that the deal was closed when Florence accepted (on LSI's behalf) the indemnity by signing the SPA was an attempt to comport Andy's and Florence's oral testimonies with the vague terms of their pleaded claim and AEICs, to show an exact moment when the indemnity agreement was formed.

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30 Andy's AEIC, p 143; 16/10/18 NE 54 –56.

31 17/10/18 NE 9.

32 16/10/18 NE 53.

33 PCS, para 12(b)(iv).

38 Finally, regardless of the version of LSI's case on when the Purported Indemnity agreement was concluded (namely whether just prior to signing the SPA or when Florence signed the SPA), it was also plain to me that the email exchange on 25 November 2014 regarding the purported indemnity agreement (at [27] above) was merely aimed at solidifying an agreement *in the SPA*. As Andy indicated to Lee, "please find the [document] without old term iii. Once you are OK with it, Florence will sign and mail it to you". Andy was clearly referring to the Purported Indemnity in the context of the negotiated document (*ie*, the SPA to be signed) and it was only when such a term had been clarified within the draft SPA that he would advise Florence to sign it. Hence, when the SPA was eventually signed with LSI as a party, it was apparent that any "indemnity" was only extant within the SPA.

Whether AMP had agreed to be bound by a separate and independent Purported Indemnity agreement

39 I proceed to deal with LSI's assertion that AMP had agreed to be bound by a separate and independent Purported Indemnity agreement. I deal first with the AMP Directors' Resolution dated 25 November 2014 ("the Directors' Resolution"). LSI relied on this to show that it had entered into an indemnity agreement with AMP as Goh had signed the Directors' Resolution on AMP's behalf and AMP's then directors were aware of the agreement and approved of it.[34] The Directors' Resolution (which was signed by Goh and his family members who were directors of AMP then, but not by one Yao Zhilian, another AMP director) stated as follows:[35]

> RESOLVED that the guarantee for the share capital value and annualized internal rate of return for Liberty Sky Investments Limited as stated in Share Sale & Purchase Agreement (SPA)

34 PCS, at para 27(a).

35 Andy's AEIC, p 157.

> dated 25 November 2014 between Aesthetic Medical Partners Pte Ltd and Liberty Sky Investments Limited, attached as Annex A, be accepted.

40 LSI also pointed to Lee's email to Andy on 25 November 2014 just prior to the signing of the SPA (see [35] above) in reply to Andy's email query on whether it was legally viable for Andy and Florence to be guaranteed by AMP. LSI asserted that AMP intended to be bound by the Purported Indemnity, as Lee had represented to Andy in that email that AMP could provide the "indemnity" and that AMP's directors had approved of the "indemnity".[36] I disagree. I find that LSI had failed to show that AMP had approved of, and entered into, a separate indemnity agreement, for the reasons below.

41 First, Lee had merely represented to Andy (whether accurately or not) in the 25 November 2014 email that AMP's board of directors had approved the *SPA*. It did not mention a directors' resolution. It also did not mention any "indemnity" much less an indemnity or guarantee that was to exist outside and independently of the SPA. Second, even if Lee represented (whether accurately or not) that AMP was "obligated to service the guarantees", this did not support LSI's case that there was a guarantee or indemnity that existed separately of the SPA. Thus far, all the evidence and my findings show otherwise.

42 Third, the Directors' Resolution was AMP's internal document which Andy had not seen before the SPA was signed.[37] It is unclear from the evidence in this suit whether the Directors' Resolution was signed before or after the SPA (since both documents bore the same date). Either way, the Directors' Resolution did not support LSI's case that a separate and independent indemnity or guarantee agreement had been concluded. On the contrary, the Directors'

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36 PCS, at para 23.

37 16/10/18 NE 49.

Resolution referred to a *guarantee* "*as stated in the SPA*" and did not mention any guarantee or indemnity which was separate from an SPA.

43 Mr Singh SC then suggested that AMP had not led any evidence to refute LSI's assertion on the Directors' Resolution.[38] However, the burden lies with LSI to prove its case. Even based on Florence's and Andy's evidence and the contemporaneous documents, I am not satisfied that they point towards any independent and separate indemnity or guarantee agreement.

