PT Jaya Sumpiles Indonesia and Another v Kristle Trading Ltd and Another Appeal [2009] SGCA 20

Case Number : CA 185/2008, 189/2008, SUM 452/2009

Decision Date : 28 May 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Yeo Soo Mong Tony and Rozalynne Asmali (Drew & Napier LLC) for the appellants in Civil Appeal No 185 of 2008 and the respondents in Civil Appeal No 189 of 2008; Samuel Chacko and Angeline Soh Ean Leng (Legis Point LLC) for the respondent in Civil Appeal No 185 of 2008 and the appellant in Civil Appeal No 189 of 2008

Parties : PT Jaya Sumpiles Indonesia; Low Tuck Kwong — Kristle Trading Ltd

Civil Procedure – Appeals – Notice – Leave to amend notice of appeal to introduce new point of law at early stage – Amendment caused no prejudice to other party – Whether leave to amend notice of appeal allowed

Credit and Security – Guarantees and indemnities – Guarantee contained "principal debtor" clause – Guarantee replete with words "guarantor" and "guarantee" with "primary obligor" used once only – Word "indemnify" appeared once in contract between principal debtor and creditor – Whether guarantee was an indemnity

Credit and Security – Guarantees and indemnities – Guarantee provided that guarantors shall pay all money balance payable under contract between principal debtor and creditor – Whether guarantee had effect of accelerating guarantors' liability for other instalments – Whether principle of co-extensiveness breached

Credit and Security – Guarantees and indemnities – Guarantee provided that guarantors shall pay upon demand by creditor – Guarantee provided that guarantors to pay on demand by creditor all costs, charges and expenses – Whether guarantee payable on demand

Credit and Security – Guarantees and indemnities – Guarantor guaranteed due performance of contract between principal debtor and creditor – Contract between principal debtor and creditor contained arbitration clause – Whether guarantor liable to pay any sum awarded in arbitration between principal debtor and creditor

Credit and Security – Guarantees and indemnities – Guarantor not privy to arbitration proceedings between principal debtor and creditor – Whether guarantor liable for arbitration award

Limitation of Actions – Extension of limitation period – Acknowledgment – Letter allegedly acknowledging liability not signed by guarantor – Guarantor did not on face of letter authorise person to sign letter on his behalf – Whether letter was an acknowledgement of liability – Section 26 Limitation Act (Cap 163, 1996 Rev Ed)

Limitation of Actions – Particular causes of action – Judgments – Defendant's counterclaim based on guarantee – Whether s 6(3) Limitation Act (Cap 163, 1996 Rev Ed) applied – Section 6(3) Limitation Act (Cap 163, 1996 Rev Ed)

28 May 2009

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 These two appeals arose from the decision of the High Court judge ("the Judge") on 22 October 2008 in Suit No 12 of 2005 ("S 12/2005"), which was consolidated and heard together with Suit No 11 of 2005 ("S 11/2005").

2 In S 11/2005, International Coal Pte Ltd ("ICP") sought (*inter alia*) an injunction against Kristle Trading Ltd ("Kristle") and Kazushi Toyoshige ("KT") to restrain them from disclosing confidential information relating to an arbitration between ICP and Kristle. The Judge dismissed the suit (see *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR 945 ("the Judgment")) and ICP did not appeal against that decision. The present appeals thus concerned S 12/2005 only.

3 In S 12/2005, PT Jaya Sumpiles Indonesia ("PTJS"), Low Tuck Kwong ("Low") and ICP sought (*inter alia*) a declaration that PTJS and Low (collectively, "the Guarantors") were not liable to Kristle under a guarantee dated 1 November 1995 ("the Guarantee"). The Guarantors had given the Guarantee to Kristle to secure ICP's obligations under a novation agreement dated 1 November 1995 entered into between Kristle and ICP ("the Second Novation Agreement"), pursuant to which ICP took over a coal mining venture in Indonesia. Kristle counterclaimed against the Guarantors for the sum of US$3.5m which remained payable by ICP under the Second Novation Agreement ("the Outstanding Sum"), accrued interest thereon amounting to US$289,872.60 ("the Accrued Interest"), as well as all the other sums which had been awarded to it ("the Remaining Sums") under an award made on 31 January 2001 ("the Award") in an arbitration between it and ICP in relation to the latter's rights and liabilities under the Second Novation Agreement. The Judge dismissed the Guarantors' action and gave judgment to Kristle on its counterclaim for the Outstanding Sum and the Accrued Interest, but not for the Remaining Sums. Both the Guarantors and Kristle filed appeals against the Judge's decision.

4 In Civil Appeal No 185 of 2008 ("CA 185/2008"), the Guarantors appealed to this court against the Judge's decision on Kristle's counterclaim. They reiterated their argument that they were not liable to Kristle under the Guarantee and also contended that, even if they were liable, their liability was limited to the Outstanding Sum and did not extend to the Accrued Interest. In Civil Appeal No 189 of 2008 ("CA 189/2008"), Kristle cross-appealed against the Judge's decision that it was not entitled to claim the Remaining Sums. At the conclusion of the hearing, we dismissed both appeals. However, in respect of CA 185/2008, we varied the Judge's order in relation to the principal judgment sum payable by the Guarantors, and also awarded costs against them on an indemnity basis for that appeal as agreed under the terms of the Guarantee. We now give our reasons for our decision.

Background facts

5 The facts relevant to the present appeals are as follows. On 15 August 1994, PT Tambang Batubara Asam (Persero) ("PTBA"), a company owned by the Indonesian government, granted PT Gunung Bayan Prarama Coal ("GBPC") the right (*inter alia*) to develop coal reserves in designated zones in Kalimantan, Indonesia ("the Designated Areas"). On 12 April 1995, GBPC entered into three agreements with Japan Overseas Coal Ltd ("JOC"), a Japanese company, to set up a joint venture company ("PMA") to develop coal reserves and conduct coal mining operations in the Designated Areas. KT was the president-director and principal shareholder of JOC at the material time. Under these three agreements ("the Three Agreements"), JOC was to hold 65% of the shares of PMA for the first five years and 60% of the latter's shares for the subsequent 25 years. JOC was also to have 100% of the selling rights for coal from the Designated Areas.

6 By a novation agreement dated 31 October 1995 ("the First Novation Agreement"), JOC novated its rights and obligations under the Three Agreements to Kristle, which in turn novated its rights and obligations to ICP on 1 November 1995 via the Second Novation Agreement. Low was the

managing director and majority shareholder of both ICP and PTJS at that time. As consideration for the novation by Kristle, ICP agreed to pay Kristle US$4.5m in five instalments at the times and in the manner set out in cl 3.1 of the Second Novation Agreement, namely:[note: 1]

> 3.1.a) US$0.5 Million … within thirty (30) days from [the] signing date of this Agreement, before the day of November 30, 1995.
>
> b) US$0.5 Million … exactly on the day of June 30, 1996.
>
> c) US$1.0 Million … exactly on the day of December 20, 1997.
>
> d) US$1.5 Million … exactly on the day of December 20, 1998.
>
> e) US$1.0 Million … exactly on the day of June 30, 1999.

It was also agreed that the Guarantors would execute "a deed of guarantee and indemnify [*sic*]"[note: 2] (see cl 9 of the Second Novation Agreement) in Kristle's favour (this deed subsequently took the form of the Guarantee). The Second Novation Agreement contained the following arbitration clause (cl 13):[note: 3]

> Any and all differences and disputes of whatsoever [nature] arising out of this Agreement shall be put to arbitration in Singapore pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one to be appointed by [Kristle], one by ICP, and one by the two so chosen. The award of any two of the three on any point or points shall be final and binding [on] both parties.

7 ICP made the first two instalment payments, totalling US$1m, to Kristle. After paying the second instalment, ICP allegedly discovered (*inter alia*) that GBPC and JOC had failed to obtain approval from PTBA to enter into the Three Agreements. In ICP's view, this meant that the transfer of rights from GBPC to JOC was not valid; this in turn meant that JOC did not transfer any rights to Kristle under the First Novation Agreement and that, consequently, ICP received no benefits from Kristle under the Second Novation Agreement. After negotiations with Indonesia's Ministry of Mines and Energy, it was agreed that GBPC would be sold to Low and another partner(s) for US$2.5m. The sale was completed in November 1997. ICP later defaulted on the third instalment set out in the Second Novation Agreement, which was due on 20 December 1997.

8 The disputes between ICP and Kristle under the Second Novation Agreement were referred to arbitration under the auspices of the Singapore International Arbitration Centre ("SIAC") in SIAC Arbitration No 78 of 1999, with ICP as the claimant and Kristle as the respondent. In the arbitration proceedings, ICP made several allegations against Kristle, including that of total failure of consideration and misrepresentation by Kristle. The arbitration tribunal made the Award on 31 January 2001 as follows:[note: 4]

> We AWARD, ADJUDGE and DIRECT that:
>
> I. [ICP's] claims in these proceedings shall stand dismissed with costs to be wholly borne by [ICP].
>
> II. [ICP] shall pay [Kristle] **US$3,5000,000** together with interest accrued thereon amounting in aggregate to **US$289,972.60**.

