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

[2023] SGHCR 1

Suit No 624 of 2020 (Summons No 2377 of 2022)

Between

(1) TA Private Capital Security Agent Limited
(2) TransAsia Private Capital Limited

… *Plaintiffs*

And

(1) UD Trading Group Holding Pte Ltd
(2) Rutmet Inc

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Pleadings — Striking out]
[Credit and Security — Guarantees and indemnities]

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v
UD Trading Group Holding Pte Ltd and another

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AR Desmond Chong
9 January, 16 January 2023

30 January 2023

AR Desmond Chong:

Introduction

1 This was the plaintiffs' application to strike out the entirety of the defences of the first and second defendant ("D1" and "D2" respectively) in HC/S 624/2020 ("Suit 624") and for there to be judgment against D1 for the sum of USD 63,303,806.66 (the "USD 63.3m sum"). The plaintiff's case was that D1's liability for the USD 63.3m sum arose from a contract titled "Guarantee", which was entered into between D1 and D2 on 15 April 2019 (the "Guarantee"). Under clauses 3.1.1 and 3.1.2 of the Guarantee, D1 guaranteed the payment of monies by its subsidiaries to D2 for the supply of metal and metal products by D2 to D1's subsidiaries. Under clause 3.2 of the Guarantee, D1 "irrevocably and unconditionally" provided a "separate and independent" obligation, as "sole or principal debtor", to pay D2 "on demand" any amounts

not recoverable on the footing of a guarantee. The present claim was brought by the plaintiffs instead of D2 because the latter had purportedly assigned its rights under the Guarantee to the plaintiffs. The plaintiffs did not bring any claims against D2.

2 Central to this application was the plaintiffs' prayer for a declaration that the Guarantee was an "on demand performance guarantee". The nature of the Guarantee was a key issue because, under an on demand performance guarantee, the obligor (in this case, D1) is (a) liable as a *primary* debtor to the obligee (in this case, the plaintiffs), (b) the obligor's liability is *not* affected by the validity of the underlying obligation, and (c) the obligor's liability to pay is triggered upon a simple demand by the obligee. On the other hand, if the Guarantee were a simple guarantee, (a) the guarantor would be liable as a *secondary* debtor, such that its liability would be contingent upon the principal debtor's failure to perform its underlying obligation guaranteed by the guarantor, and (b) the guarantor would *not* be liable if the underlying obligation were void, unenforceable, or ceased to exist.

3 This was relevant in the present case because D1 did not challenge the validity of the Guarantee. Nor did D1 deny that the USD 63.3m sum was owed by its subsidiaries to D2. Instead, D1's defence hinged on two securities – referred to as the "GEM Security" and the "Hangji Security" at [10(c)] below – that were *not* related to the Guarantee or the underlying obligations guaranteed. Rather, these two securities were pledged by D1's subsidiaries to the plaintiffs under a *separate* loan agreement. D1's defence was that the plaintiffs' improper enforcement of these securities resulted in there being no outstanding sums owed under the Guarantee. Alternatively, D1 submitted that it can set off the two securities against the USD 63.3m sum. The defendants also sought to challenge the assignment of D2's rights under the Guarantee to the plaintiffs.

4 It was well established that the threshold for striking out is high, and pleadings should not be struck out except in plain and obvious cases (see the Court of Appeal's decision in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [18]). When a court is faced with a USD 63.3 million claim and numerous defences raised by the defendants, the instinctive response may be to quickly conclude that the matter was not a "plain and obvious" one for the defences to be struck out. However, there was no general principle that a large claim must necessarily proceed to trial, or that a multi-pronged defence, even if baseless, should not be struck out. When a court is reviewing a striking out application, the court's duty is not to simply undertake a quantitative exercise to determine if the size of the claim is large or if the number of defences are high. The court's duty is to review the parties' cases, even on a summary basis, to determine if the pleadings are so clearly unmeritorious that they raise no triable issue and ought to be struck out.

5 In this case, having reviewed the parties' pleadings and submissions, I agreed with the plaintiffs that this case was a straightforward claim brought against D1 to claim for liabilities owed under the clear terms of the Guarantee. As the plaintiffs rightly pointed out, the parties' submissions were only lengthy because the defendants took a blunderbuss approach to their defences. Upon a review of the parties' pleaded cases, I found that the defendants' defences were wholly contrary to the plain text of the relevant contracts. Consequently, I struck out the defendants' defences and granted judgment in the USD 63.3m sum in favour of the plaintiffs against D1. As the defendants have appealed against my decision, I now set out the detailed grounds of my decision.

Background facts

Parties

6 I first set out the relevant parties and key facts. The second plaintiff, Transasia Private Capital Limited ("P2"), is a company incorporated in Hong Kong. P2 is a fund manager that managed Asian Trade Finance Fund 2 ("ATFF2"). P1 is a company incorporated in the British Virgin Islands and is the security agent for P2.

7 D1 is a company incorporated in Singapore while D2 is a company incorporated in Ontario, Canada. D1 is in the business of trading metals. D1's subsidiaries that were relevant to this application were UIL Commodities DMCC, UIL Hong Kong Limited ("UIL HK"), and UIL Singapore Pte Ltd ("UIL SG"), and UIL Malaysia Limited ("UIL MY") (collectively, the "UIL Subsidiaries"). I shall refer to D1 and the UIL Subsidiaries collectively as the "UD Group". D2 sold metal and metal products to the UIL Subsidiaries.

8 D2 was originally named the third plaintiff in Suit 624 by the plaintiffs. After D2 brought an application in HC/SUM 3114/2021 for leave to discontinue or stay Suit 624, an Assistant Registrar granted D2 leave to discontinue the suit as the third plaintiff but required D2 to be the second defendant therein. It was on this basis that D2 filed a defence to the suit to respond to the plaintiffs' pleadings, even though the plaintiffs did not bring any substantive claim against D2 in the suit.

9 D2's metal suppliers which were relevant to this application are Triton Metallix Pte Ltd ("Triton") and API International FZC ("API") (collectively, the "Metal Suppliers").

Three loans

10 There were three relevant loan arrangements raised by the parties:

(a) ATFF2 Loan between P2 and D2: The first loan arrangement was an uncommitted revolving trade finance facility of up to USD 60 million provided by P2 to D2, which was entered into on 24 May 2019 and set out in a facility agreement (the "Facility Agreement"). The plaintiffs referred to this as the ATFF2-Rutmet Loan in their submissions while D1 referred to it as the ATFF2-Rutmet FA in its submissions. I shall refer to this loan arrangement as the "ATFF2 Loan".

(b) ATFF1 Loan between D2 and Cantrust (Far East) Limited: The second loan arrangement was raised by D2. This was a facility agreement dated 28 June 2017 and entered into between D2 and Cantrust (Far East) Limited ("Cantrust"), the trustee of the Asian Trade Finance Fund. I shall refer to this loan arrangement as the "ATFF1 Loan". Cantrust's rights and obligations under the ATFF1 Loan were subsequently transferred to P2 pursuant to a declaration of trust dated 30 May 2014 between Cantrust and P2.[1]

(c) UD Loan between plaintiffs and two of D1's subsidiaries: The third loan arrangement was raised by D1. This was a loan arrangement provided by the plaintiffs to UIL MY and UIL SG under two separate facility agreements. D1 referred to this as the SBD-UDTG Facility in its defence.[2] The plaintiffs and D1 referred to this as the UD Loan in their written submissions. I shall refer to this as the "UD Loan". For the UD

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1 D2's Defence dated 1 March 2022 ("D2's Defence") at [7(a)].

2 D1's Defence dated 17 February 2022 ("D1's Defence") at [21(e)].

Loan, the UD Group provided security in the form of, among others, (i) a pledge of 2,030,500 shares in Hangji Global Limited ("Hangji"), a company listed on a subsidiary market of the Cyprus Stock Exchange ("Hangji Security"); (ii) a pledge of all shares in Gympie Eldorado Mining Pty Ltd, an Australian company ("GEM Security"); and (iii) a pledge of all shares in certain UD Group companies.[3]

The ATFF2 Loan and the contracts underlying the Guarantee

11 D2 had obtained financing from P2 via the ATFF2 Loan so that D2 could buy metal from the Metal Suppliers and sell the metal to the UIL Subsidiaries. Therefore, after the ATFF2 Loan was provided, D2 entered into sales contracts with three of the UIL Subsidiaries – UIL Commodities DMCC, UIL HK, and UIL SG ("Operating Companies") – to supply them with, among others, copper cathodes (the "Contracts"). Pursuant to the Contracts, D2 issued commercial invoices to the Operating Companies (the "Invoices"). The Invoices contained a notice stating that D2 had assigned, by way of security in favour of P1, all of D2's rights under the Contracts.[4]

The Guarantee between D1 and D2

12 On 15 April 2019, D1 provided the Guarantee to D2 to guarantee the Operating Companies' liabilities to D2 under the Contracts. The reason why D1 provided the Guarantee to D2 was not agreed by the parties. According to D2's pleaded defence, D1 provided the Guarantee because Export Development Canada ("EDC"), an insurance provider, had initially declined to grant trade credit insurance to UD Group. EDC's initial refusal to insure the UD Group in

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3 Reply to D1 Defence dated 22 March 2022 ("Reply to D1 Defence") at [7(a)(iv)(1)].

4 Statement of Claim (Amendment No. 1) dated 22 September 2021 ("SOC Amd 1") at [12].

turn caused P2 to be unwilling to grant financing to D2 via the ATFF2 Loan. As a result, the parties – P2, the defendants, and EDC – negotiated, and EDC eventually agreed to extend the insurance to the UD Group on two conditions: (a) that UD Group's principal, Mr Prateek Vijay Gupta, guarantee the Operating Companies' liabilities to D2 up to a limit of USD 30 million, and (b) that D1 guarantee the Operating Companies' liabilities to D2. According to D2, it was for this reason that D1 provided the Guarantee to D2, which consequently caused EDC to provide the insurance to the UD Group, and P2 to provide the ATFF2 Loan to D2.[5] On the other hand, the plaintiffs denied this, and simply stated that D1 provided the Guarantee to guarantee the Operating Companies' performance under the Contracts.[6]

Assignment of the Contracts, Invoices and Guarantee from D2 to the plaintiffs

Security Deed, General Security Agreement, and Forbearance Agreement

13 On 22 November 2019, three agreements were entered into between D2 and the plaintiffs:

(a) a security deed between P1 and D2 (the "SD");

(b) a general security agreement between P1 and D2 (the "GSA");

(c) a forbearance agreement between the plaintiffs and D2 ("Forbearance Agreement"), whereby P2 agreed to forbear from suing D2 for monies disbursed under the ATFF2 Loan.

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5 D2's Defence at [8].

6 SOC Amd 1 at [4(b)].

14 It was the plaintiffs' pleaded case that the SD was executed by D2 to assign its rights under the Contracts, Invoices and the Guarantee to P2, and the GSA was executed by D2 to assign its rights under the Contracts, Invoices and the Guarantee to P1.[7] The plaintiffs pleaded that the SD and GSA were additional security provided by D2 after D2 had defaulted on its repayment obligations to P2 under the ATFF2 Loan.[8] Consequently, the SD and GSA were executed as conditions precedent to the Forbearance Agreement,[9] and the SD and GSA were not executed as conditions precedent to the ATFF2 Loan.[10]

Notices of assignments of the Contracts and Guarantee from D2 to the plaintiffs

15 The plaintiffs pleaded that notices of assignment were served by D2 on the respective Operating Companies to give notice to them that D2 had assigned all its rights under the Invoices and Contract to the plaintiffs (the "Contract Assignments").[11] Similarly, notices of assignment were served by the plaintiffs – in their capacities as legal or equitable assignees of D2 – on D1 to give notice to D1 that D2 had assigned all of its rights and benefits under the Guarantee to the plaintiffs. These latter notices of assignment were contained within the letters of demand sent by the plaintiffs to D1 between 11 October 2019 and 24 January 2020 (see [19] below).

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7 SOC Amd 1 at [13] and [14].

8 Reply to D1 Defence at [8(b)].

9 Reply to D1 Defence at [7(c)(iii)].

10 Reply to D1 Defence at [8(b)].

11 SOC Amd 1 at [15].

Power of Attorney

16 D2 also granted a power of attorney in favour of the plaintiffs under the SD ("SD POA") and another power of attorney in favour of P1 under the GSA ("GSA POA") (collectively, the "POAs"). The plaintiffs pleaded that, pursuant to the SD POA, the plaintiffs were entitled to take steps to enforce D2's rights and interests under the Contracts, Invoices and the Guarantee in order to enforce the security provided by D2 to P2; similarly, pursuant to the GSA POA, P1 was entitled to take steps to enforce D2's rights under the Contracts, Invoices and the Guarantee to enforce the security provided by D2 to P2.[12]

Amounts owed

17 Between 16 September 2019 and 30 December 2019, D2 defaulted on its payments to P2 under the ATFF2 Loan. As of 8 January 2020, the total amount owed by D2 to P2 was USD 54,209,809.43 ("D2's Outstanding Amount"), which remains unpaid to date.[13] Separately, various amounts of monies owed under the Contracts also fell due and remained outstanding from the Operating Companies to D2 ("Operating Companies' Outstanding Amount").[14]

Plaintiffs' demand on Operating Companies to pay under the Contracts

18 Between 6 December 2019 and 17 January 2020, the plaintiffs made various demands pursuant to the Contract Assignments for the Operating Companies to make payment of the Operating Companies' Outstanding Amount to the plaintiffs for the satisfaction of D2's Outstanding Amount.

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12 SOC Amd 1 at [17] and [18].

13 SOC Amd 1 at [20].

14 SOC Amd 1 at [24].

However, the Operating Companies did not make payment of the Operating Companies' Outstanding Amount to the plaintiffs.

Plaintiffs' demand on D1 to pay under the Guarantee

19 Subsequently, between 11 October 2019 and 24 January 2020, the plaintiffs issued various letters of demand under the Guarantee in their own capacities as assignees, or alternatively in their capacities as D2's attorneys under the POAs, for D1 to make payment of the Operating Companies' Outstanding Amount to the plaintiffs for the satisfaction of D2's Outstanding Amount. On 24 January 2020, the plaintiffs sent a letter of demand to D1 ("Letter of Demand") and demanded that D1 pay the plaintiffs the Operating Companies' Outstanding Amount, which stood at the USD 63.3m sum as of 24 January 2020, by 31 January 2020.[15] However, D1 has not made payment to date.

