

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

[2021] SGHC 235

Suit No 876 of 2018

Between

Lou Kan

... Plaintiff

And

Li Hua

... Defendant

GROUND OF DECISION

[Tort] — [Misrepresentation] — [Fraud and deceit]
[Tort] — [Misrepresentation] — [Measure of damages]

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Lou Kan

v

Li Hua

[2021] SGHC 235

General Division of the High Court — Suit No 876 of 2018

Pang Khang Chau J

30–31 March, 1, 14–15 April, 7 July 2021

18 October 2021

Pang Khang Chau J:

1 The plaintiff, Mr Lou Kan (“Mr Lou”), invested \$1.5m (“the Investment”) by subscribing for preference shares in Sunmax Global Capital Fund 1 Pte Ltd (“the Fund”). Although Mr Lou subscribed to the preference shares on subscription forms which expressly provided that the Fund was a “principal-guaranteed fund (exclusive of management fee)”, the Fund was in fact *not* structured as a principal-guaranteed fund. Mr Lou sued the defendant, Mr Li Hua (“Mr Li”) for fraudulently misrepresenting that the Fund was a principal-guaranteed fund (the “Representation”). Mr Li was a director of the Fund at the material time and had attended to Mr Lou during the meeting at which the subscription forms were executed by Mr Lou.

2 I allowed Mr Lou’s claim against Mr Li for fraudulent misrepresentation. Mr Li has appealed against my decision.

Background

3 Mr Lou applied for permanent residency in Singapore (“PR”) through the Global Investment Programme (“GIP”) administered by the Contact Singapore office (“Contact Singapore”) of the Singapore Economic Development Board.¹ Under the GIP, an applicant is required to make an approved investment in Singapore within six months after receiving in-principle approval of his PR application.² Mr Lou received his in-principle approval on 29 February 2012.³

The Fund

4 Contact Singapore maintains a list of investment funds approved for the purposes of the GIP (“GIP-approved Funds”).⁴ The Fund accepted Contact Singapore’s offer to participate as a GIP-approved Fund on 16 April 2009,⁵ after having been incorporated on 7 April 2009.⁶ At all material times, Mr Li was the sole ordinary shareholder of the Fund.⁷ He was also a director of the Fund from its incorporation to 1 December 2016, and from 28 November 2018 up until the time of this trial.⁸

¹ Affidavit of Evidence-in-Chief of Lou Kan (“Lou’s AEIC”) at paras 7–9.

² Affidavit of Evidence-in-Chief of Li Hua (“Li’s AEIC”) at para 19; Defendant’s Bundle of Documents (“DBOD”) at p 4.

³ Li’s AEIC at p 257.

⁴ Lou’s AEIC at pp 15–64.

⁵ Li’s AEIC at para 29.

⁶ Li’s AEIC at para 3.

⁷ Transcript, 14 Apr, p 4 line 23–p 5 line 1.

⁸ Li’s AEIC at para 3.

Mr Xing Xinli

5 Mr Lou engaged the services of one Mr Xing Xinli (“Mr Xing”), who was the general manager of the Beijing Global Trade Way Company (“BGT”), to assist with his PR application.⁹ Mr Xing was also known as Xing Winner Xingli.¹⁰

6 The Fund was managed by a company named Sunmax Global Capital Pte Ltd (“the Manager”),¹¹ of which Mr Li was the managing director.¹² The Manager had engaged the services of Worldway (Beijing) Immigration Services Co Ltd (“WBIS”), to introduce PR applicants to the Fund.¹³ According to Mr Li, both BGT and WBIS were part of a group of companies controlled by Mr Xing.¹⁴

7 According to Mr Lou, Mr Xing recommended the Fund to him because it was principal-guaranteed.¹⁵ A meeting was therefore arranged for Mr Lou to meet the Fund’s representative in Beijing, China on 10 April 2012 (“the Meeting”).¹⁶

⁹ Lou’s AEIC at para 6.

¹⁰ Li’s AEIC at para 34.

¹¹ Li’s AEIC at para 3.

¹² DBOD at p 77; Transcript, 14 Apr, p 14 lines 1–4.

¹³ Li’s AEIC at paras 34–35.

¹⁴ Li’s AEIC at para 34.

¹⁵ Lou’s AEIC at para 9; Transcript, 30 Mar, p 44 lines 13–22.

¹⁶ Lou’s AEIC at para 10; Transcript, 30 Mar, p 49 lines 23–25.

The 10 April 2012 meeting

8 The Meeting was held at Mr Xing’s office and attended by Mr Li on behalf of the Fund.¹⁷ What exactly transpired at the Meeting was hotly disputed, and will be explored in detail below. At this stage, it suffices to note the following undisputed facts concerning the Meeting:

- (a) Mr Xing was also present at the Meeting.¹⁸
- (b) The Meeting was conducted in Mandarin,¹⁹ as Mr Lou was not conversant in English.²⁰
- (c) Mr Lou had with him copies of the Fund’s Private Placement Memorandum (“PPM”) dated 1 February 2009 (“the 2009 PPM”) in both the English language and Chinese language versions. The 2009 PPM expressly states at various places that the Fund was principal-guaranteed (exclusive of management fee).²¹
- (d) Mr Li appended his signature and wrote the date “10/04/2012” at the bottom of page four of the Chinese version of the 2009 PPM.²² Page four was the first substantive page of the 2009 PPM and appeared immediately after the contents page. It contained the executive summary of the 2009 PPM, which described the Fund in the following terms:²³

¹⁷ Lou’s AEIC at para 10.

¹⁸ Lou’s AEIC at para 11; Li’s AEIC at para 49.

¹⁹ Lou’s AEIC at para 11.

²⁰ Lou’s AEIC at para 36

²¹ Lou’s AEIC at pp 68, 71 and 73.

²² Lou’s AEIC at para 18 and p 91; Transcript, 14 Apr, p 68 lines 9–17.

²³ Lou’s AEIC at pp 68 and 91.

Sunmax Global Capital Fund 1 Pte. Ltd. as [sic] a private company limited by shares under the laws of the Republic of Singapore. It is principal-guaranteed fund [sic] (exclusive of management fee). For example, if you invest S\$1,500,000 in our fund, you will get at least of [sic] S\$1,237,500 back just after 5 years.

(e) The subscription forms executed by Mr Lou at the Meeting in both the English and Chinese versions (“the Subscription Forms”)²⁴ contained the following clause:²⁵

3. The Investor understands the Fund is an immigration-linked fund which is managed by Sunmax Global Capital Pte. Ltd. The Fund is principal-guaranteed fund [sic] (exclusive of management fee). For example, if you invest S\$1,500,000 in our fund, you will get at least of [sic] S\$1,237,500 back just after 5 years.
...

9 Although there is some dispute over whether this took place at the Meeting or only after Mr Li had returned to Singapore following the Meeting, it is undisputed that the Subscription Forms were countersigned by Mr Li on behalf of the Fund and copies of the same bearing Mr Li’s signatures were given to Mr Lou by Mr Li.

Mr Lou’s attempts to get back the principal sum he invested

10 Under the terms of the Investment, Mr Lou was required to maintain his investment for five years. After this five-year period expired, Mr Lou instructed his lawyers to write to the Fund on 14 July 2017 to demand the return of his investment principal of \$1.5m (less management fee) together with investment returns, if any.²⁶ Mr Lou explained that he adopted this approach because he had

²⁴ Lou’s AEIC at pp 111–116.

