Fairview Developments Pte Ltd *v* Ong & Ong Pte Ltd and another appeal [2014] SGCA 5

Case Number	: Civil Appeals Nos 51 and 52 of 2013
Decision Date	: 20 January 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Hri Kumar Nair SC, Shivani Retnam, Harsharan Kaur Bhullar (Drew & Napier LLC) and Yap Neng Boo Jimmy (Jimmy Yap & Co) for the appellant in Civil Appeal No 51 of 2013 and the respondent in Civil Appeal No 52 of 2013; Mohan Reviendran Pillay, Joanna Seetoh Wai Lin and Ang Wee Jian (MPillay) for the respondent in Civil Appeal No 51 of 2013 and the appellant in Civil Appeal No 52 of 2013.
Parties	: Fairview Developments Pte Ltd — Ong & Ong Pte Ltd

Building and Construction Law – Termination

20 January 2014

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The present appeals (Civil Appeal No 51 of 2013 ("CA 51") and Civil Appeal No 52 of 2013 ("CA 52")) were brought, respectively, by the defendant (Fairview Developments Pte Ltd ("Fairview")) and the plaintiff (Ong & Ong Pte Ltd ("OOPL")) in respect of the decision by the judge ("the Judge") in Suit No 369 of 2011. The proceedings below arose out of a dispute between OOPL and Fairview in relation to architectural services provided by OOPL and its predecessor, Ong & Ong Architects ("OOA"). The Judge delivered a detailed oral judgment ("the Judgment"), in which he: (a) dismissed OOPL's claim for Fairview's termination of its services; (b) allowed OOPL's claim for fees for abortive works on a *quantum meruit* basis; and (c) dismissed Fairview's counterclaim against OOPL.

2 At the hearing before us, we dismissed Fairview's appeal in CA 51 and allowed OOPL's cross-appeal in CA 52. We now give the detailed grounds for our decisions.

3 Indeed, the present appeals raised a number of significant legal issues, a few of which are broadly as follows.

4 First, when *the text and the context* of the express terms of a contract *clearly* express the intention of the parties, the court ought to give effect to that intention. This is not only logical and commonsensical but also just and fair. Indeed, as we shall see, this was a central motif in the present appeals before this court. The facts in the present appeals were in fact the converse of that referred to recently by this court in *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Limited Partnership* [2013] 4 SLR 1116 ("*Bakrie*") (especially at [2]–[4]), as there were several instances where the text and the context of the contract were, contrary to what counsel suggested, irrefutably clear.

5 Another central motif in the present appeals was the doctrine of novation. As we shall see, although the general legal principles are generally clear and uncontroversial, the difficulty lies – as is the case with most (if not all) legal doctrines – in the sphere of the application of the law to the

relevant facts.

6 A couple of issues pertaining to the law of limitation of actions were also raised and these will also be dealt with below.

7 More generally (and as already alluded to with regard to the issue of novation (above at [5])), whilst it is imperative to be clear about the relevant legal principles that are applicable to the case at hand, it is often the case that these principles are in fact clear and that the real difficulty lies with ascertaining *the precise factual matrix* to which those principles are to be applied. Indeed, as we shall see below, this was the case with regard to virtually all the legal issues raised in the context of the present appeals. More importantly, the many decisions cited by Fairview's counsel were – as a result – of little (if any) significance, save in so far as they illustrated the basic legal principles which were, in our view, clear in any event.

8 With these preliminary observations in mind, let us now turn to the relevant facts.

The facts

9 Although we set out the salient facts in this part of the judgment as far as possible in a chronological fashion, for greater clarity, we would do so in the context of the salient issues raised for decision in the present appeals (as to which see below at [38]).

Parties to the dispute

10 Fairview is a subsidiary of the Tong Eng Group of companies, incorporated as a single asset company to develop Lot 248 Mukim 18, a 40-acre plot of land off Yio Chu Kang Road ("Lot 248"). It was managed by Mr Teo Tong Wah ("TTW") from 1972 until he passed the mantle to his brother, Mr Teo Tong Lim ("TTL"), and another director, Mr Yeap Lam Hai ("YLH") in 1989. TTW passed away in 2007.

11 OOA is an architecture firm founded by Mr Ong Teng Cheong ("OTC") in 1972, which his wife, Mrs Ong Siew May ("OSM") subsequently joined. In 1975, Mr Ong left OOA when he was appointed as a minister in the government and OSM took over the management of OOA. In 1992, OOPL was incorporated. In 1994, the son of OTC and OSM, Mr Ong Tze Boon ("OTB"), joined OOA. In 1996, OSM began to transfer the business of OOA to OOPL. This process was derailed when OSM fell ill in 1997 and passed away in 1999. In 2001, OTC re-joined OOPL. He then passed away in 2002. OOA ceased its operations on 30 April 2001.

Facts pertaining to an agreement allegedly reached in 1983

12 In 1972, Fairview engaged OOA to carry out the necessary works to apply for planning approval to develop the entire Lot 248 as a condominium development. On 6 March 1980, in-principle approval for the development was obtained. Thereafter, OOA made a number of resubmissions to comply with the requirements of the various authorities. Subsequently, because of the high development charge ("DC") levied by the authorities in May/June 1981, Fairview decided to develop Lot 248 in phases instead of as one single large development.

13 Fairview confirmed this change of plans to OOA by way of a letter dated 5 April 1982 ("the 5 April 1982 Change of Plans Letter"). For ease of reference, the work done by OOA since its engagement in 1972 until the 5 April 1982 Change of Plans Letter will be referred to herein as "the Early Abortive Works".

14 There were a few key pieces of documentary evidence pertaining to the issue of OOA's fees for the Early Abortive Works. The first is a handwritten note by OSM dated 23 August 1982 ("OSM's Handwritten Note #1") stating as follows:

> Fairview 23-8-82
>
> Discussion [with] [TTL]/[TTW] on 21-8-82 in [OOA's] office & agreed as follows:-
>
> Architectural/Eng structural 5.45%
>
> Architectural only 4.5%
>
> If [OOA] continue to be [architect] for the whole [development] irrespective of the various phases and [OOA] will charge the abortive work not entirely based on fee % but a reasonable lump sum fee.

TTL, the only surviving party to the meeting referred to in OSM's Handwritten Note #1, testified that he had no recollection of such a meeting.

15 The second document is another handwritten note by OSM dated 14 September 1982 at the back of an envelope estimating the charges for the work done up to the stage of in principle permission calculated at 4.5% of the construction costs ("OSM's Handwritten Note #2"). It reads as follows:

Fairview	
Proposed Density	174 pph
Total population	2815 persons
@ 5ppu	563 units
A. Net floor area as per plan approved subject to [development] charge	76,388.75 m^2 821,942.95 ft^2
B. Gross [floor] area	99,296.07 m^2 1,068,425.70 ft^2
Estimated Project Cost:	
@ $135 of Net [floor] area	$110.9 [million]
⅓ Fee based on 4½%	$1,663,500

16 The third document is a third handwritten note by OSM dated 17 May 1983, recording as follows ("OSM's Handwritten Note #3"):

Agreed @ $450,000/- subject to further confirmation by Teo Tong Wah. This is to confirm that all the 5 proposed condominium [developments] will be by [OOA], otherwise Fee scale instead of $450,000/- will apply.

Above these words were some calculations resulting in the figure of $600,000 for the Early Abortive Works.

17 The first formal correspondence between the parties on the subject of OOA's fees for the Early Abortive Works was a letter from Fairview to OOA dated 7 June 1983 and signed by TTW stating as follows:

…

Re: Proposed Condominium Development on Lot 248 Mk 18

We refer to the discussion between your Mdm Ong and the undersigned on the reduction of fees charged by you for drawing up and submitting for approval various abortive schemes of development for the abovementioned property. Consequent upon the discussion we now enclose our cheque for $250,000/-.

In view of the fact that you will continue to be our Architects for a new scheme of development for the said property, we hope that you will accept this sum as full settlement of your fees for the aborted schemes as earlier mentioned.

We also take this opportunity to formally instruct you to draw up a fresh scheme for submission to the Competent Authority for an in-principle planning approval in the shortest possible time. In the event of the fresh scheme being disapproved your fees will be based on a quantum meruit. In the event of approval, and as agreed, your fees will be 4½% of the total construction costs (excluding other consultants' fees) the mode of payment of which can be further discussed on obtaining in-principle planning approval.

…

For ease of reference, the agreement between OOA and Fairview (for the former to be the latter's architect for the entire development of Lot 248) alleged by OOPL to be evidenced in this letter will be referred to hereafter as "the 1983 Agreement".

18 OSM replied on behalf of OOA on 26 November 1983 stating as follows:

…

PROPOSED CONDOMINIUM HOUSING DEVELOPMENT ON LOT 248 PT MK XVII OFF ANG MO KIO AVENUE 5, SELETAR ROAD

Having received your payment of $250,000/- on 8/6/83 we have gone through once again our timesheets to cross-check what is the actual cost incurred by us on this project since 1972.

Our checking shows that cost on time basis is also higher than the amount you have offered to pay us. We therefore wish to seek further discussion with you on this subject.

We enclose our receipt for the $250,000/- received and apologise for the delay.

You would have noted that we have not attempted to claim fee on percentage basis for the last submission although it has reached the final stage of planning approval subject only to payment of Development Charge. This is because you have given us your verbal assurance that we will continue to be the architect for the whole 40 acres site regardless of whether it is developed in part or in whole.

…

19 Thereafter, Fairview used OOA's services to develop Lot 248 in stages. Phase 1 and Phase 2 of the development were completed in August 1992 and August 1995, respectively.

Facts pertaining to the basis of OOA's architectural fees

20 On 5 March 1993, OSM wrote on behalf of OOA to Fairview stating as follows:

…

PROPOSED HOUSING DEVELOPMENTS ON LOT 248 MK 18 AT NIM GREEN OFF SELETAR ROAD

We refer to the meeting we had this morning ([TTW], [TTL] and [OSM]) and record below the agreement reached on our fee for the above site:

i)	Phase I development	: 4.5% of project cost
ii)	Phase II development	: 4.5% of project cost
iii)	Phase III development	: 4.25% of project cost
iv)	subsequent phases	: 4.0% of project cost

…

For ease of reference, the agreement with respect to architectural fees mentioned in this letter will be referred to herein as "the 1993 Agreement".

21 About three years later, on 6 May 1996, OOA wrote to Fairview stating as follows:

…

5. In view of the current status of the project and the present difficulties faced, your [TTW] and [TTL] have made the following commitments and instructions:

(i) [OOA's] professional fee for the services of the entire development site will remain at 4.5% throughout. This professional fee of 4.5% of the final construction cost will not be subject to any reduction as have been done previously by owner in 1993. The mode and time of payment will be based on the SIA standard and will be paid promptly by owner once received.

…

[underlining in original]

22 Fairview replied on 11 May 1996 referring to the above letter and stating "we confirm our

acceptance of the terms".

