Straits Advisors Pte Ltd *v* Michael Deeb (alias Magdi Salah El-Deeb) and others [2014] SGHC 94

Case Number	: Suit No 349 of 2011
Decision Date	: 06 May 2014
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: Chenthil Kumarasingam, Jeremy Nonis and Chiang Wan Ting (Quahe Woo & Palmer LLC) for the plaintiff; Alan Koh and Stanley Bay (Oracle Law Corporation) for the first defendant; Andrew Yeo, Colin Chow, Margaret Ling and Joel Lim (Allen & Gledhill LLP) for the second and third defendants.
Parties	: Straits Advisors Pte Ltd — Michael Deeb (alias Magdi Salah El-Deeb) and others

Contract – Breach

Tort – Conspiracy

Tort – Misrepresentation – Fraud and deceit

Tort – Negligence – Breach of duty

6 May 2014 Judgment reserved.

Chan Seng Onn J :

Introduction

1 This dispute arose from the third defendant's failure to achieve an initial public offering ("IPO") of its shares on a recognised stock exchange.

2 The plaintiff entered into a contractual engagement with the second and third defendants sometime in early 2006. The plaintiff was to provide corporate finance advisory services through two of its personnel with the aim of steering the third defendant towards an IPO. If this was successful, the plaintiff stood to be issued a portion of shares in the third defendant. Unfortunately, the planned IPO ground to a halt after an underwhelmingly short-lived pursuit which lasted not more than three months. The parties' contractual engagement, however, did not end there. Instead, after protracted negotiations, the parties managed to enter into a new agreement in late 2006 to suit the changed circumstances. Their contractual relationship only came to an end sometime in early 2008. This was when it became clear to the third defendant that it would not be restarting an IPO in the foreseeable future. In the circumstances, the third defendant refused to issue any shares to the plaintiff. The plaintiff was aggrieved. It believed that it was entitled to the shares under the renegotiated contract so long as the parties' engagement was terminated, regardless of whether the third defendant decided to pursue an IPO. The plaintiff thus commenced Suit No. 487 of 2008 ("Suit 487") against the second and third defendants to claim the shares. However, its claim failed both before the High Court: see *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and another* [2009] SGHC 86 ("*Straits Advisors (HC)*") and the Court of Appeal: see *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and another and another application* [2010] 1 SLR 760 ("*Straits Advisors (CA)*").

3 The plaintiff brought the present action after it became privy to certain information that raised its suspicions over the propriety of the defendants' conduct over the entire course of the engagement. In so doing, the plaintiff had considerably widened both the field of actionable claims as well as the scope of recoverable losses from its earlier action. Therefore, unlike the previous suit which turned solely upon an issue of contractual interpretation, the plaintiff's claims in the current proceedings were more varied and less benign, involving causes of action in fraudulent misrepresentation, conspiracy, negligence, and breach of contract. The plaintiff was also not simply seeking to recover the shares in the third defendant as it did in the previous suit. Instead, included in its heads of damages here were, for instance, opportunity loss suffered in accepting the engagement, the value of the shares in the third defendant measurable at different points of the engagement, and costs incurred in the previous suit.

4 After careful deliberation, I find that the plaintiff has failed to establish any of the claims which it had brought. There is accordingly no need for me to consider the numerous issues which arose in relation to the quantification of damages for which expert evidence had been tendered and submissions made. I will therefore now proceed to set out the background to this dispute and the reasons for my decision to dismiss the plaintiff's claims.

Background

The parties

5 Straits Advisors Pte Ltd ("the plaintiff") is a corporate finance advisory firm in Singapore. Its director, Dominic Andrla ("Dominic"), was its only factual witness and also a key character in these proceedings.

6 Music Group Ltd (formerly Behringer Corporation Ltd) ("the third defendant"), incorporated in Bermuda, is the holding company of a group of companies which are in the business of manufacturing, distributing, and selling audio related products. This group is known as the MUSIC Group (formerly the BEHRINGER Group). Music Group Services SG (Pte) Ltd (formerly Behringer Holdings Pte Ltd) ("the second defendant"), is one such company within the MUSIC Group and is also the wholly-owned Singapore subsidiary of the third defendant. The MUSIC Group was founded by one Ulrich Bernhard Behringer ("Ulrich") who is the chairman and current chief executive officer ("CEO") of the second and third defendants (collectively "the Companies").

7 The first defendant, Michael Deeb ("Deeb"), was the former managing director and CEO of the second and third defendants respectively. At the commencement of trial, he was no longer employed by the Companies.

The facts

The aborted SGX IPO

8 Sometime in late 2004 or early 2005, the third defendant decided to pursue a listing of its shares on the Singapore Exchange ("the SGX IPO"). In connection with this, the third defendant submitted a draft prospectus ("the Preliminary Prospectus") [note: 1] to the SGX. It was not disputed that the academic qualifications of Deeb and one Stephen Fraser ("Fraser"), the then chief operating officer ("COO") of the third defendant, were misleadingly represented in the Preliminary Prospectus. Whilst Deeb was stated as holding a "Bachelor of Science & Technology Degree from the American University, Cairo", [note: 2] he admitted in these proceedings to having only attended, without

graduating from, the said university. [note: 3] As for Fraser, he was stated as holding a "Bachelor of Arts Degree (Economics) from Canterbury University", [note: 4] but Canterbury University is in fact an unaccredited institution that essentially sold degrees online; the defendants have not contested this. [note: 5]

9 After lodging the Preliminary Prospectus with the SGX, the third defendant was granted a conditional eligibility-to-list ("ETL") letter [note: 6] which contained certain conditions that had to be complied with before it could list on the SGX. Thereafter, the third defendant embarked on a book building roadshow to generate and record investor interest in its contemplated IPO.

10 Shortly after the conclusion of the roadshow, the third defendant decided to abort the SGX IPO. The precise reason for doing so was disputed. The defendants claimed that the decision to abort was reached based on purely commercial considerations which related primarily to the third defendant's inability to "fill the books" during the roadshow. The defendants were thus fearful that the third defendant's shares would receive an unacceptably low valuation by listing on the SGX. [note: 7] In contrast, the plaintiff suggested that, for Deeb at least, the decision to abort was motivated by his own sense of self-preservation as he wished to avoid having his false qualifications uncovered by the relevant regulatory authorities upon a successful listing. [note: 8]

The pre-contractual negotiations relating to the NASDAQ IPO

11 Sometime in November 2005 and shortly after the SGX IPO had been aborted, Deeb approached Dominic on behalf of the Companies. The purpose for doing so was to request for the plaintiff's assistance in preparing the third defendant for an IPO on the NASDAQ securities exchange in the United States of America ("the NASDAQ IPO"), [note: 9] where the defendants believed a higher valuation for the third defendant's shares could be achieved. [note: 10] In its pursuit of the NASDAQ IPO, the Companies also engaged the professional services of Jones Day and JP Morgan to provide legal advice and to perform the role of lead manager respectively.

12 In these proceedings, Dominic claimed that during a particular meeting at the Companies' Singapore office on 21 November 2005, Deeb made certain specific oral representations concerning, *inter alia*, the prospects of the NASDAQ IPO and the Companies' commitment towards the same ("the Representations"). [note: 11] The Representations (set out at [48]) were the subject of the plaintiff's first misrepresentation claim ("the 1st Misrepresentation Claim"). It suffices to say for now that Dominic claimed that the Representations had induced him to believe that the NASDAQ IPO would be completed successfully in a relatively short period of time, [note: 12] thus he was willing to accept the engagement on behalf of the plaintiff.

13 The plaintiff also claimed that the Preliminary Prospectus, and hence the false qualifications of Deeb and Fraser contained therein, had been presented to it during these pre-contractual negotiations. [note: 13] In this regard, the plaintiff submitted that the negligence of the third defendant's board of directors in verifying the accuracy of the Preliminary Prospectus had induced it to accept the engagement on the basis of incorrect information and it thereby suffered loss and damage ("the 1st Negligence Claim"). [note: 14] By accepting the engagement as a result of the Representations and/or the third defendant's board of directors' negligence, the plaintiff claimed that it gave up the opportunity of setting up certain private equity funds which would have generated income of US$2m to US$3m per annum each on a recurring basis ("the Opportunity Loss"). [note: 15]

The Original Agreements

14 In any event, the plaintiff entered into a contractual relationship with the Companies under which two of the plaintiff's personnel, namely Dominic himself and one Ricardo Villanueva ("Villanueva"), would provide services to the Companies in different capacities. This was done by the concurrent execution of four documents (collectively "the Original Agreements"), dated 11 January 2006, which are each described in brief terms as follows:

(a) a letter between the plaintiff and the Companies releasing Dominic from the plaintiff's services to enable him to act as the group chief financial officer ("Group CFO") of the Companies ("the Release Letter"); [note: 16]

(b) a letter between the plaintiff and the Companies clarifying the terms of the Release Letter ("the Side Letter"); [note: 17]

(c) an employment agreement between Dominic and the Companies appointing Dominic as Group CFO of the Companies ("the Employment Agreement"); [note: 18] and

(d) a secondment agreement between the plaintiff and the Companies providing for the secondment of Villanueva to the Companies to act as head of corporate finance ("the Secondment Agreement"). [note: 19]

15 It was agreed under the Employment Agreement that the remuneration for Dominic's services as Group CFO was to be paid to the plaintiff. According to Clause ("Cl.") 3.1 of the Employment Agreement, the plaintiff was entitled to monthly payments of S$28,333 and an additional annual performance-based bonus of S$85,000. However, of greater significance was the fact that the Employment Agreement also contemplated, as part of the remuneration, the issuance of 0.37% of the post-IPO share capital of the third defendant ("the Shares"). The Shares formed the bulk of the remuneration and its issuance was contingent upon a successful IPO (Cl. 3.1(i) Employment Agreement) or a substantial takeover of the business of the third defendant (Cl. 3.1(ii) Employment Agreement). The parties did not dispute that, additionally, the plaintiff would also be entitled to the Shares if its services had been terminated without just cause. [note: 20]

The suspension of the NASDAQ IPO and the subsequent renegotiations

16 Sometime at the end of March 2006, which was not more than three months after the Original Agreements had come into effect, a decision was made to suspend the NASDAQ IPO. [note: 21] As with the abortion of the SGX IPO, the parties similarly disputed the reasons underlying the decision to suspend the NASDAQ IPO. The defendants claimed that the Companies were plagued by certain "operational issues" at the material time. These were assessed as requiring more immediate attention; hence it was commercially prudent to focus on resolving such issues before renewing the pursuit of an IPO. [note: 22] The plaintiff, on the other hand, contended that the significance of these "operational issues" was greatly exaggerated and that the NASDAQ IPO was suspended for reasons only known to the defendants. [note: 23]

17 In any event, interest in an IPO had demonstrably cooled and that led Deeb and Dominic to renegotiate the terms under the Original Agreements on behalf of the Companies and the plaintiff respectively. The positions taken up by Deeb and Dominic in these negotiations were recorded in

several email exchanges between themselves that began sometime in April 2006.

18 To summarise, Dominic proposed, among other things, that the plaintiff should be entitled to an automatic vesting of a higher proportion of the third defendant's shares at a time which accorded with the parties' best estimation of a successful IPO, regardless of whether the third defendant did in fact achieve a listing. [note: 24] Dominic believed that this proposal was justified given the now longer time frame for an IPO and the uncertainty as to whether the third defendant would even float, as compared to what the parties had envisaged at the time of entering into the Original Agreements. [note: 25] However, Deeb's immediate response was that he personally believed that Dominic's proposal was a "non starter" [note: 26] and, after consulting with Ulrich, confirmed that the Companies would not approve it. [note: 27]

19 Deeb's own position on the way forward concerned recalibrating the scope of Dominic's role to suit the changed circumstances. In this regard, Deeb provided Dominic with two options ("the Options"). [note: 28] First, Dominic could, as Group CFO, decide to "step up" and take on all the regular responsibilities associated with the day to day running of the finance department now that plans for an IPO had been suspended. Alternatively, Dominic could work towards certain deliverables during the short term and, once those were accomplished, take up an advisory role within the Companies until an IPO was sought and which he could then return to lead. However, Dominic did not commit to either of the Options.

Developments during the renegotiations: The poison pen emails and the Further Representations

20 The renegotiations were fairly protracted but did eventually culminate in the execution of a new agreement ("the Consultancy Agreement"). [note: 29] The salient features of the Consultancy Agreement will be elaborated upon shortly, but before moving on it is perhaps appropriate to pause and mention that, during the currency of the Original Agreements, certain poison pen emails ("PPEs") had been brought to the attention of the Companies. The plaintiff claimed that the Companies were aware of no less than five PPEs, but only two have been produced in these proceedings — one which was received by JP Morgan on 2 February 2006 ("the February 2006 PPE"), [note: 30] and the other by Jones Day on 27 September 2006 ("the September 2006 PPE"). [note: 31] Amongst several other allegations, the February 2006 PPE raised general doubts over the knowledge and skills possessed by Fraser. The September 2006 PPE made specific allegations about Fraser's qualifications from Canterbury University as well as Deeb's qualifications from the American University in Cairo.

21 In these proceedings, the plaintiff claimed that the defendants had represented during the course of the renegotiations that there was no merit to the allegations in the PPEs when this was clearly not the case. It was further claimed that certain other false representations regarding the defendants' continued commitment towards a future IPO had also been communicated to the plaintiff (collectively "the Further Representations"). The Further Representations are set out at [126] below.

22 The Further Representations and the PPEs were central to several claims by the plaintiff. In brief, its claims were as follows:

(a) the Further Representations, being false in nature, constituted breaches of expressed or implied terms within the Original Agreements that required the Companies to provide accurate and non-misleading information during the course of the plaintiff's engagement under the Original Agreements ("the 1st Breach of Contract Claim");

(b) the Further Representations had been fraudulently made by the defendants in order to induce the plaintiff to enter into the Consultancy Agreements ("the 2nd Misrepresentation Claim");

(c) even if the representations regarding the PPEs were not fraudulently made, the third defendant's board of directors was negligent in failing to ensure that the allegations therein were properly investigated ("the 2nd Negligence Claim"); and/or

(d) the Further Representations constituted the unlawful means by which the defendants furthered a conspiracy to deprive the plaintiff of the Shares under the Employment Agreement ("the 1st Conspiracy Claim").

23 The gist of the plaintiff's submissions regarding these claims was that, had it been made aware of the truth of the allegations in the PPEs and/or the falsity of the Further Representations, then it would not have agreed to prolong the parties' contractual engagement by entering into the Consultancy Agreement and would have instead terminated the Original Agreements, claimed the Shares thereunder as it was contractually entitled to do, and be then freed to set up the income generating private equity funds which had been in its contemplation prior to accepting the contractual engagement. Further, the plaintiff asserted that it certainly would not have commenced the previous suit in 2008. Accordingly, the losses which the plaintiff sought to recover in respect of the claims arising out of the parties' renegotiations included the value of the Shares under the Employment Agreement, the Opportunity Loss, and the costs incurred in relation to the previous suit ("Costs of the Previous Suit").

Entry into the Consultancy Agreement

24 I return now to elaborate upon the Consultancy Agreement. The Consultancy Agreement was dated 10 November 2006 and entered into between the plaintiff and the Companies. It was intended to supersede the Employment Agreement, the Release Letter, and the Side Letter. The Secondment Agreement for Villanueva's services, however, remained in force.

25 The Consultancy Agreement was structured such that it contained two distinct sets of terms — "Pre-Listing Terms" and "IPO Advisory Terms". The operation of either set of terms depended on whether a contractually defined event known as "IPO Activation" had taken place. The relationship between these two sets of terms as well as what was contemplated for IPO Activation are stated in Cl. 3 of the Consultancy Agreement as follows: [note: 32]

3 Terms and compensation for Mr Andrla's services after IPO Activation Date

The Pre-Listing Terms will be superceded by the following terms ("IPO Advisory Terms") one month after [the plaintiff] is notified in writing of the decision by [the Companies] to proceed with a plan to list on a recognised stock exchange, or anticipated takeover action ("IPO Activation"):
…

26 In this regard, a sub-clause under Cl. 2 of the Consultancy Agreement ("the Updates sub-clause") also provided that: [note: 33]

Updates: It is agreed that [the Companies] and [Dominic] will periodically meet to review the likely activation date of the IPO. If for some reason it becomes highly unlikely that [the Companies] will continue to seek an IPO before 31 December 2009, then [the Companies] and [the plaintiff] will agree in writing on an appropriate arrangement to meet the revised situation.

27 The Pre-Listing Terms were therefore to govern the parties' contractual relations immediately after the Consultancy Agreement had been entered into as there had yet been no IPO Activation. IPO Activation would occur only when the plaintiff was given written notice of the third defendant's decision to proceed with an IPO or an anticipated takeover action. In this regard, the parties agreed to meet periodically to consider, specifically, the likelihood of an IPO occurring before 31 December 2009.

28 Under the Pre-Listing Terms, Dominic agreed to relinquish his position as Group CFO of the Companies and to assume the position of senior consultant. His duties as Group CFO were transferred to a new CFO of the Companies, one Roch Low ("Low") who had been appointed prior to the Consultancy Agreement on or about 16 October 2006. [note: 34]

29 The Pre-Listing Terms also provided for a reduction in the commitment expected from Dominic in respect of the Companies' affairs and this was matched by a corresponding reduction in the monthly remuneration payable for his services. However, in the event of IPO Activation, the IPO Advisory Terms would come into force and result in an increase in Dominic's time contribution and remuneration. [note: 35]

30 Finally, it remains to be mentioned that, as with the now superseded Employment Agreement, the Consultancy Agreement also contemplated the issuance of the Shares in the event of a successful IPO or substantial takeover of the third defendant. [note: 36]

Termination of the Consultancy Agreement

31 On or about 24 April 2007, the plaintiff and the Companies agreed to terminate the Secondment Agreement for Villanueva's services as head of corporate finance. [note: 37] The Companies duly paid the plaintiff the contractually stipulated termination fee of S$75,000. To avoid confusion, nothing in these proceedings turns upon the termination of the Secondment Agreement.

32 As for the Consultancy Agreement, this remained in effect until sometime in early 2008. Low, acting on behalf of the Companies, emailed Dominic to propose bringing an immediate end to the parties' contractual engagement and also to discuss the mechanics of the termination. [note: 38] Low explained that this was because the Companies did not foresee that the third defendant would renew its pursuit of an IPO by 31 December 2009. Low further proposed that the parties could enter into a "separate arrangement" under which the Shares would still be payable to the plaintiff if the Companies subsequently decided to pursue an IPO before 31 December 2009. Dominic, however, was of the view that the plaintiff was contractually entitled to the Shares so long as the Consultancy Agreement was terminated. He thus replied that there was "no need for a separate arrangement". [note: 39] This came as a surprise to Low who further replied that the Companies' understanding was that the Shares were payable only as a "success fee" — in other words, that IPO Activation had to first occur before the plaintiff would be entitled to the Shares. [note: 40]

The previous suit

33 The above disagreement over the proper interpretation of the terms of the Consultancy Agreement formed the backdrop against which the plaintiff proceeded, in August 2008, to commence Suit 487 against the Companies to recover the Shares. The plaintiff's case, however, was dismissed by both the High Court and the Court of Appeal. The previous suit will be elaborated upon in greater

detail below (at [193]–[197]).

The plaintiff's discovery of new information

34 After the conclusion of the previous suit and sometime in May 2010, the third defendant filed an originating summons to seek an order for Deeb to cease acting as its director. [note: 41] While that action was ongoing, the plaintiff discovered new information which raised its suspicions over the propriety of the defendants' conduct during the now terminated engagement. In particular, Ulrich allegedly informed Dominic that the Companies had received a substantial offer for their businesses while the Consultancy Agreement was in force but did not inform the plaintiff of the same. [note: 42]

35 In these proceedings, the plaintiff sought to prove that the substantial offer mentioned by Ulrich was received in connection with the defendants' pursuit of a trade sale of the Companies with a separate advisor, namely KPMG, sometime in mid-2007. [note: 43] This was the central plank of the plaintiff's claim that the Consultancy Agreement had been breached ("the 2nd Breach of Contract Claim"). In this regard, the plaintiff submitted that, first, the pursuit of a trade sale clearly constituted an IPO Activation event under Cl. 3 Consultancy Agreement. By deliberately withholding such notice, the Companies had breached an *implied* obligation to act in good faith. Even if the Companies' pursuit of a trade sale did *not* constitute IPO Activation, the plaintiff had a further string to its bow. It submitted that by withholding information about the trade sale altogether, the Companies had, *inter alia*, breached the *express* Updates sub-clause.

36 The plaintiff also claimed that, at the point of terminating the Consultancy Agreement, the defendants made certain representations to induce the plaintiff into believing that an IPO Activation event had yet to occur. This was claimed to be done in furtherance of a conspiracy by the defendants to deprive the plaintiff of the Shares which it would otherwise have been entitled to had it exercised its contractual right to terminate the Consultancy Agreement ("the 2nd Conspiracy Claim").

37 In respect of both the above claims, the plaintiff sought recovery of the value of the Shares under the Consultancy Agreement and the Costs of the Previous Suit. Furthermore, the plaintiff sought an additional remedy should it be found that IPO Activation ought to have been triggered by the Companies. This was the difference in monthly remuneration and annual bonus between the Pre-Listing Terms and the IPO Advisory Terms from the time that IPO Activation ought to have been triggered ("Loss of Payment Increase").

