I, Florian Ammer, solicitor on record for the Respondent, hereby certify this and the following 20 pages are a true and correct copy of the Respondent's Written Submissions for publication on the Supreme Court of New South Wales website pursuant to paragraph 27 of Practice Note SC CA 1.

Dated: 17 October 2025

Florian Ammer

Filed: 14 October 2025 9:42 AM

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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00161420

TITLE OF PROCEEDINGS	
First Applicant	Kin Lam
First Prospective Respondent	Tuo Liu

FILING DETAILS	
Filed for	Tuo Liu,Prospective Respondent 1
Legal representative	Florian Ammer
Legal representative reference	
Telephone	02 9253 9999
Your reference	FSA.414165

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (20251010 Respondent's Annotated Submissions (amended formatting and signed by both counsel).pdf)

[attach.]

KIN LAM v TUO LIU (2025/00161420)

RESPONDENT'S ANNOTATED SUBMISSIONS DATED ~~12 SEPTEMBER 2025~~ 10 OCTOBER 2025

A. OVERVIEW

1. These submissions concern an appeal from the decision in *Liu v Lam* [2024] NSWSC 1306 (**J**), being a decision of Walton J (the **Primary Judge**) in the Common Law Division of the Supreme Court of New South Wales, delivered on 18 October 2024.

2. In those proceedings, the Primary Judge held that the Appellant (the Defendant below) is liable to pay the Respondent (the Plaintiff below) the amount of $1,890,531.96 plus interest under an agreement entered into by the parties on 14 May 2018.

3. Pursuant to a Notice of Appeal filed 2 July 2025 (the **Notice of Appeal**), the Appellant seeks to have the decision of the Primary Judge set aside on the basis that the Respondent did not provide consideration for the 14 May 2018 agreement. This is a defence that was not run before the Primary Judge.

4. The Appellant is not entitled to the relief sought in the Notice of Appeal. Further, by Notice of Contention filed 5 August 2025 (the **Notice of Contention**), the Respondent contends that, if this Court accepts that the Primary Judge did not find that the Respondent had provided consideration for the 14 May 2018 agreement, such a finding should have been made and, in the alternative, that the outcome of the judgment below is maintainable in any event on the basis that the Respondent is otherwise entitled to be indemnified by the Appellant for the amount of $1,890,531.96 held to be payable by the Primary Judge.

B. BACKGROUND

5. While the dispute involved complexities due in large part to the Appellant's conflicting evidence given in the Chinese Court Proceedings and in the proceeding before the Primary Judge, the essential facts as found by the Primary Judge are not complex.

6. On 3 June 2014, the Appellant, Mr Lam, entered into a loan agreement (the **Jiayi Loan Agreement**) with a company incorporated in Hong Kong, by the name of Hong Kong Jiayi International Trade Co Ltd (**Jiayi**), pursuant to which he personally borrowed RMB 5 million.[1]

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[1] Red 34L (J[6]~~) (Red)~~.

7. Pursuant to clause 4.2.4 of the Jiayi Loan Agreement, the Respondent, Mr Liu, guaranteed the obligations of the Appellant under the Jiayi Loan Agreement (the **Guarantee**).[2] The Primary Judge held that the Guarantee was provided either at the request of the Appellant or with the Appellant's knowledge and acquiescence.[3]

8. The Appellant defaulted under the Jiayi Loan Agreement, and Jiayi commenced proceedings under the Guarantee against the Respondent guarantor (who is ordinarily resident in China), rather than against the principal debtor, the Appellant (who is ordinarily resident in New South Wales) (the **Lower Court Proceedings**).[4]

9. At the conclusion of the Lower Court Proceedings and subsequent appeal proceedings (the **Appeal Proceedings**) on 19 March 2018, the Respondent was found to be liable to pay Jiayi RMB 6,692,699.64 (which accrued post judgment interest, including during the pendency of the Appeal Proceedings) and ultimately, the Respondent had to pay an amount of RMB 9,469,485.52 (the **Judgment Debt**).[5]

10. The Respondent first made a payment in satisfaction of the Judgment Debt on 7 May 2018 and by 11 May 2018 he had paid RMB 4,314,930.73.[6] The Appellant and Respondent subsequently entered into an agreement on 14 May 2018 under which the Appellant agreed to, in substance, indemnify the Respondent for his loss occasioned by the Lower Court Proceedings, Appeal Proceedings, and Judgment Debt (the **2018 Agreement**). The amount of the indemnity was to be paid by 31 December 2018 together with interest, and other than an amount of RMB 300,000 paid by the Appellant directly to the Court in respect of the Judgment Debt, no further payment has been made.

11. The Respondent paid the balance of the Judgment Debt over time, paying a total of RMB 9,469,485.52 by 23 January 2019.[7] On 24 January 2019, the People's Court of

[2] Red 67X-68V (J[144]) ~~(Red)~~.

[3] Red 66N-67B (J[140(1)]), 68W-69M (J[145]), 97L-98B (J[246], J[247(3)]) ~~(Red)~~.

[4] Red 34O-V (J[7]) ~~(Red)~~.

[5] Red 35D-H (J[9]) ~~(Red)~~. The amount includes RMB 300,000 paid by the Appellant directly to the Court and accordingly the Primary Judge found that an adjustment was required (Red 277H-I (J[811])) ~~(Red)~~.

[5] Red 274D-H (J[800]) ~~(Red)~~.

[6] Red 274D-H (J[800]) ~~(Red)~~.

