Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and Others [2006] SGHC 182

Case Number : Suit 592/2005

Decision Date : 01 November 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Sarjit Singh Gill SC, Suhaimi Lazim and Rohan Harith (Shook Lin & Bok) for the plaintiff; Davinder Singh SC, Jaikanth Shankar and Cheryl Tan (Drew & Napier LLC) for the first, second, fourth and fifth defendants; Ajaib Haridass and Srivathsan Rajagopal (Haridass Ho & Partners) for the third defendant

Parties : Raiffeisen Zentralbank Osterreich AG — Archer Daniels Midland Co; Adm-Acti Trade Resources, Inc; Toepfer International-Asia Pte Ltd; Trade Resources LLC; Rush River Trading Cayman Ltd

Tort – Conspiracy – Conspiracy by unlawful means – Whether elements made out

Tort – Misrepresentation – Fraud and deceit – Whether proof of false representation alone sufficient to found action for deceit based on fraudulent misrepresentation – Whether plaintiff induced to enter transactions by alleged representations – Whether plaintiff suffering loss because of misrepresentation

1 November 2006 *Judgment reserved.*

Andrew Ang J:

1 This is an action in deceit by the plaintiff bank against the defendants in respect of alleged fraudulent misrepresentations made by one or more of the defendants which the plaintiff claims it relied upon to its detriment. The plaintiff also alleges that the defendants and other persons unknown (or any two or more of them) conspired by unlawful means (*ie*, the fraudulent misrepresentations) to defraud the plaintiff. The plaintiff is a bank organised and existing under the laws of Austria and operates as a branch in Singapore. The first defendant, Archer Daniels Midland Company ("ADM"), is a company incorporated in the United States. It is one of the largest agribusiness companies in the world and is principally involved in the production and trading of agricultural and related products. The second, third, fourth and fifth defendants are all related to ADM. The second defendant, ADM-ACTI Trade Resources, Inc ("ADM-ACTI"), is a company incorporated in the United States which is 100% owned by ADM. The third defendant, Toepfer International-Asia Pte Ltd ("Toepfer"), is a company incorporated in Singapore and is wholly owned by Alfred C Toepfer International Netherlands BV, which is a subsidiary of ADM. The fourth defendant, Trade Resources LLC, is a company incorporated in the United States and is jointly owned by ADM and a firm known as Global Trade Resources. The fifth defendant, Rush River Trading Cayman Ltd ("RRT"), is a company incorporated in the Cayman Islands and is a subsidiary of ADM.

2 In September 2001, one Mak Wai Cheng ("Katherine Mak"), Structured Trade Finance Asia Manager, Archer Daniels Midland Singapore Pte Ltd ("ADM Singapore"), approached Catherine Low ("Low") and Sharon Tan Su Lin ("Tan") who were the managing director and associate director of commodity finance at the Singapore branch of the plaintiff respectively and proposed the said transactions. Besides corresponding over the phone, Katherine Mak also made a presentation in relation to the proposed structured trade finance transactions to Low and Tan on 17 September 2001 at the plaintiff's office. The plaintiff thereafter entered into four structured trade finance transactions

with Agrograin SA ("Agrograin"), one of the first defendant's affiliated companies, the first defendant and the third defendant between September 2001 and May 2003. The purpose of these structured trade finance transactions was to use ADM's trade flows to raise cheaper working capital financing for the Brazilian subsidiary of Parmalat SpA ("Parmalat"). This method of raising finance meant that the Brazilian subsidiary avoided paying the high interest rates which would otherwise have been payable had the Brazilian subsidiary obtained loans from local banks and the high withholding taxes which would otherwise have been payable had it obtained loans from offshore banks.

3 In ADM's usual trade flow, goods would be purchased from ADM in the United States or its Brazilian subsidiary by one of ADM's affiliated companies such as Agrograin, a wholly-owned subsidiary of ADM based in the Cayman Islands which is used as a re-invoicing unit for booking tax-free profits of the ADM group. The goods would then be further sold by Agrograin to another ADM subsidiary in Cairo or the Netherlands before being sold to the end buyer.

4 Under the four structured trade finance transactions in question, Wishaw Trading SA ("Wishaw"), an Uruguayan company that is 50% owned by Parmalat and 50% owned by Parmalat's Brazilian subsidiary, would be provided with working capital financing by "borrowing" ADM's usual trade flows. Save for some minor variations, the transactions were structured in the following manner: Wishaw would purchase goods from ADM and/or its affiliate on a deferred 360-day payment term by issuing a promissory note in favour of ADM and/or its affiliate, payment of which would be guaranteed by Parmalat. Wishaw would then sell the goods on sight payment terms to RRT thereby obtaining cash. RRT would sell the goods to an end buyer through another ADM affiliate. In respect of these four transactions, the plaintiff agreed with ADM and/or its affiliates to discount, on a without recourse basis, five promissory notes, guaranteed by Parmalat, that had been issued by Wishaw.

5 Three promissory notes were issued in the first and second transactions in favour of Agrograin and/or ADM pursuant to a contract of sale and purchase of specific commodities between Agrograin/ADM as seller and Wishaw as buyer. These promissory notes were redeemed in full upon maturity. One promissory note was issued in each of the third and fourth transactions in favour of Toepfer, pursuant to a contract of sale and purchase of specified commodities between Toepfer as seller and Wishaw as buyer. However, Wishaw and Parmalat defaulted in payment in respect of the third and fourth transactions on account of Parmalat's bankruptcy sometime in December 2003.

6 As earlier stated, the plaintiff has two main claims against the defendants in respect of the third and fourth transactions – one for damages for fraudulent misrepresentation and the other a claim in respect of a conspiracy by unlawful means.

7 As regards the claim in respect of fraudulent misrepresentation, the following issues arise:

(a) What were the representations made by the defendants in respect of the third and fourth transactions and were they false.

(b) If the representations were false, were they made fraudulently.

(c) Whether there was inducement, *ie*:

(i) whether the representations were made with the intention that they should be acted or relied upon by the plaintiff; and

(ii) whether the plaintiff did so act or rely upon the false representations.

(d) Whether the plaintiff suffered loss as a consequence of the misrepresentations.

I shall deal with each of these in turn.

What representations were made and were they false

8 The alleged representations as to the structure of the transactions are pleaded at paras 12 and 21 of the amended statement of claim. The plaintiff says, in respect of the third transaction, that:

> 12. During the period from December 2002 until January 2003, it was represented by the said Katherine Mak on behalf of the Defendants to Sharon Tan, an employee of the Plaintiff, that the structure of the transaction would be as follows:
>
> (a) The 1st Defendant would contract to sell the goods (wheat) to the 3rd Defendant.
>
> (b) The 3rd Defendant would then contract to sell the same goods on deferred payment sums to Wishaw in exchange for a 360-day promissory note in the sum of US$2,999,240.76 from Wishaw in favour of the 3rd Defendant.
>
> (c) The said promissory note would be guaranteed by Parmalat.
>
> (d) The 3rd Defendant would sell the promissory note to the Plaintiff at a discount, and the Plaintiff would look to Wishaw and/or Parmalat for payment of the full amount upon the maturity date as stated in the promissory note.
>
> (e) Wishaw would contract to sell the same goods on sight payment terms to the 5th Defendant.
>
> (f) The 5th Defendant would contract to sell the goods to an end buyer in the Philippines, namely, Pilmico Foods Corporation ("Pilmico"), on sight payment terms.
>
> (g) The 1st Defendant would ship the goods directly to the end buyer in the Philippines on behalf of the 5th Defendant.
>
> (h) Wishaw and/or Parmalat was to pay the Plaintiff the full value of the promissory note at maturity.

