IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 22

Suit No 758 of 2013

Between

CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Limited)

… *Plaintiff*

And

(1) Polimet Pte Ltd
(2) Lee Sin Peng
(3) Andy Ho
(4) Ong Puay Koon
(5) Yap Tien Sung

… *Defendants*

And

(1) Chris Chia Woon Liat
(2) Yeo Kar Peng

… *Third parties*

JUDGMENT

[Contract] — [Contractual terms] — [Interpretation]

[Contract] — [Illegality and public policy] — [Penalties]

CONTENTS

CIFG Special Assets Capital I Ltd
v
Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)

[2017] SGHC 22

High Court — Suit No 758 of 2013
Audrey Lim JC
18–21, 25–27 October 2016; 1, 28 November 2016

8 February 2017 Judgment reserved.

Audrey Lim JC:

Introduction

1 This is the plaintiff's claim against the defendants for the recovery of monies, as a result of the first defendant's default on a series of loans which were structured as Convertible Bond Subscription Agreements ("CBSAs"). The first defendant ("Polimet") is a special purpose vehicle ("SPV") while the second to fifth defendants ("the Initial Shareholders") were its initial shareholders.

2 The plaintiff's claim against the Initial Shareholders, for Polimet's default, is based on (a) personal guarantees ("PGs") signed by the second and third defendants for up to 50% of Polimet's liabilities under the CBSAs; and (b) an indemnity clause in the CBSAs which binds all five defendants.

Judgment had been entered against Polimet under the CBSAs, and against the first and second defendant pursuant to the PGs. The dispute before me centres on the interpretation and ambit of the indemnity clause.

Background to the dispute

Parties

3 The plaintiff, an investment vehicle, was set up in 2007 to enter into the CBSAs with the defendants.[1] At the material time, the plaintiff was wholly owned by a mezzanine fund managed by Kendall Court Capital Partners Limited ("KC"), a fund management company. The partners of KC include the first third party ("Chia") and the second third party ("Yeo"). The funds under the CBSAs were disbursed by the plaintiff to Polimet, which was set up as an SPV for this purpose. The second to fifth defendants were the Initial Shareholders of Polimet when the first of the CBSAs was executed in 2007 ("2007 CBSA"). Both Polimet and the Initial Shareholders are parties to the CBSAs.

4 The Initial Shareholders were involved in the business of manufacturing components used to make diodes. The business was operated through four companies incorporated in China and Hong Kong – Boluo United Diode Lead Co Ltd ("BUDL"), Citi-Venture Ltd ("Citi-Venture"), Fortuna Development Ltd (HK) ("Fortuna HK") and Delta China Technologies Ltd ("DCT"). DCT had a wholly-owned subsidiary, FDP (Huizhou) Co Ltd ("FDP").[2] I shall collectively refer to these companies as "the Group Companies".

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1 AEIC of Chris Chia Woon Liat dated 29 July 2016 ("CC AEIC"), para 92.

2 AEIC of Lee Sin Peng dated 3 August 2016 ("LSP AEIC"), paras 3, 7, 10 and 17.

5 BUDL was first started in 1995 by the fourth defendant ("Ong").[3] He approached the second defendant ("Lee") to run and manage BUDL. Lee, in turn, enlisted her husband, the third defendant ("Ho"), for the same purpose. Citi-Venture was later incorporated in 1998 as the vehicle to purchase the raw materials used by BUDL, including dumet (a composite wire made of copper and nickel).[4] Ong was the largest beneficial shareholder of the business, but his evidence is that he himself was not involved in the management or operations of BUDL or Citi-Venture. This was entrusted to Lee and Ho. In 2001, Lee and Ho started Fortuna HK, and brought in the fifth defendant ("Yap") as a minority shareholder to manage it.[5]

Events leading up to the 2007 CBSA

6 In 2007, a business decision was made to acquire the dumet manufacturing line of Philips Lighting BV ("Philips"). Ong introduced Chua Jim Boon ("Chua"), a banking executive, to Ho and Lee to advise them on the business opportunity. Chua then brought in AFG Advisory Sdn Bhd ("AFG") to help the Group Companies find an investor willing to provide financing for the proposed acquisition. AFG secured KC as a potential investor and arranged for the parties to first meet in June 2007.[6] There were several meetings and communications from June to October 2007 leading up to the 2007 CBSA. The parties vigorously contest many of the facts. The relevant areas of disputes will be examined in the rest of the judgment, but the broad facts are as follows.

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3 LSP AEIC, para 3.

4 LSP AEIC, para 7.

5 LSP AEIC, para 10.

6 LSP AEIC, paras 22 and 23.

Initial meetings in June and July 2007

7 Chia dealt primarily with Lee and Ho as they were managing the business. In June 2007, Chia first met Lee, Chua and AFG's representatives for preliminary discussions.[7]

8 On 27 July 2007, Chia met Lee, Ho and AFG's representatives ("27 July 2007 meeting") to inform them of the main commercial terms on which KC was willing to invest. It was envisioned that an SPV (*ie*, Polimet) would be incorporated as the holding company for the Group Companies. KC would provide a loan of US$5m by subscribing for convertible bonds issued by the SPV with a maturity term of five years and a redemption value of US$8.33m.[8] Chia also explained that KC would require, among other things, all shareholdings of the SPV to be transferred to it as security for the investment.[9] Although the parties disagree on whether Chia brought up the PGs at this meeting (see [50] below), it is common ground that the issue of an indemnity was not discussed.

9 Lee subsequently updated Ong and sent an email on 30 July 2007 to inform Chia that Ho, Ong and she were largely agreeable to the terms discussed on 27 July 2007.[10] Yap was not involved in the negotiations at this point.

Term Sheet 1

10 Thereafter, Chia sent a first draft Indicative Term Sheet dated 1 August

7 CC AEIC, para 11.

8 CC AEIC, para 17.

9 LSP AEIC, para 27.

10 CC AEIC, para 20.

2007 ("Term Sheet 1") to AFG setting out the broad terms of the proposed investment.[11] The security for the bonds listed in Term Sheet 1 were: (a) debentures over the assets of the SPV (called "Diamond" then); (b) all shareholding of the SPV which were to be transferred to KC for the duration of the bonds; and (c) PGs.[12] In addition, Term Sheet 1 contained an indemnity clause indicating that KC should be indemnified by the SPV for all losses arising out of or relating to the investment.

Early August 2007 discussions on PGs and purported First Oral Agreement

11 On 3 August 2007, Chia spoke to Lee on the phone to discuss the terms of Term Sheet 1. Although it is disputed what exactly was discussed (see [51] below), it is common ground that they deliberated the PGs and which of the Initial Shareholders would be required to provide them.

12 The defendants' case is that there was subsequently a meeting between Lee, Chia and Yeo on or about 7 August 2007 at which Chia agreed with Lee that: (a) only Ho and Lee were required to provide a PG based on their total initial shareholding in the SPV (*ie*, 50%); (b) Ho's and Lee's further liability would be limited to the loss of their shares in the SPV; and (c) Ong was not required to provide any PG and his liability would be limited to the loss of his shares in the SPV ("First Oral Agreement").[13] Chia and Yeo deny this meeting took place (see [53] below).

13 On 8 August 2007, Lee emailed Chia and informed him, among other things, that she had convinced Ho to provide a PG. She also asked Chia to

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11 CC AEIC, para 21 and exhibit CCWL-6.

12 CC AEIC, para 24 and exhibit CCWL-6.

13 LSP AEIC, para 40.

consider lowering the coupon interest rate.[14]

Final Term Sheet

14 On 10 August 2007, Chia emailed Lee a revised draft Term Sheet dated 9 August 2007 ("Final Term Sheet").[15] It included the reduced coupon interest rate and indicated that joint and several PGs would be provided by Lee and Ho based on their initial shareholding of 50% in the SPV. Apart from this, the terms were similar to those of Term Sheet 1. In particular, the other securities listed apart from the PGs were the same. The indemnity clause was left unchanged as well. The Final Term Sheet was signed by Lee (on behalf of the investee "Diamond") and Chia (on behalf of KC).

Dinner meeting between Ong and KC on 22 August 2007

15 Up till that point, Ong had yet to meet Chia or Yeo. They only first met at a dinner meeting on 22 August 2007 in Kuala Lumpur, Malaysia ("22 August 2007 dinner") after the Final Term Sheet was signed. The meeting was attended by Chia and Yeo (on behalf of KC) and Lee, Ho and Ong (on behalf of the Group Companies), among other representatives from both sides. Again, the parties disagree on what happened at the meeting (see [57] below). The defendants' evidence is that Ong made it very clear to Chia and Yeo that he was not willing to provide any PG and that his liability should be limited to the loss of his shares in the business, to which Chia and Yeo agreed, thereby confirming the First Oral Agreement.[16] Chia and Yeo, on the other hand, assert that there were no discussions during the dinner on the provision of a personal

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14 CC AEIC, para 62.

15 CC AEIC, para 66 and exhibit CCWL-11.

16 LSP AEIC, paras 50 and 51.

guarantee by Ong or on his liability under the investment, and that Ong's focus was on convincing KC to extend the financing.[17]

Yap's involvement in the investment and purported Second Oral Agreement

16 KC similarly did not meet Yap until a site visit to China in the week of 27 August 2007.[18] The defendants' evidence is that Yap did not wish to be involved in the investment and wanted his shares in Fortuna HK to be bought out.[19] They claim that he only agreed to come in as a minority shareholder (with an interest of about 3% in the SPV) after Chia and Yeo agreed that Yap would not be required to provide any PG and that his personal liability would be limited to the loss of his shares in the SPV ("Second Oral Agreement").[20] The plaintiff disputes this and asserts that Yap neither raised any issue in relation to his liability under the CBSAs nor discussed any commercial terms with Chia and Yeo when they met him in China (see [58] below).[21]

Salzburg meeting on 9 September 2007

17 Drafts of the execution documents, including the 2007 CBSA and the PGs, were prepared by KC and sent to Lee on 7 September 2007. Chia then called Lee the same evening to briefly outline the draft documents.[22] On 9 September 2007, Lee, Chia and a representative of AFG, Yip Kit Weng ("Yip"), met at a hotel in Salzburg, Austria to review the terms of the draft 2007 CBSA documents. Although Lee disputes that Yip was at this meeting, I

17 CC AEIC, para 80.

18 CC AEIC, para 91.

19 LSP AEIC, paras 55 to 57.

20 LSP AEIC, paras 55 to 57.

21 CC AEIC, para 91.

22 CC AEIC, para 95.

find that nothing turns on this. The terms Lee and Chia reviewed included, for the first time, the indemnity clause (Clause 12) which lies at the heart of this dispute.[23]

2007 CBSA

18 After further discussions, the parties finalised the terms of the 2007 CBSA which was executed on 5 October 2007.[24] Polimet was incorporated the same day. Under the 2007 CBSA:

(a) Polimet (defined as the "Issuer" in the agreement) issued a convertible bond with a redemption value of US$8,333,333 (subsequently increased to US$9,166,667);

(b) the plaintiff (defined as the "Bondholder") subscribed for the convertible bond in full and, in return, granted Polimet a US$5.5m facility;

(c) Polimet was deemed to be indebted to the plaintiff for the full redemption value of the bond from the date of subscription and had to make regular repayments of the principal redemption amounts and interest, as provided for in the payment schedule (Schedule 2). If it failed to make payment promptly, Polimet was liable to pay default interest on any amount which was outstanding at the rate of 2% per month (Clause 5.5); and

(d) the Initial Shareholders were also parties to the agreement and signed the document in their personal capacities.

