IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 169

Suit No 1238 of 2015

Between

(1) TAN SWEE WAN

(2) KELVIN LOW KENG SIANG

… Plaintiffs

And

JOHNNY LIAN TIAN YONG

… Defendant

And Between

JOHNNY LIAN TIAN YONG

… Plaintiff-in-Counterclaim

And

TAN SWEE WAN

… Defendant-in-Counterclaim

JUDGMENT

[Contract] — [Formation] — [Certainty of terms]

[Contract] — [Misrepresentation] — [Statements of intention]

[Tort] — [Misrepresentation] — [Fraud and deceit]

[Trusts] — [Constructive trusts]

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v
Johnny Lian Tian Yong

[2018] SGHC 169

High Court — Suit No 1238 of 2015
George Wei J
13-16, 19-21 March 2018; 10 April 2018

26 July 2018 Judgment reserved.

George Wei J:

1 This action concerns a project dating back to around middle of 2010 between Tan Swee Wan and Kelvin Low Keng Siang (the "first plaintiff" and "second plaintiff" respectively, and collectively "the plaintiffs") and Johnny Lian Tian Yong ("the defendant"). The project involved developing computer software for use in software asset management and computer systems, with the intention of ultimately listing the company to be set up for the project ("the Project Company") on the NASDAQ Exchange in the United States ("the Project").

2 The plaintiffs' role was to develop the computer software. The defendant's role was essentially to raise funds and to bring in investors. For reasons which I shall discuss in detail later, the plaintiffs withdrew from the Project in or around June 2011. The circumstances leading to their withdrawal are heavily disputed and include alleged issues over the development of the

software, its commercial potential and problems in respect of funding. The defendant's basic position is that because of issues over the state of development of the software and the projected revenue stream, the investor who was supposed to provide the main source of funding for the project decided not to proceed with his investment. The plaintiffs' position is that, at the time of their decision to withdraw from the Project, the defendant concealed the fact that the funds had in fact been raised and the Project was essentially on track. On this basis, the plaintiffs assert they are entitled to claim certain contractual payments.

3 The plaintiffs commenced this suit against the defendant on 3 December 2015. Three alternative causes of action were pleaded:[1]

(a) First, the plaintiffs claim that the defendant breached an oral agreement entered into by the parties sometime in 2010 in respect of the Project ("the Oral Agreement").

(b) Second, the plaintiffs assert that if there was no Oral Agreement, the defendant made fraudulent misrepresentations, thereby inducing the plaintiffs to enter into a subscription agreement ("the Subscription Agreement") in connection with the Project around 24 January 2011.[2]

(c) Third, the plaintiffs claim that sometime in 2010, they reached a "common understanding" or agreement with the defendant concerning the defendant's duties in respect of fund raising. These funds were in fact raised sometime in 2011 by the defendant for the Project but the defendant failed to apply the

1 Statement of Claim (Amendment No 2) ("SOC 2") at paras 15–38.

2 SOC 2 at paras 21–30.

funds in accordance with the common understanding and has failed to provide any account of the monies raised.[3] The Plaintiffs accordingly claim to have suffered loss and damage and to be entitled to an account on the basis of breach of constructive trust.

4 The defendant denies the plaintiffs' allegations and claims. He also brings a counterclaim for a loan totaling S$400,000 made to the first plaintiff sometime in March or April 2011.[4]

5 The trial was held over seven days. A total of four witnesses were called, including the first and second plaintiffs, the defendant, and a witness for the defendant, Mr Chang Meng Heng, from Bizpoint International Pte Ltd ("BPI").

6 I now deliver my judgment, which I shall structure as follows:

(a) Overview of the plaintiffs' case.

(b) Overview of the defendant's case.

(c) The counterclaim.

(d) The decision.

(e) Miscellaneous points.

(f) Conclusion.

7 While I shall begin with the plaintiffs' case and evidence, I shall indicate those points on which there is no substantial dispute between the parties. I will

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3 SOC 2 at para 36.

4 Defence and Counterclaim at para 27.

also touch on some key areas in which the defendant's and the plaintiffs' cases diverge, which will then be elaborated on if necessary in the following section setting out the defendant's case.

Overview of the plaintiffs' case

The background

8 The first plaintiff and the defendant met around 1986 when they were members of the Singapore Police Force.[5] The defendant left the Police Force sometime in 1991 and became a businessman. The first plaintiff remained and thereafter became acquainted with the second plaintiff around May 1997. At this time, the first plaintiff was heading the Computer Crime Branch. The second plaintiff was his subordinate.

9 Sometime in 1998, the first plaintiff introduced the second plaintiff to the defendant so that the second plaintiff might obtain advice on the engagement of a domestic helper. The defendant, after leaving the Police Force in 1991, was involved in various business ventures including that of a domestic helper agency.[6] I note that the first plaintiff's Affidavit of Evidence-in-Chief also makes a passing reference to the defendant as "an agent in a multi-level marketing business".[7] This was not elaborated on in the plaintiffs' evidence and was not specifically touched on in cross-examination. I shall return to this at the end of the judgment.

10 The defendant asserts that he was introduced to the second plaintiff sometime in 2002 (and not 1998), but the parties have no serious disagreement

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5 First plaintiff's Affidavit of Evidence-in-Chief ("AEIC)" at para 3.

6 First plaintiff's AEIC at paras 3–6; second plaintiff's AEIC at para 5.

7 First plaintiff's AEIC at [6].

as to how they became acquainted. There is no dispute that the defendant was the first to leave the Police Force to try his hand in business. As will be examined in more detail later, the defendant has held directorships (executive and non-executive) in many companies involved in a wide range of businesses. It is clear that he is often brought into companies as an investor, usually receiving shares and sometimes being given a non-executive director's position. The monies invested may be his own or sourced from or combined with sums raised from other investors whether in Singapore, China or elsewhere. In other cases, the defendant may also take a more active management role as an executive director, that is, to come on board the company for the purpose of helping to grow the business – possibly to the point where a listing on a recognised stock exchange becomes possible.

11 While the defendant left for the business world in 1991, the first plaintiff remained in the Police Force where he acquired experience in computer forensic criminal investigation. The first plaintiff also acquired a degree in science from the National University of Singapore while with the Police Force.[8] The second plaintiff also appears to have served in the area of investigation of computer crimes.[9] In this way, there is no doubt that, as compared to the defendant, the plaintiffs were far better acquainted and much more familiar with computer systems and computer programming. This forms the backdrop against which the plaintiffs and defendant came together to collaborate for the Project that lies at the heart of this action.[10] That said, I note that while the first plaintiff asserts that he is not familiar with financial matters and simply brought technical skills to the table, I am satisfied that the first plaintiff has greater familiarity and

8 First plaintiff's AEIC at para 7l; Certified Transcript ("CT"), 13 March 2018, p 120 (lines 11–16).

9 First plaintiff's AEIC at para 4.

10 Second plaintiff's AEIC at paras 4–7.

involvement in financial matters than he is prepared to acknowledge. The relevance of this will become clearer later. On the other hand, while it has been suggested that the defendant is more familiar with information technology than he admits, I have the clear impression that he is not an IT aficionado and that his IT knowledge is rather general in nature.

12 The first plaintiff left the Police Force sometime in 1998 and joined Microsoft Singapore for about a year, working in intellectual property enforcement. Thereafter, he joined Seagate for two years followed by a short period at KPMG (forensics and litigation support).[11]

13 By 2001, the first plaintiff and the defendant had become close friends. The second plaintiff did not know the defendant as well as the first plaintiff did, but their relationship was also cordial and they were on friendly terms. In general, it appears that the defendant had much more frequent contact with the first plaintiff as opposed to the second plaintiff. It seems the second plaintiff was based in China for much of the period when certain key discussions or matters transpired between the first plaintiff and defendant. The defendant's evidence, which I accept, is that he mostly left it to the first plaintiff to explain the discussions to the second plaintiff.

14 Unfortunately, as a result of the dispute that subsequently arose over the Project and which led to this law suit, the friendship between the parties has been lost and replaced by considerable animosity.

15 One feature of this case is the lack of contemporaneous documentation to establish, support and corroborate the evidence of the witnesses on many key issues in dispute between the parties. While there are some emails in evidence

[11] CT, 15 March 2018, pp 52 (line14) to 54 (line 8).

(together with their attachments), it seems that many of the discussions between the parties were never recorded or confirmed by minutes or emails. Indeed, as will be seen, the material record on the agreement between the parties in respect of the Project is surprisingly sparse and incomplete given the size of the deal contemplated. The plaintiffs and defendant have explained this lack of documentation by saying that there was a good deal of trust between the parties and that it was not thought necessary to have everything recorded or confirmed in writing. After all, they were friends who helped each other out on personal matters from time to time.[12]

The setting up of Tecbiz

16 Sometime around early 2001, the plaintiffs decided to start their own business together with Mr Ong Cheng Ho ("Mr Ong"), who was also a police investigator, leveraging on their acquired skills in investigating computer crimes. The defendant was invited to join as an investor and to provide general business advice. The plan was to enter the market for computer forensics and detection and prevention of copyright infringement and software piracy.[13] Pursuant to this plan, around August 2001, the first plaintiff incorporated Tecbiz Sherlock Pte Ltd. The company's name was subsequently changed to Tecbiz Frisman Pte Ltd ("Tecbiz"). At the time of incorporation, the first plaintiff held 60% of the shares and the remaining 40% of shares in Tecbiz were held by Mr Ong. The second plaintiff was then still with the Police Force and apparently felt it would be inappropriate for him to hold shares in the company.[14] Subsequently, on 10 October 2001, the defendant invested S$166,667 in Tecbiz and was allotted 33,333 of the shares in return (at S$4 per share).[15]

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12 First plaintiff's AEIC at paras 5, 7 and 12; second plaintiff's AEIC at paras 5 and 10.

13 First plaintiff's AEIC at para 8.

14 First plaintiff's AEIC at para 10.

17 On 16 January 2002, Mr Ong sold his shares in Tecbiz and the second plaintiff (who had now left the Police Force) became a shareholder. The shares in Tecbiz were thus held in the following proportions: the first plaintiff held 45%; the second plaintiff held 25%; and the defendant held 30%.[16] The shareholding in Tecbiz remained in these proportions until April 2011, when the relationship between the plaintiffs and defendant soured.

18 While the defendant was a non-executive director and shareholder in Tecbiz almost from the very start, his role was essentially passive: that of an investor who had a seat at the table, so to speak. He lacked technical expertise in computer software and the operations of Tecbiz were left to the plaintiffs. The defendant did attend board meetings and had sight of company reports, but his evidence was that he was not concerned with the details and that he did not recall much of the matters discussed.

Tecbiz's core business

19 Tecbiz's core business was the provision of forensic IT services to the private sector.[17] These included the examination of computer and IT systems for evidence of wrongdoing, such as the use of pirated software, unauthorised access and appropriation of confidential information.[18] This was the business Tecbiz started and indeed continued with, until the plaintiffs gave up their directorships in 2011. It appears that Microsoft was a customer of Tecbiz's IT forensic services as well.[19]

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15 Defendant's AEIC at [10].

16 Second plaintiff's AEIC at para 9.

17 CT, 15 March 2018, p 58 (lines 6–14).

18 Defendant's AEIC at para 6; first plaintiff's AEIC at para 8.

19 CT, 15 March 2018, pp 58 (line 25) to 59 (line 4).

20 The expertise within Tecbiz eventually extended from forensic examination of computer systems to the development of software programs to assist in the forensic work of Tecbiz.[20] As will be seen, the development of software applications lies at the heart of the dispute between the parties. While the plaintiffs did have knowledge of computer technology, it seems the key person at Tecbiz who led developments in software applications was Mr Tan Kah Leong ("Mr Tan"). Indeed, it appears that Mr Tan did much of the early developmental work on the software package which gave rise to the Project.[21]

21 The evidence is that if Tecbiz wanted to grow the software development side of their business, then aside from capital injections, it might be necessary to expand their team of programmers and software engineers.[22] This is essentially the backdrop against which I turn to the attempts by Tecbiz to attract new investments in or around 2005 with a view to expanding the business. The eventual "failure" of these early attempts led to the discussions with the defendant and his involvement in fund-raising in late 2010.

Early attempts by Tecbiz to attract investors: Sirius and Spring Seeds

22 According to the defendant, sometime in 2005, Tecbiz decided to attract new investors. To this end, on 1 September 2005, Mr Eugene Wong ("Mr Wong"), who was founder and director of a venture capital investment company, Sirius Venture Consulting Pte Ltd ("Sirius"), was appointed a director of Tecbiz. Subsequently, in September 2006, Sirius and another company, Spring Seeds Pte Ltd ("Spring Seeds") each invested S$300,000 in return for

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20 CT, 15 March 2018, pp 59 (lines 18) to 60 (line 3).

21 CT, 15 March 2018, pp 72 (lines 18–19) and 101 (lines 11–13).

22 CT, 15 March 2018, p 72 (lines 18–19).

shares in Tecbiz.[23] Another new director, Mr Jen Shek Voon ("Mr Jen"), was appointed to represent Spring Seeds' interests.

23 A subscription agreement was signed on 5 September 2006 by Tecbiz, the plaintiffs, the defendant, Sirus, and Spring Seeds. The documentation in evidence for this investment by Sirius and Spring Seeds was substantial and included:

(a) Three "Statutory Declaration(s) for Founders" dated 20 September 2006;[24]

(b) A letter captioned "Allotment of shares in [Tecbiz]" in which the plaintiffs and the defendant gave consent for the allotment of new redeemable convertible preference shares in favour of Spring Seeds and Sirius dated 19 September 2006;[25]

(c) Two directors' resolutions relating to the allotment of redeemable convertible preference shares to Sirius and Spring Seeds;[26]

(d) A subscription agreement dated 5 September 2006 and signed by the parties;[27] and

(e) A Shareholders' Agreement dated 5 September 2006 and signed by the parties.[28]

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23 Defendant's AEIC, JLTY-2, at p 39.

24 Defendant's AEIC, JLTY-2, at pp 36–38.

25 Defendant's AEIC, JLTY-2, at p 39

26 Defendant's AEIC, JLTY-2, at pp 40 – 43.

27 Defendant's AEIC, JLTY-2, at pp 44–84.

28 Defendant's AEIC, JLTY-2, at pp 85–117.

24 On 3 March 2009, Sirius and Spring Seeds both gave notice to redeem their redeemable convertible preference shares. The defendant asserts this was because Tecbiz was unable to fulfil certain milestones in the subscription agreement,[29] but the details are unclear. An email dated 5 January 2010 sent by the first plaintiff to Mr Wong and Mr Jen (copied to the second plaintiff and the defendant) suggests that the 2009 financial year had been "difficult" for Tecbiz because of the global economic downturn, and mentions an unsuccessful "attempted OTC listing in FY 2009".[30] This appears to be a reference to an attempt to list Tecbiz around 2009 in Phillip Securities' Over-the-Counter ("OTC") Board in Singapore, which was unsuccessful or at least was not proceeded with because of the sense that the listing was premature.[31] The email went on to state that 2010 would likely be another difficult year, and that Tecbiz was adopting a strategy of remaining lean and focusing on high margins markets and services. The email concluded with the first plaintiff stating that there was a need to reduce the size of the board of directors because board activity would be "very thin", and respectfully requesting that Mr Wong and Mr Jen resign from the board.[32]

25 Nothing turns on the reason for Spring Seeds and Sirius' withdrawal from Tecbiz in 2009. The point I make, however, is that the first plaintiff appears to be reasonably knowledgeable about finance, investments, venture capital funding, listings and business operations. The first plaintiff is clearly not just a "technical person" (*supra* [11]). It is evident that by 2009, he had considerable business experience of his own and that he was very much

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29 Defendant's AEIC at para 19.

30 Defendant's AEIC at JLTY-4, p 127.

31 First plaintiff's AEIC at para 25.

32 Defendant's AEIC at JLTY-4, p 127.

involved in the engagement with Spring Seeds and Sirius. It does not appear to me that the first plaintiff is "hands-off" when it comes to business and financial arrangements.

The birth of the Solvesam project

26 While there is a lack of clarity over the dates, it appears that sometime around 2005, Tecbiz conceived the idea for developing a new software program or package which had as its objective management of information technology assets, software licences and license compliance. Corporate users needed to comply with the terms of software licences, including licence renewals and restrictions on the number of computers in which the software could be stored and used. Given the large number of software programs a corporate user may need, there was a need to assist companies in managing their licences so as to ensure "proactive compliance with the terms and conditions of these licences".[33] The second plaintiff also explains that assistance on compliance involved obtaining data on the usage information of various software products deployed within the companies and analysing them against the software licence purchase records and entitlements.[34]

27 At the time, Tecbiz was using a software tool called LicenceCare produced by Microsoft in providing software asset management services for customers of Microsoft products,[35] but the tool had "some limitation(s)".[36] Thus, Tecbiz developed its own software, "Solvesam". The first version of Solvesam was developed, and "soft launch[ed]" sometime around 2006.[37] For

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33 First plaintiff's AEIC at para 13.

34 Second plaintiff's AEIC at para 11; CT, 15 March 2018, pp 97 (line 20) to 98 (line 2).

35 CT, 15 March 2018, pp 59 (line 18) to 60 (line 7).

36 CT, 15 March 2018, p 59 (line 20).

convenience, this will be referred to as "SS V1.0" which existed as a server version as well as a thumbdrive version.[38] At the time, the plan was to market it as part of Tecbiz's software asset management service. This involved providing the customer with a complete service package that included accessing and linking up the customer's computers/servers in a manner that would allow Tecbiz to manage the customer's software licences. SS V1.0 was not sold as a standalone product.

28 SS V1.0 was officially launched around March 2007. The plaintiffs' evidence is that it was well received, and was used by Tecbiz in providing software asset management services to significant corporate customers including Thai Airways, Jurong International Pte Ltd and China National Oil Corporation.[39]

29 The plaintiffs assert that by 2011, Tecbiz had begun selling copies of the "enforcement edition" of Solvesam to Microsoft China to assist in conducting raids on companies by checking for evidence of breaches of licence terms and conditions.[40] Evidence of this includes:

(a) A Tecbiz invoice to Microsoft China, 19 May 2011, for installing and setting up Solvesam Enforcement.[41]

(b) A Tecbiz invoice to Microsoft China, 20 January 2011, for 3 sets of Solvesam and 10 USB scanning drives.[42]

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37 Second plaintiff's AEIC at para 12.

38 CT, 16 March 2018, pp 54 (lines 3–8) and 61 (lines 3–5).

39 First plaintiff's AEIC at para 16; second plaintiff's AEIC at para 14.

40 First plaintiff's AEIC at para 21; second plaintiff's AEIC at para 20.

41 Second plaintiff's AEIC at Tab 2, pp 142, 143.

42 Second plaintiff's AEIC at Tab 2, pp 140, 141.

(c) A Tecbiz invoice to Microsoft China, 2 July 2010 for a pilot project for Direct SAM and engagement of customers in SAM process.[43]

30 The defendant was not involved in the development of SS V1.0, but was present at Tecbiz board meetings where SS V1.0 was raised and discussed.[44] For example, on 25 May 2007, the defendant was present at a board meeting during which the first plaintiff updated the board on "the successful development and testing of [SS V1.0]", as well as the fact that Tecbiz had received an invitation to speak on Software Asset Management at a Microsoft Worldwide Partner Conference, and had secured a contract with Thai Airways.[45]

31 While the defendant may not have been aware of the details of SS V1.0 in 2006 and 2007, he would certainly have been generally aware of SS V1.0 and that it was a significant development in Tecbiz's software asset management business.

Further attempts to raise funds between 2008 and 2009

32 With the birth of SS V1.0, Tecbiz was keen to attract investment for the purposes of growing the business with the ultimate goal of securing a listing on a stock exchange. Expansion of SS V1.0 into a fully developed software asset management system would require injection of capital and technical expertise.[46] As will be seen, one major aspect of the parties' plans for Solvesam was to develop a cloud-based version. This would require expensive infrastructure,[47] hence the need for funding.

43 Second plaintiff's AEIC at Tab 2, pp 136, 137.

44 First plaintiff's AEIC at para 15.

45 First plaintiff's AEIC at para 17(a).

46 CT, 15 March 2018, pp 64 (line 4) to 65 (line 8) and p 72 (lines 12–22).

33 It appears this was the reason why Tecbiz considered a listing on Phillip Securities OTC Board in 2009. Consideration was also given in late 2009 to the idea of selling Tecbiz to Deloitte & Touche Financial Advisory Services ("Deloitte"). According to the first plaintiff, the sale did not materialise because among other reasons: (a) the offer price was too low; (b) the defendant would not be part of the business at Deloitte; and (c) Deloitte was only interested in acquiring the forensic investigation business, and not SS V1.0.[48]

34 I pause here to note that while the defendant was a non-executive director of Tecbiz, he appears to have played a fairly important role in discussions and planning of future developments of Tecbiz, at least from the business or financial perspective. That much is clear from the fact that one reason for the decision not to sell Tecbiz's business to Deloitte was that Deloitte was only interested in acquiring Tecbiz's management team which of course excluded the defendant.[49]

Further and planned iterations of SS V1.0

35 From 2009 through to 2010, the parties continued to consider how to develop Tecbiz's business and Solvesam. The plan, as explained in a Tecbiz slide presentation sent to the defendant around 27 August 2010, was to target the China market on account of the large number of IT users in China. To succeed, it would be necessary to develop SS V1.0 into a "Cloud-based" product.[50] It seems the goal was to develop Solvesam into an "IT [a]sset [m]anagement tool to be used for computer maintenance services for the

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47 CT, 15 March 2018, p 65 (lines 3–8).

48 First plaintiff's AEIC at paras 26–27; second plaintiff's AEIC at para 25.

49 First plaintiff's AEIC at para 27.

50 First plaintiff's AEIC, TSW-4, at p 173.

purpose of generating revenue from advertising, group buy and market trend analysis".[51] It was envisioned that this would be achieved by developing SS V1.0 through the following iterations:[52]

(a) Development of a web-based version by October 2010 for a pilot run by Microsoft China clients (this shall be referred to as "SS V1.25").

(b) Development of an enforcement version for sale to Microsoft China in 2011 ("SS V1.25A").[53]

(c) Development of a cloud-based version in 2011 with added services such as updates and security health checks ("SS V2").[54] Aside from some preparatory work, it appears that SS V2 was never completed.[55]

(d) Further development of the cloud-based version in 2012 by adding features and functions such as break/fix services, improving bandwidth and storage capacity for users, and building a PC market trend analysis platform ("SS V3").[56] The overall goal was to reach 5 million users within 5 years. SS V3 was intended to be an "on-demand" and "pay-as-you-use" version of Solvesam for individuals.[57]

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51 First plaintiff's AEIC at p 178.

52 First plaintiff's AEIC at p 173.

53 First plaintiff's AEIC at para 21, second plaintiff's AEIC at para 20; CT, 16 March 2018, pp 75 (line 25) to 76 (line 8).

54 First plaintiff's AEIC at p 173.

55 CT, 15 March 2018, p 66 (lines 18–25).

56 First plaintiff's AEIC at p 173.

57 CT, 16 March 2018, pp 70 (line 7) to 73 (line 5); 2AB pp 871–889.

36 The evidence is that by around early or mid-2011, SS V1.25, the web-based version, existed at least as a demonstration model. Unfortunately, the Solvesam project never developed beyond SS V1.25 since the plaintiffs withdrew from the project in mid-2011 for reasons that will be examined later. The point, however, is that the Solvesam project appears to have developed over numerous discussions into a fairly sophisticated plan which culminated in the hope that SSV3 would have a degree of market penetration such that it would be like a Facebook for China (in terms of the number of user accounts).

Expansion of the defendant's role: raising funds for Solvesam

37 While 2009 was not a good year for Tecbiz, a positive development took place in April 2010 when International Enterprise Singapore offered its assistance in setting up an overseas marketing office in Shanghai, China, under the Internationalisation Capability Development Programme. As a result, Tecbiz established a representative office in China in August 2010 with the second plaintiff as the Chief Representative. The second plaintiff also relocated to China.[58]

38 It is evident that Microsoft was interested in developments in the Solvesam software around 2010, as can be seen from the various invoices referred to at [29] above. According to the plaintiffs, sometime around August 2010, Mr Alex Cooper, Microsoft's general manager in China, even suggested that Tecbiz set up a separate company to develop Solvesam further and suggested that he might be able to assist in finding venture capitalists to invest in the new company.[59] The defendant was informed of this suggestion by email dated 27 August 2010 which included the powerpoint slides mentioned at [35]

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58 First plaintiff's AEIC at para 28; second plaintiff's AEIC at para 26.