The causes of action

Preliminary observations

38 As one might gather thus far, this dispute is striking for the sheer quantity of claims which the plaintiff had brought. The plaintiff alleged misrepresentation, negligence, conspiracy, and breach of contract, and each of these general heads of action were further subdivided into standalone claims. I should also point out that while the claims in misrepresentation and conspiracy were brought against all the defendants, the claims in negligence and breach of contract were brought against only the Companies and did not implicate Deeb in his personal capacity.

39 Moreover, I observe that this is not a case where the facts relied upon by the plaintiff to establish each of its claims were confined by reference to a single isolated incident in the parties' commercial relationship. Rather, the relevant facts were strewn across a temporal continuum that spanned a period of roughly over two years, beginning from the parties' pre-contractual negotiations

sometime in late 2005 up to the termination of the Consultancy Agreement sometime in early 2008. This added yet a further layer of complexity to this case.

Categorising the causes of action into distinct time frames

40 The above aspects of the present dispute can lead to a haphazard, and likely unilluminating, discussion. That is clearly undesirable. Therefore, for clarity, I am of the view that it is beneficial to delineate distinct time frames during the course of the parties' engagement within which the plaintiff's claims and alleged losses could be grouped. In this regard, I identified three distinct time frames which will provide the broad structure to my analysis. They are arranged in chronological order as follows — first, the period during the pre-contractual negotiations leading up to the Original Agreements ("Time Frame 1"); second, the period during the operation of the Original Agreements and prior to the Consultancy Agreement ("Time Frame 2"); and, third, the period during the operation of the Consultancy Agreement up to its termination ("Time Frame 3").

41 In Time Frame 1, the plaintiff claimed for the Opportunity Loss of *accepting* the engagement and entering into the Original Agreements. The plaintiff submitted that it was induced to do so by reasonably relying on one or all of the following:

(a) the Representations made by Deeb on behalf of the Companies, which formed the 1st Misrepresentation Claim; and

(b) Deeb and Fraser's falsely stated qualifications in the Preliminary Prospectus for the SGX IPO, which formed the 1st Negligence Claim.

42 In Time Frame 2, the plaintiff claimed for the value of the Shares which it would have been entitled to under the Employment Agreement had it exercised its contractual right to terminate the engagement. This contractual right to terminate arose due to the Companies' failure to provide accurate and non-misleading information, which formed the 1st Breach of Contract Claim. Instead of terminating the engagement and claiming the Shares, however, the plaintiff's case was that it had been induced into *prolonging* it as a result of the following:

(a) the Further Representations made by the defendants, which formed the 2nd Misrepresentation Claim;

(b) the conspiracy by the defendants to deprive the plaintiff of the Shares under the Employment Agreement, which formed the 1st Conspiracy Claim; and

(c) the negligence of the third defendant's board of directors in verifying the two PPEs, which formed the 2nd Negligence Claim.

43 The losses sought to be recovered in respect of the above claims included the value of the Shares under the Employment Agreement, the Opportunity Loss, and the Costs of the Previous Suit.

44 In Time Frame 3, the plaintiff claimed for the value of the Shares it would have been entitled to under the Consultancy Agreement and the Costs of the Previous Suit. This was because the plaintiff argued that, instead of commencing the previous suit, it would have been entitled to the Shares upon *termination* of the Consultancy Agreement if not for the following:

(a) the Companies' failure to act in good faith by not issuing an IPO Activation notice and/or the Companies' withholding of information related to the trade sale, both of which formed the 2nd

Breach of Contract Claim; and

(b) the defendants' false representations which misled the plaintiff into believing that an IPO Activation event had not occurred, which formed the 2nd Conspiracy Claim.

45 The plaintiff further submitted that if it was found that IPO Activation had occurred by reason of the trade sale, then it ought also to be entitled to the Loss of Payment Increase.

Summary

46 A summary of the foregoing is presented in a tabular form below:

		Time Frame 1	**Time Frame 2**	**Time Frame 3**
Cause of action	**Against all the defendants**	1st Misrepresentation Claim	2nd Misrepresentation Claim 1st Conspiracy Claim	2nd Conspiracy Claim
	Against the Companies only	1st Negligence Claim	1st Breach of Contract Claim 2nd Negligence Claim	2nd Breach of Contract Claim
Losses claimed		Opportunity Loss	Value of the Shares under the Employment Agreement Opportunity Loss Costs of the Previous Suit	Value of the Shares under the Consultancy Agreement Costs of the Previous Suit Loss of Payment Increase

47 With this broad structure in place, I now provide my analysis of the plaintiff's claims, beginning, naturally, with those within Time Frame 1.

Analysis of Time Frame 1

The 1st Misrepresentation Claim

The Representations

48 The 1st Misrepresentation Claim centred upon certain oral representations which had allegedly been made by Deeb to Dominic during their pre-contractual negotiations leading up to the Original Agreements. These representations have thus far been referred to as "the Representations" and are now set out in full below: [note: 44]

(a) the third defendant had a well-qualified management team in place which would be well-

suited to lead the third defendant to a listing on a reputable stock exchange and in particular that:

(i) Fraser, the then COO of the Companies, was a strong COO who was an economist by training;

(ii) Ulrich, the chairman of the Companies, had a Master's Degree in Sound Engineering.

(Representation (a)");

(b) there was nothing unsatisfactory in the documentation of the third defendant ("Representation (b)");

(c) the SGX IPO was terminated only because the defendants believed that they would achieve a significantly higher valuation for the third defendant's business by listing on NASDAQ ("Representation (c)");

(d) there would be no significant hurdles to the successful completion of the engagement as a conditional ETL letter had been received from the SGX for the SGX IPO ("Representation (d)");

(e) the management and owners of the Companies were committed and motivated to achieve a successful IPO of the third defendant and/or sale of the business of the Companies during 2006 ("Representation (e)"); and

(f) Deeb was particularly keen and motivated to successfully complete an IPO of the shares in the third defendant and/or sale of the business of the Companies because this was the only way he could realise the value of the shares in the third defendant ("Representation (f)").

The parties' submissions

49 The plaintiff claimed that Deeb orally made the Representations to Dominic during a particular meeting at the Companies' Singapore office on 21 November 2005. The plaintiff further claimed that each of the Representations was false in some material way:

(a) Representation (a) was false because Fraser was clearly not an "economist by training". His academic qualifications were obtained from an unaccredited online degree mill.

(b) Since Fraser's qualifications, and those of Deeb, were also incorrectly stated in the Preliminary Prospectus, this contributed to Representation (b) being false as well.

(c) Representation (c) was false because, for Deeb at least, the real motivation behind aborting the SGX IPO was to prevent his false qualifications in the Preliminary Prospectus from being exposed.

(d) Representation (d) was false as the fact that the qualifications of senior officers such as Deeb and Fraser were wrongly stated in the Preliminary Prospectus for the SGX IPO was a serious impediment to a successful future listing on NASDAQ.

(e) Representation (e) was false because the apparent lack of enthusiasm towards a listing after postponement of the NASDAQ IPO showed that the third defendants' management was never in fact "committed and motivated" to achieve an IPO "during 2006".

(f) Representation (f) was false because an IPO or sale of the Companies was not the "only" way in which Deeb could realise his shareholding in the third defendant. Deeb was apparently aware of interest in his shareholding by a company known as Apollo Capital Ltd, hence selling his shares privately was always known to be a viable exit strategy for him.

50 The sting in the plaintiff's case, however, was that Deeb had made the Representations *with the knowledge that they were false or without an honest belief that they were true*. In other words, the plaintiff claimed that the defendants were guilty of fraudulent, as opposed to merely negligent or innocent, misrepresentation. To support its allegation of fraud, the plaintiff submitted that it was crucial to appreciate the context within which the Representations were made. In particular, the plaintiff greatly emphasised that, at the time of the pre-contractual negotiations, the defendants were clearly "desperate" to have Dominic as the Companies' Group CFO, and it was said that this could be gleaned from an internal email exchange between Deeb and Ulrich dated 6 January 2006 ("the 6 January 2006 email") (reproduced below at [65]). [note: 45] In this email, Deeb stated his view that it would be unwise for the Companies to drag their feet in negotiations with Dominic because searching for an alternative candidate meant that the defendants "would need to postpone [their] IPO arrangements" and, further, that "any one coming this late [would] demand a pound of flesh". The plaintiff's case, therefore, was that the defendants badly wanted to secure Dominic's services and thus made the Representations in a calculated attempt to induce Dominic to accept the engagement on the plaintiff's behalf. [note: 46]

51 The defendants' submissions primarily centred upon the rather more elementary issue of whether the Representations had even been made. While Deeb admitted to making a part of Representation (e) above — that the Companies' management and owners were committed to a successful *IPO* of the third defendant during 2006 — he denied making the rest. [note: 47] In this respect, the defendants argued that apart from Dominic's affidavit and oral evidence, there was no other proof that the Representations had been uttered. There were neither contemporaneous attendance notes of the 21 November 2005 meeting nor any follow up correspondence which specifically recorded the Representations. The defendants also highlighted that if the Representations had indeed been made and were so material to the plaintiff, then it was puzzling that the plaintiff did not confront the defendants once the falsity of the Representations came to light. The only explanation for the plaintiff's silence, they argued, was that the Representations had not been made. As for the only representation which Deeb admitted to making in part, *ie*, Representation (e), the defendants argued that this was certainly true when it was made.

The central element of dishonesty in the tort of fraudulent misrepresentation

52 The essential elements of the tort of fraudulent misrepresentation were set out by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 as follows (at [14]):

> ... First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, *the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true*. [emphasis added]

53 I emphasise the final element in the passage above as it bears close attention in the present

action. This final element essentially requires there to be *proof of dishonesty* on the part of the representor in the manner described by Lord Herschell in the leading House of Lords decision of *Derry v Peek* (1889) 14 App Cas 337 ("*Derry v Peek*") (at 374). Anything short of this will not suffice. Thus, while proof of a falsehood is a common ingredient across all forms of actionable misrepresentation, that falsehood must further be shown to have been made with a dishonest intent in order to ground a claim for *fraudulent* misrepresentation. This was alluded to by Buller J in *Pasley and another v Freeman* (1789) 3 Term Rep 51 where he stated in a rather more succinct fashion (at 56) that, "Every deceit comprehends a lie, but a deceit is more than a lie …" It is therefore unsurprising that this subjective element of deceit or dishonesty has been variously described as being the "touchstone": see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 14.011; or as the "core issue": see John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 3rd Ed, 2012) ("*Cartwright*") at para 5-14 of fraudulent misrepresentation which distinguishes it from other forms of misrepresentation. I hasten to add, however, that the foregoing should not be read as implying that the remaining elements are of any diminished significance where an action for fraudulent misrepresentation is concerned. That is certainly not the law, for just as the common stool cannot stand without any one of its legs, so too must a legal claim fall for want of proof of any of its constituent ingredients. My intention has simply been to highlight at the outset what I regard as the centrality of dishonesty in this particular action.

54 The burden of proving dishonesty lies on the claimant and discharging it is no easy task. While the authorities have made clear that allegations of dishonesty in a civil claim are to be proven according to the civil standard, *ie*, on a balance of probabilities, and not according to the higher criminal standard of beyond reasonable doubt: see, for example, *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 ("*Tang Yoke Kheng*") at [14] and *Chua Kwee Chen and others (as Westlake Eating House) and another v Koh Choon Chin* [2006] 3 SLR(R) 469 at [36] and [39]; the gravity of such allegations have led the courts to consistently emphasise the need for particularly cogent supporting evidence. This appears clearly from the following observation by Choo Han Teck J when delivering the judgment of the Court of Appeal in *Tang Yoke Kheng* (at [14]):

> ... [B]ecause of the severity and potentially serious implications attaching to a fraud, even in a civil trial, *judges are not normally satisfied by that little bit more evidence such as to tilt the "balance". They normally require more* ... [emphasis added]

55 The Court of Appeal has more recently affirmed its view on this matter in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801(at [30] and [31]):

> It is, in our view, of the first importance to emphasise right at the outset the *relatively high standard of proof* which must be satisfied by the representee ... before a fraudulent misrepresentation can be established successfully against the representor ... As V K Rajah JA put it in the Singapore High Court decision of *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 (at [30]), the allegation of fraud is a serious one and that "[g]enerally speaking, the graver the allegation, the higher the standard of proof incumbent on the claimant". If an allegation of fraud is successfully made, the representor would be justifiably found to have been guilty of *dishonesty*. Dishonesty is a grave allegation requiring a high standard of proof. ...
>
> This high standard of proof is also consistent with the fact that an award of damages for fraudulent misrepresentation covers a wide ambit - including all loss which flowed directly as a result of the entry by the representee into the transaction in question, *regardless of whether or*

not such loss was foreseeable, and which would include all consequential loss as well ...

[emphasis in original]

The relevance of the representor's motive in proving dishonesty

56 Proving the representor's subjective state of dishonesty seems an even more unenviable task when one further considers the inherent difficulty described by Bowen LJ in *Angus v Clifford* [1891] 2 Ch 449 at 471 of having to "look into a man's mind". However, in this regard, the courts have been willing to look to the surrounding circumstances in order to shed some light on the mental state of the representor. And, in the present case, focus will be centred on *the representor's motive* as a particular aspect of the surrounding circumstances. This is because the plaintiff argued that it was proper to infer that the defendants had been dishonest in making the Representations from their apparent desperation to secure Dominic's services.

57 It is trite that, in one sense, proof of a good motive is irrelevant as a shield for the representor because "if fraud be proved … [i]t matters not that there was no intention to cheat or injure the person to whom the statement was made": see *Derry v Peek* at 374, per Lord Herschell. However, clear proof of the representor's sinister motive is certainly relevant as a sword for the representee because he can then more readily persuade the court with the simple logic that "A man is more likely knowingly to make a false statement if he has some reason for doing so": see *Barings Plc (In Liquidation) v Coopers & Lybrand (No. 5)* [2002] EWHC 461 (Ch) at [62], per Evans-Lombe J).

58 Here, the plaintiff relied on the defendants' motive for the latter purpose. However, as discussed below, I find it to be misplaced.

The defendants were not dishonest

59 Let me state at the outset, before even addressing the defendants' submissions on whether the Representations had been made, that I am not convinced that the pre-contractual negotiations preceding the Original Agreements were somehow tainted by the defendants' deceit.

60 First, even accepting the plaintiff's case that the 6 January 2006 email demonstrated the defendants' "desperation" to secure Dominic's services, I am of the view that there is still an evidential gap which must be bridged before I can conclude that the defendants must have therefore resorted to the nefarious means of fabricating the Representations to achieve their intended purpose. This is especially so in light of the abovementioned authorities which make clear that more will be required to prove the serious allegation of fraud. In this vein, the plaintiff's case would, for example, have been made more convincing if there was some evidence that Ulrich and Deeb had agreed to take *any means necessary* to secure Dominic's services. In the absence of evidence of this nature, I do not see why it cannot equally be said that the defendants had acted legitimately within the bounds of commercially acceptable practices to attract Dominic's services despite their purportedly desperate circumstances. Therefore, I find that the plaintiff's case requires me to take a leap in logic to arrive at its desired conclusion, and I am not willing to do that.

61 Second, I also find it unsatisfactory that the plaintiff had relied on the 6 January 2006 email to prove Deeb's dishonesty when the Representations had purportedly been made by Deeb on 21 November 2005, which was certainly during a very early part of the parties' negotiations. This is because while the email might show that the defendants had *grown* desperate during the course of negotiations with Dominic, I am far less inclined to treat it as evidence that the defendants had *started off* desperate to secure Dominic's services. To my mind, it is highly unlikely that Deeb, on

behalf of the Companies, was already so gripped by a sense of desperation at such an early stage of the negotiations that he came to the meeting prepared to lie through his teeth to Dominic.

62 Third, and perhaps most significantly, I find that the entire premise of the plaintiff's case for dishonesty was based on an overstated reading of the 6 January 2006 email. In my view, this email certainly did not reek of a "desperation" which was the alleged basis of Deeb or Ulrich's boldness in seeking to defraud their prospective Group CFO. Instead, Deeb was merely being frank in putting his view across to Ulrich that it was not worth the increased costs of hiring an alternative candidate, as well as the prospect of postponing the NASDAQ IPO, by stinging on Dominic's remuneration package. Therefore, if there was indeed any hint of "desperation" disclosed in the 6 January 2006 email, it emerged from Deeb's desire *to convince Ulrich* of the best course to take, *rather than any desire to defraud Dominic*.

63 I reached this view after considering the 6 January 2006 email in the context of earlier emails from Deeb to Ulrich. These emails essentially showed that Deeb was genuinely attempting to convince Ulrich that the tentative remuneration package offered by the Companies to Dominic was not over-generous and that it would thus be in the Companies' best interests to reach an agreement with Dominic quickly. For instance, in one such email, Deeb made the following comments to Ulrich: [note: 48]

> Uli [the tentative remuneration package] may look like a lot but we are also asking [Dominic] for a leap of faith and after all we only pay 50% [of the Shares] at IPO and 50% 12 month[s] after IPO and contingent on him either committing to stay permanently or having recruited and bedded in a replacement – so frankly until an IPO he will cost us the same as Dennis [the then CFO] or at worst case 45K Sing a year more.

64 Shortly afterwards, in response to Ulrich's queries about Dominic's proposed salary, Deeb stated thus: [note: 49]

> …
>
> Frankly it would be extremely difficult to find an expat CFO at less then [*sic*] 350K US Dollars so the salary and bonus is not a problem.
>
> …

65 Finally, in the 6 January 2006 email itself, Deeb cautioned Ulrich again as follows:

> Please remember that we are in a negotiation mode he is pushing and we are pulling and while I'm playing it cool he [Dominic] does understand that he is in a good position and also recognizes that any alternative options would be a great deal more expensive to us … Uli remember that we have started a search but this will take 4-6 month [*sic*] which means that we would need to postpone our IPO arrangements and of course we would then have another candidate but any one coming this late will demand a pound of flesh.

66 The plaintiff relied on the second part of Deeb's comments above to argue that the defendants were desperate to secure Dominic's services. However, as the prior exchanges between Deeb and Ulrich show, the plaintiff appears to have taken these comments out of context.

67 In light of the above, I am not persuaded by the plaintiff's claim that the defendants had been desperate to secure Dominic's services. This therefore meant that the defendants' supposed motive

for falsifying the Representations was removed and, with that, the plaintiff's allegations of dishonesty immediately appear more far-fetched. However, even if it was accepted that the 6 January 2006 email did evidence desperation to secure Dominic's services, I am of the view that this alone was not sufficient to support an inference of dishonesty which, it bears repeating, is a very grave allegation.

The Representations had not been made except for a part of Representation (e)

68 The above analysis has so far proceeded on the assumption that the Representations had been made by the defendants to begin with. However, save for a part of Representation (e), this was strongly disputed by the defendants with whom I am inclined to agree.

(1) None of the Representations were recorded down by Dominic except for a part of Representation (e)

69 A false statement which is the subject of a misrepresentation claim need not be in writing. It may be communicated to the representee orally or even by conduct: see *Cartwright* at para 3-04. That the Representations in this case were alleged to have been made orally at the 21 November 2005 meeting is therefore certainly not fatal to the plaintiff's claim. However, what I consider to be of significance is the fact that none of the Representations had subsequently been recorded down in writing by Dominic. This is because Dominic had, by his own admission, a conscientious habit of following up on the oral discussions between himself and Deeb by reproducing these discussions in writing. As Dominic explained during his cross-examination, it was "helpful to have clarity". [note: 50] In light of this, it would be reasonable to expect that, if the Representations were so material as to induce Dominic to accept the engagement on the plaintiff's behalf, then he would likely have sought to record them down and register them with Deeb so as to avoid any confusion or misunderstanding further down the road.

70 It is therefore striking that the only documentary proof which went towards illuminating what had been communicated during the 21 November 2005 meeting did not make any references to the Representations, except for a part of Representation (e). This crucial email was sent by Dominic to Deeb on 22 November 2005 with the subject "Follow up from yesterday's meeting" and the material portions are set out below: [note: 51]

> …
>
> From our discussions, I understand that ideally you wish to have a succession plan with a new Group CFO post listing.
>
> However, in the short term, your most important consideration is the successful listing of the company on Nasdaq. With this in mind, you thought that I may be able to add value with heading an IPO team. In particular, you would wish me to liaise with the lead managers, lawyers etc, to ensure optimal structuring and appropriate pricing for the shareholders and the company. You would also expect me to field, as appropriate, questions from investors, analysts and the bankers. Much of this liaison would be on the road shows. The day to day running of the company's finances etc would still be under [the then CFO's] remit.
>
> You expect the listing to be in the second or third quarter of 2006.
>
> As I mentioned, probably the ideal solution for the company would be to recruit a strong CFO to take the company to listing, and to go forward with the company thereafter. However, you indicated that you had had considerable difficulty in identifying a suitable candidate.

> As I mentioned, I do not believe that I would be in a position to assume the position of CFO post listing, but am happy to assist if you believe that I may be able to add value in the listing process.
>
> …

71 The above email by Dominic clearly constitutes strong evidence of what *had* been discussed at the 21 November 2005 meeting. In particular, from the second paragraph of the quoted email, it appears that Deeb spent the bulk of this meeting outlining the expected scope of Dominic's duties if he accepted the engagement to act as Group CFO. It also appears that the parties had exchanged their views on succession planning once the third defendant had moved into the post-listing phase.

