

I, Shing Hei Lam, solicitor on the record for the Appellant, hereby certify this and the following 12 pages are a true and correct copy of the Appellant's Submissions in Reply for publication on the Supreme Court of New South Wales website pursuant to paragraph 27 of the Practice Note No. SC CA 1

20 October 2025

Shing Hei Lam



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Written Submissions

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Appellant	Kin Lam
First Respondent	Tuo Liu

FILING DETAILS

Filed for	Kin Lam,Appellant 1
Legal representative	Shing Hei Lam
Legal representative reference	
Telephone	9223 1513
Your reference	Kin.SL

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 (Appellant's Reply Submissions - Annotated.pdf)

[attach.]

APPELLANT'S ANNOTATED REPLY SUBMISSIONS**COURT DETAILS**

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/161420

TITLE OF PROCEEDINGS

Appellant	Kin Lam
Respondent	Tuo Liu

PROCEEDINGS IN THE COURT BELOW

Title below	Tuo Liu v Kin Lam
Court below	Supreme Court of New South Wales
Case number below	2020/00117870
Dates of hearing	14, 15, 16, 19, 20, 23, 27 February, 13 March 2024
Material date	4 April 2025
Decision of	Walton J

FILING DETAILS

Filed for	Kin Lam (Appellant)
Filed in relation to	Whole decision below
Legal representative	Mr Shing Hei Lam MLH Lawyers
Legal representative reference	Kin.SL
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A. ISSUES IN RESPECT OF THE RESPONDENT'S SUMMARY OF FACTS

1. The submission in the last sentence of [7] of the Respondent's submissions filed 12 September 2025 (**RS**) that the Primary Judge held at J[140(1)], [145], [246], [247(3)]¹ that the guarantee in the Jiayi Agreement was provided at the request of the Appellant or with the Appellant's knowledge and acquiescence,² does not accurately state the findings made. The Appellant knew that the Respondent was signing the document and let him do so, however, the Primary Judge made no finding as to the Respondent making a request (indeed at J[247(1)]³ the Primary Judge appears to accept a concession by the Appellant that Mr Tian Hao (Jiayi) suggested that the Respondent be a guarantor) and no finding of 'acquiescence' was made (or sought).

B. THE EXTENT TO WHICH 'CONSIDERATION' WAS IN ISSUE BELOW

B1. The pleadings

2. The Respondent's submission at RS [13(a)], [15]-[20] to the effect that 'consideration' was not in issue on the pleadings should be rejected.
3. The Respondent accepts at RS [16], as he must, that consideration was 'essential' to his pleaded claim. He then positively advances the propositions at RS [16] that:
 - (a) The allegation that the parties entered into an agreement (SOC [3]) included an implied allegation that the Respondent provided consideration;⁴ and
 - (b) The SOC thus **put the Appellant on notice that consideration was in issue**.Thus, the Respondent admits that he put consideration in issue below via the SOC. The Appellant agrees.
4. Having impliedly alleged the existence of consideration at SOC [3] by asserting the existence of an agreement, it logically follows that its traversal with a denial of the existence of that agreement at Defence [2(a)] included a denial of the implied allegation of consideration. There was a joinder of issue in relation to consideration. To similar effect see also SOC [16] and its unequivocal denial at Defence [16(a)].⁵
5. There was also no admission of the implied allegation of consideration at SOC [3].
6. As for the contention at RS [20] that the denial was not unqualified because it denied entry into an agreement **on 14 May 2018**, the Appellant at SOC [3] alleged entry into an agreement on 14 May 2018, not on any other date. The denial denied the existence of the only agreement that was alleged. Furthermore, the repetition of the allegation of an agreement at SOC [16] was traversed with the broader denial at Defence [16(a)] that the

¹ Red 66N-67B, 68W-69M, 97L-98B.

² A submission repeated at RS [36], [63] and [65].

³ Red 97V.

⁴ Citing *Smith v Young* [2016] NSWCA 281 at [26] (Ward JA, with whom Leeming JA and Sackville AJA agreed).

⁵ SOC [16] (Red 5W) and Defence [16(a)] (Red 20K).

Appellant denied entering into the Agreement on 14 May 2018 with the Respondent as alleged “*or at all*”.