[7] Red 35I-M (J[10]) ~~(Red)~~.

Tianjin Binhai New Area issued a Notice of Concluding a Case after payment of RMB 9,469,485.52.[8]

12. While consideration was not in issue before the Primary Judge (and is raised for the first time on appeal), the Respondent submitted, in written opening submissions, that he provided consideration for the 2018 Agreement by proffering a period of forbearance.[9] That was accepted by the Primary Judge, who held that the 2018 Agreement was a binding agreement enforceable at law.[10]

C. THE PROCEEDINGS BELOW

13. The first difficulty with the Appellant's appeal grounds is that consideration was *not* in issue between the parties at first instance. Rather (in summary):

    (a) contrary to AS[53] and [65], on a proper reading of the pleadings, the Appellant (and Defendant below) did not deny, on an unqualified basis, the existence of the pleaded 2018 Agreement (such that there was no general denial putting consideration in issue on the pleaded case). Rather, the Appellant raised a number of discrete defences to that allegation, (being a matter which was confirmed, in oral opening, by experienced Senior Counsel for the Appellant); and

    (b) in oral opening, Senior Counsel for the Appellant made an admission *vis-à-vis* consideration such that even if it was in issue on the pleadings (which is denied), the Appellant's defence was advanced on the basis that it was not in issue.

14. This is a matter of some importance because the Respondent made forensic decisions about the matters that were cross-examined on (and did not seek leave to adduce further evidence) and would suffer irremediable prejudice if the Appellant were permitted to contest consideration, for the first time, on appeal.

Position on the pleadings

15. In relation to paragraph 13(a) above, the Statement of Claim filed on 20 April 2020 (**Statement of Claim**) contained the following allegation (at [3]): "*On 14 May 2018, the Plaintiff and Defendant entered into a written agreement (Agreement)*". The particulars

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[8] Red 141U-V (J[392]) ~~(Red)~~.

[9] Red 37U-Y (J[25]) ~~(Red)~~.

[10] Red 215G-L (J[630]) and 220G-T (J[636] – J[639]) ~~(Red)~~.

to that allegation were as follows: *"Written agreement (in Chinese) dated 14 May 2018 executed by both parties. The terms of the Agreement are dealt with below at [16]ff."* Consistent with those particulars, the relevant terms of the 2018 Agreement were pleaded at [16] to [23] of the Statement of Claim.

16. That pleaded allegation was sufficient to put the Appellant on notice that consideration was in issue on the Statement of Claim. As consideration is essential to the validity of the agreement pleaded in the Statement of Claim, in the absence of a strike out motion, the pleading should be read as impliedly alleging that the Respondent provided consideration for the 2018 Agreement.[11]

17. In any event, the fact that the consideration took the form of a forbearance to sue was explicitly stated in paragraph 6 of the Respondent's opening written outline of submissions dated 9 February 2024.[12] That statement, together with an identical statement in the Respondent's closing submissions, was the only mention of consideration, by either party, during the first instance hearing. The Appellant (who did not object) therefore understood the case which he had to meet, and the parties conducted the proceedings on ~~that~~ the basis that consideration had been raised by the Respondent.[13] That is also how the Primary Judge understood the Respondent to have advanced his case below,[14] notwithstanding that there was no contest as to the existence or sufficiency of consideration (that is, it is entirely different question as to whether the Appellant joined issue with the allegation of consideration, either in his defence or, moreover, whether upon an examination of the actual conduct of the proceedings the Appellant contested (or put the Respondent to proof) as to consideration). The Respondent submits that this did not occur.

18. In answer to that pleaded allegation (at [2] of the Statement of Claim), the Appellant pleaded, relevantly, the following (at [2] of the Further Amended Defence (**Defence**)):

(a) that he "*deni[ed] entering into a written agreement dated 14 May 2018 on 14 May 2018*" [our emphasis] (Defence [2(a)]);

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[11] *Smith v Young* [2016] NSWCA 281 at [26] per Ward JA with Leeming JA and Sackville AJA agreeing.

[12] ~~(~~Black 203E-I~~)~~.

[13] *Vines v Australian Securities and Investments Commission* [2007] NSWCA 75; ~~2007~~ 73 NSWLR 451 at [54] and [57] per Spigelman CJ.

[14] Red 37U-Y (J[25])~~ (Red)~~.

(b) that the Appellant received a document from the Respondent styled "Agreement" on 8 May 2018 which he signed "*in English only*" and sent to the Respondent by WeChat on 9 May 2018 (defined in the Defence as the "Agreement") (Defence, [2(b)] and [2(c)]);

(c) that prior to 21 July 2020 he had not received or seen any other original or copy of "the Agreement" (Defence, [2(d)]); and

(d) that he denied that the Appellant and Respondent "*had the intention that the Agreement should or would give rise to any enforceable legal obligations as between them*" (Defence [2(f)] and [2(g)]).

19. The reference to the Appellant having signed the Agreement in "*English only*" in paragraph 18(b) above is of some import, given that the Respondent contended (consistent with his particulars extracted above) that the Appellant had signed a version of the 2018 Agreement on 14 May 2018 using his Chinese signature in a hotel room in Shenzhen, China (which the Appellant denied doing)[15].

