IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 295

Suit No 1229 of 2020

Between

(1) Ari Investments Limited
(2) Asian Infrastructure Limited

… *Plaintiffs*

And

(1) Accelera Precious Timber and Strategic Agriculture Limited
(2) Perfect Earth Management Pte. Ltd.
(3) Dennis Kam Thai Leong
(4) Tan E-Lin, Eileen

… *Defendants*

JUDGMENT

[Res Judicata — Extended doctrine of res judicata — Shortcomings in a party's conduct during the interlocutory stages of a previous suit do not amount to "special circumstances" justifying a waiver of res judicata]

Ari Investments Ltd and another
v
Accelera Precious Timber and Strategic Agriculture Ltd and others

[2023] SGHC 295

General Division of the High Court — Suit No 1229 of 2020
Choo Han Teck J
21 – 23 August, 13 October 2023

17 October 2023 Judgment reserved.

Choo Han Teck J:

1 The 1st plaintiff is ARI Investment Limited, a company incorporated in Hong Kong ("ARI"). The 2nd plaintiff is Asian Infrastructure Limited, also incorporated in Hong Kong ("AIL"). Mr Malcolm Chang, ("Mr Chang") is a director and shareholder of ARI and AIL who testified at trial. He is also a director and shareholder of Infraavest Private Limited ("Infraavest") and Marin Trading Pte Ltd ("Marin Trading"), which are associated companies of the plaintiffs. Mr Tin Jiing Soon ("Mr Tin") is a former business development manager of Infraavest who had assisted Mr Chang with his businesses including ARI and AIL. Mr Tin also testified at trial.

2 The 1st defendant, Accelera Precious Timber and Strategic Agriculture Limited ("APTSA") is a company incorporated in Cayman Islands. It owns a majority stake in an Indonesian incorporated company called PT Aceh Rubber

Industries ("PT ARI") which owned and operated a rubber processing plant ("Factory") in Aceh Indonesia. PT ARI was in the business of processing raw rubber. It was put under liquidation on 2 May 2019, by way of a shareholders' resolution passed on 30 April 2019. The 2nd defendant is Perfect Earth Management Pte Ltd ("PEM"), a company incorporated in Singapore. The plaintiffs' claims against PEM in the present suit (HC/S 1229/2020) have been dismissed pursuant to a successful striking out application by the defendants in HC/SUM 1510/2021.

3 The 3rd defendant, Dennis Kam Thai Leong ("Mr Kam"), and the 4th defendant Tan E-Lin Eileen ("Ms Tan") are directors and shareholders of the 1st defendant and directors of the 2nd defendant. Mr Kam is the sole shareholder of the 2nd defendant. Mr Kam and Ms Tan were also involved with PT ARI. Mr Kam was the Komisaris of PT ARI, which meant that he was the chairman of the board of directors. Ms Tan was a director of PT ARI at least from 17 June 2012 to around 15 December 2018. The Direktur Utama (i.e. managing director) of PT ARI was Mr Yeo Siang Cher ("Mr Yeo"). He ran PT ARI's operations.

4 Prior to the above action that was struck out, AIL and PEM had entered into two loan agreements, on 23 September 2013 for a sum of USD 500,000, and 11 March 2014 for a sum of USD 650,000 (the "Loan Agreements"). Although these loans were extended to PEM, they were meant to be used as working capital for PT ARI. Mr Kam had given personal guarantees to AIL for both loans (the "Personal Guarantees"). PEM was subsequently unable to pay back both loans in full to AIL and Mr Kam as guarantor was unable to do so as well.

5 In a bid to resolve the problem, the parties made an alternative arrangement in September 2015 whereby ARI and AIL entered into an agreement with APTSA, with PT ARI and PEM signing as well (the "Agreement") for a restructuring of the debt. This agreement required ARI to provide further funds for APTSA in exchange for a 70% equity stake in ATPSA. It was further agreed that the Loan Agreements between AIL and PEM would be novated, and the Personal Guarantees given by Mr Kam would be discharged.

6 Pursuant to the Agreement, ARI, through its associated company Infraavest, paid USD 320,000 into APTSA on 3 September 2015, 30 September 2015, and 2 December 2015. Thereafter (other than a USD 100,000 short-term loan from Marin Trading in April 2016 which was repaid) payments to APTSA stopped.