9 The alleged representations in respect of the fourth transaction are similarly pleaded in para 21 of the amended statement of claim apart from non-material differences relating to the nature of the goods, the face value of the note and the identity of the end buyer.

10 It is noted that, as pleaded, the alleged representations refer to *contracts to sell* which the defendants argue is to be contrasted with *actual sales*. The particulars of the alleged falsity of the alleged representations are set out in paras 14 and 23 of the amended statement of claim. According to para 14 of the amended statement of claim, the plaintiff's pleaded case is that:

> (a) At the time the representations were made (*ie*, from December 2002 until January 2003) and when the written confirmations of the transactions were sent to the plaintiff (*ie*,

27 December 2002 and 3 January 2003), the defendants knew that the representations made in respect of the trade transactions were false and that the underlying transaction for which the note would be issued was fictitious.

(b) When the offer was made to the plaintiff to enter into the trade finance transaction (*ie*, 27 December 2002 and 3 January 2003) and when the plaintiff agreed to discount the promissory note, there were in fact no goods to be sold to and by Wishaw as represented, because the goods had already been sold by the third defendant to the end buyer directly.

11 Counsel for the first, second, fourth and fifth defendants, Mr Davinder Singh, therefore contends that the plaintiff's pleaded charge of fraud is based, not on the contention (pursued during cross-examination) that title did not actually pass from the third defendant to Wishaw, but, on the allegation as set forth at sub-para 14(a) under "Particulars", that "the 3rd Defendant had already sold the goods directly to Pilmico through contracts which had been entered into in or about September and November 2002".

12 Mr Singh contends that the core of the plaintiff's pleaded case is premised on the erroneous assumptions that:

(a) If more than one contract was entered into in respect of the same goods, then the contracts subsequent to the first in time must be fictitious.

(b) A contract of sale or invoice is fraudulent, "purported" or "fictitious" by virtue of the fact that there is a pre-existing contract under which the same goods have been sold (regardless of when title actually passed).

He contrasts the pleaded case to the one run by the plaintiff at trial and asserts that the pleadings are at odds with what the plaintiff now appears to be saying, *ie*, that at the time the representations were made, the plaintiff was "entitled to assume" that title to the goods would and must pass sequentially from the third defendant to Wishaw and from Wishaw to the fifth defendant, before it finally passed to the end buyer.

13 Mr Singh argues that if such sequential passing of title was indeed the key to the plaintiff's case all along, then it could have been easily made clear in the pleadings. He goes further to assert that if that was indeed the plaintiff's case, it would have been obliged to plead that (although there was no discussion as to the passage of title) there was an implied representation that title would and had to vest in Wishaw in order to effect an actual sale of goods, and that title must pass sequentially down the chain. Similarly, counsel for the third defendant, Mr Ajaib Haridass, argued that the plaintiff did not allude anywhere in the pleadings to any express or implied representation as to the passing of title between the third defendant and Wishaw.

14 Mr Singh points to such omission as clear evidence that the plaintiff has shifted its position, having realised from the defendants' experts' affidavits of evidence-in-chief that the pursuit of its pleaded line would be futile. This argument was also made by Mr Haridass. Mr Singh urges the court to take a strict approach to the pleadings and submits that the court should be slow to imply a representation in the absence of necessity and where it would be unjust to do so.

15 There is some force in both Mr Haridass and Mr Singh's arguments and I agree that the plaintiff's pleadings could have been clearer and more specific. However, I do not think I could go so far as to say that the plaintiff's position at trial was at odds with the pleadings.

16 Sub-paras (h) and (j) of the "Particulars" under para 14 of the amended statement of claim state as follows:

> (h) On or about 16 January 2003, the 3rd Defendant issued an invoice to Wishaw for the sale of the goods, *after title had already passed to Pilmico and after Pilmico had already paid for the said goods*.
>
> …
>
> (j) On or about 20 January 2003, the 5th Defendant issued an invoice to the 3rd Defendant for the purported sale of the same goods to the 5th Defendant, also *after the title in the goods had passed to Pilmico and Pilmico had already paid for the said goods*.
>
> [emphasis added]

Similarly, in sub-paras (i) and (k) of the "Particulars" under para 23 of the amended statement of claim substantially the same points are made. In each instance, there is specific averment that title in the goods had passed to the end buyer and that the end buyer had paid for the goods.

17 The thrust of the plaintiff's case is that the representations in respect of the sale and purchase between the third defendant and Wishaw and between the latter and the fifth defendant were false because the third defendant had no goods to sell to Wishaw to justify the issue of the invoices and the promissory notes. Mr Sarjit Singh Gill therefore submits on their behalf that even if the representation (that there would be a sale by the third defendant to Wishaw) was true at the time it was made (during discussions prior to the approval by the plaintiff's Credit Committee and at the time the trade confirmation was executed) by the time the invoices were issued by the third defendant and presented to the plaintiff together with Wishaw's promissory notes for discounting purposes, the representation was no longer true.

18 Mr Gill points out that para 16(c) of the defence of the first, second, fourth and fifth defendants also envisaged an actual sale by reason of the statements therein:

> (a) that "Wishaw would *purchase* goods from an affiliate of ADM [the first defendant] in consideration of which it would issue a freely transferable 360-day promissory note, guaranteed by Parmalat SpA" [emphasis added]; and
>
> (b) that "Wishaw would obtain funding by promptly *selling* the goods 'at sight' back to an affiliate of ADM, thereby inserting Wishaw's purchase and sale in the original contract string" [emphasis added].

19 Finally, I note that provisions in the contract between the third defendant and Wishaw specifically covered the passing of title. Under the section "Special Condition" in the contract, the passage of title from the third defendant to Wishaw was expressly postponed until after the documents had been accepted by the plaintiff for discounting purposes.

20 In my view, the defendants have not been surprised by the plaintiff's position taken at trial. The plaintiff's contention at paras 14 and 23 of the amended statement of claim that "[t]he underlying trade transaction for which Wishaw would issue the promissory note was fictitious" would have alerted the defendants as to the plaintiff's position.

21 In these circumstances, I do not think it would be unjust to read into the plaintiff's pleadings an averment of an implied representation that title would pass under the contracts in question.

22 The defendants have pointed out the different complaints made by the plaintiff about the following matters:

(a) The plaintiff was allegedly not told, in respect of the third and fourth transactions, that the third defendant had, prior to the contract between the third defendant and Wishaw, contracted to sell the goods to an end buyer ("Pre-Existing Contract Issue").

(b) The plaintiff was allegedly not told that the third and fourth transactions would be circular in that the same related entity (*ie*, the third defendant) would enter into a contract to repurchase the goods from the fifth defendant ("Circularity Issue"). Instead, it understood that these transactions would be sequential. In particular:

(i) in the third transaction, the plaintiff was allegedly told that the fifth defendant would contract to sell goods to a subsidiary of ADM that would in turn contract to sell those goods to the end buyer in Philippines;

(ii) in the fourth transaction, the plaintiff was allegedly told that the fifth defendant would contract to sell goods directly to the end buyer in China;

(iii) in both the third and fourth transactions, the plaintiff was allegedly not told that the fifth defendant would contract to sell the goods back to the third defendant; and

(iv) if the plaintiff had known that the fifth defendant would contract to sell the goods back to the third defendant, the plaintiff would not have agreed to discount the promissory notes.

