Tembusu Growth Fund Ltd *v* ACTAtek, Inc and others
[2015] SGHC 206

Case Number	: Suit No 642 of 2012
Decision Date	: 05 August 2015
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Daniel Chia, Kenneth Chua, Stephany Aw and Ker Yanguang (Stamford Law Corporation) for the plaintiff; S Magintharan and James Liew (Essex LLC) for the defendants.
Parties	: TEMBUSU GROWTH FUND LTD — ACTATEK, INC. — WAN WAH TONG THOMAS — ACTATEK PTE. LTD. — HECTRIX, INC. — THOMROSE HOLDINGS (BVI) LTD

Contract – Breach

Contract – Misrepresentation – Fraudulent

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 191 of 2014 was allowed by the Court of Appeal on 17 August 2016. See [2016] SGCA 50.]

5 August 2015

Vinodh Coomaraswamy J:

Introduction

1 Under two convertible loan agreements ("CLA"), entered into in 2007 and in 2012, the plaintiff lent the first defendant US$1.5m and S$1.5m respectively. The plaintiff's case is that the defendants induced the plaintiff to enter into the 2012 CLA through fraudulent misrepresentation; alternatively, that the first defendant has breached a term of the 2012 CLA with the second defendant having induced that breach. In either event, the plaintiff says, the result is to trigger an event of default not only under the 2012 CLA, but also a cross-default under the 2007 CLA.

2 The plaintiff now claims damages against the defendants for fraudulent misrepresentation, breach of contract, inducement of breach of contract and conspiracy. The defendants counterclaim against the plaintiff damages for breach of contract, breach of a duty of care in tort and conspiracy by unlawful means.

3 I have allowed the plaintiff's claim against the first and second defendants and have dismissed its claim against the remaining three defendants. I have also dismissed the defendants' counterclaim in its entirety. The first and second defendants have appealed to the Court of Appeal against my decision. I now give my grounds.

The parties

The plaintiff

4 The plaintiff is Tembusu Growth Fund Ltd ("Tembusu"), a company incorporated in Singapore.

Tembusu is a venture capital fund which invests in medium sized start-up companies with growth potential. [note: 1]

5 Tembusu is owned and managed by Tembusu Partners, a professional fund manager. [note: 2] The Chairman of Tembusu Partners is Andy Lim ("Andy"). The key employees of Tembusu are Mahim Chellappa ("Mahim") and Lee Renhui ("Renhui"). Andy, Mahim and Renhui all played a central role in the events leading up to the dispute with the defendants. They all gave evidence at trial for Tembusu.

The defendants

6 The first defendant is ACTAtek, Inc ("AI"). AI is a Cayman Islands company which provides identification management solutions. It carries on business through various wholly-owned subsidiaries incorporated in Singapore, Hong Kong, UK, US and Canada. [note: 3] These subsidiaries design, manufacture and trade in electronics products. Together with AI, their holding company, these subsidiaries form a group of companies known as the ACTAtek Group.

7 The third defendant is ACTAtek Pte Ltd ("ASg"). ASg is a wholly-owned subsidiary of AI and is incorporated in Singapore. It is the main operating and trading company of the ACTAtek Group. [note: 4]

8 The second defendant is Wan Wah Tong Thomas ("Thomas"). Thomas is both the Chief Executive Officer and a director of both AI and ASg. Thomas is in charge of AI's day to day operations and oversees the strategic direction of the group. Thomas founded the ACTAtek Group together with Paul Hung ("Paul") in 2007. [note: 5] Paul is not himself a defendant.

9 Thomas and Paul hold their shares in ACTAtek through the fourth defendant Hectrix, Inc ("Hectrix"). Hectrix is a Cayman Islands company which holds 80.68% of the shares in AI. [note: 6] The remaining shares in AI are held by a number of minority shareholders.

10 The fifth defendant is Thomrose Holdings (BVI) Ltd ("Thomrose"). [note: 7] Thomrose is a company incorporated in the British Virgin Islands. Thomas owns and controls Thomrose as his personal investment vehicle. Thomrose and Paul together own 100% of Hectrix.

Background facts

The 2007 Convertible Loan Agreement

11 In 2007, one of AI's minority shareholders introduced AI and Thomas to Tembusu. [note: 8] Tembusu saw potential in the ACTAtek Group and expressed interest in AI's prospects. [note: 9] AI and Tembusu began negotiations for the latter to extend a loan of US$1.5m to fund AI's research and development. Tembusu and AI eventually signed the 2007 CLA on 29 June 2007.

12 The important terms of the 2007 CLA are the following: [note: 10]

(a) By cl 2 of the 2007 CLA, Tembusu agreed to lend US$1.5m to AI to be drawn down in two equal tranches of US$0.75m each.

(b) By cl 5 of the 2007 CLA, AI granted Tembusu the option either to demand repayment of

the loan with interest at 10% per annum at any time before 31 March 2008 or to convert the loan into equity in AI at any time before AI's initial public offering ("IPO"), at the valuation and on the terms stipulated in the 2007 CLA.

(c) By cl 3 of the 2007 CLA, AI was expressly prohibited from using the funds advanced under the 2007 CLA for any purpose other than those stipulated in Schedule 3 of that agreement, unless Tembusu consented in writing and in advance.

(d) By cl 10.1.10 of the 2007 CLA, AI gave Tembusu the right to declare an event of default if any ACTAtek Group company defaulted on the repayment of any other indebtedness or if any ACTAtek Group company's obligation to repay any other indebtedness was accelerated by reason of an event of default being declared.

(e) By cl 10.3 of the 2007 CLA, if an event of default occurred, Tembusu had the option to declare the whole of the loan extended under the 2007 CLA immediately due and payable.

13 Tembusu duly disbursed the US$1.5m to Tembusu under the 2007 CLA. Tembusu did not exercise its right to demand repayment of the loan on or before 31 March 2008. On and after 1 April 2008, therefore, pursuant to cl 5 of the 2007 CLA, its only means of earning a return on this investment in AI was through conversion of its loan into equity upon AI's IPO.

Discussions leading up to the 2012 CLA

14 Between 2009 and 2011, AI and Tembusu discussed from time to time the possibility of a further investment from Tembusu. Nothing came of those discussions.

15 On 23 March 2011, Daniel Wong ("Daniel") of AI informed Renhui that AI was negotiating with Ingram Micro ("Ingram"), the world's largest distributor of computer and technology products, for Ingram to be a promoter and distributor of the ACTAtek Group's products. [note: 11] On 20 April 2011, Thomas told Mahim that this opportunity represented a chance for AI to "expand exponentially", but only if AI secured the necessary funding to work with an entity as large as Ingram. [note: 12]

16 So it was that Tembusu and AI began to discuss in earnest the possibility of AI raising additional funds to help AI progress towards its planned IPO. In late June 2011, the parties met to discuss this matter. Renhui followed up on the meeting with an email to Thomas asking for details on how the proceeds were going to be used and for a copy of the signed contract between Ingram and AI. [note: 13]

17 Nothing of significance then happened until 30 September 2011, when Thomas met Mahim and Renhui at an industry dinner. Thomas asked Mahim to consider a second investment by Tembusu in the sum of US$500,000. [note: 14] To follow up, on 3 October 2011, Thomas emailed Mahim as follows: [note: 15]

> Further to our short conversation during the ... dinner, to assist me to come up with a forecast, is Tembusu ready to invest USD750k or other amount to ACTAtek?
>
> I like to wrap this up asap. ... The ACTAtek operation is solid and with real and solid customers. The fact that we need the cashflow for inventory, sales/marketing investment has been mentioned. All we need now is the fund to leverage upon Ingram Micro's network. So our plan is based upon cash available.

