

KLW Holdings Ltd v Straitsworld Advisory Ltd and another
[2017] SGHC 35

Case Number : Suit No 1199 of 2015 (Registrar's Appeal No 381 of 2016)
Decision Date : 24 February 2017
Tribunal/Court : High Court
Coram : Hoo Sheau Peng JC
Counsel Name(s) : Hing Shan Shan Blossom, Tan Yi Yin Amy and Chong Yi-Hao Clayton (Drew & Napier LLC) for the plaintiff/respondent; Ling Daw Hoang Philip, Yap Jie Han and Ho Wei Li (Wong Tan & Molly Lim LLC) for the defendants/appellants
Parties : K LW Holdings Ltd — Straitsworld Advisory Ltd — Michael ET Chan

Civil Procedure – Summary judgment

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 168 of 2016 was dismissed with costs by the Court of Appeal on 28 September 2017 with no written grounds of decision rendered.]

24 February 2017

Hoo Sheau Peng JC:

1 This was an appeal by the defendants, Straitsworld Advisory Ltd (“Straitsworld”) and Michael ET Chan (“Mr Chan”), against the decision of the learned Assistant Registrar Paul Tan Wei Chean (“the AR”) granting summary judgment in favour of the plaintiff, K LW Holdings Ltd (“K LW”), pursuant to an application under Order 14 Rule 1 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) (“ROC”) (“the summary judgment application”). After hearing the parties, I dismissed the appeal. The defendants have appealed against my decision. I now set out my reasons.

Background facts

The parties

2 K LW is a company incorporated in Singapore and listed on the Singapore Exchange (“SGX”), with businesses in property development and property investment.

3 Straitsworld is a company incorporated in the British Virgin Islands. Mr Chan is, and was at all material times, the sole shareholder and director of Straitsworld. Prior to 2005, Mr Chan was an investment banker. Since then, he has been a businessman.

Dealings between the parties

4 From sometime in 2010, K LW and Mr Chan have been involved in business dealings. Negotiations took place mainly between Mr Chan and K LW’s former chief executive officer (“CEO”) and managing director, Lee Boon Teck (“Mr Lee”). In particular, Mr Chan recommended to K LW some potential investments in property development projects. These transactions were documented by way of term sheets. Each term sheet would briefly set out the potential investment, and provide for the payment of a commitment fee by the potential investor. Should a definitive agreement be signed by the parties within a specified period in relation to the investment, the commitment fee would form part of the

investment. Otherwise, the commitment fee would be refunded.

Project Happy

5 Essentially, K LW's claim was for the return of such a *refundable* commitment fee in the sum of S\$7m ("the Commitment Fee") paid under a term sheet signed by the parties on or around 25 May 2015 ("the Project Happy Term Sheet"). Under the Project Happy Term Sheet, the defendants proposed to introduce to K LW a potential transaction to acquire and develop a property in Vietnam ("Project Happy").

6 The Project Happy Term Sheet comprised a preamble and two parts, namely Part A and Part B. The preamble set out, *inter alia*, that the Project Happy Term Sheet would contain "certain key indicative terms of [the] potential transaction". The preamble also provided that:

This Term Sheet does not constitute a binding agreement between the parties relating to [Project Happy], save and except that Part B of this Term Sheet shall constitute legally binding obligations as between the parties. This Term Sheet is not intended to be, and is not, an exhaustive description of the agreement, arrangement or understanding between the Parties relating to [Project Happy].

7 Under Part A, it was stated that K LW's investment in Project Happy would be subject to five "conditions precedent", including due diligence by K LW, the approval of K LW shareholders if required, and most importantly, the "execution of a definitive agreement on [Project Happy]".

8 Then, Part B, which contained the legally binding provisions, provided as follows under a section entitled "Refundable Deposit":

(a) The parties acknowledged that on 21 June 2014, Straitsworld and K LW's wholly-owned subsidiary Ambertree Pte Ltd ("Ambertree") had entered into an agreement ("the Zhangye Development Term Sheet"), in relation to a property development project in Zhangye, China.

(b) Pursuant to the Zhangye Development Term Sheet, K LW had paid Straitsworld a commitment fee of S\$7m. The Zhangye Development Term Sheet stipulated that the commitment fee would be refunded to Ambertree if a definitive agreement was not signed by 15 July 2014. No such definitive agreement was executed.

(c) The parties agreed that within 90 days of the Project Happy Term Sheet, the commitment fee would be paid into an escrow account held on trust for K LW. The amount would be utilised as part of the funding required under any definitive agreement between the parties for Project Happy or for any other transaction acceptable to K LW.

(d) If no such definitive agreement was entered into within 180 days of the date of the Project Happy Term Sheet, the amount was to be refunded to K LW forthwith.

