IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 145

Suit No 1109 of 2018

Between

Lyu Yan @ Lu Yan

… *Plaintiff*

And

(1) Lim Tien Chiang
(2) Ang Jian Sheng Jonathan
(3) Lim ZhengDe

… *Defendants*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Remedies] — [Damages]
[Contract] — [Misrepresentation] — [Fraudulent]
[Contract] — [Illegality and public policy] — [Illegality under foreign law]
[Tort] — [Conspiracy] — [Fraudulent]
[Tort] — [Negligence] — [Breach of duty]
[Tort] — [Misrepresentation]
[Restitution] — [Unjust enrichment]
[Equity] — [Fiduciary relationships] — [When arising]
[Equity] — [Remedies] — [Account]

Lyu Yan
v
Lim Tien Chiang and others

[2020] SGHC 145

High Court — Suit No 1109 of 2018
Choo Han Teck J
31 March, 1-3 April 2020, 1 June 2020

20 July 2020 Judgment reserved.

Choo Han Teck J:

1 The plaintiff ("Lyu Yan") was a private bank customer of BNP Paribas Singapore ("BNP"). She wanted to transfer funds in RMB from her bank account in China to her personal bank accounts in Singapore. In September 2018, her relationship manager at BNP told her that the bank was unable to handle the transaction, and instead referred her to the first defendant ("Joseph").

2 On 4 September 2018, Lyu Yan contacted Joseph to discuss her proposed remittance. On 6 September 2019, she instructed him to remit the equivalent of US$3m in RMB from her Chinese bank account to her Singapore bank account with Credit Suisse ("First Transaction"). For the First Transaction, Joseph used an Indonesian remittance company, PT Niaga Lestari Remittance ("PT Niaga"). Lyu Yan first transferred the relevant funds to various Chinese bank accounts (the details for which were given to her by Joseph, who in turn said he had received them from PT Niaga) on 6 September 2018. Four days later

(*ie,* 10 September 2018), she successfully received the equivalent amount in USD in her Singapore Credit Suisse bank account from a Hong Kong bank account.

3 Lyu Yan began discussing another remittance with Joseph (the "Second Transaction"). On 16 October 2018, Lyu Yan agreed to engage Joseph's services (the "Agreement") to convert RMB21,075,000 to US$3m at an exchange rate of USD1 = RMB7.025, and to remit the funds in USD from her Chinese bank account with China Merchant Bank to her Singapore bank account with BNP according to the following process ("Remittance Process"):

(a) Joseph would provide Lyu Yan with a quotation of the exchange rate for the day, and the funds available for the remittance;

(b) Lyu Yan would confirm the amount of RMB she wished to remit, and Joseph would provide her with the details of the relevant Chinese bank accounts to remit the funds to;

(c) The equivalent amount in USD, based on the agreed exchange rate, would be remitted from Joseph's counterparty's Hong Kong bank account to Lyu Yan's Singapore bank account in the afternoon of the same day. Joseph would then provide Lyu Yan with a remittance slip confirming the same.

(d) The funds in USD would be credited to Lyu Yan's Singapore bank account in two days.

Lyu Yan says the Agreement was a binding contract between Joseph and herself. She also says, but Joseph denies, that Joseph also agreed to release her

funds in RMB to his counterparty only after she received the equivalent amount in USD in her Singapore bank account (the "Escrow Arrangement").

4 For the Second Transaction, Joseph sought the assistance of his ex-colleague, the third defendant ("Derek"), who in turn brought on board the second defendant ("Jonathan"). Joseph gave Lyu Yan the details of various Chinese bank accounts, and on 16 October 2018 at 2.47pm, Lyu Yan followed his instructions to make the following transfers from her Chinese bank account:

(a) RMB13,975,000 to two Chinese bank accounts in Jonathan's name;

(b) RMB7,000,000 to one Chinese bank account in in Derek's name; and

(c) RMB100,000 to one Chinese bank account in the name of one Kang Tie Tie ("Kang").

5 Jonathan and Derek admit that they had provided their bank account numbers to Joseph to receive Lyu Yan's transfers. As for Kang's bank account, Joseph admitted at trial that he had nominated it for the purpose of receiving his commission. Between 17 and 18 October 2018, Jonathan and Derek say that:

(a) Jonathan transferred from his two Chinese bank accounts RMB13,970,000 to various Chinese bank accounts nominated by a person known only as "Allan", and the remaining RMB5,000 to Joseph via WeChat; and

(b) Derek transferred all of the RMB7,000,000 he had received from Lyu Yan to two bank accounts nominated by "Allan".

Joseph admitted at trial that he took the RMB100,000 in Kang's bank account as his commission, and said that he shared it equally with the relationship manager from BNP who had referred Lyu Yan to him.