(c) The defendants had allegedly represented to the plaintiff that the discounted proceeds would be used by the third defendant to pay its supplier for the goods and the sight payment received by Wishaw for the goods from the fifth defendant would be received from payment derived directly from the ultimate end buyer of the goods, as opposed to the discounted proceeds ("Payment Flow Issue").

(d) The defendants had allegedly represented to the plaintiff that there would be "genuine buy-sell" contracts or trade transactions:

(i) between the third defendant and Wishaw;

(ii) between Wishaw and the fifth defendant; and

(iii) between the fifth defendant; and in the case of the third transaction, the ADM subsidiary that the fifth defendant would contract to sell to, and in the case of the fourth transaction, the end buyer in China. By doing so, the plaintiff seems to contend that it was "entitled to assume", in respect of the third and fourth transactions, that:

(A) at the time the plaintiff discounted the promissory notes, the third defendant would have title to the goods to pass to Wishaw, "even for a split second";

(B) the third defendant would pass title to Wishaw, Wishaw would pass title to the fifth defendant, and the fifth defendant would pass title to (in the case of the third transaction), the ADM subsidiary that the fifth defendant would contract to sell to, and (in the case of the fourth transaction), the end buyer in China, "even for a split second"; and

(C) if the plaintiff had known that, at the time it discounted the promissory notes, the third defendant had no title to pass to Wishaw since payment had been made by the end buyers to the third defendant by the time of discounting, and that as a result title did not in fact pass, "even for a split second", down the contract string, *ie*, from the third defendant to Wishaw, Wishaw to the fifth defendant and the fifth defendant to (in the case of the third transaction), the ADM subsidiary that the fifth defendant would contract to sell to, the plaintiff would allegedly not have agreed to discount the promissory notes ("Title Issue").

(e) The defendants had allegedly represented to the plaintiff that there would be an "underlying trade transaction" between the third defendant and Wishaw pursuant to which the promissory note would be issued ("Underlying Trade Transaction Issue").

Mr Singh contends that the contentions are baseless as there were simply no representations on any of the five matters above.

23 In my view, ultimately the different complaints resolve into one main contention involving the passing of title, *viz*, that the defendants misrepresented the transactions as being genuine transactions when in truth, title to the goods having passed to the end buyer by the time the sale and purchase between the third defendant and Wishaw was to take place, there were no goods which could be the subject of the transaction. The key issue therefore is that relating to title. Nevertheless, if only to dispose of them, I shall briefly refer to the other issues.

24 In all the transactions at issue, before the plaintiff discounted the promissory notes, it was furnished with, *inter alia*, copies of the bills of lading issued in the underlying trade transaction. These copies of the bills of lading were provided to the plaintiff not because the plaintiff had or wanted any interest in the goods but simply to evidence that there was an underlying shipment of goods, a transaction to be "borrowed". The following would have been clear to the plaintiff from the face of the copies of the bills of lading:

(a) In respect of the third transaction, the goods were shipped on board the vessel *M/V Great Prestige* from Minneapolis, USA, and were bound for the Philippines.

(b) In respect of the fourth transaction, the goods were shipped on board the vessel *M/V Feng Shan Hai* from Brazil and were bound for China.

(c) The "notify party" in the third transaction was Pilmico Foods Corporation.

(d) The "notify party" in the fourth transaction was Henan Cereals Oils and Foodstuffs Import and Export Group Corporation Ltd.

(e) The commodities shipped were described as "U.S. No 2 or better Hard Red Winter Wheat" and "U.S. No 2 or better Soft White Wheat" (in the shipment to the Philippines) and "Brazilian Soybeans 2002/2003 Crop" (in the shipment to China).

(f) The quantity of the goods shipped was specifically stated in these bills of lading.

(g) The goods were shipped on, in the case of the shipment to the Philippines, 27 and 28 December 2002, and in the case of the shipment to China, 9 and 10 April 2003.

(h) In both cases, the goods were shipped well before the plaintiff received the copies of the bills of lading.

25 It would have been obvious to any banker with a basic knowledge of trade finance and the function and purpose of bills of lading, particularly given the confirmations that the plaintiff had previously received and executed, that there was already a pre-existing contract in place between the third defendant and the respective end buyers. The defendants' expert, David Norman Hudson, and Peter Thomas Frankl, in their joint expert report at para 81 (which is unchallenged on this point), state as follows:

> When RZB received and executed the confirmations for these transactions, it was obvious from the face of the confirmation, as well as from the associated copies of bills of lading that it received, that the goods had already been shipped to the end-buyer prior to RZB's commitment to discount the notes. There could likewise have been no doubt that such shipment was pursuant to a contract of sale between Toepfer and that end-buyer. That, after all, was the trade flow that Wishaw "borrowed" for purposes of arranging for the buy-sell transactions with ADM-related entities that would result in its raising working capital. No reasonable bank that was knowingly participating in a structured trade finance transaction, as RZB was here, could have considered the existence of a prior contract with the end-buyer a surprise, nor could it have been a reason not to enter into the Transactions.

26 Tan confirmed, under cross-examination by Mr Haridass, that from the trade confirmations, the plaintiff knew that a trade flow had already been selected for discounting purposes and that the original underlying contract of sale had already been entered into. The plaintiff had in fact been informed no later than by the trade confirmation dated 3 January 2003 that the goods for the third transaction were bound for an end buyer in the Philippines, a fact the plaintiff reflected in its own Credit Committee memorandum dated 8 January 2003.

27 Tan was then shown copies of the bills of lading which confirmed and provided a specific identity to the end buyer (Pilmico) in the Philippines. She again confirmed that at the time the plaintiff was asked to consider discounting the promissory note, she believed that the original contract had already been entered into. She repeatedly admitted, during cross-examination, that she knew that from the face of the bills of lading that the goods had been shipped pursuant to pre-existing contracts for sale of the goods.

28 Douglas Chew ("Chew"), general manager of the plaintiff, similarly confirmed, under cross-examination by Mr Haridass, that he believed that at the time the plaintiff was asked to consider discounting the promissory notes, the original contracts with the end buyers for the third and fourth transactions had already been entered into.

29 As Tan and Chew both admitted, goods are not shipped aimlessly without reason. Shipment of goods clearly take place pursuant to contracts of sale between parties. To suggest that the plaintiff thought that the goods in the third transaction were put on board the vessel and shipped to the Philippines without a pre-existing contract of sale is fanciful.

30 With regard to the Circularity Issue, Mr Gill concedes that the question whether or not there

was a sale back to Toepfer is "not really relevant". Accordingly, I shall deal no further with this point. Neither does Mr Gill deal with the Underlying Trade Transaction Issue in his closing submissions. Similarly, the Payment Flow Issue appears to have been dropped and rightly so, it being obvious to me that the payment flow would have been immaterial to the plaintiff in any event.

31 Returning to the Title Issue, as I have already concluded that the plaintiff may be taken to have asserted that there was an implied representation as to the passing of title, I shall now proceed to consider whether the representation was false.