Facts pertaining to the alleged novation of the alleged 1983 Agreement

23 On 3 April 2001, under OOA's letterhead, OTC and OTB signed and sent the following letter to Fairview in relation to OOPL's succession of OOA ("the 3 April 2001 Succession Letter"):

> …
>
> ONG & ONG ARCHITECTS (OOA) AND ITS SUCCESSOR, ONG & ONG ARCHITECTS PTE LTD (OOAPL)
>
> Ong & Ong Architects (OOA) was established in 1972 as a professional partnership firm.
>
> In line with Government Policy in encouraging professional firms to expand and reach out, Ong & Ong Architects Pte Ltd (OOAPL) was incorporated and came into operation in July 1996 with the objective to succeed OOA eventually as part of the streamlining.
>
> The succession and streamlining process was halted when Mrs Ong, the principal partner was taken ill in early 1997. She eventually succumbed to her illness in mid-1999.
>
> Now that the arrangement between OOAPL and OOA has been finalized, we plan to cease the operations of OOA with effect from April 30, 2001. Henceforth, OOAPL will succeed OOA and will handle and manage all OOAPL and OOA projects and billings. There will be no change to the organizational set-up. The people in both companies are the same. Mr Ong Teng Cheong and Mr Ong Tze Boon who are Partners of OOA are also major shareholders of OOAPL.
>
> We hope you have no objection to our plan to allow OOAPL to succeed OOA. If you wish, we will be very happy to meet and explain to you personally of this succession matter.
>
> …

24 On 27 April 2001, TTL and YLH replied on behalf of Fairview that it had "no objection to [OOA's] plan to let [OOPL] succeed [OOA]".

Facts pertaining to the Later Abortive Works and the termination of OOPL

25 Prior to the exchange of letters in April 2001, OOA undertook the following work for Phase 3 of the development of Lot 248 ("the Phase 3 Abortive Works"):

(a) 121 units of conventional housing development for which submission for Provisional Permission ("PP") was made on 10 June 1993;

(b) 310 units of conventional housing development for which submission for PP was made on 13 July 1994;

(c) 310 units of conventional housing development for which PP was obtained on 4 July 1997; and

(d) 239 units of conventional housing development for which Written Permission ("WP") was obtained on 21 July 2000.

26 In November 2000, after obtaining the WP for *conventional* housing mentioned above at

[25(d)], Fairview instructed OOA to do works for *cluster* housing as it wanted to consider that option as well. Meanwhile, Fairview obtained a two-year extension of the conventional housing WP and OOPL took over as the architect. Fairview eventually decided to proceed with cluster housing for Phase 3 and the conventional housing works were thus aborted (*ie*, the Phase 3 Abortive Works). The main Phase 3 was completed in 2003, while Phase 3a and Phase 3b were completed in March 2009 and April 2009, respectively.

27 In addition, OOA and/or OOPL also undertook the following works for Phase 4 pursuant to Fairview's instructions ("the Phase 4 Abortive Works"):

(a) 353 units of cluster housing development for which schematic design was produced in 2000;

(b) 344 units of cluster housing development for which schematic design was produced in 2000; and

(c) 108 units of cluster housing development for which PP was obtained on 23 July 2002.

28 On 6 February 2004 and 1 August 2004, OTB on behalf of OOPL wrote to Fairview asking for Fairview's decision as to whether to proceed with conventional or cluster housing for Phase 4. On both occasions, Fairview did not make a decision.

29 On 1 October 2009, Fairview wrote to OOPL to terminate its services and asked for a letter of release ("LR") ("the 1 October 2009 Termination Letter"). No reason for the termination was cited in this letter. In response to this, OOPL made some attempts to discuss the matter with Fairview. On 3 November 2009, Fairview replied declining to meet OOPL and reiterated its request for the LR along with a new request for OOPL's invoice for work done to date. On 18 November 2009 and 3 December 2009, Fairview repeated its requests for OOPL's invoice as well as the LR. Both times, OOPL replied requesting for more time to go through the voluminous documents.

30 On 18 December 2009, Fairview sent a Letter of Demand to OOPL copied to the Board of Architects ("BOA") giving OOPL 14 days to provide the LR on Fairview's undertaking to pay "such reasonable fees as [OOPL is] entitled to, for all work done to date in relation to the above project". On 21 December 2009, OOPL gave its commitment to submit its claims by end April 2010. On 30 December 2009, Fairview stated that it did not know that there were still outstanding fees and requested the BOA to order OOPL to give its estimate of such fees so that Fairview could furnish the necessary security to obtain the LR.

31 After further exchanges of letters, on 28 January 2010, OOPL estimated that Fairview owed it $6,512,158.80 in loss of profits and $9.888 million in professional fees. On 1 March 2010, Fairview denied that OOPL was entitled to claim for loss of profits and contested the estimate of OOPL's professional fees as being only $703,551.50 without prejudice to its defence that the OOPL's claim was time-barred. Subsequently, there were further exchanges of letters and the BOA appointed a committee to resolve the matter. On 17 May 2010, the BOA wrote to the parties fixing the security at $3.3 million. On 24 May 2010, the BOA confirmed receipt of a banker's guarantee for this sum. On 31 May 2010, OOPL issued the LR.

Summary of pleadings

32 OOPL claimed for: (a) loss of profits of $5,626.653.31 (or alternatively, damages to be assessed) arising from what it alleged was Fairview's wrongful termination of its services; and (b) fees

of $4,511,474.97 (or alternatively, damages to be assessed) for the Phase 3 Abortive Works and Phase 4 Abortive Works (collectively, "the Later Abortive Works"). Fairview counterclaimed for damages arising from OOPL's delay in issuing the LR.

The decision in the court below

33 The proceedings below were bifurcated, so that the trial below was confined to issues of liability. The Judge first *dismissed* OOPL's claim for wrongful termination. He found that OOA and Fairview had arrived at an agreement in 1983 for OOA to be the architect for the development of the *entire* Lot 248 ("the 1983 Agreement") (see the Judgment at [12]–[13]). However, this was found not to have been novated to OOPL (see the Judgment at [22]–[29]).

34 Next, the Judge *allowed* OOPL's claim for the Later Abortive Works. He found that parties would have construed the 3 April 2001 Succession Letter to mean that: (a) OOPL would be entitled to payment from Fairview instead of OOA in respect of works already completed by OOA; and (b) OOPL undertook to complete the outstanding works and Fairview would pay OOPL according to the terms earlier agreed between Fairview and OOA (see the Judgment at [17]–[21]). The Judge further held that there was an implied term that the basis of payment for the Later Abortive Works would be on a *quantum meruit* basis (see the Judgment at [40]–[47]). The right to payment for the Later Abortive Works accrued when Fairview issued the 1 October 2009 Termination Letter. Since this was within the statutory limitation period of six years, the defence of time-bar did not apply (see the Judgment at [48]–[51]).

35 Finally, the Judge *dismissed* Fairview's counterclaim for damages arising from OOPL's delay in issuing the LR. He found that the four months that OOPL took to render its bill was not unreasonable (see the Judgment at [59]). Even if three months was the reasonable period, Fairview would still have failed to show causation (*ibid*). Furthermore, Fairview had failed to mitigate its damages (see the Judgment at [60]).

The parties' cases

36 Fairview filed CA 51 against the Judge's decision that it is liable in respect of the Later Abortive Works. It should be noted that Fairview's appeal in CA 51 was confined to OOPL's claim below; Fairview did *not* appeal against the Judge's dismissal of its counterclaim.

37 OOPL filed CA 52 against: (a) the Judge's dismissal of its claim for wrongful termination; and (b) the Judge's assessment of its damages for the Later Abortive Works on a *quantum meruit* basis.

The issues

38 Due to the overlap in issues between CA 51 and CA 52, we will deal with the substantive issues in a composite manner and in the following order:

(a) Issue 1: OOPL's claim for wrongful termination:

(i) Whether the alleged 1983 Agreement existed;

(ii) If the answer to (i) is in the affirmative, whether the 1983 Agreement had been novated to OOPL;

(iii) If the answer to (ii) is in the affirmative, whether there had been wrongful

termination of the 1983 Agreement; and

(iv) If the answers to (i)–(iii) are in the negative, whether there was nevertheless a wrongful termination of OOPL's engagement to develop the remaining undeveloped land on Lot 248.

(b) Issue 2: OOPL's claim for the Later Abortive Works:

(i) Whether OOA's entitlement to fees for its portion of the Later Abortive Works was novated to OOPL;

(ii) Whether the quantum of the Later Abortive Works should be assessed on a *quantum meruit* basis;

(iii) Whether OOPL's claim for the Later Abortive Works had been time-barred under the Limitation Act (Cap 163, 1996 Rev Ed) (hereinafter referred to as "the Limitation Act" or "the Singapore Limitation Act" as the context requires).

Our decision on Issue 1

39 We first turn to set out the reasons why we allowed OOPL's claim against Fairview for wrongful termination.

The existence of the 1983 Agreement

40 As alluded to earlier, the Judge found that the 1983 Agreement for Fairview to retain OOA as the architect for the development of the *entire* Lot 248 existed (see the Judgment at [12]–[13]). In brief, this was firstly because the Judge found that there was a valid offer by Fairview to retain OOA as the architect for the development of the entire Lot 248 as evidenced by OSM's Handwritten Note #1 (reproduced above at [14]), OSM's Handwritten Note #3 (reproduced above at [16]), Fairview's letter dated 7 June 1983 (reproduced above at [17]) and OOA's letter dated 26 November 1983 (reproduced above at [18]). This offer was accepted by OOA in consideration of $250,000 as full settlement of the fees for the Early Abortive Works. The 1983 Agreement was also found to be sufficiently certain.

41 On appeal, Fairview argued that the only agreement reached in 1983 in consideration of the discount for the Early Abortive Works was for Fairview to appoint OOA for Phase 1 *only*, and not for the entire development of Lot 248. It was submitted that even up to the time of OSM's Handwritten Note #3 dated 17 May 1983 (reproduced above at [16]), OOA did not have the assurance that it would be engaged for the entire development. No agreement for OOA to be the architect for the entire development was reached by Fairview's letter dated 7 June 1983 (reproduced above at [17]). Otherwise, Fairview argued, OOA would not have sought further discussion on the $250,000 and suddenly refer to a verbal assurance that OOA would continue to be the architect for the entire development in its letter dated 26 November 1983 (reproduced above at [18]). The "new scheme of development" and the "fresh scheme" referred to in Fairview's letter dated 7 June 1983, Fairview submitted, referred *only* to Phase 1 of the development. It was also argued by Fairview that in OOA's letter dated 26 November 1983, OOA was actually seeking to be the architect for more than just Phase 1. In addition, Fairview argued that its "verbal assurance" that "[OOA] will continue to be the architect for the whole 40 acres site regardless of whether it is developed in part or in whole" that was recorded in that letter was not intended to create legal relations. Neither was this verbal assurance supported by consideration since OOA's discount for the Early Abortive Works was given

5 months *before* this verbal assurance. In accordance with Fairview's case that the only agreement reached between the parties pertained to Phase 1 only, it was also submitted that OOA's letters dated 5 March 1993 (reproduced above at [20]) and 6 May 1996 (reproduced above at [21]) merely set out OOA's fees *if* it (OOA) were to be retained for other phases of the development.

