IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 87

Civil Appeal No 10 of 2020

Between

Dennis Kam Thai Leong

… *Appellant*

And

Asian Infrastructure Limited

… *Respondent*

In the matter of Suit No 397 of 2017

Between

Asian Infrastructure Limited

… *Plaintiff*

And

Dennis Kam Thai Leong

… *Defendant*

JUDGMENT

[Contract] — [Contractual terms]
[Equity] — [Estoppel] — [Promissory estoppel]

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v
Asian Infrastructure Ltd

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Steven Chong JA, Chao Hick Tin SJ and Quentin Loh J
3 August 2020

31 August 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 At the heart of this appeal lies a relatively straightforward mixed question of fact and law – when does a novation of a contract take place? It seems to us that the answer must lie in the text and the context of the agreement.

2 However, in examining this issue, it is crucial to bear in mind the purpose of a novation, which is to transfer the rights and obligations of an existing party to an agreement to a new party. In essence, the new party would substitute and assume the rights and liabilities of the original party.

3 Fundamentally, in the inquiry as to *when* the novation is to take effect, it stands to reason that there must be outstanding rights and liabilities to novate in the first place. As such, any case theory which seeks to establish that the novation is to take place only *after* the outstanding liabilities have been

discharged would be untenable as such a case theory would be diametrically opposed to the very concept of a novation.

4 The High Court judge below ("the Judge") effectively found that the novation of two loans was to take effect only upon its *full* repayment. In their quest to analyse the text and context of the agreement, both parties omitted to directly address the Judge on this fundamental threshold issue and in the process, its critical significance was unfortunately obfuscated.

Background facts

5 The appellant, Mr Dennis Kam Thai Leong ("Mr Kam"), is a self-described investor and entrepreneur. In the course of his business activities, he became a shareholder and director of Accelera Precious Timber & Strategic Agriculture Ltd ("APTSA"), a Cayman Islands incorporated company with limited liability. APTSA in turn owned a majority stake in PT Aceh Rubber Industries ("PT ARI"), an Indonesia incorporated company which owned and operated a rubber factory in Aceh, Indonesia, and of which Mr Kam was appointed a *Komisaris* (or commissioner). Mr Kam was also the director and sole shareholder of Perfect Earth Management Pte Ltd ("PEM"), a Singapore incorporated company which was utilised to channel the loan moneys (the subject matter of this action) to PT ARI to be used as working capital.

6 The respondent, Asian Infrastructure Ltd ("AIL"), is a company owned and controlled by Mr Malcolm Chang ("Mr Chang"). Mr Chang also owned and controlled a number of other corporate entities including ARI Investments Ltd ("ARI") and Infraavest Private Ltd ("Infraavest") which are of particular relevance to this case.

7 The present appeal arises out of two personal guarantees Mr Kam entered into in relation to two loans extended by AIL to PEM. Though both loans were extended to PEM, they were in reality for the purposes of PT ARI. Mr Chang preferred the borrower of the loans to be a Singapore incorporated company for ease of enforcement, hence the involvement of PEM.

8 The first loan, which was for a sum of US$500,000, was extended by AIL on 23 September 2013 and was due to be repaid on 23 December 2013 with a monthly interest rate of 1%. Mr Kam provided a personal guarantee on the same day for the repayment of PEM's obligations. By mid-January 2014, only US$150,000 had been repaid by PT ARI on behalf of PEM. AIL subsequently agreed to extend the repayment date for the balance sum to 31 December 2014.

9 The second loan, which was for a sum of US$650,000, was extended by AIL on 11 March 2014 and was due to be repaid on 31 December 2014 with interest at the same rate of 1% per month. Mr Kam again provided a personal guarantee for the repayment of PEM's obligations. It is undisputed between the parties that PEM did not make any further payments to AIL under both loans.

10 AIL commenced proceedings in the suit below against Mr Kam on 2 May 2017 to enforce the personal guarantees for PEM's obligations under the two loans. In his Defence, Mr Kam did not deny that the personal guarantees were valid when they were executed. Rather, he contended that the personal guarantees had been discharged and/or were unenforceable for three reasons:

(a) First, the personal guarantees had been discharged pursuant to a "joint venture" agreement entered into between PEM, PT ARI, APTSA, ARI and AIL sometime in September 2015 ("the Agreement").

(b) Second, a collateral oral agreement ("the alleged oral agreement") was reached in a meeting on 24 July 2015 at Infraavest's office in Singapore ("the 24 July 2015 Meeting") which discharged his liability under the personal guarantees.

(c) Third, AIL was estopped from denying that the personal guarantees had been discharged. The terms of the Agreement constituted a representation to Mr Kam that he would no longer be bound by the personal guarantees and he acted to his detriment in allowing Mr Chang and Mr Tin Jing Soon ("Mr Tin"), an employee of Infraavest, to take control of PT ARI's business and by not taking steps to repay PEM's obligations leading to increased accrued interest. Alternatively, the same representation was made out to Mr Kam by AIL's failure to demand repayment of the loans extended to PEM from the signing of the Agreement up till 13 February 2017.

11 In its Reply (Amendment No 3), AIL contended that the Agreement, properly construed, did not have the effect that Mr Kam claimed it did. In the alternative, AIL argued that the Agreement should be rescinded by virtue of a number of misrepresentations and breach of warranties on the part of Mr Kam. As there is no cross-appeal by AIL against the Judge's decision in dismissing its claims for misrepresentation and breach of warranty, we will not address them any further.