32 It is, I think, undeniable that the representation was untrue. With regard to the third transaction, the invoice was issued by the third defendant to Wishaw on 16 January 2003 and on the same day documents were presented to the plaintiff for discounting of the promissory note issued by Wishaw. The plaintiff agreed to discount the promissory note only on 20 January 2003. However, even before issue of the invoice, the third defendant had, on 9 January 2003, already received payment from the end buyer. Thus, the invoice dated 16 January 2003 issued by the third defendant to Wishaw was for sale of goods which had already been sold to the end buyer.

33 With regard to the fourth transaction, the third defendant issued an invoice dated 22 May 2003 against Wishaw in respect of the purported sale of goods. Together with Wishaw's promissory note issued in payment therefore, documents were presented to the plaintiff for discounting on 22 May 2003. The plaintiff agreed to discount the promissory note on 27 May 2003. However, even before the issue of the invoice, the third defendant had earlier negotiated the letter of credit (issued on behalf of the end buyer) with DZ Bank and the latter had accepted the same on 7 May 2003 and made payment on 22 May 2003. Thus, as in the case of the third transaction, the invoice dated 22 May 2003 issued by the third defendant to Wishaw was for goods which had already been sold to the end buyer.

34 The representations were originally made in September 2001, during discussions between the third defendant's Katherine Mak and the plaintiff's Tan (prior to approval given by the plaintiff's Credit Committee), and again at the respective times when the trade confirmations for the third and fourth transactions were executed.

35 Mr Gill did not deal with the question whether the representations at those times were merely representations as to the future (which were not actionable) or representations as to the intentions of the third defendant in which event, if they were made with knowledge that they were false or without belief that they were true, they could found an action for deceit.

36 Instead, he submitted that even if the representations were true earlier, by the time the invoices were issued by the third defendant to Wishaw and documents were presented to the plaintiff for discounting purposes, the said representations were no longer true. He cited *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at para 6-018 which reads as follows:

> Representations are treated for many purposes as continuing in their effect until the contract between the parties is actually concluded. This is one reason why a statement which is true when made, but which ceases to be true to the knowledge of the representor before the contract is concluded, is treated as a misrepresentation unless the representor informs the representee of the change in circumstances. This principle may have other effects as well. First, as we have just seen, if a representation is made innocently but falsely, and facts later come to the knowledge of the representor which show that the statement was false, a failure to inform the representee of the truth may convert what was originally an innocent misrepresentation into a fraudulent one.

On that basis, provided the change in circumstances was known to the third defendant, its failure to notify the plaintiff of the same when the documents were presented to the plaintiff for discounting in the third and fourth transactions caused its earlier representations to become misrepresentations.

37 This requirement for knowledge on the part of the maker of the representation is also stated in *Clerk & Lindsell on Torts* (Anthony M Dugdale & Michael A Jones gen eds) (Sweet & Maxwell, 19th Ed, 2006) at para 18–16 as follows:

> The tort of deceit is complete only when the representation is acted upon. Where there is an interval between the time when the representation is made and the time when it is acted on, and the representation relates to an existing state of things, the representation is deemed to be repeated throughout the interval. Hence if it is false to the maker's knowledge at the time when it is relied on there will be a deceit at that time.
>
> Thus if, during the time between the making of the representation and the claimant acting upon it, the defendant discovers it to be false or circumstances change to his knowledge so that it is now untrue, liability may be incurred.

Were the representations made fraudulently?

38 In an action for deceit, it is not enough to establish a false representation. It must also be proved that the representation was made with knowledge that it was false or without belief in its truth. The leading case on point is the House of Lords' decision in *Derry v Peek* (1889) 14 AC 337 (followed by our Court of Appeal in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405) where Lord Herschell said at 374:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. *Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth*. [emphasis added]

39 It follows from this that a statement honestly believed to be true, however implausible it may be, is not capable of amounting to fraud. In *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] QB 985, a bank presented a letter of credit to a buyer for payment, despite the fact that it was obvious to any reasonable person that no payment was due under it since the goods had never been shipped. But this fact was not in the mind of the relevant bank officer when he arranged the presentation: it followed that, however casual or naïve he might have been, no claim lay in deceit (*Clerk & Lindsell on Torts* [37] *supra* at para 18-17). The English High Court's finding ([2002] 2 All ER (Comm) 705 at [105]) upheld by the Court of Appeal, was as follows:

> The letters from Milestone and Woralco enclosing the documents were essentially of a routine kind and many such routine communications passed across Mr Francis' desk in the course of each day. Although it can no doubt be said that all letters coming into the bank should be read carefully and their contents fully digested before any action is taken, in practice this does not always happen even in the best-regulated offices. I think it more likely than not that Mr Francis did see one or both of these letters, but I accept his evidence that he did not appreciate the significance of the reference to the bill of lading. *That may have been due to carelessness on his part, but having seen and heard him give evidence I am not persuaded that he allowed the*

documents to be sent to the back office for checking and presentation to Bank Sepah knowing full well that the bills of lading were not genuine. Nor, I should make it clear, am I persuaded that he was reckless in that regard, in the sense that he realised something might be wrong but did not bother to investigate. I accept that the significance of the letter simply failed to register with him. [emphasis added]

40 Dishonesty is the touchstone which distinguishes fraudulent misrepresentation from other forms of misrepresentation. This turns on the intention and belief of the representor. A party complaining of having been misled by a representation to his injury has no remedy in damages under the general law unless the representation was not only false, but fraudulent. See Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("Spencer Bower") at para 98.

41 In deciding whether the representation was fraudulent, the question is not whether the representor honestly believed it to be true in the sense assigned to it by the court, or on an objective consideration of its truth and falsity, but whether he honestly believed it to be true in the sense in which he understood it when it was made. See Spencer Bower at para 101.

42 Belief, not knowledge, is the test. Good faith need not be rational, it may indeed be opposed to reason and good sense, but it must be good faith, *ie*, it must be sincere. See Spencer Bower at para 107.

43 Thus, negligence, however gross, is not fraud. Irrational or ill-founded belief is also not fraud. The plaintiff has to show that the belief was so incredible or unreasonable as to infer an absence of honest belief. See Spencer Bower at paras 109–110.

44 The plaintiff alleges a systematic and orchestrated fraud on the part of the defendants. Not only is the accusation backed by no evidence of any intent to deceive, it simply makes no sense. According to the evidence of the third defence witness, Richard P Spycher ("Spycher"), vice president of the first defendant, between 2001 and 2003, the first and third defendants arranged for structured trade finance transactions involving Wishaw promissory notes guaranteed by Parmalat with more than a dozen banks in Singapore, Europe and the United States. If the plaintiff was not interested in entering into these transactions, then the defendants would simply have not done these deals with it. It seems improbable, to say the least, that the defendants would conspire with "persons unknown" to defraud the plaintiff, to gain a meagre profit of about US$40,000 in total for both transactions, when other banks – none of which has lodged any complaint against the first defendant or the third defendant arising out of these transactions – were already doing these transactions with the defendants.

45 In relation to the Title Issue, the evidence of the defendants' factual witnesses, John David Longwell ("Longwell"), formerly employed by the first defendant, Soh Kim Siang ("Soh"), chief executive officer of the third defendant, and Spycher, clearly shows that they honestly believed at all times that title would pass down the chain of contracts from the third defendant to Wishaw to the fifth defendant, and instantaneously back to the third defendant. That was the expectation or intention behind the structure. However, as it turned out in the third and fourth transaction, the end buyer made payment to the third defendant prior to the discounting of the promissory note by the plaintiff. That was unfortunate. In my view, while it might have been an oversight, it was certainly not fraudulent.

