IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 54

Suit No 264 of 2019

Between

KPMG Services Pte Ltd

… *Plaintiff*

And

Pawley, Mark Edward

… *Defendant*

JUDGMENT

[Credit and Security] — [Guarantees and indemnities] — [Guarantor]
[Contract] — [Contractual terms]
[Evidence] — [Admissibility of evidence] — [Hearsay]

Version No 1: 12 Mar 2021 (15:44 hrs)

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KPMG Services Pte Ltd
v
Pawley, Mark Edward

[2021] SGHC 54

General Division of the High Court — Suit No 264 of 2019
Andre Maniam JC
21 December 2020, 5 February 2021

12 March 2021 Judgment reserved.

Andre Maniam JC:

Introduction

1 When an agent signs a contract on behalf of his principal, with a clause that purports to make him personally liable if his principal defaults, is he so liable?

Background

2 The defendant, Mark Edward Pawley ("Mr Pawley"), had a successful career as an investment banker, before moving on to do deals on his own. One of those deals was a potential investment in a major US-based media publishing group.

3 The investment vehicle was Bluestone Special Situations #4 Ltd ("Bluestone"). Bluestone was a British Virgin Islands ("BVI") company owned

by Asia Harimau Investments Ltd ("Asia Harimau") and Mr Pawley in turn owned Asia Harimau.[1]

4 The plaintiff, KPMG Services Pte Ltd ("KPMG (S)"), is the Singapore member of the KPMG network of firms. It was engaged to provide advisory and consulting services in relation to the prospective investment. KPMG (S)' client on record was Bluestone, and the terms of engagement between them were set out in a letter of engagement dated 24 January 2014 ("the LOE"),[2] which Mr Pawley signed as director and authorised signatory of Bluestone.

5 KPMG (S), however, inserted into the LOE language purporting to make Mr Pawley responsible if Bluestone failed to pay KPMG (S). Clause 5.1 of the LOE read:[3]

> [KPMG (S)'] fees will be the responsibility of and will be paid by [Bluestone], failing which, [Mr Pawley] will be responsible for the payment of our fees. We have set out details of our fees and fee arrangements in Appendix A.
>
> [emphasis added in underline]

6 In the course of negotiations, the in-house counsel whom Mr Pawley had tasked to review the draft LOE proposed that the underlined phrase, which said Mr Pawley would be personally responsible for KPMG (S)' fees, be struck out. KPMG (S) did not agree, and in the event, Mr Pawley signed the LOE containing clause 5.1 as originally drafted.

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1 Agreed Bundle of Documents ("ABOD") at p 265.

2 ABOD at pp 169–184.

3 ABOD at p 170.

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7 KPMG (S) duly proceeded with and completed the engagement. Bluestone, however, was unsuccessful in its bid, and the potential investment did not materialise.

8 Over US$1.2m in time costs were incurred. KPMG (S) billed a discounted amount of US$939,000 in fees, plus US$15,000 in expenses, making a total of US$954,000. Mr Pawley was informed of the amounts KPMG (S) intended to bill, and he agreed to those amounts, before KPMG (S) rendered its invoices.[4]

9 Bluestone, however, did not pay KPMG (S) anything. All that KPMG (S) received towards its invoices, was partial payment of US$9,949.30 from another company, TMF Trust Labuan Ltd ("TMF Trust").[5] Mr Pawley had arranged for that.

10 KPMG (S) sued Mr Pawley for the balance of US$944,050.70 on the basis that Mr Pawley was responsible for payment, as stipulated in clause 5.1 of the LOE.

11 Mr Pawley denied liability on the basis that he had only signed the LOE for and on behalf of Bluestone; he had not agreed to be responsible to KPMG (S). In the alternative, Mr Pawley put forward various reasons why, even if he were responsible, KPMG (S) should not recover the amount claimed (or any amount).

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4 Transcript, 21 December 2020, p 91 lines 13–21.

5 ABOD at p 279.

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Issues

12 The two main issues are:

(a) is Mr Pawley responsible to KPMG (S), as stipulated in clause 5.1 of the LOE; and if so

(b) what is KPMG (S) entitled to recover from Mr Pawley?

Is Mr Pawley responsible to KPMG (S), as stipulated in clause 5.1 of the LOE?

The requirement that a promise of guarantee be in writing (or evidenced in writing) and signed by the guarantor

13 It is common ground that under s 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA"), a promise to answer for the debt of another person:

(a) must be in writing and signed by the person to be charged therewith; or

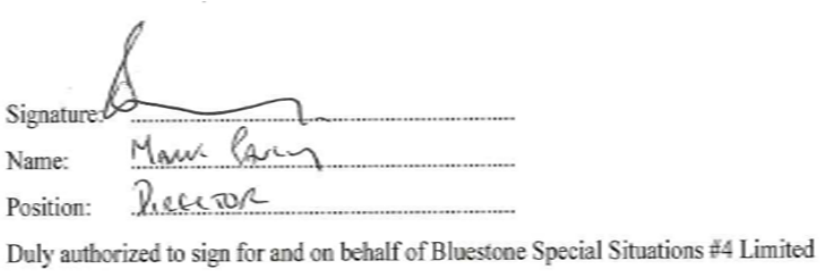
(b) must, if the promise is an oral one, have a memorandum or note thereof, in writing and signed as aforesaid.

14 KPMG (S) contends that the requirements in s 6(b) of the CLA are satisfied because clause 5.1 is a term in the *written* LOE, which Mr Pawley *signed*. Mr Pawley contends that he only signed the LOE *for and on behalf of* Bluestone; he never promised to be responsible to KPMG (S) if Bluestone failed to pay KPMG (S).

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What is the effect of Mr Pawley's signature on the LOE?

15 Mr Pawley relies on the signature block of the LOE:[6]



16 The signature block was in the form originally drafted by KPMG (S), and Mr Pawley added (in handwriting) his name, his position – director, and his signature.

17 Mr Pawley cites Lord Millett's statement in *Homburg Houtimport BV and others v Agrosin Pte Ltd and another* [2004] 1 AC 715 ("*Homburg v Agrosin*") at [176]:

> [w]here a contract is contained in a signed and written document, the process of ascertaining the identity of the parties and the capacity in which they entered into the contract must begin with the signatures and any accompanying statement which describes the capacity in which the persons who appended their signatures did so.