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23 CC AEIC, paras 98-99; LSP AEIC, para 63.

24 CC AEIC, paras 104 and 105; exhibit CCWL-22.

19 Crucially, the 2007 CBSA contained an indemnity clause, Clause 12, under which the Initial Shareholders jointly and severally agreed to hold the plaintiff harmless from, among others, "any… losses" caused to the plaintiff "for any breach or alleged breach of any term or condition of this Agreement". As indicated, Clause 12 is the focal point of this case. Another term that is material is Clause 14.1 which is an "entire agreement" clause (see [63] below).

20 The plaintiff obtained the following as security for the facility:[25] (a) charges over the assets of the Group Companies by way of Deeds of Debentures; (b) under the terms of the 2007 CBSA, the Initial Shareholders were obliged to transfer their shares in Polimet to the plaintiff, and would only have the shares retransferred to them upon full discharge of the facility; and (c) PGs from Lee and Ho for up to 50% of Polimet's liabilities under the 2007 CBSA.[26] In addition, the plaintiff was granted a Subscription Option which entitled it to subscribe for shares in Polimet at its absolute discretion (*eg*, if Polimet performed well financially).[27]

21 Although the plaintiff became the sole shareholder of Polimet, the Initial Shareholders remained responsible for the operations of the business.

Subsequent CBSAs

2008 CBSAs

22 The entire facility extended under the 2007 CBSA was drawn down by Polimet. As it required more funds, the parties entered into a 2008 CBSA and

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25 LSP AEIC, paras 79 and 80.

26 CC AEIC, p 650; exhibit CCWL-23 and CCWL-24.

27 CC AEIC, para 136(b); exhibit CCWL-24.

a 2008 Supplemental CBSA ("the 2008 CBSAs") on 16 October 2008. Under the 2008 CBSAs, Polimet issued, and the plaintiff subscribed for, a further convertible bond with a redemption value of US$4,666,667. In exchange, the plaintiff granted Polimet a US$2.8m facility.[28] The material terms of the 2008 CBSAs were substantially the same as those of the 2007 CBSA, with similar security obtained. In particular, Clause 12 remained unchanged and similar PGs were obtained from Lee and Ho for up to 50% of Polimet's liabilities under the 2008 CBSAs.[29] Once again, the entire facility extended under the 2008 CBSAs was drawn down.

2009 Supplemental CBSA

23 In 2009, due to a delay in setting up the dumet business, the parties anticipated that Polimet would be unable to meet its upcoming payment obligations under the 2007 and 2008 CBSAs. Hence, they entered into a 2009 Supplemental CBSA of 28 October 2009 ("the 2009 Supplemental CBSA"), which restructured Polimet's payment obligations and extended the periods for repayment.[30] All the other terms of the 2007 and 2008 CSBAs were left unchanged. The 2009 Supplemental CBSA is mainly relevant because it contains a preamble ("Preamble B") stating that "[t]he Issuer and the Initial Shareholders are unable to meet the payment of the Bond pursuant to the Payment Schedule under [the 2007 and 2008 CBSAs]", which the plaintiff relies on (see [110] below).

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28 CC AEIC, para 149; exhibit CCWL-30.

29 CC AEIC, pp 1020 and 1021; para 151; exhibit CCWL-32.

30 CC AEIC, para 158.

Negotiation of Proposed 2011 CBSA and legal advice from Richard Wee & Yip

24 Despite the restructuring, Polimet did not perform well and, in 2011, it became clear that it would not be able to meet its upcoming payment obligations. In September 2011, the parties entered into a Debt Moratorium and Distribution Arrangement Term Sheet and started negotiations on a second supplemental CBSA ("Proposed 2011 CBSA"), to implement a moratorium of Polimet's obligations under the CBSAs and work towards a sale of Polimet and the Group Companies as a going concern.[31]

25 In the course of negotiating the Proposed 2011 CBSA, Ong sought advice from Yip Huen Weng ("Yip HW") of Richard Wee & Yip, the solicitors for both the plaintiff and the Initial Shareholders, on whether he and Yap will be "responsible for the balance 50% of any shortfall as they did not give any personal guarantee" if the Proposed 2011 CBSA was executed.[32] In other words, Ong wanted confirmation that his personal liability under the Proposed 2011 CBSA, which was similar in terms to the 2007 and 2008 CBSAs, would be limited to the loss of his shares in Polimet.[33] Yip HW however could not provide a "simple and straightforward" answer to Ong's satisfaction.[34] For this reason, Ong refused to proceed with the Proposed 2011 CBSA, which was never concluded.[35]

Polimet's default and enforcement of the CBSAs

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31 CC AEIC, paras 166 to 168.

32 AEIC of Ong Puay Koon dated 1 August 2016 ("OPK AEIC"), p 474.

33 OPK AEIC, para 48.

34 OPK AEIC, paras 50 to 52.

35 LSP AEIC, para 136.

26 Polimet subsequently failed to make payment in accordance with the terms of the CBSAs. Therefore, the plaintiff issued letters of demand to the defendants on 26 March 2012 and 10 April 2012 to notify them they were in breach of the CBSAs.[36] These letters of demand named all five defendants, but were only addressed to the office of Polimet and the home of Lee and Ho.[37] None of the defendants responded.

11 August 2013 meeting

27 In July 2013, KC sold the plaintiff to a company specialising in distressed debts, Global Distress Alpha Fund III Limited Partnership ("GDAF"). A further letter of demand dated 5 August 2013 was sent, this time to the addresses of Polimet, Lee and Ho, and Ong.[38] There was then a meeting between Ong and Chia on 11 August 2013 ("11 August 2013 meeting") at which Ong asked Chia why the letter of demand had been issued against him as the plaintiff should deal with Polimet directly.[39] The parties differ on Chia's response. The plaintiff claims that Chia explained that Ong was liable under the CBSAs as an initial shareholder and that he should contact GDAF if he wanted further clarity. The defendants' case is that Chia reassured Ong that his liability was limited to the loss of his shares and nothing more.

Cancellation of the CBSAs and Settlement Agreement

28 Soon after, the plaintiff *via* its solicitors issued a Notice of Cancellation dated 15 August 2013 to the defendants, giving notice that the

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36 CC AEIC, paras 185 and 186; exhibit CCWL-40.

37 LSP AEIC, para 138.

38 CC AEIC, exhibit CCWL-42.

39 CC AEIC, para 192.

CBSAs were cancelled due to Polimet's default and that the bonds issued thereunder were immediately due and payable.[40] The defendants' solicitors responded on 21 August 2013, requesting for the basis for the demand against Ong and Yap. The plaintiff's solicitors replied on the same day and cited Ong and Yap's obligations under Clause 12 of the CBSAs.[41]

29 The plaintiff then commenced this suit claiming against: (a) Polimet for the outstanding sums due and owing under the CBSAs; (b) Lee and Ho on the PGs for 50% of all the sums owing by Polimet; and (c) the Initial Shareholders under Clause 12.1 of the 2007 and 2008 CBSAs for *all the sums* owing by Polimet.

30 There is no dispute that an event of default had occurred under the 2007 and 2008 CBSAs due to Polimet's failure to make repayment; Clause 11.1(a) clearly provides that non-payment of "any amount due and payable" under the agreements constitutes an event of default. Nor do the parties disagree on the amounts owed, except for the plaintiff's entitlement to the default interest. The parties thus entered into a partial Settlement Agreement[42] and recorded a consent judgment on 22 August 2016 against Polimet (under the CBSAs) and Lee and Ho (under the PGs). The consent judgment provides that: (a) Polimet is to pay the plaintiff (i) US$39,057,063 as the sum owed as at 29 June 2016 comprising approximately US$18,685,477 as the outstanding sum owed under the CBSAs along with facility fees and contractual default interest of 2% per month; and (ii) continuing contractual interest of 2% per month until the date of full payment; and (b) Lee and Ho are to pay the

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40 CC AEIC, para 198; exhibit CCWL-43.

41 LSP AEIC, para 150 and Tab 61.

42 CC AEIC, para 215; exhibit CCWL-46.

plaintiff US$8,744,501 pursuant to the PGs and interest at 5.33% per annum.

31 The Settlement Agreement makes clear that there are two broad issues which are still in dispute. First, the Initial Shareholders deny that they are liable under Clause 12.1 for Polimet's entire liability by reason of its default under Clause 11.1(a) ("Polimet's default"). Second, the defendants submit that the default interest of 2% per month provided for under Clause 5.5 of the CBSAs is an unenforceable penalty.

Parties' respective cases

Plaintiff

32 The plaintiff submits that the language of Clause 12.1 is clear and unambiguous – it is a general indemnity which imposes a joint and several obligation on the Initial Shareholders to hold the plaintiff harmless from "any… losses" caused to it by "any breach" of the CBSAs. There is nothing in the language of the clause limiting its scope or excluding the losses caused by Polimet's failure to make repayments. The commercial context of the case and the surrounding circumstances also show that the Clause 12.1 is a general indemnity. The plaintiff is thus entitled to claim *all the sums* owing by Polimet under the CBSAs from the Initial Shareholders pursuant to Clause 12.1.

33 In addition, the plaintiff asserts that Chia and Yeo did not represent that the Initial Shareholders' liability would be limited to the loss of their initial shareholding in Polimet and deny the First and Second Oral Agreements. In any case, it submits that any such oral agreements would be of no legal effect due to the entire agreement clause (Clause 14.1) in the CBSAs.