Summary of contractual relationships

20 In summary, D2 used the funds provided by P2 via the ATFF2 Loan to pay the Metal Suppliers for metal and metal products which D2 would then sell to the Operating Companies under the Contracts. D1, as the Operating Companies' parent company, provided the Guarantee to D2 to guarantee the Operating Companies' payment to D2 under the Contracts. D2 then allegedly assigned its rights under the Guarantee to the plaintiffs via the SD and GSA. The plaintiffs then issued the Letter of Demand to D1 on 24 January 2020 to seek payment from D1 under the Guarantee for the Operating Companies' liabilities under the Contracts.

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15 SOC Amd 1 at [26] and [27].

Parties' pleaded cases in the Suit

Plaintiffs' statement of claim

21 The plaintiffs pleaded that, as legal or equitable assignees of the Assignments, or as attorneys under the POAs pursuant to the SD and GSA, D2 had assigned its rights under the Guarantee to the plaintiffs. Consequently, D1 was liable to pay the USD 63.3m sum which the Operating Companies owed D2 under the Contracts and Invoices.

D1's defence

22 D1's defence was not that it had already paid the USD 63.3m sum, whether in full or in part. D1 did not challenge the validity of the Guarantee or the Contracts. D1 also did not bring any counterclaims against the plaintiffs. Instead, D1's defence centred on other ancillary issues. While D1's defence was not organised in a structured manner, its defences can be grouped into three broad issues.

Hangji Security and GEM Security

23 The first set of defences concerned the Hangji Security and GEM Security. This defence was referred to as the "Cross-Collaterization Theory" in the plaintiffs' submissions. This defence had two alternative limbs. I shall refer to the two alternative limbs collectively as the "Hangji and GEM Securities Defence".

(1) No amount owed under the Guarantee

24 First, D1 claimed that no money was outstanding under the Guarantee because the plaintiffs already had the benefit of the GEM Security and the Hangji Security to satisfy the plaintiffs' claim under the Guarantee. The logic

of this defence seemingly flowed in this manner. The value of the Hangji Security was estimated to be approximately USD 42 million, while the value of the GEM Security was estimated to be between USD 38.5 million and USD 65.8 million. It was allegedly agreed between the plaintiffs and D1 that the GEM Security and/or Hangji Security would "ostensibly" be in respect of the UD Loan but that they would also serve as security for the ATFF2 Loan.[16] While all amounts owing under the UD Loan had been settled, the plaintiffs failed to release the Hangji Security and/or had enforced the GEM Security for purported defaults under the UD Loan.[17] Given that there was no basis to enforce the GEM Security for defaults under the UD Loan, the plaintiffs' alleged improper enforcement of the GEM Security "suffices to satisfy" the plaintiffs' claims against D1 under the Guarantee,[18] with the result that there were no outstanding sums owed by D1 to the plaintiffs under the Guarantee.[19]

(2) Set off

25 Alternatively, even if the GEM Security and Hangji Security were not intended as security for the ATFF2 Loan, D1 pleaded that it can set off the USD 63.3m sum claimed under the Guarantee against the value of the GEM Security and/or Hangji Security.[20]

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16 D1's Defence at [21(g)(iv)].

17 D1's Defence at [21(h)].

18 D1's Defence at [21(i)].

19 D1's Defence at [21(k)].

20 D1's Defence at [22].

Assignment of D2's rights under the Guarantee

26 The second set of defences pertained to D1's challenge of the assignment of D2's rights under the Guarantee to the plaintiffs. This was on two main bases.

(a) D1 denied that the letters of demand between 11 October 2019 and 24 January 2020 were valid notices of assignment. D1 pleaded that it was a requirement under clause 12.3 of the Guarantee that D2 provide D1 with a notice of the assignment, but no such notice was provided.[21]

(b) D1 also pleaded that D2 was seeking in proceedings in Ontario to discharge the Forbearance Agreement, the GSA, the SD, and the POAs.[22]

Clause 6 of ATFF2 Loan

27 Finally, D1 pleaded that, even assuming that there was a valid assignment of D2's rights under the Guarantee to the plaintiffs, the plaintiffs could not invoke the rights under the Guarantee in respect of D2's alleged debts owed to the plaintiffs under the ATFF2 Loan because clause 6 of the Facility Agreement for the ATFF2 Loan provided that a condition precedent to the ATFF2 Loan was that the assignment of rights must have been executed with the relevant notices delivered to the "Approved Buyer" under the ATFF2 Loan. This allegedly meant that any assignment must have taken place before any monies could have been drawn down from the facility in order for the assigned security to cover the monies drawn down. As the SD and/or the GSA were both only entered into on 22 November 2019, any security assigned pursuant to either

21 D1's Defence at [15(c)].

22 D1's Defence at [13(a)] to [13(c)].

of these documents could only be invoked in relation to monies drawn down on or after 22 November 2019. However, the sums purportedly drawn down by D2 in respect of which the present claim was brought were drawn down between May and July 2019. Accordingly, D1 pleaded that the plaintiffs could not rely on the benefit of the Guarantee *vis-à-vis* those sums. Further in the alternative, even assuming that the SD and GSA were stand-alone documents from the Facility Agreement, D1 pleaded that the Guarantee assigned in these documents could not cover monies drawn down before notices of assignments were given to the Approved Buyers.[23] I shall refer to this as the "Clause 6 Defence".

D2's defence

28 D2's defence sought to challenge the assignment of its rights under the Guarantee to the plaintiffs. This was on the following basis. D2 allegedly agreed with the plaintiffs that the plaintiffs would, instead of remitting the monies drawn down under the ATFF1 Loan to Cantrust and that under the ATFF2 Loan to D2, remit the monies directly to the Metal Suppliers to pay for the supply of metal and metal products purchased by D2 (the "alleged Payment Agreement"), but the plaintiffs did not do so. The plaintiffs allegedly thereby breached the facility agreements under the ATFF1 Loan and ATFF2 Loan.[24]

29 Under the terms of the Forbearance Agreement, P2 agreed to forbear from exercising its rights and remedies in respect of a debt owed by UIL HK, which became due upon UIL HK being wound up by the High Court of Hong Kong on or around 2 September 2019 (the "UIL HK Debt"). The failure to pay this purported debt amounted to an "Event of Default" under the terms of the

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23 D1's Defence at [13(e)(i)] to [13(e)(iv)] and [13(f)].

24 D2's Defence at [7(a)(i)] and D2's further and better particulars dated 9 May 2022 at [1.3].

ATFF2 Loan. In exchange for P2's forbearance, D2 agreed to, among other things, enter into the GSA and execute the SD.[25] However, in proceedings in Ontario brought by the Metal Suppliers against D2, the Metal Suppliers claimed that they have not received any payment for the sale of metals and metal products to D2, which payments should have, according to D2, been received directly from the plaintiffs. This meant that no UIL HK Debt was due and owing, as no such monies had been paid by the plaintiffs to the Metal Suppliers to finance D2's purchase of metals and/or metal products from the Metal Suppliers that were sold to UIL HK. There was therefore no reason for the plaintiffs and D2 to have entered the Forbearance Agreement and, consequently, no reason for D2 to have entered the GSA with the plaintiffs or to have executed the SD in their favour.[26] D2's defence was referred to as the "Non-Payment Theory" in the plaintiffs' submissions.

Brief procedural history

30 Suit 624 was commenced on 9 July 2020. Some 2.5 years later, the matter had still not been heard at trial. This was because the progress of Suit 624 was delayed by multiple interlocutory applications brought by the defendants seeking to stay Suit 624.[27] The defendants have also brought various proceedings in Ontario, including the following:

(a) Ontario proceedings brought by D1: D1 commenced proceedings against the plaintiffs on 12 August 2020, shortly after Suit

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25 D2's Defence at [9(b)].

26 D2's Defence at [9(b)].

27 HC/SUM 3537/2020 (and the Registrar's Appeal in HC/RA 138/2021 and D1's application for leave to appeal to the Appellate Division of the High Court in AD/OS 51/2021); HC/SUM 1616/2021; HC/SUM 3114/2021; as well as HC/SUM 4702/2021 (and the Registrar's Appeal in HC/RA 350/2021).

624 was commenced, to seek to claim against the plaintiffs for the alleged loss caused to D1 and/or its subsidiaries by the plaintiff's alleged improper enforcement of the GEM Security and/or Hangji Security, and a declaration that no amounts were owed under the Guarantee. This was referred to as the Ontario UD Action by D1 in its submissions. However, this action has been *permanently stayed*.[28]

(b) Ontario proceedings brought by D2: D2 commenced proceedings against the plaintiffs on 14 December 2020 to seek a declaration that the commencement of Suit 624 under the "power of attorney delivered under the Forbearance Agreement" was "not properly authorized".[29] This was referred to as the Rutmet Ontario Proceedings by the defendants in their submissions, and as the Ontario Rutmet Action by the plaintiffs in their submissions. I shall refer to it as the "D2 Ontario Proceedings". As was noted by Justice Gilmore in a judgment in Ontario, D2 was prosecuting its claim in the D2 Ontario Proceedings at a "glacial" pace. This was also noted by the Appellate Division of the High Court in *UD Trading Group Holding Pte Ltd v TA Private Capital Security Agent Limited and another* [2022] SGHC(A) 3 ("*UD Trading Group (AD)*") at [47(b)].

31 Consequently, D1's defence was only filed on 17 February 2022, some 1.5 years after the statement of claim was first filed. D2's defence was filed on 1 March 2022, and the plaintiffs' replies were filed on 22 March 2022. Further and better particulars were filed by all parties on 9 May 2022 pursuant to the parties' requests, and again on 21 June 2022 by D1 pursuant to the court's order

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28 D1's submissions dated 18 November 2022 at [13].

29 D2's Defence at [9(e)].

after an application for further and better particulars was brought by the plaintiffs.[30] As such, the present application was only brought on 28 June 2022.

Parties' submissions in this application

32 In this application, the plaintiffs' principal submission was that the Guarantee was an on demand performance guarantee, which meant that D1 was liable upon the simple demand to pay issued by the plaintiffs on 24 January 2020. Alternatively, the plaintiffs submitted that D1's and D2's defences should be struck out because they were irrelevant, frivolous, inherently incredible and obviously unsustainable.

33 D1 submitted that the Guarantee was not an on demand performance guarantee, and that its defences were arguable. D2 also submitted that its defence was reasonable and not irrelevant, frivolous, or vexatious. D2 did not make any submissions regarding the nature of the Guarantee.

Applicable legal principles

34 The plaintiffs brought the present application under O 14 r 12 and O 18 r 19 of the revoked Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC 2014"). Therefore, I first set out the applicable principles under these provisions.

O 14 r 12

35 It first bears highlighting that the defendants did not dispute that this court *could* determine the nature of the Guarantee in this application. This flows from O 14 r 12, which provided as follows:

> **Determination of questions of law or construction of documents (O. 14, r. 12)**

[30] See HC/SUM 1866/2022.

> **12**.—(1) The Court may, upon the application of a party or of its own motion, determine any question of law or *construction of any document* arising in any cause or matter where it appears to the Court that —
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> (*a*) such question is suitable for determination without a full trial of the action; and
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> (*b*) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.
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> (2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
>
> [emphasis added]

36 The mere fact that a question raises a complex question of law is also not a bar to summary determination (*TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)* [2015] 2 SLR 540 at [33] per Judith Prakash J (as Her Honour then was)). Indeed, as the plaintiffs pointed out, courts have routinely determined the question of whether a contract of suretyship is an on demand performance guarantee in interlocutory applications (see, for instance, *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 ("*Master Marine*"), where the Singapore Court of Appeal interpreted whether the contract in question was on demand performance guarantee in deciding whether to grant an interim injunction; and *IIG Capital LLC v Van Der Merwe and another* [2008] 2 All ER (Comm) 1173 ("*IIG Capital*"), *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2013] 1 All ER (Comm) 1191 ("*Wuhan Guoyu Logistics*"), and *Bitumen Invest AS v Richmond Mercantile Ltd FZC* [2016] EWHC 2957 (Comm) ("*Bitumen*"), where the English Court of Appeal (in *IIG Capital* and *Wuhan Guoyu Logistics*) and the English High Court (in *Bitumen*) respectively considered that the contracts in question were on demand performance guarantees and granted summary judgment).

O 18 r 19

37 I next briefly set out the applicable principles on striking out under O 18 r 19(1) of the ROC 2014, which the parties generally did not dispute. That provision stated as follows:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
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> **19**.—(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (*a*) it discloses *no reasonable cause of action or defence*, as the case may be;
>
> (*b*) it is *scandalous, frivolous or vexatious*;
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> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> [emphasis added]

38 The plaintiffs relied on all four limbs of O 18 r 19(1). Under O 18 r 19(1)(*a*), pleadings may be struck out if they disclose no reasonable cause of action. A reasonable cause of action is one with some chance of success, when only the allegations in the pleadings are considered: *Madan Mohan Singh v Attorney-General* [2015] 2 SLR 1085 at [20], citing *The "Tokai Maru"* [1998] 2 SLR(R) 646 at [44]. This follows from O 18 r 19(2), which provided that "[n]o evidence shall be admissible on an application under" O 18 r 19(1)(*a*).

39 Under O 18 r 19(1)(*b*), pleadings may be struck out if they are "scandalous, frivolous or vexatious". Allegations that are made needlessly and not related to the relief sought may be considered scandalous (*Singapore Civil Procedure 2021* vol I (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) ("*Civil*

Procedure") at para 18/19/11, citing *Brooking v Maudslay* (1886) 55 L.T. 343). A claim can be "frivolous or vexatious" if it is "plainly or obviously unsustainable". An action is legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks". An action is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance", for example, if it is "clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based" (*The* "*Bunga Melati 5*" [2012] 4 SLR 546 at [32]–[33] and [39]).

40 O 18 r 19(1)(*c*) contemplates unnecessary pleadings that tend to prejudice, embarrass, or delay the fair trial of the action (*Civil Procedure* at para 18/19/13, citing *Knowles v Roberts* (1888) 38 Ch D 263 at 270).

41 Under O 18 r 19(1)(*d*) and under the inherent jurisdiction of the court, pleadings may be struck out if they are an abuse of the court process. This could include: (a) proceedings which involve a deception on the court or constitute a mere sham; (b) proceedings where the process of the court is not being fairly or honestly used, but is employed for some ulterior or improper purpose; or (c) proceedings which are manifestly groundless, are without foundation, or serve no useful purpose (*Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [34] and [36]).

