



Neutral Citation Number: [2019] EWHC 676 (Comm)

Case No: CL-2015-000740

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 26/03/2019

**Before :**

**THE HONOURABLE MRS JUSTICE MOULDER**

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**Between :**

**OVERSEA-CHINESE BANKING CORPORATION  
LIMITED**

**Claimant**

**- and -**

**ING BANK N.V**

**Defendant**

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**Mr R Cox QC & Mr S Snook (instructed by Stephenson Harwood LLP) for the Claimant**  
**Mr D Allison QC & Mr R Perkins (instructed by Clifford Chance LLP) for the Defendant**

Hearing dates: 15, 16, 17, 21, 22 and 24 January 2019  
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**APPROVED JUDGMENT**

## **Mrs Justice Moulder**

### Introduction

1. This is a claim for breach of warranty under a sale and purchase agreement dated 15 October 2009 (the “Agreement”) in relation to an alleged failure to properly record in the accounts of the target company, ING Asia Private Banking Limited (“IAPBL”), for the year ended 31 December 2008 (the “2008 Accounts”) an exposure to Lehman Brothers Finance S.A (“LBF”).

### Background

2. The Agreement was entered into between the claimant, Oversea-Chinese Banking Corporation Limited (“OCBC”) and the defendant, ING Bank N.V. (“ING”). Pursuant to the Agreement the defendant, ING agreed to sell to OCBC the shares in IAPBL. The transaction completed on 29 January 2010 for a total consideration of US\$1.466 billion.
3. It is common ground that pursuant to clause 11.1 (read with clause 3.1 of schedule 7) of the Agreement the defendant warranted that the 2008 Accounts gave a true and fair view of the state of affairs of IAPBL as at 31 December 2008.
4. It is also common ground that IAPBL entered into equity derivative transactions (“KODAs”) with LBF pursuant to an ISDA master agreement dated 28 June 2006 (the “ISDA Agreement”) and that pursuant to that ISDA Agreement, IAPBL was required to deposit cash collateral with Lehman Brothers Bankhaus, London branch (“LBB”).
5. On 15 September 2008 Lehman Brothers Holdings Inc., the credit support provider under the ISDA Agreement filed for chapter 11 bankruptcy which triggered an event of default under the ISDA Agreement.
6. IAPBL calculated the amount payable on early termination as the sum of US\$8,445,991 against which IAPBL set-off (the “Collateral Set-Off”) an amount of cash collateral held by LBB in the sum of US\$4,846,895 (the “LBB Collateral”) leaving a net balance payable by IAPBL to LBF of US\$3,599,096 (the “Termination Sum”).
7. IAPBL then gave notice on 23 December 2008 that it had set off against the Termination Sum the amount of US\$8,037,848.67 owed by LBF to ING Belgium S.A. (the “Triangular Set-Off”).
8. LBF brought a claim against IAPBL alleging that the amount due to LBF had been incorrectly calculated, the LBB Collateral should not have been deducted and the Triangular Set-Off was invalid. In November 2012 a settlement was reached with LBF pursuant to which IAPBL made a payment of US\$14,500,000 to LBF.

### Issues for the court

9. I propose to address the following issues in this judgment:
  - i) whether the claim is unsustainable in law; in particular whether the measure of damages sought to be recovered can be recovered as a matter of law;

- ii) If (i) does not provide a complete answer to the claim, and on the assumption that the 2008 Accounts were not properly drawn up such that the defendant was in breach of the Agreement, did that breach cause the claimant to suffer loss and damage? In particular if the claimant had been fully informed or aware of the alleged liabilities to LBF, would the Agreement have contained a specific warranty and/or indemnity in the claimant's favour in respect of the liability to LBF?
  - iii) Was there a breach of the warranty in Paragraph 3.1 of Schedule 7 of the Agreement that the 2008 Accounts were properly drawn up so as to give a true and fair view of the state of affairs and results of IAPBL?
10. It will be apparent from what follows, that in the light of my findings on the above issues, in my view it is not necessary to determine the other issues which were raised by the parties. To the extent that in dealing with the three issues, I do not address every submission that was made by counsel it should be assumed that all submissions, both oral and written, have been considered but the court has decided that it is not necessary to address them expressly in order to provide a reasoned conclusion. Similarly, it is neither proportionate nor necessary in my view to recite all the evidence on which a party relies in support of a specific issue and it should not be inferred that evidence has not been taken into consideration in reaching a conclusion merely because it has not been expressly referred to. Insofar as issue (iii) is concerned, as is stated below, the judgment addresses only the case as advanced by counsel for OCBC in oral closing submissions.

### Evidence

11. I heard from the following witnesses of fact:
- i) For the claimant, the court heard evidence from Mr Soon Tit Koon, who was Head of Group Investments at OCBC at the time that the Agreement was negotiated and signed. Mr Soon gave two witness statements dated 19 March 2018 and 26 April 2018. He was cross-examined on these witness statements.
  - ii) For the defendant, the court heard evidence from Mr Diederik Sillevius Smitt, who was at the relevant time an in-house lawyer within ING's Corporate Mergers & Acquisitions team. Mr Smitt gave a witness statement dated 19 March 2018 and was cross-examined on this statement.
12. Three of the defendant's witnesses – Mr Harpreet Bindra, Mr Marinus Müller and Mr Alexander van den Hoek – were not called, but their evidence was admitted in chief. Mr Bindra, who was a Director of Strategy and Business Development for Retail and Private Banking in Asia at ING at the time of the sale process, gave a witness statement dated 16 March 2018. Mr Müller, who was at the relevant time a Director in ING's Global Restructuring department and was involved in the Triangular Set-Off, gave a witness statement dated 16 March 2018. Mr van den Hoek, who was at the relevant time the Chief Financial Officer within the Global Private Banking business of ING, gave a witness statement dated 19 March 2018.
13. I also heard expert evidence in three fields: (i) derivatives valuation; (ii) Swiss insolvency law; and (iii) Singapore accountancy standards.

14. In relation to derivatives valuation, I heard the following evidence:
- i) For the claimant, from Mr Andrew Kasapis, a Director in the Global Disputes & Investigations practice of Duff & Phelps Limited. Mr Kasapis served an expert report dated 1 June 2018 and a reply expert report dated 27 September 2018.
  - ii) For the defendant, from Dr Robert Selvaggio, a professional economist and the current Head of Analytics at Rutter Associates LLC (a financial risk management advisory firm). Dr Selvaggio served an expert report dated 27 July 2018.
  - iii) Mr Kasapis and Dr Selvaggio also produced a joint memorandum dated 7 November 2018.
15. In relation to Singapore accountancy standards, I heard the following evidence:
- i) For the claimant, from Mr Timothy Reid, the Director in charge of the Singapore office of Ferrier Hodgson Pte Ltd (a firm specialising in restructuring, corporate recovery, forensic accounting and litigation). Mr Reid served an expert report dated 1 June 2018, a reply expert report dated 28 September 2018 (and amended on 18 January 2019), an addendum dated 22 November 2018 and a supplemental expert report dated 14 December 2018.
  - ii) For the defendant, from Mr Kon Yin Tong, the Managing Partner of Foo Kon Tan LLP (a Singaporean audit and accounting practice). Mr Kon served an expert report dated 27 July 2018 and two supplemental reports dated 16 November 2018 and 27 December 2018.
  - iii) Mr Reid and Mr Kon produced a joint memorandum dated 2 November 2018.
16. In relation to Swiss insolvency law, I heard the following evidence:
- i) For the claimant, from Professor Olivier Hari, a Professor of Law at the University of Neuchâtel, where he is chair holder for corporate and business law. Professor Hari served an expert report dated 1 June 2018 and a reply expert report dated 28 September 2018.
  - ii) For the defendant, from Mr Thomas Rohde, a Partner and the Head of Restructuring and Insolvency at Bär & Karrer AG. Mr Rohde served an expert report dated 27 July 2018.
  - iii) Professor Hari and Mr Rohde produced a joint memorandum dated 2 November 2018.

I Whether the claim is unsustainable in law; in particular whether the measure of damages sought to be recovered can be recovered as a matter of law

17. In the Amended Particulars of Claim at paragraph 26 OCBC pleads that:

“But for the defendant’s breach of the Agreement, the true accounting position as between IAPBL and LBF would have been disclosed with the result that:

...

(2) the claimant would have been informed or aware of substantial liabilities to LBF... and the Agreement would have contained a specific warranty and/or indemnity in the claimant’s favour in respect of the true liability to LBF.

27 By reason of the foregoing matters the claimant has suffered loss and damage as follows:

(1) not less than US\$14,500,000 namely the amount paid by [IAPBL] to LBF...

(2) Alternatively damages to be assessed.”