18 The issue in that case was whether certain bills of lading were shipowner's bills or charterer's bills. The forms used were intended for use as owners' bills, to be signed by the master (*Homburg v Agrosin* at [122]). They were however not signed by the master, but by port agents as agents "for the carrier Continental Shipping" (or with similar language) (*Homburg v Agrosin*

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6 ABOD at p 173.

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at [123]). Continental Shipping was the time charterer, and not the shipowner. The House of Lords concluded that the bills were charterer's bills, notwithstanding the presence of inconsistent printed terms.

19 From *Homburg v Agrosin*, Mr Pawley submits that the LOE was between Bluestone and KPMG (S),[7] but that only gets him so far. Bluestone was indeed KPMG (S)' client, and accordingly the LOE was addressed to Bluestone, setting out the terms of that engagement. But the LOE *also* contained language purporting to make Mr Pawley personally responsible to KPMG (S), if Bluestone failed to make payment to KPMG (S).

20 The crucial question is not whether the LOE was a contract between KPMG (S) and Bluestone – it was – but whether Mr Pawley *also* agreed to be personally responsible to KPMG (S) as stipulated in clause 5.1 of the LOE.

21 It is common ground that Mr Pawley signed the LOE for and on behalf of Bluestone; but did he *only* sign it for and on behalf of Bluestone, or did his signature *also* signify his agreement to be personally responsible to KPMG (S)?

22 Mr Pawley invokes the general rule that where a corporate representative indicates that he is signing a contract "for and on behalf of" a company, he will usually have sufficiently made clear the intention of the parties that he is to be regarded as acting in a representative rather than personal capacity and will therefore incur no personal liability under the contract: Tan Cheng Han, SC, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*The Law of Agency*") at para 09.012.[8] However, *The Law of Agency* also notes at

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7 Defendant's Closing Submissions ("DCS") at para 6.

8 DCS at paras 7–8.

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para 09.013 that the use of the words "director", "manager" or even "agent" alone may not be sufficient, as such words may be regarded as words of description rather than words which qualify the capacity in which an agent signs a contract. They raise no presumption that the agent did not intend to contract personally: see *Todd Trading Pte Ltd v Aglow Far East Trading Pte Ltd* [1997] 1 SLR(R) 494 ("*Todd Trading*") at [35(b)].

23 Those propositions are of some value, but again the question is not whether Bluestone or Mr Pawley had engaged KPMG (S) on the terms of the LOE, but more specifically whether Mr Pawley had agreed to be personally responsible to KPMG (S) as stipulated in clause 5.1.

24 The phrase "*[d]uly [authorised] to sign* for and on behalf of [Bluestone]" [emphasis added][9] speaks of Mr Pawley's authority to represent Bluestone, but it does not say he was *only* signing "for and on behalf of Bluestone". KPMG (S) certainly wanted Mr Pawley to be duly authorised to sign the letter for and on behalf of Bluestone, but KPMG (S) also wanted him to agree to be personally responsible for payment, as stipulated in clause 5.1 of the LOE.

What did the parties intend?

25 Mr Pawley submits that the phrase "*[d]uly [authorised] to sign* for and on behalf of [Bluestone]" [emphasis added][10] (which was in the LOE from the time it was originally circulated as a draft by KPMG (S) through to its execution by the parties) means that KPMG (S) and Bluestone clearly intended to exclude

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9 ABOD at p 173.

10 ABOD at p 173.

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Mr Pawley from any personal liability.[11] The facts are, however, fundamentally inconsistent with this being the common intention of KPMG (S) and Bluestone.

26 Clause 5.1 of the LOE purports to make Mr Pawley responsible to KPMG (S), if Bluestone failed to make payment. KPMG (S) did not intend to exclude Mr Pawley from any personal liability – it wanted him to be liable. Indeed, Mr Pawley recognises that that is the purport of clause 5.1 – he describes it in his Defence as "an onerous clause which purported to impose personal liability upon [him] for work that was to be done for Bluestone as a corporate entity".[12]

27 Mr Pawley cannot maintain that KPMG (S) intended to exclude him from any personal liability, while acknowledging that the clause purported to impose personal liability on him.

28 The court will look at what the parties as a whole intended, based on what reasonable businessmen making a contract of that nature, in those circumstances, in those terms and in those surrounding circumstances, must be taken to have intended: *Todd Trading* ([22] *supra*) at [40]. In the present case, the intention of the parties was that Mr Pawley would be responsible to KPMG (S) on the terms of clause 5.1.

29 First, Bluestone was a BVI company, and KPMG (S) had no information as to its finances.[13] On the other hand, KPMG (S) knew that Mr Pawley was the

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11 DCS at para 10.

12 Defence (Amendment No. 1) dated 28 August 2020 ("Defence (Amendment No. 1)") at para 5(a) in Set Down Bundle ("SDB") at p 21.

13 Affidavit of Evidence-in-Chief of Andrew Timothy Thompson at paras 2.2.2–2.2.3 ("Mr Thompson's AEIC") in Bundle of Affidavits of Evidence-in-Chief ("AEIC Bundle") at pp 8–9; Transcript, 21 December 2020, p 7 lines 10–28.

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individual behind Bluestone, he was the individual who would ultimately benefit from KPMG (S)' services, and that he was wealthy. It is quite understandable that KPMG (S) did not want to do substantial work on the engagement and only have Bluestone to look to for payment. This is consistent with KPMG (S)' client evaluation report citing Mr Pawley's credentials.[14]

30 Second, clause 5.1 is not a typical clause in KPMG (S)' engagement letters – it was specifically inserted by KPMG (S) to address its concerns about whether Bluestone were good for payment.[15]

31 Third, the events leading up to Mr Pawley's signing of the LOE indicate that KPMG (S) wanted Mr Pawley to be personally liable as guarantor, *and that Mr Pawley had agreed to this*.

32 Mr Pawley says he had left it to Cate Friedlander ("Ms Friedlander") to review and propose amendments to the draft LOE.[16] He described her as "my legal counsel".[17] Ms Friedlander was in-house counsel at Oxley Capital Ltd (a company in which some shares were owned by Mr Pawley, and some shares were owned by Asia Harimau (which Mr Pawley owned)).[18]

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14 ABOD at pp 163–164; Mr Thompson's AEIC at para 2.2.5 in AEIC Bundle at p 10.