42 Finally, the following guidance from *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, endorsed by Judith Prakash J (as Her Honour then was) in *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19], is also instructive:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.* … [emphasis added in *M2B*]

43 While *M2B* concerned summary judgment, the general principle espoused in the foregoing extract is equally applicable to a striking out application, as both types of applications concerned interlocutory applications seeking to summarily dispose of a claim. This was especially so in the present case, as the plaintiffs sought to strike out the entirety of the defendants' defences and to enter judgment against D1.

Issues

44 Accordingly, the following issues arose for this court's determination:

(a) First, was the Guarantee an on demand performance guarantee? If so, D1 was liable to the plaintiffs upon a simple demand to pay, and D1's Hangji and GEM Securities Defence and the Clause 6 Defence would be irrelevant and should be struck out.

(b) Second, if the Guarantee was a simple guarantee, was D1's other defences – namely, the Hangji and GEM Securities Defence and the Clause 6 Defence – liable to be struck out?

(c) Third, were the defendants' defences regarding the assignment of D2's rights under the Guarantee to the plaintiffs liable to be struck out?

Issue 1: Was the Guarantee an on demand performance guarantee?

45 I first turn to the issue of whether the Guarantee was an on demand performance guarantee.

Governing law

46 A preliminary issue was the governing law of the Guarantee, as clause 18.1 of the Guarantee provided that the Guarantee was governed by Ontario law. In this regard, it was well established that, where foreign law was not proven or not pleaded, the law of the forum applied by default (*Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [43]). This is a rule of convenience which the courts may utilise unless it is unjust and inconvenient to do so (*D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 at [25]). There may therefore be situations where the court may refuse to presume that the content of the foreign law is the same as that of the law of the forum in the absence of proof of foreign law. Case law from other jurisdictions has considered the following as possibilities: where it is not in the interest of justice to apply the law of the forum to the issue; where the foreign law is not based on the common law; where it is inherently improbable that the foreign law is the same as the law of the forum; and where fairness requires that the law of the forum should not apply (see the English High Court's decision in *Balmoral Group Ltd v Borealis (UK) Ltd* and others [2006] All ER (D) 378 at [428]). None of these applied to the present case.

47 In this case, the plaintiffs submitted that Singapore law applied, as the defendants did not plead or prove Ontario law on any aspect of the Guarantee other than the issue of set-off. The plaintiffs also submitted that, in any event, Singapore law and Ontario law, as another common law jurisdiction, were not materially different on the law of on demand performance guarantees. I agreed

with the plaintiffs. Indeed, *both* parties cited and relied on Singapore law to make submissions on the Guarantee's nature. As such, I will first turn to consider whether the Guarantee was an on demand performance guarantee under Singapore law.

Principles on contractual interpretation

48 As the determination of the nature of the Guarantee would depend on an interpretation of its terms, it is first appropriate to set out the applicable principles on contractual interpretation in Singapore. In this regard, the following principles are well established (see the Court of Appeal's summary of the principles in *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 at [59]):

(a) The starting point is that one looks to the *text* that the parties have used.

(b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties. The court has regard to the relevant context because it then places itself in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by the parties in the [contract] in their proper context".

(c) The meaning ascribed to the terms of the contract must be one which the *expressions* used by the parties *can reasonably bear*.

49 Therefore, to determine the nature of the Guarantee, the *text* of the Guarantee was paramount. In this regard, the court should not excessively focus on particular phrases or words; the "emphasis is on the document as a whole" (see the Court of Appeal's decision in *Master Marine* at [41(c)], citing *Zurich*

Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029 at [131]).

Distinction between guarantees, indemnities, and on demand performance guarantees

50 With the general principles on contractual interpretation in mind, I now turn to the law pertaining to on demand performance guarantees. An on demand performance guarantee has also been referred to as a "first demand performance bond" (*Master Marine* at [25]), "first demand performance guarantee" (*Master Marine* at [30]), "demand guarantee", or "first demand guarantee". For ease of reference, I will adopt the term "on demand performance guarantee" here. One of the earlier and clearer statements on the law of on demand performance guarantees can be found in the judgment of the English Court of Appeal in *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] 1 WLR 2497 ("*Marubeni*") at [22] (per Carnwath LJ), citing *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at para 44-014:

> A number of cases have involved discussion of the nature of 'performance guarantees' which are, in essence, *exceptionally stringent contracts of indemnity*. They are *contractual undertakings, normally granted by banks, to pay or repay, a specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor*. An unusual feature of several modern cases has been that the bank's *liability arises on mere demand by the creditor*, notwithstanding that it may appear on the evidence that the principal debtor is not in any way in default, or even that the creditor is in default under the principal contract. Such guarantees are sometimes called 'first demand guarantees'. It has been held that performance guarantees of this nature are *analogous to a bank's letter of credit* … [emphasis added]

51 Therefore, an on demand performance guarantee is a contractual undertaking by a person, usually a bank, insurer, or similar commercial provider, to pay a specified amount of money to a third party on the occurrence

of a stated event, usually the non-fulfilment of a contractual obligation by a principal debtor to that third party (see also the English High Court's decision in *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2011] 2 All ER (Comm) 307 ("*Vossloh*") at [28]; and Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet and Maxwell, 7th Ed, 2015) ("*Andrews and Millett*") at para 1-016). An on demand performance guarantee is akin to letters of credit (*Master Marine* at [26]; *Wuhan Guoyu Logistics* at [27], citing *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 171; *Andrews and Millett* at para 16-001). Under a confirmed letter of credit, an issuing bank and a confirming bank are obliged to pay the beneficiary against a complying presentation of documents (see *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [51]).

52 Furthermore, an on demand performance guarantee is a "stringent" contract of indemnity (see also *Vossloh* at [28]; and *Andrews and Millett* at para 1-016). To that extent, the term "on demand performance guarantee" is a misnomer. Therefore, it was first crucial to understand the difference between a guarantee and an indemnity.

53 Guarantees and indemnities are two types of contracts of suretyship. Under a contract of guarantee (which are also known as "see to it" guarantees (see *Master Marine* at [29])), which is entered into between a guarantor and a creditor, the guarantor guarantees the performance of the obligation of a third party – the principal debtor – to the creditor. On the other hand, under a contract of indemnity, a party (the obligor) undertakes directly to the beneficiary (the obligee) that the obligor would perform a certain obligation. This indemnity obligation is usually given as security for the performance of an obligation by another party (*Vossloh* at [25]).

54 It is well established that there are two principal differences between a guarantee and an indemnity (see *Vossloh* at [22] to [26]).

(a) Secondary liability: First, a guarantor's obligation under a guarantee is a *secondary* one, in the sense that it is contingent upon the principal debtor's continuing liability and ultimately the principal debtor's default. The guarantor is not liable unless and until the principal debtor has failed to perform his obligation (*Master Marine* at [29]). On the other hand, under a contract of indemnity, the liability of the giver of the indemnity is a *primary* one, and is not dependent upon the principal debtor's default.

(b) Principle of co-extensiveness: Second, the fact that the guarantor's obligation is secondary means that, if the underlying obligation is void, unenforceable, or ceases to exist, the guarantor is also discharged from his obligation under the guarantee. This is known as the principle of co-extensiveness, as the guarantor's liability is "co-extensive" with the principal debtor's liability. On the other hand, the fact that liability under an indemnity is a primary one means that the principle of co-extensiveness does not apply to a contract of indemnity, and the giver of an indemnity is liable to the creditor even if the underlying obligation between the principal debtor and the creditor is void, unenforceable, or ceases to exist.

55 An example of an indemnity can be found in the case of *Clement v Clement* [1995] Lexis Citation 4562 ("*Clement*"). In that case, the son stated in a letter that he would "guarantee" to his parents a company's payment of retirement benefits. The "guarantee" provided as such:

> By an agreement of even date ('the Agreement') between First Fashions Limited ('the Company') and yourselves the Company

> covenanted to pay certain retirement benefits. *Now I undertake that if the Company or its successors fail to pay the sums covenanted to be paid by it I or my personal representatives will pay such sums or so much of them as shall not be paid.* This guarantee shall continue in force until the death of the survivor of you … For the purposes of this guarantee the liability of the Company shall not be affected by any restriction modification or variation of the sums covenanted to be paid by it … [emphasis added]

56 While the letter used the phrase "guarantee", the English Court of Appeal in *Clement* held that the promise contained in the letter was in substance an indemnity as it "imposed an obligation independent of the continuation of the Company's liability under the Agreement to pay the Plaintiffs' pensions if and to the extent that the Company did not do so."

57 What, then, was the difference between an on demand performance guarantee and a simple indemnity? The case law and textbooks did not clearly spell this out. Nevertheless, it appeared that one difference was that, under an on demand performance guarantee, liability is triggered upon a simple "demand" by the obligee to pay, usually upon a presentation of one or more documents as stipulated in the contract, without reference to the actual existence of the facts which those documents assert (see *Master Marine* at [27]; *Simic v New South Wales Land and Housing Corp* (2016) 339 ALR 200 at [2] per Robert French CJ).

58 Furthermore, under the common law, the English courts have devised evidential presumptions of fact to determine if a document is an on demand performance guarantee or not.

(a) The English Court of Appeal has held in *Marubeni* at [30] that, in a transaction outside the banking context, the absence of language expressly indicating the creation of an on demand performance

guarantee created a strong presumption against the existence of such an obligation (the "*Marubeni* presumption").

(b) Conversely, English Court of Appeal has also held in *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2002] 1 Lloyd's Rep 617 at [16] (and reaffirmed in *Wuhan Guoyu Logistics* at [26] to [28]) that the existence of four factors listed in the textbook, *Paget's Law of Banking*, gave rise to a presumption that the document in question will be construed as an on demand performance guarantee ("*Paget* presumption"). These four factors, which I shall refer to collectively as the "*Paget* factors", are where the instrument (a) relates to an underlying transaction between the parties in different jurisdictions, (b) is issued by a bank, (c) contains an undertaking to pay "on demand" (with or without the words "first" and/or "written") and (d) does not contain clauses excluding or limiting the defences available to a guarantor.

59 The parties did not cite to me a Singapore case which has endorsed either the *Marubeni* presumption or the *Paget* presumption. I did not need to decide if the *Paget* presumption applied in this case, as not all the *Paget* factors were present (since the Guarantee was not issued by a bank). I also did not need to decide if the *Marubeni* presumption applied in this case – as I will explain in more detail below, even if it did, I would have found that the presumption was rebutted in this case (see [96] below).

60 For completeness, it also bears briefly mentioning the "conditional performance bond", which is contrasted with the "first demand performance bond" or "unconditional performance bond" (which are terms that have been used to refer to an on demand performance guarantee (see [50] above)). A "conditional performance bond" is conditioned on breach and/or actual loss.

However, a conditional performance bond is not a guarantee, as the bond issuer's liability to honour payment on the bond is a primary, rather than secondary, one (*Master Marine* at [29]). An on demand performance guarantee may also be drafted in such a way that a demand can be made subject to the fulfilment of various conditions (*Master Marine* at [31]), but this does not detract from the *primary* liability of the obligor of the on demand performance guarantee.

61 Finally, it was also important to note that a contract may not solely be either a guarantee, an indemnity, or an on demand performance guarantee. In the modern commercial world, as highlighted by *Andrews and Millet* at para 1-015, "[a] more common approach, if the language of the contract permits it, is to treat the contract as giving rise to *separate enforceable* obligations of indemnity and guarantee" [emphasis added].

Cases with on demand performance guarantees

62 At this juncture, it is helpful to refer to specific examples of contracts that have been held to be on demand performance guarantees. There are four notable cases in this regard, two of which were not in the banking context (so the *Marubeni* presumption was found to have rebutted in those cases).

IIG Capital

63 The first case of *IIG Capital* is the most notable case outside the banking context where a contract was held to be an on demand performance guarantee. In that case, Mr and Mrs Van Der Merwe were directors of a company which received financial assistance from the claimant New York entity. Mr and Mrs Van Der Merwe each entered into a document described as a "guarantee" with the claimant. The relevant clauses of the "guarantee" provided as such:

(a) by clause 2.1 of the contract, the guarantor (Mr or Mrs Van Der Merwe) agreed "as *principal obligor* … not merely as surety" that "*if* ... *the Guaranteed Moneys are not paid in full on their due date* … [the guarantor] will immediately *upon demand unconditionally* pay to the Lender the Guaranteed Moneys which have not been so paid" [emphasis added] (*IIG Capital* at [31]);

(b) the guaranteed moneys were defined as "all moneys and liabilities … which are now or may at any time hereafter be due, owing, payable, or *expressed to be due, owing or payable*, to the Lender from or by the Borrower" [emphasis added] (*IIG Capital* at [31]);

(c) clause 4.2 further provided that a "certificate in writing signed by a duly authorised officer … stating *the amount* at any particular time due and payable by the Guarantor … shall, save for manifest error, be *conclusive and binding* on the Guarantor for the purposes hereof" [emphasis added] (*IIG Capital* at [32]).

64 Master Teverson gave summary judgment to the claimant. The Van Der Merwes' appeal to Lewison J was dismissed, and a further appeal to the English Court of Appeal was also dismissed. Waller LJ, in a judgment with whom the other Lord Justices of the English Court of Appeal fully agreed with, held that, while the contract was described as a "guarantee", "it ultimately depends on the true construction of the agreement whether a particular label is the right one to apply to any instrument" (*IIG Capital* at [7]). Waller LJ emphasised that "context is important", and "even minor variations in language plus a different context can produce different results" (*IIG Capital* at [20]). Waller LJ held that the document must be looked at "as a whole", and "[t]he question at the end of

the day is what on the true language of these deeds of guarantee did the Van Der Merwes agree" (*IIG Capital* at [30]).

65 Turning to the text of the contract, Waller LJ first held that the obligation to pay monies (a) "expressed to be due" (b) "upon demand" (c) "unconditionally" (d) as "principal obligor not merely as surety" indicated that the Van Der Merwes "were taking on something more than a secondary obligation" (*IIG Capital* at [31]). Second, Waller LJ also held that clause 4.2 put "the matter beyond doubt" as, "[a]part from manifest error, the Van Der Merwes ha[d] bound themselves to pay on demand as primary obligor the amount stated in a certificate pursuant to cl 4.2" (*IIG Capital* at [32]). Therefore, any presumption against the finding of an on demand performance guarantee due to the non-banking context was "clearly rebutted" by the language used in the contract (*IIG Capital* at [32]).