72 I also find that this email was highly probative of what had *not* been discussed at the meeting just the day before. In all of what had been recorded by Dominic, the absence of any reference to the Representations is certainly conspicuous. There is clearly no mention whatsoever of Deeb having represented, even obliquely, that Fraser was an "economist by training" (Representation (a)); that there was "nothing unsatisfactory" in the third defendant's documentation (Representation (b)); that the SGX IPO had been terminated "only" because a higher valuation could be achieved by listing on NASDAQ (Representation (c)); that there were "no significant hurdles" to the NASDAQ IPO (Representation (d)); or that the "only" way which Deeb could realise the value of his shares in the third defendant was through an IPO and/or a sale of the business of the Companies (Representation (f)).

73 Finally, I also note that in the single-lined third paragraph of the email quoted above, Deeb appears to have represented that the third defendant was expected to list sometime during 2006. This might be regarded as evidence that part of Representation (e) had been made, *viz*, that the Companies were committed and motivated to achieve a successful IPO of the third defendant during 2006. This is perfectly consistent with the defendants' case that this was the only part of the Representations that Deeb had made at the 21 November 2005 meeting (see above at [51]). It should also be noted that Deeb did not admit to representing the remaining part of Representation (e), which was that the Companies were also committed and motivated in the alternative to achieve a *trade sale* of the business of the Companies during 2006. [note: 52] This appears logical since the focus was only on achieving a successful *IPO* at the material time of the pre-contractual negotiations. Accordingly, I find that the defendants' case as to which of the Representations had been made to be more believable on the balance of probabilities.

74 This position which I have reached may also be further buttressed by the following discussion which undertakes a closer analysis of whether *each* (as opposed to *all*) of the Representations had been made.

(2) Representation (a)

75 In relation to Representation (a), I agree with the defendants that had it been represented that Fraser was an "economist by training", then the plaintiff would have sought reassurances about this once Fraser's knowledge and skills as COO were called into question a mere three months later by the February 2006 PPE. This is especially if the purported representation was, as the plaintiff claimed, material enough to induce it to accept the engagement. However, as no action was taken by the plaintiff, this suggested to me that Deeb did not in fact make any representation as to Fraser's qualifications. At trial, Dominic sought to explain his apparent lack of concern on the basis that the February 2006 PPE only cast doubt on Fraser's *knowledge and skills*, hence there was no need for him

to worry about Fraser's *qualifications*, which was what Deeb's representation related to. [note: 53] However, I have no hesitation in rejecting this explanation as it is based on an artificially fine distinction that would not realistically be made.

(3) Representations (b) and (d)

76 Representations (b) and (d) shall be considered together. In my judgment, it is highly unlikely that Deeb would have made either of these representations given their distinctly unqualified nature. For example, in relation to Representation (d), it seems odd that Deeb would have said that there were "no significant hurdles" to the *NASDAQ* IPO merely on the basis that a *conditional* ETL letter had been received in relation to the *SGX* IPO. First, the listing requirements on NASDAQ and the SGX are conceivably very different; hence whilst receipt of conditional approval from the latter securities exchange may at least be *some* indication of the likelihood of a successful listing on the former, this did not explain why Deeb would effectively represent that listing on NASDAQ would be no more than a formality. This is especially because, as a matter of logic, one would imagine that a representation as to whether the NASDAQ IPO faced "significant hurdles" or not would more probably come from the lips of the advisor (Dominic) rather than that of the party seeking advice (Deeb). Second, the conditional ETL letter received from the SGX itself listed some 14 conditions which remained to be fulfilled before listing on the SGX was possible. This also made it implausible that Deeb would have been so over-confident as to have represented that there were "no significant hurdles" to the NASDAQ IPO. In my judgment, therefore, the very breadth of both Representations (b) and (d) — that there was *nothing* unsatisfactory in the third defendant's documentation and that there were *no* significant hurdles to listing respectively — had exposed them as being contrived to support Dominic's claim that he was induced to believe that the NASDAQ IPO would be completed in a relatively short period of time.

(4) Representation (c)

77 Representation (c) was not borne out by the evidence. I am not persuaded that Deeb represented to Dominic that the "*only*" reason for aborting the SGX IPO was because a significantly higher valuation could be achieved on NASDAQ. First, I note that there was an email from Dominic to Deeb on 24 November 2005, which was three days after the 21 November 2005 meeting, where Dominic made the following statement: [note: 54]

> …
>
> I *presume* that the *primary* reason for switching from DBS and SGX, to JP [Morgan] and NASDAQ, was valuation. [emphasis added]
>
> …

78 Dominic's use of the words "presume" and "primary", as emphasised above, is key. This showed that Deeb did not unambiguously specify a *single* reason for aborting the SGX IPO during his meeting with Dominic. Indeed, in Deeb's subsequent email reply on 25 November 2005, he informed Dominic that there was *more than one* reason for the decision to abort the SGX IPO. His reply was as follows: [note: 55]

> …
>
> The main reason for going local [*ie*, pursuing the SGX IPO] was speed to market and the lighter compliance and reporting requirements [than on NASDAQ] and we thought that we would make up for the initial lower valuation over time as the shares traded up. *Once we started the road*

show we realised that the likelihood of the value of the shares trading up on the SGX was remote due to lack of understanding of the Company and its markets.

The disparity in valuation [compared to a listing on NASDAQ] *also increased dramatically due to the M-Audio transaction completing in the US. This is a company very much like [the third defendant] and its' [sic] trade sale just prior to listing on NASDAQ established with a high degree of accuracy the likely valuation for us on NASDAQ - the multiple was very much north of 20.*

…

[emphasis added]

79 In this email reply, Deeb identified, as it appears to me, both a "pull" and a "push" factor for aborting the SGX IPO. The "pull" factor here was the potentially higher listing value on NASDAQ. This, however, was not the "*only*" reason communicated to Dominic because, as can be seen, Deeb also explained that there was a "push" factor, *viz*, the lack of understanding of the Companies and their markets shown by potential investors during the book building road show for the SGX IPO, which indicated that the likelihood of the value of the shares trading upwards on the SGX subsequent to the IPO was going to be remote. I therefore inferred from the above email correspondence between Deeb and Dominic that Representation (c) had not been made by Deeb at the 21 November 2005 meeting.

(5) Representation (f)

80 Finally, regarding Representation (f), I find that while Deeb may have said that he was personally motivated to achieve a listing of the third defendant on NASDAQ, it is unlikely that he would have represented that this was because a listing and, in the alternative a sale of the business, was the "*only*" way he could realise his shares in the third defendant. I agree with the defendants' submission that, had this representation been made, then Dominic would have immediately sought assurances once he learnt that Deeb could realise the value of his shares through means other than a listing or a sale of the business. Specifically, Deeb was able to extract value for his shares through a "phantom share scheme" for certain MUSIC Group employees (which was a staff retention incentive scheme rolled out in the wake of the decision to suspend the NASDAQ IPO) and had also negotiated with Ulrich to sell back some of his stock options. However, despite coming to know of these arrangements which were directly contradictory to Representation (f), there was never a point in the parties' subsequent correspondence where Dominic made any direct references back to the 21 November 2005 meeting to remind Deeb, politely or otherwise, of the latter's alleged representation then of the *exclusive* means for divesting his shares which, as matters worryingly unfolded, now appeared to be untrue. Hence, I am able to infer that Representation (f) was not made.

81 In light of the above, I find that Representations (a), (b), (c), (d), and (f) were not made by Deeb as alleged by the plaintiff.

The part of Representation (e) which was made was not false

82 This leaves me to deal with Representation (e) which Deeb admitted to making in part. The plaintiff argued that there was ample evidence to show that the defendants had simply allowed a listing of the third defendant to fall off the radar once the NASDAQ IPO had been suspended. For instance, the plaintiff relied on a board resolution dated 3 May 2006 [note: 56] which showed that the third defendant's focus had turned away from a possible listing towards exploiting opportunities within the mass retail market. The plaintiff urged me to infer from this lack of interest in a listing that the defendants were never in fact committed or motivated to achieve the same during 2006; hence

Representation (e) was false at the time it was made.

83 To my mind, the plaintiff's submission is a highly fanciful one. The defendants were clearly invested in the NASDAQ IPO. They had engaged professionals such as JP Morgan and Jones Day whose services would not have come at a small expense. In fact, the defendants were ready to fork out even more to secure Dominic's services as Group CFO to head the NASDAQ IPO. Therefore, I do not see how it could be said that the defendants were only mildly, if at all, committed to a listing. Certainly, enthusiasm for a listing had dissipated over time but that was only natural once a collective decision had been reached to suspend the NASDAQ IPO. More so since, as discussed in greater detail below (at [137]–[140]), the suspension was intended to allow the MUSIC Group to address certain "operational issues" which had disrupted its business. Further, while Deeb may have represented to Dominic that there was a commitment to achieve a listing "during 2006", I find that this was an estimate and nothing more. I do not think that it is reasonable to say that Deeb had meant this as a strict time frame within which a listing *had* to be achieved regardless of changes in the circumstances. Accordingly, I find that the part of Representation (e) relating to the commitment to achieve a *listing* during 2006 was *not false* at the time it was made. This is to be contrasted with the remaining part of Representation (e) relating to the commitment to achieve in the alternative a *sale* of the business during 2006 which, as I have earlier found at [73] above, was *not even made* to begin with.

84 In light of the above, I dismiss the 1st Misrepresentation Claim.

The 1st Negligence Claim

The parties' submissions

85 The parties' submissions regarding the 1st Negligence Claim can be simply stated. The plaintiff asserted that it was normal business practice for external consultants, such as itself, to rely on the correctness of information provided by its corporate clients. [note: 57] Accordingly, it was argued that the Companies owed a duty of care to provide accurate and complete information to the plaintiff. However, this duty was breached during the pre-contractual negotiations as the plaintiff was given the Preliminary Prospectus with Deeb and Fraser's false qualifications. The plaintiff claimed that this inaccurate information induced it to accept the engagement and concomitantly to forgo the opportunity of setting up its intended income generating private equity funds. Hence it now sought to recover the Opportunity Loss. For the Companies, it was disputed that any duty of care could be owed in the present circumstances.

The Spandeck two-stage test

86 The nub of the dispute in this claim relates to whether the Companies owed the plaintiff a duty of care. In this regard, the starting point must be the leading case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") where the Court of Appeal set out (at [73]) a basic two-stage test of proximity and policy considerations, preceded by a threshold inquiry of factual foreseeability, for determining whether a duty of care existed. Since the claim in the present case involved the recovery of a purely economic loss, it is also pertinent to recall the Court of Appeal's emphasis (at [115]) that the two-stage test was intended to be the test applied regardless of the nature of the damage caused. This view was reached after the Court of Appeal considered (at [65]–[72]) that there was neither sound justification for a general exclusionary rule against recovery of all economic losses (thus declining to follow the approach in the United Kingdom), nor any practical need to adopt a different test in such cases (thus introducing a coherent, consistent and reliable approach in Singapore).

87 The threshold inquiry of factual foreseeability was described by Andrew Phang Boon Leong J (as he then was) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of W P Architects)* [2007] 1 SLR(R) 853 as one which "will almost always be satisfied" [emphasis in original omitted] (at [55]). That has proven to be the case here as I have no difficulty in finding that it was factually foreseeable that a failure to provide accurate information during the pre-contractual negotiation stage could result in economic loss to the plaintiff.

88 The critical issue to my mind, however, was whether legal proximity could be established. In *Spandeck*, the court stated (at [77]) that "[t]he focus here is necessarily on the closeness of the relationship between the parties themselves" and (at [81]) that such closeness may, in turn, be borne out by certain significant relational indicia as expressed by Deane J in *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 ("*Sutherland*") which included the physical, circumstantial and causal facets of proximity between the parties as well as the twin criteria of voluntary assumption of responsibility and reliance (at 499).

Proving proximity in cases of pure economic loss

89 At this juncture, I pause to make a brief observation regarding the *application* of these indicia, which is that there is certainly no strict requirement that a claimant has to canvass and prove *all* of these indicia to establish proximity and, depending on the precise factual matrix at hand, *some* of these indicia may assume greater prominence. As Deane J remarked in *Sutherland* (at 499), "Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of cases."

90 For the particular purposes of this claim, I note that our courts seem to take the view that, where *pure economic loss* is concerned, it may be more practicable to adjudge whether the requisite proximity existed based on the *twin criteria* of voluntary assumption of responsibility and reliance. The following observation of Quentin Loh J in *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485 ("*Geospecs*") is apposite (at [26]):

> I note that although the Court of Appeal in *Spandeck* set out a single test for a duty of care and enunciated a number of broad proximity considerations … *the factors to be considered in ascertaining whether the requisite proximity exists depends on the precise factual circumstances, including the type of harm*: see for example, *Spandeck*, which emphasised the traditional test of assumption of responsibility and reliance in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 … in the context of economic loss; *cf Ngiam Kong Seng*, which applied the three factors in *McLoughlin v O'Brian* [1983] 1 AC 410 within the context of the first proximity stage in the *Spandeck* Test for a claim involving a duty of care not to cause psychiatric harm. *The case before me is one involving economic loss, and I analyse the factual circumstances primarily through the prism of the twin criteria of assumption of responsibility and reasonable reliance*, but with reference to other considerations where relevant. [emphasis added]

91 In a similar vein, it has also been commented in Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 03.059 that:

> *[T]he twin concepts of assumption of responsibility and reliance are useful for particular types of cases involving negligent advice or the provision of professional services, but less important in other scenarios such as negligent acts by defendants causing personal injury or psychiatric harm to plaintiffs who were strangers at the relevant time* … In the context of psychiatric harm, for instance, it is often difficult to find, as in *Ngiam Kong Seng*, that the defendant had

voluntarily assumed responsibility for the psychiatric harm suffered by the plaintiff. [emphasis added and footnotes omitted]

92 In light of these observations, I propose to determine whether a duty of care was owed here according to the twin criteria of voluntary assumption of responsibility and reliance. However, before doing so, I wish to clear the ground on what is meant, particularly, by the first criteria of "*voluntary assumption of responsibility*" as this will be relevant to my analysis later.

Voluntary assumption of responsibility

93 Robby Bernstein has observed in *Economic Loss* vol 1 (Sweet & Maxwell, 3rd Ed, 2013) (at para 3-056) that the term "assumption of responsibility" can be used in two distinct senses. First, it may be used rather broadly for the purposes of conveying that the defendant has assumed responsibility for the performance of a certain task, *eg*, the making of a statement, the giving of advice, or the performance of a service. This is arrived at after an entirely factual inquiry into whether the defendant had consciously performed the particular task. However, proof of such *factual* assumption of responsibility, though an important first step, does not carry one all the way towards a definitive finding of *legal* liability. In Bernstein's words (at para 3-057), "[t]he mere assumption of responsibility for performing a certain task does not have legal consequences, but assumption of responsibility for performing the task needs to be established as a fact before the analysis of whether legal liability can attach, can even begin."

94 At this point, it is appropriate to introduce the second and more specific sense in which the term "assumption of responsibility" is also often used, that is, in its *legal* sense. As Loh J made clear in *Geospecs* (at [38]), this is how the term is to be understood for the purposes of determining liability.

95 What "assumption of responsibility" conveys in this context is that the defendant has performed a task in circumstances where he is "deemed" to have assumed responsibility for the consequences in law of the task being performed negligently. This does *not* mean that the defendant must have knowingly and deliberately accepted responsibility for the potential loss which he had foreseen might flow from his negligence; his subjective intentions are irrelevant: see *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 ("*Customs and Excise Commissioners*") at [5], per Lord Bingham of Cornhill; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 654, per Lord Slynn of Hadley. All that it means is that, after an *objective* assessment of the circumstances in which the defendant had performed the task in question, the court, *as a matter of law*, "imposes" a duty of care on the defendant. And, in undertaking this objective assessment, the "primary focus" for the court must be, as Lord Steyn stated in *Williams and anor v Natural Life Health Foods Ltd* [1998] 1 WLR 830 ("*Williams*"), on exchanges which may take the form of statements and conduct that "cross the line" between the claimant and the defendant (at 835-G).

96 The preceding discussion on the first limb of the twin criteria has sought to draw a distinction between *factual* and *legal* assumption of responsibility. In essence, the latter is what the law is concerned with and, in this regard, proof of the former is a necessary prerequisite though not sufficient on its own. With this distinction in mind, I turn now to the facts of this case.

The Companies did not voluntarily assume responsibility towards the plaintiff

97 It was not disputed that the Companies had provided the plaintiff with the Preliminary Prospectus during the parties' pre-contractual negotiations. The plaintiff submitted that in so doing, the Companies had duly assumed responsibility for the accuracy and completeness of the information in the Preliminary Prospectus; hence there was sufficient proximity to find that a duty of care was

owed in the circumstances.

98 In my view, the plaintiff's description that there was an "assumption of responsibility" by the Companies here was relevant, but only in the broad factual sense, as Lord Hoffman says in *Customs and Excise Commissioners* (at [38]), of "drawing attention" to the *bare fact* that the Companies had made a conscious decision to provide the plaintiff with the Preliminary Prospectus. It does not answer the further (and more fundamental) question of whether, as a matter of law, the Companies ought to be "deemed" to have assumed responsibility for the losses arising out of any inaccuracy in the information provided. The answer to the latter question ultimately depended on an objective view of the surrounding conditions which, in my judgment, militated against imposing a duty of care on the Companies. My reasons are as follows.

99 First, I begin with an analysis of the immediate circumstances attendant to the Companies' provision of the Preliminary Prospectus to the plaintiff. I had earlier found that Deeb did not make any express representation that the documentation of the third defendant at the time, which would have included the Preliminary Prospectus, was entirely free from error (at [76] above). Other than this alleged representation, the plaintiff did not point me towards any other relevant communication or conduct by the Companies from which I could infer an assumption of the risk of losses that might flow from any inaccuracy in the Preliminary Prospectus. Neither did the plaintiff place any degree of stress on the Preliminary Prospectus which might have reasonably put the Companies on notice that the information therein was of particular importance. In fact, it appears that the Preliminary Prospectus was merely one of various seemingly unrelated documents which Dominic had requested from Deeb in an email dated 23 November 2005. [note: 58] One might have thought that this would dilute the apparent importance of the Preliminary Prospectus to the plaintiff. Therefore, it seems that nothing other than the Preliminary Prospectus itself had, to use the description in *Williams*, "crossed the line" between the plaintiff and the Companies. In these circumstances, I find it difficult to say that the Companies had assumed responsibility towards the plaintiff in the sense which is necessary for attributing liability.

100 Second, I am minded to consider the wider context within which the pre-contractual negotiations took place. In this regard, I noted the plaintiff's argument which effectively sought to justify proximity on the basis of the parties' relationship alone since, as it was claimed, external consultants ordinarily relied on its corporate clients to provide accurate and complete information before accepting a potential engagement. However, I find this assertion to be sweeping, unsupported by evidence, and essentially a call to this court to desensitise itself from the factual circumstances peculiar to each case before it. That would clearly be undesirable, as is amply illustrated by the present case.

101 Here, it was undisputed that, prior to accepting the engagement, the plaintiff had been given *unrestricted* access to the Companies' offices, employees, information and documents for a period of about one week. [note: 59] There was some dispute as to the precise purpose of this arrangement. However leaving that aside, it would appear that, objectively, the Companies had extended to the plaintiff an opportunity from which the latter could potentially receive a generous amount of information from multiple sources. In my view, it surely cannot be held that the Companies had, *without more*, thereby voluntarily assumed responsibility for the accuracy of *all* information which could have been passed on to the plaintiff simply by virtue of the positions (*ie*, external advisor and corporate client) which the parties' were respectively in. Had I accepted the plaintiff's premise for finding proximity based on the nature of the parties' relationship alone, I imagine that the result would not only be unduly onerous for corporate clients in the position of the Companies but also encourage litigation on the part of external consultants such as the plaintiff. In any event, commercial parties

such as those before me have always been able to shift and allocate the risk of losses arising from pre-contractual misinformation through the mechanism of the contractual agreement itself. I see no reason why the law of tort should interfere in a manner which unduly qualifies the parties' freedom to contract.

102 Finally, and no less significantly, I looked to the contents of the Preliminary Prospectus. Here, I find that the Preliminary Prospectus was clear on its own terms that it was only to be relied on by a *specific class of persons* and in connection with a *specific purpose*. This clearly circumscribed the scope of legal liability which the Companies can properly be said to have assumed responsibility for. The relevant statement in the Preliminary Prospectus reads as follows: [note: 60]

> This Prospectus has been prepared solely for the purpose of the Invitation [in connection with the SGX IPO] and may not be relied upon by any persons other than the applicants in connection with their application for the Invitation Shares, or any other purpose. …

103 The plaintiff clearly did not fall within the class of persons who could rely on the Preliminary Prospectus nor could it be said to have relied on the Preliminary Prospectus for its intended purpose. The plaintiff was not a potential subscriber of shares in the third defendant and if it had placed any reliance on the Preliminary Prospectus this was for the purpose of informing its decision to accept the engagement with the Companies or not. Accordingly, I do not see how it can properly be said that the Companies had assumed responsibility when the Preliminary Prospectus was provided in circumstances where it was never contemplated that liability should arise.