18. OCBC’s claim for damages is advanced on the basis that, had there been no breach of warranty in the Agreement (that is to say, had the 2008 Accounts been properly drawn up to show a true and fair view), the accounts would have disclosed the liability to LBF and OCBC would have obtained an indemnity in the Agreement in respect of IAPBL’s liability to LBF and thus OCBC would have been able to recover the \$14.5 million paid out to LBF in respect of its claim.
19. For ING it was submitted that the measure of loss sought is not available. It was submitted that, in a case of breach of warranty contained within a contract for the sale of shares, it is well-established that the purchaser is entitled to recover the difference between the true value of the shares and the value of the shares as warranted.
20. For OCBC it was submitted that diminution in value is not the only measure of loss for breach of warranty in a share sale.
21. I propose to consider the issue of whether the claim is unsustainable in law on the assumption that the following matters are established:
  - i) that the 2008 Accounts were not properly drawn up in accordance with the provisions of the Singapore Companies Act and Singapore Financial Reporting Standards so as to give a true and fair view of the state of affairs of IAPBL as at 31 December 2008;
  - ii) that there were errors in the 2008 Accounts which were sufficiently material so as to mean that the 2008 Accounts did not give a true and fair view of the state of affairs of IAPBL as at 31 December 2008;
  - iii) that these errors arose out of the determination of Loss under the ISDA Agreement, the Collateral Set-Off and the Triangular Set-off.

## Submissions

22. For OCBC it was submitted that the normal measure of damages for breach of warranty as to the truth and fairness of accounts in a share sale agreement is the estimated loss directly and naturally resulting from the breach of warranty. Although counsel for OCBC accepted that the Sale of Goods Act 1979 does not apply to contracts for the sale of shares he submitted that the principles have been applied by way of analogy. *McGregor on Damages* (20<sup>th</sup> Ed.) at 29-001 states:

“Although the Sale of Goods Act 1979 does not apply to contracts for the sale of shares, the principles relating to damages in sale of goods have been applied, as far as the subject-matter permits, to such contracts...”

*Chitty* at 26-189:

“In an action for a seller’s failure to transfer shares, the buyer may recover the market price of the shares on the day fixed for completion, less the contract price, since the principles of law governing damages in the sale of goods are applied by analogy.

23. S.53 of the Sale of Goods Act provides:

(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.” [emphasis added]

24. It was submitted for OCBC that the Sale of Goods Act provides that the seller may bring a claim for damages at large and is not confined to a claim for diminution in value and that s.53(3) sets out only the *prima facie* measure of difference in value which may be departed from in an appropriate case: *Chitty* at 44-413.

“[44-413] Section 53(3) lays down only a “prima facie” rule, from which the court may depart in appropriate circumstances. For instance, the time when the actual value of the goods in their

defective state is assessed may be postponed until the defect is discovered. Similarly, when the seller knows that the buyer intends to resell the goods to a sub-buyer at another place, and that the goods will not be examined until they reach the sub-buyer (e.g. because they are packaged), the date at which the latter examines the goods may be the date at which the market price should be taken to assess the buyer's damages for the defective condition of the goods. Again, a warranty as to quality may relate to the future (e.g. that seed will produce a certain crop) so that there can be no question of the buyer's opportunity to resell the defective goods until the defect becomes apparent at a later date. The market value test should not be applied until the future event is known. In *Bence Graphics International Ltd v Fasson UK Ltd* the Court of Appeal held that s.53(3) provided only a "prima facie" rule, which should not be applied if it would give the buyer "more than his true loss". Section 53(2) should be the "starting point". [emphasis added]

25. OCBC further relied on the Privy Council judgment in *Lion Nathan Ltd v CC Bottlers LTD* [1996] 1 WLR 1438 (PC). That case concerned an agreement that the defendants would sell the entire issued share capital of a soft drinks company to the claimants. The claimants brought proceedings for damages for breach of a warranty given by the defendants as to the accuracy of their forecast of the company's expected profits up to the date of completion. At p1441, Lord Hoffman said:

"This difference over construction has an important effect on the way in which damages are calculated. In the case of a warranty as to the quality of the goods, the purchaser is prima facie entitled to the difference between what the goods as warranted would have been worth and what they were actually worth. If the vendor had warranted that the earnings in the last two months would be \$2,223,000, there would have been an analogy with a warranty of quality and the damages would prima facie have been the difference between what the shares would have been worth if the earnings had been in accordance with the warranty and what they were actually worth. The Court of Appeal was saying that although the vendor had not warranted that the earnings would be \$2,223,000, it had effectively warranted that the company could be valued on the assumption that they would be in the region of \$2,223,000. As the region would be a range above and below the figure of \$2,223,000, the reasonable buyer would value such a company, as the actual purchaser had done, on the assumption that the earnings would be the mean figure of \$2,223,000. Accordingly, the measure of damages was the difference between the company valued on that basis and the actual value of the company, calculated by applying the same multiple to the actual earnings after tax." [emphasis added]

Counsel for OCBC emphasised the use of the words "*prima facie*" in the above passage.

26. Counsel for OCBC also relied on *Chitty* at 44-412, which he submitted supported the *prima facie* nature of the difference in value rule from which the court may depart in appropriate circumstances:

“As is illustrated by s.53(3) the usual measure of damages for breach of the seller’s contractual undertaking as to the quality or condition of the goods is the difference between: (a) the value of the goods if they had complied with the undertaking, measured at the time and place of delivery; and (b) the actual value of the goods, in their actual condition, at the same time and place. This is the “prima facie” measure of damages, which will be superseded where the buyer claims loss of profits or other consequential losses. Where there is a market price for goods of the contractual description and quality, this will fix their “value”; in the absence of an available market, any relevant evidence should be admitted, e.g. the price at which a sub-buyer had agreed to buy the goods from the buyer before the defect was discovered may be some evidence of their value, as may the price at which an offer for the goods was made by a third person. The value of the defective goods actually delivered by the seller may be fixed by any relevant evidence, e.g. the price at which the buyer has been able to resell the goods to a sub-buyer who has knowledge of their defective condition. The courts may follow the commercial practice of fixing a “price allowance” for damaged goods. [emphasis added]

27. For ING it was submitted that the Court of Appeal authority of *Wemyss v Karim* [2016] EWCA Civ 27, [23]-[28] showed the correct approach to the measure of damages for breach of warranty on a sale of shares. That case concerned a claim for breach of warranty and misrepresentation by the purchaser of shares under a share and purchase agreement. The relevant warranty and representation concerned the turnover and profits of the business. Lewison LJ said:

“23. Before delving into the details of the way in which the damages claim was put I think that it is necessary to set out a few principles. The claim was put both as a claim for breach of warranty (i.e. a claim in contract) and also as a claim for misrepresentation (i.e. a claim in tort). The measure of damages differs according to which cause of action is in play. In the case of a claim that there has been a breach of warranty about the quality of an asset that is sold, the measure of damages is the difference between the true value of the asset and its value with the quality as warranted. But in the case of a claim in tort, the measure of damages is the different between the true value of the asset and the price paid.

...

28. In principle, therefore, Mr Karim is entitled to be put into the position in which he would have been if the business had had the turnover and profit warranted.” [emphasis added]



28. ING also relied on the following authorities which it was submitted, showed that the measure of damages for breach of warranty in a share sale agreement is the difference between the value of the asset purchased as compared with the value of what was warranted: *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] Bus LR 1338; *The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB); *Zayo Group v Ainger* [2017] EWHC 2542 (Comm).
29. In *Ageas* the claimant purchased the entire issued share capital in the insurance services division of the first defendant. Under the share purchase agreement the first defendant warranted the truth, fairness, accuracy and compliance with relevant accounting standards of the accounts. The claimant issued proceedings seeking compensation for breach of warranty. An issue arose as to the correct date for valuing the breach. Popplewell J held that:
- “the measure of loss for breach of warranty in a share sale agreement is the difference between the value of the shares as warranted and the true value of the shares: see *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438...” [14]
- “...The prima facie rule, from which departure must be justified, is that damages are to be assessed at the date of breach and that only events which have occurred at that date can be taken into account.” [37]
30. In *The Hut Group*, again a claim for breach of warranty as to the sale of shares, Blair J summarised the principles to be applied to the quantification of damages for breach of warranty in the sale of shares at [180]:

“As to the principles to be applied, it is common ground that:

(1) The measure of loss for breach of warranty in a share sale agreement is the difference between the value of the shares as warranted and the true value of the shares, or as put shortly, "warranty true" vs. "warranty false", assessed as at the date of the share sale agreement since that is the date when the breach of warranty occurs.

(2) This involves a valuation, and as with any valuation the process involves establishing (as the defendants' expert put it), "The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in arm's length transaction, after proper marketing where the parties had each acted knowledgeably, prudently, and without compulsion".

(3) However, there is no one methodology to be applied in a valuation (*Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [405], Mann J).

(4) As with any valuation it is necessary, as both experts agreed, to appraise the number in question in the light of the circumstances. As THG's expert aptly put it, " ... you always have to stand back and say, does the answer give you a sensible result and not get too worked up in the model itself." [emphasis added]

31. *Ageas* was also followed by Simon Bryan QC (sitting as a deputy) in *Zayo*, where he struck-out a claim for an indemnity in respect of the loss suffered by the target company.
32. ING also relied on *McGregor* at [29-008]:

[29-008]: "Where the shares are in some way not up to the promised standard this is in the nature of a breach of warranty of quality and the normal measure is of value as warranted less value in fact. This is confirmed and applied in all of three cases in the circumstances of which it was held that events subsequent to the breach were not to be taken into account. These are *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*, *Hut Group Ltd v Nobahar-Cookson*, and *Bir Holdings Ltd v Mehta*, considered in detail at para.10-121, above.