III. [ICP] shall bear the costs of this award of **S$241,737.75**.

IV. [ICP] shall bear and pay the costs of [Kristle] incurred in these proceedings which we hereby fix at **US$160,000.00** together with disbursements of **S$12,960.61** and **A$7,072.38**.

V. [ICP] shall reimburse to [Kristle] the sum of **S$115,000**, being the deposit to account made by [Kristle] to the SIAC.

VI. [ICP] shall pay to the SIAC the sum of **S$11,797.75**, being the balance of the costs of the [A]ward. If [Kristle] shall have paid the whole or any part of this sum in the first instance, [it] shall be entitled to immediate reimbursement from [ICP] of the amount so paid.

[emphasis in bold in original]

We should point out that, although the quantum of the Accrued Interest was stated as US$289,972.60 in the Award (see item (II) of the quotation above), Kristle counterclaimed for a sum of only US$289,872.60 under this particular head (see [3] above).

9 After the Award was made, there was an exchange of letters between the parties. On 23 February 2001, Kristle wrote to ICP asking for payment under the Award.[note: 5] On 27 February 2001, ICP replied requesting that Kristle work out a payment plan with it because of the economic situation in Indonesia as well as the financial problems of ICP and Low.[note: 6] Thereafter, there was a long exchange of letters, with ICP asking for meetings with Kristle to discuss an "amicable solution"[note: 7] and Kristle repeatedly demanding payment under the Award and refusing to meet ICP anywhere except in Tokyo.

10 On 26 March 2001, Kristle made a formal demand on the Guarantors for payment, pursuant to the terms of the Guarantee, of the "amounts set out in the Award"[note: 8] with interest at 6% per annum with effect from 1 February 2001 to the date of payment. On 28 March 2001, Low made a proposal for ICP to pay a total of US$3m in settlement of all the sums set out in the Award, with a first payment of US$300,000 and subsequent instalments of US$100,000 per month over 27 months.[note: 9] Kristle rejected the proposal on the same day and counter-proposed a settlement amount of US$4m, with US$3.5m to be paid upfront as a lump sum within five days from 28 March 2001 and the remaining US$500,000 to be paid by 28 April 2001.[note: 10]

11 Low replied to Kristle's counter-proposal on 5 April 2001, stating that ICP was not able to make the payment.[note: 11] Again, there was an exchange of letters between ICP and Kristle, with ICP seeking to find an amicable solution involving "a reasonable discount and a payment period of … a few years"[note: 12] and Kristle continuing to demand payment. ICP claimed that it had no money, but Kristle pointed out that ICP was still operating the coal mines in the Designated Areas profitably. ICP and Kristle later arranged for a meeting, which was held in Tokyo on 28 June 2001.

12 On the same day (*ie*, 28 June 2001) but after the meeting, ICP wrote a letter to Kristle ("the ICP Letter") claiming that it had reached a settlement with the latter at the meeting. The letter read as follows:[note: 13]

Dear Mr Toyoshige [*ie*, KT]

ARBITRATION No. 78 of 1999

Please refer to the meeting today in Tokyo. The meeting was attended by our representatives [Low] and Mr Lim Chai Hock, and your representatives Mr Nakahara and your goodself.

It has been agreed in the referred meeting that both parties to the captioned arbitration [have] reached full and final settlement. With this settlement, there shall be no further claims by either party against the other parties or the [G]uarantors or any other persons/organisations.

The settlement shall only consist of payments by [ICP] to Kristle … as follows:

1 One First Payment of US$300,000 after the signing of the formal settlement agreement.

2 Monthly Payments of US$100,000 each beginning a month after the First Payment. There shall only be 27 of such Monthly Payments.

It is also agreed that Kristle … will prepare the draft of the formal settlement agreement based on the agreed terms as described above. In this respect, we [*ie*, ICP] await … your draft and hope to receive it as soon as possible.

The ICP Letter was signed by ICP's director, Helen Ong.

13 On 3 July 2001, ICP reminded Kristle to send the draft settlement agreement.[note: 14] On 6 July 2001, Kristle replied stating that the draft was being prepared by its lawyer.[note: 15] However, no settlement agreement was ever signed by the parties. Following its letter to ICP dated 6 July 2001, Kristle continued making demands for payment until the last letter (dated 30 December 2004)[note: 16] found in the records.

14 On 5 January 2005, ICP commenced S 11/2005 against Kristle and KT. On the same date, the Guarantors and ICP commenced S 12/2005 against Kristle and KT.

15 On 1 December 2006, Kristle applied *ex parte* to the High Court via Originating Summons No 2255 of 2006 for leave to enforce the Award in the same manner as a judgment pursuant to s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). Leave to enforce was granted on the same day. ICP later applied on 1 November 2007 (via Summons No 4903 of 2007) to set aside the order granting Kristle leave to enforce the Award, but its application was dismissed on 21 December 2007 by an assistant registrar. ICP's appeal to the High Court against the assistant registrar's decision was dismissed by Andrew Ang J ("Ang J") on 28 January 2008. Judgment was entered against ICP for all the sums set out in the Award on 6 February 2008. ICP did not appeal against Ang J's order.

The issues before the Judge

16 ICP and the Guarantors raised numerous issues at the consolidated trial of S 11/2005 and S 12/2005 in the court below. For the purposes of the present appeals, the pertinent issues before the Judge turned entirely on whether the Guarantors were liable under the Guarantee and, if so, the extent of their liability. Broadly, these issues were as follows:

(a) whether Kristle's claim under the Guarantee was barred by limitation; and

(b) if Kristle's claim was not time-barred, whether the Guarantors were liable to pay all the

sums awarded to Kristle under the Award.

In determining these two issues, the Judge had to construe the terms of the Second Novation Agreement, the Guarantee as well as the ICP Letter, which Kristle relied on in this court (but *not* in the court below) as an acknowledgment by Low of his liability under the Guarantee.

The Judge's decision

17 The Judge made the following findings:

(a) No settlement agreement was reached on 28 June 2001 or at anytime thereafter *vis-à-vis* the sums payable under the Award, contrary to what ICP and the Guarantors alleged (see the Judgment at [108]).

(b) In respect of Kristle's counterclaim against the Guarantors, time started to run on 20 December 1997 when ICP defaulted on the third instalment due under the Second Novation Agreement. As a result, Kristle's counterclaim should have become time-barred on 20 December 2003 (*id* at [117]). However, Kristle's counterclaim did not become time-barred on that date because the ICP Letter was "an open acknowledgement that ICP (and the [G]uarantors) owed Kristle [the sums due under] the Award which ICP alleged had been compromised and reduced to US$3.5m" (*id* at [119]). Therefore, time started to run afresh on 28 June 2001 (*ie*, the date of the ICP Letter) under s 26(2) of the Limitation Act (Cap 163, 1996 Rev Ed) (*ibid*).

(c) The Award was converted into a judgment that was enforceable on 30 January 2008 (see the Judgment at [119]), thereby extending the limitation period to 12 years from that date under s 6(3) of the Limitation Act. This was because Kristle's counterclaim against (*inter alia*) Low was based on the Award (which ICP had failed to honour), and not the Second Novation Agreement (*id* at [119]–[120]). For this reason too, Kristle's counterclaim against Low was not time-barred (*id* at [120]). We pause to note that the Award was actually converted into an enforceable judgment only on 6 February 2008 (and not 30 January 2008 as stated at [119] of the Judgment), but this error is inconsequential to the outcome of the present appeals.

(d) As the Guarantors had pleaded in their statement of claim that they had been discharged from all liability as guarantors on the ground that the Second Novation Agreement was void and unenforceable for total failure of consideration and/or misrepresentation, they had implicitly accepted that "*the Guarantee was valid* but not enforceable" [emphasis added] (*id* at [120]). In claiming limitation as a defence to Kristle's counterclaim, Low was approbating and reprobating at the same time, and this could not be allowed in law (*ibid*).

(e) Low's liability as a guarantor was "limited to cl 3.1 [of the Second Novation Agreement]" (see the Judgment at [122]); *ie*, Low only had to pay "the outstanding sum owed by ICP of US$3.5m" (*ibid*). He was not liable to pay the other sums set out in the Award as "there was no reference to arbitration or any award arising out of arbitration proceedings" (*ibid*) in the Guarantee.

In the result, the Judge allowed Kristle's counterclaim against the Guarantors for the Outstanding Sum and the Accrued Interest, together with interest on those two sums and costs.