46 As was explained by Spycher, Longwell and Soh, the defendants honestly believed that the issue of title or the passage of title was completely irrelevant to the plaintiff. The plaintiff was

concerned only about the validity of the promissory notes and the guarantee. The intention behind the structure was that title would pass from the third defendant to Wishaw to the fifth defendant and instantaneously back to the third defendant. The defendants tried to ensure that there were "live" flows by choosing shipments with a long voyage or transit time. Although the structure contemplated that title would vest in Wishaw for a split second if discounting were to occur, the fact was that it had no material effect on the transactions. It certainly did not materially affect the plaintiff's position *vis-à-vis* its security. The defendants would have viewed it as an administrative oversight, given their belief that the issues of title or passage of title were completely irrelevant and of no consequence to anyone including the plaintiff.

47 As the defendants have contended, if the plaintiff had for any reason raised any concern about the various timing or sequencing issues that it now says were important, the defendants had other commodity shipments moving at or about the same time frame involving different entities that could have been used instead. There was no reason for the defendants to misrepresent to the plaintiff the details or timing of the particular commodity flows being "borrowed".

48 As for Katherine Mak's evidence, she said, under cross-examination, that she was not familiar with issues as to passage of title and that she did not view title as important in a structured trade finance transaction. She also confirmed that she did not discuss title with Tan.

49 The fact is that the plaintiff did not raise any such concern and it did not consider title issues to be at all material to its decision. For all the emphasis the plaintiff now places upon issues relating to title, passage of title and the timing of the payment by the end buyer, the contemporaneous documents involved are remarkably silent on these issues.

50 In the present action, grave allegations of fraud and conspiracy are levelled against the defendants. This flies in the face of the evidence of its own witness, Tan, who says the defendants acted "in good faith".

51 In my view, the misrepresentation came about because of an accident of timing. There is simply no evidence of fraud or dishonesty on the part of any of the defendants.

Whether there was inducement

52 There are two aspects to proving inducement.

53 First, it is relevant to consider the state of mind of the representor as the plaintiff must establish an intent to induce. The representor is presumed to have so intended once materiality is proved. The evidential burden then shifts to the representor to displace the *prima facie* case. It follows that materiality and inducement are closely related. Conversely, if the subject matter of the misrepresentation was immaterial to the business at hand, the court will normally find that the defendant had no intention to induce in the absence of evidence otherwise.

54 Second, it is relevant of course to consider the representee's state of mind to see whether he altered his position as a result of receiving the representation. It is necessary to show actual inducement. Spencer Bower states as follows at para 116:

> Accordingly, whenever the representee has failed to discharge the burden of establishing that he was *in fact* induced he has failed. He may have relied *solely* on something other than the misrepresentation, his own skill or judgment, his general knowledge of business, faith in the venture, special enquiries, or knowledge of the truth. The representee may not have read the

document containing the misrepresentation; it may not have been addressed to, or intended for him, or for a class of which he was a member; he may not have examined the article so that the active concealment of its defects had no effect on his decision; or it may appear that he was determined to take the risk, whatever it was. [emphasis in original]

55 As may be inferred from the passage above quoted, it is not necessary for the plaintiff to show that he entered into the transactions solely in reliance upon the misrepresentation. *Clerk & Lindsell on Torts* ([37] *supra*) at para 18-32 sets out the position as follows:

> To entitle a claimant to succeed in an action in deceit, he must show that he acted in reliance on the defendant's misrepresentation. If he would have done the same thing even in the absence of it, he will fail. However, the misrepresentation need not have been the sole cause of the claimant acting as he did: provided it substantially contributed to deceive him, that will be enough. If the claimant's mind was partly influenced by the defendant's misstatements the defendant will not be any the less liable because the claimant was also partly influenced by a mistake of his own.

56 As Stephenson LJ said in *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583 at 589:

> [A]s long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing a plaintiff to act, it is a cause of his loss and he relies on it, no matter how strong or how many are the other matters which play their part in inducing him to act.

Inducement is a question of fact and the burden of proving it is at all times on the representee. However, inducement may be inferred from materiality. Spencer Bower states, at para 126, that:

> A representation is material when its tendency, or its natural and probable result, is to induce the representee to alter his position in the manner he did.

57 Where the materiality is patent and the probability of inducement is great, actual inducement may be found with little or no other evidence: *William Smith v David Chadwick* (1884) 9 App Cas 187 *per* Lord Blackburn. *Per contra*, where materiality is in doubt, the representee's burden of proving inducement is not easily discharged.

58 Of the two aspects aforesaid, I shall deal first with the question whether the plaintiff was actually induced to enter into the transactions by the misrepresentations.

Whether the plaintiff relied on the misrepresentations

59 The plaintiff contends that it would not have agreed to enter into the transactions unless there was an underlying trade transaction for which the promissory notes were to be issued. In cross-examination, Chew testified that if he had doubts about the structure of the transactions, he would have rejected it. When questioned whether he would have rejected the transactions because the structure would have rendered the promissory notes invalid, he said he was unable to answer but maintained that "the structure was a necessary element for the bank to start off with". He further stated that the plaintiff would need to have genuine sales.

60 On the other hand, the defendants contend that the plaintiff was not actually induced to enter into the transaction by the alleged misrepresentation. Firstly, they relied on the distinction drawn in *Avon Insurance plc v Swire Fraser Limited* [2000] Lloyd's Rep IR 535 between a factor which is observed or considered by a plaintiff, or even supports or encourages his decision, and a factor which is sufficiently important to be called a real and substantial part of what induced him to enter

into a transaction. In arriving at this distinction, the learned judge relied upon statements made in the English Court of Appeal in *JEB Fasteners Ltd* ([56] *supra*) by Donaldson and Stephenson LJJ. Donaldson LJ put the matter thus (at 588):

> In real life decisions are made on the basis of a complex of assumptions of fact. Some of these may be fundamental to the validity of the decision. 'But for' that assumption, the decision would not be made. Others may be important factors in reaching the decision and collectively, but not individually, fundamental to its validity. Yet others may be subsidiary factors which support or encourage the taking of the decision. If these latter assumptions are falsified in the event, whether individually or collectively, this will be a cause for disappointment to the decision-taker, but will not affect the essential validity of his decision in the sense that if the truth had been known or suspected before the decision was taken, the same decision would still have been made.

Stephenson LJ said this (at 589):

> … But, as long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing a plaintiff to act, it is a cause of his loss and he relies on it, no matter how strong or how many are the other matters which play their part in inducing him to act.
>
> …
>
> … And it is only because the judge complicated the matter by introducing what would have encouraged for what did induce, and so finding reliance where no true reliance was, that he has given counsel for the plaintiffs any real ground for appealing his judgment that the defendants did not cause the plaintiffs' loss.

61 The defendants have gone to great lengths to show that the plaintiff's concern was with the creditworthiness of Parmalat as well as with the validity of the promissory notes and the guarantee but not with the structure of the transactions, the plaintiff not having any security in the goods themselves. They contend that Chew's evidence on what he would have done if he had found out about the differences in structure should be rejected and, likewise, his evidence that he would have sought a legal opinion over the differences in structure to satisfy himself of the validity and enforceability of the promissory notes. The defendants point out that the evidence Chew gave does not accord with the attitude the Credit Committee took when it decided "for commercial reasons" not to obtain its own legal opinion on the promissory notes when it was considering the first transaction.