15 Mr Thompson's AEIC at para 2.3.1 in AEIC Bundle at p 10.

16 Affidavit of Evidence-in-Chief of Mark Edward Pawley ("Mr Pawley's AEIC") at para 8 in AEIC Bundle at p 345.

17 Transcript, 21 December 2020, p 51 line 27.

18 Mr Pawley's AEIC at para 8 in AEIC Bundle at p 345; ABOD at pp 264–265.

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33 KPMG (S) circulated the first draft of the LOE with clause 5.1 as it appears in the signed LOE:[19] this draft was sent to Mr Pawley on 13 January 2014, and then to Ms Friedlander on 24 January 2014.[20]

34 On 27 January 2014, Ms Friedlander sent a revised draft of the LOE back to KPMG (S),[21] with changes marked up, including a deletion of that part of clause 5.1 that purported to make Mr Pawley responsible to KPMG (S):[22]

> [KPMG (S)'] fees will be the responsibility of and will be paid by [Bluestone]. ~~, failing which, Mr Mark Pawley will be responsible for the payment of our fees.~~ We have set out details of our fees and fee arrangements in Appendix A.
>
> [markup in original]

35 On 28 January 2014, KPMG (S) replied to Ms Friedlander to say which of her proposed changes were accepted.[23] KPMG (S) did not accept Ms Friedlander's deletion of the language in clause 5.1 about Mr Pawley's responsibility to KPMG (S).

36 On 29 January 2014, Ms Friedlander responded to say that she was seeking further instructions from Mr Pawley, who was travelling that day.[24] Later that same day, Ms Friedlander sent KPMG (S) a further draft of the LOE, with some "outstanding, required changes" marked up afresh, and she said:[25]

> I have also highlighted several sections of the [draft LOE] – these are items in respect of which I am seeking further instructions

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19 ABOD at pp 65–80.

20 ABOD at p 64.

21 ABOD at p 87.

22 ABOD at p 91.

23 ABOD at pp 155–157.

24 ABOD at p 106.

25 ABOD at pp 110 and 113–128

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> from [Mr Pawley]. Unfortunately he is travelling today and is not contactable. I will discuss these items with him further tomorrow and will revert after that.

37 One of the highlighted sections of the draft LOE which Ms Friedlander said she was seeking Mr Pawley's further instructions on, was the language in clause 5.1 about Mr Pawley's responsibility to KPMG (S):[26]

> [KPMG (S)'] fees will be the responsibility of and will be paid by [Bluestone]. , failing which, Mr Mark Pawley will be responsible for the payment of our fees. We have set out details of our fees and fee arrangements in Appendix A."
>
> [highlight in original]

38 On 30 January 2014, KPMG (S) replied Ms Friedlander to say that certain of the amendments Ms Friedlander had wanted were accepted.[27] Those did not, however, include clause 5.1.

39 On 3 February 2014, Ms Friedlander emailed KPMG (S) to say that she had since had an opportunity to review the latest iteration of the LOE. She said there was just one remaining item she would like to raise, which concerned clause 6.8 of the LOE.[28] KPMG (S) promptly replied to say that that change had already been made.[29] Ms Friedlander then asked that the LOE be sent to a particular address, marked for Mr Pawley's attention.[30]

40 On 4 February 2014, Mr Pawley emailed KPMG (S) to say that the LOE had been signed.[31]

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26 ABOD at p 114.

27 ABOD at pp 129–130.

28 ABOD at p 142.

29 ABOD at p 141.

30 ABOD at p 141.

31 ABOD at p 140.

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41 Not only had Mr Pawley signed the LOE with clause 5.1 purporting to make him responsible if Bluestone failed to pay KPMG (S), he had done so after Ms Friedlander had tried to have that language removed, but KPMG (S) had insisted that it be retained.

42 At trial, Mr Pawley concedes that Ms Friedlander had marked up the draft LOE with his instructions; she probably would have told him or talked to him before doing so;[32] and it was unlikely that Ms Friedlander would have made the mark ups or amendments without at least talking to him.[33] Mr Pawley says he presumed that Ms Friedlander would have, with his instructions, struck out the part of clause 5.1 providing for his responsibility to KPMG (S) for fees,[34] and that it was "highly likely" that she did so on his instructions.[35]

43 Mr Pawley seeks to rely on Ms Friedlander's proposed strike-out of that part of clause 5.1 as evidence that he had instructed her, "no personal guarantees".[36] He said:[37]

> … all I can recall now is when – when [Ms Friedlander] mentioned – and, by the way, I wasn't reading [the draft LOE] in depth. [Ms Friedlander] was probably reading [the draft LOE] to me on the phone, right? She says, 'You know, there's [clause 5.1] here.' I went, '[Ms Friedlander], strike it out. No personal guarantees.' That's all I can recall, which is probably why she then did what she did, right? And that's it.

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32 Transcript, 21 December 2020, p 53 lines 24–32; p 54 lines 1–2.

33 Transcript, 21 December 2020, p 54 lines 5–11.

34 Transcript, 21 December 2020, p 54 lines 31–32; p 55 lines 1–5.

35 Transcript, 21 December 2020, p 58 lines 31–32; p 59 lines 1–7.

36 Transcript, 21 December 2020, p 67 lines 2–13; p 70 lines 7–24; p 73 lines 5–10.

37 Transcript, 21 December 2020, p 73 lines 5–10.

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44 The story, however, does not end with Ms Friedlander's proposed strike-out, for KPMG (S) did not agree to the strike-out. In her email of 29 January 2014, Ms Friedlander highlighted to KPMG (S) the language of that part of clause 5.1, and said she was seeking Mr Pawley's instructions on it ([36]–[37] above). Thereafter, neither Ms Friedlander nor Mr Pawley asked again for that part of clause 5.1 to be struck out; and Mr Pawley signed the LOE with the whole of clause 5.1 in it ([38]–[40] above).

45 Indeed, Mr Pawley concedes that after Ms Friedlander's email of 29 January 2014, Ms Friedlander would have reached out to him for his further instructions specifically in relation to the part of clause 5.1 which she had sought earlier to strike out.[38]

46 On Mr Pawley's own reasoning, if Ms Friedlander's proposed strike-out was evidence of his instruction that there were to be "no personal guarantees", then by signing the LOE with the whole of clause 5.1 (containing the very language which Ms Friedlander had earlier sought to strike out but which KPMG (S) insisted on retaining), Mr Pawley had agreed to give a personal guarantee. That is certainly how it would have appeared to KPMG (S), who then proceeded with the engagement.