The issues on appeal

18 In their notice of appeal filed on 17 November 2008 for CA 185/2008 ("the original Notice of

Appeal"), the Guarantors had originally relied on two grounds of appeal, *viz*:[note: 17]

> (a) … [T]here are no obligations due or monies owing by the [Guarantors] to [Kristle] under the Guarantee … as [Kristle's] claim against the [Guarantors] under the Guarantee is time-barred; or
>
> (b) … [T]he [Guarantors'] obligation under the Guarantee (if at all) is limited to the amounts stated in Clause 3.1 of the [Second] Novation Agreement … and … if [Kristle's claim is] not found to be time-barred, the [Guarantors'] liability is only limited to US$3.5 million [*ie*, the Outstanding Sum] without the added interest of US$289,872.60 [*ie*, the Accrued Interest] awarded pursuant to the … Award …

The Guarantors later applied (via Summons No 452 of 2009) for leave to amend the original Notice of Appeal by deleting the second ground of appeal (*ie*, ground (b) of the quotation set out above) and replacing it with two separate grounds, *viz*:[note: 18]

> (b) That if [Kristle's claim under the Guarantee is] not found to be time-barred, the [Guarantors] are not liable under the Guarantee to honour any sums due under the … Award … including *inter alia* the US$3.5 million and the added interest of US$289,872.60 awarded pursuant to the … Award as the Guarantee does not cover the … Award; or
>
> (c) That if [Kristle's claim under the Guarantee is] not found to be time-barred, and the [Guarantors] are found to be liable under the Guarantee to honour the … Award … the liability of the [Guarantors] to pay under the Guarantee is limited to the amounts stated in Clause 3.1 of the [Second] Novation Agreement i.e. US$3.5 million only.
>
> [underlining in original omitted]

19 The Guarantors' application for leave to amend the original Notice of Appeal by ostensibly replacing ground (b) thereof with two grounds was actually an application for leave to insert an entirely new ground of appeal (*viz*, that the Guarantors were not liable to Kristle for any of the sums set out in the Award at all as the Guarantee did not cover that award). This appeared to be a response to Kristle's argument in its written case (in CA 189/2008) that the Guarantors were liable for all the sums due under the Award because they had, by implication, undertaken that ICP would perform the Award. We allowed the application for leave to amend (but without any order as to costs) as there was no prejudice to Kristle if the Guarantors were permitted to rely on the aforementioned new ground of appeal, a point which Kristle's counsel acknowledged during the hearing before this court. The new ground of appeal raised an issue of law and not of fact. Further, the application had been filed at a relatively early stage, giving Kristle more than sufficient time to respond.

20 The parties raised only two main issues before us, which were also the issues raised before the Judge (see [16] above), namely:

> (a) whether Kristle's counterclaim against the Guarantors was barred by limitation ("the First Main Issue"); and
>
> (b) if Kristle's counterclaim was not time-barred, whether the Guarantors were liable for only the Outstanding Sum (*ie*, US$3.5m) and interest thereon, or for all the amounts payable by ICP under the Award ("the Second Main Issue").

21 These two main issues gave rise to a number of sub-issues. In relation to the First Main Issue,

the sub-issues were:

(a) whether the Guarantee was a guarantee payable on demand;

(b) whether cl 4 of the Guarantee was an acceleration clause;

(c) whether the ICP Letter was an acknowledgment of liability for the purposes of s 26(2) of the Limitation Act;

(d) whether the Guarantors approbated and reprobated in their pleadings;

(e) whether the conversion of the Award into an enforceable judgment on 6 February 2008 extended the limitation period to 12 years from that date pursuant to s 6(3) of the Limitation Act; and

(f) whether the Guarantors had waived the defence of limitation by virtue of cl 8 of the Guarantee.

22 In relation to the Second Main Issue, the sub-issues were:

(a) whether the principle laid down in *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 ("*Re Kitchin*") (see further [39]–[42] below) was applicable to Kristle's counterclaim against the Guarantors;

(b) whether the Guarantee had the effect of an indemnity because of the "primary obligor" provision in cl 1 thereof; and

(c) whether the Guarantee was a "performance guarantee" or a "payment guarantee".

We shall deal with the above issues *seriatim*.

The First Main Issue: Was Kristle's claim under the Guarantee barred by limitation?

Was the Guarantee a guarantee payable on demand?

23 In the court below, Kristle argued that the Guarantee was a guarantee payable on demand and that the limitation period for its counterclaim had started to run only when it made a demand on the Guarantors on 26 March 2001 for payment (see [10] above). The Judge implicitly rejected this argument in holding that time had started to run on 20 December 1997 when ICP defaulted on the third instalment of US$1m due under cl 3.1(c) of the Second Novation Agreement (see sub-para (b) of [17] above). She accepted the Guarantors' argument (as set out at [112] of the Judgment) that a demand for payment was not necessary because of cl 2 of the Guarantee. She further held that cl 4 of the Guarantee operated as an acceleration clause such that all outstanding instalments payable under the Second Novation Agreement became due once ICP defaulted on the third instalment.

24 With respect, we disagreed with the Judge's construction of cl 2 and cl 4 of the Guarantee. In our view, the Guarantee *was*, as Kristle contended, a guarantee payable on demand. The relevant terms of the Guarantee were as follows:[note: 19]

1. Each Guarantor hereby irrevocably and unconditionally guarantees, not as surety only but as a primary obligor and jointly and severally with ICP, until all the money as specified in clause 3.1

and/or in … clause 7.1 [of] the [Second Novation] Agreement [has been] fully paid,

a) the due, prompt and faithful performance by ICP of all its obligations under the [Second Novation] Agreement and

b) the due and punctual payment by ICP of the money payable by ICP under the [Second Novation] Agreement in the manner and at the time fixed under the [Second Novation] Agreement.

In addition to the above, … each Guarantor guarantee[s] to pay in [a] lump sum payment to [Kristle] in the event that ICP has gone bankruptcy [*sic*], or has been dissolved or merged, or has [its property] … attached by any person, or [a] substantial part of its business has been assigned, or [a] petition for reorganization, composition or else for special liquidation of ICP is filed.

Each Guarantor shall, upon demand by [Kristle], cause forthwith to pay the moneys, and such payment shall be made in accordance with clause 3.1 … and clause 7.1 … of the [Second Novation] Agreement.

2. This Guarantee shall be a continuing guarantee and shall remain in full force and effect so long as any m[o]neys remain owing under the [Second Novation] Agreement, and may be enforced against each Guarantor without any demand being made on or proceedings taken against ICP.

3. …

4. Each Guarantor hereby agrees that if any event of non-payment under and pursuant to clause 3.1 … and clause 7.1 … of the [Second Novation] Agreement occurs, the … Guarantors shall (whether or not any guarantor knows of the occurrence of such non-payment and/or [of] the said notice having been given to ICP) pay all the money balance payable under the [Second Novation] Agreement.

5. In addition to but not [limited] to the [Guarantors'] guarantee of payment of fees and all other sums payable under the [Second Novation] Agreement, each Guarantor hereby undertakes and agree[s] to pay, *on demand* by [Kristle], all costs, charges and expenses (including legal fees on a full indemnity basis) incurred by [Kristle] in connection with the enforcement of this Guarantee.

[emphasis added]

25 Clause 1 of the Guarantee referred to cl 3.1 and cl 7.1 of the Second Novation Agreement (the latter of which was not relevant in the present appeals). Clause 3.1 of the Second Novation Agreement (which is also reproduced at [6] above) was as follows:[note: 20]

3. ICP shall make payment to [Kristle] as follows.

3.1.a) US$0.5 Million … within thirty (30) days from [the] signing date of this Agreement, before the day of November 30, 1995.

b) US$0.5 Million … exactly on the day of June 30, 1996.

c) US$1.0 Million … exactly on the day of December 20, 1997.

d) US$1.5 Million … exactly on the day of December 20, 1998.

e) US$1.0 Million … exactly on the day of June 30, 1999.

26 In our view, the last paragraph of cl 1 of the Guarantee (italicised in the quotation at [24] above) clearly provided that "[e]ach Guarantor shall, *upon demand by [Kristle]*, cause forthwith to pay the moneys, and such payment shall be made in accordance with clause 3.1 … of the [Second Novation] Agreement" [emphasis added]. Similarly, and consistent with cl 1 of the Guarantee, cl 5 thereof likewise provided that each of the Guarantors undertook and agreed to pay "*on demand by [Kristle]*, all costs, charges and expenses (including legal fees on a full indemnity basis) incurred by [Kristle] in connection with the enforcement of [the] Guarantee" [emphasis added]. The reference in cl 2 of the Guarantee to that guarantee being enforceable against each of the Guarantors "without any demand being made on or proceedings taken against ICP" merely meant that the Guarantors' liability was not dependent on whether Kristle had demanded payment from or initiated legal proceedings against ICP. Similarly, and consistent with cl 2 of the Guarantee, cl 4 thereof, under which the Guarantors agreed to pay all the outstanding amounts due under the Second Novation Agreement "whether or not any guarantor [knew] of the occurrence of such non-payment and/or [of] the said notice having been given to ICP", merely meant that the liability of the Guarantors was not dependent on whether they had any knowledge of ICP's default on the instalments due under the Second Novation Agreement. In our view, the Judge was therefore wrong to hold, *vis-à-vis* Kristle's counterclaim, that time had started to run on 20 December 1997. This was because Kristle did not make any demand on the Guarantors for payment until 26 March 2001 (see [10] above).

27 Our decision that the Guarantee was a guarantee payable on demand and that time did not start to run until 26 March 2001 *vis-à-vis* Kristle's counterclaim in S 12/2005 would have been sufficient to dispose of the First Main Issue. However, as we disagreed with the Judge's decision on the other sub-issues relating to the First Main Issue, we think it is desirable that we also set out our views on those sub-issues.

Was clause 4 of the Guarantee an acceleration clause?