62 Chew agreed, under cross-examination, that when considering the first transaction the focus of the Credit Committee's deliberation was on whether Parmalat was good for the money and whether the promissory notes and the guarantee were enforceable. He confirmed that the Credit Committee knew that Tan had checked with the Vienna head office about the promissory note that the Singapore branch was going to discount, and Vienna's response was that the Singapore branch was not to rely on the legal opinions received from the Vienna head office.

63 Despite the warnings from the Vienna head office that the Vienna transactions were different and that the Singapore branch had to "structure the appropriate documentation including legal opinions", the Credit Committee made a "commercial decision" not to obtain one. Although Chew denied the suggestion that it was to save legal costs thereby maximising profits, he later conceded that the plaintiff wanted the deal, regardless of the legal risks, in view of the attractive returns.

64 Another indication that the plaintiff's Credit Committee was not concerned about structure or

the alleged differences in structure at all, is shown by the fact that in the diagram drawn by Tan relating to the fourth transaction, she had reflected a sale from the fifth defendant to the end buyer directly, unlike the diagram for the third transaction, where the sale to the end buyer was via an ADM subsidiary. There was no comment or discussion whatsoever about this "difference" in structure between the third and fourth transactions, and Chew described it as a "minor variation" in para 120 of his affidavit of evidence-in-chief. There was no allegation that the alleged "minor variation" was the result of any representation or misrepresentation by the defendants. Hence, the defendants' contention that the plaintiff is being selective and that there is no basis to draw a distinction between the differences complained of and the differences described as "minor variations". The truth is, the alleged differences in structure complained of by the plaintiff were all minor. The structure was simply not important to the plaintiff's Credit Committee and did not materially influence or contribute to its lending decisions when it considered the third and fourth transactions.

65 Looking at all the circumstances, it is evident that the plaintiff certainly did not rely on, nor was it materially influenced by, Katherine Mak's representations as to structure, beyond the core structure that it clearly and correctly understood of back-to-back contracts of purchase and the sale involving Wishaw and ADM-related entities. It was primarily motivated to do the deal for its attractive returns and the positive risk assessment. The plaintiff has not shown, sufficiently or at all, how the matters complained of would have been material if they did not at all affect the validity and enforceability of the promissory notes and the guarantee. This is a critical gap in the plaintiff's case.

66 In fact, during cross-examination, Tan admitted that if the promissory notes and the guarantee were and remained valid, then the case should never have been brought. Similarly, during cross-examination, Chew confirmed that he would "be happy" if the promissory notes and the guarantee were and remained valid and enforceable, regardless of the structure.

67 However, on the second day of his cross-examination, Chew changed his evidence. He took the position that he would have "rejected" the transactions outright even before taking a legal opinion. That change of position (likewise his original position that he would have taken a legal opinion) is hard to believe.

68 In my view, that was an *ex post facto* reconstruction calculated to advance the plaintiff's case. I am emboldened in my conclusion by the joint expert report given on behalf of the defendants as to the material features in the transactions which would have influenced the decision of a reasonable and prudent bank in the plaintiff's position when considering whether to enter into the transactions. These were listed by the defendant's experts as follows:

(a) The purpose of the transactions was to provide working capital financing for the Parmalat group.

(b) The entity to be financed was being inserted as an additional party into an original contract string.

(c) The entity to be financed would receive the financing by buying on deferred terms and on-selling the same goods at sight, so that it will have use of the funds promptly and, in any case, well in advance of its obligation to honour the relevant payment instrument.

(d) The entity to be financed would simultaneously contract to buy from and sell to entities which are affiliates of or otherwise related to each other.

(e) The entity to be financed would not be the importer of record at the final destination of

the goods nor would it have physical possession of the goods, which would instead be shipped directly to the end buyer.

69 I accept the experts' opinion that in structured trade finance transactions, banks would be well aware that, unlike lenders in conventional trade finance, they would acquire no security interest in the commodities shipped in the underlying trade transaction (since the underlying trade transaction was merely being borrowed). As such, the focus of their risk analysis would be confined to:

(a) their willingness to participate in structured trade finance transactions;

(b) the credit risk of the party obtaining financing; and

(c) the debt instrument by which that party's indebtedness is evidence or might have to be enforced.

70 The plaintiff was at all times fully aware that it was not obtaining any security interest in the commodities. The only security the plaintiff obtained was the corporate guarantee of Parmalat. Indeed, the plaintiff itself expressly acknowledged that its only exit opportunities were: "From WT [Wishaw] on maturity of the Promissory Note" and "Recourse to Parmalat, the guarantor".

71 The key risks (and the corresponding mitigating factors) that the plaintiff considered itself exposed to as a result of the transactions were set out in the first credit application. These key risks are equally applicable to the second, third and fourth transaction, since it cannot be disputed that all the four transactions were essentially identical. They are as follows:

(a) Default risk:

Recourse in the event of non-payment by WT is to Parmalat through its guarantee. Parmalat is a financially sound company with annual sales turnover (on consolidated basis) of above US$6,776 [mil] and shareholder equity of US$2,644 [mil]. It enjoys a good market reputation. RZB-Vienna has a strong direct relationship with Parmalat.

(b) Transactional risk:

PN to be discounted is freely transferable and proceeds at maturity are to be domiciled at RBSG's NY account.

Our Vienna office has successfully completed similar transactions with the Parmalat Group. Confidence in such transactions is seen from the US$77 [mil] Revolving Limit for Promissory Notes granted by our Head Office to the Group (see UAF from RZB-Vienna attached).

(c) No legal opinion:

RZB-Vienna has sent us a copy of WT's PN discounted under its Facility and we have found the PN to be exactly the same format as the PN offered to RBSG under this proposed transaction, except for the following difference: RZB-Vienna's PN contains the sentence 'The financing evidenced by this PN is in support of the trade program of exports of Parmalat Latin American subsidiaries.' We feel that this difference is not material as we shall be in receipt of a side letter from WT certifying that the PN covers the financing of shipment of foodstuff from Brazil and/or U.S.

Although RZB-Vienna has advised us to seek independent legal opinion, we feel that our PN is

> not materially different from that of RZB-Vienna's and thus the underlying payment risk is essentially the same. In view of this, we shall not be getting an independent legal opinion but shall simply rely on the legal opinion sent to us by RZB-Vienna from the Uruguay and Italian counsel for its Facility (please see PN and legal opinion sent by RZB-Vienna attached).

It is clear that the plaintiff's risk analysis was focused on the creditworthiness of Parmalat as well as the validity of the promissory notes and the guarantee, for the simple reason that these were the instruments by which it would get repaid.

72 Certain other evidence is material to this case. Tan conceded, under cross-examination, that she did not think the plaintiff was concerned about title at the material time. She further conceded that the Pre-existing Contract Issue, Circularity Issue and Payment Flow Issue were all matters within the contemplation of the plaintiff prior to its agreement to discount the notes. However, it chose to ignore those matters in order to capitalise on the diagrams set out in the Credit Committee memoranda.

73 For all the above reasons, I find that the plaintiff was not induced by the misrepresentations to enter into the third and fourth transactions.

Did the defendants intend to induce the plaintiff to enter into the transactions by the alleged misrepresentations?