34 On the default interest clause (Clause 5.5), the plaintiff's position is

that the contractual interest of 2% per month is a genuine pre-estimate of loss as it reflects the opportunity cost of deploying the funds for other similar investments.

Initial Shareholders

35 The Initial Shareholders' defence is that Clause 12.1 is a third party indemnity limited to losses or liabilities caused to the plaintiff arising out of claims made by a non-party to the CBSAs. Lee and Ho claim that their liability is limited by the PGs whilst Ong's and Yap's case is that they are not personally liable at all. They rely on the purported First and Second Oral Agreements as well as the background circumstances of the case – including the negotiations over the provision of PGs by the Initial Shareholders – to support their position that Clause 12.1 was never intended to operate as a general and unlimited indemnity under which the Initial Shareholders could be held personally liable for all of Polimet's liabilities under the CBSAs.

36 In the alternative, the Initial Shareholders submit that there was either a common mistake made by both parties or a unilateral mistake made by the Initial Shareholders as to the nature and effect of Clause 12.1. They therefore seek an order rectifying the clause to reflect the Initial Shareholders' understanding that it was a third party indemnity.

37 Finally, they argue that the default interest of 2% per month is manifestly extravagant and out of proportion in comparison with the greatest loss that could conceivably be proved to have followed from Polimet's default.

Third party claim

38 The Initial Shareholders have also brought a claim in misrepresentation

against Chia and Yeo as third parties. The third party claim is that Chia and Yeo made the following false representations which induced the Initial Shareholders to enter into the CBSAs:

(a) only Lee and Ho were required to provide PGs for up to 50% of Polimet's liability and indebtedness under the 2007 CBSA and any further liability on their part shall be limited to the loss of their initial shareholding in Polimet; and

(b) Ong and Yap were not required to provide any PGs and their liabilities, if any, arising out of or in connection with the 2007 CBSA would be limited to the loss of their initial shareholding in Polimet.

39 The third party claim only needs to be considered if the plaintiff prevails against the Initial Shareholders under Clause 12.1. Otherwise, there would be no loss caused to the Initial Shareholders by the representations, even if they had been made.

Issues

40 The issues before the court are therefore as follows:

(a) Were there any oral agreements between the parties on the Initial Shareholders' personal liability under the investment (namely, the First and/or Second Oral Agreement) and, if so, are these agreements enforceable?

(b) What is the scope of Clause 12.1 of the CBSAs and does it entitle the plaintiff to claim from the Initial Shareholders all the sums owing by Polimet under the CBSAs?

(c) If Clause 12.1 does entitle the plaintiff to claim from the Initial

Shareholders all the sums owing by Polimet under the CBSAs:

(i) Was there either a common mistake made by both parties or a unilateral mistake made by the Initial Shareholders as to the nature and effect of Clause 12.1? If so, should the clause be rectified?

(ii) Were there misrepresentations made by Chia and Yeo on the Initial Shareholders' liabilities under the 2007 CBSA which induced them to enter into the CBSAs?

(d) Is the default interest provided for under Clause 5.5 of the CBSAs an unenforceable penalty?

Oral agreements on the Initial Shareholders' personal liability

Evidence of Chua and AFG's representatives

41 Before examining the Initial Shareholders' evidence on the purported First and Second Oral Agreements, there is a preliminary issue to be determined. Prior to the trial, the defendants brought an application to admit statements and affidavits by Chua, the banking executive who advised Ho and Lee on the investment, and two representatives of AFG – Yip and Wong Tshun Peei ("Wong"). Chua passed away on 1 August 2016, while Yip and Wong are Malaysian residents who were not present at the hearing as the defendants were unable to secure their attendance. Hence, these statements and affidavits are hearsay evidence; nevertheless, they were admitted by consent. The issue is the weight which I should now give to them.

Chua's evidence

42 Starting with Chua, it is clear that he played an active role in assisting

Lee and Ho in the acquisition of Phillip's dumet business and also in the early negotiations with KC, at least until end August 2007. However, his evidence is replete with difficulties.

43 First, Chua's evidence contains various factual inaccuracies. Chua stated that Term Sheet 1 was prepared by KC's Malaysian solicitors Raslan Loong,[43] which is incorrect since the firm was not involved then.[44] He also allegedly remembered that Term Sheet 1 called for PGs from "all the [I]nitial [S]hareholders, specifically Ms Lee, Mr Ho, Mr Ong and Mr Yap".[45] Term Sheet 1 did not actually state who was required to provide the PGs. In fact, Yap was not even in the picture at that point.

44 More significantly, the nub of Chua's evidence relates to a meeting which he said he attended sometime between 3 and 7 August 2007[46] with Lee, Ho, Chia and Wong at which Chia purportedly agreed that Ong would not be required to provide any PG and that his liability would be limited to the loss of his shareholding in the Group Companies. Chua's description of this meeting is strikingly similar to Lee's account of the alleged 7 August 2007 meeting at which the First Oral Agreement was made. However, Lee conceded that Chua did not attend the 7 August 2007 meeting which, according to her, was *between herself, Chia and Yeo*. She accepted that there was no other meeting which she attended with KC at that time at which the purported First Oral Agreement was agreed to.[47] She also could not satisfactorily explain why Chua

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43 Chua Jim Boon's 1st affidavit dated 20 September 2013 ("CJB 1st affidavit"), para 7.

44 Notes of Evidence ("NE") for 25 October 2016, p 147:6–14.

45 CJB 1st affidavit, para 7.

46 Chua Jim Boon's 2nd affidavit dated 7 January 2014 ("CJB 2nd affidavit").

47 NE for 25 October 2016, p 159:2–20.

included Ho and Wong as attendees of the meeting and left out Yeo.[48] Chua's evidence on the meeting is thus problematic and unreliable and I accord no weight to it.

Yip and Wong's evidence

45 The evidence of AFG's representatives Yip and Wong is similarly unreliable. Both their affidavits are almost identical in relation to what transpired after AFG received Term Sheet 1 on 2 August 2007. They state that, while Lee and Ho agreed to provide PGs up to their 50% shareholdings in the investment, Ong and Yap refused to do so as they wanted to limit their liability to the loss of their shares only. KC purportedly agreed to this and then sent over the Final Term Sheet.[49]

46 However, these assertions are completely unsupported. Both Yip and Wong's affidavits are bereft of any details and do not state when these discussions happened and how either of them were personally involved. Lee also did not mention the presence of either Yip or Wong at the meetings and discussions that she had with Ong and Ho during that time. The Initial Shareholders' own position is that Yap was not even involved in the negotiations at this point and that Ong did not meet KC until late August 2007 after the Final Term Sheet was signed. Even if Ong and Yap had communicated their positions to AFG, Yip and Wong did not say how this information was passed on to KC. There is also no mention of KC's purported agreement on Ong and Yap's personal liability in the emails between Yip and Lee during that period.[50] Therefore, I do not give any weight to Yip and

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48 NE for 25 October 2016, p 160:6–25.

49 Yip Kit Weng's affidavit dated 24 September 2013, paras 6 and 7; Wong Tshun Peei's affidavit dated 25 September 2013, paras 6 and 7.

Wong's evidence either.

First Oral Agreement

47 As indicated above, the Initial Shareholders claim that there was a First Oral Agreement that: (a) only Ho and Lee were required to provide a PG based on their total initial shareholding in the SPV (*ie*, 50%); (b) Ho's and Lee's further liability would be limited to the loss of their shares in the SPV; and (c) Ong was not required to provide any PG and his liability would be limited to the loss of his shares in the SPV. The first limb of this alleged agreement – that only Ho and Lee were required to provide PGs – is uncontroversial. The real question is whether there was a binding oral agreement that, apart from the PGs, the personal liability of Lee, Ho and Ong under the investment was to be limited to the loss of their shares in the SPV. The Initial Shareholders bear the burden of proving this.

48 Lee's evidence is that the issue of the Initial Shareholders' personal liability under the investment was first raised in Term Sheet 1 which contained the requirement for PGs. According to her, she then called Chia on 3 August 2007 who informed her that KC required PGs from all the shareholders of the Group Companies.[51] There was then an internal meeting between Lee, Ong, Ho and Chua on 5 August 2007 in which they expressed their objections to giving any PGs.[52] Ong in particular was adamant that he would not agree to the investment if he had to bear any personal liability beyond the loss of his shares as he only wished to be a passive investor. This led to the purported 7 August 2007 meeting between Lee, Chia and Yeo at which the First Oral Agreement

50 LSP AEIC, Tab 12.

51 NE for 25 October 2016, p 105:25.

52 LSP AEIC, paras 33 to 34.

was reached.

49 Chia and Yeo, on the other hand, testified that the PGs were first raised at the earlier 27 July 2007 meeting. They acknowledge that there was a telephone conversation with Lee on 3 August 2007 to discuss the PGs. But they deny informing Lee that PGs were required from all the Initial Shareholders. Rather, KC only required PGs from the shareholders managing the business, namely Lee and Ho. After Lee indicated that it may be difficult to get Ho to agree to provide a PG, it was Chia who suggested that the PGs of Lee and Ho be limited to their collective shareholding in the SPV (*ie*, 50%). There was no representation made that any of the Initial Shareholders' personal liability would be limited to their shares in the SPV. Subsequently, there was no 7 August 2007 meeting nor was the issue of the Initial Shareholder's personal liability raised at the 22 August 2007 dinner.

Initial discussions on PGs

50 To begin with the initial discussions, I accept Lee's evidence that the requirement to provide PGs was only raised in Term Sheet 1 and not at the 27 July 2007 meeting. If the PG had been raised at that meeting, Lee would not have sent Chia an email on 30 July 2007 to inform him that Lee, Ho and Ong were agreeable to the terms discussed at that meeting, only to subsequently call him again on 3 August 2007 (after Term Sheet 1 was sent to Lee) to discuss the PGs. Be that as it may, it is clear that Term Sheet 1 did not specify which of the Initial Shareholders were to provide PGs. So it does not particularly matter when the PGs were first raised as an issue.