12 It is clear from the foregoing that the dispute centres on the interpretation of the Agreement. We therefore take this opportunity to set out its salient features, including the key clauses which the parties are in dispute over. The Agreement is a relatively concise document comprising six pages and 12 pages of associated appendices. The preamble states that the parties to the Agreement

are APTSA, ARI and AIL, although, as we will elaborate on below, PEM and PT ARI also signed the Agreement in acknowledgment. The parties broadly agree that the Agreement was entered into in a bid to facilitate a turnaround of PT ARI's business which by all accounts was struggling at the material time, with considerable debts at both the APTSA and PT ARI levels. Pursuant to this, Mr Chang through his special purpose vehicle, ARI, would inject up to US$750,000 in the form of a convertible loan to APTSA (in-effect PT ARI's parent company). When the convertible loan was fully converted, it would entitle ARI to 70% of APTSA's participating shares, which was the class of shares entitled to dividends. ARI would also be transferred 70% of APTSA's management shares, which was the class of shares entitled to vote at general meetings, while Mr Kam would hold the remaining 30% of both the participating and management shares. In order to prevent ARI's investment from being used to pay off existing debts, the Agreement contemplated a restructuring of APTSA's and PT ARI's existing obligations. This entailed negotiating substantial haircuts on the companies' existing debts and obtaining the agreement of existing shareholders that any loans extended to the companies would be paid off only with dividends. As part of this restructuring, PEM's loan obligations to AIL would be novated to ARI and Mr Kam's personal guarantees discharged, though the parties were at odds as to *when* this would occur under the Agreement.

13 With this background in mind, we set out in full cll 4 and 5 of the Agreement, which are the material clauses dealing with ARI's investment into APTSA and the novation of PEM's loan obligations to ARI:

> **4. Cash Injection into [APTSA] via Convertible Loan**
>
> (a) ARI shall inject USD 750,000 via convertible loan into [APTSA]. The USD 750,000 loan shall be converted into 82,274.85 shares at USD9.1157869 each, this shall acquire for

a 70% equity stake in [APTSA] (referring to Participating Shares). This shall be by way of new issuance of Participating Shares in the Company.

(b) The convertible loan injection shall be in tranches, likely to be in four (4) tranches, to be decided at the discretion of ARI.

(c) ARI reserves the right to terminate the turnaround plan should it not work out.

(d) Further to the injection of USD 750,000, in the circumstance that the business requires additional funding, [APTSA] shall raise additional capital by way of new issuance of participating shares. All participating shareholders shall be invited to participate in the additional raise in accordance to pro-rated % of shareholding, and if participating shareholders are not willing to inject additional funds in accordance to pro-rated % of shareholding, their respective shareholdings shall be diluted from the new issuance event. As a note, ARI is willing to inject up to USD 250,000.00.

5. Debt Restructure

With reference to appendix "Loan Status".

(a) Post this exercise, the "Existing Shareholder Group" (excluding ARI) shall be responsible for the loans outstanding to creditors (excluding ARI, trade creditors and staff outstanding(s)) as at this date, at both [APTSA] and PT ARI levels.

(b) Loans are to be re-negotiated (achieve substantial haircuts) and restructured such that any dividends distributed (to the Existing Shareholder Group) upon a successful turnaround, shall be applied to settling the loans.

(c) Trade creditors (namely Cody and Robert) and outstanding amounts to SC Yeo (salaries and loans) shall remain the responsibility of the PT ARI and [APTSA].

(d) AIL shall novate its existing USD1,000,000 loan with interest to ARI. ARI shall be responsible for this loan and interest, meaning that repayment shall be when dividends distributed (to AIL) upon a successful turnaround, shall be applied to settling the loan.

(e) The existing loan sits in PEM, where 100% shares are currently held in name of [Mr Kam], taken on behalf of [APTSA]. As per Clause 5(d) AIL agrees to novate the loan and interest from PEM to ARI, and hereby agrees that PEM be shut-down immediately without further liabilities in accordance with the laws of Singapore after all liabilities of PEM have been discharged. The personal guarantee given by [Mr Kam] shall

> also be dissolved with immediate effect (currently there is a back to-back guarantee from PT ARI to [Mr Kam]).
>
> [emphasis in bold in original; emphasis in underline in original omitted]

14 It can be readily observed that cll 5(d) and 5(e) of the Agreement clearly contemplate that PEM's obligations to AIL under the two loan agreements would be novated to ARI and that Mr Kam's corresponding personal guarantees would be dissolved. The question, then, is when these events would take place, and whether there were any conditions precedent which needed to be satisfied. Mr Kam's pleaded case was that the novation of the loans and the discharge of the personal guarantees took place upon the signing of the Agreement in September 2015. As against this, AIL's pleaded case was that the novation of the loans and the discharge of Mr Kam's personal guarantees would only take place after the occurrence of a number of events, including the successful turnaround of PT ARI's business and the shutdown of PEM. AIL also took the position that the Agreement could not have novated PEM's obligations to AIL under the two loan agreements as PEM was not a party to the Agreement, and that a separate novation agreement was required.

Decision below

15 The Judge's decision is reported as *Asian Infrastructure Ltd v Kam Thai Leong Dennis* [2019] SGHC 288 ("the Judgment"). The Judge rejected all three arguments raised by Mr Kam and found that he had failed to prove that he was not liable under the personal guarantees.