7. In relation to the Respondent’s recitation at RS [18] of the positive allegations of fact in the Defence at [2(b)-(g)], they are additional to, and do not qualify, the denial of entry into an agreement on 14 May 2018 at [2(a)] and [16(a)], nor admit consideration.
8. In any event, the Respondent did not conduct the trial on the basis of a perceived admission as to consideration in the pleadings. The Respondent specifically submitted to the Court in opening and closing submissions that there was consideration via a promise to forbear from suing for a period, said to be found in clauses I-III of the Agreement.⁶ He was thus cognisant that it was in issue and he addressed the Court on its merit, rather than rely on any perceived admission or assumption that it was not in issue. The Court also understood the Respondent’s case in this way (J[25]⁷) and, on the Respondent’s case in the appeal, impliedly considered and accepted the submission in its findings (RS [12]).

B2. The alleged admission made at trial

9. The submission at RS[13(b)], [21]-[25] that Senior Counsel for the Appellant conceded in his oral opening that there was ‘consideration’ should be rejected.
10. The alleged ‘admission’ is an out of context equivocal statement about a different topic.
11. As conceded by the Respondent at RS [21], the exchange concerned a contention that there was no agreement because there was no communication of acceptance.⁸ In that context, Senior Counsel for the Appellant agreed with the proposition that, if the Respondent countersigned the written agreement in the absence of the Appellant, there could be a contract; i.e. the absence of the Appellant when the Respondent countersigned the contract was not critical to the existence of valid contractual acceptance. The existence of consideration was not the subject matter of the exchange.
12. Furthermore, the statement was equivocal. Senior Counsel for the Appellant said that there **could** be a contract if both parties signed the written document.
13. Accordingly, contrary to RS [25], there was, and is, no necessity for the Appellant to apply to withdraw an admission (although if, contrary to this submission, the Court finds that there was an admission, then a withdrawal is applied for).
14. As to the submission in RS [25(b)] that the Respondent would suffer prejudice if leave was granted to permit the Appellant to withdraw the admission, [10]-[13] above are repeated. Also, there is an air of hindsight reconstruction underlying this contention. Neither the Respondent nor Primary Judge referred to any admission arising from this exchange, or expressed any reliance on it. Rather, as explained at [8] above, the Respondent himself

⁶ [Respondent’s opening submissions](#) (Black 203E-H, U); [Respondent’s closing submissions](#) (Black 273K-P,U).

⁷ Red 37U-Y.

⁸ T40.12-15 (Black 40G-I).

raised the issue of consideration and made submissions on its merit in both opening and closing submissions, and the Primary Judge, on the Respondent's case on the appeal, considered and accepted his submission. It is not unfairly prejudicial to, on appeal, examine the merit of an argument expressly put and considered (*a fortiori* on an issue of contractual construction of a written term).

B3. Overall analysis

15. As a further response to the proposition that 'consideration' was not in issue before the Primary Judge, while the Appellant did not make a specific submission that there was no consideration:

- (a) The Respondent concedes that he impliedly put the Appellant on notice that he raised the issue of 'consideration' via SOC [3] (and [16]) (see [3] above and RS [16]);
- (b) This was denied in the Defence and thus there was a joinder of issue on the question of consideration (see [4]-[7] above);
- (c) Thus, when the Respondent prepared his evidence, he was on notice that consideration was in issue. No question as to whether the Respondent would have adduced other evidence had consideration been raised therefore properly arises;

(d) The joint statement of issues prepared by the parties and given to the Primary Judge expressly indicated that the pleadings determined what was in issue, not their statement of issues. It stated that the issues in dispute were not to be enlarged or narrowed from those pleaded.⁹ The parties maintained this position when closing;¹⁰

~~(d)~~(e) In oral closing submissions, the Appellant described his case in the following terms: "The big picture position is **whether there's an agreement properly formed to sue on, and whether it's got an intention to be binding**" (emphasis added): Black 85L;

~~(e)~~(f) The Respondent's written opening and closing submissions reveal his awareness of the necessity of proving consideration, that he voluntarily raised the issue, and that he addressed it on its merits rather than on the basis of any assumed admission.¹¹ The Respondent conducted himself at trial on the basis that it was in issue and for him to prove; and

~~(f)~~(g) The Primary Judge was aware of the Respondent's submission as to consideration (J[25]¹²) and, on the Respondent's case in the appeal, considered and accepted that submission (RS [12], last sentence).

16. Therefore, the matter was sufficiently in issue before the court below such that leave is not required to raise it on appeal. An appeal ground that challenges the correctness of an

⁹ Blue 433K.