42 We were unable to accept Fairview's arguments. Turning first to Fairview's 7 June 1983 letter (reproduced above at [17]), the reference to the "new scheme of development" and "fresh scheme" should, as we had highlighted at the outset, be objectively construed, not just on its *text*, but also in its *context*. It would be recalled that the parties' original plan all along was for OOA to be the architect of the *entire* Lot 248, developed as a single development. It was because of the high DC and the prevailing market conditions that Fairview decided to proceed with phased development *in lieu of* a single development. Having regard to this context, it would be extremely artificial to interpret the phrases "new scheme of development" and "fresh scheme" as referring to Phase 1 only. Clearly, on an objective (and contextual) view, Fairview had, in the discussions referred to in its letter dated 7 June 1983, offered to retain OOA as the architect for the *entire* development of Lot 248. This offer, as the Judge rightly found, was accepted by OOA in (sufficient) consideration of a reduced sum of $250,000 in full settlement of the Early Abortive Works. The mere fact that the representatives of OOA and Fairview dealt with each other on a somewhat informal basis, had goodwill, and knew each other personally, did not detract from the inexorable fact that the parties were essentially dealing with each other on a *commercial* basis with an undoubted intention to create legal relations.

43 Even if the 7 June 1983 letter did not exist, we would have had no hesitation in finding that an agreement between the parties for OOA to be the architect for the entire development existed in the form of the verbal assurance that Fairview gave to OOA as referred to in OOA's letter dated 26 November 1983 (reproduced above at [18]). The terms of this verbal assurance could not be clearer – "[OOA] will continue to be the architect for the whole 40 acres site *regardless of whether it is developed in part or in whole*" [emphasis added]. This verbal assurance would not have failed for want of consideration either. Under our local jurisprudence, very little is required to find sufficient consideration in law (see, for example, the Singapore High Court decisions of *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 ("*Chwee Kin Keong*") at [139] (affirmed (but without discussion of this particular point) in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502) and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of WP Architects)* [2007] 1 SLR(R) 853 at [28]–[30] (reversed (but again without discussion of this particular point) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782); the decisions of this court in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [92]–[118] and *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713 ("*Rainforest Trading*") at [38]; as well as the detailed exposition in Koo Zhi Xuan, "Envisioning the Judicial Abolition of the Doctrine of Consideration in Singapore" (2011) 23 SAcLJ 463). Indeed, as this court observed in *Rainforest Trading* (at [38]), "[t]he courts are understandably (and justifiably) reluctant to invalidate otherwise perfectly legitimate and valid commercial transactions on as technical a basis as consideration". In the context of Fairview's verbal assurance, the mutual exchange of promises would have been sufficient consideration (see *Chwee Kin Keong* at [139]). And, as mentioned in the preceding paragraph, the parties had clearly intended to create legal relations.

44 For the reasons set out above, we affirmed the Judge's finding that the 1983 Agreement existed. We now turn to the issue of whether the 1983 Agreement (which was between Fairview and OOA) had been novated to OOPL in 2001.

The novation of the 1983 Agreement

45 As we stated earlier, the Judge was of the view that the 1983 Agreement had *not* been novated to OOPL (see the Judgment at [22]–[30]). The key points of his reasoning were as follows. First, OOA's 3 April 2001 Succession Letter (reproduced above at [23]) stating that OOPL would "succeed OOA" and "handle and manage all … OOA projects and billings" could not reasonably be construed to include the 1983 Agreement. There was no direct or indirect reference to the 1983 Agreement. The 1983 Agreement was neither necessary nor was there any evidence that contracts such as this were the norm in the engagement of architects. In the absence of clear words, TTL and YLH could not be fixed with the knowledge of the 1983 Agreement (which was essentially an oral one) since TTL was not directly involved in the 1983 Agreement and YLH was not involved at all. Second, the Judge was of the view that there was no consideration provided for the alleged novation. The Judge reasoned that the present situation which entailed Fairview living with the services provided by OOPL instead of OOA was different from a debt situation in which there would be no difference between paying money to one party or another. Therefore, the mere discharge of Fairview from its obligation to retain OOA as the architect for the entire Lot 248 development did not, in the Judge's view, constitute consideration for the novation flowing from OOPL to Fairview.

46 We respectfully disagreed with the Judge's finding that the 1983 Agreement had not been novated to OOPL. To explain why, it would be useful to first briefly review the governing legal principles on novation. The term "novation" refers to the process by which the contract between the original contracting parties is *discharged through mutual consent* and *substituted with a new contract* between the new parties. A novation is therefore to be distinguished from an *assignment*. In a novation, *both the benefits and the burdens* of the original contract are transferred to the *new contracting parties*, essentially because, as just mentioned, the original contract is extinguished and a new contract is formed. And, as Lord Selborne LC observed in the House of Lords decision of *Benjamin Scarf v Alfred George Jardine* (1882) 7 App Cas 345 (at 351), the new contract can, of course, be either between the same parties to the original contract or between different parties. The learned Law Lord also referred (*ibid*) to the term "novation" as being one derived from the Civil Law (*cf* also the doctrine of frustration) as well as to the fact that the necessary (and sufficient) consideration consists in the discharge through mutual consent of the original contract. In an assignment, however, *only the benefits of the contract* are transferred to the assignee. The assignor remains bound to perform the obligations under the contract. The assignee does *not* become a party to the contract, which continues to subsist as between the contracting parties. Accordingly, in an assignment, the consent of the other contracting party is *not* necessary for a contracting party to assign the benefits under the contract to a third party. All these legal principles are well-established (see, for example, Andrew Phang Boon Leong & Tham Chee Ho, "Exceptions to the Rule of Privity" in *The Law of Contract in Singapore* (Academy Publishing, 2012) (Andrew Phang Boon Leong gen ed) ("*The Law of Contract in Singapore*") ch 15 at paras 15.059–15.067 and *Chitty on Contracts Vol 1* (Sweet & Maxwell, 31st ed, 2012) ("*Chitty on Contracts*") at para 19-086).

47 The determination of whether there has *in fact* been a novation turns on the ordinary principles of contractual interpretation. The reality is that there is often more than one immutable meaning to words, and *a fortiori*, to phrases (see the decision of this court in *Bakrie* at [1]–[3]). When faced with rival meanings, the court must, in carrying out its role of giving effect to the objective intentions of the contracting parties, consider the relevant contractual, contextual and commercial background against which the document containing the disputed words and phrases came about. This can be summed up in the fundamental principle referred to above (at [4]), *viz*, *text and context* (and on the concept of context, see generally J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) at chs 6 and 7).

48 In the present case, it was evident to us that there was only *one* reasonable interpretation of the 3 April 2001 Succession Letter. By this letter, OOA had sought Fairview's consent for OOPL to

step into its shoes, including (not surprisingly) the 1983 Agreement. And Fairview's reply on 27 April 2010, objectively construed, was an unequivocal acceptance of such a novation. In our respectful view, the Judge adopted too narrow an approach by focussing too much on the phrase "handle and manage all [OOPL] and [OOA] projects and billings" in the 3 April 2001 Succession Letter (see the Judgment at [23]). The important principle of construing *both* text and context was not, with respect, applied comprehensively – with the focus being more on the former rather than the latter when, in fact, both constituted part of an integrated whole. To that end, regard should also have been given to the other portions of the 3 April 2001 Succession Letter, specifically, the references to: (a) the "succession" of OOA by OOPL as part of OOA's "streamlining" plans; (b) the notice that OOA would cease operations with effect from 30 April 2001; and (c) the fact that there would be "no change to the organisational set-up". Having regard to the 3 April 2001 Succession Letter in its *entirety* against the backdrop of its *context*, we did not see how this letter could reasonably be construed in any other way other than that *OOPL was to take over OOA entirely – lock stock and barrel*. OOA's intention for such a *wholesale* succession was so clear and certain that we could not see how the absence of a specific reference to the 1983 Agreement could be significant.

49 To that end, it mattered not that TTL and YLH, who were Fairview's directors at the material time of the succession, did not know about the 1983 Agreement. It bears reiterating that the court gives effect to the intentions of the contracting parties, *objectively* ascertained. The lack of personal knowledge on the part of individual directors is not a valid reason to defeat a commercial transaction entered into by the company. We noted that Fairview's instructed counsel in their written and oral submissions agreed with the trite legal proposition that a contract is to be construed *objectively*. It therefore seemed incongruous that such an argument was still canvassed before us. We mention this because this was not the only instance where a party's *subjective* intention was used to buttress Fairview's case on the *objective* interpretation of a contract (see below at [64]).

50 Having found that there was an agreement between Fairview and OOPL for the latter to step wholly into OOA's shoes, we now turn to the issue of whether that agreement was supported by consideration. The arguments presented below and on appeal centred mainly on the analysis of the following legal proposition as set out in *Chitty on Contracts* (at para 19-088) that:

> … If A owes B money and both parties agree with C that C, not A, is to pay the money to B, B provides consideration for C's promise to pay him by agreeing to release A; while A provides consideration for B's promise to release him by providing the new debtor, C.

At [25] of the Judgment, the Judge pointed out that, since Fairview was obliged to appoint OOA as the architect for the entire development under the 1983 Agreement, Fairview was the debtor (A) and OOA was the creditor (B), not the other way round as OOPL contended. The Judge further pointed out that OOPL (C) was procured not to stand in the place of the debtor Fairview (A) but in the place of the promisee OOA (B). The Judge's attempts to analogise the present facts to the example set out in the preceding paragraph appeared to us to be unnecessary.

51 In finding that OOPL did not furnish sufficient consideration for the novation, the Judge reasoned that the novation would fail for lack of consideration because the present situation was unlike a debt situation where it mattered not who was servicing the debt. In this regard, the Judge pointed out: (a) the difference in corporate structure (OOPL being a limited liability company as opposed to OOA which was a partnership); and (b) issues of the quality of the architectural services now to be provided by OOPL. With respect, the Judge, in so reasoning, had erroneously ventured into the issues of the *adequacy* of the consideration. Such an approach was contrary to the general principle that the courts will only consider the *sufficiency* of the consideration and not the relative merits of the bargains that the parties had contracted for. As it is oft said, consideration need not be

adequate so long as it is *sufficient.* In this regard, the following observations by Assoc Prof Lee Pey Woan are apposite (see Lee Pey Woan, "Consideration" in *The Law of Contract in Singapore*, ch 4 at paras 04.023–04.025):

> Consideration must be sufficient but need not be adequate. Although the terms "sufficient" and "adequate" are often used interchangeably in ordinary parlance, they denote different meanings in the present context. Here, the term "sufficient" is synonymous with "*legal* validity". Hence, the phrase "consideration must be sufficient" is often explained as requiring that consideration be of some value *in the eyes of the law*. However, once an act or forbearance is deemed sufficient or valid consideration at law, it is *not* necessary to show that such consideration is also *adequate*, *ie*, that it has a value that is comparable to the value of the promise. ***The rationale for this rule lies in the belief that contracting parties are perfectly able to assess the merits of their own bargains; the role of the court is to ascertain whether a bargain has been made but not whether it is a good bargain.*** Hence if *A* agrees to sell his car to *B* for $20,000 when it in fact has a market value of $50,000, *B*'s payment of $20,000 is undoubtedly good or sufficient consideration even if it may not be a fair price for *A*'s car. A more extreme example can be found in *Chappell & Co Ltd v Nestlé Co Ltd*, where it was held that even used chocolates wrappers which were discarded on receipt could constitute sufficient consideration for the sale of records.
>
> Sometimes, however, a grossly inadequate consideration may indicate that the promisor did not willingly consent to a bargain but was in fact coerced or improperly influenced into such agreement. In such situations, the contract may be set aside on the ground of duress or undue influence.
>
> Generally, any consideration in monetary terms or which by its nature may readily be expressed or measured in economic terms is regarded as sufficient in the eyes of the law. Hence, in the vast majority of commercial contracts, under which parties furnish consideration in the form of monetary payments, or the provision of goods or services the value of which can readily be measured by reference to market prices, the sufficiency of consideration is not in doubt. Where such "price-tags" cannot be readily affixed to the consideration in question, the task of identifying consideration becomes more difficult.
>
> [footnotes omitted; emphasis in italics in original; emphasis added in bold italics]

Further, as we had earlier pointed out above at [43], very little is needed to find sufficient consideration.