44 I turn to deal with two other assertions by LSI to support its case that AMP had agreed to be bound by the Purported Indemnity. First, LSI asserted that AMP admitted that it was bound by the Purported Indemnity by its pleadings in Suit 111 of 2016 ("Suit 111"), which it commenced against Goh and other defendants.[39] The version of AMP's pleadings reproduced in LSI's Statement of Claim is as follows:

> … "*[*Goh*], Michelle Goh and/or … **directly or indirectly procured** and/or caused [the 2nd Defendant] to be bound by **the [Indemnity]** for the share capital value and the annualized internal rate of return stated in the [SPA]"* by, among other things, passing a director's resolution accepting the 2nd Defendant's obligation under the Indemnity.
>
> [emphasis by LSI in italics in original, emphasis added in bolded italics]

I find that AMP did not, by its pleadings in Suit 111, admit that it was bound by the Purported Indemnity. It should also be noted that LSI had not cited AMP's pleadings in Suit 111 accurately – AMP's Statement of Claim stated that Goh was amongst those who had "purported to" procure and/or cause AMP to be bound by the "guarantee" (and not an indemnity as LSI claims in its pleadings

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38 PCS, para 25.

39 Statement of Claim, para 9(b).

in the present proceedings).[40] Nelson, who was a director of AMP by the time Suit 111 was filed, explained that after AMP discovered Goh's "wrongdoings" it decided to protect itself against all contingencies and pursue Goh for all possible wrongdoings. This was because AMP, which had new directors by then, did not know if a valid guarantee had indeed been given by the previous AMP board to LSI.[41] Nelson further explained that *if* such a guarantee did exist and was legally enforceable, AMP wanted to ensure that it would be able to recover from Goh any losses that it had to pay on the guarantee to a third party.[42]

45 Second, LSI relied on a preliminary report prepared by Ferrier Hodgson on AMP's instructions which confirmed that AMP was guaranteeing LSI's capital for 24 months and committing to guarantee an annual amount defined as principal and annualised IRR.[43] Again, I find that this report does not assist LSI's case. Ferrier Hodgson's report clearly mentions that the SPA "purports" to place obligations on AMP (via the clauses in the SPA). Andy conceded that the report, as written, did not admit to the validity of the Purported Indemnity.[44]

46 Hence, I find there was eventually no separate and independent indemnity or guarantee agreement concluded between LSI and AMP. This is the case even if Lee and Goh had made certain representations (assuming they even had authority to bind AMP) that AMP would agree to provide an indemnity or a guarantee, and regardless of whether Andy and Florence had intended an indemnity or a guarantee agreement to be concluded with AMP. The SPA,

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40 Florence's AEIC, p 141 (referring to AMP's Statement of Claim in Suit 111 at para 67).

41 17/10/18 NE 71–72.

42 17/10/18 NE 73–74.

43 Statement of Claim, para 9(c).

44 5AB 2136 (Ferrier Hodgson's Report, para 138); 16/10/18 NE 34.

which was between LSI and Goh, contained the terms of the Purported Indemnity and was the *only* agreement ultimately concluded. Thus LSI could not rely on the Purported Indemnity vis-à-vis AMP as AMP was not a party to the SPA and in any event LSI had brought the SPA to an end by its act of rescission. Mr Singh SC agreed that LSI would not be able to rely on the Purported Indemnity (whether it was a guarantee or an indemnity) if it were part of the SPA and the SPA had been rescinded.[45]

47 The SPA was a brief document of essentially three pages. Hence, when LSI executed the SPA, Florence and Andy would have noticed that Goh was signing "as seller" (in his personal capacity). Unlike the earlier draft term sheets in which Goh was stated (in the signature column) "as seller and on behalf of [AMP]", the draft SPAs, of which there were a few versions before the final version being executed, all showed Goh (in the signature column) "as seller". It is also not LSI's case that Goh was representing AMP to execute *the SPA*. LSI claimed that Goh or Lee was representing (or had authority to represent) AMP to conclude a separate contract of indemnity or guarantee (of which I had found was not the case).