18 Mahim responded on the same day to say that Tembusu would require more details on the use of the proceeds in order to give the proposed investment serious consideration. Thomas responded on 3 October 2011 that US$400,000 would be used for inventory financing and US$100,000 would be used for sales and marketing related expenses to "drive the add-on sales from Ingram and other distributors". [note: 16]

19 A series of further discussions between the parties led to term sheets being exchanged. Tembusu proposed to lend S$1m to AI. [note: 17] Eventually, the loan amount was increased to S$1.5m. [note: 18]

20 On 25 November 2011, Mahim asked Thomas for a detailed statement of how AI intended to use the proceeds of the investment by Tembusu. [note: 19] On 13 December 2011, Mahim asked Thomas for detailed financial projections so that this additional investment in AI could be put before Tembusu's investment committee for approval. Thomas instructed Daniel to send AI's financial forecast for the years 2011 to 2013 to Tembusu. Daniel did so on 14 December 2011. This forecast had the following note on page two:

> Note:
>
> Utilisation of proceed: SGD1.5mil
>
> | | |
> |---|---|
> | Sales & Marketing Expenses | SGD 500k |
> | R&D expenditure | SGD 300k |
> | IPO | SGD 200k |
> | Working Capital | SGD 500k |
> | | SGD 1.5mil |

21 Tembusu circulated drafts of an agreement to Thomas in December 2011 and carried out further financial due diligence. Thomas then introduced into the discussions the issue of AI's liabilities to Thomas and Paul. These liabilities included unpaid salary due from AI and shareholders' loans extended to AI. [note: 20] Tembusu's position was that none of the $1.5m that it was going to lend AI should go towards paying unpaid salary or towards repaying existing shareholders' loans. Tembusu did, however, agree to consider allowing the shareholders' loans to be converted into equity. But Tembusu and Thomas could not agree on the terms of the conversion. Tembusu proposed deferring the discussion of the shareholders' loans and unpaid salary and going ahead with the S$1.5m loan on the terms already agreed. [note: 21] AI agreed to do so.

Parties sign the 2012 Convertible Loan Agreement

22 Under the 2012 CLA, which is dated 6 January 2012, Tembusu agreed to lend S$1.5m to AI. The important terms of the 2012 CLA are as follows: [note: 22]

(a) By cl 5, the loan was convertible into shares in AI upon AI's IPO at a 50% discount to the issue price of AI's shares or, if there was no IPO, at a 50% discount to the value of the shares assessed by two independent accountants.

(b) By cl 3.1(d)(ii) of the 2012 CLA, it was an express condition precedent to Tembusu's

obligation to lend the S$1.5m to AI that AI deliver to Tembusu details of how it intended to use the proceeds of the loan and an execution plan for AI's expansion.

(c) By cl 3.2 of the CLA, if AI failed to comply with this condition precedent, Tembusu would be entitled to terminate the 2012 CLA without any liability to AI.

(d) The 2012 CLA gave Tembusu the right to declare an event of default in the following circumstances, amongst others:

(i) Under cl 8.1(c) of the 2012 CLA, if any ACTAtek group company was guilty of fraud or serious or persistent misconduct likely to bring any company in the group into disrepute.

(ii) Under cl 8.1(e) of the 2012 CLA, if AI was in material breach of any of its obligations under the 2012 CLA; and, provided that the breach was capable of remedy (in Tembusu's sole determination), if AI failed to remedy that breach within 30 days of committing it.

(e) By cl 8.2 of the 2012 CLA, as soon as an event of default occurred, AI immediately came under an obligation to repay the loan extended under the 2012 CLA together with interest on it at 15% per annum.

What was notably missing from the 2012 CLA is an express provision equivalent to cl 3 of the 2007 CLA (see [12(c)] above) obliging AI to use the 2012 CLA Proceeds for, and only for, specified purposes.

Thomas prepares the use of proceeds document

23 On the morning of 6 January 2012, Tembusu sent an execution copy of the 2012 CLA to Thomas for signature. At that time, Thomas had not yet delivered to Tembusu a statement of the use of proceeds prepared specifically to comply with the condition precedent under the 2012 CLA.

24 In order to satisfy that condition precedent, Thomas prepared a standalone document which comprised a single sheet of paper bearing the title "Use of Proceeds" ("the UOP"). It set out four figures and a total. Thomas took the four figures from the "utilisation of proceeds" sent on 14 December 2011 (see [20] above), but made two adjustments. He increased the amount to be used for working capital by S$400,000 (from S$500,000 to S$900,000), and decreased the sales and marketing expenses by S$200,000 (from S$500,000 to S$300,000). His evidence was that he did so in order to give AI more flexibility in how the 2012 CLA Proceeds could be used. Although the new figures added up to S$1.7m instead of S$1.5m, Thomas left the total unchanged at S$1.5m.

25 The UOP, in its entirety, thus reads as follows: [note: 23]

Use of Proceeds

Sales & Marketing Expenses	SGD 300k
R&D expenditure	SGD 300k
IPO	SGD 200k
Working Capital	SGD 900k
	SGD 1.5 mil

26 The crucial issue dividing the parties on Tembusu's contractual claim is the nature of AI's obligation, if any, arising from the UOP and the width of the phrase "working capital". [note: 24]

27 Thomas attached the UOP physically to the 2012 CLA, signed the 2012 CLA and returned it to Tembusu. [note: 25] In due course, Tembusu too executed the 2012 CLA. On 11 January 2012, Tembusu paid S$1.5m ("2012 CLA Proceeds") into the bank account of ASg pursuant to the 2012 CLA.

Events after the execution of the 2012 CLA

28 After Tembusu had disbursed the 2012 CLA Proceeds, it nominated Daniel Lee ("Lee") to AI's board of directors. This was a right which Tembusu had under cl 6.2 of the 2012 CLA.

29 On the day that the 2012 CLA Proceeds were disbursed, Renhui emailed Lee to highlight that Tembusu's capital was to be used to pay trade payables and not to pay unpaid salaries or shareholders' loans. The email also stated that the treatment of the unpaid salary and shareholders' loans had not yet been agreed but that various ideas would be discussed. [note: 26]

Discussions about unpaid salary and shareholder's loans

30 In February 2012, Tembusu and Thomas returned to the issue of how to deal with the unpaid salary and shareholders' loans. On 5 April 2012, AI agreed to deal with these issues only upon IPO, and to do so by converting Thomas's and Paul's shareholders' loans into shares and converting their unpaid salary into loans to be repaid over two years:

> We are writing to request that you provide written confirmation for the following arrangements:
>
> > Pursuant to the 2007 USD1.5 million investment and the subsequent 2012 SGD1.5 million investment, Tembusu agrees to:
> >
> > a. Convert USD 1.5 million investment into 21,848 ACTAtek Inc shares which will be converted into ACTAtek Limited (NZ) shares of 15,362,228 immediately upon receiving approval from the New Zealand stock exchanges per the terms in the IRG IPO mandate;
> >
> > …
> >
> > c. Conversion of the cash loan from Thomas Wan and Paul Hung since 2008 into ACTAtek Ltd (NZ) shares, total amount of USD394,862 and USD126,995 converting into 4,738,344 and 1,523,940 shares of ACTAtek NZ respectively…
> >
> > …
> >
> > d. Restructuring the back-salary amount of USD505,012 and USD386,319 from Executive Directors Thomas Wan and Paul Hung respectively since 2008 into a two year loan payable within two years of listing of the ACTAtek Ltd (NZ) with a non-compound 7% interest rate;
> >
> > e. Restructure the USD50,234 due to Hectrix since 2007 into a two year loan payable within

two years of listing of the ACTAtek Ltd (NZ) with a non-compound 7% interest rate.

Tembusu investigates the use of the 2012 CLA Proceeds

31 On 3 May 2012, Daniel emailed AI's income statement for the first quarter of 2012 to Lee and Renhui. The statement recorded that in that quarter, AI had spent about US$400,000 on working capital and had paid about US$260,000 to AI's holding company, Hectrix. AI had never before disclosed any such liability to Hectrix, whether during the discussions leading up to the 2012 CLA, or when the parties agreed on 5 April 2012 to convert the shareholders' loans into equity only upon the IPO. Renhui immediately flagged this as use contrary to the UOP and contrary to the cash flow forecast sent on 14 December 2011. Lee followed up by asking Thomas for clarification. Thomas drafted AI's response which Daniel then sent.

32 AI's response was that this amount due to Hectrix had been omitted due to an oversight from the earlier computation of shareholders' loans to be converted into shares upon the IPO. AI had therefore decided to convert $65,000 of the Hectrix loan to shares and to repay the remainder to Hectrix. Daniel, using words supplied by Thomas, made a proposal to reverse the US$260,000 payment to Hectrix and to leave that amount to be converted into equity as well, at the same valuation as Thomas's and Paul's shareholders' loans.

33 This was not acceptable to Tembusu because the additional conversion would dilute Tembusu's interest. It considered ACTAtek's conduct, on the facts known to it at that time, to be a misuse of funds. Tembusu lost all trust and confidence in Thomas. This was because of Thomas's failure to disclose this loan to Hectrix earlier, because of his surreptitious conduct in repaying it from Tembusu's investment, and because, once caught out, his offer to reverse the payment was not unconditional.