28 The Guarantors argued that, under cl 4 of the Guarantee, ICP's default on the third instalment due under the Second Novation Agreement had the effect of accelerating the due date of the remaining instalments (*ie*, the fourth and the fifth instalments), such that, for the purposes of limitation, time started to run on 20 December 1997; as a result, Kristle's counterclaim for the outstanding moneys payable under the Second Novation Agreement became time-barred on 20 December 2003.[note: 21] The Guarantors' argument placed strong emphasis on the phrase "pay *all* the money balance payable under the [Second Novation] Agreement" [emphasis added] in cl 4 of the Guarantee. In our view, cl 4 of the Guarantee could not have the effect of accelerating (upon ICP's default on the third instalment on 20 December 1997) the liability of the Guarantors for the fourth and the fifth instalments due under the Second Novation Agreement. If cl 4 did indeed have such an effect, the Guarantors' liability (which was secondary in nature) as at 20 December 1997 would have exceeded ICP's liability on that same date under the Second Novation Agreement, which *did not* contain an acceleration clause. This would be contrary to the principle of co-extensiveness, which provides that the guarantor's liability is co-extensive with the principal debtor's liability, such that, "as a general rule, the [guarantor's] liability is no greater and no less than that of the principal [debtor] … in terms of [the] amount, [the] time for payment and the conditions under which the principal [debtor] is liable" (see Geraldine Mary Andrews & Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 5th Ed, 2008) ("Andrews & Millett") at para 6-002; see also *id* at para 4-014). We did not

consider whether, conceptually, it is legally permissible for a guarantee to "contradict" the primary obligation to which it relates (in terms of rendering the guarantor's liability more extensive than the principal debtor's liability) as that question did not arise in the present appeals. In view of the principle of co-extensiveness, the result is that, even assuming that the Guarantee required the Guarantors to make payment *without* any demand being made on them after ICP defaulted on the third instalment due under the Second Novation Agreement, the Guarantors would have been obliged to pay *only the particular instalment due on 20 December 1997*. The Guarantors would not have been obliged to pay the fourth and the fifth instalments until 20 December 1998 and 30 June 1999 respectively. As such, Kristle's counterclaim for the last instalment of US$1m (which was due on 30 June 1999), at least, was not time-barred at the time ICP and the Guarantors commenced S 12/2005 against Kristle on 5 January 2005. (That date, *ie*, 5 January 2005, was the date on which Kristle's counterclaim was deemed to have been commenced because, under s 31 of the Limitation Act, "any claim by way of set-off or counterclaim shall be deemed … to have been commenced *on the same date as the action in which the set-off or counterclaim is pleaded*" [emphasis added].)

Was the ICP Letter an acknowledgment of liability by Low for the purposes of section 26(2) of the Limitation Act?

29 The Judge held that the ICP Letter was an acknowledgment by (*inter alia*) Low of his liability under the Guarantee (see sub-para (b) of [17] above). Before this court, the Guarantors argued that the Judge's decision was wrong and should be reversed on the following grounds, namely:

(a) the issue of acknowledgment of liability came as a complete surprise to the Guarantors as it was not pleaded by Kristle or raised by either Kristle or the Judge during the trial; and

(b) in any case, the ICP Letter was not an acknowledgment of liability by Low because it was signed by Helen Ong on ICP's behalf and not by Low or on his behalf.

30 In relation to the first ground, the Guarantors argued that, if the issue of acknowledgment of liability had been pleaded, they would have been able to call evidence in the court below to rebut it. It was argued that the Judge's approach in unilaterally considering the issue of acknowledgment of liability and relying on it (among other grounds) to find that Kristle's counterclaim in S 12/2005 was not time-barred was wrong in law, and that the Judge should not have made any finding on acknowledgment of liability. In this regard, the observations of Scrutton LJ in *Blay v Pollard and Morris* [1930] 1 KB 628 (at 634) are apposite:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.

We agree with this statement, which reflects a principle of fairness and transparency that has been approved by this court on numerous occasions (see, for instance, *The Ohm Mariana* [1993] 2 SLR 698 at 714–715, [49]–[53] and *Yap Chwee Khim v American Home Assurance Co* [2001] 2 SLR 421 at [27]).

31 We note, however, that although Kristle had not pleaded the issue of acknowledgment of liability in its counterclaim against the Guarantors in S 12/2005, the Guarantors and ICP had pleaded the ICP Letter (in its entirety) in their statement of claim for that suit,[note: 22] albeit in relation to a different argument (namely, that ICP and Kristle had reached a settlement on 28 June 2001).[note: 23] The ICP Letter stated that "[w]ith this settlement, there shall be no further claims by either party

against … the [G]uarantors". For this reason, it was not entirely unreasonable for the Judge, having found that there was no such settlement, to regard the ICP Letter as evidence that the Guarantors must have considered themselves as still being liable under the Guarantee. In this connection, we observe that, in *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR 565, this court held that (at [36]):

> [I]t is not necessary that to operate as an acknowledgement, an admission has to be direct or explicit so long as the statement or act constitutes a "*sufficiently* clear admission of the title or claim to which it is alleged to relate" [emphasis added]: see Terence Prime & Gary Scanlan, *The Law of Limitation* (Oxford University Press, 2nd Ed, 2001) at para 2.7.6. [emphasis in original]

32 Indeed, Kristle argued before this court that the Judge had sufficient material before her to find that there had been an acknowledgment of liability by Low even though the issue had not been pleaded. To support this argument, Kristle cited the Malaysian case of *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 ("*KEP Mohamed Ali*"). In *KEP Mohamed Ali*, the plaintiff sought to recover a sum of money due to him under a deed of compromise which he and the defendant had entered into on 24 April 1967. In response to the defendant's plea of limitation, the plaintiff adduced evidence during the trial that the parties had entered into a later agreement on 23 March 1976 under which the defendant had acknowledged his liability for the sum stated in the deed of compromise. However, the plaintiff did not plead the material facts relating to the defendant's alleged acknowledgment of liability. The court took the view that the material facts of and the circumstances relating to the alleged acknowledgment of liability should have been pleaded (*id* at 11), but held that (*id* at 11–12):

> *Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the [trial judge] and we think there are materials on the record from which a decision to that effect could be arrived at*. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. [emphasis added]

33 A similar pragmatic approach was taken in *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1 ("*OCBC v Philip Wee*"), a decision of the Privy Council on an appeal from Malaysia. There, the appellant bank, which was seeking to recover a debt from the respondent, did not plead any acknowledgment of debt by the latter. In the course of the trial, the sole witness for the bank tendered in evidence a letter from the respondent dated 14 January 1974 which constituted an acknowledgment of debt. No objection was raised by the respondent to the admission of that letter in evidence, despite the respondent's counsel being asked by the trial judge if he wanted to put any questions concerning the letter to the bank's witness. The Privy Council held that (*id* at 3):

> So, in the instant case, the only time when objection could have been taken to the admission in evidence of the respondent's letter of 14 January, 1974, on the ground that the acknowledgement had not been pleaded, was when the evidence was tendered. It is true that if the objection had then been taken and [an] application … made to amend the pleadings, this could have been successfully opposed on the ground that by 23 January, 1980 [*ie*, the date on which the bank's suit against the respondent was heard] the right of action deemed to have accrued on the date of the letter had itself become statute-barred. But once the letter was received in evidence without objection this consideration became immaterial. The letter became part of the total material on which the judge had to decide the case and since the writ in the action had been issued well within the period of six years from the date of the letter, the bank's

claim, if the letter constituted an effective acknowledgement, was not statute-barred.

34 In both *KEP Mohamed Ali* ([32] *supra*) and *OCBC v Philip Wee* ([33] *supra*), the issue of acknowledgment of liability, although not pleaded by the respective plaintiffs, *was raised* during the course of the trial and therefore did not take any party to the proceedings by surprise. In the present appeals, however, the issue of acknowledgment of liability was *neither pleaded nor raised* at the trial. Accordingly, in our view, the Judge should have given the Guarantors an opportunity to address this issue before relying on it to make a finding on limitation against their favour. Such an opportunity could have been given at any time before judgment was delivered. If the Judge had heard arguments from counsel for the Guarantors, she might not have held that the ICP Letter constituted an acknowledgment of liability for the purposes of s 26(2) of the Limitation Act. Indeed, we were of the view that the ICP Letter was *not* an acknowledgment of liability because the Limitation Act requires every acknowledgment referred to in s 26 thereof to be signed by either the person making the acknowledgment (see s 27(1)) or his agent (see s 27(2)). Here, ICP's letterhead appeared on the ICP Letter, and the letter was signed by Helen Ong as ICP's director. The letter referred to a meeting in Tokyo between ICP's representatives and Kristle's representatives. While it was possible that Low, who was one of ICP's representatives at the meeting, had also represented himself *qua* guarantor at that meeting, the fact remained that he did not sign the ICP Letter; neither did the letter, on its face, authorise Helen Ong to sign that document on his behalf. There was also no evidence showing that Helen Ong had signed the ICP Letter under Low's authority. The fact that Low testified that he had instructed Helen Ong to prepare the ICP Letter was neither here nor there as it shed no light on whether Helen Ong had been acting as an agent for Low *qua* guarantor when she signed the letter. In our view, the Guarantors' argument was correct. The ICP Letter, which spoke for itself by its terms and by the signature that appeared on it, was *not* an acknowledgment of liability by Low.