(e) Mr Chan undertook to fulfil the payment obligations of Straitsworld under the Zhangye Development Term Sheet and the Project Happy Term Sheet.

9 As it transpired, the parties did not enter into any definitive agreement within 180 days from the date of the Project Happy Term Sheet, nor at any time thereafter.

The previous action

10 On 7 September 2015, K LW commenced Suit No 918 of 2015 ("the previous action") against Mr Chan for a repayment of the Commitment Fee. On 30 September 2015, Mr Chan filed a Defence and Counterclaim ("the Defence in the previous action"). On 4 December 2015, K LW withdrew the previous action, acknowledging that it had been commenced before the date K LW was entitled to the refund of the Commitment Fee, *ie*, 21 November 2015.

The present action

11 On 25 November 2015, K LW brought the present action on essentially the same grounds, *ie*, for the repayment of the Commitment Fee, against both Straitsworld and Mr Chan.

12 On 18 December 2015, the defendants filed a Defence and Counterclaim ("the Defence"). On 3 May 2016, K LW filed the summary judgment application. After the due date to show cause, the defendants applied for leave to amend the Defence ("the amendment application"). The AR disallowed the defendants leave to make substantive amendments, and the defendants appealed. On 10 August 2016, I substantially dismissed the appeal, but allowed the defendants leave to introduce a new defence that the defendants had already repaid S\$2m out of the Commitment Fee to K LW ("the S\$2m repayment defence").

13 Accordingly, on 24 August 2016, the defendants filed the Defence and Counterclaim (Amendment No 1) ("the amended Defence"). Three substantive defences were pleaded:

(a) *The misrepresentation defence.* At para 9, the defendants alleged that in May 2015, Mr Lee made false oral representations to the effect that:

(i) K LW had agreed to invest in Project Happy by authorising the application of the commitment fee from the Zhangye Development Term Sheet towards Project Happy;

(ii) Notwithstanding the contents, the Project Happy Term Sheet was a mere formality that had to be executed before K LW could enter into a definitive agreement with Straitsworld to invest in Project Happy; and

(iii) K LW would execute the definitive agreement on Project Happy once it was prepared by its lawyers.

Relying on the misrepresentations, Mr Chan was induced to execute the Project Happy Term Sheet. However, Mr Chan discovered that the representations were not true because K LW did not prepare a definitive agreement, nor did it intend to enter into such a definitive agreement. Further, Mr Lee stopped all communications with Mr Chan after the Project Happy Term Sheet had been executed. K LW's sole purpose was to induce Mr Chan to become personally liable for Straitsworld's repayment of the Commitment Fee.

(b) *The S\$2m repayment defence.* At paras 10 and 11, it was alleged that Mr Lee informed Mr Chan that K LW's board of directors had requested for the Commitment Fee to be reduced to S\$5m (being 10% of the value of Project Happy which was said to be S\$50m). K LW's board of directors would approve proceeding with Project Happy on that basis. Mr Chan agreed, and this accounted for the return of S\$2m to K LW in two tranches of S\$1.8m and S\$200,000.

(c) *The no consideration defence.* At para 13, it was claimed that that no consideration was given for the defendants to enter into the Project Happy Term Sheet, in particular for Mr Chan to undertake to personally fulfil Straitsworld's payment obligation to refund the Commitment Fee.

Thus, Straitsworld counterclaimed against K LW for the repayment of S\$2m, or the right to set off S\$2m from any sum that Straitsworld might be found liable to pay to K LW. Mr Chan counterclaimed against K LW for a declaration that the Project Happy Term Sheet be rescinded against him, and for damages, interest and costs.

14 In the Reply and Defence to Counterclaim (Amendment No 1) filed on 7 September 2016, K LW denied that the alleged representations were made to Mr Chan, and that he had relied on them and was thus induced to enter into the Project Happy Term Sheet. In relation to the S\$2m repayment defence, K LW stated that the amount had nothing to do with Project Happy. On 3 April 2014, K LW and an Indonesian company PT Atlas Sutera Jaya ("PT Atlas") entered into an agreement ("the Project Bali Term Sheet") relating to a property development project in Indonesia known as "Project Bali". A sum of S\$2.2m was paid as the refundable commitment fee. As no definitive agreement materialised, the sum of S\$2.2m was due to be refunded to K LW, and the S\$2m was a partial refund of the amount. Lastly, K LW denied that no consideration was provided for the Project Happy Term Sheet.