59 First plaintiff's AEIC at para 30.

above on how Solvesam could be developed, together with a copy of Mr Cooper's curriculum vitae.[60]

39 The fact that Microsoft China was interested in Solvesam is also clear from the fact that in November 2010, they expressed interest in training sessions on Tecbiz's enforcement tool for Microsoft's technicians and lawyers, as well as training on how to use the software for inspection.[61]

40 In short, the plaintiffs' position is that SS V1.0 had been well received and that the plans to develop SS V.1.25 and beyond had certainly attracted the attention of Microsoft. The plaintiffs also assert that they did not receive complaints from other customers as to the capabilities of the Solvesam software.[62]

41 According to the plaintiffs, the defendant, after being informed of Mr Cooper's proposal, offered to develop his own fund-raising proposal. He advised against having Mr Cooper involved as "it was difficult to work with venture capitalists", and the parties would lose control of the company. The plaintiffs say that although they knew the defendant was a "smooth talker and skilled salesperson", they were keen on his fund-raising proposal because they viewed him as their trusted friend who would have their interests at heart.[63]

42 Several discussions took place between the parties, likely around end August to October 2010. A key assertion of the plaintiffs is that the defendant was an experienced businessman who stressed (essentially boasted of) his

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60 First plaintiff's AEIC at Tab 4, at p 180.

61 Second plaintiff's AEIC, Tab 2, at pp 133–135.

62 First plaintiff's AEIC at para 22; second plaintiff's AEIC at para 21.

63 First plaintiff's AEIC, at para 33; second plaintiff's AEIC at paras 30–31.

ability to raise funds and to bring new start-up companies up to and through to listing on NASDAQ.[64]

43 At around that time, it appears the plaintiffs were also exploring the option of applying for government grants to develop the Solvesam project and expand Tecbiz. When the defendant was informed, the plaintiffs say he discouraged these grant applications and instead stressed his own experience and ability in fundraising.[65]

44 One example which the defendant is said to have raised in this context was his involvement in fund raising and a listing exercise for Techmedia Advertising Inc ("TECM") in the United States. In brief, TECM was allegedly first set up in Singapore as Techmedia Advertising Singapore Pte Ltd. A related company, Techmedia Advertising Mauritius, was set up as the parent of Techmedia Advertising India to carry out media related activities in India and take advantage of tax treaties.[66] The defendant was said to have led the fund-raising exercise with the intention of listing TECM on NASDAQ. According to the plaintiffs, the defendant cited or made references to TECM so as to persuade the plaintiffs that he would be able to lead and drive the fund-raising exercise for the Solvesam project.

45 A key statement which the plaintiffs assert was made by the defendant, and which the plaintiffs claim to have relied on, was that TECM was already listed on NASDAQ. The plaintiffs say the defendant never informed them of any problems that had arisen over fundraising, or the fact that TECM was never listed on NASDAQ, and was instead initially listed on the Over-the-Counter

64 First plaintiff's AEIC at paras 35, 194; second plaintiff's AEIC at para 33.

65 Second plaintiff's AEIC at para 39.

66 First plaintiff's AEIC, Tab 4 at p 196.

Bulletin Board ("OTC BB") in the United States and thereafter "down-graded" to "Over-the-Counter Pink Sheets" ("OTC Pink Sheets").[67] The plaintiffs claim the defendant made this representation prior to the parties coming to an understanding on the defendant's fundraising involvement. They also assert that the defendant reinforced the representations in early 2011 (after the understanding was allegedly reached) by repeating the claim that he had successfully raised funds for TECM which was listed on NASDAQ.[68]

46 The plaintiffs assert that they were impressed by the defendant's success in his fundraising efforts for TECM because they had been informed by the defendant of the TECM fund-raising exercise years earlier. By email dated 18 September 2008, the defendant informed the plaintiffs that TECM was intending to carry out a reverse take-over of a US-listed company in less than 18 months. The plaintiffs were invited to participate by subscribing for shares. The email included slides on TECM and its goal to provide one-stop advertising solutions in whatever appropriate media format in India.[69] The plaintiffs declined the invitation.

47 Leaving aside the fact that TECM was never successfully listed on NASDAQ, the plaintiffs also note the defendant's conviction on 31 March 2014 for an offence under the Securities and Futures Act (Cap 289, 2006 Rev Ed) relating to offering securities without a licence in connection with TECM.[70] The plaintiffs also claim that "various individuals" who had invested in TECM contacted the plaintiffs towards end 2014, complaining about the defendant's failure to list TECM on NASDAQ, the listing of TECM on OTC BB and the

67 First plaintiff's AEIC at paras 37, 66 and 193.

68 First plaintiff's AEIC at para 194(b).

69 First plaintiff's AEIC, Tab 4, at p 196.

70 First plaintiff's AEIC at para 193(a).

subsequent downgrading to OTC Pink Sheets. None of these investors gave evidence and no details were provided as to who these investors were or, indeed, how or why they made contact with the plaintiffs. It is undisputed that the TECM fundraising exercise had no connection with the Solvesam project.

48 The plaintiffs claim that the structure of the fundraising proposal for the Solvesam project bore striking similarities to the fund-raising structure for TECM. The defendant's involvement and the requirement that the defendant must have complete control or responsibility for funds raised from investors, and the alleged goal of listing TECM on NASDAQ was essentially the same as what was proposed for Solvesam project.

49 Thus, the plaintiffs refer to TECM for two reasons. First, because the defendant's claims about his success with TECM is relied on (a) as an actionable misrepresentation; and/or (b) as the basis for a term of the Oral Agreement; and/or (c) as an element of the common understanding reached. Secondly, it appears (although this is less clear) that the plaintiffs raise TECM as similar fact evidence – to support their contention that the defendant never believed or had an intention to carry through with his representations, promises and statements on the Solvesam project.[71]

The understanding and/or agreement between the plaintiffs and the defendant

50 The plaintiffs assert that their discussions with the defendant culminated in an understanding on the defendant's fundraising proposal. Evidence as to the date or period when the understanding was reached was unclear to say the least. No records were made of *any* of the discussions. There is not a single email or

[71] First plaintiff's AEIC at para 196.

communication from either side that purports to capture or summarise the understanding that had been reached. The evidence suggests that many conversations took place during which certain points were raised and consensus reached. The plaintiffs' argument is that by marrying together all the conversations, an oral agreement emerged on the following terms:[72]

(a) The plaintiffs and the defendant would collectively hold 51% of the shares in a company called Solvesam International Pte Ltd ("SIPL") while the remaining shares were to be held by investors sourced from the People's Republic of China.

(b) Once sufficient capital had been raised for the Solvesam project, the plaintiffs and the defendant would procure Tecbiz to transfer the ownership and rights over Solvesam to SIPL.

(c) The ultimate objective of the Solvesam project was to list SIPL on NASDAQ.

(d) The plaintiffs would be responsible for developing the Solvesam software, business development and operations whereas the defendant would be responsible for raising funds from investors.[73]

(e) The fundraising for the Solvesam project would be done in the name of SIPL without any link back to Tecbiz.

(f) The defendant would raise US$20m in funds. The funds were to be under the defendant's control as the defendant told the plaintiffs that this was a key requirement of the potential

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72 SOC 2 at para 15.

73 SOC 2, paras 15(d) and (e); Defendant's closing submissions, paras 12–13.

investors' representative, who allegedly only trusted the defendant to control the funds.

(g) The defendant would procure and arrange for the transfer and disbursement of the funds as follows:

(i) US$900,000 to each of the plaintiffs and defendant;

(ii) US$2.3m as expenses for the fund-raising exercise; and

(iii) US$15m as working capital for the Solvesam project and the new Project Company.

51 I pause to note that while the plaintiffs' pleadings have referred to the above figures as representing the understanding on how the funds raised were to be used and disbursed, it appears that there was an earlier understanding that the plaintiffs would be paid US$1m each whilst only US$2m would be set aside for expenses. I shall return to this below, but make the point that this is clearly not a case where there were just one or two meetings during which all the terms of the agreement were discussed and agreed upon. Instead, it appears that there were likely many meetings over a period of many months on different points.

52 For example, while it is undisputed that SIPL was incorporated on 23 December 2010, it is unclear if the alleged understanding that the investment funds raised had to be under the sole control or responsibility of the defendant was reached before or after that date. Based on the first plaintiff's evidence, it appears that the "understanding" on control over the funds raised was only reached sometime after 7 January 2011 when the plaintiffs were allegedly informed that the investors only trusted the defendant to control the funds.[74] That

[74] First plaintiff's AEIC at paras 46–49; second plaintiff's AEIC at paras 47 and 51.

being so, it appears that the alleged Oral Agreement could only have come into existence sometime in early January 2011 and not in 2010 as pleaded.

53 Indeed, even the term that the plaintiffs and defendant would collectively hold 51% of the shares in SIPL while the remaining was to be held by investors sourced from the People's Republic of China is one which appears to have been raised and "agreed" only in early June 2011.[75]

54 It seems that a new Project Company was thought necessary in order to ensure that the defendant would lead the fund-raising exercise in the name of, and through, the Project Company "without any link back to Tecbiz". At first sight, this term appears to mean that Tecbiz's name was not to appear at all in connection with the raising of funds and the marketing efforts for Solvesam. The first plaintiff states that the parties did not want to include Tecbiz's core business (forensic investigations) in the Solvesam project. That business was to be retained by Tecbiz and only Solvesam was to be transferred to the new Project Company. This way, the risks and rewards from the Solvesam project would be solely confined to the new Project Company, and the profitability of Tecbiz (the core business) would not be affected by or shared with the new investors.[76] On this basis, it would follow that the alleged term (that the fund-raising would be conducted with no links back to Tecbiz) simply meant that SIPL would be the borrower and that Tecbiz would have no legal responsibilities or liabilities for or to SIPL and the Solvesam software. It did not mean that the fact that the Solvesam software originated from Tecbiz had to be masked at all times.[77] The significance of this point will become apparent later.

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75 First plaintiff's AEIC at para 120.

76 First plaintiff's AEIC at para 34; second plaintiff's AEIC at para 32.

77 Certified Transcript, 15 March 2018, p 69, line 22 – p 71, line 10.

The incorporation of the Project Company

55 As mentioned, SIPL was incorporated as the Project Company on 23 December 2010. Shortly thereafter, around 5 January 2011, the plaintiffs became directors and shareholders. There is nothing to suggest that any of the parties were merely non-executive directors. The plaintiffs and defendant were also equal shareholders of SIPL. Later, around 20 July 2011 (after the plaintiffs withdrew from the Solvesam Project), SIPL changed its name to SSI Holdings Pte Ltd ("SSI") for reasons which will be gone into later.

The events in January 2011

56 January 2011 was clearly an important month given that SIPL had just been incorporated. By this time, Tecbiz had established a representative office in China and the second plaintiff had relocated to China. As alluded to earlier, Microsoft China was a user of the enforcement edition of Solvesam software and had indicated its interest in the development of the Solvesam system.

57 In late 2010, the defendant had informed the plaintiffs that he was meeting, or in discussions with, investors in China, but the evidence on who these investors were is thin and hazy, and it seems that at this stage, the defendant had not yet managed to secure any definite or confirmed investments.[78]

58 Then, in January 2011, the defendant informed the plaintiffs that a Chinese fund manager called "Ah Dong" was very keen on the Solvesam project. Ah Dong would represent a group of individual retail investors who would invest in a fund company on the basis that their investments would be

[78] First plaintiff's AEIC at paras 39(a), 44, and 46–49.

channelled to the Solvesam project (*ie*, to SIPL).[79] The plaintiffs were later informed that Ah Dong's real name was "Chi Jiayu" ("Mr Chi").[80]

59 Mr Chi's key requirement was that the funds raised must be under the defendant's control. The plaintiffs understood this to mean that the defendant was to be the custodian of the funds prior to the defendant's transfer of the funds to the Project Company (*ie*, SIPL, *supra* [55]). It did not mean that the defendant was to have full discretion as to how the funds were to be applied, used or disbursed. The funds were to be applied in accordance with the understanding that had been reached between the plaintiffs and the defendant.[81] Indeed, under cross-examination, the defendant also stated that what Mr Chi wanted was for the defendant to be responsible for the funds raised, as opposed to the defendant having total control over the use of the funds for SIPL.[82]

60 Around 10 January 2011, the first plaintiff provided the defendant with a budget/revenue estimate for SIPL's first three years. The estimate of SIPL's costs (including the costs of staff, the office, information technology and legal services) was just under US$20m.[83] The three-year budget estimate is of some significance as it is the same figure that features in the Oral Agreement and the alleged common understanding. I return to this point below.

61 As an aside, it also appears that the defendant, even at this early stage, was considering bringing in another IT company, BPI, into the Solvesam project

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79 First plaintiff's AEIC at para 47; second plaintiff's AEIC at para 45.

80 First plaintiff's AEIC at para 55; second plaintiff's AEIC at para 53.

81 First plaintiff's AEIC at para 49; second plaintiff's AEIC at para 47.

82 CT, 19 March 2018, pp 35 (line 10) to 37 (line 5).

83 First plaintiff's AEIC at Tab 7, pp 368 and 371. Second plaintiff's AEIC at Tab 7, pp 369 and 372.

with the aim of securing a listing on NASDAQ. The plaintiffs claim that sometime in late 2010 or early 2011, the defendant raised the possibility of using SIPL to acquire BPI which was then listed on the Phillip Securities OTC Board in Singapore. According to the plaintiffs, the discussion was brief as the defendant did not yet have any firm proposals on the acquisition of BPI.[84] The relevance of this point will become clearer later.

The Subscription Agreement

62 According to the plaintiffs, the defendant then requested that the first plaintiff prepare a draft of the Subscription Agreement (*supra* [3(b)]). The draft was prepared based on the discussions between the parties and was sent by the first plaintiff to the defendant and the second plaintiff on 19 January 2011. The draft was not prepared by legal counsel apparently because the parties were good friends and trusted each other. Furthermore, the first plaintiff was told, and appears to have accepted, that the Subscription Agreement was more for the investor, Mr Chi, or his fund company, than to regulate the dealings between the plaintiffs and the defendant.[85] The defendant undertook to translate the draft Subscription Agreement into Chinese and to procure Mr Chi's agreement and signature.[86]

63 Before I set out the main provisions of the Subscription Agreement, the following points are noted:

(a) The draft Subscription Agreement, as sent to the defendant on 19 January 2011 for translation and for Mr Chi's agreement, is between SIPL ("the Company"), Mr Chi ("the Investor"), the

84 First plaintiff's AEIC at para 45.

85 CT, 13 March 2018, p 32 (lines 1–9).

86 First plaintiff's AEIC at paras 55 and 56.

plaintiffs and the defendant ("the Founders"). The signature page of this draft provides for (i) a signature for and on behalf of SIPL; and (ii) signatures of Mr Chi, the plaintiffs and the defendant.[87]

(b) It appears that some corrections were made to this draft. These include, for example, alteration of the Investor's shareholding to 30% (instead of 70% as erroneously set out in the first draft).

(c) The execution page that Mr Chi apparently signed is (i) undated; (ii) not witnessed; and (iii) signed by Mr Chi for and on behalf of "Hong Kong Fu Xuan Investment Company Limited" ("HKFXI").[88] There is no independent evidence that the body of the Subscription Agreement had been amended to state that Mr Chi was signing for or on behalf of HKFXI and explaining what was the intended role of HKFXI. That said, Mr Chi had indicated to the defendant his intention to use a fund company as the vehicle for his investment into SIPL and the Solvesam project, and it seems that it was understood that HKFXI was this fund company.[89]

(d) The plaintiffs never had sight of the Subscription Agreement in Chinese that was signed and agreed to by Mr Chi. Only the execution page bearing Mr Chi's signature was sent to them via an email from the defendant on 24 January 2011.[90] According to the first plaintiff, the defendant handled all the interaction with Mr Chi because Mr Chi only trusted the defendant. For this

87 First plaintiff's AEIC at Tab 7, pp 377–381.

88 First plaintiff's AEIC at TAB 8, p 394.

89 CT, 14 March 2018, p 125 (lines 6-10).

90 First plaintiff's AEIC at para 60.

reason, the first plaintiff did not ask for the complete Subscription Agreement signed by Mr Chi.[91] The Subscription Agreement as translated and signed by Mr Chi is also not in evidence.

(e) The plaintiffs and the defendant signed the execution page (which was first signed by Mr Chi) on or about 10 February 2011. The execution page is undated. There is no signature for and on behalf of SIPL.[92]

(f) There is no evidence at all from Mr Chi, as he was not called as a witness.

64 The key provisions of the Subscription Agreement as drafted by first plaintiff and sent to the defendant on 19 January 2011 are as follows:

(a) The preamble states (in brief) that:

(i) SIPL is a private company limited by shares in Singapore with an issued and paid-up share capital of $3000 divided into 3000 ordinary shares.

(ii) Mr Chi, the investor, agreed to subscribe for new ordinary shares in SIPL such that the investor would have 30% of the shareholding of SIPL.

(b) The key terms of the Subscription Agreement (in brief) were:

(i) The investor shall subscribe in cash and SIPL shall issue to the investor new ordinary shares equivalent to 70%

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91 CT, 13 March 2018, p 25, lines 4 – 12, and p 31, line 16.

92 First plaintiff's AEIC at TAB 8, p 396.

(this was later amended to 30%) of the ordinary shares of SIPL in accordance with "Schedule 2".

(ii) The Founders shall procure and ensure that the proceeds from the issue of the new ordinary shares will only be used for the conduct of business and as part of SIPL's working capital.

(iii) Completion shall take place when all events in Schedule 2 had been successfully completed. Schedule 2 set out a "completion timeline" which, in gist, provided that some US$15m was to be paid to SIPL and US$5m paid to the Founders within 6 months of the execution of the Subscription Agreement.

(iv) The Founders undertake with the Investor that they shall *inter alia* procure the Founders to enter into a service agreement with SIPL before the Completion Date, that the Founders will not resign without prior written approval by the Investor while the Investor remains a shareholder and that the Investor shall be appointed as a non-executive director within 2 months of the execution of the Subscription Agreement.

65 There are no other terms or conditions or warranties. For instance, there are no provisions on governing law or dispute resolution, nor any warranties in respect of the Solvesam software. The Subscription Agreement also does not impose any obligations on the Founders to procure the transfer of all rights in the Solvesam software to SIPL.

66 The plaintiffs' position is that the parties entered into the Subscription Agreement with Mr Chi on or about 24 January 2011.[93] This was the date when the defendant by email provided the plaintiffs with copies of the execution page signed by Mr Chi (*supra* [63(d)]). However, it was only on or around 10 February 2011, after the parties had met Mr Chi and his group of investors in Singapore,[94] that the plaintiffs and the defendant signed the execution page. The plaintiffs say this was the first time they had met Mr Chi.

67 I pause to note that, according to the plaintiffs, the original understanding between them and the defendant was that each Founder (*ie*, each of the plaintiffs and the defendant) would receive US$1m ("Founders' Fees") and that US$2m would be set aside to cover expenses. However, upon being informed of substantial expenses incurred by the defendant to meet and entertain Mr Chi, the plaintiffs say they agreed to increase the sum set aside for expenses to US$2.3m and to reduce the Founder's Fees to US$900,000 each.[95]

68 The key provision of the Subscription Agreement relates to payment of the Founders' Fees to the plaintiffs. Under Clause 1, the Investor was to subscribe in cash for new ordinary shares equivalent to 30% of the ordinary shares of SIPL in accordance with Schedule 2. For convenience, I reproduce Schedule 2 below:

Events	**Payment to SIPL for allotment of new ordinary shares (USD)**	**Payment to Founders (USD)**	**Total (USD)**

93 First plaintiff's AEIC at para 58; second plaintiff's AEIC at para 56.

94 First plaintiff's AEIC at para 61.

95 First plaintiff's AEIC at para 63; second plaintiff's AEIC at para 61.

Upon execution of Subscription Agreement	*600,000*	*0*	*600,000*
Within one month of execution of Subscription Agreement	*900,000*	*500,000*	*1,400,000*
Within two months of execution of Subscription Agreement	*3,000,000*	*500,000*	*3,500,000*
Within three months of execution of Subscription Agreement	*3,500,000*	*1,000,000*	*4,500,000*
Within six months of execution of Subscription Agreement	*7,000,000*	*3,000,000*	*10,000,000*
Total	*15,000,000*	*5,000,000*	*20,000,000*

69 The plaintiffs say that under the Subscription Agreement, Mr Chi was obligated to provide funds totalling US$20m. Of this amount, US$15m was to be paid to SIPL in five tranches. This sum represented the working capital that

the defendant agreed to raise for the Solvesam project through his Chinese investors. The remaining US$5m was to be paid to the Founders in four tranches. It appears that the plaintiffs' case is that this sum set out in the Subscription Agreement reflected the understanding and terms of the Oral Agreement between the plaintiffs and the defendant, *ie*, that the Founders would be entitled to receive US$900,000 each and another US$2.3m would allocated for expenses of the fund-raising exercise.[96]

70 I pause here to stress that the word "understanding" as used in the preceding paragraphs is used loosely and as a matter of convenience to refer to the Oral Agreement and/or understanding which the plaintiffs alleged was reached with the defendant in late 2010 or early 2011. As noted, there is a dispute over whether an understanding was reached at all and, if so, whether the understanding ever resulted in a binding Oral Agreement between the plaintiffs and the defendant.

71 I note also that the plaintiffs make reference to a "common understanding" reached between the parties in 2010 and in respect of which they have claimed for breach of constructive trust by the defendant.[97] This "common understanding" is based on three of the points of the Oral Agreement (*supra* [50]):

(a) That the defendant would be responsible for raising the funds from prospective investors from the People's Republic of China;

(b) The funds had to be under the defendant's control because the potential investors' representative only trusted the defendant; and

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96 CT, 13 March 2018, pp 34 (line 18) to 35 (line 19).

97 SOC 2 at [32].

(c) The defendant would procure the eventual transfer and disbursement of the funds (in the manner described at [50(g)] above).

72 The first plaintiff stated that the funds raised in accordance with the Subscription Agreement were to be applied only for the Solvesam project and not for any other purpose, such as the contemplated acquisition of BPI (*supra* [61]).[98] But beyond this, the plaintiffs did not give a very clear picture of how they understood the funds were to be applied under Schedule 2. When questioned under cross-examination as to what would be the position in respect of the Founders' Fees if Mr Chi had only invested or raised some amount less than US$20m, the first plaintiff responded that it was implicit or obvious that in such a case, the Founders' Fees would be proportionally reduced.[99] When queried further on how funds raised would be split under Schedule 2 as between Founders' Fees and costs, the reply was that 60% of each tranche (for example, the first tranche of US$500,000) would be for Founders' Fees and 40% would be applied towards costs. The first plaintiff, however, accepted that this was not provided for in the Subscription Agreement and was based on his "common sense" understanding of Schedule 2.[100]

73 Thus the overall picture, as understood by the plaintiffs, was that if Mr Chi chose to transfer the funds from his investment vehicle to the defendant, the defendant would transfer/allocate the funds received to SIPL and the Founders in accordance with Schedule 2 and the understanding between the plaintiffs and the defendant.

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98 CT, 15 March 2018, p 35 (lines 6–15).

99 CT, 13 March 2018, pp 122 (line 7) to 124 (line 8).

100 CT, 13 March 2018, pp 123 (lines 3–4).

74 The plaintiffs' case is that Mr Chi indeed raised and paid the US$20m, and they were entitled to receive their share of the Founders' Fees and, failing that, to recover damages.[101] The basis for their claim derives from (i) the Oral Agreement; (ii) fraudulent misrepresentation and deceit; and (iii) a constructive trust arising from a common understanding between the parties.

75 However, the evidence that Mr Chi did in fact raise US$20m and that this amount was in fact transferred to the defendant to be transferred to SIPL for the Solvesam project is thin. Indeed, there is no evidence at all that Mr Chi paid any monies to the defendant.

76 Further, while there is evidence that some monies were paid into SIPL's bank accounts (in the manner that I shall describe later), the account statements do not indicate who was the payee or the source of the monies, and many of the deposits were made after the plaintiffs had decided to pull out of the arrangement by divesting their shares in SIPL to the defendant. The total sums paid in are also far below the US$20m that Mr Chi was supposed to raise and invest in SIPL and Solvesam.