6 In the days immediately following her transfers, from 16 to 19 October 2018, Lyu Yan became anxious when she did not receive her funds in USD. She asked Joseph several times by WhatsApp to complete the remittance, and demanded explanations for the delay. Joseph gave various reasons to placate her, including that 17 October 2018 was a public holiday in Hong Kong, and that the original transfer of USD made by his counterparty had failed and that another company would make the transfer instead. Joseph himself turned to Derek, who told him the transfers of USD by Derek's counterparty would be delayed. Joseph appeared to have found out that Derek's counterparty was "Allan" only on 18 October 2018, when Derek finally added him to a WhatsApp group chat, called "Fast Remittance", with "Allan" and Jonathan. In that group chat, "Allan" gave various assurances that he would make the transfers, but stopped replying on 22 October 2018. From 23 to 30 October 2018, the parties attempted to resolve the matter. Lyu Yan met Joseph, and spoke to Derek (via conference call) for the first time on 23 October 2018, and met with Jonathan (for the first time), Joseph and Derek on 30 October 2018. Nothing, however, came of these meetings.

7 Lyu Yan never saw her RMB21,075,000 again, nor did she receive the equivalent amount in USD. She commenced this action against the defendants. As regards Joseph, Lyu Yan claims the following:

(a) Breach of the Agreement ("Breach of Contract Claim"), and the US$3m which she ought to have received, or alternatively, RMB21,075,000.

(b) Misrepresentation ("Misrepresentation Claim"), and the RMB21,0750,000 that she had parted with upon being induced to enter into the Agreement.

She also seeks a declaration that the Agreement has been validly rescinded, or rescission of the Agreement, and/or damages or damages to be assessed.

8 As against all the defendants, Lyu Yan pleaded the following:

(a) the defendants, or two or more of them acting together, are liable for conspiracy to defraud her ("Conspiracy Claim").

(b) the defendants are constructive trustees for her of all moneys received purporting to relate to the Second Transaction ("Constructive Trust Claim").

(c) the defendants are liable in unjust enrichment ("Unjust Enrichment Claim").

(d) the defendants owed her a duty to exercise reasonable care and skill in converting and remitting her moneys ("Negligence Claim"), and fiduciary duties ("Fiduciary Duties Claim") in carrying out the same, and they breached those duties. Further, Jonathan and Derek dishonestly assisted Joseph to act in breach of trust and his fiduciary duties ("Dishonest Assistance Claim"), and/or knowingly received moneys which they knew had been transferred pursuant to Joseph's breaches of fiduciary duties to Lyu Yan ("Knowing Receipt Claim").

9 Lyu Yan thereby claims the following reliefs against all the defendants on a joint and several basis:

(a) The sum of RMB 21,075,000.

(b) A declaration as to what sums in the hands of the defendants are her assets.

(c) An order that the defendants account to her for the sum of RMB 21,075,000, for all necessary enquiries to be made in connection with the taking of the account, and for payment by the defendants to her of all sums found to be due on the taking of the account.

(d) Alternatively, damages or damages to be assessed, or equitable compensation.

10 As to the Breach of Contract Claim against Joseph alone, Joseph's defence admits to the Agreement (as defined in [3] above), but strangely, also disputes its terms. Joseph claims that Lyu Yan knew that it was his contacts in the remittance industry who would carry out the Second Transaction, and that his only obligation, which he fulfilled, was to act as a "middleman" to "connect" her to them. Joseph's counsel, Mr Gino Hardial Singh, argued that Lyu Yan had been informed by Joseph that different counterparties (*ie,* PT Niaga and a "Hong Kong company") would be carrying out the conversion and remittance in the First and the Second Transactions, and hence must have known that Joseph would not be doing the same himself. Mr Singh said it was Jonathan and Derek who had breached their obligation to carry out the Second Transaction.

11 As Mr Yap pointed out, Joseph's position in [10] above is inconsistent with his pleadings, where he admitted to the Agreement, as defined at [3] above. It is also unclear what Joseph meant when he said that he had fulfilled his only obligation, which was to "connect" Lyu Yan with his contacts. The evidence, including Lyu Yan's WhatsApp exchanges with him from 4 September to

16 October 2018, shows that Lyu Yan only knew that Joseph was working with other parties to arrange the Second Transaction. Joseph was not expected to tell her who his counterparties were or put her in touch with them, and in fact did neither of these things until after 19 and 23 October 2018, when it was already clear from the delays in the transfer of USD that something was amiss. He also did not tell Lyu Yan about his counterparties' intended course of action, including their use of yet another counterparty to carry out the Second Transaction.

12 In my view, after Lyu Yan had transferred the RMB21,075,000, Joseph's obligation under the Agreement was to ensure that in accordance with the Remittance Process, the funds are converted into USD, and the sum of US$3m is remitted from his counterparty's Hong Kong bank account to Lyu Yan's Singapore bank account. He was not obliged to carry out the conversion and remittance personally. In his WhatsApp exchanges with Lyu Yan between 4 September to 15 October 2018, Joseph confirmed to Lyu Yan that (a) he could remit certain amounts of funds for her; (b) he would have certain amounts of funds available for conversion and remittance; and (c) he could prepare the necessary documentation for Lyu Yan's Singapore bank. Although Lyu Yan knew that Joseph would be working with other parties to effect the conversion and remittance of funds, this is consistent with my finding that ultimately, Joseph was responsible to Lyu Yan for making the proper arrangements with these parties. Further, in Mr Singh's own submissions in relation to the Misrepresentation Claim, he said that most of the representations made by Joseph to Lyu Yan (including that Joseph was "able to arrange" the remittance of several millions in USD, and that his "remittance services were safe") are true. I do not think, however, that Joseph was obliged to observe the Escrow Arrangement. Although Joseph did tell Lyu Yan on 10 September 2018 that he

would continue to observe the Escrow Arrangement for the First Transaction, the matter was simply not discussed prior to the Second Transaction underlying the Agreement.