104 For the above reasons, I find that there was no voluntary assumption of responsibility by the Companies in respect of the Preliminary Prospectus and so it was unnecessary for me to consider the second aspect of the twin criteria, *viz*, reliance. Accordingly, the plaintiff's attempt to establish a duty of care fails at the first hurdle of the *Spandeck* two-stage test and the 1st Negligence Claim is dismissed.

Analysis of Time Frame 2

The 1st Breach of Contract Claim

The parties' submissions

105 The plaintiff claimed that after it accepted the engagement, and during the operation of the Original Agreements, it was provided with false information regarding the merits of the PPEs and the defendants' continued commitment towards a listing, *ie*, the Further Representations. The precise content of the Further Representations will be dealt with under the 2nd Misrepresentation Claim below. For the purposes of the 1st Breach of Contract Claim, the subject of analysis here, it suffices to say that the plaintiff submitted that false information had been provided to it and this breached the plaintiff's Standard Terms and Conditions ("STCs"), in particular the "Access and Information" Clause, which provided as follows: [note: 61]

> **3. Access and information**
>
> …
>
> … [The Companies] will ensure that any information which is supplied to [plaintiff] will be complete and accurate in all material respects and not misleading, whether by omission or otherwise and should have been properly obtained and may properly be furnished to [plaintiff].

106 Of the four documents which made up the Original Agreements, the plaintiff's STCs were only appended to the Secondment Agreement as well as the Side Letter which, in turn, was a clarification of the Release Letter. Notably, the STCs were not attached to the Employment Agreement. Nevertheless, the plaintiff submitted that this was immaterial since the Original Agreements should be construed as a whole and, in that way, the STCs applied across all of its constituent agreements.

107 The Companies submitted that this was an erroneous construction of the Original Agreements. The Companies argued that, though executed concurrently, each of the four documents had to be looked at individually and could not be grouped under an amorphous umbrella "engagement" as the plaintiff conveniently did.

108 This matter of segregating the agreements was crucial for the Companies. This was because the Companies submitted that if any false information had been provided (which was disputed) then this was communicated to Dominic as an employee of the Companies. Accordingly, if any of the four documents should be made the subject of a breach claim, that ought to be the Employment Agreement entered into with Dominic. Since the STCs were not appended to the Employment Agreement, and the Original Agreements ought *not* to be read collectively, the Companies argued that the Access and Information Clause of the STCs could not have been breached.

Each of the Original Agreements had to be looked at individually

109 In my judgment, the Companies' construction of the Original Agreements is to be preferred.

110 To begin with, I find that there is no basis for treating all of the documents which made up the Original Agreements as one collective agreement. Clearly, a different *purpose* was sought to be effected through each document. For instance, the Release Letter embodied the plaintiff's one-off agreement to release Dominic to be employed as Group CFO of the Companies, whereas it was left to the Employment Agreement to set out the substantive terms which governed the course of that employer-employee relationship. Furthermore, not all of the agreements were entered into between the same *parties*. While the Secondment Agreement, Release Letter, and Side Letter were between the Companies and the plaintiff, the Employment Agreement was between the Companies and Dominic in his own personal capacity. To my mind, these were important factors which cast doubt on the plaintiff's construction of the Original Agreements.

The information was specifically provided to Dominic under the Employment Agreement

111 By establishing that the individual documents under the Original Agreements ought to be treated separately, the question then arises as to which of the agreements had been breached by the Companies' alleged provision of false information. In this regard, I find that the Companies were correct in their view that if any such information had been provided, then this fell under the remit of the Employment Agreement.

112 I consider it important to first determine *the identity of the intended recipient* of the allegedly false information. It was not disputed that the information was provided to Dominic and that, as a matter of fact, Dominic remained a director of the plaintiff while he worked as Group CFO of the Companies. In this sense, one might be inclined to think that while the information had been directly communicated to Dominic, it also travelled on to the plaintiff. However, it ought to be remembered that, as a matter of law, a company has a separate legal personality from its directors and shareholders. Therefore, any information communicated to Dominic in the course of his employment with the Companies could not, without more, be said to have been conveyed to the plaintiff as well. This is especially so given that the Employment Agreement contained a general confidentiality clause,

ie, Cl. 6.1(h) which prohibited Dominic from releasing information concerning the Companies to third parties.

113 As such, I find that even if any false information had been conveyed to Dominic, it was conveyed to him in his capacity *as an employee of the Companies*. Seen in this way, it becomes clear that the relevant conduct of the Companies, *viz*, the giving of false information, ought to be confined *within the employer-employee relationship* between the Companies and Dominic. This relationship, as mentioned above, was governed solely by the Employment Agreement and not any of the other documents which formed the Original Agreements.

Dominic was the proper plaintiff for the 1st Breach of Contract Claim

114 The conclusion which I have reached up to this point clearly suggests that the proper party which should have sued under the 1st Breach of Contract Claim is Dominic, and not the plaintiff. While the plaintiff was no doubt in a contractual relationship with the Companies, it nevertheless stood outside of the employer-employee relationship which is where the relevant breach is said to lie.

115 However, I observe that the plaintiff might have been able to establish its *locus* to sue under the Employment Agreement if it had pleaded that it was doing so under the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("the CRTPA"). This was because the Employment Agreement provided that the monthly remuneration and bonuses for Dominic's services were to be paid directly to the plaintiff; hence it appeared that the Employment Agreement did, in accordance with s 2(1)(*b*) of the CRTPA, "purport to confer a benefit" on the plaintiff. As this point has not been pleaded though, I dismiss the 1st Breach of Contract Claim for the plaintiff's lack of standing.

116 Notwithstanding the above point, it flows from my discussion that *even if* the plaintiff had established its standing to sue under the Employment Agreement, it still had to overcome the hurdle of proving that the STCs formed a part of the Employment Agreement. This is a matter which I also do not find in favour of the plaintiff.

The plaintiff's STCs were not incorporated into the Employment Agreement

117 In my view, the plaintiff could not establish that the STCs, which were appended only to the Secondment Agreement and the Side Letter, also formed part of the Employment Agreement. As I have explained above, I am not persuaded by the argument that all the documents within the Original Agreements should be read as a whole such that the STCs could be said to apply across each of them. In fact, I find that there were other pertinent reasons which militated against a finding that the STCs had been incorporated into the Employment Agreement in particular.

118 I begin by noting that the legal position regarding the incorporation of contractual terms in a contract of employment, such as the Employment Agreement here, was well set out by Hobhouse J (as he then was) in *Alexander and others v Standard Telephones & Cables Ltd (No 2)* [1991] IRLR 286 after a consideration of the relevant case law (at 292–293):

> The principles to be applied can therefore be summarised. *The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained.* In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated

into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. *Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.* [emphasis added]

119 This passage was also cited with approval by Judith Prakash J in *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 (at [24]). The passage clarifies that whether or not certain terms are incorporated into an employment contract ultimately depends on the intention of the two contracting parties. In the particular situation where there is no express incorporation, as is the case here, then this contractual intent has to be inferred. An inference that the parties did intend the incorporation of certain terms, however, will only be made where the court views them to be "apt to form part of the individual contract".

120 In the present case, I find great difficulty in inferring that the STCs were intended to be incorporated into the Employment Agreement.

121 First, as a general observation, I cannot see how it can be assumed that the *plaintiff's* STCs necessarily formed part of an agreement between *Dominic* and the Companies.

122 Second, I note that Cl. 9.8 Employment Agreement was an "entire agreement clause" which expressly stated that:

> This Agreement and any schedules attached hereto constitute the whole of the agreement between the parties. There are no collateral representations, agreements or conditions not specifically set forth herein ...

123 The purpose and effect of an entire agreement clause was the subject of detailed analysis by the Court of Appeal in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"). There, the Court of Appeal observed that such clauses are generally "conducive to certainty as they define and confine the parties' rights and obligations within the four corners of the written document" (at [25]) and, further, that this made eminent sense especially if the parties are "commercial entities or knowledgeable businessmen who have negotiated the terms of their agreement with the benefit of legal advice" (at [27]). Although the Court of Appeal in *Lee Chee Wei* was considering the effect of entire agreement clauses on oral collateral contracts or pre-contractual negotiations in particular, I find that there is no sound reason which prevents me from adopting its observations in the present context, which concerns the effect of an entire agreement clause on the incorporation of one party's written standard terms. Therefore, to my mind, Cl. 9.8 Employment Agreement was a further obstacle in the way of inferring that the parties had intended the STCs to form part of the Employment Agreement, given that the former was not appended to the latter.

124 Third, as the Companies have rightly pointed out, there are several notable contradictions between the terms of the Employment Agreement and the STCs which thus give rise to the inference that the STCs were never intended to apply to the Employment Agreement. For instance, Cl. 2.4(b) of the Employment Agreement allowed Dominic to terminate the Employment Agreement upon giving three months' written notice or payment of equivalent remuneration in lieu of notice. However, Cl. 14 of the STCs allowed either party to terminate the same upon giving seven days' notice. Another

example concerns the different dispute resolution mechanisms contemplated under the Employment Agreement and the STCs. Whilst Cl. 9.1 of the Employment Agreement provided that any disputes arising out of the contract would be resolved by arbitration in accordance with the Arbitration Rules of the International Chamber of Commerce, Cl. 18 of the STCs provided that the Companies would submit such disputes to the exclusive jurisdiction of the courts of Singapore.

125 In light of the above, I am not persuaded that the plaintiff's STCs formed a part of the Employment Agreement. Therefore, even if the plaintiff had the standing to sue under the Employment Agreement, it would still not be able to claim for a breach of the STCs.

The 2nd Misrepresentation Claim

The Further Representations

126 The 2nd Misrepresentation Claim centred upon certain false representations which have hitherto been referred to as "the Further Representations". The Further Representations were allegedly made by the defendants during the renegotiations leading up to the Consultancy Agreement which commenced after the NASDAQ IPO was suspended sometime at the end of March 2006. The Further Representations are as follows: [note: 62]

(a) the defendants intended to continue with the listing of the third defendant, or a sale of the business of the Companies, within one year, *ie*, by the third quarter of 2007 ("Further Representation (a)");

(b) there was no merit to the anonymous allegations that Deeb and Fraser did not possess the educational qualifications that they had professed to have in the documents submitted to the Singapore regulatory authorities for the SGX IPO, particularly since the directors of the third defendant had confirmed to the SGX that the information submitted was correct ("Further Representation (b)");

(c) Ulrich was committed to a listing of the third defendant ("Further Representation (c)");

(d) JP Morgan's concerns about the accuracy of the stated educational qualifications of the directors and executive officers of the Companies were unfounded ("Further Representation (d)"); and

(e) there was no merit in the allegations made in the five PPEs (including the February 2006 PPE and the September 2006 PPE) received in respect of the proposed NASDAQ IPO of the third defendant ("Further Representation (e)").

Two broad categories: The Commitment Further Representations and the Qualifications Further Representations

127 As a preliminary point, it is plain that some of the Further Representations overlap quite significantly and that they may thus be placed into two groups which, broadly, are as follows: (1) Further Representations (a) and (c) which relate to the defendants' continued commitment towards a listing by the third quarter of 2007 ("the Commitment Further Representations"); and (2) Further Representations (b), (d) and (e) which relate to the lack of any merits in the PPEs that had cast doubt over Deeb and Fraser's qualifications ("the Qualifications Further Representations"). In this regard, I note that Dominic did not object to such a categorisation at trial as he agreed that the Further Representations in each of the two groups were basically the same. [note: 63]

The parties' submissions

128 The plaintiff relied on evidence from the parties' correspondence during the renegotiation phase to show that the Further Representations had been *made*. As with the Representations discussed above (see [48] to [84]), the plaintiff also submitted that the defendants had been *dishonest* in making the Further Representations. The plaintiff claimed that the Commitment Further Representations were made with the knowledge that they were false because, despite the defendants' repeated references to serious "operational issues" which caused the suspension of the NASDAQ IPO, the evidence showed that these operational issues were exaggerated. The plaintiff therefore surmised that the defendants must have already decided at the time of the suspension, for reasons only known to them, that a listing would not be pursued in the foreseeable future. The plaintiff also submitted that Deeb was clearly aware of his falsely stated qualifications at the time when the Qualifications Further Representations were made; hence these representations were also made with the knowledge that they were false. Finally, the plaintiff claimed that it had reasonably *relied* upon the Further Representations before entering into the Consultancy Agreement, since these related to matters which were not within its knowledge.

129 The defendants submitted that the Commitment Further Representations were not made and, even if they had been, they were not false. In this regard, there was no basis for the plaintiff's theory that some unknown reason was responsible for the suspension of the NASDAQ IPO. The evidence amply bore out the fact that there were certain operational issues confronting the MUSIC Group which were sufficiently serious and that, more significantly, these issues were known to Dominic. It was therefore disingenuous for the plaintiff to now claim that the extent of these operational issues was exaggerated.

130 As for the Qualifications Further Representations, Deeb's own evidence was that he did not make these representations. The defendants further submitted that even if the Qualifications Further Representations had been made, they were not false. In this regard, significant reliance was placed on an email chain which showed Deeb clarifying his qualifications in the Preliminary Prospectus with the then in-house counsel, one Koh Tien Gui ("Koh"), at the time of the SGX IPO ("the Email Chain"). [note: 64] Having done so, it was thus true that there were "no merits" in the allegations against Deeb since his falsely stated qualifications were no longer a significant issue and could easily be corrected going forward. Finally, the defendants argued that, even if these representations were falsely made, they did not induce the plaintiff to enter into the Consultancy Agreement as the plaintiff had its own reasons for doing so.

The Commitment Further Representations were made but were not actionable

(1) The Commitment Further Representations were made

131 I do not think that it can be disputed that, as a matter of fact, the Commitment Further Representations had been made. The following email from Deeb to Dominic on 6 October 2006 ("the 6 October 2006 email") clearly bears this out: [note: 65]

> Dear Dominic
>
> …
>
> *Our intention is still to IPO*
>
> Provided that market conditions and internal performance figures etc. allow it would be our

intention to commence IPO proceedings *around the third quarter 2007.*

…

[emphasis added]

132 To my mind, however, the more crucial issue was whether the Commitment Further Representations constituted what could be considered in law as *actionable* representations.

(2) The Commitment Further Representations were not actionable

(A) Statements of fact vs Statements of intent

133 In order for a statement to amount to an actionable representation, it is trite that the statement must relate to a matter of *fact*, whether past or present. With that being so, then a statement of the maker's *intent*, relating as it does to matters in the future, will generally not be actionable in the tort of misrepresentation: see *The Law of Contract in Singapore* at paras 11.026 – 11.029 and *Cartwright* at para 3-13; although it can be sued upon as a *promise* in the law of contract if the contract so provides. These propositions were similarly noted by the Court of Appeal in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 (at [21]):

> There is also a need to differentiate between actionable representation and future promise and this is elucidated in Andrew Phang's *Law of Contract (Second Singapore and Malaysian Edition)* (1998) as follows at pp 444 to 445:
>
> > A representation, as we have seen, relates to some existing fact or some past event. It implies a *factum*, not a *faciendum*, and since it contains no element of futurity it must be distinguished from a statement of intention. An affirmation of the truth of a fact is different from a promise to do something *in futuro*, and produces different legal consequences. This distinction is of practical importance. If a person alters his position on the faith of a representation, the mere fact of its falsehood entitles him to certain remedies. If, on the other hand, he sues upon what is in truth a promise, he must show that this promise forms part of a valid contract …

134 There are, however, limited situations where a statement of future intent can ground an action for misrepresentation. For instance, it may be shown that, at the time of making the statement, the maker did not in fact intend to do what he asserted he would. This can give rise to liability because what the state of the representor's mind is in relation to future matters is no less an *existing* fact. This was famously described by Bowen LJ in *Edgington v Fitzmaurice* (1884) 29 Ch D 459 in the following terms (at 483):

> [T]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. …

135 In the present case, the plaintiff argued that the Commitment Further Representations amounted to precisely such a misrepresentation of the defendants' state of mind. The plaintiff's submission was that when the defendants' communicated a desire to IPO in the future during the renegotiation stage, they had *already* decided not to restart the IPO process. This state of mind, the plaintiff claimed, could be inferred from the fact that the "operational issues" raised by the

defendants in these proceedings were not as serious as made out to be; hence the defendants clearly had other underlying reasons for suspending the NASDAQ IPO which were not disclosed and which could explain their apparent lack of enthusiasm for resuming an IPO.

136 I am not persuaded by the plaintiff's case. There is ample evidence to support the defendants' assertion that the "operational issues" were indeed serious at the time of the Commitment Further Representations and that these representations were made subject to these issues being resolved. Accordingly, I am more inclined towards the view that the Commitment Further Representations ought to be characterised as innocuous statements of future intent instead.

(B) The operational issues faced by the companies were serious

137 I begin by elaborating on what these "operational issues" were. In their affidavit evidence, Deeb and Ulrich explained that, among these issues was the fact that a number of the third defendant's products did not comply with certain regulatory requirements. Specifically, these included regulations imposed by the United States ("US") Federal Communications Commission ("the FCC issue") and the European Community Restriction of Hazardous Substances Directive ("the RoHS issue"). [note: 66]

138 Regarding the FCC issue, the evidence showed that the MUSIC Group's US subsidiary was served with a notice from the FCC on 16 February 2006. [note: 67] In this notice, the FCC described the "egregious" nature of the US subsidiary's non-compliance which included the marketing of 50 models of unauthorised radio frequency devices. In the event, a fine of US$1m was imposed [note: 68] which was a record amount for the industry. Importantly, the defendants also claimed that the FCC issue had a significant impact on the MUSIC Group's operations, financial performance and reputation. In this regard, both Deeb and Ulrich gave evidence that, in line with the FCC notice, all non-compliant products which were not yet on the American market had to be redesigned while those which already were had to be recalled. [note: 69] Consequently, the MUSIC Group's manufacturing lines had to be halted for a period of up to 12 months and extra efforts expended to step up production so as to satisfy customer orders. [note: 70] Furthermore, one of MUSIC Group's largest customers in the US, Guitar Centre, had also cancelled all its orders until such a time when full compliance could be attained. [note: 71]

139 Both Deeb and Ulrich also gave evidence that the RoHS issue had emerged at around the same time as the FCC issue. Although it was a known fact that the RoHS Directive was to take effect on 1 July 2006, [note: 72] it appeared that the defendants only realised very late in the day that a significant number of the MUSIC Group's products sold on the European market were non-compliant. [note: 73] As Ulrich explained, there were products which had spare parts made of lead and these had to be replaced with non-lead parts. To further compound matters, there were, in some instances, no alternative parts available. [note: 74] Accordingly, the MUSIC Group faced an urgent need to redesign its products which contained lead based components and to source for available alternatives before the RoHS Directive came into force. The RoHS issue thus proved to be a further disruption to the MUSIC Group's production prior to the suspension of the NASDAQ IPO.

140 I am inclined to believe that the FCC issue and the RoHS issue as fleshed out by Deeb and Ulrich were, among other things, credible and commercially minded explanations for why the NASDAQ IPO was suspended. They do not appear to me to be contrived, overplayed or convenient afterthoughts.

(C) Dominic was aware of the seriousness of the operational issues

141 The conclusion which I have just reached is fortified by clear documentary evidence which shows that, in arriving at the decision to suspend the NASDAQ IPO, both the FCC issue and the RoHS issue were firmly within the contemplation of not just Deeb and Ulrich, but that of Dominic as well. In an email dated 28 March 2006 from Deeb to Ulrich, Fraser, *and Dominic*, both the RoHS issue and the FCC issue were specifically identified under the heading "Business Currently on Hand" [note: 75] which were situated within the broader theme of "Stabilizing the Organization". Against this backdrop, Deeb then conveyed his opinion on the NASDAQ IPO as follows: [note: 76]

> ...
>
> The IPO should be removed from the immediate horizon call it whole [*sic*] 18 on a gulf [*sic*] course and like on a golf course absolute focus will always be on the whole [*sic*] immediately being played. When we have fixed the ship it will become easier and almost natural to seek an IPO.

142 In his email dated 30 March 2006, Dominic did not raise any queries about the extent of the operational difficulties faced by the Companies but instead replied that he "agree[d] with the golf course analogy". [note: 77] To my mind, this is clear evidence that *Dominic was himself aware* that the FCC issue and the RoHS issue were, amongst others matters, sufficiently serious such as to warrant halting the NASDAQ IPO.

143 In fact, I further find that during the renegotiations leading up to the Consultancy Agreement, Dominic continued to be apprised of the fact that the Companies were *still* in the midst of recovering from their operational setbacks and that these issues would impact on whether an IPO was recommenced moving forward. This appears from *Dominic's* own email to Deeb dated 17 August 2006 where he was clearly able to articulate the numerous problems which required resolution as follows: [note: 78]

> ...
>
> With regard to operational issues, there are still a number outstanding (FCC issue still not resolved, products are out of stock, not delivered, faulty, large customers (e.g. GC [Guitar Centre]) canceling [sic] orders, re-work parts being delayed etc.).
>
> Rome was not built in a day, but all these matters need to be resolved prior to listing.
>
> ...