²⁵ Lou’s AEIC at pp 113 and 116.

²⁶ Lou’s AEIC at p 124.

heard, by then, that several lawsuits had been commenced against the Fund in the Singapore courts.²⁷

11 The Fund replied through their lawyers on 25 September 2017 that:²⁸

(a) according to the Fund’s PPM dated 1 January 2010 (“the 2010 PPM”)²⁹ and the Fund’s articles of association,³⁰ the Fund was not principal-guaranteed;

(b) more than half of the Fund’s 40-odd investors had already redeemed their preference shares on the basis that the Fund was not principal-guaranteed; and

(c) under the terms of redemption offered in the Fund’s letter to its investors dated 21 July 2016 (“the Redemption Offer Letter”),³¹ Mr Lou would upon redemption of his preference shares receive an immediate cash distribution of \$224,510 with the possibility of further distributions after liquidation of the Fund’s non-cash assets.

12 Mr Lou’s lawyers replied on 4 October 2017 that:³²

(a) Mr Lou had invested in reliance on Mr Li’s representation that the Fund was principal-guaranteed and also on the basis of

²⁷ Lou’s AEIC at para 22.

²⁸ Lou’s AEIC at pp 126–127.

²⁹ Lou’s AEIC at pp 128–148.

³⁰ Lou’s AEIC at pp 149–177.

³¹ Li’s AEIC at pp 274–278.

³² Lou’s AEIC at p 178.

representations contained in the 2009 PPM and the Subscription Forms;
and

(b) Mr Lou had no knowledge of the 2010 PPM.

On the same day, Mr Lou’s lawyers issued a letter of demand to Mr Li seeking damages for Mr Lou’s losses arising from Mr Li’s misrepresentation.³³ An identical letter of demand was also sent the next day to another known address of Mr Li.³⁴ These letters of demand provisionally assessed Mr Lou’s damages to be \$1.5m less whatever cash distribution or other sums which Mr Lou may obtain from the Fund.

13 According to Mr Lou, Mr Li did not respond to the letter of demand and remained uncontactable.³⁵ By May 2018, Mr Lou decided to cut his losses and proceeded to redeem his preference shares (“the Redemption”).³⁶ On the day that Mr Lou effected the Redemption, his lawyers also sent an email to one Mr Yap Keng Ann, who was then the sole director of the Fund,³⁷ to put on record that the Redemption was transacted strictly between the Fund and Mr Lou, and that Mr Lou reserved his rights at law against Mr Li.³⁸

14 In September 2018, Mr Lou commenced the present suit against Mr Li.

³³ Lou’s AEIC at pp 179–180.

³⁴ Lou’s AEIC at pp 181–182.

³⁵ Lou’s AEIC at para 26; Transcript, 31 Mar, p 6 line 21.

³⁶ Affidavit of Evidence-in-Chief of He Ping (“He’s AEIC”) at para 6; Lou’s AEIC at para 28; Transcript, 31 Mar, p 6 lines 22–30.

³⁷ Transcript, 1 Apr, p 3 lines 19–22.

³⁸ Lou’s AEIC at p 185.

The parties’ respective cases

Mr Lou’s case

15 Mr Lou claimed that:

(a) The 2009 PPM and the Subscription Forms were given to him by Mr Li at the Meeting.³⁹

(b) Mr Li briefed Mr Lou on the Fund at the Meeting and explained that, after the five-year investment period, Mr Lou would get back at least \$1.5m less the Fund’s management fee.⁴⁰ Mr Li used the Mandarin term “保本” (*bao ben*), which meant principal-guaranteed, to describe the Fund to Mr Lou.⁴¹

(c) Mr Lou was induced to invest in the Fund in reliance on Mr Li’s oral representation as well as the contents of the 2009 PPM and the Subscription Forms. Mr Lou signed the Subscription Forms in Mr Li’s presence, and Mr Li countersigned the Subscription Forms and affixed the Fund’s company stamp to them in Mr Lou’s presence.⁴²

(d) The Representation was fraudulent because it was made by Mr Li with the knowledge that it was false – *ie*, Mr Li knew, at the time of the Meeting, that the Fund was not in fact principal-guaranteed.⁴³

³⁹ Lou’s AEIC at paras 13–15.

⁴⁰ Lou’s AEIC at para 12.

⁴¹ Lou’s AEIC at para 12.

⁴² Lou’s AEIC at paras 16–17.

⁴³ Statement of Claim (Amendment No 2) (“SOC”) at para 7; Plaintiff’s Closing Submissions (“PCS”) at paras 101–102.

Mr Li's case

16 Mr Li denied ever passing the 2009 PPM and the Subscriptions Forms to Mr Lou. According to Mr Li, the operative version of the PPM in use by the Fund was the 2010 PPM,⁴⁴ which did not state that the Fund was a principal-guaranteed fund. The 2009 PPM was only a draft, to be used for testing the market.⁴⁵ Historically, the 2009 PPM was shown only to five investors, all of whom had subscribed to the Fund in 2009, because the 2010 PPM was not finalised then.⁴⁶ According to Mr Li, these five investors were told that the 2009 PPM was only pre-marketing material and the operative PPM would be finalised in due course.⁴⁷

17 Mr Li recalled that he had also given a copy of the 2009 PPM to Mr Xing during a meeting in Beijing in early 2009.⁴⁸ This was because Mr Xing insisted that he needed a copy of the 2009 PPM in order to understand the Fund better.⁴⁹ That copy of the 2009 PPM was therefore given to Mr Xing on the understanding that it was for the personal reference of Mr Xing and his staff, and not for distribution to investors.⁵⁰

18 Mr Li had brought to the Meeting a copy of the 2010 PPM and its corresponding subscription forms (which contain no clauses about the Fund

⁴⁴ Li's AEIC at para 28.

⁴⁵ Li's AEIC at para 28.

⁴⁶ Li's AEIC at para 29.

⁴⁷ Li's AEIC at para 29.

⁴⁸ Li's AEIC at para 37.

⁴⁹ Li's AEIC at para 37.

⁵⁰ Li's AEIC at para 37.

being principal-guaranteed) to be given to Mr Lou.⁵¹ However, when Mr Li arrived at the Meeting, he saw on the table subscriptions forms which had already been signed by Mr Lou.⁵² It appeared to Mr Li that Mr Lou had already made up his mind to invest even before Mr Li arrived at the Meeting.⁵³

19 Mr Li's account of what transpired at the Meeting was as follows:

(a) He handed a copy of the 2010 PPM to Mr Lou upon meeting Mr Lou.⁵⁴

(b) He then performed "Know Your Client" checks and asked Mr Lou whether he had any questions. Mr Lou had no questions for Mr Li. Specifically, Mr Lou did not ask Mr Li about any guarantee. Mr Li then advised Mr Lou to read the 2010 PPM and explained briefly about matters relating to the Fund. The only question Mr Lou asked was the deadline by which he should make his investment in the Fund, and how payment was to be effected for that purpose.⁵⁵

(c) The two of them then spent the remaining time at the Meeting ironing out some issues which Mr Lou had with cross-border capital controls. This resulted in them signing a side agreement under which Mr Lou would transfer the sum required for his investment in Renminbi to Mr Li's bank account in China while Mr Li would transfer an

⁵¹ Transcript, 14 Apr, p 41 lines 25–31, p 42 lines 1–5; 15 Apr, p 3 lines 17–20.

⁵² Transcript, 15 Apr, p 3 lines 14–16.