7 AIL subsequently brought a claim (HC/S 397/2017) against Mr Kam on 2 May 2017 pursuant to the Personal Guarantees he had given for the outstanding sums owed by PEM to AIL. That action was heard in the High Court by Gill JC (as he then was) in *Asian Infrastructure Ltd v Kam Thai Leong Dennis* [2019] SGHC 288 ("*Asian Infrastructure Ltd*"). AIL claimed in *Asian Infrastructure Ltd* at [14]-[15] that the Agreement did not extinguish PEM's and Mr Kam's liabilities (stemming from the Loan Agreements and Personal Guarantees) as at the date of the Agreement, and only did so after the turnaround plan was fully implemented. 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. These related to two matters, PT ARI's production capacity, and Mr Kam's failure to disclose that not all of the sums loaned by

AIL were used for the Factory, but were instead siphoned off to various third parties.

8 Gill JC allowed (at [113] of *Asian Infrastructure Ltd*) AIL's claim against Mr Kam under the contract of personal guarantee but dismissed its claims for misrepresentation and breach of warranties. On appeal, the Court of Appeal ("CA") in *Kam Thai Leong Dennis v Asian Infrastructure Ltd* [2020] SGCA 87 allowed Mr Kam's appeal and set aside the decision below.

9 The plaintiffs then commenced this present action on 23 December 2020. The plaintiffs' claims based on misrepresentation and breach of agreement were struck out by an assistant registrar ("AR") on 10 August 2021 by way of HC/ORC 4565/2021, and only two issues were left for trial before me. The plaintiffs' and defendants' appeals against the striking out orders were dismissed by Thean J in HC/RA 234/2021 and HC/RA 235/2021 on 11 October 2021.

10 The first issue before me concerns the plaintiffs' claim that in breach of the Agreement, PT ARI failed to disclose to the plaintiffs that there were outstanding tax matters and outstanding taxes ("Tax Issues"). Secondly, the plaintiffs' claim that the defendants should not have unilaterally commenced the winding up of PT ARI because it prejudiced the goodwill of the plaintiffs ("Winding-up Issue").

11 Counsel for the plaintiffs, Mr Mathiew Christophe Rajoo ("Mr Rajoo") submits that the plaintiffs have suffered loss from the defendants' actions in relation to the Tax Issue. He argues that the plaintiffs are entitled to the outstanding amount and interest under the Loan Agreements because the Agreement was "an alternative way for the [outstanding portion of the Loan

Agreements and interest] to be paid to AIL". This would not have occurred but for the defendants' misrepresentations that there were no tax liabilities. Mr Rajoo argues that as a result of the same misrepresentation, the additional capital payments of USD 320,000 into APTSA pursuant to the Agreement should also be repaid to them. Finally, Mr Rajoo argues that the defendants ought to reimburse the plaintiffs for legal expenses they had incurred because of the defendants' breach.

12 It is clear that the plaintiffs are trying to recover what AIL failed to get in *Asian Infrastructure Ltd* and *Kam Thai Leong*. In that suit, the plaintiffs sued Mr Kam for his liabilities under the Personal Guarantee, and for the Agreement to be rescinded for misrepresentations and breaches of the Agreement. Now that the previous suit has been dismissed, the plaintiffs are making a case that there are newly discovered misrepresentations and breaches concerning tax liabilities. Only that they are not new.

13 The doctrine of res judicata includes a bar against a "litigant who seeks to argue points which were not previously determined by a court or tribunal because they were not brought to the attention of the court or tribunal in the earlier proceedings even though they ought properly to have been raised and argued then". The plaintiff will be barred unless there are "special circumstances" to allow the litigant to do otherwise.

14 Mr Rajoo argues that the plaintiffs did not pursue the Tax Issues in the previous action because AIL's specific discovery application was dismissed as irrelevant and it was unable to obtain the correspondence and documents relating to the claims by the Indonesian tax authorities against PT ARI ("Tax Notices"). According to Mr Rajoo, it was only after both *Asian Infrastructure*

Ltd and *Kam Thai Leong* that the plaintiffs had managed "to obtain the incriminating tax notices from a business associate ("Wafa"). Mr Rajoo submits that the present case was one where further material became available only after the previous suit had ended (*Arnold and Others Respondents and National Westminster Bank PLC. Appellants* [1991] 2 WLR 1177 ("*Arnold*")). Mr Rajoo says that the plaintiffs had tried various ways to obtain the Tax Notices but were unable to do so because of the obstacles put up by the defendants. Therefore, the defendants ought not to be allowed to rely on res judicata.