34 Tembusu did not respond to the AI's proposal. Instead, on 15 May 2012, Tembusu sent an email to AI formally to express its shock at AI's repayment of the loan to Hectrix and at Thomas's conduct in bypassing the board, which included Tembusu's representative, to make the repayment. In this email, Tembusu called an event of default under the 2012 CLA on the grounds that AI's failure to disclose the liability to Hectrix falsified AI's warranties in breach of cl 7.2 of the CLA, thereby constituting an event of default under cl 8.1(e) of the CLA.

35 On 16 May 2012, Tembusu's solicitors wrote to AI also declaring an event of default under the 2012 CLA. The default was said to be: (i) the failure to disclose the Hectrix loan, constituting a breach of warranty under the 2012 CLA; and (ii) AI's use of the 2012 CLA Proceeds to repay the Hectrix loan without Tembusu's consent, not being a use permitted by the UOP.

36 On 24 May 2012, in his capacity as an independent director, Lee requested a special audit of AI. The auditors' report ("Special Audit Report") showed, *inter alia*, that out of the 2012 CLA Proceeds, S$74,128.80 had been used to pay Thomas's credit card debts, and a total of S$171,084.00 had been drawn by Thomas in various smaller sums. [note: 27]

The claim and the defence

Tembusu's claim

37 Tembusu instituted the present suit on 2 August 2012. In it, Tembusu claims damages against Thomas and AI in the tort of deceit for fraudulent misrepresentation. Specifically, Tembusu's case is that Thomas fraudulently misrepresented to Tembusu that he intended to use the 2012 CLA Proceeds for the purposes set out in the 3 October email (see [17] above) and the "utilisation of proceeds"

sent on 14 December 2011 (see [20] above). Tembusu also advances a case against the remaining defendants that they are all corporate entities controlled and used by Thomas to perpetrate the fraud on Tembusu. These entities are therefore said to be liable to Tembusu in the tort of conspiracy for Tembusu's loss.

38 Tembusu also claims that AI breached an express, alternatively an implied, term of the 2012 CLA which restricted AI's use of the 2012 CLA Proceeds to those uses set out in the UOP. Tembusu's case is that the breach triggered an event of default under the 2012 CLA, thereby accelerating AI's obligation to repay the S$1.5m lent under it. Tembusu asserts also that Thomas is personally liable for inducing AI to breach the 2012 CLA. Furthermore, Tembusu claims, the event of default under the 2012 CLA triggered the cross-default clause in the 2007 CLA and accelerated AI's obligation to repay that loan as well.

The defendants' defences

39 All five defendants were jointly represented and ran a common defence comprising several strands. They deny any fraudulent misrepresentation. As for the contractual claim, their principal defence is that there was no breach of the 2012 CLA and, even if there was a breach of the 2012 CLA, it did not entitle Tembusu to declare an event of default under that agreement because:

(a) The breach was not a "material" breach within the meaning of the CLA because it did not threaten AI's IPO;

(b) The breach was capable of being remedied and was in fact remedied when AI offered to reverse the payment;

(c) Alternatively, the breach should be treated as having been remedied because all that was needed by way of remedies was a reclassification of income and expenditure.

40 The defendants also advance a counterclaim against Tembusu in contract and in tort for damages arising from AI's failed IPO.

41 I have accepted Tembusu's submissions, albeit only as against AI and Thomas, and rejected the defendants' defences and their counterclaim. I now set out my reasons. I start by considering the claim in deceit and then the claim in contract.

Fraudulent misrepresentation

42 To establish that a defendant is liable in the tort of deceit, Tembusu must establish the following elements (see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14]; *Chu Said Thong and another v Vision Law LLC* [2014] SGHC 160 at [112] and [114]):

(a) That the defendant made a representation of fact by words or conduct.

(b) That the defendant made that representation with the intention that Tembusu should act upon it.

(c) That Tembusu did in fact act upon the representation.

(d) That the defendant made the representation: (i) knowing that it is false; or (ii) without any belief in its truth; or (iii) recklessly, without regard to whether it is true or not.

(e) That Tembusu suffered damage by acting upon the misrepresentation.

In all of the alternative formulations of the defendant's state of mind under (d) above, the core concept is dishonesty.

Representation of fact

43 Tembusu's case on fraudulent misrepresentation is founded on two representations made in the lead up to the 2012 CLA:

(a) The first misrepresentation is said to be Thomas's email of 3 October 2011 (see [17] above) representing that AI needed funds to invest in inventory and sales and marketing in order to take full advantage of the opportunity to work with Ingram.

(b) The second misrepresentation is said to be the statement in the "utilisation of proceeds" contained in the forecast sent on 14 December 2011 (see [20] above) that the 2012 CLA Proceeds would be used for those four specific purposes.

44 Tembusu's position is that both of these are misrepresentations of fact. The defendants deny that either representation is a representation of fact. Their position is that these representations are at most forecasts or predictions, and are therefore incapable of being actionable misrepresentations, let alone fraudulent misrepresentations.

45 I find that both of these representations are indeed representations of fact. The defendants' submission to the contrary misses the point. The fact which is being represented in these two representations, and on which Tembusu relies, is not that AI would carry into effect its stated intention and actually use the 2012 CLA Proceeds for the purposes which it had specified. To that extent, I agree with the defendants that both representations are indeed forecasts or predictions and therefore not actionable. The fact which is being represented and which is material for present purposes is that the defendants had an actual intention, genuinely held at the time of these representations, to use the 2012 CLA Proceeds only for the four purposes set out in these two representations.

46 A representation as to the representor's future intent is not a statement of fact and is not therefore an actionable misrepresentation. But a representation as to the representor's current intent is a representation of fact and is therefore actionable if the representor does not in fact have that intent at the time he makes the representation.

47 In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, company directors issued a prospectus inviting subscriptions for debentures. In the prospectus, they represented that the money to be raised would be used to complete alterations and additions to certain buildings, to purchase horses and vans and to develop the supply of fish. The money, once raised, was in fact used to repay pressing liabilities of the company. The English Court of Appeal held that the directors' statement in the prospectus was an actionable misstatement of fact (at p 483 and 484). As Bowen LJ (as he then was) said:

> "the state of a man's mind is as much a fact as the state of his digestion. ... A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. ... Such a misstatement was material if it was actively present to [the investor's] mind when he decided to advance his money".

Tembusu acted on the representations

48 I shall take the second and third elements of a claim in deceit together. The evidence shows that: (i) the use of proceeds was of fundamental importance to Tembusu; (ii) that AI and Thomas knew that to be the case and intended Tembusu to rely on the representations as to the use of proceeds; and (iii) that Tembusu in fact relied on the representations when it entered into the 2012 CLA. I will consider first the period from 2007 to 2011, before the 2012 CLA was proposed. I will then consider the discussions which specifically led to the 2012 CLA.

Tembusu insisted on knowing how its money was to be used

49 The evidence shows that Tembusu, from the outset of its communications with AI and Thomas, was focused on requiring AI to disclose and commit in writing the use to which it intended to put any funds which Tembusu advanced. The evidence also shows that AI and Thomas well understood the importance which Tembusu attached to having this information.

50 First, the 2007 CLA had an express provision requiring AI to adhere to the use of proceeds annexed as Schedule 3 to that agreement, subject to Tembusu's consent. While the absence of an equivalent clause in the 2012 CLA may have an impact on Tembusu's contractual claim, I can and do take cl 3 of the 2007 CLA into account as evidence of the importance which Tembusu attached to having in hand a statement of the use of proceeds and AI's knowledge of that.

51 Second, during each of the abortive discussions between 2009 and 2011 in which AI solicited a further investment, Tembusu asked on each occasion for a statement of how AI proposed to use the additional funds and AI responded with details. Thus, on 7 December 2009, Renhui asked Thomas for a breakdown of how he proposed to use the further investment of US$5m which he was then seeking. [note: 28] Thomas's response was to forward to Tembusu a document which had been presented to other potential investors, which set out in detail how the US$5m then under consideration would be used. [note: 29] So too, the term sheet which followed this discussion on 21 December 2009 stipulated a specific use for the proceeds: to scale up AI's business. [note: 30]

52 Third, when Thomas approached Tembusu on 1 December 2010 for a US$1m investment, he again detailed as part of his proposal how AI proposed to use the US$1m investment. [note: 31]

53 Fourth, after Thomas raised the business opportunity with Ingram in March 2011, the correspondence from Tembusu emphasised repeatedly that Tembusu wanted to see a detailed use of proceeds for any additional funds raised. [note: 32] Thomas explained that the funds would be used to "finance the expansion" and "to play with the Number 1 IT distributor in the world." [note: 33]

Tembusu insisted on knowing how the 2012 CLA Proceeds were to be used

54 The negotiations which led specifically to the 2012 CLA can be traced forward from 30 September 2011, when Thomas met Mahim and Renhui at the industry dinner (see [17] above). These communications demonstrate, in the specific context of the 2012 CLA, the fundamental importance which Tembusu placed on knowing how AI was going to use its money. These communications demonstrate also that Thomas well understood that how AI was going to use Tembusu's money was fundamentally important to Tembusu.