51 This leads to the telephone conversation on 3 August 2007. I reject Lee's evidence that Chia informed her during the call that he required PGs

from all the shareholders of the Group Companies. As Lee conceded under cross-examination, this assertion is not contained in her affidavit of evidence-in-chief ("AEIC") and was only first made on the stand.[53] In fact, Lee's AEIC states that Chia only required a PG from Ho and her as they would be the ones running the business;[54] this corroborates Chia and Yeo's evidence on this issue. Chia and Yeo's account is also supported by an email which Lee sent to Chia (with Ho copied) on the same day, shortly after the call, in which she mentioned the PGs only in relation to Ho and her.[55]

52 If at all, Lee may have mistakenly assumed that Ong was required to provide a PG – she asserted that this was "implied".[56] Ong also accepted that his understanding that he was required to provide a PG was based entirely on what Lee told him.[57] There is no real evidence that such a requirement came from KC. Thus I am persuaded that Lee was only informed by Chia and Yeo that KC required PGs from Ho and her. They did not specifically tell her that Ong or any other shareholder needed to provide PGs as well.

7 August 2007 meeting

53 I move next to the 7 August 2007 meeting. Although the plaintiff denies that this meeting took place, its initial pleaded position was otherwise. It earlier accepted that there was such a meeting, but disputed that Chia and Yeo made any representation that Ong's liability would be limited to the loss of his shareholding. Chia explained that the plaintiff's later change in position,

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53 NE for 25 October 2016, pp 106:20–109:3.

54 LSP AEIC, para 33.

55 LSP AEIC, Tab 10.

56 NE for 25 October 2016, p 108:18–22.

57 NE for 20 October 2016, p 149:6–10.

to deny the meeting altogether, was effected after he verified that he was in Singapore on that date and could not have met with Lee in Malaysia as she claimed. He also denied that any meeting took place over the phone that day.

54 I accept that Chia was initially mistaken and that he was, at the time of the pleadings, focused on the existence of whether there was such a conversation leading to the alleged First Oral Agreement. I also accept Yeo's testimony that she was mistaken for the same reason. Chia's evidence that he was not in Malaysia that day was not disputed. Instead, Lee changed her position in court and said that she was in KC's office in Malaysia with Yeo and they made a conference call to Chia in Singapore.[58] Lee also testified that she called Ho in the middle of the meeting, while Yeo was present and Chia was on the phone, as the decision to provide the PGs was "such an important decision". This was not stated in Lee's or Ho's AEICs or in the pleadings.[59]

55 Also material is the email which Lee sent to Chia on 8 August 2007, ostensibly soon after the 7 August 2007 meeting.[60] In that email, Lee mentioned a meeting *with AFG* on 7 August 2007 and suggested changes to Term Sheet 1. In addition, she informed Chia that she had managed to convince Ho to provide a PG. Crucially, nothing was said in that email, or in any subsequent email, of the 7 August 2007 meeting. There was also no mention of any oral agreement that, apart from the PGs, Lee, Ho and Ong's personal liability under the investment would be limited to the loss of their shares in the SPV (*ie*, the First Oral Agreement). If there had been such an oral agreement, one would have expected Lee to have recorded and confirmed it

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58 NE for 25 October 2016, p 123:14–22.

59 NE for 25 October 2016, p 127:21–129:4.

60 LSP AEIC, Tab 13.

immediately, particularly given her evidence that Ong was not willing to proceed with the investment unless his personal liability was so limited and she knew that this was an important issue to Ong. Instead, there was a glaring absence of any documentary evidence of both the meeting and the First Oral Agreement.

56 Therefore, on balance, I conclude that the 7 August 2007 meeting did not take place and there was no First Oral Agreement concluded on that day.

22 August 2007 dinner

57 I also do not accept Lee, Ho and Ong's account of the 22 August 2007 dinner (see [15] above). According to them, the dinner was arranged so that Ong could meet Chia to confirm the First Oral Agreement before approving the investment with KC. However, by then, the Final Term Sheet – which Ong had seen – had been executed. The Final Term Sheet clearly stated that only Lee and Ho were to provide PGs. Ong himself explained that he only wanted to make sure that he did not have to provide a PG when he discussed the Term Sheets with Lee. Apart from that, he did not instruct Lee to specifically include a term in the Final Term Sheet to confirm that his personal liability would be limited to the loss of his shares. When asked why, he explained that he saw no need for such a term be included in the Final Term Sheet; as long as he was not required to provide a PG, then "it's all right" and that was the end of the matter for him.[61] If that was indeed true, there would have been no reason for Ong to bring up the issue of his personal liability at the dinner – in his mind, the issue was settled by then and it was "all right". Accordingly, I find that there was no confirmation of the purported First Oral Agreement at this dinner.

Second Oral Agreement

58 The Initial Shareholders also claimed that there was a Second Oral Agreement in relation to Yap – that he would not be required to provide any PG and that his personal liability would be limited to the loss of his shares in the SPV. Again, it is uncontested that Yap did not provide a PG. So the actual issue is whether there was a binding agreement limiting his personal liability to the loss of his 3% share in the SPV.

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[61] NE for 20 October 2016, pp 150:16–152:8.

59 On this purported oral agreement, Lee's evidence was again shifting and contradictory. Under cross-examination, she finally admitted that Chia and Yeo did not inform her that KC required a PG from Yap and that she had raised the issue with Yap on her own volition.[62] She sought to explain that she had done so because the provision of the PGs was reflected in the Term Sheet. This made no sense – by the time Yap came into the picture, the Final Term Sheet had been signed, which expressly required PGs only from Lee and Ho. Likewise there was no reason for Lee to have specifically discussed Yap's personal liability under the investment with Chia and Yeo.

60 Accordingly, I reject Lee's testimony that KC had expressly agreed with her that Yap need not provide a PG and that his personal liability would be limited to the loss of his shares. I accept Yap's testimony that he was reluctant to get involved in the investment and was happy for his shares in Fortuna HK to be bought out and for him to simply remain an employee of the business. I observed him to be a candid witness. Hence it is possible that Lee made assurances to Yap in relation to his personal liability under the investment because she was anxious to get him on board. However there is no credible evidence that such assurances came from Chia or Yeo. Yap did not participate in any negotiations relating to the CBSAs with KC.

Observation on the Initial Shareholders' case on the First and Second Oral Agreements

61 There is one other important observation which needs to be made. Despite the ostensible importance of the First and Second Oral Agreements, they were never reduced into writing. Ong, being a director of two public listed companies, was acutely aware of the importance of putting agreements

62 NE for 25 October 2016, pp 182:9–183:23.

in writing, especially if they were meant to protect him.[63] Lee tried to explain that in her business dealings, a matter which *the parties had agreed to omit from the documents* need not be raised or mentioned again.[64] This explanation makes sense in relation to the PGs – if KC had initially demanded that PGs were required from Ong and Yap and then subsequently agreed to waive this requirement, there would no need for this waiver to be expressly recorded in the Final Term Sheet or the CBSAs. The fact that Ong and Yap did not in fact sign any PGs would speak for itself. The difficulty which the Initial Shareholders face in relation to the First and Second Oral Agreements is that they are not seeking to prove such an omission or waiver. Rather, their case is that there was a positive and binding agreement limiting their personal liability to the loss of their shares in the SPV. I am not persuaded that such a limitation was ever discussed, let alone agreed, between the parties.

62 That is not to say the Initial Shareholders were unconcerned about their personal liability under the investment. In fact, that was far from the case. Even Chia and Yeo accept that Lee was worried about the PGs and had some difficulty persuading Ho to provide one. Similarly, I do not doubt Ong and Yap's evidence that they would not have entered into the investment if they were required to sign PGs. However, *besides discussions in relation to the PGs*, there was no real discussion on the Initial Shareholders' personal liability, at least until the Salzburg meeting in September 2007. From this, it appears that the Initial Shareholders assumed that the PGs and their personal liability under the investments were coterminous – as Ong tellingly put it, they thought it would be "all right" as long as they did not sign a PG. Whether this assumption was justified is a separate matter, which is discussed below (at

63 NE for 20 October 2016, pp 157:11–16.

64 NE for 25 October 2016, pp 172:4–173:22.

[97]).

Impact of entire agreement clause in the CBSAs

63 For completeness, I note that even if the First and Second Oral Agreements had been made, they would not have been legally enforceable due to Clause 14.1 of the CBSAs which reads:[65]

> **Entire Agreement**: This Agreement and the documents referred to herein are in substitution for all previous agreements, both written and oral, between all or any of the parties and contain the whole agreement between the parties relating to the subject matter of this Agreement.

64 It is clear that the CBSAs and the purported First and Second Oral Agreements concern the same subject matter, namely the liability of the Initial Shareholders under the investment. Hence, even if there were any prior oral agreements between the parties limiting the Initial Shareholders' liability under the investment, these collateral agreements would have been superseded by the terms of the CBSAs. As the Court of Appeal held in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"), absent fraud or some other vitiating element, provisions such as Clause 14.1 will generally be given effect to, so that prior discussions concerning the contract may not prevail over what has been acknowledged in writing to constitute the parties' "entire agreement" (at [32] citing *MacMillan v Kaiser Equipment Ltd* [2004] BCJ 969). In the present case, there was no allegation that there is any such factor to vitiate Clause 14.1. In such circumstances, the First and Second Oral Agreements have no contractual force, save in so far as they are reflected and given effect in the CBSAs (see *Lee Chee Wei* at [26]).

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[65] CC AEIC, p 612.

65 Here, I pause to note that the issue of whether the First and Second Oral Agreements are contractually enforceable is separate from the evidential question of whether the facts relating to the various meetings and communications between the parties leading up to the 2007 CBSA are admissible as extrinsic evidence to aid the court in interpreting the terms of the CBSAs, particularly Clause 12.1. The latter is a distinct, albeit related, issue which is discussed below (at [90]).

Scope of Clause 12.1

66 The law on contractual interpretation is well settled, though not always easy to apply. Put simply, interpretation is the ascertainment of the meaning which the expressions in a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [33]).

67 The text is always the first port of call, but the relevant context is also important and the court must ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract (*Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [32]). To assist in this exercise, the courts have also laid down various canons of interpretation. There is also the issue of the parol evidence rule, as encapsulated in s 94 of the Evidence Act (Cap 97, 1997 Rev Ed), which governs the admissibility of extrinsic evidence in aid of contractual interpretation. I will deal with these matters in due course.