77 The plaintiffs, in support of their case, point to the following events or communications that took place between February and March 2011:

(a) An email from the defendant dated 11 February 2011 enclosing a list of software companies listed on NASDAQ. This email is said to have been part of the defendant's plan to lead the plaintiffs to believe that the defendant truly intended to take SIPL through to a NASDAQ listing when in fact the defendant was just "stringing" the plaintiffs along.[102]

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101 First plaintiff's AEIC at para 65; second plaintiff's AEIC at para 63.

(b) An email dated 12 February 2011 from the defendant requesting materials on Solvesam for presentation to potential investors.[103]

(c) A series of emails in February 2011 between the plaintiffs and the defendant on matters relating to the setting up of a subsidiary of SIPL in Suzhou, China and the need to register Solvesam intellectual property ("IP") rights under the Suzhou subsidiary pursuant to regulatory and/or legal requirements of China. Registration was apparently required in connection with Microsoft China's interest in using Solvesam software for law enforcement purposes in China.[104] Funds were needed to set up the Suzhou subsidiary. Because of time constraints, the plaintiffs decided to register the Solvesam software under Tecbiz first and to transfer the IP registration in China to a subsidiary of SIPL later. In this context, the defendant by an email dated 12 February 2011 informed the plaintiffs that "Ah Dong" had arrived in Hong Kong and "would settle our bank acc by next week". The defendant also stated that, if necessary, he would inject some funds to start Solvesam and that he had signed a personal guarantee on the success of Solvesam. It appears the defendant was referring to the fact that he had been required to give a personal guarantee to the investors under Mr Chi.

(d) The defendant raised with the first plaintiff the possibility of SIPL acquiring BPI so as to increase the chances of a successful listing on NASDAQ. This information was passed on by the first

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102 First plaintiff's AEIC at para 66.

103 First plaintiff's AEIC at para 71.

104 First plaintiff's AEIC at paras 67–70.

plaintiff to the second plaintiff. The plaintiffs' position is that the defendant wanted to acquire BPI because time would be required before the fully developed Solvesam software package could be expected to bring in sufficient profits. BPI, on the other hand, was an existing IT company which was already earning revenue but which did not have the resources to expand further.[105]

(e) Further emails were exchanged towards the end of February 2011 between the plaintiffs and defendant on whether to proceed with registration of the Solvesam software in China under Tecbiz.[106] The email exchange appears to have been initiated in this case by the second plaintiff who was concerned because of the pressure from Microsoft China to finalise certification and product registration.[107] The second plaintiff was concerned that the earliest registration could be completed under an SIPL subsidiary in China would be May 2011 and that would be too late. Indeed, by an email dated 26 February 2011, the second plaintiff asked whether the "project is likely to KIV" and if so to let him know so that adjustments could be made.[108] The defendant's response by email was that the project was "on" and that the planned acquisition of BPI (whose projected revenue was US$25m for 2011) would reduce the stress of fulfilling revenues to show to the investors. Some other points made by the defendant in his response included:[109]

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105 First plaintiff's AEIC at para 72; second plaintiff's AEIC at para 70.

106 First plaintiff's AEIC at paras 73–78.

107 Second plaintiff's AEIC at para 71.

108 Second plaintiff's AEIC at para 72.

109 Second plaintiff's AEIC at para 77.

(i) That the defendant was a director and shareholder in the fund company (*ie*, the fund company that Mr Chi was using to raise funds from Chinese investors);

(ii) That the defendant was able to influence the fund company to increase the investment to US$50m, if necessary;

(iii) That the Defendant was good at the capital market and raising investments;

(iv) That Mr Chi and his group had made a lot of money from the defendant in previous deals and they were investing in SIPL based solely on trust and faith in the defendant; and

(v) The plaintiffs needed to be patient and to put their trust in the defendant.

78 The plaintiffs point to the above emails and communications in support of their case that the defendant was still keen on the Solvesam project and SIPL in February 2011. In short, the plaintiffs' case is that the defendant had not given any indication that Mr Chi was not proceeding with his investment or had changed his mind. On the contrary, the impression created was that all was well and that considerable funds would soon be injected into SIPL alongside the projected acquisition of BPI.

79 According to the plaintiffs, they subsequently discovered that there was no evidence that BPI's projected revenue for 2011 was US$25m. Further, the plaintiffs point out that there is no evidence to support the defendant's claim to have provided personal guarantees to the investors under Mr Chi.[110]

The opening of a Hong Kong bank account for SIPL

80 As mentioned, SIPL was incorporated in Singapore in December 2010, while the Subscription Agreement is said to have been entered into around 24 January 2011. It followed that SIPL needed to open bank accounts soon after 24 January 2011 to receive the investment funds and indeed for business operations.

81 It will be recalled that Mr Chi was using a fund company, HKFXI, as his vehicle to receive the monies from the investors. By an email dated 11 March 2011, the defendant (through his assistant) informed the plaintiffs that a Hong Kong bank account for SIPL was to be opened with DBS Bank (Hong Kong) Limited ("DBS Hong Kong") to facilitate the transfer of funds from HKFXI to SIPL. Two directors were required to open the bank account in Hong Kong. The plaintiffs decided that the second plaintiff would open the bank account together with the defendant.[111]

82 The plaintiffs' position is that the defendant was in control of SIPL's bank account in HK. This was in accordance with Mr Chi's requirement that the defendant should have control and be responsible for the investment monies. It seems that although the bank formally required both directors to be signatories for transactions exceeding HK$50,000,[112] the defendant would be able to operate the account on his own for remote transactions as he had possession of the internet banking token.[113]

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110 First plaintiff's AEIC at paras 79–80.

111 First plaintiff's AEIC at paras 84–85.

112 CT, 15 March 2018, p 132 (lines 22–25),

113 CT, 20 March 2018, p 13 (lines 6–22).

83 The second plaintiff, whilst one of the two authorised signatories, never operated the account. Whilst the second plaintiff had an internet banking token, this only enabled him to access the account for viewing purposes.[114] I note there is some evidence that the second plaintiff might not have received his token from DBS. For example, by email dated 13 May 2011, the second plaintiff requested the defendant's assistant to provide a copy of the bank statement of SIPL's DBS Hong Kong account. The statement was needed to apply for a waiver of an office rental in Suzhou. The second plaintiff was, at that time, based in China and since the bank statements were sent to Singapore, he required the assistance of the defendant. It is also clear that the defendant without delay provided copies of the bank statements for the DBS Hong Kong account for April and May 2011 when he was requested to do so. The statements reflected a sum of HK$31,996,200 in the account as at 13 May 2011.[115] There is nothing to suggest that the defendant tried to hide or block the plaintiffs' access to information on SIPL's DBS Hong Kong account.[116]

Developments in March 2011

84 March 2011 was a busy period for the plaintiffs and the defendant. Numerous discussions and communications took place. These largely concerned four main topics: (i) the opening of a bank account for SIPL in Hong Kong to receive the investment funds (as mentioned above); (ii) setting up SIPL's Suzhou office and the registration and certification of the Solvesam software; (iii) presentations and meetings with the Chinese investors in Singapore; and (iv) the intended acquisition of BPI.

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114 First plaintiff's AEIC at para 85; second plaintiff's AEIC at para 84.

115 First plaintiff's AEIC at [101] and [102].

116 Certified Transcript, 13 March 2018, pp 42 (line 12) to 45 (line 10).

85 Given the patchy state of the evidence, a time-line for March 2011 based on the plaintiffs' evidence may be helpful.

(a) 1 March 2011: A test on the Solvesam software was conducted by the Conformance Test Centre for Information Technology Standards. The test summary concluded, *inter alia*, that the sample competently performed all the functions stated in the Solvesam Enforcement User Manual.[117]

(b) 11 March 2011: The defendant informed the Plaintiffs by email (through his assistant) that he would be travelling to Hong Kong to open an account for SIPL with DBS Hong Kong.

(c) 18 March 2011: The second plaintiff requested the defendant to provide the name of the fund company involved in the fund raising exercise.

(d) 19 March 2011: The defendant informs the plaintiffs by email that the fund company in Hong Kong was known as "Xuang Fong" together with the following points:

(i) The fund company had agreed to transfer US$5m to SIPL in connection with the setting up of a subsidiary in Suzhou.[118]

(ii) DBS Hong Kong had conducted due diligence on the source of funds from Xuang Fong.

(iii) Xuang Fong had agreed to open a DBS Hong Kong account at the same branch to facilitate transfers.

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117 First plaintiff's AEIC at para 93.

118 First plaintiff's AEIC at para 87.

(iv) Xuang Fong would be able to complete full financing in a few months.

(v) An office space in Singapore had been identified for SIPL which would be confirmed if the acquisition of BPI was confirmed.

(vi) That listing by year end should be possible if the acquisition of BPI was successful.

(vii) That 120 investors were coming to Singapore on 29 March 2011 and wished to meet the Plaintiffs.

(e) 22 March 2011: A company called Universal Wide Investment Holdings Limited ("UWI") was incorporated in Hong Kong with the defendant and his assistant or associate, Mr Chan Boon Wee, as the founding members and directors. UWI is also known as Xuang Fong.[119]

(f) 23 March 2011: The defendant through his assistant, Mr Chan, requested the first plaintiff to speak on the Solvesam software at a seminar on 30 March 2011 before potential investors in Singapore. The first plaintiff responded by expressing surprise as to why he was asked to speak to investors as he thought the plaintiffs were not supposed to be responsible for raising funds. Nevertheless the first plaintiff spoke at the seminar on Solvesam software.[120]

(g) 23 March 2011: The defendant by email raised the need to hold discussions on the paid-up capital for a Chinese subsidiary in Suzhou.[121]

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119 CT, 19 March 2018, p 96 (lines 5–11).

120 First plaintiff's AEIC at para 90(d).

121 First plaintiff's AEIC at para 95.

(h) 24 March 2011: The second plaintiff by email informed the first plaintiff and the defendant of Microsoft China's urgent demand that the Solvesam product be made available for sale in China.[122] Other points raised by the second plaintiff included the following.

(i) Tecbiz had been registered as the owner of copyright in the Solvesam software.

(ii) Potential activities in April included presentations to various Chinese governmental and judicial bodies as well as registration of Solvesam as a product for marketing and sale in China.

(iii) While some local clients such as Microsoft China were expecting local sales by April 2011, the second plaintiff's impression was that the earliest that the SIPL subsidiary could be registered was April 2011 with completion possibly in June 2011. For this reason, the second plaintiff had revived contacts with some potential resellers who would "import" Solvesam into China.

(iv) That DBS Hong Kong had yet to confirm when SIPL's bank account in Hong Kong would be opened.

(v) That design work would have to commence on a brochure for Solvesam Web (*ie,* SS V.1.25) for Microsoft.

(i) 24 March 2011: The defendant by email sent the plaintiffs a profile of BPI and its subsidiary, Quantum Consultancy Services Pte Ltd ("Quantum") together with information about BPI's auditors and

122 First plaintiff's AEIC at para 97; second plaintiff's AEIC at para 97.

lawyers. The second plaintiff, who was in China, requested for more information on the details of the proposed acquisition, including the percentage share swap, who would be the controlling shareholder after the transaction, the structure of the board of directors and how the deal would affect the understanding reached over the initial allocation of funds.[123]

(j) 31 March 2011: The first plaintiff had a discussion with BPI on the arrangements for the new office premises as well as other details relating to the planned acquisition, such as the corporate structure of SIPL and accounting matters. The first plaintiff's understanding at this stage was that SIPL would buy out all shareholders in BPI and issue new shares in SIPL to BPI shareholders.[124]

(k) End March 2011: The defendant personally provided the first plaintiff with a cheque for S$200,000. According to the first plaintiff, this was pursuant to a request made by the first plaintiff in February 2011 for an advance on his US$900,000 Founders' Fees entitlement.

86 The plaintiffs' case is that the time-line for March 2011 clearly establishes that the defendant was proceeding on the basis of the Oral Agreement and understanding that they had earlier reached. The email of 19 March 2011 allegedly shows that the defendant was proceeding with fundraising for the Solvesam project for SIPL and that he never raised any issues or doubts over the uniqueness, functionality and prospects for Solvesam software.[125]

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123 First plaintiff's AEIC at para 106; second plaintiff's AEIC at para 108.

124 First plaintiff's AEIC at para 107

125 First plaintiff's AEIC at para 89.

87 Further, the plaintiffs take the point that there would be no need to have discussions on setting up the Suzhou subsidiary if the defendant was already harbouring doubts on the viability of the Solvesam project.[126]

88 As will be seen, the defendant's position is quite different. According to the defendant, issues had arisen over the uniqueness and functionality of the Solvesam software and there were doubts over the prospects for SIPL if its success was to be based solely on the Solvesam project. It appears that the defendant's concern was that it would take some time for the Solvesam project to develop into a fully operational cloud platform. Indeed, in answer to questions from the Court, the first plaintiff agreed that to achieve NASDAQ listing, SIPL would need a finished product that was tried and tested. Further developing the product was one thing; whether it was successful to the public was quite a different matter. The first plaintiff's estimate was that it would take about two years to develop the product and that their hope was to go for a NASDAQ listing about a year or so thereafter.[127] The defendant therefore took the view that the acquisition of BPI was necessary to improve the prospects for SIPL. Further, once Mr Chi decided to pull out of the planned US$20m investment (because of his concerns over the Solvesam software), the acquisition and development of BPI became the main goal and not just a supporting business for SIPL.

89 It is clear that during March 2011, the first plaintiff and defendant were moving forward on the acquisition of BPI by SIPL. The second plaintiff, who was in China, was kept aware of the discussions by the first plaintiff. The acquisition of BPI had become a key element in the plan to raise funds for SIPL

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126 First plaintiff's AEIC at para 96.

127 CT, 15 March 2018, pp 72 (line 4) to 73 (line 25).

and the hoped for eventual listing on NASDAQ. Indeed, as mentioned (see [85(d)(v)] above) the defendant informed the plaintiffs that arrangements for office premises in Singapore for SIPL was pegged to the successful acquisition of BPI. While the first plaintiff appeared to have no issue with the planned acquisition BPI, the second plaintiff had requested for more information from time to time (see [85(i)] above).

The first plaintiff sells his Tecbiz shares to the defendant

90 The shareholding of the plaintiffs and the defendant in Tecbiz at the start of 2011 was still as follows:

(a) The first plaintiff held 45%;

(b) The second plaintiff held 25%; and

(c) The defendant held 30%.

91 According to the first plaintiff, sometime around March or April 2011, the defendant requested the first plaintiff to sell him 7.5% of Tecbiz shares so that he would appear to be the "boss" of Tecbiz.[128] The first plaintiff agreed and transferred 7.5% of the shares to the defendant for S$200,000.[129] The defendant now owned 37.5% of Tecbiz, while the first and second plaintiffs owned 37.5% and 25% respectively.

92 I pause to note that while the first plaintiff claims that he sold the shares to the defendant for S$200,000 the documentation on the share transfer (including documents relating to the payment of stamp duty) states the consideration as being S$100,000.[130] The first plaintiff was unable to offer a

128 First plaintiff's AEIC at para 134.

129 CT, 13 March 2018, p 66 (lines 6–7).

satisfactory explanation for this discrepancy, save to offer that he must have failed to notice the error in the transfer documents on the sale price. As will be seen, the defendant's case is that the correct sale price was indeed S$100,000 which was paid to the first plaintiff in cash. The defendant's position is that a separate S$200,000 cheque payment made out by him to the first plaintiff was nothing more than a loan to the first plaintiff.[131] The relevance of this point to the defendant's counterclaim will become clearer shortly.

Acquisition of BPI

93 Evidence as to when the agreement was struck between SIPL and BPI is somewhat unclear. By April 2011, the business plan for SIPL had changed, by which I mean that the original plan to raise funds ofUS$20m to develop the Solvesam software and to achieve a listing of SIPL on NASDAQ had morphed into a business model wherein the acquisition of BPI was going to play a key part. The plan now was for SIPL to buy over BPI's assets and business in exchange for shares in SIPL. Discussions and communications took place between the plaintiffs and the defendant on a draft Business Transfer Agreement ("BTA") with the plaintiffs expressing concerns that the terms were too favourable for BPI.[132]

94 Sometime during April 2011, the defendant apparently informed the plaintiffs that he had already signed a BTA on behalf of SIPL. The plaintiffs were unhappy with the terms and requested negotiations for a supplemental agreement. The defendant carried out negotiations for a supplemental

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130 Defendant's AEIC, JLTY-42, pp 601–602.

131 First plaintiff's AEIC at para 129.

132 First plaintiff's AEIC at para 112.

agreement in May 2011. During this time, the plaintiffs met BPI staff including members of BPI's technical team.

95 It seems that two meetings took place during which there were discussions of Solvesam's functionality and capabilities. A planned demonstration of the existing Solvesam software at the first meeting apparently did not take place because of technical issues. [133]

96 The second meeting (attended only by the second plaintiff) on 20 May 2011 is described as being "useful" and "positive" with an idea discussed to research development of an Appstore hardware box. Apparently, this feature would assist in reaching the goal of SS V3.

97 The second plaintiff states that while BPI staff raised the point that features that SIPL intended to develop for Solvesam were available in the US market, the second plaintiff took this as a positive sign that SIPL was developing the product in the right direction. According to the second plaintiff, the goal was to develop Solvesam with minimal resources and as quickly as possible so that by marketing the next version of Solvesam in China, they would be one of the first to introduce those features to the Chinese market.[134]

98 The plaintiffs' general point, once again, is that there would be no reason for BPI to hold technical discussions with the plaintiffs in May 2011 if SIPL had already decided to abandon the Solvesam project.[135]

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133 CT, 21 March 2018, p 175 (lines 19–24).

134 Second plaintiff's AEIC at para 117.

135 First plaintiff's AEIC at para 118.

99 The negotiations for a supplemental agreement were, however, apparently unsuccessful. The supplemental agreement was never signed.[136] What was left was the BTA entered into by the defendant on behalf of SIPL.

100 In early June 2011, the plaintiffs assert that they reached an agreement with the defendant on how the shares of SIPL were to be allocated between the plaintiffs and the defendant post-acquisition of BPI's business.[137] The points of this agreement are as follows.

(a) The plaintiffs and the defendant would collectively hold 51% shares in SIPL. The remainder of the shares would be held by the investors sourced by Mr Chi as per the Subscription Agreement.

(b) BPI would hold 15% of the 51% shares of the plaintiffs and defendant.

(c) The first and second plaintiffs would each hold 10.33% of the shares in SIPL. The defendant would hold 15.33% of the shares in SIPL so that he retained control, as per the wishes of Mr Chi.

(d) Since the plaintiffs each held 33.33% shares in SIPL at the time, they would each transfer 23% of the shares (690 shares each) to the defendant for transfer to BPI, Mr Chi and the investors. The end result was that the plaintiffs each had a 10.33% share in SIPL.

101 On 6 June 2011, the plaintiffs signed the SIPL directors' resolution and instruments of transfer, transferring 690 shares each to the defendant. The plaintiffs assert that the defendant continued to represent that they would be

136 First plaintiff's AEIC at para 116.

137 First plaintiff's AEIC at para 120 and TSW 12, p 740.

paid the Founders' Fees of US$900,000 each (less S$200,000 for the first plaintiff, as he claims to have received this sum by way of an advance).

102 Further, around 3 June 2011, the second plaintiff requested DBS Hong Kong to provide a reference letter in respect of SIPL's account for the purposes of registering Solvesam International (Suzhou) Co Ltd as a subsidiary for SIPL. The reference letter which was provided around 9 June 2011 stated that the bank balance as at 8 June 2011 was an "eight-figure" sum in Hong Kong dollars.[138]

Requests by the plaintiffs for payment of the Founders' Fees

103 The plaintiffs' case is that between May and June 2011, they raised the issue of the payment of Founders' Fees with the Defendant on two occasions: First, in early May 2011 at a café in Siglap; and secondly, sometime around 20 June 2011 at the St Regis hotel in Singapore. There is, however, no contemporaneous documentary evidence of these discussions.

104 The plaintiffs' evidence is that the defendant did not reject or deny that they were entitled to Founders' Fees. Instead, the defendant is alleged to have essentially adopted stalling tactics by insisting he was too busy to physically attend at SIPL's bank in Hong Kong to arrange for the payments to be made.[139]

Circumstances leading to the plaintiffs' withdrawal from SIPL

105 On 29 June 2011, Tecbiz received an email from a Mr Hu concerning Solvesam and Tecbiz ("the Hu Email").[140] The first plaintiff was concerned as the email set out false or incorrect statements including:

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138 Second plaintiff's AEIC at para 103.

139 First plaintiff's AEIC at para 122.

140 First plaintiff's AEIC at para 140.

(a) That Solvesam was being used by the Singapore Government and government-linked agencies including the Police and a "government airline".

(b) Microsoft had provided 50,000 user accounts for a clinical trial of Solvesam (whereas in truth Microsoft had only provided 500 user accounts).

(c) Solvesam had the capability of revealing the browsing history of users and whether, when and where the user's account had been hacked.

(d) Microsoft had proposed a purchase price of US$80m for Solvesam.

(e) SIPL had applied for 3 patents.

106 The plaintiffs were also concerned because the Hu Email stated that Xuang Fong was the source of the following falsehoods: (a) Tecbiz (not SIPL) was raising funds for the Solvesam project; and (b) Tecbiz (not SIPL) would eventually be listed on NASDAQ. The plaintiffs were also worried that the falsehoods might damage the relationship with Microsoft China.[141]

107 The plaintiffs' fears worsened after the first plaintiff investigated the source of the falsehoods on 29 June 2011 only to discover a blog-post hosted on a Chinese website, http://blog.sina.com.cn/s/blog_779f04da0100q3n9.html, ("the Blog Post") which also made false or misleading statements similar to those set out in the Hu Email.

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[141] First plaintiff's AEIC at paras 145–147.

108 The first plaintiff forwarded a Portable Document Format ("PDF") copy of the Blog Post to the defendant and the second plaintiff and complained in strong language about the falsehoods. The first plaintiff's view was that the defendant was the source of the falsehoods because the website appeared to be connected with Xuang Fong and also made references to TECM and Hu Bei Min Kang Pharmaceutical Limited, both of which were companies which the defendant was involved. The defendant took the position that he had nothing to do with the falsehoods.[142]

109 On 30 June 2011, the first plaintiff replied to sender of the Hu Email, stating, *inter alia*, that Tecbiz was an independent company which had no connections with Xuang Fong/UWI. The first plaintiff also stated that certain stakeholders in Tecbiz had explored the possibility of collaborating with UWI to develop Solvesam through SIPL but that "nothing has been finalised". The first plaintiff's email also set out a list of statements made in the Hu Email which were objected to as being inaccurate.[143]

110 The plaintiffs say the Hu Email and the Blog Post caused them to lose trust in the defendant. Despite the defendant's denials, the plaintiffs took the view that only someone with knowledge of Tecbiz and the Solvesam project would be able to post such falsehoods or half-truths.[144] For example, one of the false or misleading statements was that Solvesam had the capability of revealing the browsing history of users. This was not true. While Solvesam had the ability to determine if the user was using pirated software and to identify the IP address of the user, it could not discover the browsing history of the user. Further, while Microsoft had recommended the Solvesam software on its website and

142 First plaintiff's AEIC at para 148.

143 First plaintiff's AEIC at para 154.

144 First plaintiff's AEIC at paras 157–158.

recommended the software to the Intellectual Property Office of China, there was no Microsoft proposal to purchase Solvesam, let alone one for US$80m.

111 The plaintiffs argue that by virtue of the defendant's alleged dissemination of the falsehoods, he was in repudiatory breach of the understanding and Oral Agreement between the parties that (i) the funds would be raised in the name of SIPL with no link back to Tecbiz; and (ii) SIPL would be eventually listed on NASDAQ.[145] In my view, while the online falsehoods were understandably irritating and worrying to the plaintiffs, it is hard to see how they meant that the defendant was acting in breach of his undertaking or agreement to raise funds with no link back to Tecbiz.

112 The point has been made already that Solvesam did originate from Tecbiz. It was Tecbiz which had an established business and reputation in the market. The plaintiffs wanted to ensure that the core forensic IT business of Tecbiz remained intact and with Tecbiz, and to isolate Tecbiz from the consequences of any legal issues or problems at SIPL. To be sure, a statement that Tecbiz would be listed on NASDAQ and would head the Solvesam project (or words to that effect) would need to be corrected – lest investors were misled. But given the long relationship between the plaintiffs and defendant and all the facts and circumstances, the plaintiffs appear to have been very quick to draw the conclusion that the defendant had no intention to use SIPL as the Project Company for the development of Solvesam and the eventual NASDAQ listing.