15 Additionally, Mr Rajoo argues that the defendants had knowledge of, but intentionally concealed the documentary evidence in relation to the Tax Issues despite having access to them, thus preventing AIL from raising the said Tax Issues in the previous suit. Counsel submits that the defendants should have disclosed all relevant documents in their possession, during discovery, and not conceal them. He submits that O 24 r 1 of the Rules of Court 2014 ("ROC 2014") obliges Mr Kam to disclose evidence that would adversely affect the defence or support AIL's case in the previous suit.

16 Mr Rajoo emphasises that recission of the Agreement was not pleaded as a relief by AIL in the previous suit. He argues that the misrepresentation in the previous suit related to rubber production capacities and the misuse of the loan amounts instead of the Tax Notices. He also argues that the present suit is not a collateral attack upon the previous decision, nor are the plaintiffs trying to relitigate an issue that was previously decided on. Finally, Mr Rajoo argues that Thean J had accepted that it is unclear whether the plaintiffs had the requisite knowledge to raise the Tax Issues in the previous suit.

17 Counsel for the defendants, Mr Tham Wei Chern ("Mr Tham") submits that the Tax Issues and the other facts relating to the alleged misrepresentations and breaches of warranty brought up in the present suit were within AIL's knowledge in the previous suit and ought reasonably to have been raised and addressed there. First, Mr Tham argues that by end-2016, the plaintiffs already had in their possession an unofficial tax notice which purportedly showed tax breaches on the part of PT ARI for FY 2013 ("Unofficial Tax Notice"). He says that in a letter sent by ARI to APTSA on 22 September 2017 ("22 Sep Letter"), the plaintiffs had alleged that PT ARI had committed breaches of the Indonesian Tax Code for FY 2013 and that they would not have entered into the Agreement otherwise. Counsel points out that from the 22 Sep Letter, it was obvious that the plaintiffs had the knowledge to raise the Tax Issues.

18 Mr Chang had in the 22 Sep Letter made specific references to the breaches set out in the Unofficial Tax Notice. His clear words contradict the plaintiffs' claim that they were uncertain about the situation. In Mr Chang's evidence in the previous suit, he claimed (on multiple occasions) to know about the tax issues. Secondly, Mr Chang had on affidavit, confirmed that he had received the Unofficial Tax Notice from Mr Yeo in the last quarter of 2016.

19 Thirdly, Mr Tham argues that the plaintiffs had deliberately not pleaded the tax liabilities for FY 2013 in the previous suit, when they clearly could have done so. He submits that the plaintiffs had erred by "putting the proverbial cart before the horse" because they had tried to obtain specific discovery relating to the Tax Issues before pleading them, and unsurprisingly, their application for specific discovery failed. AIL did not file any appeal.

20 Fourthly, Mr Tham submits that although AIL had subsequently applied for leave to amend its pleadings in the previous suit to include a claim in misrepresentation against Mr Kam with respect to PT ARI's tax affairs in HC/SUM 2425/2018, this was a bare claim without any particulars. Thus, at the hearing of HC/SUM 2425/2018 on 16 July 2018, the assistant registrar ordered AIL to provide particulars of the alleged pre-contractual misrepresentations made by Mr Kam, but this remained unfulfilled. Its application to amend its pleadings to include a claim in misrepresentation against Mr Kam with respect to the Tax Issues was disallowed. AIL again did not appeal.

21 Mr Tham points out that Thean J had held that it is not clear that the plaintiffs had the requisite knowledge to raise the Tax Issues in the previous suit, noting that she did not have sight of a copy of the Unofficial Tax Notice in reaching her decision. Therefore, PT ARI's Tax Issues had to be resolved at trial. Mr Tham submits that the Unofficial Tax Notice was only later disclosed by the plaintiffs in Mr Chang's affidavit filed on 22 June 2022, after the conclusion of HC/RA 234/2021 and HC/RA 235/2021. Thean J had thus made an observation that the plaintiffs (in the previous suit) should have joined the other parties to the Agreement and amended their pleadings to raise all relevant matters within their knowledge to impugn the Agreement. That would have included the plaintiffs' current claims that the Agreement should be rescinded on the ground of misrepresentation due to PT ARI's tax affairs and all breaches of warranty.

