

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 288

Suit No 397 of 2017

Between

Asian Infrastructure Ltd

... Plaintiff

And

Kam Thai Leong Dennis

... Defendant

JUDGMENT

[Contract] — [Contractual terms] — [Oral agreement between parties]

[Contract] — [Misrepresentation]

[Equity] — [Estoppel] — [Promissory estoppel]

TABLE OF CONTENTS

THE FACTS AND THE EVIDENCE	1
THE PARTIES.....	1
THE WITNESSES	2
BACKGROUND FACTS	3
THE DEFENDANT’S CASE	5
THE PLAINTIFF’S CASE.....	5
ISSUES TO BE DETERMINED	6
ISSUES 1 AND 2: INTERPRETATION OF THE AGREEMENT	7
THE LAW	8
ANALYSIS.....	10
<i>Text before context</i>	12
<i>Context</i>	18
<i>Relevance of the email correspondence</i>	21
<i>Relevance of the control of PT ARI’s operations</i>	24
ISSUE 3: EXISTENCE OF A COLLATERAL ORAL AGREEMENT?.....	25
THE LAW	25
ANALYSIS.....	25
<i>Documentary evidence</i>	27
<i>Commercial context</i>	30

ISSUE 4: MISREPRESENTATION AND/OR BREACH OF WARRANTIES	31
MISREPRESENTATION	31
<i>Defect in pleadings</i>	31
<i>The law</i>	32
<i>Production capacity of 1000 tons a month</i>	33
<i>50 containers of Indonesian Rubber 20</i>	35
<i>Omission to mention the CAL loan</i>	36
BREACH OF WARRANTIES	37
ISSUE 5: PROMISSORY ESTOPPEL	39
THE LAW	39
THE FIRST REPRESENTATION	40
THE SECOND REPRESENTATION	42
THE THIRD REPRESENTATION	42
CONCLUSION.....	44

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Asian Infrastructure Ltd

v

Kam Thai Leong Dennis

[2019] SGHC 288

High Court — Suit No 397 of 2017

Dedar Singh Gill JC

14–17, 21–23 May 2019

10 December 2019

Judgment reserved.

Dedar Singh Gill JC:

1 This is a claim by Asian Infrastructure Limited (“AIL”) against Mr Dennis Kam (“Mr Kam”) under two contracts of personal guarantee for outstanding sums owed by Perfect Earth Management Pte Ltd (“PEM”).¹

The facts and the evidence

The parties

2 It is necessary to highlight the identities of the following parties in the present dispute:

¹ Statement of Claim (“SOC”), pp 1 – 5.

- (a) PEM is a Singapore incorporated company which borrowed money from AIL under two loan agreements dated 23 September 2013 and 11 March 2014.²
- (b) AIL is a Hong Kong incorporated company³ which entered into two contracts of personal guarantee with Mr Kam guaranteeing loans extended to PEM on 23 September 2013 and 11 March 2014.⁴
- (c) ARI Investments Limited (“ARI”) is a Hong Kong incorporated company which shares the same registered address as AIL.
- (d) Mr Malcolm Chang (“Mr Chang”) is a director of both AIL and ARI.
- (e) PT Aceh Rubber Industries (“PT ARI”) is an Indonesia incorporated company which owns and operates a rubber factory in Aceh, Indonesia.
- (f) Accelera Precious Timber & Strategic Agriculture Limited (“APTSA”) is a Cayman Islands company with limited liability. APTSA is a majority shareholder in PT ARI.
- (g) Mr Kam is a *Komisaris* (ie, commissioner) of PT ARI, as well as a director and shareholder of APTSA.

The witnesses

² Malcolm Chang’s AEIC (“MCAEIC”), paras 10 and 16.

³ Dennis Kam’s AEIC (“DKAEIC”), para 11.

⁴ MCAEIC, paras 9 and 15.

3 Mr Chang and Mr Tin Jing Soon (“Mr Tin”), the Business Development Manager of Infraavest Private Limited, a company controlled by Mr Chang, testified on behalf of the plaintiff.⁵

4 In addition to Mr Kam, two other witnesses testified for the defendant. These were Ms Eileen Tan E-Lin (“Ms Tan”) and Mr Yeo Siang Cher (“Mr Yeo”). Ms Tan was a director and shareholder of APTSA, as well as a director of PEM.⁶ Like Mr Kam, Mr Yeo was a director of PT ARI.⁷

Background facts

5 The following facts are not substantially in dispute.

6 Sometime in August or September 2013, Mr Kam approached Mr Chang for a loan to be used as “working capital” for PT ARI.⁸ PT ARI operated a rubber factory in Aceh, Indonesia.⁹ Both Mr Kam and Mr Chang agreed that the borrowing entity would be a Singapore incorporated company, PEM.¹⁰ PEM was a company controlled by Mr Kam.¹¹

7 On 23 September 2013, AIL loaned US\$500,000 to PEM with interest payable at 1% per month. The loan was to be repaid on 31 December 2013 (“the

⁵ Tin Jing Soon’s AEIC (“TJSAEIC”), para 1.

⁶ Eileen Tan E-Lin’s AEIC (“ETAEIC”), para 1.

⁷ Yeo Siang Cher’s AEIC (“YSCAEIC”), para 1.

⁸ MCAEIC, para 5.

⁹ DKAEIC, para 3.

¹⁰ MCAEIC, para 7.

¹¹ MCAEIC, para 8.

2013 loan”).¹² On the same day, Mr Kam provided a personal guarantee to AIL guaranteeing the repayment of this sum.¹³ By mid-January 2014, only US\$150,000 had been repaid by PT ARI (on behalf of PEM) to AIL.¹⁴ AIL agreed to extend the repayment date of the balance sum to 31 December 2014.¹⁵

8 Subsequently, AIL loaned a further sum of US\$650,000 to PEM at the same rate of interest of 1% per month. This was due to be repaid by 31 December 2014 (“the 2014 loan”). Mr Kam gave another personal guarantee on 16 March 2014 to AIL guaranteeing repayment of the 2014 loan.

9 AIL now claims against Mr Kam under both contracts of personal guarantee for the outstanding sums owed by PEM under the 2013 and 2014 loans.

10 The relevant terms of both personal guarantees are as follows:¹⁶

I, [Mr Kam], personally guarantee to you [AIL]... any obligation of [PEM] and hereby agree to bind myself to pay you on demand the sum which may become due to you by the company whenever [PEM] shall fail to pay the same.

It is understood that this guarantee shall be a continuing and irrevocable guarantee and indemnity for such indebtedness of [PEM].

¹² ABDV1, pp 8 – 9.

¹³ ABDV1, p 10.

¹⁴ SOC, paras 7-8.

¹⁵ ABDV1, pp 19-20.

¹⁶ Plaintiff’s Set down Bundle (“PSB”), pp 146-147; DKAEIC, p 177.

The defendant's case

11 Mr Kam denied that he was liable under the personal guarantees. He relied on an agreement which he characterised as a “joint venture” between PEM, PT ARI, APTSA, ARI, and AIL. I refer to this as “the Agreement”. In his view, the Agreement novated the 2013 and 2014 loans from PEM to ARI (a company controlled by Mr Chang) on the date of the Agreement. As the underlying loan agreements were novated, he submitted that his liability as guarantor fell away. Mr Kam also relied on Clause 5(e) of the Agreement as extinguishing his liability under the personal guarantees on the date of the Agreement.