113 The plaintiffs say that by around the end of June 2011 they had come to the conclusion that the defendant never intended to act on the representations that he had made to the plaintiffs in late 2010 or early 2011 that he would raise funds for the Solvesam project in SIPL's name and not Tecbiz's; and that he

145 Plaintiffs' closing submissions, para 83.

would list SIPL on NASDAQ. They concluded that the defendant was simply making use of their names and the Solvesam project to "raise funds" and to "subsequently siphon the [f]unds to line his own pockets".[146] That is a serious charge: it is an allegation that the defendant was acting fraudulently from the outset.

Discovery of more online falsehoods

114 The plaintiffs say that in early July 2011 they discovered other websites which had published other half-truths and falsehoods which they believe to have been attributable to the defendant.[147] In brief, these were:

(a) A website hosted at www.pe668.com containing similar half-truths to that contained in the Blog Post.

(b) Another website hosted at www.xiangmantang.com falsely stating that Tecbiz was aiming for a NASDAQ listing in 2012 and that UWI/Xuang Fong had been appointed to develop Tecbiz's initial offerings project.

(c) Telephone conversations between the plaintiffs and a Mr Wang who claimed to represent "Xi An Yongze Network and Technology" which was apparently interested in a partnership with Tecbiz and who was allegedly referred to the plaintiffs by UWI/Xuang Fong.

(d) A website that appeared to be the website of UWI/Xuang Fong which stated the defendant was the Chairman of UWI/Xuang Fong and

146 First plaintiff's AEIC at para 159.

147 First plaintiff's AEIC at paras 160–162.

Mr Chan was the director. The website also referred to TECM as a company listed on NASDAQ.

The plaintiffs resign and withdraw from SIPL

115 In summary, the plaintiffs say that by end June and early July 2011, there was a good deal of confusion over what was happening. Microsoft China was keen on the Solvesam software being launched and made available to its customers and users. The plaintiffs were concerned that the half-truths and confusion would hurt the relationship with Microsoft China. In fact, the plaintiffs say that they were by then convinced that the defendant never intended to use SIPL to develop Solvesam and was simply stringing them along in an elaborate scam.

116 It will be recalled the first plaintiff had more direct contact and discussions with the defendant on SIPL, BPI and the Solvesam project. Indeed, it is clear that the second plaintiff on several occasions asked the first plaintiff and defendant for more information so that he could better understand what was the state of the arrangements.

117 By 1 July 2011, the second plaintiff had decided that he wanted to withdraw from SIPL. On that date, the second plaintiff, by email to the defendant (copying the first plaintiff) sent in his notice of resignation and indicated his total withdrawal from "the Solvesam company including the Singapore and Suzhou companies under Solvesam". In resigning, the second plaintiff referred to (amongst other things) his dissatisfaction over the lack of progress in meetings and his recent discoveries of the online falsehoods. He also stated that "the business approach and work" did not suit him and that he wanted to be removed immediately as shareholder and director of SIPL. The second

plaintiff also asked for details on those who would be assigned to take over his duties so that he could make preparations to hand over the preparatory work and provide them with the necessary information.[148] This included information on the progress of the setting up of the Suzhou office for SIPL and the approval to register SIPL Suzhou's Chinese name.

118 The second plaintiff's resignation took place amidst the plaintiffs' discovery of the various online falsehoods summarised in the previous section. The first plaintiff's position is that sometime around 3 or 4 July 2011, he and the defendant had a heated discussion during which the defendant denied publishing the false information and claimed that he was carrying out his own investigations on who was responsible. The defendant, however, refused to publish corrections on the Tecbiz website until his own investigations were completed. When the question of resignation cropped up, the first plaintiff's position was that if the plaintiffs did resign then (i) the plaintiffs' shares in SIPL would be sold to the defendant; (ii) the Solvesam project could no longer be carried out by SIPL; (iii) SIPL should change its name by removing the word Solvesam; and (iv) that Tecbiz and Solvesam logos as well as images of the plaintiffs were to be taken out of the defendant's presentation materials and websites.[149]

119 I pause to note that the intellectual property rights in the Solvesam software still belonged to Tecbiz. The plaintiffs' position (which the defendant agrees with) was that when they resigned from SIPL, the understanding or agreement reached with the defendant on fundraising and the Solvesam project in late 2010 or early 2011 was over. The plaintiffs had worked hard to develop

148 First plaintiff's AEIC at para 163; second plaintiff's AEIC at para 153.

149 First plaintiff's AEIC at paras 165—166.

Tecbiz and the Solvesam software and upon their resignation, SIPL and its Suzhou subsidiary would have no part or interest in the Solvesam software.[150]

120 The first plaintiff also asserts that when he asked the defendant what he would do with the funds already raised, the defendant's response, which the first plaintiff states he did not believe, was that he would wind down SIPL and return the funds to the investors.[151] The plaintiffs' case is that there is no evidence that the funds were ever returned and that the defendant simply siphoned the funds raised for his personal benefit.[152]

121 On 4 July 2011, the second plaintiff informed the defendant of his resignation as director and Chief Operating Officer of Tecbiz.[153]

122 On 5 July 2011, the first plaintiff received from the defendant the share transfer forms for SIPL. The first plaintiff replied by email to the defendant (copying the second plaintiff) repeating the need for SIPL to change its name and logo by deleting references to Solvesam. Sometime around 5 July 2011, the second plaintiff also informed the first plaintiff of his resignation from Tecbiz.

123 According to the first plaintiff, he met Mr Chi in Shanghai on 12 July 2011. Mr Chi allegedly said he did not know why the funds had not been transferred to SIPL as the monies had come into Xuang Fong. Mr Chi also stated that the defendant had informed him that US$20m would be used by SIPL, but that he had no knowledge that any part of this money was meant to be applied towards the payment of Founders' Fees.[154] Mr Chi apparently then agreed to

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150 First plaintiff's AEIC at para 167.

151 First plaintiff's AEIC at para 168.

152 Plaintiffs' closing submissions, para 45.

153 Second plaintiff's AEIC at para 158.

meet the defendant with the first plaintiff on the next day. The meeting on 12 July 2011 was apparently arranged by the first plaintiff who had Mr Chi's telephone number.[155]

124 On 13 July 2011, the first plaintiff met the defendant in Shanghai. According to the first plaintiff, the defendant informed him that Mr Chi had changed his mind about attending the meeting. At this meeting, the defendant is said to have repeated his statement that he would wind down SIPL and return all the monies to the investors. Again, the first plaintiff says that he did not believe the defendant.[156]

125 After the meeting on 13 July 2011, the first plaintiff also decided to resign from SIPL. The plaintiffs signed the SIPL share transfer forms which recorded the sale of their shares in SIPL to the defendant for S$1 each. The resignations were backdated to 29 June 2011 because that was just before they discovered the online falsehoods. By doing this, the plaintiffs intended to demonstrate their disagreement with the falsehoods.[157]

126 I note that the defendant avers that there was no meeting on 12 July 2011 between Mr Chi and the first plaintiff.[158] It was suggested to the first plaintiff in cross-examination that if he had been concerned about dissociating himself from the online falsehoods, and if he had disbelieved the defendant's claim that he would return the funds raised to the investors, he would have informed Mr Chi of this. The first plaintiff's answer was that it did not occur to him to do

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154 First plaintiff's AEIC at para 176.

155 CT, 14 March 2018, p 105 (line 11).

156 First plaintiff's AEIC at para 179.

157 First plaintiff's AEIC at paras 181 and 182.

158 CT, 14 March 2018, p 111 (lines 2 – 10).

this, that this was not his responsibility and, in any case, Mr Chi and the defendant could be in cahoots.[159]

127 Once again there is no contemporaneous documentary evidence to confirm and summarise the meetings which allegedly took place on 12 and 13 July 2011 between the first plaintiff, Mr Chi and the defendant.

Events after the plaintiffs' withdrawal from SIPL

SIPL's change of name

128 On 18 July 2011, SIPL changed its name to SSI Holdings Ltd (SSI). On the same day, Tecbiz added statements in its China facing websites (to address the online falsehoods). The statements clarified that (i) Tecbiz is an independent company that was not in partnership with UWI; (ii) Tecbiz does not have plans for a listing; (iii) the plaintiffs had not signed any employment agreement with UWI or SIPL; (iv) that Tecbiz does not have any agreement with any party regarding the transfer of copyright in Solvesam.

Use of Solvesam material by UWI after the plaintiffs' withdrawal from SIPL

129 The plaintiffs have referred to the fact that UWI appears to have continued using Solvesam material in some presentations after the plaintiffs had resigned from SIPL. The plaintiffs say this is consistent with their case that the planned fund-raising exercise was successful and that Mr Chi had indeed come through with the funds, but the defendant hid that fact from them. The defendant's general response was that he played no part in those presentations – after it became clear to him that Mr Chi was not proceeding with the investment plans, there was no need for him to remain in UWI, which had been

159 CT, 14 March 2018, pp 108 (line 23) to 111 (line 5).

set up as a fund investment vehicle on Mr Chi's instructions, and accordingly he resigned in May 2011.

130 What is clear is that, by resigning from SIPL, any agreement between the plaintiffs and the defendant was effectively terminated by the plaintiffs. They were no longer directors or shareholders of SIPL. Further, the second plaintiff also resigned from Tecbiz and sold his entire interest to the defendant, leaving the defendant the clear majority owner of Tecbiz. That being so, if Tecbiz decided to continue with the development of Solvesam (to the extent that it could do so, after the departure of the second plaintiff as well as other staff resignations from 2011–2012), this was surely Tecbiz's right to do so.

Sale of second plaintiff's shares in Tecbiz

131 According to the first plaintiff, the second plaintiff informed him around 17 July 2011 that the defendant had offered to purchase the second plaintiff's shares in Tecbiz. The defendant had reportedly reassured the second plaintiff that he would on-sell his shares to the first plaintiff. The first plaintiff disbelieved the defendant's claim that he would on-sell the second plaintiff's shares to him (the first plaintiff), but advised the second plaintiff that he should accept the offer, as he felt it was better for the second plaintiff to sell the shares so that he would have some money in hand. The first plaintiff states that he did not share with the second plaintiff his reservations or skepticism over the defendant's statement that he would on-sell the shares to the first plaintiff because he did not want to influence the second plaintiff's decision as to whether he should sell his Tecbiz shares to the defendant.[160]

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160 First plaintiff's AEIC at para 187.

132 On or about 26 July 2011, the second plaintiff sold his shares in Tecbiz to the defendant for S$100,000. The sale of the second plaintiff's shares meant the defendant was now the majority shareholder with 62.5% of the Tecbiz shares and the first plaintiff holding 37.5%.[161]

133 The first plaintiff claims that, just as he expected, the defendant never transferred the second plaintiff's Tecbiz shares to the first plaintiff and that it was now clear that the second plaintiff had been tricked by the defendant into selling his Tecbiz shares, so that the defendant could obtain the majority shareholding and control of Tecbiz. Given that Tecbiz was still the owner of the Solvesam software, the defendant would have to obtain control of Tecbiz to ensure that he could still raise funds using the Solvesam software after the plaintiffs withdrew from SIPL.[162]

134 In my view, it is somewhat odd that the first plaintiff should state that it was *now* clear the second plaintiff had been "tricked" into selling his shares. After all, according to the first plaintiff, when the second plaintiff told him that the defendant had offered to buy his Tecbiz shares, the first plaintiff never believed that the defendant genuinely intended to transfer those shares onwards to the first plaintiff. On this basis, surely the first plaintiff's position was that he already knew the defendant was deceiving the second plaintiff.

135 Indeed, as I have mentioned, the first plaintiff has claimed that by end June 2011 or early July 2011, he no longer trusted the defendant "as a business partner"[163] and believed that the defendant was simply making use of the plaintiffs and the Solvesam project to "line his own pockets."[164] That being so,

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161 First plaintiff's AEIC at paras 188 and 189.

162 First plaintiff's AEIC at para 190.

163 First plaintiff's AEIC at para 157.

his evidence that he did not want to share his reservations with the second plaintiff because of fear that it might affect his decision to sell the shares to the defendant, is hard to accept. The first plaintiff appears to be suggesting that even though it may have been in his interest to stop the sale of the Tecbiz shares to the defendant, he decided to keep his reservations about the defendant to himself, purely because the sale was in the interests of the second plaintiff.

136 The second plaintiff's evidence is that initially he was not interested in selling his Tecbiz shares to the defendant because Tecbiz's forensic investigation business was still doing well and he was confident that the first plaintiff would still be able to continue that business. The second plaintiff goes on to explain that he was subsequently persuaded by the defendant to change his mind. The defendant had represented that he was very saddened by the fact that the first plaintiff no longer trusted him and, for this reason, the defendant's plan was to buy the second plaintiff's shares for S$100,000 and to transfer them to the first plaintiff for S$1, in order to regain the first plaintiff's trust. The second plaintiff claims that he was moved by the defendant's statements, even though he had doubt about the defendant's business methods. He believed the defendant was sincere in his statement that he would transfer the Tecbiz shares to the first plaintiff.[165]

137 With respect, the second plaintiff's explanation as to why he was purportedly convinced by the apparent sincerity of the defendant's offer to buy and transfer the shares to the first plaintiff is hard to accept. The second plaintiff, like the first plaintiff, had stated several times (by reference to earlier dates and events) that he no longer trusted the defendant. Indeed, the lack of trust was so

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164 First plaintiff's AEIC at para 159.

165 Second plaintiff's AEIC at paras 177–178.

bad that the second plaintiff even refused to attend the meeting in Shanghai between the first plaintiff and defendant on 11 July 2011.[166]

138 Regardless of why the second plaintiff decided to sell his interest in Tecbiz to the defendant, the result was that he gave control of Tecbiz to the defendant at a time when Tecbiz still had (i) its core forensic business; and (ii) the legal rights over the Solvesam software. The first plaintiff, who supported the sale, can hardly claim to have been surprised.

Resignation of the first plaintiff from Tecbiz

139 The first plaintiff subsequently resigned as director and Chief Executive Officer of Tecbiz with his last official work day being 31 December 2011. The first plaintiff's evidence is that he resigned because even though it pained him to leave Tecbiz, which he describes as "his baby", the defendant's conduct was so dubious that the first plaintiff did not want any further part of the Solvesam project. The only way for the first plaintiff to cut his ties with the Solvesam project was to resign from Tecbiz.[167] That said, it appears that the first plaintiff remains, to this day, the owner of 37.5% of the shares in Tecbiz.

What has happened to Tecbiz, SIPL and Solvesam?

140 The evidence as to what happened to the Solvesam software, UWI, SIPL, and Tecbiz after July 2011 is hazy. With the departure of the second plaintiff from SIPL in early July 2011, the resignation of the first plaintiff in December 2011 and further resignations of other staff of Tecbiz in 2012, including Mr Tan,[168] it appears that the Solvesam project ground to a halt. What

166 Second plaintiff's AEIC at para 162.

167 First plaintiff's AEIC at para 191.

168 CT, 14 March 2018, p 93 (lines 20–24).

was left of Tecbiz was its core business in computer forensics but it seems that this also did not develop further and likely atrophied in the months and years after the departure of the plaintiffs. It also appears that the defendant sold his shares in Tecbiz to a Mr Goh Cher Kian sometime in 2012.[169]

141 As noted (*supra* [129]), the plaintiffs refer to a number of events after their resignation which they assert indicates that even with their departure, UWI and SIPL was still publicly demonstrating an interest or connection with the Solvesam software in 2012 and 2013.[170] The events are, in brief, as follows:

(a) 17 December 2011: UWI issued an announcement that SIPL had *inter alia* successfully acquired two other IT companies as well as the online Solvesam Web IT resource management tool from Tecbiz and that SIPL was preparing for a NASDAQ listing in 2013.

(b) 10 April 2012: UWI announcement that SIPL had been successfully listed on NASDAQ

(c) 14 August 2013: The defendant was still named on UWI's website as the President.

142 The point made is that the defendant must have been aware of and consented to these announcements. They are said to support the plaintiffs' position that the defendant did in fact raise funds for the Solvesam project as per the original understanding or agreement, and that he failed to disclose or had hidden that fact from the plaintiffs. As mentioned, the defendant denies any connection with these announcements and asserts that he had resigned from his directorship of UWI in May 2011.

169 CT, 21 March 2018, pp 14 (line 23) to 15 (line12).

170 First plaintiff's AEIC at paras 202 and 203.

The source of funds in SIPL's DBS Hong Kong account

143 As noted, a key part of the plaintiffs' case is that the defendant was obliged to pay them the Founders' Fees pursuant to their understanding or Oral Agreement, because the defendant had in fact raised the funds from Mr Chi for the purpose of the Solvesam project. In support of this, the plaintiffs rely on the fact that large sums of monies were remitted to SIPL's DBS Hong Kong bank account.[171] While the total amount falls far short of the US$20m that was originally envisaged, the plaintiffs' case is that the defendant likely placed the balance monies elsewhere. Alternatively, they assert that they are at least entitled to their Founders' Fees on a *pro rata* basis, according to the amounts remitted to the DBS Hong Kong bank account.

144 The bank statements in evidence (as summarised by a table prepared by the plaintiffs)[172] reveal the following deposits into SIPL's HK bank account in 2011:

(a) 4 April 2011: HK$200,000

(b) 7 April 2011: HK$9,000,000

(c) 21 April 2011: HK$24,000,000

(d) 20 May 2011: HK$15,000,000

(e) 17 August 2011: HK$25,000,000.

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171 First plaintiff's AEIC at para 212.

172 Plaintiff's closing submissions, p 45.

145 Based on the evidence before the Court, the total sum of HK$73,200,000 was deposited into SIPL's bank account in Hong Kong in 2011. This is approximately US$9.5m.

146 It also appears from the bank statements that the following remittances or transfers were made in 2011 from SIPL's DBS Hong Kong bank account to SIPL's OCBC account in Singapore, totaling some HK$13,779,000:

(a) 26 April 2011: HK$100,000

(b) 26 April 2011: HK$100,000

(c) 27 April 2011: HK$500,000

(d) 27 April 2011: HK$500,000

(e) 4 August 2011: HK$6,500,000

(f) 14 November 2011: HK$2,432,800

(g) 14 November 2011: HK$1,824,600

(h) 14 November 2011: HK$1,821,600.

147 In addition, the bank statements in evidence show large withdrawals from SIPL's DBS Hong Kong bank account in favour of the defendant and other individuals and companies. A few examples will be sufficient:

(a) Remittance of HK$8.4m to Mr Wei Shean Peng on 19 August 2011.

(b) Remittance of HK$1,835,700 to Quantum Consultancy on 18 October 2011.

(c) Remittance of HK$3,200,000 to Forever Beauty Ind.com on 15 December 2011.

(d) Remittance of HK$23,478,000 to the defendant on 19 July 2012.

(e) Remittance of HK$500,000 to Mr Chan Boon Wee (the defendant's assistant/associate) on 8 January 2014.

148 The plaintiffs' general point is that the evidence supports their case that the defendant was successful in raising funds for SIPL and that, in the circumstances, the inference must be that those funds were raised in accordance with the original plan for the Solvesam project as conceived in late 2010 and early 2011. The plaintiffs say that the defendant used the monies raised for his own purposes (whatever those purposes may have been).[173]

Overview of the defendant's case

149 The defendant denies the plaintiffs' claims. In brief, according to the defendant, the plaintiffs presented a business proposal for the Solvesam project to him in 2009. However, from February 2011, the defendant discovered or was given information that the plaintiffs had exaggerated and misrepresented the uniqueness and functionality of Solvesam and its business prospects. It was collectively decided by the parties that the Solvesam project would be discontinued. The plaintiffs' subsequent resignation as directors and their sale of shares in SIPL were done amicably.[174] The defendant denies that he initiated the discussions with the plaintiffs on the possibility of his arranging for substantial investments with the goal of developing the Solvesam project and listing SIPL.

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173 Plaintiffs' closing submissions, para 7.

174 Defence and Counterclaim, paras 10(a), (b), (d) and 13.

150 Further, the defendant asserts that in or around March 2011, he had extended two personal loans to the first plaintiff, totalling S$400,000, when the first plaintiff was short on cash to pay for renovation works on his house. The defendant, thus, counterclaimed for payment of the S$400,000 from the first plaintiff.[175]

151 The defendant is in broad agreement with the plaintiffs as to how they became friends and then business associates in Tecbiz. His evidence is also that he had more contact and discussions with the first plaintiff than with the second plaintiff. In many cases, the defendant appears to have assumed that the first plaintiff would inform the second plaintiff of the discussions such as those relating to the acquisition of BPI. Most of the discussions were either face-to-face or through the telephone. The defendant explains that he is not a frequent user of computer technology and while he does have email accounts, he preferred verbal discussions with the plaintiffs, rather than more formal communications, such as emails, because they were his friends. In general, the defendant states that his business with the plaintiffs was conducted on the basis of friendship and trust. The essence of the defendant's evidence is also that he preferred to eschew documentation until all details relating to a transaction were finalised.

152 Even in light of the defendant's claims in this regard, the absence of some key documents is somewhat surprising. For example, the Subscription Agreement which was translated into Chinese and shown to Mr Chi for his approval and signing was not put in evidence at all. The defendant claimed that he was unable to locate his copy. Mr Chi also did not testify. Indeed, it appears that neither the plaintiffs nor the defendant were able to locate Mr Chi. The first

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175 Defence and Counterclaim, paras 16 and 29(1).

plaintiff's evidence was that he tried to contact Mr Chi after July 2011 but was unable to because Mr Chi had changed his phone number.[176] The first plaintiff asserts that in an attempt find Mr Chi, he searched the Internet for HKFXI (the company Mr Chi had signed the Subscription Agreement on behalf of), only to come across a news article on a Chinese website stating that HKFXI was involved in a Ponzi scam. Yet when asked if this meant it was possible Mr Chi was raising monies from investors using the name of the Solvesam project to keep for himself, the first plaintiff's response was that he did not know as this would be speculation. His view was that the plaintiffs had been tricked by the defendant.[177]

153 Another transaction for which documentation is surprisingly lacking is the BTA signed by SIPL and BPI (*supra* [93]). It is odd that the defendant was unable to locate the actual signed copy. Instead what was in evidence was a draft. Likewise, Mr Chang, the Chief Technical Officer of BPI, who gave evidence for the defendant, did not exhibit the BTA. The result is that while it is clear that some sort of agreement resembling the BTA had been entered into between SIPL and BPI, and that a draft BTA was put in evidence, there is uncertainty as to what the terms of the actual BTA were. That said, the defendant did at least, during trial, obtain a signed copy from BPI – which copy was undated with certain details such as the consideration not set out.[178]

154 While a more complete picture of the terms of the BTA might have been helpful in the assessment of the evidence concerning the importance of BPI to SIPL and its relationship with the Solvesam project, for the purposes of this case, it is at least established that a BTA-of-sorts *was* signed before the plaintiffs

176 CT, 14 March 2018, p 51, (lines 11–18).

177 CT, 14 March 2018, pp 52 (lines 2–21) and 56 (lines 5–16).

178 CT, 21 March 2018, p 4 (lines 14–18); pp 5–12.

had resigned from SIPL, and that SIPL and BPI subsequently terminated the BTA by consent and went their separate ways. Further, the first plaintiff accepts that he knew of the BPI acquisition and that he was actively involved and even assisted in putting up the budget for the post-acquisition period. The first plaintiff also accepts that even if there was no direct upfront cost for acquiring BPI, the defendant would have to raise some funds for the BPI deal and these funds would not be relevant to his claim for the Founders' Fees under the Solvesam project.[179] The first plaintiff, however, also takes the position that the acquisition of BPI was part of the agreement/understanding between the plaintiffs and the defendant, in the sense that the acquisition of BPI was undertaken with an ultimate view to achieving a NASDAQ listing for SIPL.[180]

The defendant's position on the Subscription Agreement

155 The defendant's position *in his evidence* on the Subscription Agreement between SIPL, Mr Chi, the plaintiffs and the defendant is that the agreement was never in fact entered into, even though the execution page in evidence bears their signatures. Several points are raised by the defendant.[181] These have been touched on already and for convenience are summarised here. First, there is no signature by and on behalf of SIPL. Second, the signatures are undated. Third, the parties did not sign at the same time. Fourth, the agreement in evidence which is in English is completely undated. The defendant's explanation is that Mr Chi signed the execution page simply to demonstrate his interest in the Solvesam project. Furthermore, the execution page states that Mr Chi was signing on behalf of HKFXI – Mr Chi's Hong Kong company and through which the monies were intended to come. There is no seal of HKFXI on the

179 CT, 14 March 2018, p 67 (line 13) to 68 (line 8).

180 Certified Transcript, 14 March 2018, pp 68 (line 9) to 69 (line 11).

181 Defendant's AEIC at para 39.

execution page and no evidence that the body of the Subscription Agreement had been amended to reflect the fact that it was HKFXI who was the investor.