16 A preliminary point which the Judge had to decide was the date on which the Agreement was entered into. While AIL's pleaded position was that this took place in September 2015 (see [14] above), it sought to resile from this position in its written submissions and argued that the Agreement had been

entered into on 3 November 2015. Given Mr Kam's objection to AIL's departure from its pleaded case, the Judge eventually adopted September 2015 as the month in which the Agreement was concluded without making a specific finding on the exact date (Judgment at [21]–[23]). Since both parties are content to proceed with the appeal on this basis, we likewise adopt September 2015 as the month in which the Agreement was signed.

Interpretation of the Agreement

17 The Judge began by undertaking a granular analysis of the text of the Agreement, which he found did not support the interpretation that PEM's loans had been novated and Mr Kam's personal guarantees discharged upon its signing. The Judge first considered that the modal verb "shall" in cl 5(d) of the Agreement was used to express the future tense, implying that the novation was to take place in the future. Second, cl 5(d) also provided that the novation would take place *after* dividends had been distributed to AIL *upon a successful turnaround*. Third, cl 4(c) of the Agreement conferred ARI the right to terminate the turnaround plan should it fail to work out, which would be rendered nugatory should the novation of the loans have taken place immediately as it would then be saddled with the loans regardless of what transpired thereafter. Fourth, the term "immediately" in cl 5(e) in the phrase "[AIL] agrees to novate the loan and interest from PEM to ARI, and hereby agrees that PEM be shut down immediately without further liabilities … after all liabilities of PEM have been discharged" only attached to the shutdown of PEM after its liabilities had been discharged, rather than the act of novation. Finally, a holistic consideration of cl 5 led to the conclusion that the novation of PEM's obligations would only take place when dividends were distributed from APTSA to ARI upon a successful turnaround of PT ARI (Judgment at [31]–[40]).

18 The Judge rejected Mr Kam's arguments that the final sentence of cl 5 (e), which stated that "[t]he personal guarantee given by [Mr Kam] shall also be dissolved with immediate effect…", meant that the personal guarantees were discharged upon the signing of the Agreement. The Judge took the view that this had to be read against the entirety of cl 5(e), which made it apparent that the personal guarantees would only be discharged *after* the following events had taken place: (a) first, the pay-out of dividends by APTSA to ARI (upon a successful turnaround of PT ARI); (b) second, the novation of the loans and interest from PEM to ARI; and (c) third, the shutdown of PEM after all its liabilities had been discharged (Judgment at [41]–[49]).

19 At this juncture, we pause briefly to note that it is not entirely clear whether the Judge made a specific finding on the amount of dividends which would have to be paid out by APTSA to ARI in order to trigger the novation. There are two possible constructions which the Judge's decision can admit of: (a) first, that novation would take place upon the payment of *some* dividends from APTSA to ARI; and (b) second, that novation would take place only when dividends sufficient to pay-off PEM's obligations in *full* under the loan agreements had been paid out from APTSA to ARI. We are of the view the general tenor of the Judgment suggests that the Judge had in mind the latter and we will explain our reasoning on this point below.

20 The Judge then went on to consider the context of the Agreement, which he found supported his textual analysis of the Agreement. The Agreement was entered into as part of a "turnaround plan" to rescue PT ARI by which ARI would inject capital by way of a convertible loan in exchange for a fixed shareholding in APTSA. It was apparent from the evidence that the parties were acting in their own self-interests. AIL's key motive was to secure repayment of the outstanding loans through dividends paid out to ARI from APTSA, as well

as potential returns on the shares it would obtain in APTSA. In this connection, it would fly in the face of commercial common sense for AIL to have agreed to give up its security in the form of Mr Kam's personal guarantees and novate the loans to ARI for "nothing in return". Mr Kam's proposed interpretation would mean that AIL was in-effect forgiving the debt of an arms-length commercial party and there would no longer be any incentive for Mr Kam to ensure the successful turnaround of PT ARI. This commercially insensible result could not have been what the parties objectively intended. Given that ARI had not been paid dividends from APTSA, or indeed even allotted shares in the latter, novation of PEM's obligations had not taken place and Mr Kam was therefore still liable under the personal guarantees (Judgment at [54]–[57], [66]).

21 Finally, the Judge analysed a number of pre- and post-contractual emails relied on by Mr Kam and arrived at the conclusion that they did not support his interpretation of the Agreement (Judgment at [58]–[65]).

The alleged oral agreement

22 The Judge rejected Mr Kam's argument that there was an oral agreement formed at the 24 July 2015 Meeting whereby Mr Chang, on AIL's behalf, agreed to release him from the personal guarantees on condition that he procure APTSA's entering into a "joint venture agreement" with PEM, PT ARI, AIL and ARI. The Judge found that this contention was unsupported by any of the available documentary evidence and appeared to be an afterthought given that there was no credible explanation for the signing of the Agreement, which carried different conditions in relation to the discharge of Mr Kam's personal guarantees, if indeed there had been the alleged oral agreement. The terms of the alleged oral agreement were also similarly inconsistent with the commercial context (Judgment at [71]–[80]).