Did the Guarantors approbate and reprobate in their pleadings?

35 With respect to the Judge's ruling that the Guarantors should not be allowed to approbate and reprobate at the same time in their pleadings (see sub-para (d) of [17] above), we were of the view, on the facts of the present appeals, that this was an inapt application of the principle prohibiting approbation and reprobation. ICP's and the Guarantors' attempt to challenge the Second Novation Agreement on the ground of misrepresentation and/or total failure of consideration was not a contradiction of the Guarantors' defence of limitation *vis-à-vis* Kristle's counterclaim. The allegations of misrepresentation and total failure of consideration, if accepted by the Judge, would have invalidated the Second Novation Agreement, with the result that there would have been nothing which the Guarantors could be held liable for under the Guarantee (see Andrews & Millett ([28] *supra*) at para 6-020). The argument relating to limitation, if accepted by the Judge, would have resulted in Kristle's counterclaim under the Guarantee being time-barred. The allegations of misrepresentation and total failure of consideration on the one hand and the defence of limitation on the other were alternative grounds for contending that the Guarantors were not liable to Kristle under the Guarantee, and not mutually exclusive defences to Kristle's counterclaim.

Was the limitation period extended under section 6(3) of the Limitation Act upon the conversion of the Award into an enforceable judgment?

36 The Guarantors argued that the Judge's decision that s 6(3) of the Limitation Act had the effect of "further extend[ing] [the limitation period] to run from 30 January 2008 when the Award was converted into a judgment that was enforceable" (see the Judgment at [119]) likewise came as a complete surprise to them as this point was neither pleaded by Kristle nor raised at the trial. The Guarantors argued that, as a result, they had been severely prejudiced – a contention which we disagreed with, as counsel could have raised the scope of s 6(3) of the Limitation Act before us, it

being a point of law. We did, however, agree with the Guarantors' submission that the Judge should not have relied on s 6(3) of the Limitation Act to make a finding on limitation against the Guarantors' favour. In this regard, we would reiterate our earlier comments (at [34] above) on the issue of acknowledgment of liability in the context of s 26(2) of the Limitation Act. If the Judge had heard arguments on the applicability of s 6(3) of the Limitation Act to Kristle's counterclaim against the Guarantors, she might not have confused *ICP's* liability under *the Award* with the *Guarantors'* liability under *the Guarantee*. All that s 6(3) provides is that no "action upon any *judgment*" [emphasis added] may be brought after the expiration of 12 years from the date on which the judgment became enforceable. Section 6(3) was not applicable to Kristle's counterclaim against the Guarantors because their counterclaim was based on the Guarantee, and not on a judgment.

Did the Guarantors waive the defence of limitation by virtue of clause 8 of the Guarantee?

37 We now consider a sub-issue which was neither pleaded nor raised by counsel or the Judge at the trial, but which we nonetheless brought up for argument at the hearing of these appeals. This sub-issue was whether, assuming that Kristle's counterclaim against the Guarantors were indeed time-barred, the Guarantors had waived the defence of limitation by virtue of cl 8 of the Guarantee, which read as follows:[note: 24]

> Any provision of this Guarantee prohibited by or unlawful or unenforceable under any applicable law actually applied by any court of competent jurisdiction shall to the extent required by such law, be severed from this Guarantee and rendered [ineffective] so far as is possible without modifying the remaining provisions of this Guarantee. *Where however the provisions of any applicable law may be waived, they are hereby waived by the Guarantor[s] and [Kristle] to the full extent permitted by such law to the end that this Guarantee shall be a valid and binding continuing guarantee enforceable in accordance with its terms*. [emphasis added]

38 Clause 8 of the Guarantee was clearly intended to provide for two contingencies which every prudent creditor would wish to avoid, especially in cross-border transactions where the laws of two or more different jurisdictions might be applicable. The first contingency relates to applicable laws that affect the legality of the provisions of the Guarantee, which laws cannot be waived, whilst the second contingency relates to applicable laws that affect the enforceability of the provisions of the Guarantee, which laws can be waived. In the first case, the provisions concerned will be "severed … and rendered [ineffective]" (see the first sentence of cl 8 of the Guarantee) so as not to affect the validity and the enforceability of the rest of the Guarantee. In the second case, the applicable law will be "waived … to the full extent permitted by [the applicable] law" (see the second sentence of cl 8 of the Guarantee) so that the rest of the Guarantee will remain valid, binding and enforceable. In the context of the present appeals, the law of limitation is a law that the party who is entitled to rely on it may waive either expressly or impliedly (by not pleading or invoking it). As such, although the first limb of cl 8 of the Guarantee was not directly relevant to the present appeals, the second limb thereof was potentially applicable. However, since neither counsel for the Guarantors nor counsel for Kristle was ready to address us on this point and since it had no bearing on the final outcome of these appeals because of our determination on other matters, we shall not express a conclusive view on this issue in these grounds of decision.

The Second Main Issue: Were the Guarantors liable for only the Outstanding Sum together with interest thereon, or for all the amounts payable by ICP under the Award?

Was the principle laid down in Re Kitchin applicable in the present appeals?

39 The present appeals raised for the first time before this court the status of the principle laid

down in *Re Kitchin* ([22] *supra*) ("the *Re Kitchin* principle"). In *Re Kitchin*, the guarantor ("J") executed a guarantee in favour of the creditor ("Cantor") under which he "[undertook] and guarantee[d] that all wines supplied to [the principal debtor] by [Cantor] shall be duly paid for, and that the said agreement shall be otherwise duly performed in all respects on [the principal debtor's] part" (*id* at 669). Disputes later arose between Cantor and the principal debtor ("Pelican"). The disputes were referred to arbitration and an award in Cantor's favour for the sum of £1,250 was made. By then, J had become bankrupt. As the arbitration award was not satisfied, Cantor, relying on the guarantee given by J, sought to prove in J's bankruptcy that it was J's creditor to the sum of £1,250.

40 At first instance, Cantor's proof was admitted in full. On appeal, however, the English Court of Appeal reversed that decision and held that Cantor was not entitled to file a proof of debt for the sum awarded to it in the arbitration. The court's reasoning was as follows (*id* at 673–674 *per* Lush LJ):

> … Cantor claim[s] to prove for the amount which [was] awarded in an arbitration to which [J] was no party, an arbitration between [Cantor] and [Pelican] pursuant to the terms of the agreement. Now, I agree … that, if the guarantee fairly bears this meaning, not only that [Pelican] shall arbitrate if [it is] required to do so, but "I undertake to pay you such sum as the arbitrators shall find that they owe you for damages," a proof might well be made for that sum. But I do not think any of us ever saw a guarantee in such a form, and, to my mind, *this guarantee has not, and was never intended to have, such an effect*. There is not a word said in it as to what amount the surety [*ie*, J] will pay; it is not usual to say that, and there is not a word about it here. What [J] says is, "I undertake and guarantee that all wines supplied to [Pelican] by [Cantor] shall be duly paid for." Now, suppose the dispute between the parties was whether a given amount was due for wine; supposing [Cantor] had brought an action against [Pelican], and had proved before a jury, and had got a verdict for a given amount as being the debt due to [it] for wines supplied, and [Cantor] had then brought an action against [J] upon this guarantee, that verdict [against Pelican] would have been no evidence against [J] of the amount due for wines. [Cantor] must … [prove] it [all] over again against [J], because he is not bound by any admissions or statements of the principal [*ie*, Pelican] as to what amount is due. He is only bound to pay the amount which [is] proved against him. In such a case as that, the verdict [against Pelican] would have been no evidence at all [*vis-à-vis* J], except to shew what the amount of the verdict was. It would have been no evidence of [J's] liability to pay that amount. Then we go on to the next clause: "I undertake and guarantee that the agreement shall be otherwise duly performed in all respects." That is all. [J] does not say a word about paying anything. That is left to the proper legal conclusion. He would have to pay damages for the breach of the contract by [Pelican]. How are those damages to be assessed? Why, in the same way as the debt would have to be assessed if the claim were for wine supplied. *You must find explicit words to make a person liable to pay any amount which may be awarded against a third party, whether … by a jury, or a Judge, or an arbitrator. That is not the natural construction of the words of this guarantee nor the usual form*; for, as I have already said, I never saw a guarantee which contained such words. [emphasis added; emphasis in original omitted]

41 James LJ's comments (*id* at 671–672) are also pertinent:

> It is perfectly clear that in an action against a surety the amount of the damage cannot be proved by any admissions of the principal [debtor]. No act of the principal [debtor] can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by

> it. But it would be a strong thing to say that he has done so, unless you find that he has said so in so many words. The arbitration is a proceeding to which he [*ie*, the surety] is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract [*ie*, the principal debtor], and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor … should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained.

42 *Re Kitchin* ([22] *supra*) lays down the principle that a judgment or an award against a principal debtor is not binding on the guarantor and is not evidence against the guarantor in an action by the creditor against the guarantor based on the judgment or the award. Instead, should the creditor sue the guarantor, it must prove the guarantor's liability in the same way as it must prove the principal debtor's liability if it were to bring an action against the principal debtor. In the court below, the Judge held that the facts of *Re Kitchin* were "vastly different" (see the Judgment at [135]) from the facts before her (see also *id* at [134]–[136] generally). Before this court, counsel for Kristle made a faint (and, in our view, entirely unmeritorious) attempt to argue that the *Re Kitchin* principle should not be followed because, when *Re Kitchin* was decided, the English courts did not have much faith in arbitration, whereas arbitration is today well regarded and widely accepted as a creditable form of alternate dispute resolution.