52 For these reasons, we found that the 1983 Agreement had been novated to OOPL. We now turn to the issue of whether this agreement had been wrongfully terminated by Fairview.

Wrongful termination of the 1983 Agreement

53 The Judge below dismissed OOPL's claim for wrongful termination of the 1983 Agreement on the basis that the 1983 Agreement had not been novated to it (see the Judgment at [39]). It was not clear whether the Judge had impliedly decided the issue of wrongful termination in OOPL's favour and would have allowed its claim if not for the fact that (as the Judge held but with whose holding we have disagreed) OOPL had failed to prove that the 1983 Agreement had been novated to it.

54 On appeal, OOPL sought to invite this court to imply a term into the 1983 Agreement that an architect has the right and duty to act as the architect of a project until its completion in the absence of express terms to the contrary. In this regard, OOPL relied on Nicholas Dennys, Mark

Reaside and Robert Clay gen eds, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 12th ed, 2010) at paras 2-018 and 2-139 and Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 9th ed, 2012) at para 14-062 as authority for this argument.

55 Fairview, on the other hand, contended that there was no basis to imply such a term into the 1983 Agreement as it was onerous and not necessary to give business efficacy to the 1983 Agreement. Instead, all that was required to give the 1983 Agreement business efficacy was an implied term that the 1983 Agreement could be terminated upon reasonable notice, this being consistent with contracts of service in general. Fairview also relied on the Singapore High Court decision of *Chung Meng Soon and Others v Lee Kai Investment (Pte) Ltd* [1993] SGHC 26 ("*Chung Meng Soon*") for what it perceived was the proposition to the effect that that it is an implied term of an employer's engagement of an architect that the standard conditions of the Singapore Institute of Architects ("the SIA Conditions") applied, because architects in Singapore invariably adopt the SIA Conditions. Consequently, Fairview also relied on cl (j) of the SIA Conditions of Engagement in the *Singapore Institute of Architects Yearbook 1983* ("the SIA Conditions 1983") at p 75 which provided that:

> … An engagement entered into between the architect and the client may be terminated at any time by either party upon reasonable notice being given.

As for what "reasonable notice" entails, Fairview relied on cl 1.29 of the Singapore Institute of Architects Conditions of Appointment and Scale of Professional Charges 1985 ("the SIA Conditions 1985") and its successor provisions for the proposition that one month's notice would suffice.

56 Proceeding on the basis referred to in the preceding paragraph, Fairview further submitted that its failure to give OOPL one month's notice did not render such failure a repudiatory breach. Fairview argued that, at the most, OOPL should only be entitled to claim damages for non-compliance with the notice clause, which in this case would be nominal as OOPL did not suffer any loss as a result of the non-compliance. Fairview also argued that OOPL had waived its right to claim damages for such non-compliance as OOPL did not raise this in its correspondence nor did it plead such damages.

57 In our view, the arguments presented by *both* parties, with respect, were off the mark. This issue could and should be resolved by reference to the *express* terms of the 1983 Agreement instead of resorting to implied terms. It will be recalled that the essence of the 1983 Agreement was that OOA (and because of the novation, also OOPL) was to be the architect for the *entire* development of Lot 248. Put another way, the 1983 Agreement itself had already *expressly* provided that OOA/OOPL could *not* be terminated as the architect for the development of Lot 248 without just cause. That being the case, Fairview clearly had no right under the terms of the 1983 Agreement to terminate OOPL's services in the manner that it did. The conclusion that inexorably followed was that Fairview's termination was wrongful. Given our views on this issue, it was not necessary for us to consider OOPL's alternative argument that Fairview had wrongfully terminated OOPL's engagement to develop the remaining undeveloped land on Lot 248. We would also add, parenthetically, that we did not agree with the manner in which Fairview's counsel sought to rely on *Chung Meng Soon* to establish its case on implied terms.

Conclusion on Issue 1

58 In the circumstances, we allowed OOPL's appeal and found Fairview liable for OOPL's loss of profits arising out of the remaining undeveloped land. This, however, is to be assessed by the Registrar hearing the assessment of damages taking into account our decision on Issue 2 and the

principle that there should be no double recovery.

Our decision on Issue 2

59 We now turn to set out our reasons as to why we also allowed OOPL's claim for the Later Abortive Works.

Novation of OOA's entitlement to fees

60 It would be recalled that part of OOPL's claim for the Later Abortive Works encapsulated work done by OOA (see above at [25] and [27]). It is evident from [20] of the Judgment that the key factor that weighed in the Judge's decision that OOA's entitlement to its fees had been novated to OOPL was the phrase "[OOPL] will succeed OOA and will handle and manage all [OOPL] and OOA projects and billings" in the 3 April 2001 Succession Letter (set out above at [23]). The Judge was of the view that OOA and Fairview would have construed that to mean that from that particular point in time, OOPL, instead of OOA, would be *entitled* to the outstanding payment from Fairview.

61 On appeal, Fairview argued that this particular phrase in the 3 April 2001 Succession Letter evinced an intention on the part of OOA to allow OOPL to *collect* OOA's fees only, as opposed to an intention on the part of OOA to novate to OOPL its *entitlement* to its fees. Fairview argued that, from OOA's perspective, it would not have been commercially sensible for it to have given up its right to its fees. There was also no evidence of consideration provided by OOPL or evidence that OOPL had agreed to be liable to Fairview for OOA's breaches and/or negligence. It was further argued that, from *Fairview's* perspective, it would not have made commercial sense for it to agree to give up its right to claim against individual partners of OOA and agree to only claim against OOPL, a private limited company. TTL also gave evidence that he would have disagreed to such a novation because he would have had concerns about tax consequences.

62 We were unsympathetic to Fairview's arguments for a variety of reasons. First and foremost, we have earlier explained (see above at [46]–[52]) that the 3 April 2001 Succession Letter and Fairview's acceptance of it evinced an agreement between the parties for OOPL to *completely* step into OOA's shoes. We would further point out, in this specific context of the novation of the entitlement to OOA's fees, that if OOA had only intended for OOPL to be an agent to collect OOA's fees, Fairview's consent would not have been necessary. Moreover, a mere *assignment* of OOA's right to OOPL, which as pointed out above (at [46]) would not require Fairview's consent, would have sufficed to transfer this benefit to OOPL. The *context* of the 3 April 2001 Succession Letter was also highly significant. It bears reiterating that, at the material time, OOA was undergoing streamlining and its operations were to cease shortly thereafter; the change in entities was merely a change in form and not substance. It was commercially absurd to contend that OOA was prepared to let its legal rights to its outstanding fees fade away into a legal black hole.

63 Next, since the issue of lack of consideration was not challenged by Fairview at the proceedings below, it did not lie in its mouth to now seek to rely on the alleged absence of any evidence of consideration provided by OOPL for such a novation. Matters of evidence aside, we very much doubted Fairview's ability to convince us that the novation should fail for lack of consideration. As we have earlier pointed out (see above at [43]), very little is needed to find consideration.

64 Finally, as we had earlier pointed out (see above at [49]), Fairview's reliance on TTL's purported concerns about tax consequences in aid of its case that there could not have been an agreement for OOA's entitlement to fees to be novated to OOPL was ultimately irrelevant in the context of the objective assessment of the parties' intentions.

65 For these reasons, we affirmed the Judge's finding that OOA's entitlement to fees in respect of its share of the Later Abortive Works had been novated to OOPL. It followed that it was not necessary for us to determine the factual dispute as to the exact delineation between works done by OOA and OOPL respectively. We held that OOPL is entitled to fees in respect of *all* of the Later Abortive Works, regardless of whether it was OOA or OOPL who performed them.

The computation for the Later Abortive Works

66 The Judge held (at [40]–[47] of the Judgment) that OOPL should be entitled to claim for the Later Abortive Works on a *quantum meruit* basis, and not on a percentage fee basis. He took into account the evidence provided by the experts that, ordinarily, if a project proceeds to construction, the architect would be entitled to fees charged according to a percentage of the construction costs. If, however, a project is aborted and this was because of a wrongful termination by the client concerned, then the architect would be entitled to damages assessed on the basis of his loss of profits. On the other hand, if the project is aborted but this was not because of any wrongful termination by the client, then the damages that the architect would be entitled to would depend on the specific term in question. Since the termination of the 1983 Agreement by Fairview was not wrongful and there was no express term governing remuneration for abortive works, the Judge implied the term that the fees for the Later Abortive Works should be assessed on a *quantum meruit* basis. Such a basis of assessment was, in the Judge's view, consistent with the parties' course of dealing, in particular: (a) the $250,000 paid by Fairview for the Early Abortive Works; and (b) Fairview's letter dated 7 June 1983 in which it was stated that "[i]n the event of the fresh scheme being disapproved [OOA's] fees will be based on a quantum meruit".

67 OOPL appealed against the basis of computation used by the Judge and urged us, instead, to find that OOPL's claim for the Later Abortive Works should be calculated on a *percentage* basis according to the terms of the 7 June 1983 letter and the 1993 Agreement (reproduced above at [20]). OOPL first submitted that the *quantum meruit* basis referred to in Fairview's letter dated 7 June 1983 applied only to works that had been aborted because of disapproval from the relevant authorities, and not to works that had been aborted as a result of Fairview's own accord. OOPL further argued that it was clear from the parties' conduct that they had intended to abide by the 1993 Agreement. In May 1996, Fairview paid for abortive works carried out by OOA at 4.5% of the construction costs ("the 1996 4.5% Payment"). Furthermore, Fairview had applied the fee structure that was set out in the 1993 Agreement in its computation of fees for the Later Abortive Works in its letter to the BOA dated 1 March 2010.

68 In response to OOPL's arguments, Fairview contended that the 1996 4.5% Payment was merely a one-off event. It was undisputed that when OOPL later attempted to charge 4.25% of construction costs for other abortive works in its letter dated 21 September 2001, Fairview disagreed and offered OOPL $50,000 taking into account the time costs, which OOPL eventually accepted ("the 2001 $50,000 Payment"). In so far as Fairview's percentage computation in its letter to the BOA dated 1 March 2010 was concerned, Fairview urged us to consider that against the factual context at the material time. In particular, Fairview pointed out that it was merely trying to do what was necessary to furnish the necessary security to obtain the LR, and it had expressly stated that the computation was done on a without prejudice basis. Fairview further argued that the SIA Conditions applied, and that under these conditions, the works set out above at [27(a)] and [27(b)] were considered as Preliminary or Additional Services, not Basic Services, and thus should be remunerated on a *quantum meruit* basis.

69 Having considered the parties' arguments, we respectfully disagreed with the Judge's finding. We found, instead, that the Later Abortive Works should be calculated on a *percentage* basis. Let us

elaborate.