68 I first set out Clause 12.1 which reads as follows:

> **12. INDEMNITY**
>
> 12.1 **General Indemnity**. The Initial Shareholders and the Issuer hereby jointly and severally agree and undertake to fully indemnify and hold the Bondholder and its shareholders and their respective fund managers, directors, officers and employees (the "**Indemnified Parties**") harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) directly or indirectly caused to the Indemnified Parties and in particular, but without prejudice to the generality of the foregoing, for any short-fall, depletion or diminution in value of the assets of the Issuer, the Group or any Group Company resulting directly or indirectly from or arising out of any breach or alleged breach of any of the representations, warranties, undertakings and covenants given by the Initial Shareholders and/or the Issuer under this Agreement or for any breach or alleged breach of any term or condition of this Agreement.

69 It is not disputed that Clause 12.1 is an indemnity clause, namely an undertaking by the defendants to keep the plaintiff "harmless against loss" arising from particular transactions or events (see *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) v Teoh Cheng Leong* [2012] 2 SLR 1 at [28]).

70 Such an indemnity often takes the form of a promise by one contracting party (Y) to the other contracting party (X) that if X suffers a loss, whether due to the acts of Y or a third party who is not privy to the contract, then Y is to indemnify X against such loss *as long as the loss falls within the scope of the indemnity*. But there is no reason, as a matter of principle, why an indemnity clause cannot provide for X to be indemnified by Y for a loss caused by another party (Z), who is also a party to the same contract. It all depends on what the parties intend. In *Scottish Amicable Life Assurance*

Society v Reg Austin Insurances Pty Ltd and others (1985) 9 ACLR 909 ("*Scottish Amicable*"), for instance, the company entered into an agency agreement with the plaintiff which was also signed by the company's directors. The agency agreement contained the following indemnity clause:

> We, [the directors] in consideration of [the plaintiff] having entered into the within agreement with the said [company] hereby jointly and severally agree to indemnify and hold indemnified the [plaintiff] against any loss which it may sustain *by reason of any default by the said [company] in payment to the [plaintiff] of amounts which may from time to time become due* to the [plaintiff] under the terms of the said agreement.
>
> [emphasis added]

71 The issue in *Scottish Amicable* was whether the plaintiff could establish a claim against the directors personally even though, on its face, the agreement had been signed by them "on behalf of" the company. That issue, which was determined in favour of the plaintiff, does not arise here as it is undisputed that the Initial Shareholders signed the CBSAs in their personal capacities. Nevertheless, the case indicates that it is possible for an indemnity clause in a loan instrument entered into by a company to also impose personal liability on its directors or shareholders, who are signatories to the same document, for the company's principal debt obligations.

72 In the present case, the Initial Shareholders jointly executed the CBSA with Polimet and Clause 12.1 imposes an indemnity on all the defendants jointly and severally. The issue at hand is the *scope* of Clause 12.1 – whether it covers losses caused to the plaintiff by Polimet's failure to make repayments and thereby makes the Initial Shareholders personally liable for all the sums owing by Polimet under the CBSAs, which is over US$39m.

Applicable canons of interpretation

73 Before I begin my analysis proper, there are some relevant canons, or principles, of interpretation which need to be kept in mind.

74 The first is that, in cases of ambiguity, contracts of indemnity are to be construed strictly in favour of the indemnifier (see *General Surety & Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21; James O'Donovan and John Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, 2ndEnglish Ed, 2010) at para 5-15). This is partly because, unlike a guarantor's liability under a guarantee which is secondary to the liability of the principal debtor, an indemnifier's liability is primary and independent. As Russell LJ observed in *Stadium Finance Co Ltd v Helm* (1965) 109 SJ 471, a clearer form must be in place if a primary obligation is intended to be imposed, bearing in mind that most people are not prepared to subject themselves to the nuisance of primary liability.

75 Another reason for construing any ambiguity in an indemnity in favour of the indemnifier is related to another canon of interpretation – the *contra proferentum* rule that "where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [131]). This rationale particularly applies in cases where the interpretation of the indemnity clause being advanced by the indemnified party is inherently improbable or commercially insensible.

76 In *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1 ("*Kay Lim*"), for instance, the defendant ("Soon Douglas") was found liable to the plaintiff ("Kay Lim") under a contract for the rental of tower cranes. Soon Douglas had failed to provide properly skilled

and qualified labour to dismantle and remove the cranes, causing the death of one worker and injury to three others. The contract contained an indemnity clause which provided that Kay Lim was to indemnify Soon Douglas against all loss arising from, among others, any injury suffered by "any person" from the removal or dismantling of the cranes. Soon Douglas sought to rely on this indemnity to avoid its liability to Kay Lim. It contended that the ambit of the clause covered the claims made by Kay Lim against it – there was no ambiguity in the phrase "any person" and it included Kay Lim making a claim.

77 Quentin Loh J rejected this argument. He found that, while the phrase "any person" was, taken by itself, literally broad enough to include Kay Lim, it was inherently improbable, and indeed bordering on commercial absurdity, that Kay Lim would have agreed to the circular obligation of indemnifying Soon Douglas for any claims brought *by Kay Lim* for loss and damage suffered as a result of *Soon Douglas's breach of contract* (at [45]). He also stated as follows:

> 40 … The Court of Appeal reiterated in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [52], that it is trite law that exemption clauses are to be construed strictly and if a party seeks to exclude or limit his liability, he must do so in clear words. … The related *contra proferentum* rule that "contractual provisions should prima facie be construed against the party who was responsible for the preparation of the contract and/or who is to benefit from the provision" (*per* Hobhouse J in *E E Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 221 at 227) also applies to exemption clauses.
>
> 41 These principles of construction are equally relevant to the construction of indemnity clauses. … The courts will therefore start, and I emphasise the word "start", with a similar presumption that parties are unlikely to have agreed to bear the liability for the acts of another unless set out in clear and unequivocal terms.

78 *Kay Lim* does suggest that, in so far as there is any ambiguity,

Clause 12.1 should be construed in favour of the defendants. That said, I am fully cognisant that the scope of the clause is ultimately a matter of interpretation which cannot be determined by any automatic rule of law or single canon of interpretation (see *Kay Lim* at [40]).

Text of Clause 12 and the CBSAs

79 I now start with the text of the indemnity clause. Clause 12.1 states that the losses covered by the indemnity include "*any… losses*" caused by "*any breach* or alleged breach of any term or condition of this Agreement" [emphasis added]. Hence, on its face, it does appear to be an unlimited and general indemnity which would cover Polimet's failure to make repayments in breach of Clause 11.1(a).

80 Against this, the Initial Shareholders submit that Clause 12.1 has to be construed in the context of the rest of Clause 12, particularly Clauses 12.2 and 12.3, which they say make clear that Clause 12.1 was intended to be an indemnity against third party claims. These clauses read as follows:

> 12.2 **Conduct of Defence:** If any action, proceeding, claim or demand … shall be instituted involving any of the Indemnified Parties in respect of which indemnity may be sought pursuant to Clause 12.1, such Indemnified Party shall promptly notify the Issuer and the Initial Shareholders in writing and the Issuer and the Initial Shareholders shall, unless the Indemnified Party elects to assume the defence itself, assume the defence thereof … and shall be liable to pay the fees and expenses of such lawyers related to such proceeding. …
>
> 12.3 **Defence by Indemnified Person:** In any proceeding, pursuant to Clause 12.2, if the Indemnified Person has elected to assume the defence itself or the Issuer has and the Initial Shareholders have failed to appoint lawyers satisfactory to the Indemnified Person within a reasonable time, the Issuer and the Initial Shareholders shall reimburse such fees and expenses

> as are incurred by the Indemnified Person. …

81 I agree that whether an indemnity clause does in fact cover a particular type of loss or liability must be construed in the light of the other provisions of the contract (see *Kay Lim* at [40]). However I am of the view that Clause 12.1 is not limited to third party claims. First, while Clauses 12.2 and 12.3 indicate that third party claims fall within the scope of Clause 12.1, they do not limit Clause 12.1 *per se*. The Initial Shareholders themselves accept this.[66] Instead, Clauses 12.2 and 12.3 deal with distinct matters such as determining which party assumes the defence in the event of an action commenced against the plaintiff and the circumstances in which the defendants are to reimburse the plaintiff if the latter assumes the defence itself. Clause 12.1, by contrast, is labelled a "General Indemnity" – this clearly indicates that third party claims are merely a sub-set of the types of losses which fall within its scope.

82 Second, the ambit of Clause 12.1 is very wide. It is an indemnity against not just "claims", "damages", "costs" and so on, but also "losses" and "deficiencies" – the last two of which do not necessarily presuppose a third party claim. The clause also expressly incorporates losses, deficiencies, and so on caused to the plaintiff "for any short-fall, depletion or diminution in value of the assets of" Polimet or the Group Companies resulting from "any breach of the representations, warranties, undertaking and covenants given by the Initial Shareholders". This is a type of loss which would ordinarily be directly suffered by the plaintiff rather than flowing from or even resulting in a third party claim. For instance, a third party may not necessarily be concerned with, let alone bring a claim against the plaintiff for, a deficiency in the value of Polimet's assets. These features of Clause 12.1 distinguish this case from

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66 2nd to 5th Defendants' Closing Submissions ("DCS"), para 64.

Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] 3 SLR(R) 782, which the Initial Shareholders rely on. In that case, the relevant clause necessarily presupposed liability incurred by the indemnified party to a third party (at [37]).

83 Even if Clause 12.1 is a general indemnity clause, the key issue remains whether it was intended by the parties to make the Initial Shareholders liable for losses arising from Polimet's default for non-payment – in other words, whether it was intended to grant the plaintiff recourse to the Initial Shareholders for Polimet's debts. On this issue, the text of Clause 12.1 and the rest of the CBSAs is, at the very least, equivocal. In fact, it seems to go against the plaintiff's case.

84 First, if Clause 12.1 was to operate as an indemnity to cover Polimet's default then it is strange that there is no reference in the clause to Polimet's obligations to make repayment. In an indemnity agreement under which the indemnifier undertakes primary liability for the debts of another, it would invariably be made clear that this is the object of the agreement (see, for example, the clause in *Scottish Amicable* quoted at [70] above). In such an indemnity, it would also be odd, and indeed illogical, to find the principal debtor – Polimet in this case – named as an indemnifier for *its own debts*. However, this is the case here as Polimet is identified as one of the parties to Clause 12.1 even though it is already liable to repay the full redemption amounts under the other terms of the CBSAs, particularly Clause 11.1 (see [85] below). In addition, there will typically be other provisions specifying whether the indemnity is limited or unlimited, whether a demand is necessary for payment, and so forth. None of these details are contained in Clause 12. This is despite the fact that Clause 12.1 does specifically deal with losses arising from any short-fall, depletion or diminution in value of the assets of

Polimet or the Group Companies, while Clauses 12.2 and 12.3 focus on the steps to be taken in relation to third party claims. The omission is glaring. If Clause 12.1 was intended to cover Polimet's default, then this would have been the most important category of breach falling within the ambit of the clause, both in terms of commercial significance and quantum; yet it was not made express.