13 The defendants all raised the defence that the Agreement is illegal under Chinese law, and therefore void and unenforceable in Singapore as being contrary to public policy. Mr Singh submitted that the doctrine of foreign illegality comprises two separate strands, both explored in the Court of Appeal decision in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh Teck Quee")*. That decision is to be followed in preference to the High Court decision in *Singapore Finance Ltd v Soetanto* [1992] 1 SLR(R) 645, which Lyu Yan's counsel, Mr Jimmy Yap, cited.

14 The first strand, based on the rule in the English decision in *Foster v Driscoll and others* [1929] 1 KB 470 ("*Foster v Driscoll*"), is a principle of domestic public policy that a Singapore court will not enforce a contract or award damages for its breach, if its object would involve doing an act in a foreign and friendly state which would violate the law of that state (see *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 4 SLR 1 at [175]). The second strand is based on the English decision in *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Brothers")*, discussed further below. Mr Singh relied on the rules in both decisions, whereas Mr Chooi Jing Yen, counsel for Jonathan and Derek, relied only on the former.

15 Under *Foster v Driscoll,* the first question is whether the Agreement violates foreign law. Jonathan and Derek adduced a report from their expert witness, Mr Ren Gulong, to support their case that the Agreement violates Chinese law. Joseph relied on Mr Ren's report, and did not adduce any expert evidence of his own. The transaction which Mr Ren was asked to examine was

Lyu Yan's transfer of funds to the four nominated bank accounts, and the subsequent transfers to an unlicensed money changer (*ie,* "Allan"). Mr Ren's report said that under Chinese law, the transaction would violate (a) a legal requirement for Lyu Yan to apply for approval from a Chinese government authority to transfer her personal property out of China; (b) a legal requirement to trade foreign exchange with only "authorised financial institutions in China"; and (c) a legal prohibition against the "sale and purchase of foreign exchange in private in China". As to the latter two violations, Mr Ren explained that it was "obvious that [Lyu Yan] attempted to trade foreign exchange with a person who is not an authorized financial institution". He said that in China, a contract violating the first two laws may be held invalid as it "undermines social and public interest", whereas a contract is invalid if it violates "mandatory provisions of laws and administrative regulations", and the last-mentioned law was both of these things. He concluded that an agreement to enter into the transaction would be void and unenforceable in China.

16 The report from Lyu Yan's expert, Mr Tao Shan, only addressed the consequences of holding a contract illegal under the relevant Chinese laws. I thus accept the uncontradicted evidence of Mr Ren (as set out above), with one qualification. Mr Ren's conclusion above was based on "Allan" not being an "authorised financial institution" in China, but his involvement was not part of the Agreement. Nonetheless, it is not seriously disputed that Joseph is also not an "authorised financial institution" in China. I hence accept that the Agreement would violate Chinese law.

17 Counsel all accepted that under the rule in *Foster v Driscoll,* at the time of contracting, the parties' real object must have been to violate the laws of a foreign country. The defendants' case is that Joseph and Lyu Yan had a common understanding that the Second Transaction was illegal under Chinese foreign

exchange laws. Mr Singh pointed out, *inter alia,* that in the First Transaction, Lyu Yan had requested (via WhatsApp) on 4 September 2018 that Joseph provide a "loan document" because "my [Singapore] bank manager [from Credit Suisse] said you need to provide a borrowing contract". When cross-examined on the purported loan, she said that:

> My bank manager told me that if I were to transfer money from China to another account in China, it would be as if I was lending money to this person. And if this person repays me the money from overseas, then this would be acceptable to the [Singapore] bank…

Lyu Yan acknowledged, however, that "this was not the true state of affairs". On 15 October 2018, prior to the Second Transaction, Joseph told her he could again prepare the "document certificates suitable for BNP" and Lyu Yan agreed. It is thus clear that Lyu Yan knew that the First and Second Transactions were not genuine loans, and intended to submit those documents to the Singapore bank to show that the money was deposited pursuant to a loan contract. According to Mr Singh, this showed that Lyu Yan knew that the Agreement violated Chinese foreign exchange laws, and wanted to conceal that violation. There is no evidence, however, that the document was shown, or intended to be shown, to any Chinese bank or authority.