In *Lion Nathan v CC Bottlers*, the whole of the share capital in a soft drinks company was sold with a warranty not that the profits for a number of months would be a specified figure but that the forecast of profits for those months had been calculated with all due care. It was said by Lord Hoffmann that, had there been a warranty as to the level of profits, which he referred to as a warranty of quality, then

"the damages would prima facie have been the difference between what the shares would have been worth if the earnings had been in accordance with the warranty and what they were actually worth".

Since, however, the breach of warranty was only in relation to the forecast, the damages were held to be the difference between the price agreed on the basis of the forecast as made and the price it would have been had the forecast been properly made. Where the seller delivered partly paid instead of fully paid shares in *Re Government Security Fire Insurance, Mudford's Claim*, the buyer successfully claimed the amount unpaid."

### Discussion

33. For breach of contract the claimant is entitled to be put in the position he would have been in if the wrong had not been committed and to recover damages for the loss of his bargain: *McGregor on Damages* (20<sup>th</sup> ed.) at [24-003].

"Turning to the case of compensatory damages...there is at the very start a basic, though somewhat latent, distinction between

contract and tort. This distinction is in the general rule which is the starting point for resolving all problems as to measure of damages. The distinction is latent because the leading formulation of the general rule is sufficiently wide to cover contract and tort equally: this formulation is that the claimant is entitled to be put into the same position, as far as money can do it, as he would have been in had the wrong not been committed. In contract, however, the wrong consists not in the making but in the breaking of the contract and therefore the claimant is entitled to be put into the position he would have been in if the contract had never been broken or, in other words, if the contract had been performed. The claimant is entitled to recover damages for the loss of his bargain.” [emphasis added]

34. Although therefore an analogy has been drawn with the principles under the Sale of Goods Act, the basic principle in contract is that the claimant is entitled to be put into the position he would have been in if the contract had never been broken.
35. OCBC in support of its contention that s.53(3) is only a prima facie rule referred to *Butterworths Common Law Series The Law of Damages* at 22.102 where the example was given that where a seller of a business gave a warranty as to undisclosed liabilities, that loss may be measured by reference to the amount of the undisclosed liabilities. However, in my view this is consistent with the principle that the buyer should be compensated for his loss of bargain and such actual liabilities go to the diminution of the value of the asset. By contrast in this case no diminution in the value of the shares is alleged by reason of the (alleged) undisclosed liabilities to LBF.
36. The extracts from the textbooks relied upon (*Chitty* at 44-412 and 44-413 cited above) do not it seems to me, provide support for the claimant’s case that the “general” rule concerning the measure of damages on a share sale, as expressed above, can be departed from “in appropriate circumstances”. In my view read in context, the passages in the textbooks are dealing with the circumstances in which it may not be appropriate to value goods at the time of and place of delivery and thus deal with when this prima facie rule as to the date on which damages are to be assessed does not apply. The extracts relied upon do not provide support for a more general principle for the measure of damages for breach of warranty of quality on a sale of shares.
37. *Lion Nathan* was concerned with a warranty in relation to a forecast. The warranty had two elements: firstly, that it was calculated on a proper basis and secondly that the amount forecast was achievable. The Court of Appeal found that the warranty that the forecast was “achievable” amounted to a warranty of quality. Lord Hoffman in the passage upon which both parties rely, stated that in the case of a warranty as to quality, the purchaser was “prima facie” entitled to the difference between what the goods as warranted if the earnings had been in accordance with the forecast would have been worth and what they were actually worth. However, Lord Hoffman concluded that in that particular case it was not a warranty of quality, thus disagreeing with the Court of Appeal. Lord Hoffman did not therefore have to decide the basis on which damages could be claimed for a warranty of quality. However, he does appear to endorse the proposition that the measure of damages for breach of such a warranty was the difference between the value on the assumption that the warranty was true and the actual value of the company on the basis of the true figures:

“...The Court of Appeal was saying that although the vendor had not warranted that the earnings would be \$2,223,000, it had effectively warranted that the company could be valued on the assumption that they would be in the region of \$2,223,000. As the region would be a range above and below the figure of \$2,223,000, the reasonable buyer would value such a company, as the actual purchaser had done, on the assumption that the earnings would be the mean figure of \$2,223,000. Accordingly, the measure of damages was the difference between the company valued on that basis and the actual value of the company, calculated by applying the same multiple to the actual earnings after tax.” [emphasis added]

38. In *Karim*, the Court of Appeal clearly stated that the measure of damages for breach of warranty in these circumstances is the difference between the true value of the asset and its value with the quality warranted:

“39. It seems to me therefore that the information that Mr Wemyss provided was no longer true as at the date of the contract, and moreover was incomplete and misleading. Mr Wemyss was, therefore, in breach of warranty.”

40. The upshot is, in my judgment, that Mr Karim was entitled to damages on both the tortious measure and also the contractual measure. Which he chooses will be that which produces the better result for him. The tortious measure is the difference between (a) the price that Mr Karim paid and (b) the true value of the Business. The contractual measure is the difference between (a) the value of the Business if the warranted information had complied with the warranty: i.e. it had been true, complete and not misleading and (b) its true value. The difficulty confronting the judge was that he had no valuation evidence of either:

- i) The true value of the Business at the contract date; or
- ii) The value that the Business would have had if the warranted information had been true, complete and not misleading.” [emphasis added]

39. Accordingly, it seems to me that neither the authorities nor the textbooks, support the proposition advanced by OCBC that on a claim for breach of warranty of quality on a share sale, the measure of damages claim could be a hypothetical indemnity and the amount which could have been claimed under that hypothetical indemnity. As stated above, it seems to me that in determining the “loss of bargain” it may be necessary to adjust the valuation methodology but neither the authorities nor the textbooks support an entirely different measure of damages for breach of a warranty as to quality on a share sale other than the diminution of the value of the asset.

Conclusion on the measure of damages

40. In my view for the reasons discussed above, the claim for damages which would have been recovered under a hypothetical indemnity which would have been negotiated had the 2008 Accounts included provision for the potential liability to LBF is not recoverable as a measure of damages for breach of a warranty as to quality on a share sale.

II On the assumption that the 2008 Accounts were not properly drawn up such that the defendant was in breach of the Agreement, did that breach cause the claimant to suffer loss and damage?

41. The conclusion under I above is sufficient to dispose of the claim. However if I am wrong on the issue of law, I consider the second issue of causation.
42. OCBC's claim for damages is on the basis that, had it known of the LBF exposure, it would have asked for, and would have obtained an indemnity. In paragraph 26 of their APOC, OCBC pleads as follows:

“26. But for the Defendant's breach of the Agreement, the true accounting position as between IAPBL and LBF would have been disclosed with the result that:

(1) ...

(2) The Claimant would have been informed or aware of substantial liabilities to LBF (which liabilities potentially were increasing at a high default interest rate), and the Agreement would have contained a specific warranty and/or indemnity in the Claimant's favour in respect of the true liability to LBF.” [emphasis added]

43. In order to establish its claim, OCBC therefore needs to establish causation, namely that if it had been aware of the liabilities to LBF, it would have sought and obtained an indemnity in the Agreement in respect of that liability.

Submissions

44. OCBC submitted that, had the true position been disclosed, it would have extended the definition of “Excluded Liabilities” in Clause 14 of the Agreement to make specific provision against the risks arising on the LBF exposure. OCBC relied on *Allied Maples Group v Simmons* [1995] 1 WLR 1602 for the proposition that what the claimant needs to show, on the balance of probability, is that it would have taken action to obtain the benefit or avoid the risk.
45. OCBC submitted that the evidence demonstrated that ING had acceded to its request for indemnities in the Agreement in relation to potential exposure to third parties (in Clause 14) and that ING was also prepared to make provision for new indemnities in OCBC's favour by amendment following the signing of the Agreement. OCBC submitted that this evidence demonstrated that it sought and obtained indemnities from ING against potential exposure to third parties (including where the potential exposure

was not precisely known) and thus that it would have been able to obtain a specific warranty or indemnity in respect of the liability to LBF. OCBC submitted that it had leverage over ING as its bid for IABPL was the best on the table and was an unexpectedly good offer.

46. ING submitted that the evidence given by Mr Soon for OCBC in cross-examination undermined OCBC's case, as it demonstrated that OCBC may not have sought and/or may not have obtained any indemnity from ING in respect of IABPL's contingent liability to LBF.

#### Evidence

47. In his first witness statement, Mr Soon stated that:

“if OCBC had been informed by ING of the risk of LBF Claims prior to entering into the Agreement, OCBC would certainly have sought an indemnity from ING against that risk...”