⁵³ Li's AEIC at para 46.

⁵⁴ Li's AEIC at para 47.

⁵⁵ Li's AEIC at paras 47.

equivalent sum in Singapore dollars to Mr Lou's bank account in Singapore ("the Currency Exchange Agreement").⁵⁶

(d) Mr Li did not countersign the Subscription Forms at the Meeting but brought them back to Singapore. Three days later, he countersigned the Subscription Forms and issued the share certificates for the preference shares subscribed to by Mr Lou.⁵⁷

20 While Mr Li did not deny that the Subscription Forms were from the 2009 PPM, he explained that he had mistakenly thought that these were the subscription forms from the 2010 PPM.⁵⁸ He did not anticipate that the 2009 PPM would resurface nearly two and a half years after the 2010 PPM had been in use.⁵⁹

21 In his closing submissions, Mr Li raised the following defences:

(a) Mr Li did not make the Representation.⁶⁰ If anyone had represented to Mr Lou that the Fund was principal-guaranteed, it would have been Mr Xing for whom Mr Li should not be held responsible.⁶¹

(b) Mr Lou did not rely on any representations from Mr Li (even if any were made).⁶² Mr Lou had already decided to make the Investment

⁵⁶ Li's AEIC at paras 49–54.

⁵⁷ Li's AEIC at para 63.

⁵⁸ Transcript, 15 Apr, p 14 lines 3–11.

⁵⁹ Li's AEIC at para 64.

⁶⁰ Defendant's Closing Submissions ("DCS") at paras 90–171.

⁶¹ DCS at paras 172–191.

⁶² DCS at paras 200–201.

before meeting Mr Li and pre-signed the Subscription Forms before Mr Li arrived at the Meeting.⁶³

(c) The Representation was not actionable as it was a representation of future intention and not a representation of fact.⁶⁴

(d) Any written representations in the 2009 PPM were made in the name of the Fund. Mr Li should not be held responsible for them.⁶⁵

(e) Any written representations in the 2009 PPM were made on 1 February 2009, before the Fund was constituted, and at a time when Mr Li would have no reason to believe they were untrue.⁶⁶

22 Mr Li also argued that, even if the other elements of a claim for fraudulent misrepresentation were made out, Mr Lou has suffered no damage because Mr Lou has failed to prove any loss arising from the Investment.⁶⁷

23 Mr Li raised two other defences in his pleadings. First, any claim by Mr Lou should be against the Fund, and not against him, because he merely acted as an agent of the Fund at the Meeting and Mr Lou knew of the same.⁶⁸ Second, Mr Lou had, by participating in the Redemption, acknowledged that the 2010 PPM (which contained no provision on principal guarantee) was the effective PPM of the Fund, and so waived all rights to rely on the Representation in

⁶³ DCS at paras 202–205.

⁶⁴ DCS at paras 194–199.

⁶⁵ DCS at para 192.

⁶⁶ DCS at para 238.

⁶⁷ DCS at paras 232–237; Defendant’s Reply Submissions (“DRS”) at paras 123–134.

⁶⁸ Defence (Amendment No. 3) (“Defence”) at para 11.

subsequent claims against him.⁶⁹ As these defences were not raised during trial or in Mr Li’s submissions, I do not propose to deal with them in these grounds.

Issues to be determined

24 Having regard to parties’ cases, there are two main issues to be determined:

- (a) Whether the requisite elements of a claim in fraudulent misrepresentation have been established by Mr Lou?
- (b) Assuming that Mr Li is liable to Mr Lou for fraudulent misrepresentation, what would be the measure of damages?

Whether the requisite elements of a claim in fraudulent misrepresentation have been established

Applicable principles

25 It is common ground that the elements which must be satisfied to establish a claim in fraudulent misrepresentation are as set out in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 (“*Panatron*”) at [14], namely:

- (a) there must be a representation of fact made by words or conduct;
- (b) the representation must be made with the intention that it should be acted upon by the plaintiff;
- (c) it must be proved that the plaintiff had acted upon the false statement;

⁶⁹ Defence at para 19.

- (d) it must be proved that the plaintiff suffered damage by so doing;
and
- (e) the representation must be made with knowledge that it is false – it must be wilfully false, or at least made in the absence of any genuine belief of its truth.

26 Having regard to these principles, the sub-issues I need to address are:

- (a) whether Mr Li had made the Representation to Mr Lou;
- (b) whether the Representation was a representation of fact;
- (c) whether the Representation was made by Mr Li with the intention that it be acted upon by Mr Lou;
- (d) whether Mr Lou had acted upon the Representation;
- (e) whether Mr Lou had suffered damage in doing so; and
- (f) whether the Representation had been made by Mr Li (if he did) with the knowledge that it was false.

27 As for the applicable standard of proof, it is common ground that, following the Court of Appeal’s decision in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263, even in cases where fraud is alleged, the standard of proof in a civil case remains on a balance of probabilities, although the more serious the allegation, the more the party on whom the burden of proof falls may have to do in order to establish his case (at [14]).

Whether Mr Li had made the Representation to Mr Lou

28 I find that Mr Li had made the Representation by telling Mr Lou that the Fund was a principal-guaranteed fund, and by giving Mr Lou the 2009 PPM and the Subscription Forms at the Meeting. This finding turns largely on the assessment of the relative credibility of Mr Lou’s and Mr Li’s accounts of what occurred at the Meeting.

29 Although I agree with Mr Li that Mr Lou could not clearly remember certain details of the Meeting,⁷⁰ I do not think this undermines the overall reliability of Mr Lou’s testimony. First, it is unsurprising that a witness will not remember every detail of events which took place so many years ago. Secondly, the things which Mr Lou could not remember, such as who helped Mr Lou fill up the English version of the Subscription Forms at the Meeting⁷¹ or the exact duration of the Meeting⁷² are matters of detail. It does not necessarily follow from Mr Lou’s inability to remember such details that he would not be able to reliably recall the more material aspects of the Meeting, such as whether the issue of the principal-guarantee was discussed and from whom he had received the 2009 PPM. Similarly, I do not think that the dispute over the accuracy of Mr Lou’s recollection concerning whether Mr Li returned the countersigned Subscriptions Forms to Mr Lou at the Meeting or only later (see [9] above) had a significant impact on Mr Lou’s case. Overall, I found Mr Lou to be a candid witness who readily conceded when mistakes were pointed out to him or

⁷⁰ DCS at para 98.

⁷¹ Transcript, 30 Mar, p 53 lines 18–23.

⁷² Transcript, 31 Mar, p 3 lines 14–15.

reasonable propositions were put to him.⁷³ On the other hand, I had difficulties with various aspects of Mr Li’s testimony, as explained below.

Whether Mr Lou received the 2009 PPM from Mr Li

30 It is Mr Li’s testimony that he gave Mr Lou a copy of the 2010 PPM at the Meeting. However, it is also undisputed that Mr Li had affixed his signature to the 2009 PPM at the Meeting (see [8(d)] above). Therefore, if Mr Li’s testimony (that he never brought any copy of the 2009 PPM to the Meeting, and only handed Mr Lou a copy of the 2010 PPM) were to be believed, Mr Lou must have already had the 2009 PPM with him *before* Mr Li arrived at the Meeting. However, Mr Li’s Affidavit of Evidence-in-Chief (“AEIC”) only states that he saw the Subscription Forms on the table when he arrived at the Meeting (see [18] above). There is no mention by Mr Li in his AEIC, nor in his testimony in court, of him seeing Mr Lou already in possession of *any* copy of the Fund’s PPM when he arrived at the Meeting.