156 These are fair points. As referenced already, it is somewhat odd that the plaintiffs did not ask for copies of the actual signed Subscription Agreement and the Chinese translation that was provided to Mr Chi. The sums being raised were considerable and the plaintiffs, much as they may have trusted the defendant, had never done business with Mr Chi or his company before. The point has been made that the Subscription Agreement in evidence is rather brief and sketchy. There are no provisions on governing law, dispute resolution, obligations of the Founders in respect of the Solvesam software, or warranties (see [65] above). The drafts in evidence were not prepared by solicitors and have the flavour of a first draft or a work in progress.

157 I note also that the plaintiffs did not lack experience in fundraising and the importance of proper legal documentation. It will be recalled that on 5 September 2006, Tecbiz, Spring Seeds, and Sirius, together with the plaintiffs and defendant, entered into a subscription agreement in respect of the investments by Spring Seeds and Sirius in Tecbiz (*supra* [23]). That subscription agreement is far more detailed, and includes numerous schedules. The execution page includes signatures for and on behalf of Tecbiz, Spring Seeds, Sirius as well as those of the plaintiffs and the defendant.

158 Whilst I am not for a moment suggesting that a binding contract must have the shape and size of the 2006 subscription agreement between Tecbiz, Spring Seeds, Sirius, the plaintiffs and the defendant, the point is that the skimpy nature of the Subscription Agreement provides some support for the defendant's case that the agreement had not in fact been finalised. Nevertheless, I note that the defendant had accepted in the *pleadings* that the Subscription Agreement

was entered into.[182] The skimpy nature of the Subscription Agreement is still relevant, however, because it provides some support for the view that so far as Mr Chi was concerned, he still needed to conduct due diligence enquiries before the deal was finalised.

159 The size of the investment and the funds that the defendant was required to raise were considerable: US$20m. The Solvesam software was very much a work in progress. Whilst SS V1.0 was up and running, what was needed was the web version (SS V1.25) and the cloud-based version (SS V2 and beyond). SIPL would not have any leverage from Tecbiz's core business in computer forensics. That was not part of the Solvesam project at all. The success or failure of the Solvesam project depended entirely on the success of the Solvesam software and, in particular, on the web and cloud versions which had not yet been developed or fully developed. Seen in that light, the plaintiffs must have known that any serious investor would have to conduct considerable due diligence on the Solvesam software before committing to an investment of the size contemplated in the Subscription Agreement.

160 It is also clear the plaintiffs knew the defendant is not an IT expert and that while he was aware of the Solvesam software in broad terms, it is most improbable that he would be able to explain, describe and demonstrate the workings of Solvesam in sufficient detail for an investor to make such a huge commitment. A serious investor or fund manager would have to conduct substantive investigations and/or receive substantial assurances before committing to a project of this magnitude: raising US$20 m for a new start-up company with the intention of securing a NASDAQ listing in the not too distant future.

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182 Defence and Counterclaim, para 10(c).

161 Indeed, looking at the Subscription Agreement in evidence, it is worth noting what Mr Chi (or HKFXI) obtains as consideration for his agreement to subscribe in cash for new ordinary shares equivalent to 30% of the ordinary shares of SIPL. The *quid pro quo* is that SIPL will issue the shares free of all claims, charges, liens and encumbrances. In addition, the Founders (*ie,* the plaintiffs and defendant) agree to procure that the proceeds from the share issue will only be used by SIPL for *inter alia* "the conduct of the Business and its highest value-added activities … or any other activities deemed appropriate by the Founders in their absolute discretion", and will be used "as part of the Company's working capital".[183] There is no reference to the Solvesam project or the Solvesam software at all. There is no timeline or schedule or benchmarks to be met and no provision for the consequences of a failure to meet those benchmarks.

162 Further, Schedule 2 (*supra* [68]) which sets out the completion timeline is vague on its own terms and nearly impossible to apply given that it is constructed with reference to the date of the execution of the Subscription Agreement, but such date is undefined. For example, cl 6 (iii) states that "[t]he Investor shall be appointed as a Non-executive Director of [SIPL] within 2 months of the execution of this Subscription Agreement." It is clear that Mr Chi was never appointed as a non-executive director of SIPL, but it is unclear when this appointment was supposed to have taken place. When did the stipulated two-month period expire, given that there is no date set out for the execution?

163 Further, cl 6 (i) required the Founders "to enter into a service agreement with [SIPL] in such form as approved by the Investor before the Completion Date". It does not appear that the Founders ever discussed the terms of a service

183 First plaintiff's AEIC at p 377.

agreement with Mr Chi or any other personnel of HKFXI – certainly there is no evidence of this at all, nor even any evidence of preliminary discussions prior to Mr Chi signing the execution page. What, in any case, is the "Completion Date"? According to cl 5, completion would take place when all the events in Schedule 2 had been successfully completed, *ie*, a total of US$15m was to be paid to SIPL and US$5m was to be paid to the Founders within 6 months of the execution of the Subscription Agreement. If it is assumed that the execution date is 24 January 2011 as pleaded (*supra* [3(b)]), it would follow that the US$20m had to be paid in by Mr Chi or HKFXI before end July 2011. Based on the bank statements in evidence (*supra* [144]), only some HK$48.2m (approximately US$5.2m) had been deposited into SIPL's HK bank account by end July 2011, so it appears unlikely that the parties were acting in accordance with the Subscription Agreement.

164 While it might be suggested that the balance was received by the defendant in some other account, there is no evidence to support this. Indeed, there is no evidence at all as to the source of the funds that were deposited into SIPL's DBS Hong Kong bank account. There is no evidence from Mr Chi, or indeed any of the investors that Mr Chi represented, that any investment monies were transferred to Mr Chi for the Solvesam project and SIPL. The first plaintiff states that he was told by Mr Chi at the Shanghai meeting on 12 July 2011 (*supra* [123]) that the funds had been raised and passed to the defendant, but that is purely hearsay. Leaving that aside, there is nothing to corroborate the claim that Mr Chi had in fact raised the funds for the Solvesam project and SIPL.

165 As will be seen, the defendant's evidence is that while some monies were deposited into the HK account, these monies in fact came from another investor or associate of his in Indonesia, and had nothing to do with Mr Chi and the alleged Subscription Agreement.

166 Turning to the alleged Oral Agreement, the defendant's basic case is that there was no such agreement. The defendant accepts that there were discussions on the Solvesam project centred on the concept of setting up a Project Company (*ie*, SIPL) in respect of which the defendant would use his connections and experience in the financial market to raise funds. He does not dispute that the general tenor of these discussions was that the funds (if raised) were to be for the development of Solvesam, and that the parties' ultimate goal was for the SIPL to be listed on NASDAQ. However, the defendant claims that the discussions were still at an early stage. Even though SIPL was incorporated in late December 2010, the defendant was, at that stage, still sounding out potential investors from China. Any investor or group of investors would still need to meet the plaintiffs and/or conduct proper due diligence on the plaintiffs, the Solvesam software and Tecbiz, which, at that stage, owned the intellectual property rights in Solvesam software.

167 With regard to the claim in misrepresentation, the defendant does not deny informing the plaintiffs about TECM and indeed, that he invited the plaintiffs in December 2008 to subscribe for shares in TECM. However, he denies that any statements or references he made to TECM and its listing on NASDAQ were made for the purpose of inducing the plaintiffs to enter into any agreement with him in relation to the Solvesam project. The defendant's position is that a listing of SIPL on NASDAQ was indeed the ultimate goal, but by this, it appears he means that it was an important aspiration, rather than an obligation binding upon him.[184]

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184 Defendant's closing submissions, para 56.

The defendant's positions on Mr Chi, HKFXI, UWI, BPI and the monies deposited into SIPL accounts

The defendant and Mr Chi

168 The defendant's evidence is that he first met Mr Chi around 2007. He describes Mr Chi as a casual friend and claims that they were not close. Notwithstanding the defendant's characterisation of his relationship with Mr Chi, it seems that he and Mr Chi had cooperated in previous business investments in shares in Hong Kong and the United States, seemingly on the basis of a great deal of trust. These deals involved the defendant using Mr Chi's trading account in Hong Kong to acquire shares and Mr Chi using the account of a friend of the defendant to purchase US shares. According to the defendant, the investments were worth around HK$1m to US$1m. The shares were purchased in the names of the account holders without any paper trail to evidence the rights and interests of Mr Chi or the defendant. Again, the defendant stresses the theme that as between friends, there was no need for paper trails or proper documentation. On occasions, there would be a written agreement when the deal was confirmed, but this was not always necessarily so.

169 The defendant's case is that he started discussions with Mr Chi on Solvesam sometime in late 2010 or early 2011. By this time, the first plaintiff had provided a draft budget estimate of US$20m for the Solvesam project. The evidence as to whether Mr Chi was proposing to use his own funds, or proposing to try to raise funds from other Chinese investors was somewhat confused. Ultimately, it appears that whatever the defendant may have thought or intended at the start of the discussions, it eventually became clear that Mr Chi was intending to bring in other investors from China for the Solvesam project.

170 Whether the plaintiffs met Mr Chi prior to the preparation of the Subscription Agreement is unclear and in dispute. The plaintiffs' case appears to be that at the time when Mr Chi signed the execution page, Mr Chi had never met the plaintiffs or held any discussions with them on Solvesam. There is also nothing to suggest that Mr Chi had any communications with Mr Tan – the Tecbiz employee who actually developed the Solvesam program as it then existed (*supra* [20]).

171 The defendant, on the other hand, states that the first plaintiff had a meeting with Mr Chi in Singapore at the end of 2010 or start of 2011 at which the defendant was also present. According to the defendant, the discussion was on the Solvesam project and the requirement for payments to be made to the Founders. The defendant asserts that he left the negotiations to the first plaintiff as he was a good negotiator and could speak for the Founders. The defendant goes on to state that he subsequently explained to Mr Chi that payments to the Founders were necessary because the plaintiffs had developed the Solvesam software.

172 Mr Chi subsequently informed the defendant that his investment vehicle was HKFXI. The defendant's position is that when Mr Chi was asked to sign the execution page of the Subscription Agreement (for HKFXI), Mr Chi did so on the basis that the Subscription Agreement was not legally binding yet, and that a formal contract would have to be entered into when the monies were actually raised. According to the defendant, Mr Chi signed the execution page simply to demonstrate his serious interest.

173 I pause to stress again that there is no evidence from Mr Chi at all, and therefore no evidence on why he signed the execution page and whether he actually did come to Singapore and have discussions with the plaintiffs. Indeed,

there is not even in evidence any email from Mr Chi referencing the Subscription Agreement at all, let alone one expressing Mr Chi's intention that by signing the Agreement, he was only demonstrating his interest and not formally entering into a binding contract. Neither is there any email from the defendant to the plaintiffs clarifying that this was Mr Chi's intent.

HKFXI and UWI

174 It will be recalled that initially, it appeared that Mr Chi himself would be the investor in SIPL for the Solvesam project. Thereafter, Mr Chi informed the defendant that he was sourcing for individual retail investors to acquire shares in his investment vehicle "Xuang Fong", which investment vehicle would then transfer the funds to SIPL. As it turns out, Xuang Fong is UWI, a company incorporated in Hong Kong around 22 March 2011 by the defendant at the request of Mr Chi.

175 According to the defendant, sometime in February/March 2011 (around the time when Mr Chi signed the execution page), Mr Chi asked the defendant to set up UWI with the defendant and Mr Chan as directors. Once Mr Chi succeeded in raising the required funds, a proper Subscription Agreement would be entered into. The monies raised by Mr Chi would be transferred to UWI first and then transferred to an SIPL bank account in Hong Kong. Thereafter, the funds were to be remitted to SIPL's bank account in Singapore. According to the defendant, while UWI was incorporated in end March 2011, no bank account was in fact opened in the name of UWI at that time. Indeed, according to the defendant, UWI did not have a bank account in Hong Kong at the time of his resignation in May 2011.[185] That said, the Court only has the defendant's

185 CT, 20 March 2018, p 155 (lines 18–22).

word on this since no one else gave evidence, not even Mr Chan, the defendant's assistant and fellow director at UWI.

176 While the defendant claims he gave notice of his resignation to UWI in May 2011, the company records in Hong Kong show that he was still listed as a director in June 2011.[186] The defendant's explanation was that Mr Chan had failed or forgotten to act on his resignation, so the defendant filed the resignation papers himself stating 1 May 2011 as the date of resignation. According to the defendant, he resigned because, by 1 May 2011, Mr Chi had made it clear that he was not satisfied with the Solvesam software and was not proceeding with the plans to invest in SIPL and the Solvesam project. That being so, the defendant resigned and left UWI.[187]

The reasons why Mr Chi decided not to proceed.

177 According to the defendant, one of Mr Chi's conditions for investing or having his group of investors invest in SIPL was that SIPL had to have a revenue stream and Solvesam had to be ready as a working product.[188] In January and February 2011, the defendant asserts Mr Chi conducted due diligence checks in China.[189] By around 23 March 2011, Mr Chi had begun to tell the defendant that he harboured concerns over information from his sources that the Solvesam software was not as good as it was made out to be and that quite some time may be needed to develop the software into SS V3. To be clear, there is nothing to suggest that SS V1.0 was in any sense defective or not working properly. Instead, the concern appears to be that the web and cloud-based versions with

186 CT, 20 March 2018, p 156 (lines 6–7).

187 CT, 20 March 2018, p 156 (lines 11–19).

188 CT, 19 March 2018, p 33 (lines 16–23).

189 CT, 19 March 2018, p 134, (lines 13–22).

full features were still not fully developed or in the market. Further, Mr Chi was also concerned with the discovery that Chinese government agencies were not in fact using the Solvesam software as the plaintiffs had claimed.[190] According to the defendant, it was clear to him that Mr Chi would not be providing US$5m (as urgent funds) to set up the SIPL Suzhou office or indeed the US$20m investment as originally discussed.

178 The defendant accepts that he did not send an email or other notice in writing to the plaintiffs to let them know that Mr Chi was not proceeding with the plan to invest in SIPL and the Solvesam project. Instead, the defendant states that he informed the first plaintiff orally that Mr Chi would not be investing and that he would instead work towards raising the funds himself and would switch his focus to the discussions to acquire BPI.[191] The defendant apparently left it to the first plaintiff to inform the second plaintiff.

179 By the start of April 2011, the original plan or understanding to set up and use SIPL as the vehicle to develop and promote Solvesam had drastically changed. SIPL would instead focus on the discussions and plans to acquire BPI. The Solvesam project, rather than taking pride of place, would essentially operate in the background in the sense that if the plaintiffs were able to develop the Solvesam software into the fully developed package at a future date, this would be desirable, but it was no longer a priority. The defendant's plan was that the plaintiffs would still have shares in SIPL and therefore an interest in BPI's business once the acquisition was completed. As regards the Founders' Fees, however, the defendant's position appears to be that the plaintiffs no

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190 Defendant's closing submissions at para 21; see also CT, 19 March 2018, p 135, (lines 2–17).

191 Defendant's AEIC at para 43. See also CT, 19 March 2018, p 138 (lines 2–6).

longer had a basis to claim them, at least not until the Solvesam software was fully developed and marketable.

The plan to acquire BPI

180 The defendant's case is that he first raised the idea of acquiring BPI around the end of 2010, when SIPL was incorporated. The concern was that SIPL's revenue stream as a brand-new company with no track record would make it difficult to achieve a listing in the United States.[192] It appears that even as Mr Chi was conducting his due diligence on Solvesam, the defendant was already beginning to have concerns arising from the first plaintiff's information that they may not be able to meet the projected revenues and the time line for the product development.[193]

181 The chances of a listing would be much better if SIPL had other assets and revenue streams – especially if these flowed from an established business with a proven track record. BPI was an IT company that had already been listed in Singapore on Phillips Securities OTC Board. It bears underscoring that the plaintiffs were not intending to transfer Tecbiz's core business in computer forensic investigation services to SIPL. All that would be transferred, if things had gone to plan, were the rights to the Solvesam software.

182 The defendant, who was acquainted with Mr Lee Tong Tai (the founder of BPI), discussed the matter with the plaintiffs – and in particular the first plaintiff.[194]

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192 Defendant's AEIC at para 52.

193 CT, 19 March 2018, pp 136 (lines 2–9) and pp 137 (line 23) to 138 (line 16).

194 Second plaintiff's AEIC at para 70.

183 It will be recalled that by January/February 2011, the second plaintiff had already re-located to China and was evidently busy dealing with queries from Microsoft China on the progress of the Solvesam product certificate, copyright registration and related matters. The second plaintiff was also working on the plans to establish a Chinese subsidiary for SIPL and an office in Suzhou. To do this, an injection of funds was necessary.

184 It bears repeating that by end February 2011, the defendant's case is that Mr Chi, whilst interested and indeed willing to sign the execution page, was still sourcing for investors and conducting his due diligence into the Solvesam software. The defendant's understanding was that the signature by Mr Chi was simply to show that Mr Chi was serious and that a proper or formal agreement would have to be entered into once funds were raised. The fact that the second plaintiff, by email dated 26 February 2011,[195] asked (in view of the delays in obtaining the certificates and Microsoft's queries) if the "project likely to KIV" and, if so, to let him know early so that adjustments could be made, provides some support for the assertion that the Subscription Agreement was still "tentative" and that the plan to use SIPL to carry out the Solvesam project with Mr Chi was still not confirmed.

185 The defendant's response by email was "No it's on already" (*supra* [77(e)]). He stated that he had already sourced a few locations for the office premises in Singapore and that SIPL was "taking over a [S]ingapore company, [BPI] …". The reply from the second plaintiff was that it was "[g]ood to hear that" and "[o]nce the first two payments in, we can start the registration process in China."[196]

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195 Second plaintiff's AEIC at para 72.

196 Second plaintiff's AEIC at para 73.

186 Yet, while the defendant clearly stated that the Project was proceeding, he was evidently already placing much stress on the discussions for SIPL to take over or merge with BPI.

187 The understanding and/or Oral Agreement which the plaintiffs rely on does not refer to any merger with BPI as part of the plan to develop the Solvesam project. There was no discussion or reference to the involvement of another IT company and incorporation of its business and products or services into SIPL. To be sure, the goal of a NASDAQ listing for SIPL was said to be the "ultimate goal" (*supra* [32]). The immediate goal was to set up SIPL and raise funds to develop Solvesam and to enter the China market for software asset management products and services. Development of SIPL's business and revenue stream to the point where it might seek a listing lay sometime in the future and might well involve acquisition of other businesses and assets so as to broaden SIPL's base in preparation for a listing attempt. If the Solvesam project was successfully developed into a cloud-based software asset management service with deep end-user market penetration in China, it may well be that a listing attempt had a good chance of succeeding. After all, it appears the parties did contemplate – at least by way of an aspiration – development of the Solvesam software and service into something akin to Facebook.

188 It is not, of course, for this Court to judge whether the understanding said to have been reached in late 2010 and early 2011 was commercially realistic. The only point I make is that it is one thing to say the parties had an understanding, in the sense of a shared aspiration, and quite something else to state that the parties had entered into a legally binding agreement.

189 Given the paucity of documentation and the plaintiffs' heavy reliance on the "understanding" or "common understanding" and "Oral Agreement", it is

necessary to examine the surrounding circumstances with care to reach a determination on (i) whether an understanding was reached; (ii) what the understanding entailed; and (iii) whether an oral or perhaps implied contract arose based on what was said and done. Indeed, it is for this reason that the evidence, claims and assertions have been set out at length.

190 Any understanding must be seen in the context of the size of the budget estimate (prepared by the first plaintiff) and the investment funds needed for the Solvesam project: US$20m. Indeed, there is some evidence that even this figure was simply the "first stage" since the defendant had alluded in his communications with the plaintiffs to the fact that if more funds were needed, it was possible to increase the total amount.[197] In short, there is good basis for the view that any understanding reached around the time SIPL was incorporated and into early 2011 was necessarily tentative in nature. If, for example, it was decided that SIPL should "join forces" with another established IT company in order to meet funding requirements, it stands to reason that this *could* have an impact on any decision on the payment of the Founders' Fees out of the investment funds raised by the investor.

191 The expression "join forces" is used advisedly in recognition that there are many different ways in which the business and assets of the other IT company could be acquired, merged or brought into SIPL with the goal of broadening and strengthening SIPL's base for a listing attempt. Nevertheless, the fact that the parties were actively discussing and pursuing a merger with or acquisition of BPI very soon after SIPL was incorporated is a point that must be taken into consideration in assessing the plaintiffs' claims. This is especially so since there is no evidence at all as to whether the parties raised the possibility

197 CT, 19 March 2018, pp 22 (lines 20–25) and 43 (lines 4–7).

of BPI's involvement with Mr Chi. There is certainly nothing in the Subscription Agreement which Mr Chi is said to have entered into which refers to BPI. What the Subscription Agreement says in Clause 3 is that the funds raised are only to be used for the conduct of business and its highest value-added activities or any other activities "deemed appropriate by the Founders in their absolute discretion".

192 It is in this context that this Court must assess the second plaintiff's response that once the first two payments were in, he could proceed with the registration process (*supra* [185]). The second plaintiff was in China. Whilst he was aware of the talks with BPI, he did not have much direct discussions with the defendant on BPI. His main concern at the end of February 2011 was the need for an injection of funds so that the Suzhou office could be set up and the registration of the Solvesam software attended to and completed. Indeed, subsequently around 24 March 2011, the second plaintiff by email asked how the proposed merger and acquisition with BPI then under discussion would affect the initial allocation of funds.[198] It is apparent that, at the very least, the second plaintiff was aware that the upcoming tie-up or merger with BPI might have an impact on the earlier understanding on allocation of funds including use of a portion of the funds to pay the Founders' Fees to the plaintiffs and the defendant.

Contact between the plaintiffs and BPI, and the BTA.

193 According to the defendant, the plaintiffs together with Mr Tan met staff of BPI on a number of occasions. The defendant's recollection of the details was, however, rather thin. The essence of his position is that they met Mr Chang, the Chief Technical Officer of BPI, and other staff, to provide an overview of

198 Second plaintiff's AEIC at para 108.

the Solvesam software and to generally acquaint each other with their respective products and business.

194 Mr Chang's evidence was that whilst BPI understood that a demonstration of the Solvesam software would be conducted at the first meeting, this did not take place because of technical difficulties. Instead, what took place was a general presentation on the Solvesam project. Mr Chang's evidence is that there was a second meeting during which general discussions on Solvesam and BPI's own products/services continued without a technical presentation of the Solvesam software.

195 The defendant's position, which is supported by the evidence of Mr Chang, is that BPI was concerned after these meetings that there was no actual demonstration of the Solvesam software and that Mr Chang had reservations over the fact that Solvesam was not yet a working model.[199] The plaintiffs, on the other hand, assert that the meetings were positive and useful and that at no time did BPI's staff raise any concerns or misgivings about the technical capabilities of the Solvesam software or its projected functions.[200]

196 On the whole, it is clear that no demonstration of the Solvesam software was actually conducted for BPI's staff. Further, Mr Chang's evidence that it was usual to see an actual demonstration to assess the working capabilities of the software is readily understandable. The fact that Mr Chang likely did express his concern that he had not seen a working model does not, of course, mean that BPI concluded that the Solvesam software was defective. At the time the plaintiffs and BPI met, it is undisputed that the Solvesam project was still at an early stage of development. Solvesam V1.0 was available and Solvesam V1.25

199 Defendant's AEIC at para 54; Chang Meng Heng's AEIC at paras 5 and 10.

200 Second plaintiff's AEIC at paras 117 and 119.

was well on the way, but the web or cloud-based versions with additional features (SS V.2 and V.3) were still something for the future.