70 First and foremost, the $250,000 lump sum payment for the Early Abortive Works should have been considered in the context of it being a reduced sum accepted by OOA specifically in consideration of the 1983 Agreement. It was evident from OSM's handwritten notes (reproduced above at [14]–[16]) that *prior* to the $250,000 payment, the parties had proceeded on the basis that OOA was entitled to fees for the Early Abortive Works on a *percentage* basis. The relevant extract from OSM's Handwritten Note #1 is set out below:

> Architectural only ***4.5%***
>
> If [OOA] continue to be [architect] for the whole [development] irrespective of the various phases and [OOA] will charge the abortive work ***not entirely based on fee %*** but a reasonable lump sum fee.
>
> [emphasis added in bold italics]

The relevant extract from OSM's Handwritten Note #2 is set out below:

> Estimated Project Cost:
>
> @ $135 of Net [floor] area $110.9 [million]
>
> ***⅓ Fee based on 4½%*** $1,663,500
>
> [emphasis added in bold italics]

The relevant extract from OSM's Handwritten Note #3 is set out below:

> Agreed @ $450,000/- subject to further confirmation by Teo Tong Wah. This is to confirm that all the 5 proposed condominium [developments] will be by [OOA], ***otherwise <u>Fee scale</u> instead of $450,000/- will apply*** . [emphasis added in bold italics and in underlined bold italics]

71 Next, we agreed with OOPL that on a true construction of the 7 June 1983 letter, OOA and Fairview had only agreed that the *quantum meruit* basis was applicable in the event of a scheme being *rejected by the relevant authorities*. The relevant paragraph of the said letter is reproduced below, as follows:

> We also take this opportunity to formally instruct you to draw up a fresh scheme for submission to the Competent Authority for an in-principle planning approval in the shortest time. *In the event of the fresh scheme being* ***disapproved*** *your fees will be based on a quantum meruit.* In the event of approval, and as agreed, your fees will be 4½% of the total construction costs (excluding other consultants' fees) the mode of payment of which can be further discussed on obtaining in-principle planning approval. [emphasis added in italics and in bold italics]

It should be noted that the paragraph quoted above began with Fairview's specific instructions to "draw up a fresh scheme for submission" to *the relevant authorities*. It was only thereafter that Fairview had stated that "[i]n the event of the fresh scheme being *disapproved*" [emphasis added], the fees would be based on a *quantum meruit* basis. Viewed in the *context* of that entire paragraph, it was clear that the parties' agreement with regard to a *quantum meruit* basis extended *only* to works that are aborted because of disapproval from the relevant authorities. The Judge's view that the parties had had a course of dealing of resolving payment for abortive works on a *quantum meruit*

basis even where the reason for the abortion had *nothing to do with disapproval from the relevant authorities* was therefore, with respect, misplaced.

72 In our view, the 7 June 1983 letter evinced, instead, an agreement to the effect that OOPL's fees for *all* works done (*other than* works aborted by virtue of regulatory disapproval) would be paid on a *percentage* basis, specifically, 4.5% of the total construction costs. The significant sentence was that which came after the sentence that the Judge, with respect, erroneously relied on. It stated as follows:

> *In the event of approval, and as agreed, your fees will be **4½%** of the total construction costs* (excluding other consultants' fees) the mode of payment of which can be further discussed on obtaining in-principle planning approval. [emphasis added in italics and in bold italics]

73 This agreement in 1983 was then subsequently *varied* in 1993 pursuant to a meeting between the parties' representatives. It was recorded in OOA's 5 March 1993 letter (see above at [20]) that the parties had agreed that an increasingly lower percentage would be payable for the later phases of development:

i)	Phase I development	:	4.5% of project cost
ii)	Phase II development	:	4.5% of project cost
iii)	Phase III development	:	4.25% of project cost
iv)	subsequent phases	:	4.0% of project cost

Fairview did not point us to any evidence that such a variation had not in fact been agreed to. It should be noted that Fairview's reliance on the 2001 $50,000 Payment and its without prejudice computation in its letter to the BOA dated 21 March 2001 were events that transpired *much later* in time. At best, Fairview could argue that those events constituted a later *further* variation of this agreement (and even then we do not agree (see below at [77]–[79])), but there was no basis to find that a variation had not taken place in 1993.

74 We noted that, in its submissions, OOPL urged us to find that the Later Abortive Works were calculable on a percentage basis, *specifically*, on the figures set out in the 1993 Agreement. This translated to the items set out above at [25(a)]–[25(c)] (being works done in relation to Phase 3) being paid at 4.25% of the construction costs and the items set out above at [25(d)] and [27(a)]–[27(c)] (being works done in relation to Phase 4) being paid at 4% of the construction costs. OOPL did *not* pursue the seemingly higher case that *all* items of the Later Abortive Works were payable at *4.5%* pursuant to a *further* variation of the fee agreement in 1996 as referred to in OOA's letter dated 6 May 1996 (see above at [21]):

> In view of the current status of the project and the present difficulties faced, your [TTW] and [TTL] have made the following commitments and instructions:
>
> (i) [OOA's] professional fee for the services of the entire development site will remain at 4.5% throughout. This professional fee of 4.5% of the final construction cost *will not be subject to any reduction as have been done previously by owner in 1993*. The mode and time of payment will be based on the SIA standard and will be paid promptly by owner once received.

[original emphasis in underlining; emphasis added in italics]

Not only did OOPL not pursue a case based on the above letter, it had actually *denied* the existence of such a variation in its pleadings. Presumably, this was because, in the proceedings below, Fairview had relied on this letter to plead that *inter alia*: (a) the SIA Conditions 1985 applied; and (b) the purported agreement in 1996 constituted a full and final settlement of all works (including abortive works) done by OOA up to May 1996. These arguments, if fully made out, might have had the effect of bolstering Fairview's case that there had been no wrongful termination of OOPL's services and/or that OOPL's claim for the Later Abortive Works was time-barred. We note that Fairview did not pursue these specific lines of arguments on appeal.

75 Notwithstanding the parties' positions on appeal, we were minded to find that the parties' agreement as to OOA/OOPL's fees had in fact been *further* varied in 1996. At this juncture, it would be useful to set out the following summary of the applicable principles relating to variation of a contract from Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation and Estoppel* (Oxford University Press, 3rd ed, 2012) (at para 2.14):

> Since *Felthouse v Brindley* unless there is a specific provision which permits it, a party cannot unilaterally vary the terms of a contract; ***there has to be acceptance of the variation of the contract, that acceptance being more than 'mental acceptance or mere acquiescence'*** . Therefore, in the same way as there must be offer and acceptance at the formation of the contract, ***the parties to the contract must agree to the variation, must agree to all material aspects of the variation and must intend to vary the contract*** . … Finally, the parties' consensus must be ***sufficiently certain and be in sufficiently clear terms such that the proposed alteration of their obligations can be given effect*** . [footnotes omitted, emphasis added in bold italics]

OOA's letter dated 6 May 1996 (reproduced above at [74]) and Fairview's unqualified acceptance of those terms in a letter dated 11 May 1996 clearly and objectively evinced a consensus that OOA was to be paid 4.5% of the construction costs henceforth. The fact that OOPL subsequently submitted a claim for Phase 3 abortive works on a percentage basis that was inconsistent with that set out in OOA's letter dated 6 May 1996 did not, in the final analysis, detract from the validity of the further variation in 1996 (see below at [78]).

76 It suffices to note at this juncture that, pursuant to the 6 May 1996 letter, the agreement between the parties was also varied inasmuch as the SIA Conditions 1985 were henceforth to be incorporated into the agreement. However, those conditions were incorporated *only* in so far as the "mode and time of payment" were concerned. The 6 May 1996 letter therefore had no bearing at all on our finding with regard to Issue 1 that there had been wrongful termination of OOPL's employment (see above at [53]–[57]). In the final analysis, neither did this letter have a bearing on our decision on the inapplicability of the limitation defence (see below at [84]–[91]).

77 For completeness, although Fairview itself did not make submissions on this, we also considered Fairview's case at its next highest to the effect that there was yet another further variation of the parties' agreement for OOA/OOPL's fees to be paid on a *quantum meruit* basis. On 21 September 2001, OOA wrote to Fairview seeking $190,000 (calculated upon 4.25% of construction costs) for certain works pertaining to Phase 3 which were aborted because of changes to design. On 11 October 2001, Fairview replied, proposing to pay a *quantum meruit* sum of $50,000 instead, citing the following reasons:

> 1 The above is amendment work, not a separate new project. It is concurrently administered

with the other 44 units of classical design. Your proposed standard mode for the affected units is based on, as if the 34 terraces and 4 bungalows are a separate new project.

2 There is no change to site layout and concept; no change in internal house plans layout and architectural finishes for the modern design to the originally approved classical design. Thus less time will be spent as compare [sic] to a separate new project, starting from brief.

3 This amendment work is taking into consideration of the Existing Structures (complete and under-construction) and repropose the elevation treatment, together with our and main contractor's input. Thereafter submitting to authority for approval.

78 Several points should be made regarding this letter. First, it was evident that Fairview did *not* dispute that OOA/OOPL was entitled to fees on a *percentage* basis for abortive works. This further buttressed our earlier finding that the parties had in fact arrived at such an agreement (see above at [69]–[75]). This then brings us to our second point briefly alluded to above at [75], which is that although the $190,000 (which was calculated upon 4.25% of the construction costs) was consistent with there being an agreement on a percentage basis, the percentage figure used was *consistent with the 1993 Agreement* and *inconsistent with the further variation in 1996*. However, in the final analysis, this did *not* detract from the validity of the further variation in 1996. The courts, in construing whether a contract (or in this case, a variation of a contract) had come into existence at a particular point in time, do not take into account the parties' subsequent conduct. Subsequent conduct may perhaps be relevant to the finding of a *subsequent* variation, but would not affect the coming into existence of the contract (or in this case, a variation of the contract) at an *earlier* point in time.

79 The third point to be made about the letter dated 11 October 2001 is this. It was apparent that Fairview had proposed the *quantum meruit* sum of $50,000 because it had taken the view that the *particular* abortive work concerned was, in fact, not very substantial. This letter dated 11 October 2001 was therefore different from OOA's letter dated 6 May 1996 (which we found sufficient to vary the agreement between the parties (see above at [75])) as there was nothing in Fairview's letter dated 11 October 2001 that could be objectively construed as an offer from Fairview that *all* abortive works were henceforth to be calculated on a *quantum meruit* basis. The parties clearly had *not* arrived at any consensus to the effect that the fees for abortive works were to be varied to a *quantum meruit* basis. Accordingly, having regard to the contractual principles on variation set out above (at [75]), we rejected the possibility that the variation in 1996 was further varied to a *quantum meruit* basis in 2001.

80 We were also unable to accept Fairview's reliance on the fact that it had stated that in its letter to the BOA dated 1 March 2010 that its percentage basis computation was on a without prejudice basis. The relevant portion of the said letter is reproduced below, as follows:

…

12) Based on our computation for work done in respect of Phase 4 and 4a only (Appendix 1), OOPL would only have been entitled to $703,551.50 for architectural services rendered.

