IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 7

Civil Appeal No 55 of 2019

Between

Liberty Sky Investments Limited

… *Appellant*

And

Aesthetic Medical Partners Pte Ltd

… *Respondent*

In the matter of Suit No 457 of 2017

Between

Liberty Sky Investments Limited

… *Plaintiff*

And

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

… *Defendants*

Civil Appeal No 56 of 2019 and Civil Appeal Summons No 100 of 2019

Between

Liberty Sky Investments Limited

… *Applicant / Appellant*

And

Dr Goh Seng Heng

… *Respondent*

Civil Appeal No 57 of 2019

Between

Dr Goh Seng Heng

… *Appellant*

And

Liberty Sky Investments Limited

… *Respondent*

In the matter of Suit No 1311 of 2015

Between

Liberty Sky Investments Limited

… *Plaintiff*

And

(1) Dr Goh Seng Heng
(2) Goh Ming Li Michelle @ Wu Mingli

… *Defendants*

ORAL JUDGMENT

[Contract] — [Misrepresentation] — [Fraudulent misrepresentation]
[Contract] — [Formation]
[Equity] — [Remedies] — [Rescission] — [Bar to rescission]
[Civil Procedure] — [Pleadings] — [Sufficiency of pleadings]
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Liberty Sky Investments Ltd
v
Aesthetic Medical Partners Pte Ltd and other appeals and another matter

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Court of Appeal — Civil Appeals Nos 55, 56 and 57 of 2019 and Civil Appeal Summons No 100 of 2019
Andrew Phang Boon Leong JA, Judith Prakash JA and Belinda Ang Saw Ean J
22 January 2020

10 February 2020 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the oral judgment of the court):

Introduction

1 Having carefully considered the parties' written as well as oral submissions, we dismiss Civil Appeals Nos 55, 56 and 57 of 2019 and Civil Appeal Summons No 100 of 2019 ("SUM 100").

2 By way of a brief factual background, Dr Goh Seng Heng ("Goh") is a medical doctor who founded Aesthetic Medical Partners Pte Ltd ("AMP") in 2008. Liberty Sky Investments Limited ("LSI") is an investment vehicle incorporated in the Seychelles. Gong Ruilin ("Gong") is LSI's sole director and shareholder. Mr Lin Lijun ("Lin") is Gong's husband and LSI's representative.

3 On 25 November 2014, LSI executed a sale and purchase agreement with Goh ("the SPA") to purchase 32,049 shares in AMP ("the AMP shares") from Goh for $14,422,050 ("the Purchase Price"). As the deal between LSI and Goh had to be concluded quickly, Gong and Lin did not have time to perform due diligence on AMP. Hence, they requested to be given a guarantee on their investment capital, as well as an internal rate of return ("IRR") of 15% per annum ("the Guarantee") to protect their investment. Goh informed them that AMP would provide the Guarantee.

4 In this appeal, the relevant fraudulent misrepresentations that Goh allegedly made to Gong took place over dinner on 23 October 2014, as well as at a meeting on 24 October 2014 ("the 24 October 2014 Meeting"), and are as follows:

> (a) First, there would be a trade sale of all AMP shares to an important person in Singapore (*ie*, one Peter Lim, a billionaire who owned a medical group or hospital chain). The trade sale had a 99% chance of being concluded, it was a likely deal, it was imminent, and it would take place within one month or very soon ("the Trade Sale Representations"); and
>
> (b) Second, if the trade sale did not materialise, Goh intended to list AMP through an initial public offering ("IPO") on the Singapore Exchange that was targeted for completion around March to June 2015 ("the IPO Representations").

5 Shortly after the SPA was executed, LSI sold 30,549 AMP shares to two Chinese investors ("the Chinese Investors") at the same price that LSI paid Goh. LSI held the beneficial interest of only 1,500 AMP shares. Neither the trade sale

nor the IPO occurred. Gong and Lin then brought claims against Goh in Suit No 1311 of 2015 ("Suit 1311") for fraudulent misrepresentations and against Goh and AMP in Suit No 457 of 2017 ("Suit 457") for the Purchase Price plus 15% IRR under the Guarantee.