74 Having decided as I have that the plaintiff was not induced by the misrepresentations, it is not strictly necessary for me to consider the question. However, for completeness, I should state my views briefly.

75 When the representations were originally made in September 2001 in discussions between Katherine Mak and Tan (prior to approval by the plaintiff's Credit Committee), they must have been intended to be acted upon. However, no suggestion was made by the plaintiff that at that early stage the representations were made with knowledge that they were false or without belief that they were true.

76 The alleged falsity in the representations only came about at a later stage in regard to the third and fourth transactions. Liability is sought to be pinned on the defendants not for the representations made in September 2001 *per se* but for the subsequent failure to inform the plaintiff that the representations were no longer true. As noted earlier, such omission caused the earlier representations to become misrepresentations. The test should therefore be whether the omission was intended to induce the plaintiff to enter into the transactions relying on the earlier representations which had become untrue.

77 It does not appear from the evidence that this was a deliberate suppression of information. I therefore find that there was no intention to induce the plaintiff to enter into the third and fourth transactions by a deliberate suppression of information as to how the structure had changed.

Whether the plaintiff suffered loss as a consequence of the misrepresentations

78 To succeed in its claim, the plaintiff needs to prove that it suffered loss by acting upon the alleged false representations (*Panatron Pte Ltd v Lee Cheow Lee* [38] *supra*). The plaintiff must satisfy the court that the loss it claims it suffered flowed directly from the alleged fraudulent misrepresentations (*Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162). If it fails to do so and leaves the court in real doubt as to whether it has suffered any loss at all, the court

may be obliged to make no award (*CEMP Properties (UK) Limited v Dentsply Research and Development Corporation* [1991] 2 EGLR 202).

79 Proof of damage is essential. The damage must have been caused by an alteration of position induced by the misrepresentation. There must be a causal relationship between the intended inducement, reliance on the misrepresentation, the plaintiff's change of position and the damage to make the misrepresentation actionable (see Spencer Bower [40] *supra*).

80 The case of *Holmes v Jones* (1907) 4 CLR 1692 is instructive. That case was an action by the respondents against the appellants to recover damages for fraudulent misrepresentation inducing a contract and for breach of warranty. The High Court of Australia held that "damage is an essential factor in the cause of action". O'Connor J said at 1709:

> Applying that law to the facts of the case, the only question is, has there been any evidence of this damage? Undoubtedly there is some evidence of damage for a breach of warranty. But the damage to be proved here does not rest on the same principle. Damages for a breach of warranty are given on the principle that, where a person contracts to do something and fails to do it, he must put the other party in the same position as if the thing had been done, so far as money can do it. But where the complaint is that the contract has been induced by a fraudulent misrepresentation, the remedy for that wrong is to put the party, who has been induced to make the contract, as far as possible in the position he would have been in if he had not entered into the contract. To put him into that position he must be recompensed for the damage he has sustained by entering into the contract. In order to ascertain the extent of that damage the whole contract must be looked at. If it should turn out that though in one respect the contract is less beneficial to the other party than it would have been if the representation had been true, yet in other respects it is so profitable that on the whole he loses nothing, no damage has resulted from his entering into the contract and he cannot recover. Thus damage is an essential factor in the cause of action.

Further, Isaacs J held at 1715–1717:

> With regard to the damages the position seems to me perfectly clear. … I shall only refer shortly to a few cases to show the principle in which damages are to be measured in an action of deceit. In *Thom v Bigland* [8 Exch 725 at 731; 155 ER 1544 at 1547] *Parke* B. said:— "It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a fraudulent intention to induce another to act on the [face] of it, and to alter his position to his damage". That is the keynote, the alteration of the position he was in before the action of the defendant which caused him to act to his own detriment. … it seems to me that an action cannot lie at all without loss to the plaintiffs. …
>
> Now, how have the plaintiffs attempted to satisfy that last condition here? They say:— "We bought the station with stock and improvements for £15,000, and we were deceived by a statement that a certain number of the cattle were of certain ages, and if those cattle had been of that number and of those ages we would have been so much to the good; the property would have been worth £2,700 more to us than it actually was." I put this to counsel. Suppose, apart from warranty, the declaration had said that the defendants had fraudulently made a representation as to the number of cattle on a certain property and thereby induced the plaintiffs to buy the property for £10,000 whereas the property was worth £20,000, but if the representation had been true the property would have been worth £30,000, could the plaintiffs succeed? Counsel said, Yes. That is quite foreign to my notions as to the nature of an action for deceit.

81 I therefore consider two questions:

(a) Whether there is a causal link between any loss suffered by the plaintiff and the defendants' alleged misrepresentations.

(b) If so, whether the plaintiff has proved the loss it claims to have suffered.

The claimant in deceit must, of course, show that his loss results from the defendant's misrepresentations. The burden of proving the loss is at all times on him.

82 Assuming *arguendo* that the defendants made certain fraudulent misrepresentations, it is incumbent upon the plaintiff to prove that its loss was caused by these misrepresentations. It is immediately apparent that the situation the plaintiff is in at the moment is not the result of the alleged misrepresentations. By agreeing to discount the promissory notes, the plaintiff had taken a pure corporate risk on Parmalat. Unfortunately for the plaintiff, Parmalat subsequently collapsed and as a result the promissory notes were not repaid. But this has nothing to do with the defendants. Cockburn J's famous pronouncement in *Twycross v Grant* (1877) 2 CPD 469 at 544 is germane to the present case:

> If a man buys a horse, as a racehorse, on the false representation that it has won some great race, while in reality it is a horse of very inferior speed, and he pays ten or twenty times as much as the horse is worth, and after the buyer has got the animal home it dies of some latent disease inherent in its system at the time he bought it, he may claim the entire price he gave; the horse was by reason of the latent mischief worthless when he bought; but if it catches some disease and dies, the buyer cannot claim the entire value of the horse, which he is no longer in a condition to restore, but only the difference between the price he gave and the real value at the time he bought.

83 The case of *Waddell v Blockey* (1879) 4 QBD 678 is also instructive. In that case, the defendant represented to one Lutscher that Indian rupee paper would be a profitable investment. Upon the faith of these representations, Lutscher instructed the defendant to buy for him rupee paper and the defendant purported to buy the rupee paper and forwarded the contract notes to Lutscher. The purchases were completed by Lutscher in the belief that they were *bona fide* made by the defendant on his behalf on the stock exchange. After the purchases, rupee paper rapidly fell in value and ultimately Lutscher sold what had been bought for him by the defendant at a loss. Lutscher subsequently discovered that the representations of the defendant as to the rupee paper were untrue and that the defendant had not bought rupee paper for Lutscher on the stock exchange but had simply transferred to him certain rupee paper belonging to himself. Lutscher then commenced an action against the defendant to recover damages for fraudulent misrepresentation.