22 Finally, Mr Tham submits that there is no fresh evidence that justifies a re-litigation. He submits that the plaintiffs' current claims in respect of PT ARI's Tax Issues are an attack on the courts' decisions in *Asian Infrastructure Ltd* and *Kam Thai Leong*. I agree with Mr Tham's submissions that the plaintiffs

only have themselves to blame for their failure to raise and argue the Tax Issues in the previous suit. They are caught in a bind of their own making.

23 On the facts, I am of the view that the plaintiffs have no excuse for not having raised and argued the Tax Issues at the previous suit. The Tax Issues and their implications on the plaintiffs' claim were within the plaintiffs' knowledge in the previous suit. First, Mr Chang had in his affidavit dated 9 June 2021 acknowledged that he had been made aware by Mr Yeo of the Unofficial Tax Notice in the last quarter of 2016. Secondly, although Mr Chang had claimed that the Unofficial Tax Notice was "not conclusive at all on the issue of the existence of PT ARI's tax issues", ARI had nevertheless gone ahead on 22 September 2017 to send the 22 Sep Letter to APTSA. Pertinently, in the 22 Sep Letter, ARI asserted that:

> 6. After we had disbursed to you the convertible loan in the amount of USD320,000.00, we discovered that each of the Representations was untrue:
>
> …
>
> (ii) Contrary to your Representation that PT ARI was in good order, we also discovered that PT ARI had breached a number of Indonesian tax codes namely PP PASAL 21, PPH PSASAL 22, PPH PASAL 23, PPH PASAL 26, PPH Final PASAL 4 Ayat (2), PPN and STP PPN Denda Pasal 14 (4) KUP for Year of Assessment 2013 (1 January 2013 to 31 December 2013). Due to the undisclosed tax matters, we face unlimited exposure to tax liabilities as a result of your representations and/or non-disclosure of such breaches. Such exposure to tax liabilities may have an [sic] looming impact on the tax assessment period for the respective years of 2014 and 2015.
>
> 7. The said Representations were made despite your knowledge that they were false and untrue and/or recklessly not caring whether they were true or false. But for the misrepresentations as to the production capacity of the factory premises and as to the fact that you had made full and fair disclosure in all material respects of any matter including tax issues pursuant

> to the Share Subscription Agreement, we would not have entered into the Share Subscription agreement. Consequently, the amount of USD320,000.00 would not have been disbursed if you had "*made full and fair disclosure in all material respects of any matters*" under Clause 1.3 (f) of the said Appendix.
>
> 8. By reason of the foregoing misrepresentations, we have suffered loss, damage and expenses. We are entitled to, and we do hereby demand for damages and/or repayment of all moneys paid under and pursuant to the Share Subscription Agreement, including but not limited to the refund of all payments advanced to you in the sum of USD320,0000.00 [sic] plus interest.
>
> 9. Further and/or in the alternative and without prejudice to our right of rescission of the Share Subscription Agreement, the Share Subscription Agreement was terminated by us on 10 February 2017 on, inter alia, the following breaches of the Share Subscription Agreement by you.
>
> …
>
> Your failure to disclose PT ARI's tax issues is a breach of your obligation(s) to make proper reporting of your tax obligations under Clause 1.3(a) of the Appendix, read with Clause 8 of the Share Subscription Agreement. This said failure to properly report your tax obligations is also a breach of the condition, representation and/or warranty under the share subscription agreement in Clause 1.3(f) of the Appendix in that you failed to provide "*full and fair disclosure in all material respects of any matter that could be reasonably be expected to affect ARI's decision*" to purchase the Shares on the terms set out in the share subscription agreement.

24 The contents of the 22 Sep Letter are clear and unequivocal, that ARI takes the view that APTSA had breached the Agreement because of the Tax Issues, and misrepresentations had been made to ARI. Additionally, the 22 Sep Letter shows that ARI is of the view that it would not have entered into the Agreement if misrepresentations had not been made. This is inconsistent with Mr Chang's evidence that to him the Unofficial Tax Notice was "not conclusive at all on the issue of the existence of PT ARI's tax issues".

25 Thirdly, Mr Chang had on multiple occasions during trial in the previous suit given evidence that he knew PT ARI was facing tax issues. For instance, when questioned about the breach of warranties of the Agreement, Mr Chang had testified that "there were tax issues as well that were not disclosed to us". It must be remembered that the trial took place sometime in May 2019, long before the plaintiffs' position that they had only obtained the incriminating tax notices from Wafa after both *Asian Infrastructure Ltd* and *Kam Thai Leong* had ended. This is a material inconsistency. Taken with Mr Chang's knowledge of the Unofficial Tax Notice by late-2016, and the 22 Sep letter sent by ARI on 22 September 2017, I find that this is indicative that the plaintiffs had by 22 September 2017 known about the Tax Issues in relation to their claims regarding the Agreement and the relevant alleged misrepresentations.