48. He continued:

“[63] I also believe that ING would have agreed to such indemnity. During the acquisition process, the granting of indemnities for liabilities of an uncertain extent was discussed between the parties. ING disclosed the existence of litigation in respect of client A but said that it would not be providing any details regarding this litigation. Due to the uncertainty of this exposure, and in accordance with OCBC's standard practice, OCBC sought an indemnity from ING for any losses arising from any litigation or claim in respect of client A... ING agreed to grant an indemnity for any losses arising from any litigation or claim in respect of client A...”

[64] Further.... ING also agreed to grant an indemnity for any losses arising from or in connection with two specific regulatory investigations...”

49. In his second statement (paragraphs 12-13), Mr Soon stated that the Agreement, by including the indemnities in Clause 14 with minimum loss thresholds for claims of US\$1 million:

“clearly shows that OCBC was concerned about and sought and obtained indemnities in respect of potential liabilities which are far smaller than the LBF Claim. In the circumstances, if OCBC had been informed by ING of the risk of LBF Claims (whether assessed in terms of principal and interest, or principal alone) prior to entering into the Agreement, OCBC would certainly have sought an indemnity from ING against that risk.”

50. In cross-examination, Mr Allison QC for ING took Mr Soon to a report prepared for OCBC by PWC (the “PWC Report”) dated 3 September 2009 (just over a month before

the signing of the Agreement). In the report PWC recommended that OCBC should seek a number of indemnities and/or warranties from ING:

- i) PWC recorded that IAPBL had significant outstanding derivative financial instruments and stated that they noted significant differences between its independent valuation and the valuation provided. PWC recommended that OCBC should seek an indemnity against any liability in respect of exposures from incorrect valuation of outstanding financial derivative positions.
- ii) PWC noted that the bank may have significant FX trading positions on FX derivatives and recommended that OCBC seek an indemnity on losses from outstanding financial derivative positions.
- iii) PWC noted a significant number of derivative transactions with related companies giving rise to counterparty risk and recommended that OCBC should consider obtaining an indemnity on losses from outstanding financial derivative positions.

51. In cross-examination Mr Soon said:

“ ... I think within the due diligence team we had expert from our own Treasury Department who traded a large amount of derivatives and who was very experienced in terms of valuing as well as position taking, so on and so forth. And I do not remember the detail but they were definitely very involved in looking at the position, derivative position, trading position, if any, taken by IAPBL. And at that time I remember having asked our Treasury members of the team as to what they thought of IAPBL's risk with regard to trading, derivative or otherwise.

I was assured that from their own checking while there might be valuation issues IAPBL as a practice did not get into open position taking. Their practices have always been matching on the back-to-back basis. And if that were to be the case, valuation is frankly -- of the derivative -- could be a moot point because one side would be offsetting the other side, even if there is a difference. That was what I took comfort from. And I do not remember the exact detail, but I was given the comfort that derivative or trading position would not be an issue.

Obviously we would love to have an indemnity from ING on everything, which in fact we have asked for many, many warranties. But in the course of the negotiation again -- I don't remember the exact detail -- the warranty clauses were negotiated and were -- finally they took the form they appear in the agreement.

Q. So you accept there is no warranty in the SPA in relation to the valuation of exposures to derivatives, is there?

A. As far as my recollection is concerned of the agreement there was no such warranty on valuation.

Q. And there is no indemnity in relation to losses arising from derivatives, is there?

A. With regard to -- no, there was no such clauses in the agreement.

Q. You didn't ask for that indemnity, then?

A. In the course of the negotiation we asked for many, many things. Then obviously there were numerous sessions of negotiation. Some were taken out, some were put in. For example, client A which was an indemnity that was started right at the beginning and it was in there, there were several others we asked for and there were two others that were incorporated --

Q. We will come to client A later, thank you. Just picking up on that, you said there were several others you asked for which were not incorporated in the agreement?

A. Several others as far as the wording of the warranties. For example the threshold was something that was heavily negotiated and took the final form as it appeared in the agreement.

Q. So you would rather have had additional warranties that were rejected by ING?

A. Yes, I believe we asked for more and not all were accepted."  
[emphasis added]

52. Mr Allison QC took Mr Soon to two further portions of the PwC report which recommended that OCBC obtain indemnities:
- i) PwC noted that there could be additional potential exposure relating to outstanding litigation claims and sale of structured products. In relation to the sale of structured products, PwC estimated the exposure to be about USD16m. PwC recommended that OCBC consider a suitable indemnity for all liabilities in respect of exposures from litigation and claims on structured products and against undisclosed contingent liabilities.
  - ii) As of 30 June 2009, a total of US\$ 622 million of loans were recorded as substandard or doubtful and a provision in the accounts of US\$24 million had been made in respect of these loans. PwC recommended that OCBC should seek a warranty on the recoverability of all loans and the adequacy of the loan provision.
53. Mr Soon accepted that the potential value of the issue regarding non-performing loans could run into the hundreds of millions of dollars. In relation to the structured notes his evidence was as follows:



“Q. ... you were told to seek a warranty and indemnity in relation to the structured notes with an estimated exposure of over 15 million, but you didn't seek it, did you?”

A. We did not seek indemnity, or rather I would say the indemnity did not appear in the final agreement. I cannot remember if we sought the indemnity. But again, the comfort we had in terms of structured notes was that OCBC alone sold a substantial amount of structured notes and we had a good understanding and feeling of the risk involved and the damages that could arise from that.

Q. So you think you may have asked for the indemnity and not got it; you can't remember that?

A. I can't remember that.

Q. Also you were told that you should seek a warranty and indemnity in relation to non-performing loans running into the hundreds of millions; that wasn't in the SPA, was it?

A. That wasn't in the SPA, and again, lending business has always been the core business of OCBC bank and we have a fair number of credit expert assigned by the bank to look into that portfolio, and I believe we took comfort from the fact that we believed the provisions may not be absolutely so-called iron-clad, but it would be sufficient.

Q. Do you know whether that is another indemnity you asked for and didn't get, or can you not remember?

A. I remember that initially the draft, the earlier drafts that were circulated had much tighter warranty and indemnity clauses and as the document evolved unfortunately certain items were either diluted or eliminated.

Q. Because ING wouldn't give you what you wanted?

A. Well, it was both ways. Ultimately negotiation is a case of at the end -- I call it horse trading; one has to give something in order to protect clauses that were deemed to be more important to one.” [emphasis added]

54. Mr Soon maintained, however, that the US\$7.5 million which OCBC alleges should have been included in the accounts by reason of the IAPBL/LBF position was “significant”. Mr Allison put to him in contrast the fact that the risk of the structured product claim was over US\$15 million, but the indemnity is not there for that. Mr Soon responded that:

“That amount of 15 million was looked at and based on the input from our Treasury expert they felt comfortable with whatever

liabilities or whatever valuations there were embedded in the balance sheet.”

55. In re-examination Mr Soon maintained that:

“put me back in time to the point before we signed the agreement, if we had understood the extent, the complexity, the uncertainty of all those factors, the components that made up the claim ultimately we received from Lehman Brothers, I would – it is only logical, sensible, practical for me to seek an indemnity from ING against that risk.”

56. Mr Cox QC asked him to explain why OCBC would have been concerned about a potential liability in the quantum of the claim from LBF. He answered as follows:

“... In deciding on the final bid to be submitted, the binding bid to be submitted, obviously we had presentation to the board and so on and so forth. The board focused on two things, one is the franchise value: how much is it worth? And the other big item there, which is a larger item, is the NAV. And the thinking behind was that NAV, so long as the accounts are done correctly, so long as whatever presented in the balance sheet are of that -- of those values, we ought not to lose the value even if we don't make any money. Therefore, goodwill is at risk and NAV is a sure amount that we want to be in the pocket, and therefore we would be very concerned about any amount that could hurt the NAV as on a downside protection basis.

And therefore, on that basis I was pretty hard, I would say pretty tough in terms of negotiating for all the threshold relating to the indemnity or the breach of warranties and so on and so forth, I believe I pushed as hard as I could on those amounts. So this amount of together close to 19 point whatever million was suddenly -- I would not even use the word "concern", it was kind of shocking when we received that letter from Lehman Brothers.”[emphasis added]

57. Mr Cox QC also re-examined Mr Soon about the fact that OCBC had not obtained any indemnity in respect of the matters raised in the PwC report. Mr Soon responded as follows:

“A. I -- well, seeking indemnities is very much -- is part of a negotiation and our -- as I was running the transaction, it is very important to me that things that I could box, box in terms of the team, the bank, and appreciate the limit of the liabilities, the losses and damages and so on, we would be a bit more prepared not to ask for too much protection, versus things that are difficult, uncertain and complex and we don't have enough experience or time to do it.

And I also fully appreciate that Pricewaterhouse, as a financial consultant is very -- and it's not the first time I'm seeing it -- in every page, whenever problems are pointed out, they would want to add something. Even if those are impossible or unreasonable to obtain, they would put that in.

For example, on NPL, it is very practical that if a buyer were to buy a bank, it is impossible to ask the selling bank to give too much warranties on the recoverability, because the seller bank would have to provide capital for that kind of assurance. And it is no wonder we do that kind of thing on this deal. They have capital to play with, and if that is the case, why should they sell the bank, yes, for example?