43 The authority of *Re Kitchin* ([22] *supra*) has stood for more than 100 years. In *The Vasso* [1979] 2 Lloyd's Rep 412, the *Re Kitchin* principle was clearly and unequivocally endorsed by the court. In that case, the guarantor "guarantee[d] and [undertook] to procure the due performance and payment by [the principal debtor] … of all [the] liabilities and obligations of [the principal debtor] arising out of the [agreement between the principal debtor and the creditors]" (*id* at 416). A dispute arose between the creditors and the principal debtor, and was referred to arbitration. The arbitrator found in the creditors' favour. The creditors then sought to enforce the arbitration award against the guarantor, arguing (*inter alia*) that (*id* at 418):

> [I]t was an implied term of the contract … that each party to it would pay any sum awarded by an arbitration tribunal established pursuant to the arbitration clause … and … since, under his guarantee, the [guarantor] undertook and guaranteed the due performance and payment by [the principal debtor] of all [the] liabilities and obligations of [the principal debtor] arising out of the [contract], he guaranteed that [the principal debtor] would honour [the arbitration] award.

In relation to this two-pronged argument, Robert Goff J held (*id* at 418–419):

> Now, the first part of that proposition, the implied term of the [contract], is supported by authority (see *Bremar v. Drewry*, [1933] 1 K.B. 753) and is not disputed. But the second part is, in my judgment, contrary to authority and cannot be supported. *It is well established that general words in a guarantee guaranteeing the due performance of all the obligations of the principal debtor do not of themselves have the effect that the surety is bound by an arbitration award in an arbitration between the principal debtor and the creditor, even where the arbitration award arises out of an arbitration clause in the contract containing the obligations of the principal debtor guaranteed by the surety. That is established by the case of* Re Kitchin*, (1881) 17 Ch.D. 668, a decision of the [English] Court of Appeal which has stood unchallenged for nearly 100 years and [which] is still cited in the leading [textbooks] as good authority today.*

> *As was pointed out in that case, if the law was otherwise, serious injustice might occur*. For example, an arbitration award might result from an admission made by the principal debtor in the course of the arbitration without the authority of the surety. Again, to take a more extreme example, the principal debtor might take no part in the arbitration whatsoever; he might not even appoint an arbitrator, in which event, pursuant to s. 7 of the Arbitration Act, 1950 [(c 27) (UK)], the creditor's arbitrator would act as [the] sole arbitrator and the case, although it would not go by default, would simply proceed on the basis of the creditor proving his case before the sole arbitrator. It cannot be right that a surety by general words such as those in the defendant's guarantee in the present case should be bound by such an award. In truth, an arbitration clause which provides the machinery for resolving disputes arising between the parties to the contract has special characteristics which distinguishes it from the main obligations of the contract, as can be seen from the leading case of *Heyman v. Darwins*, [1942] A.C. 356. The short answer is that, *as a matter of construction, a guarantee containing general words, as in the case of the guarantee of the defendant, although applicable generally to obligations of the principal debtor arising under the relevant agreement, does not apply to an obligation to honour an arbitration award*. [emphasis added]

44 The *Re Kitchin* principle was recently affirmed in the UK (see the English High Court decision of *Sabah Shipyard (Pakistan) Ltd v Government of Pakistan* [2008] 1 Lloyd's Rep 210) and is also good law in numerous Commonwealth jurisdictions (see, for instance, *Re Meridian Construction Inc* [2006] NSSC 17 (a decision of the Supreme Court of Nova Scotia) at [27]–[31] and, in particular, [29]; *Robert Louden Begley v The Attorney-General of New South Wales* (1910) 11 CLR 432 (a decision of the High Court of Australia) at 439–440 (*per* Griffith CJ); and *Weltime Hong Kong Limited v Cosmic Insurance Corporation Limited* [2003] HKCFI 163 (a decision of the High Court of Hong Kong) at [13]–[19]). The principle was accepted locally by Choo Han Teck J in *Oversea-Chinese Banking Corp Ltd v Ang Thian Soo* [2006] 4 SLR 156 as "good law" (at [4]) on the basis that (at [6]):

> A contract of guarantee is a separate and independent contract from the principal contract and thus [the guarantor] may have defences that might not be available or applicable to the principal [debtor].

Choo J gave the example of the guarantor being misled into providing the guarantee even though the principal debtor itself might not have been misled in any way (*ibid*).

45 In his written submissions, counsel for Kristle argued that this court should adopt the approach taken in *Peerless Carpet Corporation v Maurice Desjarlais and Joyce Desjarlais* Vancouver Registry No C851477 (10 November 1987) (unreported) ("*Peerless*"), where the British Columbia Supreme Court held that the guarantors were bound by a court judgment against the principal debtor. There, the creditor had earlier sued the principal debtor *and the guarantors* in *the same action* for the unpaid balance owed by the principal debtor. The judge allowed the creditor's application for summary judgment against the principal debtor, but dismissed the creditor's application for summary judgment against the guarantors. The creditor's action against the guarantors was eventually dismissed altogether because the creditor had failed to make a demand on the guarantee, which was a condition precedent to any action by the creditor against the guarantors. Subsequently, the creditor sued the guarantors in a fresh action and sought to rely on the earlier judgment against the principal debtor as proof of the guarantors' indebtedness under the guarantee. The court distinguished *Re Kitchin* ([22] *supra*), citing the following statement by Lord Denning in the Privy Council case of *Nana Ofori Atta II Omanhene of Akyem Abuakwa v Nana Abu Bonsra II* [1958] AC 95 at 101:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against

> him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties [to the action], a "privy" as he is called, is bound equally with the parties, in which case he is estopped by res judicata[;] the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

Applying the first of the two exceptions outlined by Lord Denning, the British Columbia Supreme Court held the guarantors liable for the judgment entered against the principal debtor in the earlier action because they had been privy to that action.

46 In the court below, Kristle and KT argued that the Guarantors had been ICP's privies in the arbitration proceedings (see the Judgment at [124]–[125]). The Guarantors sought to rebut that argument by contending that (*id* at [126]):

> [T]here was no mention of the Guarantee in the arbitration which was also not with or against Low/PTJS. Kristle could have[,] but did not, invite the … [G]uarantors to participate in the arbitration and must live with the consequences of its omission.

The Judge found that Low had indeed been "[ICP's] privy" (*id* at [136]) in the arbitration proceedings. However, it is not clear what this finding of "privity" signified. On one hand, the Judge held that Low was "the *alter ego* of ICP" (*id* at [135]) and was therefore its privy, thereby suggesting that the finding of privity arose out of Low's involvement in the arbitration *qua* managing director and/or controlling shareholder of ICP. On the other hand, the Judge held that "it was for Low … and not [Kristle and KT] to bring the issue of the Guarantee into the arbitration" (*id* at [148]), thereby suggesting that Low was privy to the arbitration *qua* guarantor as well. With respect, given that the arbitration did not relate to the enforceability of the Guarantee, we did not see how Low could have been privy to the arbitration *qua* guarantor. As such, the fact situation in *Peerless* ([45] *supra*) was distinguishable from that in the present appeals. In *Peerless*, the guarantors were privy to (and were, in fact, also parties to) the creditor's earlier action *qua* guarantors as they were sued under the guarantee. Here, however, Low was privy to the arbitration only as the managing director and/or controlling shareholder of ICP, *and not as ICP's guarantor*. As such, whatever the authority of *Peerless* might be, it had no application to the present appeals.

47 Kristle also argued that this court should adopt the position taken by Mocatta J in *The Rosarino* [1973] 1 Lloyd's Rep 21 in lieu of the *Re Kitchin* principle. In *The Rosarino*, the creditor chartered a vessel to the principal debtor. The guarantor executed a guarantee in the creditor's favour, as follows (*id* at 22):

> We … hereby declare that we guarantee as Surety and Guarantor for [the principal debtor] the due fulfilment of any obligation and the full and total payment without discount up to an amount not exceeding £13,200 sterling … excluding bunkers on delivery due to [the creditor]. *Furthermore, we promise to fulfil and pay as Surety up to the amount stated above in accordance with any arbitration award rendered in London according to Clauses 23 and 24 of the … [c]harter* … [emphasis added]

A dispute between the creditor and the principal debtor arose and was referred to arbitration, pursuant to which an award was made against the principal debtor. As the principal debtor did not honour that award, the creditor sued the guarantor for the sums due under the award. Mocatta J allowed the creditor's claim, holding that (*id* at 25–26):

> … I think it follows from the interesting case in the [English] Court of Appeal of *Bremer Oeltransport G.m.b.H. v. Drewry*, [1933] 1 K.B. 753; (1933) 45 Ll.L.Rep. 133, that the obligation

on a party to a contract containing an arbitration clause to meet the award made in an arbitration held under that clause is an obligation which arises out of the agreement containing the arbitration clause: in this case, of course, the charter-party. *Accordingly, I think that [even] without the second sentence in this letter of guarantee the [guarantor] would be liable up to the ceiling therein stated under the first sentence* [*ie*, the ceiling of £13,200] *in respect of an award made pursuant to clause 23 of the charter*.