85 Next, the provisions on repayment, such as Clauses 2.5, 4.1, 5.1 and 11, indicate that only the Issuer (*ie*, Polimet) is under obligation under the CBSAs to repay the full redemption amounts. In particular, Clause 11 – which sets out the procedure to be followed upon an event of default – suggests that the plaintiff's recourse *under the CBSAs* for any amount which is then "due and payable" is only against the "Issuer". The material portions of Clause 11 are as follows:

> 11. DEFAULT
>
> 11.1 If:
>
> (a) **Non-payment:** any Security Party fails to pay to the Bondholder any amount due and payable …
>
> …
>
> then the Bondholder may, by *notice to the Issuer*, declare the Bond to be immediately due and payable and the Facility to be cancelled, whereupon:
>
> …
>
> (ii) (where the Drawing has been made) the Facility shall be cancelled, and *the Issuer shall pay to the Bondholder*:
>
> (a) the total sum of all the Redemption Amounts as stated in Schedule 2;
>
> (b) accrued interest on the Principal Amount as at the date of the cancellation; and

> (c) all other sums which have accrued or are due and *payable by the Issuer* to the Bondholder under this Agreement and the Security Documents as at the date of the cancellation.
>
> …
>
> 11.4 For the avoidance of doubt, any determination or notification by the Bondholder concerning all payments referred to in this Clause shall in the absence of manifest error be conclusive evidence of the matter and *shall be binding on the Issuer*.
>
> [emphasis added]

86 There is no mention of the Initial Shareholders. The plaintiff argues that that Clause 11.1 is not intended to exhaustively spell out the remedies that the plaintiff may exercise upon an event of default. This is right in that Clause 11 does not prevent the plaintiff from enforcing its rights under the other security documents such as the PGs and Deeds of Debenture. However, as far as the CBSAs are concerned, there is no indication that the specific procedure set out in Clause 11 must be read together with Clause 12.1.

87 Hence, even just based on the text of the CBSAs, it does not appear that Clause 12.1 was intended to impose personal liability on the Initial Shareholders for all the sums owing by Polimet. At the very least, there is ambiguity on the issue. This makes the relevant context, which is the subject matter of the next section, important.

88 For completeness, I note that the plaintiff also referred me to the indemnity provisions in the other contractual documents, namely the Deeds of Debenture and the Subscription Option Agreement. I did not derive much assistance from these clauses. While they arguably bolster the plaintiff's argument that Clause 12.1 is not restricted to third party claims, they do not shed any additional light on the ambit of Clause 12.1 given my finding that it

is a general indemnity provision.

Relevant context

89 I now move on to the relevant context. While the parties have adduced a great deal of evidence in relation to what transpired both before and after the execution of the CBSAs, I must emphasise that the court can only take into account the facts necessary to establish the background knowledge which would reasonably have been available to the parties at the time of the contract (see [66] above).

Admissibility of extrinsic evidence

90 A preliminary issue is the admissibility of the extrinsic evidence which has been tendered. This issue arises because of the parol evidence rule, which survives in Singapore law through s 94 of the Evidence Act. As the Court of Appeal noted in the seminal case of *Zurich Insurance*, this is a rule of evidence which operates where the contract was intended by the parties to contain all the terms of the agreement (at [112]). This requirement is clearly satisfied here due to Clause 14.1 of the CBSAs, the entire agreement clause. Hence, no extrinsic evidence is admissible "to contradict, vary, add to or subtract from" the terms of the CBSAs (see s 94 of the Evidence Act).

91 Having said that, extrinsic evidence is admissible under proviso (*f*) to s 94 to aid in the *interpretation* of written words. In the words of the Court of Appeal, such evidence can be used to *explain and illuminate* the written words, but *not to contradict or vary them* (*Zurich Insurance* at [132(f)]). This is a fine but important distinction. In addition, and notwithstanding my finding that the language of Clause 12.1 is unclear, ambiguity is not a prerequisite for the operation of proviso (*f*). The extrinsic evidence, however, must be: (a)

relevant; (b) reasonably available to all the contracting parties; and (c) relate to a clear or obvious context. Apart from these three requirements, there is no strict rule that evidence of prior negotiations or of the parties' subsequent conduct cannot be admitted, although the Court of Appeal in *Zurich Insurance* noted that the position in relation to evidence of subsequent conduct may require fuller scrutiny in the future (at [132(c)] and [132(d)]).

92 In the present matter, given the ambiguity surrounding the language of Clause 12, there is no real risk that the extrinsic evidence would lead to the court to contradict or vary the written words. This is a case where illumination is required. The extrinsic evidence tendered by the parties for this purpose can be placed into two broad categories. First, there is the evidence of the pre-contractual negotiations between the parties including the Term Sheets, the discussions in August 2007 and the Salzburg meeting in September 2007. Second, there is the evidence of the parties' conduct subsequent to execution of the 2007 and 2008 CBSAs (see [23] to [28] above). In my view, both categories of evidence are admissible and fulfil the requirements set down in *Zurich Insurance*.

93 For a start, the evidence is relevant as it directly relates to the terms of the CBSAs and the commercial bargain between the parties. While it is true that the Term Sheets and pre-contractual negotiations, for instance, do not represent the final position agreed upon, they are nevertheless objective evidence which shed light on the common assumptions held by the parties when they were negotiating the CBSAs. These assumptions would have necessarily influenced them when they ultimately executed the CBSAs. The evidence of the parties' subsequent conduct is of less relevance. But I accept that their post-contractual conduct may show what they would have reasonably known and intended *at the time of the contract*. Second, the

evidence of the discussions and meetings between the parties, both prior to and after the execution of the CBSAs, would necessarily have been available to all the contracting parties. The last requirement is that the evidence must relate to a clear or obvious context. Here, the plaintiff argues that the evidence of the pre-contractual discussions and meetings should not be admitted as the facts are patently unclear. This is true in relation to the purported 7 August 2007 meeting and the First and Second Oral Agreements, of which there is insufficient evidence. But there is no reason why the other pre-contractual evidence, such as the Term Sheets, the telephone and email discussions between KC and Lee on the PGs in August 2007 and the Salzburg meeting, should be excluded.

94 This is not to say that the different items of extrinsic evidence, though admissible, are of equal relevance. Their impact on the interpretation to be given to Clause 12.1 is a separate issue, to which I now turn.

Term Sheets and discussions in August 2007

95 Starting with Term Sheet 1, it was merely a draft which set out the indicative terms of the investment, and did not represent the final and detailed position between the parties. Various amendments were then made which led to the Final Term Sheet, particularly the revision of the PG clause to make it clear that only Lee and Ho will provide PGs based on their initial shareholding of 50% in Polimet. Both Term Sheet 1 and the Final Term Sheet also referred to an indemnity to be provided by Polimet as the "Investee". But it is common ground that neither party discussed the indemnity clause until the Salzburg meeting in September, which took place after the Final Term Sheet was signed.

96 Similarly, the evidence relating to the 3 August 2007 telephone conversation (see [50] to [52] above) and the emails of 3 and 8 August 2007 sent by Lee to Chia (see [51] and [55] above) indicates that the parties did not apply their minds to the indemnity clause at the negotiation stage, although they were particularly concerned about the PGs. Hence what the evidence of the Term Sheets and the August 2007 discussions reveals is that Lee, Ho and Ong were worried about their personal liability and therefore focussed on the PGs. They did not discuss the indemnity clause because they appear to have assumed that the PGs and their personal liability under the investment were coterminous.

97 In one sense, this assumption was clearly wrong. As both Ong and Lee conceded,[67] the Initial Shareholders had various personal liabilities under the CBSAs. These included an obligation to provide an additional cash injection of US$500,000 as working capital if the dumet manufacturing line was not fully operational by a certain date (Clause 9.2(xxvii)). They also gave warranties and made representations relating to the Group Companies' business, assets, accounts and so forth (Clause 7 and Schedule 3). Finally, there is Clause 12 under which the Initial Shareholders were all jointly and severally liable for, at the very least, losses caused by third party claims. Thus it is apparent that the Initial Shareholders' personal liability under the investment was not limited to the loss of their shares in Polimet.

98 On the other hand, it appears that what the Initial Shareholders were concerned with, quite naturally, was the personal consequences to them if there was *default* on the sizeable loan to be disbursed by KC to Polimet. On this, I have already rejected the Initial Shareholder's contention that there were

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[67] NE for 25 October 2015, pp 4:12–6:3; NE for 26 October 2016, pp 25:13–27:3.

oral agreements between the parties that, if Polimet defaulted, the Initial Shareholders would only lose their shares and be personally liable to the extent of any PGs granted by them (see [56] and [60] above). Nevertheless, this was clearly the assumption on which the Initial Shareholders operated, at least until the Salzburg meeting. The question is whether this was a purely subjective belief which the Initial Shareholders held or was one which both parties shared.

99 Considering the evidence, my view is that when the Final Term Sheet was signed, both parties were operating under the *common* assumption that, if Polimet defaulted, the plaintiff's only recourse against the Initial Shareholders personally would be under the PGs provided by Lee and Ho. This is why both sides focussed their negotiations on the PGs and never applied their minds to the indemnity clause. It is also why, as Chia knew, Ho was reluctant to provide a PG for 100% of Polimet's liabilities and needed to be persuaded to do so. Indeed, the same assumption would have been shared by any reasonable business person who was at that point in time privy to the objective communications between KC and Lee leading up to the Final Term Sheet.

Salzburg meeting

100 Hence the evidence of the Salzburg meeting is important. It was the first and indeed only time Clause 12 was specifically discussed before the execution of the 2007 CBSA. Lee admitted that Chia went through with her the main clauses of a draft of the 2007 CBSA, including Clause 12. She however prevaricated on the issue of what exactly Chia told her about the scope and nature of Clause 12. Initially, she claimed that Chia had represented to her that Clause 12 was merely a third party indemnity clause.[68] She

subsequently changed her position and conceded that Chia did point out to her that Clause 12.1 was a general indemnity, and that her impression that it was a third party indemnity was one that she had formed herself.[69] Her concession fortifies my finding at [81] and [82] above that Clause 12.1 is not limited to losses arising from third party claims. But it still leaves open the question of whether it was intended to be broad enough to cover losses arising from Polimet's default.