Bitumen

66 I next turn to the English case of *Bitumen*, which is another case outside the banking context. In that case, the claimant, the owner a vessel, entered into a contract titled "Deed of Guarantee" with the defendant, the parent company of the bareboat charterer of the vessel, for the defendant to guarantee the performance of the bareboat charterer's payment obligations to the claimant. The claimant applied for summary judgment against the defendant in respect of sums alleged to be due under a deed of guarantee. The relevant clauses of the deed provided as follows (*Bitumen* at [19]):

> [A] In consideration of the Owners entering into the Charter with the Charterers and delivering the vessel thereunder, and for other good and valuable consideration (the receipt and adequacy of which the Guarantor hereby acknowledges) the Guarantor hereby *unconditionally and irrevocably* guarantees as *primary obligor* and not merely as surety the due and proper performance of all obligations, including payment obligations,

> which the Charterers incur or may incur towards the Owners under the Charter (the 'Guaranteed Obligations') and to *pay to the Owners on demand* all monies as may fall due from the Charterers to the Owners and to discharge all Guaranteed Obligations or any part thereof when the same become due for payment or discharge.
>
> …
>
> [C] The Guarantor expressly undertakes to make payment *on demand* of any amount certified by Owners by written notice to be due to the Owners as a consequence of the Charterers not having fulfilled their obligations under the Charter, within five (5) Business Days after receipt of written notice for payment from the Owners.
>
> [D] Any payments under this Guarantee shall be made in full, *free and clear of any deductions, withholdings, set-offs or counterclaims of any nature whatsoever …*
>
> [emphasis added]

67 Sir Jeremy Cooke, sitting as a Judge of the English High Court, gave summary judgment to the claimant. Sir Jeremy held as follows:

> (a) The "key feature of the Deed of Guarantee appear[ed] in paragraph C" of the clause, as the "trigger for payment is the issue of a demand by the Owners for an amount certified by them, by written notice, as due as a consequence of [the principal debtor] failing to fulfil its obligations under the Charter" (*Bitumen* at [22]). The "certification of any amount as due as a consequence of non-fulfilment of [the principal debtor's] obligations must go, inevitably, to liability since, otherwise, the certification of sums as due is meaningless" (*Bitumen* at [23]).
>
> (b) The foregoing point is reinforced by the terms of paragraph D of the clause, which led to the conclusion that "[p]ayments which are certified by the [claimant] as due as a consequence of non-fulfilment of obligations by [the principal debtor] under the Charter fall to be paid,

with no defence available of any kind" [emphasis added] (*Bitumen* at [24]).

(c) The "unconditional and irrevocable wording in the first line of paragraph A [did] not really take the matter any further save to emphasise the nature of the obligation undertaken", but, "looking at the clause as a whole, there can … be no doubt as to the objective intention of the parties which was that, absent fraud which is not alleged here, payment should become due in the circumstances set out in paragraphs C and D upon the certification made in accordance with their terms" (*Bitumen* at [30]).

68 Therefore, Sir Jeremy Cooke held that "the clear objective intention of the instrument is that payment should be triggered upon certification in accordance with paragraph C and that there should be no room for defence to such a certification by reason of the terms of paragraph D, absent fraud". Once the demand was made in accordance with paragraph C, the defendant was liable to pay the sums certified without any deduction of any kind (*Bitumen* at [26]).

Wuhan Guoyu Logistics

69 The next English case is *Wuhan Guoyu Logistics*, which was within a banking context. In that case, the defendant bank issued a payment guarantee to the claimants to guarantee certain payments by the buyer owed under a shipbuilding contract between the claimants and the buyer. The payment guarantee provided (see *Wuhan Guoyu Logistics* at [12]):

> (1) … we … IRREVOCABLY, ABSOLUTELY and UNCONDITIONALLY guarantee, as the *primary obligor* and not merely as the surety, the due and punctual payment by the BUYER of the 2nd instalment of the Contract Price … as specified in (2) below.

> …
>
> (4) In the event that the BUYER fails to punctually pay the second Instalment guaranteed hereunder or the BUYER fails to pay any interest thereon, and any such default continues for a period of twenty (20) days, then, *upon receipt by us of your first written demand* stating that the Buyer has been in default of the payment obligation for twenty (20) days, we shall immediately pay to you or your assignee the unpaid 2nd Instalment, together with the Interest as specified in paragraph (3) hereof, without requesting you to take any or further action, procedure or step against the BUYER or with respect to any other security which you may hold.
>
> [emphasis added]

70 At the English High Court, Clarke J held that the contract was a traditional guarantee and not an on demand performance guarantee. The English Court of Appeal allowed the claimants' appeal and granted summary judgment in favour of the claimants. Longmore LJ, in a judgment which the other Lord Justices of the English Court of Appeal agreed with, made three important findings.

(a) First, Longmore LJ noted that, while there were six factors in the contract that could be said to favour a conclusion that the document was a traditional guarantee, and four factors in the contract that could be said to lead to the opposite conclusion that the document was an on demand performance guarantee, it "would be obviously absurd to say that there are six pointers in favour of the former and only four pointers in favour of the latter and it must therefore be the former", as the law "does not permit boxes to be ticked in this way" (*Wuhan Guoyu Logistics* at [25]).

(b) Second, Longmore LJ reaffirmed the *Paget* presumption (see [58(b)] above).

(c) Third, Longmore LJ also cited *Paget's Law of Banking* for the observation that an on demand performance guarantee "can hardly avoid

> making reference to the obligation for whose performance the guarantee is security", as "[a] bare promise to pay on demand without any reference to the principal's obligation would leave the principal even more exposed in the event of a fraudulent demand because there would be room for argument as to which obligations were being secured" (*Wuhan Guoyu Logistics* at [26]).

71 On the facts of that case, the first three *Paget* factors were present. While the fourth *Paget* factor was absent, the English Court of Appeal nevertheless held that the *Paget* presumption applied and that the contract was an on demand performance guarantee (*Wuhan Guoyu Logistics* at [28] and [31]).

Master Marine

72 I now turn to a Singapore case, *Master Marine*. In that case, the appellant and the first respondent entered into an agreement for the former to purchase and the latter to construct an offshore elevating rig (the "Rig"). The appellant paid the purchase price in instalments prior to delivery in exchange for the first respondent procuring "Refund Guarantees" from the second to fourth respondents (the "Banks") as security. All the Refund Guarantees provided that the appellant could make the following written demands on the Banks for repayment of their advances (*Master Marine* at [4]):

> (a) Clause 3(b) provided that an "Initial Demand" must be made in written form "stating that the Contract is cancelled or rescinded by the Owner in accordance with the Contract, *which statement shall be final and conclusive*" [emphasis added by the Court of Appeal] (*Master Marine* at [45]).

(b) The first paragraph of the proviso to clause 3 provided that a "Deferred Demand" must be made if the rescission was disputed, arbitrated and an award was granted in the appellant's favour.

(c) The third paragraph of the proviso to clause 3 (the "New Demand Clause") provided that a "New Demand" must be made if either there was delay in the delivery of the Rig or the arbitration could not reasonably be expected to conclude 30 Singapore banking days before the expiry date of the subsisting Refund Guarantees, and the first respondent failed to furnish a replacement/extended guarantee 14 Singapore banking days before the expiry date of the subsisting Refund Guarantees. The New Demand Clause provided that "[the Banks] shall pay the [the appellant] the said sum claimed under the New Demand immediately upon our receipt of the New Demand *irrespective of whether or not the claim under the New Demand is disputed by the Builder or has been referred to arbitration or there is an arbitration claim pending*" [emphasis added by the Court of Appeal] (*Master Marine* at [45]).

73 The Court of Appeal held that, notwithstanding its label, the Refund Guarantees constituted "first demand performance bonds" (which are also known as on demand performance guarantees (see [50] above)):

(a) The essence of a guarantee was predication on actual breach by the creditor. However, the emphasised portion of clause 3(b) of the Refund Guarantees (at [72(a)] above) made clear that the Banks were not to investigate the accuracy of the appellant's assertion of breach. Such was the characteristic hallmark of a first demand performance

bond: immediate payment eschewing any manner of delving into the merits of the underlying dispute (*Master Marine* at [45]).

(b) Under the New Demand Clause, payment will be made whether or not the appellant was right to say there was a valid rescission (*Master Marine* at [45]).

Cases with simple guarantees

74 On the other hand, D1 placed emphasis on two English cases where the courts held that the contracts in question were not on demand performance guarantees.

Vossloh

75 The first case is the English High Court's decision in *Vossloh*. In that case, which was in a non-banking context, the claimant provided guarantees to the defendant in respect of the obligations of the claimant's subsidiary under a master purchase agreement. Specifically, the contracts provided:

> 2. GUARANTEE AND INDEMNITY
>
> 2.1 In consideration of the Angel Trains Group placing orders under any Call-Off Notice the Guarantor hereby unconditionally and irrevocably as a continuing obligation and as principal debtor and not merely as surety, as a separate, continuing and primary obligation:
>
> (a) guarantees to each Beneficiary the due and punctual observance and performance by each Guaranteed Party of each obligation owed by such Guaranteed Party to that Beneficiary contained in the Relevant Documents to which that Guaranteed Party is a party;
>
> (b) guarantees to each Beneficiary the due and punctual payment by each Guaranteed Party of all of its Secured Obligations;
>
> (c) undertakes with each Beneficiary that whenever a Guaranteed Party does not pay any of the Secured Obligations

as and when the same shall be expressed to be due, the Guarantor shall forthwith on demand pay such Secured Obligations which have not been paid at the time such demand is made,

(d) as a separate and independent stipulation, agrees that if any purported obligation or liability of the Guaranteed Party which would have been the subject of this Guarantee had it been valid and enforceable is not or ceases to be valid or enforceable against a Guaranteed Party on any ground whatsoever whether or not known to any Beneficiary, the Guarantor shall nevertheless be liable to the relevant Beneficiary in respect of that purported obligation or liability as if the same were fully valid and enforceable and the Guarantor was the principal debtor in respect thereof and shall be paid or caused to be paid by the Guarantor under this Guarantee upon demand; and

(e) as principal obligor and as a separate and independent obligation and liability, indemnifies each Beneficiary against any losses suffered by it from time to time in connection with or as a direct or indirect result of the failure of a Guaranteed Party to duly and punctually perform its terms, representations and warranties, conditions, covenants and obligations contained in the Relevant Documents to which it is a party or failure to duly and punctually pay the Secured Obligations or as a result of the whole or any part of the Relevant Documents being or becoming void, voidable, unenforceable or ineffective as against that Beneficiary for any reason whatsoever, irrespective of whether such reason or any related fact or circumstance was known or ought to have been known to that Beneficiary …

…

3. PAYMENTS

3.1 All sums payable hereunder shall be paid on demand to such bank account as may be specified in any demand made by a Beneficiary hereunder, in immediately available funds, free of any restriction or condition and free and clear of and without any deduction or withholding, whether for or on account of tax, by way of set-off or otherwise, except to the extent required by law …

…

6. WAIVER OF DEFENCES

6.1 The liabilities and obligations of the Guarantor under this Guarantee shall remain in force notwithstanding any act, omission, neglect, event or matter whatsoever whether or not known to the Guarantor, any Guaranteed Party or any

> Beneficiary (other than the irrevocable payment of the Secured Obligations to a Beneficiary and the full performance of all obligations guaranteed hereunder) and the foregoing shall apply, without limitation, in relation to: …
>
> 6.2 Without limiting Clause 6.1, none of the liabilities or obligations of the Guarantor under this Guarantee shall be impaired by any Beneficiary: …
>
> 6.3 The Guarantor hereby waives any right it may have of first requiring a Beneficiary to proceed against or enforce any other rights or security or claim payment from any person (including each Guaranteed Party) before claiming from the Guarantor under this Guarantee.
>
> 6.4 Subject to the terms of this Guarantee, and in particular this Clause 6, the Guarantor shall be entitled to raise such defences which are available to the Guaranteed Party under the Relevant Document only after the Guarantor has complied with Clause 2.1 of this Guarantee. However the Guarantor is not entitled to refuse payment or performance based on this right to reclaim.
>
> …
>
> 11. MISCELLANEOUS PROVISIONS
>
> …
>
> 11.2 A certificate of a Beneficiary setting forth the amount of any Secured Obligations not then paid by a Guaranteed Party shall be conclusive evidence of such amount against the Guarantor in the absence of any manifest error.

76 Sir William Blackburne, sitting as Judge of the English High Court, held that the contracts were simple guarantees and were not on demand performance guarantees. Sir William's reasoning was as follows.

> (a) Clause 2 was premised upon the establishment of a failure of performance (including a failure of payment) under a relevant document (*Vossloh* at [53]). Clauses 2.1(a) and 2.1(b) were framed in the "classic language of guarantee", that is, "of a secondary obligation triggered upon proof of a breach of obligation by the principal" (*Vossloh* at [44]) or "premised upon a failure of observance or performance of an underlying obligation (in the case of sub-clause (a)) or of punctual

payment under an underlying obligation (in the case of sub-clause (b)) by a guaranteed party under a relevant document" (*Vossloh* at [46]).

(b) Clauses 2.1(d) and 2.1(e) were worded as primary obligations. Clause 2.1(c), although not prefaced by the expression "guarantee" (as clauses 2.1(a) and 2.1(b) were) had "the appearance of a secondary obligation" as it was "premised upon a default in payment by 'a Guaranteed Party'" – the obligation was "to make good on demand any Secured Obligations which have not been paid at the time such demand [by the claimant] is made" (*Vossloh* at [44]).

(c) The opening words of clause 2 were not effective to convert into purely primary obligations what were otherwise secondary in nature (*Vossloh* at [45]).

(d) Clause 3.1 did not lend support to the case that the contract was an on demand performance guarantee (*Vossloh* at [47]).

(e) Clause 6 also did not lend support to the case that the contract was an on demand performance guarantee. Clauses 6.1–6.3 contained provisions one would expect to find in a guarantee. The "pay now, argue later" terms of clause 6.4 pointed to the existence of a secondary rather than to a primary liability. The clause assumed that the claimant may raise defences which the guaranteed party could have raised if the demand had been addressed to it, but, if the claimant's liability were primary, the fact that the guaranteed party had or may have a defence to the demand would be immaterial (*Vossloh* at [48]).