The decision below

15 Before the AR, the defendants resisted the summary judgment application by arguing that the three aforementioned defences raised triable issues. Also, the defendants submitted that the lack of sufficient evidence and candour on K LW's part constituted "some other reason" why there ought to be a trial on this matter. K LW countered that the three defences were not *bona fide*, and that there was no other reason for the matter to go to trial. As the parties' submissions before the AR were substantially the same as those raised before me, I shall deal with them in my analysis below. For now, it suffices for me to say that the AR agreed with K LW, and granted summary judgment for K LW against the defendants in the sum of S\$7m, with interest and costs.

My decision

16 The principles relating to summary judgment are well-settled. In order to obtain judgment, a plaintiff must first show that he has a *prima facie* case for summary judgment. If the plaintiff satisfies this, the burden shifts to the defendant to establish that there is a fair or reasonable probability that he has a *bona fide* defence so as to obtain leave to defend: *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B*") at [17]. A court would not grant leave to defend if the defendant only provides a mere assertion contained in an affidavit of a given situation which forms the basis of his defence. Where an assertion or denial "is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial": *M2B* at [19] citing from *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400.

17 It was not seriously disputed, and I was duly satisfied, that K LW had established a *prima facie* case for summary judgment. On the face of the Project Happy Term Sheet signed by the defendants, K LW was entitled to a refund of the amount paid under the Zhangye Development Term Sheet and applied towards the Project Happy Term Sheet if the parties did not enter into a definitive agreement within 180 days of the date of the latter. No such definitive agreement was reached. As K LW put it, its claim was a simple and straightforward one.

18 Thus, the burden shifted to the defendants to show a fair or reasonable probability that one or more of the defences raised was *bona fide*, or that there was some other reason for the matter to go to trial. To sum up, I did not find any of the defences raised to be *bona fide*. The defendants' case has evolved over time, with contradictory positions being taken on important points between the

Defence in the previous action and in the present case. The evidence furnished has also shifted, with various notable inconsistencies. Aspects of the defendants' evidence were also materially contradicted by the objective evidence. In the light of these factors, the defendants' case, especially on the S\$2m repayment, was unbelievable. Further, given the clear terms of the Project Happy Term Sheet, it was implausible that the defendants relied on representations made by Mr Lee, and were thus induced to sign the agreement. As for the no consideration defence, there was no merit to it at all. I now deal with each defence more closely, and will then deal with whether there was any other reason to allow the matter to proceed to trial.

The misrepresentation defence

19 I begin with the misrepresentation defence. In an affidavit filed by Mr Chan on 26 September 2016 ("the show cause affidavit"), Mr Chan recounted the history of his dealings with Mr Lee and KWL, so as to provide the context for the alleged representations and the repayment of S\$2m.

20 According to Mr Chan, by May 2015, a total of S\$14m had been paid by Ambertree to Straitsworld, being the commitment fee under the Zhangye Development Term Sheet and another S\$7m under a term sheet for another related project known as the "Zhangye Hotel Project". In turn, KWL owed him a sum of S\$750,000 plus agreed commission and reimbursement arising from his work in relation to various potential transactions. Further, Mr Lee owed him around S\$15m in personal loans.

21 To resolve these matters, Mr Lee arranged for a meeting on 23 May 2015 where Mr Lee purportedly said to him that KWL would invest in Project Happy, and apply the commitment fee from the Zhangye Development Term Sheet towards it. Mr Lee also told Mr Chan that he had to be a party to the Project Happy Term Sheet (which was a mere formality) to assure KWL's board of directors of Mr Chan's "involvement in and commitment to Project Happy", and gave an assurance that there was "no danger" of a definitive agreement not being entered into or of Mr Chan being personally liable to return the Commitment Fee. In addition, Mr Lee asked Mr Chan to prepare a cheque to KWL for the sum of S\$2.2m, which would not be cashed, to demonstrate to KWL's board of directors his commitment. In turn, Mr Lee would repay the outstanding amount owed by KWL and Mr Lee, "less the S\$7m under the Zhangye Hotel Term Sheet". To raise the funds, Mr Lee would sell his shares in KWL to a buyer to be nominated by Mr Chan.

22 In reliance on the representations, and so induced, Mr Chan entered into the Project Happy Term Sheet. Also, he duly prepared a cheque of S\$2.2m dated 26 May 2015 ("the S\$2.2m cheque"). On 24 May 2015, Mr Lee and Mr Chan went to Brunei to discuss with another party the issue of obtaining a refund of the S\$2.2m paid to PT Atlas in relation to Project Bali. Somehow, Mr Chan then "realised the significance of the S\$2.2m cheque [he] had given to [Mr Lee], and stopped payment of the cheque". While it was not entirely clear, it seemed to me that Mr Chan was alleging that he was worried that KWL would somehow link the S\$2.2m cheque to Project Bali.