26 The plaintiffs have only themselves to blame for their subsequent half-hearted effort to amend their pleadings to include the tax issues, and consequent failure. They did not provide any particulars in support of their application to amend their pleadings to include the Tax Issues. Counsel at the hearing confirmed that the plaintiffs "are purely relying [on the contractual clause in the Agreement]" as a basis for the amendment. This is notwithstanding the assistant registrar's direction that particulars had to be given. Ultimately, no particulars were given and the proposed amendment to add the Tax Issues to the pleadings disallowed. Nothing on the facts suggests that there are special reasons for the plaintiffs to circumvent the res judicata rule.

27 I do not accept Mr Rajoo's submission of the Tax Notices being new material available only after the previous suit had ended. Mr Rajoo's reliance on the case of *Arnold* is misplaced. *Arnold* was primarily a case where the court considered the doctrine of res judicata in the context of a subsequent change in

law, and whether this was capable of being "special circumstances" allowing relitigation. In *Arnold*, although the court observed that in considering "special circumstances", further relevant materials related to matters of fact may be brought forward, these have to relate to new materials that were not available at the time of the earlier decision. In the present case, the Tax Notices are not new materials that were not available at the time of the earlier decision. They would have been available to the plaintiffs had they followed the proper procedure by pleading their case properly and seeking for discovery thereafter.

28 Moreover, I am not persuaded by Mr Rajoo that Mr Kam had breached his disclosure obligations in the previous suit under O 24 r 1 ROC 2014. Without having pleaded the Tax Issues in the previous suit, I do not see how Mr Kam could have reasonably known that the Tax Notices would support the plaintiffs' case or were detrimental to his own case. In any event, the plaintiffs had already made a subsequent specific discovery application which was disallowed. In the light of the reasons above, I find that the plaintiffs are estopped from raising the Tax Issue in the present suit.

29 As for the Winding-up Issue, Mr Rajoo does not appear to have made substantive arguments about this aspect of the plaintiffs' claim in his closing submissions. In any event, based on the available evidence before me, it is clear that there is no merit to this aspect of the plaintiffs' claim. In the plaintiffs' Statement of Claim, they allege that the winding up of PT ARI was a breach of clauses 1.3(c) and 1.3(d) of the appendix to the Agreement. The clauses read as follows:

> **1.3** The following representations and warranties are made and given by the Company 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 favor 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:
>
> …
>
> (c) The business of ARI will not be adversely affected in any material respect in any way, whether by the Company or by any other person or cause whatsoever, up to closing and the Company will not do anything before or after closing to prejudice the goodwill of ARI;
>
> (d) The Company will carry on business as usual until closing except that it will not declare any dividends or make any other distributions of capital or retained earnings or undertake or compromise any major contractual liabilities without the express written consent of ARI;
>
> …

For avoidance of doubt, references to "the Company" above refer to APTSA, references to ARI and PT ARI refer to themselves as defined previously (at [1]–[2] above). On the facts, it is clear that the winding up of PT ARI on 2 May 2019 did not affect ARI "in any material respect" or "in any way" by the time of closing (i.e. when the Agreement had been entered into on September 2015). In relation to goodwill, there is no evidence that the winding up of PT ARI prejudiced the goodwill of ARI. In fact, there is also no evidence of what goodwill ARI had, in order to be prejudiced by PT ARI's winding up.

30 Likewise, in relation to clause 1.3(d), there is no evidence of any major contractual liabilities being compromised by PT ARI. Additionally, it is Mr Chang's and Mr Tin's evidence at trial that PT ARI had never distributed dividends from the time the Agreement was entered into. Therefore, it is clear that there can be no breach of clause 1.3(d) of the Agreement. Accordingly, the

plaintiffs' claims in relation to the Winding-up Issue are dismissed. I will hear parties on costs at a later date if they are unable to agree on costs.

- Sgd -
Choo Han Teck
Judge of the High Court

Mathiew Christophe Rajoo, Gerard Vincent Nicholas and Abiramee Ghandhidass (DennisMathiew) for the plaintiffs;
Tham Wei Chern, Charis Wang Chunhua and Samuel Ang Rong En (Fullerton Law Chambers LLC) for the defendants.