47 In the circumstances, I can only conclude that Mr Pawley had agreed to be responsible to KPMG (S) as stipulated in clause 5.1 of the LOE. Mr Pawley did not sign the LOE *solely* as agent for Bluestone; he also signed it in his individual capacity signifying his agreement to be responsible to KPMG (S) as stipulated in clause 5.1. That an agent had signed in a dual capacity (on his own behalf as well as on behalf of his principal) was likewise the conclusion reached

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[38] Transcript, 21 December 2020, p 63, lines 6–16.

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in *Young v Schuler* (1883) 11 QBD 651 ("*Young*"), as explained in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 ("*Elpis*") at 28–31, and by the New Zealand Court of Appeal in *Doughty-Pratt Group Ltd v Perry Castle* [1995] 2 NZLR 398 ("*Doughty-Pratt*") at 404, which followed both *Young* and *Elpis*.

48 Mr Pawley seeks to distinguish *Doughty-Pratt* by pointing out that, in that case, the guarantors had made handwritten amendments and additions to the guarantee clause,[39] but the case did not turn on this. While the court had found that the handwritten amendments and additions showed that the guarantors knew they were giving a guarantee (like the evidence here, which shows that Mr Pawley knew he was to be responsible to KPMG (S) as stipulated in clause 5.1 of the LOE), the court also found, in addition to and independent of that earlier finding, that "[the guarantors'] execution *of the agreement* may properly be taken to have been done in a dual capacity" [emphasis added] (*Doughty-Pratt* at 404).

The nature of clause 5.1 of the LOE, and independent legal advice

49 In his Defence, Mr Pawley also pleads that it was not highlighted to him that there was an "onerous clause" (referring to clause 5.1) in the LOE which purported to impose personal liability upon him.[40] However, Mr Pawley did not need KPMG (S) to highlight the clause to him. Mr Pawley acknowledges that Ms Friedlander had highlighted clause 5.1 to him, and when she did, he instructed Ms Friedlander to propose that that part of clause 5.1 be struck out. He knew that language providing for his responsibility to KPMG (S) for

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39 DCS at para 30.

40 Defence (Amendment No. 1) at para 5(a) in SDB at p 21.

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Bluestone's fees was there and he wanted to remove it, but KPMG (S) stood firm.

50 In any event, where a party has agreed to a term, he cannot thereafter escape its consequences by arguing that it is onerous and was not highlighted to him. As stated in *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 at [40]:

> [w]here a party has signed a contract after having been given notice … of what would be included among the contractual terms, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been drawn specifically to its attention.

51 Mr Pawley further argues that he did not receive independent legal advice on clause 5.1: Ms Friedlander was merely in-house counsel, and moreover she was looking at the LOE on behalf of Bluestone rather than Mr Pawley personally.[41] There is nothing in this point. First, the lack of independent legal advice is not in itself a defence: it is a non-mandatory factor to be considered in the context of unconscionability (*BOM v BOK and another appeal* [2019] 1 SLR 349 at [141]–[142]) but Mr Pawley did not invoke unconscionability, nor would I have found the transaction unconscionable. Second, Ms Friedlander could not have been proposing the strike-out on Bluestone's behalf: the language in question related only to *Mr Pawley's* responsibility, not Bluestone's. Why did Ms Friedlander ask to strike out that language, and why did Mr Pawley ask her to do so based on his instruction, "no personal guarantees"? It could only have been that Ms Friedlander knew full well, as did Mr Pawley, that clause 5.1 purported to make Mr Pawley responsible to KPMG (S) – that is why they sought to have it amended; and that

[41] DCS at para 18.6.

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is precisely what Mr Pawley ultimately agreed to by signing the LOE with the unamended clause 5.1.

Is the LOE a written and signed promise by Mr Pawley to be responsible to KPMG (S), or a written and signed memorandum or note of that promise?

52 I find that Mr Pawley's signature on the LOE satisfied the requirement in s 6(b) of the CLA (see [13] above) that his promise (to be responsible to KPMG (S)) be in writing or evidenced in writing, signed by him. In *Elpis* ([47] *supra*), the House of Lords held that even if a memorandum or note of the promise is signed by the guarantor *solely* as agent, that is sufficient for enforceability: *Elpis* at 33 *per* Lord Brandon (with whom the other Law Lords agreed). Mr Pawley seeks to distinguish *Elpis* by arguing that the guarantor in that case had signed the particular page containing the guarantee clause without qualifying that it was signing solely as agent,[42] but the decision in *Elpis* did not rest on this: the House of Lords decided that even if "every signature" on the document were affixed solely as agent, there would still be a sufficient note or memorandum for enforceability (*Elpis* at 32–33).

53 In any event, on the facts, I find that Mr Pawley signed the LOE in a dual capacity: see [47] above. In the circumstances, the LOE signed by Mr Pawley was a written and signed agreement in relation to clause 5.1; if his promise were regarded as an oral one, clause 5.1 would be a written and signed memorandum or note of his promise.

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42 DCS at para 29.

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Was there an oral guarantee from Mr Pawley (aside from Mr Pawley agreeing to clause 5.1 of the LOE)?

54 As I find that Mr Pawley had agreed to clause 5.1 of the LOE, it is not necessary for me to decide on KPMG (S)' alternative case that he had, aside from the LOE, orally agreed to guarantee payment to KPMG (S).

55 I would simply observe that the evidence of such an agreement was thin. KPMG (S)' case rested on what its engagement partner Diana Koh ("Ms Koh") had briefed Andrew Timothy Thompson ("Mr Thompson"), who was then Ms Koh's supervisor. However, the details of this were vague. Ms Koh had unfortunately passed away before trial, and Mr Thompson was KPMG (S)' sole witness.

56 In its particulars, KPMG (S) said that the alleged oral agreement was reached on or around 24 January 2014.[43] In Mr Thompson's Affidavit of Evidence-in-Chief, however, he said that the alleged verbal agreement was reached around 13 January 2014.[44]

57 13 January 2014 was the date KPMG (S) circulated the first draft of the LOE.[45] 24 January 2014 was the date on which that draft was sent to Ms Friedlander,[46] and it is also the date on the signed LOE.[47]

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43 Plaintiff's Particulars Served Pursuant to Request dated 16 October 2019 at p 3 in SDB at p 56.