23 On 27 May 2015, KWL requested Mr Chan to reduce the commitment fee for the Project Happy Term Sheet to S\$5m. Mr Chan agreed. Specifically, on 27 May 2015 and 1 July 2015, Straitsworld transferred S\$1.8m and S\$200,000 to KWL's bank account respectively. I shall return to the S\$2.2m cheque, as well as the two other payments amounting to S\$2m at [38] below, in relation to the S\$2m repayment defence.

24 Mr Chan claimed that after a series of announcements made by KWL to SGX ending 1 October 2015, he finally realised that KWL never had any intention to proceed with Project Happy, and that the whole scheme was devised merely to make him personally liable for the Commitment Fee. The events were as follows:

(a) In an SGX announcement on 27 May 2015, it was stated that the Zhangye Development Term Sheet and the Zhangye Hotel Term Sheet were entered into by Mr Lee without the approval of the board of directors, and that Straitsworld and Mr Chan had agreed in writing that the Commitment Fee "shall be paid in 90 days from 25 May 2015 on trust for [KLW], and [Mr Chan] has further undertaken to fulfil the payment obligations of [Straitsworld]".

(b) On 26 June 2015, SGX published a general announcement that special auditors had been appointed to carry out a review into the financial affairs of KLW, including the facts and circumstances surrounding the Zhangye Development Term Sheet and the Zhangye Hotel Term Sheet.

(c) On 8 September 2015, KLW released an announcement that they had commenced legal proceedings for the return of S\$7m due under the Zhangye Term Sheet and "a subsequent term sheet".

(d) Thereafter, Mr Lee did not sell his shares in KLW to a buyer to be nominated by Mr Chan. Mr Chan discovered this on 1 October 2015, when KLW announced that Mr Lee had entered into an off-market transaction to sell his shares, without prior notice to the board of directors.

25 Based on such evidence, the defendants' position was that Mr Lee had acted improperly in relation to KLW's affairs. To obtain a refund of the S\$7m, Mr Lee made the false representations to Mr Chan. Thus, the announcements did not mention Project Happy, and the focus was on the recovery of the Commitment Fee from Mr Chan. As such, the defendants argued that the misrepresentation defence was genuine. The defendants pointed out that KLW had not even called upon Mr Lee to file an affidavit to dispute Mr Chan's account of the events. Instead, KLW's present CEO, Quek Chek Lan ("Mr Quek"), who took over on 16 October 2015, filed two affidavits supporting the summary judgment application. Mr Quek and Mr Nicholas Jeyaraj s/o Narayanan (an independent director of KLW who filed the final affidavit) were not involved in the dealings at the material time.

26 KLW's arguments were that the defendants' story has conveniently shifted and changed over time, rendering it incapable of belief. Further, as it stood, the misrepresentation defence was incredible and unsustainable. I appreciated that Mr Lee did not give evidence for KLW. However, for the following reasons, I agreed with KLW that the misrepresentation defence was untenable.

27 At the outset, I noted that this defence was raised belatedly. It was not pleaded in the Defence in the previous action, but only in the Defence. The Defence was silent as to when Mr Chan discovered the representations were false. In an affidavit dated 6 June 2016 filed in support of the amendment application, Mr Chan stated that after the execution of the Project Happy Term Sheet, he realised "that the whole scheme must have been a complete set-up by [KLW]" because of KLW's announcements made on 27 May and 26 June 2015. The brief contents of these announcements are set out at [24(a)]-[24(b)], and seemingly reflect KLW's concern about the Zhangye Hotel Term Sheet and the Zhangye Development Term Sheet, and KLW's concern over recovering the Commitment Fee. However, if, by 26 June 2015, Mr Chan realised that the alleged representations were false, it was incredible that the misrepresentation defence was not raised in the Defence in the previous action (which was filed on 30 September 2015). Further, it was also incredible that Mr Chan would then make the further payment of S\$200,000 to KLW on 1 July 2015 purportedly as a reduction of the Commitment Fee: see details of this payment at [23]. Then, in the show cause affidavit, Mr Chan shifted the date of discovery to 1 October 2015, a day after the filing of the Defence in the previous action. I considered this change in date to be an afterthought to account for the failure to raise the misrepresentation defence earlier, and to account for the payment of S\$200,000 made on 1 July 2015.