(D) The commitment further representations were mere statements of intent

144 In light of the above, I find that the plaintiff had wrongly characterised the "operational issues" as a smokescreen that was raised by the defendants to obscure their undisclosed reasons for suspending the NASDAQ IPO. These issues featured prominently at the time the NASDAQ IPO was suspended and continued to be relevant even as the terms of the Original Agreements were being renegotiated. More importantly, Dominic knew about these issues throughout the negotiations which preceded the Consultancy Agreement. Therefore, I am of the view that, when the Commitment Further Representations were made to Dominic, the defendants were genuinely keen on pursuing a future listing *provided* that there was further progress in relation to the operational matters. This is consistent with the email sent to all MUSIC Group employees (including Dominic) announcing the

suspension of the NASDAQ IPO. In this email dated 31 March 2006, Deeb stated in his capacity as CEO that: [note: 79]

> …
>
> The IPO is still one of the objectives for this Company. However, [preparations] for the IPO will be with immediate effect halted *until we have achieved all of our more critical objectives and fixed the gaps* at which point we will proceed once again.
>
> *How fast we get there will depend on our ability to address and remedy the deficiencies. This may take 2 years it may take less or more.* Our own effort will determine this. Bottom line we will not revisit the IPO or even consider it *until we are firmly on safe grounds*.
>
> [emphasis in original omitted; emphasis added it italics]

145 This clearly evidenced that the defendants never intended for the IPO process to be restarted *regardless of the circumstances*. Neither did the defendants intend for the third quarter of 2007 to be a strict time frame within which an IPO was to be completed. Therefore, in my judgment, the Commitment Further Representations were not misrepresentations of the defendants' state of mind. Rather, they constituted mere *statements of intent* and were, as such, not actionable in the law of misrepresentation.

146 I now turn to deal with the Qualifications Further Representations.

The Qualifications Further Representations were made with the knowledge that they were false but did not induce the plaintiff to enter into the Consultancy Agreement

(1) The Qualifications Further Representations were made

147 I find that the Qualifications Further Representations had also been made.

148 Dominic claimed that Deeb had orally represented to him during certain meetings in September and October 2006 that there were no merits to the allegations in the September 2006 PPE. [note: 80] Dominic's claim is supported by a subsequent email on 9 October 2006 from Dominic to Deeb ("the 9 October 2006 email") (reproduced below at [153]) wherein Dominic explicitly referred to Deeb's "comments that there are *no merits* in any of the allegations" [emphasis added]. [note: 81] Importantly, Deeb did not reply to deny making those comments despite having the opportunity to do so. Therefore, I am not minded to place any weight on Deeb's bare denial of such representations in these proceedings and accordingly find that they had been made.

(2) The Qualifications Further Representations were dishonestly made

149 I further find that the Qualifications Further Representations were known by Deeb to be false at the time they were made. In this regard, I note that the defendants had produced the Email Chain to show that Deeb had clarified his qualifications in the Preliminary Prospectus with Koh and that this was thus an inadvertent error that could be rectified with little impact on a future IPO. I pause at this point to mention that the plaintiff disputed the authenticity of the Email Chain. However, I see no need to make a specific finding on this matter because, even if I did accept that the Email Chain was authentic, I cannot see how it would help the defendants' case here.

150 To my mind, the allegations in the September 2006 PPE were targeted and detailed. This is

what it said in respect of Deeb: [note: 82]

> In the [SGX] IPO documents Michael Deeb is described as the Group Chief Executive and Executive Director of [the third defendant]. He is also described as holding a Bachelor of Science & Technology from the American University, Cairo. The American University is a very prestiguous [*sic*] institution, but it does not issue anything called a Bachelor of Science & Technology. In fact there is no record of him (either under the name Michael Deeb or his alias Magdi El Deeb) ever attending the American University as a student. Why have the company officers and their advisers not discovered this blatant lie? …

151 The allegations above clearly raised legitimate questions over Deeb's qualifications. The gist of the defendants' argument, however, was that these allegations had *already* been internally addressed, hence they carried no merit. I cannot agree. It is one thing to represent that the allegations had no merits at all, and another to represent that they *no longer had any merits* after being dealt with. If the Email Chain was authentic, as the defendants claimed, then what this proved was that at least by 27 March 2006, [note: 83] which was the date of the last email sent in the Email Chain, Deeb was already aware that his qualifications were wrongly stated in the Preliminary Prospectus. With this knowledge, and confronted with the specific allegations in the September 2006 PPE, I cannot see how Deeb can brush off the pointed allegation that he does not have a Bachelor of Science & Technology degree from the American University, Cairo as being without merit simply because his false qualifications had been brought to Koh's attention before. The fact that this was done does not change the fact that his qualifications were wrongly stated and that, in turn, the allegations in the September 2006 PPE were true. This being so, I find that the Qualifications Further Representations were made by Deeb despite knowing them to be false.

(3) The Qualifications Further Representations did not induce the plaintiff to enter into the Consultancy Agreement

152 Notwithstanding the above, I find that the 2nd Misrepresentation Claim is not made out. This is because the plaintiff did not satisfy me that the Qualifications Further Representations had *induced* it to enter into the Consultancy Agreement which was, ultimately, what was alleged to have given rise to the losses in Time Frame 2. In essence, there was a distinct lack of cause and effect between the misrepresentation and the losses suffered. This is borne out by the following.

153 In the 9 October 2006 email, it appeared that Dominic had expressed some concern over the PPEs which had been received up to that time. He was thus initially of the view that the plaintiff's interests should be protected under the Consultancy Agreement with a clause concerning the disclosure of information. However, he later decided against the inclusion of this clause after being assured by the Qualifications Further Representations. This portion of the 9 October 2006 email from Dominic to Deeb is reproduced here: [note: 84]

> We have suggested the inclusion of a new clause relating to the disclosure of information and conduct of [the third defendant] and its officers due to the poison pen letters (I understand from you that there are now 5) that the Board has yet to address fully. I have raised my concerns verbally a number of times and in writing in August. As you are aware, these could be an impediment to listing. *Following your comments that there are no merits in any of these allegations, I am prepared to drop this.* [emphasis added]

154 While the italicised statement supports the plaintiff's case that the Qualifications Further Representations had been made, what may be further gleaned from it is that these representations

had influenced the plaintiff's decision *only insofar as the inclusion of this suggested clause was concerned*. It appears that the plaintiff was already willing to enter into the Consultancy Agreement and the Qualifications Further Representations did not appear to affect its decision of actually doing so.

155 In fact, even though Dominic seems to have raised some concerns about the PPEs, his approach to the entire matter demonstrated a general lack of urgency. In the material portion of the 9 October 2006 email reproduced above, it appears that Dominic had been told that there were at least five PPEs. Yet, he had only seen two PPEs: the February 2006 PPE and the September 2006 PPE. This is significant because even though Dominic felt that the five PPEs *could* be an impediment to listing, he did not seem to be even mildly concerned about the matters raised in the remaining three PPEs since no evidence of him inquiring about them has been adduced. As for the two PPEs which Dominic had sight of, he could easily have conducted a search to determine if the allegations contained therein were true. Indeed, in these proceedings, the plaintiff has, for instance, relied on a simple Wikipedia entry [note: 85] of "Canterbury University" to prove that Fraser's qualifications were from an unaccredited institution and were thus misleadingly stated in the Preliminary Prospectus.

156 Certainly it may be argued, as has been done here, that the assurances given by the defendants were good enough for Dominic and thus there was no need for him to conduct further independent investigations. However, as against that, I find that since the allegations in the PPEs could have been verified with the minimum of fuss or aggravation, Dominic's failure to do so evinced a lack of anxiety to achieve clarity in this regard before putting pen to paper on the Consultancy Agreement. This was even more telling considering that, at the material time, Dominic was the Group CFO of the Companies and had primary responsibility for doing what was required in order to achieve a listing. Therefore, if Dominic was indeed of the view that the allegations in the PPEs were critical to the success of a listing, then one would have expected *him* to investigate the matter. This is not to state that an obligation exists on the part of a representee to verify the truthfulness and accuracy of the representation made by a representor, failing which a misrepresentation claim will fail *in limine*. Rather, this lack of interest on the part of Dominic to perform simple independent verifications on Deeb and Fraser's educational qualifications shows that Dominic himself did not seem to regard their possible lack of tertiary educational qualifications or the possible inaccuracy of these qualifications as previously stated in the Preliminary Prospectus to be matters that were so material as to have the effect of seriously lowering the overall valuation of the third defendant, adversely impacting its future performance, or significantly diminishing its prospects of a successful listing on NASDAQ. These possibilities, accordingly, did not appear to have a material influence on the plaintiff's decision to enter into the Consultancy Agreement to help list the Companies in the first place.

157 I am further of the view that *even if Deeb had been truthful* prior to signing the Consultancy Agreement by telling Dominic that the qualifications of Deeb and Fraser were erroneously stated in the Preliminary Prospectus and that the PPEs were *not* without merit, Dominic would have still caused the plaintiff to enter the Consultancy Agreement. Put simply, the Consultancy Agreement would still be concluded even without the misrepresentation being made *and* with the truth being told. As I will proceed to explain, this is because the plaintiff, with its savviness as an IPO consultant and its interest in obtaining the Shares, would not likely have regarded Deeb and Fraser's falsely stated qualifications in the Preliminary Prospectus or the subsequent PPE allegations as delivering what could be considered debilitating, much less fatal, blows to the pursuit of a future IPO.

158 The very reason for the Companies engaging an IPO consultant such as the plaintiff is to assist in overcoming impediments and problems in the way of a successful listing. It is only when these impediments appear insurmountable even with the aid of a consultant that the consultant may perhaps decide not to enter into a consultancy agreement to perform that undertaking. This is a

question of risk assessment on the part of the consultant.

159 Here, the consequences flowing from Deeb's misrepresentation were not as serious as the plaintiff made them out to be. The NASDAQ IPO was still only in its preliminary stages, having not progressed beyond the drafting of the relevant prospectus required by NASDAQ. Action could thus easily have been taken to ensure that the information pertaining to Deeb and Fraser's qualifications was presented accurately for the NASDAQ IPO. I note also that there is evidence which shows that legal advice on the potential consequences of the falsely stated qualifications in the Preliminary Prospectus was sought from Messrs Rajah & Tann LLP, whose opinion was that this would have "no significant exposure" for the Companies in respect of the NASDAQ IPO. [note: 86] In any event, I am not convinced that the academic qualifications of the directors and other key appointment holders in the Companies are matters which any serious investor would have at the forefront of his/her contemplation. The lack of tertiary academic qualifications on the part of Fraser and Deeb is not likely to affect the viability of the Companies' flotation on NASDAQ. Neither do I think that investors on *NASDAQ*, given a prospectus with the correct qualifications stated for Fraser and Deeb, would have altered their investment decisions significantly simply because incorrect qualifications had been stated previously in the Preliminary Prospectus for the aborted *SGX* IPO. On the contrary, investors are more likely to base their investment decisions on the managerial track record of key personnel, the previous consistent good financial performance, and the future prospects of the company seeking listing. In this regard, I take cognisance of the views of Ulrich who stated under cross-examination that he did not consider Deeb's educational qualifications to be an important factor when he decided to employ and appoint Deeb as the Managing Director and CEO of the Companies. [note: 87]

160 The plaintiff thus failed to persuade me that Deeb and Fraser's erroneously stated qualifications in the Preliminary Prospectus lodged in respect of the withdrawn SGX IPO would have potentially severe consequences for the NASDAQ IPO going forward. In particular, I am not convinced that the legacy of the erroneously stated qualifications alone was such an insurmountable obstacle from the perspective of the plaintiff that it would then have assessed an engagement with the Companies as making no commercial sense since there was then little prospect of it earning the Shares as its success fee. If that had been the severity of the consequences flowing from the falsely stated qualifications, then I might well have been inclined to accept the plaintiff's present claim that it would never have entered into the Consultancy Agreement with the Companies given Deeb's misrepresentation. However, that is not the case.

161 Accordingly, I find that the plaintiff would still have agreed to act as the consultant for the Companies even if it were to be made aware of Fraser and Deeb's lack of tertiary educational qualifications, given the lucrative success fee payable to the plaintiff in the event of a successful IPO on NASDAQ and that the consequences of their erroneous qualifications in the Preliminary Prospectus for the aborted SGX IPO would not have seriously diminished the overall prospects of success of the intended NASDAQ IPO.

162 In light of the above, I find that the Qualifications Further Representations did not materially induce the plaintiff to enter into the Consultancy Agreement.

163 For these reasons, as well as those provided in relation to the Commitment Further Representations, the 2nd Misrepresentation Claim is dismissed.

The 2nd Negligence Claim

164 This is an appropriate juncture to discuss the 2nd Negligence Claim. The plaintiff's submission here was that the third defendant owed it a duty of care to verify the allegations in the PPEs and

that this duty was breached since appropriate steps were not taken to do so. It was alleged that the third defendant's negligence in this respect caused the plaintiff to enter into the Consultancy Agreement on the basis of incorrect information and, accordingly, the plaintiff suffered the losses claimed in Time Frame 2.

165 The reasons which I have just provided for dismissing the 2nd Misrepresentation Claim, specifically those relating to the Qualifications Further Representations, are immediately relevant for dealing with the plaintiff's submissions here. In particular, I reiterate my view at [152]–[162] above that the allegations in the PPEs were simply not a *material* concern for the plaintiff at the time of entering into the Consultancy Agreement. Therefore, without having to enter into an analysis of whether a duty of care was owed and breached in the circumstances, I find that the 2nd Negligence Claim fails in any event since the alleged breach, *viz*, failing to verify the PPEs, did not materially affect the plaintiff's decision to enter into the Consultancy Agreement from which the alleged losses were said to flow. In other words, I am not satisfied that causation had been established and, accordingly, the 2nd Negligence Claim is dismissed.

The 1st Conspiracy Claim

The parties' submissions

166 As will become apparent, the Further Representations were also relevant to the 1st Conspiracy Claim.

167 For the 1st Conspiracy Claim, the plaintiff claimed that the defendants, Ulrich, Fraser, and Low (the new CFO who had replaced Dominic) had combined to injure the plaintiff by depriving it of the Shares under the Employment Agreement. In this regard, the plaintiff placed particular reliance on an email exchange between Low and Deeb on 31 October 2006 ("the Low/Deeb Email Exchange") [note: 88] (reproduced below at [187] and [188]). According to the plaintiff, this conspiracy was borne out of the unhappy situation which the defendants had found themselves in soon after the NASDAQ IPO had been suspended. On the one hand, the Companies continued to be contractually obliged to pay a handsome remuneration for Dominic's services even though the very purpose for which he was engaged, *viz*, pursuing the NASDAQ IPO, had been put on the back burner. On the other hand, the Companies were not willing to end this contractual engagement by an outright termination of the Original Agreements since doing so without just cause would have entitled the plaintiff to the Shares under the Employment Agreement despite an IPO not being achieved.

168 Portrayed as such, it thus appeared that the defendants were caught between a rock and a hard place, and it was the plaintiff's submission that the defendants turned to *unlawful means* to extricate themselves from it. It was in this connection that the defendants made the Further Representations to induce the latter to accept the Consultancy Agreement. Unbeknownst to the plaintiff, the Consultancy Agreement was nothing more than a ruse by the conspirators to achieve their own self-interested purpose of stalling on the issuance of the Shares while, in the meantime, introducing fresh terms to govern the parties' engagement which were more favourable to the Companies.

169 The defendants have strenuously denied all allegations of conspiracy. The defendants submitted that it was in fact the plaintiff which had become unhappy with the continued operation of the Original Agreements. In this regard, the defendants submitted that Dominic had become increasingly frustrated at being contractually tied to provide services as Group CFO of the Companies after the NASDAQ IPO was suspended. This was because the bulk of the plaintiff's remuneration under the Original Agreements, *viz*, the Shares, was put out of reach until efforts to pursue an IPO were

restarted and, at the same time, Dominic was unable to pursue other profitable ventures for the plaintiff. In these circumstances, it was argued that the plaintiff *willingly* entered into the Consultancy Agreement because its terms, such as the reduced time commitment expected of Dominic under the Pre-Listing Terms (explained above at [25]–[29]), aligned with the plaintiff's own interests.

The tort of conspiracy by unlawful means

170 The Court of Appeal recently had the occasion in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") to expound more generally on the law which has developed in relation to the wider body of economic torts. However, for present purposes, it is the Court of Appeal's observations about the tort of conspiracy, by unlawful means in particular, that is of relevance. The Court of Appeal set out the elements of this tort in the following terms (at [112]):

> ... To succeed in a claim for conspiracy by unlawful means of conspiracy, the appellants must show that:
>
> (a) there was a combination of two or more persons to do certain acts;
>
> (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
>
> (c) the acts were unlawful;
>
> (d) the acts were performed in furtherance of the agreement; and
>
> (e) the plaintiff suffered loss as a result of the conspiracy …

171 As with proof of dishonesty discussed above in the context of fraudulent misrepresentation, the burden of establishing a conspiracy by unlawful means is equally onerous since it similarly involves allegations of a serious nature. Therefore, while the standard of proof is also the civil standard based on a balance of probabilities, the amount of proof required will be higher than that in respect of a normal civil action: see *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR(R) 451 ("*Wu Yang*") at [93] and *Swiss Butchery Pte Ltd v Huber Ernst and others and another suit* [2010] 3 SLR 813 at [17]. This point was driven home by Phang J (as he then was) in *Wu Yang* in the following terms (at [93] and [94]):

> ... [M]ere unsubstantiated assertion is clearly insufficient. And even something that goes a little more beyond mere assertion is still insufficient.
>
> An allegation of fraud entails a high requirement with respect to proof. Whilst still being based on the civil standard of a balance of probabilities, the amount of evidence required is far from trifling ...

There was no conspiracy to injure the plaintiff

172 Regarding the first element of the tort, a conspiratorial agreement or combination need not be in the form of an express agreement but may, and often is, proven inferentially from the surrounding circumstances and acts of the alleged conspirators: see *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [19]; *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [95] and [96] and *The*

"Dolphina" [2012] 1 SLR 992 at [262] and [263].

173 In the present case, it was alleged that the defendants must have been part of a conspiracy to induce the plaintiff to enter into the Consultancy Agreement. I was invited to infer this from the defendants' unhappiness with the continued operation of the Original Agreements in light of the NASDAQ IPO being suspended. However, I am of the view that the plaintiff's case was inconsistent with the relevant documentary evidence and, ultimately, mischaracterised how the renegotiations leading up to the Consultancy Agreement had been conducted. In essence, I find that the plaintiff had put forward nothing more than a conspiracy *theory* and this is something which the courts are not minded to take any cognisance of.

(1) It was the plaintiff which was unhappy with the continued operation of the Original Agreements

174 The first inconsistency which I observe between the plaintiff's case and the documentary evidence related to the circumstances which followed immediately after the suspension of the NASDAQ IPO. The plaintiff stressed that, at this point, *the defendants* had begun to view the Original Agreements as a shackle which it badly wanted to be rid of. However, in this regard, I accept the defendants' submission that, if any party was unhappy with the terms of the Original Agreements, it was *the plaintiff* which was first to show it.

175 Not more than a month after the NASDAQ IPO was suspended, Dominic emailed Deeb on 18 April 2006 to express his thoughts on the way forward. In particular, he suggested that, given the longer and more uncertain time frame for a future IPO, the plaintiff ought to be entitled to a *greater* portion of shares under the Employment Agreement and, further, that there should be an *automatic* vesting of the same, regardless of whether an IPO was successful or not. The material portion of this email from Dominic reads as follows: [note: 89]

> You [Deeb] originally expected the [NASDAQ] IPO to take place latest September 2006 …
>
> The IPO has now moved out by approximately 18 months …
>
> As mentioned to you, *we are concerned about this much longer time frame and, most importantly whether the company will float* … The shares that we are currently entitled to represent 0.37% post IPO or approximately 0.47% pre IPO. Extrapolating this for the revised IPO timing would translate into approximately 0.925% post IPO or 1.16% pre IPO. *I would therefore like to propose that we are granted 0.925% of the shares post IPO or that 1.16% is automatically vested in March 2008 in the event that there is no IPO* …
>
> [emphasis added]

176 I observe that this proposal being put forward by Dominic on behalf of the plaintiff was a radical departure from what had been contemplated under the Employment Agreement. First, the Employment Agreement clearly provided for the issuance of the Shares only upon the occurrence of certain defined events, *viz*, receipt of approval for listing on a recognised stock exchange or a substantial takeover of the third defendant's business. In other words, the Shares were meant as a form of *contingent*, and not *guaranteed*, remuneration; hence the idea of an "automatic" vesting was certainly novel. Furthermore, there was neither any provision within the Original Agreements that entitled the plaintiff to an increase in shares as the time frame for a successful IPO stretched out, nor any mechanism for calculating the rate of such increase. Therefore, there also appeared to be no agreed basis for Dominic's attempt at "extrapolating" what the plaintiff's increased entitlement of shares amounted to after suspension of the NASDAQ IPO.

177 Accordingly, having fired the first salvo to kick start the renegotiation process, I find that it was in fact *the plaintiff* which appeared to be dissatisfied with the continued operation of the Original Agreements moving forward. This contradicts the plaintiff's case in a material way because it was then difficult to infer that *the defendants* were keen to engineer a way out of the Original Agreements, much less through a conspiracy by unlawful means.