101 On this issue, Chia gave evidence that he specifically informed Lee that the Initial Shareholders had various obligations under the CBSAs which were in addition to Lee and Ho's liability under the Personal Guarantees.[70] He testified that he also told her that Clause 12.1 was a "general indemnity" which was not limited to losses arising from third party claims.[71] In addition, he emphasised that Clause 12 was read out to Lee and it was explained to her that the Initial Shareholders were jointly and severally liable under the clause. As Chia pointed out, this would been clear to Lee from the plain language of the clause.[72] Crucially though, Chia did not assert that either he or Lee specifically considered, let alone discussed, the possibility that Clause 12.1 was broad enough to make the Initial Shareholders personally liable for all the sums which were to be disbursed to Polimet. In this respect, Chia's evidence is equivocal. It appears that, apart from Chia reading out and going through what Clause 12.1 says on its face, there was no real discussion as to its scope. Indeed, if Chia had informed Lee, at the Salzburg meeting, that the Initial

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68 NE for 25 October 2015, pp 94:18–24.

69 NE for 26 October 2015, pp 40:14–42:12.

70 NE for 19 October 2015, pp 30:2–9.

71 NE for 19 October 2015, pp 73:17–74:5.

72 NE for 19 October 2015, pp 31:1–7.

Shareholders would be personally liable for all the sum which were to be disbursed to Polimet, I would have no doubt that the Initial Shareholders would not have proceeded with signing the CBSAs (see [105] below).

102 The evidence of the Salzburg meeting therefore supports the Initial Shareholders' case that neither party attached any significant weight to Clause 12.1. They did not consider its impact on the Initial Shareholders' personal liability in the event of Polimet's default and were still operating under the common assumption that it was the PGs which mattered in this regard. As Chia told the court, the main purpose of the Salzburg meeting was for him to walk through the relevant draft documents with Lee and to assure her that they "capture[d] the same substance" set out in the Final Term Sheet.[73] In other words, neither party considered Clause 12.1 as altering the commercial bargain between them.

Execution of 2007 and 2008 CBSAs

103 For completeness, I note that the actual execution of the 2007 CBSA was unremarkable. It is clear that the Initial Shareholders did not go through the legal documents in any detail when they signed them. Certainly, there was no specific discussion on Clause 12. The same is true of the 2008 CBSAs, which were simply based on the terms of the 2007 CBSA. Hence, the facts concerning the execution of the 2007 and 2008 CBSAs do not assist me in construing Clause 12.1.

Conclusion on the pre-contractual negotiations and commercial context

104 The background evidence of the pre-contractual negotiations, taken as

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[73] NE for 19 October 2015, pp 73:4–9.

a whole, leads me to the conclusion that the parties could not have intended for Clause 12.1 to impose a personal obligation on the Initial Shareholders to indemnify the plaintiff for all the sums owing by Polimet. The fact of the matter is that neither party applied their minds to the issue when the CBSAs were executed. But if the question had been raised at the time of contract, then a reasonable business person in the parties' shoes would have understood that Clause 12.1 was not an indemnity for Polimet's debts.

105 The commercial context and the bargain between the parties must be kept in mind. A key part of this bargain was the PGs given by Lee and Ho. As KC knew, both of them were concerned about their personal liability under the investment and only agreed to grant the PGs after Chia suggested that they could be limited to Lee and Ho's 50% shareholdings in Polimet. Having gotten this compromise, it would have made no sense for Lee and Ho to have agreed to be exposed to 100% of Polimet's liabilities *via* the indemnity clause. Similarly, Ong and Yap were not directly involved in the negotiations and it is implausible that they would have agreed to participate in the investment on such onerous personal terms. Yap, in particular, had a mere 3% stake in the investment. So for him to have agreed to what, in substance, would have been an unlimited and primary obligation to repay all of Polimet's debts in the event of its default would have been incredible.

106 Next, even though Clause 4 of the PGs states that the obligations of the guarantors are "additional to, and not instead of, any obligations contained in the [other transaction documents]",[74] it is difficult to see what commercial reason there was for KC to have specifically required the PGs from Lee and Ho if the indemnity clause already covered a default by Polimet. Chia sought

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[74] CC AEIC, p 670.

to explain that the PGs were valuable as they were a sign of commitment from Ho and Lee and allowed the plaintiff to "enforce quicker" the 50% they covered.[75] It is true that the PGs, which contain specific provisions on payment and exclude Lee and Ho's rights to require the plaintiffs to first exhaust its remedies against Polimet, might be easier to enforce than Clause 12.1. However I am not persuaded that the practical benefits of a limited PG over an unlimited personal indemnity were so significant as to explain the insistence of KC that Ho and Lee provide PGs. The truth, it seems to me, is that KC did not consider that Clause 12.1 applied to Polimet's default.

107 Against this, the plaintiff submits that it would not have made financial sense for KC to have participated in what was a highly risky investment with only the 50% PGs from Ho and Lee, and without any right to seek recourse against Ong, the Group Companies' largest shareholder. According to Chia, KC was only comfortable accepting the limited PGs as they were in addition to the indemnity that it expected from the Initial Shareholders. He pointed out that the net asset position of the Group Companies at that time was a fraction of the financing sought; thus it was insufficient for KC to only hold the shares and assets of Polimet, along with the PGs, as security. Chia argued that this was especially so because the dumet business which the Group Companies wished to acquire consisted of land, machinery and other assets located in China and realising such assets would be a complex and uncertain enterprise. KC also viewed the investment with a heightened sense of risk as it was KC's first investment in China. This line of argument seems plausible at first blush, but it faces several difficulties.

108 First, it ignores the fact that this was not an ordinary loan where one

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[75] NE for 19 October 2015, pp 83:11–85:3.

would expect considerable caution from the creditor, but a mezzanine investment. It involved greater risk, but also greater potential reward. KC had the option to subscribe for the shares of Polimet and would have directly profited if the business had taken off. As Chia testified, KC's investments are based on the growth potential of a company.[76] Second, the interests, fees and redemption amounts for the loan of US$5.5m were considerable. So KC was adequately compensated for the risk it took. Third, it is not as if KC did not have any security. They had the PGs and securities over the assets and shares of Polimet. Finally, and crucially, even if it would have made commercial sense for KC to have obtained a full indemnity from all the Initial Shareholders, particularly Ong, to cover Polimet's debts, there is no actual evidence that this was the object of Clause 12.1. In fact, the evidence suggests that the plaintiff's argument that the indemnity was central to the risk allocation between the parties is an afterthought. The only contemporaneous negotiations on the Initial Shareholders' personal liability in the event of Polimet's default were focused on the PGs, and the indemnity clause was never discussed in any detail. Thus I am not persuaded by the plaintiff's submission that the commercial context of the case is in their favour.

Post-contractual conduct after the execution of the CBSAs

109 I derived much less assistance from the evidence of the parties' conduct subsequent to the execution of the CBSAs. Such extrinsic evidence is only relevant if it assists the court in ascertaining the parties' objective intention *at the time of the contract*. In this case, this evidence does not affect my findings on the scope of Clause 12.1.

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[76] NE for 18 October 2015, pp 29:13–15.

110 First, the plaintiff relies on Preamble B of the 2009 Supplemental CBSA which states:

> The Issuer *and the Initial Shareholders* are unable to meet the payment of the Bond *pursuant to the Payment Schedule under Schedule 2* of [the 2007 and 2008 CBSAs].
>
> [emphasis added].

The plaintiff contends that the reference in Preamble B to the Initial Shareholders being unable to pay is an acknowledgment by them that they did have such payment obligations under the 2007 and 2008 CBSAs. In the plaintiff's pleadings, there is also a reference to the doctrine of estoppel – it is averred that the Initial Shareholders are "estopped from denying their liability under Clause 12.1" due to Preamble B.[77] This claim is not made out. As I noted earlier, under the terms of the CBSAs, only the Issuer is under obligation to repay the full redemption amounts *pursuant to the Payment Schedule* (see [85] above). Insofar as Preamble B suggests that the Initial Shareholders have a similar obligation, it is clearly wrong. Next, the preamble makes no reference to the indemnity clause. So it cannot be construed as a clear and equivocal representation by the Initial Shareholders that they were liable to repay the redemption amounts under Clause 12.1. Thus there can be no estoppel either. In my view, the language of Preamble B is at best a neutral factor. It fails to assist the plaintiff.

111 There are then the facts surrounding the Proposed 2011 CBSA and the legal advice of Yip HW of Richard Wee & Yip on the Initial Shareholders' personal liability under the CBSAs (see [24] and [25] above). The business was falling apart by then. That was when Ong – or for that matter any of the

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[77] Reply and Defence to Counterclaim (Amendment No 5) dated 27 October 2016, para 6(l).

parties – first considered the possibility that the Initial Shareholders might be held personally liable for Polimet's debts *under the CBSAs* rather than the PGs. The fact that Ong and Lee subsequently sought legal advice on this issue and abandoned the Proposed 2011 CBSA after being unable to get a "straightforward" answer from Yip HW, who issued his equivocal legal advice on Chia's instructions,[78] fortifies my analysis that neither party had applied their minds to the issue when the CBSAs were executed. Apart from that, the evidence relating to this episode does not assist me in determining how a reasonable business person would have understood Clause 12.1 if the issue had been considered at the time of contract.

112 Next, there are the various pieces of correspondence and meetings between the parties in 2012 and 2013. That was almost five years after the time of contract and, unsurprisingly, these items of extrinsic evidence are of limited utility. Starting with the letters of demand which were sent in 2012 (see [26] above), not much can be inferred from the fact that they named all five defendants, including Ong and Yap, who did not respond. The letters also do not make any reference to Clause 12.1. In addition, the Initial Shareholders' failure to respond or object to them is understandable as the parties were still in negotiations during that period of time and looking for a possible "white knight" investor to rescue Polimet.[79]

113 There is also the meeting of 11 August 2013 between Ong and Chia following the further letter of demand sent on 5 August 2013 (see [27] above). Ong testified that Chia reassured him at this meeting that Ong's liability was limited to the loss of his shares and nothing more. This is difficult to accept

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78 CC AEIC, para 179.