31 When this point was explored in cross-examination, Mr Li inexplicably denied that, if he had indeed given Mr Lou a copy of the 2010 PPM at the Meeting, Mr Lou would have two sets of PPM with him at the end of the Meeting.⁷⁴ After much toing-and-froing, Mr Li finally accepted that, based on his version of the events, there would have been two sets of PPM at the Meeting, but he continued to maintain that he did not realise, *at the time of the Meeting*, that there had been two sets of PPM present.⁷⁵ I find this part of Mr Li’s evidence illogical and lacking in credibility.

⁷³ Transcript, 30 Mar, p 29 lines 18–21, p 48 lines 1–10,

⁷⁴ Transcript, 15 Apr, p 6 lines 7–19.

⁷⁵ Transcript, 15 Apr, p 8 lines 14–16.

32 Mr Li suggested that Mr Lou could have obtained the 2009 PPM from Mr Xing.⁷⁶ In this regard, Mr Li stated in his AEIC that Mr Xing asked Mr Li for a copy of the 2009 PPM (even though its status was allegedly only a draft) because Mr Xing wanted to understand the Fund better and gain an advantage over its competitors who may similarly want to market the Fund.⁷⁷ During cross-examination, Mr Li gave another reason – that Mr Xing had made the request because the Fund was then not yet a GIP-approved Fund, and Mr Xing wanted to know the possibility of the Fund becoming a GIP-approved Fund.⁷⁸ These explanations do not sound logical. First, it is not clear why affording Mr Xing a competitive advantage would require Mr Li to give Mr Xing an entire “draft” of the PPM as opposed to merely giving Mr Xing additional details about the Fund in the form of a factsheet or other marketing materials. That is especially the case when Mr Li himself said that any copy of the Fund’s PPM (whether the 2009 PPM or the 2010 PPM) was confidential and that it was a security risk to circulate it to non-investors.⁷⁹ Secondly, I fail to see how obtaining a copy of the 2009 PPM (which was allegedly only a draft) would assist Mr Xing in gauging the possibility of the Fund becoming a GIP-approved Fund.

33 Mr Li made three other submissions on this point. First, the 2009 PPM was only a draft and it was unlikely that Mr Li would have provided draft documents to an investor.⁸⁰ Second, the 2009 PPM pre-dated the incorporation of the Fund and it would not have made sense for Mr Li to offer documents which were dated before the Fund’s incorporation for an investor’s

⁷⁶ DCS at paras 185–190.

⁷⁷ Li’s AEIC at para 37.

⁷⁸ Transcript, 14 Apr, p 36 line 30–p 37 line 3.

⁷⁹ Li’s AEIC at para 36.

⁸⁰ DCS at paras 165–167.

subscription.⁸¹ Third, given the high-risk areas which the Fund was required to invest in, it would not have made commercial sense for Mr Li to represent that the Fund was principal-guaranteed.⁸² For reasons explained below, I do not accept any of these submissions.

34 In relation to the first submission, I am not persuaded that the 2009 PPM was only a draft. It is not marked as a draft. It appears complete and ready to be used in every respect, down to the corresponding subscription forms. In fact, it is Mr Li's own evidence that, between 16 April 2009 and 31 December 2009, five investors had "validly subscribed" to the 2009 PPM.⁸³ A PPM which was shown to investors after incorporation of the Fund and validly subscribed to by investors cannot be described as a mere draft. As for the second submission, I see nothing wrong with a PPM being prepared ahead of the incorporation of a fund with a view towards the PPM being used once the fund is ready to accept investments.

35 Finally, in relation to the third submission, Mr Li relied on the condition imposed in Contact Singapore's letter dated 27 February 2009, which required the Fund to invest at least 50% of its total funds in Singapore-based companies in the biomedical science, clean energy, environment and water, healthcare, info-communications and media, nanotechnology, and urban solutions sectors.⁸⁴ First, not all of these seven sectors are high-risk sectors. Second, Mr Li has not explained how a mere 50% allocation to these sectors (as opposed to full allocation) would make it untenable for the Fund to provide a principal-

⁸¹ DCS at para 168.

⁸² DCS at paras 169–171.

⁸³ Li's AEIC at para 29.

⁸⁴ DBOD at p 69.

guarantee. Third, even if Contact Singapore's condition would make the Fund's investments more risky, it does not necessarily follow that it would be senseless for Mr Li to misrepresent to investors that the Fund was principal-guaranteed. In my view, it would not be unimaginable for a fund manager in Mr Li's position to consider it worthwhile to run the risk of providing a principal-guarantee in return for attracting more investors. In fact, given Mr Li's claim that the first five investors who subscribed on the basis of the 2009 PPM all obtained returns similar to or better than that under a principal-guarantee,⁸⁵ it would appear that the making of the Representation by Mr Li may not have been as senseless as his submission made it out to be.

36 In the light of the foregoing, I find that Mr Li had given Mr Lou the 2009 PPM at the Meeting.

Whether Mr Lou received the Subscription Forms from Mr Li

37 It is Mr Li's position that every copy of the Fund's PPM would have annexed to it the corresponding subscription forms.⁸⁶ It therefore follows, from my finding that Mr Lou received the 2009 PPM from Mr Li, that Mr Lou also received from Mr Li the Subscription Forms, which would have been annexed to the 2009 PPM. Nevertheless, for completeness, I will explain in detail why Mr Li's version of events concerning the Subscription Forms is in any event unpersuasive.

38 In his AEIC, Mr Li explained that he had to prepare what he described as "Change of PR Sponsors Letters" in advance of the Meeting as Mr Lou's PR

⁸⁵ Li's AEIC at para 30.

⁸⁶ Transcript, 14 Apr, p 45 line 13, p 46 lines 3–6.

application was originally sponsored by a different GIP-approved Fund.⁸⁷ During cross-examination, Mr Li added that he brought along three sets of documents to the Meeting: (a) a copy of the 2010 PPM, (b) the Change of PR Sponsors Letters to be signed by Mr Lou, and (c) an internal checklist.⁸⁸

39 Mr Li also agreed during cross-examination that, before the Meeting, his expectation was that he would be giving Mr Lou the blank subscription forms at the Meeting to complete and sign, and that he was “very surprised” when he saw that Mr Lou had already signed the subscription forms when he (Mr Li) arrived at the Meeting.⁸⁹ Mr Lou’s counsel then asked Mr Li whether, upon seeing the pre-signed subscription forms on the table, Mr Li had asked Mr Lou or Mr Xing where the forms came from. Mr Li replied that he did not.⁹⁰

40 Mr Lou’s counsel then suggested to Mr Li that, upon seeing the pre-signed subscription forms on the table, Mr Li would have known that these forms must have come from the 2009 PPM previously given to Mr Xing by Mr Li.⁹¹ Mr Li replied in the negative, and proceeded to explain that, one week before the Meeting, he had in a telephone conversation with Mr Xing indicated that he would ask a staff to send a copy of the 2010 PPM and its corresponding subscription forms over to Mr Xing.⁹² I find that Mr Li’s explanation lacks credibility. It is also inconsistent with other parts of Mr Li’s evidence.

⁸⁷ Li’s AEIC at para 41.

⁸⁸ Transcript, 14 Apr, p 41 lines 27–31, p 42 lines 1–2.