20. At AS[65], the Appellant contends, in this appeal, that the Defence at paragraph 2(a) (as extracted in paragraph 18(a) above) constitutes a denial, without qualification, of the allegation that the parties entered into the 2018 Agreement. That is not so. Rather, paragraph 2(a) of the Defence constitutes a denial that the Appellant signed the Agreement on 14 May 2018 (as opposed to having signed it on 9 May 2018, which was conceded in the Defence). This was clarified by experienced Senior Counsel for the Appellant in oral opening who described paragraph 2(a) of the Defence as "*a very specific denial of entering into the written agreement dated 14 May on 14 May*."[16]

Admission by Senior Counsel as to consideration

21. In relation to 13(b) above, there was a debate, in oral opening, as to the scope of paragraph 2 of the Defence and whether it was sufficient to advance a defence that the Respondent failed to communicate his acceptance of an offer made by the Appellant, such that there was no binding agreement. More precisely, the Appellant contended that: (i) an offer was made by the Appellant when he sent the Agreement to the Respondent on 9 May 2018 containing his English signature; (ii) that offer was capable of acceptance by the Respondent who could have signed it on 14 May 2018;

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[15] Blue 12G-13E (Affidavit of Tuo Liu dated 29 March 2021 at [43] – [45]~~) (Black)~~.

[16] Black 39S-T (T39.39-40~~) (Black)~~.

and (iii) however, the Respondent was said not to have communicated his acceptance of the offer within a reasonable time, such that there was no binding contract.[17]

22. Against that background, experienced Senior Counsel for the Appellant made the following submission:

> *Mr Willis [being Counsel for the Respondent] is correct when he says possibly that Liu could have signed that [being the version of the agreement executed by the Appellant on 9 May 2018]. He didn't have to be – Lam didn't have to be present. It was an offer, and it was capable of being congruent to the acceptance, and there could be a contract…*[18]

23. The operative terms of the offer made by the Appellant on 9 May 2018 were identical to the operative terms of the 2018 Agreement which the Primary Judge held was signed by the parties on 14 May 2018 in a hotel room in Shenzhen, China (of which a translation is Annexed to the Appellant's Submissions).[19] The necessary corollary of the submission "*there could be a contract*" is that if the Court was satisfied of offer and acceptance (and communication of acceptance), there was no issue between the parties vis-à-vis consideration and there would be a binding contract.

24. Accordingly, not only did the Appellant not put the Respondent on notice that consideration was in issue (including in circumstances where it was raised in the Respondent's written opening), but he made an admission that a valid contract could have arisen if the offer was congruent to the acceptance (and the acceptance was communicated). The trial then proceeded on the basis that consideration was not in issue. Consequently, the Appellant requires leave of this Court to withdraw that admission.[20]

25. The principles that apply to the withdrawal of an admission are well known and need not be repeated.[21] The Respondent will oppose any such leave being granted (should it be sought) because:

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[17] Black 39S-40L (T39.39-40.22~~) (Black)~~.

[18] Black 40G-I (T40.12-15~~) (Black)~~.

[19] Blue 277-279 (CB Vol D 456 – 458 below~~) (Black)~~; Blue 295-298 (CB Vol D 468 – 471 below~~) (Black)~~, see also Red 215N-220T (J[631] – [639]~~) (Red)~~.

[20] *Nominal Defendant v Gabriel* (2007) 71 NSWLR 150 at [109]) per Campbell JA, citing *Urquhart v Butterfield* (1887) LR 37 Ch D 357 at 369 per Cotton LJ, at 374 per Sir J Hannen, at 377 per Lopes LJ; *Dunn v Brown* (1911) 12 SR (NSW) 22 at 41 per Cullen CJ, at 51 per Pring J, at 52 per Gordon J; and *McFadden v Snow* (1952) 69 WN (NSW) 8 at 9, per Kinsella J.

[21] *Re Dymocks Book Arcade Pty Limited* [2013] NSWSC 298 at [8] – [13].

(a) the admission was freely made by experienced Senior Counsel; and

(b) as explained in paragraphs 35 and 58 to 68 below, the Respondent would suffer irremediable prejudice if leave to withdraw the admission were granted.

D. THE RESPONDENT PROVIDED CONSIDERATION FOR THE 2018 AGREEMENT

26. Even if the Appellant is permitted to raise the question of consideration for the first time on appeal, the findings of the Primary Judge support a conclusion that the Respondent provided consideration for the 2018 Agreement in the form of a forbearance to sue to enforce an indemnity granted by the Appellant for payments made under the Guarantee.

Legal principles

27. An express or implied promise of forbearance by a creditor for a limited period is valuable consideration where the creditor's substantive claim is one for which the debtor is liable.[22]

28. Further, actual forbearance by the creditor will be good consideration where it is at the express or implied request of the debtor,[23] or where it is evidence of an implied promise to forbear.[24]

29. Contrary to the Appellant's position at AS[86] and [89], it is not necessary for there to be a request for forbearance if there is a promise of forbearance where the creditor's substantive claim is one for which the debtor is liable.[25]

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[22] *Butler v Fairclough* (1917) 23 CLR 78, 96; *Fullerton v Provincial Bank of Ireland* [1903] AC 309, 313 - 314, 315 - 316, 319; *Pico Holdings Inc v Wave Vistas Pty Ltd* (2005) 79 ALJR 825 at [63] - [65] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd* [2022] WASCA 132 at [574]; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 155 [5.370].

[23] *Fullerton v Provincial Bank of Ireland* [1903] AC 309, 313 – 314; *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd* [2022] WASCA 132 at [574] ; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 157 [5.390].

[24] *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234 at [103] per Whitlam and Jacobson JJ; at [103]; *Janala Pty Limited v Hardaker (No 3)* [2023] NSWSC 446 at [94].