84 The court of first instance found as a fact that the defendant had been guilty of a fraudulent misrepresentation and that Lutscher had paid for the rupee paper on the faith of the defendant's representation. The judge held that Lutscher was entitled to recover the difference between the price paid and the price at which he had sold the rupee paper at a loss. The defendant appealed. The Court of Appeal held (at 682) that the damages were excessive on the basis that there was no natural or proximate connection between the wrong done and the damage suffered:

> The plaintiff [Lutscher's trustee in bankruptcy] complains that the insolvent [Lutscher] has been induced by the fraudulent misrepresentation of the defendant to buy rupee paper belonging to the defendant, which he would not otherwise have bought; and the plaintiff asks to be recouped the loss sustained upon the re-sale of such rupee paper through its depreciation in the market

> consequent upon a fall in the value of silver. … There is no natural or proximate connection between the wrong done and the damage suffered. In *Twycross* v. *Grant* [(1877) 2 CPD 469] the thing purchased was worthless, owing to inherent defects existing at the time of the purchase. The plaintiff became a shareholder in a company, which was a dying one, and the fact of his holding his shares until it was dead, was decided by the Court to be no reason for reducing the damages assessed by the jury below the full value paid for the shares. In the present case, on the contrary, the thing purchased had at the time of purchase no inherent defect. There was nothing in it which either necessarily or naturally, or even probably, would lead to any loss. It became deteriorated by reason solely of a cause which subsequently arose. Upon such circumstances the general rule laid down by the Lord Chief Justice [in *Twycross* v *Grant*] would be applicable: "If a man is induced by a misrepresentation to buy an article, and while it is still in his possession it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration, which has arisen from some other supervening cause."

85 Similarly, in the present case, there is no natural and proximate connection between the alleged misrepresentations and the loss the plaintiff presently claims. The plaintiff discounted the promissory note in the third transaction on 21 January 2003 and the promissory note in the fourth transaction on 28 May 2003. At the time, the promissory notes were readily marketable assets. Parmalat paper was highly sought after. According to Spycher's evidence, every note issued by Wishaw in connection with the various other financings which the first and third defendants had arranged with more than a dozen banks in Singapore, Europe and the United States was repaid in a timely fashion. In fact, the plaintiff duly obtained payment at maturity on the promissory notes issued in the first and second transactions without any impediment or complaint.

86 In December 2003, about 11 months after the plaintiff obtained the note issued in the third transaction and more than six months after the plaintiff obtained the note issued in the fourth transaction, news reports indicated that Parmalat faced a series of financial and accounting difficulties. This ultimately resulted in Parmalat's bankruptcy. Until those news reports, the first defendant did not believe that Parmalat was in any financial difficulty. It is unfortunate for the plaintiff that Parmalat collapsed in the manner it did. But that does not entitle the plaintiff to look to the defendants. The plaintiff must stand by its credit assessment. I find that there was no causal link between any loss suffered by the plaintiff and the misrepresentations. Even if I found such a link, there is yet another hurdle the plaintiff has to clear, *ie*, to prove the loss suffered.

Whether the plaintiff has proved loss

87 Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) ("McGregor") at para 41-002 points out an important difference between a measure of damages based on tort principles and one based on contract principles. In the passage, McGregor goes on to say:

> Thus the correct measure of damages in the tort of deceit is an award which serves to put the claimant into the position he would have been in if the representation had not been made to him, and not, as with breach of condition or warranty in contract, into the position he would have been in if the representation had been true. In other words, if the claimant has been induced by the deceit to conclude a contract he is not entitled, as he is in contract, to recover in deceit for the loss of his bargain.

88 It is interesting to observe that in the present case, if the plaintiff had been able to sue in contract, it would nevertheless not have been able to recover a cent. This is because, even if the representations were true, the loss would still have been suffered owing to Parmalat's collapse!

89 In deceit cases, the measure of damages is, in general, the difference between the contract price and the true open market value of the property or asset purchased, valued as at the date of the contract of purchase ("Date of Transaction Rule") (see *Twycross v Grant* ([82] *supra*), *Waddell v Blockey* ([83] *supra*), *Peek v Derry* (1887) 37 Ch D 541 and *McConnel v Wright* [1903] 1 Ch 546).

90 Although the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 acknowledged that the Date of Transaction Rule was only a general rule, Lord Browne-Wilkinson held that in many cases it will be appropriate to value the asset as at the transaction date (at 266):

> In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act.

Lord Browne-Wilkinson elaborated on the situation where it may be appropriate for the Date of Transaction Rule to be departed from (at 261):

> It was common ground that there was one exception to this general rule: where the open market at the transaction date was a false market, in the sense that the price was inflated because of a misrepresentation made to the market generally *by the defendant*, the market value is not decisive: in such circumstances the "true" value as at the transaction date has to be ascertained but with the benefit of hindsight: *McConnel v Wright*. [emphasis in original]

91 The present case is not one which warrants a departure from the Date of Transaction Rule. First, there cannot be any suggestion that the open market at the transaction date was a false market in the sense that the value of the promissory notes was inflated. There is absolutely no evidence before this court that any misrepresentation was made to the market generally about the value of Parmalat.

92 Second, as stated above, the promissory notes were readily marketable assets and the plaintiff has acted on that premise all along. There cannot be any suggestion that the plaintiff was locked into holding the promissory notes as a result of any continuing misrepresentation. There was a significant secondary market for these notes and the plaintiff was free to sell them (which in fact it did, in respect of the note issued in the third transaction). In fact, it was only in December 2003 that the value of the promissory notes declined. But the decision to retain the promissory notes until then was entirely the plaintiff's and had nothing to do with the defendants.

93 Applying the Date of Transaction Rule to the present case, it would be apparent that the plaintiff cannot visit its losses on the defendants. The plaintiff purchased the promissory notes at a discount, *ie*, the price it paid for those notes was significantly less than the open market value of those promissory notes. The plaintiff earned and continues to keep the interest income it earned from the transactions. As the evidence shows, there was a secondary market for a promissory note issued by Wishaw and guaranteed by Parmalat. The plaintiff could thus have sold the notes soon after it obtained them. The plaintiff has not proved its loss.

Conspiracy

94 The plaintiff's action for conspiracy is in respect of a conspiracy by unlawful means.

Conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring the plaintiff, and the act is carried out and the intention achieved: *Quah Kay Tee v Ong & Company Pte Ltd* [1997] 1 SLR 390.

95 The plaintiff pleaded that the defendants and other persons unknown (or any two or more together) conspired, and conspired to defraud the plaintiff. It contends that the agreement between the conspirators need not be in the nature of an express agreement and that the court may infer an agreement from the overt acts (in this case the alleged fraudulent misrepresentations).

96 I agree that such agreement need not be express. Indeed, in the majority of cases, it is unlikely the plaintiff will be in a position to prove any express agreement given the purpose of such agreement. Proof of the combination may instead be by way of inference from the acts of the parties alleged to be conspiring.

97 In this vein, in the case of *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271, it was held (in the headnotes) that:

> The effect of the principal authorities was simply that in order to establish an unlawful means conspiracy, it was necessary to establish an intention to injure the claimant but not a predominant purpose or intention to do so. Although an intention to injure the claimant had to be proved, there was no reason why such an intention could not be inferred from the facts.

98 I therefore do not agree with the defendants' contention that the failure to provide particulars of the dates when, or dates between which, the conspiracy was entered into or continued rendered the pleadings bad.

99 Nevertheless, I agree that the plaintiff has failed to make good its claim in respect of conspiracy. In view of my earlier finding that there was no evidence of fraud or dishonesty on the part of any of the defendants, one essential element of the conspiracy claim is missing, leaving aside the question as to proof of loss. The plaintiff's plea of conspiracy is premised on the alleged fraud. If the plaintiff's claim in deceit fails, the conspiracy plea collapses.

100 For all the foregoing reasons, I give judgment for the defendants and dismiss the plaintiff's action with costs to be taxed unless agreed.