So it is a case of balancing the important and the less important and ultimately striking a set of indemnities that we would be able to live with, and in this particular instance, dealing with ING, I did find that for specific indemnities they are quite willing, I must say, quite willing to provide, perhaps because of their own situation.” [emphasis added]

### Discussion

58. OCBC submitted that if a risk had been fully disclosed, OCBC was able to take an informed and commercial decision as to whether it was necessary to seek an indemnity in respect of that risk. The “key question” was therefore whether the risk was identified and understood. However the proposition that the determining factor as to whether to seek an indemnity was whether the risk was understood is not borne out by evidence: in relation to the structured notes, Mr Soon in cross-examination said that they had a “good understanding” of the risk involved but his evidence was that he could not remember whether in fact they sought an indemnity nevertheless:

“We did not seek indemnity, or rather I would say the indemnity did not appear in the final agreement. I cannot remember if we sought the indemnity...”

59. On non-performing loans Mr Soon said OCBC “took comfort from the fact that we believed the provisions may not be absolutely so-called iron-clad, but it would be sufficient”. However, when asked whether that was an indemnity which was asked for, Mr Soon responded:

A. I remember that initially the draft, the earlier drafts that were circulated had much tighter warranty and indemnity clauses and as the document evolved unfortunately certain items were either diluted or eliminated.

Q. Because ING wouldn't give you what you wanted?

A. Well, it was both ways. Ultimately negotiation is a case of at the end -- I call it horse trading; one has to give something in

order to protect clauses that were deemed to be more important to one.”

It would seem on the evidence that it cannot be said that this was a risk which was “boxed” and where the limit of the liabilities was appreciated.

60. In relation to the valuation of derivative positions, Mr Soon said he had in house expertise and was given comfort by his own Treasury department that the derivatives position would not be an issue. However, when he was asked whether he sought such an indemnity his response was:

“In the course of the negotiation we asked for many, many things. Then obviously there were numerous sessions of negotiation. Some were taken out, some were put in. For example, client A which was an indemnity that was started right at the beginning and it was in there, there were several others we asked for and there were two others that were incorporated –

...

“Q. So you would rather have had additional warranties that were rejected by ING?”

“A. Yes, I believe we asked for more and not all were accepted.”

61. Whilst I accept the evidence that it may not have been necessary to seek all the indemnities recommended by PwC, the evidence does not establish that the determining factor for whether to seek an indemnity was whether the risk was understood or that where indemnities were sought, they were necessarily obtained.
62. It was submitted for OCBC that specific indemnities were obtained where the risk was uncertain and Mr Soon’s evidence was that this amount of \$7.5million was significant in this context since the threshold for indemnity claims was set at US\$1million. However, the evidence of Mr Soon was that the purchase price was set by reference to the Net Asset Value and the goodwill (a percentage of the assets under management). He said in cross-examination:

“We were very concerned about the balance sheet which provides us with the downside protection if business failed to perform.”

63. Even if OCBC had been aware of both the exposure of \$11.6 million and default interest running at a high rate, OCBC have not established in my view that such a potential exposure would have been of such significance as to make an impact on the NAV and thus make a difference to their calculation of the purchase price so as to render an indemnity one which, on the balance of probabilities, they would have sought and obtained.
64. OCBC submitted that the question needed to be considered against the commercial reality and relied on evidence that they were one of ING’s final two preferred bidders and the claimant’s bid was the best offer on the table and above the defendant’s own

valuation. However, I note that the evidence from ING's internal documents setting out a "Qualitative assessment of preferred bidders" describes one of the features of OCBC's bid as "SPA markup light" compared with the second highest bidder where the corresponding observation was "SPA markup heavy but reasonable". This suggests that the likely extent of the documentary negotiation was a relevant factor for ING.

65. OCBC submitted that it would be "commercially improbable" that ING would risk losing the purchaser for an indemnity for a claim of \$10-20 million, however there is no evidence from Mr Soon that OCBC would have regarded the indemnity as of such importance as to advance it as a "dealbreaker" such that the entire deal would have been at risk if the request for such an indemnity was refused.
66. Mr Soon's evidence was that it was a question of balancing the important and the less important and ultimately striking a set of indemnities that OCBC would be able to live with. In my view OCBC have not shown on the evidence that had it been aware of this particular liability, OCBC would have sought and obtained an indemnity. The scale of the liability was relatively modest viewed against the purchase price and the impact on the Net Asset Value and, even if the exposure was uncertain in amount, OCBC was prepared to take a view on liabilities arising from structured notes for a similar amount and in relation to derivatives trading, on the basis that they understood these areas of business even though the risk appeared unquantified. The liabilities to LBF of course arose in the context of derivatives trading. As Mr Soon said:

"Ultimately negotiation is a case of at the end -- I call it horse trading; one has to give something in order to protect clauses that were deemed to be more important to one."

### Conclusion on causation

67. For the reasons discussed above, OCBC has not, proved on the evidence that if it had been informed of the potential exposure to LBF (i) OCBC would have sought an indemnity from ING in respect of the LBF exposure; and (ii) that, had it sought the indemnity, it would have obtained such an indemnity from ING. Accordingly OCBC's case fails on causation.

### III Was there a breach of the warranty concerning the 2008 Accounts?

68. The claim in this case fails for the reasons set out above. However, for completeness I propose to deal with the issue of whether there was a breach of the warranty concerning the 2008 Accounts.
69. Schedule 7 of the Agreement contained a warranty that:

"3.1 The IAPBL Accounts are properly drawn up in accordance with the provisions of the Singapore Companies Act, Cap. 50 and Singapore Financial Reporting standards so as to give a true and fair view of the state of affairs of the IAPBL as at the Last Accounting Date and of the results, changes in equity and cash flows of IAPBL for the year ended on the Last Accounting Date; and the other matters required by Section 201 of Singapore

Companies Act, Cap. 50 to be dealt with in the IAPBL Accounts." [emphasis added]

70. The experts are agreed (Joint Statement paragraph 2) that:
- i) there is no definition of "true and fair" in the contemporaneous or current versions of the Singapore Companies Act or in the Financial Reporting Standards ("FRS");
  - ii) accounts which are in full compliance with the relevant FRS are likely to be true and fair and that minor non-compliance does not necessarily result in accounts that are not true and fair.
71. The requirement of materiality derives from FRS 8:
- "41. Errors can arise in respect of the recognition, measurement, presentation or disclosure of elements of financial statements. Financial statements do not comply with FRSs if they contain either material errors or immaterial errors made intentionally to achieve a particular presentation of an entity's financial position, financial performance or cash flows."

The original case advanced by OCBC

72. OCBC's case was originally advanced on the basis that in breach of the FRS:
- i) IAPBL had incorrectly calculated the Loss on early termination of the derivative transactions with LBF (the "Initial Sum") and undercalculated the amount due on termination (an alleged breach of FRS 39);
  - ii) The LBB Collateral had been wrongly (in that it was contrary to the provisions of the ISDA Agreement) treated as an Unpaid Amount owing to IAPBL and thus wrongly deducted from the amount due to LBF; it should have been shown as an unsecured liability owing to IAPBL but in the light of the insolvency of LBF and LBB, the accounts should have recorded a provision to take account of its impairment (an alleged breach of FRS 32 (*Financial Instruments: Presentation*) and 39);
  - iii) IAPBL had wrongly (due to the fact that at the time of the purported set-off LBF was in bankruptcy and thus contrary to English/Swiss insolvency law) set off amounts owed by LBF to ING Belgium (the "Triangular Set-Off") with the result that the amount payable on early termination was reduced to nil.
73. As a result of these three alleged errors, OCBC's pleaded case (paragraph 25(4) of the APOC) was that adjustments should have been made to the 2008 Accounts:
- i) to reverse the Triangular Set-Off by an adjustment on the balance sheet to reflect the fact that this amount was due to LBF rather than ING Belgium;
  - ii) to reverse the Collateral Set-Off by an adjustment on the balance sheet to reflect the fact that the amount of collateral remained owed to IAPBL but with a provision (of 50-100%) to take account of the impairment of the LBB Collateral

which would be reflected in an adjustment to the profit and loss statement and the balance sheet; and

iii) to reverse and restate the correct Initial Sum by adjustments to the balance sheet and the profit and loss statement.

74. OCBC's case (paragraph 25(5) APOC) was that the adjustments would have resulted in a decrease of around \$7.5m on the profit and loss statement and in retained earnings on the balance sheet. If the errors had not been made then it is OCBC's pleaded case that the profit after tax for 2008 would have been reduced by approximately 24.8% to 25.22% and OCBC pleaded that this amounted to a material misstatement of the state of affairs of IAPBL (paragraph 25(6) APOC).
75. It was also alleged that the 2008 Accounts should have disclosed (by virtue of FRS 37) IAPBL's contingent liability to LBF arising from any set off and the failure to disclose the contingent liabilities in respect of the Collateral Set-Off and the Triangular Set-Off meant that the 2008 Accounts did not give a true and fair view (paragraph 25 (7) APOC).