6 In Suit 1311, the trial judge ("the Judge") held that Goh had fraudulently misrepresented to Lin and Gong that (a) the trade sale was imminent and (b) he had reasonable grounds to believe that the IPO preparations were in a sufficiently advanced stage to enable an IPO to be achieved by June 2015. The Trade Sale and IPO Representations induced Lin and Gong to procure LSI to enter into the SPA to make a quick and large profit. LSI was not granted rescission as it failed to show that substantial *restitutio in integrum* was possible, but was awarded damages for the 1,500 AMP shares that it beneficially owned. In Suit 457, the Judge held that the Guarantee was encapsulated and reflected in cll 4(ii), (iv), (v), (vii) and (viii) of the SPA. LSI could not rely on the Guarantee as AMP was not a party to the SPA. There was no separate agreement between LSI and AMP and, in any event, LSI had rescinded the SPA.

CA 57 of 2019 – Misrepresentation

7 Civil Appeal No 57 of 2019 ("CA 57") is Goh's appeal against the Judge's finding on liability for misrepresentation. In our view, the Judge rightly concluded, based on a comprehensive evaluation of the objective evidence, that the Trade Sale and IPO Representations were false, and Goh had made them fraudulently. On appeal, Goh submits, *inter alia*, that LSI could not rely on the Trade Sale Representations as he only mentioned "Peter Lim" to Gong and Lin after the SPA was executed. Goh refers, *inter alia*, to (a) an email dated 10 November 2014 where Peter Lim was referred to generically as the "buyer", and (b) a text from Goh to Gong on 13 January 2015, which Goh claimed was

the first time he informed Gong that Peter Lim was the prospective buyer ("the Text"). Goh further submits that if he had already informed Gong at the 24 October 2014 Meeting that Peter Lim was the prospective buyer, there would be no need for such secrecy in the 10 November 2014 email. There would also be no need for him to disclose Peter Lim's details in the Text.

8 We find this to be an unpersuasive as well as literalist argument that, in any event, is contrary to the documentary evidence. First, even if Peter Lim's name was not repeated in correspondence subsequent to the 24 October 2014 Meeting, this does not imply that it was not uttered then. Second, shortly after the 24 October 2014 Meeting, Gong informed Lin on WeChat that Peter Lim was the prospective buyer in the trade sale. Gong could not have done so had she not heard Peter Lim's name from Goh. Third, Goh admitted in his Further and Better Particulars dated 29 April 2016 ("F&BP") that when he met Gong at the 24 October 2014 Meeting, he had informed her that one Nelson Loh, a director of AMP, "was in the process of negotiating a trade sale of AMP to Thomson Medical and/or Peter Lim". The Judge rightly held that Goh was represented by counsel throughout and was unlikely to have made any mistakes as to the contents of his F&BP. Finally, even if Goh had not represented that the prospective buyer was Peter Lim, he nonetheless represented that a trade sale was imminent and this was sufficient to establish liability for fraudulent misrepresentation.

9 Goh further submits on appeal that Lin and Gong were not induced by the Trade Sale and IPO Representations as the Guarantee was the real reason they entered into the SPA. We cannot accept this submission. A representation will be actionable so long as it played a real and substantial part in inducing the representee to enter into the contract: see the decision of this court in *Panatron*

Pte Ltd v Lee Cheow Lee [2001] 2 SLR(R) 435 at [23]. The Judge rightly concluded that the Trade Sale and IPO Representations played a real and substantial part in inducing Gong and Lin to enter into the SPA, as they clearly wanted to make a quick and handsome profit from the occurrence of a liquidity event.