18 The evidence as to whether Lyu Yan intended to violate Chinese foreign exchange laws is finely balanced. Insofar as the fictitious loan document is concerned, it is clear that Lyu Yan had requested it only because her Credit Suisse bank manager told her that the Singapore bank required it. Although it may appear that she intended to violate Singapore law, that is not the defendants' case. Their case is only that she intended to violate Chinese law. In my view, Lyu Yan just wanted Joseph to assist her to satisfy the bank's

documentary requirement, whatever the reason for the requirement might have been.

19 Although Joseph said he shared a "common understanding" with Lyu Yan regarding the foreign illegality, there is no evidence that this point was discussed before the time of contracting. For the First Transaction, Joseph had told Lyu Yan he would be using an Indonesian licensed remittance company. For the Second Transaction, he did not say he would also use a licensed remittance company, but neither did he say he would use an unlicensed one. I do not think Lyu Yan's common intention can be inferred from such silence. Joseph said he had himself been lied to by Derek, who said he would be using a licensed remittance company, but in any event, Joseph also did not tell Lyu Yan about the involvement of Jonathan or Derek until after 22 October 2018. Even on 19 October 2018, when Lyu Yan asked him "What on earth is the relationship between the Hong Kong company and you, are they legal?" Joseph continued to maintain that "All are legal, if illegal, will not transfer for private bank clients".

20 Generally, Lyu Yan's evidence on affidavit and on the stand was consistent in that she was seeking a legal method of transferring her funds in China to Singapore, and had asked her BNP relationship manager to refer her to someone who could assist. She admitted she was aware that Chinese foreign exchange laws only allowed her to transfer US$50,000 annually directly from her Chinese bank accounts out of China. She thought, however, that it would be legal for her to transfer funds from one Chinese bank account to another, and have a counterparty transfer the equivalent amount in USD from Hong Kong to Singapore. I find Lyu Yan's evidence to be credible in this regard. Mr Ren's report did not say that this way of structuring the transaction would be illegal in China, although the Chinese cases he cited suggested so.

21 Based on the parties' WhatsApp messages, and Lyu Yan's demeanour and testimony at trial, I do not think that she intended to violate Chinese foreign exchange laws (including those specified in Mr Ren's report), or to disguise the Second Transaction as a loan for the purpose of hiding such a violation from Chinese authorities. From her perspective, the Second Transaction was already legal under Chinese law, and the loan document was meant to satisfy the Singapore bank's requirements. The Agreement is thus not unenforceable under the rule in *Foster v Discroll* ([14] *supra*).

22 I turn to the rule in *Ralli Brothers* ([14] *supra*), which only Mr Singh relied on. In that case, Spanish shippers entered an agreement with English charterers for the shipment of goods from Calcutta to Barcelona. Under the agreement, which was governed by English law, the shippers would pay freight at £50 per ton upon arrival in Barcelona. After the ship had set sail, but before it arrived in Barcelona, Spain passed a law prohibiting the charging of freight above £10 per ton. The English courts found that the charterers were not entitled to claim the balance of £40 per ton, because the charging of freight above £10 was illegal at the place of performance, the *lex loci solutionis*.

23 As the Court of Appeal observed in *Peh Teck Quee* ([13] *supra;* at [44]), there is considerable debate over whether *Ralli Brothers* is authority for an independent conflict of laws principle that a contract is, in general, invalid so far as its performance is unlawful by its *lex loci solutionis* (whatever its proper law), or simply a domestic rule of English contract law that regards a supervening illegality as a frustrating event leading to a discharge of the contract.

24 Neither counsel made any argument to justify which interpretation is correct. Mr Yap simply proceeded on the basis of the first interpretation.

Mr Singh failed to make clear whether he was relying on either or both. He submitted that since "at least part of the performance of the Agreement took place in China as a matter of fact", the "proper law of contract, as to the mode of performance was China" and that performance being illegal in China, the Agreement was thus unenforceable.

25 It is unnecessary for me to decide which of the two interpretations is correct, as I find that neither assists the defendants. Applying the first interpretation, the court must first decide the place of performance of the obligation that it is being asked to enforce (see *Peh Teck Quee* at [45]). That obligation is Joseph's obligation to ensure that US$3m is remitted from his counterparty's Hong Kong bank account to Lyu Yan's Singapore bank account. Joseph confirmed at trial that under the Remittance Process, there would not be any USD or RMB transferred out of China. I thus agree with Mr Yap that the place of performance of Joseph's obligation would likely be either Hong Kong or Singapore, and not China. None of the defendants adduced evidence or submitted that Joseph's performance of his obligation would be illegal in either Hong Kong or Singapore. The Agreement is hence not unenforceable on this interpretation of *Ralli Brothers.*

26 Even if I apply the second interpretation of *Ralli Brothers* ([14] *supra*), I am unpersuaded by Mr Singh that the proper law of the Agreement is Chinese law. Mr Yap made no submission on this point. There is no inference that can be drawn as to the parties' intentions regarding the proper law of the Agreement. Insofar as the court must identify the system of law the Agreement has its most close and real connection with, Mr Singh's point that one part of the Agreement was to be performed in China (*ie,* Lyu Yan's transfer of funds) is neutralised by the fact that under the other part, the USD was to be remitted from Hong Kong and received in Singapore. Mr Singh did not address any of the other factors

relevant to this issue, even though, for example, the place of residence or business of all the defendants, and perhaps, also Lyu Yan, appeared to be in Singapore and pointed in favour of Singapore law. There being no evidence that Joseph's performance of his obligation would be illegal anywhere except in China, I do not think Mr Singh has shown that the Agreement should be unenforceable under the second interpretation of *Ralli Brothers*.