197 It stands to reason that BPI would require a proper demonstration of what had been developed so as to assess the overall viability and prospects of the Solvesam project. As mentioned (*supra* [97]), the second plaintiff took it as a good sign that, at the meeting, BPI's staff mentioned that the features that the plaintiffs wished to develop for Solvesam were already available in the US market. To the second plaintiff, this meant they were developing Solvesam in the right direction for the China market.[201] The defendant, on the other hand, had the impression that BPI's view was that the Solvesam software was not as good or not as unique as it professed or aspired to become.[202] Given that the goal was to eventually list SIPL on NASDAQ, BPI's view that the features planned for Solvesam were already available in the US might well have been a cause for some concern.

198 Whatever the state of the second plaintiff's knowledge of the details of the discussions with BPI, it is at least clear, as the defendant points out, that the first plaintiff was fully aware and indeed involved in the details. For example, there is an email dated 6 April 2011 from the first plaintiff to the defendant and the second plaintiff in which he attaches a budget proposal for SIPL that now includes US$1.2m for acquisition of BPI shares and US$1.7m for day-to-day operating expenses.[203]

199 What followed thereafter were discussions/communications between the plaintiffs and the defendant on the terms of the draft BTA, with theplaintiffs

201 Second plaintiff's AEIC at para 117.

202 Defendant's AEIC at para 58.

203 Defendant's AEIC at para 56 and JLTY-20, p 249.

taking the position that the terms were too favourable for BPI (*supra* [93]). Eventually, the defendant, on behalf of SIPL, entered into the BTA with BPI.

200 Based upon the evidence as a whole, it appears that the original plan for SIPL to buy the shares of BPI was changed at some point. Instead, the BTA was an agreement for SIPL to acquire the assets of BPI, and for BPI to receive shares in the enlarged SIPL in return.

201 Finally, whilst the BTA was entered into, it appears that the deal was terminated (by consent) after a few years.[204] According to the defendant, since the assets of BPI had not yet been assigned or transferred to SIPL there was no need to arrange for a transfer back of BPI's assets. BPI transferred its shares in SIPL back to the defendant.

202 I pause to note that whilst the plaintiffs complain that the defendant did not obtain their consent to the signing of the BTA, there is no evidence that they took any issue on this with BPI or indeed with the defendant at any time before they resigned from SIPL in July 2011. Indeed, the plaintiffs have not pleaded that the BTA was entered into without their consent or that they have a cause of action against the defendant in respect of the BTA.

Source of funds deposited into SIPL's Hong Kong bank account.

203 As mentioned, considerable sums (worth around US$9.5m) were in fact deposited into SIPL's DBS Hong Kong bank account in tranches between April and August 2011. The plaintiffs' case is that these deposits must have come from Mr Chi and his group of China-based investors whether this was done through UWI or by some other means. Further, the plaintiffs say these deposits

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204 Defendant's AEIC at para 83.

were specifically in respect of the Subscription Agreement which Mr Chi had signed and which the defendant had tried to conceal. The balance of the US$20m, the plaintiffs assert, was likely also raised but kept elsewhere by the defendant.[205] On this basis, the plaintiffs claim that they are, at the very least, entitled to claim the Founders' Fees on a *pro rata* basis based on the US$9.5 m which they say was raised by Mr Chi and transferred to SIPL's Hong Kong bank account.

204 The defendant's position is that all the funds deposited into SIPL's account in Hong Kong were raised by the defendant and had nothing to do with Mr Chi who had already pulled out of the Solvesam project. The defendant asserts the funds were raised for the purpose of funding the growth of BPI's business. This was because SIPL incurred costs for setting up BPI's new office in Singapore, including acquiring equipment and meeting other expenses of BPI.[206]

205 Accordingly, while monies were deposited into SIPL's Hong Kong bank account, these were not attributable to the alleged understanding reached in late 2010 or early 2011 between the parties in respect of SIPL and the Solvesam project. The plaintiffs accepted that, if the funds/deposits were indeed raised in respect of some other project or business activity that had nothing to do with the Solvesam project, they would not have any basis to claim Founders' Fees from those funds.[207]

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205 CT, 13 March 2018, p 126 (lines 8–22).

206 Defendant's AEIC at paras 80–83.

207 CT, 14 March 2018, p 64 (lines 12–19).

206 The defendant's evidence is that the monies deposited into SIPL's account in Hong Kong were a mix of his own funds and monies loaned by another Indonesian friend and long-time business associate called Pak Bani.[208]

207 The defendant and Pak Bani were allegedly in the waste plastic recycling business in Indonesia. According to the defendant, Pak Bani held large sums for the defendant.[209] The defendant explained that he contacted Pak Bani to find out how much money Pak Bani held for the defendant with the intention of transferring those funds to SIPL in Hong Kong. If his own funds were insufficient, his plan was to borrow from Pak Bani to make up any shortfall. The defendant's evidence was that Pak Bani also had business in Hong Kong and, for this reason, it was more convenient for the monies to be transferred into SIPL's account in Hong Kong rather than directly into SIPL's bank account in Singapore.

208 The defendant's explanation for transfers out of SIPL's Hong Kong bank account to other entities or persons such as a Mr Wei Shean Peng in August 2011 and Forever Beauty Ind.com on 15 December 2011 (*supra* [147]) is that these were done at the request of Pak Bani who subsequently needed some of his loans back for his own purposes. The defendant asserts that he had the consent of Mr Lee (the founder of BPI), who was by now a director of SIPL, to make these payments.

209 The defendant acknowledges that he also withdrew large sums from SIPL's account in HK. For example, on 19 July 2012, HK$23m was paid out to the defendant (*supra* [147(d)]). The defendant's explanation was that this was a return of monies that the defendant had transferred into SIPL's account in Hong

208 CT, 20 March 2018, pp 129 (lines 23) to 130 (line 10).

209 CT, 20 March 2018, p 117 (lines 23–25) and p 130 (line 8).

Kong. When cross-examined on how this could be done when the HK$23m had been converted into SIPL's working capital, the defendant's explanation was that he had cleared the payment with the other directors of SIPL (Mr Lee and one Ms Grace Ang who sat on the board as BPI representatives).[210]

210 A difficulty with the defendant's evidence is that there is no independent evidence supporting his claim that the monies were raised from or through his Indonesian friend and business partner. Pak Bani did not give evidence. The assertion that Pak Bani was the source of the funds deposited into SIPL's bank account in Hong Kong was not set out in the defendant's affidavit of evidence-in-chief. The explanation arose in the course of cross-examination. There is no documentary evidence at all – not a single email between the defendant and Pak Bani referring to SIPL, BPI and the defendant's need for funds. There is also no evidence supporting the claim that representatives of BPI on the board of SIPL were aware and gave consent to the payments out.

211 Once again, the defendant's explanation is that much of his dealings with business associates who were his friends was done on trust and good faith with little or no documentation and formal records. The plaintiffs, on the other hand, assert that the funds most likely came from Mr Chi and were transferred to SIPL's Hong Kong bank account from a UWI account in Hong Kong. The defendant denies this and counters that UWI, which was set up at Mr Chi's request (at a time when Mr Chi was conducting due diligence and had not yet withdrawn from the Solvesam project), did not even have a bank account in Hong Kong up to the time when the defendant resigned from UWI in May 2011. Unfortunately, there is no other evidence on this. Mr Chan, a Singaporean, who

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210 CT, 21 March 2018, p 66 (lines 12–17).

was a director of UWI and who appears to be a friend and/or associate of the defendant was not called to give evidence.

212 In short, there is no independent evidence on where the funds deposited into SIPL's account in Hong Kong came from, apart from the fact that the account which the funds were remitted from was a DBS Hong Kong account held at the Tsim Sha Tsui DBS branch. The plaintiffs point out that the registered office address of UWI is also situated in Tsim Sha Tsui, to which the defendant's response is that that is simply the corporate secretarial address. It does not follow that UWI must have opened a bank account at DBS Hong Kong at the Tsim Sha Tsui branch.

213 I pause to make clear that, whilst I have set out in some detail the evidence on the BTA, the tie-up with BPI and the payments in and out of SIPL's Hong Kong bank account, many of the events such as the payment of HK$23m to the defendant out of SIPL in July 2012 (*supra* [147(d)]) occurred well after the plaintiffs had resigned from SIPL and sold their shares to the defendant. SIPL, after July 2011, was owned by the defendant, Mr Lee and Ms Grace Ang (of BPI). There is no complaint or issue before this Court raised by SIPL or BPI on any misuse of funds belonging to SIPL.

The counterclaim

214 The defendant claims he loaned a total of S$400,000 to the first plaintiff which remains unpaid and owing. The first loan of S$200,000 took place at the end of March 2011 when the first plaintiff requested the loan in connection with renovation works at his house. The first plaintiff does not deny receipt of the monies but claims that this was in fact nothing more than an advance on the

US$900,000 Founders' Fees that he was entitled to under the understanding and Oral Agreement over the Solvesam project.

215 The defendant's case is that, sometime in April 2011, the first plaintiff asked for another S$200,000 loan in connection with some personal problems he was having at home. The first plaintiff does not deny receipt of these monies (by cheque) but asserts that this S$200,000 was nothing more than payment for the 7.5% Tecbiz shares sold by the first plaintiff to the defendant (see [91] above). While the defendant agrees that he purchased the 7.5% shares from the first plaintiff, he notes that the consideration set out in the relevant transfer forms and stamp duty certificate was S$100,000. Further, the transfer of shares only took place after 6 May 2011. The defendant's case is that the second payment of S$200,000 by cheque dated 12 April 2011 was just a loan and had nothing to do with the subsequent sale of Tecbiz shares.[211]

216 The defendant accepts that he did not make any written request or demand for repayment until filing the counterclaim, but asserts that he did bring up the matter of the loans orally with the first plaintiff on several occasions which the latter, unsurprisingly, denies.

217 I reiterate that the first plaintiff and defendant had been close friends for a long time. The evidence as a whole does support the view that they both conducted their affairs with each other largely on the basis of trust and confidence. They had helped each other out before on personal matters. For example, the first plaintiff states that as early as 1991, the first plaintiff assisted the defendant who had run into financial difficulties by lending him money for petrol. Indeed, the first plaintiff expressly states that at that time "the [d]efendant told me that he would remember my generosity and when his

[211] Defendant's AEIC at paras 99 and 102.

financial crisis was over, he would invest in whatever business venture I decided to pursue".[212] Thereafter, the first plaintiff makes reference to the fact that in 2004, when the defendant ran into financial trouble, the plaintiffs extended a helping hand to the defendant.[213]

The decision

218 To recapitulate, the plaintiffs' claims are advanced on a number of overlapping fronts arising out of the sequence of events as described above.

219 First, there is the claim for the Founders' Fees said to be owing to the plaintiffs under the Oral Agreement between the plaintiffs and the defendant made in late 2010 or early 2011.

220 Second, in the event that the Court finds that there was no binding Oral Agreement, the claim is that the defendant made certain false representations which induced the plaintiffs to enter into the Subscription Agreement. If the plaintiffs had not entered into the Subscription Agreement, they would have been free to use alternative sources of funding to develop the Solvesam software and achieve the goal of a listing. The plaintiffs say that the Founders' Fees are an appropriate indicator of the sums that the plaintiffs would likely have made had they approached other investors.

221 Third, the plaintiffs claim that, by virtue of a common understanding reached in late 2010 or early 2011, the sums raised by the defendant through use of the Solvesam project were for the benefit of the plaintiffs and the defendant. The plaintiffs claim the right to trace their entitlements to the

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212 First plaintiff's AEIC at para 7.

213 First plaintiff's AEIC at para 12.

Founders' Fees into the funds raised on the basis that those sums (representing the Founders' Fees) are held on a constructive trust.[214] I shall discuss each of these in turn before I discuss the defendant's counterclaim, as described in detail at [214]–[217] above.

Oral Agreement

222 The Oral Agreement relied on by the plaintiffs is said to have arisen sometime in 2010.[215] Whether or not a binding contractual agreement was formed depends on whether the following well-established legal requirements are satisfied: (i) offer and acceptance; (ii) intention to create legal relations; (iii) certainty of terms; and (iv) consideration.

223 Where the parties have not reduced the contract into writing, disputes often arise over whether the elements are satisfied and, of course, over interpretation of the scope of the contractual obligations.

224 As noted by Andrew Phang Boon Leong J (as he then was) in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [86] the "best objective evidence is *a written agreement* that does not fall afoul of any vitiating factors" [emphasis in original]. This statement flows naturally from the well-established principle that whether there was an offer that was accepted in circumstances such that the parties intended to enter into binding legal relations is a question that must be answered on the basis of an objective assessment of the facts. In *Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd* [2003] 3 SLR(R) 462 at [22], Chao Hick Tin JA noted that:

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214 Plaintiffs' closing submissions, paras 93–96.

215 SOC 2 at para 15.

> … where negotiations are protracted the court is entitled to look at all the circumstances and apply an objective test to determine whether the parties had reached an agreement as far as the essential terms are concerned, or whether the parties intended to reserve their rights pending a formal agreement.

225 In *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [71], the Court of Appeal reaffirmed the principle that it must be demonstrated that both parties intended the transaction to have legal effect before a valid contract can be said to have been formed. Whether the parties possessed such intentions is for the Court to determine, taking a holistic approach and "attempt[ing] its level best to ascertain the subjective intentions of the parties by reference to all the objective evidence that is both relevant as well as available to the court" (see Andrew Phang Boon Leong (Gen ed) *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 03.014). As Lai Kew Chai J stated in *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan* [2004] 4 SLR(R) 330 at [43] (affirmed in *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR(R) 22), "… the intention which courts will attribute to a person is always that which that person's conduct and words amount to when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind".

226 Agreements made in the business and commercial context are generally presumed to be legally binding. Absent an express provision that the agreement is not intended to be legally binding, the presumption may only be rebutted if the presumption against contractual enforceability may be reasonably implied (*The Law of Contract in Singapore* (*supra* [225]) at paras 05.020–05.021). By way of example, the learned authors of *The Law of Contract in Singapore* point to a situation where the alleged terms are uncertain or incomplete or where the subject matter of the agreement is so complicated or sophisticated such that

parties would not ordinarily expect to create legal obligations without the benefit of professional assistance (at para 05.025). These are, however, just examples to illustrate the general point. Each case must depend on its own facts and circumstances.

227 In the present case, the plaintiffs have asserted and relied on an Oral Agreement, a key term of which was that the defendant would raise US$20m and procure the eventual transfer of US$900,000 to each of the plaintiffs from the funds raised for the Solvesam project.

228 After reviewing the evidence as a whole, I have come to the conclusion that the plaintiffs' claim for breach of the Oral Agreement fails for the following reasons.

229 First, whilst the alleged Oral Agreement arose in a commercial or business context, I find that there is so much uncertainty over the date or period over which the oral contract was formed as well as the terms of the agreement that it is not possible to conclude that any Oral Agreement was actually made.

230 In reaching my decision, I have noted that it is understandable that the plaintiffs were unable to identify (or recall) the date when the Oral Agreement was made, given the passage of time as well as the inherent problems in pinning down a date when an agreement crystallises out of a sequence of discussions over a period of time. Nevertheless, the plaintiffs themselves have pleaded that the Oral Agreement was made "sometime in 2010" (*supra* [3(a)]). Yet their own evidence does not support that position.

231 To begin with, it is unclear what significance exactly the plaintiffs seek to attach to the undated Subscription Agreement (said to have arisen around

February 2011, *supra* [63(e)]). To be sure, the plaintiffs deny that the Oral Agreement was replaced or superseded by the Subscription Agreement. After all, the parties to the agreements are not the same. The Subscription Agreement concerned the relationship between the plaintiffs, the defendant, SIPL and Mr Chi. The earlier Oral Agreement, on the other hand, was just between the plaintiffs and the defendant and dealt in particular with their individual entitlements to the Founders' Fees.[216]

232 That said, it appears that the plaintiffs do rely on the fact that a Subscription Agreement was entered into as *support* for the claim that a prior Oral Agreement had been made between the parties. Further, they rely on the fact that the plaintiffs continued to work on the Solvesam software, such as by developing SS V1.25 and SS V1.25A and conceptualising SS V3, as evidence that the plaintiffs had provided part consideration and performance of the Oral Agreement.[217] I shall come back to this point below.

233 The plaintiffs also assert the existence of the Oral Agreement cannot be disputed because the defendant admitted unequivocally at trial that the parties had agreed to the terms of the Oral Agreement.[218] It is true that under cross-examination, the defendant answered in the affirmative when asked whether certain terms said to constitute the Oral Agreement were "discussed" and "agreed".[219] Yet that evidence must be taken in light of the fact that the Defence and Counterclaim as amended specifically denies that an Oral Agreement had been made between the parties.[220] Further, whilst the defendant had no issues

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216 Plaintiffs' closing submissions at para 79.

217 Plaintiffs' closing submissions at para 81.

218 Plaintiffs' closing submissions at para 6.

219 CT, 19 March 2018, pp 74 (line 17) to 75 (line 2).

220 Defence and Counterclaim (Amendment No 1), para 15.

with the points that were discussed and said to form the terms of the Oral Agreement, his evidence, essentially, was that the plan was still developing and depended very much on whether the defendant was able to secure investors.[221]

234 What is clear is that from late 2010 to early 2011, the plaintiffs and defendant had many discussions on the Solvesam project, including the need to raise funds, the plan to set up a new Project Company (SIPL) separate from Tecbiz, the ultimate goal of a NASDAQ listing, the defendant's role in sourcing for investors, the transfer of the Solvesam software IP rights to the Project Company, the payment of Founders' Fees, and the importance to investors that the defendant retain control or responsibility for the funds.

235 It is readily apparent that the parties were excited about the discussions on the Solvesam project, leveraging on the China market for huge growth and the possibility of becoming a kind of "Facebook" once all the planned features were in place. There is no doubt that during late 2010 and early 2011, many things were said by each side during their talks and meetings. For example, the Court accepts the defendant likely did refer to his considerable experience in business and fund-raising, his connections with potential investors from China and his ability to oversee or take companies into listings on the stock market (NASDAQ or otherwise). Nevertheless, the fact that he chose to "boast" and even exaggerate his achievements is not sufficient to establish that the parties had entered into an Oral Agreement. Similarly, whatever may have been said in the discussions, it remains doubtful that parties understood that they were settling on the *terms* of a legally binding, mutually enforceable *contract*. In this regard, it is worth noting that as late as June 2011, the first plaintiff had stated in his response to the Hu email that while "certain stakeholders in Tecbiz" had

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221 See. eg, CT, 19 March 2018, pp 64 (line 20) to 66 (line 23).

explored the possibility of collaborating with UWI to develop Solvesam through SIPL, "*nothing [had] been finalised*" (emphasis added) (see [109] above). It is not clear what exactly the first plaintiff meant by his reference to "certain stakeholders in Tecbiz" or what the first plaintiff had in mind in saying that "nothing had been finalised", but his response certainly supports the defendant's case that the plans for the Solvesam project were still developing and had yet to be confirmed.

236 While SIPL was incorporated in late December 2010, it is clear that the overall strategy at that stage was still in an early stage of development. Nothing had been signed. The defendant, who was himself a non-executive director and shareholder of Tecbiz, was still sourcing for investors in China. The plaintiffs themselves only recently had been considering raising funds through Mr Cooper of Microsoft, and other investors. The situation was fluid. The view that I have come to is that even in late 2010 (and certainly at the start of 2011), the parties had not yet come to any firm agreement.

237 Further, it appears that at least at that point in time, Tecbiz would continue to push the Solvesam software regardless of what may happen to SIPL. There was still work that had to be done on the Solvesam software. Tecbiz itself had established a Representative Office in China and there appeared to have been many requests from Microsoft China for information on the Solvesam software development and its registration/certification within China. Indeed, the Solvesam software was registered in China eventually in the name of Tecbiz – apparently because of the delays in setting up the SIPL Suzhou office.

238 Investors would obviously need to conduct their own due diligence enquiries. Further, the desirability or indeed the necessity of bringing on board another partner (by way of acquisition of BPI) so as to broaden SIPL's asset

base and business and revenue streams became an increasingly important subject matter of discussion as the days and weeks of 2011 passed by.

239 At the same time, whilst the defendant did refer to and "boast" of his listing of TECM, the fact that the defendant may have incorrectly stated or given the impression that TECM had been listed on NASDAQ says nothing about the plaintiffs' case that an Oral Agreement had been entered into between the parties on SIPL.

240 The plaintiffs plead that one of the terms of the Oral Agreement was that "the ultimate objective … was to list [SIPL] on NASDAQ, a stock exchange in the United States of America".[222] It is not clear to this Court what exactly this means. It is not claimed that the defendant undertook to list SIPL by a particular date or by the end of any stated period. Indeed, it is hard to see how the defendant could agree to be subjected to such a term – by way of an obligation imposed on himself. The goal of an eventual listing on NASDAQ was an aspiration – a listing whose success would depend on numerous variables and circumstances, some or many of which the parties will have little control over.

241 Where the parties have acted in reliance on an agreement, the court is generally more inclined to find an intention that the agreement is binding (*The Law of Contract in Singapore* (*supra* [225]) at para 05.025). Yet, whether the court does so must depend on the facts of the case at hand. In any case, it does not seem that the Court is being asked to find an implied agreement based on conduct. Instead, what the plaintiffs rely on are verbal discussions over a somewhat amorphous period of time on a number of topics out of which an oral contract has allegedly arisen. Whilst the plaintiffs plead that the Oral Agreement was entered into sometime in 2010, I have noted that some of the alleged terms

222 SOC 2 at para 15(c).

of the agreement were only discussed and agreed to in 2011. In particular, the term that the defendant and plaintiffs would collectively hold 51% of the shares in SIPL while the remaining 49% would be held by investors from the PRC only came about in June 2011 (*supra* [53]).[223]

Oral Agreement and the Subscription Agreement

242 What remains is the possibility that the Oral Agreement is founded on, or evidenced by, the Subscription Agreement (as mentioned at [231] and [232] above). There are, however, several difficulties that arise. First, the pleadings do not make clear whether this is the position the plaintiffs are taking in terms of the relationship between the Oral Agreement and Subscription Agreement.

243 What the Statement of Claim (as amended) pleads is that "[o]n or about 24 January 2011, in furtherance of the Oral Agreement, [SIPL], the Plaintiffs and the Defendant entered into a subscription agreement … with an investor from PRC, Chi Jiayu."[224] The plaintiffs' position is that the Subscription Agreement arose after the Oral Agreement. To be sure, the terms of the Subscription Agreement and the details (such as they were) are not identical to the alleged Oral Agreement. Nevertheless, the key terms in the Subscription Agreement are substantially the same as the Oral Agreement. One interpretation is that the Oral Agreement was replaced or subsumed within the Subscription Agreement. Another is that the written terms of the Subscription Agreement are relevant as evidence supporting the plaintiffs' case that they had entered into an Oral Agreement prior to the Subscription Agreement.

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223 First plaintiff's AEIC at para 120.

224 SOC 2, para 17.

244 The first possibility, which is in any case denied by the plaintiffs, cannot succeed. As noted above (*supra* [231]), the parties to the Subscription Agreement are not the same as the alleged Oral Agreement. The key provision of the Oral Agreement relied on is the defendant's promise to raise US$20m and to thereafter procure the transfer and disbursement of US$900,000 as Founders' Fees to the plaintiffs and the defendant. The Subscription Agreement, on the other hand, which includes SIPL and the investor, states in cl 5 that Completion only arises when US$15m has been paid to SIPL and US$5m has been paid to the Founders (*supra* [163]). It is noted that cl 5 imposes the obligation to make the payments on the *Investor*. There is nothing in the Subscription Agreement on how the U$5m is to be split or distributed between the Founders. In light of these points, the plaintiffs' basic case rightly remains founded on the Oral Agreement with the defendant, and the argument appears to be that the Subscription Agreement *evidences* or *confirms* the existence of the Oral Agreement.

Is the Subscription Agreement valid?