55 The tenor of the communications is that Thomas expresses from time to time interest in securing a further investment from Tembusu. Tembusu responds cautiously and explains that whether it makes a further investment depends, amongst other things, on how AI intends to use Tembusu's

money. Thomas then explains that the proceeds will be used for future growth and expansion.

56 Thus, in his first email of 3 October 2011, Thomas solicits an investment of US$1m from Tembusu and, in that context, explains pre-emptively what the investment will be used for (see [17] above). This shows Thomas's knowledge, gained from all of the previous discussions with Tembusu, that Tembusu will not invest unless it is satisfied as to how its money will be used. This pattern is repeated in the string of emails which follow 3 October 2011. [note: 34]

57 In particular, on 25 November 2011, Mahim specifically informed Thomas that a detailed use of proceeds for the further investment then under consideration would be a condition precedent of a further investment. [note: 35] Thomas instructed Daniel how to respond. [note: 36] Less than two hours later, by instant message, Thomas conveyed Tembusu's requirements to Daniel [note: 37] and set out the use of proceeds for Daniel to convey to Tembusu. Daniel then adopted Thomas's input for the "utilisation of proceeds" document which he sent as part of AI's forecast on 14 December 2011. This document said that the S$1.5m was to be used for "Sales & Marketing Expenses", "R&D expenditure", "IPO" and "Working Capital" (see [20] above).

58 This statement of the use of proceeds was required by Tembusu, conceived by Thomas and conveyed by Daniel on Thomas's instructions for one purpose: to induce Tembusu to enter into the 2012 CLA. Thomas admits as much in his affidavit of evidence in chief, [note: 38] when he says that Tembusu's investment committee, as that of any venture capital firm, would not have agreed to lend without doing their due diligence and that that due diligence included asking for AI's forecast financials. AI's forecast financials sent on 14 December 2011 included the "use of proceeds".

59 Tembusu also adduced evidence that its investment committee authorised the 2012 CLA in reliance on AI's representations. First, it produced its internal investment memorandum dated 16 December 2011, which Tembusu's investment committee had before it when it approved the 2012 CLA. That investment memorandum recorded not only that AI was seeking S$1.5m in funding but also that it was seeking that funding to expand sales and marketing in association with the opportunity to work with Ingram. Second, Andy's very clear evidence in chief was that Tembusu would never have agreed to advance money to AI which would be used to pay down accrued salaries or shareholders' loans to AI's founders. [note: 39]

Tembusu's reliance on the use of proceeds is understandable

60 All of this is quite understandable. Every lender wants to know what its money will be used for, and will not lend unless satisfied on that point.

61 Further, the context of all discussions between Tembusu and AI from 2007 to 2012 was directed towards the future, not the past. The purpose of Tembusu's investment was to fund the expansion of AI's business with a view to an IPO. That IPO was Tembusu's desired exit strategy for its two investments in AI. The specific context of the 2012 CLA was AI's need for capital to maximise the opportunity to work with Ingram. Tembusu was, on both occasions, injecting cash into AI for the future. Tembusu was not, on either occasion, injecting cash into AI which would immediately flow out of AI to AI's founders for to pay for services already rendered and to repay loans already advanced.

Thomas made the representations knowing them to be false

62 I am also satisfied that Thomas is ultimately responsible for both representations and that he made them knowing them to be false.

63 The email sent on 3 October 2011 is clearly attributable to Thomas, as he was the sender. The email sent on 14 December 2011, on the other hand was sent not by Thomas but by Daniel. However, Thomas supplied the "utilisation of proceeds" categories and figures which Daniel conveyed to Tembusu and Daniel sent the email to Tembusu on Thomas's instructions. [note: 40] I therefore hold that this representation too is attributable to Thomas.

64 It is therefore Thomas's state of mind which will determine whether the representation on which Tembusu's case is founded was true or false.

65 All of the items of expenditure which Thomas included in the "utilisation of proceeds" which Daniel sent Tembusu on 14 December 2011 were for the future: to fund AI's expansion and IPO. I find that Thomas knew that "working capital" was not meant to encompass accrued debts, including sums due for accrued salaries and shareholders' loans.

66 However, the evidence adduced shows that Thomas intended from the outset not to use the 2012 CLA Proceeds for the purposes set out in the representations but instead to pay off accrued salaries and shareholders' loans. Thus, in an instant messaging exchange on 15 December 2011, Thomas tells Daniel that the accrued salary due to Thomas, Paul and another employee, Welic Chua, should not be classified as long term liabilities in AI's balance sheet but ought to be paid out of Tembusu's money: [note: 41]

[Daniel]:	I'm working out Nov's BS for Tembusu, there is USD500k in accruals for salary to you, paul and welic, I will reallocate to long term liabilities
[Thomas]:	How can it be long term, we need to pay!
[Daniel]:	Ok then I put it in accrual There are 590k accrual to you & paul for salary under actatek inc i will reallocate to accrual as well
[Thomas]:	*I already promised Welic to pay all his arrears once we received the fund!*

[emphasis added]

67 This conversation clearly shows that Thomas had no intention to use the 2012 CLA Proceeds in accordance with the use of proceeds he drew up on 14 December 2011. Instead he planned from the outset to use Tembusu's money to pay accrued salaries. I have no doubt that the representations Thomas made on 14 December 2011 did not represent his intention at that time. In cross-examination, Thomas tried to explain that he intended only to pay another employee's salary, Welic Chua, and not his or Paul's salary. [note: 42] I do not believe Thomas. I found him to be a dishonest witness on the stand. I find that he intended to use the 2012 CLA Proceeds to pay unpaid and accrued salaries due to AI employees, including at least himself and Paul. [note: 43] I find also that Thomas had already formed this intention by October 2011, at the time of his first representation.

68 Thomas thus fraudulently misrepresented to Tembusu that he had a genuine intention to use the 2012 CLA Proceeds for the purposes set out in his two representations. Further, Thomas made his fraudulent misrepresentations both in his personal capacity and as a director, and therefore agent, of AI. AI is liable for these fraudulent misrepresentations too.

Tembusu suffered loss

69 The victim of a fraudulent misrepresentation is entitled to damages to put him in the position he would have been in if the misrepresentation had not been made. Those damages include both the loss flowing directly from the misrepresentation and the consequential loss arising from the misrepresentation, even if that loss is not foreseeable: *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [21]. Thomas and AI are therefore liable for all of Tembusu's direct and consequential losses.

70 If Thomas had not made the fraudulent misrepresentations, Tembusu's Investment Committee would not have approved the 2012 CLA and Tembusu would not have entered into it. Tembusu would not have disbursed $1.5m to AI under the 2012 CLA and would have been able to deploy that sum in an alternative investment. In light of my findings on Tembusu's contractual claim, however, it is not necessary for me to quantify or award any damages to Tembusu on its claim in fraudulent misrepresentation.

The 2007 CLA

71 I would also add that if Tembusu had pursued a claim only in fraudulent misrepresentation, it would not have been able to recover the amount disbursed under the 2007 CLA. This is because there was no causal link between the misrepresentations in 2011 and the 2007 CLA. This means that in this particular case, AI's liability for breach of contract and Thomas's liability for inducing that breach, encompassed at least Thomas's and AI's liability for damages in fraudulent misrepresentation. I therefore order no damages for Tembusu's claim in fraudulent misrepresentation.

AI is in breach of contract

There is no express term

72 Tembusu's first argument on its contractual claim is that it was an express term of the 2012 CLA that AI would use the 2012 CLA Proceeds only for the purposes set out in the UOP, unless Tembusu consented to the contrary. To make this argument, Tembusu relies primarily on the fact that the UOP formed an integral part of the 2012 CLA, both in the physical sense (because it was attached to the CLA) but also in the legal sense (because its delivery was an express condition precedent to the 2012 CLA).