27 The defence of foreign illegality is thus not made out. It is undisputed that Lyu Yan never received her moneys in RMB or USD. I thus find that Joseph breached his obligation as set out at [12] above. As Lyu Yan is entitled to be placed in the same position she would have been in had Joseph performed his obligation, Joseph is hence liable to her for US$3m.

28 As to the Misrepresentation Claim, Lyu Yan claimed that Joseph represented the following to her, thereby inducing her to enter into the Agreement:

(a) that his company was an Indonesian licensed remittance company, PT Niaga.

(b) that he/his company had the ability to arrange for the remittance of up to several millions in USD via electronic bank transfer in a single transaction;

(c) he/his company was able to satisfy any documentation requests from Lyu Yan's banks, including BNP;

(d) that his/his company's remittance services were safe and used by other clients regularly;

(e) that his company in Singapore was at Raffles Place;

(f) that he/his company had sufficient funds on hand to arrange for an exchange and remittance of US$3m;

(g) that he would only transfer the Lyu Yan's funds in RMB to his counterparty upon receipt of proof that the counterparty had remitted the USD to her (*ie,* the Escrow Arrangement); and

(h) that he was in the business of providing remittance services and/or was the owner of a company providing remittance services

(respectively, "Representations A, B, C, D, E, F, G, H").

29 Mr Yap's submissions confined the Misrepresentation Claim to fraudulent (as opposed to negligent or innocent) misrepresentation. I dismiss the claim for the following reasons:

(a) Representation A was not made.

(b) The falsity of Representation B has not been proven.

(c) Representation C was abandoned in Lyu Yan's closing submissions, and in any event, its falsity is not proven.

(d) Representation D comprises a statement of opinion (which is not actionable) and a statement whose falsity is not proven.

(e) The falsity of Representation E is not proven, and even if it is false, it did not materially induce Lyu Yan into entering the Agreement.

(f) As to Representation F, it is unclear what having "sufficient funds on hand" means, and its falsity is not proven.

(g) Representation G was not pleaded in the Misrepresentation Claim and in any case, it was not made.

(h) Representation H was abandoned in Lyu Yan's closing submissions.

30 As to the Conspiracy Claim, there is a lack of evidence showing a conspiracy between Joseph on the one hand, and Jonathan and/or Derek on the other, to defraud Lyu Yan. In my view, Joseph's testimony at trial and his WhatsApp exchanges with Lyu Yan, as well as with Jonathan and Derek, before and after the commencement of the Second Transaction, show that he was genuinely wanted to ensure that the Second Transaction was successfully carried out so that he could earn his commission. In particular, his WhatsApp messages to Derek from 16 to 23 October 2018 showed that he was pressing Derek for the transfer of USD, and asking for an explanation as to the delays. I hence dismiss this claim. To Mr Yap's credit, he appeared to have abandoned this argument at trial.

31 As to Jonathan and Derek, Mr Chooi submitted that like Joseph, the two were simply in it for the commission. They had allegedly agreed with "Allan" to convert RMB20,970,000 at an exchange rate of USD1 = RMB6.97, before agreeing with Joseph on the rate of USD1 = RMB6.99, so that they could profit from the difference and share it between themselves. As mentioned, they said that the RMB20,970,000 they had received was transferred into Chinese bank accounts nominated by "Allan". They relied on bank account statements and remittance slips to evidence these transfers, and screenshots (adduced by Joseph) of WhatsApp messages sent to them, purportedly showing "Allan's" instructions to Derek to transfer moneys to certain accounts. As mentioned, there was a WhatsApp group chat named "Fast Remittance" between Jonathan,

Derek, and "Allan", to which Joseph was added on 18 October 2018 at 9.36pm, after the transfer of the USD was delayed. "Allan" acknowledged in this chat that he had received the funds in RMB, but gave various reasons for the delay in transferring the USD. His last reply was on 22 October 2018, after which he disappeared.

32 Jonathan and Derek's case is that "Allan" exists, and it was "Allan" who had disappeared with the moneys. Derek says that "Allan" was his contact, and is an unlicensed moneychanger in China to whom he had been introduced through one "Lan Da Tong" and whom he had worked with in a similar transaction in 2017. Save for "Allan's" WhatsApp contact number, however, Derek claimed he had no other contact details. Both Jonathan and Derek said that they had deleted all their messages relating to the Second Transaction, including those with "Allan", Joseph, and between themselves. They testified that in this "underground banking system", it was standard practice to do so for fear of criminal prosecution in China.