#### The case advanced in closing by OCBC

76. OCBC's case, as advanced in closing submissions, is that the 2008 Accounts were not "true and fair" as they failed to disclose as a contingent liability the potential liability to LBF of US\$7.46m together with default interest accruing and liability for costs. It was submitted that under FRS 37 these matters should have been disclosed in a note to the 2008 Accounts setting out a brief description of the nature of the contingent liability and, where practicable, an estimate of its financial effect, an indication of the uncertainties relating to the amount and timing of any outflow and the possibility of any reimbursement.
77. It was also submitted for OCBC that the amount of the potential liability was material in that the materiality level should have been set at no more than US\$3.4 million (10% of the pre-tax profit figure of \$34 million in the 2008 Accounts). The risk was therefore material. Alternatively even if the threshold was higher at US\$10.5 million, there was a risk that the liability would exceed that depending on the extent of the penal interest and the risks were material.

#### The court's approach

78. ING disputes that there were any errors in the accounts. It will be assumed for the purpose of considering the question of whether the 2008 Accounts gave a "true and fair" view that OCBC is correct that there were errors in the 2008 Accounts (i) as to the validity of the Triangular Set-Off; (ii) as to the validity of the Collateral Set-Off and the absence of any impairment; and (iii) as to the calculation of the Initial Sum.

#### Contingent Liabilities

79. In oral closing submissions counsel for OCBC submitted that:

“on any view there was at least a contingent liability that was not too remote and that should have been disclosed in the notes to the accounts”

He further submitted that in relation to all three areas of errors they were clearly areas of “potential liability” and “that being so”, FRS 37 was engaged.

80. FRS 37 defines “contingent liabilities” as follows:

“A contingent liability is;

- a) a possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non occurrence of one or more uncertain future events not wholly within the control of the enterprise; or
- b) a present obligation that arises from past events but is not recognised because:
  - i) it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation; or
  - ii) the amount of the obligation cannot be measured with sufficient reliability.”

81. FRS 37 also provides that:

“Unless the possibility of any outflow in settlement is remote, an enterprise should disclose for each class of contingent liability at the balance sheet date a brief description of the nature of the contingent liability and, where practicable:

- a) an estimate of its financial effect...
- b) an indication of the uncertainties relating to the amount or timing of any outflow; and
- c) the possibility of any reimbursement.”

### Triangular Set-Off

82. In the case advanced in closing OCBC rely on the three errors both individually and cumulatively as amounting to material misstatement of the accounts. Dealing first with the Triangular Set-Off the evidence was as set out below.

83. In his supplemental expert report dated 14 December 2018 (the “third report”) (paragraph 13) Mr Reid stated that the 2008 Accounts simply recorded that IAPBL had an obligation to a related company and did not inform OCBC about the “true position” because:

- i) there was a real risk that the Triangular Set-Off, upon which that supposed related company obligation was based, might be found to be invalid; and that



- ii) if it were, LBF might bring a claim against IAPBL for the amounts represented by the Triangular Set-Off, with that claim carrying an extremely high interest rate.
84. He noted that LBF claimed interest at 17.427% per annum. He stated that the error by IAPBL meant that the accounts did not disclose “a potentially toxic contingent liability.”
85. Mr Kon responded to the supplemental report of Mr Reid in his second supplemental report dated 27 December 2018. Mr Kon stated that:
- i) the Triangular Set-Off does not fall within FRS 37 as that standard does not apply to financial instruments that fall within FRS 39;
  - ii) to qualify for disclosure under FRS 37 a contingent liability must meet the definition in FRS 37 and in this case the Triangular Set-Off is not a “past event” that gives rise to a contingent liability since set-offs or reclassifications do not amount to past events that give rise to contingent liabilities;
  - iii) the omission of a note or disclosure does not invalidate the true and fair view of a set of accounts;
  - iv) materiality depended on the size and nature of the omission or misstatement judged in the surrounding circumstances. The size or nature of the item, or a combination of both, may be the determining factor.
86. Mr Reid accepted in cross-examination that until his third report he had not previously suggested that the Triangular Set-Off was material to the truth and fairness of the accounts. In his first report although he referred to the Triangular Set-Off, his analysis of materiality focussed on the question of profits and he accepted in cross-examination that the validity of the Triangular Set-Off had no impact on profits. In his second report, Mr Reid, whilst agreeing that the adjustment to reverse the effect of the Triangular Set-Off did not impact on profits, stated that the failure to disclose the Triangular Set-off as a related party transaction under FRS 24 meant that the accounts were not drawn up in accordance with the FRS. However Mr Reid accepted in cross-examination that there was no suggestion that this error had caused a material misstatement.
87. It was put to Mr Reid that [T5/14]:
- “... There is nothing in your first report and nothing in your second report that suggests the triangular set-off has caused material misstatement of the accounts, is there?”
- Mr Reid replied:
- “there isn’t no.”
88. Mr Reid was then asked about the Joint Statement in which the agreed position was stated to be that the Triangular Set-Off had no impact on reported profit and net assets. Mr Reid accepted in cross-examination that there was “a clear meeting of the minds” between him and Mr Kon that the Triangular Set-Off had no relevance to the truth and fairness of the accounts. However, in the third report, Mr Reid stated (paragraph 11):

“... Nothing in paragraph 2 of the joint statement referred to or was intended to have an impact on my views about the breach of FRS 37, which remain as set out in my earlier reports, namely that IAPBL’s failure to disclose the contingent liability arising from the triangular set-off amounted to a breach of FRS 37 and that this breach of FRS 37 is material to the truth and fairness of the IAPBL 2008 Accounts.” [emphasis added]

89. Notwithstanding the way in which the third report was expressed, Mr Reid accepted in cross-examination that this was a change in position. It is wholly unclear why Mr Reid changed his position or why he failed in his third report to acknowledge that it was a change in position.

### Discussion

90. Counsel for OCBC in oral closing submissions submitted that because there was doubt at the time about whether the Triangular Set-Off would work, this meant there was a potential liability for this sum to LBF.

91. Mr Kon’s evidence was that FRS 37 does not apply to financial instruments. It was submitted for OCBC that Mr Kon was wrong in this regard since FRS 39 does not apply where an asset was derecognised by way of payment or discharge. Mr Kon is an experienced auditor and there is no evidence to support the submission that Mr Kon was wrong in this regard. The suggestion by counsel for OCBC that Mr Kon “professed ignorance” in cross-examination when asked about this issue is in my view wholly without foundation.

92. However even if FRS 37 does apply to the Triangular Set-Off, the evidence of Mr Kon was that it was not properly categorised as a contingent liability. It was submitted for OCBC that Mr Kon was wrong in this regard and that all that is required is that the matter be an historic event which gives rise to a possible legal obligation. Counsel for OCBC relied on the examples given in FRS 37 of a guarantee and of a court case where the lawyers advise that it is probable that a company will not be found liable for an event; in these circumstances no provision is recognised but the matter is disclosed as a contingent liability.

93. It was put to Mr Kon that applying FRS 37:

“so if you have a claim, a potential liability which is within the definition of a contingent liability, that is as a possible outflow of funds from the company, that would be disclosed by way of a note to the accounts, as a contingent liability?”

“A. Generally, yes.”

“Q. And if you have a case, as here, where there was a possible liability to LBF which included uncertain sums, that is the interest that is payable on the liability, then the uncertain sum is also something you would include in the note of contingent liabilities, isn’t it?”

A. No... I disagree... In the current case the owings to Lehman's were set-off. It is still on the balance sheet. I cannot opine as to whether it is discharged or not but it is still on the balance sheet, but set-off against another asset....

These items are already on the balance sheet, if there is liability to pay interest it is already on the balance sheet. If you underestimated the liability, it could be a change in estimate or it could be in error. But in effect the liability is already on the balance sheet....

Q... If you assume for the moment that there was a financial liability on the derivative... but there is a doubt that because of a dispute or potential dispute between LBF and IAPP about that liability, that is a circumstance in which you would have to include a note in the accounts about the contingent liability unless you thought it was so remote that it didn't qualify, isn't it?

A. No, I disagree.... The liability is already on the balance sheet. If there is any underaccrual, underestimate of the liability, then that underestimation should be rectified. If it is a material error, then the 2008 Accounts should have been restated." [emphasis added]

94. In my view, the evidence of Mr Kon, that no liability fell to be noted as a contingent liability under FRS 37, is to be preferred to the evidence of Mr Reid for the following reasons:

- i) There are the following matters which adversely affect the general credibility of Mr Reid:
  - a) There is no explanation for the change in position of Mr Reid in his third report or his failure to be clear that it was a change from his earlier reports.
  - b) Although Mr Reid stated on his CV that he had more than 25 years' experience in the accounting profession, he stated in cross-examination that he spends close to 50% of his time taking appointments as an insolvency practitioner e.g. administrator, receiver, liquidator and the rest of the time on valuation work and as an expert witness in accounting related matters. He confirmed in cross-examination that his day-to-day practice does not involve auditing.
  - c) Notwithstanding the fact that Mr Reid stated that he spends part of his time as an expert witness, he did not appear to understand his role as an expert witness: in his first report, Mr Reid considered various legal authorities and expressed his own view on the legality of the set-off of the LBB Collateral. In cross-examination, it appeared from his evidence that he did not understand why it was inappropriate for him to provide

an opinion on legal matters, asserting that he had a very good understanding of the law of set-off as he had dealt with it professionally.