44 Mr Thompson's AEIC at para 2.2.1(b) in AEIC Bundle at p 8.

45 ABOD at pp 41–57.

46 ABOD at p 194.

47 ABOD at p 169.

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58 Ms Friedlander responded to the draft LOE on 27 January 2014 proposing deletion of the phrase in clause 5.1 which would make Mr Pawley responsible to KPMG (S) ([34] above). There is no evidence of KPMG (S) thereafter responding that Mr Pawley had already agreed to that orally. It would have been natural to mention that, if in fact there were such an agreement.

59 Mr Thompson's evidence was that he did not know the exact date of the alleged oral agreement – he was relying on what Ms Koh had informed him.[48] Mr Pawley said he does not recall having any such conversation with any KPMG (S) representative, and that he was certain he did not orally agree to give a guarantee.[49]

60 In the end, what Ms Koh told Mr Thompson might simply have been that Mr Pawley had agreed to guarantee payment, because he had agreed to clause 5.1 of the LOE. That would add nothing to what I have already decided in favour of KPMG (S) (see [41]–[47] and [52]–[53] above).

What is KPMG (S) entitled to recover from Mr Pawley?

61 KPMG (S) invoiced Bluestone a total of US$954,000:

(a) US$206,500 (US$200,000 in professional fees, and US$6,500 in disbursements) under its first invoice, dated 17 March 2014;[50] and

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48 Transcript, 21 December 2020, p 22 lines 4–31; p 23; p 24 lines 1–9.

49 Mr Pawley's AEIC at para 10 in AEIC Bundle at p 346; Transcript, 21 December 2020, p 102 lines 20–31; p 103; p 104 lines 1–6.

50 ABOD at p 253.

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(b) US$747,500 (US$739,000 in professional fees, and US$8,500 in disbursements) under its second invoice, dated 19 January 2016.[51]

62 In the course of the engagement, KPMG (S) updated Mr Pawley on the costs that were being incurred,[52] and Mr Pawley raised no issue with the amounts in question.[53] Mr Pawley agreed that KPMG (S)' fees "didn't seem out of line"[54] and he said, "I did not challenge them and so therefore I agree that I agreed to the quantum, [which] did not seem unreasonable at that time".[55] He also said, "the service that I recall getting from [KPMG (S)] at [that] time was actually quite good".[56]

63 The updates which Mr Pawley received included an email from KPMG (S) dated 15 August 2014 which set out the deliverables provided and a breakdown of fees for:[57]

(a) pre-deal financial and tax due diligence (US$ 470,000, "as per [LOE] signed 24 January 2014");

(b) addendum and updates to report (US$200,000, as "[p]reviously communicated … which includes a 25% discount"); and

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51 ABOD at p 267.

52 Mr Thompson's AEIC at paras 5.3.1–5.3.9 in AEIC Bundle at pp 38–43.

53 Mr Thompson's AEIC at paras 5.3.10 and 5.3.12 in AEIC Bundle at p 44; Transcript, 21 December 2020, p 81 lines 7–16 and 29–32; p 82 lines 1–27; p 85 lines 9–30.

54 Transcript, 21 December 2020, p 105 line 22.

55 Transcript, 21 December 2020, p 105 lines 31–32.

56 Transcript, 21 December 2020, p 87 lines 3–4.

57 ABOD at pp 257–258.

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(c) tax structuring (US$269,000, as "[p]reviously communicated … which includes a 25% discount").

64 The amounts KPMG (S) invoiced were agreed to by Mr Pawley before the invoices were issued:

(a) on 21 February 2014, KPMG (S) emailed Mr Pawley to say that it would need to issue its invoice for half of some US$400,000 with disbursements of US$6,500;[58] Mr Pawley replied on 22 February 2014, saying "[t]hanks for the heads up. By all means submit the bill",[59] and on 17 March 2014 KPMG (S) duly invoiced US$200,000 in professional fees and US$6,500 in disbursements, as agreed;

(b) on 14 January 2016, KPMG (S) informed Mr Pawley, "[t]he [total] amount we will invoice is US$939,000 plus [US]$15,000 expenses and taxes as applicable – please confirm prior to us issuing invoice", Mr Pawley replied "[y]ep",[60] and on 19 January 2016 KPMG (S) duly invoiced the balance US$739,000 in professional fees and US$8,500 in disbursements[61] (making a total of US$939,000 and US$15,000 in disbursements, as agreed).

65 Mr Pawley made various promises that KPMG (S) would be paid, or that he would try to arrange payment,[62] but all KPMG (S) received was a partial

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58 ABOD at pp 246–247.

59 ABOD at p 246.

60 ABOD at pp 264–265.

61 ABOD at p 267.

62 Mr Thompson's AEIC at paras 3.2.5–3.2.6 and 3.4.1–3.4.11 in AEIC Bundle at pp 19–20 and 22–28.

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payment of US$9,949.30 from TMF Trust, in September 2016 (see [9] above).[63] In the event, KPMG (S) sued Mr Pawley for the balance sum of US$944,050.70.

66 Although he had contemporaneously agreed to the amounts billed, Mr Pawley argues in these proceedings that even if he were personally responsible as stipulated in clause 5.1, KPMG (S) should recover nothing, or at least, not the full amount claimed.

Can Mr Pawley avoid liability by disputing time costs?

67 It was agreed that KPMG (S)' fees would be based on time costs – clause A.6 of Appendix A to the LOE stated:[64]

> ***A.6. Fees and charges***
>
> A.6.1 Our fees, which may be billed as work progresses, are based on the time required by the individuals assigned to perform or provide the services. Individual hourly rates vary according to the degree of responsibility involved and the experience and skills required.
>
> A.6.2 Based on the information available to us, our fee for the work will be as follows:
>
> | | |
> |---|---|
> | Financial due diligence | [US$]240,000 to [US$]350,000 |
> | Tax due diligence | [US$]85,000 to [US$]120,000 |
> | Tax structuring and SPA review | To be discussed |
>
> The fees above are exclusive of goods and services tax at the prevailing rate, foreign taxes and net of withholding tax, if any. In addition, you shall reimburse us all charges we incur and all payments we make on your behalf in connection with the service.
>
> …
>
> A.6.4 Our billings will be made in the following stages:
>
> | | |
> |---|---|
> | Upon commencement of engagement | 50% |

[63] ABOD at p 279.

[64] ABOD at p 180.