(2) Dominic did not become a "part-time CFO" when the NASDAQ IPO was terminated

178 Second, the plaintiff also asserted that Dominic became a "part-time CFO" after the NASDAQ IPO was suspended and thus the Companies were unhappy to continue remunerating the plaintiff on the generous terms provided by the Employment Agreement.

179 I do not agree with this depiction of Dominic's role. To my mind, regardless of the depth in which Deeb and Dominic may have discussed the NASDAQ IPO during the pre-contractual stage, as well as the expectations that this may have engendered about the scope of Dominic's services as Group CFO, little can be done to alter the terms of the Employment Agreement which Dominic agreed to be bound by. In this connection, the Employment Agreement provided, [note: 90] *inter alia*, that Dominic would have "the customary duties of a Group [CFO] … as assigned to him from time to time by the Board of Directors of [the Companies]" (Cl. 2.2), that he would "devote his full working time, attention and energies to the business of [the Companies]" (Cl. 2.3), and that though he could continue to have an involvement in the plaintiff's business, this was subject to him spending "the majority of his cumulative working time discharging his duties as CFO of [the Companies]" (Cl. 2.7). These terms about the scope of Dominic's services were unambiguously and broadly worded. Importantly, none of them sought to restrict the scope of such services by reference to the contemplated pursuit of the NASDAQ IPO.

180 I am therefore of the view that, for all intents and purposes, Dominic had signed up as a *full-time* Group CFO of the Companies, and his status as such did not change with the suspension of the NASDAQ IPO. Deeb could thus legitimately require Dominic to fulfil his full-time CFO duties in accordance with the terms of his engagement. In fact, Deeb did attempt to do so by proposing the Options to Dominic during the renegotiation phase which will be further discussed below at [190]. This accordingly removes yet another basis for inferring that the defendants had cause to manoeuvre out of the Original Agreements such that they would have combined to employ unlawful means in achieving that purpose.

(3) Dominic was employed by and not seconded to the Companies

181 At this juncture, I also wish to address a related argument by the plaintiff, which was that Dominic was a mere *secondee* of the Companies and not an *employee* as such. This argument was also made to reinforce the view that Dominic's role within the Companies was only limited to the NASDAQ IPO. In my judgment, this assertion had little merit.

182 To begin with, it is clear that Dominic had personally entered into what was titled an "*Employment* Agreement" with the Companies. While it is well established that the label which parties use to describe their relationship is not a conclusive determination of their true legal relationship, it is nevertheless relevant as an expression of their intention and its importance varies according to the facts of the case: see *Young & Woods Ltd v West* [1980] IRLR 201 at [30], per Ackner LJ. In this regard, I noted that the plaintiff had sought to persuade me to look beyond the face of the Employment Agreement because the parties had always intended for it to be structured only as a secondment.

183 The plaintiff referred me to an email dated 19 January 2006 which showed that Dominic did express an intention for his services to be provided by way of secondment. However, I do not see how this email supported the plaintiff's case when, in the same breath, it showed that Dominic had also expressly acknowledged the Companies' reluctance to engage him on that very basis. By way of background, I should mention that Dominic knew that the Companies were desirous to avoid any potential negative impressions which may be conveyed by his appointment as an external consultant only, as opposed to a full-fledged employee. This was because the idea of a Group CFO who was involved in the Companies' affairs merely as a secondee was not one which would do much to inspire the confidence of potential investors. With this in mind, I now reproduce the relevant part of the 19 January 2006 email from Dominic to Deeb: [note: 91]

> As you [Deeb] are aware, our [the plaintiff's] intention was to structure this as a straightforward secondment. We believe that this is appropriate given the nature of the objectives and the likely time frame.
>
> *However, we realise that you have various other considerations that need to be balanced and presentation, in particular, is important.*
>
> We believe that we have structured an elegant solution that meets both parties' requirements. We have pruned the release letter down to the bare minimum and gone to considerable lengths to reword the agreement in the most satisfactory manner for [the Companies]. *Our lawyers requested considerable changes and additions which we have declined so that your needs can be met* and the agreements can be signed in an expeditious manner …
>
> [emphasis added]

184 The italicised portions of the passage above show that, contrary to what the plaintiff had claimed, it is not clear that there was a common understanding that Dominic should only be seconded to the Companies. While a secondment may have been the plaintiff's preferred arrangement, that certainly was not acceptable to the Companies.

185 In any event, what was finally entered into was an "Employment Agreement" and I am inclined to find that, despite protestations to the contrary, the plaintiff had agreed to release Dominic so that he could be *employed* by the Companies at the material time. The undeniable fact is that the Original Agreements were drafted by the plaintiff's own lawyers, thus it was well-placed to safeguard its own interests. If the plaintiff strictly wanted Dominic to be seconded, it could have insisted on this being reflected in the agreement. However, as the above email excerpt showed, the plaintiff was also cognisant of the Companies' competing interest in hiring Dominic as an employee. That the contract eventually turned out as an Employment Agreement is a strong indication to me that the plaintiff had accorded greater precedence to satisfying the Companies' interests than preserving its own. I am also drawn to this conclusion because if the plaintiff merely intended to second Dominic to the Companies, then it could easily have done so. This is especially when Villanueva's secondment via the Secondment Agreement is juxtaposed against the more complex arrangement in respect of Dominic's employment which involved the execution of the Release Letter and then the Employment Agreement.

186 I therefore reject the plaintiff's submissions which sought to downplay Dominic's role in the Companies. He neither became a "part-time CFO" after the suspension of the NASDAQ IPO, nor was he ever a mere secondee to the Companies. He was, at all times during the operation of the Original Agreements, employed as the Group CFO of the Companies.

(4) The Low/Deeb Email Exchange did not evince a conspiracy

187 Finally, I deal with the Low/Deeb Email Exchange of 31 October 2006 which the plaintiff said was evidence of a conspiracy to injure its interests. I set out below the email from Low to Deeb which formed the first part of this exchange: [note: 92]

> ...
>
> As you [Deeb] are aware I have sent an email to Dominic yesterday requesting he comply with the 4 day week interpretation of the contract. I met with him today to understand what his position was and if he intends to comply. He has indicated that he intends to continue to stick to his interpretation of a 2.5 day week. Though not explicitly stated by him, I believe he is readying himself for a legal battle, if necessary. However, he has expressively indicated that he is happy to continue to seek an amicable situation if that was still possible. I however believe that he is unwilling to compromise his current position, if at all, very much. My recommendations are as follows:
>
> - When you are back you should sit with him again to see if an amicable solution is possible.
>
> - At the very least it will strengthen our legal position that we have tried and tried on numerous occasions to work out a solution.
>
> - If he is not prepared to be reasonable, then rather than take a litigious position by dismissing him for cause, maybe the first step you should take is to agree with him to go for arbitration. I do not believe that this should prejudice our position to still subsequently dismiss him. Perhaps we can see Kathleen's [the then in-house counsel] opinion before acting.
>
> - My preference, as is yours, is to work out an amicable or arbitrated solution as any litigation would not be beneficial for anybody, let alone divert our valuable time away from the many major challenges that we already face. ...

188 Deeb replied to Low's email on the same day in the following terms:

> ...
>
> This is disappointing ... We now need to prepare for this. It is important we document any event where we can demonstrate that the Company's affairs suffered adversely due to Dominic's limited time contribution. ...
>
> Beside[s] this, it is now important to document everything, all of your instructions to him, his exact attendance record etc ... We have to go through the paces and if he fails to conform to what we believe are his obligations then we will need to warn him in writing. Bottom line it is now time to take legal advice and prepare for a confrontation. I know his character he will not back down.

189 The plaintiff argued that this email exchange was important in shedding light on the defendants' state of mind while the renegotiations were ongoing. It was claimed that by collaborating to look for ways in which they could terminate the engagement *for just cause*, the defendants had combined with the intention of depriving the plaintiff of the Shares under the Employment Agreement. [note: 93]

190 I cannot agree with the plaintiff's interpretation of the Low/Deeb Email Exchange. While it does appear from the email exchange that the renegotiations were tense at that point in time, I am not inclined to infer from this tension that the defendants were intent on depriving the plaintiff of the Shares. As is clearly borne out by the contents of the email exchange, both Deeb and Low were aggrieved that Dominic had interpreted his Employment Agreement in a way which reduced his time contribution to the Companies. Deeb and Low's view, and rightly as I have found, was that Dominic was at all times employed as Group CFO of the Companies; hence he ought to have continued spending the majority of his cumulative working time on the Companies' affairs notwithstanding the suspension of the NASDAQ IPO. In this connection, Deeb had provided Dominic with the Options (described above at [19]) which essentially provided alternative ways by which Dominic could channel his time and energies towards other non-IPO related work within the broad scope of his responsibilities as Group CFO. However, Dominic adopted a non-committal stance towards the Options and this continued for some time. It reached a point where, in an email dated 6 October 2006, Deeb informed Dominic that their different and seemingly irreconcilable interpretations of the latter's obligations had created a "dysfunctional" situation: [note: 94]

> Dominic I do not want to labor this matter any further ... The current situation is dysfunctional and can not [*sic*] go on and while you continue to say that you have performed the duties expected of a CFO to the Company's satisfaction; I maintain that a great deal more should have been done, could have been done and can be done had you committed the majority of your time to [the Companies] business, and that the current situation is unacceptable and does not provide the Company with that is required or expected.

191 It is in this context that the Low/Deeb Email Exchange of 31 October 2006 should be understood. Up to that point in the renegotiations, Deeb had held one understanding of what the Companies were entitled to expect of Dominic as Group CFO while Dominic had his own entrenched view. Both were at loggerheads and a mutually agreeable solution did not appear to be in sight. In those circumstances, I do not think that there was anything untoward about Deeb instructing Low to monitor Dominic's activities closely in the event of pending litigation. Deeb was merely doing what I would consider to be prudent for the purposes of protecting the Companies' interests. In fact, Deeb was correct in his interpretation of the Employment Agreement that Dominic was engaged as a full time CFO of the Companies. Since Dominic was insisting on working only 2.5 days in the week in breach of the terms of Employment Agreement, there is nothing conspiratorial in Deeb instructing Low to document everything, including all of Dominic's attendance records and his refusal to follow instructions in order to secure evidence of Dominic's breaches of the Employment Agreement in case the Companies had to warn him and/or dismiss him for cause. Accordingly, I am not persuaded by the plaintiff's argument that the Low/Deeb Email Exchange hinted at something rather more sinister.

192 For the foregoing reasons, I find that there was nothing problematic with the defendants' conduct throughout the course of the renegotiations. There was nothing to suggest a possible conspiratorial combination between Deeb and Low to injure the plaintiff and this is sufficient to dispose of the 1st Conspiracy Claim.

Analysis of Time Frame 3

The 2nd Breach of Contract Claim

Background to the dispute: The previous suit

193 The 2nd Breach of Contract Claim invites close scrutiny of the Companies' conduct from mid-2007 up to the termination of the Consultancy Agreement in early 2008. The gist of the plaintiff's

case was that, during this period while the Consultancy Agreement was still in force, a trade sale of the Companies had evidently been initiated and pursued without the plaintiff being informed. That, claimed the plaintiff, is conduct which breached the Consultancy Agreement and thus entitled it to the Shares thereunder. However, before fleshing out the parties' submissions in greater detail, I propose to deal briefly with Suit 487 which was commenced in August 2008. I do so because an understanding of what the Court of Appeal had held there is helpful in contextualising why the plaintiff was determined in arguing here that a trade sale had indeed been commenced.

194 Suit 487 was commenced by the plaintiff against the Companies. It arose as a result of the termination of the Consultancy Agreement. The Shares were not issued on termination and the plaintiff was aggrieved by this. The plaintiff was certain that it became entitled to the Shares immediately upon termination of the Consultancy Agreement without just cause. There was no other condition which impinged on its clear contractual entitlement. On the other hand, the Companies argued that it was significant that the contractually-defined event known as "IPO Activation" had not yet occurred at the point of termination. This was a fact which the parties were agreed on: *Straits Advisors (CA)* at [6]. The lack of such IPO Activation meant that, under the dual-phased structure of the Consultancy Agreement (described above at [25]), the parties were governed by the Pre-Listing Terms at the time of termination. However, the specific contractual term which provided for the issuance of the Shares was not a Pre-Listing Term. It was expressed as an IPO Advisory Term and this latter set of terms came into force only upon IPO Activation. The Companies therefore argued that, *since there was no IPO Activation*, the plaintiff was not contractually entitled to the Shares at the point of termination.

195 The previous suit therefore turned entirely upon a question of construction of the Consultancy Agreement. That question, specifically, was whether or not the plaintiff became entitled to the Shares upon termination of the Consultancy Agreement despite no IPO Activation having occurred. The material clause in the Consultancy Agreement which had to be construed was Cl. 4 which provided the conditions under which the plaintiff became entitled to the Shares. Cl. 4 Consultancy Agreement provided as follows: [note: 95]

> **4 Success Fee**
>
> …
>
> [The Companies] hereby agrees to issue shares in [the third defendant] to [the plaintiff] or its nominee equivalent to 0.37 per cent of the post IPO (or post takeover, as applicable) share capital of [the third defendant] for a total nominal sum of US$100/- (the 'Shares'). The shares will be issued under the following circumstances:
>
> > (i) When approval has been granted by a recognised stock exchange for the listing of [the third defendant's] shares, the Shares shall be issued upon receipt of the said approval. For the avoidance of doubt, the approval to list [the third defendant's] shares shall be a condition precedent for the issuance of the Shares under this clause (i).
> >
> > (ii) In the event of a takeover of [the Companies] of all or substantially all of its business, the Shares shall be issued on the offer becoming unconditional and, if applicable, the acquirer having secured more than 50 per cent of the issued share capital of [the third defendant].
>
> In the event that [the Companies] terminates the appointment of [Dominic] and/or [the plaintiff] (other than for gross negligence or willful default), prior to the conditions in (i) or (ii) above being satisfied, the Shares shall immediately be issued to [the plaintiff] or its nominee for the total

nominal sum of US$100/-.

...

196 The Court of Appeal in *Straits Advisors (CA)* ultimately found that the construction of Cl. 4 Consultancy Agreement as advanced by the Companies was more favourable as it was supported by both the surrounding context and the text of the Consultancy Agreement. The following passage from the Court of Appeal's judgment neatly captures the essence of its reasoning (at [10]–[12]):

> In our view, it is clear that the parties were actively contemplating an IPO of [the third defendant's] shares when they entered into the Original Agreements on 11 January 2006; there would have been no reason for [the Companies] to have contracted with [the plaintiff] for the latter's services at all, let alone at the handsome rates that it did, if the situation were otherwise. By contrast, and crucially for the purposes of the present appeal, the parties' initial enthusiasm had demonstrably cooled by the time of the Consultancy Agreement …
>
> In light of this change in context … ***it is evident that, when the parties signed the Consultancy Agreement, they intended to delay the work and remuneration scheme envisaged under the Original Agreements until [the Companies] chose to issue a written notice to trigger IPO Activation*** … Put another way, it is highly improbable that the parties intended that the Shares, by any measure the most valuable remuneration payable to [the plaintiff[, to be issuable precisely at the point in time when they had expressly provided that the IPO plans were to be placed on a *dormant* footing.
>
> This contextual interpretation is fortified by the text and structure of the Consultancy Agreement itself. [Cl. 4], which governs the issuance of the Shares, is first referred at the end of [Cl. 3] (in the form of the statement, "Success Fee: See [Cl. 4] below") which, as mentioned, governs, *inter alia*, the remuneration payable to Straits Advisors *after* IPO Activation. ***[Cl. 4] itself is entitled "Success Fee", a characterisation which would be rendered nonsensical if the Shares were to be issuable when an IPO Activation had not even occurred.*** … Viewed in this context, the termination provision [in Cl. 4] is clearly intended to give effect to the parties' continued intention that [the Companies] should not terminate the Consultancy Agreement in bad faith and deprive [the plaintiff] of its entitlement to the Shares. What the termination provision *does not* do is to stipulate when [the plaintiff] entitlement to the Shares *arises*; that is controlled by the rest of [Cl. 4], as well as [Cl. 3], whose language and purpose indicate beyond doubt that ***the Shares were issuable only after IPO Activation*** . ***Put positively, the termination provision is a natural and integral part of the whole "Success Fee" regime, which in turn comes into operation only upon IPO Activation*** . …
>
> [original emphasis in italics; emphasis added in bold italics]

197 The Court of Appeal's judgment in *Straits Advisors (CA)* makes clear, therefore, that the plaintiff's entitlement to the Shares under the Consultancy Agreement is contingent upon the occurrence of IPO Activation. It does not arise upon mere termination. In a sense, IPO Activation is very much akin to a key for unlocking the plaintiff's entitlement to the Shares under the Consultancy Agreement. Thus, with it being agreed in the previous suit that *no* IPO Activation had occurred, the plaintiff's claim to the Shares there was doomed to fail as it did.

198 In the present proceedings, the plaintiff certainly did not seek to persuade me that the Court of Appeal's construction of the Consultancy Agreement was wrong. Instead, armed with its discovery of new information, the plaintiff sought to prove that IPO Activation *should have been* triggered by

the defendants at the time the previous suit was heard.

Two points about "IPO Activation"

199 "IPO Activation" is defined in Cl. 3 Consultancy Agreement as having occurred:

> … one month after [plaintiff] is notified in writing of the decision by [the third defendant] to proceed with a plan to list on a recognised stock exchange, or anticipated takeover action ("IPO Activation") …

200 I make two preliminary points about this definition of "IPO Activation".

201 First, whether or not IPO Activation *is* triggered is a matter to be decided by the Companies. Of this there can be little dispute because Cl. 3 Consultancy Agreement expressly provides that IPO Activation is triggered only upon issuance of a written notice by the Companies to the plaintiff. This places the plaintiff in a somewhat vulnerable position because the key to the bulk of its remuneration (the Shares) rests firmly in the hands of the Companies. In *Straits Advisors (CA)*, the Court of Appeal was also cognisant of the potential prejudice which such an arrangement may cause to the plaintiff. It thus stated in *obiter* that the Companies must act in good faith when deciding whether or not IPO Activation *should* be triggered. The Court of Appeal's observation has proved prescient because it has assumed great importance in these proceedings. I set out the Court of Appeal's observation (at [18]) here:

> … Before concluding, we observe, for completeness … that *while it is [the Companies] alone who decides whether or not to issue a written notice to trigger IPO Activation … it must act in good faith and for proper purposes in arriving at its decision. It cannot, for example, refuse to issue a written notice to trigger IPO Activation with respect to [the plaintiff] in order to avoid issuing the Shares, while at the same time pursuing its IPO ambitions with another set of advisors instead.* But, as [then counsel for the Companies] correctly pointed out, [the plaintiff] is not claiming in its action against [the Companies] that [the Companies] had engaged in any such conduct. [emphasis added]

202 Second, as the term "*IPO* Activation" suggests, this event ought to be triggered where there is a decision to proceed with an IPO. However, that is not the only situation in which the Companies may be obliged to trigger IPO Activation. As is clearly contemplated by the definition in Cl. 3 Consultancy Agreement, IPO Activation can also occur where there is an "*anticipated takeover action*". Therefore, by arguing in these proceedings that the defendants had embarked on an attempt to sell the Companies, the plaintiff essentially sought to establish that IPO Activation *should have been* triggered by the time of the previous suit. In a way, then, these proceedings were an attempt by the plaintiff to remedy what it perceived to be a miscarriage of justice.

203 With these two points about IPO Activation and the context of the dispute in mind, I now proceed to set out the parties' submissions in the present proceedings.

The parties' submissions

204 The plaintiff submitted that a trade sale of the Companies had been agreed on sometime in mid-2007 and, from there onwards, active steps were taken by the defendants to market the Companies. In connection with this, the plaintiff argued that it was borne out by the evidence that, *while the Consultancy Agreement was still in operation*, (a) Ulrich had decided sometime in mid-2007 to sell the Companies; (b) pursuant to this, Deeb then actively sought out potential buyers with

whom non-disclosure agreements ("NDAs") were entered into; (c) offers were received to purchase the Companies including one from a Malaysian Datuk; and (d) the Companies had engaged another set of advisors, KPMG, to provide services in relation to the proposed sale.

205 The plaintiff submitted that this body of evidence was sufficient for showing that there was an "anticipated takeover action" within the definition of "IPO Activation". However, it was alleged that the Companies deliberately withheld the issuance of an IPO Activation notice so as to deprive the plaintiff of the Shares under the Consultancy Agreement. The Companies were thus in clear breach of the good faith obligation that was articulated by the Court of Appeal in *Straits Advisors (CA)*.

206 The Companies denied that their failure to issue an IPO Activation notice was ever motivated by bad faith. First, while the evidence relied on by the plaintiff showed that a trade sale had indeed been discussed and that NDAs were signed; in reality, the pursuit of a trade sale never went past being merely *exploratory* in nature. [note: 96] Second, whilst the Companies did receive offers, these were unsolicited offers which were not of a serious nature. [note: 97] Third, the Companies submitted that the alleged engagement of KPMG occurred only in March 2008 *after* the Consultancy Agreement had been terminated; [note: 98] hence it was not relevant to whether IPO Activation should have been triggered while the Consultancy Agreement was in operation.