- d) Although Mr Reid confirmed orally that the opinions that he had expressed in this case were the opinions that he holds, nevertheless it is of concern that the Court of Appeal in Singapore in November 2018 criticised the expert evidence of Mr Reid on an issue of valuation, in particular that the court found that the chosen methodology was not an objective approach and the evidence was highly subjective having been based very heavily on the respondent's instructions. Asked about the findings of the court in cross-examination, Mr Reid agreed that the court found that his evidence fell short of the standards expected of expert evidence. There was a further decision of the courts of Singapore in 2017 where the court found that Mr Reid's expert evidence was inconsistent with the objective evidence.
- ii) By contrast, Mr Kon is the Managing Partner of Foo Kon Tan LLP, a Singapore audit and accounting practice. Mr Kon is a fellow of the Institute of Singapore Chartered Accountants, the national accountancy body of Singapore and currently President of the Institute of Singapore Chartered Accountants and President of the ASEAN (Association of Southeast Asian Nations) Federation of Accountants. His experience includes (paragraph 5 of his report) the "preparation, oversight, audit and regulation of accounts drawn up in accordance with the provisions of the Singapore Companies Act and Singapore Financial Reporting Standards".
- iii) Unlike the examples of a liability arising out of the wedding or a guarantee (referred to above) where the liability is not already on the balance sheet, the liability for the Triangular Set-Off is already on the balance sheet and thus these examples of an obligation arising from a past event can be distinguished from the present case and do not provide evidence to counter the evidence of Mr Kon that the Triangular Set-Off should not be categorised as a contingent liability falling within FRS 37.

#### Conclusion on Triangular Set-Off

95. For the reasons discussed above, I find on the evidence that in relation to the Triangular Set-Off there was no breach of FRS 37 and no failure to disclose a contingent liability.

#### Alternative case-materiality in relation to Triangular Set-Off

96. If I were wrong in my conclusion and the Triangular Set-Off gave rise to a contingent liability which should have been disclosed under FRS 37, the issue arises as to:
- i) whether it was a material breach for the purposes of the warranty that the 2008 Accounts gave a true and fair view; and
  - ii) how the test of materiality would apply to a contingent liability.
97. It was submitted for OCBC that:

- i) the materiality level should have been set at no more than US\$3.4 million being 10% of the pre-tax profit of US\$34 million in the 2008 Accounts, but even if the threshold was higher at US\$10.5 million (as ING contend) there was a risk that the liability would exceed that;
  - ii) no distinction was drawn in the evidence in relation to the materiality test depending on whether it is a contingent liability or actual liability.
98. Mr Reid stated in his third report that whether an error is material is not necessarily, or only to be determined by reference to fixed percentage levels by reference to profit or net assets. He stated that the test of materiality in all cases is as defined by FRS 1, paragraph 11:
- “Material* Omissions or misstatements of items are material if they could, individually or collectively, influence the economic decisions of users taken on the basis of the financial statements. Materiality depends on the size and nature of the omission or misstatement judged in the surrounding circumstances. The size or nature of the item, or a combination of both, could be the determining factor.”
99. He further stated (paragraph 17 of the third report) that the test of materiality would include the materiality of any information (including notes) not disclosed or disclosed incorrectly. He stated that:
- “it follows that it is my view that the mere fact that an error would not necessarily affect the profit or net asset figures... does not mean it cannot be material.”
100. He continued (paragraph 21):
- “applying what I say is the correct approach to materiality, the relevant question with regard to the nondisclosure by IAPBL and the triangular set-off is whether the consequent breach of FRS 37 could have influenced the economic decision of the user of the IAPBL 2008 Accounts. My view is that it almost certainly would have done.”
101. He went on to say that the breach of FRS 37 was material because the 2008 Accounts did not inform OCBC about the real risk that the Triangular Set-Off might be found to be invalid and if it were, LBF might bring a claim against IAPBL for the amounts represented by the Triangular Set-Off with that claim carrying an extremely high interest rate.
102. Mr Reid’s evidence (paragraph 31 of his third report) is that had the true position been disclosed in relation to the Triangular Set-Off, it would have influenced the economic decision of OCBC as a potential investor.
103. Mr Kon responded to this evidence in his second supplemental report. Mr Kon stated that he had seen no evidence or information as to the default interest rate as at the date

the 2008 Accounts were approved. He further stated that in his experience omission of a note or disclosure does not invalidate the true and fair view of a set of accounts.

104. In cross-examination Mr Reid was taken to his first two reports. In his first report he referred (amongst other things) to the Singapore Standards on Auditing (“SSA”) and (at page 64 of his report) cited SSA 320 which states that:

“Determining materiality involves the exercise of professional judgment. A percentage is often applied to a chosen benchmark as a starting point in determining materiality for the financial statements as a whole.”

105. The SSA states that examples of benchmarks depending on the circumstances of the entity include categories of reported income such as profit before tax, total equity or net asset value. An example is given that an auditor may consider 5% of profit before tax from continuing operations to be appropriate for a profit orientated entity in a manufacturing industry.
106. In his first report Mr Reid took a benchmark of 5% of profit before tax. In his second report he took a benchmark of “profit after tax” but this was “corrected” the day before he gave evidence to profit before tax. In cross-examination he said that he formed the view professionally looking at the adjustments that he deemed appropriate and the drop in the performance of the company, that the drop was significant and that was a misstatement which was material. He said he then looked to see whether there was any professional guidance which could corroborate his professional opinion. Mr Reid accepted in cross-examination however that there was no support for setting a benchmark equal to 5% of profit before tax. Mr Reid accepted that the auditors’ guidance proposing 5% as a benchmark is in relation to a manufacturing company and not a bank. He also accepted that it could be useful to have a cross check by reference to the net assets. In cross-examination he expressed the view that the percentage base is not the test, the test is whether it would reasonably influence the economic decision of the user of the accounts.
107. In determining the materiality level, ING submitted that a benchmark is 10% of normalised profits, it is not however a “hard” benchmark and materiality involves exercise of professional judgement.
108. Mr Kon’s evidence was that it is standard professional practice in Singapore to determine materiality thresholds based on an assessment of normalised profits and that this would have been the reasonable expectation of users of the accounts. Mr Kon stated that normalisation is applied to avoid distortions that may occur from year to year. Mr Kon’s calculations were that the normalised profit before tax of IAPBL for 2008 was US\$105 million. He identified six significant items that in his view fell within the criteria of being one-off, exceptional or non-recurring items. The largest identified item was US\$49.8 million of specific loan loss provisions which arose as the bank “experienced a surge in margin calls due to collateral values falling as a result of the downturn of the financial markets.” Other items included litigation provisioning relating to Lehman’s bankruptcy of US\$11.9 million. Mr Kon therefore concluded that any user of the 2008 Accounts could only reasonably have expected that errors in excess of US\$10.5 million would be assessed as material. (The alternative benchmark viewed

by reference to net assets would give a higher benchmark but the reference to profits is accepted by Mr Kon to be a more conservative approach.)

109. Mr Reid accepted in cross-examination that the Singapore Standards on Auditing expressly contemplate the normalisation of profits when assessing materiality by reference to profits. Mr Reid's evidence was that whilst auditors prepare financial statements and normalise profits in determining materiality, that is not the touchstone for determining whether financial statements were true and fair which is how a reader of the financial statements would read those financial statements. His evidence was that a reader of a financial statement will assume that those statements are correct.
110. In the Joint Statement (at paragraph 3.1.7) Mr Reid stated that the question of truth and fairness should not be considered from the perspective of ING but by its influence on the economic decisions of OCBC being one of the users.
111. It is of some relevance to the question of normalisation in my view that in a press release issued by OCBC on the date on which the Agreement was signed when it agreed to acquire the business, it described the price paid as a multiple of "normalised" 2008 earnings. Mr Reid's evidence in cross-examination on this point was that there is no correlation between the approach taken by OCBC in its press release and the test for what is a misstatement in a financial statement. It seems to me it is of some evidential value as to whether a matter would influence the economic decision of OCBC as a potential investor (the test applied by Mr Reid in his third report).
112. Mr Reid disputed the adjustments made by Mr Kon to normalise the profits: with regard to the specific items referred to above, he was of the view that the loan loss provisioning was a normal cost of IAPBL's business as was the litigation provisioning.
113. In my view as a general matter of credibility, the evidence of Mr Kon on whether the normalised profit should be used is to be preferred to the evidence of Mr Reid for the reasons set out above. In addition, I have regard to FRS 8 paragraph 6 (relied on by Mr Kon) which states:

"Assessing whether an omission or misstatement could influence economic decisions of users, and so be material, requires consideration of the characteristics of those users. *The Framework for the Preparation and Presentation of Financial Statements* states in paragraph 21 that "that users are assumed to have a reasonable knowledge of business and economic activities and accounting and a willingness to study the information with reasonable diligence." Therefore the assessment needs to take into account how users with such attributes could reasonably be expected to be influenced in making economic decisions." [emphasis added]

114. Accordingly whether one approaches the question of materiality on the basis that the auditors in drawing up "true and fair" accounts would determine materiality by reference to normalised profits or whether one looks at it purely from the perspective of the user, in my view the user of the accounts can be expected to assess and understand the effect of one-off, exceptional or non-recurring items and the issue of whether an omission or misstatement could influence the economic decision of users should be

tested by reference to normalised profits. Thus, in this case it would suggest that the materiality level is in excess of \$3.4 million (10% of actual profits). It is not necessary to establish a precise figure for the normalised profits but just adding back the loan loss provision would add \$47.4 million to actual profits.