Conclusion on whether Purported Indemnity agreement was separate

48 In conclusion, I find that there was no separate and independent indemnity or guarantee agreement, and that any indemnity or guarantee was instead encapsulated in the SPA executed on 25 November 2014. Despite the importance of this indemnity or guarantee to Andy and Florence and ample documentation on this matter, they could not state with certainty what the clauses of this separate agreement were until Andy was cross-examined in court, or when this separate agreement was concluded. It is clear from the

[45] 17/10/19 NE 63–64; Minute Sheet dated 19 October 2018; List of issues, item 6.

correspondence and conduct of the individuals involved that they were negotiating the terms of the SPA throughout. It is also clear that the terms of the indemnity or guarantee (which were to protect LSI's investment money) were negotiated by Andy as part and parcel of the terms of the SPA, and there is no evidence that the negotiations were for a separate and independent indemnity or guarantee agreement. Pertinently, all the terms of the Purported Indemnity (which Andy claimed to be as reflected in clauses 4(ii), (iv), (v), (vii) and (viii) of the SPA) are the exact same terms found in clause 4 of the SPA.

Nature of the Purported Indemnity clauses

49 I have found that the terms of the Purported Indemnity are part and parcel of the SPA. This being the case, LSI cannot rely on the Purported Indemnity against AMP. Not only was AMP not a party to the SPA, LSI has also terminated the SPA by rescinding it.[46] Be that as it may, for completeness, I will consider the nature of the Purported Indemnity (which, to avoid doubt, means clauses 4(ii), (iv), (v), (vii) and (viii) of the SPA).

50 LSI asserted that the Purported Indemnity was in fact a contract of indemnity, whereas AMP's case is that it was a guarantee. The distinction between a guarantee and an indemnity is not disputed.[47] As I explained above (at [8]), the key difference is that a guarantor's liability is collateral and dependent upon the liability and default of the principal debtor, whereas an indemnitor's liability is original and independent. As with all contracts, it is a matter of construction in each case whether a guarantee or indemnity has been given (*PT Jaya Sumpiles Indonesia v Kristle Trading Ltd* [2009] 3 SLR(R) 689 at [50] and [52]).

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46 17/10/18 NE 63; List of Issues, item 6; Minute Sheet dated 19 October 2018.

47 DCS, para 78; POS, para 40.

Construction of the Purported Indemnity terms

51 I first consider the relevant terms of the SPA. The SPA was, understandably, not well-drafted as it was prepared by lay persons within a short period of time. The operative part of the SPA (which deals with the event of the non-occurrence of a trade sale or an IPO) is clause 4(vii). In my view, this clause, when taken with the other clauses in the SPA, is to be read as imposing the following rights and obligations:

(a) LSI has the option to sell the shares back to Goh, with Goh paying for the shares at the Sale Price plus IRR ("the First Scenario").

(b) If LSI exercises the option to sell the shares back to Goh and Goh does not pay for them (either fully or in part), AMP is obliged to make up the difference, since "[t]he principle [*sic*] and the IRR return are guaranteed by [AMP]". Likewise, if Goh refuses to accept and pay for the shares, AMP is obliged to pay LSI for them ("the Second Scenario").

(c) LSI has the option to sell the shares to AMP, in which case AMP has to pay the Sale Price plus IRR ("the Third Scenario").