10 For these reasons, we dismiss CA 57 and affirm the Judge's findings on liability for misrepresentation.

CA 56 of 2019 – Remedies; SUM 100 – Leave to adduce further evidence

11 Civil Appeal No 56 of 2019 ("CA 56") is LSI's appeal against the Judge's finding that LSI is entitled only to damages for 1,500 AMP shares. LSI submits, in its Appellant's Case, that the burden falls on Goh to plead and prove the equitable bars to rescission, and it is entitled *qua* trustee, *vis-à-vis* the Chinese Investors, to rescind the SPA and recover damages in respect of all the 32,049 AMP shares ("the Trustee Argument"). However, during oral submissions, LSI (elaborating on what was in effect a *volte face* in so far as its Appellant's Case was concerned, the seed of which it had (surprisingly) planted in its skeletal submissions) argued that it is entitled to rescission in its personal capacity as there had never been any sale of the AMP shares under the investment agreements between it and the Chinese Investors ("the Investment Agreements"). In essence, LSI argued that as it was still in possession of all the 32,049 AMP shares, it could furnish *restitutio in integrum*, and was therefore entitled to rescind the SPA and recover damages in respect of these shares ("the New Argument"). During oral submissions, LSI asserted that the Trustee Argument would remain relevant only if this court finds that there was indeed a sale of the AMP shares to the Chinese Investors.

12 LSI has also filed SUM 100, which is its application for leave to adduce the affidavits of the Chinese Investors ("the Investors' Affidavits"). The Investors' Affidavits state that the Chinese Investors (a) have authorised LSI to commence Suit 1311 on their behalf; (b) were willing to transfer the AMP shares back to Goh; and (c) had not dealt with their beneficial interests in the shares. Given LSI's radical change in the direction of its arguments before this court during oral submissions (as set out in the preceding paragraph), it is not surprising that it did not now desire to focus on SUM 100, which is relevant only in relation to the Trustee Argument.

The Trustee Argument would have failed in any event

13 Returning to the substantive arguments proffered in CA 56, we pause to note, notwithstanding LSI's *concession* (as noted above) that the Trustee Argument was only a fall back, such an argument *would have* ***failed in any event***. This particular argument is a completely new one that cannot succeed. First, LSI did not plead in its statement of claim that it was suing in a representative capacity: see O 6 r 2(1)(*c*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Second, LSI did not apply for leave to introduce this completely new argument on appeal: see O 57 r 9A(4)(*b*) of the ROC. Third, there is no reason for this court to entertain LSI's new argument that it is entitled to the full measure of damages flowing from all the AMP shares as a trustee when this should have been made clear from the outset in Suit 1311. *In any event*, LSI's argument is wholly without merit. LSI did not enter into the SPA for the benefit of the Chinese Investors, the fraudulent misrepresentations were directed only at Gong and Lin, and the creation of a trust between LSI and the Chinese Investors (if any) would have arisen only after the tort had been

committed, since LSI and the Chinese Investors entered into the Investment Agreements *after* the SPA was concluded (see the discussion below at [27]).

The pleading issue

14 LSI had vigorously contended that since Goh did not plead any bars to rescission, the impossibility of *restitutio in integrum* was not an issue that LSI had to contend with at trial, and the Judge erred in refusing rescission on this basis. Goh, as the representor, has the legal burden of proving any bars to rescission: see the House of Lords decision of *Emile Erlanger and Others v The New Sombrero Phosphate Company and Others* (1878) 3 App Cas 1218 at 1283 and the English Court of Appeal decision of *Geoffrey Alan Salt v Stratstone Specialist Limited t/a Stratstone Cadillac Newcastle* [2015] EWCA Civ 745 at [25]. Generally, if a representor desires to contend that the representee is not entitled to the remedy of rescission, the representor should plead the impossibility of rescission and provide full particulars of why this is so: see *Bullen & Leake & Jacob's Singapore Precedent of Pleadings* (Jeffrey Pinsler gen ed) (Sweet & Maxwell, 2016) at para 25.72. This is, however, not a hard and fast rule. A balance has to be struck between, on the one hand, instilling procedural discipline in civil litigation and, on the other, permitting parties to present the substantive merits of their case notwithstanding a procedural irregularity: see the observation of this court in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [20]. In this instance, we must consider whether Goh could have, but failed, to plead the impossibility of rescission, and whether this resulted in LSI being taken by surprise.