73 Tembusu relies on extrinsic evidence to construe the express term. That extrinsic evidence comprises: (i) the clear importance that Tembusu attached to the UOP before the 2012 CLA was signed; (ii) the importance which Thomas attached to the UOP by drawing it up on the day he signed the 2012 CLA and applying his mind to amend the earlier figures; and (iii) the fact that Tembusu objected vehemently and immediately when it discovered that AI had used the 2012 CLA Proceeds in a manner contrary to the UOP.

74 While I accept Tembusu's argument that the UOP was an integral part of the 2012 CLA, I cannot accept its argument that that fact somehow translates into the express term on which Tembusu relies. It is true that the express terms of a contract can be expressed not just in words but also in pictures or diagrams: see *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [39]. The express terms of a contract can also, no doubt, be expressed in numbers. But the express term that Tembusu submits the 2012 CLA contains is a very specific express term: that AI would use the 2012 CLA Proceeds only for the purposes set out in the UOP unless Tembusu consented otherwise. I find it impossible to find an express term in the 2012 CLA to that effect.

75 The fact that the UOP is integral to the 2012 CLA does not, by itself, express an obligation on

the part of AI to use the 2012 CLA Proceeds for no other purpose without Tembusu's consent. The UOP's only role under the 2012 CLA is as a condition precedent to Tembusu's obligation to lend. The UOP being attached to the 2012 CLA does no more than record as a historical fact that a condition precedent stipulated in that agreement has been satisfied. Neither the words of the UOP nor the fact that it is attached to the 2012 CLA suffice to express an obligation on AI to adhere those figures.

There is an implied term

76 I accept Tembusu's submissions, however, that it is an implied term of the 2012 CLA that AI would not apply the 2012 CLA Proceeds otherwise than in accordance with the UOP drawn up by AI without Tembusu's consent.

77 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*"), the Court of Appeal explained that finding a term to be implied in a contract as an implied term in fact is a process of filling gaps in a contract to give effect to the parties' presumed intentions (at [93]). A term will be implied in fact only if it is necessary. A term will not be implied simply because it is reasonable to do so (*Sembcorp* at [82]).

78 In *Sembcorp*, the Court of Appeal set out the following three-step process to be followed before a particular term could be found to be implied in fact in a given contract (at [101]):

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

79 The first step is to ascertain how the gap in the contract arises. At the simplest level, this gap in the 2012 CLA arises because, unlike the 2007 CLA, the 2012 CLA has no express term obliging AI to use the 2012 CLA Proceeds in accordance with the UOP. The absence of such an express term could be said to support a finding that the parties' intention objectively ascertained in 2012 was for AI's use of the 2012 CLA Proceeds to be free of any restriction equivalent to that imposed by cl 3 of the 2007 CLA. I am not, however, prepared to make any such finding. The fact that the UOP was a condition precedent to Tembusu's obligation to lend under the 2012 CLA and the extrinsic evidence I have summarised above both militate strongly against such a finding.

80 On the evidence before me, I find that this gap actually arose because neither Tembusu nor AI contemplated a situation where AI would spend the CLA 2012 Proceeds otherwise than in accordance with the UOP. I have detailed above how Tembusu requested a detailed breakdown of the intended use of proceeds on multiple occasions. Tembusu also made the UOP a condition precedent to its obligation to lend. It is clear that the manner in which AI used Tembusu's money was a key aspect of Tembusu's investment decision. It is because the parties never contemplated the possibility that AI would not comply with the UOP that the 2012 CLA does not specify an obligation for AI to do so. This gap is one which can appropriately be filled by a term implied in fact.

81 Moving on to the second step, it is clear that it is necessary in the business sense to imply this term to give the 2012 CLA efficacy. It makes commercial and business sense to imply a term requiring compliance with the UOP. To put it another way, it makes no commercial or business sense for a loan agreement to require a borrower, as a condition precedent to the lender's obligation to lend, to draw up a list detailing how it intends to use the money being lent but not to bind the borrower in any way to complying with it.

82 The purpose of the 2012 CLA was for Tembusu to advance money to AI and to earn a return on it in the future. The desired return was to be earned through an IPO or, if that proved unavailable, through AI in the future repaying the principal advanced with interest. Both of those purposes required AI to use the 2012 CLA Proceeds to further the business of AI and of the ACTAtek Group. It is only through that use that AI could achieve a listing or, failing that, earn the profits to be in a position to repay principal and interest on the due date. The CLA would lack business efficacy if AI could, the day after it received the 2012 CLA Proceeds, pay the money out for any purpose it saw fit.

83 I am conscious that the 2012 CLA cannot be said to be unworkable if no such term is implied. However, so long as a term can be said to be necessary to give a contract business efficacy, I do not think that the contract must also be shown to be unworkable without that term in order for that term to be implied in fact. Requiring only necessity and not unworkability does not set the threshold for the implication of terms too low. In *Sembcorp*, the Court of Appeal explained that the business efficacy test is inherently imprecise and cannot answer the normative question of whether a specific term should be implied. The purpose of the three-step process is to establish a principled approach to implying terms and thereby to avoid a court rewriting the agreement based on its own sense of what is fair and just (at [88]). A term which is admitted at the second step must still also satisfy the third step. The officious bystander test comes into play to ensure that the term which has been found necessary in the second step is still within the parties' presumed intention.

84 I therefore move on to the third step, I have no hesitation in concluding that the parties would have responded with an emphatic affirmation if the specific term to be implied had been put to them just before they executed the 2012 CLA. Tembusu would undoubtedly have affirmed the term because it is to Tembusu's benefit. AI too would have assented because it understood that from all of its prior discussions with Tembusu that that was the intent and, more importantly, that Tembusu would not, if the gap were brought to its attention, grant the loan otherwise.

85 I have, in analysing the parties' presumed intentions thus far, put aside a critical fact: that AI and Thomas had a fraudulent intent. The fact is that Thomas put forward the "utilisation of proceeds" on 14 December 2011 and the UOP on 6 January 2012 with no intention of adhering to it. On one view, a fraudulent intent of that nature would make it more likely that the fraudster would assent to an implied term. The fraudster knows that the other party would insist upon that term if the gap were brought to its attention. The fraudster simply wants the contract to be concluded so that he can get his hands on the money. He loses nothing by assenting as has no intention of observing the term anyway. On another view, the fraudulent intent means that there is no gap to be filled because the fraudster is aware of the gap. Indeed, it is the existence of the very gap which the fraudster wishes to take advantage of. On the former view, the final step in the *Sembcorp* three-step process is satisfied. On the latter view, that final step must be taken to be satisfied. To take account of a fraudster's fraudulent intent to preclude an implied term would be tantamount to allowing the fraudster to benefit from its own fraud.

86 Finally, there is nothing in the 2012 CLA which precludes there being such an implied term. Clause 14.1 of the 2012 CLA is an entire agreement clause. Such a clause does not prevent the implication of a term in fact unless there is clear and unambiguous language to that effect (*Ng Giap*

Hon v Westcomb Securities Pte Ltd and others [2009] 3 SLR(R) 518 at [31]–[32]). Clause 14.1 does not provide clear and unambiguous language to exclude the implication of contractual terms.

87 Therefore, I find that it was an implied term of the 2012 CLA that AI would apply the 2012 CLA Proceeds only in accordance with the UOP, unless Tembusu consented otherwise.

The implied term was breached

88 Tembusu complains in its pleaded case of various payments made out of the 2012 CLA Proceeds. Tembusu discovered these payments only through the Special Audit Report. Some of these payments are denied by the defendants. For ease, I will focus on those payments where the parties have reached some semblance of an agreement. These are the two sums referred to in [36] and paid out of ASg's account as part of its payment to Hectrix.

89 The first sum is S$74,128 paid by Hectrix in settlement of Thomas's credit card debt. That payment took place on 1 February 2012. [note: 44] The second sum is S$171,084 paid by Hectrix to Thomrose, which belonged to Thomas. That particular sum can be broken down into the following payments:

No.	Date	Amount
1	13 January 2012	S$80,400
2	16 January 2012	S$45,024
3	16 January 2012	S$13,500
4	20 January 2012	S$32,160

90 The defendants' first line of defence is to raise a few technical arguments in relation to these payments. First, they argue that a total of US$280,125.59 was credited into the account of ASg. [note: 45] It was thus possible that the payments to Hectrix were made out of these monies that were credited into ASg's account. This argument lacks merit. On the defendants' own pleaded case, the payments made into ASg's account from third parties were made more than six days after the payments to Hectrix. [note: 46] This leaves little doubt that the third parties' US$280,125.59 was not used to pay Hectrix.