In court, Andy agreed to the above construction of clause 4(vii).[48]

52 The First Scenario is not material here. If Goh accepts the shares and pays for them, that is the end of the matter. In the Second Scenario, LSI would be undertaking a secondary obligation as guarantor, when Goh who is principally liable to repurchase the shares at the Sale Price and IRR fails to do so or to pay for them (whether in full or in part). Andy agreed that this would

[48] 16/10/18 NE 104–106.

be the effect if LSI first made a claim against Goh.[49] He also agreed that regardless of whomever LSI elected to sell the shares to, LSI could not make overlapping claims against both Goh and AMP. Nevertheless, it is undisputed that AMP was not a party to the SPA and, even if it were, LSI had acted to rescind the SPA and the SPA had been terminated, thus any guarantee within it would fall away (see also [46]–[48] above). I would also add that even if a guarantee with AMP somehow existed outside of the SPA, that the obligation of Goh (as the purported principal) within the SPA had come to an end meant that any secondary obligation undertaken by AMP would similarly fall away. A guarantor is generally liable to the same extent that the principal is liable to the creditor. There is usually no liability on the part of the guarantor if the underlying obligation is void, unenforceable, or the underlying obligation ceases to exist: see *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [40]. Hence, LSI cannot avail itself of the Second Scenario vis-à-vis AMP.

53 LSI sought to rely principally on the Third Scenario, which it claimed reflected the indemnity provided for by AMP to it.[50] This scenario would, at first blush, make AMP's liability original and independent and hence support the characterisation of the Purported Indemnity as an indemnity. Even so, the fact remains that AMP was never a party to the SPA. Even if it had been, any indemnity within the SPA would have fallen away as LSI had acted to rescind the SPA (see also [46]–[48] above). Likewise, LSI cannot avail itself of the Third Scenario.

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49 16/10/18 NE 106.

50 PCS, at para 14(k).

Parties' conduct and contemporaneous evidence

54 I turn then to the contemporaneous evidence and parties' conduct, which suggests that the Purported Indemnity (vis-à-vis AMP) was treated as a guarantee. All the contemporaneous documents consistently referred to a "guarantee" and not an "indemnity". Andy acknowledged that throughout the negotiations, the word used was "guarantee" and Florence admitted that there were no references to an "indemnity" at the material time.[51]

55 Mr Singh SC suggested that the negotiating individuals were laypersons who may not have appreciated the technical distinction between a "guarantee" and an "indemnity".[52] During the trial, Florence stated she had not known the difference between a "guarantee" and "indemnity".[53] I am prepared to accept that the technical connotations in the use of the words "guarantee" and "indemnity" might not have been apparent to the negotiating individuals at the material time. What was important was their relevant understanding of the term, objectively ascertained (see *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 06.041–06.042). It was not inconceivable that Florence and Andy might have used the term "guarantee", when they meant to describe a principal liability undertaken by AMP. However, the evidence suggests that the negotiating individuals had treated the Purported Indemnity vis-à-vis AMP as a guarantee in the true sense.

56 On 2 December 2016, when no trade sale or IPO had taken place and the 24-month period mentioned in the SPA had passed, LSI wrote to AMP ("the AMP Demand Letter") stating, among other things:[54]

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51 16/10/18 NE 24; 17/10/18 NE 8.

52 POS, at para 39; PCS, at para 46.

53 17/10/18 NE 8.

> 2. The letter we sent today to [Goh] was copied to you to give you notice that, as provided for in Clause 4(vii) of the SPA, we have given formal notification to, and demanded that, [Goh] re-purchase the Shares from us at the Sale Price plus 15% annualized IRR within 21 days.
>
> 3. As we explain below, and as you are fully aware, [Goh's] obligation to re-purchase the Shares from us at the Sale Price plus 15% annualized IRR within 21 days was guaranteed by you (*i.e.* the Company).
>
> 4. In the circumstances, please take note that *in the event that [Goh] fails and/or refuses to satisfy our demand* by 23 December 2016 (being the end of the said 21-day period), *we will be making a claim against you under the guarantee* you have given us (the "***Guarantee***").
>
> …
>
> 17. As you know, under the Guarantee, you will be obliged to pay to our client the sum of **$19,073.162** *in the event that*:
>
> a) there is no trade sale or IPO of [AMP] at the end of 24 months after the date of the SPA (*i.e.* by 25 November 2016); and
>
> b) *[Goh] fails and/or refuses to re-purchase and/or make payment to us for the Shares* at the Sale Price plus 15% annualized IRR within 21 days after receiving notification from us of our intention to sell the Shares back to him.
>
> 18. We have today given notice to [Goh] of our demand that he re-purchases the Shares from us …
>
> 19. *In the event that [Goh] fails and/or refuses to satisfy our demand*, please take note that *we will be making a claim against you under the Guarantee*.
>
> [emphasis added in italics, all other emphases in original]