12 Further, Mr Kam alleged the existence of a collateral oral agreement reached on 24 July 2015 which discharged his liability as guarantor.

13 Lastly, Mr Kam submitted that AIL is estopped from denying that his liability under the personal guarantees had been discharged.¹⁷

The plaintiff's case

14 AIL adopted a different view from Mr Kam on the significance and contractual effect of the Agreement. It submitted that Clause 5 of the Agreement should be interpreted contextually. In its view, the “proper context” was that AIL entered into the Agreement because PEM was unable to repay the outstanding loans owed to AIL.¹⁸ The Agreement was meant to embody a “turnaround plan” in which AIL would take an equity stake in APTSA and, in

¹⁷ PSB, p 117 at paras 27-28.

¹⁸ MCAEIC, paras 26-28; Bundle of Affidavits of Evidence in Chief (“BAEIC”) Vol 1, pp 8-9; TJSAEIC, paras 7-8.

the process, receive dividends which it would use to repay the outstanding sums owed to it. In exchange, AIL would agree to the novation of the 2013 and 2014 loans. This would discharge PEM of its outstanding liabilities and extinguish Mr Kam’s liabilities under the personal guarantees. Given the “proper context”, AIL submitted that both parties could not have intended for the liabilities of PEM and Mr Kam to be extinguished on the date of Agreement. On the contrary, their liabilities would only be discharged *after* the “turnaround plan” was fully implemented.

15 Further and in the alternative, AIL claimed that the Agreement should be rescinded by virtue of Mr Kam’s misrepresentations and/or breach of warranties. The misrepresentations and/or breach of warranties related to two matters. First, PT ARI’s production capacity. Second, Mr Kam’s failure to disclose that not all of the sums loaned by AIL were used for PT ARI’s factory (which was the very reason why the loans had been extended in the first place), but were siphoned off to various third parties.

16 Lastly, AIL rejected Mr Kam’s argument that it was estopped from denying that he was liable under the personal guarantees.

Issues to be determined

17 The issues are:

- (a) whether the Agreement novated the 2013 and 2014 loans from PEM to ARI in September 2015 (there is some dispute between the parties on the relevant date to be applied. I address this at [20]–[22]);
- (b) did the Agreement discharge, as at the date of the Agreement, Mr Kam’s liabilities under the personal guarantees;

(c) was there a collateral oral agreement between Mr Chang (on behalf of AIL) and Mr Kam entered into on 24 July 2015 which discharged the latter’s liability under the personal guarantees;

(d) should the Agreement be rescinded for misrepresentation and/or breach of warranties; and

(e) whether the defence of promissory estoppel arises in favour of Mr Kam such that AIL can no longer call on the personal guarantees.

Issues 1 and 2: Interpretation of the Agreement

18 The first two issues will be dealt with together.

19 Mr Kam did not dispute either the existence of the 2013 and 2014 loans and that a total of US\$1,000,000 (excluding interest) was due and payable to AIL by PEM as at 31 December 2014. Neither did he challenge the existence of the two contracts of personal guarantee with AIL.

20 Relying on Clauses 5(d) and 5(e) of the Agreement,¹⁹ Mr Kam’s defence to AIL’s claim was that, based on his interpretation of the clauses, his liability under the personal guarantees was discharged “immediately” (*ie*, instantaneously) on the date of the Agreement.²⁰

21 I noted in [17a] above that there was a disagreement between the parties regarding the date on which both parties entered into the Agreement. According to AIL’s pleadings, the relevant month in which the Agreement was entered into

¹⁹ BAEIC, Vol 2, at p 835.

²⁰ SDB, p 114 at [25].

was September 2015.²¹ AIL, however, departed from its pleaded position during cross-examination and in its written submissions. It took 3 November 2015 to be the date of the Agreement. However, Mr Chang’s affidavit stated that AIL entered into the Agreement “[o]n or about 29 September 2015”.²² More significantly, the date stated on the Agreement itself is September 2015, although the precise day of the month is left blank.²³

22 Mr Kam argued that AIL should not be permitted to alter its position, given that it had pleaded that the Agreement was entered into in September 2015.

23 In the circumstances, I adopt September 2015 as the month in which the Agreement was concluded. In any case, the difference in the dates makes no material difference to the contractual analysis below. The crux of Mr Kam’s case is that the loan agreements had been novated “immediately” (*ie*, on the date of Agreement). As both September 2015 and the later date referred to in AIL’s written submissions (*ie*, 3 November 2015) have passed, novation would have already taken place on either date (assuming that I accept Mr Kam’s interpretation of the Agreement).

The law

24 The relevant principles concerning contractual interpretation may be summarised as follows:

²¹ SDB, p 132 at para 18(i).

²² MCAEIC, para 36.

²³ MCAEIC, MC-1, pp 131.

(a) The “text” of a contract remains the primary source of understanding the parties’ intentions, even under the modern contextual approach. Text comes before context: *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [59].

(b) Extrinsic evidence of the external context of the document is admissible in aid of contractual interpretation even if there is no ambiguity in the contract sought to be interpreted: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (“*Zurich Insurance*”) at [114]–[120].²⁴ However, the extrinsic evidence has to be relevant, reasonably available to all the contracting parties and should relate to a clear or obvious context (see [132d]).

(c) The role of context relates only to the need to place the court in the position of the party which drafted the contractual instrument and not the drafter’s *subjective intention* as such: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 (“*Soup Restaurant*”) at [33].

(d) Avoiding a commercially absurd result is a factor (albeit a “not unimportant one”) to be considered in the process of interpretation: *Soup Restaurant* at [32]. The court should ordinarily start from the working position that the parties did not intend for the terms concerned to produce an absurd result, although it might well be the case that the objective evidence demonstrates that the parties were aware of the

²⁴ Defendant’s Bundle of Authorities (“DBOA”), Tab 23

absurd result that might ensue from the contractual terms, but still proceeded to enter into the contract in question.

25 Neither party disputed the applicability of the contextual approach outlined above, although Mr Kam submitted that it was clear from Clauses 5(d) and 5(e) of the Agreement that novation was to take place immediately.²⁵

Analysis

26 I now turn to the analysis of the Agreement.

27 It is helpful to reproduce the entire subsection of the Agreement in which the disputed clauses appear:²⁶

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 [Mr Yeo] (salaries and loans) shall remain the responsibility of the PT ARI and [APTSA].

(d) AIL shall novate its existing USD 1,000,000 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.

²⁵ DCS, paras 18-19.

²⁶ MCAEIC, MC-1, pp 131.

(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]).

28 On Mr Kam’s interpretation of Clause 5, both the 2013 and 2014 loans were novated “immediately” upon the signing of the Agreement in September 2015.²⁷ Relying on a reading of Clause 5(e) which states that “the personal guarantee given by [Mr Kam] shall also be dissolved with immediate effect”, he further submitted that the personal guarantees given by him were discharged in September 2015.