1 3) *However, we are advised that their claim for work done in respect of Phase 4 and Phase 4a are now time-barred, by virtue of the Limitation Act as more than 6 years have elapsed since they completed their work for Phase 4 and Phase 4a in 2000 and 2002 respectively.*

> 1 4) ***Nonetheless*** *, and on a strictly without prejudice basis and solely for the purpose of furnishing security, we are prepared to accept the figure of $703,551.50 for computation of fees.* For avoidance of doubt, this should not be construed as an admission that OOPL are entitled to any fees.
>
> …
>
> [emphasis added in italics and bold italics]

Viewed in its full *context*, and in particular having regard to the word "[n]onetheless" in para 14 of the letter which linked back to the preceding paragraph (*viz*, para 13), it was clear that Fairview's express reservation that the computation was on a "without prejudice" basis was made in relation to its assertion that OOPL's claim had been *time-barred*. Put another way, the "without prejudice" reservation was *not* made in relation to any dispute on the part of Fairview that the parties had agreed to, or had agreed to vary to a *quantum meruit* basis for *all* abortive works.

81 Finally, for the reasons already canvassed earlier (see above at [78]), the fact that Fairview's computation to the BOA was done on the basis of the figures set out in the 1993 Agreement and not the subsequent variation in 1996 did not detract from the existence of the latter.

82 For the above reasons, we concluded, firstly, that the parties had agreed in 1983 for OOA (and by extension, OOPL) to be paid on a *percentage* and not *quantum meruit* basis for *all* works including those that were aborted, but *excluding works that were aborted by reason of regulatory disapproval*. The exact percentage was subsequently varied in 1993 and further varied in 1996 back to the original terms in the 7 June 1983 letter (*ie*, *4.5%* for *all* works pertaining to Lot 248). Finally, since *only* the SIA Conditions 1985 pertaining to the *mode and timing of payment* were incorporated into the terms of the parties' engagement with each other after the variation in 1996, we rejected Fairview's argument that the works set out above at [27(a)] and [27(b)] were considered as Preliminary or Additional Services, not Basic Services, and thus should be remunerated on a *quantum meruit* basis pursuant to the SIA Conditions 1985.

Limitation

83 Fairview's primary case in relation to the issue of limitation was that, even if OOPL was entitled to claim for fees for the Later Abortive Works, the claim had been time-barred under the Limitation Act. OOPL's argument in response was that the time-bar defence was inapplicable, and even if it was applicable, there had been a valid acknowledgment of debt by Fairview which therefore *restarted* the limitation clock. Fairview's counter-argument was that there had been no valid acknowledgment of debt, and that, even if there was such an acknowledgment, it should not restart the limitation clock. We will turn to consider each of these arguments *seriatim*.

Applicability of the time-bar defence

84 We turn first to the primary issue centring on the applicability of the time-bar defence. The Judge held (albeit without delving into much detail) that the right to payment for the Later Abortive Works accrued only when Fairview gave its instructions to abandon the project on 1 October 2009, and since this was within six years of the filing of the suit on 20 May 2011, the time-bar defence was inapplicable (see the Judgment at [48]–[51]).

85 On appeal, Fairview argued that the Judge had erred in finding that OOPL's right to payment accrued only when Fairview terminated its engagement, as OOA/OOPL's entitlement to payment arose

upon completion of the various stages of work pursuant to cl 2.2 of the SIA Conditions 1985. In response, OOPL contended that the Judge's finding was correct as OOPL had the additional and separate (as well as independent or free-standing) right to bill for works at the time that they became abortive.

86 We arrived at the same conclusion as the Judge who held that the time-bar defence was not applicable, albeit for somewhat different reasons. First and foremost, as pointed out earlier (see above at [74]–[76]), the SIA Conditions 1985 applied, *but only* in so far as the terms pertaining to the mode and time of payment were concerned. In other words, *only* the relevant clauses in section 6 of the SIA Conditions 1985 titled "Mode and Time of Payment and Partial Services" were applicable to the terms of the parties' engagement. In particular, Condition 6.1 provided as follows:

> Payment for Basic Services in Stages
>
> 6.1 Subject to the monthly payments to be made to the Architect as hereinafter provided, *the Architect shall be entitled to progress payments for basic services rendered in stages as the project progresses in accordance with the following percentage fee on completion of each stage* as follows:-
>
> …
>
> NOTE:
>
> (a) The above fees shall be *deemed to be due and payable on the issuance of the notes or bills of charges* by the Architect to the Client.
>
> …
>
> [emphasis added]

87 When both the opening paragraph of Condition 6.1 and Note (a) are read together, it was evident that while an architect became entitled to progress payments upon the completion of the various stages, such progress payments only became "due and payable" upon the issuance of the relevant invoice(s). Accordingly, while an architect's *entitlement* to payment accrues upon completion of various stages, *no right and corresponding cause of action to sue upon such a right arises unless and until the relevant invoice(s) had been issued*. To put it another way, the entitlement to fees crystallises into a right upon which a cause of action accrues only when the invoice is issued.

88 Our interpretation in the preceding paragraph accords, first, with the permissive and open manner in which it was stated in the opening paragraph of Condition 6.1 that the architect "shall be entitled" to progress payments on completion of each stage, as opposed to words with a more mandatory effect such as "the client *shall pay* to the architect". Our interpretation also accords with the absence of any condition setting out a timeline within which an architect *must* render its invoice. Any concern that such an interpretation would result in developers being inundated by invoices relating to works completed an inordinately long time ago (possibly even beyond the six year limitation period for contractual claims) was, in our view, valid but, in the final analysis, overstated. An architect would not (for obvious commercial reasons) want to be put out of pocket for too long. And so long as the working relationship between the parties is on-going, the *flexibility* to decide when to bill (even if it would be more than six years after the completion of a particular stage of work) would be commercially beneficial to *both* the architect and its client, particularly where the construction project in question is a long and drawn out one. The architect would be assured of its due

entitlement to payment while, on the other hand, the client would have room to negotiate with the architect on when the invoice is to be issued and when the actual payment is to be made based on the parties' respective commercial considerations.

89 In the light of our interpretation, we disagreed with Fairview's contention that OOA/OOPL's cause of action arose immediately upon the completion of each stage of work. We also disagreed with OOPL's characterisation of a "separate and free-standing right". There was only ever *one* cause of action in respect of each item of the Later Abortive Works, and that accrued upon the service of the relevant invoice. However, as we shall proceed to explain, this was inapplicable on the present facts as the 1983 Agreement had been wrongfully terminated.

90 In our view, once Fairview had wrongfully terminated OOPL's services on 1 October 2009, r 6(1) of the Architects (Professional Conduct and Ethics) Rules (Cap 12, R 2, 2003 Rev Ed) ("r 6(1)") was triggered, thereby causing the cause of action founded upon contract to arise. Rule 6(1) reads as follows:

> **Fees payable for registered architect's services, etc.**
>
> **6.**—(1) Where a registered architect, licensed corporation or licensed partnership (referred to in this rule as a claimant) performs partial services for any reason, including the abandonment, deferment, substitution or omission of any work or part thereof, or *if the claimant's services are terminated for any reason, the claimant shall be entitled to such fees for such partial services rendered, or services performed up to the date of termination of his services* as may be agreed between the parties or, in the absence of any specific agreement to that effect, the following fees: …
>
> [emphasis added]

Although r 6(1) similarly speaks of "entitlement" (the phrase "the claimant shall be entitled to such fees" refers), the meaning of the word "entitlement" within the context of r 6(1) was different from that within the context of Condition 6.1. As there was no equivalent provision similar to Note (a) in r 6(1), the entitlement that arose in r 6(1) was *not* contingent upon any other further event to crystallise as an actionable right. Put simply, once OOPL's service was terminated, the cause of action to recover the outstanding sums arose *immediately* and the limitation clock started ticking. Such an interpretation of r 6(1), in our view, accords sensibly with the specific fact scenario that it addresses, namely, where the relationship between the parties has come to an *end*.

91 In the circumstances, we agreed with the Judge's conclusion that OOPL's cause of action arose only on 1 October 2009, and that accordingly, the time-bar defence was inapplicable.

Acknowledgment of debt by Fairview

92 Even if Fairview was able to rely on the time-bar defence, we would have found (as the Judge did in passing at [52] of the Judgment) that there had been a valid acknowledgment of debt by Fairview which resulted in the fresh accrual of action pursuant to s 26(2) of the Limitation Act. The said provision reads follows:

> **Fresh accrual of action on acknowledgement or part payment**
>
> **26.** …

(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, *the right shall be deemed to have accrued on and not before the date of the acknowledgment* or the last payment.

[emphasis added]

93 A useful summary of the applicable legal principles governing what would constitute a valid acknowledgment within the meaning of s 26(2) of the Limitation Act is set out in the Singapore High Court decision of *Kim Eng Securities Pte Ltd v Tan Suan Khee* [2007] 3 SLR(R) 195 ("*Kim Eng Securities*") at [40], as follows:

40 Under s 26(2) of the Act, a cause of action in debt will accrue afresh where "the person liable or accountable for the claim acknowledges the claim." As to what was needed to constitute an acknowledgment under the limitation regime, the Court of Appeal in *Chuan & Company Pte Ltd v Ong Soon Huat* [2003] 2 SLR(R) 205 ("*Chuan & Company*") held at [17] that to constitute an acknowledgement under s 26(2), the debt must be admitted as remaining due. The Court of Appeal in *Greenline-Onyx* at [14] accepted and adopted the principle in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("Bradford & Bingley") that acknowledgments for the purposes of the limitation regime are not confined to admissions of debts where liability and quantum are indisputable. Furthermore, there can be an acknowledgment of a debt for a lower amount accepted as payable (see *Greenline-Onyx* at [16]). There can also be an acknowledgment even if the quantum of the debt is not stated so long as reference can be made to extrinsic evidence to ascertain the amount. As the debt which is time-barred under the Act is not extinguished, the acknowledgment may be made after the expiration of the period of limitation (see *Chuan & Company* at [34]). There is a further principle of some importance. It is that the communication must be construed as a whole and in its context. Where words in a document are clear, it is not permissible to refer to extrinsic material to give the words a meaning that is at variance with the express words (see *Chuan & Company* at [35]).

94 With the above legal principles in mind, we now turn to set out the details of the relevant facts, with particular regard to the correspondence between the parties.

95 It would be recalled that Fairview's termination of OOPL's services was communicated on 1 October 2009. On 3 November 2009, Fairview rejected OOPL's request to meet to resolve the matter and stated at the end of the letter as follows:

Kindly let us have your letter of release and your invoice for work done todate [*sic*].

96 Subsequently, in response to OOPL's request on 13 November 2009 for more time to "assess the immense work done to date", Fairview replied on 18 November 2009 stating as follows:

… [K]indly let us know as to when you will be sending the invoice for the above phase of work.

97 On 3 December 2009, Fairview sent a reminder letter stating as follows:

… [W]e note that we have still not received your invoice and the letter of release.

Kindly let us have the above without further delay.

98 On 14 December 2009, OOPL responded to Fairview's letter dated 3 December 2009, stating as follows:

> …
>
> Much work, effort, time and manpower would be required for us to run through the history of hard work that has been done to safeguard Lot 248 in order for us to be reasonably compensated for this discharge.
>
> We will thus send the required in good time when ready …

99 Fairview thereafter responded on 18 December 2009 stating as follows:

> … We cannot wait indefinitely for your bill and as we require the letter of release/no objection as soon as possible, we are hereby giving you fourteen (14) days from the date of this letter to give us the letter of release *on our undertaking to pay such reasonable fees as you are entitled to*, for all work done to date in relation to the above project … [emphasis added]

100 Subsequently, by way of a letter dated 30 December 2009 to the BOA and copied to OOPL, Fairview wrote as follows:

> 10) If OOPL cannot get their bill prepared in time, OOPL can give their best estimate of the proposed fees hopefully by 7 January 2009, so that we can furnish the necessary security. We reiterate our undertaking to pay such reasonable fees as OOPL are entitled to, for all work done to date in relation to the Project in order to secure the letter of release from OOPL.
>
> 11) We therefore request that the [BOA] ask OOPL to give us their estimate of the fees due so that we can furnish the necessary security with the Board and OOPL in order to secure the letter of release.