[25] *Butler v Fairclough* (1917) 23 CLR 78, 96; *Fullerton v Provincial Bank of Ireland* [1903] AC 309, 313 - 314, 315 - 316, 319; *Pico Holdings Inc v Wave Vistas Pty Ltd* (2005) 79 ALJR 825 at [63] - [65] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd* [2022] WASCA 132 at [574]; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 155 [5.370].

30. Nor is it necessary for the forbearing party to have asserted the existence of a liability (contrary to AS[89(b)]). A request for forbearance can be implied,[26] as can a promise to forbear[27] and either an implied request or an implied promise will be sufficient. As the Western Australian Court of Appeal said in *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd* [2022] WASCA 132 at [574], "*[f]orbearance is an area in which the courts have applied some liberality in the drawing of inferences*".[28]

31. In the present case, the Respondent's position is that he provided consideration in the form of a promise to forbear from enforcing his right to be indemnified by the Appellant for payments made under the Guarantee, with the promise to forbear being recorded in Clause III of the 2018 Agreement.

32. Where a guarantor gives a guarantee at the valid request of the principal debtor, there is, in the absence of an express right of indemnity, an implied contract of indemnity, or an implied term in the contract of guarantee to similar effect.[29] For such an indemnity to arise, the guarantee must have been provided at the request of the principal debtor, though it suffices if the principal debtor knew that the surety intended to guarantee its debts and acquiesced in the provision of the guarantee for the benefit of the debtor.[30]

33. The right to be indemnified arises when the guarantor first makes payment under the guarantee.[31] It is not necessary for the guarantor to pay the entire amount owing under the guarantee; part payment is sufficient to enliven the right to be indemnified.[32]

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26 *Fullerton v Provincial Bank of Ireland* [1903] AC 309, 313 – 314; *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd* [2022] WASCA 132 at [574]; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 157 [5.390].

27 *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234 at [103] per Whitlam and Jacobson JJ; at [103]; *Janala Pty Limited v Hardaker (No 3)* [2023] NSWSC 446 at [94].

28 Citing *Fullerton v Provincial Bank of Ireland* [1903] AC 309, 316; J W Carter, *Contract Law in Australia* (7th ed) [6.55]; Cheshire and Fifoot, *Law of Contract* (11th Australian ed) [4.28]; also referring to JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 144 [5.150].

29 *Hopper v DJ Sincock Pty Ltd* (2021) 107 NSWLR 153 at [25] per Brereton J, McCallum JJA and Simpson AJA agreeing.

30 *Hopper v DJ Sincock Pty Ltd* (2021) 107 NSWLR 153 at [26] per Brereton J, McCallum JJA and Simpson AJA agreeing.

31 *Public Trustee (Qld) v Octaviar Ltd* (2009) 73 ACSR 139 at [89].

32 Ibid.

34. The Jiayi Loan Agreement was entered into in Hong Kong.[33] It concerned a loan in Chinese Renminbi.[34] Of the parties to the Jiayi Loan Agreement, Jiayi is a company registered in Hong Kong, the Appellant is a resident of New South Wales, and the Respondent is a resident of the People's Republic of China.[35]

35. In circumstances where the Appellant did not contend that the 2018 Agreement was unsupported by valuable consideration before the Primary Judge, the Court of Appeal would (in the absence of being persuaded that the Jiayi Loan Agreement was governed by New South Wales law):

    (a) accept that the Jiayi Loan Agreement is governed by Hong Kong law (or alternatively, Chinese law) as the legal system with the closest and most real connection with the contract,[36] and apply the presumption that the law of contract in Hong Kong (or China) is the same as the law of contract in Australia;[37] or, alternatively

    (b) by reason of the Appellant's failure to raise a challenge to consideration before the Primary Judge (on the pleadings or otherwise, in opening), find that the Respondent has been denied the opportunity to adduce evidence as to the content of the relevant foreign law (which could have been done by, *inter alia*, tendering relevant documents pursuant to sections 174 and 175 of the *Evidence Act 1995* (NSW)). Had the Respondent been put on notice of this issue, there is reason to believe that he could have tendered a report that would support a finding that Chinese law on this point was substantively the same as New South Wales law. That is based on the following extract from the judgment in the Appeal Proceedings delivered on 27 September 2017: "*[i]n this case, the scope of the guarantee does not exceed the scope of the principal debt. After LIU Tuo [the Respondent] assumes the liabilities under the guarantee, he could make his claims against LAM Kin [the Appellant]*".[38] (our emphasis)

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[33] Blue 28D-S (Affidavit of Kin Lam dated 26 July 2021 at [61] – [68]) ~~(Black)~~. Blue 2S-3S (Affidavit of Tuo Liu dated 29 March 2021 at [6] – [11]) ~~(Black)~~.

[34] Red 67K-T (J[142]) ~~(Red)~~.

[35] Red 34J-V (J[6] and J[7]) ~~(Red)~~.

[36] *Bonython v The Commonwealth* [1951] AC 201 at 219; (1950) 81 CLR 486 at 498.

[37] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [125], [249], [275].

[38] Blue 163E-F (Court Book below, Vol D at 341) ~~(Black)~~.