57 On the same day, and in the same vein, LSI wrote to Goh ("the Goh Demand Letter") stating:[55]

> … In the circumstances, and subject to what we have said … above, we hereby give you notification under Clause 4(vii) of the

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54 3AB1536–1539.

55 3AB 1542.

> SPA that we require you to re-purchase the Shares from us at the price stipulated at Clause 4(vii) of the SPA, *i.e.* **S$19,073,162,** within twenty-one (21) days, *i.e.* by no later than **close of business on 23 December 2016**.
>
> [emphasis in original]

58 The AMP Demand Letter referred to clause 4 of the SPA, and was replete with the word "guarantee" with no mention of an "indemnity". Florence conceded that the AMP Demand Letter was prepared by LSI's lawyers after she and Andy had related all the facts and furnished all the relevant documents to them.[56] I agree with AMP's counsel (Mr Sreenivasan SC) that LSI's lawyers, having been appraised all of the facts and given the documents, would have reflected in the AMP Demand Letter (which they drafted and no doubt based on their advice) an "indemnity" rather than a "guarantee" which LSI could call upon vis-à-vis AMP, if the Purported Indemnity was alleged to be and treated as an indemnity by LSI.[57] The inference was that even until 2 December 2016, well after the circumstances giving rise to the Purported Indemnity had occurred, Florence and Andy continued to apprehend the Purported Indemnity to be a guarantee. This was apparent not merely from the use of the word "guarantee" throughout, but from LSI's description and treatment of the *mechanism* for its claim against AMP and Goh. The tenor of the AMP and Goh Demand Letters (which LSI's lawyers drafted) showed that LSI treated Goh as the principal in the context of a guarantee and that it was only in the event that Goh did not honour the terms of clause 4(vii) to buy the shares that LSI would make a claim against AMP, *ie*, that LSI had to call on Goh before it could turn to AMP. On the stand, Andy claimed that LSI was acting out of kindness by giving Goh an opportunity to repurchase the shares (as per clause 4(vii)) and only if he failed to do so would LSI look to AMP. I disbelieve Andy's claim as

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56 17/10/18 NE 11.

57 DCS, paras 73–74.

he subsequently admitted that he had in any event a right under clause 4(vii) to make a claim against Goh.[58]

59 It seems to me that LSI was consistent throughout in treating clause 4(vii) as a guarantee vis-à-vis AMP. On 30 December 2016, LSI's lawyers wrote to AMP again, this time informing AMP that Goh had, more than 21 days after the Goh Demand Letter, failed to repurchase the shares and in those circumstances, LSI demanded payment from AMP for that sum ("30 December 2016 letter").[59] Then, on 6 January 2017, AMP's lawyers (in reply to the 30 December 2016 letter) informed LSI's lawyers that any purported "guarantee" must be reduced to writing and asked for a copy of the purported "guarantee" ("6 January 2017 letter").[60] LSI's lawyers' reply letter of 12 January 2017 challenged the legal requirement of reducing any guarantee to writing, but did not correct or counter the term "guarantee" (which use of the word was in any event based on LSI's letters) mentioned in the 6 January 2017 letter.[61]

60 It seems to me that the alleged independent indemnity agreement was an afterthought. I infer that when LSI's lawyers received the 6 January 2017 letter, in which they were informed that a guarantee had to be reduced in writing and were requested to produce a copy of that guarantee, LSI changed its position to assert that there was a separate and independent agreement of indemnity or guarantee when it realised by this time that it had acted to rescind the SPA and there were no other written agreements.

61 Finally, Andy's and Florence's testimonies showed that they did not

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58 16/10/18 NE 39, 41.