207 The Companies therefore claimed that, in these circumstances, there was no real pursuit of a trade sale as no serious steps were ever taken to realise this ambition. [note: 99] The plaintiff had placed a disproportionate amount of weight on the evidence to make it appear as if the Companies had surreptitiously charted and moved along a clear path towards a trade sale when this had never been the case. Accordingly, the Companies were not obliged to trigger IPO Activation and did not breach its implied obligation to act in good faith.

A preliminary inquiry: When should IPO Activation be triggered?

208 "IPO Activation" is not a term of art or of common usage. It does not have a widely-known and accepted meaning amongst commercial men. It is a privately defined contractual term which finds its place in the Consultancy Agreement for one purpose — to describe the watershed moment or tipping point at which the parties can unambiguously say that their contractual relationship has progressed from being governed by one regime (*ie*, the Pre-Listing Terms) to another (*ie*, the IPO Advisory Terms).

209 To my mind, the question around which the 2nd Breach of Contract Claim revolves is whether or not this tipping point had been reached as a matter of *substance*. Certainly, as a matter of *form*, this tipping point was never reached. As mentioned earlier, the parties' contractual relationship never became governed by the IPO Advisory Terms because no formal IPO Activation notice emanated from the Companies. However, the failure to issue such notice is not conclusive of the critical issue at hand which, as I have alluded to, is concerned with whether or not the IPO Activation notice *should* have been issued. This is because the plaintiff suggested that the Companies' failure to formally trigger IPO Activation may have been tainted by the bad faith motive of preventing the plaintiff from accessing the Shares. *Therefore, what the 2nd Breach of Contract Claim is really concerned with is whether the Companies' **substantive conduct** in connection with realising the purported trade sale was of such a degree that it could objectively be said to have taken the parties right up to the tipping point where IPO Activation **should** have been triggered.*

210 The determination of this critical issue will no doubt rest on an evaluation of the Companies' conduct and all of the surrounding circumstances. However, before that exercise can be meaningfully

undertaken, *it is of importance to first establish at least some understanding of the level at which the tipping point for IPO Activation ought to be pitched*. This is useful because it infuses the abstract notion of a "tipping point" or the unfamiliar term of "IPO Activation" with some substance. As a matter of illustration, by pitching the tipping point at a higher level, more evidence of, for instance, a concrete intention or steps taken by the Companies in relation to the attempted trade sale will be required to cross this threshold. Setting the tipping point at a lower level naturally has the opposite implication. However, by failing to undertake this preliminary inquiry at all, then one becomes greatly handicapped when evaluating the Companies' conduct because this will effectively be done in the dark, without the help of any sort of referential threshold which could inform one of when the elusive "tipping point" is being or has been reached.

211 The parties to the 2nd Breach of Contract Claim recognised the importance of this preliminary inquiry and, to no great surprise, their views on the appropriate level at which the tipping point for IPO Activation should be pitched varied considerably. For the plaintiff, it was submitted that stress should be placed on the word "*anticipated*" as it appears within the term "anticipated takeover action" in Cl. 3 Consultancy Agreement. The word "anticipated" should be given its ordinary dictionary meaning so that IPO Activation must be triggered once a takeover action is seen as something which might happen in the future and action had been taken to prepare for it. [note: 100] The Companies, however, argued that the tipping point for IPO Activation was not reached simply if a trade sale was being explored or considered. What IPO Activation required, at the very least, was a buyer who had made a serious offer which was likely to be accepted by the Companies. [note: 101]

212 In my judgment, this question of when IPO Activation should be triggered, being quintessentially one of fact and degree, cannot be answered with the sort of unwavering certainty and specificity as one may be accustomed to when stating trite propositions of law. The parties wisely made no attempt at doing so and neither will I. *In my opinion, the best which can be done is to arrive at no more than* ***a rough and ready approximation*** *of when one may sensibly conclude that IPO Activation ought to have been triggered.* In this regard, I am informed by two pivotal factors —first, the *structure and terms* of the Consultancy Agreement and, second, the context in which the Consultancy Agreement was entered into. Ultimately, after a consideration of these two factors, I rejected the low threshold for IPO Activation which the plaintiff urged upon me. Instead, I am minded to place the tipping point for IPO Activation at a fairly high level. I explain my view as follows.

213 First, as a matter of *structure*, I have already explained that the Consultancy Agreement was cleaved into two distinct regimes, one which governed the parties' relationship pre-IPO Activation while the other only came into operation post-IPO Activation (see above [25]). However, what I have yet to elaborate upon are the *terms* which subsist under these different regimes.

214 I begin with the terms regarding *remuneration*. Under the Pre-Listing Terms, the remuneration payable by the Companies for Dominic's services (now as senior consultant) was a modest S$8,333.33 per month. However, once IPO Activation was triggered, then that amount rose by more than threefold to the not inconsiderable sum of S$28,333 per month. Furthermore, the plaintiff stood to gain an annual bonus of S$85,000 depending on whether certain key performance indicators were met. And finally, as *Straits Advisors (CA)* makes clear, the Shares would become payable in the situations listed in Cl. 4 Consultancy Agreement, including upon termination of the Consultancy Agreement without just cause. It is clear, just from this simple comparison, that there is an appreciable difference in the entire remuneration package post-IPO Activation compared with that pre-IPO Activation. This stark difference in remuneration terms in itself suggests to me that triggering IPO Activation is certainly no small matter. Accordingly, the threshold for doing so should not be a low one.

215 However, aside from these plain differences in remuneration terms, I find that even more telling is the fact that the entire remuneration package under the IPO Advisory Terms closely mirrors that under the Original Agreements (see [14] and [15] above) which, as will be recalled, were entered into with a view towards pursuing the NASDAQ IPO. This similarity in remuneration terms is no mere coincidence. It suggests that the vigour with which *the NASDAQ IPO* was pursued can provide, by way of analogy at least, some indication of the kind of conduct required of the Companies' *pursuit of a trade sale* before concluding when IPO Activation should be triggered in the latter scenario. Of course, the process leading up to an IPO is different from that for a takeover and so parallels should not be loosely drawn. However, because the definition of "IPO Activation" itself contemplates that this event can be triggered *either* upon a pursuit of an IPO *or* a takeover, I believe that there is a proper basis for saying that there should at least be a semblance of parity in the broad level of activity as pertains to the respective pursuits for concluding when the tipping point for IPO Activation in both scenarios is reached. It is in this general sense that I am minded to take note of the following factors which were present in the context of the NASDAQ IPO: (a) the Companies did not merely "anticipate" an IPO in general but had clearly identified the specific stock exchange on which they wished to list the third defendant's shares, *viz*, the NASDAQ stock exchange; (b) professional advisors such as JP Morgan and Jones Day had been engaged to advise the Companies; (c) JP Morgan was asked to conduct an analysis of the target valuation range which the third defendant's shares could achieve upon a listing; [note: 102] (d) the employees of MUSIC Group were made aware of the NASDAQ IPO; and (e) perhaps most importantly, the NASDAQ IPO had received consideration by and approval from the third defendant's board of directors.

216 What the foregoing collection of factors suggests to me is that *it is certainly not enough for triggering IPO Activation in the context of a trade sale if it is merely "anticipated", in the sense of being a contemplated or foreseen possibility, without, for instance, an agreement on the minimum price at which the Companies may be sold and an identification of one or more serious purchasers who may be willing to buy at that price. The fact that a trade sale is being considered is also not enough if this is merely at a level that does not engage the Companies as companies. By this I mean that, at the very least, the Companies' board must be apprised of the possibility of a trade sale since, after all, the Companies cannot be sold without the approval of the board.* These considerations therefore explain my reluctance to pitch the tipping point for IPO Activation at the relatively low level where the plaintiff said was appropriate.

217 I continue with my comparison of the difference between the Pre-Listing Terms and the IPO Advisory Terms by looking at what these separate regimes expected from Dominic regarding his *involvement* in and *time contribution* to the Companies' affairs. Under the Pre-Listing Terms, Dominic's role was simply to "maintain a high level overview" of the Companies' finance department "so as to be ready to assist" the Companies with an IPO or takeover as the case may be upon IPO Activation. During this time, Dominic was only expected to spend no more than two working days *a month* on the Companies' affairs and, further, where he spent that time was entirely at his discretion. Therefore, it was entirely possible for Dominic not to even report to the Companies' premises so long as the Pre-Listing Terms continued in operation. Once the IPO Advisory Terms came into force, however, Dominic's role evolved from being merely supervisory in nature to actually having to "assist" in the Companies' planned IPO or takeover. In connection with this more involved role, Dominic accordingly came under the more time-consuming obligation of having to "devote the necessary time to assist [the Companies] with its meetings, negotiations, documentary reviews etc." As with the remuneration terms discussed above, I again find that these differences in Dominic's expected involvement and time contribution were significant enough to support the view that more than just a mere anticipation of a trade sale was required for triggering IPO Activation.

218 Finally, I consider the *context* in which the Consultancy Agreement had been entered into. In

this regard, I observe that the Consultancy Agreement had its genesis, so to speak, in the suspension of the NASDAQ IPO. As I have earlier found, this event led Dominic, on behalf of the plaintiff, to propose the automatic vesting of more shares than was stipulated under the Employment Agreement given the longer and more uncertain time frame for a listing. However, this was firmly rejected by Deeb on behalf of the Companies. Subsequently, Deeb put forward the Options in an attempt to recalibrate the scope of Dominic's role as Group CFO to suit the changed circumstances. However, it was then Dominic's turn to reject this proposal. There was thus an impasse under the Original Agreements after the NASDAQ IPO was suspended. However, a middle ground was reached as the Consultancy Agreement was eventually entered into.

219 This, I believe, is an accurate portrayal of the events which led to the Consultancy Agreement. An appreciation of this context is important because, it suggests to me that, by having just broken through one impasse under the Original Agreements, the parties would not have then intended to land themselves so easily in another one under the Consultancy Agreement. Yet, that unpalatable prospect is precisely what might have befallen the parties if the tipping point for IPO Activation was pitched at a low level. This is because if the threshold for IPO Activation can so easily be crossed upon a trade sale being "anticipated", then this implies that the relationship between the parties can fall to be governed by the IPO Advisory Terms even though plans for a trade sale may still be at a fairly nascent stage. At such a stage, there is a higher possibility that the said plans will not materialise for one reason or another. If that should occur, then the parties would be thrown back into the same quagmire that they were in before under the Original Agreements — the plaintiff unhappily having to contribute a considerable amount of its time, through Dominic, to the Companies despite issuance of the Shares again being placed out of reach; and the Companies having to pay more for Dominic's services despite no trade sale being pursued. I believe that this scenario is one which the parties would certainly have wanted to avoid under the Consultancy Agreement, especially given their experience under the Original Agreements. And it is for that reason that I am inclined towards pitching the tipping point for IPO Activation at a much higher level than that advanced by the plaintiff.

220 With this rough and ready approximation of where the tipping point for IPO Activation lies, I now turn to evaluate the evidence which the plaintiff said proved that a trade sale had been pursued.

Ulrich's decision to focus on a trade sale

221 The plaintiff first sought to establish that Ulrich had already decided sometime in mid-2007 to focus on a sale of the Companies at a clearly expressed minimum price. In this regard, the plaintiff relied primarily on an email dated 1 June 2007 which was sent from Ulrich to Deeb with the subject "Trade sale". In this email, Ulrich stated that: [note: 103]

> ...
>
> After having given it some thougt [*sic*] and also consulted my advisors *I am willing to sell the whole company for 350kk net but not below*. There are some things that need to be clarified before the final deal can march. Please call me so we can discuss. ... [emphasis added]

222 However, this email cannot be seen in isolation for it only tells part of the story. What the subsequent correspondence between Deeb and Ulrich on the same subject show is that there was a conscious attempt to keep their discussions on a possible trade sale strictly private between themselves. This shows that Deeb and Ulrich only intended for their discussions to take place in their capacity as shareholders and was in no way intended to engage the Companies *as companies*. Further, it shows that Deeb and Ulrich were only at a very preliminary stage of discussions as they

were concerned not to get the hopes of employees up. This is borne out by the follow-up email from Ulrich to Deeb a day later on 2 June 2007: [note: 104]

> ...
>
> Please note that *our discussions must be non-binding* as I am not familiar with these produres [*sic*]. I will also consider to get an advisor when I have more clarity between the two of us.
>
> *I like to keep this discussion strictly among us two shareholders only* and in the near future bring in the directors as the future of our company is at stake. ...
>
> ... I am concerned that we will again raise immense expectations and if they don't mature we will have a mass exodus of people as we had at the aborted ipo [sic]. ...
>
> [emphasis added]

223 Furthermore, it also appears that, notwithstanding Ulrich's view that the Companies should be sold at no less than "350kk net", there was in fact no agreement between Ulrich and Deeb on the minimum sale price. In Deeb's lengthy email reply to Ulrich on the same day (2 June 2007), he described his "exhaustion and fatigue" [note: 105] at having worked as CEO of the Companies for the past five years and, in light of that, his desire for an "exit strategy" [note: 106] which would allow him to realise the value of his minority shareholding. Deeb was thus keen on pursuing a trade sale so that he could monetise his shares. However, he felt that the minimum sale price put forward by Ulrich was unrealistic and overly ambitious for it did not appear to have taken market conditions into account. In Deeb's view, it was more commercially sensible for the Companies to be sold at the "market price", as the following excerpt shows:

> If we pursue a trade sale the final price will be decided by the Market and not by you or me. ...
>
> The market is getting really tough and the company is riddled with issue and conflicts some of which due to there [*sic*] nature will never be completely resolved. Yes there is always a chance of a miracle but with that there is also a price ... so what is it that you want to do? What does Uli want?
>
> ...
>
> I thought that both of us agreed to exit within 3 years which means a trade sale in the next 6 to 9 month[s]. Price is important to an extent but a fair market price is crucial, so while we must try to get the maximum we also need to accept what is possible.
>
> If we price ourselves out of the market then why even bother? as we are bound to fail. Fore [*sic*] instance what would you do if we tried for the 350 M net and ended up with an offer of 350 M Gross? or 321 M net to you? Will we turn it down? Is this not what we did with the SGX IPO?
>
> What damage would we be facing within the Company? What I'm trying to say is that if we go for a trade sale then we need to be of the mind set that we will accept the Market Price. Whatever that may be within reason? In 2005 SGX exercise priced us at 280 Million GROSS so what is wrong with 350 Gross today this is an increase of 70 Million or 25%.
>
> [emphasis in original]

224 In light of the above, I am not persuaded by the plaintiff that the 1 June 2007 email from Ulrich was evidence that a decision had been reached to pursue a trade sale at an agreed minimum price. Instead, I accept the Companies' characterisation of the discussions between Deeb and Ulrich as being merely "exploratory" in nature at this point. In fact, it appears to me that, even at this exploratory stage, there was already a seeming lack of accord between Deeb and Ulrich which made it even harder to suggest that the tipping point for IPO Activation had been reached by mid-2007.

The non-disclosure agreements

225 The plaintiff next claimed that, pursuant to Ulrich's decision to focus on a trade sale, Deeb had actively approached no less than six potential investors with whom NDAs were signed. In this regard, the plaintiff relied on an email dated 10 September 2007 which showed Deeb updating Ulrich on the status of discussions with each of these investors. [note: 107] The plaintiff claimed that following the NDAs, Deeb was then able to send detailed confidential information to these investors, thus showing that the Companies had moved further along the line in their pursuit of a trade sale. [note: 108]

226 I accept that this is evidence that Deeb took active steps to put the trade sale in motion notwithstanding his initial unhappiness with Ulrich's target sale price. However, I note that Ulrich and Deeb were still keeping their discussions of a trade sale firmly under wraps even at this seemingly more advanced stage. Thus, in the 10 September 2007 email which the plaintiff relied on, Deeb is seen describing the "confidential nature of this email", the "sensitivity" of the proposed trade sale, and "the need to operate outside the norm ... without [involving] HR, Finance and Legal". [note: 109] This again supports the view that the trade sale discussions were *still* of a tentative nature, occurring only at the personal level between Ulrich and Deeb and without them being ready to escalate the matter up for consideration by the board.

227 I also do not place much weight on the fact that NDAs had been signed because I am cognisant that, in the context of takeovers and acquisitions, the selling company will normally enter into such confidentiality agreements *at a very early stage* of its interaction with potential buyers. The rationale behind this practice is well canvassed by Andrew Stilton in *Sale of Shares and Businesses: Law, Practice and Agreements* (Sweet & Maxwell, 3rd ed, 2011) ("*Sale of Shares and Businesses*") (at pp 10–14) and by Susan Singleton in *Beswick and Wine: Buying and Selling Private Companies and Businesses* (Bloomsbury Professional, 8th Ed, 2011) ("*Beswick and Wine*") (at pp 46–48). In Sale of Shares and Businesses, Stilton explains as follows (at pp 10–11):

> Whichever method of sale [by auction or other competitive process] is adopted, the seller is likely to be required to provide a certain amount of information about the business to any prospective buyer *before detailed negotiations can begin*. However, unless and until a binding sale and purchase agreement has been entered into, the seller will almost certainly want to keep confidential the fact that the business is "for sale" and the fact that discussions/negotiations are taking place with one or more interested buyers. The fact that the business is for sale may well unsettle its employees (who are likely to be distracted by concerns as to who the new owner might be and how a change of ownership may impact on them) and once the news (or even rumours) that a business is up for sale reaches "the trade", relationships with customers and suppliers may suffer.
>
> It may be particularly unfortunate if it becomes common knowledge that a particular buyer is proposing to buy a business and then, for whatever reason, the transaction does not proceed—employees, customers and suppliers may continue to feel that they face an uncertain future, while there will inevitably be speculation as to why the transaction did not go ahead, and the

fact that one buyer is seen to have withdrawn from a deal may weaken the seller's negotiating position with other potential buyers.

...

Of even greater concern will be the consequences of making available to potential buyers (who may well already be competitors) confidential business information relating to the business—its customers, suppliers, prices and the like. It could be extremely damaging for a business if such information is provided to a competitor with a view to a sale to that competitor which never takes place and, in many cases, the seller will be concerned that a competitor who has expressed an interest in buying the business has no real intention of doing so but simply wants to find out as much information as possible about it and then use that information to compete with it more aggressively—for example, by attacking its customer base or poaching its key employees.

Although the common law does give some protection in such circumstances, *it is almost universal practice for sellers to insist upon a formal confidentiality or non-disclosure agreement before entering into any negotiations with a prospective buyer and before providing any information of a confidential nature*. ...

[emphasis added]

228 What may thus be said is that if a selling company is serious at all about a trade sale, then one would expect it, as a matter of good corporate governance, to enter into confidentiality agreements with potential buyers. However, that such confidentiality agreements are entered into should not be interpreted as determinative or even as a strong indication of the fact that the selling company is indeed serious about a trade sale. Such confidentiality agreements generally provide a contractual safeguard by which the selling company can "test the waters" of the acquisition market as it were, establish what range of price offers are obtainable and then decide whether or not to commit more fully to a sale at a specific price or valuation. If market sentiments are unfavourable, the cloak of confidentiality afforded by the agreement allows the selling company to pull back without any embarrassment or other potentially negative knock-on effect on employees, customers, suppliers and the like. Therefore, to my mind, the mere fact that the Companies had entered into NDAs in the present case was no more than evidence that preliminary or, as the Companies say, exploratory steps had been taken. This alone could not have brought the Companies right up to the tipping point for IPO Activation which, as I have discussed, ought to be pitched at a fairly high level.

The receipt of offers

229 The plaintiff also claimed that, as further evidence of a trade sale being pursued, offers had been received to purchase the Companies, particularly one by a Malaysian Datuk. However, Deeb's evidence was that this offer was not definite or meaningful as there was not even a tentative price agreed between the parties. [note: 110] I see no reason for doubting the credibility of his evidence especially when it seemed to be consistent with Ulrich's testimony in court that all the Companies had received were "unsolicited offers". As Ulrich had explained, these offers did not come with a proposed purchase price and thus could not be taken seriously: [note: 111]

A: Your Honour, the background is, as I stated in the beginning, we had unsolicited offers.

Court: When you say unsolicited offers, does it come with a number or not. [Or] did somebody say, I just want to buy, but you ... never give you a number. That sort of offer is of no use.

A: Exactly, and I had no interest to entertain those conversations.

Court: So unsolicited offer is what sort of offer. Is there a number attached to the offer.

A: No, there was no real offer.

Court: There's no real offer.

A: That's correct. Perhaps I was not clear, but we had interested parties who wrote to us, and said they might be interested, and I had no interest to entertain those conversations and say, look, don't bother me. Here is a number, and anything below I don't care.

Court: Fair enough.

230 I find that Ulrich's position was an entirely reasonable one to take. Therefore, although the Companies did not deny that offers had been received in respect of a trade sale, I find that these offers did not signify any meaningful progress because none of the potential buyers appeared willing to propose a purchase price, much less one which met Ulrich's valuation of the Companies. Singleton describes in *Beswick and Wine* (at p 6) that unsolicited offers may sometimes be "at a price which the seller finds to be irresistible; the offer is simply too good to refuse". However, those were simply not the kind of unsolicited offers which Ulrich received and which could serve as a platform from which further negotiations could take place in earnest. Accordingly, I also do not find that the receipt of these unsolicited offers had moved Ulrich and Deeb out of their exploratory discussions and further up towards the tipping point for IPO Activation.