15 Goh pointed out that para 74 of the Defence and Counterclaim (Amendment No 2) did contain a general averment that LSI was not entitled to rescission. More importantly, having sought rescission *and* having sold 30,549

of the 32,049 AMP shares to the Chinese Investors pursuant to the relevant Investment Agreements, it is difficult to believe that the equitable bar to rescission in the form of third party rights (in relation to the Chinese Investors who had purchased the 30,549 AMP shares) was not within LSI's contemplation. The said Investment Agreements were also the subject of cross-examination in the court below, and *Gong* herself *admitted* that the Chinese Investors had furnished valid consideration for the said AMP shares and that LSI had retained *only* 1,500 AMP shares, being the only shares that were unsold: see the Grounds of Decision in Suit 1311 ("the GD") at [102]–[104]. Indeed, LSI *was* aware of the argument that rescission was barred due to the intervention of third party rights as this was raised in Goh's closing submissions in Suit 1311. In addition, LSI informed the Judge (by a letter dated 3 December 2018) that "further written submissions are unnecessary". LSI nevertheless proceeded to set out specific arguments (in the same letter) as to why there was no bar to rescission (which included the argument that it was not pleaded, and that there was no factual basis for it). During oral submissions before this court, LSI reiterated the pleading point (which was also the key motif in its letter to the Judge).

16 In so far as the question of pleading is concerned, it was, in fact, open to LSI to request leave to make further written submissions but it chose not to do so. Given the overall circumstances, it *cannot* be said that LSI was taken by *surprise*. Indeed, the circumstances surrounding the sale of the AMP shares to the Chinese Investors pursuant to the Investment Agreements constituted a fact within *LSI's exclusive knowledge*. Yet, it chose – notwithstanding the fact that it had full notice of the argument that rescission was barred by the intervention of third party rights at least by the time of Goh's closing submissions – not to adduce any evidence that would have supported its claim to rescission. In the

circumstances, we find the argument from pleading to be rather arid and technical. The entire spirit underlying the regime of pleadings is that each party is aware of the respective arguments against it and that neither is therefore taken by surprise. LSI's submission that Goh's failure to plead the bars to rescission prevented it from running the argument that *restitutio in integrum* was possible, is ***antithetical*** to the very *spirit* of the rules of pleading themselves. This is because the *specific facts and circumstances* germane to *that* argument were actually within LSI's exclusive knowledge. Indeed, as this court observed in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 (at [63] and [82]):

> 63 In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, the court awarded special damages notwithstanding that they had been incorrectly pleaded as general damages, amply illustrating the pragmatic judicial approach that eschews refusal of a claim purely on account of a technical error of pleading. As aptly noted by Lai Kew Chai J, in *Lea Tool and Moulding Industries Pte Ltd v CGU International Insurance plc* [2000] 3 SLR(R) 745 at [16], "our procedural laws are ultimately handmaidens to help us to achieve the ultimate and only objective of achieving justice as best we can in every case [and should] not [be] permitted to rule us to such an extent that injustice is done". In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 (at [85]) the court observed:
>
> > … Rules of court which are meant to facilitate the conduct of proceedings invariably encapsulate concepts of procedural fairplay. They are not mechanical rules to be applied in a vacuum, devoid of a contextual setting. …
>
> …
>
> 82 We are fully in agreement with Bowen LJ [in *Cropper v Smith* (1884) 26 Ch D 700 at 710–711]. The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. In the ultimate analysis, each case

> involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even handed justice.