33 I do not believe Jonathan and Derek's claim that "Allan" exists. The accounts allegedly nominated by "Allan" were in the names of various unidentified persons. Jonathan and Derek themselves testified that it is standard practice in the underground remittance industry in China to set up fictitious "*tua pek kong"* or "burner" accounts, to be used for the quick transfer of funds and then closed. Jonathan and Derek could not identify who these nominated account-holders were, and there is simply no way of knowing who actually controlled the accounts.

34 As for the purported WhatsApp instructions from "Allan" to transfer the moneys to the nominated accounts, they only account for RMB7,870,000 of Lyu Yan's funds, leaving RMB13,100,000 unaccounted for. Just like "Allan's"

acknowledgements on WhatsApp that he had received the funds in RMB, there is no way of knowing whether these messages are genuine. All we have is a contact number, and Jonathan and Derek's word that "Allan" exists. Even Jonathan himself agreed in cross-examination that "Allan" could be anyone, including himself or Derek. The two have no one but themselves to blame for the lack of evidence, having deleted all the messages in their possession that might have helped their case if true. As Mr Yap pointed out, both testified that they knew it was possible to recover deleted phone messages. Despite the importance of such evidence to the present suit, however, Jonathan made no attempt at recovery while Derek claimed that he had tried but lost his phone. Nothing was said of "Lan Da Tong", who might have supported Derek's claim that he got to know "Allan" through him.

35 There were also several troubling aspects of how the transfers from Jonathan and Derek's Chinese bank accounts took place. On 15 October 2018, while arranging the Second Transaction, Joseph asked Derrick which company would be remitting the USD from the Hong Kong bank account, and the latter initially told him it would be a company called "Vinyard Knight Hong Kong Ltd" ("Vinyard HK"). Jonathan and Derek describe themselves as "business partners" in this company. At trial, Derek said "we do not have a Vinyard HK bank account…we tried…to get a bank account, we can't get it". Mr Yap then pointed out that this was inconsistent with his aforementioned WhatsApp message. Derek responded that "[they] were in the midst of getting a bank account for Vinyard HK". When Mr Yap pressed the point, Derek changed his explanation, saying that "I believe I have the corporate account", but it was later "cancelled" and "we closed [it] down". I doubt whether Vinyard HK even had a bank account with which to make the transfers of USD at the material time,

and this reinforces Mr Yap's submission that Derek (along with Jonathan) had intended to defraud Lyu Yan all along.

36 Further, on 18 October 2018 at 7.08pm, after many exchanges regarding the delay in the transfer of the USD, Derek messaged Joseph on WeChat, saying that he was unable to contact "Allan". The remittance slips (relied upon by Jonathan and Derek) show that at this point, only Derek had fully transferred the funds in his Chinese bank account to the accounts purportedly nominated by "Allan"; Jonathan had not yet done the same. At 7.15pm, Joseph asked Derek to stop the transfers until he could get a hold of "Allan". Jonathan, however, continued transferring the remaining funds throughout the night. When asked why he did not tell Jonathan to stop the transfers, Derek claimed he could not reach Jonathan, and said he had called Joseph, who agreed to continue the transfers. No evidence exists to substantiate Derek's claim. At 7.39pm, Derek told Joseph that all the funds in RMB had been transferred out, even though, as Derek admitted at trial, this was untrue. In fact, the remittance slips show that Jonathan had not transferred all the funds in RMB that he had received to the nominated accounts until 12.11am on 19 October 2018, at the earliest.

37 Jonathan and Derek's story is also that all the funds in RMB had to be transferred to "Allan" first, before "Allan" would transfer the funds in USD. But on 18 October 2018, between 9.37pm to 10.48pm, in the "Fast Remittance" WhatsApp group chat, Derek asked "Allan" to send him the "usd slip" confirming the transfer of the USD as soon as possible, and "Allan" replied "You said RMB transfer done. All done?", and "Tmrw". As Mr Yap and Mr Singh pointed out, it was curious for Derek to ask, and for "Allan" to agree without the slightest resistance, that "Allan" transfer US$3m even though the transfer of the RMB was incomplete. In my view, the circumstances of

"Allan's" alleged involvement are highly suspicious, and I am not persuaded he actually exists.

38 If "Allan" does not exist, then it must have been Jonathan and Derek who misappropriated the moneys. Based on what we do know, I find that Jonathan and Derek conspired to defraud Lyu Yan of the RMB20,970,000 they had received. The combination between the two can be inferred from the fact that they worked closely on the Second Transaction together. Derek was the one who brought Jonathan on board, and they admitted discussing the Second Transaction over WhatsApp between themselves, and with Joseph. Both their bank accounts were also used to receive the funds in question. Their various misrepresentations to Joseph (including after 16 October 2018 regarding "Allan's" purported involvement), which they clearly knew and/or intended would be conveyed to Lyu Yan, as well as their actual receipt of Lyu Yan's moneys and subsequent transfers of the same elsewhere, amounts to fraud. Although they did not know Lyu Yan personally, they knew that the funds belonged to Joseph's client and were meant to be converted and remitted to her Singapore bank account. I find that they intended to injure her by misappropriating her moneys, which they did. From the manner he chose to answer the questions put to him, Derek seems to me to be a person who knew more than he cared to admit, and was evasive whenever it suited him. Jonathan seems to me the henchman for Derek.