Promissory estoppel

23 The Judge rejected Mr Kam's claim that AIL was estopped from enforcing the personal guarantees against him. The Judge found that the terms of the Agreement, properly construed, did not constitute a clear and unequivocal representation that AIL would no longer seek to enforce the personal guarantees against him. AIL's failure to demand repayment similarly did not constitute a clear and unequivocal representation that it would not call on the personal guarantees as it did not have a duty to speak (Judgment at [105]–[111]).

The parties' cases on appeal

The appellant's case

24 Mr Kam raises substantially the same arguments which he did before the Judge. In essence, he argues that a plain reading of the Agreement leads to the conclusion that the novation of the loans and interest and the dissolution of his personal guarantees were to take place upon the signing of the Agreement. This is also supported by the context of the Agreement as it was entered into for Mr Chang to take a majority stake and control of PT ARI's business (through ARI) and turn it around with his technical expertise. The debt restructuring exercise was undertaken as Mr Chang did not want APTSA and PT ARI to be burdened by the loans owed to existing stakeholders. As part of this, Mr Kam's personal guarantees would fall away, with PEM's obligations being assumed by ARI. This was evidenced by the fact that Mr Chang came into APTSA on favourable terms and stood to benefit greatly from any turnaround, with the trade-off being that ARI would bear the responsibility of paying off the loans originally extended to PEM. There was ample evidence that Mr Chang had taken operational control over PT ARI notwithstanding the fact that shares in APTSA were not allotted to ARI or AIL's representatives appointed to the boards of

APTSA and PT ARI. Further, the pre- and post-contractual emails demonstrated the parties' objective intention that the novation was to take place immediately.

25 Mr Kam also challenges the Judge's findings in relation to the existence of the alleged oral agreement. He argues that the evidence demonstrated that the discharge of the personal guarantees was discussed at the 24 July 2015 Meeting, and that the Judge erred in comparing the terms for discharge of the personal guarantees under the Agreement against the alleged oral agreement in arriving at the conclusion that the latter was an afterthought. The requirements for discharge under the alleged oral agreement were not simple and the Judge failed to consider that this was Mr Kam's first time providing a personal guarantee, which he entered into without the benefit of legal advice.

26 Finally, Mr Kam argues that the Judge erred in finding that that AIL was not estopped from enforcing the personal guarantees. There was a clear representation from the terms of the Agreement, as it was reasonable for Mr Kam to think that cl 5 of the Agreement released him from the personal guarantees, especially given that Mr Chang emphasised that he did not want to be concerned with debts that did not involve his companies. There was also a clear representation from AIL's failure to inform him, at the 24 July 2015 Meeting and after the conclusion of the Agreement up until February 2017, that the personal guarantees were still effective, as AIL had a duty to speak. Without these representations, Mr Kam would not have given up the running of APTSA and PT ARI to Mr Chang. Under these circumstances, it would be inequitable for AIL to call on the personal guarantees.

The respondent's case

27 AIL seeks to uphold the Judge's decision. It argues that the interpretation of the Agreement proffered by Mr Kam is inconsistent with the text of the Agreement and also ignores the context in which the Agreement was entered into, *ie*, as a means for the loans and interest to be repaid. The evidence also did not establish that control of APTSA and PT ARI had been turned over to Mr Chang. As regards the alleged oral agreement, the Judge had correctly considered the evidence in finding that Mr Kam had failed to prove its existence. Finally, Mr Kam's case on promissory estoppel should be rejected as the terms of the Agreement did not amount to a clear and unequivocal representation that the personal guarantees would be dissolved with immediate effect. AIL also did not have a duty to inform Mr Kam that the personal guarantees were still effective after the 24 July 2015 Meeting. Mr Kam's position as to the detriment he suffered in giving up control of APTSA and PT ARI was also inconsistent with his testimony in court.

Issues before the Court

28 There are three main issues to be determined:

(a) whether on a proper interpretation of the Agreement, the personal guarantees given by Mr Kam had been discharged ("Issue 1");

(b) whether Mr Kam has successfully proved the existence of the alleged oral agreement discharging the personal guarantees ("Issue 2"); and

(c) whether AIL is otherwise estopped from enforcing the personal guarantees against Mr Kam ("Issue 3").

It was common ground between the parties at the appeal that if Issue 1 were decided in favour of Mr Kam, the appeal would be allowed irrespective of this court's decision on Issues 2 and 3.

Issue 1: Interpretation of the Agreement

29 We begin with the principles to be applied in the construction of contracts. These are well-established and were not disputed between the parties here and below:

(a) The starting point is to look to the text which the parties have used: *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).

(b) The court may have regard to the relevant context so long as the relevant contextual points are clear, obvious and known by the parties: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129].

(c) The court has regard to the relevant context in order to place itself in the best possible position to discern the parties' objective intentions by interpreting the expressions used by the parties in their proper context: *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [72].

(d) Generally, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear: *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31].

30 In addition, when determining the objective intentions of the parties, the court should ordinarily start from the position that the parties did not intend for

the terms of the contract to produce an absurd result. This, however, does not allow the court to disregard the parties' intentions if the objective evidence establishes that they were cognisant of the possibility of an absurd result, yet nevertheless chose to proceed with the contract: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [31]–[32].

31 We also briefly discuss the principles and requirements for a novation as they bear significance to the present appeal. A novation refers to a process by which a contract between the original contracting parties is discharged through mutual consent and substituted with a new contract. As a result, both the *benefits* and the *burdens* of the original contract are transferred to the new contracting parties. This requires not only the consent of the new contracting parties, but also of the original contracting parties. In determining whether there has in fact been a novation, the same principles governing contractual interpretation will apply as the court seeks to give effect to the objective intention of the parties: *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 at [46]–[47].