29 In contrast, AIL argued that the novation of the loans must be seen as part of “a chain of interconnected components which cannot be viewed in isolation”.²⁸ The interconnected components are as follows.²⁹ First, ARI would step into PEM’s shoes and assume its liability to pay the outstanding sums (including interest) to AIL. Then, ARI would repay the outstanding sums using dividends distributed to ARI by APTSA *after* PT ARI and its rubber factory in Aceh, Indonesia had been successfully turned around and had begun generating profit. PEM would then be shut down. But this was to be done only after all of its liabilities had been discharged. It was only after all these steps were completed that Mr Kam’s liability under the personal guarantees would be extinguished. AIL submitted that viewing the novation of the two loan

²⁷ SDB, p 114 – 117; Defence, para 25.

²⁸ PCS at para 26.

²⁹ PCS at para 26.

agreements in isolation would lead to an “absurd result” which would be contrary to the parties’ objective intention.³⁰ The “absurd result” which AIL referred to was the “result” of novation taking place immediately in September 2015 *before* dividends had been paid to ARI from APTSA upon the successful turnaround of PT ARI. AIL contended that this was an “absurd result” because ARI would not be able to repay the outstanding loans not having received any dividends from APTSA at the time.³¹

30 In relation to Clause 5(e), AIL contended that this should not be interpreted to mean that the personal guarantees were dissolved in September 2015. Instead, the court should have regard to the commercial context as well as the Agreement’s various “[n]ovation [c]omponents”.³²

Text before context

31 My analysis begins with the language of the Agreement. There are several reasons why the text of the Agreement does not support Mr Kam’s interpretation.

32 First, Clause 5(d) of the Agreement reads “AIL *shall* novate its existing USD 1,000,000 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”. One of the definitions of the word “shall” provided by the *Oxford English Dictionary* is a modal verb which is used to express the *future* tense. The example provided

³⁰ PCS at para 27.

³¹ PCS at para 39.

³² PCS at para 81.

in relation to this is “this time next week I *shall* be in Scotland”. *Black’s Law Dictionary* likewise defines “shall” as a future-tense verb, as in “the debtor shall then be released from all debts”. In this case, the word “shall”, in the context in which it appears, implies that novation would take place in the future. If parties had intended for novation to take place immediately, phrases such as “AIL novates the loan...” or “by this Agreement, AIL novates the loan” would have been used.

33 Second, Clause 5(d) itself, on closer reading, provides that novation takes place only after dividends have been distributed to AIL upon a successful turnaround (*ie*, a future event). Thus, although the first line of the clause is silent on *when* novation should take place, the second sentence of Clause 5(d) goes on to state 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*” [emphasis added].

34 At this juncture, it is worth highlighting briefly the nature of novation as it assists in the task of interpreting Clause 5(d). A contractual liability, such as an obligation to repay an outstanding loan, cannot be transferred unilaterally and requires a novation: *Halsbury’s Laws of Singapore* – vol 7 (LexisNexis, 2016 Reissue) at para 80.431. When a contract is novated, the old agreement is extinguished and a new contract is formed with new or substituted parties (or in some cases, between the same parties): *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 at [46]. Having regard to the nature of novation, the phrase “ARI shall be responsible for this loan and interest” is an obvious reference to the legal effect of novation. Spelled out, this legal effect is that the “substituted party” to the contract, *ie*, ARI, will assume PEM’s liabilities under the 2013 and 2014 loans.

35 Having stated that ARI “shall be responsible for [the] loan and interest” (this referring to the legal effect of novation), the second sentence of the clause goes on to explain *when* this effect, *ie*, the novation, kicks in: “...*meaning that* repayment shall be *when* dividends distributed (to AIL) ***upon a successful turnaround***” [emphasis added]. The use of the clarificatory phrase “meaning that” preceding the phrase “repayment shall be *when*” suggests that parties intended for the latter part of this clause to explain *when* novation was to take place. Thus, the second sentence of Clause 5(d) clarifies that novation takes place at the time when dividends are distributed to AIL upon a successful turnaround of PT ARI.

36 Third, the interpretation that novation takes place upon the successful turnaround of PT ARI is supported by Clause 4(c) of the Agreement. The clause states that “ARI reserves the right to terminate the turnaround plan should it not work out”. Accepting Mr Kam’s interpretation that novation takes place “immediately” would render ARI’s right of termination nugatory. This is because ARI would immediately be burdened with the liabilities under the two loans. This having happened, it would become pointless for ARI to exercise its right of termination were it “not [to] work out” as it would be saddled with liability *regardless* of what transpired after the Agreement. This does not appear to be what the parties’ objectively intended. Instead, ARI’s right of termination is consistent with the interpretation that novation (to ARI) is contingent on the successful turnaround of PT ARI.

37 Fourth, Clause 5(d) must be considered in the light of Clause 5(e). Like Clause 5(d), Clause 5(e) speaks of novation. The material part of Clause 5(e) states “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”.

38 Mr Kam relied on the use of the word “immediately” in Clause 5(e) to argue that novation takes place “immediately” in September 2015. On closer scrutiny, it is clear that the word “immediately” cannot be interpreted to mean “instantaneously”. This is because the phrase stipulating that PEM is to be shut down “immediately” goes on to say that it is only to be shut down “*after* all liabilities” have been discharged. The language of Clause 5(e) therefore, plainly understood, does not support Mr Kam’s interpretation that novation takes place “immediately” in September 2015.

39 In any case, I am of the view that the word “immediately” attaches to the second phrase and not the first. A natural reading of the entire Clause 5(e) indicates that the word “immediately” refers to when PEM is to be shut down and not when “AIL agrees to novate”.

40 Finally, the entire Clause 5 (consisting of its various sub-clauses) supports AIL’s case that novation takes place only after certain conditions are satisfied. At the outset, I note that the title of Clause 5 states “Debt Restructure”. This is the subject-matter of the entire clause. Clause 5(a) reads “Post this exercise, the ‘Existing Shareholder Group’ (excluding ARI) shall be responsible for the loans outstanding to creditors”. In light of the title of Clause 5, the use of the word “exercise” must be a reference to the “debt restructuring exercise”. Following from this, Clause 5(b) goes on to state the manner in which the debt is to be restructured: “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.” This clause in particular, together with Clauses 5(d) and 5(e), evidences the parties’ objective intention that PEM’s liability under the loan agreements was never meant to cease immediately in September 2015. Instead, the parties’ intention, gleaned objectively from a holistic consideration of

Clause 5, was for PEM’s liability to be extinguished (*ie*, for novation to take place) only when dividends from APTSA were distributed to ARI upon a successful turnaround of PT ARI.

41 Similarly, there are several reasons why Mr Kam’s interpretation of Clause 5(e) cannot stand.

42 Like Clause 5(d), Clause 5(e) stipulates that “the personal guarantee given by [Mr Kam] *shall* also be dissolved with immediate effect”. The use of the word “shall”, in the context in which it appears, indicates that the dissolution of Mr Kam’s personal guarantees is to take place in the future.

43 The manner in which the entire Clause 5(e) is worded also makes apparent that several events must *first* take place *before* the personal guarantees are discharged. These are as follows:

- (a) First, dividends must be paid out to ARI (upon a successful turnaround of PT ARI).
- (b) Second, AIL novates the loan and interest from PEM to ARI.
- (c) Third, PEM is to be shut down immediately after all its liabilities have been discharged.
- (d) Fourth, Mr Kam’s personal guarantees are to be discharged at the *same time* that PEM is shut down.