115. As noted above, it was only in his third report that Mr Reid suggested that the absence of a note as to the contingency in respect of the Triangular Set-Off was material to the truth and fairness of the accounts. Mr Reid accepted in cross-examination that the relevance of FRS 37 to the Triangular Set-Off would be the liability to pay interest in the event of a challenge. The contingent liability would therefore be interest on US\$3.6 million. Mr Reid accepted in cross-examination that the interest percentage he had used was based on the rate of interest disclosed in LBF's claim brought against IAPBL in 2011, Mr Reid agreed that one cannot use hindsight when assessing materiality and that the use of the rate disclosed in LBF's particulars of claim involved hindsight.
116. To establish that there was a material misstatement, it is not sufficient in my view to show that (as submitted for OCBC) there was "a risk" that the potential liability would exceed the materiality threshold. The issue is whether there was a failure to disclose a contingent liability and whether that failure was material. As to that:
  - i) there is no evidence before the court as to how the note for the contingent liability should be presented and whether the contingent liability would be presented as the default interest which would accrue for one year or more than one year;
  - ii) whilst the evidence of Mr Reid is that the failure to note the contingent liability is material (without reference to any benchmark being required) it is unclear how materiality can be determined without any reference to a benchmark as a starting point or any other evidence as to how it would influence the decision of a user of the 2008 Accounts: such an approach was only adopted by Mr Reid in his third report and runs contrary to the approach in the auditing standards which acknowledges that a percentage is often applied to a benchmark as a starting point in determining materiality;
  - iii) if a benchmark is adopted, there is no evidence that profits would be an appropriate benchmark for a contingent liability;
  - iv) assuming that the default interest was to be as high as 18% and that a benchmark of 10% of normalised profits is an appropriate starting point, without evidence as to the way in which the liability would be noted (ie how many years of interest) it cannot be concluded that the amount of such a contingent liability is material.
117. For all these reasons I find that, even if I had found that there was a breach of FRS 37 in a failure to note the potential liability in respect of the interest on any claim in respect of the Triangular Set-Off, the evidence fails to establish that by reason of such failure, the 2008 Accounts contained a material misstatement.



### Collateral Set-Off

118. Counsel for OCBC in oral closing submissions, submitted that because IAPBL sought to use the LBB Collateral “in a wrong way” that generated a contingent liability to LBF because it was “potentially wrong”.
119. In his first report (paragraph 99) Mr Reid stated that insofar as IAPBL had no legally enforceable right to effect the Collateral Set-Off, IAPBL was required to disclose an estimate of the financial effect of the contingent liabilities arising from the set-off and in breach of FRS 37 IAPBL failed to disclose this estimate in the 2008 Accounts.
120. In section H of his first report Mr Reid addressed whether or not the errors in relation to the Collateral Set-Off were material. He stated that he was of the view that the Collateral Set-Off should not have been made and provisions for impairment of the LBB Collateral should have been made, taking a provision of 50-100%. He concluded that there was an understatement of total assets and total liabilities and an overstatement of equity and profit for the year. However he did not address the impact on the 2008 Accounts of the alleged breach of FRS 37 or conclude that such a breach resulted in a material misstatement of the 2008 Accounts.
121. The evidence of Mr Kon that FRS 37 does not apply to financial instruments would appear to apply equally to the Collateral Set-Off. However even if FRS 37 applied, there is no evidence before the court that any breach of FRS 37 in relation to the Collateral Set-Off resulted in a material misstatement of the 2008 Accounts.
122. It was submitted for OCBC in closing that materiality for the LBB Collateral would be approached in the same way notwithstanding the shift from profits to contingent liabilities. Mr Cox QC said in closing that his submission is that “*there is no distinction drawn between the materiality level in relation to any other matter and contingent liability. One has to apply the materiality level.*”
123. However, there is no specific evidence which supports that submission. The evidence of Mr Kon is to the contrary: that the omission of a note or disclosure does not invalidate the true and fair view of a set of accounts.
124. If one assumed that Mr Reid was right that a note should have been included as to the potential liability in relation to the Collateral Set-Off, the issue is then whether the failure was material. If OCBC were correct and the “materiality level” should be applied, then the issue is the amount of the potential liability which would have been disclosed and whether that is material. Mr Reid accepted in cross-examination that a 50% impairment of the Collateral would have been reasonable, which would mean that the liability (assuming an impairment of 50%) would amount to an overstatement of IAPBL's profits by \$2.4m. However, this would be less than the benchmark for profits of \$3.4m (before any adjustment for normalisation). If one sought to add in the potential default interest, then there are the same issues discussed above in relation to Triangular Set-Off including no evidence as to how the contingent liability would be presented and whether the liability for interest is for one year or more than one year. In any event it has not been shown that the amount would exceed the materiality level determined by reference to normalised profits.

125. Accordingly, for all these reasons, I find that OCBC have failed to show that there was a material misstatement of the 2008 Accounts as a result of any breach of FRS 37 in respect of the Collateral Set-Off.

### Initial Sum

126. In closing submissions counsel for OCBC submitted that:

“in relation to all three areas of errors we are talking about, there was a non-remote potential liability to LBF in respect of those matters... That being so, we say FRS 37 is engaged... There is a non-remote potential liability here ... because you have not calculated the initial sum in a certain way...”

127. Counsel for OCBC submitted that it would go into the accounts as a contingency because:

“the way they calculated the initial sum meant that there was said to be a lower sum due to LBF than in fact should have been the case and they therefore did not include in the accounts the correct liability... They were the ones doing the initial sum calculation, they chose to value using historic data,...and in those circumstances they ought to have put a note in to say -...that there was a potential liability...arising from the way that we have calculated our initial sum and ... we have not also taken into account anything for unpaid cash flows.”

128. It was submitted for OCBC that there was detailed evidence on the liability of IAPBL to LBF and thus “an ample basis” for saying that there was a contingent liability in those respects. However, in my view, whilst there is evidence from the derivatives experts about the alleged errors in the calculation of the Initial Sum, there is no accounting evidence from Mr Reid or Mr Kon that these alleged errors in the calculation of the Initial Sum were a breach of FRS 37 and that a note should have been included as to the “potential liability” in the event that the Initial Sum was incorrect. In his first report (paragraph 99) Mr Reid said that the failure to disclose the contingent liabilities that could arise if the Collateral Set-off and the Triangular Set-Off were held to be invalid was a breach of FRS 37 but he did not identify any error arising out of the calculation of the Initial Sum as a breach of FRS 37. As discussed above the third report deals only with the Triangular Set-Off.

129. In my view the “potential liability” which arose by virtue of the (alleged) errors in the calculation of the Initial Sum would give rise to increased actual liabilities not to contingent liabilities as is evident from OCBC’s pleaded case which refers to adjustments which should have been made to the balance sheet and profit and loss account. It was submitted for OCBC that it should have been shown as a contingent liability because IAPBL may have thought that there was a mismatch between its calculation of Loss under the ISDA Agreement and the amount that it actually lost on the hedges. There is no accounting evidence to support this. More generally there is no accounting evidence that there is an obligation under FRS 37 to include as a “contingent liability” the liability in respect of the Initial Sum if such liability in the accounts is wrongly calculated.

130. On the evidence I find that the claimant has not established any breach of FRS 37 arising out of any error in the calculation of the Initial Sum and thus there can be no material misstatement in this regard.

Conclusion on breach of warranty

131. For the reasons set out above I find that OCBC has not established its case that the 2008 Accounts were not true and fair; in particular OCBC has not established on the evidence that the 2008 Accounts contained the alleged material error in that in breach of FRS 37 the 2008 Accounts failed to disclose as a contingent liability the potential liability to LBF of US\$7.5 million plus default interest plus costs.

Errors in the 2008 Accounts; disclosure; limitation of liability

132. In the light of the conclusion on breach of warranty (and the other findings above including on causation), I do not propose to consider the question of whether the three errors alleged were in fact errors in the 2008 Accounts as any findings would make no difference to the outcome of this claim.
133. For the same reasons, it is also not necessary for me to consider the defendant's case that matters had been disclosed to OCBC, or whether the liability of the defendant to the claimant is limited or excluded pursuant to clause 11.4 and paragraph 1.1.2 of schedule 8 of the Agreement.