…

The second sentence in the letter of guarantee, if one were left in any doubt about the first, in my judgment makes it abundantly clear that what I have said up to this moment [*vis-à-vis* the principal debtor's liability under the award] is part and parcel of the liability of the guarantor in the event of the [principal debtor] not meeting an award obtained as a result of an arbitration held under the charter.

…

Primarily I suspect that the object of the second sentence was to remove any doubt, if any doubt there be (though, in my opinion, there is none), in relation to the obligation arising on the [guarantor] from the first sentence.

[emphasis added]

48 With respect, Mocatta J's decision in *The Rosarino* ([47] *supra*) was given without reference to *Re Kitchin* ([22] *supra*) and was inconsistent with the *Re Kitchin* principle as summarised by Goff J in *The Vasso* ([43] *supra*) at 418–419 (reproduced at [43] above). Mocatta J's decision was subsequently rejected in *Ards Borough Council v Northern Bank Ltd* [1994] NI 121, where the court, in preferring Goff J's decision in *The Vasso*, commented as follows:

In [*The Rosarino*], there was [a] specific agreement by the surety to meet an arbitration award …

This was sufficient to make the surety liable to pay the creditor the amount found due to it by the arbitrator, and I consider that the decision can be supported on this ground. Mocatta J went further, however, for he held that by entering into the charter party containing an arbitration clause the parties thereto impliedly agreed ipso facto to meet any award that might be made thereunder. The learned judge considered that this proposition following from the decision in Bremer Oeltransport GmbH v Drewry [1933] 1 KB 753, but *[an] examination of the latter case shows that it is authority for the existence of such an implied agreement to pay on an award only as between [the] creditor and [the] principal debtor, and it does not extend to the case of a surety*. Re Kitchin was not referred to in The Rosarino, and may not have been cited to the court.

[emphasis added]

49 To summarise, in view of the numerous authorities affirming the decision in *Re Kitchin* ([22] *supra*) and the principle laid down therein, the *Re Kitchin* principle remains good law in Singapore and is applicable in the present appeals. We therefore rejected Kristle's argument that this court should adopt the position taken by Mocatta J in *The Rosarino* ([47] *supra*). We also did not think that the decision in *Peerless* ([45] *supra*) assisted Kristle's case as the facts of *Peerless* were distinguishable from those in the present appeals for the reasons given at [46] above.

Did the Guarantee have the effect of an indemnity?

50 Turning now to Kristle's contention that the Guarantee had the effect of an indemnity, the key difference between a guarantee and an indemnity, as succinctly summarised in Low Kee Yang, *The Law of Guarantees in Singapore and Malaysia* (LexisNexis Butterworths, 2nd Ed, 2003) ("Low's *Law of Gaurantees*"), is that a guarantor's liability is "collateral to and dependent upon the liability and default of a third person [*ie*, the principal debtor]" (*id* at p 52) whereas "an indemnitor's liability is original and independent" (*id* at pp 52–53).

51 Before this court, Kristle argued that the Guarantee was in effect an indemnity because each of the Guarantors had (under cl 1 of the Guarantee):[note: 25]

> … irrevocably and unconditionally guarantee[d], not as surety only but as a primary obligor and jointly and severally with ICP …
>
> a) the due, prompt and faithful performance by ICP of all its obligations under the [Second Novation] Agreement and
>
> b) the due and punctual payment by ICP of the money payable by ICP under the [Second Novation] Agreement in the manner and at the time fixed under the [Second Novation] Agreement.

Reference was also made to cl 9 of the Second Novation Agreement, which provided that:[note: 26]

> [PTJS] … and [Low] … shall forthwith as a condition precedent to [the Second Novation] Agreement, execute a deed of guarantee and *indemnify* [*sic*] in the form and substance of Annexure D to [the Second Novation] Agreement in favor of [Kristle]. [emphasis added]

52 We rejected Kristle's argument that the Guarantee was effectively an indemnity. The "principal debtor" clause (which is also referred to as a "primary obligor" clause) is a common feature of modern guarantees. It is also sometimes used together with words such as "indemnity" or "indemnify" to describe the guarantor's liability. The purpose of incorporating a "principal debtor" clause in a guarantee is typically to preserve the guarantor's liability in the event that the principal debtor's obligation is, for some reason, discharged or unenforceable (see *Paget's Law of Banking* (Mark Hapgood gen ed) (LexisNexis Butterworths, 13th Ed, 2007) at para 33.31). However, "[a]s with all contracts, it is a matter of construction in each case [involving a 'principal debtor' clause] whether a guarantee or an indemnity has been given" (see Low's *Law of Guarantees* ([50] *supra*) at p 32). The dominant view of the effect of a "principal debtor" clause ("the Dominant View"), according to James O'Donovan & John Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, English Ed, 2003), is that it "does not convert what would otherwise be interpreted as a contract of guarantee into a contract of indemnity" (at para 1-101). This can be seen from, *inter alia*, *Heald v O'Connor* [1971] 1 WLR 497, where the question arose as to whether a guarantee which stated that "the liability hereunder of the guarantor [was] as a primary obligor and not merely as a surety" (*id* at 500) had the effect of an indemnity. Fisher J held in the negative, as follows (*id* at 503):

> In the present case, the instrument was given pursuant to clause 7 of the agreement which calls for a personal guarantee. The word "guarantee" is used in it time and again. The obligation is to pay the principal moneys [which] become due under the debenture if and whenever the company [*ie*, the principal debtor] makes default. The statement of claim refers to [the instrument] as a guarantee and pleads the company's default and the consequent liability of the guarantor. *The only straw for the [creditor] to clutch [at] is the phrase "as a primary obligor and not merely as*

a surety" but that, in my judgment, is merely part of the common form of provision to avoid the consequences of giving time or indulgence to the principal debtor and cannot convert what is in reality a guarantee into an indemnity. [emphasis added]

53 In *Habibullah Mohamed Yousuff v Indian Bank* [1999] 3 SLR 650 ("*Habibullah*"), this court endorsed the Dominant View. There, the relevant clauses of the guarantee given by the guarantor ("Habibullah") to the creditor ("Indian Bank") were as follows (at [45]):

> 17 Though as between us [*ie*, Habibullah] and the customer [*ie*, the principal debtor in *Habibullah*] we are sureties only for the customer, yet as between us and you [*ie*, Indian Bank] we and each of us shall be deemed to be principal debtors for all the moneys the payment of which is hereby guaranteed and accordingly shall not be discharged nor shall our liability be affected by any fact or circumstance or any act[,] thing[,] omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors.
>
> 18 For the consideration aforesaid and as a separate and independent situation:
>
> (i) we hereby agree that *all sums of money which may not be recoverable from us on the footing of a guarantee* whether by reason of any legal limitation[,] disability or incapacity on or of the customer or any other fact or circumstance, whether known to you or not *shall nevertheless be recoverable from us or each of us on demand as though we and each of us were the sole and principal debtors;*
>
> (ii) *we hereby irrevocably and unconditionally undertake to indemnify you in full and keep you fully indemnified against all loss[,] damage[,] liabilities[,] costs and expenses* whatsoever which you may sustain or incur as a result of or arising [from] your loan advances[,] credit or other banking facilities granted to the customer.
>
> [emphasis added]

54 Indian Bank sued Habibullah on the guarantee and obtained summary judgment against him. Habibullah appealed to the Court of Appeal (following an unsuccessful appeal to a High Court judge) against the granting of summary judgment, arguing (*inter alia*) that there had been non-disclosure by Indian Bank of certain unusual features in the main contract between it and the principal debtor and that such non-disclosure gave him (Habibullah) a real or *bona fide* defence to the claim on the guarantee. One of the counter-arguments raised by Indian Bank was that, since Habibullah had in the guarantee itself given a separate and independent covenant to indemnify it (Indian Bank), Habibullah would be liable in any event on the indemnity. Citing the Australian case of *The Fletcher Organisation Pty Ltd v Crocus Investments Pty Ltd* [1988] 2 Qd R 517 ("*Fletcher*"), where the contract of guarantee contained a clause stating that the creditor was "at liberty to act as though the [g]uarantor were the principal debtor" (*id* at 520), Indian Bank submitted that (see [51] of *Habibullah* ([53] *supra*)):

> [D]efences available to a defendant qua guarantor would not avail [the defendant] if he [had] also contracted to be liable as a [principal] debtor and … consequently, [Habibullah] would still be liable as a principal debtor even if there [were] a valid guarantor's defence based on the … principle requiring disclosure of 'unusual features'.