The facts – Indemnity and actual forbearance

36. The Primary Judge found that the Respondent provided the Guarantee either at the request of the Appellant or with the Appellant's knowledge and acquiescence.[39] Consequently, there is an implied contract of indemnity pursuant to which the Appellant agreed to indemnify the Respondent for any monies paid under the Guarantee, or an implied term in the Guarantee to similar effect.[40]

37. Between 7 and 11 May 2018, the Respondent had paid RMB 4,314,930.73 under the Guarantee.[41] The Respondent therefore had a good cause of action against the Appellant from 7 May 2019. The Primary Judge found that the 2018 Agreement was entered into on 14 May 2018.[42] Accordingly, at the time the parties entered into the 2018 Agreement the Respondent had a good cause of action against the Appellant to be indemnified for the amount of RMB 4,314,930.73 which the Respondent had paid under the Guarantee. As the Respondent did not seek to enforce that right at any time prior to 31 December 2018, there was actual forbearance of the Respondent's right to be indemnified.

38. In those circumstances, it is sufficient to dispose of the appeal if the Respondent can establish any one of the following matters:

(a) he explicitly promised to forbear from enforcing his right to be indemnified;

(b) there was an implied request from the Appellant that the Respondent forbear from enforcing his right to indemnity; or

(c) the Respondent's actual forbearance is evidence of an implied promise to forbear.

The 2018 Agreement – textual analysis

39. The promise to forbear was contained in Clause III of the 2018 Agreement, which is in the following terms:

> *If Party A fails to perform the obligation to pay Party B within the period agreed in Clause II, Party B has the right to commence legal proceedings to request*

[39] Red 66N-B (J[140(1)]), 68W-69M J[145], 97L-S (J[246]) and 98B (J[247(3)]) ~~(Red)~~.

[40] *Hopper v DJ Sincock Pty Ltd* (2021) 107 NSWLR 153 at [25] per Brereton J, McCallum JJA and Simpson AJA agreeing.

[41] Red 274D-H (J[800]) ~~(Red)~~.

[42] Red 206K-208R (J[612], J[613]) and 220U-221G (J[640]) ~~(Red)~~.

Party A to pay all debts mentioned above and interests for overdue payments (0.05% per day). All resulting costs, including but not limited to litigation costs, legal service fee, translation fee and authentication fee, shall be borne by Party A.

40. The proper construction of the 2018 Agreement depends on the parties' intentions, objectively ascertained, at the time of entry into the 2018 Agreement.[43] Accordingly, whether or not the Respondent actually threatened to sue the Appellant before entering into the 2018 Agreement is not determinative. The real question is whether, as the Respondent contends, properly construed, Clause III of the 2018 Agreement would have enabled the Appellant to prevent the Respondent from enforcing his right to indemnity in the period 14 May 2018 to 31 December 2018.[44] If the answer is yes, there was a promise to forbear from enforcing the Respondent's claim to be indemnified and therefore consideration for the 2018 Agreement.

41. For the reasons below, on the proper construction of clause III, it contains a promise by the Respondent to forbear from enforcing his right to be indemnified by the Appellant.

42. *First*, clause I of the 2018 Agreement creates a separate contractual right pursuant to which Party A (being the Appellant) promises to Party B (being the Respondent) the following:

Party A promises to Party B that it will borne all the debts assumed by Party B due to the above-mentioned cases, and all liabilities, fees and loss incurred by Party B, including but not limited to all and any liabilities, legal service fees, litigation costs, translation fees, authentication fees, potential costs for court enforcement, penalty interests, and all the legal service fees paid by Party B ('all debts').

43. The defined term "all debts" is not used to define the contractual right created by clause I. Rather, it is used to define, in substance, all liabilities, fees and losses which the

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[43] *Electricity Generation Corp v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan and Kiefel JJ; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at [11] per Gleeson CJ, Gummow and Hayne JJ, citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 254 [8.130] and 255 - 256 [8.160].

[44] *Pitts v Jones* [2008] QB 706 at [18]; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 144 [5.150].

Respondent incurred due to the "*above-mentioned cases*" being a reference to the cases described in paragraph 1 to 5 of the 2018 Agreement, (being in the nature of recitals). As paragraphs 1 and 2 of the recitals make plain, those cases concerned the Respondent's liability as "*the guarantor"* under the Jiayi Loan Agreement. Put another way, clause I creates a contractual right in relation to "all debts" (such that the term "all debts" should not be conflated with the contractual cause of action).

44. *Secondly*, clause II of the 2018 Agreement is, relevantly, in the following terms:

> *Party A promises that before 31 December 2018, it will pay all debts and interests agreed in Clause I…*

45. The use of the language "*all debts and interest agreed in Clause I*" is plainly a reference to the contractual obligation created by clause I. Moreover, it also reinforces the conclusion at paragraph 43 above, being that "*all debts*" is not used to define the contractual cause of action created in clause I. If that were so, the use of the words "in clause I" would be redundant.

46. *Thirdly*, clause III provides that if the Appellant fails to perform the obligation within the period agreed in clause II, the Respondent "*has the right to commence legal proceedings to request Party A to pay all debts mentioned above*". Several observations are necessary:

   (a) any party has a right to *commence* legal proceedings to *request* that the court make an order. Accordingly, unless the clause is construed as imposing a corresponding burden on the Respondent not to *commence* legal proceedings until 31 December 2018, it has no effect. While the presumption against surplusage is often said to be weak, where the relevant clause is a bespoke provision in a small commercial contract, as in the present case (the 2018 Agreement is three pages long (noting that the translation is two pages) and has only 10 operative clauses), it is submitted that this Court would not lightly conclude that clause III has no meaning;[45] and

   (b) in contrast to clause II of the 2018 Agreement, clause III does not refer to "*all debts and interests agreed in Clause I*". Rather, it refers to "*all debts mentioned above*". Simply put, the agreement not to commence proceedings before

[45] *Angas Securities Ltd v Small Business Consortium Lloyds Consortium No 9056* [2016] NSWCA 182 at [12] – [13] per Leeming JA; P Herzfeld and T Prince, *Interpretation* (Thomson Reuters, 3rd ed, 2024) at [22.50].