101 And in a separate letter to OOPL also dated 30 December 2009, Fairview wrote as follows:

> As stated in our letter to the [BOA], if you cannot get your bill ready, please let us have your best estimate of the fees due so that we can furnish the necessary security.
>
> We repeat our undertaking to pay such reasonable fees you are entitled to, for all work done to date in relation to the above project.

102 By a letter dated 15 January 2010, the BOA wrote to Fairview stating as follows:

> 6. In order for the [BOA] to understand the terms and conditions governing your relationship with [OOPL], you are required to provide a full account of your relationship with OOPL and to state your view(s) as to the amount of fees which [OOPL] should be entitled to and which have not been paid and the basis of your view(s), together with copies of those documents which you are relying on …

103 On 28 January 2010, Fairview replied to the BOA and copied to OOPL, stating as follows:

> 5) We are not in a position to give our views as to the amount of fees OOPL are entitled to, as we have not received any bills or invoices from OOPL for work done in respect of the Written Permission and the Provisional Permission above. It is best that the amount of fees payable

should come from OOPL themselves.

104 Finally, on 1 March 2010, Fairview wrote to the BOA contending (for the first time) that OOPL's claim had been time-barred:

> 12) Based on our computation for work done in respect of Phase 4 and 4a only (Appendix 1), OOPL would only have been entitled to $703,551.50 for architectural services rendered.
>
> 13) However, we are advised that their claim for work done in respect of Phase 4 and Phase 4a are now time-barred, by virtue of the Limitation Act as more than 6 years have elapsed since they completed their work for Phase 4 and Phase 4a in 2000 and 2002 respectively.
>
> 14) Nonetheless, and on a strictly without prejudice basis and solely for the purpose of furnishing security, we are prepared to accept the figure of $703,551.50 for computation of fees. For avoidance of doubt, this should not be construed as an admission that OOPL are entitled to any fees.

105 Having regard to the overall chain of correspondence between the parties (and the BOA) set out above (at [95]–[104]), it was evident to us that, although Fairview did not acknowledge the exact amount owing to OOPL, it had acknowledged the *existence* of a debt owing to OOPL. Such an acknowledgment, as noted in [40] of *Kim Eng Securities* (cited above at [93]), was sufficient for the purposes of the operation of s 26(2) of the Limitation Act, so long as reference could be made to extrinsic evidence to ascertain the said amount.

106 In coming to our conclusion that there was a valid acknowledgment of debt, we noted in particular that in Fairview's letter dated 3 November 2009 (see above at [95]), instead of enquiring *if* there were any outstanding fees, Fairview had, *on its own initiative*, sought OOPL's invoice *without any prior prompting from OOPL*. We also disagreed with Fairview's submission that the words "reasonable" and "entitled" in its letters dated 18 December 2009 (see above at [99]) and 30 December 2009 (see above at [100]–[101]) were qualifications that negated the coming into existence of any acknowledgment of debt. In our view, the only reasonable interpretation of those letters was that Fairview was merely reserving its position to pay fees which were reasonable in quantum. And, most significantly, we noted that in the face of the BOA's direct question to Fairview as to the latter's views on OOPL's entitlement as to fees, Fairview did *not* deny such entitlement in its response dated 28 January 2010 (see above at [103]) even though it had had the benefit of legal advice then. All that was asserted by Fairview was that it was not in a position to give its views as to the "amount of fees" that OOPL was entitled to.

107 In short, Fairview's reservation of its position with regard to the issue of limitation in its letter to the BOA dated 1 March 2010 was too late, as there had already been a valid acknowledgment of debt prior to that. In any event, this issue was rendered academic in light of our earlier finding that the limitation defence was not applicable to Fairview in the first place (see above at [84]–[91]).

Restarting of the limitation clock

108 As alluded to earlier (see above at [83]), Fairview raised the further argument on appeal that, even if there had been a valid acknowledgment of debt on its part, such acknowledgment, having been made after the purported expiry of the limitation period, ought not to restart the limitation clock. As we found that the limitation period had *not* expired (see above at [84]–[91]), this issue was also an academic one. Nevertheless, we would take this opportunity to address the arguments raised by Fairview.

109 The key question can be summed up as follows – can an acknowledgment made *after* the expiry of a limitation period restart the limitation clock? The short answer, based on the authority of this court's decision in *Chuan & Company Pte Ltd v Ong Soon Huat* [2003] 2 SLR(R) 205 ("*Chuan & Company*") at [33]–[35] (which was applied in the Singapore High Court's decision in *Kim Eng Securities* at [40] and [45]) is that it *can*. Fairview did not dispute that this *is* the position under our law. However, while recognising that this matter might be one best left for Parliament to look into, Fairview invited us to *reconsider* the common law position on the basis that the legislative history behind s 26(2) of the Limitation Act was not considered in *Chuan & Company*, and that such consideration would have made a difference to the conclusion reached.

110 Having considered the matter, we disagreed with Fairview's contention and saw no basis to differ from the conclusion that we arrived at in *Chuan & Company*. It would, first and foremost, be useful to note that the Singapore Limitation Act was adopted from the Limitation Act 1939 (c 21) (UK) ("UK Limitation Act 1939") (see *per* the then Minister for Labour and Law, Mr K M Byrne in *Singapore Parliamentary Debates, Official Report* (2 September 1959) vol 11 at cols 586–587):

> … Sir, the main purpose of this Bill is to effect a simplification and, I hope, an improvement in the law relating to the limitation of actions. The present law in Singapore is based on the Indian law, which was passed in 1877 in India and was introduced into the former Straits Settlements in 1896. The Indian Act and the whole law is extremely complicated.
>
> …
>
> Mr Speaker, Sir, in the Federation, a committee was set up in 1950 to consider the law relating to limitations. This committee recommended the adoption of the English law of limitations as contained in the Limitation Act of 1939. As a result, the Federation, in 1953, enacted the Limitation Ordinance. The Singapore Bar Committee has also considered the matter and has recommended that legislation on the lines of the English Limitation Act, 1939, and the Federation Limitation Ordinance, 1953, be enacted in Singapore.

111 In particular, s 26(2) of the Singapore Limitation Act (reproduced above at [92]) is *in pari materia* with s 23(4) of the UK Limitation Act 1939. English decisions such as *In re Gee & Co (Woolwich) Ltd* [1975] 1 Ch 52 have interpreted s 23(4) of the UK Limitation Act 1939 as permitting acknowledgments made both before *and after* the expiry of the limitation period to restart the limitation clock.

112 To make good its case that this court should reconsider its decision in *Chuan & Company*, Fairview relied primarily on the English High Court decision of *Dwr Cymru (Welsh Water) v Carmarthenshire County Council* [2004] EWHC 2991 ("*Dwr Cymru*") (at [30]) for the proposition that the restarting of the limitation clock was intended to apply *only* when the acknowledgment was made *before* the expiry of the limitation period:

> The Limitation Act 1623 provided that an action for debt could not be brought more than six years after the cause of action arose. According to the preamble this Act was passed "for quieting of mens' estates and avoiding of suits". This statute could sometimes cause injustice and judges mitigated its effect in the following way. If the debtor acknowledged the debt or made a part payment on account ***during the first six years*** , then the limitation period started again. The law treated this as a promise to pay which revived the original cause of action. [emphasis added in bold italics]

Fairview argued that when this judge-made law was later put onto a statutory footing and

consolidated into the UK Limitation Act 1939, it did not go so far as to allow acknowledgements made *after* the expiry of the limitation period. It was on this basis that Fairview invited us to reconsider our decision in *Chuan & Company*.

113 In our view, it might well have been the case, as suggested in *Dwr Cymru* at [30] (and quoted in the preceding paragraph), that, *historically*, only acknowledgements made before the expiry of the limitation period could restart the limitation clock. However, it was clear that *the common law had developed and the English courts began to also permit acknowledgements made after the expiry of the limitation period to restart the limitation clock*. This much was acknowledged in 1936 in the UK Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (Cmd 5334, 1936) ("1936 Report") at p 25, as follows:

> … [I]t is now well settled (1) that a written unconditional promise to pay a debt on request given within six years before action brought is sufficient to defeat a defence based upon the Limitation Act, 1623; (2) that such a promise is implied in a simple acknowledgment of the debt; (3) that if the promise be one to pay at a future time, or subject to the performance of some condition, the Statute will be available as a defence until that time arrives, or the condition is performed, as the case may be; (4) when the acknowledgment is coupled with expressions that negative a promise to pay it is ineffective altogether; *and (5) that it is immaterial whether the acknowledgment be given before* ***or after*** *the Statute has run*. [emphasis added in italics and in bold italics]

114 This was also consistent with the UK Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (Cmnd 6923, 1977) ("1977 Report") at para 2.68:

> … Before 1939, although *there had been some conflict of authority in the 19th century*, it had become the rule that if expiration of the limitation period had extinguished a title to property no subsequent part-payment or acknowledgment could revive that title. *But if only the remedy was barred, the obligation was revived by an acknowledgment or part-payment made* ***at any time*** *.* [emphasis added in italics and in bold italics]

115 It was also significant that the UK Law Revision Committee expressly recommended in 1936 that the pre-existing rule (*viz*, that acknowledgements made *after* the expiry of the limitation period can restart the limitation clock) should be retained, save that such acknowledgments would bind only the maker and his personal representatives. In this regard, the UK Law Revision Committee concluded as follows in the *1936 Report* at p 29:

> We have indeed given careful consideration to the question whether it is not desirable to render ineffective altogether acknowledgments and part payments made after the statute has run. The question is to some extent bound up with the wider question whether the effect of statutes of limitation should not be in all cases to extinguish the right as well as to bar the remedy. At present the right is only extinguished in actions for the recovery of land, and in such actions acknowledgments given after the period of limitation are ineffective … On the whole we have come to the conclusion that unless it is decided to extinguish the right in all cases (and we do not want to anticipate our consideration of that question), *acknowledgments and part payments made* ***after*** *the statute has run* ***should*** *bind the persons who make them but them alone.*
>
> We recommend therefore that s. 14 of the Mercantile Law Amendment Act, 1856, should be repealed, and that a general provision should be enacted to the effect that acknowledgments should bind the persons making them and their successors in title, and that part-payments should in addition bind co-debtors and co-contractors but that *no acknowledgment or party payment made after the statute has run should bind any reason other than the person who made it, or*

his personal representatives.