28 More importantly, the misrepresentation defence conflicted with Mr Chan's position concerning his state of mind in the Defence in the previous action. There, Mr Chan raised a defence of mistake, where it was pleaded that Mr Chan agreed to assume liability under the Project Happy Term Sheet because he thought that he was already liable under the Zhangye Development Term Sheet even though he was not a party thereto. In other words, he laboured under a self-induced mistake as to his liability. However, under the misrepresentation defence, Mr Chan alleged that he was induced by the representations to assume personal liability under the Project Happy Term Sheet. In fact, K LW's sole purpose was to make him do so. In other words, Mr Chan suggested that he knew that he would not have been personally liable otherwise. The mistake defence was initially retained in the Defence, but this was subsequently dropped during the amendment application. In order to put forth the misrepresentation defence, Mr Chan has clearly shifted his position in relation to a significant aspect.

29 I should add that aspects of Mr Chan's account were also internally inconsistent, and contradicted by the objective evidence. As these aspects were intertwined with the S\$2m repayment defence, I will deal with these below: see [49]–[50]. Taking into consideration all these matters, I had serious doubt as to the credibility of the misrepresentation defence, including Mr Chan's assertion that the representations were made.

30 Even if the representations were made, I was of the view that Mr Chan could not have relied on them so as to be induced to enter into the Project Happy Term Sheet. I shall elaborate on this from [34] below. Before that, I digress to deal with a prior issue raised by K LW that the representations were statements of future intention, and were *not* actionable. The crux of the alleged representations was essentially that K LW *would* enter into a definitive agreement with Straitsworld on Project Happy, and that Mr Chan *would not* be called upon to be personally liable to return the Commitment Fee.

3 1 *Prima facie*, these were statements of future intention. For a statement to give rise to actionable misrepresentation, it must be a statement of present fact. As elaborated in *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 ("*Deutsche Bank*") at [93], "[t]his would exclude statements as to future intention, predictions, statements of opinion or belief, sales puffs, exaggerations and statements of law". Thus, K LW argued that the representations to do something in the future were not actionable, unless subsequently incorporated into the contract as a term: *Deutsche Bank* at [94].

32 In response, the defendants argued that "a finding that the statements in question were statements as to future intention rather than statements of present fact is not necessarily fatal to a misrepresentation claim": *Deutsche Bank* at [95]. If the statements imply that the maker had an honest belief or expectation, based on reasonable grounds, that the events would turn out to be as stated or forecasted, the statements may be re-characterised as statements of present fact: *Deutsche Bank* at [96]. Alternatively, the defendants submitted that a statement of a person's intent can also include a representation that the person does in fact hold that intent. If it can be shown that, at the time the statement was made, the person who made it had no intention of doing what he asserted he would do, that would be a misrepresentation of the person's statement of mind: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at [11.039]–[11.040].

33 As described at [97] of *Deutsche Bank*, "[t]he main difficulty in trying to found an action for misrepresentation on statements of future intention is an evidential one". For the purposes of the appeal, I was prepared to accept that, because the representations were purportedly made by Mr Lee, the CEO of K LW, the representations implied an honest belief of a certain state of affairs within K LW with regard to Project Happy and how events would turn out, so as to be considered statements of present fact.

34 This brings me back to the question of whether Mr Chan relied on the alleged representations and was thus induced to enter into the Project Happy Term Sheet. To answer this question, the undisputed fact that Mr Chan was fully aware of the terms therein was crucial. To reiterate, the Project Happy Term Sheet expressly provided that it did "not constitute a binding agreement between the parties relating to the Transaction", except for Part B. In Part A, it was provided that the potential transaction would be subject to certain conditions precedent, including the "execution of a definitive agreement on [Project Happy]". In fact, Part A further stated that K LW was "interested to evaluate [Project Happy]", and requested Straitsworld to "provide to K LW all relevant information that K LW will require to evaluate [Project Happy]". Indeed, Part B (which was legally binding), expressly contemplated the possibility that K LW would not proceed further with Project Happy. This was a deal that K LW could walk away from.

35 Given the clear and unambiguous language, Mr Chan would have realised that such representations could not form promises to be relied upon. In this regard, it should be borne in mind that Mr Chan was an experienced businessman. As he admitted in the show cause affidavit, the Project Happy Term Sheet was of a similar format to previous term sheets. Indeed, there were previous transactions between the parties which did not materialise. I noted the background circumstances put forth by Mr Chan to explain that the parties meant to resolve all the outstanding issues between them. While Mr Chan might have hoped that the representations by Mr Lee would come to fruition, any such expectation was founded on very little basis in the face of the express terms of the Project Happy Term Sheet.