⁸⁹ Transcript 14 Apr, p 51 lines 18–25.

⁹⁰ Transcript 14 Apr, p 53 line 13–16.

⁹¹ Transcript, 14 Apr, p 53 lines 18–21 and 25–26.

⁹² Transcript, 14 Apr, p 53 line 27–p 54 line 2.

41 First, Mr Li did not state either in his AEIC or in the earlier parts of his cross-examination that he had sent any documents to Mr Xing ahead of the Meeting. I therefore consider this belated explanation to be an improvised embellishment, aimed at explaining why the sight of the pre-signed subscription forms would not have raised alarm in Mr Li's mind that they could have been the subscription forms from the 2009 PPM. This explanation is also inconsistent with Mr Li's earlier testimony that he was surprised to see the pre-signed subscription forms. If Mr Li had indeed sent some subscription forms to Mr Xing a few days before the Meeting, there would have been no reason for Mr Li to be surprised to see the pre-signed subscription forms at the Meeting. This explanation is also inconsistent with Mr Li's earlier testimony that he had expected to pass the blank subscription forms to Mr Lou at the Meeting for Mr Lou to sign. Finally, it is also inconsistent with Mr Li's evidence in his AEIC that he would not normally provide any copy of the Fund's PPM (whether the 2009 PPM or the 2010 PPM) to non-investors as these were confidential documents.⁹³

42 In the light of the foregoing, I find that Mr Lou was given the Subscription Forms by Mr Li at the Meeting.

Whether Mr Li told Mr Lou that the Fund was principal-guaranteed

43 It is common ground that, at the Meeting, Mr Li briefed Mr Lou about the Fund.⁹⁴ It would be reasonable to expect that, during any such briefing, the issue of investment risk would be touched upon. Therefore, on Mr Li's case that he had briefed Mr Lou based on the 2010 PPM, one would expect Mr Li to have

⁹³ Li's AEIC at para 36.

⁹⁴ Lou's AEIC at para 12; Li's AEIC at para 47.

highlighted to Mr Lou that the Fund was making – in Mr Li’s words – “high-risk investments”.⁹⁵ Similarly, on Mr Lou’s case that he was briefed by Mr Li on the basis of the 2009 PPM, one would have expected the issue of whether the Fund was principal-guaranteed to be discussed in the course of Mr Li’s briefing. In either scenario, it would be extremely unlikely that the risk profile of the Fund was not discussed at all at the Meeting.

44 Given the presence of Mr Li’s signature on the 2009 PPM, I find on the balance of probabilities that Mr Li had briefed Mr Lou on the basis of the 2009 PPM. It therefore follows that it is more likely than not that Mr Lou would have sought assurance from Mr Li at the Meeting that the Fund was indeed principal-guaranteed, and Mr Li would have told Mr Lou that the Fund was principal-guaranteed when briefing Mr Lou about the Fund using the 2009 PPM.

45 In addition, I consider that the presence of Mr Li’s signature on page four of the Chinese version of the 2009 PPM corroborates Mr Lou’s evidence that he was told by Mr Li that the Fund was principal-guaranteed. As the 2009 PPM spanned 23 pages, it is noteworthy that Mr Li affixed his signature to only one page of the document, which happened to be the page containing a definition of the Fund that employs the phrase “principal-guaranteed fund (exclusive of management fee)”.⁹⁶ In his AEIC, Mr Li did not proffer any explanation for the existence of his signature on the Chinese version of the 2009 PPM. In court, Mr Li explained that, during the Meeting, Mr Xing

⁹⁵ Li’s AEIC at para 31.

⁹⁶ Lou’s AEIC at pp 68 and 91.

suddenly asked him to sign this document and he just signed as requested without reading the document carefully.⁹⁷ I find this explanation unbelievable.

46 One of Mr Li’s tasks at the Meeting was to get Mr Lou to sign the Fund’s subscription forms and the Change of PR Sponsor Letters (see [38] above). Given Mr Li’s evidence that he had brought the Subscription Forms back to Singapore for processing by the Fund before countersigning them,⁹⁸ he would not have expected himself to sign anything at the Meeting, other than the Currency Exchange Agreement which was negotiated at the Meeting. The Currency Exchange Agreement is a two-page document,⁹⁹ and is very different in appearance from the 2009 PPM. Given this context, I find it unbelievable that Mr Li would have signed a random page in a 23-page document at the Meeting without thinking, simply because Mr Xing had asked him to do so.

47 I therefore find that Mr Li had orally represented to Mr Lou that the Fund was a principal-guaranteed fund.

Whether written representations in the 2009 PPM and the Subscription Forms were attributable to Mr Li

48 Mr Li also submitted that, as the 2009 PPM and the Subscription Forms were made in the name of the Fund and emanated from the Fund, Mr Li should not be held responsible for the written representations therein.¹⁰⁰ Given my finding concerning the oral representation made by Mr Li, this submission, even if accepted, would have made no difference to Mr Li’s liability. In any event, I

⁹⁷ Transcript, 14 Apr, p 69 lines 4–5, p 71 lines 28–31.

⁹⁸ Li’s AEIC at para 63; Transcript, 15 Apr, p 4 lines 12–16.

⁹⁹ Lou’s AEIC at pp 117–118.

¹⁰⁰ DCS at paras 4.2 and 192.

find no merit in this submission. It goes without saying that one can make a representation by presenting the contents of a document emanating from another. More importantly, in the present case, Mr Li had, by signing on page four of the Chinese version of the 2009 PPM, expressly adopted the representations contained on that page (if not the representations contained in the entirety of the 2009 PPM) as his own.

Whether adverse inferences should be drawn from Mr Xing’s absence as a witness

49 As Mr Xing was also present at the Meeting,¹⁰¹ he is a material witness to what transpired at the Meeting. In the circumstances, both Mr Lou and Mr Li urged the court to draw an adverse inference against the other side pursuant to illustration (g) of s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) (“the Evidence Act”) for not calling Mr Xing to give evidence.¹⁰²

50 At trial, Mr Lou explained that he had asked Mr Xing to give evidence but Mr Xing declined on the basis that he was not in a position to come to court to give evidence as he had received substantial commission from Mr Li.¹⁰³ Although Mr Li was not asked during cross-examination to explain why he did not call Mr Xing to give evidence, he was asked a related question concerning why he had not commenced legal proceedings against Mr Xing even though it was his case that the Representation was made by Mr Xing.¹⁰⁴ Mr Li replied that his lawyers tried to contact Mr Xing but there was no response from Mr Xing.¹⁰⁵

¹⁰¹ Lou’s AEIC at para 11; Transcript, 14 Apr, p 71 lines 23–27.

¹⁰² PCS at paras 142–148; DRS at paras 139–148.

¹⁰³ Transcript, 31 Mar, p 19 lines 1–14.

¹⁰⁴ Transcript, 15 Apr, p 14 line 27–p 15 line 11.

¹⁰⁵ Transcript 15 Apr, p 15 lines 12–13.

51 Illustration (g) to s 116 of the Evidence Act provides that the court may presume “that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it”. Based on the statutory text, the presumption only applies to evidence “which *could* be ... produced” [emphasis added] and the presumption may only be made against the person “who withholds it”. Given that both sides claimed that they had contacted Mr Xing and were not able to secure the desired response from him, Mr Xing’s testimony could hardly be described as evidence “which could be ... produced” by either side. It therefore follows that neither side could reasonably be regarded as a party “who withholds it”. As noted by MPH Rubin JC (as he then was) in *Min Hong Auto Supply Pte Ltd v Loh Chun Seng and another* [1993] 1 SLR(R) 642 (“*Min Hong*”), an adverse inference can be drawn “only if there is withholding of the evidence but not merely on account of the failure to obtain evidence” (at [63]).