[emphasis added in italics and bold italics]

116 In the 1977 Report, the UK Law Reform Committee confirmed that this recommendation in 1936 was followed through *viz* the UK Limitation Act 1939 at para 2.69:

> The Law Revision Committee treated this rule as *well settled* by 1936 and, *although they gave careful consideration to the matter, did not recommend any fundamental change*, though they did propose that an acknowledgment or a part-payment made out of time should bind only the person making it and his personal representatives. *The Committee's recommendation on this point was implemented by section 25 of the 1939 Act, which left the pre-existing general rule* ***unchanged*** *.* [emphasis added in italics and bold italics]

117 It was therefore clear to us that when the UK Parliament put the judge-made law on acknowledgments on a statutory footing, *viz*, by way of s 23(4) of the UK Limitation Act 1939, it was effected with the intention to *also permit* acknowledgements made *after* the expiry of the limitation period to restart the limitation clock. Consequently, when the Singapore Parliament in 1959 adopted s 23(4) of the UK Limitation Act 1939 and enacted it as s 26(2) of our Limitation Act, we effectively adopted that rule as well. At this juncture, we should point out that the rule that gives legal effect to an "out-of-time" acknowledgment is logically consistent with the principle that limitation only bars the *remedy* and not the *right*. In this regard, the following extract from *Chuan & Company* at [35] is apposite:

> 35 Under our statutory scheme, where the limitation period has expired, what it means is that the debt is irrecoverable. If the debtor is sued, he may plead the defence of limitation. However, this defence must be expressly pleaded: see s 4 of the Act, O 18 r 18(1) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) and the House of Lords' decision in *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189 at 219. Thus, a judgment may be entered on such a claim unless the debtor raises the limitation defence. A judgment may also be entered if there is a subsequent acknowledgment of the debt. Therefore, our scheme of things does not render a debt which is time barred non-existent; it only renders the debt irrecoverable if limitation is pleaded.

118 In 1980, the UK *departed* from the pre-existing rule as set out in s 23(4) of the UK Limitation Act and enacted s 29(7) of the Limitation Act 1980 (c 58) (UK) ("UK Limitation Act 1980") which expressly *prohibits* the revival of a time-barred action. The relevant sub-sections of s 29 are reproduced below:

> **29 Fresh accrual of action on acknowledgment or part payment.**
>
> …
>
> (5) Subject to subsection (6) below, where any right of action has accrued to recover—
>
> (a)any debt or other liquidated pecuniary claim; or
>
> …
>
> and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

(6) A payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

(7) Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.

119 That this legislative change was actually *inconsistent* with *then existing* legal principle was expressly acknowledged by the UK Law Reform Committee in the 1977 Report (at paras 2.70 to 2.71):

2.70 In our consultative document we sought views on the desirability of changing [the rule that an obligation could be revived by an acknowledgment made at any time]. There was general support for the principle that, once lapse of time had extinguished a title, no subsequent acknowledgment should be capable of reviving it. But there was a marked difference of opinion on the question whether a similar principle should apply to the barring of a remedy where the right still persisted. It was argued, in favour of making the change, that the contrary rule gives rise to much uncertainty and is also something of a trap in that, for example, a company's accounts required by law to be published may have to include a balance sheet showing statute-barred debts and these may then be revived as having been "acknowledged", although no such revival was intended to be the result of the publication of the accounts.

2.71 On the other hand, *we recognise that the current rule, by which legal effect is given to an "out-of-time" acknowledgment, is logically consistent with the principle that limitation only bars the remedy and leaves the right unaffected.* Nevertheless, we think the rule is somewhat unreal and serves no very useful purpose. If the debtor and creditor both wish to preserve the former's liability, they can do so easily in some other manner and it seems to us better, and to make for a greater measure of certainty, that once a debt has become statute-barred it should remain irrecoverable by action. Therefore, although the issue is not one of prime importance, we think the law should be changed so that no acknowledgment or part-payment made after the expiration of the relevant limitation period should be capable of reviving a time-barred remedy.

[emphasis added]

120 We further note that the change in the law in the UK was not without its criticisms in the House of Lords and the House of Commons. Mr Victor Mishcon ("Lord Mishcon") expressed the following sentiments as the Limitation Amendment Bill passed through the House of Lords (see *Parliamentary Debates (Hansard) – House of Lords* (25 June 1979) vol 400 ("*the 25 June 1979 Parliamentary Debates*") at col 1228):

If I may say so respectfully, I cannot see the logic behind that because, to re-enunciate the principle, it is that it is not the right that goes but the remedy, and there can surely be no hardship on a defendant where indeed an acknowledgement of the indebtedness has been made, and a part payment has been made. I therefore respectfully observe that I cannot see why that recommendation has been accepted.

At a subsequent sitting of the House of Lords, Lord Mishcon elaborated upon his views further as follows (see *Parliamentary Debates (Hansard) – House of Lords* (16 July 1979) vol 401 at cols 1158–1160):

We have the position therefore that not even the committee whose recommendations in the main

have been followed in this Bill thought this a matter of prime importance. The Committee may therefore feel that, if they are not dealing with a matter of prime importance, why alter the law as it stands, if the position seems to be just and if it seems to follow the situation which I have tried to explain to your Lordships, where no great hardship would seem to occur to the debtor? The noble and learned Lord the Lord Chancellor was good enough to listen to the point on Second Reading and to give what I hope was a provisional reply. He then said that he thought the change that was recommended in Clause 6, which would no longer give the creditor any right at all to pursue his remedy by issuing a writ after the termination of the limitation period, made for more certainty. I am afraid I do not follow that because, as I explained to the Committee, if anything like this happens—the acknowledgment in writing or the part payment—in the course of the six years, then the whole of the period commences to run again, and once more in those circumstances there is a period of uncertainty.

In the example given of a company's accounts, there again the question of certainty is by no means answered if you admit that rather odd example. I describe it as an odd example, because in fairness I must say it was a matter dealt with in a case only a few months ago. In that case it was held, as I understand it, that although a company has to put in its balance sheet an account of statute-barred debts, which may be a document which in law is directed to the creditor, the creditor has to receive it before it can be deemed to be an acknowledgment. The Company Law Committee of the Law Society, consisting of very experienced company practitioners in the law, have decided that, in their view, this is unlikely to create any difficulty at all and certainly no substantial difficulty. Indeed, your Lordships may wonder whether it is just that a company in these circumstances should be exempted from paying what they have freely admitted to be a statute-barred debt.

In any event, how does it help on the certainty point?—because if this is law it would mean that a company's balance sheet issued six months before the expiration of the period, although the creditor may not know about it, would start the period running all over again; so, again, there is no certainty in regard to this. I think that is all I can usefully say to the Committee in support of a plea that the law should remain as it is.

121 Similar sentiments were also expressed by Mr Graham Page in the House of Commons (see *Parliamentary Debates (Hansard) – House of Commons* (26 October 1979) vol 972 at col 789):

… My understanding is that if a debt is acknowledged during the six-year period of limitation, that extends the period. Yet, strangely enough, if we accept this clause as it stands and that acknowledgment is made when the six years have expired, it does nothing to revive the debt or to revive the right of action. That seems illogical.

I should have thought that the present law was sensible and that the time could run from any acknowledgment, whether that acknowledgment was during the statutory period or afterwards. What is the difference in substance if the debtor acknowledges? Surely the time could run from that point. I should have liked to hear the Solicitor-General say that he intended to remove clause 6 altogether.

122 In his speech in the House of Lords, the Lord Chancellor Mr Quintin Hogg (Lord Hailsham of St Marylebone) acknowledged that the criticisms founded on legal principle were valid, and explained to the effect that the recommended change was ultimately a policy decision (see the 25 June 1979 *Parliamentary Debates* at cols 1233–1234):

… Now a much more substantial question—and this is a matter upon which the committee was

> divided—was the question of the effect of acknowledgment or part-payment on a claim which is statute barred. Following extreme legal accuracy and traditional legal learning, the noble Lord, Lord Mishcon, and the Law Society represented to us that the cause of action is not destroyed by the time bar; it is only, as it were, buried but not dead, and disinterment by acknowledgment or part-payment will set time running again. This is of course absolutely accurate legal learning, but I happen to take the other view, as did a bare majority of the committee and, I believe, the previous Government. One can be too learned about these things, but I am going to try to be a little pedantic myself.
>
> When the original limitation period of 1623 was introduced during the reign of James I, of course the mischief which was then aimed at was different from the mischief which is aimed at now, although the period happens to be the same. In those days, after six years a wicked and cunning plaintiff would get a lot of perjured witnesses to allege the existence of a contract or a cause of action and put up a false case against a defendant which he could not answer, and the reason why he could not answer it, as students of Dickens will remember, is that until comparatively recently neither the plaintiff nor a defendant could give evidence at all. Therefore, the mischief was that of a trumped-up, false case. Nowadays, the mischief you are aiming at is not that but the absence of certainty in dealing with insurance claims and in dealing with the carrying on of business.
>
> The view of the majority of the committee—I will not read it all, but it is Part II, paragraphs 2.70 and 2.71, of the little blue report—was in favour of certainty after six years. It is quite true that there is an element of illogicality if you pursue the strict, legally accurate, view that what happens when an action is statute barred is that the remedy is removed but not the right. But the committee came to the conclusion that this was basically—and I use the word without offence—gobbledygook, and that what was wanted was certainty. On balance, I agree with this view. I quite acknowledge that other people may differ, and the question is on which side you come down, the majority or the minority view. I am with the majority on this occasion. We can try it out, if we want to try it out, in Committee. I shall not take it ill if the Committee takes an opposite view, but I shall still vote for the position as I have argued that it should be.

123 In passing the UK Limitation Act 1980, the UK legislature ultimately took the position that the change would promote the objective of the law of limitation in that a defendant could now be certain that he would be free from claims after a reasonable time. We noted that this reasoning has been observed by Professor Andrew McGee to be "not altogether convincing" since a defendant who wished to remain free of claim should simply refuse to acknowledge the debt (see Andrew McGee, *Limitation Periods* (Sweet & Maxwell, 6th ed, 2010) at para 18.039).

124 In 1992, the Singapore Parliament considered the UK Limitation Act 1980 and imported provisions relating to latent damages from that Act (see the Singapore Limitation (Amendment) Act 1992 (No 22 of 1992)). Significantly, the Singapore Parliament did *not* import s 29(7) of the UK Limitation Act 1980. We therefore arrived at the conclusion that the Singapore Parliament intended that our law on acknowledgment of debt *remain as it had always stood* notwithstanding the departure to the contrary in the UK.

125 In conclusion, having traced and considered the historical background to s 26(2) of our Limitation Act, we saw no reason at all to differ from our decision in *Chuan & Company*. We accordingly affirmed the legal proposition that under s 26(2) of our Limitation Act, an acknowledgment made after the expiry of the limitation period *can* restart the limitation clock. In any event, as alluded to earlier, this issue was an academic one in the light of our finding that the time-bar defence could not apply in the first place.

Conclusion on Issue 2

126 We summarise our decision on Issue 2 as follows. OOA's entitlement to its fees had been novated to OOPL, thereby entitling OOPL to claim for the full spectrum of the Later Abortive Works. These works are to be assessed on a percentage cost basis, specifically, 4.5% of the construction costs. The claim had not been time-barred. Accordingly, we dismissed Fairview's appeal and allowed OOPL's appeal. We should point out, however, that as alluded to above (at [58]), the Later Abortive Works should be assessed taking into account our decision on Issue 1 and the principle that there should be no double recovery.

Conclusion

127 For the reasons set out above, we dismissed Fairview's appeal in CA 51 and allowed OOPL's appeal in CA 52 with costs and the usual consequential orders. For the avoidance of doubt, OOPL is entitled to the costs below and one set of the costs of the appeals.

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