36 In this regard, *Kim Hok Yung v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2000] 2 SLR(R) 455, a case relied on by K LW, is instructive. There, the plaintiffs alleged that the defendant bank had represented that it was committed to establishing an investment business, thus inducing the plaintiffs into signing on as investment bankers with the defendant bank. Eventually, the defendant bank did not carry on with the investment banking business, and terminated the plaintiffs' employment contracts. In the employment contracts, there were clear terms entitling the bank to terminate the plaintiffs' employment with three months' notice and to withdraw from active involvement in investment banking so long as the plaintiffs were compensated in accordance with the contracts. The High Court held that the plaintiffs could not have been induced by the alleged representations, having been fully aware of the terms of the contracts. The claim was struck out. At [15], the High Court explained:

The fundamental question is, whether the plaintiffs read, understood and signed their respective contracts of employment? The answer, by concession, is in the affirmative. Then it must be asked, would anyone be induced by promises that great things lay in store for him in the proposed employment if the employer is contractually entitled to cease business and/or terminate his employment? I think that this question must be answered objectively, and the answer in this case must be that although [the plaintiffs] find the representations sufficiently attractive to engender the hope that they will be true, the plaintiffs entered into the contracts fully aware that those representations were not promises, and that any expectation founded on those representations may be dashed by the stroke of a pen; as it so transpired. Therefore, the plaintiffs' case that they were induced by those representations is, in my view, unsustainable.

37 In my view, Mr Chan's evidence that he had relied upon and had been induced by the alleged representations to execute the term sheet with K LW was unsustainable. Any such expectation could be "dashed" by K LW walking away from the deal. Indeed, by raising the misrepresentation defence, the defendants appeared to be taking an "indirect route to legally enforce what was conceded at the outset to be non-legally binding": *Elitegroup Computer Systems Co, Ltd v Kobian Pte Ltd* [2010] SGHC 37 at [11]. In that case, the defendant sought leave to amend its pleadings to bring a new

counterclaim in misrepresentation based on oral discussions and representations made in the context of a conclusion of a non-binding memorandum of understanding. The High Court found such a counterclaim implausible, as it sought to enforce the non-binding terms of the memorandum of understanding by way of representations. The application to amend was refused. In the same vein, I held that the defendants had not established a *bona fide* defence of misrepresentation. Should Mr Chan have any grievance against Mr Lee for any personal loans or the breach of any agreement in relation to the sale of Mr Lee's personal shares in K LW, these were really claims to be brought against Mr Lee.

The S\$2m repayment defence

38 I turn now to the S\$2m repayment defence, and begin by setting out K LW's case. As stated at [14] above, K LW did not dispute that it had received from Straitsworld S\$2m in total, being S\$1.8m on 27 May 2015 and S\$200,000 on 1 July 2015. Pursuant to the Project Bali Term Sheet, on 8 April 2014, Ambertree had paid S\$2.2m as the commitment fee on behalf of K LW to Straitsworld, which received the money on behalf of PT Atlas ("the 8 April 2014 transaction"). As no definitive agreement materialised between K LW and PT Atlas, S\$2.2m was due to be refunded to K LW.

39 To refund the amount, from 26 May to 13 July 2015, the undisputed evidence showed a series of payments and attempted payments by Straitsworld to K LW as follows:

- (a) On 26 May 2016, Straitsworld issued the S\$2.2m cheque, but the cheque bounced;
- (b) On 27 May 2015, Straitsworld transferred S\$1.8m to K LW's bank account, and the payment was successfully made;
- (c) On 29 June 2015, Straitsworld issued a cheque to K LW in the sum of S\$200,000, but payment was unsuccessful as the cheque bounced;
- (d) On 1 July 2015, Straitsworld transferred S\$200,000 to K LW's bank account, and payment was successfully made; and
- (e) On 13 July 2015, Straitsworld issued a further cheque in the sum of S\$200,000, but payment was unsuccessful as the cheque bounced.

40 K LW emphasised that the S\$2.2m cheque was an attempt to repay the full amount that K LW paid under the Project Bali Term Sheet, and was not issued to show Mr Chan's commitment to Project Happy as alleged by the defendants: see [21]–[22]. Also, K LW pointed out that in the SGX announcement on 27 May 2015, issued on the same day Straitsworld transferred S\$1.8m to K LW, K LW stated that it had recovered S\$1.8m of the S\$2.2m commitment fee under Project Bali. Thereafter, on 28 August 2015, K LW issued another announcement through SGX to update its shareholders that K LW had received part-payment in the sum of S\$200,000 in relation to the commitment fee paid under the Project Bali Term Sheet, and that S\$200,000 remained outstanding. This referred to the payment of S\$200,000 on 1 July 2015. This also explained why Straitsworld attempted to make the payment of S\$200,000 on 13 July 2015. Finally, K LW pointed out that on 23 August 2015, Mr Lee and Mr Chan signed a handwritten agreement under which, among other things, Mr Chan undertook "to settle the outstanding sum of \$200,000 from PT Atlas to K LW Holdings Limited by 31 August 2015".