¹⁰ Black 86J, 87G-J, 88G-J, 440M-441J.

¹¹ Respondent's opening submissions (Black 203E-H, U); Respondent's closing submissions (Black 273K-P, U).

¹² Red 37U-Y.

argument expressly put to the Primary Judge, considered, and implicitly dealt with in the findings can hardly be said to be an issue raised only on appeal.

17. Alternatively, if leave is required, the fact that the Respondent raised and dealt with the issue below and contends that the Primary Judge considered and dealt with it in the reasons weighs in favour of the grant of leave, and undermines any proposition to the effect that the Respondent would have done anything differently below.

C. WHETHER THE RESPONDENT PROVIDED CONSIDERATION

C1. Applicable legal principles

18. The Appellant takes no issue with the principle set out at RS [27] that an express or implied promise of forbearance by a creditor for a limited period can be valuable consideration where the substantive claim is one for which the other party is liable. However, that principle has no application in the present case because the Respondent's case below was there was an express promise to forbear found in clauses I-III of the Agreement. No case as to an implied promise was put.
19. Likewise, the expression of principle at RS [28] as to actual forbearance being good consideration where at the express or implied request of the debtor, or where it is evidence of an implied promise to forbear, may be correct as a statement of legal principle, but has no application here where the Respondent's case below as to consideration was confined to an express contractual promise in clause I-III.
20. As for the contention at RS [29] that the Appellant erred by submitting that it is necessary for there to be a request for forbearance, that principle is derived from *Player v Isenberg* [2002] NSWCA 186 at [45] per Beazley JA (Giles JA and Ipp AJA agreeing), who stated that "*forbearance to sue only constitutes good consideration if it comes about at the request of the other party to the contract*". The Respondent has not given notice that that this Court of Appeal decision is erroneous.
21. In relation to the assertion at RS [30] that (1) it is not necessary for the forbearing party to assert the existence of a liability because (2) a request and a promise to forbear can be implied, the ~~second-first~~ proposition does not contradict the first necessity or significance of asserting liability. Indeed, whether liability has been asserted would be a powerful consideration in determining whether a request to forbear or a promise to forbear ought to be implied. In any event, the Respondent's case below as to consideration was based on an express promise (see [18]-[19] above).

C2. The Jiayi Agreement

22. At RS [32]-[36], the Respondent submits that there was a liability owed by the Appellant to the Respondent before entry into the Agreement.
23. The flaw with the Respondent's analysis is that the Jiayi Agreement contains no express

clause conferring upon the Respondent any right of indemnity against the Appellant.¹³ To meet this, the Respondent asks the Court to infer the existence of an implied contract of indemnity or to infer an implied term of indemnity into the Jiayi Agreement based on *Hopper v DJ Sincock Pty Ltd* (2021) 107 NSWLR 153 at [25]-[26]). However, as noted at [1] above, there is a factual problem in that the Primary Judge made no finding that the relevant guarantee was provided at the request of the Appellant or that the Appellant acquiesced in the provision of the guarantee. Furthermore, more fundamentally, the Jiayi Agreement expressly provides that the law of the People's Republic of China applies to it,¹⁴ whereas the Respondent relies upon Australian common law principles to contend for an implied indemnity.

24. To address this, the Respondent then contends that the Court should apply the presumption that the law of contract in Hong Kong or China is the same as that in Australia (RS [35(a)]). However:
- (a) The law of Hong Kong does not apply. As noted at [23] above, the contract expressly provides that the laws of the People's Republic of China apply. Indeed the Respondent pleaded below that the law of the People's Republic of China applied at SOC [7] (Red 4T), which was admitted at Defence [7(b)] (Red 19M);
 - (b) The Respondent made no allegation below as to an implied contract or term of indemnity. It was not raised in the pleadings. A foreign law notice as per UCPR r 6.43 was not served. No submissions were made at trial as to the existence of any implied term or contract of indemnity. It would thus be procedurally unfair for the appeal to be determined on the basis of such a presumption, or an allegation of an implied indemnity. It could have been met with evidence of foreign law had it been raised, for example;¹⁵
 - (c) The presumption is not of automatic and universal application. The Court would be cautious to adopt it in circumstances where China has a very different legal system with no shared common law tradition.¹⁶ It would be problematic and fictional to assume that China has laws as to the implication of terms of indemnity into contracts of guarantee that are identical to Australian common law principles; and
 - (d) The application of the presumption would be contrary to the Respondent's own submissions to the Primary Judge that no such presumption ought to be adopted

¹³ Blue 119-122.