91 Second, the defendants also argue that there were funds already in ASg's accounts when the 2012 CLA Proceeds were paid in. This mixing of funds, they say, resulted in the 2012 CLA Proceeds no longer being separately identifiable as the source of the payments. This submission is also devoid of merit. Prior to the 2012 CLA Proceeds being disbursed, ASg's account had a balance of S$382.62. [note: 47] On the same day as the S$1.5m comprising the 2012 CLA Proceeds were credited to the account, S$27,316.76 was also credited from third parties. This meant that the 2012 CLA Proceeds were mixed with a grand total of S$27,699.38. Apart from any submission that the 2012 CLA Proceeds cannot be traced, it is incontrovertible that of the payments made to Hectrix more than S$200,000 came from the 2012 CLA Proceeds. The 2012 CLA Proceeds were thus used to make payments to Hectrix.

92 In the premises, the crucial question is whether these payments are within the implied term which I have found to exist and within one of the four categories specified in the UOP. The defendant

argues that these payments made to Hectrix are not outside those categories. According to the defendants, these payments were for Thomas's accrued salaries and therefore within the term "working capital" in the UOP. Tembusu, on the other hand, argues that these payments were unconnected to AI and that labelling them as salary was merely a guise for making multiple payments to Thomas for his personal use.

93 Taking the defendants' case at its highest, I find, as a matter of contractual interpretation, that the payment of accrued salaries does not come within the meaning of the term "working capital".

94 Interpretation is the ascertainment of the meaning which the expressions in a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of contract (*Sembcorp* at [33]). In *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] SGHC 93 ("*HSBC Trustee*"), I reviewed the jurisprudence in Singapore pertaining to contractual interpretation (see [25]–[85]). I do not propose to do so again save to say that the starting point for interpretation should be the words used by the parties (*HSBC Trustee* at [68]).

95 The operative words in the present case are the words "working capital" which appear in the UOP. The UOP is a sparse, five-line document. Save that the other three categories of use all relate to future expenses, the UOP itself offers no other assistance in construing the term. There is no contractual definition in the 2012 CLA of "working capital". Finally, the term "working capital" is not a legal term of art. The sentences and phrases of the 2012 CLA and the legal background do not offer assistance in the interpretation exercise.

96 The parties have accordingly adduced expert evidence on accounting definitions of "working capital". Predictably, the experts disagree. I think the matter can be resolved by simply referring to extrinsic evidence of circumstances surrounding the formation of the 2012 CLA, specifically, the purpose for which the parties entered into the contract (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [53]). Such evidence is admissible under s 94(*f*) of the Evidence Act (Cap 97, 1997 Rev Ed) (see *Sembcorp* at [63]). The evidence relating to the purpose of the contract is clearly relevant to elucidate what the parties' intention, objectively ascertained, were as regards the term "working capital". It is also evidence which was reasonably available to both parties at the time of the contract. Moreover, the discussions between the parties in the lead up to the formation of the 2012 CLA provide a clear and obvious context. It informed the driving business force behind the 2012 CLA.

97 The purpose of the 2012 CLA was to provide AI with the funding necessary for its expansion and then for a successful IPO. The 2012 CLA was specifically not intended to provide AI with funding to ease its cashflow difficulties or to discharge its existing indebtedness. That is particularly the case where that indebtedness is owed not to a third party who might be expected to press for payment, such as a bank, but to its founders or to a shareholder owned by its founders, who would be expected to wait for payment. It would have been different if the evidence showed that Tembusu had extended the loan to help AI stave off impending bankruptcy proceedings.

98 The IPO had always been Tembusu's target as its route to realise its investment. Tembusu, not unnaturally, expected AI's founders to target the same route. Whenever Thomas tried to bring up the subject of getting his salary and shareholder loans repaid, Tembusu was quick to say that it should not be done before the IPO. For example, when Mahim detected payments made to Hectrix in 2010, he sent the following email on 23 June 2010 [note: 48] :

> Ok. Thanks. The way it is written, it looks like it is a repayment of the Holdco Loan. Are you

stating that this is not the case? Given that the Company is looking to IPO in the next 1 to 2 years, any holdco/shareholder loans should not be repaid until the IPO, as institutional shareholders would not find that a good precedence.

99 Tembusu also made clear to AI that it did not expect the shareholders' to be repaying themselves before the IPO. In the run up to the 2012 CLA, Thomas unilaterally amended a draft term sheet to include a provision that AI issue penny warrants for himself and Paul. Andy wrote back telling Thomas that the parties should proceed on terms they had earlier agreed and defer discussion about repayment of Thomas's shareholders' loans.

100 Another item of extrinsic evidence is the two-year forecast which Daniel sent to Tembusu on 14 December 2011. [note: 49] In this forecast, AI itself did not classify accrued salaries and shareholders' loans as working capital. Instead, working capital comprised expenditure to be incurred in the future and not the repayment of indebtedness incurred in the past.

101 I therefore hold that the payment to Hectrix was outside the scope of the term "working capital" in the UOP. This means that AI breached the implied term in the contract requiring it to apply the 2012 CLA Proceeds only in accordance with the UOP.

102 The consequences of a breach of the 2012 CLA is governed by cl 8 of the 2012 CLA:

> 8.1 Each of the following events shall be an Event of Default:
>
> …
>
> (e) There is a material breach of any obligations and/or terms in this Agreement, and in the case of any breach of an obligation or term of this agreement which, in the sole determination of the Lender, is capable of remedy, it is not remedied within 30 days of such breach…
>
> 8.2 Upon the occurrence of an Event of Default, the Loan shall become immediately due and payable with the addition of an interest payment calculated at fifteen percent (15%) internal rate of return.

103 The defendants argue that even if there was a breach of the implied term, it was not a material breach because it was capable of being remedied. Tembusu's position is that the breach was incapable of remedy. In *Crosstown Music Company 1, LLC (a company incorporated under the laws of the State of California) v Rive Droite Music Limited, Mark Taylor, Paul Barry* [2009] EWHC 600 ("*Crosstown*"), Mann J had to consider the same phrase "material breach" as it appeared in a contract. He approved the concept of materiality as explained by Neuberger J (as he then was) in *Phoenix Media Ltd v Cobweb Information* (unreported, 16 May 2000) (see *Crosstown* at [98]).

104 In that case, Neuberger J said:

> Materiality involves considering the following: the actual breaches, the consequences of the breaches to [the innocent party]; [the guilty party's] explanation for the breaches; the breaches in the context of [the contract]; the consequences of holding [the contract] determined and the consequences of holding [the contract] continues.

Mann J further explained that in order to be material, the breach does not have to be repudiatory, or close to being repudiatory. The breach also need not be "vested with the character of going to the root of the contract" (*Crosstown* at [99]).

105 I have no difficulty in concluding that AI's breach in this case was material. As I observed, at the *minimum*, over S$200,000 of the 2012 CLA Proceeds were misapplied by AI. This sum is not *de minimis* sum in the context of the loan amount. Furthermore, the evidence showed that when AI sent the confirmation letter on 5 April 2012 discussing, *inter alia*, the treatment of Thomas's unpaid salary, Thomas had already arranged payment of part of his salary out of the 2012 CLA Proceeds. AI, through Thomas, was clearly being dishonest in its dealings with Tembusu. If nothing else, the breach was also material in that it typified the dishonesty of Thomas and AI and destroyed the relationship of trust and confidence between Tembusu and AI.

106 I also accept Tembusu's submission that the breach was not capable of remedy. AI's suggestion that Hectrix repay the money to AI and that its loan be discharged by converting its debt into shares upon IPO was not a remedy. Accepting that suggestion would have resulted in a dilution of Tembusu's shares. And the betrayal of trust resulting from Thomas's dishonesty is irremediable. In any event, cl 8.1(e) makes it clear that the question of whether a breach is capable of remedy is one within the sole discretion of Tembusu. There has been no attempt by the defendants to show that this contractual discretion was exercised for an improper purpose, capriciously or arbitrarily (see *Edwards Jason Glenn v Australian and New Zealand Banking Group Ltd* [2012] SGHC 61 at [99]–[102] for discussion on fetters on contractually conferred discretions).

107 Therefore, I find that the breach of the implied term to apply the 2012 Proceeds in accordance with the UOP was an event of default. The occurrence of that event of default, in and of itself, led to automatic acceleration of AI's obligation to repay the loan amount. AI is thus liable under cl 8.2 of the 2012 CLA to repay the sum of S$1,500,000 with simple interest at 15% per annum from 11 January 2012 until the date of payment, both before as well as after judgment.