(f) Clause 11.2 was a "conclusive evidence provision" of a kind "commonly seen in guarantees" (*Vossloh* at [50]). It also assumed that

there was a breach of the obligation. Its reference to the certificate "setting forth the amount" of the secured obligation constituting "conclusive evidence … against the Guarantor in the absence of any manifest error" did not go to the existence of the breach (that is, liability). Instead, it went only to the quantum of liability (*Vossloh* at [50]). In other words, Sir William held that clause 11.2 did not prevent the guarantor from denying liability. Sir William further held that such conclusive evidence provisions should be strictly construed and any ambiguity should be resolved in favour of the guarantor (*Vossloh* at [50] and [51]).

(g) As the case was outside the banking context, Sir William held that the *Marubeni* presumption against construing the contract as an on demand performance guarantee was not rebutted (*Vossloh* at [53]).

Carey Value

77 The second English case which D1 relied on is *Carey Value Added, S.L. v Grupo Urvasco, S.A.* [2010] EWHC 1905 (Comm) ("*Carey Value*"). The relevant terms of the Deed of Guarantee and Indemnity in that case provided as follows (see *Carey Value* at [25] and [39]):

(a) Clause 2.1(a) provided: "[The defendant] irrevocably and unconditionally … guarantees to [the claimant] punctual and complete performance by the Obligors [Grupo Hotelero Urvasco] of the Guaranteed Obligations".

(b) Clause 2.1(c) provided: "[The defendant] irrevocably and unconditionally … undertakes with [the claimant] to be responsible as primary obligor for any failure by an Obligor to perform, discharge or

fulfil for whatever reason any of the Guaranteed Obligations when due and promptly on demand by [the claimant] …"

(c) Clause 2.1(d) provided: "[The defendant] irrevocably and unconditionally … undertakes with [the claimant] to indemnify any of them immediately on demand against any cost, loss or liability suffered and expenses incurred by [the claimant] …"

(d) Clause 20.6 provided: "Any certification or determination by [the claimant] of a rate or amount under any Transaction Document or this deed is, in the absence of manifest error, conclusive evidence of the matters to which it relates."

78 Blair J dismissed the application for summary judgment. Blair J distinguished *IIG Capital* and held as follows:

(a) The language of primary and secondary liability is routinely found in the same contracts, and is not in itself a guide to the content of the liability, and the mere incorporation of a principal debtor clause will not usually suffice in itself to determine the nature of the contract (*Carey Value* at [22]).

(b) The use of the words "expressed to be" in the definition of "Guaranteed Monies" in *IIG Capital* (see [63(b)] above) meant that the definition in *IIG Capital* was "appreciably wider than the definition of 'Guaranteed Obligations'" in *Carey Value* (*Carey Value* at [36]).

(c) By clause 2.1(c) of the Deed of Guarantee and Indemnity, the defendant undertook to be responsible as primary obligor for any failure of Grupo Hotelero Urvasco to discharge any of the Guaranteed

Obligations when due. This "tend[ed] to suggest that the guarantor's liability is the same as that of the borrower" (*Carey Value* at [37]).

(d) The language of clause 2.1(d) appeared to be the language of co-extensive liability, and was not indicative of the unqualified liability which arises under an on demand performance guarantee (*Carey Value* at [37]).

(e) The conclusive evidence clause in *IIG Capital* stated that the certificate was as to the "amount at any particular time due and payable". Those words were missing from clause 20.6. There was a major difference between a certificate as to "amount" and a certificate as to "amount due and payable". Therefore, clause 20.6 only referred to the amount advanced, and not the amount due (*Carey Value* at [40]).

Summary of the interpretive approach

79 The foregoing outline of the caselaw shows that the courts' approach to interpreting contracts of suretyships is consistent with the principles outlined at [48] above.

(a) First, it was important to bear in mind that labels were not necessarily helpful and might even serve to distract. It has been consistently held that the *form* and label used to describe a contract of suretyship (whether as guarantee, indemnity, or as an on demand performance guarantee) was not conclusive as to the nature of the contract *in substance*. The core issue was what was the nature of D1's obligations under the Guarantee: was the liability primary or secondary; did the principle of co-extensiveness apply; and was D1's liability to pay triggered upon a simple demand by the obligee under the Guarantee?

(b) Second, when interpreting a contract of suretyship, the *text* of the contract was paramount.

(c) Third, to interpret the nature of the obligations under the contract, the contractual clauses cannot be read in isolation. The document *as a whole* had to be interpreted, and the court should not be simply undertaking a quantitative, box-ticking exercise to determine the number of factors in favour or against the interpretation of the document as an on demand performance guarantee (see [70(a)] above).

(d) Fourth, while there was a "strong presumption" under the common law against the existence of an on demand performance guarantee outside the banking context if the contract did not expressly label it as an on demand performance guarantee, one must be careful not to overstate the effect of that presumption. Ultimately, an evidential presumption of fact simply shifts the burden of proof to another party to rebut the presumed fact. Bearing in mind that the *form* used to label the contract of suretyship is not itself conclusive as to the nature of the obligation *in substance*, and that every case turns on its own facts, the court ultimately has to construe the text of the contractual clauses *as a whole* to determine the nature of the obligor's obligations under the contract. This was evident in the cases of *IIG Capital* and *Bitumen*.

Application to the present case

80 With the applicable principles in mind, I now turn to the Guarantee in this case.

The clauses in the Guarantee

81 The relevant clauses of the Guarantee provided as follows:

(a) Obligations: Clauses 3.1 and 3.2 provided:

> 3.1 The Guarantor [D1] hereby irrevocably and unconditionally:
>
> 3.1.1. Guarantees to the Vendor [D2] the due and punctual performance by the Operating Companies [UIL Singapore Pte Limited, UIL Hong Kong limited and UIL Commodities DMCC] of all of their obligations under or pursuant to the Materials Contract and other due payment and discharge of all moneys and liabilities whatsoever, whether actual or contingent, by way of principal, Interest or otherwise, which may be now or hereafter due, owing, or incurred to the Vendor [D2] by the Operating Companies (whether alone or jointly and whatever style, name or form and whether as principal or surety) or incurred by the Vendor on the Operating Companies' behalf under or pursuant to the Materials Contract.
>
> 3.1.2. Undertakes that, if and whenever the Borrower fails to pay on the due date any sum whatsoever due and payable under or pursuant to the Materials Contract, the Guarantor shall pay such sum on demand by the Vendor and where requested by the Vendor, in the currency in which the same falls due for payment.
>
> 3.2 As a separate and independent stipulation, the Guarantor [D1] hereby irrevocably and unconditionally agrees that, if any amounts hereby guaranteed are not recoverable on the footing of a guarantee, whether by reason of any legal limitation, disability or incapacity on or of the Operating Companies (or any of them) or any other fact or circumstance, whether known to the Vendor or the Guarantor not, then such amounts shall nevertheless be recoverable from the Guarantor as sole or principal debtor and shall be payable by the Guarantor on demand.

(b) Conclusive evidence clause: Clause 9.1 provided:

> A certificate or determination by the Vendor as to the *moneys and liabilities* for the time being due, owing or incurred to the Vendor by the Operating Companies, or incurred by the Vendor on the Operating Companies behalf or, without limitation as to any other matter provided for in this Guarantee, shall (save in case of manifest error) for all purpose be *conclusive and binding* upon the Guarantee. [emphasis added]

(c) Set off: Clause 7.3 of the Guarantee provided:

> All payments to be made by the Guarantor under this Guarantee *shall be made without set-off or counterclaim*, and free and clear of, and without deduction for or on account of, any present or future taxes, unless the Guarantor is compelled by law to make payment subject to any such tax. [emphasis added]

Parties' submissions

82 The plaintiffs' instructed counsel, Mr Chan Leng Sun SC, submitted that the Guarantee was an on demand performance guarantee because the foregoing provisions were similar to the clauses in the cases of *IIG Capital* and *Bitumen*, and the courts held in those cases that the contracts in question were on demand performance guarantees. D1's instructed counsel, Mr Kenneth Tan SC ("Mr Tan SC"), submitted that the clauses and structure of the Guarantee showed that the Guarantee was not an on demand performance guarantee because D1's liability was dependent on the Operating Companies' breach of their payment obligations under the Contracts.

Analysis

83 In my judgment, bearing in mind that parties can and do draft modern contracts in such a way that they can contain separate enforceable obligations (see [61] above), I found that the Guarantee contained an obligation of a simple guarantee (under clauses 3.1.1 and 3.1.2) with a separate enforceable obligation of an on demand performance guarantee (under clause 3.2).

84 First, it was clear that the obligation under clauses 3.1.1 and 3.1.2 was that of a guarantee rather than an indemnity. This was because D1's liability to pay under clause 3.1.2 was only triggered "if and whenever the Borrower fails to pay on the due date any sum whatsoever *due and payable* under or pursuant

to the Materials Contract" [emphasis added]. This was a clear stipulation that D1's liability was contingent on the Operating Companies' default on their obligations under the Contracts when those obligations became "due and payable". This meant that D1's liability under clauses 3.1.1 and 3.1.2 was secondary and the principle of co-extensiveness applied.

85 On the other hand, clause 3.2, when read together with clauses 9.1 and 7.3, clearly indicated that it gave rise to a separate and independent obligation under an on demand performance guarantee. This was for the following reasons.

(1) Clause 3.2

86 Under clause 3.2, it was significant that D1 (a) "irrevocably and unconditionally" agreed to provide a (b) "separate and independent" obligation to pay the obligee (c) "as sole or principal debtor", and this liability was triggered (d) "on demand" (e) if "any amounts hereby guaranteed are *not recoverable on the footing of a guarantee*" [emphasis added]. All these factors were indicators that D1's obligation to pay under clause 3.2 was a primary one that was not subject to the principle of co-extensiveness.

87 D1 submitted that clause 3.2 was not an on demand performance guarantee because it only applied "if any amounts hereby guaranteed are not recoverable on the footing of a guarantee" (the "Phrase"), which indicated that D1 would not be liable under clause 3.2 unless the Operating Companies' breach of their payment obligations under the Contracts was first established. With respect, I was unable to agree with this submission. In my judgment, it was clear that the Phrase was specifying the *stated event* that triggered liability under clause 3.2: this stated event was when there were amounts owed under the Guarantee that were not recoverable on the footing of a guarantee. This stated event addressed the principle of co-extensiveness directly to state that *it*

did not apply. Therefore, for any amounts that were recoverable on the footing of a guarantee, D1's liability would fall under clauses 3.1.1 and 3.1.2. For any amounts that were *not* recoverable by way of a guarantee (if, for instance, the underlying Contracts were unenforceable or void), then D1 would be liable as a *primary* debtor by reason of clause 3.2. Therefore, rather than being inconsistent with the nature of on demand performance guarantee, the Phrase expressly indicated that clause 3.2 was intended as one.

88 It was important to bear in mind that liability under all contracts of suretyship, including on demand performance guarantees, will invariably only be triggered after an underlying obligation has been breached. This was recognised by the English High Court in *Vossloh* itself, a case heavily relied upon by D1, where Sir William Blackburne stated that liability under an on demand performance guarantee was triggered on the occurrence of a stated event that was usually "the non-fulfilment of a contractual obligation by the principal to that third party" (see [51] above). Indeed, this was the case for the contractual clauses in *IIG Capital* and *Bitumen*: in *IIG Capital*, the clause stated that the obligor was liable to pay on demand "*if … the Guaranteed Moneys are not paid in full on their due date*" [emphasis added] (see [63(a)] above); in *Bitumen*, the relevant clause stated that the obligor had to pay on demand any amount certified by the vessel owners to be due to the owners "as a consequence of the Charterers *not having fulfilled their obligations under the Charter*" [emphasis added] (see paragraph C of the clause extracted at [66] above).

89 Therefore, the key determining factor was not whether the Guarantee envisioned an underlying obligation that had been breached; what was critical was whether D1's liability under the Guarantee was *contingent on the principal debtor's default* of the underlying obligation (see also *Vossloh* at [44] (see

[76(a)] above)). Clause 3.2 was *not* contingent on such a default, so the clause did not indicate secondary liability on D1's part.

90 However, there was also a contractual clause in *Vossloh* – clause 2.1(d) – that was similar to clause 3.2 in this case (see [75] above). Therefore, clause 3.2 alone was not sufficient to indicate the presence of an obligation of an on demand performance guarantee. As such, I turned to the other clauses in the Guarantee.

(2) Clause 9.1

91 Clause 9.1 stated clearly that a "certificate or determination by the Vendor as to the *moneys and liabilities* for the time being due, owing or incurred to the Vendor by the Operating Companies … shall (save in case of manifest error) for all purpose be *conclusive and binding* upon the Guarantee" [emphasis added]. In the cases of *IIG Capital* and *Bitumen*, the presence of clauses similar to clause 9.1 led to the courts' findings that the contracts in those cases were on demand performance guarantees (see [65] and [67(a)] above). In *IIG Capital*, the English Court of Appeal held that the existence of a similar clause had put "the matter beyond doubt" as, "[a]part from manifest error, the [obligors] ha[d] bound themselves to pay on demand as primary obligor the amount stated in a certificate" (see [65] above). In *Bitumen*, while the clause in that case was worded differently from clause 9.1, it nevertheless provided that the guarantor would pay on demand "*any amount certified by Owners by written notice to be due to the Owners* …" [emphasis added] (see paragraph C of the clause at [66] above). Sir Jeremy Cooke found that the "certification of any amount as due as a consequence of non-fulfilment of [the principal debtor's] obligations *must go, inevitably, to liability*" [emphasis added] (see [67(a)] above).

92 D1, relying on the principle that conclusive evidence clauses should be strictly construed (see [76(f)] above), submitted that clause 9.1 was only "conclusive" as to the quantum of money owed by D1 and not D1's liability to pay. On D1's submission, clause 9.1 did not indicate that the Guarantee was an on demand performance guarantee because it did not prevent D1 from denying liability when a demand to pay was made by the obligee.