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> Upon issuance of draft deliverable 50%
>
> …
>
> [emphasis in original]

68 KPMG (S) put in evidence its internal records of time spent by those who worked on the engagement, from KPMG (S) and the US member firm of the KPMG network ("KPMG (US)").[65] The KPMG (US) timesheet showed time costs of US$1,006,706, of which US$666,988 was for due diligence, and US$339,718 was for structuring (including review of SPA).[66] The KPMG (S) timesheet showed time costs of US$93,822.50, of which US$76,800 was for time spent by partner Ms Koh and US$4,200 was for time spent by manager Mr Lemuel Cheong ("Mr Cheong").[67]

69 Mr Pawley disputes these time records.[68] In effect, his position is that unless the individuals in question each gave evidence in these proceedings, there was no admissible evidence of KPMG (S) and KPMG (US) having spent any time on the engagement, and so KPMG (S) was not entitled to be paid anything. I reject this.

70 Mr Pawley does not dispute the following: KPMG (S) performed the engagement, he agreed to the amounts billed (which he said did not seem unreasonable at the time) (see [62] and [64] above), he promised that KPMG (S) would be paid, and he arranged a partial payment (of a modest sum of under US$10,000). On his case that KPMG (S) is not entitled to any payment, that

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65 ABOD at pp 249–252.

66 ABOD at pp 251–252.

67 ABOD at p 249.

68 Defence (Amendment No. 1) at paras 10A(d) and 11(d) in SDB at pp 65–67.

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partial payment would have been a mistake, yet there is no evidence of Mr Pawley (or TMF Trust) making any attempt to recover the amount paid.

71 In the circumstances, it is not open to Mr Pawley to dispute KPMG (S)' billings by seeking to put KPMG (S) to proof of the time costs. Mr Pawley made no attempt to prove that the time costs did not justify the US$939,000 billed as professional fees. The furthest he went was to cite Mr Thompson's evidence that Mr Cheong's time entries might have been *understated*, and to rhetorically ask if the time entries as a whole might have been *overstated*.[69] There is an obvious difference between a timekeeper understating the time he spent (in which case the client might be billed less) and him overstating the time he spent (in which case the client might be billed for work that was never done). Moreover, from the documents, it appears that Mr Cheong's time costs were not billed at all, and that might explain why not all his time spent was recorded. Mr Cheong's time entries were for April and May 2014[70] (after the due diligence work was completed), and from his email of 15 August 2014 ([63] above),[71] the additional costs beyond that were based on the discounted time costs of KPMG (US).

72 I cannot conclude, as Mr Pawley speculates, that the time costs may have been overstated at all, let alone overstated to the point of affecting the billed amount of US$939,000 in professional fees, bearing in mind that the time costs were over US$1.2m.

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69 DCS at para 51.

70 ABOD at p 249.

71 ABOD at pp 257–258.

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73 In any event, I regard the timesheets as admissible evidence under s 32(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), specifically:

(a) under s 32(1)(b) of the EA as business records;

(b) under s 32(1)(j)(i) of the EA in relation to Ms Koh, who has passed away;

(c) under s 32(1)(j)(iii) of the EA in relation to the US-based timekeepers, on the basis that they are outside Singapore and it is not practicable to secure their attendance to testify as to what they each did on the engagement.

74 Mr Pawley also pleaded that clause 5.1 of the LOE read with clause A.6 of Appendix A is too uncertain to be enforced as there were no agreed hourly rates.[72] This point was not pursued in submissions, but for completeness I expressly reject it. Absent an agreement on specific hourly rates, the engagement would be based on KPMG (S)' and KPMG (US)' standard hourly rates. Moreover, for the reasons stated above at [70], Mr Pawley's attempt to say that Bluestone and he need not pay anything for the work done is doomed to fail.

75 In similar vein is the complaint that "there [were] no particulars and/or breakdown provided by [KPMG (S)] to justify the amount that was invoiced to Bluestone."[73] Particulars or a breakdown are not a pre-requisite to KPMG (S) getting paid for its work under the LOE. Mr Pawley never took issue with this contemporaneously, and he did not require any additional particulars or

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72 Defence (Amendment No. 1) at para 11(a) in SDB at p 66.

73 Defence (Amendment No. 1) at para 11(b) in SDB at p 67.

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breakdown in agreeing to the amounts which KPMG (S) proceeded to invoice. Moreover, KPMG (S)' email of 15 August 2014 ([63] above) provided particulars of work done, and a breakdown of fees.[74] This point does not relieve Bluestone and Mr Pawley of their obligation to pay for work done.

Is Mr Pawley's responsibility limited to professional fees and not also disbursements?

76 Mr Pawley argues that because clause 5.1 of the LOE says he "will be responsible for the payment of our *fees*" [emphasis added],[75] he is only responsible for *professional fees* and not also *disbursements*.[76]

77 Clause 5.1 is found under the heading "5. [f]ees and charges", but the text of clause 5.1 only uses the word "fees". It says that KPMG (S)' "fees" will be the responsibility of and will be paid by Bluestone, failing which Mr Pawley will be responsible for the payment of KPMG (S)' "fees"; it then says that details of "our fees and fee arrangements" have been set out in Appendix A. Appendix A in turn has clause A.6, which has the same heading as clause 5: "[f]ees and charges". Clause A.6.1 of Appendix A states that KPMG (S)' "fees" are based on time costs; clause A.6.2 provides certain ranges for KPMG (S)' "fee for the work", but also states, "[i]n addition, you shall reimburse us all charges we incur and all payments we make on your behalf in connection with the service".[77]

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74 ABOD at pp 257–258.

75 ABOD at p 170.

76 Defence (Amendment No. 1) at para 10A(a)–10A(c) in SDB at pp 65–66.

77 ABOD at p 180.

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78 If "fees" in clause 5.1 of the LOE only meant "professional fees" as Mr Pawley contends, then by clause 5.1 Bluestone only agreed to be responsible for, and to pay, professional fees and not also disbursements. But that could not have been the intention, given that clause A.6.2 of Appendix A expressly provides that Bluestone shall reimburse KPMG (S) for disbursements (charges incurred by KPMG (S), or payments made by KPMG (S) on Bluestone's behalf).

79 I prefer the commercially sensible interpretation of clause 5.1 that "fees" in clause 5.1 covered both professional fees and disbursements. KPMG (S) wanted Bluestone to be responsible for, and to pay, both these components; and it wanted Mr Pawley to be responsible for both if Bluestone failed to pay; and that is what Mr Pawley agreed to.