44 Clause 5(e) states “*as per Clause 5(d)*, AIL agrees to novate the loan and interest from PEM...”. However, given that Clause 5(e) is to be read subject to Clause 5(d), which properly construed, provides that novation takes place only *after* dividends are paid out to ARI by APTSA (upon a successful turnaround

of PT ARI), the very *first* event which must take place is the dividend payment by APTSA to ARI. It is the payment of dividends that triggers novation.

45 Thereafter, AIL novates the loans from PEM to ARI.

46 Next, PEM is to be shut down. It is clear that this step must follow after the *novation*, as shut-down is to take place only “after all [its] liabilities...have been discharged”. PEM’s liabilities cannot conceivably be discharged until after novation has taken place.

47 After Clause 5(e) states “...that PEM be shut-down immediately without further liabilities in accordance with the laws of Singapore after all liabilities of PEM have been discharged”, it says that “the personal guarantee given by [Mr Kam] shall *also* be dissolved with immediate effect”. The use of the word “also” indicates that the dissolution of Mr Kam’s guarantees is to take place at the same time as PEM’s shut-down. Interpreting “the personal guarantee given by [Mr Kam] shall *also* be dissolved with immediate effect” in the context of the Clause 5(e), as well as the chronology of events which it entails, strongly implies that the words “with immediate effect” should not be interpreted to mean “instantaneously”. Thus, the discharge of liabilities was not intended to take place immediately in September 2015.

48 Finally, just as the word “immediately” was not intended by the parties to be interpreted to mean “instantaneously” (see above at [37]), the same can be said about the words “with immediate effect”. That both “immediately” and “with immediate effect” are to be given the same meaning is bolstered upon reading Clause 5(e) in its entirety. Reading the phrases “...that PEM be shut-down immediately without further liabilities in accordance with the laws of Singapore after all liabilities of PEM have been discharged...” and “the personal

guarantee given by [Mr Kam] shall ***also*** be dissolved with immediate effect” [emphasis added] together, it becomes apparent that the words “immediately” and “with immediate effect” are to be given the same interpretation.

49 In summary, based on a textual analysis of the Agreement:

- (a) novation is to take place after dividends have been paid out to ARI, upon the successful turnaround of PT ARI; and
- (b) the personal guarantees are to be discharged at the same time as when PEM is shut down (after all its liabilities have been discharged).

Context

50 AIL urged the court to bear in mind the “proper context” of the Agreement.³³ It also submitted that Mr Kam’s interpretation of the clauses would produce an “absurd result” (see above at [29]).

51 It is necessary to elaborate briefly on the events in the period leading up to the signing of the Agreement to address the above two points.

52 According to Mr Chang, Mr Kam approached him towards the end of 2014 when both the 2013 and 2014 loans were due to be repaid. Mr Kam then informed Mr Chang that he could not repay the loans by the contractually stipulated date.³⁴ Both of them agreed on a “turnaround plan”, although it is disputed which party proposed it. This was the plan eventually embodied in the Agreement. ARI was to inject capital into PT ARI through APTSA by way of a

³³ PCS at paras 32, 34 and 36.

³⁴ MCAEIC, para 26.

convertible loan. In exchange, ARI was to be given fixed shareholdings in APTSA.³⁵

53 Mr Kam’s evidence is consistent with the fact that the Agreement was entered into as part of a “turnaround plan” to rescue PT ARI. In his affidavit, Mr Kam stated that he had sent several emails to Mr Tin on PT ARI’s audited accounts for Mr Chang to review so that the latter could “get a better view of how PT ARI was performing” and “provide some feedback and comments as to how PT ARI could perform better” [emphasis added].³⁶ These emails were dated 19 November, 27 November and 29 November 2014, and appended the audited accounts of PT ARI as of 31 December 2011 and 31 December 2012.³⁷ The emails show that Mr Kam was seeking to assuage AIL’s fears concerning the outstanding loans and soliciting its help (through Mr Chang) to improve PT ARI’s financial state. Subsequently, on 4 June 2015, Mr Chang sent Mr Tin to Aceh, Indonesia to physically inspect PT ARI’s rubber factory.³⁸ Presumably, this was for AIL and Mr Chang to assess the viability of the turnaround plan. On 10 June 2015, Mr Kam prepared for Mr Chang a slide presentation which provided information on the operating capacity of PT ARI’s factory³⁹ and solicited AIL’s investment. This led to a meeting between the parties on 24 July 2015 (which forms the subject of Mr Kam’s defence of an oral agreement that I shall address later). Emails were then exchanged between AIL and Mr Kam’s representatives, which eventually concluded in the signing of the Agreement.

³⁵ MCAEIC, para 37.

³⁶ DKAEIC, para 48.

³⁷ DKAEIC, para 48.

³⁸ DKAEIC, para 54.

³⁹ MCAEIC, para 31; Exhibit MC-1.

54 The above background leads me to the following conclusions. It is evident that throughout the negotiating process and the signing of the Agreement, both parties were always acting in their self-interest. The “turnaround plan” embodied in the Agreement was intended as a “win-win” solution for the various parties involved.

55 One of AIL’s key motives was to secure repayment of the outstanding loans. It was always intended that these loans would be repaid, albeit through a circuitous mechanism. Dividends would be paid out to ARI from APTSA (upon a successful turnaround of PT ARI) and these dividends would be used to satisfy the outstanding debt. Another possible motive was a potential return on its investment in PT ARI through acquired shares in APTSA. Turning to Mr Kam, if the turnaround plan was successful, PT ARI (through the borrowing entity, PEM) would no longer be liable to repay the outstanding loans.

56 Having understood the parties’ respective motives, it flies in the face of commercial common sense for AIL to enter into the Agreement only to “immediately” give up the only form of security it had, *ie*, Mr Kam’s personal guarantees, as well as novate the loans to ARI, in exchange for nothing in return. Accepting Mr Kam’s proposed interpretation (on both the novation and guarantee issues) would mean that AIL was practically “forgiving” the debt of an arms-length commercial counterparty. No reason was provided by Mr Kam on why this might have been done in the circumstances. Further, applying Mr Kam’s interpretation would mean that there would no longer be any incentive for Mr Kam to ensure the successful turnaround of PT ARI. With PEM and his own liability discharged, there would be nothing left to do. This is a commercially insensible result which, from the evidence available to me, does not appear to be what the parties objectively intended.

57 This is also not a situation where “the parties were aware of the absurd result that might ensue from the contractual terms, but nevertheless proceeded to enter into the contract in question”: *Soup Restaurant* at [32]. Both parties are sophisticated men of business, and have conducted themselves on an arms-length basis. Mr Kam described himself as an investor or entrepreneur, running companies that focus on real estate in Japan, Australia and Thailand.⁴⁰ Meanwhile, Mr Chang also appeared to me to be an investor capable of protecting his commercial interests. There is no objective evidence which might reveal that the parties were aware that a commercially illogical result was likely to result from the contractual terms (*ie*, both novation and the discharge of Mr Kam’s guarantees taking place immediately) but still proceeded to enter into the Agreement.

Relevance of the email correspondence

58 Mr Kam relied on several correspondence to support his interpretation of the Agreement. I will deal with each of them in turn.

59 The first email was sent by Ms Tan to Mr Tin on 27 July 2015. It contains a draft copy of the Agreement, which has a clause stating that “Since [AIL] is responsible for its own loan, the 100% shares [which were held in Mr Kam’s name on behalf of APTSA] shall be transferred to AIL or its representative to hold in name on behalf of APTSA”. Mr Kam did not explain how this clause in the draft Agreement supports his proposed interpretation of the Agreement. I am also cognisant that this clause was eventually removed from the final version of the Agreement and cannot, therefore, be treated as reflecting the objective intention of the parties under the Agreement.