Cross default of the 2007 CLA

108 An acceleration of AI's indebtedness under the 2012 CLA before its maturity triggered a cross default under cl 10.1.10 of the 2007 CLA (see [12(d)] above). Under cl 10.3 of the 2007 CLA, upon the occurrence of an event of default, Tembusu may at any time declare that the whole of AI's indebtedness under the 2007 CLA which is outstanding and unpaid shall become immediately due and payable. Tembusu's position is that it declared AI's indebtedness under the 2007 CLA immediately due and payable by way of its statement of claim in these proceedings. That is admittedly an unorthodox mechanism for making the necessary declaration. But it is not a contractually impermissible mechanism. A lender who adopts this approach runs the risk of being deprived of his legal costs, on the basis that litigation was unnecessary, if the borrower repays as soon as the proceedings are served on him. But that does not detract from the contractual effect of a statement of claim as a declaration that the full outstanding sum is due and payable.

109 Upon an event of default under the 2007 CLA, AI becomes liable under cl 10.2 to pay default interest at the rate of 10% per annum compounded annually from the period of the first draw down up till the date of repayment. Therefore, Tembusu is entitled to repayment of US$1.5m under the 2007 CLA together with interest on that sum at the rate of 10% per annum compounded annually from 11 July 2007 until the date of payment, both before as well as after judgment.

Other defences raised by AI lack merit

110 The defendants claim that AI did not have to repay any portion of the loans under the CLAs because the loans were unlicensed moneylending transactions prohibited by the Moneylenders Act (Cap 188, 2010 Rev Ed) ("MLA").

111 In *Donald McArthy Trading Pte Ltd and others v Pankaj s/o Dhirajlal (trading as TopBottom Impex)* [2007] 2 SLR(R) 321, the Court of Appeal stated that it has "never been the objective of the MLA to prohibit or impede legitimate commercial intercourse between commercial persons" (at [9]). The Court of Appeal further explained (at [12]):

> In addition, in the light of the discussion on the purpose and application of the MLA above at [6]–[9], we were of the view that the courts should not, in the words of Rajah J in *City Hardware* at [25], "be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money", especially when the transactions take place in a commercial context. …

112 In *Real Estate Consortium Pte Ltd v East Coast Properties Pte Ltd and another* [2011] 2 SLR 758, Andrew Ang J found that a convertible bond agreement did not contravene the MLA because there was a genuine commercial purpose for the agreement. It is clear to me that the CLAs in the present case were for a genuine commercial purpose. They were entered into between two commercial parties as a legitimate form of investment. The MLA does not apply to these transactions. I reject this submission from the defendant.

113 The defendants also made a bare assertion that Tembusu's claims for repayment with interest under the CLAs are in fact penalties and therefore unenforceable in law. This submission again is clearly unmeritorious. The defendants have not made any attempt to prove that the repayment provisions coupled with default interest were penalties and not genuine pre-estimates of loss. This is a burden which falls squarely on them: *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [63].

114 The other notable defence raised by the defendants [note: 50] is an allegation of an oral agreement in 2011 in which Tembusu agreed to the amounts due to Thomas and Paul being repaid. I find no merit at all in this defence. The alleged agreement in 2011 is a clear afterthought and palpably false. It has been contrived by Thomas in an attempt to justify his conduct. If it was indeed true that Tembusu had agreed to the repayment of his accrued salaries, Thomas would have brought this up in early May 2012 when Tembusu first asked Thomas to explain the payments made to Hectrix. Instead, the internal Skype messages between Thomas and Daniel show that he made no mention of any such agreement. Instead, he was trying to work out with Daniel how to label these repayments plausibly as "working capital". I disbelieved without hesitation Thomas's evidence of an oral agreement with Tembusu allowing him to repay his accrued salaries from the 2012 CLA Proceeds. The only relevance of this allegation is that it once again demonstrates Thomas's dishonesty and shows that he is prepared to lie to the court to advance his case.

Conclusion

115 In summary, I allow Tembusu's claim against AI for breach of the 2012 CLA. AI breached an implied term which required it to apply the 2012 CLA Proceeds in accordance with the UOP. I find that even if the payments were Thomas's salary payments, it amounted to a material breach of the contract resulting in an event of default. This event of default under the 2012 CLA resulted in the loan being accelerated and also triggered the cross default clause in the 2007 CLA.

Thomas induced the breach of the 2012 CLA

116 Tembusu also claimed damages against Thomas personally for inducing AI's breach of the 2012 CLA. I agree with Tembusu that the evidence from the internal Skype messages showed that Thomas

knowingly directed Daniel to make payments in breach of the 2012 CLA. [note: 51] Thomas was the one who directed that AI pay his accrued salaries. He was clearly instrumental in AI's breach of the 2012 CLA.

117 A director is not liable to a third party for inducing or procuring the breach of contract of by the company of which he is a director if: (i) he is acting *bona fide* in the discharge of his office as a director; and (ii) he is acting within the scope of his authority (*Said v Butt* [1920] 3 KB 497 at 506 ("*Said v Butt*"); *Chong Hon Kuan Ivan v Levy Maurice (No 2)* [2004] 4 SLR 801).

118 In *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2005] SGHC 98, Kan Ting Chiu J explained that this principle is taken to apply only if the claim of inducement of breach of contract against a defendant who is a director is pleaded against him *qua* director. If claim against the defendant director is pleaded without reference to his office as director, the burden is on the director to show that he acted in good faith and within the scope of his authority (at [24]–[28]).

119 Tembusu's pleaded claim against Thomas for inducing the breach of contract makes no reference to his office as a director. Thomas has also not shown that the payments in breach of the 2012 CLA were done in good faith. In fact, he was acting in his own interest rather than in the interest of ASg by paying his own salary in breach of the 2012 CLA. He is thus is not entitled to rely on the principle in *Said v Butt*.

120 Thomas knowingly induced AI's breach of the 2012 CLA and is liable for all loss suffered by Tembusu as a result of the breach, provided the loss is not too remote (*British Motor Trade Association v Salvadori* [1949] Ch 556 at 568–569 cited in *Clerk and Lindsell on Torts* (Sweet and Maxwell, 21st Ed, 2014) at para 24–51). Tembusu advanced a loan under the 2012 CLA with the hope of making a return on its investment upon the IPO. AI's contractual breach, induced by Thomas, resulted in a loss of this opportunity. Tembusu is thus entitled to recover as damage against Thomas a sum equivalent to the principal sum of S$1.5m advanced under the 2012 CLA with a reasonable rate of return. The reasonable rate of return Tembusu was entitled to expect is reflected in the default interest cl 8.2 of the 2012 CLA, which provides a default interest of 15% per annum simple interest. I find that this is a genuine pre-estimate of loss.

121 Tembusu also advanced a loan under the 2007 CLA with the hope of making a return on that principal upon the IPO. AI's breach of the 2012 CLA, induced by Thomas, resulted in a loss of that opportunity under the 2007 CLA. No doubt, the 2007 CLA came to an end because Tembusu declared an event of default under cl 10.3. But I do not think this prevents it from claiming damages for losses against Thomas, subject to the rule of remoteness. The event of default under cl 10.3 of the 2007 CLA is certainly not too remote. Tembusu is therefore entitled to the return of its principal under the 2007 CLA with a reasonable rate of return. Again, I find that the default interest clause in cl 10.2 of the 2007 CLA provides a genuine pre-estimate of loss. In these circumstances, Thomas is liable to Tembusu in damages for US$1.5m with 10% interest per annum compounded annually.

122 If AI proves able to pay the sums for which it has now been adjudged liable, Tembusu would suffer no loss from Thomas's wrong. Tembusu suffers loss only in the event that AI is unable to pay those sums. I find that the possibility of AI not being able to pay these sums is not one that can be said to be too remote. As a result, Thomas is liable to pay damages to Tembusu for the same sums that AI is liable to pay Tembusu. To prevent double-recovery, however, Tembusu must give credit to Thomas for any sums recovered from AI. It similarly must give credit to AI for any sums recovered from Thomas.

Claim in conspiracy

123 Turning to the third to fifth defendants, I find no evidence to support Tembusu's case of any conspiracy by these defendants with AI or with Thomas to deceive Tembusu. While Thomas may have been controlling AI and therefore ASg, AI had other shareholders. Even Hectrix had other shareholders besides Thomas and Paul. I do not think the evidence before me allows me to find ASg, Hectrix or Thomrose liable in conspiracy. In light of this, I dismiss Tembusu's claim in conspiracy against these three defendants.