41 Turning to the defendants' case, it was argued that the S\$2.2m commitment fee for Project Bali was not paid on 8 April 2014 by Ambertree to Straitsworld as K LW had described. There was no reason for Ambertree and Straitsworld to be involved, as they were not parties to the Project Bali. To

counter K LW's position, the defendants introduced another two transactions of S\$2.2m into the picture:

(a) S\$2.2m from K LW to PT Atlas by way of a cheque dated 8 January 2014 which cleared on 18 March 2014 ("the 8 January 2014 transaction"); and

(b) S\$2.2m transferred to Ambertree with reference to PT Atlas, comprising monies from both Mr Chan and one of Mr Chan's companies around 27 March 2014 ("the 27 March 2014 transaction").

42 The defendants argued that the commitment fee for Project Bali was really paid by K LW to PT Atlas by way of the 8 January 2014 transaction. As for the 27 March 2014 transaction, it was a loan given by Mr Chan to K LW, which then led to the repayment of the loan by way of the 8 April 2014 transaction. The defendants, in Mr Chan's show cause affidavit, seemed to suggest that the defendants created the appearance that K LW paid Straitsworld the commitment fee for Project Bali on 8 April 2014, so as to justify characterising the S\$2m repayment from Straitsworld to K LW as a partial refund of the commitment fee for Project Bali. The defendants contended that the purpose of the S\$2m repayment from Straitsworld to K LW was for Project Happy. Pointing out that Mr Lee "was off on a frolic of his own in relation to the running of [K LW]", the defendants argued that further evidence from, *inter alia*, the board of PT Atlas and Mr Lee was required at trial to explain the relationship between PT Atlas and the parties, as well as these various payments.

43 In the main, I agreed with K LW that the S\$2m repayment defence was untenable in light of the objective evidence placed before me, and the contradictory positions taken by Mr Chan in the present suit and in the previous action. I elaborate.

44 Like the misrepresentation defence, this defence was raised late in the day. In fact, the defendants did not raise this defence when they initially filed the Defence, and only sought to introduce it on 24 May 2016 by way of the amendment application. If indeed the amount was paid for the purpose of reducing the Commitment Fee, I found it extremely difficult to see why the defendants did not mention something so significant from the outset.

45 Further, this defence was inconsistent with the position taken in the Defence in the previous action. In the latter, Mr Chan averred that this payment of S\$2m had been made by Mr Chan to K LW so as to facilitate a deal involving PT Atlas. As K LW did not repay the sum to Mr Chan, Mr Chan counterclaimed for the sum. There has been a material change on the part of Mr Chan as to the very purpose of the S\$2m. More significantly, the earlier position accorded with K LW's stance that the S\$2m payment was not connected to Project Happy (which did not involve PT Atlas), but to Project Bali (which involved PT Atlas). The S\$2m repayment defence lacked credibility.

46 Moving on, K LW was able to support its position with uncontroverted objective contemporaneous evidence that all along, the S\$2m payment was meant and understood to be in relation to Project Bali. K LW's announcements to its shareholders through SGX on 27 May 2015 and 28 August 2015 clearly stated that the S\$2m was a partial repayment of the S\$2.2m owed to the company by PT Atlas, and that S\$200,000 was still outstanding. The handwritten and signed agreement between Mr Lee and Mr Chan on 23 August 2015 further confirmed that Mr Chan understood that S\$200,000 was still due to K LW in relation to Project Bali.

47 In contrast, the defendants were unable to provide much else beyond mere assertions in Mr Chan's show cause affidavit. The defendants characterised K LW's position with regard to the purpose of the S\$2m repayment as being disingenuous, as neither defendant was a party to the Project Bali

Term Sheet between K LW and PT Atlas. With this in mind, again, it was unclear why Mr Chan would have voluntarily undertaken in the handwritten agreement on 23 August 2015 to repay the remaining S\$200,000 owed by PT Atlas to K LW. Further, the defendants did not explain why, if their version of events were to be accepted, K LW would have paid the commitment fee on 8 January 2014 *prior* to the parties' entering into the Project Bali Term Sheet on 3 April 2014. In this regard, the Project Bali Term Sheet stated in the future tense that "[a] commitment fee of S\$2.2 million will be paid to the Target upon signing of this Term Sheet". In my view, the defendants' account could not be believed.

48 I noted that K LW's position was that the 27 March 2014 transaction was a refund of the payment made by K LW in the 8 January 2014 transaction, as the cheque for the latter was not meant to be presented. In any case, these had nothing to do with the later transactions in relation to Project Happy. I accepted K LW's clear position. I also saw no merit in the contention that further evidence was required from PT Atlas and Mr Lee.