17 LSI nevertheless sought to argue before us that Goh had notice (in translation) of two of the three Investment Agreements when they were disclosed in discovery on 2 December 2016. These two Investment Agreements covered approximately half of the AMP shares sold by LSI to the Chinese Investors. LSI argued that Goh therefore ought to have pleaded the bars to rescission which he was going to rely upon. We acknowledge that Goh could have, knowing that LSI had sold half of the AMP shares to the Chinese Investors (at the time of discovery), amended his pleading to aver that third party rights had intervened. Goh could also have, after Gong admitted during cross-examination at trial that LSI had retained only 1,500 AMP shares, amended his pleading to the same effect. However, such information was *incomplete*, *not forthcoming*, and, in any event, is no answer to the more general point relating to the underlying rationale and spirit of the rules of pleading to which we have just referred. Notwithstanding Goh's failure to plead the particulars of the bars to rescission, the balance lies in favour of allowing Goh to present the merits of his case. We are therefore of the view that there is no procedural impediment to the consideration of Goh's argument centring on bars to rescission (which the Judge correctly ruled upon).

18 As we have already noted, LSI presently relies on the New Argument. Before turning to consider it, it might be apposite to consider SUM 100 first (although, as already noted, it is relevant only in relation to the Trustee Argument).

SUM 100 – Whether LSI is allowed to adduce the Investors' Affidavits

19 While the legal burden will always remain on Goh as the representor to prove the bars to rescission, the evidential burden might shift as between the parties, depending on the precise evidence adduced before the court: see the decision of this court in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [14]. LSI had sold a majority of the AMP shares to the Chinese Investors shortly after the execution of the SPA and this was (as already alluded to above) quintessentially a fact that was within LSI's exclusive knowledge. Although the Investment Agreements were disclosed by LSI in discovery, only two out of a total of three agreements were disclosed. The third, which was for a substantial purchase of 15,049 shares by one Sun Yongjian, was produced *only recently* in ***SUM 100 itself***. Consequently, the *evidential* burden naturally fell on *LSI* to show whether substantial *restitutio in integrum* was possible in order to avail itself the remedy of rescission, since the agreements were within LSI's knowledge and possession the whole time. As such, it was imperative for LSI to have produced the Investors' Affidavits to discharge its evidential burden in Suit 1311. LSI could have produced the Investors' Affidavits with reasonable diligence in Suit 1311 but chose not to do so. This court will not allow LSI to belatedly plug the evidential gaps and retrieve lost ground by relying on evidence that it should have placed before the court below: see the decision of this court in *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [44].

20 One might even go further to suggest that the *legal*, not just the evidential, burden fell on LSI to prove that *restitutio in integrum* was possible. Section 108 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") is an exception to the general rule in s 103 of the EA that the legal burden is on the

party who asserts a fact (*ie*, on Goh to prove the existence of bars to rescission). Section 108 of the EA applies in exceptional circumstances by reversing the burden of proof and placing the legal burden on a party to prove matters within its exclusive knowledge: see the decision of this court in *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [68]–[69]. As we have already pointed out, the circumstances surrounding the sale of the AMP shares to the Chinese Investors constituted a fact within LSI's exclusive knowledge. Pursuant to s 108 of the EA, the legal burden might even have fallen on LSI to prove that *restitutio in integrum* is possible, which LSI has failed to do. Indeed, it is clear that, in the circumstances, SUM 100 itself must be dismissed.

The New Argument

21 We turn now to the New Argument. In our view, it must be rejected. Even a cursory reading of the available Investment Agreements reveals that there clearly *was* a transaction concluded between LSI and the Chinese Investors – pursuant to which the former ***divested***, *at the* ***very least***, *the* ***beneficial*** *interest in 30,549 AMP shares* ***to the Chinese Investors***. This is evident from the preamble and cl 1 of one of the Investment Agreements (Gong admitted during cross-examination that the clauses in each of the Investment Agreements are similar):