The KPMG engagement

231 Finally, I consider the plaintiff's claim that the Companies had engaged another advisor, namely KPMG, to assist them with the trade sale. The plaintiff's case was that KPMG had been engaged by the Companies "sometime in or around the third quarter of 2007" as this was what Deeb himself had pleaded. [note: 112] This engagement thus occurred *while the Consultancy Agreement was still in force* and provided further evidence that IPO Activation should have been triggered by the time the Consultancy Agreement was terminated.

232 I am not persuaded by this view. There is objective evidence before me in the form of a letter of engagement which showed that KPMG had only been engaged by Deeb and Ulrich in their personal capacities on 6 March 2008. [note: 113] This was *after* the Consultancy Agreement had been terminated. The plaintiff sought to explain away this engagement letter, however, by claiming that it merely "formalised" the earlier *substantive* engagement between the Companies and KPMG sometime in the third quarter of 2007. [note: 114] According to the plaintiff, the Companies had deliberately waited until after the Consultancy Agreement had been terminated before executing the letter of engagement with KPMG. This was so that the fact of the engagement could be hidden from the plaintiff at the point of termination in order to make it appear that no trade sale had been pursued.

233 I am not impressed by this claim which seems decidedly far-fetched. I do not see why an established accounting firm such as KPMG, which presumably has the benefit of sound legal advice in respect of its transactions, would risk providing any of its services to the plaintiff without a written

contract in place that clearly defined the rights and obligations of the parties. That would clearly be absurd on their part. If the plaintiff is suggesting that KPMG's willingness to delay entering into a formal contract was because it was knowingly complicit in the Companies' attempt to defraud the plaintiff, then I find this suggestion even more absurd. There is no evidence before me which bears that out. Accordingly, I reject the plaintiff's attempt at downplaying the letter of engagement. Instead, I find that KPMG was engaged *after* the Consultancy Agreement had been terminated. While this may be inconsistent with Deeb's pleaded position, I find that it is more likely that this inconsistency arose from Deeb's failure to recollect precisely when KPMG had been engaged.

234 Given my finding above, I do not see how KPMG's engagement could go towards supporting the plaintiff's case that IPO Activation should have been triggered by the Companies *prior to* termination of the Consultancy Agreement.

The Companies were not obliged to trigger IPO Activation

235 My evaluation of the evidence relied upon by the plaintiff shows that while Ulrich and Deeb had entered into discussions about a possible trade sale, those discussions never reached a stage where they were comfortable with putting this matter before the board. Deeb and Ulrich may have been the CEO and chairman of the Companies respectively but it is the board, ultimately, which acts are those of the Companies. The wishes and predilections of individuals, even of key individuals within the Companies, cannot form the basis for IPO Activation as that ignores the fact that it is *the Companies*, ultimately, which must be primed for a takeover or IPO as the case may be. I also find that while steps may have been taken to approach potential buyers, these were also of a very preliminary nature which never really took off. Indications of interest were also received, but no concrete offers made.

236 In light of all this, I sum up the discussion thus far on the 2nd Breach of Contract Claim by concluding that the Companies were not obliged to issue an IPO Activation notice by virtue of Deeb and Ulrich's apparent interest in a trade sale. In other words, the Companies cannot be said to have withheld IPO Activation in circumstances where it should have been triggered. Accordingly, I find that the Companies were not in breach of the implied obligation to act in good faith and for proper purposes as articulated by the Court of Appeal in *Straits Advisors (CA)*.

The Companies did not act in bad faith

237 While the above is sufficient to dispose of the question of whether the implied obligation had been breached, I should also mention that there is ample evidence before me which supports the view that the Companies had not acted in bad faith by deliberately setting out to deprive the plaintiff of the Shares under the Consultancy Agreement. Two crucial pieces of evidence bear this out.

238 First, I consider an email dated 1 June 2007 from Deeb to Ulrich. In this email, Deeb considered the minimum target price of "350kk net" set by Ulrich and worked out a breakdown of how much each party would stand to gain if a trade sale was successful at this price. Significantly, Dominic (on behalf of the plaintiff) was included in the list of persons set out by Deeb, which read as follows: [note: 115]

Uli Behringer 95.5% $321,000,000

Michael Deeb 3% $10,083,770

Stephen Fraser contracted amount $1,000,000

Dominic contracted amount *$1,277,277*

...

[emphasis added]

239 The sum of $1,277,277 for Dominic works out to roughly 0.37% of the trade sale price proposed by Ulrich. This corresponds with the plaintiff's contractual entitlement under Cl. 4 Consultancy Agreement. Therefore, to my mind, this was strong evidence that, at the time of entering into preliminary discussions about a possible trade sale, Deeb and Ulrich had every intention of remunerating the plaintiff in accordance with the terms of the Consultancy Agreement if a trade sale was indeed successful. There was certainly no ill intent to deprive the plaintiff of the bulk of its remuneration by withholding IPO Activation.

240 The second piece of evidence which I consider to be crucial is an email dated 29 January 2008 from Low to Dominic. In this email, Low informed Dominic of the Companies' intention to bring an end to the Consultancy Agreement and to work out the mechanics of the termination at a further meeting. Significantly, Low is also recorded to have stated the following: [note: 116]

...

To protect your interest, we will can [*sic*] agree to a separate arrangement where your "success fee" (under the current agreement) will still be payable if the company changes it[s] mind and decides to pursue an IPO before 31st December 2009. [emphasis added]

241 What may be gleaned from this email is the Companies were clearly amenable to preserving the plaintiff's contractual entitlement to the "Success Fee" under the Consultancy Agreement, notwithstanding that the Companies were intent on terminating that very agreement. As the above email extract shows, the Companies were aware that the plaintiff would be hard done by if a listing was pursued after termination of the Consultancy Agreement and willingly volunteered a separate arrangement which would *protect* the plaintiff's interest. This is certainly not consistent with the acts of one who had set out to *harm* another. As it turned out, however, Dominic rejected Low's offer, replying that there was "no need for a separate arrangement" [note: 117] and then proceeding to commence the previous suit to recover the Shares.

242 What these two pieces of evidence show is that the Companies had not acted in bad faith towards the plaintiff, whether at the time the trade sale was being discussed or at the time of terminating the Consultancy Agreement. Accordingly, this further buttresses the view that the Companies did not breach the implied obligation to act in good faith when deciding whether or not to trigger IPO Activation.

The Companies did not breach any express terms of the Consultancy Agreement

243 One final point which must be addressed in relation to the 2nd Breach of Contract Claim is whether or not the Companies were in breach of any of the *express* terms in the Consultancy Agreement. This was because the plaintiff had an alternative submission, which was that *even if* it was found that the Companies had not acted in bad faith in withholding IPO Activation, the Companies failure to keep the plaintiff informed of the trade sale process was *in itself* a breach of the express terms in the Consultancy Agreement. [note: 118]

244 In light of the findings which I have made above, I am of the view that this alternative submission of the plaintiff fails as well. I explain my reasons below.

245 First, the plaintiff claimed that the Companies' failure to disclose their pursuit of a trade sale was in breach of the Updates sub-clause in the Consultancy Agreement. I have already referred to the Updates sub-clause earlier in this judgment (at [26]) but, for ease of reference, I set it out here once more:

> It is agreed that Behringer [*the Companies]* and Mr Andrla will periodically meet to review *the likely activation date of the IPO*. If for some reason it becomes highly unlikely that Behringer will continue to seek an IPO before 31 December 2009, then [the Companies] and [the plaintiff] will agree in writing on an appropriate arrangement to meet the revised situation. [emphasis added]

246 It is apparent from the italicised words in the second line above that what the Updates sub-clause obliges the Companies to do is to inform Dominic, specifically, of the likely activation date for *an IPO*. It does not say that the Companies must update Dominic of the likely date for *IPO Activation*. If this was what the Updates sub-clause did say, then I accept that there may be some basis for arguing that the Companies had to inform Dominic of *an anticipated takeover action* as well since, as I have pointed out (at [202] above), this was also a basis for triggering IPO Activation.

247 More importantly, however, it will be noted that emphasis has also been placed on the word "Behringer" in the first line of the Updates sub-clause as reproduced above. As the Consultancy Agreement provides in its preamble, the term "Behringer" in this context refers to the Companies collectively in their former incarnations as Behringer Corporation Limited and Behringer Holdings Pte Ltd. It is not a reference to Ulrich in his personal capacity. I say that this is important because it is clear, then, that the Updates sub-clause places an obligation on *the Companies* to update Dominic on the likely date for activating an IPO.

248 However, as I have already found (at [222] and [226] above), the Companies, *as companies*, were not made aware of the private discussions between Deeb and Ulrich about the potential trade sale. This was because the board of directors, whose acts and state of mind can ordinarily be treated as that of the company, were not apprised of these private discussions. Certainly it was open for the plaintiff to establish that the state of mind of Deeb and Ulrich personally could have been attributed to the Companies on the basis that they occupied important positions within the Companies and thus were the "directing mind and will" of the Companies: see, for example, *Walter Woon on Company Law* (Tan Cheng Han SC, gen ed) (Sweet & Maxwell, 3rd Ed, 2009) at para 3.98. However, the plaintiff made no submissions on this point. Accordingly, I find that as the Companies had no knowledge of the discreet trade sale discussions between Ulrich and Deeb in the first place, it cannot then be said that the Companies were in breach of the Updates sub-clause. Put simply, the Companies cannot be held liable for failing to inform Dominic of something which they did not know.

249 In any event, I also find that *even if* it could be established that Deeb and Ulrich were the "directing mind and will" of the Companies, their trade sale discussions were of such a preliminary nature that there was no real need to inform Dominic of the same.

250 The point which I have just made regarding what *the Companies* knew is also important in disposing of the plaintiff's claim in respect of two other provisions in the Consultancy Agreement. These provisions are found in the plaintiff's STCs which were appended to the Consultancy Agreement. To avoid confusion, I should mention that, unlike the above discussion in respect of the Employment Agreement, there was no dispute that the STCs did apply to the Consultancy Agreement.

251 The plaintiff claimed that the Companies' failure to inform it of the potential trade sale had also breached the following two clauses of the STCs:

> **3 Access and Information**
>
> …
>
> The Client [the Companies] also agree to provide [the plaintiff] with all information within the [the Companies'] possession or control which [the plaintiff] may reasonably request or which could reasonably be expected to be relevant in enabling [the plaintiff] to fulfil its responsibilities during the Engagement. [The Companies] will ensure that any information which is supplied to [the plaintiff] will be complete and accurate in all material respects and not misleading, whether by omission or otherwise and should have been properly obtained any may properly be furnished to [the plaintiff].
>
> …
>
> **7 Undertakings**
>
> The Client [the Companies] agrees that it will inform [the plaintiff] in advance of any significant steps which [the Companies] or any of its agents or advisors propose to take in respect of the Transaction and will ensure that [the plaintiff] is fully informed of all material developments which arise during the course of the Engagement. In particular, [the Companies] will consult [the plaintiff] before [the Companies] or any member of its group takes any steps which may have an effect on the terms of, or conduct of, the Transaction.

252 As may be observed once more, the obligations in these two clauses were placed on "the Client", which is a reference to the Companies as the relevant contracting party under the Consultancy Agreement. Again, as the Companies did not know of the possibility of a trade sale, I find that the plaintiff's claim in respect of these two clauses must fall together with its claim under the Updates sub-clause.

253 Finally, the plaintiff claimed that, by engaging KPMG while the Consultancy Agreement was still in force, the Companies were in breach of Cl. 8 of the STCs ("the exclusive engagement clause"). The material part of this clause reads as follows:

> **8 Engagement**
>
> …
>
> The engagement of [the plaintiff] by [the Companies] will be an exclusive engagement and the [the Companies] will not engage any other party as financial advisor during the Engagement period. …

254 However, given that KPMG was only engaged *after* the Consultancy Agreement was terminated (see [233] above), I find that this exclusive engagement clause was not breached as well.

255 In light of the above, I conclude that the 2nd Breach of Contract Claim fails. The Companies were neither in breach of the implied obligation to act in good faith in triggering IPO Activation nor were the Companies in breach of any of the express clauses in the Consultancy Agreement.

The 2nd Conspiracy Claim

The 2nd Conspiracy Claim

256 I now come to the final claim by the plaintiff — the 2nd Conspiracy Claim. This claim can be dealt with swiftly because the plaintiff's case rested on broadly the same premise as that which had been put forward in respect of the 2nd Breach of Contract Claim.

257 Essentially, it was claimed that the defendants, Ulrich, Low and Fraser had all combined to deprive the plaintiff of the Shares under the Consultancy Agreement by refusing to issue an IPO Activation notice in good faith and suppressing material information about the same from the plaintiff. However, as I have earlier found (at [237]–[242]) above), there is evidence which strongly militates against inferring that the defendants were ever motivated by bad faith. This evidence which I have referred to positively showed that the defendants were never intent on excluding the plaintiff from its contractual entitlement to the Shares if there was a successful trade sale or a successful IPO. I thus find that the plaintiff could not establish that there was a conspiracy by unlawful means to injure it and I accordingly dismiss the 2nd Conspiracy Claim.

Conclusion

258 In the premises, I find that the plaintiff is not able to establish any of the claims which it had advanced within each of the respective Time Frames.

259 Parties are to write in for further hearing if no agreement can be reached on costs.

[note: 1] Agreed bundle vol 9 at p 5645 – 6002

[note: 2] Agreed bundle vol 9 at p 5796

[note: 3] Affidavit of Michael Deeb dated 11 November 2012 ("Deeb's Affidavit") at paras 13 and 15

[note: 4] Agreed bundle vol 9 at p 5800

[note: 5] Agreed bundle vol 11 at p 7066

[note: 6] Agreed bundle vol 8 at p 4736

[note: 7] Deeb's Affidavit at paras 10 – 12; Affidavit of Ulrich Bernhard Behringer dated 26 November 2012 ("Ulrich's Affidavit") at paras 45 and 46

[note: 8] Closing submissions of plaintiff dated 30 December 2013 ("Plaintiff's Submissions") at paras 359(b)

[note: 9] Deeb's Affidavit at para 19

[note: 10] Ulrich's Affidavit at paras 51 and 52

[note: 11] Affidavit of Dominic Andrla dated 20 December 2012 ("Dominic's Affidavit") at para 16

[note: 12] Dominic's Affidavit at para 21

[note: 13] Plaintiff's Submissions at para 522

[note: 14] Plaintiff's Submissions at para 534

[note: 15] Statement of Claim (Amendment No 1) dated 5 March 2012 at para 64(b)

[note: 16] Agreed bundle vol 7 at p 4507 - 4511

[note: 17] Agreed bundle vol 7 at p 4512 - 4515

[note: 18] Agreed bundle vol 7 at p 4495 - 4505

[note: 19] Agreed bundle vol 7 at p 4483 - 4494

[note: 20] Notes of Evidence dated 18 January 2013 at p 148 line 11 to p 149 line 17; Plaintiff's Submissions at para 260

[note: 21] Agreed bundle vol 4 at p 2021 - 2026

[note: 22] Deeb's Affidavit at paras 41 and 42; Ulrich's Affidavit at para 89

[note: 23] Plaintiff's Submissions at paras 428 and 429

[note: 24] Agreed bundle vol 4 at p 2053

[note: 25] Agreed bundle vol 4 at pp 2053 and 2107

[note: 26] Agreed bundle vol 4 at p 2056

[note: 27] Agreed bundle vol 4 at p 2104

[note: 28] Agreed bundle vol 4 at p 2223 - 2224

[note: 29] Agreed bundle vol 7 at p 4594 - 4605

[note: 30] Agreed bundle vol 3 at p 1660

[note: 31] Agreed bundle vol 4 at p 2329

[note: 32] Agreed bundle vol 7 at p 4597

[note: 33] Agreed bundle vol 7 at p 4596

[note: 34] Agreed bundle vol 4 at p 2547

[note: 35] Agreed bundle vol 7 at p 4597

[note: 36] Agreed bundle vol 7 at p 4598

[note: 37] Agreed bundle vol 8 at p 5131

[note: 38] Agreed bundle vol 7 at p 4092

[note: 39] Agreed bundle vol 7 at p 4093

[note: 40] Agreed bundle vol 7 at p 4097

[note: 41] Statement of Claim (Amendment No 1) dated 5 March 2012 at para 44

[note: 42] Statement of Claim (Amendment No 1) dated 5 March 2012 at para 45(j)

[note: 43] Plaintiff's Submissions at paras 273–300

[note: 44] Statement of Claim (Amendment No 1) dated 5 March 2012 at para 7

[note: 45] Agreed bundle vol 1 at p 670

[note: 46] Plaintiff's Submissions at para 371

[note: 47] Closing submissions of 1st Defendant dated 2 January 2014 ("1st Defendant's Submissions") at para 32

[note: 48] Agreed bundle vol 1 at p 671

[note: 49] Agreed bundle vol 1 at p 670

[note: 50] Notes of Evidence dated 7 January 2013 at p 85 line 25 to p 86 line 9

[note: 51] Agreed bundle vol 1 at p 155

[note: 52] Deeb's Defence (Amendment No 1) dated 28 March 2012 at para 5

[note: 53] Notes of Evidence dated 8 January 2013 at p 168 line 10 to p 169 line 6

[note: 54] Agreed bundle vol 1 at p 254

[note: 55] Agreed bundle vol 1 at p 253

[note: 56] Agreed bundle vol 10 at p 6499

[note: 57] Plaintiff's Submissions at para 523

[note: 58] Agreed bundle vol 1 at p 154

[note: 59] Notes of Evidence dated 7 January 2013 p 80 line 18 to p 81 line 17

[note: 60] Agreed bundle vol 9 at p 5674

[note: 61] Agreed bundle vol 7 at p 4522

[note: 62] Statement of Claim (Amendment No. 1) in Bundle of Pleadings at pp 387 - 388

[note: 63] Notes of Evidence dated 8 January 2013 at p 30 lines 17–25

[note: 64] Second and third defendant's bundle of documents at pp 98 - 100

[note: 65] Agreed bundle vol 4 at p 2376

[note: 66] Deeb's Affidavit at paras 37–42 and Ulrich's Affidavit at paras 79–89

[note: 67] Agreed bundle vol 10 at p 6439

[note: 68] Agreed bundle vol 10 at p 6448

[note: 69] Deeb's Affidavit at para 38 and Ulrich's Affidavit at para 84

[note: 70] Ulrich's Affidavit at para 84(3)

[note: 71] Deeb's Affidavit at para 41(g)

[note: 72] Agreed bundle vol 8 at p 5181

[note: 73] Ulrich's Affidavit at para 88

[note: 74] Ulrich's Affidavit at para 88

[note: 75] Agreed bundle vol 3 at p 1947

[note: 76] Agreed bundle vol 3 at p 1944

[note: 77] Agreed bundle vol 3 at p 1948

[note: 78] Agreed bundle vol 4 at p 2235

[note: 79] Agreed bundle vol 4 at p 2012

[note: 80] Dominic's Affidavit at para 112

[note: 81] Agreed bundle vol 4 at p 2510

[note: 82] Agreed bundle vol 4 at p 2329

[note: 83] Second and third defendants' bundle at pp 98–105

[note: 84] Agreed bundle vol 4 at p 2510

[note: 85] Agreed bundle vol 11 at p 7066

[note: 86] Second and third defendants' supplemental bundle of documents dated 28 December 2012 at pp 13–15

[note: 87] Notes of Evidence dated 29 April 2013 at p 53 lines 10 – 24.

[note: 88] Agreed bundle vol 5 at pp 3274 - 3275

[note: 89] Agreed bundle vol 4 at p 2053

[note: 90] Agreed bundle vol 7 at pp 4497 – 4498

[note: 91] Agreed bundle vol 2 at p 1033

[note: 92] Agreed bundle vol 5 at p 3274

[note: 93] Plaintiff's Submissions at paras 547–549

[note: 94] Agreed bundle vol 4 at 2376

[note: 95] Agreed bundle vol 7 at p 4598

[note: 96] Closing Submissions of 2nd and 3rd Defendants dated 2 January 2014 ("2nd and 3rd Defendants' Submissions") at para 246

[note: 97] 2nd and 3rd Defendants' Submissions at para 247

[note: 98] 2nd and 3rd Defendants' Submissions at para 248

[note: 99] 2nd and 3rd Defendants' Submissions at para 249

[note: 100] Plaintiff's Submissions at para 456

[note: 101] 2nd and 3rd Defendants' Submissions at para 260

[note: 102] Agreed bundle vol 1 at pp 186–235

[note: 103] Agreed bundle vol 6 at p 3499

[note: 104] Agreed bundle vol 6 at p 3498

[note: 105] Agreed bundle vol 6 at p 3504

[note: 106] Agreed bundle vol 6 at p 3500

[note: 107] Agreed bundle vol 7 at p 4120

[note: 108] Plaintiff's Submissions at paras 279 and 280

[note: 109] Agreed bundle vol 7 at p 4118

[note: 110] Deeb's Affidavit at para 132

[note: 111] Notes of Evidence dated 2 May 2013 at p 213 line 23 to p 214 line 15

[note: 112] Plaintiff's Submissions at para 479

[note: 113] Agreed bundle vol 8 at p 5135

[note: 114] Plaintiff's Submissions at para 489(c)

[note: 115] Agreed bundle vol 6 at p 3498

[note: 116] Agreed bundle vol 7 at p 4092

[note: 117] Agreed bundle vol 7 at p 4093

[note: 118] Plaintiff's Submissions at para 492

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