¹⁴ Clause 6 (Blue 121K).

¹⁵ See *Benson v Rational Entertainment Enterprises Ltd* (2018) 97 NSWLR 798 at [107] (Leeming JA, Beazley P and Emmett AJA agreeing).

¹⁶ *Damberg v Damberg* (2001) 52 NSWLR 492 at [120], [162] (Heydon JA, with whom Spigelman CJ and Sheller JA agreed); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [203]; *PCH Offshore Pty Ltd v Dunn (No 2)* (2010) 273 ALR 167; [2010] FCA 897 at [111]-[112] (Siopis J); *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141 at [66]-[68] (Bathurst CJ, with whom Beazley P and Barrett JA agreed); *Benson* at [101]-[107].

because of the differences in the legal systems in relation to the laws of partnership and fiduciary duty.¹⁷ Those submissions would apply equally here in relation to the implication of indemnities into contracts of guarantee.

25. As for the Respondent's contention at RS [35(b)] that he has been denied the opportunity to adduce evidence of foreign law, this ought to be rejected. As explained in section B above, the Respondent admits putting consideration in issue via SOC [3] (and [16]), and there was a joinder of issue by virtue of its denial. The Respondent nevertheless chose to prepare his evidence without adducing any evidence as to foreign law. The Respondent was also content to raise the issue of consideration at trial and make submissions to the Primary Judge as to the existence of consideration based solely on the written terms of the Agreement without seeking an opportunity to adduce evidence of foreign law.
26. In relation to the reliance in RS [35(b)] on a sentence in the judgment given by the Chinese court at first instance, which stated, "*After [the Respondent] assumes the liabilities under the guarantee, he could make his claims against [the Appellant]*",¹⁸ this is too equivocal to support a finding to the requisite standard of proof that the Respondent had a right of indemnity against the Appellant under Chinese law. It refers to **making claims**, not having rights. It imposes as a precondition to the possibility of making a claim the requirement that the Respondent first assume the liabilities under guarantee, which may be requirement that he first meet the entire liability to make his claim. The preceding reasoning also indicates that the Chinese court was dealing with a contention as to the scope of the guarantee given, not the Respondent's rights against the Appellant. The reasons also contains passage that sets out how contracts are to be interpreted under Chinese law, which emphasises the written terms and omits any reference to implied terms.¹⁹

C3. Construction of the written agreement – textual analysis

27. Contrary to RS [40], the 'real question' is not, "*whether... Clause III... 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*". It is whether clause III contained a promise by the Respondent that he would forbear from suing the Appellant in respect of an implied right of indemnity. Also, while it is correct to say that, whether or not the Respondent threatened to sue the Appellant is not 'determinative', it is an important objective contextual circumstance relevant to the objective ascertainment of the parties' intentions.
28. The Respondent contends at RS [43] that the defined phrase 'all debts' does not define the

¹⁷ See J[663] (Red 228F-I) and [Respondent's oral opening](#) (Black 19G-21H, 22V, 25R-U, 26O-P, 27S), [Respondent's oral closing](#) (102J-M; 195Y-196T); [Respondent's written opening submissions at \[9\], \[133\]-\[136\], \[183\(a\)\], \[201\]](#) (Black 204N, 234-235K, 247Q, 252U-253D), [Respondent's written closing submissions at \[1\(b\)\(i\)\], \[1\(d\)\(iv\)\(1\)\], \[10\], \[188\]-\[190\], \[242\(a\)\], \[264\]](#) (Black 269P-T, 271M-P, 274P-R, 322L-323S, 338Q, 346F-I).

¹⁸ Blue 163F.

¹⁹ Court Book below, volume D at 340 (Blue 162U).

contractual right created by clause I. However, in clause I, the Appellant makes a promise, framed in the future tense, that he would bear all debts assumed by the Respondent arising from the circumstances set out above (i.e. in the recitals), which is then defined as 'all debts'. The phrase 'all debts' therefore defines the contractual right created by clause I. The meaning of the submission that the scope of a promise does not identify the scope of any right created by the promise is unclear.