> WHEREAS:
>
> …
>
> 2) [The Chinese Investor] intends to ***invest in*** and appoint [LSI] to invest and hold the following [AMP] shares on its behalf.
>
> …
>
> 1. [LSI] agrees to provide investment opportunity to [the Chinese Investor] and ***hold on behalf of [the Chinese Investor] the [AMP shares] invested***. The number of

> stocks ***purchased*** under this agreement is 6,500 which are purchased at SGD450 per share, and the investment amount is SGD2,925,000 …
>
> [emphasis added in bold italics]

22 Indeed, one might even go further inasmuch as Gong clearly admitted in the court below (and which the Judge noted in the GD at [103]) that ***LSI now owned only 1,500 shares, and this could only be so in the light of the fact that LSI had ceased to own 30,549 out of the 32,049 AMP shares that constituted the subject matter of the transaction between it and the Chinese Investors***. This, in turn, suggests that even the legal interest in the 32,049 AMP shares had passed to the Chinese Investors.

23 Let us – for the sake of argument – take LSI's case at its *highest*, *ie*, that only the *beneficial* interest in the 30,549 AMP shares had passed to the Chinese Investors and that LSI had retained the *legal* interest in all 32,049 AMP shares. *Even* on this particular scenario, it is clear that ***LSI would be in no position to confer substantial restitutio in integrum in respect of the 32,049 AMP shares*** and that LSI's appeal in CA 56 *must necessarily* ***fail***.

24 LSI, however, sought to rely upon a passage in the joint judgment of Masten and Fisher JJA in the Ontario Court of Appeal decision of *Pigott et al v Nesbitt Thomson & Co Ltd* [1939] OR 66 ("*Pigott*") in order to support the New Argument – and it is to this particular passage that our attention now turns.

The conflation of the New Argument with the Trustee Argument

25 LSI sought, in particular, to rely upon the following passage in the joint judgment of Masten and Fisher JJA in *Pigott* (at 79−80) in order to support the New Argument:

> Here, the contract for purchase of these shares was between the appellants and Pigott as an individual, and the misrepresentations complained of were made to him. The shares were transferred to him and he became, and has remained at all times a shareholder of the Power Company. As the contract was his, and the representations were made to him, he has the right to claim personally its rescission for such a right is incidental to his personal contract with the appellants, and the fact that third parties are entitled to look to Pigott ***as a trustee for them*** cannot affect, much less annul, his right to claim rescission. ***Indeed, as a trustee, that was his duty.*** As between the successive *cestui que trustent* the transfer of interest from one to the other cannot operate to annul and defeat Pigott's right of action. The appellant contracted with Pigott personally and cannot set up in his defence the outstanding rights of third parties for whom Pigott is ***trustee***.
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> [emphasis added in bold italics and underlined bold italics]

26 It is clear – from just a cursory reading of the passage quoted in the preceding paragraph – that *Pigott* related to a fact situation in which the representee (Pigott) was claiming rescission of the contract concerned *as a* ***trustee*** (see also the Supreme Court of Canada decision in *Nesbitt Thomson & Co Ltd v Pigott et al* [1941] SCR 520 at 530). ***However***, this (as already noted) is ***not*** LSI's main case and, as we have also observed above, would have ***failed in any event*** even if LSI had sought to maintain it. Indeed, where a representee claims rescission in the capacity of a trustee, the implicit premise or assumption is that, as such a claim is ***aligned with*** the interests of ***the beneficiaries***, ***substantial*** *restitution in integrum* is possible and that, ***therefore***, the equitable bar centring on *third party* rights does ***not*** apply. Having said this, it is ***not*** clear, in our view, that such an implicit premise or assumption follows ***automatically*** in the first place. Indeed, we (and counsel for LSI) are not aware of any Canadian cases that followed or affirmed Masten and Fisher JJA's pronouncement in *Pigott* above. The closest, perhaps, is the Alberta Court of Queen's Bench decision of *Alberta (Treasury Branches) v Ghermezian* [1999] AJ 1023 ("*Alberta*") at [97]–[98], where Moore CJQB