⁴⁰ DKAEIC, para 2.

60 The second email was sent by Mr Tin on 25 August 2015. It contained a draft version of the Agreement. There is an additional phrase “...agreed to novate the loan agreements from PEM to APTSA” in the draft. This phrase does not assist Mr Kam as APTSA is not even the party to which the loans are to be novated to under the final Agreement. In any case, the phrase entirely omits any mention on when novation is to take place and therefore does not shed light on this issue.

61 The final email was sent by Ms Tan to Carol Pang (an employee of AIL) on 29 October 2015. The email contains two typographical amendments to the draft Agreement. After the amendments, the relevant clause is the same as the equivalent clause in final version of the Agreement, which is that “repayment [of the loan] shall be when dividends [are distributed to AIL]”. It is not relevant to the issue at hand.

62 Mr Kam also highlighted two other emails in order to counter AIL’s averment that “the parties were well aware of, had the knowledge, and intended for a separate document to be signed to effect the proposed novation”.⁴¹ Although it is unnecessary to make a finding on this point, given my interpretation that novation is to take place only after dividends are paid to ARI upon a successful turnaround of PT ARI, I consider the emails for the sake of completeness.

63 The emails are as follows:

⁴¹ PSB, p 138.

(a) an email from Ms Pang on 23 October 2015 to Ms Tan, stating “...can I also check if the PEM loan has been novated, can we have a copy of the agreement”;⁴² and

(b) an email from Ms Tan to Ms Pang on 18 November 2015,⁴³ with two supporting documents: first, Mr Kam’s personal guarantee with the word “cancelled” stamped on it and second, a letter addressing the writing off of the outstanding loan between AIL and PEM which was to be signed by Mr Chang.

64 The first email does not appear to me relevant to the issue of the timing of novation. Clauses 5(d) and 5(e) already make plain that novation is to take place after dividends have been paid to ARI upon a successful turnaround of PT ARI. In the circumstances, the email does not throw further light on the parties’ intention under the Agreement. Furthermore, as the email is evidence of post-contractual conduct, it must be viewed with utmost scrutiny and concern (see *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [54]).

65 Like the first email, the second email does not assist Mr Kam’s case. First, there is no evidence that the document addressing the “writing off” of the loan was ever signed by Mr Chang. Second, the email itself states, “please find attached the [*sic*] novation agreement”. This was intended as a response to an earlier email to Ms Tan on 29 October 2015 stating “Hi [Ms Tan], [could] you help us *draft a simple novation agreement?*” [emphasis added].⁴⁴ Instead of

⁴² DKAEIC, p 600.

⁴³ DKAEIC, pp 660 – 665.

⁴⁴ DKAEIC, p 668.

supporting Mr Kam's position, this email (as well as the email preceding it) buttresses AIL's position that a *subsequent novation agreement was necessary* before novation could take place.

66 To conclude, the correct interpretation of the Agreement is that novation was to take place at the time when dividends were eventually distributed to ARI, upon a successful turnaround of PT ARI. Given that Mr Kam failed to provide any evidence that dividends were paid out to ARI by APTSA (indeed no shareholdings in APTSA were ever provided to ARI),⁴⁵ I hold that novation has not taken place. Accordingly, PEM remains liable under the 2013 and 2014 loans.

Relevance of the control of PT ARI's operations

67 Mr Kam submitted that he was not the one responsible for effecting the turnaround plan. Rather, it was the responsibility of Mr Chang and his associates as they had control over PT ARI.⁴⁶

68 I have held that novation is contingent on dividends being paid to ARI by APTSA, upon the successful turnaround of PT ARI. Based on Clause 5(d), it does not matter *who* is responsible for the successful turnaround of PT ARI. Novation takes place after dividends have been paid to ARI by APTSA, irrespective of which party was responsible for APTSA's successful turnaround. In the circumstances, it is not necessary for me to make a finding on *who* was responsible for the successful turnaround of PT ARI.

⁴⁵ MCAEIC, paras 48 to 50.

⁴⁶ SDB, p 140 at [18(viii)(e)]; DCS at para 53.

Issue 3: Existence of a collateral oral agreement?

69 This issue concerns an alleged oral agreement reached on 24 July 2015.⁴⁷

The law

70 Quentin Loh J in *ARS v ART and another* [2015] SGHC 78 (“*ARS v ART*”) at [53] helpfully summarised the guiding principles on the proper approach for determining the existence of an oral agreement:

...

a) in ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time;

b) where possible, the court should look first at the relevant documentary evidence;

c) the availability of relevant documentary evidence reduces the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists;

d) oral testimony may be less reliable as it is based on the witness’ recollection and it may be affected by subsequent events (such as the dispute between the parties);

e) credible oral testimony may clarify the existing documentary evidence;

f) where the witness is not legally trained, the court should not place undue emphasis on the choice of words; and

(g) if there is little or no documentary evidence, the court will nevertheless examine the precise factual matrix to ascertain if there is an oral agreement concluded between the parties.

Analysis

71 It is undisputed that Mr Kam met up with Mr Chang, Mr Yeo, Ms Tan

⁴⁷ DKAEIC, para 57.

on 24 July 2015 at Infraavest’s office.⁴⁸

72 Mr Kam alleged that, during the meeting, an oral agreement was reached with Mr Chang (who acted on behalf of AIL) that he would procure APTSA to enter into a “joint venture agreement” with PEM, PT ARI, AIL, and ARI. In exchange, AIL would agree to release him from his liabilities under the personal guarantees.⁴⁹ The other terms of the alleged oral agreement include:⁵⁰

- (a) Mr Chang would take over control of the operations of PT ARI’s rubber factory; and
- (b) the debts of APTSA and PT ARI would be restructured so that companies controlled by Mr Chang (which would include AIL) would be responsible for paying off their own portions of the debts owed to APTSA and/or PT ARI, and the other shareholders of APTSA and/or PT ARI would be responsible for paying off the other debts of APTSA and/or PT ARI.

73 AIL’s position was that the discharge of Mr Kam’s liability under the personal guarantees was never discussed during the meeting on 24 July 2015. Instead, the meeting was to discuss the numbers behind the proposed investment into PT ARI.⁵¹ It also submitted that the oral agreement “defence” was only an

⁴⁸ DKAEIC, para 59.

⁴⁹ DKAEIC, para 59.

⁵⁰ DKAEIC, para 60.

⁵¹ MCAEIC, para 74.

afterthought as it was included in Mr Kam’s defence as an amended pleading in Defence (Amendment No.1).⁵²

Documentary evidence

74 The starting point of my analysis is the Agreement itself. As stated above, the Agreement, *inter alia*, provides for the discharge of Mr Kam’s personal guarantees after certain events have taken place. These events are the payment of dividends by APTSA to ARI, novation of PEM’s loans to ARI, and PEM’s dissolution after settling its outstanding liabilities.