29. In any event, it is clear from the text of clause I that the Appellant was making a promise to prospectively bear all debts that had been assumed by the Respondent arising from the circumstances in the recitals. Significantly, there is no reference in either clause I or the recitals to any liability owed by the Appellant to the Respondent that pre-existed the promise. It was through clause I that liability would be assumed.
30. Clause II then identifies the time for performance of the promise in clause I. There is no hint in this clause of any forbearance or the existence of any preexisting liability owed by the Appellant. Indeed, the Respondent at RS [45] agrees that this clause concerns payment of the promise created via clause I.
31. Clause III then prescribes the rights of the Respondent in the event that the Appellant was in default of his promises made in clauses I-II. It says that if the Appellant fails to perform *"the obligation to pay [the Respondent] within the period agreed in Clause II"*, then he has a right to commence legal proceedings in respect of *"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"*. Contrary to the Respondent's submissions, the clause regulates the Respondent's rights upon the Appellant's default **in respect of the obligations arising from clauses I-II**:
 - (a) There is nothing in the Agreement that identifies, or even asserts the existence of, any liability or debt owed by the Appellant to the Respondent other than that which the Appellant agreed to prospectively assume in clause I;
 - (b) The Respondent contends that a distinction should be drawn between the expression 'all debts agreed in clause I' used in clause II and 'all debts mentioned above' in clause III, to suggest (at RS [46]) that the debts referred to in clause III should be construed in some wider sense so as to encapsulate the now asserted liability arising from the Jiayu Agreement. However, 'all debts' is a defined expression that is defined in clause I rather than at large;
 - (c) In any event, contrary to RS [47], any liability on the part of the Appellant to the Respondent arising from the Jiayu Agreement is not a debt 'mentioned above'. The recitals set out **the Respondent's** debts and liabilities arising from the Jiayu

Agreement. They do not mention liability on the part of the Appellant to the Respondent;

- (d) There is no reference to any forbearance from suing. Clause III confers a right to sue, provides for a higher rate of interest on default, and permits the claiming of costs. It does not purport to preclude the Respondent from suing in respect of any pre-existing rights;
 - (e) The Respondent's contention that the clause is otherwise redundant (RS [46(a)]) ought to be rejected. It is not unusual for a contract to provide that, upon default, the other party may sue. Furthermore, the Respondent overlooks that clause III permits the Respondent to sue for interest at 0.05% per day, which is higher than the 0.02% per day applicable when there is no default (clause I), and it also confers a contractual right to claim all costs; and
 - (f) Thus, the proposition at RS [47] that an implied indemnity arising under the Jiayi Agreement was precluded by clause III until 31 December 2018 is unsustainable. There is no promise that any such right would not be enforced. The clause does not contemplate or promise to forbearance from suing in respect of, any such liability;
32. The submission at RS [54]-[55] misconceives the significance of clause X and the point being made. The point is that, if the parties had objectively contemplated the Agreement containing a promise by the Respondent that he would not sue upon obligations arising out of the Jiayi Agreement, being a contract that expressly provided that the laws of China applied and could be enforced in Chinese courts, then one would expect to find in the Agreement a clause that provided for its recognition for the purposes of any proceedings brought against the Appellant in a Chinese court.

C4. Construction of the written agreement – surrounding circumstances

33. In relation to RS [56]-[57], there is no contradiction in the Appellant's position. It is orthodox in the construction of a clause of a written contract to consider the textual meaning of the written clauses and the objectively ascertained circumstances known to the parties at the time and conveyed to each other.
34. The Respondent's submission also overstates the Appellant's reliance on surrounding circumstances. The Appellant says that on a textual analysis of the written terms no promise of a forbearance in respect of liabilities that pre-existed the Agreement was made. The objectively ascertained circumstances (especially the absence of any assertion of preexisting liability, the negotiations framing the Agreement as being 'fair' rather than to forestall a claim against the Appellant, and the expressed motivation of the parties in entering into the Agreement) simply reinforces the unambiguous conclusion.
35. As to the various complaints of alleged prejudice:

- (a) As explained in section B, consideration was in issue on the pleadings and thus in issue when the Respondent prepared his evidence;
- (b) Given that the Appellant challenged the existence of the Agreement on the basis of a lack of intention to enter into legal relationship, the parties in any event exhaustively adduced evidence as to their communications regarding the Agreement;
- (c) The Respondent raised the issue of consideration in his submissions and addressed the Primary Judge with reference to the written terms of the Agreement. There was no suggestion that he needed or wanted to adduce all of the evidence that he now contends he could have adduced;
- (d) The complaint at RS [58] that he was denied an opportunity to adduce evidence of actual forbearance, of an express or implied request to forbear, or an implied promise to forbear should be rejected. His case below was that there was an express promise to forbear found in clauses I-III, not in any implied request or promise, or actual forbearance;
- (e) The contention at RS [59] that the Respondent could have led evidence from the Respondent or his Chinese lawyer, or cross-examined the Appellant, as to their various subjective understandings of the Respondent's liability to the Appellant under the Jiayi Agreement or as to their intentions in relation to particular communications should be rejected. Evidence of uncommunicated subjective beliefs is not relevant to either the existence of actual liability or the contractual interpretation of a written term. The asserted lack of an opportunity to adduce or cross-examine on inadmissible/irrelevant matters is not a relevant prejudice; and
- (f) As to any suggestion of a denial of an opportunity to adduce evidence of threat to sue prior to the Agreement, that does not ring true in circumstances where it was the Respondent's case, positively put to the Appellant in cross-examination, that there was no threat to sue prior to 20 December 2018.²⁰ He also positively put to the Appellant in cross-examination that, prior to this date, they were "friends" that were working together "whatever the legal rights may have been" between them.²¹ See also Black 53J where the Respondent gave evidence under cross-examination that his lawyer in the Chinese proceedings "doesn't only represent me" and that he "represents both of us", and at Black 56U-W, where the Respondent stated that they were "all together", "one party", and "not parties against each other". That is to say, the Respondent's own evidence and case was that while the Chinese proceedings were on foot, up until 20 December 2018, the parties worked collaboratively, with a common interest.

²⁰ T263.32-264.45 (Black 77T-78V).

²¹ T263.32-264.45 (Black 77T-78V).

36. It also bears emphasis that the appeal ground merely challenges a submission actually put by the Respondent at trial, that the Respondent contends the Primary Judge considered and accepted, as to the construction of express written terms. The proposition that irreparable prejudice flows from challenging on appeal this type of submission, put and considered below, should not be accepted.

D. THE NOTICE OF CONTENTION

37. The first contention is adequately dealt with by the Appellant's written submissions and those put above.
38. In relation to the second contention, it is not open to the Respondent to raise on appeal for the first time, a whole new cause of action for breach of contract premised on a breach of an implied term of indemnity in the Jiayi Agreement or some other type of implied indemnity. This was not pleaded below or otherwise put in issue. No notice of foreign law was issued as required by the rules. It was not the subject of any submissions at trial, nor was it considered by the Primary Judge. The purpose of a contention is to permit a respondent to rely upon alternative reasons to support the judgment appealed from, not to advance entirely new causes of action never raised or addressed. Had it been raised, the Respondent may have sought to adduce additional evidence including as to foreign law regarding whether and when terms of indemnity will be implied into contracts of surety in China. This is similar to *Yi v Park* [2024] NSWCA 187, where the respondent in that case sought to advance on appeal an alleged alternative formulation of a forbearance to sue that had not been pleaded nor advanced at first instance, said to be open on the evidence, which the Court of Appeal considered could not be raised on appeal.²²
39. It is fundamentally different from the question that the Appellant raises on appeal, which the Respondent raised at first instance and addressed the Court on its merit, which the Respondent contends was considered and dealt with by the Primary Judge in the reasons, and which concerns a question of contractual question of a written term.
40. The contention also depends upon the proposition that the Court should assume that, under the laws of China, an implied indemnity in favour of the guarantor will arise where the guarantee was made at the request of the borrower or with the borrower's knowledge and acquiescence (RS [63]). As noted at [1] above, the Primary Judge found neither a request by the Appellant nor acquiescence. Furthermore, as explained at [23]-[24] above, the Jiayi Agreement expressly provides that the law of China applies to it and it would not be appropriate to (1) assume that China has laws permitting the implication of indemnities into contracts of guarantee, and (2) assume that such laws are identical to the Australian common law including as to when any such implication will be made, and its content.

²² *Yi*, [46]-[51] per Bell CJ (Mitchelmore and Adamson JJA agreeing).

There is no basis on which the Court could safely assume that, under Chinese law, “as a matter of law the Respondent is entitled to be indemnified for the RMB 9,469,485.52 paid under the Guarantee” (cf RS [63]).

41. The proposition at RS [62] that, had consideration been raised below, it would have been open for the Respondent to sue on the Jiayi Agreement ought to be rejected. As explained in section B above, consideration was in issue and indeed put in issue by the Respondent in his SOC. Yet no application to amend the SOC to raise this cause of action was made.



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