referred to *Pigott* at 82 for the proposition that the right to rescind a contract may be allowed even where the property of a contract has been assigned (see also the British Columbia Supreme Court decision in *Manitoba Ltd v Palmer et al* [1985] BCJ 3069 ("*Manitoba*") at [37]). But even then, *Alberta* and *Manitoba* dealt with the issue of whether a cause of action was validly assigned, and not whether the bar to rescission in the form of an intervention of third party rights applies when a trustee attempts to rescind a contract for fraudulent misrepresentation. In any event, as this issue does not arise directly for our decision, we say no more about it.

27 What *is* clear is that, *even* on LSI's *highest* case, it must make good its argument based on the ***Trustee*** *Argument* – and has ***failed*** to do so (see [13] above). We add that in *Pigott*, the shares in question were clearly purchased by the representee as a *trustee*. In this case, however, it is doubtful that LSI purchased the AMP shares from Goh in the capacity of a trustee *vis-a-vis* the Chinese Investors. This is because the relevant Investment Agreements (which LSI claims formed the basis of the trust relationship between LSI and the Chinese Investors) were entered into between LSI and the Chinese Investors only ***after*** the SPA was concluded. Parties entered into the first and second Investment Agreements (disclosed in discovery) on 15 December 2014 and 11 January 2015 respectively, after the SPA was concluded on 24 November 2014. Given that SUM 100 is dismissed, we *need not* consider the third Investment Agreement which was only disclosed in SUM 100 (see [19] above). In any event, were we to do so, Sun Yongjian admitted in his affidavit filed for the purposes of SUM 100 that the undated third Investment Agreement was concluded *after* the SPA.

28 Given that *Pigott* is relevant (but distinguishable) in relation to the *Trustee* Argument, LSI *cannot* utilise this particular decision in support of the New Argument. Indeed, by seeking to do so, LSI has, in substance and effect, not only ***conflated*** the New Argument with the Trustee Argument in the process, but is running two *inconsistent* cases. Whilst the court will afford a party the maximum latitude to state its case, there are limits to the extent to which a party will be permitted to run two inconsistent cases. As this court observed in *Ng Chee Weng v Lim Jit Min Bryan* [2012] 1 SLR 457 (at [36]−[37]):

> 36 The suggestion in [*Chong Poh Siew v Chong Poh Heng* [1994] 3 SLR(R) 188 at [61] and [62]] that, while a party has the right to plead inconsistent rights in the alternative, the alternatives cannot offend common sense and justice represents the law in Singapore. Indeed, in *Brailsford v Tobie* (1888) 10 ALT 194 ("*Brailsford*"), it was held that an exception to the general rule is that alternative statements of fact are not permitted if one statement or the other must, to the knowledge of the pleader, be false.
>
> 37 This exception highlights the tension the law faces in deciding whether or not to permit parties to plead inconsistent causes of action in the alternative. While the pleader should be free to plead inconsistent causes of action in the alternative, the inconsistency cannot – particularly in relation to the facts pleaded – offend common sense. One obvious example of an inconsistency that will offend common sense is when the pleader has actual knowledge of which alternative is true, as was the case in *Brailsford*.

29 In the context of the present appeal, to permit (if that is indeed the case in substance and effect at least) both the New Argument and the Trustee Argument to be run simultaneously would, in our view, offend common sense. On the one hand, LSI claims that the Investment Agreements *did* ***not*** *establish any trustee-beneficiary* relationship between LSI and the Chinese Investors (the New Argument). On the other, LSI claims that the Investment Agreements ***did*** *establish a trustee-beneficiary* relationship between LSI and the Chinese Investors, and that, as a trustee, it could rescind the SPA and recover damages