31 December 2018 is not expressed as being limited to the contractual cause of action created by clause I. Rather, unlike clause II, it does not refer to clause I.

47. If the Respondent had, prior to 31 December 2018, sought to enforce his rights pursuant to an implied indemnity arising under the Jiayi Loan Agreement (as distinct from suing on the contractual right created by clause I), it would be "commencing legal proceedings to request [the Appellant] to pay all debts mentioned above".

48. For that reason, the terms of the 2018 Agreement make plain that there is a promise to forbear from bringing *any* cause of action in relation to "*all debts*" and not just in relation to the contractual right created by clause I of the 2018 Agreement.

49. As to AS[74], nothing contained in the recitals is inconsistent with the above construction.

50. As to AS[75], nothing turns on the statement in recital 5 that the Appellant "*voluntarily becomes liable*" to the Respondent. The contractual obligation was obtained voluntarily (i.e. free of duress), such that the Respondent had a right to claim against the Appellant in New South Wales, where he resided and held real property, in exchange for a covenant to forbear.

51. As to AS[76], the use of language "*friendly negotiations"* in the chapeau to the operative provisions does not detract from the contractual promise to forbear, and nor could it sensibly be contended that it does so.

52. As to AS[77(c)], in an attempt to give clause III some meaning, the Appellant argues that this is merely a facilitatory provision. However, that begs the question, facilitatory of what? It is further contended that it creates a right that entitles the Respondent to sue if the Appellant does not discharge his obligations under the 2018 Agreement by a date, but that right would exist independently of clause III.

53. As to AS[78], the fact that clause X provides that, in the event of a dispute that could not be resolved by negotiation, "the matter shall be administered exclusively by the courts of the State where [the Appellant's] land locates", does not detract from the construction advanced by the Respondent. Clause X has the effect of conferring jurisdiction upon the courts of New South Wales to determine any dispute regarding the contractual right created by the 2018 Agreement. That is entirely consistent with the fact that the Appellant resides in New South Wales and held real property in New South Wales. The 2018 Agreement does not provide that any right of indemnity arising

under the Jiayi Loan Agreement (that is, a right not created by the 2018 Agreement) must be administered by the courts of New South Wales.

54. Nor does clause X prevent the 2018 Agreement being pleaded as a defence in any proceedings commenced by the Appellant in China regarding any right of indemnity arising under the Jiayi Loan Agreement. That submission proceeds on the fallacy that proceedings brought in one jurisdiction cannot apply the law of another jurisdiction.

55. If the Respondent had commenced proceedings in China to enforce the indemnity prior to 31 December 2018, the Appellant could have pleaded the 2018 Agreement as a defence in those proceedings. A question may then have arisen as to whether the effect of doing so was to make the Chinese proceedings a dispute "in relation to" the 2018 Agreement and therefore subject to Clause X.

(a) If it was found not to be "in relation to" the 2018 Agreement, then applying the presumption that the law of private international law in China is the same as that in Australia,[46] a Chinese Court would have applied Australian law to the construction of the 2018 Agreement and determined that it was a bar to any proceedings in China.

(b) If it was found to be "in relation to" the 2018 Agreement, and again applying the presumption that the law of private international law in China is the same as that in Australia,[47] the Appellant may have been able to obtain a stay in China so that the proceedings could be determined by a Court in New South Wales (the Court would have had a discretion whether to stay any such proceedings, though in the absence of strong countervailing reasons, proceedings will be stayed where there is a foreign exclusive jurisdiction clause).[48] In that case, the Appellant could have pleaded the 2018 Agreement as a defence to any claim in for indemnity heard by a Court in New South Wales.

<u>The 2018 Agreement – surrounding circumstances</u>

56. On the one hand, the Appellant contends (at J[68]) that the Court of Appeal is in as good a position as the Primary Judge to deal with the new argument being raised on appeal (*viz* the sufficiency of consideration) as it concerns the contractual

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[46] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [125], [249], [275].

[47] Ibid.

[48] *Karpik v Carnival plc* (2023) 98 ALJR 45 at [66] per Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ.

interpretation of a written instrument and a question of law; being whether clauses I-III of the 2018 Agreement contain a forbearance to sue that the law would recognise as sufficient consideration.

57. However, on the other hand, the Appellant relies on the surrounding circumstances to inform the meaning of the 2018 Agreement. While that is correct as a matter of principle,[49] it neatly highlights the prejudice occasioned to the Respondent, and the difficulty with the submission described in paragraph 56 above. It is not permissible for a point to be argued on appeal that was not raised below if the point could or might possibly have been met by rebutting evidence or cross-examination.[50]

58. This is such a case (leaving aside the necessity of making an application to withdraw the relevant admission described in paragraphs 24 and 25 above). The Respondent was denied the opportunity to adduce evidence (or, at the very least, to seek leave to adduce evidence) going to the surrounding circumstances to the 2018 Agreement, and to cross-examine the Appellant on aspects of this topic. Moreover, the prejudice is particularly acute in circumstances where, aside from the terms of the 2018 Agreement, consideration can arise where there is actual forbearance by the creditor and there was an express or implied request of the debtor,[51] or where it is evidence of an implied promise to forbear,[52] being topics which were not explored in the Respondent's evidence in chief nor in cross-examination of the Appellant.