59 5AB 2400.

60 5AB 2450.

61 5AB 2452.

believe the Purported Indemnity to be a true indemnity at the material time. Florence claimed it was only when she started preparing for the trial in *mid-2018* that she understood the Purported Indemnity was really an indemnity.[62] This was more than three years after she had signed the SPA. But LSI's Statement of Claim, filed on Florence's instructions,[63] was filed in *May 2017*. By this time, LSI had asserted an "indemnity" in the Statement of Claim. As for Andy, he stated that he did not know the difference between an indemnity and a guarantee, not even when Suit 1311 was filed in December 2015, and realised the difference when his lawyers explained it to him *before* the present action was filed.[64] I disbelieve Andy, and even if his evidence were to be believed, it was strange that Andy's and Florence's AEICs prepared in Suit 1311 (which were prepared *after* the present proceedings were commenced) refer throughout to a "guarantee" without them correcting their purportedly mistaken impression. Andy's and Florence's inconsistent explanations, coupled with the documentary evidence, show that they neither believed nor intended at the material time to create an indemnity.

Conclusion on the nature of the agreement

62 In conclusion, I find that clause 4(vii) was intended by the parties to the SPA to create a guarantee. Even if clause 4(vii) was intended to partially create an indemnity (in the Third Scenario at [51(c)] above), I have found there to be no separate and independent indemnity or guarantee agreement outside of the SPA. Hence, whether the Purported Indemnity was an indemnity or guarantee and whether or not Goh and/or Lee had authority to represent AMP, AMP was also not a party to the SPA and could not be held liable on the Purported

62 17/10/18 NE 12–13.

63 17/10/18 NE 16.

64 16/10/18 NE 7, 32.

Indemnity encapsulated within the SPA. In any event, as LSI has acted to rescind the SPA, it can no longer rely on the Purported Indemnity which was within the SPA.

Miscellaneous issues

63 I have already found there to be no independent contract of indemnity or guarantee outside the SPA. Hence, I need not consider whether the formal requirements for a contract of guarantee (if one existed independent of the SPA) have been complied with pursuant to s 6(*b*) of the CLA. In any event, although LSI relied on *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [27], where the Court of Appeal held that s 6(*d*) of the CLA (in the context of an option to purchase a property) could be satisfied by the joinder of several documents, I find that LSI could not adequately demonstrate *which* of the documents it was relying on. If at all, the evidence points towards the Purported Indemnity terms being encapsulated in the SPA.

64 As to LSI's assertion that AMP is precluded from relying on s 6(*b*) of the CLA by virtue of part-performance or estoppel (assuming there was a separate contract of guarantee), I will deal with it briefly for completeness although the point is moot. In relation to part performance, LSI claimed that AMP had induced it to enter the SPA without conducting due diligence of AMP by representing that the guarantee would be legally enforceable. LSI then relied detrimentally on this representation by omitting to conduct due diligence and making payment for the AMP shares.[65] Additionally, AMP was estopped from relying on s 6(*b*) of the CLA as LSI had relied on the representation to its detriment and entered into the SPA without conducting due diligence.[66]

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65 Reply to the Defence, para 5(c)(i).

66 Reply to the Defence, para 5(c)(ii).

65 LSI relied on *Hu Lee Impex Pte Ltd v Lim Aik Seng (trading as Tong Seng Vegetable Trading)* [2013] 4 SLR 176 ("*Hu Lee Impex*") as authority that the doctrine of part performance would be an equitable defence against any allegation of non-compliance with formality requirements.[67] However, in *Hu Lee Impex* the court at [33] stated that "the acts relied upon as evidence of part performance of a purported oral contract must unequivocally and of themselves point to the contract as alleged". In the present case, there was no part performance pointing unequivocally toward an independent contractual guarantee. Quite the contrary, Andy had stated that throughout the correspondence with Lee he was looking at the SPA.