for all the 32,049 AMP shares (the Trustee Argument). LSI then attempts to adduce the Investors' Affidavits in SUM 100 to support the Trustee Argument. Indeed, this inconsistency seems to stem from the fact that LSI appeared to be unsure as to what the precise nature of the Investment Agreements was. This is incomprehensible because *it was, in fact,* ***a party to the Investment Agreements themselves***, and would have known whether (a) it had divested any legal and/or beneficial interests in the AMP shares to the Chinese Investors pursuant to the Investment Agreements; or, instead, (b) whether it is a trustee *vis-à-vis* the Chinese Investors. The best interpretation that can be made on behalf of LSI is that it had (in effect) *abandoned* the Trustee Argument on appeal before this court, decided to focus on the New Argument, and had simply *misconstrued* the decision in *Pigott* – which interpretation is (for the reasons already set out above) of no avail to LSI for the purposes of CA 56 in any event.

No conditional rescission

30 Finally, we observe that the submission by LSI with regard to conditional rescission is, with respect, misconceived. As we have already held, its *right to rescission is barred* and, hence, conditional rescission, which may be ordered in order to achieve practical justice between the parties in situations where perfect *restitutio in integrum* may not be possible, does not even arise for consideration by this court in the first place. Indeed, this was not a remedy sought by LSI in Suit 1311, and the grant of an order for conditional rescission would be inconsistent with the fact that this court has declined to allow LSI to adduce the Investors' Affidavits in SUM 100. Such an order would be a "backdoor" to effectively allow LSI to return the shares to Goh, achieving the same outcome as if SUM 100 had been allowed (bypassing the existing bar to rescission in the process).

Conclusion

31 For the reasons set out above, we dismiss CA 56 and SUM 100. We reject LSI's application to introduce the Investors' Affidavits and affirm the Judge's findings on the measure of damages awarded to LSI.

CA 55 of 2019 – Guarantee

32 Civil Appeal No 55 of 2019 ("CA 55") is LSI's appeal against the Judge's finding that there was no indemnity agreement between LSI and AMP. The Judge rightly concluded, based on a comprehensive evaluation of the objective evidence, that parties intended that the terms of the Guarantee be encapsulated within the SPA, and there was no separate or independent agreement between AMP and LSI. The SPA was the only agreement concluded. AMP was not a party to the SPA and LSI would not be able to enforce any claim against AMP.

33 In Suit 457, LSI attempted to escape this conundrum by arguing that there was a separate or independent agreement between LSI and AMP, and this was rejected by the Judge. In this appeal, LSI makes yet another attempt to escape this conundrum by arguing that Goh had the authority to enter into the Guarantee on behalf of AMP, and that LSI and AMP had agreed to the Guarantee "as stated in the SPA". We reject this argument. Even if Goh had the authority to enter into the Guarantee on behalf of AMP, LSI has failed to show the existence of any agreement, be it a guarantee or an indemnity, between LSI and AMP.

34 For these reasons, we dismiss CA 55 and affirm the Judge's findings in relation to the Guarantee.

Conclusion

35 In summary, CA 55, 56, 57 and SUM 100 are dismissed. We will hear parties on costs.

Andrew Phang Boon Leong	Judith Prakash	Belinda Ang Saw Ean
Judge of Appeal	Judge of Appeal	Judge

Nehal Harpreet Singh SC (Instructed Counsel), Jordan Tan Zhengxian, Han Guangyuan Keith and Tan Tian Yi (Cavenagh Law LLP) for the appellant in Civil Appeals Nos 55 and 56 of 2019 and Civil Appeal Summons No 100 of 2019, and the respondent in Civil Appeal No 57 of 2019;
Lok Vi Ming SC, Lee Sien Liang Joseph, Muk Chen Yeen Jonathan and Kelly Tseng Ai Lin (LVM Law Chambers LLC) for the respondent in Civil Appeal No 56 of 2019, Civil Appeal Summons No 100 of 2019 and the appellant in Civil Appeal No 57 of 2019;
Narayanan Sreenivasan SC and Rajaram Muralli Raja (K&L Gates Straits Law LLC) for the respondent in Civil Appeal No 55 of 2019.