93 Conclusive evidence clauses are found in many standard form guarantees. The commercial function of a conclusive evidence clause is to avoid debate about the correctness of the calculation of any sums that are due if liability is established. Thus, a clause that refers to a certificate of the "amount" due or payable as being "conclusive evidence" should normally be construed as meaning that it is evidence only of the quantum of money owed and not of liability; instead, it would take explicit wording to make the liability of the obligor to pay conditional upon a certificate alone (see *Andrews and Millett* at para 1-016). This was consistent with the decisions in *Vossloh* and *Carey Value*, as the conclusive evidence clauses in those cases did not expressly state that the obligee's certification or determination of the obligor's "liability" was conclusive and binding (see clause 11.2 at [75] above and [77(d)] above).

94 However, clause 9.1 in the present case *did* explicitly provide that the obligee's certification and determination of not only the "moneys" but also the "*liabilities*" due under the Guarantee was, save for manifest error, "*conclusive and binding*" on D1 [emphasis added]. The fact that clause 9.1 expressly referred to "liabilities" made it clear that this was not a typical conclusive evidence clause referred to in *Andrews and Millett* regarding the quantum of moneys owed. Instead, clause 9.1 prevented D1 from denying liability to pay once the obligee issued its demand on D1 to pay. As such, *Vossloh* and *Carey Value* could be distinguished. Furthermore, the conclusive evidence clauses in

IIG Capital and *Bitumen* did not even expressly state that the obligee's certification of the obligor's "liabilities" was conclusive and binding on the obligor (see [63(c)] and [66] above). As clause 9.1 did expressly state this, clause 9.1 stood on an even firmer footing than the clauses in *IIG Capital* and *Bitumen* in showing that clause 3.2 of the Guarantee was an on demand performance guarantee.

(3) Clause 7.3

95 Third, clause 7.3 stated that all payments that D1 had to make "shall be made without set-off or counterclaim". Clause 7.3 was similar to paragraph D of the clause in *Bitumen*, which led to Sir Jeremy Cooke's decision that the contract in that case was an on demand performance guarantee, as payments which were certified by the obligee fell to be paid by the obligor "with no defence available of any kind" (see [67(b)] above). The plain text of clause 7.3 resulted in the same effect in this case, as clause 7.3 also prevented D1 from raising any set off or counterclaims to seek to avoid paying for the sum certified by the obligee as being due and payable under clause 9.1. Thus, clause 7.3 further bolstered the interpretation that D1's liability under clause 3.2 was a primary obligation not subject to the principle of co-extensiveness.

(4) Conclusion

96 Therefore, clause 3.2, read together with clauses 9.1 and 7.3, clearly showed that D1 had "irrevocably and unconditionally" agreed to provide a "separate and independent" obligation (from the guarantee obligation under clauses 3.1.1 and 3.1.2) "as sole or principal debtor" to pay the obligee "on demand" any "moneys and liabilities" certified or determined by the obligee as "due, owing or incurred" to the obligee by the Operating Companies that were "not recoverable on the footing of a guarantee", and that D1 had to make this

payment "without set-off or counterclaim". This was clearly a primary obligation on D1's part to pay the obligee of the Guarantee on demand, and the principle of co-extensiveness did not apply. These were the defining characteristics of an on demand performance guarantee. Therefore, I found that clause 3.2, read together with clauses 9.1 and 7.3, was an on demand performance guarantee. Even if the *Marubeni* presumption applied in Singapore, it was clear from the plain text of the Guarantee as a whole that the *Marubeni* presumption was rebutted.

97 In any event, even if clause 3.2 was not an on demand performance guarantee, for the reasons I explained at [86] to [96] above, it was nevertheless clearly an *indemnity* that was triggered upon a simple demand by the obligee to pay, and payment had to be made without any set-off or counterclaim. Consequently, whether clause 3.2 was an on demand performance guarantee or an indemnity, D1's liability to pay the obligee was clearly *primary* and the principle of co-extensiveness did not apply.

98 Accordingly, when the plaintiffs issued the Letter of Demand on D1 to pay under the Guarantee for the Operating Companies' liabilities under the Contracts, D1 was clearly liable to pay either (a) as a guarantor under clauses 3.1.1 and 3.1.2, since the Operating Companies had defaulted on their payment obligations under the Contracts or, (b) even if the USD 63.3m sum was not recoverable on the footing of the guarantee under clauses 3.1.1 and 3.1.2, D1 was still liable as a *primary* debtor to pay the plaintiffs the USD 63.3m sum under clause 3.2. It was thus not open to D1 to resist payment on the ground that the amount under the Guarantee was satisfied by the Hangji Security and/or GEM Security, which, even on D1's own case, were securities for a *different contract* (the ATFF2 Loan). If D1 had any other independent claims against the plaintiffs, it was for D1 to claim that amount *separately* from the plaintiffs.

The position under Ontario law

99 For completeness, even if Ontario law governed the issue of whether the Guarantee was an on demand performance guarantee, I would have similarly found that clause 3.2, read together with clauses 9.1 and 7.3, gave rise to a separate enforceable obligation of an on demand performance guarantee. Ontario is a common law jurisdiction. D1 did not cite any Ontario cases on the law of on demand performance guarantees. From the cases cited to me by the plaintiffs' counsel in their written submissions, it was clear that the legal principles on guarantees, indemnities, and on demand performance guarantees were not materially different between Singapore and Ontario. Most notably, in *Standard Trust v Mortgage Insurance Co* 1992 CarswellOnt 139 at [11], the Ontario Court of Justice held that an on demand performance guarantee was akin to letters of credit and that the obligor's liability was not contingent on the principal debtor's default of its obligations under the underlying contract:

> Herman J. Wilton-Siegel in 'International Business Agreements: Security For Payment' found in Canadian Institute Proceedings (1990) The Art of Negotiating & Drafting International Commercial Contracts has noted there *is little functional difference between a standby letter of credit and a performance guarantee. In both instances the issuer's obligation to pay is generally independent of the performance of the underlying contract.* Similarly, K.P. McGuinness in his treatise The Law of Guarantee (Carswell: Toronto 1986) has the following to say under the heading 'Performance Guarantees':
>
> > … A performance guarantee (also known as an 'on demand guarantee' or a 'first demand guarantee') is a documentary form of security under which the issuer undertakes to guarantee the payment of a stipulated amount to a named or designated beneficiary, upon compliance with terms set out in the performance guarantee. As in the case of a letter of credit, payment under a performance guarantee generally must be made upon demand. *It is not usually necessary for the beneficiary to prove actual default by the principal.* … Thus, in terms of both the nature of the obligation assumed and the type of institution likely to enter into such an undertaking, *performance guarantees are very*

> *similar in nature of letters of credit, and indeed … it would seem that the two terms are synonymous* — the term 'performance guarantee' being used to describe this type of obligation in Europe, while the term 'standby letter of credit' is more common in American practice.
>
> [emphasis added]

100 The parties' experts on Ontario law were also agreed in their affidavits (filed on the issue of set off) that, under Ontario law, a contract had to be read as a whole, in a plain and ordinary way, in light of the context in which the contract was made.[31] This was entirely consistent with the principles of contractual interpretation under Singapore law and how English and Singapore courts have determined if contracts were on demand performance guarantees (see [48] and [79] above).

101 As such, even if Ontario law applied, I would have reached the same conclusion at [83] and [96] above based on an interpretation of the text of the Guarantee as a whole.

Issue 2: D1's other defences

102 In any event, even if the Guarantee were a simple guarantee, I agreed with the plaintiffs that D1's other defences ought to be struck out. These were the Hangji and GEM Securities Defence and the Clause 6 Defence.

D1's defences regarding the Hangji Security and GEM Security

D1's defence that no amount was owed under the Guarantee

103 I first turn to the first prong of D1's Hangji and GEM Securities Defence: that no amount was owed under the Guarantee because the Hangji

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[31] Angela Swan's affidavit dated 7 September 2022, Tab 2, at [33].

Security and/or GEM Security could satisfy the amounts owed (see [24] above). In my judgment, this defence was unsustainable for two main reasons: it was uncertain and legally flawed.

(1) D1's pleadings were vague, unparticularised, and did not support its case

104 First, in my judgment, this pleading was fundamentally flawed because it rested upon D1's claim that it allegedly *agreed* with the plaintiffs to use the Hangji Security and GEM Security as security for the ATFF2 Loan (the "alleged Security Agreement"), but the date and terms of the alleged Security Agreement were not pleaded by D1 with any precision.

105 In this regard, the findings of Steven Chong J (as His Honour then was) in *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 ("*Likpin (HC)*") are instructive. In that case, the plaintiff brought the suit against the defendants for the breach of an alleged oral charterparty which it referred to as a procurement agreement. The plaintiff pleaded that, "[i]n so far as it was made orally or by conduct, the Procurement Agreement was made during meetings held at the 1st Defendants' [*sic*] offices *on or about February 2009 to on or about 20th April 2009*" [emphasis added by Chong J] (*Likpin (HC)* at [40]). The defendants applied to strike out the plaintiff's suit on the ground that, among others, the alleged agreement did not exist. Chong J struck out the plaintiff's suit. Chong J held (at [42], [45] and [46]):

> 42 While it is possible for a party to plead (a) that a contract was made orally and merely evidenced in a written document; or (b) that the written document *per se* constitutes the agreement of the parties to be contractually bound, ***there should only be one date on which the contract could be said to have been concluded***: that is the date there was *consensus ad idem* – a meeting of minds to be bound by terms which are both certain and complete. But this is not so in the present case. ***No explanation has been provided to account***

> ***for the wide disparity in the contract dates. It is plainly unarguable to assert that an oral contract was concluded over a two-month period***. It is vexatious for the plaintiff to ***experiment*** by pleading different dates and different bases for the same contract. Thus, I accept the defendants' submission that the plaintiff's inability to specifically identify when the Procurement Agreement was concluded points against the existence of the said agreement.
>
> …
>
> 45 Thus, based on the plaintiff's writ and statement of claim, ***the terms of the Procurement Agreement are clearly too uncertain to form the basis of a legally enforceable contract***. …
>
> 46 Moreover, in my view, ***it is frivolous, vexatious and an abuse of process to expect a defendant to defend a contractual claim when the plaintiff itself admits in its pleading that it is unsure of the most salient terms of the contract: the date of the contract; whether the contract was oral or written***; and the consideration which was agreed (in this case, the charter hire). …
>
> [emphasis in original in underline; emphasis added in bold italics]

106 The plaintiff's appeal to the Court of Appeal was dismissed, as the Court of Appeal agreed with Chong J's reasons that the plaintiff's claims were legally and factually unsustainable (*Likpin International Ltd v Swiber Holdings Ltd and another* [2016] 4 SLR 1079 at [3]).

107 In this case, D1's pleadings on the date when the alleged Security Agreement was reached, and where and how it was reached, was not only vague but also morphed continuously with each new further and better particulars that D1 provided.

(a) In D1's defence, D1 did not plead the date when the alleged Security Agreement was reached:[32]

[32] D1's Defence at [21(g)(iv)].

> … it was agreed between the Plaintiffs and the 1st Defendant that the GEM and / or Hangji Securities would ostensibly be in respect of the SBD-UDTG Facility but that they would also serve as security for the Facility Agreement.

(b) In response to the plaintiffs' request (dated 20 April 2022), D1 then further pleaded in its further and better particulars (dated 9 May 2022) ("1st FNBP") that the alleged Security Agreement was reached in writing by email on 18 and 20 February 2019 "*and/or*" orally by phone calls (with no date specified):

> a) Please identify the manner in which the Plaintiffs and UD had allegedly agreed that the GEM and / or Hangji Securities would ostensibly be in respect of the SBD-UDTG Facility but that they would also serve as security for the Facility Agreement;
>
> **Answer:**
>
> The manner was ***in writing and / or orally***.
>
> …
>
> The document(s) setting out the agreement are as follows:
>
> a. An ***email*** from the Plaintiff(s)' Mr Sullivan to the 1st Defendant's Mr Gupta ***dated 18 February 2019***. …
>
> b. An ***email*** from the Plaintiff(s)' Mr Sullivan to the 1st Defendant's Mr Gupta ***dated 20 February 2019***. In the email, Mr Sullivan stated: …
>
> c. An ***email*** from the 1st Defendant's Mr Gupta to the Plaintiff(s)' Mr Sullivan ***dated 20 February 2019***. In the email, Mr Gupta stated: …
>
> …
>
> The agreement was discussed and / or reached ***orally on phone calls*** between the Plaintiff(s)' Mr Sullivan and / or Mr Yang and the 1st Defendant's Mr Gupta and / or Mr Mokashi.
>
> [emphasis in original in bold underline; emphasis added in bold italics]

(c) D1 provided a second set of further and better particulars (dated 21 June 2022) pursuant to a court order ("2nd FNBP"). D1 then pleaded that the alleged agreement for the Hangji Security was reached by yet another new method – an "in-person meeting" – and phone calls on *three alternative dates* spanning a total of *three months* (21 February 2019 "and/or" 22 March 2019 "and/or" 22 May 2019); and that, for the GEM Security, the agreement was allegedly reached by phone call on two alternative dates spanning two months (1 May 2019 "and/or" 26 July 2019):

> a) If the manner in which the Plaintiffs and UD had allegedly agreed that the GEM and / or Hangji Securities would ostensibly be provided in respect of the SBD-UDTG Facility but that they would also serve as security for the Facility Agreement was orally, please identify:
>
> i. When the parties reached the alleged agreement;
>
> ii. The name(s) of the person(s) who had reached the alleged agreement on behalf of their respective principals; and
>
> …
>
> **Answer:**
>
> *In respect of the Hangji Security:*
>
> a. The parties reached the agreement *at an in-person meeting on **21 February 2019** at 1 pm Hong Kong time **and / or** by phone call **on 22 March 2019** at 2.30 pm Dubai time **and / or** by phone call **on 22 May 2019** at 4 pm Dubai time.*
>
> …
>
> *In respect of the GEM Security:*
>
> a. The parties reached the agreement *by phone call **on 1 May 2019** at 11 am Dubai time and / or by phone call **on 26 July 2019** at 10 am Dubai time.*
>
> [emphasis added in italics and bold italics]

108 Furthermore, D1's pleadings did not even support D1's case that the parties had reached any agreement to use the Hangji Security and GEM Security as security for the ATFF2 Loan at all.