66 LSI's reliance on estoppel would fail for similar reasons. AMP referred to *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA and another* [2003] 2 AC 541. That case concerned the plaintiff ("P") supplying labour to the first defendant ("D1") who had contracted to build a factory for the second defendant ("D2"). D1 fell into arrears of payment to P, and D2 and P allegedly orally agreed that in consideration of P not withdrawing its labour from the site, D2 would provide a guarantee to meet D1's payment obligations to P if D1 failed to do so. In a striking out application, D2 relied on s 4 of the Statute of Frauds 1677 (c 3) (UK), which required any such agreement to be in writing. P alleged that D2 was estopped from relying on the UK Statute of Frauds as D2's promise had encouraged P to remain on site to its detriment. Lord Bingham outlined three requirements (at [8]) for estoppel to prevent a party from disputing the assumed effect of a guarantee, namely: (a) there had to be an assumption made by the plaintiff; (b) the defendant had to induce or encourage the making of that assumption; and (c) in all the circumstances, it was unconscionable for the defendant to rely on the requirement of writing. It

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67 PCS, para 67 and fn 22.

was found (at [9]) that the mere fact of D2 making an oral guarantee was insufficient inducement for the purposes of founding the estoppel. There was no representation by D2 to P that it would honour the guarantee *despite* the absence of writing, or that it would confirm the agreement in writing.

67 Although LSI claimed that it had relied on AMP's representations that the guarantee would be enforceable, I could not discern any representation that such a guarantee could be enforceable even if it were not confirmed in writing. Indeed, my finding was that any envisaged guarantees during the negotiations were those to be concluded in the SPA. Even accepting that LSI had relied on the assumption of an enforceable guarantee, it was questionable whether it was *AMP* who had induced LSI's representatives into such an independent guarantee (see also [41]–[42] above). After all, it was *Goh's* shares that were being sold to LSI and for which *Goh* derived the benefit of the share purchase. Additionally, in *BOM v BOK and another appeal* [2018] SGCA 83 at [142], the Court of Appeal has clarified (in a case involving the setting aside of an agreement) that the *narrow* doctrine of unconscionability applies in Singapore. To succeed, LSI had to show that it was suffering from some form of infirmity that AMP exploited in procuring the transaction. This was not apparent from the facts even putting aside that AMP was not a party to the SPA. To the contrary, the transaction was negotiated between the individuals in a commercial setting attempting to ensure their interests were protected.

Conclusion

68 In conclusion, I summarise my findings above.

(a) The terms of the Purported Indemnity are encapsulated in clauses 4(ii), (iv), (v), (vii) and (viii) of the SPA and there is no Additional Term as alleged by LSI.

(b) The Purported Indemnity is, on the proper analysis, a guarantee. Even if clause 4(vii) provided partly for an indemnity in that LSI could look directly to AMP to purchase the shares and pay LSI the Sale Price plus IRR, any such agreement was part and parcel of the SPA. There is no separate contract of indemnity or guarantee as LSI claimed.

(c) Even if the SPA (which includes clause 4) purports to provide a right to LSI to claim against AMP for the Sale Price plus IRR, LSI cannot rely on the SPA to enforce such a right against AMP because AMP is not a party to the SPA.

(d) Even if AMP were a party to the SPA, LSI would in any event not be able to claim on the Purported Indemnity because the SPA (which the Purported Indemnity is a part of) has come to an end by LSI's act of rescission.

69 At the end of the day, even if Andy and Florence may have intended to make AMP a guarantor or indemnitor for the investment money when LSI bought the shares from Goh, the fact remains that when LSI signed the SPA which contained the clauses pertaining to AMP's obligations, it knew that the counterparty was Goh. LSI has also acted to rescind the SPA, terminating any obligations within it, including any indemnity or guarantee. Having subsequently realised this, LSI has now mounted a case on the basis that there was a separate agreement entered into between it and AMP, which was outside the SPA. I have found that LSI has not been able to prove this.

70 Accordingly, I dismiss LSI's claim with costs.

Audrey Lim
Judicial Commissioner

Harpreet Singh Nehal SC, Keith Han, and Tan Tian Yi
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