The relevant context

32 With these in mind, we turn to consider the proper construction of cll 5(d) and 5(e) of the Agreement which are the critical clauses dealing with the novation of PEM's obligations to ARI and the discharge of Mr Kam's personal guarantees. Before analysing the text of the Agreement, it is helpful to first set out the context against which it should be considered. We largely agree with the Judge's analysis of the parties' purpose in entering into the Agreement, which was to achieve a turnaround of PT ARI's business by having ARI inject capital through APTSA in the form of a convertible loan over several tranches.

As part of this, PEM's obligations to AIL would be novated to ARI, which would repay these obligations out of dividends paid out from APTSA to its shareholders including ARI if it decides to exercise its right of conversion. In exchange, ARI would potentially obtain up to 70% of the participating shares in APTSA.

33 That being said, it appears to us that the Judge omitted three key components of the relevant context in his reasoning. The first was that Mr Chang (through ARI) would be investing into the companies on extremely favourable terms. Leaving aside the issue of whether the conversion price of the convertible loan represented a discount on ARI's shares in APTSA at the time of the Agreement, we agree with the submission of counsel for Mr Kam, Mr Tham, that part of the turnaround involved negotiating haircuts on existing obligations at both the APTSA and PT ARI levels, with shareholders agreeing on what was in-effect a moratorium on seeking repayment of any loans extended by them to the companies. These meant that ARI stood to reap significant returns on its investment in the event that the turnaround plan was successful. The second was that Mr Chang was to contribute his expertise to achieve the turnaround of PT ARI's business. While the Judge did not think it necessary to make a finding on which party was responsible for effecting the turnaround plan (Judgment at [67]–[68]), the evidence clearly establishes that Mr Chang and Mr Tin became closely involved in the management of PT ARI's business following the conclusion of the Agreement. The third was a key facet of the factual background underpinning the Agreement, which was the fact that Mr Kam was in possession of a back-to-back guarantee from PT ARI. This is demonstrated by cl 5(e) of the Agreement, which states in parenthesis in its final sentence that "currently there is a back-to-back guarantee from PT ARI to [Mr Kam]". It is especially significant that the back-to-back guarantee from

PT ARI was referred to immediately after stating that the guarantees by Mr Kam were to be "dissolved with immediate effect". One of the key objectives of the Agreement was for ARI to inject capital with an eventual view to take a majority stake in APTSA/PT ARI. It would thus not make commercial sense for Mr Kam to remain liable under the guarantees to AIL when the ultimate liability would rest with the shareholders of PT ARI, including ARI, pursuant to the back-to-back guarantee. While counsel for AIL, Mr Rajoo, tried to downplay its relevance during the oral arguments in highlighting that the back-to-back guarantee was not in evidence before the court, this was quite off the mark. In ascertaining the relevant context, the court is concerned with material which might shed light on the parties' objective intentions at the time when the Agreement was entered into. It was highly relevant that the parties were *ad idem* as to the existence of the back-to-back guarantees when entering into the Agreement. Indeed, this was not a point disputed between the parties in the proceedings below.

34 We highlight the above three contextual facts because the Judge appeared to have found that it would not make any commercial sense for AIL to have agreed to give up its only security in the form of Mr Kam's personal guarantees and novate the loans to ARI for "nothing in return". Evidently, this was clearly not the case, the significance of which will be elaborated on below.

35 A separate point which AIL raised in the course of oral arguments was the fact that the structure of the turnaround plan appeared to have changed between the time negotiations first took place and when the Agreement was eventually signed. In an update to APTSA's shareholders dated 26 August 2015 ("the Shareholders' Update"), the proposed turnaround plan was explained as having Mr Chang taking a 70% equity stake in APTSA in several tranches, which would have the effect of diluting the shareholdings of existing

shareholders. This was slightly different from what was eventually agreed in the Agreement, whereby ARI would extend APTSA a convertible loan which could be converted into a 70% stake in its participating shares. With respect, we do not see how this has any bearing on the interpretation of the Agreement in so far as the novation of PEM's obligations to ARI is concerned. This change in structure appears to have been prompted by concerns over the accounting treatment of the acquisition of APTSA shares over a number of tranches, and in no way demonstrates that the parties' intention as regards the novation of PEM's obligations to AIL had ever changed.

Text of the Agreement

36 We now come to the text of the Agreement. At the outset, it should be noted that there were only two competing case theories before the court as to *when* the novation of PEM's obligations to ARI was to take place and Mr Kam's personal guarantees discharged. The first, which was advanced by AIL and accepted by the Judge, was that novation would take place only after the occurrence of number of events including the paying out of dividends from APTSA to ARI and the shutdown of PEM. In this connection, in response to our query as to the amount of dividends required to trigger the novation, Mr Rajoo submitted that the Judge found that payment of *some* dividends would suffice and that it was unnecessary for dividends to be paid in *full* to discharge PEM's outstanding loan obligations. The second, which was Mr Kam's case theory, was that novation of PEM's obligations to ARI and the discharge of his personal guarantees were to take place upon the signing of the Agreement.