79 CC AEIC, para 182; LSP AEIC, para 139.

given my finding that there never was any oral agreement between the parties to this effect. In addition, KC had already sold the plaintiff to GDAF by then, so there was no reason for Chia to go out on a limb and make such a representation. Hence I do not accept that what transpired at the meeting supports the Initial Shareholders' case. Having said that, it does not undermine my findings on Clause 12.1 either, which neither party asserts was discussed at the 11 August 2013 meeting.

114 Indeed, the first time Clause 12 was expressly brought up by the plaintiff, in relation to the Initial Shareholders' purported liability to indemnify the plaintiff for Polimet's default under Clause 11.1, was on 21 August 2013 in response to the request by the defendants' solicitors for the basis of the demand against Ong and Yap (see [28] above). This was after the plaintiff's solicitors had issued two demands earlier in the same month, the first dated 15 August 2013 to the defendants to cancel the CBSAs and to demand payment, and the second dated 20 August 2013 to Lee and Ho to demand payment pursuant to their PGs.[80] Both demand letters did not mention Clause 12. This fact corroborates my analysis that neither party had intended *at the time of contract* for Clause 12.1 to cover Polimet's debts. Otherwise, the clause would have been brought up by the plaintiff earlier, and not belatedly in response to a specific request by the defendants' solicitors. Having said that, I accept that the failure of the plaintiff to bring up Clause 12.1 from the outset cannot, on its own, be determinative.

115 Finally, there was a reference made to an exchange of correspondence in August 2013 between Lee and David Soong ("Soong"), the solicitor from Raslan Loong who drafted the 2007 and 2008 CBSAs.[81] Lee wrote to Soong

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[80] CC AEIC, paras 198 and 199; exhibit CCWL-43.

after the defendants received the plaintiff's letters of demand to enquire if Ong was personally liable for Polimet's debts under the CBSAs. I do not place any weight on this evidence. Clause 12.1 was not discussed in the correspondence or brought to Soong's attention. More importantly, this was well after the fact and Lee was clearly trying to get an answer favourable to her in anticipation of the imminent litigation. Hence the correspondence does not assist me in determining what the parties' intention was at the time of contract.

Conclusion on Clause 12.1

116 Having considered all of the above, particularly the text of Clause 12.1 placed in the full context of the terms of the CBSAs, the extrinsic evidence of the parties' pre-contractual negotiations and the commercial context of the investment, I find that Clause 12.1, as a matter of interpretation, does not cover losses arising from Polimet's default despite its broad language. Thus the plaintiff's claim on this issue is dismissed.

117 Consequently, the Initial Shareholders' alternative defence based on mistake and the third party claim for misrepresentation do not strictly need to be considered. But, for completeness, I will make some brief observations on these issues.

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[81] LSP AEIC, Tab 62.

Mistake and third party claim for misrepresentation

118 The Initial Shareholders rely on both the doctrines of unilateral and common mistake.[82] I find that unilateral mistake does not apply to the present case, although it is arguable that the parties entered into the CBSAs under a common mistake as to the Initial Shareholders' personal liability in the event of Polimet's default.

119 Before I set out my analysis of both types of mistake, it must be kept in mind that these are alternative defences which presuppose that Clause 12.1 is broad enough to cover losses arising from Polimet's default. The Initial Shareholders argue that, even if this was the case, the plaintiff's claim should still fail because they made a mistake as to the meaning and effect of Clause 12.1 of which the plaintiff was aware (unilateral mistake) or that was made by both parties (common mistake).

120 The defence of unilateral mistake can be easily dismissed. Even if the Initial Shareholders had been mistaken about the scope of Clause 12.1, and assuming that this mistake was sufficiently important or fundamental (see *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [34] ("*Digilandmall*")), there is no indication that Chia or Yeo would have known of the mistake at the time of contract. As I found earlier, neither party applied their minds to the scope of Clause 12.1 until well after the execution of the CBSAs. While Chia knew that Clause 12.1 was a general indemnity, he had not considered the possibility that it was broad enough to be enforced as an unlimited personal indemnity against the Initial Shareholders for all the sums owing by Polimet. This is the reason why there were no

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[82] Defence and Counterclaim (Amendment No 5) dated 27 October 2016 ("DCC"), paras 17 and 18; Defendants' Opening Statement dated 11 October 2016, para 38.

serious discussions on the indemnity clause during the course of negotiations. Thus, not having considered the matter themselves, Chia and Yeo could not have known of the Initial Shareholders' purported mistake at the time the CBSAs were executed.

121 It is less clear if the doctrine of common mistake applies. On the one hand, I have found that neither party applied their minds to Clause 12.1 until well after the execution of the CBSAs and that there were no firm oral agreements on the Initial Shareholders' personal liability under the investment. This supports the plaintiff's position that neither of them could have been mistaken about the nature and effect of Clause 12.1. At the same time, the evidence suggests that the parties, at the time of negotiations, were operating under a common assumption that, if Polimet defaulted, the Initial Shareholders would only be personally liable to the extent of any PGs granted by them, if any (see [98] and [99] above). Therefore, and assuming that Clause 12.1 is broad enough to cover losses arising from Polimet's default, the parties' assumption would have been wrong and they would have entered into the CBSAs under a common mistake as to Clause 12.1's "effect on the [Initial Shareholders'] liability under the 2007 CBSA", as pleaded by the defendants.[83]

122 I accept that this mistake is unlikely to meet the high common law threshold – that the mistake be so fundamental that it "renders the subject matter of the contract essentially and radically different from that which both parties believed to exist at the time the contract was executed" (*Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 4 SLR 407 at [69] citing *Associated Japanese Bank (International) Ltd v Crédit Du Nord SA* [1989] 1 WLR 255). However, equity might still intervene. This possibility

[83] DCC, para 17.

was left open by our Court of Appeal in *Digilandmall* (see [75]– [80]) notwithstanding the English Court of Appeal's judgment in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] 1 QB 679. In the latter case, it was held that there is no equitable jurisdiction to grant remedy for common mistake in circumstances which fall short of those in which the common law held a contract void (at [126]). The case was distinguished by Chao Hick Tin JA in *Digilandmall*, who observed that the court should not approach the issue in a rigid and dogmatic fashion for equity is dynamic (at [77]). *Digilandmall* concerned unilateral mistake, but the reasoning of the Court of Appeal was clear in its preference for the continual role of equity in the area of mistake (see *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2016 Reissue) at para 80.153). Hence, it is certainly arguable that the common mistake made by the parties – as to the effect of Clause 12.1 on the Initial Shareholders' liability under the CBSAs in the event of Polimet's default – is sufficient to warrant the equitable remedy of rectification sought by the Initial Shareholders (albeit not on the exact terms which they seek). Having said that, I do not make any firm finding on this issue and it is unnecessary for me to do so given that I have found in favour of the Initial Shareholders on their primary defence.

123 Turning next to the third party claim for misrepresentation, the Initial Shareholders' case is that Chia and Yeo falsely represented that their personal liability will be limited to the loss of their initial shareholdings in Polimet, aside from Ho and Lee who were also liable under the PGs. This claim is undermined by my finding that there was never such a discussion or agreement (see [61] above). Hence there is no evidence that Chia and Yeo made such representations, be it fraudulently or negligently.

Enforceability of default interest

124 The final discrete issue before the court is whether the default interest of 2% per month provided for under Clause 5.5 of the CBSAs is an unenforceable penalty. The burden of proving this is on the defendants (*CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [63]). The applicable principles were recently examined by the High Court in *iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronic*").

125 In essence, the question is whether the sum stipulated for is extravagant and unconscionable in comparison with the greatest that could conceivable be proved to have followed from the breach (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 87). This test is qualified by the "strong initial presumption" that that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach in a negotiated contract between properly advised parties of comparable bargaining power (*iTronic* at [177] relying on the landmark UK Supreme Court case of *Cavendish Square Holding BV v Makdessi* [2016] AC 1172). As was observed in *iTronic* (at [177]), it is not for the courts to relieve a party from the consequences of what may prove to be an onerous or possibly even a commercially imprudent bargain. Thus, a clause will not become a penalty simply because it results in overpayment in particular circumstances and the parties are allowed a generous margin to determine the agreed damages to be payable upon breach (*iTronic* at [176] and [177]).

126 Applying these principles to this case, it is clear that Clause 5.5 does not contravene the penalty doctrine. First, the defendants have not really adduced any evidence to show that the default interest rate of 2% per month is out of line with that imposed in comparable loans of such a nature. While they

submit that it is "common knowledge" that the returns on bond subscriptions in the open market would range between 3% to 6% per annum,[84] this assertion is unsubstantiated by any material. It is unclear to me what kind of bond subscriptions the defendants are referring to, particularly whether they are comparable to the CBSAs. The plaintiff, by contrast, adduced unchallenged evidence that private equity funds, similar to mezzanine funds such as KC, typically target an internal rate of return ("IRR") of between 20% and 25%.[85] Thus Polimet's default deprived KC of the opportunity to deploy the funds for other investments which could conceivably have generated such annualised returns. The plaintiff also relied on statutory guidelines which stipulate that late interest charged under a licensed business loan will only be considered "unconscionable or substantially unfair" if it exceeds a rate of 4% per month (see r 11(1) of the Moneylenders Rules 2009 read with s 23(6) of the Moneylenders Act (Cap 188, 2010 Rev Ed)). While the CBSAs may not fall within the scope of these guidelines, they are a further indication that the default interest rate of 2% per month is not extravagant and unconscionable.

127 Just as crucially, the defendants have not rebutted the "strong initial presumption" which applies to negotiated contracts between properly advised parties of comparable bargaining power. There is no dispute that the terms of the CBSAs were specifically negotiated. The Initial Shareholders were advised by AFG and Chua, and the commercial terms of the CBSAs were not unilaterally imposed by KC. For instance, the coupon rate was lowered upon Lee's specific request and she had the full opportunity to review the terms of the 2007 CBSA when the drafts were presented to her. So, even if the default interest rate is high, this is not a case where the court ought to intervene. In

84 DCS, para 463.

85 CC AEIC, para 210.

such circumstances, I find that Clause 5.5 is valid and enforceable.

Conclusion

128 In conclusion, these are my findings:

(a) The plaintiff's claim against the Initial Shareholders for the outstanding sums owing by Polimet under Clause 12.1 of the CBSAs is dismissed.

(b) Against the defendants, I find that the default interest provided for under Clause 5.5 of the CBSAs is valid and enforceable.

(c) The third party claim against Chia and Yeo is dismissed.

129 I now invite the parties to make their submissions on costs.

Audrey Lim
Judicial Commissioner

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