75 On the contrary, under the alleged oral agreement, all that Mr Kam was required to do was to procure APTSA to enter into the “joint venture” before all his liabilities under the personal guarantees would be discharged. The fact that this discharge hinged on an entirely different condition (especially one that was relatively simple for Mr Kam to perform *qua* director of APTSA) as compared to the more onerous conditions in the written Agreement gives me the impression that the allegation of an oral agreement is an afterthought. There appears to me no credible explanation as to why there was a *need* for a lengthy written Agreement, carrying with it entirely different conditions which would trigger discharge of Mr Kam’s liability, if there had indeed been an oral agreement in which liability was discharged after procuring APTSA’s involvement. If there had been in reality an oral agreement between the parties, I would have expected Mr Kam (or any of his representatives) to have written to AIL soon after procuring APTSA’s involvement on 27 July 2015. But this was not done. In the circumstances, I do not accept Mr Kam’s assertions and find that he has not proven the existence of the oral agreement.

⁵² PCS at para 104.

76 For completeness, I consider the documentary evidence that Mr Kam relied on to support his version of events. Primarily, this is in the form of an email sent out by Ms Tan to Mr Tin on 27 July 2015,⁵³ three days after the meeting on 24 July 2015. The email attaches a *draft* copy of the Agreement,⁵⁴ and contains the following clause:

“...the existing loan sits in PEM, where 100% shares are currently held in name of [Mr Kam] on behalf of APTSA (there is a trust document in place). Since [AIL] is responsible for its own loan, 100% shares shall be transferred to [AIL] or its representative to hold in name on behalf of [APTSA]. *The personal guarantee given by [Mr Kam] shall also be dissolved with effect (currently there is a back-to-back guarantee from PT ARI to [Mr Kam]*” [emphasis added].

77 Given that the clause explicitly referred to the dissolution of Mr Kam’s personal guarantees and that this email was sent merely *three* days after the meeting on 24 July 2015, I find that the topic of the discharge of Mr Kam’s liability was likely discussed during the meeting. However, on the face of the clause, there is nothing that indicates that Mr Kam’s liabilities would be “immediately” discharged solely in exchange for him procuring APTSA’s involvement.

78 It is also telling that Mr Kam failed to point to *any email or correspondence* between the parties after 24 July 2015 where parties explicitly *acknowledged* that Mr Kam’s liabilities had been immediately discharged, save for the email sent to Ms Tan by Ms Pang on 18 November 2015.⁵⁵ This email⁵⁶

⁵³ DKAEIC, para 61; see also DKTL, Tab 26 for a copy of the email.

⁵⁴ Defendant’s Bundle of Affidavits of Evidence in Chief (“DBAEIC”), Volume I of II, p 278.

⁵⁵ DKAEIC, p 660.

⁵⁶ DKAEIC, DKTL-41, pp 659 – 664.

included a copy of Mr Kam's first personal guarantee dated 23 September 2013, with the word "cancelled" stamped on it. The email with the "cancelled" guarantee attached to it is not good documentary evidence of the alleged oral agreement. If Mr Kam genuinely believed that this act of unilateral cancellation would dissolve the guarantees, why did the email attach only the personal guarantee dated 23 September 2013 and not also the one dated 11 March 2014? Further, there was no follow-up by Mr Kam or any of his representatives after 18 November 2015 confirming that the personal guarantees had been discharged. This was yet another indication that Mr Kam never genuinely believed that the personal guarantees had dissolved, whether on 24 July 2015 or subsequently.

79 It must also be borne in mind that the alleged oral agreement was said to have been formed on 24 July 2015. In this regard, the correspondence immediately following the meeting on 24 July 2015 would be particularly illuminating on the existence of the oral agreement. The emails that were sent out after 24 July 2015 referred to many matters which related to the "joint venture" between the parties. For instance, the email sent out by Mr Tin to Ms Tan on 2 September 2015 referred to PEM's outstanding loan, the contracting parties to the Agreement, as well as queries on when APTSA would inject the funds into PT ARI.⁵⁷ The matter of novation was also discussed: there was an email sent out to Ms Tan stating "...could you help us draft a simple novation agreement?". Ms Tan replied saying "OK, I will think about how to draft...currently have no template so need time to think about it".⁵⁸ However, there was a *noticeable absence of any discussion* of Mr Kam's personal

⁵⁷ BAEIC, Vol 2, p 538.

⁵⁸ BAEIC, Vol 2, p 656.

guarantees and their discharge on 24 July 2015 in the immediate period thereafter. I would expect, having regard to the nature of the oral agreement which was alleged (as well as the potential extinction of Mr Kam’s liability under the personal guarantees), for there to be at least some subsequent acknowledgment or correspondence between *both parties* on the topic of personal guarantees.

Commercial context

80 The issue of the existence of the oral agreement should also be approached with regard to the commercial context. I noted above that the objective of the Agreement was for parties to rescue PT ARI from its financial problems (see at [53]), so that it could repay its outstanding loans (which were owed through PEM as the borrowing entity). I also held that it would have been commercially insensible for AIL to give up its only form of security, *ie*, the personal guarantees, in exchange for nothing. Similarly, it would have been illogical for AIL to give up its only form of security simply for Mr Kam to procure APTSA to enter the “joint venture”. In this regard, I agree with Mr Chang’s evidence that it would be illogical for him to release his leverage over Mr Kam in respect of PT ARI’s turnaround.⁵⁹

81 In summary, I find that there was no oral agreement between AIL and Mr Kam reached on 24 July 2015 for the “immediate” dissolution of his personal guarantees. Both the contemporaneous documentary evidence and the commercial context do not support its existence and are, in fact, inconsistent with it.

⁵⁹ MCAEIC, para 76.

Issue 4: Misrepresentation and/or breach of warranties

82 AIL, in its closing submissions, claimed that Mr Kam had made the following two misrepresentations:

- (a) that PT ARI's factory had a production capacity of 1000 tons/month;⁶⁰ and
- (b) that PTI ARI had the necessary capacity to produce output of 50 containers worth of Standard Indonesian Rubber 20;

83 In addition, AIL alleged that Mr Kam made a third misrepresentation by omitting to mention that a US\$100,000 loan was extended from PEM to Create Asia Limited ("CAL").⁶¹

84 The first alleged misrepresentation was contained in a series of presentation slides sent by Mr Kam on 10 June 2015 while the second was in a verbal conversation between Mr Chang and Mr Kam sometime before the Agreement was signed.

85 AIL also alleged that these misrepresentations constitute breach of warranties under the Agreement, in particular Clause 1.3(f).

Misrepresentation

Defect in pleadings

86 Mr Kam raised two primary objections to AIL's claim for

⁶⁰ PSB, p 143, para 18(x)(b)(i).

⁶¹ SDB, p 146, para 18(x)(b)(vii).

misrepresentation. First, he submitted that AIL failed to particularise the form of misrepresentation it was relying on, *ie*, whether it was fraudulent, negligent or innocent. Second, he argued that the failure to plead that it had suffered any loss as a result of misrepresentation meant that AIL cannot claim under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed).⁶²

87 The failure to specify the type of misrepresentation *per se* does not render a pleading defective if it is otherwise clear what the allegation is. There is support for this in *BOM v BOK and another appeal* [2019] 1 SLR 349 at [41]. Although AIL failed to particularise its claim, it is apparent that it was alleging innocent misrepresentation. There is no mention of dishonesty or fraud, or any of the elements of negligent misrepresentation, which might have suggested a claim in fraudulent or negligent misrepresentation.