Conclusion on the claim

124 In conclusion, I have allowed Tembusu's claim against AI for breach of contract. I have also found that Thomas induced AI's breach of contract. As a result, AI and Thomas are both liable for the following:

(a) S$1,500,000 with interest at 15% per annum simple interest from 11 January 2012 until the date of payment, both before as well as after judgment; and

(b) US$1,500,000 with interest at 10% per annum compounded annually from 11 July 2007 until the date of payment, both before as well as after judgment.

125 AI is liable for these sums under the 2012 CLA and 2007 CLA while Thomas is liable to pay these sums as damages for inducing the breach of the 2012 CLA. To avoid double recovery, Tembusu must give AI credit for any such sums recovered from Thomas and must give Thomas credit for any sums recovered from AI. I also find that Thomas was guilty of fraud in the lead up to the formation of the 2012 CLA but award no damages to Tembusu because I have already ordered recovery against Thomas for procuring the breach of the 2012 CLA. Finally, I dismiss Tembusu's claim in conspiracy against the third to fifth defendants.

Defendant's counterclaim

Summary of the counterclaim

126 The defendants' counterclaim [note: 52] is founded on breach of contract and in the torts of negligence and conspiracy.

127 In contract, the defendants' case is that it is an implied term in both the 2007 CLA and the 2012 CLA that Tembusu: (i) will act at all times in good faith to enable AI's intended listing; (ii) will not act recklessly or negligently to prevent AI's intended listing; and (iii) will take reasonable care and skill in exercising any of its rights under the 2007 CLA and the 2012 CLA so as not to prevent AI's intended listing. Tembusu, it is said, is in repudiatory breach of those implied terms.

128 In the tort of negligence, the defendants' case is that Tembusu is in a sufficient relationship of proximity to the defendants that it owes the defendants a duty of care in tort which is equivalent in legal effect to the implied terms set out at [127] above.

129 In the tort of conspiracy, the defendants' case is that Tembusu and its officers conspired to injure the defendants by unlawful means by preventing AI from listing.

My findings on the counterclaim

130 The defendants' counterclaim is wholly fanciful as far as liability is concerned and grossly inflated as far as quantum is concerned.

131 The defendants have not shown any basis on which I should imply into the 2007 CLA or the 2012 CLA the implied contractual terms on which they rely. I therefore reject any such implied term. I have also found that it is AI who breached the 2012 CLA. It thus follows that Tembusu cannot be liable in contract to AI for what I have found was an event of default correctly declared under the 2012 CLA and under the 2007 CLA. Tembusu is not in breach, let alone repudiatory breach, of the 2007 CLA or the 2012 CLA. This also disposes of the defendants' counterclaim in conspiracy.

132 I turn now to the defendants' counterclaim in the tort of negligence. They merely argue by assertion that there is sufficient proximity between the parties for Tembusu to owe them a duty of care not to prevent AI's intended listing. I cannot accept this unsubstantiated assertion. I reject any such relationship of proximity or duty of care.

Conclusion

133 In conclusion, I have allowed Tembusu's claim against AI and Thomas. I have dismissed its claim against ASg, Hectrix and Thomrose. I have also dismissed the defendants' counterclaim in its entirety. I have therefore entered judgment for Tembusu in the following terms:

(a) I have declared that AI has breached the terms of the 2012 CLA and thereby committed an event of default under the 2012 CLA;

(b) I have ordered AI to pay to Tembusu the sum of S$1,500,000.00 due under the 2012 CLA together with simple interest on that sum at the rate of 15% per annum from 11 January 2012 until the date of payment, both before as well as after judgment;

(c) I have declared that an event of default has occurred under cl 10 of the 2007 CLA;

(d) I have ordered AI to pay Tembusu the sum of US$1,500,000.00 under the 2007 CLA plus interest on that sum at 10% per annum compounded annually from 11 July 2007 until the date of payment, both before as well as after judgment;

(e) I order that Thomas shall pay Tembusu by way of damages the sums adjudged against AI under paragraphs (b) and (d) above;

(f) Tembusu shall give Thomas credit for any sums recovered under this judgment from AI; and shall give AI credit for any such sums recovered from Thomas;

(g) I have dismissed the plaintiff's claim against ASg, Hectrix and Thomrose; and

(h) I have dismissed the defendants' counterclaim against Tembusu.

134 I now turn to the issue of costs. Tembusu has failed entirely against the third to fifth defendants. That would ordinarily entail an order that Tembusu pay the costs of and incidental to the defence of those defendants. I find, however, that all five defendants advanced a single set of identical defences. The defences advanced by the three successful defendants did not therefore give rise to any separate costs which they should be entitled to recover as between party and party. I have thus made no order for those three defendants' costs.

135 Tembusu has succeeded against AI. Clause 7.8 of the 2012 CLA obliges AI to indemnify Tembusu against "any and all ... costs and expenses of whatever nature which [Tembusu] may ... sustain ... as a direct result of or arising out of a breach ... of the representations, warranties and

undertakings" contained in the 2012 CLA. This obligation is sufficiently broad to cover Tembusu's legal costs of and incidental to this litigation. I therefore order AI to pay Tembusu's costs of and incidental to this litigation on the indemnity basis. Those costs are to be taxed in the event that parties cannot reach an agreement.

[note: 1] Plaintiff's closing submissions at para 2, statement of claim at para 3.

[note: 2] Plaintiff's closing submissions at para 10.

[note: 3] Plaintiff's closing submissions, Annex 1.

[note: 4] Statement of claim at para 4 and Defence and Counterclaim (Amendment No 5) at para 5.

[note: 5] Defendants' reply submissions at para 10.

[note: 6] Statement of claim at para 5 and Defence and Counterclaim (Amendment No 5) at para 6.

[note: 7] Wan Wah Tong Thomas's ("Thomas") AEIC at paras 1–5.

[note: 8] Thomas's AEIC at para 20 and Statement of claim Annex A.

[note: 9] Thomas's AEIC at para 20 and plaintiff's closing submissions at para 12.

[note: 10] 1 AB (I) at pages 106–134.

[note: 11] 3 AB (I) at page 1830.

[note: 12] 3 AB (I) at page 1865.

[note: 13] 3 AB (I) at page 2126.

[note: 14] 3 AB (I) at page 2245.

[note: 15] 3 AB (I) at page 2265.

[note: 16] 3 AB (I) at page 2261.

[note: 17] 3 AB (I) at page 2297.

[note: 18] 4 AB (I) at page 2561.

[note: 19] 4 AB (I) at page 2561.

[note: 20] 4 AB (I) at page 3009 and 5 AB (I) at page 3567.

[note: 21] 4 AB (I) at page 3161.

[note: 22] 5 AB (I) at pages 3377–3425.

[note: 23] 5 AB (I) at page 3421

[note: 24] Thomas's AEIC at para 157.

[note: 25] Thomas's AEIC at para 154.

[note: 26] 5 AB (I) at page 3567.

[note: 27] 8 AB (I) at page 5946.

[note: 28] 1AB (I) at page 559.

[note: 29] 1 AB (I) at pages 591–592.

[note: 30] 1 AB (I) at page 714.

[note: 31] 3 AB (I) at page 1687.

[note: 32] 3 AB (I) at page 2126.

[note: 33] 3 AB (I) at page 1865.

[note: 34] 3 AB (I) at pages 2254–2261.

[note: 35] 4 AB (I) at page 2561.

[note: 36] 4 AB (I) at page 2554.

[note: 37] 4 AB (I) at page 2552.

[note: 38] Paragraph 110.

[note: 39] At [59]–[60].

[note: 40] 4 AB (I) at page 2721.

[note: 41] 4 AB (I) at page 2767.

[note: 42] Notes of Evidence 6 August 2014 at page 142, line 22.

[note: 43] Notes of Evidence 6 August 2014 at page 142, line 22 onwards.

[note: 44] 1 AB (II) at page 6261 (ASg's Ledger for payments to Hectrix).

[note: 45] Defence and Counterclaim (Amendment No 5) at para 34(d).

[note: 46] Defence and Counterclaim (Amendment No 5) at para 34(d).

[note: 47] PBAEIC volume 4, page 18 Table 2.

[note: 48] 2 AB (I) at page 1504.

[note: 49] 4 AB (I) at page 2745.

[note: 50] Defendants' closing submissions from paras 162–177.

[note: 51] 5 AB (I) at page 3587.

[note: 52] Defence and Counterclaim at paras 82–89.