59. By way of example:

(a) the Appellant gave inconsistent evidence in the Chinese Court Proceedings and the proceedings before the Primary Judge as to his liability under the Jiayi Loan Agreement. In the Chinese Court Proceedings, his evidence was to the effect that he understood he was liable to Jiayi as principal, and that he only let the Respondent sign as guarantor because the security given by the Appellant took

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[49] *Willis Australia Ltd v AMP Capital Investors Ltd* [2023] NSWCA 158 at [48]-[50] (Ward P, Beech-Jones JA and Griffiths AJA).

[50] *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [51] per Gleeson CJ, McHugh and Gummow JJ; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at [44]; *Water Board v Moustakas* (1988) 180 CLR 491 at 496-497.

[51] *Fullerton v Provincial Bank of Ireland* [1903] AC 309, 313 – 314; *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd* [2022] WASCA 132 at [574]; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 157 [5.390].

[52] *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234 at [103] per Whitlam and Jacobson JJ; at [103]; *Janala Pty Limited v Hardaker (No 3)* [2023] NSWSC 446 at [94].

priority over that guarantee (J[62]). In the proceedings before the Primary Judge, the Appellant gave evidence of an alleged conversation he had with the Respondent in which the Appellant said "*we are liable 50/50 for the total loss. If Jiayi do go after the land you will have to pay me half of the land value*". This area of the Appellant's evidence was fertile ground for cross examination vis-à-vis his understanding of his liability to the Respondent prior to entry into the 2018 Agreement. Plainly, if the evidence demonstrated that the Appellant (and Respondent) was aware he had an extant obligation to indemnify the Respondent at the time of entry into the 2018 Agreement (that is, separate from the contractual rights created in clause I of the 2018 Agreement), that would be a probative material fact which the Court would take into account in assessing surrounding circumstances (that is, that there existed a debt in respect of which the forbearance would operate). The absence of consideration being in issue informed the line of questioning of the Appellant about his evidence, which did not extend to his appreciation of his liability to the Respondent prior to the entry of the 2018 Agreement.[53] There is a credible basis to suspect that such relevant evidence could have been obtained in cross-examination given the Appellant's evidence was that the Appellant and Respondent were liable "*50/50 for the total loss*"[54] such that he must have understood that some liability existed (but that was not explored further). Similarly, no such evidence was led from the Respondent;

(b) the Appellant (at AS[82]) asserts that there is nothing in the voluminous [written] communications between the parties, all admitted into evidence before the Primary Judge, that constitutes an assertion by the Respondent that the Appellant was liable to repay him for the liabilities incurred by the Respondent under the Jiayi Agreement or the Chinese proceedings, or any discussion of a forbearance from enforcing those rights in connection with the Agreement. That does not mean that the relevant evidence could not have been adduced viva-voce, including through cross-examination, which did not occur;

(c) the Appellant, (at AS[83(a)]), seizes on the Respondent's evidence that his lawyer suggested that the parties should enter into an agreement in respect of the Respondent's liabilities, "*[t]o be fair*". There are a number of reasons why the lawyer may have made this statement, including that the Appellant should

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[54] Blue 27U-V (Affidavit of ~~the Appellant~~Kin Lam affirmed 26 July 2021, [60]~~) (Black)~~.

agree to be liable in contract, with that liability being secured by real property which the Appellant owned in New South Wales. Selectively identifying particular correspondence which is said to support the Appellant's construction neatly highlights the problem as that correspondence needs to be placed in proper context (particularly so where the nuance of such evidence is capable of being "lost in translation"), being a matter which was not explored on the evidence and about which the Respondent could have, but did not, adduce evidence from his Chinese lawyer; and

(d) the Appellant, (at AS[61]), also seeks to rely on the finding that the first occasion on which the Respondent made a threat to sue the Appellant was on 20 December 2018. That finding was made following a trial in which the Appellant conceded that consideration was not in issue. In those circumstances, it is not surprising that counsel for the Respondent did not put to the Appellant in cross-examination that a threat to sue had been made at any time before 14 May 2018. Instead, the cross-examination of the Appellant regarding the relationship between the parties in the period between when judgment was delivered in the Appeal Proceedings on 19 March 2018 and December 2018, when any such threat would have been made, did not address this issue at all.[55] The following observations of Bell CJ in *Yi v Park* [2024] NSWCA 187 at [54] concerning the application of the principles in *Whisprun* apply with equal force to the Appellant's attempt to rely on this finding:

> "*In the present case, it is also "a virtual certainty" that, had any of the possible alternative cases posited above been pleaded, not only would the Respondent have been cross-examined on portions of her affidavits upon which she was not tested but she may well have been tested more thoroughly or with a different forensic purpose or intent which was not necessitated by the clear and narrow way in which the case had been formulated at trial*".

60. In any event, the matters to which the Appellant directs the Court's attention vis-à-vis surrounding context are not persuasive. As to AS[82], even if the Respondent made no demand for payment prior to 20 December 2018 (being consistent with the Primary Judge's finding, at J[382], based on the evidence *actually* adduced), the absence of such an explicit demand is of little significance in the present case, primarily because,

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[55] Black 77P-78W (T.263.32-264.45~~) (Black)~~.

as accepted by the Appellant in cross-examination, it is a big step in Chinese culture to threaten to sue someone.[56] As to AS[83(b)], the fact that the Respondent held a perception that the 2018 Agreement would assist in delaying action taken by the Chinese Court against him does not mean this was his sole reason for entering into the agreement nor negate the promise to forbear given in Clause III of the 2018 Agreement.