The law

88 The Court of Appeal in *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 (“*Lim Koon Park*”) stated the relevant legal principles in relation to an actionable misrepresentation:

- (a) an operative misrepresentation is a false statement of existing or past fact made by one party before or at the time of making the contract, which is addressed to the other party and which induces the other party to enter into the contract (at [38]);
- (b) section 2(1) of the Misrepresentation Act does not alter the common law as to what constitutes a misrepresentation but reverses the

⁶² DRS, paras 34 and 35.

burden of proof so that the party who made the representation has to show reasonable grounds to believe that the fact represented was true (at [39]);

(c) the presumption of reliance is that if the representation is material, the onus would lie on the representor to show the representee's lack of reliance (at [52]); and

(d) the presumption is not a legal presumption but is a presumption of fact and may be rebutted by counter-evidence (at [53]); and

(e) the presumption of reliance is not mandatory but optional and a court may choose to apply the presumption, depending on the factual matrix (at [54]).

Production capacity of 1000 tons a month

89 The first statement made by Mr Kam was that the Aceh factory had a production capacity of 1000 tons/month.

90 According to Mr Kam, the production capacity refers to “what the equipment or machines in the entire production line put together is purportedly capable of at peak efficiency”.⁶³ In other words, the reference to production is to *future* capacity and not *actual* capacity at the time the statement was made. In Mr Kam's view, this was also supported by the fact that the presentation slides were accompanied by a *proposal* on how PT ARI could increase production to 1000 tons/month.⁶⁴

⁶³ DKAEIC, para 127.

⁶⁴ MCAEIC, para 131.

91 AIL, in its written submissions, did not challenge Mr Kam’s position that his representation was as to the factory’s *future capacity*. Neither did it do so in cross-examination. Instead, AIL adopted the position that the operative representation made by Mr Kam was that “only the sum of USD 123,538.46 ...was needed ... to increase capacity of the Rubber Processing Plant”.⁶⁵ In other words, the representation was that the rubber factory would be able to produce 1000 tons/month so long as Mr Kam received the stated sum of money. Unfortunately for AIL, this is not contained in its pleadings. There is no reference to any representation made by Mr Kam that he would ensure that the factory would produce 1000 tons per month *on the condition* that AIL provided specified sums of money.⁶⁶

92 All that AIL has pleaded is that “[Mr Kam] represented to AIL and in consideration of his doing so warranted that: ...PT ARI’s rubber processing plant had a conservative production capacity of at [*sic*] 1,000 tons per month...”.⁶⁷

93 AIL is bound by its pleadings. The burden rests on AIL to prove the falsity of Mr Kam’s representation *on the basis of its pleaded case*. As AIL adduced no evidence to show that PT ARI was *incapable* of producing 1000 tons/month, I find that AIL has not proven the falsity of the representation.

⁶⁵ PCS, para 115.

⁶⁶ PSB, pp 143 – 144.

⁶⁷ Reply Amendment (No.3), p 20.

50 containers of Indonesian Rubber 20

94 Although AIL stated in its written submissions that Mr Kam had made a representation that the rubber plant had the necessary capacity to produce 50 containers worth of Standard Indonesian Rubber 20,⁶⁸ this was not adequately pleaded.

95 AIL pleaded as follows:⁶⁹

(x)(b)(i) [Mr Kam] represented to [AIL] and in consideration of his doing so warranted that:

a. PT ARI's rubber processing plant had a conservative production capacity of at [least] 1,000 tons per month.

(x)(b)(ii) ***The said representations*** and/or warranties were made by and/or are to be ***inferred*** from:

a. [Mr Kam] had sent presentation slides sent to [AIL] by email on 10 June 2015, which inter alia contained the following statements:

“Production Capacity

Our lines are rated at 3 tons/hour (could exceed assumptions)

Conservatively assuming we operate at 2.5 tons/hour

Conservative production would be at least 1,000 tons/months i.e. 12,000 tons/year”.

b. Sometime before parties executed the Agreement, [Mr Kam] had verbally represented to the [Mr Chang] of AIL that PT ARI's factory facilities had the necessary capacities to produce output of 50 containers worth of Standard Indonesian Rubber 20 (SIR 20, equivalent to TSR 20).

[emphasis added]

⁶⁸ PCS, para 110.

⁶⁹ PSB at pp 143-144.

96 The verbal representation allegedly made by Mr Kam to Mr Chang regarding the factory’s capacity to produce 50 containers of Standard Indonesian Rubber 20 was only a representation from which the representation that “PT ARI’s rubber processing plant had a conservative production capacity of at least 1,000 tons per month” was to be *inferred from*. It was not a separate representation in AIL’s claim for misrepresentation. There is only one representation founding AIL’s claim for misrepresentation in paragraphs 5(x)(b)(i) and 5(x)(b)(ii), and I have already dealt with this above at [89]–[93].

Omission to mention the CAL loan

97 Mr Kam stated in his affidavit that the sum of US\$100,000 which was provided by AIL to PEM was loaned to a company known as Create Asia Limited (“CAL”).⁷⁰ AIL claimed that it only found out that the US\$1,000,000 loan sum was not entirely transferred from PEM to PT ARI sometime in January 2016.⁷¹

98 Even if I accept that the omission constitutes a false representation of fact, AIL’s claim fails. There is no evidence in the affidavits of Mr Chang or Mr Tin from which I can infer that AIL would not have entered into the Agreement if Mr Kam had not omitted to mention the CAL loan. This is not an instance where it is possible to apply a presumption of reliance as a “commonsense inference” (*Lim Koon Park* at [54]). On the contrary, the evidence shows that AIL had compelling commercial reasons for entering into the Agreement, in particular to secure repayment of the substantial sums owed to it, and would

⁷⁰ MCAEIC, para 20.

⁷¹ MCAEIC, para 20.

have entered into the Agreement even if it had known about the CAL loan. As inducement has not been proved, I dismiss AIL’s claim.

99 For the above reasons, I dismiss all of AIL’s claims in misrepresentation.

Breach of warranties

100 AIL relied on Clauses 1.3, 1.3(f), 11, and the Appendix in the Agreement in its claim for breach of warranties. They read as follows:⁷²

1.3 The following representations and warranties are made and given by [APTSA] to ARI and expressly survive the closing of this agreement. The representations are true as of the date of this agreement and will be true as of the date of closing when they shall continue as warranties according to their terms. At the option of ARI, the representations and warranties may be treated as conditions of the closing of this agreement in favour of ARI. However, the closing of this agreement shall not operate as a waiver or otherwise result in a merger to deprive ARI of the right to sue the Company for breach of warranty in respect of any matter warranted, whether or not ascertained by ARI prior to closing:

(f) [APTSA] has made full and fair disclosure in all material respects of any matter that could reasonably be expected to affect ARI’s decision to purchase the Shares on the terms set out in this agreement.

11. All amendments, deletions or additions to this Agreement must be in writing and signed by both Parties. [Mr Kam] and [Mr Yeo] shall warranty that the Group’s financial statements are fairly disclosed to ARI and the completeness of legal licenses are sufficient and appropriate to manufacture and export SIR20.

APPENDIX

The existing directors of [APTSA] warrant the accuracy of the following statements and documents and that they are true and accurate.

...

⁷² MCAEIC, MC-1, pp 137 – 138.