52 The foregoing analysis is consistent with the Court of Appeal’s warning in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 (“*Sudha Natrajan*”) that the drawing of an adverse inference must (at [20]):

depend on the circumstances of each case, and it is not the position that in every situation in which a party fails to call a witness or give evidence, an adverse inference must be drawn against that party.

In fact, a review of the decided cases shows that among the circumstances which the court takes into account is the relationship of the absentee witness with the party against whom an adverse inference is sought to be drawn. Thus in *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 (“*Cheong Ghim Fah*”), an adverse inference was drawn against the defence because the witness who failed to turn up was the defendant himself (at [39]–[45]). In *Sudha Natrajan*, the question was whether an adverse inference should

be drawn against the appellant (the defendant in the suit) for not calling her husband to give evidence (at [18]). In *Teng Ah Kow and another v Ho Sek Chiu and others* [1993] 3 SLR(R) 43, the Court of Appeal held that the trial judge erred in drawing an adverse inference against the plaintiff for not calling a material witness who was an employee of the *defendants* (at [28]). Instead, the court considered that the adverse inference should be drawn against the defendants for not calling their employee to give evidence (at [28]). In contrast, in *Min Hong*, which was a suit between the plaintiff-purchaser and the defendant-vendor of land, the court declined to draw an adverse inference against the plaintiff for not calling the real estate agent who handled the transaction to give evidence (at [64]).

53 In the present case, Mr Xing was engaged by Mr Lou to assist with Mr Lou’s PR application. At the same time, Mr Xing was also engaged by Mr Li to introduce potential PR applicants to the Fund. As Mr Xing is an independent third party who is equally accessible to both Mr Lou and Mr Li, his position is analogous to that of the real estate agent in *Min Hong*. In this situation, neither side could rightfully be said to have withheld evidence from the other by not calling Mr Xing.

54 For the reasons given above, I declined to draw an adverse inference against either Mr Lou or Mr Li for Mr Xing’s absence as a witness.

Whether the Representation is a representation of fact

55 Mr Li submitted that the Representation is not actionable because it is not a statement of existing fact but a statement of future intention.¹⁰⁶ In this

¹⁰⁶ DCS at paras 194–199.

regard, Mr Li relied on *Zuraimi bin Mohamed Dahlan and another v Zularnine B Hafiz and another* [2020] SGHC 219 (“*Zuraimi*”) where it was held that a representation that “the plaintiffs would receive dividends on their investments in the Companies, which would be paid annually by electronic transfer” was not actionable as it “pertain[ed] to a future event” (at [9(e)] and [51]).

56 It will be helpful to examine the exact terms of the alleged Representation. In the Statement of Claim, the Representation was described as:¹⁰⁷

... the Fund was a principal-guaranteed fund (exclusive of management fee) in that the Plaintiff could get back the principal of his investment sum (less management fee) after 5 years

57 The written representation in the Subscription Forms relied on by Mr Lou reads:¹⁰⁸

The Investor understands the Fund is an immigration-linked fund which is managed by Sunmax Global Capital Pte. Ltd. The Fund is principal-guaranteed fund [*sic*] (exclusive of management fee). For example, if you invest S\$1,500,000 in our fund, you will get at least of [*sic*] S\$1,237,500 back just after 5 years

The 2009 PPM also contained written representations in similar terms in its executive summary¹⁰⁹ and in section IV, paragraph 1.¹¹⁰

¹⁰⁷ SOC at para 3.

¹⁰⁸ Lou’s AEIC at pp 113 and 116.

¹⁰⁹ Lou’s AEIC at pp 68 and 91.

¹¹⁰ Lou’s AEIC at pp 73 and 96.

58 As for the oral representation made at the Meeting, Mr Lou described it in his AEIC in the following terms:¹¹¹

Li Hua briefed me on the Fund. He told me that the investment sum would be 1.5 million Singapore dollars. The investment period was 5 years, and on the expiry of the 5 years, I would get back at least the 1.5 million dollars less the Fund's management fee. This meant that even in the worst-case scenario where the Fund did not make money with my investment, I would be guaranteed that my principal sum (less management fee) would be intact and returned to me after 5 years. The Mandarin term that Li Hua used was “保本” (*bao ben*), meaning that the principal was guaranteed.

59 Each of the representations referred to at [56]–[58] above is, on closer analysis, a double-barrelled representation in the sense that they each contain the following two elements:

- (a) the Fund was principal-guaranteed (or “保本” (*bao ben*)) (“the First Element”); and
- (b) Mr Lou would get back at least the principal sum of the Investment (less management fee) after five years (“the Second Element”).

60 Mr Li's submission focused on the Second Element and argued that this is a statement of future intention.¹¹² In response, Mr Lou submitted that it is wrong to focus on the Second Element to the exclusion of the First Element, since the operative part of the Representation is in the First Element, while the Second Element merely explained what was meant by “principal-guaranteed”.¹¹³ Mr Lou submitted that the First Element constituted a statement of fact

¹¹¹ Lou's AEIC at para 12.

¹¹² DCS at para 198; DRS at para 118.

¹¹³ Plaintiff's Reply Submissions (“PRS”) at para 53.

concerning a characteristic of the Fund which existed at the time the Representation was made.¹¹⁴ In response, Mr Li merely disputed that the First Element was borne out by the evidence.¹¹⁵ Mr Li's submission did not grapple with whether the First Element, if proved, would constitute a statement of existing fact.¹¹⁶

61 Given my conclusions at [36], [42] and [47] above, I find as a fact that both elements of the Representation had been proved by Mr Lou. I also consider that the presence of the First Element sufficiently distinguishes the present case from the facts of *Zuraimi*. I therefore hold that the First Element is a statement of existing fact concerning how the Fund was designed and structured. Although such a statement carries the implication, as elaborated in the Second Element, that the Fund was making a contractual promise to guarantee the principal, that does not make the statement any less a statement of existing fact concerning a characteristic of the Fund.

Whether Mr Li made the Representation with the intention that it be acted upon by Mr Lou

62 Since I have found that the issue of whether the Fund was a principal-guaranteed fund would have been discussed between Mr Lou and Mr Li at the Meeting, and that Mr Lou would have sought assurance from Mr Li on whether the Fund was a principal-guaranteed fund before deciding to make the Investment (see [44] above), I also find that the Representation, which was made by Mr Li to assure Mr Lou, would have been made by Mr Li with the intention that it be acted upon by Mr Lou.

¹¹⁴ PCS at paras 32–33; PRS at para 49.

¹¹⁵ DRS at paras 13–18.

¹¹⁶ DRS 117–118.

Whether Mr Lou acted upon the Representation

63 I find that Mr Lou acted upon the Representation because he would have withheld his decision to make the Investment until he was assured at the Meeting by Mr Li that the Fund was a principal-guaranteed fund (see [65] below). I also reject Mr Li’s submission that Mr Lou had made the Investment as a result of his reliance on reasons other than the Representation (see [69]–[71] below).