E. THE APPELLANT HAS AN OBLIGATION TO INDEMNIFY THE RESPONDENT

61. The Respondent has filed a Notice of Contention in which he contends, *inter alia*, at paragraph 2 that:

> *To the extent that the Prejudice can be cured before the Court of Appeal, the Respondent contends that the Appellant is required to indemnify the Respondent for the entire RMB 9,469,485.52 paid under the Jiayi Loan Guarantee.*

62. Put simply, had the Appellant raised the challenge to consideration before the Primary Judge, it would have been open to the Respondent to have met that challenge by, *inter alia*, relying directly upon the Guarantee (being the implied contract of indemnity arising out of the Jiayi Loan Agreement described in paragraphs 31 to 37 above), rather than solely on the forbearance contained in the 2018 Agreement.

63. *First*, and fortuitously, all of the facts necessary to establish the right to be indemnified were either admitted below or found by the Primary Judge. The Primary Judge found that the Respondent provided the Guarantee either at the request of the Appellant or with the Appellant's knowledge and acquiescence.[57] It was not in dispute that, as of 23 January 2019, the Respondent had paid RMB 9,469,485.52 under the Guarantee (though the Appellant did dispute that the Respondent used his own funds to do so, a contention that was rejected by the Primary Judge and that is not challenged on appeal).[58] In any event, it is a matter that was established beyond any doubt by the enforcement ruling issued by the People's Court of Tianjin Binhai New Area on 23 January 2019.[59] It follows as a matter of law that the Respondent is entitled to be indemnified for the RMB 9,469,485.52 paid under the Guarantee.

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[56] Red 141H-J (J[389]) ~~(Red)~~.

[57] Red 66N-B (J[140(1)], 68W-69M (J[145]), 97L-S (J[246]), 98B (J[247(3)]) ~~(Red)~~.

[58] Red 7N-O (Statement of Claim at [25]) ~~(Red)~~; Red 20U-V (Defence [20(a)]) ~~(Red)~~; See also Red 35I-M, 66N-67B, 68W-69M, 97L-S, 98B-C (J[10], J[140(1)], J[145], J[246], J[247(3)]) ~~(Red)~~.

[59] Blue 379-397 (CB D 576 – 593) ~~(Black)~~.

64. *Secondly*, neither of those findings of fact could possibly have been met at trial by rebutting evidence or cross-examination. However, to the extent that the Appellant disagrees with that proposition, that is simply evidence that the prejudice to the Respondent cannot be cured.

65. The Primary Judge found that that the Respondent provided the Guarantee either at the request of the Appellant or with the Appellant's knowledge and acquiescence only after both the Appellant and the Respondent were cross-examined on this issue.[60] The Appellant denied he had requested that the Respondent provide the Guarantee and gave evidence that the parties entered into the Jiayi Loan Agreement as joint borrowers as part of a joint venture.[61] The Court did not accept the Appellant's evidence, finding that the Respondent provided the Guarantee either at the request of the Appellant or with the Appellant's knowledge and acquiescence.[62] That finding is not challenged on appeal.

66. *Thirdly*, the material facts supporting the claim were largely pleaded below. Relevantly,

(a) the Respondent's guarantee of the Appellant's obligations under the Jiayi Loan Agreement is pleaded at paragraph 5 of the Statement of Claim; and

(b) the payments made by the Respondent under the Guarantee are pleaded at paragraph 25 of the Statement of Claim.

67. The only material fact that was not pleaded is that the Guarantee was provided either at the request of the Appellant or with the Appellant's knowledge and acquiescence, though that issue was in dispute below for a different reason (being whether the Jiayi Loan Agreement was entered into between the Appellant and Respondent as partners) and was the subject of findings of fact made by the Primary Judge.[63]

68. The only other relevant matter concerns the content of the proper law of the Jiayi Loan Agreement as it concerns a guarantor's implied right of indemnity. That issue is discussed in paragraphs 34 and 35 above. In summary, either:

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[60] Black 45P-47N (T65.32-67.27); 59U-63M (T197.43-201.25); 64N-66E (T202.28-204.07); 68K-W (T236.21-47) ~~(Black)~~ and Red 97L-S (J[246]) ~~(Red);~~. .

[61] Blue 15K-16L (Affidavit of Tuo Liu dated 29 March 2021 at [56] – [60]); Black 64N-U (T.202.28-42)~~;~~ ~~(Black)~~.

[62] Red 66N-67B (J[140(1)]), , 68W-M (J[145]), 97L-S (J[246]), 98B-C (J[247(3)]) ~~(Red)~~.

[63] Red 66N-67B (J[140(1)]), 68W-M (J[145]), 97L-S (J[246]), 98B-C (J[247(3)]) ~~(Red)~~.

(a) this Court finds that the proper law of the Jiayi Loan Agreement is New South Wales or is willing to adopt the presumption that the law of contract in Hong Kong (or China) is the same as the law of contract in Australia; or

(b) the Respondent cannot meet the prejudice occasioned by the Appellant raising a new defence on appeal as it has lost the opportunity to adduce evidence as to the content of the relevant foreign law.

G. CONCLUSION

69. The appeal should be dismissed with costs.

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~~12 September~~10 October 2025