(a) In D1's 1st FNBP, *none* of what D1 pleaded demonstrated that the parties had reached any *agreement*:

> The document(s) setting out the agreement are as follows:
>
> a. An email from the Plaintiff(s)' Mr Sullivan to the 1st Defendant's Mr Gupta dated 18 February 2019.
>
> i. In the email, Mr Sullivan stated: '*I am wondering if we use the security for UIL exposure instead of Rutmet then perhaps EDC will re-instate full coverage without deductible?*'.
>
> ii. The reference to 'UIL exposure' was a reference to the SBD-UDTG Facility.
>
> b. An email from the Plaintiff(s)' Mr Sullivan to the 1st Defendant's Mr Gupta dated 20 February 2019. In the email, Mr Sullivan stated:
>
> i. 'For Rutmet our message to EDC should be clear. *We do not have any security from UIL for our Rutmet exposure and we will not entertain such security* if it means that they will introduce an arbitrary high deductible from any claim.'
>
> c. An email from the 1st Defendant's Mr Gupta to the Plaintiff(s)' Mr Sullivan dated 20 February 2019. In the email, Mr Gupta stated:
>
> i. '*No security to be provided for this facility*, so automatically the AFL doesn't get triggered (however, *we would offer you the security on your sales side or by a side agreement to protect TFC's interest*).'
>
> ii. The reference to 'this facility' in Mr Gupta's email was a reference to the Facility Agreement.
>
> iii. The reference to security to be offered 'by a side agreement' was a reference to the fact the GEM and / Hangji securities would be additionally offered by way of a separate

> agreement in order to protect the Plaintiff(s)' exposure on the Facility Agreement.
>
> iv. The method for implementing this separate agreement was by ostensibly providing the GEM and / or Hangji Securities as security for the SBD-UDTG Facility instead.

[emphasis added]

(b) In D1's 1st FNBP, even though D1 was explicitly asked to plead the "gist of the words" used by the parties in reaching any alleged oral agreement, D1 did not do so:

> c) If orally, please identify:
>
> i. The place(s) at which the parties reached the alleged agreement;
>
> ii. The name(s) of the person(s) who had reached the alleged agreement on behalf of their respective principals; and
>
> iii. *The gist of the words used* by the person(s) when reaching the alleged agreement.
>
> **Answer:**
>
> The following are the best particulars the 1st Defendant can provide pending discovery:
>
> *The agreement was discussed and / or reached orally on phone calls between the Plaintiff(s)' Mr Sullivan and / or Mr Yang and the 1st Defendant's Mr Gupta and / or Mr Mokashi.*

[emphasis added]

(c) Subsequently, even after D1 was compelled to provide the 2nd FNBP pursuant to a court order, D1's 2nd FNBP did not demonstrate the existence of any *agreement* between the plaintiffs and D1:

> *In respect of the Hangji Security:*
>
> …
>
> c. The gist of the words used at the in-person meeting on 21 February 2019 were as follows:

a. Mr David Sullivan [the plaintiffs' representative] stated that the message to EDC regarding the Facility Agreement should be that UD had not provided the Plaintiff(s) any security in connection with the Facility Agreement.

b. Mr David Sullivan stated that the Plaintiff(s) still wished to have the Hangji Security provided in connection with the Facility Agreement.

c. Mr Swapnil Mokashi [D1's representative] stated that:

i. the Hangji Security would ostensibly be charged for the SBD-UDTG Facility.

ii. However, the Hangji Security would also act as security for the Plaintiff(s) on the Facility Agreement.

d. Mr David Sullivan stated that the Plaintiff(s) would conclude the Facility Agreement in consideration of the Hangji Security being provided to the Plaintiff(s) as security for the Facility Agreement.

d. The gist of the words used on the 22 March 2019 phone call at 2.30 pm Dubai time was as follows:

a. Mr David Sullivan stated that the message to EDC regarding the Facility Agreement should be that UD had not provided the Plaintiff(s) any security in connection with the Facility Agreement.

b. Mr David Sullivan stated that the Plaintiff(s) still wished to have the Hangji Security provided in connection with the Facility Agreement.

c. Mr Prateek Gupta and Mr Swapil Mokashi [D1's representatives] stated that:

i. The Hangji Security would ostensibly be charged for the SBD-UDTG Facility.

ii. However, the Hangji Security would also act as security for the Plaintiff(s) on the Facility Agreement.

d. Mr David Sullivan stated that the Plaintiff(s) would conclude the Facility Agreement in consideration of the Hangji Security being provided to the Plaintiff(s) as security for the Facility Agreement.

e. The gist of the words used on the 22 May 2019 phone call at 4 pm Dubai time was as follows:

a. Mr David Sullivan stated that the message to EDC regarding the Facility Agreement should be that UD had not provided the Plaintiff(s) any security in connection with the Facility Agreement.

b. Mr Prateek Gupta and Mr Vipul Choudhari [D1's representatives] stated that the Hangji Security charged for the SBD-UDTG Facility would also act as security for the Plaintiffs for the Facility Agreement.

c. Mr David Sullivan and Mr Ian Milne [the plaintiffs' representatives] stated that the Plaintiff(s) would conclude the Facility Agreement in consideration of the fact the Hangji Security would also act as security for the Plaintiff(s) on the Facility Agreement.

In respect of the GEM Security:

…

f. [*sic*] The person(s) who reached the agreement on behalf of their respective principals were as follows:

a. 1 May 2019 at 11 am Dubai time – Mr Prateek Gupta and Mr Swapnil Mokashi of UD and Mr David Sullivan for the Plaintiff(s).

b. 26 July 2019 at 10 am Dubai time – Mr Prateek Gupta, Mr Swapnil Mokashi and Mr Vipul Choudhari of UD and Mr David Sullivan and Mr Ian Milne for the Plaintiff(s).

b. [*sic*] The gist of the words that were used on the 1 May 2019 phone call at 11 am Dubai time were as follows:

a. Mr David Sullivan stated that the message to EDC regarding the Facility Agreement should be that UD had not provided the Plaintiff(s) any security for the Facility Agreement.

b. Mr David Sullivan stated that the Plaintiff(s) still wished to have the GEM Security provided in connection with the Facility Agreement.

c. Mr Prateek Gupta and Mr Swapnil Mokashi stated that:

> i. The GEM Security would ostensibly be charged for the SBD-UDTG Facility.
>
> ii. However, the GEM Security would also act as security for the Plaintiff(s) on the Facility Agreement.
>
> d. Mr David Sullivan stated that the Plaintiff(s) would conclude the Facility Agreement in consideration of the GEM Security being provided to the Plaintiff(s) as security for the Facility Agreement.
>
> c. [*sic*] The gist of the words used on the 26 July 2019 phone call at 10 am Dubai time were as follows:
>
> a. Mr David Sullivan and Mr Ian Milne stated that the message to EDC regarding the Facility Agreement should be that UD had not provided the Plaintiff(s) any security in connection with the Facility Agreement.
>
> b. Mr Prateek Gupta, Mr Swapnil Mokashi and Mr Vipul Choudhari stated that the GEM Security charged for the SBD-UDTG Facility would also act as security for the Plaintiffs for the Facility Agreement, in consideration for the Plaintiff(s) concluding the Facility Agreement, and as previously discussed.

109 As Chong J held in *Likpin (HC)* at [46], it was "frivolous, vexatious and an abuse of process to expect a defendant to defend a contractual claim when the plaintiff itself admits in its pleading that it is unsure of the most salient terms of the contract", such as "the date of the contract" and "whether the contract was oral or written" (see [105] above). A plain reading of D1's further and better particulars above showed that that was exactly what D1 sought to do in its pleadings:

(a) First, D1 could not even plead with certainty if the alleged Security Agreement was concluded in writing or orally, and, if orally, if it was by phone calls or at an in-person meeting.

(b) Second, D1 also could not plead the date of the alleged Security Agreement with certainty. The pleaded date(s) when the alleged Security Agreement was reached was wide-ranging and unparticularised. The alleged Security Agreement spanned *three months* over emails (allegedly on 18 and 20 February 2019), one in-person meeting (allegedly on 21 February 2019), and/or two phone calls (22 March 2019 and/or 22 May 2019) for the Hangji Security; and two months over two phone calls (1 May 2019 and/or 26 July 2019) for the GEM Security. The fact that D1 pleaded such wide-ranging dates *both cumulatively and alternatively* ("and/or") spanning months showed that D1 was clearly experimenting with its pleadings. This, as Chong J held in *Likpin (HC)* at [42], was vexatious (see [105] above).

(c) Third, D1's defence and FNBPs did not even demonstrate that the plaintiffs and D1 even *agreed* on the alleged Security Agreement. There was no "meeting of minds" (*Likpin (HC)* at [43]; see [105] above). Instead, there were only multiple offers or suggestions uttered by various parties, which explained why the alleged Security Agreement took *months* to purportedly "conclude". Therefore, even taking D1's pleadings at its highest, there was no agreement reached between the plaintiffs and D1 that the GEM Security and Hangji Security were to be used as security for the ATFF2 Loan.

110 As such, D1's case on the alleged Security Agreement was too uncertain to form the basis of a legally enforceable contract. Therefore, D1's case on the alleged Security Agreement was legally and factually unsustainable.

(2) D1's case was legally unsustainable

111 Besides uncertainty, D1's defence that the GEM Security and Hangji Security could "satisfy" the amounts owed under the Guarantee was also legally flawed.

(a) First, the defence ran contrary to clause 7.3 and clause 9.1, which prevented D1 from raising any set-off or counterclaims against any determination by the plaintiffs of the liabilities and monies owed under the Guarantee.

(b) Second, it was undisputed that D1 *did not even own* the GEM Security and Hangji Security. As the plaintiffs rightly pointed out, D1 could not rely on *another entity's* asset to discharge *D1's* liability under the Guarantee.

(c) Third, the alleged agreement was that the GEM Security and Hangji Security were to be used as security *for the ATFF2 Loan*, not the *Guarantee*. Therefore, even if D1's claim was taken at its highest, the GEM Security and Hangji Security could not be used to satisfy D1's liability under the *Guarantee*.

(d) Fourth, clause B(1)(p) of Part C of the Facility Agreement for the ATFF2 Loan expressly provided that "[n]o amendments … will be binding on any of the parties to this Facility Agreement unless the amendments are in writing in the prescribed format for amendments and signed and delivered to all relevant parties".[33] The alleged Security Agreement would have constituted an amendment to the Facility Agreement of the ATFF2 Loan, since it sought to use new securities –

[33] David Sullivan's 4th affidavit dated 28 June 2022, p 36, clause B(1)(p).

> the GEM Security and Hangji Security – for the ATFF2 Loan. It was never suggested by the defendants that there was any "writing" regarding the alleged Security Agreement "in the prescribed format for amendments and signed and delivered to all relevant parties". Therefore, none of the alleged oral agreements pleaded by D1 that formed the basis of the alleged Security Agreement could have been valid.

112 Consequently, I agreed with the plaintiffs that, even if the Guarantee was a simple guarantee, D1's defence that no amount was owed under the Guarantee as the Hangji Security and GEM Security could "satisfy" these amounts was plainly legally and factually unsustainable, and should be struck out.

D1's defence of set-off

113 Next, I turn to D1's alternative defence of set off relying on the GEM Security and Hangji Security (that is, that D1 could set off the amount claimed under the Guarantee against the value of the GEM Security and/or Hangji Security: see [22] above). This defence can be dealt with briefly. On this issue, D1 adduced expert evidence on Ontario law to submit that clause 7.3 did not cover equitable set-off. However, I found this argument to be contrived. Clause 7.3 unequivocally provided that all payments that D1 had to make under the Guarantee "shall be made without set-off or counterclaim". The phrase "set off" was clearly broad enough to encompass both legal and equitable set off. If the parties had intended to limit clause 7.3 to legal set off, that would have been expressly stated in the clause. Thus, I agreed with the plaintiffs that, regardless of whether Singapore law or Ontario law applied, D1 could not seek to set off its liabilities under the Guarantee. In any event, as the defence of set off also depended on the alleged Security Agreement, which was a legally and factually

unsustainable claim, I also found that D1's defence of set off should be struck out.

D1's defence regarding clause 6 of the ATFF2 Loan

114 I next turn to D1's Clause 6 Defence, which was the claim that the plaintiffs allegedly could not invoke the rights under the Guarantee in respect of D2's debts owed to the plaintiffs under the ATFF2 Loan (see [27] above). Mr Tan SC did not raise this defence at the hearing before me. Nevertheless, I will deal with this defence for completeness. This defence hinged on clause 6 of the Facility Agreement of the ATFF2 Loan, which provided:

> 6. Security
>
> Security or Security Documents: As a Condition Precedent, the following Security Documents shall be executed to secure the Facility [ATFF2 Loan], including:
>
> a. Assignment of Rights in connection with the credit insured receivables, the sales contract, invoice and other related trade documents with notice delivered to the Approved Buyer and acknowledge of the same …

115 In my judgment, D1's Clause 6 Defence was a non-starter, and Mr Tan SC rightly chose not to devote time to this defence in his oral submissions before me. Clause 6 was a condition precedent to the *ATFF2 Loan*. Even though the funds for the ATFF2 Loan were used by D2 to purchase metal from the Metal Suppliers to sell to the Operating Companies under the Contracts, the ATFF2 Loan was an entirely distinct agreement from not only the Guarantee but also the underlying obligation under the Guarantee (which was the Contracts). Therefore, the Clause 6 Defence was legally unsustainable because the Guarantee was not pertaining to *D2's debts* owed to the plaintiffs under the ATFF2 Loan to begin with – the Guarantee concerned the Operating Companies' liabilities owed to D2 under the Contracts (see [81(a)] above).

116 Accordingly, I found that D1's Clause 6 Defence was, once again, completely contradictory to the plain text of the relevant contracts and legally flawed. As such, I found D1's defence on this issue to be plainly unsustainable under O 18 r 19(1)(*b*) and should be struck out.

Issue 3: The assignment of the Guarantee

117 I next turn to the issue of the assignment of the Guarantee. It first bears emphasis that the defendants did not dispute that the purported assignment of D2's rights under the Guarantee to the plaintiffs was done pursuant to the *GSA and SD*. The defendants' defences seeking to challenge the assignment of D2's rights under the Guarantee to the plaintiffs were as follows:

(a) D2 sought to challenge the assignment by seeking to rescind the SD and GSA. D2's defence seemingly flowed as such: the SD and GSA could allegedly be rescinded because the Forbearance Agreement could be rescinded, and this in turn was because no UIL HK Debt was owed, as the plaintiffs did not pay the Metal Suppliers directly, in breach of the alleged Payment Agreement (and the facility agreements under the ATFF1 Loan and ATFF2 Loan) (see [28] and [29] above).