49 Like the AR, I was troubled by other unsatisfactory aspects of the defendants' case. In the Defence, the defendants pleaded that Mr Lee had ceased all communications with Mr Chan after the execution of the Project Happy Term Sheet on 25 May 2015. However, in the show cause affidavit, it was alleged that there was a telephone call on 27 May 2015, where Mr Lee conveyed K LW's request that Straitsworld repay S\$2m of the Commitment Fee before K LW's board of directors would agree to proceed with Project Happy.

50 Moreover, in the show cause affidavit, Mr Chan stated that during this telephone call with Mr Lee on 27 May 2015, Mr Lee was agreeable to the defendants repaying S\$1.8m of the S\$2m K LW had requested to reduce the Commitment Fee. Nevertheless, after paying the initial S\$1.8m, Straitsworld nevertheless still proceeded to transfer a further S\$200,000 to K LW on 1 July 2015, and then made a further albeit unsuccessful attempt to pay another S\$200,000 to K LW by cheque on 13 July 2015. The defendants did not adequately explain why they had made or attempted these further payments which would have added up to S\$2.2m, the same amount due to K LW under the Project Bali Term Sheet.

51 Given all of the above, including the numerous inconsistencies and contradictions in the defendants' evidence and positions, I was of the view that the defendants had not established that the S\$2m repayment defence was *bona fide*.

The no consideration defence

52 The no consideration defence was mainly legal in nature. The defendants argued that K LW had not given consideration under the Project Happy Term Sheet, in particular for Mr Chan to undertake to personally fulfil Straitsworld's obligation to repay the Commitment Fee. I found this defence to be unmeritorious.

53 The requirement of consideration was clearly met here. As stated in *Malayan Banking Bhd v Lauw Wisanggeni* [2003] 4 SLR(R) 287 ("*Malayan Banking*") at [11], "[i]t is well established that a forbearance to sue, even for a short time, may, in appropriate circumstances, be consideration for a promise". In my view, by procuring Ambertree to exercise forbearance to sue for Straitsworld's immediate repayment of the Commitment Fee due to it under the Zhangye Development Term Sheet, K LW furnished consideration. Further, by entering into the Project Happy Term Sheet, and undertaking the obligation to use the Commitment Fee towards the funding required for Project Happy if any definitive agreement was entered into, K LW again provided consideration.

54 The defendants also argued in the alternative that any consideration provided by K LW only

benefitted Straitsworld and not Mr Chan. However, it is clear that there is no requirement in law that consideration must benefit each and every party to the contract. As stated in *Malayan Banking* at [12], it is trite law that while consideration must move from the promisee, it need not move to the promisor. Otherwise, it would not be possible to enter into contracts that are solely intended to benefit third parties. It then follows from this proposition that consideration also need not move to every promisor under the contract. In other words, any consideration provided by K LW did not necessarily have to benefit both defendants. Therefore, I found that the defence that there was no consideration to be completely devoid of merit.

Any "other reason" to order a trial on this matter

55 O 14 r 3(1) of the ROC provides that the Court may give summary judgment for a plaintiff unless "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part". The defendants relied on the latter limb of this test as an alternative to showing the existence of a triable issue, and argued that K LW's failure to adduce critical evidence, *inter alia*, from Mr Lee, amounted to such a "reason" warranting a trial to put K LW to strict proof of its claim.

56 In *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 1 SLR(R) 465 at [12], it was stated, citing the English decision of *Miles v Bull* [1969] 1 QB 258, that there would be "some other reason" for a trial if the defendant is able to satisfy the court that there are circumstances that ought to be investigated, especially where the plaintiff has shown to be "devious and crafty" and where "most or all of the relevant facts are under the control of the plaintiff".

57 In *Ling Yew Kong v Teo Vin Li Richard* [2014] 2 SLR 123 at [35], the High Court quoted Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 267 for the following proposition:

[A] defendant must show clear justification for his reliance on this ground. A vague allegation that a case needs to be investigated in the absence of good reason would not constitute some other reason for trial.

58 In my view, K LW presented sufficient evidence to establish a *prima facie* case for summary judgment, and put forward a consistent account of events that was not dubious, contrived or in need of further investigation. On the other hand, the defendants did not provide more than vague allegations regarding K LW's omission to adduce critical evidence, and failed to show justification why there ought to be a trial even in the absence of any triable issue. I therefore saw no "other reason" for this matter to be tried.

Conclusion

59 For the above reasons, I dismissed the appeal against the AR's decision to grant summary judgment in favour of K LW. The hearing was a contested half-day hearing. I ordered costs of the appeal to be fixed at S\$5,000 with reasonable disbursements to be paid by the defendants to K LW.