39 As to damages, Lyu Yan is entitled to be placed in the same position that she would have been in had the tort not been committed. I find Jonathan and Derek jointly and severally liable to Lyu Yan for the RMB20,970,000 that they had received between themselves, and misappropriated together. They are not liable for the remaining RMB105,000, since Joseph would have taken that sum as his commission, whether or not they committed the tort.

40 I am also satisfied that Joseph owed Lyu Yan a duty to exercise reasonable care in converting and remitting her moneys. His actions had a direct causal bearing on her loss. There is circumstantial proximity as the two entered into a predefined arrangement to carry out the Second Transaction. Further, the Remittance Process required Lyu Yan to take the first step by transferring her funds to bank accounts given to her by Joseph. Joseph knew that these were people who were nominated solely by him or his counterparty, and not known to Lyu Yan. He knew that she depended on him to handle her funds, and that vis-à-vis her, he would be in complete control of the same. There is hence legal proximity. I do not think that this *prima facie* duty of care is negated by any policy considerations. Mr Singh argued that since Lyu Yan was engaged in a joint (foreign) illegal enterprise with Joseph, no liability in negligence should be imposed. I reject this argument given my finding that Lyu Yan did not share in the common object to violate Chinese law.

41 On the issue of breach, Mr Singh argued, *inter alia*, that Derek had represented to Joseph that he worked with licensed remittance companies, and that the Second Transaction would be carried out by Vinyard HK, but this was later changed to another company called "Golden Country Corporation Limited". Mr Singh said it was reasonable for Joseph to have believed that Derek would use "licensed remittance companies", especially since the "underground remittance industry" relied on trust. In my view, whatever Derek may have said, a reasonable person ought to have taken steps to verify the truth. Joseph failed to expressly confirm beforehand which companies Derek would be using for the Second Transaction, and verify whether they were licensed. Even at trial, he did not know the answer to the latter question. When given the details of the bank accounts in Jonathan and Derek's own names, he also did not verify if they actually belonged to the company being used. Given that there

was no express discussion with Lyu Yan about whether a licensed remittance company had to be used, it would then be incumbent on him to inform her if he planned to use an unlicensed one. Joseph did none of these of things, and fell far short of his standard of care.

42 As to Jonathan and Derek, I also find that they owed Lyu Yan a duty to exercise reasonable care in converting and remitting her moneys. Although they were a step removed compared to Joseph, they knew that his client would transferring moneys to bank accounts nominated by them, and that once the moneys were in their hands, they would be in complete control and Joseph's client would be completely reliant on them to convert and remit her moneys safely. Mr Chooi made a similar argument to Mr Singh's at [40] above, which I reject for the same reason. Having found that Jonathan and Derek defrauded Lyu Yan of her moneys, they were clearly in breach of their duty of care.

43 As to damages for negligence, Lyu Yan is entitled to be placed in the same position that she would have been in had the defendants not been negligent. I find that but for Joseph's breach, Lyu Yan would not have made the transfers leading to the loss of her whole RMB21,075,000. I also find that but for Jonathan and Derek's breaches, she would not have lost the RMB20,970,000 that she transferred into their accounts. I do not think Jonathan and Derek's fraudulent conspiracy breaks the chain of causation between Joseph's negligence and Lyu Yan's loss of this RMB20,970,000. Joseph had a duty to take reasonable steps to verify whether Jonathan and Derek used licensed remittance companies, or were in fact frauds. It was not submitted, and is in any event speculative to claim, that even if Joseph had done the necessary verifications, Jonathan and Derek's fraud would still have succeeded, for example, because they would have falsified licence documents. I thus find that:

(a) Joseph, Jonathan and Derek are jointly and severally liable to Lyu Yan for RMB20,970,000. To be clear, Jonathan and Derek are joint tortfeasors vis-à-vis each other. But vis-à-vis Joseph, they are several tortfeasors responsible for the whole of the same loss.

(b) Joseph is alone liable for the remaining RMB105,000.

44 As to the apportionment of liability between the defendants themselves, none of the defendants' pleadings claimed a contribution from the others in the event that I find (as I have in [43(a)] above) that they are held liable in respect of the same damage (*ie,* under section 15 of the Civil Law Act (Cap 43, 1999 Rev Ed), or otherwise). Although I view Jonathan and Derek as far more culpable than Joseph for Lyu Yan's loss, the issue does not arise for my consideration.

45 As to the Unjust Enrichment Claim, Mr Singh complained that it had not been properly pleaded against Joseph. Although Lyu Yan's pleadings could be much clearer, my view is that the defendants had sufficient notice of the case against them since Lyu Yan had pleaded that "the consideration for the payment of her RMB21,075,000 to the defendants has wholly failed", and the reliefs for this claim was sought against all of them on a joint and several basis.