245 Evidently, it is not strictly necessary to decide whether the Subscription Agreement was properly entered into and binding on SIPL, Mr Chi, the plaintiffs and the defendant. Nevertheless, the plaintiffs have argued that the defendant cannot dispute the validity, terms and parties to the Subscription Agreement since the defendant had conceded that the Subscription Agreement had been entered into.[225] For example, the defendant has pleaded that "[w]hile the Plaintiffs, the Defendant, [SIPL] and Mr Chi had *entered into* an undated Subscription Agreement, no funds were received by [SIPL] under the Subscription Agreement" [emphasis added].[226] Further, while the defendant

225 Plaintiffs' closing submissions at paras 26, 27 and 74.

226 Defence and Counterclaim (Amendment No 1) at para 10(c).

denies in his pleadings that the undated Subscription Agreement was signed in furtherance of the Oral Agreement, the fact that the plaintiffs, the defendant, Mr Chi and SIPL *had* entered into the Subscription Agreement is admitted.[227]

246 Leaving aside for the moment the defendant's pleading that the Subscription Agreement had been entered into, there are some troubling features with the Subscription Agreement. The circumstances in which the Subscription Agreement was apparently signed has been set out in some detail already. Even if, as the plaintiffs allege, these points cannot be used now by the defendant to challenge the fact that the Subscription Agreement was entered into, they may provide some assistance when the Court examines whether the investor, Mr Chi, likely went on to perform his side of the bargain and raise US$20m in funds.

247 The troubling points include:

(a) the absence of any date for the signatures on the execution page;

(b) the fact that Mr Chi signed several days prior to the plaintiffs and defendant;

(c) the fact that the body of the Subscription Agreement in evidence is undated;

(d) the fact that the plaintiffs were never given sight of the complete Subscription Agreement as translated into Chinese for Mr Chi's signature and approval;

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227 Defence and Counterclaim (Amendment No 1) at para 17.

(e) the fact that the complete signed agreement is not even in evidence (an important point, as it appears there were a few drafts of the agreement);

(f) the lack of detail and clarity on points such as the duties and obligations imposed on the Founders in respect of the Solvesam software, the governing law and so on; and

(g) the fact that there is no signature or seal for SIPL.

248 For these reasons, even though Mr Chi appears to have signed the execution page, it is not possible to come to the conclusion that Mr Chi did so with the intention of being legally bound. Mr Chi's signature is undated. Mr Chi also states that he was signing for HKFXI as the investor. At the time when Mr Chi signed, no one else had signed the execution page. The actual body of the Subscription Agreement (in Chinese) which Mr Chi read is not in evidence at all. Further, at the time when Mr Chi signed (around 24 Feb 2011), it is obvious that he could not have conducted or completed any due diligence enquiries. The amount that was required (US$20m) was very substantial and completion was supposed to take place no later than 6 months after execution of the Subscription Agreement.

249 If it was not for the fact that the plaintiffs and defendant pleaded that the Subscription Agreement had been entered into, this Court would have had some difficulty concluding that a reasonable person in the shoes of the plaintiffs would have taken Mr Chi's signature on the bare execution page and without the body of the Subscription Agreement attached as signifying his intention to be bound.

250 In the end, as will be seen, nothing much turns on this point. Even if the Subscription Agreement was validly entered into, the fact that there is no subsequent supplementary agreement on the rights, duties, obligations of the plaintiffs and defendant vis-à-vis Mr Chi or his investment/fund company is surprising, if Mr Chi had indeed performed by raising US$20m and transferring the same (or making them available) to the defendant for use under the Subscription Agreement.

251 The defendant may have accepted that a Subscription Agreement had been entered into, but if Mr Chi did not (or could not) raise the funds, the defendant would not be in a position to procure transfer and payment of the Founders' Fees out of those funds. Under the Subscription Agreement, there is no doubt that Mr Chi had to raise the funds and transfer the same in accordance with the completion timeline in Schedule 2. No doubt, the plaintiffs rely on their pleading that a term of the Oral Agreement was that the defendant would procure the eventual transfer and disbursement of the funds raised for payment of US$900,000 to the plaintiffs as Founders' Fees. But what was the timeline for such payment? The plaintiffs themselves refer to the 6-month completion timeline in the Subscription Agreement, but that agreement requires funds to be provided by Mr Chi.

252 Having regard to the circumstances as a whole, I am of the view that the plaintiffs have failed to make out their claim that the parties had entered into any Oral Agreement. The totality of the evidence, including that relating to the Subscription Agreement, suggests that parties had many shared aspirations relating to the Solvesam software and the future of SIPL. These included shared aspirations about receiving investment capital for developing the Solvesam software and distributing these among the plaintiffs and the defendant. There is

no doubt that the parties even *acted on* these shared aspirations. Shared aspirations, however, do not make a contract.

Fraudulent misrepresentation and deceit

253 The plaintiffs' alternative claim in misrepresentation and deceit is based on the assertion that the defendant made false statements during the discussions in late 2010 and early 2011 which were intended to induce the plaintiffs to enter into the Subscription Agreement between the plaintiffs, the defendant, Mr Chi and SIPL. The plaintiffs are not claiming rescission of the contract on grounds of misrepresentation under the Misrepresentation Act (Cap 390, 1994 Rev Ed). Instead the claim is predicated on s 2(1) which states:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

254 In addition, there is the possibility of a claim in the common law tort of deceit. The following passages from *The Law of Contract in Singapore* (*supra* [225] at paras 11.001 and 11.004) provide a helpful summary of the principles:

> Many things are said en route to a concluded contract. Some of these statements are likely to be promises, and if these promises are incorporated as terms of the contract, the consequences of their non-fulfilment lie to be determined by the principles of breach. There will however also be other statements which do not get incorporated into the contract. Oftentimes, these statements play a not insignificant part in persuading the person to whom the statements were made … to enter into contractual relations with the maker of the statements … If these statements turn out to be false or misleading, the representee is not necessarily without remedy just because the statements were not incorporated as terms of

> the contract ultimately concluded. Much depends on the nature of the statement and the role it played in inducing the contract.
>
> …
>
> A representee, who is the victim of a misrepresentation *fraudulently* made, will be able to claim damages in an action in the tort of deceit. A misrepresentation, made in circumstances that amount to a breach of a duty of care … will similarly give the representee a right to claim in damages in the tort of negligence. A misrepresentation made negligently, in the sense that the representor had no reasonable grounds upon which to believe in the truth of the facts asserted, will also give the representee a claim, pursuant to the Misrepresentation Act, for damages for losses suffered. Even where the misrepresentation was wholly innocent, the representee may be awarded damages in lieu of rescission at the discretion of the court.
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> [emphasis in original]

255 In short, even if no binding contract (whether the Subscription Agreement or the Oral Agreement) was entered into, if the plaintiffs can show that a false representation of fact was fraudulently made with the intention that it be relied on, and that it resulted in the plaintiffs suffering loss or damage as a result of their reliance on the representation, a claim for damages may arise in the tort of deceit: see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435. Following the Court of Appeal's decision in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [173], it is sufficient if the representation is substantially false. This is to be determined by an assessment as to whether the discrepancy between the facts as represented and the facts as they existed would have influenced the mind of a normal representee.

256 The representations relied on and pleaded by the plaintiffs are as follows:

(a) The defendant intended to lead the fund-raising exercise for the Solvesam project in the name of SIPL (with the ultimate objective to list on NASDAQ) without any link back to Tecbiz.

(b) The funds raised for the Solvesam project under the Subscription Agreement had to be under the defendant's control because this was a key requirement of the potential investors' representative who only trusted the defendant to control the funds.

(c) The defendant intended to procure the eventual transfer and disbursement of the funds as follows:

(i) USD$900,000 to each of the plaintiffs and the defendant;

(ii) US$2.3m as expenses for the fund-raising exercise; and

(iii) US$15m for the Solvesam project as part of SIPL's working capital

(d) The defendant had successfully raised funds for one of his other business ventures, a development stage company in the United States known as Techmedia Advertising Inc (TECM) which was to be listed on NASDAQ.

257 It is immediately apparent that some, if not most, of the representations are statements of intention in respect of future conduct. These are

(a) the intention to lead the fund-raising in the name of SIPL with no link back to Tecbiz;

(b) the intention to procure the distribution of the funds when raised in the manner pleaded; and

(c) the intention to list SIPL on NASDAQ as the ultimate objective of the Solvesam project.

258 It is established law that in order for a statement to be actionable, the statement must relate to a matter of fact either present or past: *The Law of Contract in Singapore* (*supra* [225]) at para 11.026, citing Chao Hick Tin J (as he then was) in *Bestland Development Pte Ltd v Thasin Development Pte Ltd* [1991] SGHC 27).

259 In the same vein, a statement by the maker that he will do something or intends to do something in the future is not ordinarily a statement of fact: see *Tan Chin Seng v Raffles Town Club Pte Ltd* ("*Raffles Town Club"*) [2003] 3 SLR(R) 307 at [21] that a representation relates to "some existing fact" or "some past event" and "contains no element of futurity" and "must be distinguished from a statement of intention". As was aptly stated by Saville J in *Bank Leumi Le Israel BM v British National Insurance Co Ltd* [1988] 1 Lloyd's Rep 71 at 75, a statement as to a future state of affairs can in itself be neither true nor false when made "since the future cannot be foretold".

260 This does not, however, mean that a statement of intention made during the course of negotiations never carries legal consequences. In appropriate situations, the making of the statement may be used as part of the surrounding circumstances that leads to the finding of an implied term. The *Raffles Town Club* case is one such example, where statements made in a club's promotional materials about it being an exclusive and premier club supported a finding that there was an implied term to the effect that the club would exercise its discretionary powers to remain as such a club. Alternatively, legal consequences may arise because the statement of intention is supported by a finding that there was an accompanying representation that the speaker possessed an honest belief

or expectation based on reasonable grounds that events will turn out as forecasted. Closely related is the principle that a statement of a person's intent can include a representation that the person does in fact hold that intent. A misrepresentation as to the state of a person's mind is a misstatement of fact (albeit one that can be hard to prove).

261 A key argument for the assertion that the defendant did not hold the professed intention to raise funds for Solvesam and apportion the Founders' Fees to the plaintiffs, concerns the alleged similarity between the Solvesam project fund-raising and the defendant's offering of securities without a licence in relation to TECM (*supra* [47]). The plaintiffs' case is that just as investors were persuaded to provide funds for TECM on the basis that TECM would be listed on NASDAQ, the same or substantially similar "carrot" was used by the defendant in the Solvesam project to entice the plaintiffs and investors. The truth, according to the plaintiffs, was that the defendant, from the outset, never intended for SIPL to be listed on NASDAQ. Instead, he intended to use the Solvesam project to raise funds for the purposes of dishonestly lining his own pocket and enriching himself at the expense of the investors and his erstwhile partners.[228]

262 After considering the evidence and submissions, I am unable to agree with the plaintiffs. TECM was apparently a "development project" undertaken by the defendant. The Statement of Facts ("SOF") presented against the defendant in respect of the charge for dealing in securities without a licence makes it clear that the investors and persons involved in TECM are different and do not involve the plaintiffs. The SOF states that in order to raise funds for TECM, the board of directors, including the defendant, resolved to offer private

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228 SOC 2 at para 26.

placement shares to private individuals from September 2008. The defendant had himself, between April and July 2009, offered various persons opportunities to subscribe for securities in TECM.

263 Indeed, it bears repeating that the plaintiffs were invited to participate in the TECM listing in 2008 (by subscribing for shares) but they decided against taking up the invitation.

264 A substantial amount of money was raised from the sale of securities to investors. Investors with US dollar accounts remitted their investment money directly to a trust account set up on behalf of TECM. Investors who did not have a US dollar account would pass their investment money directly to the defendant, who would purportedly transfer the money to the trust account. As it turned out, TECM failed to be listed on the NASDAQ, but was instead listed on OTC BB and thereafter downgraded to OTC Pink Sheets on 20 December 2010.

265 On 4 May 2011, a police report was lodged against one "Raymond" and the investigations involved the defendant. Ultimately, the defendant pleaded guilty and was convicted, on 31 March 2014, of an offence under s 82(1) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) for carrying on a business in the dealing of securities without a valid capital markets services license. He was fined S$150,000, in default of which he was to serve a sentence of 15 months' imprisonment.

266 Based on the material available to this Court, the defendant's charge and conviction relating to TECM concerned his act of dealing in securities without a valid capital market service licence. The defendant was not convicted of an offence of fraud or cheating of the investors. I do note the SOF presented against the defendant states that Raymond, who had been engaged to source for

interested investors, had informed a potential investor in 2008 that TECM was expected to be listed on NASDAQ. At that time, TECM was listed on OTC BB. The investor, believing that TECM was going to be listed on NASDAQ, invested monies to acquire shares in TECM. But as it turned out, TECM was eventually downgraded to OTC Pink Sheets. A police report was lodged by the investor against Raymond.

267 The point, however, is that whilst TECM did not manage to list on NASDAQ, it is undisputed that it was listed on OTC BB and subsequently transferred to OTC Pink Sheets. There is nothing to show that the defendant never intended to achieve a NASDAQ listing. The fact that TECM did not achieve a NASDAQ listing is not evidence that the defendant never intended to try to place TECM on NASDAQ. Indeed, the SOF makes clear that the police report filed by the investor was against Raymond. Further, there is nothing to suggest that any investor has sued or taken out proceedings against TECM or the defendant for cheating or fraud. There is also no evidence before this Court that Raymond has been sued or prosecuted for fraud.

268 In any case, this Court notes that the controversies surrounding TECM date back to around 2008 and 2009, and the conviction for the securities offence dates back to early 2014. It does not appear or at least there is no evidence that any TECM investor has filed a suit against the defendant. Whilst the first plaintiff states that he has heard that there are TECM investors who are very unhappy and who intend to sue, it is unclear what the unhappiness concerns (failure to achieve a NASDAQ listing, fraud or something else), and in any event this is purely hearsay.[229]

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229 First plaintiff's AEIC at para 193.

269 The plaintiffs raise the TECM controversy in their pleadings to show that the defendant has a *modus operandi* or system that he uses to dishonestly raise funds. According to the plaintiffs, TECM is evidence that the defendant never had the intention to carry through his undertakings/promises such as listing SIPL on NASDAQ, paying the Founders' Fees out of the funds raised and so on.

270 In coming to my decision, I have noted s 15 of the Evidence Act (Cap 97, 1997 Rev Ed) which provides as follows:

> **Facts bearing on question whether act was accidental or intentional**
>
> **15.** When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

271 The first statutory illustration deals with a case where a person is accused of burning his house down to obtain insurance money. The fact that the same person lived in several houses, each of which he insured, in each of which a fire occurred and in respect of each of which he received an insurance payment from a different insurance office, is relevant as tending to show that the fire was not accidental.

272 Neither party addressed the law on similar fact evidence in the submissions. The TECM episode was not even referred to in the plaintiffs' closing submissions as similar fact evidence tending to show that the defendant did not have the intention to list SIPL on NASDAQ. This is despite the fact that the first plaintiff in his evidence made much of the shock which he felt on discovering how strikingly similar the defendant's fund-raising events for

TECM and SIPL were, and his conclusion that the defendant's participation in the Solvesam project was part of the defendant's *modus operandi*.[230]

273 In light of this, I shall only briefly touch on the basic principles. I begin with the general observation that whilst there are many authorities on similar fact evidence in criminal cases, there are fewer reported cases on similar fact evidence in civil cases. Indeed, some commentators have questioned whether principles on similar fact evidence developed in respect of criminal proceedings are fully applicable in civil cases (see, *eg*, Ho Hock Lai, *A Philosophy of Evidence Law – Justice in the Search for Truth* (Oxford University Press, 2008) at p 337).

274 In Singapore, use of similar fact evidence in civil cases has featured in two relatively recent cases. The first is *Hin Hup Bus Service (a firm) v Tay Chwee Hiang and another* [2006] 4 SLR(R) 723 ("*Hin Hup Bus Service*"). In this case, Lai Siu Chiu J, after referring to prior cases on similar fact evidence in criminal proceedings, cited the English decision *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119 for the proposition that the principles on similar fact evidence were the same in criminal and civil cases (at [40]). The general principle was that similar fact evidence was admissible in civil cases if the evidence was logically probative (*ie* logically relevant in determining the matter in issue), provided that its probative value outweighed its prejudicial value – which required that the evidence not be oppressive or unfair and also that the other side had fair notice of it and was able to deal with it (*Hin Hup Bus Services* at [40]).

275 The second case is the decision of Choo Han Teck J in *Rockline Ltd and others v Anil Thadani and others* [2009] SGHC 209 where a similar view was

230 First plaintiff's AEIC at paras 193(b) and 196.

expressed, albeit with the gloss at [2] that the court in a criminal case is likely to be stricter when exercising its discretion in admitting similar fact evidence.

276 Given that this Court does not have the benefit of submissions on similar fact evidence, I shall confine myself to the following observation. Whilst similar fact evidence can be used to establish intention in appropriate cases, the law has long approached the use of such evidence with care and caution. In some cases, the evidence may have very little or no probative value at all. In other cases, the evidence may give rise to an inference of knowledge or intention strong enough to place an evidential burden on the other side to rebut the inference. In all such cases, the court will naturally examine with care the degree of similarity and the nature of the issues in question before reaching any conclusion. In making this observation I am mindful of the statement of Steven Chong J (as he then was) in *Public Prosecutor v Mas Swan bin Adnan and another* [2011] SGHC 107 at [107] that following *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, admissibility of similar fact evidence has to be determined according to the categories of relevance under ss 14 and 15 of the Evidence Act.

277 In the present case, I am not persuaded that the TECM events are similar to such an extent that an inference can be drawn that the defendant was setting out to cheat the plaintiffs (and the investors) in the Solvesam project. All that can be said is that while there was talk of a TECM listing in the US, things went wrong or did not go as hoped for. TECM did not achieve a NASDAQ listing and was placed instead on OTC BB. Thereafter, the failure to file certain financial statements led to the transfer of TECM to OTC Pink Sheets. The trading activity of the defendant without the necessary licence also led to his conviction under the Securities and Futures Act in 2014. Whilst these are serious matters, they do not necessarily support the conclusion that the defendant

engages in a discrete pattern of activity wherein his objective is to defraud investors and/or his partners or business associates.

278 Putting aside TECM, the plaintiffs do not have any other sufficient evidence or basis for the assertion that the defendant made the representations with the intention of lining his own pockets, and with no intention of using the monies for the Solvesam project. The Court is reminded that where allegations of fraud and dishonesty are made in a civil case, more evidence is required to establish fraud and dishonesty even though the standard of proof remains set at a balance of probabilities. In short, the Court does not lightly make findings of fraud and dishonesty (see *Visionhealthone Corp Pte Ltd v HD Holdings Pte Ltd and others and another appeal* [2013] SGCA 47 at [43]).

279 The evidence as to what happened in early 2011 is consistent with the defendant making efforts to raise funds through his contacts in China and specifically with Mr Chi. The defendant also broached the question of bringing BPI on board (by means of merger or acquisition) in order to improve the chances of success in the hoped-for development of SIPL to a position whereby a listing was a realistic proposition. SIPL without BPI would only have one asset and business stream - the Solvesam software and software asset management services.

280 Whilst Solvesam V1.0 was up and running, it is clear that the downstream success of the Solvesam project and the anticipated penetration of the market in China rested heavily on development plans that lay in the future. I have no doubt that the plaintiffs and the defendant were excited about the prospects but, that said, the comment from BPI that the planned features were already available in the US market provides food for thought. There is no doubt that the defendant did from time to time refer to his financial prowess and the

listing of TECM to rally support. Indeed, whilst the evidence is confused, it may well be that the defendant at times erroneously (knowingly or otherwise) stated that TECM had achieved a NASDAQ listing when in fact it had only been listed on OTC BB and later OTC Pink Sheets. This does not mean, however, that the defendant never possessed the intention to develop SIPL for the purpose of a listing in NASDAQ.

281 The fact that the defendant had operational control of SIPL's bank account with DBS Hong Kong also does not establish that the defendant had always intended to use the Solvesam project to line his own pockets. It is clear and undisputed that the defendant informed the plaintiffs that two directors were required to open the account. The defendant could not open the account on his own and the plaintiffs decided that the second plaintiff would open the account with the defendant. The second plaintiff, it will be recalled, was at that time based in China. There was no reason why the first plaintiff could not have been a signatory on the account. In any case, the plaintiffs knew that SIPL had opened a Hong Kong account into which monies were to be deposited. The second plaintiff even had an internet token which allowed him to view transactions – although there is some uncertainty as to when he received the token. In any case, there is no doubt that when the plaintiffs requested for copies of the Hong Kong bank statements, the defendant readily complied (see [83] above). There is, in my view, some force to the defendant's point that if he had set out to cheat the plaintiffs, he would not have used SIPL's DBS Hong Kong account to hold the monies raised for SIPL.

282 To conclude this section of my judgment, I have come to the view that the plaintiffs have failed to establish that the defendant, when making the statements or representations, did not have an honest belief or expectation based on reasonable grounds that events would turn out as forecasted. Neither have

they established that the defendant did not in fact at that time hold the intention of using the funds raised for the Solvesam project.

283 For this reason, the plaintiffs' case for fraudulent misrepresentation and deceit fails. Before I turn to the plaintiffs' next cause of action (breach of constructive trust), for completeness, there are some other reasons why the plaintiffs' case for fraudulent misrepresentation and deceit fails.

284 The first additional reason relates to the issue of pleadings and the defendant's alleged statement that TECM had been listed on NASDAQ. Assuming for the moment that the defendant had stated that TECM had been listed on NASDAQ (as a statement of fact, as opposed to a statement of intention that it was a goal for TECM to achieve a NASDAQ listing), the plaintiffs would still have to establish that they relied on that TECM representation and that the TECM representation was made with the knowledge that it was false or in the absence of any genuine belief that it was true (see *Panatron Pte Ltd v Lee Cheow Lee* (*supra* [255]) at [14]). In addition, the plaintiffs would have to show that they suffered damage *as a result of* such reliance.

285 The difficulty, however, is that the plaintiffs do not plead that the representation made was that TECM had already been listed on NASDAQ. Instead, the Statement of Claim (as amended) pleads that the defendant had successfully raised funds for TECM "which was to be listed on NASDAQ".[231] Under cross-examination, the first plaintiff's response was that the pleading was wrong and that the correct position was that the representation made by the defendant was that TECM had already been listed. Counsel for the defendant points out that these amendments to the Statement of Claim were introduced after several hearings over the plaintiffs' attempt to include mention of TECM

[231] SOC 2 at para 23(d).

in the Statement of Claim.[232] The defendant through his counsel urges the Court to disregard what he characterises as a "last-ditch" attempt to "amend" the pleadings by way of the first plaintiff's responses in cross-examination.

286 To be clear, the plaintiffs did not in fact make any application to amend the pleading during the trial. Further, whilst it is a fair point that the plaintiffs should have made the position clearer in their pleadings on the nature of the representation concerning TECM and its listing, I have come to the view that the defendant would not have suffered any substantial prejudice if an amendment was applied for and granted. The defendant in his evidence-in-chief accepts that he could have made passing references to TECM but adds that he did not discuss details because "TECM is in a completely different business as that of [SIPL] and TECM was already listed on the United States Over The Counter Bulletin Board".[233] Furthermore, the defendant was cross-examined on the remarks made in respect of TECM and NASDAQ and had the opportunity to respond to the plaintiffs' position in evidence. He denied having made any statement that TECM had been listed on NASDAQ.[234]

287 In the end, nothing turns on the pleading point since I have come to the view that the action in fraudulent misrepresentation and deceit would fail even if the TECM/NASDAQ statement had been pleaded as a statement of fact.

288 Even if the defendant made the statement that TECM had been listed on NASDAQ, knowing it to be false or with reckless disregard to its truth or falsity, the plaintiffs must establish an adequate causal link between the statement and the act said to constitute reliance. Academic commentaries have

232 Defendant's AEIC at para 90.

233 Defendant's AEIC at para 93.

234 CT, 19 March 2018, p 77 (lines 3–25).

noted the possibility that proof of reliance is not necessary in cases involving fraud: that is to say, cases where the speaker intentionally made the false statement to induce entry into a contract (see *The Law of Contract in Singapore* (*supra* [225]) at para 11.067 *et seq* citing *Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR(R) 283, which observes that it does not lie in the mouth of the representor who had made false representations to argue that the representations did not operate as an operative inducement). Nevertheless, as *The Law of Contract in Singapore* at [11.069] states, "there is however little doubt that relief for misrepresentation is predicated upon proof of actual inducement. See also *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179. Even so as *The Law of Contract in Singapore* notes at [11.071] the preferred approach in the case of fraud is that a (rebuttable) presumption of inducement arises.