55 This court rejected Indian Bank's argument for the following three reasons (*id* at [52]):

> Firstly … the correctness of the decision in [*Fletcher*] that a guarantor is not released from his

> liability where there is a loss of securities is in itself doubtful for the reason given by the authors of *The Modern Contract of Guarantee* [(LBC Information Services, 3rd Ed, 1996)] at p 416 … *The dominant view taken is that a 'principal debtor' clause does not convert a contract of guarantee into a contract of indemnity*. Secondly, [Habibullah's] argument is that because of the failure to disclose, the entire guarantee should be set aside. However, the 'principal debtor' clauses in the guarantee, cll 17 and 18[,] are themselves embodied in the guarantee and we are doubtful if they can operate for the benefit of [Indian Bank] in a situation where the validity of the entire guarantee is disputed. Thirdly, the statement of claim proceeds against [Habibullah] on the basis of his liability as a guarantor and not as a principal debtor. [emphasis added]

56 In our view, it is clear from the quotation in the preceding paragraph that this court rejected Indian Bank's argument based on *Fletcher* ([54] *supra*) as, *inter alia*, the correctness of the decision in that case had been doubted by the authors of a leading treatise and as the decision was inconsistent with the Dominant View (as summarised at [52] above). The court accordingly gave Habibullah unconditional leave to defend the action. We note that the court did not appear to have considered the effect of cl 18 of the guarantee given by Habibullah (reproduced at [53] above), which, on its face, appeared to us to be a true indemnity. As such, the decision in *Habibullah* ([53] *supra*) does not assist us in determining whether, as a matter of construction, the "principal debtor" clause in the present case (*ie*, cl 1 of the Guarantee) turned the Guarantee into an indemnity.

57 For the purposes of the present appeals, therefore, we had to look at the terms of the Guarantee, read with the Second Novation Agreement, to determine whether the Guarantors had indeed undertaken to indemnify Kristle. In this connection, the Guarantee was replete with the words "[g]uarantor" and "guarantee" (with the latter used both as a noun and, more importantly, as a verb). The words "primary obligor" were used only once in the Guarantee, and that was in cl 1. The words "indemnity" and "indemnify" did not appear in the Guarantee at all, and the latter term (*viz*, "indemnify") appeared only once in cl 9 of the Second Novation Agreement. In our view, the overall effect of the Guarantee was that it was not an indemnity, nor did it make the Guarantors liable as principal debtors to Kristle. The Dominant View was apt to apply to the Guarantee.

Was the Guarantee a "performance guarantee" or a "payment guarantee"?

58 Kristle argued that, even if the Guarantee were not an indemnity, the Guarantors had entered into what some writers have categorised as a "performance guarantee", as opposed to a "payment guarantee". Lord Reid drew a distinction between these two types of guarantees in *Moschi v Lep Air Services Ltd* [1973] AC 331 ("*Moschi*"), where he stated (at 344–345):

> With regard to [a guarantor] making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. *A [guarantor] might undertake no more than that if the principal debtor fails to pay any instalment he will pay it*. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to the undertaking would never be purified and the subsidiary obligation [of the guarantor] would never arise.
>
> On the other hand, the guarantor's obligation might be of a different kind. *He might undertake that the principal debtor will carry out his contract*. Then if at any time and for any reason the principal debtor acts [contrary to his contract] or fails to act as required by his contract, he not only breaks his own contract but … also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for

> damages. [The guarantor's] contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do.
>
> In my view, the [guarantor's] contract [in the present case] is of the latter type. [The guarantor] "*personally guaranteed the performance*" by the company [*ie*, the principal debtor] "of its obligation to make the payments at the rate of £6,000 per week." The rest of the clause does not alter that obligation. So [the guarantor] was in breach of his contract as soon as the company fell into arrears with its payment of the instalments. The guarantor … then became liable to the creditor … in damages. Those damages were the loss suffered by the creditor by reason of the company's breach. It is not and could not be suggested that by accepting the company's repudiation the creditor in any way increased [the guarantor's] loss. The creditor lost more than the maximum which the [guarantor] guaranteed and it appears to me that the whole loss was caused by the [principal] debtor having failed to carry out his contract. That being so, the [guarantor] became liable to pay as damages for his breach of [his] contract of guarantee the whole loss up to the maximum of £40,000.
>
> [emphasis added]

59 In the present appeals, the Guarantee contained elements of both types of undertakings described by Lord Reid in *Moschi* ([58] *supra*) at 344–345 in that, under cl 1(a) of the Guarantee, the Guarantors guaranteed "the due, prompt and faithful *performance* by ICP of all its obligations under the [Second Novation] Agreement" [emphasis added] (*ie*, the Guarantors gave a *performance* guarantee) and, under cl 1(b), the Guarantors guaranteed "the due and punctual *payment* by ICP of the money payable by ICP under the [Second Novation] Agreement in the manner and at the time fixed under the Agreement" [emphasis added] (*ie*, the Guarantors gave a *payment* guarantee). However, it was clear to us, from our perusal of the Second Novation Agreement, that ICP had not breached any of the clauses therein other than the payment clause in cl 3. Therefore, the question of whether the Guarantee was a performance guarantee or a payment guarantee was immaterial for the purposes of the present appeals.

60 In truth, Kristle was contending that the Guarantee was a performance guarantee and that:[note: 27]

> [I]t is an implied term of the [Second] Novation Agreement that ICP will perform the Award. It would follow, pursuant to the terms of the Guarantee, that the Guarantors undertook that ICP would perform the Award. ICP having failed to do so, the Guarantors are obliged, under the terms of the Guarantee, to compensate [Kristle] in damages for such breach. The measure of such damage[s] would be the sums payable by ICP under the Award.

On this basis, Kristle sought to recover from the Guarantors not only the Outstanding Sum, which constituted "the money payable by ICP under the [Second Novation] Agreement" (*per* cl 1(b) of the Guarantee), but also the Accrued Interest and the Remaining Sums. However, as we noted earlier, the fact that the guarantor has guaranteed the due performance of the contract between the principal debtor and the creditor does not, in the absence of express words, render the guarantor also liable to pay any sum awarded in an arbitration between the principal debtor and the creditor, even if the award arises out of an arbitration clause in the contract between the principal debtor and the creditor (see *The Vasso* ([43] *supra*) at 418 *per* Goff J (reproduced at [43] above)). We thus held that Kristle was entitled to recover from the Guarantors *only* the remaining amount payable by ICP under the Second Novation Agreement (*ie*, the Outstanding Sum), *but not* the Accrued Interest and the Remaining Sums.

Conclusion

61 For the above reasons, we dismissed both CA 185/2008 (with costs to the respondent therein, *ie*, Kristle) and CA 189/2008 (with costs to the respondents therein, *ie*, the Guarantors). However, in relation to CA 185/2008, we varied the Judge's order in two ways. First, we agreed with the Guarantors that the Judge ought not to have awarded interest on the Accrued Interest (see [17] above). We therefore ordered that interest was to be paid on the Outstanding Sum only at the rate 5.33% per annum from the date of the writ to the date of judgment and at the rate prescribed by the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for the period thereafter, such that the principal judgment sum recovered by Kristle on its counterclaim was limited to the Outstanding Sum alone. Second, we ordered the appellants in CA 185/2008 (*ie*, the Guarantors) to pay the costs of that appeal and of the proceedings below on an indemnity basis, in accordance with the terms of the Guarantee.

[note: 1] See the Appellant's Core Bundle for CA 189/2008 ("ACB for CA 189/2008") at vol 2, p 103.

[note: 2] *Id* at vol 2, p 105.

[note: 3] *Id* at vol 2, p 106.

[note: 4] See the Respondent's Supplemental Core Bundle in CA 185/2008 at vol 2, p 43.

[note: 5] See ACB for CA 189/2008 at vol 2, p 119.

[note: 6] *Id* at vol 2, p 120.

[note: 7] See, *inter alia*, ICP's letter to Kristle dated 13 March 2001 (*id* at vol 2, p 126).

[note: 8] See Kristle's letter of demand to PTJS dated 26 March 2001 (*id* at vol 2, p 130) as well as Kristle's letter of demand to Low of the same date (*id* at vol 2, p 132).

[note: 9] *Id* at vol 2, pp 135–136.

[note: 10] *Id* at vol 2, p 137.

[note: 11] *Id* at vol 2, p 139.

[note: 12] See ICP's letter to Kristle dated 17 April 2001 (*id* at vol 2, p 145).

[note: 13] *Id* at vol 2, p 164.

[note: 14] *Id* at vol 2, p 165.

[note: 15] *Id* at vol 2, p 166.

[note: 16] *Id* at vol 2, p 263.

[note: 17] See ACB for CA 189/2008 at vol 2, p 52.

[note: 18]See p 3 of Annex A to Summons No 452 of 2009.

[note: 19]See ACB for CA 189/2008 at vol 2, pp 110–111.

[note: 20]*Id* at vol 2, p 103.

[note: 21]See para 51 of the Appellants' Case for CA 185/2008.

[note: 22]See para 33(B) of the Statement of Claim (Amendment No 3) filed on 20 February 2008 in respect of S 12/2005 (at vol 2, pp 90–91 of the Appellants' Core Bundle in CA 185/2008).

[note: 23]See para 34 of the Statement of Claim (Amendment No 3) filed on 20 February 2008 in respect of S 12/1005 (at vol 2, p 91 of the Appellants' Core Bundle in CA 185/2008).

[note: 24]See ACB for CA 189/2008 at vol 2, p 112.

[note: 25]*Id* at vol 2, p 110.

[note: 26]*Id* at vol 2, p 105.

[note: 27]See para 92 of the Appellant's Case in CA 189/2008.