46 To make out this claim, there must be enrichment of the defendant, at the expense of the plaintiff, and circumstances which make the enrichment unjust. As to the last limb (*ie,* the unjust factor), Mr Yap submitted that there was a total failure of basis. As to Joseph, I agree with Mr Yap that the basis of Lyu Yan's transfers to him was for him to ensure that the equivalent sum in USD is remitted from his counterparty's Hong Kong bank account to her Singapore bank account. That basis has completely failed. Out of the

RMB21,075,000 transferred by Lyu Yan, Joseph received RMB105,000 as his commission, and he has admitted at trial that he still holds those moneys. He has thus been enriched to that extent, and is liable to return that amount.

47 As to Jonathan and Derek, Mr Chooi argued that they had made no promise to Lyu Yan, of which a failure to perform could constitute total failure of basis (especially since they were not even known to Lyu Yan at the time of the transfers on 16 October 2018). Mr Yap correctly submitted, however, that the unjust factor of "total failure of basis" may arise in a non-contractual context where transfers are made to further a particular purpose, and that purpose fails (see *Zhou Weidong v Liew Kai Lung and others* [2018] 3 SLR 1236 (*"Zhou Weidong*") at [72]). In *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) (Charles Mitchell, Paul Mitchell & Stephen Watterson eds), it has been explained that the idea underlying failure of basis is that "a benefit has been conferred on the *joint understanding* that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit" [emphasis added].

48 I agree with Mr Yap that the basis of the transfers to Jonathan and Derek was for them convert Lyu Yan's moneys to USD, and remit the funds to her Singapore bank account. In multi-party cases, it has been acknowledged that it is not entirely clear how the requirement of a "joint understanding" will be satisfied (see *Zhou Weidong* at [73]). Here, the question is whether Lyu Yan must have formed a common understanding directly with Jonathan and Derek. In my view, that is unnecessary. The basis of the transfers was communicated by Lyu Yan to Joseph, who on his own accord, enlisted the help of Derek, who in turn enlisted Jonathan. There was a common understanding between Joseph, Jonathan and Derek that the moneys were meant to be converted and remitted to Lyu Yan. That purpose has failed. As mentioned, Jonathan and Derek

received RMB13,975,000 (of which RMB5,000 was given to Joseph) and RMB7,000,000 respectively. Since I have found both of them to have conspired with each other and it is not known how they had dealt with the funds between themselves, they are jointly and severally liable for the RMB20,970,000. Mr Chooi also raised the defences of ministerial receipt and change of position. Given that I am not satisfied that "Allan" exists, I do not think they fulfil the requirement of good faith and reject both defences.

49 I also dismiss the Fiduciary Duties Claim against all the defendants. Fiduciary duties are owed when a party has undertaken to act for on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of single-minded loyalty (see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 at [135]). There is, however, nothing exceptional on these facts showing that any of the defendants had undertaken to put Lyu Yan's interests ahead of his own. As to the Constructive Trust, Dishonest Assistance and Knowing Receipt Claims, Lyu Yan no longer pursued them in her closing and reply submissions, and it is hence unnecessary for me to deal with them.

50 In summary, I have made the following findings:

(a) Under the Breach of Contract Claim, Joseph is liable to Lyu Yan for US$3m.

(b) The Misrepresentation Claim against Joseph is dismissed.

(c) Under the Conspiracy Claim, Joseph is not liable, but Jonathan and Derek are jointly and severally liable to Lyu Yan for RMB20,970,000.

(d) Under the Negligence Claim:

(i) Joseph, Jonathan and Derek are jointly and severally liable to Lyu Yan for RMB20,970,000; and

(ii) Joseph is liable for the remaining RMB105,000.

(e) Under the Unjust Enrichment Claim:

(i) Jonathan and Derek are jointly and severally liable for RMB20,970,000; and

(ii) Joseph is liable for the remaining RMB105,000.

(f) The Fiduciary Claim against all the defendants is dismissed.

As Lyu Yan is not entitled to double recovery, the remedies at sub-paragraphs (c), (d) and (e), insofar as they are for the same loss, are alternative to each other. The remedies in sub-paragraphs (c), (d) and (e) are also alternative to that at (a).

51 There will thus be judgment for Lyu Yan, at her election, for either the US$3m against Joseph, or for:

(a) RMB20,970,000 against Joseph, Jonathan and Derek jointly and severally; and

(b) RMB105,000 against Joseph only.

Under s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed), interest on the judgment sum(s) will run from the date on which the writ was issued to the date of this judgment, at 5.33% per annum. I will hear parties on the issue of costs at a later date.

- Sgd -
Choo Han Teck
Judge

Jimmy Yap (Jimmy Yap & Co.) for the plaintiff;
Gino Hardial Singh and Pai Aniket Rajendra (Abbots Chambers LLC) for the first defendant;
Chooi Jing Yen and Hamza Malik (Eugene Thuraisingam LLP) for the second and third defendants.