37 In our judgment, there are considerable difficulties with AIL's case theory. The position adopted by AIL before the court, that the novation would take place upon the pay out of *some* dividends by APTSA to ARI, would give

rise to intolerable uncertainty. Taken to its logical conclusion, this would mean that the declaration of even a nominal dividend would be sufficient to trigger the novation. We do not think that there is anything in the text of the Agreement which supports AIL's contentions in this regard. More importantly, this does not appear to have been the position which AIL took in the proceedings below. In its closing submissions, AIL argued that the novation of PEM's obligations should be seen as a "chain of interconnected components" and that novation would only take place when *all* of the necessary components were fulfilled. Since one of these components was the repayment of PEM's outstanding obligations with dividends distributed by APTSA, this suggests that sufficient dividends to discharge PEM's loan obligations in full would have to be distributed before the novation would take effect.

38 In any event, it appears from the general tenor of the Judgment that the Judge was of the view that novation would only take place upon sufficient dividends being paid out by APTSA to fully discharge PEM's outstanding loan obligations. In our view, there are also considerable difficulties with this approach. As mentioned above at [31], a novation serves to replace an existing contract with a new one. In the present case, the novation was to serve the purpose of transferring PEM's obligations to ARI, such that the latter would become the party indebted to AIL and eventually repay the loans utilising dividends distributed from APTSA. Seen in this light, it would be antithetical to the concept of a novation for it to take place only at the point where sufficient dividends had been paid out to *fully* satisfy PEM's obligations to AIL as by this time, there would be in reality no liabilities left to novate. In fairness to the Judge, this was a point which neither party raised in the proceedings below.

39 It follows from the discussion above that the only plausible case theory as to the interpretation of the Agreement before the court was Mr Kam's. In our

judgment, the text of the Agreement supports Mr Kam's case that PEM's obligations to AIL was novated to ARI and his personal guarantees discharged upon the signing of the Agreement.

40 We begin our analysis with cl 5(d) of the Agreement (see [13] above). The first sentence of the clause unequivocally states that AIL "shall novate its existing … loan with interest to ARI." This clearly suggests that the novation was not contingent on *any* dividends being distributed by APTSA to ARI. We do not think that the second sentence of cl 5(d), which provides that "ARI shall be responsible for this loan and interest, meaning that repayment shall be when dividends distributed (to AIL) upon a successful turnaround, shall be applied to settling the loan", changes this analysis. There is nothing in the second sentence which introduces any qualification to the first sentence in cl 5(d). It seems to us that the second sentence of cl 5 (d) simply refers to the source of funds for ARI to repay the obligations it would assume post-novation, and does not introduce any additional requirements in order for the novation to take place.

41 We also do not agree with the Judge that the use of the term "shall" in cl 5(d) meant that the novation would take place in the future, rather than upon the signing of the Agreement. To our minds, the ordinary use of the term "shall" is to refer to a *mandatory* obligation in contradistinction to a step which a party *may* undertake. Taken holistically, we do not think there is anything in cl 5(d) which suggests that the novation was not meant to take place upon the conclusion of the Agreement.

42 Turning to cl 5(e) of the Agreement, we do not think that anything in its text affects the construction of cl 5(d). On the contrary, it serves to confirm our interpretation of cl 5(d). The Judge (and AIL) placed great emphasis on the second sentence, which reads "[a]s per cl 5(d) AIL agrees to novate the loan and

interest from PEM to ARI, and hereby agrees that PEM be shut-down immediately without further liabilities in accordance with the law of Singapore after all liabilities of PEM have been discharged." This was said to subject the novation of PEM's obligations to the shutting down of PEM. With respect, we do not see how the text of cl 5(e) can reasonably bear such a meaning. First, cl 5(e) must be read subject to cl 5(d) which, as discussed above, contemplates the novation taking place upon the signing of the Agreement. Second, a more natural reading of the second sentence of cl 5(e) suggests that the shutting down of PEM, which would have to occur pursuant to Singapore law in a members' voluntary winding up, was separate and distinct from the novation of its obligations to AIL. Third, the final sentence of cl 5(e), which states that "[t]he personal guarantee given by [Mr Kam] shall also be dissolved with immediate effect (currently there is a back-to-back guarantee from PT ARI to [Mr Kam])" puts to rest any debate over the timing of the novation. This is expressed in unequivocal terms and we do not think that the word "also" can be taken to mean that the dissolution of the guarantees was premised on PEM being shut down.

43 We also do not agree that cl 4(c) provides any assistance to AIL's position. Clause 4(c) of the Agreement provides *ARI* with the right to terminate the turnaround plan should it not work out. We do not see how this has any bearing on the timing of the novation of PEM's obligation from AIL to ARI. If anything, cl 4(c) was simply a provision inserted by the parties to protect ARI from having to throw good money after bad in the event it became patently clear that the turnaround plan would not succeed. The Judge attached significance to cl 4(c) because, in his view, the right of termination might render the Agreement nugatory should novation of the loans take place immediately as ARI would then be saddled with the loans regardless of the success of the turnaround plan.

However, with respect, this finding ignores the fact that the right of termination was conferred on ARI and not on APTSA. It was designed to protect ARI from further investment exposure in the event it decided that the turnaround was not going to work. Therefore, if any turnaround plan and/or the Agreement was to be rendered nugatory, that would be due to ARI's call to safeguard its own interest and we fail to see how that would impact on *when* the novation was to take place.