80 In any event, KPMG (S) only billed US$15,000 in disbursements. It would be entitled to appropriate the US$9,949.30 partial payment towards those disbursements, leaving only US$5,050.70 outstanding in terms of disbursements, together with the full US$939,000 in professional fees. If Mr Pawley is right that "fees" in clause 5.1 do not include disbursements, that would only help him in relation to US$5,050.70 of what KPMG (S) has claimed against him.

Was KPMG (S) entitled to bill "fees" for work done by KPMG (US)?

81 Mr Pawley argues that for the work done by KPMG (US), KPMG (S) was not entitled to bill "fees".[78] Instead, KPMG (S) could only recover as

[78] Defence (Amendment No. 1) at paras 10A(a)–10A(c) in SDB at pp 65–66.

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disbursements, what was paid by KPMG (S) to KPMG (US), on an inter-firm basis. This argument is untenable.

82 Clause 4.2 of the LOE expressly provides that KPMG (S) could appoint persons from other KPMG member firms to participate in the delivery of the services contracted for, with all services delivered to be regarded as having been provided by KPMG (S):[79]

> [w]e may appoint KPMG Persons from other KPMG Member Firms to support us in the delivery of our services under this [LOE]. You may have direct contact with them but all services delivered under this [LOE] will be provided by [KPMG (S)]. Such KPMG Persons who have any direct dealings with you shall do so on our behalf and as our agent, as a matter of practical convenience, but we shall remain responsible for such dealings and work performed by them.

83 It follows that KPMG (S) was entitled to bill professional fees for the whole of the work done, whether by persons from KPMG (S), or from KPMG (US). Mr Pawley agrees that clause 4.2 was "quite uncontroversial";[80] it was "quite typical" in engagements of this nature;[81] it was not in dispute that the work was going to be performed in the main by KPMG (US), and he knew that from the start;[82] and KPMG (S) could not have done this engagement without the clause.[83]

84 Mr Pawley further agrees that the fees and charges clauses (comprising clause 5.1 of the LOE, and clause A.6 in Appendix A) drew no distinction

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79 ABOD at p 170.

80 Transcript, 21 December 2020, p 94 lines 10–13.

81 Transcript, 21 December 2020, p 94 lines 13–15.

82 Transcript, 21 December 2020, p 94 lines 16–24.

83 Transcript, 21 December 2020, p 94 lines 25–29.

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between work done by KPMG (S) and work done by KPMG (US);[84] he agrees that KPMG (S) was entitled to get KPMG member firms involved, and indeed "[t]hey couldn't do their work otherwise."[85]

85 Given that it was common ground that most of the work was going to be done by KPMG (US), the fee ranges in clause A.6.2 of Appendix A would make no sense if "fees" were limited to what KPMG (S) itself did, to the exclusion of work done by KPMG (US).

86 I find that KPMG (S) was entitled to bill professional fees for the whole of the work done, whether by persons from KPMG (S) itself, or from KPMG (US). It follows that under clause 5.1 of the LOE, Mr Pawley was responsible for all of those "fees".

87 This also disposes of a related argument by Mr Pawley: that KPMG (S) could only recover what it had paid KPMG (US) on an inter-firm basis. On the terms of the LOE, KPMG (S) was entitled to bill Bluestone for work done based on time costs; whatever KPMG (S) actually paid KPMG (US) is entirely irrelevant to that.

88 Mr Pawley seeks to capitalise on the default in payment of the invoices, which led to KPMG (S) crediting KPMG (US) a sum of US$398,852.92 for the work done by KPMG (US), although KPMG (S) had not, at the time of doing so, received any payment.[86] Mr Pawley argues that consequently, Bluestone and he need not pay full fees for the work done by KPMG (US), but only the

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84 Transcript, 21 December 2020, p 95 lines 2–32; p 96 lines 1–12.

85 Transcript, 21 December 2020, p 97 lines 1–3.

86 Mr Thompson's Affidavit at paras 6.1.1–6.1.6 in AEIC Bundle at pp 47–50.

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"settlement" sum of about US$400,000 agreed between KPMG (S) and KPMG (US). I reject this. This is like an employer, who defaults in payment of what is contractually due to his contractor, telling the contractor that for work done by a sub-contractor, the employer will only pay what the contractor had paid the sub-contractor. Contractually, the liability of the employer to the contractor depends on the contractual relationship as between themselves; it is independent of the contractual relationship between the contractor and sub-contractor. As such, Bluestone (and Mr Pawley's) contractual liability to KPMG (S) depends on the LOE; the inter-firm position between KPMG (S) and KPMG (US) is not relevant to that. To take an extreme example: if KPMG (US) had decided to forgo any payment from KPMG (S) for this engagement, that would not mean that Bluestone and Mr Pawley would get the work for free.

89 For completeness, I also note Mr Thompson's evidence that what was agreed between KPMG (S) and KPMG (US) was only an interim matter, which would be revisited if KPMG (S) were to recover payment from Mr Pawley.[87]

Is KPMG (S) limited to US$470,000 in fees?

90 Mr Pawley argues that "[KPMG (S)] is contractually prohibited from billing more than US$470,000 for financial due diligence and tax due diligence work".[88] This argument is a non-starter, for KPMG (S) did not bill more than US$470,000 for financial due diligence and tax due diligence work. It billed exactly US$470,000 for that work (see [63] above).

91 As the work progressed, Mr Pawley was informed that additional work had been done beyond financial due diligence and tax due diligence work, that

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87 Mr Thompson's Affidavit at paras 6.1.7–6.1.8 in AEIC Bundle at p 50.

88 DCS at para 49.

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there would be additional costs for that additional work, and how much those additional costs were.[89]

92 In any event, clause A.6 of Appendix A (see [67] above) does not limit KPMG (S) to recovering only US$470,000 for *all* of the work done. The sum of US$470,000 was an estimate, and it was only for financial due diligence and tax due diligence work.

Are KPMG (S)' fees unreasonable and disproportionate?

93 Mr Pawley contends that KPMG (S)' fees are unreasonable and disproportionate. He pleads that "[t]he amount billed by [KPMG (S)] for the alleged work done over a span of only [six] months … is unreasonable and disproportionate"[90] and that "there is an implied term that the fees charged by [KPMG (S)] should be reasonable and proportionate to the work done (to which [Mr Pawley] is putting [KPMG (S)] to proof). [KPMG (S)] breached this term".[91]

94 Having asserted that KPMG (S)' fees were unreasonable and disproportionate, and that there was an implied term in that regard which KPMG (S) breached, the onus was on Mr Pawley to establish all this. He failed to.