Mr Lou relied upon the Representation because he only made up his mind to make the Investment at the Meeting

64 I reject Mr Li’s submission that Mr Lou had already decided to make the Investment before the Meeting after hearing from Mr Xing that the Fund was a principal-guaranteed fund, and so did not rely on the Representation made at the Meeting by him.¹¹⁷ Mr Lou said in his AEIC that the Meeting was for him to “confirm [his] investment in the Fund” [emphasis added].¹¹⁸ He was questioned on the same during cross-examination.¹¹⁹

- Q. So your position is still that on 10 April 2012, the purpose is for you to confirm your investment in [the Fund]?
- A. What kind of confirmation?
- Q. It’s your evidence, so you have to explain.
- A. I did have my money ready and if, let’s say, everything was discussed and settled at [the Meeting], then I can go ahead with the investment.
- Q. Now, you have been told it’s principal-guaranteed. What other conditions ... you wanted to know or talk about at [the Meeting]?

¹¹⁷ DCS at paras 204–206.

¹¹⁸ Lou’s AEIC at para 9.

¹¹⁹ Transcript, 30 Mar, p 50 lines 24–30, p 51 lines 1–9.

A. There are different varieties. For instance, principal-guaranteed with benefits and also principal-guaranteed with no benefits. Because there are so many different combinations, I must meet [Mr Li] and understand it from him.

Q. So what you wanted to know was what are the other benefits ... of investing in [the Fund]. Is that correct?

A. Yes.

[emphasis added]

65 Evidently, Mr Lou did not perceive the Meeting as a mere formality to finalise the Investment – he had envisioned a *discussion* during the Meeting with Mr Li about what the Fund offered. It was only after “everything was discussed and settled” that Mr Lou would go forward with the Investment. I therefore accept Mr Lou’s submission that he had not yet decided to make the Investment before the Meeting.¹²⁰

66 Furthermore, Mr Xing was only an immigration services agent responsible for introducing Mr Lou to various investment schemes to facilitate his PR application. Whatever Mr Xing had said of those investment schemes, it would only be prudent on the part of Mr Lou to find out more information from persons authorised to represent those investment schemes – that was why the Meeting had been arranged in the first place. I therefore accept Mr Lou’s submission that he would not have decided to make the Investment without first meeting and hearing from a representative of the Fund (*ie*, Mr Li) as regards its details.¹²¹

67 For completeness, I would also add that, even if Mr Lou had relied on Mr Xing’s recommendation in his decision to make the Investment, that would

¹²⁰ PRS at para 62.

¹²¹ PRS at para 68.

not have prevented me from finding that he had acted upon the Representation. As a matter of law, there is no requirement that a misrepresentation must be the sole inducement, and it suffices that the misrepresentation played a real and substantial part and operated on the representee's mind in his decision to enter into the fraudulently induced transaction (*Panatron* ([25] above) at [20]–[23]).

Mr Li's submissions on why Mr Lou could not have relied on the Representation

68 I now turn to consider Mr Li's submissions as to why Mr Lou could not have relied on the Representation.

(1) Allegation that Mr Lou would not have believed the Representation

69 Mr Li submitted that Mr Lou, as a savvy businessman, would not have believed the Representation and so could not have relied on it because it came from a stranger whom he had met for only two hours.¹²² I do not agree with Mr Li's characterisation of himself as a "stranger". Mr Li was not just any stranger who accosted Mr Lou on the streets unsolicited. Mr Li was introduced to Mr Lou by Mr Xing, who had a prior working relationship with Mr Li. Mr Li held credentials as a director of an investment fund which had been approved by a Singapore government agency for the purposes of the GIP. That lent credibility to whatever Mr Li said about the Fund and made it likely that Mr Lou would believe it, and therefore rely on it. Furthermore, from Mr Lou's perspective, Mr Li's oral representations were backed up by the contents of the 2009 PPM and the Subscription Forms.

¹²² DCS at para 215–217.

70 On the contrary, the fact that Mr Lou was a savvy businessman would mean that it was less likely that he would have decided to make the Investment solely on the basis of representations made by Mr Xing, who did not represent the Fund, and more likely that Mr Lou would have deferred any decision to invest till after he had met Mr Li personally.

(2) Allegation that Mr Lou made the Investment because of the Currency Exchange Agreement

71 Mr Li also submitted that Mr Lou made the Investment because of Mr Li's willingness to enter into the Currency Exchange Agreement, and not because he was induced by the Representation.¹²³ I do not accept this submission. In my view, the mere fact that the Currency Exchange Agreement may have been an important factor in Mr Lou's decision to invest does not mean that Mr Lou could not have, at the same time, been induced by the Representation to make the Investment. The two are not mutually exclusive.

72 For the reasons above, I find that Mr Lou had acted upon the Representation in his decision to make the Investment.

Whether Mr Lou had suffered damage by acting upon the Representation

73 For the reasons discussed at [80]–[83] below, it is clear that Mr Lou had suffered damage by acting upon the Representation.

Whether the Representation was made by Mr Li with the knowledge that it was false

74 It is clear that by the time of the Meeting, based on the terms of the 2010 PPM and the Fund's articles of association, the Fund offered no principal-

¹²³ DCS at paras 220–227.

guarantee for its investors. Hence, at the time of the Meeting, Mr Li knew that the Fund was not a principal-guaranteed fund.¹²⁴ Therefore, I find that the Representation was made by Mr Li with the knowledge that it was false.

75 Mr Li submitted that any written representations in the 2009 PPM were made on 1 February 2009, at a time when Mr Li genuinely believed they were true.¹²⁵ This does not assist Mr Li, as the Representation was not made at the time Mr Li drafted the 2009 PPM, but at the time Mr Li presented the 2009 PPM to Mr Lou.

76 For the above reasons, I find that Mr Li is liable to Mr Lou for fraudulent misrepresentation.

Damages

Applicable principles

77 An award of damages for deceit seeks to put the plaintiff into the position he would have been if no false representation had been made. What this means in practical terms may be discerned from *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 where the Court of Appeal cited with approval certain passages from the decision of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (“*Smith New Court*”) (at [21]–[22]). Of particular relevance for present purposes is the statement by Lord Browne-Wilkinson in *Smith New Court* that, in the context of a fraudulently induced transaction involving the purchase of shares (at 267):

¹²⁴ Transcript, 14 Apr, p 59 lines 7–9.

¹²⁵ DCS at para 238.

... the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction.

Of similar relevance is the statement by Lord Steyn in *Smith New Court* that (at 282):

[t]he legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement.

The appropriate measure of damages

78 Applying these principles, the *prima facie* measure of damages would be the \$1.5m which Mr Lou had parted with as a result of relying on the Representation in deciding to make the Investment, less any benefits he had derived from the Redemption.

79 Under the terms of the Redemption, Mr Lou received a cash distribution of \$224,510 (“the Cash Distribution”) and is further entitled to 1,500 shares in a Liquidating Special Purpose Vehicle (“LSPV”) to which the Fund would assign its non-cash assets.¹²⁶ These non-cash assets include shares held by the Fund in six different companies (that were identified in the Redemption Offer Letter) as well as proceeds from two lawsuits.¹²⁷

80 Mr Li submitted that Mr Lou has suffered no loss because the Redemption puts Mr Lou in a better position than he would have been pursuant to the principal-guarantee.¹²⁸ Mr Li further submitted that, as Mr Lou has

¹²⁶ Li’s AEIC at pp 274–278 and 298.

¹²⁷ Li’s AEIC at para 81.