44 One final point which we have to address is whether PEM's obligations *vis-à-vis* AIL were novated to ARI pursuant to the Agreement. This point was not addressed by the Judge below in light of his decision that the novation did not take effect upon the signing of the Agreement. For a valid novation to take place, the consent of both the original and new contracting parties is required (see [31] above). This means that PEM must be a party to the Agreement for the novation to be valid and effective. Although the text of the Agreement described the parties as APTSA, ARI and AIL, it is common ground that PEM also appended its signature in acknowledgment of the Agreement. In our view, nothing turns on the fact that PEM signed the Agreement in acknowledgment. It did not alter the fact that PEM was nonetheless a party to the Agreement for the purposes of the novation. While AIL had pleaded that PEM was not a party to the Agreement, in his affidavit of evidence-in-chief, Mr Chang acknowledged that PEM was a party to the Agreement. This concession is in fact borne out by the Agreement itself. In this regard, we note that only APTSA and ARI purported to sign the Agreement as parties even though APTSA, ARI and AIL were each identified as parties. AIL, as a party to the Agreement, likewise signed the Agreement in acknowledgment in the same way as PEM and PT ARI. It is significant that PEM and AIL signed the Agreement side-by-side as they were the borrower and lender under the two loan agreements. In our

view, the signatures of the original contracting parties, *ie*, AIL and PEM as well as the new contracting parties, *ie*, AIL and ARI on the Agreement were sufficient to constitute the requisite consent to effect the novation.

Relevance of pre- and post-contractual conduct

45 While we do not think it is strictly necessary for us to consider the pre- and post-contractual conduct given that the text and context of the Agreement provide a clear answer as to when the novation of PEM's obligations and the discharge of Mr Kam's personal guarantees were to take place, we nevertheless briefly consider the parties' pre- and post-contractual conduct to confirm the interpretation to be accorded to the Agreement.

46 The primary instance of pre-contractual conduct which Mr Kam relied on before the court was the Shareholders' Update sent to APTSA's shareholders on 26 August 2015. As mentioned above at [35], this roughly outlined the turnaround plan, which was being negotiated between the parties at the time. Crucially, it specifically mentioned that Mr Chang "[would] take 70% of equity [in APTSA] … and also *take over the responsibility* of the USD1,000,000 debt + interest which he had previously lent". Notably, when a draft of this update was sent to Mr Chang and Mr Tin, they did not object to this statement but instead commented on other matters. To us, this is strong evidence of the parties' intentions that Mr Chang would no longer look to PEM and Mr Kam for repayment of the loans, and had agreed to run the risk of ARI being unable to repay the novated obligations to AIL should the turnaround plan not succeed. Indeed, this makes sense in the grand scheme of things in light of the back-to-back guarantee which Mr Kam had obtained from PT ARI. The other shareholders in APTSA and PT ARI were asked to take haircuts and agree to a moratorium on all loans extended to the companies. Given this, it would make

little sense for Mr Chang to have no "skin in the game" and continue to be able to look to Mr Kam (and correspondingly PT ARI due to the back-to-back guarantee) for repayment. As we have observed at [33] above, it would not make commercial sense for Mr Kam to remain liable under the guarantees to AIL when the ultimate liability would eventually rest with the shareholders of PT ARI including ARI pursuant to the back-to-back guarantee.

47 Turning to the post-contractual conduct, the parties relied on a number of emails from October to November 2015 between Ms Carol Pang ("Ms Pang"), an employee of Infraavest, and Ms Eileen Tan ("Ms Tan"), a director of both APTSA and PEM. In the email exchange, there were discussions on whether PEM's loans had been novated and the circulation of certain draft "novation agreements". At this point, it bears mentioning once again that the focus of the inquiry is on ascertaining the objective intention of the parties in entering into the Agreement (see [31] above). If the parties had intended that the Agreement would suffice to novate PEM's loan obligations to ARI, that would have been sufficient and nothing further would have been required. This was a question of law to be resolved by reference to the terms of the Agreement and the relevant context. In our view, the emails do not establish conclusively that a further novation agreement was required. From the emails, it would appear that Ms Tan and Ms Pang were both unsure as to whether the loans had already been novated and whether any further formalities had to be complied with. For example, Ms Pang emailed Ms Tan on 23 October 2015 to "check if the PEM loan has been novated" and requested that the latter provide "a copy of the agreement". This was followed by a number of emails discussing the drafting of a novation agreement. However, when Ms Tan emailed Ms Pang on 18 November 2015 attaching a draft novation agreement together with a copy of the first personal guarantee given by Mr Kam dated 23 September 2013 with

the words "cancelled" stamped on it, we regard it significant that it did not elicit any response from either Ms Pang or Mr Tin, who was copied on the email. While the Judge dismissed this email as irrelevant on the basis that there was no evidence that these were ever signed by Mr Chang (see Judgment at [65]), we take a different view. If the novation of the loans was not to take place until dividends have been distributed from APTSA to ARI according to AIL's case, one would have expected a contrary reaction from Ms Pang or Mr Tin that the guarantees had not been "cancelled". In our judgement, the omission to react to the cancellation of the guarantee on AIL's part is quite telling. It is consistent with the parties' understanding that the novation had already taken effect upon the signing of the Agreement. This also explains why no reminder was ever sent by AIL to PEM on the repayment of the loans throughout the period when the turnaround plan was in progress, a point which we shall elaborate on below.