(b) D1 sought to challenge the assignment on two primary grounds.

(i) First, D2 pleaded that clause 12.3 of the Guarantee required D2 to provide D1 with a notice of the assignment, but this was not done (see [26] above).

(ii) Second, D1 pleaded that D2 was seeking in the D2 Ontario Proceedings to discharge the Forbearance Agreement, the GSA, the SD, and the POAs (see [26] above).

118 I agreed with the plaintiffs that the defendants' defences on this issue should be struck out as they were plainly legally and factually sustainable and were thus frivolous or vexatious under O 18 r 19(1)(*b*) of the ROC 2014.

Alleged agreement for the plaintiffs to pay the Metal Suppliers directly

119 I first turn to D2's defence. D2's defence depended entirely on the existence of the alleged Payment Agreement (that is, the alleged agreement for the plaintiffs to remit the monies drawn down under the ATFF1 Loan and ATFF2 Loan directly to the Metal Suppliers instead of D2). However, in my judgment, this defence was also legally and factually unsustainable.

120 First, the fatal flaw to D2's defence on the alleged Payment Agreement was that it was, similar to the alleged Security Agreement, wholly vague and uncertain. As aforementioned at [105] above, it was trite that any party making a claim for breach of contract has to clearly and accurately plead the material terms of the agreement breached. However, D2 *did not even plead* in its defence that the alleged Payment Agreement existed. Instead, D2 pleaded that P2 breached the terms of the two facility agreements under *the ATFF1 Loan and ATFF2 Loan*, *not* the alleged Payment Agreement:

> (a) … from in or around mid-2019, the 2nd Plaintiff *breached the terms of the 1st and 2nd Facility Agreements* when it failed, refused, and/or neglected to extend monies in the sum of US$ 73,108,092.50 to pay the 2nd Defendant's suppliers of metals and metal products, Triton Metallix Pte Limited ('Triton') and API International FZC ('API'):
>
> > (i) The 1st and 2nd Plaintiffs were required to remit the monies drawn down under the 1st and 2nd Facility Agreements directly to Triton and API, to pay for the supplies of metal and metal products purchased by the 2nd Defendant. But the 1st and 2nd Plaintiffs failed, refused, and/or neglected to do so; and
> >
> > …

> (b) The 2nd Defendant relies on the 2nd Plaintiff's *breaches of the 1st and 2nd Facility Agreements* in the Third Party Claims it commenced to, among other things, obtain contribution and indemnity from the 2nd Plaintiff in the proceedings commenced against the 2nd Defendant by (i) Triton for the sum of US$ 41,526,349.50 (i.e., CV-21-00001691-0000); and (ii) API for the sum of US$ 31,581,743.00 (i.e., CV-21-00001719-0000) (collectively, the 'Material Suppliers Ontario Proceedings').
>
> [emphasis added]

121 In other words, D2's pleaded case in its defence was that it was *the terms of the facility agreements under the ATFF1 Loan and ATFF2 Loan* which required the plaintiffs to remit the monies drawn down from the ATFF1 Loan and the ATFF2 Loan directly to the Metal Suppliers (instead of D2). However, the Facility Agreement under the ATFF2 Loan did not provide for such an alleged term at all. The plaintiffs thus sought further and better particulars from D2 to the question:

> Please identify the clauses in the 1st and 2nd Facility Agreements which contained the alleged obligation that the 1st and 2nd Plaintiffs were required to remit the monies drawn down under the 1st and 2nd Facility Agreements directly to Triton and API.

122 It was only in response to this request that D2 then changed its entire position and finally pleaded the existence of the alleged Payment Agreement:

> The obligation incumbent upon the 1st and/or 2nd Plaintiff to remit monies drawn down under the 1st and/or 2nd Facility Agreements to Triton and API ***was not set out in the 1st and/or 2nd Facility Agreements***. Instead, the Plaintiffs' representative, Mr. Milne, and the 2nd Defendant's representative, Mr. Modi, *verbally agreed, in or around the time the 1st and 2nd Facility Agreements were executed* ***(i.e., in or around 28 June 2017 and 24 May 2019),*** that the 1st and 2nd Plaintiffs would remit the monies drawn down under the 1st and 2nd Facility Agreements directly to Triton and API. [emphasis added in bold italics and italics]

123 Therefore, D2 had changed its position: D2 only pleaded in its further and better particulars that it was not actually the terms of the ATFF1 Loan or

ATFF2 Loan that the plaintiffs had allegedly breached by not paying the Metal Suppliers directly, but an *entirely separate* Payment Agreement that was breached. In these circumstances, D2's defence was legally unsustainable:

(a) First, it was unclear *which* agreement was breached.

(b) Second, it was also not stated how a breach of the alleged Payment Agreement could lead to a breach of the facility agreements under the ATFF1 Loan or ATFF2 Loan, when these were distinct agreements.

124 Second, as aforementioned at [111(d)] above, the Facility Agreement for the ATFF2 Loan expressly provided that no amendments to the Facility Agreement would be binding unless the amendments were in writing in the prescribed format and signed and delivered to all relevant parties. The alleged Payment Agreement would clearly have constituted an amendment to the Facility Agreement of the ATFF2 Loan, since it purportedly required the plaintiffs to remit monies drawn down under the ATFF2 Loan to a *non-party* to the Facility Agreement (the Metal Suppliers) rather than D2. However, D2's own case was that the alleged Payment Agreement was entirely *verbal*. Therefore, even if D2's case was taken at its highest, the alleged Payment Agreement could not have been legally valid.

125 Third, the alleged Payment Agreement was unsupported by any objective evidence, whether by correspondence or otherwise. While the alleged Payment Agreement was verbal, these were large corporations negotiating a multi-million dollar agreement that was allegedly entered into on *two separate dates* that were two years apart ("in or around 28 June 2017 and 24 May 2019"). Yet, D2 was unable to adduce a shred of objective evidence, not even by

informal internal correspondence, to support D2's claim that the alleged Payment Agreement existed.

126 This lack of objective evidence was particularly damning in this case because the plaintiffs *did* disburse the funds to the account which was stated in the drawdown notices. D2 itself stated this fact in its affidavit filed in this application:[34]

> The commercial arrangement for monies drawn down under the 2nd Facility Agreement was similar to what had been agreed under the 1st Facility Agreement (see paragraphs 10 to 19 of my 1st Affidavit), save as follows (see paragraph 38 of my 1st Affidavit): … *The 2nd Plaintiff would transfer the monies referred to in paragraph 6(b)(i) above to an account that the 2nd Defendant held with the National Bank of Canada* … [emphasis added]

127 Consequently, the alleged Payment Agreement was wholly contrary to the objective undisputed fact that P2 *did* disburse the monies drawn down under the ATFF2 Loan to D2's bank account as stated in the drawdown notices. As the plaintiffs submitted, after P2 did so, it was for D2 to determine how it wanted to further disburse the monies.

128 To support D2's claim on the alleged Payment Agreement, D2 further attested on affidavit that D2 would, after receiving the money from P2, remit it to a bank account by Cantrust ("Cantrust Account"), and that P2 "would then arrange for the monies transferred to the Cantrust Account by [D2] to be paid to the [Metal] Suppliers" *or* that, "alternatively, [P2] would pay the [Metal] Suppliers directly".[35] However, this claim was, once again, entirely unsustainable because Cantrust was a separate entity. If the alleged Payment

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34 Anil Shah's 5th affidavit dated 17 August 2022 at [6(b)(ii)].

35 Anil Shah's 5th affidavit dated 17 August 2022 at [6(b)(iv)].

Agreement were genuine, it did not make any sense that the plaintiffs would transfer the money to D2 *first* in order for D2 to further transfer the money to *another entity* (Cantrust) before the plaintiffs somehow finally caused that separate entity (Cantrust) to pay the Metal Suppliers directly; instead, the plaintiffs could have simply paid the Metal Suppliers directly. Furthermore, D2's case was completely uncertain, as D2 was once again pleading vague alternative cases that were fundamentally inconsistent: on D2's case, the plaintiffs had agreed to pay the Metal Suppliers directly by *either* transferring the monies to D2 first *or* by transferring the monies to the Metal Suppliers directly. There was, once again, not a shred of objective evidence to support D2's case that the parties had reached such a *nuanced* agreement for the plaintiffs to, on some occasions, transfer the monies to D2 first but, on other occasions, pay the Metal Suppliers directly. As such, bearing in mind that it was undisputed that P2 did remit the monies drawn down from the ATFF2 Loan to D2, D2's claim on the alleged Payment Agreement was plainly factually unsustainable.

129 As such, for the foregoing reasons, it was plain that D2's claim on the alleged Payment Agreement was legally and factually unsustainable. As D2's entire defence hinged upon the alleged Payment Agreement, I found that D2's defence was frivolous and vexatious and should be struck out.

Notice of assignment

130 I next turn to D1's defence that it did not receive a notice of assignment from D2. This defence hinged on clause 12.3 of the Guarantee. That clause provided as follows:

> The Vendor may transfer, assign and/or sub-participate all or any of its rights and benefits under this Guarantee, *without the consent of the Guarantor*. On such transfer, assignment or sub-

> participation, *the Vendor shall provide the Guarantor with notice of such transfer, assignment or sub-participation.* [emphasis added]

131 I agreed with the plaintiffs that clause 12.3 clearly did not stipulate that the assignment of any rights under the Guarantee was *conditional* upon giving notice of the assignment to D1. Nor was the consent of D1 required. Therefore, there was simply no basis to D1's defence that the Guarantee was not validly assigned due to a purported failure to provide notice of the assignment to D1.

Forbearance Agreement

132 Finally, I turn to D1's defence that D2 was seeking to rescind the Forbearance Agreement, the GSA, the SD, and the POAs in the D2 Ontario Proceedings.

133 First and foremost, as pointed out by the Appellate Division of the High Court in *UD Trading Group (AD)* at [45], it was questionable as to whether D1 even had standing to challenge D2's assignment of its rights under the Guarantee to the plaintiffs. Therefore, strictly speaking, D1's defence – that another party, *D2*, was seeking to challenge the assignment *in foreign proceedings* (Ontario) – was not an actual defence at law to the plaintiffs' pleaded claims.

134 Second, as analysed at [119] to [128] above, D2's actual pleaded defence challenging the assignment of its rights under the Guarantee to the plaintiffs was legally and factually unsustainable.

135 Third, in any event, D2's pleaded basis for seeking to rescind the SD and GSA was contradicted by the objective text of the Forbearance Agreement. D2's defence was that, by rescinding the Forbearance Agreement, the SD and

GSA could then also be rescinded (see [117(a)] above). However, as rightly pointed out by the plaintiffs, (a) the SD and GSA were distinct, standalone agreements from the Forbearance Agreement, and (b) the SD and GSA were the *conditions precedent* to the Forbearance Agreement, rather than the other way around. This was plain from the text of clause 3.1(d) of the Forbearance Agreement, which provided:

> 3.1 Conditions Precedent
>
> The obligations of the Lender to forbear under this Agreement shall not be effective unless and until the Lender and the Security Agent shall have received:
>
> …
>
> (d) any and all additional instruments, assignments, title certificates, security agreements or other documents or agreements that the Lender or the Security Agent may require to evidence or perfect or render opposable a lien or encumbrance on all present and after acquired property of the Borrower, or otherwise to give effect to the intent of this Agreement, including but not limited to (i) *an Ontario law governed general security agreement* in the form attached hereto as Schedule 'C' [that is, the GSA] and (ii) *a Hong Kong law governed general security deed* in the form attached hereto as Schedule 'D' [that is, the SD]. [emphasis added]

136 Thus, clause 3.1(d) of the Forbearance Agreement clearly stipulated that the GSA and SD were the conditions precedent to the Forbearance Agreement. In other words, even if the Forbearance Agreement were rescinded, that would *not* lead to a rescission of the SD and GSA. D2's defence that a rescission of the Forbearance Agreement would lead to a rescission of the GSA and SD was thus completely contradicted by the plain terms of the Forbearance Agreement itself.

137 As such, I agreed with the plaintiffs that the defendants' defences challenging the assignment of D2's rights under the Guarantee to the plaintiffs were plainly legally and factually unsustainable and should be struck out.

Ancillary matter

138 Finally, for completeness, I briefly mention that, while the plaintiffs sought to submit that the defendants should be estopped from taking contrary positions against their admissions in the Ontario proceedings and findings made by the Ontario courts, I did not need to make any findings in this regard, as the foregoing factors were sufficient to lead me to the conclusion that the defendant's defences should be struck out.

Summary of findings

139 In summary, despite the best efforts of the defendants' counsel, I found that this was a plain and obvious case for the defendants' defences to be struck out. The defendants' defences were not only defective but also entirely contradicted by the plain text of the Guarantee and the other contracts and documents raised by the parties. On the other hand, the plaintiffs' pleaded case was clear and straightforward. As such, I made the following findings:

(a) The Guarantee contained an obligation of a simple guarantee (under clauses 3.1.1 and 3.1.2) and a separate enforceable obligation of an on demand performance guarantee (under clause 3.2 read with clauses 9.1 and 7.3). Even if clause 3.2 did not contain an on demand performance guarantee, it was clearly an indemnity obligation that was triggered upon the obligee's demand to pay.

(b) Even if the Guarantee were a guarantee, D1's Hangji and Securities Defence and Clause 6 Defence were legally and factually unsustainable and should be struck out.

(c) D1's and D2's defences seeking to challenge D2's assignment of its rights under the Guarantee were also plainly unsustainable and should be struck out.

Conclusion

140 Accordingly, I struck out the defendants' defences and granted the plaintiffs' judgment for the USD 63.3m sum against D1 plus interest with costs. Finally, I would like to record my gratitude to the parties' counsel for their helpful and comprehensive submissions.

Desmond Chong
Assistant Registrar

Chan Leng Sun SC (Duxton Hill Chambers) (instructed), Bazul Ashhab, Lionel Chan, Nicholas Chang, and Esther Yong (Oon & Bazul LLP) for the plaintiffs;
Kenneth Tan SC (Kenneth Tan Partnership) (instructed), Eugene Thuraisingam, Chooi Jing Yen, Hamza Malik and Ng Yuan Siang (Eugene Thuraisingam LLP) for the first defendant;
Daniel Koh, Imran Rahim, and Zerlina Yee (Eldan Law LLC) for the second defendant.