¹²⁸ DCS at para 236; Li’s AEIC at para 82.

adduced no evidence to refute Mr Li's assertion in this regard, Mr Lou has failed to prove that he suffered damage.¹²⁹

81 During cross-examination, Mr Li accepted that:

(a) to date, Mr Lou has not been issued any shares in the LSPV¹³⁰ and there is no fixed timeline as to when the shares in the LSPV would be distributed;¹³¹

(b) to date, none of the Fund's non-cash assets have been transferred to the LSPV;¹³²

(c) to date, no sum has been recovered by the Fund pursuant to judgments given in the lawsuits,¹³³ there is no fixed timeline as to when the litigation proceeds will be distributed and no certainty as to how much of the judgment sums can be recovered;¹³⁴ and

(d) of the six companies listed in the Redemption Offer Letter, the Fund currently still hold shares in only one of them.¹³⁵

In addition, Mr Li has provided no evidence on the value of the shares of any of these six companies.

¹²⁹ DCS at paras 232, 233 and 237.

¹³⁰ Transcript, 15 Apr, p 19 lines 2–25.

¹³¹ Transcript, 15 Apr, p 24 lines 10–12.

¹³² Transcript, 15 Apr, p 22 lines 10–12.

¹³³ Transcript, 15 Apr, p 23 lines 24–29.

¹³⁴ Transcript. 15 Apr, p 24 lines 13–16.

¹³⁵ Transcript, 15 Apr, p 18 lines 5–27.

82 While I agree with Mr Li that Mr Lou bears the legal burden to prove his loss, I am of the view that Mr Lou has adduced sufficient evidence to shift the evidential burden to Mr Li to show that the Redemption would result in Mr Li suffering no loss. The principle applicable here may be illustrated by reference to the English Court of Appeal’s decision in *Parallel Imports (Europe) Ltd v Radivan and another* [2007] EWCA Civ 1373. In that case, the defendant represented to the claimant that 36 specified Ford cars, identified by chasis numbers, were available from a dealer (“Deprince”). In fact, the cars were no longer available from Deprince because the defendant’s company had already bought, taken delivery of and sold those 36 cars. Acting on the defendant’s misrepresentation, the claimant transferred payment for those cars to Deprince. The defendant submitted that the claimant has suffered no loss in transferring the payment to Deprince because Deprince was entitled to keep the payment to set off the claimant’s pre-existing liability to Deprince. This submission succeeded at first instance even though neither side called evidence from Deprince about the alleged pre-existing liability. On appeal, it was held that the trial judge was wrong to place the burden on the claimant to show that Deprince was not entitled to keep the payment. Specifically, the court held that (at [29]):

[the claimant] had proved that a fraudulent misrepresentation was made by [the defendant] to [the claimant], that [the claimant] was induced to make a payment to Deprince that it would not have otherwise made, that the cars paid for were not available and that [the claimant] was not repaid. In our judgment, it was for [the defendant] to adduce evidence showing that [the claimant] had in reality suffered no loss by making the payment, because Deprince was entitled to keep it in respect of [the claimant’s] existing liability to it.

83 In the present case, Mr Lou had proved that he parted with \$1.5m by acting on the Representation and had received nothing from the Redemption beyond the Cash Distribution. In this situation, and especially having regard to

the answers provided by Mr Li in cross-examination as set out at [81] above, the burden falls on Mr Li to show that the Redemption would result in Mr Lou suffering no loss. Mr Li has not discharged this burden.

84 As for the quantification of damages, in the light of the matters alluded to at [81] above, I accept Mr Lou’s submission that any further benefits from the Redemption beyond the Cash Distribution remain uncertain and speculative.¹³⁶ In the circumstances, the appropriate quantification would be to give judgment to Mr Lou for the sum of \$1.5m less the Cash Distribution.

85 However, since there remains a potential for further distributions to be made by the Fund arising from the Redemption, I hold that, should there be further distributions from the Fund, these should be taken into account in order to avoid double recovery. If there are further distributions from the Fund after Mr Li has fully satisfied this judgment, then Mr Li is entitled to be subrogated to Mr Lou’s right to such distributions. If Mr Lou were to receive further distributions before this judgment is fully satisfied, then in the enforcement of this judgment, Mr Lou should give credit to Mr Li for any such further distributions received.

Whether account should be taken of the possibility that Mr Lou might have made loss-making investments in other GIP-approved Funds

86 Finally, Mr Li submitted that Mr Lou would have invested in some other GIP-approved Funds to obtain his PR even if he did not make the Investment, and so would have suffered losses anyway.¹³⁷ He submitted that the onus is on Mr Lou to adduce evidence of what other potential GIP-approved Funds he was

¹³⁶ PCS at paras 115–122.

¹³⁷ DCS at paras 247–248.

considering at that point in time as well as evidence of the extent of losses suffered by such alternative funds,¹³⁸ and that Mr Lou’s failure to do so meant that he had adduced insufficient evidence to prove his alleged loss.¹³⁹ Mr Li has not cited any authority to support this proposition.

87 By this submission, Mr Li was saying that a court assessing damages for deceit should take into account losses from hypothetical transactions which the plaintiff would have entered into in place of the fraudulently induced transaction. This appears to be an issue that has not been decided in any local cases. In England, prior to the decision in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd’s Rep 526 (“*Yam Seng*”), the generally accepted legal position was summarised in *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 20th Ed, 2010) (“*Clerk & Lindsell*”) as follows (at para 18-45):

... where a defendant deceives the claimant into entering a business transaction, the claimant is entitled to recover the loss he suffers as a result, without reference to the fact that he might otherwise have invested his money in some other unprofitable way and lost it anyway.

88 In *Yam Seng*, Leggatt J noted that a number of recent cases had allowed a claimant to recover as damages for fraudulent misrepresentation profits that he would have obtained from hypothetical alternative transactions (at [213]–[216]). He then observed that, in circumstances where the claimant can recover a profit that would have been obtained from some other transaction, it must in principle be equally relevant to take account of any loss (at [217]). Leggatt J went on to state that the evidential burden is on the defendant to show that if the misrepresentation had not been made, the claimant would have incurred a loss

¹³⁸ DCS at paras 248–249.

¹³⁹ DCS at paras 250–251.

(at [217(v)]). In this regard, the defendant has to demonstrate, with a reasonable degree of certainty, that the claimant would probably have suffered a loss from an alternative transaction and the amount of that loss (at [217(vi)]). On the facts, Leggatt J did not reduce the damages on this account as the defendant had not even attempted to quantify what loss the claimant would have suffered under a hypothetical alternative transaction (at [218]).

89 Given the state of the evidence in the present case, it is not necessary for me to decide whether I should adopt the principles articulated by Leggatt J in *Yam Seng* or adhere to the more traditional understanding as summarised in the passage from *Clerk & Lindsell* quoted at [87] above. This is because, even if I were to follow *Yam Seng*, Mr Li would have failed to discharge his burden of showing that Mr Lou would have suffered losses from making alternative investments.

Conclusion

90 For all the reasons above, I allowed Mr Lou's claim against Mr Li and gave judgment in favour of Mr Lou for S\$1,275,490 with interest at 5.33% *per annum* from the date of issue of the writ.

91 I also ordered that costs are to be taxed or fixed if not agreed.

Pang Khang Chau
Judge of the High Court

Chia Foon Yeow (Loo & Partners LLP) for the plaintiff;
Koong Len Sheng, Richard Yeoh Kar Hoe and Eileen Tok See Teng
(David Lim & Partners LLP) for the defendant.