48 We accept that any delay in seeking repayment in itself would typically not be determinative as to whether the loans and guarantees had been discharged. A number of reasons could well have accounted for the delay. However, on the facts of this case, in our view, the inordinate delay was significant for several reasons. First, the delay was quite substantial. The due date for the loans was 31 December 2014 but the demand for repayment was only made more than two years later on 13 February 2017. Second, the demand for repayment was only made *after* the abandonment of the turnaround plan even though by AIL's case, there was no moratorium for repayment of the loans pending the successful turnaround of PT ARI. Third, the loans carried relatively high rates of interest of 1% per month which means that significant interest would have been accumulating on the loans without any hint from AIL that PEM and Mr Kam remained liable for them. It was in the context of these factors that the complete absence of any discussion on repayment in the interim period

serves to reflect the common understanding of the parties that the loans and consequently the guarantees had indeed been discharged under the terms of the Agreement.

Conclusion on interpretation of the Agreement

49 To conclude on this point, we are satisfied that the plain text of the Agreement evinces the parties' objective intention that PEM's obligations were novated to ARI and Mr Kam's personal guarantees discharged upon its signing. This is further supported by the relevant context: the turnaround plan called for ARI to inject capital into APTSA by way of a convertible loan and to contribute the necessary expertise. As part of this plan, it was necessary to restructure debts at both the APTSA and PT ARI levels and prevent the fresh funds from being used to repay old debts. Given that Mr Kam was effectively able to call on PT ARI's assets given the back-to-back guarantee, it was entirely sensible for Mr Chang to agree to assume the risk of the turnaround plan not succeeding, bearing in mind that he stood to reap significant benefits from his right to obtain a 70% stake in the participating shares of APTSA.

50 One final argument which was raised by AIL in the course of oral arguments was the fact that PEM might have committed breaches of the loan agreements in not transferring the full sums borrowed from AIL to PT ARI. This argument can be dealt with summarily as it is simply irrelevant to the present appeal, which concerns the proper interpretation of the Agreement. AIL's claim is against Mr Kam for repayment of the loans which were extended to PEM. Whether PEM had in fact used the entire loans for PT ARI's operation can have no bearing on PEM's liability to AIL under the loans and correspondingly, Mr Kam's liability, if any, under the guarantees.

51 For the reasons expressed above, we are of the view that the personal guarantees given by Mr Kam were discharged at the time the Agreement was concluded in September 2015.

Issue 2: The alleged oral agreement

52 It follows from the above analysis that it is unnecessary to deal with the existence of the alleged oral agreement. We do, however, take this opportunity to make some brief observations about the alleged oral agreement.

53 In situations where the terms of a contract have been reduced to writing, s 94(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) operates to preclude a party from adducing evidence of an oral agreement which is inconsistent with its terms. As is noted in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 6.036, citing *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30, this statutory embodiment of the parole evidence rule is *stricter* than the common law exception, which allows proof of a collateral contract whose terms are inconsistent with those in the main agreement. Here, the parties did sign the Agreement, which as mentioned above specifically dealt with the discharge of the personal guarantees furnished by Mr Kam. As against this, the terms of the alleged oral agreement were that the personal guarantees would be discharged on condition that Mr Kam procured APTSA's entry into a joint venture agreement under which Mr Chang would be given control over PT ARI's rubber processing plant and the debts of APTSA and PT ARI restructured. Given that the terms of the alleged oral agreement stipulated quite different conditions for the discharge of Mr Kam's personal guarantees than those contained in the Agreement, we agree with the Judge that the alleged oral agreement simply cannot get off the ground.

Issue 3: Promissory estoppel

54 Mr Kam's claim in promissory estoppel on appeal was based on two representations: (a) cl 5 of the Agreement could be construed as a representation that he was released from the personal guarantees; and (b) that AIL's failure to inform him at the 24 July 2015 Meeting that the personal guarantees were valid, coupled with its failure to remind him about his obligations under the personal guarantees until February 2017.

55 Given our finding that Mr Kam's personal guarantees had been discharged upon the signing of the Agreement, it is similarly unnecessary for us to consider whether AIL is estopped from enforcing them. We do, however, harbour some doubts as to whether a creditor ordinarily has a duty to inform a debtor that he or she still considers the debt to be valid, as Mr Kam appears to argue. It appears to us that in most situations, silence on the part of a creditor or delay in prosecuting a claim would not amount to an unequivocal representation that the creditor no longer intends to insist on its strict legal rights (see Sean Wilken QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation and Estoppel* (Oxford University Press, 3rd Ed, 2012) at para 8.22). Each case, however, must turn on its own facts and it is not necessary to decide the issue here given our findings on the interpretation of the Agreement.

Conclusion

56 For the above reasons, we allow the appeal and set aside the judgment below. AIL shall pay Mr Kam's costs below to be taxed if not agreed and the costs of the appeal are fixed at $40,000 inclusive of disbursements with the usual consequential orders.

Steven Chong Judge of Appeal	Chao Hick Tin Senior Judge	Quentin Loh Judge

Tham Wei Chern, Shirlene Leong Hong Mei and Charis Wang Chunhua (Fullerton Law Chambers LLC) for the appellant;
Mathiew Christophe Rajoo and Gerard Vincent Nicholas (DennisMathiew) for the respondent.