95 Indeed, after alleging that KPMG (S)' fees were unreasonable and disproportionate, and that this was in breach of the implied term he advanced, Mr Pawley sought to reverse the burden by putting KPMG (S) to proof that its fees were <u>not</u> unreasonable and disproportionate. This is misconceived.

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89 ABOD at pp 221–225, 228–229, 231 and 257–258.

90 Defence (Amendment No. 1) at para 11(c) in SDB at p 67.

91 Defence (Amendment No. 1) at para 11(c)(ii) in SDB at p 67.

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96 Mr Pawley's closing submissions are in similar vein. There is a bare assertion that the quantum billed is inconsistent with the implied term that the fees should be reasonable and proportionate, another assertion that KPMG (S) "has not specifically denied Mr Pawley's averment that there is such an implied term", and then a conclusion advanced that "[KPMG (S)] therefore bears the burden of showing that its claimed quantum is reasonable and proportionate".[92] This is wrong. The burden rests on Mr Pawley to prove what he asserts, and he failed to.

97 Indeed, not only did Mr Pawley agree to the amounts in question before KPMG (S) invoiced them, he also testified that the quantum did not seem unreasonable at that time (see [62] above).

98 The engagement here was on the basis that KPMG (S) would be paid based on time costs, with a range of fees provided for certain aspects of the work. In that context, I am not persuaded that a term should be implied to limit KPMG (S)' fees to what would be reasonable and proportionate to the work done, but I express no final conclusion as the point was not fully argued, and I do not need to decide it. If KPMG (S) were limited to recovering only what is reasonable and proportionate to the work done, Mr Pawley has failed to prove that what KPMG (S) billed was unreasonable and disproportionate (see [96] above). His own conduct indicates that he regarded KPMG (S)' invoices to be quite justified. In any event, he put forward no evidence from which I could find KPMG (S)'s fees to be unreasonable and disproportionate, and his own testimony went against that (see [62] above).

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92 DCS at para 53.

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Does KPMG (S) need to make a demand against Bluestone, or exhaust remedies against Bluestone, before it can recover payment from Mr Pawley?

99 Mr Pawley pleads that KPMG (S) had not made any demand or claim against Bluestone, and that KPMG (S) had not exhausted all available avenues for obtaining payment by Bluestone.[93] He argues that in those circumstances, his liability to KPMG (S) has not arisen.[94]

100 Mr Pawley cites *Barclays Bank plc v Price and others* [2018] EWHC 2727 (Comm) ("*Barclays Bank*") as authority for the proposition that "'principal debtor' clauses have the effect of creating a primary liability and such liability is not contingent on demand even where the words 'repayable on demand' have been used" in the instrument in the context of the surety's liability as surety.[95] From that, Mr Pawley reasons that, as there is no "principal debtor" clause in the present case, KPMG (S) must at least demand payment from Bluestone, before he can be liable for anything.

101 This reasoning is flawed. *Barclays Bank* did not concern whether a demand needed to be made against the principal debtor, it concerned whether a demand needed to be made against the surety (see *Barclays Bank* at [20]). Moreover, whether any demand is required is essentially a question of construction of the contract (as is recognised in *Barclays Bank* at [19]).

102 Here, clause 5.1 of the LOE states that Mr Pawley will be responsible for payment, "failing" payment by Bluestone. Bluestone failed to make payment when KPMG (S)' invoices were not paid within 30 days, as provided for under

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93 Defence (Amendment No. 1) at para 11(e) in SDB at p 67.

94 DCS at paras 54–55.

95 DCS at para 54.

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clause 8.4 of the KPMG (S)' "General Terms and Conditions of Business", (which, according to clause 6.1 of the LOE, was to be read together with the LOE).[96] The partial payment of US$9,949.30 that was made (see [9] above), came only some eight months after the second of KPMG (S)' two invoices. There is no need for any demand to be made on Bluestone or Mr Pawley, before Mr Pawley's responsibility for payment would arise. In any event, on the facts, many demands were made.[97]

103 As for Mr Pawley's contention that KPMG (S) had to exhaust remedies against Bluestone, it is settled law that "[a] surety has no right … to require the creditor to proceed against the principal (or any of the co-sureties), or against any security provided for the debt guaranteed before proceeding against himself": *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 at [36].

104 It is indeed ironic for Mr Pawley to insist that KPMG (S) must exhaust remedies against Bluestone, given his evidence that "Bluestone had no assets",[98] "Bluestone couldn't pay them",[99] "Bluestone was not in a position to pay",[100] and "Bluestone has not been in a position to pay them".[101]

105 In the circumstances, it was sensible of KPMG (S) to extract from Mr Pawley his agreement to be responsible for payment, as stipulated in clause 5.1

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96 ABOD at pp 181–184.

97 Mr Thompson's AEIC at paras 3.2.5–3.2.6 and 3.4.1–3.4.11 in AEIC Bundle at pp 19–20 and 22–28.

98 Transcript, 21 December 2020, p 83 lines 16–17.

99 Transcript, 21 December 2020, p 88 line 27.

100 Transcript, 21 December 2020, p 88 line 29.

101 Transcript, 21 December 2020, p 89 line 3.

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of the LOE. Charles Dickens said, "[t]he word of a gentleman is as good as his bond – sometimes better; as in the present case, where his bond might prove but a doubtful sort of security." Here, Mr Pawley gave not only his word, but his bond; he then sought to resile from what he had promised, but I find it is good security to KPMG (S).

Conclusion

106 In the circumstances, I grant KPMG (S) judgment as claimed, for:

(a) the sum of US$944,050.70;

(b) interest at 5.33% from the date of the writ (12 March 2019) to judgment; and

(c) costs.

107 Unless the parties reach an agreement on costs, they are to put in their respective cost submissions, limited to ten pages (excluding any schedule of disbursements) within three weeks.

Andre Maniam
Judicial Commissioner

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Daryl Fong, Abhinav R Mohan, Annette Tan
(Shook Lin & Bok LLP) for the plaintiff;
Suang Wijaya, Genghis Koh
(Eugene Thuraisingam LLP) for the defendant.

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