289 Reliance does not mean that the misrepresentation must be the only factor in play: it is enough if it played a real and substantial part in operating on the mind of the representee. Furthermore, once causation (reliance) is established, the fact that the representee had an opportunity to verify the truth is not relevant, for "[a] knave does not escape liability because he is dealing with a fool": *per* Brennan J in *Gould v Vaggelas* (1985) 157 CLR 215 at 252; see also *The Law of Contract in Singapore* (*supra* [225]) at para 11.076. It is only if the misrepresentation had no causal effect at all (*ie*, no effect on the representee) that the claim for fraudulent misrepresentation and deceit will fail.

290 In the present case, the plaintiffs were aware of the defendant's involvement in TECM well before the discussions over the Solvesam project and fund-raising by the defendant in late 2010. Under cross-examination on the date when the defendant allegedly said that TECM had been listed on NASDAQ, the first plaintiff responded that "[i]t was around 2010, probably

around October" and "very likely to be through his email".[235] There is, however, no such October 2010 email in evidence where the defendant makes that statement of fact. Instead, as the defendant's counsel points out, the only email in evidence that refers to TECM is an email dated 18 September 2008, where the defendant informed the plaintiffs of TECM and invited them to participate by subscribing for shares in the planned listing.[236]

291 The plaintiffs (in particular, the first plaintiff) was not lacking experience or knowledge of fund-raising and listings on stock markets. In 2009, the plaintiffs had considered an attempt to list Tecbiz on Phillips Securities OTC Board but decided not to make the attempt, having reached the conclusion that the action was premature. Further, Tecbiz at that time had engaged Spring Seeds and Sirius for investments and entered into a detailed Subscription Agreement (see [22]–[25] above). Then again, in late 2010 or early 2011 when the defendant raised the desirability of bringing on board BPI into SIPL, the first plaintiff must have been aware that BPI was at that time listed on Phillips Securities OTC Board in Singapore and would have to be delisted in preparation for the merger and acquisition by SIPL.

292 The point this Court makes is that even if the defendant made a statement that he had succeeded in listing TECM on NASDAQ, there is nothing to suggest that the statement had any impact on the plaintiffs. The plaintiffs already knew the defendant was connected with the TECM listing in the United States. The first plaintiff, in particular, was well aware that there were different forms of listing in the United States and Singapore. There is nothing in the evidence to suggest that the plaintiffs ever asked for details or clarification concerning the

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235 CT, 14 March 2018, p 118 (lines 2–7).

236 Defendant's closing submissions, para 93.

TECM listing. If indeed this was such a material factor in the plaintiffs' decision to enter into the Subscription Agreement, one would have thought that the plaintiffs would have sought more information from the defendant.

293 After reviewing the evidence, I have come to the conclusion that whilst the defendant did make references to TECM and NASDAQ in late 2010 and early 2011, these were passing references by way of boasts and "self-praise". A reasonable person in the plaintiffs' position would have treated the references as nothing more than the defendant's attempt to underscore his financial and business experience and ability to raise investment funds. In making this comment, the Court is not going so far as to say that the statement is nothing more than "mere praise" or "puffing and pushing" that does not amount to making any representation (see Chao Hick Tin J in *Bestland Development Pte Ltd* (*supra* [258]) and *The Law of Contract in Singapore* (*supra* [225]) at para 11.048). But the point is that even if the defendant made a statement of fact on TECM and its NASDAQ listing, there is nothing to suggest that the plaintiffs would have acted differently if they had been told instead that TECM was only listed in the US on OTC BB or OTC Pink Sheets. The principal business activity of TECM was to provide outdoor media solutions to advertisers in India. In the case of the Solvesam project, the plaintiffs were well aware that achieving a listing on NASDAQ was not in any sense guaranteed. Much developmental work was still needed on the Solvesam software and a lot would also depend on the success of the plans to penetrate and dominate the China market.

294 The comments by Gary Chan Kok Yew in *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.019 are instructive, namely, that "[w]here the facts relating to the representation made are publicly available and can be easily ascertained by the plaintiff, it may be difficult for the plaintiff to show reliance on the defendant's representation." In support, reference was

made to *Quah Poh Hoe Peter v Probo Pacific Leasing Pte Ltd* [1992] 3 SLR(R) 400 ("*Quah Poh Hoe Peter*"). This was a case where two yachts were leased to a named company under separate contracts. It was discovered after the default payments of rent that the company was not in fact registered. In this context, an issue arose as to whether the owner reasonably relied on a representation (that the guarantor was going to work at the company) for its belief that the company existed. The Court of Appeal found that the representee (the owner) could not reasonably have relied on a representation as to the existence of a company as this was a fact that could easily have been established by conducting a search at the Registry of Companies (*Quah Poh Hoe Peter* at [13]). Further, the owner must have already satisfied itself that the company existed since it had already leased the other vessel to the same company. Likewise, on the present facts, information on companies listed on NASDAQ is information that is readily available.

295 In the Court's view, what mattered was the fact that the defendant had experience in raising funds and investments and was trusted by the plaintiffs. Indeed, in the case of TECM, it is apparent that funds were indeed raised – although, as noted, a NASDAQ listing was not achieved and there were problems arising from the sale of securities without a licence. Further, the question whether TECM was listed on NASDAQ was a matter that could easily have been established had the plaintiffs conducted a simple search.

296 The second additional reason relates to the alleged falsity of the statements made by the defendant. This has been dealt with already, but to be clear and for sake of completeness, there is little to support the assertion that the defendant never intended (i) to lead the fund-raising project in the name of SIPL and without links back to Tecbiz; and (ii) to procure the eventual transfer and disbursement of US$900,000 from the funds raised as Founders' Fees.

297 The defendant clearly did engage in fund-raising for the Solvesam project and there were certainly references in promotional material to Tecbiz. If one were to disregard the terms of the alleged Oral Agreement, this would seem unremarkable given that the Solvesam software originated from Tecbiz, an IT company with an established business. SIPL was a new company with no track record of its own and it would stand to reason that explanations would have to be provided to potential investors as to the historical connection with Tecbiz. After all, the plan was for Tecbiz to transfer the Solvesam software to SIPL. Further, existing users of Tecbiz's software asset management services would obviously be aware that the Solvesam software was a Tecbiz product.[237] Indeed, the plaintiffs registered the Solvesam software in China under Tecbiz's name – with the intention of later transferring the registration to SIPL.

298 The plaintiffs appear to take objection to any mention of Tecbiz in the fund-raising exercise for SIPL. The basis for this objection, however, is hard to understand. The evidence was that the plaintiffs wanted to ensure that Tecbiz's core business in computer forensics remained intact after SIPL was set up. The only part of Tecbiz's business that was to be transferred to SIPL was the Solvesam software for the Solvesam project. It does not follow that it was a requirement that there must be no mention of Tecbiz at all: not even for the purposes of explaining the background and origin of the Solvesam project as what was, in substance, a "spin-off" from Tecbiz. If the reason there had to be "anonymity" of origination was because the plaintiffs were concerned that the reputation of Tecbiz might be hurt if the Solvesam software did not become the anticipated success story, the position should have been made much clearer if the defendant was to understand that this was the meaning of "no links" back to Tecbiz.

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237 Defendant's Closing Submissions at para 73.

299 In any case, even if the defendant had accepted that Tecbiz's name would not appear in any fund-raising material, the point remains that the documents prepared by the plaintiffs themselves on the Solvesam software expressly connected Tecbiz with Solvesam.[238] Prior to the resignation of the plaintiffs from SIPL in July 2011, the rights to the Solvesam software remained with Tecbiz. The registration of the Solvesam software in China was under Tecbiz and had not yet been assigned or transferred to SIPL. Any promotion of the Solvesam project prior to the plaintiffs' resignation (which they accept constituted termination, in any case, of whatever agreement they had with the defendant) would inevitably make references to Tecbiz.

300 Whilst there was evidence that some of the online falsehoods published in China indicated that Tecbiz was the Solvesam project vehicle, the defendant has denied any association with these statements. He claims he was also upset by the posts and was trying to find out who was responsible. Whoever may have been responsible, any interested potential investor in China might have easily drawn a connection between Tecbiz and the Solvesam software if he had come across Tecbiz's own material which indicated that Solvesam belonged to Tecbiz.[239] In short, I am unable to conclude on the basis of the evidence before the Court that the defendant was responsible for the online falsehoods that the plaintiffs complained of. Furthermore, the fact that there were some references in promotional material that referenced Tecbiz does not mean that the defendant never had the intention, from the outset, to carry out the Solvesam project with "no links" back to Tecbiz.

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238 Defendant's Closing Submissions at paras 73 and 90.

239 Defendant's Closing Submissions at [73]. See also Certified Transcript, 15 March 2018, p 151, line 5 – p 152, line 11.

301 Turning to the alleged false representation that the defendant intended to procure payment of the Founders' Fees out of the funds raised, there is no basis for the assertion that the defendant did not hold the intention in question at the time when the representation was made. It is clear that by early 2011, even before the signing of the Subscription Agreement, it was likely that the original understanding or plan would need to be modified to bring in BPI. Indeed, as pointed out earlier (*supra* [192]), the second plaintiff even queried what would be the effect of the merger and acquisition of BPI on the initial fund allocation. In short, this Court is of the view that any reasonable person in the plaintiffs' position must have been aware that the prospective involvement of BPI might well affect any original understanding on Founders' Fees.

302 Finally, with regard to the representation that the funds raised for SIPL under the Subscription Agreement had to be under the defendant's control because this was a key requirement of the potential investors' representative, there is no evidence that this statement, even if made in this form, was in any sense false. Indeed, the first plaintiff accepted this under cross-examination.[240] Further, the defendant's evidence in cross-examination was that in his discussions with Mr Chi, he informed Mr Chi that whilst he would be responsible for the funds, two or three directors would be needed to co-manage the funds in SIPL. In short, his position was that he told the plaintiffs that Mr Chi required that the defendant remain responsible to Mr Chi for the funds: not that he has sole managerial control.[241] There is no evidence to suggest otherwise.

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240 Defendant's Closing Submissions at para 91.

241 Defendant's Reply Submissions at para 19.

Constructive trust

303 The plaintiffs' claim on constructive trust (or the *Pallant v Morgan* equity) arises from the decision of Belinda Ang JC (as she then was) in *Ong Heng Chuan and another v Ong Boon Chuan and another* [2003] 2 SLR(R) 469 ("*Ong v Ong*"), where the High Court followed the English case of *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372. Ang JC stated that the elements for such a constructive trust were as follows (*Ong v Ong* at [7]):

> (a) the existence of an arrangement or common understanding, before property is acquired by one party that the other should have some interest in it. The arrangement or understanding need not have contractual effect.
>
> (b) the arrangement or understanding must be that one party will take steps to acquire the target property on the basis that the non-acquiring party will acquire an interest in it. If the acquiring party subsequently changes his mind, he must because of the changed situation inform the non-acquiring party of this in time for him to be able to adjust his position.
>
> (c) the non-acquiring party must rely on the existence of the understanding. Reliance may take either one or two forms. This means he must either do something, or omit to do something, which is either to the advantage of the acquiring party or to his own detriment. The essential test is whether the circumstances are such that it is "inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted"

304 Aside from denying the existence of any common understanding or arrangement, the defendant submits that no property was in fact acquired pursuant to any common understanding, namely, to raise funds for the Solvesam project in the name of SIPL and with an ultimate goal of a NASDAQ listing. The defendant's point is that all the monies raised and placed into SIPL's DBS Hong Kong bank account were in fact a mixture of the defendant's own monies

and monies loaned by Pak Bani. These sums were raised solely in connection with the acquisition of BPI and not the Solvesam project to develop the Solvesam software. The monies were not raised by Mr Chi, who had already decided against proceeding with the investment in SIPL and the Solvesam project.

305 For the same reasons that I found against the plaintiffs in relation to breach of the alleged Oral Agreement as well as fraudulent misrepresentation, the claim built on the asserted constructive trust also fails. In other words, I am not persuaded that there was an agreement or common understanding in place. Even putting that difficulty aside, the evidence does not establish, on a balance of probabilities, that any "target property" was acquired pursuant to any agreement or common understanding between the parties. As mentioned at [211]–[212] above, there is no evidence that the funds deposited in SIPL's DBS Hong Kong bank account originated from Mr Chi or UWI. The best that the plaintiffs can say is that the account from which the funds were remitted was a DBS Hong Kong account held at a branch in Tsim Sha Tsui, where UWI's registered office is also located. But that does not take them very far. In any case, it is not apparent as to what is the detriment that the plaintiffs suffered as a result of any reliance other than the general claim that they thereby lost the opportunity to develop Solvesam into a great product.[242]

306 I make the passing observation that the plaintiffs were shareholders and directors of SIPL as well as Tecbiz. Indeed, prior to the second plaintiff's sale of his Tecbiz shares to the defendant, the plaintiffs had control of Tecbiz even though the defendant was also a shareholder and non-executive director. Tecbiz still had ownership and control of the rights to Solvesam. One of the interested

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242 Defendant's Closing Submissions at para 109; see also CT, 14 March 2018, pp 44 (line 21) to 45 (line 3).

"clients" was none other than Microsoft China who was well aware that the Solvesam software was a Tecbiz product. If the plaintiffs believed that the defendant had somehow tricked them into letting him use the good name of Solvesam and the Solvesam software in some fraudulent scheme to raise funds from investors with the intent of lining his own pockets, it is odd that they should then opt to resign from SIPL and especially from Tecbiz and thereby effectively confer almost full control over the Solvesam software to the defendant.

The counterclaim

307 The first plaintiff does not deny receiving two cheques totalling S$400,000 from the defendant in March and April 2011. At this time, the plaintiffs had not yet decided to pull out of the investment and were working *inter alia* on (i) registering the Solvesam software in China; (ii) setting up the Suzhou office; (iii) opening SIPL's Hong Kong bank account; and (iv) the details of the merger and acquisition of BPI.

308 The defendant's case is that even though it was becoming ever clearer that Mr Chi was losing interest in Solvesam and SIPL, he was personally pushing forward with the plan for SIPL to acquire BPI. The complexion of the relationship and interests of the plaintiffs and the defendant by now had changed. The Solvesam project was no longer in the driving seat of the plans for SIPL. Instead, the plan had evolved into one whereby the acquisition and development of BPI had become the main event so to speak. The defendant's position (which the plaintiffs accept) is that BPI was the defendant's connection – not the plaintiffs'. The defendant could have chosen to end his involvement with the plaintiffs, SIPL and Solvesam and simply engage BPI direct on an investment/development project. Instead, his evidence is that since SIPL had been set up already, the focus of SIPL would shift to BPI. The plaintiffs would

still be part of SIPL and would benefit from development of the SIPL-BPI tie up. Further, whilst the defendant's evidence is not clear, it appears that his understanding or intention was that once Solvesam had been fully developed and established a proven revenue stream – then at that stage it would still be possible (subject to the plaintiff's agreement) to bring the Solvesam software into SIPL. It was against this backdrop that the first plaintiff requested friendly loans in March and April 2011 to assist in home renovation costs and personal matters.

309 The first plaintiff's position, of course, is rather different. His understanding was that the Solvesam project and SIPL remained in place and that whilst BPI was a new element – it was nothing more than a step along the road to developing SIPL and achieving the NASDAQ listing. In other words, the acquisition of BPI was secondary and was just to assist SIPL's main goal of developing the Solvesam project. The first plaintiff's position is that at the time of the alleged loans, the defendant never indicated that Mr Chi was getting cold feet or that there were problems with Solvesam (*viz* its state of development and revenue stream *etc*).

310 In coming to my decision on the counterclaim, I have noted that there is no written document or record of a loan arrangement between the first plaintiff and the defendant. I note also there is no email or other written evidence that the defendant ever made a formal demand for repayment prior to these proceedings.

311 Nevertheless, taking all the evidence into account, I have come to the view that there is no basis for the assertion that the S$400,000 was by way of payment of (i) an advance of S$200,000 in March 2011 on the US$900,000 that the first plaintiff would be entitled to in due course as his share of the Founders'

Fees if all went to plan; and (ii) payment of another S$200,000 to the first plaintiff for the sale of 7.5% of his Tecbiz shares to the defendant.

312 In the case of March 2011 and the alleged payment of an advance on the Founders' Fees, it must be noted that, at that time, SIPL had not even opened a Hong Kong bank account to receive any investment funds. Mr Chi, at that stage, was carrying out his due diligence enquiries. The S$200,000 cheque was provided by the defendant and not SIPL. There is no evidence of any record made in SIPL's documents or records of the advance payment. Further, whilst the plaintiffs take the view that, under the Oral Agreement and common understanding, the duty was imposed on the defendant to pay the Founders' Fees – the point remains that this duty would only arise if and when the investment funds were in fact raised for the purposes of the Solvesam project and SIPL (whether on a *pro rata* basis or otherwise).

313 The first plaintiff does not dispute that the first loan was used for home renovation purposes. Looking at the evidence as a whole, I am satisfied that the March 2011 cheque was indeed by way of a friendly loan. I do note that there is no written loan agreement or formal letters of demand. Then again, it was a friendly loan and it is quite apparent that the first plaintiff and the defendant were accustomed to dealing with each other on the basis of trust.

314 Finally, in the case of the second cheque in April 2011, I do not accept the first plaintiff's explanation that this was by way of payment for the 7.5% shares in Tecbiz that the first plaintiff had agreed to sell to the defendant. As noted above (*supra* [92]), the stamp fee documents clearly state that the consideration was just S$100,000. The first plaintiff's explanation that this was an error is hard to accept especially given an email from the first plaintiff to

Tecbiz's company secretary confirming the S$100,000 figure for the transfer of shares.[243]

Miscellaneous points

The District Court proceedings

315 Sometime in 2013, the defendant commenced proceedings in the District Court against the plaintiffs for contributions under two personal guarantees executed during their time as directors of Tecbiz in respect of certain bank loans. The defendant's claim was that he had fully paid the bank loans owed by Tecbiz and hence sought to recover contribution from the plaintiffs in the District Court proceedings. These proceedings have been stayed pending the determination of the High Court proceedings in the present suit.

316 The defendant made the point that during a period of more than two years in the District Court proceedings, the plaintiffs never made any reference to or claim in respect of their alleged entitlement to US$900,000 in Founders' Fees, not even by way of a defence of set off or counterclaim, or otherwise. References to the claim for the Founders' Fees apparently only surfaced in those proceedings after their pleadings went through five rounds of amendments.

317 Whilst it is clear that the plaintiffs waited a long time before bringing the current proceedings in respect of the Founders' Fees, there is no issue over limitation and the Court does not make any inference that the plaintiffs' case must have been made up as an afterthought simply because of how long it took for the point to surface.

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243 See Defendant's Closing Submissions at para 111(b).

318 That said, the fact remains that the plaintiffs could well have chosen to raise the point much earlier in the proceedings, even if they needed some time to "sort out" what had happened and to come to a considered view. Given the relative thinness of the documentary records, the passage of time and the fragility of the human memory, the task of marshalling and presenting evidence can only get more difficult.

The defendant's business and fraud

319 The plaintiffs' case is fundamentally based on a serious allegation of a fraud which took place in late 2010 or early 2011. Indeed, at trial, it appears that the plaintiffs' case is that they were not the only victims. There were likely other victims, namely, the investors from China who had put in monies expecting SIPL to grow on the back of the Solvesam project into a NASDAQ company. Instead, the plaintiffs assert that the defendant clearly intended to siphon the funds raised for his personal benefit and that he had lined his own pockets with the monies received.[244] These are serious allegations. The sums involved are large: quite possibly US$20m or at least US$10m. And yet there is, to date, nothing to suggest that the defendant has been sued whether in Singapore, Hong Kong or elsewhere by these investors. Whilst the plaintiffs may contend that actions or prosecutions may still be brought by disgruntled investors – it remains somewhat puzzling that no investor has taken any action thus far, given the seriousness of the allegations.

320 Finally, I note also that there was some suggestion that the sums raised were "dirty money" or that there was or might be some sort of Ponzi scheme involved.[245] It never became clear what the first plaintiff meant by this. The first

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244 First plaintiff's AEIC at para 169.

245 Defendant's Closing Submission at para 101; CT, 14 March 2018, p 108 (lines 12–24).

plaintiff states he came to this view after seeing comments in a Chinese language website that HKFXI was some sort of Ponzi scheme. There is, however, nothing else.

321 I pause to make the observation that the Chinese webpage in question was not translated. What was set out in the Agreed Bundle of Documents was a copy of the Chinese language original.[246] Under cross-examination, the first plaintiff, who is fluent in Chinese, agreed that the webpage does not refer to SIPL, Solvesam, Mr Chi or the defendant. When questioned further, the first plaintiff explained that the webpage referred to HKFXI and a story about a lady who had collected monies to invest in a Hong Kong company but that the shares were never issued.[247]

322 In his evidence-in-chief, what the first plaintiff stated was that he understood that the defendant's business ventures included acting as "an agent in a multi-level marketing business".[248] There is no evidence, however, on what the first plaintiff means by this reference to "multi-level" marketing. It is also unclear if it has any significance to the claims in issue in these proceedings.

323 The general observation I make is that if the plaintiffs' case is they were duped into a scheme that was ultimately concerned or connected with distributing or hiding tainted monies, they ought to have pleaded that position in a coherent and clearer manner.

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246 Agreed Bundle of Documents Vol 5, at p 2673.

247 Certified Transcript, 13 March 2018, p 53, line 16 – p 58, line 3.

248 First plaintiff's AEIC at [6].

Conclusion

324 What is clear is that in June 2011, matters rapidly came to a boil. Aside from the issues and delays arising from the BPI negotiations, the transfer of funds for the Suzhou office and so on, it is apparent that the single most important trigger was the various online falsehoods regarding Tecbiz and Solvesam that were discovered. The plaintiffs' view was that the defendant must have been responsible and that it must follow that he had been lying to them from the start on his intentions for the Solvesam project, and that they were victims of his fraudulent ruse alongside the investors who provided the monies. There is, however, insufficient evidence to support that view.

325 I am unable to accept the plaintiffs' assertion that the defendant was involved in some sort of Ponzi scheme based on the evidence before the court. The conclusion I have reached is that the decision to resign and sell their shares in SIPL was the plaintiffs' own decision. The same is true of their departure from Tecbiz. Whilst the plaintiffs point to their suspicions and beliefs that the defendant was perpetrating a scam and say they were entitled to terminate the Oral Agreement on the basis of repudiatory breach, the evidence does not support the existence of the Oral Agreement to begin with, let alone any alleged breaches of it by the defendant. In any case, even if there was an Oral Agreement as alleged, for whatever reason it may have been, the plaintiffs decided to "pull-out" and the agreement was effectively terminated by mutual agreement.

326 For the reasons stated above, I also am unable to accept the plaintiffs' assertion that the defendant made any actionable misrepresentations which induced them into entering into the Subscription Agreement. I also find that there was no agreement or common understanding from which a constructive trust could arise.

327 The plaintiffs' case against the defendant is dismissed.

328 I allow the defendant's counterclaim and award him S$400,000 plus interest under s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed).

329 Costs are awarded to the defendant to be taxed, if not agreed.

330 This case has turned heavily on the oral evidence of the witnesses. The fact that the parties were once friends and colleagues is evident from the emotions that surfaced at times during examination. Indeed, there were aspects of the evidence which were troubling. The Court expresses its appreciation for the helpful closing submissions of learned counsel and for the manner in which the case was conducted.

331 There is, however, one observation I make on the evidence. Given the serious nature of some of the assertions on fraud or illegality, it would have been helpful if all foreign language documents that might be referred to by witnesses were provided together with certified translations. For example, with regard to the Chinese language webpage referred to above, it appears that this document was produced by the plaintiffs. However, since it was not referred to by the first plaintiff in his affidavit of evidence-in-chief, a translation was not provided. This Chinese language webpage surfaced only during the cross-examination of the first plaintiff on the reasons as to why he had lost confidence in the defendant and formed the view they were being cheated. In the end, defence counsel simply put his points to the witness on the contents of the webpage and obtained answers as to whether the witness (who was familiar with Chinese) agreed; the key point put to the first plaintiff being that the first plaintiff, even with sight of the webpage, was and is not aware of anybody who says that he has been cheated by the defendant. A certified English translation, whilst it would doubtless have

incurred costs, was surely desirable given the issue to which the webpage related.

George Wei
Judge

Wendell Wong Hin Pkin, Priscylia Wu Baoyi and Alexis Loo Quan Rung (Drew & Napier LLC) for the plaintiffs;
N Sreenivasan, SC and Claire Tan Kai Ning (Straits Law Practice LLC) for the defendant.