- 4) The detailed info provided in Appendix “Loan Status”
- 5) The detailed info provided in Appendix “Financial statements”

101 AIL’s allegation of breach pursuant to Clause 1.3(f) of the Agreement is unsustainable. Clause 1.3(f) clearly states that the obligation is for *APTSA* to make “full and fair disclosure”, not Mr Kam. AIL did not suggest that this clause could be interpreted to include Mr Kam owing a duty of “full and frank disclosure”. As Mr Kam owes no duty of full and frank disclosure pursuant to Clause 1.3(f), he could not possibly have committed a breach of warranty under the said provision.

102 Equally unsustainable is AIL’s claim for breach pursuant to Clause 11 of the Agreement. The clause provides that Mr Kam shall warrant that the Group’s (*ie*, PEM, PT ARI and APTSA) financial statements are fairly disclosed to *ARI*. In its submissions, AIL failed to cite evidence that the Group’s financial statements were not disclosed to *ARI*. Also, AIL did not cross-examine Mr Kam on his alleged failure to fairly disclose the Group’s financial statements to *ARI*. Given that there is no evidence of a failure to disclose matters to *ARI*, I find that Mr Kam did not breach Clause 11.

103 The preamble to the Appendix provides that Mr Kam shall warrant the accuracy of the “...detailed info provided in Appendix ‘Loan Status’” and “...detailed info provided in Appendix ‘Financial statements’”. Unfortunately for AIL, it failed to raise anything in the evidence which was false vis-à-vis the “detailed info” provided in the parts titled “Loan Status” or “Financial Statements” under the Appendix. AIL’s main argument in support of its claim for breach of warranty was premised on Mr Kam’s failure to disclose certain loan agreements involving PEM. Ultimately, this had to be tied explicitly to some information which was contained in the parts titled “Loan Status” and

“Financial Statements” in the Appendix. AIL failed to do this. In the premises, there is no evidence that Mr Kam breached the term in the Appendix.

Issue 5: Promissory Estoppel

104 Mr Kam relied on three representations made by AIL in support of his estoppel argument:

- (a) First, Clause 4 of the Agreement accompanied by ARI’s subsequent action of disbursing US\$320,000 to PEM.⁷³
- (b) Second, Clause 5(e) which states that “the personal guarantee given by [Mr Kam] shall also be dissolved with immediate effect”.
- (c) Third, “silence or inaction”⁷⁴ when AIL failed to demand repayment despite PEM failing to repay the outstanding loan sums.⁷⁵

The law

105 The relevant law may briefly be summarised as follows:

- (a) The doctrine of promissory estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee will render it inequitable for the representor to go back upon his representation: *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi Construction*”) at [57].

⁷³ DCS, para 146.

⁷⁴ DCS, p 45.

⁷⁵ DCS, para 148.

(b) The determination of whether the representations are “clear and unequivocal” is an objective question to be considered in the particular context of each case: *Neo Hui Ling v Ang Ah Sew* [2012] SGHC 65 at [54].⁷⁶

(c) Mere silence or inaction will not normally amount to an unequivocal representation: *Audi Construction* at [58]. However, “in certain circumstances, particularly where there is a duty to speak, mere silence may amount to [such] a representation”.

(d) Whether there is a duty to speak is a question which must be decided having regard to the facts of the case at hand and the relevant legal context. The “duty to speak” does not refer to a legal duty as such but to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future: *Audi Construction* at [61].

(e) For a “duty to speak” to arise, it must be shown, at least, that the silent party *knew* that the party seeking to raise the estoppel was in fact acting or proceeding with its course of conduct on the basis of the mistaken belief which the former is said to have acquiesced: *The “Bunga Melati 5”* [2016] 2 SLR 1114 at [17].

The first representation

106 Clause 4 of the Agreement reads as follows:

⁷⁶ DBOA, Tab 11.

- a) ARI shall inject USD 750,000 via convertible loan into [APTSA]. The USD750,000 loan shall be converted into 82,274.85 of 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 [APTSA].
- 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 750,000.00, 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 shareholding shall be diluted from the new issuance event. As a note, ARI is willing to inject up to USD 250,000.00.

107 In my view, there is nothing in Clause 4 which contains a “clear and unequivocal” representation that Mr Kam’s liability as a guarantor will be discharged. Clause 4 simply describes part of the turnaround plan which was intended by both parties to rescue PT ARI from financial trouble. The significant part of the turnaround plan described here is the injection of US\$750,000 into APTSA in the form of a “convertible loan”. Mr Kam also pointed to the fact that there was a subsequent disbursement of US\$320,000 from ARI to PEM after the Agreement was signed. I take him to be saying that this was an implied representation that AIL would no longer call on the personal guarantees given by Mr Kam. Far from carrying this implication, I find that ARI’s disbursement of US\$320,000 simply shows that it had sincerely intended to satisfy its obligations under the Agreement. In any case, I see no logical reason why *ARI*’s disbursement of money to *PEM* would mean that *AIL* was representing that it would no longer call on *Mr Kam*’s personal guarantees.

The second representation

108 Clause 5(e) of the Agreement contains the term, “(t)he personal guarantee given by [Mr Kam] shall also be dissolved with immediate effect”. I have already determined that the phrase “immediate effect” cannot be interpreted to mean the personal guarantees are discharged on the date on which the Agreement was signed. Given this interpretation, Clause 5(e) is not a “clear and unequivocal” representation that Mr Kam’s guarantees will be discharged as of the date of the signing of the Agreement.

The third representation

109 Mr Kam submitted that AIL’s failure to demand repayment also constituted a “clear and unequivocal representation” from AIL that his guarantees would be discharged on the date the Agreement was signed. He relied on the following strands of evidence.

110 First, that Mr Chang possessed the knowledge that the parties to the Agreement proceeded with the investment in PT ARI in the belief that the two loan agreements would be restructured and that he would be released from the personal guarantees.⁷⁷ Second, both Mr Chang and Mr Tin requested for an update to be made to the APTSA investors, whereupon they were informed that Mr Chang would “take over the responsibility of the USD1,000,000 debt plus interest which he had previously lent”⁷⁸ APTSA for the PT ARI rubber factory. Third, AIL did not demand repayment for the two loan agreements from the time the Agreement was entered into.

⁷⁷ BAEIC Vol 2, p 648.

⁷⁸ Reply (Amendment No.3), p 48.

111 In order for AIL's failure to demand repayment (or silence) to constitute an unequivocal representation, Mr Kam must show, on the basis of the evidence which he presented, that AIL had a duty to speak. This is one of the requirements set out by the Court of Appeal in *Audi Construction* at [61]. At the very least, Mr Kam must demonstrate that AIL had the knowledge that he was proceeding with his course of conduct on the basis of a mistaken belief, *ie*, that AIL would not call on the personal guarantees. Unfortunately for Mr Kam, he failed to present any evidence from which I could infer such knowledge. Mr Chang's request for an update from the APTSA investors is likewise equivocal, and something which any reasonable investor would do in the circumstances. There is no reason why Mr Kam would perceive this request for an update as a representation that his personal guarantees would be discharged.

112 I therefore dismiss all of Mr Kam's allegations of estoppel.

Conclusion

113 For the above reasons, I allow AIL’s claim under the contracts of personal guarantee but dismiss its claims for misrepresentation and breach of warranties.

114 I will hear counsel on the question of costs.

Dedar Singh Gill
Judicial Commissioner

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